FEDERAL TRADE COMMISSION
BUREAU OF COMPETITION

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

ANNUAL REPORT TO CONGRESS
FISCAL YEAR 2002

Pursuant to Subsection (j) of Section 7A of the Clayton Act
Hart-Scott-Rodino Antitrust Improvements Act of 1976
(Twenty-Fifth Report)

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INTRODUCTION

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act" or the "Act"), together with Section 13(b) of the Federal Trade Commission Act and Section 15 of the Clayton Act, gives the Federal Trade Commission (the "Commission") and the Antitrust Division of the Department of Justice (the "Antitrust Division" or "Division") the opportunity to obtain effective preliminary relief against anticompetitive mergers and to prevent interim harm to competition and consumers. The premerger notification program was instrumental in detecting transactions that were the subject of the numerous enforcement actions brought in fiscal year 2002 to protect consumers -- individuals, businesses, and government -- against anticompetitive mergers.

Fiscal year 2002 marked the first full year of operation under the extensive reforms to the HSR Act.[1] The increase in the reporting thresholds inherently resulted in a decrease in the number of reportable transactions as did the overall decline in merger activity from that of recent years. (*See* Figure 1 below.) In fiscal year 2002, 1,187 transactions were reported under the Act, representing about a 50 percent decrease from the number of transactions reported in fiscal year 2001, and about a 76 percent decrease from the 4,926 transactions reported in fiscal year 2000, the last full fiscal year under the previous reporting thresholds.[2]

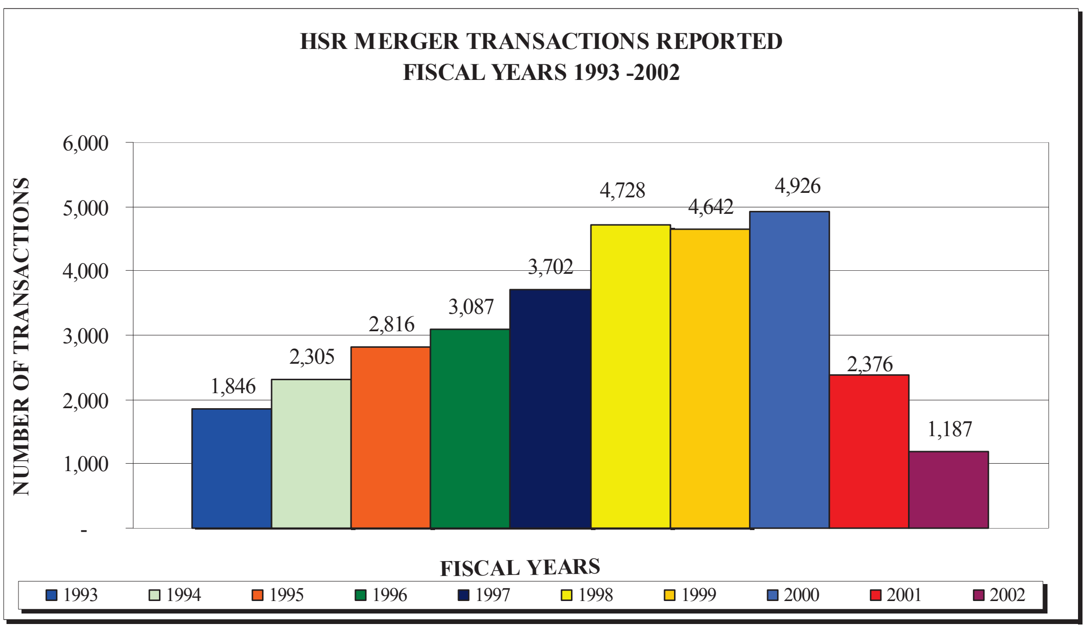

Figure 1

During the year, the Commission challenged twenty-four transactions, leading to ten consent orders, two administrative complaints, and seven abandoned transactions. The

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[1] Section 630 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, 114 Stat. 2762. The legislation, which became effective February 1, 2001, raised the size-of-transaction threshold from $15 million to $50 million and made other changes to the filing and waiting period requirements.

[2] *See* Appendix A.

Commission also authorized staff to seek injunctive relief in five matters, one of which was filed in district court. Most notably, the Commission challenged the proposed merger of Nestle Holdings, Inc., the world's largest food producer, and Ralston Purina Company,[3] the world's largest producer of dry pet foods. The merger would have eliminated direct competition between the companies in the dry cat food market and increased the likelihood of higher prices for consumers. The Commission also challenged the proposed merger of Valero Energy Corporation and Ultramar Diamond Shamrock Corporation,[4] which would have likely increased the price of California Air Resources Board ("CARB") gasoline for consumers in California due to loss of competition from the merger.

The Antitrust Division challenged ten merger transactions, leading to two consent decrees, two abandoned transactions, and five other transactions that were restructured after the Division informed the parties of its antitrust concerns relating to the transaction. The Division's merger challenges included General Dynamics Corporation's proposed acquisition of Newport News Shipbuilding, Inc., which would have eliminated competition for nuclear submarines and harmed competition for other military ships.[5] The Division also challenged Archer-Daniels-Midland Company's proposed acquisition of Minnesota Corn Processors[6] that, as originally structured, would have reduced the number of independent competitors in the corn wet milling industry to four, making coordination among the remaining firms more likely.

In fiscal year 2002, the Commission's Premerger Notification Office ("PNO") continued to respond to thousands of telephone calls seeking information concerning the reportability of transactions under the HSR Act and the details involved in completing and filing the Notification and Report Form ("the filing form"). The HSR website, www.ftc.gov/bc/hsr/, continued to provide improved access to information necessary to the notification process. The website includes such information as the premerger notification filing form and instructions, the premerger notification statute and rules, formal interpretations of the rules, grants of early termination, filing fee instructions, HSR events, tips for completing the filing form, procedures for submitting post-consummation filings, frequently asked questions regarding the HSR filing requirements, and other useful information. In particular, the website is the paramount source of information for HSR practitioners seeking information on the changes to the Act and the premerger rules as a result of last fiscal year's HSR reform legislation, and includes Federal Register notices finalizing the rules. A recent addition is a database of informal interpretation letters which provide PNO staff interpretations of the premerger notification rules and the Act.

This fiscal year the PNO staff continued its outreach efforts by providing an in-depth introductory seminar about the HSR filing requirements, specifically targeting new HSR

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[3] *See infra* p. 15.

[4] *See infra* p. 16.

[5] *See* infra p. 10.

[6] *See infra* p. 10.

practitioners and others who are not familiar with the program, and incorporated those seminar materials on the website.

BACKGROUND OF THE HSR ACT

Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, amended the Clayton Act by adding a new Section 7A, 15 U.S.C. §18a. Subsection (j) of Section 7A provides:

> Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and the need for any rule promulgated pursuant thereto, and any recommendations for revisions of this section.

This is the twenty-fifth annual report to Congress pursuant to this provision. It covers fiscal year 2002 -- October 1, 2001 through September 30, 2002.

In general, the Act requires that certain proposed acquisitions of voting securities or assets must be reported to the Commission and the Antitrust Division prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. Small acquisitions, acquisitions involving small parties, and other classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with the opportunity to review mergers and acquisitions before they occur. The premerger notification program, with its filing and waiting period requirements, provides the agencies with both the time and the information necessary to conduct this antitrust review. Much of the information for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to the proposed transactions and is immediately available for review during the waiting period.

However, if either agency determines during the waiting period that further inquiry is necessary, it is authorized by Section 7A(e) of the Clayton Act to issue a request for additional information and documentary material ("a second request"). The second request extends the waiting period for a specified period after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies).[7] This additional time provides the reviewing agency with the opportunity to

[7] Under the statutory changes cited in footnote 1, this waiting period extension was increased to 30 days for most transactions. The 10-day waiting period extension for cash tender offers and bankruptcies remains the same.

analyze the information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may substantially lessen competition, it may seek an injunction in federal district court to prohibit consummation of the transaction.

The Commission, with the concurrence of the Assistant Attorney General, promulgated final rules implementing the premerger notification program on July 31, 1978. At that time, a comprehensive Statement of Basis and Purpose was also published, containing a section-by-section analysis of the rules and an item-by-item analysis of the filing form. The program became effective on September 5, 1978. The Commission, with the concurrence of the Assistant Attorney General, has amended the rules and the filing form on several occasions over the years to improve the program's effectiveness and to lessen the burden of complying with the rules.[8]

A STATISTICAL PROFILE OF THE PREMERGER NOTIFICATION PROGRAM

The appendices to this report provide a statistical summary of the operation of the premerger notification program. Appendix A shows, for a ten-year period, the number of transactions reported,[9] the number of filings received, the number of merger investigations in which second requests were issued, and the number of transactions in which requests for early termination of the waiting period were received, granted, and not granted. Appendix A also shows for fiscal years 1993 through 2002 the number of transactions in which second requests could have been issued, as well as the percentage of transactions in which second requests were issued. Appendix B provides a month-by-month comparison of the number of transactions reported and the number of filings received for fiscal years 1993 through 2002.

The statistics set out in these appendices show that the number of transactions reported in fiscal year 2002 decreased approximately 50 percent from the number of transactions reported in fiscal year 2001. In fiscal year 2002, 1,187 transactions were reported, while 2,376 were reported in fiscal year 2001. The statistics in Appendix A show that the number of merger investigations in which second requests were issued in fiscal year 2002 decreased approximately 30 percent from the number of merger investigations in which second requests were issued in fiscal year 2001. Second requests were issued in 49 merger investigations in

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[8] 43 Fed. Reg. 3443 (August 4, 1978); 43 Fed. Reg. 36053 (August 15, 1978); 44 Fed. Reg. (November 21, 1979); 45 Fed. Reg. 14205 (March 5, 1980); 48 Fed. Reg. 34427 (July 29, 1983); 50 Fed. Reg. 46633 (November 12, 1985); 51 Fed. Reg. 10368 (March 26, 1986); 52 Fed. Reg. 7066 (March 6, 1987); 52 Fed. Reg. 20058 (May 29, 1987); 54 Fed. Reg. 214251 (May 18, 1989); 55 Fed. Reg. 31371 (August 2, 1990); 60 Fed. Reg. 40704 (August 9, 1995); 61 Fed. Reg. 13666 (March 28, 1996); 63 Fed. Reg. 34592 (June 25, 1998); 66 Fed. Reg. 8680 (February 1, 2001); 66 Fed. Reg. 8723 (February 1, 2001); 66 Fed. Reg. 16241 (March 23, 2001); 66 Fed. Reg. 23561 (May 9, 2001); 66 Fed. Reg. 35531 (July 6, 2001); 67 Fed. Reg. 11898 (March 18, 2002); 67 Fed. Reg. 11904 (March 18, 2002); 68 Fed. Reg. 2425 (January 17, 2003).

[9] The term "transaction," as used in Appendices A and B, and Exhibit A to this report, does not refer only to separate mergers or acquisitions. A particular merger, joint venture or acquisition may be structured such that it involves more than one transaction. For example, cash tender offers, options to acquire voting securities from the issuer, or options to acquire voting securities from someone other than the issuer, may result in multiple acquiring or acquired persons that necessitate separate HSR transaction numbers to track the filing parties and waiting periods.

fiscal year 2002, while second requests were issued in 70 merger investigations in fiscal year 2001. While the number of second requests declined, the percentage of second request transactions increased. (*See* Figure 2 below.)

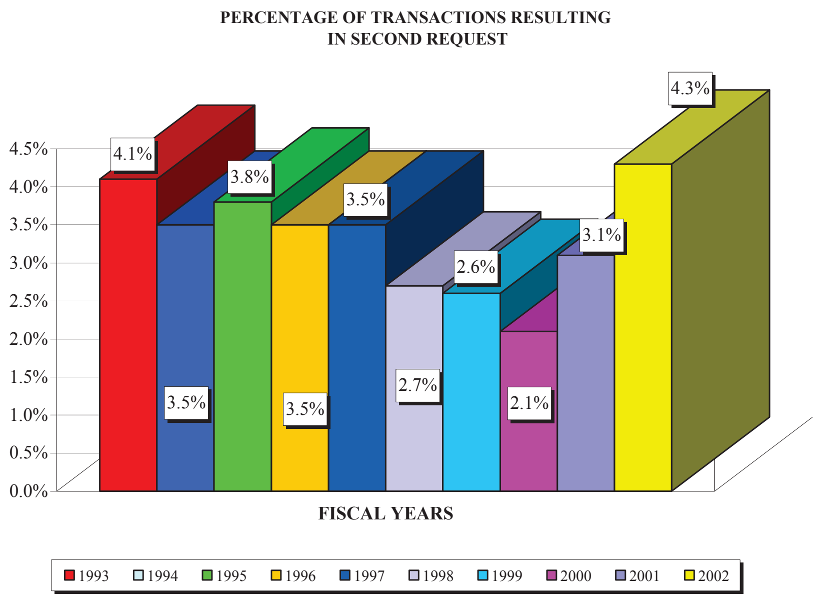

Figure 2

The statistics in Appendix A also show that in recent years, early termination was requested in the majority of transactions. In fiscal year 2002, early termination was requested in 87.8 percent (1,042) of the transactions reported while in fiscal year 2001 it was requested in 86.8 (2,063) percent of the transactions reported. The percentage of requests granted out of the total requested slightly decreased from 77.7 percent in fiscal year 2001 to 76.1 percent in fiscal year 2002.

Statistical tables (Tables I through XI) in Exhibit A contain information about the agencies' enforcement activities for transactions reported in fiscal year 2002. The tables provide, for various statistical breakdowns, the number and percentage of transactions in which clearances to investigate were granted by one antitrust agency to the other and the number of merger investigations in which second requests were issued. Table III of Exhibit A shows that, in fiscal year 2002, clearance was granted to one or the other of the agencies for the purpose of conducting an initial investigation in 18.3 percent of the total number of transactions in which a second request could have been issued.

The tables also provide the number of transactions based on the dollar value of transactions reported and the reporting threshold indicated in the notification report. The total dollar value of reported transactions rose dramatically from fiscal years 1993 to 2000 from about $222 million to about $3 trillion before declining to about $1 trillion in fiscal year 2001. During fiscal year 2002, the dollar value of reported transactions fell to about $565.4 billion.

Tables X and XI provide the number of transactions in each industry group in which the acquiring person or the acquired entity derived revenue. Figure 3 illustrates the percentage of reportable transactions within industry groups for fiscal year 2002 based on the acquired entity's operations.

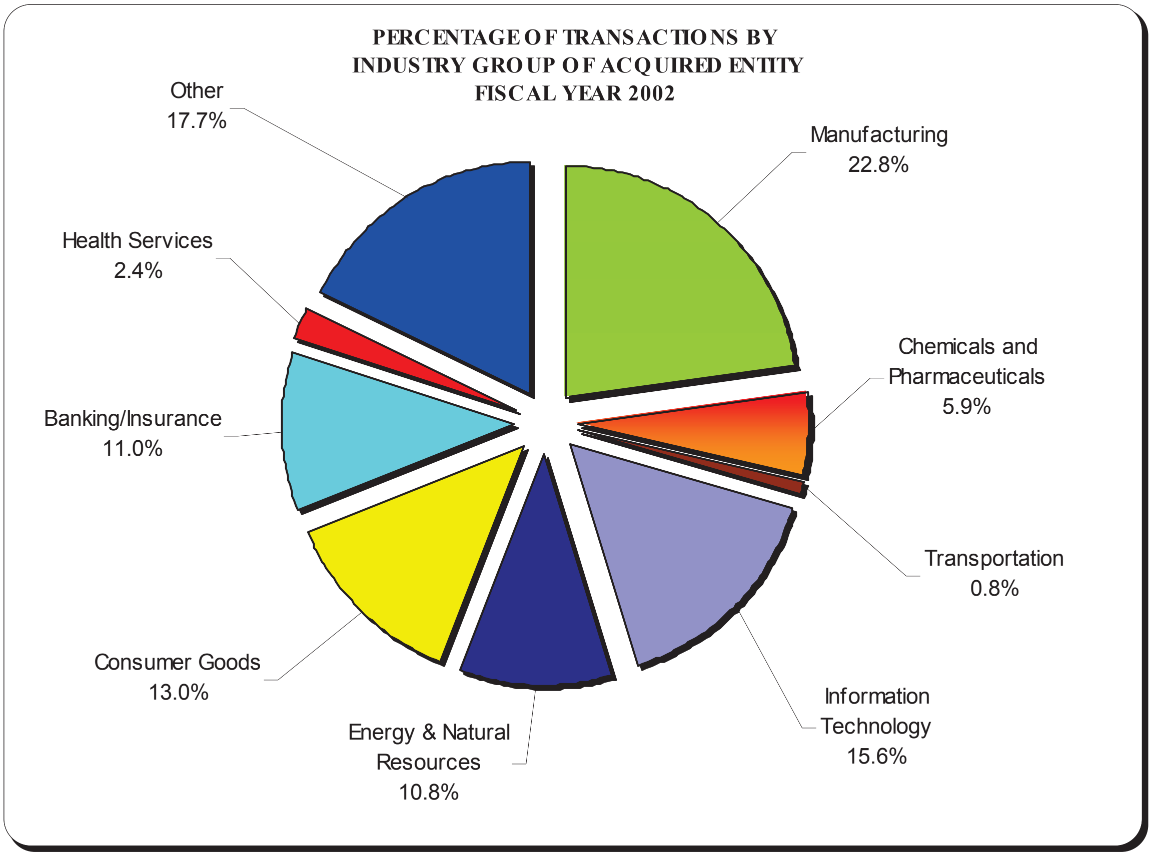

Figure 3

DEVELOPMENTS WITHIN THE PREMERGER PROGRAM

1. *Final Rules*

On February 1, 2001, the Commission, with the concurrence of the Assistant Attorney General, published two Federal Register notices resulting in significant changes to the premerger notification rules. These amendments were discussed in detail in the fiscal year 2001 Annual Report.[10]

The first 2001 Federal Register notice had published Interim Rules[11] that became effective on February 1, 2001, and incorporated the extensive statutory changes to the HSR

[10] See the Annual Report to Congress, Fiscal Year 2001 for a detailed discussion of the substantive changes.

[11] The majority of the Interim Rules became final on January 17, 2003. 68 Fed. Reg. 2425. These

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Act into the Premerger Notification Program. In fiscal year 2002, in response to public comments, the Commission, with the concurrence of the Assistant Attorney General, modified one of the Interim Rules. The final rule restored to parties who filed prior to February 1, 2001 the full five-year period following expiration of the waiting period to acquire up to the next notification threshold that was in effect at the time of filing.[12]

The second 2001 Federal Register notice had set forth certain proposed amendments that were not necessary to implement the HSR Act, but consisted instead of updates, corrections and other improvements in the rules that the Commission determined were timely and appropriate. These proposals had included modifying Section 802.2 by removing associated agricultural assets from the agricultural property exemption, revising Section 802.6(b) regarding federal regulatory approval, and restructuring and revising Sections 802.50 and 802.51 to clarify and refocus exemptions for acquisitions of foreign assets and voting securities. During fiscal year 2002, these amendments were finalized (with some changes in response to public comment) and became effective on April 17, 2002.[13]

2. *Compliance*

The Commission and the Department of Justice continued to monitor compliance with the premerger notification program's filing and waiting period requirements and initiated a number of compliance investigations in fiscal year 2002. The agencies monitor compliance through a variety of methods, including the review of newspapers and industry publications for announcements of transactions that may not have been reported in accordance with the requirements of the Act. In addition, industry sources, such as competitors, customers and suppliers, as well as interested members of the public, provide the agencies with information about transactions and possible violations of the Act's requirements. Under Section 7A(g)(1) of the Act, any person that fails to comply with the Act's notification and waiting requirements is liable for a civil penalty of up to $11,000 for each day the violation continues.[14] In fiscal year 2002, corrective filings for thirteen transactions were received[15] and one enforcement action was brought.

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changes included implementing the increase in the size-of-transaction threshold and the introduction of a three-tiered filing fee structure, and the elimination of Section 802.20 (which applied to acquisitions of 15% but valued at $15 million or less), as well as updating the filing form.

[12] 67 Fed. Reg. 11904 (March 18, 2002).

[13] 67 Fed. Reg. 11898 (March 18, 2002).

[14] Effective November 20, 1996, dollar amounts specified in civil monetary penalty provisions within the Commission's jurisdiction were adjusted for inflation in accordance with the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134 (April 26, 1996). The adjustments included, in part, an increase from $10,000 to $11,000 for each day during which a person is in violation under Section 7A(g)(1). 61 Fed. Reg. 54548 (October 21, 1996), corrected at 61 Fed. Reg. 55840 (October 29, 1996).

[15] When the parties inadvertently fail to file, the enforcement agencies generally do not seek penalties where the parties promptly make corrective filings after discovering the failure to file, submit an acceptable explanation of their failure to file, and have not previously violated the Act.

In *The Hearst Trust*,[16] the complaint alleged that Hearst failed to submit certain key corporate documents that were required for premerger notification review under the HSR Act before acquiring Medi-Span, Inc. in 1998, and that the failure to submit these documents hindered the ability of the federal antitrust agencies to analyze the competitive effects of the acquisition prior to consummation. Hearst's acquisition of Medi-Span, its main competitor in the market for electronic integratable drug information databases, also known as integratable drug data files, allowed Hearst's First DataBank, Inc. subsidiary to institute substantial price increases to its customers for use of the electronic databases which contain clinical, pricing and other information on prescription and non-prescription drugs. Pharmacists, physicians, hospital staff, and health plans use these databases to help them provide high-quality, cost-effective patient care. Most notably, integratable drug data files are needed for pharmacists to get quick, automatic warnings of any dangerous interactions between newly prescribed drugs and other drugs their patients are already taking. A consent decree that was filed simultaneously with the complaint and entered by the court on October 15, 2001 required Hearst to pay $4 million in civil penalties, as of then the largest amount paid by a single company for a violation of the premerger notification law.

MERGER ENFORCEMENT ACTIVITY[17]

1. *The Department of Justice*

During fiscal year 2002, the Antitrust Division challenged ten merger transactions that it concluded may have substantially lessened competition if allowed to proceed as proposed. In four of these transactions, the Antitrust Division filed a complaint in U.S. district court. Two of these cases were settled by consent decree; one transaction was abandoned after filing the complaint; and one case was litigated unsuccessfully in district court. In the six other challenges during fiscal year 2002, the Antitrust Division informed the parties to a proposed transaction that it would likely file suit challenging the transaction unless the parties restructured the proposal to avoid competitive problems or abandoned the proposal altogether.[18] In five of these proposed transactions, the parties restructured the transactions;

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[16] United States v. The Hearst Trust and The Hearst Corporation, Civil No. 1:01CV02119 (D.D.C. complaint filed October 11, 2001).

In Federal Trade Commission v. The Hearst Trust, Civ. No. 1:01CV00734 (D.D.C. complaint filed April 5, 2001), the Commission filed for a permanent injunction alleging that Hearst and First DataBank illegally acquired a monopoly in the market for electronic integratable drug information drug data files. On December 14, 2001, the Commission voted to approve a proposed settlement that required Hearst to divest the former Medi-Span business and pay $19 million as disgorgement of unlawful profits. The settlement marks the first time the Commission has sought either divestiture or disgorgement of profits in a federal court action for a consummated merger. The funds were required to be distributed to injured customers as part of the settlement of a private class action suit alleging unlawful overcharges by Hearst. The district court approved the final order and stipulated permanent injunction on December 18, 2001. See Annual Report to Congress, Fiscal Year 2001at 19-20.

[17] All cases in this report were not necessarily reportable under the premerger notification program. Because of provisions regarding the confidentiality of the information obtained pursuant to the Act, it would be inappropriate to identify which cases were initiated under the program.

[18] In four instances, the Department of Justice issued press releases: November 29, 2001 – Wells Fargo

and in one, the parties abandoned the proposed transaction entirely.

In *United States v. SunGard Data Systems, Inc. and Comdisco, Inc.*,[19] the Division sued to prevent SunGard from acquiring Comdisco and consequently reducing competition substantially in the sale of shared hot site disaster recovery services provided to consumers in the event of an interruption of a computer data center due to an incapacitating event. The companies were two of three major suppliers of shared hot site services for data recovery. For many customers, SunGard and Comdisco were the closest and best competitive alternatives, based upon considerations of hot site systems offerings, service, and price. After Comdisco filed voluntary Chapter 11 bankruptcy, SunGard offered the highest bid at the auction for the Comdisco assets. The Division sued to block the transaction in the U.S. District Court for the District of Columbia on October 23, 2001. On November 14, 2001, after an expedited trial, the district court entered judgment for the defendants, denied the Division's request for permanent injunction, and dismissed the complaint with prejudice.

In *United States v. General Dynamics Corporation and Newport News Shipbuilding Inc.*,[20] the Division challenged General Dynamics' $2.6 billion acquisition of Newport News, alleging that the cash tender offer, as originally proposed, would eliminate competition for nuclear submarines – a weapon platform of vital importance to the security of the United States – resulting in a monopoly. General Dynamics and Newport News were the only manufacturers of nuclear submarines. The companies were also leaders on the only two teams working to develop electric drive technology for nuclear submarines and surface combatants. The merger, as structured, also would have harmed competition for the manufacture of other military ships, including conventionally powered surface combatants. The parties abandoned their merger agreement on October 29, 2001.

In *United States v. The Manitowoc Company, Inc., Grove Investors, Inc. and National Crane Corporation*,[21] the Division challenged The Manitowoc Company's $170 million

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and Company merger with Texas Financial Bancorporation, Inc. and its acquisition of certain bank and non-bank subsidiaries of Marquette Bancshares, Inc. – Minnesota and South Dakota banks (business banking services); December 3, 2001 – SunTrust Bank's acquisition of Huntington National Bank – Florida banks (business banking services); December 18, 2001 – Suiza Foods Corporation and Dean Foods Company merger (dairy processing plants in Alabama, Florida, Indiana, Kentucky, Ohio, South Carolina, Virginia and Utah); September 6, 2002 – Aggregate Industries' acquisition of Wakefield Materials Company (ready-mix concrete facility serving northern metropolitan Boston).

In the remaining two challenges, the Division informed the parties of its antitrust concerns but did not issue a press release: American General Media Corp.'s proposed acquisition of Rocky Mountain Broadcasting I, L.L.C. and Salisbury Broadcasting's acquisition of Mass Entertainment Corporation (Aspen and Vail, Colorado radio stations); Oldcastle Materials Group's acquisition of Aggregate Industries' Central Region ((Michigan and Indiana) (aggregate, asphalt and ready-mix concrete facilities)).

[19] United States v. SunGard Data Systems, Inc. & Comdisco, Inc., No.01-2196 (ESH) (D.D.C. Oct. 22, 2001).

[20] United States v. General Dynamics Corp. & Newport News Shipbuilding Inc., No.1:01CV02200 (D.D.C. Oct. 23, 2001).

[21] United States v. The Manitowoc Co., Inc., Grove Investors, Inc. & National Crane Corp., No.

acquisition of Grove Investors. The complaint alleged that the acquisition, as originally proposed, would have reduced competition by combining two of only three major producers of medium- and heavy-lift boom trucks in North America. A boom truck is a stiff boom telescopic crane mounted on a standard flat-bed commercial truck chassis. This general-purpose mobile crane has a broad range of applications in the construction, petroleum, and utility industries. The Division filed a proposed consent decree simultaneously with the complaint, settling the suit. Under the terms of the decree, Manitowoc was required to divest either its own or Grove's boom truck business to a purchaser acceptable to the Division. The Court entered the consent decree on December 11, 2002.

In *United States v. Archer-Daniels-Midland Company and Minnesota Corn Processors,*[22] the companies agreed to dissolve a joint venture with a competing corn wet miller in order for ADM to proceed with its $634 million proposed acquisition of MCP. ADM and MCP were two of the largest wet corn millers in the United States. The complaint alleged that the acquisition, as originally structured, would have lessened competition substantially by reducing the number of independent competitors in the corn wet milling industry to four and making coordination among the remaining firms more likely. The wet mill processing of corn results in the manufacture of corn syrup and high fructose corn syrup ("HFCS"), products found in foods and soft drinks. Americans consume over $2.5 billion in corn syrup and HFCS each year. The Division filed a proposed consent decree simultaneously with the complaint, settling the suit. The decree required ADM and MCP to dissolve the joint venture between MCP and Corn Producers International, Inc. ("CPI"), allowing CPI to compete independently of the merged ADM and MCP. The Court entered the consent decree on July 22, 2003.

During fiscal year 2002, the Division investigated four bank merger transactions for which divestiture was required prior to or concurrently with the acquisition and two others in which conditions were imposed. A "not significantly adverse" letter conditioned upon a letter agreement between the parties and the Division was sent to the appropriate bank regulatory agency in all instances.[23] Also during fiscal year 2002, courts entered consent decrees in two

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02CV0159 (D.D.C. July 31, 2002).

[22] United States v. Archer-Daniels-Midland Co. & Minnesota Corn Processors, No. 1:02CV01768 (D.D.C. Sept. 6, 2002).

[23] The six letters were: October 4, 2001 letter to the Comptroller of the Currency regarding the application by Community Bank, N.A., Canton, NY, to acquire 36 branches of Fleet National Bank, Providence, RI; October 15, 2001 letter to the Comptroller of the Currency regarding the application for NBT Bank, N.A., Norwich, NY, to acquire Central National Bank, Canajoharie, NY; November 29, 2001 letter to the Board of Governors of the Federal Reserve System regarding the application by Wells Fargo & Company, San Francisco, CA, to acquire certain bank and non-bank subsidiaries of Marquette Bancshares, Inc., MN, and to merge with Texas Financial Bancorporation, TX (the Pohlad Group); December 3, 2001 letter to the Board of Governors regarding the application by SunTrust Bank, Atlanta, GA, to acquire Florida branches of Huntington Bank, Columbus, OH; December 26, 2001 letter to the Board of Governors of the regarding the application by Wesbanco, Inc., Wheeling, WV, to acquire American Bancorporation, Wheeling, OH, and to merge Wheeling National Bank, Wheeling, WV, into Wesbanco Bank, Wheeling, WV; August 8, 2002 letter to the Federal Deposit Insurance Corporation regarding the application by S&T Bank, Indiana, PA, to acquire PFC Bank, Ford City, PA, as part of a transaction wherein S&T Bancorp, Inc. acquired Peoples Financial Corp.

merger cases previously filed by the Division in fiscal year 2001.[24]

Additionally, on September 10, 2002, in *United States v. Earthgrains Co., Specialty Foods Corp. and Metz Holdings, Inc.* (N.D. Ill.), the Division petitioned the Court to find Earthgrains Baking Companies, Inc., successor in interest to Earthgrains Company, in civil contempt for violating an order that had been entered by the court on July 3, 2000.[25] According to the motion, Earthgrains violated the consent decree by failing to maintain assets prior to their divestiture, as required by the Hold Separate Stipulation and Order. To resolve the matter, Earthgrains agreed to pay a $100,000 civil penalty to the United States.

2. *The Federal Trade Commission*

The Commission challenged twenty-four transactions that it concluded would lessen competition if allowed to proceed as proposed during fiscal year 2002,[26] leading to ten consent orders, two administrative complaints, and seven withdrawn filings. In five of the twenty-four matters, the Commission authorized staff to seek injunctive relief; of these, one case was filed in district court and after a preliminary injunction was granted the parties abandoned the transaction, in two cases the parties negotiated a consent agreement, and in two other cases the parties abandoned the transaction.

In *Diageo plc/Vivendi Universal S.A.*,[27] the Commission authorized staff to file for a preliminary injunction to block Diageo's and Pernod Ricard S.A.'s proposed $8.15 billion joint acquisition of Vivendi's Seagram Wine and Spirits business. According to the complaint, the proposed acquisition would have substantially lessened competition in five relevant product markets in the distilled spirits industry. Specifically, the rum market would have become a duopoly controlled by Bacardi U.S.A., the industry leader, and Diageo/Seagram, the second and third largest sellers of rum in the United States. Together, Bacardi U.S.A. and Diageo/Seagram would have controlled 95 percent of all premium rum sales in the United States. The next largest competitor would have a market share in the United States of about only two percent. Diageo would have also acquired highly sensitive commercial business information about Seagram's Gin, its principal competitor in the retail gin market. Prior to the Commission's filing of a complaint seeking the preliminary injunction, a proposed consent agreement was negotiated that allowed the parties to proceed with the transaction under certain conditions. The order required Diageo to divest its Malibu

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[24] On April 5, 2002, the District Court entered the consent decree in United States v. Premdor, Inc., Premdor U.S. Holdings, Inc., Int'l Paper Co. & Masonite Corp. (D.D.C. Aug. 3, 2001); on April 17, 2002, the consent decree was entered in United States v. 3D Systems Corp. & DTM Corp. (D.D.C. Aug. 16, 2001). See the Annual Report to Congress, Fiscal Year 2001 for a description of these cases.

[25] See the Annual Report to Congress, Fiscal Year 2000 for a description of this case.

[26] In addition to the two administrative complaints discussed on page 14 of this report, an administrative complaint was also issued in Libbey Inc./Newell Rubbermaid, Inc. (See the above discussion). To avoid double counting this report includes only those merger enforcement actions in which the Commission took its first public action during fiscal year 2002.

[27] Diageo plc/Vivendi Universal S.A., Docket No. C-4032 (issued February 4, 2002).

Rum assets, the country's leading coconut-flavored rum, to a Commission-approved buyer and agree not to obtain or use any commercially sensitive business information regarding four brands, including Seagram's Gin, that were to be acquired by Pernod.

In *Libbey, Inc./Newell Rubbermaid, Inc.*,[28] the Commission filed for a preliminary injunction in district court alleging that Libbey's proposed acquisition of Newell Rubbermaid's Anchor Hocking Corporation subsidiary would have substantially lessened competition in the market for soda-lime glassware sold to the food service industry in the United States. According to the complaint, the acquisition would have combined the largest and third-largest sellers of soda-lime glassware to the United States food service industry. The acquisition would have eliminated substantial competition between Libbey and Anchor, increased barriers to entry into the relevant market and increased the likelihood of higher prices for consumers. In April 2002, the court granted the Commission's motion blocking the proposed acquisition. Following the court's preliminary injunction order, in May 2002 the Commission issued an administrative complaint against the parties. The parties subsequently abandoned the transaction.

In *Deutsche Gelatine-Fabriken Stoess AG/Goodman Fielder Limited*,[29] the Commission authorized staff to file for a preliminary injunction to block the proposed acquisition by DGF Stoess of Goodman Fielder's gelatin business. According to the complaint, DGF Stoess and Goodman Fielder were the two largest producers of pigskin and beef hide gelatin in the world. Pigskin and beef hide gelatin are used primarily by the food industry as an ingredient in edible products and by the pharmaceutical industry to produce capsules and tablets. The proposed acquisition would have further consolidated an already concentrated market and increased the likelihood that customers of pigskin and beef hide gelatin would be forced to pay higher prices. Prior to the Commission's filing of a complaint seeking the preliminary injunction, a proposed consent agreement was negotiated to remedy the alleged anticompetitive effects of the merger. Under the terms of the agreement, DGF Stoess could not acquire Goodman Fielder's entire gelatin business; rather, Leiner Davis Gelatin Corporation, a Goodman Fielder subsidiary, would retain its United States and Argentine gelatin plants and related assets.

In *Meade Instruments Corporation/Tasco Holdings, Inc.*,[30] the Commission authorized staff to file for a preliminary injunction in federal district court to pre-empt any attempt by Meade to purchase assets of bankrupt Tasco Holdings, Inc.'s Celestron International subsidiary. According to the complaint, Meade was the leading manufacturer of performance telescopes and Schmidt-Cassegrain telescopes in the United States, with dominant positions in

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[28] Federal Trade Commission v. Libbey, Inc., Civ. No. 02-0060 (D.D.C. complaint filed January 14, 2002). On June 10, 2002, the respondents announced that they had terminated their merger agreement. On October 7, 2002, the Commission issued a consent order in settlement of the accompanying administrative proceedings (Docket No. 9301).

[29] Deutsche Gelatine-Fabriken Stoess AG/Goodman Fielder Limited, Docket No. C-4045 (issued April 17, 2002).

[30] Meade Instruments Corporation/Tasco Holdings, Inc., File No. 021-0127.

the markets for performance and Schmidt-Cassegrain telescopes. Celestron International was the number two performance telescope provider in the United States and the only other supplier of Schmidt-Cassegrain telescopes. The acquisition would have adversely impacted the performance telescope market by eliminating competition between the two companies and by creating a monopoly in the market for Schmidt-Cassegrain telescopes. In May 2002, Meade notified the Commission that it had abandoned its efforts to bid for the Celestron assets.

In *Cytyc Corporation/Digene Corporation*,[31] the Commission authorized staff to seek a preliminary injunction to block Cytyc's proposed acquisition of Digene. According to the complaint, the combination of the two companies would have lessened competition and increased consumer prices within the highly concentrated market for primary cervical cancer screening tests. Both Cytyc and Digene manufactured and sold products used to screen women for cervical cancer. Cytyc's products accounted for 93 percent of the U.S. liquid-based pap tests, the most widely used sensitive primary screening tool available for the detection of cervical cancer. The only other company producing and selling an FDA-approved liquid pap test in the United States was TriPath Imaging. While three other companies had developed such tests, they had not yet begun clinical trials, and were at least two years away from entering the U.S. market. Digene was the only company in the United States selling a DNA-based test for the human papillomavirus ("HPV"), believed to cause nearly all cervical cancer cases. Digene's HPV test is most commonly and efficiently conducted using a residual sample obtained from a liquid pap test, which requires FDA approval. Thus, it is important that a company manufacturing liquid pap tests have FDA approval to run the Digene HPV test off its sample medium. It is similarly important that a liquid pap test supplier's customers have viable access to Digene's HPV test. By purchasing Digene, Cytyc would have been in a position to eliminate its only existing competitor, TriPath, by limiting access to Digene's HPV test, and thus, could have thwarted the entry of other firms that planned to sell liquid pap tests in the United States. The parties abandoned the transaction prior to the Commission's filing of the complaint in district court.

The Commission issued an administrative complaint in *MSC.Software Corporation,*[32] alleging that MSC's 1999 acquisitions of Universal Analytics, Inc. ("UAI") and Computerized Structural Analysis & Research Corporation ("CSAR") substantially lessened competition in the market for a popular type of advanced computer-aided engineering software used throughout the aerospace and automotive industries known as Nastran. According to the complaint, MSC was the dominant Nastran supplier with an estimated 90 percent of worldwide revenue and UAI and CSAR, each, held an estimated five percent of worldwide revenue. The acquisitions created and enhanced MSC's power to raise prices above a competitive level and prevented other suppliers of engineering software form acquiring UAI and CSAR and increasing competition. Subsequently, the matter was withdrawn from adjudication and a consent agreement was negotiated. The order required MSC to divest at least one clone copy of its current advanced Nastran software, including the

[31] Cytyc Corporation/Digene Corporation, File No. 021-0098.

[32] MSC.Software Corporation, Docket No. 9299 (issued October 9, 2001).

source code. In addition, MSC was required to permit certain customers to terminate paid-up licenses entered into since the acquisitions and required MSC to refund a portion of the advance consideration paid by its customers.

The Commission also issued an administrative complaint in *Chicago Bridge & Iron Company N.V., Chicago Bridge & Iron Company, and Pitt-Des Moines, Inc.*,[33] alleging that CB&I's 2001 acquisition of the Water Division and Engineered Construction Division of Pitt-Des Moines, Inc. ("PDM") substantially lessened competition in four relevant specialty industrial storage tank markets. According to the complaint, CB&I and PDM competed against each other as the two leading U.S. producers of large, field-erected industrial and water storage tanks and other specialized steel-plate structures. The combination of the two companies resulted in a monopoly in the U.S. markets for two of the more difficult and costly products to construct – LNG tanks and thermal vacuum chambers. In addition, the combination of the two companies resulted in a dominant firm in the U.S. markets for LPG tanks and LIN/LOX/LAR tanks. On June 18, 2003, in an Initial Decision, the administrative law judge upheld the administrative complaint allegations. The order entered by the judge required CB&I to divest all of the assets acquired in the February 2001 acquisition, in order to restore competition as it existed prior to the acquisition.

In fiscal year 2002, the Commission accepted consent agreements for public comment in ten merger cases. A complaint and decision and order were issued in eight of these matters during the fiscal year, and a consent agreement in two of these cases became final after September 2002.

In *Airgas, Inc.*,[34] the complaint alleged that Airgas's purchase of the Puritan Bennett Medical Gas business from Mallinckrodt, Inc. in January 2000 had an adverse effect on competition in the nitrous oxide market in the United States and Canada. Nitrous oxide is a clear, odorless gas primarily used in dental and surgical procedures as an analgesic agent or as a supplement to anesthesia. At the time of the acquisition, Puritan Bennett was Airgas's only competitor in the production and sale of nitrous oxide. Airgas was the nation's largest distributor of industrial, medical, and specialty gases and the only producer and seller of nitrous oxide in North America. Puritan Bennett, prior to its $90 million purchase by Airgas, was a leading distributor of medical gases and a producer and seller of nitrous oxide in North America. The acquisition eliminated any competition in this market in North America and increased the likelihood that customers requiring nitrous oxide would pay higher prices. Under the agreement, Airgas was required to divest a nitrous oxide business to Air Liquide America Corporation, a producer of other medical gases, such as medical grade oxygen and nitrogen. The agreement also required Airgas to supply Air Liquide with a sufficient amount of bulk liquid nitrous oxide in order to ensure that Air Liquide has the same volume of nitrous oxide as Airgas did before its acquisition of Puritan Bennett.

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[33] Chicago Bridge & Iron Company N.V., Chicago Bridge & Iron Company, and Pitt-Des Moines, Inc., Docket No. 9300 (issued October 25, 2001).

[34] Airgas, Inc., Docket No. C-4029 (issued December 12, 2001).

In *Koninklijke Ahold NV/Bruno's Supermarkets, Inc.*,[35] the complaint alleged that Ahold's proposed purchase of Bruno's Supermarkets would have substantially lessened competition in the retail sale of food and grocery items in supermarkets in or near the towns of Milledgeville and Sandersville, Georgia. According to the complaint, Ahold, a global food service distributor and retailer, operated approximately 1,300 United States food stores under the trade names Giant, Stop & Shop, Tops, and BI-LO. Bruno's Supermarkets, a large supermarket chain in the southeastern United States, owned 169 supermarkets under the trade names Bruno's Fine Foods, Food World, Food Max, Food Fair, and Fresh Value. The order required Ahold to divest two of its BI-LO supermarkets in Georgia, one in Milledgeville and one in Sandersville.

In *Nestle Holdings, Inc./Ralston Purina Company*,[36] the complaint alleged that Nestle's proposed $10.3 billion acquisition of Ralston would have substantially lessened competition in the dry cat food market in the United States. According to the complaint, the proposed transaction would have substantially increased concentration in the relevant market, eliminated direct competition between the companies, and increased the ability of the combined company to unilaterally exercise market power, thereby increasing the likelihood that consumers would pay higher prices. Nestle, the largest food corporation in the world, sells its pet food products through its Friskies Pet Care Division, including Alpo, Come N' Get It, Mighty Dog, Friskies, Fancy Feast, Jim Dandy, and Chef's Blend. Ralston, the world's leading producer of dry pet foods, markets brands such as Dog Chow, Puppy Chow, Cat Chow, Kitten Chow, Purina Special Care, Meow Mix, Purina O.N.E., Purina Pro Plan, Fit & Trim, Alley Cat, and Deli-Cat. Under the order, Nestle was required to divest Ralston's Meow Mix and Alley Cat brands to J.W. Childs Equity Partners II, L.P., which owns Hartz Mountain, a leading manufacturer and distributor of pet supplies in the United States.

In *Valero Energy Corp./Ultramar Diamond Shamrock Corp.*,[37] the complaint alleged that the proposed merger of petroleum refiners Valero and Ultramar would have substantially lessened competition in the following markets: 1) the refining and bulk supply of California Air Resources Board ("CARB") 2 and CARB 3 gasoline for sale in Northern California and 2) the refining and bulk supply of CARB 2 and CARB 3 gasoline in the state of California. According to the complaint, both Valero and Ultramar were leading refiners and marketers of CARB gasoline in California and by eliminating the direct competition between the parties the merger would have likely increased the price of CARB gasoline for consumers in California due to loss of competition from the merger. The order required Valero to divest Ultramar's Golden Eagle Refinery, certain bulk gasoline supply contracts, and 70 Ultramar retail service stations in Northern California to a Commission-approved buyer.

In *INA-Holding Schaeffler KG/FAG Kugelfischer Georg Schafer AG*,[38] the complaint

[35] Koninklijke Ahold NV/Bruno's Supermarkets, Inc., Docket No. C-4027 (issued January 16, 2002).

[36] Nestle Holdings, Inc./Ralston Purina Company, Docket No. C-4028 (issued February 4, 2002).

[37] Valero Energy Corp./Ultramar Diamond Shamrock Corp., Docket No. C-4031 (issued February 19, 2002).

[38] INA-Holding Schaeffler KG/FAG Kugelfischer Georg Schafer AG, Docket No. C-4033 (issued February 5, 2002).

alleged that the proposed acquisition of FAG by INA would have lessened competition and created a monopoly in the worldwide market for the research, development, manufacture and sale of cartridge ball screw support bearings ("CBSSB"), a type of bearing used in manufacturing machine tool equipment. According to the complaint, INA and FAG were the only two suppliers of CBSSB in the world and the proposed acquisition, if consummated, would have resulted in a monopoly in the market. Entry into the market was a difficult process because of, among other things, the time and cost associated with researching and developing a line of CBSSB products, acquiring the necessary production assets, and developing the expertise needed to successfully design, produce, and market these products. The order required INA and FAG to divest FAG's CBSSB business to Aktiebolaget SKF, the largest supplier of ball and other roller bearings in the world.

In *Solvay S.A.*,[39] the complaint alleged that Solvay's proposed $1.3 billion acquisition of Ausimont S.p.A. from Italengeria S.p.A. would have lessened competition in the production and sale of all grades of polyvinylidene fluoride ("PVDF") and the production and sale of melt-processible grades of PVDF. PVDF is a fluoropolymer used in a wide variety of applications, including highly durable architectural coatings, wire and cable jacketing, fiber optic raceways, chemical processing equipment, semiconductor manufacturing equipment, and other miscellaneous applications. According to the complaint, Solvay and Ausimont were two of only three producers of PVDF in the United States and were two of the three major PVDF producers in the world. The proposed merger would have eliminated Ausimont as a growing competitor in the market for melt-processible grades of PVDF, increasing the likelihood of higher prices and reduced innovation in the relevant market. The order required Solvay to divest its United States PVDF operations, including its Decatur, Alabama PVDF plant and its interest in Alventia LLC, a joint venture that manufactures the main raw material for PVDF.

In *Bayer AG/Aventis S.A.*,[40] the complaint alleged the proposed $6.2 billion acquisition by Bayer of Aventis's subsidiary Aventis CropScience Holdings S.A. would have lessened competition in the United States in the following markets: 1) new generation chemical insecticide products; 2) new generation chemical insecticide active ingredients and related technologies for various insecticide and animal health products; 3) post-emergent grass herbicides for spring wheat; and 4) cool weather cotton defoliants. According to the complaint, all of the relevant markets were highly concentrated. Bayer and Aventis were two of only three firms competing significantly in the market for new generation chemical insecticide active ingredients and products and the only firms that had developed and successfully sold such products for non-repellent liquid termite control and for veterinarian use in controlling fleas. The companies were also the only two suppliers of cool weather cotton defoliants. The merger would have eliminated a significant competitor, increased barriers to entry, reduced innovation competition for certain products, and increased the possibility of coordinated interaction among the remaining competitors in the relevant

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[39] Solvay S.A., Docket No. C-4046 (issued June 21, 2002).

[40] Bayer AG/Aventis S.A., Docket No. C-4049 (issued July 24, 2002).

markets. The order required the parties to divest assets relating to their acetamiprid, fipronil, flucarbazone, and folex businesses.

In *Amgen Inc./Immunex Corporation*,[41] the complaint alleged that the proposed $16 billion acquisition by Amgen of Immunex would have lessened competition in the United States in the research, development and sale of the following: 1) neutrophil (white blood cell) regeneration factors; 2) tumor necrosis factor ("TNF") inhibitors used in the treatment of rheumatoid arthritis; and 3) interleukin-1 ("IL-1") inhibitors, also used in the treatment of rheumatoid arthritis. According to the complaint, all three markets in the United States were highly concentrated. Amgen and Immunex were the only two companies competing in the market for neutrophil regeneration products and Immunex was only one of two companies with TNF inhibitors on the market. Amgen's Kineret was the only IL-1 inhibitor approved for sale in the United States for the treatment of rheumatoid arthritis. Immunex and Regeneron Pharmaceuticals Inc. were the only two companies with IL-1 inhibitor products in clinical trials in the United States, but due to the patent position of Amgen and Immunex, Regeneron would have likely been unable to bring its IL-inhibitor to market. To remedy the anticompetitive effects of the proposed merger, the order required the companies to sell all of Immunex's assets related to Leukine, a neutrophil regeneration factor, to Schering AG. The order also required the companies to grant a license to certain intellectual property rights related to TNF inhibitors to Serono S.A. and certain intellectual property rights related to IL-1 inhibitors to Regeneron.

In *Phillips Petroleum Company/Conoco Inc.*,[42] the complaint alleged that the proposed merger of Phillips and Conoco would have lessened competition in the following markets: 1) the bulk supply of light petroleum products in Eastern Colorado and Northern Utah; 2) light petroleum product terminaling services in the metropolitan statistical areas ("MSAs") of Spokane, Washington, and Wichita, Kansas; 3) the bulk supply of propane in Southern Missouri, the St. Louis MSA, and Southern Illinois; 4) natural gas gathering in more than 50 sections of the Permian Basin in New Mexico and Texas; and 5) the fractionation processes in Mont Belvieu, Texas. According to the complaint, the merger would have eliminated ongoing competition between the two companies resulting in the likelihood of increased rates and terminaling services fees and the reduced output of propane, processed natural gas and other products and services, thereby increasing consumer costs. The order required the companies to divest several refineries, a light petroleum products terminal, a propane terminal, and certain gas gathering assets. The parties were also required to create firewalls that prevent the transfer of competitively sensitive information among the Mont Belvieu fractionators.

In *Shell Oil Company/Pennzoil-Quaker State Company*,[43] the complaint alleged that the proposed $1.8 billion acquisition of Pennzoil by Shell would have lessened competition

[41] Amgen Inc./Immunex Corporation, Docket No. C-4056 (issued September 3, 2002).

[42] Phillips Petroleum Company/Conoco Inc., Docket No. C-4058 (issued February 7, 2003).

[43] Shell Oil Company/Pennzoil-Quaker State Company, Docket No. C-4059 (issued November 18, 2002).

and raised prices in the United States and Canadian market for Group II paraffinic base oil. Group II base oil is used to produce motor oil and other lubricants, and is needed to meet current performance standards for lighter-viscosity motor oil formulations, such as 5-W20 and 5-W30, as well as requirements for other lubricants. According to the complaint, Pennzoil had a 50/50 joint venture with Conoco Inc. called Excel Paralubes that operated a base oil refinery at West Lake, Louisiana adjacent to Conoco's petroleum products refinery in Lake Charles, Louisiana. The proposed merger would have eliminated Pennzoil as a major competitor and positioned Shell, the market leader, into a close partnership with Conoco Inc., another leading producer. The price of Group II base oils would have likely increased by a substantial amount, especially as new motor oil standards are developed and require even greater use of Group II base oil. The order required the parties to divest Pennzoil's 50 percent interest in Excel Paralubes, which represents Pennzoil's only base oil ownership position, to a Commission-approved buyer and freeze Pennzoil's ability to obtain additional Group II base oil supply under an existing 10-year agreement with ExxonMobil Corporation at approximately current levels.

ONGOING REASSESSMENT OF THE EFFECTS OF THE PREMERGER NOTIFICATION PROGRAM

The Commission continually reviews the impact of the premerger notification program on the business community and antitrust enforcement. As indicated in past annual reports, the HSR program ensures that virtually all significant mergers or acquisitions that affect American consumers in the United States will be reviewed by the antitrust agencies prior to consummation. The agencies generally have the opportunity to challenge unlawful transactions before they occur, thus avoiding the problem of constructing effective post-acquisition relief. As a result, the HSR Act is doing what Congress intended, giving the government the opportunity to investigate and challenge mergers that are likely to harm consumers *before* injury can arise. Prior to the premerger notification program, businesses could, and frequently did, consummate transactions that raised significant antitrust concerns before the antitrust agencies had the opportunity to adequately consider their competitive effects. The enforcement agencies were forced to pursue lengthy post-acquisition litigation, during the course of which harm from the consummated transaction continued (and afterwards as well, where achievement of effective post-acquisition relief was not practicable). Because the premerger notification program requires reporting before consummation, this problem has been significantly reduced.

Always cognizant of the program's impact and effectiveness, the enforcement agencies continue to seek ways to speed up the review process and reduce burdens for companies. As in past years, the agencies will continue their ongoing assessment of the HSR program in order to increase accessibility, promote transparency and reduce burden on the filing parties without compromising the agencies' ability to investigate and interdict proposed transactions that may substantially lessen competition.

LIST OF APPENDICES

Appendix A - Summary of Transactions, Fiscal Years 1993 - 2002

Appendix B - Number of Transactions Reported and Filings Received by Month for Fiscal Years 1993 - 2002.

LIST OF EXHIBITS

Exhibit A - Statistical Tables for Fiscal Year 2002, Presenting Data Profiling Hart-Scott-Rodino Premerger Notification Filings and Enforcement Interest

APPENDIX A

SUMMARY OF TRANSACTIONS

FISCAL YEARS 1993 - 2002

APPENDIX A

SUMMARY OF TRANSACTION BY YEAR

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Transactions Reported	**1,846**	**2,305**	**2,816**	**3,087**	**3,702**	**4,728**	**4,642**	**4,926**	**2,376**	**1,187**
Filings Received[1]	**3,559**	**4,403**	**5,439**	**6,001**	**7,199**	**9,264**	**9,151**	**9,941**	**4,800**	**2,369**
Adjusted Transactions In Which A Second Request Could Have Been Issued[2]	1,745	2,128	2,612	2,864	3,438	4,575	4,340	4,749	2,237	1,142
Investigations in Which Second Requests Were Issued	**71**	**73**	**101**	**99**	**122**	**125**	**111**	**98**	**70**	**49**
FTC[3]	40	46	58	36	45	46	45	43	27	27
Percent[4]	2.3%	2.2%	2.2%	1.3%	1.3%	1.0%	1.0%	0.9%	1.2%	2.4%
DOJ[3]	31	27	43	63	77	79	68	55	43	22
Percent[4]	1.8%	1.3%	1.6%	2.2%	2.2%	1.7%	1.6%	1.2%	1.9%	1.9%
Transactions Involving a Request For Early Termination[5]	**1,689**	**2,081**	**2,471**	**2,861**	**3,363**	**4,323**	**4,110**	**4,324**	**2,063**	**1,042**
Granted[5]	1,201	1,508	1,869	2,044	2,513	3,234	3,103	3,515	1,603	793
Not Granted[5]	448	573	602	817	850	1,089	1,007	809	460	249

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person when a transaction is reported. Only one application is received when an acquiring party files for an exemption under sections 7A(c)(6) or (c)(8) of the Clayton Act.

[2] These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of sections 7A (c)(6) and 7A(c)(8) of the Act.; and (3) transactions which were found to be non-reportable. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, e.g., filing one threshold and later filing for a higher threshold, only a single consolidated transaction has been counted because as a practical matter the agencies do not issue more than one Second Request in such a case. These statistics also omit from the total number of transactions reported secondary acquisitions filed pursuant to 801.4 of the Premerger Notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.

[3] These statistics are based on the date the request was issued and not the date the investigation was opened.

[4] Second Requests investigations as a percentage of the total number of adjusted transactions.

[5] These statistics are based on the date of the HSR filing and not the date action was taken on the request.

Appendix B

Number of Transactions Reported

and

Filings Received by Month

for

Fiscal Years 1993 - 2002

Appendix B

Table 1. Number of Transactions Reported by Months for the Fiscal Years 1993 - 2002

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
October	163	184	273	238	296	424	333	376	360	89
November	184	221	309	273	332	387	359	428	451	105
December	160	222	216	249	267	426	394	468	345	95
January	100	156	180	238	263	306	282	335	245	111
February	110	149	170	231	250	336	330	440	66	87
March	149	167	229	277	315	392	427	455	120	109
April	131	167	177	252	302	384	364	343	94	99
May	155	220	281	304	328	401	438	398	153	111
June	151	182	252	253	319	442	445	494	190	88
July	172	208	225	265	389	435	444	351	94	121
August	204	226	237	264	318	427	434	446	163	97
September	167	203	267	243	323	368	392	392	95	75
TOTAL	**1,846**	**2,305**	**2,816**	**3,087**	**3,702**	**4,728**	**4,642**	**4,926**	**2,376**	**1,187**

Appendix B

Table 2. Number of Filings Received[1] by Month for Fiscal Years 1993 - 2002

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
October	297	332	505	450	561	818	662	777	751	190
November	341	428	614	520	636	749	686	839	920	211
December	325	427	419	474	521	836	785	922	686	183
January	188	293	360	445	514	614	548	677	499	224
February	239	295	326	480	483	650	658	867	144	174
March	263	326	432	528	614	766	828	959	243	230
April	251	321	350	498	599	763	719	695	188	203
May	301	421	534	584	640	787	851	859	296	212
June	311	362	496	502	620	862	884	1,004	378	170
July	327	380	439	515	759	851	887	718	182	230
August	393	431	455	515	617	844	885	886	332	191
September	323	387	509	490	635	724	758	738	181	151
TOTAL	3,559	4,403	5,439	6,001	7,199	9,264	9,151	9,941	4,800	2,369

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person when the transaction is reported, unless notification is for a joint venture where more than one acquiring person is required to submit a filing. Only one filing is received when an acquiring person files for a transaction that is exempt under Sections 7A(c)(6) and (c)(8) of the Clayton Act.

EXHIBIT A

STATISTICAL TABLES

FOR

FISCAL YEAR 2002

DATA PROFILING HART-SCOTT-RODINO PREMERGER

NOTIFICATION FILINGS AND ENFORCEMENT INTEREST

TABLE I FISCAL YEAR 2002[1] ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]												
TRANSACTION RANGE ($MILLIONS)	**HSR TRANSACTIONS**		**CLEARANCE GRANTED TO FTC OR DOJ**					**SECOND REQUEST INVESTIGATIONS[3]**				
	NUMBER[4]	**PERCENT**	**NUMBER**		**PERCENT OF TRANSACTION RANGE GROUP**			**NUMBER**		**PERCENT OF TRANSACTION RANGE GROUP**		
			FTC	**DOJ**	**FTC**	**DOJ**	**TOTAL**	**FTC**	**DOJ**	**FTC**	**DOJ**	**TOTAL**
Less than 50	2[5]	0.2%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
50 UP to 100	414	36.3%	32	16	7.7%	3.9%	11.6%	3	4	0.7%	1.0%	1.7%
100 UP to 150	179	15.7%	16	13	8.9%	7.3%	16.2%	3	3	1.6%	1.7%	3.3%
150 UP to 200	112	9.8%	14	10	12.5%	8.9%	21.4%	3	1	2.7%	0.9%	3.6%
200 UP to 300	130	11.4%	17	9	13.1%	6.9%	20.0%	3	1	2.3%	0.8%	3.1%
300 UP to 500	125	10.9%	18	15	14.4%	12.0%	26.4%	2	3	1.6%	2.4%	4.0%
500 UP to 1000	95	8.3%	13	11	13.7%	11.6%	25.3%	6	5	6.3%	5.3%	11.6%
1000 AND UP	85	7.4%	14	11	16.5%	12.9%	29.4%	7	5	8.2%	5.9%	14.1%
ALL TRANSACTIONS	1,142	100.0%	124	85	10.9%	7.4%	18.3%	27	22	2.4%	1.9%	4.3%

TABLE II
FISCAL YEAR 2002[1]
ACQUISITIONS BY SIZE OF TRANSACTION[2] (CUMULATIVE)

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF CLEARANCES GRANTED			NUMBER		PERCENT OF TOTAL SECOND REQUESTS ISSUED		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 50	2[5]	0.2%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
LESS THAN 100	416	36.5%	32	16	15.3%	7.7%	23.0%	3	4	6.1%	8.2%	14.3%
LESS THAN 150	595	52.2%	48	29	23.0%	13.9%	36.9%	6	7	12.2%	14.3%	26.5%
LESS THAN 200	707	62.0%	62	39	29.7%	18.7%	48.4%	9	8	18.4%	16.3%	34.7%
LESS THAN 300	837	73.4%	79	48	37.8%	23.0%	60.8%	12	9	24.5%	18.4%	42.9%
LESS THAN 500	962	84.3%	97	63	46.4%	30.1%	76.5%	14	12	28.6%	24.5%	53.1%
LESS THAN 1000	1,057	91.7%	110	74	52.6%	35.4%	88.0%	20	17	40.8%	34.7%	75.5%
ALL TRANSACTIONS	1,142		124	85	59.3%	40.7%	100.0%	27	22	55.1%	44.9%	100.0%

TABLE III
FISCAL YEAR 2002[1]
TRANSACTIONS INVOLVING THE GRANTING OF CLEARANCE BY AGENCY

TRANSACTION RANGE ($ MILLIONS)	CLEARANCE GRANTED TO AGENCY			CLEARANCE GRANTED AS A PERCENTAGE OF: TOTAL NUMBER OF TRANSACTIONS[4]			TOTAL NUMBER OF CLEARANCES PER AGENCY		TOTAL NUMBER OF CLEARANCES GRANTED		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50 to 100	32	16	48	2.8%	1.4%	4.2%	25.8%	18.8%	15.3%	7.6%	22.9%
100 to 150	16	13	29	1.4%	1.1%	2.5%	12.9%	15.3%	7.7%	6.2%	13.9%
150 to 200	14	10	24	1.2%	0.8%	2.1%	11.2%	11.8%	6.7%	4.8%	11.5%
200 to 300	17	9	26	1.5%	0.8%	2.2%	13.7%	10.6%	8.1%	4.3%	12.4%
300 to 500	18	15	33	1.6%	1.3%	2.8%	14.6%	17.7%	8.6%	7.2%	15.8%
500 to 1000	13	11	24	1.1%	1.0%	2.1%	10.6%	12.9%	6.2%	5.3%	11.5%
1000 AND UP	14	11	25	1.2%	1.0%	2.4%	11.2%	12.9%	6.7%	5.3%	12.0%
ALL CLEARANCES	124	85	209	10.9%	7.4%	18.3%	100.0%	100.0%	59.3%	40.7%	100.0%

TABLE IV
FISCAL YEAR 2002[1]

INVESTIGATIONS IN WHICH SECOND REQUESTS WERE ISSUED

TRANSACTION RANGE ($MILLIONS)	INVESTIGATIONS IN WHICH SECOND REQUEST WERE ISSUED[3]			SECOND REQUESTS ISSUED AS A PERCENTAGE OF:								
				TOTAL NUMBER OF TRANSACTIONS			TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF SECOND REQUEST INVESTIGATIONS		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
50 to 100	3	4	7	0.3%	0.4%	0.7%	0.7%	1.0%	1.7%	6.1%	8.2%	14.3%
100 to 150	3	3	6	0.3%	0.3%	0.6%	1.6%	1.7%	3.3%	6.1%	6.1%	12.2%
150 to 200	3	1	4	0.3%	0.1%	0.4%	2.7%	0.9%	3.6%	6.1%	2.1%	8.2%
200 to 300	3	1	4	0.3%	0.1%	0.4%	2.3%	0.8%	3.1%	6.1%	2.0%	8.1%
300 to 500	2	3	5	0.2%	0.3%	0.5%	1.6%	2.4%	4.0%	4.1%	6.1%	10.2%
500 to 1000	6	5	11	0.5%	0.4%	0.9%	6.3%	5.3%	11.6%	12.2%	10.2%	22.4%
1000 AND UP	7	5	12	0.6%	0.4%	1.0%	8.2%	5.9%	14.3%	14.3%	10.2%	24.5%
ALL TRANSACTIONS	27	22	49	2.4%	1.9%	4.3%	2.4%	1.9%	4.3%	55.0%	44.9%	99.9%

TABLE V
FISCAL YEAR 2002[1]
ACQUISITIONS BY REPORTING THRESHOLD

THRESHOLD	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS				
	NUMBER	PERCENT	NUMBER		PERCENTAGE OF THRESHOLD GROUP			NUMBER		PERCENTAGE OF THRESHOLD GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
$50M	241	21.1%	16	8	6.6%	3.3%	9.9%	3	3	1.2%	1.2%	2.4%
$100M	238	20.8%	30	12	12.6%	5.0%	17.6%	5	2	2.1%	0.8%	2.9%
$500M	52	4.6%	6	9	11.5%	17.3%	28.8%	2	4	3.8%	7.7%	11.5%
25%	4	0.4%	0	1	0.0%	25.0%	25.0%	0	0	0.0%	0.0%	0.0%
50%	552	48.3%	72	46	13.0%	8.3%	21.3%	17	11	3.1%	2.0%	5.1%
ASSETS ONLY	55	4.8%	0	9	0.0%	16.4%	16.4%	0	2	0.0%	3.6%	3.6%
ALL TRANSACTIONS	1,142	100.0%	124	85	10.9%	7.4%	18.3%	27	22	2.4%	1.9%	4.3%

TABLE VI
FISCAL YEAR 2002
TRANSACTIONS BY ASSETS OF ACQUIRING PERSON

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS				
	NUMBER	PERCENT	NUMBER		PERCENTAGE OF ASSET RANGE GROUP			NUMBER		PERCENTAGE OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	47	4.1%	0	1	0.0%	2.1%	2.1%	0	1	0.0%	2.1%	2.1%
50M - 100M	25	2.2%	1	0	4.0%	0.0%	4.0%	1	0	4.0%	0.0%	4.0%
100M - 150M	24	2.1%	2	1	8.3%	4.2%	12.5%	0	0	0.0%	0.0%	0.0%
150M - 200M	38	3.3%	3	4	7.9%	10.5%	18.4%	0	1	0.0%	2.6%	2.6%
200M - 300M	44	3.9%	5	0	11.4%	0.0%	11.4%	0	0	0.0%	0.0%	0.0%
300M - 500M	103	9.0%	4	5	3.9%	4.9%	8.8%	3	2	2.9%	1.9%	4.9%
500M - 1000M	129	11.3%	14	12	10.9%	9.3%	20.2%	2	3	1.6%	2.3%	3.9%
OVER 1000M	732	64.1%	95	62	13.0%	8.5%	21.5%	21	15	2.9%	2.0%	4.9%
ALL TRANSACTIONS	1,142	100.0%	124	85	10.9%	7.4%	18.3%	27	22	2.4%	1.9%	4.3%

TABLE VII

FISCAL YEAR 2002[1]

TRANSACTIONS BY SALES OF ACQUIRING PERSON

SALES RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENTAGE OF SALES RANGE GROUP			NUMBER		PERCENTAGE OF SALES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	88	7.7%	4	1	4.5%	1.1%	5.6%	0	1	0.0%	1.1%	1.1%
50M - 100M	26	2.3%	2	1	7.7%	3.8%	11.5%	1	0	3.8%	0.0%	3.8%
100M - 150M	31	2.7%	2	1	6.5%	3.2%	9.7%	1	0	3.2%	0.0%	3.2%
150M - 200M	32	2.8%	1	2	3.1%	6.3%	9.4%	1	1	3.1%	3.1%	6.2%
200M - 300M	51	4.5%	4	3	7.8%	5.9%	13.7%	0	0	0.0%	0.0%	0.0%
300M - 500M	95	8.3%	4	9	4.2%	9.5%	13.7%	1	2	1.1%	2.1%	3.2%
500M - 1000M	97	8.5%	11	10	11.3%	10.3%	21.6%	2	2	2.1%	2.1%	4.2%
0VER 1000M	685	60.0%	95	58	13.9%	8.5%	22.3%	21	16	3.1%	2.3%	5.4%
Sales Not Available[6]	37	3.2%	1	0	2.7%	0.0%	2.7%	0	0	0.0%	0.0%	0.0%
ALL TRANSACTIONS	1,142	100.0%	124	85	10.9%	7.4%	18.3%	27	22	2.4%	1.9%	4.3%

TABLE VIII
FISCAL YEAR 2002
TRANSACTIONS BY ASSETS OF ACQUIRED ENTITIES

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS				
	NUMBER	PERCENT	NUMBER		PERCENTAGE OF ASSET RANGE GROUP			NUMBER		PERCENTAGE OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	350	30.6%	29	24	8.3%	6.9%	15.2%	3	4	0.9%	1.1%	2.0%
50M - 100M	212	18.6%	21	17	9.9%	8.0%	17.9%	2	5	0.9%	2.4%	3.3%
100M - 150M	110	9.6%	10	8	9.1%	7.3%	16.4%	2	0	1.8%	0.0%	1.8%
150M - 200M	61	5.3%	8	5	13.1%	8.2%	21.3%	1	1	1.6%	1.6%	3.2%
200M - 300M	74	6.5%	12	2	16.2%	2.7%	18.9%	1	1	1.4%	1.4%	2.7%
300M - 500M	79	6.9%	12	10	15.2%	12.7%	27.9%	4	1	5.1%	1.3%	6.4%
500M - 1000M	56	4.9%	9	8	16.1%	14.3%	30.4%	2	6	3.6%	10.7%	14.3%
0VER 1000M	101	8.8%	8	8	7.9%	7.9%	15.8%	10	3	9.9%	3.0%	12.9%
Assets Not Available[7]	99	8.7%	15	3	15.2%	3.0%	18.2%	2	1	2.0%	1.0%	3.0%
ALL TRANSACTIONS	1,142	100.0%	124	85	10.9%	7.4%	18.3%	27	22	2.4%	1.9%	4.3%

TABLE IX
FISCAL YEAR 2002
TRANSACTIONS BY SALES OF ACQUIRED ENTITIES[8]

SALES RANGE ($ MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS				
	NUMBER	PERCENT	NUMBER		PERCENTAGE OF SAKES RANGE GROUP			NUMBER		PERCENTAGE OF SAKES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	405	35.5%	37	28	9.1%	6.9%	16.0%	3	6	0.7%	1.5%	2.2%
50M - 100M	142	12.4%	15	10	10.6%	7.0%	17.6%	3	1	2.1%	0.7%	2.8%
100M - 150M	81	7.1%	5	7	6.2%	8.6%	14.8%	0	2	0.0%	2.5%	2.5%
150M - 200M	63	5.5%	2	10	3.2%	15.9%	19.1%	0	0	0.0%	0.0%	0.0%
200M - 300M	89	7.8%	12	7	13.5%	7.9%	21.4%	1	2	1.1%	2.2%	3.4%
300M - 500M	98	8.6%	20	8	20.4%	8.2%	28.6%	5	1	5.1%	1.0%	6.1%
500M - 1000M	131	11.5%	13	7	9.9%	5.3%	15.2%	2	4	1.5%	3.1%	4.6%
0VER 1000M	87	7.6%	10	7	11.5%	8.0%	19.5%	13	5	14.9%	5.7%	20.7%
Sales Not Available[9]	46	4.0%	10	1	21.7%	2.2%	23.9%	0	1	0.0%	2.2%	2.2%
ALL TRANSACTIONS	1,142	100.0%	124	85	10.9%	7.4%	18.3%	27	22	2.4%	1.9%	4.3%

TABLE X
FISCAL YEAR 2002[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

3-DIGIT NAICS CODE[10]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[11]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
111	AGRICULTURAL PRODUCTION – CROPS	0	0.0%	NC	0	0	0	0	0	0
112	AGRICULTURAL PRODUCTION – LIVESTOCK AND ANIMAL SPECIALTIES	1	0.1%	0.1%	0	0	0	0	0	0
113	LUMBER AND WOOD PRODUCTS, EXCEPT FURNITURE	1	0.1%	-0.1%	0	0	0	0	0	0
114	FISHING, HUNTING AND TRAPPING	0	0.0%	NC	0	0	0	0	0	0
211	OIL AND GAS EXTRACTION	13	1.1%	0.1%	0	0	0	0	0	0
212	MINING AND QUARRYING OF NONMETALLIC MINERALS, EXCEPT FUELS	13	1.1%	1.1%	0	0	0	0	0	0
221	ELECTRIC, GAS AND SANITARY SERVICES	53	4.6%	4.1%	1	8	9	0	1	1
233	BUILDING CONSTRUCTION – GENERAL CONTRACTORS AND OPERATIVE BUILDERS	1	0.1%	-0.2%	0	0	0	0	0	0
234	HEAVY CONSTRUCTION OTHER THAN BUILDING CONSTRUCTION – CONTRACTORS	4	0.4%	-0.2%	1	0	1	0	0	0
235	CONSTRUCTION – SPECIAL GRADE CONTRACTORS	7	0.6%	0.1%	0	0	0	0	0	0

TABLE X
FISCAL YEAR 2002[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

3-DIGIT NAICS CODE[10]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[11]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
311	Food and Kindred Products	32	2.8%	-0.1%	9	6	15	2	2	4
312	Bottled and Canned Soft Drinks and Carbonated Drinks; and Cigarette Manufacturing	8	0.7%	0.6%	0	0	0	0	0	0
313	Textile Mill Products	1	0.1%	-0.2%	0	0	0	0	0	0
315	Apparel and Other Finished Products Made From Fabrics and Similar Materials	1	0.1%	0.1%	0	0	0	0	0	0
316	Leather and Leather Products	0	0.0%	-0.2%	0	0	0	0	0	0
322	Paper and Allied Products	9	0.8%	0.1%	0	4	4	0	1	1
324	Petroleum Refining and Related Industries	9	0.8%	0.5%	1	0	1	1	0	1
325	Chemicals and Allied Products	71	6.2%	1.3%	29	2	31	7	0	7
326	Rubber and Misc. Plastics Products	20	1.8%	0.8%	4	1	5	2	0	2
327	Stone, Clay, Glass and Concrete Products	13	1.1%	0.7%	3	1	4	0	1	1
332	Fabricated Metal Products, Except Machinery and Transportation Equipment	23	2.0%	0.6%	4	2	6	0	0	0

TABLE X
FISCAL YEAR 2002[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

3-DIGIT NAICS CODE[10]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[11]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
333	INDUSTRIAL AND COMMERCIAL MACHINERY AND COMPUTER EQUIPMENT	22	1.9%	-1.2%	2	6	8	0	2	2
334	MEASURING, ANALYZING AND CONTROLLING INSTRUMENTS; PHOTOGRAPHIC, MEDICAL AND OPTICAL GOODS; WATCHES AND CLOCKS	79	6.9%	2.6%	11	12	23	3	4	7
335	ELECTRONIC AND OTHER ELECTRICAL EQUIPMENT AND COMPONENTS, EXCEPT COMPUTER EQUIPMENT	10	0.9%	-4.4%	0	3	3	0	0	0
336	TRANSPORTATION EQUIPMENT	18	1.6%	-0.4%	4	1	5	1	0	1
337	HOME FURNITURE, FURNISHINGS AND EQUIPMENT STORES	4	0.4%	NC	2	0	2	0	0	0
339	MISCELLANEOUS MANUFACTURING INDUSTRIES	15	1.3%	0.8%	3	0	3	0	0	0
421	WHOLESALE TRADE – DURABLE GOODS	43	3.8%	-0.2%	4	6	10	0	0	0
422	WHOLESALE TRADE – NONDURABLE GOODS	56	4.9%	1.6%	9	0	9	3	0	3
441	AUTOMOTIVE DEALERS AND GASOLINE SERVICE STATIONS	5	0.4%	-0.9%	0	0	0	0	0	0

TABLE X
FISCAL YEAR 2002[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

3-DIGIT NAICS CODE[10]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[11]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
443	Miscellaneous Repair Services	2	0.2%	0.1%	0	0	0	0	0	0
444	Building Materials, Hardware, Garden Supply, and Mobile Home Dealers	0	0.0%	-0.3%	0	0	0	0	0	0
446	Miscellaneous Retail	6	0.5%	-0.2%	2	0	2	0	0	0
447	Food Stores	2	0.2%	-0.5%	0	1	1	0	0	0
448	Apparel and Accessory Stores	4	0.4%	0.3%	0	0	0	0	0	0
452	General Merchandise Stores	1	0.1%	-0.2%	0	0	0	0	0	0
453	Stationery and Office Supplies	2	0.2%	-0.5%	0	0	0	0	0	0
454	Heating Oil Dealers and Liquefied Petroleum Gas	8	0.7%	-0.3%	2	0	2	0	0	0
481	Transportation by Air	3	0.3%	-0.1%	0	0	0	0	0	0
482	Railroad Transportation	1	0.1%	0.1%	0	0	0	0	0	0
483	Water Transportation	3	0.3%	-0.3%	1	1	2	1	1	2
484	Motor Freight Transportation and Warehousing	3	0.3%	-0.3%	0	0	0	0	0	0
485	Local and Suburban Transit and Interurban Highway Passenger Transportation	0	0.0%	NC	0	0	0	0	0	0
486	Pipelines, Except Natural Gas	21	1.8%	-1.2%	3	0	3	1	0	1

TABLE X
FISCAL YEAR 2002[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

3-DIGIT NAICS CODE[10]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[11]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
511	Printing, Publishing and Allied Industries	44	3.9%	1.5%	2	5	7	1	1	2
512	Motion Pictures	14	1.2%	0.8%	0	1	1	0	0	0
513	Communications	79	6.9%	0.2%	0	11	11	0	5	5
521	Depository Institutions	0	0.0%	1.5%	0	0	0	0	0	0
522	Nondepository Credit Institutions	51	4.5%	3.4%	1	1	2	0	0	0
523	Security and Commodity Brokers, Dealers, Exchanges and Services	88	7.7%	4.4%	1	2	3	0	1	1
524	Insurance Carriers	32	2.8%	0.8%	1	2	3	0	0	0
525	Insurance Agents, Brokers and Service	18	1.6%	0.9%	0	0	0	0	0	0
532	Automotive Repair, Services and Parking	5	0.4%	NC	1	0	1	0	0	0
541	Services – Business, Legal, Engineering, Accounting, Research, Management and Related Services	83	7.3%	6.5%	9	7	16	3	2	5
551	Holding and Other Investment Offices	2	0.2%	-4.6%	0	0	0	0	0	0
561	Transportation Services	20	1.8%	0.8%	3	0	3	0	0	0
611	Educational Services	3	0.3%	-9.7%	0	0	0	1	0	1
621	Health Services	11	1.0%	0.4%	3	0	3	1	0	1

TABLE X
FISCAL YEAR 2002[1]
INDUSTRY GROUP OF ACQUIRING PERSONS

3-DIGIT NAICS CODE[10]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[11]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
622	General Medical and Surgical; Psychiatric and Substance Abuse Hospitals	16	1.4%	0.8%	3	0	3	0	0	0
624	Social Services	1	0.1%	0.1%	0	0	0	0	0	0
711	Real Estate	4	0.4%	-0.1%	0	0	0	0	0	0
713	Amusement and Recreation Services	5	0.4%	-3.1%	1	0	1	0	0	0
721	Hotels, Rooming Houses, Camps, and Other Lodging Places	5	0.4%	0.1%	1	0	1	0	0	0
722	Eating and Drinking Places	14	1.2%	0.5%	1	0	1	0	0	0
812	Personal Services	2	0.2%	0.1%	0	1	1	0	0	0
813	Membership Organizations	1	0.1%	NC	0	0	0	0	0	0
923	Administration of Human Resource Programs	0	0.0%	-0.1%	0	0	0	0	0	0
924	Administration of Environmental Quality and Housing Programs	0	0.0%	NC	0	0	0	0	0	0
999	Non-classificable Establishments	0	0.0%	NC	0	0	0	0	0	0
000	Not Available[12]	56	4.9%	NC	2	1	3	0	1	1
	ALL TRANSACTIONS	1,142			124	85	209	27	22	49

Table XI

FISCAL YEAR 2002[1] INDUSTRY GROUP OF ACQUIRED ENTITIES

3-DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[13] *(the data series for this column was revised in April, 2008)*
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
111	Agricultural Production - Crops	0	0.0%	NC	0	0	0	0	0	0	0
112	Agricultural Production - Livestock and Animal Specialties	1	0.1%	NC	0	0	0	0	0	0	1
113	Lumber and Wood Products, Except Furniture	3	0.3%	0.1%	0	0	0	0	0	0	1
114	Fishing, Hunting and Trapping	0	0.0%	NC	0	0	0	0	0	0	0
211	Oil and Gas Extraction	11	1.0%	NC	0	0	0	0	0	0	9
212	Mining and Quarrying of Nonmetallic Minerals, Except Fuels	9	0.8%	0.6%	0	0	0	0	0	0	3
221	Electric, Gas and Sanitary Services	58	5.1%	1.4%	1	8	9	0	1	1	44
233	Building Construction – General Contractors and Operative Builders	0	0.0%	-0.2%	0	0	0	0	0	0	0
234	Heavy Construction Other Than Building Construction - Contractors	8	0.7%	0.1%	1	0	1	0	0	0	4
235	Construction - Special Grade Contractors	10	0.9%	0.5%	0	0	0	0	0	0	4
311	Food and Kindred Products	36	3.2%	0.6%	7	6	13	2	2	4	26
312	Bottled and Canned Soft Drinks and Corbonated Drinks; and Cigarette Manufacturing	6	0.5%	0.3%	0	0	0	0	0	0	6
313	Textile Mill Products	2	0.2%	-0.2%	0	0	0	0	0	0	1
315	Apparel and Other Finished Products Made From Fabrics and Similar Materials	1	0.1%	NC	0	0	0	0	0	0	1
316	Leather and Leather Products	0	0.0%	NC	0	0	0	0	0	0	0

Table XI

FISCAL YEAR 2002[1] INDUSTRY GROUP OF ACQUIRED ENTITIES

3-DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[13] *(the data series for this column was revised in April, 2008)*
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
322	Paper and Allied Products	11	1.0%	0.1%	0	4	4	0	0	0	6
324	Petroleum Refining and Related Industries	4	0.4%	NC	1	0	1	1	0	1	4
325	Chemicals and Allied Products	67	5.9%	1.6%	22	1	23	6	0	6	44
326	Rubber and Misc. Plastics Products	18	1.6%	0.3%	2	1	3	0	0	0	14
327	Stone, Clay, Glass and Concrete Products	18	1.6%	1.2%	3	2	5	0	1	1	11
332	Fabricated Metal Products, Except Machinery and Transportation Equipment	20	1.8%	-0.1%	4	2	6	0	0	0	16
333	Industrial and Commercial Machinery and Computer Equipment	24	2.1%	-0.9%	2	5	7	0	2	2	16
334	Measuring, Analyzing and Controlling Instruments; Photographic, Medical and Optical Goods; Watches and Clocks	76	6.7%	2.4%	11	13	24	1	3	4	51
335	Electronic and Other Electrical Equipment and Components, Except Computer Equipment	10	0.9%	-3.9%	0	4	4	0	0	0	7
336	Transportation Equipment	23	2.0%	0.3%	5	1	6	1	0	1	13
337	Home Furniture, Furnishings and Equipment Stores	3	0.3%	0.2%	2	0	2	0	0	0	2
339	Miscellaneous Manufacturing Industries	13	1.1%	0.5%	3	0	3	0	0	0	7
421	Wholesale Trade - Durable Goods	55	4.8%	0.5%	7	4	11	2	0	2	32
422	Wholesale Trade - Nondurable Goods	49	4.3%	1.5%	10	0	10	3	0	3	30

Table XI

FISCAL YEAR 2002[1] INDUSTRY GROUP OF ACQUIRED ENTITIES

3-DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[13] *(the data series for this column was revised in April, 2008)*
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
441	Automotive Dealers and Gasoline Service Stations	7	0.6%	-0.9%	0	0	0	0	0	0	4
443	Miscellaneous Repair Services	2	0.2%	0.1%	0	0	0	0	0	0	2
444	Building Materials, Hardware, Garden Supply, and Mobile Home Dealers	0	0.0%	NC	0	0	0	0	0	0	0
446	Miscellaneous Retail	9	0.8%	NC	2	0	2	0	0	0	5
447	Food Stores	1	0.1%	-0.5%	0	0	0	0	0	0	1
448	Apparel and Accessory Stores	9	0.8%	0.6%	0	1	1	0	0	0	4
452	General Merchandise Stores	2	0.2%	NC	0	0	0	0	0	0	0
453	Stationery and Office Supplies	0	0.0%	NC	0	5	5	2	0	2	0
454	Heating Oil Dealers and Liquefied Petroleum Gas	20	1.8%	NC	2	0	2	0	0	0	7
481	Transportation by Air	3	0.3%	NC	0	1	1	0	1	1	1
482	Railroad Transportation	0	0.0%	-0.1%	0	0	0	0	0	0	0
483	Water Transportation	3	0.3%	-0.4%	1	1	2	1	1	2	2
484	Motor Freight Transportation and Warehousing	3	0.3%	-0.2%	0	0	0	1	0	1	1
485	Local and Suburban Transit and Interurban Highway Passenger Transportation	0	0.0%	NC	1	0	1	1	0	1	0
486	Pipelines, Except Natural Gas	23	2.0%	1.6%	4	0	4	0	0	0	13
511	Printing, Publishing and Allied Industries	55	4.8%	2.0%	2	7	9	0	2	2	32
512	Motion Pictures	18	1.6%	1.2%	0	1	1	0	0	0	8
513	Communications	100	8.8%	1.2%	0	6	6	0	7	7	55
521	Depository Institutions	1	0.1%	-1.2%	0	0	0	0	0	0	0
522	Nondepository Credit Institutions	41	3.6%	1.9%	0	1	1	0	0	0	29
523	Security and Commodity Brokers, Dealers, Exchanges and Services	48	4.2%	0.9%	0	2	2	0	1	1	21

Table XI

FISCAL YEAR 2002[1] INDUSTRY GROUP OF ACQUIRED ENTITIES

3-DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[13] *(the data series for this column was revised in April, 2008)*
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
524	Insurance Carriers	32	2.8%	0.5%	1	2	3	0	0	0	22
525	Insurance Agents, Brokers and Service	3	0.3%	-0.7%	0	0	0	0	0	0	1
532	Automotive Repair, Services and Parking	10	0.9%	0.5%	1	0	1	0	0	0	5
541	Engineering, Accounting, Research, Management and Related Services	89	7.8%	-4.9%	10	5	15	3	1	4	57
551	Holding and Other Investment Offices	0	0.0%	-1.2%	0	0	0	0	0	0	0
561	Transportation Services	19	1.7%	0.7%	3	0	3	0	0	0	9
611	Educational Services	3	0.3%	0.1%	0	0	0	0	0	0	3
621	Health Services	13	1.1%	-1.2%	3	0	3	1	0	1	6
622	General Medical and Surgical; Psychiatric and Substance Abuse Hospitals	14	1.2%	NC	3	0	3	0	0	0	13
624	Social Services	0	0.0%	-0.1%	0	0	0	0	0	0	0
711	Real Estate	4	0.4%	0.4%	0	0	0	0	0	0	4
713	Amusement and Recreation Services	7	0.6%	NC	1	0	1	0	0	0	1
721	Hotels, Rooming Houses, Camps, and Other Lodging Places	2	0.2%	NC	1	0	1	0	0	0	0
722	Eating and Drinking Places	14	1.2%	0.3%	1	0	1	0	0	0	2
812	Personal Services	2	0.2%	0.1%	0	1	1	0	0	0	0
813	Membership Organizations	0	0.0%	-2.5%	0	0	0	0	0	0	0
711	Miscellaneous Services	0	0.0%	NC	0	0	0	0	0	0	0
923	Administration of Human Resource Programs	0	0.0%	NC	0	0	0	0	0	0	0
924	Administration of Environmental Quality and Housing Programs	0	0.0%	NC	0	0	0	0	0	0	0

Table XI

FISCAL YEAR 2002[1] INDUSTRY GROUP OF ACQUIRED ENTITIES

3-DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2001[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[13] *(the data series for this column was revised in April, 2008)*
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
999	**Nonclassificable Establishments**	0	0.0%	NC	0	0	0	0	0	0	0
000	**NOT AVAILABLE**	49	4.3%	1.1%	7	1	8	2	0	2	1
	ALL TRANSACTIONS	1,142	100.0%	--	124	85	209	27	22	49	662

[1] Fiscal Year 2002 figures include transactions reported between October 1, 2001 and September 30, 2002.

[2] The size-of-transactions is based on the aggregate total amount of voting securities and/or assets to be held by the acquiring person as a result of the transaction and is taken from the response to Item 3(b)(ii) and 3(c) of the notification form.

[3] These statistics are based on the date that the second request was issued.

[4] During fiscal year 2002, 1,187 transactions were reported under the HSR Premerger Notification program. The smaller number of 1,142 reflects adjustments to eliminate the following types of transactions: (1) transactions reported under Sections 7A(c)(6) and (c)(8), (transactions involving certain regulated industries and financial businesses); (2) transactions found to be non-reportable; (3) incomplete transactions (only one party in each transaction filed a compliant notification); and (4) transactions withdrawn before the waiting period began. The table does not, however, exclude competing offers or multiple party transactions (transactions involving two or more acquiring persons).

[5] The total number of filings under $50M submitted in Fiscal Year 2002 is corrective filings for transactions occurring before February 1, 2001.

[6] This category includes newly formed acquiring persons, foreign acquiring persons with no United States revenues, and acquiring persons who had not derived any revenues from their investments at the time of filing.

[7] Assets of an acquired entity are not available when the acquired entity's financial data is consolidated within its ultimate parent.

[8] Sales of an acquired entity are taken from responses to Items 4(a) and (b) (SEC documents and annual reports) or Item 5 (dollar revenues) of the Premerger Notification and Report form.

[9] This category includes acquisitions of newly formed corporations or corporate joint ventures from which no sales were generated, and acquisitions of assets which produced no sales or revenues during the prior year to filing the Notification and Report form.

[10] The 3-digit codes are part of the North American Industrial Classification System (NAICS) established by the United States Government North American Industrial Classification System 1997, Executive Office of the President – Office of Management and Budget. The NAICS groups used in this table were determined from responses submitted by the parties to Item 5 of the Premerger Notification and Report effective July 1, 2001.

[11] This number represents the deviation from the FY 2001 percentage.

[12] This category includes transactions by newly formed entities.

[13] The intra-industry transaction column identifies the number of acquisitions in which both the acquiring and acquired persons derived revenues in the same industry.

Federal Trade Commission
Bureau of Competition

Department of Justice
Antitrust Division

HART-SCOTT-RODINO ANNUAL REPORT
Fiscal Year 2010

Section 7A of the Clayton Act
Hart-Scott-Rodino Antitrust Improvements Act of 1976
(Thirty-third Annual Report)

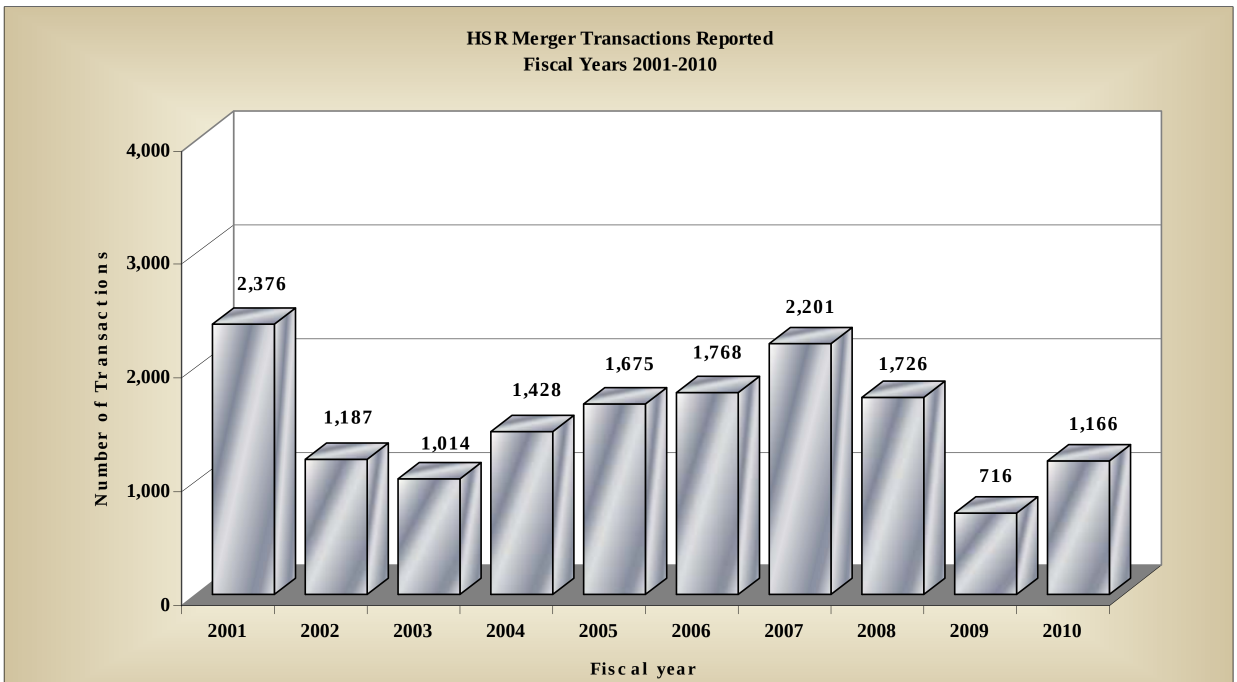
Jon Leibowitz
Chairman
Federal Trade Commission

Christine A. Varney
Assistant Attorney General
Antitrust Division

INTRODUCTION

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act or the Act), together with Section 13(b) of the Federal Trade Commission Act and Section 15 of the Clayton Act, enables the Federal Trade Commission (Commission) and the Antitrust Division of the Department of Justice (Antitrust Division or Division) to obtain effective preliminary relief against anticompetitive mergers and to prevent interim harm to competition and consumers. The premerger notification program was instrumental in alerting the Commission and the Division of transactions that became the subjects of the numerous enforcement actions brought in fiscal year 2010[1] to protect consumers – individual, business, and government – against anticompetitive mergers.

The Commission and the Antitrust Division continue their efforts to protect competition by identifying and investigating those mergers and acquisitions that raise potentially significant competitive concerns. In fiscal year 2010, 1,166 transactions were reported under the HSR Act, representing about a 63% increase from the 716 transactions reported in fiscal year 2009 and about a 51% decrease from the 2,376 transactions reported in fiscal year 2001, the last partial fiscal year under the previous reporting thresholds.[2] (*See* Figure 1 below.)



(Figure 1)

During the year, the Commission challenged 22 transactions, leading to 19 consent orders, one of which was obtained after the Commission filed an administrative complaint, and

[1] The fiscal year covers the period of October 1, 2009 through September 30, 2010.

[2] The decrease in the number of reportable transactions since fiscal year 2001 is, to a considerable extent, a result of the significant statutory changes to the HSR Act that took effect on February 1, 2001. The legislation raised the size-of-transaction threshold from $15 million to $50 million (with annual adjustments for changes in gross national product that began in 2005), and made other changes to the filing and waiting period requirements. In fiscal year 2010, the threshold was adjusted to $63.4 million. Section 630 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, 114 Stat. 2762. *See also* Appendix A.

three transactions that were abandoned after the parties learned of the Commission's concerns. One of the Commission's notable challenges was against Dun & Bradstreet's consummated acquisition of Quality Education Data, which produces data used to sell books, educational materials, and other products to teachers nationwide. The Commission filed an administrative complaint to challenge this acquisition, but before trial, Dun & Bradstreet agreed to divest to a Commission-approved buyer certain assets acquired in the merger to restore competition. Other notable challenges were against proposed mergers in key industries that are critical to consumers, including pharmaceuticals and energy. In the pharmaceutical industry, the Commission challenged Watson Pharmaceutical's proposed acquisition of rival generic drug company Arrow Pharmaceuticals, asserting that the merger, as originally proposed, would have substantially reduced competition in U.S. markets for important generic drugs used to treat Parkinson's disease and the side effects of chemotherapy. To restore the competition that would have been lost as a result of the merger, the Commission required the firms to sell assets related to two drugs. In the energy industry, the Commission also challenged Pilot Corporation's proposed acquisition of Flying J Inc.'s travel center network. To resolve the Commission's concerns, Pilot, owner of the largest travel center network in the United States, agreed to sell 26 travel centers, which provide diesel, food, parking, and other amenities for truckers, as part of a settlement that will replace the competition that would have been lost because of the acquisition.

The Antitrust Division challenged 19 merger transactions. Consent decrees resolved ten of these challenges[3], one matter is currently in litigation, and eight transactions were abandoned or restructured after the Division informed the parties of its antitrust concerns relating to the transaction. Notably, the Division obtained a consent decree requiring Ticketmaster Entertainment Inc. to license its ticketing software, divest ticketing assets and subject itself to anti-retaliation provisions in order to proceed with its proposed merger with Live Nation Inc., thereby remedying anticompetitive effects in the sale of primary ticketing services. The Division also sued and is currently in litigation seeking to undo Dean Foods' acquisition of the Consumer Products Division of Foremost Farms USA, alleging that the acquisition was likely to substantially lessen competition in the sale of school milk and fluid milk to school districts and other purchasers located in Wisconsin, the Upper Peninsula of Michigan, and Northeastern Illinois. In another notable challenge, the Division alleged that an acquisition by Election Systems and Software, Inc., substantially lessened competition in the market for voting equipment systems and obtained a consent decree requiring divestiture of all voting equipment systems assets acquired in that consummated transaction.

In fiscal year 2010, the Commission's Premerger Notification Office (PNO) continued to respond to thousands of telephone calls seeking information concerning the reportability of transactions under the HSR Act and the details involved in completing and filing the Notification and Report Form (the filing form). The HSR website, http://www.ftc.gov/bc/hsr/, continued to provide improved access to information necessary to the notification process. The website includes basic resources such as introductory guides that provide an overview of the premerger notification program and merger review process. It is the primary source of information for HSR practitioners seeking information on the HSR form and instructions, the premerger notification statute and rules, current filing thresholds, notices of grants of early termination, filing fee instructions, scheduled HSR events, training materials for new HSR practitioners, tips for completing the filing form, procedures for submitting post-consummation filings, contact information for PNO staff, and frequently asked questions regarding the HSR filing requirements. Web users can also find up-to-date information on changes to the Act and

[3] One consent decree addressed two separate mergers.

amendments to the premerger rules, including speeches, press releases, summaries and highlights, and Federal Register notices about any amendments. The website also includes a database of informal interpretation letters, giving the public ready access to PNO staff interpretations of the premerger notification rules and the Act. As always, PNO staff is available to help HSR practitioners comply with HSR notification requirements.

BACKGROUND OF THE HSR ACT

Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, amended the Clayton Act by adding a new Section 7A, 15 U.S.C. §18a. In general, the HSR Act requires that certain proposed acquisitions of voting securities or assets be reported to the Commission and the Antitrust Division prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. Small acquisitions, acquisitions involving small parties, and certain classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with the opportunity to review mergers and acquisitions before they occur. The premerger notification program, with its filing and waiting period requirements, provides the agencies with both the time and the information necessary to conduct this antitrust review. Much of the information for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to the proposed transactions and is immediately available for review during the waiting period.

If either agency determines during the waiting period that further inquiry is necessary, the agency is authorized by Section 7A(e) of the Clayton Act to issue a request for additional information and documentary material (second request). The second request extends the waiting period for a specified period (usually 30 days, but 10 days in the case of a cash tender offer or bankruptcy sale) after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may substantially lessen competition, it may seek an injunction in federal district court to prohibit consummation of the transaction. The Commission may also challenge the transaction in administrative litigation.

The Commission, with the concurrence of the Assistant Attorney General for the Antitrust Division, promulgated final rules implementing the premerger notification program on July 31, 1978. At that time, a comprehensive Statement of Basis and Purpose was also published, containing a section-by-section analysis of the rules and an item-by-item analysis of the filing form.[4] The program became effective on September 5, 1978. The Commission, with the concurrence of the Assistant Attorney General, has amended the rules and the filing form on several occasions over the years to improve the program's effectiveness and to lessen the burden of complying with the rules.[5] During fiscal year 2010, the Commission proposed giving the

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[4] 43 Fed. Reg. 33450 (July 31, 1978).

[5] 43 Fed. Reg. 34443 (August 4, 1978); 43 Fed. Reg. 36053 (August 15, 1978); 44 Fed. Reg. (November

HSR form its most extensive overhaul since its creation. The proposed changes are intended to reduce the burden of filing parties, while capturing additional information that will significantly assist the agencies in their initial review.[6]

A STATISTICAL PROFILE OF THE PREMERGER NOTIFICATION PROGRAM

The appendices to this report provide a statistical summary of the operation of the premerger notification program. Appendix A shows, for a ten-year period, the number of transactions reported, the number of filings received, the number of merger investigations in which second requests were issued, and the number of transactions in which requests for early termination of the waiting period were received, granted, and not granted.[7] Appendix A also shows, for fiscal years 2001 through 2010, the number of transactions in which second requests could have been issued, as well as the percentage of transactions in which second requests were issued. Appendix B provides a month-by-month comparison of the number of transactions reported and the number of filings received for fiscal years 2001 through 2010.

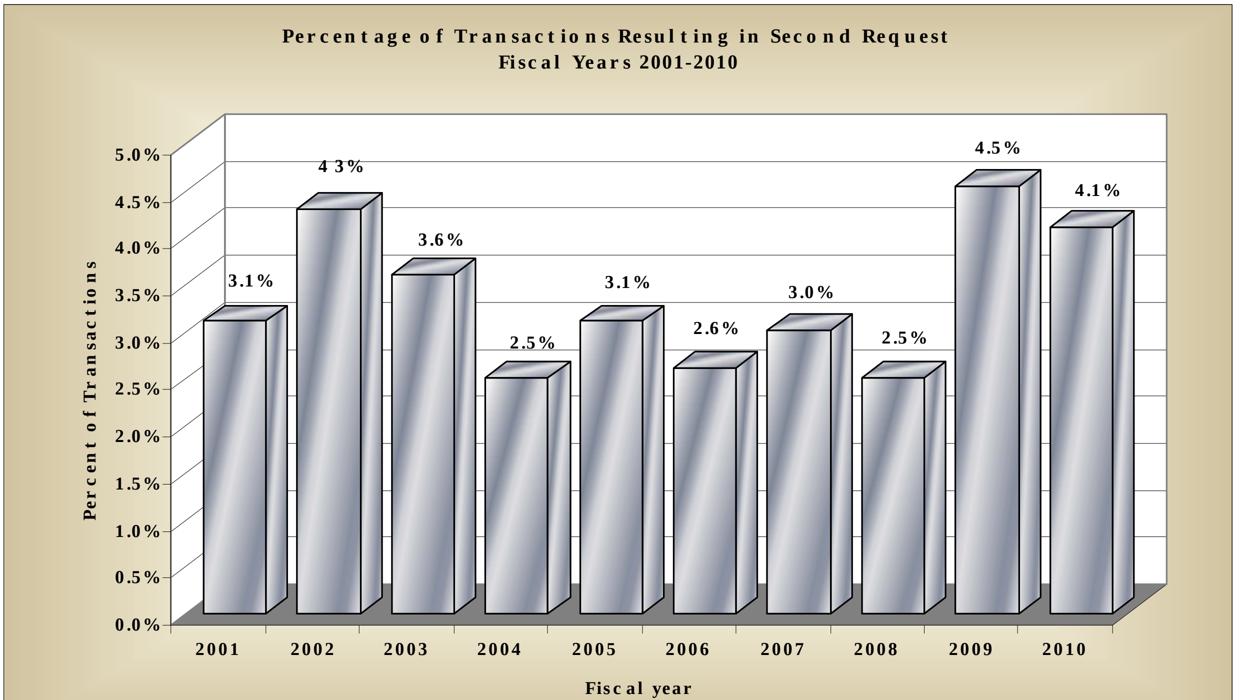
The statistics set out in these appendices show that the number of transactions reported in fiscal year 2010 increased 63% from the number of transactions reported in fiscal year 2009. In fiscal year 2010, 1,166 transactions were reported, while 716 were reported in fiscal year 2009.[8] The statistics in Appendix A also show that the number of merger investigations in which second requests were issued in fiscal year 2010 increased 48% from the number of merger investigations in which second requests were issued in fiscal year 2009. Second requests were issued in 46 merger investigations in fiscal year 2010 (20 issued by the FTC and 26 issued by the Division), while second requests were issued in 31 merger investigations in fiscal year 2009 (15 issued by the FTC and 16 issued by the Division). The percentage of transactions resulting in second requests decreased slightly, from 4.5% in fiscal year 2009 to 4.1% in fiscal year 2010. (*See* Figure 2 below.)

21, 1979); 45 Fed. Reg. 14205 (March 5, 1980); 48 Fed. Reg. 34427 (July 29, 1983); 50 Fed. Reg. 46633 (November 12, 1985); 51 Fed. Reg. 10368 (March 26, 1986); 52 Fed. Reg. 7066 (March 6, 1987); 52 Fed. Reg. 20058 (May 29, 1987); 54 Fed. Reg. 214251 (May 18, 1989); 55 Fed. Reg. 31371 (August 2, 1990); 60 Fed. Reg. 40704 (August 9, 1995); 61 Fed. Reg. 13666 (March 28, 1996); 63 Fed. Reg. 34592 (June 25, 1998); 66 Fed. Reg. 8680 (February 1, 2001); 66 Fed. Reg. 8723 (February 1, 2001); 66 Fed. Reg. 16241 (March 23, 2001); 66 Fed. Reg. 23561 (May 9, 2001); 66 Fed. Reg. 35541 (July 6, 2001); 67 Fed. Reg. 11898 (March 18, 2002); 67 Fed. Reg. 11904 (March 18, 2002); 68 Fed. Reg. 2425 (January 17, 2003); 70 Fed. Reg. 4988 (January 31, 2005); 70 Fed. Reg. 11501 (March 8, 2005); 70 Fed. Reg. 11526 (March 8, 2005); 70 Fed. Reg. 47733 (August 15, 2005); 70 Fed. Reg. 73369 (December 12, 2005; 70 Fed Reg. 77312 (December 30, 2005); 71 Fed. Reg. 2943 (January 18, 2006); 71 Fed. Reg. 35995 (June 23, 2006); 72 Fed. Reg. 2692 (January 22, 2007); 75 Fed. Reg. 57110 (September 17, 2010).

[6] 75 Fed. Reg. 57110 (September 17, 2010).

[7] The term "transaction," as used in Appendices A and B and Exhibit A to this report, does not refer only to separate mergers or acquisitions. A particular merger, joint venture, or acquisition may be structured such that it involves more than one transaction. For example, cash tender offers, options to acquire voting securities from the issuer, or options to acquire voting securities from someone other than the issuer, may result in multiple acquiring or acquired persons that necessitate separate HSR transaction numbers to track the filing parties and waiting periods.

[8] This Report, like previous Reports, also includes annual data on "adjusted transactions in which a second request could have been issued" ("adjusted transactions"). See Appendix A and n. 2 of Appendix A (explaining calculation of that data). There were 1128 adjusted transactions in FY 2010, and the data presented in the Tables and the percentages discussed in the text of this Report (e.g., percentage of transactions resulting in second requests) are based on this figure.



(Figure 2)

The statistics in Appendix A also show that early termination of the waiting period was requested in the majority of transactions. In fiscal year 2010, early termination was requested in 84% (953) of the transactions reported, remaining unchanged from fiscal year 2009 when it was also requested in 84% (575) of the transactions reported. The percentage of requests granted out of the total requested increased from 69% in fiscal year 2009 to 74% in fiscal year 2010.

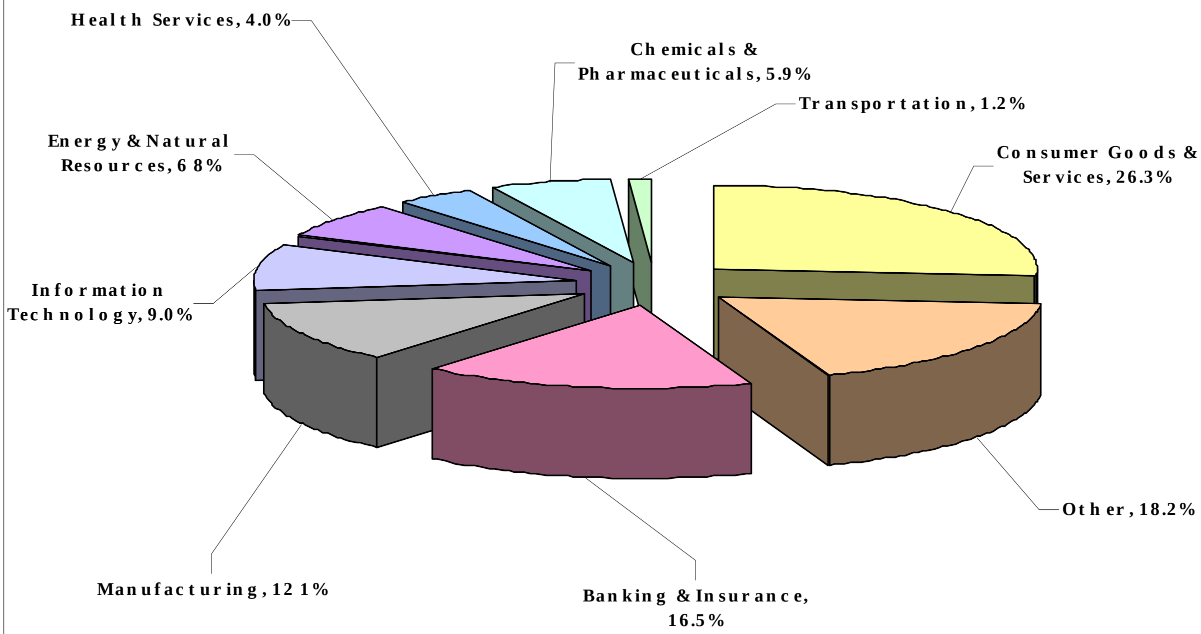
Statistical tables (Tables I through XI) in Exhibit A contain information about the agencies' enforcement activities for transactions reported in fiscal year 2010. The tables provide, for various statistical breakdowns, the number and percentage of transactions in which clearances to investigate were granted by one antitrust agency to the other and the number of merger investigations in which second requests were issued. Table III of Exhibit A shows that, in fiscal year 2010, clearance was granted to one or the other of the agencies for the purpose of conducting an initial investigation in 19.7% of the total number of the transactions reported. The tables also provide the number of transactions based on the dollar value of transactions reported and the reporting threshold indicated in the notification report.

The total dollar value of reported transactions rose dramatically from fiscal years 1996 to 2000, from about $677.4 billion to about $3 trillion. After the statutory thresholds were raised, the dollar value declined to about $1 trillion in fiscal year 2001, $565.4 billion in fiscal year 2002, and $406.8 billion in fiscal year 2003. This was followed by an increase in the dollar value of reported transactions over the next four years: about $630 billion in fiscal year 2004, $1.1 trillion in fiscal year 2005, $1.3 trillion in fiscal year 2006, and almost $2 trillion in 2007. The total dollar value of reported transactions declined to just over $1.3 trillion in fiscal year 2008, and to $533 billion in fiscal year 2009, and increased to $780 billion for fiscal year 2010.[9]

[9] The information on the value of reported transactions for fiscal year 2010 is drawn from the Premerger Database, while data for the previous fiscal years is taken from the corresponding fiscal year Annual HSR Reports (http://www ftc.gov/bc/anncompreports.shtm).

Tables X and XI provide the number of transactions by industry group in which the acquiring person or the acquired entity derived the most revenue. Figure 3 illustrates the percentage of reportable transactions within industry groups for fiscal year 2010 based on the acquired entity's operations.[10]

Percentage of Transactions By Industry Group of Acquired Entity
Fiscal Year 2010



(Figure 3)

DEVELOPMENTS WITHIN THE PREMERGER PROGRAM

1. *Compliance*

The Commission and the Antitrust Division continued to monitor compliance with the premerger notification program's filing and waiting period requirements and initiated a number of compliance investigations in fiscal year 2010. The agencies monitor compliance through a variety of methods, including a review of newspapers and industry publications for announcements of transactions that may not have been reported in accordance with the requirements of the Act. In addition, industry sources, such as competitors, customers and suppliers, interested members of the public, and in some cases the parties themselves, often provide the agencies with information about transactions and possible violations of the Act's requirements.

Under Section 7A(g)(1) of the Act, any person that fails to comply with the Act's notification and waiting period requirements is liable for a civil penalty of up to \$16,000 – increased in 2009 from \$11,000 – for each day the violation continues.[11] The antitrust agencies

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[10] The "Other" category consists of industry segments that include construction, educational services, performing arts, recreation, and non-classifiable establishments.

[11] Dollar amounts specified in civil monetary penalty provisions within the Commission's jurisdiction are adjusted for inflation in accordance with the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134 (April 26, 1996). The adjustments have included an increase in the maximum civil penalty from \$10,000 to \$11,000 for each day during which a person is in violation under Section 7A(g)(1) (61 Fed. Reg. 54548 (October 21, 1996), corrected at 61 Fed. Reg. 55840 (October 29, 1996)) and to \$16,000 effective February 10, 2009 (74 Fed. Reg. 857-

examine the circumstances of each violation to determine whether penalties should be sought.[12] During fiscal year 2010, 24 corrective filings for violations were received, and the agencies brought one enforcement action, resulting in the payment of $900,000 in civil penalties.

In this enforcement action, *United States v. Smithfield Foods, Inc. and Premium Standard Farms, LLC*,[13] the complaint alleged that prior to the expiration of the statutory waiting period applicable to Smithfield's acquisition of Premium Standard, Premium Standard stopped exercising independent business judgment in its hog purchases. Instead, it submitted for Smithfield's consent each of the three contracts for hog purchases from independent producers that arose during the HSR waiting period. These hog procurement contracts were necessary to Premium Standard's ongoing business and entered into in the ordinary course. Through this conduct, Smithfield exercised operational control over Premium Standard's hog procurement and thereby acquired beneficial ownership of a significant segment of Premium Standard's business. Such "gun jumping" is prohibited by the Act. Under the terms of a consent decree filed simultaneously with the complaint and entered by the Court on January 22, 2010, the companies were required to pay a total of $900,000 in civil penalties to settle the charges.

2. *Threshold Adjustments*

The 2000 amendments to the HSR Act require the Commission to publish adjustments to the Act's jurisdictional and filing fee thresholds annually, based on the change in the gross national product, in accordance with Section 8(a)(5) of the Clayton Act for each fiscal year beginning after September 30, 2004. The Commission amended the rules in 2005 to provide a method for future adjustments as required by the 2000 amendments and to reflect the revised thresholds contained in the rules. The revised thresholds are published annually in January and become effective 30 days after publication.

On January 21, 2010, the Commission published a notice[14] to reflect adjustment of reporting thresholds as required by the 2000 amendments[15] to Section 7A of the Clayton Act, 15 U.S.C. §18a. The revised threshold, which dropped from $65.2 million to $63.4 million, became effective February 22, 2010.

3. *International Cooperation*

The Commission and the Antitrust Division routinely cooperate with their non-U.S. counterparts in merger investigations to promote transparency and predictability as well as convergence, where appropriate, towards the best practices of merger review. These efforts enable multiple jurisdictions to manage the similarities and differences in their approach to merger review with the goal of more efficient and effective merger enforcement worldwide to the benefit of consumers and businesses. Additionally, these efforts reduce the risk of inconsistent outcomes and remedies among agencies. In some instances cooperation with non-U.S. competition authorities is particularly extensive. During the past year, the FTC worked on

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01 (January 9, 2009)).

[12] When the parties inadvertently fail to file, the enforcement agencies generally do not seek penalties if the parties promptly make corrective filings after discovering the failure to file, submit an acceptable explanation of their failure to file, and have not previously violated the Act.

[13] United States v. Smithfield Foods, Inc. and Premium Standard Farms, LLC, No.1:10-CV-00120 (D.D.C. filed January 21, 2010).

[14] 75 Fed. Reg. 3468 (January 21, 2010).

[15] 15 U.S.C. §18a(a). *See* Pub. L. 106-553, 114 Stat. 2762.

over 15 international merger investigations that involved coordination or cooperation with international counterparts. Highlighted examples from the year are Nufarm/A.H. Marks and Panasonic/Sanyo. In the Nufarm matter, the Commission worked particularly closely with staff from the Canadian Competition Bureau throughout the investigation to arrive at a proposed settlement order that restored competition in both the U.S. and Canadian markets for certain types of herbicides. In the Panasonic/Sanyo matter, the Commission worked with its counterparts in the European Commission (EC), Canada, and Japan to resolve competitive concerns raised by Panasonic's proposed $9 billion acquisition of Sanyo. The FTC and the EC's Directorate General for Competition coordinated to order the divestiture of a battery manufacturing facility in Japan to protect competition in the market for portable NiMH batteries that power two-way radios used by police and fire departments. Of the Antitrust Division's investigations that were closed during fiscal year 2010, the Division coordinated with one or more non-U.S. competition agencies in eleven matters. Amongst the Antitrust Division's most notable instances of international cooperation were its Ticketmaster matter and Cisco Systems Inc.'s acquisition of Tandberg ASA. In its Ticketmaster matter[16], the Division cooperated closely with the Canadian Competition Bureau throughout the investigation, and the two agencies worked together to obtain the same remedy. The Division and the EC cooperated closely to resolve competition issues regarding Cisco Systems Inc.'s acquisition of Tandberg ASA. In announcing that it would not challenge the acquisition, the Division stated that it had taken into account commitments Cisco had made to the EC as part of the EC's merger clearance process, along with various market factors, and stated that the investigation "was a model of international cooperation between the United States and the European Commission."[17] In many instances, international cooperation is aided by the parties' waivers of certain confidentiality rights so the agencies can have more meaningful discussions regarding their analyses of the merger and, if enforcement action is warranted, seek compatible remedies.

MERGER ENFORCEMENT ACTIVITY[18]

1. *The Department of Justice*

During fiscal year 2010, the Antitrust Division challenged 19 merger transactions that it concluded might have substantially lessened competition if allowed to proceed as proposed or as consummated. In eleven of these challenges, the Antitrust Division filed a complaint in U.S. district court.[19] Ten of these challenges were settled by consent decree, and one matter is currently in litigation. In the other eight challenges during fiscal year 2010, when apprised of the Antitrust Division's concerns regarding their proposed transactions, the parties in four instances abandoned the proposed transaction and in four instances restructured the proposed transaction to avoid competitive problems.[20]

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[16] See *infra* at p. 10.

[17] http://www.justice.gov/atr/public/press_releases/2010/257173.pdf.

[18] The cases listed in this section were not necessarily reportable under the premerger notification program. Because of provisions regarding the confidentiality of the information obtained pursuant to the Act, it would be inappropriate to identify which cases were initiated under the program except in specific instances where such information has already been disclosed.

[19] The Division filed ten complaints. One of those complaints challenged two transactions, and both of those challenges were resolved in one consent decree.

[20] In two instances, the Division issued a press release: March 8, 2010 – proposed acquisition of Physicians Health Plan of Mid-Michigan by Blue Cross Blue Shield of Michigan (commercial health insurance); and August 27, 2010 – proposed merger of Continental Airlines and United Airlines (takeoff and landing rights at Newark Liberty Airport). In the other six instances, the Division informed the parties of its concerns, but did not issue a press release: proposed acquisition of National Amusements, Inc. by New Rave (movie theatres); proposed

In *United States et al. v. AT&T Inc. and Centennial Communications Corp.*,[21] the Division and the State of Louisiana challenged the proposed acquisition of Centennial Communications Corp. by AT&T. The complaint alleged that the transaction, as originally proposed, would have substantially lessened competition for mobile wireless telecommunications services in eight cellular marketing areas (CMAs), as defined by the Federal Communications Commission (FCC), likely resulting in higher prices, lower quality and reduced network investments. AT&T and Centennial were each other's closest competitor for a significant set of customers in the eight CMAs. The Division filed a proposed consent decree simultaneously with the complaint. Under the terms of the decree, which was entered by the court on February 10, 2010, AT&T was required to divest assets in the eight affected CMAs in southwestern and central Louisiana and southwestern Mississippi in order to proceed with the acquisition. The Division coordinated with the FCC throughout its investigation, and the acquisition was also subject to FCC review.

In *United States v. Cameron International Corporation and NATCO Group Inc.*,[22] the Division challenged both Cameron's proposed $780 million acquisition of NATCO and Cameron's previous $8.5 million acquisition of assets of Howe Baker Engineers Ltd. The complaint alleged that the NATCO transaction, as originally proposed, would have substantially lessened competition in the manufacture of refinery desalters in the United States. The complaint also alleged that Cameron's acquisition of the Howe Baker assets in 2005 had substantially lessened competition and created a monopoly in that market. Refinery desalters are used to remove salt from crude oil at the oil refining stage of production. The desalting process is a critical initial stage of the refining process. Cameron and NATCO, a recent entrant, were each other's closest competitor for a significant set of refinery customers domestically. The Division filed a proposed consent decree simultaneously with the complaint. Under the terms of the decree, Cameron was required to divest the desalter and dehydrator assets it purchased from Howe Baker. The decree also required Cameron to divest a non-exclusive, worldwide, irrevocable license to NATCO's refinery desalter technology that utilizes dual frequency transformers. The court entered the consent decree on May 11, 2010.

In *United States et al. v. Stericycle, Inc., ATMW Acquisition Corp., Medserve, Inc., and Avista Capital Partners, L.P.*,[23] the Division and the States of Missouri and Nebraska challenged the acquisition of Medserve by Stericycle. The complaint alleged that the transaction, as originally proposed, would have substantially lessened competition in infectious waste collection and treatment services to hospitals and other critical healthcare facilities in Kansas, Missouri, Nebraska, and Oklahoma, resulting in higher prices and reduced service. Stericycle and Medserve were the two largest providers of infectious waste collection and treatment services in the United States, and were the only two firms able to compete for customers that generated

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acquisition of NSTAR Corporation's thermal distribution system in the Boston, Massachusetts area by Morgan Stanley Infrastructure Partners and Veolia North America Holdings, Inc. (steam distribution); proposed acquisition of Spheris Holding II, Inc. by Nuance Communications, Inc. (automatic speech recognition); proposed acquisition of Lewis Brothers Bakeries' Butternut brand by Hostess Brands, Inc. (white pan bread); proposed acquisition of CPI International, Inc. by Comtech Telecommunications Corp. (traveling wave tube amplifiers); and Continental Airlines and AirTran Airways (exchange of slots at Newark, LaGuardia, and Reagan Washington National airports).

[21] United States et al. v. AT&T Inc. and Centennial Communications Corp., No. 1:09-CV-01932 (D.D.C. filed October 13, 2009).

[22] United States v. Cameron International Corporation and NATCO Group Inc., No. 1:09-CV-02165 (D.D.C. filed November 17, 2009).

[23] United States et al. v. Stericycle, Inc., ATMW Acquisition Corp., Medserve, Inc., and Avista Capital Partners, L.P., No. 1:09-CV-02268 (D.D.C. filed November 30, 2009).

large quantities of infectious waste in the affected geographic areas. The Division filed a proposed consent decree simultaneously with the complaint, requiring divestiture of all of MedServe's assets primarily used in the provision of infectious waste collection and treatment services to large customers in Kansas, Missouri, Nebraska, and Oklahoma to a viable purchaser approved by the Department. The court entered the decree on April 30, 2010.

In *United States et al. v. Dean Foods Company*,[24] the Division and the States of Illinois, Michigan, and Wisconsin sued seeking to undo Dean's April 2009 acquisition of the Consumer Products Division of Foremost Farms USA, which included two dairy processing plants, located in Waukesha and DePere, Wisconsin. Dairy processors, such as Dean and Foremost, purchase raw milk from dairy farms and agricultural cooperatives and then pasteurize and package the milk for sale to school districts, supermarkets and other commercial customers. The complaint alleged that the acquisition was likely to substantially lessen competition both in the sale of school milk to individual school districts located throughout Wisconsin and the Upper Peninsula of Michigan and in the sale of fluid milk to purchasers located in those areas and in Northeastern Illinois. Dean and Foremost were the first and fourth largest sellers of school milk and fluid milk in the region, and the acquisition resulted in Dean accounting for more than 57% of fluid milk sales. Because the acquisition was valued at $35 million, premerger notification to the federal antitrust agencies under the HSR Act had not been required. On April 7, 2010, the district court denied defendant's motion to dismiss the complaint, and the suit remains in litigation.

In *United States et al. v. Ticketmaster Entertainment, Inc. and Live Nation, Inc.*,[25] the Division, joined by 17 state attorneys general (Arizona, Arkansas, California, Florida, Illinois, Iowa, Louisiana, Massachusetts, Nebraska, Nevada, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, and Wisconsin), challenged the acquisition of Live Nation by Ticketmaster Entertainment. The complaint alleged that the transaction, as originally proposed, would be likely to lessen competition substantially for primary ticketing services to major concert venues located in the United States, and thus likely to result in higher prices and less innovation for consumers. Primary ticketing services facilitate the initial sale of tickets to concertgoers through websites, call centers, and retail networks. Ticketmaster was the largest primary ticketing company in the United States. Live Nation, the largest concert promoter in the United States, had entered the market for primary ticketing services in December, 2008. A proposed consent decree was filed simultaneously with the complaint. Under the terms of the decree, entered by the court on July 30, 2010, the merged firm must license ticket software and divest ticketing assets to two companies, Anschutz Entertainment Group and either Comcast-Spectacor or another buyer suitable to the Division, allowing both companies to compete head-to-head with the merged entity. The decree also prohibits the merged firm from engaging in certain conduct, such as retaliating against any venue owner that chooses to use another company's ticketing services, and requires firewalls to protect confidential and valuable competitor data by preventing the merged firm from using information gleaned from its ticketing business in the day-to-day operations of its promotions or artist management business.

In *United States v. Bemis Company, Inc., Rio Tinto plc and Alcan Corporation*,[26] the Division challenged the proposed $1.2 billion acquisition of the Alcan Packaging Food Americas business by Bemis from Rio Tinto, the parent of Alcan Corporation. The complaint alleged that

[24] United States et al. v. Dean Foods Company, No. 10-C-0059 (E.D. WI filed January 22, 2010).

[25] United States et al. v. Ticketmaster Entertainment, Inc. and Live Nation, Inc., No. 1:10-CV-00139 (D.D.C. filed January 25, 2010).

[26] United States v. Bemis Company, Inc., Rio Tinto plc and Alcan Corporation, No. 1:10-CV-00295 (D.D.C. filed February 24, 2010).

the acquisition, as originally proposed, likely would have substantially lessened competition in the United States and Canada for the development, production, and sale of both flexible-packaging rollstock for chunk, sliced and shredded natural cheese packaged for retail sale and flexible-packaging shrink bags for fresh meat. Flexible packaging products for natural cheese and fresh meat are unique in that they must meet strict performance standards to prevent spoilage, maintain product appearance, operate properly on customers' packaging equipment, and adhere to unique standards specific to the particular products. As a result, these types of flexible packaging are difficult to manufacture and commercialize successfully. The Division filed a proposed consent decree simultaneously with the complaint. Under the terms of the decree, Bemis was required to divest certain assets, including plants and intellectual property, used in the production and sale of flexible packaging for natural cheese and fresh meat. The court entered the decree on July 13, 2010.

In *United States et al. v. Election Systems and Software, Inc*,[27] the Division, joined by nine state attorneys general (Arizona, Colorado, Florida, Maine, Maryland, Massachusetts, New Mexico, Tennessee, and Washington), challenged the 2009 acquisition of Premier Election Solutions, Inc. and PES Holdings, Inc. (collectively, "Premier") by Election Systems and Software, Inc. ("ES&S"). The complaint alleged that the acquisition substantially lessened competition in the market for voting equipment systems, as it combined the two largest providers of systems used to tally votes in federal, state, and local elections in the United States. As a result of the acquisition, which did not require notification under the HSR Act because its $5 million value fell below the Act's reporting threshold, ES&S became the provider of more than 70 percent of the voting equipment systems in the United States. The Division filed a proposed consent decree simultaneously with the complaint. The decree, which was entered by the court on June 30, 2010, required that ES&S divest Premier voting equipment systems assets it had acquired, including the means to produce all versions of Premier's hardware, software, and firmware used to record, tabulate, transmit, or report votes.

In *United States v. Baker Hughes Incorporated and BJ Services Company*,[28] the Division challenged the proposed $5.5 billion acquisition of BJ Services by Baker Hughes. The complaint alleged that the acquisition, as originally proposed, would likely substantially lessen competition by combining two of only four companies that provide specialized pumping services, called vessel stimulation services, necessary for the production of oil and gas from wells in the U.S. Gulf of Mexico. These critical services prevent sand from interfering with the flow of oil and gas from wells in the Gulf and are performed using specially designed and equipped vessels that are operated by experienced crews and supported by scientists, engineers, and other lab technicians who customize the stimulation job for the specific well formation. The Division filed a proposed consent decree simultaneously with the complaint, requiring divestiture of two vessels used for providing stimulation services. The court entered the decree on July 26, 2010.

In *United States et al. v. AMC Entertainment Holdings, Inc. and Kerasotes Showplace Theatres, LLC*,[29] the Division and the States of Illinois, Colorado, and Indiana challenged AMC Entertainment Holdings' proposed acquisition of most of the movie theaters operated by Kerasotes Showplace Theatres. The complaint alleged that the transaction, as originally

[27] United States et al. v. Election Systems and Software, Inc., No.1:10-CV-00380 (D.D.C. filed March 8, 2010).

[28] United States v. Baker Hughes Incorporated and BJ Services Company, No. 1:10-CV-00659 (D.D.C. filed April 27, 2010).

[29] United States et al. v. AMC Entertainment Holdings, Inc. and Kerasotes Showplace Theatres, LLC, No. 1:10-CV-00846 (D.D.C. filed May 21, 2010).

proposed, would likely substantially lessen competition among movie theaters that show first-run, commercial movies in the Chicago, Illinois, Denver, Colorado, and Indianapolis, Indiana metropolitan areas, resulting in higher ticket prices and a decreased quality viewing experience for moviegoers. The Division filed a proposed consent decree simultaneously with the complaint. Under the terms of the decree, which was entered by the court on August 9, 2010, AMC was required to divest the following movie theaters: AMC Gardens 13 and Kerasotes Glen 10 (North Suburban Chicago); AMC Cantera 30 (Upper Southwest Suburban Chicago); Kerasotes Showplace 12 Bolingbrook (Lower Southwest Suburban Chicago); Kerasotes Colony Square 12 (Upper Northwest Denver); Kerasotes Olde Town 14 (Lower Northwest Denver); AMC Castleton Square 14 or Kerasotes Showplace 12 Glendale Town (North Indianapolis); and AMC Greenwood 14 (South Indianapolis).

In *United States v. Amcor Ltd., Rio Tinto Plc and Alcan Corporation*,[30] the Division challenged the proposed acquisition of Rio Tinto's Alcan Packaging Medical Flexibles business by Amcor Ltd. The complaint alleged that the transaction, as originally proposed, would substantially lessen competition in the development, production and sale of vented bags for medical use in the United States. Vented bags are a type of flexible packaging used to package large or bulky medical items such as drapes, gowns, and surgery trays and kits. Vented bags must meet rigorous performance and qualification standards because failure of the package in the sterilization process could expose the contents to microbes, bacteria, or particulates, which could cause injury, sickness, or even death to a patient. Under the terms of the proposed consent decree filed simultaneously with the complaint, the companies were required to divest Alcan Packaging's Marshall, North Carolina plant, which manufactured all of Alcan Packaging's vented bags for medical use. The court entered the decree on October 6, 2010.

Additionally during fiscal year 2010, the Division settled via consent decree a merger challenge brought in 2007. In *United States v. Daily Gazette Company and MediaNews Group, Inc.*, Cv. No: 2:07-0329 (S.D.W.V. filed 5/22/07)[31], the Division filed a proposed consent decree on January 20, 2010. Under the terms of the decree, which was entered by the court on July 19, 2010, the parties were required to restructure their newspaper joint operating arrangement and take other steps to remedy the anticompetitive effects of a series of transactions entered into in 2004. MediaNews Group (now known as Affiliated Media Inc.) will regain independent control over the operations of the *Charleston Daily Mail* and economic incentives to grow the newspaper. The settlement also requires the parties to offer substantial discounts of the *Charleston Daily Mail* in order to rebuild its subscriber base and prohibits the *Daily Gazette* from discriminating against the *Charleston Daily Mail* in circulation, advertising sales, and other key joint activities. In addition, the companies are required to continue publishing the *Charleston Daily Mail* as long as it has not failed financially.

[30] United States v. Amcor Ltd., Rio Tinto Plc and Alcan Corporation, No. 1:10-CV-00973 (D.D.C. filed June 10, 2010) .

[31] See the HSR Annual Report, Fiscal Year 2007 for a description of this case.

2. *The Federal Trade Commission*

During fiscal year 2010, the Commission challenged 22 transactions that it had reason to believe may have lessened competition if allowed to proceed as proposed or, in the case of consummated transactions, to remain unchallenged,[32] leading to 18 consent orders in non adjudicative proceedings, one administrative complaint, and three transactions that were abandoned after Commission staff informed the parties of its antitrust concerns. In the one case in which the Commission issued an administrative complaint, the parties settled the charges by agreeing to a divestiture.

In *The Dun & Bradstreet Corporation/QED*,[33] the Commission issued an administrative complaint challenging The Dun & Bradstreet Corporation's February 2009 acquisition of Quality Education Data (QED) and alleging that the deal hurt consumers by eliminating nearly all competition in the market for kindergarten through twelfth-grade educational marketing databases. The data sold by these companies is used to sell books, education materials, and other products to teachers and other educators nationwide. The combination of the two companies gave Dun & Bradstreet, through its subsidiary Market Data Retrieval, more than 90% of the market for K-12 educational marketing data. To settle the charges, Dun & Bradstreet agreed to divest certain assets to an independent data company, restoring competition that had been eliminated as a result of the transaction.

In fiscal year 2010, the Commission accepted consent agreements and issued proposed orders for public comment in 18 merger cases. Thirteen of the consent orders became final in fiscal year 2010; five either became final in fiscal year 2011 or are still pending.

In *Pfizer Inc./Wyeth*,[34] the Commission challenged Pfizer Inc.'s proposed $68 billion acquisition of Wyeth, alleging that the transaction would have reduced competition in several markets for the manufacture and sale of animal vaccines and pharmaceutical products, leaving veterinarians and other animal health product customers with limited options. To settle the Commission's claims, the companies agreed to sell animal health business assets to a Commission-approved buyer.

In *Merck/Schering-Plough*,[35] the Commission's review of Schering-Plough's proposed $41.1 billion acquisition of Merck resulted in significant divestitures to resolve concerns that the merger would have reduced competition in several animal health care markets and in the market for drugs used to treat nausea and vomiting in surgical and chemotherapy patients. Before the merger, the companies were two of the leading animal health pharmaceutical suppliers in the United States, and competed head-to-head in several markets. In addition, Merck's Emend product is the first and only drug in its class, NK 1 receptor antagonists, approved for human use to treat side effects of chemotherapy. Schering-Plough was in the process of licensing an equivalent drug to a third party when its transaction with Merck was announced. According to the complaint, the merger would likely have reduced the combined firm's incentives to launch Schering-Plough's competing drug. To resolve the Commission's concerns in the market for NK 1 receptor antagonist drugs for nausea and vomiting, Schering-Plough agreed to divest its related

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[32] To avoid double counting, this report includes only those merger enforcement actions in which the Commission took its first public action during fiscal year 2010.

[33] FTC v. The Dun & Bradstreet Corporation, Dkt. No. 9342 (administrative complaint issued May 7, 2010).

[34] In the matter of Pfizer Inc./Wyeth, Docket No. C-4267 (proposed order issued Oct. 14, 2009).

[35] In the matter of Merck/Schering-Plough, Docket No. C-4268 (proposed order issued Oct. 29, 2009).

assets to Opko Health, Inc. To remedy concerns about animal health product competition, Merck agreed to sell its interest in Merial (an animal health joint venture) to Sanofi-Aventis, its joint venture partner.

In *Panasonic/Sanyo*,[36] the Commission challenged major consumer electronics manufacturer Panasonic Corporation's proposed $9 billion acquisition of Sanyo Electric Co., Ltd., requiring that Sanyo sell its portable nickel metal hydride (NiMH) battery business, including a premier manufacturing plant in Japan. NiMH batteries power two-way radios, among other products, which are used by police and fire departments nationwide. Panasonic and Sanyo were the two largest manufacturers and sellers of these batteries. The Commission order will maintain competition through the divestiture to FDK Corporation.

In *SCI/Palm Mortuary*,[37] the Commission challenged Service Corporation International's (SCI) proposed acquisition of Palm Mortuary, Inc., a competitor in the cemetery services business in Las Vegas, Nevada. The Commission required that SCI, the nation's largest cemetery operator, must sell a cemetery and funeral home in Las Vegas to complete its proposed acquisition of Palm Mortuary.

In *Watson Pharmaceuticals/Arrow Group*,[38] the Commission challenged Watson Pharmaceutical's proposed $1.7 billion acquisition of rival generic drug company Arrow Pharmaceuticals, alleging that the transaction would have substantially reduced competition in the U.S. markets for important generic drugs used to treat Parkinson's disease and the side effects of chemotherapy. To remedy the Commission's concerns, Watson and Arrow agreed to sell certain rights and assets related to the two drugs to Commission-approved buyers to ensure continued competition in these markets.

In *Agrium/CF Industries*,[39] agricultural products supplier Agrium Inc. agreed to sell a range of assets as part of an agreement with the Commission that will allow the company to move forward with its acquisition of competitor CF Industries Holdings, Inc. The consent order settles charges that the acquisition would have eliminated competition in the market for anhydrous ammonia fertilizer, a product that farmers rely on to grow their crops.

In *Danaher Corp./MDS*,[40] the Commission challenged Danaher's proposed acquisition of MDS Analytical Technologies, requiring that MDS divest assets related to its laser microdissection business. Danaher and MDS were two of only four firms in North America selling microdissection devices – a key tool for scientific research. The settlement is designed to preserve competition in this market.

In *PepsiCo Inc./Pepsi Bottling*,[41] the Commission required that carbonated soft drink company PepsiCo, Inc. restrict its access to confidential competitive information of rival Dr Pepper Snapple Group as a condition for proceeding with PepsiCo's proposed $7.8 billion acquisition of its two largest bottlers and distributors, which also distribute Dr Pepper Snapple Group carbonated soft drinks. Under the order, PepsiCo is required to set up a firewall to ensure

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[36] In the matter of Panasonic/Sanyo, Docket No. C-4274 (proposed order issued Nov. 24, 2009).

[37] In the matter of SCI/Palm Mortuary, Docket No. C-4275 (proposed order issued Nov. 25, 2009).

[38] In the matter of Watson Pharmaceuticals/Arrow Group, Docket No. C-4276 (proposed order issued Dec. 2, 2009).

[39] In the matter of Agrium/CF Industries, Docket No. C-4277 (proposed order issued Dec. 23, 2009).

[40] In the matter of Danaher Corp/MDS, Docket No. C-4283 (proposed order issued Jan. 27, 2010).

[41] In the matter of PepsiCo Inc./Pepsi Bottling, Docket No. C-4301 (proposed order issued Feb. 26, 2010).

that its ownership of these bottlers does not give PepsiCo employees access to commercially sensitive and confidential Dr Pepper Snapple marketing and brand plans.

In *SCI/Keystone North America*,[42] Service Corporation International (SCI), the nation's largest provider of funeral and cemetery services, settled Commission charges that its proposed acquisition of Keystone North America Inc., the fifth-largest funeral and cemetery services provider in North America, would have raised antitrust concerns in the markets for both funeral services and cemetery services. The order requires SCI to sell 22 funeral homes and four cemeteries in 19 local markets to ensure competition is preserved following its acquisition of Keystone.

In *Varian, Inc./Agilent, Inc.*,[43] Agilent Technologies, Inc. and Varian, Inc., two leading global suppliers of high-performance scientific measurement instruments, agreed to sell three of their product lines in order to proceed with their proposed $1.5 billion merger. According to the Commission's complaint, Agilent's acquisition of Varian would have violated U.S. antitrust laws by reducing competition for three types of scientific measurement instruments because the companies currently compete with one another in those markets. To resolve these competitive concerns, the parties agreed to an order requiring them to sell assets related to the manufacture and sale of Micro Gas Chromatography instruments, Triple Quadrupole Gas Chromatography-Mass Spectrometry instruments, and Inductively Coupled Plasma-Mass Spectrometry instruments.

In *Flying J/Pilot Corp.*,[44] the Commission required Pilot Corporation, owner of the largest travel center network in the U.S., to sell 26 travel centers as part of a settlement to replace the competition that would have been lost because of Pilot's proposed $1.8 billion acquisition of Flying J Inc.'s travel center network. Pilot agreed to sell the travel centers, which provide diesel, food, parking, and other amenities for truckers, to Love's Travel Stops and Country Stores. According to the Commission's complaint, the deal between Pilot and Flying J would have reduced competition for certain long-haul trucking fleets for which Pilot and Flying J were the first and second best choices to fulfill their diesel needs.

In *AEA Investors/D.A. Stuart GmbH*,[45] Houghton International, Inc., the leading North American provider of hot rolling oil used to process aluminum, agreed to sell some of the assets it acquired in 2008 through its purchase of D.A. Stuart GmbH, a transaction that included multiple product markets. The Commission's investigation found that Houghton's acquisition of D.A. Stuart GmbH combined the two largest suppliers of aluminum hot rolling oil (AHRO) in North America, giving the combined firm control of almost 75% of the North American market. The Commission's complaint alleges that through its purchase of Stuart, Houghton could unilaterally raise AHRO prices to U.S. consumers. The complaint also alleged that the acquisition could decrease innovation for this vital input into aluminum manufacturing. Under the order settling the Commission's charges, Houghton will sell Stuart's AHRO business to Quaker Chemical Corporation.

[42] In the matter of SCI/Keystone North America, Docket No. C-4284 (proposed order issued Mar. 26, 2010).

[43] In the matter of Varian, Inc./Agilent, Inc., Docket No. C-4292 (proposed order issued May 14, 2010).

[44] In the matter of Flying J/Pilot Corp., Docket No. C-4293 (proposed order issued Jun. 30, 2010).

[45] In the matter of AEA Investors/ D.A. Stuart GmbH, Docket No. C-4297 (proposed order issued Jul. 14, 2010).

In *Fidelity/LandAmerica*,[46] to settle Commission charges that its 2008 acquisition of three LandAmerica Financial, Inc. subsidiaries was anticompetitive, Fidelity National Financial, Inc. agreed to sell several title plants and related assets in the Portland, Oregon, and Detroit, Michigan, metropolitan areas and in four other Oregon counties. Fidelity sells title insurance and provides title information services. Land America also sold title insurance and services. Title plants are databases used by abstractors, title insurers, title insurance agents, and others to determine the ownership of, and interests in, real property in connection with underwriting and issuance of title insurance polices and for other purposes. According to the Commission, Fidelity's acquisition of the LandAmerica assets was anticompetitive in several local markets for the provision of title insurance information services by title plants. The consent will restore independent title plant owners and competition in these markets.

In *NuFarm/A.H. Marks Holdings, Ltd.*,[47] Australian chemical company Nufarm Limited agreed to sell certain assets and modify some of its business agreements to settle charges that its 2008 acquisition of rival A.H. Marks Holding Limited hurt competition in the U.S. market for three herbicides that are relied upon by farmers, landscapers, and consumers. Under the settlement, Nufarm agreed to sell rights and assets associated with two of the herbicides to competitors and to modify agreements with two other companies to allow them to fully compete in the market for the other herbicide. Nufarm's acquisition of United Kingdom-based A.H. Marks gave Nufarm monopolies in the U.S. markets for two herbicides called MCPA and MCPP-P, which also are known as phenoxy herbicides. The transaction also left only two competitors in the market for a third phenoxy herbicide, called 2,4DB. The three herbicides are widely used in the turf, lawn care, and agriculture industries to eliminate certain weeds safely and inexpensively.

In *Tops/Penn Traffic*,[48] the Commission reached a settlement agreement with Tops Markets LLC that protects consumers from the potential anticompetitive effects of Tops' recent acquisition of the bankrupt Penn Traffic Company supermarket chain. To settle Commission charges that the acquisition was anticompetitive in several areas of New York and Pennsylvania, Tops agreed to sell seven Penn Traffic supermarkets to Commission-approved buyers. Because the Commission adopted a flexible process for reviewing the potential anticompetitive effects of the acquisition, none of the 79 Penn Traffic stores was liquidated in the bankruptcy proceeding.

In *Nestle/Novartis*,[49] to settle Commission charges that its proposed acquisition of Alcon, Inc. from Nestle, S.A. would be anticompetitive, Novartis AG agreed to sell to a Commission-approved buyer the rights and assets related to an injectable miotic, an eye care drug used in cataract surgery to constrict the pupil to help check for ruptures in the eye. Novartis and Alcon are the only two U.S. providers of injectable miotics, and the Commission alleged that the acquisition would have created a monopoly in injectable miotics. The settlement requires Novartis to sell its drug Miochol-E to Bausch & Lomb, Inc.

In *Airgas/Air Products and Chemicals*,[50] industrial gas supplier Air Products and Chemicals, Inc. reached an agreement with the Commission requiring the company to sell certain

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[46] In the matter of Fidelity/LandAmerica, Docket No. C-4300 (proposed order issued Jul. 16, 2010).

[47] In the matter of NuFarm/A.H. Marks Holdings, Ltd. Docket No. C-4298 (proposed order issued Jul. 28, 2010).

[48] In the matter of Tops/Penn Traffic, Docket No. C-4295 (proposed order issued Aug. 4, 2010).

[49] In the matter of Nestle/Novartis, Docket No. C-4296 (proposed order issued Aug. 16, 2010).

[50] In the matter of Airgas/Air Products and Chemicals, Docket No. C-4299 (proposed order issued Sep. 9, 2010).

liquid gas assets to resolve Commission charges that Air Products' proposed acquisition of Airgas, a competing industrial gas supplier, would be anticompetitive. The Commission alleged that the takeover would have harmed competition in five regional markets for bulk liquid oxygen and bulk liquid nitrogen, which are used in a range of applications from hospital patient care to the manufacture of frozen foods. The Commission order would restore this competition.

In *Coca-Cola/Coca-Cola Enterprise*,[51] The Coca-Cola Company agreed to restrict its access to confidential competitive business information of rival Dr Pepper Snapple Group as a condition for completing Coca-Cola's proposed $12.3 billion acquisition of its largest North American bottler, which also distributes Dr Pepper Snapple carbonated soft drinks. Under the settlement, Coca-Cola will set up a "firewall" to ensure that its ownership of the bottling company does not give certain Coca-Cola employees access to commercially sensitive confidential Dr Pepper Snapple marketing information and brand plans. In a complaint filed with the settlement, the Commission charged that access to this information likely would have harmed competition in the U.S. markets for carbonated soft drinks.

ONGOING REASSESSMENT OF THE EFFECTS OF THE PREMERGER NOTIFICATION PROGRAM

The Commission and the Antitrust Division continually review the impact of the premerger notification program on the business community and antitrust enforcement. As indicated in past annual reports, the HSR program ensures that virtually all relatively large mergers or acquisitions that affect consumers in the United States will be reviewed by the antitrust agencies prior to consummation. The agencies generally have the opportunity to challenge unlawful transactions before they occur, thus avoiding the problem of constructing effective post-acquisition relief. As a result, the HSR Act is doing what Congress intended, giving the government the opportunity to investigate and challenge those relatively large mergers that are likely to harm consumers *before* injury can arise. Prior to the premerger notification program, businesses could, and frequently did, consummate transactions that raised significant antitrust concerns before the antitrust agencies had the opportunity to consider adequately their competitive effects. The enforcement agencies were forced to pursue lengthy post-acquisition litigation, during the course of which harm from the consummated transaction continued (and afterwards as well, where achievement of effective post-acquisition relief was not practicable). Because the premerger notification program requires reporting before consummation, this problem has been significantly reduced.

Always cognizant of the program's impact and effectiveness, the enforcement agencies continue to seek ways to speed up the review process and reduce burdens for companies. As in past years, the agencies will continue their ongoing assessment of the HSR program to increase accessibility, promote transparency, and reduce the burden on the filing parties without compromising the agencies' ability to investigate and interdict proposed transactions that may substantially lessen competition.

In August 2010, the Commission proposed giving the HSR form its most extensive overhaul since its creation. The proposed form changes are an attempt to provide the agencies

[51] In the matter of Coca-Cola/Coca-Cola Enterprise, Docket No. C-4305 (proposed order issued Sep. 27, 2010).

with some additional information that would be useful in making an initial evaluation of whether a transaction may raise competitive issues warranting investigation, while at the same time eliminating the need to provide certain information that the agencies have found not as helpful as originally anticipated. The public comment period ended on October 18, and the agencies are considering those comments before implementing HSR form changes.[52]

[52] 75 Fed. Reg. 57110 (September 17, 2010).

LIST OF APPENDICES

Appendix A -	Summary of Transactions, Fiscal Years 2001 - 2010
Appendix B -	Number of Transactions reported and Filings Received by Month for Fiscal Years 2001 - 2010

LIST OF EXHIBITS

Exhibit A -	Statistical Tables for Fiscal year 2010, Presenting Data Profiling Hart-Scott-Rodino Premerger Notification Filings and Enforcement Interests

APPENDIX A

SUMMARY OF TRANSACTIONS

FISCAL YEARS 2001 – 2010

APPENDIX A
SUMMARY OF TRANSACTION BY YEAR

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Transactions Reported	**2,376**	**1,187**	**1,014**	**1,428**	**1,675**	**1,768**	**2,201**	**1,726**	**716**	**1,166**
Filings Received[1]	**4,800**	**2,369**	**2,001**	**2,825**	**3,287**	**3,510**	**4,378**	**3,455**	**1411**	**2,318**
Adjusted Transactions In Which A Second Request Could Have Been Issued[2]	2,237	1,142	968	1,377	1,610	1,746	2,108	1,656	684	1,128
Investigations in Which Second Requests Were Issued	**70**	**49**	**35**	**35**	**50**	**45**	**63**	**41**	**31**	**46**
FTC[3]	27	27	15	20	25	28	31	21	15	20
Percent[4]	1.2%	2.4%	1.5%	1.5%	1.6%	1.6%	1.5%	1.3%	2.2%	1.8%
DOJ[3]	43	22	20	15	25	17	32	20	16	26
Percent[4]	1.9%	1.9%	2.1%	1.1%	1.6%	1.0%	1.5%	1.2%	2.3%	2.3%
Transactions Involving a Request For Early Termination[5]	**2,063**	**1,042**	**700**	**1,241**	**1,385**	**1,468**	**1,840**	**1,385**	**575**	**953**
Granted[5]	1,603	793	606	943	997	1,098	1,402	1,021	396	704
Not Granted[5]	460	249	94	298	388	370	438	364	179	249

Note: The data for FY 2004 and FY 2005 "Transactions Reported" and for FY 2004 – FY 2007 "Filings Received" reflect corrections to some prior Annual reports to account for a coding error.

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1 Usually, two filings are received, one from the acquiring person and one from the acquired person when a transaction is reported. Only one application is received when an acquiring party files for an exemption under Section 7A (c)(6) or (c)(8) of the Clayton Act.

2 These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of Sections 7A (c) (6) and 7A(c)(8) of the Act; and (3) transactions which were found to be non-reportable. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, e.g., filing one threshold and later filing for a higher threshold, only a single consolidated transaction has been counted because as a practical matter the agencies do not issue more than one Second Request in such a case. These statistics also omit from the total number the transactions reported secondary acquisitions filed pursuant to 801.4 of the Premerger Notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.

3 These statistics are based on the date the request was issued and not the date the investigation was opened.

4 Second Requests investigations are a percentage of the total number of adjusted transactions. The total percentage reflected in Figure 2 may not equal the sum of reported component values due to rounding.

5 These statistics are based on the date of the HSR filing and not the date action was taken on the request.

APPENDIX B

NUMBER OF TRANSACTIONS REPORTED

AND

FILINGS RECEIVED BY MONTH

FOR

FISCAL YEARS 2001 - 2010

APPENDIX B
TABLE 1. NUMBER OF TRANSACTIONS REPORTED BY MONTH FOR FISCAL YEARS 2001 - 2010

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
October	360	89	77	93	139	130	201	158	91	66
November	451	105	104	127	160	148	189	191	85	135
December	345	95	78	143	126	137	151	172	37	84
January	245	111	93	85	138	142	143	158	42	62
February	66	87	71	109	99	124	157	119	32	61
March	120	109	74	137	121	150	194	131	42	116
April	94	99	92	127	121	125	156	128	60	92
May	153	111	83	125	171	158	250	150	58	108
June	190	88	80	117	153	172	202	146	51	108
July	94	121	86	123	118	141	219	128	62	94
August	163	97	85	134	170	186	200	126	77	120
September	95	75	91	108	159	155	139	119	79	120
TOTAL	**2,376**	**1,187**	**1,014**	**1,428**	**1,675**	**1,768**	**2,201**	**1,726**	**716**	**1,166**

Note: The data for FY 2004 and FY 2005 “Transactions Reported” reflect corrections to some prior Annual reports to account for a coding error.

APPENDIX B
TABLE 2. NUMBER OF FILINGS RECEIVED[1] BY MONTH FOR FISCAL YEARS 2001 - 2010

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
October	751	190	148	185	277	261	401	319	185	146
November	920	211	206	254	324	311	376	380	165	242
December	686	183	150	280	238	260	294	343	79	177
January	499	224	179	161	259	279	288	316	77	126
February	144	174	146	207	201	257	317	246	63	116
March	243	230	144	277	239	309	381	242	81	232
April	188	203	182	245	242	270	312	272	119	182
May	296	212	168	258	337	300	481	294	114	216
June	378	170	158	241	297	346	403	293	99	213
July	182	230	170	234	236	255	441	259	121	187
August	332	191	164	270	328	367	396	251	149	238
September	181	151	186	213	309	295	288	240	159	243
TOTAL	**4,800**	**2,369**	**2,001**	**2,825**	**3,287**	**3,510**	**4,378**	**3,455**	**1,411**	**2,318**

Note: The data for FY 2004 – FY 2007 "Filings Received" reflect corrections to some prior Annual reports to account for a coding error.

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person, when the transaction is reported. Only one filing is received when an acquiring person files for a transaction that is exempt under Sections 7A(c)(6) and (c)(8) of the Clayton Act.

EXHIBIT A

STATISTICAL TABLES

FOR

FISCAL YEAR 2010

DATA PROFILING HART-SCOTT-RODINO PREMERGER

NOTIFICATION FILINGS AND ENFORCEMENT INTERESTS

TABLE I
FISCAL YEAR 2010[1]
ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M [5]	1	0.1%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
50M - 100M	215	19.1%	19	14	8.8%	6.5%	15.3%	3	3	1.4%	1.4%	2.8%
100M - 150M	208	18.4%	18	12	8.7%	5.8%	14.4%	1	5	0.5%	2.4%	2.9%
150M - 200M	104	9.2%	9	1	8.7%	1.0%	9.6%	0	0	0.0%	0.0%	0.0%
200M - 300M	144	12.8%	25	8	17.4%	5.6%	22.9%	6	2	4.2%	1.4%	5.6%
300M - 500M	146	12.9%	25	8	17.1%	5.5%	22.6%	2	5	1.4%	3.4%	4.8%
500M - 1000M	186	16.5%	24	14	12.9%	7.5%	20.4%	2	4	1.1%	2.2%	3.2%
Over 1000M	124	11.0%	29	16	23.4%	12.9%	36.3%	6	7	4.8%	5.6%	10.5%
ALL TRANSACTIONS	1,128	100.0%	149	73	13.2%	6.5%	19.7%	20	26	1.8%	2.3%	4.1%

TABLE II
FISCAL YEAR 2010[1]
ACQUISITIONS BY SIZE OF TRANSACTION[2] **(CUMULATIVE)**

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENTAGE OF TOTAL NUMBER OF CLEARANCES			NUMBER		PERCENTAGE OF TOTAL NUMBER OF SECOND REQUESTS		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 50[5]	1	0.1%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
LESS THAN 100	216	19.1%	19	14	8.6%	6.3%	14.9%	3	3	6.5%	6.5%	13.0%
LESS THAN 150	424	37.6%	37	26	16.7%	11.7%	28.4%	4	8	8.7%	17.4%	26.1%
LESS THAN 200	528	46.8%	46	27	20.7%	12.2%	32.9%	4	8	8.7%	17.4%	26.1%
LESS THAN 300	672	59.6%	71	35	32.0%	15.8%	47.7%	10	10	21.7%	21.7%	43.5%
LESS THAN 500	818	72.5%	96	43	43.2%	19.4%	62.6%	12	15	26.1%	32.6%	58.7%
LESS THAN 1000	1,002	88.8%	120	56	54.1%	25.2%	79.3%	14	19	30.4%	41.3%	71.7%
ALL TRANSACTIONS	1,128		149	73	67.1%	32.9%	100.0%	20	26	43.5%	56.5%	100.0%

TABLE III FISCAL YEAR 2010[1] TRANSACTIONS INVOLVING THE GRANTING OF CLEARANCE BY AGENCY												
TRANSACTION RANGE ($MILLIONS)	CLEARANCES GRANTED TO AGENCY			CLEARANCE GRANTED AS A PERCENTAGE OF:								
				TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF CLEARANCES PER AGENCY		TOTAL NUMBER OF CLEARANCES GRANTED			
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M [5]	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
50M - 100M	19	14	33	8.8%	6.5%	15.3%	12.8%	19.2%	8.6%	6.3%	14.9%
100M - 150M	18	12	30	8.7%	5.8%	14.4%	12.1%	16.4%	8.1%	5.4%	13.5%
150M - 200M	9	1	10	8.7%	1.0%	9.6%	6.0%	1.4%	4.1%	0.5%	4.5%
200M - 300M	25	8	33	17.4%	5.6%	22.9%	16.8%	11.0%	11.3%	3.6%	14.9%
300M - 500M	25	8	33	17.1%	5.5%	22.6%	16.8%	11.0%	11.3%	3.6%	14.9%
500M - 1000M	24	14	38	12.9%	7.5%	20.4%	16.1%	19.2%	10.8%	6.3%	17.1%
Over 1000M	29	16	45	23.4%	12.9%	36.3%	19.5%	21.9%	13.1%	7.2%	20.3%
ALL TRANSACTIONS	149	73	222	13.2%	6.5%	19.7%	100.0%	100.0%	67.1%	32.9%	100.0%

TABLE IV FISCAL YEAR 2010[1] TRANSACTIONS IN WHICH SECOND REQUESTS WERE ISSUED												
TRANSACTION RANGE ($MILLIONS)	INVESTIGATIONS IN WHICH SECOND REQUEST WERE ISSUED [3]			SECOND REQUESTS ISSUED AS A PERCENTAGE OF:								
				TOTAL NUMBER OF TRANSACTIONS			TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF SECOND REQUEST INVESTIGATIONS		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
Below 50M [5]	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
50M - 100M	3	3	6	0.3%	0.3%	0.5%	1.4%	1.4%	2.8%	6.5%	6.5%	13.0%
100M - 150M	1	5	6	0.1%	0.4%	0.5%	0.5%	2.4%	2.9%	2.2%	10.9%	13.0%
150M - 200M	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
200M - 300M	6	2	8	0.5%	0.2%	0.7%	4.2%	1.4%	5.6%	13.0%	4.3%	17.4%
300M - 500M	2	5	7	0.2%	0.4%	0.6%	1.4%	3.4%	4.8%	4.3%	10.9%	15.2%
500M - 1000M	2	4	6	0.2%	0.4%	0.5%	1.1%	2.2%	3.2%	4.3%	8.7%	13.0%
Over 1000M	6	7	13	0.5%	0.6%	1.2%	4.8%	5.6%	10.5%	13.0%	15.2%	28.3%
ALL TRANSACTIONS	20	26	46	1.8%	2.3%	4.1%	1.8%	2.3%	4.1%	43.5%	56.5%	100.0%

TABLE V
FISCAL YEAR 2010[1]
ACQUISITIONS BY REPORTING THRESHOLD

THRESHOLD[6]	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF THRESHOLD GROUP			NUMBER		PERCENT OF THRESHOLD GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
$50M (as adjusted)	67	5.9%	2	2	3.0%	3.0%	6.0%	0	2	0.0%	3.0%	3.0%
$100M (as adjusted)	68	6.0%	4	1	5.9%	1.5%	7.4%	0	2	0.0%	2.9%	2.9%
$500M (as adjusted)	21	1.9%	1	0	4.8%	0.0%	4.8%	0	0	0.0%	0.0%	0.0%
25%	3	0.3%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
50%	589	52.2%	97	44	16.5%	7.5%	23.9%	14	16	2.4%	2.7%	5.1%
ASSETS ONLY	380	33.7%	45	26	11.8%	6.8%	18.7%	6	6	1.6%	1.6%	3.2%
ALL TRANSACTIONS	1,128	100.0%	149	73	13.2%	6.5%	19.7%	20	26	1.8%	2.3%	4.1%

TABLE VI
FISCAL YEAR 2010[1]
TRANSACTION BY ASSETS OF ACQUIRING PERSON

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	69	6.1%	2	2	2.9%	2.9%	5.8%	0	2	0.0%	2.9%	2.9%
50M - 100M	19	1.7%	1	0	5.3%	0.0%	5.3%	0	0	0.0%	0.0%	0.0%
100M - 150M	24	2.1%	0	1	0.0%	4.2%	4.2%	0	0	0.0%	0.0%	0.0%
150M - 200M	18	1.6%	4	0	22.2%	0.0%	22.2%	0	0	0.0%	0.0%	0.0%
200M - 300M	42	3.7%	1	2	2.4%	4.8%	7.1%	0	0	0.0%	0.0%	0.0%
300M - 500M	59	5.2%	5	6	8.5%	10.2%	18.6%	1	1	1.7%	1.7%	3.4%
500M - 1000M	127	11.3%	13	6	10.2%	4.7%	15.0%	2	4	1.6%	3.1%	4.7%
Over 1000M	770	68.3%	123	56	16.0%	7.3%	23.2%	17	19	2.2%	2.5%	4.7%
ALL TRANSACTIONS	1,128	100.0%	149	73	13.2%	6.5%	19.7%	20	26	1.8%	2.3%	4.1%

TABLE VII FISCAL YEAR 2010[1] TRANSACTION BY SALES OF ACQUIRING PERSON												
SALES RANGE ($MILLIONS)	**HSR TRANSACTIONS**		**CLEARANCE GRANTED TO FTC OR DOJ**					**SECOND REQUEST INVESTIGATIONS[3]**				
	NUMBER	**PERCENT**	**NUMBER**		**PERCENT OF SALES RANGE GROUP**			**NUMBER**		**PERCENT OF SALES RANGE GROUP**		
			FTC	**DOJ**	**FTC**	**DOJ**	**TOTAL**	**FTC**	**DOJ**	**FTC**	**DOJ**	**TOTAL**
Below 50M	74	6.6%	1	3	1.4%	4.1%	5.4%	0	1	0.0%	1.4%	1.4%
50M - 100M	19	1.7%	1	1	5.3%	5.3%	10.5%	0	0	0.0%	0.0%	0.0%
100M - 150M	36	3.2%	2	1	5.6%	2.8%	8.3%	0	0	0.0%	0.0%	0.0%
150M - 200M	29	2.6%	1	0	3.4%	0.0%	3.4%	0	0	0.0%	0.0%	0.0%
200M - 300M	49	4.3%	4	2	8.2%	4.1%	12.2%	0	1	0.0%	2.0%	2.0%
300M - 500M	67	5.9%	2	6	3.0%	9.0%	11.9%	1	1	1.5%	1.5%	3.0%
500M - 1000M	110	9.8%	14	6	12.7%	5.5%	18.2%	1	5	0.9%	4.5%	5.5%
Over 1000M	681	60.4%	122	52	17.9%	7.6%	25.6%	18	17	2.6%	2.5%	5.1%
Sales Not Available[7]	63	5.6%	2	2	3.2%	3.2%	6.3%	0	1	0.0%	1.6%	1.6%
ALL TRANSACTIONS	1,128	100.0%	149	73	13.2%	6.5%	19.7%	20	26	1.8%	2.3%	4.1%

TABLE VIII
FISCAL YEAR 2010[1]
TRANSACTION BY ASSETS OF ACQUIRED ENTITIES[8]

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	176	15.6%	25	9	14.2%	5.1%	19.3%	2	1	1.1%	0.6%	1.7%
50M - 100M	152	13.5%	17	13	11.2%	8.6%	19.7%	3	2	2.0%	1.3%	3.3%
100M - 150M	117	10.4%	16	10	13.7%	8.5%	22.2%	2	6	1.7%	5.1%	6.8%
150M - 200M	74	6.6%	7	1	9.5%	1.4%	10.8%	0	0	0.0%	0.0%	0.0%
200M - 300M	84	7.4%	9	6	10.7%	7.1%	17.9%	4	0	4.8%	0.0%	4.8%
300M - 500M	84	7.4%	11	4	13.1%	4.8%	17.9%	3	5	3.6%	6.0%	9.5%
500M - 1000M	117	10.4%	15	13	12.8%	11.1%	23.9%	1	3	0.9%	2.6%	3.4%
Over 1000M	205	18.2%	34	11	16.6%	5.4%	22.0%	5	7	2.4%	3.4%	5.9%
Assets Not Available[8]	119	10.5%	15	6	12.6%	5.0%	17.6%	0	2	0.0%	1.7%	1.7%
ALL TRANSACTIONS	1,128	100.0%	149	73	13.2%	6.5%	19.7%	20	26	1.8%	2.3%	4.1%

TABLE IX FISCAL YEAR 2010[1] TRANSACTION BY SALES OF ACQUIRED ENTITIES [9]												
SALES RANGE ($MILLIONS)	**HSR TRANSACTIONS**		**CLEARANCE GRANTED TO FTC OR DOJ**					**SECOND REQUEST INVESTIGATIONS [3]**				
	NUMBER	**PERCENT**	**NUMBER**		**PERCENT OF SALES RANGE GROUP**			**NUMBER**		**PERCENT OF SALES RANGE GROUP**		
			FTC	**DOJ**	**FTC**	**DOJ**	**TOTAL**	**FTC**	**DOJ**	**FTC**	**DOJ**	**TOTAL**
Below 50M	181	16.0%	26	8	14.4%	4.4%	18.8%	1	1	0.6%	0.6%	1.1%
50M - 100M	177	15.7%	20	8	11.3%	4.5%	15.8%	3	2	1.7%	1.1%	2.8%
100M - 150M	108	9.6%	16	11	14.8%	10.2%	25.0%	3	4	2.8%	3.7%	6.5%
150M - 200M	95	8.4%	8	8	8.4%	8.4%	16.8%	0	3	0.0%	3.2%	3.2%
200M - 300M	100	8.9%	10	7	10.0%	7.0%	17.0%	1	1	1.0%	1.0%	2.0%
300M - 500M	99	8.8%	10	5	10.1%	5.1%	15.2%	1	2	1.0%	2.0%	3.0%
500M - 1000M	131	11.6%	14	12	10.7%	9.2%	19.8%	1	3	0.8%	2.3%	3.1%
Over 1000M	185	16.4%	36	12	19.5%	6.5%	25.9%	5	5	2.7%	2.7%	5.4%
Sales not Available [10]	52	4.6%	9	2	17.3%	3.8%	21.2%	5	5	9.6%	9.6%	19.2%
ALL TRANSACTIONS	1,128	100.0%	149	73	13.2%	6.5%	19.7%	20	26	1.8%	2.3%	4.1%

TABLE X FISCAL YEAR 2010[1] INDUSTRY GROUP OF ACQUIRING PERSON										
3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2009[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
000[13]	Not Available	77	6.8%	-1.2%	3	2	5	0	1	1
112	Animal Production	1	0.1%	0.0%	1	0	1	0	0	0
114	Fishing, Hunting and Trapping	1	0.1%	0.1%	0	0	0	0	0	0
211	Oil and Gas Extraction	21	1.9%	0.4%	3	0	3	0	0	0
212	Mining (except Oil and Gas)	5	0.4%	-0.3%	0	0	0	0	0	0
213	Support Activities for Mining	6	0.5%	-0.4%	0	1	1	0	2	2
221	Utilities	39	3.5%	0.9%	1	5	6	0	3	3
237	Heavy and Civil Engineering Construction	14	1.2%	0.6%	0	1	1	0	0	0
238	Specialty Trade Contractors	3	0.3%	-0.4%	0	0	0	0	0	0
311	Food and Kindred Products	35	3.1%	1.6%	13	2	15	2	0	2
312	Beverage and Tobacco Product Manufacturing	3	0.3%	-0.2%	1	0	1	0	0	0
314	Textile Products	2	0.2%	0.2%	0	0	0	0	0	0
316	Leather and Allied Product Manufacturing	2	0.2%	0.2%	0	0	0	0	0	0
321	Wood Product Manufacturing	2	0.2%	0.1%	1	1	2	0	0	0
322	Paper Manufacturing	9	0.8%	0.0%	0	3	3	0	0	0
323	Printing and Related Support Actitivies	3	0.3%	0.0%	2	0	2	1	0	1
324	Petroleum and Coal Products Manufacturing	7	0.6%	0.2%	0	0	0	0	0	0
325	Chemical Manufacturing	67	5.9%	0.7%	19	1	20	2	0	2
326	Plastics and Rubber Manfuacturing	12	1.1%	0.1%	3	2	5	0	2	2
327	Nonmetallic Mineral Product Manufacturing	4	0.4%	-0.6%	1	1	2	1	1	2
331	Primary Metal Manufacturing	7	0.6%	-1.1%	1	1	2	0	1	1

TABLE X FISCAL YEAR 2010[1] INDUSTRY GROUP OF ACQUIRING PERSON										
3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2009[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
332	Fabricated Metal Product Manufacturing	17	1.5%	-0.1%	3	1	4	0	0	0
333	Machinery Manufacturing	16	1.4%	-1.3%	2	4	6	1	0	1
334	Computer and Electronic Product Manufacturing	47	4.2%	1.0%	11	5	16	0	3	3
335	Electrical Equipment, Applicance, and Component Manufacturing	8	0.7%	-0.3%	2	0	2	0	0	0
336	Transportation Equipment Manufacturing	35	3.1%	1.4%	6	3	9	0	0	0
339	Miscellaneous Manufacturing	18	1.6%	0.6%	10	0	10	0	0	0
422	Wholesale Trade, Nondurable Goods	1	0.1%	0.1%	0	0	0	0	0	0
423	Merchant Wholesalers, Durable Goods	63	5.6%	-0.9%	14	8	22	1	3	4
424	Merchant Wholesales, Nondurable Goods	64	5.7%	1.5%	11	1	12	0	0	0
441	Motor Vehicle and Parts Dealers	2	0.2%	0.0%	0	0	0	0	0	0
444	Electronics and Appliance Stores	3	0.3%	0.0%	1	0	1	0	0	0
445	Food and Beverage Stores	6	0.5%	0.2%	2	0	2	0	0	0
446	Health and Personal Care Stores	7	0.6%	0.3%	1	0	1	0	0	0
447	Gasoline Stations	3	0.3%	0.1%	1	0	1	0	0	0
448	Clothing and Clothing Accessories Stores	5	0.4%	0.2%	0	0	0	0	0	0
453	Miscellaneous Store Retailers	4	0.4%	0.3%	0	0	0	0	0	0
454	Nonstore Retailers	14	1.2%	0.9%	1	0	1	0	0	0
481	Air Transportation	4	0.4%	-0.1%	0	1	1	0	1	1
483	Water Transportation	1	0.1%	-0.1%	0	0	0	0	0	0
484	Truck Transportation	1	0.1%	-0.1%	0	0	0	0	0	0
486	Pipeline Transportation	6	0.5%	0.2%	1	0	1	0	0	0

TABLE X FISCAL YEAR 2010[1] INDUSTRY GROUP OF ACQUIRING PERSON											
3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2009[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
488	Support Actitivies for Transportation	2	0.2%	-0.2%	0	0	0	0	0	0
493	Warehousing and Storage	2	0.2%	-0.1%	0	0	0	0	0	0
511	Publishing Industries (except Internet)	39	3.5%	-0.1%	3	8	11	0	2	2
512	Motion Pictures and Sound Recording Industries	3	0.3%	-0.2%	0	1	1	0	0	0
514	Information Services and Data Processing Services	1	0.1%	0.1%	0	0	0	0	0	0
515	Broadcasting (except Internet)	10	0.9%	0.4%	0	1	1	0	1	1
516	Internet Publishing and Broadcasting	4	0.4%	-0.1%	2	0	2	1	0	1
517	Telecommunications	32	2.8%	0.3%	0	3	3	0	2	2
518	Internet Service Providers, Web Search Portals, and Data Processing Services	16	1.4%	0.8%	3	1	4	1	0	1
519	Other Information Services	1	0.1%	-0.1%	0	0	0	0	0	0
522	Credit Intermediation and Related Activities	30	2.7%	0.2%	1	3	4	0	0	0
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	88	7.8%	-3.4%	2	3	5	0	0	0
524	Insurance Carriers and Related Actitivities	40	3.5%	-0.4%	2	4	6	0	1	1
525	Funds, Trusts, and Other Financial Vehicles	25	2.2%	0.2%	0	0	0	0	0	0
531	Real Estate	1	0.1%	-0.6%	0	0	0	0	0	0
532	Rental and Leasing Services	9	0.8%	0.0%	2	0	2	2	0	2
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	4	0.4%	0.0%	0	0	0	0	0	0
541	Professional, Scientific, and Technical Services	64	5.7%	0.4%	0	2	2	1	1	2
551	Management Companies and Enterprises	6	0.5%	0.2%	1	0	1	0	0	0
561	Administrative and Support Services	27	2.4%	0.4%	2	0	2	0	0	0
562	Waste Management and Remediation Services	1	0.1%	-0.6%	0	0	0	0	0	0

TABLE X
FISCAL YEAR 2010[1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2009[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
611	Educational Services	3	0.3%	0.0%	0	1	1	0	0	0
621	Ambulatory Health Care Services	13	1.2%	0.6%	5	0	5	1	1	2
622	Hospitals	28	2.5%	1.3%	9	0	9	4	0	4
623	Nursing Care Facilities	2	0.2%	0.1%	0	0	0	0	0	0
624	Social Assistance	3	0.3%	-0.3%	0	0	0	0	0	0
711	Performing Arts, Spector Sports, and Related Industries	5	0.4%	0.1%	0	1	1	0	1	1
713	Amusement, Gambling, and Recreation Industries	3	0.3%	-0.2%	0	1	1	0	0	0
721	Accommodation	2	0.2%	0.1%	0	0	0	0	0	0
722	Food Services and Drinking Places	6	0.5%	-0.2%	1	0	1	0	0	0
811	Repairs and Maintenance	3	0.3%	0.1%	0	0	0	0	0	0
812	Personal and Laundry Services	4	0.4%	0.1%	1	0	1	2	0	2
813	Religious, Grantmaking, Civic, Professional, and Similar Organizations	2	0.2%	0.2%	0	1	1	0	0	0
924	Administration of Environmental Quality Programs	4	0.4%	0.3%	0	0	0	0	0	0
		1,128	100.0%		149	73	222	20	26	46

TABLE XI
FISCAL YEAR 2010[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2009[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
000[13]	Not Available	59	5.2%	0.1%	10	1	11	0	1	1	0
211	Oil and Gas Extraction	29	2.6%	1.7%	2	0	2	0	0	0	11
212	Mining (except Oil and Gas)	7	0.6%	-0.5%	0	0	0	0	0	0	1
213	Support Activities for Mining	9	0.8%	-0.1%	0	0	0	0	2	2	3
221	Utilities	45	4.0%	-0.3%	1	6	7	0	3	3	26
236	Construction of Buildings	1	0.1%	-0.2%	0	0	0	0	0	0	0
237	Heavy and Civil Engineering Construction	16	1.4%	0.5%	0	1	1	0	0	0	10
238	Specialty Trade Contractors	8	0.7%	0.3%	0	0	0	0	0	0	1
311	Food and Kindred Products	46	4.1%	1.9%	7	3	10	2	0	2	21
312	Beverage and Tobacco Product Manufacturing	5	0.4%	-0.4%	3	0	3	0	0	0	1
316	Leather and Allied Product Manufacturing	1	0.1%	0.1%	0	0	0	0	0	0	0
321	Wood Product Manufacturing	2	0.2%	0.0%	1	1	2	0	0	0	2
322	Paper Manufacturing	6	0.5%	0.4%	1	2	3	0	0	0	2
323	Printing and Related Support Actitivies	4	0.4%	0.2%	2	0	2	1	0	1	2
324	Petroleum and Coal Products Manufacturing	4	0.4%	-0.1%	0	1	1	0	0	0	0
325	Chemical Manufacturing	48	4.3%	-1.9%	14	0	14	2	0	2	11
326	Plastics and Rubber Manfuacturing	17	1.5%	-0.2%	3	2	5	0	2	2	6
327	Nonmetallic Mineral Product Manufacturing	3	0.3%	0.0%	0	0	0	1	1	2	1
331	Primary Metal Manufacturing	9	0.8%	0.5%	1	1	2	0	1	1	2
332	Fabricated Metal Product Manufacturing	16	1.4%	0.4%	3	3	6	0	0	0	6
333	Machinery Manufacturing	14	1.2%	-0.8%	3	2	5	1	0	1	5

TABLE XI
FISCAL YEAR 2010[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2009[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
334	Computer and Electronic Product Manufacturing	46	4.1%	1.0%	13	4	17	0	3	3	16
335	Electrical Equipment, Applicance, and Component Manufacturing	10	0.9%	0.4%	1	2	3	0	0	0	3
336	Transportation Equipment Manufacturing	20	1.8%	-1.0%	8	1	9	0	0	0	9
337	Furniture and Related Product Manufacturing	3	0.3%	0.0%	1	0	1	0	0	0	0
339	Miscellaneous Manufacturing	25	2.2%	1.0%	8	0	8	0	0	0	7
423	Merchant Wholesalers, Durable Goods	72	6.4%	1.0%	11	8	19	1	3	4	20
424	Merchant Wholesales, Nondurable Goods	59	5.2%	-0.3%	10	0	10	0	0	0	12
425	Wholesale Electric Markets and Agent and Brokers	2	0.2%	0.2%	0	0	0	0	0	0	0
441	Motor Vehicle and Parts Dealers	5	0.4%	0.2%	0	0	0	0	0	0	0
443	Miscellaneous Repair Services	1	0.1%	0.1%	0	0	0	0	0	0	0
444	Electronics and Appliance Stores	1	0.1%	0.1%	0	0	0	0	0	0	0
445	Food and Beverage Stores	7	0.6%	-0.5%	3	0	3	0	0	0	2
446	Health and Personal Care Stores	3	0.3%	0.3%	1	0	1	0	0	0	1
447	Gasoline Stations	4	0.4%	-0.1%	0	0	0	0	0	0	2
448	Clothing and Clothing Accessories Stores	3	0.3%	-0.6%	0	0	0	0	0	0	0
451	Sporting Goods, Hobby, Book, and Music Stores	2	0.2%	-0.6%	1	0	1	0	0	0	0
452	General Merchandise Stores	2	0.2%	0.2%	0	0	0	0	0	0	0
453	Miscellaneous Store Retailers	3	0.3%	0.3%	0	0	0	0	0	0	2
454	Nonstore Retailers	12	1.1%	0.3%	0	0	0	0	0	0	3
481	Air Transportation	6	0.5%	0.1%	0	1	1	0	1	1	4
482	Railroad Transportation	1	0.1%	0.1%	0	0	0	0	0	0	0

TABLE XI
FISCAL YEAR 2010[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2009[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
483	Water Transportation	1	0.1%	-0.2%	0	0	0	0	0	0	0
484	Truck Transportation	1	0.1%	-0.1%	0	0	0	0	0	0	0
486	Pipeline Transportation	11	1.0%	0.4%	3	0	3	0	0	0	1
488	Support Activities for Transportation	3	0.3%	0.3%	0	1	1	0	0	0	0
492	Couriers	2	0.2%	0.2%	0	0	0	0	0	0	0
493	Warehousing and Storage	1	0.1%	-0.1%	0	0	0	0	0	0	0
509	Miscellaneous Durable Goods	1	0.1%	0.1%	0	0	0	0	0	0	0
511	Publishing Industries (except Internet)	51	4.5%	0.4%	3	6	9	0	2	2	19
512	Motion Pictures and Sound Recording Industries	7	0.6%	-0.1%	0	2	2	0	0	0	2
514	Information Services and Data Processing Services	1	0.1%	0.1%	0	0	0	0	0	0	0
515	Broadcasting (except Internet)	4	0.4%	-1.0%	0	2	2	0	1	1	3
516	Internet Publishing and Broadcasting	6	0.5%	0.2%	1	0	1	1	0	1	1
517	Telecommunications	25	2.2%	-1.1%	0	3	3	0	2	2	17
518	Internet Service Providers, Web Search Portals, and Data Processing Services	30	2.7%	1.5%	0	6	6	1	0	1	4
522	Credit Intermediation and Related Activities	26	2.3%	-1.6%	0	0	0	0	0	0	10
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	34	3.0%	-0.8%	1	3	4	0	0	0	13
524	Insurance Carriers and Related Actitivities	41	3.6%	-1.2%	1	4	5	0	1	1	22
525	Funds, Trusts, and Other Financial Vehicles	3	0.3%	0.0%	0	0	0	0	0	0	1
531	Real Estate	2	0.2%	0.2%	0	0	0	0	0	0	0
532	Rental and Leasing Services	6	0.5%	-1.1%	2	0	2	2	0	2	2
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	5	0.4%	0.0%	0	0	0	0	0	0	2

TABLE XI
FISCAL YEAR 2010[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	CHANGE FROM FY 2009[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
541	**Professional, Scientific, and Technical Services**	84	7.4%	0.1%	8	3	11	1	1	2	20
551	**Management Companies and Enterprises**	1	0.1%	0.1%	0	0	0	0	0	0	1
561	**Administrative and Support Services**	31	2.7%	1.0%	3	1	4	0	0	0	9
562	**Waste Management and Remediation Services**	6	0.5%	-0.2%	0	1	1	0	0	0	1
611	**Educational Services**	14	1.2%	0.8%	0	2	2	0	0	0	2
621	**Ambulatory Health Care Services**	23	2.0%	1.0%	7	0	7	1	1	2	6
622	**Hospitals**	32	2.8%	0.4%	8	0	8	4	0	4	21
623	**Nursing Care Facilities**	2	0.2%	0.2%	1	0	1	0	0	0	0
624	**Social Assistance**	1	0.1%	0.1%	0	0	0	0	0	0	0
711	**Performing Arts, Spector Sports, and Related Industries**	6	0.5%	0.1%	0	0	0	0	1	1	2
713	**Amusement, Gambling, and Recreation Industries**	8	0.7%	0.3%	0	0	0	0	0	0	1
721	**Accommodation**	5	0.4%	0.2%	0	0	0	0	0	0	1
722	**Food Services and Drinking Places**	10	0.9%	-0.6%	2	0	2	0	0	0	1
811	**Repairs and Maintenance**	5	0.4%	0.3%	0	0	0	0	0	0	0
812	**Personal and Laundry Services**	3	0.3%	-0.2%	1	0	1	2	0	2	1
		1,128	100.0%		149	73	222	20	26	46	355

1 Fiscal year 2010 figures include transactions reported between October 1, 2009 and September 30, 2010.

2 The size of transaction is based on the aggregate total amount of voting securities, non-corporate interests and/or assets held by the acquiring person as a result of the transaction and are taken from the response to Item 3 (b)(ii) and 3 (c) of the Notification and Report Form.

3 These statistics are based on the date the Second Request was issued.

4 During fiscal year 2010, 1166 transactions were reported under the HSR Premerger Notification program. The smaller number, 1128, reflects the adjustments to eliminate the following types of transactions: (1) transactions reported under Section 7A(c)(6) and (c)(8) (transactions involving certain regulated industries and financial businesses); (2) transactions deemed non-reportable; (3) incomplete transactions (only one party in each transaction filed a compliant notification); and (4) transactions withdrawn before the waiting period began. The table does not, however, exclude competing offers or multiple HSR transactions resulting from a single business transaction (where there are multiple acquiring persons or acquired persons).

5 The filings for transactions valued under $50M submitted in Fiscal Year 2010 reflects corrective filings.

6 In February 2001, legislation raised the size of transaction from $15 million to $50 million with annual adjustments beginning in February 2005.

7 The category labeled “Sales Not Available” includes newly-formed acquiring persons, foreign acquiring person with no United States revenues, and acquiring persons who had not derived any revenues from their investments at the time of filing.

8 Assets of an acquired entity are not available when the acquired entity’s financial data is consolidated within its ultimate parent.

9 Sales of an acquired entity are taken from responses to Item 4(a) and (b) (SEC documents and annual reports) or item 5 (dollar revenues) of the Premerger Notification and Report Form.

10 This category includes acquisition of newly-formed entities from which no sales were generated, and acquisitions of assets which produced no sales revenues during the prior year to filing the Notification and Report Form.

11 The 3-digit codes are part of the North American Industrial Classification System (NAICS) established by the United States Government North American Industrial Classification System 1997, Executive Office of the President, Office of Management and Budget. The NAICS groups used in this table were determined from responses submitted by the parties to Item 5 of the Premerger Notification and Report Form.

12 This represents the deviation from the fiscal year 2009 percentage.

13 This category includes transactions by newly-formed entities.

14 The intra-industry transactions column identifies the number of acquisitions in which both the acquiring and acquired person derived revenues from the same 3-digit NAICS code.

Federal Trade Commission
Bureau of Competition

Department of Justice
Antitrust Division

HART-SCOTT-RODINO ANNUAL REPORT
Fiscal Year 2013

Section 7A of the Clayton Act
Hart-Scott-Rodino Antitrust Improvements Act of 1976
(Thirty-Sixth Annual Report)

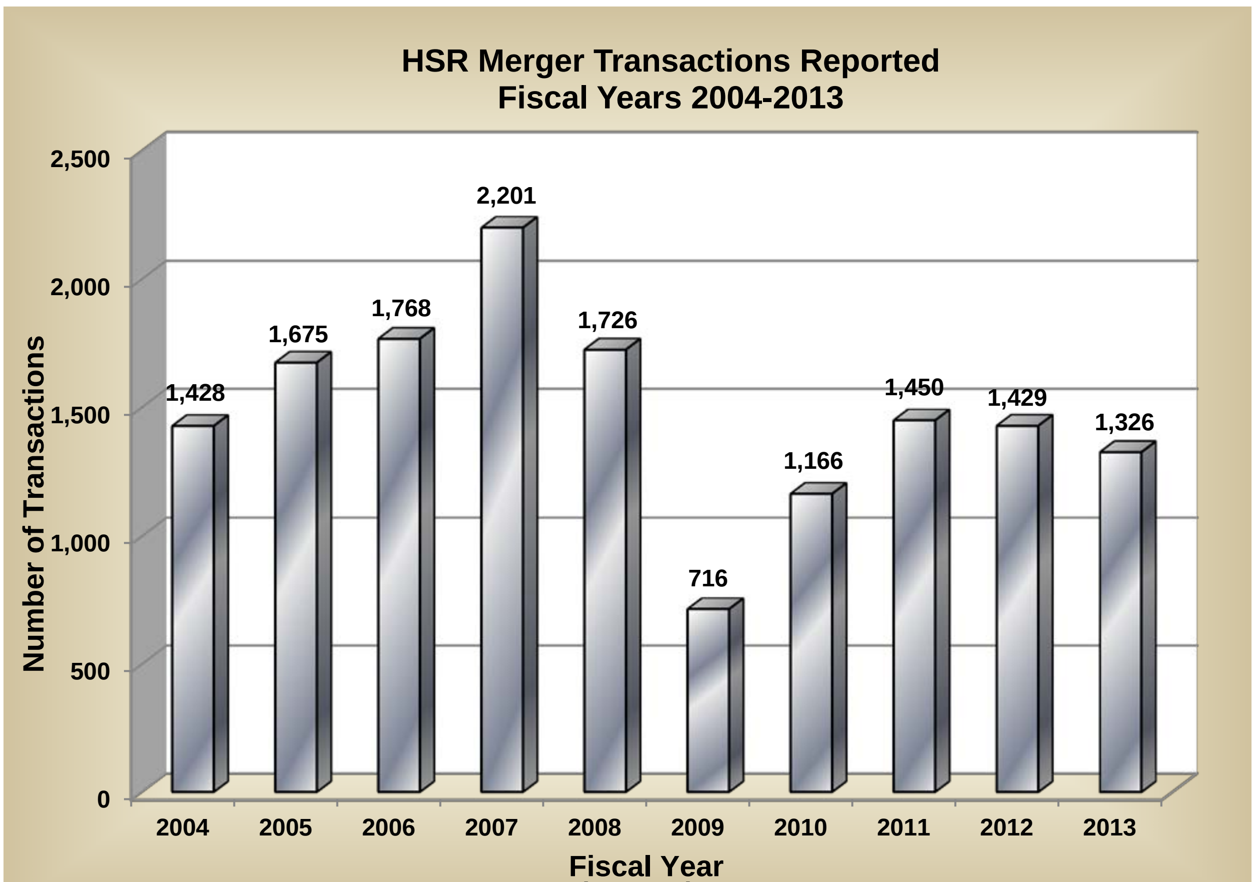
Edith Ramirez
Chairwoman
Federal Trade Commission

William J. Baer
Assistant Attorney General
Antitrust Division

INTRODUCTION

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act" or "the Act"), together with Section 13(b) of the Federal Trade Commission Act and Section 15 of the Clayton Act, enables the Federal Trade Commission ("FTC" or "Commission") and the Antitrust Division of the Department of Justice ("Antitrust Division" or "Division") to obtain effective preliminary relief against anticompetitive mergers, and to prevent interim harm to competition and consumers. The premerger notification program was instrumental in alerting the Commission and the Division to transactions that became the subjects of the numerous enforcement actions brought in fiscal year 2013[1] to protect consumers—individual, business, and government—against anticompetitive mergers.

The Commission and the Antitrust Division continue their efforts to protect competition by identifying and investigating those mergers and acquisitions that raise potentially significant competitive concerns. In fiscal year 2013, 1,326 transactions were reported under the HSR Act, representing about a 7.2% decrease from the 1,429 transactions reported in fiscal year 2012. (*See* Figure 1 below.)



(Figure 1)

[1] Fiscal year 2013 covers the period of October 1, 2012 through September 30, 2013.

During fiscal year 2013, the Commission brought 23 merger enforcement actions,[2] including 16 in which it accepted consent orders for public comment, all of which resulted in final orders; two in which the transactions were abandoned or restructured as a result of antitrust concerns raised during the investigation; one in which the Commission filed a complaint in federal court to permanently enjoin the acquisition; and four in which the Commission initiated administrative litigation. In one of these administrative matters, the Commission contemporaneously filed a motion for preliminary injunction in federal court. In two of the others, the Commission dismissed its administrative complaints after the parties abandoned their intended transactions, and in the fourth, the Commission issued a consent order requiring divestitures. These enforcement actions preserved competition in numerous sectors of the economy, including pharmaceuticals, hospitals, high tech and industrial goods, casinos, and energy.

One of the Commission's notable challenges was against Idaho-based St. Luke's Health System's acquisition of Idaho's largest independent, multi-specialty physician practice group, Saltzer Medical Group. The Commission, together with the Idaho Attorney General, initiated an action in federal district court to block the transaction. The four-week bench trial began on September 23, 2013. On January 24, 2014, the U.S. District Court for the District of Idaho found that the acquisition violated Section 7 of the Clayton Act and the Idaho Competition Act, and permanently enjoined the consummated acquisition and ordered St. Luke's to fully divest itself of Saltzer's physicians and assets. St. Luke's has appealed the decision.

The Commission also initiated federal district court and administrative proceedings in connection with its challenge of Ardagh Group S.A.'s proposed acquisition of rival glass container manufacturer Saint-Gobain Containers, Inc. To resolve the litigation, Ardagh agreed to sell six of its nine U.S. glass container manufacturing plants. In another challenge, the Commission initiated administrative litigation and authorized staff to seek a temporary restraining order and preliminary injunction in federal district court to block casino operator Pinnacle Entertainment's proposed acquisition of rival Ameristar Casinos. The Commission agreed to resolve the litigation with a consent order that required Pinnacle to divest casino properties in Missouri and Louisiana to settle concerns that the acquisition would hinder competition in those areas.

During fiscal year 2013, the Antitrust Division challenged 15 merger transactions. In seven of these challenges, the Antitrust Division filed a complaint in U.S. district court. The Division prevailed at trial in its challenge to Bazaarvoice's $168 million consummated acquisition of PowerReviews, its closest rival in the U.S. market for internet product ratings and reviews platforms. Subsequently, a proposed consent decree was filed with the court on April 24, 2014, requiring Bazaarvoice to divest the assets it acquired from PowerReviews and to adhere to other requirements to fully restore competition in the provision of online product ratings and reviews platforms. In another court challenge, trial is pending. The other five court challenges resulted in settlements being filed with the court: three times simultaneously with the complaint, and in two other instances, post-complaint. In the eight fiscal year 2013 challenges where the Division did not file a complaint, the parties in three instances abandoned the proposed

[2] To avoid double-counting, this Report includes only those merger enforcement actions in which the Commission or the Antitrust Division took its first public action during fiscal year 2013.

transaction, in three instances restructured the proposed transaction, and in two instances changed their conduct to avoid competitive problems, thus resolving the Division's concerns.

One of the Division's notable challenges was the suit brought, together with several state attorneys general, to block the merger between US Airways and American Airlines. As proposed, this transaction would have reduced competition in air travel—an industry that is increasingly concentrated and oligopolistic—and raised prices for consumers. The settlement, which was entered by the court on April 25, 2014, requires the parties to divest key assets at capacity-constrained airports across the county. These divestitures will provide low cost carrier airlines the opportunity to expand their national footprint and increase system-wide competition to the benefit of the American consumer.

The Division also acted to preserve competition and avoid price increases in the U.S. beer market, suing to stop Anheuser-Busch InBev's (ABI) proposed acquisition of total ownership and control of Grupo Modelo, a leading rival and aggressive competitor. After the Division sued, the parties agreed to divest to Constellation Brands Modelo's entire U.S. business, ensuring that Modelo would remain an independent horizontal competitor of ABI and MillerCoors.

In fiscal year 2013, the Commission's Premerger Notification Office ("PNO") continued to respond to thousands of telephone calls seeking information about the reportability of transactions under the HSR Act, and the details involved in completing and filing the Notification and Report Form (the filing form). The HSR website, http://www.ftc.gov/enforcement/premerger-notification-program, continued to provide improved access to information necessary to the notification process. The website includes basic resources, such as introductory guides, that provide an overview of the premerger notification program and merger review process. It is the primary source of information for HSR practitioners seeking information relating to the HSR form and instructions, the premerger notification statute and rules, current filing thresholds, notices of grants of early termination, filing fee instructions, scheduled HSR events, training materials for new HSR practitioners, tips for completing the filing form, procedures for submitting post-consummation filings, contact information for PNO staff, and frequently asked questions regarding HSR filing requirements. Web users also can find up-to-date information, including speeches, press releases, summaries and highlights, and Federal Register notices regarding any amendments to the HSR rules. The website also includes a database of informal interpretation letters, giving the public ready access to PNO staff interpretations of the premerger notification rules and the Act. As always, PNO staff is available to help HSR practitioners comply with HSR notification requirements.

BACKGROUND OF THE HSR ACT

Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435 ("the Act" or "HSR Act"), amended the Clayton Act by adding a new Section 7A, 15 U.S.C. § 18a. In general, the HSR Act requires that certain proposed acquisitions of voting securities or assets be reported to the Commission and the Antitrust Division prior to consummation. The parties must then wait a specified period, usually 30 days (or 15 days in the case of a cash tender offer or bankruptcy sale), before they may complete the transaction.

Whether a particular acquisition is subject to these requirements depends on the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. Acquisitions valued below a certain threshold, acquisitions involving parties with assets and sales below a certain threshold, and certain classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with the opportunity to review mergers and acquisitions before they occur. The premerger notification program, with its filing and waiting period requirements, provides the agencies with both the time and the information necessary to conduct this antitrust review. Much of the information for a preliminary antitrust evaluation is included in the notification filed with the agencies by the parties to the proposed transactions.

If either agency determines during the waiting period that further inquiry is necessary, the agency is authorized by Section 7A(e) of the Clayton Act to issue a request for additional information and documentary material ("Second Request").[3] The Second Request extends the waiting period for a specified period of time (usually 30 days, but 10 days in the case of a cash tender offer or bankruptcy sale) after all parties have complied with the Second Request (or, in the case of a tender offer or bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may substantially lessen competition, it may seek an injunction in federal district court to prohibit consummation of the transaction. The Commission also may challenge the transaction in administrative litigation.

The Commission, with the concurrence of the Assistant Attorney General for the Antitrust Division, promulgated final rules implementing the premerger notification program on July 31, 1978. At that time, a comprehensive Statement of Basis and Purpose also was published, containing a section-by-section analysis of the rules and an item-by-item analysis of the filing form.[4] The program became effective on September 5, 1978. The Commission, with the concurrence of the Assistant Attorney General, has amended the rules and the filing form on several occasions over the years to improve the program's effectiveness and to lessen the burden of complying with the rules.[5]

A STATISTICAL PROFILE OF THE PREMERGER NOTIFICATION PROGRAM

The appendices to this Report provide a statistical summary of the operation of the premerger notification program. Appendix A shows, for the ten-year period covering fiscal years 2004-2013, the number of transactions reported; the number of filings received; the number of merger investigations in which Second Requests were issued; and the number of

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[3] 15 U.S.C. §18a(e)(1)(a) ("The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period)…require the submission of additional information or documentary material relevant to the proposed acquisition").
[4] 43 Fed. Reg. 33450 (July 31, 1978).
[5] *See* http://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-and-formal-interpretations/statements-basis-purpose.

transactions in which requests for early termination of the waiting period were received, granted, and not granted.[6] Appendix A also shows the number of transactions in which Second Requests could have been issued, as well as the percentage of transactions in which Second Requests were issued. Appendix B provides a month-by-month comparison of the number of transactions reported and the number of filings received for fiscal years 2004 through 2013.

The statistics set out in these appendices show that the number of transactions reported in fiscal year 2013 decreased 7.2% from the number of transactions reported in fiscal year 2012. In fiscal year 2013, 1,326 transactions were reported, while 1,429 were reported in fiscal year 2012.[7] The statistics in Appendix A also show that the number of merger investigations in which Second Requests were issued in fiscal year 2013 decreased 4.1% from the number of merger investigations in which Second Requests were issued in fiscal year 2012. Second Requests were issued in 47 merger investigations in fiscal year 2013 (25 issued by the FTC and 22 issued by the Antitrust Division), while Second Requests were issued in 49 merger investigations in fiscal year 2012 (20 issued by the FTC and 29 issued by the Antitrust Division). The percentage of transactions in which a Second Request was issued increased from 3.5% in fiscal year 2012 to 3.7% in fiscal year 2013. (*See* Figure 2 below)

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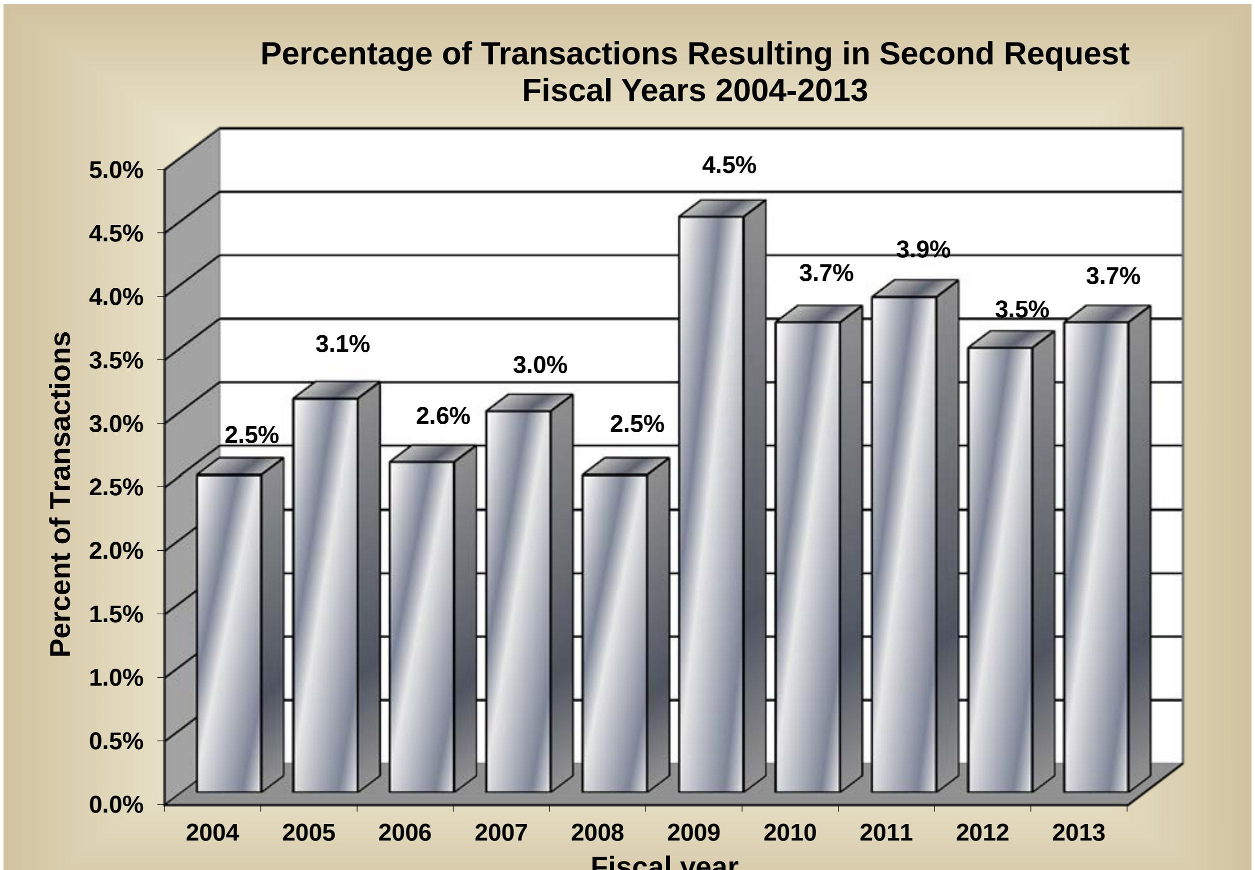
[6] The term "transaction," as used in Appendices A and B and Exhibit A to this Report, does not refer only to individual mergers or acquisitions. A particular merger, joint venture, or acquisition may be structured such that it involves more than one filing that must be made under the HSR Act.

[7] This Report, like previous Reports, also includes annual data on "adjusted transactions in which a Second Request could have been issued" ("adjusted transactions"). *See* Appendix A and n.2 of Appendix A (explaining calculation of that data). There were 1,286 adjusted transactions in fiscal year 2013, and the data presented in the Tables and the percentages discussed in the text of this Report (*e.g.*, percentage of transactions resulting in Second Requests) are based on this figure.



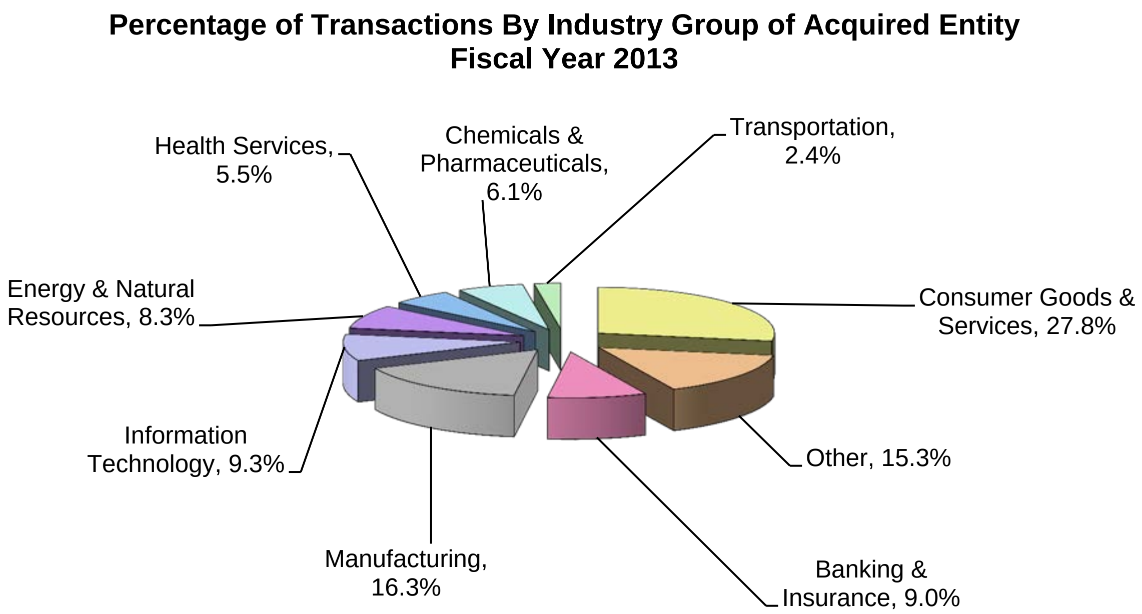
(Figure 2)

The statistics in Appendix A also show that early termination of the waiting period was requested in the majority of transactions. In fiscal year 2013, early termination was requested in 77% (990) of the transactions reported. In fiscal year 2012, early termination was requested in 78% (1,094) of the transactions reported. The percentage of requests granted out of the total requested decreased from 82% in fiscal year 2012 to 80.5% in fiscal year 2013.

The tables (Tables I through XI) in Exhibit A contain information regarding the agencies' enforcement activities for transactions reported in fiscal year 2013. The tables provide, for example, various categories of transactions, the number and percentage of transactions in which clearance to investigate was granted by one antitrust agency to the other, and the number of merger investigations in which Second Requests were issued. Table III of Exhibit A shows that, in fiscal year 2013, clearance was granted to either of the agencies to conduct an initial investigation in 16.9% of the total number of transactions reported. The tables also provide the number of transactions based on the dollar value of transactions reported and the reporting threshold indicated in the notification report. In fiscal year 2013, the dollar value of reported transactions was $815 billion.[8]

[8] The information on the value of reported adjusted transactions for fiscal year 2013 is drawn from a database maintained by the Premerger Notification Office.

Tables X and XI provide the number of transactions by industry group in which the acquiring person or the acquired entity derived the most revenue. Figure 3 illustrates the percentage of reportable transactions within industry groups for fiscal year 2013 based on the acquired entity's operations.[9]



(Figure 3)

DEVELOPMENTS WITHIN THE PREMERGER PROGRAM

1. *Amendments to the Premerger Notification Rules*

The Commission, with the concurrence of the Antitrust Division, amended the premerger notification rules (effective August 9, 2013) to provide a framework for the withdrawal of a premerger notification filing under the HSR Act.[10] These amendments set forth the procedures for voluntarily withdrawing an HSR filing; establish when a premerger notification filing will be automatically withdrawn if a filing publicly announcing the termination of the transaction is made with the U.S. Securities and Exchange Commission under the Securities Exchange Act of 1934 and the rules promulgated under that Act; and set forth the procedure for resubmitting a filing after a withdrawal without incurring an additional filing fee.

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[9] The category designated as "Other" consists of industry segments that include construction, educational services, performing arts, recreation, and other non-classifiable businesses.

[10] Press Release, FTC Finalizes Amendments to the Premerger Notification Rules Related to the Withdrawal of HSR Filings (June 28, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/06/ftc-finalizes-amendments-premerger-notification-rules-related; 78 Fed. Reg. 41293 (July 10, 2013) (codified at 16 C.F.R. pt. 803).

In another rule change (effective December 16, 2013), the Commission, with the concurrence of the Antitrust Division, amended the premerger notification rules regarding acquisitions of exclusive patent rights in the pharmaceutical industry.[11] The amended rules provide a framework for determining when a transaction involving the transfer of rights to a patent or part of a patent in the pharmaceutical and medicine manufacturing industry constitutes an asset acquisition that may be reportable under the HSR Act.

2. *Compliance*

The Commission and the Antitrust Division continued to monitor compliance with the premerger notification program's filing and waiting period requirements, and initiated a number of compliance investigations in fiscal year 2013. The agencies monitor compliance through a number of methods, including a review of newspapers and industry publications for announcements of transactions that may not have been reported in accordance with the HSR Act's requirements. In addition, industry sources, such as competitors, customers, and suppliers, interested members of the public, and, in certain cases, the parties themselves, often provide the agencies with information about transactions and possible violations of the Act's requirements.

Under Section 7A(g)(1) of the Act, any person that fails to comply with the Act's notification and waiting period requirements is liable for a civil penalty of up to $16,000 for each day the violation continues.[12] The antitrust agencies examine the circumstances of each violation to determine whether penalties should be sought.[13] During fiscal year 2013, 39 post-consummation "corrective" filings were received, and the agencies brought two enforcement actions, resulting in $1.2 million in civil penalties.

In *United States v. Barry Diller*,[14] the complaint alleged that Barry Diller, a member of the board of directors of The Coca Cola Company ("Coke"), failed to comply with the HSR Act's premerger notification requirements before acquiring Coke voting securities. Although this was the first time that Diller was charged with an HSR Act violation, he had previously made a corrective filing for what he claimed was an inadvertent failure to file before acquiring voting securities of a different company. Under the terms of a consent decree filed simultaneously with the complaint and entered by the court on July 3, 2013, Diller agreed to pay a $480,000 civil penalty to settle the charges.

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[11] Press Release, FTC Finalizes Amendments to the Premerger Notification Rules Related to the Transfer of Exclusive Patent Rights in the Pharmaceutical Industry (Nov. 6, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/11/ftc-finalizes-amendments-premerger-notification-rules-related; 78 Fed. Reg. 68705 (Nov. 15, 2013) (codified at 16 C.F.R. pt. 801).

[12] Dollar amounts specified in civil monetary penalty provisions within the Commission's jurisdiction are adjusted for inflation in accordance with the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134 (Apr. 26, 1996). The adjustments have included an increase in the maximum civil penalty from $10,000 to $11,000 for each day during which a person is in violation of Section 7A(g)(1) (61 Fed. Reg. 54548 (Oct. 21, 1996), corrected at 61 Fed. Reg. 55840 (Oct. 29, 1996)) and to $16,000 effective February 10, 2009 (74 Fed. Reg. 857 (Jan. 9, 2009)).

[13] If parties inadvertently fail to file, the agencies generally will not seek penalties so long as the parties promptly submit corrective filings after discovering the failure to file, submit an acceptable explanation of their failure to file, and have not previously violated the Act.

[14] *United States v. Barry Diller*, No. 1:13-CV-01002 (D.D.C.) (final judgment issued July 3, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130703dillerjdmt.pdf.

In *United States v. MacAndrews & Forbes Holdings*,[15] the complaint alleged that investment firm MacAndrews & Forbes Holdings Inc. failed to comply with premerger notification requirements before acquiring voting securities of Scientific Games Corporation in June 2012. Although this was the first time that MacAndrews & Forbes had been charged with an HSR Act violation, the firm had previously made a corrective filing in May 2011 for what it asserted was an inadvertent failure to file before acquiring voting securities of a different company. Under the terms of a consent decree filed simultaneously with the complaint and entered by the court on July 1, 2013, MacAndrews & Forbes agreed to pay a civil penalty of $720,000 to settle the charges.

3. *Threshold Adjustments*

The 2000 amendments to the HSR Act require the Commission to publish adjustments to the Act's jurisdictional and filing fee thresholds annually, based on the change in the gross national product, in accordance with Section 8(a)(5) of the Clayton Act for each fiscal year beginning after September 30, 2004. The Commission amended the rules in 2005 to provide a method for future adjustments as required by the 2000 amendments, and to reflect the revised thresholds contained in the rules. The revised thresholds are published annually in January and become effective 30 days after publication.

On January 11, 2013, the Commission published a notice[16] to reflect adjustment of the reporting thresholds as required by the 2000 amendments[17] to Section 7A of the Clayton Act, 15 U.S.C. § 18a. The revised thresholds, including an increase in the size of transaction threshold from $68.2 million to $70.9 million, became effective February 11, 2013.

MERGER ENFORCEMENT ACTIVITY[18]

1. *The Department of Justice*

During fiscal year 2013, the Antitrust Division challenged 15 merger transactions that it concluded might have substantially lessened competition if allowed to proceed as proposed. In seven of these challenges, the Antitrust Division filed a complaint in U.S. district court. One of these seven court challenges was litigated, and the district court ruled in favor of the government on January 8, 2014. In another court challenge, trial is pending. In three, the parties filed settlement papers simultaneously with the complaint, and in two other court challenges, settlement papers were filed post-complaint. In the eight fiscal year 2013 challenges where the Division did not file a complaint, in three instances the parties abandoned the proposed transaction, in three other instances the parties restructured the proposed transaction, and in two

[15] *United States v. MacAndrews & Forbes Holdings Inc.*, No. 1:13-CV-0926 (D.D.C.) (final judgment issued July 1, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701macandrewsforbesjdmt.pdf.
[16] 78 Fed. Reg. 2406 (Jan. 11, 2013).
[17] 15 U.S.C. §18a(a). *See* Pub. L. No. 106-553, 114 Stat. 2762.
[18] The cases listed in this section were not necessarily reportable under the premerger notification program. Given the confidentiality of information obtained pursuant to the Act, it would be inappropriate to identify the cases initiated under the program except in those instances in which that information has already been disclosed.

instances the parties changed their conduct to avoid competitive problems, thus resolving the Division's concerns.[19]

In *United States v. Star Atlantic Waste Holdings, L.P., Veolia Environnement S.A., and Veolia ES Solid Waste, Inc.*,[20] the Division challenged the proposed acquisition of Veolia Environnement S.A. by Star Atlantic Waste Holdings, L.P. The complaint alleged that the transaction, as originally proposed, would have resulted in higher prices for the collection of commercial waste and the disposal of municipal solid waste in northern New Jersey, central Georgia, and Macon, Georgia. In each of these areas, Star Atlantic and Veolia were two of only a few significant firms providing commercial waste collection and municipal solid waste disposal. The Division filed a proposed consent decree simultaneously with the complaint, requiring Star Atlantic and Veolia to divest three transfer stations in northern New Jersey, a landfill and transfer station in central Georgia, and three commercial waste collection routes in the Macon metropolitan area. On March 1, 2013, the court entered the decree.

In *United States and State of New York v. Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights, LLC, and City Sights Twin, LLC*,[21] the Division and the State of New York challenged the formation of Twin America, a joint venture formed in 2009 between the two largest double-decker hop-on, hop-off sightseeing bus companies operating in New York City. In addition to the joint venture itself, the complaint also names as defendants Coach USA Inc. and CitySights, LLC and the subsidiaries through which they entered into the Twin America joint venture, International Bus Services Inc. and City Sights Twin, LLC. The complaint alleges that the joint venture, which did not require notification under the HSR Act, had the effect of eliminating head-to-head competition between Coach and CitySights in the market for hop-on, hop-off bus tours in New York City and gave the parties an effective monopoly that enabled them to raise prices to consumers. The lawsuit seeks to dissolve the joint venture and impose other relief to restore competition and redress the anticompetitive effects of the parties' conduct. The suit is pending litigation.

In *United States v. Bazaarvoice, Inc.*,[22] the Division challenged the June 2012 acquisition of PowerReviews, Inc. by Bazaarvoice, Inc. The complaint alleged that the transaction, which was not reportable under the HSR Act, significantly lessened competition in the market for product ratings and reviews (PRR) platforms in the United States by combining Bazaarvoice's

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[19] WellPoint Inc.'s proposed acquisition of Amerigroup Corp. (Medicaid managed care plans); proposed acquisition of certain branches from Bank of America by Camden National Bank, N.A. (banks); EnviroSolutions Holdings, Inc.'s acquisition of Environmental Alternatives, Inc. (solid waste collection; solid waste landfill); Entergy's acquisition of Acadia Energy Center Block II from Acadia Power Partners (wholesale electricity); Aetna, Inc.'s proposed acquisition of Coventry Health Care, Inc. (direct health and medical insurance carriers and third party administration of insurance and pension funds); Partners Healthcare System Inc.'s proposed acquisition of Cooley Dickinson Hospital (hospital services); Midcontinent Communications' proposed acquisition of the Knology business centered in Sioux Falls, South Dakota from WideOpenWest (WOW!) (cable, ISP, television broadcasting and sale of advertising); BAE Systems Inc.'s proposed acquisition of MHI Ship Repair & Services from American Maritime Holdings Inc. (ship building and repair).
[20] *United States v. Star Atlantic Waste Holdings, L.P., Veolia Environnement S.A., and Veolia ES Solid Waste, Inc.*, No. 1:12-CV-01847 (D.D.C. filed November 15, 2012).
[21] *United States and State of New York v. Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights, LLC and City Sights Twin, LLC*, No. 12-CV-8989 (S.D.N.Y. filed December 11, 2012).
[22] *United States v. Bazaarvoice, Inc.*, No. C-13-0133 (N.D. Cal. filed January 10, 2013).

market-leading PRR platform with PowerReviews, its most significant U.S. rival. Consumer-generated product ratings and reviews are displayed on retailers' and manufacturers' websites to enhance the online shopping experience. The feature allows consumers to read feedback from authentic product owners prior to making a purchase. According to the complaint, before the transaction PowerReviews was an aggressive price competitor and Bazaarvoice routinely responded to competitive pressure from PowerReviews. The lawsuit sought to restore the competition lost as a result of the acquisition by, among other things, having Bazaarvoice divest assets sufficient to create a separate and viable competing business to replace PowerReviews' competitive significance in the marketplace. After a three week trial, on January 8, 2014, the district court issued a Memorandum Opinion concluding that Bazaarvoice's acquisition violated the antitrust laws. The court's Memorandum Opinion can be found at http://www.justice.gov/atr/cases/bazaarvoice.html. A proposed consent decree was filed April 24, 2014, requiring Bazaarvoice to sell all of the PowerReviews assets to a divestiture buyer and containing other provisions to compensate for the deterioration of PowerReviews' competitive position that occurred as a result of the transaction. Under the proposed consent decree, Bazaarvoice is required to provide syndication services to the divestiture buyer for four years, allowing the divestiture buyer to build its customer base and develop its own syndication network. Bazaarvoice is required to waive breach of contract claims against its customers, allowing them to switch to the divestiture buyer without penalty. Bazaarvoice is also required to waive trade-secret restrictions for any of its employees who are hired by the divestiture buyer, enabling the buyer to leverage Bazaarvoice's post-merger research and development efforts.

In *United States v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B de C.V.*,[23] the Division challenged Anheuser-Busch InBev's (ABI) proposed acquisition of the remaining interest in Grupo Modelo that ABI did not already own. According to the complaint filed on January 31, 2013, as originally proposed, the $20.1 billion transaction would have substantially lessened competition in the market for beer in the United States as a whole and in 26 metropolitan areas across the United States, resulting in consumers paying more for beer and diminished innovation. ABI's Bud Light is the best selling beer in the United States, and Modelo's Corona Extra is the best selling import. On April 19, 2013, a consent decree was filed settling the suit and requiring Modelo and ABI to make divestitures that would fully replace Modelo as a competitor in the United States. The decree called for the divestiture of Modelo's entire U.S. business including perpetual and exclusive licenses of Modelo brand beers for distribution and sale in the United States, its most advanced brewery, Piedras Negras, and its interest in Crown Imports, LLC (Crown) to Constellation Brands, Inc. (Constellation) or an alternative purchaser. Crown was the joint venture established by Modelo and Constellation to import, market, and sell certain Modelo beers into the United States. The decree was entered by the court on October 24, 2013.

In *United States. v. Ecolab Inc. and Permian Mud Service, Inc.*,[24] the Division challenged Ecolab Inc.'s proposed acquisition of Permian Mud Services, Inc. The complaint alleged that the transaction, as originally proposed, would combine two of the three leading providers of production chemical management services ("PCMS") for deepwater wells in the U.S. Gulf of

[23] *United States v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B de C.V.*, No 1:13-CV-00127 (D.D.C. filed January 31, 2013).
[24] *United States v. Ecolab Inc. and Permian Mud Service, Inc.*, No 1:13-CV-00444 (D.D.C. filed April 8, 2013).

Mexico ("Gulf") and eliminate significant competition in the highly concentrated market, leading to higher prices, reduced service quality, and diminished innovation. PCMS involves the application of specially formulated chemical solutions to oil and gas wells to facilitate hydrocarbon production and protect well infrastructure. These critical services are administered by experienced personnel including scientists, engineers, and other lab technicians who customize the chemical blends and application methodology for specific well formations. Permian's wholly-owned subsidiary, Champion Technologies, Inc. ("Champion"), and Ecolab's wholly-owned subsidiary, Nalco Company ("Nalco"), were the two largest suppliers of deepwater PCMS in the Gulf, and the companies vigorously competed head-to-head to win the business of oil and gas exploration and production companies. A proposed consent decree settling the suit filed simultaneously with the complaint requires the companies to divest to Clariant Corporation and its affiliate, Clariant International Ltd., assets Champion had been using to provide deepwater production chemical management services in the Gulf, including the patent for Champion's best-selling production chemical in the deepwater Gulf. The settlement also provides Clariant with the exclusive right to hire the merged firm's relevant personnel, who possess essential expertise and know-how. The court entered the consent decree on September 18, 2013.

In *United States and State of Texas v. Cinemark Holdings, Inc., Rave Holdings, LLC and Alder Wood Partners, L.P.*,[25] the Division and the State of Texas challenged the proposed acquisition by Cinemark of Rave Cinemas. According to the complaint, the transaction, as originally proposed, would lessen competition in the market for first-run, commercial movies in specified portions of Kentucky, New Jersey and Texas. Under the terms of the proposed consent decree filed along with the complaint, Cinemark must divest movie theaters in Kentucky, New Jersey and Texas. In addition, Cinemark's chairman must divest Movie Tavern, Inc., a company that he controlled that operated in Fort Worth and Denton, Texas that competed with Rave Cinemas. Without the divestitures, moviegoers in the relevant areas would likely have faced higher prices, and Cinemark, Rave Cinemas, and Movie Tavern would have had less incentive to maintain, upgrade, and renovate their theaters and to license the most popular movies, reducing the quality of the viewing experience for the moviegoer. On August 15, 2013, the court entered the consent decree.

In *United States, et al. v. US Airways Group, Inc. and AMR Corporation*,[26] the Division and the states of Texas, Arizona, Pennsylvania, Florida, Tennessee, Virginia, and the District of Columbia challenged the proposed $11 billion merger between US Airways Group, Inc. and American Airlines' parent company, AMR Corporation. The complaint alleged that the transaction, as originally proposed, would substantially lessen competition for commercial air travel and result in passengers paying higher airfares and receiving reduced service. In addition, the transaction would reduce competition in the market for slots at National Airport where the merged carrier would control almost 70% of the slots. A proposed consent decree settling the suit was filed November 12, 2013, requiring US Airways and American to divest slots and gates in key constrained airports across the country to low cost carriers in order to enhance system-

[25] *United States and State of Texas v. Cinemark Holdings, Inc., Rave Holdings, LLC, and Alder Wood Partners, L.P.*, No. 1:13-CV-00727 (D.D.C. filed May 20, 2013).
[26] *United States et al. v. US Airways Group, Inc. and AMR Corporation*, No. 1:13-CV-01236 (D.D.C. filed August 13, 2013).

wide competition in the airline industry and address the competitive harm that would result from the proposed transaction. Specifically, the companies are required to divest or transfer: (i) 104 air carrier slots and related gates and facilities at Washington Reagan National Airport; (ii) 34 slots at New York LaGuardia Airport and related gates and facilities; and (iii) two gates and related facilities at each of five airports: Boston Logan, Chicago O'Hare, Dallas Love Field, Los Angeles International, and Miami International. These divestitures are the largest ever in an airline merger and will allow low cost carriers to fly more direct and connecting flights throughout the country in competition with the legacy carriers. This will result in more choices and more competitive airfares for consumers. The court entered the consent decree on April 25, 2014.

Additionally, during fiscal year 2013, the Division initiated one civil contempt proceeding. On November 14, 2012, the Division filed a petition in the U.S. District Court for the District of Columbia asking the court to find Exelon Corporation in civil contempt for violating the consent decree and related order entered by the court in *United States v. Exelon Corporation and Constellation Energy Group, Inc.*[27] Under the decree, Exelon was required to sell three electricity plants in Maryland Brandon Shores and H.A. Wagner in Anne Arundel County, MD and C.P. Crane in Baltimore County, MD. Exelon was also required to abide by a hold separate stipulation and order that placed restrictions on Exelon's conduct between the time Exelon closed its $7.9 billion acquisition of Constellation and the time it completed the plant divestitures required by the consent decree. The hold separate required Exelon, during this period, to bid certain of its electricity generating plants at or below cost to ensure that Exelon would not be able to raise market prices for electricity. In consenting to entry of the consent decree and hold separate, Exelon specifically agreed to take all steps necessary to comply with its legal obligations. The petition charged that Exelon failed to fulfill its obligations under the decree and related order. In a settlement agreement filed simultaneously with the petition, and approved by the court on November 26, 2012, Exelon agreed to pay $400,000 to settle the alleged violation.

2. *The Federal Trade Commission*

During fiscal year 2013, the Commission brought 23 merger enforcement actions. Those 23 actions include: 16 in which the Commission accepted consent orders for public comment, with all 16 resulting in final orders; one in which the transaction was abandoned and one in which the transaction was restructured as a result of antitrust concerns raised during the investigation; one in which the Commission initiated proceedings to obtain a permanent injunction in federal district court; and four in which the Commission initiated administrative litigation. In one of the four administrative litigation matters, the Commission also sought a preliminary injunction in federal district court to enjoin the acquisition pending resolution of the Commission's administrative litigation.

Described below are the four matters in which the Commission initiated administrative litigation, and the single matter in which the Commission sought to enjoin permanently a consummated acquisition in federal district court.

[27] *See* the HSR Annual Report, Fiscal Year 2012 for a description of this case.

In *Reading Health System/Surgical Institute of Reading*,[28] the Commission issued an administrative complaint challenging, and authorized staff to seek a preliminary injunction in federal district court enjoining, Reading Health Systems' ("RHS'") proposed acquisition of rival surgical services provider Surgical Institute of Reading, L.P. The Commission alleged that the acquisition would have substantially reduced quality and price competition for orthopedic and other surgical services in the Reading, Pennsylvania area, and increased RHS's ability to demand higher reimbursement rates from commercial health plans, causing significant harm to area employers and residents. Shortly after the Commission filed its administrative complaint, the parties abandoned the transaction.

In *Integrated Device Technology/PLX Technology*,[29] the Commission challenged Integrated Device Technology's ("IDT's") proposed acquisition of PLX Technology ("PLX"), IDT's primary competitor. The Commission alleged that the transaction would have created a near-monopoly in the market for PCIe switches, a type of integrated computer circuit, which performs critical connectivity functions in computers and other electronic devices. The Commission also alleged that the acquisition would have eliminated substantial price, quality, and customer service competition between the two firms, leading to higher prices, less innovation, reduced customer service, and lower-quality products for consumers. The Commission issued an administrative complaint challenging, and authorized staff to seek a preliminary injunction in federal district court enjoining, the transaction. Shortly after the Commission filed its administrative complaint, IDT and PLX abandoned the transaction.

In *Pinnacle Entertainment/Ameristar Casinos*,[30] the Commission issued an administrative complaint to challenge, and authorized staff to seek a preliminary injunction in federal district court to enjoin, Pinnacle Entertainment's $2.8 billion acquisition of rival casino operator, Ameristar Casinos. The Commission charged that the proposed transaction would substantially reduce the combined entity's incentive to offer better prices and higher quality amenities and casino services to customers in two geographic markets: the St. Louis, Missouri metropolitan area, and the Lake Charles, Louisiana area. The Commission alleged that in St. Louis, the proposed acquisition would eliminate direct price and non-price competition between Pinnacle's two casinos—Lumière and River City—and Ameristar's St. Charles casino, enabling the merged firm to reduce its promotions and discounts to customers, reduce its investments in amenities, and offer a lower-quality experience without losing a substantial number of customers. In Lake Charles, Ameristar was building Mojito Pointe, a casino and hotel property located adjacent to Pinnacle's existing casino resort, L'Auberge Lake Charles. Ameristar expected to open Mojito Pointe in 2014. The Commission alleged that in Lake Charles, the proposed acquisition would eliminate the significant competitive impact of Ameristar's entry and close competition with Pinnacle, and thus eliminate the merging parties' incentive to offer

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[28] *In the Matter of Reading Health Sys.*, FTC Dkt. No. 9353 (compl. filed Nov. 16, 2012), *available at* http://www.ftc.gov/enforcement/cases-proceedings/121-0155/reading-health-system-surgical-institute-reading-matter.
[29] *In the Matter of Integrated Device Tech.*, FTC Dkt. No. 9354 (compl. filed Dec. 18, 2012), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/01/matter-integrated-device-technology-inc-corporation.
[30] *In the Matter of Pinnacle Entm't*, FTC Dkt. No. 9355 (compl. filed May 28, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/12/pinnacle-entertainment-inc-ameristar-casinos-inc.

promotions, discounts, and better amenities to keep L'Auberge and Mojito Pointe customers from switching to the other's casino. To resolve the litigation and ensure that casino patrons would continue to benefit from competitive pricing and amenities in the St. Louis and Lake Charles areas, the Commission issued a consent order that required Pinnacle to divest its St. Louis-based Lumiére casino and all related assets, as well as all of the assets associated with Ameristar's development and construction of Mojito Pointe casino in Lake Charles.

In *Ardagh Group S.A./Saint-Gobain Containers*,[31] the Commission issued an administrative complaint challenging Ardagh Group's proposed $1.7 billion acquisition of rival glass manufacturer Saint-Gobain Containers. The Commission's complaint alleged that the acquisition would combine two of the three largest U.S. manufacturers of glass beer and spirits containers and result in an effective duopoly, increasing the ease and likelihood of coordination between the two remaining major glass container manufacturers. The Commission also alleged that the acquisition would harm competition by eliminating the head-to-head price and innovation competition that previously existed between Ardagh and Saint-Gobain. In addition to the administrative litigation, FTC staff filed a separate complaint in federal district court, seeking a preliminary injunction to halt the acquisition until the conclusion of the Commission's administrative proceeding and any subsequent appeals. To resolve the litigation, Ardagh agreed to sell six of its nine glass container manufacturing plants in the United States to a Commission-approved buyer.

In *St. Luke's Health System/Saltzer Medical Group*,[32] the Commission and the Idaho Attorney General filed a joint complaint in federal district court challenging Idaho-based St. Luke's Health System's consummated acquisition of Saltzer Medical Group. The Complaint alleged that the acquisition combined the two largest providers of adult primary care physician services in the Nampa, Idaho area, and increased St. Luke's ability and incentive to demand higher reimbursement rates from commercial health plans, thereby leading to higher health care costs for Idaho employers and area consumers. In March 2013, the U.S. District Court for the District of Idaho consolidated the Commission and Idaho Attorney General's joint action with a private action filed by two of St. Luke's rivals who similarly sought to block the acquisition. The 18-day proceeding commenced in September 2013 and ended in November. On January 24, 2014, the federal district court permanently enjoined the acquisition, finding that the combination would likely substantially increase St. Luke's market power over primary care physicians in the Nampa area and thus allow St. Luke's to demand higher rates for health care services, ultimately leading to higher costs for both employers and consumers.

As previously stated, in fiscal year 2013, the Commission also accepted consent agreements and issued proposed orders for public comment in 16 merger matters. The Commission has finalized all 16 of them.

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[31] *In the Matter of Ardagh Group*, FTC Dkt. No. 9356 (compl. filed June 28, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/131-0087/ardagh-group-sa-public-limited-liability-company; *FTC v. Ardagh Group*, Case No. 1:13-cv-01021 (RMC) (D.D.C.), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/11/ardagh-group-sa-compagnie-de-saint-gobain-saint.

[32] *FTC v. St. Luke's Health Sys.*, Case No. 01:12-cv-00560-BLW-REB (D. Idaho) (compl. filed Mar. 12, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/03/st-lukes-health-system-ltd-and-saltzer-medical-group.

In *Universal Health Services/Ascend Health Services*,[33] the Commission challenged Universal Health Services' acquisition of Ascend Health Services. As proposed, the transaction allegedly would have led to a virtual monopoly and harmed competition for the provision of acute inpatient psychiatric services to commercially insured patients in the El Paso, Texas/Santa Theresa, New Mexico area. To resolve these charges, the Commission issued a consent order that required Universal Health to sell an acute inpatient psychiatric facility in the El Paso/Santa Theresa area, thus restoring competition in the local market for acute inpatient psychiatric services.

In *Magnesium Elektron North America*,[34] the Commission challenged Magnesium Elektron North America, Inc.'s 2007 acquisition of rival Revere Graphics Worldwide, Inc. Magnesium Elektron specialized in the manufacture of magnesium products, including photoengraving magnesium plates. Revere also manufactured magnesium photoengraving plates, in addition to zinc, copper, and brass plates. The Commission's complaint alleged that the transaction was an unlawful merger-to-monopoly in the worldwide market for photoengraving magnesium plates, and increased Magnesium Elektron's ability to exercise market power unilaterally in the relevant market. To remedy these competitive concerns and replace the competition lost as a result of the Revere acquisition, the Commission issued a consent order requiring Magnesium Elektron to sell to Universal Engraving, Inc., a manufacturer in an adjacent market, the intellectual property and know-how used to roll and coat magnesium plates for photoengraving applications. The consent order also required Magnesium Elektron to supply Universal with finished magnesium plates and the chemicals used in the photoengraving process, thereby enabling Universal to enter the market immediately and compete while getting its production up and running.

In *Watson Pharmaceuticals/Actavis*,[35] the Commission challenged Watson Pharmaceuticals' $5.9 billion acquisition of rival Actavis. The Commission charged that the acquisition would reduce competition in the markets for 21 current and future generic drugs used to treat a wide range of conditions, including hypertension, diabetes, attention deficit hyperactivity disorder, and certain heart rhythm disorders. These markets were, or were expected to be, concentrated, and Watson and Actavis were, or were expected to be, two of only a few competitors. The consent order required the companies to divest the rights and assets pertaining to 18 drugs, and relinquish the manufacturing and marketing rights to three others, thus restoring competition that would otherwise be lost as a result of the acquisition and resolving the Commission's concerns about the acquisition's likely impact on competition.

In *Corning Incorporated*,[36] the Commission charged that Corning's acquisition of Becton, Dickinson and Company's Discovery Labware Division would have had an

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[33] *In the Matter of Universal Health Servs.*, FTC Dkt. No. C-4372 (final order issued Nov. 27, 2012), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/05/universal-health-services-and-alan-b-miller.

[34] *In the Matter of Magnesium Elektron N.A.*, FTC Dkt. No. C-4381 (final order issued Dec. 21, 2012), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2012/12/magnesium-elektron-north-america-inc.

[35] *In the Matter of Watson Pharm.*, FTC Dkt. No. C-4373 (final order issued Dec. 13, 2012), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2012/12/magnesium-elektron-north-america-inc.

[36] *In the Matter of Corning Inc.*, FTC Dkt. No. C-4380 (final order issued Dec. 20, 2012), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2012/12/corning-incorporated.

anticompetitive impact in the markets for tissue culture treated dishes, multi-well plates, and flasks (together, "TCT cell culture vessels"). TCT culture cell vessels are used by researchers at pharmaceutical and biotechnology companies and at universities in their cell culture research. According to the Commission, the acquisition would have increased Corning's share in each market, and increased its incentive and ability unilaterally to charge higher prices for TCT cell culture vessels. To resolve these concerns and restore competition in the TCT cell culture markets, the Commission issued a consent order that required Corning to provide assets and assistance to enable another life sciences company to manufacture TCT cell culture vessels.

In *Hertz Global Holdings/Dollar Thrifty*,[37] the Commission challenged Hertz Global Holdings' $2.3 billion acquisition of Dollar Thrifty Automotive Group. Both Hertz and Dollar Thrifty provided car rentals to consumers in most major airports in the United States, and were two of four major competitors in the market for airport car rentals. The Commission charged that the acquisition would harm competition for airport car rentals in 72 individual airport locations by enabling the combined Hertz/Dollar Thrifty to increase prices, slow the pace of innovation, and decrease service levels. The Commission further charged that the acquisition would reduce the number of firms that own all of the most competitively significant car rental brands from four to three, increasing the likelihood of coordination among the remaining competitors. To resolve the Commission's concerns and restore competition that would otherwise have been lost as a result of the acquisition, the Commission issued a consent order requiring Hertz to divest its entire Advantage Rent-A-Car business as well as 16 additional on-airport locations to Franchise Services of North America, Inc. ("FSNA") and Macquarie Capital USA Inc. ("Macquarie"). The Commission's consent order also required Hertz to divest 13 additional Dollar Thrifty airport concession agreements and related assets to FSNA/Macquarie. FSNA, through its direct subsidiary Simply Wheelz, operated these assets under the Advantage name. On November 15, 2013, Simply Wheelz filed for Chapter 11 bankruptcy protection and sought to sell Advantage, which it had continued to operate during this process. Following a bankruptcy auction held in December 2013, Catalyst was declared the winning bidder for the Advantage assets. The bankruptcy court approved Catalyst's acquisition of Advantage, subject to Commission approval. Following a public comment period, the Commission approved FSNA's application to sell the Advantage assets to Catalyst on January 30, 2014.

In *Robert Bosch GmbH/SPX Service Solutions*,[38] the Commission accepted a consent order to resolve charges that Bosch's $1.15 billion acquisition of SPX Services Solutions would have been anticompetitive. The Commission alleged that the acquisition, as originally proposed, would have given Bosch a virtual monopoly in the U.S. market for equipment used to recharge automobile air conditioning systems. Under the terms of the consent order, Bosch must divest its air conditioning recycling, recovery, and recharge ("ACRRR") devices business, including all relevant intellectual property and contracts, to automotive manufacturer Mahle Clevite Inc. to restore competition that would otherwise have been lost if the acquisition had proceeded as initially proposed. In addition, the consent order resolves allegations that SPX harmed competition when it reneged on its agreement to license certain standard-essential patents on fair,

[37] *In the Matter of Hertz Global Holdings*, FTC Dkt. No. C-4376 (final order issued July 10, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/07/hertz-global-holdings-inc-matter.
[38] *In the Matter of Robert Bosch GmBH*, FTC Dkt. No. C-4377 (final order issued Apr. 23, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/04/bosch-robert-bosch-gmbh.

reasonable, and nondiscriminatory terms. To that end, Bosch must offer a royalty-free license to those patents to any third-party that wishes to use the patents to make ACRRR devices in the U.S.

In *Tesoro Corporation*,[39] the Commission challenged Tesoro's $335 million acquisition of Chevron Corporation's Northwest Products Pipeline system and associated terminals. The Commission alleged that the acquisition as proposed would have given Tesoro ownership of two of the three refined light petroleum products terminals in the Boise, Idaho area, leading to substantially reduced competition for local terminaling services and increased terminal costs, which likely would have been passed on to consumers. Refined light petroleum products include gasoline, diesel fuel, and jet fuel. To resolve these concerns and preserve competition, the Commission issued a consent order requiring Tesoro to sell a refined light petroleum products terminal in Boise to a Commission-approved acquirer. The consent order also includes a separate order to maintain assets to preserve the Tesoro Boise terminal as a viable, competitive, and ongoing business until the terminal is divested.

In *Oltrin Solutions/JCI Jones Chemicals*,[40] the Commission challenged a non-compete agreement between two producers of bulk sodium hydrochloride bleach, a disinfectant used by municipalities and other entities to treat water. According to the Commission, in March 2010, Oltrin Solutions, LLC agreed to pay JCI Jones Chemicals $5.5 million over four years in exchange for JCI's list of North Carolina bleach customers and an agreement that JCI would not sell bulk bleach in North Carolina or South Carolina for six years. The Commission alleged that the agreement eliminated substantial competition between Oltrin and JCI in the southern Virginia, North Carolina, and South Carolina bulk bleach market; substantially increased market concentration for bulk bleach sales in those areas; and increased Oltrin's ability to raise bulk bleach prices. To facilitate JCI's re-entry into the bulk bleach market and restore the competition lost as a result of the 2010 agreement, the Commission issued a consent order that required Oltrin to, among other things, transfer to JCI customer contracts totaling approximately two million gallons worth of bleach volume; enter into a six-month backup bleach supply agreement with JCI, so that JCI can continue to supply its bleach customers if JCI encounters any unexpected production interruptions; and notify any customers that requested a bid after execution of the non-competition agreement that JCI will be supplying bleach in the relevant area, and ask those customers to add JCI's contact information to any future solicitation bids.

In *Charlotte Pipe/Star Pipe Products*,[41] the Commission accepted a consent order settling charges that Charlotte Pipe and Foundry Company's 2010 acquisition of the cast iron soil pipe ("CISP") business from Star Pipe Products, Ltd. was anticompetitive. In 2010, only two firms—Charlotte Pipe and McWane Inc.—sold 90% of the CISP products in the U.S. CISP products are used to transport wastewater from buildings to municipal sewage systems, to vent plumbing systems, and to transport rainwater to storm drains. According to the Commission, the third-

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[39] *In the Matter of Tesoro Corp.*, FTC Dkt. No. C-4405 (final order issued Aug. 5, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/04/bosch-robert-bosch-gmbh.
[40] *In the Matter of Oltrin Solutions*, FTC Dkt. No. C-4388 (final order issued Mar. 7, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/03/oltrin-solutions-llc-company-jci-jones-chemicals-inc.
[41] *In the Matter of Charlotte Pipe and Foundry*, FTC Dkt. No. C-4403 (final order issued May 9, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/05/charlotte-pipe-and-foundry-company-et-al.

largest CISP seller, Star Products, had entered the U.S. market in 2007 and by 2010, had become a disruptive force or "maverick," competing on price and service to customers' benefit. In July 2010, Charlotte Pipe acquired Star Pipe's CISP business for $19 million. As part of the transaction, the parties allegedly executed a "Confidentiality and Non-Competition Agreement" that prohibited Star Pipe and certain of its employees from competing with Charlotte Pipe in the U.S., Canada, and Mexico for six years. Star Pipe also allegedly agreed to keep the acquisition confidential and inform its customers that it had decided to exit—rather than sell—the CISP business. After the acquisition, Charlotte Pipe destroyed the CISP production equipment that it acquired from Star Pipe. The Commission charged that the transaction, in conjunction with the non-competition agreement, eliminated actual and direct competition between Charlotte Pipe and Star Pipe, substantially increased market concentration, eliminated a maverick firm, and increased Charlotte Pipe's ability to unilaterally exercise market power. The Commission's consent order requires Charlotte Pipe to provide prior notification to the Commission of any acquisition of any entity engaged in the manufacture and sale of CISP products in the U.S., even if the acquisition is not otherwise reportable under the HSR Act, and wait 30 days before closing the transaction. In addition, the consent order prohibits Charlotte Pipe from enforcing the 2010 non-competition agreement against Star Pipe, and requires Charlotte Pipe to inform its customers of the Commission's consent order, the voided confidentiality and non-competition agreement against Star Pipe, and Charlotte Pipe's prior acquisitions of CISP manufacturers.

In *Graco Inc.*,[42] the Commission charged that Graco violated the antitrust laws by acquiring Gusmer Corp. in 2005 and GlasCraft, Inc. in 2008. At the time, Gusmer and GlasCraft were Graco's two closest competitors in the North American market for fast set equipment ("FSE"), which is used by contractors to apply polyurethane and polyuria coatings. FSE manufacturers sell their products almost exclusively through a network of specialized, third-party distributors, which, in turn, sell to end-users. Prior to the acquisitions, distributors had historically carried multiple FSE manufacturers' brands, and Gusmer and GlasCraft competed with Graco as full-line FSE manufacturers. The Commission alleged that Graco's Gusmer and GlasCraft acquisitions virtually eliminated all of Graco's competition and increased Graco's market share to between 90 and 95%, enabling Graco to raise prices and reduce product options and innovation. Additionally, Graco allegedly engaged in certain post-acquisition conduct that heightened barriers to entry and expansion in the North American FSE market. For example, the Commission charged that Graco increased the discount and inventory thresholds it required of distributors, and threatened distributors with retaliation if they agreed to carry rivals' products. According to the Commission's complaint, Graco also sued prospective entrants, such as Polyurethane Machinery Corp. ("PME"), alleging, among other things, breach of contract. Allegedly, the lawsuits effectively prevented some distributors from purchasing PME's FSE due to uncertainty as to the litigation's outcome and how supply might be affected as a result. To resolve these competitive concerns and restore competition lost in the acquisition, the Commission order required Graco to settle the PME litigation and grant PME an irrevocable license to certain Graco patents and intellectual property. The Commission order also prohibited Graco from imposing exclusivity conditions on FSE distributors, and discriminating against distributors that carry or service any rival's FSE.

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[42] *In the Matter of Graco, Inc.*, FTC Dkt. No. C-4399 (final order issued Apr. 17, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/04/graco-inc.

In *Nielsen Holdings/Arbitron Inc.*,[43] the Commission challenged Nielsen's proposed acquisition of Arbitron Inc., alleging that the merger would eliminate future competition between the two firms in the market for national syndicated cross-platform audience measurement services and tend to create a monopoly. Nielsen is a global media measurement and research firm, and the dominant provider of U.S. television audience measurement services. Arbitron also is a media measurement and research firm, and provides audience ratings for radio that are similar to Nielsen's television ratings. Both firms are developing national syndicated cross-platform audience measurement services, which allow audiences to be measured accurately across multiple platforms, such as television and online. The Commission alleged that the elimination of future competition between Nielsen and Arbitron in this market would increase the likelihood that Nielson would exercise market power and cause U.S. advertisers, advertisement agencies, and media programmers to pay higher prices for national syndicated cross-platform audience measurement services. To resolve these concerns, the Commission issued a consent order that required Nielsen to divest assets related to Arbitron's cross-platform audience measurement business to a Commission-approved acquirer and enter related licensing agreements. The Commission approved an application by Nielsen to sell these assets to comScore, Inc. and to enter other arrangements supporting the divestiture.

In *General Electric Company*,[44] the Commission challenged General Electric Company's $4.3 billion acquisition of the aviation business of Avio S.p.A., alleging that the acquisition would substantially lessen competition and give GE the ability and incentive to disrupt the design and certification of an engine component designed by Avio for rival aircraft manufacturer Pratt & Whitney. GE, through its joint venture CFM International, and Pratt & Whitney are the only engine manufacturers for Airbus's A320neo aircraft, and compete head-to-head for A320neo sales. Avio is the sole designer for the accessory gearbox ("AGB") on the Pratt & Whitney PW1100G engine for the Airbus A320neo aircraft. The Commission alleged that GE's acquisition of the Avio aviation business likely would diminish competition in the sale of engines for the A320neo, resulting in higher prices, reduced quality, and engine delivery delays for A320neo customers. To resolve these concerns, the Commission's consent order prohibits GE from interfering with Avio's design and development work on the AGB for the Pratt & Whitney PW1100G engine, and from accessing Pratt & Whitney's proprietary information about the AGB that is shared with Avio. Commission staff worked closely with a variety of international antitrust agencies, including the European Commission, throughout the investigation, and investigated in parallel how the acquisition would change GE's relationships with rival aircraft engine manufacturers.

In *Solera Holdings, Inc.*,[45] the Commission challenged Solera Holdings' 2012 acquisition of rival automotive recycling yard management systems ("YMS") software provider Actual Systems of America, Inc. The Commission charged that the acquisition eliminated direct and substantial competition between Solera and Actual Systems, two of the three leading providers of

[43] *In the Matter of Nielsen Holdings*, FTC File No. 131-0058 (final order issued Feb. 24, 2014), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/09/nielsen-holdings-nv-arbitron-inc-matter.
[44] *In the Matter of General Elec. Co.*, FTC Dkt. No. C-4411 (final order issued Aug. 27, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/08/general-electric-company-matter.
[45] *In the Matter of Solera Holdings*, FTC Dkt. No. C-4415 (final order issued Oct. 22, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/10/solera-holdings-inc.

YMS to the automotive recycling industry. To resolve these concerns and restore competition that was lost as a result of the acquisition, the Commission issued a consent order that required Solera to divest assets related to Actual Systems' U.S. and Canadian YMS business to ASA Holdings, an entity formed by former Actual Systems managers.

In *Actavis/Warner Chilcott*,[46] the Commission challenged Actavis Inc.'s proposed $8.5 billion acquisition of Warner Chilcott plc. The Commission alleged that the acquisition would substantially reduce competition in the U.S. markets for four current and future pharmaceutical products. The four products, which consist of three oral contraceptives and an osteoporosis treatment, are generic Femcon FE; Lo Loestrin 24 FE and its generic equivalents; Lo Loestrin FE and its generic equivalents; and Atelvia and its generic equivalents. According to the Commission, Actavis and Warner Chilcott are the only significant manufacturers of generic Femcon FE, and the proposed acquisition would eliminate current competition between them in the market for this drug. For pharmaceutical products, price generally decreases as the number of competitors increases; thus, the reduction in the number of suppliers likely would have a direct and substantial effect on pricing. In the other three markets, Warner Chilcott sells the branded drugs, but no company sells a generic version of Loestrin 24 FE, Loestrin FE, or Atelvia. The Commission alleged that Actavis was likely to be the first generic supplier to compete with Warner Chilcott's branded versions of these drugs. As a result, the proposed acquisition would likely lead to higher prices for U.S. consumers, because the merged firm would have the ability to delay the entry of Actavis's generic product in each of the three markets. To resolve these concerns, the Commission issued a consent order that required Actavis to sell all rights and assets to the four drugs at issue to Amneal Pharmaceuticals L.L.C. The order also required Actavis to enter into an agreement to supply generic versions of Femcon FE and Lo Loestrin 24 FE to Amneal for two years, after which Amneal may extend the agreement to two more years. Finally, Actavis must relinquish its claim to first-filer marketing exclusivity for generic Lo Loestrin FE and Atelvia to preserve the incentive of the firms currently leading patent litigation against Warner Chilcott related to those products. By relinquishing its first-filer status, the merged firm cannot act to delay the introduction of a generic version of these two products.

In *Honeywell/Intermec*,[47] the Commission challenged Honeywell International, Inc.'s proposed $600 million acquisition of Intermec Inc. Both Honeywell and Intermec designed, manufactured, and sold two-dimensional scan engines, which are hardware components that include a two-dimensional image sensor and translate a barcode into a digital format that computer processors can interpret and analyze. The Commission alleged that Honeywell's acquisition of Intermec would combine two of the three most significant participants in the highly concentrated U.S. two-dimensional scan engine market, and result in an effective duopoly. To remedy these concerns and replace the competition that otherwise would be eliminated by the acquisition, the Commission issued a consent order that required Honeywell to license the Honeywell and Intermec U.S. patents necessary to manufacture two-dimensional scan engines and related devices to Datalogic IPTECH s.r.l., a subsidiary of Datalogic S.p.A.

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[46] *In the Matter of Actavis*, FTC Dkt. No. C-4414 (final order issued Dec. 4, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/12/actavis-inc-warner-chilcott-plc-matter.
[47] *In the Matter of Honeywell Int'l*, FTC Dkt. No. C-4418 (final order issued Nov. 22, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/11/honeywell-international-inc-matter.

In *Mylan/Agila*,[48] the Commission challenged Mylan, Inc.'s proposed $1.85 billion acquisition of Agila Specialties Global Pte. Limited and Agila Specialties Private Limited (collectively, "Agila") from Strides Arcolab Limited, alleging that the acquisition would cause significant anticompetitive harm to U.S. consumers in eleven generic injectable pharmaceutical product markets either by eliminating current or potential competition in concentrated existing markets, or by eliminating potential competition among a limited number of likely competitors in a future market. The eleven injectable products at issue treat a variety of medical concerns, including several types of pediatric cancers, certain autoimmune diseases, severe hypertension, and urinary tract damage caused by a particular chemotherapy drug. According to the Commission, in each of the eleven product markets, Mylan and Agila were two of only a limited number of current or likely future suppliers of the drugs in the U.S., and their combination likely would have caused U.S. consumers to pay significantly higher prices for these products. To remedy these concerns, the Commission issued a consent order that required the divestiture of the following Mylan and Agila/Strides products: (1) Mylan's fluorouracil injection and methotrexate sodium preservative-free injection to Intas Pharmaceuticals Ltd.; (2) Mylan's etomidate injection, ganciclovir injection, meropenem injection, and mycophenolate mofetil injection, as well as Agila/Strides' amiodarone hydrochloride injection and fomepizole injection to JHP Pharmaceuticals, LLC; and (3) Agila/Strides' acetylcysteine injection and mensa injection to Sagent Pharmaceuticals, Inc. Also under the order, Mylan must release all of its rights relating to labetalol hydrochloride injection to Gland Pharma Ltd. The order included several supply and technology provisions to ensure that the approved acquirers can immediately and effectively compete in the marketplace, and thus maintain the competitive environment that existed prior to the acquisition.

In addition to these new merger enforcement actions, the FTC also concluded litigation initiated in prior fiscal years, including cases against Polypore International/Daramic LLC[49] and Phoebe Putney Health System/Palmyra Park Hospital,[50] and continued to pursue litigation initiated in fiscal year 2011 (ProMedica Health System/St. Luke's Hospital).[51] In December 2013, the Commission approved Polypore's application to divest Microporous Products, L.P., a competitor it acquired five years earlier. The case began in February 2008 when Polypore acquired rival battery separator manufacturer Microporous Products, L.P. The Commission issued an administrative complaint challenging the transaction and alleging that the merger led to decreased competition and higher prices in several North American markets for battery separators. After a trial on the merits, the FTC's administrative law judge ruled in February

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[48] *In the Matter of Mylan Inc.*, FTC Dkt. No. C-4413 (final order issued Dec. 12, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/12/mylan-inc-corporation-agila-specialties-global.

[49] *In the Matter of Polypore Int'l*, FTC Dkt. No. 9327 (final order issued Nov. 5, 2010; divestiture application approved Dec. 18, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/12/polypore-international-inc-corporation-matter.

[50] *In the Matter of Phoebe Palmyra Health Sys.*, FTC Dkt. No. 9348 (proposed order announced Aug. 22, 2013), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/08/matter-phoebe-putney-health-system-inc-phoebe-putney.

[51] *In the Matter of ProMedica Health Sys.*, FTC Dkt. No. 9346 (compl. issued Jan. 6, 2011), *available at* http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2012/06/matter-promedica-health-system-inc-corporation.

2010 that the acquisition was illegal and ordered divestiture of the acquired assets. The Commission unanimously upheld the administrative law judge's decision in November 2010, and in July 2012, the U.S. Court of Appeals for the Eleventh Circuit upheld the Commission's final decision and order, thus leading to the divestiture of Microporous.[52] In the Phoebe Putney/Palyra Park Hospital matter, on February 19, 2013, the U.S. Supreme Court ruled in a unanimous opinion that the state action doctrine did not immunize Phoebe Putney's acquisition of its sole rival in Albany, Georgia, Palmyra Park Hospital, from the federal antitrust laws, and remanded the case for further proceedings.[53] In August 2013, the Commission accepted for public comment a consent order that has not been finalized. In April 2014, the U.S. Court of Appeals for the Sixth Circuit upheld the Commission's March 2012 ruling that the ProMedica Health System, Inc.'s consummated acquisition of rival St. Luke's Hospital in Lucas County, Ohio, was anticompetitive and would allow ProMedica to raise the prices of general acute care inpatient hospital services.[54]

ONGOING REASSESSMENT OF THE EFFECTS OF THE PREMERGER NOTIFICATION PROGRAM

The Commission and the Antitrust Division continually review the impact of the premerger notification program on the business community and antitrust enforcement. As indicated in previous annual reports, the HSR program ensures that the antitrust agencies review virtually every relatively large merger and acquisition that affects U.S. consumers prior to consummation. The agencies generally have the opportunity to challenge unlawful transactions before they occur, thus avoiding the problem of constructing effective post-acquisition relief. As a result, the HSR Act is doing what Congress intended—giving the government the opportunity to investigate and challenge those relatively large mergers that are likely to harm consumers *before* injury can arise. Prior to the premerger notification program, businesses could, and often did, consummate transactions that raised significant antitrust concerns before the agencies had an opportunity to consider adequately their competitive effects. This practice forced the agencies to engage in lengthy post-acquisition litigation, during the course of which the transaction's anticompetitive effects continued to harm consumers (and afterwards as well, where the achievement of effective post-acquisition relief was not practicable). Because the premerger notification program requires reporting before consummation, the agencies' ability to obtain timely, effective relief to prevent anticompetitive effects has vastly improved.

The antitrust enforcement agencies regularly examine the premerger notification program's effectiveness and impact, and continually seek ways to speed up and improve the review process and minimize regulatory burdens. Thus, as they have in the past, the agencies will continue their ongoing assessment of the HSR program to increase accessibility, promote transparency, and reduce the burden on the filing parties without compromising the agencies'

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[52] In June 2013, the U.S. Supreme Court denied Polypore's petition for a writ of certiorari.
[53] *FTC v. Actavis, Inc.*, 570 U.S. 756 (2013), *available at* http://www.ftc.gov/system/files/documents/cases/130617actavisopinion.pdf.
[54] *FTC v. ProMedica Health System, Inc.*, No. 12-3583, 2014 U.S. App. LEXIS 7500 (6th Cir. Apr. 22, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140422promedicaopinion_0.pdf.

ability to investigate and interdict proposed transactions that may substantially lessen competition.

LIST OF APPENDICES

Appendix A: Summary of Transactions, Fiscal Years 2004 -2013

Appendix B: Number of Transactions Reported and Filings Received by Month for Fiscal Years 2004- 2013

LIST OF EXHIBITS

Exhibit A: Statistical Tables for Fiscal Year 2013 – Data Profiling Hart-Scott-Rodino Notification Filings and Enforcement Interests

APPENDIX A

SUMMARY OF TRANSACTIONS

FISCAL YEARS 2004 – 2013

APPENDIX A
SUMMARY OF TRANSACTIONS BY FISCAL YEAR

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Transactions Reported	**1,428**	**1,675**	**1,768**	**2,201**	**1,726**	**716**	**1,166**	**1,450**	**1,429**	**1,326**
Filings Received[1]	**2,825**	**3,287**	**3,510**	**4,378**	**3,455**	**1,411**	**2,318**	**2,882**	**2,829**	**2,628**
Adjusted Transactions In Which A Second Request Could Have Been Issued[2]	1,377	1,610	1,746	2,108	1,656	684	1,128	1,414	1,400	1,286
Investigations in Which Second Requests Were Issued	**35**	**50**	**45**	**63**	**41**	**31**	**42**	**55**	**49**	**47**
FTC[3]	20	25	28	31	21	15	20	24	20	25
Percent[4]	1.5%	1.6%	1.6%	1.5%	1.3%	2.2%	1.8%	1.7%	1.4%	1.9%
DOJ[3]	15	25	17	32	20	16	22	31	29	22
Percent[4]	1.1%	1.6%	1.0%	1.5%	1.2%	2.3%	2.0%	2.2%	2.1%	1.7%
Transactions Involving a Request For Early Termination[5]	**1,241**	**1,385**	**1,468**	**1,840**	**1,385**	**575**	**953**	**1,157**	**1,094**	**990**
Granted[5]	943	997	1,098	1,402	1,021	396	704	888	902	797
Not Granted[5]	298	388	370	438	364	179	249	269	192	193

Note: The data for FY 2004 and FY 2005 "Transactions Reported" and for FY 2004 – FY 2007 "Filings Received" reflect corrections to some prior Annual reports to account for a coding error. Additionally, the data for FY 2010 and FY 2011 reflect corrections to some prior annual reports and the DOJ number of investigations in which second requests were issued and the percentage of transactions in which second requests were issued by DOJ.

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1 Usually, two filings are received, one from the acquiring person and one from the acquired person when a transaction is reported. Only one application is received when an acquiring party files for an exemption under Section 7A (c)(6) or (c)(8) of the Clayton Act.

2 These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of Sections 7A (c)(6) and 7A(c)(8) of the Act; (3) transactions which were found to be non-reportable; and (4) transactions withdrawn before the waiting period began. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, e.g., filing one threshold and later filing for a higher threshold, only a single consolidated transaction has been counted because as a practical matter the agencies do not issue more than one Second Request in such a case. These statistics also omit from the total number the transactions reported secondary acquisitions filed pursuant to §801.4 of the Premerger Notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.

3 These statistics are based on the date the Second Request was issued and not the date the investigation was opened.

4 Second Request investigations are a percentage of the total number of adjusted transactions. The total percentage reflected in Figure 2 may not equal the sum of reported component values due to rounding.

5 These statistics are based on the date of the HSR filing and not the date action was taken on the request.

APPENDIX B

NUMBER OF TRANSACTIONS REPORTED

AND

FILINGS RECEIVED BY MONTH

FOR

FISCAL YEARS 2004 - 2013

Appendix B

Table 1. Number of Transactions Reported by Month for Fiscal Years

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
October	93	139	130	201	158	91	66	128	122	127
November	127	160	148	189	191	85	135	217	169	260
December	143	126	137	151	172	37	84	91	95	92
January	85	138	142	143	158	42	62	97	104	78
February	109	99	124	157	119	32	61	81	90	82
March	137	121	150	194	131	42	116	97	111	87
April	127	121	125	156	128	60	92	96	96	77
May	125	171	158	250	150	58	108	142	117	117
June	117	153	172	202	146	51	108	117	142	90
July	123	118	141	219	128	62	94	120	130	91
August	134	170	186	200	126	77	120	164	133	122
September	108	159	155	139	119	79	120	100	120	103
TOTAL	**1,428**	**1,675**	**1,768**	**2,201**	**1,726**	**716**	**1,166**	**1,450**	**1,429**	**1,326**

Note: The data for FY 2004 and FY 2005 "Transactions Reported" reflect corrections to some prior Annual reports to account for a coding error.

Appendix B
Table 2. Number of Filings Received[1] by Month for Fiscal Years

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
October	185	277	261	401	319	185	146	252	242	255
November	254	324	311	376	380	165	242	422	332	511
December	280	238	260	294	343	79	177	193	188	180
January	161	259	279	288	316	77	126	188	203	151
February	207	201	257	317	246	63	116	157	185	169
March	277	239	309	381	242	81	232	195	215	172
April	245	242	270	312	272	119	182	190	193	151
May	258	337	300	481	294	114	216	284	231	228
June	241	297	346	403	293	99	213	231	275	181
July	234	236	255	441	259	121	187	240	269	186
August	270	328	367	396	251	149	238	329	259	240
September	213	309	295	288	240	159	243	201	237	204
TOTAL	**2,825**	**3,287**	**3,510**	**4,378**	**3,455**	**1,411**	**2,318**	**2,882**	**2,829**	**2,628**

Note: The data for FY 2004 – FY 2007 "Filings Received" reflect corrections to some prior Annual reports to account for a coding error.

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person, when the transaction is reported. Only one filing is received when an acquiring person files for a transaction that is exempt under Sections 7A(c)(6) and (c)(8) of the Clayton Act.

EXHIBIT A

STATISTICAL TABLES

FOR

FISCAL YEAR 2013

DATA PROFILING HART-SCOTT-RODINO PREMERGER NOTIFICATION FILINGS AND ENFORCEMENT INTERESTS

TABLE I
FISCAL YEAR 2013[1]
ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M [5]	4	0.3%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
50M - 100M	209	16.3%	17	10	8.1%	4.8%	12.9%	1	3	0.5%	1.4%	1.9%
100M - 150M	262	20.4%	25	6	9.5%	2.3%	11.8%	3	0	1.1%	0.0%	1.1%
150M - 200M	123	9.6%	12	6	9.8%	4.9%	14.6%	3	1	2.4%	0.8%	3.3%
200M - 300M	129	10.0%	11	2	8.5%	1.6%	10.1%	2	1	1.6%	0.8%	2.3%
300M - 500M	166	12.9%	27	12	16.3%	7.2%	23.5%	1	3	0.6%	1.8%	2.4%
500M - 1000M	251	19.5%	23	17	9.2%	6.8%	15.9%	5	7	2.0%	2.8%	4.8%
Over 1000M	142	11.0%	30	19	21.1%	13.4%	34.5%	10	7	7.0%	4.9%	12.0%
ALL TRANSACTIONS	1,286	100.0%	145	72	11.3%	5.6%	16.9%	25	22	1.9%	1.7%	3.7%

TABLE II FISCAL YEAR 2013[1] ACQUISITIONS BY SIZE OF TRANSACTION[2] (CUMULATIVE)													
TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]					
	NUMBER[4]	PERCENT	NUMBER		PERCENTAGE OF TOTAL NUMBER OF CLEARANCES			NUMBER		PERCENTAGE OF TOTAL NUMBER OF SECOND REQUESTS			
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL	
LESS THAN 50M [5]	4	0.3%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%	
LESS THAN 100M	213	16.6%	17	10	7.8%	4.6%	12.4%	1	3	2.1%	6.4%	8.5%	
LESS THAN 150M	475	36.9%	42	16	19.4%	7.4%	26.7%	4	3	8.5%	6.4%	14.9%	
LESS THAN 200M	598	46.5%	54	22	24.9%	10.1%	35.0%	7	4	14.9%	8.5%	23.4%	
LESS THAN 300M	727	56.5%	65	24	30.0%	11.1%	41.0%	9	5	19.1%	10.6%	29.8%	
LESS THAN 500M	893	69.4%	92	36	42.4%	16.6%	59.0%	10	8	21.3%	17.0%	38.3%	
LESS THAN 1000M	1,137	88.4%	115	53	53.0%	24.4%	77.4%	15	15	31.9%	31.9%	63.8%	
ALL TRANSACTIONS	1,286		145	72	66.8%	33.2%	100.0%	25	22	53.2%	46.8%	100.0%	

TABLE III FISCAL YEAR 2013[1] TRANSACTIONS INVOLVING THE GRANTING OF CLEARANCE BY AGENCY												
TRANSACTION RANGE ($MILLIONS)	CLEARANCES GRANTED TO AGENCY			CLEARANCE GRANTED AS A PERCENTAGE OF:								
				TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF CLEARANCES PER AGENCY		TOTAL NUMBER OF CLEARANCES GRANTED			
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL	
Below 50M [5]	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	
50M - 100M	17	10	27	8.1%	4.8%	12.9%	11.7%	13.9%	7.8%	4.6%	12.4%	
100M - 150M	25	6	31	9.5%	2.3%	11.8%	17.2%	8.3%	11.5%	2.8%	14.3%	
150M - 200M	12	6	18	9.8%	4.9%	14.6%	8.3%	8.3%	5.5%	2.8%	8.3%	
200M - 300M	11	2	13	8.5%	1.6%	10.1%	7.6%	2.8%	5.1%	0.9%	6.0%	
300M - 500M	27	12	39	16.3%	7.2%	23.5%	18.6%	16.7%	12.4%	5.5%	18.0%	
500M - 1000M	23	17	40	9.2%	6.8%	15.9%	15.9%	23.6%	10.6%	7.8%	18.4%	
Over 1000M	30	19	49	21.1%	13.4%	34.5%	20.7%	26.4%	13.8%	8.8%	22.6%	
ALL TRANSACTIONS	145	72	217	11.3%	5.6%	16.9%	100.0%	100.0%	66.8%	33.2%	100.0%	

TABLE IV
FISCAL YEAR 2013[1]
TRANSACTIONS IN WHICH SECOND REQUESTS WERE ISSUED

TRANSACTION RANGE ($MILLIONS)	INVESTIGATIONS IN WHICH SECOND REQUEST WERE ISSUED [3]			SECOND REQUESTS ISSUED AS A PERCENTAGE OF:								
				TOTAL NUMBER OF TRANSACTIONS			TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF SECOND REQUEST INVESTIGATIONS		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
Below 50M [5]	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
50M - 100M	1	3	4	0.1%	0.2%	0.3%	0.5%	1.4%	1.9%	2.1%	6.4%	8.5%
100M - 150M	3	0	3	0.2%	0.0%	0.2%	1.1%	0.0%	1.1%	6.4%	0.0%	6.4%
150M - 200M	3	1	4	0.2%	0.1%	0.3%	2.4%	0.8%	3.3%	6.4%	2.1%	8.5%
200M - 300M	2	1	3	0.2%	0.1%	0.2%	1.6%	0.8%	2.3%	4.3%	2.1%	6.4%
300M - 500M	1	3	4	0.1%	0.2%	0.3%	0.6%	1.8%	2.4%	2.1%	6.4%	8.5%
500M - 1000M	5	7	12	0.4%	0.5%	0.9%	2.0%	2.8%	4.8%	10.6%	14.9%	25.5%
Over 1000M	10	7	17	0.8%	0.5%	1.3%	7.0%	4.9%	12.0%	21.3%	14.9%	36.2%
ALL TRANSACTIONS	25	22	47	1.9%	1.7%	3.7%	1.9%	1.7%	3.7%	53.2%	46.8%	100.0%

TABLE V FISCAL YEAR 2013[1] ACQUISITIONS BY REPORTING THRESHOLD												
THRESHOLD[6]	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF THRESHOLD GROUP			NUMBER		PERCENT OF THRESHOLD GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
$50M (as adjusted)	77	6.0%	1	0	1.3%	0.0%	1.3%	0	0	0.0%	0.0%	0.0%
$100M (as adjusted)	97	7.5%	1	3	1.0%	3.1%	4.1%	0	1	0.0%	1.0%	1.0%
$500M (as adjusted)	34	2.6%	2	1	5.9%	2.9%	8.8%	0	0	0.0%	0.0%	0.0%
ASSETS ONLY	459	35.7%	58	27	12.6%	5.9%	18.5%	8	5	1.7%	1.1%	2.8%
25%	3	0.2%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
50%	616	47.9%	83	41	13.5%	6.7%	20.1%	17	16	2.8%	2.6%	5.4%
ALL TRANSACTIONS	1,286	100.0%	145	72	11.3%	5.6%	16.9%	25	22	1.9%	1.7%	3.7%

TABLE VI FISCAL YEAR 2013[1] TRANSACTION BY ASSETS OF ACQUIRING PERSON													
ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]					
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP			
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL	
Below 50M	156	12.1%	4	3	2.6%	1.9%	4.5%	0	0	0.0%	0.0%	0.0%	
50M - 100M	21	1.6%	2	0	9.5%	0.0%	9.5%	0	0	0.0%	0.0%	0.0%	
100M - 150M	28	2.2%	1	0	3.6%	0.0%	3.6%	1	0	3.6%	0.0%	3.6%	
150M - 200M	23	1.8%	1	1	4.3%	4.3%	8.7%	0	0	0.0%	0.0%	0.0%	
200M - 300M	42	3.3%	5	0	11.9%	0.0%	11.9%	0	0	0.0%	0.0%	0.0%	
300M - 500M	61	4.7%	4	2	6.6%	3.3%	9.8%	0	0	0.0%	0.0%	0.0%	
500M - 1000M	129	10.0%	14	4	10.9%	3.1%	14.0%	2	1	1.6%	0.8%	2.3%	
Over 1000M	826	64.2%	114	62	13.8%	7.5%	21.3%	22	21	2.7%	2.5%	5.2%	
ALL TRANSACTIONS	1,286	100.0%	145	72	11.3%	5.6%	16.9%	25	22	1.9%	1.7%	3.7%	

TABLE VII
FISCAL YEAR 2013[1]
TRANSACTION BY SALES OF ACQUIRING PERSON

SALES RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF SALES RANGE GROUP			NUMBER		PERCENT OF SALES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	128	10.0%	4	1	3.1%	0.8%	3.9%	1	0	0.8%	0.0%	0.8%
50M - 100M	34	2.6%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
100M - 150M	22	1.7%	2	1	9.1%	4.5%	13.6%	0	0	0.0%	0.0%	0.0%
150M - 200M	26	2.0%	3	0	11.5%	0.0%	11.5%	0	0	0.0%	0.0%	0.0%
200M - 300M	63	4.9%	4	0	6.3%	0.0%	6.3%	0	0	0.0%	0.0%	0.0%
300M - 500M	88	6.8%	4	3	4.5%	3.4%	8.0%	0	1	0.0%	1.1%	1.1%
500M - 1000M	135	10.5%	13	5	9.6%	3.7%	13.3%	2	0	1.5%	0.0%	1.5%
Over 1000M	700	54.4%	114	60	16.3%	8.6%	24.9%	22	21	3.1%	3.0%	6.1%
Sales Not Available[7]	90	7.0%	1	2	1.1%	2.2%	3.3%	0	0	0.0%	0.0%	0.0%
ALL TRANSACTIONS	1,286	100.0%	145	72	11.3%	5.6%	16.9%	25	22	1.9%	1.7%	3.7%

TABLE VIII
FISCAL YEAR 2013[1]
TRANSACTION BY ASSETS OF ACQUIRED ENTITIES[8]

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	194	15.1%	18	4	9.3%	2.1%	11.3%	0	0	0.0%	0.0%	0.0%
50M - 100M	173	13.5%	16	8	9.2%	4.6%	13.9%	2	2	1.2%	1.2%	2.3%
100M - 150M	119	9.3%	17	3	14.3%	2.5%	16.8%	1	1	0.8%	0.8%	1.7%
150M - 200M	66	5.1%	7	6	10.6%	9.1%	19.7%	1	1	1.5%	1.5%	3.0%
200M - 300M	86	6.7%	12	3	14.0%	3.5%	17.4%	3	1	3.5%	1.2%	4.7%
300M - 500M	114	8.9%	14	12	12.3%	10.5%	22.8%	2	4	1.8%	3.5%	5.3%
500M - 1000M	102	7.9%	11	9	10.8%	8.8%	19.6%	2	2	2.0%	2.0%	3.9%
Over 1000M	265	20.6%	25	18	9.4%	6.8%	16.2%	7	9	2.6%	3.4%	6.0%
Assets Not Available[8]	167	13.0%	25	9	15.0%	5.4%	20.4%	7	2	4.2%	1.2%	5.4%
ALL TRANSACTIONS	1,286	100.0%	145	72	11.3%	5.6%	16.9%	25	22	1.9%	1.7%	3.7%

TABLE IX FISCAL YEAR 2013[1] TRANSACTION BY SALES OF ACQUIRED ENTITIES [9]												
SALES RANGE ($MILLIONS)	**HSR TRANSACTIONS**		**CLEARANCE GRANTED TO FTC OR DOJ**					**SECOND REQUEST INVESTIGATIONS [3]**				
	NUMBER	**PERCENT**	**NUMBER**		**PERCENT OF SALES RANGE GROUP**			**NUMBER**		**PERCENT OF SALES RANGE GROUP**		
			FTC	**DOJ**	**FTC**	**DOJ**	**TOTAL**	**FTC**	**DOJ**	**FTC**	**DOJ**	**TOTAL**
Below 50M	223	17.3%	27	6	12.1%	2.7%	14.8%	3	0	1.3%	0.0%	1.3%
50M - 100M	182	14.2%	18	3	9.9%	1.6%	11.5%	1	2	0.5%	1.1%	1.6%
100M - 150M	138	10.7%	15	7	10.9%	5.1%	15.9%	0	2	0.0%	1.4%	1.4%
150M - 200M	65	5.1%	3	3	4.6%	4.6%	9.2%	0	0	0.0%	0.0%	0.0%
200M - 300M	129	10.0%	19	9	14.7%	7.0%	21.7%	1	1	0.8%	0.8%	1.6%
300M - 500M	124	9.6%	12	8	9.7%	6.5%	16.1%	4	1	3.2%	0.8%	4.0%
500M - 1000M	115	8.9%	11	10	9.6%	8.7%	18.3%	2	5	1.7%	4.3%	6.1%
Over 1000M	253	19.7%	33	14	13.0%	5.5%	18.6%	10	6	4.0%	2.4%	6.3%
Sales not Available [10]	57	4.4%	7	12	12.3%	21.1%	33.3%	4	5	7.0%	8.8%	15.8%
ALL TRANSACTIONS	1,286	100.0%	145	72	11.3%	5.6%	16.9%	25	22	1.9%	1.7%	3.7%

TABLE X FISCAL YEAR 2013[1] INDUSTRY GROUP OF ACQUIRING PERSON											
3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2012[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
000 [13]	Not Available	109	8.5%	1.4%	1	2	3	1	0	1
211	Oil and Gas Extraction	19	1.5%	0.1%	0	0	0	0	0	0
212	Mining (except Oil and Gas)	8	0.6%	0.1%	0	0	0	0	0	0
213	Support Activities for Mining	13	1.0%	0.1%	0	1	1	0	0	0
221	Utilities	26	2.0%	-0.4%	1	1	2	0	0	0
236	Construction of Buildings	1	0.1%	-0.1%	0	0	0	0	0	0
237	Heavy and Civil Engineering Construction	15	1.2%	0.6%	0	0	0	0	0	0
238	Specialty Trade Contractors	5	0.4%	0.3%	0	0	0	0	0	0
311	Food and Kindred Products	37	2.9%	0.9%	4	3	7	0	1	1
312	Beverage and Tobacco Product Manufacturing	4	0.3%	-0.4%	3	0	3	0	0	0
313	Textile Mills	1	0.1%	0.0%	0	0	0	0	0	0
314	Textile Products	4	0.3%	0.3%	2	0	2	0	0	0
315	Apparel Manufacturing	2	0.2%	0.1%	1	0	1	0	0	0
316	Leather and Allied Product Manufacturing	1	0.1%	0.0%	0	0	0	0	0	0
321	Wood Product Manufacturing	7	0.5%	0.4%	0	3	3	0	2	2
322	Paper Manufacturing	8	0.6%	-0.3%	0	1	1	0	0	0
323	Printing and Related Support Actitivies	4	0.3%	0.2%	2	0	2	0	0	0
324	Petroleum and Coal Products Manufacturing	15	1.2%	0.8%	0	0	0	1	0	1
325	Chemical Manufacturing	74	5.8%	-1.0%	32	0	32	3	1	4
326	Plastics and Rubber Manfuacturing	14	1.1%	-0.3%	2	2	4	0	0	0
327	Nonmetallic Mineral Product Manufacturing	6	0.5%	0.0%	1	0	1	1	0	1

TABLE X FISCAL YEAR 2013 [1] INDUSTRY GROUP OF ACQUIRING PERSON										
3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2012 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
331	Primary Metal Manufacturing	15	1.2%	-0.2%	1	3	4	0	0	0
332	Fabricated Metal Product Manufacturing	16	1.2%	0.0%	2	1	3	0	0	0
333	Machinery Manufacturing	31	2.4%	0.2%	0	5	5	0	3	3
334	Computer and Electronic Product Manufacturing	40	3.1%	0.5%	8	1	9	2	0	2
335	Electrical Equipment, Applicance, and Component Manufacturing	7	0.5%	0.1%	1	0	1	0	0	0
336	Transportation Equipment Manufacturing	34	2.6%	-0.3%	4	2	6	2	1	3
337	Furniture and Related Product Manufacturing	5	0.4%	0.4%	2	0	2	1	0	1
339	Miscellaneous Manufacturing	18	1.4%	-0.9%	4	0	4	0	0	0
423	Merchant Wholesalers, Durable Goods	55	4.3%	-0.2%	4	4	8	1	1	2
424	Merchant Wholesales, Nondurable Goods	68	5.3%	0.1%	12	0	12	0	0	0
425	Wholesale Electric Markets and Agent and Brokers	2	0.2%	0.1%	0	0	0	0	0	0
441	Motor Vehicle and Parts Dealers	6	0.5%	0.1%	1	0	1	0	0	0
444	Electronics and Appliance Stores	1	0.1%	0.0%	1	0	1	0	0	0
445	Food and Beverage Stores	5	0.4%	0.0%	3	0	3	1	0	1
446	Health and Personal Care Stores	10	0.8%	0.1%	2	0	2	0	0	0
447	Gasoline Stations	3	0.2%	-0.2%	0	0	0	0	0	0
448	Clothing and Clothing Accessories Stores	10	0.8%	0.7%	1	1	2	0	0	0
451	Sporting Goods, Hobby, Book, and Music Stores	2	0.2%	-0.1%	0	0	0	0	0	0
452	General Merchandise Stores	2	0.2%	0.1%	1	0	1	0	0	0
453	Miscellaneous Store Retailers	5	0.4%	0.2%	1	0	1	1	0	1
454	Nonstore Retailers	6	0.5%	-0.4%	0	0	0	0	0	0

TABLE X FISCAL YEAR 2013 [1] INDUSTRY GROUP OF ACQUIRING PERSON										
3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2012 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
481	Air Transportation	3	0.2%	0.1%	0	3	3	0	2	2
482	Railroad Transportation	2	0.2%	0.2%	1	0	1	0	0	0
483	Water Transportation	5	0.4%	0.1%	0	0	0	0	0	0
484	Truck Transportation	1	0.1%	0.0%	0	1	1	0	0	0
486	Pipeline Transportation	3	0.2%	-0.3%	2	0	2	1	0	1
488	Support Actitivies for Transportation	4	0.3%	-0.1%	0	0	0	0	0	0
511	Publishing Industries (except Internet)	36	2.8%	-0.8%	0	2	2	0	2	2
512	Motion Pictures and Sound Recording Industries	8	0.6%	0.2%	0	1	1	0	1	1
515	Broadcasting (except Internet)	20	1.6%	0.7%	0	5	5	0	2	2
517	Telecommunications	29	2.3%	-0.1%	0	16	16	0	3	3
518	Internet Service Providers, Web Search Portals, and Data Processing Services	4	0.3%	-0.4%	1	1	2	1	0	1
519	Other Information Services	11	0.9%	-0.5%	1	1	2	0	0	0
522	Credit Intermediation and Related Activities	34	2.6%	0.7%	0	0	0	0	0	0
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	135	10.5%	0.0%	1	4	5	0	0	0
524	Insurance Carriers and Related Actitivities	46	3.6%	-0.1%	1	0	1	1	1	2
525	Funds, Trusts, and Other Financial Vehicles	30	2.3%	1.0%	0	0	0	0	0	0
531	Real Estate	12	0.9%	0.4%	1	0	1	0	0	0
532	Rental and Leasing Services	4	0.3%	-0.4%	1	0	1	0	0	0
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	3	0.2%	-0.3%	0	0	0	0	0	0
541	Professional, Scientific, and Technical Services	53	4.1%	-2.0%	8	3	11	2	0	2
551	Management Companies and Enterprises	3	0.2%	0.1%	0	0	0	0	0	0

TABLE X FISCAL YEAR 2013 [1] INDUSTRY GROUP OF ACQUIRING PERSON										
3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2012 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
561	**Administrative and Support Services**	25	1.9%	-0.5%	3	0	3	0	1	1
562	**Waste Management and Remediation Services**	4	0.3%	-0.2%	0	2	2	0	0	0
611	**Educational Services**	7	0.5%	-0.1%	0	0	0	0	0	0
621	**Ambulatory Health Care Services**	15	1.2%	0.1%	5	0	5	0	0	0
622	**Hospitals**	44	3.4%	0.9%	21	3	24	4	1	5
623	**Nursing Care Facilities**	10	0.8%	0.5%	0	0	0	0	0	0
711	**Performing Arts, Spector Sports, and Related Industries**	2	0.2%	0.1%	0	0	0	0	0	0
713	**Amusement, Gambling, and Recreation Industries**	4	0.3%	-0.3%	0	0	0	0	0	0
721	**Accommodation**	1	0.1%	-0.2%	1	0	1	1	0	1
722	**Food Services and Drinking Places**	12	0.9%	-0.5%	0	0	0	0	0	0
811	**Repairs and Maintenance**	1	0.1%	0.0%	0	0	0	0	0	0
812	**Personal and Laundry Services**	1	0.1%	-0.3%	1	0	1	1	0	1
		1,286	100.0%		145	72	217	25	22	47

TABLE XI
FISCAL YEAR 2013[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2012[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
000[1]	Not Available	44	3.4%	-1.3%	6	12	18	1	1	2	0
111	Crop Production	1	0.1%	0.1%	0	0	0	0	0	0	0
211	Oil and Gas Extraction	31	2.4%	0.6%	1	0	1	0	0	0	12
212	Mining (except Oil and Gas)	7	0.5%	0.3%	0	0	0	0	0	0	3
213	Support Activities for Mining	32	2.5%	1.2%	0	0	0	0	0	0	6
221	Utilities	33	2.6%	0.0%	1	1	2	0	0	0	19
237	Heavy and Civil Engineering Construction	14	1.1%	0.3%	0	0	0	0	0	0	5
238	Specialty Trade Contractors	5	0.4%	0.0%	0	0	0	0	0	0	1
311	Food and Kindred Products	29	2.3%	0.3%	4	3	7	0	1	1	14
312	Beverage and Tobacco Product Manufacturing	8	0.6%	-0.2%	4	0	4	0	0	0	3
313	Textile Mills	1	0.1%	0.0%	0	0	0	0	0	0	0
314	Textile Products	1	0.1%	0.0%	0	0	0	0	0	0	0
315	Apparel Manufacturing	1	0.1%	-0.1%	0	0	0	0	0	0	0
321	Wood Product Manufacturing	8	0.6%	0.4%	1	2	3	0	1	1	4
322	Paper Manufacturing	10	0.8%	-0.2%	0	2	2	0	1	1	4
323	Printing and Related Support Actitivies	6	0.5%	0.2%	1	0	1	0	0	0	1
324	Petroleum and Coal Products Manufacturing	4	0.3%	-0.6%	0	0	0	0	0	0	1
325	Chemical Manufacturing	78	6.1%	1.7%	20	0	20	3	1	4	27
326	Plastics and Rubber Manfuacturing	19	1.5%	-0.5%	1	1	2	0	0	0	7
327	Nonmetallic Mineral Product Manufacturing	7	0.5%	-0.1%	2	0	2	1	0	1	2
331	Primary Metal Manufacturing	12	0.9%	-0.2%	1	1	2	0	0	0	4

TABLE XI
FISCAL YEAR 2013[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2012[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
332	Fabricated Metal Product Manufacturing	20	1.6%	0.2%	1	2	3	0	0	0	3
333	Machinery Manufacturing	30	2.3%	-1.1%	1	3	4	1	3	4	11
334	Computer and Electronic Product Manufacturing	49	3.8%	-0.5%	11	3	14	1	1	2	20
335	Electrical Equipment, Applicance, and Component Manufacturing	12	0.9%	0.0%	1	0	1	0	0	0	3
336	Transportation Equipment Manufacturing	37	2.9%	-0.1%	2	2	4	2	1	3	17
337	Furniture and Related Product Manufacturing	7	0.5%	0.4%	2	0	2	1	0	1	3
339	Miscellaneous Manufacturing	30	2.3%	0.7%	7	0	7	0	0	0	7
423	Merchant Wholesalers, Durable Goods	68	5.3%	0.0%	7	4	11	0	0	0	21
424	Merchant Wholesales, Nondurable Goods	58	4.5%	-0.8%	16	0	16	0	0	0	20
441	Motor Vehicle and Parts Dealers	4	0.3%	-0.2%	1	0	1	0	0	0	2
442	Furniture and Home Furnishing Stores	2	0.2%	0.1%	0	0	0	0	0	0	0
443	Miscellaneous Repair Services	1	0.1%	-0.1%	0	0	0	0	0	0	0
444	Electronics and Appliance Stores	1	0.1%	-0.1%	1	0	1	0	0	0	0
445	Food and Beverage Stores	7	0.5%	0.0%	3	0	3	1	0	1	4
446	Health and Personal Care Stores	5	0.4%	-0.2%	1	0	1	0	0	0	0
447	Gasoline Stations	4	0.3%	-0.3%	0	0	0	0	0	0	1
448	Clothing and Clothing Accessories Stores	7	0.5%	0.0%	0	0	0	0	0	0	0
451	Sporting Goods, Hobby, Book, and Music Stores	3	0.2%	0.2%	0	0	0	0	0	0	0
452	General Merchandise Stores	3	0.2%	-0.6%	1	0	1	0	0	0	1
453	Miscellaneous Store Retailers	6	0.5%	0.1%	1	0	1	1	0	1	2
454	Nonstore Retailers	14	1.1%	0.0%	0	0	0	0	0	0	1

TABLE XI
FISCAL YEAR 2013[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2012[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
481	Air Transportation	3	0.2%	0.2%	0	3	3	0	2	2	3
482	Railroad Transportation	1	0.1%	-0.1%	0	0	0	0	0	0	0
483	Water Transportation	3	0.2%	0.1%	0	1	1	0	0	0	2
484	Truck Transportation	4	0.3%	0.1%	0	0	0	0	0	0	0
486	Pipeline Transportation	9	0.7%	-0.4%	1	0	1	2	0	2	2
488	Support Activities for Transportation	11	0.9%	0.4%	0	1	1	0	0	0	2
492	Couriers	2	0.2%	0.1%	0	0	0	0	0	0	0
493	Warehousing and Storage	2	0.2%	0.1%	0	0	0	0	0	0	0
511	Publishing Industries (except Internet)	47	3.7%	-1.1%	0	1	1	0	0	0	15
512	Motion Pictures and Sound Recording Industries	9	0.7%	0.2%	0	2	2	0	1	1	2
514	Information Services and Data Processing Services	1	0.1%	0.1%	0	0	0	0	0	0	0
515	Broadcasting (except Internet)	21	1.6%	0.8%	0	4	4	0	3	3	11
516	Internet Publishing and Broadcasting	1	0.1%	0.0%	0	0	0	0	0	0	0
517	Telecommunications	30	2.3%	0.3%	0	10	10	0	3	3	14
518	Internet Service Providers, Web Search Portals, and Data Processing Services	25	1.9%	-0.5%	2	1	3	1	0	1	2
519	Other Information Services	14	1.1%	-0.5%	1	3	4	1	0	1	4
522	Credit Intermediation and Related Activities	36	2.8%	1.2%	0	0	0	0	0	0	18
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	32	2.5%	0.1%	0	2	2	0	0	0	16
524	Insurance Carriers and Related Actitivities	41	3.2%	0.1%	1	1	2	0	1	1	17
525	Funds, Trusts, and Other Financial Vehicles	2	0.2%	0.1%	0	0	0	0	0	0	1
531	Real Estate	5	0.4%	0.0%	0	0	0	0	0	0	1

TABLE XI
FISCAL YEAR 2013[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2012[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
532	Rental and Leasing Services	13	1.0%	0.4%	1	0	1	0	0	0	2
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	5	0.4%	-0.6%	1	0	1	0	0	0	2
541	Professional, Scientific, and Technical Services	90	7.0%	-0.9%	9	2	11	1	1	2	26
561	Administrative and Support Services	30	2.3%	-0.2%	3	1	4	0	0	0	6
562	Waste Management and Remediation Services	5	0.4%	-0.3%	0	2	2	0	0	0	1
611	Educational Services	7	0.5%	0.3%	0	0	0	0	0	0	1
621	Ambulatory Health Care Services	19	1.5%	-0.1%	5	0	5	2	0	2	5
622	Hospitals	48	3.7%	1.6%	20	2	22	4	1	5	30
623	Nursing Care Facilities	3	0.2%	-0.1%	0	0	0	0	0	0	1
624	Social Assistance	1	0.1%	0.1%	0	0	0	0	0	0	0
711	Performing Arts, Spector Sports, and Related Industries	7	0.5%	0.0%	0	0	0	0	0	0	0
713	Amusement, Gambling, and Recreation Industries	11	0.9%	0.3%	0	0	0	0	0	0	2
721	Accommodation	7	0.5%	0.2%	1	0	1	1	0	1	1
722	Food Services and Drinking Places	10	0.8%	-0.6%	0	0	0	0	0	0	4
811	Repairs and Maintenance	4	0.3%	-0.2%	0	0	0	0	0	0	0
812	Personal and Laundry Services	7	0.5%	0.2%	1	0	1	1	0	1	1
999	Nonclassificable Establishments	1	0.1%	0.1%	1	0	1	0	0	0	0
		1,286	100.0%		145	72	217	25	22	47	421

1 Fiscal year 2013 figures include transactions reported between October 1, 2012 and September 30, 2013.

2 The size of transaction is based on the aggregate total amount of voting securities, non-corporate interests and/or assets held by the acquiring person as a result of the transaction and are taken from the response to Item 2(d)(iii), 2(d)(vii), and 2(d)(ix) of the Notification and Report Form.

3 These statistics are based on the date the Second Request was issued.

4 During fiscal year 2013, 1326 transactions were reported under the HSR Premerger Notification program. The smaller number, 1286, reflects the adjustments to eliminate the following types of transactions: (1) transactions reported under Section 7A(c)(6) and (c)(8) (transactions involving certain regulated industries and financial businesses); (2) transactions deemed non-reportable; (3) incomplete transactions (only one party in each transaction filed a compliant notification); and (4) transactions withdrawn before the waiting period began. The table does not, however, exclude competing offers or multiple HSR transactions resulting from a single business transaction (where there are multiple acquiring persons or acquired persons).

5 The total number of filings under $50M submitted in Fiscal Year 2013 reflects corrective filings.

6 In February 2001, legislation raised the size of transaction from $15 million to $50 million with annual adjustments beginning in February 2005.

7 The category labeled “Sales Not Available” includes newly-formed acquiring persons, foreign acquiring person with no United States revenues, and acquiring persons who had not derived any revenues from their investments at the time of filing.

8 Assets of an acquired entity are not available when the acquired entity’s financial data is consolidated within its ultimate parent.

9 Sales of an acquired entity are taken from responses to Item 4(a) and (b) (SEC documents and annual reports) or item 5 (dollar revenues) of the Premerger Notification and Report Form.

10 This category includes acquisition of newly-formed entities from which no sales were generated, and acquisitions of assets which produced no sales revenues during the prior year to filing the Notification and Report Form.

11 The 3-digit codes are part of the North American Industrial Classification System (NAICS) established by the United States Government North American Industrial Classification System 1997, Executive Office of the President, Office of Management and Budget. The NAICS groups used in this table were determined from responses submitted by the parties to Item 5 of the Premerger Notification and Report Form.

12 This represents the deviation from the fiscal year 2012 percentage.

13 This category includes transactions by newly-formed entities.

14 The intra-industry transactions column identifies the number of acquisitions in which both the acquiring and acquired person derived revenues from the same 3-digit NAICS code.

Federal Trade Commission
Bureau of Competition

Department of Justice
Antitrust Division

Hart-Scott-Rodino Annual Report

Fiscal Year 2021

October 1, 2020 through September 30, 2021

Section 7A of the Clayton Act
Hart-Scott-Rodino Antitrust Improvements Act of 1976
(Forty-Fourth Annual Report)

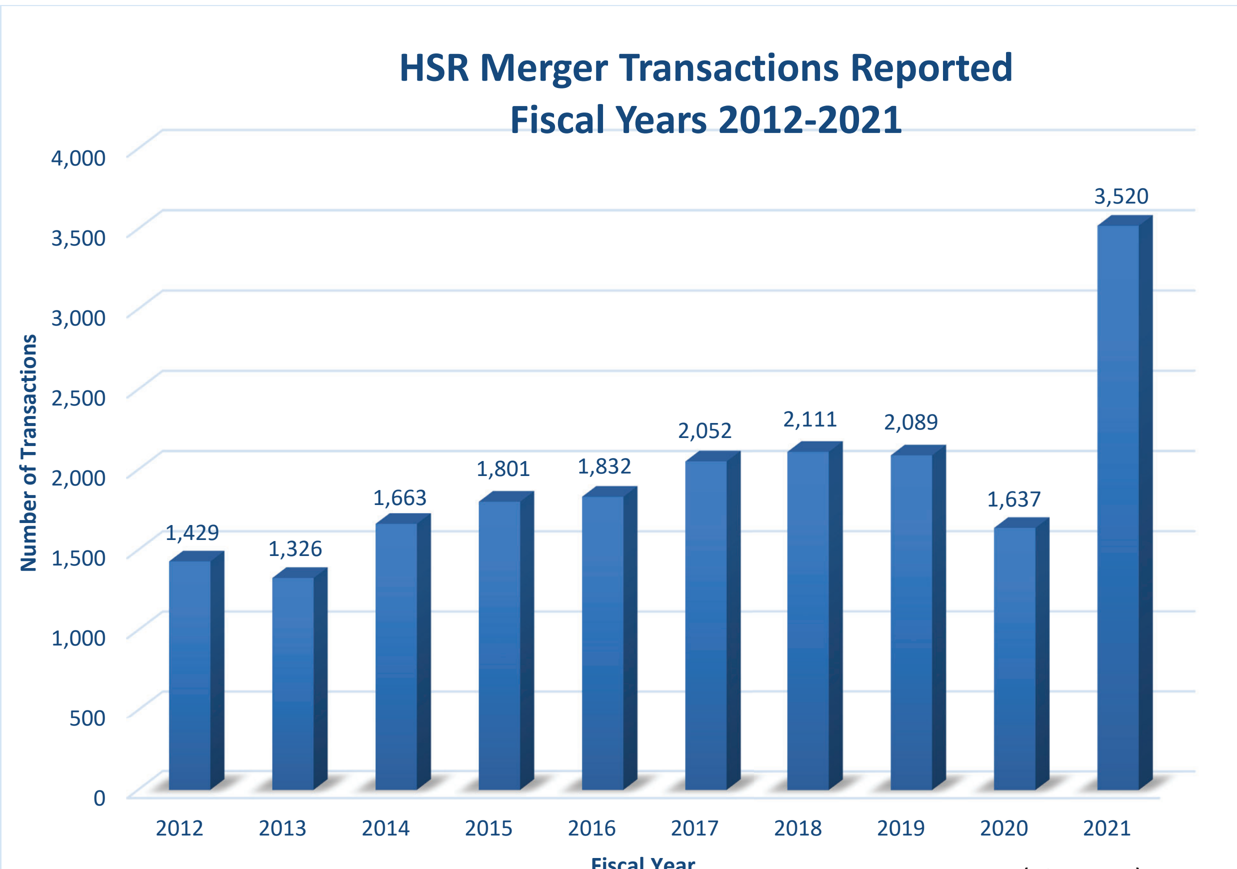
Lina Khan
Chair
Federal Trade Commission

Jonathan Kanter
Assistant Attorney General
Antitrust Division

INTRODUCTION

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435 (HSR Act or the Act), together with Section 13(b) of the Federal Trade Commission Act and Section 15 of the Clayton Act, enables the Federal Trade Commission (FTC or Commission) and the Antitrust Division of the Department of Justice (Antitrust Division or Division) to prevent anticompetitive mergers, acquisitions, and other types of transactions and to prevent interim harm to competition associated with those transactions. The premerger notification program was instrumental in alerting the Commission and the Division to transactions that became the subjects of numerous enforcement actions brought in fiscal year 2021.[1]

The Commission and the Antitrust Division continue their efforts to identify and investigate those mergers, acquisitions, and other types of transactions that raise competition concerns. In fiscal year 2021, a record-breaking 3,520 transactions were reported under the HSR Act, representing about a 115 percent increase from the 1,637 transactions reported in fiscal year 2020. *See* Figure 1 below.



(Figure 1)

[1] Fiscal year 2021 covered the period from October 1, 2020 through September 30, 2021.

During fiscal year 2021, the Commission brought 18 merger enforcement challenges:[2] 5 in which it issued final consent orders after a public comment period; 7 in which the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation; and 6 in which the Commission initiated administrative or federal court litigation. These enforcement actions addressed competition in numerous sectors of the economy, including consumer goods and services, pharmaceuticals, healthcare, high tech and industrial goods, and energy.

In November 2020, the FTC issued an administrative complaint and authorized staff to seek a preliminary injunction to prevent the proposed acquisition of two Tenet-owned Memphis-area hospitals by Methodist Healthcare. The complaint alleged that the acquisition would have likely eliminated competition for a broad range of inpatient hospital services requiring an overnight stay. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

In December 2020, the FTC filed an administrative complaint and authorized staff to seek a preliminary injunction to prevent the merger of Procter & Gamble and Billie. The complaint alleged that the proposed merger would have eliminated the head-to-head competition between Procter & Gamble and Billie for the sale of women's razors. In addition, the proposed merger would likely have eliminated Billie's growing threat to Procter & Gamble's dominant market share as it planned on entering the retail channel. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

Also in December, the Commission filed an administrative complaint and authorized staff to seek a preliminary injunction to block Hackensack Meridian Health's acquisition of a community hospital operated by Englewood Healthcare Foundation in Bergen County, New Jersey. The complaint alleged that the proposed acquisition would substantially lessen competition for inpatient general acute care services in Bergen County. After an evidentiary hearing on the preliminary injunction motion, the district court granted the injunction and the defendant hospitals appealed. In March 2022, the Third Circuit affirmed, finding that the FTC had established the merger was presumptively unlawful and the defendants had failed to rebut the FTC's "strong prima facie case."[3]

The Antitrust Division addressed anticompetitive mergers in a variety of industries, including agriculture, health care, financial services, technology, food, manufacturing, and waste management. During fiscal year 2021, the Division challenged 14 merger transactions: two in which it filed lawsuits in federal court to block the transactions; nine in which it filed a consent decree (i.e. filed a complaint and proposed settlement simultaneously in federal district court); and three in which the transaction was restructured in the face of the Division's competition concerns.

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[2] To avoid double-counting, this Report includes only those merger enforcement actions in which the Commission or the Antitrust Division took its first public action during fiscal year 2021.

[3] *FTC v. Hackensack Meridian Health, Inc. v. Englewood Healthcare Foundation*, No. 21-2603 (3d Cir. Mar. 22, 2022).

In November 2020, the Division challenged Visa Inc.'s proposed acquisition of Plaid Inc., alleging that the proposed acquisition would have violated Section 2 of the Sherman Act as well as Section 7 of the Clayton Act. While Plaid did not compete with Visa at the time, Plaid planned to leverage its existing technology—including connections to 200 million consumer bank accounts in the U.S.—to launch an online debit product that would compete with Visa at a lower cost to merchants. The complaint alleged that Visa sought to unlawfully maintain its monopoly in the market for online debit services by acquiring Plaid to eliminate it as a nascent competitive threat. The parties abandoned their transaction after the complaint was filed.

In June 2021, the Division sued to block Aon plc's proposed acquisition of Willis Towers Watson plc. The complaint alleged that the merger would have combined two of the "Big Three" global insurance broking and consulting firms, threatening to increase prices and reduce quality for businesses seeking to manage their risks and provide their employees with competitive health and retirement benefits. The parties abandoned the transaction before the trial commenced.

The Commission's Premerger Notification Office (PNO) website[4] includes instructions for completing the HSR form, information on the HSR rules, current filing thresholds, filing fee instructions, and procedures for submitting post-consummation filings. The website also provides frequently asked questions regarding HSR filing requirements, the number of HSR transactions submitted each month, and contact information for PNO staff.[5]

BACKGROUND OF THE HSR ACT

Section 201 of the HSR Act amended the Clayton Act by adding a new Section 7A, 15 U.S.C. § 18a. In general, the HSR Act requires that certain proposed acquisitions of voting securities, non-corporate interests, or assets be reported to the Commission and the Antitrust Division prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or bankruptcy sale), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends on the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. Acquisitions valued below a certain threshold, acquisitions involving parties with assets and sales below a certain threshold, and certain classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

The Commission, with the concurrence of the Assistant Attorney General for the Antitrust Division, promulgated final rules implementing the premerger notification program on July 31, 1978. At that time, a comprehensive Statement of Basis and Purpose was published, containing a section-by-section analysis of the rules and an item-by-item analysis of the filing

[4] *See* https://www.ftc.gov/enforcement/premerger-notification-program.

[5] Resource materials are available on the PNO website; in addition, PNO staff is always available to help HSR practitioners comply with HSR notification requirements.

form.[6] The program became effective on September 5, 1978. The Commission, with the concurrence of the Assistant Attorney General, has amended the rules and the filing form on many occasions over the years to improve the program's effectiveness and to lessen the burden of complying with the rules, while ensuring that the agencies get all the information they need to analyze the underlying transaction.[7]

The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with the opportunity to identify and review potentially anticompetitive mergers and acquisitions before they are consummated. The premerger notification program, with its filing and waiting period requirements, facilitates this goal.

If either reviewing agency determines during the waiting period that further inquiry is necessary, the reviewing agency is authorized by Section 7A(e) of the Clayton Act to issue a request for additional information and documentary material (Second Request).[8] The Second Request extends the waiting period for a specified period of time (usually 30 days, but 10 days in the case of a cash tender offer or bankruptcy sale) after all parties have complied with the Second Request (or, in the case of a tender offer or bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may substantially lessen competition, the agency may seek an injunction in federal district court to prohibit consummation of the transaction. The Commission also may challenge the transaction in administrative litigation.

A STATISTICAL PROFILE OF THE PREMERGER NOTIFICATION PROGRAM

The appendices to this Report provide a statistical summary of the operation of the premerger notification program. Appendix A shows, for the ten-year period covering fiscal years 2012-2021, the number of transactions reported; the number of filings received; the number of merger investigations in which Second Requests were issued; and the number of transactions in which requests for early termination of the waiting period were received, granted, and not granted.[9] Appendix A also shows the number of transactions in which Second Requests could have been issued, as well as the percentage of transactions in which Second Requests were issued. Appendix B provides a month-by-month comparison of the number of transactions reported and the number of filings received for fiscal years 2012 through 2021.

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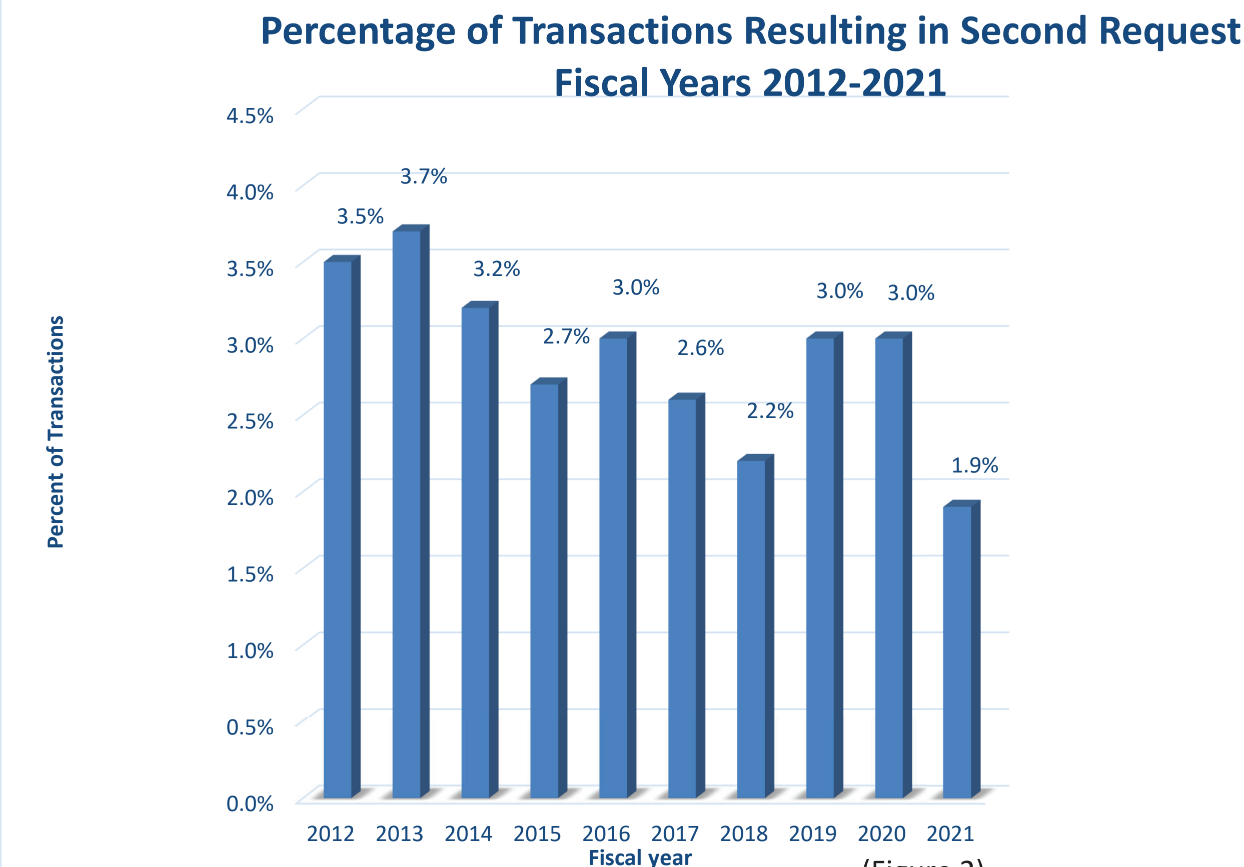
[6] 43 Fed. Reg. 33450 (July 31, 1978).
[7] *See* https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-and-formal-interpretations/statements-basis-purpose.
[8] 15 U.S.C. §18a(e)(1)(a) ("The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period)…require the submission of additional information or documentary material relevant to the proposed acquisition").
[9] The term "transaction," as used in Appendices A and B and Exhibit A to this Report, does not refer only to individual mergers or acquisitions. A particular merger, joint venture, or acquisition may be structured such that it involves more than one filing that must be made under the HSR Act.

The statistics set out in these appendices show that the number of transactions reported in fiscal year 2021 increased 115 percent from the number of transactions reported in fiscal year 2020. In fiscal year 2021, 3,520 transactions were reported, while 1,637 were reported in fiscal year 2020.[10] Of the 3,520 reported transactions, Second Requests could have been issued in 3,413 of them. The statistics in Appendix A also show that the number of merger investigations in which Second Requests were issued in fiscal year 2021 increased from the previous year. Second Requests were issued in 65 merger investigations in fiscal year 2021 (42 issued by the FTC and 23 issued by the Antitrust Division), while Second Requests were issued in 48 merger investigations in fiscal year 2020 (23 issued by the FTC and 25 issued by the Antitrust Division). This is the largest number of Second Requests issued by the Agencies in twenty years. *See* Figure 2 below. With additional resources, the FTC and Antitrust Division likely would have issued a much greater number of second requests, given the historic increase in the absolute number of transactions.



(Figure 2)

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[10] This Report, like previous Reports, also includes annual data on "adjusted transactions in which a Second Request could have been issued" (adjusted transactions). *See* Appendix A & Appendix A n.2 (explaining calculation of that data). There were 3,413 adjusted transactions in fiscal year 2021, and the data presented in the Tables and the percentages discussed in the text of this Report (*e.g.*, percentage of transactions resulting in Second Requests) are based on this figure.

The statistics in Appendix A show that early termination of the waiting period is requested in the majority of transactions. In fiscal year 2021, early termination was requested in 62.2 percent (2,124) of the adjusted transactions reported. In fiscal year 2020, early termination was requested in 71.7 percent (1,133) of the transactions reported. The percentage of requests granted out of the total requested decreased from 76.0 percent in fiscal year 2020 to 19.6 percent in fiscal year 2021, due to a suspension of the granting of early termination in February 2021, except in situations where merging parties entered into a consent order or the parties resolved the investigating agency's concerns prior to fully complying with a Second Request.[11]

The tables (Tables I through XI) in Exhibit A contain information regarding the agencies' enforcement activities for transactions reported in fiscal year 2021. The tables provide, for example, various characteristics of transactions, the number and percentage of transactions in which one antitrust agency granted the other clearance to commence an investigation, and the number of merger investigations in which either agency issued Second Requests. Table III of Exhibit A shows that in fiscal year 2021, the agencies received clearance to conduct an initial investigation in 7.9 percent of the total number of transactions reported. The tables also provide the number of transactions based on the dollar value of transactions reported and the reporting threshold indicated in the notification report. In fiscal year 2021, the aggregate dollar value of reported transactions was $3.04 trillion.[12]

Tables X and XI provide the number of transactions by industry group in which the acquiring person or the acquired entity derived the most revenue. Figure 3 illustrates the percentage of adjusted transactions within industry groups for fiscal year 2021 based on the acquired entity's operations.[13]

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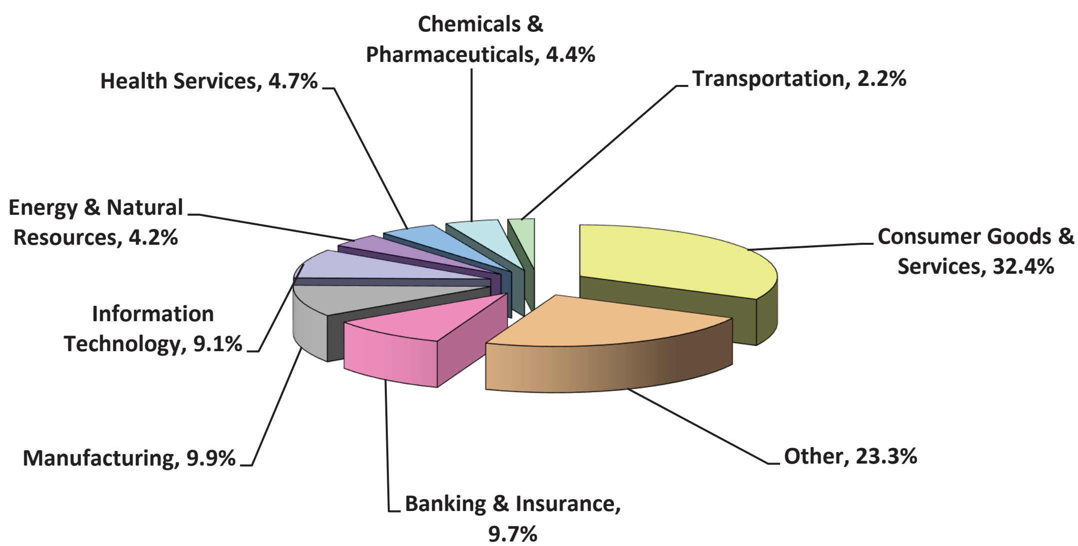
[11] *See* https://www.ftc.gov/enforcement/competition-matters/2021/03/hsr-early-termination-after-second-request-issues.

[12] The information on the value of reported adjusted transactions for fiscal year 2021 is drawn from a database maintained by the Premerger Notification Office.

[13] The category designated as "Other" consists of industry segments that include construction, educational services, performing arts, recreation, and other non-classifiable businesses.

Percentage of Transactions By Industry Group of Acquired Entity



(Figure 3)

DEVELOPMENTS WITHIN THE PREMERGER PROGRAM

1. Threshold Adjustments

The 2000 amendments to the HSR Act require the Commission to publish adjustments to the Act's jurisdictional and filing fee thresholds in the Federal Register annually, for each fiscal year beginning on September 30, 2004, based on the change in the gross national product, in accordance with Section 8(a)(5) of the Clayton Act. The Commission amended the rules in 2005 to provide a method for future adjustments as required by the 2000 amendments, and to reflect the revised thresholds contained in the rules. The Commission usually publishes the revised thresholds annually in January, and they become effective 30 days after publication.

On February 2, 2021, the Commission published a notice[14] to reflect adjustment of the reporting thresholds as required by the 2000 amendments[15] to Section 7A of the Clayton Act, 15 U.S.C. § 18a. The revised thresholds, including a decrease in the size of transaction threshold from $94 million to $92 million, became effective March 4, 2021. The thresholds are calculated based on the prior year's GNP. This decrease in 2021 reflected the economic slowdown due to the pandemic. A reduction in the thresholds is unusual. The last time the reporting thresholds dropped was in 2009 due to the recession of 2008.

2. Compliance

The Commission and the Antitrust Division continued to monitor compliance with the premerger notification program's filing and waiting period requirements and initiated a number of investigations in fiscal year 2021. The agencies use several methods to oversee compliance, including monitoring news outlets and industry publications for transactions that may not have been reported in accordance with the HSR Act's requirements. Industry sources, such as competitors, customers, and suppliers, interested members of the public, and, in certain cases, the parties themselves, also provide the agencies with information about transactions and possible violations of the Act's requirements.

Under Section 7A(g)(1) of the Act, any person that fails to comply with the Act's notification and waiting period requirements is liable for a civil penalty of up to $46,517 for each day the violation continues.[16] The antitrust agencies examine the circumstances of each

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[14] 86 Fed. Reg. 7870 (Feb. 2, 2021).

[15] 15 U.S.C. §18a(a). *See* Pub. L. No. 106-553, 114 Stat. 2762.

[16] Dollar amounts specified in civil monetary penalty provisions within the Commission's jurisdiction are adjusted for inflation in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-7 (Nov. 2, 2015). The adjustments have included an increase in the maximum civil penalty from $10,000 to $11,000 for each day during which a person is in violation of Section 7A(g)(1) (61 Fed. Reg. 54548 (Oct. 21, 1996), corrected at 61 Fed. Reg. 55840 (Oct. 29, 1996)), to $16,000 effective February 10, 2009 (74 Fed. Reg. 857 (Jan. 9, 2009)), to $40,000 effective August 1, 2016 (81 Fed. Reg. 42476 (June 30, 2016)), to $43,792 effective Jan. 13, 2021 (86 Fed. Reg. 2880 (Jan. 13, 2021)) and to $46,517 effective January 10, 2022, (87 Fed. Reg. 1070 (Jan. 10, 2022).

violation to determine whether to seek penalties. During fiscal year 2021, 41 post-consummation "corrective" filings were received, and the agencies brought one enforcement action, resulting in more than $600,000 in civil penalties.

In *United States v. Richard D. Fairbank*,[17] the complaint alleged that Mr. Fairbank, the CEO of Capital One Financial Corporation, violated the HSR Act by failing to file for an acquisition of additional voting securities of Capital One Financial when his holdings crossed the relevant threshold. Mr. Fairbank had previously failed to file HSR Forms for acquisitions of Capital One Financial voting securities as part of his compensation package. Under the terms of a negotiated settlement, Mr. Fairbank will pay a $637,950 civil penalty. On December 15, 2021, the court entered the final judgment.

MERGER ENFORCEMENT ACTIVITY[18]

The Department of Justice

During fiscal year 2021, the Antitrust Division challenged 14 merger transactions that it concluded may have substantially lessened competition or tended to create a monopoly if allowed to proceed as proposed. In two of these challenges, the Antitrust Division filed a complaint in the U.S. district court and the parties abandoned the proposed transactions. Three challenges were resolved after the parties restructured the proposed transactions in the face of the Division's competitive concerns. The Division also accepted consent decrees to resolve nine other matters.

In *United States v. Visa Inc. and Plaid Inc.*,[19] the Division filed suit to block Visa Inc.'s $5.3 billion proposed acquisition of Plaid Inc. The complaint alleged that Visa is a monopolist in online debit services and sought to protect its monopoly by acquiring Plaid, a nascent competitor developing a disruptive and innovative, lower-cost option for online debit payments. The complaint also alleged that the acquisition, if allowed to proceed, likely would have enabled Visa to raise prices, increase barriers to entry, and reduce quality, service, choice and innovation in the online debit market. On January 12, 2021, Visa and Plaid terminated their merger agreement and abandoned the proposed acquisition.

In *United States v. Aon plc and Willis Towers Watson plc*,[20] the Division filed a lawsuit to enjoin Aon plc (Aon) from acquiring Willis Towers Watson plc. (Willis). The complaint alleged that the proposed acquisition would have combined two of the three largest insurance brokers in the world. The complaint further alleged that combination would have eliminated

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[17] *United States v. Richard D. Fairbank,* No. 1:21-cv-02325 (D.D.C. filed on Sept. 2, 2021), https://www.ftc.gov/enforcement/cases-proceedings/2010065/richard-d-fairbank-us-v.

[18] The cases listed in this section were not necessarily reportable under the premerger notification program. Given the confidentiality of information obtained pursuant to the Act, it would be inappropriate to identify the cases initiated under the program except in those instances in which that information has already been disclosed.

[19] *United States v. Visa Inc. and Plaid Inc.*, 3:20-cv-07810 (N.D. Cal. filed Nov. 5, 2020).

[20] *United States v. Aon plc and Willis Towers Watson plc*, No. 1:21-cv-01633 (D.D.C. filed June 16, 2021).

substantial head-to-head competition between Aon and Willis resulting in higher prices and less innovation in five relevant product markets (1) property, casualty, and financial risk broking for large customers; (2) health benefits broking for large customers; (3) actuarial services for large single-employer defined benefit pension plans; (4) the operation of private multicarrier retiree exchanges; and (5) reinsurance broking. On July 26, 2021, Aon and Willis abandoned the proposed acquisition.

The Division accepted for public comment and finalized consent decrees in the following nine merger matters.

In *United States v. Liberty Latin America Ltd., Liberty Communications of Puerto Rico LLC, and AT&T Inc.*,[21] the Division challenged the proposed acquisition of AT&T Inc.'s (AT&T) wireless and wireline telecommunications operations in Puerto Rico and U.S. Virgin Islands by Liberty Latin America Ltd. (Liberty). A proposed final judgment, filed concurrently with the complaint on October 23, 2020, required Liberty to divest fiber network assets and customer accounts in Puerto Rico. The court entered the final judgment on February 3, 2021.

In *United States, State of Florida, State of Illinois, State of Minnesota, Commonwealth of Pennsylvania and State of Wisconsin v. Waste Management, Inc. and Advanced Disposal Services, Inc.*,[22] the Division along with the attorneys general of Florida, Illinois, Minnesota, Pennsylvania, and Wisconsin, challenged the proposed acquisition of Advanced Disposal Services, Inc. (ADI) by Waste Management, Inc. (WMI). Under the terms of a proposed final judgment filed simultaneously with the complaint on October 23, 2020, the parties agreed to divest specified commercial waste collection and municipal solid waste disposal assets in ten different states to GFL Environmental Inc., or an alternative acquirer acceptable to the United States. The court entered the final judgment on May 3, 2021.

In *United States v. Intuit Inc. and Credit Karma, Inc.*,[23] the Division challenged Intuit Inc.'s proposed acquisition of Credit Karma, Inc. The Division filed a complaint and proposed final judgment on November 25, 2020. The decree required Intuit to divest its CKT business to Square, Inc. or an alternative acquirer acceptable to the United States. The court entered the final judgment on August 2, 2021.

In *United States and State of New Hampshire v. Harvard Pilgrim Health Care, Inc. and Health Plan Holdings, Inc.*,[24] the Division and the State of New Hampshire challenged the proposed merger of Harvard Pilgrim Health Care and Health Plan Holdings (f/k/a Tuffs Health Plan). On December 14, 2020, a proposed final judgment was filed simultaneously with the

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[21] *United States v. Liberty Latin America Ltd., Liberty Commc'ns of Puerto Rico LLC, and AT&T Inc.*, No. 1:20-cv-03064 (D.D.C. filed Oct. 23, 2020).
[22] *United States, State of Florida, State of Illinois, State of Minnesota, Commonwealth of Pennsylvania and State of Wisconsin v. Waste Mgmt., Inc. and Advanced Disposal Servs., Inc.*, No. 1:20-cv-03063 (D.D.C. filed Oct. 23, 2020).
[23] *United States v. Intuit Inc. and Credit Karma, Inc.*, No. 1:20-cv-03441 (D.D.C filed Nov. 25, 2020).
[24] *United States and State of New Hampshire v. Harvard Pilgrim Health Care, Inc. and Health Plan Holdings, Inc.*, No. 1:20-cv-01183 (D. N.H. filed Dec. 14, 2020).

complaint. The terms of the settlement required the parties to divest Health Plan Holdings' New Hampshire subsidiary, Tufts Health Freedom Plans, Inc. to UnitedHealth Group, Inc. or an alternative acquirer acceptable to the United States. The court entered the final judgment on March 22, 2021.

In *United States and State of Alabama v. Republic Services, Inc. and Santek Waste Services, LLC*,[25] the Division along with the State of Alabama challenged the proposed acquisition of Santek Waste Services, LLC (Santek) by Republic Services, Inc. (Republic). A proposed final judgment, filed simultaneously with the complaint on March 31, 2021, required the parties to divest specified commercial waste collection and municipal solid waste disposal assets in five different states. The court entered the final judgment on July 1, 2021.

In *United States v. Stone Canyon Indus. Holdings LLC, SCIH Salt Holdings Inc., K+S Aktiengesellschaft and Morton Salt, Inc.*,[26] the Division challenged the acquisition of K+S Aktiengesellschaft (K+S) Operating Unit Salt Americas business, a bundle of several subsidiaries, including Morton Salt, Inc. (Morton), by Stone Canyon Industry Holdings LLC (Stone Canyon) and its portfolio company SCIH Salt Holdings Inc. (SCIH). On April 19, 2021, the Division filed a complaint and proposed final judgement requiring Stone Canyon and SCIH to divest US Salt, which comprised their entire evaporated salt business. The court entered the final judgment on August 10, 2021.

In *United States v. Zen-Noh Grain Corp. and Bunge North America, Inc.*,[27] the Division challenged the proposed acquisition of 35 operating and 13 idled U.S. grain elevators in nine states from Bunge North America, Inc. (Bunge) by Zen-Noh Grain Corp. (Zen-Noh). A proposed final judgment was filed simultaneously with the complaint on June 1, 2021. Pursuant to the terms of the settlement, Zen-Noh agreed to divest nine grain elevators in nine geographic areas located in five states along the Mississippi River and its tributaries.

In *United States v. Eaton Corp. plc and Danfoss A/S*,[28] the Division challenged the proposed acquisition of Eaton Corporation plc's (Eaton) hydraulics business by Danfoss A/S (Danfoss). A proposed final judgment, filed concurrently with the complaint on July 14, 2021, required the parties to divest assets from both Danfoss's and Eaton's orbital motor and hydraulic steering unit manufacturing businesses. The court entered the final judgment on October 26, 2021.

In *United States v. Gray Television, Inc. and Quincy Media, Inc.*,[29] the Division challenged Gray Television, Inc.'s proposed acquisition of Quincy Media, Inc. A proposed final judgment

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[25] *United States and State of Alabama v. Republic Servs., Inc. and Santek Waste Servs., LLC*, No. 1:21-cv-00883 (D.D.C. filed Mar. 31, 2021).
[26] *United States v. Stone Canyon Indus. Holdings LLC, SCIH Salt Holdings Inc., K+S Aktiengesellschaft and Morton Salt, Inc.*, No. 1:21-cv-01067 (filed Apr. 19, 2021).
[27] *United States v. Zen-Noh Grain Corp. and Bunge North America, Inc.*, No. 1:21-cv-01482 (filed June 1, 2021).
[28] *United States v. Eaton Corp. plc and Danfoss A/S*, No. 1:21-cv-01880 (D.D.C. July 14, 2021).
[29] *United States v. Gray Television, Inc. and Quincy Media, Inc.*, No. 1:21-cv-02041 (July 28, 2021).

was filed simultaneously with the complaint on July 28, 2021. The terms of the final judgment required the parties to divest certain broadcast television stations and related assets to acquirers approved by the United States. The court entered the final judgment on October 25, 2021.

The Federal Trade Commission

During fiscal year 2021, the Commission challenged 18 mergers that may have substantially lessened competition or tended to create a monopoly if allowed to proceed as proposed. In six cases, the Commission initiated administrative or federal court litigation, and seven mergers were abandoned after the Commission raised concerns about their potential for eliminating beneficial competition. The Commission also accepted consent orders that require divestitures and other strong relief in five merger cases.

In *Methodist/Tenet St. Francis*,[30] the Commission filed an administrative complaint challenging Methodist Le Bonheur's $350 million proposed acquisition of two Memphis-area hospitals, known as St. Francis, owned by Tenet Healthcare. The Commission also authorized staff to seek a preliminary injunction in federal court to maintain the status quo pending the outcome of the administrative trial. The complaint alleged that the proposed merger would likely harm competition in the Memphis area for a broad range of inpatient medical and surgical services that require an overnight hospital stay. The proposed merger would have eliminated the competitive pressure that has driven quality improvements and lowered hospital rates in Memphis. Only one other major hospital system, Baptist Memorial, would meaningfully constrain the combined health system. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

In *CoStar/RentPath*,[31] the Commission filed an administrative complaint challenging CoStar's $587.5 million proposed acquisition of RentPath. The Commission also authorized staff to seek a preliminary injunction in federal court to maintain the status quo pending the outcome of the administrative trial. CoStar and RentPath operate websites that match prospective renters with available apartments. The complaint alleged that the proposed merger would likely increase concentration in the already concentrated markets for internet listing services for apartments in 49 metropolitan areas across the United States. The proposed merger would have eliminated the aggressive head-to-head competition that has kept advertising rates low while offering consumers a convenient tool for finding apartments. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

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[30] *In the Matter of Methodist Le Bonheur Healthcare and Tenet Healthcare Corporation*, FTC Dkt. C-9396 (complaint filed on Nov. 12, 2020), https://www.ftc.gov/enforcement/cases-proceedings/191-0189/methodist-le-bonheur-healthcare-matter.

[31] *In the Matter of CoStar Group, Inc. and RentPath Holdings, Inc.,* FTC Dkt. C-9398 (complaint filed on Nov. 30, 2020), https://www.ftc.gov/enforcement/cases-proceedings/201-0061/costar-group-rentpath-holdings-matter.

In *Hackensack/Englewood*,[32] the Commission filed an administrative complaint challenging Hackensack Meridian Health's proposed acquisition of Englewood Healthcare Foundation, two leading providers of inpatient general acute care hospital services in Bergen County, New Jersey. The Commission also authorized staff to seek a preliminary injunction in federal court. The complaint alleged that the proposed merger would likely harm competition because Hackensack and Englewood had a history of competing against each other to improve quality and services. The combination would eliminate this competition and leave insurers with few alternatives for inpatient general acute care services. On June 2, 2021, the United States District Court for the District of New Jersey granted the preliminary injunction. The parties appealed this decision to the Third Circuit Court of Appeals. On March 22, 2022, the Third Circuit affirmed the District Court's decision, and shortly afterwards the parties abandoned the transaction.

In *Procter & Gamble/Billie*,[33] the Commission filed an administrative complaint challenging P&G's proposed acquisition of Billie, a direct-to-consumer company that began selling women's razors and body care products in November 2017. The Commission also authorized staff to seek a preliminary injunction in federal court. The complaint alleged that the proposed merger would allow P&G, the market-leading supplier of both women's and men's wet shave razors, to buy Billie, a newer but expanding maker of women's razors, to eliminate a growing competitive threat that would result in more choices and better pricing for consumers. The proposed merger would have also halted Billie's anticipated expansion into brick-and-mortar retail stores. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

In *Illumina/Grail*,[34] the Commission filed an administrative complaint and authorized staff to seek a preliminary injunction challenging Illumina's $7.1 billion proposed acquisition of Grail, a maker of non-invasive, early detection liquid biopsy that screens for multiple types of cancer using DNA sequencing. Illumina was the only provider of DNA sequencing that is a viable option for these multi-cancer early detection (MCED) tests. The complaint alleged that the proposed merger would likely harm innovation in the market for MCED tests. The federal district court entered a stipulated TRO and protective order on April 1, 2021. Defendants filed a motion to transfer the matter to the Southern District of California, which the court granted on April 20, 2021. The same day, the EC announced that it had accepted requests from member states that the parties could not implement the transaction before notifying and obtaining clearance from the Commission. As a result, staff withdrew the TRO and PI court complaint. The administrative trial began on August 24, 2021, and concluded on September 24, 2021. Closing arguments took place on June 8, 2022.

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[32] *In the Matter of Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation,* FTC Dkt. C-9399 (complaint filed on Dec. 3, 2020), https://www.ftc.gov/enforcement/cases-proceedings/2010044/hackensack-meridian-health-inc-englewood-healthcare-foundation.

[33] *In the Matter of The Procter & Gamble Company and Billie, Inc.*, FTC Dkt. C-9400 (complaint filed on Dec. 8, 2020), https://www.ftc.gov/enforcement/cases-proceedings/2010042/procter-gamble-co-billie-inc-matter.

[34] *In the Matter of Illumina, Inc. and Grail, Inc.,* FTC Dkt. C-9401 (complaint filed on March 30, 2021), https://www.ftc.gov/enforcement/cases-proceedings/201-0144/illumina-inc-grail-inc-matter.

In *Heidelberg/Keystone*,[35] the Commission challenged Heidelberg's Lehigh Cement Company's $151 million acquisition of Keystone Cement Company. The Commission also authorized staff to seek a preliminary injunction in federal court. The complaint alleged the proposed merger would likely harm competition in the market for the key ingredient used to make concrete. Cement is an essential ingredient of concrete and there are no reasonable substitutes. Lehigh owned and operated multiple facilities that sold concrete in direct competition with Keystone, including two plants located within 40 miles of Keystone's Bath, Pennsylvania plant. The combined firm would have controlled more than 50 percent of cement sales with two other competitors accounting for most of the other sales. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

The Commission also accepted for public comment and finalized consent orders in the following five merger matters.

In *Stryker/Wright*,[36] the Commission challenged Stryker's $4 billion proposed acquisition of Wright. The Commission's complaint alleged the proposed merger would likely harm competition for the sale of total ankle replacements and finger joint implants. According to the complaint, Stryker and Wright were close competitors and this competition led to improved products, better service, and lower prices for these products. The proposed merger would have eliminated this competition and would have allowed the combined company to exercise market power unilaterally. To remedy these concerns, the Commission issued a consent order requiring the parties to divest all the assets associated with Stryker's total ankle replacements and finger joint implants to DJO Global. Following a public comment period, the Commission approved the final order on December 11, 2020.

In *Pfizer/Mylan*,[37] the Commission challenged Pfizer's $900 million proposed combination with Mylan. The transaction contemplated that Pfizer would spin off its Upjohn division (Pfizer's generic business) and combine it with Mylan to form a new company called Viatris. According to the complaint, the proposed transaction would likely harm competition in seven generic drug markets and future competition in three generic drug markets. To remedy these concerns, the Commission issued a consent order requiring the parties to divest rights and assets in these seven generic drug markets and requires prior Commission approval before Upjohn, Mylan, or Viatris may gain an interest in or exercise control over any third party's rights in the three future generic drug markets. Following a public comment period, the Commission approved the final order on January 25, 2021.

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[35] *In the Matter of Heidelberg Cement AG, et. al.,* FTC Dkt. C-9402 (complaint filed on May 20, 2021), https://www.ftc.gov/enforcement/cases-proceedings/2010006/heidelbergcement-ag-et-al-matter.
[36] *In the Matter of Stryker Corporation, and Wright Medical Group N.V.,* FTC Dkt. C-4728 (final order issued on Dec. 11, 2020), https://www.ftc.gov/enforcement/cases-proceedings/201-0014/stryker-wright-medical-matter.
[37] *In the Matter of Pfizer, Inc. et. al.,* FTC Dkt. C-4727 (final order issued on Jan. 25, 2021), https://www.ftc.gov/enforcement/cases-proceedings/191-0182/pfizermylan-matter.

In *E. & J. Gallo/Constellation Brands*,[38] the Commission challenged Gallo's $1.4 billion proposed acquisition of certain assets of Constellation Brands. According to the complaint, the proposed transaction would have eliminated head-to-head competition for six types of wine and spirits products. To remedy these concerns, the Commission issued a consent order requiring Gallo to divest several product lines and remove others from its asset purchase agreement with Constellation. Following a public comment period, the Commission approved the final order on April 4, 2021.

In *Casey's/Bucky's*,[39] the Commission challenged Casey's $580 million proposed acquisition of Bucky's. According to the complaint, the proposed merger would likely harm competition for the retail sale of gasoline in seven local markets in Nebraska and Iowa. The merger would have also eliminated the retail sale of diesel fuel in four of these markets. To remedy these concerns, the Commission required the parties to divest six retail fuel outlets, three Casey's locations and three Bucky's outlets, to Western Oil. Following a public comment period, the Commission approved the final order on June 8, 2021.

In *Seven & i/Marathon*,[40] the Commission challenged 7-Eleven's $21 billion proposed acquisition of Marathon's Speedway Markets. According to the complaint, the proposed merger would likely harm competition for the retail sale of fuel in 292 local markets across twenty states. To remedy these concerns, the Commission issued a consent order requiring that 7-Eleven and Marathon divest 124 retail fuel outlets to Anabi Oil, 106 outlets to CrossAmerica, and 62 outlets to Jackson Food Stores. The order also prohibits 7-Eleven from enforcing any non-compete agreements to any franchisees or employees working at or doing business with the divested assets. Following a public comment period, the Commission approved the final order on November 8, 2021.

* * *

Prior to the HSR Act, businesses could, and often did, consummate transactions that raised significant antitrust concerns before the agencies had an opportunity to review them. This practice forced the agencies to engage in lengthy post-acquisition litigation, during the course of which the transaction's anticompetitive effects continued to harm competition; furthermore, if effective post-acquisition relief was not practicable, the harm continued indefinitely.

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38 *In the Matter of E. & J. Gallo Winery and Constellation Brands, Inc.,* FTC Dkt. C-4730 (final order issued on April 4, 2021), https://www.ftc.gov/enforcement/cases-proceedings/191-0110/e-j-gallo-wineryconstellation-brands-matter.

39 *In the Matter of Casey's General Stores, Inc. and Buck's Intermediate Holdings, LLC,* FTC Dkt. C-4742 (final order issued on June 8, 2021), https://www.ftc.gov/system/files/documents/cases/2110028c4742caseyscomplaint.pdf.

40 *In the Matter of Seven & I Holdings and Marathon Petroleum Corporation*, FTC Dkt. C-4748 (final order issued on Nov. 8, 2021), https://www.ftc.gov/enforcement/cases-proceedings/201-0108/seven-i-holdings-co-ltd-matter.

In the face of an unprecedented merger wave this past year and incredible resource constraints, all staff of the Commission and the Department of Justice, including the FTC's Premerger Notification Office, are to be commended for their diligent and dedicated efforts to identify and investigate mergers and acquisitions that may substantially lessen competition and to pursue law enforcement before injury can arise. The Commission and the Antitrust Division salute the tireless work of their excellent staffs in protecting the American public from unlawful mergers and acquisitions.

The Commission and the Antitrust Division regularly examine the premerger notification program's effectiveness and continually seek ways to increase accessibility, promote transparency, and improve the review process to reduce the burden on the filing parties without compromising each agency's ability to investigate and challenge proposed transactions that may substantially lessen competition or tend to create a monopoly.

LIST OF APPENDICES

Appendix A: Summary of Transactions, Fiscal Years 2012 - 2021

Appendix B: Number of Transactions Reported and Filings Received by Month for Fiscal Years 2012 - 2021

LIST OF EXHIBITS

Exhibit A: Statistical Tables for Fiscal Year 2021 – Data Profiling Hart-Scott-Rodino Notification Filings and Enforcement Interests

APPENDIX A

SUMMARY OF TRANSACTIONS

FISCAL YEARS 2012 – 2021

APPENDIX A
SUMMARY OF TRANSACTIONS BY FISCAL YEAR

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Transactions Reported	**1,429**	**1,326**	**1,663**	**1,801**	**1,832**	**2,052**	**2,111**	**2,089**	**1,637**	**3,520**
Filings Received[1]	**2,829**	**2,628**	**3,307**	**3,585**	**3,674**	**4,083**	**4,188**	**4,142**	**3,249**	**7,002**
Adjusted Transactions In Which A Second Request Could Have Been Issued[2]	1,400	1,286	1,618	1,754	1,772	1,992	2,028	2,030	1,580	3,413
Investigations in Which Second Requests Were Issued	**49**	**47**	**51**	**47**	**54**	**51**	**45**	**61**	**48**	**65**
FTC[3]	20	25	30	20	25	33	26	30	23	42
Percent[4]	1.4%	1.9%	1.9%	1.1%	1.4%	1.7%	1.3%	1.5%	1.5%	1.2%
DOJ[3]	29	22	21	27	29	18	19	31	25	23
Percent[4]	2.1%	1.7%	1.3%	1.5%	1.6%	0.9%	0.9%	1.5%	1.6%	0.7%
Transactions Involving a Request For Early Termination[5]	**1,094**	**990**	**1,274**	**1,366**	**1,374**	**1,552**	**1,500**	**1,507**	**1,133**	**2,124**
Granted[5]	902	797	1,020	1,086	1,102	1,220	1,170	1,107	861	417
Not Granted[5]	192	193	254	280	272	332	330	400	272	1707

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person when a transaction is reported. Only one application is received when an acquiring party files for an exemption under Section 7A (c)(6) or (c)(8) of the Clayton Act.

[2] These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of Sections 7A (c)(6) and 7A(c)(8) of the Act; (3) transactions which were found to be non-reportable; and (4) transactions withdrawn before the waiting period began. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, e.g., filing one threshold and later filing for a higher threshold, only a single consolidated transaction has been counted because as a practical matter the agencies do not issue more than one Second Request in such a case. These statistics also omit from the total number the transactions reported secondary acquisitions filed pursuant to §801.4 of the Premerger Notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.

[3] These statistics are based on the date the Second Request was issued and not the date the investigation was opened.

[4] Second Request investigations are a percentage of the total number of adjusted transactions. The total percentage reflected in Figure 2 may not equal the sum of reported component values due to rounding.

[5] These statistics are based on the date of the HSR filing and not the date action was taken on the request.

APPENDIX B

NUMBER OF TRANSACTIONS REPORTED AND

FILINGS RECEIVED BY MONTH

FOR

FISCAL YEARS 2012 - 2021

Appendix B

Table 1. Number of Transactions Reported by Month for Fiscal Years

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
October	122	127	124	144	168	163	174	211	151	202
November	169	260	159	157	243	215	207	254	206	400
December	95	92	108	122	157	148	160	157	164	204
January	104	78	125	118	117	153	170	150	154	210
February	90	82	114	140	127	153	141	145	138	278
March	111	87	100	128	125	146	178	156	136	322
April	96	77	140	131	129	150	140	163	72	261
May	117	117	157	152	168	209	222	191	57	299
June	142	90	150	155	150	191	177	161	117	299
July	130	91	162	170	140	146	180	170	110	329
August	133	122	151	216	166	219	223	173	170	353
September	120	103	173	168	142	159	139	158	162	363
TOTAL	**1,429**	**1,326**	**1,663**	**1,801**	**1,832**	**2,052**	**2,111**	**2,089**	**1,637**	**3,520**

Appendix B
Table 2. Number of Filings Received[1] by Month for Fiscal Years

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
October	242	255	247	289	345	329	336	421	298	454
November	332	511	325	322	483	416	417	505	413	825
December	188	180	211	239	314	297	319	308	329	364
January	203	151	244	244	236	307	316	287	309	399
February	185	169	236	257	249	298	304	295	269	564
March	215	172	195	252	265	302	338	308	270	616
April	193	151	271	265	249	290	285	335	145	524
May	231	228	315	305	331	402	424	365	137	623
June	275	181	304	322	304	388	365	349	212	573
July	269	186	323	327	284	291	364	306	208	659
August	259	240	292	425	339	446	433	358	336	717
September	237	204	344	338	275	317	287	305	323	684
TOTAL	**2,829**	**2,628**	**3,307**	**3,585**	**3,674**	**4,083**	**4,188**	**4,142**	**3,249**	**7,002**

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person, when the transaction is reported. Only one filing is received when an acquiring person files for a transaction that is exempt under Sections 7A(c)(6) and (c)(8) of the Clayton Act.

EXHIBIT A

STATISTICAL TABLES

FOR

FISCAL YEAR 2021

DATA PROFILING HART-SCOTT-RODINO PREMERGER NOTIFICATION FILINGS AND ENFORCEMENT INTERESTS

TABLE I
FISCAL YEAR 2021[1]
ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	48	1.4%	0	1	0.0%	2.1%	2.1%	0	0	0.0%	0.0%	0.0%
100M - 150M	433	12.7%	19	5	4.4%	1.2%	5.5%	4	1	0.9%	0.2%	1.2%
150M - 200M	538	15.8%	13	13	2.4%	2.4%	4.8%	1	2	0.2%	0.4%	0.6%
200M - 300M	373	10.9%	17	8	4.6%	2.1%	6.7%	2	2	0.5%	0.5%	1.1%
300M - 500M	458	13.4%	23	12	5.0%	2.6%	7.6%	6	2	1.3%	0.4%	1.7%
500M - 1000M	985	28.9%	45	29	4.6%	2.9%	7.5%	13	5	1.3%	0.5%	1.8%
Over 1000M	578	16.9%	47	38	8.1%	6.6%	14.7%	16	11	2.8%	1.9%	4.7%
ALL TRANSACTIONS	3,413	100.0%	164	106	4.8%	3.1%	7.9%	42	23	1.2%	0.7%	1.9%

TABLE II FISCAL YEAR 2021[1] ACQUISITIONS BY SIZE OF TRANSACTION[2] (CUMULATIVE)												
TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENTAGE OF TOTAL NUMBER OF CLEARANCES			NUMBER		PERCENTAGE OF TOTAL NUMBER OF SECOND REQUESTS		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 50M [5]	0	0.0%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
LESS THAN 100M	48	1.4%	0	1	0.0%	0.4%	0.4%	0	0	0.0%	0.0%	0.0%
LESS THAN 150M	481	14.1%	19	6	7.0%	2.2%	9.3%	4	1	6.2%	1.5%	7.7%
LESS THAN 200M	1,019	29.9%	32	19	11.9%	7.0%	18.9%	5	3	7.7%	4.6%	12.3%
LESS THAN 300M	1,392	40.8%	49	27	18.1%	10.0%	28.1%	7	5	10.8%	7.7%	18.5%
LESS THAN 500M	1,850	54.2%	72	39	26.7%	14.4%	41.1%	13	7	20.0%	10.8%	30.8%
LESS THAN 1000M	2,815	82.5%	116	67	43.0%	24.8%	67.8%	26	12	40.0%	18.5%	58.5%
ALL TRANSACTIONS	3,413		164	106	60.7%	39.3%	100.0%	42	23	64.6%	35.4%	100.0%

TABLE III
FISCAL YEAR 2021[1]
TRANSACTIONS INVOLVING THE GRANTING OF CLEARANCE BY AGENCY

TRANSACTION RANGE ($MILLIONS)	CLEARANCES GRANTED TO AGENCY			CLEARANCE GRANTED AS A PERCENTAGE OF:							
				TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF CLEARANCES PER AGENCY		TOTAL NUMBER OF CLEARANCES GRANTED		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	0	1	1	0.0%	2.1%	2.1%	0.0%	0.9%	0.0%	0.4%	0.4%
100M - 150M	19	5	24	4.4%	1.2%	5.5%	11.6%	4.7%	7.0%	1.9%	8.9%
150M - 200M	13	13	26	2.4%	2.4%	4.8%	7.9%	12.3%	4.8%	4.8%	9.6%
200M - 300M	17	8	25	4.6%	2.1%	6.7%	10.4%	7.5%	6.3%	3.0%	9.3%
300M - 500M	23	12	35	5.0%	2.6%	7.6%	14.0%	11.3%	8.5%	4.4%	13.0%
500M - 1000M	45	29	74	4.6%	2.9%	7.5%	27.4%	27.4%	16.7%	10.7%	27.4%
Over 1000M	47	38	85	8.1%	6.6%	14.7%	28.7%	35.8%	17.4%	14.1%	31.5%
ALL TRANSACTIONS	164	106	270	4.8%	3.1%	7.9%	100.0%	100.0%	60.7%	39.3%	100.0%

TABLE IV FISCAL YEAR 2021[1] TRANSACTIONS IN WHICH SECOND REQUESTS WERE ISSUED												
TRANSACTION RANGE ($MILLIONS)	INVESTIGATIONS IN WHICH A SECOND REQUEST WAS ISSUED [3]			SECOND REQUESTS ISSUED AS A PERCENTAGE OF:								
				TOTAL NUMBER OF TRANSACTIONS			TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF SECOND REQUEST INVESTIGATIONS		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
50M - 100M	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
100M - 150M	4	1	5	0.1%	0.0%	0.1%	0.9%	0.2%	1.2%	6.2%	1.5%	7.7%
150M - 200M	1	2	3	0.0%	0.1%	0.1%	0.2%	0.4%	0.6%	1.5%	3.1%	4.6%
200M - 300M	2	2	4	0.1%	0.1%	0.1%	0.5%	0.5%	1.1%	3.1%	3.1%	6.2%
300M - 500M	6	2	8	0.2%	0.1%	0.2%	1.3%	0.4%	1.7%	9.2%	3.1%	12.3%
500M - 1000M	13	5	18	0.4%	0.1%	0.5%	1.3%	0.5%	1.8%	20.0%	7.7%	27.7%
Over 1000M	16	11	27	0.5%	0.3%	0.8%	2.8%	1.9%	4.7%	24.6%	16.9%	41.5%
ALL TRANSACTIONS	42	23	65	1.2%	0.7%	1.9%	1.2%	0.7%	1.9%	64.6%	35.4%	100.0%

TABLE V FISCAL YEAR 2021[1] ACQUISITIONS BY REPORTING THRESHOLD												
THRESHOLD[6]	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF THRESHOLD GROUP			NUMBER		PERCENT OF THRESHOLD GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
$50M (as adjusted)	230	6.7%	2	3	0.9%	1.3%	2.2%	0	0	0.0%	0.0%	0.0%
$100M (as adjusted)	332	9.7%	7	9	2.1%	2.7%	4.8%	0	0	0.0%	0.0%	0.0%
$500M (as adjusted)	77	2.3%	0	2	0.0%	2.6%	2.6%	1	0	1.3%	0.0%	1.3%
25%	22	0.6%	1	1	4.5%	4.5%	9.1%	0	0	0.0%	0.0%	0.0%
50%	1515	44.4%	81	58	5.3%	3.8%	9.2%	22	16	1.5%	1.1%	2.5%
ASSETS ONLY	287	8.4%	29	6	10.1%	2.1%	12.2%	8	4	2.8%	1.4%	4.2%
100M	1	0.0%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
N/A	1	0.0%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
NCI	948	27.8%	44	27	4.6%	2.8%	7.5%	11	3	1.2%	0.3%	1.5%
ALL TRANSACTIONS	3,413	100.0%	164	106	4.8%	3.1%	7.9%	42	23	1.2%	0.7%	1.9%

TABLE VI FISCAL YEAR 2021[1] TRANSACTION BY ASSETS OF ACQUIRING PERSON													
ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]					
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP			
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL	
Below 50M	567	16.6%	8	6	1.4%	1.1%	2.5%	0	0	0.0%	0.0%	0.0%	
50M - 100M	44	1.3%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%	
100M - 150M	55	1.6%	1	3	1.8%	5.5%	7.3%	0	0	0.0%	0.0%	0.0%	
150M - 200M	266	7.8%	4	3	1.5%	1.1%	2.6%	0	1	0.0%	0.4%	0.4%	
200M - 300M	165	4.8%	7	2	4.2%	1.2%	5.5%	1	2	0.6%	1.2%	1.8%	
300M - 500M	259	7.6%	7	7	2.7%	2.7%	5.4%	1	2	0.4%	0.8%	1.2%	
500M - 1000M	315	9.2%	8	9	2.5%	2.9%	5.4%	1	0	0.3%	0.0%	0.3%	
Over 1000M	1,742	51.0%	129	76	7.4%	4.4%	11.8%	39	18	2.2%	1.0%	3.3%	
ALL TRANSACTIONS	3,413	100.0%	164	106	4.8%	3.1%	7.9%	42	23	1.2%	0.7%	1.9%	

TABLE VII FISCAL YEAR 2021[1] TRANSACTION BY SALES OF ACQUIRING PERSON												
SALES RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF SALES RANGE GROUP			NUMBER		PERCENT OF SALES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	307	9.0%	4	3	1.3%	1.0%	2.3%	0	0	0.0%	0.0%	0.0%
50M - 100M	142	4.2%	2	4	1.4%	2.8%	4.2%	0	0	0.0%	0.0%	0.0%
100M - 150M	114	3.3%	6	1	5.3%	0.9%	6.1%	0	0	0.0%	0.0%	0.0%
150M - 200M	89	2.6%	0	3	0.0%	3.4%	3.4%	0	1	0.0%	1.1%	1.1%
200M - 300M	146	4.3%	5	5	3.4%	3.4%	6.8%	1	1	0.7%	0.7%	1.4%
300M - 500M	217	6.4%	5	7	2.3%	3.2%	5.5%	0	2	0.0%	0.9%	0.9%
500M - 1000M	302	8.8%	15	8	5.0%	2.6%	7.6%	2	2	0.7%	0.7%	1.3%
Over 1000M	1433	42.0%	121	70	8.4%	4.9%	13.3%	39	17	2.7%	1.2%	3.9%
Sales Not Available[7]	663	19.4%	6	5	0.9%	0.8%	1.7%	0	0	0.0%	0.0%	0.0%
ALL TRANSACTIONS	3,413	100.0%	164	106	4.8%	3.1%	7.9%	42	23	1.2%	0.7%	1.9%

TABLE VIII
FISCAL YEAR 2021[1]
TRANSACTION BY ASSETS OF ACQUIRED ENTITIES[8]

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	674	19.7%	23	13	3.4%	1.9%	5.3%	5	1	0.7%	0.1%	0.9%
50M - 100M	484	14.2%	15	10	3.1%	2.1%	5.2%	2	2	0.4%	0.4%	0.8%
100M - 150M	284	8.3%	9	8	3.2%	2.8%	6.0%	4	0	1.4%	0.0%	1.4%
150M - 200M	183	5.4%	10	1	5.5%	0.5%	6.0%	1	1	0.5%	0.5%	1.1%
200M - 300M	274	8.0%	14	2	5.1%	0.7%	5.8%	4	0	1.5%	0.0%	1.5%
300M - 500M	241	7.1%	18	10	7.5%	4.1%	11.6%	2	3	0.8%	1.2%	2.1%
500M - 1000M	287	8.4%	20	6	7.0%	2.1%	9.1%	5	1	1.7%	0.3%	2.1%
Over 1000M	652	19.1%	33	40	5.1%	6.1%	11.2%	13	12	2.0%	1.8%	3.8%
Assets Not Available[8]	334	9.8%	22	16	6.6%	4.8%	11.4%	6	3	1.8%	0.9%	2.7%
ALL TRANSACTIONS	3,413	100.0%	164	106	4.8%	3.1%	7.9%	42	23	1.2%	0.7%	1.9%

TABLE IX FISCAL YEAR 2021[1] TRANSACTION BY SALES OF ACQUIRED ENTITIES[9]												
SALES RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF SALES RANGE GROUP			NUMBER		PERCENT OF SALES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	771	22.6%	31	11	4.0%	1.4%	5.4%	2	1	0.3%	0.1%	0.4%
50M - 100M	566	16.6%	25	10	4.4%	1.8%	6.2%	5	1	0.9%	0.2%	1.1%
100M - 150M	371	10.9%	12	11	3.2%	3.0%	6.2%	2	3	0.5%	0.8%	1.3%
150M - 200M	190	5.6%	8	7	4.2%	3.7%	7.9%	2	1	1.1%	0.5%	1.6%
200M - 300M	271	7.9%	9	10	3.3%	3.7%	7.0%	2	1	0.7%	0.4%	1.1%
300M - 500M	299	8.8%	8	11	2.7%	3.7%	6.4%	2	2	0.7%	0.7%	1.3%
500M - 1000M	285	8.4%	19	9	6.7%	3.2%	9.8%	9	4	3.2%	1.4%	4.6%
Over 1000M	506	14.8%	33	35	6.5%	6.9%	13.4%	13	10	2.6%	2.0%	4.5%
Sales not Available[10]	154	4.5%	19	2	12.3%	1.3%	13.6%	5	0	3.2%	0.0%	3.2%
ALL TRANSACTIONS	3,413	100.0%	164	106	4.8%	3.1%	7.9%	42	23	1.2%	0.7%	1.9%

TABLE X FISCAL YEAR 2021 [1] INDUSTRY GROUP OF ACQUIRING PERSON										
3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2020 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
[13]		2	0.1%	0.1%	0	0	0	0	0	0
000 [13]	Not Available	652	19.1%	7.4%	6	5	11	0	0	0
111	Crop Production	3	0.1%	-0.1%	0	0	0	0	0	0
112	Animal Production	2	0.1%	0.0%	1	0	1	0	0	0
211	Oil and Gas Extraction	26	0.8%	-0.5%	1	0	1	1	0	1
212	Mining (except Oil and Gas)	6	0.2%	0.1%	0	1	1	0	0	0
213	Support Activities for Mining	4	0.1%	-0.5%	0	0	0	0	0	0
221	Utilities	39	1.1%	-0.9%	0	1	1	0	0	0
236	Construction of Buildings	9	0.3%	0.3%	0	0	0	0	0	0
237	Heavy and Civil Engineering Construction	23	0.7%	0.2%	0	0	0	0	0	0
238	Specialty Trade Contractors	27	0.8%	0.3%	0	0	0	0	0	0
311	Food and Kindred Products	44	1.3%	-1.4%	3	4	7	0	2	2
312	Beverage and Tobacco Product Manufacturing	11	0.3%	-0.4%	1	1	2	0	1	1
313	Textile Mills	4	0.1%	0.1%	0	0	0	0	0	0
321	Wood Product Manufacturing	13	0.4%	0.0%	0	0	0	0	0	0
322	Paper Manufacturing	8	0.2%	-0.1%	0	2	2	0	0	0
323	Printing and Related Support Actitivies	5	0.1%	-0.1%	0	0	0	0	0	0
324	Petroleum and Coal Products Manufacturing	17	0.5%	-0.6%	2	0	2	2	0	2
325	Chemical Manufacturing	175	5.1%	-0.4%	40	1	41	6	0	6
326	Plastics and Rubber Manfuacturing	31	0.9%	-0.5%	1	2	3	0	1	1
327	Nonmetallic Mineral Product Manufacturing	17	0.5%	0.3%	0	2	2	0	2	2

TABLE X FISCAL YEAR 2021 [1] INDUSTRY GROUP OF ACQUIRING PERSON										
3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2020 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
331	Primary Metal Manufacturing	14	0.4%	0.0%	0	3	3	0	1	1
332	Fabricated Metal Product Manufacturing	35	1.0%	-0.3%	3	0	3	1	0	1
333	Machinery Manufacturing	65	1.9%	0.2%	2	5	7	0	3	3
334	Computer and Electronic Product Manufacturing	59	1.7%	-0.7%	7	3	10	2	0	2
335	Electrical Equipment, Applicance, and Component Manufacturing	15	0.4%	-0.1%	0	1	1	0	0	0
336	Transportation Equipment Manufacturing	62	1.8%	-0.5%	2	4	6	1	0	1
337	Furniture and Related Product Manufacturing	8	0.2%	0.1%	1	1	2	1	0	1
339	Miscellaneous Manufacturing	35	1.0%	-1.0%	9	2	11	3	0	3
423	Merchant Wholesalers, Durable Goods	131	3.8%	0.0%	2	8	10	1	1	2
424	Merchant Wholesales, Nondurable Goods	108	3.2%	-1.6%	7	2	9	3	0	3
425	Wholesale Electric Markets and Agent and Brokers	9	0.3%	0.3%	1	0	1	2	0	2
441	Motor Vehicle and Parts Dealers	27	0.8%	0.3%	0	0	0	0	0	0
444	Electronics and Appliance Stores	12	0.4%	0.1%	0	0	0	0	0	0
445	Food and Beverage Stores	7	0.2%	0.1%	4	0	4	2	0	2
446	Health and Personal Care Stores	15	0.4%	0.3%	5	0	5	1	0	1
447	Gasoline Stations	8	0.2%	-0.1%	1	2	3	1	0	1
448	Clothing and Clothing Accessories Stores	9	0.3%	0.2%	0	0	0	0	0	0
451	Sporting Goods, Hobby, Book, and Music Stores	9	0.3%	0.3%	0	0	0	1	0	1
452	General Merchandise Stores	1	0.0%	0.0%	1	0	1	1	0	1
453	Miscellaneous Store Retailers	15	0.4%	-0.2%	0	1	1	0	0	0
454	Nonstore Retailers	33	1.0%	0.7%	2	0	2	2	0	2

TABLE X FISCAL YEAR 2021 [1] INDUSTRY GROUP OF ACQUIRING PERSON										
3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2020 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
481	Air Transportation	6	0.2%	-0.2%	0	3	3	0	1	1
482	Railroad Transportation	2	0.1%	0.1%	0	0	0	0	0	0
483	Water Transportation	2	0.1%	0.0%	0	0	0	0	0	0
484	Truck Transportation	14	0.4%	-0.1%	0	0	0	0	0	0
485	Transit and Ground Transportation	3	0.1%	0.0%	0	0	0	0	0	0
486	Pipeline Transportation	6	0.2%	-0.5%	0	0	0	0	0	0
488	Support Activities for Transportation	24	0.7%	-0.6%	0	0	0	0	0	0
492	Couriers	3	0.1%	-0.1%	0	0	0	0	0	0
493	Warehousing and Storage	2	0.1%	0.0%	1	0	1	0	0	0
511	Publishing Industries (except Internet)	164	4.8%	0.5%	1	12	13	0	3	3
512	Motion Pictures and Sound Recording Industries	16	0.5%	0.4%	0	0	0	0	0	0
515	Broadcasting (except Internet)	9	0.3%	-0.3%	0	2	2	0	2	2
517	Telecommunications	31	0.9%	-0.2%	0	0	0	0	0	0
518	Internet Service Providers, Web Search Portals, and Data Processing Services	58	1.7%	0.4%	2	2	4	0	1	1
519	Other Information Services	31	0.9%	0.3%	2	2	4	2	0	2
522	Credit Intermediation and Related Activities	67	2.0%	0.0%	2	2	4	0	1	1
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	382	11.2%	1.4%	2	4	6	0	1	1
524	Insurance Carriers and Related Actitivities	127	3.7%	0.4%	4	4	8	1	1	2
525	Funds, Trusts, and Other Financial Vehicles	61	1.8%	-0.7%	0	0	0	0	0	0
531	Real Estate	27	0.8%	0.3%	4	0	4	1	0	1
532	Rental and Leasing Services	16	0.5%	0.1%	0	3	3	0	0	0

TABLE X FISCAL YEAR 2021 [1] INDUSTRY GROUP OF ACQUIRING PERSON											
3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2020 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	11	0.3%	-0.1%	2	0	2	0	0	0
541	Professional, Scientific, and Technical Services	264	7.7%	1.0%	12	13	25	1	1	2
551	Management Companies and Enterprises	4	0.1%	-0.1%	0	0	0	0	0	0
561	Administrative and Support Services	87	2.5%	0.4%	0	4	4	0	0	0
562	Waste Management and Remediation Services	16	0.5%	0.0%	3	1	4	1	0	1
611	Educational Services	13	0.4%	-0.1%	0	0	0	0	0	0
621	Ambulatory Health Care Services	65	1.9%	-0.4%	8	0	8	0	0	0
622	Hospitals	33	1.0%	0.0%	15	0	15	4	0	4
623	Nursing Care Facilities	1	0.0%	0.0%	1	0	1	1	0	1
624	Social Assistance	4	0.1%	0.0%	1	0	1	0	0	0
711	Performing Arts, Spector Sports, and Related Industries	6	0.2%	0.0%	0	1	1	0	1	1
713	Amusement, Gambling, and Recreation Industries	7	0.2%	-0.1%	0	0	0	0	0	0
721	Accommodation	8	0.2%	-0.3%	0	2	2	0	0	0
722	Food Services and Drinking Places	20	0.6%	-0.6%	0	0	0	0	0	0
811	Repairs and Maintenance	19	0.6%	0.0%	2	0	2	0	0	0
812	Personal and Laundry Services	6	0.2%	-0.1%	0	0	0	0	0	0
813	Religious, Grantmaking, Civic, Professional, and Similar Organizations	1	0.0%	0.0%	0	0	0	0	0	0
923	Administration of Human Resource Programs	2	0.1%	0.0%	0	0	0	0	0	0
		3,413	100.0%		164	106	270	42	23	65

TABLE XI
FISCAL YEAR 2021[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2020[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
000[13]	Not Available	145	4.2%	-0.8%	15	0	15	5	0	5	0
111	Crop Production	9	0.3%	0.1%	0	0	0	0	0	0	0
112	Animal Production	2	0.1%	0.1%	1	0	1	0	0	0	0
113	Forestry and and Logging	1	0.0%	-0.1%	0	0	0	0	0	0	0
211	Oil and Gas Extraction	45	1.3%	-0.6%	2	0	2	2	0	2	10
212	Mining (except Oil and Gas)	9	0.3%	-0.1%	0	0	0	0	0	0	4
213	Support Activities for Mining	8	0.2%	-0.5%	1	0	1	0	0	0	2
221	Utilities	71	2.1%	-0.5%	0	3	3	0	0	0	3
236	Construction of Buildings	9	0.3%	-0.2%	0	0	0	0	0	0	0
237	Heavy and Civil Engineering Construction	30	0.9%	0.2%	0	1	1	0	0	0	1
238	Specialty Trade Contractors	36	1.1%	-0.4%	0	2	2	0	0	0	0
311	Food and Kindred Products	52	1.5%	-0.5%	1	3	4	0	2	2	0
312	Beverage and Tobacco Product Manufacturing	10	0.3%	0.0%	1	0	1	0	0	0	0
313	Textile Mills	5	0.1%	0.0%	0	1	1	0	0	0	0
314	Textile Products	2	0.1%	0.0%	0	0	0	0	0	0	0
315	Apparel Manufacturing	2	0.1%	0.1%	0	0	0	0	0	0	0
321	Wood Product Manufacturing	9	0.3%	0.0%	0	0	0	0	0	0	1
322	Paper Manufacturing	12	0.4%	0.0%	0	1	1	0	0	0	0
323	Printing and Related Support Actitivies	11	0.3%	0.1%	0	1	1	0	0	0	0
324	Petroleum and Coal Products Manufacturing	11	0.3%	0.3%	4	0	4	3	0	3	1
325	Chemical Manufacturing	149	4.4%	0.0%	13	1	14	2	1	3	2

TABLE XI
FISCAL YEAR 2021[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2020[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
326	Plastics and Rubber Manfuacturing	32	0.9%	-0.3%	1	2	3	0	1	1	0
327	Nonmetallic Mineral Product Manufacturing	17	0.5%	0.1%	0	4	4	0	2	2	1
331	Primary Metal Manufacturing	17	0.5%	0.1%	0	3	3	0	1	1	3
332	Fabricated Metal Product Manufacturing	39	1.1%	-0.2%	2	1	3	0	0	0	2
333	Machinery Manufacturing	60	1.8%	0.3%	2	6	8	0	3	3	7
334	Computer and Electronic Product Manufacturing	90	2.6%	0.7%	4	3	7	1	0	1	1
335	Electrical Equipment, Applicance, and Component Manufacturing	26	0.8%	0.3%	0	0	0	0	0	0	1
336	Transportation Equipment Manufacturing	49	1.4%	-0.4%	1	5	6	1	0	1	0
337	Furniture and Related Product Manufacturing	6	0.2%	-0.1%	0	1	1	0	0	0	1
339	Miscellaneous Manufacturing	41	1.2%	-0.2%	9	0	9	2	0	2	2
423	Merchant Wholesalers, Durable Goods	191	5.6%	2.2%	3	5	8	0	1	1	7
424	Merchant Wholesales, Nondurable Goods	105	3.1%	-1.0%	13	1	14	3	0	3	3
425	Wholesale Electric Markets and Agent and Brokers	11	0.3%	0.0%	1	2	3	1	0	1	0
441	Motor Vehicle and Parts Dealers	30	0.9%	0.0%	0	0	0	0	0	0	2
442	Furniture and Home Furnishing Stores	3	0.1%	0.0%	1	0	1	1	0	1	0
443	Miscellaneous Repair Services	5	0.1%	0.1%	1	0	1	0	0	0	0
444	Electronics and Appliance Stores	8	0.2%	0.2%	0	0	0	0	0	0	0
445	Food and Beverage Stores	9	0.3%	0.0%	3	0	3	2	0	2	1
446	Health and Personal Care Stores	6	0.2%	-0.6%	0	0	0	0	0	0	0
447	Gasoline Stations	13	0.4%	0.0%	2	0	2	2	0	2	0
448	Clothing and Clothing Accessories Stores	6	0.2%	-0.1%	0	0	0	0	0	0	0

TABLE XI
FISCAL YEAR 2021[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2020[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
451	Sporting Goods, Hobby, Book, and Music Stores	5	0.1%	0.1%	0	0	0	1	0	1	0
452	General Merchandise Stores	10	0.3%	0.0%	1	0	1	1	0	1	0
453	Miscellaneous Store Retailers	20	0.6%	0.6%	0	1	1	0	0	0	3
454	Nonstore Retailers	72	2.1%	1.3%	2	0	2	2	0	2	0
481	Air Transportation	7	0.2%	-0.2%	0	2	2	0	1	1	0
483	Water Transportation	3	0.1%	0.0%	0	0	0	0	0	0	0
484	Truck Transportation	14	0.4%	-0.2%	0	0	0	0	0	0	0
485	Transit and Ground Transportation	5	0.1%	0.0%	0	0	0	0	0	0	0
486	Pipeline Transportation	9	0.3%	-0.2%	1	0	1	1	0	1	1
488	Support Actitivies for Transportation	36	1.1%	0.6%	0	1	1	0	0	0	3
492	Couriers	6	0.2%	0.2%	0	0	0	0	0	0	0
493	Warehousing and Storage	10	0.3%	0.0%	0	0	0	0	0	0	1
511	Publishing Industries (except Internet)	362	10.6%	2.0%	1	12	13	0	2	2	9
512	Motion Pictures and Sound Recording Industries	19	0.6%	0.2%	2	0	2	1	0	1	0
515	Broadcasting (except Internet)	13	0.4%	-0.2%	0	3	3	0	3	3	0
517	Telecommunications	48	1.4%	-0.3%	0	0	0	0	0	0	4
518	Internet Service Providers, Web Search Portals, and Data Processing Services	112	3.3%	-1.2%	4	6	10	2	1	3	1
519	Other Information Services	62	1.8%	-0.6%	1	1	2	0	1	1	2
522	Credit Intermediation and Related Activities	83	2.4%	0.3%	1	4	5	0	1	1	3
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	95	2.8%	1.1%	0	2	2	0	0	0	8
524	Insurance Carriers and Related Actitivities	127	3.7%	-1.5%	0	3	3	0	0	0	13

TABLE XI
FISCAL YEAR 2021[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2020[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
525	Funds, Trusts, and Other Financial Vehicles	4	0.1%	-0.1%	0	0	0	0	0	0	0
531	Real Estate	32	0.9%	0.0%	3	1	4	1	0	1	4
532	Rental and Leasing Services	38	1.1%	0.4%	2	3	5	0	0	0	1
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	22	0.6%	-0.3%	2	0	2	1	0	1	1
541	Professional, Scientific, and Technical Services	426	12.5%	0.1%	25	12	37	2	2	4	11
551	Management Companies and Enterprises	1	0.0%	0.0%	0	0	0	0	0	0	0
561	Administrative and Support Services	78	2.3%	-0.2%	2	5	7	0	0	0	3
562	Waste Management and Remediation Services	24	0.7%	0.0%	3	1	4	0	0	0	1
611	Educational Services	31	0.9%	0.3%	0	0	0	0	0	0	0
621	Ambulatory Health Care Services	119	3.5%	0.9%	14	0	14	0	0	0	6
622	Hospitals	27	0.8%	-0.7%	15	0	15	4	0	4	3
623	Nursing Care Facilities	9	0.3%	0.2%	1	0	1	1	0	1	1
624	Social Assistance	7	0.2%	0.0%	0	0	0	0	0	0	0
711	Performing Arts, Spector Sports, and Related Industries	11	0.3%	-0.3%	0	1	1	0	1	1	1
713	Amusement, Gambling, and Recreation Industries	11	0.3%	-0.4%	0	1	1	0	0	0	1
721	Accommodation	9	0.3%	-0.1%	1	0	1	0	0	0	0
722	Food Services and Drinking Places	27	0.8%	0.3%	0	1	1	0	0	0	0
811	Repairs and Maintenance	17	0.5%	0.0%	2	0	2	0	0	0	1
812	Personal and Laundry Services	6	0.2%	0.0%	0	0	0	0	0	0	0
813	Religious, Grantmaking, Civic, Professional, and Similar Organizations	1	0.0%	0.0%	0	0	0	0	0	0	0
927	Space Research and Technology	1	0.0%	0.0%	0	0	0	0	0	0	0

TABLE XI
FISCAL YEAR 2021[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2020[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
928	National Security and International Affairs	1	0.0%	0.0%	0	0	0	0	0	0	0
999	Nonclassificable Establishments	1	0.0%	0.0%	0	0	0	0	0	0	0
		3,413	100.0%		164	106	270	42	23	65	137

1 Fiscal year 2021 figures include transactions reported between October 1, 2020 and September 30, 2021.

2 The size of transaction is based on the aggregate total amount of voting securities, non-corporate interests and/or assets held by the acquiring person as a result of the transaction and are taken from the response to Item 2(d)(iii), 2(d)(vii), and 2(d)(ix) of the Notification and Report Form.

3 These statistics are based on the date the Second Request was issued.

4 During fiscal year 2021, 3,520 transactions were reported under the HSR Premerger Notification program. The smaller number, 3,413, reflects the adjustments to eliminate the following types of transactions: (1) transactions reported under Section 7A(c)(6) and (c)(8) (transactions involving certain regulated industries and financial businesses); (2) transactions deemed non-reportable; (3) incomplete transactions (only one party in each transaction filed a compliant notification); and (4) transactions withdrawn before the waiting period began. The table does not, however, exclude competing offers or multiple HSR transactions resulting from a single business transaction (where there are multiple acquiring persons or acquired persons).

5 The total number of filings under $50M submitted in Fiscal Year 2021 reflects corrective filings.

6 In February 2001, legislation raised the size of transaction from $15 million to $50 million with annual adjustments beginning in February 2005. As of FY 2017, the threshold categories include non-corporate interests (NCI), encompassing transactions in which the acquiring entity acquires 50% of more of the non-corporate interests of the acquired entity.

7 The category labeled “Sales Not Available” includes newly-formed acquiring persons, foreign acquiring person with no United States revenues, and acquiring persons who had not derived any revenues from their investments at the time of filing.

8 Assets of an acquired entity are not available when the acquired entity’s financial data is consolidated within its ultimate parent.

9 Sales of an acquired entity are taken from responses to Item 4(a) and (b) (SEC documents and annual reports) or item 5 (dollar revenues) of the Premerger Notification and Report Form.

10 This category includes acquisition of newly-formed entities from which no sales were generated, and acquisitions of assets which produced no sales revenues during the prior year to filing the Notification and Report Form.

11 The 3-digit codes are part of the North American Industrial Classification System (NAICS) established by the United States Government North American Industrial Classification System 1997, Executive Office of the President, Office of Management and Budget. The NAICS groups used in this table were determined from responses submitted by the parties to Item 5 of the Premerger Notification and Report Form.

12 This represents the deviation from the fiscal year 2020 percentage.

13 This category includes transactions by newly-formed entities.

14 The intra-industry transactions column identifies the number of acquisitions in which both the acquiring and acquired person derived revenues from the same 3-digit NAICS code.

Federal Trade Commission
Bureau of Competition

Department of Justice
Antitrust Division

Hart-Scott-Rodino Annual Report

Fiscal Year 2022

October 1, 2021 through September 30, 2022

Section 7A of the Clayton Act
Hart-Scott-Rodino Antitrust Improvements Act of 1976
(Forty-Fifth Annual Report)

(corrected September 2024)

Lina Khan
Chair
Federal Trade Commission

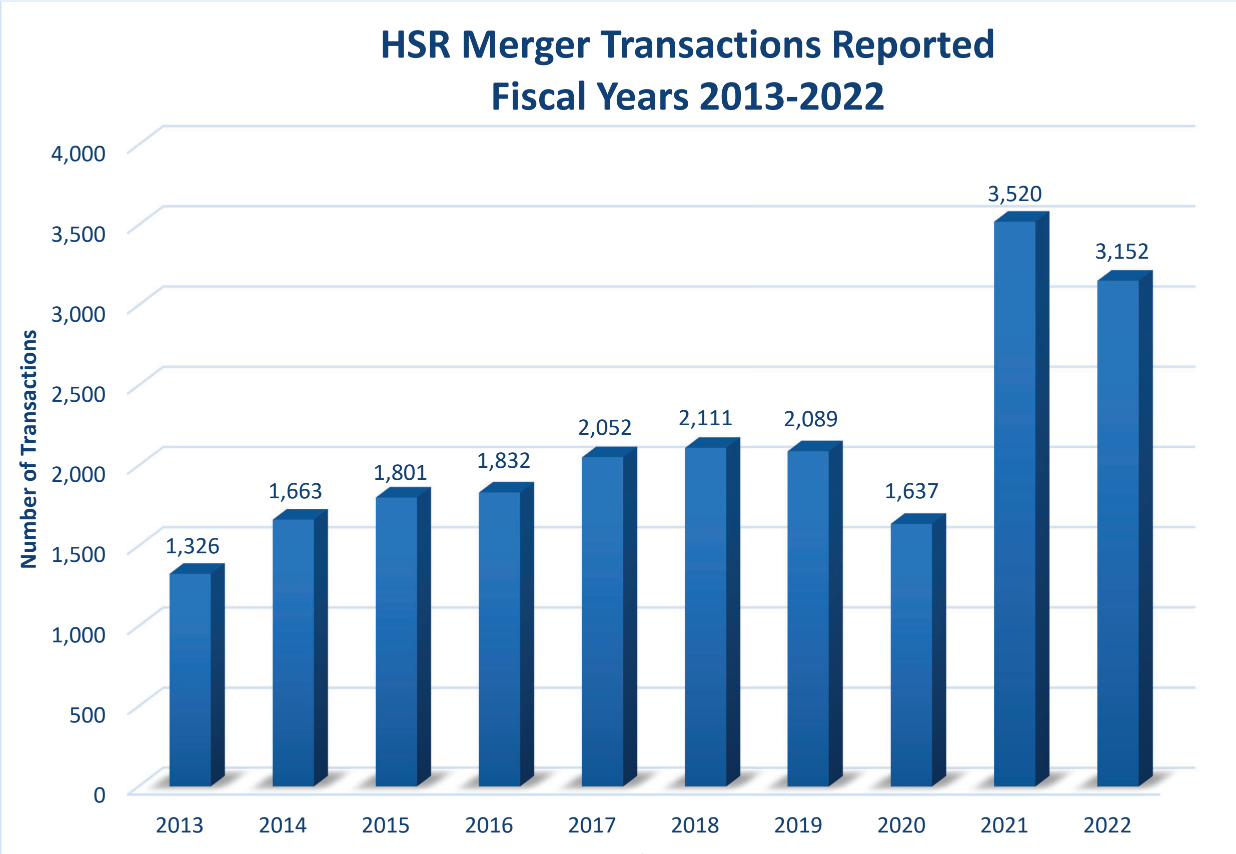
Jonathan Kanter
Assistant Attorney General
Antitrust Division

INTRODUCTION

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435 (HSR Act or the Act), together with Section 13(b) of the Federal Trade Commission Act and Section 15 of the Clayton Act, enables the Federal Trade Commission (FTC or Commission) and the Antitrust Division of the Department of Justice (Antitrust Division or Division) to prevent unlawful mergers, acquisitions, and other types of transactions and to prevent interim harm to competition associated with those transactions. The premerger notification program was instrumental in alerting the Commission and the Division to transactions that became the subjects of the numerous enforcement actions brought in fiscal year 2022.[1]

The Commission and the Antitrust Division continue their efforts to protect competition by identifying and investigating those mergers and acquisitions that may violate the antitrust laws. Together, the FTC and the Division represent the American people's front-line defense against unlawful industry consolidation, and stopping illegal mergers is central to that mission. In fiscal year 2022, 3,152 transactions were reported under the HSR Act, which is the second-highest number of reported transactions over the past ten years. Overall, the number of transactions reported in fiscal year 2022 is still about 50% higher than the prior fiscal year high between 2013 and 2020. *See* Figure 1 below.

[1] Fiscal year 2022 covered the period from October 1, 2021 through September 30, 2022.



(Figure 1)

During fiscal year 2022, the Commission brought 23 merger enforcement challenges:[2] twelve in which it issued final consent orders after a public comment period; five in which the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation; and six in which the Commission initiated administrative or federal court litigation. The 23 merger enforcement challenges the Commission brought in fiscal year 2022 is the second-highest figure in the last ten years.[3] These enforcement actions prevented unlawful mergers in numerous sectors of the economy, including consumer goods and services, pharmaceuticals, healthcare, high tech and industrial goods, and energy.

In December 2021, the Commission sued to stop United States chip supplier Nvidia's proposed $40 billion acquisition of U.K. chip design provider Arm. More than two months into its litigation with the FTC, Nvidia abandoned its acquisition of Arm—representing the first abandonment of a litigated vertical merger in many years.

In January 2022, the Commission issued an administrative complaint and authorized staff to seek a preliminary injunction to prevent Lockheed Martin's proposed acquisition of

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[2] To avoid double-counting, this Report includes only those merger enforcement actions in which the Commission or the Antitrust Division took its first public action during fiscal year 2022.
[3] In 2020 the Commission brought 28 enforcement challenges.

Aerojet. The complaint alleged that this proposed vertical merger would likely allow Lockheed to harm rival defense contractors by cutting them off from Aerojet's critical components needed to build competing missiles. Shortly after the Commission filed its complaint, the parties abandoned the transaction. This lawsuit represented the first time in decades that the Commission had sought to outright block a defense industry transaction.

In February 2022, the two largest healthcare systems in Rhode Island, Lifespan and Care New England Health System, called off their merger after the FTC, in conjunction with the Rhode Island Attorney General, sought to block the merger. On the same day in June 2022, the Commission voted to block two proposed hospital mergers: HCA's acquisition of Steward Health Care System and RWJBarnabas's acquisition of Saint Peter's Healthcare System. Both of these acquisitions were later abandoned. The Commission will continue to identify and aggressively challenge hospital mergers that threaten access to critical healthcare services.

In July 2022, the Commission issued an administrative complaint and authorized staff to seek a preliminary injunction to prevent Meta's proposed acquisition of virtual reality giant Within Unlimited. The Commission's complaint alleged that Meta's proposed acquisition would have harmed competition and dampened innovation in the markets for fitness and dedicated-fitness virtual reality apps. Although the U.S. District Court denied the preliminary injunction and the Commission dismissed the administrative complaint, this enforcement action illustrates the Commission's commitment to challenge acquisitions that eliminate potential competition.

The Antitrust Division worked to block anticompetitive mergers in critical industries, including agriculture, healthcare, financial services, publishing, manufacturing, transportation, and national security. The Division's enforcement efforts directly impacted 26 merger transactions. In six cases, the Division filed lawsuits in federal court to block the transactions; in four others the Division filed a complaint and settlement simultaneously. In ten proposed transactions the parties abandoned the transaction in the face of questions from the Division, and in six others the parties changed the structure of their transaction such that the Division chose not to bring an enforcement action at that time.

One of the Division's most notable successes was its efforts to block Penguin Random House's proposed purchase of a major publishing rival, Simon & Schuster. The merger, if completed, would have eliminated competition that had led to higher advances, better services, and more favorable contract terms for authors trying to sell their work. The merger also jeopardized the breadth, depth, and diversity of written work by authors. The Division filed suit to block the merger in November 2021; after a thirteen-day trial in August 2022, the U.S. District Court for the District of Columbia found that the proposed acquisition violated Section 7 of the Clayton Act based on the harm it would cause to a specific class of workers—in this case, authors.

Two other enforcement efforts illustrate the Division's commitment to protecting competition in key areas of the supply chain. In 2021, Cargotec Corporation and Konecranes Plc announced their plans to merge. This merger, if completed, would have diminished competition in the manufacture and supply of four types of container-handling equipment. This equipment, which included straddle carriers, rubber-tired gantry cranes, automated stacking cranes, and rail-mounted gantry trains, is a crucial part of modern ocean freight services. The proposed merger threatened to harm port and terminal operators in the United States that used these machines to move consumer goods, medicines, and other important products throughout the global supply change. In March 2022, Cargotec and Konecranes announced that they abandoned this merger in the face of a potential enforcement action by the Antitrust Division and the United Kingdom's Competition and Markets Authority.

The Antitrust Division's enforcement efforts protected competition for other important parts of the supply chain as well. In August 2022, in the face of a potential enforcement action, China International Marine Containers Group Co. Ltd. announced that it had abandoned its intended plan to purchase Maersk Container Industry A/S and Maersk Container Industry Qingdao Ltd. The proposed acquisition would have combined two of the world's four suppliers of insulated container boxes and refrigerated shipping containers and consolidated control of more than 90 percent of insulated container box and refrigerated container production worldwide in Chinese state-owned or state-controlled enterprises. This would likely have led to higher prices, lower quality, and less resiliency within the global supply chain.

The Commission's Premerger Notification Office (PNO) website[4] includes instructions for completing the HSR form, information on the HSR rules, current filing thresholds, filing fee instructions, and procedures for submitting post-consummation filings. The website also provides frequently asked questions regarding HSR filing requirements, the number of HSR transactions submitted each month, and contact information for PNO staff.[5]

BACKGROUND OF THE HSR ACT

Section 201 of the HSR Act amended the Clayton Act by adding a new Section 7A, 15 U.S.C. § 18a. In general, the HSR Act requires that certain proposed acquisitions of voting securities, non-corporate interests, or assets be reported to the Commission and the Antitrust Division prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or bankruptcy sale), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends on the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. Acquisitions valued below a certain threshold, acquisitions involving parties with assets and sales below a certain threshold, and certain classes of acquisitions that are less likely to raise antitrust concerns are excluded from the Act's coverage.

[4] *See* https://www.ftc.gov/enforcement/premerger-notification-program.

[5] Resource materials are available on the PNO website; in addition, PNO staff is always available to help HSR practitioners comply with HSR notification requirements.

The Commission, with the concurrence of the Assistant Attorney General for the Antitrust Division, promulgated final rules implementing the premerger notification program on July 31, 1978. At that time, a comprehensive Statement of Basis and Purpose was published, containing a section-by-section analysis of the rules and an item-by-item analysis of the filing form.[6] The program became effective on September 5, 1978. The Commission, with the concurrence of the Assistant Attorney General, has amended the rules and the filing form on many occasions over the years to improve the program's effectiveness and to lessen the burden of complying with the rules, while ensuring that the agencies get all the information they need to analyze the underlying transaction.[7]

The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with the opportunity to identify and review potentially anticompetitive mergers and acquisitions before they are consummated. The premerger notification program, with its filing and waiting period requirements, facilitates this goal.

If either reviewing agency determines during the waiting period that further inquiry is necessary, the reviewing agency is authorized by Section 7A(e) of the Clayton Act to issue a request for additional information and documentary material (Second Request).[8] The Second Request extends the waiting period for a specified period of time (usually 30 days, but 10 days in the case of a cash tender offer or bankruptcy sale) after all parties have complied with the Second Request (or, in the case of a tender offer or bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may substantially lessen competition, the agency may seek an injunction in federal district court to prohibit consummation of the transaction. The Commission also may challenge the transaction in administrative litigation.

A STATISTICAL PROFILE OF THE PREMERGER NOTIFICATION PROGRAM

The appendices to this Report provide a statistical summary of the operation of the premerger notification program. Appendix A shows, for the ten-year period covering fiscal years 2013-2022: the number of transactions reported; the number of filings received; the number of merger investigations in which Second Requests were issued; and the number of transactions in which requests for early termination of the waiting period were received,

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[6] 43 Fed. Reg. 33450 (July 31, 1978).

[7] *See* https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-and-formal-interpretations/statements-basis-purpose.

[8] 15 U.S.C. §18a(e)(1)(a) ("The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period)…require the submission of additional information or documentary material relevant to the proposed acquisition").

granted, and not granted.[9] Appendix A also shows the number of transactions in which Second Requests could have been issued. Appendix B provides a month-by-month comparison of the number of transactions reported and the number of filings received for fiscal years 2013 through 2022.

The statistics set out in these appendices show that the number of transactions reported in fiscal year 2022 decreased 10.5 percent from the number of transactions reported in fiscal year 2021. In fiscal year 2022, 3,152 transactions were reported, while 3,520 were reported in fiscal year 2021, but the number of reported transactions remained significantly above the ten-year median.[10] Of the 3,152 reported transactions, Second Requests could have been issued in 3,029 of them. The absolute number of Second Requests has remained fairly consistent across the last decade, including 48 Second Requests in 2020, 65 in 2021, and 47 in 2022.[11]

The statistics in Appendix A show that in fiscal year 2022, early termination was requested in 44.4 percent (1,345) of the adjusted transactions reported. In fiscal year 2021, early termination was requested in 62.2 percent (2,124) of the transactions reported. The percentage of requests granted out of the total requested decreased from 19.6 percent in fiscal year 2021 to 0.4 percent in fiscal year 2022, due to a suspension of the granting of early termination in February 2021, except in situations where merging parties entered into a consent order or the parties resolved the investigating agency's concerns prior to fully complying with a Second Request.[12]

The tables (Tables I through XI) in Exhibit A contain information regarding the agencies' enforcement activities for transactions reported in fiscal year 2022. The tables provide, for example, various characteristics of transactions, the number and percentage of transactions in which one antitrust agency granted the other clearance to commence an investigation, and the number of merger investigations in which either agency issued Second Requests. Table III of Exhibit A shows that in fiscal year 2022, the agencies received clearance to conduct an initial investigation in 9.2 percent of the total number of transactions reported. The tables also provide the number of transactions based on the dollar value of transactions reported and the

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[9] The term "transaction," as used in Appendices A and B and Exhibit A to this Report, does not refer only to individual mergers or acquisitions. A particular merger, joint venture, or acquisition may be structured such that it involves more than one filing that must be made under the HSR Act.

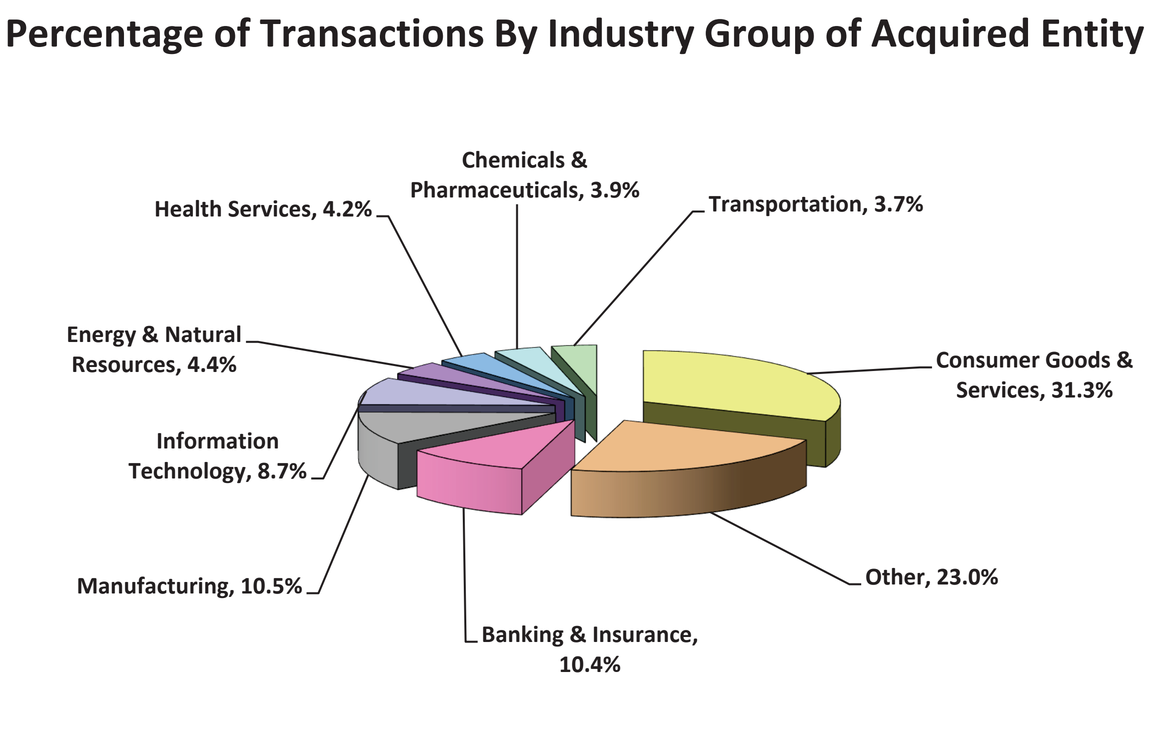
[10] This Report, like previous Reports, also includes annual data on "adjusted transactions in which a Second Request could have been issued" (adjusted transactions). *See* Appendix A & Appendix A n.2 (explaining calculation of that data). There were 3,029 adjusted transactions in fiscal year 2022, and the data presented in the Tables and the percentages discussed in the text of this Report are based on this figure. The number of transactions in fiscal year 2021 was an all-time high and 2022's figures still represent the second-highest total in at least a decade.

[11] As noted in prior reports, and described in Appendix A, the total number of Second Requests has remained fairly consistent over the last decade – 47 in 2013, 51 in 2014, 47 in 2015, 54 in 2016, 51 in 2017, 45 in 2018, 61 in 2019, 48 in 2020, 65 in 2021, and 47 in 2022.

[12] https://www.ftc.gov/enforcement/competition-matters/2021/03/hsr-early-termination-after-second-request-issues.

reporting threshold indicated in the notification report. In fiscal year 2022, the aggregate dollar value of reported transactions was $2.5 trillion.[13]

Tables X and XI provide the number of transactions by industry group in which the acquiring person or the acquired entity derived the most revenue. Figure 2 illustrates the percentage of adjusted transactions within industry groups for fiscal year 2022 based on the acquired entity's operations.[14]



(Figure 2)

[13] The information on the value of reported adjusted transactions for fiscal year 2022 is drawn from a database maintained by the Premerger Notification Office.

[14] The category designated as "Other" consists of industry segments that include construction, educational services, performing arts, recreation, and other non-classifiable businesses.

DEVELOPMENTS WITHIN THE PREMERGER PROGRAM

1. Threshold Adjustments

The 2000 amendments to the HSR Act require the Commission to publish adjustments to the Act's jurisdictional and filing fee thresholds in the Federal Register annually, for each fiscal year beginning on September 30, 2004, based on the change in the gross national product, in accordance with Section 8(a)(5) of the Clayton Act. The Commission amended the rules in 2005 to provide a method for future adjustments as required by the 2000 amendments, and to reflect the revised thresholds contained in the rules. The Commission usually publishes the revised thresholds annually in January, and they become effective 30 days after publication.

On January 24, 2022, the Commission published a notice[15] to reflect adjustment of the reporting thresholds as required by the 2000 amendments[16] to Section 7A of the Clayton Act, 15 U.S.C. § 18a. The revised thresholds, including an increase in the size of transaction threshold from $92 million to $101 million, became effective February 23, 2022. The thresholds are calculated based on the prior year's GNP.

2. Compliance

The Commission and the Antitrust Division continued to monitor compliance with the premerger notification program's filing and waiting period requirements and initiated a number of investigations in fiscal year 2022. The agencies use several methods to oversee compliance, including monitoring news outlets and industry publications for transactions that may not have been reported in accordance with the HSR Act's requirements. Industry sources, such as competitors, customers, and suppliers, interested members of the public, and, in certain cases, the parties themselves, also provide the agencies with information about transactions and possible violations of the Act's requirements.

Under Section 7A(g)(1) of the Act, any person that fails to comply with the Act's notification and waiting period requirements is liable for a civil penalty of up to $46,517 for each day the violation continues.[17] The antitrust agencies examine the circumstances of each

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[15] 87 Fed. Reg. 3541 (Jan. 23, 2022).
[16] 15 U.S.C. §18a(a). *See* Pub. L. No. 106-553, 114 Stat. 2762.
[17] Dollar amounts specified in civil monetary penalty provisions within the Commission's jurisdiction are adjusted for inflation in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-7 (Nov. 2, 2015). The adjustments have included an increase in the maximum civil penalty from $10,000 to $11,000 for each day during which a person is in violation of Section 7A(g)(1) (61 Fed. Reg. 54548 (Oct. 21, 1996), corrected at 61 Fed. Reg. 55840 (Oct. 29, 1996)), to $16,000 effective February 10, 2009 (74 Fed. Reg. 857 (Jan. 9, 2009)), to $40,000 effective August 1, 2016 (81 Fed. Reg. 42476 (June 30, 2016)), to $43,792 effective Jan. 13, 2021 (86 Fed. Reg. 2880 (Jan. 13, 2021)) and to $46,517 effective January 10, 2022, (87 Fed. Reg. 1070 (Jan. 10, 2022).

violation to determine whether to seek penalties.[18] During fiscal year 2022, 74 post-consummation "corrective" filings were received, and the agencies brought two civil penalty actions, resulting in approximately $1.89 million in civil penalties.

In *United States v. Clarence L. Werner*,[19] the complaint alleged that Mr. Werner, the founder of the Omaha, Nebraska-based truckload carrier Werner Enterprises, Inc., violated the HSR Act by failing to file for an acquisition of additional voting securities of Werner Inc. when his holdings crossed the relevant threshold. Mr. Werner had previously failed to file HSR Forms for acquisitions of Werner Inc. voting securities as part of his compensation package. Under the terms of a negotiated settlement, Mr. Werner agreed to pay a $486,900 civil penalty. On April 20, 2022, the U.S. District Court for the District of Columbia entered the final judgment.

In *United States v. Biglari Holdings*,[20] the complaint alleged that restaurant chain owner and investment fund operator Biglari violated the HSR Act by failing to file for an acquisition of additional voting securities of Cracker Barrel Old Country Store, Inc. Under the terms of a negotiated settlement, Biglari agreed to pay a $1.4 million civil penalty. On May 9, 2022, the U.S. District Court for the District of Columbia entered the final judgment.

MERGER ENFORCEMENT ACTIVITY[21]

The Department of Justice

During fiscal year 2022, the Antitrust Division worked to block anticompetitive mergers where it concluded the effect may be substantially to lessen competition or tend to create a monopoly if allowed to proceed as proposed. The Division's enforcement efforts directly impacted 26 merger transactions. In six cases, the Division filed lawsuits in federal court to block the transactions; in four others the Division filed a complaint and settlement simultaneously. In ten proposed transactions the parties abandoned the transaction in the face of questions from the Division, and in six others the parties changed the structure of their transaction such that the Division chose not to bring an enforcement action at that time.

The Division filed the following six cases that resulted in active litigation.

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[18] If parties inadvertently fail to file, the agencies generally will not seek penalties so long as the parties promptly submit corrective filings after discovering the failure to file, submit an acceptable explanation of their failure to file, and have not previously violated the Act.

[19] *United States v. Clarence L. Werner,* No. 1:21-cv-03332 (D.D.C. filed on Dec. 22, 2021), https://www.ftc.gov/legal-library-browse/cases-proceedings/211-0004-clarence-l-werner-us-v.

[20] *United States v. Biglari Holdings, Inc.,* No. 1:21-cv-0331 (D.D.C. filed on Dec. 22, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110040-biglari-holdings-inc.

[21] The cases listed in this section were not necessarily reportable under the premerger notification program. Given the confidentiality of information obtained pursuant to the Act, it would be inappropriate to identify the cases initiated under the program except in those instances in which that information has already been disclosed.

In *United States v. Bertelsmann SE & Co. KGaA, Penguin Random House, LLC, ViacomCBS, Inc., and Simon & Schuster, Inc.*,[22] the Division filed a lawsuit to block Penguin Random House's proposed acquisition of Simon & Schuster. As alleged in the complaint, the proposed acquisition would have enabled Penguin Random House, the largest book publisher in the world, to exert outsized influence over which books would be published in the United States and how much authors would be paid for their work. The proposed acquisition would have put the combined firm in control of nearly half of the market for acquiring publishing rights to anticipated top-selling books, leaving hundreds of individual authors with fewer options and less leverage. On November 7, 2022, after a thirteen-day trial on the merits, the U.S. District Court for the District of Columbia enjoined the merger.

In *United States v. United States Sugar Corp., United Sugars Corp., Imperial Sugar Co., and Louis Dreyfus Co. LLC*,[23] the Division filed a challenge to United States Sugar Corporation's proposed acquisition of Imperial Sugar Company. The complaint alleged that the proposed acquisition would further consolidate an already consolidated industry, resulting in a duopoly—United States Sugars and American Sugar Refining (also known as "Domino") —controlling the vast majority of refined sugar sold in the Southeast. As a result, the complaint alleged that the acquisition would eliminate a significant competitor leading to higher prices and increase the likelihood of, or enable, successful anticompetitive coordination in the production and sale of refined sugar to customers in the Southeast, as well as in Georgia and its bordering states. On September 28, 2022, the U.S. District Court for the District of Delaware ruled in favor of the Defendants. The U.S. Court of Appeals for the Third Circuit affirmed the district court's decision on July 13, 2023.

In *United States, State of Minnesota and State of New York v. UnitedHealth Group Inc., and Change Healthcare Inc.*,[24] the Division, together with the Attorneys General of Minnesota and New York, filed suit to block the $13 billion proposed acquisition of Change Healthcare Inc. by UnitedHealth Group Inc. The complaint alleged that the proposed merger would give UnitedHealth Group, which owns the largest health insurer in the United States, control over Change Healthcare's electronic data interchange clearinghouse, a critical data highway through which about half of all Americans' health insurance claims pass each year. As a result, the acquisition would allow UnitedHealthcare to use its rivals' competitively sensitive information to gain an unfair advantage and harm competition in health insurance markets. Additionally, the complaint alleged that the proposed transaction would eliminate UnitedHealth Group's only major rival for first-pass claims editing technology, a critical product used to efficiently process health insurance claims, and give it a monopoly share in the market. On September 19, 2022, the U.S. District Court for the District of Columbia, while acknowledging the validity of the

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[22] *United States v. Bertelsmann SE & Co. KGaA, Penguin Random House, LLC, ViacomCBS, Inc., and Simon & Schuster, Inc.*, 1:21-cv-02886 (D.D.C. filed Nov. 02, 2021).
[23] *In United States v. United States Sugar Corp., United Sugars Corp., Imperial Sugar Co., and Louis Dreyfus Co. LLC*, 1:21-cv-01644-UNA (D. Del. Filed Nov. 23, 2021).
[24] *United States, State of Minnesota and State of New York v. UnitedHealth Group Inc., and Change Healthcare Inc.*, 1:22-cv-00481 (D.D.C. filed Feb 24, 2022).

plaintiffs' data-use theory, ruled in favor of the Defendants, declined to enjoin the transaction, and ordered the divestiture of Change Healthcare's first-pass claims editing business.

In *United States v. Grupo Verzatec S.A. de C.V., Stabilit America, Inc, Crane Co., and Crane Composites, Inc.*,[25] the Division filed suit to enjoin Grupo Verzatec S.A. de C.V. from buying its closest competitor, Crane Composites, Inc. The complaint alleged that the transaction would have created a monopoly in the market for the production and sale of pebbled fiberglass reinforced plastic wall panels, whose product and performance characteristics make it the wall covering of choice for many restaurants, grocery stores, hospitals, and convenience stores across the United States. On May 26, 2022, the parties abandoned the proposed acquisition.

In *United States v. Booz Allen Hamilton Holding Corp., Booz Allen Hamilton Inc., Everwatch Corp., EC Defense Holdings, LLC, and Analysis, Computing & Engineering Solutions, Inc.*,[26] the Division filed suit to block Booz Allen Hamilton Holding Corporation's proposed acquisition of Everwatch Corporation. The complaint alleged that the companies' merger agreement harmed competition for an imminent government request for proposals to provide signals intelligence modeling and simulation services to the National Security Agency. The complaint alleged that Booz Allen and Everwatch, were the only competitors for this project, and that the companies were competing vigorously to win the contract before agreeing to merge. Once the companies agreed to merge, according to the complaint, they no longer had an incentive to bid aggressively against each other because no matter which company NSA selected, the merged firm would ultimately own the contract and reap the rewards. Although recognizing that the litigation may have accomplished some of the Division's goals, on October 11, 2022, the U.S. District Court for the District of Maryland denied the Division's Motion for a Preliminary Injunction.

In *United States v. ASSA ABLOY AB and Spectrum Brands Holdings, Inc.*,[27] the Division filed suit to enjoin ASSA ABLOY from acquiring its residential door hardware rival, a division of Spectrum Brands Holding. The complaint alleged that acquisition would combine two of the three largest producers of residential door hardware in the concentrated $2.4 billion industry. As a result, the acquisition likely would have resulted in higher price, lower quality, reduced innovation, and poorer service in the sale of at least two types of residential door hardware: premium mechanical door hardware and smart locks. On May 5, 2023, following more than seven months of litigation and several days of trial, the Division filed a proposed final judgment requiring ASSA ABLOY, among other things, to divest assets to Fortune Brands Innovation, Inc. and to submit to five years of oversight by a monitoring trustee. The proposed final judgment provided greater relief than earlier offers by the Defendants, although the Division did not

[25] *United States v. Grupo Verzatec S.A. de C.V., Stabilit America, Inc, Crane Co., and Crane Composites, Inc.*, 1:22-cv-01401 (N.D. Ill. Filed Mar. 17, 2022).

[26] *United States v. Booz Allen Hamilton Holding Corp., Booz Allen Hamilton Inc., Everwatch Corp., EC Defense Holdings, LLC, and Analysis, Computing & Engineering Solutions, Inc.*, 1:22-cv-01603-CCB (D. MD. Filed June 29, 2022).

[27] *United States v. ASSA ABLOY AB and Spectrum Brands Holdings, Inc.*, 1:22-cv-02791-ABJ (D.D.C. Nov. 03, 2022).

contend that the relief obtained would fully eliminate the risks to competition alleged in the complaint. The proposed final judgment is designed to try to preserve competitive intensity in the markets for premium mechanical door hardware and smart locks. The Court entered final judgment on September 13, 2023.

The Division filed complaints and proposed settlements in the following four matters.

In *United States v. Wienerberger AG, General Shale Brick, Inc., LSF9 Stardust Super Holdings, L.P., Boral Limited, and Meridian Brick LLC*,[28] the Division challenged General Shale Inc.'s proposed acquisition of Meridian Brick LLC. A proposed final judgment, filed concurrently with the complaint on October 1, 2021, required the parties to divest specified residential brick manufacturing and sales assets located within seven states. The U.S. District Court for the District of Columbia entered the final judgment on January 31, 2022.

In *United States v. Neenah Enterprises, Inc., U.S. Holdings, Inc., and U.S. Foundry and Manufacturing Corp.*,[29] the Division challenged Neenah Enterprises Inc.'s proposed acquisition of substantially all of the assets of U.S. Holdings, Inc.'s subsidiary, U.S. Foundry and Manufacturing Corporation. On October 14, 2021, the Division filed a complaint and proposed final judgment requiring the parties divest assets designed to establish an independent and economically viable competitor in the market for the design, product, and sale of gray iron municipal castings. The U.S. District Court for the District of Columbia entered the final judgment on January 31, 2022.

In *United States v. B.S.A. S.A., LAG Holding, Inc., and The Kraft Heinz Co.*,[30] the Division challenged B.S.A. S.A.'s (Lactalis) proposed acquisition of The Kraft Heinz Company's natural cheese business in the United States. A proposed final judgment, filed concurrently with the complaint on November 10, 2021, required the parties to divest Kraft Heinz's Athenos business and Polly-O business. The U.S. District Court for the District of Columbia entered the final judgment on March 15, 2022.

In *United States v. S&P Global Inc. and IHS Markit Ltd.*,[31] the Division challenged the proposed merger of S&P and IHS Markit. On November 12, 2021, the Division filed a complaint and proposed final judgment requiring the divest IHS Markit's price reporting agency businesses. The U.S. District Court for the District of Columbia entered the final judgment on March 21, 2022.

[28] *United States v. Wienerberger AG, General Shale Brick, Inc., LSF9 Stardust Super Holdings, L.P., Boral Limited, and Meridian Brick LLC*, 1:21-cv-02555 (D.D.C. Oct. 01, 2021).
[29] *United States v. Neenah Enterprises, Inc., U.S. Holdings, Inc., and U.S. Foundry and Manufacturing Corp.*, 1:21-cv-02701 (D.D.C. Oct. 14, 2021).
[30] *United States v. B.S.A. S.A., LAG Holding, Inc., and The Kraft Heinz Co.*, 1:21-cv-02976 (D.D.C. Nov. 10, 2021).
[31] *United States v. S&P Global Inc. and IHS Markit Ltd.*, 1;21-cv-03003 (D.D.C. Nov. 12, 2021).

The Federal Trade Commission

During fiscal year 2022, the Commission challenged 23 mergers as violations of the Clayton Act. In six cases, the Commission initiated administrative or federal court litigation. In at least five instances, firms abandoned their mergers after the Commission raised concerns. The Commission also accepted consent orders that required divestitures and other relief in twelve merger cases.

In *Nvidia/Arm*,[32] the Commission filed an administrative complaint challenging Nvidia's $40 billion proposed acquisition of U.K. semiconductor provider Arm. The complaint alleged that the proposed vertical merger would give Nvidia, one of the largest chip companies in the world, control over Arm's computing technology that rival firms rely on to develop their own competing chips. If consummated, the combined company would have had the means and incentive to stifle innovative next-generation technologies, including driver-assistance systems in cars. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

In *Lockheed/Aerojet*,[33] the Commission filed an administrative complaint challenging Lockheed's $4.4 billion proposed vertical acquisition of Aerojet. The Commission also authorized staff to seek a preliminary injunction in the U.S. District Court for the District of Columbia to maintain the status quo pending the outcome of the administrative trial. Aerojet is the last independent U.S. supplier of missile propulsion systems and supplies advanced power, propulsion, and armament systems to Lockheed and other defense contractors. The complaint alleged that the proposed merger would allow Lockheed to harm rival defense contractors by cutting them off from Aerojet's critical components needed to build competing missiles or otherwise disadvantaging its rivals' ability to compete effectively. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

In *Lifespan/Care New England*,[34] the Commission filed an administrative complaint challenging the proposed merger of Rhode Island's two largest healthcare providers. The Commission also authorized staff to seek a preliminary injunction in the U.S. District Court for the District of Rhode Island to maintain the status quo pending the outcome of the administrative trial. The complaint alleged that the proposed merger would eliminate the head-to-head competition between Lifespan and Care New England and create a dominant healthcare system for most inpatient general acute care services and inpatient behavioral health services in Rhode Island. The parties had a history of competing against each other to improve quality and services in the state of Rhode Island and 19 nearby Massachusetts

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[32] *In the Matter of Nvidia Corporation, Softbank Group, and Arm, Ltd.*, FTC Dkt. C-9404 (complaint filed on Dec. 2, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110015-nvidiaarm-matter.
[33] *In the Matter of Lockheed Martin Corporation and Aerojet Rocketdyne Holdings, Inc.,* FTC Dkt. C-9405 (complaint filed on Jan. 25, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0052-lockheedaerojet-matter.
[34] *In the Matter of Lifespan Corporation and Care New England Health System,* FTC Dkt. C-9406 (complaint filed on Feb. 17, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0031-lifespancne-matter.

communities. The combination would have eliminated competition for a range of essential medical and surgical services and left insurers with few alternatives for inpatient general acute care services. The complaint further alleged the combined healthcare system would have reduced the hospitals' incentives to invest in vital non-price dimensions of competition, such as quality of care, access to services, and technology. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

In *HCA/Steward*,[35] the Commission filed an administrative complaint challenging HCA's proposed acquisition of Steward Health. The Commission also authorized staff to seek a preliminary injunction in the U.S. District Court for the District of Utah to maintain the status quo pending the outcome of the administrative trial. The complaint alleged that the proposed merger would eliminate the head-to-head competition between the parties for a broad range of essential medical and surgical diagnostic and treatment services that require an overnight hospital stay, known as inpatient general acute care services. HCA and Steward are the second and fourth largest healthcare systems in the Wasatch Front region of Utah, and the competition between them helps keep healthcare costs down. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

In *Barnabas Health/Saint Peter's*,[36] the Commission filed an administrative complaint challenging Barnabas Health's proposed acquisition of Saint Peter's. The Commission also authorized staff to seek a preliminary injunction in the U.S. District Court for the District of New Jersey to halt the transaction pending an administrative trial. The complaint alleged that the proposed merger would eliminate the head-to-head competition for general acute care services in Middlesex County, New Jersey. The combination would have given the combined system a market share of more than 50% in Middlesex County, leaving insurers with fewer and less attractive alternatives, and allowing the combined health system to demand higher reimbursement rates and more onerous contract terms. Shortly after the Commission filed its complaint, the parties abandoned the transaction.

In *Meta/Within*,[37] the Commission filed an administrative complaint challenging Meta's proposed acquisition of Within. The Commission also authorized staff to seek a preliminary injunction in the U.S. District Court of Northern California pending the outcome of the administrative trial. The Commission's complaint alleged that Meta is a potential entrant in the virtual reality dedicated fitness market with the required resources of building its own virtual reality fitness app to compete in the space. Meta, as a potential entrant with the resources available to build its own dedicated-fitness virtual reality app, instead chose to acquire a

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[35] *In the Matter of HCA Healthcare, Inc. and Steward Health Care System, LLC*, FTC Dkt. C-9410 (complaint filed on June 2, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210003-hca-healthcaresteward-health-care-system-matter.

[36] *In the Matter of RWJ Barnabas Health and Saint Peter's Healthcare System,* FTC Dkt. C-9409 (complaint filed on June 2, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2010145-rwj-barnabas-healthsaint-peters-healthcare-system-matter.

[37] *In the Matter of Meta Platforms, Inc. and Within Unlimited, Inc.,* FTC Dkt. C-9411 (complaint filed on Aug. 11, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-metazuckerbergwithin-matter.

primary competitor. The Commission's complaint alleged that Meta's acquisition would likely eliminate the prospect of entry and dampen future innovation. In December 2022, the U.S. District Court denied the preliminary injunction and the Commission dismissed the administrative complaint.

The Commission also accepted for public comment and finalized consent orders in the following twelve merger matters.

In *DaVita/Total Renal Care*,[38] the Commission challenged DaVita's subsidiary, Total Renal Care's, proposed acquisition of 18 dialysis clinics from the University of Utah in a non-HSR reportable transaction. The Commission's complaint alleged the proposed merger would eliminate competition between the parties in outpatient dialysis services in the Provo, Utah market. To remedy these concerns, the Commission issued a consent order requiring DaVita to divest three dialysis clinics to Sanderling Renal Services. In addition, DaVita is prohibited from entering or enforcing non-compete agreements and must seek Commission approval before acquiring new clinics anywhere in Utah for a period of ten years. Following a public comment period, the Commission approved the final order on January 12, 2022.

In *Price Chopper/Tops*,[39] the Commission challenged Golub's Price Chopper chain's proposed acquisition of the Tops Market chain. According to the complaint, the proposed merger would reduce competition and result in highly concentrated markets for the sale of grocery products in several Upstate New York communities, including Cooperstown, Cortland, Oneida, Owego, Norwich, Warrensburg, Lake Placid, Rome, Watertown, Pittsburgh, and Rutland, Vermont. To remedy these concerns, the Commission issued a consent order requiring the parties to divest one supermarket in each market, except for Watertown, where they will divest two. Following a public comment period, the Commission approved the final order on January 20, 2022.

In *ANI/Novitium*,[40] the Commission challenged ANI's $210 million proposed acquisition of Novitium. According to the complaint, the proposed transaction would eliminate future competition in the U.S. market for generic SMX-TMP oral suspension, an antibiotic used to treat infections, and generic dexamethasone tablets, an oral steroid product. To remedy these concerns, the Commission issued a consent order requiring ANI to divest ANI's rights and assets to generic SMX-TMP and generic dexamethasone to Prasco. In addition, the final order contains a prior approval provision giving the Commission notice and approval rights for future related acquisitions in these two markets. Following a public comment period, the Commission approved the final order on January 12, 2022.

[38] *In the Matter of DaVita, Inc. and Total Renal Care, Inc.,* FTC Dkt. C- (complaint filed on Oct. 25, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110013-davita-inc-total-renal-care-inc-matter.
[39] *In the Matter of The Golub Corporation, Tops Markets Corporation, and Project P Newco,* FTC Dkt. C-4753 (final order issued on Jan. 20, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0002-price-choppertops-markets-matter.
[40] *In the Matter of ANI Pharmaceuticals, Inc. and Novitium Pharma LLC,* FTC Dkt. C-4754 (final order issued on Jan. 12, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0101-aninovitium-matter.

In *Global Partners/Fuel Assets*,[41] the Commission challenged Global's $151 million proposed acquisition of 27 retail gasoline and diesel outlets owned by Richard Wiehl. According to the complaint, the proposed merger would have significantly increased concentration for the retail sale of gasoline and diesel in the Connecticut towns of Fairfield, Bethel, Milford, Wilton, and Shelton. To remedy these concerns, the Commission required the parties to divest six Global retail fuel outlets and one Wheels retail fuel outlet to Petroleum Marketing Investment Group. Following a public comment period, the Commission approved the final order on March 2, 2022.

In *EnCap/EP Energy*,[42] the Commission challenged EnCap's $1.4 billion proposed acquisition of EP Energy. According to the complaint, the proposed merger would eliminate substantial head-to-head competition for the sale of Uinta Basin waxy crude oil to Salt Lake City refiners. The complaint alleged that EnCap and EP Energy were two of only four significant producers of Uinta waxy crude oil and that the proposed merger would have increased the likelihood of collusion or coordination among the remaining competitors in the Uinta Basin. To remedy these concerns, the Commission issued a consent order requiring EnCap divest EP's business and assets in Utah to Crescent Energy Company. Following a public comment period, the Commission approved the final order on September 13, 2022.

In *Hikma/Custopharm*,[43] the Commission challenged Hikma's $375 million proposed acquisition of Custopharm. According to the complaint, the proposed merger would eliminate future competition in the market for the corticosteroid drug triamcinolone acetonide (TCA). The complaint alleged that only Custopharm and a few other companies were making this drug and Hikma would stop developing its own TCA following its acquisition of Custopharm, threatening competition in the TCA market. To remedy this concern, the Commission issued a consent order requiring Custopharm's parent company to retain and transfer its TCA assets to another one of its subsidiaries, Long Grove Pharmaceuticals. The consent order also requires Long Grove to maintain the competitive viability of these assets and requires Hikma to seek Commission approval for future TCA-related acquisitions. Following a public comment period, the Commission approved the final order on July 13, 2022.

In *American Securities/Ferro*,[44] the Commission challenged Prince International's parent company, American Securities', $2.1 billion proposed acquisition of Ferro. According to the complaint, the proposed merger would increase the likelihood of the merged firm to

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[41] *In the Matter of Global Partners LP and Richard Wiehl,* FTC Dkt. C-4755 (final order issued on March 2, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/global-partnersfuel-assets.
[42] *In the Matter of EnCap Investments L.P.,* FTC Dkt. C-4760 (final order issued on Sept. 13, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110158-encapep-energy-matter.
[43] *In the Matter of Hikma Pharmaceuticals PLC and Custopharm, Inc.,* FTC Dkt. C-4771 (final order issued on July 13, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210001-hikma-pharmaceuticalscustopharm.
[44] *In the Matter of American Securities Partners VII, L.P., Prince International Corp. and Ferro Corporation*, FTC Dkt.C-4762 (final order issued on June 13, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110131-american-securities-partnersferro-matter.

unilaterally raise prices in the North American market for porcelain enamel frit and the world market for forehearth colorants. In addition, the acquisition would have eliminated Prince as an independent competitor in the world market for glass enamel, increasing the likelihood of coordination between the merged firm and its largest competitor, Fenzi. To remedy these concerns, the Commission issued a consent order requiring Prince and Ferro to divest three facilities used to make porcelain enamel frit, glass enamel, and forehearth colorants to KPS Capital. It also requires American Securities to obtain prior approval from the Commission for ten years before buying assets to manufacture and sell porcelain enamel frit, glass enamel, or forehearth colorants. Following a public comment period, the Commission approved the final order on June 13, 2022.

In *Medtronic/Intersect*,[45] the Commission challenged Medtronic's $1.1 billion proposed acquisition of Intersect ENT. According to the complaint, the merger would eliminate actual, direct, and future competition between Medtronic and Intersect, and result in higher prices and reduced innovation in the markets for ENT navigation systems and balloon sinus dilation products. To remedy these concerns, the Commission issued a consent order requiring Medtronic to divest Intersect's subsidiary Fiagon—which makes ear, nose, and throat navigation systems and balloon sinus products—to Hemostasis. Following a public comment period, the Commission approved the final order on June 27, 2022.

In *Buckeye/Magellan*,[46] the Commission challenged pipeline and storage company Buckeye's $435 million proposed acquisition of Magellan. According to the complaint, the proposed merger may have substantially lessened competition for petroleum products terminaling services in North Augusta, South Carolina; Spartanburg, South Carolina; and Montgomery, Alabama. The complaint alleged that in all three geographic markets, the proposed merger would eliminate close competition between Buckeye and Magellan, increasing the likelihood of coordinated interaction between the remaining competitors, reducing the number of options for third-party customers, and increasing the price for terminaling services. To remedy these concerns, the Commission issued a consent order requiring Buckeye to divest assets to U.S. Venture no later than ten days after the acquisition is consummated. Following a public comment period, the Commission approved the final order on August 8, 2022.

In *JAB/SAGE*,[47] the Commission challenged private equity firm JAB's subsidiaries Compassion-First Pet Hospitals' and National Veterinary Associates' $1.1 billion proposed acquisition of SAGE Veterinary Partners. The complaint alleged that the proposed merger

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[45] *In the Matter of Medtronic plc and Intersect ENT, Inc.,* FTC Dkt. C-4763 (final order issued on June 27, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110184-medtronicintersect-matter.
[46] *In the Matter of IFM Global Infrastructure Fund, Buckeye Partners, and Magellan Midstream Partners, L.P.*, FTC Dkt. C-4765 (final order issued on Aug. 8, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110144-buckeyemagellan-matter.
[47] *In the Matter of JAB Consumer Partners SCA, National Veterinary Associates, Inc., and SAGE Veterinary Partners, LLC,* FTC Dkt. C-4766 (final order issued on Aug. 2, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110140-jab-consumer-partnersnational-veterinary-associatessage-veterinary-partners-matter.

would reduce the number of providers for various types of veterinary care, including emergency services, in three geographic markets in Texas and California. In addition, a monopoly would result for the provision of neurology and ophthalmology veterinary specialty service in and around San Francisco. To remedy these concerns, the Commission issued a consent order requiring JAB to divest clinics in Texas and California. In addition, the Commission imposed robust prior approval and prior notice requirements on any future JAB acquisitions of specialty and emergency veterinary clinics. Following a public comment period, the Commission approved the final order on August 2, 2022.

In *Arko/GPM*,[48] the Commission required ARKO Corp. and its subsidiary GPM to divest assets and roll back anticompetitive provisions contained in their acquisition agreement with Corrigan Oil. As part of their $94 million acquisition of Corrigan's 60 Express Stop retail fuel outlets, ARKO and GPM imposed a broad agreement not to compete covering more than 190 GPM locations in Michigan and Ohio. The acquisition also eliminated retail fuel competition in five local markets where they both operated outlets prior to the acquisition. The Commission ordered ARKO to release back to Corrigan retail assets in the five local markets, to seek prior approval from the Commission before acquiring retail fuel assets within a 3-mile drive of any of these returned locations, and to amend their acquisition agreement to limit the effects of their overly broad noncompete restrictions. The Commission issued the Final Order on August 9, 2022.

In *JAB/VIPW*,[49] the Commission challenged JAB's $1.65 billion proposed acquisition of VIPW's Ethos, a specialty and emergency veterinary clinic operator with locations in nine states. This deal is part of a growing trend towards consolidation in the emergency and specialty veterinary services markets across the U.S. by large chains, including JAB. The complaint alleged that transaction would eliminate the close competition among the parties for a number of veterinary services and substantially increase competition in already highly concentrated markets. The Commission issued a consent order requiring JAB to divest clinics in Richmond, Virginia, Denver, San Francisco, and Washington, D.C. and imposing extensive prior approval and prior notice requirements on JAB and any divestiture buyers of specialty and emergency veterinary services. Following a public comment period, the Commission approved the final order on October 10, 2022.

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Prior to the HSR Act, businesses could, and often did, consummate transactions that raised significant antitrust concerns and in some cases violated the antitrust laws before the agencies had an opportunity to investigate and block them. This practice forced the agencies to

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[48] *In the Matter of Arko and GPM Investments*, LLC, FTC Dkt. C-4773 (final order issued on Aug. 9, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0187-arkogpm-investments-matter.

[49] *In the Matter of JAB Consumer Partners SCA, National Veterinary Associates, Inc., and VIPW, LLC*, FTC Dkt. C-4770 (final order issued on Oct. 10, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0174-jab-consumer-partnersvipwethos-veterinary-health-matter.

engage in lengthy post-acquisition litigation, during the course of which the transaction's anticompetitive effects continued to harm competition and the public; furthermore, if effective post-acquisition relief was not practicable, the harm continued indefinitely.

All staff of the Commission and the Department of Justice, including the FTC's Premerger Notification Office, are to be commended for their diligent and dedicated efforts to identify and investigate mergers and acquisitions that may substantially lessen competition or tend to create a monopoly and to vigorously enforce the law. The Commission and the Antitrust Division salute the tireless work of their excellent staffs in protecting the American public from unlawful mergers and acquisitions.

LIST OF APPENDICES

Appendix A: **Summary of Transactions, Fiscal Years 2013 – 2022**

Appendix B: **Number of Transactions Reported and Filings Received by Month for Fiscal Years 2013 - 2022**

LIST OF EXHIBITS

Exhibit A: **Statistical Tables for Fiscal Year 2022 – Data Profiling Hart-Scott-Rodino Notification Filings and Enforcement Actions**

APPENDIX A

SUMMARY OF TRANSACTIONS

FISCAL YEARS 2013 – 2022

Appendix A
Summary of Transactions by Fiscal Year

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Transactions Reported	**1,326**	**1,663**	**1,801**	**1,832**	**2,052**	**2,111**	**2,089**	**1,637**	**3,520**	**3,152**
Filings Received[1]	**2,628**	**3,307**	**3,585**	**3,674**	**4,083**	**4,188**	**4,142**	**3,249**	**7,002**	**6,288**
Adjusted Transactions In Which A Second Request Could Have Been Issued[2]	1,286	1,618	1,754	1,772	1,992	2,028	2,030	1,580	3,413	3,029
Investigations in Which Second Requests Were Issued	**47**	**51**	**47**	**54**	**51**	**45**	**61**	**48**	**65**	**47**
FTC[3]	25	30	20	25	33	26	30	23	42	25
Percent[4]	1.9%	1.9%	1.1%	1.4%	1.7%	1.3%	1.5%	1.5%	1.2%	0.8%
DOJ[3]	22	21	27	29	18	19	31	25	23	22
Percent[4]	1.7%	1.3%	1.5%	1.6%	0.9%	0.9%	1.5%	1.6%	0.7%	0.7%
Transactions Involving a Request For Early Termination[5]	**990**	**1,274**	**1,366**	**1,374**	**1,552**	**1,500**	**1,507**	**1,133**	**2,124**	**1,345**
Granted[5]	797	1,020	1,086	1,102	1,220	1,170	1,107	861	417	5
Not Granted[5]	193	254	280	272	332	330	400	272	1,707	1,340

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person when a transaction is reported. Only one application is received when an acquiring party files for an exemption under Section 7A (c)(6) or (c)(8) of the Clayton Act.

[2] These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of Sections 7A (c)(6) and 7A(c)(8) of the Act; (3) transactions which were found to be non-reportable; and (4) transactions withdrawn before the waiting period began. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, e.g., filing one threshold and later filing for a higher threshold, only a single consolidated transaction has been counted because as a practical matter the agencies do not issue more than one Second Request in such a case. These statistics also omit from the total number the transactions reported secondary acquisitions filed pursuant to §801.4 of the Premerger Notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.

[3] These statistics are based on the date the Second Request was issued and not the date the investigation was opened.

[4] Second Request investigations are a percentage of the total number of adjusted transactions. The total percentage reflected in Figure 2 may not equal the sum of reported component values due to rounding.

[5] These statistics are based on the date of the HSR filing and not the date action was taken on the request.

APPENDIX B

NUMBER OF TRANSACTIONS REPORTED AND

FILINGS RECEIVED BY MONTH

FOR

FISCAL YEARS 2013 - 2022

Appendix B

Table 1. Number of Transactions Reported by Month for Fiscal Years

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
October	127	124	144	168	163	174	211	151	202	432
November	260	159	157	243	215	207	254	206	400	575
December	92	108	122	157	148	160	157	164	204	279
January	78	125	118	117	153	170	150	154	210	233
February	82	114	140	127	153	141	145	138	278	206
March	87	100	128	125	146	178	156	136	322	221
April	77	140	131	129	150	140	163	72	261	218
May	117	157	152	168	209	222	191	57	299	211
June	90	150	155	150	191	177	161	117	299	202
July	91	162	170	140	146	180	170	110	329	184
August	122	151	216	166	219	223	173	170	353	197
September	103	173	168	142	159	139	158	162	363	194
TOTAL	**1,326**	**1,663**	**1,801**	**1,832**	**2,052**	**2,111**	**2,089**	**1,637**	**3,520**	**3,152**

Appendix B

Table 2. Number of Filings Received[1] by Month for Fiscal Years

	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
October	255	247	289	345	329	336	421	298	454	870
November	511	325	322	483	416	417	505	413	825	1,187
December	180	211	239	314	297	319	308	329	364	552
January	151	244	244	236	307	316	287	309	399	431
February	169	236	257	249	298	304	295	269	564	407
March	172	195	252	265	302	338	308	270	616	440
April	151	271	265	249	290	285	335	145	524	434
May	228	315	305	331	402	424	365	137	623	420
June	181	304	322	304	388	365	349	212	573	407
July	186	323	327	284	291	364	306	208	659	365
August	240	292	425	339	446	433	358	336	717	407
September	204	344	338	275	317	287	305	323	684	368
TOTAL	**2,628**	**3,307**	**3,585**	**3,674**	**4,083**	**4,188**	**4,142**	**3,249**	**7,002**	**6,288**

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person, when the transaction is reported. Only one filing is received when an acquiring person files for a transaction that is exempt under Sections 7A(c)(6) and (c)(8) of the Clayton Act.

EXHIBIT A

STATISTICAL TABLES

FOR

FISCAL YEAR 2022

DATA PROFILING HART-SCOTT-RODINO PREMERGER NOTIFICATION FILINGS AND ENFORCEMENT ACTIONS

TABLE I
FISCAL YEAR 2022[1]
ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	25	0.8%	0	1	0.0%	4.0%	4.0%	0	0	0.0%	0.0%	0.0%
100M - 150M	401	13.2%	11	7	2.7%	1.7%	4.5%	1	2	0.2%	0.5%	0.7%
150M - 200M	402	13.3%	14	8	3.5%	2.0%	5.5%	0	1	0.0%	0.2%	0.2%
200M - 300M	513	16.9%	29	15	5.7%	2.9%	8.6%	2	0	0.4%	0.0%	0.4%
300M - 500M	434	14.3%	26	14	6.0%	3.2%	9.2%	3	3	0.7%	0.7%	1.4%
500M - 1000M	643	21.2%	43	27	6.7%	4.2%	10.9%	3	6	0.5%	0.9%	1.4%
Over 1000M	611	20.2%	61	35	10.0%	5.7%	15.7%	16	10	2.6%	1.6%	4.3%
ALL TRANSACTIONS	3,029	100.0%	184	107	6.1%	3.5%	9.6%	25	22	0.8%	0.7%	1.6%

TABLE II
FISCAL YEAR 2022[1]
ACQUISITIONS BY SIZE OF TRANSACTION[2] (CUMULATIVE)

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENTAGE OF TOTAL NUMBER OF CLEARANCES			NUMBER		PERCENTAGE OF TOTAL NUMBER OF SECOND REQUESTS		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 50M [5]	0	0.0%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
LESS THAN 100M	25	0.8%	0	1	0.0%	0.3%	0.3%	0	0	0.0%	0.0%	0.0%
LESS THAN 150M	426	14.1%	11	8	3.8%	2.7%	6.5%	1	2	2.1%	4.3%	6.4%
LESS THAN 200M	828	27.3%	25	16	8.6%	5.5%	14.1%	1	3	2.1%	6.4%	8.5%
LESS THAN 300M	1,341	44.3%	54	31	18.6%	10.7%	29.2%	3	3	6.4%	6.4%	12.8%
LESS THAN 500M	1,775	58.6%	80	45	27.5%	15.5%	43.0%	6	6	12.8%	12.8%	25.5%
LESS THAN 1000M	2,413	79.7%	123	72	42.3%	24.7%	67.0%	9	12	19.1%	25.5%	44.7%
ALL TRANSACTIONS	3,029		184	107	63.2%	36.8%	100.0%	25	22	53.2%	46.8%	100.0%

TABLE III
FISCAL YEAR 2022[1]
TRANSACTIONS INVOLVING THE GRANTING OF CLEARANCE BY AGENCY

TRANSACTION RANGE ($MILLIONS)	CLEARANCES GRANTED TO AGENCY			CLEARANCE GRANTED AS A PERCENTAGE OF:							
				TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF CLEARANCES PER AGENCY		TOTAL NUMBER OF CLEARANCES GRANTED		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	0	1	1	0.0%	4.0%	4.0%	0.0%	0.9%	0.0%	0.3%	0.3%
100M - 150M	11	7	18	2.7%	1.7%	4.5%	6.0%	6.5%	3.8%	2.4%	6.2%
150M - 200M	14	8	22	3.5%	2.0%	5.5%	7.6%	7.5%	4.8%	2.7%	7.6%
200M - 300M	29	15	44	5.7%	2.9%	8.6%	15.8%	14.0%	10.0%	5.2%	15.1%
300M - 500M	26	14	40	6.0%	3.2%	9.2%	14.1%	13.1%	8.9%	4.8%	13.7%
500M - 1000M	43	27	70	6.7%	4.2%	10.9%	23.4%	25.2%	14.8%	9.3%	24.1%
Over 1000M	61	35	96	10.0%	5.7%	15.7%	33.2%	32.7%	21.0%	12.0%	33.0%
ALL TRANSACTIONS	184	107	291	6.1%	3.5%	9.6%	100.0%	100.0%	63.2%	36.8%	100.0%

TABLE IV
FISCAL YEAR 2022[1]
TRANSACTIONS IN WHICH SECOND REQUESTS WERE ISSUED

TRANSACTION RANGE ($MILLIONS)	INVESTIGATIONS IN WHICH A SECOND REQUEST WAS ISSUED [3]			SECOND REQUESTS ISSUED AS A PERCENTAGE OF:								
				TOTAL NUMBER OF TRANSACTIONS			TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF SECOND REQUEST INVESTIGATIONS		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
50M - 100M	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
100M - 150M	1	2	3	0.0%	0.1%	0.1%	0.2%	0.5%	0.7%	2.1%	4.3%	6.4%
150M - 200M	0	1	1	0.0%	0.0%	0.0%	0.0%	0.2%	0.2%	0.0%	2.1%	2.1%
200M - 300M	2	0	2	0.1%	0.0%	0.1%	0.4%	0.0%	0.4%	4.3%	0.0%	4.3%
300M - 500M	3	3	6	0.1%	0.1%	0.2%	0.7%	0.7%	1.4%	6.4%	6.4%	12.8%
500M - 1000M	3	6	9	0.1%	0.2%	0.3%	0.5%	0.9%	1.4%	6.4%	12.8%	19.1%
Over 1000M	16	10	26	0.5%	0.3%	0.9%	2.6%	1.6%	4.3%	34.0%	21.3%	55.3%
ALL TRANSACTIONS	25	22	47	0.8%	0.7%	1.6%	0.8%	0.7%	1.6%	53.2%	46.8%	100.0%

TABLE V
FISCAL YEAR 2022[1]
ACQUISITIONS BY REPORTING THRESHOLD

THRESHOLD[6]	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF THRESHOLD GROUP			NUMBER		PERCENT OF THRESHOLD GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
$50M (as adjusted)	236	7.8%	1	2	0.4%	0.8%	1.3%	0	0	0.0%	0.0%	0.0%
$100M (as adjusted)	271	8.9%	4	11	1.5%	4.1%	5.5%	0	0	0.0%	0.0%	0.0%
$500M (as adjusted)	65	2.1%	1	0	1.5%	0.0%	1.5%	0	0	0.0%	0.0%	0.0%
25%	18	0.6%	0	1	0.0%	5.6%	5.6%	0	0	0.0%	0.0%	0.0%
50%	1227	40.5%	95	50	7.7%	4.1%	11.8%	13	17	1.1%	1.4%	2.4%
ASSETS ONLY	270	8.9%	38	9	14.1%	3.3%	17.4%	6	1	2.2%	0.4%	2.6%
NCI	942	31.1%	45	34	4.8%	3.6%	8.4%	6	4	0.6%	0.4%	1.1%
ALL TRANSACTIONS	3,029	100.0%	184	107	6.1%	3.5%	9.6%	25	22	0.8%	0.7%	1.6%

TABLE VI
FISCAL YEAR 2022[1]
TRANSACTION BY ASSETS OF ACQUIRING PERSON

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	491	16.2%	7	7	1.4%	1.4%	2.9%	0	1	0.0%	0.2%	0.2%
50M - 100M	40	1.3%	3	0	7.5%	0.0%	7.5%	0	0	0.0%	0.0%	0.0%
100M - 150M	48	1.6%	1	2	2.1%	4.2%	6.3%	1	0	2.1%	0.0%	2.1%
150M - 200M	129	4.3%	1	3	0.8%	2.3%	3.1%	0	0	0.0%	0.0%	0.0%
200M - 300M	241	8.0%	12	10	5.0%	4.1%	9.1%	0	2	0.0%	0.8%	0.8%
300M - 500M	216	7.1%	6	5	2.8%	2.3%	5.1%	0	1	0.0%	0.5%	0.5%
500M - 1000M	266	8.8%	9	10	3.4%	3.8%	7.1%	0	1	0.0%	0.4%	0.4%
Over 1000M	1,598	52.8%	145	70	9.1%	4.4%	13.5%	24	17	1.5%	1.1%	2.6%
ALL TRANSACTIONS	3,029	100.0%	184	107	6.1%	3.5%	9.6%	25	22	0.8%	0.7%	1.6%

TABLE VII
FISCAL YEAR 2022[1]
TRANSACTION BY SALES OF ACQUIRING PERSON

SALES RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF SALES RANGE GROUP			NUMBER		PERCENT OF SALES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	292	9.6%	2	3	0.7%	1.0%	1.7%	0	2	0.0%	0.7%	0.7%
50M - 100M	121	4.0%	0	3	0.0%	2.5%	2.5%	0	0	0.0%	0.0%	0.0%
100M - 150M	90	3.0%	9	5	10.0%	5.6%	15.6%	0	1	0.0%	1.1%	1.1%
150M - 200M	96	3.2%	6	2	6.3%	2.1%	8.3%	1	1	1.0%	1.0%	2.1%
200M - 300M	150	5.0%	2	3	1.3%	2.0%	3.3%	0	0	0.0%	0.0%	0.0%
300M - 500M	171	5.6%	9	7	5.3%	4.1%	9.4%	0	1	0.0%	0.6%	0.6%
500M - 1000M	334	11.0%	15	14	4.5%	4.2%	8.7%	1	1	0.3%	0.3%	0.6%
Over 1000M	1316	43.4%	135	58	10.3%	4.4%	14.7%	23	16	1.7%	1.2%	3.0%
Sales Not Available[7]	459	15.2%	6	12	1.3%	2.6%	3.9%	0	0	0.0%	0.0%	0.0%
ALL TRANSACTIONS	3,029	100.0%	184	107	6.1%	3.5%	9.6%	25	22	0.8%	0.7%	1.6%

TABLE VIII
FISCAL YEAR 2022[1]
TRANSACTION BY ASSETS OF ACQUIRED ENTITIES[8]

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	603	19.9%	32	12	5.3%	2.0%	7.3%	3	4	0.5%	0.7%	1.2%
50M - 100M	406	13.4%	18	11	4.4%	2.7%	7.1%	1	2	0.2%	0.5%	0.7%
100M - 150M	260	8.6%	13	7	5.0%	2.7%	7.7%	0	1	0.0%	0.4%	0.4%
150M - 200M	183	6.0%	6	1	3.3%	0.5%	3.8%	0	1	0.0%	0.5%	0.5%
200M - 300M	247	8.2%	15	9	6.1%	3.6%	9.7%	2	1	0.8%	0.4%	1.2%
300M - 500M	252	8.3%	21	11	8.3%	4.4%	12.7%	3	1	1.2%	0.4%	1.6%
500M - 1000M	247	8.2%	22	14	8.9%	5.7%	14.6%	2	3	0.8%	1.2%	2.0%
Over 1000M	555	18.3%	33	29	5.9%	5.2%	11.2%	10	8	1.8%	1.4%	3.2%
Assets Not Available[8]	276	9.1%	24	13	8.7%	4.7%	13.4%	4	1	1.4%	0.4%	1.8%
ALL TRANSACTIONS	3,029	100.0%	184	107	6.1%	3.5%	9.6%	25	22	0.8%	0.7%	1.6%

TABLE IX
FISCAL YEAR 2022[1]
TRANSACTION BY SALES OF ACQUIRED ENTITIES [9]

SALES RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS [3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF SALES RANGE GROUP			NUMBER		PERCENT OF SALES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	709	23.4%	38	14	5.4%	2.0%	7.3%	3	1	0.4%	0.1%	0.6%
50M - 100M	513	16.9%	23	12	4.5%	2.3%	6.8%	2	4	0.4%	0.8%	1.2%
100M - 150M	305	10.1%	18	13	5.9%	4.3%	10.2%	0	3	0.0%	1.0%	1.0%
150M - 200M	220	7.3%	12	6	5.5%	2.7%	8.2%	3	0	1.4%	0.0%	1.4%
200M - 300M	287	9.5%	13	17	4.5%	5.9%	10.5%	1	2	0.3%	0.7%	1.0%
300M - 500M	232	7.7%	19	11	8.2%	4.7%	12.9%	1	3	0.4%	1.3%	1.7%
500M - 1000M	219	7.2%	17	15	7.8%	6.8%	14.6%	5	1	2.3%	0.5%	2.7%
Over 1000M	425	14.0%	21	19	4.9%	4.5%	9.4%	8	8	1.9%	1.9%	3.8%
Sales not Available [10]	119	3.9%	23	0	19.3%	0.0%	19.3%	2	0	1.7%	0.0%	1.7%
ALL TRANSACTIONS	3,029	100.0%	184	107	6.1%	3.5%	9.6%	25	22	0.8%	0.7%	1.6%

TABLE X
FISCAL YEAR 2022 [1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2021 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
000 [13]	Not Available	454	15.0%	-4.1%	6	8	14	0	0	0
111	Crop Production	3	0.1%	0.0%	0	0	0	0	0	0
211	Oil and Gas Extraction	36	1.2%	0.4%	4	0	4	1	0	1
212	Mining (except Oil and Gas)	5	0.2%	0.0%	1	1	2	1	0	1
213	Support Activities for Mining	5	0.2%	0.1%	0	0	0	0	0	0
221	Utilities	43	1.4%	0.3%	0	0	0	0	0	0
236	Construction of Buildings	7	0.2%	-0.1%	0	0	0	0	0	0
237	Heavy and Civil Engineering Construction	23	0.8%	0.1%	0	0	0	0	0	0
238	Specialty Trade Contractors	28	0.9%	0.1%	0	1	1	0	0	0
311	Food and Kindred Products	46	1.5%	0.2%	1	6	7	0	2	2
312	Beverage and Tobacco Product Manufacturing	12	0.4%	0.1%	0	0	0	0	0	0
313	Textile Mills	3	0.1%	0.0%	0	0	0	0	0	0
314	Textile Products	2	0.1%	0.1%	0	0	0	0	0	0
315	Apparel Manufacturing	2	0.1%	0.1%	0	0	0	0	0	0
316	Leather and Allied Product Manufacturing	1	0.0%	0.0%	0	0	0	0	0	0
321	Wood Product Manufacturing	11	0.4%	0.0%	1	0	1	0	0	0
322	Paper Manufacturing	12	0.4%	0.2%	0	1	1	0	0	0
323	Printing and Related Support Actitivies	3	0.1%	0.0%	0	0	0	0	0	0
324	Petroleum and Coal Products Manufacturing	10	0.3%	-0.2%	0	0	0	0	0	0
325	Chemical Manufacturing	171	5.6%	0.5%	48	3	51	4	3	7
326	Plastics and Rubber Manfuacturing	21	0.7%	-0.2%	1	1	2	0	0	0

TABLE X
FISCAL YEAR 2022[1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2021[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
327	Nonmetallic Mineral Product Manufacturing	20	0.7%	0.2%	3	1	4	0	0	0
331	Primary Metal Manufacturing	14	0.5%	0.1%	0	3	3	0	1	1
332	Fabricated Metal Product Manufacturing	37	1.2%	0.2%	0	4	4	0	3	3
333	Machinery Manufacturing	50	1.7%	-0.2%	0	5	5	0	0	0
334	Computer and Electronic Product Manufacturing	36	1.2%	-0.5%	4	1	5	0	0	0
335	Electrical Equipment, Applicance, and Component Manufacturing	19	0.6%	0.2%	0	0	0	0	0	0
336	Transportation Equipment Manufacturing	30	1.0%	-0.8%	1	5	6	0	2	2
337	Furniture and Related Product Manufacturing	3	0.1%	-0.1%	0	0	0	0	0	0
339	Miscellaneous Manufacturing	40	1.3%	0.3%	9	0	9	2	0	2
423	Merchant Wholesalers, Durable Goods	149	4.9%	1.1%	3	3	6	0	0	0
424	Merchant Wholesales, Nondurable Goods	121	4.0%	0.8%	12	6	18	1	1	2
425	Wholesale Electric Markets and Agent and Brokers	4	0.1%	-0.2%	0	0	0	0	0	0
441	Motor Vehicle and Parts Dealers	42	1.4%	0.6%	2	0	2	0	0	0
443	Miscellaneous Repair Services	5	0.2%	0.2%	0	0	0	0	0	0
444	Electronics and Appliance Stores	4	0.1%	-0.3%	0	0	0	0	0	0
445	Food and Beverage Stores	9	0.3%	0.1%	1	1	2	0	0	0
446	Health and Personal Care Stores	8	0.3%	-0.1%	0	1	1	0	0	0
447	Gasoline Stations	4	0.1%	-0.1%	0	0	0	0	0	0
448	Clothing and Clothing Accessories Stores	11	0.4%	0.1%	2	0	2	0	0	0
452	General Merchandise Stores	5	0.2%	0.2%	0	0	0	0	0	0
453	Miscellaneous Store Retailers	12	0.4%	0.0%	0	0	0	0	0	0

TABLE X
FISCAL YEAR 2022 [1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2021 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
454	Nonstore Retailers	18	0.6%	-0.4%	2	2	4	2	0	2
481	Air Transportation	7	0.2%	0.0%	0	4	4	0	2	2
482	Railroad Transportation	2	0.1%	0.0%	0	0	0	0	0	0
483	Water Transportation	3	0.1%	0.0%	0	1	1	0	0	0
484	Truck Transportation	11	0.4%	0.0%	0	0	0	0	0	0
485	Transit and Ground Transportation	2	0.1%	0.0%	0	0	0	0	0	0
486	Pipeline Transportation	12	0.4%	0.2%	1	0	1	0	0	0
488	Support Actitivies for Transportation	42	1.4%	0.7%	0	3	3	0	0	0
492	Couriers	1	0.0%	-0.1%	0	0	0	0	0	0
493	Warehousing and Storage	3	0.1%	0.0%	0	0	0	0	0	0
511	Publishing Industries (except Internet)	132	4.4%	-0.4%	6	5	11	3	1	4
512	Motion Pictures and Sound Recording Industries	13	0.4%	-0.1%	0	0	0	0	0	0
515	Broadcasting (except Internet)	7	0.2%	-0.1%	0	4	4	0	1	1
517	Telecommunications	22	0.7%	-0.2%	0	2	2	0	1	1
518	Internet Service Providers, Web Search Portals, and Data Processing Services	49	1.6%	-0.1%	2	4	6	0	1	1
519	Other Information Services	30	1.0%	0.1%	2	2	4	1	1	2
521	Monetary Authorities - Central Bank	1	0.0%	0.0%	0	0	0	0	0	0
522	Credit Intermediation and Related Activities	68	2.2%	0.2%	0	4	4	0	0	0
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	321	10.6%	-0.6%	2	5	7	1	0	1
524	Insurance Carriers and Related Actitivities	116	3.8%	0.1%	6	6	12	2	1	3
525	Funds, Trusts, and Other Financial Vehicles	54	1.8%	0.0%	0	1	1	0	0	0

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TABLE X
FISCAL YEAR 2022 [1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE [11]	INDUSTRY DESCRIPTION	NUMBER [4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2021 [12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS [3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
531	Real Estate	25	0.8%	0.0%	0	0	0	0	0	0
532	Rental and Leasing Services	23	0.8%	0.3%	2	0	2	0	0	0
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	16	0.5%	0.2%	2	0	2	0	0	0
541	Professional, Scientific, and Technical Services	249	8.2%	0.5%	25	7	32	2	1	3
551	Management Companies and Enterprises	9	0.3%	0.2%	0	0	0	0	0	0
561	Administrative and Support Services	88	2.9%	0.4%	7	2	9	0	0	0
562	Waste Management and Remediation Services	19	0.6%	0.1%	0	1	1	0	0	0
611	Educational Services	14	0.5%	0.1%	2	0	2	0	0	0
621	Ambulatory Health Care Services	56	1.8%	-0.1%	8	0	8	1	0	1
622	Hospitals	25	0.8%	-0.2%	13	0	13	3	0	3
623	Nursing Care Facilities	4	0.1%	0.1%	1	0	1	0	0	0
624	Social Assistance	4	0.1%	0.0%	0	0	0	0	0	0
711	Performing Arts, Spector Sports, and Related Industries	8	0.3%	0.1%	0	2	2	0	1	1
713	Amusement, Gambling, and Recreation Industries	6	0.2%	0.0%	1	1	2	0	0	0
721	Accommodation	8	0.3%	0.1%	1	0	1	1	0	1
722	Food Services and Drinking Places	23	0.8%	0.2%	1	0	1	0	0	0
811	Repairs and Maintenance	15	0.5%	-0.1%	0	0	0	0	0	0
812	Personal and Laundry Services	2	0.1%	-0.1%	1	0	1	0	0	0
		3,029	100.0%		184	107	291	25	22	47

TABLE XI
FISCAL YEAR 2022[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2021[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
000[13]	Not Available	110	3.6%	-0.6%	20	0	20	1	0	1	0
111	Crop Production	4	0.1%	-0.1%	0	0	0	0	0	0	0
112	Animal Production	3	0.1%	0.0%	0	1	1	0	0	0	0
115	Support Activities for Agriculture and Forestry	2	0.1%	0.1%	0	0	0	0	0	0	0
211	Oil and Gas Extraction	43	1.4%	0.1%	3	0	3	1	0	1	16
212	Mining (except Oil and Gas)	9	0.3%	0.0%	1	0	1	1	0	1	1
213	Support Activities for Mining	14	0.5%	0.2%	0	2	2	0	1	1	0
221	Utilities	60	2.0%	-0.1%	2	0	2	0	0	0	4
236	Construction of Buildings	8	0.3%	0.0%	0	0	0	0	0	0	0
237	Heavy and Civil Engineering Construction	26	0.9%	0.0%	0	0	0	0	0	0	2
238	Specialty Trade Contractors	42	1.4%	0.3%	0	1	1	0	0	0	2
311	Food and Kindred Products	66	2.2%	0.7%	1	5	6	0	1	1	7
312	Beverage and Tobacco Product Manufacturing	23	0.8%	0.5%	0	0	0	0	0	0	0
313	Textile Mills	2	0.1%	-0.1%	0	0	0	0	0	0	0
315	Apparel Manufacturing	1	0.0%	0.0%	0	0	0	0	0	0	0
316	Leather and Allied Product Manufacturing	1	0.0%	0.0%	0	0	0	0	0	0	0
321	Wood Product Manufacturing	20	0.7%	0.4%	0	1	1	0	0	0	0
322	Paper Manufacturing	12	0.4%	0.0%	0	1	1	0	0	0	1
323	Printing and Related Support Actitivies	12	0.4%	0.1%	0	0	0	0	0	0	0
324	Petroleum and Coal Products Manufacturing	6	0.2%	-0.1%	0	1	1	0	0	0	2
325	Chemical Manufacturing	118	3.9%	-0.5%	25	1	26	3	1	4	19

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TABLE XI
FISCAL YEAR 2022[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2021[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
326	Plastics and Rubber Manfuacturing	35	1.2%	0.2%	3	0	3	0	0	0	1
327	Nonmetallic Mineral Product Manufacturing	15	0.5%	0.0%	2	1	3	0	0	0	0
331	Primary Metal Manufacturing	13	0.4%	-0.1%	0	2	2	0	1	1	4
332	Fabricated Metal Product Manufacturing	38	1.3%	0.1%	1	3	4	0	2	2	6
333	Machinery Manufacturing	43	1.4%	-0.3%	1	5	6	0	1	1	4
334	Computer and Electronic Product Manufacturing	69	2.3%	-0.4%	6	3	9	0	1	1	5
335	Electrical Equipment, Applicance, and Component Manufacturing	19	0.6%	-0.1%	0	0	0	0	0	0	0
336	Transportation Equipment Manufacturing	43	1.4%	0.0%	1	3	4	0	2	2	2
337	Furniture and Related Product Manufacturing	3	0.1%	-0.1%	0	0	0	0	0	0	0
339	Miscellaneous Manufacturing	37	1.2%	0.0%	7	2	9	1	0	1	3
423	Merchant Wholesalers, Durable Goods	165	5.4%	-0.1%	7	5	12	1	1	2	14
424	Merchant Wholesales, Nondurable Goods	131	4.3%	1.2%	13	5	18	2	0	2	17
425	Wholesale Electric Markets and Agent and Brokers	3	0.1%	-0.2%	0	0	0	0	0	0	0
441	Motor Vehicle and Parts Dealers	36	1.2%	0.3%	0	0	0	0	0	0	6
442	Furniture and Home Furnishing Stores	2	0.1%	0.0%	0	0	0	0	0	0	0
443	Miscellaneous Repair Services	2	0.1%	-0.1%	0	0	0	0	0	0	1
444	Electronics and Appliance Stores	5	0.2%	-0.1%	0	1	1	0	0	0	1
445	Food and Beverage Stores	9	0.3%	0.0%	1	0	1	0	0	0	1
446	Health and Personal Care Stores	7	0.2%	0.1%	0	0	0	0	0	0	0
447	Gasoline Stations	8	0.3%	-0.1%	0	0	0	0	0	0	1
448	Clothing and Clothing Accessories Stores	7	0.2%	0.1%	1	0	1	0	0	0	0

TABLE XI
FISCAL YEAR 2022[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2021[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
451	Sporting Goods, Hobby, Book, and Music Stores	1	0.0%	-0.1%	0	0	0	0	0	0	0
452	General Merchandise Stores	5	0.2%	-0.1%	0	0	0	0	0	0	0
453	Miscellaneous Store Retailers	6	0.2%	-0.4%	0	0	0	0	0	0	2
454	Nonstore Retailers	40	1.3%	-0.8%	0	0	0	0	0	0	0
481	Air Transportation	21	0.7%	0.5%	0	5	5	0	2	2	1
482	Railroad Transportation	1	0.0%	0.0%	0	0	0	0	0	0	0
483	Water Transportation	5	0.2%	0.1%	0	0	0	0	0	0	0
484	Truck Transportation	12	0.4%	0.0%	0	0	0	0	0	0	0
485	Transit and Ground Transportation	7	0.2%	0.1%	0	1	1	0	0	0	0
486	Pipeline Transportation	19	0.6%	0.4%	1	0	1	0	0	0	0
488	Support Actitivies for Transportation	47	1.6%	0.5%	1	6	7	0	0	0	5
492	Couriers	3	0.1%	-0.1%	0	0	0	0	0	0	0
493	Warehousing and Storage	16	0.5%	0.2%	1	0	1	0	0	0	1
511	Publishing Industries (except Internet)	266	8.8%	-1.8%	6	6	12	3	2	5	11
512	Motion Pictures and Sound Recording Industries	16	0.5%	0.0%	0	1	1	0	0	0	4
515	Broadcasting (except Internet)	11	0.4%	0.0%	0	5	5	0	1	1	4
517	Telecommunications	28	0.9%	-0.5%	0	6	6	0	1	1	7
518	Internet Service Providers, Web Search Portals, and Data Processing Services	108	3.6%	0.3%	2	4	6	1	0	1	5
519	Other Information Services	59	1.9%	0.1%	3	1	4	1	1	2	7
522	Credit Intermediation and Related Activities	69	2.3%	-0.2%	0	2	2	0	0	0	10
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	104	3.4%	0.7%	2	0	2	0	0	0	64

TABLE XI
FISCAL YEAR 2022[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2021[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
524	Insurance Carriers and Related Actitivities	107	3.5%	-0.2%	3	0	3	1	0	1	15
525	Funds, Trusts, and Other Financial Vehicles	10	0.3%	0.2%	0	0	0	0	0	0	17
531	Real Estate	28	0.9%	0.0%	0	0	0	0	0	0	4
532	Rental and Leasing Services	29	1.0%	-0.2%	4	0	4	0	0	0	2
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	25	0.8%	0.2%	6	0	6	0	0	0	2
541	Professional, Scientific, and Technical Services	351	11.6%	-0.9%	22	20	42	1	3	4	31
551	Management Companies and Enterprises	1	0.0%	0.0%	0	0	0	0	0	0	2
561	Administrative and Support Services	101	3.3%	1.0%	4	1	5	0	0	0	25
562	Waste Management and Remediation Services	23	0.8%	0.1%	0	0	0	0	0	0	3
611	Educational Services	25	0.8%	-0.1%	0	0	0	0	0	0	0
621	Ambulatory Health Care Services	87	2.9%	-0.6%	17	2	19	4	0	4	9
622	Hospitals	27	0.9%	0.1%	11	0	11	3	0	3	6
623	Nursing Care Facilities	6	0.2%	-0.1%	1	0	1	0	0	0	1
624	Social Assistance	6	0.2%	0.0%	0	1	1	0	0	0	0
711	Performing Arts, Spector Sports, and Related Industries	12	0.4%	0.1%	0	2	2	0	1	1	0
713	Amusement, Gambling, and Recreation Industries	15	0.5%	0.2%	2	0	2	0	0	0	0
721	Accommodation	11	0.4%	0.1%	1	0	1	1	0	1	1
722	Food Services and Drinking Places	18	0.6%	-0.2%	0	1	1	0	0	0	2
811	Repairs and Maintenance	22	0.7%	0.2%	1	0	1	0	0	0	2
812	Personal and Laundry Services	7	0.2%	0.1%	1	0	1	0	0	0	1
813	Religious, Grantmaking, Civic, Professional, and Similar Organizations	2	0.1%	0.0%	0	0	0	0	0	0	0

TABLE XI
FISCAL YEAR 2022[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2021[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
		3,029	100.0%		184	107	291	25	22	47	364

1 Fiscal year 2022 figures include transactions reported between October 1, 2021 and September 30, 2022.

2 The size of transaction is based on the aggregate total amount of voting securities, non-corporate interests and/or assets held by the acquiring person as a result of the transaction and are taken from the response to Item 2(d)(iii), 2(d)(vii), and 2(d)(ix) of the Notification and Report Form.

3 These statistics are based on the date the Second Request was issued.

4 During fiscal year 2022, 3,152 transactions were reported under the HSR Premerger Notification program. The smaller number, 3,029, reflects the adjustments to eliminate the following types of transactions: (1) transactions reported under Section 7A(c)(6) and (c)(8) (transactions involving certain regulated industries and financial businesses); (2) transactions deemed non-reportable; (3) incomplete transactions (only one party in each transaction filed a compliant notification); and (4) transactions withdrawn before the waiting period began. The table does not, however, exclude competing offers or multiple HSR transactions resulting from a single business transaction (where there are multiple acquiring persons or acquired persons).

5 The total number of filings under $50M submitted in Fiscal Year 2025 reflects corrective filings.

6 In February 2001, legislation raised the size of transaction from $15 million to $50 million with annual adjustments beginning in February 2005. As of FY 2017, the threshold categories include non-corporate interests (NCI), encompassing transactions in which the acquiring entity acquires 50% of more of the non-corporate interests of the acquired entity.

7 The category labeled "Sales Not Available" includes newly-formed acquiring persons, foreign acquiring person with no United States revenues, and acquiring persons who had not derived any revenues from their investments at the time of filing.

8 Assets of an acquired entity are not available when the acquired entity's financial data is consolidated within its ultimate parent.

9 Sales of an acquired entity are taken from responses to Item 4(a) and (b) (SEC documents and annual reports) or item 5 (dollar revenues) of the Premerger Notification and Report Form.

10 This category includes acquisition of newly-formed entities from which no sales were generated, and acquisitions of assets which produced no sales revenues during the prior year to filing the Notification and Report Form.

11 The 3-digit codes are part of the North American Industrial Classification System (NAICS) established by the United States Government North American Industrial Classification System 1997, Executive Office of the President, Office of Management and Budget. The NAICS groups used in this table were determined from responses submitted by the parties to Item 5 of the Premerger Notification and Report Form.

12 This represents the deviation from the fiscal year 2021 percentage.

13 This category includes transactions by newly-formed entities.

14 The intra-industry transactions column identifies the number of acquisitions in which both the acquiring and acquired person derived revenues from the same 3-digit NAICS code.

Federal Trade Commission
Bureau of Competition

Department of Justice
Antitrust Division

Hart-Scott-Rodino Annual Report

Fiscal Year 2023

October 1, 2022 through September 30, 2023

Section 7A of the Clayton Act
Hart-Scott-Rodino Antitrust Improvements Act of 1976
(Forty-Sixth Annual Report)

Lina Khan
Chair
Federal Trade Commission

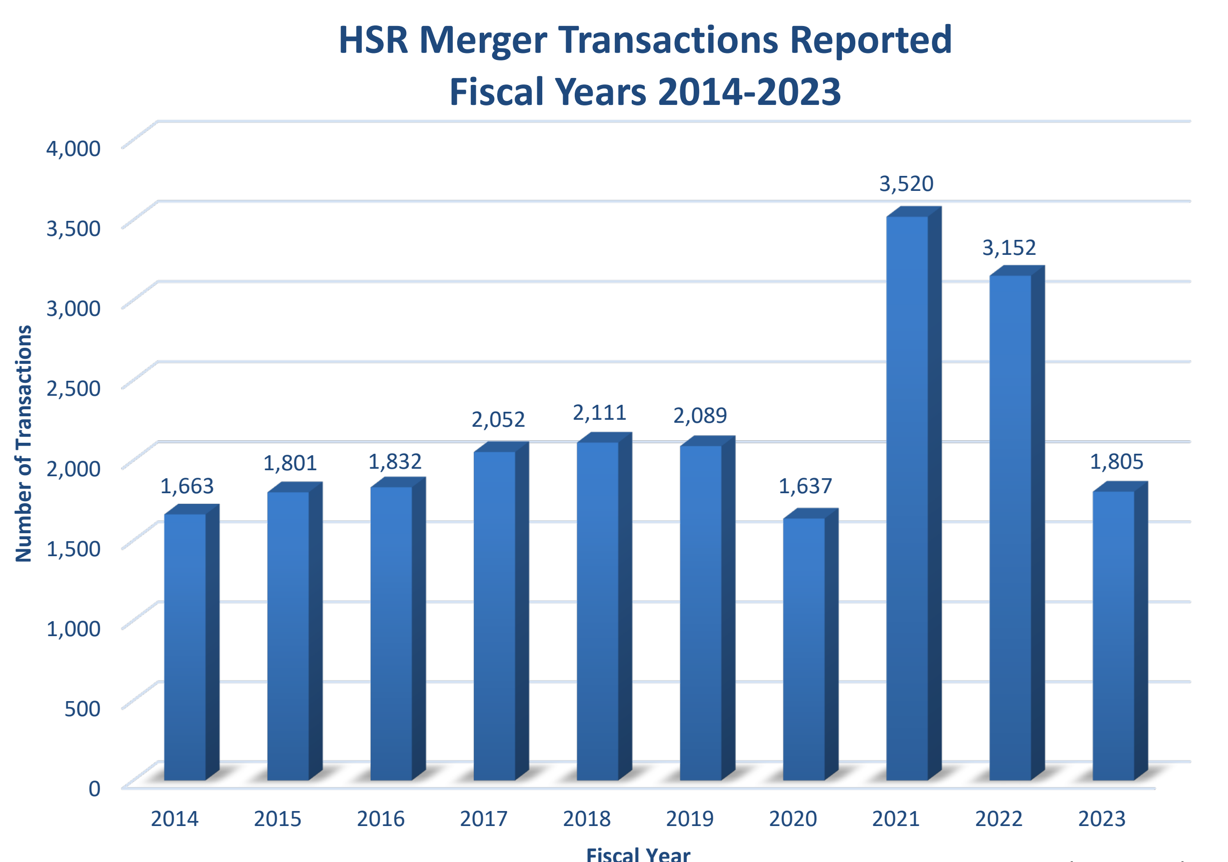
Jonathan Kanter
Assistant Attorney General
Antitrust Division

AR_002390

INTRODUCTION

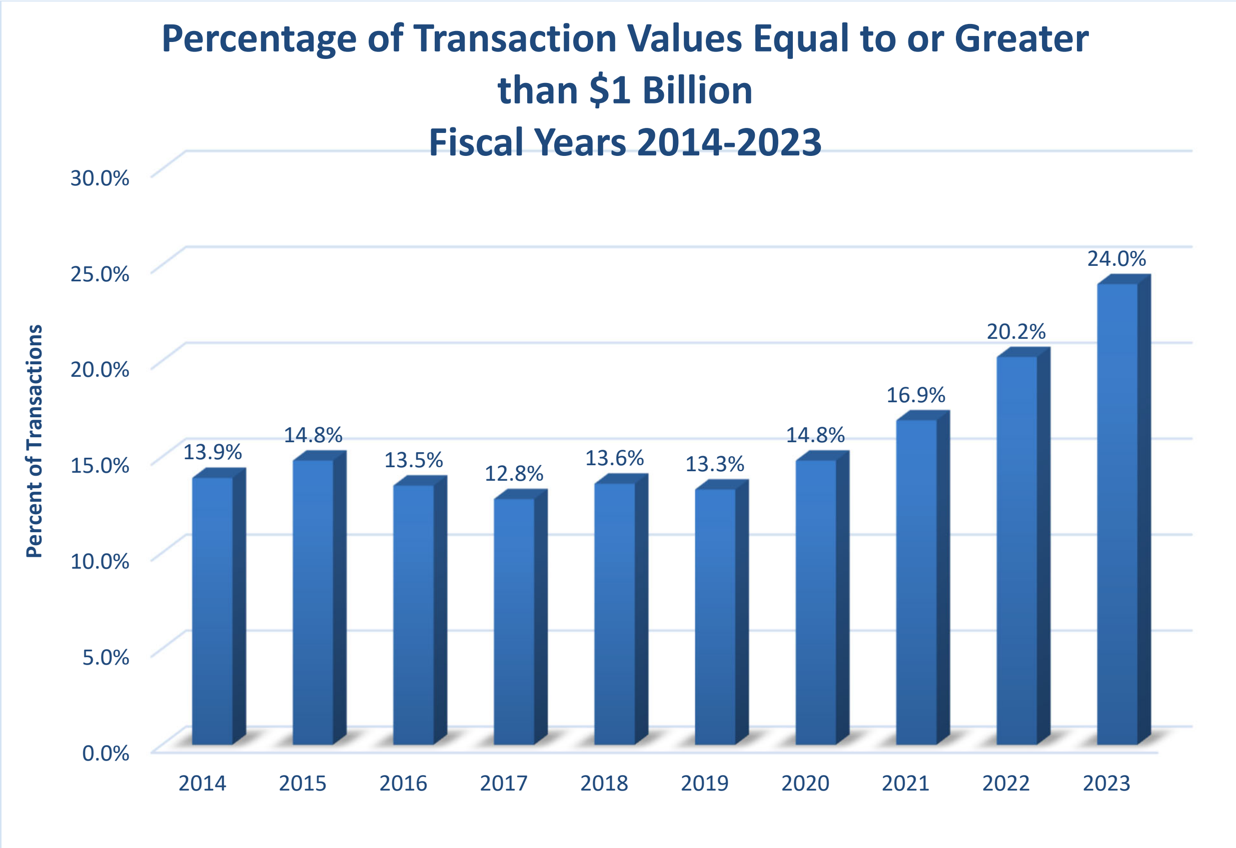
The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435 (HSR Act or the Act), together with Section 13(b) of the Federal Trade Commission Act and Section 15 of the Clayton Act, enables the Federal Trade Commission (FTC or Commission) and the Antitrust Division of the Department of Justice (Antitrust Division or Division) to prevent anticompetitive mergers, acquisitions, and other types of transactions and to prevent interim harm to competition associated with those transactions. The premerger notification program was instrumental in alerting the Commission and the Division to transactions that became the subjects of the numerous enforcement actions brought in fiscal year 2023.[1]

The Commission and the Antitrust Division continue their efforts to protect competition by identifying and investigating those mergers and acquisitions that raise potentially significant competitive concerns. Together, the FTC and the Division represent the American people's front-line defense against unlawful industry consolidation, and stopping illegal mergers is central to that mission. In fiscal year 2023, 1,805 transactions were reported under the HSR Act. *See* Figure 1 below. Nearly one-fourth of the transactions reviewed by the agencies were valued over $1 billion (see Table I), continuing a trend in recent years towards larger and more complex transactions. *See* Figure 2 below.



(Figure 1)

[1] Fiscal year 2023 covered the period from October 1, 2022 through September 30, 2023.



(Figure 2)

During fiscal year 2023, the Federal Trade Commission and the Antitrust Division worked to block unlawful mergers across a range of industries, including pharmaceuticals, transportation, hospitals, agriculture, mortgage lending, financial services, cement, construction, healthcare advertising, broadcasting, medical devices, electricity, and reproductive health services. The Commission took action against 16 deals: two in which it issued consent orders for public comment; ten in which the transaction was abandoned or restructured as a result of antitrust concerns raised during the investigation; and four in which the Commission initiated administrative or federal court litigation.[2] The Division took action against 12 merger transactions: two that were blocked through lawsuits in U.S. district courts and ten in which the transaction was abandoned or restructured after the Division raised concerns about the threat it posed to competition. In some cases, the parties abandoned their merger plans prior to a complaint, avoiding the expense of extended litigation for both the

[2] To avoid double-counting, this Report includes only those merger enforcement actions in which the Commission or the Antitrust Division took its first public action during fiscal year 2023 and does not fully reflect all the merger enforcement activities of the agencies, including litigation resulting in consent orders and/or divestitures during FY 2023 or on-going investigations and litigation.

parties and the agency.[3] Collectively, the agencies' enforcement actions preserved competition across the American economy.

The Federal Trade Commission

FTC Enforcement Actions by Deal Size:[4]

< $500M	3
Between $500M and $1B	1
Between $1B and $10B	1
Over $10B	3

Summary Numbers for Enforcement Actions:[5]

Complaints Filed	4
Litigated Win	1
Consent Entered in the Course of Litigation[6]	2
Litigation Ongoing	1
Consent Filed with Complaint	2
Abandoned or Restructured Pre-Complaint	10

A major area of focus of the FTC was protecting competition in healthcare markets. The FTC challenged Amgen's $27.8 billion proposed acquisition of Horizon Therapeutics, alleging that the transaction—one of the largest pharmaceutical deals in recent memory—would

[3] *See, e.g.,* Press Release, Fed. Trade Comm'n*, Statement of Elizabeth Wilkins, Director of the FTC's Office of Policy Planning, on the Decision of SUNY Upstate Medical University and Crouse Health System, Inc. to Drop Their Proposed Merger* (Feb. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/statement-elizabeth-wilkins-director-ftcs-office-policy-planning-decision-suny-upstate-medical; Press Release, Fed. Trade Comm'n*, Statement Regarding the Termination of CalPortland Company's Attempted Acquisition of Assets Owned by Rival Cement Producer Martin Marietta Materials, Inc*. (Apr. 28, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/statement-regardingtermination-calportland-companys-attempted-acquisition-assets-owned-rival-cement*;* Press Release, Fed. Trade Comm'n, *Statement Regarding the Termination of Boston Scientific Corporation's Attempted Acquisition of a Majority Stake in M.I. Tech Co., Ltd.* (May 24, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/statement-regarding-termination-boston-scientificcorporations-attempted-acquisition-mi-tech*;* Press Release, Fed. Trade Comm'n, *Statement Regarding Termination of CooperCompanies' Attempted Acquisition of Cook Medical's Reproductive Health Business* (Aug. 1, 2023), https://www.ftc.gov/news-Pevents/news/press-releases/2023/08/statement-regarding-termination-coopercompanies-attemptedacquisition-cook-medicals-reproductive; Press Release, *Infineum USA L.P., Acquisition Terminated* (Feb. 16, 2023), https://www.infineum.com/en-gb/news/acquisition-terminated/.

[4] Transaction values represent only those Commission actions for which the value of the transaction has been publicly disclosed.

[5] In addition to the Complaints filed in FY2023, the FTC's litigation wins in the fiscal year included *Illumina/Grail*. In March 2023, the Commission found that DNA sequencing provider Illumina's $7.1 billion vertical acquisition of GRAIL, Inc., which makes a multi-cancer early detection (MCED) test, was likely to substantially reduce competition in U.S. market for research, development, and commercialization of cancer tests and ordered Illumina to divest Grail. https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf.

[6] Matters where the Commission successfully reached a resolution even after federal court litigation had been initiated are listed under "Consent Orders" but not under "Litigated Wins." "Litigated Wins" here lists only those matters where an evidentiary hearing was completed and a decision was issued by the court.

substantially lessen competition in the market for FDA-approved drugs and would enable Amgen to pressure insurance companies and pharmacy benefit managers into favoring Horizon's two monopoly products, Tepezza and Krystexxa. After the complaint was filed, the parties agreed to a consent order, prohibiting the bundling of any Amgen product with Horizon's medications used to treat thyroid eye disease and chronic refractory gout—and protecting Americans who rely on these treatments.

The Commission also filed an administrative complaint and sought a preliminary injunction challenging the $700 million proposed acquisition of Propel Media, Inc. by IQVIA, the world's largest provider of health care data, alleging that the deal would unlawfully reduce competition and raise health care prices for Americans. After a two-week hearing, the U.S. District Court for the Southern District of New York granted the Commission's preliminary injunction, prompting the parties to abandon their merger plans.[7]

The Commission's merger enforcement work also prompted firms to abandon deals involving reproductive fertility treatments, medical stents, and the combination of two major healthcare systems—protecting patients across the country.

The Commission's work also protected homebuyers from higher costs. The Commission filed an administrative complaint and sought a preliminary injunction challenging Intercontinental Exchange's (ICE) $13.1 billion proposed acquisition of Black Knight, which would have combined the two largest providers of home mortgage loan origination systems. After the complaint was filed, the parties agreed to a consent order to divest Black Knight's Optimal Blue and Empower business platforms to Constellation Web Solutions and prohibiting the parties from enforcing any noncompete or non-solicit provisions against employees.[8] The structural relief obtained by the FTC helped protect competition in key areas of the mortgage origination process, protecting homebuyers and lenders from higher costs. The FTC's merger enforcement work also led to the abandonment of an acquisition involving major cement producers that would have further concentrated the market and risked raising costs for construction and infrastructure projects.

Lastly, the FTC challenged Microsoft's $69 billion acquisition of Activision, alleging that Microsoft would have both the means and motive to harm competition by degrading Activision's game quality or player experience on rival gaming platforms, or limiting or withholding Activision's content—creating a walled garden rather than maintaining an open market. After the district court denied a preliminary injunction, the Commission appealed and the case is moving forward in the Commission's administrative proceedings.[9]

[7] *FTC v. IQVIA Holdings, Inc*., No. 1:23-cv-06188 (S.D.N.Y. Jan. 8, 2024 (Op. & Order)).
[8] *See* Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Resolving Antitrust Concerns Surrounding ICE, Black Knight Deal* (Nov. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-approves-final-order-resolving-antitrust-concerns-surrounding-ice-black-knight-deal.
[9] *In the Matter of Microsoft Corporation and Activision Blizzard, Inc.,* FTC Dkt. C-9412 (complaint filed on Dec. 8, 2022).

Enforcement Actions by Deal Size:

< $500M	2
Between $500M and $1B	2
Between $1B and $10B	7
JV Affecting Commerce Above $5B[10]	1

Summary Numbers for Enforcement Actions:

Complaints Filed[11]	1
Litigated Win[12]	2
Consent Entered in the Course of Litigation [13]	1
Abandoned Post-Complaint	0
Consent Filed with Complaint	0
Abandoned or Restructured Pre-Complaint	10

Two of the Division's most noteworthy achievements helped protect competition that benefits airline passengers. In one case, the United States and a group of state Attorneys General successfully persuaded a district court to unwind a joint venture between American Airlines and JetBlue Airways. In a second, related case, the United States and its state Attorneys General partners persuaded another judge to block JetBlue's proposed acquisition of Spirit Airlines. As the court observed in *JetBlue-Spirit,* that acquisition "does violence to the core principle of antitrust law: to protect the United States' markets – and its market participants – from anticompetitive harm."[14] These enforcement efforts protected millions of travelers—especially the most price-sensitive ones—flying on hundreds of routes across the country.

Two other enforcement efforts highlight the Division's commitment to protecting competition across key industries. Tenaris, S.A. sought to acquire Benteler Steel & Tube

[10] This reflects the trial victory in *United States v. American Airlines Group Inc*., No. CV 21-11558-LTS, 2023 WL 4766220 (D. Mass. July 26, 2023). As described further below, *see infra* note 33, the Division previously had categorized this enforcement effort as a non-merger matter for purposes of its annual reporting, but reports it here as a merger matter, in part because of the court's findings after trial.

[11] The complaint filed in FY 23 was *United States v. JetBlue Airways Corp. and Spirit Airlines*, 1:23-cv-10511 (D. Mass. filed March 7, 2023). Because the "Litigated Win" and "Consent Entered" rows reflect cases filed before FY 23, the sum of the "Litigated Win" and "Consent Entered" rows is greater than the "Complaints Filed" row.

[12] This includes *United States v. Bertelsmann SE & Co. KGaA, Penguin Random House, LLC, ViacomCBS, Inc., and Simon & Schuster, Inc*., 1:21-cv-02886 (D.D.C. filed Nov. 2, 2021), which was discussed in the 2022 annual report because it was initiated in fiscal year 2022, but reached resolution in fiscal year 2023, and also includes the Antitrust Division's trial victory against American Airlines Group Inc. and JetBlue Airways Corp. *See infra* notes 31-33.

[13] In *United States v. ASSA ABLOY AB and Spectrum Brands Holdings, Inc.*, 1:22-cv-02791-ABJ (D.D.C. filed Sept. 15, 2022), the U.S. District Court for the District of Columbia entered final judgment on September 13, 2023, requiring ASSA ABLOY to divest assets and abide by other remedies. Like *U.S. v. Bertelsmann*, this case was discussed in the 2022 annual report because it was initiated in fiscal year 2022, but reached resolution in fiscal year 2023.

[14] *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109 (D. Mass. 2024).

Manufacturing Corp. The proposed acquisition, if completed, would have diminished competition in the domestic supply of seamless tubing and production casing, important types of steel pipe used in the extraction of oil and gas. In February 2023, Tenaris and Benteler abandoned this transaction in the face of potential enforcement action by the Antitrust Division.

In March 2023, Vistra Corporation announced its plan to acquire Energy Harbor Corporation's nuclear plants in PJM Interconnection (PJM), the regional transmission organization that manages the electricity grid for more than 65 million consumers in all or parts of 13 states and the District of Columbia. The Antitrust Division and the Federal Energy Regulatory Commission (FERC) share jurisdiction to review acquisitions of electric power plants. In accordance with President Biden's Executive Order[15] mandating that executive branch agencies take a whole-of government approach to protecting competition, the Antitrust Division submitted a comment to assist FERC's review of the announced merger. The Division explained that the proposed acquisition could increase Vistra's ability or incentive to withhold electricity from a plant located in Ohio in order to raise wholesale electricity prices in part of the PJM region, specifically Ohio and Pennsylvania. In response to the Division's concerns and further action from FERC, Vistra offered to restructure its proposed acquisition by divesting that power plant in Ohio. FERC issued an Order on February 16, 2024, mandating the divestiture.[16]

The Commission's Premerger Notification Office (PNO) website[17] includes instructions for completing the HSR form, information on the HSR rules, current filing thresholds, filing fee instructions, and procedures for submitting post-consummation filings. The website also provides frequently asked questions regarding HSR filing requirements, the number of HSR transactions submitted each month, and contact information for PNO staff.[18]

BACKGROUND OF THE HSR ACT

Section 201 of the HSR Act amended the Clayton Act by adding a new Section 7A, 15 U.S.C. § 18a. In general, the HSR Act requires that certain proposed acquisitions of voting securities, non-corporate interests, or assets be reported to the Commission and the Antitrust Division prior to consummation. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or bankruptcy sale), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends on the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. Acquisitions valued below a certain threshold, acquisitions involving parties with assets and sales below a certain threshold, and certain classes of acquisitions that have been viewed as less likely to raise antitrust concerns are excluded from the Act's coverage.

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[15] Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

[16] *Energy Harbor Corp. Vistra Corp.,* 186 FERC ¶ 61,129 (Feb. 16, 2024).

[17] *See* Fed. Trade Comm'n, *Premerger Notification Program* (Aug. 28, 2024), https://www.ftc.gov/enforcement/premerger-notification-program.

[18] Resource materials are available on the PNO website; in addition, PNO staff is always available to help HSR practitioners comply with HSR notification requirements.

The Commission, with the concurrence of the Assistant Attorney General for the Antitrust Division, promulgated final rules implementing the premerger notification program on July 31, 1978. At that time, a comprehensive Statement of Basis and Purpose was published, containing a section-by-section analysis of the rules and an item-by-item analysis of the filing form.[19] The program became effective on September 5, 1978. The Commission, with the concurrence of the Assistant Attorney General, has amended the rules and the filing form on many occasions over the years to improve the program's effectiveness and to lessen the burden of complying with the rules, while ensuring that the agencies receive sufficient information to analyze the underlying transaction.[20]

The primary purpose of the statutory scheme, as the legislative history makes clear, is to provide the antitrust enforcement agencies with the opportunity to identify and review potentially anticompetitive mergers and acquisitions before they are consummated. The premerger notification program, with its filing and waiting period requirements, facilitates this goal.

If either reviewing agency determines during the waiting period that further inquiry is necessary, the reviewing agency is authorized by Section 7A(e) of the Clayton Act to issue a request for additional information and documentary material (Second Request).[21] The Second Request extends the waiting period for a specified period of time (usually 30 days, but 10 days in the case of a cash tender offer or bankruptcy sale) after all parties have complied with the Second Request (or, in the case of a tender offer or bankruptcy sale, after the acquiring person complies). This additional time provides the reviewing agency with the opportunity to analyze the information and to take appropriate action before the transaction is consummated. If the reviewing agency believes that a proposed transaction may substantially lessen competition or tend to create a monopoly, the agency may challenge the transaction.

A STATISTICAL PROFILE OF THE PREMERGER NOTIFICATION PROGRAM

The appendices to this Report provide a statistical summary of the operation of the premerger notification program. Appendix A shows, for the ten-year period covering fiscal years 2014-2023, the number of transactions reported; the number of filings received; the number of merger investigations in which Second Requests were issued; and the number of transactions in which requests for early termination of the waiting period were received,

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[19] 43 Fed. Reg. 33450 (July 31, 1978).

[20] *See* Fed. Trade Comm'n *Legal Library: Statements of Basis and Purpose* (June 29, 2023), https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-and-formal-interpretations/statements-basis-purpose.

[21] 15 U.S.C. §18a(e)(1)(A) ("The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) . . . . require the submission of additional information or documentary material relevant to the proposed acquisition.").

granted, and not granted.[22] Appendix A also shows the number of transactions in which Second Requests could have been issued, as well as the percentage of transactions in which Second Requests were issued. Appendix B provides a month-by-month comparison of the number of transactions reported and the number of filings received for fiscal years 2014 through 2023.

The statistics set out in these appendices show that the number of transactions reported in fiscal year 2023 decreased from the record high number of transactions reported in fiscal years 2021 and 2022 but were generally in line with the number of reported transactions over the past decade.[23] Of the 1,805 reported transactions in fiscal year 2023, Second Requests could have been issued in 1,735 of them. The FTC issued 26 Second Requests in FY 2023. In FY 2023, the Division issued 11 Second Requests. *See* Table I.

The tables (Tables I through XI) in Exhibit A contain information regarding the agencies' enforcement activities for transactions reported in fiscal year 2023. The tables provide, for example, various characteristics of transactions, the number and percentage of transactions in which one antitrust agency granted the other clearance to commence an investigation, and the number of merger investigations in which either agency issued Second Requests. Table III of Exhibit A shows that in fiscal year 2023, the agencies received clearance to conduct an initial investigation in 10.2 percent of the total number of transactions reported. The tables also provide the number of transactions based on the dollar value of transactions reported and the reporting threshold indicated in the notification report. In fiscal year 2023, the aggregate dollar value of reported transactions was $1.6 trillion.[24]

Tables X and XI provide the number of transactions, by broad industry group, in which the acquiring person and the acquired entity, respectively, derived the most revenue. Figure 3 illustrates the percentage of adjusted transactions within industry groups for fiscal year 2023 based on the acquired entity's operations, reflecting the breadth of the agencies' experience in reviewing transactions that impact every sector of the U.S. economy[25]

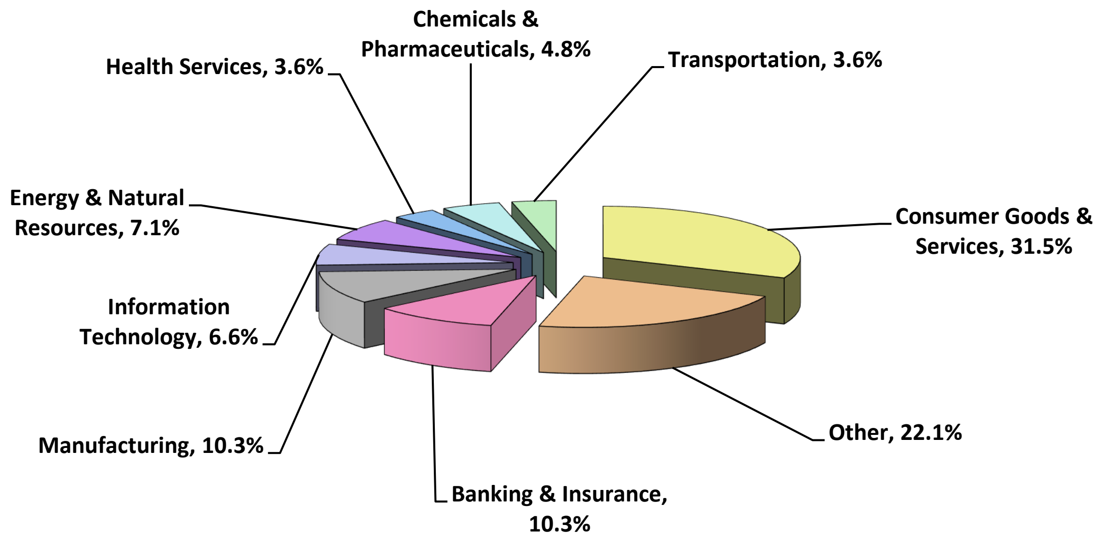
[22] The term "transaction," as used in Appendices A and B and Exhibit A to this Report, does not refer only to individual mergers or acquisitions. A particular merger, joint venture, or acquisition may be structured such that it involves more than one filing that must be made under the HSR Act.

[23] This Report, like previous Reports, also includes annual data on "adjusted transactions in which a Second Request could have been issued" (adjusted transactions). *See* Appendix A & Appendix A n.2 (explaining calculation of that data). There were 1,735 adjusted transactions in fiscal year 2023, and the data presented in the Tables and the percentages discussed in the text of this Report (*e.g.*, percentage of transactions resulting in Second Requests) are based on this figure.

[24] The information on the value of reported adjusted transactions for fiscal year 2023 is drawn from a database maintained by the Premerger Notification Office.

[25] The category designated as "Other" consists of industry segments that include construction, educational services, performing arts, recreation, and other non-classifiable businesses.

Percentage of Transactions By Industry Group of Acquired Entity
Fiscal Year 2023



(Figure 3)

DEVELOPMENTS WITHIN THE PREMERGER PROGRAM

1. *Threshold Adjustments*

The 2000 amendments to the HSR Act require the Commission to publish adjustments to the Act's jurisdictional and filing fee thresholds in the Federal Register annually, for each fiscal year beginning on September 30, 2004, based on the change in the gross national product, in accordance with Section 8(a)(5) of the Clayton Act. The Commission amended the rules in 2005 to provide a method for future adjustments as required by the 2000 amendments, and to reflect the revised thresholds contained in the rules. The Commission usually publishes the revised thresholds annually in January, and they become effective 30 days after publication.

On January 26, 2023, the Commission published a notice[26] to reflect adjustment of the reporting thresholds as required by the 2000 amendments[27] to Section 7A of the Clayton Act, 15 U.S.C. § 18a. The revised thresholds, including an increase in the size of transaction threshold from $101 million to $111.4 million, became effective February 27, 2023. The thresholds are calculated based on the prior year's GNP. In addition to the adjustment of the reporting thresholds, the Commission announced new merger filing fees based on the size of the proposed transaction. The 2023 Consolidated Appropriations Act now requires the FTC to

[26] 88 Fed. Reg. 5006 (Jan. 26, 2022).
[27] 15 U.S.C. §18a(a). *See* Pub. L. No. 106-553, 114 Stat. 2762.

revise the HSR filing fee thresholds on an annual basis based on an amount equal to the percentage increase, if any, in the consumer price index.

2. *HSR Compliance*

The Commission and the Antitrust Division continued to monitor compliance with the premerger notification program's filing and waiting period requirements and initiated a number of compliance investigations in fiscal year 2023. The agencies use several methods to oversee compliance, including monitoring news outlets and industry publications for transactions that may not have been reported in accordance with the HSR Act's requirements. Industry sources, such as competitors, customers, and suppliers, interested members of the public, and, in certain cases, the parties themselves, also provide the agencies with information about transactions and possible violations of the Act's requirements.

Under Section 7A(g)(1) of the Act, any person that fails to comply with the Act's notification and waiting period requirements is liable for a civil penalty of up to $50,120 for each day the violation continues.[28] The antitrust agencies examine the circumstances of each violation to determine whether to seek penalties.[29] During fiscal year 2023, 22 post-consummation "corrective" filings were received.

3. *HSR Form Change Rulemaking*

In June 2023, the Commission, with the concurrence of the Antitrust Division, voted out a notice of proposed rulemaking to change the premerger notification form and associated instructions, as well as the premerger notification rules implementing the HSR Act. On September 27, 2024, the Commission, again with the concurrence of the Antitrust Division, voted out a Final Rule that incorporates updates and revisions to the premerger notification form, instructions, and rules. The changes to the form and associated instructions will enable the agencies to more effectively and efficiently screen transactions for potential competition issues within the initial waiting period.

[28] Dollar amounts specified in civil monetary penalty provisions within the Commission's jurisdiction are adjusted for inflation in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-7 (Nov. 2, 2015). The adjustments have included an increase in the maximum civil penalty from $10,000 to $11,000 for each day during which a person is in violation of Section 7A(g)(1) (61 Fed. Reg. 54548 (Oct. 21, 1996), corrected at 61 Fed. Reg. 55840 (Oct. 29, 1996)), to $16,000 effective February 10, 2009 (74 Fed. Reg. 857 (Jan. 9, 2009)), to $40,000 effective August 1, 2016 (81 Fed. Reg. 42476 (June 30, 2016)), to $46,517 effective Jan. 10, 2022 (87 Fed. Reg. 1070 (Jan. 10, 2021)) and to $50,120 effective January 11, 2022, (88 Fed. Reg. 1499 (Jan. 11, 2022).

[29] If parties inadvertently fail to file, the agencies generally will not seek penalties so long as the parties promptly submit corrective filings after discovering the failure to file, submit an acceptable explanation of their failure to file, and have not previously violated the Act.

MERGER ENFORCEMENT ACTIVITY[30]

The Department of Justice

In addition to litigating and investigating several significant non-merger antitrust enforcement matters, during fiscal year 2023 the Antitrust Division took steps to protect competition that resulted in mergers that were either blocked, abandoned, or restructured in light of the Division's concerns.[31]

The two proposed transactions that the Division successfully blocked in active litigation included the following:

In *United States v. American Airlines Group Inc.*,[32] the Division, joined by the Attorney Generals of the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the States of Arizona, California, and Florida, and the District of Columbia, filed a civil antitrust action to unwind an unprecedented series of agreements between American Airlines and JetBlue designed to consolidate the two airlines' operations in Boston and New York City with effects resembling a merger.[33] At trial in October 2022, the Division proved that this extensive combination, which the companies called the "Northeast Alliance," eliminated competition between American and JetBlue on scores of routes to and from Boston and New York City. And the Division proved that the Northeast Alliance had harmed air travelers across the country by significantly diminishing JetBlue's ability and incentive to act as a disruptive maverick competitor, further consolidating the already highly concentrated airline industry. In July 2023, the U.S. District Court for the District of Massachusetts entered a permanent injunction dissolving the Northeast Alliance. American Airlines is appealing the District Court's ruling.

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[30] The cases listed in this section were not necessarily reportable under the premerger notification program. Given the confidentiality of information obtained pursuant to the Act, it would be inappropriate to identify the cases initiated under the program except in those instances in which that information has already been disclosed.

[31] Two merger enforcement matters, which were discussed in the 2022 annual report because they were initiated in fiscal year 2022, continued into fiscal year 2023. Those two matters, *United States v. ASSA ABLOY AB and Spectrum Brands Holdings, Inc.*, 1:22-cv-02791-ABJ (D.D.C. filed Sept. 15, 2022) and *United States v. Bertelsmann SE & Co. KGaA, Penguin Random House, LLC, ViacomCBS, Inc., and Simon & Schuster, Inc.*, 1:21-cv-02886 (D.D.C. filed Nov. 2, 2021) are not included in the fiscal year 2023 enforcement matters discussed in this section but are being mentioned for completeness. In the former, the U.S. District Court for the District of Columbia entered final judgment on September 13, 2023, requiring ASSA ABLOY, among other things, to divest assets and abide by other remedies. In the latter, the U.S. District Court for the District of Columbia's enjoined the proposed merger on October 31, 2022, and Penguin Random House and Simon & Schuster thereafter abandoned the proposed transaction.

[32] *United States v. Am. Airlines Grp. Inc.*, No. CV 21-11558-LTS, 2023 WL 4766220 (D. Mass. July 26, 2023).

[33] The Division previously had categorized this enforcement effort as a non-merger matter for purposes of its annual reporting, but reports it here as a merger matter, in part because of the court's finding: "The NEA [Northeast Alliance], of course, is not a merger. American and JetBlue remain separate entities. Both have operations that fall beyond the NEA's reach, and the agreement does not formally embody a complete combination of the partners' operations even within the NEA region. Nevertheless, as implemented by the parties, its effects resemble those of a merger of the parties' operations within the northeast in ways the Court will describe next." *United States v. Am. Airlines Grp. Inc.,* 675 F.Supp.3d 65, 89 (D. Mass. May 19, 2023) (on appeal to the First Circuit).

In *United States v. JetBlue Airways Corp.*,[34] the Division filed a civil antitrust lawsuit to block JetBlue Airways Corporation's proposed $3.8 billion acquisition of its largest and fastest-growing ultra-low-cost rival, Spirit Airlines, Inc. The Division's complaint was joined by the Attorneys General of the Commonwealth of Massachusetts, the States of New York, California, Maryland, New Jersey, and North Carolina, and the District of Columbia. The complaint alleged that Spirit's low-cost, no-frills flying option has brought lower fares and more options to routes across the country, making it possible for more Americans – particularly price sensitive consumers who pay their own fares – to travel. JetBlue's acquisition of Spirit would have eliminated the "Spirit Effect," where Spirit's presence flying on a route forces other air carriers, including JetBlue, to lower their fares. The deal also would have eliminated half of the ultra-low-cost capacity in the United States, ultimately leading to higher fares and fewer seats, harming millions of consumers on hundreds of routes. In January 2024, the U.S. District Court for the District of Massachusetts blocked the proposed takeover because it "does violence to the core principle of antitrust law: to protect the United States' markets – and market participants – from anticompetitive harm." Subsequently, in March 2024, JetBlue announced that it had abandoned the deal and would not pursue an appeal.

The Division's merger enforcement work also resulted in the abandonment or restructuring of several transactions after the Division raised antitrust concerns.

For example, in February 2023, Tenaris, S.A. and Benteler Steel & Tube Manufacturing Corp. abandoned Tenaris's proposed $460 million acquisition of Benteler after the Division raised concerns about the impact of the deal on competition. Both companies operate domestic steel mills that supply seamless tubing and production casing, important types of steel pipe used in the extraction of oil and gas. The deal would have increased concentration in an already concentrated industry, cementing Tenaris as the undisputed dominant player in the market.

In March 2023, the Division worked with the Federal Energy Regulatory Commission (FERC) to challenge Vistra Corporation's proposed acquisition of nuclear plants owned by Energy Harbor Corporation. The Division summitted a comment to FERC explaining that the proposed acquisition could substantially lessen competition and increase wholesale electricity prices. After the Division raised these concerns and FERC took further action, Vistra proposed a divestiture to address the Division's competitive concerns. The company offered to restructure its proposed acquisition by divesting that power plant in Ohio. In February 2024, FERC issued an Order mandating that divestiture.

In October and November 2022, the Division helped secure divestitures for two proposed transactions in the banking industry.[35] In October, US Bancorp and MUFG Union Bank

[34] *United States v. JetBlue Airways Corp.*, No. 23-10511-WGY, 2024 U.S. Dist. LEXIS 7509 (D. Mass. Jan. 16, 2024).

[35] Based on these divestiture commitments, the transactions were approved pursuant to orders of the Federal Reserve Board. Order Approving the Acquisition of a Bank, FRB Order No. 2022-22 (Oct. 14, 2022); Order Approving the Merger of Bank Holding Companies and Determination on a Financial Holding Company Election, FRB Order No. 2022-20 (Oct. 25, 2022).

("Union Bank") agreed to a divestiture of three of Union Bank's full-service branches after the Division raised concerns that the proposed merger was likely to substantially lessen competition in retail and/or small business banking products and services. Then in November, Columbia Bank and Umpqua Bank agreed to divestitures to remedy the Division's concerns that the proposed merger was likely to substantially lessen competition in retail and/or small business banking products and services in local markets in California, Oregon, and Washington.

The Federal Trade Commission

During fiscal year 2023, the Commission challenged 16 mergers that, as proposed, would violate the federal antitrust laws, including several blockbuster multi-billion dollar deals. In four cases, the Commission initiated administrative or federal court litigation, and ten mergers were abandoned after the Commission raised concerns about their potential for eliminating beneficial competition. The Commission also accepted consent orders that require divestitures and other strong relief in two merger cases.[36] As discussed below, two of these litigated matters were also settled by Commission order during FY 2023. In Intercontinental Exchange/Black Knight, the Commission ordered divestitures and in Amgen/Horizon Therapeutics, the Commission imposed strong prohibitions to prevent the merger from causing harm.

In *Microsoft/Activision*,[37] the Commission filed an administrative complaint challenging Microsoft's $69 billion proposed acquisition of Activision. The Commission also authorized staff to seek a preliminary injunction in federal court to maintain the status quo pending the outcome of the administrative trial. The complaint alleged that with control over Activision's blockbuster gaming franchises, Microsoft would have both the means and motive to harm competition by degrading Activision's game quality or player experience on rival platforms, limiting access to Activision's content, or withholding content from competitors entirely—resulting in a walled garden rather than an open market. On July 10, 2023, the U.S. District Court for the Northern District of California denied the Commission's request for a preliminary

[36] Other merger cases discussed in prior annual reports also required significant Commission resources during FY 2023. They are not included in the numbers referenced in this report but are being mentioned for completeness and because of their programmatic significance. For example, in December 2023, the Fifth Circuit affirmed the Commission's findings that Illumina's acquisition of Grail lessened competition through the potential foreclosure of a key input by the sole supplier, which would lead to chilled investment by firms reliant on those inputs for their own competitive success. *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1055 (5th Cir. 2023). After the ruling, Illumina determined to divest its interest in Grail. In January 2023, a district court denied the Commission's motion to enjoin the proposed merger between virtual reality giant Meta and Within Unlimited, the VR studio that marketed the leading VR fitness app and in February the Commission dismissed its related administrative complaint. In July 2023, the Commission issued an order vacating the ALJ's initial decision in the administrative litigation challenging an alleged unlawful agreement between Altria Group, Inc. and Juul Labs, Inc., ending the matter. After the Supreme Court's April 2023 decision in *Axon Enterprise, Inc. v. Fed. Trade Comm'n.*, et al., 598 U.S. ----, 143 S. Ct. 890 (2023), that remanded the petitioners' constitutional challenges back to district court for further proceedings, Commission withdrew its administrative complaint challenging the consummated merger of Axon and its rival VieVu, makers of body-worn camera systems used by police departments.

[37] *In the Matter of Microsoft Corporation and Activision Blizzard, Inc.,* FTC Dkt. C-9412 (complaint filed on Dec. 8, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter.

injunction. That decision is on appeal to the U.S. Court of Appeals for the Ninth Circuit. The Commission's administrative proceeding concerning these claims is scheduled to begin three weeks after the Ninth Circuit issues its opinion.

In *Intercontinental Exchange/Black Knight*,[38] the Commission filed an administrative complaint challenging Intercontinental Exchange's (ICE) $13.1 billion proposed acquisition of Black Knight and heading off potential price increases for homebuyers. The Commission also authorized staff to seek a preliminary injunction in federal court to maintain the status quo pending the outcome of the administrative trial. The complaint alleged that the proposed merger would give ICE, the largest provider of home mortgage loan origination systems (LOS), control over its top competitor, Black Knight. Because Black Knight is also a vertically integrated business with its own LOS, the complaint also alleged that the merger would have allowed ICE to raise costs to lenders, which would then be passed to homebuyers. If consummated, the combined company would have had the means and incentive to drive up costs, reduce innovation, and reduce lenders' choices for tools necessary to generate and service mortgages. After the Commission filed its complaint, the Commission secured a consent order requiring Black Knight to divest its Optimal Blue and Empower businesses to Constellation Web Solutions, a provider of mortgage-related tools. The order also prohibits the parties from enforcing any noncompete or non-solicit provisions against employees. Following a public comment period, the Commission approved the final order on November 3, 2023.

In *Amgen/Horizon Therapeutics*,[39] the Commission filed an administrative complaint challenging Amgen's $27.8 billion proposed acquisition of Horizon. The Commission also authorized staff to seek a preliminary injunction in federal court to maintain the status quo pending the outcome of the administrative trial. The complaint alleged that the proposed merger would enable Amgen to leverage its large portfolio of drugs to pressure insurance companies and pharmacy benefit managers into favoring Horizon's two monopoly products – Tepezza and Krystexxa, used to treat thyroid eye disease and refractory gout, respectively, thereby harming patients who rely on these treatments for their health and quality of life. After the complaint was filed, the Commission secured a consent order prohibiting Amgen from bundling any Amgen product with either of Horizon's Tepezza or Krystexxa products. In addition, Amgen may not condition any product rebate or contract term related to an Amgen product on the sale or positioning of either Tepezza or Krystexxa. Following a public comment period, the Commission approved the final order on December 13, 2023.

In *IQVIA/Propel,*[40] the Commission filed an administrative complaint challenging the world's largest provider of health care data, IQVIA's, $700 million proposed acquisition of

[38] *In the Matter of Intercontinental Exchange and Black Knight, Inc.*, FTC Dkt. C-9413 (complaint filed on March 9, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0142-intercontinental-exchange-incblack-knight-inc-matter.
[39] *In the Matter of Amgen Inc. and Horizon Therapeutics PLC,* FTC Dkt. C-914 (complaint filed on June 22, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/231-0037-amgen-inc-horizon-therapeutics-plc-matter.
[40] *In the Matter of IQVIA Holdings Inc. and Propel Media, Inc.,* FTC Dkt. C-9416 (complaint filed on July 17, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210196-iqvia-holdingspropel-media-matter.

Propel Media, alleging that the proposed merger would lead to increased healthcare prices. The Commission also authorized staff to seek a preliminary injunction in the U.S. District Court for the Southern District of New York. The complaint alleged that the proposed merger would give IQVIA a market-leading position in programmatic advertising targeted to doctors and other healthcare professionals. IQVIA and Propel are both vertically integrated companies with large healthcare datasets. According to the complaint, post-merger, IQVIA's ownership of both datasets would have raised the incentive to withhold key information to prevent rival companies and potential entrants from effectively competing. After a two-week evidentiary hearing and closing arguments, the District Court granted the Commission's preliminary injunction. Shortly afterwards, the parties abandoned the transaction.

The Commission's merger enforcement work also resulted in the abandonment of various transactions in light of antitrust concerns.

The proposed merger of the State University of New York Upstate Medical University and Crouse Health System, Inc. presented substantial risk of serious competitive and consumer harm in the form of higher healthcare costs, lower quality of care, reduced innovation and access to care, and lower wages for hospital workers. FTC staff had an active investigation into the effects of the proposed merger and had voiced opposition to a request by the parties for a certificate of public advantage, also known as a COPA, which could have shielded the merger from antitrust laws.[41]

CalPortland Company's proposed acquisition of rival cement producer Martin Marietta Materials, Inc. was presumptively illegal under the Merger Guidelines and would have reduced the number of cement suppliers in Southern California from five to four, further concentrating an already concentrated market.[42]

Boston Scientific and M.I. Tech abandoned their proposed transaction in response to investigations by FTC staff and international antitrust enforcers. The proposed merger raised competitive concerns that could have affected doctors and patients.[43]

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[41] Press Release, Fed. Trade Comm'n, *Statement of Elizabeth Wilkins, Director of the FTC's Office of Policy Planning, on the Decision of SUNY Upstate Medical University and Crouse Health System, Inc. to Drop Their Proposed Merger* (Feb. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/statement-elizabeth-wilkins-director-ftcs-office-policy-planning-decision-suny-upstate-medical.

[42] Press Release, Fed. Trade Comm'n*, Statement Regarding the Termination of CalPortland Company's Attempted Acquisition of Assets Owned by Rival Cement Producer Martin Marietta Materials, Inc*. (Apr. 28, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/statement-regarding-termination-calportland-companys-attempted-acquisition-assets-owned-rival-cement.

[43] Press Release, Fed. Trade Comm'n, *Statement Regarding the Termination of Boston Scientific Corporation's Attempted Acquisition of a Majority Stake in M.I. Tech Co., Ltd.* (May 24, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/05/statement-regarding-termination-boston-scientificcorporations-attempted-acquisition-mi-tech.

CooperCompanies' decision to abandon its proposed acquisition of Cook Medical Holdings, LLC's reproductive health business following a full-phase investigation by FTC staff helped ensure continued competition in critical reproductive health markets.[44]

The Commission also accepted for public comment and finalized consent orders in the following two merger matters.

In *Tractor Supply/Orschein*,[45] the Commission challenged Tractor Supply's $320 million proposed acquisition of Orschein. According to the complaint, the proposed merger would have harmed competition among farm stores in the Midwest and South that sell products for small farmers, ranchers, and landowners. To remedy this concern, the Commission issued a consent order requiring Tractor Supply to divest some Orschein stores and Orschein's corporate offices and its Missouri distribution center to Bomgaars, an Iowa-based farm store chain, and some other stores to Buchheit, another chain with farm stores in Missouri and Illinois. Following a public comment period, the Commission approved the final order on December 2, 2022.

In *EQT/Quantum*,[46] the Commission challenged EQT's $5.2 billion proposed acquisition of Quantum. According to the complaint, Quantum and EQT are direct competitors in the production and sale of natural gas in the Appalachian Basin, the largest natural gas-producing region in the United States. The proposed merger would make Quantum one of EQT's largest shareholders and give Quantum a seat on EQT's board of directors, which the Commission alleged would violate the antitrust laws and harm competition in this industry. The complaint also alleged that, by making Quantum one of EQT's largest shareholders, the deal would give Quantum the ability to sway EQT's competitive decision-making and access EQT's confidential and competitively sensitive information. According to the complaint, by enabling Quantum to communicate directly with EQT, access and exchange confidential business information, and influence or direct EQT's competitive actions or strategies, this arrangement would create an unfair method of competition in violation of the FTC Act. In addition to the proposed transaction, the complaint addresses a pre-existing joint venture between EQT and Quantum called The Mineral Company (TMC), which is involved in purchasing mineral rights in the Appalachian Basin. According to the complaint, this joint venture relationship raises additional concerns regarding anticompetitive information exchange and harms competition in the acquisition of mineral rights. To remedy these concerns, the Commission issued a consent order prohibiting Quantum from occupying an EQT board seat to prevent an interlocking directorate.

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[44] Press Release, Fed. Trade Comm'n, *Statement Regarding Termination of CooperCompanies' Attempted Acquisition of Cook Medical's Reproductive Health Business* (Aug. 1, 2023), https://www.ftc.gov/news-Pevents/news/press-releases/2023/08/statement-regarding-termination-coopercompanies-attemptedacquisition-cook-medicals-reproductive.

[45] *In the Matter of Tractor Supply Company and Orschein Farm and Home LLC,* FTC Dkt. C-4776 (final order issued on Dec. 2, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0083-tractor-supply-companyorscheln-farm-home-llc-matter.

[46] *In the Matter of QEP Partners, LP, Quantum Energy Partners VI, LP, Q-TH Appalachia (VI) Investment Partners, LLC, and EQT Corporation,* FTC Dkt. C-4799 (final order issued on Oct. 10, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210212-qep-partnerseqt-corporation-matter.

The consent order also requires Quantum to divest its EQT shares. This order marks the FTC's first case in 40 years that enforces Section 8 of the Clayton Act, which prohibits interlocking directorates, an arrangement that occurs when an officer or director of one firm simultaneously serves as an officer or director of a competing firm. In addition, the consent order imposes other provisions to prevent anticompetitive information exchanges, immediately unwind the problematic TMC joint venture, protect competition, and ensure the effectiveness of the consent order. Following a public comment period, the Commission approved the final order on October 10, 2023.

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Prior to the HSR Act, businesses could, and often did, consummate transactions that raised significant antitrust concerns before the agencies had an opportunity to review them. This practice forced the agencies to engage in lengthy post-acquisition litigation, during the course of which the transaction's anticompetitive effects continued to harm competition; furthermore, if effective post-acquisition relief was not practicable, the harm continued indefinitely.

Leadership at both agencies commend staff of the Commission and the Department of Justice, including the FTC's Premerger Notification Office, for their diligent and dedicated efforts to identify and investigate mergers and acquisitions that may substantially lessen competition or tend to create a monopoly and to pursue law enforcement before injury can arise. The Commission and the Antitrust Division salute the tireless work of their excellent staffs in protecting the American public from unlawful mergers and acquisitions.

LIST OF APPENDICES

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APPENDIX A

SUMMARY OF TRANSACTIONS

FISCAL YEARS 2014 – 2023

Appendix A
Summary of Transactions by Fiscal Year

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Transactions Reported	**1,663**	**1,801**	**1,832**	**2,052**	**2,111**	**2,089**	**1,637**	**3,520**	**3,152**	**1,805**
Filings Received[1]	**3,307**	**3,585**	**3,674**	**4,083**	**4,188**	**4,142**	**3,249**	**7,002**	**6,288**	**3,515**
Adjusted Transactions In Which A Second Request Could Have Been Issued[2]	1,618	1,754	1,772	1,992	2,028	2,030	1,580	3,413	3,029	1,735
Investigations in Which Second Requests Were Issued	**51**	**47**	**54**	**51**	**45**	**61**	**48**	**65**	**47**	**37**
FTC[3]	30	20	25	33	26	30	23	42	25	26
Percent[4]	1.9%	1.1%	1.4%	1.7%	1.3%	1.5%	1.5%	1.2%	0.8%	1.4%
DOJ[3]	21	27	29	18	19	31	25	23	22	11
Percent[4]	1.3%	1.5%	1.6%	0.9%	0.9%	1.5%	1.6%	0.7%	0.7%	0.6%
Transactions Involving a Request For Early Termination[5]	**1,274**	**1,366**	**1,374**	**1,552**	**1,500**	**1,507**	**1,133**	**2,124**	**1,345**	**780**
Granted[5]	1,020	1,086	1,102	1,220	1,170	1,107	861	417	5	0
Not Granted[5]	254	280	272	332	330	400	272	1,707	1,340	780

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person when a transaction is reported. Only one application is received when an acquiring party files for an exemption under Section 7A (c)(6) or (c)(8) of the Clayton Act.

[2] These figures omit from the total number of transactions reported all transactions for which the agencies were not authorized to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of Sections 7A (c)(6) and 7A(c)(8) of the Act; (3) transactions which were found to be non-reportable; and (4) transactions withdrawn before the waiting period began. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, e.g., filing one threshold and later filing for a higher threshold, only a single consolidated transaction has been counted because as a practical matter the agencies do not issue more than one Second Request in such a case. These statistics also omit from the total number the transactions reported secondary acquisitions filed pursuant to §801.4 of the Premerger Notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.

[3] These statistics are based on the date the Second Request was issued and not the date the investigation was opened.

[4] Second Request investigations are a percentage of the total number of adjusted transactions. The total percentage reflected in Figure 2 may not equal the sum of reported component values due to rounding.

[5] These statistics are based on the date of the HSR filing and not the date action was taken on the request.

APPENDIX B

NUMBER OF TRANSACTIONS REPORTED AND

FILINGS RECEIVED BY MONTH

FOR

FISCAL YEARS 2014 - 2023

Appendix B

Table 1. Number of Transactions Reported by Month for Fiscal Years

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
October	124	144	168	163	174	211	151	202	432	172
November	159	157	243	215	207	254	206	400	575	207
December	108	122	157	148	160	157	164	204	279	170
January	125	118	117	153	170	150	154	210	233	139
February	114	140	127	153	141	145	138	278	206	150
March	100	128	125	146	178	156	136	322	221	122
April	140	131	129	150	140	163	72	261	218	114
May	157	152	168	209	222	191	57	299	211	139
June	150	155	150	191	177	161	117	299	202	145
July	162	170	140	146	180	170	110	329	184	146
August	151	216	166	219	223	173	170	353	197	162
September	173	168	142	159	139	158	162	363	194	139
TOTAL	**1,663**	**1,801**	**1,832**	**2,052**	**2,111**	**2,089**	**1,637**	**3,520**	**3,152**	**1,805**

Appendix B
Table 2. Number of Filings Received[1] by Month for Fiscal Years

	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
October	247	289	345	329	336	421	298	454	870	346
November	325	322	483	416	417	505	413	825	1,187	467
December	211	239	314	297	319	308	329	364	552	287
January	244	244	236	307	316	287	309	399	431	273
February	236	257	249	298	304	295	269	564	407	226
March	195	252	265	302	338	308	270	616	440	243
April	271	265	249	290	285	335	145	524	434	225
May	315	305	331	402	424	365	137	623	420	273
June	304	322	304	388	365	349	212	573	407	301
July	323	327	284	291	364	306	208	659	365	279
August	292	425	339	446	433	358	336	717	407	319
September	344	338	275	317	287	305	323	684	368	276
TOTAL	**3,307**	**3,585**	**3,674**	**4,083**	**4,188**	**4,142**	**3,249**	**7,002**	**6,288**	**3,515**

[1] Usually, two filings are received, one from the acquiring person and one from the acquired person, when the transaction is reported. Only one filing is received when an acquiring person files for a transaction that is exempt under Sections 7A(c)(6) and (c)(8) of the Clayton Act.

EXHIBIT A

STATISTICAL TABLES

FOR

FISCAL YEAR 2023

DATA PROFILING HART-SCOTT-RODINO PREMERGER NOTIFICATION FILINGS AND ENFORCEMENT ACTIONS

TABLE I FISCAL YEAR 2023[1] ACQUISITIONS BY SIZE OF TRANSACTION (BY SIZE RANGE)[2]												
TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENT OF TRANSACTION RANGE GROUP			NUMBER		PERCENT OF TRANSACTION RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	2	0.1%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
100M - 150M	173	10.0%	5	2	2.9%	1.2%	4.0%	0	0	0.0%	0.0%	0.0%
150M - 200M	227	13.1%	10	5	4.4%	2.2%	6.6%	1	0	0.4%	0.0%	0.4%
200M - 300M	293	16.9%	21	1	7.2%	0.3%	7.5%	8	0	2.7%	0.0%	2.7%
300M - 500M	259	14.9%	14	8	5.4%	3.1%	8.5%	2	1	0.8%	0.4%	1.2%
500M - 1000M	364	21.0%	26	21	7.1%	5.8%	12.9%	6	3	1.6%	0.8%	2.5%
Over 1000M	417	24.0%	48	24	11.5%	5.8%	17.3%	9	7	2.2%	1.7%	3.8%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE II
FISCAL YEAR 2023[1]
ACQUISITIONS BY SIZE OF TRANSACTION[2] (CUMULATIVE)

TRANSACTION RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER[4]	PERCENT	NUMBER		PERCENTAGE OF TOTAL NUMBER OF CLEARANCES			NUMBER		PERCENTAGE OF TOTAL NUMBER OF SECOND REQUESTS		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
LESS THAN 50M [5]	0	0.0%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
LESS THAN 100M	2	0.1%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
LESS THAN 150M	175	10.1%	5	2	2.7%	1.1%	3.8%	0	0	0.0%	0.0%	0.0%
LESS THAN 200M	402	23.2%	15	7	8.1%	3.8%	11.9%	1	0	2.7%	0.0%	2.7%
LESS THAN 300M	695	40.1%	36	8	19.5%	4.3%	23.8%	9	0	24.3%	0.0%	24.3%
LESS THAN 500M	954	55.0%	50	16	27.0%	8.6%	35.7%	11	1	29.7%	2.7%	32.4%
LESS THAN 1000M	1,263	72.8%	72	33	38.9%	17.8%	56.8%	17	3	45.9%	8.1%	54.1%
ALL TRANSACTIONS	1,735	100%	124	61	67.0%	33.0%	100.0%	26	11	70.3%	29.7%	100.0%

TABLE III FISCAL YEAR 2023[1] TRANSACTIONS INVOLVING THE GRANTING OF CLEARANCE BY AGENCY												
TRANSACTION RANGE ($MILLIONS)	CLEARANCES GRANTED TO AGENCY			CLEARANCE GRANTED AS A PERCENTAGE OF:								
				TRANSACTIONS IN EACH TRANSACTION RANGE GROUP			TOTAL NUMBER OF CLEARANCES PER AGENCY		TOTAL NUMBER OF CLEARANCES GRANTED		
	FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
50M - 100M	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
100M - 150M	5	2	7	2.9%	1.2%	4.0%	4.0%	3.3%	2.7%	1.1%	3.8%
150M - 200M	10	5	15	4.4%	2.2%	6.6%	8.1%	8.2%	5.4%	2.7%	8.1%
200M - 300M	21	1	22	7.2%	0.3%	7.5%	16.9%	1.6%	11.4%	0.5%	11.9%
300M - 500M	14	8	22	5.4%	3.1%	8.5%	11.3%	13.1%	7.6%	4.3%	11.9%
500M - 1000M	26	21	47	7.1%	5.8%	12.9%	21.0%	34.4%	14.1%	11.4%	25.4%
Over 1000M	48	24	72	11.5%	5.8%	17.3%	38.7%	39.3%	25.9%	13.0%	38.9%
ALL TRANSACTIONS	124	61	185	7.1%	3.5%	10.7%	100.0%	100.0%	67.0%	33.0%	100.0%

TABLE IV FISCAL YEAR 2023[1] TRANSACTIONS IN WHICH SECOND REQUESTS WERE ISSUED													
TRANSACTION RANGE ($MILLIONS)	**INVESTIGATIONS IN WHICH A SECOND REQUEST WAS ISSUED [3]**			**SECOND REQUESTS ISSUED AS A PERCENTAGE OF:**									
				TOTAL NUMBER OF TRANSACTIONS			**TRANSACTIONS IN EACH TRANSACTION RANGE GROUP**			**TOTAL NUMBER OF SECOND REQUEST INVESTIGATIONS**			
	FTC	**DOJ**	**TOTAL**	**FTC**	**DOJ**	**TOTAL**	**FTC**	**DOJ**	**TOTAL**	**FTC**	**DOJ**	**TOTAL**
50M - 100M	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
100M - 150M	0	0	0	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
150M - 200M	1	0	1	0.1%	0.0%	0.1%	0.4%	0.0%	0.4%	2.7%	0.0%	2.7%
200M - 300M	8	0	8	0.5%	0.0%	0.5%	2.7%	0.0%	2.7%	21.6%	0.0%	21.6%
300M - 500M	2	1	3	0.1%	0.1%	0.2%	0.8%	0.4%	1.2%	5.4%	2.7%	8.1%
500M - 1000M	6	3	9	0.3%	0.2%	0.5%	1.6%	0.8%	2.5%	16.2%	8.1%	24.3%
Over 1000M	9	7	16	0.5%	0.4%	0.9%	2.2%	1.7%	3.8%	24.3%	18.9%	43.2%
ALL TRANSACTIONS	26	11	37	1.5%	0.6%	2.1%	1.5%	0.6%	2.1%	70.3%	29.7%	100.0%

TABLE V
FISCAL YEAR 2023[1]
ACQUISITIONS BY REPORTING THRESHOLD

THRESHOLD[6]	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF THRESHOLD GROUP			NUMBER		PERCENT OF THRESHOLD GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
$50M (as adjusted)	96	5.5%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
$100M (as adjusted)	160	9.2%	2	5	1.3%	3.1%	4.4%	0	0	0.0%	0.0%	0.0%
$500M (as adjusted)	24	1.4%	0	4	0.0%	16.7%	16.7%	0	0	0.0%	0.0%	0.0%
25%	3	0.2%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
50%	631	36.4%	64	33	10.1%	5.2%	15.4%	13	10	2.1%	1.6%	3.6%
ASSETS ONLY	225	13.0%	35	3	15.6%	1.3%	16.9%	8	0	3.6%	0.0%	3.6%
NCI	596	34.4%	23	16	3.9%	2.7%	6.5%	5	1	0.8%	0.2%	1.0%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE VI
FISCAL YEAR 2023[1]
TRANSACTION BY ASSETS OF ACQUIRING PERSON

ASSET RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF ASSET RANGE GROUP			NUMBER		PERCENT OF ASSET RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	224	12.9%	0	1	0.0%	0.4%	0.4%	0	0	0.0%	0.0%	0.0%
50M - 100M	20	1.2%	0	3	0.0%	15.0%	15.0%	0	0	0.0%	0.0%	0.0%
100M - 150M	23	1.3%	0	0	0.0%	0.0%	0.0%	0	0	0.0%	0.0%	0.0%
150M - 200M	24	1.4%	0	1	0.0%	4.2%	4.2%	0	0	0.0%	0.0%	0.0%
200M - 300M	158	9.1%	4	0	2.5%	0.0%	2.5%	0	0	0.0%	0.0%	0.0%
300M - 500M	117	6.7%	9	4	7.7%	3.4%	11.1%	0	0	0.0%	0.0%	0.0%
500M - 1000M	157	9.0%	7	3	4.5%	1.9%	6.4%	0	1	0.0%	0.6%	0.6%
Over 1000M	1,012	58.3%	104	49	10.3%	4.8%	15.1%	26	10	2.6%	1.0%	3.6%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE VII FISCAL YEAR 2023[1] TRANSACTION BY SALES OF ACQUIRING PERSON												
SALES RANGE ($MILLIONS)	HSR TRANSACTIONS		CLEARANCE GRANTED TO FTC OR DOJ					SECOND REQUEST INVESTIGATIONS[3]				
	NUMBER	PERCENT	NUMBER		PERCENT OF SALES RANGE GROUP			NUMBER		PERCENT OF SALES RANGE GROUP		
			FTC	DOJ	FTC	DOJ	TOTAL	FTC	DOJ	FTC	DOJ	TOTAL
Below 50M	170	9.8%	1	2	0.6%	1.2%	1.8%	0	0	0.0%	0.0%	0.0%
50M - 100M	61	3.5%	1	2	1.6%	3.3%	4.9%	0	0	0.0%	0.0%	0.0%
100M - 150M	53	3.1%	3	2	5.7%	3.8%	9.4%	0	1	0.0%	1.9%	1.9%
150M - 200M	52	3.0%	3	0	5.8%	0.0%	5.8%	0	0	0.0%	0.0%	0.0%
200M - 300M	49	2.8%	3	1	6.1%	2.0%	8.2%	0	0	0.0%	0.0%	0.0%
300M - 500M	108	6.2%	6	3	5.6%	2.8%	8.3%	0	0	0.0%	0.0%	0.0%
500M - 1000M	154	8.9%	4	6	2.6%	3.9%	6.5%	1	3	0.6%	1.9%	2.6%
Over 1000M	848	48.9%	102	45	12.0%	5.3%	17.3%	25	7	2.9%	0.8%	3.8%
Sales Not Available[7]	240	13.8%	1	0	0.4%	0.0%	0.4%	0	0	0.0%	0.0%	0.0%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE VIII FISCAL YEAR 2023[1] TRANSACTION BY ASSETS OF ACQUIRED ENTITIES[8]												
ASSET RANGE ($MILLIONS)	**HSR TRANSACTIONS**		**CLEARANCE GRANTED TO FTC OR DOJ**					**SECOND REQUEST INVESTIGATIONS[3]**				
	NUMBER	**PERCENT**	**NUMBER**		**PERCENT OF ASSET RANGE GROUP**			**NUMBER**		**PERCENT OF ASSET RANGE GROUP**		
			FTC	**DOJ**	**FTC**	**DOJ**	**TOTAL**	**FTC**	**DOJ**	**FTC**	**DOJ**	**TOTAL**
Below 50M	250	14.4%	12	4	4.8%	1.6%	6.4%	2	1	0.8%	0.4%	1.2%
50M - 100M	197	11.4%	9	4	4.6%	2.0%	6.6%	1	0	0.5%	0.0%	0.5%
100M - 150M	165	9.5%	14	2	8.5%	1.2%	9.7%	0	0	0.0%	0.0%	0.0%
150M - 200M	92	5.3%	6	1	6.5%	1.1%	7.6%	0	0	0.0%	0.0%	0.0%
200M - 300M	157	9.0%	12	5	7.6%	3.2%	10.8%	4	0	2.5%	0.0%	2.5%
300M - 500M	146	8.4%	10	4	6.8%	2.7%	9.6%	2	2	1.4%	1.4%	2.7%
500M - 1000M	177	10.2%	17	7	9.6%	4.0%	13.6%	3	2	1.7%	1.1%	2.8%
Over 1000M	388	22.4%	28	23	7.2%	5.9%	13.1%	7	4	1.8%	1.0%	2.8%
Assets Not Available[8]	163	9.4%	16	11	9.8%	6.7%	16.6%	7	2	4.3%	1.2%	5.5%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE IX FISCAL YEAR 2023[1] TRANSACTION BY SALES OF ACQUIRED ENTITIES [9]												
SALES RANGE ($MILLIONS)	**HSR TRANSACTIONS**		**CLEARANCE GRANTED TO FTC OR DOJ**					**SECOND REQUEST INVESTIGATIONS [3]**				
	NUMBER	**PERCENT**	**NUMBER**		**PERCENT OF SALES RANGE GROUP**			**NUMBER**		**PERCENT OF SALES RANGE GROUP**		
			FTC	**DOJ**	**FTC**	**DOJ**	**TOTAL**	**FTC**	**DOJ**	**FTC**	**DOJ**	**TOTAL**
Below 50M	305	17.6%	19	3	6.2%	1.0%	7.2%	2	1	0.7%	0.3%	1.0%
50M - 100M	277	16.0%	15	5	5.4%	1.8%	7.2%	5	0	1.8%	0.0%	1.8%
100M - 150M	160	9.2%	10	5	6.3%	3.1%	9.4%	3	1	1.9%	0.6%	2.5%
150M - 200M	132	7.6%	6	3	4.5%	2.3%	6.8%	2	1	1.5%	0.8%	2.3%
200M - 300M	161	9.3%	9	5	5.6%	3.1%	8.7%	1	1	0.6%	0.6%	1.2%
300M - 500M	144	8.3%	12	7	8.3%	4.9%	13.2%	0	2	0.0%	1.4%	1.4%
500M - 1000M	152	8.8%	13	6	8.6%	3.9%	12.5%	3	1	2.0%	0.7%	2.6%
Over 1000M	326	18.8%	29	22	8.9%	6.7%	15.6%	8	4	2.5%	1.2%	3.7%
Sales not Available [10]	78	4.5%	11	5	14.1%	6.4%	20.5%	2	0	2.6%	0.0%	2.6%
ALL TRANSACTIONS	1,735	100.0%	124	61	7.1%	3.5%	10.7%	26	11	1.5%	0.6%	2.1%

TABLE X FISCAL YEAR 2023[1] INDUSTRY GROUP OF ACQUIRING PERSON										
3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
000 [13]	Not Available	241	13.9%	-1.1%	1	1	2	0	0	0
111	Crop Production	2	0.1%	0.0%	0	0	0	0	0	0
112	Animal Production	2	0.1%	0.1%	0	0	0	0	0	0
115	Support Activities for Agriculture and Forestry	1	0.1%	0.1%	0	1	1	0	0	0
211	Oil and Gas Extraction	38	2.2%	1.0%	2	0	2	1	0	1
212	Mining (except Oil and Gas)	3	0.2%	0.0%	0	0	0	0	0	0
213	Support Activities for Mining	10	0.6%	0.4%	0	0	0	0	0	0
221	Utilities	39	2.2%	0.8%	1	3	4	1	1	2
237	Heavy and Civil Engineering Construction	14	0.8%	0.0%	0	0	0	0	0	0
238	Specialty Trade Contractors	20	1.2%	0.3%	0	2	2	0	0	0
311	Food and Kindred Products	35	2.0%	0.5%	6	4	10	1	2	3
312	Beverage and Tobacco Product Manufacturing	12	0.7%	0.3%	2	0	2	0	0	0
315	Apparel Manufacturing	3	0.2%	0.1%	0	0	0	0	0	0
321	Wood Product Manufacturing	9	0.5%	0.1%	1	0	1	0	0	0
322	Paper Manufacturing	12	0.7%	0.3%	0	2	2	0	1	1
323	Printing and Related Support Actitivies	3	0.2%	0.1%	0	0	0	0	0	0
324	Petroleum and Coal Products Manufacturing	10	0.6%	0.3%	2	0	2	1	0	1
325	Chemical Manufacturing	96	5.5%	-0.1%	24	4	28	4	1	5
326	Plastics and Rubber Manfuacturing	15	0.9%	0.2%	1	0	1	0	0	0
327	Nonmetallic Mineral Product Manufacturing	11	0.6%	-0.1%	2	2	4	1	0	1
331	Primary Metal Manufacturing	12	0.7%	0.2%	1	0	1	0	0	0

TABLE X
FISCAL YEAR 2023[1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
332	Fabricated Metal Product Manufacturing	13	0.7%	-0.5%	0	0	0	0	0	0
333	Machinery Manufacturing	31	1.8%	0.1%	1	5	6	0	1	1
334	Computer and Electronic Product Manufacturing	25	1.4%	0.2%	4	0	4	1	0	1
335	Electrical Equipment, Applicance, and Component Manufacturing	9	0.5%	-0.1%	0	1	1	0	0	0
336	Transportation Equipment Manufacturing	21	1.2%	0.2%	0	3	3	0	0	0
337	Furniture and Related Product Manufacturing	2	0.1%	0.0%	2	0	2	1	0	1
339	Miscellaneous Manufacturing	20	1.2%	-0.1%	4	0	4	1	0	1
423	Merchant Wholesalers, Durable Goods	71	4.1%	-0.8%	6	3	9	1	1	2
424	Merchant Wholesales, Nondurable Goods	85	4.9%	0.9%	8	2	10	3	0	3
425	Wholesale Electric Markets and Agent and Brokers	3	0.2%	0.1%	0	0	0	0	0	0
441	Motor Vehicle and Parts Dealers	22	1.3%	-0.1%	0	0	0	0	0	0
442	Furniture and Home Furnishing Stores	2	0.1%	0.1%	0	0	0	0	0	0
444	Electronics and Appliance Stores	2	0.1%	0.0%	0	0	0	0	0	0
445	Food and Beverage Stores	3	0.2%	-0.1%	2	0	2	1	0	1
446	Health and Personal Care Stores	9	0.5%	0.2%	4	1	5	1	1	2
447	Gasoline Stations	9	0.5%	0.4%	5	0	5	0	0	0
448	Clothing and Clothing Accessories Stores	7	0.4%	0.0%	2	1	3	0	0	0
451	Sporting Goods, Hobby, Book, and Music Stores	4	0.2%	0.2%	0	0	0	0	0	0
452	General Merchandise Stores	3	0.2%	0.0%	0	0	0	0	0	0
453	Miscellaneous Store Retailers	1	0.1%	-0.3%	0	0	0	0	0	0
454	Nonstore Retailers	10	0.6%	0.0%	1	0	1	0	0	0

TABLE X FISCAL YEAR 2023[1] INDUSTRY GROUP OF ACQUIRING PERSON											
3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
481	Air Transportation	2	0.1%	-0.1%	0	0	0	0	0	0
482	Railroad Transportation	1	0.1%	0.0%	0	0	0	0	0	0
483	Water Transportation	8	0.5%	0.4%	0	2	2	0	0	0
484	Truck Transportation	12	0.7%	0.3%	0	0	0	0	0	0
485	Transit and Ground Transportation	5	0.3%	0.2%	0	0	0	0	0	0
486	Pipeline Transportation	8	0.5%	0.1%	0	0	0	0	0	0
488	Support Activities for Transportation	19	1.1%	-0.3%	0	0	0	0	0	0
492	Couriers	2	0.1%	0.1%	0	0	0	0	0	0
493	Warehousing and Storage	2	0.1%	0.0%	0	0	0	0	0	0
511	Publishing Industries (except Internet)	50	2.9%	-1.5%	0	2	2	0	1	1
512	Motion Pictures and Sound Recording Industries	8	0.5%	0.1%	0	0	0	0	0	0
515	Broadcasting (except Internet)	5	0.3%	0.1%	0	1	1	0	0	0
517	Telecommunications	10	0.6%	-0.1%	0	1	1	0	0	0
518	Internet Service Providers, Web Search Portals, and Data Processing Services	15	0.9%	-0.7%	1	1	2	0	1	1
519	Other Information Services	12	0.7%	-0.3%	1	2	3	0	0	0
522	Credit Intermediation and Related Activities	31	1.8%	-0.4%	0	0	0	0	0	0
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	183	10.5%	-0.1%	2	5	7	1	0	1
524	Insurance Carriers and Related Actitivities	63	3.6%	-0.2%	2	4	6	0	1	1
525	Funds, Trusts, and Other Financial Vehicles	38	2.2%	0.4%	0	0	0	0	0	0
531	Real Estate	9	0.5%	-0.3%	0	0	0	0	0	0
532	Rental and Leasing Services	12	0.7%	-0.1%	1	0	1	0	0	0

TABLE X
FISCAL YEAR 2023[1]
INDUSTRY GROUP OF ACQUIRING PERSON

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]		
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	13	0.7%	0.2%	2	1	3	1	0	1
541	Professional, Scientific, and Technical Services	115	6.6%	-1.6%	10	2	12	3	0	3
551	Management Companies and Enterprises	3	0.2%	-0.1%	0	0	0	0	0	0
561	Administrative and Support Services	53	3.1%	0.2%	0	0	0	0	0	0
562	Waste Management and Remediation Services	11	0.6%	0.0%	0	1	1	0	0	0
611	Educational Services	6	0.3%	-0.2%	2	0	2	1	0	1
621	Ambulatory Health Care Services	29	1.7%	-0.1%	2	0	2	0	0	0
622	Hospitals	27	1.6%	0.8%	16	0	16	2	0	2
623	Nursing Care Facilities	2	0.1%	0.0%	1	0	1	0	0	0
624	Social Assistance	1	0.1%	0.0%	0	0	0	0	0	0
711	Performing Arts, Spector Sports, and Related Industries	5	0.3%	0.0%	0	3	3	0	0	0
713	Amusement, Gambling, and Recreation Industries	8	0.5%	0.3%	0	0	0	0	0	0
721	Accommodation	1	0.1%	-0.2%	0	0	0	0	0	0
722	Food Services and Drinking Places	12	0.7%	-0.1%	1	0	1	0	0	0
811	Repairs and Maintenance	9	0.5%	0.0%	1	0	1	0	0	0
812	Personal and Laundry Services	3	0.2%	0.1%	0	0	0	0	0	0
813	Religious, Grantmaking, Civic, Professional, and Similar Organizations	2	0.1%	0.1%	0	1	1	0	0	0
		1,735	100.0%		124	61	185	26	11	37

TABLE XI
FISCAL YEAR 2023[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
000[13]	Not Available	61	3.5%	-0.1%	11	0	11	2	0	2	0
111	Crop Production	2	0.1%	0.0%	0	0	0	0	0	0	0
115	Support Activities for Agriculture and Forestry	1	0.1%	0.0%	0	1	1	0	0	0	0
211	Oil and Gas Extraction	43	2.5%	1.1%	1	0	1	0	0	0	16
212	Mining (except Oil and Gas)	12	0.7%	0.4%	0	0	0	0	0	0	1
213	Support Activities for Mining	13	0.7%	0.3%	0	1	1	0	0	0	2
221	Utilities	48	2.8%	0.8%	0	1	1	0	1	1	3
236	Construction of Buildings	4	0.2%	0.0%	0	0	0	0	0	0	0
237	Heavy and Civil Engineering Construction	11	0.6%	-0.2%	0	0	0	0	0	0	0
238	Specialty Trade Contractors	27	1.6%	0.2%	0	1	1	0	0	0	3
311	Food and Kindred Products	41	2.4%	0.2%	2	5	7	1	1	2	5
312	Beverage and Tobacco Product Manufacturing	9	0.5%	-0.2%	2	0	2	1	0	1	0
313	Textile Mills	1	0.1%	0.0%	0	1	1	0	0	0	0
315	Apparel Manufacturing	1	0.1%	0.0%	0	0	0	0	0	0	0
321	Wood Product Manufacturing	11	0.6%	0.0%	1	1	2	0	0	0	0
322	Paper Manufacturing	9	0.5%	0.1%	0	1	1	0	1	1	0
323	Printing and Related Support Actitivies	3	0.2%	-0.2%	0	0	0	0	0	0	1
324	Petroleum and Coal Products Manufacturing	7	0.4%	0.2%	4	0	4	2	0	2	2
325	Chemical Manufacturing	84	4.8%	0.9%	11	4	15	1	0	1	0
326	Plastics and Rubber Manfuacturing	11	0.6%	-0.5%	1	0	1	0	0	0	1
327	Nonmetallic Mineral Product Manufacturing	10	0.6%	0.1%	3	0	3	1	0	1	3

TABLE XI
FISCAL YEAR 2023[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
331	Primary Metal Manufacturing	10	0.6%	0.1%	0	1	1	0	0	0	2
332	Fabricated Metal Product Manufacturing	17	1.0%	-0.3%	1	2	3	2	0	2	0
333	Machinery Manufacturing	34	2.0%	0.5%	0	3	3	0	1	1	2
334	Computer and Electronic Product Manufacturing	37	2.1%	-0.1%	1	1	2	0	0	0	0
335	Electrical Equipment, Applicance, and Component Manufacturing	10	0.6%	-0.1%	0	0	0	0	0	0	0
336	Transportation Equipment Manufacturing	26	1.5%	0.1%	3	1	4	1	0	1	0
337	Furniture and Related Product Manufacturing	1	0.1%	0.0%	0	0	0	0	0	0	0
339	Miscellaneous Manufacturing	25	1.4%	0.2%	8	0	8	1	0	1	0
423	Merchant Wholesalers, Durable Goods	96	5.5%	0.1%	2	4	6	0	1	1	3
424	Merchant Wholesalers, Nondurable Goods	89	5.1%	0.8%	9	2	11	3	1	4	5
425	Wholesale Electric Markets and Agent and Brokers	3	0.2%	0.1%	0	0	0	0	0	0	0
441	Motor Vehicle and Parts Dealers	22	1.3%	0.1%	1	0	1	0	0	0	3
442	Furniture and Home Furnishing Stores	1	0.1%	0.0%	1	0	1	1	0	1	0
444	Electronics and Appliance Stores	3	0.2%	0.0%	0	0	0	0	0	0	0
445	Food and Beverage Stores	3	0.2%	-0.1%	2	0	2	1	0	1	0
446	Health and Personal Care Stores	14	0.8%	0.6%	4	1	5	1	0	1	0
447	Gasoline Stations	11	0.6%	0.4%	6	0	6	0	0	0	2
448	Clothing and Clothing Accessories Stores	8	0.5%	0.2%	2	0	2	0	0	0	0
452	General Merchandise Stores	4	0.2%	0.1%	0	0	0	0	0	0	0
453	Miscellaneous Store Retailers	3	0.2%	0.0%	0	0	0	0	0	0	0
454	Nonstore Retailers	23	1.3%	0.0%	3	0	3	0	0	0	0

TABLE XI
FISCAL YEAR 2023[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSACTIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
481	Air Transportation	6	0.3%	-0.3%	0	0	0	0	0	0	1
483	Water Transportation	5	0.3%	0.1%	0	2	2	0	0	0	2
484	Truck Transportation	15	0.9%	0.5%	0	1	1	0	0	0	0
485	Transit and Ground Transportation	4	0.2%	0.0%	0	0	0	0	0	0	0
486	Pipeline Transportation	13	0.7%	0.1%	1	0	1	2	0	2	0
488	Support Activities for Transportation	20	1.2%	-0.4%	0	0	0	0	0	0	0
492	Couriers	1	0.1%	0.0%	0	0	0	0	0	0	0
493	Warehousing and Storage	9	0.5%	0.0%	0	0	0	1	0	1	0
511	Publishing Industries (except Internet)	111	6.4%	-2.4%	3	3	6	0	1	1	2
512	Motion Pictures and Sound Recording Industries	9	0.5%	0.0%	0	1	1	0	0	0	0
515	Broadcasting (except Internet)	8	0.5%	0.1%	0	0	0	0	0	0	0
517	Telecommunications	24	1.4%	0.5%	0	4	4	0	0	0	0
518	Internet Service Providers, Web Search Portals, and Data Processing Services	37	2.1%	-1.4%	0	0	0	0	0	0	0
519	Other Information Services	17	1.0%	-1.0%	1	0	1	0	0	0	0
522	Credit Intermediation and Related Activities	32	1.8%	-0.4%	0	0	0	0	0	0	3
523	Securitites, Commodity Contracts, and Other Financial Investments and Related Activities	71	4.1%	0.7%	0	2	2	0	0	0	4
524	Insurance Carriers and Related Actitivities	57	3.3%	-0.2%	1	0	1	0	0	0	5
525	Funds, Trusts, and Other Financial Vehicles	3	0.2%	-0.2%	0	0	0	0	0	0	0
531	Real Estate	11	0.6%	-0.3%	0	0	0	0	0	0	0
532	Rental and Leasing Services	17	1.0%	0.0%	2	0	2	0	0	0	0
533	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	15	0.9%	0.0%	2	1	3	0	0	0	0

TABLE XI
FISCAL YEAR 2023[1]
INDUSTRY GROUP OF ACQUIRED ENTITIES

3 DIGIT NAICS CODE[11]	INDUSTRY DESCRIPTION	NUMBER[4]	PERCENT OF TOTAL	% POINTS CHANGE FROM FY 2022[12]	CLEARANCE GRANTED TO FTC OR DOJ			SECOND REQUEST INVESTIGATIONS[3]			NUMBER OF 3 DIGIT INTRA-INDUSTRY TRANSAC-TIONS[14]
					FTC	DOJ	TOTAL	FTC	DOJ	TOTAL	
541	Professional, Scientific, and Technical Services	186	10.7%	-0.9%	11	4	15	2	2	4	1
551	Management Companies and Enterprises	1	0.1%	0.0%	0	0	0	0	0	0	0
561	Administrative and Support Services	50	2.9%	-0.5%	0	2	2	0	0	0	2
562	Waste Management and Remediation Services	26	1.5%	0.7%	0	4	4	0	0	0	0
611	Educational Services	14	0.8%	0.0%	1	1	2	0	0	0	0
621	Ambulatory Health Care Services	33	1.9%	-1.0%	8	2	10	1	2	3	0
622	Hospitals	22	1.3%	0.4%	13	0	13	2	0	2	2
623	Nursing Care Facilities	4	0.2%	0.0%	1	0	1	0	0	0	0
624	Social Assistance	4	0.2%	0.0%	0	0	0	0	0	0	0
711	Performing Arts, Spector Sports, and Related Industries	11	0.6%	0.2%	0	3	3	0	0	0	1
713	Amusement, Gambling, and Recreation Industries	15	0.9%	0.4%	0	0	0	0	0	0	1
721	Accommodation	2	0.1%	-0.2%	0	0	0	0	0	0	0
722	Food Services and Drinking Places	12	0.7%	0.1%	1	0	1	0	0	0	0
811	Repairs and Maintenance	15	0.9%	0.1%	0	0	0	0	0	0	1
812	Personal and Laundry Services	5	0.3%	0.1%	0	0	0	0	0	0	0
813	Religious, Grantmaking, Civic, Professional, and Similar Organizations	1	0.1%	0.0%	0	0	0	0	0	0	0
		1,735	100.0%		124	61	185	26	11	37	79

[1] Fiscal year 2023 figures include transactions reported between October 1, 2022 and September 30, 2023.

[2] The size of transaction is based on the aggregate total amount of voting securities, non-corporate interests and/or assets held by the acquiring person as a result of the transaction and are taken from the response to Item 2(d)(iii), 2(d)(vii), and 2(d)(ix) of the Notification and Report Form.

[3] These statistics are based on the date the Second Request was issued.

[4] During fiscal year 2023, 1,805 transactions were reported under the HSR Premerger Notification program. The smaller number, 1,735, reflects the adjustments to eliminate the following types of transactions: (1) transactions reported under Section 7A(c)(6) and (c)(8) (transactions involving certain regulated industries and financial businesses); (2) transactions deemed non-reportable; (3) incomplete transactions (only one party in each transaction filed a compliant notification); and (4) transactions withdrawn before the waiting period began. The table does not, however, exclude competing offers or multiple HSR transactions resulting from a single business transaction (where there are multiple acquiring persons or acquired persons).

[5] The total number of filings under $50M submitted in Fiscal Year 2023 reflects corrective filings.

[6] In February 2001, legislation raised the size of transaction from $15 million to $50 million with annual adjustments beginning in February 2005. As of FY 2017, the threshold categories include non-corporate interests (NCI), encompassing transactions in which the acquiring entity acquires 50% of more of the non-corporate interests of the acquired entity. In addition, the 2023 Merger Filing Fee Modernization Act introduced additional filing fee tiers and new filing fees. Both the filing fee tiers and the filing fees are adjusted annually along with the jurisdictional thresholds.

[7] The category labeled “Sales Not Available” includes newly-formed acquiring persons, foreign acquiring person with no United States revenues, and acquiring persons who had not derived any revenues from their investments at the time of filing.

[8] Assets of an acquired entity are not available when the acquired entity’s financial data is consolidated within its ultimate parent.

[9] Sales of an acquired entity are taken from responses to Item 4(a) and (b) (SEC documents and annual reports) or item 5 (dollar revenues) of the Premerger Notification and Report Form.

[10] This category includes acquisition of newly-formed entities from which no sales were generated, and acquisitions of assets which produced no sales revenues during the prior year to filing the Notification and Report Form.

[11] The 3-digit codes are part of the North American Industrial Classification System (NAICS) established by the United States Government North American Industrial Classification System 1997, Executive Office of the President, Office of Management and Budget. The NAICS groups used in this table were determined from responses submitted by the parties to Item 5 of the Premerger Notification and Report Form.

[12] This represents the deviation from the fiscal year 2022 percentage.

[13] This category includes transactions by newly-formed entities.

[14] The intra-industry transactions column identifies the number of acquisitions in which both the acquiring and acquired person derived revenues from the same 3-digit NAICS code.

EXHIBIT B

Summary letters required by Section 102(c) of the Merger Fee Modernization Act of 2022, including the information required under Sections 102(a) and (b) of the MMA.

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

July 1, 2024

The Honorable Jim Jordan
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Thomas Massie
Chairman, Subcommittee on the Administrative State, Regulatory Reform, and Antitrust
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Lou Correa
Ranking Member, Subcommittee on the Administrative State, Regulatory Reform, and Antitrust
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Jordan, Ranking Member Nadler, Chairman Massie, and Ranking Member Correa:

On behalf of the Federal Trade Commission and the Justice Department's Antitrust Division (collectively, the Agencies), please find below the summary required by Section 102(c) of the Merger Fee Modernization Act of 2022 ("MMA"), including the information required under Sections 102(a) and (b) of the MMA.

Summary of the FY2023 HSR Annual Report

In fiscal year 2023, 1,805 transactions were reported under the Hart-Scott-Rodino Antitrust Improvements (HSR) Act, which is in line with the number of transactions reported over the past 10 years, excluding the record high number of transactions reported in fiscal years 2021 and 2022. Nearly one-fourth of the transactions reviewed by the Agencies were valued over $1 billion, continuing a trend in recent years towards larger and more complex transactions.

During fiscal year 2023, the Federal Trade Commission took enforcement actions against 16 deals: four in which the Commission initiated administrative or federal court litigation; ten in which the transaction was abandoned or restructured after the Commission raised concerns about the threat they posed to competition; and two in which it issued consent orders for public comment. The Antitrust Division took enforcement actions against 12 deals: two that were blocked through lawsuits in U.S. district court; ten in which the transaction was abandoned or restructured after the Antitrust Division raised concerns about the threat they posed to competition.

Section 102

(a)(1) The amount of funds made available to the Federal Trade Commission and the Department of Justice, respectively, from the premerger notification filing fees under this section, as adjusted by the Merger Filing Fee Modernization Act of 2022, as compared to the funds made available to the Federal Trade Commission and the Department of Justice, respectively, from premerger notification filing fees as the fees were determined in fiscal year 2022.

FY23 Total Fee Estimate (Oct – Feb) – prior fee structure

October –	$21,337,500
November –	$24,665,275
December –	$17,167,600
January –	$18,577,550
February (adjusted) –	$19,775,010

Total (Oct – Feb): $101,522,935

FY23 Total Fee Estimate (Mar – Sept) – applying prior fee structure

210 Tier 1 Transactions @ $45,000 =	$9,450,000
482 Tier 2 Transactions @ $125,000 =	$60,250,000
231 Tier 3 Transactions @ $280,000 =	$64,680,000

Total (Mar – Sep): $134,380,000

If the MMA did not apply, total collections for FY23 would have been **$235,902,935**, with **$117,951,467.50** made available to the FTC and **$117,951,467.50** made available to the Department of Justice.

Actual Filing Fee Revenue for FY23 was **$343,628,165.01**, with **$171,814,082.51** made available to the FTC and **$171,814,082.50** made available to the Department of Justice.

Difference due to MMA: +$107,725,230.01

(a)(2) The total revenue derived from premerger notification filing fees, by tier, by the Federal Trade Commission and the Department of Justice, respectively.

RESPONSE: See Appendix A, attached.

(a)(3) The gross cost of operations of the Federal Trade Commission, by Budget Activity, and the Antitrust Division of the Department of Justice, respectively.

RESPONSE:

Gross Cost of Operations		
FTC		
(Dollars in Millions)	FY 2022	FY 2023
Consumer Protection	193	218
Antitrust	166	200
TOTAL	359	418
DOJ, Antitrust Division		
(Dollars in Millions)	FY 2022	FY 2023
Antitrust	208	220

(b) (1) for actions with respect to which the record of the vote of each member of the Federal Trade Commission is on the public record of the Federal Trade Commission, a list of each action with respect to which the Federal Trade Commission took or declined to take action on a 3 to 2 vote; and

RESPONSE: There were no such actions during FY23.

(b)(2) for all actions for which the Federal Trade Commission took a vote, the percentage of such actions that were decided on a 3 to 2 vote.

RESPONSE: Zero percent during FY23.

If you or your staff have additional questions or comments, please do not hesitate to contact Jeanne Bumpus, FTC Director of the Office of Congressional Relations, at (202) 326-2946 or Slade Bond, DOJ Deputy Assistant Attorney General, Office of Legislative Affairs, at 202-616-8795.

Sincerely,

Lina Khan

Lina M. Khan
Chair, Federal Trade Commission

Appendix A: HSR PREMERGER FILING FEES
FY 2023 SUMMARY REPORT
PREPARED BY FEDERAL TRADE COMMISSION

FY 2023 Fee Collections and Income											
Filing Fee Thresholds	**$92M - < $184M**	**$184M - < $919.9M**	**$919.9M or Greater**	**$111.4M - < $161.4M**	**$161.5M - < $499.9M**	**$500M - < $999.9M**	**$1B - < 1.9B**	**$2B - < $4.9B**	**$5B or Greater**		
Filing Fee	**$45,000**	**$125,000**	**$280,000**	**$30,000**	**$100,000**	**$250,000**	**$400,000**	**$800,000**	**$2,250,000**	Other Amounts	TOTAL
Filings	254.0	396.0	133.5	182.5	432.0	163.5	93.0	52.0	32.0	NA	1,738.50
Fees Collected	11,430,000	49,500,000	37,380,000	5,475,000	43,200,000	40,875,000	37,200,000	41,600,000	72,000,000	7,291,466	345,951,466.01
Refunds										(2,323,301)	(2,323,301.00)
Net Fee Income	11,430,000	49,500,000	37,380,000	5,475,000	43,200,000	40,875,000	37,200,000	41,600,000	72,000,000	4,968,165	**343,628,165.01**

FY 2023 Fee Distribution:	Year-to-Date
DOJ	171,814,082.50
FTC	171,814,082.51
Total Distributed Fees	343,628,165.01

The first three tiers cover October through February and the last six tiers cover February through September.

During fiscal year 2023, 1,805 transactions were reported under the HSR Premerger Notification program. The smaller number here, 1,738.50, reflects filing fees received (including partial fees), and adjustments to eliminate the following types of transactions, for which no transaction fee was received: (1) transactions reported under Section 7A(c)(6) and (c)(8) (transactions involving certain regulated industries and financial businesses); (2) transactions deemed non-reportable; (3) incomplete transactions (only one party in each transaction filed a compliant notification); and (4) transactions withdrawn before the waiting period began. The table does not, however, exclude competing offers or multiple HSR transactions resulting from a single business transaction (where there are multiple acquiring persons or acquired persons).

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

July 1, 2024

The Honorable Dick Durbin
Chair, Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Lindsey Graham
Ranking Member, Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Amy Klobuchar
Chair, Subcommittee on Competition Policy, Antitrust, and Consumer Rights
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

The Honorable Mike Lee
Ranking Member, Subcommittee on Competition Policy, Antitrust, and Consumer Rights
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Chair Durbin, Ranking Member Graham, Chair Klobuchar, and Ranking Member Lee:

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Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

Issued: December 18, 2023

1. Overview

These Merger Guidelines identify the procedures and enforcement practices the Department of Justice and the Federal Trade Commission (the "Agencies") most often use to investigate whether mergers violate the antitrust laws. The Agencies enforce the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Sections 3, 7, and 8 of the Clayton Act,[1] 15 U.S.C. §§ 14, 18, 19.[2] Congress has charged the Agencies with administering these statutes as part of a national policy to promote open and fair competition, including by preventing mergers and acquisitions that would violate these laws. "Federal antitrust law is a central safeguard for the Nation's free market structures" that ensures "the preservation of economic freedom and our free-enterprise system."[3] It rests on the premise that "[t]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[4]

Section 7 of the Clayton Act ("Section 7") prohibits mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Competition is a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits. Mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power and deprive the public of these benefits. Mergers can lessen competition when they diminish competitive constraints, reduce the number or attractiveness of alternatives available to trading partners, or reduce the intensity with which market participants compete.

Section 7 was designed to arrest anticompetitive tendencies in their incipiency.[5] The Clayton Act therefore requires the Agencies to assess whether mergers present risk to competition. The Supreme Court has explained that "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition'" or to tend to create a monopoly.[6] Accordingly, the Agencies do not attempt to

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[1] As amended under the Celler-Kefauver Antimerger Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (1950), and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[2] Although these Guidelines focus primarily on Section 7 of the Clayton Act, the Agencies consider whether any of these statutes may be violated by a merger. The various provisions of the Sherman, Clayton, and FTC Acts each have separate standards, and one may be violated when the others are not.

[3] *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015).

[4] *NCAA v. Board of Regents*, 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4-5 (1958)); *see also NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021) (quoting *Board of Regents*, 468 U.S. at 104 n.27).

[5] *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 nn.32-33 (1962); *see also United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (Section 7 "halt[s] incipient monopolies and trade restraints outside the scope of the Sherman Act." (quoting *Brown Shoe*, 370 U.S. at 318 n.32)); *Saint Alphonsus Medical Center-Nampa v. St. Luke's*, 778 F.3d 775, 783 (9th Cir. 2015) (Section 7 "intended to arrest anticompetitive tendencies in their incipiency." (quoting *Brown Shoe*, 370 U.S. at 322)); *Polypore Intern., Inc. v. FTC*, 686 F.3d 1208, 1213-14 (11th Cir. 2012) (same). Some other aspects of *Brown Shoe* have been subsequently revisited.

[6] *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).

predict the future or calculate precise effects of a merger with certainty. Rather, the Agencies examine the totality of the evidence available to assess the risk the merger presents.

Competition presents itself in myriad ways. To assess the risk of harm to competition in a dynamic and complex economy, the Agencies begin the analysis of a proposed merger by asking: how do firms in this industry compete, and does the merger threaten to substantially lessen competition or to tend to create a monopoly?

The Merger Guidelines set forth several different analytical frameworks (referred to herein as "Guidelines") to assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action. These frameworks account for industry-specific market realities and use a variety of indicators and tools, ranging from market structure to direct evidence of the effect on competition, to examine whether the proposed merger may harm competition.

How to Use These Guidelines: When companies propose a merger that raises concerns under one or more Guidelines, the Agencies closely examine the evidence to determine if the facts are sufficient to infer that the effect of the merger may be to substantially lessen competition or to tend to create a monopoly (sometimes referred to as a "prima facie case").[7] **Section 2** describes how the Agencies apply these Guidelines. Specifically, Guidelines 1-6 describe distinct frameworks the Agencies use to identify that a merger raises prima facie concerns, and Guidelines 7-11 explain how to apply those frameworks in several specific settings. In all of these situations, the Agencies will also examine relevant evidence to determine if it disproves or rebuts the prima facie case and shows that the merger does not in fact threaten to substantially lessen competition or tend to create a monopoly. **Section 3** identifies rebuttal evidence that the Agencies consider, and that merging parties can present, to rebut an inference of potential harm under these frameworks.[8] **Section 4** sets forth a non-exhaustive discussion of analytical, economic, and evidentiary tools the Agencies use to evaluate facts, understand the risk of harm to competition, and define relevant markets.

These Guidelines are not mutually exclusive, as a single transaction can have multiple effects or raise concerns in multiple ways. To promote efficient review, for any given transaction the Agencies may limit their analysis to any one Guideline or subset of Guidelines that most readily demonstrates the risks to competition from the transaction.

Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market. Market concentration is often a useful indicator of a merger's likely effects on competition. The Agencies therefore presume, unless sufficiently disproved or rebutted, that a merger between competitors that significantly increases concentration and creates or further consolidates a highly concentrated market may substantially lessen competition.

Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms. The Agencies examine whether competition between the merging parties is substantial since their merger will necessarily eliminate any competition between them.

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[7] *See, e.g.*, *United States v. AT&T, Inc.*, 916 F.3d at 1032 (explaining that a *prima facie* case can demonstrate a "reasonable probability" of harm to competition either through "statistics about the change in market concentration" or a "fact-specific" showing (quoting *Brown Shoe*, 370 U.S. at 323 n.39)); *United States v. Baker Hughes*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).

[8] These Guidelines pertain only to the Agencies' consideration of whether a merger or acquisition may substantially lessen competition or tend to create a monopoly. The consideration of remedies appropriate for mergers that pose that risk is beyond the Merger Guidelines' scope. The Agencies review proposals to revise a merger in order to alleviate competitive concerns consistent with applicable law regarding remedies.

Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination. The Agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the Agencies will infer, subject to rebuttal evidence, that the merger may substantially lessen competition. In a market that is not highly concentrated, the Agencies investigate whether facts suggest a greater risk of coordination than market structure alone would suggest.

Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market. The Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

Guideline 5: Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals Use to Compete. When a merger creates a firm that can limit access to products or services that its rivals use to compete, the Agencies examine the extent to which the merger creates a risk that the merged firm will limit rivals' access, gain or increase access to competitively sensitive information, or deter rivals from investing in the market.

Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position. The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce, thereby tending to create a monopoly. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

Guideline 7: When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly. A trend toward consolidation can be an important factor in understanding the risks to competition presented by a merger. The Agencies consider this evidence carefully when applying the frameworks in Guidelines 1-6.

Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series. If an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy when applying the frameworks in Guidelines 1-6.

Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The Agencies consider the distinctive characteristics of multi-sided platforms when applying the frameworks in Guidelines 1-6.

Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers. The Agencies apply the frameworks in Guidelines 1-6 to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline 11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition. The Agencies apply the frameworks in Guidelines 1-6 to assess if an acquisition of partial control or common ownership may substantially lessen competition.

* * *

This edition of the Merger Guidelines consolidates, revises, and replaces the various versions of Merger Guidelines previously issued by the Agencies. The revision builds on the learning and experience reflected in those prior Guidelines and successive revisions. These Guidelines reflect the collected experience of the Agencies over many years of merger review in a changing economy and have been refined through an extensive public consultation process.

As a statement of the Agencies' law enforcement procedures and practices, the Merger Guidelines create no independent rights or obligations, do not affect the rights or obligations of private parties, and do not limit the discretion of the Agencies, including their staff, in any way. Although the Merger Guidelines identify the factors and frameworks the Agencies consider when investigating mergers, the Agencies' enforcement decisions will necessarily continue to require prosecutorial discretion and judgment. Because the specific standards set forth in these Merger Guidelines will be applied to a broad range of factual circumstances, the Agencies will apply them reasonably and flexibly to the specific facts and circumstances of each merger.

Similarly, the factors contemplated in these Merger Guidelines neither dictate nor exhaust the range of theories or evidence that the Agencies may introduce in merger litigation. Instead, they set forth various methods of analysis that may be applicable depending on the availability and/or reliability of information related to a given market or transaction. Given the variety of industries, market participants, and acquisitions that the Agencies encounter, merger analysis does not consist of uniform application of a single methodology. The Agencies assess any relevant and meaningful evidence to evaluate whether the effect of a merger may be substantially to lessen competition or to tend to create a monopoly. Merger review is ultimately a fact-specific exercise. The Agencies follow the facts and the law in analyzing mergers as they do in other areas of law enforcement.

These Merger Guidelines include references to applicable legal precedent. References to court decisions do not necessarily suggest that the Agencies would analyze the facts in those cases identically today. While the Agencies adapt their analytical tools as they evolve and advance, legal holdings reflecting the Supreme Court's interpretation of a statute apply unless subsequently modified. These Merger Guidelines therefore reference applicable propositions of law to explain core principles that the Agencies apply in a manner consistent with modern analytical tools and market realities. References herein do not constrain the Agencies' interpretation of the law in particular cases, as the Agencies will apply their discretion with respect to the applicable law in each case in light of the full range of precedent pertinent to the issues raised by each enforcement action.

2. Applying the Merger Guidelines

This section discusses the frameworks the Agencies use to assess whether a merger may substantially lessen competition or tend to create a monopoly.

2.1. Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.

Market concentration and the change in concentration due to the merger are often useful indicators of a merger's risk of substantially lessening competition. In highly concentrated markets, a merger that eliminates a significant competitor creates significant risk that the merger may substantially lessen competition or tend to create a monopoly. As a result, a significant increase in concentration in a highly concentrated market can indicate that a merger may substantially lessen competition, depriving the public of the benefits of competition.

The Supreme Court has endorsed this view and held that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market[,] is so inherently likely to lessen competition substantially that it must be enjoined in the absence of [rebuttal] evidence."[9] In the Agencies' experience, this legal presumption provides a highly administrable and useful tool for identifying mergers that may substantially lessen competition.

An analysis of concentration involves calculating pre-merger market shares of products[10] within a relevant market (see Section 4.3 for a discussion of market definition and Section 4.4 for more details on computing market shares). The Agencies assess whether the merger creates or further consolidates a highly concentrated market and whether the increase in concentration is sufficient to indicate that the merger may substantially lessen competition or tend to create a monopoly.[11]

The Agencies generally measure concentration levels using the Herfindahl-Hirschman Index ("HHI").[12] The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm. Markets with an HHI greater than 1,800 are highly concentrated, and a change of more than 100 points is a significant increase.[13] A merger that creates or further consolidates a highly

[9] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); *see, e.g.*, *FTC v. v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 172-73 (3d Cir. 2022); *United States v. AT&T, Inc.*, 916 F.3d at 1032.

[10] These Guidelines use the term "products" to encompass anything that is traded between firms and their suppliers, customers, or business partners, including physical goods, services, or access to assets. Products can be as narrow as an individual brand, a specific version of a product, or a product that includes specific ancillary services such as the right to return it without cause or delivery to the customer's location.

[11] Typically, a merger eliminates a competitor by bringing two market participants under common control. Similar concerns arise if the merger threatens to cause the exit of a current market participant, such as a leveraged buyout that puts the target firm at significant risk of failure.

[12] The Agencies may instead measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure shares in the relevant market.

[13] For illustration, the HHI for a market of five equal firms is 2,000 ($5 \times 20^2 = 2{,}000$) and for six equal firms is 1,667 ($6 \times 16.67^2 = 1667$).

concentrated market that involves an increase in the HHI of more than 100 points[14] is presumed to substantially lessen competition or tend to create a monopoly.[15] The Agencies also may examine the market share of the merged firm: a merger that creates a firm with a share over thirty percent is also presumed to substantially lessen competition or tend to create a monopoly if it also involves an increase in HHI of more than 100 points.[16]

Indicator	Threshold for Structural Presumption
Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm's Market Share	Share greater than 30% AND Change in HHI greater than 100

When exceeded, these concentration metrics indicate that a merger's effect may be to eliminate substantial competition between the merging parties and may be to increase coordination among the remaining competitors after the merger. This presumption of illegality can be rebutted or disproved. The higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it.

2.2. Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms.

A merger eliminates competition between the merging firms by bringing them under joint control.[17] If evidence demonstrates substantial competition between the merging parties prior to the

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[14] The change in HHI from a merger of firms with shares *a* and *b* is equal to 2*ab*. For example, in a merger between a firm with 20% market share and a firm with 5% market share, the change in HHI is 2 x 20 x 5 = 200.

[15] The first merger guidelines to reference an HHI threshold were the merger guidelines issued in 1982. These guidelines referred to mergers with HHI above 1,000 as concentrated markets, with HHI between 1,000 and 1,800 as "moderately concentrated" and above 1,800 as "highly concentrated," while they referred to an increase in HHI of 100 as a "significant increase." Each subsequent iteration until 2010 maintained those thresholds. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1997); Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1992); U.S. Dep't of Justice, Merger Guidelines § 3(A) (1982). During this time, courts routinely cited to the guidelines and these HHI thresholds in decisions. *See, e.g.*, *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 431 (5th Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 (11th Cir. 1991). Although the Agencies raised the thresholds for the 2010 guidelines, based on experience and evidence developed since, the Agencies consider the original HHI thresholds to better reflect both the law and the risks of competitive harm suggested by market structure and have therefore returned to those thresholds.

[16] *Phila. Nat'l Bank*, 374 U.S. at 364-65 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

[17] The competitive harm from the elimination of competition between the merging firms, without considering the risk of coordination, is sometimes referred to as unilateral effects. The elimination of competition between the merging firms can also lessen competition with and among other competitors. When the elimination of competition between the merging firms

merger, that ordinarily suggests that the merger may substantially lessen competition.[18]Although a change in market structure can also indicate risk of competitive harm (see Guideline 1), an analysis of the existing competition between the merging firms can demonstrate that a merger threatens competitive harm independent from an analysis of market shares.

Competition often involves firms trying to win business by offering lower prices, new or better products and services, more attractive features, higher wages, improved benefits, or better terms relating to various additional dimensions of competition. This can include competition to research and develop products or services, and the elimination of such competition may result in harm even if such products or services are not yet commercially available. The more the merging parties have shaped one another's behavior, or have affected one another's sales, profits, valuation, or other drivers of behavior, the more significant the competition between them.

The Agencies examine a variety of indicators to identify substantial competition. For example:

Strategic Deliberations or Decisions. The Agencies may analyze the extent of competition between the merging firms by examining evidence relating to strategic deliberations or decisions in the regular course of business. For example, in some markets, the firms may monitor each other's pricing, marketing campaigns, facility locations, improvements, products, capacity, output, input costs, and/or innovation plans. This can provide evidence of competition between the merging firms, especially when they react by taking steps to preserve or enhance the competitiveness or profitability of their own products or services.

Prior Merger, Entry, and Exit Events. The Agencies may look to historical events to assess the presence and substantiality of direct competition between the merging firms. For example, the Agencies may examine the competitive impact of recent relevant mergers, entry, expansion, or exit events.

Customer Substitution. Customers' willingness to switch between different firms' products is an important part of the competitive process. Firms are closer competitors the more that customers are willing to switch between their products. The Agencies use a variety of tools, detailed in Section 4.2, to assess customer substitution.

Impact of Competitive Actions on Rivals. When one firm takes competitive actions to attract customers, this can benefit the firm at the expense of its rivals. The Agencies may gauge the extent of competition between the merging firms by considering the impact that competitive actions by one of the merging firms has on the other merging firm. The impact of a firm's competitive actions on a rival is generally greater when customers consider the firm's products and the rival's products to be closer substitutes, so that a firm's competitive action results in greater lost sales for the rival, and when the profitability of the rival's lost sales is greater.

Impact of Eliminating Competition Between the Firms. In some instances, evidence may be available to assess the impact of competition from one firm on the other's actions, such as firm choices

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leads them to compete less aggressively with one another, other firms in the market can in turn compete less aggressively, decreasing the overall intensity of competition.

[18] *See also United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 669-70 (1964) (per curiam) ("[I]t [is] clear that the elimination of significant competition between [merging parties] constitutes an unreasonable restraint of trade in violation of § 1 of the Sherman Act. . . . It [can be] enough that the two . . . compete[], that their competition [is] not insubstantial and that the combination [would] put an end to it."); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568-70 (6th Cir. 2014), *cert. denied*, 575 U.S. 996 (2015).

about price, quality, wages, or another dimension of competition. Section 4.2 describes a variety of approaches to measuring such impacts.

***Additional Evidence, Tools, and Metrics*.** The Agencies may use additional evidence, tools, and metrics to assess the loss of competition between the firms. Depending on the realities of the market, different evidence, tools, or metrics may be appropriate.

Section 4.2 provides additional detail about the approaches that the Agencies use to assess competition between or among firms.

2.3. Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination.

The Agencies determine that a merger may substantially lessen competition when it meaningfully increases the risk of coordination among the remaining firms in a relevant market or makes existing coordination more stable or effective.[19] Firms can coordinate across any or all dimensions of competition, such as price, product features, customers, wages, benefits, or geography. Coordination among rivals lessens competition whether it occurs explicitly—through collusive agreements between competitors not to compete or to compete less—or tacitly, through observation and response to rivals. Because tacit coordination often cannot be addressed under Section 1 of the Sherman Act, the Agencies vigorously enforce Section 7 of the Clayton Act to prevent market structures conducive to such coordination.

Tacit coordination can lessen competition even when it does not rise to the level of an agreement and would not itself violate the law. For example, in a concentrated market a firm may forego or soften an aggressive competitive action because it anticipates rivals responding in kind. This harmful behavior is more common the more concentrated markets become, as it is easier to predict the reactions of rivals when there are fewer of them.

To assess the extent to which a merger may increase the likelihood, stability, or effectiveness of coordination, the Agencies often consider three primary factors and several secondary factors. The Agencies may consider additional factors depending on the market.

2.3.A. Primary Factors

The Agencies may conclude that post-merger market conditions are susceptible to coordinated interaction and that the merger materially increases the risk of coordination if any of the three primary factors are present.

Highly Concentrated Market. By reducing the number of firms in a market, a merger increases the risk of coordination. The fewer the number of competitively meaningful rivals prior to the merger, the greater the likelihood that merging two competitors will facilitate coordination. Markets that are highly concentrated after a merger that significantly increases concentration (see Guideline 1) are presumptively susceptible to coordination. If merging parties assert that a highly concentrated market is not susceptible to coordination, the Agencies will assess this rebuttal evidence using the framework

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[19] *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 229-30 (1993) ("In the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the Act prohibits.").

described below. Where a market is not highly concentrated, the Agencies may still consider other risk factors.

Prior Actual or Attempted Attempts to Coordinate. Evidence that firms representing a substantial share in the relevant market appear to have previously engaged in express or tacit coordination to lessen competition is highly informative as to the market's susceptibility to coordination. Evidence of failed attempts at coordination in the relevant market suggest that successful coordination was not so difficult as to deter attempts, and a merger reducing the number of rivals may tend to make success more likely.

Elimination of a Maverick. A maverick is a firm with a disruptive presence in a market. The presence of a maverick, however, only reduces the risk of coordination so long as the maverick retains the disruptive incentives that drive its behavior. A merger that eliminates a maverick or significantly changes its incentives increases the susceptibility to coordination.

2.3.B. Secondary Factors

The Agencies also examine whether secondary factors demonstrate that a merger may meaningfully increase the risk of coordination, even absent the primary risk factors. Not all secondary factors must be present for a market to be susceptible to coordination.

Market Concentration. Even in markets that are not highly concentrated, coordination becomes more likely as concentration increases. The more concentrated a market, the more likely the Agencies are to conclude that the market structure suggests susceptibility to coordination.

Market Observability. A market is more susceptible to coordination if a firm's behavior can be promptly and easily observed by its rivals. Rivals' behavior is more easily observed when the terms offered to customers are readily discernible and relatively observable (that is, known to rivals). Observability can refer to the ability to observe prices, terms, the identities of the firms serving particular customers, or any other competitive actions of other firms. Information exchange arrangements among market participants, such as public exchange of information through announcements or private exchanges through trade associations or publications, increase market observability. Regular monitoring of one another's prices or customers can indicate that the terms offered to customers are relatively observable. Pricing algorithms, programmatic pricing software or services, and other analytical or surveillance tools that track or predict competitor prices or actions likewise can increase the observability of the market.

Competitive Responses. A market is more susceptible to coordination if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by its rivals' likely responses. This is more likely to be the case the stronger and faster the responses from its rivals because such responses reduce the benefits of competing more aggressively. Some factors that increase the likelihood of strong or rapid responses by rivals include: (1) the market has few significant competitors, (2) products in the relevant market are relatively homogeneous, (3) customers find it relatively easy to switch between suppliers, (4) suppliers use algorithmic pricing, or (5) suppliers use meeting-competition clauses. The more predictable are rivals' responses to strategic actions or changing competitive conditions, and the more interactions firms have across multiple markets, the greater the susceptibility to coordination.

Aligned Incentives. Removing a firm that has different incentives from most other firms in a market can increase the risk of coordination. For example, a firm with a small market share may have less incentive to coordinate because it has more to gain from winning new business than other firms. The same issue can arise when a merger more closely aligns one or both merging firms' incentives with the other firms in the market. In some cases, incentives might be aligned or strengthened when firms compete with one another in multiple markets ("multi-market contact"). For example, firms might compete less aggressively in some markets in anticipation of reciprocity by rivals in other markets. The Agencies examine these and any other market realities that suggest aligned incentives increase susceptibility to coordination.

Profitability or Other Advantages of Coordination for Rivals. The Agencies regard coordinated interaction as more likely to occur when participants in the market stand to gain more from successful coordination. Coordination generally is more profitable or otherwise advantageous for the coordinating firms the less often customers substitute outside the market when firms offer worse terms.

Rebuttal Based on Structural Barriers to Coordination Unique to the Industry. When market structure evidence suggests that a merger may substantially lessen competition through coordination, the merging parties sometimes argue that anticompetitive coordination is nonetheless impossible due to structural market barriers to coordinating. The Agencies consider this rebuttal evidence using the framework in Section 3. In so doing, the Agencies consider whether structural market barriers to coordination are "so much greater in the [relevant] industry than in other industries that they rebut the normal presumption" of coordinated effects.[20] In the Agencies' experience, structural conditions that prevent coordination are exceedingly rare in the modern economy. For example, coordination is more difficult when firms are unable to observe rivals' competitive offerings, but technological change has made this situation less common than in the past and reduced many traditional barriers or obstacles to observing the behavior of rivals in a market. The greater the level of concentration in the relevant market, the greater must be the structural barriers to coordination in order to show that no substantial lessening of competition is threatened.

2.4. Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market.

Mergers can substantially lessen competition by eliminating a potential entrant. For instance, a merger can eliminate the possibility that entry or expansion by one or both firms would have resulted in new or increased competition in the market in the future. A merger can also eliminate current competitive pressure exerted on other market participants by the mere perception that one of the firms might enter. Both of these risks can be present simultaneously.

A merger that eliminates a potential entrant into a concentrated market can substantially lessen competition or tend to create a monopoly.[21] The more concentrated the market, the greater the magnitude of harm to competition from any lost potential entry and the greater the tendency to create a monopoly. Accordingly, for mergers involving one or more potential entrants, the higher the market concentration, the lower the probability of entry that gives rise to concern.

[20] *See H.J. Heinz Co.*, 246 F.3d at 724.

[21] *United States v. Marine Bancorp.*, 418 U.S. 602, 630 (1974). A concentrated market is one with an HHI greater than 1,000 (See Guideline 1, n.15).

2.4.A. Actual Potential Competition: Eliminating Reasonably Probable Future Entry

In general, expansion into a concentrated market via internal growth rather than via acquisition benefits competition.[22] Merging a current and a potential market participant eliminates the possibility that the potential entrant would have entered on its own—entry that, had it occurred, would have provided a new source of competition in a concentrated market.

To determine whether an acquisition that eliminates a potential entrant into a concentrated market may substantially lessen competition,[23] the Agencies examine (1) whether one or both[24] of the merging firms had a reasonable probability of entering the relevant market other than through an anticompetitive merger, and (2) whether such entry offered a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects.[25]

Reasonable Probability of Entry. The Agencies' starting point for assessment of a reasonable probability of entry is objective evidence regarding the firm's available feasible means of entry, including its capabilities and incentives. Relevant objective evidence can include, for example, evidence that the firm has sufficient size and resources to enter; evidence of any advantages that would make the firm well-situated to enter; evidence that the firm has successfully expanded into similarly situated markets in the past or already participates in adjacent or related markets; evidence that the firm has an incentive to enter; or evidence that industry participants recognize the company as a potential entrant. This analysis is not limited to whether the company could enter with its pre-merger production facilities, but also considers overall capability, which can include the ability to expand or add to its capabilities on its own or in collaboration with someone other than the acquisition target.

Subjective evidence that the company considered entering absent the merger can also indicate a reasonable probability that the company would have entered without the merger. Subjective evidence that the company considered organic entry as an alternative to merging generally suggests that, absent the merger, entry would be reasonably probable.

Likelihood of Deconcentration or Other Significant Procompetitive Effects. New entry can yield a variety of procompetitive effects, including increased output or investment, higher wages or improved working conditions, greater innovation, higher quality, and lower prices. If the merging firm had a reasonable probability of entering a highly concentrated relevant market, this suggests benefits that would have resulted from its entry would be competitively significant, unless there is substantial direct evidence that the competitive effect would be *de minimis*. To supplement the suggestion that new entry yields procompetitive effects, the Agencies will consider projections of the potential entrant's

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[22] *See Ford Motor Co. v. United States*, 405 U.S. 562, 587 (1972) (referring to the "typical[]" competitive concern when "a potential entrant enters an oligopolistic market by acquisition rather than internal expansion" as being "that such a move has deprived the market of the pro-competitive effect of an increase in the number of competitors").

[23] Harm from the elimination of a potential entrant can occur in markets that do not yet consist of commercial products, even if the market concentration of the future market cannot be measured using traditional means. Where there are few equivalent potential entrants, including one or both of the merging firms, that indicates that the future market, once commercialized, will be concentrated. The Agencies will consider other potential entrants' capabilities and incentives in comparison to the merging potential entrant to assess equivalence.

[24] *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) (holding that a merger between two firms, each or both of which might have entered the relevant market, could violate Section 7).

[25] *See id.* at 175-76; *Marine Bancorp.*, 418 U.S. at 622, 633 ("[T]he proscription expressed in § 7 against mergers 'when a "tendency" toward monopoly or [a] "reasonable likelihood" of a substantial lessening of competition in the relevant market is shown' applies alike to actual- and potential-competition cases." (quoting *Penn-Olin*, 378 U.S. at 171)); *see also Yamaha Motor Co. v. FTC*, 657 F.2d 971, 980-981 (8th Cir. 1981) (acquisition of potential entrant violated Section 7).

competitive significance, such as market share, its business strategy, the anticipated response of competitors, or customer preferences or interest.

A merger of two potential entrants can also result in a substantial lessening of competition. The merger need not involve a firm that has a commercialized product in the market or an existing presence in the same geographic market. The Agencies analyze similarly mergers between two potential entrants and those involving a current market participant and a potential entrant.

2.4.B. Perceived Potential Competition: Lessening of Current Competitive Pressure

A perceived potential entrant can stimulate competition among incumbents. That pressure can prompt current market participants to make investments, expand output, raise wages, increase product quality, lower product prices, or take other procompetitive actions. The acquisition of a firm that is perceived by market participants as a potential entrant can substantially lessen competition by eliminating or relieving competitive pressure.

To assess whether the acquisition of a perceived potential entrant may substantially lessen competition, the Agencies consider whether a current market participant could reasonably consider one of the merging companies to be a potential entrant and whether that potential entrant has a likely influence on existing competition.[26]

Market Participant Could Reasonably Consider a Firm to Be a Potential Entrant. The starting point for this analysis is evidence regarding the company's capability of entering or applying competitive pressure. Objective evidence is highly probative and includes evidence of feasible means of entry or communications by the company indicating plans to expand or reallocate resources in a way that could increase competition in the relevant market. Objective evidence can be sufficient to find that the firm is a potential entrant; it need not be accompanied by any subjective evidence of current market participants' internal perceptions or direct evidence of strategic reactions to the potential entrant. If such evidence is available, it can weigh in favor of finding that a current market participant could reasonably consider the firm to be a potential entrant.

Likely Influence on Existing Rivals. Direct evidence that the firm's presence or behavior has affected or is affecting current market participants' strategic decisions is not necessary but can establish a showing of a likely influence. Even without such direct evidence, circumstantial evidence that the firm's presence or behavior had an effect on the competitive reactions of firms in the market may also show likely influence. Objective evidence establishing that a current market participant could reasonably consider one of the merging firms to be a potential entrant can also establish that the firm has a likely influence on existing market participants. Subjective evidence indicating that current market participants—including, for example, customers, suppliers, or distributors—internally perceive the merging firm to be a potential entrant can also establish a likely influence.

2.4.C. Distinguishing Potential Entry from Entry as Rebuttal

When evaluating a potentially unlawful merger of current competitors, the Agencies will assess whether entry by other firms would be timely, likely, and sufficient to replace the lost competition using the standards discussed in Section 3.2. The existence of a perceived or actual potential entrant may not meet that standard when considering a merger between firms that already participate in the relevant market. The competitive impact of perceived and actual potential entrants is typically attenuated

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[26] *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-36 (1973); *Marine Bancorp.*, 418 U.S. at 624-25.

compared to competition between two current market participants. However, because concentrated markets often lack robust competition, the loss of even an attenuated source of competition such as a potential entrant may substantially lessen competition in such markets. Moreover, because the Agencies seek to prevent threats to competition in their incipiency, the likelihood of potential entry that could establish that a merger's effect "may be" to substantially lessen competition will generally not equal the likelihood of entry that would rebut a demonstrated risk that competition may be substantially lessened.

2.5. Guideline 5: Mergers Can Violate the Law When They Create a Firm that May Limit Access to Products or Services That Its Rivals Use to Compete.

The Agencies evaluate whether a merger may substantially lessen competition when the merged firm can limit access to a product, service, or route to market[27] that its rivals may use to compete. Mergers involving products or services rivals may use to compete can threaten competition in several ways, for example: (A) the merged firm could limit rivals' access to the products or services, thereby weakening or excluding them, lessening competition; (B) the merged firm may gain or increase access to rivals' competitively sensitive information, thereby facilitating coordination or undermining their incentives to compete; or (C) the threat of limited access can deter rivals and potential rivals from investing.

These problems can arise from mergers involving access to any products, services, or routes to market that rivals use to compete, and that are competitively significant to those rivals, whether or not they involve a traditional vertical relationship such as a supplier and distributor relationship. Many types of related products can implicate these concerns, including products rivals currently or may in the future use as inputs, products that provide distribution services for rivals or otherwise influence customers' purchase decisions, products that provide or increase the merged firm's access to competitively sensitive information about its rivals, or complements that increase the value of rivals' products. Even if the related product is not currently being used by rivals, it might be competitively significant because, for example, its availability enables rivals to obtain better terms from other providers in negotiations. The Agencies refer to any product, service, or route to market that rivals use to compete in that market as a "related product."

The Agencies analyze competitive effects in the relevant market in which the merged firm competes with rivals that use the related product. The Agencies do not always define a market around the related product, although they may do so (see Section 2.5.A.2).

2.5.A. The Risk that the Merged Firm May Limit Access

A merger involving products, services, or routes to market that rivals use to compete may substantially lessen competition when the merged firm has both the ability and incentive to limit access to the related product so as to weaken or exclude some of its rivals (the "dependent" rivals) in the relevant market.

The merged firm could limit access to the related product in different ways. It could deny rivals access altogether, deny access to some features, degrade its quality, worsen the terms on which rivals

[27] A "route to market" refers to any way a firm accesses its trading partners, such as distribution channels, marketplaces, or customers.

can access the related product, limit interoperability, degrade the quality of complements, provide less reliable access, tie up or obstruct routes to market, or delay access to product features, improvements, or information relevant to making efficient use of the product. All these ways of limiting access are sometimes referred to as "foreclosure."[28]

Dependent rivals can be weakened if limiting their access to the related product would make it harder or more costly for them to compete; for example, if it would lead them to charge higher prices or offer worse terms in the relevant market, reduce the quality of their products so that they were less attractive to trading partners, or interfere with distribution so that those products were less readily available. Competition can also be weakened if the merger facilitates coordination among the merged firm and its rivals, for example by giving the merged firm the ability to threaten to limit access to uncooperative rivals.

Rivals or potential rivals may be excluded from the relevant market if limiting their access to the related product could lead them to exit the market or could deter them from entering. For example, potential rivals may not enter if the merged firm ties up or obstructs so many routes to market that the remaining addressable market is too small. Exclusion can arise when a new entrant would need to invest not only in entering the relevant market, but also in supplying its own substitute for the related product, sometimes referred to as two-stage entry or multi-level entry.

Because the merged firm could use its ability to limit access to the related product in a range of ways, the Agencies focus on the overall risk that the merged firm will do so, and do not necessarily identify which precise actions the merged firm would take to lessen competition.

2.5.A.1. Ability and Incentive to Foreclose Rivals

The Agencies assess the merged firm's ability and incentive to substantially lessen competition by limiting access to the related product for a group of dependent rivals in the relevant market by examining four factors.

1. Availability of Substitutes. The Agencies assess the availability of substitutes for the related product. The merged firm is more able to limit access when there are few alternative options to the merged firm's related product, if these alternatives are differentiated in quality, price, or other characteristics, or if competition to supply them is limited.

2. Competitive Significance of the Related Product. The Agencies consider how important the related product is for the dependent firms and the extent to which they would be weakened or excluded from the relevant market if their access was limited.

3. Effect on Competition in the Relevant Market. The Agencies assess the importance of the dependent firms for competition in the relevant market. Competition can be particularly affected when the dependent firms would be excluded from the market altogether.

4. Competition Between the Merged Firm and the Dependent Firms. The merged firm's incentive to limit the dependent firms' access depends on how strongly it competes with them. If the dependent firms are close competitors, the merged firm may benefit from higher sales or prices in the relevant market when it limits their access. The Agencies may also assess the potential for the merged

[28] *See Illumina, Inc. v. FTC*, No. 23-60167, slip op. at 17 (5th Cir. Dec. 15, 2023) ("[T]here are myriad ways in which [the merged firm] could engage in foreclosing behavior . . . such as by making late deliveries or subtly reducing the level of support services.").

firm to benefit from facilitating coordination by threatening to limit dependent rivals' access to the related product. These benefits can make it profitable to limit access to the related product and thereby substantially lessen competition, even though it would not have been profitable for the firm that controlled the related product prior to the merger.

The Agencies assess the extent of competition with rivals and the risk of coordination using analogous methods to the ones described in Guidelines 2 and 3, and Section 4.2.

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In addition to the evidentiary, analytical, and economic tools in Section 4, the following additional considerations and evidence may be important to this assessment:

Barriers to Entry and Exclusion of Rivals. The merged firm may benefit more from limiting access to dependent rivals or potential rivals when doing so excludes them from the market, for example by creating a need for the firm to enter at multiple levels and to do so with sufficient scale and scope (multi-level entry).

Prior Transactions or Prior Actions. If firms used prior acquisitions or engaged in prior actions to limit rivals' access to the related product, or other products its rivals use to compete, that suggests that the merged firm has the ability and incentive to do so. However, lack of past action does not necessarily indicate a lack of incentive in the present transaction because the merger can increase the incentive to foreclose.

Internal Documents. Information from business planning and merger analysis documents prepared by the merging firms might identify instances where the firms believe they have the ability and incentive to limit rivals' access. Such documents, where available, are highly probative. The lack of such documents, however, is less informative.

Market Structure. Evidence of market structure can be informative about the availability of substitutes for the related product and the competition in the market for the related product or the relevant market. (See Section 2.5.A.2)

2.5.A.2. Analysis of Industry Factors and Market Structure

The Agencies also sometimes determine, based on an analysis of factors related to market structure, that a merger may substantially lessen competition by allowing the merged firm to limit access to a related product.[29] The Agencies' assessment can include evidence about the structure, history, and probable future of the market.

Structure of the Related Market. In some cases, the market structure of the related product market can give an indication of the merged firm's ability to limit access to the related product. In these cases, the Agencies define a market (termed the "related market") around the related product (see Section 4.3). The Agencies then define the "foreclosure share" as the share of the related market to which the merged firm could limit access. If the share or other evidence show that the merged firm is

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[29] *See Brown Shoe*, 370 U.S. at 328-34; *Illumina*, slip op. at 20-22 ("There is no precise formula when it comes to applying these factors. Indeed, the Supreme Court has found a vertical merger unlawful by examining only three of the *Brown Shoe* factors." (cleaned up)); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353 (2d Cir. 1979); *U.S. Steel Corp. v. FTC*, 426 F.2d 592, 599 (6th Cir. 1970).

approaching or has monopoly power over the related product, and the related product is competitively significant, those factors alone are a sufficient basis to demonstrate that the dependent firms do not have adequate substitutes and the merged firm has the ability to weaken or exclude them by limiting their access to the related product. (See Considerations 1 and 2 in Section 2.5.A.1).[30]

Structure of the Relevant Market. Limiting rivals' access to the related product will generally have a greater effect on competition in the relevant market if the merged firm and the dependent rivals face less competition from other firms. In addition, the merged firm has a greater incentive to limit access to the dependent firms when it competes more closely with them. Market share and concentration measures for the merged firm, the dependent rivals, and the other firms, can sometimes provide evidence about both issues.

Nature and Purpose of the Merger. When the nature and purpose of the merger is to foreclose rivals, including by raising their costs, that suggests the merged firm is likely to foreclose rivals.

Trend Toward Vertical Integration. The Agencies will generally consider evidence about the degree of integration between firms in the relevant and related markets, as well as whether there is a trend toward further vertical integration and how that trend or the factors driving it may affect competition. A trend toward vertical integration may be shown through, for example: a pattern of vertical integration following mergers by one or both of the merging companies; or evidence that a merger was motivated by a desire to avoid having its access limited due to similar transactions among other companies that occurred or may occur in the future.

* * *

If the parties offer rebuttal evidence, the Agencies will assess it under the approach laid out in Section 3.[31] When assessing rebuttal evidence focused on the reduced profits of the merged firm from limiting access from rivals, the Agencies examine whether the reduction in profits would prevent the full range of reasonably probable strategies to limit access. When evaluating whether this rebuttal evidence is sufficient to conclude that no substantial lessening of competition is threatened by the merger, the Agencies will give little weight to claims that are not supported by an objective analysis, including, for example, speculative claims about reputational harms. Moreover, the Agencies are unlikely to credit claims or commitments to protect or otherwise avoid weakening the merged firm's rivals that do not align with the firm's incentives. The Agencies' assessment will be consistent with the principle that firms act to maximize their overall profits and valuation rather than the profits of any particular business

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[30] *See Brown Shoe*, 370 U.S. at 328 ("If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated . . . ."). The Agencies will generally infer, in the absence of countervailing evidence, that the merging firm has or is approaching monopoly power in the related product if it has a share greater than 50% of the related product market. A merger involving a related product with share of less than 50% may still substantially lessen competition, particularly when that related product is important to its trading partners.

[31] A common rebuttal argument is that the merger would lead to vertical integration of complementary products and as a result, "eliminate double marginalization," since in specific circumstances such a merger can confer on the merged firm an incentive to decrease prices to purchasers. The Agencies examine whether elimination of double marginalization satisfies the approach to evaluating procompetitive efficiencies in Section 3.3, including examining: (a) whether the merged firm will be more vertically integrated as a result of the merger, for example because it increases the extent to which it uses internal production of an input when producing output for the relevant market; (b) whether contracts short of a merger have eliminated or could eliminate double marginalization such that it would not be merger-specific, and (c) whether the merged firm has the incentive to reduce price in the relevant market given that such a reduction would reduce sales by the merged firm's rivals in the relevant market, which would in turn lead to reduced revenue and margin on sales of the related product to the dependent rivals.

unit. A merger may substantially lessen competition or tend to create a monopoly regardless of the claimed intent of the merging companies or their executives. (See Section 4.1)

If the merged firm has the ability and incentive to limit access to the related product and lessen competition in the relevant market, there are many ways it could act on those incentives. The merging parties may put forward evidence that there are no reasonably probable ways in which they could profitably limit access to the related product and thereby make it harder for rivals to compete, or that the merged firm will be more competitive because of the merger.

2.5.B. Mergers Involving Visibility into Rivals' Competitively Sensitive Information

If rivals would continue to access or purchase a related product controlled by the merged firm post-merger, the merger can substantially lessen competition if the merged firm would gain or increase visibility into rivals' competitively sensitive information. This situation could arise in many settings, including, for example, if the merged firm learns about rivals' sales volumes or projections from supplying an input or a complementary product; if it learns about promotion plans and anticipated product improvements or innovations from its role as a distributor; or if it learns about entry plans from discussions with potential rivals about compatibility or interoperability with a complementary product it controls. A merger that gives the merged firm increased visibility into competitively sensitive information could undermine rivals' ability or incentive to compete aggressively or could facilitate coordination.

Undermining Competition. The merged firm might use visibility into a rival's competitively sensitive information to undermine competition from the rival. For example, the merged firm's ability to preempt, appropriate, or otherwise undermine the rival's procompetitive actions can discourage the rival from fully pursuing competitive opportunities. Relatedly, rivals might refrain from doing business with the merged firm rather than risk that the merged firm would use their competitively sensitive business information to undercut them. Those rivals might become less-effective competitors if they must rely on less-preferred trading partners or accept less favorable trading terms because their outside options have worsened or are more limited.

Facilitating Coordination. A merger that provides access to rivals' competitively sensitive information might facilitate coordinated interaction among firms in the relevant market by allowing the merged firm to observe its rivals' competitive strategies faster and more confidently. (See Guideline 3.)

2.5.C. Mergers that Threaten to Limit Rivals' Access and Thereby Create Barriers to Entry and Competition

When a merger gives a firm the ability and incentive to limit rivals' access, or where it gives the merged firm increased visibility into its rivals' competitively sensitive information, the merger may create entry barriers as described above. In addition, the merged firm's rivals might change their behavior because of the risk that the merged firm could limit their access. That is, the risk that the merger will give a firm the ability and incentive to limit rivals' access or will give the merged firm increased visibility into sensitive information can dissuade rivals from entering the market or expanding their operations.

Rivals or potential rivals that face the threat of foreclosure, or the risk of sharing sensitive information with rivals, may reduce investment or adjust their business strategies in ways that lessen competition. Firms may be reluctant to invest in a market if their success is dependent on continued supply from a rival, particularly because the merged firm may become more likely to foreclose its competitor as that competitor becomes more successful. Firms may use expensive strategies to try to reduce their dependence on the merged firm, weakening the competitiveness of their products and services. Even if the merged firm does not deliberately seek to weaken rivals, rivals or potential rivals may fear that their access will be limited if the merged firm decides to use its own products exclusively. These effects may occur irrespective of the merged firm's incentive to limit access and are greater as the merged firm gains greater control over more important inputs that those rivals use to compete.

2.6. Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position.

The Agencies consider whether a merger may entrench or extend an already dominant position. The effect of such mergers "may be substantially to lessen competition" or "may be . . . to tend to create a monopoly" in violation of Section 7 of the Clayton Act. Indeed, the Supreme Court has explained that a merger involving an "already dominant[] firm may substantially reduce the competitive structure of the industry by raising entry barriers."[32] The Agencies also evaluate whether the merger may extend that dominant position into new markets.[33] Mergers that entrench or extend a dominant position can also violate Section 2 of the Sherman Act.[34] At the same time, the Agencies distinguish anticompetitive entrenchment from growth or development as a consequence of increased competitive capabilities or incentives.[35] The Agencies therefore seek to prevent those mergers that would entrench or extend a dominant position through exclusionary conduct, weakening competitive constraints, or otherwise harming the competitive process.

To undertake this analysis, the Agencies first assess whether one of the merging firms has a dominant position based on direct evidence or market shares showing durable market power. For example, the persistence of market power can indicate that entry barriers exist, that further entrenchment may tend to create a monopoly, and that there would be substantial benefits from the emergence of new competitive constraints or disruptions. The Agencies consider mergers involving dominant firms in the context of evidence about the sources of that dominance, focusing on the extent to which the merger relates to, reinforces, or supplements these sources.

Creating or preserving dominance and the profits it brings can be an important motivation for a firm to undertake an acquisition as well as a driver of the merged firm's behavior after the acquisition. In particular, a firm may be willing to undertake costly short-term strategies in order to increase the chance that it can enjoy the longer-term benefits of dominance. A merger that creates or preserves dominance may also reduce the merged firm's longer-term incentives to improve its products and services.

A merger can result in durable market power and long-term harm to competition even when it initially provides short-term benefits to some market participants. Thus, the Agencies will consider not just the impact of the merger holding fixed factors like product quality and the behavior of other industry participants, but they may also consider the (often longer term) impact of the merger on market

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[32] *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-578 (1967); *see, e.g.*, *Fruehauf*, 603 F.2d at 353 (the "entrenchment of a large supplier or purchaser" can be an "essential" showing of a Section 7 violation).
[33] *Ford*, 405 U.S. at 571 (condemning acquisition by dominant firm to obtain a foothold in another market when coupled with incentive to create and maintain barriers to entry into that market).
[34] *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (acquisitions are among the types of conduct that may violate the Sherman Act).
[35] *See*, *e.g.*, *id.* at 570-71.

power and industry dynamics. Important dynamic competitive effects can arise through the entry, investment, innovation, and terms offered by the merged firm and other industry participants, even when the Agencies cannot predict specific reactions and responses with precision. If the ultimate result of the merger is to protect or preserve dominance by limiting opportunities for rivals, reducing competitive constraints, or preventing competitive disruption, then the Agencies will approach the merger with a heightened degree of scrutiny. The degree of scrutiny and concern will increase in proportion to the strength and durability of the dominant firm's market power.

2.6.A. Entrenching a Dominant Position

Raising Barriers to Entry or Competition. A merger may create or enhance barriers to entry or expansion by rivals that limit the capabilities or competitive incentives of other firms. Barriers to entry can entrench a dominant position even if the nature of future entry is uncertain, if the identities of future entrants are unknown, or if there is more than one mechanism through which the merged firm might create entry barriers. Some examples of ways in which a merger may raise barriers to entry or competition include:

- *Increasing Switching Costs.* The costs associated with changing suppliers (often referred to as switching costs) can be an important barrier to competition. A merger may increase switching costs if it makes it more difficult for customers to switch away from the dominant firm's product or service, or when it gives the dominant firm control of something customers use to switch providers or of something that lowers the overall cost to customers of switching providers. For example, if a dominant firm merges with a complementary product that interoperates with the dominant firm's competitors, it could reduce interoperability, harming competition for customers who value the complement.

- *Interfering With the Use of Competitive Alternatives.* A dominant position may be threatened by a service that customers use to work with multiple providers of similar or overlapping bundles of products and services. If a dominant firm acquires a service that supports the use of multiple providers, it could degrade its utility or availability or could modify the service to steer customers to its own products, entrenching its dominant position. For example, a closed messaging communication service might acquire a product that allowed users to send and receive messages over several competing services through a single user interface, which facilitates competition. The Agencies would examine whether the acquisition would entrench the messaging service's market power by leading the merged firm to degrade the product or otherwise reduce its effectiveness as a cross-service tool, thus reducing competition.

- *Depriving Rivals of Scale Economies or Network Effects.* Scale economies and network effects can serve as a barrier to entry and competition. Depriving rivals of access to scale economies and network effects can therefore entrench a dominant position. If a merger enables a dominant firm to reduce would-be rivals' access to additional scale or customers by acquiring a product that affects access such as a customer acquisition channel, the merged firm can limit the ability of rivals to improve their own products and compete more effectively.[36] Limiting access by rivals to customers in the short run can lead to long run entrenchment of a dominant position and tend to create monopoly power.

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[36] The Agencies' focus here is on the artificial acquisition of network participants that occurs directly as a result of the merger, as opposed to future network growth that may occur through competition on the merits.

> For example, if two firms operate in a market in which network effects are significant but in which rivals voluntarily interconnect, their merger can create an entity with a large enough user base that it may have the incentive to end voluntary interconnection. Such a strategy can lessen competition and harm trading partners by creating or entrenching dominance in this market. This can be the case even if the merging firms did not appear to have a dominant position prior to the merger because their interoperability practices strengthened rivals.

Eliminating a Nascent Competitive Threat. A merger may involve a dominant firm acquiring a nascent competitive threat—namely, a firm that could grow into a significant rival, facilitate other rivals' growth, or otherwise lead to a reduction in its power.[37] In some cases, the nascent threat may be a firm that provides a product or service similar to the acquiring firm that does not substantially constrain the acquiring firm at the time of the merger but has the potential to grow into a more significant rival in the future. In other cases, factors such as network effects, scale economies, or switching costs may make it extremely difficult for a new entrant to offer all of the product features or services at comparable quality and terms that an incumbent offers. The most likely successful threats in these situations can be firms that initially avoid directly entering the dominant firm's market, instead specializing in (a) serving a narrow customer segment, (b) offering services that only partially overlap with those of the incumbent, or (c) serving an overlapping customer segment with distinct products or services.

Firms with niche or only partially overlapping products or customers can grow into longer-term threats to a dominant firm. Once established in its niche, a nascent threat may be able to add features or serve additional customer segments, growing into greater overlap of customer segments or features over time, thereby intensifying competition with the dominant firm. A nascent threat may also facilitate customers aggregating additional products and services from multiple providers that serve as a partial alternative to the incumbent's offering. Thus, the success and independence of the nascent threat may both provide for a direct threat of competition by the niche or nascent firm and may facilitate competition or encourage entry by other, potentially complementary providers that may provide a partial competitive constraint. In this way, the nascent threat supports what may be referred to as "ecosystem" competition. In this context, ecosystem competition refers to a situation where an incumbent firm that offers a wide array of products and services may be partially constrained by other combinations of products and services from one or more providers, even if the business model of those competing services is different.

Nascent threats may be particularly likely to emerge during technological transitions. Technological transitions can render existing entry barriers less relevant, temporarily making incumbents susceptible to competitive threats. For example, technological transitions can create temporary opportunities for entrants to differentiate or expand their offerings based on their alignment with new technologies, enabling them to capture network effects that otherwise insulate incumbents from competition. A merger in this context may lessen competition by preventing or delaying any such beneficial shift or by shaping it so that the incumbent retains its dominant position. For example, a dominant firm might seek to acquire firms to help it reinforce or recreate entry barriers so that its dominance endures past the technological transition. Or it might seek to acquire nascent threats that might otherwise gain sufficient customers to overcome entry barriers. In evaluating the potential for entrenching dominance, the Agencies take particular care to preserve opportunities for more competitive markets to emerge during such technological shifts.

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[37] The Agencies assess acquisitions of nascent competitive threats by non-dominant firms under the other Guidelines.

Separate from and in addition to its Section 7 analysis, the Agencies will consider whether the merger violates Section 2 of the Sherman Act. For example, under Section 2 of the Sherman Act, a firm that may challenge a monopolist may be characterized as a "nascent threat" even if the impending threat is uncertain and may take several years to materialize.[38] The Agencies assess whether the merger is reasonably capable of contributing significantly to the preservation of monopoly power in violation of Section 2, which turns on whether the acquired firm is a nascent competitive threat.[39]

2.6.B. Extending a Dominant Position into Another Market

The Agencies also examine the risk that a merger could enable the merged firm to extend a dominant position from one market into a related market, thereby substantially lessening competition or tending to create a monopoly in the related market. For example, the merger might lead the merged firm to leverage its position by tying, bundling, conditioning, or otherwise linking sales of two products. A merger may also raise barriers to entry or competition in the related market, or eliminate a nascent competitive threat, as described above. For example, prior to a merger, a related market may be characterized by scale economies but still experience moderate levels of competition. If the merged firm takes actions to induce customers of the dominant firm's product to also buy the related product from the merged firm, the merged firm may be able to gain dominance in the related market, which may be supported by increased barriers to entry or competition that result from the merger.

These concerns can arise notwithstanding that the acquiring firm already enjoys the benefits associated with its dominant position. The prospect of market power in the related market may strongly affect the merged firm's incentives in a way that does not align with the interests of its trading partners, both in terms of strategies that create dominance for the related product and in the form of reduced incentives to invest in its products or provide attractive terms for them after dominance is attained. In some cases, the merger may also further entrench the firm's original dominant position, for example if future competition requires the provision of both products.

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If the merger raises concerns that its effect may be to entrench or extend a dominant position, then any claim that the merger also provides competitive benefits will be evaluated under the rebuttal framework in Section 3. For example, the framework of Section 3 would be used to evaluate claims that a merger would generate cost savings or quality improvements that would be passed through to make their products more competitive or would otherwise create incentives for the merged firm to offer better terms. The Agencies' analysis will consider the fact that the incentives to pass through benefits to customers or offer attractive terms are affected by competition and the extent to which entry barriers insulate the merged firm from effective competition. It will also consider whether any claimed benefits are specific to the merger, or whether they could be instead achieved through contracting or other means.

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[38] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

[39] *See id*. at 79 ("[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will. . . .").

2.7. Guideline 7: When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly.

The recent history and likely trajectory of an industry can be an important consideration when assessing whether a merger presents a threat to competition. The Supreme Court has explained that "a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be."[40] It has also underscored that "Congress intended Section 7 to arrest anticompetitive tendencies in their incipiency.[41] The Agencies therefore examine whether a trend toward consolidation in an industry would heighten the competition concerns identified in Guidelines 1-6.

The Agencies therefore closely examine industry consolidation trends in applying the frameworks above. For example:

Trend Toward Concentration. If an industry has gone from having many competitors to becoming concentrated, it may suggest greater risk of harm, for example, because new entry may be less likely to replace or offset the lessening of competition the merger may cause. Among other implications, in the context of a trend toward concentration, the Agencies identify a stronger presumption of harm from undue concentration (see Guideline 1), and a greater risk of substantially lessening competition when a merger eliminates competition between the merging parties (see Guideline 2) or increases the risk of coordination (see Guideline 3).

Trend Toward Vertical Integration. The Agencies will generally consider evidence about the degree of integration between firms in the relevant and related markets and whether there is a trend toward further vertical integration. If a merger occurs amidst or furthers a trend toward vertical integration, the Agencies consider the implications for the competitive dynamics of the industry moving forward. For example, a trend toward vertical integration could magnify the concerns discussed in Guideline 5 by making entry at a single level more difficult and thereby preventing the emergence of new competitive threats over time.

Arms Race for Bargaining Leverage. The Agencies sometimes encounter mergers through which the merging parties would, by consolidating, gain bargaining leverage over other firms that they transact with. This can encourage those other firms to consolidate to obtain countervailing leverage, encouraging a cascade of further consolidation. This can ultimately lead to an industry where a few powerful firms have leverage against one another and market power over would-be entrants or over trading partners in various parts of the value chain. For example, distributors might merge to gain leverage against suppliers, who then merge to gain leverage against distributors, spurring a wave of mergers that lessen competition by increasing the market power of both. This can exacerbate the problems discussed in Guidelines 1-6, including by increasing barriers to single-level entry, encouraging coordination, and discouraging disruptive innovation.

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[40] *United States v. Pabst Brewing*, 384 U.S. 546, 552-53 (1966).
[41] *Phila. Nat'l Bank*, 374 U.S. at 362 (quoting *Brown Shoe*, 370 U.S. at 317).

***Multiple Mergers*.** The Agencies sometimes see multiple mergers at once or in succession by different players in the same industry. In such cases, the Agencies may examine multiple deals in light of the combined trend toward concentration.

2.8. Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.

A firm that engages in an anticompetitive pattern or strategy of multiple acquisitions in the same or related business lines may violate Section 7.[42] In these situations, the Agencies may evaluate the series of acquisitions as part of an industry trend (see Guideline 7) or evaluate the overall pattern or strategy of serial acquisitions by the acquiring firm collectively under Guidelines 1-6.

In expanding antitrust law beyond the Sherman Act through passage of the Clayton Act, Congress intended "to permit intervention in a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize."[43] As the Supreme Court has recognized, a cumulative series of mergers can "convert an industry from one of intense competition among many enterprises to one in which three or four large [companies] produce the entire supply."[44] Accordingly, the Agencies will consider individual acquisitions in light of the cumulative effect of related patterns or business strategies.

The Agencies may examine a pattern or strategy of growth through acquisition by examining both the firm's history and current or future strategic incentives. Historical evidence focuses on the strategic approach taken by the firm to acquisitions (consummated or not), both in the markets at issue and in other markets, to reveal any overall strategic approach to serial acquisitions. Evidence of the firm's current incentives includes documents and testimony reflecting its plans and strategic incentives both for the individual acquisition and for its position in the industry more broadly. Where one or both of the merging parties has engaged in a pattern or strategy of pursuing consolidation through acquisition, the Agencies will examine the impact of the cumulative strategy under any of the other Guidelines to determine if that strategy may substantially lessen competition or tend to create a monopoly.

2.9. Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.

Platforms provide different products or services to two or more different groups or "sides" who may benefit from each other's participation. Mergers involving platforms can threaten competition, even when a platform merges with a firm that is neither a direct competitor nor in a traditional vertical relationship with the platform. When evaluating a merger involving a platform, the Agencies apply Guidelines 1-6 while accounting for market realities associated with platform competition. Specifically,

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[42] Such strategies may also violate Section 2 of the Sherman Act and Section 5 of the FTC Act. Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, at 12-14 & nn.73 & 82 (Nov. 10, 2022) (noting that "a series of . . . acquisitions . . . that tend to bring about the harms that the antitrust laws were designed to prevent" has been subject to liability under Section 5).
[43] H.R. Rep. No. 81-1191, at 8 (1949).
[44] *See Brown Shoe*, 370 U.S. at 334 (citing S. Rep. No. 81-1775, at 5 (1950); H.R. Rep. No. 81-1191, at 8 (1949)).

the Agencies consider competition *between* platforms, competition *on* a platform, and competition to *displace* the platform.

Multi-sided platforms generally have several attributes in common, though they can also vary in important ways. Some of these attributes include:

- Platforms have multiple sides. On each side of a platform, platform participants provide or use distinct products and services.[45] Participants can provide or use different types of products or services on each side.

- A platform operator provides the core services that enable the platform to connect participant groups across multiple sides. The platform operator controls other participants' access to the platform and can influence how interactions among platform participants play out.

- Each side of a platform includes platform participants. Their participation might be as simple as using the platform to find other participants, or as involved as building platform services that enable other participants to connect in new ways and allow new participants to join the platform.

- Network effects occur when platform participants contribute to the value of the platform for other participants and the operator. The value for groups of participants on one side may depend on the number of participants either on the same side (direct network effects) or on the other side(s) (indirect network effects).[46] Network effects can create a tendency toward concentration in platform industries. Indirect network effects can be asymmetric and heterogeneous; for example, one side of the market or segment of participants may place relatively greater value on the other side(s).

- A conflict of interest can arise when a platform operator is also a platform participant. The Agencies refer to a "conflict of interest" as the divergence that can arise between the operator's incentives to operate the platform as a forum for competition and its incentive to operate as a competitor on the platform itself. As discussed below, a conflict of interest sometimes exacerbates competitive concerns from mergers.

Consistent with the Clayton Act's protection of competition "in any line of commerce," the Agencies will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants—i.e., around one side of the platform (see Section 4.3).[47]

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[45] For example, on 1990s operating-system platforms for personal computer (PC) software, software developers were on one side, PC manufacturers on another, and software purchasers on another.

[46] For example, 1990s PC manufacturers, software developers, and consumers all contributed to the value of the operating system platform for one another.

[47] In the limited scenario of a "special type of two-sided platform known as a 'transaction' platform," under Section 1 of the Sherman Act, a relevant market encompassing both sides of a two-sided platform may be warranted. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2280 (2018). This approach to Section 1 of the Sherman Act is limited to platforms with the "key feature . . . that they cannot make a sale to one side of the platform without simultaneously making a sale to the other." *Id.* Because "they cannot sell transaction services to [either user group] individually . . . transaction platforms are better understood as supplying only one product—transactions." *Id.* at 2286. This characteristic is not present for many types of two-sided or multi-sided platforms; in addition, many platforms offer simultaneous transactions as well as other products and services, and further they may bundle these products with access to transact on the platform or offer quantity discounts.

The Agencies protect competition *between* platforms by preventing the acquisition or exclusion of other platform operators that may substantially lessen competition or tend to create a monopoly. This scenario can arise from various types of mergers:

A. Mergers involving two platform operators eliminate the competition between them. In a market with a platform, entry or growth by smaller competing platforms can be particularly challenging because of network effects. A common strategy for smaller platforms is to specialize, providing distinctive features. Thus, dominant platforms can lessen competition and entrench their position by systematically acquiring firms competing with one or more sides of a multi-sided platform while they are in their infancy. The Agencies seek to stop these trends in their incipiency.

B. A platform operator may acquire a platform participant, which can entrench the operator's position by depriving rivals of participants and, in turn, depriving them of network effects. For example, acquiring a major seller on a platform may make it harder for rival platforms to recruit buyers. The long-run benefits to a platform operator of denying network effects to rival platforms create a powerful incentive to withhold or degrade those rivals' access to platform participants that the operator acquires. The more powerful the platform operator, the greater the threat to competition presented by mergers that may weaken rival operators or increase barriers to entry and expansion.

C. Acquisitions of firms that provide services that facilitate participation on multiple platforms can deprive rivals of platform participants. Many services can facilitate such participation, such as tools that help shoppers compare prices across platforms, applications that help sellers manage listings on multiple platforms, or software that helps users switch among platforms.

D. Mergers that involve firms that provide other important inputs to platform services can enable the platform operator to deny rivals the benefits of those inputs. For example, acquiring data that helps facilitate matching, sorting, or prediction services may enable the platform to weaken rival platforms by denying them that data.

The Agencies protect competition *on* a platform in any markets that interact with the platform. When a merger involves a platform operator and platform participants, the Agencies carefully examine whether the merger would create conflicts of interest that would harm competition. A platform operator that is also a platform participant may have a conflict of interest whereby it has an incentive to give its own products and services an advantage over other participants competing on the platform. Platform operators must often choose between making it easy for users to access their preferred products and directing those users to products that instead provide greater benefit to the platform operator. Merging with a firm that makes a product offered on the platform may change how the platform operator balances these competing interests. For example, the platform operator may find it is more profitable to give its own product greater prominence even if that product is inferior or is offered on worse terms after the merger—and even if some participants leave the platform as a result.[48] This can harm competition in

[48] However, few participants will leave if, for example, the switching costs are relatively high or if the advantaged product is a small component of the overall set of services those participants access on the platform. Moreover, in the long run few participants will leave if scale economies, network effects, or entry barriers enable the advantaged product to eventually gain market power of its own, with rivals of the advantaged product exiting or becoming less attractive. After these dynamics play

the product market for the advantaged product, where the harm to competition may be experienced both on the platform and in other channels.

The Agencies protect competition to *displace* the platform or any of its services. For example, new technologies or services may create an important opportunity for firms to replace one or more services the incumbent platform operator provides, shifting some participants to partially or fully meet their needs in different ways or through different channels. Similarly, a non-platform service can lessen dependence on the platform by providing an alternative to one or more functions provided by the platform operators. When platform owners are dominant, the Agencies seek to prevent even relatively small accretions of power from inhibiting the prospects for displacing the platform or for decreasing dependency on the platform.

In addition, a platform operator that advantages its own products that compete *on* the platform can lessen competition *between* platforms and to *displace* the platform, as the operator may both advantage its own product or service, and also deprive rival platforms of access to it, limiting those rivals' network effects.

2.10. Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.

A merger between competing buyers may harm sellers just as a merger between competing sellers may harm buyers.[49] The same—or analogous—tools used to assess the effects of a merger of sellers can be used to analyze the effects of a merger of buyers, including employers as buyers of labor. Firms can compete to attract contributions from a wide variety of workers, creators, suppliers, and service providers. The Agencies protect this competition in all its forms.

A merger of competing buyers can substantially lessen competition by eliminating the competition between the merging buyers or by increasing coordination among the remaining buyers. It can likewise lead to undue concentration among buyers or entrench or extend the position of a dominant buyer. Competition among buyers can have a variety of beneficial effects analogous to competition among sellers. For example, buyers may compete by raising the payments offered to suppliers, by expanding supply networks, through transparent and predictable contracting, procurement, and payment practices, or by investing in technology that reduces frictions for suppliers. In contrast, a reduction in competition among buyers can lead to artificially suppressed input prices or purchase volume, which in turn reduces incentives for suppliers to invest in capacity or innovation. Labor markets are important buyer markets. The same general concerns as in other markets apply to labor markets where employers are the buyers of labor and workers are the sellers. The Agencies will consider whether workers face a risk that the merger may substantially lessen competition for their labor.[50] Where a merger between

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out, the platform operator could advantage its own products without losing as many participants, as there would be fewer alternative products available through other channels.

[49] *See, e.g.*, *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").
[50] *See, e.g.*, *Alston*, 141 S. Ct. 2141 (applying the Sherman Act to protect workers from an employer-side agreement to limit compensation).

employers may substantially lessen competition for workers, that reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality.[51] When assessing the degree to which the merging firms compete for labor, evidence that a merger may have any one or more of these effects can demonstrate that substantial competition exists between the merging firms.

Labor markets frequently have characteristics that can exacerbate the competitive effects of a merger between competing employers. For example, labor markets often exhibit high switching costs and search frictions due to the process of finding, applying, interviewing for, and acclimating to a new job. Switching costs can also arise from investments specific to a type of job or a particular geographic location. Moreover, the individual needs of workers may limit the geographical and work scope of the jobs that are competitive substitutes.

In addition, finding a job requires the worker and the employer to agree to the match. Even within a given salary and skill range, employers often have specific demands for the experience, skills, availability, and other attributes they desire in their employees. At the same time, workers may seek not only a paycheck but also work that they value in a workplace that matches their own preferences, as different workers may value the same aspects of a job differently. This matching process often narrows the range of rivals competing for any given employee. The level of concentration at which competition concerns arise may be lower in labor markets than in product markets, given the unique features of certain labor markets. In light of their characteristics, labor markets can be relatively narrow.

The features of labor markets may in some cases put firms in dominant positions. To assess this dominance in labor markets (see Guideline 6), the Agencies often examine the merging firms' power to cut or freeze wages, slow wage growth, exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit.

If the merger may substantially lessen competition or tend to create a monopoly in upstream markets, that loss of competition is not offset by purported benefits in a separate downstream product market. Because the Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly in *any* line of commerce and in *any* section of the country, a merger's harm to competition among buyers is not saved by benefits to competition among sellers. That is, a merger can substantially lessen competition in one or more buyer markets, seller markets, or both, and the Clayton Act protects competition in any one of them.[52] If the parties claim any benefits to competition in a relevant buyer market, the Agencies will assess those claims using the frameworks in Section 3.

Just as they do when analyzing competition in the markets for products and services, the Agencies will analyze labor market competition on a case-by-case basis.

[51] A decrease in wages is understood as relative to what would have occurred in the absence of the transaction; in many cases, a transaction will not reduce wage levels, but rather slow wage growth. Wages encompass all aspects of pecuniary compensation, including benefits. Job quality encompasses non-pecuniary aspects that workers value, such as working conditions and terms of employment.

[52] Often, mergers that harm competition among buyers also harm competition among sellers as a result. For example, when a monopsonist lowers purchase prices by decreasing input purchases, they will generally decrease sales in downstream markets as well. (See Section 4.2.D)

2.11. Guideline 11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

In many acquisitions, two companies come under common control. In some situations, however, the acquisition of less-than-full control may still influence decision-making at the target firm or another firm in ways that may substantially lessen competition. Acquisitions of partial ownership or other minority interests may give the investor rights in the target firm, such as rights to appoint board members, observe board meetings, influence the firm's ability to raise capital, impact operational decisions, or access competitively sensitive information. The Agencies have concerns with both cross-ownership, which refers to holding a non-controlling interest in a competitor, as well as common ownership, which occurs when individual investors hold non-controlling interests in firms that have a competitive relationship that could be affected by those joint holdings.

Partial acquisitions that do not result in control may nevertheless present significant competitive concerns. The acquisition of a minority position may permit influence of the target firm, implicate strategic decisions of the acquirer with respect to its investment in other firms, or change incentives so as to otherwise dampen competition. The post-acquisition relationship between the parties and the independent incentives of the parties outside the acquisition may be important in determining whether the partial acquisition may substantially lessen competition. Such partial acquisitions are subject to the same legal standard as any other acquisition.[53]

The Agencies recognize that cross-ownership and common ownership can reduce competition by softening firms' incentives to compete, even absent any specific anticompetitive act or intent. While the Agencies will consider any way in which a partial acquisition may affect competition, they generally focus on three principal effects:

First, a partial acquisition can lessen competition by giving the partial owner the ability to influence the competitive conduct of the target firm.[54] For example, a voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, influence capital budgets, determine investment return thresholds, or select particular managers, can create such influence. Additionally, a nonvoting interest may, in some instances, provide opportunities to prevent, delay, or discourage important competitive initiatives, or otherwise impact competitive decision making. Such influence can lessen competition because the partial owner could use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm.

Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete.[55] Acquiring a minority position in a rival might blunt the incentive of the partial owner to compete aggressively because it may profit through dividend or other revenue share even when it loses business to the rival. For example, the partial owner may decide not to develop a new product feature to win market share from the firm in which it has acquired an interest, because doing so will

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[53] *See United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) ("[A]ny acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of [Section 7 of the Clayton Act] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.").

[54] *See United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 860-61 (6th Cir. 2005).

[55] *See Denver & Rio Grande v. United States*, 387 U.S. 485, 504 (1967) (identifying Section 7 concerns with a 20% investment).

reduce the value of its investment in its rival. This reduction in the incentive of the acquiring firm to compete arises even when it cannot directly influence the conduct or decision making of the target firm.

Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can substantially lessen competition through other mechanisms. For example, it can enhance the ability of the target and the partial owner to coordinate their behavior and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the investor to the target firm. Even if coordination does not occur, the partial owner may use that information to preempt or appropriate a rival's competitive business strategies for its own benefit. If rivals know their efforts to win trading partners can be immediately appropriated, they may see less value in taking competitive actions in the first place, resulting in a lessening of competition.

* * *

The analyses above address common scenarios that the Agencies use to assess the risk that a merger may substantially lessen competition or tend to create a monopoly. However, they are not exhaustive. The Agencies have in the past encountered mergers that lessen competition through mechanisms not covered above. For example:

A. A merger that would enable firms to avoid a regulatory constraint because that constraint was applicable to only one of the merging firms;

B. A merger that would enable firms to exploit a unique procurement process that favors the bids of a particular competitor who would be acquired in the merger; or

C. In a concentrated market, a merger that would dampen the acquired firm's incentive or ability to compete due to the structure of the acquisition or the acquirer.

As these scenarios and these Guidelines indicate, a wide range of evidence can show that a merger may lessen competition or tend to create a monopoly. Whatever the sources of evidence, the Agencies look to the facts and the law in each case.

Whatever frameworks the Agencies use to identify that a merger may substantially lessen competition or tend to create a monopoly, they also examine rebuttal evidence under the framework in Section 3.

3. Rebuttal Evidence Showing that No Substantial Lessening of Competition is Threatened by the Merger

The Agencies may assess whether a merger may substantially lessen competition or tend to create a monopoly based on a fact-specific analysis under any one or more of the Guidelines discussed above.[56] The Supreme Court has determined that analysis should consider "other pertinent factors" that may "mandate[] a conclusion that no substantial lessening of competition [is] threatened by the acquisition."[57] The factors pertinent to rebuttal depend on the nature of the threat to competition or tendency to create a monopoly resulting from the merger.

Several common types of rebuttal and defense evidence are subject to legal tests established by the courts. The Agencies apply those tests consistent with prevailing law, as described below.

3.1. Failing Firms

When merging parties suggest the weak or weakening financial position of one of the merging parties will prevent a lessening of competition, the Agencies examine that evidence under the "failing firm" defense established by the Supreme Court. This defense applies when the assets to be acquired would imminently cease playing a competitive role in the market even absent the merger.

As set forth by the Supreme Court, the failing firm defense has three requirements:

A. "[T]he evidence show[s] that the [failing firm] face[s] the grave probability of a business failure."[58] The Agencies typically look for evidence in support of this element that the allegedly failing firm would be unable to meet its financial obligations in the near future. Declining sales and/or net losses, standing alone, are insufficient to show this requirement.

B. "The prospects of reorganization of [the failing firm are] dim or nonexistent."[59] The Agencies typically look for evidence suggesting that the failing firm would be unable to reorganize successfully under Chapter 11 of the Bankruptcy Act, taking into account that "companies reorganized through receivership, or through [the Bankruptcy Act] often emerge[] as strong competitive companies."[60] Evidence of the firm's actual attempts to resolve its debt with creditors is important.

C. "[T]he company that acquires the failing [firm] or brings it under dominion is the only available purchaser."[61] The Agencies typically look for evidence that a company has made unsuccessful good-faith efforts to elicit reasonable alternative offers that pose a less severe danger to competition than does the proposed merger.[62]

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[56] *See United States v. AT&T, Inc.*, 916 F.3d at 1032.
[57] *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974); *Baker Hughes*, 908 F.2d at 990 (quoting *General Dynamics* and describing its holding as permitting rebuttal based on a "finding that 'no substantial lessening of competition occurred or was threatened by the acquisition'").
[58] *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 138 (1969).
[59] *Id.*
[60] *Id.*
[61] *Id.* at 136-39 (quoting *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930)).
[62] Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Parties must solicit reasonable alternative offers before claiming that the business is failing.

Although merging parties sometimes argue that a poor or weakening position should serve as a defense even when it does not meet these elements, the Supreme Court has "confine[d] the failing company doctrine to its present narrow scope."[63] The Agencies evaluate evidence of a failing firm consistent with this prevailing law.[64]

3.2. Entry and Repositioning

Merging parties sometimes raise a rebuttal argument that a reduction in competition resulting from the merger would induce entry or repositioning[65] into the relevant market, preventing the merger from substantially lessening competition or tending to create a monopoly in the first place. This argument posits that a merger may, by substantially lessening competition, make the market more profitable for the merged firm and any remaining competitors, and that this increased profitability may induce new entry. To evaluate this rebuttal evidence, the Agencies assess whether entry induced by the merger would be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[66]

Timeliness. To show that no substantial lessening of competition is threatened by a merger, entry must be rapid enough to replace lost competition before any effect from the loss of competition due to the merger may occur. Entry in most industries takes a significant amount of time and is therefore insufficient to counteract any substantial lessening of competition that is threatened by a merger. Moreover, the entry must be durable: an entrant that does not plan to sustain its investment or that may exit the market would not ensure long-term preservation of competition.

Likelihood. Entry induced by lost competition must be so likely that no substantial lessening of competition is threatened by the merger. Firms make entry decisions based on the market conditions they expect once they participate in the market. If the new entry is sufficient to counteract the merger's effect on competition, the Agencies analyze why the merger would induce entry that was not planned in pre-merger competitive conditions.

The Agencies also assess whether the merger may increase entry barriers. For example, the merging firms may have a greater ability to discourage or block new entry when combined than they would have as separate firms. Mergers may enable or incentivize unilateral or coordinated exclusionary

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Liquidation value is the highest value the assets could command outside the market. If a reasonable alternative offer was rejected, the parties cannot claim that the business is failing.

[63] *Citizen Publ'g*, 394 U.S. at 139.

[64] The Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill; and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition. Because firms can allocate costs, revenues, and intra-company transactions among their subsidiaries and divisions, the Agencies require evidence that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

[65] Repositioning is a supply-side response that is evaluated like entry. If repositioning requires movement of assets from other markets, the Agencies will consider the costs and competitive effects of doing so. Repositioning that would reduce competition in the markets from which products or services are moved is not a cognizable rebuttal for a lessening of competition in the relevant market.

[66] *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019).

strategies that make entry more difficult. Entry can be particularly challenging when a firm must enter at multiple levels of the market at sufficient scale to compete effectively.

Sufficiency. Even where timely and likely, the prospect of entry may not effectively prevent a merger from threatening a substantial lessening of competition. Entry may be insufficient due to a wide variety of constraints that limit an entrant's effectiveness as a competitor. Entry must at least replicate the scale, strength, and durability of one of the merging parties to be considered sufficient. The Agencies typically do not credit entry that depends on lessening competition in other markets.

As part of their analysis, the Agencies will consider the economic realities at play. For example, lack of successful entry in the past will likely suggest that entry may be slow or difficult. Recent examples of entry, whether successful or unsuccessful, provide the starting point for identifying the elements of practical entry barriers and the features of the industry that facilitate or interfere with entry. The Agencies will also consider whether the parties' entry arguments are consistent with the rationale for the merger or imply that the merger itself would be unprofitable.

3.3. Procompetitive Efficiencies

The Supreme Court has held that "possible economies [from a merger] cannot be used as a defense to illegality."[67] Competition usually spurs firms to achieve efficiencies internally, and firms also often work together using contracts short of a merger to combine complementary assets without the full anticompetitive consequences of a merger.

Merging parties sometimes raise a rebuttal argument that, notwithstanding other evidence that competition may be lessened, evidence of procompetitive efficiencies shows that no substantial lessening of competition is in fact threatened by the merger. This argument asserts that the merger would not substantially lessen competition in any relevant market in the first place.[68] When assessing this argument, the Agencies will not credit vague or speculative claims, nor will they credit benefits outside the relevant market that would not prevent a lessening of competition in the relevant market. Rather, the Agencies examine whether the evidence[69] presented by the merging parties shows each of the following:

Merger Specificity. The merger will produce substantial competitive benefits that could not be achieved without the merger under review.[70] Alternative ways of achieving the claimed benefits are considered in making this determination. Alternative arrangements could include organic growth of one of the merging firms, contracts between them, mergers with others, or a partial merger involving only those assets that give rise to the procompetitive efficiencies.

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[67] *Phila. Nat'l Bank*, 374 U.S. at 371; *Procter & Gamble Co.*, 386 U.S. at 580 ("Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").

[68] *United States v. Anthem*, 855 F.3d 345, 353-55 (D.C. Cir. 2017) (although efficiencies not a "defense" to antitrust liability, evidence sometimes used "to rebut a prima facie case"); *Saint Alphonsus Medical Center-Nampa*, 778 F.3d at 791 ("The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate.").

[69] In general, evidence related to efficiencies developed prior to the merger challenge is much more probative than evidence developed during the Agencies' investigation or litigation.

[70] If inter-firm collaborations are achievable by contract, they are not merger specific. The Agencies will credit the merger specificity of efficiencies only in the presence of evidence that a contract to achieve the asserted efficiencies would not be practical. *See Anthem*, 855 F.3d at 357.

Verifiability. These benefits are verifiable, and have been verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging parties or their agents. Procompetitive efficiencies are often speculative and difficult to verify and quantify, and efficiencies projected by the merging firms often are not realized. If reliable methodology for verifying efficiencies does not exist or is otherwise not presented by the merging parties, the Agencies are unable to credit those efficiencies.

Prevents a Reduction in Competition. To the extent efficiencies merely benefit the merging firms, they are not cognizable. The merging parties must demonstrate through credible evidence that, within a short period of time, the benefits will prevent the risk of a substantial lessening of competition in the relevant market.

Not Anticompetitive. Any benefits claimed by the merging parties are cognizable only if they do not result from the anticompetitive worsening of terms for the merged firm's trading partners.[71]

Procompetitive efficiencies that satisfy each of these criteria are called cognizable efficiencies. To successfully rebut evidence that a merger may substantially lessen competition, cognizable efficiencies must be of a nature, magnitude, and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market. Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly.

[71] The Agencies will not credit efficiencies if they reflect or require a decrease in competition in a separate market. For example, if input costs are expected to decrease, the cost savings will not be treated as an efficiency if they reflect an increase in monopsony power.

4. Analytical, Economic, and Evidentiary Tools

The analytical, economic, and evidentiary tools that follow can be applicable to many parts of the Agencies' evaluation of a merger as they apply the factors and frameworks discussed in Sections 2 and 3.

4.1. Sources of Evidence

This subsection describes the most common sources of evidence the Agencies draw on in a merger investigation. The evidence the Agencies rely upon to evaluate whether a merger *may* substantially lessen competition or tend to create a monopoly is weighed based on its probative value. In assessing the available evidence, the Agencies consider documents, testimony, available data, and analysis of those data, including credible econometric analysis and economic modeling.

Merging Parties. The Agencies often obtain substantial information from the merging parties, including documents, testimony, and data. Across all of these categories, evidence created in the normal course of business is more probative than evidence created after the company began anticipating a merger review. Similarly, the Agencies give less weight to predictions by the parties or their employees, whether in the ordinary course of business or in anticipation of litigation, offered to allay competition concerns. Where the testimony of outcome-interested merging party employees contradicts ordinary course business records, the Agencies typically give greater weight to the business records.

Evidence that the merging parties intend or expect the merger to lessen competition, such as plans to coordinate with other firms, raise prices, reduce output or capacity, reduce product quality or variety, lower wages, cut benefits, exit a market, cancel plans to enter a market without a merger, withdraw products or delay their introduction, or curtail research and development efforts after the merger, can be highly informative in evaluating the effects of a merger on competition. The Agencies give little weight, however, to the lack of such evidence or the expressed contrary intent of the merging parties.

Customers, Workers, Industry Participants, and Observers. Customers can provide a variety of information to the Agencies, ranging from information about their own purchasing behavior and choices to their views about the effects of the merger itself. The Agencies consider the relationship between customers and the merging parties in weighing customer evidence. The ongoing business relationship between a customer and a merging party may discourage the customer from providing evidence inconsistent with the interests of the merging parties.

Workers and representatives from labor organizations can provide information regarding, among other things, wages, non-wage compensation, working conditions, the individualized needs of workers in the market in question, the frictions involved in changing jobs, and the industry in which they work.

Similarly, other suppliers, indirect customers, distributors, consultants, and industry analysts can also provide information helpful to a merger inquiry. As with other interested parties, the Agencies give less weight to evidence created in anticipation of a merger investigation and more weight to evidence developed in the ordinary course of business.

Market Effects in Consummated Mergers. Evidence of observed post-merger price increases or worsened terms is given substantial weight. A consummated merger, however, may substantially lessen competition even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and is therefore moderating its conduct.

Consequently, in evaluating consummated mergers, the Agencies also consider the same types of evidence when evaluating proposed mergers.

Econometric Analysis and Economic Modeling. Econometric analysis of data and other types of economic modeling can be informative in evaluating the potential effects of a merger on competition. The Agencies give more weight to analysis using high quality data and adhering to rigorous standards. But the Agencies also take into account that in some cases, the availability or quality of data or reliable modeling techniques might limit the availability and relevance of econometric modeling. When data is available, the Agencies recognize that the goal of economic modeling is not to create a perfect representation of reality, but rather to inform an assessment of the likely change in firm incentives resulting from a merger.

Transaction Terms. The financial terms of the transaction may also be informative regarding a merger's impact on competition. For example, a purchase price that exceeds the acquired firm's stand-alone market value can sometimes indicate that the acquiring firm is paying a premium because it expects to be able to benefit from reduced competition.

4.2. Evaluating Competition Among Firms

This subsection discusses evidence and tools the Agencies look to when assessing competition among firms. The evidence and tools in this section can be relevant to a variety of settings, for example: to assess competition between rival firms (Guideline 2); the ability and incentive to limit access to a product rivals use to compete (Guideline 5); or for market definition (Section 4.3), for example when carrying out the Hypothetical Monopolist Test (Section 4.3.A).

For clarity, the discussion in this subsection often focuses on competition between two suppliers of substitute products that set prices. Analogous analytic tools may also be relevant in more general settings, for example when considering: competition among more than two suppliers; competition among buyers or employers to procure inputs and labor; competition that derives from customer willingness to buy in different locations; and competition that takes place in dimensions other than price or when terms are determined through, for example, negotiations or auctions.

Guideline 2 describes how different types of evidence can be used in assessing the potential harm to competition from a merger; some portions of Guideline 2 that are relevant in other settings are repeated below.

4.2.A. Generally Applicable Considerations

The Agencies may consider one or more of the following types of evidence, tools, and metrics when assessing the degree of competition among firms:

Strategic Deliberations or Decisions. The Agencies may analyze the extent of competition among firms, for example between the merging firms, by examining evidence of their strategic deliberations or decisions in the regular course of business. For example, in some markets, the firms may monitor each other's pricing, marketing campaigns, facility locations, improvements, products, capacity, output, input costs, and/or innovation plans. This can provide evidence of competition between the merging firms, especially when they react by taking steps to preserve or enhance the competitiveness or profitability of their own products or services.

Prior Merger, Entry, and Exit Events. The Agencies may look to historical events to assess the presence and substantiality of direct competition between the merging firms. For example, the Agencies may examine the impact of recent relevant mergers, entry, expansion, or exit events on the merging parties or their competitive behavior.

Customer Substitution. Customers' willingness to switch between different firms' products is an important part of the competitive process. Firms are closer competitors the more that customers are willing to switch between their products, for example because they are more similar in quality, price, or other characteristics.

Evidence commonly analyzed to show the extent of substitution among firms' products includes: how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions; documentary and testimonial evidence such as win/loss reports, evidence from discount approval processes, switching data, customer surveys, as well as information from suppliers of complementary products and distributors; objective information about product characteristics; and market realities affecting the ability of customers to switch.

Impact of Competitive Actions on Rivals. When one firm takes competitive actions to attract customers, this can benefit the firm at the expense of its rivals. The Agencies may gauge the extent of competition among firms by considering the impact that competitive actions by one firm have on the others. The impact of a firm's competitive actions on a rival generally depends on how many sales a rival would lose as a result of the competitive actions, as well as the profitability of those lost sales. The Agencies may use margins to measure the profitability of the sale a rival would have made.[72]

Impact of Eliminating Competition Between the Firms. In some instances, evidence may be available to assess the impact of competition from one or more firms on the other firms' actions, such as firm choices about price, quality, wages, or another dimension of competition. This can be gauged by comparing the two firms' actions when they compete and make strategic choices independently against the actions the firms might choose if they acted jointly. Actual or predicted changes in these results of competition, when available, can indicate the degree of competition between the firms.

To make this type of comparison, the Agencies sometimes rely on economic models. Often, such models consider the firms' incentives to change their actions in one or more selected dimensions, such as price, in a somewhat simplified scenario. For example, a model might focus on the firms' short-run incentives to change price, while abstracting from a variety of additional competitive forces and dimensions of competition, such as the potential for firms to reposition their products or for the merging firms to coordinate with other firms. Such a model may incorporate data and evidence in order to produce quantitative estimates of the impact of the merger on firm incentives and corresponding choices. This type of exercise is sometimes referred to by economists as "merger simulation" despite the fact that the hypothetical setting considers only selected aspects of the loss of competition from a merger. The Agencies use such models to give an indication of the scale and importance of competition, not to precisely predict outcomes.

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[72] The margin on incremental units is the difference between incremental revenue (often equal to price) and incremental cost on those units. The Agencies may use accounting data to measure incremental costs, but they do not necessarily rely on accounting margins recorded by firms in the ordinary course of business because such margins often do not align with the concept of incremental cost that is relevant in economic analysis of a merger.

4.2.B. Considerations When Terms Are Set by Firms

The Agencies may use various types of evidence and metrics to assess the strength of competition among firms that set terms to their customers. Firms might offer the same terms to different customers or different terms to different groups of customers.

Competition in this setting can lead firms to set lower prices or offer more attractive terms when they act independently than they would in a setting where that competition was eliminated by a merger. When considering the impact of competition on the incentives to set price, to the extent price increases on one firm's products would lead customers to switch to products from another firm, their merger will enable the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost because of the price increase will be diverted to the products of the other firm, and capturing the value of these diverted sales can make the price increase profitable even though it would not have been profitable prior to the merger.

A measure of customer substitution between firms in this setting is the diversion ratio. The diversion ratio from one product to another is a metric of how customers likely would substitute between them. The diversion ratio is the fraction of unit sales lost by the first product due to a change in terms, such as an increase in its price, that would be diverted to the second product. The higher the diversion ratio between two products made by different firms, the stronger the competition between them.

A high diversion ratio between the products owned by two firms can indicate strong competition between them even if the diversion ratio to another firm is higher. The diversion ratio from one of the products of one firm to a group of products made by other firms, defined analogously, is sometimes referred to as the aggregate diversion ratio or the recapture rate.

A measure of the impact on rivals of competitive actions is the value of diverted sales from a price increase. The value of sales diverted from one firm to a second firm, when the first firm raises its price on one of its products, is equal to the number of units that would be diverted from the first firm to the second, multiplied by the difference between the second firm's price and the incremental cost of the diverted sales. To interpret the magnitude of the value of diverted sales, the Agencies may use as a basis of comparison either the incremental cost to the second firm of making the diverted sales, or the revenues lost by the first firm as a result of the price increase. The ratio of the value of diverted sales to the revenues lost by the first firm can be an indicator of the upward pricing pressure that would result from the loss of competition between the two firms. Analogous concepts can be applied to analyze the impact on rivals of worsening terms other than price.

4.2.C. Considerations When Terms Are Set Through Bargaining or Auctions

In some industries, buyers and sellers negotiate prices and other terms of trade. In bargaining, buyers commonly negotiate with more than one seller and may play competing sellers off against one another. In other industries, sellers might sell their products, or buyers might procure inputs, using an auction. Negotiations may involve aspects of an auction as well as aspects of one-on-one negotiation. Competition among sellers can significantly enhance the ability of a buyer to obtain a result more favorable to it, and less favorable to the sellers, compared to a situation where the elimination of competition through a merger prevents buyers from playing those sellers off against each other in negotiations.

Sellers may compete even when a customer does not directly play their offers against each other. The attractiveness of alternative options influences the importance of reaching an agreement to the negotiating parties and thus the terms of the agreement. A party that has many attractive alternative trading partners places less importance on reaching an agreement with any one particular trading partner than a party with few attractive alternatives. As alternatives for one party are eliminated (such as through a merger), the trading partner gains additional bargaining leverage reflecting that loss of competition. A merger between sellers may lessen competition even if the merged firm handles negotiations for the merging firms' products separately.

Thus, qualitative or quantitative evidence about the leverage provided to buyers by competing suppliers may be used to assess the extent of competition among firms in this setting. Analogous evidence may be used when analyzing a setting where terms are set using auctions, for example, procurement auctions where suppliers bid to serve a buyer. If, for some categories of procurements, certain suppliers are often among the most attractive to the buyer, competition among that group of suppliers is likely to be strong.

Firms sometimes keep records of the progress and outcome of individual sales efforts, and the Agencies may use these data to generate measures of the extent to which customers would likely substitute between the two firms. Examples of such measures might include a diversion ratio based on the rate at which customers would buy from one firm if the other one was not available, or the frequency with which the two firms bid on contracts with the same customer.

4.2.D. Considerations When Firms Determine Capacity and Output

In some markets, the choice of how much to produce (output decisions) or how much productive capacity to maintain (capacity decisions) are key strategic variables. When a firm decreases output, it may lose sales to rivals, but also drive up prices. Because a merged firm will account for the impact of higher prices across all of the merged firms' sales, it may have an incentive to decrease output as a result of the merger. The loss of competition through a merger of two firms may lead the merged firm to leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, lay off or stop hiring workers, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another market so as to raise the price in the former market. The analysis of the extent to which firms compete may differ depending on how a merger between them might create incentives to suppress output.

Competition between merging firms is greater when (1) the merging firms' market shares are relatively high; (2) the merging firms' products are relatively undifferentiated from each other; (3) the market elasticity of demand is relatively low; (4) the margin on the suppressed output is relatively low; and (5) the supply responses of non-merging rivals are relatively small. Qualitative or quantitative evidence may be used to evaluate and weigh each of these factors.

In some cases, competition between firms—including one firm with a substantial share of the sales in the market and another with significant excess capacity to serve that market—can prevent an output suppression strategy from being profitable. This can occur even if the firm with the excess capacity has a relatively small share of sales, as long as that firm's ability to expand, and thus keep prices from rising, makes an output suppression strategy unprofitable for the firm with the larger market share.

4.2.E. Considerations for Innovation and Product Variety Competition

Firms can compete for customers by offering varied and innovative products and features, which could range from minor improvements to the introduction of a new product category. Features can include new or different product attributes, services offered along with a product, or higher-quality services standing alone. Customers value the variety of products or services that competition generates, including having a variety of locations at which they can shop.

Offering the best mix of products and features is an important dimension of competition that may be harmed as a result of the elimination of competition between the merging parties.

When a firm introduces a new product or improves a product's features, some of the sales it gains may be at the expense of its rivals, including rivals that are competing to develop similar products and features. As a result, competition between firms may lead them to make greater efforts to offer a variety of products and features than would be the case if the firms were jointly owned, for example, if they merged. The merged firm may have a reduced incentive to continue or initiate development of new products that would have competed with the other merging party, but post-merger would "cannibalize" what would be its own sales.[73] A service provider may have a reduced incentive to continue valuable upgrades offered by the acquired firm. The merged firm may have a reduced incentive to engage in disruptive innovation that would threaten the business of one of the merging firms. Or it may have the incentive to change its product mix, such as by ceasing to offer one of the merging firms' products, leaving worse off the customers who previously chose the product that was eliminated. For example, competition may be harmed when customers with a preference for a low-price option lose access to it, even if remaining products have higher quality.

The incentives to compete aggressively on innovation and product variety depend on the capabilities of the firms and on customer reactions to the new offerings. Development of new features depends on having the appropriate expertise and resources. Where firms are two of a small number of companies with specialized employees, development facilities, intellectual property, or research projects in a particular area, competition between them will have a greater impact on their incentives to innovate.

Innovation may be directed at outcomes beyond product features; for example, innovation may be directed at reducing costs or adopting new technology for the distribution of products.

4.3. Market Definition

The Clayton Act protects competition "in any line of commerce in any section of the country."[74] The Agencies engage in a market definition inquiry in order to identify whether there is any line of commerce or section of the country in which the merger may substantially lessen competition or tend to create a monopoly. The Agencies identify the "area of effective competition" in which competition may be lessened "with reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country.')."[75] The Agencies refer to the process of identifying market(s) protected by the Clayton Act as a "market definition" exercise and the markets so defined as "relevant antitrust markets,"

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[73] Sales "cannibalization" refers to a situation where customers of a firm substitute away from one of the firm's products to another product offered by the same firm.
[74] 15 U.S.C. § 18.
[75] *Brown Shoe*, 370 U.S. at 324.

or simply "relevant markets." Market definition can also allow the Agencies to identify market participants and measure market shares and market concentration.

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. The outer boundaries of a relevant product market are determined by the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[76] Within a broad relevant market, however, effective competition often occurs in numerous narrower relevant markets.[77] Market definition ensures that relevant antitrust markets are sufficiently broad, but it does not always lead to a single relevant market. Section 7 of the Clayton Act prohibits any merger that may substantially lessen competition "in any line of commerce" and in "any section of the country," and the Agencies protect competition by challenging a merger that may lessen competition in any one or more relevant markets.

Market participants often encounter a range of possible substitutes for the products of the merging firms. However, a relevant market cannot meaningfully encompass that infinite range of substitutes.[78] There may be effective competition among a narrow group of products, and the loss of that competition may be harmful, making the narrow group a relevant market, even if competitive constraints from significant substitutes are outside the group. The loss of both the competition between the narrow group of products and the significant substitutes outside that group may be even more harmful, but that does not prevent the narrow group from being a market in its own right.

Relevant markets need not have precise metes and bounds. Some substitutes may be closer, and others more distant, and defining a market necessarily requires including some substitutes and excluding others. Defining a relevant market sometimes requires a line-drawing exercise around product features, such as size, quality, distances, customer segment, or prices. There can be many places to draw that line and properly define a relevant market. The Agencies recognize that such scenarios are common, and indeed "fuzziness would seem inherent in any attempt to delineate the relevant . . . market."[79] Market participants may use the term "market" colloquially to refer to a broader or different set of products than those that would be needed to constitute a valid relevant antitrust market.

The Agencies rely on several tools to demonstrate that a market is a relevant antitrust market. For example, the Agencies may rely on any one or more of the following to identify a relevant antitrust market.

A. Direct evidence of substantial competition between the merging parties can demonstrate that a relevant market exists in which the merger may substantially lessen competition and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.

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[76] *Id.* at 325.

[77] *Id.* ("[W]ithin [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."). Multiple overlapping markets can be appropriately defined relevant markets. For example, a merger to monopoly for food worldwide would lessen competition in well-defined relevant markets for, among others, food, baked goods, cookies, low-fat cookies, and premium low-fat chocolate chip cookies. Illegality in any of these in any city or town comprising a relevant geographic market would suffice to prohibit the merger, and the fact that one area comprises a relevant market does not mean a larger, smaller, or overlapping area could not as well.

[78] *United States v. Cont'l Can Co.*, 378 U.S. 441, 449 (1964); *see also FTC v. Advoc. Health Care Network*, 841 F.3d 460, 469 (7th Cir. 2016) ("A geographic market does not need to include all of the firm's competitors; it needs to include the competitors that would substantially constrain the firm's price-increasing ability." (cleaned up)).

[79] *Phila. Nat'l Bank*, 374 U.S. at 360 n.37.

B. Direct evidence of the exercise of market power can demonstrate the existence of a relevant market in which that power exists. This evidence can be valuable when assessing the risk that a dominant position may be entrenched, maintained, or extended, since the same evidence identifies market power and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.

C. A relevant market can be identified from evidence on observed market characteristics ("practical indicia"), such as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[80] Various practical indicia may identify a relevant market in different settings.

D. Another common method employed by courts and the Agencies is the hypothetical monopolist test.[81] This test examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price. An analogous hypothetical monopsonist test applies when considering the impact of a merger on competition among buyers.

The Agencies use these tools to define relevant markets because they each leverage market realities to identify an area of effective competition.

Section 4.3.A below describes the Hypothetical Monopolist Test in greater detail. Section 4.3.B addresses issues that may arise when defining relevant markets in several specific scenarios.

4.3.A. The Hypothetical Monopolist Test

This Section describes the Hypothetical Monopolist Test, which is a method by which the Agencies often define relevant antitrust markets. As outlined above, a relevant antitrust market is an area of effective competition. The Hypothetical Monopolist/Monopsonist Test ("HMT") evaluates whether a group of products is sufficiently broad to constitute a relevant antitrust market. To do so, the HMT asks whether eliminating the competition among the group of products by combining them under the control of a hypothetical monopolist likely would lead to a worsening of terms for customers. The Agencies generally focus their assessment on the constraints from competition, rather than on constraints from regulation, entry, or other market changes. The Agencies are concerned with the impact on economic incentives and assume the hypothetical monopolist would seek to maximize profits.

When evaluating a merger of sellers, the HMT asks whether a hypothetical profit-maximizing firm, not prevented by regulation from worsening terms, that was the only present and future seller of a group of products ("hypothetical monopolist") likely would undertake at least a small but significant and non-transitory increase in price ("SSNIP") or other worsening of terms ("SSNIPT") for at least one

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[80] *Brown Shoe*, 370 U.S. at 325, *quoted in United States v. U.S. Sugar Corp.*, 73 F.4th 197, 204-07 (3d Cir. 2023) (affirming district court's application of *Brown Shoe* practical indicia to evaluate relevant product market that included, based on the unique facts of the industry, those distributors who "could counteract monopolistic restrictions by releasing their own supplies").

[81] *See FTC v. Penn State Hershey Med. Center*, 838 F.3d 327, 338 (3d Cir. 2016). While these guidelines focus on applying the hypothetical monopolist test in analyzing mergers, the test can be adapted for similar purposes in cases involving alleged monopolization or other conduct. *See, e.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 829-30 (11th Cir. 2015).

product in the group.[82] For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. Analogously, when considering a merger of buyers, the Agencies ask the equivalent question for a hypothetical monopsonist. This Section often focuses on merging sellers to simplify exposition.

4.3.B. Implementing the Hypothetical Monopolist Test

The SSNIPT. A SSNIPT may entail worsening terms along any dimension of competition, including price (SSNIP), but also other terms (broadly defined) such as quality, service, capacity investment, choice of product variety or features, or innovative effort.

Input and Labor Markets. When the competition at issue involves firms buying inputs or employing labor, the HMT considers whether the hypothetical monopsonist would undertake at least a SSNIPT, such as a decrease in the offered price or a worsening of the terms of trade offered to suppliers, or a decrease in the wage offered to workers or a worsening of their working conditions or benefits.

The Geographic Dimension of the Market. The hypothetical monopolist test is generally applied to a group of products together with a geographic region to determine a relevant market, though for ease of exposition the two dimensions are discussed separately, with geographic market definition discussed in Section 4.3.D.2.

Negotiations or Auctions. The HMT is stated in terms of a hypothetical monopolist *undertaking* a SSNIPT. This covers settings where the hypothetical monopolist sets terms and makes them worse. It also covers settings where firms bargain, and the hypothetical monopolist would have a stronger bargaining position that would likely lead it to extract a SSNIPT during negotiations, or where firms sell their products in an auction, and the bids submitted by the hypothetical monopolist would result in the purchasers of its products experiencing a SSNIPT.

Benchmark for the SSNIPT. The HMT asks whether the hypothetical monopolist likely would worsen terms relative to those that likely would prevail absent the proposed merger. In some cases, the Agencies will use as a benchmark different outcomes than those prevailing prior to the merger. For example, if outcomes are likely to change absent the merger, e.g., because of innovation, entry, exit, or exogenous trends, the Agencies may use anticipated future outcomes as the benchmark. Or, if suppliers in the market are coordinating prior to the merger, the Agencies may use a benchmark that reflects conditions that would arise if coordination were to break down. When evaluating whether a merging firm is dominant (Guideline 6), the Agencies may use terms that likely would prevail in a more competitive market as a benchmark.[83]

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[82] If the pricing incentives of the firms supplying the products in the group differ substantially from those of the hypothetical monopolist, for reasons other than the latter's control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment. Analogous considerations apply when considering a SSNIPT for terms other than price.

[83] In the entrenchment context, if the inquiry is being conducted after market or monopoly power has already been exercised, using prevailing prices can lead to defining markets too broadly and thus inferring that dominance does not exist when, in

Magnitude of the SSNIPT. What constitutes a "small but significant" worsening of terms depends upon the nature of the industry and the merging firms' positions in it, the ways that firms compete, and the dimension of competition at issue. When considering price, the Agencies will often use a SSNIP of five percent of the price charged by firms for the products or services to which the merging firms contribute value. The Agencies, however, may consider a different term or a price increase that is larger or smaller than five percent.[84]

The Agencies may base a SSNIP on explicit or implicit prices for the firms' specific contribution to the value of the product sold, or an upper bound on the firms' specific contribution, where these can be identified with reasonable clarity. For example, the Agencies may derive an implicit price for the service of transporting oil over a pipeline as the difference between the price the pipeline firm paid for oil at one end and the price it sold the oil for at the other and base the SSNIP on this implicit price.

4.3.C. Evidence and Tools for Carrying Out the Hypothetical Monopolist Test

Section 4.2 describes some of the qualitative and quantitative evidence and tools the Agencies can use to assess the extent of competition among firms. The Agencies can use similar evidence and analogous tools to apply the HMT, in particular to assess whether competition among a set of firms likely leads to better terms than a hypothetical monopolist would undertake.

To assess whether the hypothetical monopolist likely would undertake at least a SSNIP on one or more products in the candidate market, the Agencies sometimes interpret the qualitative and quantitative evidence using an economic model of the profitability to the hypothetical monopolist of undertaking price increases; the Agencies may adapt these tools to apply to other forms of SSNIPTs.

One approach utilizes the concept of a "recapture rate" (the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market). A price increase is profitable when the recapture rate is high enough that the incremental profits from the increased price plus the incremental profits from the recaptured sales going to other products in the candidate market exceed the profits lost when sales are diverted outside the candidate market. It is possible that a price increase is profitable even if a majority of sales are diverted outside the candidate market, for example if the profits on the lost sales are relatively low or the profits on the recaptured sales are relatively high.

Sometimes evidence is presented in the form of "critical loss analysis," which can be used to assess whether undertaking at least a SSNIPT on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits. Critical loss analysis compares the magnitude of the two offsetting effects resulting from the worsening of terms. The "critical loss" is defined as the number of lost unit sales that would leave profits unchanged. The "predicted loss" is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the worsening of terms. The worsening of terms raises the hypothetical monopolist's profits if the predicted loss is less than the

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fact, it does. The problem with using prevailing prices to define the market when a firm is already dominant is known as the "Cellophane Fallacy."

[84] The five percent price increase is not a threshold of competitive harm from the merger. Because the five percent SSNIP is a minimum expected effect of a hypothetical monopolist of an *entire* market, the actual predicted effect of a merger within that market may be significantly lower than five percent. A merger within a well-defined market that causes undue concentration can be illegal even if the predicted price increase is well below the SSNIP of five percent.

critical loss. While this "breakeven" analysis differs somewhat from the profit-maximizing analysis called for by the HMT, it can sometimes be informative.

The Agencies require that estimates of the predicted loss be consistent with other evidence, including the pre-merger margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction, high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price. Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture rate[85] necessary for the candidate market to satisfy the hypothetical monopolist test. Similar considerations inform other analyses of the profitability of a price increase.

4.3.D. Market Definition in Certain Specific Settings

This Section provides details on market definition in several specific common settings. In much of this section, concepts are presented for the scenario where the merger involves sellers. In some cases, clarifications are provided as to how the concepts apply to merging buyers; in general, the concepts apply in an analogous way.

4.3.D.1. Targeted Trading Partners

If the merged firm could profitably target a subset of customers for changes in prices or other terms, the Agencies may identify relevant markets defined around those targeted customers. The Agencies may do so even if firms are not currently targeting specific customer groups but could do so after the merger.

For targeting to be feasible, two conditions typically must be met. First, the suppliers engaging in targeting must be able to set different terms for targeted customers than other customers. This may involve identification of individual customers to which different terms are offered or offering different terms to different types of customers based on observable characteristics.[86] Markets for targeted customers need not have precise metes and bounds. In particular, defining a relevant market for targeted customers sometimes requires a line-drawing exercise on observable characteristics. There can be many places to draw that line and properly define a relevant market. Second, the targeted customers must not be likely to defeat a targeted worsening of terms by arbitrage (e.g., by purchasing indirectly from or through other customers). Arbitrage may be difficult if it would void warranties or make service more difficult or costly for customers, and it is inherently impossible for many services. Arbitrage on a modest scale may be possible but sufficiently costly or limited, for example due to transaction costs or search costs, that it would not deter or defeat a discriminatory pricing strategy.

If prices are negotiated or otherwise set individually, for example through a procurement auction, there may be relevant markets that are as narrow as an individual customer. Nonetheless, for analytic convenience, the Agencies may define cluster markets for groups of targeted customers for whom the

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[85] The recapture rate is sometimes referred to as the aggregate diversion ratio, defined in Section 4.2.B.

[86] In some cases, firms offer one or more versions of products or services defined by their characteristics (where brand might be a characteristic). When customers can select among these products and terms do not vary by customer, the Agencies will typically define markets based on products rather than the targeted customers. In such cases, relevant antitrust markets may include only some of the differentiated products, for example products with only "basic" features, or products with "premium features." The tools described in Section 4.2 can be used to assess competition among differentiated products.

conditions of competition are reasonably similar. (See Section 4.3.D.4 for further discussion of cluster markets.)

Analogous considerations arise for a merger involving one or more buyers or employers. In this case, the analysis considers whether buyers target suppliers, for example by paying targeted suppliers or workers less, or by degrading the terms of supply contracts for targeted suppliers. Arbitrage would involve a targeted supplier selling to the buyer indirectly, through a different supplier who could obtain more favorable terms from the buyer.

If the HMT is applied in a setting where targeting of customers is feasible, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the targeted group would undertake at least a SSNIPT on some, though not necessarily all, customers in that group. The products sold to those customers form a relevant market if the hypothetical monopolist likely would undertake at least a SSNIPT despite the potential for customers to substitute away from the product or to take advantage of arbitrage. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

4.3.D.2. Geographic Markets

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. A market's geography depends on the limits that distance puts on some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Factors that may limit the geographic scope of the market include transportation costs, language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and local service availability.

4.3.D.2.a. Geographic Markets Based on the Locations of Suppliers

The Agencies sometimes define geographic markets as regions encompassing a group of supplier locations. When they do, the geographic market's scope is determined by customers' willingness to switch between suppliers. Geographic markets of this type often apply when customers receive goods or services at suppliers' facilities, for example when customers buy in-person from retail stores. A single firm may offer the same product in a number of locations, both within a single geographic market or across geographic markets; customers' willingness to substitute between products may depend on the location of the supplier. When calculating market shares, sales made from supplier locations in the geographic market are included, regardless of whether the customer making the purchase travelled from outside the boundaries of the geographic market (see Section 4.4 for more detail about calculating market shares).

If the HMT is used to evaluate the geographic scope of the market, it requires that a hypothetical profit-maximizing firm that was the only present or future supplier of the relevant product(s) at supplier locations in the region likely would undertake at least a SSNIPT in at least one location. In this exercise, the terms of sale for products sold to all customers at facilities outside the region are typically held constant.[87]

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[87] In some circumstances, as when the merging parties operate in multiple geographies, if applying the HMT, the Agencies may apply a "Hypothetical Cartel" framework for market definition, following the approach outlined in Section 4.3.A, n.81.

4.3.D.2.b. Geographic Markets Based on Targeting of Customers by Location

When targeting based on customer location is feasible (see Section 4.3.D.1), the Agencies may define geographic markets as a region encompassing a group of customers.[88] For example, geographic markets may sometimes be defined this way when suppliers deliver their products or services to customers' locations, or tailor terms of trade based on customers' locations. Competitors in the market are firms that sell to customers that are located in the specified region. Some suppliers may be located outside the boundaries of the geographic market, but their sales to customers located within the market are included when calculating market shares (see Section 4.4 for more detail about calculating market shares).

If prices are negotiated individually with customers that may be targeted, geographic markets may be as narrow as individual customers. Nonetheless, the Agencies often define a market for a cluster of customers located within a region if the conditions of competition are reasonably similar for these customers. (See Section 4.3.D.4 for further discussion of cluster markets.)

A firm's attempt to target customers in a particular area with worsened terms can sometimes be undermined if some customers in the region substitute by travelling outside it to purchase the product. Arbitrage by customers on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a targeting strategy.[89]

If the HMT is used to evaluate market definition when customers may be targeted by location, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region likely would undertake at least a SSNIPT on some, though not necessarily all, customers in that region. The products sold in that region form a relevant market if the hypothetical monopolist would undertake at least a SSNIPT despite the potential for customers to substitute away from the product or to locations outside the region. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.[90]

4.3.D.3. Supplier Responses

Market definition focuses solely on demand substitution factors, that is, on customers' ability and willingness to substitute away from one product or location to another in response to a price increase or other worsening of terms. Supplier responses may be considered in the analysis of competition between firms (Guideline 2 and Section 4.2), entry and repositioning (Section 3.2), and in calculating market shares and concentration (Section 4.4).

4.3.D.4. Cluster Markets

A relevant antitrust market is generally a group of products that are substitutes for each other. However, when the competitive conditions for multiple relevant markets are reasonably similar, it may be appropriate to aggregate the products in these markets into a "cluster market" for analytic convenience, even though not all products in the cluster are substitutes for each other. For example, competing hospitals may each provide a wide range of acute health care services. Acute care for one health issue is not a substitute for acute care for a different health issue. Nevertheless, the Agencies may

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[88] For customers operating in multiple locations, only those customer locations within the targeted region are included in the market.

[89] Arbitrage by suppliers is a type of supplier response and is thus not considered in market definition. (See Section 4.3.D.3)

[90] In some circumstances, as when the merging parties operate in multiple geographies, the Agencies may apply a "Hypothetical Cartel" framework for market definition, as described in Section 4.3.A, n.81.

aggregate them into a cluster market for acute care services if the conditions of competition are reasonably similar across the services in the cluster.

The Agencies need not separately analyze market definition for each product included in the cluster market, and market shares will typically be calculated for the cluster market as a whole.

Analogously, the Agencies sometimes define a market as a cluster of targeted customers (see Section 4.3.D.1) or a cluster of customers located in a region (see Section 4.3.D.2.b).

4.3.D.5. Bundled Product Markets

Firms may sell a combination of products as a bundle or a "package deal," rather than offering products "*a la carte*," that is, separately as standalone products. Different bundles offered by the same or different firms might package together different combinations of component products and therefore be differentiated according to the composition of the bundle. If the components of a bundled product are also available separately, the bundle may be offered at a price that represents a discount relative to the sum of the *a la carte* product prices.

The Agencies take a flexible approach based on the specific circumstances to determine whether a candidate market that includes one or more bundled products, standalone products, or both is a relevant antitrust market. In some cases, a relevant market may consist of only bundled products. A market composed of only bundled products might be a relevant antitrust market even if there is significant competition from the unbundled products. In other cases, a relevant market may include both bundled products and some unbundled component products.

Even in cases where firms commonly sell combinations of products or services as a bundle or a "package deal," relevant antitrust markets do not necessarily include product bundles. In some cases, a relevant market may be analyzed as a cluster market, as discussed in Section 4.3.D.4.

4.3.D.6. One-Stop Shop Markets

In some settings, the Agencies may consider a candidate market that includes one or more "one-stop shops," where customers can select a combination of products to purchase from a single seller, either in a single purchase instance or in a sequence of purchases. Products are commonly sold at a one-stop shop when customers value the convenience, which might arise because of transaction costs or search costs, savings of time, transportation costs, or familiarity with the store or web site.

A multi-product retailer such as a grocery store or online retailer is an example of a one-stop shop. Customers can select a particular basket of groceries from a range of available goods and different customers may select different baskets. Some customers may make multiple stops at specialty shops (e.g., butcher, baker, greengrocer), or they may do the bulk of their shopping at a one-stop shop (the grocery store) but also shop at specialty shops for particular product categories.

There are several ways in which markets may be defined in one-stop shop settings, depending on market realities, and the Agencies may further define more than one relevant antitrust market for a particular merger. For example, a relevant market may consist of only one-stop shops, even if there is significant competition from specialty shops; or it may include both one-stop shops and specialty shops. When a product category is sold by both one-stop shops and specialty suppliers (such as a type of produce sold in grocery stores and produce stands), the Agencies may define relevant antitrust markets for the product category sold by a particular type of supplier, or it may include multiple types of suppliers.

4.3.D.7. Market Definition When There is Harm to Innovation

When considering harm to competition in innovation, market definition may follow the same approaches that are used to analyze other dimensions of competition. In the case where a merger may substantially lessen competition by decreasing incentives to innovate, the Agencies may define relevant antitrust markets around the products that would result from that innovation if successful, even if those products do not yet exist.[91] In some cases, the Agencies may analyze different relevant markets when considering innovation than when considering other dimensions of competition.

4.3.D.8. Market Definition for Input Markets and Labor Markets

The same market definition tools and principles discussed above can be used for input markets and labor markets, where labor is a particular type of input. In input markets, firms compete with each other to attract suppliers, including workers. Therefore, input suppliers are analogous to customers in the discussions above about market definition. In defining relevant markets, the Agencies focus on the alternatives available to input suppliers. An antitrust input market consists of a group of products and a geographic area defined by the location of the buyers or input suppliers. Just as buyers of a product may consider products to be differentiated according to the brand or the identity of the seller, suppliers of a product or service may consider different buyers to be differentiated. For example, if the suppliers are contractors, they may have distinct preferences about who they provide services to, due to different working conditions, location, reliability of buyers in terms of paying invoices on time, or the propensity of the buyer to make unexpected changes to specifications.

The HMT considers whether a hypothetical monopsonist likely would undertake a SSNIPT, such as a reduction in price paid for inputs, or imposing less favorable terms on suppliers. (See Section 4.2.C for more discussion about competition in settings where terms are set through auctions and negotiations, as is common for input markets.)

When defining a market for labor the Agencies will consider the job opportunities available to workers who supply a relevant type of labor service, where worker choice among jobs or between geographic areas is the analog of consumer choices among products and regions when defining a product market. The Agencies may consider workers' willingness to switch in response to changes to wages or other aspects of working conditions, such as changes to benefits or other non-wage compensation, or adoption of less flexible scheduling. Depending on the occupation, alternative job opportunities might include the same occupation with alternative employers, or alternative occupations. Geographic market definition may involve considering workers' willingness or ability to commute, including the availability of public transportation. The product and geographic market definition may involve assessing whether workers may be targeted for less favorable wages or other terms of employment according to factors such as education, experience, certifications, or work locations. The Agencies may define cluster markets for different jobs when firms employ workers in a variety of jobs characterized by similar competitive conditions (see Section 4.3.D.4).

4.4. Calculating Market Shares and Concentration

This subsection further describes how the Agencies calculate market shares and concentration metrics.

[91] *See Illumina*, slip op. at 12 (affirming a relevant market defined around "what . . . developers reasonably sought to achieve, not what they currently had to offer").

As discussed above, the Agencies may use evidence about market shares and market concentration as part of their analysis. These structural measures can provide insight into the market power of firms as well as into the extent to which they compete. Although any market that is properly identified using the methods in Section 4.3 is valid, the extent to which structural measures calculated in that market are probative in any given context depends on a number of considerations. The following market considerations affect the extent to which structural measures are probative in any given context.[92]

First, structural measures may be probative if the market used to estimate them includes the products that are the focus of the competitive concern that the structural inquiry intends to address. For example, the concentration measures discussed in Guideline 1 will be most probative about whether the merger eliminates substantial competition between the merging parties when calculated on a market that includes at least one competing product from each merging firm.

Second, the market used to estimate shares should be broad enough that it contains sufficient additional products so that a loss of competition among all the suppliers of the products in the market would lead to significantly worse terms for at least some customers of at least one product. Markets identified using the various tools in Section 4.3 can satisfy this condition—for example, all markets that satisfy the HMT do so.

Third, the competitive significance of the parties may be understated by their share when calculated on a market that is broader than needed to satisfy the considerations above, particularly when the market includes products that are more distant substitutes, either in the product or geographic dimension, for those produced by the parties.

4.4.A. Market Participants

All firms that currently supply products (or consume products, when buyers merge) in a relevant market are considered participants in that market. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently supplying products in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not currently active in a relevant market, but that very likely would rapidly enter with direct competitive impact in the event of a small but significant change in competitive conditions, without incurring significant sunk costs, are also considered market participants. These firms are termed "rapid entrants." Sunk costs are entry or exit costs that cannot be recovered outside a relevant market. Entry that would take place more slowly in response to a change in competitive conditions, or that requires firms to incur significant sunk costs, is considered in Section 3.2.

Firms that are active in the relevant product market but not in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are already active in geographies that are close to the geographic market. Factors such as transportation

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[92] For simplicity, the discussion in the text focuses on the case where concerns arise that involve competition among the suppliers of products; analogous considerations may also arise for suppliers of services, or when concerns arise about competition among buyers of a product or service, or when analyzing market shares in certain specific settings (see Section 4.3.D).

costs are important; or for services or digital goods, other factors may be important, such as language or regulation.

In markets for relatively homogeneous goods where a supplier's ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available "swing" capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant. However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm's possession of idle or swing capacity alone does not make that firm a rapid entrant.

4.4.B. Market Shares

The Agencies normally calculate product market shares for all firms that currently supply products (or consume products, when buyers merge) in a relevant market, subject to the availability of data. The Agencies measure each firm's market share using metrics that are informative about the market realities of competition in the particular market and firms' future competitive significance. When interpreting shares based on historical data, the Agencies may consider whether significant recent or reasonably foreseeable changes to market conditions suggest that a firm's shares overstate or understate its future competitive significance.

How market shares are calculated may further depend on the characteristics of a particular market, and on the availability of data. Moreover, multiple metrics may be informative in any particular case. For example:

- Revenues in a relevant market often provide a readily available basis on which to compute shares and are often a good measure of attractiveness to customers.
- Unit sales may provide a useful measure of competitive significance in cases where one unit of a low-priced product can serve as a close substitute for one unit of a higher-priced product. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively low revenues.
- Revenues earned from recently acquired customers (or paid to recently acquired buyers, in the case of merging buyers) may provide a useful measure of competitive significance of firms in cases where trading partners sign long-term contracts, face switching costs, or tend to re-evaluate their relationships only occasionally.
- Measures based on capacities or reserves may be used to calculate market shares in markets for homogeneous products where a firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in a relevant market in response to a price increase or output reduction by others in that market (or to rapidly expand its purchasing in the case of merging buyers).
- Non-price indicators, such as number of users or frequency of use, may be useful indicators in markets where price forms a relatively small or no part of the exchange of value.

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Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- United States --

25 February 2014

This note is submitted by United States to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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− United States −

1. Pre-merger notification regime

Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction? If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below.)

1. In the United States, the Department of Justice and the Federal Trade Commission (collectively, "the Agencies"), State Attorneys General, and private parties can challenge mergers and acquisitions under federal and state antitrust laws. The Hart-Scott-Rodino Act, 15 U.S.C. § 18a, Section 7A of the Clayton Act (the "Act" or "HSR Act"), requires that parties to certain mergers or acquisitions notify the Agencies before consummating the proposed acquisition. The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or a bankruptcy sale), before they may complete the transaction. Whether a particular acquisition is subject to these requirements depends upon the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. Acquisitions that lack sufficient nexus to U.S. commerce and certain classes of acquisitions that are not likely to raise antitrust concerns are exempted from the premerger notification statute's coverage.[1]

2. If either Agency determines during the waiting period that further inquiry is necessary, the Agency is authorized by the HSR Act to issue a request for additional information and documentary material ("second request"). The second request extends the waiting period for a specified period (usually 30 days, but 10 days in the case of a cash tender offer or bankruptcy sale) after all parties have complied with the request (or, in the case of a tender offer or a bankruptcy sale, after the acquiring person complies). If competitive concerns remain at the end of the second request waiting period, the Agency and the merging parties may enter into a settlement with remedies designed to address the competitive concerns or the Agency may go to court to seek an injunction prohibiting the transaction. Whereas the Department of Justice ("DOJ") seeks preliminary and permanent injunctions in court, the Federal Trade Commission ("FTC") typically seeks to preliminarily enjoin the transaction in court pending the outcome of an administrative challenge before the Commission, which may result in the Commission's entry of a cease and desist order barring the transaction.

2. Review of mergers falling below notification thresholds

For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?

3. Although the U.S. premerger notification system subjects most mergers of significant size to premerger competitive review, a transaction does not have to be subject to such review for the Agencies to be able to challenge it under the antitrust laws. Under Section 7 of the Clayton Act, 15 U.S.C. § 18 – which was enacted many years before the HSR Act – the Agencies can challenge acquisitions of stock or assets, without regard to whether the acquisition requires a premerger notification under the HSR Act, and

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1 *See* 16 CFR 802.50-51 (nexus) and generally 15 U.S.C. § 18a(c) and 16 CFR Part 802.

such challenges can be brought either before or after a transaction is consummated. Indeed, the Agencies have investigated and challenged a number of transactions that were not reportable under the HSR Act.[2] If a consummated merger violates the antitrust laws, the same types of remedies are available as in the case of reportable mergers.[3]

4. The number of challenges to consummated and non-notifiable mergers has increased since 2000, partly as a result of the annual increase in the notification thresholds mandated by amendments made that year to the HSR Act (the thresholds increase based on the change in the gross national product). Following are statistics showing the number of DOJ merger investigations and challenges by fiscal year:

	2009	**2010**	**2011**	**2012**	**2013**
Total Preliminary Inquiries Opened (HSR and non-HSR)	68	64	90	74	65
Non-HSR Preliminary Inquiries	19	9	18	12	15
Consummated Preliminary Inquiries Opened	6	3	4	4	4
Total Merger Challenges	12	19	20	19	15
Non-HSR Challenges	4	6	4	5	3
Challenges of Consummated Transactions	3	0	1	2	0

If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

5. As noted in the response to Question 2, in the case of a consummated merger, whether or not it was subject to mandatory notification, the Agencies can obtain the same types of remedies that are available in the case of reportable mergers. Depending on the extent of integration (sometimes called the "scrambling") of the firms' operations, degradation of assets, or other changes in the market – all of which depend to some extent on how quickly after consummation the Agencies become aware of the merger – simple structural remedies may not be available or effective.

2 The Agencies ordinarily do not make information as to the applicability of the HSR Act to any given transaction public. But it is worth noting that the Agencies have challenged numerous consummated mergers in the period following the enactment of the HSR Act. *See, e.g., FTC and State of Idaho v. St. Luke's Health Sys., Ltd.*, 1:12-cv-00560-BLW-REB (D. Id. filed March 13, 2013), *available at* www.ftc.gov/opa/2013/03/stluke.shtm; *U.S. v. Bazaarvoice, Inc.*, C13-0133 (N.D. Cal., filed Jan. 10, 2013), *available at* www.justice.gov/atr/public/press_releases/2013/291185.htm; *U.S. and State of New York v. Twin America LLC*, 12 CV 8989 (S.D.N.Y., filed Dec. 11, 2012), *available at* www.justice.gov/atr/public/press_releases/2012/290136.htm; *In the Matter of Polypore International, Inc.*, Docket No. 9327 (Complaint issued Sept. 10, 2008), *available at* www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/12/polypore-international-inc-corporation-matter.

3 *See* U.S. Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (June 2011), *available at* www.justice.gov/atr/public/guidelines/272350.pdf, and Bureau of Competition, Fed. Trade Comm'n, Statement of Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (Apr. 2, 2003), *available at* www.ftc.gov/tips-advice/competition-guidance/merger-remedies.

6. Following are some examples of Agency challenges to consummated mergers that were not subject to HSR notification.

7. On January 10, 2013, DOJ filed a lawsuit in U.S. District Court for the Northern District of California challenging the June 2012 acquisition of PowerReviews, Inc. by Bazaarvoice Inc. The complaint alleged that Bazaarvoice's acquisition of PowerReviews eliminated the company's only significant rival in the market for product ratings and reviews platforms used by U.S. manufacturers and retailers to display product ratings and reviews on their websites. DOJ began investigating the transaction within days of its closing after it learned of the consummated deal. On January 8, 2014, following a three-week trial, the District Court found that the acquisition would likely have anticompetitive effects and therefore violated Section 7 of the Clayton Act. While Bazaarvoice argued that PowerReviews was a "weak and unworthy competitor," the Court found that portrayal "belied by the plethora of documents showing that, prior to the merger, Bazaarvoice considered PowerReviews its strongest and only credible competitor, that the two companies operated as a duopoly, and that Bazaarvoice's management believed that the purchase of PowerReviews would eliminate its only real competitor." The Court also rejected arguments by Bazaarvoice that any number of technology companies could enter the market, observing that: "The marketplace may be filled with many strong and able companies in adjacent spaces. But that does not mean that entry barriers become irrelevant or are somehow more easily overcome. To conclude otherwise would give eCommerce companies carte blanche to violate the antitrust laws with impunity with the excuse that Google, Amazon, Facebook, or any other successful technology company stands ready to restore competition to any highly concentrated market." Remedy proceedings are currently in progress.[4]

8. On January 2, 2014, DOJ filed a lawsuit and proposed settlement challenging the acquisition by Heraeus Electro-Nite LLC of certain assets of Midwest Instrument Company Inc. that substantially lessened competition in the market for sensors used in the steel manufacturing process. DOJ learned of the non-reportable transaction after it occurred in September 2012, and acquired assets already had been integrated into Heraeus's business, supply contracts had been terminated, and foreign production facilities had closed. To restore competition, the proposed consent decree requires Heraeus to divest certain acquired assets to a pre-approved buyer. Heraeus is required to waive non-compete provisions it had imposed on some former employees, and provide the new entrant with information about former personnel who might be available. Heraeus must also give advance notice of any future non-reportable acquisitions in the sensor market, and agree to provide training and technical support regarding the divested assets. Finally, to overcome a customer qualification process barrier to entry, Heraeus must allow customers of the new entrant to use Heraeus products for testing and qualification purposes.[5]

9. In October 2011, the FTC issued a consent order resolving charges that Cardinal Health, Inc.'s acquisition of three nuclear pharmacies from Biotech reduced competition for low-energy radiopharmaceuticals in Las Vegas, Nevada (radiopharmaceuticals are used in hospitals and cardiology clinics to diagnose and treat various diseases). The Commission's order required Cardinal Health to reconstitute and sell the acquired nuclear pharmacies to an FTC-approved buyer along with related intellectual property and permits. In addition, the order required Cardinal Health to provide the Commission with advance notice of future acquisitions in the relevant markets.[6]

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4 *See* "At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement," Remarks by DAAG Renata B. Hesse (Jan. 22, 2014), *available at* www.justice.gov/atr/public/speeches/303152.pdf.

5 *See* U.S. Dep't of Justice, Antitrust Case Filings, *U.S. v. Heraeus Electro-Nite Co., LLC, available at* www.justice.gov/atr/cases/heraeus.html.

6 *See In the Matter of Cardinal Health, Inc.*, http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2012/04/cardinal-health-inc.

10. In December 2010, the FTC, in an administrative proceeding, found that Polypore International, Inc.'s consummated acquisition of Microporous Products likely harmed competition in several markets for battery separators (which are key components of lead-acid batteries) and was therefore unlawful. The Commission ordered Polypore to divest Microporous to an FTC-approved buyer, and ordered a variety of ancillary relief provisions in support of the divestiture.[7]

11. In September 2009, Election Systems & Software, Inc. ("ES&S") acquired Premier Election Solutions, Inc., combining the two largest providers of voting equipment systems in the U.S. DOJ learned of the acquisition after consummation, and sued in March 2010, simultaneously filing an Asset Preservation Stipulation and Order, and a proposed Final Judgment. Given the diminution and dismantling of the Premier assets since ES&S acquired the company, relief that replicated the condition of Premier prior to the acquisition was not available. The final judgment required ES&S to divest (1) all the assets needed for an acquirer to compete in the voting equipment systems market, including intellectual property related to the Premier systems it had purchased; (2) tooling and fixed assets used to manufacture those systems; and (3) existing inventory and parts related to the Premier systems. ES&S was also required to divest a fully paid-up, non-exclusive, irrevocable license to certain products previously licensed to Premier. Other conditions intended to facilitate the acquirer's ability to compete included a waiver by ES&S of non-competition agreements for employees, and contractual terms that might otherwise prevent customers from selecting the acquirer for voting equipment services.[8]

12. In July 2008, Microsemi Corporation acquired most of the assets of Semicoa, Inc. DOJ learned of the transaction after consummation, and filed a complaint in December 2008 alleging that the transaction significantly lessened competition in the market for certain signal transistors and diodes used in aerospace and military applications. The court entered an order that month to preserve and maintain the relevant assets. A consent decree was entered in January 2010 that required the divestiture of essentially all the assets acquired in 2008. In addition, Microsemi was ordered to provide DOJ with advance notice of any future acquisitions in the relevant markets.[9]

Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?

13. One obvious difference between investigations of notifiable and non-notifiable mergers is the manner in which the Agencies learn of the transaction. In the absence of an HSR notification, the Agencies become aware of possibly anticompetitive mergers through news reports, complaints from competitors or customers, information from other investigations, or, in some cases, self-reporting by the parties.

14. The statutory waiting periods described above in the answer to Question 1 do not apply to a merger that is not subject to the HSR Act. Investigative procedures are largely the same for non-notifiable mergers as for notifiable ones, although there is no second request procedure. Compulsory process in the form of civil investigative demands is available to obtain the same information from the parties, but if they have already consummated the merger, they may not have the same incentives to cooperate with the Agencies in order to expedite Agency review.

7 *See In the Matter of Polypore International, Inc.*, Docket No. 9327 (Complaint issued Sept. 10, 2008), www.ftc.gov/enforcement/cases-and-proceedings/cases/2013/12/polypore-international-inc-corporation-matter.

8 *See* U.S. Dep't of Justice, Antitrust Case Filings, *U.S. v. Election Systems & Software, Inc.*, *available at* www.justice.gov/atr/cases/ess.html.

9 *See* U.S. Dep't of Justice, Antitrust Case Filings, *U.S. v. Microsemi Corporation, available at* www.justice.gov/atr/cases/microsemi.htm.

15. Timing issues are critical in the absence of the statutory waiting periods. If the transaction has just been consummated, the Agencies will proceed rapidly in order to avoid changes in the disposition of assets that would make it more difficult to restore competition in the event the transaction is deemed to violate the law, but the process is in practice no different than if the parties had not yet merged. The Agencies are likely to seek a timing agreement for the review process, and may seek an agreement from the parties to maintain the status quo; the Agencies can also seek a hold separate order from the court pending completion of the investigation.

16. If an Agency opens an investigation months after consummation, there may be evidence of actual anticompetitive effects that occur after the closing; in fact, those effects may be the reason why the Agency decided to investigate. Importantly, the legal standard does not change in the review of consummated mergers -- no proof of actual anticompetitive effects is required.[10] Although "post-merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit,"[11] the converse is not true. Indeed, the Supreme Court has stated that the probative value of post-acquisition evidence offered by a defendant has been "found to be extremely limited."[12] "The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 merger divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behaviour when such a suit was threatened or pending."[13]

3. Review of mergers that should have been notified but were not

If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties? In such a case, does your agency retain the power to review the merger under merger review or other competition law provisions? Is there a time limit on when the agency can bring an enforcement action?

17. Under Section 7A(g)(1) of the Act, 15 U.S.C. § 18a(g)(1), the United States can sue any person that fails to comply with the Act's notification and waiting period requirements for a civil penalty of up to $16,000 for each day the violation continues. The Agencies examine the circumstances of each violation to determine whether penalties should be sought and the appropriate amount.[14] All of the civil penalty cases brought by the United States have been settled by consent decrees. Civil penalties can be and have been sought even if the underlying transaction is not anticompetitive. In addition to seeking penalties for failure to comply with the HSR Act's notification and waiting period requirements, the Agencies have the

10 *See* Memorandum Opinion at 138, *United States v. Bazaarvoice*, No. 3:13-cv-00133-WHO (N.D. Cal. Jan. 8, 2014) (rejecting argument that "the government cannot carry its burden if post-merger evidence shows continued price competition and innovation or if 'affected customers have testified the merger is not harmful'"), *available at* www.justice.gov/atr/cases/f302900/302948.pdf.

11 *U.S. v. General Dynamics Corp.,* 415 U.S. 486 (1974).

12 *Id.,* at 504-05.

13 *Id. See also* Memorandum Opinion at 108-09, *United States v. Bazaarvoice*, No. 3:13-cv-00133-WHO (N.D. Cal. Jan. 8, 2014) (finding post-acquisition evidence regarding pricing to be "inconclusive" and in any event "manipulatable" and therefore "entitled to little weight"), *available at* www.justice.gov/atr/cases/f302900/302948.pdf; 5 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1205 (3d ed. 2009).

14 The Agencies often have determined not to seek civil penalties when parties have inadvertently failed to file *and* the parties made corrective filings promptly after discovering the failure to file, submitted an acceptable explanation for their failure to file, did not benefit from the violation, and have not previously violated the Act.

authority under Section 7 of the Clayton Act to review and challenge the underlying transaction and have done so in several instances. As noted in the answer to Question 7 below, Section 7 contains no time limit on challenging the underlying transaction.[15]

> ***If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.***

18. The Agencies have authority to investigate and challenge in court under Section 7 a transaction that parties have failed to properly report in accordance with the HSR Act. The remedy available in such circumstances is the same as for any Section 7 matter. The Agencies have obtained divestitures, partial or complete, to resolve competitive concerns in these situations. Over the years, there have been several examples of HSR civil penalties cases involving consummated transactions that have also resulted in successful divestitures after an investigation on the merits. For example, in a transaction involving Mahle GmbH, where the Agencies obtained the maximum civil penalty of more than $5.6 million for an intentional failure to file, the Agencies required the divestiture of the acquired company's U.S. piston business, including two factories and a research and development center, as well as technology outside the United States that supports that business.[16] In a transaction involving Sara Lee Corporation, where the Agencies obtained a $3.1 million civil penalty for failure to file, divestiture of several bands of shoe care products was required.[17]

19. Similarly, the Agencies have obtained substantive relief in addition to civil penalties in instances in which the parties consummated acquisitions after having filed incomplete HSR notifications (*e.g.*, failure to produce required business documents). For example, the Agencies obtained a $4 million civil penalty from Hearst Trust for filing an incomplete premerger notification and also required the company to divest the acquired business.[18] In another matter, the Agencies obtained a $2.97 million civil penalty from Automatic Data Processing for filing an incomplete premerger notification, and required the company to divest the acquired assets and offer a license to necessary data.[19]

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

16 *U.S. v. Mahle*, 1:97CV01401 (D.D.C. filed June 19, 1997), *available at* www.ftc.gov/news-events/press-releases/1997/06/ftc-obtains-56-million-german-and-brazilian-piston-manufacturers (press release for civil penalty case), and *In the Matter of Mahle Gmb* FTC C-3736 (June 6, 1997), *available at* www.ftc.gov/news-events/press-releases/1997/06/announced-actions-june-6-1997 (press release for divestiture).

17 *U.S. v. Sara Lee Corp*., 1:96CV00196 (D.D.C. filed Feb. 6, 1996), *available at* www.ftc.gov/opa/1996/02/sara.shtm (press release for civil penalty case); Press Release, Fed Trade Comm'n, Sara Lee Agrees to Pay Record Civil Penalty to Settle Charges Over Shoe-Care Product Acquistion (Feb. 6, 1996), *available at* www.ftc.gov/news-events/press-releases/1996/02/sara-lee-agrees-pay-record-civil-penalty-settle-charges-over-shoe; *In the Matter of Sara Lee Corp*., *available at* www.ftc.gov/enforcement/cases-and-proceedings/cases/1996/02/sara-lee-corporation-united-states-america-ftc.

18 *U.S. v. Hearst Trust*, 1:01CV02119 (D.D.C. filed Oct. 11, 2001), *available at* **Error! Hyperlink reference not valid.**www.ftc.gov/news-events/press-releases/2001/10/hearst-corporationsettles-charges-filing-incomplete-pre-merger (press release for civil penalty case), and *FTC v. Hearst Trust*, 1:01CV00734 (D.D.C. filed Dec. 14, 2001), *available at* **Error! Hyperlink reference not valid.**www.ftc.gov/news-events/press-releases/2001/12/hearst-corp-disgorge-19-million-and-divest-business-facts-and (press release for divestiture).

19 *U.S. v. Automatic Data Processing, Inc.*, 1:96CV00606 (D.D.C. filed Mar. 27, 1996); *In the Matter of Automatic Data Processing, Inc*., FTC Docket 9282 (filed June 18, 1997) www.ftc.gov/news-events/press-releases/1997/10/announced-actions-october-24-1997 (press release for consent order).

4. Subsequent review of previously cleared and consummated mergers

If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then? Is there a time limit on when such a post-merger review can take place? Please provide examples.

20. In the U.S., the Agencies do not "clear" or "approve" mergers. Although they may issue a public statement upon closing certain investigations without taking enforcement action,[20] this is not in any legal sense an official "approval" and the statement creates no rights for the parties. If the Agencies later conclude that a merger may have anticompetitive consequences, they can file a complaint challenging the transaction.

21. In 1957, the Supreme Court upheld a 1949 DOJ suit challenging stock acquisitions that occurred in 1917-19,[21] although Clayton Act challenges so many years after a transaction are exceptional. The FTC's challenge to Chicago Bridge & Iron Company's (CB&I) acquisition of certain Pitt-Des Moines, Inc. (PDM) assets provides a useful example.[22] In September 2000, the parties notified the Agencies of the proposed acquisition pursuant to HSR. More than 30 days later, but before the parties executed the acquisition, the FTC notified CB&I "that it had significant antitrust concerns about the acquisition and was conducting an investigation."[23] Roughly four months after expiration of the 30-day statutory waiting period, CB&I consummated the acquisition. The FTC subsequently issued an administrative complaint challenging the completed acquisition, and following an administrative trial found that the acquisition substantially lessened competition in four relevant product markets in the U.S., in violation of the Clayton and FTC Acts. To restore competition, the FTC ordered CB&I to create two separate, stand-alone divisions capable of competing in the relevant markets, and to divest one of those divisions within six months. The FTC's decision and order were upheld on appeal.[24] In *Evanston*, too, the FTC subsequently challenged a previously cleared transaction.[25] The HSR Act explicitly provides that the Agencies' decision not to challenge following an HSR review is not a bar to a future Clayton Act case.[26] Remedies available are the same broad equitable remedies that would have been available at the time of the merger, although changes in the markets may make remedies that would have been appropriate at the earlier time no longer suitable.

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20 *See* Antitrust Division, United States Department of Justice, *Issuance of Public Statements Upon Closing of Investigations* (December 12, 2003), *available at* www.justice.gov/atr/public/guidelines/201888.pdf.

21 *U.S. v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

22 *See* Press Release, Fed. Trade Comm'n, FTC Rules That Chicago Bridge & Iron Company Acquisition Is Anticompetitive (Jan. 6, 2005), *available at* www.ftc.gov/news-events/press-releases/2005/01/ftc-rules-chicago-bridge-iron-company-acquisition-anticompetitive/.

23 *Chicago Bridge & Iron Co. v. F.T.C.*, 534 F.3d 410, 420 and n.2 (5th Cir. 2008).

24 *Id*.

25 *In re* Evanston Nw. Healthcare Corp., F.T.C. No. 9315 (Aug. 6, 2007), *available at* www.ftc.gov/os/adjpro/d9315/070806opinion.pdf.

26 15 U.S.C. § 18a(i)(1).

22. The Agencies or private parties can also sue a merged firm that later engages in anticompetitive unilateral conduct, if monopoly power has been unlawfully acquired or maintained, under Section 2 of the Sherman Act. In the case of a merger that has been consummated following an Agency challenge and settlement pursuant to a consent decree, the Agencies could in theory petition the court to modify the decree if it were still in effect and circumstances had changed to the point that the merger was later producing anticompetitive effects. The parties and court would have to agree to any changes to the decree. This is different from a failure by a party to comply with the terms of an existing consent decree; the Agencies can always bring such a violation to the court's attention and seek appropriate sanctions and relief.

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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Suspensory Effects of Merger Notifications and Gun Jumping - Note by the United States

27 November 2018

This document reproduces a written contribution from the United States submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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United States

1. The Relevance and Investigation of Gun-Jumping

1.1. In the United States, Section 7A of the Clayton Act Requires Companies to Maintain Separate Operations Until the Expiration of a Waiting Period Following Merger Notification

1. In the United States, merging parties that meet certain threshold requirements[1] must file a notification and observe a waiting period to allow the federal antitrust agencies to investigate the competitive impact of proposed transactions, and if necessary, to seek an injunction to prevent the consummation of anticompetitive transactions. The notification and waiting period requirements apply to direct and indirect acquisitions when a size of person and commerce threshold contained in Section 7A of the Clayton Act ("Section 7A") [2] are met and if the acquiring person would hold a threshold amount of voting securities or assets after the acquisition.[3] The regulations adopted pursuant to Section 7A (the "Premerger Notification Rules") define "hold" to mean "beneficial ownership."[4] Although the term beneficial ownership is not defined, the agencies generally look to who bears the risk of loss or may realize potential gains, who makes decisions in the normal course of business, and who exercises control over assets or contracts.[5]

2. Gun-jumping is illegal under Section 7A, which prohibits the acquisition of beneficial ownership of certain assets or voting securities before the end of a statutory waiting period and provides for civil penalties. Firms that fail to observe the statutory waiting period—for example, by beginning to coordinate business activities prior to consummation of their merger—may be liable for gun-jumping. Therefore, although some communication and coordination is necessary in order for firms to plan for an upcoming

[1] For 2018, generally, if the transaction is valued between $84.4 million and $337.6 million, and one party has sales or assets of $168.8 million or greater and the other party has sales or assets of $16.9 million or greater, then the parties must file a notification with the Federal Trade Commission and the Antitrust Division of the Department of Justice. If the size of the transaction is more than $337.6 million, the parties must file notification with the agencies, no matter the size of the parties, unless an exemption applies. *See, e.g.*, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing.

[2] 15 U.S.C. 18a. Section 7A also is referred to as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or the HSR Act.

[3] 15 U.S.C. 18a(a)-(b).

[4] 16 C.F.R. § 800 *et. seq.*

[5] The Statement of Basis and Purpose accompanying the Premerger Notification Rules states that the "existence of beneficial ownership is to be determined in the context of particular cases with reference to the person or persons that enjoy the indicia of beneficial ownership," which include "[1] the right to obtain the benefit of any increase in value or dividends, [2] the risk of loss of value, [3] the right to vote the stock or to determine who may vote the stock, [4] the investment discretion (including the power to dispose of the stock)." 43 Fed. Reg. 33,449, 33,458 (July 31, 1978).

proposed merger, each company should be careful to keep operating as a separate, independent entity during the waiting period.

1.2. The Purpose of the Statutory Waiting Period Specified in Section 7A of the Clayton Act is to Allow Time to Review Proposed Mergers before the Assets Become Too Difficult to Unscramble.

3. The U.S. antitrust agencies principally challenge anticompetitive acquisitions under Section 7 of the Clayton Act ("Section 7"), which allows prospective challenges to mergers before the harm to consumers actually occurs.[6] Prior to the enactment of Section 7A, the agencies did not receive advance notice through premerger notifications and merging firms did not observe a statutory waiting period. As a result, Section 7 proved difficult to enforce because the U.S. agencies could challenge mergers only after their consummation and the agencies' only recourse was to sue to unwind anticompetitive mergers after the fact.[7] If a court later found that a merger was illegal and ordered relief, the interim loss of competition during trial harmed consumers.[8] Additionally, once companies had merged, effective relief was difficult to fashion because the companies' operations and assets often were irrevocably changed and entwined.

4. The U.S. Congress enacted Section 7A in 1976, requiring firms to file a notice and observe a waiting period. The legislative history leading to the enactment of Section 7A demonstrates Congress's intent to create a more effective enforcement mechanism "to detect and prevent illegal mergers prior to consummation."[9] Congress believed a premerger injunction is "often the only effective and realistic remedy against large illegal mergers—before the assets, technology, and management of the merging firms are hopelessly and irreversibly scrambled together, and before competition is substantially and perhaps irremediably lessened. . . ."[10] This legislative history underscores Congress's desire that competition existing before the merger be maintained pending review by the antitrust enforcement agencies and a court.

5. The legislative history also underscores Congress' desire to maintain the integrity of the premerger investigation. The purpose is to give the "the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of

[6] "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. 18. Although agencies can challenge mergers under Sections 1 and 2 of the Sherman Act, they rarely do because the Sherman Act requires proof of actual harm to competition and the Section 7 requires proof that an acquisition "may" substantially lessen competition. *Id.*

[7] *See, e.g.*, Competitive Impact Statement at 11. *United States v. Gemstar-TV Guide International, Inc.*, No. 03CV000198 (D.D.C. 2003), https://www.justice.gov/atr/case-document/competitive-impact-statement-108 ("Gemstar CIS").

[8] Gemstar CIS at 11.

[9] S. Rep. No. 94-803, pt. 1 at 63 (1976).

[10] H.R. Rep. No. 94-1373, at 5 (1976).

questionable legality before they are consummated."[11] In discussing waiting period requirements, Congressman Rodino explained: "[T]here may well be cases in which the merging companies act in bad faith, or conceal relevant data from the Government . . . . If they do so, they act at their peril, and would properly be subject to sanctions. . . ."[12] Congress left it to the agencies to determine the information that they need from the parties and provided equitable and civil relief in the event merging parties did not substantially comply with requests for information.

1.3. Gun-Jumping Also May be Illegal under Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act

6. Section 1 of the Sherman Act ("Section 1") prohibits agreements between competitors that harm competition.[13] Thus, during the pre-consummation period, competing firms also may be liable for agreements that violate Section 1. Conduct illegal under Section 1 may include merging firms' jointly setting prices or contract terms, or entering market division or customer allocation agreements. In addition, if competing firms use the other party's competitively sensitive information during the pre-consummation period, their exchange and use of such information may constitute an agreement in violation of Section 1. These agreements harm consumers by eliminating competition at a time when firms should behave as separate and independent competitors. The agencies also may use conduct that violates Section 1, including exchanges and use of competitively sensitive information, as indicia of operational control to prove violations of Section 7A that provide for civil penalties.[14] As discussed below, several gun-jumping complaints have alleged violations of Section 1.

1.4. The Agencies May Discover Evidence of Gun-jumping During Merger Review From the Parties or Third Parties

7. Evidence of gun-jumping usually is discovered when the agencies investigate the proposed transaction. In the United States, agencies collect contemporaneous documents during merger review; these documents sometimes reveal communications between the parties about illegal gun-jumping activity. In other instances, third-party witnesses may provide information that suggests the parties have engaged in illegal gun-jumping activity. Both the Antitrust Division and the Federal Trade Commission have authority to subpoena documents or testimony or issue civil investigative demands requesting interrogatory

[11] *Id.*

[12] 122 Cong. Rec. 30878 (1976) (statement of Representative Rodino).

[13] 15 U.S.C. 1. The Federal Trade Commission has jurisdiction under Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition in or affecting commerce. 15 U.S.C. § 45. Despite enforcement using different statutes, the overwhelming majority of FTC competition cases rely on the same standards as those used by the Antitrust Division, including in cases alleging conduct that would violate Section 1 of the Sherman Act.

[14] *See, e.g.*, Complaint at 8-9. *United States v. Flakeboard America Ltd.*, No. 3:14-cv-4949 (N.D. Cal. 2014), https://www.justice.gov/atr/case-document/file/496511/download ("Flakeboard Complaint"); Complaint at 11, 13. *United States v. Computer Associates Int'l Inc.*, Civ. No. 1:01CV02062 (D.D.C. 2002) https://www.justice.gov/atr/case-document/complaint-equitable-relief-and-civil-penalties ("Computer Associates Complaint").

responses from the parties and from third-party witnesses. Based on initial findings, the agencies can determine whether they need additional information and can use their subpoena power to obtain this information to understand the conduct. Parties also often submit white papers and engage in discussions with the agencies to explain and defend the relevant conduct.

2. Legal Consequences and Remedies for Gun-Jumping

8. Under Section 7A(g)(1) of the Clayton Act, firms in violation of Section 7A are liable for civil penalties.[15] Only the Antitrust Division may obtain civil penalties; the Federal Trade Commission may refer its cases to the Antitrust Division to obtain civil penalties. Each party is liable to pay the applicable civil penalty. In 2018, the maximum penalty per company per day in violation of Section 7A is $41,484.[16] Thus, a 7A violation lasting ten days could lead to a penalty for each party of up to $414,840 or $829,680.[17] To date, the largest civil penalty obtained by either agency for a violation of Section 7A was $11,000,000.[18]

9. Defendants that violate Section 1 also may be liable for equitable remedies, including disgorgement. For example, the United States sought and obtained disgorgement of $1.15 million in illegally obtained profits during the six-month period leading up to its settlement with Flakeboard and SierraPine.[19] Additional equitable remedies have included rescission of contracts entered into during the pre-consummation period[20] and injunctive relief.[21]

10. Pre-merger conduct for mergers that do not meet the Section 7A thresholds or otherwise are not notifiable cannot technically violate Section 7A. However, parties that are not covered by Section 7A still may be liable for violations of Section 1 during the pre-consummation period of their merger.

[15] 15 U.S.C. § 18a(g)(1).

[16] *See* 16 C.F.R. § 1.98.

[17] Each party pays $41,484 multiplied by the ten days of the violation – i.e., 10-Day Penalty = 2*($41,484*10).

[18] Final Judgment at 7. *United States v. VA Partners I*, No. 16-cv-01672 (WHA) (N.D. Cal. 2016), https://www.justice.gov/atr/case-document/file/908516/download.

[19] Competitive Impact Statement at 11. *United States v. Flakeboard America Ltd.*, No. 3:14-cv-4949 (N.D. Cal. 2014), https://www.justice.gov/atr/case-document/file/496496/download ("Flakeboard CIS").

[20] *See, e.g.,* Gemstar CIS at 15.

[21] *See, e.g.,* Flakeboard CIS at 11-12; Competitive Impact Statement at 15. *United States v. Computer Associates Int'l Inc.*, Civ. No. 1:01CV02062 (D.D.C. 2002), https://www.justice.gov/atr/case-document/competitive-impact-statement-76 ("Computer Associates CIS").

3. Interactions and Communications Indicating Gun-Jumping

11. As discussed above, gun-jumping occurs when parties to an acquisition prematurely transfer beneficial ownership prior to the end of the required waiting period. A common way in which parties prematurely transfer beneficial ownership is by allowing the buyer to take operational control over the assets that are the subject of the acquisition.[22]

3.1. Taking Control of Physical Assets Such as a Plant, Inventory, or Machinery

12. The agencies have challenged conduct as gun-jumping when one party to a merger took control of the other parties' plant, inventory, or machinery. For example, in 2014, the United States alleged Flakeboard America Ltd. and Sierra Pine entered an illegal premerger agreement to close a Sierra Pine mill and divert customers to Flakeboard. The agreement to close the mill and allocate customers constituted an illegal agreement between competitors to reduce output and allocate customers in violation of Section 1 of the Sherman Act. Additionally, the complaint alleged that by coordinating to close the mill, allocate customers, and exchange competitively sensitive information, Flakeboard exercised operational control (and thereby obtained beneficial ownership) of SierraPine's business prior to the end of the waiting period in violation of Section 7A. As a result of the agreement, Flakeboard successfully secured a substantial amount of business from SierraPine and harmed competition.

13. In this example, the parties abandoned their merger in response to competitive concerns raised by the United States. To remedy the Section 1 violation, the settlement agreement provides for disgorgement of $1.15 million, the approximate amount of profits that Flakeboard illegally obtained from closing the mill and allocating customers. Additionally, each party agreed to pay a civil penalty of $1.9 million ($3.8 million total) to remedy the Section 7A violation.

14. Other cases have alleged that assuming control over physical assets constituted a gun-jumping violation. For example, Titan Wheel took immediate possession and operations of a Pirelli Armstrong plant and used the plant to manufacture tires during a thirteen-day period in violation of Section 7A[23]; Titan Wheel agreed to pay the maximum civil penalty of $130,000 to settle the case. In another case, two competitors in the market for title plant services,[24] Commonwealth Land Title Insurance and First American, agreed to consolidate their title plants in the District of Columbia. Before relocating, Commonwealth terminated existing contracts with customers. After the relocation, the

[22] There are no litigated gun-jumping cases, but several consent decrees provide guidance about gun-jumping violations. Practitioners may look to litigated cases involving Section 1 violations for additional guidance.

[23] Complaint at 6-7. *United States v. Titan Wheel*, No. 1:96CV01040 (D.D.C. 1996), https://www.justice.gov/atr/case-document/file/628336/download ("Titan Wheel Complaint").

[24] Title plant services are used by abstractors, title insurers, title insurance agents, and others to determine ownership of and interests in real property in connection with the underwriting and issuance of title insurance policies and for other purposes. Complaint at 3. *In re Commonwealth Land Title Insurance Co.* No. C-3835 (F.T.C. 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/11/ftc.gov-9810127cmp.htm ("Commonwealth Complaint"). The FTC also alleged the combination violated Section 7.

parties jointly set prices and terms for plant title services. The Federal Trade Commission alleged this constituted an agreement to raise prices and fix output in violation of Section 5.[25] The settlement included injunctive relief.[26]

15. *United States v. Duke Energy* provides another example of parties taking control of assets.[27] In this case, Duke Energy entered into an agreement to acquire the Osprey Energy Center from Calpine Corp. In conjunction with the acquisition agreement, Duke also entered into a tolling agreement for the Osprey plant.[28] Under the tolling agreement, Duke immediately began exercising control over the Osprey plant, making decisions about its output. Duke began earning profits from and assuming risk for the day-to-day operations of the business. Duke admitted it entered the tolling agreement only as part of its acquisition of the Osprey plant.[29]

16. Management agreements, such as tolling agreements, may be permissible outside of the merger context. However, because management agreements "entered into in connection with an acquisition transfers operating control of the assets or business," they may violate Section 7A when entered in conjunction with a merger agreement.[30] In these instances, the buyer takes over the business and obtains operational control through the management agreement while the seller essentially exits prior to merger review.[31] In this case, the combination of the tolling agreement and the acquisition agreement allowed Duke Energy to acquire beneficial ownership of the Osprey plant by taking operational control of the plant. Through these intertwined agreements, Calpine ceased to be an independent competitor and the parties harmed competition. The parties agreed to pay a $600,000 civil penalty.[32]

3.2. Taking Control of Management Functions

17. Evidence that the acquiring company has taken control of management functions in some way is a common form of gun-jumping alleged in the agency complaints. This control takes many forms and includes *ad hoc* decision making and formalized agreements

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[25] Commonwealth Complaint at 4. The allegations correspond to a violation of Section 1 of the Sherman Act.

[26] Analysis of Proposed Consent Order to Aid Public Comment at 3-4. *In re Commonwealth Land Title Insurance Co.*, No. C-3835 (F.T.C. 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/08/ftc.gov-9810127.ana_.htm.

[27] Complaint at 2-3. *United States v. Duke Energy Corp.*, No. 1:17-cv-00116 (D.D.C. 2017), https://www.justice.gov/atr/case-document/file/928986/download ("Duke Energy Complaint").

[28] Tolling agreements are commonly used in the energy industry. These agreements are contracts where a buyer supplies fuel to an electric generator, and the generator provides power to the buyer.

[29] *United States v. Duke Energy Corp.*, No. 17-cv-00116 (D.D.C. 2017) ("Duke Energy CIS") at 3, https://www.justice.gov/atr/case-document/file/929006/download.

[30] Lawrence R. Fullerton, Deputy Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, Address before the Business Development Associates Antitrust 1997 Conference: Current Issues in Radio Station Merger Analysis (Oct. 21, 1996) at 8.

[31] *Id*. at 8.

[32] Duke Energy CIS at 6.

contained in the merger contracts. The conduct alleged includes joint decision-making, agreement on prices and contract terms, reorganizations, and even settlement of disputes on behalf of another party to the merger.

18. In its case against Gemstar-TV Guide International, Inc., the United States alleged that prior to their merger, the parties engaged gun-jumping by "effectively merg[ing] most of their decision-making processes."[33] They did so by developing standard contract prices and terms, exchanging and redlining draft contracts and using TV Guide to act as Gemstar's agent during customer contract negotiations in violation of Section 7A.[34] Additionally, Gemstar and TV Guide agreed on contract prices and terms, agreed to slow customer negotiations during the pre-consummation period to get better terms after the merger, and entered into a market and customer allocation agreement in violation of Section 1.[35] The United States alleged that this joint decision-making eliminated both companies as independent competitors during the pre-consummation period.[36] The agreements harmed competition through increased prices and more onerous contract terms.[37] Gemstar agreed to pay a $5,676,000 civil penalty under Section 7A violations and agreed to injunctive relief, including rescission of contracts entered into during the statutory waiting period.[38]

19. In another instance, Input/Output announced a reorganization of Digicourse, the business Input/Output planned to acquire. Pursuant to this reorganization, Input/Output assigned key Digicourse executives to new roles and titles, moved them into Input/Output facilities, and provided them with Input/Output business cards and email addresses. The United States alleged that these actions "constituted a transfer of beneficial ownership of DigiCourse to Input/Output prior to the expiration of the waiting period" in violation of Section 7A.[39] The parties agreed to pay $450,000 in civil penalties.[40]

3.3. Limitations of Day-to-Day Operations Through Merger Contract Provisions.

20. Often merging parties will include provisions in their merger agreements designed to maintain the value of the acquired firm during the pre-merger period. These "interim conduct of business" provisions require approval from the acquiring firm for certain decisions taken after the merger agreement is signed but before the merger has closed. These types of provisions often require approval for decisions such as undertaking large capital projects, selling significant assets, or incurring significant debt. Usually, merging

[33] Gemstar Complaint at 15.

[34] *Id.* at 15-17.

[35] *Id.* at 10-15.

[36] Gemstar Complaint at 16-17.

[37] Gemstar CIS at 10-11.

[38] *Id.* at 15. The decision to rescind the contracts at issue rested solely with the third parties who entered into the contracts.

[39] Complaint at 4. *United States v. Input/Output, Inc.*, No. 1:99CV00912 (D.D.C. 1999), https://www.justice.gov/atr/case-document/complaint-civil-penalties-violation-premerger-reporting-requirements-hart-scott ("Input/Output Complaint").

[40] Final Judgment at 2. *United States v. Input/Output, Inc.*, No. 1:99CV00912 (D.D.C. 1999), https://www.justice.gov/atr/case-document/proposed-final-judgment-154.

parties have legitimate business reasons for including such provisions and they do not run afoul of gun-jumping laws. However, if the interim conduct of business provisions require approvals for decisions the acquired firm would make in the ordinary course of its business, the provisions may constitute gun-jumping. Three matters provide examples of overly restrictive conduct of business provisions.

21. In 2010, the United States entered into a consent decree to address gun-jumping that occurred between Smithfield Foods and Premium Standard Farms.[41] Smithfield entered into a merger agreement with Premium Standard Farms that contained provisions limiting Premium Standard's operations during the waiting period. These provisions also included a requirement that Premium Standard "carry on its business in the ordinary course consistent with past practice."[42] Because of this provision, Premium Standard submitted three ordinary course purchase contracts to Smithfield Foods for its approval.[43] Each time Premium Standard sought consent for the contracts, it provided Smithfield with proposed terms include price, quantity, and length of contract.[44] The United States alleged a violation of Section 7A and obtained a $900,000 civil penalty.[45]

22. *United States v. Computer Associates* provides a similar example. Computer Associates and Platinum Technology International were leading vendors of management software products and competed aggressively prior to their agreement to merge.[46] The merger agreement contained several provisions governing how Platinum would conduct its business prior to consummation of the merger, including requirements that it seek approval to change standard license terms or offer discounts greater than 20 percent.[47] Before entering into the merger agreement, Platinum routinely entered into contracts with discounts greater than 20 percent.[48] Platinum changed its customer contract approval procedures to ensure that the company met these limitations and Computer Associates executives made decisions about Platinum contracts during the HSR waiting period. Computer Associates executives had access to competitively sensitive information when making decisions about whether to approve or deny changes.[49] The merger agreement also limited Platinum's ability to offer certain services without Computer Associates' approval. Computer Associates also changed some of Platinum's accounting practices and cancelled

[41] Final Judgment at 1. *United States v. Smithfield Foods, Inc.*, No. 1:10-cv-00120 (D.D.C. 2010), https://www.justice.gov/atr/case-document/final-judgment-171 ("Smithfield Final Judgment").

[42] Complaint at 5. *United States v. Smithfield Foods, Inc.*, No. 1:10-cv-00120 (D.D.C. 2010), https://www.justice.gov/atr/case-document/complaint-211 ("Smithfield Complaint").

[43] Smithfield Complaint at 6.

[44] *Id*.

[45] Smithfield Final Judgment at 2.

[46] Computer Associates Complaint at 5. *United States v. Computer Associates Int'l Inc.*, Civ. No. 1:01CV02062 (D. D.C. 2002), https://www.justice.gov/atr/case-document/complaint-equitable-relief-and-civil-penalties ("Computer Associates Complaint").

[47] *Id*. at 2.

[48] *Id*. at 8.

[49] *Id*. at 8-10.

Platinum's participation in trade shows.[50] The United States alleged violations of both Section 7A and Section 1. Computer Associates and Platinum each agreed to pay a civil penalty of $638,000 as well as injunctive relief.[51]

23. *United States v. Qualcomm* provides a third example of an acquiring firm exercising control over the day-to-day operations of Flarion, the to-be-acquired firm.[52] The merger agreement required Flarion to support certain pre-existing technologies, but prohibited it from expanding the scope of the existing deployments of technologies or supporting new deployments of technologies.[53] Within days of the merger agreement, Flarion sought Qualcomm's consent before entering transactions with third parties even when the merger agreement did not oblige Flarion to do so.[54] The United States alleged a violation of Section 7A and obtained a $1.8 million civil penalty.[55]

24. In all of these examples, the acquired firm stopped exercising its own independent business judgment and deferred to the acquiring firm. The acquiring firm then exercised control over business operations and acquired beneficial ownership of the business prior to the expiration of the waiting period. In doing so, consumers were denied the benefits of competition prior to the end of the statutory waiting period and the agencies were denied the ability to review the merger while the parties remained independent during the waiting period.

3.4. Negotiating Contracts or Settlements on Behalf of the Other Party

25. The agencies have alleged Section 7A violations where executives from one of the merging companies attempted to negotiate contracts or seek settlements to lawsuits on behalf of the other party. In *United States v. Input/Output*, an executive from the acquired company traveled to the United Kingdom to resolve a commercial dispute between the acquiring company and one of its customers and eventually accepted settlement on behalf of the acquiring firm.[56] Ordinarily, we expect competitors to try to win business when customers become unhappy=, not try to improve their competitor's customer relationships.

26. In *United States v. Gemstar-TV Guide International, Inc.*, an executive from TV Guide led negotiations to settle a patent dispute between Gemstar and another market participant. The discussed terms were against TV Guide's interests because they would have made it more difficult for TV Guide to compete effectively.[57] In both instances, the

[50] *Id*. at 10.

[51] Computer Associates CIS at 14-19.

[52] Complaint at 3-4. *United States v. Qualcomm Inc.,* No. 1:06CV00672 (PLF) (D. D.C. 2006), https://www.justice.gov/atr/case-document/complaint-civil-penalties-violation-premerger-reporting-requirements-hart-scott-0 ("Qualcomm Complaint").

[53] *Id*. at 3-4.

[54] Qualcomm Complaint at 4.

[55] Final Judgment at 2. *United States v. Qualcomm Inc.,* No. 1:06CV00672 (PLF) (D. D.C. 2006), https://www.justice.gov/atr/case-document/final-judgment-152.

[56] Input/Output Complaint at 4.

[57] Gemstar Complaint at 16.

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settlement discussions reflected the parties' failure to act as independent competitors. Instead, they demonstrated aligned economic interests prior to the expiration of the waiting period in violation of Section 7A.

3.5. Exchanges of Competitively Sensitive Information

27. Exchanges of competitively sensitive information between competitors could lead to violations of Section 1 of the Sherman Act or violations of Section 7A.[58] Additionally, the agencies have alleged exchanges of competitively sensitive information as indicia of operational control leading to beneficial ownership in violation of Section 7A.[59]

28. The *Insilco* case provides an example of an illegal information exchange in conjunction with a merger agreement. During the pre-consummation period for Insilco's acquisition of a close competitor in the allied tube industry, Insilco requested and received customer specific information that included prior negotiations, price quotes, and present and future pricing policies and strategies in alleged violation of Section 5.[60] In *Gemstar*, the United States alleged that an exchange and use of information was part of an agreement to fix prices and terms in violation of Section 1.[61]

29. Although merging firms need some information during the due diligence and pre-consummation planning periods, they need to be careful about what and to whom they transmit this information. A key question to ask is, if the merger does not go through, would the exchange of information between competitors facilitate collusion or harm competition in another way. If so, the parties should not freely exchange the information. If the information is necessary to the merger process, the merging parties should take care to employ a "clean team" or use other protections to prevent the information from reaching people responsible for the normal operation of the businesses during the waiting period.

[58] Exchanges of competitively sensitive information among competitors also could lead to violations of Section 1 of the Sherman Act outside of the pre-merger context. *See, e.g., United States v. Gypsum,* 438 U.S. 422 (1978); *United States v. Container Corp. of America,* 393 U.S. 333 (1969). Although cases outside the premerger context are illustrative, we limit the discussion to pre-merger cases.

[59] Flakeboard Complaint at 9 (including competitively sensitive information as one of the assets acquired when the Flakeboard obtained beneficial ownership of the Sierra Pines plant in violation of Section 7A); *see also* Gemstar Complaint at 16-17 (alleging the exchange of competitively sensitive information as evidence of operational control in violation of Section 7A); Computer Associates Complaint at 11 (including the exchange of information as evidence and indicia of operational control over Platinum).

[60] Complaint at 2. *In re Insilco Corp.,* No. C-3783 (F.T.C. 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/01/insilcocmp.pdf.

[61] Gemstar Complaint at 13-14.

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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Start-ups, killer acquisitions and merger control – Note by the United States

11 June 2020

This document reproduces a written contribution from the United States submitted for Item 2 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.
More documents related to this discussion can be found at
http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm

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United States

1. Introduction

1. In the United States, the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (together, the Agencies) recognize that competitive markets play an important role in promoting and incentivizing innovation that benefits consumers.[1]

2. New entry, as well as expansion by existing firms, can spur innovation that benefits consumers. Innovative firms are often attractive M&A targets. On one hand, incumbent firms seek to acquire pioneering firms and emerging technologies that can be further developed. On the other hand, incumbents may target such firms to eliminate a competitive threat.[2]

3. Section 7 of the Clayton Act prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[3] Acquisitions of innovative firms, mavericks, nascent competitors, and potential competitors are reviewable under Section 7. U.S. merger law is generally forward-looking, designed to stop threats to competition "in their incipiency;" but it can be used to challenge and unwind consummated mergers as well.[4] In addition, transactions may be reviewed under Section 1 of the Sherman Act, which prohibits contracts, combinations or conspiracies in restraint of trade; or Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, and conspiracy to monopolize.[5]

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[1] *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.4 (2010), https://www.ftc.gov/sites/default/files/attachments/mergerreview/100819hmg.pdf [hereinafter *Horizontal Merger Guidelines*].

[2] *See* Speech, Jeffrey M. Wilder, Acting Deputy Asst. Att'y General for Economics, U.S. Dep't of Justice, *Potential Competition in Platform Markets*, Hal White Antitrust Conference (June 10, 2019), https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-jeffrey-m-wilder-delivers-remarks-hal-white; Speech, Makan Delrahim, Asst. Att'y Gen., U.S. Dep't of Justice, *"And Justice for All:" Antitrust Enforcement and Digital Gatekeepers*, Antitrust New Frontiers Conference: The Digital Economy & Economic Concentration (June 11, 2019), https://www.justice.gov/opa/speech/file/1171341/download; Prepared Statement of the Federal Trade Commission, "Competition in Digital Technology Markets: Examining Acquisitions of Nascent and Potential Competitors by Digital Platforms," before the U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, and Consumer Rights (Sept. 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf. *See also* Economic Report of the President and Annual Report of the Council of Economic Advisers (Feb. 2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf; OECD Global Forum on Competition, *Merger Control in Dynamic Markets – Contribution from the United States* (Dec. 6, 2019), https://one.oecd.org/document/DAF/COMP/GF/WD(2019)32/en/pdf.

[3] 15 U.S.C. § 18.

[4] *Brown Shoe v. United States*, 370 U.S. 294, 323 (1962); *see also* Complaint, *United States v. Parker Hannifin Corp.*, No. 17-cv-01354 (D. Del. Sept. 26, 2017) (challenging consummated acquisition).

[5] 15 U.S.C. § 1, 2. The DOJ enforces the Sherman Act. The FTC enforces Section 5 of the FTC Act, which prohibits "unfair methods of competition," including violations of the Sherman Act as well as some other types of conduct. *See* Federal Trade Commission, Statement of Enforcement Principles Regarding "Unfair Methods of Competition"

4. U.S. antitrust law recognizes that mergers among competitors, including nascent or potential competitors, may be anticompetitive, especially "when an industry leader seeks to acquire an up-and-coming competitor that is changing customer expectations and gaining sales."[6] This includes the acquisition of a company that is not yet present in a market, but which may have the ability and incentive to enter and compete in the incumbent's market.[7] The Agencies understand the importance of competition from firms that threaten to disrupt market conditions by repositioning or offering a new technology or business model, and appreciate that the elimination of such firms through M&A activity can result in a substantial lessening of competition.[8]

5. The Agencies also recognize that acquisitions of existing or potential competitors may result in efficiencies. As further described in the *Horizontal Merger Guidelines* (2010), the Agencies will consider whether the merger has the potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. As in any merger analysis, however, cognizable efficiencies must be merger-specific, verifiable, and not result from an anticompetitive aspect of the merger. Ultimately, they must be shown to enhance competition and thus benefit consumers. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, *e.g.*, by combining complementary assets.[9]

2. U.S. Law Addressing Acquisitions of Nascent and Potential Competitors

6. Section 7 of the Clayton Act provides a well-developed legal framework for preventing or undoing mergers that may substantially lessen competition. The *Horizontal Merger Guidelines* set out the framework used by the Agencies to analyze horizontal mergers, including those between an incumbent and a small and growing competitor or a potential entrant. The Agencies take a careful, fact-based approach to assessing the competitive effects of any merger or acquisition, focusing on the particular economic characteristics of the markets affected by the transaction. To that end, the Agencies conduct thorough factual investigations that include economic analysis, the review of relevant documents and information, the taking of testimony, and interviews with parties, customers, and competitors, and other market participants.[10]

7. In some industries, market conditions and industry structure are not always static and may change rapidly. Therefore, the Agencies bear in mind that current or past market shares may overstate – or perhaps understate – the current or future competitive significance of industry participants, particularly in industries where innovation and new

Under Section 5 of the Federal Trade Commission Act, 80 FR 57056 (Sept. 21, 2015), https://www.ftc.gov/system/files/documents/federal_register_notices/2015/09/150921commissionpolicyfrn.pdf;

see alsoCalifornia Dental Ass'n v. FTC, 526 U.S. 756, *n.3* (1999).

[6] *See* Statement of the Commission, *supra* note 2 at 7.

[7] *Horizontal Merger Guidelines* § 9, Entry; Complaint ¶ 37, *United States v. Westinghouse Air Brake Technologies Corp.*, et al., No. 16-cv-02147 (D.D.C. Oct. 26, 2016).

[8] *Horizontal Merger Guidelines* § 2.1.5, Disruptive Role of a Merging Party..

[9] *Horizontal Merger Guidelines* §10, Efficiencies.

[10] *Horizontal Merger Guidelines* § 2, Evidence of Adverse Competitive Effects.

product development are key dimensions of competition.[11] The Agencies consider both price and non-price effects in their analyses, recognizing that firms often compete on the basis of quality and innovation, such as new product development, among other factors.[12]

8. The anticompetitive effects of a merger need not be certain to render a merger illegal under Section 7.[13] Predicting anticompetitive effects with precision can be particularly difficult where the parties do not currently operate in the same relevant market and the competitive effects are predicated on the reasonable likelihood of future competition between the merging parties. In analyzing the potential for competitive harm from a transaction, the Agencies rely on a broad range of evidence, including, but not limited to, strategic plans and other business documents, and public statements of the acquiring and to-be-acquired firm, and inquiry into the rationale for the proposed transaction. The Agencies also consider the acquirer's past successes or failures in bringing to market new or acquired products and the likelihood that the acquired firm would develop into a significant competitor without the merger. Moreover, the Agencies also seek and evaluate the views of competitors and customers of the merging parties, industry experts, and market analysts. Where future competition may depend on the willingness of investors to fund, or continue to fund, new or developing market participants, the Agencies may seek and evaluate the views and future plans of investors.

9. Section 2 of the Sherman Act provides an additional framework for evaluating exclusionary or predatory conduct, including acquisitions that may contribute to the acquisition or maintenance of monopoly power. For example, Section 2 may apply where a monopolist engages in exclusionary conduct (such as an acquisition) to eliminate the potential competitive threat posed by a technology, product, or service, even if it "is not presently a viable substitute" for the acquirer's own technologies, products, or services.[14] Section 2 liability requires proof of monopoly power in a relevant market, and anticompetitive conduct to acquire or maintain that power.[15] A successful monopoly maintenance claim does not require proof that a nascent or potential competitor would actually have developed into a viable substitute, but "whether as a general matter the

[11] *Horizontal Merger Guidelines* § 5.2, Market Shares.

[12] Note by the United States, Non-price Effects of Mergers, DAF/COMP/WD(2018) 45, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/non-price_effects_united_states.pdf.

[13] *Horizontal Merger Guidelines* § 1, Innovation and Product Variety.

[14] *United States v. Microsoft Corp.*, 253 F.3d 34, 54 (D.C. Cir. 2001) ("Nothing in § 2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes.").

[15] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004)("[T]he

possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.")(emphasis in original); *accord Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 891 (5th Cir. 2016)("Predatory or anticompetitive conduct, which excludes competitors from a market, is conduct, *other than competition on the merits or restraints reasonably necessary to competition on the merits*, that reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power.")(citation and internal quotation marks omitted; emphasis added); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007)("Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of *competition on some basis other than the merits*.")(emphasis added); *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1338–39 (Fed. Cir. 2006)("To establish a section 2 violation, one must prove that the party charged had monopoly power in a relevant market and acquired or maintained that power by anti-competitive practices *instead of by competition on the merits*.")(citation omitted; emphasis added).

exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to the defendant's continued market power."[16]

10. Section 2 analyses also include an evaluation of any procompetitive justifications. When parties come forward with sufficient evidence to review the claimed procompetitive benefits of an acquisition, the Agencies consider whether that acquisition would result in, among other things, new or improved products, increased speed to market of any acquired products, and any benefits in the form of improved innovation, including the ability of the merged firm to conduct research and development more effectively, to the extent those have likely effects on the relevant market.[17] For example, an incumbent digital platform might acquire, through merger, the technology of a nascent or potential competitor because the technology complements or enhances the incumbent's own technology. Additionally, an incumbent may have the financial resources, experience, and other business assets to more efficiently develop and commercialize a nascent or potential competitor's technology, thus making it available to more consumers.

2.1. Agency Experience

11. For years, the Agencies have challenged vertical and horizontal transactions that involve nascent competitors. In so doing, the Agencies have sought remedies to resolve their competition concerns. Where an adequate remedy was not available, the Agencies went to court to seek a decision declaring the merger illegal and enjoining it from closing. Challenges to nascent competitor acquisitions have included transactions where: (i) the merging firms were actual competitors, (ii) deals where, but for the merger, one firm would have faced competition from the target in the future, and (iii) mergers where both firms were working to develop products that would likely compete in the future. Examples of each of these types of cases are discussed below.

2.1.1. Cases Involving Actual Competitors

12. The Agencies have routinely challenged acquisitions by an incumbent firm of a smaller competitor that had, at the time of the acquisition, the potential to expand its market share and competitive significance absent the acquisition.

13. In September 2019, the DOJ sued to block Novelis Inc.'s proposed acquisition of Aleris Corporation in order to preserve competition in the North American market for rolled aluminum sheet for automotive applications, commonly referred to as aluminum auto body sheet.[18] As alleged in the complaint, Novelis had long been one of only a few aluminum body sheet suppliers in North America, while Aleris was a relatively new competitor that—in Novelis's own words—was "poised for transformational growth." The proposed transaction would concentrate more than half of the domestic production and sale of aluminum auto body sheet, 60 percent of projected total domestic capacity, and the majority of uncommitted domestic capacity under the control of one firm. Prior to filing

[16] *Microsoft*, 253 F.3d at 79 ("Given [the] rather edentulous test for causation, the question in this case is not whether Java or Navigator would actually have developed into viable platform substitutes, but (1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue.").

[17] *Horizontal Merger Guidelines* § 10, Efficiencies.

[18] *See* Complaint, *United States v. Novelis*, No. 1:19-cv-02033-CAB (N.D. Ohio Sept. 4, 2020), https://www.justice.gov/atr/case-document/file/1199461/download.

the complaint, the DOJ reached an agreement with defendants to refer the matter to binding arbitration on the issue of market definition if the parties were unable to resolve the competitive concerns with the transaction within a certain period of time. After a 10-day first-of-its-kind arbitration hearing, the arbitrator ruled for DOJ, holding that aluminum auto body sheet constitutes a relevant product market, as the United States had alleged. As a result, Novelis was required to divest Aleris's entire aluminum auto body sheet operations in North America to fully preserve competition.

14. In August 2019, the DOJ challenged Sabre Corporation's proposed acquisition of Farelogix under Section 7.[19] The DOJ alleged that the transaction would allow Sabre, the largest airline booking services provider in the United States, to eliminate a disruptive competitor that had introduced new technology to the travel industry and that was poised to grow significantly. According to the complaint, the transaction would result in higher prices, reduced quality, and less innovation. At trial, DOJ presented evidence that Sabre had a history of engaging in anticompetitive tactics designed to undermine and delay the adoption of Farelogix's technology. In April 2020, the U.S. federal district court issued its opinion, finding that Farelogix was a "disruptor" and a "successful" competitor of Sabre's. It further found that the "evidence suggests that Sabre will have the incentive to raise prices . . . and stifle innovation" following the acquisition.[20] Notwithstanding these factual findings, the court denied DOJ's request to block the merger, ruling that it was bound by the Supreme Court's decision in *Ohio v. American Express Co.*[21] to hold that Sabre and Farelogix do not compete in a relevant market. The DOJ filed a notice of appeal of the court's decision.[22] On May 1, 2020, Sabre and Farelogix terminated their merger agreement.[23] On May 12, 2020, the DOJ moved in the Third Circuit to vacate the district court's decision, pursuant to the doctrine from *United States v. Munsingwear*, Inc., 340 U.S. 36 (1950), because the merging parties' decision to abandon the merger rendered the case moot, precluding the possibility of challenging the decision on appeal.

15. In 2018, the FTC challenged the merger of CDK Global and Auto/Mate.[24] CDK was the market leader in specialized platform business software for franchise automotive dealers. Auto/Mate was a much smaller competitor with an innovative business model that was winning business from larger firms by offering lower prices, flexible contract terms, low fees for third-party apps participating on the platform, free software upgrades and training, and high-quality customer service. Although Auto/Mate was already competing in the market, the FTC was concerned that the acquisition would eliminate its future competitive significance. Auto/Mate's impact on existing platforms indicated that its pre-acquisition market share underrepresented its future market significance and the FTC concluded that the acquisition would have eliminated competition from a key emerging

[19] Complaint, *United States v. Sabre Corp.*, No. 1:19-cv-01548-LPS (D. Del. Aug. 20, 2019), https://www.justice.gov/opa/press-release/file/1196816/download.

[20] Opinion, *United States v. Sabre Corp.*, 34, 87, Civil Action No. 1:19-cv-01548-LPS (D. Del. April 8, 2020)

[21] 138 S. Ct. 2274 (2018).

[22] Notice of Appeal, *United States v. Sabre Corp*. On April 9, 2020, the UK Competition and Markets Authority blocked the transaction on the grounds that it would stifle innovation and competition. *See* Bloomberg Law, *U.S. to Appeal Sabre, Farelogix Merger Decision* by Victoria Graham (Apr. 9, 2020), https://news.bloomberglaw.com/mergers-and-antitrust/u-s-to-appeal-sabre-farelogix-merger-decision.

[23] See DOJ Press Release, *Statement from Assistant Attorney General Makan Delrahim on Sabre and Farelogix Decision to Abandon Merger* (May 1, 2020), https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-sabre-and-farelogix-decision-abandon.

[24] *In re CDK Global*, Dkt. 9382 (complaint filed Mar. 20, 2018).

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rival. The parties terminated their acquisition agreement shortly after the FTC issued its complaint.

16. In December 2019, the FTC challenged the acquisition of an innovative biotech firm, Pacific Biosciences of California, by an established incumbent, Illumina, as a violation of both Section 7 of the Clayton Act and Section 2 of the Sherman Act. The FTC alleged that Illumina's proposed acquisition of PacBio would substantially lessen current and future competition in a market for next-generation DNA sequencing systems, a rapidly expanding technology used in genetic research and clinical testing, and that the acquisition would unlawfully maintain Illumina's monopoly power. Illumina's systems employed short-read sequencing technology and, at the time of the proposed acquisition, it had a market share of more than 90%. PacBio's platforms employed long-read sequencing technology, and, at the time of the proposed acquisition, it had a market share of approximately 2% to 3%. But despite the current differences between their respective systems, PacBio had made significant technological advancements in recent years, and absent the proposed acquisition, competition between Illumina and PacBio would increase substantially in the future. The FTC also alleged that the acquisition constituted unlawful maintenance of Illumina's monopoly in the U.S. market for next-generation DNA sequencing systems, by extinguishing PacBio as a nascent competitive threat. The FTC alleged that the parties could not verify or substantiate any merger-specific efficiencies, that their procompetitive justifications for the acquisition were pretextual, and that any procompetitive effects flowing from the acquisition could be accomplished through means other than the acquisition.[25] The parties abandoned their merger plans after the FTC filed its complaint.[26] The UK Competition and Markets Authority (CMA) was also reviewing the transaction, and had issued provisional findings that the merger was anticompetitive.

17. In January 2013, DOJ filed a lawsuit to challenge the consummated acquisition of PowerReviews by Bazaarvoice.[27] The complaint alleged that Bazaarvoice's acquisition of PowerReviews eliminated the company's only significant rival in the market for product ratings and reviews platforms used by U.S. manufacturers and retailers to display product ratings and reviews on their websites. Product ratings and review platform providers negotiated prices based on each customer's perceived willingness to pay for the offered product, and that willingness depended upon the alternatives available. The presence of PowerReviews benefited its customers and non-customers alike because its market presence often forced price competition, including substantial discounting, by incumbent Bazaarvoice. On January 8, 2014, following a three-week trial, the district court found that the acquisition would likely have anticompetitive effects and therefore violated Section 7 of the Clayton Act. Bazaarvoice was ordered to divest the PowerReviews business it had unlawfully acquired.

2.1.2. Cases Involving a Threat to an Incumbent from a Future Competitor

18. The Agencies also have challenged acquisitions where the transaction was likely to delay or thwart future competition against the incumbent. Identifying and proving a loss of potential competition can be a challenging predictive exercise. In some markets, such

[25] *In the Matter of Illumina, Incorporated and Pacific Biosciences of California Incorporated*, Dkt. 9387 (complaint filed Dec. 17, 2019).

[26] *Illumina and Pacific Biosciences Announce Termination of Merger Agreement* (Jan. 2, 2020), https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=eb4a5eba-6b79-41fd-b932-b89e7cd1cceb.

[27] *U.S. v. Bazaarvoice*, No.13-cv-00133 (N.D. Cal. Jan. 8, 2014).

as pharmaceutical, medical device, and agricultural technology markets, the regulatory approval process may make identification of products in development more transparent than in markets in which entry is not subject to such approval processes.

19. In 2015, the FTC challenged the proposed merger of Steris Corporation and Synergy Health, alleging that the merger would eliminate Synergy as an actual potential entrant into the market for contract radiation sterilization services, or into certain narrower markets for more specific sterilization services. Steris was one of only two companies providing sterilization services to medical device firms in the United States, and Synergy had advanced plans to expand into the United States with a new, and potentially superior, sterilization technology, including securing physical locations for its plant and contracting for the required equipment. After the trial, the court concluded that the Commission had failed to show that Synergy's entry into the U.S. was probable, and declined to grant the injunction.[28]

20. In 2009, the FTC filed a complaint challenging Thoratec Corporation's proposed acquisition of rival medical device maker HeartWare International, Inc.[29] The Commission charged that the transaction would eliminate current and future competition in the U.S. market for left ventricular assist devices (LVADs), a life-sustaining treatment for patients with advanced heart failure. HeartWare was engaged in clinical trials for a device that may have been superior to Thoratec's product. Although regulatory approval for these devices was uncertain, there was sufficient evidence for the Commission to allege that Heartware's LVAD still in development was positioned to be the next LVAD approved by the Food and Drug Administration for sale in the United States, and that Heartware's product represented a significant threat to Thoratec's LVAD monopoly. The few other companies developing LVADs were significantly behind HeartWare in their clinical trials and were unlikely to reach the market as soon as, or be as competitive as, HeartWare's device. The Commission's complaint alleged that no other firm could replace the current and future competition eliminated by the merger. The parties abandoned their proposed transaction after the Commission filed its complaint.

21. In 2007, the DOJ investigated certain vertical concerns in connection with Monsanto's merger with Delta & Pine Land (D&PL).[30] The DOJ investigation focused on whether the transaction would harm nascent competition in markets for transgenic cottonseed traits in the Southeast and South-Central United States. Monsanto was the first to develop successful traits. At time when the merger was announced, almost all cotton grown in these regions used Monsanto traits that (i) make cotton tolerant to glyphosate herbicide and (ii) make cotton plants resistant to many insects. The DOJ determined that the transaction would thwart or delay efforts by rival trait developers to bring competing traits to market by depriving those rivals' access to cottonseed material (germplasm) with a proven track record. Ultimately, the parties divested their main horizontal overlap. DOJ also sought and obtained rights and access to germplasm for the divestiture buyers, as well as modification to the terms of certain Monsanto's licenses with third-party seed companies that provided incentives to use only Monsanto traits to the exclusion of traits developed by others.

[28] *FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015). The Commission dismissed an administrative complaint that sought to permanently enjoin the transaction. *In re Steris Corp., and Synergy Health PLC.*, Dkt. 9365 (May 29, 2015).

[29] *In the Matter of Thoratec Corp. and HeartWare Int'l, Inc.*, Dkt. 9339 (complaint filed Jul. 30, 2009).

[30] *See* Competitive Impact Statement, *United States v. Monsanto Co.*, No. 1:07-cv-00992-RMV (D.D.C. May 31, 2007), http://www.usdoj.gov/atr/cases/f223600/223682.pdf.

2.1.3. Cases Involving Emerging Markets

22. The Agencies have also challenged mergers where both firms had products in development for the same future market. A merger of this kind may reduce competition by bringing separate competitive efforts under common control.[31] In appropriate cases, the Agencies have required a divestiture of one of the products in development and/or the licensing of intellectual property rights of one or both parties to the merger, so as to support the continued development of future products.

23. In 2018, the DOJ challenged Bayer AG's acquisition of Monsanto, alleging both horizontal and vertical competition concerns. In its complaint, the DOJ emphasized that Bayer and Monsanto were leading competitors in the development of new products and services, and that the acquisition as proposed would have stifled innovation in agricultural technologies that has delivered significant benefits to farmers and consumers.[32] To alleviate these concerns, the DOJ negotiated a $9 billion divestiture of businesses and assets to BASF. Among the divested assets were certain intellectual property and research capabilities, including pipeline research and development projects, and complementary assets necessary to ensure that BASF continues to have the same innovation incentives, capabilities, and scale that Bayer would have as an independent competitor. Most notably, these assets included Bayer's nascent digital agriculture business.[33]

24. In 2013, two of the world's largest semiconductor manufacturing equipment makers, Applied Materials and Tokyo Electron, announced a merger that would combine the two leading firms that possessed the necessary knowhow, resources, and ability to develop and supply high-volume non-lithography semiconductor equipment. The DOJ conducted an extensive investigation and found that the existing competitive overlap between specific equipment offered by the two firms was emblematic of a broader competition to develop new equipment. Existing competition indicated that each firm had the "building blocks," the appropriate collection of assets and capabilities, necessary to be successful developers of new equipment.[34] As a result, the DOJ had substantial concerns that the merger would diminish competition to develop equipment for the manufacture of next-generation semiconductors. In 2015, Applied Materials and Tokyo Electron abandoned the merger after the DOJ informed them that their proposed remedy was inadequate.[35]

[31] Such a merger may also have procompetitive benefits: for example, it may make entry or development of a product more likely, or support more speedy entry, because the merger allows the firms to combine complementary assets. *See, e.g.*, Statement of FTC Chairman Timothy J. Muris, in the Matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc. (January 13, 2004), https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf.

[32] *United States v. Bayer AG and Monsanto Company*, Civil Action No. 1:18-cv-01241 (D.D.C. 2018) (complaint filed May 29, 2018), https://www.justice.gov/atr/case-document/file/1066656/download.

[33] *See* DOJ Press Release, *Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto* (May 29, 2018), https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened.

[34] Nicholas Hill, *et al.*, *Economics at the Antitrust Division 2014-2015: Comcast/Time Warner Cable and Applied Materials/Tokyo Electron*, 47 Rev. Ind. Or. 425, 433 (2015).

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

25. In 2013, the FTC challenged the merger of Nielsen and Arbitron. Both companies were developing national syndicated cross-platform audience measurement services, which would allow audiences to be measured accurately across multiple viewing platforms, such as TV and online.[36] At the time of the merger, no firm offered a commercially available service that could perform this function, but demand for such a service was increasing. Evidence showed that Nielsen and Arbitron were the two best positioned firms to develop this service. The FTC alleged that the elimination of future competition between Nielsen and Arbitron would increase the likelihood that Nielsen would exercise market power, and make it more likely that advertisers, advertising agencies, and programmers would pay more for national syndicated cross-platform audience measurement services. To address these concerns, as part of the settlement order, the Commission required Nielsen to divest assets related to Arbitron's cross-platform audience measurement business, including audience data, and to enter into other licensing arrangements supporting the divestiture.[37]

2.2. "Killer Acquisitions" and Agency Analysis

26. Commentators have noted that, in certain cases, a firm may acquire another firm merely to terminate or suspend innovative activity or the development of a product perceived to be a competitive threat to the acquiring firm. These transactions, when consummated, are sometimes referred to as "killer acquisitions" because they are said to result in a product or service being "killed" or terminated rather than brought to market. The Council of Economic Advisors articulates this concern as one factor that may motivate a particular acquisition:

> *[A]nother debate asks whether dominant platforms are harming competition by buying too many smaller firms, such as start-ups funded with venture capital. It is common for large platforms to acquire smaller firms. The digital economy relies heavily on innovation, and being acquired by an established firm can be an important exit path for initial investors. Acquisition can also be important for a start-up's success. The acquiring firm may bring marketing, financing, and other business assets that enable the start-up to grow. However, if a start-up is not acquired, it might instead grow into an independent, full-fledged competitor. Some acquisitions may occur precisely to prevent such competition.* [38]

27. The Agencies are attentive to acquisitions in which an incumbent acquires a firm that could develop into a future competitor, or assets necessary for a firm to develop products or services in competition with the incumbent.

28. For example, in 2017, the FTC charged Mallinckrodt (formerly known as Questcor) with unlawful monopolization by acquiring the rights to a drug that threatened its monopoly in the U.S. market for adrenocorticotropic hormone (ACTH) drugs. In its complaint, the FTC alleged that Questor enjoyed monopoly power as a result of its control of Acthar, the only U.S. ACTH drug, and that it had unlawfully maintained that monopoly power by acquiring the U.S. rights to develop a competing drug, Synacthen Depot. The FTC alleged that Questcor's acquisition of the U.S. rights for Synacthen had eliminated the possibility

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[36] *In the Matter of Nielsen Holdings N.V. and Arbitron Inc.*, Dkt. C-4439 (complaint filed Feb. 28, 2014).

[37] *See* FTC Press Release, *FTC Approves Nielsen Holdings N.V. and Nielsen Audio, Inc.'s Application to Sell its LinkMeter Technology and Related Assets to comScore, Inc.* (Apr. 2, 2014), https://www.ftc.gov/news-events/press-releases/2014/04/ftc-approves-nielsen-holdings-nv-nielsen-audio-incs-application.

[38] Economic Report of the President, *supra* note 2, at 219. *See also* Cunningham, Ederer and Ma, *Killer Acquisitions* (March 22, 2019), https://ssrn.com/abstract=3241707 (unpublished paper attempting to measure and identify the incident of such acquisitions in the pharmaceutical industry).

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that another firm would develop it and compete against Acthar. To resolve the FTC's concerns, Questor agreed to sublicense the Synacthen assets, including intellectual property rights, to another firm to commercialize Synacthen in the United States, and further to pay $100 million in redress of the Defendant's violations.[39]

29. In 2016, the DOJ challenged Westinghouse Air Brake Technology Corporation's ("Wabtec") acquisition of Faiveley Transport. The DOJ alleged that the transaction, as originally structured, would have substantially lessened competition for the development, manufacture, and sale of various freight railcar brake components. Prior to the acquisition, Faiveley had formed a joint venture with another rail equipment supplier that allowed it to bundle brake components and compete more effectively with the two large incumbents, one of which is Wabtec. In addition, Faiveley had been developing its own control valve, which is the most highly-engineered, technologically-sophisticated component in a freight car brake system, the market for which had been a duopoly for years. With a control valve, Faiveley could more directly compete with the incumbents—even though full commercialization and approval was likely years away. The transaction also would have eliminated future competition for control valves by preventing Faiveley's entry into this market, and would have thus maintained a century-old duopoly between Wabtec and its only other control valve rival. To remedy these concerns, the companies agreed to divest Faiveley's entire U.S. freight car brakes business to Amsted Rail Company, an employee-owned rail equipment company.[40]

30. In 2008, the FTC charged that Inverness Medical Innovations' acquisition of assets of ACON Laboratories, and its interference with that company's efforts to develop and supply consumer pregnancy tests, unlawfully maintained Inverness's monopoly power, and harmed or threatened to harm competition, in a market for consumer pregnancy tests.[41] Through its acquisition of ACON assets, Inverness imposed a covenant not to compete on ACON that limited the scope and duration of its joint venture to develop and market digital consumer pregnancy tests, required ACON to remit to Inverness any profits from that joint venture, and acquired rights to intellectual property developed by ACON and its joint venture partner. The FTC alleged that through these actions, Inverness interfered with ACON's ability and incentive to develop and manufacture digital consumer pregnancy tests, and hampered the joint venture partner's ability and incentive to develop and market competing digital consumer pregnancy tests. The FTC's complaint also identified that Inverness eliminated future competition from water-soluble dye lateral flow consumer pregnancy tests by purchasing ACON's water-soluble dye consumer pregnancy test assets, and by ceasing development and marketing efforts for test products associated with the assets.[42] To address the FTC's concerns, Inverness agreed to sell the water-soluble consumer pregnancy assets, disclaim any ownership rights for intellectual property

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[39] *FTC v. Mallinckrodt*, Civil Action No. 1:17-cv-00120 (D.D.C. 2017) (complaint filed Jan. 25, 2017), https://www.ftc.gov/system/files/documents/cases/170118mallinckrodt_complaint_public.pdf; *see* FTC Press Release, *Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it.

[40] *United States v. Westinghouse Air Brake Technologies Corp.*, No.1:16-cv-02147 (D.D.C. 2017 filed Oct. 26, 2016), https://www.justice.gov/atr/case/us-v-westinghouse-air-brake-technologies-corp-et-al.

[41] *See* FTC Press Release, *Inverness Medical Innovations Settles FTC Charges That it Stifled Future Competition in U.S. Market for Consumer Pregnancy Tests* (Dec. 23, 2008), https://www.ftc.gov/news-events/press-releases/2008/12/inverness-medical-innovations-settles-ftc-charges-it-stifled.

[42] *In the Matter of Inverness Medical Innovations, Inc.*, FTC File No. 061-0123 (complaint filed Dec. 23, 2008) https://www.ftc.gov/sites/default/files/documents/cases/2008/12/081223invernesscmpt.pdf.

developed during the joint venture, refrain from interference with ACON's ability to transfer or license digital consumer pregnancy test technology to its joint venture partner, and refrain from interference with ACON's ability to manufacture digital consumer pregnancy test technology for its joint venture partner.

2.3. Jurisdiction to Review Mergers Involving Nascent Competition

31. The 2005 OECD Council Recommendation on Merger Review ("OECD Recommendation") and the International Competition Network's Recommended Practices for Merger Notification and Review Procedures ("ICN Recommended Practices") call for notification thresholds to be based on: (i) objectively quantifiable criteria, and (ii) information that is readily accessible to the merging parties. The OECD and ICN recommended practices also call for such thresholds to screen out transactions lacking a material nexus to the reviewing jurisdiction.[43]

32. In the United States, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (§ 7A of the Clayton Act) requires that parties to certain mergers or acquisitions notify the Agencies before consummating the proposed transaction. Reportability under the Act depends on whether the value held as a result of the transaction and the size of the parties, as measured by their sales and assets, meet the statutory thresholds,[44] and, if so, whether an exemption applies.[45] The U.S. premerger notification program allows for efficient and expedient review of approximately two thousand proposed transactions annually by the Agencies.[46] Premerger notification has vastly improved the Agencies' ability to identify and prevent anticompetitive mergers, and to avoid the challenges of "unscrambling the eggs."[47]

33. Although the U.S. premerger notification system subjects most mergers of significant size to premerger review for competition concerns, a transaction does not have to be subject to such review for the Agencies to be able to challenge it under the antitrust laws. Under Section 7 of the Clayton Act – which was enacted many years before the HSR Act – the Agencies can challenge acquisitions of stock or assets, without regard to whether

[43] *See* OECD Recommendation on Merger Review (2005), http://www.oecd.org/daf/-competition/oecdrecommendationonmergerreview.htm; ICN Recommended Practices for Merger Notification and Review Procedures, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

[44] The Act generally requires transactions to be notified when: (1) the acquiring or acquired person is engaged in U.S. commerce or in any activity affecting U.S. commerce; (2) the amount of voting securities, or the non-corporate interests that yield control, or assets held as a result of the acquisition is over $94 million (the size of transaction test); and (3) if a transaction is valued at $376 million or less, one person has sales or assets of $188 million or more and the other has sales or assets of $18.8 million or more (the size of person test). If the size of the transaction is greater than $376 million, the size of person test does not apply. These notification thresholds are adjusted annually, and are available at: https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds.

[45] 16 CFR Part 802. *E.g.,* there is an exemption for the acquisition of foreign assets if sales in or into the United States attributable to those assets are $94 million or less, aimed at ensuring that only transactions with a material nexus to the U.S. are notifiable.

[46] For annual information on the number of notified transactions, as well as the number challenged or abandoned, see the FTC's Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

[47] An e-filing system for submission of premerger notification filings has been established to handle filings during the COVID-19 coronavirus pandemic. *See* https://www.ftc.gov/enforcement/premerger-notification-program/guidance-filing-parties.

the acquisition requires a premerger notification under the HSR Act, and such challenges can be brought either before or after a transaction is consummated.

34. As a result, another important element of the U.S. merger review regime is the Agencies' ability to review, and if necessary, challenge non-notifiable transactions, including consummated transactions. For example, over the past five years, the FTC has conducted an in-depth review of 15 transactions that were not notifiable under the Act, in addition to the 117 notified transactions where the Commission conducted an in-depth review. Similarly, DOJ conducted in-depth reviews of 18 transactions that were not notified under the HSR rules during this period, in addition to 124 in-depth investigations of notified transactions.

35. Although most of the cases discussed above involved reportable transactions, some were not. For instance, Bazaarvoice/PowerReviews, discussed *infra*, was a non-reportable transaction. In 2013, when Mallinckrodt (then Questcor) acquired the U.S. rights to Synacthen, although it met the HSR size of transaction and person thresholds, the transaction was not reportable because it involved an exclusive license where the licensor retained manufacturing rights. Later that same year, the Agencies revised the HSR Rules to require premerger notification of exclusive license transactions where the licensee acquires all commercially significant rights from the licensor.[48]

36. For reportable transactions, DOJ and FTC staff rely on several sources to learn of the potentially anticompetitive transactions. Often, the Agencies' respective staff will learn about such transactions from their ongoing monitoring of the trade press or other media. For example, the FTC's retail and hospital mergers section subscribes to publications of the National Federation of Retailers and the American Hospital Association, which often report on transactions that do not meet the notification thresholds. DOJ similarly monitors trade press covering the industries subject to its oversight. For instance, DOJ opened its preliminary investigation into Bazaarvoice's consummated acquisition of PowerReviews based on information discovered through its media review.

37. Complaints are another source of information about potentially anticompetitive transactions. Complainants can range from industry participants, such as customers concerned about potential anticompetitive effects arising from a merger between suppliers, to individual citizens or labor unions. Complaints may come to the agencies directly, may be reported in the press, or may be communicated to the Agencies by state or federal government agencies.

38. The investigation of non-reportable transactions proceeds in a manner similar to an HSR investigation. The Agencies are able to obtain documents and information through a Civil Investigative Demand in place of a Second Request. Unlike an HSR investigation, however, the parties to a non-reportable transaction may be able to consummate their deal at any time if all other regulatory approvals have been received. In many cases, however, the parties enter into a timing agreement or hold separate agreement to preserve the viability of the relevant assets during the agency's investigation and any potential challenge.[49]

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[48] 78 FR 68705 (November 15, 2013).

[49] *See, e.g., In re Otto Bock HealthCare North America, Inc.*, Dkt. 9378, Opinion (Nov. 6, 2019) (defendants agreed to Hold Separate Agreement three months after consummating acquisition of Freedom and prior to FTC complaint), https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf.

3. Policy Initiatives Related to Nascent Competition

39. The FTC recently conducted a series of hearings to examine whether adjustments to competition policy are necessary to address changes in the economy, evolving business practices, and new technologies.[50] In particular, hearings held on October 17, 2018, assessed the appropriate antitrust framework for evaluating *Acquisitions of Nascent and Potential Competitors in Digital Technology Markets*.[51] Participants discussed many of the issues raised by the OECD Competition Committee relating to nascent acquisitions, and the FTC received public comments on this topic.[52] The consensus view at the hearings was that the current antitrust laws are effective and adaptable to the digital platform environment. Additionally, participants agreed that the prospective loss of future competition is a viable theory of anticompetitive harm that the Agencies have used to challenge transactions in the past, and could continue to rely upon in the future.

40. On July 23, 2019, the DOJ announced that it was reviewing the practices of market-leading online platforms.[53] The review focuses on whether and how market-leading online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers. The goal of the review is to assess the competitive conditions in the online marketplace to ensure that companies compete on the merits to provide services that users want. If violations of law are identified, the DOJ will proceed appropriately to seek redress.

41. On February 11, 2020, the FTC issued Special Orders pursuant to Section 6(b) of the FTC Act to five large technology firms: Alphabet (including Google), Apple, Amazon, Facebook, and Microsoft.[54] The FTC's Special Orders require these firms to provide information about prior acquisitions not notified to the Agencies under the HSR Act, including information and documents on the terms, scope, structure, and purpose of transactions that each company consummated between January 1, 2010 and December 31,

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[50] Federal Trade Commission, *Hearings on Competition and Consumer Protection in the 21st Century* (Jun. 18, 2018), https://www.ftc.gov/policy/hearings-competition-consumer-protection.

[51] Federal Trade Commission, *FTC Hearing #3: Multi-Sided Platforms, Labor Markets, and Potential Competition* (Oct. 15-17, 2018), https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century (see public comment questions relating to "Acquisitions of Nascent and Potential Competitors in Digital Technology Markets").

[52] *See* Federal Trade Commission, *Competition and Consumer Protection in the 21st Century,* Transcript at 168-375 (Oct. 17, 2018), https://www.ftc.gov/system/files/documents/public_events/1413712/ftc-_hearings_session_3_transcript_day_3_10-17-18_1.pdf, and Public Comments, https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century. *See also* Public Comments submitted in response to FTC Hearings Initial Topic 6: Evaluating the Competitive Effects of Corporate Acquisitions and Mergers, https://www.ftc.gov/policy/public-comments/2018/07/initiative-759.

[53] Press Release, U.S. Dep't of Justice, *Justice Department Reviewing the Practices of Market-Leading Online Platforms* (July 23, 2019), https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms.

[54] *See* FTC Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies. Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b), authorizes the FTC to solicit information from businesses for research or non-enforcement purposes.

2019.[55] This information will help the FTC evaluate whether the Agencies are getting adequate notice of transactions that might harm competition in the digital economy.

42. On February 12, 2020, the DOJ partnered with Stanford University to hold a workshop on Venture Capital and Antitrust. The workshop explored trends in venture capital investment from the 1990s through 2020, with a focus on what antitrust enforcers can learn from investors about how to identify nascent competitors in markets dominated by technology platforms. The workshop also addressed proposed solutions to concerns that competitive alternatives to the market-leading platforms are not attractive investment opportunities. The program brought together venture capitalists, academics in law and business, and other tech industry stakeholders to explore the practical considerations that early stage investors face when calculating the risks of investing in a startup and exit strategies.

4. Conclusion

43. For decades, the Agencies have made combatting anticompetitive conduct in the technology sector is a top priority. In 2019, the FTC created the Technology Enforcement Division (TED) in the Bureau of Competition, focused on investigating anticompetitive conduct and mergers in the digital economy, including by digital platforms.[56] In addition to allocating nearly two dozen full-time staff attorneys to TED and drawing on the expertise of PhD economists in the Bureau of Economics, the FTC has hired technologists to enhance its institutional expertise. Today, DOJ's Technology and Financial Services Section is tasked with enforcing the antitrust laws in high-tech industries and digital markets.[57] From 2002 until 2017, the section was known as the Networks & Technology Enforcement Section. Before that, it was known as the Computers and Finance Section.

44. The Agencies are cognizant of concerns regarding transactions that may substantially lessen competition, including killer acquisitions in digital and other markets, and are committed to ensuring that technology markets remain competitive. The Agencies will continue to evaluate their approach to identifying and investigating acquisitions of nascent and potential competitors that may lessen current or future competition. Existing statutory tools—including Section 7 of the Clayton Act and Section 2 of the Sherman Act—provide powerful tools to protect consumers from acquisitions and other conduct that threatens to harm nascent and potential competition. The Agencies will continue to make vigorous and effective use of those tools to protect competition.

[55] Under the HSR of 1976, businesses are required to file premerger notification for acquisitions above a certain monetary threshold. However, the lack of reporting requirements for smaller transactions has historically omitted small business acquisitions from federal antitrust review. Since 1976, premerger notification filings for transactions valued above $50 million were required in the United States pursuant to the HSR Act. In 2000, Congress amended the HSR Act to require the annual adjustment of these thresholds based on the change in gross national product. As of February 28, 2020, the premerger notification and report are required if the transaction is above $94 million. *See* https://www.ftc.gov/news-events/blogs/competition-matters/2020/01/hsr-threshold-adjustments-reportability-2020.

[56] *See* FTC Press Release, *FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets* (Feb. 26, 2019).

[57] *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., *Technology & Financial Services Section*, https://www.justice.gov/atr/about-division/tfs-section.

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Theories of Harm for Digital Mergers – Note by the United States

16 June 2023

This document reproduces a written contribution from the United States submitted for Item 8 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at
https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm

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United States

1. Introduction

1. Several aspects of contemporary digital technologies have resulted in market dynamics and business strategies that merit particular attention for antitrust enforcers. For example, low marginal production costs have enabled digital firms to grow larger and more quickly than many conventional businesses. Network effects and high entry barriers in some markets may lead certain markets to "tip" towards a few powerful firms while also serving to protect incumbents. Meanwhile, network effects stemming from the collection and use of large amounts of data provide advantages to early movers, which incentivize firms to prioritize expanding and quickly securing a large user base. Further, the ability to digitally track and surveil users has enabled firms to offer zero-price services to consumers while monetizing their data. Those firms can then deploy surveillance techniques to detect and insulate themselves against competitive threats.

2. While digital markets have the potential to yield great benefits, they are also susceptible to anticompetitive practices by incumbents that lock-in dominance, block rivals, and harm competition. Thus, it is especially important for enforcers to be vigilant about potentially anticompetitive mergers or conduct in digital markets. Moreover, a loss of competition at an early stage in a market's development can both hamper and distort the path of future innovation. Thus, it is imperative that enforcers be prepared to act quickly to preserve open and fair competition *before* markets lose vitality due to harmful consolidation.

3. Mergers and acquisitions involving digital markets can lessen competition or tend to create, maintain, or entrench monopolies through a variety of mechanisms. Technology companies often operate across a variety of interrelated areas, and often maintain multi-sided platforms that provide different products or services to two or more different groups who benefit from each other's participation. Moreover, dominant technology firms can use strategic acquisitions as part of an interrelated course of monopolistic conduct. For example, technology firms have engaged in "buy-or-bury" strategies against actual or potential rivals; they have also attempted to buy or control adjacent products or services that might be used to steer customers to their other products or exclude competing platforms. While a clearer picture has begun to emerge, continued learning remains essential to fully understanding the many ways that digital firms may use mergers to maintain their position and insulate themselves from competitive challenges.

4. This submission describes the application of United States antitrust laws to digital mergers, how existing legal doctrines can be used to pursue more robust enforcement in digital markets, the issues that digital mergers are more likely to raise, the federal antitrust enforcement agencies' recent experiences with digital mergers, and how the agencies will address them going forward.

2. Application of United States Antitrust Laws to Digital Mergers

5. The longstanding principles of antitrust law remain applicable to mergers involving digital technologies. The United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (collectively, "the Agencies"), state and district attorneys general, and private parties can challenge mergers and acquisitions under the federal

antitrust laws. Most merger challenges are brought under Section 7 of the Clayton Act, which prohibits mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[1] This Act, as amended by the Celler–Kefauver Anti-Merger Act of 1950, is designed to stop threats to competition or tendencies toward monopoly in their incipiency. The Agencies, state and district attorneys general, and private parties can also challenge monopolistic mergers under Section 2 of the Sherman Act.[2] These same enforcers can also challenge mergers under Section 1 of the Sherman Act as an unreasonable restraint of trade.[3] The FTC can also challenge mergers under Section 5 of the FTC Act as an unfair method of competition.[4]

3. The Agencies Rely on Existing Antitrust Principles to Pursue Robust Enforcement in Digital Markets

6. While digital technologies have ushered in new market dynamics and business strategies in the United States, the same federal antitrust laws apply to digital mergers as to any other type of merger. The Agencies seek to fully utilize existing statutes and case law to challenge digital mergers when appropriate. This effort entails the robust application of existing law, accounting for the particular facts raised by digital mergers.

7. Certain aspects of U.S. antitrust laws are especially relevant in the digital merger context. This includes, in particular, the recognition that Section 7 of the Clayton Act is meant to "arrest anticompetitive tendencies in their incipiency."[5] As Congress and later, the Supreme Court observed, markets can consolidate rapidly. Therefore, the antitrust agencies are statutorily mandated to break those trends at their outset, well before they gather great momentum.[6] The Celler–Kefauver amendments to Section 7 equipped the Agencies to block mergers where there is an incipient trend towards concentration or reduced competition.

8. The first prong of Section 7 prohibits acquisitions, "the effect of [which] may be substantially to lessen competition . . . ." in a relevant market.[7] The second prong of Section

[1] 15 U.S.C. § 18.

[2] 15 U.S.C. § 2.

[3] 15 U.S.C. § 1.

[4] 15 U.S.C. § 45. The Federal Trade Commission also enforces Section 5 of the FTC Act, which prohibits "unfair methods of competition in or affecting commerce." Section 5 is central to the agency's legislative mandate. *See generally* FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 13-14 (Nov. 10, 2022) (Commission File No. P221202), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf. *See also* Substitute Amended Complaint for Injunctive and Other Equitable Relief, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590 79-80 (D.D.C. Sept. 8, 2021), https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no._82.pdf and *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[5] *See Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1213–14 (11th Cir. 2012) (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963)).

[6] *FTC v. Brown Shoe Co.*, 384 U.S. 316, 317, 322 (1966).

[7] 15 U.S.C. § 18.

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7 prohibits acquisitions, "the effect of [which] may be . . . to tend to create a monopoly."[8] Although case law on this second prong has not been as fully developed, it may be particularly important as a means of prohibiting certain mergers that otherwise may not be prohibited by the first prong of the Clayton Act. The second prong, in contrast to the first prong, lacks the limiting qualifier "substantially." Consequently, a less-than-substantial contribution to the creation of a monopoly can render a merger illegal based only on a tendency towards monopoly.[9] Thus, the second prong may be especially relevant to digital mergers involving a monopolist or near-monopolist acquiring a very small competitor, a nascent competitor, or potential competitor. Moreover, if a transaction is part of a pattern or strategy of multiple acquisitions, the cumulative effect of the pattern or strategy may need to be considered.

9. In order to ensure that the Agencies are best positioned to exercise their full authority in digital markets, including addressing competition concerns in their incipiency, they have been building their in-house capacity and expertise to keep pace with developments in those markets. The FTC recently launched a new Office of Technology to help contend with technological challenges in the digital marketplace and to support the agency's law enforcement and policy work.[10] The DOJ's Antitrust Division similarly has been building its in-house capabilities by expanding its Expert Analysis Group to include experts in digital markets and new technologies. The size of DOJ's civil litigation section dedicated to digital markets has doubled the number of attorneys in recent years. Importantly, these teams collaborate and share their expertise with relevant personnel throughout the Antitrust Division to ensure staff are equipped to analyze and identify problematic mergers and acquisitions involving digital markets.

4. Limitations of Premerger Reporting of Digital Mergers

10. One key to preventing harm from digital mergers is taking action as soon as evidence of the risk of competitive harm emerges. Learning about these mergers is crucial to that effort. The Hart-Scott-Rodino Act ("HSR Act") requires premerger notification to the Agencies and imposes a mandatory waiting period for certain acquisitions.[11] The HSR Act provides the Agencies with the opportunity to investigate the potential for harm and, in appropriate circumstances, bring a legal action to block a merger prior to consummation. Most of the Agencies' merger investigations and enforcement take place under our pre-merger enforcement authority, and these efforts address illegal mergers before physical assets, intellectual property, and human capital are combined and assets are allowed to deteriorate.

[8] *Id.*

[9] The Supreme Court has framed the standard as follows: any acquisition that would bring the acquirer "measurably closer" to a monopoly can violate this prong of § 7. *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) ("Obviously, under Section 7 it was not necessary . . . to find that [the defendant] has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud.").

[10] *See* Press Release, FTC, FTC Launches New Office of Technology to Bolster Agency's Work (Feb. 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-launches-new-office-technology-bolster-agencys-work.

[11] 15 U.S.C. § 18.

11. While the HSR Act facilitates the Agencies' ability to review and challenge unconsummated mergers, the Agencies can also challenge consummated mergers. Thus, the Agencies have full authority to investigate and challenge any acquisition of stock or assets, without regard to whether the transaction was notifiable or notified, unconsummated or consummated.[12]

12. Because not all mergers are reportable under the HSR Act, firms may engage in strategic avoidance of mandatory filing requirements to evade detection, especially in certain sectors.[13] This can present unique challenges in digital markets.

13. In 2019, the FTC conducted industry-wide studies to collect information about the unreported acquisitions of five large technology companies.[14] The study focused on 819 non-reported acquisitions made by Apple, Amazon, Facebook (now Meta), Google, and Microsoft over the course of 2010-2019, and provided a comprehensive overview of all the acquisitions these companies made during that time period. The studied acquisitions fell in several categories: acquisition of control; assets; hiring events, patents, minority stakes; licenses; or other economic interests. Importantly, a large portion (39.3%) of the acquisitions were of firms that were less than 5 years old, and most (65%) were valued at between $1 million and $25 million, well below the HSR filing threshold. From this study, the FTC gained insight into these companies' practices and acquisition strategies, including how they structured acquisitions, sectors of interest, and how these acquisitions figured into the companies' overall business strategies.[15]

14. It remains important for enforcement agencies to consider the acquisition strategies of digital companies to fully account for all the ways in which the companies grow through acquisitions—including those that are unreported. Enforcement agencies may also consider other ways to detect small but potentially competitively significant acquisitions, such as collecting more information about prior unreported acquisitions, or requiring prior approval or prior notice for future mergers that might otherwise go undetected.[16]

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[12] *See, e.g.*, Note by the United States, Disentangling Consummated Mergers – Experiences and Challenges DAF/COMP/WD (2022), 42, https://one.oecd.org/document/DAF/COMP/WD(2022)42/en/pdf.

[13] Statement of Rohit Chopra, https://www.ftc.gov/system/files/documents/public_statements/1596340/20210915_final_chopra_remarks_non-hsr_reported_acquisitions_by_big_tech_platforms.pdf; Thomas G. Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AM. ECON. REV: INSIGHTS 77-94 (2019), https://www.aeaweb.org/articles?id=10.1257/aeri.20180137.

[14] FTC STAFF, NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010-2019 (Sept. 15, 2021) https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study [hereinafter Non-HSR Technology Acquisitions Report].

[15] *See* Press Release, FTC, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies and accompanying statements.

[16] *See* Press Release, FTC, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (Jul. 21, 2021) (returning to practice of requiring prior approval or prior notice in merger orders), https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers.

5. Digital Mergers, Particularly Those Involving Multi-Sided Platforms, May Raise Unique Facts

15. While digital mergers can raise the same concerns as mergers in more traditional industries, consolidation in digital markets is more likely to implicate innovation concerns, as well as factual issues relating to novel, complex, or evolving technologies.

16. In particular, digital markets might raise certain competition issues that include harm to innovation and other forms of non-price competition; the role of network effects and switching costs in raising entry barriers and potentially "tipping" a market; and the collection and use of data, including within zero-price markets.

17. Mergers may raise competitive issues when they involve multi-sided platforms and products or services, even when the acquired firm's relationship to the platform is not strictly horizontal or vertical. The Agencies consider the various attributes of multi-sided platforms when evaluating mergers that involve platform operators, and carefully scrutinize the risk those mergers will lessen competition between platforms, on the platform, or to disintermediate the platform. In addition to considering impacts on market structure and vertical supply chains, the Agencies examine whether digital mergers have the potential to entrench firms' dominant positions in violation of Section 7 of the Clayton Act.

18. Digital mergers may also implicate competitive concerns due to the potential that such mergers would substantially lessen competition by giving the firm control over a product or service that its rivals use to compete. When analyzing digital mergers, the Agencies will examine, for example, whether the merged firm may have the ability and incentive to weaken or exclude rivals, for example by foreclosing access to a competitively significant related product.

19. Additionally, the nature of digital platforms and ecosystems, and the associated business strategies that they reward, may require looking beyond concerns that typically characterize more conventional markets, such as foreclosure and exclusion, in order to identify the full range of potential harms from digital mergers. These issues may require a broader analytical lens to fully account for all aspects of competition, and a closer look at all types of mergers, including those in which the participants do not compete directly with one another, requiring the Agencies to focus on non-horizontal theories of harm.

20. Within digital ecosystems, it is important to be vigilant about the loss of potential competition. Acquisitions involving a potential competitor or a nascent threat warrant close scrutiny from the Agencies. These types of acquisitions include acquisitions that eliminate a potential entrant in a concentrated market; acquisitions that eliminate a potential entrant in a future market; acquisitions that eliminate or raise the costs of a nascent threat to a powerful incumbent; and acquisitions that eliminate current competitive pressure from a perceived potential entrant. These mergers can distort the entire developmental trajectory of the relevant technology and deprive the public of the full fruits of marketplace innovation. Strong and vigorous competition is a vital catalyst of rapid economic progress. Any lessening of competition is therefore even more harmful in a new industry since its inevitable effect is to slow down the growth rate of the industry.[17] Halting illegal mergers in emerging or nascent markets is critical because of the outsized beneficial effects that

[17] *See In re Union Carbide Corp.*, 59 F.T.C. 614, 1961 WL 65409 *35 (F.T.C. 1961); *see also United States v. Bazaarvoice*, Inc., 2014 WL 203966 *76 (N.D. Cal. 2014) ("[R]apid technological progress may provide a climate favorable to increased concentration of market power rather than the opposite." (quoting *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488, 497 (9th Cir. 1977)).

healthy competition in these markets can yield over the long-term. For example, competition will provide consumers with real choices about how and to what extent they are willing to hand over personal data in exchange for goods and services across industries that are becoming increasingly more digitized. A competitive marketplace can dilute the power of any monopolist or oligopoly of firms over the apps, connected devices, and digital tools that power American life and the economy today.

6. Recent Experiences with Digital Mergers

21. The Agencies recognize that our shared statutory mandate is to prevent digital markets from becoming concentrated in the first place. Otherwise, it may be necessary to address the harm from undue concentration later through post-consummation antitrust enforcement. The Agencies' recent experiences with digital mergers such as *Google/DoubleClick* and *Google/Admeld*, and *Facebook/WhatsApp* and *Facebook/Instagram* are examples of this. The Agencies are challenging these transactions post-consummation as part of broader strategies to achieve or maintain durable, industry-wide dominance.

22. In 2007, the FTC investigated but ultimately declined to challenge Google's acquisition of DoubleClick, which at the time offered the industry-leading publisher ad server.[18] In 2011, DOJ also declined to challenge Google's acquisition of Admeld, Inc., an online display advertising provider.[19] On January 24, 2023, DOJ and eight state Attorneys General filed a civil antitrust suit against Google for monopolizing multiple digital advertising technology products in violation of Sections 1 and 2 of the Sherman Act.[20] The complaint requests, among other things, divestment of DoubleClick, structural relief, and the restoration of competitive conditions in multiple relevant markets.[21] This request for relief is the logical conclusion to a complaint that puts into context, with the benefit of hindsight and a fuller picture of the ad tech market as it exists today, the competitive harm that resulted from Google's acquisitions and other course of exclusionary conduct.

23. Similarly in 2012, the FTC closed its investigation of Facebook's acquisition of Instagram without challenging the deal.[22] Nor did the FTC challenge Facebook's

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[18] *See generally* Press Release, FTC, Federal Trade Commission Closes Google/DoubleClick Investigation (Dec. 20, 2007), https://www.ftc.gov/news-events/news/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation.

[19] *See generally* Press, Release, DOJ, Statement of the Dep't of Justice's Antitrust Div. on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Admeld Inc. (Dec. 2, 2011), https://www.justice.gov/opa/pr/statement-department-justices-antitrust-division-its-decision-close-its-investigation-google.

[20] *See generally* Press Release, DOJ, Justice Dep't Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies.

[21] Complaint, *United States v. Google LLC*, No. 1:23-cv-00108 139-40 (E.D. Va. Jan. 24. 2023), https://www.justice.gov/opa/press-release/file/1563746/download.

[22] *See generally* Press Release, FTC, FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program (Aug. 22, 2012), https://www.ftc.gov/news-events/news/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition-instagram-photo-sharing-program.

acquisition of WhatsApp in 2014.[23] The FTC subsequently filed a civil complaint in 2021 alleging that these acquisitions were part of a series of anticompetitive acts that constitute unlawful monopolization in violation of Section 2 of the Sherman Act and thus unfair methods of competition in violation of Section 5(a) of the FTC Act.[24] The complaint requests, among other things, divestment of Instagram and/or WhatsApp and any other necessary divestitures.[25] Forty-eight states and districts also previously filed a separate lawsuit alleging that these acquisitions were illegal.[26]

24. Ideally, an illegal merger would be blocked outright before consummation, to prevent harm *before* it occurs and also avoid the protracted litigation sometimes required to undo prior acquisitions and attempt to restore competition. This requires activating—and sometimes reactivating—the Agencies' entire statutory toolkit to account for all the ways in which digital mergers may lead to harmful concentration.

25. In *Meta/Within*, the FTC sought to enjoin Meta's acquisition of Within in order to prevent harm resulting from the loss of potential competition in the relevant market for virtual reality dedicated fitness applications.[27] The complaint alleged a violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.[28] Although the district court's decision ultimately denied the FTC's request for a preliminary injunction, it agreed with the FTC on the legal issues in the case and denied the defendants' motion to dismiss the case, providing useful precedent on digital mergers.[29]

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[23] *See generally* Press Release, FTC, FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition (Apr. 10, 2014), https://www.ftc.gov/news-events/news/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed-acquisition.

[24] *See generally* Press Release, FTC, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competitor After String of Failed Attempts to Innovate (Aug. 19, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush-competition-after-string-failed.

[25] Substitute Amended Complaint for Injunctive and Other Equitable Relief, *FTC v. Facebook, Inc.*, No. 1:20-cv-3590 79-80 (D.D.C. Sept. 8, 2021), https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no._82.pdf.

[26] Complaint, *New York v. Facebook, Inc.*, No. 1:20-cv-3589 (D.D.C. Dec. 9, 2020), https://ag.ny.gov/sites/default/files/court-filings/state_of_new_york_et_al._v._facebook_inc._-_filed_public_complaint_12.11.2020.pdf. The United States District Court for the District of Columbia initially dismissed the complaint, and the D.C. Circuit affirmed. *New York v. Facebook, Inc.*, 549 F.Supp.3d 6 (D.D.C. 2021), *aff'd sub nom. New York v. Meta Platforms, Inc.*, 2023 WL 3102921 (D.C. Cir. 2023) (affirming dismissal based on laches (not applicable to the FTC) and allegations related to Facebook's conduct (which the district court had already dismissed in the FTC's case)).

[27] *See generally* FTC, Press Release, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within.

[28] Amended Complaint, *FTC v. Meta Platforms Inc.*, No. 5:22-cv-04325 2, 6, 8, 25 (N.D. Cal. Oct. 7, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/221_0040_amended_complaint_-_usdc_-_10.07.22.pdf.

[29] *FTC v. Meta Platforms Inc.*, No. 5:22-cv-04325 (N.D. Cal. 2023) (slip op.).

26. First, the district court accepted the FTC's market definition based on the practical indicia articulated in the Supreme Court's *Brown Shoe* decision.[30] The district court's endorsement of practical methods for defining a digital relevant market bolsters the Agencies' ability to challenge illegal digital mergers, including in instances where quantitative data might be less available, such as in nascent or rapidly evolving markets.[31] Second, the *Meta/Within* decision affirms the continuing vitality of actual potential competition (entry effects) and perceived potential competition ("edge" effects) theories as ways to block harmful mergers.[32]

27. The court's opinion also includes other useful holdings that could help support future merger challenges in digital markets. According to the opinion, concentrated markets are presumed not to be competitive—even when they are relatively new and even if they are experiencing some entry—unless the defendants can prove that the markets are exhibiting meaningful deconcentration.[33] The court confirmed that a transaction may be challenged based on very narrow relevant product markets.[34] The court also explained that the fact that many companies do not (yet) generate profits in a market does not necessarily change the analysis of potential harm to competition.[35]

28. The U.S. Agencies' recent challenges to digital mergers reflect their efforts to use existing, but not recently utilized, theories in order to prevent harm to competition or tendencies toward monopoly. For example, the DOJ's complaint filed against Google in January 2023 specifically alleges that Google monopolized the digital advertising market through, among other things, engaging in a pattern of acquisitions to obtain control over key digital advertising tools used by website publishers to sell advertising space.[36]

29. Even in instances where a court declines to enjoin a merger, the Agencies may obtain a decision that otherwise provides a beneficial interpretation of applicable law. Such decisions can serve as useful roadmaps on how to challenge potentially anticompetitive digital mergers in the future. This precedential guidance can enhance the Agencies' enforcement capabilities over the long-term, even when they do not prevail in the short-term.

30. The Agencies' efforts to prevent harm to competition as digital technologies evolve are illustrated by their challenges to Visa/Plaid, UnitedHealth Group/Change Healthcare, Microsoft/Activision, and ICE/Black Knight.

31. In 2020, DOJ successfully sued to stop Visa, a monopolist in online debit services, from acquiring Plaid, an innovative fintech firm developing an alternative online payments

[30] *Id.* at 16-32. *See also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

[31] The FTC has also obtained similar useful precedent on market definition for digital markets based on monopolization claims not involving a merger. *See FTC v. Surescripts, LLC*, 2023 WL 2707866 *2, 12, 17-19 (D.D.C. 2023) (Mem. Op.) (granting FTC partial summary judgment on market definition regarding two alleged violations of Section 2, and using *Brown Shoe* practical indicia to conclude the relevant markets are two-sided platforms for electronic prescription routing and electronic eligibility, which do not include analog methods of routing and eligibility).

[32] *FTC v. Meta Platforms, Inc.* at 37-64.

[33] *Id*. at 37.

[34] *Id*. at 19-21.

[35] *Id*. at 36-37.

[36] *See* Complaint, *United States v. Google LLC*, No. 1:23-cv-00108 31-36 (E.D. Va. Jan. 24. 2023), https://www.justice.gov/opa/press-release/file/1563746/download.

platform that would allow users to pay online vendors directly from their bank accounts instead of using a debit card.[37] The complaint alleged that Visa viewed the proposed acquisition as a way to eliminate a nascent competitive threat in order to protect its debit business in the United States, and the transaction would therefore violate Section 2 of the Sherman Act and Section 7 of the Clayton Act.[38] Visa and Plaid abandoned the proposed transaction shortly after DOJ filed its complaint.

32. In 2022, DOJ and the Attorneys General of the states of New York and Minnesota sued to block UnitedHealth Group's acquisition of Change Healthcare under Section 7 of the Clayton Act.[39] The proposed transaction raised issues relating to healthcare claims data and the use of, and rights to use, such data, and harm to innovation in health insurance markets. In particular, the complaint applied both horizontal and vertical theories to allege that the acquisition would harm competition in the first-pass claims editing solutions market, a critical input for health insurers.[40] Despite declining to enjoin the acquisition, the district court considered the complaint's theories of harm, found that claims data can have competitive value and can be proprietary in nature, and concluded that United would have inherited both data and use rights post-merger.[41]

33. The FTC filed a complaint challenging Microsoft's $70 billion proposed acquisition of Activision using traditional vertical theories in an evolving gaming landscape.[42] According to the complaint, Microsoft is one of only two makers of high-performance video game consoles and Activision develops and publishes high-quality video games for multiple devices, including video game consoles, PCs, and mobile devices.[43] The complaint alleges that Microsoft's ownership of Activision would provide Microsoft with the ability to withhold or degrade Activision content through various means, including manipulating Activision's pricing, degrading game quality or player experience on rival offerings, changing the terms and timing of access to Activision's content, or withholding content from competitors entirely.[44] The complaint further alleges that resulting harm could occur not just in the high-performance console market, but also in

[37] *See generally* Press Release, DOJ, Justice Department Sues to Block Visa's Proposed Acquisition of Plaid (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid and Press Release, DOJ, Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block (Jan. 12, 2021), https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

[38] Complaint, *United States v. Visa Inc*., No. 3:20-cv-07810 1-2, 5-6, 13, 17-18, 20-21 (N.D. Cal. Nov. 5, 2020), https://www.justice.gov/opa/press-release/file/1334726/download.

[39] *See generally* Press Release, DOJ, Justice Dep't Sues to Block UnitedHealth Group's Acquisition of Change Healthcare (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare.

[40] Complaint, *United States v. UnitedHealth Group Inc.*, No. 1:22-cv-00481 23 (D.D.C. Feb. 24, 2022), https://www.justice.gov/opa/press-release/file/1476676/download.

[41] *United States v. UnitedHealth Group Inc.*, 2022 WL 4365867 *15-18 (D.D.C. 2022) (Mem. Op.).

[42] *See generally* Press Release, FTC, FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc. (Dec. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc.

[43] Complaint, *In re Microsoft Corp.*, No. 9412 2-4 (F.T.C. Dec. 8, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09412MicrosoftActivisionAdministrativeComplaintPublicVersionFinal.pdf.

[44] *Id*.

multi-game content library subscription services and cloud gaming subscription services, which may represent the future of gaming.[45] The complaint asserts that respondents executed a merger agreement in violation of Section 5 of the FTC Act, which if consummated would violate Section 7 of the Clayton Act.[46]

34. The FTC's recent complaint challenging *ICE/Black Knight* alleges that the proposed combination of the nation's two largest providers of mortgage loan origination systems and other key lender software tools would increase costs, reduce innovation, and reduce lenders' choices for tools necessary to generate and service mortgages.[47] The complaint alleges violations of Section 5 of the FTC Act and Section 7 of the Clayton Act in multiple markets, including for loan origination system ("LOS") software, commercial LOS software, product pricing eligibility engines ("PPEs"), and PPEs for users of ICE's LOS.[48] Reflecting the complexity of digital markets, the complaint contains both horizontal and vertical theories of harm related to the proposed merger.

7. Looking Forward

35. The Agencies will remain vigilant to prevent harm to competition resulting from digital mergers by engaging in robust merger enforcement. The Agencies are especially concerned about mergers that could entrench a dominant firm or allow such a firm to extend its dominance.

36. The Agencies are also especially concerned with any potential labor market harms when evaluating digital mergers. One concerning aspect of labor markets in digital sectors is the high proportion of non-competes in non-reportable big tech acquisitions.[49] The Agencies will continue to evaluate technology companies' use of non-compete clauses in employment agreements that prevent many skilled workers from working at competing firms or starting their own businesses. In addition, given their often close proximity and overlapping workforce needs, technology companies may be prone to enter into collusive agreements with one another that pose a harm to labor market competition. For example, technology companies have run afoul of the antitrust laws by entering into agreements not to hire each other's workers.[50] The Agencies will continue to evaluate the effects of these

[45] *Id*. at 11-16.

[46] *Id*. at 1, 21, 23. The United Kingdom Competition and Markets Authority has recently blocked the proposed *Microsoft/Activision* transaction. *See* Press Release, U.K. CMA, Microsoft / Activision deal prevented to protect innovation and choice in cloud gaming (Apr. 26, 2023), https://www.gov.uk/government/news/microsoft-activision-deal-prevented-to-protect-innovation-and-choice-in-cloud-gaming.

[47] *See generally* Press Release, FTC, FTC Staff Seeks Court Order Preventing ICE from Consummating its Acquisition of Rival Black Knight Pending Agency Administrative Challenge (Apr. 10, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-staff-seeks-court-order-preventing-ice-consummating-its-acquisition-rival-black-knight-pending.

[48] Complaint, *FTC v. Intercontinental Exchange, Inc.*, No. 3:23-cv-01710 (N.D. Cal. Apr. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023139iceblackknightfederalcomplaintpitro.pdf.

[49] *See, e.g.*, Non-HSR Technology Acquisitions Report, *supra* note 14, at 8-9, 21, 37 (discussing non-competes).

[50] *See, e.g.*, *United States v. Adobe Systems Inc.*, No. 1:10-cv-01629, 2010 WL 11417874 (D.D.C. Sept. 24, 2010).

types of restrictions on labor markets. Purported consumer benefits in digital product markets from a merger do not offset or neutralize harm to workers in labor markets.

37. The importance of preventing harm before it happens and the importance of preserving open and fair dynamic competition both underlie the Agencies' commitment to robust pre-consummation analysis—wherever possible—of digital mergers. But whether or not a digital merger is consummated, the Agencies are firmly committed to act swiftly and decisively to challenge illegal digital mergers. Enforcement action is essential to prevent critically important digital markets from becoming or remaining unduly concentrated or dominated by a monopolist.

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The Role of Innovation in Enforcement Cases – Note by the United States

5 December 2023

This document reproduces a written contribution from the United States submitted for Item 3 of the 141st OECD Competition Committee meeting on 5-8 December 2023.

More documents related to this discussion can be found at www.oecd.org/competition/the-relationship-between-competition-and-innovation.htm.

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United States

1. Introduction

1. The U.S. federal antitrust agencies (the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (together, "the Agencies")), have long recognized the vital role competition plays in driving innovation, and that protecting competition and innovation is critical for promoting growth in an economy.[1] When firms compete, they strive to gain an edge in the market by creating new or better products and services, introducing more attractive features, reducing costs, or adopting new technology for distribution of products. This leads to technological advancements, increased variety of goods or services, quality improvements, and increased productivity that benefit society as a whole.

2. The U.S. antitrust laws protect all dimensions of competition and the competitive process, including innovation. When conducting investigations, the Agencies start by determining how competition presents itself in the market. Recognizing that competition often plays out in the form of rivalry to innovate, the Agencies regularly consider and assess the potential impact on innovation in their enforcement programs. A "threat to innovation is anticompetitive in its own right,"[2] and the Agencies may bring an enforcement action based on adverse innovation effects.[3]

3. This paper focuses on innovation considerations in U.S. merger analysis. It first describes some of the ways mergers may raise innovation-related concerns, as reflected in the Agencies' joint Draft Merger Guidelines ("Draft Guidelines"), which were released for public comment in July 2023. It next discusses examples of proposed mergers where the Agencies have identified adverse competitive effects related to innovation. It then describes some recent additions to the toolkit the Agencies use to identify and address threats to innovation-based competition more broadly.

2. Innovation Considerations in Merger Review

4. As U.S. courts have acknowledged, "a merger can substantially lessen competition by diminishing innovation."[4] The Agencies' focus on this dimension of competition is

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[1] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) at § 6.4 Innovation and Product Variety (noting that competition "often spurs firms to innovate."); The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ (noting that "Economists find that as competition declines, productivity growth slows, business investment and innovation decline, and income, wealth, and racial inequality widen.").

[2] *United States v. Anthem, Inc.*, 855 F.3d 345, 361 (D.C. Cir. 2017).

[3] Horizontal Merger Guidelines, § 6.4, Innovation and Product Variety (2010) https://www.justice.gov/atr/horizontal-merger-guidelines-08192010; U.S. Dep't of Justice and Fed. Trade Comm'n, Draft Merger Guidelines (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

[4] *United States v. Anthem, Inc.*, 236 F.Supp.3d 171, 229 (D.D.C.), aff'd 855 F.3d 345 (D.C. Cir. 2017).

reflected throughout the 2023 Draft Merger Guidelines, a document designed to inform the public, practitioners, firms, and courts about what the Agencies consider when reviewing or challenging a merger.[5] These guidelines update the analysis described in the 2010 Merger Guidelines, which also recognize the importance of innovation as a dimension of competition.[6] The 2023 Draft Guidelines build on the 2010 guidance but are modernized to better reflect the most recent economic scholarship and experience with dynamic markets.

2.1. Legal Standard

5. Section 7 of the Clayton Act, the U.S. competition law that most directly addresses mergers and acquisitions, prohibits transactions whose effect "may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce . . . in any section of the country."[7] The Clayton Act is focused on stopping threats to competition "in their incipiency."[8] This forward-looking approach enables the Agencies to account for the realities of the particular market and to examine not only competition related to products and services that are currently sold, but also forward-looking competition, *e.g.*, competition to create new or improved products, services, or innovative features.

6. The anticompetitive effects of a merger need not be certain to render a merger illegal under Section 7. To show that a merger is unlawful, a plaintiff need only prove that its effect "*may be* substantially to lessen competition."[9] Accordingly, the Agencies assess the risk that the merger may lessen competition substantially or tend to create a monopoly based on the available evidence and do not seek to predict specific outcomes in the future with certainty.

2.2. Assessment of Innovation-Related Risks from a Proposed Merger

7. In making merger enforcement decisions, the Agencies assess whether the merger risks lessening competition substantially now or in the future. The Draft Guidelines describe several frameworks that the Agencies use to conduct this assessment, many of which highlight innovation-related concerns. A few examples are provided below, although innovation could be implicated under any of the frameworks.

8. As explained in the Draft Guidelines, the Agencies consider whether a merger would eliminate substantial competition between firms, including competition by firms trying to win business by offering new or better products and services or more attractive

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[5] The Agencies invited the public to submit comments on the Draft Guidelines in July 2023. As of this submission, the Agencies are preparing final guidelines that will incorporate feedback from the public.

[6] Horizontal Merger Guidelines, § 6.4 Innovation and Product Variety (2010).

[7] 15 U.S.C. § 18.

[8] *Brown Shoe v. United States*, 370 U.S. 294, 323 (1962). Although this paper focuses on Section 7 analysis, mergers may also be reviewed under Section 1 of the Sherman Act, which prohibits contracts, combinations or conspiracies in restraint of trade; or Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, and conspiracy to monopolize. 15 U.S.C. §§ 1, 2.

[9] *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).

features.[10] For example, competing firms might have tried to win revenues and share from one another by introducing new or better-quality products. A merger may reduce or eliminate the incentive to initiate or continue such projects if the sales of those new or improved products would "cannibalize" one of the merging parties' existing sales.[11] The more the merging parties have influenced one another's behavior, the more significant the competition between them. Where firms have research and development capabilities, competition between them can have a greater impact on their incentives to innovate.[12]

9. The Agencies also assess whether a merger may substantially lessen competition by eliminating a potential entrant.[13] The Agencies analyze acquisitions involving products in development to determine whether the firm's development efforts have, or are likely to have in the near future, a beneficial effect on competition. For example, a merger that eliminates one of only a few firms that has a reasonable probability of actually entering and deconcentrating a concentrated relevant market raises serious concerns. In certain cases, a firm may acquire another firm merely to terminate or suspend innovative activity or the development of a product perceived to be a competitive threat to the acquiring firm. Elimination of a perceived potential entrant may also raise concerns because the perceived entrant can incentivize current market participants to make investments or increase product quality, among other procompetitive responses.

10. The Agencies also consider the risk that the merger will give a firm control over products or services that are essential for competitors to effectively compete.[14] With respect to innovative efforts, development of new features or products depends on competitors having access to necessary inputs, tools, or platforms. If the merged firm obtains undue control over these inputs, it may enable the merged firm to weaken rivals or create barriers to entry or expansion for competitors.

11. The Agencies may also challenge mergers that entrench or extend a dominant firm's position.[15] For example, a dominant firm may acquire an innovative emerging rival in an effort to stifle future innovative competition. Such transactions may also violate Section 2 of the Sherman Act, which prohibits monopolization (and attempted monopolization and conspiracy to monopolize), separate from and in addition to the Clayton Act. The Agencies assess whether the acquired firm constitutes a nascent threat that, even if unproven, shows potential to disrupt the monopoly in the future. If so, eliminating that firm is conduct "reasonably capable of contributing significantly to the preservation of monopoly power in violation of Section 2" of the Sherman Act.[16] The Draft Guidelines explain the need for heightened caution against the extension of dominance during technological transitions:

> *At times, high entry barriers can become temporarily less effective in protecting a firm's dominance. For example, technological transitions can render existing entry*

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[10] Draft Merger Guidelines, Guideline 2, at 8.

[11] Draft Merger Guidelines, App. 2.E., at 7.

[12] For a more detailed explanation of how a merger may diminish incentives to innovate, see Draft Merger Guidelines, App. 2.E., https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

[13] *Id*., Guideline 4.

[14] *Id*., Guideline 5.

[15] *Id*., Guideline 7.

[16] *Id*. at 21: *United States v. Microsoft Corp.*, 253 F.3d 34, 54, 79 (D.C. Cir 2001) (en banc) (per curiam).

barriers less relevant, and a dominant firm might seek to acquire firms to help it reinforce or recreate those entry barriers so that its dominance endures past the technological transition. Further, technological transitions can create temporary opportunities for entrants to differentiate based on their alignment with new technologies. A dominant firm might seek to acquire firms that might otherwise gain sufficient customers to overcome entry barriers. The Agencies take particular care to preserve opportunities for deconcentration during technological shifts.[17]

2.3. Market Definition Considerations

12. The Agencies define "relevant antitrust markets" in order to identify the "area of effective competition" in which competition may be lessened.[18] Consistent with other aspects of merger analysis, the Agencies' approach to market definition reflects the principle that competitive harm may stem from harm to innovation. The Agencies consider the full range of the firms' rivalrous activities as they identify the "area of effective competition" in which competition may be lessened. As the Draft Guidelines explain, where a merger may substantially lessen competition by decreasing incentives for innovation, "the Agencies may define relevant antitrust markets around the products that would result from that innovation, even if they do not yet exist."[19] In some cases, "the Agencies may analyze different relevant markets when considering innovation than when considering other dimensions of competition."[20] For example, if a transaction would bring rival research and development programs together under the control of a single firm, potentially lessening innovation competition, the Agencies may assess the effect of the transaction in a relevant market comprising research and development programs in a particular technological space or aimed at solving a common goal or meeting a particular need.

2.4. Rebuttal Evidence

13. Merging parties sometimes argue that their merger will result in procompetitive benefits. For example, particularly in technology markets, firms often assert that a merger will increase the incentive or ability of a firm to undertake innovation activity. In evaluating these claims, the burden rests on the parties to demonstrate that such procompetitive efficiencies show that no substantial lessening of competition is in fact threatened by the merger.[21] The Agencies do not credit efficiencies that are vague or speculative or would likely be achieved without the merger.[22] For example, firms can often work together using contracts short of a merger to collaborate on innovative efforts without undertaking a full merger with the likely anticompetitive consequences. Nor do the

[17] *Id*. at 20.

[18] *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

[19] Draft Merger Guidelines, App. III.B.7. at 15.

[20] *Id*.

[21] *Id*. at 33.

[22] U.S. Dep't of Justice and Fed. Trade Comm'n, Draft Merger Guidelines § IV.3 (2023); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) ("Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.").

Agencies credit benefits outside the relevant market. Moreover, the Agencies would not trade off innovation benefits against higher prices.[23]

3. Agency Experience with Innovation-Based Harm in Merger Cases

14. The Agencies have identified innovation concerns in numerous merger cases. A few examples follow.[24]

15. The DOJ's 2020 lawsuit to block Visa Inc.'s proposed acquisition of Plaid Inc. is an example of a case where a monopolist attempted to acquire an innovative nascent threat. The DOJ alleged that Visa was a monopolist in online debit, and its proposed acquisition would extinguish a nascent competitor that had the potential to disrupt online debit with a low-cost, innovative product and further entrench Visa's dominance in the online debit market. According to the complaint, Visa sought to buy Plaid for $5.3 billion as an "insurance policy" to neutralize a "threat to our important US debit business." The DOJ challenged the deal under both Section 7 of the Clayton Act and Section 2 of the Sherman Act, recognizing that both statutes are violated when a monopolist acquires a nascent competitor to eliminate a significant competitive threat and entrench its dominant position. On January 12, 2021, Visa and Plaid announced that the companies had terminated their merger agreement.

16. In 2016, the DOJ challenged a merger between Anthem and Cigna, the second and third largest health insurance companies in the United States.[25] The DOJ alleged that Anthem and Cigna competed vigorously against one another to sell commercial health

[23] For a more detailed discussion of efficiencies analysis, *see* the U.S. Submission for the OECD Competition Committee Roundtable on Out-of-Market Efficiencies (Dec. 2023).

[24] In addition to the cases discussed in this section, the Agencies have identified adverse innovation effects in numerous other cases, *e.g.*, *United States v. Bayer AG and Monsanto Company*, Civil Action No. 1:18-cv-01241 (D.D.C. 2018), https://www.justice.gov/atr/case-document/file/1066656/download; *United States v. Deere & Company, Precision Planting LLC, and Monsanto Company*, Civil Action No. 1:16-cv-08515 (N.D. Ill. 2016), https://www.justice.gov/media/862871/dl?inline; *Applied Materials/Tokyo Electron* (Press Release, Dep't of Justice, Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy (April 27, 2015), https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011); *Amgen/Horizon Therapeutics* (Press Release, Fed. Trade Comm'n, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition); *Edgewell Personal Care/Harry's* (Press Release, Fed. Trade Comm'n, FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc. (Feb. 3, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-files-suit-block-edgewell-personal-care-companys-acquisition-harrys-inc); *Thoratec/HeartWare* (Press Release, Fed. Trade Comm'n, FTC Challenges Thoratec's Proposed Acquisition of HeartWare International (July 30, 2009), https://www.ftc.gov/news-events/news/press-releases/2009/07/ftc-challenges-thoratecs-proposed-acquisition-heartware-international).

[25] Press Release, Dep't of Justice, Justice Department and State Attorneys General Sue to Block Anthem's Acquisition of Cigna, Aetna's Acquisition of Humana (July 21, 2016), https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s; Complaint, *United States et al. v. Anthem, Inc.*, , No. 1:16-cv-01493 (D.D.C. July 21, 2016), *available at* https://www.justice.gov/atr/file/903111/download.

insurance to national accounts. Although Cigna could not compete with Anthem solely on price, it could compete on price and non-price terms, which included finding innovative ways to lower its customers' medical costs by offering sophisticated wellness programs, providing highly regarded customer service, and working closely with doctors and hospitals to improve the quality and lower the cost of care. The DOJ alleged that because the merger would eliminate Cigna as a competitor against Anthem, it would reduce the incentive to continue innovating with respect to—and competing on—these non-price elements of its product offerings. The district court blocked the merger, finding that it likely would slow such innovation.[26] The court explained that with respect to "[t]he question to be decided as to whether the transaction would reduce the new firm's incentive to innovate in the relevant market, and in connection with that issue, it is important to note that national accounts in particular are considered to be the 'innovation incubators' for the entire industry. They push carriers to enhance plan design, customer service, technology, and data security, and the innovations they spur are often deployed to other customers and segments."[27] The district court's decision was upheld by the appellate court.[28]

17. Also in 2016, the DOJ challenged a merger between Halliburton and Baker Hughes that would have combined two of the three largest oilfield services companies in the United States and the world, eliminating important head-to-head competition in markets for more than twenty products or services used for on- and offshore oil exploration and production in the United States.[29] Halliburton, Baker Hughes, and Schlumberger comprised the "Big Three" in the industry, and they possessed unrivaled research and innovation capabilities. The DOJ alleged that because of plans to eliminate expenditures on overlapping research projects, the merger would end competition between Halliburton and Baker Hughes to develop and bring to market "game changing" or "disruptive" new technologies. The firms abandoned their merger soon after the DOJ filed suit.[30]

18. In 2022, the FTC challenged Meta Platform's (formerly Facebook) acquisition of Within Unlimited and its popular virtual reality dedicated fitness app, Supernatural.[31] While Meta did not offer its own virtual reality dedicated fitness app, through its status as a key player in the virtual reality sector with its own best-selling fitness app, capabilities, and resources, the FTC alleged that Meta's acquisition would reduce innovation in multiple ways. First, the acquisition would eliminate the prospect of Meta's independent entry into the virtual reality dedicated fitness market, depriving consumers of additional choice and increased innovation. Second, the acquisition would eliminate existing innovation by

[26] *United States, et al., v. Anthem Inc. et al.*, 236 F. Supp. 3d 171, 231 (D.D.C. 2017).

[27] *Anthem*, 236 F. Supp. 3d at 230.

[28] *United States, et al., v. Anthem Inc., et al.*, 855 F.3d 345, 362 (D.C. Cir. 2017) ("The threat to innovation is anticompetitive in its own right.").

[29] Press Release, Dep't of Justice, Justice Department Sues to Block Halliburton's Acquisition of Baker Hughes (April 6, 2016), https://www.justice.gov/opa/pr/justice-department-sues-block-halliburton-s-acquisition-baker-hughes; Complaint, *United States v. Halliburton Co. and Baker Hughes, Inc.*, No. 1:16-cv-00233-UNA (D. Del. April 6, 2016), *available at* https://www.justice.gov/opa/file/838651/download.

[30] Press Release, Dep't of Justice, Halliburton and Baker Hughes Abandon Merger After Department of Justice Sued to Block Deal (May 1, 2016), https://www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal.

[31] Press Release, Fed. Trade Comm'n, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within.

Within that resulted from the mere possibility that Meta would enter the market. Third, the acquisition would eliminate rivalry between Meta and Within in a broader virtual reality fitness market where they each add features to attract users. Although the court ultimately denied the FTC's request for a preliminary injunction, the court's decision validated the FTC's core legal theories and provided a roadmap for challenging mergers that eliminate potential competitors and threaten innovation.

19. In 2021, the FTC sued to block Illumina's proposed acquisition of Grail.[32] Grail is engaged in an innovation race against other firms to develop Multi Cancer Early Detection ("MCED") tests, while Illumina supplies the DNA sequencing technology platforms that Grail and its rivals need to develop the tests. The complaint alleged harm in the relevant market for the "research, development, and commercialization of MCED tests." Following a multi-week administrative proceeding, the Commission reversed the Administrative Law Judge's Initial Decision and ordered Illumina to divest Grail, concluding that the acquisition would allow Illumina to favor Grail and foreclose other MCED developers' access to its critical sequencing technology, which would reduce innovation, decrease choice and quality, and increase prices.[33]

20. Also in 2021, the FTC challenged chip supplier Nvidia's proposed vertical acquisition of Arm, which creates and licenses chip designs to other chip suppliers.[34] As one of the largest chip suppliers, Nvidia is best known as the dominant supplier of graphics processing units for use in personal computers and datacenters. Nvidia also offers products for advanced networking, datacenter central processing units, and computer-assisted driving. In these areas, Nvidia competes with other firms that rely on Arm's technology to develop their own products. In addition to alleging that the acquisition would result in higher prices and lower quality, the FTC alleged that it would reduce innovation, contending the combined firm would have less incentive to develop new chip design features and innovations because they might harm Nvidia's chip supply business. Nvidia eventually abandoned the acquisition after the FTC challenged the deal.

21. It is important to recognize that considering a merger's impact on innovation is not limited to traditional high technology markets. For example, in 2020, the FTC challenged the proposed merger of Edgewell Personal Care and Harry's, two suppliers of shaving products.[35] The FTC alleged that Edgewell, Harry's, and market leader Procter & Gamble were among the few significant competitors in the U.S. market for the manufacture and

[32] Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Mar. 30, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection-test-maker-grail.

[33] *In the Matter of Illumina, Inc. and GRAIL, Inc.*, No. 201-0144, at 59-60 (F.T.C. Apr. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf; *see also* Press Release, Fed. Trade Comm'n, FTC Orders Illumina to Divest Cancer Detection Test Maker GRAIL to Protect Competition in Life-Saving Technology Market (Apr. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-orders-illumina-divest-cancer-detection-test-maker-grail-protect-competition-life-saving. The matter is currently on appeal before the United States Court of Appeals for the Fifth Circuit.

[34] Press Release, Fed. Trade Comm'n, FTC Sues to Block $40 Billion Semiconductor Chip Merger (Dec. 2, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger.

[35] Press Release, Fed. Trade Comm'n, FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc. (Feb. 10, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/02/statement-daniel-francis-deputy-director-ftc-bureau-competition-regarding-announcement-edgewell.

sale of men's and women's wet shave razors. The complaint further alleged that Edgewell and Procter & Gamble operated their brands of men's and women's razors as a comfortable duopoly until Harry's disrupted the market by launching a direct-to-consumer wet shave brand and offering its products in brick-and-mortar retail stores. As a result of the new competitive threat, Procter & Gamble and Edgewell reduced prices and innovated by developing value-priced products. The FTC alleged that the proposed merger would eliminate price and innovation competition between suppliers of wet shave razors, inflicting significant harm on U.S. consumers. Shortly after the FTC sued, Edgewell terminated its merger agreement with Harry's.

4. Expanding the Toolkit for Assessing Innovation Issues

22. In the U.S., there is growing recognition of the importance of ensuring that businesses have the opportunity to compete across all dimensions in modern markets, including innovation. The Biden Administration has taken a number of steps to expand the tools available to address modern market realities and promote a forward-looking approach to competition analysis.

23. First, as discussed above, the Agencies are in the process of updating the Merger Guidelines. The Draft Guidelines have been updated to reflect modern marketplace realities and state-of-the-art economic analysis. In accordance with legal precedent and up-to-date economics, the Draft Guidelines focus on the effects on competition rather than just the effects on one type of beneficiary of competitive markets, or purely price or output effects. As has been articulated in prior Guidelines, the lessening of competition from a merger can lead to many non-price harms, such as reduced quality and less innovation.[36]

24. Second, the Agencies are expanding their expertise to ensure that they have a sophisticated understanding of how modern markets function. For example, both Agencies have hired data scientists, AI experts, and technologists to provide insights into these rapidly evolving markets and ensure that opportunities for competition and innovation flourish.[37]

25. Third, the FTC, with DOJ's concurrence, has issued a Notice of Proposed Rulemaking (NPRM) proposing changes to the premerger filings required under the Hart-

[36] Relatedly, the FTC has challenged overbroad non-compete restrictions in connection with merger enforcement actions. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis ("Under the proposed order, DaVita is required to divest three Provo-area dialysis clinics . . . and prohibited from entering into or enforcing non-compete agreements and other employee restrictions."). Among other harms, non-compete agreements can decrease innovation by blocking former employees from starting new business; accordingly, the FTC has proposed a rule that would ban non-compete clauses. Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[37] *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Launches New Office of Technology to Bolster Agency's Work (Feb. 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-launches-new-office-technology-bolster-agencys-work. For a more detailed discussion of recent developments, see U.S. Submission, OECD Competition Committee Working Party 3, The Optimal Design, Organisation and Powers of Competition Authorities (Dec. 2023).

Scott-Rodino (HSR) Act.[38] Currently, filers are not required to provide information about products or services that did not derive revenue in the last fiscal year. Under the proposal, filers would be required to identify pipeline or pre-revenue products and overlaps for such products anticipated to have annual revenue totaling more than $1 million within two years. This requirement will substantially improve the Agencies' ability to identify competition relating to these forthcoming products.

26. Finally, in July 2021, President Biden signed an "Executive Order on Promoting Competition in the American Economy."[39] The Executive Order calls for a "whole-of-government" approach to promoting procompetitive policies and markets across the United States. It has enhanced opportunities for the Agencies to partner with other federal agencies and collaborate across government both to address the need for more vigorous competition in the U.S. economy and to promote fair competition. As part of this process, agencies are encouraged to consider how their regulations impact competition, including whether regulations are entrenching incumbents, making it more difficult for innovative entrants to compete.

27. For example, the Executive Order requests that the U.S. Patent and Trademark Office (PTO) and U.S. Department of Agriculture (USDA) submit a report on concerns and strategies for ensuring "that the intellectual property (IP) system, while incentivizing innovation, does not also unnecessarily reduce competition in seed and other input markets beyond that reasonably contemplated by the Patent Act."[40] In March 2023, the USDA, in consultation with the PTO and other federal agencies, including the DOJ and FTC, submitted the requested report.[41] Among other initiatives, USDA announced the creation of a new Working Group on Competition and Intellectual Property to explore joint PTO-USDA opportunities to "ensure that our IP laws continue to incentivize innovation without unduly delaying competition and new market entrants," among other goals.[42]

5. Conclusion

28. The Agencies are committed to protecting all forms of competition and the competitive process, including innovation. This commitment is reflected in the 2023 Draft Merger Guidelines, which reflects the Agencies' appreciation of systemic changes occurring across the economy. The updates explain how the Agencies apply the law to modern market realities, explicitly connecting the Agencies' analyses to effects on competition, recognizing that competition plays out in different ways. The Agencies are also making use of expanded tools to protect competition and innovation in modern markets, including expanding Agency expertise to understand evolving markets, updating the merger notification form to reflect forward-looking competition, and collaborating with

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[38] Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

[39] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

[40] Executive Order, Section 5(i)(v).

[41] U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS), *More and Better Choices for Farmers: Promoting Fair Competition and Innovation in Seeds and Other Agricultural Inputs* (March 2023), https://www.ams.usda.gov/sites/default/files/media/SeedsReport.pdf.

[42] *Id*. at 39.

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other agencies to employ a "whole of government" approach to promoting competition and innovation.

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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Serial Acquisitions and Industry Roll-ups – Note by the United States

6 December 2023

This document reproduces a written contribution from the United States submitted for Item 11 of the 141st OECD Competition Committee meeting on 5-8 December 2023.

More documents related to this discussion can be found at www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

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United States

1. Introduction

1. In recent years, there has been growing concern in the United States about the effects of "roll-ups" and "stealth consolidation," primarily in the technology and healthcare industries.[1] Serial acquisitions involve a number of acquisitions by the same firm that consolidate a fragmented market, typically composed of many relatively small competitors. The U.S. Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) (together, the Agencies) recognize that serial acquisitions can result in harm to competition and are focused on identifying those situations and taking appropriate action.

2. This paper discusses concerns raised by serial acquisitions and the challenges of detection, relevant U.S. law, and the Agencies' enforcement experience. It concludes by looking at remedies presently available and suggesting additional solutions.

2. Serial acquisitions and industry roll-ups in the United States

3. Firms may find that a strategy of growth through acquisition is more profitable than organic growth. A pattern or strategy to buy up smaller competitors or firms in the same or related lines of business that pose a competitive threat can reduce competitive pressures in the market, leading to higher profits. Incumbents can be well-placed to identify industry developments and have the incentive to stave off emerging threats. Rolling up smaller competitors or killing off nascent threats before they emerge can lead to the same magnitude and type of harm as mergers of larger or established firms and are less likely to attract the attention of enforcers until the strategy is identified. Firms that already have a dominant position may preserve that market power through various "moat-building" tactics, including acquisitions, to create barriers that will protect their position from outside threats (see, e.g., Paragraphs 12 and 13).

4. Serial acquisition strategies have been undertaken in the United States economy since the latter half of the 19th century.[2] Competition reports to Congress in the late 1940s highlighted serial acquisitions in traditionally "small business" industries by large, often national, corporations fueled by wartime capital.[3] Congress sought to address these

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[1] *See, e.g.*, Thomas Wollmann, *How to Get Away with Merger: Stealth Consolidation and its Effects on U.S. Healthcare* (NBER Working Paper Series, Working Paper 27274, 2021) at 19–20, https://www.nber.org/papers/w27274; Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. Econ. Persp. 69, 76–77 (Summer 2019), https://www.aeaweb.org/articles?id=10.1257/jep.33.3.69; Cory Capps, David Dranove & Christopher Ody, *Physician Practice Consolidation Driven by Small Acquisitions, So Antitrust Agencies Have Few Tools to Intervene*, 36 Health Affairs 1556, 1560–61 (Sept. 2017), https://doi.org/10.1377/hlthaff.2017.0054.

[2] *See, e.g.*, *Standard Oil Co. v. U.S.*, 221 U.S. 1, 31–42 (1911); *U.S. v. American Tobacco Co.*, 221 U.S. 106, 157–60 (1911).

[3] *See* Federal Trade Commission, The Merger Movement: A Summary Report 7 (1948) ("Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply. This latter pattern

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concerns in 1950 when it amended the Clayton Act, which the Supreme Court observed was specifically intended to address "the rising tide of economic concentration . . . in its incipiency to brake this force at its outset and before it gathered momentum."[4] The legislative history of the 1950 amendments makes clear that Congress intended U.S. merger law to address market power achieved through a series of acquisitions.[5]

5. Today, our experience indicates that serial acquisitions are most often favored by technology companies and private equity firms. Large technology companies with excess liquid capital often expand their dominion by entering related or adjacent markets or buying up competitors, both of which have raised concerns among policymakers in the United States and abroad.[6] Meanwhile, private equity firms execute "buy-and-build" strategies through a portfolio company that buys a firm, often the market leader, and "rolls-up" smaller competitors using the private equity firm's money and acquisition expertise.[7] Private equity has been particularly active in healthcare markets.[8]

6. To better understand the acquisition strategies of individual firms in the technology sector, the FTC collected information about unreported acquisitions of five large technology companies in 2019. The study focused on 819 non-reported acquisitions made by Apple, Amazon, Facebook (now Meta), Alphabet (including Google), and Microsoft over the course of 2010-2019, and analyzed the pace, size and types of acquisitions to provide a comprehensive overview of all the acquisitions these companies made during that time period. From this study, the FTC gained insight into these companies' practices

. . . is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interests of its rivals.").

[4] *Brown Shoe Co. v. United States*, 370 U.S. 294, 317–18 (footnote omitted) (1962).

[5] H.R. Rep. No. 81-1191, at 8 (1949) ("Acquisitions of stock or assets have a cumulative effect, and control of the market . . . may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition"); S. Rep. No. 81-1775, at 4–5 (1950) ("Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply.").

[6] *See, e.g.*, Staff of H. Comm. on the Judiciary, 116th Cong., Investigation of Competition of Digital Markets: Majority Staff Report and Recommendations 44 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 ("Leading economists and antitrust experts have expressed concern that serial acquisitions of nascent competitors by large technology firms have stifled competition and innovation."); Ken Buck, Doug Collins, Matt Gaetz & Andy Biggs, H. Comm. on the Judiciary, 116th Cong., The Third Way: Antitrust Enforcement in Big Tech 9 (2020), https://buck.house.gov/sites/evo-subsites/buck-evo.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

[7] Statement of Commissioner Rohit Chopra, Regarding Private Equity Roll-ups and the Hart-Scott-Rodino Annual Report to Congress (July 8, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf.

[8] *See*, *e.g.*, Richard M. Scheffler, Laura M. Alexander & James R. Godwin, Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk 8–16 (May 18, 2021), https://publichealth.berkeley.edu/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf.

and acquisition strategies, including how they structured acquisitions and how these acquisitions fit into the companies' overall business strategies.[9]

7. The Agencies are attuned to evolving business models and strategies in order to protect the public and the economy from the ill effects of serial acquisitions.[10] Given the increased concern posed by rollups, the Agencies will evaluate whether serial acquisitions have led to increased market power and leverage.

3. Competition risks with serial acquisitions

8. Empirical studies show that consolidation within an industry can lead to higher prices and reduced quality for consumers.[11] Such consolidation, and any resulting harm, can be the result of a single transaction or multiple transactions.[12]

9. Serial acquisition patterns or strategies can be hard to detect when some or all individual acquisitions are not notified to the Agencies or where the harm from the specific acquisition appears insignificant in isolation. Because serial acquisitions often involve relatively small acquired firms, the Agencies are less likely to be aware of them. The Agencies are notified of pending acquisitions under the Hart-Scott-Rodino (HSR) Act. For 2023, the transaction size-of-reporting threshold for agency notification under the HSR Act is $111.4 million, meaning generally only transactions of more than $111.4 million are notified to the Agencies.[13] Depending on the size of existing competitors, acquirors could significantly increase the concentration in a market through serial transactions without ever triggering the size-of-transaction threshold and thereby avoid HSR Act notification.

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[9] *See* Federal Trade Commission, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019 (2021), https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf.

[10] *See* Executive Order No. 14036, 56 Fed. Reg. 36987, 36988 (July 9, 2021) ("It is also the policy of my Administration to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.").

[11] *See e.g.*, Loren Adler, Conrad Milhaupt & Samuel Valdez, *Measuring Private Equity Penetration and Consolidation in Emergency Medicine and Anesthesiology*, 1 Health Affairs Scholar (July 2023), https://doi.org/10.1093/haschl/qxad008; Thomas Wollmann, *How to Get Away with Merger: Stealth Consolidation and its Effects on U.S. Healthcare* (NBER Working Paper Series, Working Paper 27274, 2021) at 19–20, https://www.nber.org/papers/w27274; Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. Econ. Persp. 69, 76–77 (Summer 2019), https://www.aeaweb.org/articles?id=10.1257/jep.33.3.69.

[12] *See, e.g.*, *In re Nat'l Tea Co.*, 69 F.T.C. 226, 1966 WL 88025, at *19–20, *29 (1966) ("[W]hile the acquisition of a single enterprise with annual sales of $250 million may appear more significant than a series of acquisitions involving 25 firms with sales of $10 million each, the ultimate effect is the same.").

[13] Premerger Notification Office Staff, *HSR Threshold Adjustments and Reportability for 2023* (Feb. 16, 2023), https://www.ftc.gov/enforcement/competition-matters/2023/02/hsr-threshold-adjustments-reportability-2023. HSR thresholds are adjusted annually with changes in gross national product. 15 U.S.C. § 18a(a)(2). Despite this relatively high reporting threshold, the Agencies have experienced a record number of filings. *See* Federal Trade Commission & Department of Justice, *Hart-Scott-Rodino Annual Report: Fiscal Year 2021*, at 1 fig. 1 (2023).

10. Even if the Agencies are aware of a pattern of serial acquisitions in a market, assessing each acquisition singly may result in underenforcement, especially when individual acquisitions result in very small changes in concentration as measured by the Herfindahl-Hirschman Index. But it is possible for a company to acquire, through serial acquisitions, over 50 percent of a market without any single transaction triggering close scrutiny of potential effects.[14] The Clayton Act condemns mergers whose effect may be substantially to lessen competition or tend to create a monopoly "whether the acquiring corporation accomplished these results by one immense gobble of another large [competitor] or . . . by nibbling away at small [competitors.]"[15] Therefore, to avoid underenforcement, it is important that the Agencies assess the cumulative effect of serial transactions in a given market.[16] The Agencies' 2023 Draft Merger Guidelines describe this approach in assessing whether one or all of the acquisitions may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act.[17]

11. The cumulative impact of serial acquisitions can lead to several different types of competitive harm. For instance, serial acquisitions can eliminate important head-to-head competition between the acquiring firm and its target(s).[18] Serial acquisitions can also result in a market that is highly concentrated, where a merger that eliminates even a small competitor creates undue risk that the merger may cause harm.[19] Further, serial acquisitions can increase the risk of coordination among the remaining firms in the market, for example through the elimination of a maverick firm.[20]

12. Serial acquisitions also can lead to the creation of a dominant firm, raising concerns that further acquisitions would give the firm the ability and incentive to reduce competition by making it harder for its rivals to compete, or to deter entry of new firms into the market. For instance, the acquiring firm may gain control over access to a product, service, or customers that its rivals use to compete, enabling it to weaken its rivals and thereby substantially lessen competition.[21] If the acquiring firm already has a dominant position, additional acquisitions may allow it to preserve or entrench its market power.[22]

13. Serial acquisitions by a dominant player may address not only emerging threats within its core market but may also be directed at threats emerging in related or adjacent

[14] Leemore Dafny & Nancy Rose, Response to DOJ-FTC Merger Guidelines Request for Information (April 21, 2022), https://www.hbs.edu/ris/Profile%20Files/Response%20to%20FTC-DOJ%20Request%20for%20Merger%20Guidelines%20Feedback_d7e77fe7-7bc3-4460-9938-b512f23376ba.pdf.

[15] *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 822 (9th Cir. 1961) (enforcing *In re Crown Zellerbach Corp.*, 54 F.T.C. 769 (1957)), *cert. denied*, 370 U.S. 937 (1962).

[16] *See U.S. v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 565 (E.D. Penn. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[17] *See* Draft FTC-DOJ Merger Guidelines for Public Comment, Guideline 9, at 22–23 (July 19, 2023).

[18] *Id.*, Guideline 2, at 7–9. *See, e.g., In re Hosp. Corp. of Am.*, 106 F.T.C. 361, 1985 WL 668927 (1985), *enforced*, *Hosp. Corp. of Am. v. F.T.C.*, 807 F.2d 1381 (7th Cir. 1986); *U.S. v. Healthco, Inc.*, 387 F. Supp. 258, 271 (S.D.N.Y. 1975).

[19] *Id.*, Guideline 1, at 6–7.

[20] *Id.*, Guideline 3, at 9–11.

[21] *Id.*, Guideline 4, at 11–13.

[22] *Id.*, Guideline 7, at 18–21.

markets, such as new component technologies, key intellectual property, or complementary assets. This is a particular concern in platform markets, where competition may not neatly follow horizontal or vertical lines. A merger may entrench the dominant position of the acquiring firm by, for instance, increasing barriers to entry or switching costs, interfering with customers' use of competitive alternatives, depriving rivals of scale economies or network effects, or eliminating a nascent threat.[23]

14. Serial acquirors may also acquire partial ownership stakes or preserve the acquired firms' corporate entities and branding. Such strategies maintain a façade of competition while common ownership, sponsorship, affiliation, board membership, or management dampens any incentive to compete and facilitates undue coordination.[24] Private equity firms can use serial partial acquisitions to obtain board representation in competing firms, which can violate Section 8 of the Clayton Act and harm competition.[25]

15. Serial acquisition strategies may also violate Section 2 of the Sherman Act when a firm with monopoly power relies on acquisitions, among other conduct, to acquire or maintain its monopoly.[26] Section 2 of the Sherman Act prohibits firms from acquiring, conspiring or attempting to acquire, or maintaining monopoly power. Interpreting Section 2, the Supreme Court defined unlawful monopolization as possession of monopoly power plus "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[27] Monopoly power, defined as "the power to control price or exclude competition,"[28] can be shown directly by demonstrating the company at issue has the power to control price or exclude competition or indirectly, by showing "a predominant share of the relevant market."[29] Serial acquisition strategies which aim to achieve—or actually achieve—high market share, exclusion of competitors, suppression of wages, reduction in innovation, or pricing power may violate Section 2. The framework used to assess monopolization claims under Section 2 is well-equipped to address serial acquisitions because "merging viable competitors to create a monopoly is a clear § 2 offense,"[30] and the effects of the acquiror's anticompetitive course of conduct are considered "as a whole rather than considering each aspect in isolation."[31]

[23] *Id.*, Guideline 7, at 19–21.

[24] *Id.*, Guideline 12, at 27–28. *See, e.g.*, *Reading Intern., Inc. v. Oaktree Capital Management LLC*, 317 F. Supp. 2d 301 (S.D.N.Y. 2003); *see also* Mike Moiseyev, *What's the interest in partial interests?* (May 9, 2016), https://www.ftc.gov/enforcement/competition-matters/2016/05/whats-interest-partial-interests; 15 U.S.C. § 19 (prohibiting interlocking directorates).

[25] *See, e.g.*, Department of Justice, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023), https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal.

[26] *See, e.g.*, *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); *U.S. v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Penn. 1960).

[27] *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

[28] *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

[29] *Grinnell Corp.*, 384 U.S. at 571.

[30] *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 53 (D.D.C. 2022) (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, vol. III, ¶ 701a, at 200 (4th ed. 2015)).

[31] *See LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (en banc).

16. Finally, early cases before the FTC recognized that "[i]t may be appropriate to scrutinize a series of acquisitions over a long period of time from the standpoint . . . of whether the respondent's course of conduct viewed as a whole constitutes . . . an unfair method of competition" under Section 5 of the FTC Act.[32] "The series of acquisitions may justify relief beyond what might be appropriate in a Section 7 or Section 5 case challenging a particular one or number of the acquisitions in the series, and irrespective of whether every individual acquisition, viewed separately, is unlawful."[33] Reflecting this view, the FTC's policy statement on Section 5 explicitly identifies as a potential unfair method of competition "a series of mergers, acquisitions, or joint ventures that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws."[34]

4. Agency Experience with Serial Acquisitions

17. The Agencies are focused on enforcement against serial acquisition strategies.[35]

18. In June 2022, the FTC took action to protect competition in markets for specialty and emergency veterinary services. JAB Consumer Partners, a private equity firm, had previously acquired Compassion-First Pet Hospitals and National Veterinary Associates, large veterinary chains in United States.[36] Then it proposed to acquire Sage Veterinary Partners, LLC, which would have eliminated head-to-head competition in local markets in Texas and California, which the FTC prevented as part of a consent decree.[37] JAB also sought to acquire another veterinary chain, Ethos Veterinary Health, with significant competitive overlap in Richmond, Virginia, Washington, D.C., Denver, and San Francisco. Again, the FTC required divestiture to stem the growing trend towards consolidation in the emergency and specialty veterinary services markets.[38]

19. In September 2023, the FTC filed suit against U.S. Anesthesia Partners, Inc. and its private equity sponsor, Welsh, Carson, Anderson & Stowe. The complaint challenges their

[32] *In re Beatrice Foods*, 67 F.T.C. 473, 1965 WL 92798, at *172 (1965), *supplemented*, 68 F.T.C. 1003 (1965), *modified*, 71 F.T.C. 797 (1967); *see also* In *re Dean Foods, Co.*, 70 F.T.C. 1146 (1966); *In re Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962) (market extension theory); *In re Nat'l Tea Co.*, 69 F.T.C. 226, 1966 WL 88025 (1966) (same).

[33] *In re Beatrice Foods*, 1965 WL 92798, at *172.

[34] Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[35] *See supra* notes 26 and 32, which includes some examples of historical enforcement.

[36] The FTC had previously required divestiture as part of JAB's acquisition of National Veterinary Associates in 2020.

[37] *See* Federal Trade Commission, *FTC Acts to Protect Pet Owners from Private Equity Firm's Anticompetitive Acquisition of Veterinary Services Clinics* (June 13, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-protect-pet-owners-private-equity-firms-anticompetitive-acquisition-veterinary-services.

[38] *See* Federal Trade Commission, *FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics* (June 29, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics.

multi-year anticompetitive scheme to consolidate anesthesia practices in Texas, drive up the price of anesthesia services, and increase their own profits. Together they acquired more than a dozen anesthesiology practices in Texas to eliminate competition and create a single dominant provider with the power to demand higher prices. As a result of the scheme, U.S. Anesthesia Partners, Inc. dwarfs its rivals both in terms of sheer size and cost to patients. Without relief, the complaint alleges, competition will remain stifled, and the defendants can continue to engage in similar conduct.[39]

20. In 2010, the Antitrust Division and several state attorneys general brought an action to unwind Dean Foods' acquisition of dairy processing businesses in Illinois, Wisconsin, and Michigan.[40] Dean Foods had become the largest fluid milk processor in the United States—partially by making unreportable acquisitions. The Division litigated and settled the action, securing a Final Judgment requiring Dean to divest a fluid milk processing plant. In order to guard against future serial acquisitions, the settlement also required Dean to give the Division notice before making any future acquisition of milk processing plants where the purchase price was more than $3 million. In 2020, Dairy Farmers of America ("DFA") —a dairy cooperative which also owned fluid milk processing facilities—agreed to acquire 44 fluid milk processing plants out of the Dean Foods bankruptcy auction. The Division brought an action requiring DFA to divest three fluid milk plants with which it overlapped, and, to prevent serial acquisitions, it also required DFA to give notice to the Division of fluid milk processing acquisitions in the future.[41]

21. In January 2023, the DOJ, along with a number of state attorneys general, filed a civil antitrust suit against Google for monopolizing multiple digital advertising technology products, in part based on a pattern of acquisitions aimed at neutralizing or eliminating ad tech competitors.[42] These acquisitions included Google's 2007 acquisition of DoubleClick, a dominant publisher ad server; its 2009 purchase of AdMob, a technology system that allowed publishers of mobile apps to sell ads as well; its 2010 acquisition of Invite Media, a demand side platform; and its 2011 purchase of AdMeld, which had developed technology to provide "yield management" functionality to publishers.[43] As alleged in the Complaint, "Google's acquisitions of DoubleClick, Invite Media, and AdMeld helped Google achieve dominant positions at each level of the open web ad tech stack and set the

[39] *See* Federal Trade Commission, *FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas* (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

[40] *See* Department of Justice, Justice Department Reaches Settlement with Dean Foods Company (Mar. 29, 2011), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-dean-foods-company.

[41] *See* Department of Justice, Justice Department Requires Divestitures as Dean Foods Sells Fluid Milk Processing Plants to DFA out of Bankruptcy (May 1, 2020), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-dean-foods-sells-fluid-milk-processing-plants-dfa.

[42] *See* Department of Justice, Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies.

[43] Complaint, United States v. Google LLC, No. 1:23-cv-00108, 31-35 (E.D. Va. Jan. 24. 2023),https://www.justice.gov/opa/press-release/file/1563746/download.

stage for Google to control and manipulate the process by which publishers sell and advertisers buy open web display inventory."[44]

5. Remedies and solutions for serial acquisitions

5.1. Preventative Oversight

22. As discussed above, many transactions that are part of a serial acquisition strategy may not meet the HSR Act thresholds for required filing, and thus may remain undisclosed. In order to provide more relevant information to the Agencies, the FTC, with the concurrence of the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, has proposed to expand information collected in the premerger notification form to require more robust information about prior acquisitions of each party to the transaction.[45] Other proposals would require the filing persons to identify each rationale for the transaction, and identify the documents included in the filing which support each rationale.[46] If adopted, these proposals would provide the information to better identify serial acquisition strategies at an early stage when meaningful intervention may prevent the accumulation of market power.

5.2. Terminating Conduct, Restoring Competition, and Preventing Recurrence

23. As discussed in prior papers, it is generally easier to both investigate and secure an effective remedy for pending transactions than it is for consummated transactions.[47] The objective of an ex-post remedy is to stop any ongoing violation; restore full, open, competition to the market; and to prevent future violations. If a consummated merger violates the antitrust laws, broad equitable remedies are available.[48] Structural relief forces a reorganization or divestiture of the offending company's assets, while behavioral relief requires the offending company to engage in or refrain from certain conduct. In addition, the Agencies frequently seek means of monitoring the acquiror's future conduct and the market more generally.

[44] Id. at 35.

[45] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42203 (June 29, 2023) (to be codified at 16 CFR pts. 801, 803), https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements. Proposals to improve reporting of prior acquisitions include requiring both parties to report such acquisitions (currently limited to the acquiring party); increasing the look-back period from five to ten years; eliminating the de minimis $10 million sales/assets threshold; and treating asset acquisitions the same as acquisitions involving voting securities.

[46] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42191-92 (June 29, 2023) (to be codified at 16 CFR pts. 801, 803), https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

[47] *See* Department of Justice and Federal Trade Commission, Disentangling Consummated Mergers – Experiences and Challenges 4–8 (2022), https://one.oecd.org/document/DAF/COMP/WD(2022)42/en/pdf.

[48] *See id.*

24. A series of acquisitions, whether challenged under the Clayton Act, Sherman Act, or FTC Act, "may justify relief beyond what might be appropriate in a Section 7 or Section 5 case challenging a particular one or number of the acquisitions in the series, and irrespective of whether every individual acquisition, viewed separately, is unlawful."[49]

25. When possible, the Agencies may seek to stop the series of acquisitions by obtaining an order barring any further acquisitions, thereby preventing any further degradation of competitive conditions. This remedy is particularly important if the Agencies catch the serial acquiror in early stages, but alone this remedy may be insufficient to return competitive conditions to their pre-acquisition status.

26. To fully restore competitive dynamism, the Agencies may seek structural relief in the form of divestitures. As the U.S. Supreme Court has explained, divestiture is the "most important of antitrust remedies," and it "should always be in the forefront of a court's mind when a violation of § 7 has been found."[50] Structural relief may require a complete unwinding of a series of mergers or a reorganization and spinoff of particular assets or divisions, including assets and divisions not directly involved in the illegal series of transactions. Divestiture can be relatively simple, administrable, and effective.[51]

27. The Agencies also may seek prior notice or prior approval of future acquisitions in the market.[52] Prior notice and prior approval are particularly important given that serial acquisitions often involve acquisitions below reporting thresholds. To ensure parent companies and private equity sponsors cannot evade these requirements through a new affiliate company, reporting requirements should attach to entities involved in the serial acquisition strategy above the direct acquiror.[53]

28. Ultimately, fashioning an effective remedy for a series of acquisitions should take into account marketplace realities, including degradation of assets, new entrants, and any other changes to the market that occurred during the consolidation scheme.

[49] *In re Beatrice Foods*, 67 F.T.C. 473, 1965 WL 92798, at *172 (1965).

[50] *U.S. v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 330 (1961).

[51] *Id.*

[52] *See, e.g.*, Federal Trade Commission, *FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis* (Oct. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis.

[53] *See, e.g.*, Federal Trade Commission, *FTC Acts to Protect Pet Owners from Private Equity Firm's Anticompetitive Acquisition of Veterinary Services Clinics* (June 13, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-protect-pet-owners-private-equity-firms-anticompetitive-acquisition-veterinary-services.

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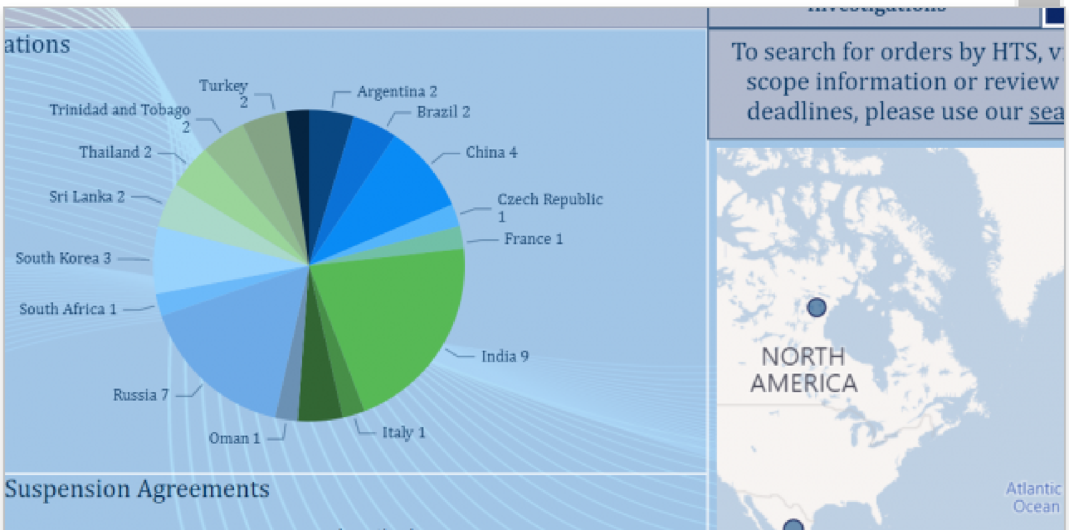

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ANTITRUST MODERNIZATION COMMISSION

REPORT AND RECOMMENDATIONS

APRIL 2007

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AR_002572

April 2, 2007

To the President and the Congress of the United States:

Three years ago, as authorized by statute, this Commission undertook a comprehensive review of U.S. antitrust law to determine whether it should be modernized. It is our pleasure to present the results of that effort, the enclosed Report and Recommendations of the Antitrust Modernization Commission ("Report").

This Report is the product of a truly bipartisan effort. The members of the Commission were appointed by the President and the respective majority and minority Leadership of the House of Representatives and Senate with the goal of ensuring "fair and equitable representation of various points of view in the Commission."[1] In fact, the Commissioners represented a diversity of viewpoints, which were fully and forcefully expressed during many hours of hearings and thoughtful deliberation. As one Commissioner has said, the Commission's recommendations were "fashioned on the anvil of rigorous discussion and debate." The Commission also endeavored at every turn to obtain a diversity of views from the public. In the end, the Commission was able to reach a remarkable degree of consensus on a number of important principles and recommendations.

First, the Report is fundamentally an endorsement of free-market principles. These principles have driven the success of the U.S. economy and will continue to fuel the investment and innovation that are essential to ensuring our continued welfare. They remain as applicable today as they ever have been. Free trade, unfettered by either private or governmental restraints, promotes the most efficient allocation of resources and greatest consumer welfare.

Second, the Report judges the state of the U.S. antitrust laws as "sound." Certainly, there are ways in which antitrust enforcement can be improved. The Report identifies several. A few Commissioners have greater concerns about aspects of current enforcement, as expressed in their separate statements. On balance, however, the Commission believes that

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[1] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).

AR_002574

U.S. antitrust enforcement has achieved an appropriate focus on (1) fostering innovation, (2) promoting competition and consumer welfare, rather than protecting competitors, and (3) aggressively punishing criminal cartel activity, while more carefully assessing other conduct that may offer substantial benefits. The laws are sufficiently flexible as written, moreover, to allow for their continued "modernization" as the world continues to change and our understanding of how markets operate continues to evolve through decisions by the courts and enforcement agencies.

Third, the Commission does not believe that new or different rules are needed to address so-called "new economy" issues. Consistent application of the principles and focus noted above will ensure that the antitrust laws remain relevant in today's environment and tomorrow's as well. The same applies to different rules for different industries. The Commission respectfully submits that such differential treatment is unnecessary, whether in the form of immunities, exemptions, or special industry-specific standards.

That does not mean the Commission sees no room for improvement. To the contrary, the Commission makes several recommendations for change. A few of these recommendations call for bold action by Congress that likely will require considerable further debate. We look forward to that debate.

The following summarizes some of the more significant changes the Commission recommends.[2]

Substantive Antitrust Standards (Mergers and Monopoly)

The Commission does not recommend legislative change to the Sherman Act or to Section 7 of the Clayton Act. There is a general consensus that, while there may be disagreement about specific enforcement decisions, the basic legal standards that govern the conduct of firms under those laws are sound.

The Commission nevertheless makes several recommendations in the area of merger enforcement. The purpose of these recommendations is to ensure that policy is appropriately sensitive to the needs of companies to innovate and compete while continuing to protect the interests of U.S. consumers. In particular, the Commission urges that substantial weight be given to evidence demonstrating a merger will achieve efficiencies, including innovation-relat-

[2] Although many recommendations garnered unanimous or nearly unanimous support, not all Commissioners fully agreed with all recommendations. Differences are identified in the text of the Report and in some instances are discussed in separate Commissioner statements. Recommendations with the support of at least seven Commissioners are reported as recommendations of the Commission. With respect to 96 percent of the recommendations, at least nine Commissioners agreed in whole or in part with the recommendations. Approximately 57 percent of the recommendations were unanimous.

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ed efficiencies. The Commission also recommends that the federal enforcement agencies continue to examine the basis for, and efficacy of, merger enforcement policy. We urge the agencies to further study the economic foundations for merger enforcement policy, including the relationship between market performance and market concentration and other factors. We also recommend increased retrospective study of the effects of decisions to challenge or not challenge specific transactions. Such empirical evidence, although difficult to gather, is critical to an informed and effective merger policy.

With respect to monopoly conduct, the Commission believes U.S. courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies are generally not improper, even for a "dominant" firm and even where competitors may lose. However, there is a need for greater clarity and improvement to standards in two areas: (1) the offering of bundled discounts or rebates, and (2) unilateral refusals to deal with rivals in the same market. Clarity will be best achieved in the courts, rather than through legislation. The Commission recommends a specific standard for the courts to apply in determining whether bundled discounts or rebates violate antitrust law.

Repeal of the Robinson-Patman Act

The Commission recommends that Congress finally repeal the Robinson-Patman Act (RPA). This law, enacted in 1936, appears antithetical to core antitrust principles. Its repeal or substantial overhaul has been recommended in three prior reports, in 1955, 1969, and 1977. That is because the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage. At the same time, it is not clear that the RPA actually effectively protects the small business constituents that it was meant to benefit. Continued existence of the RPA also makes it difficult for the United States to advocate against the adoption and use of similar laws against U.S. companies operating in other jurisdictions. Small business is adequately protected from truly anticompetitive behavior by application of the Sherman Act.

Patents and Antitrust

Patent protection and the antitrust laws are generally complementary. Both are designed to promote innovation that benefits consumer welfare. In addition, a patent does not necessarily confer market power. Nevertheless, problems in the application of either patent or antitrust law can actually deter innovation and unreasonably restrain trade. Many of the Commission's recommendations relating to the Sherman Act address the antitrust side of the balance. On the patent side, the Commission urges Congress to give serious consideration to recent recommendations by the Federal Trade Commission (FTC) and National

Academy of Sciences designed to improve the quality of the patent process and patents. The Commission also recommends that the joint negotiation of license terms within standard-setting bodies ordinarily should be treated under a rule of reason standard, which considers both potential benefits of such joint negotiation to avoid "hold up" and the possibility that such joint negotiation might suppress innovation.

Improving the Enforcement Process

To be effective, any enforcement regime must be clear, fairly administered, and not unreasonably burdensome. Several of the Commission's recommendations are designed to improve current processes to better meet these goals.

Eliminate Inefficiencies Resulting from Dual Federal Enforcement. Except in the area of criminal enforcement (which is the responsibility of the Justice Department), federal antitrust law is enforced by both the Justice Department (DOJ) and the FTC. Both agencies, for example, are equally authorized to review mergers under the Hart-Scott-Rodino Act (HSR Act), which essentially requires all mergers valued at above $59.7 million to be notified to the agencies and suspended until the expiration or termination of certain waiting periods. The Commission does not believe it would be feasible or wise to eliminate the antitrust enforcement role of either agency at this time. However, we make a number of recommendations designed to eliminate inconsistencies and problems that may result from dual enforcement.

Merger Clearance. The agencies have done a good job minimizing problems that can result from dual enforcement. But there is room for improvement that can only be achieved with the help of Congress. At the time of her confirmation, the current head of the FTC was asked to agree not to pursue a global merger clearance agreement between the agencies. The Commission calls on the appropriate congressional committees to revisit that position and authorize the DOJ and the FTC to implement a new merger clearance agreement based on the principles of the 2002 clearance agreement between the agencies. It is bad government for mergers to be delayed by turf battles between the agencies. Such battles undermine confidence in government, damage agency staff morale, and potentially delay the realization of significant merger efficiencies without good reason. The Commission recommends that Congress revise the HSR Act to require the DOJ and the FTC to resolve all clearance requests under the HSR Act within a short period of time after the parties report their transaction.

The Commission also recommends changes to ensure that mergers are treated the same no matter which agency reviews them. Specifically, the Commission recommends that Congress amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in HSR Act merger cases. The Commission further recommends that the FTC adopt a policy that when it seeks to block a merger in federal court, it will seek both preliminary and permanent relief in a combined proceeding where possible.

Improve the HSR Act Pre-Merger Review Process. The DOJ and FTC should continue to pursue reforms to their internal review processes that will reduce unnecessary burden and delay. The Commission also makes a number of specific recommendations designed to reduce the burden of HSR merger reviews and increase the transparency of government enforcement. For example, the Commission recommends that the agencies update their Merger Guidelines to explain how they evaluate non-horizontal mergers as well as a proposed merger's potential impact on innovation competition. The Commission also recommends that the agencies issue statements explaining why they have declined to take enforcement action with respect to transactions raising potentially significant competitive concerns.

Improve Coordination Between State and Federal Enforcement. State and federal enforcement can be strong complements in achieving optimal enforcement. But the existence of fifty independent state enforcers on top of two federal agencies can, at times, also result in uncertainty, conflict, and burden. The Commission encourages state and federal enforcers to coordinate their activities to seek to avoid subjecting businesses to multiple, and potentially conflicting, proceedings. We make a number of specific recommendations in this regard. In addition, the Commission believes States should continue to focus their efforts primarily on matters involving localized conduct or competitive effects. In addition, state and federal agencies should work to harmonize their substantive enforcement standards, particularly with respect to mergers.

De-link Agency Funding and HSR Act Filing Fees. HSR Act filing fees are used to fund DOJ and FTC antitrust enforcement activity. These fees are a tax on mergers, the vast majority of which are not anticompetitive. They do not accurately reflect costs to the government of reviewing a given filing, nor do they confer a benefit on notifying parties. But they set a precedent for other countries with merger control regimes. In the past, moreover, dips in merger activity (and filing fees) have threatened to affect the level of appropriations available for critical agency activities. The Commission recommends that Congress de-link agency funding from HSR Act filing fee revenues.

Private Litigation

Uniquely in the United States, private litigation has been a key part of antitrust enforcement. Under current rules, private plaintiffs are entitled to recover three times their actual damages, plus attorneys' fees. Defendants are jointly and severally liable for alleged conspiracies. There is no right of contribution among defendants. There is also only a limited right of claim reduction when one or more defendants settle. The combined effect of these rules is that one defendant can be liable for nearly all of the damages caused by an antitrust conspiracy. Defendants thus face significant pressure to settle antitrust claims of questionable merit simply to avoid the potential for excessive liability. While the rules can maximize deterrence and encourage the resolution of claims through quick settlement, they can also overdeter conduct that may not be anticompetitive.

The Commission recommends no change to the fundamental remedial scheme of the antitrust laws: the treble damage remedy and plaintiffs' ability to recover attorneys' fees. On balance, the current scheme appears to be effective in enabling plaintiffs to pursue litigation that enhances the deterrence of unlawful behavior and compensates victims. However, the Commission recommends that Congress enact legislation that would permit non-settling defendants to obtain a more equitable reduction of the judgment against them and allow for contribution among non-settling defendants.

Indirect and Direct Purchaser Litigation. There are different rules at the federal level and among the states as to whether both direct purchasers of price-fixed goods or services and indirect purchasers may sue to recover damages. Under federal law, only direct purchasers can sue (this is commonly known as the rule of *Illinois Brick*). Defendants cannot argue that direct purchasers have "passed on" any amount of the overcharge to indirect purchasers (this is commonly known as the rule of *Hanover Shoe*). In thirty-six states and the District of Columbia, however, indirect purchasers can sue under state law providing that *Illinois Brick* does not apply to state court actions.

As a result, there is typically a morass of litigation in various state and federal courts relating to a single alleged conspiracy. Injured parties are treated differently depending on where they reside and defendants are subject to suit in multiple jurisdictions. In addition, federal *Illinois Brick/Hanover Shoe* policy provides a "windfall" to purchasers who have passed on an overcharge, while depriving any recovery at all to purchasers who actually bear the overcharge. Such a system that compensates the uninjured and denies recovery to the injured seems fundamentally unfair. The Class Action Fairness Act may ameliorate some of the administrative issues caused by conflicting federal and state rules by facilitating the removal of state actions to a single federal court for pre-trial proceedings. However, that Act applies only to pre-trial proceedings and does nothing to address the fairness issues associated with current federal policy. The Commission believes it is time to enact comprehensive legislation reforming the law in this area.

The Commission recommends that Congress overrule the Supreme Court's decisions in *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to recover for their injuries. Other aspects of the Commission's recommendation are designed to ensure that damages would not exceed the overcharges (trebled) paid by direct purchasers, that the full adjudication of such claims occurs in a single federal

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forum, and that current class action standards would continue to apply to the certification of direct purchasers regardless of differences in the degree to which overcharges may have been passed on to indirect purchasers.

Criminal Penalties

There is a strong consensus worldwide favoring vigorous enforcement against cartels. Cartels offer no benefit to society and invariably harm consumers. Sentencing and fines under the Sherman Act are generally determined by the courts based on guidance in the Sentencing Guidelines issued by the U.S. Sentencing Commission. The Sentencing Guidelines employ a proxy of harm from cartels based on twenty percent of the volume of commerce affected. This twenty percent proxy is based on an assumed average overcharge of ten percent, which is doubled to account for dead-weight loss to society. The Commission recommends that the Sentencing Commission evaluate whether it remains reasonable to assume an overcharge of ten percent (*i.e.*, whether it should it be higher or lower) and the difficulty of proving actual gain or loss in lieu of using a proxy. It also recommends that the Sentencing Guidelines be amended to make explicit that the twenty percent proxy may be rebutted by proof by a preponderance of evidence that the actual amount of overcharge was higher or lower where a difference is material.

International Antitrust

The United States was once the only major country actively enforcing a comprehensive set of antitrust laws. Today, more than 100 countries have adopted competition laws. On the one hand, this development has helped the United States in its fight to stamp out international cartels. It has also benefited world trade by opening up markets to competition. On the other hand, the proliferation of competition authorities has increased the risk of burden, inconsistency, and even conflict. There is some concern about the potential effect on U.S.-based companies of differences in the way that other countries treat so-called dominant firm behavior and the exploitation of rights in intellectual property.

The Commission recommends a number of steps to address these concerns. First, "as a matter of priority" the DOJ and the FTC should study and report to Congress on the possibility of developing a centralized international pre-merger notification system that would ease the burden of companies engaged in cross-border transactions. Second, the DOJ and the FTC should seek procedural and substantive convergence around the world on sound principles of competition law. Third, the United States should pursue bilateral and multilateral cooperation agreements with more of its trading partners. These agreements should explicitly recognize that conflicting antitrust enforcement can impede global trade, investment, and

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consumer welfare. They should also promote comity by providing for the exercise of deference where appropriate, the harmonization of remedies, consultation and cooperation, and benchmarking reviews. Fourth, the DOJ and the FTC should be provided with direct budgetary authority to provide antitrust technical assistance to other countries for the purpose of enhancing convergence and cooperation.

Cooperation from other countries can be essential to punishing international cartels that exact hundreds of millions of dollars from U.S. consumers. But the United States has had limited success in entering Antitrust Mutual Assistance Agreements (AMAAs) with other countries. Many believe this is because U.S. law appears to require that those nations agree to allow the United States to use confidential information obtained under such agreements for non-antitrust enforcement purposes. The Commission recommends that Congress amend the International Antitrust Enforcement Assistance Act to clarify that it does not require such a commitment as the cost of entering into an AMAA.

Finally, the Commission recommends that, as a general principle, purchases made outside the United States from sellers outside the United States should not give rise to a cause of action in U.S. courts. The Commission was split as to whether this principle should be codified through amendment to the Foreign Trade Antitrust Improvements Act.

Immunities and Exemptions

Free-market competition is the foundation of our economy, and the antitrust laws stand as a bulwark to protect free-market competition. Nevertheless, we have identified thirty statutory immunities from the antitrust laws. The Commission is skeptical about the value and basis for many, if not most or all, of these immunities. Many are vestiges of earlier antitrust enforcement policies that were deemed to be insufficiently sensitive to the benefits of certain types of conduct. Others are fairly characterized as special interest legislation that sacrifices general consumer welfare for the benefit of a few. Congress is currently considering the repeal of several immunities, including those covering the business of insurance and international shipping conferences. The Commission strongly encourages such review.

The Commission believes that statutory immunity from the antitrust laws should be disfavored. Immunities should rarely (if ever) be granted and then only on the basis of compelling evidence that either (1) competition cannot achieve important societal goals that trump consumer welfare, or (2) a market failure clearly requires government regulation in place of competition. The Commission recommends a framework for such a review and recommends that Congress consult with the DOJ and FTC about the likely competitive effects of existing and proposed immunities. In those rare instances in which Congress does grant an immunity, the Commission recommends (1) that the immunity be as limited in scope as possible to accomplish the intended objective, (2) that it include a sunset provision pursuant to which the immunity would terminate at the end of a specified period unless renewed, and (3) that the FTC, in consultation with the DOJ, report to Congress on the effects of the immunity before any vote on renewal.

The judicial state action doctrine immunizes private action undertaken pursuant to a clearly articulated state policy deliberately intended to displace competition. In addition, the state must provide sufficient "active supervision" to ensure that conduct is truly a manifestation of state policy rather than private interests. A recent report by the FTC staff raises concern that courts have been applying the doctrine without sufficient care to ensure that private anticompetitive conduct has actually been authorized by the state pursuant to a clear policy to displace competition. The Commission agrees that courts should adhere more closely to Supreme Court state action precedents. It recommends that the doctrine should *not* apply where the effects of conduct are not predominantly intrastate. In addition, the doctrine should equally apply to governmental entities when they act as participants in the marketplace.

Regulated Industries

During the early part of the 20th century, several industries—including electricity, natural gas, telecommunications, and transportation—were thought to be natural monopolies or at risk of "excessive competition." Since then, however, technological advancement and changed economic precepts have led to substantial deregulation. The unleashing of competition in these industries has greatly increased efficiency and provided substantial benefits to consumers. The Commission believes the trend toward deregulation should continue.

Antitrust enforcement is an important counterpart to deregulation. Where government regulation does exist, the antitrust laws should continue to apply to the maximum extent consistent with the regulatory regime. Ideally, statutes should clearly state whether, and to what extent, Congress intended to displace the antitrust laws, if at all. The courts, of course, should interpret antitrust "savings clauses" to give full effect to congressional intent that the antitrust laws continue to apply. Where there is no antitrust savings clause, the courts should imply immunity from the antitrust laws only where there is a clear repugnancy between those laws and the regulatory scheme.

The filed-rate doctrine prohibits private treble damage actions alleging that industry rates approved by a regulator resulted from unlawful collusion. Today, however, few filed rates are actually reviewed by regulators for their reasonableness. In 1986, the Supreme Court opined that a number of factors appeared to undermine the continued validity of the filed-rate doctrine,[3] but concluded that it was for Congress to make that determination. The Commission believes it is time for Congress to reevaluate the filed-rate doctrine and consider overruling it where a regulator no longer specifically reviews and approves proposed rates agreed to among an industry.

The DOJ and FTC review mergers pursuant to the HSR Act, applying the same standards across all industries. In several industries, however, the DOJ and the FTC share merger review authority with a regulatory agency that reviews the merger under a "public interest" standard. Review by two different government agencies can impose substantial and duplicative costs. It can also lead to conflict. The Commission recommends that the DOJ or the FTC should have full antitrust merger enforcement authority with respect to regulated industries. In addition, Congress should review whether separate review under a public interest standard is needed to protect particular interests that cannot be adequately protected under application of an antitrust standard.

* * *

The federal antitrust laws are more than 115 years old. Although the free-market principles on which they stand remain a rock-solid foundation, the world, our economy, and our understanding of how markets work have changed substantially. For that reason, we believe it was a wise decision to authorize this Commission to assess those laws and whether the policies developed to enforce them are serving the nation well.

The almost constitutional generality of the central provisions of the antitrust laws has provided the needed flexibility to adjust to new developments. In this sense, "antitrust modernization" has occurred continuously. But, even so, the interplay of statutes, enforcement activity, and court decisions has suggested a substantial number of areas that the Commission believes can be improved.

The issues the Commission examined are complex. Reasonable minds can, and likely will, differ on many of the Commission's findings and recommendations. But we hope this Report will prompt an important national conversation on those recommendations that will result in the adoption of many, if not all, of them.

Deborah A. Garza

Deborah A. Garza
Chair

Jonathan R. Yarowsky

Jonathan R. Yarowsky
Vice-Chair

[3] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 423–24 (1986).

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balanced and diverse viewpoints and helped to disseminate information about the Commission's activities. ABA Antitrust Section publications were a rich source of detailed information on many issues covered by the Report.

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Without in any way diminishing the strong contribution made by each and every staff member, we would like to especially acknowledge the contributions of Andrew Heimert and Susan DeSanti.

Andrew deserves special recognition for his unflagging, able, and good-humored shepherding of the Commission as Executive Director and General Counsel from its inception through to the completion of its work. There is no instruction manual for setting up and running a Commission such as this. But Andrew has shown how it successfully can be done, setting a very high bar for others. He created an operating commission out of whole cloth: Within the period of three years, he found office space, negotiated the lease, had the space built out, and furnished it; created a website; hired staff; managed appropriations; developed the Commission's procedures and processes; handled relations with the press, Executive Branch, and Congress; ran flawless meetings and hearings; managed the preparation of thousands of pages of staff memoranda, minutes, transcripts, notices and correspondence; advised the Commissioners on Federal Advisory Committee Act and other legal obligations; produced this 500+-page Report; was on time and under budget; and remained cool, calm, collected, and cheerful while dealing with twelve demanding Commissioners. It is impossible to underestimate the effort Andrew expended for the Commission, the difficulty of his job at times, or how essential he was to the Commission's successes.

Susan DeSanti came to the Commission in May 2006 specifically to assist in writing the Report. The Commission was extremely fortunate to persuade Susan to join us from the FTC. As she has done so many times before at the FTC during both Democratic and Republican Administrations, Susan helped guide the Commission staff in writing a Report that fairly and clearly communicates the complex issues it covers and the consensus views of twelve Commissioners. We are particularly grateful to her for jumping into the game during the third quarter, which no doubt added to the challenge of her task. The quality of the Report is in very large part a credit to Susan's skill and intellect.

Commissioners Garza and Yarowsky, who co-chaired the Commission, would like to thank their colleagues for their collegiality and commitment to producing a Report in which we could all join. At the beginning of this enterprise, it was quite clear that Commissioners differed in their view on a host of issues, sometimes significantly. But, as with all collective bodies, there came a moment when this assembly of diverse, strong-minded, well-versed individuals reached a critical juncture that would define themselves as a group: whether to fractionate into small or even individual units of position-taking, or to come together to seek convergence and concordance, whenever possible. This group unhesitatingly chose the latter path. That choice led to extensive public deliberations—rather than instant decision-making—over recommendations to the President and the Congress. These bipartisan deliberations continued right through to the tenth month of the third Commission year; but the result was indeed an unusual consensus fashioned in the heat of debate and in the light of common purpose.

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Introduction and Recommendations

1. INTRODUCTION

Congress established the Antitrust Modernization Commission "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues."[1] This Report sets forth the Commission's recommendations and findings on how antitrust law and enforcement can best serve consumer welfare in the global, high-tech economy that exists today.

The antitrust laws seek to deter or eliminate anticompetitive restraints that impede free-market competition. To do so properly, antitrust law must reflect an economically sound understanding of how competition operates. As Congress recognized, competition in the twenty-first century increasingly involves innovation, intellectual property, technological change, and global trade.

In many high-tech sectors of the economy, firms must constantly innovate to keep pace in markets in which product life cycles are counted in months, not years.[2] To protect their innovations, firms may rely on intellectual property. In some cases, intellectual property assets may be more important to businesses than specialized manufacturing facilities.

The digital revolution has produced new, general-purpose technologies that enable firms to create many new goods and services for consumers.[3] New information and communication technologies have revolutionized firms' production and distribution processes as well, allowing faster and easier access to suppliers and distributors. Technological advances have played an important role in facilitating global integration,[4] as newly available communication technologies have shrunk the time and distance that separate markets around the world.[5] New markets across the globe have opened for trade following the determination by policymakers in many developing countries that free-market competition yields productivity and other benefits far superior to the results produced by central planning.[6]

Antitrust analysis must reflect a proper understanding of how these forces affect competition. To be sure, many of these seemingly new phenomena raise competitive issues parallel to those that confronted antitrust in earlier decades.[7] So-called "general-purpose technologies," such as electricity, railroads, and the internal combustion engine, for example, also revolutionized production, made many new goods and services available to consumers, and created industries that produced analogous competitive issues.[8] Nonetheless, a present-day assessment of how well antitrust law is operating to address current issues is important to ensure that competitive markets continue to benefit consumer welfare. As the nature of competition evolves, so must antitrust law.

A. Antitrust Law Seeks to Protect Competition and Consumer Welfare

The Supreme Court has explained:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.[9]

As this language confirms, free-market competition is, and has long been, the fundamental economic policy of the United States.[10] Competition in free markets—that is, markets that operate without either private or governmental anticompetitive restraints—forces firms to lower prices, improve quality, and innovate.[11] Businesses in competitive markets develop and sell the kinds and quality of goods and services that consumers desire, and firms seek to do so as efficiently as possible, so they can offer those goods and services at competitive prices.[12]

In free markets, consumers determine which firms succeed. Consumers benefit as firms offer discounts, improve product reliability, or create new services, for example, to keep existing customers and attract new ones. The free-market mechanism generally provides greater success "to those firms that are more efficient and whose products are most closely adapted to the wishes of consumers."[13]

Competitive markets also drive an economy's resources toward their fullest and most efficient uses, thereby providing a fundamental basis for economic development.[14] Competition facilitates the process by which innovative, cutting-edge technologies replace less efficient productive capacity. Market forces continuously prod firms to innovate—that is, to develop new products, services, methods of doing business, and technologies—that will enable them to compete more successfully.[15] The ongoing churning of a flexible competitive economy leads to the creation of wealth, thus making possible improved living standards and greater prosperity.[16]

To be competitive, markets need not conform to the economic ideal in which many firms compete and no firm has control over price. In fact, the real world contains very few such markets.[17] Rather, competition generally "refers to a state of affairs in which prices are sufficient to cover a firm's costs, but not excessively higher, and firms are given the correct set of incentives to innovate."[18] Experience has shown that intense competition can take place in a wide variety of market circumstances.[19] Some factors—such as many sellers and buyers, small market shares, homogeneous products, and easy entry into a market—may suggest competitive behavior is likely.[20] The absence of those factors, however, "does not necessarily prevent a market from behaving competitively."[21] Economic learning in recent decades has afforded a greater appreciation of the variety of factors that can affect competitive forces at work in particular markets.

Antitrust law prohibits anticompetitive conduct that harms consumer welfare.[22] Antitrust law in the United States is not industrial policy; the law does not authorize the government (or any private party) to seek to "improve" competition. Instead, antitrust enforcement seeks to deter or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework that prohibits private (and, sometimes, governmental) restraints that frustrate the operation of free-market competition.

To determine whether and when particular forms of business conduct may harm competition requires an understanding of the market circumstances in which they are undertaken. Antitrust agencies and the courts have long looked to economic learning for assistance in understanding market circumstances and the likely competitive effects of particular business conduct.[23] Indeed, economics now provides the core foundation for much of antitrust law. Not surprisingly, as economic learning about competition has advanced over the decades, so have the contours of antitrust doctrine.

Antitrust law also must keep pace with developments in the business world. Business practices may change, especially as technological innovation and global economic integration alter the competitive forces at work in particular markets. To protect competition and consumer welfare, antitrust analysis must offer sufficient flexibility to take account of these changes, while maintaining clear and administrable rules of antitrust enforcement.

B. Periodic Assessments of the Antitrust Laws Are Advisable

The antitrust laws in the United States require ongoing evaluation and assessment to ensure they are keeping pace with both economic learning and the ever-changing economy.[24] In past decades, various entities have empowered six different commissions to assess how well antitrust law operates to serve consumers. The Antitrust Modernization Commission is the seventh such commission in almost seventy years.[25] Prior commissions have made recommendations about both the substance and procedure of antitrust law.

The tradition of assigning commissions to evaluate antitrust law began in 1938, when President Roosevelt recommended that Congress appropriate funds for the study of the antitrust laws.[26] Recommendations from that first commission, the Temporary National Economic Commission (TNEC), played a role in spurring Congress to strengthen the law against anticompetitive mergers.[27] In 1955 the Attorney General's National Committee to Study the Antitrust Laws recommended important changes to antitrust analysis, most notably to reduce the use of per se rules that deemed many types of conduct automatically illegal.[28] Twenty years later, these proposals combined with further economic learning to produce significant changes in antitrust law.[29]

Between 1969 and 1979, three commissions issued reports, each known by the names of those who led them—the Neal Report,[30] the Stigler Report,[31] and the Shenefield Report.[32] Among other things, these reports reflected ongoing debates about whether and when monopolies, or firms with large market shares in highly concentrated markets (oligopolies), should be subject to more stringent antitrust enforcement.[33] The recommendation of the Neal Report to reduce concentration in oligopolies by requiring firms to divest assets was opposed by the Stigler Report, which described the connection between concentration and competition as "weak."[34] The recommendation of the Shenefield Report to make it easier to prove monopolization also did not gain traction.[35]

Recommendations from these commissions for revised or new antitrust procedures and remedies were more successful. For example, the Neal Report recommended that, in certain circumstances, businesses be required to notify the antitrust agencies before consummating a merger;[36] in 1976 Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act, which imposed pre-merger notification requirements.[37] The Stigler Report recommended substantial increases in government antitrust penalties, a recommendation adopted into law through The Antitrust Procedures and Penalties Act of 1974.[38] The Shenefield Report led directly to passage of the Antitrust Procedural Improvements Act of 1980[39] and "provided important encouragement to federal judges to manage trials—including the massive *AT&T* trial—effectively."[40] The Shenefield Report also issued twenty recommendations for further deregulation, providing significant support to the deregulation movement.[41]

Most recently, the increasing importance of global trade spurred the 1998 establishment of the International Competition Policy Advisory Committee (ICPAC)—chaired by former Assistant Attorney General James F. Rill and former International Trade Commission Chairwoman Paula Stern—to study international aspects of antitrust law.[42] The ICPAC Report provided the impetus for the International Competition Network, through which nearly one hundred nations now discuss antitrust procedures and policies.[43]

C. Major Changes in Antitrust Analysis over the Past Twenty-Five Years Make this a Timely Report

In the decades since the Neal, Stigler, and Shenefield Reports undertook their assessments, antitrust law has gone through what is arguably the most important period in its development. The antitrust landscape differs greatly from earlier decades in terms of antitrust analysis and the role of antitrust enforcement agencies, among other things.

Most important, antitrust case law has become grounded in the related principles that antitrust protects competition, not competitors, and that it does so to ensure consumer welfare. Substantial economic learning now undergirds and informs antitrust analysis. Time and again in recent decades, the Supreme Court has used economic reasoning to develop standards for antitrust analysis. Case-by-case decision-making has provided myriad opportunities for the integration of economics into antitrust analysis, and litigating parties and the courts have used them.

Economic learning has provided the foundation for updated antitrust analysis in part by revealing the potential procompetitive benefits of some business conduct previously assumed to be anticompetitive. The accommodation of such advances in economic learning has increased the flexibility of antitrust law, with courts and the antitrust agencies now considering a wide variety of economic factors in their analyses. Improved economic understanding and greater analytical flexibility have increased the potential for a sound competitive assessment of business conduct in all industries, including those characterized by innovation, intellectual property, and technological change.

The improvements in economic understanding and the increases in analytical flexibility have added further complexity to antitrust law, however. In response, courts have searched for standards that can make antitrust analysis more manageable. They also have given increased attention to whether businesses can understand and comply with, and courts can efficiently and competently administer, particular antitrust rules. Whether particular antitrust rules overdeter procompetitive conduct or underdeter anticompetitive conduct has received greater scrutiny as well.

D. The Commission's History and Process

The Antitrust Modernization Commission began the three years of work that culminated in this Report in April 2004. The Commission met for the first time on April 1 that year, shortly after all appointments to the Commission had been made. The Commission has over those three years engaged in a careful, deliberate course of study to fulfill its statutory mandate of examining "whether the need exists to modernize the antitrust laws" and soliciting the "views of all parties concerned with the operation of the antitrust laws."[44] Interested members of the public have participated substantially through the submission of comments and testimony and attendance at the Commission's many hearings and meetings.

1. Legislative History of the Commission

The Commission was created by an act of Congress in 2002. The original bill was introduced by F. James Sensenbrenner, Jr., then-Chairman of the House Judiciary Committee.[45] Although the bill did not limit the scope of the Commission's study, at the time of its introduction, Chairman Sensenbrenner highlighted three issues he believed the Commission should review in the course of its study: (1) "the role of intellectual property law in antitrust law"; (2) "how antitrust enforcement should change in the global economy"; and (3) "the role of state attorneys general in enforcing antitrust laws."[46]

The Act obliged the Commission to perform four tasks:

1. "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues";
2. "to solicit views of all parties concerned with the operation of the antitrust laws";

3. "to evaluate the advisability of proposals and current arrangements with respect to any issues so identified"; and
4. "to prepare and submit to Congress and the President a report . . . ."[47]

The Act provided the Commission with three years to complete these tasks[48] and authorized $4 million to be appropriated for the Commission to perform its work.[49]

2. Organization of the Commission

The Antitrust Modernization Commission Act called for the appointment of twelve Commissioners, four by the House of Representatives, four by the Senate, and four by the President.[50] Appointments by both houses of Congress were split equally between the Democratic and Republican parties.[51] No more than two of the President's four appointments could be from the same political party.[52] The Chair was designated by the President; the Vice-Chair was designated jointly by the Democratic leadership of the House of Representatives and the Senate.[53]

The House of Representatives appointed as Commissioners Donald G. Kempf, Jr., John L. Warden,[54] John H. Shenefield, and Debra A. Valentine.[55] The Senate appointed W. Stephen Cannon, Makan Delrahim,[56] Jonathan M. Jacobson, and Jonathan R. Yarowsky.[57] The President appointed to the Commission Bobby R. Burchfield, Dennis W. Carlton, Deborah A. Garza, and Sanford M. Litvack.[58] The President designated Commissioner Garza as Chair; the Democratic leadership of the House of Representatives and the Senate designated Commissioner Yarowsky as Vice-Chair. Pursuant to the AMC Act, the Commission appointed Andrew J. Heimert to be the Executive Director and General Counsel.[59] The Commission subsequently hired additional staff and appointed advisors to assist it in its work.[60]

3. Transparency and Involvement of the Public

The Commission's work proceeded in three general phases: selection of issues for study, study of those issues, and deliberation upon the recommendations the Commission would make on the issues it studied. At each phase, the public was invited to participate through written comments and testimony and by observing the Commission's hearings and deliberations.

The Commission's principal mechanism for informing the public of its work was through its website, *www.amc.gov*. All materials that the Commission discussed at its meetings were posted on the website in advance of the meetings. The Commission placed its entire record on the website as it was developed. Comments from the public were posted as soon after receipt as possible. Witness statements for hearings were made available on the website as far in advance of the hearing as the witnesses provided them, and transcripts from the hearings were posted shortly after each hearing.

a. Issue Selection Through Public Comment and Outreach

The first phase of the Commission's work was to select issues for study. Consistent with its mandate to solicit the views of interested persons, the Commission requested that the public propose issues for study.[61] The Commission received comments from fifty-six entities proposing a variety of issues for study.[62] Commissioners also specifically solicited the views of a variety of persons and organizations, including consumer organizations, current and former state and federal antitrust enforcement officials, and federal judges. The Commission met in January 2005 to deliberate publicly on a list of approximately sixty possible issues synthesized by Commission staff from the comments and input received in the fall of 2004.[63] Ultimately, the Commission adopted twenty-five issues (broadly defined) for study.

b. Information Gathering Through Public Comment and Hearings

Having selected issues for study, the Commission began an extended study and evaluation of these issues and proposals regarding them.[64] The Commission compiled its record through two principal mechanisms: comments from the public and hearings.[65]

The Commission requested comment from the public on the issues it selected, including specific questions about the U.S. antitrust laws and whether change was advisable to any of them.[66] Although the majority of comments were provided to the Commission in 2005—during the Commission's major study period—members of the public continued to submit comments throughout the entire period of the Commission's work. Overall, the Commission received 192 comments from 126 persons or organizations.[67]

Between June 2005 and October 2006, the Commission held 18 hearings over 13 days, with testimony by 120 witnesses, generating almost 2500 pages of transcripts.[68] Witnesses were selected to provide a balance and diversity of views. The public was invited to, and did, comment on issues addressed in the hearings.[69] All hearings were open to the public.

c. Deliberations on Possible Recommendations and Report Drafting

Commission deliberations on the recommendations in this Report occurred between May 2006 and February 2007. Overall, the Commission met to deliberate on eleven days. All deliberations of the Commission were held in public. Documents prepared by staff to assist the Commissioners in their deliberations were made available to the public in advance of the meetings and at the meetings themselves. The Report was drafted to explain the recommendations agreed to by a majority of Commissioners, and reflects the views of the Commissioners supporting each recommendation.

2. RECOMMENDATIONS

The charge to this Commission has been to study, evaluate, and make recommendations for the antitrust landscape as it now exists, much changed from earlier years. The current antitrust panorama, of course, covers a broad array of issues; to study all of the possible issues would be neither efficient nor desirable. To use its resources most productively, the Commission chose to focus on four primary areas: substantive standards of antitrust law; enforcement institutions and processes; civil and criminal remedies; and statutory and other exceptions to competition (such as immunities and exemptions from the antitrust laws). The Chapters that address these issues are briefly described below.

Chapter I addresses certain aspects of substantive antitrust law. Chapter I.A reviews changes in antitrust law in recent decades and discusses antitrust analysis in industries in which innovation, intellectual property, and technological change are central features (the "new economy"). Chapters I.B and I.C assess two areas of antitrust analysis—mergers and exclusionary conduct—in greater depth. Finally, in light of the importance of intellectual property to competition in a high-technology economy, Chapter I.D briefly discusses how the operation of patent law can affect competition.

Chapter II discusses enforcement institutions and processes. Chapter II.A deals with the two federal antitrust agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, and Chapter II.B addresses issues surrounding these agencies' implementation and enforcement of the Hart-Scott-Rodino Act's pre-merger notification process. Chapter II.C discusses antitrust enforcement at the state level, while Chapter II.D addresses international antitrust enforcement.

Chapter III addresses civil and criminal antitrust remedies. Chapter III.A discusses the monetary remedies available to private parties, such as treble damages, as well as liability rules. Issues related to indirect purchaser litigation are assessed in Chapter III.B. Chapter III.C examines civil remedies available to the federal government, and Chapter III.D discusses criminal remedies that the government may obtain.

Finally, Chapter IV evaluates statutes and particular doctrines that provide exceptions to free-market competition. Chapter IV.A addresses the Robinson-Patman Act. Chapter IV.B discusses statutory immunities and exemptions from antitrust law, regulated industries, and the state action doctrine.

The following are recommendations agreed to by a majority of the Commission. Dissenting votes are identified in the text of the Report and, in some instances, are discussed in separate statements of Commissioners.

Chapter I: Substantive Standards of Antitrust Law

A. Antitrust Law and the "New Economy"

1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.

2. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.

B. Substantive Merger Law

3. No statutory change is recommended with respect to Section 7 of the Clayton Act.

   3a. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.S. merger policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.

   3b. The Commission was not presented with substantial evidence that current U.S. merger policy is materially hampering the ability of companies to operate efficiently or to compete in global markets.

4. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.

   4a. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.

5. The Federal Trade Commission and the Antitrust Division of the Department of Justice should ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets, while continuing to protect the interests of U.S. consumers.

6. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.

7. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.

8. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.

9. The agencies should be flexible in adjusting the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions.

10. The Federal Trade Commission and the Antitrust Division of the Department of Justice should seek to heighten understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of the economic foundations of merger policy and agency enforcement activity.

    10a. The Federal Trade Commission and the Antitrust Division of the Department of Justice should conduct or commission further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy.

    10b. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.

11. The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means.

11a. The agencies should issue "closing statements," when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies' merger enforcement policy.

11b. The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts, including such information as was reported by the Federal Trade Commission in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions. These reports should emanate from more frequent, periodic internal reviews of data relating to the merger enforcement activity of the Federal Trade Commission and the Antitrust Division of the Department of Justice. To facilitate and ensure the high quality of such reviews and reports, the Federal Trade Commission and the Antitrust Division of the Department of Justice should undertake efforts to coordinate and harmonize their internal collection and maintenance of data.

11c. The agencies should update the Merger Guidelines to explain more extensively how they evaluate the potential impact of a merger on innovation.

11d. The agencies should update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers.

C. Exclusionary Conduct

12. In general, standards for applying Section 2 of the Sherman Act's broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.

13. Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a "dominant" firm and even where competitors might be disadvantaged.

14. Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.

15. Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.

16. The lack of clear standards regarding bundling, as reflected in *LePage's v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.

17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.

18. In general, firms have no duty to deal with a rival in the same market.

19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.

D. Antitrust and Patents

20. Joint negotiations with intellectual property owners by members of a standard-setting organization with respect to royalties prior to the establishment of the standard, without more, should be evaluated under the rule of reason.

21. Congress should seriously consider recommendations in the Federal Trade Commission and National Academy of Sciences reports with the goal of encouraging innovation and at the same time avoiding abuse of the patent system that, on balance, will likely deter innovation and unreasonably restrain competition. In particular:

    21a. Congress should seriously consider the Federal Trade Commission and National Academy of Sciences recommendations targeted at ensuring the quality of patents.

    21b. Congress should ensure that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a reasonable time period.

    21c. The courts and the Patent and Trademark Office should avoid an overly lax application of the obviousness standard that allows patents on obvious subject matter and thus harms competition and innovation.

Chapter II: Enforcement Institutions and Processes

A. Dual Federal Enforcement

22. The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.

23. To ensure prompt clearance of all transactions reported under the Hart-Scott-Rodino Act, Congress should enact legislation to require the Federal Trade Commission and the Antitrust Division of the Department of Justice to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short period of time (for example, no more than nine calendar days) after the filing of the pre-merger notification.

24. The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.

25. Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.

26. Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.

B. The Hart-Scott-Rodino Act Pre-Merger Review Process

27. No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.

28. Congress should de-link funding for the Federal Trade Commission and the Antitrust Division of the Department of Justice from Hart-Scott-Rodino Act filing fee revenues.

29. The Federal Trade Commission and the Antitrust Division of the Department of Justice should continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by second requests.

30. The Federal Trade Commission and the Antitrust Division of the Department of Justice should systematically collect and record information regarding the costs and burdens imposed on merging parties by the Hart-Scott-Rodino Act process, to improve the ability of the agencies to identify ways to reduce those costs and burdens and enable Congress to perform appropriate oversight regarding enforcement of the Hart-Scott-Rodino Act.

31. The agencies should evaluate and consider implementing several specific reforms to the second request process.

    31a. The agencies should adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.

    31b. The agencies should in all cases inform the merging parties of the competitive concerns that led to a second request.

    31c. To enable merging companies to understand the bases for and respond to any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies' economic analysis and facilitate dialogue including the agency economists.

    31d. The agencies should reduce the burden of translating foreign-language documents.

    31e. The agencies should reduce the burden of requests for data not kept in the normal course of business by the parties.

C. State Enforcement of Antitrust Laws

32. No statutory change is recommended to the current role of the states in non-merger civil antitrust enforcement.

33. State non-merger enforcement should focus primarily on matters involving localized conduct or competitive effects.

34. No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to reviewing mergers.

35. Federal and state antitrust enforcers are encouraged to coordinate their activities and to seek to avoid subjecting companies to multiple, and possibly inconsistent, proceedings.

36. Federal and state antitrust enforcers should consider the following actions to achieve further coordination and cooperation and thereby improve the consistency and predictability of outcomes in merger investigations.

    36a. The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law, particularly with respect to mergers.

    36b. Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.

    36c. The state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements.

D. International Antitrust Enforcement

37. The Federal Trade Commission and the Antitrust Division of the Department of Justice should, to the extent possible, pursue procedural and substantive convergence on sound principles of competition law.

38. As a matter of priority, the Federal Trade Commission and the Antitrust Division of the Department of Justice should study and report to Congress promptly on the possibility of developing a centralized international pre-merger notification system that would ease the burden on companies engaged in cross-border transactions.

39. Congress should amend the International Antitrust Enforcement Assistance Act to clarify that it does not require that Antitrust Mutual Assistance Agreements include a provision allowing the non-antitrust use of information obtained pursuant to an AMAA.

40. Congress should provide budgetary authority, as well as appropriations, directly to the Federal Trade Commission and the Antitrust Division of the Department of Justice to provide international antitrust technical assistance.

41. The United States should pursue bilateral and multilateral antitrust cooperation agreements that incorporate comity principles with more of its trading partners and make greater use of the comity provisions in existing cooperation agreements.

    41a. Cooperation agreements should explicitly recognize the importance of promoting global trade, investment, and consumer welfare, and the impediment that inconsistent or conflicting antitrust enforcement poses. Existing agreements should be amended to add appropriate language.

    41b. Cooperation agreements should incorporate several principles of negative and positive comity relating to circumstances when deference is appropriate, the harmonization of remedies, consultation and cooperation, and "benchmarking reviews."

42. As a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act.

Chapter III: Civil and Criminal Remedies

A. Private Monetary Remedies and Liability Rules

43. No change is recommended to the statute providing for treble damages in antitrust cases.

44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.

45. No change is recommended to the statute providing for attorneys' fees for successful antitrust plaintiffs. In considering an award of attorneys' fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.

46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.

B. Indirect Purchaser Litigation

47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:

- Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.
- Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.
- Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.
- Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.

C. Government Civil Monetary Remedies

48. There is no need to give the antitrust agencies expanded authority to seek civil fines.

49. There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.

D. Criminal Remedies

50. While no change to existing law is recommended, the Antitrust Divsion of the Department of Justice should continue to limit its criminal enforcement activity to "naked" price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.

51. No change should be made to the current maximum Sherman Act fine of $100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.

52. Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.

53. The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy)—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.

54. No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to "bid-rigging, price-fixing, or market allocation agreements among competitors," and the Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.

Chapter IV: Government Exceptions to Free-Market Competition

A. The Robinson-Patman Act

55. Congress should repeal the Robinson-Patman Act in its entirety.

B. Immunities and Exemptions, Regulated Industries, and the State Action Doctrine

56. Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition.

Immunities and Exemptions

57. Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.

58. In evaluating the need for existing or new immunities, Congress should consider the following:

    - Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;
    - The likely adverse impact of the existing or proposed immunity on consumer welfare; and
    - Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.

59. The following steps are important to assist Congress in its consideration of those factors:

- Create a full public record on any existing or proposed immunity under consideration by Congress.
- Consult with the Federal Trade Commission and the Antitrust Division of the Department of Justice about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity.
- Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.

60. If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:

- Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (for example, a limit on damages to actual, rather than treble, damages).
- Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.
- Adopt a requirement that the Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.

61. Courts should construe all immunities and exemptions from the antitrust laws narrowly.

Regulated Industries

62. Public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry. Such economic regulation should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address. In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.

63. When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.

64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.

65. Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect.

66. Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.

67. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.

68. Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.

69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.

70. For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.

71. The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.

72. The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.

73. Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.

74. Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency's "public interest" standard to determine whether in fact such regulatory review is necessary.

    - In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency's review of the proposed transaction's likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such "particular, identified interests" would be interests other than those consumers' interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition.

The State Action Doctrine

75. Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.

76. **The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless (1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and (2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.**

77. **As proposed in the FTC State Action Report, the courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state; and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.**

78. **The courts should adopt a flexible approach to the active supervision prong, with different requirements based on the situation.**

79. **Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.**

80. **When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.**

Notes

[1] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116 Stat. 1856, 1856 (2002), *amended by* Antitrust Modernization Commission Extension Act of 2007, Pub. L. No. 110-6, 121 Stat. 61 (2007) [hereinafter AMC Act].

[2] William J. Baumol, The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism 3 (2002) [hereinafter Baumol, Free-Market Innovation Machine].

[3] Ben S. Bernanke, Gov., Fed. Reserve, Productivity, Remarks at the C. Peter McColough Roundtable Series on International Economics, Council on Foreign Relations (Jan. 19, 2005) [hereinafter Bernanke, Productivity] (citing Timothy F. Bresnahan & Manuel Trajtenberg, *General Purpose Technologies: "Engines of Growth?"*, 65 J. of Econometrics 83–108 (1995)).

[4] Ben S. Bernanke, Chairman, Fed. Reserve, Global Economic Integration: What's New and What's Not?, Remarks Before Federal Reserve Bank of Kansas City's Thirtieth Annual Economic Symposium (Aug. 25, 2006) [hereinafter Bernanke, Global Economic Integration].

[5] Alan Greenspan, Chairman, Fed. Reserve, Current Account, Remarks at Advancing Enterprise 2005 Conference (Feb. 4, 2005).

[6] Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before HM Treasury Enterprise Conference (Jan. 26, 2004) [hereinafter Greenspan, Economic Flexibility]; International Competition Policy Advisory Committee, Antitrust Division of the Department of Justice, Final Report 33 (2000) [hereinafter ICPAC Report].

[7] *See* Jonathan M. Jacobson, *Do We Need A "New Economy" Exception for Antitrust*, 16 Antitrust, Fall 2001, at 89, 89.

[8] *See* Bernanke, Productivity; Bernanke, Global Economic Integration.

[9] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[10] *See* National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General at 177 (1979) [hereinafter Shenefield Report] ("Free market competition, protected by the antitrust laws, should continue to be the general organizing principle of our economy."); Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before National Association for Business Economics Annual Meeting (Sept. 27, 2005); *see also* J. Bruce McDonald, Statement at AMC Regulated Industries Hearing, at 1 (Dec. 5, 2005) ("The fundamental premise of the federal antitrust laws is that free and open competition is the most effective means to ensure lower prices, increased quality . . . and great innovation.").

[11] Ernest Gellhorn et al., Antitrust Law and Economics 57 (5th ed. 2004) [hereinafter Gellhorn, Antitrust Law and Economics] ("[C]ompetition presses producers to satisfy consumer wants at the lowest price while using the fewest resources.").

[12] *See, e.g.*, Terry Calvani, *Consumer Welfare is the Prime Objective of Antitrust*, Legal Times, Dec. 24, 1984, at 14 ("In a competitive equilibrium, each firm is forced to sell at the lowest possible production cost because it otherwise faces losing customers to competitors who undercut its prices.").

[13] Baumol, Free-Market Innovation Machine, at 10.

[14] *See* William W. Lewis, The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability 90–91 (2004).

[15] Baumol, Free-Market Innovation Machine, at 10.

[16] Greenspan, Economic Flexibility.

[17] Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 57 (4th ed. 2005) (stating that "perfect competition is rarely, if ever, encountered in the real world"); *see also* David McGowan, *Innovation, Uncertainty, and Stability in Antitrust Law*, 16 Berkeley Tech. L.J. 729, 734–35 (Spring 2001).

[18] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 13 (2005) [hereinafter HOVENKAMP, ANTITRUST ENTERPRISE].

[19] *See, e.g.*, William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Legal and Economic Thinking*, 14 J.L. & ECON. PERSP. 43, 52 (2000) [hereinafter Kovacic & Shapiro, *Antitrust Policy*] ("[E]conomists came to realize that departures from the perfect competition model are normal, indeed inevitable, even in 'competitive' industries.'").

[20] GELLHORN, ANTITRUST LAW AND ECONOMICS, at 72.

[21] *Id.* at 72–73.

[22] Debate continues about the precise definition of "consumer welfare." *See, e.g.*, Merger Enforcement Transcript at 112–195 (Nov. 17, 2005) (various witnesses debating the proper meaning). The Supreme Court has not ruled specifically on this issue. The Commission's use of the term "consumer welfare" does not imply a choice of a particular definition.

Judge Robert Bork argued that Congress's goal in passing the Sherman Act was to optimize efficiency, regardless of whether producers or consumers capture the gains. *See generally* ROBERT BORK, THE ANTITRUST PARADOX 61–66 (1978) [hereinafter BORK, ANTITRUST PARADOX]. This will achieve consumer welfare, proponents maintain, because *all* consumers in the economy benefit when fewer resources are needed to make a product and those freed-up resources can be put to a higher and better use. *See, e.g.*, Merger Enforcement Trans. at 171–72 (Rule). In certain limited cases—for example, if a merger to monopoly would significantly lower costs and lead to a more efficient allocation of resources, but would also raise consumer prices—Judge Bork's approach would permit the transaction to be consummated, despite an increase in consumer prices, because the merger would create efficiency gains that outweighed deadweight losses. *See* BORK, ANTITRUST PARADOX, at 91, 107–11.

Others, however, argue that Congress's main goal was to prevent price increases to consumers—that is, wealth transfers from consumers to producers. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concerns of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68 (1982) [hereinafter Lande, *Wealth Transfers*]. Proponents of this approach distinguish between the consumers of products in a relevant market (consumers) and the shareholders of the firms in that market (producers). *See, e.g.*, Merger Enforcement Trans. at 121, 161 (Baker). They maintain that antitrust law should not allow wealth transfers from consumers to producers, even if gains in overall efficiency must be sacrificed. *See* Lande, *Wealth Transfers*, at 69–70; Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1592 (1983).

The use of one standard or the other can have various implications for antitrust analysis. *See, e.g.*, Merger Enforcement Trans. at 118–19, 137–38 (Cary) (discussing circumstances in which fixed-cost savings should, or should not, be considered in merger analysis). Nonetheless, the use of one standard versus the other often does not change the results of that analysis, and the cases in which the choice of standard would make a difference are relatively few. *See* Merger Enforcement Trans. at 166–67 (Cary) (standards often do not produce inconsistent results); *id.* at 122 (Baker) (stating that "possibilities for conflict are largely hypothetical," and that in his experience, "agency investigations rarely turn on the welfare standard"); *id.* at 172–73 (Rule) (difficulties in calculating with precision different types of efficiencies raises questions about how much difference using one standard rather than another makes).

[23] *See generally* Kovacic & Shapiro, *Antitrust Policy*, at 43 ("As economic learning changed, the contours of antitrust doctrine . . . would shift as well.").

[24] *See generally* Timothy J. Muris, FTC Chairman, Improving the Economic Foundations of Competition Policy, Remarks at George Mason University Law Review's Winter Antitrust Symposium (Jan. 15, 2003) (referring to the "importance of regularly reassessing the economic assumptions of current policy, of distilling economic insights . . . and of doing empirical research . . . .").

[25] *See* Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. CORP. L. 421, 425 (2006) [hereinafter Calkins, *Looking Backwards*]; Albert Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029, 1029 (2003) [hereinafter Foer, *Putting AMC into Perspective*]; Thomas E. Kauper, *The Report of the Attorney General's National Committee to Study the Antitrust Laws:*

A Retrospective, 100 MICH. L. REV. 1867, 1867 (2002) [hereinafter, Kauper, *Antitrust Laws: A Retrospective*].

26 Foer, *Putting AMC into Perspective*, at 1032–33. The TNEC had twelve members, including members of Congress and antitrust agency officials. *Id.* at 1033.

27 *Id.* at 1036 (crediting the TNEC with leading to Clayton Act amendments that "strengthened the law against anticompetitive mergers").

28 Kauper, *Antitrust Laws: A Retrospective*, at 1871–72 ("The general thrust of the Report is clear. It contemplates an antitrust world virtually free of per se rules.").

29 *Id.* at 1873 (stating that "[m]ost of the per se rules adopted in the previous two decades have disappeared").

30 PHIL C. NEAL ET AL., REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, *reprinted in* 2 ANTITRUST L. & ECON. REV. 11 (1968–69).

31 REPORT OF THE NIXON TASK FORCE ON PRODUCTIVITY AND COMPETITION, *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 413, at X-1 to X-14 (June 10, 1969).

32 SHENEFIELD REPORT.

33 *See generally* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1134–38 (1989).

34 Calkins, *Looking Backwards*, at 436; *see also* Foer, *Putting AMC into Perspective*, at 1040–41 (citing CHARLES R. GEISST, MONOPOLIES IN AMERICA 240 (2000)).

35 *See* Foer, *Putting AMC into Perspective*, at 1043–44 & n.55.

36 Calkins, *Looking Backwards*, at 434–35.

37 Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

38 Calkins, *Looking Backwards*, at 439.

39 *Id.* at 442 ("The Shenefield Report's most immediate consequence was passage of the Antitrust Procedural Improvements Act of 1980 . . . ."); Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 2, 94 Stat. 1154, 1154–58; *see* H.R. REP. NO. 96-870 (1980) (legislative history). Among other things, the Act increased potential sanctions for attorney delay, authorized prejudgment interest especially in response to delay, and encouraged wider use of collateral estoppel. Calkins, *Looking Backwards*, at 442.

40 Calkins, *Looking Backwards*, at 447.

41 Foer, *Putting AMC into Perspective*, at 1043 ("Probably the most important contribution of [the Shenefield Report] was to underscore . . . the desirability of continuing the nation's . . . movement toward deregulation."); *see also* Calkins, *Looking Backwards*, at 440.

42 Foer, *Putting AMC into Perspective*, at 1044; *id.* at 1045 (citing the launch of the International Competition Network as ICPAC's "most important effect" and "the materialization of [ICPAC's] Global Competition Initiative—a new venue where governmental officials, as well as private firms, nongovernmental organizations (NGOs) and others can exchange ideas and work towards common solutions of competition law and policy problems") (quoting ICPAC REPORT, at 29) (internal quotations and emphasis omitted).

43 *See* International Competition Network Website, *available at* http://www.internationalcompetitionnetwork.org.

44 AMC Act, § 11053.

45 Antitrust Modernization Commission Act of 2001, H.R. 2325, 107th Cong. (2001).

46 Press Release, H. Comm. On the Judiciary, Sensenbrenner Introduces Antitrust Study Commission Legislation (June 27, 2001), *available at* http://judiciary.house.gov/Legacy/news_062701.htm.

[47] AMC Act, § 11053.

[48] *Id.* § 11058.

[49] *Id.* § 11060. Actual appropriations to the Commission made in fiscal years 2004, 2005, 2006, and 2007 totaled slightly less than $4 million after application of across-the-board rescissions.

[50] *Id.* § 11054(a).

[51] *Id.*

[52] *Id.* § 11054(a)(1).

[53] *Id.* § 11054(i).

[54] 150 Cong. Rec. H224 (daily ed. Jan. 28, 2004).

[55] 149 Cong. Rec. H44 (daily ed. Jan. 7, 2003).

[56] 149 Cong. Rec. S2872 (daily ed. Feb. 26, 2003).

[57] 149 Cong. Rec. S87 (daily ed. Jan. 7, 2003).

[58] The White House, Personnel Announcement (Mar. 5, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/03/20040305-5.html. Bobby Burchfield was appointed by the President to replace Deborah Platt Majoras, who resigned her position as a Commissioner upon her appointment to be the Chairman of the Federal Trade Commission in August 2004. *See* The White House, Personnel Announcement (Dec. 17, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/12/20041217-17.html.

[59] AMC Act, § 11056(a)(1).

[60] *Id.* Short biographies of Commissioners and Commission staff are provided in Appendix D of the Report.

[61] *See* 69 Fed. Reg. 43,969 (July 23, 2004).

[62] *See generally* Appendix C (listing comments proposing issues for Commission study).

[63] *See* 69 Fed. Reg. 70,627 (Dec. 7, 2004). The Commission held brief subsequent meetings to consider the adoption of additional specific issues for study. *See* 70 Fed. Reg. 8568 (Feb. 22, 2005); 70 Fed. Reg. 37,747 (June 30, 2005).

[64] *See* AMC Act, § 11053(3).

[65] The Commission's Record is contained on the CD-ROM included with this Report.

[66] *See* 70 Fed. Reg. 28,902 (May 19, 2005). The Commission issued several additional requests for comment from the public on issues it adopted for study at later points and when its study revealed the desirability of obtaining more specific comments on certain issues. *See* 70 Fed. Reg. 46,474 (Aug. 10, 2005); 70 Fed. Reg. 69,510 (Nov. 16, 2005); 71 Fed. Reg. 30,863 (May 31, 2006); 71 Fed. Reg. 34,590 (June 15, 2006).

[67] *See* Appendix C of this Report (listing comments received on issues selected for study).

[68] Panels generally consisted of four or five witnesses each, although for some panels there were as few as one or two, or as many as seven, witnesses. A list of hearings and panelists appears in Appendix B of this Report.

[69] *See, e.g.*, 70 Fed. Reg. 37,746 (June 24, 2005); 71 Fed. Reg. 57,462 (Sept. 29, 2006).

Chapter I
Substantive Standards Of Antitrust Law

In this Chapter the Commission discusses aspects of the current substantive standards of antitrust law. Those standards should meet several criteria. The rules of antitrust must be economically sound and flexible enough to accommodate new economic learning and changes in the nature of competition. The rules also should be clear, predictable, and administrable, so that businesses can comply with them and courts can administer them.

Clarity, predictability, and administrability can be hard to maintain in a system that is flexible enough to adapt to new economic learning and changing business environments. For example, per se rules that deem specified conduct automatically illegal are clear, predictable, and administrable. Yet the courts, scholars, and antitrust practitioners have reached consensus that—although appropriate in particular limited circumstances—per se rules can all too often condemn business conduct that actually benefits, not harms, consumers. As antitrust law has more fully incorporated economic learning into the substantive rules of antitrust, the courts and the antitrust agencies have sought to develop revised rules that combine economically sound principles and flexible analysis with clarity, predictability, and administrability.

This Chapter first reviews these developments and then discusses their application in industries in which innovation, intellectual property, and technological change are central features. Chapter I.A discusses general antitrust standards in light of the competitive forces at work in the twenty-first century. Chapters I.B and I.C review two areas of antitrust analysis—mergers and exclusionary conduct—in greater depth. Finally, Chapter I.D, in light of the importance of intellectual property to competition in a high-technology economy, briefly discusses how the operation of patent law can affect competition as well.

Chapter I.A

Antitrust Law and the "New Economy"

1. INTRODUCTION

The term "new economy" can describe a diverse array of markets in which new information, communication, and other technologies have produced significant changes in recent decades. For purposes of this Report, the key question is whether antitrust analysis can properly account for the economic characteristics of these markets. Those economic characteristics include innovation, intellectual property, and technological change. As referenced in this Report, the new economy includes those industries in which innovation, intellectual property, and technological change are central features.

To assess how well antitrust law addresses competitive issues in such industries first requires an understanding of the major changes in antitrust analysis in recent decades. During this period a quiet transformation has strengthened the economic foundations of antitrust and increased its flexibility. These changes have improved the likelihood of an accurate assessment of competitive effects. In particular, the flexibility to account properly for the efficiencies associated with business conduct means that antitrust analysis has become less likely to condemn improperly business conduct that in fact benefits consumer welfare.

The Commission sought comment on and testimony about the application of antitrust analysis in industries in which innovation, intellectual property, and technological change are central features. Among other things, the Commission asked whether antitrust law encouraged a static analysis of dynamic industries or whether particular features of new economy industries posed distinctive problems for antitrust analysis. The Commission also asked whether antitrust law should use different benchmarks for market definition or market power assessments in new economy industries because innovation-driven firms may need to set prices above marginal costs to earn reasonable returns on their investments in innovation.

Commenters and witnesses largely agree that antitrust analysis has sufficient grounding in sound economic analysis, openness to new economic learning, and flexibility to enable the courts and the antitrust agencies properly to assess competitive issues in new economy industries. Most importantly, commenters noted, the economic principles on which antitrust is based do not require revision for application to those industries. As one economist noted, basic economic principles do not become "outdated" simply because industries become highly dynamic.[1]

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The Commission agrees and makes the following recommendations.

1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.

2. In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.

The economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of industries in which innovation, intellectual property, and technological change are central features. Antitrust analysis, as refined to incorporate new economic learning, is sufficiently flexible to provide a sound competitive assessment in such industries. This has improved the potential for a sound competitive assessment in all industries, including those characterized by innovation, intellectual property, and technological change.

To be sure, not all agree with the results in particular cases. That antitrust has the proper tools for an economically sound analysis of competitive effects does not mean that everyone agrees on how to use those tools in particular cases or interpret the results of their use. Nonetheless, the Commission concluded that current antitrust analysis is up to the task of properly assessing the competitive effects of business conduct in new economy industries.

Just as in other industries, of course, antitrust enforcers evaluating business conduct in new economy industries must ensure proper attention to particular market dynamics and economic characteristics that may play a role in determining likely competitive effects. Certain characteristics may arise more frequently in markets in which innovation, intellectual property, and technological change are key factors than in some other industries. These characteristics can include:

- very high rates of rapid innovation;
- falling average costs (on a product, not a firm-wide, basis) over a broad range of output;
- relatively modest capital requirements;
- quick and frequent entry and exit;
- demand-side economies of scale;

- switching costs; and
- first-mover advantages.

That one or more of these characteristics may be important in the context of a new economy industry, however, does not suggest that such characteristics never appear in other industries or that all of the listed characteristics always appear in new economy industries. Rather, the point is simply that proper antitrust analysis in *all* industries requires careful consideration of economic characteristics of the industry, and the listed characteristics are ones that may play important roles in industries in which innovation, intellectual property, and technological change are central features.

2. BACKGROUND

Antitrust law has gone through many changes. From the 1950s through the early 1970s, antitrust law was expansively interpreted and broadly enforced. Plaintiffs frequently won, and a wide variety of business practices were presumed to be illegal.[2] The bases for such expansive interpretations was sometimes questionable, however. Courts, for example, in some cases seemed more concerned about protecting competitors than consumers. Business practices might be quickly condemned, seemingly on the basis of courts' skepticism that businesses would try to maximize profits by becoming more efficient, rather than by obtaining greater market power.

These expansive interpretations of antitrust law precipitated a sea change, led by critics who questioned the basic premises of antitrust law as it was then enforced. "In the 1960s through the 1980s, [antitrust scholars generally associated with the University of Chicago] explained how many market structures and practices that antitrust treated with hostility could be beneficial."[3] Around the same time, antitrust scholars generally associated with Harvard advanced the concept that, in developing antitrust rules, courts and enforcers should keep in mind institutional limits, so that "antitrust rules [do] not outrun the capabilities of implementing institutions."[4] In the 1980s, developments in economics continued to influence antitrust thinking, with "'post-Chicago' economic literature argu[ing] that certain market structures and types of collaborative activity are more likely to be anticompetitive than Chicago School antitrust writers imagined."[5]

All of these schools of thought "emphasize[] reliance on economic theory in the formulation of antitrust rules."[6] The reassessment of antitrust doctrine based on economic learning has resulted in significant improvements to antitrust law over the past thirty years. This Section briefly reviews a few of the most important developments below. First, antitrust case law integrated the related principles that antitrust protects competition, not competitors, and it does so in order to ensure consumer welfare. Second, as new economic learning suggested possible procompetitive explanations for conduct previously assumed to be anticompetitive, the courts moved away from per se rules of automatic illegality toward a more flexible rule of reason analysis that would allow consideration of procompetitive explanations of challenged business conduct. Finally, antitrust enforcers have recognized the importance of intellectual property as a spur to innovation and have adopted policies that reflect a greater sensitivity to the need to protect incentives to innovate.

A. Antitrust Protects Competition, Not Competitors, and Should Ensure Consumer Welfare

During the 1960s and early 1970s antitrust decisions from the Supreme Court sometimes seemed more directed to protecting small businesses than to protecting competition that would benefit consumers through lower prices, improved quality, or innovation.[7] Indeed, in some instances the Court "condemned conduct precisely *because* it reduced costs or generated more desirable products [for consumers]."[8] For example, in *FTC v. Procter & Gamble* the Court affirmed that a merger was illegal because it created efficiencies its rivals could not match.[9] Decisions such as this were criticized as likely to deprive consumers of lower prices or other benefits from the increased competition that a more efficient merged firm could provide.[10]

Such decisions also were criticized for the absence of a coherent rule of law that could explain them.[11] On what basis should courts decide to disallow cost-saving, pro-consumer transactions so that smaller, less efficient firms could be kept afloat? The Court's premise seemed to be that all markets should be made up of many small firms, staying as close as possible to the economic ideal of "perfect competition."[12] "The Warren Court defined 'competitive' as a market containing many firms, the small ones having a 'right' to compete with the bigger ones."[13] The underlying economic assumption was that a "certain [industry] structure made certain types of conduct inevitable, so antitrust should be directed mainly toward anticompetitive industry structures."[14]

Developments in economic learning seriously undermined these premises and sent antitrust law in a new direction. Economic research found procompetitive reasons to explain highly concentrated markets—that is, that the most efficient firms were winning the competitive struggle and thereby achieving high market shares.[15] Some economists and lawyers further contended that effective competition did not require dozens of little firms, but instead could occur with relatively few firms in a market.[16] If effective competition could occur without many small firms in a market, then courts did not need to interpret antitrust law to protect small businesses at the expense of consumers.

In response to this and other advances in economic understanding, the Supreme Court in 1977 stated without caveat that the "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'"[17] The adoption of this principle represented a marked change in the direction of antitrust law. There is now a better understanding that trade-offs exist between the goals of consumer welfare and protecting small firms. To protect small firms can mean a less efficient economy in which consumers must pay higher prices.

Conversely, to allow firms to achieve economies of scale may harm small firms. "For example, large scale production and distribution may reduce costs but also eliminate competitive opportunities for small firms."[18]

In 1979 the Supreme Court once again chose to interpret the antitrust law to protect consumers, not small businesses, describing the Sherman Act as a "consumer welfare prescription."[19] Other courts have adopted similar views.[20] For the last few decades courts, agencies, and antitrust practitioners have recognized consumer welfare as the unifying goal of antitrust law.[21] "Few people dispute that antitrust's core mission is protecting consumers' right to the low prices, innovation, and diverse production that competition promises."[22]

B. Procompetitive Explanations May Exist for Much Business Conduct, So Antitrust Law Should Avoid Per Se Rules of Automatic Illegality

Over time, new economic learning has brought to the fore procompetitive explanations for certain business practices previously condemned outright.[23] Some have argued that many practices reflect aggressive competition or innovation and "that nearly all vertical practices [*e.g.*, arrangements between manufacturers and distributors], price discrimination and most strategic pricing, many patent practices, and business torts were rarely or never anticompetitive."[24] New anticompetitive theories have also emerged.[25] Given the potential for either procompetitive or anticompetitive explanations for business conduct, antitrust analysis needed to move away from per se rules of automatic illegality.

In 1977 in *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Supreme Court relied on economic reasoning to hold that territorial restraints on franchisees should be evaluated under the rule of reason, rather than viewed as per se illegal.[26] Territorial restraints forbid franchisee retailers from selling the manufacturer's products outside their agreed-upon locations, which typically do not overlap with those of other franchisees. Although such restrictions could reduce competition among franchisees of the same manufacturer ("intrabrand competition"), the Court explained that they also could increase competition among different manufacturers' franchisees ("interbrand competition").[27]

"Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers," the Court stated.[28] For example, such restrictions may be used to provide franchisees with sufficient incentives to engage in promotional activities or to provide service and repair facilities for the manufacturer's products. Franchisees might be reluctant to make such investments without territorial restraints because they would worry that other franchisees of the same manufacturer would "free ride" on their efforts to promote the manufacturer's brand, the Court pointed out.[29] In light of these potentially "redeeming virtues," the rule of reason, not a per se rule of automatic illegality, should be applied.[30] Moreover, the Court directed, "departure from the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[31]

The Court's decision in *Sylvania* marked a major turning point in antitrust law. After this decision, "the Court systematically went about the task of dismantling many of the per se rules it had created in the prior fifty years, and increasingly turned to modern economic theory to inform its interpretation and application of the Sherman Act."[32] Indeed, only two years later, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Court refused to apply a per se rule to circumstances in which alleged price-fixing among competitors provided substantial efficiencies that could not be obtained through other means.[33] Defendants were the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), both of which had thousands of composers as members. The composers granted nonexclusive licenses to their compositions to ASCAP or BMI, which then created blanket licenses authorizing the playing of millions of copyrighted musical compositions at agreed-upon fees. Plaintiff CBS objected that the blanket licenses issued to television networks were per se illegal price-fixing. The Court described the critical question as "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'"[34] For several reasons, including a substantial lowering of costs through eliminating thousands of individual transactions, the Court held the blanket licenses should be "subjected to a more discriminating examination under the rule of reason."[35]

Since *Sylvania* and *BMI*, the Supreme Court and lower courts have often looked to economic learning to understand why firms may use particular business practices. Rule of reason analysis allows this examination of potential efficiency rationales for challenged conduct. Although there are exceptions, of course,[36] the use of per se rules of automatic illegality is now substantially reduced, replaced by a more discriminating analysis under the rule of reason.

C. Antitrust Analysis Has Incorporated a More Sophisticated Understanding of How Intellectual Property Can Benefit Competition and Consumer Welfare

During much of the twentieth century, the courts, antitrust enforcers, and antitrust practitioners viewed intellectual property with deep skepticism.[37] Most assumed that a patent or other intellectual property automatically created a monopoly,[38] and Supreme Court cases fostered that presumption.[39] Antitrust enforcers attempted to restrict the use of intellectual property so that competition would be protected.[40] Over-zealous antitrust rules for the use of patents reached a pinnacle when, in 1972, the Antitrust Division of the Department of Justice (DOJ) issued the so-called "Nine No-Nos," a list of nine patent licensing practices the DOJ generally viewed as per se illegal.[41]

The influence of economic learning about the competitive benefits of intellectual property and the potential efficiencies of intellectual property licensing and other conduct reversed this trend. In 1981 the Chief of the Intellectual Property Section of the Antitrust Division explained that because patents increase the reward for research and development, inventions are produced that otherwise would not have come about (or would not have come about as quickly); in those cases, "the availability of a patent [serves] only to benefit competition—to make additional or less expensive choices available to consumers."[42] In 1981 officials from the DOJ renounced the Nine No-Nos.[43] The 1995 Antitrust Guidelines for the Licensing of Intellectual Property (DOJ/FTC IP Guidelines), issued jointly by the DOJ and the Federal Trade Commission (FTC), take the view that "intellectual property licensing . . . is generally procompetitive"[44] and should be examined under the rule of reason.[45]

As part of this trend, Congress in 1988 amended the Patent Code to eliminate a presumption that a patent confers market power in the context of patent misuse.[46] The antitrust agencies expanded that concept to include copyrights and trade secrets, stating in the DOJ/FTC IP Guidelines that the antitrust agencies "will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner."[47] In 2006 the Supreme Court recognized that "Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee."[48] In light of this consensus, the Court reversed its prior holdings and held that, in a tying case, "the mere fact that a tying product is patented does not support . . . a presumption [of market power.]"[49]

Over the course of recent decades, the courts and the antitrust agencies have thus moved away from a presumption that intellectual property automatically creates a monopoly and intellectual property arrangements are likely to harm competition. They now assess whether particular intellectual property in fact confers market power and consider how business arrangements involving intellectual property can benefit consumer welfare. This move has opened antitrust analysis to a more economically sophisticated approach to intellectual property issues, increasing the likelihood that antitrust will properly value the contribution of intellectual property rights to innovation and competition.

3. RECOMMENDATIONS AND FINDINGS

1. There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.

Current antitrust analysis has a sufficient grounding in economics and is sufficiently flexible to reach appropriate conclusions in matters involving industries in which innovation, intellectual property, and technological change are central features. Judge Richard A. Posner, for example, has concluded that "antitrust doctrine is sufficiently supple, and sufficiently informed by economic theory, to cope effectively with the distinctive-seeming antitrust problems that the new economy presents."[50] Others agree, finding, for example, that "[w]hile the new economy has a number of distinct characteristics, antitrust enforcement is sufficiently flexible to account for the distinguishing features of the new economy and to preserve competition when it benefits consumers."[51]

The fundamental economic principles that guide antitrust law remain relevant to and appropriate for the antitrust analysis of new economy industries. Over the years, antitrust analysis has been refined to incorporate useful aspects of new economic learning. This has improved the potential for a proper competitive assessment in all industries, including those characterized by innovation, intellectual property, and technological change.

Moreover, antitrust analysis, guided by valid economic principles, is sufficiently flexible to provide a sound competitive assessment in such industries. Rule of reason analysis, for example, can accommodate the assessment of a wide variety of factors, including likely procompetitive effects of challenged conduct. As discussed above, advances in economic learning have persuaded courts to replace many per se rules of automatic illegality with a more flexible analysis under the rule of reason.

Increased flexibility and improved economic understanding can be seen in the evaluation of both joint and unilateral conduct under the Sherman Act, where courts have largely turned away from the application of per se rules of automatic illegality and moved toward rule of reason analysis. Likewise, the analysis of mergers has moved away from structural presumptions that increased concentration will necessarily result in anticompetitive conduct, toward a more complex analysis that incorporates predictions of competitive effects using tools of modern economic analysis. Significantly, both rule of reason analysis and current merger analysis require an evaluation of procompetitive efficiencies that may result from firms' agreements, unilateral conduct, or proposed transactions. This is a significant positive change from the typical antitrust analysis of thirty years ago.

In addition, as discussed above, the courts and the antitrust agencies in recent decades have evidenced a greater appreciation of the importance of intellectual property in promoting innovation and, accordingly, the need to incorporate this recognition into a dynamic analysis of competitive effects. Witnesses and commenters remarked there is an improved understanding that antitrust law and patent law are complementary, with both seeking to encourage innovation and competition.[52]

Antitrust analysis can be properly applied in dynamic, innovation-driven industries.[53] Rapid technological progress and innovation are not new issues in antitrust law.[54] One witness pointed out "innovation has been the driver of American economic growth since at least the passage of the Sherman Act in 1890" and maintained "antitrust doctrine does not focus on static analysis."[55] Yet another stated that "[a]ntitrust law is sufficiently flexible to take innovation concerns into account, and today's theories, which may be replaced over time, need not be codified into the statute."[56]

Indeed, the evolution of antitrust law—both through case law and agency guidelines—has shown that new or improved economic learning can be incorporated into antitrust analysis as appropriate. Allowing the ongoing incorporation of economic learning into antitrust case law and agency guidelines is preferable to attempts at legislative change to specify different antitrust analyses for industries characterized by innovation, intellectual property, and technological change. Industries that fall into those categories will keep changing over time; attempts to define them would likely be difficult and impermanent at best. Furthermore, economic learning continues to evolve, and antitrust law needs to be able to incorporate this new learning as appropriate. It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles relevant to antitrust analysis.

2. **In industries in which innovation, intellectual property, and technological change are central features, just as in other industries, antitrust enforcers should carefully consider market dynamics in assessing competitive effects and should ensure proper attention to economic and other characteristics of particular industries that may, depending on the facts at issue, have an important bearing on a valid antitrust analysis.**

Antitrust analysis in *all* industries requires careful assessments of each industry's market dynamics and economic characteristics. To take proper account of market dynamics, antitrust analysis should carefully consider the incentives and obstacles that firms seeking to develop and commercialize new technologies may face.[57] Antitrust enforcers should "explicitly recognize that market conditions, business strategies, and industry structure can be highly dynamic."[58]

Innovation provides a significant share of the consumer benefits associated with competition, particularly in the most dynamic industries.[59] New and improved products and services, as well as new business methods and production processes, are created through innovation.[60] To improve the application of antitrust in new economy industries, antitrust enforcers should give further consideration to efficiencies that lead to more rapid or enhanced innovation.[61] The potential benefits to consumer welfare from such efficiencies are great, thus warranting careful assessments of the potential for certain business conduct to create more rapid or enhanced innovation.

"[A] proper market-power inquiry in new economy industries must include a serious analysis of the vigor of dynamic competition" that looks beyond current sales figures.[62] To account properly for dynamic effects, antitrust enforcers must recognize that current market shares may overstate or understate likely future competitive significance. The Supreme Court identified this issue thirty years ago in *United States v. General Dynamics*, a merger case in which a coal company's share of uncommitted coal reserves was a better indicator of its likely ability to compete for future supply contracts than its historical market share.[63]

Analogous examples can be found in new economy industries, in which there may be "sequences of races to develop a new product or . . . to replace an existing product through drastic innovation."[64] For example, if a firm has failed recently to introduce new and improved products comparable to rivals' new offerings, and has no plans to do so, its likely future competitive significance may be far less than would be indicated by its historical market share.[65] A recent entrant with a promising new product, on the other hand, may have greater likely future competitive significance than its current low market share might suggest.[66]

Intellectual property may be critical to future innovation in an industry, so it is also important "to examine ownership of and investment in relevant intellectual property—which may involve technologies not currently in commercial use."[67] If, for example, the current leader "owns all intellectual property necessary for radical innovation, dynamic competition will not be effective."[68] If a firm with a low market share holds an intellectual property asset essential for future product development, that firm's likely future competitive significance may be far greater than that of a current market leader that has no promising new products or intellectual property assets in the pipeline.[69]

Antitrust analysis also must recognize that a price above marginal cost, by itself, does not necessarily suggest that a firm has market power that should be relevant in an antitrust matter or is operating anticompetitively in a relevant antitrust market.[70] Particularly in innovative industries, such as those in which intellectual property assets are key, firms may have large, up-front fixed costs for research and development, and relatively small marginal costs of production.[71] In pharmaceuticals, for example, a drug that costs millions of dollars to research, develop, and put through clinical testing may cost only a few cents per pill to produce.[72] Over the long run, the pharmaceutical company must set a competitive price that will cover its up-front fixed costs, including a risk-adjusted cost of capital.[73] Firms in innovative industries also must cover the costs of innovation failures, such as drug products that fail before or during clinical testing.[74]

For these reasons, firms with low marginal costs but large fixed costs, for research and development and other innovative activity, for instance, often need to price significantly above marginal costs simply to earn a competitive return in the long run. "This basic economic observation is not new, either in practice or in theory: it holds in any industry with large fixed costs, from railroads to microprocessors, from newspapers to computer software."[75]

A number of industries in which innovation, intellectual property, and technological change are central features also have one or more of the characteristics described briefly below. Depending on the facts at issue, such characteristics may have an important bearing on a proper antitrust analysis.

Very high rates of rapid innovation. One critical feature of new economy industries is innovation competition.[76] Competitive pressure to get new products or services to market ahead of one's competitors can lead to short product life cycles,[77] with new products replacing the old every few months instead of years. In addition, in some industries, "[s]uccessful incumbents . . . are constrained primarily . . . by the threat that another firm will come up with a drastic innovation that causes demand for the incumbent's product to collapse."[78] Threats of drastic innovations may "force new-economy firms to invest heavily in R&D and to bring out new versions of their products—including versions that lead to the demise of their old versions."[79]

Relatively modest capital requirements. Some new economy industries do not require entrants to incur substantial sunk costs. Depending on the circumstances, some software markets, for example, may require only modest capital investments for entry. Ease of entry is relevant to assessment of whether a firm has or could obtain market power.

Quick and frequent entry and exit. In industries with relatively modest capital requirements entry and exit may be quick and frequent. Start-up software enterprises, for instance, particularly during the 1990s, were frequently born only to die while very young.[80] The extent to which quick and frequent entry and exit characterize an industry also will be relevant to whether a firm in such an industry could possess durable market power.

Falling average costs (on a product, not a firm, basis) over a broad range of output. Economies of scale over a wide range of output are typical of industries with "large fixed costs (most of which are sunk R&D expenditures) and low marginal costs."[81] New entrants may not be able to duplicate these economies of scale and therefore may not be able to constrain incumbent firms.[82]

Demand-side economies of scale. "Economies of scale in consumption describe the situation in which the larger the firm's output is, up to some point, the more valuable that output is to its customers."[83] Examples include telephones and other interactive services, such as email and online auctions.[84] Computer programs also "tend to be more valuable the more people use them because training, support by information-technology personnel, and standardization of equipment and procedures are facilitated."[85] The presence of demand-side economies of scale can have a variety of implications for antitrust analysis, including that common standards typically are necessary to benefit from such economies.

Switching costs. In industries with demand-side economies of scale consumers may need to incur costs to switch from one competitor to another. Such switching costs may deter customers from moving from an incumbent to a new entrant and thus cause entrants to be an ineffective competitive constraint.[86]

First-mover advantages. "There is often a substantial advantage to being the first in a high-tech industry to develop and introduce a new product or the first to gain a significant market presence."[87] This advantage can arise, for instance, because the first to market can quickly take advantage of demand-side economies of scale or gain a head-start on moving down the learning curve for making the new product.[88] Whatever the source of a first-mover advantage in a particular industry, its effect is to encourage fierce competition by firms to be the first to market. Antitrust analysis should take into account such competitive incentives.

In sum, antitrust law has sufficient grounding in economic learning and flexibility to provide appropriate analyses of competitive issues in new economy industries. Developments in antitrust law in recent decades have made this possible. To tether antitrust law to the goal of consumer welfare, achieved through free-market competition, with an analysis based on economic learning, has benefited consumers and produced more consistency and predictability in antitrust doctrine.

Notes

1 Prof. Carl Shapiro, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005) [hereinafter Shapiro Statement re New Economy].

2 *See generally* Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 1–10 (2005) [hereinafter Hovenkamp, Antitrust Enterprise].

3 Gellhorn et al., Antitrust Law and Economics 105 (5th ed. 2004) [hereinafter Gellhorn, Antitrust Law and Economics].

4 William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 101, 138 [hereinafter Kovacic, *Intellectual DNA of Modern U.S. Competition Law*] ("A hallmark of the antitrust treatise authored by Professors Areeda and Turner is the recurring attention to institutional factors and the precept that antitrust rules should not outrun the capabilities of implementing institutions.").

5 Hovenkamp, Antitrust Enterprise, at 36.

6 Kovacic, *Intellectual DNA of Modern U.S. Competition Law*, at 136.

7 See Hovenkamp, Antitrust Enterprise, at 2; Gellhorn, Antitrust Law and Economics, at 47 & n.14.

8 Hovenkamp, Antitrust Enterprise, at 1 (citing Albrecht v. Herald Co., 390 U.S. 145 (1968) (per se unlawful for dealer to limit maximum price charged by its dealers); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (merger unlawful, in part because it would enable resulting firm to undersell its rivals);

FTC v. Procter & Gamble, 386 U.S. 568 (1967) (merger illegal for creating efficiencies its rivals could not match)).

9 *See Procter & Gamble*, 386 U.S. at 579.

10 *See, e.g.*, Hovenkamp, Antitrust Enterprise, at 2 ("[I]n the 1960s and 1970s the Supreme Court went overboard in protecting small business from larger firms, often at the expense of consumers.").

11 *See, e.g.*, *id.* (result "was a mélange of incoherent policies that confused competition with small business protection").

12 Gellhorn, Antitrust Law and Economics, at 105 ("During the 1960s, when the antitrust laws were applied expansively, real market divergences from the model of perfect competition were viewed suspiciously and often were subject to prosecution.").

13 Hovenkamp, Antitrust Enterprise, at 2.

14 *Id.* at 37.

15 *See* Gellhorn, Antitrust Law and Economics, at 92–93 (quoting Harold Demsetz, *Two Systems of Belief about Monopoly*, *in* Industrial Concentration: The New Learning 164 (Harvey J. Goldschmid et al. eds., 1974)).

16 Hovenkamp, Antitrust Enterprise, at 32.

17 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting *Brown Shoe*, 370 U.S. at 320). The Court had made this observation fifteen years earlier as well, but in that case had disallowed a merger that would produce a firm with a 5 percent market share, noting "Congress' desire to promote competition through the protection of viable, small, locally owned businesses." *Brown Shoe*, 370 U.S. at 344. By contrast, "[i]n *Brunswick*, the Court studied the Janus-like features of *Brown Shoe* and ignored the face of business egalitarianism." Gellhorn, Antitrust Law and Economics, at 47.

18 Gellhorn, Antitrust Law and Economics, at 45.

19 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, The Antitrust Paradox 66 (1978)); *see* Gellhorn, Antitrust Law and Economics, at 47. Debate continues over whether the Supreme Court implicitly adopted the goal of allocative efficiency or the goal of preventing wealth transfers as the standard by which consumer welfare should be measured. *See* Merger Enforcement Transcript at 112–15 (Rule) (Nov. 17, 2005). *See generally* Introduction of this Report, note 22.

20 *See* Gellhorn, Antitrust Law and Economics, at 47.

21 *See, e.g.*, *id.*

22 Hovenkamp, Antitrust Enterprise, at 1.

23 *See generally id.* at 25–39.

24 *Id.* at 32.

25 For example, "[p]ost-Chicago scholars developed a fairly robust theory of 'raising rivals' costs,' under which dominant firms or cartels adopt strategies that impose higher costs on rivals, thus creating a price umbrella for the strategizing firms." *Id.* at 38.

26 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–59 (1977).

27 *Id.* at 54–55.

28 *Id.* (citation omitted).

29 *Id.* at 55.

30 *Id.* at 54–59.

31 *Id.* at 58–59.

32 Gavil et al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 358 (2002) [hereinafter Gavil, Antitrust Law in Perspective].

[33] Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

[34] *Id.* at 19–20 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

[35] *BMI*, 441 U.S. at 24.

[36] *See, e.g.*, Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982).

[37] *See generally* Gavil, Antitrust Law in Perspective, at 1109.

[38] *See, e.g.*, Robert P. Merges & John F. Duffy, Patent Law and Policy: Cases and Materials 1349 (3d ed. 2002) ("During the middle part of the twentieth century, the courts tended to associate patents with monopolies, and hence to view them as narrow exceptions to the nation's antitrust laws. This view [was] especially prominent in the Supreme Court cases from the 1930s until the 1960s . . . .").

[39] *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947) (in tying context, court will presume market power from a patent), *overruled by* Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006).

[40] *See generally* Willard K. Tom & Joshua Newberg, *Antitrust and Intellectual Property: From Two Separate Spheres to Unified Field*, 66 Antitrust L.J. 167 (1997); Herbert Hovenkamp et al., IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law I15–I17 (2002).

[41] *See* Bruce B. Wilson, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Remarks Before Michigan State Bar Antitrust Law Section and Patent, Trademark and Copyright Law Section (Sept. 21, 1972), *reprinted in* 5 CCH Trade Reg. Rep. 50,146 (current comment transfer binder 1969–83) (DOJ official's speech articulating what came to be called the "Nine No-Nos").

[42] Roger B. Andewelt, Chief, Intellectual Property Section, Antitrust Div., Dep't of Justice, Basic Principles to Apply at the Patent-Antitrust Interface, Remarks Before Houston Patent Law Association, at 4–5 (Dec. 3, 1981).

[43] *See* Abbott B. Lipsky, Jr., *Current Antitrust Division Views on Patent Licensing Practices*, 50 Antitrust L.J. 515, 517–24 (1981). Mr. Lipsky was then a Deputy Assistant Attorney General in the Antitrust Division of the DOJ.

[44] Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property, § 2.0 (1995) [hereinafter DOJ/FTC IP Guidelines].

[45] The DOJ/FTC IP Guidelines call for per se treatment in certain limited circumstances, but still make clear that the agencies use the rule of reason "[i]n the vast majority of cases." *Id.* § 3.4.

[46] 35 U.S.C. § 271(d)(5); *see also Independent Ink*, 126 S. Ct. at 1290.

[47] DOJ/FTC IP Guidelines, § 2.2.

[48] *Independent Ink*, 126 S. Ct. at 1292.

[49] *Id.* at 1284.

[50] Posner, Antitrust Law, at 256. Judge Posner finds more "troublesome" the institutional structure of antitrust enforcement. *Id.* The Commission addresses antitrust enforcement institutions in Chapter II of this Report.

[51] Prof. Richard J. Gilbert, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005) [hereinafter Gilbert Statement].

[52] *See, e.g.*, M. Howard Morse, Statement at AMC New Economy Hearing, at 6 (Nov. 8, 2005) [hereinafter Morse Statement] (patents and antitrust are complementary, "as both are aimed at encouraging innovation, industry, and competition") (citing Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990)).

[53] *See, e.g.*, Gilbert Statement, at 4.

[54] *See, e.g.*, Jonathan M. Jacobson, *Do We Need a "New Economy" Exception for Antitrust Law?*, 16 Antitrust, Fall 2001, at 89, 89–90.

[55] Shapiro Statement re New Economy, at 2–3.

[56] Morse Statement, at 5.

[57] *See* Shapiro Statement re New Economy, at 2; *see also id.* (endorsing this Commission's description of new economy industries because it focuses on the economic characteristics of those industries).

[58] *See id.*

[59] *See, e.g.*, Gilbert Statement, at 4 ("[D]ynamic competition to develop new products and to improve existing products [in innovation-driven industries] can have much greater impacts on consumer welfare than static price competition."); Morse Statement, at 5 ("Everyone should understand that small increases in productivity from innovation dwarf even significant reductions in static efficiency over time.") (citing F.M. Scherer & D. Ross, Industrial Market Structure and Economic Performance 31, 613 (3d ed. 1990)); Shapiro Statement re New Economy, at 2 ("[A]t least over the medium to long term, the lion's share of consumer benefits associated with competition in our most dynamic industries results from innovation.").

[60] *See* Shapiro Statement re New Economy, at 2.

[61] *See* Morse Statement, at 4 (noting that "such efficiencies often drive [merger] transactions in high-tech industries"). Conversely, because of innovation's importance, "anticompetitive effects on innovation can have much greater impact than effects on price." *Id.* at 5.

[62] David S. Evans & Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, at 25 (National Bureau of Economic Research, Working Paper 8268, May 2001) [hereinafter Evans & Schmalensee, *Antitrust Analysis in Dynamically Competitive Industries*].

[63] United States v. General Dynamics Corp., 415 U.S. 486, 498, 502, 510–11 (1974).

[64] *See* Evans & Schmalensee, *Antitrust Analysis in Dynamically Competitive Industries*, at 11.

[65] Shapiro Statement re New Economy, at 3.

[66] *Id.* at 3–4.

[67] Evans & Schmalensee, *Antitrust Analysis in Dynamically Competitive Industries*, at 25.

[68] *Id.*

[69] *See* Shapiro Statement re New Economy, at 3–4.

[70] *See* Gilbert Statement, at 9–10; Shapiro Statement re New Economy, at 6–7.

[71] *See, e.g.*, Gilbert Statement, at 9–10; Morse Statement, at 7; Shapiro Statement re New Economy, at 7.

[72] *See, e.g.*, Gilbert Statement, at 9 (reporting an estimate that researching, developing, and testing a new drug costs $800 million) (citing Joseph DiMasi et al., *The Price of Innovation: New Estimates of Drug Development Costs*, 22 J. Health Econ. 151 (2003)).

[73] *See* Shapiro Statement re New Economy, at 7.

[74] *See id.*

[75] *Id.*

[76] *See* Gilbert Statement, at 7.

[77] Morse Statement, at 6.

[78] Evans & Schmalensee, *Antitrust Analysis in Dynamically Competitive Industries*, at 20.

[79] *Id.* at 21.

[80] William J. Baumol, The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism 172 (2002) (discussing the frequency of entry and exit in new economy industries).

[81] Gilbert Statement, at 4.

[82] *See id.* at 4–5.

83 Posner, Antitrust Law, at 247.

84 *Id.*

85 *Id.* at 248.

86 *See* Gilbert Statement, at 5.

87 Morse Statement, at 8.

88 *Id.*

Chapter I.B
Substantive Merger Law

1. INTRODUCTION

Section 7 of the Clayton Act, enacted in 1914 and amended in 1950, prohibits mergers or acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly" in a relevant market.[1] Both the substance and the procedures of antitrust merger enforcement have changed significantly in recent decades. These changes are to some extent interrelated.

Before 1976, antitrust challenges typically occurred after a merger already had been consummated; such challenges sometimes took years to litigate. In cases where a court ultimately ruled the merger illegal and ordered the merged firm to divest the acquired assets, it was sometimes difficult to recreate a competitively viable firm—that is, to "unscramble the eggs"—and effectively restore lost competition.

Passage of the Hart-Scott-Rodino Antitrust Improvements Act in 1976 (HSR Act) changed this dynamic.[2] The HSR Act requires firms that propose mergers or acquisitions of a certain size to notify the antitrust agencies and to adhere to certain waiting periods before consummating the proposed transaction.[3] The HSR Act enables the agencies to obtain documents and other information to assess whether to challenge the proposed transaction. Either the agencies can sue to block the entire transaction, or they can seek the divestiture of assets in order to resolve competitive concerns while allowing the overall transaction to proceed. In practice, merging companies most often consent to relief sought by the agencies in order to avoid time-consuming litigation that would delay closing the transaction and the realization of related efficiencies.

As a result, there have been fewer litigated merger cases interpreting application of the antitrust laws to mergers and acquisitions and greater reliance on agency enforcement guidelines and other guidance explaining how the agencies assess mergers and exercise their prosecutorial discretion. This development has made merger enforcement more predictable, due to the issuance of agency guidelines and other guidance and the fact that the enforcement agencies systematically review a greater number of transactions than was the case prior to enactment of the HSR Act. Such expanded review has led to the development of substantial expertise within the agencies. Agency guidelines have served as both a source of guidance to business and a mechanism through which advances in economic learning have been integrated into substantive merger analysis. At the same time, the paucity of litigated court cases has made the merger review process much more administrative in nature.

Over time, the antitrust agencies and courts have moved away from the stringent enforcement standards that prevailed during the 1950s and 1960s, when mergers resulting in a merged firm's market share as small as 5 percent had sometimes been found unlawful.[4] The agencies' promulgation of guidelines for merger analysis played an important role in this process. In 1968 Assistant Attorney General Donald Turner "used the first merger guidelines to bring rigor and transparency to the merger review process."[5] In 1982, and again in 1984, Assistant Attorney General William Baxter further advanced merger analysis with new guidelines outlining specific issues that must be addressed to answer the critical question of whether a merger would tend to "create or enhance market power or . . . facilitate its exercise."[6] The antitrust agencies have jointly updated these guidelines two more times: first in 1992, when the agencies revised the guidelines to clarify their analysis of competitive effects, and most recently in 1997, when they added a section specifically addressing efficiencies. The courts have played significant roles in interpreting and applying these guidelines.[7]

The Commission's review and study of current merger enforcement standards revealed a general consensus that the framework for analyzing mergers used by the antitrust agencies and the courts is basically sound. Most agree that current law, including as interpreted and applied under the agencies' merger guidelines, is sufficiently grounded in economic learning and has sufficient flexibility to analyze properly the competitive issues that can arise in industries in which innovation, intellectual property, and technological change are central features.

Nonetheless, room for improvement exists. The Commission has agreed on recommendations that the agencies give substantial weight to certain factors in merger analysis, particularly with respect to efficiencies related to innovation; that the agencies further study the bases for merger enforcement policy; and that the agencies increase the transparency of merger review through a variety of means. The Commission makes the following recommendations.

3. No statutory change is recommended with respect to Section 7 of the Clayton Act.

3a. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.S. merger policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.*

3b. The Commission was not presented with substantial evidence that current U.S. merger policy is materially hampering the ability of companies to operate efficiently or to compete in global markets.†

* Commissioner Kempf does not join this recommendation.

† Commissioner Kempf does not join this recommendation.
Commissioner Garza joins this recommendation with qualifications.

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4. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.*

    4a. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.†

5. The Federal Trade Commission and the Antitrust Division of the Department of Justice should ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets, while continuing to protect the interests of U.S. consumers.

6. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.

7. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.

8. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.

9. The agencies should be flexible in adjusting the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions.

* Commissioner Delrahim does not join this recommendation.

† Commissioner Kempf does not join this recommendation.
Commissioner Garza joins this recommendation with qualifications.

10. The Federal Trade Commission and the Antitrust Division of the Department of Justice should seek to heighten understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of the economic foundations of merger policy and agency enforcement activity.

10a. The Federal Trade Commission and the Antitrust Division of the Department of Justice should conduct or commission further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy.

10b. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.

11. The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means.

11a. The agencies should issue "closing statements," when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies' merger enforcement policy.

11b. The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts, including such information as was reported by the Federal Trade Commission in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions. These reports should emanate from more frequent, periodic internal reviews of data relating to the merger enforcement activity of the Federal Trade Commission and the Antitrust Division of the Department of Justice. To facilitate and ensure the high quality of such reviews and reports, the Federal Trade Commission and the Antitrust Division of the Department of Justice should undertake efforts to coordinate and harmonize their internal collection and maintenance of data.*

* Commissioner Kempf does not join this recommendation.

11c. **The agencies should update the Merger Guidelines to explain more extensively how they evaluate the potential impact of a merger on innovation.***

11d. **The agencies should update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers.†**

2. BACKGROUND

Federal antitrust merger enforcement has evolved significantly since enactment of the Clayton Act in 1914. It has shifted in emphasis from a litigation-based system focused on judicial review of consummated deals to an administrative regime in which two federal agencies, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), review mergers above a certain size prior to consummation.[8] In recent years, the DOJ/FTC Horizontal Merger Guidelines (Merger Guidelines or Guidelines) have described the analytical framework used by the agencies for merger enforcement and guided the agencies' enforcement approach.[9]

The Antitrust Division (under Assistant Attorney General Donald Turner) issued its first set of merger enforcement guidelines in 1968.[10] The DOJ explained that its purpose in publishing the 1968 Merger Guidelines was to inform business, counsel, and others of "the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers."[11] The 1968 Merger Guidelines used concentration within the relevant market as a guidepost for whether enforcement action should be taken, setting thresholds by which merger challenges became more likely as market concentration and the market shares of the merging firms increased.[12]

In 1982 the DOJ issued a revised set of merger guidelines, under the leadership of Assistant Attorney General William Baxter.[13] To measure market concentration, the 1982 Merger Guidelines introduced use of the Herfindahl-Hirschman Index (HHI) and established revised concentration thresholds, which are still in use today.[14] More important, the 1982 Merger Guidelines expanded merger analysis beyond concentration thresholds to explain how mergers may raise competitive concerns and to include an assessment of additional factors in the markets of relevance to the merger.[15]

The 1982 Merger Guidelines explained that antitrust law seeks to prevent mergers that could increase the likelihood of collusion, either tacit or explicit, in a post-merger market.[16]

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* Commissioners Carlton and Kempf do not join this recommendation.

† Commissioner Kempf does not join this recommendation.

Thus, merger enforcement is one of the ways in which antitrust enforcers attempt to prevent tacit coordination in oligopolistic markets.[17] Antitrust law also seeks to prevent mergers that would enhance market power by creating or strengthening a dominant firm, the 1982 Merger Guidelines explained.[18]

To ground the analytical framework of merger analysis more firmly, the 1982 Merger Guidelines set forth a methodology for assessing market definition based on the behavior that would be profitable post-merger for a hypothetical profit-maximizing monopolist.[19] Market definition requires an assessment of substitutes to which customers could turn if the merged firm attempted to raise price. The 1982 Merger Guidelines also introduced the concept that entry by other firms into the relevant market might deter or counteract attempts by a merged firm to raise prices post-merger, thus negating a merger's potential anticompetitive effects.[20]

Several factors, including ongoing economic research that questioned the extent to which market concentration was correlated with reduced competition, prompted these revisions to merger analysis.[21] In 1984 the DOJ made modest revisions to update the 1982 Merger Guidelines with recent thinking and "to correct any misperception that the Merger Guidelines are a set of rigid mathematical formulas that ignore market realities, and rely solely on a static view of the marketplace."[22]

In 1992 the DOJ and the FTC jointly issued merger guidelines, the first time both agencies set forth a unified approach to merger analysis.[23] For market definition, the 1992 Merger Guidelines continued to ask whether a hypothetical monopolist could successfully impose a small but significant non-transitory increase in price.[24] The 1992 Merger Guidelines further deemphasized the HHI thresholds. Although mergers that would increase concentration by a certain amount in a highly concentrated market remained subject to a presumption of anticompetitive effects, the 1992 Merger Guidelines explained that "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger."[25]

Once past this starting point, the 1992 Merger Guidelines emphasized a need to explain how the proposed transaction could harm competition and which factors suggest the likelihood of such harm. The 1992 Merger Guidelines articulated more fully two mechanisms of anticompetitive effects: (1) coordinated effects, that is explicit or tacit collusion, and (2) unilateral effects resulting from the relaxation of competitive constraints on the combined firm due to the acquisition of a close competitor. For each mechanism, the Guidelines outlined how particular factors might be more or less conducive to a particular theory of anticompetitive effects.[26] In addition, the Guidelines refined the analysis of entry to focus on the potential entrants' need to sink costs in a relevant market as a key determinant of whether entry would be "timely, likely, and sufficient" to deter or counteract anticompetitive effects.[27]

In 1997 the FTC and the DOJ revised the 1992 Merger Guidelines to elaborate on the treatment of merger-related efficiencies. The revisions recognized that the main benefit of mergers to the economy is their potential to achieve efficiencies.[28] The Guidelines explained that merging parties must show that the efficiencies resulting from the merger "would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in the market."[29]

Although the Merger Guidelines have not been altered since 1997, the FTC and the DOJ issued a Commentary on the Horizontal Merger Guidelines in 2006.[30] The Commentary provides further explication of the Merger Guidelines, including examples of how the agencies have applied them in particular matters. The Commentary does not change the standards of the Merger Guidelines, however. Rather, the antitrust agencies issued the Commentary "to provide greater transparency and foster deeper understanding regarding antitrust law enforcement."[31]

3. RECOMMENDATIONS AND FINDINGS

A. Merger Policy in General

3. No statutory change is recommended with respect to Section 7 of the Clayton Act.

3a. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.S. merger policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.*

3b. The Commission was not presented with substantial evidence that current U.S. merger policy is materially hampering the ability of companies to operate efficiently or to compete in global markets.†

* Commissioner Kempf does not join this recommendation.

† Commissioner Kempf does not join this recommendation.

Commissioner Garza joins this recommendation but notes that the Commission was unable to assess evidence sufficient to opine on the actual efficacy or effects of merger enforcement policy.

4. No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features.*

4a. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.†

5. The Federal Trade Commission and the Antitrust Division of the Department of Justice should ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets, while continuing to protect the interests of U.S. consumers.

1. U.S. Merger Policy is Fundamentally Sound

The current merger policy of the United States is fundamentally sound. The testimony of numerous antitrust practitioners and economists and comments from a variety of interested parties show general consensus on this point. Commentators agree that merger policy has significantly improved since the 1950s and 1960s and, as a general matter, is on the right course. Accordingly, the Commission does not recommend any statutory change to Section 7 of the Clayton Act or any wholesale changes to merger policy overall.

Merger policy has seen significant improvements over the past twenty-five years. One witness reported that, during that period, "merger enforcement has become increasingly predictable, transparent, and analytically sound."[32] He also explained that merger policy has become stable and bipartisan, affording "a sense of gravity that previously was lacking."[33] Changes since the early 1980s mark a significant improvement from the policies reflected in court cases of the 1950s and 1960s.[34] Several witnesses stated that U.S. merger enforcement policy is readily defensible[35] and that room for improvement exists only on the margins.[36]

Commenters agreed that merger policy in the United States has benefited significantly from the introduction of the Merger Guidelines, along with subsequent revisions and refinements to them.[37] There is general consensus that the Merger Guidelines have acted as the

* Commissioner Delrahim does not join this recommendation.

† Commissioner Kempf does not join this recommendation.

Commissioner Garza joins this recommendation with the proviso that current enforcement can be improved in the ways suggested in the Commission's other recommendations.

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"blueprint[] for the architecture" of merger analysis and, overall, provide a guide that "functions well."[38] The Guidelines have had a significant influence on judicial development of merger law, which is reflected in their widespread acceptance by the courts as the relevant framework for analyzing merger cases.[39] Conversely, the courts have occasionally influenced how the agencies have revised the Guidelines.[40] The Guidelines have also provided useful guidance and transparency to the business community and antitrust bar.[41] Finally, the Guidelines have helped to influence the development of merger policy by jurisdictions outside the United States.[42]

To be sure, some disagree with the outcomes of particular merger cases. Different antitrust enforcers may interpret evidence differently and therefore reach different conclusions as to the likelihood of anticompetitive effects. Nonetheless, there does not appear to be a systematic bias toward either overenforcement or underenforcement.[43] The ongoing debate over merger policy is an important one. Overall, however, the Commission found no need to recommend changes to Section 7 of the Clayton Act or wholesale changes to merger policy in the United States.

2. U.S. Merger Policy is Sufficiently Flexible to Address Industries in Which Innovation, Intellectual Property, and Technological Change are Central Features

As discussed in Chapter I.A, the common-law development of antitrust doctrine has permitted the courts and the agencies to adapt the contours of the antitrust laws to new economic learning, changes in markets, shifting consumer and business behavior, and numerous other factors. Innovation has driven the U.S. economy since before the passage of the Sherman Act.[44] In some respects, the challenges for antitrust analysis presented by dynamic, innovation-driven industries today are analogous to those presented in past years.[45] Current merger policy has met this challenge. It is well grounded in economics and is sufficiently flexible to provide a sound competitive assessment in matters involving industries in which innovation, intellectual property, and technological change are central features.[46]

As described above, merger analysis has moved away from structural presumptions, which presume increased concentration will likely lead to anticompetitive outcomes, toward a more complex analysis that predicts competitive effects using modern economic tools.[47] Furthermore, as explained below, current merger analysis requires an evaluation of procompetitive efficiencies that may result from transactions and an assessment of whether these efficiencies offset the potential anticompetitive effects of a merger. These changes have positioned U.S. merger policy so that it does not currently need substantial change to account for innovation, intellectual property, and technological change.

Merger law and policy—as it has developed through both agency guidelines and case law—has incorporated new or improved economic learning. Industries characterized by innovation, intellectual property, and technological change will continue to evolve, and economic learning will progress.[48] Guidelines and case law provide flexible vehicles through which antitrust analysis can continue to develop. In contrast, efforts to adjust antitrust analysis though statutory change would likely prove difficult, and would require continual amendment or pose the risk of codifying economic learning at only one point in time.[49] For these reasons as well, the Commission does not recommend any changes to Section 7 of the Clayton Act.

3. U.S. Merger Policy Must Continue to Protect U.S. Consumers While Allowing Companies to Innovate and Compete Effectively

U.S. merger policy has served U.S. consumers well in recent years. By and large, it has done so without preventing companies from competing effectively and continuing to innovate.[50] The agencies should remain mindful of the importance of both objectives going forward to ensure that U.S. merger policy remains the leading paradigm for competition policy throughout the world.

B. Efficiencies and Innovation

6. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.**

7. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices.**

8. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.**

9. **The agencies should be flexible in adjusting the two-year time horizon for entry, where appropriate, to account for innovation that may change competitive conditions.**

1. The Importance of Efficiencies

Since the 1980s, the courts and the antitrust agencies have recognized that efficiencies resulting from a merger can improve consumer welfare and should be considered in the overall assessment of the merger's likely effects on competition.[51] A merger can allow firms to realize efficiencies from the combination of two complementary companies. Such efficiencies can benefit firms by lowering their costs and can benefit consumers through lower prices, higher quality prodcts, or entirely new products.

The DOJ and the FTC formally recognized the relevance of efficiencies to their evaluation of mergers in 1997, when they revised the Merger Guidelines to add a section describing the circumstances in which the agencies would consider the efficiencies that would result from a merger.[52] The Guidelines now explicitly recognize that "the primary benefit of mergers to the economy is their potential to generate . . . efficiencies."[53] As the agencies explain, "mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction."[54] When a firm is able to lower its costs (or increase quality) consumers benefit from the merger.

The Guidelines generally require that the savings from efficiencies be "passed on" to consumers; that is, they must be "sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market."[55] This is because "[e]ven when efficiencies generated through merger enhance a firm's ability to compete . . . a merger may have other effects that may lessen competition and ultimately may make the merger anticompetitive."[56] Accordingly, the agencies take into account both the benefits that efficiencies would bring to consumers along with the anticompetitive effects a merger is predicted to have. Thus the FTC or the DOJ "will not challenge a merger . . . . if cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market."[57]

Overall, the Commission was presented with little evidence the agencies were routinely failing to take efficiencies into account. A number of witnesses and commenters argued that the agencies' current approach to assessing efficiency claims works well and is appropriate.[58] The FTC and the DOJ readily acknowledge that they do and must, as part of any complete evaluation of a merger, take into account efficiencies that will result from the merger and the effect those efficiencies will have on a firm's incentives to reduce output or increase prices.[59]

In particular, there was little support for the argument that, as a general matter, the agencies impose too high a burden on the parties to demonstrate efficiencies offsetting competitive concerns raised by a merger. Witnesses and commenters generally agreed that the evidentiary burden imposed by the agencies on parties to demonstrate the likelihood and magnitude of asserted efficiencies is appropriate where other evidence indicates that the merger would likely have anticompetitive effects.[60] Requiring merging companies to demonstrate efficiencies is also appropriate because the companies have the best access to information regarding the value and likelihood of achieving the efficiencies they assert.[61]

The explicit acknowledgment in the Merger Guidelines of the importance of efficiencies underscores the important role efficiencies play in both driving mergers and bringing lower cost, higher quality products to consumers.[62] Of course, for a substantial majority of proposed mergers, efficiencies will not play a role in the agency's assessment, because market conditions will ensure that the merger will not have an anticompetitive effect. In such cases, any efficiencies can be fully realized by the companies. However, in cases where a merger may raise competitive concerns, a detailed assessment of the potential efficiencies the parties will realize may be necessary. The agencies should ensure that they give substantial weight to efficiencies in formulating merger enforcement policy and in evaluating specific transactions.

2. The Agencies Should Ensure that they Give Sufficient Credit to Certain Fixed-Cost Efficiencies

The agencies should account for the value of fixed-cost efficiencies in assessing the likely competitive effects of a merger.[63] As one commenter explained, "[s]ince all costs vary in the long run, reductions in capital expenses or other costs fixed in the short run should also be considered."[64] Failure to take account of and give proper weight to such fixed costs in evaluating a merger could deprive consumers and the U.S. economy of significant benefits from a procompetitive merger.

The agencies currently place the greatest weight on efficiencies that will reduce prices to consumers in the short run.[65] Efficiencies that do not lower prices in the short run are given less weight.[66] Thus, for example, a merger that allows a company to reduce the cost of producing each widget by 10 percent (for example, through improved production line technology or streamlining of distribution) can quickly benefit consumers in the form of lower prices. Such efficiencies are typically fully credited by the agency (if substantiated). By comparison, reductions in total costs (including fixed costs)—such as through the elimination of redundant facilities or by improvement upon the rate and quality of innovation—have less (if any) effect on pricing in the short run. In the longer run, however, some (if not all) such efficiencies are also likely to benefit consumers in the form of lower prices or improved quality.[67]

The Commission identified one type of fixed-cost efficiency in particular—those increasing innovation through research and development—to which the agencies may be giving insufficient credit. As one witness explained, "an increasing part of the economy is comprised of research-intensive products . . . such as computer chips, software, pharmaceuticals and media content [that] have very high fixed costs."[68] Mergers generally benefit consumers by making innovation more likely or less costly in such industries, rather than by reducing (the generally very low) marginal costs.[69] Indeed, such innovation efficiencies "often drive transactions in high-tech mergers."[70] More generally, there is "broad agreement . . . that research and development is a major source of economic growth."[71] It is important to make sure that merger policy does not unduly inhibit that basis for growth.

Innovation efficiencies can result in a variety of ways. For example, a merger may make it easier to "combine complementary assets and know-how."[72] Alternatively, a merged company may be better able to share risks associated with research and development.[73] In some industries, such as pharmaceuticals, a merger can "increase the odds of successful commercialization of the product."[74] In each of these instances, the efficiencies do not necessarily lower prices to consumers immediately, but have the potential to bring significant benefits to consumers through new, improved, or lower priced products in the longer run. If the agencies discount those benefits too greatly, they run the risk of preventing mergers that may have short-term anticompetitive effects but long-run procompetitive benefits to consumer welfare.[75]

The enforcement policy of the FTC and the DOJ may give insufficient recognition to innovation efficiencies in some mergers in which they believe anticompetitive effects may result in the short term. For example, although the Merger Guidelines recognize that R&D efficiencies should be considered, they appear to view them with particular skepticism: "Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions."[76] One witness testified that the FTC failed to give proper credit to innovation efficiencies in its evaluation of the merger his company was proposing.[77] More generally, the American Bar Association, Section of Antitrust Law observed that the agencies emphasize potential anticompetitive short-term price effects from a merger and pay insufficient attention to how a merger could increase the merged firm's ability to produce better products and to innovate.[78]

As the nation's economy moves toward an increasing role for goods and services involving intellectual property—such as computer software, electronics, and biotechnology—it becomes even more important for U.S. consumers that the value of efficiencies and innovation that can result from mergers in such industries be realized where possible.[79] A failure by the agencies to take into account fully the benefit of such efficiencies in evaluating whether a merger will harm or benefit consumers could deprive consumers of significant benefits and value.[80] In addition, it "may end up limiting some firms' ability to compete more effectively."[81] Although some witnesses stated that the agencies were not, in fact, hostile to innovation benefits cited by merging parties,[82] on balance, the agencies may in some cases give insufficient credit or weight to such efficiencies. The agencies should ensure that they give substantial weight in evaluating a merger to evidence presented by the merging parties that demonstrates a merger will enhance consumer welfare through innovation and similar efficiencies.

To be sure, such efficiencies are often not easy to measure.[83] Moreover, the agencies may need to balance the value of future benefits that potentially will result from innovation against any current costs to consumers.[84] While analytical methods to assess a merger's likely anticompetitive effects are relatively well developed, methods for analyzing whether a merger will encourage innovation are far less advanced.[85] Nonetheless, the agencies should endeavor to weigh more heavily the potential for welfare-enhancing innovation that a merger will create.

3. The Antitrust Agencies Should be Flexible in Considering the Time Horizon for Entry

Innovation can give rise to dynamic change in markets. Such change may occur over a short or long period of time. For example, although computer software programs may be outdated within six months, approval of a new drug may take years. Under the Merger Guidelines, the possibility of dynamic change over a longer period of time is not clearly taken into account by their treatment of entry. The Guidelines provide that a merger is unlikely to harm competition where entry is sufficiently easy that market participants cannot, collectively or unilaterally, raise prices from pre-merger levels.[86] To meet this requirement, entry must be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern."[87] As a general matter, the FTC and the DOJ will consider timely "only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact."[88]

The two-year time horizon may be inappropriately short in some cases. In particular, innovation may result in entry beyond the two-year horizon. The agencies should consider the potential for such entry in assessing the likely competitive effects of the merger.[89] Although it appears that the Guidelines provision represents an approximation, not a hard-and-fast rule,[90] the Commission recommends that the agencies increase their flexibility in this regard to ensure that innovation that will change competitive conditions more than two years in the future receives proper credit. This will help ensure that the agencies' analysis of competitive effects appropriately takes account of competitive dynamics in the markets at issue and that they will not seek to block mergers that, as a result of innovation, may not present a longer-term threat to competition and consumer welfare.

C. Further Study of Merger Policy

10. The Federal Trade Commission and the Antitrust Division of the Department of Justice should seek to heighten understanding of the basis for U.S. merger enforcement policy. U.S. merger enforcement policy would benefit from further study of the economic foundations of merger policy and agency enforcement activity.

10a. The Federal Trade Commission and the Antitrust Division of the Department of Justice should conduct or commission further study of the relationship between concentration, as well as other market characteristics, and market performance to provide a better basis for assessing the efficacy of current merger policy.

10b. The Federal Trade Commission and the Antitrust Division of the Department of Justice should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy.

While there is general consensus that the basic framework for current U.S. merger enforcement policy has improved markedly over the past forty years and appears to be fundamentally sound, there is limited empirical support for these conclusions. This shortfall in support allows for reasonable criticism both that merger policy is too lenient or too strict. Indeed, one recent, prominent study questioned whether merger policy has benefited consumers at all,[91] while one commenter suggested that policy should be more aggressive.[92]

The agencies should undertake further study of merger policy and its effects. The potential benefits of such study are substantial; empirical studies and the development of the economics of antitrust law have played a central role in the transformation of merger policy over the past forty years. Further research in this area would improve the empirical basis for merger policy and could improve understanding of the overall costs and benefits of that policy.[93]

To be most useful, further study should focus on questions of particular importance to the evaluation and implementation of merger policy. While there are numerous potentially valuable avenues for research, the Commission identifies two areas in which further research would be especially desirable: (1) studies of the effects on competition of market concentration and other market characteristics; and (2) retrospective studies of the results of merger enforcement decisions.

1. Studies of the Effects of Concentration and Other Market Characteristics on Competition

Current U.S. merger enforcement policy is premised on assumptions about how concentration and other market characteristics (such as ease of entry) affect competition and market power. Empirical evidence gives only limited support for these assumptions, however.[94] In particular, one of the central assumptions of current merger policy is that increased concentration in a relevant market potentially (but not necessarily) leads to a reduction in competition. This basic assumption is reflected in the Merger Guidelines, which use concentration and market-share thresholds as screens that indicate the need for further analysis of the proposed transaction.[95] Nonetheless, several observers have pointed out that there is limited economic knowledge about the levels of concentration at which market power emerges, increases substantially, or becomes problematic for competition.[96] Indeed, although a variety of studies suggest a relationship between concentration and market power, none of these studies, either alone or together, provide a good sense as to the level of concentration at which "antitrust should bite."[97] Furthermore, understanding regarding the impact on competition of other market characteristics, such as the ease of entry, is also limited. Focused study to increase understanding of how these important characteristics of the competitive landscape affect a merger's impact could improve the enforcement agencies' understanding and ability to enforce the antitrust laws in a manner that maximizes benefits for U.S. consumers.

Increasing learning about the validity of the economic theories and assumptions that inform current merger policy, such as empirical study of the relationship between concentration and the probability of the exercise of market power, would be beneficial. To be sure, it can be difficult to obtain the necessary data, to differentiate the effects of concentration from other factors affecting operation of a market, or to draw conclusions about the effects of concentration that apply across diverse industries. For that reason, several witnesses advised that such studies would be unlikely to shed much light on merger policy.[98] However, greater understanding of these relationships is essential to the design and evaluation of merger policy, and similar advances in understanding have promoted substantial improvement in merger policy in the recent past.

2. Retrospective Studies of Merger Enforcement Decisions

The FTC and the DOJ should increase their use of retrospective studies of merger enforcement decisions to assist in determining the efficacy of merger policy. Such retrospective studies would review enforcement decisions in a particular merger or for several mergers in a given industry. Such studies—both in markets in which mergers were allowed to proceed and in those in which mergers were blocked—will help the agencies to evaluate whether their previous decisions have incorrectly blocked mergers that would not have been anticompetitive or permitted mergers that were ultimately anticompetitive.[99] Such studies may also be informative about such things as what levels of concentration or market shares give rise to competitive issues and the effectiveness of entry.[100] More important, such studies may shed light on why a particular decision was later shown to be erroneous, thereby allowing the agencies to modify the models and approaches they use in conducting merger analysis.

3. The Agencies Should Consider "Outsourcing" Studies of Both Types

The agencies should consider whether much of the work for the studies can be more effectively done by outsourcing it to economists and researchers outside the agency. Such studies can require extensive work, and conducting them internally may distract the agencies from their principal mission of detecting and preventing anticompetitive conduct. In addition, outsourcing will help avoid the perception (and possible reality) that the results of such studies are biased toward justifying agency practice. Placing responsibility for conducting the study with economists and other consultants who are not closely connected with the agency largely avoids this problem.

D. Increased Transparency

11. The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means.

"Transparency" can mean several things with respect to merger policy. The Commission uses it here to mean providing the public with information about both the decisions the agency makes and the methods or approaches that drive those decisions. Transparency promotes basic fairness to parties contemplating mergers by enabling them to predict the legal consequences of contemplated transactions. For example, a firm can determine whether a potential transaction will be likely to be cleared or blocked by the agencies. Moreover, when parties are able to predict in advance what types of transactions are likely to result in enforcement actions, they can eschew them in the first instance, thereby reducing the need for costly investigations and enforcement actions.[101] Transparency thereby economizes on the agencies' scarce merger enforcement resources, which can cover only a small number of transactions. Ultimately, the public's confidence in the ability of the antitrust laws to promote competition relies upon transparent decision-making that can be predicted with some confidence in advance.

Both agencies have taken numerous steps in recent years to provide antitrust practitioners and the general public with information about their enforcement activities. To provide the public with a clear statement of the basic principles of enforcement policy, the agencies have issued, and periodically revised, the Merger Guidelines. In 2006 the agencies issued an extensive "commentary" on those Guidelines that includes various examples illustrating the principles in the Guidelines by describing their application to particular merger matters. The agencies also use various other vehicles—such as speeches, testimony, and reports—to explain their merger policy priorities. In addition, the agencies have issued several other guidelines for conduct, including regarding the licensing of intellectual property and regarding joint conduct. Finally, the agencies provide information regarding their enforcement activity. The agencies routinely provide explanations of the enforcement actions they take, and, in a few instances, have provided some explanation of decisions not to take enforcement actions. Moreover, they also have recently begun to provide data on merger enforcement activities.

On the whole, agency policy statements, commentary, and data on enforcement activity supplement the current Merger Guidelines, and thereby provide informative guidance to merging parties and the public regarding current enforcement policy.* Nonetheless, the Commission believes that the agencies could further improve upon their efforts, including in four specific respects, described below: (1) increase the use of closing statements explaining decisions not to challenge transactions; (2) continue regular reporting of statistics regarding merger enforcement activity; (3) update the Merger Guidelines to explain how the agencies evaluate the potential impact of a merger on innovation; and (4) update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers. While the agencies have already taken some steps toward these recommendations, the Commission concludes that further efforts in these specific areas are of particular importance.

11a. The agencies should issue "closing statements," when appropriate, to explain the reasons for taking no enforcement action, in order to enhance public understanding of the agencies' merger enforcement policy.

Both the DOJ and the FTC generally provide a statement of reasons as to why they are taking an enforcement action against a merger. If either agency seeks a preliminary injunction to block an allegedly anticompetitive merger, the complaint and subsequent pleadings will spell out the agency's concerns with the proposed transaction. Similarly, when either the FTC or the DOJ enters into a consent decree with respect to a merger, it will provide a statement explaining the reasons why the agency sought relief and how the relief resolves its concerns that the merger would otherwise be anticompetitive.[102]

The agencies often decide, after a thorough review of a proposed merger, not to seek any relief and to allow the merger to be completed. In the vast majority of cases, when either agency decides to close a merger investigation, it provides no explanation as to why it did not seek relief. In many of those investigations, the decision not to seek relief is noncontroversial; over 95 percent of mergers that are notified to the FTC or the DOJ are determined not to pose competitive problems sufficient to warrant an extended investigation.[103] Nonetheless, in the instances when the FTC or the DOJ closes the investigation of a merg-

* Commissioner Kempf does not agree with this assessment.

er after an extended investigation, the public and antitrust bar may be left to speculate why the agency declined to seek relief.

Although the agencies are not required to explain why they decided not to challenge a merger, they have in recent years issued such explanations with respect to a limited number of transactions. For example, the FTC and the DOJ have issued explanations as to why they closed investigations without seeking relief in the cruise line, airline, media, and telecommunications industries.[104] This increased use of closing statements has benefited the merging parties, interested observers, and the agencies themselves, by reducing uncertainty, increasing predictability, and promoting voluntary business compliance.

Increased issuance of such statements would further benefit the public and businesses.[105] In particular, the agencies have tended to issue closing statements in higher-profile, "close" cases for which there is keen interest from the public in the outcome. The Commission recommends that the FTC and the DOJ expand issuance of closing statements to other matters in which they undertake significant reviews of a transaction (that is, issuance of a second request along with an extended, as opposed to "quick look," investigation). Such statements need not be lengthy, and will necessarily omit details containing confidential business information.

The Commission does not recommend imposition of a requirement that the FTC and the DOJ explain why they decided not to seek relief, as advocated by some.[106] The agencies have already issued explanatory statements in many matters, and can be expected to continue to do so. Requiring a statement in all cases, however, could place burdens on the agencies and might present problems with respect to the confidentiality that the HSR Act provides to the merging parties and third parties who provide information to the agencies.[107] Leaving the publication of such statements to the discretion of the agencies leaves them free not to issue statements where the burden of doing so might be substantial. Accordingly, the Commission believes that continued encouragement of expanded efforts to issue closing statements is sufficient to improve agency transparency in this regard.

11b. The agencies should increase transparency by periodically reporting statistics on merger enforcement efforts, including such information as was reported by the Federal Trade Commission in its 2004 Horizontal Merger Investigation Data, as well as determinative factors in deciding not to challenge close transactions. These reports should emanate from more frequent, periodic internal reviews of data relating to the merger enforcement activity of the Federal Trade Commission and the Antitrust Division of the Department of Justice. To facilitate and ensure the high quality of such reviews and reports, the Federal Trade Commission and the Antitrust Division of the Department of Justice should undertake efforts to coordinate and harmonize their internal collection and maintenance of data.*

The DOJ and the FTC have recently undertaken several efforts to complement their statements on merger enforcement policy with statistical information concerning their actual enforcement activity. In 2003 the FTC and the DOJ published a report summarizing data on market structure for the horizontal mergers in which they had sought relief during Fiscal Years (FY) 1999–2003.[108] During 2004 the Federal Trade Commission published a report containing similar (and some additional) data on nearly all of the mergers it had investigated through the issuance of a second request, covering FY1996–2003.[109] In January 2007 the FTC updated this report with data through the end of FY2005.[110]

The FTC and the DOJ should continue to conduct, and make available to the public, periodic reviews of data and other statistics regarding enforcement activity. While general statements of policy provide useful guidance to business, data on actual enforcement actions provide particularly valuable insights into how the agencies actually apply the relevant policies. In combination with statements about individual cases, systematically collected data about enforcement practices—released on a regular (for example, a biennial or triennial) basis—can provide additional valuable transparency regarding agency enforcement practices.[111] Such data collection and publication would be most useful if it focuses on the key considerations that govern whether the agency takes an enforcement action.[112] Among other things, it will help supplement the Guidelines' information on the concentration levels used as screens and information on the levels of concentration that actually draw challenges.

The Commission's recommendation contemplates that the agencies will regularly engage in careful internal reviews of data regarding enforcement activity. However, not all such reviews need be released publicly. Rather, more frequent internal reviews could form the basis

* Commissioner Kempf does not join this recommendation.

for less frequent, but regular public reports. Keeping the reviews internal in most cases will permit the agencies to focus resources on broadening their data analysis to determine whether there are new trends in their enforcement practices, rather than devoting energy to preparing frequent reports for public review. In addition, it will permit the agencies to focus their public releases on the data and analysis that are most likely to improve public understanding of the key variables driving agency enforcement practice.

Finally, the Commission is concerned that current efforts to develop such data may be hindered by differences in the data collection and retention policies followed by each agency. The ability of the agencies to discern trends and provide meaningful information to the public, particularly in a form that permits useful comparisons between the approach each agency takes, requires consistency in the data and other information retained. As part of undertaking studies of this type, the agencies will inevitably identify ways in which they retain data and other information differently. The Commission encourages the agencies to undertake efforts to adopt a common approach to and standards for retention of data and other information about their enforcement activities.[113]

11c. The agencies should update the Merger Guidelines to explain more extensively how they evaluate the potential impact of a merger on innovation.*

The ability to increase innovation is a significant reason for some mergers, as explained above. However, the current Merger Guidelines offer little explanation as to how the agencies will analyze the claims of parties that a merger will enhance their ability to innovate and how the agencies will balance a predicted increase in innovation with potential anticompetitive effects from the merger. Indeed, the only mention of innovation is in a passing reference in a footnote.[114] The agencies have provided limited guidance on these issues through actions in individual matters, albeit in large part because the issue is not presented squarely in many investigations.

The agencies should update the Merger Guidelines to provide more extensive discussion regarding how they evaluate the competitive effects of a merger on innovation. As explained above, innovation is extremely important to economic welfare, and it is important for the agencies to articulate clearly how they analyze the effects of a merger on innovation.[115] The Commission recognizes that there remains a need for additional learning regarding innovation.[116] However, it believes that the agencies have sufficiently considered the issues involved to produce useful guidelines in this area.

* Commissioners Carlton and Kempf do not join this recommendation.

11d. The agencies should update the Merger Guidelines to include an explanation of how the agencies evaluate non-horizontal mergers.*

Horizontal mergers involve a merger between two companies that generally compete with each other to sell products in the same markets. Vertical (or non-horizontal) mergers, in comparison, occur between two companies in a distribution chain, where one company sells an input to the second company's business in a "vertical" relationship. The analysis of each type of merger differs substantially (mergers may present both horizontal and vertical "issues"). ("Conglomerate" mergers, which are neither horizontal nor vertical, generally do not raise antitrust issues.)

The 1982 Merger Guidelines contained a section addressing non-horizontal mergers, including vertical mergers and mergers raising potential competition concerns.[117] These provisions were also included in the 1984 Merger Guidelines. However, subsequent Guidelines revisions in 1992 and 1997 did not include the non-horizontal mergers section, although the agencies did not formally abandon that part of the 1984 Guidelines.[118] Significant thinking regarding vertical mergers has taken place since then, but the Guidelines have not been updated or separate guidelines issued to address non-horizontal mergers.

The existing Merger Guidelines have brought significant transparency to the business community and antitrust bar as to how the agencies evaluate horizontal mergers. Businesses and antitrust practitioners would benefit greatly from a similar statement of how the agencies assess the competitive effects of vertical mergers.[119] While the issues are challenging, providing an explanation of how the agencies undertake analysis in non-horizontal mergers would supply beneficial transparency.

* Commissioner Kempf does not join this recommendation.

Notes

[1] 15 U.S.C. § 18. The Act contains several additional paragraphs of extending and limiting coverage. *See id.*

[2] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

[3] *See generally* Chapter II.B of this Report regarding the Hart-Scott-Rodino Act pre-merger review process.

[4] *See* American Bar Association, Section of Antitrust Law, Monograph No. 12, Horizontal Mergers: Law and Policy 37–38 (1986) [hereinafter ABA, Horizontal Mergers] (citing United States v. Pabst Brewing Co., 384 U.S. 546 (1966) (combined shares of 4.49 percent); United States v. Von's Grocery Co., 384 U.S. 270 (1966) (combined shares of 7.5 percent)). One Supreme Court Justice concluded from this string of cases that the "sole consistency . . . is that . . . the Government always wins." *Von's*, 384 U.S. at 301 (Stewart, J., dissenting).

[5] Ernest Gellhorn et al., Antitrust Law and Economics 421 (5th ed. 2004) [hereinafter Gellhorn, Antitrust Law and Economics] (citing Oliver E. Williamson, *The Merger Guidelines of the U.S. Department of Justice—In Perspective* (June 10, 2002), *available at* http://www.usdoj.gov/atr/hmerger/11257.htm).

[6] Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines, § 0.1 (1992, revised 1997) [hereinafter DOJ/FTC Horizontal Merger Guidelines] ("The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise."). Unless otherwise specified or clear from the context, all citations to the DOJ/FTC Horizontal Merger Guidelines are to the Horizontal Merger Guidelines, as revised in 1997 and currently in effect.

[7] *See generally* Gellhorn, Antitrust Law and Economics, at 453–64.

[8] A description of the procedural aspects of this pre-merger review, including the size-of-transaction threshold, appears in Chapter II.B of this Report regarding the HSR Act.

The FTC does not have jurisdiction to review mergers of certain common carriers, certain banks and financial institutions, and certain entities in the meatpacking business. *See* 15 U.S.C. § 45(a)(2). In addition, several regulatory agencies have principal or exclusive authority to review mergers in the industries they regulate. *See, e.g.*, 12 U.S.C. § 1828(c) (banks subject to Comptroller of the Currency, Federal Reserve Board of Governors, FDIC, or the Office of Thrift Savings Director); 47 U.S.C. §§ 214, 310(b) (FCC authority to review license transfers incident to mergers); 49 U.S.C. § 11321(a) (Surface Transportation Board's exclusive jurisdiction over rail mergers).

[9] *See generally* DOJ/FTC Horizontal Merger Guidelines.

[10] Dep't of Justice, Merger Guidelines (1968), *reprinted in* ABA, Horizontal Mergers, at 264–76 [hereinafter 1968 DOJ Merger Guidelines]. The FTC neither participated nor joined in the issuance of these Guidelines. *Id.* at Introduction, ¶ 1 (explaining that "these Guidelines are announced solely as a statement of current Department [of Justice] policy"). *See generally* Hillary Greene, *Agency Character and the Character of Agency Guidelines: An Historical and Institutional Perspective*, 72 Antitrust L.J. 1039 (2005) (contrasting the 1968 Guidelines (as well as subsequent guidelines and FTC statements) with prior and contemporaneous industry-specific guidelines promulgated by the FTC).

[11] 1968 DOJ Merger Guidelines, at Purpose, ¶ 1.

[12] *See id.* § 1, ¶¶ 4–6. The 1968 DOJ Merger Guidelines used the four-firm concentration ratio, which is the sum of the market shares (as a percentage) of the four largest firms in the relevant market, in determining whether to challenge a merger. *Id.* § 1, ¶¶ 5–6.

[13] Dep't of Justice, Merger Guidelines (1982), *reprinted in* ABA, Horizontal Mergers, at 277–98 [hereinafter 1982 DOJ Merger Guidelines].

[14] 1982 DOJ Merger Guidelines, pt. III.A.

[15] *Id.* pt. III.

[16] *Id.* pt. III.C.

[17] *See, e.g.*, Gellhorn, Antitrust Law and Economics, at 410.

[18] 1982 DOJ Merger Guidelines, pt. III.

[19] *Id.* pt. II.A.

[20] *Id.* pt. III.B.

[21] ABA, Horizontal Mergers, at 45 ("[O]ngoing economics research continued to cast doubt on the strength of inferences that could be drawn from concentration data.").

[22] Dep't of Justice, Statement to Accompany Release of 1984 Merger Guidelines (June 14, 1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103. The 1984 revisions continued to cover non-horizontal mergers of various types, including vertical mergers and those raising potential competition issues. American Bar Association, Section of Antitrust Law, Mergers and Acquisitions: Understanding the Antitrust Issues 20 (2d ed. 2004) [hereinafter ABA, Mergers and Acquisitions]. Although not much used, the non-horizontal portions have not been superseded. *Id.*

[23] Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter 1992 DOJ/FTC Horizontal Merger Guidelines].

[24] *Id.* § 1.11.

[25] *Id.* § 2.0. *But see* Gellhorn, Antitrust Law and Economics, at 406 ("On the other hand, concentration can matter: 'In cross-section comparisons involving markets in the same industry, seller concentration is positively related to the level of price.'") (quoting Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, *in* 2 Handbook of Industrial Organization 951, 988 (Richard Schmalensee & Robert D. Willig eds., 1989) (stylized fact 5.1)); *id.* (citing Paul A. Pautler, Evidence on Mergers and Acquisitions, 48 Antitrust Bull. 119, 207 (2003) ("[S]everal studies of differing industries using price to measure performance suggest that increasing concentration may indeed lead to higher prices.")).

[26] *See* 1992 DOJ/FTC Horizontal Merger Guidelines, § 2.

[27] *Id.* § 3.

[28] DOJ/FTC Horizontal Merger Guidelines, § 4.

[29] *Id.*

[30] Dep't of Justice & Federal Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006).

[31] *Id.* at v. (Foreword).

[32] Merger Enforcement Transcript at 26 (Baer) (Nov. 17, 2005); William J. Baer, Statement at AMC Merger Enforcement Hearing, at 14 (Nov. 17, 2005) [hereinafter Baer Statement] ("Merger enforcement is more predictable, transparent and analytically sound than ever before."); Merger Enforcement Trans. at 16 (Rill) (opining that "the current merger enforcement regime [is] on the right track").

[33] Baer Statement, at 5–6 (citing similarities in policies pursued by Pitofsky and Muris); *see also* Merger Enforcement Trans. at 46–47 (Scheffman) (policy is bipartisan); Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 Antitrust L.J. 105, 107 (2002).

[34] David T. Scheffman, Statement at AMC Merger Enforcement Hearing, at 2 (Nov. 17, 2005) [hereinafter Scheffman Statement] ("There are few if any knowledgeable people that would defend the pre-1982 merger enforcement policy in the U.S."); Economists' Roundtable on Merger Enforcement Transcript at 29 (Bresnahan) (Jan. 19, 2006) (there is "nothing as remotely troubling about merger review today as there was in the early 1980s.").

[35] Economists' Roundtable Trans. at 107–08 (White, Rubinfeld, Reiss, Kaplan, Bresnahan); *see also* Statement of Prof. Robert D. Willig, at AMC Merger Enforcement Hearing, at 1 (Nov. 17, 2005) [hereinafter Willig statement]; American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Horizontal Merger Guidelines, at 1 (Nov. 10, 2005) [hereinafter ABA Comments re Guidelines] (opining that, "generally speaking, federal merger policy has been effective without unduly limiting the ability of firms to achieve efficiencies and expand internationally" while noting "room for improvement"); Economists' Roundtable Trans. at 10–11 (Rubinfeld) ("My sense is that the merger laws, the Clayton and FTC Acts, really work well and that the level of enforcement has generally been good.").

[36] Merger Enforcement Trans. at 26 (Baer) (stating that "the need for changes, really are at the margins"); Baer Statement, at 14 (cautioning about the effect of uncertainty resulting from change); James F. Rill, Statement at AMC Merger Enforcement Hearing, at 3 (Nov. 17, 2005) [hereinafter Rill Statement] (while there have been some critical observations with "some kernel of validity" in recent years, "they are marginal criticisms that misjudge the flexibility of the *Merger Guidelines* to adapt").

[37] Rill Statement, at 2 ("[T]he 1982 *Merger Guidelines* were a fundamental turning point in merger enforcement."); Baer Statement, at 2 ("Today's approach to merger enforcement largely dates to the adoption of the 1982 Merger Guidelines."); Scheffman Statement, at 2 (merger enforcement policy has continued to improve since 1982 from the perspective of both economic efficiency and consumer welfare).

[38] Willig Statement, at 2; *see also* Merger Enforcement Trans. at 22 (Baer) (commending agencies for achieving "better internal discipline about how [they] look at a merger"); *id.* at 23 (Baer) (the system "basically works well"; quarrels focus on particular decisions).

[39] Rill Statement, at 3–5 (citing cases); Baer Statement, at 6–8; Merger Enforcement Trans. at 77–78 (Baer) (although twenty years ago there was a "tremendous divergence" between courts relying on 1960s precedents and agency enforcement practice, courts have since then largely adopted the Guidelines' approach); *id.* at 17–18 (Rill) (noting improvement in U.S. courts and internationally); *see also id.* at 80 (Scheffman) (Guidelines provide judges with a "roadmap"); *id.* at 81–82 (Willig) (it is a slow process, but judges appear to be making "some pretty good decisions" on market definition) (citing FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004)).

[40] For example, after losing a series of merger challenges because courts found that easy entry would deter any anticompetitive effects, the agencies adopted a more extensive entry provision in their next revisions to the Guidelines. This section set forth what the agencies believe is required for entry to be "timely, likely, and sufficient to deter or counteract anticompetitive effects." DOJ/FTC Horizontal Merger Guidelines, § 0.2. *See generally id.* § 3. So far, courts appear to have accepted this change. See *generally* GELLHORN, ANTITRUST LAW AND ECONOMICS, at 456–57.

[41] *See, e.g.*, ABA Comments re Guidelines, at 1 (the Guidelines "have stood the test of time and provide valuable guidance to the bar and business community"); Merger Enforcement Trans. at 22–23 (Baer).

[42] Rill Statement, at 4–5 (citing the development of the Canadian and E.U. guidelines); Baer Statement, at 8 (focusing on the acceptance by the European Union and other jurisdictions of a substantial lessening of competition standard for merger enforcement).

[43] *See* Merger Enforcement Trans. at 39 (Willig) ("I don't see systematic errors" in merger enforcement); *id.* at 38 (Rill) ("I think the error rate is low."). *But see* American Antitrust Institute, Public Comments Submitted to AMC Regarding Merger Enforcement, at 2 (July 15, 2005) [hereinafter AAI Comments re Merger Enforcement] ("It appears that enforcement policy has evolved to the point where 2 to 1 or 3 to 2 mergers are the only ones that the agencies will regularly consider dangerous to competition.").

The fact that the agencies sometimes lose in court does not necessarily mean that they are overenforcing. *See* Economists' Roundtable Trans. at 11 (Rubinfeld) ("If the agencies are not out there aggressively pursuing mergers that they think are anticompetitive because they're afraid of losing a case, we're going to be having under-enforcement.").

[44] Prof. Carl Shapiro, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005) [hereinafter Shapiro Statement re New Economy]; M. Howard Morse, Statement at AMC New Economy Hearing, at 5 (Nov. 8, 2005) [hereinafter Morse Statement].

[45] *See, e.g.*, Jonathan M. Jacobson, *Do We Need a "New Economy" Exception for Antitrust?*, 16 Antitrust, Fall 2001, at 89, 89–90.

[46] *See* Willig Statement, at 2 ("[T]he standards for merger enforcement have appropriately adapted to major changes in the economy and in our capabilities and methodologies for analyzing competition."); *see also* New Economy Transcript at 6–7 (O'Connell) (Nov. 8, 2005) (stating that antitrust laws "are flexible enough . . . to work in all industries, including those that are constantly evolving through the introduction of new technologies. . . . This is a flexible fact-based analysis that's supported by sound economic principles that don't change from industry to industry, and it enables us to deal with industries that experience fast-paced changes while serving the primary goal of protecting competition in rapidly evolving markets."); *see also* Prof. Richard J. Gilbert, Statement at AMC New Economy Hearing, at 2 (Nov. 8, 2005) [hereinafter Gilbert Statement] ("[A]dvocates of an antitrust exemption for the new economy represent another special interest group . . . ."); New Economy Trans. at 20 (Morse) ("[T]he broad language of Sherman and Clayton Acts are sufficiently flexible to take innovation concerns into account."); Shapiro Statement, at 1–2.

[47] *See* Part 2 of this Section; *see, e.g.*, Deborah Platt Majoras, Reforms to the Merger Review Process, at 6 (Feb. 16, 2006), *available at* www.ftc.gov/os/2006/02/mergerreviewprocess.pdf ("[S]tandards for reviewing transactions have changed substantially since the passage of the HSR Act, such that today the agencies rely less on readily apparent structural indicators, such as market shares, and more on detailed and direct market analyses."); Susan A. Creighton, Statement at AMC Merger Enforcement Hearing, at 2–3 (Nov. 17, 2005) (emphasizing the impact of "increasing sophistication of substantive merger analysis," "rigorous [judicial] standards," and "increasing use of data-dependant economic analysis"); International Bar Association, Public Comments Submitted to AMC Regarding Merger Enforcement, at 25 (Oct. 26, 2005) [hereinafter IBA Comments re Merger Enforcement] ("US merger review has come a long way and now involves detailed and sophisticated microeconomic analysis of a merger's likely impact on prices and markets."); Mark D. Whitener, Statement at AMC Merger Enforcement Hearing, at 6 (Nov. 17, 2005) (agencies and courts "rely more heavily on econometric analysis of business data," and companies in turn are able to collect more data); Shapiro Statement re New Economy, at 4 ("Gone are the days when the government could rely heavily on a static measure of market shares to challenge a merger in a dynamic industry. Modern merger analysis is far from static."); Baer Statement, at 4 ("Market concentration and the market shares of the merging parties correlate with the likelihood of investigation but do not alone dictate enforcement decisions."); Morse Statement, at 3.

[48] *See* Willig Statement, at 2 ("[E]conomic understanding has continued to deepen and be guided in new directions by both the changes in the economy and by continuing progress of productive thinkers in academe, government, and antitrust practice.").

[49] *See* Shapiro Statement re New Economy, at 2 ("Technology changes. Economic laws do not. . . . [T]he Commission should be wary of proposals to modify the antitrust laws, or their enforcement, based on claims that we are living in a 'New Economy.'") (internal quotations omitted); Morse Statement, at 5 ("Antitrust law is sufficiently flexible to take innovation concerns into account, and today's theories, which may be replaced over time, need not be codified into the statute."); *see also* Merger Enforcement Trans. at 21 (Rill) ("please, no" to the idea of "legislation in the merger area"; things are working well).

[50] *See* Part 3.B.2 of this Section (discussing the Commission's recommendations on ensuring appropriate weight is given to increased innovation that may result from a merger).

[51] *See, e.g.*, FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054–55 (8th Cir. 1999); FTC v. H.J. Heinz Co., 246 F.3d 708, 720–22 (D.C. Cir. 2001); United States v. Carilion Health Sys., 707 F. Supp. 840, 849 (W.D. Va.) (denying preliminary injunction, in part based on finding that the merger would help the parties achieve economies), *aff'd mem.*, 892 F.2d 1042 (4th Cir. 1989); FTC v. Owens-Illinois, Inc., 681 F. Supp. 27, 53 (D.D.C.) (granting preliminary injunction in part based on finding that "defendants' con-

tention as to realization of economies is, at this preliminary stage of review, the more persuasive"), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988); *see also* William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 214 (2003) [hereinafter Kolasky & Dick, *The Merger Guidelines and the Integration of Efficiencies*] ("parties began increasingly in the late 1970s and early 1980s to include efficiencies arguments in presentations to the agencies in merger investigations" with some success). *See generally* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 360–63 (6th ed. 2007) [hereinafter ANTITRUST LAW DEVELOPMENTS].

52 DOJ/FTC Horizontal Merger Guidelines, § 4.

53 *Id.*

54 *Id.*

55 *Id.* The Guidelines provide that the agencies may also take into consideration efficiencies that do not have a "short-term, direct effect on prices in the relevant market." *Id.* § 4 n.37. The Guidelines call for giving such savings less weight because they are "less proximate and more difficult to predict." *Id.*

56 *Id.* § 4 n.37.

57 *Id.* § 4 (footnote omitted)

58 *See, e.g.*, Prof. Jonathan Baker, Statement at AMC Merger Enforcement Hearing, at 1 (Nov. 17, 2005); Merger Enforcement Trans. at 120 (Baker) ("[T]here's no serious problem involving efficiencies in merger analysis that would call for intervention by your Commission, and . . . in particular, there's no need to recommend any legislation to address anything concerning efficiencies."); George S. Cary, Statement at AMC Merger Enforcement Hearing, at 2 (Nov. 17, 2006) [hereinafter Cary Statement] ("The Agencies, by and large, have taken appropriate account of efficiencies in deciding whether to challenge mergers, and the courts have done quite well in evaluating efficiency arguments in litigation."); Merger Enforcement Trans. at 116 (Cary) ("[A]fter eight years of seeing the Guidelines in action . . . it's my view that the basic trade-offs made in the Guidelines were right. . . . the process of actually doing the efficiency analysis that is set forth in the Guidelines is more manageable and more administrable than one might have thought going into the process of creating the Guidelines' analysis in the first place."); Baer Statement, at 12 ("The 1997 amendments to the Merger Guidelines in my view handle efficiencies appropriately.") (footnote omitted); Rill Statement, at 14–16 (the Merger Guidelines provide a proper approach to analyzing efficiencies); *see also* Kolasky & Dick, *The Merger Guidelines and the Integration of Efficiencies*, at 207–10.

Others believe the agencies should give more credit to efficiencies. *See* Charles F. (Rick) Rule, Statement at AMC Merger Enforcement Hearing, at 13 (Nov. 17, 2005) [hereinafter Rule Statement re Merger Enforcement] ("To the extent that merger enforcement continues to focus exclusively on price effects (and reductions in consumer surplus) and ignores the way in which increases in productive efficiency benefit consumers as whole even when such increases generate producer surplus, the thresholds for identifying anticompetitive mergers are likely to be too low and the explicit *and* implicit treatment of productive efficiencies is likely to be too limited."); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Efficiencies, at 1 (Nov. 10, 2005) [hereinafter ABA Comments re Efficiencies] (stating that the 1997 revisions to the Merger Guidelines "clarified and improved the [agencies'] treatment of efficiencies in merger review," while suggesting improvements in the treatment of efficiencies that result in "substantial reductions in fixed costs" or "development of new products").

59 Kenneth Heyer, Statement at AMC Merger Enforcement Hearing, at 2–3 (Nov. 17, 2005) [hereinafter Heyer Statement] ("[T]he Merger Guidelines underscore the central role of efficiencies in the evaluation of the likely competitive effects of proposed mergers. . . . There is simply no way to evaluate whether a merger will give the merged firm the ability and incentive to raise prices, either unilaterally or in coordination with other firms, without examining the efficiencies a merger may produce."); *see* Michael A. Salinger, Statement at AMC Merger Enforcement Hearing, at 2 (Nov. 17, 2005) [hereinafter Salinger Statement] ("As the merger guidelines have developed through their various iterations, efficiencies have moved, in

part, from a possible 'defense' to part of an integrated analysis of competitive effects."); Scheffman Statement, at 10 (suggesting that standard of proof required by agencies in efficiency analysis is "sometimes unrealistic").

[60] *See, e.g.*, Rill Statement, at 14 ("The Merger Guidelines do not preclude recognition of longer-term cost savings that are demonstrable and merger specific."); *see also* Merger Enforcement Trans. at 107 (Heyer) ("We actually need some evidence to support the fact that there may be efficiencies from what might otherwise be a troublesome merger . . . ."); Salinger Statement, at 4 ("[W]e cannot conclude that a merger will generate efficiencies simply because the parties say it is so. Mere assertion is not proof or even, by itself, supporting evidence."). *But see* Merger Enforcement Trans. at 84–85 (Scheffman) (efficiencies claims are "speculative," but so are predictions of anticompetitive effects).

[61] Cary Statement, at 8–9 ("Requiring the party with greater access to information to come forward with evidence of a proposition that is helpful to its position is not at all unusual in antitrust cases generally or merger cases particularly."); *see* Heyer Statement, at 4 ("[T]he information needed to make an informed and reasoned judgment about such claims is almost always uniquely in the hands of the merging parties. We cannot verify efficiency claims without their cooperation.").

[62] Some assert that enforcement could be more aggressive without limiting merger-related efficiency gains. *See* AAI Comments re Merger Enforcement, at 3, 6–7 (citing economic literature suggesting many mergers do not increase market value or ultimately provide efficiency gains); *id.* at app. 19–20 (Statement of AAI on Horizontal Mergers and the Role of Concentration in the Merger Guidelines); F.M. Scherer, Public Comments Submitted to AMC, at 1–3 (Mar. 1, 2006); *see also* Economists' Roundtable Trans. at 72 (Rubinfeld) (opining that many mergers reviewed by the DOJ during his tenure as the Economics Deputy were bad for the company but pursued due to "the stupidity or the egos of the CEOs of the two companies"); Charles D. Weller, Public Comments Submitted to AMC Regarding Merger Enforcement, at 2–3 (July 16, 2005) (arguing that most mergers are not successful).

Others argue that enforcement could be less aggressive by pointing to economic literature suggesting few mergers are undertaken to enhance market power, and rather are generally driven by efficiencies. *See* Economists' Roundtable Trans. at 22–28 (Kaplan); Prof. Steven N. Kaplan, Statement at AMC Economists' Roundtable on Merger Enforcement, at 13–15 (Jan. 19, 2006) (economics literature, based on a number of stock-market "event" studies on mergers, suggests that mergers seldom increase market power and, on average, increase the total economic value of the parties).

[63] Rill Statement, at 14 ("'[A]n arbitrary exclusion of fixed costs from cognizable efficiencies is unwarranted because savings in fixed costs may affect competition and have an ultimate downward effect on price.'") (quoting FEDERAL TRADE COMM'N STAFF REPORT, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH GLOBAL MARKETPLACE, ch. 2, at 34; Rule Statement re Merger Enforcement, at 13 ("Consumer welfare benefits from fixed cost savings just as much as variable savings."); Merger Enforcement Trans. at 86 (Scheffman) (courts should consider fixed-cost efficiencies and "things that fall into this pass-through trap"); IBA Comments re Merger Enforcement, at 47–48 ("For example, industries with significant R&D investments may have pricing unrelated to marginal cost, but rather geared towards recouping large investments in fixed costs. Large fixed cost efficiencies in such industries can directly affect price and should be given greater consideration where appropriate."); ABA Comments re Efficiencies, at 6 ("[W]here fixed cost savings in a merger have the potential to lead to lower prices or will lead to reduced allocations of direct, shared or common fixed costs that are incorporated in the economic justifications underlying such investment decisions, fixed cost savings should be accorded specific credit in evaluating the benefits of the proposed merger or acquisition.").

[64] AAI Comments re Merger Enforcement, at 8–9 (footnotes omitted). *But see* Merger Enforcement Trans. at 110 (Salinger) (claims of overhead savings are often properly rejected, not because they are fixed costs (which they are not), but because overhead costs tend to bear the same ratio to total expenses for both large and small companies, meaning a merger will not likely create savings in such costs); *see also id.* at 128 (Salinger) ("[O]n the pass-through, we make a distinction between fixed-cost savings and marginal-cost savings, because we operate under a consumer welfare standard.").

[65] DOJ/FTC Horizontal Merger Guidelines, § 4 & n.37.

[66] *Id.* § 4 n.37. The Guidelines do not rule out taking account of longer-run efficiencies; ordinarily, however, "the result of [the Agency's] analysis over the short term will determine the Agency's enforcement decision in most cases. The Agency also will consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market." *Id.*

[67] Over the longer run, costs that are at one time fixed (or sunk) become variable. Thus, savings in such costs could lower prices. *See, e.g.*, William J. Kolasky, The Role of Economics in Merger Enforcement: Efficiencies and Market Definition under Conditions of Price Discrimination, Presented at Charles River Associates Conference: Current Topics in Merger & Antitrust Enforcement, at 10 (Dec. 11, 2002) ("[F]ixed cost savings matter. . . . First, which costs are variable depends in part on how long our time horizon is. With a longer horizon, costs that might otherwise appear fixed may indeed impact marginal pricing decisions."); Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 Antitrust L.J. 1, 55 (2007) [hereinafter Katz & Shelanski, *Mergers and Innovation*] ("[I]t is important to remember that, over a long enough time horizon, everything is variable.").

[68] Cary Statement, at 12; *see* Prof. Daniel L. Rubinfeld, Statement at AMC Economists' Roundtable on Merger Enforcement, at 4 (Jan. 19, 2006) [hereinafter Rubinfeld Statement] ("[M]any firms have relatively high price-cost margins, yet little or no market power in the antitrust sense. This is particularly true in high-fixed cost, low variable cost industries, including high technology, where incremental costs are low and profit margins are high (to cover the fixed costs).").

[69] Cary Statement, at 12 ("Competition takes the form of expenditures in R&D designed to differentiate the product from those of rivals and to increase the value of the product in terms of enhanced productivity for customers. In such a market, efficiencies that reduce already trivial marginal costs are irrelevant. . . . For example, even a small increase in the productivity of an oil refinery through better computer modeling can be worth hundreds of millions of dollars a year.").

[70] Morse Statement, at 4; *see also* New Economy Trans. at 22 (Morse) ("[I]t is just such efficiencies from the combination of complementary expertise, while not easily measured, that drive many transactions and have great potential consumer benefit.").

[71] *See* Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, *in* 6 Innovation Policy and the Economy 159 (Adam B. Jaffe et al. eds., 2006) [hereinafter Gilbert, *Looking for Mr. Schumpeter*]; *see also* Katz & Shelanski, *Mergers and Innovation*, at 1 ("Policymakers and economists strongly agree that innovation is a critical component of a sustained healthy economy.").

[72] Gilbert Statement, at 14.

[73] Gilbert Statement, at 14; *cf.* Morse Statement, at 7 (emphasizing "notoriously expensive and risky" investments required in the pharmaceutical industry, including the high percentage of "dry wells"); John E. Osborn, Statement at AMC New Economy Hearing, at 4–5 (Nov. 8, 2005) [hereinafter Osborn Statement].

[74] New Economy Trans. at 18 (Osborn). Mr. Osborn explained that mergers enable "research-stage" firms with an innovative product to combine with commercial-stage firms that have critical expertise (for example, regulatory, clinical, marketing, sales, or medical) necessary to develop a product, gain FDA approval, and commercialize a product. New Economy Trans. at 16–17 (Osborn); *see also* Osborn Statement, at 4–6 (Nov. 8, 2005) (companies must deal with high development costs and high probabilities that products will ultimately not be developed or commercially successful). *But see* New Economy Trans. at 92 (Shapiro) (must consider alternative ways that the smaller firm might have commercialized the technology).

[75] *See* ABA Comments re Guidelines, at 4 ("[T]he costs of short-term anticompetitive pricing can quickly be overwhelmed by the benefits provided by even small efficiencies, as these benefits can be expected to be long-lived and potentially widely distributed.").

[76] DOJ/FTC Horizontal Merger Guidelines, § 4. Moreover, "delayed benefits from efficiencies (due to delay in the achievement of, or the realization of consumer benefits from, the efficiencies) will be given less

weight because they are less proximate and more difficult to predict." *Id.* § 4 n.37.

77 New Economy Trans. at 18, 44 (Osborn) (investigating staff tended "to resolve uncertainties against the proposed merger" without "putting a lot of value on the consumer benefits" from innovation); Osborn Statement, at 3–4.

78 ABA Comments re Guidelines, at 2.

79 *See* ABA Comments re Guidelines, at 4 ("[G]iven the importance of innovation to the economy's overall productivity . . . there might well be benefit in expanding the efficiencies that are recognized to include those that allow the combined firm to conduct R&D more efficiently . . . ."); *see also* Morse Statement, at 4–5; Osborn Statement, at 3.

80 *See* Daniel Cooperman Statement at AMC New Economy Hearing, at 1 (Nov. 8, 2005) (due to the rapid nature of innovation in the software industry, "a procompetitive transaction that is delayed [by merger review] may be derailed altogether").

81 ABA Comments re Guidelines, at 2.

82 New Economy Trans. at 9 (O'Connell) ("[The DOJ] does care about the effects of a merger on innovation . . . ."); *id.* at 49–50 (O'Connell, Morse) (observing no general anti-merger bias at the agencies); *id.* at 50–51 (Shapiro) (suggesting that appearance of such biases may reflect skepticism of staff as part of building its case).

83 *See* Morse Statement, at 4; *see also* New Economy Trans. at 22 (Morse) ("[I]t is just such efficiencies from the combination of complementary expertise, while not easily measured, that drive many transactions and have great potential consumer benefit.").

84 *See* Katz & Shelanski, *Mergers & Innovation*, at 2–3 ("Consumers benefit from competition because, when producers face rivalry, they seek to attract customers through lower prices and higher quality. Consumers also benefit from technological innovation because, when firms invest in research and development (R&D), they can create valuable new products and reduce the costs of producing existing products. Product-market competition and innovation are both, therefore, natural objectives of public policies designed to further consumer welfare. But policies designed to pursue one of these objectives cannot always be implemented without costs for the other."); *id.* at 56–57; *see also* Introduction of this Report, note 22 (discussing different definitions of "consumer welfare" and the tradeoffs each definition would make).

85 *See* Gilbert Statement, at 8 ("Economic theory is ambiguous on the relationship between competition and innovation."); Shapiro Statement re New Economy, at 11–12 ("[T]here is no consensus among industrial organization economists about the general relationship between concentration and innovation competition."); Gilbert, *Looking for Mr. Schumpeter*, at 206 ("We remain far from a general theory of innovation competition . . . ."); *see also* Katz & Shelanski, *Mergers & Innovation*, at 14 ("[I]n markets in which innovation is significant, the traditional concentration-competition relationship is on a weaker or more nuanced empirical and theoretical footing than otherwise."); *id.* at 18–19 (describing ways in which competition can either drive or hamper innovation).

86 DOJ/FTC Horizontal Merger Guidelines, § 3.0.

87 *Id.*

88 *Id.* § 3.2 (footnote omitted).

89 Morse Statement, at 9 ("[W]here later entry will deter anticompetitive effects, it should be considered timely."); *see also* Gilbert Statement, at 11 (recommending flexible application based on capacity to deter anticompetitive effects). Of course, impacts further in the future may be more uncertain, and the agencies should take such uncertainty into account in their assessments. *See* DOJ/FTC Horizontal Merger Guidelines, § 4 n.37.

90 James J. O'Connell Jr., Statement at AMC New Economy Hearing, at 5 (Nov. 8, 2005) (the DOJ "certainly has considered expected effects—both positive and negative—more than two years into the future in

its merger analysis, particularly in matters involving the development of innovative, next-generation products"); *id.* at 5 n.9 (pursuant to the Guidelines, in the case of durable goods, entry that is expected to occur outside the two-year window will be considered timely "so long as it would deter or counteract the competitive effects of concern within the two-year period and subsequently") (quoting DOJ/FTC Horizontal Merger Guidelines, § 3.2); Shapiro Statement re New Economy, at 9 ("[T]here is nothing magical about the two-year time horizon in this calculus."). *But see* Katz & Shelanski, *Mergers & Innovation*, at 56 ("Under current practice . . . the agencies often take an approach of considering a two-year horizon in assessing the effects of entry, with little or no discounting within the horizon and complete discounting of anything beyond.").

91 *See* Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3, 3–4 (2003). For criticisms of this study, see Jonathan Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27 (2003); Gregory J. Werden, *The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook* (Dep't of Justice, Antitrust Div., Discussion Paper No. EAG 03-2, 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=384100.

92 *See* AAI Comments re Merger Enforcement, at 2–3 (arguing that U.S. merger policy should be more strict).

93 *See, e.g.*, Public Comments Submitted to AMC Proposing Issues for Study, at 1 (Jan. 5, 2005) (proposing that this Commission undertake comprehensive empirical study of the antitrust laws).

94 *See* ABA Comments re Guidelines, at 2 ("[T]here has been insufficient empirical research to create confidence that particular merger enforcement decisions (and the *Merger Guidelines*) are based upon accurate assumptions about the relationship between concentration and performance of the market."); Economists' Roundtable Trans. at 6–8 (White) (none of the empirical studies provide a good sense as to the level of concentration at which "antitrust should bite"); Economists' Roundtable Trans. at 33 (Bresnahan) (knowledge of the "functional relationship" of concentration and market power is limited, but "we do know the extreme end of it around the range that modern merger policy would intervene").

95 DOJ/FTC Horizontal Merger Guidelines, § 1.5. *See generally* ANTITRUST LAW DEVELOPMENTS, at 344–50.

96 *See, e.g.*, ABA Comments re Guidelines, at 2; Economists' Roundtable Trans. at 32 (Bresnahan); *cf. id.* at 40 (White) ("[W]e now have 20 or so years of price-oriented data and studies that show that concentration matters and that show up as price effects."). *But see* AAI Comments re Merger Enforcement, at 14 (stating that the "consensus conclusion from more recent studies using more sophisticated research tools is that increased concentration, at high levels, is associated with higher prices, and is therefore a suitable proxy, at least in the first instance, for an expectation of market power"); *id.* at 3 ("[C]urrent economic thinking . . . and evidence still support the presumption that concentration implies anticompetitive potential . . . .").

97 Economists' Roundtable Trans. at 6–8 (White); *id.* at 78–80 (White) (citing the need for pricing studies).

98 *See, e.g.*, *id.* at 30–31 (Bresnahan) (because there's substantial "heterogeneity in industries," it is not possible to draw generalizations about the effect of concentration that will apply broadly across industries); *see also id.* at 63–64 (Reiss) (heterogeneity of industries and firms have led economists away from cross-industry studies of the effect of entry and to "within-industry studies"); *id.* at 31 (Bresnahan) (similar past efforts—structure-conduct-performance studies and Chicago Economics—"were empirical disasters").

99 *See, e.g.*, ABA Comments re Guidelines, at 5–6 (recommending "case studies" examining "the market effects from particular mergers that were cleared by the antitrust agencies to see if they led to neutral or procompetitive outcomes in the relevant industries . . . or to higher prices/less innovation/etc."); Merger Enforcement Trans. at 66–67 (Scheffman) (noting similar FTC studies); *id.* at 68 (Baer) ("[S]uch studies are a good idea, and more ought to be done."); *id.* at 71–72 (Rill) (supporting the use of "retrospective reviews"); *id.* at 73 (Scheffman) ("retrospectives are very important").

100 Economists' Roundtable Trans. at 8, 69, 79–80 (White); Prof. Lawrence White, Statement at AMC

Economists' Roundtable on Merger Enforcement, at 7–8 (Jan. 19, 2006).

101 Barnett/Majoras Transcript at 20 (Majoras) (Mar. 21, 2006) (explaining that "transparency . . . [is] a high priority" because "[v]oluntary compliance with the law is the best outcome for consumers, and compliance depends on knowing when the line is being crossed").

102 The DOJ provides a statement pursuant to the Tunney Act. *See* 15 U.S.C. § 16(b). The FTC provides an analysis to aid public comment pursuant to regulation. *See* 16 C.F.R. § 2.34(c) (2006). For examples of such statements, see Competitive Impact Statement, United States v. Verizon, No. 1:05CV02103 (D.D.C. Nov. 16, 2005), and Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In re* Procter & Gamble Co. and Gillette Co., FTC File No. 051-0115 (Sept. 30, 2005).

103 *See* Chapter II.B of this Report summarizing data regarding enforcement under the HSR Act.

104 *See, e.g.*, Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation, *In re* Comcast, Time Warner Cable, and Adelphia Commc'ns, FTC File No. 051-0151 (Jan. 31, 2006) (approving decision by Bureau of Competition to close investigation, and setting forth reasons); Dep't of Justice, Antitrust Div., Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006) (setting forth background on transaction and reasons for allowing the merger to proceed); *see also* Dep't of Justice, Antitrust Div., Issuance of Public Statements Upon Closing of Investigations (Dec. 12, 2003); Thomas Barnett, Statement at AMC Barnett/Majoras Hearing, at attachment 6 (Mar. 21, 2006) (reporting that the DOJ had issued 12 statements upon closing investigations); Federal Trade Comm'n, Commission Closing Letters, *available at* http://www.ftc.gov/os/closings/commclosing.htm (collecting a number of closing letters issued by the FTC).

105 *See generally* Merger Enforcement Trans. at 71 (Baer) (advocating public statements "as to major matters"); IBA Comments re Merger Enforcement, at 15; Scheffman Statement, at 7 ("[M]ore detailed explanations for agency decisions, as is routinely done in the EU . . . would clearly be beneficial.").

106 IBA Comments re Merger Enforcement, at 4 ("FTC and DOJ should publish reasoned decisions (or summaries of their findings) in all cases where a Second Request has been issued."); *id.* at 15–16; U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 14 (Nov. 8, 2005); *see also* U.S. Chamber of Commerce, Public Comments Proposing Issues for Study, at 2 (Sept. 30, 2004); International Chamber of Commerce, Public Comments Submitted to AMC, at 6–7 (Sept. 5, 2005) (proposing that speeches, press releases and other communications be used to publish information about agency decisions in high-profile cases).

107 American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding the Hart-Scott-Rodino Second Request Process, at 15 (Dec. 7, 2005).

108 Dep't of Justice, Antitrust Div. & Federal Trade Comm'n, Merger Challenges Data, Fiscal Years 1999–2003 (Dec. 18, 2003), *available at* http://www.ftc.gov/os/2003/12/mdp.pdf. Mergers were deemed to have been challenged by the FTC if it voted to challenge the transaction (either in court or administratively). Mergers were deemed to have been challenged by the DOJ if a complaint was filed in court or a press release was issued by the DOJ announcing that the transaction had been abandoned or restructured in response to the DOJ's concerns. In addition, mergers involving financial institutions subject to the Bank Merger Acts of 1960 and 1966 or the Bank Merger Holding Company Act were deemed to have been challenged by the DOJ if the transactions were restructured to satisfy the DOJ's concerns, even absent a press release. *Id.* at 2.

109 Federal Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996–2003 (Feb. 2, 2004, revised Aug. 31, 2004), *available at* http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf.

110 Federal Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996–2005 (Jan. 25, 2007),

available at http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf.

[111] *See* Merger Enforcement Trans. at 91–92 (Willig) (suggesting that the agencies keep records of basic information (for example, on relevant market and concentration levels) for transactions for which a second request is issued); *see also id.* at 94–95 (Baer) (advocating systematic collection of information on enforcement).

[112] *See id.* at 94 (Rill).

[113] *See also* Chapter II.B of this Report regarding a recommendation for the agencies to collect data on the burdens imposed by the HSR Act.

[114] *See* DOJ/FTC Horizontal Merger Guidelines, § 0.1 n.6.

[115] New Economy Trans. at 22, 46 (Morse); *id.* at 83–84 (Shapiro); Morse Statement, at 2. *But see* New Economy Trans. at 65–66 (O'Connell) (the Guidelines are "not meant to address every possible theory or even every way of looking at a merger. . . . The Division doesn't believe that the Guidelines need to be amended to reflect or address additional theories, because we believe that those theories are already incorporated where appropriate in the analysis that we conduct.").

[116] Merger Enforcement Trans. at 59–60 (Rill).

[117] 1982 DOJ Merger Guidelines, pt. IV.

[118] ABA, Mergers and Acquisitions, at 20.

[119] *See, e.g.*, AAI Comments re Merger Enforcement, at 5 ("Formally updating the agencies' policy on vertical mergers would provide much needed guidance.").

Chapter I.C
Exclusionary Conduct

1. INTRODUCTION

Section 2 of the Sherman Act outlaws conduct, joint or by a single firm, to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States."[1] The law directs itself to improper conduct, not the possession of a monopoly. Section 2 does not prohibit firms from having monopoly power in a relevant market or from charging monopoly prices.[2] Rather, it prohibits conduct that improperly maintains or facilitates acquiring, or attempting to acquire, a monopoly.

How to evaluate single-firm conduct under Section 2 poses among the most difficult questions in antitrust law. Appropriate antitrust enforcement must distinguish aggressive competition that benefits consumers, such as most price discounting, from conduct that tends to destroy competition itself, and thus maintains, or facilitates acquiring, monopoly power. The Supreme Court has defined improper "exclusionary" conduct under Section 2 to "comprehend[] at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[3] Thus, a crucial distinction in Section 2 enforcement entails whether a firm's conduct represents competition on the merits or improper "exclusionary" conduct.

To ask whether a firm's conduct is "exclusionary" is not sufficient to make this determination. After all, companies routinely attempt to "exclude" competitors from the market simply by producing the best quality product at the lowest price. Accordingly, an observation that a particular firm's conduct "excludes" its competitor does not answer whether the conduct is harmful to competition or just to the firm's competitor. Antitrust law is concerned with harm to competition, not particular competitors.

In addition, a firm may achieve monopoly power through competition on the merits. Judge Learned Hand long ago pointed out that a "single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. . . . The successful competitor, having been urged to compete, must not be turned upon when he wins."[4]

The Commission examined whether the substantive standards for evaluating alleged anticompetitive conduct under Section 2 should be revisited, and, if so, whether improvements could best be achieved through legislation or case law development. In recent decades the courts have adopted and applied sound general principles for Section 2 enforcement. These general principles emphasize that appropriate legal rules should identify unreasonably exclusionary conduct, without discouraging aggressive competition that benefits consumers or creating excessive litigation and compliance costs for businesses and problems of administrability for courts. The use of these principles has assisted courts in developing appropriate tests to identify when certain types of conduct, such as predatory pricing, are unreasonably exclusionary.

Section 2 standards are not fully developed with respect to all types of conduct, however. In particular, the Commission focused on two types of conduct that have been the subject of recent court decisions and ongoing debate. One type of conduct involves the sale of products bundled together at a discount from their prices when purchased separately. Widespread agreement exists that discounts offered for bundled products (for example, "meal deals" combining a hamburger and a soda) often benefit consumers. Economic theories suggest, however, that in certain circumstances a firm may be able to use discounts on bundled products to obtain or maintain a monopoly by excluding rivals, or otherwise harm consumers, on some basis other than competition on the merits. A recent decision by the United States Court of Appeals for the Third Circuit that upheld a finding of Section 2 liability for discounts on bundled products, *LePage's v. 3M*, has provoked criticism and argument about the circumstances in which bundled discounts could violate Section 2.[5]

The second type of conduct involves a firm's refusal to deal with its rival in the same market. In 1919 the Supreme Court confirmed the right of a firm to make its own decisions about the business entities with which it will deal, absent "any purpose to create or maintain a monopoly."[6] Whether—and, if so, when—a firm's refusal to deal with its rival may violate Section 2 has long troubled antitrust courts and commentators. The Commission studied this issue in light of the Supreme Court's recent decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP.*[7]

The Commission also examined the question of whether courts should apply a presumption of market power for patents in tying cases, a question that the Supreme Court has recently resolved, as well as whether such a market-power presumption should be applied to copyrights or trademarks in tying cases.

The Commission's study and analysis lead it to make the following recommendations.

12. In general, standards for applying Section 2 of the Sherman Act's broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.

13. Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a "dominant" firm and even where competitors might be disadvantaged.

14. Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.

15. Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.

16. The lack of clear standards regarding bundling, as reflected in *LePage's v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.

17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.*

18. In general, firms have no duty to deal with a rival in the same market.†

19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.

* Commissioners Carlton and Garza join this recommendation with qualifications.

† Commissioners Jacobson and Shenefield join this recommendation with qualifications.

2. BACKGROUND

A. General Standards

Section 2 of the Sherman Act forbids "monopolization" and "attempted monopolization" (as well as combinations and conspiracies to monopolize) of any part of the trade or commerce of the United States.[8] The classic statement of unlawful monopolization is found in *United States v. Grinnell Corp.*:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[9]

The Supreme Court has defined "monopoly" power as the power to "control prices or exclude competition."[10] In general, "monopoly" power is treated as "substantial market power."[11] Modern economics generally defines "market power" as "the ability to raise prices above a competitive level *without suffering an immediate and unprofitably substantial loss of sales*,"[12] thus emphasizing that the power to control price or exclude competition must have some degree of durability to constitute market power of concern to antitrust law. A plaintiff may prove a defendant's possession of monopoly power through direct evidence of the defendant's actual control over price or exclusion of competition within a relevant market, or through indirect evidence, most typically a defendant's high market share and barriers to entry that make challenge to the defendant's market position unlikely.[13]

After establishing the defendant's monopoly power, a plaintiff must prove the monopolist has obtained or maintained its dominant position through unlawful exclusionary or predatory conduct.[14] As the Supreme Court stated in *Spectrum Sports, Inc. v. McQuillan*, the Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[15] Courts and commentators have often found it easier to identify conduct that is not or should not be unlawful under Section 2 than to identify conduct that Section 2 does prohibit. For example, two of the most commonly cited articulations explain that Section 2 is *not* violated by either "growth or development as a consequence of a superior product, business acumen, or historic accident"[16] or conduct attributable to "superior skill, foresight and industry."[17] Attempts to develop more definitive standards have evolved over time.

B. Definitions of "Exclusionary" Conduct

A variety of factors, including changing perspectives on the significance of monopoly power, have influenced courts' views on the scope of conduct that should be considered potentially exclusionary. In the mid-twentieth century, courts evidenced deep concern about the dangers of monopoly power. The opinion of Judge Learned Hand in *United States v. Aluminum Co. of America* provides the best-known expression of this attitude:

> Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.[18]

In *Alcoa* the Second Circuit held that a firm with 90 percent of the market for virgin ingot aluminum had violated Section 2 by repeatedly building new capacity to serve new demand in that market, thus discouraging its rivals from expanding their existing capacity or entering with new capacity.[19] In the court's view, "[i]t was *not inevitable* that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them."[20]

The Supreme Court quickly endorsed this expansive view of exclusionary conduct.[21] The question of whether the challenged conduct was "inevitable" appeared in other cases as well.[22] With such a broad scope of conduct that might be viewed as exclusionary, the government pursued and won several monopolization cases over the next few decades.[23] This aggressive view of the law reached its zenith in the 1970s, with proposals from well-regarded antitrust practitioners and scholars that proof of monopoly itself should be sufficient to establish a violation of Section 2.[24]

Questions about this approach arose with increasing frequency during the 1960s and 1970s, however, as developments in economic analysis spurred antitrust scholars to examine more closely what types of incentives encouraged vigorous competition and how certain business practices might benefit, rather than harm, consumers.[25] Commentators questioned the bases of many prior court decisions, including *Alcoa*, asking, for example, whether antitrust law should require a firm with a dominant position not to compete to serve new demand.[26] Courts and commentators began to reexamine whether the standards for exclusionary conduct were likely actually to discourage aggressive competition that could benefit consumers.[27]

One of the first court decisions to evidence this shifting attitude was *Berkey Photo, Inc. v. Eastman Kodak Co.*[28] The defendant, Eastman Kodak, sold cameras and held a monopoly in the film market; the plaintiff, Berkey Photo, sold cameras and also competed with Kodak in other photo-related services. When Kodak introduced a new kind of film compatible with only one of Kodak's cameras, Berkey alleged that Kodak had violated Section 2 by failing to give Berkey advance notice of the new product design so that Berkey could develop its own cameras to handle the new Kodak film. The Second Circuit reversed the jury verdict in Berkey's favor, holding that "a firm may normally keep its innovations secret from its rivals as long as it wishes, forcing them to catch up on the strength of their own efforts after the new product is introduced."[29] The court emphasized that firms' incentives to innovate rested on the prospect of market success:

> It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated.[30]

Unlike the Second Circuit's decision in *Alcoa*, which associated *existing* monopoly power with deadened initiative and competition, the Second Circuit's decision in *Berkey Photo* used a wider lens to see how *the prospect of market success* spurred competition and innovation. This perspective has been preeminent in recent decades.[31]

Most recently, the Supreme Court expressed the view in *Trinko* that the "prospect of market success" includes the prospect of obtaining monopoly power:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.[32]

This view—that the prospect of gaining monopoly is an appropriate incentive for competition and innovation—implies that the application of overly stringent antitrust rules for monopolists' conduct could discourage competition and innovation. Some disagree, pointing to economic studies that either suggest monopoly affirmatively discourages innovation[33] or are ambiguous as to whether monopoly power encourages innovation.[34]

Courts have also increasingly scrutinized the potential for consumers to benefit from precisely the type of conduct once commonly condemned as exclusionary. The theory of predatory pricing, for example, involves a company selling its product at very low prices to force its competitors out of business, and then raising its prices to a supracompetitive level that enables it to recoup its losses and earn monopoly profits. Thus, the first step in a predatory pricing scheme is to sell at low prices—something that generally benefits consumers. As the Supreme Court has observed, if a court erroneously concludes that a firm has engaged in illegal predatory pricing, "the costs of [such] an erroneous finding of liability are high"[35] because firms may be reluctant to cut prices aggressively if they fear predatory pricing allegations. Overdeterrence could harm consumers.

In addition, courts have carefully examined the likelihood that an alleged exclusionary scheme could succeed. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* the Supreme Court joined commentators who had concluded that "predatory pricing schemes are rarely tried, and even more rarely successful."[36] The reasons for this skepticism include the speculative nature of the scheme: it requires a firm to forgo definite profits in the short run, in hopes that competitors will leave the market and allow the firm, in the long run, to reap monopoly profits sufficient to make up for its prior losses and provide significant gains for the future.

The improbability of predatory pricing schemes, combined with the certainty that lower prices benefit consumers, persuaded the Supreme Court to select a test that may fail to capture all instances of predatory pricing, but will not incorrectly condemn price discounting.[37] This test excludes the possibility that above-cost pricing could constitute price predation. The Court cited the difficulty that courts would have determining just *how much* above cost a defendant's prices must be to avoid liability for predatory pricing, as well as the Court's concern that the possibility of such liability would chill aggressive price cutting.[38]

The adoption of a "safe harbor" in the area of predatory pricing also illustrates courts' desire to adopt bright-line legal rules that businesses can understand and follow with relatively little difficulty. This issue has become increasingly important as economic understandings of business conduct have become more sophisticated, and courts have struggled to take into account a wide variety of factors that may be relevant to judging the likely competitive effects of a particular business practice. Then-Judge (current Justice) Breyer explained the need for simplifying rules more than two decades ago:

> [W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.[39]

Particularly in the context of Section 2 predatory pricing enforcement—where overdeterrence may deprive consumers of the benefits of aggressive competition—courts have been increasingly willing to adopt potentially underinclusive, but simple and objective cost-based legal rules.

This is not to say, however, that developments in the understanding of monopolizing conduct have all tended to restrict potential liability for such conduct. There have been a number of recent Section 2 cases in which liability was found. *Microsoft*, for example, is the most prominent Section 2 case in the last decade. In that case the United States Court of Appeals for the District of Columbia Circuit upheld portions of the lower court's ruling that Microsoft had engaged in various forms of unreasonably exclusionary conduct in maintaining its operating system monopoly.[40] The court held that the evidence established that Microsoft had engaged in various forms of anticompetitive conduct to prevent its rival, Netscape, from attaining a market position from which Netscape could challenge Microsoft's monopoly of Intel-compatible PC operating systems.[41] The case ultimately was settled by consent decree.[42]

The Federal Trade Commission (FTC) recently investigated and filed complaints against two companies that allegedly achieved monopoly power through unreasonably exclusionary conduct. In *Unocal* the FTC alleged that Unocal falsely represented to a government panel that Unocal's technologies were nonproprietary, when it knew it held patents on these technologies,[43] and that Unocal thereby was able to obtain monopoly power over certain gasoline formulas dictated by government regulation.[44] The matter was ultimately settled by consent decree in connection with another firm's acquisition of Unocal.[45]

In *Rambus* the FTC recently held that Rambus illegally monopolized certain technologies required for computer memory. The FTC concluded that Rambus exploited its participation in a standard-setting organization to obtain patents that would cover technologies incorporated into the standards adopted by the organization, without revealing its patent position to other members of the standard-setting organization. As a result, the FTC stated, Rambus was able to "distort the standard-setting process" and unlawfully gain monopoly power in the computer memory industry.[46]

Some degree of controversy has surrounded each of these cases, illustrating the ongoing debate in the antitrust community about the proper role of, and legal standards for, Section 2 enforcement. The Commission discusses some of the issues in this debate below.

3. RECOMMENDATIONS AND FINDINGS

As discussed below, the Commission concludes that, compared to legal standards in the mid-twentieth century, the Supreme Court has now adopted and is applying legal standards and rules for Section 2 that are more sensitive to the possible efficiencies of business conduct and more attuned to the potential for consumer harm from overly stringent application of Section 2 standards in some cases. This represents progress.

This Part discusses the general principles underlying Section 2 enforcement below, as well as tests that have been proposed for general use in identifying exclusionary conduct. It then turns to specific observations about the need to develop improved legal standards to evaluate discounts for bundled products and refusals to deal with a rival in the same market.

A. General Principles for Section 2 Standards

12. In general, standards for applying Section 2 of the Sherman Act's broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.

13. Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a "dominant" firm and even where competitors might be disadvantaged.

In recent decades, more often than not, courts have used appropriate caution in assessing single-firm conduct. Courts have relied on general principles, including those that follow, to guide the development and application of rules for Section 2 enforcement. The use of these principles has benefited and encouraged appropriate antitrust enforcement.

Section 2 standards should be clear and predictable in application and administrable. The area of predatory pricing law provides the best example of success in achieving these goals. In *Brooke Group* the Supreme Court established an objective, cost-based test that first requires a predatory pricing plaintiff to prove that the alleged predatory prices are below an appropriate measure of the defendant's costs.[47] This rule is relatively clear, predictable, and administrable. The Court's test further requires predatory pricing plaintiffs to demonstrate that the defendant "had a reasonable prospect, or, under Section 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices."[48] This part of the test not only ensures that a Section 2 violation is found only if consumer welfare can be harmed, but also enhances administrability for the courts by allowing summary disposition of claims where market circumstances—such as easy entry—preclude the possibility of recoupment.[49]

The Supreme Court has taken other steps as well to enhance the administrability of predatory pricing litigation. In *Matsushita* the Court affirmed summary judgment for the defendant, refusing to allow the case to go to trial based on ambiguous evidence, which included rebates and other price-cutting activities that the plaintiff alleged tended to prove a conspiracy to suppress prices.[50] The Court explained that "cutting prices in order to increase business often is the very essence of competition."[51] To avoid summary judgment, the Court required the plaintiffs to produce evidence that "tends to exclude the possibility" that the challenged conduct was permissible competition that did not involve a conspiracy.[52] This comparatively clear and administrable rule has enabled courts to avoid costly and extensive litigation based solely on evidence from which inferences of permissible competition and anticompetitive joint conduct were equally plausible.

Section 2 standards should be designed to minimize overdeterrence and underdeterrence, both of which impair long-run consumer welfare. At least two observations underlie this general principle. One is that business practices typically offer more efficiencies and, thus, benefits to consumer welfare, than recognized in the early-to-mid-twentieth century. A second observation is that aggressive competition on the merits may resemble unreasonably exclusionary conduct. As discussed earlier, for example, price discounting may appear the same as predatory pricing.

These observations have given courts a better understanding that, like underdeterrence, overdeterrence also can harm consumer welfare. Thus, it is important to consider whether proposed legal rules are likely to chill procompetitive conduct or create unintended consequences. For example, the Supreme Court has observed that "[i]t would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high."[53]

The recognition of potential consumer harm from overdeterrence has led courts to try to avoid "false positives"—that is, finding Section 2 liability for a firm that has not engaged in unreasonably exclusionary conduct, but instead was simply competing aggressively on the merits.[54] Nonetheless, it remains important to avoid underdeterrence that results in "false negatives"—that is, failing to condemn anticompetitive conduct—when the challenged conduct typically provides few or no benefits to consumer welfare and does not resemble competition on the merits.[55] In an ideal world, of course, legal rules would avoid both underdeterrence and overdeterrence. In practical reality, however, such precision is often difficult to achieve. Thus, courts may need to make a trade-off between accuracy and the risks of either chilling procompetitive, or encouraging anticompetitive, conduct.

B. Further Development of Section 2 Standards

1. Continued Case Law Development in the Courts

14. Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.

As noted earlier, the Supreme Court defined improper "exclusionary" conduct under Section 2 to "comprehend[] at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[56] This articulation improves on earlier analysis asking whether the conduct at issue was "inevitable," but it begs the question of what specific types of conduct in what circumstances should be considered "competition on the merits." This issue has precipitated much debate and discussion.

The appropriate legal standards should continue to evolve in the courts, with continuing sensitivity to the need to avoid chilling procompetitive conduct and undue enforcement costs. The federal enforcement agencies should use appropriate opportunities to aid development of the law.[57] The FTC and the Antitrust Division of the Department of Justice (DOJ) are currently soliciting comments and holding hearings on Section 2 standards,[58] and the FTC is co-chairing the International Competition Network Unilateral Conduct Working Group, which plans to conduct an in-depth study of the issue over the next several years. The Commission is hopeful that those research efforts will prove useful.

2. Tests for Particular Types of Conduct or a Single Test for All Conduct

15. Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.

Many commentators are skeptical that any one legal standard should be used to evaluate the wide variety of different types of conduct that may be challenged under Section 2.[59] Others, however, have urged the use of a single test. Two proposals—the "no economic sense" and "profit sacrifice" tests—have their genesis in the predatory pricing test, which implicitly defines "competition on the merits" as pricing that is above an appropriate measure of the defendant's costs. Those and other proposals are discussed below.

"No Economic Sense" Test. The DOJ has advocated the use of a "no economic sense" test,[60] which asks "whether, on the basis of information available to a firm at the time of the challenged conduct, the challenged conduct would have made economic sense even if it did not reduce or eliminate competition."[61] The test condemns conduct only when its anticompetitive objective is unambiguous because the conduct would not have been undertaken "but for" the prospect of obtaining or maintaining monopoly power.[62] Although the DOJ has advanced this test in several cases, including *Microsoft*,[63] *Dentsply*,[64] and *Trinko*,[65] no court has ever adopted it.

Proponents contend the test is consistent with existing case law and "can be administered effectively by courts and businesses alike"[66] because the test essentially focuses on the economic rationality or profitability of the defendant's conduct from the defendant's perspective at the time the defendant decides whether to undertake a particular course of conduct.[67] Although this test may not capture all anticompetitive single-firm conduct, pro-

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ponents believe underinclusiveness is preferable to requirements for complex evidentiary judgments.[68]

Others counter that the test can fail to capture substantially anticompetitive conduct by focusing exclusively on the profitability of the conduct for the defendant. Thus, the test fails to examine the challenged conduct's effects on consumer welfare, critics assert.[69] The test exculpates conduct that offers some minimal efficiencies—that is, that makes *some* economic sense—even where the conduct may cause disproportionately great anticompetitive effects.[70] In addition, in exclusive dealing cases the application of the "no economic sense" test is arguably unintelligible because exclusive dealing "makes economic sense" for the defendant "precisely through the mechanism of exclusion."[71] "In most cases, there is no way to separate the economic benefit to the defendant from the exclusionary impact on rivals."[72] This criticism suggests the test may be overinclusive as well as underinclusive.

"Profit Sacrifice" Test. The "profit sacrifice" test is closely related to the "no economic sense" test. One variant asks whether the defendant has sacrificed immediate profits as part of a strategy whose profitability depends on the recoupment of those profits through the exclusion of rivals.[73] Although it has not specifically adopted this test, the Supreme Court has asked this question in refusal-to-deal cases, noting, for example, that the defendant in *Aspen* "was willing to sacrifice short-run benefits and goodwill in exchange for a perceived long-run impact on its smaller rival."[74] Another variant asks "whether the allegedly anticompetitive conduct would be profitable for the defendant and would make good business sense even if it did not exclude rivals and thereby create or preserve market power for the defendant."[75]

As with the "no economic sense" test, proponents maintain the "profit sacrifice" test is easy to administer and provides clear guidance to businesses, thereby increasing the likelihood that businesses will engage in procompetitive conduct that other legal tests might misconstrue as anticompetitive.[76] The test does not condemn all conduct that might reduce welfare overall, but proponents judge the test to be preferable to "market-wide balancing tests."[77]

Opponents apply basically the same criticisms to the "profit sacrifice" test as to the "no economic sense" test. In particular, one commentator argues the test is "both too broad and too narrow."[78] The test is too broad, this critic contends, because it could condemn a firm "invest[ing] heavily in designing a better mousetrap that, once marketed, will ruin rivals or significantly limit their sales."[79] The test is too narrow, he asserts, "because some exclusionary practices don't involve sacrifice at all."[80] He agrees the test is dispositive in predatory pricing cases, however, and also finds the test "quite helpful in cases involving unilateral refusals to deal."[81]

Less Efficient Competitor Test. Judge Richard A. Posner has proposed that an unreasonably exclusionary practice is one that is "likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor."[82] Proponents see value in this test,[83] but caution that it, too, may be too narrow "where the dominant firm is able to keep the output of rivals inefficiently low by engaging in practices that confer no significant social benefits."[84] Others point out that exclusion of an inefficient rival may harm consumer welfare if the rival is excluded before it reaches minimum efficient scale, or if the less efficient rival has been keeping prices in the relevant market below the monopoly level.[85] Critics also raise concern that the test may be very difficult administratively.[86] Nonetheless, commentators and courts have found this test useful in evaluating bundled discounts or rebates.[87]

Balancing Test. In its *Microsoft* decision, the D.C. Circuit employed a balancing test, which examines both competitive effects and efficiencies, to assess claims under Section 2.[88] That test requires a plaintiff first to establish that the monopolist's conduct had an "'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers."[89] Once the plaintiff establishes a prima facie case, to avoid liability the defendant must provide a procompetitive justification for its conduct, that is, "a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."[90] If the defendant makes this showing, then the plaintiff either must rebut the claim of procompetitive benefits or show that the anticompetitive harm nevertheless "outweighs" those benefits.[91] Proponents point out this is the basic rule of reason test that courts have applied for many years, and continue to apply, in Section 1 and Section 2 cases.[92] They contend that use of this test is necessary to answer the basic question of whether the challenged conduct, on balance, harmed consumer welfare.[93]

Opponents criticize this test as too complex and difficult to administer. They argue that, because businesses will be uncertain of how their course of conduct might be judged, they will be reluctant to undertake procompetitive conduct.[94] Proponents respond that other tests, including the "no economic sense" and "profit sacrifice" tests, are equally complex and less accurate.[95]

As this brief review of possible tests for evaluating conduct under Section 2 suggests, they each seek to identify conduct that harms consumer welfare.[96] Some tests place greater value on the avoidance of chilling procompetitive conduct and undue enforcement costs than on ensuring that the test captures all or most instances of anticompetitive conduct. Others emphasize the importance of focusing on consumer welfare effects and contend that accuracy can be achieved without perverse influences on firms' incentives or undue enforcement costs.

Thus far, no consensus exists that any one test can suffice to assess all types of conduct that may be challenged under Section 2. The current test for predatory pricing, for example, works well in that context, but problems have been identified with the application of its progeny—the "no economic sense" and "profit sacrifice" tests—in some other contexts. The more extensive inquiry mandated by the *Microsoft* balancing test may be appropriate in some circumstances, but, as exemplified by the case of predatory pricing, is not necessarily warranted or desirable for all types of conduct challenged under Section 2. Some contend that the best approach is to develop different tests for different types of conduct.[97]

As courts, antitrust agencies, and commentators continue to refine the antitrust standards for conduct challenged under Section 2, a focal point for their assessment should be whether a particular test is the one most likely to protect consumer welfare in the context of the type of conduct at issue. To answer this question will require, among other things, an evaluation of whether a particular test is likely to overdeter procompetitive, or underdeter anticompetitive, conduct. Particular attention should be given to long-run, as well as short-run, consumer interests. For example, any Section 2 test for refusals to deal with a rival should reflect proper consideration of consumers' long-run interests in maintaining firms' incentives to invest in valuable competitive assets—incentives that could be significantly diminished by forced sharing of assets with a rival in particular circumstances.

C. Specific Areas of Concern—Bundled Discounts and Refusals to Deal with a Rival in the Same Market

1. Discounts on Bundled Products

16. The lack of clear standards regarding bundling, as reflected in *LePage's v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.

"Bundling" entails the sale of two or more products as a package. Bundled products may be sold only in a package or as part of a package and separately as well.[98] When bundled products are also sold separately, manufacturers may provide a discount or rebate to buyers that purchase the entire bundle, instead of purchasing only certain products in the bundle. These are known as "bundled discounts" or "bundled rebates." Large and small firms, incumbents, and new entrants use bundled discounts and rebates in a wide variety of industries and market circumstances. Because they involve lower prices, bundled discounts and bundled rebates typically benefit consumers.

Despite the ubiquity of bundling, there is a paucity of case law addressing the practice.[99] One prominent and recent appellate decision is *LePage's v. 3M*, in which the Third Circuit, sitting en banc, condemned bundled rebates as a violation of Section 2.[100] Because the court failed to evaluate whether 3M's program of bundled rebates represented competition on the merits, its decision offers no clear standards by which firms can assess whether their bundled rebates are likely to pass antitrust muster. Therefore, the Third Circuit's decision is likely to discourage firms from offering procompetitive bundled discounts and rebates to consumers.

The proconsumer benefits and possible anticompetitive harms of bundled discounts, the *LePage's* decision, and various proposals for legal standards that will deter unfounded claims that bundled discounts violate Section 2 are discussed below. A test that compares incremental revenues with incremental costs, as described below, offers the most promising source of an economically sensible and administrable safe harbor for bundled rebates or discounts.

a. Consumer Benefits, and Theories of Harm, from Bundled Discounts

Product bundling and bundled discounts are widespread throughout the U.S. economy.[101] Fitness clubs may offer their sessions separately or as a package at a discount; a furniture retailer may offer a bed and two dressers separately or together as a bedroom set at a discount; retailers may bundle free parking with a purchase in their stores.[102] Other examples abound.[103]

Businesses may offer bundled products for a variety of reasons. Firms can use bundling to save costs in distribution and packaging, to reduce transaction costs for themselves and their customers, and to increase reliability for customers.[104] Selling products as a package may reduce a manufacturer's costs, and the manufacturer may pass these cost reductions on to purchasers as bundled discounts.[105] Instead of advertising, firms can use bundled discounts to increase demand.[106] When a retailer reduces the number of its suppliers to save costs, multiproduct manufacturers may offer multiproduct discounts to keep the retailer's business.[107] A firm selling a product in one market may employ a bundling strategy as a means of encouraging consumers in another market to try a new product.[108] In some cases, bundling can help a firm enter a new market and compete with established firms. As one witness explained:

> Cable companies attempt to compete with telecommunications companies by offering bundles of digital telephone service, high speed internet service, and digital cable. Telecommunications companies have responded by offering discounts if consumers bundle their phone service with DSL and with satellite television . . . . The resulting bundle versus bundle competition will likely continue to drive down prices, increasing consumer welfare.[109]

These types of bundling can result in bundled discounts or rebates that significantly lower prices to consumers. One witness noted that "virtually everyone who submitted a paper tends to agree that bundling is pro-consumer. It is a way of discounting; it's a way of waging competition."[110] Moreover, the fact that firms without market power often offer bundled discounts suggests that efficiencies, not schemes to acquire or maintain monopoly power, typically explain their use.[111]

Nonetheless, recent economic literature has suggested three theories by which, in certain circumstances, bundled discounts could be unreasonably exclusionary:[112] (1) as a form of predatory pricing; (2) as *de facto* tying; and (3) as exclusionary conduct that deters entry.[113] If bundled discounts were used as a form of predatory pricing, a dominant firm might eliminate competition by forcing its competitors to sell at unprofitably low prices.[114] Under standard predatory pricing law, for this strategy to be plausible, the predator must be able to recoup its investment in below-cost pricing by using its increased market power to capture monopoly profits in the long run.[115]

In the case of *de facto* tying, while consumers are free to buy components separately, the components are priced to make it more attractive to buy the bundled components together.[116] Under this theory, the prices of the components are actually increased, including the stand-alone price of the monopolized good.[117] Thus, instead of receiving a discount, consumers are actually paying more for the bundled products.[118]

Finally, a dominant firm selling multiple products might use bundled discounts to deter entry or otherwise foreclose competition by firms that do not sell multiple products. By providing bundled discounts that reduce the price (net of discounts) of the competing good, a competitor that sells only that good may not be able to compete effectively if it does not also sell the monopoly good.[119] Suppose, for example, each of two manufacturers produces product A at a cost of $10 per unit. The manufacturer that earns monopoly profits in related product B, which it produces at a cost of $10 per unit but sells for $20, can bundle A and B and sell the bundle for $28. The manufacturer that produces only A, however, cannot sell product A for $8 without losing money.

There was disagreement among witnesses before the Commission as to the plausibility of these strategies, the conditions necessary to make them plausible, and the optimal legal standards to assess such anticompetitive risks. All appeared to agree, however, that further empirical study would benefit enforcement and policymakers. In addition, whatever legal standards are adopted should be sufficiently clear to enable companies to conform their conduct to the law, be administrable by the courts, and avoid chilling procompetitive discounting.

b. The Third Circuit's LePage's *Decision*

In *LePage's* the Third Circuit, sitting en banc, upheld a jury verdict that 3M had violated Section 2 through its program of bundled rebates. Plaintiff LePage's and defendant 3M competed in sales of transparent tape. LePage's alleged that 3M used its monopoly in its Scotch-brand tape to gain a competitive advantage in private-label transparent tape by offering higher rebates—that is, lower prices—when purchasers, such as office superstores, bought certain amounts of products across a number of 3M's product lines (including Scotch tape)[120] or increased the amount of Scotch tape purchased in proportion to 3M's private-label tape.[121] If an eligible buyer met certain targets across all of the product lines, a rebate of up to 2 percent was applied to all of its purchases from 3M. Conversely, if the buyer failed to meet any one of the targets in each product line, the 2 percent rebate for all purchases

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would be rescinded.[122] LePage's alleged that such rebates gave buyers the incentive to purchase either 3M's Scotch tape or 3M's private-label tape, instead of LePage's private-label tape.

3M responded that its pricing was above cost, no matter how cost was calculated, and that, following the Supreme Court's decision in *Brooke Group*, above-cost pricing could not give rise to antitrust liability.[123] The court specifically rejected 3M's argument, stating that "a monopolist will be found to violate Section 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification."[124] The court upheld the jury's finding that 3M had no legitimate business justification, in part because no evidence showed that the amount of 3M's savings from bundling its products equaled the amount that 3M had given its customers through bundled rebates.[125] In explaining why such bundled rebates harmed consumers, the court stated that the "principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer."[126]

c. *Criticisms of* LePage's

The fundamental criticism of the Third Circuit's decision is that it did not assess whether 3M's bundled rebates constituted competition on the merits. The court focused on the claimed harm to LePage's, including its loss of market share in the market for transparent tape and its loss of efficiencies in manufacturing.[127] But, as one critic points out, that a monopolist's conduct weakens a rival is not sufficient to trigger liability under Section 2.[128] "Price cutting may result . . . in some competitors being driven out of business, a result that is tolerated as a natural product of legitimate competition when an exit is the product of an inability to compete efficiently on the merits."[129] Lower prices may harm a rival but benefit consumers.

The Third Circuit did not require LePage's to prove it could make tape as efficiently as 3M and therefore that 3M's conduct had excluded an equally efficient rival.[130] In fact, 3M and LePage's both agreed that 3M was a more efficient, lower-cost producer of transparent tape than LePage's.[131] Nor did the court require LePage's to prove that, regardless of LePage's ability to operate efficiently, 3M's conduct would have excluded a hypothetical competitor that was as efficient as 3M.[132] The court did not even consider 3M's assertion that its bundled pricing was above cost, no matter how cost was calculated—an assertion that LePage's did not dispute.[133] Thus, it is unclear what would have been sufficient to convince the court that 3M was competing on the merits, rather than on some basis other than efficiency, with its bundled rebates. The decision is too vague[134] and is therefore likely to chill welfare-enhancing bundled discounts or rebates.[135]

d. Possible "Safe Harbors" for Bundled Discounts

Given the likelihood that most bundled discounts or rebates benefit consumers, many have proposed a safe harbor for bundled discounts that clearly constitute competition on the merits. One proposal, relevant to the use of bundled discounts as *de facto* tying arrangements, would ask what proportion of buyers accepted the bundled discount. If all or almost all buyers accepted the bundled discount, then it should be evaluated under tying law; if a substantial proportion of buyers rejected the bundled discount, it should be deemed legal.[136]

Other proposals relate to the possible use of bundled discounts or rebates in a manner analogous to predatory pricing. One type of safe harbor would also operate as a screen, requiring plaintiffs pursuing a Section 2 challenge first to establish that the bundled prices at issue fell below an appropriate measure of the defendant's cost.[137] If a defendant's costs are properly defined, "below-cost pricing, unlike pricing at or above that level, carries with it the threat that the party so engaged will drive equally efficient competitors out of business, thus setting the stage for recoupment at the expense of consumers."[138] Prices below an appropriate measure of cost would be a necessary, but not sufficient, condition for liability.[139] In addition, plaintiffs would be required to establish that the defendant could recoup the profits it sacrificed through bundled discounts,[140] as well as establish actual or probable harm to competition.

Proposals differ on the appropriate measure of the defendant's costs, although most involve some type of comparison between the defendant's costs and revenues.[141] One approach, comparable to the approach adopted by a decision in the Southern District of New York,[142] would allocate all discounts attributable to the entire bundle of products to the competitive product, and then ask if, after reallocation of those discounts, the competitive product is sold at or above incremental cost.[143] If the competitive product is being sold at or above incremental cost after allocation to it of all bundled discounts, then the bundle would fall within the safe harbor. If not, then the plaintiff would need to demonstrate a likelihood that the defendant could recoup the short-term losses. Put another way, this test would find potential liability under Section 2 if the defendant's incremental price of the competitively supplied good is less than the defendant's incremental cost of producing it.[144]

By comparison, one witness proposed that bundled discounts be evaluated under a modified *Brooke Group* standard that would reject bundling claims whenever the defendant's total revenues derived from the entire bundle exceeded the total of the average variable costs to produce all of the products in the bundle—essentially, a total revenue versus total cost approach.[145] The witness argued this test was appropriate because it would allow a dominant firm to offer a bundled discount "that effectively lowers the price of a supracompetitively priced good."[146] Others see significant problems with the test. They contend the test ignores the effects of bundling insofar as it permits bundled discounts where a monopolist lowered its price in a competitive market below the monopolist's average variable cost for the competitively priced product.[147] Another witness suggested that courts should prorate the total discount and allocate an equal share to each of the products in the bundle, then ask whether any product was sold below incremental cost.[148] In deciding which test to apply, some would ask whether a firm has near monopoly power in a well-defined market, and whether any competing firm can match the defendant's discounts across all product lines.[149]

These and other proposed tests raise various issues, as the federal antitrust agencies recognized in recommending that the Supreme Court decline to grant certiorari in *LePage's* to allow further development in the case law and economic analysis.[150] One witness noted that competitors less efficient than a dominant firm might still constrain the dominant firm to price below a monopoly level.[151] Thus, a test asking whether a bundled discount could exclude a hypothetical equally efficient competitor would not capture instances in which a bundled discount enabled a dominant firm to exclude a less efficient rival that had in fact benefited consumers by constraining prices.[152] Others concede that, just as above-cost predatory pricing could occur, above-cost predatory bundled discounts could occur.[153] Nonetheless, they believe that a safe harbor for above-cost bundled discounts "provides valuable clarity to the business community and reduces the number of false positives, which would otherwise discourage procompetitive discounting."[154] Moreover, some courts have concluded that "only price cutting that threatens equally or more efficient firms is condemned under Section 2."[155] They explain that "[t]he antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business."[156]

e. Conclusion

17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.*

* Commissioners Carlton and Garza join this recommendation, but are concerned that the first screen in the three-part test would still require many pricing schemes where exclusion is not at issue to receive further scrutiny under the second and third parts of the test. Bundled discounts that do not pass the first screen in the Commission's proposed test can be used to price discriminate with no exclusionary effect on competition. Failure to recognize that price discrimination is a motive for mixed bundling implies that the incremental revenue is not correctly calculated by the Commission's proposal. Commissioner Carlton elaborates on these points in his separate statement.

The first screen in the recommended three-part test would establish that bundled discounts should be subject to scrutiny under Section 2 only if they could exclude a hypothetical equally efficient competitor. This standard would permit bundled discounts that could exclude a less efficient competitor, even if the less efficient competitor had provided some constraint on pricing of the competitive product. The difficulties of assessing such circumstances, the lack of predictability and administrability in any standard that would capture such instances, and the undesirability of a test that would protect less efficient competitors, however, counsel against the adoption of a screen that protects less efficient competitors.

Importantly, the first screen would provide sufficient clarity to enable businesses to determine whether a particular bundled discount would be "screened out" from further scrutiny under the second and third parts of the tests. In this sense, the first screen could operate as a "safe harbor" and thus ameliorate the chilling of procompetitive bundled discounts that now exists. The first screen is also sufficiently administrable for courts to apply, although the Commission acknowledges it could be difficult to apply in circumstances where the alleged competitive product is separate from the other products in the bundle. This issue arises with other proposed tests as well, however.

The first screen is not perfect; it could reserve for further scrutiny bundled discounts with no anticompetitive exclusionary effects. Thus, it is crucial to apply the second and third parts of the test. Under the second part of the test, a plaintiff would need to prove that the defendant was likely to recoup its losses from its use of the challenged bundled discount or rebate. This would typically require a plaintiff to show that entry into the relevant market is not easy and therefore is unlikely to undermine the defendant's ability to recoup its losses. Like the first screen, this portion of the test also might be considered a "safe harbor" for defendants in relevant markets where entry is easy. Under the third part of the test, a plaintiff would have to establish actual or probable harm to competition.[157] Use of the Commission's proposed three-part test would bring the case law on bundled discounts into line with the reasoning of *Brooke Group*.

The Commission also encourages additional empirical economic research in this area. The courts, the antitrust agencies, and antitrust practitioners generally would benefit from a more thorough and empirically based understanding of the likely competitive effects of bundled discounts in a variety of settings.

2. Refusals to Deal with a Rival in the Same Market.

18. In general, firms have no duty to deal with a rival in the same market.*

The Supreme Court has long held that, "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[158] Recently, in *Trinko* the Supreme Court confirmed there is no general duty to aid rivals under Section 2 of the Sherman Act.[159] Rather, the Court characterized its earlier decisions, including *Aspen Skiing* and *Otter Tail*, as "limited exception[s]" in which the defendant was found liable under Section 2 for a failure to deal with a rival.[160]

Although the Court's decision in *Trinko* provided some guidance on the factors that might suggest liability for a refusal to deal with a rival, the decision is far from definitive. Businesses need better guidance from the courts on how to avoid antitrust scrutiny for a refusal to deal with a rival. The following briefly reviews the reasoning and guidance that can be gleaned from the *Trinko* decision, as well as proposals to the Commission on how courts should evaluate refusals to deal with a rival.

a. Refusals to Deal with Rivals Should Rarely, if Ever, Be Unlawful

Refusals to deal with horizontal rivals in the same market should rarely, if ever, be unlawful under antitrust law, even for a monopolist.[161] In *Trinko* the Supreme Court explained:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.[162]

Thus, absent a right to refuse to deal with a rival, a firm that lawfully obtained a monopoly through superior acumen, skill, foresight, or industry would find itself forced to share the fruits of its investment with rivals, thereby undermining the value of its lawfully acquired

* Commissioners Jacobson and Shenefield join this recommendation with qualifications. They believe that, if the refusal to deal with a rival in the same market is likely to raise price or reduce output in that relevant market, and is insufficiently supported by legitimate procompetitive justifications, the conduct is appropriately prohibited. A refusal to deal with a customer in an adjacent market (or different level of distribution), unless the customer agrees not to do business with a rival, is analytically the same as exclusive dealing and should be treated under the same principles. A refusal to deal with a rival in an adjacent market may be harmful to consumers if the defendant is using its monopoly power in one market to attempt to monopolize a second market.

monopoly and discouraging others from making similar investments.[163] Because investments in new facilities and assets often enhance consumer welfare, antitrust rules that discourage such activity should be avoided.[164] Forced sharing stultifies the incentives of smaller firms to develop alternatives to the monopolist's product.[165] Moreover, forced sharing requires courts to determine the price at which such sharing must take place, thereby transforming antitrust courts into price regulators, a role to which they are ill suited.[166] Setting a price too low, for example, could dampen the incentives of monopolists and others to develop substitutes for the monopolist's product[167] and ultimately disserve the interests of consumers.[168]

In *Trinko*, the Court noted it has been cautious in finding exceptions to the general rule of no duty to aid a rival, precisely "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."[169] The Court appeared to link its prior exceptions to two factors: (1) the defendant's unilateral termination of a voluntary, and thus presumably profitable, prior course of dealing with the plaintiff (*Aspen Skiing*), and (2) the defendant's refusal to provide to a customer rival the same service that it provided to other customers (retail sales of ski-lift tickets in *Aspen*, power transmission over its network in *Otter Tail*). Questions have been raised concerning the Court's use of these two factual circumstances as key indicators of a potentially anticompetitive refusal to deal with a rival in the same market.[170] The Court seemed to suggest that either type of conduct might be worthy of scrutiny to assess whether it reflected a willingness to forsake short-term profits to achieve an anticompetitive end.[171] The Court did not clarify that point, however, and it also did not explain what additional factors would be required to establish Section 2 liability in such circumstances.

b. Further Proposals for Evaluating Refusals to Deal

The principal approaches advanced at the Commission's hearings were: (1) a rule of reason test centered on a pricing benchmark; (2) a "no economic sense" or "profit sacrifice" test; and (3) an examination of whether the conduct or pricing at issue is coercive or provides incentives.

Rule of Reason/"Consumer Welfare Effect" Test. The purpose of this test is to determine whether the refusal to deal would enable the monopolist to charge supracompetitive prices in any market.[172] If the defendant possessed monopoly power in a relevant market for inputs used by the firm's rivals, the court would determine whether the defendant's refusal to sell such inputs—or its insistence on terms so unattractive as to constitute an effective refusal to deal (a "non-negotiable" refusal to deal)—would lead to supracompetitive prices in a market.[173] Because requiring a monopolist to share inputs or facilities with its rivals at any price could destroy a firm's incentive to develop the capacity to produce such inputs in the first place,[174] this test would require the plaintiff to demonstrate that the rival was willing to pay a *sufficient* price for the monopolized product. The fact finder would ask whether the rival was willing to pay a price high enough to support an inference that the refusal to sell at that price was exclusionary.[175] The monopolist could rebut a prima facie claim by showing that the refusal was necessary to create efficiencies, and that these efficiencies counteracted any harmful impact of the refusal.[176] The court would then balance the harmful effects of the refusal against the benefits proved by the defendant in a way analogous to the rule of reason analysis that courts employ in the merger and Section 1 contexts.[177]

Objections to this proposal centered on its complexity, the difficulty of determining the proper "non-exclusionary benchmark price," and questions whether the conduct the standard would condemn as unreasonably exclusionary actually would harm consumer welfare.[178] Some questioned whether there was sufficient evidence of durable monopoly power to support the use of such a complex test instead of a simpler test that could better avoid "false positives." Witnesses also argued that courts are not rate-making bodies and are ill equipped to determine the "non-exclusion benchmark price" as required by this test.[179] Finally, a determination of harm to consumer welfare would require a determination whether rivals would be able to obtain alternative, cost-effective sources of supply, and other factors that could increase the potential for error in application of the test.[180]

The "Profit Sacrifice" and "No Economic Sense" Tests. As discussed earlier, to establish liability for a refusal to deal with a rival, the "no economic sense" and "profit sacrifice" tests would require proof that the refusal makes "no economic sense" or is unprofitable but for the refusal's tendency to fortify preexisting market power or help the monopolist acquire new market power.[181] If the refusal does make economic sense absent such a contribution to market power (or the expectation of acquiring market power), the conduct survives Section 2 scrutiny, without additional analysis.

Although proof that a monopolist's refusal to deal makes no economic sense is a *necessary* condition for liability under this test, it is not sufficient, and thus the test acts only as a screen.[182] The second step of the inquiry requires a determination that the conduct harmed competition.[183] Thus, under the "no economic sense test," a plaintiff may prevail by proving four elements: (1) the defendant's possession of a monopoly over an input; (2) the refusal to sell the input or the sale of the input at a price that significantly disadvantages rivals; (3) the absence of any economic rationale for the refusal, apart from its tendency to maintain or acquire monopoly power; and (4) the maintenance or acquisition of market power as a result of such refusal.[184]

Some have found this test useful in the context of refusals to deal with rivals.[185] Nonetheless, some antitrust practitioners question whether the test can be applied sensibly in all circumstances, given the fine distinction between seeking to exclude competitors by increasing a firm's sales as opposed to seeking to obtain or maintain monopoly power.[186]

"Coercing" versus "Incentivizing" Conduct. A third proposal focuses on whether the challenged conduct is "coercing" or "incentivizing."[187] This question is the third, and most important part, of a three-part inquiry under this approach. The first part calls for courts to

determine whether conduct is “excluding” or “exploiting.”[188] Exploiting conduct is that which may be undertaken by a monopolist as a fruit of its monopoly, and should not give rise to an antitrust claim.[189] Excluding conduct is conduct that is designed to eliminate rivals, and potentially is actionable.[190] Second, this approach asks whether the challenged conduct is horizontal or vertical. If the conduct relates only to horizontal dealings among competitors, this approach concludes that antitrust law should rarely (if ever) be concerned with the conduct.[191] Vertical conduct, however, may be actionable.

If the conduct is excluding and vertical, then the analysis asks whether the challenged conduct is coercing or incentivizing. Coercing conduct occurs when a firm refuses to deal with a (potential) customer because that customer also deals with the firm’s rivals.[192] By comparison, a firm engages in incentivizing conduct when it continues to deal with a customer, despite that customer’s dealing with the rival, but not necessarily on the same favorable price terms.[193]

The proponent of this test argues that this proposed distinction is important for three reasons. First, a monopolist is uniquely capable of coercing because of its monopoly status; any firm is capable of engaging in incentivizing conduct (at least to the limits of its “checkbook”).[194] Second, coercing conduct hurts the customer by issuing a “take it or leave it” choice; incentivizing conduct provides a choice to the customer.[195] Third, a monopolist’s competitors can respond to incentivizing conduct by providing their own incentive offers.[196]

Under this test, coercing conduct would be presumptively unlawful, with the presumption overcome only if the defendant could show procompetitive justifications for the conduct.[197] By comparison, incentivizing conduct would be presumptively lawful.[198] The only exception would be for price incentives so great that they would constitute predatory pricing under the *Brooke Group* standard.[199] The test’s author contended it has several advantages because, among other things, it provides companies with clarity as to what conduct is permissible,[200] and it would harmonize refusal-to-deal analysis with tying law by making unlawful only that conduct that creates the type of coercion that an unlawful tie-in creates.[201]

c. Conclusion

The Commission endorses the longstanding principle that, in general, firms have no duty to deal with a rival in the same market. To the extent that circumstances exist in which firms may be liable for a refusal to deal with a rival in the same market, the courts should further clarify those circumstances.

3. Intellectual Property in Tying Cases

19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.

In *Illinois Tool Works, Inc. v. Independent Ink, Inc.* the Supreme Court reversed a decision by the Court of Appeals for the Federal Circuit adhering to previous Supreme Court precedents that provided for a presumption of market power.[202] The Court unanimously held that "a patent does not necessarily confer market power upon the patentee" and that, "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."[203]

In reaching this decision, the Court reviewed the history of tying law generally and its application in cases involving intellectual property in particular. It explained that the presumption originated in patent misuse cases involving tying of patented and unpatented goods, and that subsequent cases—particularly *International Salt Co. v. United States*[204]—"imported" this doctrine into tying law, in part on the ground that the policy considerations were the same.[205] As a result, the Court had characterized such patent ties as "illegal per se."[206]

The Court explained that its reconsideration of the "presumption of per se illegality of a tying arrangement involving a patented product" was appropriate in light of developments since those earlier rulings.[207] Most important, in 1988 Congress "amended the Patent Code to eliminate [the market power] presumption in the patent misuse context."[208] After considering "the congressional judgment reflected" in this amendment, the Court concluded that ties involving patented products should be treated like other ties, and not be condemned without a showing of market power.[209] The Court also observed that imposing this requirement was supported by "the vast majority of academic literature" addressing the question and by "a virtual consensus among economists" on this matter.[210] Furthermore, it noted, the antitrust enforcement agencies' Intellectual Property Guidelines provide that the agencies "will not presume that a patent, copyright or trade secret necessarily confers market power upon its owner."[211]

Consistent with the "virtual consensus" the Court identified in *Independent Ink*, witnesses at the Commission's hearing (which took place before *Independent Ink* was decided) were united in their opposition to the market-power presumption.[212] Similarly, a number of commenters argued that there should be no presumption of market power from patents or copyrights.[213] Thus this Commission's witnesses and commenters generally advocated what is now the state of the law.

The Supreme Court decision in *Independent Ink* is clearly correct. For similar reasons, courts should not presume market power from a copyright or trademark in tying cases.

Notes

[1] 15 U.S.C. § 2.

[2] *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004). Section 2 also does not make mere size an offense. United States v. International Harvester Co., 274 U.S. 693, 708 (1927); United States v. United Shoe Mach. Co., 247 U.S. 32 (1918); American Tobacco Co. v. United States, 221 U.S. 106 (1911).

[3] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (quoting III Phillip E. Areeda & Donald F. Turner, Antitirust Law 78 (1978)); *see also* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1074 (2007); Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S. Ct. 1281, 1288 (2006); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993).

[4] United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.).

[5] LePage's, Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003) (en banc).

[6] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[7] *Trinko*, 540 U.S. at 398.

[8] *See* 15 U.S.C. § 2 ("Every person who shall monopolize, 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 . . . shall be deemed guilty of a felony . . . .").

[9] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

[10] *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

[11] Andrew I. Gavil et al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 564–65 (2002) [hereinafter Gavil, Antitrust Law in Perspective].

[12] *Id.* at 564 (emphasis added).

[13] *See id.* at 564–71; *see also* United States v. Microsoft Corp., 253 F.3d 34, 57–58 (D.C. Cir. 2001) (monopolization claim supported by direct evidence that a firm can raise prices substantially above a competitive level in a relevant market); United States v. Syufy, 903 F.2d 659 (9th Cir. 1989) (ease of entry dooms monopolization claim); *Alcoa*, 148 F.2d at 424–26 (market share screen).

[14] *See Aspen Skiing*, 472 U.S. at 605; *Grinnell*, 384 U.S. at 570–71; Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482–83 (1992).

[15] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

[16] *Grinnell*, 384 U.S. at 570–71.

[17] *Alcoa*, 148 F.2d at 430.

[18] *Id.* at 427.

[19] *Id.* at 430–31.

[20] *Id.* at 431 (emphasis added). Judge Hand's decision in *Alcoa*, although expansive, rejected the view that monopolization was illegal per se. *Id.* at 429–30.

[21] *See* American Tobacco Co. v. United States, 328 U.S. 781, 813–15 (1946) (quoting approvingly large sections of *Alcoa* decision, specifically including *Alcoa*'s statement that "we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened," *Alcoa*, 148 F.2d at 431).

[22] For example, in *United States v. United Shoe Machinery Corp.*, where the government challenged the terms on which the largest maker of shoe-making machines leased those machines, the court explained that the defendant "is denied the right to exercise effective control of the market by business policies that are not *the inevitable consequences of its capacities or its natural advantages*." United States v. United Shoe Mach. Corp., 110 F. Supp., 295, 345 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (emphasis added).

[23] *See generally* GAVIL, ANTITRUST LAW IN PERSPECTIVE, at 593–99.

[24] *See* NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 150–63 (1979); *cf.* Eleanor M. Fox, *Monopoly and Competition; Tilting the Law Towards a More Competitive Economy*, 37 WASH. & LEE L. REV. 49, 55–62 (1980) (advocating an approach to monopolization doctrine whereby proof of monopoly would itself establish liability under Section 2 and "[w]illfulness or bad conduct would not be a requisite part of the case"). This approach no longer has support. *See, e.g.*, Exclusionary Conduct Transcript at 121 (Pitofsky) (Sept. 29, 2005) (Section 2 should not ban obtaining monopoly power through superior skill, foresight, and industry).

[25] *See* Chapter I.A of this Report.

[26] *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 165–70 (1978) [hereinafter BORK, ANTITRUST PARADOX]; Oliver E. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1512–13 (1972); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1596–97 (1969); Aaron Director & Edward Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 286 (1956).

[27] *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 431–34 (2d ed. 1993) (discussing in epilogue general improvements in Section 2 enforcement).

[28] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

[29] *Id.* at 281.

[30] *Id.* The Federal Circuit has held, and other cases have suggested, however, that, absent any product improvement or reduced costs, a deliberate effort to create incompatibility with a rival's product violates Section 2. *See* C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1382 (Fed. Cir. 1998). *See generally* GAVIL, ANTITRUST LAW IN PERSPECTIVE, at 627.

[31] *See, e.g.*, Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 824–25 (2000) ("To punish a firm simply because it has achieved a monopoly is to discourage superior business performance."); Alan J. Meese, *Monopolization, Exclusion, and the Theory of the Firm*, 89 MINN. L. REV. 743, 834–35 (2005).

[32] *Trinko*, 540 U.S. at 407.

[33] *See, e.g.*, Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY 609–25 (Richard R. Nelson ed., 1962); *see also* Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation* (Feb. 8, 2007), *available at* http://ssrn.com/abstract=962261; M. Howard Morse, Statement at AMC New Economy Hearing, at 10 (Nov. 8, 2005) (citing economic studies that suggest smaller firms or new entrants without a vested interest in the status quo are more likely to introduce paradigm-shifting innovations); *cf.* New Economy Transcript at 68–69 (Shapiro) (Nov. 8, 2005) (business documents show competition is "a very powerful force to innovate").

[34] See Jonathan B. Baker, *Promoting Innovation Competition Through the* Aspen/Kodak *Rule*, 7 GEO. MASON L. REV. 495, 512 (1999) ("As a matter of economic theory, it is impossible to say for certain whether enforcement of the antitrust prohibition against monopolization, which might restrict the conduct of a dominant firm, will on balance enhance or reduce aggregate industry innovation in general."); *see also* RICHARD A. POSNER, ANTITRUST LAW 20 (2d ed. 2001) [hereinafter POSNER, ANTITRUST LAW] (explaining that empirical studies indicate it is unclear "whether monopoly retards or advances innovation"); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Exclusionary Conduct, at 8 (Mar. 17, 2006) [hereinafter ABA Comments re Exclusionary Conduct] ("Some disagreement exists among experts as to whether the ability to charge monopoly profits indeed induces risk taking, innovation and economic growth."); *cf.* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 43 (2004) ("[U]nless firms are hopelessly disconnected from the real world, the pipe dream of 'monopoly' can hardly be the major incentive that drives most firms to innovate . . . . Profits, not monopoly profits, are the principal spur to innovation that attracts 'business acumen.'") (citations omitted).

[35] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986)).

[36] *Matsushita*, 475 U.S. at 589.

[37] *See Brooke Group*, 509 U.S. at 226–27.

[38] *Id.* at 223 (Section 2 does not forbid above-cost pricing that preserves a dominant position); Phillip E. Areeda and Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 733 (1975) (proposing that prices above average variable cost be presumptively lawful, and that prices below average variable cost be presumptively predatory); *see also* Carl Shapiro, Statement at AMC Exclusionary Conduct Hearing, at 4 (Sept. 29, 2005) [hereinafter Shapiro Statement re Exclusionary Conduct]; Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 418–20 (2006) [hereinafter Werden, *No Economic Sense Test*] (explaining how *Brooke Group* created a "prudential safe harbor" for above-cost pricing).

[39] *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983). One witness expressly endorsed the reasoning of Justice Breyer in *Barry Wright*. *See* Exclusionary Conduct Trans. at 10 (Popofsky) (stating that *Barry Wright* is "perhaps the most important Section 2 case that was ever decided"). Two other witnesses embraced similar reasoning without mentioning the decision. *See id.* at 55–56 (Rule) ("I think the issue is that: how do you—can you really develop a cost-effective rule for evaluating [the impact of unilateral conduct] in these circumstances?"); Shapiro Statement re Exclusionary Conduct, at 3–4.

[40] *Microsoft*, 253 F.3d at 61–64 (holding restrictions on licenses with computer manufacturers were unlawfully exclusionary); *id.* at 64–67 (holding that "Microsoft's exclusion of IE from the Add/Remove Programs utility and its commingling of browser and operating system code constitute exclusionary conduct"); *id.* at 66–71 (holding agreements with Internet access providers were unlawful, exclusionary devices); *id.* at 72–74 (holding exclusive-dealing arrangements with independent software vendors and Apple were unlawfully exclusionary); *id.* at 74–78 (holding certain actions involving Java were unlawfully exclusionary).

[41] *See id.* at 50, 53–54.

[42] *See* Final Judgment, United States v. Microsoft Corp., Civil Action No. 98-1232 (CKK) (Nov. 12, 2002).

[43] Complaint, *In re* Union Oil Co. of Cal., FTC Docket No. 9305 (Mar. 4, 2003).

[44] *Id.*; *see also* Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L.J. 975, 985–87 (2005) [hereinafter Creighton, *Cheap Exclusion*].

[45] Agreement Containing Consent Order, *In re* Union Oil Co. of Cal., FTC Docket No. 9305 (June 6, 2005).

[46] Opinion of the Commission, *In re* Rambus Inc., FTC Docket No. 9302, at 3 (Aug. 2, 2006).

[47] *Brooke Group*, 509 U.S. at 222.

[48] *Id.* at 224.

[49] *See id.* at 226.

[50] *Matsushita*, 475 U.S. at 594–95.

[51] *Id.* at 594.

[52] *Id.* at 588.

[53] *Brooke Group*, 509 U.S. at 226–27.

[54] *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 21 (1984); Frank H. Easterbrook, *When is it Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 Colum. Bus. L. Rev. 345, 357–58. *See generally* Bork, Antitrust Paradox.

[55] *See* Creighton, *Cheap Exclusion*, at 981–82.

[56] *Aspen Skiing*, 472 U.S. at 605 n.32 (quoting III Phillip E. Areeda & Donald F. Turner, Antitrust Law 78 (1978)).

[57] *See, e.g.*, Kenneth L. Glazer, Statement at AMC Exclusionary Conduct Hearing, at 11 (Sept. 29, 2005) [hereinafter Glazer Statement]; R. Hewitt Pate, Statement at AMC Exclusionary Conduct Hearing, at 1 (Sept. 29, 2005) [hereinafter Pate Statement]; Robert Pitofsky, Statement at AMC Exclusionary Conduct Hearing, at 9 (Sept. 29, 2005) [hereinafter Pitofsky Statement]. Mr. Rule, the sole witness who recommended repeal of Section 2, recognized that repeal was unlikely. Charles F. (Rick) Rule, Statement at AMC Exclusionary Conduct Hearing, at 15 (Sept. 29, 2005) [hereinafter Rule Statement re Exclusionary Conduct]. He accordingly made ten suggestions for courts to consider in deciding Section 2 claims that would not be effectuated through legislative change. *Id.* at 16–17.

[58] *See* Thomas O. Barnett, The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act, Opening Remarks for FTC and DOJ Hearings Regarding Section 2, at 2–3 (June 20, 2006) (hearings to increase understanding and advance development of law).

[59] *See* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 437 (2006) [hereinafter M.S. Popofsky, *Defining Exclusionary Conduct*]; *see also* Exclusionary Conduct Trans. at 158–59 (Pitofsky); Shapiro Statement re Exclusionary Conduct, at 3.

[60] Pate Statement, at 2.

[61] *Id.*; *see also* Werden, *No Economic Sense Test*.

[62] Werden, *No Economic Sense Test*, at 413.

[63] The DOJ alleged that Microsoft's conduct to protect its operating system monopoly was exclusionary because it "would not make economic sense unless it eliminated or softened competition." *See* ABA Comments re Exclusionary Conduct, at 10; Brief for Appellees, United States v. Microsoft Corp., Nos. 00-5212, 00-5213 (D.C. Cir. Feb. 9, 2001).

[64] The DOJ argued that the defendant's policies of not using dealers who distributed the products of rivals "made no economic sense but for their tendency to harm rivals" because the policies were costly to defendant but produced no benefit except reducing competition. ABA Comments re Exclusionary Conduct, at 10; Brief for the United States, United States v. Dentsply Int'l, Inc., No. 03-4097 (3d Cir. May 14, 2004). The DOJ won the case on appeal, but the Third Circuit applied a business-justification test similar to the balancing test applied in *Microsoft*. United States v. Dentsply Int'l, Inc., 399 F.3d 181, 196–97 (3d Cir. 2005) (citing United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)).

[65] In their amicus brief on the merits, the FTC and the DOJ argued that Trinko's complaint failed to allege exclusionary conduct because it did not explain how Verizon's failure to assist rivals "would not make business sense apart from the effect on competition, the pertinent standard here." Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, No. 02-682, at 7–8 (May 2003) [hereinafter DOJ & FTC, *Trinko* Amicus Brief].

[66] Pate Statement, at 3; *see also* Werden, *No Economic Sense Test*, at 472–73.

[67] Werden, *No Economic Sense Test*, at 416–17.

[68] Pate Statement, at 8 (stating "while the [no economic sense] test will lead to some false negatives, this criticism has more purchase in the seminar room than in the real world").

[69] *See, e.g.*, Jonathan M. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 ANTITRUST L.J. 779, 780–81 (2006) [hereinafter Jacobson & Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*]; Steven C. Salop, Statement at AMC Exclusionary Conduct Hearing, at 16–17 (Sept. 29, 2005) [hereinafter Salop Statement]; Pitofsky Statement, at 5–6.

[70] Pitofsky Statement, at 4.

[71] *See* Jacobson & Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, at 781.

[72] *Id.*

[73] *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE & EXECUTION 152 (2006) [hereinafter HOVENKAMP, ANTITRUST ENTERPRISE].

[74] *Aspen Skiing*, 472 U.S. at 610–11.

[75] A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 Berkeley Tech. L.J. 1247, 1255 (2005) [hereinafter Melamed, *Exclusionary Conduct Under the Antitrust Laws*].

[76] *See* A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 Antitrust L.J. 375, 389–403 (2006) [hereinafter Melamed, *Exclusive Dealing Agreements*].

[77] Melamed, *Exclusionary Conduct Under the Antitrust Laws*, at 1258.

[78] Hovenkamp, Antitrust Enterprise, at 152.

[79] *Id.*; *see also* ABA Comments re Exclusionary Conduct, at 10 (short-run profit sacrifice cannot be sufficient to find conduct exclusionary, because that would capture procompetitive conduct, such as R&D or purchasing capital equipment, and would thus overdeter procompetitive conduct).

[80] Hovenkamp, Antitrust Enterprise, at 152.

[81] *Id.*

[82] Posner, Antitrust Law, at 194–95.

[83] Hovenkamp, Antitrust Enterprise, at 153 ("[D]efinition works well much of the time and occasionally provides the best analytic tool for determining whether a practice is anticompetitive.").

[84] *Id.*

[85] ABA Comments re Exclusionary Conduct, at 11–12.

[86] *Id.* at 11.

[87] *See* Part 3.C.1 of this Section (discussing bundled discounts).

[88] *See Microsoft*, 253 F.3d at 58–59. The use of a balancing test in evaluating Section 2 claims is not new. For example, the FTC had already used a similar test in 1980. *In re* E. I. DuPont de Nemours & Co., 96 F.T.C. 653 (1980) (stating that "a balancing approach, which takes due account of rational, efficiency related conduct, is best suited to the task at hand").

[89] *Microsoft*, 253 F.3d at 58.

[90] *Id.* at 59; *see also Eastman Kodak*, 504 U.S. at 483 (once plaintiff makes out a prima facie case, "liability turns, then, on whether 'valid business reasons' can explain [the defendant's] actions") (citing *Aspen Skiing*, 472 U.S. at 605).

[91] *Microsoft*, 253 F.3d at 59.

[92] Jacobson & Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, at 800; Pitofsky Statement, at 5–6. The FTC endorsed this test in evaluating the type of conduct at issue in *Rambus*, while specifically rejecting the "profit sacrifice" (or "no economic sense") test to evaluate such conduct. Opinion of the Commission, *In re* Rambus Inc., FTC Docket No. 9302, at 30–31 (Aug. 2, 2006) (noting that the "no economic sense" test may be appropriate in some Section 2 cases "where the risk of interfering with vigorous competitive activity is heightened," but that it is inappropriate when evaluating the type of conduct engaged in by Rambus).

[93] Jacobson & Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, at 800–01; Pitofsky Statement, at 5–6.

[94] Melamed, *Exclusionary Conduct Under the Antitrust Laws*, at 1257.

[95] Salop Statement, at 16–17; Jacobson & Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, at 790–93.

[96] *See* Shapiro Statement re Exclusionary Conduct, at 2–3 (defining "legitimate competition" as that which "benefits consumers"); Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *Are Misguided*, 68 Antitrust L.J. 659, 671 (2001) [hereinafter Carlton, *Why*

Aspen *and* Kodak *Are Misguided*] ("The key issue is whether one can distinguish when these theories imply a harm to competition as distinct from a harm to a rival.").

[97] *See* M.S. Popofsky, *Defining Exclusionary Conduct*, at 437; *see also* Exclusionary Conduct Trans. at 158–59 (Pitofsky); Shapiro Statement re Exclusionary Conduct, at 3.

[98] Bundled products sold only as a package are known as "pure" bundles; bundled products also sold separately are termed "mixed" bundles. *See, e.g.*, David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 Yale J. on Reg. 37, 54 (2005) [hereinafter Evans & Salinger, *Why Do Firms Bundle and Tie?*]. One commentator has adopted the terms "forced" bundling and "optional" bundling. *See* Barry J. Nalebuff, *Bundling as a Way to Leverage Monopoly*, at 4 (Yale School of Management Working Paper ES-36, Sept. 1, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=586648.

[99] LePage's Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003) (en banc); SmithKline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir. 1977); Virgin Atl. Airways Ltd. v. British Airways, PLC, 69 F. Supp. 2d 571 (S.D.N.Y. 1999); Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455 (S.D.N.Y. 1996).

[100] *LePage's*, 324 F.3d at 169.

[101] Evans & Salinger, *Why Do Firms Bundle and Tie?*, at 89; Prof. Timothy J. Muris, Statement at AMC Exclusionary Conduct Hearing, at 2 (Sept. 29, 2005) (Public Comment Regarding Bundling Submitted to AMC on Behalf of USTelecom, July 15, 2005) [hereinafter Muris Statement re Exclusionary Conduct] ("The use of bundles to sell goods or services . . . is ubiquitous throughout the American economy.").

[102] Pitofsky Statement, at 7; Muris Statement re Exclusionary Conduct, at 2 (citing Thomas T. Nagle & Reed K. Holden, The Strategy and Tactics of Pricing: A Guide to Profitable Decision Making 244–45 (3d ed. 2002)).

[103] *See generally* Evans & Salinger, *Why Do Firms Bundle and Tie?*, at 40–41.

[104] *See* David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73, 90 (2005); *see also* Daniel A. Crane, *Multiproduct Discounting: A Myth of Nonprice Predation*, 72 U. Chi. L. Rev. 27, 39–43 (2005).

[105] *See* Business Roundtable, Public Comments Submitted to AMC, at 25 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]. *But see* Willard K. Tom, Statement at AMC Exclusionary Conduct Hearing, at 6 (Sept. 29, 2005) [hereinafter Tom Statement].

[106] Muris Statement re Exclusionary Conduct, at 4.

[107] *Id.*

[108] *See id.* at 3–4.

[109] *Id.* at 2.

[110] Exclusionary Conduct Trans. at 110 (Pitofsky).

[111] *See* Evans & Salinger, *Why Do Firms Bundle and Tie?*, at 41–42; Muris Statement re Exclusionary Conduct, at 2; Exclusionary Conduct Trans. at 102 (Muris).

[112] *See* Shapiro Statement re Exclusionary Conduct, at 17–18 ("One can construct economic models in which a dominant firm selling multiple products can profitably employ multi-product discounts to drive its smaller rivals from the market and then recoup those discounts in the form of higher prices."). *But see* Muris Statement re Exclusionary Conduct, at 16–17 (discussing shortcomings of models that purport to show that bundling can produce harms); *id.* at 22 ("Empirical support for the anticompetitive hypothesis is virtually nonexistent.").

[113] *See* Muris Statement re Exclusionary Conduct, at 12–18; Daniel Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. Chi. L. Rev. 243, 254–61 (2005) [hereinafter Rubinfeld, *Bundled Rebates*].

[114] Muris Statement re Exclusionary Conduct, at 12; Rubinfeld, *Bundled Rebates*, at 254–56.

[115] Muris Statement re Exclusionary Conduct, at 12.

[116] *Id.*

[117] *Id.* at 14.

[118] *Id.* This theory relies on the "one monopoly rent" theory not applying to the behavior. *See* Patrick Greenlee et al., *An Antitrust Analysis of Bundled Loyalty Discounts*, at 12 (Economic Analysis Group Discussion Paper EAG 04-13, Oct. 2004), *available at* http://papers.ssrn.com/soL3/papers.cfm?abstract_id=600799; *see also* Salop Statement, at 3 (listing circumstances in which one monopoly rent, or "single monopoly profit" (SMP) does not apply).

[119] *See* Rubinfeld, *Bundled Rebates*, at 256–58; Muris Statement re Exclusionary Conduct, at 16.

[120] *LePage's*, 324 F.3d at 144–45. The six product lines were: Health Care Products, Home Care Products, Home Improvement Products, Stationery Products (including transparent tape), Retail Auto Products, and Leisure Time. *Id.* at 154.

[121] *See id.* at 171 (Greenberg, J., dissenting); *see also* Joanna Warren, LePage's v. 3M*: An Antitrust Analysis of Loyalty Rebates*, 79 N.Y.U. L. Rev. 1605, 1614 (2004).

[122] *See LePage's*, 324 F.3d at 170–71 (Greenberg, J., dissenting).

[123] *See id.* at 147 & n.5.

[124] *Id.* at 152.

[125] *Id.* at 164.

[126] *Id.* at 155.

[127] *Id.* at 161–62.

[128] Rubinfeld, *Bundled Rebates*, at 262.

[129] *Ortho*, 920 F. Supp. at 465.

[130] *See, e.g.*, Muris Statement re Exclusionary Conduct, at 10 ("The Third Circuit did not require LePage's to prove that it could make tape as efficiently as 3M . . . ."); Pate Statement, at 14; *see also* Business Roundtable Comments, at 25.

[131] Rubinfeld, *Bundled Rebates*, at 248.

[132] *See, e.g.*, Muris Statement re Exclusionary Conduct, at 10 ("The Third Circuit did not require LePage's to prove . . . that 3M's conduct would have excluded a hypothetical equally efficient competitor."); Pate Statement, at 14.

[133] Rubinfeld, *Bundled Rebates*, at 249.

[134] *See* Muris Statement re Exclusionary Conduct, at 11–12; Pate Statement, at 15–16; Business Roundtable Comments, at 24. *But see* American Antitrust Institute, Public Comments Submitted to AMC Regarding Exclusionary Conduct, at 25 (July 15, 2005) [hereinafter AAI Comments re Exclusionary Conduct] (concluding that the outcome in *LePage's* was "reasonable and predictable").

[135] Business Roundtable Comments, at 24. *See, e.g.*, Crane, *Multiproduct Discounting*, at 38–48; Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. Chi. L. Rev. 49, 68–71 (2005); Rubinfeld, *Bundled Rebates*, at 254–62.

[136] *See* Pitofsky Statement, at 2; *id.* at 8 & n.12 (citing SmithKline v. Eli Lilly, 575 F.2d 1056 (3d Cir. 1978); *Ortho*, 920 F. Supp. 455 (S.D.N.Y. 1996); *LePage's*, 324 F.3d 141 (3d Cir. 2003)).

[137] *See* Exclusionary Conduct Trans. at 39 (Tom); Muris Statement re Exclusionary Conduct, at 23–27; Exclusionary Conduct Trans. at 52 (Popofsky); *id.* at 110–11 (Pitofsky); Shapiro Statement re Exclusionary Conduct, at 18; Business Roundtable Comments, at 24–25; International Bar Association, Antitrust and Trade Law Section, Public Comments Submitted to AMC, at 19 (Sept. 26, 2005) [hereinafter IBA Comments]. Professor Salop expressed concern that monopolists could circumvent a cost-based test by manipulating the benchmark against which such a test was applied. *See* Exclusionary Conduct Trans.

at 72. Nonetheless, he seemed to endorse such a test as a matter of theory. *See id.*; *see also id.* at 81–82 (Salop).

138 *Ortho*, 920 F. Supp. at 466.

139 *See* Pate Statement, at 17 (price-cost test should operate as a necessary but not sufficient condition for liability); Shapiro Statement re Exclusionary Conduct, at 18.

140 Shapiro Statement re Exclusionary Conduct, at 18; Muris Statement re Exclusionary Conduct, at 20–21; Tom Statement, at 8–9 (endorsing the requirement that the market from which a rival is purportedly excluded be characterized by economies of scale that prevent reentry). Some also have suggested that courts require an additional showing that the purportedly excluded rival could not rationally match the challenged discounts, or that courts allow defendants to adduce proof that the bundle produces benefits not reflected in the defendant's production costs. *See, e.g.*, IBA Comments, at 20–21 (courts should also ask whether the injured rival can rationally match the challenged discounts); *see also* Muris Statement re Exclusionary Conduct, at 17 (explaining that bundling that seems to exclude an equally efficient rival may in fact be a means of reducing transaction costs).

141 *See* Shapiro Statement re Exclusionary Conduct, at 18; IBA Comments, at 18–19; *see also* M. Laurence Popofsky, Statement at AMC Exclusionary Conduct Hearing, at 11–13 (Sept. 29, 2005).

142 *See Virgin Atlantic*, 69 F. Supp. 2d at 580 n.8 (describing *Ortho* as holding "that there would be an antitrust violation if the competitive product in the bundle were sold for a price below average variable cost after the discounts on the monopoly items in the bundle were subtracted from the price of that competitive product") (citing *Ortho*, 920 F. Supp. at 467–69).

143 *See* Shapiro Statement re Exclusionary Conduct, at 18; Tom Statement, at 9.

144 *See* Muris Statement re Exclusionary Conduct, at 23 (citing Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law 749 (2005 Supp.)).

145 *See* Muris Statement re Exclusionary Conduct, at 13, 20–27. Under this approach, courts would "allow bundled discounts as long as the price of the bundle exceeds the sum of the separate costs of the constituent elements. Put another way, if the total price of the bundle exceeds the total cost of its constituents (taking into account the efficiencies directly attributable to bundling), the firm has not engaged in predatory bundling." *Id.* at 13.

146 *See id.* at 24.

147 Exclusionary Conduct Trans. at 60–61 (Salop).

148 *See id.* at 110–11 (Pitofsky).

149 Muris Statement re Exclusionary Conduct, at 24 (citing Phillip E. Areeda & Herbert Hovenkamp, III Antitrust Law, ¶ 749, at 184).

150 Upon the Court's invitation to express the views of the United States, the Solicitor General recommended that the Court deny certiorari in *LePage's*. Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, 3M Co. v. LePage's Inc., No. 02-1865, at 19 (May 2004) (stating that "at this juncture, it would be preferable to allow the case law and economic analysis to develop further and to await a case with a record better adapted to development of an appropriate standard").

151 Salop Statement, at 5 ("Entry by higher cost (even clearly less efficient) competitors can provide competition to a monopolist and cause prices to fall and output to rise, which increases consumer welfare and allocative efficiency.").

152 *See id.*

153 *See, e.g.*, Shapiro Statement re Exclusionary Conduct, at 18.

154 *Id.*

155 *Ortho*, 920 F. Supp. at 469.

[156] *Id.* at 470 (quoting Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 58 (2d Cir. 1979)).

[157] The recommended three-part test is proposed here for challenges to bundled *pricing* practices, and its purpose, as the text explains, is to avoid deterring procompetitive price reductions. The Commission is not recommending application of this test outside the bundled pricing context, for example in tying or exclusive dealing cases. The Commission did not undertake to study tying and exclusive dealing issues more generally.

[158] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[159] *Trinko*, 540 U.S. at 407–09.

[160] *Id.* at 409.

[161] *See* Exclusionary Conduct Trans. at 161 (Pitofsky); Glazer Statement, at 4; Rule Statement re Exclusionary Conduct, at 16–17 (refusals to deal should be lawful per se); Shapiro Statement re Exclusionary Conduct, at 13–16 (advocating per se legality except where there has been a prior course of dealing); *see also* Exclusionary Conduct Trans. at 157–58 (Pate) (appearing to endorse rule of per se legality for refusals to deal even when there has been a prior course of dealing).

[162] *Trinko*, 540 U.S. at 407–08.

[163] *See id.* at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place."); *see also* Shapiro Statement re Exclusionary Conduct, at 12.

[164] *See* Rule Statement re Exclusionary Conduct, at 17 (investment in "development and deployment of technological innovation should be viewed as an efficiency justification, and never a threat to consumer welfare"); Shapiro Statement re Exclusionary Conduct, at 4 (advocating the use of a safe harbor for investment in "new and superior production capacity" and "unadorned product improvement").

[165] Shapiro Statement re Exclusionary Conduct, at 11; Herbert Hovenkamp, Federal Antitrust Policy, § 7.5b (3d ed. 2005) (forced sharing "undermines the competitive market process of forcing firms to develop their own sources of supply"); *Trinko*, 540 U.S. at 408; DOJ & FTC, *Trinko* Amicus Brief, at 17 ("A firm that has the right to utilize an input from an incumbent—or that can claim that right through litigation—may have a reduced financial incentive to develop the input itself.").

[166] Shapiro Statement re Exclusionary Conduct, at 12; Rule Statement re Exclusionary Conduct, at 14; *see Trinko*, 540 U.S. at 408 ("Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited."); *see also* AT&T v. Iowa Utils. Bd., 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part) ("Even the simplest kind of compelled sharing, say, requiring a railroad to share bridges, tunnels, or track, means that someone must oversee the terms and conditions of that sharing.").

[167] Shapiro Statement re Exclusionary Conduct, at 11–12; Rule Statement re Exclusionary Conduct, at 14.

[168] Shapiro Statement re Exclusionary Conduct, at 11.

[169] *Trinko*, 540 U.S. at 408.

[170] *See* Carlton, *Why* Aspen *and* Kodak *Are Misguided*, at 676–78.

[171] *Trinko*, 540 U.S. at 409–10.

[172] *See* Salop Statement, at 5.

[173] *See id.* at 2, 5–6.

[174] *See id.* at 7 ("[T]he integrated firm generally should be entitled to earn a return on input sales commensurate with whatever market power it has achieved legitimately. A return on this investment in the input technology also may be needed to maintain adequate investment incentives."); *see also* Shapiro Statement re Exclusionary Conduct, at 12; Glazer Statement, at 5.

[175] Salop Statement, at 7.

[176] *See id.* at 6–7.

[177] *See, e.g.*, Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines, § 4 (1992, revised 1997); Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993) ("Ultimately it remains for the factfinder to weigh the harms and benefits of the challenged behavior.").

[178] *See* Pate Statement, at 10-12; Melamed, *Exclusive Dealing Agreements*, at 387 (A "static market-wide balancing test . . . would still pose a daunting challenge to any decision maker and would place a costly and often impossible burden on the defendant when deciding in real time how to conduct its business.").

[179] *See* Pate Statement, at 3, 8–12 (arguing that courts can readily administer the "no economic sense" test, and it is easier to administer than the "consumer welfare effects" test); Shapiro Statement re Exclusionary Conduct, at 12 (experience with regulation "makes me doubt that the courts are well placed to control unconditional refusals to deal by imposing price caps and regulating the terms on which dominant firms deal.").

[180] *See generally* Pate Statement, at 10.

[181] *See id.* at 2–12 (defending the "no economic sense" test and criticizing the "consumer welfare effects" test); Melamed, *Exclusive Dealing Agreements*, at 376, 411–12 (advocating the "profit sacrifice" test for all Section 2 claims); Werden, *No Economic Sense Test*, at 415–22. Moreover, the DOJ and the FTC recently advocated such a test in an amicus brief filed in the *Trinko* case. *See* DOJ & FTC, Trinko Amicus Brief, at 7, 15–20.

[182] *See* Exclusionary Conduct Trans. at 163–64 (Pate).

[183] Melamed, *Exclusive Dealing Agreements*, at 391 (the "sacrifice" or "no economic sense" test includes an inquiry into whether the conduct does or will in fact protect or enhance a firm's monopoly power); *see* DOJ & FTC, *Trinko* Amicus Brief, at 14 ("A *sine qua non* for any claim of monopolization or attempted monopolization is conduct that 'reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power.'" (quoting III Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 651F, at 83–84)); *see also* United States Telecom Association, Public Comments Submitted to AMC Regarding Refusals to Deal, at 11 (July 15, 2005) [hereinafter USTA Comments re Refusals to Deal] (endorsing requirement of proof of harm as part of a "no economic sense" test); John E. Lopatka & William H. Page, *Monopolization, Innovation, and Consumer Welfare*, 69 Geo. Wash. L. Rev. 367, 387–92 (2001) (arguing that proof of actual consumer harm should be a necessary condition for establishing a violation of Section 2); Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 Antitrust L.J. 693 (2000) (contending that proof of actual anticompetitive effect should be a *sine qua non* of any Section 2 case); *cf. Brooke Group*, 509 U.S. at 224–26 (holding that some prospect of recoupment is a necessary element of predatory pricing claim, without regard to apparent rationality (or not) of the defendant's pricing).

[184] *See* Melamed, *Exclusive Dealing Agreements*, at 389–90; USTA Comments re Refusals to Deal, at 10–12; IBA Comments, at 10–11; *see also* DOJ & FTC, *Trinko* Amicus Brief, at 15–20; *cf.* AAI Comments re Exclusionary Conduct, at 15–16 (absence of legitimate business justification as a necessary condition for refusal-to-deal liability).

[185] *See, e.g.*, Pate Statement, at 2; *see also* DOJ & FTC, *Trinko* Amicus Brief, at 7, 15–20.

[186] *See, e.g.*, Exclusionary Conduct Trans. at 27–30 (Rule); M.S. Popofsky, *Defining Exclusionary Conduct*, at 464; *see also* Steven C. Salop, 73 Antitrust L.J. 311, 373 (2006).

[187] *See* Glazer Statement, at 1.

[188] *Id.* at 1–2.

[189] *See id.* at 2.

[190] *See id.*

[191] *See id.* at 4.

[192] *See id.* at 6–7 (citing Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005)).

[193] Glazer Statement, at 7.

[194] *Id.* at 8.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 9.

[198] *Id.*

[199] *Id.*

[200] *Id.* at 9–10.

[201] *See id.*

[202] Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006), *rev'g* 396 F.3d 1342 (Fed. Cir. 2005).

[203] *Id.* at 1293.

[204] International Salt Co. v. United States, 332 U.S. 392 (1947).

[205] *Illinois Tool Works*, 126 S. Ct. at 1288–89.

[206] *Id.* at 1289 (quoting United States v. Columbia Steel Co., 334 U.S. 495, 522–23 (1948)).

[207] *Illinois Tool Works*, 126 S. Ct. at 1290.

[208] *Id.*

[209] *Id.* at 1291.

[210] *Id.* at 1291 n.4, 1292.

[211] *Id.* (quoting Dep't of Justice & Federal Trade Comm'n, Guidelines for the Licensing of Intellectual Property, § 2.2 (1995)).

[212] New Economy Trans. at 38 (witnesses appeared "unanimous in saying that the mere fact that you have a patent shouldn't give the presumption of market power"); *see also* James J. O'Connell, Statement at AMC New Economy Hearing, at 3 (Nov. 8, 2005) ("[T]here should not be a presumption of market power in tying cases when there is a patent.") (citing Brief for the United States as Amicus Curiae Supporting Petitioners, Illinois Tool Works Inc. v. Independent Ink, Inc., No. 04-1329, *cert. granted*, 73 U.S.L.W. 3729 (June 21, 2005)); Carl Shapiro, Statement at AMC New Economy Hearing, at 7–8 (Nov. 8, 2005) ("[m]any patents are "of limited commercial significance" and "many copyrights merely allow their owners to differentiate their products" from others); Richard J. Gilbert, Statement at AMC New Economy Hearing, at 10 (Nov. 8, 2005) ("There should be no presumption that a patent or copyright is a source of market power in tying cases or in other antitrust contexts.").

[213] *See* Motion Picture Association of America, Inc., Public Comments Submitted to AMC, at 3–4 (July 15, 2005) (stating that "[t]he great weight of analysis and opinion" opposes the presumption, citing numerous authorities); American Intellectual Property Law Association, Public Comments Submitted to AMC, at 1–3 (July 25, 2005) (urging that this Commission recommend congressional action to eliminate the presumption if the Supreme Court does not do so); Computer & Communications Industry Association, Public Comments Submitted to AMC Regarding New Economy, at 12 (July 20, 2005) (a presumption is "unnecessary").

Chapter I.D
Antitrust and Patents

1. INTRODUCTION

Patents have played an important role in the innovation that has enabled the United States to become "the world's preeminent technological and economic superpower."[1] Patents "are granted on the assumption that, although firms and individuals have many incentives to invent and create, some innovations are less likely to be forthcoming in the absence of a grant of exclusive rights providing an opportunity to recoup initial investments while excluding imitators."[2]

A number of issues relating to how antitrust law evaluates conduct and transactions involving patents were proposed to the Commission for study. Several issues were not ripe for resolution by this Commission due to recent congressional action or ongoing litigation about the issue.[3] Accordingly, the Commission did not undertake a comprehensive survey of the interaction between antitrust and patent law and policy.

The Commission studied some of these issues, however, which are discussed in other sections of this Report. For example, Chapter I.B proposes that, in merger analysis, the agencies take a flexible approach to the two-year time horizon generally used in assessing the likely competitive impact of new entry, and give greater weight to research-and-development-related efficiencies. These recommendations address how the effect of innovation should be assessed in a dynamic competitive analysis. Chapter I.C discusses the Commission's recommendation that market power should not be presumed from a patent, copyright, or trademark.

This Section of the Report discusses two additional issues involving competition and patents. The first addresses a situation in which members of a standard-setting organization (SSO) may need to pay higher royalties to license a patent *after* SSO members have chosen a standard covered by that patent than they would have *before* the standard was chosen. SSO members may take a range of approaches to mitigate this possibility, including possible joint negotiation of licensing terms before patented technology is adopted as a standard. Some SSOs apparently have avoided joint negotiations with patent holders out of concern that the conduct would be considered a per se unlawful violation of the Sherman Act.[4]

Joint negotiations between SSO members and patent holders, without more, may be reasonably necessary in the circumstances to ensure that SSO members obtain reasonable patent licensing terms. At the same time, joint negotiations carry a risk of anticompetitive conduct, so they should be subject to antitrust scrutiny. Accordingly, without intending to endorse any particular approach by SSOs, the Commission makes the following recommendation.

20. Joint negotiations with intellectual property owners by members of a standard-setting organization with respect to royalties prior to the establishment of the standard, without more, should be evaluated under the rule of reason.*

The second issue involves the relationship between the patent system and competition. Patents and patent law play an important role in the property rights regime essential to a well-functioning competitive economy. Properly applied, patent and antitrust laws are complementary, as both are aimed at encouraging innovation, industry, and competition. As discussed in Chapter I.A, the courts and antitrust agencies in recent decades have developed a more sophisticated understanding of how certain business arrangements involving patents can benefit innovation and competition and have taken such potential procompetitive effects into account.

Just as the proper application of antitrust law is important to holders of patents, how well the patent system operates matters for competition. Patents on obvious subject matter, for example, may impede competition without the offsetting benefits of rewarding innovation. Recent reports from the Federal Trade Commission (FTC)[5] and the National Academy of Sciences (NAS),[6] as well as recent cases in which the Supreme Court has granted certiorari,[7] have raised questions about whether the patent system is functioning as well as it should. Given the importance of proper operation of the patent system to free-market competition, the Commission makes the following recommendations.

* Commissioner Delrahim does not join this recommendation.
Commission Garza joins this recommendation with qualifications.

21. **Congress should seriously consider recommendations in the Federal Trade Commission and National Academy of Sciences reports with the goal of encouraging innovation and at the same time avoiding abuse of the patent system that, on balance, will likely deter innovation and unreasonably restrain competition.* In particular:**

21a. **Congress should seriously consider the Federal Trade Commission and National Academy of Sciences recommendations targeted at ensuring the quality of patents.†**

21b. **Congress should ensure that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a reasonable time period.**

22. **The courts and the Patent and Trademark Office should avoid an overly lax application of the obviousness standard that allows patents on obvious subject matter and thus harms competition and innovation.**

2. NEGOTIATIONS OF PATENT ROYALTIES BY MEMBERS OF STANDARD-SETTING ORGANIZATIONS

A. Background

Collaborative standard setting can produce many procompetitive benefits. Particularly in high-technology industries, collaborative standard setting is ubiquitous as a means to achieve interoperability among a variety of products. Interoperability typically requires agreement on a technical standard that all manufacturers will use in producing their products. Agreement on a standard that achieves interoperability can increase competition, innovation, and output, as well as significantly reduce costs to manufacturers and consumers.

In many circumstances, particularly in technology-intensive industries, the implementation of a technical standard will require firms to obtain licenses to patents that cover the technology chosen as the standard. Before the standard is chosen, patent holders may compete to have a technology that their patents cover chosen as the standard. As part of that

* Commissioners Delrahim and Kempf do not join this recommendation.
Commissioner Garza joins this recommendation with qualifications.

† Commissioners Delrahim and Kempf do not join this recommendation.

competition, they may offer reasonable patent royalties and other licensing terms. Once the standard has been chosen, however, patent holders may believe they can obtain much higher royalty rates and more restrictive licensing terms. At that point, members of the SSO may already have begun designing, testing, and producing goods that conform to the standard. Competition may not operate as a significant constraint on patent holders' demands in such circumstances because the members of the SSO may find it much too expensive and time-consuming to develop a new standard around a different technology. The higher royalties paid by members of an SSO in such circumstances might be passed on to consumers of the ultimate product.[8]

Some SSOs have adopted various practices to reduce the risk of unexpectedly high licensing demands from a patent holder once a standard has been chosen. For example, some SSOs require members to disclose patents that would cover a technology under consideration as a standard and to promise to license any such patents on "reasonable and nondiscriminatory" terms.[9] Other organizations have pursued alternative approaches. For example, VITA, a non-profit standards development organization, recently sought review by the Antitrust Division of the Department of Justice (DOJ) of a proposed policy requiring participants in VITA's standard-setting process to "disclose patents that are essential to implement a new standard and declare the most restrictive licensing terms that will be required to license any such patents."[10] Under this proposed plan, the patent holder and each prospective licensee will negotiate separately, "subject only to the restrictions imposed by the patent holder's unilateral declaration of its most restrictive terms."[11] The DOJ concluded that "[i]mplementation of the proposed policy should preserve, not restrict, competition among patent holders."[12] Among other things, the DOJ noted that, "[u]nless the standard-setting process is used as a sham to cloak naked price-fixing or bid-rigging, the Department analyzes action during the standard-setting process under the rule of reason."[13]

B. Recommendation and Findings

20. Joint negotiations with intellectual property owners by members of a standard-setting organization with respect to royalties prior to the establishment of the standard, without more, should be evaluated under the rule of reason.*

Members of some SSOs may wish *jointly* to negotiate with patent holders about patent licensing terms before the members select a standard. Such joint negotiations would carry antitrust risk, of course. One antitrust concern would be that members of the SSO might cross the line from discussing royalty rates for licensing patents they need to discussing prices for products they will sell, a per se violation of Section 1 of the Sherman Act.[14] Another concern would arise if the members of an SSO jointly possess monopsony power[15] and can force patent holders to offer royalty rates below a reasonable level, leading innovators to respond by reducing new investments in research and development.[16]

Depending on the circumstances, joint negotiations can also offer sufficient potential pro-competitive benefits to merit examination under the rule of reason, however. Joint negotiations can allow members of an SSO to obtain reasonable licensing terms from patent holders, which can lead to lower marginal costs for the standardized product and lower consumer prices.[17] By eliminating a potential threat of demands for unreasonably high royalty rates from patent holders, joint royalty negotiations might also facilitate a more timely and efficient development of standards and reduce the need for litigation to resolve issues of patent royalties and other licensing terms.[18]

For these reasons, both the Chairman of the FTC and the Assistant Attorney General for Antitrust at the DOJ have stated the FTC and the DOJ likely would evaluate such joint negotiations under the rule of reason.[19] The Commission agrees.

* Commissioner Delrahim does not join this recommendation for the reasons set forth in his separate statement.

Commissioner Garza joins this recommendation insofar as it simply recommends general rule of reason treatment for the legitimate activities of standard-setting organizations, including the joint negotiation of licensing terms before a particular standard is selected. It is critical to note, however, that the Commission is not recommending that such joint negotiation is a preferred approach under the antitrust laws or a necessary one to avoid "hold up" issues. Issues relating to the adoption of an industry standard are complex. This recommendation should be taken as a starting point for analysis.

3. THE RELATIONSHIP BETWEEN COMPETITION AND PATENT LAW

The patent laws encourage invention by granting to those who develop new, useful, and nonobvious inventions the exclusive right to practice their inventions for a period of years. Patents and patent law play an important role in the property rights regime essential to a well-functioning competitive economy.

Just as the proper application of antitrust law is important to patent holders, so the proper application of patent law is important to maintaining effective free-market competition. The U.S. patent laws express "a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy."[20] Patents on obvious subject matter, for example, may impede competition without the offsetting benefits of rewarding innovation. As the Supreme Court has explained, "[t]aken together, the novelty and nonobviousness requirements [to obtain a patent] express a congressional determination that the purposes behind the Patent Clause [of the U.S. Constitution] are best served by free competition and exploitation of either that which is already available to the public or that which may be readily discerned from publicly available material."[21]

Recent reports from the FTC and the NAS have raised questions about whether the patent system is functioning as well as it should.[22] In recent years, bills have been introduced in Congress to address some of the concerns that have been raised.[23] In addition, the Supreme Court has granted certiorari and heard oral arguments in *KSR International Co. v. Teleflex, Inc.*, a case that presents the issue whether the Federal Circuit's test for nonobviousness is sufficiently rigorous to screen out obvious patents.[24] In an amicus brief urging the Supreme Court to grant certiorari in that case, the Solicitor General stated that the Federal Circuit's approach to the non-obviousness inquiry "unnecessarily sustains patents that would otherwise be subject to invalidation as obvious."[25] The brief explained the "extension of patent rights to obvious combinations of familiar elements retards, rather than advances, new discoveries."[26]

The Director of the U.S. Patent and Trademark Office (PTO) and Under Secretary of Commerce for Intellectual Property, Jon Dudas, has reported that a record 440,000 patent applications were filed in 2006 and "the volume of patent applications continues to outpace our capacity to examine them."[27] Moreover, he noted that the PTO currently has "a pending application backlog of historic proportions."[28] To meet this challenge, the PTO has introduced new ways to improve the speed of its patent examinations, as well as the quality of its review of patent applications[29] and Congress has appropriated funds for the hiring of more examiners.[30] Nonetheless, the steadily increasing numbers of patent applications each year—in 2006 about 100,000 more patent applications were filed than in 2001—continue to raise concerns that the PTO receive the resources it needs to do its job properly.

Because the proper operation of the patent system is important to maintaining effective free-market competition, the Commission makes the following recommendations.

21. Congress should seriously consider recommendations in the Federal Trade Commission and National Academy of Sciences reports with the goal of encouraging innovation and at the same time avoiding abuse of the patent system that, on balance, will likely deter innovation and unreasonably restrain competition.* In particular:

21a. Congress should seriously consider the Federal Trade Commission and National Academy of Sciences recommendations targeted at ensuring the quality of patents.†

21b. Congress should ensure that the Patent and Trademark Office is adequately equipped to handle the burden of reviewing patent applications with due care and attention within a reasonable time period.

21c. The courts and the Patent and Trademark Office should avoid an overly lax application of the obviousness standard that allows patents on obvious subject matter and thus harms competition and innovation.

* Commissioners Delrahim and Kempf do not join this recommendation. While they join their fellow Commissioners in urging Congress to consider taking actions that would help ensure the quality of patents, they believe that some of the specific recommendations made by the FTC are not necessarily designed to accomplish that, do not do so, and may well not be helpful in advancing innovation incentives.

Commissioner Garza joins the recommendation to give serious consideration to the recommendations in the FTC and NAS Reports but does not necessarily endorse all of the recommendations.

† Commissioners Delrahim and Kempf do not join this recommendation for the reasons stated in the previous note.

Commissioner Garza joins this recommendation with the reservation expressed in the previous note.

Notes

[1] New Economy Transcript at 102–03 (Pinkos) (Nov. 8, 2005).

[2] National Research Council of the National Academies of Sciences (NAS), Board on Science, Technology, and Economic Policies (STEP), Committee on Intellectual Property Rights in the Knowledge-based Economy, A Patent System for the 21st Century 18–19 (Stephen A. Merrill et al. eds., 2004) [hereinafter NAS-STEP Report].

[3] Congress recently took action in the area of standard setting. *See, e.g.*, Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004). Also, certain issues—such as patent settlements between brand and generic drug manufacturers and alleged abuses of standard-setting processes—are exceedingly fact-specific and are being addressed in the context of ongoing litigation, and perhaps legislation. *See* Opinion of the Commission, *In re* Rambus, Inc., FTC Docket No. 9302 (Aug. 2, 2006) (finding anticompetitive abuse of the standard-setting process); Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005) (agreement between brand and generic drug manufacturers), *cert. denied*, 126 S. Ct. 2929 (2006); *In re* Tamoxifen Citrate Antitrust Litig., 466 F.3d 187 (2d Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3333 (Dec. 13, 2006) (No. 06-830) (agreement between brand and generic drug manufacturers); *see also* Preserve Access to Affordable Generics Act, S. 316, 110th Cong. (2007) (proposed legislation sponsored by Senators Kohl, Leahy, and others aimed at preventing brand drug companies from compensating generic drug companies for delaying their entry into the market), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s110-316.

[4] Hewlett-Packard Co., Public Comments Submitted to AMC Proposing Issues for Study, at 6–7 (Jan. 5, 2005); Cisco Systems, Inc., Public Comments Submitted to AMC Proposing Issues for Study, at 1–2 (Jan. 7, 2005); Sun Microsystems, Inc., Public Comments Submitted to AMC Proposing Issues for Study, Regarding Ex Ante Disclosure of IPRs, at app. (Sept. 30, 2004). *See generally* Qualcomm Inc., Public Comments Submitted to AMC (Mar. 1, 2007); Sun Microsystems, Inc., Public Comments Submitted to AMC Proposing Issues for Study, Regarding Standard-Setting Processes (Jan. 4, 2005).

[5] Federal Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003) [hereinafter FTC Report].

[6] NAS-STEP Report, at 18–19.

[7] Teleflex, Inc. v. KSR Int'l Co., 2005 WL 23377 (Fed. Cir. Jan. 6, 2005), *cert. granted*, 126 S. Ct. 2965, 2966 (2006) (nonobviousness standard); eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1841 (2006) (standard for injunctive relief); *cf.* Laboratory Corp. of Am. Holdings v. Metabolite Labs., Inc., 126 S. Ct. 2921 (2006) (writ of certiorari denied as improvidently granted); *see id.* at 2921, 2929 (Justice Breyer, joined by Justices Stevens and Souter, dissenting from dismissal of writ of certiorari and arguing that a decision by the Court would "contribute to the important ongoing debate . . . as to whether the patent system, as currently administered and enforced, adequately reflects the 'careful balance' that 'the federal patent laws . . . embody'") (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989)).

[8] *Cf.* Deborah Platt Majoras, FTC Chairman, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting, Prepared for Standardization and the Law: Developing the Golden Mean for Global Trade, at 8 & n.13 (Sept. 23, 2005) [hereinafter Majoras, Royalty Discussions] (stating that if such royalty rate increases are prevented, "we can generally expect lower royalty rates to lead to lower marginal costs for the standardized product and lower consumer prices").

[9] *See* Mark. A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1906, 1923–27 (2002).

[10] Letter from Thomas O. Barnett, Ass't Att'y Gen., Antitrust Div., Dep't of Justice, to Robert A. Skitol, at 1 (Oct. 30, 2006), *available at* http://www.usdoj.gov/atr/public/busreview/219380.pdf [hereinafter VITA DOJ Business Review Letter].

[11] *Id.* at 9.

[12] *Id.* at 10.

[13] *Id.* at 8.

[14] Majoras, Royalty Discussions, at 10–11; VITA DOJ Business Review Letter, at 9–10 ("Any efforts to reduce competition by using the declaration process as a cover to fix downstream prices of VME products would be a per se violation of section 1 of the Sherman Act, and the Department would not hesitate to condemn such activity.").

[15] *See, e.g.*, Mandeville Is. Farms v. American Crystal Sugar Co., 334 U.S. 219, 242–43 (1948) (finding per se unlawful an agreement among local sugar refiners to set the price at which the refiners would purchase sugar beets). The Supreme Court recently has remarked that "[t]he kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization." Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1076 (2007).

[16] Majoras, Royalty Discussions, at 7–8; *cf.* VITA DOJ Business Review Letter, at 9 ("The proposed policy should not permit licensees to depress the price of licenses for patented technologies through joint action because it prohibits any joint negotiation or discussion of licensing terms among the working group members or with third parties at all VSO and working group meetings."). *But see* Majoras, Royalty Discussions, at 9–10 (discussing ameliorating factors, such as manufacturers in SSOs recognizing that exercising monopsony power might deter patent holders from joining the SSO, thus preventing manufacturers from obtaining pre-standard-setting disclosures; and that monopsony power might be difficult to exercise when the patent holders themselves are also the manufacturers).

[17] Majoras, Royalty Discussions, at 8 & n.13.

[18] *Id.* at 8 (stating that ex ante discussions could "reduce the extent to which litigation is needed to resolve issues relating to patent and standards").

[19] Majoras, Royalty Discussions, at 7; VITA DOJ Business Review Letter, at 9 n.27.

[20] *Bonito Boats*, 489 U.S. at 146.

[21] *Id.* at 150. The Constitution authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their respective . . . Discoveries." U.S. Const. art. I, § 8, cl. 8.

[22] *See generally* FTC Report; NAS-STEP Report.

[23] *See, e.g.*, S. 3818, 109th Cong. (2006); H.R. 2795, 109th Cong. (2005).

[24] *Teleflex*, 2005 WL 23377, *cert. granted*, 126 S. Ct. at 2966; *see also* Brief for the United States as Amicus Curiae, KSR Int'l Co. v. Teleflex, Inc., 2006 WL 1455388 (May 25, 2006) [hereinafter U.S. Amicus Brief]. The Supreme Court granted certiorari on June 26, 2006, and heard oral argument on Nov. 28, 2006. *Teleflex*, 126 S. Ct. at 2966, *argued*, 75 U.S.L.W. 3311 (Nov. 28, 2006); *see also eBay*, 126 S. Ct. at 1841 (addressing issue of which test courts should employ in awarding permanent injunctive relief under the Patent Act).

[25] U.S. Amicus Brief, at *12.

[26] *Id.* at *9. Similarly, the Solicitor General's amicus brief on the merits argued that the Federal Circuit test for nonobviousness "exacts a heavy cost in the form of unwarranted extension of patent protection to obvious subject matter." Brief for the United States as Amicus Curiae Supporting Petitioner, KSR Int'l Co. v. Teleflex, Inc., 2006 WL 2453601, at *10 (Aug. 22, 2006). Some members of the Supreme Court have also recently shown interest in reevaluating what constitutes eligible subject matter. *See* Laboratory Corp. of Am. Holdings v. Metabolite Labs., Inc., 126 S. Ct. 2921, 2925 (2006) (Justice Breyer, joined by Justices Stevens and Souter, argued in a dissent to a dismissal of certiorari as improvidently granted that the Court should address the issue of whether certain patents should be deemed "invalid in light of the 'law of nature' principle.").

[27] Performance and Accountability Report Fiscal Year 2006, U.S. Patent and Trademark Office, Message from the Director, at 2, *available at* http://www.uspto.gov/web/offices/com/annual/2006/200_message_director.html.

[28] *Id.*

[29] For example, the PTO has proposed rule changes "to produce a more focused, higher-quality, and efficient [patent] examination," and "to provide the most relevant information to examiners as early as possible." *Id.* at 3.

[30] Id. at 2.

Chapter II
Enforcement Institutions and Processes

In the United States, in addition to the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), fifty states and the District of Columbia are authorized to enforce federal antitrust laws as *parens patriae*, including in instances where the federal enforcers might have chosen not to challenge a transaction or conduct. Each state also has its own antitrust laws, which generally parallel federal law. In addition, numerous international competition authorities have begun to pursue enforcement much more aggressively, sometimes at odds with U.S. enforcement policies.

Principles of federalism and sovereignty support the authority of these many enforcers. Their existence is not without costs, however. Multiple enforcers may investigate the same conduct or transaction, increasing the burdens on companies and, ultimately, costs to consumers. In addition, different authorities may have divergent views as to how antitrust law should apply to certain types of conduct or mergers. These differences potentially subject companies to a range of different legal obligations, thus either imposing substantial compliance costs or compelling companies to follow the rules of the most restrictive jurisdiction. Multiple enforcers also may seek different remedies with respect to the same conduct or transaction, whether because they view the merits of the conduct or merger differently, or because the applicable law compels a different outcome. All of these differences across antitrust authorities have the potential to impose costs and inefficiencies on companies that may be passed on to consumers.

Of course, antitrust compliance and enforcement will always impose some costs on companies, regardless of the number of enforcers. It is important, however, to ensure that those costs do not overwhelm the benefits of antitrust enforcement or undermine consensus about the value of a strong antitrust enforcement regime. Enforcers should strive to avoid the imposition of unreasonable costs—for example, costs not reasonably justified by legitimate needs to gather further evidence or that could be avoided by coordination with, or deference to, other antitrust enforcers.

The Commission was urged to examine the need for multiple enforcers and the costs that multiple enforcers impose. In particular, it was suggested that the Commission consider whether it is necessary to maintain two federal enforcement agencies—the DOJ and the FTC—to enforce the antitrust laws and whether it is necessary, or even appropriate, for states to enforce federal antitrust law as *parens patriae*. In addition, many commenters expressed concern about international enforcement, including the potential that other jurisdictions might apply their competition laws to discriminate against U.S.-based companies, that international trade might be adversely affected by the policies of other jurisdictions that may be more restrictive than those of the United States, or that other regimes might be more hostile to intellectual property rights.

These important and interrelated questions focus attention directly on the procedural mechanisms used to enforce the antitrust laws. Accordingly, the Commission undertook to study a range of issues relevant to enforcement institutions and processes. The recommendations set forth in this Chapter address: (A) the consequences and costs of having two principal federal antitrust enforcers; (B) the costs of the merger review process used by the FTC and the DOJ pursuant to the Hart-Scott-Rodino Act; (C) the authority of the states independently to enforce federal antitrust laws; and (D) the implementation of mechanisms to enhance international cooperation in antitrust matters and appropriate convergence toward similar procedural and substantive approaches under each nation's antitrust laws.

Chapter II.A
Dual Federal Enforcement

1. INTRODUCTION

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have shared responsibility for government enforcement of the federal antitrust laws for decades. The position of Assistant Attorney General for Antitrust was created in 1903, and the Antitrust Division became a separate operating unit within the Department of Justice thirty years later.[1] Congress separately created the FTC in 1914, in part specifically to supplement the DOJ's enforcement of the antitrust laws.[2] Congress also believed that an administrative agency—conducting administrative adjudication of antitrust cases, and vested with broad information-gathering powers—would be a better vehicle for developing more flexible standards of antitrust law than were the courts.[3]

The antitrust enforcement authority of the DOJ and the FTC are similar. The DOJ enforces the Sherman Act and the Clayton Act through civil actions, and may also criminally prosecute certain "hard core" offenses under the Sherman Act. The FTC enforces the antitrust laws through Section 5 of the FTC Act, which prohibits "[u]nfair methods of competition," a term that is generally coextensive with the prohibitions of the Sherman and Clayton Acts.[4] In addition to actions in federal court, the FTC may enforce Section 5 through internal administrative litigation (known as Part III proceedings) before an administrative law judge, with review by the five FTC Commissioners and then a federal court of appeals.[5]

This system of "dual enforcement" has been the subject of periodic debate. Critics contend that having two agencies enforce the federal antitrust laws entails unnecessary duplication and can result in inconsistent antitrust policies, additional burdens on businesses, or other obstacles to efficient and fair federal antitrust enforcement. Some have suggested eliminating the FTC's antitrust authority; others propose reallocating nearly all antitrust enforcement authority to the FTC, with the DOJ prosecuting only criminal violations of the Sherman Act.

The Commission recommends no comprehensive change to the existing system in which both the FTC and the DOJ enforce the antitrust laws.* There appears to have been little, if any, duplication of effort between the two agencies, and they typically have worked together to develop similar, if not identical, approaches to substantive antitrust policy.[6] Although concentrating enforcement authority in a single agency generally would be a superior institutional structure,[7] the significant costs and disruption of moving to a single-agency system

* Commissioners Kempf, Litvack, and Shenefield would recommend eliminating the FTC's antitrust enforcement authority and vesting responsibility for all antitrust enforcement with the DOJ.

at this point in time would likely exceed the benefits.[8] Furthermore, there is no consensus as to which agency would preferably retain antitrust enforcement authority.

Because the Commission concluded that consolidation or reallocation of authority is not worth the costs (and any such efforts would likely be politically very difficult), the Commission focused its study and recommendations on the areas in which dual enforcement appears to have the most significant negative consequences. In particular, concerns regarding efficiency and fairness remain in the area of merger enforcement, where both agencies are responsible for enforcing the Clayton Act through the Hart-Scott-Rodino Act (HSR Act) premerger notification system. The Commission studied two particular ways in which having two agencies creates inefficiencies or unfairness to merging parties in certain situations.

First, the Commission reviewed the process through which the DOJ and the FTC decide which agency will investigate a proposed merger (known as the "clearance process"). In some instances—most frequently high-profile mergers between large companies—the agencies take a lengthy time, sometimes exceeding thirty days, to decide which agency will conduct the investigation of the merger. These delays impose significant burdens on companies with time-sensitive transactions that potentially provide great value to consumers and shareholders alike. The agencies attempted to address these concerns in 2002 by entering into an agreement regarding the clearance process that sought to ensure a decision would be made within ten days. However, the agencies abandoned this agreement after congressional opposition to its provisions allocating mergers based on industry area. The delays the agreement appeared to alleviate remain.

Second, the FTC and the DOJ take different approaches when seeking an injunction from a court to block a merger, in part because of the different statutes governing their authority in such instances. The DOJ generally seeks a permanent injunction (along with a preliminary injunction) against mergers it believes are anticompetitive, resolving the question fully and completely in a single proceeding before a judge. If the DOJ fails to obtain the permanent injunction it seeks, the parties can consummate the merger without further antitrust litigation (assuming the DOJ does not appeal). In contrast, the FTC seeks only preliminary injunctions—not permanent injunctions—in federal district court when challenging mergers it believes are anticompetitive. The FTC's approach permits it to seek permanent relief in administrative Part III proceedings if it fails to obtain a preliminary injunction. Thus, although the parties can consummate the proposed transaction (absent a stay), antitrust litigation may continue for the merged parties while the FTC pursues permanent relief via Part III proceedings. Such administrative litigation can be lengthy, leaving a completed transaction in the limbo of litigation for over a year. In addition, the statutory standard governing when the FTC is entitled to preliminary relief is arguably more favorable to the government than is the general standard governing motions by the DOJ for preliminary relief.

Some believe that these differences in DOJ and FTC practices and standards result in mergers' being treated differently depending on which agency is involved. The FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ. Regardless of the degree of effect, these factors have led some knowledgeable practitioners to believe that companies whose mergers are investigated by the FTC are at a disadvantage as compared with those investigated by the DOJ. Any such differences—real or perceived—can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger.

Based on its study of these issues, the Commission makes the following recommendations.

22. The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.

23. To ensure prompt clearance of all transactions reported under the Hart-Scott-Rodino Act, Congress should enact legislation to require the Federal Trade Commission and the Antitrust Division of the Department of Justice to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short period of time (for example, no more than nine calendar days) after the filing of the pre-merger notification.*

24. The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.†

25. Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.**

* Commissioners Burchfield, Cannon, and Yarowsky do not join this recommendation.

† Commissioners Cannon and Yarowsky do not join this recommendation.

** Commissioners Burchfield, Garza, Jacobson, and Kempf do not join this recommendation.

26. Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.*

2. THE MERGER CLEARANCE PROCESS

A. Background

Merger enforcement at both the DOJ and the FTC consists primarily of the review of proposed mergers pursuant to the HSR Act.[9] Although the DOJ and the FTC have concurrent, overlapping authority to review nearly all HSR-reportable transactions,[10] in practice only one agency takes responsibility for investigation of a particular merger. To eliminate duplication in agency merger enforcement efforts, the agencies decide between themselves which agency will conduct a formal investigation of a particular transaction.[11] They accomplish this through the "clearance process"—one agency requests authority to investigate a transaction from the other agency, which "clears" the request. Neither agency will request non-public information from the merging parties (or third parties) until clearance has been received from the other agency.[12]

A large majority of mergers reported under the HSR Act do not raise competitive concerns and therefore do not result in clearance requests by either agency. Indeed, in over 80 percent of transactions over the past five years, neither agency sought clearance.[13] In most other cases, one agency requests clearance, which the other agency grants quickly. Usually, such matters involve industries in which one agency has a long record of expertise and experience, which is the traditional basis for assigning a merger to one agency or the other.[14]

In a limited number of cases, however, both agencies seek clearance to investigate a transaction, and the agencies must jointly determine which agency will conduct the investigation. In some matters in which clearance is "contested," the dispute is relatively quickly resolved because one agency concedes the other has greater relevant expertise in the products or industry at issue. In other matters, however, resolution of the dispute takes more

* Commissioners Burchfield, Cannon, and Yarowsky do not join this recommendation.

steps. First, the staff of each agency submits a "claims memo," explaining that agency's relevant experience regarding the product or industry involved in the merger.[15] Then the dispute is passed to increasingly senior staff until it is resolved, sometimes by the Chairman of the FTC and the Assistant Attorney General for Antitrust.[16] As detailed below, these disputes can cause significant delays in the review of a merger.

The FTC and the DOJ have long recognized concerns over clearance delays and have periodically implemented procedures that aim to reduce those delays.[17] Indeed, they have longstanding procedures regarding clearance for both merger and non-merger investigations.[18] Most recently, in August 2001, then-FTC Chairman Timothy Muris and then-Assistant Attorney General Charles James launched an effort to address increasingly serious delays in clearance. After an internal review, and after seeking recommendations from former antitrust officials, the FTC and the DOJ in early 2002 reached agreement on a new clearance framework.[19]

The 2002 Clearance Agreement explicitly identified which industries would be the primary responsibility of each agency.[20] These allocations of responsibility generally were consistent with the existing practices of assigning a merger to the agency with greater experience and expertise in the particular industry.[21] Under the agreement, each agency had a "right of first refusal" to review transactions in industries within its primary responsibility; both agencies retained authority to seek clearance for mergers in industries allocated to the other agency.[22] Thus, the agreement did not transfer or alter "jurisdiction" over mergers in particular industries. This allocation (and the 2002 Clearance Agreement itself) was subject to review every four years.[23] Finally, in the event a dispute arose regarding a particular transaction, the agreement created a dispute resolution mechanism, proceeding though increasing levels of seniority to the agency head, and then, if necessary, to binding arbitration, with a specified time—ten days—within which a clearance decision was to be made.[24]

The 2002 Clearance Agreement was in effect for only about two months, at which point the Antitrust Division withdrew from the agreement at the direction of the Attorney General. This withdrawal followed objections by Senator Ernest Hollings (at the time the Ranking Member on both the Senate Commerce Committee and the Senate Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary) relating to certain of the industry allocations.[25] The FTC and the DOJ have not subsequently sought to implement a revised version of the 2002 Clearance Agreement, and have therefore continued to follow previous agreements regarding clearance.

B. Recommendations and Findings

22. The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.

Clearance disputes impose substantial costs in a small but meaningful number of mergers. Although clearance disputes are relatively infrequent, when they occur they can cause significant delays in the review of a proposed transaction, since neither agency can investigate until the dispute is resolved.[26] Because these disputes reduce the time for initial review, they impose costs on merging parties either by extending the wait before they may consummate the transaction or by leading to the unnecessary issuance of a costly and burdensome second request, and sometimes both.[27] These effects can be especially significant because the transactions that spark clearance disputes are often among the largest mergers with the most substantial implications (whether positive or negative) for the U.S. economy.[28] These disputes, and the costs they impose, ultimately undermine the effectiveness and efficiency of agency review of proposed transactions under the HSR Act, and their elimination is of particular importance.[29] Moreover, the disputes create tension in the normally cooperative relationship between the two agencies and undermine public confidence in the U.S. antitrust enforcement regime.[30]

In the most serious instances, a clearance dispute may consume so much time that the agency cannot conduct an initial competitive assessment within the statutory thirty-day waiting period. In this situation, the agency may issue a second request, thereby preventing the parties from completing the transaction until they have complied with the second request, and imposing upon the parties the burden of responding to that request.[31] More commonly, the agencies provide the parties with an option to withdraw their pre-merger notification and re-file it, which restarts the thirty-day waiting period and allows the parties to forestall issuance of a second request.[32] This approach, in essence, transforms the statutory thirty-day waiting period into a sixty-day waiting period, so that the parties must wait an additional thirty days before either consummating their transaction or receiving and responding to a second request.[33]

The average number of clearance disputes each year (including merger and non-merger) increased more than seven-fold, from an average of ten during FY1982–89 to an average of eighty-three during FY1990–2001.[34] By comparison, reported transactions rose only 74

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percent.[35] The number of clearance disputes since 2002 has remained stable when adjusted for the number of HSR filings.[36] The reasons for the increase are not clear. Some commentators suggest that the increase in clearance disputes is, in part, the result of changes in the economy, such as increased convergence between industries that were formerly distinct, which has made the existing arrangements that relied on industry experience less effective at providing clear determinations.[37] Whatever the cause, it is clear that clearance disputes continue to affect a small but meaningful number of mergers notified under the HSR Act.

The delays from clearance disputes are significant, however measured. Data compiled in developing the 2002 Clearance Agreement show that clearance disputes delayed review of a transaction an average of 17.8 business days during a twenty-one-month period.[38] Even where only one agency sought clearance, there were numerous instances in which the other agency delayed granting clearance for more than one week; clearance in these matters took an average of 12.8 days to resolve.[39] Recent data provided to the Commission by the agencies show that clearance-related delays remain. The FTC and the DOJ calculate that, over the past seven years, the average time for clearing HSR Act merger matters when both agencies sought clearance was 10.7 business days after the HSR filing.[40] This figure likely understates the magnitude of the problem for two reasons. First, this average is based on 297 matters in which both agencies made a claim for clearance; it is not limited to those in which the dispute was sufficiently significant to warrant an exchange of claims memos, which occurred 92 times.[41] It is the latter type of matter in which clearance delays can be most pronounced. Second, the agency data provide only averages, and do not give any indication of the incidence of lengthy delays. The agencies were unable to provide to the Commission such detailed data, which, if available, could shed additional light on the problems posed by clearance delays.

A clearance system containing the central elements of the 2002 Clearance Agreement is the most effective way to address the problems besetting the clearance process. The 2002 Clearance Agreement received uniform praise for being a fair and effective solution to the clearance dispute problem, and would be a marked improvement over the existing clearance process.[42] Moreover, the current agency heads recognize that approach as superior to the current arrangement.[43] Experience with the 2002 Clearance Agreement, although it was in place for only a short time, confirmed its effectiveness in expediting the clearance process and decreasing the number of clearance disputes.[44]

Ultimately, of course, the agencies should have final responsibility for developing the details of an improved clearance system, given their greater familiarity with the issues involved.[45] Nevertheless, because the 2002 Clearance Agreement provides the best starting point for the development of an improved clearance system, the Commission wishes to highlight two significant features of that agreement that should be part of any new agreement.

The most significant feature of the 2002 Clearance Agreement was its allocation of areas of primary responsibility by industry area.[46] This minimized room for clearance disputes in the first place, permitting quick determinations in the sizable majority of cases. It also provided transparency and predictability to the business community with respect to which agency would review a particular transaction.[47] Furthermore, by making an express allocation by industry in advance, the 2002 Clearance Agreement made further acquisition of expertise irrelevant to clearance decisions. In doing so, the agreement eliminated the agencies' incentives to conduct unnecessary, or more extensive, investigations in ongoing cases to enhance claims of expertise for use in future disputes.[48] Similarly, the allocation eliminated the agencies' incentives to fight for clearance to review a particular merger in order to preserve its claims of expertise in future mergers in the same or similar industries.[49]

The Commission does not take a position on how industries should be allocated between the two agencies or the specific allocations in the 2002 Clearance Agreement. However, those allocations may provide a useful starting point for discussion, because they were based largely on the agencies' historical experience and resulted from extensive negotiation between the agencies.[50] Far more important than the specific allocations is finding a procedure that permits the agencies to reach clearance decisions quickly.[51]

A second feature of the 2002 Clearance Agreement that should be part of any new clearance system is a "tie-breaker" to govern in the event the agencies cannot quickly agree to a clearance decision.[52] The agreement used an arbitrator to break deadlocks so that a final decision was ensured within ten days of the initial clearance request.[53] The Commission does not take a position on what tie-breaker the agencies should use. Although arbitration can result in clearance to the agency with greater relative experience, it takes additional time.[54] By comparison, a random mechanism—such as a coin flip, a "possession arrow" that alternates which agency gets clearance in disputed matters, or allocation of disputed matters depending on whether the transaction is assigned an odd or even file number—provides a nearly instantaneous decision, but sacrifices allocating a merger to the agency with greater relevant expertise and may be subject to "gaming."[55] Regardless of how the agencies balance these competing concerns and which tie-breaker they decide is best, however, any clearance agreement they adopt should include some tie-breaking mechanism that ensures final resolution within a short period (no longer than nine days) from the initial filing.

Finally, the Commission urges Congress and the agencies to work together in developing a new clearance system. Congressional opposition led to the demise of the 2002 Clearance Agreement, and concern over the potential for renewed congressional opposition has prevented the FTC and the DOJ from seeking to implement a new clearance agreement since 2002.[56] To facilitate congressional support and guidance, the agencies should consult with the appropriate congressional committees in developing a new clearance agreement. Congress should encourage the agencies in this process and provide guidance to allow the agencies to implement a clearance agreement that is satisfactory to Congress.[57]

23. To ensure prompt clearance of all transactions reported under the Hart-Scott-Rodino Act, Congress should enact legislation to require the Federal Trade Commission and the Antitrust Division of the Department of Justice to clear all mergers reported under the Hart-Scott-Rodino Act (for which clearance is sought) to one of the agencies within a short period of time (for example, no more than nine calendar days) after the filing of the pre-merger notification.*

The Commission also recommends that Congress enact a statute that requires the agencies to resolve clearance promptly. A statute will impose additional discipline on the agencies to ensure that clearance is resolved expeditiously. Furthermore, it will enhance the ability of Congress to use its oversight authority to monitor the agencies' compliance with the clearance requirement. Indeed, whether or not Congress enacts legislation in this area, the Commission believes that the timeliness of clearance dispute resolutions should be a part of Congress' continuing oversight of the agencies.

The legislation should require the agencies to make clearance decisions within a short period (*e.g.*, nine days) after the merging parties submit their pre-merger notification under the HSR Act. A period of this length is appropriate; indeed, the agencies have previously committed to resolving clearance within nine days from the date of filing.[58] The statute should not include a penalty for the failure of the agencies to comply with its terms, however, and Congress should make clear that the statute does not create any implied penalties (or rights) that would prevent effective merger enforcement on the merits of the transaction. A penalty that, for example, allowed the parties to consummate the transaction if the agencies failed to provide timely notification could harm consumers and would not effectively penalize the agency.[59] Rather, congressional oversight, facilitated by agency recordkeeping regarding compliance, should provide sufficient opportunity to impose any needed corrective action against the agencies.

Possible legislation that would impose such a requirement appears in Annex A.

* Commissioners Burchfield and Cannon do not join this recommendation.

Commissioner Burchfield notes that precatory, or even mandatory, congressional deadlines on agencies have rarely been effective in other contexts, and sees no reason to believe one would be more so here.

Although Commissioner Carlton joins this recommendation, he would impose some financial penalty on the agencies for failing to resolve clearance within the appropriate period.

3. INJUNCTIONS AND ADMINISTRATIVE LITIGATION IN MERGER MATTERS

A. Background

Both the FTC and the DOJ have essentially identical authority to conduct investigations under the HSR Act.[60] Both agencies are also authorized to seek an injunction in federal court to prevent consummation of a merger they believe may substantially lessen competition.[61] If the court grants an injunction, the parties almost always abandon the transaction because of the cost and uncertainty of keeping the deal in place while seeking reversal on appeal.[62] When a court denies the injunction, the parties typically complete the transaction nearly immediately (absent a stay by a court of appeals). Once a merger is completed, the agency is unlikely to seek any further action.[63]

Although both agencies have similar authority, their practices with respect to seeking permanent injunctions differ. Generally, the DOJ agrees with the parties to combine (or consolidate) proceedings for both a preliminary injunction and a permanent injunction before a district court.[64] The FTC's practice, in contrast, is to seek only a preliminary injunction in court (despite statutory authorization to seek permanent relief in court as well).[65] This practice results from its statutory authority to secure permanent relief through administrative litigation, an avenue not available to the DOJ. The FTC has never consolidated proceedings for preliminary and permanent relief in federal court in a merger case,[66] and has in fact affirmatively sought to prevent such consolidation.[67] The FTC's practice thus prevents consolidation under the rules of civil procedure.[68]

This difference in approach has two consequences. First, the DOJ generally faces a higher burden of proof before the court. Obtaining a permanent injunction requires the DOJ to prove its case by a preponderance of the evidence.[69] By comparison, the FTC needs to meet only a lower burden applicable to preliminary injunctions in government merger enforcement litigation (and, as explained below, the FTC arguably faces a preliminary injunction burden that is lower than that the DOJ would face if it sought only preliminary relief).[70] Second, the FTC, by not seeking a permanent injunction, retains the option to seek permanent relief through its internal administrative litigation process. It thus may pursue administrative litigation even when the district court does not grant a preliminary injunction.[71] In 1995 the FTC adopted a policy setting forth the circumstances in which it will bring administrative litigation after the denial of a preliminary injunction in merger cases.[72]

B. Recommendations and Findings

Parties to a proposed merger should receive comparable treatment and face similar burdens regardless of whether the FTC or the DOJ reviews their merger.[73] A divergence undermines the public's trust that the antitrust agencies will review transactions efficiently and fairly. More important, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction. In particular, the divergence may permit the FTC to exert greater leverage in obtaining the parties' assent to a consent decree.[74] So long as both agencies retain authority to enforce the antitrust laws, such divergence should be minimized or eliminated. To accomplish this objective, the Commission makes three interrelated recommendations for administrative action and legislative change that, together, will ensure that parties before either agency face comparable procedural approaches and burdens when an injunction is sought, regardless of which agency reviews their merger.

24. The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.*

The differences in the agencies' policies regarding consolidation of actions for preliminary and permanent relief impose significantly different burdens on the parties in two respects. The DOJ usually agrees with the merging parties to consolidate proceedings for preliminary and permanent injunctions; it therefore must establish that the proposed merger would violate Section 7 of the Clayton Act by a preponderance of the evidence.[75] By comparison, the FTC must meet the burden required for obtaining a preliminary injunction, which is generally regarded as lower.[76] Because the grant of any injunction (whether preliminary or permanent) almost always kills the deal, this difference could materially affect the parties' prospects for completing their transaction.[77] Second, the decision of the district court in a consolidated DOJ proceeding is final (barring an appeal); if the DOJ loses, the parties can be certain that the challenge is finished.[78] In contrast, if the FTC fails to obtain a preliminary injunction, it may pursue relief in a potentially lengthy and costly internal administrative proceeding.

The FTC has rarely sought administrative remedies after losing a preliminary injunction. This change in practice would eliminate that possibility altogether. The mere availability of such proceedings can harm parties by creating uncertainty as to the legal status of their transaction, a risk not faced when the DOJ brings a challenge to a merger. It thus can give the FTC greater leverage in seeking concessions in a consent decree. Although the FTC has not pursued a full administrative trial after denial of a preliminary injunction in at least fif-

* Commissioners Cannon and Yarowsky do not join this recommendation.

teen years,[79] its policy regarding the circumstances in which it would seek administrative litigation following the denial of a preliminary injunction does not rule out the possibility that it may pursue this course.[80] Indeed, in 2005 the FTC left an administrative complaint pending against Arch Coal for over eight months after it had failed to obtain a preliminary injunction, and has acted similarly in the recent past.[81]

This recommendation calls for the FTC to conform its practice to the DOJ's current practice regarding consolidation and thereby eliminate the difference in burden resulting from the agencies' divergent practices. There does not appear to be any obstacle to the FTC's adoption of the DOJ's approach: Section 13(b) of the FTC Act permits the FTC to seek permanent, as well as preliminary, injunctions in federal court.[82] This recommendation contemplates that the FTC may, as the DOJ does now, condition its consent to consolidation on the parties' agreement to a reasonable timetable for pre-hearing matters, in order to permit the FTC sufficient time to prepare its case on the merits.[83] The FTC should be able to agree to a reasonable schedule, just as the DOJ generally has been able to reach such agreements with merging parties.[84] In instances where the FTC cannot agree with the parties on timing and therefore seeks only a preliminary injunction, however, it should also seek any permanent relief in court, as the DOJ does, not in administrative litigation.

25. Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.*

The FTC's ability to pursue administrative litigation even after losing a preliminary injunction proceeding can impose unreasonable costs and uncertainty on parties whose mergers are reviewed by the FTC, as compared to the DOJ.[85] If, as recommended above, the FTC seeks permanent relief in federal court it will not be able to bring administrative proceedings to challenge mergers. Statutory change, however, will ensure that even where the FTC does not seek permanent relief in court, it will not be able to resort to administrative liti-

* Commissioners Burchfield, Garza, Jacobson, and Kempf do not join this recommendation.

Commissioner Burchfield would preserve the option of subsequent administrative proceedings for situations in which, for whatever reason, the preliminary injunction and permanent injunction phases are not consolidated. He also notes that removing the authority of the FTC would be practically meaningless so long as the FTC retains the ability to reinstitute administrative proceedings against a consummated merger.

Commissioners Garza and Jacobson believe that follow-on administrative litigation following the denial of a preliminary injunction is inappropriate except in highly unusual contexts. Because the FTC has already acknowledged this point in its internal policy, Commissioners Garza and Jacobson believe that statutory change is both unnecessary and potentially harmful.

gation.[86] As a result, an amendment of the statute to bar administrative litigation in HSR cases will provide further reason for the FTC to seek permanent relief in district court, as recommended above.

Elimination of administrative litigation in HSR Act merger cases will not deprive the FTC of an important enforcement option. Although administrative litigation may provide a valuable avenue to develop antitrust law in general,[87] it appears unlikely to add significant value beyond that developed in federal court proceedings for injunctive relief in HSR Act merger cases.[88] Whatever the value, it is significantly outweighed by the costs it imposes on merging parties in uncertainty and in litigation costs. Indeed, the FTC's own conduct confirms holding administrative trials after losing an injunction rarely, if ever, adds significant value, as the FTC has not held an administrative trial regarding an HSR Act merger after losing a preliminary injunction motion in recent years.

The proposed statutory bar would not preclude the FTC from pursuing an administrative complaint after the consummation of a merger, based on evidence that the merger has had actual, as opposed to predicted, anticompetitive effects. In such circumstances, the merger is no longer in the time-sensitive stage of HSR Act review and should be subject to the FTC's usual administrative process.[89]

26. Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.*

There is at least a perception, if not a reality, that the FTC and the DOJ face different standards for obtaining a preliminary injunction.[90] Some antitrust practitioners contend that the

* Commissioners Burchfield, Cannon, and Yarowsky do not join this recommendation.

Commissioner Burchfield believes the case law has become clear that, unless Congress has articulated a different standard for injunctive relief, as it did for the Endangered Species Act, 16 U.S.C. §§ 1531-1544, *see* Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978), the traditional equitable test governs the grant or denial of injunctions, *see* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), and eBay, Inc. v. MercExchange, LLC, 126 S. Ct. 1837 (2006). This evolving authority suggests that the DOJ and the FTC confront the same preliminary injunction standards. Further legislation on this issue is as likely to confuse as clarify.

Commissioners Garza, Jacobson, and Kempf join this recommendation but believe that the standard today is the same and that such legislation is not truly necessary. Nevertheless, clarification can do no harm and may be beneficial by removing possible doubts.

standard applicable to FTC actions, as applied by the courts, is less burdensome, or is generally perceived to be less burdensome, than the standard applicable to DOJ actions.[91] This difference (or even a perception of difference) can lead to adverse consequences for parties whose transaction is reviewed by the FTC. In particular, the FTC may have greater leverage in negotiating a consent decree with the merging parties.[92] In addition, just the perception that the applicable rules depend on the happenstance of which agency is reviewing the transaction can undermine confidence in the fairness of the dual merger enforcement regime.

The agencies face nominally different standards governing whether a federal district court will issue a preliminary injunction. The FTC must meet a public interest standard under Section 13(b) of the FTC Act, which calls for an injunction to be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[93] Courts have employed a number of formulations in describing the required burden, such as whether the FTC raises questions that are "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation."[94] By comparison, Section 15 of the Clayton Act, pursuant to which the DOJ seeks injunctions, does not specify a standard for obtaining preliminary relief. Accordingly, courts generally apply a version of the traditional equity test, which does not require the usual showing of irreparable injury.[95] Some courts describe the proper test as "whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tips in its favor."[96]

While the magnitude of the difference between the two standards is not clear, the Commission believes Congress should remove all doubt by ensuring that courts apply the same standard in ruling on a motion for a preliminary injunction, whether the injunction is sought by the FTC or the DOJ.[97] The Commission recommends that the statute omit any specific standard for granting a preliminary injunction, which should lead courts to employ the version of the traditional equity test that they use in merger cases brought by the DOJ. This change should not hamper the FTC's ability to obtain injunctive relief in appropriate cases;[98] on the contrary, its ability should be identical to that of the DOJ.

This statutory change should not extend beyond HSR Act merger cases. Section 13(b) gives the FTC general authority with respect both to competition and consumer protection cases. The Commission did not undertake to study whether this standard was inappropriate in other areas, particularly consumer protection. The legislation therefore should make clear that the existing statutory language of Section 13(b) would continue to apply to injunctions sought by the FTC in consumer protection and other non-HSR merger cases.

ANNEX A

Amend 15 U.S.C. § 18a to add subsection (e)(1)(B) as follows, and redesignate existing subsection (e)(1)(B) as subsection (e)(1)(C).

> No later than the end of the ninth day after the beginning of the waiting period as defined in subsection (b)(1)(A) of this section, the Federal Trade Commission or the Assistant Attorney General shall inform both persons (or in the case of a tender offer, the acquiring person) whether the Federal Trade Commission or the Assistant Attorney General will have the authority to issue a request for additional information (if any) pursuant to this subsection.

Notes

[1] *See* Ernest Gellhorn et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 Antitrust Bull. 695, 717–18 (1990) [hereinafter Gellhorn, *Has Antitrust Outgrown Dual Enforcement?*].

[2] D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. 319, 319–20 (2003). *See generally* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1, 4–5 (2003).

[3] *See* American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Dual Federal Merger Enforcement, at 2 (Oct. 28, 2005) [hereinafter ABA Comments re Dual Federal Merger Enforcement]; David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 Antitrust L.J. 1113, 1113–14 (2005) [hereinafter Balto, *Reassessing the Approach to FTC Remedies*] (citing Philip Elman, Antitrust Enforcement: Retrospect and Prospect, Remarks Before First New England Antitrust Conference (Mar. 31, 1967)). The FTC has specific authority to gather information, which it may use to "enhance the development of antitrust law through studies and publication of reports." Balto, *Reassessing the Approach to FTC Remedies*, at 1114; William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 Antitrust L.J., 861, 865–66 (2005) (emphasizing the importance of "competition policy R&D"); *see also* Guide to the Federal Trade Commission, *available at* http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm#bc (stating that "Congress created the FTC as a source of expertise and information on the economy" and noting as an example the FTC's research and policy work public workshops on issues such as the development of electronic marketplaces).

[4] 15 U.S.C. § 45. Section 5 of the Federal Trade Commission Act generally covers conduct condemned by the Sherman, Clayton, and Robinson-Patman Acts, but in some circumstances it may cover unfair methods of competition that are not unlawful under those laws. *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); *see also* American Bar Association, Section of Antitrust Law, Antitrust Law Developments 647–56 (6th ed. 2007) [hereinafter Antitrust Law Developments] (describing antitrust laws and other laws that the FTC is authorized to enforce and its authority under Section 5 of the FTC Act). The FTC does not have criminal enforcement authority.

[5] *See* 15 U.S.C. § 45(b)–(c); 16 C.F.R. § 3 (2006). In merger cases, the FTC may seek a preliminary or permanent injunction in federal court. 15 U.S.C. § 53(b).

[6] *See* Federal Enforcement Institutions Transcript at 102 (Sohn) (Nov. 3, 2005) (discounting the need for diversity in decision makers in merger regulation since "[t]he agencies have gone to considerable pains

to get together on the substance of Section 7"); Prof. Timothy J. Muris, Statement at AMC Federal Enforcement Institutions Hearing, at 15 (Nov. 3, 2005) [hereinafter Muris Statement re Federal Enforcement] (describing the agencies' efforts "to develop[] common substantive standards and to apply[] them consistently" in merger regulation). The agencies' joint development of the *Horizontal Merger Guidelines* and the *Commentary on the Horizontal Merger Guidelines* has facilitated this convergence.

[7] *See, e.g.*, Joe Sims, Statement at AMC Federal Enforcement Institutions Hearing, at 2 (Nov. 3, 2005) [hereinafter Sims Statement] ("[n]o sensible person would design" a dual system); Federal Enforcement Institutions Trans. at 51 (Blumenthal) (in advising other jurisdictions "doing it from scratch, you probably would design it differently . . . [with] one independent agency"); Gellhorn, *Has Antitrust Outgrown Dual Enforcement?*, at 736 ("[D]ual enforcement is at best inefficient, and at worst inconsistent with sound economic policy."); William E. Kovacic, *Downsizing Antitrust: Is it Time to End Dual Enforcement?*, 41 Antitrust Bull. 505, 515, 521, 535 (1996). *But see* Federal Enforcement Institutions Trans. at 85 (Sohn) ("I think there are strong arguments for having both an FTC and a Justice Department at the federal level."); American Antitrust Institute, Public Comments Submitted to AMC Regarding Enforcement Institutions, at 2 (July 15, 2005) [hereinafter AAI Comments re Enforcement Institutions] (dual enforcement can promote a "diversity of viewpoints and policy competition over what merger enforcement policy and cases are best").

[8] *See* Deborah Platt Majoras, Statement at AMC Barnett/Majoras Hearing, at 14 (Mar. 21, 2006) ("[C]hang[ing] the current system would come at a cost that would not be offset by countervailing benefits."); Federal Enforcement Institutions Trans. at 51 (Blumenthal) (arguing that the system generally works well and that the transition costs are substantial relative to any inefficiencies of the current system); *Nomination of Robert Pitofsky to be Chairman of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 104th Cong. 13 (1995) (statement of Robert Pitofsky) (explaining that, although one might not have to set up the antitrust agencies this way in the first place, "the fact of the matter is it works rather well"). *See generally Report of the American Bar Association, Section of Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L.J. 43, 113–19 (1989) [hereinafter 1989 ABA Report] (discussing the advantages and disadvantages of dual enforcement). Previous ABA panels have declined to recommend termination of dual enforcement. 1989 ABA Report, at 119 ("[A] majority of the Committee believe that the case for ending the FTC's role has not been made."); Report of the ABA Commission to Study the Federal Trade Commission 2 (1969) (proposing that concurrent jurisdiction be retained while urging reexamination of the allocation of enforcement resources).

[9] *See generally* Chapter II.B of this Report regarding the Hart-Scott-Rodino Act pre-merger review process.

[10] There are a limited number of exceptions to the HSR Act. *See* 15 U.S.C. § 18a(c) (exempting various types of transactions from HSR's requirements); *see also* 15 U.S.C. § 21(a) (limiting FTC jurisdiction to enforce Section 7 by excluding certain common carriers and banks).

[11] See American Bar Association, Section of Antitrust Law, The Merger Review Process: A Step-By-Step Guide to Federal Merger Review 134–36 (3d ed. 2006) [hereinafter ABA, Merger Review Process].

[12] *See id.* at 135 ("As a consequence [of the understandings underlying the clearance process], neither agency may begin an antitrust-related investigation until clearance has been granted.").

[13] *See* Letter from Marian Bruno and J. Robert Kramer II to Andrew Heimert, at chart D (Nov. 22, 2006, revised Feb. 8, 2007, & Mar. 7, 2007) [hereinafter FTC/DOJ Data Submission].

[14] Federal Trade Comm'n & U.S. Dep't of Justice, FTC/DOJ Clearance Procedures for Investigations (Dec. 1993), *in* American Bar Association, Section of Antitrust Law, The Merger Review Process: A Step-By-Step Guide to Federal Merger Review 513 (2d ed. 2001) [hereinafter 1993 FTC/DOJ Clearance Procedures] ("[T]he principal ground for clearance is expertise in the product involved . . . gained through a substantial antitrust investigation of the product within the last five years."); Michael N. Sohn, Statement at AMC Federal Enforcement Institutions Hearing, at 2 (Nov. 3, 2005) [hereinafter Sohn Statement] ("Traditionally, clearance decisions have been made on the basis of prior experience in leading substantial investigations relating to the product or industry segment in question.") (citing U.S. Department of Justice, Antitrust Division Manual (3d ed. 1998)).

15 Such disputes can happen if, for example, both agencies have significant relevant expertise with respect to the industry or products at issue; if each agency has substantial expertise in different industries or products at issue; or if neither agency has significant expertise in the products or industries at issues.

16 1993 FTC/DOJ Clearance Procedures; ABA Comments re Dual Federal Merger Enforcement, at 11.

17 Muris Statement re Federal Enforcement, at 3–5.

18 ABA, MERGER REVIEW PROCESS, at 134–36. The agencies entered into a revised letter agreement setting forth clearance procedures in 1993. 1993 FTC/DOJ Clearance Procedures.

19 Dep't of Justice, Antitrust Div. & Federal Trade Comm'n, Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002) [hereinafter 2002 Clearance Agreement].

20 *Id.* ¶ 17.

21 Federal Enforcement Institutions Trans. at 133 (Sims, Muris) (allocation was based on "historical experience"); Number of Enforcement Actions and Substantial Investigations by DOJ and FTC, by Industry, *available at* http://www.ftc.gov/opa/2002/02/clearance/clearchart.htm.

22 2002 Clearance Agreement, ¶ 17d.

23 *Id.* ¶ 31.

24 *Id.* ¶¶ 11–16, 25–29.

25 *See* Matt Andrejczak, *Federal Trustbusters Abandon Pact: Justice, FTC Succumb to Budget Threats*, Market Watch, May 21, 2002, *available at* http://www.marketwatch.com/news/story/federal-trustbusters-abandon-merger-review/story.aspx?guid=%7BD7016EC7%2D6F14%2D4975%2D8F56%2D353D8FC05CC0%7D; *see also* Sohn Statement, at 5–6; Sims Statement, at 4.

26 *See* Sims Statement, at 3 (process works "most of time" but can impose unacceptable delay when it breaks down); U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 15 (Nov. 8, 2005) [hereinafter U.S. Chamber of Commerce Comments]; ABA Comments re Dual Federal Merger Enforcement, at 10; William J. Baer, Statement at AMC Merger Enforcement Hearing, at 13 (Nov. 17, 2005) [hereinafter Baer Statement].

27 *See, e.g.*, ABA Comments re Dual Federal Merger Enforcement, at 10 ("All too often clearance is substantially delayed during the initial HSR Act waiting period, resulting either in Second Requests being issued . . . , or in the merging parties being forced unnecessarily to withdraw and re-file . . . to trigger a new, post-clearance, initial waiting period."); Baer Statement, at 13 ("The existing clearance process unduly delays antitrust clearance."); Sohn Statement, at 3–4; Sims Statement, at 3; Business Roundtable, Public Comments Submitted to AMC, at 21 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]. *See generally* Chapter II.B of this Report regarding the HSR Act pre-merger review process, which describes the costs of complying with the second request process.

28 For example, the agencies' clearance dispute over review of the AOL/Time Warner merger, one of the largest deals ever, took 45 days. *See* Letter from John J. Castellani, President, The Business Roundtable, to Timothy Muris, Chairman, FTC, at 4 (Feb. 25, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/brt.pdf; Business Roundtable Comments, at 20–21 (noting lengthy clearance delays in the AOL/Time Warner, AT&T/Media One, Whirlpool/Maytag, and Northrop/United Defense merger matters).

29 *See, e.g.*, ABA Comments re Dual Federal Merger Enforcement, at 10 ("[T]here is a pressing need to fix the system by which merger matters are cleared between the agencies."); Business Roundtable Comments, at 21 (the "clearance process requires an immediate solution").

The Commission's recommendation is focused upon, but not limited to, clearance delays in HSR Act matters, where the problem "ar[ises] most acutely." Muris Statement re Federal Enforcement, at 6. Clearance disputes may also delay non-HSR Act investigations, although the problem for businesses is usually less acute because they are not precluded from engaging in the allegedly unlawful conduct pending agency review. Overall, the sizable majority of clearance disputes arise in HSR Act merger matters: Over 90 percent (92 of 104) of instances in which the agencies exchanged claims memos between FY2000 and FY2006 involved merger matters. *See* FTC/DOJ Data Submission, at chart C.

[30] *See* Federal Enforcement Institutions Trans. at 96 (Sims); John M. Nannes, Statement at AMC Federal Enforcement Institutions Hearing, at 2–3 (Nov. 3, 2005) [hereinafter Nannes Statement]; Muris Statement re Federal Enforcement, at 4–5 (citing one battle in which each side thought the other "was acting in bad faith") (emphasis omitted).

[31] *See* ABA Comments re Dual Federal Merger Enforcement, at 12; U.S. Chamber of Commerce Comments, at 15; ABA, MERGER REVIEW PROCESS, at 141.

[32] *See* U.S. Chamber of Commerce Comments, at 15; ABA Comments re Dual Federal Merger Enforcement, at 10; Muris Statement re Federal Enforcement, at 6; Sohn Statement, at 4; Business Roundtable Comments, at 21.

[33] *See* Merger Enforcement Transcript at 282 (Kramer) (Nov. 17, 2005) (estimating, based on recent experience, that about 40 percent of those who "pull and re-file" receive a second request).

[34] Muris Statement re Federal Enforcement, at 6; Prepared Statement of the Federal Trade Commission Before the Subcommittee on Commerce, Justice, State, and the Judiciary of the Committee on Appropriations, United States Senate (Mar. 19, 2002), *available at* http://www.ftc.gov/os/2002/03/budgetstmt.htm.

[35] Calculations are based on reports by the FTC and the DOJ of transactions in which a second request could be issued. *See* Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 2005, at app. A (2006); Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1997, at app. A (1998); Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1988, at app. A (1989).

[36] FTC/DOJ Data Submission, at chart A (overlap clearance requests and HSR Act transactions increased by 56.7 percent and 52.9 percent, respectively, between 2002 and 2006).

[37] Sohn Statement, at 2 (citing "increasing convergence of industry sectors"); Nannes Statement, at 1–2 (evolution of the economy makes "application of traditional [clearance] allocations more difficult"); ABA Comments re Dual Federal Merger Enforcement, at 12.

[38] Clearance Delays, *available at* http://www.ftc.gov/opa/2002/02/clearance/cleardelaystats.htm. The data reflect the period from the initial request for clearance until clearance was granted.

[39] *Id.*

[40] FTC/DOJ Data Submission, at chart A.

[41] *Id.* at chart A, n.3 & chart C. The data also did not include information on delays in granting clearance when only one agency seeks clearance.

[42] Sohn Statement, at 6 (the Commission "should urge the enforcement agencies to re-endorse the 2002 agreement in consultation with the relevant congressional committees"); Federal Enforcement Institutions Trans. at 121 (Sohn); Sims Statement, at 4; Nannes Statement, at 4 (stating that "although their efforts were not successful, such an approach made sense then and would make sense now"); Merger Enforcement Trans. at 97–98 (Rill, Baer); Muris Statement re Federal Enforcement, at 11–13; Thomas B. Leary, Statement at AMC Government Civil Remedies Hearing, at 7 (Dec. 1, 2005) (describing the 2002 Clearance Agreement as "an act of enlightened statesmanship"); U.S. Chamber of Commerce Comments, at 15.

When the 2002 Clearance Agreement was announced, then-FTC Commissioner Mozelle W. Thompson argued that it had been reached without adequate consultation with other FTC Commissioners and that the problem of clearance delays was not as significant as claimed by proponents of the agreement. *See* Statement of Commissioner Mozelle W. Thompson, Concerning the Mar. 5, 2002, Clearance Agreement Between the Department of Justice and the Federal Trade Commission, *available at* http://www.ftc.gov/

opa/2002/03/clearancemwt.htm; Statement of Commissioner Mozelle W. Thompson, Concurring in Part in, and Dissenting in Part from, the Federal Trade Commission's Mar. 19, 2002, Testimony Before the Senate Commerce, Justice, State and the Judiciary Subcommittee of the Appropriations Committee, *available at* http://ftc.gov/os/2002/03/budgetmwt.htm.

43 Barnett/Majoras Transcript at 43 (Majoras) (Mar. 21, 2006) (noting that the 2002 agreement is a "good idea"); *id.* at 43–44 (Barnett) (observing that an agreement would make the agencies "better off").

44 Muris Statement, at 12; Sims Statement, at 4; Sohn Statement, at 6–7.

45 Federal Enforcement Institutions Trans. at 94 (Nannes) (the resolution should be "accomplished by the antitrust agencies"); *id.* at 121 (Sohn) (the agencies should be "given deference" by Congress in allocating industries); *id.* at 110 (Sims) (agencies should receive "considerable deference" in making industry allocations).

46 Federal Enforcement Institutions Trans. at 87 (Muris) (stating that having industry allocation was "the heart of the agreement"); *id.* at 88 (Sims); *id.* at 90, 93 (Sohn) (stating that the allocation agreement was "all the difference" and that any other approach would be a "distinct second best").

47 *See* Federal Enforcement Institutions Trans. at 93 (Sohn); Business Roundtable Comments, at 22.

48 *See* Business Roundtable Comments, at 22; Muris Statement, at 6 (stating that "agencies waste precious enforcement resources contesting the right to examine specific matters and in conducting investigations in marginal matters for the purpose of using the experience gained to assert claims to other cases in the future"); Nannes Statement, at 2–3.

49 Anecdotal experience suggests that many recent clearance disputes were prolonged unnecessarily in debates over whether a particular clearance resolution would be a "precedent" in clearance disputes regarding future mergers in the same industry. *See* Deborah Platt Majoras, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Houston, We Have a Competitive Problem: How Can We Remedy It?, Remarks Before the Houston Bar Ass'n, Antitrust and Trade Regulation Sec. (Apr. 17, 2002) (clearance disputes sometimes arise due to one "agency's concern that granting clearance to the other agency would permit the other agency to gain expertise, and, perhaps, 'capture' that industry").

50 *See id.* at 131 (Sims) (the agencies should adopt the 2002 Clearance Agreement allocation with minimal change rather than "open[ing] up" those arguments); *id.* at 133 (Muris) (while some changes in the allocation may be needed, "starting over again would be a heroic task"). *But see id.* at 121 (Sohn) (advising the Commission not to recommend that the agencies simply adopt the specific allocation in the 2002 Clearance Agreement).

51 *Id.* at 102 (Sims) (arguing that "it doesn't make all that much difference which agency" reviews a particular merger); *id.* at 102 (Sohn) (same); *id.* at 103 (Muris).

52 *See* Federal Enforcement Trans. at 113 (Muris) ("You need a way to break ties . . . ."); Federal Enforcement Trans. at 111–12 (Sims).

53 2002 Clearance Agreement, ¶¶ 25–29.

54 *See id.* ¶ 27 (providing 48 hours for decision by arbitrator).

55 *See* Federal Enforcement Trans. at 111 (Sims) (arguing that an arbitrator-based system is best, since others, such as the coin flip, "can be gamed in various ways"); ABA Comments re Dual Federal Merger Enforcement, at 14 (describing drawbacks with "random assignment" tiebreaker systems).

56 *See* Barnett/Majoras Trans. at 54 (Majoras) (recounting expressions of concern from the Chairman of the Commerce Committee during her confirmation hearing and explaining the need for this Commission's help on clearance reform "as a practical and political matter").

57 *See* Muris Statement, at 19 (due to congressional opposition to the 2002 Clearance Agreement, "the agencies likely will feel it necessary to consult Congress before any global resolution regarding clearance"); Barnett/Majoras Trans. at 54 (Majoras).

58 Dep't of Justice & Federal Trade Comm'n, FTC/DOJ Announcement of Expedited Clearance Procedure, (Mar. 23, 1995), *in* ABA, MERGER REVIEW PROCESS, at Appendix 18.

[59] *See* ABA Comments re Dual Federal Merger Enforcement, at 14.

[60] *See* ABA, Merger Review Process, at 22–30 (describing the agencies' investigative authority and the processes they follow in conducting HSR Act pre-merger investigations).

[61] 15 U.S.C. § 25 (DOJ); 15 U.S.C. § 53(b) (FTC); *see* ABA, Merger Review Process, at 30–31.

[62] *See* Sohn Statement, at 7, 11 (losing a preliminary injunction hearing is generally final for the parties, since "it is a rare seller whose business can withstand the destabilizing effect of a year or more of uncertainty" regarding the transaction); Sims Statement, at 7 (stating that "the entry of a preliminary injunction is fatal to the deal").

[63] *See* Sohn Statement, at 7 (losing a preliminary injunction hearing is generally final for the agencies, since they are generally unable to obtain effective relief post-consummation).

[64] *See* Federal Enforcement Institutions Trans. at 31–32 (Conrath); Craig Conrath, Statement at AMC Federal Enforcement Institutions Hearing, at 3 (Nov. 3, 2005) [hereinafter Conrath Statement] (the DOJ "agrees, pursuant to Rule 65(a)(2), to a consolidated proceeding combining the preliminary injunction hearing with the trial on the merits" when a reasonable schedule can be reached); Sohn Statement, at 13 (the DOJ "regularly agrees at the outset of a judicial proceeding to consolidate"). Fed. Rule Civ. Proc. 65(a)(2) provides, in part, that "before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."

[65] Section 13(b) specifies that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

[66] The FTC has recently sought permanent injunctive relieve under Section 13(b) to enjoin anticompetitive, non-merger conduct violating Section 5 of the FTC Act. *See, e.g.*, Complaint for Injunctive and Other Equitable Relief, FTC v. Warner Chilcott Holdings Co., No. 1:05-CV-02179, 2005 WL 3439585, ¶ 68, (D.D.C. Nov. 7, 2005).

[67] *See* Pl. FTC's Mem. in Opp'n to Defs.' Mot. Seeking Consolidation of Prelim. & Permanent Injs., FTC v. Arch Coal, Inc., Case No. 1:04-CV-00534, at 3, 4 (Apr. 22, 2004) (arguing against consolidation).

[68] Sohn Statement, at 14 ("Because the preliminary injunction is aimed at preserving the status quo pending a trial before an FTC Administrative Law Judge, the opportunity provided by Rule 65 to consolidate a hearing on the application for preliminary relief with a trial on the merits is unavailable.").

[69] *See* United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004).

[70] Sohn Statement, at 13–14. As discussed below, the FTC or the DOJ need not make the traditional showing of irreparable injury in order to obtain a preliminary injunction to enjoin a merger, but rather must make a sufficient showing of likelihood of success on the merits. *See United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980); 15 U.S.C. § 53(b). *See generally* Antitrust Law Developments, at 408–10.

[71] Although the FTC's approach also permits the agency to seek administrative litigation if it obtains a preliminary injunction in court, in nearly all cases the merging parties moot further action by abandoning the transaction.

[72] Federal Trade Comm'n, Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (Aug. 3, 1995) [hereinafter FTC Administrative Litigation Policy Statement].

[73] American Bar Association, Public Comments Submitted to AMC Regarding Merger Enforcement Standards, at 1 (Oct. 28, 2005) [hereinafter ABA Comments re Merger Enforcement Standards]; Sohn Statement, at 8.

[74] *See* ABA Comments re Merger Enforcement Standards, at 4.

[75] Sohn Statement, at 13–14; *see also Oracle*, 331 F. Supp. 2d at 1109.

[76] *See Oracle*, 331 F. Supp. 2d at 1109 (in consolidated proceeding, "[p]laintiffs have the burden of proving a violation of Section 7 by a preponderance of the evidence"); Sohn Statement, at 13 (consolidation puts the "enforcer to its ultimate burden of proof" before their deal is lost).

[77] *See, e.g.*, Federal Enforcement Institutions Trans. at 28–29 (Sohn) (describing differences in applicable standards between DOJ consolidated proceedings and FTC preliminary injunction proceedings).

[78] The American Bar Association, Section of Antitrust Law (ABA Antitrust Section) reported that it had "not found any example" in which the DOJ sought a permanent injunction after failing to obtain a preliminary injunction under Section 7. ABA Comments re Merger Enforcement Standards, at 5.

[79] The FTC identifies only one instance in "modern history" in which the FTC used this authority. Barnett/Majoras Trans. at 50–51 (Majoras) (identifying the *R.R. Donnelley* case); *see* FTC Press Release, Federal Trade Commission Dismisses Case Against R.R. Donnelley over Acquisition of Meredith/Burda (Aug. 4, 1995) (stating that the FTC failed to obtain a preliminary injunction, issued a Part III complaint, but ultimately overturned the ALJ's decision requiring divestitures), *available at*: http://www.ftc.gov/opa/1995/08/donnelly.htm.

[80] FTC, Administrative Litigation Policy Statement (explaining that "it would not be in the public interest to forego an administrative trial solely because a preliminary injunction has been denied" and that it will make decisions on a "case-by-case" basis); *cf.* William Blumenthal, Statement at AMC Federal Enforcement Institutions Hearing, at 4 (Nov. 3, 2005) [hereinafter Blumenthal Statement] (stating that the FTC has restrained itself appropriately through promulgating and implementing the 1995 policy statement).

[81] *Compare* FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004) (order denying motion for preliminary injunction in August 2004), *appeal dismissed*, 2004 WL 2066879 (D.C. Cir. 2004) (ordering voluntary dismissal of FTC appeal in Sept. 2004) *with* Statement of the Commission, *In re* Arch Coal, Inc., FTC File No. 031-0191 (June 13, 2005) (reporting 4–1 vote in June 2005 not to pursue further administrative litigation in the *Arch Coal* matter); *see* Order Granting Motion to Dismiss, *In re* Butterworth Health Corp., FTC Docket No. 9283 (Sept. 25, 1997) (dismissing administrative complaint one year after preliminary injunction was denied and several months after denial was affirmed on appeal); *see also* ABA Comments re Merger Enforcement Standards, at 9 n.35.

[82] Section 13(b) specifies that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b).

[83] Federal Enforcement Institutions Trans. at 31–33 (Conrath) (pointing out that the government has a heavy burden and that key elements like expert reports require time).

[84] *See id.* at 31–32 (Conrath); Sohn Statement, at 13.

[85] *See* ABA Comments re Dual Federal Merger Enforcement, at 8–9.

[86] If the FTC does not consolidate the proceedings for preliminary and permanent relief, it would have to seek any necessary permanent relief in federal court.

[87] *See* AAI Comments re Enforcement Institutions, at 2 (stating that administrative litigation provides a forum in which facts can be more fully developed than in an injunction proceeding); Blumenthal Statement, at 3–4; Federal Enforcement Institutions Trans. at 8 (Blumenthal).

[88] Statement of Commission, *In re* Arch Coal, FTC File No. 031-0191, at 8 (June 13, 2005) ("The benefits of administrative litigation can be reduced greatly when the large majority of the relevant evidence already has been presented . . . at the preliminary injunction hearing.").

[89] *See* Initial Decision, *In re* Evanston Northwestern Healthcare Corp., FTC Docket No. 9315, at 1–2 (Oct. 20, 2005) (appeal pending before FTC).

[90] ABA Comments re Merger Enforcement Standards, at 3 (stating that the Section 13(b) standard is "more lenient" than the DOJ standard); Sohn Statement, at 10 ("[M]any practitioners believe the FTC is accorded more deference than the Antitrust Division at the preliminary injunction stage."); Sims Statement, at 6. *But see* Federal Enforcement Institutions Trans. at 57–58 (Blumenthal) (stating that the perception

continually changes, and that it is not invariably the case that people would rather be before the DOJ).

91 Sims Statement, at 6 ("most private practitioners today advise their clients that the FTC may have a greater legal ability to block a merger," and that FTC staff is "likely to be slightly more aggressive" since some FTC Commissioners believe the required showing is lower); Sohn Statement, at 10–11; ABA Comments re Merger Enforcement Standards, at 3 (stating that the Section 13(b) standard is "more lenient" than the DOJ standard). *But see* Barnett/Majoras Trans. at 49–50 (Majoras) (the courts are "treating the [preliminary injunction] hearing more like a trial on the merits" because granting the preliminary injunction "likely will block the deal"); Federal Enforcement Institutions Trans. at 33 (Conrath) (courts focus on merits considerations rather than the legal standard); Blumenthal Statement, at 4–6 (arguing that the standard applied to the FTC "is not meaningfully different from that applied by the courts to DOJ" and that both are subject to a "public interest" test).

92 *See* ABA Comments re Merger Enforcement Standards, at 4.

93 15 U.S.C. § 53(b); *see* Antitrust Law Developments, at 409. Courts have recognized that, in adopting this standard, "Congress intended this standard to depart from what it regarded as the then-traditional equity standard." FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001). The FTC's role as the "ultimate decision maker" regarding permanent relief has been cited as justification for applying a lesser standard. *See* ABA Comments re Merger Enforcement Standards, at 4; Antitrust Law Developments, at 409–10.

94 *Heinz*, 246 F.3d at 714–15; *see also* FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 44 (D.D.C. 2002); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1051 (8th Cir. 1999); *Arch Coal*, 329 F. Supp. 2d at 116; FTC v. Staples, Inc., 970 F. Supp. 1066, 1071 (D.D.C. 1997). However, a showing of a "fair or tenable chance of success on the merits" will not suffice. *Tenet Health Care*, 186 F.3d at 1051. *See generally* Antitrust Law Developments, at 409 (describing standard).

95 United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (holding that "once the Government demonstrates a reasonable probability that [Section] 7 has been violated, irreparable harm to the public should be presumed"); *see* Conrath Statement, at 5–6; Federal Enforcement Institutions Trans. at 9–10 (Conrath); Sohn Statement, at 9–10. *See generally* Antitrust Law Developments, at 408.

96 *Siemens*, 621 F.2d at 505.

97 *See* Sims Statement, at 6–7 (arguing that the applicable preliminary injunction standards should be the same, especially since the preliminary injunction is fatal to the deal).

98 *See id.* at 7–8 (emphasizing that agency should be able to establish reasonable likelihood of success after second request and judicial discovery).

Chapter II.B
The Hart-Scott-Rodino Act Pre-Merger Review Process

1. INTRODUCTION

The passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) marked one of the most significant changes to federal merger enforcement since enactment of the Clayton Act in 1914.[1] Before enactment of the HSR Act, it was more difficult for the agencies to investigate and challenge mergers before they had been consummated. Even when these lawsuits were successful, it was difficult to fashion relief that was effective in eliminating the anticompetitive effects that resulted from the merger. Effective relief proved especially challenging in cases brought after the merger had been consummated, because in most instances it would require recreating a company, or significant parts of one, to replace the competitor that the merger had eliminated.

Under the HSR Act, parties to mergers subject to the Act must file a notification form with the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). The parties may not complete their transaction until the expiration of a thirty-day waiting period, which permits the FTC or the DOJ to investigate whether the transaction may substantially lessen competition in violation of Section 7 of the Clayton Act.[2] The investigating agency may extend the waiting period in order to conduct a more detailed investigation by issuing a request for additional information, commonly called a "second request." The second request requires the parties to supply detailed information regarding the transaction and its possible competitive effects. The parties must also observe a second thirty-day waiting period after fulfilling this request, during which the agency must decide whether to challenge the transaction in court.[3]

Under this system, the agencies are able to challenge mergers before they are consummated, and seek injunctions blocking the merger, partial divestitures that would adequately address the competitive concerns, or other appropriate relief. Since Fiscal Year 2001 (FY2001), the FTC and the DOJ have blocked or obtained relief in nearly 165 mergers that they concluded would harm competition and consumers, or approximately 1.8 percent of all transactions notified pursuant to the HSR Act during that period.[4]

Although the HSR Act is widely recognized as having made merger enforcement far more effective, some concern has been expressed over costs it imposes. First, some believe that the second request process has become unduly expensive and burdensome, both in the cost of providing requested information and in the length of time for resolution. Second, some believe that the HSR reporting requirements cover a significant number of transactions that pose no competitive problems, imposing unnecessary costs, including preparing the filing, filing fees, and a thirty-day delay in completing the transaction.

Both the coverage and cost of complying with the HSR Act have grown beyond that originally expected by Congress. The reach of the Act was limited in recognition that, if its requirements "were imposed on every merger, the resulting added reporting burdens might more than offset" the enforcement benefits.[5] At the time the Act was passed, Congress expected that only about 150 very large transactions would be reported each year.[6] Instead, there have been nearly 1000 filings annually since the program began, reaching a high of 4749 in 2000.[7] Congress's recent changes to the filing thresholds, partially adjusting for inflation since 1976, reduced the number of notifications by approximately 50 percent.[8] Many of the transactions notified are quickly assessed as not likely to lessen competition substantially. For example, in FY2006, of the 1746 transactions notified, the government granted early terminations for 1098 (62.9 percent), extensively investigated only 45 (2.6 percent), and ultimately brought only 29 HSR Act enforcement actions (1.7 percent).[9] This broad coverage, however, ensures that the agencies are aware of nearly every transaction that has the potential to cause competitive harm.

Congress also assumed that the burden and cost of supplying documents and information in response to second requests would be modest and not time-consuming, as the responsive information would largely be contained in materials that the parties had already assembled.[10] Since 1976, however, merger analysis has become more complex, as the agencies have moved away from concentration thresholds in favor of a more flexible analysis that aims toward greater accuracy. As a result, today a second request can impose sizable burdens, including expenditures of several million dollars for attorneys' fees and production of tens of millions of pages of documents and tens of gigabytes of electronic data. One estimate places the current cost of responding to a second request investigation at between $5 million and $10 million.[11] The time needed for review of a transaction and receipt of approval from the agency now can be six months or longer.[12] The agencies maintain that they need this time and volume of information to accurately assess a merger's likely effects; others are skeptical.

Since 1990, acquiring parties must pay filing fees in connection with their notification. These fees, which range up to $280,000 for the largest transactions, supply a substantial part of the funding for the FTC and the Antitrust Division of the Department of Justice. Since 1996, at least 79 percent of the Antitrust Division's budget has been funded with filing fee revenue; for FY2000–FY2003, filing fee revenue fully funded the Antitrust Division's budget.[13] Between 32 and 59 percent of the FTC's appropriations, which also support its consumer protection mission, have come from filing fees each year since FY2001.[14]

The United States is one of approximately seventy jurisdictions, including the European Union and Canada, with a merger review system.[15] Most of these jurisdictions also require parties to notify transactions and observe waiting periods before closing to provide enforcers an opportunity to challenge the proposed merger before consummation.[16] Each jurisdiction that requires a filing imposes costs on a proposed transaction. Nonetheless, a recent broad survey concluded that the external costs to the merging parties subject to a second request investigation in the United States (including payments for attorneys, economists, and document production) were at least double that of any other jurisdiction.[17]

In light of the concerns about the burdens imposed by the HSR Act, the Commission studied the HSR Act pre-merger notification system as a whole, paying specific attention to pre-merger filing requirements, the second request process employed by the FTC and the DOJ, the costs the current system imposes, and the benefits of more effective merger enforcement that the HSR Act brings.

Based on its study of the issues, the Commission makes the following recommendations.

27. **No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.***

28. **Congress should de-link funding for the Federal Trade Commission and the Antitrust Division of the Department of Justice from Hart-Scott-Rodino Act filing fee revenues.†**

29. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by second requests.**

30. **The Federal Trade Commission and the Antitrust Division of the Department of Justice should systematically collect and record information regarding the costs and burdens imposed on merging parties by the Hart-Scott-Rodino Act process, to improve the ability of the agencies to identify ways to reduce those costs and burdens and enable Congress to perform appropriate oversight regarding enforcement of the Hart-Scott-Rodino Act.**

* Commissioners Garza, Kempf, and Warden do not join this recommendation.

† Commissioners Carlton and Jacobson do not join this recommendation.

31. **The agencies should evaluate and consider implementing several specific reforms to the second request process.**

31a. **The agencies should adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.***

31b. **The agencies should in all cases inform the merging parties of the competitive concerns that led to a second request.†**

31c. **To enable merging companies to understand the bases for and respond to any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies' economic analysis and facilitate dialogue including the agency economists.**

31d. **The agencies should reduce the burden of translating foreign-language documents.**

31e. **The agencies should reduce the burden of requests for data not kept in the normal course of business by the parties.**

* Commissioners Burchfield, Carlton, and Garza do not join this recommendation.

† Commissioners Burchfield, Cannon, Carlton, Litvack, and Yarowsky do not join this recommendation.

2. BACKGROUND

A. The Purpose and Mechanics of the Hart-Scott-Rodino Act

Prior to enactment of the HSR Act, the U.S. government had limited ability to stop an anticompetitive merger. To the extent the government had notice of a transaction, it had limited practical ability to obtain sufficient information to challenge it prior to its consummation.[18] Post-merger challenges, moreover, could take years—five to six on average.[19] As a result, even where the government ultimately prevailed, it was often unable to obtain effective relief.[20] It could neither fully compensate society for the interim loss of competition, nor fully restore a competitive market structure, particularly if the companies had already integrated their productive assets, or "scrambled the eggs."[21]

Congress addressed these issues by enacting the HSR Act. The stated purpose of the Act was "to provide advance notification to the antitrust authorities of very large mergers prior to their consummation, and to improve procedures to facilitate enjoining illegal mergers before they [were] consummated."[22] Under the HSR Act, before consummating certain mergers and acquisitions, parties must file a notification with both the DOJ and the FTC.[23]

The HSR Act applies to transactions that exceed certain size-of-company and size-of-transaction thresholds and that have a significant nexus to U.S. commerce.[24] Currently, to be subject to the HSR Act, one of the acquired or acquiring persons must have at least $119.6 million in annual net sales or total assets, and the other must have at least $12 million in annual net sales or total assets.[25] The value of the transaction must be greater than $59.8 million.[26] The acquiring person must pay a filing fee, which depends on the value of the transaction and ranges from $45,000 to $280,000.[27] All filing thresholds are adjusted annually in accordance with changes in the Gross National Product (GNP).[28]

The HSR Act filing provides certain basic information about the transaction and the companies (for example, their affiliates, major shareholders, revenues, and the industries and geographic areas in which the operate, by North American Industry Classification System code (NAICS codes)), and includes documents prepared by or for directors or board-appointed officers of the companies in connection with the transaction that address competitive issues.[29] The parties are not required to provide any additional information about the extent to which they do or do not compete or the transaction's potential impact on competition.

After filing, the parties must observe a thirty-day waiting period (fifteen days for cash tender offers) to allow the government time to make an initial determination as to whether to allow the transaction to proceed or to conduct a more extensive investigation.[30] The initial thirty-day waiting period may be terminated early if the parties so request and the government determines there are no material competitive issues, or may simply be allowed to expire.[31] In either case, the parties may then close their transaction. Alternatively, the government can extend the waiting period by issuing a request for additional information, which has come to be called a "second request." [32] If a second request is issued, the parties may not close their transaction until thirty days (ten days for cash tender offers) after they both have "substantially complied" with the second request.[33] During that second thirty-day period the government must decide whether to allow the transaction to close, seek to block it in court, or negotiate to place conditions on it that resolve competitive concerns.

B. Actual Practice

For the vast majority of transactions, the agencies grant early termination of the initial thirty-day waiting period or simply permit the waiting period to expire without conducting any formal investigation. For example, of the 1746 transactions notified in FY2006, 62.9 percent received early termination.[34] Only 2.6 percent of these transaction received second requests.[35] As Table A shows, these figures have been consistent from year to year.

Table A: HSR Act Enforcement Activity

	2001	2002	2003	2004	2005	2006
Transactions Reported	2237	1142	968	1377	1610	1746
Clearance not Sought or Investigation Closed During Initial Waiting Period	2167	1093	933	1342	1560	1702
Early Termination Granted	1603	793	606	943	997	1098
Second Request Issued	70	49	35	35	50	45
HSR Act Merger Enforcement Actions	42	28	33	17	16	29
Non-HSR Act Merger Enforcement Actions	13	5	3	5	2	3

Notes: HSR Act Merger Enforcement Actions: Enforcement actions are reported by the fiscal year in which the action was brought, regardless of when the investigation that led to the action was opened. FTC enforcement actions include Part II consents made public for comment, FTC authorization to file motions for preliminary or permanent injunction, FTC issuance of Part III complaints, and transactions that were abandoned or withdrawn for antitrust concerns that arose during the course of investigations. DOJ enforcement actions include complaints filed (whether litigated or settled), transactions that were abandoned or subject to a fix-it-first remedy, and certain bank divestitures pursuant to regulatory orders. Figures do not include merger enforcement actions in which the court found in favor of defendants (1 in 2002; 2 in 2004).

Non-HSR Merger Enforcement Actions: Both the DOJ and the FTC also bring enforcement actions challenging mergers that are not reportable under the HSR Act. For example, the DOJ has brought enforcement actions in banking mergers that are not reportable. Both agencies have brought actions in mergers that were below the reporting thresholds.

Source: FTC/DOJ Data Submission, at chart D.[40]

If one of the agencies decides that the transaction may raise material competitive concerns, it seeks clearance from the other agency to investigate.[36] In that event, the agency may request that the parties voluntarily provide additional information. The only way under the HSR Act that the government can prevent the parties from closing their transaction after thirty days is to issue a "second request."[37] However, in order to provide the government with additional time for investigation without the issuance of a second request, an informal practice has developed by which parties voluntarily withdraw their HSR filing and re-file it to start another thirty-day waiting period.[38] (Withdrawing does not guarantee that a second request will not issue.) Although the Commission understands from anecdotal evidence that increasing use has been made of this "pull and re-file" strategy to extend the initial thirty-day waiting period,[39] neither the FTC nor the DOJ has systematically tracked the number of transactions for which this has been done.

Issuing a second request enables the government to conduct a further examination of the competitive effects of a proposed transaction based on information and documents provided by the merging parties, their competitors, and customers. In addition to seeking the voluntary provision of information by competitors and customers, the agencies have the ability to compel information through the use of a subpoena or civil investigative demand. The agencies also have the ability to compel testimony from the merging parties and others through depositions (in the case of the DOJ) or investigational hearings (in the case of the FTC).[41] In this sense, the second request process resembles discovery in civil litigation, although it is not supervised by a court or governed by the Federal Rules of Civil Procedure.

The parties may not close their transaction until they both have substantially complied with the second request.[42] An officer of each company is required to certify substantial compliance.[43] If the government disputes substantial compliance, it has the option to go to court to enjoin the transaction until substantial compliance has been achieved.[44] In the history of the HSR Act, there have been only three occasions on which the FTC voted to authorize the filing of a complaint and motion seeking such an injunction.[45] Otherwise, the parties and government generally informally resolve their differences. The 2000 HSR Amendments, discussed below, required the FTC and the DOJ to establish formal internal processes for resolving such disputes, which they have adopted.[46]

If the agency determines that the effect of the transaction may be substantially to lessen competition, the agency can challenge the transaction in court.[47] Before seeking an injunction in court, however, the investigating agency may negotiate with the merging parties to reach a consent decree that obligates the merging parties to divest assets or agree to other relief that resolves the agency's concerns about the merger's competitive effects.

C. Recent Reforms by Congress and the Agencies

In 2000 Congress enacted the 21st Century Acquisition Reform and Improvement Act (2000 HSR Amendments) to address concerns about the growing scope and burden of the HSR Act.[48] These amendments had two principal components.

First, the 2000 HSR Amendments substantially increased the size-of-transaction filing threshold, from $15 million to $50 million. This amendment had the effect of reducing the number of transactions for which filings were required by about half.[49] The amendments also provided that all thresholds would be adjusted annually for changes in Gross National Product (GNP) beginning in 2005.[50]

Second, the 2000 HSR Amendments made several changes regarding the second-request process. One significant change required the agencies to designate a senior official to hear appeals from merging parties regarding the burden of second requests.[51] The amendments also directed both agencies to conduct one-time internal reviews of the HSR Act process, "implement reforms . . . in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay," and report back to Congress within 180 days.[52] Both the FTC and the DOJ reported to Congress in 2001, describing their reviews of the second request process and reforms they implemented.[53]

Both the FTC and the DOJ have continued to reform their pre-merger review processes. Each announced further reforms in 2006.[54]

3. RECOMMENDATIONS AND FINDINGS

Overall, the existing pre-merger review system under the HSR Act is achieving its intended objectives of providing a more effective means for challenging mergers raising competitive concerns before their consummation and protecting consumers from anticompetitive effects.[55] Although efforts must continue to reduce the cost and burden the system imposes on merging parties, there is no need for comprehensive reform.[56]

The costs the HSR Act imposes are not insignificant; while very small relative to the total value of the transactions reviewed, their magnitude remains of concern to many. First, the current notification system imposes costs—filing fees and a thirty-day waiting period—on a large number of merging parties whose transactions do not pose competitive problems. Second, the second-request process imposes very large, and in some cases unnecessary, burdens on parties to provide information to the agencies.

Effective prevention of anticompetitive mergers is an important policy objective. Nonetheless, mergers are often beneficial to consumers and businesses, offering procompetitive efficiencies that will benefit both.[57] Imposing unnecessary burdens on such transactions wastes resources and may, in the extreme case, inhibit beneficial conduct. The pre-merger review process should aim to strike a balance that enables effective merger enforcement while avoiding the imposition of excessive costs on the parties and the economy.

Based on its assessment of the operation of the HSR pre-merger review system, the Commission does not recommend systemic change or major modifications. Although the system is not perfect, alternative approaches do not appear to be more suitable and would impose their own sets of costs. For example, the Commission does not recommend adoption of a markedly different approach, such as that used in the European Union or Canada.[58] Indeed, there was minimal call for the Commission to recommend such alternatives.[59]

Rather, comments generally focused on reducing the burdens imposed by making modifications to the current process.

The Commission considered a variety of possible reforms to the current HSR system. First, the Commission considered changes to the initial filing process. As explained below, the Commission does not recommend any changes to the filing thresholds. The Commission does recommend that agency funding no longer be linked to filing fees. Second, the Commission considered numerous possible reforms to the second request process. Overall, it concludes that the second request process can impose sizable burdens on merging parties in terms of expense and delay that should be reduced wherever possible. It commends the agencies for the various reforms they have adopted to reduce second request burdens, and urges them to take steps to reduce those burdens further as well as implement mechanisms to measure burdens and track progress. The Commission recommends several specific reforms for the agencies to evaluate and, if appropriate, refine and implement.[60]

A. Pre-Merger Filing Requirements

27. No changes are recommended to the initial filing requirements under the Hart-Scott-Rodino Act.*

Although the number of transactions reviewed has increased over time (largely due to the fact that the dollar thresholds remained constant while the dollar value of merger activity increased markedly),[61] the increase in the filing thresholds in 2000 significantly reduced the number of covered transactions.[62] If the $50 million size-of-transaction threshold had been in place for FY2000 (the last full year under the original thresholds), only 2502 transactions would have been reported in that year, rather than the 4749 actually notified, representing a decrease of 47 percent.[63] The 2000 HSR Amendments thus significantly addressed concerns that the HSR Act thresholds were "too low and capture[d] too many lawful transactions."[64]

Even with this significant reduction in coverage, and annual adjustments to accommodate GNP growth, it is clear that the vast majority of transactions reported raise no competitive issues.[65] This is particularly true for smaller transactions, which are less likely to be subject to challenge, or even extensive review, than transactions with large dollar values. Over the past five years, as Table B shows, the FTC or the DOJ issued a second request in 1.3

* Commissioners Garza, Kempf, and Warden do not join this recommendation. They believe that the filing thresholds should be increased in light of the significant number of transactions at the lower end of the thresholds that receive early termination and the few such transactions that either receive a second request or are subject to an enforcement action by the agencies.

percent of transactions valued between $50 million and $100 million, as compared with 11.1 percent of transactions over $1 billion. Similarly, they brought enforcement actions in less than 1 percent of mergers valued below $100 million, but 7.7 percent of mergers worth over $1 billion. Nevertheless, small transactions regularly account for a fair percentage of investigative activity. Between FY2002 and FY2006, 31 of the 214 second requests issued by the agencies (14.5 percent) were related to mergers valued between $50 million and $100 million.[66]

Table B: Second Requests and Enforcement Actions by Size of Transaction FY2002–2006

	Second Requests		Enforcement Actions	
Transaction Size	Number	Percent	Number	Percent
$50M–$100M	31	1.3%	14	0.4%
$100M–$150M	20	1.9%	12	1.1%
$150M–$200M	19	2.9%	9	1.4%
$200M–$300M	19	2.4%	10	1.3%
$300M–$500M	18	2.4%	14	1.9%
$500M–$1000M	37	6.4%	22	3.8%
Over $1000M	70	11.1%	49	7.7%
Total	214	3.1%	130	1.9%

Notes: "Enforcement actions" are defined in same manner as described in Table A, and do not include enforcement actions brought against mergers that were not reportable under the HSR Act.

"Percent" is the percentage of all transactions notified within each size range that resulted in a second request or an enforcement action.

Source: FTC/DOJ Data Submission, charts E1–E3.

The FTC's and the DOJ's enforcement efforts suggest that relatively small transactions can pose competitive problems, and that the pre-merger filing requirements facilitate review of these transactions. The recent adjustments to the thresholds adopted by Congress in 2000 reduced the number of filings considerably, and the evidence has not persuaded the Commission that further increases are currently warranted.[67] The Commission believes that the provisions for regular adjustments to the thresholds for increases in GNP should remain in place.

Although no change to the thresholds is currently recommended, Congress should continue to monitor the operation of the system, and periodically reevaluate whether it should adjust the size-of-transaction threshold to ensure that the number of smaller transactions actually reviewed and challenged by the agencies justifies the filing burdens imposed on those transactions.

28. Congress should de-link funding for the Federal Trade Commission and the Antitrust Division of the Department of Justice from Hart-Scott-Rodino Act filing fee revenues.*

Revenues the antitrust agencies receive from HSR Act filing fees are evenly divided and credited to the appropriations for the Antitrust Division of the DOJ and the FTC.[68] As a result, filing fees significantly reduce the amounts that Congress appropriates from general revenues to fund the agencies' enforcement programs.[69] Indeed, in some recent years, the Antitrust Division has been funded entirely from filing-fee revenue.[70] Prior to FY 1990, there were no filing fees; Congress instituted a $20,000 filing fee in 1990 and began to fund both agencies' operations in part with the fee receipts. Congress increased the filing fees in the 2000 HSR Amendments, with fees ranging from $45,000 to $280,000, depending on the size of the transaction.[71] Congress enacted this increase largely to offset the reduction in fee receipts resulting from increasing the size-of-transaction threshold and thereby preserve agency funding.[72]

The agencies should be funded fully from general revenues, and should not have their funding linked to HSR filing fees.[73] The existing linkage has at least the potential to expose funding of other agency enforcement efforts—including criminal and civil non-merger efforts—to the risk that merger activity (and therefore filing fee revenues) will fall.[74] Furthermore, merging parties should not have to shoulder the burden of paying a large portion of the cost of antitrust enforcement generally.[75] Indeed, the fees Congress has imposed effectively tax mergers, the vast majority of which are procompetitive or competitively neutral.[76] Other countries may follow this example and use fees to finance various activities.[77] Moreover, because a large majority of filings impose negligible review costs on the agencies, filing fees do not accurately reflect the burden imposed on the government by a given filing.[78]

* Commissioners Carlton and Jacobson do not join this recommendation.

Commissioner Carlton believes that filing fees are equivalent to a user fee that is appropriately linked to agency funding.

Commissioner Jacobson believes that funding from HSR Act filing fees lessens the politics associated with funding the nation's antitrust function. Without the significant revenues from HSR filing fees, the agencies will be increasingly vulnerable to political pressures to appease various constituencies to ensure they get the funds they need.

This recommendation is not a call for reduced antitrust enforcement or reduced funding for the antitrust agencies. The Commission recognizes the importance of antitrust enforcement to promoting consumer welfare, efficiency, and innovation. It urges Congress to fund the antitrust agencies solely from general revenues.[79]

B. The Second Request Process

29. The Federal Trade Commission and the Antitrust Division of the Department of Justice should continue to pursue reforms of the Hart-Scott-Rodino Act merger review process to reduce the burdens imposed on merging parties by second requests.

A second request is the principal formal mechanism through which the agencies can obtain the information they need to perform a detailed assessment of a proposed merger's likely impact on competition. The second request process must provide the agencies with sufficient information in a timely fashion to enable them to determine whether to challenge an anticompetitive merger in court. The challenge facing the agencies is implementing an approach that strikes an appropriate balance between the likely benefit of requested information to their review and the cost it will impose on the merging parties. While additional information may potentially be helpful to an investigation, requests should be limited to avoid situations in which "the cost of supplying much of the information . . . is disproportionate to its probative value."[80]

The second request process can impose immense burdens on parties, both in terms of delaying transactions and forcing parties to expend significant resources to supply requested information. Indeed, commenters and witnesses uniformly expressed concern over the excessive cost and delay associated with the second request process.[81] The American Bar Association Section of Antitrust Law (ABA Antitrust Section) reported a "consensus in the private bar that second requests are unduly burdensome."[82] Furthermore, the 2000 Report of the International Competition Policy Advisory Committee (ICPAC) observed that "[m]any business groups and practitioners . . . perceive the second request process to be 'unduly burdensome.'"[83] Agency witnesses agreed as well that decreasing the burdens imposed by second requests is an important goal.[84] Indeed, reviewing a response to a second request imposes considerable burdens on the government;[85] FTC Chairman Deborah Platt Majoras has expressly stated that recent reforms at the FTC are intended to reduce the costs faced by parties *and* the agencies.[86]

The burdens of second requests are high and increasing.[87] The cost of responding to a typical second request includes outside counsel fees, payments for processing electronic documents and photocopying, and economists' fees.[88] Indirect costs, such as employee time and opportunity cost, are difficult to quantify but are nonetheless very significant.[89] The ABA Antitrust Section cited reports that compliance with a second request typically takes six months and costs $5 million, while the reviews in more complex investigations can take eighteen months and cost the merging parties up to $20 million.[90]

Most of the Commission's evidence on burden, however, is anecdotal. The primary empirical study available to the Commission at the outset of its work was performed by PricewaterhouseCoopers in June 2003 under the sponsorship of the American Bar Association and the International Bar Association.[91] PricewaterhouseCoopers collected information on sixty-two transactions requiring multijurisdictional filing and reviews.[92] The sample thus focused on large international transactions subject to review by multiple jurisdictions.[93] The study found a "relatively small, regressive tax on mergers" and "significant delays in the multi-jurisdictional merger review process."[94] The study also found that the U.S. second request process is by far the most costly in the world, imposing twice the external costs (including payments for attorneys, economists, and document productions) than do second-phase investigations in the European Union.[95]

To supplement this information, the Commission sought data on the burden imposed by second requests from the public. No individual firms or companies provided data on burdens they had experienced. Although companies did not provide information directly to the Commission about the burden imposed by second requests, the ABA Antitrust Section provided the Commission with the aggregated results of a survey it conducted on burdens.[96] The figures for the delays and burdens imposed by second requests obtained through the survey are generally consistent with other anecdotal evidence, as shown in Table C. For example, on average, second request investigations took seven months and resulted in median compliance costs of $3.3 million. In addition, the median values for these data illustrate some of the specific burdens involved in complying with second requests: electronic document production of 583,000 pages of email and 555,000 pages of other documents; 275 pages of interrogatory responses; 13 gigabytes of electronic data; $2.4 million in fees for attorneys; and $300,000 in fees for economists. However, the survey's value is limited by the fact that it is based on a non-scientific, self-selected sample of only twenty-three total responses, and only a subset of these included information on each specific question. Moreover, the median values of most measures of burden were much lower than the means, suggesting that the average (*i.e.*, mean) values may be influenced by a few very high observations.

Table C: Burdens Imposed by Second Requests

Measure of Burden *(number of responses providing numerical data)*	**Mean Value**	**Median Value**
Length of investigation, in months (from HSR Act filing to close or agency action) (22)	7	7
Number of custodians searched (23)	126	94
Pages of e-mail produced (7)	1,566,867	582,913
Pages of electronic documents produced (other than e-mail) (6)	5,411,437	554,870
Pages of documents produced in hard copy (20)	1,515,662	544,516
Pages of interrogatory responses produced (18)	872	275
Electronic data produced in response to the interrogatories (in gigabytes) (6)	20	13
Total costs of compliance with second request (18)	$5,194,196	$3,300,000
Cost of economists (fees) (9)	$1,116,349	$300,000
Cost of attorneys/paralegals (fees) (13)	$4,361,604	$2,424,803
Costs of duplication/reproduction of documents and information (13)	$714,047	$100,787

Source: Letter from Joseph Angland to the Antitrust Modernization Commission Re: Data Regarding the Burden Involved in Responding to HSR Second Request Investigations (Feb. 22, 2007).

The Commission also sought data on second request burden from the agencies. The agencies do not systematically track the number of documents or the amount of data produced by parties in response to second requests.[97] However, they do track the length of second request investigations. For both agencies, the length of second request investigations averaged about six months from the opening of the investigation in FY2005.[98] The length of investigations resulting in no enforcement action decreased significantly between FY2000 and FY2005, dropping from 312 days to 168 days for the FTC, and from 184 days to 163 days for the DOJ.[99] Investigations resulting in enforcement actions generally took longer—208 days for the FTC and 260 days for the DOJ in FY2005—and the length of these investigations decreased for the FTC but not the DOJ over the same period.[100]

It appears clear from the evidence available to the Commission that the second request process imposes significant costs on the merging parties in a substantial number of cases. However, the Commission is concerned that the lack of reliable quantitative information on the extent and nature of the problem may inhibit the ability of the agencies and Congress to identify and implement improvements, and recommends efforts to improve data collection below.

There are a number of reasons for the sizable costs imposed by second requests in some merger investigations. Merger investigations pose considerable challenges for the agencies. The issues are complex, and decisions must be made on a tight time frame. The second request must be issued early in the investigation and is the agencies' only opportunity to obtain documents and data, other than by consent of the parties, prior to challenging the merger in court.[101] Moreover, merging parties have no incentive voluntarily to provide the agencies with information that would suggest the transaction might be anticompetitive. Accordingly, the agencies cannot simply rely on the parties to provide all significant information and instead must actively seek the information they need. As a result, cooperation by the parties in meeting the agencies' needs is likely to be important to reducing the burdens imposed by second requests.[102]

The agencies' need for information to assess the impact of a merger has expanded as antitrust analysis has evolved over the past thirty years from a reliance on structural presumptions that mergers that increased concentration above certain thresholds were unlawful, to a more complex and fact- and data-intensive analysis.[103] The agencies must consider a variety of complex issues, including entry barriers and efficiencies. Moreover, the agencies increasingly rely on econometric assessments in evaluating mergers, and direct analysis of likely competitive impacts.[104]

The problem of increasingly extensive production requirements has been compounded by an "explosion" in the number of documents retained by companies in electronic format in recent years.[105] Some commentators have reported a ten-fold increase in the volume of documents collected per employee due to electronic documents.[106] As a result, the "search and production of electronic files has become the most expensive and burdensome part of most second request productions."[107] The agencies' need for increased production of data has also increased costs, especially because firms retain more data due to technological advances.[108] Data production costs are further increased by the need to re-process data for an agency—for example, to produce the information in a particular common format.[109] The agencies' review efforts are also negatively affected by these developments, because the production of massive amounts of data and documents also make it more difficult for staff to find and review relevant data.[110]

Unfortunately, agencies may face internal pressures that discourage staff from limiting the scope of second requests and may restrict the systematic reforms they adopt.[111] The agencies are generally reluctant to forgo the possibility of obtaining relevant information, even where it may not improve their ability to assess the competitive impact of the merger. As one witness observed, from the agency staff perspective, "[i]t is easy to take the view that more is better when it comes to obtaining information," since limitations "pose risks . . . without, from the government's perspective, much apparent downside."[112] For example, a large percentage of email that is responsive to a second request typically comes from lower-level employees, and arguably is not likely to produce insights regarding competitive effects beyond information also stored centrally or available in management files.[113] Moreover, such evidence may provide relatively little useful information on the market and economic characteristics most relevant to merger assessment. The agencies' use of the second request process to obtain evidence to support seeking a preliminary injunction can exacerbate this tendency towards over-inclusiveness.[114] This, however, is counter to the intended purpose of the HSR Act process, which aims to provide the agency only with the information they need to determine whether to bring a court challenge.[115] The agencies may later obtain further discovery—governed by a district court and the rules of civil procedure—if the agency brings a challenge in court.

There are limited formal constraints on the agencies' tendencies to seek more information, due to the largely regulatory nature of the HSR Act process.[116] The parties' need to obtain the fastest possible resolution makes it extremely unlikely that they will request that a court review agency decisions regarding second request breadth or compliance.[117] The delay, uncertainty, and potential bar that a challenge would cause leads the parties to meet almost any agency demand in order to avoid going to court. Although the agencies have created formal internal checks, as required by the 2000 HSR Amendments, some commenters and witnesses questioned the efficacy of these internal review mechanisms.[118] The limited set of overall constraints has led some critics to assert that the agencies may use the second request "to essentially create the automatic stay of a transaction" and to "create a whole new discovery mechanism, unconstrained by the Federal Rules."[119]

Over the last several years, the agencies have engaged in various initiatives to reduce the burdens imposed by HSR Act review.[120] Both agencies adopted a number of specific reforms during 2006 (including limitations on the number of employees whose files must be searched for a second request, discussed more fully below).[121] Some of these reforms appear to have had modest success in reducing the length of second request investigations—in investigations in which no enforcement action was brought the length has decreased markedly over the past five years.[122] The 2006 reforms occurred too recently to have yet had a measurable effect.

The Commission commends the agencies for undertaking reforms, and for their continuing efforts, in collaboration with the antitrust bar, business community, and public, to reduce the burdens resulting from HSR Act review and second requests. The Commission encourages both agencies to fulfill their commitment to conduct an "ongoing assessment of the HSR Act program to increase accessibility, promote transparency, and reduce the burden on the filing parties without compromising the agencies' ability to investigate and interdict transactions that may substantially lessen competition."[123] Overall, the Commission shares FTC Chairman Majoras's view that the FTC's most recent reforms should be "the start rather than the end."[124]

30. The Federal Trade Commission and the Antitrust Division of the Department of Justice should systematically collect and record information regarding the costs and burdens imposed on merging parties by the Hart-Scott-Rodino Act process, to improve the ability of the agencies to identify ways to reduce those costs and burdens and enable Congress to perform appropriate oversight regarding enforcement of the Hart-Scott-Rodino Act.

There is little question that second requests have the potential to impose significant costs on the merging parties. The evidence of those costs is largely anecdotal, however, with little systematic quantitative information on the burdens second requests impose. The agencies are in the best position to collect such information. For example, the agencies could compile information about the volume of data and documents (or electronic "bytes") the parties produce in each investigation.[125] Information about the overall length of investigations, and the number of investigational hearings or depositions taken,[126] are valuable but do not provide a complete pictures of the burden involved in an investigation.

The absence of reliable data about investigational burdens makes it difficult to evaluate accurately the actual burdens imposed by HSR Act investigations. Such data could be used to confirm the anecdotal evidence that costs are high, or might show that the limited evidence overstates the typical burden. Equally important, comprehensive data provide a baseline by which to measure improvements through process reforms introduced by the agencies or to help identify "best practices" in merger review.[127] (In addition, data relevant to other aspects of the HSR Act process, such as information regarding delays from clearance decisions, would also help identify areas where delays and costs could be most effectively reduced.[128]) Finally, systematic data collection would assist congressional committees in exercising their oversight responsibilities regarding merger enforcement under the HSR Act by the FTC and the DOJ.

The agencies should improve and increase their systematic collection of data relating to the length, costs, and burdens of their investigations under the HSR Act. The agencies should collaborate on developing consistent measures and definitions to ensure that the data applicable to each agency are comparable, so that data can be aggregated or compared to see whether one agency has developed a more effective approach for reducing burdens. The Commission believes the development of improved data collection systems will not unduly burden the FTC and the DOJ. On the contrary, once institutionalized, the collection of such information is likely to become a routine part of each investigation that takes minimal additional time to compile. The benefits it can bring, however, to improved understanding of the costs and burdens of the HSR Act and areas for further reform are likely to be substantial.

31. The agencies should evaluate and consider implementing several specific reforms to the second request process.

The Commission has identified several additional ways to streamline the second request process. The Commission recommends one specific reform to the second request process, and identifies four additional specific areas in which it recommends that the agencies evaluate current practices to determine whether further improvements can be made. These potential reforms recognize the need to maintain an appropriate balance between the burdens imposed by second requests and the need of the agencies to review a merger adequately. Overall, the reforms offered for the agencies' consideration could help reduce burdens on parties without materially impairing the ability of the agencies to determine whether a merger will cause anticompetitive effects. Other than with respect to the specific reform, the Commission has described the contours of these reforms in general terms, leaving it to the agencies to determine the best method of implementation in light of their substantial experience.[129] (To the extent these reforms require legislative change, the Commission recommends that Congress enact any legislation necessary for the agencies to implement these proposed reforms.)

The Commission's identification of these five possible reforms is not intended to be exhaustive. On the contrary, there are likely numerous other ways in which the agencies could reduce the costs and burdens of second requests. The Commission, however, leaves it to the agencies, and their collective expertise, to identify areas for further reducing costs and how best to implement appropriate reforms.

1. Recommended Specific Reform

31a. The agencies should adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request.*

One of the principal sources of burden from a second request is the volume of electronic and paper documents that must be searched and produced. This burden is related to the number of custodians whose files must be searched for responsive information.[130] Several witnesses and commenters before the Commission suggested that custodian limits could

* Commissioners Burchfield, Carlton, and Garza to not join this recommendation.

Commissioner Carlton does not join this recommendation because he would not eliminate the provisions in the agencies' existing custodial limits that require the parties to enter into timing agreements or other scheduling conditions.

significantly reduce unnecessary burden in second requests without prejudice to the government's ability to obtain material information.[131] Indeed, limiting the number of persons subject to search in a second request is consistent with discovery limits imposed by procedural rules governing civil litigation.[132]

Recognizing these principles, the FTC and the DOJ recently adopted custodian search limits, capping the number of employees whose files must be searched for a second request to thirty to thirty-five for the DOJ and thirty-five for the FTC, subject to certain exceptions.[133] These limits do not vary depending on the size of the transaction,[134] and may be exceeded upon authorization by senior agency personnel.[135] Both agencies require that the parties provide documents and personnel to assist the agencies in determining which employees files should be searched, and do not extend the limits to company or "central" files.[136] Moreover, to obtain the benefit of these limits, the parties must agree to certain provisions extending the length of the investigation.[137] The FTC requires that the parties agree to delay certifying substantial compliance until thirty days after producing the required materials (or to a "rolling production"), and agree to a joint scheduling order containing at least a sixty-day discovery period in the event of a court challenge.[138] The DOJ requires that parties enter into a "Process and Timing Agreement" that, among other things, affords sufficient time for post-complaint discovery in the event of litigation, indicating that "four to six months is generally necessary."[139]

The Commission endorses the concept of custodian limits but recommends several modifications. Under the Commission's approach: (1) merging companies could opt into presumptive custodian-search limits at the time they file the HSR Act notification; (2) companies opting in would provide detailed organization charts with the HSR Act filing and commit to make company representatives immediately available to discuss them; (3) the limit on the number of custodians would vary based on the size of the transaction; and (4) the presumptive limit could be exceeded for cause with the agreement of the merging companies or with the approval of the Assistant Attorney General or FTC Chairman, as appropriate. (The complete description is set forth in Annex A.) The Commission's approach would not require the merging companies to commit to an extension of the statutory time periods of the HSR Act or any other timing agreements as a condition of limiting the number of custodians, as the current FTC and DOJ limits require.

Filing Option and Organizational Charts. The parties could choose to have the limits apply by checking a box on the HSR form, rather than when the second request issues, as under the existing agency approaches.[140] The parties would also be required to provide complete and accurate organizational charts at the time of the initial HSR filing, and to make a responsible officer available to explain the charts. This will allow the agency to begin its inquiry immediately. In addition, by making the election at the filing stage, the parties will provide the agencies with an indication that they believe the agencies may scrutinize the transaction.

Sliding Scale Limits. The agencies would establish limits on the number of custodians to be searched based on the size of the transaction, with the limits ranging between fifteen and thirty-five employees. A single limit has the potential to impose a proportionately larger burden on small transactions than on large transactions. Furthermore, the cost savings a sliding scale affords to smaller transactions should outweigh any increased complexity of such an approach.[141] Moreover, to the extent that lower limits would prevent thorough investigations, the agency could exceed the limits in appropriate cases.

Case-by-Case Increases in Limits. An agency may need to increase the number of custodians to search in some investigations to enable staff to conduct an adequate investigation (for example, when there are numerous product or geographic markets).[142] Accordingly, under the Commission's proposed approach, agency staff may seek to exceed the custodian limit where they deem it necessary to conduct an adequate investigation. They may do this either by obtaining the consent of the parties or by seeking certification from the Assistant Attorney General or Chairman of the FTC of his or her good-faith belief that the additional materials are needed. Because such exceptions should be granted sparingly, the Commission recommends that only the head of the investigating agency be permitted to make the formal certification of the need to expand the search.

No Agreement on Time Limits. The Commission's proposal does not include a provision requiring the parties to agree to a thirty-day extension of the second thirty-day waiting period after certifying substantial compliance, a stipulated period for post-complaint discovery, or other scheduling requirements, as both the current FTC and DOJ approaches do. Requiring the parties to agree to extensions of the waiting period is unnecessary and effectively amounts to an administrative amendment of the second thirty-day waiting period established by Congress. The thirty-day waiting period, in conjunction with the investigation period, should be adequate time for the agencies to decide whether to challenge a merger and to prepare a filing for a preliminary injunction; if it is not, the agencies should seek statutory change in Congress. Furthermore, parties should not be required to stipulate to a discovery schedule in order to avail themselves of the custodian limit. If the agencies challenge a transaction in court, the district court in its sound discretion can be relied upon to provide a sufficient period for any additional discovery the agencies need.

2. Additional Areas for Possible Reform

The Commission also identifies four specific areas in which further reform may be appropriate. The first two concern the transparency of the agencies' review process, particularly their economic and competitive analyses. The second two are areas in which the costs imposed by the second request may be particularly large relative to their benefits. The Commission recommends that the agencies examine how they could make further improvements in these areas, and take action as appropriate.

31b. The agencies should in all cases inform the merging parties of the competitive concerns that led to a second request.*

The Commission understands that the agencies' staffs frequently discuss their competitive concerns and possible second request modifications with the parties shortly after the second request.[143] Based on comments submitted to the Commission, it appears that this may not occur in all cases or such discussions may not always fully reflect an agency's competitive concerns.[144] Such explanations can facilitate substantive discussions between the parties and agencies, as well as enable the parties to make better assessments of the information that would be most useful to the agencies. Furthermore, a systematic requirement to provide such an explanation may impose discipline on the second request itself, by clarifying the areas in which information is needed. The Commission therefore recommends that the agencies institutionalize this practice by specifically committing to provide information to merging parties regarding the agencies' competitive concerns shortly after issuing a second request.

31c. To enable merging companies to understand the bases for and respond to any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies' economic analysis and facilitate dialogue including the agency economists.

The Commission understands that the agencies currently promote discussions between agency economists and the parties' economists as part of their efforts to ensure transparency and promote efficient merger review.[145] Several witnesses and commenters before the Commission advised that there should be greater transparency concerning the government's economic analysis. Merging companies are often limited in their ability to evaluate and critique the economic models being developed by agency economists, for example, because of concerns regarding the confidentiality of third-party information.[146] In addition, agency staff may be reluctant to reveal their preliminary analysis if the government may have to litigate with the parties.[147]

Current merger analysis relies heavily on econometric analysis and is highly sensitive to the assumptions, techniques, and data used. Specifying, testing, and refining econometric models to reflect actual industry circumstances are best served if the agencies' economists and the parties' economists can discuss alternative modeling approaches and economet-

* Commissioners Burchfield, Cannon, Carlton, Litvack, and Yarowsky do not join this recommendation.

ric testing.[148] Particularly given the reality that most merger challenges are not litigated, the search for the right resolution would be facilitated by open discussion. The Commission accordingly recommends that the agencies devise additional means through which the agency's economists can have frank and open discussions with the merging parties of the economic analysis being used.

31d. The agencies should reduce the burden of translating foreign-language documents.

The burden of translating into English foreign-language documents submitted in response to a second request can be particularly onerous in some transactions.[149] This burden should not be imposed on parties except where the documents are likely to be relevant to evaluating the competitive concerns, and even then only to the extent necessary to conduct an adequate investigation.[150] Although the agencies often limit translation requirements to certain key foreign-language documents, the standard second request contains no such limits and requires translation of all documents.[151] The Commission therefore recommends that the agencies consider institutionalizing reforms to limit the burden of translating documents. For example, it may be possible to require summaries of documents rather than full translations,[152] or to limit translation mandates to documents of "key corporate decision makers" and those relating to businesses or product lines most relevant to the competitive concern.[153]

31e. The agencies should reduce the burden of requests for data not kept in the normal course of business by the parties.

Requests for data that are not kept in the ordinary course of business can be extraordinarily burdensome, since supplying such data may require the parties to incur great expense in engaging experts and information technology personnel.[154] The Commission recognizes the agencies have taken steps to reduce the burden of data requests, including efforts to understand the types of data the parties keep and the formats in which it is kept.[155] The Commission recommends that the agencies give further attention to taking steps, including formalizing policies, to reduce the burden imposed by requests for data that is not kept in the normal course of business by the parties (or which is kept in a form different from that requested).

ANNEX A

HSR ACT CUSTODIAN SEARCH LIMIT

1. The HSR Act Report Form will be modified to include a box labeled "Optional custodian limitation for potential additional request for information." If the notifying party checks this box, the procedures set forth below will apply. If, however, the box is not checked, any additional request for information may proceed without the limitations set forth below, consistent with current practice.

2. A party electing the custodian limitation option must (1) provide or create, and submit with the form, complete and accurate organization charts (or equivalent materials that allow staff to identify the party's employees and their positions), and (2) provide the name, and make available for interview, a responsible officer to explain the organization charts, the roles of the listed personnel, and the location of company records. The officer designated should be the senior person within the organization most familiar with these issues. If necessary, more than one such person should be made available.

3. If the notifying party has complied with paragraph 2 above, then, depending on the dollar size of the transaction, the reviewing agency will be limited to requiring a search of documents in the files of fifteen employees (at the low end) to thirty-five employees (at the high end).

4. If the agency staff believe that the files of custodians in excess of the numbers set forth in paragraph 3 are required to pursue their investigation, staff should first notify the affected party of the total number custodians whose files it seeks and request the party's consent. If consent is not provided within two business days, staff may seek materials from additional custodians only upon the personal approval and certification of a good faith belief that the additional materials are needed by, as the case may be, the Chair (or Acting Chair) of the Federal Trade Commission or the Assistant Attorney General (or Acting Assistant Attorney General) in charge of the Antitrust Division of the Department of Justice.

Notes

[1] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

[2] 15 U.S.C. § 18a(b).

[3] *Id.* § 18a(e).

[4] *See* Part 2.B of this Section, Table A. In addition, the agencies blocked or obtained relief in thirty-one mergers that were not reportable under the HSR Act. *See id.*

[5] H.R. Rep. No. 94-1373, at 11 (1976).

[6] Representative Rodino estimated that the HSR Act "will reach only about the largest 150 mergers a year." 122 Cong. Rec. 25,052 (1976) (remarks of Rep. Rodino); *see also* H.R. Rep. No. 94-1373, at 11.

[7] *See* Part 2.B of this Section, Table A; Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 2005, at app. A (2006) [hereinafter DOJ/FTC FY2005 HSR Report]; Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1997, at app. A (1998); Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 1988, at app. A (1989).

[8] *See* U.S. Dep't of Justice & Federal Trade Comm'n, Annual Report to Congress Regarding the Operation of the Hart-Scott-Rodino Premerger Notification Program for Fiscal Year 2000, at tbl.II (2001) [hereinafter DOJ/FTC FY2000 HSR Report] (reporting that 47.3 percent of reported transactions were valued at less than $50 million).

[9] *See* Part 2.B of this Section, Table A.

[10] 122 Cong. Rec. 30,876–77 (1976) (remarks of Rep. Rodino) (second requests would call for "the very data that is already available to the merging parties and has already been assembled and analyzed by" the parties).

[11] Steven C. Sunshine & David P. Wales, Statement at AMC Merger Enforcement Hearing, at 4 (Nov. 17, 2005) [hereinafter Sunshine & Wales Statement].

[12] *Id.* (approval for transactions receiving second requests took an average of 7.8 months for the FTC and 5.7 months for the DOJ in 2005); Merger Streamlining Group, Public Comments Submitted to AMC, at 6 (Feb. 6, 2006) [hereinafter Merger Streamlining Group Comments] (reporting that the second request process often takes half a year); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Hart-Scott-Rodino Second Request Process, at 4 (Dec. 7, 2005) [hereinafter ABA Comments re HSR].

[13] Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm.

[14] Data on FTC Appropriations (on file with AMC).

[15] James R. Atwood, Statement at AMC International Antitrust Hearing, at 3 (Feb. 15, 2006) (estimating that "approximately 70 [countries] provide for merger pre-notification and/or review"); International Competition Network, Report on the Costs and Burdens of Multijurisdictional Merger Review, at 4 (Nov. 2004), *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/costburd.pdf (estimating that about 75 jurisdictions have merger review laws).

[16] Randolph W. Tritell, Ass't Dir. for Int'l Antitrust, Federal Trade Comm'n, Int'l Aspects of U.S. Merger Review Policy, ABA International Section Lunch Program, at 2 (Feb. 28, 2001), *available at* http://www.ftc.gov/bc/international/docs/tritell_intaspectsmergreview.pdf.

[17] PricewaterhouseCoopers, *A Tax on Mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews*, at 42 (July 2003) [hereinafter PwC Survey]; *id.* at 18 (defining costs covered in survey); Merger Streamlining Group Comments, at 6 (citing PwC Survey).

[18] *See* S. Rep. No. 94-803, at 61 (1976) ("Presently, the Government can stop few illegal mergers before they take place."); *see also* H. Rep. No. 94-1373, at 8 (the absence of pre-closing notification requirements "meant that many large and illegal mergers have been successfully consummated in recent years, before the government had any realistic chance to challenge them"); William J. Baer, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825, 828–29 (1997) [hereinafter Baer, *Reflections on 20 Years of Merger Enforcement*].

[19] *See* Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & Econ. 43, 52 (1969) [hereinafter Elzinga, *Antimerger Law*]; Baer, *Reflections on 20 Years of Merger Enforcement*, at 828–31.

[20] *See* Elzinga, *Antimerger Law*, at 47–54; S. Rep. No. 94-803, at 61. In one extreme case, a 1955 acquisition involving companies engaged in printing color comic supplements for newspapers was challenged by the DOJ in 1960. After the trial court dismissed the complaint in 1970, the Supreme Court held that the acquisition violated Section 7 and ordered the trial court to fashion relief in 1971. The trial court ordered divestiture in 1973, but by that time no interested buyer could be found. *See* United States v. Greater Buffalo Press, Inc., 327 F. Supp. 305 (W.D.N.Y. 1970) (dismissing complaint), *rev'd*, 402 U.S. 549 (1971), *on remand to* 1973 WL 833 (W.D.N.Y.) (ordering divestiture).

[21] *See* H.R. Rep. No. 94-1373, at 7–11.

[22] S. Rep. No. 94-803, at 61.

[23] A summary describing the main aspects of the program relevant to the Commission's study may be found in American Bar Association, Section of Antitrust Law, Antitrust Law Developments 388–96 (6th ed. 2007). For a more detailed discussion of the merger review process, see American Bar Association, Section of Antitrust Law, The Merger Review Process: A Step-by-Step Guide to Federal Merger Review 22–31 (3d ed. 2006) [hereinafter ABA, Merger Review Process].

[24] 15 U.S.C. § 18a(a).

[25] *Id.*; 72 Fed. Reg. 2693 (Jan. 22, 2007) (setting new filing thresholds based on change in GNP).

[26] 15 U.S.C. § 18a(a); 72 Fed. Reg. 2693 (Jan. 22, 2007).

[27] Act of Dec. 21, 2000, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111. These fee thresholds are also adjusted for changes in GNP. *See* 72 Fed. Reg. 2693 (Jan. 22, 2007) ($45,000 for transactions valued at less than $119.6 million; $125,000 for transactions valued between $119.6 million and $597.9 million; and $280,000 for transactions valued at $579.9 million or more).

[28] 15 U.S.C. § 18a(a)(2).

[29] 16 C.F.R. § 803, app. (2006), Notification and Report Form for Certain Mergers and Acquisitions.

[30] 15 U.S.C. § 18a(b)(1)(B).

[31] *Id.* § 18a(b)(2).

[32] *Id.* § 18a(e).

[33] *Id.* § 18a(e)(2). In the case of a cash tender offer, only the acquiring party is required to certify substantial compliance. *Id.*

[34] *See* Table A.

[35] *Id.*

[36] *See* Chapter II.A of this Report regarding the merger clearance process.

[37] 15 U.S.C. § 18a(e)(2); *see also* ABA, Merger Review Process, at 136–42.

[38] The FTC Premerger Notification Office has an informal policy under which the acquiring party can avoid paying a second filing fee and producing certain other additional information with the filing if re-filing is completed within two days. *See generally* ABA, Merger Review Process, at 141.

[39] *See* Cecile Kohrs Lindell, *Companies are Trying to Beat the Antitrust Clock*, DAILY DEAL (Feb. 6, 2007) (reporting that companies are more frequently opting to pull and re-file their HSR notifications, and describing two recent examples).

[40] Letter from Marion Bruno and J. Robert Kramer II to Andrew Heimert re AMC Data Request (Nov. 22, 2006, revised Feb. 8, 2007 & Mar. 7, 2007) [hereinafter FTC/DOJ Data Submission] chart D.

[41] Federal Trade Comm'n's Rules of Practice, 16 C.F.R. § 2.8 (2006); Order No. 753–77, 42 Fed. Reg. 56,730 (Oct. 28, 1977).

[42] 15 U.S.C. § 18a(e)(2).

[43] 16 C.F.R. § 803.6 (2006).

[44] 15 U.S.C. § 18a(g)(2).

[45] *See* FTC v. Blockbuster, Inc., Civ. No. 1:05CV00463 (D.D.C. 2005); FTC v. McCormick & Co., 1988 WL 43791, at *1 (D.D.C. Apr. 26, 1988); FTC v. Dana Corp., No. CA-3-81-0003-H (N.D. Tex. 1981).

[46] 15 U.S.C. § 18a(e)(B)(i).

[47] *Id.* § 18.

[48] Department of Commerce, Justice, State, and the Judiciary, and Related Agencies Appropriations Act, FY 2001, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111 (2000) (codified as amended at 15 U.S.C. §§ 18a & 18a note).

[49] *See* DOJ/FTC FY2000 HSR REPORT, at tbl.II (reporting that 47.3 percent of reported transactions were valued at less than $50 million).

[50] 15 U.S.C. § 18a(a)(2). Adjustments were first made in FY2005 and are now made annually.

[51] *Id.* § 18a(e)(1)(B)(i) ("The assistant attorney general and the Federal Trade Commission shall each designate a senior official who does not have direct responsibility for the review of any enforcement recommendation under this section concerning the transaction at issue, to hear any petition filed by such person. . . ."). It also increased the second waiting period from twenty to thirty days. *Id.* § 18a(e)(2).

[52] *Id.* § 18a(e)(1)(B)(iii)-(v).

[53] Federal Trade Comm'n, Report to Congress Regarding Merger Review Procedures (June 19, 2001), *available at* http://www.ftc.gov/os/2001/06/hsrreport.htm [hereinafter FTC Report to Congress re Merger Review Procedures]; Dep't of Justice, Antitrust Div., Report to Congress Regarding Merger Review Procedures (June 19, 2001), *available at* http://www.usdoj.gov/atr/public/guidelines/8550.pdf.

[54] Deborah Platt Majoras, Reforms to the Merger Review Process (Feb. 16, 2006), *available at* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf [hereinafter FTC 2006 Merger Process Reforms]; Deborah Platt Majoras, Statement at AMC Barnett/Majoras Hearing, at 11 (Mar. 21, 2006) [hereinafter Majoras Statement] (summarizing reforms); Dep't. of Justice, Antitrust Div., Background Information on the 2006 Amendments to the Merger Review Process Initiative (Dec. 14, 2006) [hereinafter DOJ Background on 2006 Merger Process Initiative Amendments], *available at* www.usdoj.gov/atr/public/220241.htm; Dep't. of Justice, Antitrust Div., Merger Review Process Initiative (revised, Dec. 14, 2006) [hereinafter DOJ Revised Merger Process Initiative], *available at* www.usdoj.gov/atr/public/220237.htm.

[55] *See* J. Robert Kramer II, Statement at AMC Merger Enforcement Hearing, at 2–3 (Nov. 17, 2005) [Kramer Statement] (before the HSR Act, the DOJ could not effectively detect and challenge anticompetitive mergers; pre-merger review effectively protects consumers from anticompetitive mergers); Baer, *Reflections on 20 Years of Merger Enforcement*, at 834.

[56] *See, e.g.*, Merger Enforcement Transcript at 203 (Whitener) (Nov. 17, 2005) ("[I]n the main, it's a system that works well."); *id.* at 201 (Kramer) (HSR process is "successful from any global view"); Wayne D. Collins, Statement at AMC Merger Enforcement Hearing, at 2 (Nov. 17, 2005) (HSR Act provides "an adequate statutory framework for merger review," and the U.S. agencies "have done many things very well, [though] there is significant room for further improvement"); U.S. Chamber of Commerce, Public Comments Submitted to AMC (Nov. 8, 2005), at 14–15 [hereinafter U.S. Chamber of Commerce Comments] (prais-

ing agencies for reducing the number of second requests); *see also* INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 139 n.127 (2000) [hereinafter ICPAC REPORT] (observing that "business and bar association representatives who appeared before the Advisory Committee emphasized that the U.S. review process is 'fundamentally sound'").

57 *See, e.g.*, Thomas O. Barnett, Statement at AMC Barnett/Majoras Hearing, at 7 (Mar. 21, 2006) [hereinafter Barnett Statement] (mergers can "generate procompetitive benefits, such as lower costs and increased innovation"); Susan A. Creighton, Statement at AMC Merger Enforcement Hearing, at 1 (Nov. 17, 2005) [hereinafter Creighton Statement] (merger review process may impose costs on transactions that are largely or wholly beneficial to consumers). *See generally* Chapter I.B of this Report regarding substantive merger law.

58 *See, e.g.*, Merger Enforcement Trans. at 234–35 (Whitener) (arguing against adopting the European approach to merger review in the United States); Merger Enforcement Trans at 235–36 (Wales) (arguing that U.S. system relies more on "objective facts"); ABA Comments re HSR, at 13 (declining to recommend adoption of a "Form CO-like submission").

59 *See, e.g.*, International Chamber of Commerce, Public Comments Submitted to AMC, at 2 (Sept. 5, 2005) [hereinafter ICC Comments] (commending the E.U. and Canadian approaches to structuring the second request review period); Merger Streamlining Group Comments, at 8–10 (noting that second phase investigations in Canada and the European Union imposes fewer burdens on parties and suggesting reforms analogous to features of those systems).

60 *See generally* Majoras Statement, at 10 ("[t]he agencies can implement such flexible revisions readily through changes to their internal procedures" while "crafting the revisions [to merger review procedures] through more static legislation presents substantial challenges"); Barnett/Majoras Transcript at 24 (Barnett) (Mar. 21, 2006) (merger review process reform is "an issue that I do not believe can be fixed legislatively. It's a very fact-specific, very process-specific issue, and the agencies are focused on it and, I think, have made progress."); Barnett Statement, at 7–9.

61 *See* ICPAC REPORT, at 127 (stating that, as of 2000, HSR filings had "increased significantly since the HSR Act was enacted" due to increased merger activity and the failure to adjust the thresholds).

62 *See* Table A; U.S. Chamber of Commerce Comments, at 13 (the "upward revision in the filing threshold has dramatically reduced the number of filings").

63 *See* DOJ/FTC FY2000 HSR Report, at tbl.II (reporting that 47.3 percent of reported transactions were valued at less than $50 million).

64 ICPAC REPORT, at 126 (emphasis omitted).

65 U.S. Chamber of Commerce Comments, at 13.

66 *See* Table B.

67 *See* ICC Comments, at 2; ABA Comments re HSR, at 14. One commenter did suggest that action be taken to reduce the number of filings further. U.S. Chamber of Commerce Comments, at 13.

68 *See* Pub. L. No. 101-162, § 605, 103 Stat. 988, 1031 (1989) ("Fees collected for [HSR filings] shall be divided evenly between and credited to the appropriations, Federal Trade Commission, 'Salaries and Expenses' and Department of Justice, 'Salaries and Expenses, Antitrust Division.'") (codified as amended by Pub. L. No. 101-302, Title II, 104 Stat. 213, 217 (1990) at 15 U.S.C. § 18a note).

69 Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm; Data on FTC Appropriations (on file with AMC).

70 Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm.

71 Act of Dec. 21, 2000, Pub. L. No. 106-553, § 630, 114 Stat. 2762, 2762A-108 to 111. Congress also raised the filing fee, in 1994, to $45,000 per transaction. Act of Aug. 26, 1994, Pub. L. No. 103-317, Title I, 108 Stat. 1724, 1739.

72 146 Cong. Rec. S10921 (daily ed. Oct. 10, 2000) (statement of Sen. Leahy) ("the appropriations to these agencies usually corresponds to the level of the fees collected," and the "bill authorizes the collection of sufficient fees to be revenue neutral"); 146 Cong. Rec. S11240 (daily ed. Oct. 27, 2000) (statement of Sen. Kohl) ("In order to assure that this reform is revenue neutral [for the agencies], we have worked with the Appropriations Committee to ensure that this bill raises the filing fees for the largest transactions.").

73 Sunshine & Wales Statement, at 10; Business Roundtable, Public Comments Submitted to AMC, at 15 (Nov. 5, 2005) [hereinafter Business Roundtable Comments]; U.S. Chamber of Commerce Comments, at 16; ICC Comments, at 2.

74 ICPAC Report, at 129; *Antitrust Enforcement Agencies: The Bureau of Competition of the Federal Trade Commission and the Antitrust Division of the Department of Justice, Hearing Before the Committee on the Judiciary House of Representatives*, 106th Cong. 209 (2000) (prepared statement of Jim Rill, Co-Chair, International Competition Policy Advisory Committee) [hereinafter Rill/ICPAC Statement].

75 *See* 146 Cong. Rec. S11240 (daily ed. Oct. 27, 2000) (statement of Sen. Kohl) ("Of course, in a perfect world, we wouldn't finance the Antitrust Division and the FTC on the backs of these filing fees.").

76 U.S. Chamber of Commerce Comments, at 16 ("As presently structured and applied, the fees represent nothing less than a tax imposed on parties that are forced to comply with the Hart-Scott-Rodino pre-merger scheme . . . ."); PwC Survey, at 4.

77 *See* Business Roundtable Comments, at 15.

78 U.S. Chamber of Commerce Comments, at 13 ("These [HSR] fees bear no relationship to the costs incurred in reviewing the average filing (since the vast majority of filings are cleared without any substantive review) and cannot be justified as a reasonable user charge."); Sunshine & Wales Statement, at 10.

79 *See* ICPAC Report, at 129 ("[F]iling fees should be delinked from funding for the agencies, but . . . any efforts to do so must occur in an environment where sufficient funds are assured from other sources."); Rill/ICPAC Statement, at 209.

80 William Blumenthal, *Overenforcement in the Hart-Scott-Rodino Second Request Process*, in Malcolm B. Coate & Andrew N. Kleit, The Economics of the Antitrust Process 26 (2003) [hereinafter Blumenthal, *Overenforcement in the HSR Second Request Process*]; *see also* Mark D. Whitener, Statement at AMC Merger Enforcement Hearing, at 3 (Nov. 17, 2005) [hereinafter Whitener Statement] ("The cost, delay and disruption to business operations associated with a typical second request are disproportionate to the benefits to the government's enforcement mission, and they are increasing.").

81 *See, e.g.*, Business Roundtable Comments, at 11; ICC Comments, at 11 (many ICC members have reported that overly broad second requests are being issued); ABA Comments re HSR, at 3; Whitener Statement, at 6 ("Second request responses have transmogrified into even more massive efforts that typically entail several million dollars in direct costs, and result in the collection, review and production of not hundreds but thousands of boxes of documents (or their electronic equivalent) as well as complex and costly data responses."); U.S. Chamber of Commerce Comments, at 14 ("The incredible burden of responding to Second Requests is well-known to any firm that has survived the ordeal. It is not unusual for companies caught up in the process to produce millions of documents and spend similar amounts in order to comply with agency demands."); Sunshine & Wales Statement, at 2.

82 ABA Comments re HSR, at 3.

83 ICPAC Report, at 138 (footnote omitted).

84 Majoras Statement, at 10–13; Barnett Statement, at 7–8; Kramer Statement, at 2; Creighton Statement, at 1–2.

85 *See* Merger Enforcement Trans. at 285 (Kramer); id. (Creighton).

86 *See* Majoras Statement, at 10 (reforms will reduce costs to parties and agencies).

87 *See, e.g.*, Whitener Statement, at 5 ("From the merging parties' perspective, the costs of complying with a second request in terms of time, money and disruption are enormous. . . . The delays alone, to say nothing of the costs, usually are enough to make litigation infeasible."); ICC Comments, at 1, 4 ("the cost, burden . . . involved in HSR review appear to have increased dramatically" and the second request process is "unduly burdensome") (quoting ICPAC Report, at 137); ABA Comments re HSR, at 1–2 (despite prior reform efforts, "the expense and burden of second request compliance has steadily increased and is becoming untenable"); Business Roundtable Comments, at 11 ("The issuance of a Second Request dramatically increases the cost, delay, and burden for both the agencies and the parties. . . . Second Requests are overbroad and require parties to produce an extraordinary amount of documents and data, far beyond the scope of information that is 'readily available.'").

88 *See, e.g.*, ABA Comments re HSR, at 9 (stating that parties that must comply with second requests "incur a variety of very substantial costs," including lawyers, economists, computer/data processing vendors, copy vendors, the opportunity costs of employee time, and the cost of delay in consummating the transaction.); Sunshine & Wales Statement, at 4.

89 *See* ABA Merger Comments re HSR, at 9; PwC Survey, at 5.

90 ABA Comments re HSR, at 4 (citing Cecile Kohrs Lindell, *Majoras Hopes to Streamline Reviews*, Daily Deal (May 11, 2005)); *see also* Sunshine & Wales Statement, at 4 (approval for transactions receiving second requests took an average of 7.8 months for the FTC and 5.7 months for the DOJ in 2005); *cf.* Barnett Statement, at attachment 5 (citing average duration of approximately four months for matters that the DOJ does not challenge in court).

91 PwC Survey, at 4.

92 *Id.* at 12–13.

93 *Id.* at 44.

94 *Id.* at 42.

95 *Id.*

96 Letter from Joseph Angland to the Antitrust Modernization Commission Re: Data Regarding the Burden Involved in Responding to HSR Second Request Investigations (Feb. 22, 2007) [hereinafter Angland Letter].

97 FTC/DOJ Data Submission (attachment: Questions to be Answered with Data from the FTC and/or the DOJ, at 2).

98 *Id.* at charts H1–H2.

99 *Id.*

100 *Id.*; *see also* Barnett Statement, at 8–9, attachments 4–5 (reporting reductions in the length of second request investigations and the percentage of initial investigations resulting in second requests).

101 *See* American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2001*, at 29–30.

102 *See* Deborah Platt Majoras, FTC Chairman, Reflections on My First Year, Remarks Before the 2005 ABA Annual Meeting, at 10 (Aug. 6, 2005) ("[I]f we do not have a reasonable level of assurance that parties are dealing in good faith, new rules and process reforms will be, I fear, dead-on-arrival."); *see also* Whitener Statement, at 11–12; Merger Enforcement Trans. at 224–25 (Creighton) ("[C]ooperation by the parties really is indispensable for us to be able to engage in any kind of meaningful reduction in the number of custodians searched.").

103 FTC 2006 Merger Process Reforms, at 2, 6; Majoras Statement, at 10; Creighton Statement, at 2–3 (emphasizing the impact of "increasing sophistication of substantive merger analysis" and "increasing use of data-dependant economic analysis"); International Bar Association, Public Comments Submitted

to AMC Regarding Merger Enforcement, at 25 (Oct. 26, 2005) [hereinafter IBA Comments] ("U.S. merger review has come a long way and now involves detailed and sophisticated microeconomic analysis of a merger's likely impact on prices and markets.").

104 *See, e.g.*, Whitener Statement, at 6 (agencies and courts "rely more heavily on econometric analysis of business data").

105 *See, e.g.*, Creighton Statement, at 2 (due to increased use of electronic storage, "the number of documents that need to be searched and produced has grown exponentially"); FTC 2006 Merger Process Reforms, at 2 ("advances in technology—from the copy machine to e-mail—have resulted in companies' producing and retaining substantially more documents"); Kramer Statement, at 9 (the proliferation of electronic documents makes second request reform "more urgent").

106 Scott Sher & Daryl Teshima, *e-Normous: The Increasing Burden Associated with Electronic Document Production in Second Request Investigations*, ANTITRUST SOURCE, at 1 (Nov. 2005), *available at* www.wsgr.com/PDFSearch/sher1105.pdf [hereinafter Sher & Teshima, *e-Normous*] ("The volume of electronic documents . . . is overwhelming and increasing at a rate that puts Moore's Law to shame.").

107 American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2004*, at 42 [hereinafter ABA, *The State of Federal Antitrust Enforcement—2004*].

108 *See* Whitener Statement, at 6 (agencies and courts "rely more heavily on econometric analysis of business data," and companies in turn collect more data that the agencies can request); IBA Comments re Merger Enforcement, at 25 (noting an increase in the need for data and the sources of data).

109 *See* ABA Comments re HSR, at 2 (The cost and length of time required to comply is primarily due to volume of (primarily electronic) documents and data being produced pursuant to second requests. Corporations store and retain more, and the agencies more regularly require the manipulation and production of such data.); Sher & Teshima, *e-Normous*, at 8.

110 Merger Enforcement Trans. at 285 (Kramer); *id.* (Creighton).

111 *See* Blumenthal, *Overenforcement in the HSR Second Request Process*, at 23–24.

112 *See* Whitener Statement, at 4–5; *see also* ABA, *State of Federal Antitrust Enforcement—2004*, at 41 (efforts to "discover[] every conceivable, potentially relevant fact" can "result[] in the type of massive, overbroad and unduly burdensome requests that are issued too often").

113 *See* Sher & Teshima, *e-Normous*, at 12.

114 IBA Comments re Merger Enforcement, at 30 (arguing that "[t]he Agencies' desire to collect all the evidence that may be required in litigation . . . increases the cost of the Second Request Process").

115 *See* Sunshine & Wales Statement, at 2 (HSR was intended to give the agencies "the time and the basic information needed to determine whether to institute a merger enforcement action in federal court").

116 *See generally* Sunshine & Wales Statement, at 1; William J. Kolasky & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 889–93 (1997) [hereinafter Kolasky & Lowe, *Merger Review Process*].

117 See Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 868–69 (1997) [hereinafter Sims & Herman, *Effect of Twenty Years of Hart-Scott-Rodino*]; Sunshine & Wales Statement, at 1; Kolasky & Lowe, *Merger Review Process*, at 893 (time-sensitive nature of transactions generally leads parties to avoid litigation "wherever possible").

118 *See, e.g.*, Business Roundtable Comments, at 14 ("The internal appeals process at both agencies has proved to be useless."); ABA Comments re HSR, at 11 (in five years "the agencies have not, and, perhaps, cannot, create a credible internal second request appeals process"); Whitener Statement, at 13.

119 Sims & Herman, *Effect of Twenty Years of Hart-Scott-Rodino*, at 881. The authors contend that the agencies disregarded the clear intent of the HSR Act when they decreed that "[a]nything less than a complete response is not substantial compliance" and that the waiting period does not run until the agencies deter-

mine substantial compliance. *Id.* at 881 & n.58 (quoting Federal Trade Comm'n, Statement of Basis and Purpose, 43 Fed. Reg. 33,450, 33,508, 33,550 (July 31, 1978) (internal quotations omitted)).

[120] For descriptions of specific initiatives, see Kramer Statement, at 7–15 (describing various initiatives taken by DOJ over the past ten years); Barnett Statement, at 8–9 (focusing on the Division's 2001 Merger Review Process initiative); Majoras Statement, at 10; Barnett/Majoras Trans. at 11–12 (Majoras); ABA Comments re HSR, at 5.

[121] The agencies also adopted several other reforms that help reduce burdens, but that are not addressed by the Commission in this Report. FTC 2006 Merger Process Reforms, at 19–30; DOJ Background on 2006 Merger Process Initiative Amendments, at 13–15.

[122] FTC/DOJ Data Submission, at Charts H1–H2.

[123] DOJ/FTC FY2005 HSR Report, at 17–18; DOJ Background on 2006 Merger Process Initiative Amendments, at 1 (the "amendments are part of the Division's ongoing effort to reduce merger review burdens while preserving its ability to conduct thorough investigations and successfully challenge anticompetitive transactions.").

[124] Majoras Statement, at 12.

[125] FTC/DOJ Data Submission (attachment: Questions to be Answered with Data from the FTC and/or the DOJ, at 2).

[126] *Id.* at charts I1–I3.

[127] For example, the agencies do not currently track which types of employees are most likely to be the source of documents that prove most useful in investigations. FTC/DOJ Data Submission (attachment: Questions to be Answered with Data from the FTC and/or the DOJ, at 3).

[128] *See* Chapter II.A of this Report regarding dual federal enforcement, which describes the limited data on length of delays resulting from clearance disputes.

[129] *See* Majoras Statement, at 10 ("The agencies can implement such flexible revisions readily through changes to their internal procedures" while "crafting the revisions [to merger review procedures] through more static legislation presents substantial challenges"); Barnett/Majoras Hearing Trans. at 24 (Barnett) (merger review process reform is "an issue that I do not believe can be fixed legislatively. It's a very fact-specific, very process-specific issue, and the agencies are focused on it and, I think, have made progress."); Barnett Statement, at 7–9.

[130] ABA Comments re HSR, at 10 ("[L]imiting the number of custodians is probably one of the most effective ways to reduce the burden of compliance."); FTC 2006 Merger Process Reforms, at 12 (noting "the strong relationship between search group size and investigation cost"); Merger Enforcement Trans. at 224 (Creighton) ("[T]wo of the really key variables . . . are the time period and, even more importantly, the number of custodians that we review."); Whitener Statement, at 8 ("The number of people who are subject to the search is critical . . . ."); ABA, *State of Federal Antitrust Enforcement—2004*, at 42; *see also* Angland Letter, at chart 1 (comparing the total cost of compliance and the number of custodians searched).

[131] Whitener Statement, at 9–10; ABA Comments re HSR, at 10; FTC 2006 Merger Process Reforms, at 12.

[132] IBA Comments, at 28.

[133] *See, e.g.*, FTC 2006 Merger Process Reforms, at 9 (referring to a presumption of searching thirty-five custodians); DOJ Background on 2006 Merger Process Initiative Amendments, at 9 (referring to thirty-custodian cap on searches).

[134] FTC 2006 Merger Process Reforms, at 12–13.

[135] *Id.* at 13 (limit may be exceeded if authorized by the Director of the Bureau of Competition); DOJ Background on 2006 Merger Process Initiative Amendments, at 9 (limit may be exceeded if authorized by the Section Chief responsible for the investigation).

136 FTC 2006 Merger Process Reforms, at 9–10, 13–14, 17–18; DOJ Background on 2006 Merger Process Initiative Amendments, at 10–12.

137 FTC 2006 Merger Process Reforms, at 10, 15–19; DOJ Background on 2006 Merger Process Initiative Amendments, at 11.

138 FTC 2006 Merger Process Reforms, at 10, 15–19.

139 DOJ Background on 2006 Merger Process Initiative Amendments, at 11; DOJ Revised Merger Process Initiative, at 7.

140 The agencies could retain their existing custodial limit programs for instances in which the parties do not elect this option using the HSR Act notification form.

141 *But see* FTC 2006 Merger Process Reforms, at 12 (the FTC considered but rejected "establishing a range of presumptive custodial limits" tied to the size of the transaction, due to the "complexity of such an approach").

142 *See* FTC 2006 Merger Process Reforms, at 13; DOJ Background on 2006 Merger Process Initiative Amendments, at 12.

143 *See, e.g.*, DOJ Revised Merger Process Initiative, at 2–3 (stating that "[e]arly substantive consultations are strongly encouraged . . . . [for] both the Division and the parties to present their preliminary views on the transactions," including identification of all "critical or potentially dispositive issues"); FTC Report to Congress re Merger Review Procedures (generally within five days of issuing a second request, FTC staff will invite the parties "to discuss the second request and the competitive issues raised by the proposed transaction, to the extent then known").

144 *See, e.g.*, ICC Comments, at 4 (at the beginning of a second stage review, the reviewing agency should give the parties, orally or in writing, "a short but clear statement of the competitive concerns that cause the agency to undertake further investigation"); Business Roundtable Comments, at 14; IBA Comments re Merger Enforcement, at 29.

145 *See, e.g.*, DOJ Revised Merger Process Initiative, at 3–5; Federal Trade Comm'n, Best Practices for Data, and Economics and Financial Analyses in Antitrust Investigations, at 1–2, *available at* www.ftc.gov/be/ftcbebp.pdf.

146 *See* Merger Enforcement Trans. at 278–79 (Creighton) (data sharing raises substantial difficulties); *see also id.* at 66, 74–75 (Willig) (discussing problems of data confidentiality in related context).

147 *See* Merger Enforcement Trans. at 152–53 (Rule) (recounting instance in which the agency economists declined to reveal their models due to the possibility of litigation); *cf. id.* at 153 (Heyer) (noting that such events may occur but that cooperation is usually good).

148 Two witnesses considered allowing staff to discuss the specifications of the models (and resulting estimates) with the parties' economists, but not the underlying data. Merger Enforcement Trans. at 277–79 (Kramer, Collins); *id.* at 151–52 (Heyer) (describing efforts to share data with parties).

149 ICC Comments, at 6; Business Roundtable Comments, at 12; *see also* ICPAC Report, at 141–42; Letter from Roxanne C. Busey to Joseph Simons re Merger Review Process, at 17 (Aug. 6, 2002) (translation requirements can be "extremely expensive" and "potentially cripple a transaction in terms of time and expense").

150 *See* Busey Letter, at 17–18 (suggesting an approach to balance the costs and benefits of requiring transaction of non-English documents).

151 ABA, Merger Review Process, at 171; *id.* at app. 19, at 19-18 (Model Second Request); Casey R. Triggs, *Effectively Negotiating the Scope of Second Requests*, 13 Antitrust, Summer 1999, at 36, 39.

152 *See* ICC Comments, at 6 (encouraging the Commission to explore how the practice of providing summaries of documents, and limiting production of full translations, can reduce the burden on the parties).

153 *See* Business Roundtable Comments, at 13–14.

[154] *See, e.g.*, ABA Comments re HSR, at 4 (providing data in a different format from that maintained by the company in the ordinary course of business can be especially burdensome, difficult, time consuming, and expensive); U.S. Chamber of Commerce Comments, at 15 (recommending a reduction in the "number and scope of interrogatory requests calling for the submission of financial/economic data not kept in the ordinary course of business"); Business Roundtable Comments, at 13 ("[r]equests for econometric data not kept in the ordinary course of business should not be standard" but rather determined by agency management).

[155] *See, e.g.*, FTC 2006 Merger Process Reforms, at 22–23 (providing for improved communication regarding data needs and negotiation of data requests, including an opportunity for parties to meet with senior management about a request).

Chapter II.C
State Enforcement of Antitrust Laws

1. INTRODUCTION

Today, each state, and the District of Columbia, has its own antitrust laws.[1] The language of most state antitrust laws is substantially identical to the language of the Sherman Act, and even where they are not identically worded, state antitrust statutes are generally "interpreted by the state court[s to be] consistent with federal law."[2] Courts generally have resolved constitutional challenges to state antitrust laws in favor of giving state antitrust laws full effect.[3] The Supreme Court has declined to find preemption of state antitrust laws on either Commerce Clause or Supremacy Clause grounds, holding that Congress intended there to be antitrust enforcement at both the state and federal levels.[4]

Each state, and the District of Columbia, also can sue under the federal antitrust laws. A state may sue on its own behalf (or on behalf of one of its political subdivisions) as an injured purchaser.[5] Alternatively, a state may sue as *parens patriae* seeking treble damages or restitution on behalf of state consumers—that is, "natural persons" (as opposed to corporations, partnerships, and other entities) residing in the state—who have suffered antitrust injuries under federal law.[6] Finally, a state may seek injunctive relief under Section 16 of the Clayton Act to forestall injury to the state's economy or its consumers.[7]

Much state antitrust enforcement has been consistent with federal enforcement. States nonetheless operate as independent decision-makers in enforcing federal antitrust laws.[8] As a result, state antitrust enforcers sometimes have challenged business conduct that federal enforcers declined to challenge, and have sought more stringent remedies than those sought by federal enforcers.[9]

Some have criticized such divergences as undermining a consistent, coherent federal antitrust policy and creating uncertainty and unjustified antitrust risks for businesses.[10] Among other things, opponents point to antitrust enforcement guidelines, adopted by the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG), which differ in some respects from the guidelines of the federal antitrust agencies.[11] Critics of states' enforcing federal antitrust laws further argue that, even when state antitrust enforcement is consistent with federal enforcement, state activities duplicate the efforts of federal agencies and unnecessarily burden businesses with additional costs.[12]

Proponents of states' enforcing federal antitrust laws, on the other hand, contend that antitrust enforcement by states can fill important gaps in federal antitrust enforcement. States can better identify and pursue local antitrust violations, they argue, and can bring their own enforcement actions if they believe federal agencies are enforcing the antitrust laws at a suboptimal level.[13] Proponents also value the states' authority to obtain treble damages for consumers injured by price-fixing or other antitrust violations that a federal agency has established in court—an authority the federal antitrust agencies do not have.[14]

To examine these issues, the Commission sought testimony and comments and reviewed data on state antitrust enforcement over the past fifteen years. The available evidence indicates that, in general, the types of antitrust cases brought by state antitrust enforcers have been consistent with those brought by federal antitrust enforcers. There also has been a substantial degree of cooperation and coordination among state and federal antitrust enforcers. On occasion, in significant, national cases, state antitrust enforcers have diverged from federal enforcers by, for example, seeking remedies beyond those sought by the federal government. Some see this as a problem requiring solution; others see it as a benefit of independent state antitrust authority. One definite cost of state merger enforcement is that it has sometimes overburdened businesses with duplicative document requests or the need to negotiate different document confidentiality agreements with different states.

In the Commission's view, such costs of state antitrust enforcement do not warrant eliminating the states' authority to enforce the federal antitrust laws. State antitrust enforcement can benefit consumers by obtaining treble damages for consumers and supplementing federal enforcement. The states have unique authority to recover antitrust damages for their consumers and local government purchasers. The vast majority of state enforcement activity over the past fifteen years has involved areas in which state enforcers may have a comparative advantage in terms of knowledge—that is, with respect to local markets, local competitive effects, and local government purchasers. During the same time period, the states' enforcement efforts have targeted most frequently those antitrust violations most likely to cause significant consumer harm, such as price-fixing, bid-rigging, and market allocation.

In addition, in recent years, state and federal antitrust enforcement have been largely consistent. State and federal authorities together have taken many steps to improve the coordination of their investigational and enforcement efforts. To the extent that differences occur, federalism suggests the states should continue to have the ability to make their own judgments on how best to seek to protect their consumers. Indeed, it would seem inappropriate to preclude the states from enforcing claims on behalf of themselves and their citizens while still allowing private parties to sue. Moreover, because the states, like the federal antitrust agencies, must go to court to pursue their cases, the courts can take steps to ensure the consistency of legal standards under federal law.

The Commission was not persuaded that the costs of state enforcement—such as companies' being required to deal with multiple enforcers—outweigh the benefits of state enforcement or could not be substantially mitigated by means short of eliminating the authority of the states to enforce the federal antitrust laws. Rather, to address the concerns that have been raised, state antitrust enforcers should continue to focus on their areas of comparative advantage, such as local markets, and should coordinate with the federal antitrust agencies and each other to find additional ways to reduce the costs to businesses of state merger review. Specifically, the Commission makes the following recommendations.

32. No statutory change is recommended to the current role of the states in non-merger civil antitrust enforcement.*

33. State non-merger enforcement should focus primarily on matters involving localized conduct or competitive effects.†

34. No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to reviewing mergers.**

35. Federal and state antitrust enforcers are encouraged to coordinate their activities and to seek to avoid subjecting companies to multiple, and possibly inconsistent, proceedings.

36. Federal and state antitrust enforcers should consider the following actions to achieve further coordination and cooperation and thereby improve the consistency and predictability of outcomes in merger investigations:

36a. The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law, particularly with respect to mergers.

36b. Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.

36c. The state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements.

* Commissioners Carlton, Delrahim, and Shenefield do not join this recommendation.

† Commissioners Cannon, Jacobson, and Yarowsky do not join this recommendation.

** Commissioners Carlton, Delrahim, Garza, Shenefield, and Warden do not join this recommendation.

2. BACKGROUND

A. The History of State Enforcement of Antitrust Laws

State antitrust enforcement has a long history. Twenty-one states had enacted their own antitrust laws before the passage of the first federal antitrust law, the Sherman Act, in 1890.[15] Senator Sherman stated the Sherman Act would supplement state antitrust enforcement: "Each State can deal with a combination within the State, but only the General Government can deal with combinations reaching not only the several States, but the commercial world."[16] Because the definition of interstate commerce was then narrower than it is today,[17] the enactment of a federal antitrust law did not imply any overlap with state antitrust enforcement efforts. State antitrust laws applied only to intrastate conduct, while federal antitrust enforcement applied only to interstate conduct, narrowly defined.[18]

At the beginning of the twentieth century, the states' antitrust enforcement—proceeding under state antitrust laws—was more robust than that of the federal government.[19] Federal antitrust enforcement institutions developed slowly.[20] After World War I, however, the Supreme Court began to interpret the Commerce Clause much more broadly,[21] and state involvement in antitrust enforcement decreased as federal antitrust enforcement grew. Once the courts interpreted the Commerce Clause to allow federal enforcement agencies to challenge anticompetitive conduct virtually anywhere in the country, "state antitrust took a decided back seat to federal law and policy."[22]

In 1976, however, the passage of two federal statutes reinvigorated the states' role in antitrust enforcement.[23] Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) gave state attorneys general *parens patriae* authority to seek monetary relief (including treble damages) on behalf of state residents.[24] In addition, the Crime Control Act of 1976 led to the appropriation of new funds that enabled twenty-five states to establish antitrust enforcement units for the first time.[25]

For many decades, federal and state antitrust enforcers have had largely concurrent jurisdiction over interstate commerce.[26] This concurrent jurisdiction creates a potential for overlapping and inconsistent federal and state antitrust enforcement that did not exist when Congress passed the Sherman Act.[27] During the 1980s, for example, some state attorneys general, dissatisfied with what they perceived as insufficient levels of antitrust enforcement by the federal government, formed a Multistate Antitrust Task Force (Task Force) through NAAG.[28] The Task Force has coordinated a variety of state antitrust efforts, including the adoption of NAAG antitrust enforcement guidelines, which differ in some respects from those of the federal antitrust agencies.[29]

Important efforts to coordinate state and federal antitrust enforcement have taken place despite the differences.[30] These efforts include the 1989 formation of an Executive Working Group on Antitrust, which coordinates state and federal enforcement activities to avoid duplicative efforts.[31] Most states have joined the NAAG Voluntary Pre-Merger Disclosure

Compact, as revised in 1994 (NAAG Compact). That Compact encourages merging firms to submit pre-merger filings to the member states in return for an agreement by the states to forgo the issuance of individual state subpoenas and to obtain documents through the same process used by the relevant federal antitrust agency.[32] There also have been the joint state and federal adoption of two protocols—a Protocol for Increased State Prosecution of Criminal Antitrust Offenses in 1996[33] and a Protocol for Joint Federal/State Merger Investigations in 1998.[34]

In 2005 NAAG adopted certain Principles of State Antitrust Enforcement (NAAG Principles),[35] which articulate, among other things, NAAG's view of the relationship between state and federal antitrust enforcement.[36] The NAAG Principles state that Congress intended federal antitrust laws to "complement, rather than supplant state antitrust laws," and that the state attorneys general accordingly "oppose[] federal preemption of any state antitrust statutes . . . or other limitation of state antitrust authority."[37] The NAAG Principles note the states have merger enforcement jurisdiction and can obtain divestiture in merger cases.[38] They also claim that "in merger cases, the effects of consolidation in national mergers are more often felt locally than nationally," thus making state attorneys general at least as knowledgeable about those effects as the federal antitrust agencies.[39] The NAAG Principles assert that state attorneys general work closely with the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), and they have done so efficiently and productively. Congress has mandated and continues to support (as do the state attorneys general) increased cooperation (including sharing information) among the federal agencies and the states.[40]

B. State Authority and Recent State Antitrust Enforcement

State authority to obtain damages on behalf of consumers is broader than that of the federal antitrust agencies. This section briefly reviews that authority and then discusses state antitrust enforcement from the 1990s through 2006.

1. States Are the Only Governmental Authorities that May Seek Treble Damages for Consumers to Remedy Violations of Federal Antitrust Law

The only governmental authorities that may recover treble damages on behalf of consumers injured by violations of federal antitrust law are state attorneys general.[41] The federal antitrust enforcers have no such authority; at most, they may seek disgorgement or restitution as monetary remedies.[42] This state remedial authority is most relevant in non-merger matters, such as price-fixing cases, where states may recover overcharges that consumers paid.[43]

Of course, consumers may also sue individually, or as participants in class actions, to recover treble damages. Many individual consumers, however, are unlikely to undertake what can be lengthy and expensive litigation.[44] In addition, states have certain advantages as litigants. States using *parens patriae* authority do not need to meet all of the requirements that apply to private class actions,[45] and states—unlike private plaintiffs—can use tools such as subpoenas to investigate potential violations prior to litigation.[46]

2. Recent State Antitrust Enforcement

Data on state antitrust enforcement activities are not comprehensive. Each of the available data sets is missing some information, such as different states' activities or cases during different time periods. The data sets vary in the level of detail they provide about challenged activities and how the cases were resolved.

Nonetheless, various efforts to collect and describe data on state antitrust enforcement generally outline a consistent picture. One scholar who analyzed state antitrust enforcement activity between 1993 and 2002 concluded that state antitrust enforcement "is based overwhelmingly on the states' comparative advantages," characterized as "familiarity with local markets, familiarity with and representation of state and local institutions, and ability to send money to injured individuals."[47] Another scholar, using a different data set, concluded that a relatively large number of state price-fixing and bid-rigging cases, coupled with a relatively small number of vertical cases, reflected state enforcement priorities that were consistent with the enforcement priorities suggested by prevalent, well-regarded economic analysis.[48]

A similar picture emerges from analysis of the data provided in the NAAG State Antitrust Litigation database (NAAG Database), the most comprehensive source of information about state antitrust enforcement actions.[49] NAAG sought data from its members on their antitrust enforcement actions, requesting (among other things) case names, the dates cases were initiated and settled or brought to final judgment, the types of claims, the industry, and whether there was "federal participation" in the case. NAAG defined "federal participation" to mean "there was a federal case related to the state case."[50] The database does not explain whether federal participation was "joint, parallel, or independent,"[51] nor does it indicate whether the federal agency and the relevant state(s) sought or received different remedies in court or in settlement agreements.

Although the database is less than complete,[52] it provides significant insights into recent state antitrust enforcement activity. The analysis below focuses on actions filed within the last seventeen years, from 1990 through 2006. The reporting states filed a total of 343 antitrust actions in that period, including cases the states brought on their own as well as cases in which there was federal participation.

The greatest percentage of all of the NAAG-reported cases—47 percent—involved claims of price-fixing, bid-rigging, or market allocation, as shown in Figure 1. Merger challenges followed, making up 34 percent of the total cases.[53] Finally, 19 percent of the cases involved "other" allegations, including group boycotts, monopolization, horizontal and vertical non-price restraints, joint ventures, resale price maintenance, refusals to deal, tying, monopsony, or violation of enforcement orders.

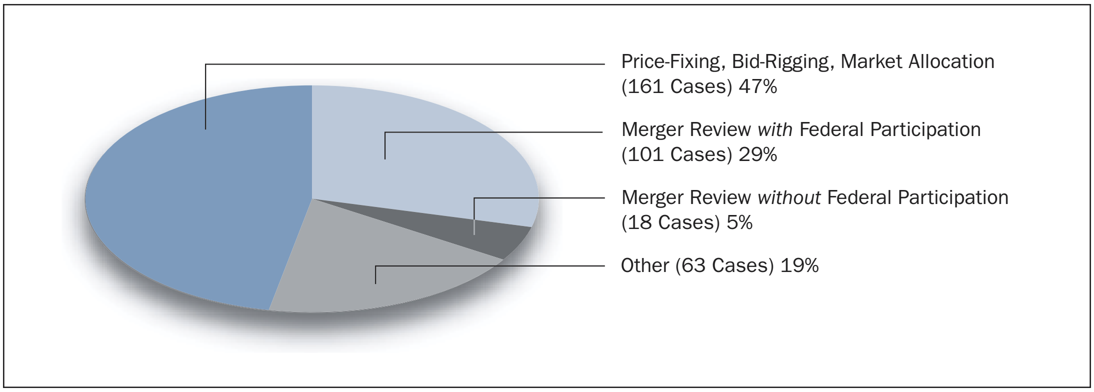

Figure 1: State Antitrust Enforcement by Type of Case

59 percent (201 of 343) of these actions represent joint enforcement with one of the federal agencies.[54] With respect to the remaining 142 cases, 56 percent involved allegations of price-fixing, bid-rigging, or market allocation, as shown in Figure 2. Only 13 percent involved merger challenges. Finally, 31 percent involved "other" allegations, as described above. 80 percent of the enforcement actions that states pursued on their own involved local or regional conduct.[55]

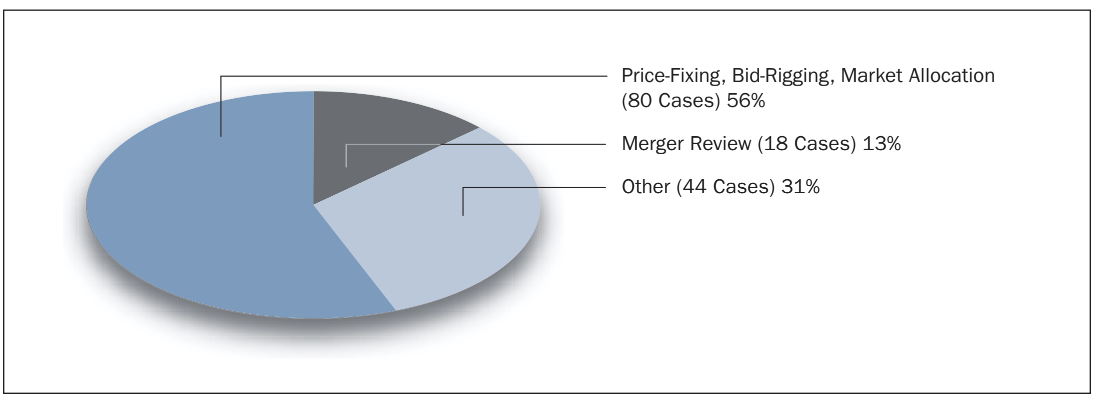

Figure 2: Types of State-Only Antitrust Enforcement

3. RECOMMENDATIONS AND FINDINGS

The available evidence does not suggest a need for Congress to change the states' authority to enforce the federal antitrust laws. The Commission does, however, make specific recommendations as to how the states and federal enforcement agencies can work together to respond to legitimate concerns that have been raised concerning multiple enforcement agencies. Because the issues differ somewhat for state non-merger and merger enforcement, recommendations for these areas are discussed separately below.

A. State Non-Merger Enforcement

32. No statutory change is recommended to the current role of the states in non-merger civil antitrust enforcement.*

33. State non-merger enforcement should focus primarily on matters involving localized conduct or competitive effects.†

Multiple enforcers with different enforcement approaches can lead to inconsistent results.[56] To avoid this, state and federal antitrust enforcement should be broadly consistent. In the non-merger area, antitrust enforcement over the past fifteen years has been generally consistent between state and federal antitrust enforcers. During that time, the states' enforcement efforts most frequently have targeted the types of antitrust violations—such as price-fixing, bid-rigging, and market allocation—that antitrust practitioners generally agree are most likely to cause significant consumer harm. In addition, the states have exercised their unique authority to recover antitrust damages for state residents and local government purchasers. Finally, the available evidence shows the states have concentrated their non-merger enforcement efforts in areas where they have a comparative advantage in terms of knowledge—that is, with respect to local markets, local competitive effects, and local government purchasers. Thus, the available evidence does not justify a recommendation for statutory change to the states' authority to bring non-merger cases based on federal antitrust law.

* Commissioners Carlton, Delrahim, and Shenefield do not join this recommendation.

Although Commissioners Garza and Warden join this recommendation, they believe that the Supreme Court would reject the authority of the states to sue for equitable relief as *parens patriae* under the federal antitrust laws for other than state-specific injury, making statutory change unnecessary. Commissioner Warden elaborates on these views in his separate statement, in which Commissioner Garza joins.

† Commissioners Cannon, Jacobson, and Yarowsky do not join this recommendation.

1. State Non-Merger Enforcement Has Been Broadly Consistent with Federal Non-Merger Enforcement

a. The States and the Federal Agencies Generally Appear to Have Brought the Same Types of Antitrust Cases

Consistent state and federal antitrust enforcement standards and policies are generally desirable for a variety of reasons. Firms need clear guidance on what is or is not permissible under both federal and state antitrust laws. Consistency in legal standards increases a firm's ability accurately to assess risk with a reasonable degree of certainty, while inconsistency increases businesses' risks.[57] Conflicting state and federal antitrust standards can obfuscate and undermine the predictable application of antitrust law, thus hampering antitrust compliance efforts by businesses.[58]

Businesses have valid concerns that "complaints filed in state-initiated lawsuits could seek to impose multiple punishments or to generate inconsistent obligations on national or international firms."[59] For example, states may seek injunctive relief or conduct remedies that differ from those sought by federal agencies.[60] Moreover, because each state joining a federal antitrust prosecution becomes a party to any settlement negotiations, state participation may reduce the probability of reaching a final resolution.[61] Finally, some observers have expressed concern that state enforcers rarely issue statements explaining their reasons for challenging, or not challenging, particular conduct, so businesses may lack a clear understanding of state enforcement policies and may be unable to address perceived errors in state enforcement.[62]

The recent *Microsoft* litigation exemplified, among other things, the difficulties that can arise when federal and state governments disagree about settlement terms. The DOJ and a number of states brought this case. Following settlement talks, nine states and the District of Columbia (the "litigating states") rejected a settlement that the DOJ and nine other states had accepted.[63] The litigating states pursued a remedies trial, but were awarded less relief than they sought.[64] Two states took further action: West Virginia appealed, then settled;[65] Massachusetts litigated and lost.[66] Judge Richard A. Posner, who tried but was unable to mediate a settlement in *Microsoft*, complained that "[s]tates do not have the resources to do more than free ride on federal antitrust litigation, complicating its resolution; in addition, they are too subject to influence by interest groups that may represent a potential antitrust defendant's competitors."[67] Other commentators also have been critical that relatively few states were able to lengthen and complicate federal antitrust enforcement proceedings of such significance.[68]

The issues raised in the context of the *Microsoft* litigation and the possibility of conflicting or inconsistent legal standards, remedies, or settlement approaches, however, must be viewed in the context of the federal system in the United States. The states currently have the right and responsibility to make their own judgments about how best to seek to enforce the antitrust laws to serve the interests of their citizens. Even if Congress revoked the states' authority to bring suit under federal antitrust law, the states would still have authority to make those judgments under state antitrust law, absent a further step by Congress to preempt state antitrust laws.

Moreover, some view the states' ability to make such independent judgments, about both possible remedies and whether to bring an antitrust case in the first instance, as important to ensure challenges to anticompetitive behavior.[69] Even skeptics of state enforcement of federal antitrust law concede that "states might well serve as watch dogs, pressuring Washington to act when it is lax, but deferring to federal prosecutors even if they chose to enter after the fact."[70] In addition, the states can identify and pursue local antitrust violations. Others argue further that the states may produce useful diversification in antitrust policy.[71]

Of course, what some consider useful policy diversification, others view as unfounded theories of anticompetitive harm. Such disagreements are not surprising. Given the ongoing evolution of economics and antitrust law—especially in important and difficult cases with novel fact patterns—some disagreements among antitrust practitioners, including antitrust enforcers, are virtually inevitable. For our purposes, the question is whether such disagreements between and among state and federal antitrust enforcers are sufficiently frequent and disruptive that they significantly undermine coherent and judicious federal antitrust enforcement and unreasonably burden businesses with excessive costs and uncertainty.

The available evidence suggests that, to the contrary, state and federal non-merger antitrust enforcement over the past seventeen years has been broadly consistent and not in conflict. In the non-merger area, the states have brought claims of price-fixing, bid-rigging, and market allocation much more frequently than any other types of antitrust claims. Antitrust enforcers are in general agreement that consumers are likely to suffer significant harm from price-fixing, bid-rigging, and market allocation agreements, so state enforcement efforts in these areas fall very much in the mainstream of antitrust.

Other non-merger antitrust enforcement efforts have the potential to generate controversy. Nevertheless, the data suggest that, once again, state and federal antitrust enforcement have not been significantly inconsistent. The category of "other" cases in the NAAG Database includes allegations—such as resale price maintenance, vertical non-price restraints, and tying—that federal antitrust enforcers have become more cautious about bringing, particularly in light of developments in economic thinking in recent decades. It appears that state enforcers also have become more cautious in these areas. There has been a gradual reduction over time in the number of NAAG-reported cases in the "other" category that the reporting states brought without any federal participation. From 1989 to 1994, the reporting states brought nineteen state-only cases in the "other" category; from 1995 to 2000, they brought sixteen state-only cases in the "other" category; and from 2001 to 2006, they brought only nine state-only cases in the "other" category.

Table A: "Other" State-Only Cases (excluding Mergers, Price-Fixing, Bid-Rigging, and Market Allocation)

1989–1994 (19 Cases)	
# of Cases	**Claims**
2	Boycott
2	Boycott, Horizontal Non-Price Restraint
2	Boycott, Monopolization
1	Horizontal Non-Price Restraint
1	Horizontal Non-Price Restraint, Refusal to Deal
2	Vertical Non-Price Restraint
4	Resale Price Maintenance
2	Tying
3	Other
1995–2000 (16 Cases)	
# of Cases	**Claims**
2	Boycott
1	Boycott, Horizontal Non-Price Restraint
1	Joint Venture
5	Monopolization
1	Monopolization, Tying
1	Monopolization, Vertical Non-Price Restraint
1	Monopsony
1	Refusal to Deal
1	Resale Price Maintenance
1	Tying
2001–2006 (9 Cases)	
# of Cases	**Claims**
1	Boycott
1	Boycott, Resale Price Maintenance
5	Monopolization (Three are related cases)
1	Resale Price Maintenance, Vertical Non Price-Restraint
1	Tying

Source: NAAG Database.

These data reveal that conflicts between state and federal enforcers in the cases they bring or remedies they seek are more the exception than the rule.[72] With a few notable exceptions, state non-merger and federal non-merger antitrust enforcement over the past fifteen years appear broadly consistent.

b. The Available Evidence Does Not Support Elimination of the States' Authority to Collect Damages on Behalf of Consumers

In 1976 Congress passed the HSR Act, Title III of which gave state attorneys general *parens patriae* authority to seek monetary relief (including treble damages) on behalf of state residents.[73] (As explained earlier, federal antitrust enforcers do not have a comparable authority to seek such relief on behalf of consumers.)[74] The question of whether the states should continue to have this authority has been raised.[75] Some view state *parens patriae* actions as adding little value to overall deterrence and enforcement.[76]

Several witnesses testified, however, that *parens patriae* recovery has been a success,[77] noting examples such as a recent multistate litigation, in which states obtained $80 million from defendant pharmaceutical companies to compensate consumers, state agencies, and insurance companies for overcharges due to federal and state antitrust violations.[78] The states have also developed innovative methods of distributing settlement proceeds,[79] using Web-based submissions, for example, to streamline the process.[80] Acknowledging the states' greater experience in this area, the FTC had the states distribute the FTC's portion of the recovery in a case in which it obtained disgorgement of profits by a defendant.[81] Thus, it appears that state *parens patriae* damages actions have played, and can continue to play, a useful role in non-merger antitrust enforcement.

In the Commission's view, the states and the federal antitrust agencies should consider on a continuing basis how best to avoid seeking or imposing inconsistent remedies. Nevertheless, evidence that state and federal enforcers occasionally impose inconsistent remedies does not justify a recommendation to eliminate the states' authority to bring *parens patriae* actions to recover damages for their citizens. The data suggest that state antitrust enforcement efforts have usefully fulfilled their mandate to recover damages for consumers.

2. State Non-Merger Antitrust Enforcement Should Focus on Local Markets and Local Government Purchasers

Knowledge of local markets and conditions can be helpful to proper antitrust enforcement.[82] Proponents of state enforcement assert that the states can better ensure expert coverage of smaller, more local enforcement matters.[83] Some suggest that state antitrust enforcers have greater familiarity with local government institutions that purchase goods, and therefore can better identify and pursue antitrust violations, such as price-fixing, that affect those purchasers.[84]

State enforcement of the federal antitrust laws is not the only way to ensure coverage of local antitrust violations, of course. Both the DOJ and the FTC have brought a significant number of complaints involving purely local or regional markets and have demonstrated their expertise in investigating and pursuing such matters.[85] Nonetheless, the states' non-merger antitrust enforcement efforts in recent decades appear to have had a largely local and regional focus, which may improve the likelihood of uncovering and prosecuting local antitrust violations. Indeed, even a proposed transaction that is national or international in scope may also have competitive effects in local markets.[86] The data suggest that states have focused their enforcement efforts on such localized competitive effects.

A review of all (not just non-merger) state antitrust enforcement matters from 1993 to 2002 published in one case-law reporter showed more than 80 percent of the cases had a local aspect, typically because the complaints alleged local markets.[87] The author found state antitrust enforcement activity to be "overwhelmingly local," with challenged conspiracies involving "travel agents and tour bus operators, health care providers, school bus companies, road builders, roofers, auto body shops, dairies, group homes repairers, bakers of Italian bread, individuals who gave carriage rides, towers, and trash haulers."[88]

The NAAG-reported data on "other" cases—involving claims such as group boycotts, horizontal and vertical non-price restraints, and violations of enforcement orders—also reveal a primary focus on local markets. Of the 44 state-only "other" cases brought by the reporting states, 33 cases appeared to involve local or regional conduct or markets, 6 involved national markets, and 5 cases did not provide enough detail to assess the scope of markets they involved.[89]

A state focus on local or regional matters in the non-merger area is desirable. Among other things, state antitrust enforcers typically are better positioned to discover and prevent or prosecute locally based activities such as price-fixing or bid-rigging. Government purchasers are sometimes among the first to experience the effects of a local price-fixing conspiracy; states can use their ties with those agencies to develop a case challenging the anticompetitive conduct.[90] In addition, a state focus on local or regional matters can avoid unnecessary overlaps in state and federal antitrust enforcement, thereby using limited enforcement resources most efficiently. Finally, for matters of national or international scope that also have local competitive effects, it seems most appropriate for states to investigate competitive conditions in their own local markets.

B. State Merger Enforcement

34. **No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to reviewing mergers.***

35. **Federal and state antitrust enforcers are encouraged to coordinate their activities and to seek to avoid subjecting companies to multiple, and possibly inconsistent, proceedings.**

State merger enforcement takes place today in a world in which business operations are increasingly international. More than 100 countries have some form of antitrust enforcement,[91] and multinational firms proposing a merger or acquisition may need to obtain merger clearances from antitrust agencies in as many as seventy countries in addition to the United States.[92] The differing requirements of antitrust agencies all over the world can substantially increase a firm's costs of merger clearance.[93]

Adding the potential for fifty state merger enforcers also can significantly increase the time and money required to obtain clearance of a proposed transaction.[94] State merger reviews increase the likelihood that businesses will be subject to multiple and differing document production and data requests, differing competitive analyses, significant delays, and even inconsistent remedies. As discussed below, the Commission recommends specific areas of additional coordination and cooperation between state and federal enforcers to reduce such inefficiencies.

Some go further in their criticism of state merger enforcement, however. They view state merger enforcement as simply "free riding" on federal efforts.[95] Counsel for merging parties report that, in some instances, state antitrust enforcers have "contributed few resources, provided little expertise, and conducted little or no document review."[96] Commenters point out the tremendous disparity in resources between state and federal antitrust enforcers.[97] For example, in 2005 California, one of the most active states in antitrust enforcement, had an antitrust budget of $6 million; this was dwarfed, however, by the Antitrust Division's budget of $144 million that year.[98] Others note that states with limited resources and staff who may review only a few antitrust cases each year may find it difficult to match the degree of expertise at the federal antitrust agencies, where hundreds of lawyers and economists review many matters during any given year.[99] Commenters also express concern that merger investigations by state attorneys general may be influenced by non-antitrust-based concerns (such as job preservation).[100]

* Commissioners Carlton, Delrahim, Garza, Shenefield, and Warden do not join this recommendation.

FFrom the record before the Commission, it appears there have been instances in which state antitrust enforcers essentially "piggy-backed" on the investigational and enforcement efforts of a federal antitrust agency. Whether such instances are rare or frequent, however, remains subject to debate. But the available evidence also suggests that states have played useful roles in merger enforcement. In the merger area, as in the non-merger area, the vast majority of cases in which states have been involved (with or without federal participation) address competitive problems in local markets, in which states may have particular expertise. In one survey, the author reported that state merger challenges from 1993 to 2002 "involve[d] hospitals, movie theaters, waste disposal operations, grocery stores, Jewish funeral homes, dairies, radio stations, gasoline stations, ski resorts, de-icing salt production facilities, and a sardine processing plant."[101]

Another analysis, undertaken by the state attorneys general of Hawaii, Maine, and Oregon, found that 77 percent of NAAG-reported state merger cases from 1991 to 2005 involved commercial and industrial sectors characterized by "their localized market structure."[102] These sectors included "health care, retail gasoline, solid waste, supermarkets, movie theaters, banking, retail pharmacy, funeral homes, department stores, and asphalt."[103] Federal participation occurred in 97 of 120 state merger cases,[104] suggesting that many involved national markets as well as local or regional markets. As one comment explained, the "effects of the merger in national markets can be reviewed by the federal government, while the local markets can be investigated by the state attorneys general."[105] States also have sometimes pursued very small, local transactions that may not have come to the attention of federal enforcers. For example, the state of Maine challenged certain health care consolidations that may have escaped notice at the federal level because they did not require pre-merger notification.[106]

In addition, as in non-merger enforcement, the states can act if federal antitrust enforcers fail to do so.[107] States may challenge a merger that a federal antitrust agency has purposefully declined to challenge, and states may seek broader relief than that sought by the federal agency.[108] Supporters of active state merger enforcement believe that such actions can be important to protect consumer welfare, where the level of federal enforcement is suboptimal.[109]

With respect to the substantive merger analyses of the states, however, the 1993 NAAG Horizontal Merger Guidelines themselves raise concern that state merger enforcement may sometimes be driven by motivations other than a sound antitrust analysis focused on consumer welfare. Those guidelines state that social and political objectives *other than* consumer welfare may be taken into account in making judgments about whether to challenge a proposed transaction.[110] This language, and state actions in a handful of cases, has raised concerns that states could attempt to block mergers for reasons other than to preserve competition.[111] Commenters argue that the "political nature of the state attorney general's office makes constituent influence more likely than at the federal level,"[112] and suggest that state attorneys general may be tempted to block mergers to prevent job losses in their states,[113] even though a proposed transaction could result in cost savings and lower prices for consumers in other states.[114]

The available evidence suggests only two or three instances in which state merger enforcement could be criticized as responsive to concerns other than preserving competition.[115] Even the scholar who found alleged instances of such "antitrust parochialism" states that, "[w]hile parochialism and externality concerns are theoretically well grounded, they do not find much empirical support in the states' actions to date."[116] Nonetheless, significant concerns remain among the antitrust bar that state merger enforcement, on occasion, may seek to accomplish goals other than consumer welfare.[117]

36. Federal and state antitrust enforcers should consider the following actions to achieve further coordination and cooperation and thereby improve the consistency and predictability of outcomes in merger investigations.

While the Commission does not recommend changing state authority to enforce federal antitrust law, further efforts at coordination and cooperation between the state and federal agencies could reduce inefficiencies and other possible problems. Accordingly, the Commission proposes a number of specific methods to improve coordination, as described below.

36a. The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law, particularly with respect to mergers.*

The federal and state antitrust agencies use two different sets of guidelines for the analysis of a proposed merger or acquisition between or among competitors. The federal antitrust enforcement agencies use the Horizontal Merger Guidelines issued by the DOJ and the FTC (DOJ/FTC Merger Guidelines).[118] Many states apply the 1993 NAAG Horizontal Merger Guidelines, which offer a common standard for merger reviews among the states.[119]

There are important differences between these two sets of guidelines. The NAAG Horizontal Merger Guidelines provide a different methodology for defining relevant product and geographic markets, using the market definition methodology of the DOJ/FTC Merger

* Commissioners Carlton, Garza, and Valentine believe such harmonization ideally should take the form of the states' adoption of the DOJ/FTC Merger Guidelines.

Guidelines as only an "alternative."[120] The federal and state merger guidelines also use two different requirements for how soon certain types of entry must occur in the relevant market to eliminate or reduce competitive concerns.[121] Finally, the federal and state merger guidelines apply different standards for the circumstances in which evidence of efficiencies may eliminate or ameliorate competitive concerns.[122]

Beyond the differences between federal and state merger analysis, differences among various states are possible as well. Some states do not necessarily use the NAAG Horizontal Merger Guidelines in their merger analyses. Businesses and antitrust practitioners report there can be, and often are, divergent enforcement policies among the different states.[123]

All of these differences between and among federal and state merger enforcement standards can produce inconsistencies in enforcement that add time, costs, and uncertainty to merger review. The federal antitrust agencies and the states may seek to review different documents or seek different relief, depending on their theories of competitive harm. There may be delays in the negotiation of consent decrees "where state attorneys general and the federal government have different enforcement or remedy philosophies (and [there is an] accompanying potential for opportunistic behavior, as each government party to the consent negotiations may have an incentive to be the last to agree)."[124] Some maintain that "federal agency and attorney general consent orders often require different relief even when the states are suing under federal law only."[125] Such divergence can lead firms to question the fairness and validity of antitrust merger enforcement.

The costs of dual merger review at the state and federal levels, and among multiple states, could be significantly reduced by the application of well-established, generally agreed-upon antitrust principles for merger analysis.[126] Agreement by federal and state enforcers on general principles for antitrust merger analysis would also reduce the risk of inconsistent results. That inconsistency can undermine and impair the value of guidance to businesses that merger guidelines are intended to offer.[127]

The federal antitrust agencies and the states should work together toward the substantive harmonization of the NAAG Horizontal Merger Guidelines and the DOJ/FTC Merger Guidelines based on sound economic principles. Such analytical convergence might be fostered through a variety of means, including joint training sessions, participation by state attorneys general and the federal antitrust agencies in workshops, and additional application of economic theory and resources to merger review.[128] Federal and state enforcers may not agree on the precise application of analytical principles in every merger case. Nonetheless, federal and state enforcers should reach agreement on the proper antitrust principles to apply in merger analysis. The substantive convergence of federal and state antitrust merger analysis around an agreed-upon sound analytical framework would reduce the costs, delays, and uncertainty caused by differences in enforcement perspectives.[129]

36b. Through state and federal coordination efforts, data requests should be consistent across enforcers to the maximum extent possible.

The HSR Act does not give the states any right to participate in the HSR Act pre-merger review process.[130] Except when the merging companies consent, the DOJ and the FTC cannot share any information obtained from the companies. States must subpoena documents from the parties. Merging companies accordingly can be subject to multiple, inconsistent document requests from federal and several different state enforcers.

State and federal enforcers have made progress in coordinating document requests. The Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General (adopted in 1998) provides a general framework for sharing confidential documents. The protocol provides examples of waivers through which merging companies can authorize the FTC or the DOJ to share with state attorneys general documents the companies submitted, whether in response to a second request, a civil investigative demand, or voluntarily.[131] In addition, most states have joined the NAAG Compact, which encourages merging companies to submit a copy of their HSR Act pre-merger filings to the states.[132] In return, the NAAG Compact binds the signatory states to obtain documents only through this mechanism and forgo the issuance of individual state subpoenas.[133] State antitrust enforcers also have worked together to reduce the number of matters in which parties are required to respond to multiple document requests from multiple states.[134]

There is still significant room for improvement, however. Counsel for merging parties report "there are instances in which state and federal authorities issued different requests for information even though they appeared to be pursuing the same theory [of possible competitive harm]."[135] In such instances, counsel for merging parties generally had to negotiate with both federal and state enforcers to narrow the requests and make them consistent.[136] State governments, unlike the federal government, may require paper (instead of electronic) copies of documents, and the "cost of preparing multiple responses [to various states] can be significant."[137] Different states may request data in varying formats or for different time periods, depending on how individual states view their information needs in light of the interests they seek to protect.[138]

These types of problems are caused by both a lack of coordination between federal and state enforcers about document and data requests and the different analytical approaches that federal and state enforcers may apply to merger analysis. To avoid such circumstances, federal and state antitrust enforcers should work together before issuing document and data requests to achieve as much consistency in those requests as possible. In addition, the states should continue to work with each other to achieve consistency in data requests. Not all states have signed the NAAG Compact, and even the signatory states are not required to use it in every investigation.[139] Practitioners emphasize the need for even greater coordination.[140]

36c. The state antitrust agencies should work to adopt a model confidentiality statute with the goal of eliminating inconsistencies among state confidentiality agreements.

Under the HSR Act, confidential business documents that firms submit to a federal antitrust agency as part of a merger review are treated as confidential.[141] The ability of the federal antitrust agencies to ensure that confidential business documents are not publicly or otherwise disclosed is critical to the success of the HSR Act's pre-merger review program.[142] Firms often submit documents to an antitrust agency that provide critical insights into current competitive conditions, the firm's own future competitive strategies, and the like, in a relevant market in which the firm participates. To reveal the content of those documents could potentially cause significant competitive harm to the firm.

Because the HSR Act does not allow for state participation in the pre-merger review process, states must negotiate confidentiality agreements with firms to ensure that confidential business documents are properly protected from disclosure. Inconsistencies among the provisions of confidentiality agreements offered by different states are another cost of state merger reviews, however. Confidentiality protections for firms' proprietary information typically must be negotiated on a state-by-state basis, because confidentiality statutes vary from state to state.[143] Those costs could be reduced by the adoption of a model confidentiality statute by as many states as possible.[144]

Notes

[1] *See* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 678 (2003) [hereinafter Calkins, *Perspectives on State and Federal Antitrust Enforcement*].

[2] Philip A. Proger, Statement at AMC State Enforcement Institutions Hearing, at 4 (Oct. 26, 2005) [hereinafter Proger Statement]. Statutes and case law in thirty-eight states direct judges to consult federal antitrust law for guidance. *See* American Bar Association, Section of Antitrust Law, Antitrust Law Developments 623–24 (6th ed. 2007) [hereinafter Antitrust Law Developments].

[3] *See* Antitrust Law Developments, at 627.

[4] *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 130 (1978); California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) (holding state antitrust laws to be within "an area traditionally regulated by the States" for which there is a "presumption against finding pre-emption").

[5] 15 U.S.C. § 15(a); *see* Antitrust Law Developments, at 725 & n.702 (collecting cases).

[6] 15 U.S.C. §§ 15c, 15f; *see also* Hon. G. Steven Rowe, Public Comments Submitted to AMC, at 3–4 (July 15, 2005) [hereinafter Rowe Comments]. Congress established the authority of states to seek damages on behalf of consumers in Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, after the Ninth Circuit's ruling that such actions were not permitted under the federal antitrust laws in *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973).

[7] 15 U.S.C. § 26. Such suits are brought under states' common law *parens patriae* capacity. *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 257–60 (1972). When states bring suits for injunctive relief, they must prove "threatened loss or damage" to their own interests. *See* California v. American Stores Co., 495 U.S. 271, 280 (1990).

[8] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); *In re* Compact Disc Minimum Advertised Price Litig., 138 F. Supp. 2d 25 (D. Me. 2001).

[9] *See, e.g.*, *Microsoft*, 253 F.3d 34 (although several states joined with the DOJ in settlement, two states opposed that settlement); Prof. Harry First, Statement at AMC State Enforcement Institutions Hearing, at 14–15 (Oct. 26, 2005) [hereinafter First Statement] ("The threat of independent action from a state agency may cause the federal agency to examine a case more closely (*Microsoft* is a good example of this)."); *see also* Part 3.B of this Section.

[10] *See, e.g.*, Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940 (2001) [hereinafter Posner, *Antitrust in the New Economy*]; Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 Conn. J. Int'l L. 501, 514, 521–22 (1994) [hereinafter, Flexner & Racanelli, *State and Federal Antitrust Enforcement*]; Michael E. DeBow, Statement at AMC State Enforcement Institutions Hearing, at 2–4 (Oct. 26, 2005) [hereinafter DeBow Statement].

[11] *See, e.g.*, National Association of Attorneys General, Horizontal Merger Guidelines (1993), *available at* http://www.naag.org/assets/files/pdf/at-hmerger_guidelines.pdf [hereinafter NAAG Horizontal Merger Guidelines]; National Association of Attorneys General, Vertical Restraints Guidelines (1985, revised 1995), *available at* http://www.naag.org/assets/files/pdf/at-vrest_guidelines.pdf [hereinafter NAAG Vertical Restraints Guidelines].

[12] Proger Statement, at 3, 7, 10 (noting that the system of state and federal antitrust enforcement "can lead to . . . inconsistent standards . . . cloud the clarity of the law, retard the process of continuing development of that law, . . . make the law less predictable . . . [and] introduce real additional costs"); *see also* Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, *in* Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 252 (Richard A. Epstein & Michael S. Greve eds., 2004) [hereinafter Posner, *Federalism and the Enforcement of Antitrust*]; Robert B. Bell, *States Should Stay Out of National Mergers*, 3 Antitrust, Spring 1989, at 37, 39.

13 Hon. G. Steven Rowe, Statement at AMC State Enforcement Institutions Hearing, at 6 (Oct. 26, 2005) [hereinafter Rowe Statement] ("State enforcers are present on the ground and are locally well-connected . . . in the context of local enforcement, we are the rapid responders, capable of greater efficiency with time and resources than our federal counterparts."); Proger Statement, at 12 (lauding states' "superior knowledge of local market conditions and local regulations that may affect competitive effects of merger or analysis of merger"); Rowe Comments, at 1 (describing Maine's state attorney general as having "contributed special knowledge of local conditions to cooperative enforcement endeavors with federal agencies and brought actions to address violations of which federal agencies were unaware and with which they might have been ill-equipped to deal"). *See generally* Part 3.B of this Section (describing specific instances of state enforcement).

14 As explained in Chapter III.C of this Report, the Federal Trade Commission (FTC) has in very rare instances sought monetary remedies for consumers using its authority to seek equitable relief.

15 *See ARC America*, 490 U.S. at 101 n.4. Other commenters have different counts. *See, e.g.*, First Statement, at 6 (thirteen states); Stanley Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 A.B.A. ANTITRUST SECTION 258, 263 (1962) (twenty-one states); AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, MONOGRAPH NO. 15, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW 3 (1988) (twenty-six states).

16 21 CONG. REC. 2460 (1890) (remarks of Sen. Sherman); *see also* Gregory J. Werden & Thomas A. Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. PITT. L. REV. 1, 50–51 (1982) (quoting 21 CONG. REC. at 2456, 2460 (1890) (remarks of Sen. Sherman)).

17 *See* Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, *in* COMPETITION LAWS IN CONFLICT 269 (Richard A. Epstein & Michael S. Greve eds., 2004) [hereinafter DeBow, *State Antitrust Enforcement*]. For example, "[m]anufacturing was at that time held not to be interstate commerce. Only interstate buying, selling, and transportation incident thereto could be regulated under the commerce clause." Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U. L. REV. 71, 84 (1974) (citing Kidd v. Pearson, 128 U.S. 1 (1888)); 21 CONG. REC. 2598–600 (1890) (remarks by Sen. George); 21 CONG. REC. 2465 (1890) (remarks by Sen. Vest); 21 CONG. REC. 2467 (1890) (remarks by Sen. Hiscock); *see* Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 659 n.8 (1993) (citing United States v. E.C. Knight, 156 U.S. 1 (1895)).

18 *See* DeBow, *State Antitrust Enforcement*, at 269.

19 First Statement, at 6. For example, "[b]etween 1890 and 1902, twelve states had brought twenty-eight antitrust suits; the United States Department of Justice had brought nineteen." *Id.* at 7 (citing James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U. PA. L. REV. 495, 500–01 (1987)).

20 First Statement, at 4–8. The position of the Assistant Attorney General for Antitrust was created in 1903, and the Antitrust Division became a separate operating unit within the Department of Justice thirty years later. Ernest Gellhorn et al., *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 ANTITRUST BULL. 695, 717–18 (1990); *see also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 16–17 (2003) (describing history of the DOJ); Chapter II.A of this Report regarding dual federal enforcement.

21 In 1937 the Supreme Court agreed that the federal government had authority to regulate activities *affecting* interstate commerce. *See* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *see also* DeBow, *State Antitrust Enforcement*, at 269 (citing United States v. Darby, 312 U.S. 100 (1941), and Wickard v. Filburn, 317 U.S. 111 (1942)). In 1995 the Supreme Court revived limitations on federal power over interstate commerce, concluding that federal jurisdiction requires the regulated activity to fall within one or more of three broad categories: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities having a substantial relation to interstate commerce, that is, those activities that substantially affect interstate commerce. United States v. Lopez, 514 U.S. 549, 558–59 (1995).

[22] DeBow, *State Antitrust Enforcement*, at 269; DeBow Statement, at 1–2.

[23] Rowe Comments, at 3.

[24] *See* 15 U.S.C. § 15c(a)(1).

[25] *See* Rowe Comments, at 3–4 & nn.7, 9 (citing Crime Control Act of 1976, Pub. L. No. 94-503, 90 Stat. 2407 (codified as amended at 42 U.S.C. § 3701-96c (2000))); Ralph E. Folsom, *State Antitrust Remedies: Lessons from the Laboratories*, 35 Antitrust Bull. 941, 950 (1990).

[26] It seems settled that, for the most part, state antitrust laws apply to conduct affecting interstate commerce as well as intrastate commerce. American Bar Association, Section of Antitrust Law, State Antitrust Enforcement Handbook 19–21 (2003). In some states, such as Alabama, however, jurisdiction under the state antitrust law is limited specifically to intrastate matters. *See* Ala. Code 1975, 6-5-60; Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc., 746 So. 2d 966 (Ala. 1999).

[27] *See* DeBow Statement, at 1–2.

[28] *See* Rowe Comments, at 3–4; DeBow, *State Antitrust Enforcement*, at 269; *see also* Flexner & Racanelli, *State and Federal Antitrust Enforcement*, at 501–02; *id.* at 508–09 ("In response to [increasing disagreement with the federal government in the 1980s], the states began to coordinate and formalize their enforcement role."); Lloyd Constantine, Statement at AMC Civil Remedies Hearing, at 3 (July 28, 2005); Daniel B. Moskowitz, *Why the States are Ganging up on Some Giant Companies*, Bus. Wk. 62 (Apr. 11, 1988) ("We have been witnessing the watchdog put to sleep. The States have had to fill the breach.") (quoting N.Y. State Att'y Gen. Robert Abrams).

[29] *See, e.g.*, NAAG Horizontal Merger Guidelines; NAAG Vertical Restraints Guidelines.

[30] *See, e.g.*, Thomas Greene, Public Comments Submitted to AMC, at 10-11 (July 15, 2005) [hereinafter Greene Comments].

[31] DeBow, *State Antitrust Enforcement*, at 270. The group is composed of the five Federal Trade Commissioners, the head of the Antitrust Division, and five representatives from NAAG. "The group promotes the sharing of information and the cross-deputization of attorneys to encourage the joint prosecution of cases." *Id.* at 270 & n.18.

[32] National Association of Attorneys General, Voluntary Pre-Merger Disclosure Compact (1987, revised 1994), *available at* http://www.naag.org/assets/files/pdf/200612-antitrust-voluntary-premerger-disclosure-compact.pdf [hereinafter NAAG Compact]. *But see* Proger Statement, at 10 & n.22 (listing states that have not signed).

[33] National Association of Attorneys General, Protocol for Increased State Prosecution of Criminal Antitrust Offenses, *available at* http://www.naag.org/assets/files/pdf/ProtocolforIncreasedStateProsecutionofCriminalAntitrustCases.pdf. State criminal antitrust enforcement takes place under state law.

[34] National Association of Attorneys General, Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, *available at* http://www.naag.org/assets/files/pdf/at-state_fed-protocol.pdf [hereinafter NAAG Protocol for Coordination in Merger Investigations] (setting forth ways in which the states and the federal agencies can maximize cooperation and minimize the burden imposed on the parties. Provides general framework for, and sets forth examples of, party waivers that enable federal agencies to share party-submitted documents (provided in response to HSR requests, civil investigative demands, or voluntarily) with state attorneys general); DeBow, *State Antitrust Enforcement*, at 270 & nn.20, 21 (citing Barry E. Hawk & Laraine L. Laudati, *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison*, 20 Fordham Int'l L.J. 18, 37–39 (1996) (collecting Clinton-era cases)); Laurel L. Price, *Roundtable Discussion with Enforcement Officials*, 63 Antitrust L.J. 951, 965–66 (1996).

[35] National Association of Attorneys General, Resolution, Principles of State Antitrust Enforcement (Mar. 14–16, 2005), *available at* http://www.naag.org/assets/files/pdf/2005.Spring.Antitrust.Resolution.Final.pdf.

[36] *Id.* at 1–3.

[37] *Id.* at 2 (citing *ARC America*, 490 U.S. at 101).

[38] *Id.* at 2.

[39] *Id.*

[40] *Id.* at 1, 3.

[41] *See* 15 U.S.C. § 15c.

[42] Disgorgement and restitution are equitable remedies. Disgorgement "'deprive[s] a wrongdoer of his unjust enrichment and . . . deter[s] others' from future violations," whereas "restitution . . . 'restore[s] the victims of a violation to the position they would have been in without the violation, often by refunding overpayments made as a result of the violation.'" Federal Trade Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,821 (Aug. 4, 2003). *See generally* Chapter III.C of this Report regarding the authority of the FTC and the DOJ to obtain equitable monetary remedies.

[43] Proger Statement, at 13 ("[S]tates have advantages in investigating [non-merger] conduct-related offenses, the most important of which is the states' ability to directly compensate individual consumers.").

[44] Private lawsuits to recover damages are generally lengthy and expensive propositions that most individual consumers are unlikely to undertake. Proger Statement, at 13.

[45] *See* Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004, 1039 (2001); Rowe Comments, at 20; American Antitrust Institute, Public Comments Submitted to AMC Regarding Enforcement Institutions, at 9 (July 15, 2005) [hereinafter AAI Comments re Enforcement Institutions].

[46] *See* Rowe Comments, at 20.

[47] Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 679–80, 694.

[48] *See* Michael DeBow, *State Antitrust Enforcement*, at 272–73 (the "relatively large number of bid-rigging and horizontal price-fixing cases [in state enforcement] is consistent with enforcement priorities suggested by Chicago School economic analysis, as is the small number of vertical cases").

[49] National Association of Attorneys General, State Antitrust Litigation Database, *available at* http://www.naag.org/antitrust/search/ [hereinafter NAAG Database]. This appears to be the first, and only, successful effort to compile a comprehensive database. *See* Posner, *Federalism and the Enforcement of Antitrust*, at 263 (states "do not report such data"); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding State Antitrust Enforcement, at 5 (Oct. 19, 2005) [hereinafter ABA Comments re State Antitrust Enforcement] ("We have been unable to create or identify a satisfactory database."); DeBow, *State Antitrust Enforcement*, at 271 ("There does not appear to be a central registry of information about state antitrust activity. (NAAG is reportedly working on such a database.)").

[50] NAAG Database.

[51] *Id.*

[52] The NAAG database does not include data from fourteen states: Alabama, Colorado, Indiana, Kentucky, Louisiana, Montana, Nebraska, Nevada, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, and Vermont. The level of detail about each case that is reported varies among the states.

[53] Figure 1 splits the merger-challenge segment into two pieces to illustrate the percentage of merger cases pursued with and without federal participation.

[54] AMC Staff, State Antitrust Enforcement Memo—Analysis of the NAAG Data, fig.2 (Nov. 10, 2006, updated Mar. 1, 2007) [hereinafter AMC Memo—Analysis of NAAG Data].

[55] *Id.* at 5–6 (113 of 142 cases (80 percent) of enforcement actions pursued by states without federal participation involved local or regional conduct or markets—64 of 80 price-fixing, bid-rigging, and market allocation cases; 16 of 18 merger review cases; and 33 of 44 "other" cases).

[56] *See* Posner, *Antitrust in the New Economy*, at 940; U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 2–4 (Nov. 8, 2005) [hereinafter U.S. Chamber of Commerce Comments]; Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 Harv. J.L. & Pub. Pol'y 877, 889, 890–91 (2003).

[57] *See* Proger Statement, at 3, 7.

[58] *See* U.S. Chamber of Commerce Comments, at 3; DeBow Statement, at 4–6; Proger Statement, at 3; American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding State Civil Nonmerger Enforcement, at 8–9 (Oct. 19, 2005) [hereinafter ABA Comments re State Civil Nonmerger Enforcement].

[59] U.S. Chamber of Commerce Comments, at 3.

[60] *See* First Statement, at 18 (states may seek injunctive relief under state antitrust laws); AAI Comments re State Enforcement Institutions, at 9–12 (without state enforcement, certain injunctive relief might not be attained); *see also* Rowe Supp. Statement, at 3 n.6 (citing *In re* Disposable Contact Lens Antitrust Litigation as the only example of states seeking injunctive relief after a federal antitrust agency decided not to seek injunctive relief).

[61] *See* Posner, *Antitrust in the New Economy*, at 940; *see, e.g.*, U.S. Chamber of Commerce Comments, at 3; DeBow Statement, at 4–6; Proger Statement, at 3.

[62] See Proger Statement, at 9.

[63] Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the* Microsoft *Case*, 11 Geo. Mason L. Rev. 37, 37 (2002); *States split on MSFT settlement: Nine states reject DOJ-Microsoft settlement; to pursue litigation*, CNN Money, Nov. 6, 2001, http://money.cnn.com/2001/11/06/technology/msft_ruling/index.htm; Joe Wilcox, *Breakaway States Nix Microsoft Pact*, CNET News.com, Nov. 6, 2001, http://news.com.com/Breakaway+states+nix+Microsoft+pact/2100-1001_3-275440.html?tag=nl.

[64] *Compare* Joe Wilcox, *States Get Tough in* Microsoft *Case*, CNET News.com, Dec. 7, 2001, http://news.com.com/2100-1001-276744.html (detailing states' requests for additional relief), *with* New York v. Microsoft Corp., Civ. No. 98-1233, Final Judgment (Nov. 1, 2002) (setting forth more limited relief in final judgment); *see also* David S. Evans et al., United States v. Microsoft*: Did Consumers Win?*, 1 J. Comp. L. & Econ. 497, 516–20 (2005).

[65] Andrew Chin, *Decoding* Microsoft*: A First Principle Approach*, 40 Wake Forest L. Rev. 1, 75–76 (2005).

[66] Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004); Rowe Statement, at 23 & nn.71–72.

[67] Posner, *Antitrust in the New Economy*, at 940.

[68] *See, e.g.*, DeBow Statement, at 4–6; Robert W. Hahn & Anne Layne-Farrar, *The Case for Federal Preemption in Antitrust Enforcement*, 18 Antitrust, Spring 2004, at 79, 80 [hereinafter Hahn & Layne-Farrar, *The Case for Federal Preemption*].

[69] *See* AAI Comments re Enforcement Institutions, at 10 (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), as a case in which states won significant relief and established important precedents, although the DOJ had declined to investigate the matter); Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 Loy. Consumer L. Rev. 303, 321–22 (2004).

[70] Hahn & Layne-Farrar, *Case for Federal Preemption*, at 81.

[71] *See, e.g.*, William E. Kovacic, *Toward a Domestic Competition Network*, *in* Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 321–22 (Richard A. Epstein & Michael S. Greve eds., 2004).

[72] *See* AAI Comments re Enforcement Institutions, at 12 ("The *Hartford* and *Microsoft* cases are the exception, not the rule.").

[73] *See* 15 U.S.C. § 15c(a)(1).

74 *See* Chapter III.C of this Report regarding government civil monetary remedies.

75 *See, e.g.*, ABA Comments re State Civil Nonmerger Enforcement, at 3–4.

76 *See* State Enforcement Institutions Transcript at 27 (DeBow) (Oct. 26, 2005); Posner, *Antitrust in the New Economy*, at 940; U.S. Chamber of Commerce Comments, at 4; ABA Comments re State Civil Nonmerger Enforcement, at 11 (*parens patriae* actions do not create any greater or lesser *in terrorem* effects than class actions). With respect to injunctive relief, others have objected to *parens patriae* actions for injunctive relief on the ground they allow states to seek relief that unnecessarily adds to, or potentially even conflicts with, the relief sought by federal enforcement agencies. ABA Comments re State Civil Nonmerger Enforcement, at 6–10.

77 *See* First Statement, at 16–24; Proger Statement, at 13; Rowe Statement, at 5; AAI Comments re Enforcement Institutions, at 8–11.

78 Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 692 & n.104.

79 *See* Proger Statement, at 14.

80 *See* Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 691–92.

81 Connecticut v. Mylan Labs, 2001-1 Trade Cas. (CCH) ¶ 73,273, at 90,403–03 (D.D.C. 2001). The FTC's recovery was combined with that of the states. *See* Proger Statement, at 14.

82 *See* Proger Statement, at 2; Rowe Statement, at 5; State Enforcement Institutions Trans. at 10 (Rowe); ABA Comments re State Civil Nonmerger Enforcement, at 6–7.

83 *See* Rowe Comments, at 25; AAI Comments re Enforcement Institutions, at 9; ABA Comments re State Antitrust Enforcement, at 6.

Some also argue that the states can devote resources to matters that federal enforcers cannot investigate due to the necessary prioritization of limited federal resources. *See* ABA Comments re State Civil Nonmerger Enforcement, at 6–7; AAI Comments re Enforcement Institutions, at 10; ABA Comments re State Antitrust Enforcement, at 7. States have very limited resources available for antitrust enforcement, however. *See* Hahn & Layne-Farrar, *The Case for Federal Preemption*, at 80 (in fiscal year 2002, California spent $5.6 million on antitrust enforcement, while the combined antitrust budgets of the federal antitrust agencies in 2002 totaled about $204 million); Rowe Comments, at 17 ("State attorneys general are increasingly restricted by budget constraints, with the result that meritorious enforcement actions are often passed up for lack of resources.").

84 ABA Comments re State Civil Nonmerger Enforcement, at 6–7.

85 One of the Antitrust Division's most sustained criminal enforcement efforts involved bid-rigging in the provision of milk to schools. *See, e.g.*, United States v. Md. & Va. Milk Producers Coop. Ass'n, Inc., 974 F.2d 1333 (4th Cir. 1992). The FTC has challenged many grocery mergers, which also have effects primarily in local markets. *See, e.g.*, *In re* Albertson's, Inc. & Am. Stores Co., FTC Docket No. C-3986 (2000); *In re* Winn-Dixie Stores, Inc., FTC Docket No. C-4001 (2001).

86 *See* AAI Comments re Enforcement Institutions, at 12.

87 Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 688. *But see* Rowe Comments, at 8–9 (from 1984 to 2005, only one-quarter of Maine's antitrust enforcement matters were purely intrastate, and that percentage may be shrinking).

88 Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 688–89.

89 AMC Memo—Analysis of NAAG Data, at 6.

90 Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 690–91 (discussing cases).

91 *Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the H. Comm. on the Judiciary*, 108th Cong. 18 (July 24, 2003) (statement of R. Hewitt Pate, Ass't Att'y Gen., Antitrust Div., Dep't of Justice).

[92] Bertelsmann AG et al., Public Comments Submitted to AMC, at 2–3 (Aug. 12, 2005).

[93] International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust, at 91 (2000) [hereinafter ICPAC Report] ("Although no comprehensive data are available that quantify the overall public and private costs imposed by compliance with multijurisdictional merger notification and review requirements, the responses of firms and their advisors . . . suggest that these costs are sizeable.") (citing J. William Rowley, QC, & A. Neil Campbell, *Multi-jurisdictional Merger Review—Is It Time for a Common Form Filing Treaty?*, *in* Policy Directions for Global Merger Review: A Special Report by the Global Forum for Competition and Trade Policy 9 (1999)).

[94] U.S. Chamber of Commerce Comments, at 3; Proger Statement, at 3, 5, 10; ICPAC Report, at 143.

[95] *See, e.g.*, U.S. Chamber of Commerce Comments, at 4; Posner, *Federalism and the Enforcement of Antitrust*, at 258 ("[A]s shown by the *Microsoft* case, if the [DOJ] brings an antitrust suit, the state attorneys general may be able, by bringing parallel suits, to take a free ride on the department's investment in the litigation."); *see also* Business Roundtable, Public Comments Submitted to AMC, at 20 (Nov. 4, 2005) ("State antitrust enforcement often 'free rides' on federal government investigations, thus subjecting a company to double scrutiny without adding any value for consumers.").

[96] ABA Comments re State Antitrust Enforcement, at 7.

[97] U.S. Chamber of Commerce Comments, at 2.

[98] *Id.* at 6; Dep't of Justice, Antitrust Div., Appropriation Figures for the Antitrust Division, Fiscal Years 1903–2007 (updated Jan. 2007), *available at* http://www.usdoj.gov:80/atr/public/10804a.htm.

[99] Hahn & Layne-Farrar, *Federal Preemption of Antitrust*, at 80; U.S. Chamber of Commerce Comments, at 2–3.

[100] *See, e.g.*, ABA Comments re State Antitrust Enforcement, at 1–2.

[101] Calkins, *Perspectives on State and Federal Antitrust Enforcement*, at 688.

[102] State Attorneys General of Hawaii, Maine, and Oregon, Public Comments Submitted to AMC, at 6 (July 23, 2006). Consent decrees, judgments, or settlements were reached in 111 of these cases. *Id.*

[103] *Id.*

[104] *Id.*

[105] ABA Comments re State Antitrust Enforcement, at 6; *see also* AAI Comments re Enforcement Institutions, at 5.

[106] Rowe Comments, at 11–12.

[107] ABA Comments re State Antitrust Enforcement, at 6.

[108] *See, e.g.*, Massachusetts v. Campeau Corp., 1988-1 Trade Cas. (CCH) ¶ 68,093 (1988) (the FTC had approved the transaction, but Massachusetts filed suit); *American Stores*, 495 U.S. 271 (the FTC conditionally approved the transaction, requiring a divestiture to which American Stores agreed, but California filed suit post-consummation, requesting an injunction and additional divestitures); New York v. Primestar Partners, CV 93-38683907 (S.D.N.Y. 1993) (the DOJ and the states reached different settlements, based on the states' and the DOJ's different concerns with Primestar's joint venture).

[109] For example, some view the *Kraft Foods* case, the department store cases in upstate New York, and broader divestitures in grocery store mergers as positive state actions to undertake broader anti-merger activity than the federal antitrust agencies. *See* New York v. Kraft Gen. Foods, 862 F. Supp. 1030, 1993-1, Trade Cas. ¶ 70,284 (1993); Flexner & Racanelli, *State and Federal Antitrust Enforcement*, at 524 n.121 (the New York attorney general and Macy's signed an agreement in 1988 in which "the department store chain obligated to divest itself . . . of certain stores in the New York metropolitan area" if it acquired its biggest rival, Federated Department Stores; the acquisition would otherwise have threatened to "'eliminate all meaningful competition, with resulting harm to consumers with regard to price, choice, and quality of merchandise'") (citing 54 Antitrust & Trade Reg. Rep. (BNA) 502, 503 (1988)); *see also*

Greene Comments, at 8–9, 17; Rowe Statement, at 5; Proger Statement, at 6 ("There have been, for instance, cases involving the merger of local firms where enforcement was pursued by the states, even after the federal government chose not to challenge the transaction.") (citing, for example, California v. Sutter Health Sys., 84 F. Supp. 2d 1057 (N.D. Cal.) (hospital merger that the FTC did not challenge), *aff'd mem.*, 217 F.3d 846 (9th Cir. 2000) (opinion not for publication, at 2000-1 Trade Cas. (CCH) ¶ 72,896)); Proger Statement, at 15 (acknowledging that states "fill[] in for federal enforcement not only where the federal agencies decline to investigate but also providing a mechanism for direct redress for consumers or to benefit the public good") (citing *In re* Compact Disc Minimum Advertised Price Litig., No. 2:01-CV-125-P-H (D. Me. Sept. 26, 2002); Florida v. Nine West Group, No. 00 Civ. 1707 (S.D.N.Y. Mar. 6, 2000)). *See generally* Posner, *Federalism and the Enforcement of Antitrust*, at 259 ("The state attorneys general can offer only harsher antitrust enforcement than the Justice Department.").

110 *See* NAAG Horizontal Merger Guidelines, § 2. Section 2 states that, in addition to effects on consumer welfare through price increases, "[m]ergers may also have other consequences that are relevant to the social and political goals of Section 7. For example, mergers may affect the opportunities for small and regional business to survive and compete." *Id.* Such considerations, say the Guidelines, "may affect the Attorney General's ultimate exercise of prosecutorial discretion." *Id.*

111 *See, e.g.*, Proger Statement, at 7–8; DeBow Statement, at 4; ABA Comments re State Antitrust Enforcement, at 8–9.

112 Proger Statement, at 7.

113 *See* DeBow, *State Antitrust Enforcement*, at 276 (discussing certain state merger enforcement matters); Proger Statement, at 7–8. *But see* Rowe Comments, at 12–13 (responding that Maine brought its enforcement action to protect competition, not jobs).

114 DeBow, *State Antitrust Enforcement*, at 275.

115 *See* ABA Comments re State Antitrust Enforcement, at 8–9 (citing Pennsylvania v. Russell Stover Candies, Inc., 1993-1 Trade Cas. (CCH) ¶ 70,224 (E.D. Pa. 1993) (Pennsylvania State Attorney General instituted a merger challenge to protect jobs within the state); Maine v. Conners Bros. Ltd., 2000–1 Trade Cas. (CCH) ¶ 72,937 (Me. Sup. Ct. Mar. 29, 2000); Wal-Mart Stores Inc. v. Rodriguez, 373 F.3d 747 (1st Cir. 2003)).

116 DeBow, *State Antitrust Enforcement*, at 275.

117 *See, e.g.*, U.S. Chamber of Commerce Comments, at 3; ABA Comments re State Antitrust Enforcement, at 8–9 (identifying cases that exemplify this concern and finding the lack of additional examples insufficient to refute the concern).

118 Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997) [hereinafter DOJ/FTC Merger Guidelines].

119 NAAG Horizontal Merger Guidelines.

120 *See id.* § 3A.

121 For example, the NAAG Horizontal Merger Guidelines will consider entry from unused excess capacity only if it is likely to occur within *one* year of any attempted exercise of market power. *Id.* §§ 3.3, 3.31, 3.32 (emphasis added). By contrast, the DOJ/FTC Merger Guidelines take into account entry "that can be achieved within *two* years from initial planning to significant market impact." DOJ/FTC Merger Guidelines, § 3.2 (emphasis added).

122 The NAAG Merger Guidelines allow the consideration of efficiencies only if merger proponents show by clear and convincing evidence that the cost savings will be passed on to consumers and will persist over the long run. NAAG Merger Guidelines, § 5.3. By contrast, the DOJ/FTC Merger Guidelines allow consideration of merger-specific efficiencies that merger proponents substantiate in such a way that "the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." DOJ/FTC Merger Guidelines, § 4.

[123] *See* U.S. Chamber of Commerce Comments, at 3; Proger Statement, at 9.

[124] ABA Comments re State Antitrust Enforcement, at 8.

[125] *Id.* at 9.

[126] *See id.* at 2.

[127] Proger Statement, at 3, 10; ABA Comments re State Antitrust Enforcement, at 7, 11.

[128] *See* ABA Comments re State Antitrust Enforcement, at 11.

[129] *Id.*

[130] Ilene Knable Gotts, *What Role Should State Attorneys General Have in Clayton Act Pre-merger Enforcement?* (1999), *available at* http://library.findlaw.com/1999/Jan/1/130734.html#Ref7.

[131] NAAG Protocol for Coordination in Merger Investigations.

[132] NAAG Compact.

[133] *See id.*

[134] ABA Comments re State Antitrust Enforcement, at 7 n.23.

[135] *Id.* at 7.

[136] *Id.*

[137] Proger Statement, at 10.

[138] *Id.*

[139] *Id.* at 10–11.

[140] *Id.* at 3, 8–9, 15; Rowe Comments, at 26; ABA Comments re State Antitrust Enforcement, at 11.

[141] 15 U.S.C. § 18a(h).

[142] *Id.*

[143] Proger Statement, at 11.

[144] *See id.*

Chapter II.D
International Antitrust Enforcement

1. INTRODUCTION

The United States adopted the Sherman Act over 100 years ago.[1] Although few countries adopted similar laws for many years,[2] today there are over 100 nations with competition laws.[3] An increasing number of countries implemented comprehensive competition laws and enforcement regimes as they recognized the "value of competition as a tool for spurring innovation, economic growth, and . . . economic well-being," and the advantages of moving away from government-managed economies.[4] Over this same period, global trade has increased markedly, and there has been a significant increase of economic integration and interdependence across national borders.[5] Advances in communication technology have "shrunk the time and distance that separate markets around the world."[6]

A. Convergence, Cooperation, and Comity

Notwithstanding the large number of antitrust regimes worldwide, multinational antitrust enforcement generally has not generated significant inconsistencies or conflict among nations.[7] Indeed, significant convergence based on sound principles of competition law has occurred and is continuing to occur on both procedures relating to multinational enforcement and the core substance (if not the details) of antitrust and competition law.[8] Consensus is being reached through a variety of means, including through multinational organizations such as the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN).[9] The U.S. antitrust agencies in particular have played an important role in encouraging convergence and cooperation, through participation in the OECD and the ICN, as well as through the provision of technical assistance to nascent competition law regimes. And a U.S. advisory committee, the International Competition Policy Advisory Committee (ICPAC), issued an extensive report in 2000 that identified steps for cooperation and convergence and stimulated further efforts in this regard.[10]

Cooperation between and among different nations' antitrust enforcers has also limited conflict. Instead of resisting "extraterritorial" enforcement of the U.S. antitrust laws through blocking statutes and the like (as often occurred in the 1970s), many foreign jurisdictions now actively assist the United States in antitrust enforcement efforts, and vice versa.[11] For instance, a British magistrate court and a U.K. secretary of state recently authorized the extradition of a British citizen to the United States to face criminal antitrust charges[12]—rulings that likely would not have occurred as recently as five years ago.[13]

The United States and the European Union routinely coordinate their reviews of cross-border transactions.[14] Such cooperation has been advanced by formal bilateral and multilateral agreements between the United States and other countries. For example, the United States has entered into bilateral agreements with the European Union that both encourage cooperation on investigations and establish principles of comity to govern when each jurisdiction should defer to the other.[15] In 1994 Congress enacted the International Antitrust Enforcement Assistance Act (IAEAA),[16] authorizing the United States to enter into agreements enabling the exchange of confidential business information to facilitate the coordination of cross-border investigations.[17]

Although the United States and other countries have reached a substantial degree of convergence, improved by cooperation and coordination,[18] further steps are appropriate. Divergence can create problems of at least three types. First, companies may be subject to conflicting and inconsistent laws, creating uncertainty as to the legal standards applicable to their business arrangements.[19] Second, companies must comply with the procedural requirements of multiple jurisdictions, potentially increasing their costs significantly, particularly with respect to notification requirements for mergers.[20] Third, different countries may ultimately impose different, and inconsistent, remedies with respect to the same conduct or transaction.[21] U.S. companies that have been subject to differing remedies from different enforcers, which resulted from the lack of greater convergence, include some of the largest U.S. companies, such as Boeing, General Electric, and Microsoft.[22]

Based on its study, the Commission makes several recommendations intended to further convergence on appropriate standards, encourage cooperation, and minimize conflict in the future, as follows.

37. The Federal Trade Commission and the Antitrust Division of the Department of Justice should, to the extent possible, pursue procedural and substantive convergence on sound principles of competition law.

38. As a matter of priority, the Federal Trade Commission and the Antitrust Division of the Department of Justice should study and report to Congress promptly on the possibility of developing a centralized international pre-merger notification system that would ease the burden on companies engaged in cross-border transactions.

39. Congress should amend the International Antitrust Enforcement Assistance Act to clarify that it does not require that Antitrust Mutual Assistance Agreements include a provision allowing the non-antitrust use of information obtained pursuant to an AMAA.*

* Commissioners Shenefield and Valentine do not join this recommendation.

40. **Congress should provide budgetary authority, as well as appropriations, directly to the Federal Trade Commission and the Antitrust Division of the Department of Justice to provide international antitrust technical assistance.**

41. **The United States should pursue bilateral and multilateral antitrust cooperation agreements that incorporate comity principles with more of its trading partners and make greater use of the comity provisions in existing cooperation agreements.**

41a. **Cooperation agreements should explicitly recognize the importance of promoting global trade, investment, and consumer welfare, and the impediment that inconsistent or conflicting antitrust enforcement poses. Existing agreements should be amended to add appropriate language.**

41b. **Cooperation agreements should incorporate several principles of negative and positive comity relating to circumstances when deference is appropriate, the harmonization of remedies, consultation and cooperation, and "benchmarking reviews."**

B. The Foreign Trade Antitrust Improvements Act

Applying the U.S. antitrust laws to conduct occurring overseas has the potential to conflict with competition law and other policies in other nations. The Supreme Court first addressed U.S. antitrust jurisdiction over conduct occurring outside the United States in 1909.[23] After years of divergent court decisions, Congress attempted to resolve the issue by passing the Foreign Trade Antitrust Improvements Act (FTAIA) in 1982.[24]

The FTAIA, however, proved to be less than a model of clarity and resulted in continued split court decisions. In 2004 the Supreme Court addressed some of these issues regarding the law's extraterritorial scope in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*,[25] but the opportunity for continued divergence exists. The Commission's general principle on the antitrust laws' reach is intended to offer clear guidance in these unresolved areas.

Based on its study of the FTAIA, the Commission makes the following recommendation.

42. **As a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act.***

* Commissioner Delrahim does not join this recommendation.

2. RECOMMENDATIONS AND FINDINGS

A. Cooperation and Convergence

37. The Federal Trade Commission and the Antitrust Division of the Department of Justice should, to the extent possible, pursue procedural and substantive convergence on sound principles of competition law.

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have made extensive efforts to improve cooperation between the United States and other nations' antitrust enforcers.[26] Both U.S. antitrust agencies "enjoy [a] strong cooperative relationship[] with a large and increasing number of foreign enforcement agencies, enabling close cooperation on cases, coordination on international antitrust policy, and provision of technical assistance to new agencies around the world."[27] Whereas U.S. requests for cooperation previously took up to a year to be processed,[28] today antitrust agencies worldwide have a "pick up the phone" approach toward sharing information and assisting each other in their antitrust enforcement efforts.[29] This high degree of cooperation has facilitated convergence of both procedural and substantive aspects of antitrust law.

The efforts of the U.S. antitrust agencies have been advanced in part through their participation in two organizations, the OECD and the ICN.[30] The OECD was created in 1961 to expand free trade and improve development in member countries.[31] As part of these efforts, it created a Competition Law and Policy Committee that provides a variety of means for countries to share their best practices regarding antitrust and competition policy.[32] The ICN, in comparison, is relatively new, but has a more broad-based membership. It was created after ICPAC called for the creation of a "Global Competition Initiative" to address antitrust enforcement in a growing globalized economy.[33] Membership in the ICN has increased from fourteen jurisdictions when it began in 2001[34] to ninety-seven members from eighty-five jurisdictions in 2007.[35]

The ICN and OECD have promulgated "best practices" on merger reviews and cartel investigations and continue to work on convergence of substantive and procedural law.[36] For example, the ICN is currently undertaking a study of unilateral conduct standards with the goal of developing a consensus on the objectives and legal and economic bases of enforcement regarding unilateral conduct.[37] The ICN in the past has developed principles of best practices regarding merger notification regimes, with the objective of highlighting the importance of transparency and clarity in each jurisdiction's rules regarding filing requirements and review.[38] Overall, through their efforts, these institutions have had a meaningful influence in "promoting convergence in antitrust enforcement"[39] and have contributed to the "significant recent progress in reducing conflicts by increasing cooperation, information sharing, and networking."[40] Indeed, their successes are reflected at least in part by the fact that the vast majority of international investigations are conducted without incident.[41]

The DOJ and the FTC should continue to participate and take a leadership role in the ICN and OECD competition activities. Congress should be supportive of these efforts. The ICN and OECD mechanisms have proven extremely useful for encouraging the development of competition laws in other countries based on sound antitrust principles that are not in conflict with U.S. antitrust laws. Avoiding such conflict is of great benefit to U.S. consumers and businesses, because it allows companies to operate efficiently on a global scale, providing the benefits that global commerce can bring.

38. As a matter of priority, the Federal Trade Commission and the Antitrust Division of the Department of Justice should study and report to Congress promptly on the possibility of developing a centralized international pre-merger notification system that would ease the burden on companies engaged in cross-border transactions.

Approximately seventy jurisdictions now require notification of a merger.[42] The filing requirements and procedures can vary significantly from one country to the next. As a result, companies involved in cross-border mergers must comply with numerous different rules and processes.[43] The costs can be significant, including costs for determining where filings are required, preparing filings, and paying filing fees.[44] The 2003 PricewaterhouseCoopers survey on the time and costs involved in multijurisdictional merger reviews found that such reviews typically required "eight completed or considered filings" at a cost of $3.8 million for uncomplicated mergers, and $11.5 million for "more complex ones."[45]

The FTC and the DOJ should evaluate, in consultation with other jurisdictions, how to implement some kind of common premerger notification system across countries that would reduce the burden associated with multiple filings—for example, by providing an opportunity for companies to provide a single, simple initial submission for use by all affected jurisdictions.[46] Recent efforts to harmonize filing requirements have been a useful first step, but further progress is needed. For example, one Commission witness noted that Germany, France, and Britain attempted to implement a joint filing form, but that it is not frequently used because "it really didn't serve anybody's interest."[47] The Commission believes that further steps toward a common system would be valuable and should be feasible. The antitrust agencies should report to Congress promptly as to whether a more uniform and less burdensome notification system is feasible.

39. Congress should amend the International Antitrust Enforcement Assistance Act to clarify that it does not require that Antitrust Mutual Assistance Agreements include a provision allowing the non-antitrust use of information obtained pursuant to an AMAA.*

In 1994 Congress enacted the International Antitrust Enforcement Assistance Act (IAEEA) to authorize the United States to enter into agreements with other countries that allow the exchange of confidential business information.[48] Such agreements are known as Antitrust Mutual Assistance Agreements (AMAAs). In the absence of an AMAA, the United States (as well as other nations) is generally barred from sharing confidential information obtained from businesses in the course of antitrust investigations.[49] The IAEAA requires AMAAs to include safeguards to ensure that confidential, competitively sensitive information that is exchanged between enforcement agencies does not become public.[50] By allowing countries to share confidential information, an AMAA has the potential to permit countries to conduct joint investigations more efficiently and to reduce burdens on parties that might otherwise have to supply that information to both countries separately. Moreover, they can assist countries in conducting coordinated cartel prosecutions by allowing cooperation in the investigation of international cartels.[51]

Since passage of the IAEAA, the United States has entered into only one AMAA—with Australia.[52] Notably, the United States currently has no formal mechanism for exchanging cartel evidence with the European Union.[53] Two provisions in the IAEAA may discourage other jurisdictions from entering into AMAAs with the United States. First, the IAEAA provides that the United States may enter into an AMAA only on a "reciprocal basis"—that is, the agreements must provide both signatories with similar rights and obligations.[54] Second, the IAEAA requires that an AMAA must permit the foreign signatory to request from U.S. officials the authority to use confidential information obtained through the AMAA in non-antitrust matters.[55] Because of the reciprocity requirement, this second provision could mean that other jurisdictions must similarly provide a mechanism that would allow the United States to seek approval for the use of exchanged confidential information in non-antitrust matters.

The combination of these two provisions appears to have impeded other countries from entering into AMAAs because they are not willing to provide for the possibility of non-antitrust uses of information.[56] For instance, Canada's Competition Act expressly prevents the Competition Bureau from entering into an agreement where the information provided would be used for purposes other than "the purpose for which it was requested."[57] To be

* Commissioners Shenefield and Valentine do not join this recommendation. They believe that the current statute adequately accommodates authorities' potentially divergent interests in use of shared information.

sure, there may be other reasons as to why countries have not been more willing to enter into AMAAs with the United States,[58] and there may be other mechanisms through which confidential information can be shared.[59] The fact that there may be other reasons creating obstacles to the adoption of AMAAs, as well as possible work-arounds, does not mean that statutory change is not appropriate.

Congress should amend the IAEAA to make it clear that it does not require AMAAs to include a provision for non-antitrust uses of confidential information. Such an amendment would ensure that other countries are not prevented or dissuaded from entering into such agreements out of concern over non-antitrust use of information.[60]

40. Congress should provide budgetary authority, as well as appropriations, directly to the Federal Trade Commission and the Antitrust Division of the Department of Justice to provide international technical assistance.

The DOJ and the FTC provide extensive technical assistance to nascent competition law regimes.[61] The agencies use a variety of means—such as supplying on-site, long-term advisors and conducting workshops involving personnel from agencies in several countries—to provide assistance and training.[62] Such training assists other countries in the development of their enforcement institutions as well as in their understanding of the appropriate economic and legal underpinnings of sound competition policy.[63] It provides assistance in "the development of framework laws," and in the "training of personnel in the substantive legal principles, analytical framework, and investigative techniques . . . ."[64] Taken together, these services will foster greater cooperation and convergence on sound antitrust law principles.[65]

Neither the FTC nor the DOJ, however, has authority to fund such training itself. Funding is instead provided through the U.S. Agency for International Development (USAID),[66] whose mission is to foster democracy, economic growth, and human health in developing nations through a variety of means, including food aid, infrastructure construction, training, and technical assistance.[67] FTC and DOJ requests for limited USAID funding to support antitrust training efforts accordingly compete with others' demands for basic needs such as food and healthcare support. The Commission believes that providing funding for antitrust technical assistance directly to the antitrust agencies will help to ensure that the objectives and priorities of antitrust technical assistance are properly weighed by those with the relevant expertise, and that the monies are allocated as efficiently as possible.

B. Formal Agreements Incorporating Comity Principles

Convergence and cooperation are a significant, but not the sole, method of reducing conflicting approaches and outcomes that may result from having more than one country seek to apply its antitrust or competition laws to conduct. Regular application of principles of comity is a second critical component that calls for one enforcer to defer to another's decisions, and not take parallel, potentially inconsistent decisions. Comity has been described as "a concept of reciprocal deference . . . [that] holds that one nation should defer to the law and rules . . . of another because . . . the other has a greater interest."[68] Principles of comity in the antitrust arena encourage "competition agencies to presumptively defer their own enforcement authority to that of jurisdictions with the greatest interest or center of gravity."[69]

Comity principles can be applied in different ways. For example, courts may use comity principles in deciding whether U.S. law applies to conduct that takes place outside the United States. Indeed, comity has long been recognized as "a well-established part of U.S. case law in antitrust cases."[70] Similarly, comity principles may inform the adoption of agreements between countries regarding their respective responsibility and role in enforcing laws. The United States has entered into numerous bilateral and multilateral agreements that help to foster cooperation and coordination with other antitrust regimes, many of which include provisions calling for use of comity principles.

Most significantly, the United States entered into a bilateral agreement with the European Union in 1991 regarding antitrust enforcement, and a revised agreement in 1998.[71] These agreements set out certain principles of comity, both negative and positive.[72] Traditional or "negative" comity, contained in the 1991 agreement, is where one country restrains itself so as not to allow its laws and law enforcement actions to harm or impede another country's important interests.[73] The 1991 agreement calls for the United States or European Union to consider certain factors such as the significance of the anticompetitive activities involved "within the enforcing Party's territory as compared to conduct within the other Party's territory;" "the degree of conflict or consistency between the enforcement activities and the other Party's laws;" and "the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities."[74] Accordingly, when "it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider [the factors enumerated above] . . . in seeking an appropriate accommodation of the competing interests."[75] This type of comity is an exercise of prosecutorial or investigatorial restraint.

"Positive" comity, by comparison, is where one country asks another to "take appropriate actions regarding anticompetitive behavior occurring in its territory that affects the important interests of the requesting party, where that behavior violates the competition laws and regulations of the host [country]."[76] For example, under the 1998 Agreement the U.S. competition authorities may request the E.U. competition authorities to investigate and, if warranted, to remedy anticompetitive activities occurring largely in the European Union in accordance with its competition laws.[77] Under the agreement, the United States would also defer or suspend pending or contemplated enforcement activities while the European Union investigated.[78] Positive comity thus aims to place primary responsibility for enforcement "in the hands of the jurisdiction most closely associated with the alleged anticompetitive conduct."[79]

41. The United States should pursue bilateral and multilateral antitrust cooperation agreements that incorporate comity principles with more of its trading partners and make greater use of the comity provisions in existing cooperation agreements.

41a. Cooperation agreements should explicitly recognize the importance of promoting global trade, investment, and consumer welfare, and the impediment that inconsistent or conflicting antitrust enforcement poses. Existing agreements should be amended to add appropriate language.

Agreements incorporating principles of comity provide a useful mechanism to avoid duplicative enforcement and to reduce instances of potentially conflicting decisions, thereby making antitrust enforcement more efficient and lessening costs on businesses and consumers. The 1991 and 1998 U.S.-E.U. agreements have, in general, been used successfully,[80] and have served as a template for subsequent bilateral agreements with Brazil, Canada, Israel, Japan, and Mexico.[81] However, the potential of the agreements may not been fully realized because the parties have not regularly invoked their comity principles.[82] As one commenter stated, while U.S. bilateral agreements "have largely been a success[,] . . . the comity provisions . . . have been less successful."[83]

For example, some believe that the "limited impact of comity in the antitrust field" resulted in the inconsistent conclusions reached by the United States and the European Union in the investigations of the *GE/Honeywell* merger and of conduct by Microsoft.[84] They believe that when jurisdictions with longstanding and respected antitrust regimes such as the United States and the European Union fail to apply principles of comity when appropriate, it gives jurisdictions with less mature regimes a license similarly to disregard comity principles.[85] The United States therefore must lead by example in this critical area.[86] The FTC and the DOJ should actively seek opportunities to invoke the comity provisions in existing agreements and encourage other countries to do likewise. They should consider developing more informal and efficient uses for comity and extend comity principles to interactions with other nations with which agreements do not exist.

This is particularly important because global trade, investment, and welfare depend, in part, on the efficient and consistent resolution of antitrust investigations. Inconsistent remedies and resulting conduct obligations can impose high costs on businesses and the consumers of their products.[87] For example, commenters identified numerous costs, including: (1) "increased political tension that may reduce support for global trade and cooperative bilateral relations[;]"[88] (2) "uncertainty over the legal consequences of cross-border transactions or investments which hinders business planning and skews investment decisions by diminishing the anticipated competitive rewards of innovation[;]"[89] and (3) "conflicting or inconsistent remedies, which result[s] in uncertainty, impedes business planning, skews investment decisions, and promotes inefficiency."[90] Ultimately, such costs can deter investment and trade that generally benefits consumers and increases their welfare.[91]

Multinational agreements that incorporate comity principles, whether existing or new, should be more explicit in recognizing the importance to global trade, investment, and consumer welfare of avoiding conflicting or inconsistent antitrust enforcement.[92] At present, the United States' bilateral agreements do acknowledge that "effective enforcement of antitrust laws is important to the efficient operation of markets and to economic welfare."[93] However, such statements fail to convey fully the importance of cooperation agreements including comity principles to achieving robust trade and investment on a global scale and should, where possible, be strengthened to confirm these important points.

41b. Cooperation agreements should incorporate several principles of negative and positive comity relating to circumstances when deference is appropriate, the harmonization of remedies, consultation and coordination, and "benchmarking reviews."

The United States, as it pursues increasing numbers of agreements containing comity principles with other countries, should seek to enter into agreements that contain the following five principles. These principles, as explained below, aim to assign principal enforcement authority to the country with the greatest connection to the transaction or conduct at issue, but seek to ensure that other countries that have an interest in the merger or conduct also are assured that their interests will be taken into account.

- *Complete Deferral.* Any country as to which a cross-border transaction or conduct does not have a direct, substantial, and reasonably foreseeable anticompetitive effect should defer to the enforcement judgment of the country or countries where there is such an effect.

- *Presumptive Deferral.* When a competition authority in one country with a substantial nexus to a transaction or conduct has taken enforcement action, other countries with a lesser nexus should presumptively defer to that action. The first country should consult with other jurisdictions before taking action that will affect their significant interests.*
- *Harmonization of Remedies.* When more than one country pursues an enforcement action against the same transaction or conduct, those countries should seek to avoid imposing inconsistent or conflicting remedies through, for example, consultation or by fashioning remedies on a joint basis.
- *Coordination Mechanism.* A mechanism should be established whereby any private entity that is potentially subject to inconsistent or conflicting rules or remedies with respect to the same transaction or conduct can request consultation and/or coordination between or among jurisdictions to avoid inconsistency or conflict.
- *"Benchmarking" Reviews.* In any case where the United States and another jurisdiction nevertheless impose inconsistent or conflicting remedies, they should agree to conduct ongoing "benchmarking" reviews of the impact of the divergent remedies on the parties and competitive processes.

Complete Deferral. This first principle would ensure that where a transaction or conduct does not have a significant effect on a country's consumers, that country will not seek to take an enforcement action or seek to impose remedies on the conduct.[94] Incorporating this principle into bilateral agreements would help prevent countries with only minimal connection with a particular transaction or conduct from exercising jurisdiction where they have relatively minor interests and others are better positioned to do so.

This principle would take as its guiding standard the "direct, substantial, and reasonably foreseeable" test used in the Foreign Trade Antitrust Improvements Act (and comparable principles in other countries).[95] Thus, unless anticompetitive conduct has a direct, substantial, and reasonably foreseeable effect on a country that is party to such an agreement, it would defer to the enforcement efforts of other countries in which there was such an effect. When only a negligible effect exists, a country's consumers are unlikely to be meaningfully affected, and there is little reason for that country's antitrust enforcer to seek relief against the conduct or transaction.

Presumptive Deferral. The second principle seeks to ensure that even where conduct or a merger may affect consumers in a country, that country's antitrust enforcers will defer to the enforcers in other countries in which the effects are likely to be more significant. Thus, the country with a lesser "nexus" to the conduct or transaction should defer to the other

* Commissioner Carlton does not join in recommending the inclusion of this principle.

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country with a greater nexus. The relative nexus to the transaction can be determined on the basis of generally accepted choice-of-law principles.[96] This presumptive deferral has two limitations. First, it is only a presumption, so that if there are other compelling reasons for taking action, a country may do so even where it otherwise might not. Second, although a country with a lesser nexus should defer on enforcement decisions, the country with the greater nexus should consult with it to ensure that the interests of the other country are taken into account.

The consultation obligation is of particular importance because it helps allay concerns that smaller jurisdictions will usually have a lesser nexus and thus would be obligated to defer in most instances to another jurisdiction's decisions.[97] Although global transactions and conduct have the potential to cause anticompetitive effects acutely in some nations, more typically any effects will be broadly spread throughout the world. As a result, in many instances, larger jurisdictions, such as the European Union and the United States, are likely to have the most substantial nexus to the conduct or transaction. However, "every harmed nation has a legitimate interest in applying its law to protect its citizen."[98] The consultation requirement will help to accommodate the interests of countries with less substantial connections, which would refrain from seeking remedies themselves under this principle.[99] It provides smaller nations with a "voice" and an opportunity to have their particular interests considered, while still allowing the jurisdiction with the greater nexus to the conduct to lead the investigation.[100]

Harmonization Mechanism. This principle calls for countries to seek to make remedies consistent wherever possible.[101] It helps to ensure that where comity principles do not result in one country's deferring to the enforcement responsibility of another cooperation will instead be used to avoid the costly effects of inconsistent remedies. To be sure, in the vast majority of multinational cases antitrust regimes have managed to avoid imposing inconsistent or conflicting remedies on multinational businesses.[102] Nonetheless, in a few cases the United States and other antitrust enforcement agencies have taken divergent paths in both their analysis and in the remedies imposed.[103]

The Commission does not recommend a principle by which the remedies imposed by the first jurisdiction to investigate should limit the authority of other jurisdictions to impose different (whether lesser or greater) remedies.[104] Such deference requires the countries involved in the agreement to have confidence that the jurisdiction that is the first to act will both be competent and free from political influence.[105] With time and further cooperation between the United States and other countries, the confidence such decisions will be competent and free from parochial bias are likely to increase. At that point, a different approach regarding remedies may become appropriate.

Coordination Mechanism. This principle helps to reinforce the previous principle by ensuring that where countries fail to cooperate in fashioning remedies, the entities subject to the conflicting remedies will have a mechanism through which to request that such cooperation and consultation take place.[106] While in the typical instance cooperation should occur as a result of the agreement, there may be circumstances in which it does not. The Commission does not propose any particular mechanism, but expects that any company that makes a credible showing that an investigation by more than one country could potentially subject it to inconsistent or conflicting remedies should be permitted to request a joint consultation between the antitrust agencies conducting the investigation.[107]

"Benchmarking" Reviews. This principle also helps to reinforce the previous two principles. In the few instances in which multinational cooperation and coordination cannot reach a harmonious result, the countries involved should undertake a retrospective evaluation as to why the usual cooperation mechanisms failed.[108] A benchmarking review after completion can identify why potentially avoidable conflict occurred and how to prevent it in the future. Even where the different remedies may be a result of different assessments of the relevant evidence, the investigating agencies are likely to benefit from a fuller understanding as to why each agency reached a different conclusion. Such consultations may foster further convergence that will avoid such outcomes in the future.

C. The Foreign Trade Antitrust Improvements Act

Almost since the Sherman Act's passage, courts have struggled to define the territorial limits of the Act in two interrelated respects. First, when does conduct overseas affect U.S. commerce? Second, if it does, who may sue for the harm suffered as a result of that conduct? Ultimately, the case law that developed did not provide clear answers to these questions. As U.S. businesses expanded their operations worldwide, they became concerned that their conduct overseas might be subject to the Sherman Act.[109] To provide greater clarity, Congress enacted the Foreign Trade Antitrust Improvements Act (FTAIA). The complex wording of this statute, however, has also resulted in ambiguities. The territorial scope of the Sherman Act and who may bring a claim under it thus remain unclear.

The importance of clarity in this area has grown in recent years. Improved methods of detection, as well as increased global awareness of the harms of anticompetitive conduct, have led enforcers to prosecute vigorously global price-fixing conspiracies that affect worldwide commerce. Consumers harmed by alleged anticompetitive conduct caused by such global conspiracies sometimes seek to recover under the Sherman Act. When those consumers sue for purchases they made in the United States, their right to seek recovery is not controversial. However, consumers who made purchases outside the United States from companies outside the United States also sometimes seek to take advantage of the Sherman Act's robust private remedies, including treble damages, which generally are not available under the laws of other nations.

Such lawsuits can affect both international comity and business certainty. First, interpreting the Sherman Act to extend to conduct that occurs wholly outside the United States has the potential to interfere with other countries' decisions regarding how best to regulate their own commercial affairs. Countries with less robust private remedies than those in the United States have chosen to balance the costs and benefits of such a remedial scheme differently. If remedies under the Sherman Act were extended to every purchaser world wide, that would undermine other countries' choices about the appropriate remedial scheme. Second, the lack of clarity regarding the application of the Sherman Act to conduct wholly outside the United States leaves U.S. businesses uncertain regarding the consequences of their conduct outside the United States and has the potential to increase their liability despite no additional harm to U.S. consumers.

The Supreme Court's decision in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* in 2004,[110] and a subsequent appellate court decision in that case,[111] have cleared up some of the uncertainty about the territorial limits of the Sherman Act, as articulated in the FTAIA. These judicial decisions, however, have not ended the issue. The FTAIA itself remains a source of confusion, and courts may still diverge on their approaches, given the limited guidance from the Supreme Court.

1. Background

The Sherman Act makes illegal anticompetitive restraints in, or monopolization of, any part of "trade or commerce among the several States, or with foreign nations."[112] By its terms, the Sherman Act thus protects U.S. consumers and U.S. markets against anticompetitive conduct, whether that conduct takes place within the United States or outside of it. It was always clear that when domestic conduct produces anticompetitive effects, consumers injured by these anticompetitive effects can sue for treble damages.[113] But, prior to passage of the FTAIA, courts had varied in their interpretations of when the Sherman Act applied to conduct outside the United States.[114] Some had held that the Sherman Act applied only when conduct had a direct or substantial effect on U.S. commerce.[115] Other courts had extended the Sherman Act to cover conduct that did not have a substantial effect on U.S. commerce.[116]

This lack of uniformity among courts led U.S. businesses to seek statutory clarification of the territorial reach of the Sherman Act. In 1982 Congress enacted the FTAIA to clarify the case law and establish well-defined limits on the reach of U.S. antitrust laws. The FTAIA provides that:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of [the Sherman Act], other than this section.
>
> If sections 1 to 7 of [the Sherman Act] apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of [the Sherman Act] shall apply to such conduct only for injury to export business in the United States.[117]

In short, the FTAIA places a limit on the geographic reach of the Sherman Act so that entirely foreign conduct is outside the reach of the Sherman Act. However, such conduct can be brought back within the Sherman Act's reach (and thus the FTAIA limit does not apply) if the foreign conduct causes a direct, substantial, and reasonably foreseeable effect on U.S. commerce.

Congress intended the statute to make plain that, unless foreign conduct had a direct, substantial, and reasonably foreseeable effect on U.S. commerce, such conduct would be outside the reach of U.S. antitrust laws. Congress believed that this test would serve as a "simple and straightforward clarification of existing American law" that would create "[a] clear benchmark . . . for businessmen, attorneys and judges."[118]

Despite Congress's efforts, the FTAIA had the unintended consequence of eliciting additional inconsistency in the case law. In particular, the FTAIA's proviso that the Sherman Act applies when the anticompetitive effect of foreign conduct "gives rise to a claim" under the Sherman Act produced inconsistent results in the courts. Some courts held this term to mean that the FTAIA does not limit application of the Sherman Act so long as the foreign conduct causing injury gave rise to "a" claim under the Sherman Act. Under this interpretation, a person harmed by anticompetitive conduct anywhere in the world could pursue a claim under the Sherman Act so long as at least one person was injured by that conduct's U.S. effect and thus had "a claim."[119] Other courts resolved the question differently, requiring that the plaintiff seeking relief under the Sherman Act show that it had a claim itself for relief.[120] Under this alternative interpretation, for a person to assert a Sherman Act claim, he must himself have been injured by the conduct's effect on U.S. commerce.

The Supreme Court granted certiorari in *F. Hoffmann-La Roche Ltd. v. Empagran* to resolve this split among circuit courts. *Empagran* involved a global vitamin price-fixing conspiracy that affected consumers in numerous countries, including the United States.[121] The plaintiffs were located outside the United States and conceded that they had suffered injury through purchases made outside the United States. They nevertheless sought recovery in U.S. courts on the ground that the global conspiracy produced anticompetitive effects in the United States that gave rise to "a" valid Sherman Act claim. It did not matter, they argued, that the Sherman Act claim was not their own.[122]

The Supreme Court held that a person may not assert a claim merely because another person has a claim arising from the same conduct's effect on U.S. commerce.[123] The Court further held that it could find no basis for extending the reach of U.S. antitrust laws to circumstances where the foreign injury was independent of any U.S. effects[124]—especially when the very purpose of the FTAIA was to "exclude[] from the Sherman Act's reach . . . anticompetitive conduct that causes only foreign injury."[125]

On remand, the Supreme Court directed the D.C. Circuit to consider the circumstances in which an overseas plaintiff could successfully show that it had been harmed because of the effects on U.S. commerce. The plaintiffs argued that the cartel could be successful only if it raised prices globally; had it not raised prices in the United States, resellers could have taken advantage of the lower prices in the United States to arbitrage the difference and undermine the cartel by reselling in the rest of the world.[126] Accordingly, "but for" the harm to U.S. commerce, plaintiffs argued, they would not have suffered harm, and this was sufficient to avoid the FTAIA's limitation on the Sherman Act.

The D.C. Circuit rejected the plaintiffs' "but for" causation theory, and held that the plaintiffs' harm must have a "direct causal relationship, that is, proximate causation" with the effect on U.S. commerce.[127] Subsequent courts confronting the same argument have also rejected the "but for" approach based on an arbitrage theory.[128] Nonetheless, only two of twelve circuit courts have addressed the issue. Moreover, no court of appeals has entirely foreclosed all alternative theories on which a foreign purchaser that purchases from a foreign seller might prove its harm was caused by effects within the United States.

2. Recommendation and Findings

42. As a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act.*

The Commission agreed that this general principle fairly represents the intent of Congress in enacting the FTAIA, is consistent with the Supreme Court's holding in Empagran, and describes how court decisions should apply the FTAIA.† The Commission recommends this principle for the following reasons.

* Commissioner Delrahim does not join this recommendation.

† Commissioners Burchfield, Carlton, Jacobson, Kempf, Valentine, and Warden would support a statutory change to the FTAIA consistent with this principle.

a. U.S. Antitrust Laws Should Not Interfere with Other Nations' Decisions on How Best to Regulate Their Economies

Plaintiffs that have purchased goods or services in foreign markets from foreign sellers should have no right to seek redress under U.S. laws for injuries sustained in those foreign markets.[129] Such plaintiffs should seek redress in the jurisdiction in which they were a market participant.[130] Limiting who may seek redress under U.S. antitrust laws in this way prevents those laws from interfering with other nations' decisions as to how their antitrust laws should regulate conduct in their territory.[131]

As global awareness of the importance of competition and the need for laws to protect it grows, other countries will continue to implement mechanisms to ensure competition flourishes. These nations may adopt laws that permit consumers injured in those markets to seek redress.[132] Even if a foreign jurisdiction has not adopted such remedies, however, U.S. antitrust policy should not fill the gap.[133] Other countries may reasonably determine that a remedial scheme like that in the United States would interfere with their own competition policies or other values they have decided to advance. Similarly, other countries may have concluded that treble damages are "too much" or government civil fines are sufficient for deterrence.[134] Therefore, the Commission's principle confirms that the FTAIA does not "provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign's provisions for private antitrust enforcement."[135]

b. Allowing Foreign Purchasers to Sue in the United States for Foreign Injuries Could Undermine Global Deterrence of Anticompetitive Conduct

In *Empagran* the antitrust enforcement agencies of several nations, including the DOJ, filed *amicus* briefs cautioning that allowing foreign purchasers to sue in U.S. courts could potentially undermine deterrence by hindering the agencies' criminal enforcement programs.[136] Allowing such private suits could deter participation in antitrust leniency programs in the United States and in other countries because companies would be subjected to increased liability in the United States once they had acknowledged involvement in a cartel.[137] Reduced efficacy of such leniency programs, which help identify cartels in the first place, has the potential to reduce the ability of all nations to combat and prosecute cartel conduct effectively, and hamper deterrence as a result.

Proponents of a broader interpretation of the FTAIA believe that allowing persons who purchased and suffered injury abroad to sue more freely under U.S. antitrust laws would increase overall deterrence by subjecting companies to broader liability.[138] All else being equal, increasing the liability of companies will likely increase deterrence. But a broader interpretation of the FTAIA may well undermine deterrence, for the reasons discussed above. In addition, deterrence can be increased, if appropriate, through alternative mechanisms.[139]

c. The Proposed General Principle Does Not Limit the Availability of the Sherman Act Based on the Nationality of the Plaintiff

The Commission's recommended principle does not limit the availability of the Sherman Act on the basis of the nationality of the plaintiff. In enacting the FTAIA, Congress explained that:

> [F]oreign purchasers should enjoy the protection of [U.S.] antitrust laws in the domestic marketplace, just as our citizens do . . . . [The FTAIA] preserves antitrust protections in the domestic marketplace for all purchasers, regardless of nationality . . . .[140]

Courts likewise have explained that the plaintiff's nationality is irrelevant, and that it is the location of the transaction's effects that matters.[141] There is no need to inquire into the nationality of the plaintiff—especially when such an inquiry could fail to answer the critical question of whether the plaintiff purchased abroad from a seller abroad and thus could not have suffered the requisite injury as a result of any U.S. effects.[142] Moreover, using a claimant's nationality to decide whether he or she can gain access to U.S. courts could violate certain international treaties to which the United States is a party.[143] Thus, the "critical question is not the nationality of the plaintiff but the location of the marketplace in which he participated" and whether that market was affected.[144]

Notes

[1] Congress passed the Sherman Act in 1890. *See* Act of July 2, 1890, 51 Cong. Ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. § 1 et seq.).

[2] R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., Dep't of Justice, Securing the Benefits of Global Competition, Address at the Tokyo American Center, at 2 (Sept. 10, 2004) [hereinafter Pate, Securing the Benefits of Global Competition].

[3] Bertelsmann AG et al., Public Comments Submitted to AMC, at 3 (Aug. 12, 2005) [hereinafter Bertelsmann Comments]; Association for Competitive Technology, Public Comments Submitted to AMC, at 3 (Feb. 7, 2006) [hereinafter ACT Comments]; *see also* International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust 33 (2000) [hereinafter ICPAC Report] (noting sizable majority of countries adopted their antitrust laws since 1990).

[4] ICPAC Report, at 33; *see* Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before the National Italian American Foundation, at 4 (Oct. 12, 2005) ("[M]any, if not most, governments in recent decades have been relying more and more on the forces of the marketplace and reducing their intervention in market outcomes."); Pate, Securing the Benefits of Global Competition, at 3; *see also* Prof. Eleanor M. Fox, Statement at AMC International Antitrust Hearing, at 2 (Feb. 15. 2006) [hereinafter Fox Statement] (referring to the fall of the Berlin Wall as the impetus behind the growth in global antitrust enforcement); ICPAC Report, at 33 ("The introduction of competition laws and policies has also gone hand in hand with economic deregulation, regulatory reform, and the end of command and control economies.").

[5] ICPAC REPORT, at 33 ("Economic liberalization and technological development . . . [are] driving economic integration."); Ben S. Bernanke, Chairman, Fed. Reserve, Global Economic Integration: What's New and What's Not?, Remarks at the Federal Reserve Bank of Kansas City's Thirtieth Annual Economic Symposium, at 1 (Aug. 25, 2006).

[6] Alan Greenspan, Chairman, Fed. Reserve, Current Account, Remarks at Advancing Enterprise 2005 Conference, at 1 (Feb. 4, 2005).

[7] International Antitrust Transcript at 11–12, 15 (Tritell) (Feb. 15, 2006).

[8] Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, 19 ANTITRUST 25, Summer 2005, at 26 (identifying the following antitrust principles as being most common to modern antitrust regimes: "promoting consumer welfare; the importance of economics in competition analysis; the need to deter and punish hard-core cartels; the value of separating social and employment policy from competition policy; and non-discrimination on the basis of nationality").

[9] American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding International Cooperation, at 2 (Feb. 8, 2006) [hereinafter ABA Comments re International Cooperation] (describing the U.S. agencies as "leaders in promoting convergence and coordination through multilateral fora such as the OECD and the ICN"); Fox Statement, at 3 (stating that the OECD and the ICN play an important role in today's era of cooperation).

[10] *See generally* ICPAC REPORT.

[11] Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Charting New Waters in International Cartel Prosecutions, Speech Before 20th Annual Nat'l Inst. on White Collar Crime, ABA Criminal Justice Section, at 6 (Mar. 2, 2006) [hereinafter Hammond, International Cartel Prosecutions]; Scott D. Hammond, Acting Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program, Speech Before ABA Mid-winter Leadership Meeting, at 3–4 (Jan. 10, 2005) (referring to foreign government's "increased willingness to assist the United States in prosecuting cartel activity" and acknowledges that "[c]ooperation among competition law enforcement authorities has undergone a sea change").

[12] *See* Dep't of Justice, Antitrust Div., Update, at 7 (Spring 2006) (stating that both the Bow Street Magistrate's Court and the U.K. Secretary of State for the Home Department in *The Government of the United States of America v. Ian P. Norris* authorized the extradition, under the U.K. Extradition Act of 2003, of Ian Norris to the United States to face criminal antitrust charges), *available at* http://www.usdoj.gov/atr/public/216254.htm. An appellate court in the United Kingdom has stayed the extradition ruling, pending an appeal to the House of Lords. *See* BUSINESS TIMES ONLINE, *Norris Cleared to Take Extradition Fight to Lords*, (Mar. 13, 2007), *at* http://business.timesonline.co.uk/tol/business/law/corporate/article1508737.ece.

[13] Her Majesty's Government of the United Kingdom and Northern Ireland, Public Comments Submitted to AMC, at 2 (Feb. 3, 2006) [hereinafter U.K. Comments] (referring to a recent trend in the United Kingdom of moving British antitrust laws toward U.S. standards); *see, e.g.*, Hammond, International Cartel Prosecutions, at 10 (noting that the United Kingdom introduced criminal sanctions for hard-core cartel participants in 2002 through its U.K. Enterprise Act).

[14] William Blumenthal, FTC General Counsel, The Status of Convergence on Transatlantic Merger Policy, Remarks Before the ABA Section of International Law 2005 Fall Meeting, at 3–4 (Oct. 27, 2005) (referring to the successful coordination and collaboration between the U.S. federal agencies and their E.U. counterparts in transatlantic mergers such as GE/Amersham, P&G/Gillette, Sony/BMG, Sanofi/Aventis, and GE/Instrumentarium); *see also* Randolph W. Tritell, Statement at AMC International Antitrust Hearing, at 3–4 (Feb. 15, 2006) [hereinafter Tritell Statement] (describing the close cooperation U.S. agencies enjoy with their foreign counterparts in antitrust matters involving "notification [and the] exchange of non-confidential information").

[15] American Bar Association, Sections of Antitrust Law and International Law, Public Comments Submitted to AMC Regarding Comity, at 7–8 (Apr. 10, 2006) [hereinafter ABA Comments re Comity].

[16] 15 U.S.C. §§ 6201–12.

[17] ABA Comments re International Cooperation, at 2.

[18] *See, e.g.*, U.K. Comments, at 2 (stating that there has been a "steady trend in recent years towards convergence" and that the UK's "new prohibitions on anti-competitive agreements . . . are similar to those in U.S. law").

[19] *See* Bertelsmann Comments, at 3; Michael L. Blechman, Statement at AMC International Antitrust Hearing, at 2 (Feb. 15, 2006) [hereinafter Blechman Statement]; James R. Atwood, Statement at AMC International Antitrust Hearing, at 4 (Feb. 15, 2006) [hereinafter Atwood Statement]; ABA Comments re Comity, at 4. Such uncertainty can reduce efficiency because companies will either forgo procompetitive conduct about which they have legal uncertainty or will be forced to operate different marketing, distribution, and manufacturing schemes to comply with different requirements in competing jurisdictions. *See* Bertelsmann Comments, at 3; *see also* ACT Comments, at 9–10 (noting problem is particularly acute for computer software companies, whose assets are primarily intellectual not physical, and that thus easily do business globally); Blechman Statement, at 2; International Chamber of Commerce, Public Comments Submitted to AMC, at 11 (Sept. 1, 2005); Atwood Statement, at 4; Tritell Statement, at 7 (referring to potential for duplicative or incompatible antitrust rules due to the existence of over 100 antitrust regimes); ABA Comments re Comity, at 2.

[20] *See* Bertelsmann Comments, at 3; Blechman Statement, at 2; Atwood Statement, at 4; ABA Comments re Comity, at 4; *see also* ACT Comments, at 10.

[21] In many "new economy" industries, in which a company may sell a product or service worldwide, a remedy imposed by a single country can have worldwide consequences. *See* Bertelsmann Comments, at 3; *see also* ACT Comments, at 7–9 (citing *Microsoft* remedies in European Union and South Korea, as well as European Union's order of compulsory licensing of intellectual property holding in *IMS Health*); Business Roundtable, Public Comments Submitted to AMC, at 26 (Nov. 4, 2005) [hereinafter Business Roundtable Comments] (stating that Roundtable members are concerned they will face conflicting antitrust remedies). The problem has been exacerbated by "forum shopping" by complainants that seek out a country that is likely to impose the most stringent remedy. *See* Bertelsmann Comments, at 3; Blechman Statement, at 2; ABA Comments re Comity, at 4.

[22] *See* Tritell Statement, at 8 n.17 (noting investigations of Boeing/McDonnell-Douglas and G.E./Honeywell mergers, as well as Microsoft's conduct).

[23] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (declining to extend U.S. antitrust laws in regions where the conduct at issue was not unlawful).

[24] 15 U.S.C. § 6a.

[25] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 173 (2004) (answering the question whether the FTAIA "gives rise to 'a' claim" should be interpreted as "gives rise to 'the' plaintiff's claim").

[26] ABA Comments re International Cooperation, at 2 (describing the U.S. agencies as "leaders in promoting convergence and coordination through multilateral fora such as the OECD and the ICN"); Atwood Statement, at 5 (noting that U.S. authorities encouraged the development of antitrust law around the world); Bertelsmann Comments, at 5 (stating that the United States played a "pioneering role" in developing bilateral agreements with other countries).

[27] Tritell Statement, at 3; *see also* International Antitrust Trans. at 39–42 (Tritell and Masoudi).

[28] Hammond, International Cartel Prosecutions, at 6.

[29] *Id.*; Blechman Statement, at 5 ("Antitrust enforcement authorities now routinely notify each other of investigations, share information during investigative phases, and either confer regarding or jointly negotiate remedies.").

[30] Fox Statement, at 3 (stating that the OECD and the ICN play an important role in today's era of cooperation).

31 History of Organisation for Economic Co-operation and Development, *available at* http://www.oecd.org/document/63/0,2340,en_2649_201185_1876671_1_1_1_1,00.html.

32 Organisation for Economic Co-operation and Development, Competition Law and Policy, *available at* http://www.oecd.org/department/0,2688,en_2649_34685_1_1_1_1_1,00.html.

33 ICPAC Report, at 281 (proposing a "Global Competition Initiative" as a forum for addressing global competition issues); International Competition Network, History, *available at* http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/history [hereinafter ICN, History] (stating that "[t]he concept for the ICN came directly out of the recommendations of the International Competition Policy Advisory Committee (ICPAC)").

34 ICN, History.

35 *See* International Competition Network, A Statement of Mission and Achievements up until May 2006, at 2 (May 2006), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMission&AchievementsStatement.pdf.

36 Gerald F. Masoudi, Statement at AMC International Antitrust Hearing, at 3–6 (Feb. 15, 2006) [hereinafter Masoudi Statement].

37 International Competition Network Unilateral Conduct Working Group 2006-2007 Work Plan, *available at* http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/UCWGworkplan.pdf; Press Release, Dep't of Justice, International Competition Network Conference Finalizes Merger Guidelines Workbook to Improve Merger Review Analyses, Establishes Unilateral Conduct Working Group (May 5, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/215982.htm.

38 *See, e.g.*, ICN Working Groups, Mergers, *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/notification.html.

39 Masoudi Statement, at 3.

40 Bertelsmann Comments, at 4.

41 International Antitrust Trans. at 11–12, 15 (Tritell).

42 Bertelsmann Comments, at 2.

43 Blechman Statement, at 2.

44 ACT Comments, at 10; Blechman Statement, at 2; ABA Comments re Comity, at 4; ICPAC Report, at 91–93.

45 PricewaterhouseCoopers, A Tax on Mergers? Surveying the Time and Costs to Business of Multi-jurisdictional Merger Reviews, at 4, 42 (July 2003) (figures reported were €3.3 million and €10 million, converted here at then-prevailing rate of approximately €1 to $1.15); *see also* ICPAC Report, at 93 n.17 (stating that the Halliburton/Dresser merger reportedly cost the parties $3.5 million "to comply with notification and investigation requirements in the six jurisdictions where notification was required (Australia, Brazil, Canada, the EU, Mexico, and the United States)").

46 *See* Fox Statement, at 16 & n.34 (recommending the establishment of a central clearinghouse for international mergers).

47 International Antitrust Trans. at 74 (Tritell).

48 15 U.S.C. §§ 6201–12.

49 ABA Comments re International Cooperation, at 2–3; Tritell Statement, at 5.

50 *See* International Bar Association, Public Comments Regarding International Antitrust, at 19–20 (Jan. 27, 2006) [hereinafter IBA Comments re International Antitrust]; Tritell Statement, at 5 (stating that Congress enacted the IAEAA to overcome the limitations in prior cooperative agreements that prevented parties from exchanging confidential information); ABA Comments re International Cooperation, at 3.

51 *See* Business Roundtable Comments, at 25–26 (stating that "international cooperation is necessary in order to assure effective and efficient antitrust enforcement").

52 ABA Comments re International Cooperation, at 3; Tritell Statement, at 5.

53 ABA Comments re International Cooperation, at 5.

54 15 U.S.C. § 6211(2); *see also* American Bar Association, Section of International Law, Public Comments Submitted to AMC (Sept. 1, 2005) [hereinafter ABA Int'l Section Comments] ("IAEAA provides that the United States may enter into AMAAs with foreign jurisdictions . . . on a reciprocal basis.") (internal quotations omitted).

55 15 U.S.C. § 6211(2)(E)(ii).

56 ABA Int'l Section Comments, at 8.

57 *Id.* at 9 (citing R.S.C. 1985, c. C-34, § 30.01(d)(ii), which provides that "[b]efore Canada enters into an agreement, the Minister of Justice must be satisfied that . . . the agreement contains the following undertakings by the foreign state, namely, . . . that any record or thing provided by Canada will be used only for the purpose for which it was requested").

58 Some foreign jurisdictions have laws that prevent them from entering into information-sharing agreements such as those contemplated by the IAEAA (irrespective of the issue raised by Section 6211(2)(E)(ii) of the IAEAA). ABA Comments re International Cooperation, at 6. In addition, foreign jurisdictions that have not criminalized antitrust violations might be concerned about the possible use of AMAA-obtained information in a U.S. criminal proceeding. IBA Comments re International Antitrust, at 22; ABA Comments re International Cooperation, at 6 (stating that jurisdictions might be reluctant or unable "to provide information that could be used in U.S. criminal prosecutions").

59 For example, in many investigations, particularly with respect to mergers, the parties are willing to waive the restrictions on the exchange of confidential information. *See* Tritell Statement, at 5; ABA Comments re International Cooperation, at 3. Some countries may find existing Mutual Legal Assistance Treaties (MLATs) sufficient for the exchange of information. IBA Comments re International Antitrust, at 22 (identifying Canada as one jurisdiction that prefers the use of MLATs over AMAAs). By comparison, Australia, which does not have criminal antitrust enforcement, likely entered into an AMAA because an MLAT (used only for criminal investigations) would provide it with no benefits. *Id.* at 20.

60 This amendment would specifically call for Congress to modify Section 6211(2)(E)(ii) to clarify that a provision for non-antitrust uses is not a mandatory component of an AMAA. *See* ABA Int'l Section Comments, at 2; IBA Comments re International Antitrust, at 4 (stating that it would be "advisable that Congress amend this provision to clarify that this provision to disclose antitrust evidence for non-antitrust purposes is not mandatory"); *see also id.* at 22 (Congress could amend Section 6211(2)(E)(ii) to limit information-sharing to antitrust matters only).

61 Tritell Statement, at 5–6.

62 ABA Comments re International Cooperation, at 4.

63 *Id.* (stating that the technical assistance provided by the U.S. agencies helps to "develop [the] investigational and analytical skills" of nascent foreign antitrust regimes).

64 Dep't of Justice, Antitrust Div. & Federal Trade Comm'n, The United States Experience in Competition Law Technical Assistance: A Ten Year Perspective, Report to the OECD, at 2 (Feb. 6, 2002), *available at* http://www.oecd.org/dataoecd/37/61/1833990.pdf.

65 *See* ABA Comments re International Cooperation, at 7 ("Sustained technical assistance from the U.S. and other countries and multilateral organizations is crucial if the scores of fledgling antitrust agencies that have formed in the past fifteen years are to contribute to economic efficiency rather than stifle it through ineffective or misguided regulatory approached.").

66 ABA Int'l Section Comments, at 10.

67 USAID Primer: What We Do and How We Do It, *available at* http://www.usaid.gov/about_usaid/primer.html.

68 Fox Statement, at 6.

69 International Antitrust Trans. at 15 (Tritell).

[70] *Id.* at 14 (Tritell).

[71] Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws (June 4, 1998), *available at* http://www.ftc.gov/bc/us-ec-pc.htm [hereinafter 1998 U.S.-E.U. Agreement]; Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding The Application of Their Competition Laws (Sept. 1991), *available at* http://www.usdoj.gov/atr/public/international/docs/0525.pdf [hereinafter 1991 U.S.-E.U. Agreement].

[72] *See* ABA Comments re Comity, at 8.

[73] Blechman Statement, at 2 & n.3.

[74] 1991 U.S.-E.U. Agreement, art. VI.

[75] *Id.*

[76] Atwood Statement, at 8; *see* Blechman Statement, at 3.

[77] 1991 U.S.-E.U. Agreement, art. III; *see also id.* art. II, §§ 2–3 (defining "Requested Party" and "Requesting Party").

[78] *Id.* at art. IV, § 1.

[79] Blechman Statement, at 3. The positive comity provisions have been very infrequently invoked by the United States or European Union. *See id.* at 8.

[80] Blechman Statement, at 5 (The U.S.-E.U. agreements have "facilitated substantial strides in cooperation among enforcement authorities."); ABA Comments re Comity, at 8.

[81] Eleanor M. Fox, *Extraterritoriality in the Age of Globalization: Conflict and Comity in the Age of* Empagran, 1 ANTITRUST REP. 3 (2005) [hereinafter Fox, *Extraterritoriality in the Age of Globalization*] (referring to the "numerous bilateral agreements following the [U.S.-E.U.] model"); ABA Comments re Comity, at 7–8 (discussing other bilateral agreements with Canada, Germany, Australia, Brazil, Israel, Japan, and Mexico).

[82] ABA Comments re Comity, at 8; Bertelsmann Comments, at 5 (comity provisions incorporated in the U.S.-E.U. agreements have been less successful than the coordination and cooperation provisions).

[83] Bertelsmann Comments, at 5.

[84] *Id.*; *see* ACT Comments, at 5–7; Atwood Statement, at 3.

[85] Bertelsmann Comments, at 5–6 (stating that the United States and the European Union, as long-established antitrust regimes, must set an example for countries "with less mature antitrust regimes" by avoiding inconsistent or conflicting outcomes).

[86] *Id.*

[87] *Id.* at 1 (stating that inefficiencies and uncertainty could impose significant costs on businesses and society); Atwood Statement, at 4.

[88] Bertelsmann Comments, at 3.

[89] *Id.*

[90] ABA Comments re Comity, at 4.

[91] *Id.* (stating that the consequences of business uncertainty include the discouragement of procompetitive conduct that could improve consumer welfare).

[92] Bertelsmann Comments, at 7 (proposing that agreements highlight fact that "trade, investment, and welfare can be impeded by divergent government competition policies and inconsistent antitrust remedies").

[93] *Id.*

[94] Joint Export Trade Alliance, Public Comments Submitted to AMC Regarding International Issues, at 1–2 (Jan. 13, 2006) (similarly advocating that jurisdictions adopt the FTAIA's direct, substantial, and reasonably foreseeable test when dealing with international transactions); *see also* Blechman Statement, at 8 (advocating deference for jurisdictions with no direct, substantial, and reasonably foreseeable impact resulting from the transaction).

[95] 15 U.S.C. § 6a.

[96] Fox Statement, at 16–17 & n.36 (stating that globalization has placed pressure on existing premerger notification systems and that jurisdictional disputes could be resolved through choice-of-law principles).

[97] *See* International Antitrust Trans. at 14–16 (Tritell).

[98] Fox, *Extraterritoriality in the Age of Globalization*, at 19.

[99] *See* International Antitrust Trans. at 18–21 (Fox).

[100] *Id.* at 21 (Fox).

[101] Fox Statement, at 15 (citing ICPAC Report, at 78–81).

[102] International Antitrust Trans. at 11–12 (Tritell).

[103] *See* Blechman Statement, at 6–7 (referring to the *Microsoft* case); Atwood Statement, at 9 (referring to the G.E./Honeywell and Boeing/McDonnell-Douglas transactions); Tritell Statement, at 8 n.17 (calling these the "best known, and perhaps only, examples" of where international antitrust regimes took divergent paths in a particular matter); *see also* Press Release, Dep't of Justice, Statement of Deputy Assistant Attorney General J. Bruce McDonald Regarding Korean Fair Trade Commission's Decision in its Microsoft Case (Dec. 7, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/December/05_at_648.html (objecting to Korea's implementation of remedy against Microsoft regarding Windows Media Player).

[104] *See* ABA Comments re Comity, at 7; R. Hewitt Pate, Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Current Issues in International Antitrust Enforcement, Address Before Fordham Corporate Law Institute, 31st Annual Conference on International Antitrust Law & Policy, at 11 (Oct. 7, 2004) ("[I]t surely must count for something under basic principles of comity that a competent system with a clear nexus to a matter has already made a full effort to address it and has already come to a result.").

[105] Fox, *Extraterritoriality in the Age of Globalization*, at 17 (stating that the second jurisdiction can relax its guard when it has faith in the technical and non-political motivations of the first jurisdictions).

[106] Atwood Statement, at 14.

[107] *See id.*; ABA Comments re Comity, at 14.

[108] Bertelsmann Comments, at 8.

[109] H.R. Rep. No. 97-686, at 4–5 (1982).

[110] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

[111] Empagran S.A. v. F. Hoffmann-La Roche Ltd., 417 F.3d 1267 (D.C. Cir. 2005).

[112] 15 U.S.C. § 1.

[113] 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . and shall recover threefold the damages by him sustained[.]").

[114] *See* H.R. Rep. No. 97-686, at 5 (1982) (congressional discussion of courts applying varying tests to determine U.S. jurisdiction over foreign conduct).

[115] *See, e.g.*, Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587 (E.D. Pa. 1974) (finding that the restraints imposed by defendants' distributors abroad "directly affected the flow of commerce out of this country" and thus "are subject to . . . Section 1 of the Sherman Act"); H.R. Rep. No. 97-686, at 5 (citing Dep't of Justice, Antitrust Guide to International Operations, 6–7 (1977) (stating U.S. jurisdiction should exist over international transactions when there is a substantial and foreseeable effect on U.S. commerce)).

[116] *See, e.g.*, Industria Siciliana Asfalti v. Exxon Rsrch. & Eng'g Co., 1977 WL 1353, at *11 (S.D.N.Y. Jan. 18, 1977) (referring only to the "required impact upon United States commerce" having been established); Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (referring to *Alcoa*'s "effects test" but then stating that "[i]ndeed, it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not [d]e minimus" [*sic*]).

[117] 15 U.S.C. § 6a.

[118] H.R. REP. NO. 97-686, at 2–3.

[119] *See, e.g.*, Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (2d Cir. 2002) ("[A]dopting the defendants' interpretation would mean rewriting the statute to replace the word 'a' . . . with the words 'the plaintiff's,' resulting in a new subsection 2 that requires that the 'effect give[ ] rise to *the plaintiff's* claim.'"); Sniado v. Bank Austria AG, 352 F.3d 73, 78 (2d Cir. 2004) (vacating the district court's decision that required the plaintiff to advance his own claim); Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 315 F.3d 338, 341 (D.C. Cir. 2003) (stating the FTAIA requires that "the anticompetitive conduct itself must violate the Sherman Act and the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court"), *vacated and remanded*, 542 U.S. 155 (2004).

[120] *See, e.g.*, Den Norske Stats Oljeselskap AS v. HeereMac VOF, 241 F.3d 420, 425 n.15 (5th Cir. 2001) (citing Congress for the proposition that "the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws"); *id.* at 426 & n.19 (rejecting argument that plaintiffs can advance a claim other than their own); *see also* Sniado v. Bank Austria AG, 174 F. Supp. 2d 159, 166 (S.D.N.Y. 2001); Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 2001 WL 761360, *3–4 (S.D.N.Y. June 7, 2001).

[121] *Empagran*, 542 U.S. at 158.

[122] *Id.* at 173–74 ("Respondents concede that this claim is not their own claim; it is someone else's claim. But, linguistically speaking, they say, that is beside the point.").

[123] *Id.* (holding that, notwithstanding the FTAIA's reference to "a" claim, it should be read as "the plaintiff's claim or the claim at issue") (internal quotations omitted).

[124] *Id.* at 165; *id.* at 173 (holding that "Congress would not have intended the FTAIA's exception to bring *independently* caused foreign injury within the Sherman Act's reach") (emphasis added).

[125] *Id.* at 158.

[126] *Id.* at 175.

[127] Empagran S.A. v. F. Hoffmann-La Roche, Ltd., 417 F.3d 1267, 1271 (D.C. Cir. 2005).

[128] *See In re* Monosodium Glutamate Antitrust Litig., 477 F.3d 535 (8th Cir. 2007); *In re* Graphite Electrodes Antitrust Litig., 2007 WL 137684 (E.D. Pa. Jan. 16, 2007); *see also* Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V., 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005) (finding plaintiffs' facts almost indistinguishable from the facts of *Empagran* and dismissing plaintiffs' case); *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 2006 WL 515629 (N.D. Cal. Mar. 1, 2006) (same).

[129] *In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 715 (D. Md. 2001) ("[F]oreign consumers who have not participated in any way in the U.S. market have no right to institute a Sherman Act claim.").

[130] H.R. REP. NO. 97-686, at 9–10 (stating that "foreign buyers injured by [export-only] . . . conduct would have to seek recourse in their home courts."); de Atucha v. Commodity Exch., Inc., 608 F. Supp. 510, 518 (S.D.N.Y. 1985) ("Congress did not contemplate recovery under the antitrust laws by an individual who traded, and was injured entirely outside of United States commerce."); *In re Microsoft*, 127 F. Supp. 2d at 715 (noting that in legislative history of the FTAIA "[n]othing is said about protecting foreign purchasers in foreign markets").

[131] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986) ("American antitrust laws do not regulate the competitive conditions of other nations' economies."). *But see Empagran*, 542 U.S. at 165 (stating that although it is generally inappropriate for the United States to impose its policies

on foreign jurisdictions that have opted for a different remedial scheme, it may do so where there is a need "to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused").

[132] For example, the European Union is evaluating whether to enhance private remedies. *See* Commission of the European Communities, Green Paper, Damages Actions for Breach of the E.C. Antitrust Rules, (Dec. 19, 2005), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf [hereinafter EU Damages Green Paper]; Neelie Kroes, The Green Paper on Antitrust Damages Actions: Empowering European Citizens to Enforce their Rights, Opening Speech at the European Parliament Workshop on Damages Actions for Breach of the EC Antitrust Rules, at 6 (June 6, 2006), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/speech_06062006.pdf, (stating that there was "clear consensus" that the EU needs to "complement public enforcement with stronger private actions").

[133] *Empagran*, 542 U.S. at 169 (stating that "if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress . . . would not have tried to impose them, in an act of legal imperialism, through legislative fiat.").

[134] For example, the European Union is considering whether to provide double (as opposed to treble) private damages. *See* EU Damages Green Paper, at 7.

[135] *Empagran*, 542 U.S. at 166 (internal quotations omitted); *see also Statoil*, 241 F.3d at 427–28 ("[U]nder . . . an expansive interpretation [of the FTAIA], any entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States.").

[136] Brief for the United States as Amicus Curiae Supporting Petitioners, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 2004 WL 234125, at *19–20 (Feb. 3, 2004) [hereinafter U.S. Amicus Brief]; *see also* Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 2004 WL 226388, at *5 (Feb. 3. 2004) [hereinafter Germany/Belgium Amicus Brief] ("The [lower] court's interpretation of the FTAIA . . . threatens to undermine international antitrust cooperation and enforcement . . . [by] creat[ing] strong disincentives for companies to participate in [leniency] programs[.]"); Brief for the Government of Canada as Amicus Curiae Supporting Reversal, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 2004 WL 226389, at *13 [hereinafter Canada Amicus Brief] ("[U]pholding U.S. jurisdiction in this case would conflict with and impede effective administration of Canada's immunity program.").

[137] U.S. Amicus Brief, at *19–20; Germany/Belgium Amicus Brief, at *5; Canada Amicus Brief, at *13; *Empagran*, 542 U.S. at 167–68 (noting that the U.S., Canada, and Germany stated that a broad interpretation of the FTAIA would interfere with their antitrust enforcement efforts); *see also* Canadian Bar Association, Public Comments Submitted to the AMC, at 3 (Jan. 16, 2006); IBA Comments re International Antitrust, at 16–18; Masoudi Statement, at 7.

[138] Fox Statement, at 9; *see also* American Antitrust Institute, Public Comments Submitted to AMC Regarding International Antitrust, at 4 (July 15, 2005) (stating that *Empagran* created the potential for "a substantial weakening of deterrence"); Kruman v. Christie's Int'l PLC, 284 F.3d 384, 403 (2d Cir. 2002) (stating that when the anticompetitive conduct affects both domestic and foreign markets, deterrence increases when persons injured in foreign markets are permitted to sue in the United States).

[139] For example, Commissioners Carlton and Garza would increase the damages multiplier where the FTAIA limits claims. *See* Chapter III.A of this Report regarding treble damages.

[140] H.R. Rep. No. 97-686, at 9.

[141] *In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 716 (D. Md. 2001); *see also* Pfizer, Inc. v. Government of India, 434 U.S. 308, 318–20 (1978); H.R. Rep. No. 97-686, at 10.

[142] For example, in *Sniado v. Bank Austria AG* the plaintiff was a U.S. resident who purchased allegedly price-fixed currency exchange services from European banks in Europe. Sniado sued the foreign banks under the Sherman Act for injuries he sustained in Europe. The court dismissed Sniado's claim, notwithstanding

his U.S. citizenship, on the basis that his foreign injury lacked the requisite nexus to any U.S. effects. *See Sniado*, 378 F.3d at 212–13; Sniado v. Bank Austria AG, 352 F.3d 73, 75 (2d Cir. 2003) (noting that Mr. Sniado was a resident of New York). By contrast, in *Pfizer, Inc. v. Government of India* the governments of India, Iran, and the Philippines entered into and suffered injury in U.S. commerce when they purchased allegedly price-fixed antibiotics from U.S. pharmaceutical companies. The Court stated that:

> When a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or a domestic State . . . . Neither the fact that the respondents are foreign nor the fact that they are sovereign is reason to deny them the remedy of treble damages . . . .

Pfizer, 434 U.S. at 318–20. This principle remains true even if the foreign plaintiff transacted in a U.S. market but took title abroad. *See* H.R. Rep. No. 97-686, at 9 (noting that the Sherman Act can apply "[e]ven if some purchasers take title abroad or suffer economic injury abroad").

[143] H.R. Rep. No. 97-686, at 9 (referring to Friendship, Commerce and Navigation treaties between the United States and various countries that provide reciprocal access for each other's citizens into their courts); International Antitrust Trans. at 57–58 (Fox) (stating that discriminating on the basis of nationality would be a violation of GATT).

[144] *In re Microsoft*, 127 F. Supp. 2d at 716.

Chapter III
Civil and Criminal Remedies

Congress has provided for both private and public enforcement of the antitrust laws. Anticompetitive conduct may be challenged by the Antitrust Division of the Department of Justice, the Federal Trade Commission, state attorneys general, and private parties who have been injured by the antitrust violation and have standing to sue.

When the federal government sues, it can seek a wide range of injunctive relief, including "positive" relief requiring the restructuring of a company or the implementation of certain practices, as well as recover its own damages as a purchaser. In addition, the Department of Justice is uniquely empowered to seek substantial criminal fines against both corporations and individuals and prison sentences against individuals. In more limited circumstances, the federal government may seek civil fines or equitable monetary remedies, including the disgorgement of ill-gotten gains and restitution.

State attorneys general can sue in a *parens patriae* capacity on behalf of injured citizens of their states. They also can recover for state entities where they have been directly injured.

Private parties injured by an alleged antitrust violation can sue to recover three times their actual damages, plus costs and attorneys' fees, and for equitable relief similar to what the government can obtain. Private antitrust enforcement has been more vigorous in the United States than anywhere else in the world. The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs. An aggressive and capable antitrust plaintiffs' bar has developed to pursue class actions following on to government criminal prosecutions and in situations where individual plaintiffs might not have the ability or incentive to sue. Congress, state legislatures, and the courts have developed rules governing who can recover for injuries that are "passed on" to various levels of consumers, the availability of attorneys' fees and prejudgment interest on damages, and how liability is allocated among alleged participants in an antitrust conspiracy.

Over the years, observers have debated the effectiveness of this public-private enforcement framework in achieving optimal levels of deterrence and compensation to victims. With respect to private civil actions, for example, the availability of treble damages has been both lauded as the key to an effective enforcement system and blamed for burdening business with litigation of questionable merit. Some observers contend that treble damages are insufficient to deter and compensate at optimal levels and should be increased to some higher multiplier; others take the opposite view. With respect to government civil and criminal enforcement, observers similarly have suggested both that the government has too great an enforcement arsenal at its disposal and that it has too little.

Because of the interrelated nature of the rules and procedures governing private and public enforcement, the Commission decided to study a range of issues together covering both private and public enforcement. The recommendations described in this chapter accordingly address (A) the availability of treble damages and the rules relating to prejudgment interest and attorneys' fees, as well as the liability of each defendant for the full harm caused by all participants in an antitrust conspiracy (known as "joint and several liability"); (B) which parties in a chain of distribution should be allowed to sue to recover antitrust damages; (C) whether new authorization should be provided for the Department of Justice or the Federal Trade Commission to obtain civil fines for substantive, non-criminal antitrust violations or to seek monetary equitable remedies on an expanded basis; and (D) whether any changes to current criminal antitrust enforcement and sentencing are needed.

Chapter III.A
Private Monetary Remedies and Liability Rules

1. INTRODUCTION

Private antitrust enforcement plays a critically important role in implementing the U.S. antitrust laws. From the outset, Congress contemplated that private parties would play a central role in enforcement of the Sherman Act. Indeed, Senator Sherman believed that individuals should act as "private attorneys general," and that the antitrust laws should encourage such enforcement.[1]

The central feature of private antitrust remedies is its provision for treble damages, which allows plaintiffs in all cases to recover "threefold the damages by him sustained."[2] Successful antitrust plaintiffs may, in addition, recover attorneys' fees and, in certain circumstances, prejudgment interest. The effect of these monetary remedies is reinforced by rules that make defendants jointly and severally liable for damages. That is, each defendant is liable for the full amount of damages even if several defendants jointly engage in the unlawful conduct.

The Commission studied several aspects of private remedies to determine whether they remain sensible and properly serve these goals in light of the development of antitrust law over more than 100 years. In particular, the rule of treble damages has long been questioned by some as potentially too punitive in at least some types of antitrust cases. Much conduct potentially subject to the antitrust laws can be procompetitive, or at least competitively neutral, and the rules on the lawfulness of such conduct are not always clear. As a result, treble damages arguably discourage some conduct that would benefit consumers because the damage exposure exceeds the benefits of the conduct for the company and its customers. Particularly where the law or facts are not clear, imposing treble damages may be considered unfairly punitive. Similarly, the availability of attorneys' fees for plaintiffs has led to criticism that awarding such fees, in addition to treble damages, encourages the filing of frivolous antitrust cases, particularly if successful defendants are not entitled to recover their fees. Finally, limitations on the availability of prejudgment interest have been criticized for failing to provide successful plaintiffs with full compensation, including compensation for the time from when they suffer harm to when they ultimately recover.

The Commission also reviewed the consequences of the current rule of joint and several liability that applies in antitrust cases. Joint and several liability makes all defendants fully liable for the damages caused by unlawful joint conduct, such that a plaintiff may recover the full amount of the judgment from any one of the defendants. A related rule applicable in antitrust cases bars claims for contribution among defendants. Contribution claims, if allowed, would permit one defendant to seek "contribution" from another defendant if it has paid more than a "fair" share of the judgment. A second, related rule substantially limits "claim reduction" in antitrust cases. Claim reduction in the antitrust context reduces the plaintiff's total remaining post-trebling claim to reflect settlement payments already made.

The existing rules of joint and several liability without a right of contribution and only limited claim reduction have given rise to substantial criticism regarding fairness. These rules permit plaintiffs to settle with some defendants at an early stage for a relatively small amount of damages, leaving remaining, non-settling defendants potentially liable for nearly the entire damages caused by the joint conduct, trebled. As a result, these rules can cause a "race" to settle, potentially leaving defendants that had a small or no role in the overall anticompetitive scheme with disproportionately large potential liability.

The Commission recommends the following.

43. No change is recommended to the statute providing for treble damages in antitrust cases.*

44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.†

45. No change is recommended to the statute providing for attorneys' fees for successful antitrust plaintiffs. In considering an award of attorneys' fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.**

46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.††

* Commissioners Carlton, Garza, and Warden do not join this recommendation in full.

† Commissioners Carlton, Delrahim, Garza, Shenefield, and Warden do not join this recommendation.

** Commissioners Cannon, Litvack, and Warden do not join this recommendation in full.

†† Commissioners Carlton and Garza do not join this recommendation with respect to contribution among non-settling defendants.

2. TREBLE DAMAGES

A. Background

Section 4 of the Clayton Act allows "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws" to "recover threefold the damages by him sustained."[3] This provision directly descends from the original Sherman Act, passed in 1890, which included the same treble damages provision.[4] At the time of the Sherman Act's passage, congressional debate centered on whether to provide for double or treble damages; single damages were not seriously considered as an alternative.[5] Senator Sherman and others argued that multiple damages should be "commensurate with the difficulty of maintaining a private action," punitive, and provide incentives to plaintiffs to act as private attorneys general.[6]

Treble damages have remained the rule in antitrust cases, despite periodic efforts to eliminate or limit their availability.[7] There are a few instances in which treble damages are not available. For example, Congress has created a small number of statutory exemptions pursuant to which plaintiffs' damages are not automatically trebled.[8] Congress has also provided for the elimination of treble damages, in specified circumstances, for organizations that participate in the Department of Justice's (DOJ) corporate leniency program, which provides incentives to participants in cartel activity to provide evidence to the DOJ for use in criminal prosecutions.[9]

B. Recommendation and Findings

43. No change is recommended to the statute providing for treble damages in antitrust cases.*

* Commissioners Carlton, Garza, and Warden do not join this recommendation in full.

Commissioners Carlton and Garza believe further consideration should be given to increasing treble damages in international price-fixing conspiracies where certain victims of the conduct may not seek compensation in U.S. courts through operation of the Foreign Trade Antitrust Improvements Act. In addition, they believe it would be appropriate to reduce the multiplier in cases where conduct is overt because the likelihood of such conduct's evading detection and, if unlawful, being prosecuted is much lower than for covert conduct.

As set forth in his separate statement, Commissioner Warden (with whom Commissioner Garza joins) would permit the award of treble damages where there is proof by clear and convincing evidence of clearly unlawful conduct.

Treble damages serve five related and important goals:

(1) Deterring anticompetitive conduct;

(2) Punishing violators of the antitrust laws;

(3) Forcing disgorgement of the benefits of anticompetitive conduct from those violators;

(4) Providing full compensation to victims of anticompetitive conduct; and

(5) Providing an incentive to victims to act as "private attorneys general."[10]

Although it has been argued that, in certain circumstances, something more or less than treble damages would better advance one or more of these goals,[11] the Commission concludes that an insufficient case has been made for changing the treble damages rule, either universally or in specified instances.[12] The Commission concludes that, on balance, the treble damages rule well serves the defined goals.

Deterrence. The first broadly recognized purpose of treble damages is deterrence. To eliminate the incentive to engage in anticompetitive conduct, a violator must be exposed to forfeiture of potential gains from such conduct. Treble damages compensate for the reality that some anticompetitive conduct is likely to evade detection and challenge.[13] If a company realizes that its anticompetitive conduct has only a 50 percent chance of being detected, and if its liability were limited to single damages, it would be more likely to engage in that conduct because the reward exceeds the risk.[14]

Punishment of violators. The second recognized purpose of treble damages is to punish offenders, similar to punitive damages under the common law and other statutes.[15] This reason is closely related to the deterrence justification: providing a multiple of damages helps deter such conduct and highlights societal disapproval of such conduct. Furthermore, in addition to raising prices, anticompetitive conduct causes allocative inefficiency (for example, forgone purchases and substitution of less optimal alternatives) that, while reducing consumer welfare, is not reflected in damage calculations.[16] Treble damages help to ensure that the violator pays damages that more fully reflect the harm to society caused by the anticompetitive conduct.[17]

Disgorgement of gains. Treble damages also serve the purpose of requiring the disgorgement of unlawfully obtained gains (or profits) that result from anticompetitive conduct.[18] Preventing violators from profiting removes incentives to engage in such conduct and thereby enhances deterrence.[19]

Compensation to victims. A fourth purpose of treble damages is to ensure full compensation to the victims of anticompetitive conduct. Indeed, in light of the fact that some damages may not be recoverable (*e.g.*, compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover "speculative" damages) treble damages help ensure that victims will receive at least their actual damages.[20]

Creating incentives for "private attorneys general." Finally, providing treble damages creates incentives for private enforcement of the antitrust laws. This is of particular importance in light of limited government resources to identify and prosecute all anticompetitive conduct.[21] Incentives for private enforcement reinforce the other objectives of treble damages by increasing the likelihood that claims will be brought against violators, thereby enhancing deterrence, appropriate disgorgement and punishment, and compensation to victims.[22]

The Commission was not presented with substantial evidence or empirical support that treble damages do not advance these goals. However, some have argued that treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive and result in duplicative recovery.[23] No actual cases or evidence of systematic overdeterrence were presented to the Commission, however.[24]

The Commission carefully considered a variety of circumstances in which it was proposed that the damages multiplier might be decreased (or increased). As described more fully below, the Commission considered the following (among others): (1) providing treble damages only in cases where the conduct is clearly unlawful and devoid of competitive benefit; (2) limiting damages to single damages when the conduct is overt; and, (3) placing the damages multiplier in the discretion of the trial judge. Ultimately, the Commission declined to recommend these approaches for the reasons set forth below.

There is broad consensus that treble damages are appropriate for hard-core cartel conduct. Even those who advocate eliminating treble damages in some circumstances agree that price-fixing and similar conduct should be subject to treble damages.[25] Moreover, some argue that the multiplier should be higher in these cases to compensate for the low likelihood of detection.[26] Nonetheless, because the Commission recommends retention of a single, uniform multiplier in all antitrust cases, and because hard-core cartel conduct is often subject to criminal prosecution,[27] the Commission does not recommend any increase to the multiplier for hard-core conduct.

The Commission also declines to recommend a change to provide for only single damages in rule of reason cases. Several fundamentally similar proposals were advanced to the Commission to limit treble damages to per se antitrust violations, where the conduct is clearly unlawful and bereft of procompetitive benefits.[28] These advocates argue that in cases other than those—where conduct may be procompetitive or is subject to unclear legal standards—treble damages may deter or "chill" potentially procompetitive behavior.[29] Although such concerns are reasonable, the Commission concluded that statutorily defining whether conduct was a per se violation or subject to the rule of reason would prove difficult.[30] Furthermore, there is anticompetitive conduct that is not per se unlawful can cause as much damage as per se violations such as price-fixing.[31] Indeed, eliminating treble damages for such cases could greatly hamper incentives to bring actions, and thus reduce deterrence too much.[32]

The Commission also evaluated, but declined to recommend, limiting treble damages to conduct that is covert.[33] For conduct that is publicly open (or "overt")—such as mergers, and most joint ventures, distribution contracts, and single-firm conduct—the probability of detection is close to 100 percent.[34] By comparison, much covert cartel activity likely goes undetected.[35] Given that a principal justification for treble damages is to account for the likelihood of detection, there may be no need for multiple damages where the public is aware of the conduct or it is otherwise overt.[36] The Commission declined to recommend the creation of such a distinction, however, because some overt conduct, such as aspects of a legitimate joint venture, may be a disguised cartel, or otherwise cause severe harm.[37] As with the proposed division between per se and rule of reason conduct, such a distinction might result in increased litigation over whether treble damages are available on the facts of the conduct.

In light of the concerns with these two proposals, as well as several other similar proposals, the Commission also considered, but rejected, a rule that would leave the decision whether to award treble damages to the discretion of a judge. A court may be best positioned to evaluate the severity of the violation, in light of a range of possible factors, and tailor the penalty accordingly.[38] This approach would allow a court to decline to award treble damages if, for example, the questions of fact are close or the legal standards unclear, the conduct was overt, or the conduct had sizable procompetitive benefits.[39] Allowing judges to award only single damages in such cases would therefore potentially reduce overdeterrence and the chilling of procompetitive conduct that may result from mandatory trebling.[40] It would also avoid the need for drafting a statute that defines types of conduct that are and are not subject to treble damages. The Commission concluded, however, that such an approach would increase the length and cost of trials as the parties contest factual issues relevant to the factors to be considered.[41] Moreover, judges would be required potentially to balance multiple, conflicting factors, leading to inconsistency across courts and forum shopping.[42]

3. PREJUDGMENT INTEREST

A. Background

Prior to 1980, prejudgment interest was not available for antitrust claims. In 1980, in response to a recommendation by the National Commission for the Review of Antitrust Law and Procedure, Congress amended Section 4 of the Clayton Act to permit courts to award prejudgment interest when it is "just in the circumstances."[43] The statute permits a court to award prejudgment interest when:

(1) A party filed motions or asserted claims "so lacking in merit" that they could only have been intended for delay, or "otherwise acted in bad faith";

(2) A party violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior; or

(3) A party engaged in conduct primarily intended to delay litigation or raise its cost.[44]

In the twenty-six years since the amendment, there has been no reported decision awarding prejudgment interest in an antitrust case.[45]

B. Recommendation and Findings

44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.*

The purpose of the current provision regarding prejudgment interest is to compensate plaintiffs for dilatory tactics by defendants, which is appropriate. Prejudgment interest is not, however, more broadly available. When available, prejudgment interest helps to ensure that a plaintiff harmed by a defendant's unlawful conduct is fully compensated for its injury. Where a legal violation has caused harm many years before a plaintiff receives an award of damages, the plaintiff has not earned interest on the lost money for that period of time; conversely, the defendant may have earned returns on the unlawful gains until paying the judgment.[46] That is, some argue, "the time value of money works in [the] defendants' favor . . . [allowing] defendants to profit from their wrong."[47] Because antitrust cases can take several years to resolve, prejudgment interest is particularly appropriate.[48]

Treble damages, a rule to which the Commission recommends no change, adequately compensate for the general unavailability of prejudgment interest in antitrust cases.[49] Treble damages help ensure that injured parties are indirectly compensated for the loss of the time value of their money and that defendants are not able to profit from their wrongs. Antitrust damages are not easily calculated at the time of injury in most cases. The current rule making prejudgment interest unavailable in antitrust cases is thus consistent with the traditional rule in tort lawsuits, which makes prejudgment interest unavailable because damages are not readily quantifiable at the time of injury.[50] Finally, some courts have effectively compensated for the lack of prejudgment interest by including in the determination of damages elements such as inflation and interest paid on borrowed capital.[51] Changing the rule relating to prejudgment interest could deter courts from developing sounder rules regarding the treatment of opportunity and capital costs. These considerations, together with lim-

* Commissioners Carlton, Delrahim, Garza, Shenefield, and Warden do not join this recommendation.

Commissioners Carlton, Delrahim, Garza, and Shenefield would provide mandatory prejudgment interest from the time of injury in order to compensate injured parties fully for the time value of money.

Commissioner Warden would provide mandatory prejudgment interest from the time of injury in any case where damages are not trebled.

ited evidence and argument in support of greater availability of prejudgment interest in the Commission's record,[52] leads the Commission not to recommend any change to the current statute.

4. ATTORNEYS' FEES

A. Background

Section 4 of the Clayton Act, as the Sherman Act did before it, permits successful plaintiffs to recover reasonable attorneys' fees and costs.[53] A plaintiff is considered to be "successful," and an award of attorneys' fees is mandatory, whenever any damages are awarded.[54] In addition, a plaintiff seeking injunctive relief under Section 16 of the Clayton Act may, if it "substantially prevails," recover attorneys' fees.[55] The purpose of awarding attorneys' fees to prevailing plaintiffs is to help ensure that plaintiffs with meritorious claims will have access to counsel to redress antitrust violations.[56] They also provide additional incentives to private parties to bring lawsuits prosecuting anticompetitive conduct.[57] A successful defendant, however, is not entitled to recover attorneys' fees.[58]

Although the Clayton Act entitles a successful antitrust plaintiff to recover reasonable attorneys' fees, the courts still must determine whether the requested fees are in fact "reasonable."[59] Some courts consider factors such as the novelty of the issues in the case, the skill required to perform the legal services properly, the attorney's experience and reputation, the undesirability of the case, and numerous other factors.[60] Many courts start with a "lodestar" figure, which is the attorney's hourly rate multiplied by the attorney's hours worked.[61] The court then makes adjustments to that lodestar figure if appropriate.[62]

B. Recommendation and Findings

45. No change is recommended to the statute providing for attorneys' fees for successful antitrust plaintiffs. In considering an award of attorneys' fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.*

* Commissioners Cannon, Litvack, and Warden do not join this recommendation in full.

Commissioner Cannon would not make any recommendation regarding the factors to be considered by courts in awarding attorneys' fees, but otherwise joins the recommendation.

Commissioner Litvack would make attorneys' fees available to prevailing defendants as well.

As set forth in his separate statement, Commissioner Warden would award attorneys' fees to prevailing defendants in cases brought by competitors.

By statute, successful antitrust plaintiffs are entitled to mandatory attorneys' fees. But it is within a court's discretion to determine when those fees are reasonable, and to make upward or downward adjustments when necessary. These fees are intended to compensate plaintiffs for undertaking risky, costly litigation.[63]

Because fees are intended to provide an incentive to discover and prosecute anticompetitive conduct, they are less necessary where much of that evidence has been developed as part of a government investigation. In such cases the plaintiff's case is often already made by the underlying criminal conviction.[64] Courts should therefore consider whether the plaintiffs were relying on such evidence, and reduce fees appropriately in such cases to reflect the relative lack of risk and burden.

5. CONTRIBUTION AND CLAIM REDUCTION

A. Background

Under the antitrust laws, liability is joint and several for all defendants, with no right of contribution among defendants.[65] Thus, a plaintiff may obtain treble the damages resulting from the entire conspiracy from a single participant of a price-fixing conspiracy or other anticompetitive agreement. An antitrust defendant may not seek contribution from any other co-conspirator, however. In addition, if one or more defendants settle an antitrust claim, under the rule governing claim reduction, the plaintiff's remaining claim is reduced, after trebling, by the amount of the settlement.[66] Under these combined rules, if an alleged co-conspirator settles for less than the full amount of damages fairly attributable to it, trebled, non-settling defendants arguably remain liable for more than their "fair" share of damages.[67]

The policy questions raised by these rules have been debated extensively over the past two decades, particularly preceding and in the immediate wake of the Supreme Court's 1981 decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*[68] That decision explained that any change to the traditional, existing rule was for Congress, not the courts, to make.[69] Up to now, however, Congress has declined to legislate in the area.[70] Indeed, Congress recently reconfirmed the general application of the rule of joint and several liability in antitrust cases when it passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) in June 2004.[71]

B. Recommendation and Findings

46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.*

The current rules concerning contribution and claim reduction are fundamentally unfair.[72] Antitrust defendants are jointly and severally liable, but defendants may seek reduction of plaintiffs' claims only of the amount paid by settling defendants, after total damages have been determined and trebled, and also may not seek contribution from non-settling defendants. The combination of a very limited right to claim reduction and no right of contribution means that one defendant may be responsible for nearly all of the damage caused by an antitrust conspiracy.[73] These rules create significant pressure on defendants to settle antitrust claims, even those claims of questionable merit, simply to avoid the potential for excessive liability.[74] This dynamic permits plaintiffs to engage in "whipsaw" settlement tactics, playing defendants off one another to race to settle early or be left potentially liable for nearly the full remaining amount of the claims.[75] As a result, less culpable defendants may pay an unfairly large share of total damages, while more culpable defendants escape significant (or any) liability.[76] Although the existing rules can maximize deterrence and encourage the resolution of antitrust claims through quick settlement,[77] they may also overdeter conduct that may not be anticompetitive by exposing individual defendants to potential liability for damages far in excess of the benefits they derived from their conduct.

Congress should enact legislation applicable to all antitrust cases involving joint and several liability that would address both concerns. The legislation should permit non-settling defendants to obtain reduction of the plaintiffs' remaining claims against the non-settling defendants by the ratable share of liability of the settling defendants or the amount of the settlement, whichever is greater. (As explained below, the ratable share of liability would be based in most cases on the defendants' market shares.) The contribution provision should permit non-settling defendants to seek contribution from other non-settling defendants to

* Commissioners Carlton and Garza do not join this recommendation with respect to a right of contribution among non-settling defendants. Commissioner Carlton believes that pursuit of claims for contribution among non-settling defendants would be a misuse of judicial resources. Commissioner Garza believes that current policy better furthers the goal of deterrence by destabilizing cartels and discouraging their formation and that the goals of deterrence and judicial efficiency outweigh any concern for "fairness" among defendants in cartel cases.

the extent a plaintiff has collected a disproportionate share of its judgment from one or more of the non-settling defendants. Together, these provisions would enhance fairness among both settling and non-settling defendants, while not undermining overall deterrence or the efficient resolution of antitrust litigation through settlement. Indeed, the combination of claim reduction and contribution results in defendants paying a properly allocated share of damages. It also helps ensure that all defendants face an appropriate level of deterrence.[78] The two principal components of the proposed legislation are more fully described below.

Illustration of Effect of Commission's Recommendation

Companies A, B, and C enter into an arrangement to fix prices. The violation is per se illegal. Plaintiff sues all three companies for a total of $100m (to be trebled). Plaintiff settles with A before trial for $80 million, and a court finds B and C liable as alleged.

Defendant	Market Share	***Liability Under Current Law***	***Liability Under Proposed Law***
A	50%	$80 million in settlement	$80 million in settlement
B	30%	$220 million (joint and several with C)	$150 million, with claim for contribution against C for up to $60 million
C	20%	$220 million (joint and several with B)	$150 million, with claim for contribution against B for up to $90 million
Plaintiff's Total Recovery		$300 million, with $220 million coming from B and/or C as Plaintiff sees fit to collect.	$230 million, with $150 million coming from B and/or C as Plaintiff sees fit to collect.

First, the claim reduction provision would reduce the remaining liability of the non-settling defendants by the amount of the settlement or the ratable share of liability of the settling defendant(s), whichever is greater. This ensures that non-settling defendants are not made worse off, in the form of liability potentially greatly disproportionate to their relative contribution to the anticompetitive conduct, as a result of settlements between the plaintiffs and other defendants.[79] Claim reduction can thus provide much greater fairness between settling and non-settling defendants.[80] Plaintiffs' total possible recovery will not be reduced by the availability of claim reduction, however. The only reduction in plaintiffs' recovery will come from its decision to settle a claim rather than pursue it through to judgment, thereby gaining a certain recovery in exchange for forgoing a chance at larger recovery while avoiding the risk of no recovery at all.

The Commission understands that allowing claim reduction will likely reduce incentives for settlement, at least to some extent.[81] Nonetheless, reducing "whipsaw" settlements is worth the reduction in the likelihood of settlements and deterrence that claim reduction may create.[82] To be sure, some plaintiffs may be deterred from settling out of fears that they will be doing so "too cheaply."[83] But incentives for settlement will remain, and claim reduction will have the salutary effect of encouraging plaintiffs to consider more carefully the proper amount of the settlement with each defendant.[84] Finally, claim reduction should not significantly hamper overall deterrence, because non-settling defendants will still face significant, joint and several treble damages liability for the remainder of the plaintiffs' claim.

Second, the recommended statute should allow claims for contribution, but only among non-settling antitrust violators. Contribution would not be available against settling defendants. By making contribution available only among non-settling defendants, defendants will not be deterred from settling by the threat that their liability may later be increased through a contribution action.[85] Accordingly, defendants can "buy peace" through settlement without concern over future claims for contribution. Furthermore, this rule should not reduce incentives to settle; on the contrary, it leaves the same incentives to settle as the current rule barring contribution altogether.[86] Finally, and perhaps most importantly, providing this limited right of contribution in no way reduces the total recovery of the plaintiff, as it serves solely to apportion liability among defendants after a plaintiff has recovered a judgment against them.

This limited right of contribution should not significantly reduce overall deterrence of antitrust violations. First, it helps ensure all defendants will be liable for a fair share of the damages caused; no guilty party can get off "free."[87] Second, companies do not appear to consider whether their conduct will give rise to joint and several liability, let alone whether they will have contribution rights, until they are in litigation.[88] Furthermore, the proposed statute will enhance fairness by ensuring that liability among non-settling defendants is more equitably allocated.[89] The rule thus also protects innocent parties, or those with a very minor role in an anticompetitive scheme, from having to settle claims due to the threat of liability for industry-wide damages in great disproportion to their role (if any) in the conduct.[90]

Adoption of a rule providing for claim reduction and for contribution requires a method of allocating shares of liability for purposes of determining the plaintiffs' claims remaining after a settlement. The Commission recommends that each defendant's allocated share of liability, for either claim reduction or contribution, be equal to each defendant's market share or gain from the antitrust violation. Allocation based on market share should be relatively easily accomplished in the substantial majority of multiple-defendant cases, such as price-fixing conspiracies, and should not significantly increase litigation costs. For those cases in which market share would not be an appropriate basis for allocating liability, use of relative gain makes for an appropriate substitute that is also reasonably straightforward to calculate. The Commission does not recommend that the statute contain more tailored calculation mechanisms for various types of violations,[91] because such approaches could potentially complicate the contribution proceeding and add to the burden on the courts.

The Commission has provided a possible statute in Annex A that would implement the Commission's recommendation. It is generally consistent with, although somewhat more comprehensive than, several other proposals considered by Congress that would implement either claim reduction or contribution, or both.[92] The model set out here is based largely on a substitute/alternative to S. 995, proposed by Assistant Attorney General William Baxter in 1981. The American Bar Association, Section of Antitrust Law proposed model legislation to the Commission that is also worthy of congressional consideration and would, in large part, implement the Commission's recommendations as well.[93]

ANNEX A

Proposed Statute

The Clayton Act (15 U.S.C. § 12 et seq.) is amended by inserting after Section 4H the following new section:

SEC. 4I. (a) In any action under Section 4, 4A, or 4C of this Act, the court shall reduce the claim of any person releasing any person from liability or potential liability for damages by the greatest of: (1) any amount stipulated for this purpose; (2) the amount of the consideration paid for the release; or (3) treble the actual allocated share of damages of the person released.

(b) Any person who is liable for damages in an action brought under Section 4, 4A, or 4C of this Act may claim contribution, in accordance with this Section, from any other person jointly liable for such damages.

(c) Contribution may not be claimed by or from a person who, pursuant to a settlement agreement entered into in good faith with a plaintiff in the action in respect of which contribution rights are claimed, has been released from liability or potential liability for the underlying claim.

(d) A claim for contribution may be asserted by cross-claim, counterclaim, or third-party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action.

(e) Claim reduction and contribution rights shall, to the extent consistent with the fair and expeditious conduct of litigation, be determined in a proceeding following the trial of the action in respect of which claim reduction or contribution rights are claimed.

(f) A claim for contribution shall be forever barred unless filed within six months after the entry of the final judgment for which contribution is sought.

(g) For the purposes of claim reduction and contribution, the allocated share of damages of each defendant shall be determined on the basis of each defendant's market share, unless so doing would be impractical or unjust in light of the nature of the unlawful conduct. If use of market share is not practical or is unjust, the court shall, in its discretion, use the gain of each defendant from the violation or any other method that would be equitable.

(h) Claim reduction and contribution rights shall be determined by the court sitting without a jury.

(i) Nothing in this section shall affect the joint and several liability of any person.

Section-by-Section Analysis

Subsection (a) provides for claim reduction. Claim reduction would be available for all types of antitrust violations, as explained with respect to Subsection (b). The plaintiff's claim would be reduced by the greatest of the amount of the settlement, the amount stipulated to in the settlement agreement, or treble the allocated share of the settling defendant's damages, as calculated pursuant to Subsection (g).

Subsection (b) makes the right of contribution applicable to all actions brought under the relevant sections of the Clayton Act. Although the substantial majority of cases in which these rules would have significant application are likely to be horizontal price-fixing cases, there is no reason specifically to limit the applicability of the statute to those types of antitrust cases.

Subsection (c) limits contribution claims to non-settling defendants. This limitation ensures that settling defendants will be able to remove themselves completely from the litigation without worrying about subsequent claims of contribution from co-conspirators or other defendants (it also prevents settling defendants who paid "too much" from seeking to recover a portion of their overpayment from non-settling defendants).

Subsection (d) provides non-settling defendants with multiple procedural options for bringing a claim for contribution, and thus maximizes the flexibility of defendants in seeking contribution.

Subsection (e) provides that claim reduction and contribution issues should be adjudicated after the trial on the main action wherever possible. This provision achieves three objectives. (1) It ensures that contribution issues remain exclusively among defendants; (2) it prevents the main action from becoming unduly complicated; and (3) it eliminates unnecessary adjudication of issues relating to contribution if liability is not established. If, however, the court determined that some issues relating to contribution could be resolved more expeditiously during the main case, this provision would permit the court to allow for such issues to be addressed during the main proceeding.

Subsection (f) creates a statute of limitations of six months after the entry of final judgment for contribution claims to be brought.

Subsection (g) addresses the method of allocating liability among multiple antitrust defendants for purposes both of claim reduction and contribution. This provision makes market share the presumptive basis for allocating liability among defendants for purposes of contribution and for purposes of determining the proper claim reduction of plaintiff's claims. It calls for the use of gain from the conduct as a secondary method, or any other method equitable in the circumstances.

Subsection (h) provides that claim reduction and contribution issues are to be decided without the use of a jury.

Subsection (i) reaffirms that the joint and several liability of antitrust defendants is not affected by any of the provisions. This provision ensures that plaintiffs will not bear any risk of reduced recovery from insolvent defendants and thus will be able fully to recover their damages (so long as at least one defendant is sufficiently solvent to pay the entire claim).

Notes

[1] *See* Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 782 (1987) [hereinafter Cavanagh, *Detrebling Antitrust Damages*] (stating that Senator Sherman expressed concerns about providing a remedy that would be "commensurate with . . . maintaining a private action"); David Boies, Statement at AMC Civil Remedies Hearing, at 2 (July 28, 2005) [hereinafter Boies Statement].

[2] 15 U.S.C. § 15(a).

[3] *Id.*

[4] Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890); *see* Cavanagh, *Detrebling Antitrust Damages*, at 778 (citing Section 7 of the Sherman Act as originally enacted).

[5] *See* Cavanagh, *Detrebling Antitrust Damages*, at 782.

[6] *Id.*; *see also* Boies Statement, at 2 (stating that Senator Sherman viewed multiple damages as being necessary to "deputiz[e] plaintiffs as private attorneys general by creating effective incentives to pursue what was even then viewed as costly and complex litigation").

[7] *See, e.g.*, Boies Statement, at 2–4 (recounting statutory proposals in early 20th century to move to single damages, through calls in mid-20th century to make treble damages discretionary, to legislative efforts in 1980s to limit treble damages to per se violations).

[8] For example, the National Cooperative Research and Production Act limits the liability of certain joint research and development ventures and standards development organizations notified under the Act to single damages (plus interest and reasonable attorneys' fees). *See* 15 U.S.C. § 4303(a). The Export Trading Company Act similarly limits a plaintiff to recovering only actual damages for injuries resulting from conduct engaged in pursuant to a certificate of review granted under the Act. *See* 15 U.S.C. § 4016(b)(1).

[9] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(a), 118 Stat. 661, 666 (2004) (codified as amended at 15 U.S.C. § 1 note) [hereinafter ACPERA]. The provision expires in 2009. *Id.* § 211(a), 118 Stat. at 666.

[10] Cavanagh, *Detrebling Antitrust Damages*, at 783; Boies Statement, at 6–7; Edward D. Cavanagh, Statement at AMC Civil Remedies Hearing, at 3–7 (July 28, 2005) [hereinafter Cavanagh Statement]; *see* Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982).

[11] *See, e.g.*, U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 15–18 (Nov. 8, 2005) [hereinafter U.S. Chamber of Commerce Comments]; Business Roundtable, Public Comments Submitted to AMC, at 3–4 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]; Abbott B. Lipsky, Jr., Statement at AMC Civil Remedies Hearing, at 14 (July 28, 2005) [hereinafter Lipsky Statement]; Cavanagh Statement, at 9–10.

[12] *See, e.g.*, Thirty Antitrust Practitioners, Public Comments Submitted to AMC (June 17, 2005) [hereinafter Thirty Antitrust Practitioners Comments]; American Antitrust Institute, Comments Submitted to AMC Regarding Civil Remedies (June 17, 2005) [hereinafter AAI Comments re Civil Remedies].

[13] Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445, 454 (1980) [hereinafter Easterbrook, *Detrebling Antitrust Damages*]; Robert H. Lande, Statement at AMC Civil Remedies Hearing, at 7 (July 28, 2005) [hereinafter Lande Statement] ("No one knows the percentage of antitrust violations that are detected and proven."); Civil Remedies Transcript at 161–62 (Easterbrook) (July 28, 2005) (suggesting multiplier for concealed cartels might appropriately be higher than three); Cavanagh, *Detrebling Antitrust Damages*, at 813.

[14] For a richer discussion of factors impacting deterrence, see Easterbrook, *Detrebling Antitrust Damages*, at 449–51; Cavanagh Statement, at 4–6; Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1017–20 (1986); Thirty Antitrust Practitioners Comments, at 2.

[15] Cavanagh Statement, at 6; Cavanagh, *Detrebling Antitrust Damages*, at 786–87.

[16] Lande Statement, at 4–6; *see also* Thirty Antitrust Practitioners Comments, at 4 (identifying harms that are not compensated for by antitrust damages).

[17] *See* Lande Statement, at 5; Easterbrook, *Detrebling Antitrust Damages*, at 455.

[18] Boies Statement, at 12; *see also* John D. Graubert, Statement at AMC Government Civil Remedies Hearing, at 3 (Dec. 1, 2005) ("[A]n essential element of the response to an antitrust violation is to deprive violators of the gains from their unlawful conduct.") (citing, *inter alia*, United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961)).

[19] *See* Cavanagh Statement, at 6 (treble damages make it unlikely violators will profit); Cavanagh, *Detrebling Antitrust Damages*, at 787; Boies Statement, at 12; *see also* Dissenting Statement of Commissioners Orson Swindle and Thomas B. Leary, Hearst Trust and Hearst Corporation's Acquisition of J.B. Laughrey Inc., FTC File No. 991-0323 (stating that "private remedies are adequate to ensure that respondents do not benefit from any possible wrongdoing" in that case).

[20] *See* Lande Statement, at 2, 3–8 (the "'treble damages' remedy . . . really only amounts to approximately single damages," because there is no prejudgment interest, damages do not compensate for allocative inefficiency, and other factors); Boies Statement, at 12 (delay in reaching trial and judgment is particularly long); *see also* Thirty Antitrust Practitioners Comments, at 4 (identifying harms that are not compensated for by antitrust damages); Stephen D. Susman, Statement at AMC Civil Remedies Hearing, at 5-6 (July 28, 2005) [hereinafter Susman Statement]; Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 124, 130–34 (1993)

[21] *See* Thirty Antitrust Practitioner Comments, at 3 ("[T]he federal government has limited resources at its disposal, and thus cannot adequately investigate and prosecute all (or even most) illicit anticompetitive behavior."); Cavanagh, *Detrebling Antitrust Damages*, at 790 ([The] "private remedy permits prosecution of illegal conduct which the federal government is without resources to pursue."); *see also* Harry M. Reasoner, Statement at AMC Civil Remedies Hearing, at 2 (July 28, 2005) [hereinafter Reasoner Statement] ("[G]overnmental resources are plainly inadequate to police the American economy."). *But see* Business Roundtable Comments, at 3 ("The legislative history suggests that Senator Sherman envisioned private suits as a little-used tool.") (citing Cavanagh, *Detrebling Antitrust Damages*, at 783).

[22] *See* Easterbrook, *Detrebling Antitrust Damages*, at 451–52; Cavanagh, *Detrebling Antitrust Damages*, at 786.

[23] *See, e.g.*, U.S. Chamber of Commerce Comments, at 17; Lipsky Statement, at 4–5 (referring to a "cluster bomb" of other remedies, such as equitable disgorgement, state suits, indirect purchaser rights); Cavanagh, *Detrebling Antitrust Damages*, at 792 (stating that mandatory treble damages may far exceed the harm caused).

[24] *See* Lande Statement, at 9 (stating that "duplicative recovery" has never occurred).

[25] *See* Business Roundtable Comments, at 3 (proposing elimination of treble damages except for "per se illegal conduct—horizontal price-fixing, market allocation, and bid-rigging"); U.S. Chamber of Commerce Comments, at 17 (suggesting limiting treble damages to per se offenses); *see also* Cavanagh Statement,

at 7–8 (while not necessary in every antitrust case, "trebling is absolutely critical in . . . horizontal price-fixing and horizontal divisions of markets" cases); Lipsky Statement, at 10.

[26] Thirty Antitrust Practitioners Comments, at 2 (citing Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 Loy. Consumer L. Rev. 329 (2004)); Lande Statement, at 7–8; Civil Remedies Trans. at 162 (Easterbrook) (suggesting multiplier for concealed cartels might appropriately be higher than three).

[27] *See* Cavanagh Statement, at 6–7 (citing recent increases in criminal penalties and enhancement of criminal penalties under 18 U.S.C. § 3571(d)); Lipsky Statement, at 4.

[28] U.S. Chamber of Commerce Comments, at 20–23; Business Roundtable Comments, at 3–4; Exclusionary Conduct Transcript at 64–65 (Tom) (Sept. 29, 2005) (suggesting the elimination of treble damages for certain single-firm conduct); Edward Cavanagh, *Antitrust Remedies Revisited*, 84 Oregon L. Rev. 147, 175–77 (2005) [hereinafter Cavanagh, *Antitrust Remedies Revisited*] (discussing various proposals for selective detrebling, including limiting trebling to per se offenses); *see also* Lipsky Statement, at 14; Cavanagh, *Detrebling Antitrust Damages*, at 794 ("Trebling is particularly harsh where liability turns on close questions of law or fact, on a novel interpretation of a statute, or on reversal of prior precedents upon which defendants have relied.") (citation omitted).

[29] Lipsky Statement, at 10 (treble damages can "over deter, . . . thus creating an undesirable chilling effect for legitimate competitive conduct"); Business Roundtable Comments, at 3 ("Trebling for all antitrust cases can lead to over-deterrence because trebling discourages businesses from engaging in legitimate and beneficial competitive conduct."); *see also* Cavanagh, *Detrebling Antitrust Damages*, at 801–02; Easterbrook, *Detrebling Antitrust Damages*, at 449–50; William Breit & Kenneth G. Elzinga, Antitrust Penalty Reform 8–12 (1986).

[30] Lande Statement, at 16 (trebling only for per se offenses would be "complicated" due to "the uncertain line between per se and rule of reason antitrust violations"); *see* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) ("[T]here is often no bright line separating per se from Rule of Reason analysis.").

[31] *See* Cavanagh, *Detrebling Antitrust Damages*, at 828; Civil Remedies Trans. at 71 (Lipsky) ("I can still imagine cases of exclusionary conduct where you might be sorry that you didn't have trebling available."); AAI Comments re Civil Remedies, at 5; Civil Remedies Trans. at 143–44 (Constantine) (citing *Microsoft* as an example of a rule of reason case in which the injury was potentially large and treble damages were therefore sensible).

[32] Lande Statement, at 18 ("Abolishing treble damages in rule of reason cases could effectively destroy rule of reason private antitrust enforcement."); Civil Remedies Trans. at 32 (Lande) (still need treble damages to create incentive for plaintiffs to challenge anticompetitive rule of reason conduct); Susman Statement, at 10–11.

[33] *See* U.S. Chamber of Commerce Comments, at 23; Civil Remedies Trans. at 162 (Easterbrook); Cavanagh, *Antitrust Remedies Revisited*, at 175–76.

[34] Cavanagh Statement, at 7 ("[O]ne could argue that from a deterrence prospective, trebling is unnecessary in the case of conduct that is open and notorious—as opposed to clandestine—because in such cases, there is no problem of detection.").

[35] Lande Statement, at 7 (citing estimate by then-Assistant Attorney General Douglas Ginsburg that no more than 10 percent of cartels were detected); Boies Statement, at 11.

[36] *See* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 657 (1983); Civil Remedies Trans. at 161–62 (Easterbrook) (multiplier should be set by dividing harm by probability of successful prosecution); Cavanagh, *Detrebling Antitrust Damages*, at 831–32.

[37] *See* Cavanagh, *Detrebling Antitrust Damages*, at 832; Civil Remedies Trans. at 162 (Reasoner) (noting difficulty of defining concealed and non-concealed conduct).

[38] Cavanagh Statement, at 9; *see also* Exclusionary Conduct Trans. at 139 (Pitofsky) (advocating treble damages at a judge's discretion).

[39] Cavanagh Statement, at 9; Cavanagh, *Detrebling Antitrust Damages*, at 838–39 (The factors a court might take into account include the "willfulness of the violation"; "whether a reasonably well-informed person should have known that the conduct was illegal"; the possibility of the conduct's procompetitive benefits; the duration of the illegal acts; whether the conduct was covert; "the scope of the illegal activity"; "the benefits derived by the defendants from the illegal activity"; and the impact of treble damages on the defendant's business.)

[40] Cavanagh Statement, at 9.

[41] *Id.* at 10.

[42] *Id.*; Susman Statement, at 10; Civil Remedies Trans. at 61–62 (Boies) (leaving trebling to judicial discretion will introduce undesirable uncertainty).

[43] National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 5 (1979); 15 U.S.C. § 15(a).

[44] *See* 15 U.S.C. § 15(a).

[45] American Bar Association, Section of Antitrust Law, Antitrust Law Developments 846 (6th ed. 2007) [hereinafter Antitrust Law Developments]. Some courts, while not awarding prejudgment interest, have permitted damages to be increased to account for inflation. *See* Law v. Nat'l Collegiate Athletic Ass'n, 185 F.R.D. 324, 346–48 (D. Kan. 1999) (adjustment based on CPI to account for reduced purchasing power is permitted and is not the functional equivalent of prejudgment interest); Concord Boat Corp. v. Brunswick Corp., 21 F. Supp. 2d 923, 935–36 (E.D. Ark., 1998) (adjustments to award to reflect present value were proper and not an award of prejudgment interest), *rev'd on other grounds*, 207 F.3d 1039 (8th Cir. 2000). Post-judgment interest is mandatory in antitrust cases "as it is in all civil actions." Antitrust Law Developments, at 847 (citation omitted).

[46] Fishman v. Estate of Wirtz, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) ("The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders. We should allow, indeed require, such awards.").

[47] Lande Statement, at 3 (quoting *Fishman*, 807 F.2d at 583-84 (Easterbrook, J., dissenting)).

[48] *Fishman*, 807 F.2d at 583 (Easterbrook, J., dissenting) (noting that the antitrust litigation at issue took 14 years to resolve, including a 2½-year lag between a finding of liability and the award of damages); *see also* Lande Statement, at 3 (citing evidence that the average cartel lasts six to nine years "with an additional 3–4 years lag before judgment") (citing Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 363, 381 (1970)); AAI Comments re Civil Remedies, at 2-3 ("[T]he average cartel probably lasts 7–8 years, with an additional 4-plus-year lag before judgment.") (citing Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 Loy. Consumer L. Rev. 329, 337 (2004)).

[49] *See, e.g.*, Cavanagh Statement, at 15; Thirty Antitrust Practitioners Comments, at 6.

[50] *See* Wickham Contracting Co., Inc. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 955 F.2d 831, 835 (2d Cir. 1992) ("The Supreme Court initially embraced the strict common law view that interest may not be recovered where damages are . . . difficult to ascertain with precision at the time of the alleged wrongdoing."); *id*. at 836 (The speculative nature of damages "will always be relevant to a sound decision on . . . whether prejudgment interest should be awarded . . . .").

[51] *See, e.g.*, *Law v. NCAA*, 185 F.R.D. at 347–48 (inflation); *Concord Boat*, 21 F. Supp. 2d at 935–36 (inflation); Minpeco S.A. v. Hunt, 686 F. Supp. 420, 425–27 (S.D.N.Y. 1988) (interest on borrowed capital).

[52] *See* Cavanagh Statement, at 15; Thirty Antitrust Practitioners Comments, at 6.

[53] 15 U.S.C. § 15(a); *see* Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51, 52 (1988) [hereinafter Cavanagh, *Attorneys' Fees in Antitrust Litigation*].

[54] Antitrust Law Developments, at 988–89. In some circuits, fees may be available to a victorious plaintiff even if nominal damages are awarded. *See id.* at 989; United States Football League v. Nat'l Football League, 887 F.2d 408, 411–13 (2d Cir. 1989).

[55] 15 U.S.C. § 26; Antitrust Law Developments, at 989–90.

[56] Cavanagh, *Attorneys' Fees in Antitrust Litigation*, at 57–58.

[57] *Id.* at 58.

[58] *See* Antitrust Law Developments, at 990; Cavanagh, *Attorneys' Fees in Antitrust Litigation*, at 57.

[59] Refuse & Envtl. Sys., Inc. v. Indus. Servs. of Am., 732 F. Supp. 1209, 1215 (D. Mass. 1990) ("The award of reasonable attorney's fees incurred in prosecution of the antitrust claims . . . is mandatory. This Court must only determine what award is reasonable."), *rev'd on other grounds*, 932 F.2d 37 (1st Cir. 1991); *see also* Antitrust Law Developments, at 990–94.

[60] *See* Antitrust Law Developments, at 990–91.

[61] Hensley v. Eckerhart, 461 U.S. 424, 433 (1982) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."); *see also* Antitrust Law Developments, at 991–93.

[62] Antitrust Law Developments, at 993–94.

[63] Civil Remedies Trans. at 27 (Boies) (fee shifting is intended "to encourage the private attorneys general, to encourage people to bring lawsuits"); Cavanagh Statement, at 13 (fee shifting creates "an important incentive for bringing a private antitrust action"); Thirty Antitrust Practitioners Comments, at 8; AAI Comments re Civil Remedies, at 7–8; Susman Statement, at 13.

[64] *See* Emich Motors Corp. v. Gen. Motors Corp., 340 U.S. 558, 570–71 (1951) (holding that "the criminal judgment was prima facie evidence of the general conspiracy" in an antitrust follow-on civil proceeding).

[65] *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981) (noting the "judicial determination that defendants should be jointly and severally liable" in antitrust cases, while holding that there is no right of contribution); Antitrust Law Developments, at 1003–06; *see also* Flintkote Co. v. Lysfjord, 246 F.2d 368, 397 (9th Cir. 1957) (joint and several liability is both "firmly rooted" and a "well settled principle").

[66] *See* Burlington Indus. v. Milliken & Co., 690 F.2d 380, 392 (4th Cir. 1982) (rejecting creation of claim reduction remedy); Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs., 635 F.2d 118, 130 (2d Cir. 1980); *Flintkote*, 246 F.2d at 398; Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 Vand. L. Rev. 1277, 1324 (1987) [hereinafter Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*]; Antitrust Law Developments, at 1006.

[67] Assume for example, that total overcharges resulting from a conspiracy are found to be $20 million pre-trebling. If one defendant settles for $1 million, the court will subtract that amount from the final award of $60 million ($20 million trebled). Each non-settling defendant will remain potentially liable for the remaining $59 million. *See* Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*, at 1283, 1289 n.68.

[68] *Texas Indus.*, 451 U.S. 630.

[69] *See id.* at 646 (holding that the "far-reaching" policy questions presented by the defendant's claim for contribution were "a matter for Congress, not the courts, to resolve").

[70] *See, e.g.*, H.R. 1155, 100th Cong. (1987); H.R. 5794, 97th Cong. (1982); S. 1468, 96th Cong. (1979); *see also* Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*, at 1314–22 (describing legislative proposals).

[71] ACPERA, § 214 (Section 214 of the Act provides that nothing in the Act "shall be construed to . . . affect, in any way, the joint and several liability of any party to a civil action . . . other than that of the antitrust leniency applicant and cooperating individuals . . . .").

[72] American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Contribution and Claim Reduction, at 4 (Dec. 5, 2005) [hereinafter ABA Comments re Contribution and Claim Reduction] ("This inequity has been condemned by most commentators.").

[73] *See, e.g.*, *id.* at 9; Reasoner Statement, at 7.

[74] *See* Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*, at 1288–93; Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. Fla. L. Rev. 217, 220–21 (1980) [hereinafter Jacobson, *Contribution Among Antitrust Defendants*] (innocent defendants frequently must settle due to the staggeringly high potential liability); Reasoner Statement, at 12–13.

[75] *See, e.g.*, ABA Comments Re Contribution and Claim Reduction, at 9–10 (describing "extraordinary pressure on a defendant to settle" due to "exposure greatly disproportionate to its gain from the alleged conspiracy and its size"); Cavanagh, *Contribution, Claims Reduction, and Individual Treble Damage Responsibility*, at 1288–90; Michael D. Hausfeld, Statement at AMC Civil Remedies Hearing, at 5, 7 [hereinafter Hausfeld Statement]. Joint and several liability thus increases the likelihood that any defendant will be held liable for a conspiracy and should also increase deterrence. Hausfeld Statement, at 5.

[76] *See, e.g.*, Reasoner Statement, at 5–6; *see also* Jacobson, *Contribution Among Antitrust Defendants*, at 219, 221; ABA Comments re Contribution and Claim Reduction, at 9.

[77] *See* Civil Remedies Trans. at 105–06 (Easterbrook).

[78] *See* A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 Stan. L. Rev. 447, 456 (1981).

[79] ABA Comments re Contribution and Claim Reduction, at 11; Reasoner Statement, at 21; *see Antitrust Equal Enforcement Act of 1979, S. 1468: Hearings Before the Subcomm. on Antitrust, Monopoly & Business Rights of the S. Comm. on the Judiciary*, 96th Cong. 78–79 (1979) (statement of Donald G. Kempf, Jr.) [hereinafter Kempf Statement at Senate Hearing].

[80] *See, e.g.*, Reasoner Statement, at 21; *see also* Kempf Statement at Senate Hearing, at 68–70.

[81] American Antitrust Institute, Comments Submitted to AMC Regarding Contribution and Claim Reduction, at 3–4 (Feb. 19, 2007).

[82] ABA Comments re Contribution and Claim Reduction, at 26–27.

[83] *See, e.g.*, Hausfeld Statement, at 15–16; Reasoner Statement, at 21–22 ("[P]laintiffs would bear the risk of settling too cheaply (i.e., for less than the settling defendant's actual liability) because their ultimate recovery will be reduced by the greater of the settlement or the settling party's trebled liability."); Civil Remedies Trans. at 167 (Easterbrook); Cavanagh, *Contribution, Claims Reduction, and Individual Treble Damage Responsibility*, at 1326.

[84] *See Antitrust Equal Enforcement Act: Hearing on S. 995 Before the S. Comm. on the Judiciary*, 97th Cong. 34 (1981) (statement of Griffin B. Bell, former Attorney General of the United States).

[85] Frank. H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & Econ. 331, 363 (1980) [hereinafter Easterbrook et al., *Contribution Among Antitrust Defendants*]; ABA Comments re Contribution and Claim Reduction, at 16.

[86] *See* Easterbrook et al., *Contribution Among Antitrust Defendants*, at 363–64 (A "rule that allows contribution only from not-settling defendants . . . is equivalent in its effect on settlement to a rule of no contribution. . . . There are attractive features to this type of contribution rule."); ABA Comments Re Contribution and Claim Reduction, at 16.

[87] *See* Jacobson, *Contribution Among Antitrust Defendants*, at 233 ("The absence of contribution can operate to the advantage of equally guilty conspirators by permitting them to go 'scott free.'") (quoting Professional Beauty Supply Inc. v. Nat'l Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979)) (internal quotation marks omitted).

[88] *See* Don T. Hibner, Jr., Statement at AMC Civil Remedies Hearing, at 15 (July 28, 2005); *see also* ABA Comments re Contribution and Claim Reduction, at 12, 24.

[89] ABA Comments re Contribution and Claim Reduction, at 11; *Antitrust Equal Enforcement Act of 1979, S. 1468: Hearings Before the Subcomm. on Antitrust, Monopoly & Business Rights of the S. Comm. on the Judiciary*, 96th Cong. 2 (1979) (statement of Senator Bayh) [hereinafter Bayh Statement]; Antitrust Damage Allocation: Hearing Before the Subcomm. on Monopolies and Commercial Law of H. Comm. on the Judiciary, 97th Cong. 63 (1981) (statement of William F. Baxter, Assistant Attorney General, Antitrust Div., Dep't of Justice) ("[T]here are significant equitable justifications for allowing contribution.").

[90] *See* Bayh Statement, at 1–2 (contribution would reduce the likelihood that "a small or medium-sized company could . . . face legal responsibility on behalf of the entire industry . . . while larger, more culpable businesses go relatively free"); *see* Kempf Statement at Senate Hearing, at 78–79.

[91] *See, e.g.*, *Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 119 (1981) (statement of James F. Rill) (proposing formula).

[92] *See, e.g.*, S. 1468, 96th Cong. (1979); S. 995, 97th Cong. (1981); S. 2162, 99th Cong. (1986); S. 1300, 99th Cong. (1985).

[93] *See* ABA Comments re Contribution and Claim Reduction, at 28–35.

Chapter III.B
Indirect Purchaser Litigation

1. INTRODUCTION

When an antitrust violation occurs, it may harm many firms and consumers in connected markets. To remedy such injuries, the Clayton Act allows parties to sue for treble damages if they suffer antitrust injury—"injury of the type the antitrust laws were intended to prevent"—as the result of an antitrust violation.[1] Not everyone claiming an antitrust injury may sue, however. The courts have used factors such as whether a plaintiff's injury is "too remote" from the antitrust violation to determine whether an injured private party is a "proper plaintiff" to bring suit under the Clayton Act.[2] In addition, even some parties that may sue to enjoin a defendant's antitrust violation are not permitted to sue for damages. The Supreme Court has limited the standing of parties to sue for antitrust damages, because "Congress did not intend the antitrust laws to provide a remedy in damages for *all* injuries that might conceivably be traced to an antitrust violation."[3]

One difficult question is whether all parties in a chain of distribution may sue to recover damages resulting from the same antitrust violation. As an illegal overcharge is passed through a distribution chain, each of the parties in that chain may suffer antitrust injury. For example, when a price-fixing manufacturer overcharges for the goods it sells, the party who purchases the goods directly from that manufacturer pays the overcharge in the first instance. This "direct purchaser" then may incorporate the price-fixed good into the products it sells and pass on to its distributors all or some portion of the manufacturer's overcharge. In turn, the distributors may be able to pass on all or part of that overcharge to consumers. Because neither the distributors nor the consumers have purchased directly from the price-fixing manufacturer, they are called "indirect purchasers." Thus, the damages from the original antitrust violation may flow from direct to indirect purchasers.

Such fact patterns raise a question for antitrust law: Should only direct purchasers, or both direct and indirect purchasers, be allowed to sue to recover damages stemming from the same antitrust violation? The Supreme Court first considered a related question in 1968. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* the Court held that an antitrust defendant could not avoid liability to a direct purchaser by arguing that the plaintiff, a direct purchaser, had "passed on" to indirect purchasers the illegal overcharges initially paid by the plaintiff.[4] Almost ten years later, in 1977, the Court addressed specifically whether indirect, as well as direct, purchasers could sue for damages under federal antitrust law. In *Illinois Brick Co. v. Illinois* the Court held that only direct purchasers may sue under federal antitrust law to recover for damages from anticompetitive overcharges.[5]

State governments have largely refused to take the same approach under state antitrust laws. Through legislation or court decisions, many states have adopted policies that allow indirect, as well as direct, purchasers to sue under state antitrust law to recover damages. The result typically has been that direct purchasers sue in federal court, and indirect purchasers sue in state court, to recover damages resulting from the same antitrust violation.

Vigorous debate over whether to allow only direct, or both direct and indirect, purchasers to seek antitrust damages has continued for almost thirty years. During that time, the conflict between federal and state approaches has itself spawned problems. For example, because indirect purchasers typically cannot join direct purchasers in pursuing remedies in federal court under federal antitrust law, direct and indirect purchasers have often brought multiple, duplicative lawsuits in federal and state courts, where one proceeding might have sufficed to resolve all liability and damage issues in a single forum. During this time, the conflict also has increased the potential for duplicative and otherwise inconsistent recoveries, which then skews the incentives of plaintiffs and defendants to settle.

The Class Action Fairness Act (CAFA), which Congress passed in June 2005, may mitigate certain of these problems to some extent.[6] Among other things, CAFA allows defendants to remove certain indirect purchaser class actions from state to federal court, where they can be consolidated with direct purchaser actions filed in federal court. However, there are exceptions to removal under CAFA. In addition, CAFA does not permit the consolidation of cases in a single federal court for trial. These limitations have lead some to question whether CAFA provides a sufficient remedy.

The problems created by duplicative lawsuits in federal and state courts have led many observers to seek a way to eliminate the current conflict between federal and state indirect purchaser policies. Some advocate a federal statute to allow recovery by both direct and indirect purchasers. Others would prefer that Congress preempt the state statutes and case law that allow indirect purchasers to sue and recover damages. The Commission examined the problems that conflicting federal and state policies on indirect purchaser recovery create, and whether the benefits of changing either federal or state law would be worth the costs.

These are difficult and contentious issues. Half of the Commissioners believe that, if one could address this issue on a clean slate, the best policy would be to permit only direct purchaser claims.[*] Nonetheless, the Commission recognizes that the issue must be addressed

[*] Commissioners Carlton, Garza, Jacobson, Litvack, Valentine, and Warden would favor allowing only direct purchaser claims, if writing on a clean slate. They believe that allowing only direct purchasers to sue would provide the most effective deterrence mechanism, and would avoid duplicative recoveries, speculative inquiries about how damages may have been passed on through the chain of distribution, and complex litigation. (Commissioner Carlton would allow for minor exceptions to the rule allowing only direct purchasers to sue.) Three of those Commissioners—Carlton, Litvack, and Warden—would recommend preemption of state law to implement that rule because they believe that achievement of those goals overrides considerations of federalism and political pragmatism.

Commissioners Burchfield, Delrahim, Kempf, Shenefield, and Yarowsky would allow suits by both direct and indirect purchasers.

in light of the history of the past thirty years. Accordingly, despite disagreement about which policy would be best *a priori*, the Commission largely reached consensus on a practical approach to reduce the complexity and costs generated by the existing conflict between federal and state policies. The Commission makes the following recommendation.

47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:[*]

- **Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.**
- **Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.[†]**
- **Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.**
- **Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.**

[*] Commissioners Cannon, Carlton, and Garza do not join this recommendation.

[†] Commissioner Delrahim does not join this aspect of the recommendation.

2. BACKGROUND

The following explains the history of the controversy over direct and indirect purchaser litigation and discusses the problems that conflicting federal and state policies have created, as well as attempts so far to address those problems.

A. History

As noted above, the question of how to treat the "pass on" of antitrust damages from one purchaser to the next first arose in *Hanover Shoe, Inc. v. United Shoe Machinery*.[7] There, the Supreme Court held that an antitrust defendant could not assert the pass on of overcharges from one purchaser to the next as a defense in a suit brought by the direct purchaser.[8] The ruling thus enabled direct purchasers to recover all overcharges they suffered from an antitrust violation, even if the direct purchasers passed on some or all of the overcharge to their customers (that is, indirect purchasers). In 1977, nearly ten years later, the Supreme Court in *Illinois Brick Co. v. Illinois* applied what it saw as the logical corollary, holding that federal antitrust law allowed only direct purchasers, and not indirect purchasers, to sue to recover the overcharge they had paid.[9] The Court viewed this as applying the same rule to both plaintiffs and defendants: neither could rely on the pass on of overcharges to either bring, or defend against, a suit based on federal antitrust law.[10] The Court further reasoned that restricting suits solely to direct purchasers would promote more effective private enforcement and avoid multiple and inconsistent liability for defendants and the need to "trace the complex economic adjustments" to determine the impact on indirect purchasers.[11]

A vigorous dissent, however, argued that the holding "frustrates both the compensation and deterrence objectives of the treble-damages action."[12] The dissenters emphasized congressional intent that consumers recover for their antitrust injuries, as had been recently expressed in 1976, when Congress passed legislation to allow state attorneys general to use *parens patriae* authority to sue for Sherman Act violations on behalf of state citizens.[13] The dissenters were not persuaded that the complexity of assessing and allocating damages for both direct and indirect purchasers was any greater than the complexity of other antitrust issues.[14]

The Court's decision in *Illinois Brick* immediately sparked a heated controversy.[15] Critics, including leading Senators and Representatives, agreed with the dissent that the decision ignored the will of Congress by leaving consumers and other indirect purchasers without a remedy to redress serious antitrust injuries.[16] Bills to overrule the decision by federal statute were quickly introduced.[17] Despite intensive efforts, however, these bills failed, and the rule of *Illinois Brick* has continued to govern in federal courts.[18]

Attacks on *Illinois Brick* were not limited to efforts in Congress; opponents brought their case to state legislatures and courthouses as well. Starting with California in 1978, legislatures in many states began passing *Illinois Brick* "repealers"—that is, statutes that specifically authorized indirect purchasers to recover damages under state antitrust laws.[19] In some states, courts interpreted existing state laws to allow recoveries by indirect purchasers alleging antitrust violations.[20] In 1989 the Supreme Court confirmed the validity of state laws permitting indirect purchasers to sue for damages, holding that those laws were not impliedly preempted by federal antitrust law.[21] At the present, more than thirty-five states permit indirect, as well as direct, purchasers to sue for damages under state law.[22]

B. Problems and Attempts to Address Them

Indirect purchaser litigation under state law has become increasingly common, especially since the mid-1990s.[23] Such cases are frequently pursued separately rather than consolidated with other actions in a federal court proceeding. Litigation involving recoveries by direct and indirect purchasers for the same antitrust violation often has proceeded in at least two different courts, with direct purchasers filing under federal antitrust law in federal courts and indirect purchasers pursuing their state antitrust claims in state courts, resulting in wasteful, duplicative litigation.[24]

Some judges and parties have taken steps to reduce the duplication and wasted resources resulting from multiple federal and state proceedings concerning the same alleged antitrust violation. For example, on occasion, a federal judge presiding over a direct purchaser action has "contact[ed] the various state judges in an attempt to coordinate discovery, thus avoiding duplicative efforts; in most instances, those attempts were successful."[25] Some indirect purchasers have brought their state law damage claims in federal court under the federal court's supplemental jurisdiction.[26] In these cases, the indirect purchasers have asserted a federal antitrust claim seeking injunctive relief (which is not barred under *Illinois Brick*) and have requested that the federal court hear their state law claims for damages pursuant to the court's supplemental jurisdiction.[27] Although this procedure appears to have been used successfully with some frequency in recent years,[28] it can provide only a partial remedy to the problems of duplicative litigation. Plaintiffs may not use it when they cannot seek injunctive relief, for example, from a price-fixing cartel that has disbanded following criminal prosecution. In addition, defendants cannot use a federal court's supplemental jurisdiction to remove cases from state court to federal court, where they can be consolidated.

Under the new CAFA enacted by Congress in June 2005, however, defendants now can remove certain indirect purchaser class actions to federal court, where they may be consolidated with other actions, pursuant to the multidistrict litigation (MDL) process.[29] Under CAFA, "[f]ederal jurisdiction, with a few exceptions, now exists over class actions in which (1) minimal diversity exists (that is, where at least one plaintiff and one defendant are diverse), (2) the putative class contains at least 100 members, and (3) the amount in controversy is at least $5 million."[30] CAFA does create a number of exceptions to this broad grant; however, as discussed below, some predict that these will have limited application to state indirect purchaser class actions.[31] Even if removal is achieved, the Supreme Court's holding in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* limits the purposes for which cases may be consolidated through the MDL process to pretrial proceedings.[32] This means that even when CAFA has allowed direct and indirect purchaser cases to be consolidated, those cases must be split up and returned to the originating federal courts for trial.

3. RECOMMENDATION AND FINDINGS

47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:*

- **Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.**

* Commissioners Cannon, Carlton, and Garza do not join this recommendation.

Commissioner Cannon does not join this recommendation because he believes that the problems due to the conflict between federal and state policy in this area are likely to be ameliorated to a large extent by CAFA, which makes it easier for state antitrust claims to be combined with federal antitrust claims and litigated in one federal court proceeding.

Commissioner Carlton does not join this recommendation because he believes standing should be limited to direct purchasers except where federal courts currently recognize an exception to the rule, including where the direct purchaser is alleged to be participating in the conspiracy. He would also consider allowing, after some period, a class of indirect purchasers to sue in cases where an insufficient number of direct purchasers come forward to sue. Additional study would be needed to refine this exception and to determine how to precisely define "insufficient."

Although Commissioner Garza would not recommend preemption of those state laws allowing indirect purchasers to sue under state antitrust law, she would not abandon federal policy, which she considers to be the optimal policy for reasons explained in this Report. She concurs in the view of Commissioner Cannon that CAFA may substantially ameliorate much of the burden arising out of conflicting state and federal policies and is concerned that the benefits of legislation proposed by the Commission would not outweigh the detriment of abandoning federal policy. In addition, while she does not join in this recommendation as a whole, she supports legislation that would allow consolidation of all direct and indirect purchaser actions in a single forum for both pretrial and trial proceedings, and also supports legislation allowing removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.

- **Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.***
- **Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.**
- **Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.**

A. Reasons for the Commission's Recommendation

1. *Duplicative federal direct purchaser and state indirect purchaser litigation imposes undue burdens on the judicial system and the parties, wastes resources, increases the risk of duplicative recoveries, skews the parties' incentives to settle, and hinders efficient global settlements*

The conflict between federal and state policies on indirect purchaser damage actions has created a variety of problems. Absent the consolidation of federal and state cases involving direct and indirect purchasers, defendants must respond to complaints about the same conduct in multiple courts.[33] Burdensome and uncoordinated discovery increases costs to defendants and disadvantages plaintiffs as well, because they do not have access to materials produced in other actions. Even when pretrial consolidation of federal direct and state indirect purchaser actions is possible under federal MDL rules, *Lexecon* requires that actions be returned to their originating courts for trial,[34] causing duplicative and wasteful trials. With trials proceeding in at least two, and maybe more, different courts, a defendant may be liable for duplicative damages—the amount of the overcharge to the direct purchaser in the first instance, plus whatever overcharges the direct purchaser was able to pass on to indirect purchasers.[35] Correspondingly, direct purchasers may receive "windfall" awards exceeding their actual damages. Furthermore, when all parties are not before a single court, it can be difficult to negotiate and implement a global settlement.[36] Defendants also may confront costs due to the asymmetric application of collateral estoppel: a finding by one court that the defendant did violate the antitrust law may be used by plaintiffs to establish

* Commissioner Delrahim does not join this aspect of the recommendation. He would not expand the availability of removal of state court actions to federal court.

Although Commissioners Litvack, Shenefield, and Warden join this aspect of the recommendation, they would prefer to preempt state laws to require that any claim for damages by an indirect purchaser must be brought in federal court under federal antitrust law.

liability in other suits, but a finding in one suit that the defendant did not violate the antitrust laws may not be used by the defendant to seek dismissal of other suits.[37]

2. Current efforts to ameliorate these problems cannot alone provide sufficient remedies

The Commission commends the voluntary coordination among courts overseeing multiple proceedings and the parties involved to reduce the burdens on the parties and the courts. Such efforts alone are insufficient to address these problems, however, and the need for such coordination reveals the types of burdens on courts that duplicative direct and indirect purchaser actions create. Increased use of supplemental jurisdiction promotes consolidation and is therefore commendable, but it cannot adequately address the problem of duplicative litigation. Indirect purchasers of goods from a disbanded cartel cannot seek injunctive relief and therefore do not have a basis on which to request that a court invoke its supplemental jurisdiction. A federal court's supplemental jurisdiction is also not available to defendants as a basis for removal.

CAFA is likely to promote removal of state court indirect purchaser class actions, thereby permitting their consolidation in federal court. It may also lead more plaintiffs to file initially in federal court, likewise permitting consolidation. Indeed, if predictions of some are correct that CAFA will facilitate the removal of a large majority of state indirect purchaser actions to federal court—because CAFA's requirements will generally be met and its exceptions will seldom apply[38]—that could greatly reduce the waste of resources associated with multiple indirect purchaser actions in state courts, at least at the pretrial phase.[39] The Commission is loath to rely on such predictions, however. Because CAFA has several exceptions that may apply to indirect purchaser actions, plaintiffs may seek to use CAFA's exceptions to avoid removal, and a significant number of actions may remain in state court.[40] In addition, CAFA applies only to class actions—not to claims brought by large indirect purchasers, who can afford to bring lawsuits individually rather than through a class action. Moreover, indirect purchasers may opt out of a class action and assert their claims directly in state court; such actions would be outside CAFA's reach.[41] CAFA also does not apply to *parens patriae* actions by state attorneys general.[42]

Perhaps most importantly, CAFA does not overrule the Supreme Court's ruling in *Lexecon*, which permits consolidation of class actions in one federal district court only for pretrial matters, such as discovery, class certification, and summary judgment motions. For trial, the Supreme Court's ruling in *Lexecon* requires consolidated cases to be split up again and returned to their originating courts.[43] This rule frustrates the goal of resolving interrelated direct and indirect purchaser claims in one forum to avoid duplicative proceedings and recoveries. Finally, CAFA does not address substantive and procedural issues unique to indirect purchaser litigation.

3. Federalism and political pragmatism require deference to many states' clearly expressed preferences that indirect purchasers be allowed to sue for antitrust damages, and these values outweigh arguments in favor of limiting both federal and state recoveries to direct purchasers only

One way to simplify direct and indirect purchaser litigation would be for Congress explicitly to preempt state laws allowing indirect purchaser actions. A majority of the Commission concluded, however, that principles of federalism and practical political concerns counsel in favor of deference to the clear preference expressed by more than thirty-five states that allow indirect purchasers to pursue relief.

In evaluating possible recommendations on direct and indirect purchaser litigation, the Commission considered a wide variety of relevant policy considerations. The most fundamental criticism of the *Illinois Brick* rule is that it leaves many of those actually injured by antitrust violations without compensation.[44] Indirect purchaser actions can "provide[] an effective vehicle for compensating certain victims . . . including individual consumers";[45] on occasion, indirect purchaser actions yield significant distributions to injured indirect purchasers.[46] The evidence does not point only in one direction, however. Class actions sometimes yield very little compensation to injured indirect purchasers, even when those suits produce large settlements,[47] because the settlements take the form of vouchers, coupons, or product that few class members even bother to collect, or *cy pres*, typically benefiting worthy causes, but not injured purchasers.[48]

The record before the Commission was mixed on whether the deterrence of antitrust violations is best achieved by limiting recoveries to direct purchasers or permitting indirect purchasers to sue as well. Direct purchasers usually can better perceive the violation and prove overcharges and thus may be more likely to bring an antitrust suit.[49] Some witnesses argued that direct purchasers are more likely than indirect purchasers to bring antitrust lawsuits and thus to contribute more to the deterrence of antitrust violations.[50] A sample of indirect purchaser settlements provided by attorneys for indirect purchasers shows that, in virtually all cases, direct purchasers or other private enforcers also challenged the conduct at issue.[51] Nonetheless, indirect purchasers can bring actions in circumstances in which direct purchasers choose not to sue, for example, to avoid injuring business relationships with suppliers.[52] Moreover, data presented to the Commission show that indirect purchaser suits can provide additional deterrence by increasing the liability faced by violators.[53] Taken together, this evidence suggests that direct purchaser litigation is more likely to provide effective deterrence, but indirect purchaser litigation may supplement that deterrence.

If deterrence were the sole objective, one would prohibit indirect purchaser actions if allowing them would reduce the likelihood of direct purchaser actions. Under the existing regime, state indirect purchaser recoveries do not diminish recoveries under federal antitrust law by direct purchasers. However, several witnesses expressed concerns that, if direct purchasers suing under federal antitrust law were required to share the right to recover with indirect purchasers, private enforcement would be significantly diminished.[54] Others disagreed.[55]

Another policy consideration involves the potential for duplicative recoveries. Proponents of the *Illinois Brick* rule worry that indirect purchaser litigation exposes defendants to duplicative recoveries—that is, direct purchasers recover for treble the entire overcharge, then indirect purchasers recover for treble the amount of the overcharge that the direct purchaser passed on to them, and so on. The American Bar Association, Section of Antitrust Law, among others, has highlighted such concerns.[56] Although no one identified an instance of unfair or multiple recovery,[57] that may simply reflect the difficulty of determining whether actual damage awards and settlements exceed total damages.[58]

Testimony revealed that a number of states expressly instruct courts to avoid duplicative damages; no state expressly affords duplicative damages.[59] Such state policies are important to reduce concerns about duplicative recovery. Nevertheless, the potential for duplicative recoveries remains a serious concern as long as direct and indirect purchaser actions proceed without coordination in separate courts.

The burden on courts to manage the complexity of estimating the damages incurred by indirect purchasers was emphasized by the *Illinois Brick* Court[60] and has remained an important concern.[61] In particular, courts have found that estimating pass on for a potential class can be a significant barrier to class certification, "confirm[ing], in a new context, the magnitude of the problems of proof the Court sought to avoid in *Illinois Brick*."[62] Witnesses argued that recent advances in econometrics and other methodologies have made such assessments somewhat more manageable,[63] and at least some indirect purchaser claims may be "non-speculative."[64] Nonetheless, managing the complexity of damage calculation for direct and indirect purchasers remains a non-trivial problem.

Outweighing all of these considerations, however, are the values of federalism, compensating injured parties, and practical feasibility. Most states have implemented their preferences to allow indirect, as well as direct, purchasers to sue.[65] The authority of states to establish antitrust standards that differ from federal law is well established, including specifically with respect to indirect purchaser remedies.[66] Numerous state attorneys general (and many others) oppose "federal preemption of any state antitrust statutes, including indirect purchaser statutes."[67] In particular, they oppose any federal preemption of the right of state attorneys general to bring actions on behalf of their citizens pursuant to the *parens patriae* authority that Congress gave the states in 1976.[68] The congressional intent underlying the grant of *parens patriae* authority provides additional reason to defer to the rights of the states to allow indirect purchaser damage actions. Therefore, the Commission decided *not* to recommend that Congress pass legislation expressly to preempt state laws permitting indirect purchaser litigation.

B. Specific Explanation of the Commission's Recommendation for the Management of Direct and Indirect Purchaser Litigation

In light of the Commission's recommendation that Congress not preempt state indirect purchaser laws, the question becomes how best to reach a solution that will enable courts to manage direct and indirect purchaser actions to achieve efficiency and fairness. Direct and indirect purchaser litigation would be more efficient and fairer if it took place in one federal court for all purposes, including trial, and did not result in duplicative liability, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. These goals can be best achieved if all direct and indirect purchasers are entitled to recover their actual damages (trebled) under federal law, and if all claims arising out of the same alleged antitrust violation are heard in one federal court, to the maximum extent possible. The Commission's recommendation contains four interrelated components, which are explained below, to achieve these goals.

1. ***Overrule* Illinois Brick *and* Hanover Shoe *to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of the federal antitrust laws. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers***

To the maximum extent possible, a single federal court should hear all proceedings relevant to actions by direct and indirect purchasers alleging the same antitrust violation. To accomplish this, federal law should permit direct and indirect purchasers to recover the actual damages they suffer as the result of antitrust violations. The first step toward these goals is to overrule *Illinois Brick* and *Hanover Shoe* legislatively to the extent necessary to allow both direct and indirect purchasers to sue under federal law to recover for actual damages they suffer from antitrust violations resulting in an overcharge. Overruling *Illinois Brick* would increase fairness by ensuring that all indirect purchasers, not just those in states permitting such actions, could recover treble their actual damages under federal law for injuries attributable to antitrust violations. Overruling *Hanover Shoe* would limit direct purchasers to recovering treble their actual damages, rather than the full overcharge regardless of pass on, and will thus promote fairness by preventing windfall damage recoveries.

Legislative overruling of *Illinois Brick* may encourage the resolution of direct and indirect purchaser litigation in a single forum, because indirect purchasers may choose to sue under federal antitrust laws rather than to bring state claims. In conjunction with the procedural components of the Commission's recommendation, this also should make resolution of all claims in a single forum easier. Federal recognition of indirect purchaser standing also will promote the development of a body of federal law governing the allocation of damages among direct and indirect purchasers.[69] (The allocation of damages, a second part of this component of the Commission's recommendation, is described below.)

2. *Allow removal of actions brought under state antitrust law by direct and indirect purchasers to federal court to the full extent permitted under Article III*

To ensure that direct and indirect purchaser litigation involving the same alleged antitrust violation will take place in a single court, Congress should include as an element of its comprehensive legislation a provision that allows removal of direct and indirect purchaser actions brought pursuant to state law to federal court to the full extent permitted under Article III. It is true that CAFA now permits consolidation of state indirect purchaser actions in one federal district court to a much greater extent than previously was possible. The potential susceptibility of CAFA's exceptions to plaintiff efforts to avoid removal, and other circumstances to which CAFA does not apply, however, generate concern that CAFA will not operate as well as would be desirable in consolidating direct and indirect purchaser actions. An antitrust-specific provision allowing removal of state indirect purchaser actions to federal court to the full extent permitted by Article III would afford a more comprehensive solution. In combination with other components of the Commission's recommendation, removal to the maximum extent permitted will also facilitate the transfer and consolidation of all direct and indirect purchaser actions in a single federal court.

3. *Allow consolidation of all purchaser actions in a single federal forum for both pretrial and trial proceedings*

In *Lexecon* the Supreme Court held that federal courts in which class actions are consolidated pursuant to the multidistrict litigation statute, 28 U.S.C. § 1407, may only conduct consolidated pretrial hearings on issues such as discovery, class certification, summary judgment, and other pretrial motions.[70] After that, the federal district court must remand the actions for trial in the courts in which they were originally brought.[71] Because *Lexecon* precludes consolidation for trial, the possibility of duplicative trial litigation and inconsistent results will remain.[72]

To avoid this result, Congress should legislatively overrule *Lexecon* for purposes of antitrust direct and indirect purchaser litigation only.[73] The benefits of consolidation, including reduced waste and enhanced coordination, will be far greater if the actions are consolidated for all purposes, including trial.[74] Moreover, such reform is especially necessary with respect to antitrust litigation involving claims by direct and indirect purchasers because, due to the problem of pass on, the amounts of injury suffered by different plaintiff groups are closely interrelated. Indeed, unless cases are consolidated for all purposes, it will be impractical to obtain a single determination of liability and damages and appropriately allocate damages awards among claimants, a critical element of the Commission's recommendation.

4. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered

As explained above, one component of the Commission's recommendation calls for both direct and indirect purchasers to be able to recover their actual damages, trebled. Legislatively overruling *Illinois Brick* and *Hanover Shoe* will allow a limitation of the defendant's liability to treble the overcharges suffered by the direct purchasers as a result of the initial overcharge. These damages should be allocated among the different claimants, whether direct or indirect purchasers, according to the evidence regarding their actual damages.

To be sure, determinations of how to allocate damages among direct and indirect purchasers will often involve complex economic assessments of the extent to which each purchaser in the chain of distribution has suffered harm that can be traced to the overcharge. The federal courts have shown great ability to handle such complex economic issues, however, and they will develop rules and procedures to handle these issues. Consolidating all claims in a single proceeding will facilitate an appropriate allocation of relief among the claimants by the court. In addition, once all parties are before a single court, a global settlement becomes possible. Many of these disputes are likely to be settled; once liability and total damages are established, allocations of damages may often be determined by settlements among the claimants. Furthermore, limiting damages to the amount of the initial overcharge should streamline resolution of the litigation. Indeed, once the amount of overcharge has been determined, it may be possible to resolve the issues of how to allocate those damages among direct and indirect purchasers without the further involvement of the defendants.

Without a doubt, the management of a consolidated class action involving direct and indirect purchasers will be challenging. Such a proceeding will likely involve numerous claimants, the application of differing state laws, and difficult economic assessments of the extent to which overcharges flowed from direct to indirect purchasers and how best to apportion damages among claimants. Federal courts managing such proceedings should use their discretion to structure the proceedings as they see fit to achieve fairness and efficiency. Federal judges may wish to consider structuring the proceedings to make three distinct determinations: the liability of the defendants; the damages owed by the defendant (based on overcharges to the direct purchasers only); and the allocation of those damages among direct and indirect purchasers.* However, judges may choose from a variety of different mechanisms to best manage such cases. It is far preferable to have one federal judge oversee and manage the interrelationships among the claims and claimants than to have split proceedings in federal and state courts, as is now too frequently the case.

* Commissioner Burchfield is skeptical about the proposed use of such structured (or "trifurcated") proceedings.

5. Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers

The Commission does not intend its recommended reforms to make class certification more difficult for direct and indirect purchasers to obtain than under current practice. In particular, the Commission recognizes the concerns of some that certification of direct purchaser actions may be rendered more difficult by the legislative overruling of *Hanover Shoe*.[75] *Hanover Shoe* simplifies the proof of the fact and extent of injury suffered by direct purchasers—the overcharge depends only on the price they actually paid and the price they would have paid absent the violation. If *Hanover Shoe* is overruled legislatively, however, the extent to which the direct purchasers may have passed on the overcharge may become an issue at trial. Defendants thus may seek to argue as well that the extent of pass on is not susceptible of common proof, which potentially provides a basis to deny class certification. Because the extent of pass on affects both direct purchasers' claims and the indirect purchasers' claims, it has the potential to prevent *any* class from being certified.

In order to ensure that the proposed reform does not make class certification of purchaser classes more difficult, the legislation should specify that courts should certify direct purchaser classes without regard to whether the injury alleged was passed on by direct purchasers. Thus, the degree of pass on will be an issue only at trial, not at the class certification stage of the proceedings. Because the purpose of this proposed reform is to ensure all injured parties are able to obtain appropriate recoveries, increasing obstacles by creating greater burdens to certify class actions would frustrate the objectives of the proposal.

Notes

1 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); *see* 15 U.S.C. § 15(a).

2 *See generally* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5 (1986); Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 532–46 (1983).

3 Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972) (emphasis added).

4 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

5 Illinois Brick Co. v. Illinois, 431 U.S. 720, 728–29 (1977).

6 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. § 1711 note).

7 *Hanover Shoe*, 392 U.S. at 481.

8 *Id.* at 494.

9 *Illinois Brick*, 431 U.S. at 728–29.

10 *Id.* at 728–30.

11 *Id.* at 730–34.

[12] *Id.* at 749 (Brennan, J., dissenting).

[13] *Id.* at 756–58 (Brennan, J., dissenting).

[14] *Id.* at 758–60 (Brennan, J., dissenting).

[15] Andrew I. Gavil, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, 69 Geo. Wash. L. Rev. 860, 867–69 (2001) [hereinafter Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*]; Stephen Calkins, Illinois Brick *and Its Legislative Aftermath*, 47 Antitrust L.J. 967, 967–68 (1979) [hereinafter Calkins, Illinois Brick *and Its Legislative Aftermath*].

[16] For example, Senator Kennedy charged that "the *Illinois Brick* decision effectively frustrates the clear legislative intent of Congress." *Fair and Effective Enforcement of the Antitrust Laws, S. 1874: Hearings Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary*, 95th Cong. 2 (1977) (statement of Senator Edward Kennedy).

[17] *See, e.g.*, S. 1874, 95th Cong. § 5 (1978); H.R. 11942, 95th Cong. § 3 (1978); *see also* Calkins, Illinois Brick *and Its Legislative Aftermath*, at 967.

[18] Edward D. Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 19, 26 (2004) [hereinafter Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*] (the bills to repeal *Illinois Brick* all died in committee; the most recent, introduced in 1983, would have allowed state attorneys general to sue on behalf of indirect purchasers); *see also* Edward D. Cavanagh, *The* Illinois Brick *Dilemma: Is There a Legislative Solution?*, 48 Alb. L. Rev. 273, 294–307 (1984).

[19] Ronald W. Davis, *Indirect Purchaser Litigation:* ARC America*'s Chickens Come Home to Roost on the* Illinois Brick *Wall*, 65 Antitrust L.J. 375, 391–93 (1997).

[20] Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, at 867–68.

[21] California v. ARC Am. Corp., 490 U.S. 93, 102–06 (1989).

[22] Kevin J. O'Connor, *Is the* Illinois Brick *Wall Crumbling?*, 15 Antitrust, Summer 2001, at 34, 34–35 [hereinafter O'Connor, *Is the* Illinois Brick *Wall Crumbling?*] (reporting that "thirty-six states and the District of Columbia, representing over 70 percent of the nation's population, now provide for some sort of right of action on behalf of some or all indirect purchasers"); Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, at 19 ("[S]ome thirty states . . . permit[] antitrust suits by indirect purchasers under state law."); American Bar Association, Section of Antitrust Law, *Report on Remedies*, at 2 (2004) [hereinafter 2004 Task Force Report] ("more than half the states permit" indirect purchaser antitrust suits). There are a variety of remedies available to indirect purchasers under state law. *See* Mark J. Bennett & Ellen S. Cooper, Statement at AMC Indirect Purchaser Hearing, at 18–19 (June 27, 2005) [hereinafter Bennett & Cooper Statement] (describing state law remedies available to indirect purchasers, including consumer protection and Little FTC Acts); Indirect Purchaser Transcript at 103–04 (Cooper) (June 27, 2005); Dan E. Gustafson, Statement at AMC Indirect Purchaser Hearing, at 6–8 (June 27, 2005) [hereinafter Gustafson Statement]; Joel M. Cohen & Trisha Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15 Antitrust, Summer 2001, at 29, 30–31 [hereinafter Cohen & Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*] (describing features of *Illinois Brick* repealers that vary by state).

[23] Indirect Purchaser Trans. at 41 (Zwisler); *id.* at 42–43 (Cuneo); William H. Page, *Class Certification in the* Microsoft *Indirect Purchaser Litigation*, 1 J. Competition L. & Econ., 303, 335–38 (2005) [hereinafter Page, *Class Certification in the* Microsoft *Indirect Purchaser Litigation*] (appendix listing class certification decisions in indirect purchaser actions, nearly all dating since the mid-1990s).

[24] *See, e.g.*, Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, at 30 (describing the "proliferation of litigation of indirect purchaser cases involving a common nucleus of operative fact"); Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, at 876–78.

[25] H. Laddie Montague, Jr., Statement at AMC Indirect Purchaser Hearing, at 2 (June 27, 2005) [hereinafter Montague Statement]; *see* Indirect Purchaser Trans. at 135–36 (Gustafson) (describing how "negotiated coordination" results in agreements to coordinate); *see also* O'Connor, *Is the* Illinois Brick *Wall Crumbling?*, at 34, 36–37 ("recent attempts at coordination initiated by state attorneys general, in con-

junction with private plaintiffs' and defendants' counsel," have reduced costs and facilitated settlement); Cohen & Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, at 31–32 ("indirect purchaser litigation has the potential to become unmanageable and extraordinarily expensive," but courts and plaintiffs' counsel are "frequently receptive to efforts to avoid unnecessary burden").

[26] Indirect Purchaser Trans. at 48–50 (Montague).

[27] *Id.*; Montague Statement, at 11–12.

[28] Pamela A. MacLean, *Federal Courts May Face Flood of Price-Fixing Allegations*, NAT'L L.J. (Sept. 21, 2005) (reporting that "[i]ndirect purchaser antitrust cases have flooded back to federal court using pendant state law antitrust claims"). At least eleven federal court pharmaceutical indirect purchaser actions may have been consolidated in this manner. *See* Patrick E. Cafferty et al., Public Comments Submitted to AMC (June 2, 2006) [hereinafter Cafferty Comments] (listing 11 indirect purchaser actions settled in federal court in recent years, some or all of which may have been brought relying on supplemental jurisdiction).

[29] *See* 28 U.S.C. § 1407 ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

[30] Ian Simmons & Charles E. Borden, *The Class Action Fairness Act of 2005 and State Law Antitrust Actions*, 20 ANTITRUST, Fall 2005, at 19, 19 [hereinafter Simmons & Borden, *CAFA and State Law Antitrust Actions*].

[31] *Id.* at 20. The "Home State" exception is of the greatest potential relevance to the removal of state indirect purchaser class actions. It provides that a class action that otherwise meets CAFA's requirements is not subject to removal under CAFA if, *inter alia*, "(1) all of the primary defendants are citizens of the state in which the class action is being brought, and (2) at least two-thirds of the members of the putative class are also citizens of that state." *Id.* (citing 28 U.S.C. § 1332(d)(4)(B)). Moreover, under this provision, if between one-third and two-thirds of the members of the putative class are citizens of the same state as the defendant or defendants, then a federal court has discretion over whether it will exercise jurisdiction over the class action; it is not obligated to do so. *Id.* (citing 28 U.S.C. § 1332(d)(3)).

There is also a "Local Controversy" exception. *See* Bruce V. Spiva & Jonathan K. Tycko, *Indirect Purchaser Litigation on Behalf of Consumers After CAFA*, 20 ANTITRUST, Fall 2005, at 12, 14–15 [hereinafter Spiva & Tycko, *Indirect Purchaser Litigation*] (discussing both exceptions).

[32] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998).

[33] *See, e.g.*, Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, at 863 ("[T]he artificial division of cases that now flows from *Illinois Brick* imposes unnecessary litigation burdens on the parties and leads to unjustifiable systemic inefficiencies."); Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, at 30 (state indirect litigation outside the scope of federal consolidation poses a "logistical nightmare for the courts").

[34] *Lexecon* held that a federal district court conducting pretrial proceedings pursuant to the multidistrict litigation statute has no authority to invoke the change-of-venue provisions of 28 U.S.C. § 1404(a) to assign a transferred case to itself for trial, but rather must remand the transferred case "at or before the conclusion of such pretrial proceedings to the district from which it was transferred," as provided by 28 U.S.C. § 1407(a). *Lexecon*, 523 U.S. at 34–37.

[35] A series of ABA Reports had emphasized concerns for duplicative recoveries in identifying numerous problems raised by indirect purchaser suits. *See* American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2004*, at 50; 2004 Task Force Report, at 1–2; American Bar Association, Section of Antitrust Law, *Report of the Indirect Purchaser Task Force*, 63 ANTITRUST L.J. 993, 995–96 (1995); American Bar Association, Section of Antitrust Law, *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in* California v. ARC America Corp., 59 ANTITRUST L.J. 273, 283–87 (1990); American Bar Association, Section of Antitrust Law, *Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify* Illinois Brick, 52 ANTITRUST L.J. 841, 841 (1983) [hereinafter 1983 Task Force Report]; *see also* Donald I. Baker, *Federalism and Futility: Hitting the Potholes on the* Illinois Brick

Road, 17 ANTITRUST, Fall 2002, at 14, 15 (stating that the current regime "has produced duplicative litigation and recoveries" on a scale the Court could "scarcely have imagined"); Business Roundtable, Public Comments Submitted to AMC, at 8 (Nov. 4, 2005).

36 Michael L. Denger, Statement at AMC Indirect Purchaser Hearing, at 4 (June 27, 2005) [hereinafter Denger Statement]; Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, at 27 (without being subject to a federal court's pressure to settle, plaintiffs may "behave strategically to exact more favorable settlement terms").

37 Indirect Purchaser Trans. at 9 (Tulchin) (stating that this "domino effect of collateral estoppel" makes it exceedingly difficult for defendants to go to trial); *id.* at 14, 90–91 (Zwisler) (emphasizing the "colossal damage exposure" from potential liability to indirect purchasers); Margaret M. Zwisler, Statement at AMC Indirect Purchaser Hearing, at 7–8 (June 27, 2005) [hereinafter Zwisler Statement].

38 The three requirements of CAFA "will be satisfied in the overwhelming majority of indirect purchaser class actions," and "[m]ost of these exceptions [to CAFA's applicability] will rarely, if ever, apply in the context of indirect purchaser class actions." Simmons & Borden, *CAFA and State Law Antitrust Actions*, at 19–20.

39 *Id.* at 19 (CAFA should "dramatically reduce the duplication in discovery and work product that defendants currently incur when facing multiple statewide indirect purchaser class actions"); Jonathan W. Cuneo, Statement at AMC Indirect Purchaser Hearing, at 8 (June 27, 2005) [hereinafter Cuneo Statement] (CAFA "will, without doubt, have the effect of moving the vast majority of state indirect purchaser class actions from state to federal court"); Montague Statement, at 3, 5 ("there is good reason to believe that [under CAFA] the federal courts can manage the direct and indirect purchaser cases in the same manner in which they managed them pre-*Illinois Brick*"—that is, "together in federal court"); Indirect Purchaser Trans. at 47–48 (Bennett) (predicting that state attorneys general would file in federal court if *Illinois Brick* were overruled and that few private cases would stay in state court).

40 *See* Indirect Purchaser Trans. at 135–36 (Gustafson); *id.* at 53 (Tulchin); *id.* at 144 (Gavil); David B. Tulchin, Statement at AMC Indirect Purchaser Hearing, at 11–12 (June 27, 2005) [hereinafter Tulchin Statement].

41 *See* Indirect Purchaser Trans. at 134–35 (Denger) (observing that many indirect purchasers and third-party payers are "substantial commercial entities" who could opt out of a class action and thereby avoid application of CAFA if their interests were better served in state court); *see also* Bennett & Cooper Statement, at 7–10 (reporting that some third party payers opted out of class actions and settled separately in the *Mylan*, *Buspirone*, and *Taxol* cases); Indirect Purchaser Trans. at 158 (Denger) ("[I]ncreasingly, in the last four or five years there have been a lot of opt out settlements.").

42 Bennett & Cooper Statement, at 16; 46 State Attorneys General, Public Comments Submitted to AMC, at 8 (July 20, 2006) [hereinafter Comments of 46 State Attorneys General] (*parens patriae* actions are not subject to removal under CAFA).

43 *See Lexecon*, 523 U.S. at 34–37.

44 *See, e.g.*, Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, at 23–24 (*Illinois Brick* "failed to compensate the real victims of price-fixing"); Andrew I. Gavil, *Antitrust Remedy Wars Episode I:* Illinois Brick *from Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 553, 565 (2005) (explaining that, under the *Illinois Brick* rule, there is "no compensation whatsoever for the indirect purchasers who were the true victims of the illegal overcharge").

45 Thirty Antitrust Practitioners, Public Comments Submitted to AMC, at 15 (June 17, 2005) [hereinafter Thirty Antitrust Practitioners Comments].

46 For example, Bennett and Cooper report that in several antitrust cases involving pharmaceuticals there were substantial sums paid to the injured class members. *See* Bennett & Cooper Statement, at 7–10; *see also* Indirect Purchaser Trans. at 24–25, 60–61, 94–95 (Bennett); *id.* at 178–79 (Cooper).

47 Tulchin Statement, at 9–10; Zwisler Statement, at 8–9.

[48] *See* Tulchin Statement, at 9–10. For example, even using extraordinary efforts to contact potential claimants in the *United States Tobacco* litigation, plaintiffs still achieved only a 26 percent participation rate among class members. Zwisler Statement, at 8–9; *see also* John E. Lopatka & William H. Page, *Indirect Purchaser Suits and the Consumer Interest*, 48 Antitrust Bull. 531, 536 (2003). CAFA contains several provisions directed at reforming the use of coupons in settlements of class actions. *See, e.g.*, Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, 20 Antitrust, Fall 2005, at 26, 27–28.

[49] William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L. Rev. 602, 608–15 (1979) [hereinafter Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?*]; Page, *Class Certification in the* Microsoft *Indirect Purchaser Litigation*, at 305 (the Supreme Court in *Illinois Brick* reasoned that concentrating the right to recovery in direct purchasers would ensure more effective deterrence).

[50] *See* Indirect Purchaser Trans. at 37 (Montague); Zwisler Statement, at 13; *see also* 1983 Task Force Report, at 856–57.

[51] *See* Cafferty Comments, at 1–25.

[52] *See* Professor Andrew I. Gavil, Statement at AMC Indirect Purchaser Hearing, at 17–18 (June 27, 2005); American Antitrust Institute, Public Comments Submitted to AMC Regarding Remedies, at 18–19 (June 17, 2005); Indirect Purchaser Trans. at 24 (Bennett); Cuneo Statement, at 5–6.

[53] Thirty Antitrust Practitioners Comments, at 13–14, 19; Indirect Purchaser Trans. at 23–24 (Bennett). Some witnesses reported on large settlements recently obtained on behalf of indirect purchasers though class action suits by state attorneys general. Bennett & Cooper Statement, at 7–10 (*Mylan*—approximately $137 million total payouts to indirect purchasers; *Buspirone*—$240 million; *Taxol*—$70 million). According to one commenter, in 11 recent pharmaceutical cases (including *Mylan*, *Buspirone*, and *Taxol*) brought in federal court, indirect purchasers received over $900 million in recoveries. Cafferty Comments, at 1–4 (reporting settlement amounts). Three actions brought in state court—*Vitamins*, *Brand Name Prescription Drugs*, and *Infant Formula*—resulted in settlements totaling $424.9 million in cash and $160.5 million in product. *Id.* at 5–19. Recent actions brought on behalf of indirect purchasers in fifteen states against Microsoft resulted in the provision of vouchers worth up to $1.9 billion. *See id.* at 20–23; *see also* Community Catalyst, Public Comments Submitted to AMC, at 3–4 (July 22, 2005) (reporting recoveries for consumers and third party payers in pharmaceutical cases).

[54] *See, e.g.*, Indirect Purchaser Trans. at 18, 91 (Montague); *id.* at 130–31 (Gustafson).

[55] *Id.* at 129 (Cooper); *id.* at 129–30 (Denger) ("[T]here is no shortage of plaintiffs' lawyers willing to bring actions."); *id.* at 132–33 (Steuer) ("[E]ven though the incentive may be then divided up . . . there remains ample incentive collectively to pursue the suit.").

[56] *See, e.g.*, 2004 Task Force Report, at 1–2 (2004) (expressing concern for multiple litigation, duplicative exposure, and lack of recovery for indirect purchasers in states without repealers, and citing previous studies).

[57] Montague Statement, at 3–4 ("I am not aware of any instance in which an antitrust defendant has paid in settlements or in satisfaction of judgments as much or more than treble damages, or in most cases, more than single damages."); Indirect Purchaser Trans. at 23 (Bennett) ("The testimony from both panels, I think, is stark in that no one could actually point to any case, despite the large number of *Illinois Brick* repealers, in which any defendant had actually paid too much."); Gustafson Statement, at 15; Cuneo Statement, at 9.

[58] Indirect Purchaser Trans. at 38–39 (Tulchin) (identifying an instance of unfair multiple recovery is "very difficult" because you would need to know the actual damages suffered); *id.* at 41–42 (Zwisler); Denger Statement, at 6–8.

[59] Indirect Purchaser Trans. at 164–65 (Steuer). Other witnesses believe preemption of indirect purchaser rights under state law may be necessary to ensure that duplicative recoveries do not occur. *Id.* at 161–62 (Gavil).

60 *Illinois Brick*, 431 U.S. at 731–37.

61 1983 Task Force Report, at 852–55; Chris S. Coutroulis & D. Matthew Allen, *The Pass-on Problem in Indirect Purchaser Class Litigation*, 44 ANTITRUST BULL. 179 (1999) [hereinafter Coutroulis & Allen, *The Pass-on Problem*]; William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of* Illinois Brick, 67 ANTITRUST L.J. 1, 12–19 (1999) [hereinafter Page, *The Limits of State Indirect Purchaser Suits*]; *see also In re* Brand Name Prescription Drugs Litig., 123 F.3d 599, 605 (7th Cir. 1997) (Posner, J.) ("Tracing a price hike through successive resales is an example of what is called 'incidence analysis,' and is famously difficult."); Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?*, at 615–21. *But see* Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 354 (1979) (stating that "there is simply no credible argument that courts cannot handle passing-on issues").

62 Page, *The Limits of State Indirect Purchaser Suits*, at 5; *see* Coutroulis & Allen, *The Pass-on Problem*, at 184–88. Some Commission witnesses argued that evaluating injury to indirect purchasers would make proceedings very difficult or even "totally unworkable." Indirect Purchaser Trans. at 91 (Montague); *see also* Tulchin Statement, at 3–8.

63 Bennett & Cooper Statement, at 6–7 (while difficulties remain, advances in "data capture, storage and manipulation, as well as in econometric modeling has made such allocation less problematic"). Professor Hovenkamp has also argued that the difficulty of computing pass on can largely be avoided by applying standard methods for damage estimation to each level in the chain of distribution. *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 74–76 (2005).

64 Bennett & Cooper Statement, at 13–14.

65 O'Connor, *Is the* Illinois Brick *Wall Crumbling?*, at 34–35 (reporting that "thirty-six states and the District of Columbia, representing over 70 percent of the nation's population, now provide for some sort of right of action on behalf of some or all indirect purchasers"); *see also generally* Comments of 46 State Attorneys General, at 4–7 (arguing that state laws permitting indirect purchasers to assert antitrust claims should not be preempted); Bennett & Cooper Statement, at 16–19.

66 *See ARC America*, 490 U.S. 93.

67 Bennett & Cooper Statement, at 16; *id.* app. at 2–3; *see also* Comments of 46 State Attorneys General, at 1. Others share these views. *See* American Antitrust Institute, Public Comments Submitted to AMC Regarding Indirect Purchaser Litigation, at 8 (July 10, 2006) [hereinafter AAI Comments re Indirect Purchaser Litigation] (opposing strongly "any changes to federal law that would result in preemption of state indirect purchaser remedies").

68 *See* Indirect Purchaser Trans. at 101–02, 159 (Cooper); Bennett & Cooper Statement, at 19.

69 Furthermore, direct and indirect purchasers will be encouraged to develop and present appropriate methods for estimating damages.

70 *Lexecon*, 523 U.S. at 34–37; Spiva & Tycko, *Indirect Purchaser Litigation*, at 16.

71 *Lexecon*, 523 U.S. at 34–37; Spiva & Tycko, *Indirect Purchaser Litigation*, at 16.

72 Indirect Purchaser Trans. at 134–35 (Denger).

73 The Commission does not take a position as to whether overruling *Lexecon* would be desirable in other circumstances as well.

74 Consolidation for all purposes would also avoid one arguably unfair aspect of defending multiple actions. If defendants lose one action, it will face collateral estoppel in subsequent actions against it on the same claim. However, a win in one of those actions may not be used against a different plaintiff in a subsequent action.

75 *See* AAI Comments re Indirect Purchaser Litigation, at 4–6 (repeal of *Hanover Shoe* "would fuel arguments that proof of impact is an individualized question" not susceptible of common proof).

Chapter III.C
Government Civil Monetary Remedies

1. INTRODUCTION

Congress has given the antitrust agencies authority to obtain certain remedies for antitrust violations. For criminal antitrust violations, the Antitrust Division of the Department of Justice (DOJ) may seek significant monetary fines and prison terms.[1] For substantive, non-criminal violations, the agencies can seek broad injunctive relief to prevent future violations. For certain procedural violations, such as Hart-Scott-Rodino Act (HSR Act) violations, and for breaches of consent decrees, both the DOJ and the Federal Trade Commission (FTC) may seek civil fines.

Some have argued that the authority of the U.S. antitrust agencies to seek civil fines should be expanded beyond procedural violations, so that the antitrust agencies could seek civil fines for substantive, non-criminal antitrust violations, just as antitrust enforcers in the European Union and certain countries do. Advocates of expanded monetary remedies for the antitrust agencies also suggest the federal antitrust agencies should increase use of their equitable powers to obtain disgorgement and restitution remedies. Others point out that the U.S. system of antitrust remedies differs from that in many other countries, because the U.S. system gives private plaintiffs the ability to seek treble damages for antitrust violations. Such "private attorneys general" play an important role in antitrust enforcement. Concern exists that allowing the government also to extract monetary remedies for substantive non-criminal antitrust violations—a role currently occupied by private plaintiffs seeking treble damages—could result in defendants making duplicative, excessive payments.

In light of these arguments, the Commission looked at two questions: (1) whether Congress should give the federal antitrust agencies expanded civil fine authority; and (2) whether the agencies' current authority to seek monetary equitable relief, such as disgorgement and restitution, should be clarified, expanded, or limited. The Commission makes the following recommendations.

48. There is no need to give the antitrust agencies expanded authority to seek civil fines.

49. There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.

2. BACKGROUND

A. Civil Fines

Congress has authorized the antitrust agencies to seek civil fines, but only for the breach of an antitrust consent decree with the DOJ or the FTC,[2] or for procedural violations, such as a failure to file a pre-merger notification as required under the HSR Act.[3] The agencies' pursuit of civil fines in these cases presents no threat of duplicative recovery, because no private remedies exist for such matters.[4]

The DOJ's and the FTC's lack of authority to seek civil fines for substantive, non-criminal antitrust violations differs from the authority of many antitrust regimes around the world to impose civil fines for such violations.[5] In the European Union, for example, antitrust enforcers have used their authority to impose millions of dollars in civil fines for substantive antitrust violations.[6] European Union antitrust enforcement, however, does not include robust private remedies. In fact, E.U. officials currently are studying ways in which to facilitate private damages actions as a means to "complement public enforcement."[7]

B. Equitable Relief

For substantive, non-criminal antitrust violations, Congress has authorized the DOJ and the FTC to seek equitable relief, including injunctions, temporary restraining orders, and "cease and desist" orders.[8] Courts generally have interpreted Congress's express authorization to seek broad equitable remedies, such as injunctions and restraining orders, as implied congressional authorization to seek *all* equitable remedies—including restitution and disgorgement. In *Porter v. Warner Holding Co.* the Supreme Court explained that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[9]

To date, only the FTC has exercised its implied authority to seek monetary equitable remedies, although the DOJ believes it has similar authority.[10] Courts have upheld the FTC's authority to obtain disgorgement and restitution.[11] In consumer protection cases, where consumers often have only minimal federal private rights of action,[12] the FTC has regularly obtained restitution and disgorgement.[13]

In only eleven antitrust cases in the past twenty-six years, however, has the FTC sought equitable monetary remedies.[14] Unlike consumer protection, antitrust law does provide private remedies in the form of treble damages.[15] These treble damages generally provide injured parties with recoveries for their antitrust injuries. Nonetheless, in certain circumstances, obstacles, such as statutes of limitations, prohibitions against suits by indirect purchasers, or standing requirements, may hinder the filing of a treble damages suit.[16] In such circumstances, the FTC may seek monetary remedies "because other remedies are likely to fail to accomplish fully the purposes of the antitrust laws."[17]

At the urging of former FTC Commissioner Thomas B. Leary, the FTC developed a Policy Statement to articulate the circumstances in which it might pursue restitution or disgorgement in competition cases.[18] The *Policy Statement on Monetary Equitable Remedies in Competition Cases* ("the Policy Statement") was intended to provide the public with guidance as to when, in its prosecutorial discretion, the FTC will seek such relief.[19] The Policy Statement identified three factors that will govern the FTC's use of monetary equitable remedies:

(1) whether the violation was "clear" (*i.e.*, a reasonable party should expect its conduct to be found illegal);

(2) whether there is a reasonable basis for calculating the amount of disgorgement or remedy, based on the gains or injury from the violation; and

(3) whether use of the remedy would add value because other remedies will either likely fail or provide incomplete relief.[20]

The Policy Statement further explained that the FTC did "not view monetary disgorgement or restitution as routine remedies for antitrust cases," and that the agency would "continue to rely primarily on more familiar, prospective remedies, and seek disgorgement and restitution in exceptional cases."[21]

3. RECOMMENDATIONS AND FINDINGS

A. Civil Fines

48. There is no need to give the antitrust agencies expanded authority to seek civil fines.

Neither the DOJ nor the FTC has requested expanded civil fine authority.[22] In fact, the head of the Antitrust Division expressed "reservations" about increased government civil fine authority, stating that such a change might "blur[] the distinction between a civil violation and a criminal violation"—a distinction that is important to the DOJ.[23]

In the United States, treble damage recoveries by private plaintiffs play a significant role in antitrust enforcement. If the Commission had recommended reducing or eliminating treble damage recoveries, or significantly limiting their availability, it might have been appropriate to consider whether civil fine authority should take their place. The Commission has not recommended any change to treble damage recovery, however.[24]

Thus, a need for civil fine authority could be shown only if there were significant gaps in the current level of enforcement provided by private plaintiffs seeking damages. The Commission did not receive evidence of significant gaps, however. The Commission has identified one gap: cases in which civil fine authority might address egregious conduct for which treble damages are not available because no antitrust injuries resulted.[25] Such cases are rare and do not, by themselves, provide sufficient reason to expand the agencies' civil fine authority. In addition, as discussed below, the agencies' equitable authority may be used in certain circumstances to obtain disgorgement and restitution where specific circumstances impair the ability of injured parties to recover damages. Thus, to the extent that any gaps remain, they are better addressed through the use of the agencies' equitable powers than through providing additional civil fine authority to the agencies.

B. Equitable Monetary Remedies

49. There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.[*]

To the extent treble damage remedies may not be available, or are not sufficient to force disgorgement of defendant's unlawful gains or to redress injured parties' antitrust injuries, a federal antitrust agency may appropriately consider these facts (along with others) in deciding whether to seek equitable monetary remedies such as disgorgement and restitution. The FTC's limited use of this remedy in antitrust cases has been judicious and is commended.

The availability of disgorgement and restitution as government antitrust remedies, along with treble damages as private remedies, could cause defendants to make excessive and duplicative payments.[26] It is imperative to avoid duplicative recoveries. Nonetheless, the Commission's record is devoid of any example where government-sought disgorgement or restitution led to duplicative or excessive payments. Instead, the Commission heard testimony that in the thirty years since the FTC first exercised its equitable authority, there has never been a duplicative recovery.[27]

[*] Commissioners Valentine, Jacobson, Kempf, and Warden would further recommend that the DOJ adopt a policy similar to the FTC's Policy Statement to articulate the circumstances in which it would exercise its authority to seek equitable monetary remedies.

Notes

[1] 15 U.S.C. § 1 (authorizing criminal penalties up to $100 million for corporate offenders, and up to $1 million and/or up to 10 years in prison for individuals); 18 U.S.C. § 3571(d) (general statute authorizing criminal penalties up to twice the pecuniary gain, or twice the pecuniary loss caused by a violation).

[2] Courts can retain continuing jurisdiction over decrees filed by the DOJ pursuant to the Antitrust Procedures and Penalties Act (APPA or Tunney Act). A violation of those decrees "whether litigated or consent, is punishable as contempt of court for which severe penalties may be imposed." AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 708 (6th ed. 2007) (courts have imposed monetary penalties up to $750,000). The FTC may pursue similar fines pursuant to 15 U.S.C. § 45(*l*). *See, e.g.*, United States v. Boston Scientific Corp., 253 F. Supp. 2d 85, 86 (D. Mass. 2003) (suit initiated by the DOJ on behalf of the FTC resulted in a $7 million fine against Boston Scientific for violation of a 1995 FTC Consent Decree).

[3] *See, e.g.*, 15 U.S.C. § 18a(g)(1) ("Any person . . . who fails to comply with [Hart-Scott-Rodino Act (HSR Act) filing requirements] . . . shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section."). Although 15 U.S.C. § 18a(g)(1) specifically refers to the DOJ's ability to seek civil fines for non-substantive antitrust violations, the FTC can obtain civil fines for similar violations by asking the DOJ to initiate a proceeding on its behalf. *See, e.g.*, United States v. Hearst Trust, Complaint for Civil Penalties For Failure to Comply with Premerger Reporting Requirements of the Hart-Scott-Rodino Act, No. 1:01CV02119 (Oct. 11, 2001) (complaint filed at the request of the FTC, which resulted in a $4 million civil fine against Hearst for its failure to comply fully with HSR Act requirements).

[4] Stephen Calkins, Statement at AMC Government Civil Remedies Hearing, at 24 (Dec. 1, 2005) [hereinafter Calkins Statement] ("[V]iolation of the Hart-Scott-Rodino Act . . . does not create a private cause of action.").

[5] R. Hewitt Pate, Public Comments Submitted to AMC Proposing Issues for Commission Study, at 2 (Jan. 5, 2005) [hereinafter Pate Comments Proposing Issues] ("Civil fine authority is a part of enforcement in many foreign jurisdictions."); Calkins Statement, at 3 (stating that "in Europe, the civil fine is the tool of choice").

[6] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, art. 83(2)(a); Calkins Statement, at 10 (noting that the European Union imposed both fines and conduct requirements on Microsoft for its violation of Europe's competition laws).

[7] Neelie Kroes, European Commissioner for Competition, The Green Paper in Antitrust Damages Actions: Empowering European Citizens to Enforce their Rights, Opening Speech at the European Parliament Workshop (June 6, 2006), at 6 (stating that there was "clear consensus" that the European Union needs to "complement public enforcement with stronger private actions"), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/speech_06062006.pdf; *see also* European Commission Website, *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/index_en.html (stating that "[i]n Europe, competition law is mostly enforced by competition agencies" and that the European Union is studying ways in which to "facilitate private damages actions").

[8] 15 U.S.C. § 45(b) (authorizing the FTC to seek "cease and desist" orders against violators); 15 U.S.C. § 53(b) (authorizing the FTC to seek temporary restraining orders and injunctions from the district courts); 15 U.S.C. § 4 (granting the DOJ the authority to "prevent and restrain violations of [the Sherman Act]"); 15 U.S.C. § 25 (granting the DOJ the authority to "institute proceedings in equity to prevent and restrain . . . violations [of the Clayton Act]").

[9] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). If there is an elaborate enforcement scheme, however, the Court has taken a different view. *See* Meghrig v. KFC Western, Inc., 516 U.S. 479, 487–88 (1996) (when Congress creates an elaborate enforcement scheme, such as the Resource Conservation

and Recovery Act, it is inappropriate to assume that Congress also intended to confer the full scope of equitable power, including disgorgement and restitution).

[10] *See* Reply Brief for the United States on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, United States v. Philip Morris USA, Inc., No. 05-92, at 4 & n.3 (filed Sept. 2005) (arguing that RICO provides government with disgorgement remedy and refuting contention that antitrust laws preclude disgorgement) (citing Ford Motor Co. v. United States, 405 U.S. 562, 573 & n.8 (1972)); *see also* Thomas B. Leary, Statement at AMC Government Civil Remedies Hearing, at 7–8 (Dec. 1, 2005) (stating that he is not aware of any DOJ cases, but it is reasonable to assume that the Antitrust Division has authority similar to that of the FTC).

[11] FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 37 (D.D.C. 1999) ("The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.") (quoting *Porter*, 328 U.S. at 398); *see also* FTC v. Munoz, 17 Fed. Appx. 624, 626 (9th Cir. 2001) (upholding the FTC's authority to seek equitable monetary relief); *accord* FTC v. Febre, 128 F.3d 530 (7th Cir. 1997); FTC v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991); FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982); FTC v. Ameridebt, Inc., 373 F. Supp. 2d 558 (D. Md. 2005).

[12] Kevin Arquit, Statement at AMC Government Civil Remedies Hearing, at 13 (Dec. 1, 2005) [hereinafter Arquit Statement] (stating that consumer protection does not have a "wide body of law that allows private damages").

[13] David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 Antitrust L.J. 1113, 1120 (2005) [hereinafter Balto, *Reassessing the Approach to FTC Remedies*] ("[S]eek[ing] monetary relief in unfair or deceptive practices cases since the early 1980s . . . has become the foundation of the FTC's consumer fraud program."); Arquit Statement, at 12 (describing the FTC's equitable monetary remedies as a "potent tool . . . against consumer fraud"); Calkins Statement, at 13 (stating that the "dominant use [of Section 13(b)] has been against fraud").

[14] John Graubert, Statement at AMC Government Civil Remedies Hearing, at 2 nn.4–5 (Dec. 1, 2005).

[15] Arquit Statement, at 12; American Antitrust Institute, Public Comments Submitted to AMC Regarding Civil Remedies, at 12 (June 17, 2005) ("[T]he FTC has endorsed the important complementary role that the private plaintiffs and state attorneys general serve in recovering damages. . . ."); David Boies, Statement at AMC Civil Remedies Hearing, at 12 (July 28, 2005) (stating that "[t]reble damages also play an important role in accomplishing the goal of disgorgement").

[16] Government Civil Remedies Transcript at 12 (Graubert) (Dec. 1, 2005).

[17] *Id.* at 11 (Graubert); *see also* FTC Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45,822 (Aug. 4, 2003) [hereinafter FTC Policy Statement].

[18] *See* Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, FTC v. Mylan Pharms., Inc., FTC File No. X990015 (Nov. 29, 2000), *available at* http://www.ftc.gov/os/2000/11/mylanlearystatement.htm ("[I]t is essential that we somehow communicate our views on the appropriate parameters of the Section 13(b) remedy generally for antitrust cases. At the very least, we might indicate that the remedy will not be sought in cases where the violation is unclear and where private damage remedies are available and being pursued."); *see also* Government Civil Remedies Trans. at 9 (Graubert) (confirming that the FTC's 2003 policy resulted from Commissioner Leary's urging for clarification).

[19] FTC Policy Statement, 68 Fed. Reg. at 45,820–21.

[20] *Id.* at 45,821 n.8.

[21] *Id.* at 45,821.

[22] *See* Barnett/Majoras Transcript at 51–52 (Barnett) (March 21, 2006) (expressing reservations about extending civil fine authority to substantive antitrust violations); *id.* at 52 (Majoras) (stating that she "agree[s] with Assistant Attorney General Barnett's cautionary notes on civil fines," but also stating there may be circumstances where injunctive relief is not sufficient).

[23] *Id.* at 51–52 (Barnett) (describing the challenge the DOJ sometimes has to persuade courts that criminal prosecution of antitrust violations are is targeted at a narrow range of conduct, stating that "the sharper the distinction [between criminal and civil violations], the better off we are at the end of the day").

[24] *See* Chapter III.A of this Report regarding triple damages.

[25] Calkins Statement, at 8 (referring to time-limited injunctions as little more than a "slap on the wrist"); *see also* Pate Comments Proposing Issues, at 2 (noting that "injunctive relief alone may not be sufficient to deter or redress violations of the antitrust laws"); Government Civil Remedies Trans. at 14–17 (Calkins). For example, no antitrust injuries resulted in *United States v. American Airlines, Inc.*, when American Airlines's President, Robert Crandall, invited Braniff Airlines's President, Howard Putnam, to fix prices. United States v. American Airlines, Inc., 743 F.2d 1114, 1116 (5th Cir. 1984). Putnam refused and reported the conversation to the DOJ. If Putnam had accepted, the resulting conspiracy could have subjected both airline companies to millions of dollars in criminal fines and Crandall and Putnam to possible jail time. *American Airlines*, 743 F.2d at 1116; *see also* Calkins Statement, at 8 ("[T]he federal government remedy is likely to be limited to an injunction that can be described, often with some justification, as an order not to do it again. On the other hand, if the same conduct is successfully challenged criminally, it can be punished with prison time and massive individual and corporate fines. . . ."). In the absence of any agreement, however, the DOJ sought only injunctive relief—that is, a court order barring Crandall from engaging in similar conduct again. *American Airlines*, 743 F.2d at 1116.

[26] *See, e.g.*, Arquit Statement, at 1; Balto, *Reassessing the Approach to FTC Remedies*, at 1123 ("[T]here is no lack of private enforcement against the types of antitrust violations attacked by the FTC.").

[27] Government Civil Remedies Trans. at 11 (Graubert).

Chapter III.D
Criminal Remedies

1. INTRODUCTION

Criminal antitrust prosecution is a vital component of overall antitrust enforcement in the United States. Criminal penalties can include prison sentences for individuals and sizable monetary fines for individuals and corporations. Such criminal enforcement, and the associated sentences and fines, have generally been reserved for "hard-core" offenses. Those offenses typically are "naked" conspiracies between and among competitors to fix prices, rig bids, or allocate markets or customers. Such naked conspiracies lack any plausible relationship to enhancing output or providing other benefits to consumers; the participants usually conduct their activities in secret and know their activities are illegal. A consensus exists that such conspiracies almost invariably inflict harm on consumers and the economy.[1]

The Antitrust Division of the Department of Justice (DOJ) has made the detection, criminal prosecution, and deterrence of hard-core antitrust offenses its highest priority.[2] This priority, in combination with improved enforcement tools, cooperation from international antitrust enforcers, and a robust amnesty program, have led to the detection and prosecution of an ever-increasing number of cartels, often global in scope. These cartels can affect millions, if not billions, of dollars in commerce.[3] Congress has recognized the seriousness of these economic crimes, and has recently substantially increased maximum fines and jail sentences and authorized the DOJ to use wiretaps in the investigation of suspected criminal cartel conduct.[4]

Other enforcement authorities around the world have also increased their enforcement efforts against cartels.[5] Indeed, more than 100 jurisdictions around the world have enacted laws prohibiting cartels.[6] Moreover, at least fourteen nations make violations of their competition statutes criminal.[7] Although U.S. cartel enforcement against entities based in foreign countries has been controversial on some occasions in the past, today many nations have their own laws and policies against cartels, and they cooperate with the United States in cartel investigations, pursuant to various treaties and international agreements. Even in the past few years, the changes have been significant. In 2005 the British government commenced proceedings to extradite one of its citizens for prosecution in the United States for antitrust violations. By comparison, as recently as the late 1990s, requests by U.S. antitrust officials for international assistance routinely took a year to be processed, only to be denied ultimately in the majority of cases.[8]

Against this background of the increased role of criminal antitrust enforcement both in the United States and internationally, the Commission undertook to study three issues specific to U.S. criminal antitrust enforcement.

First, the Sherman Act nominally makes all violations of Section 1 and Section 2 subject to criminal prosecution. Some violations of those statutes, however, such as "naked" conspiracies to fix prices, rig bids, and allocate markets, are universally condemned as particularly harmful to consumer welfare and without procompetitive effects that might benefit consumers. By comparison, other violations, such as anticompetitive unilateral or joint conduct, can be more difficult to judge; unilateral or joint business conduct often requires more extensive factual inquiry to assess whether the conduct is likely to benefit or harm consumers. The DOJ has generally limited its criminal prosecutions to violations of the former type, and not the latter. The Commission examined whether the DOJ appropriately exercises its discretion by limiting criminal prosecutions to hard-core offenses.

Second, the Sherman Act establishes a maximum fine of $100 million for corporate violations, an amount that was increased from $10 million in 2004. This maximum may be increased through the application of a general criminal provision, 18 U.S.C. § 3571(d), the "alternative fines statute," if certain proof burdens are met by the government. The Commission reviewed whether continued use of the alternative fines statute to increase fines was appropriate in antitrust cases in light of the complexity of adducing the necessary proof in antitrust cases and recent Supreme Court decisions requiring that juries determine whether the facts have been proven to a sufficient degree to warrant increased sentences.

Third, sentences for criminal offenses of the Sherman Act are determined through application of the United States Sentencing Commission's Sentencing Guidelines (Sentencing Guidelines). For corporate antitrust violations, the Sentencing Guidelines set the sentence based on an estimate of the harm the violation caused. The estimate of harm is established through a "proxy," which is set in all cases at 20 percent of the amount of commerce affected by the antitrust violation. This "20 percent harm proxy" assumes the harm caused by the violation bears a direct relationship to the amount of commerce affected by the conduct. The 20 percent harm proxy is adjusted on the basis of a variety of factors, and then is used to set the final sentence. Some have argued that use of the 20 percent harm proxy fails adequately to distinguish between conduct of different severity and that more should be done to take into account a variety of economic factors that can make similar conduct have significantly different costs to consumers. The Commission therefore studied whether the use of the 20 percent harm proxy in the Sentencing Guidelines for antitrust crimes adequately distinguishes cartel activity of differing severity.

The Commission makes the following recommendations regarding these issues.

50. **While no change to existing law is recommended, the Antitrust Division of the Department of Justice should continue to limit its criminal enforcement activity to "naked" price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.**

51. **No change should be made to the current maximum Sherman Act fine of $100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.***

52. **Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.†**

53. **The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy)—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.****

54. **No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to "bid-rigging, price-fixing, or market allocation agreements among competitors," and the Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.**

* Commissioners Jacobson and Warden do not join this recommendation.

† Commissioner Carlton does not join this recommendation in full.

** Commissioners Burchfield, Carlton, and Garza do not join this recommendation.

2. FOCUS OF ENFORCEMENT ON HARD-CORE CONDUCT

A. Background

Violations of the Sherman Act have been criminal offenses since the Act was passed in 1890. Criminal penalties (which are often supplemented by follow-on civil private damage suits) in general are intended to deter unlawful conduct, protect the public, and punish offenders. They are set at levels designed both to reflect the seriousness of the crime and to provide an optimal level of deterrence, considering all relevant factors.

Although Sherman Act violations originally were misdemeanors punishable by up to one year in prison and a maximum of $5000 in fines, they subsequently became felonies punishable by much larger fines and longer prison sentences. A series of amendments to the Sherman Act—the most recent in 2004—have increased the maximum prison sentence to ten years and increased the maximum fines to $1 million for individuals and $100 million for corporations.[9] The criminal fines obtained by the DOJ have also increased substantially, particularly in the last decade. Between 1997 and 2004, the total amount of annual fines obtained by DOJ ranged from $204 million to over $1 billion, in any given year.[10] In 2005, the average jail sentence for antitrust crimes was twenty-four months.[11]

The DOJ has continued to seek improved methods for finding and punishing cartels. For example, it has enhanced its enforcement efforts through an invigorated amnesty program that encourages cartel participants to assist the DOJ in discovering and prosecuting cartel activity,[12] obtained the authority to use such methods as wire tapping,[13] and entered into agreements with foreign jurisdictions to investigate international cartels cooperatively.[14] The focus of this enforcement has broadened over time from prosecutions of regional and local price-fixing, territory allocation, and bid-rigging prior to the 1990s,[15] to international cartels involving large, multinational companies and significant amounts of affected commerce.[16]

B. Recommendation and Findings

50. While no change to existing law is recommended, the Antitrust Division of the Department of Justice should continue to limit its criminal enforcement activity to "naked" price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.

Although the DOJ has statutory authority to prosecute all violations of Section 1 and 2 of the Sherman Act criminally, over time the DOJ has narrowed the scope of its criminal enforcement of the Sherman Act to "hard-core" offenses such as price-fixing.[17] The DOJ has

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in recent years forgone criminal prosecutions of unilateral conduct under Section 2 and joint conduct whose competitive effects are often ambiguous, and the DOJ has at various points in the last fifty years made policy statements narrowing the types of antitrust violations it will prosecute as criminal.[18] The last criminal prosecutions by the DOJ against conduct that did not involve price-fixing, bid-rigging, or market allocation were over twenty-five years ago.[19]

The DOJ has made quite clear that it does not currently prosecute anything other than hard-core cartel activity criminally, and it has no plans to change that policy in the future.[20] The DOJ's discretionary limitation of criminal prosecution to hard-core offenses allows it to focus its prosecutorial resources on that conduct about which there is general agreement that it harms consumers.[21] Indeed, the Supreme Court long ago made clear that any conspiracy formed for the purpose of "raising, depressing, fixing, pegging, or stabilizing . . . price . . . is illegal per se."[22] Similarly, it has long been recognized that agreements to allocate territories are unlawful without the need for an inquiry into their "business or economic justification, their impact in the marketplace, or their reasonableness."[23]

By comparison, other types of potentially anticompetitive conduct can have more ambiguous effects on consumers and consumer welfare, and the legal standards by which such conduct is determined to be anticompetitive are more complex and fact-intensive. Indeed, antitrust law evaluates a wide range of conduct under the "rule of reason," pursuant to which a court compares the anticompetitive harm from the activity with the procompetitive benefits that are likely to accrue to consumers. For example, companies often enter into a variety of joint ventures, whether for research and development, manufacturing, marketing, or distribution. Such joint ventures may "restrain" trade in some respect, but also offer efficiencies that are beneficial to both the companies and consumers.[24] Similarly, there is a wide range of unilateral conduct, such as pricing and distribution practices, that can be procompetitive in most instances, and anticompetitive only in very limited circumstances.[25] Criminal penalties, by contrast, are typically reserved for cases in which conduct is clearly unlawful. To impose them more broadly, on conduct that is potentially not anticompetitive, runs the risk of penalizing the very procompetitive, proconsumer conduct the antitrust laws are intended to encourage.

The DOJ has reasonably decided to focus its prosecutorial resources on the conduct most likely to harm consumers.[26] It likewise has reserved the most burdensome form of punishment—fines and incarceration—for such cases. The Commission therefore commends the DOJ's limitation of criminal prosecution to hard-core conduct and recommends its continuation.

3. THE ALTERNATIVE FINES STATUTE—18 U.S.C. § 3571(d)

A. Background

Section 3571(d) of Title 18 of the United States Code is a generally applicable statute that permits prosecutors to seek higher fines than those provided for in the statute laying out the offense.[27] Section 3571(d), or the "alternative fines statute," provides that:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.[28]

In antitrust cases, this statute permits the DOJ to seek fines in excess of the $100 million statutory maximum (or $1 million for individuals) if the Sentencing Guidelines (discussed below) would call for it.[29] When the DOJ seeks to invoke the alternative fines statute, fines are still calculated on the basis of the Sentencing Guidelines; the fine range is, however, no longer limited by the Sherman Act maximum.

B. Recommendation and Findings

51. No change should be made to the current maximum Sherman Act fine of $100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.*

Section 3571(d), the alternative fines statute, is generally applicable to all crimes for which there is a monetary penalty.[30] There is nothing unique about antitrust offenses that justifies their being carved out or otherwise exempted from this provision. On the contrary, the alternative fines statute provides a useful means to punish large cartels adequately without the need for Congress to pass frequent statutory increases to the maximum fine.[31] Indeed, the

* Commissioners Jacobson and Warden do not join this recommendation. They would make Section 3571(d) inapplicable to Sherman Act offenses and increase the maximum fine under the Sherman Act to $500 million. At a minimum, they would recommend that Congress revisit whether the alternative fines statute should be applicable to antitrust offenses. Because, in light of incentives to strike plea agreements with the DOJ, defendants have been unwilling to challenge the use of Section 3571(d), these Commissioners believe the issue is unlikely to be addressed and resolved by a court.

DOJ has obtained fines above $100 million in nine cases, and prior to the increase of the maximum fine in 2004, sought fines above the statutory maximum fifty-one times since 1997.[32] In the absence of the alternative fines statute, these high fines would have been barred. Congress increased the fines ten-fold in 2004; that increase, in conjunction with the use of the alternative fines statute, permits the DOJ to seek, and courts to impose, sufficiently high fines to continue to provide deterrence through criminal enforcement.

The Commission recommends that certain interpretive questions regarding the statute be left to courts to resolve in the context of actual cases. One such argument is that the term "gain or loss" in the statute refers to the gain or loss caused by the individual defendant, rather than the gain or loss caused by the entire conspiracy. A court is best suited to resolve any ambiguity in the statute and relevant legislative history.

A more substantial question that the Commission also recommends be addressed by courts is whether the alternative fines statute can continue to be used in light of *Apprendi v. New Jersey*, as well as subsequent Supreme Court decisions.[33] That case requires that any fact used to increase a sentence must be proved to a jury beyond a reasonable doubt.[34] The DOJ acknowledges that it must prove to a jury, beyond a reasonable doubt, the gain or loss used to establish a higher maximum fine under Section 3571(d).[35] Some observers argue that because proof of gain or loss is typically established through expert witnesses, opinion testimony, and econometric analysis in antitrust cases, it is inherently speculative and can never be sufficient for proof beyond a reasonable doubt.[36] Alternatively, they contend, because the litigation of gain or loss in any antitrust case is complicated and protracted, the alternative fines statute by its terms may not be applied.[37] Although antitrust sentences are typically imposed pursuant to a plea agreement,[38] the Commission believes these arguments are nonetheless best left to a court to consider in the first instance.

4. THE SENTENCING GUIDELINES

A. Background

Although the Sherman Act specifies a maximum fine for violations, actual sentences for antitrust crimes are established with reference to the Sentencing Guidelines issued by the United States Sentencing Commission (Sentencing Guidelines).[39] Fines for both corporations and individuals are set by a series of calculations, described more fully below, that establish a range of possible fines. A court may impose a fine anywhere within the calculated range. A recent Supreme Court decision, *United States v. Booker*, made the fine range calculated by the Sentencing Guidelines advisory, leaving the court with discretion to impose a fine higher or lower than the calculated range.[40]

The Sentencing Guidelines contain a specific section for the calculation of fines for organizations convicted of criminal antitrust conduct. The Sentencing Guidelines call for the calculation of a "base fine" that is then adjusted for culpability. The base fine is in most cases determined by the pecuniary loss caused by the organization's violation.[41] Pecuniary loss is calculated as 20 percent of the volume of commerce affected by the defendant's anticompetitive conduct (referred to herein as the "20 percent harm proxy").[42] The base fine is then multiplied by a minimum and maximum culpability multiplier, and the sentencing judge may impose a fine anywhere within the range calculated.[43] The culpability multiplier may range from 0.75 to 4.0,[44] which depends on various factors relevant to the defendant's culpability, such as the size of the organization and whether the defendant cooperated with the investigation or accepted responsibility.[45]

The Sentencing Commission established the 20 percent harm proxy in 1991 so that courts could "avoid the time and expense that would be required . . . to determine the actual gain or loss."[46] The Sentencing Commission retained the 20 percent harm proxy in its most recent revisions to this part of the Guidelines in 2005. This decision was, in large part, because Congress expressly stated when it increased the maximum Sherman Act fines in 2004 that "Congress does not intend for the [Sentencing] Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy."[47]

B. Recommendations and Findings

52. Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.*

The Sentencing Commission adopted its 20 percent harm proxy for antitrust crimes in 1991, concluding that it is difficult to calculate loss or gain with precision in antitrust cases.[48] Because general deterrence of antitrust violations does not require an exact correlation of expected harm and penalty, the Sentencing Commission determined that reliance on a proxy amount would be appropriate.[49] The empirical data available at the time showed that price-fixing overcharges tended to be about 10 percent of the volume of affected commerce.[50] The Sentencing Commission doubled this amount to 20 percent to reflect the fact

* Commissioner Carlton joins this recommendation only to the extent it would lead to an increase in (or no change to) the proxy.

that the cost of antitrust violations to society exceeds the amount of overcharge.[51] The Sentencing Commission therefore concluded that a 20 percent harm proxy was appropriate for use in calculating the base fine.

Some studies suggest that the average overcharge in recent cartel cases has been 40 percent and that the median overcharge is 25 percent.[52] If these studies are accurate, and confirmed by further research, the presumed 10 percent overcharge reflected in the existing 20 percent harm proxy is inappropriately low. Conversely, some observers argue that the existing presumption results in fines that are too high.[53] Furthermore, development of economic learning and estimation techniques over the past fifteen years may have made proving gain or loss in an antitrust case less difficult than it was when the Sentencing Commission created the proxy.[54] The degree of difficulty of proving gain or loss, and the burdens it would impose on the sentencing process, are worthy of renewed consideration by the Sentencing Commission.

The DOJ believes that no change to the existing 20 percent harm proxy is appropriate, because more precise calculations are unnecessary.[55] The DOJ argues that criminal fines are not intended to be substitutes for damages, and do not necessitate precise calculation, because their primary purpose is to punish and deter, and they already provide rough justice.[56] Furthermore, the DOJ contends, more precise calculations would result in damages-like litigation that Congress hoped the sentencing courts could avoid through continued use of a proxy.[57]

On balance, however, the Commission recommends that the Sentencing Commission study these questions, and that Congress should encourage such study. The Sentencing Commission should determine whether the existing proxy is empirically sound and accurately reflects the best estimate of typical harm in antitrust cases. It should also determine the costs that individualized calculations of harm would impose on the sentencing process—in light of the current ability of lawyers and economists to estimate harm caused by antitrust crimes—and should determine whether establishing more individually tailored base fines could justify those additional costs. Such study would be consistent with the Sentencing Commission's more general efforts to increase the correlation between the penalty and the underlying facts of the crime.[58] The Commission does not take a position on how the Sentencing Commission should weigh these considerations, or whether the proxy should be higher or lower; it recommends only that the Sentencing Commission revisit its fifteen-year-old decision to determine whether change is warranted.

53. The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy)—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.*

The Sentencing Guidelines' use of a proxy for harm (whether the existing 20 percent harm proxy, or another revised proxy amount) does not carefully distinguish between defendants who have caused differing degrees of actual harm. That is, the inflexible presumption that antitrust crimes cause harm equal to 20 percent of the volume of commerce affected can be "inequitable," and potentially "disproportionate."[59] Just as there is some debate as to whether the existing harm proxy is too high or too low as a general matter, as explained above, it may also be too high or too low in individual cases. Indeed, the use of a proxy runs counter to the Guidelines' approach in other, non-antitrust cases, where the Sentencing Guidelines call for actual calculation of harm.[60] Furthermore, recent Supreme Court cases have imposed a requirement that any fact that would increase a sentence be proven to a jury beyond a reasonable doubt.[61] Although the holdings of those Supreme Court cases likely do not invalidate the proxy itself, they do highlight the concern of basing sentences on facts other than those proven at trial (or admitted by a defendant).

The Commission recommends that the Sentencing Guidelines be modified to allow the 20 percent harm proxy to be rebutted in certain circumstances, because sentencing calculations should more closely reflect the harm caused by the crime committed where doing so is feasible. Accordingly, the Commission recommends an approach that would permit a defendant to show that the overcharge was well below the presumed 10 percent of commerce affected or that the harm caused by its conduct was well less than double the overcharge. Conversely, the government could seek to prove that the overcharge was more than 10 percent, or that the overall harm caused was more than double the calculated overcharge.[62] This process would thus allow the fine to be either increased or decreased, depending on the circumstances. To maintain the efficiency of the sentencing process, the

* Commissioners Burchfield, Carlton, and Garza do not join this recommendation.

Commissioners Burchfield and Garza believe the Sentencing Guidelines provide sufficient alternative mechanisms to take into account individual circumstances. First, the Guidelines calculation results in a range of fines, leaving the sentencing judge free to impose a higher or lower fine as appropriate to the circumstances. Second, the Guidelines are now discretionary, as a result of the Supreme Court's decision in *United States v. Booker*, 530 U.S. 220 (2005), and therefore a judge has even greater latitude to impose a fine above or below the range calculated by the Guidelines.

Commissioner Carlton believes that additional proceedings designed to create more individually tailored base fines are a waste of judicial and prosecutorial resources.

Commission's recommendation calls for allowing such proof only if it would materially change the base fine. This would limit the increases in duration and costs of the sentencing process to instances where the sentence would be most disproportionate (whether too low or too high) to the harm actually caused.

The Commission's recommended rebuttal procedure is not intended to reduce the government's burden of proof when it seeks to impose a fine above the statutory maximum of the Sherman Act. As the government acknowledges, in those instances it must prove gain or loss beyond a reasonable doubt to establish a higher maximum fine. Accordingly, if the government sought to use this procedure to increase the base fine, with a resulting sentence that exceeds the applicable Sherman Act maximum, it would remain obliged to make the proof of gain or loss beyond a reasonable doubt, pursuant to Section 3571(d), for the court to impose that fine, and the burden of proof would not shift. If the government failed to meet this burden, any higher sentence resulting from an increased base fine would remain limited by maximum fine amounts provided for in the Sherman Act.

54. No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to "bid-rigging, price-fixing, or market allocation agreements among competitors," and the Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.

The antitrust section of the Sentencing Guidelines specifies that its calculation of penalties is applicable only to bid-rigging, price-fixing and market allocation offenses—that is "hardcore" Section 1 offenses.[63] The Sentencing Guidelines do not, as some suggest,[64] purport to apply to other types of anticompetitive conduct, such as that which might violate Section 2 of the Sherman Act. Indeed, the Sentencing Commission decided to limit these provisions to those offenses because of the DOJ's historical practice not to prosecute other types of antitrust offenses.[65] As explained above, the Commission endorses continuation of this discretionary limitation. Should the DOJ's prosecutorial policy change in the future, it would be appropriate for the Sentencing Commission to revisit this aspect of the Sentencing Guidelines.

Notes

[1] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (describing price-fixing as having a "pernicious effect on competition and lack[ing] . . . any redeeming virtue"); Robert H. Bork, The Antitrust Paradox 268 (1978) [hereinafter Bork, Antitrust Paradox].

[2] Scott D. Hammond, Acting Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program, Speech Before ABA Mid-winter Leadership Meeting, at 1 (Jan. 10, 2005) [hereinafter Hammond, Recent Developments in the Antitrust Division's Criminal Enforcement Program].

[3] Department of Justice, Antitrust Division, Antitrust Enforcement and the Consumer, *available at* http://www.usdoj.gov/atr/public/div_stats/211491.htm; *see also* William J. Kolasky, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, A Culture of Competition for North America, Speech Before Economic Competition Day: Shared Experiences, Federal Competition Commission, at 3 (June 24, 2002) (stating that "the magnitude of harm from cartels is in the billions of dollars annually").

[4] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 188 Stat. 661, 668 [hereinafter ACPERA] (codified as amended at 15 U.S.C. §§ 1–3) (increasing criminal maximum penalties from $10 million to $100 million in fines for corporate defendants; from $350,000 to $1 million in fines for individuals; and from 3 to 10 years in prison); U.S.A. Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 113(g)(3), 120 Stat. 192, 210 [hereinafter U.S.A. Patriot Improvement and Reauthorization Act] (codified as amended at 18 U.S.C. § 2516 (1)(r)) (allowing the Antitrust Division to seek wiretaps for criminal violations of Sections 1, 2, and 3 of the Sherman Act).

[5] Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Charting New Waters in International Cartel Prosecutions, Speech Before 20th Annual Nat'l Institute on White Collar Crime, ABA Criminal Justice Section, at 2 (Mar. 2, 2006) [hereinafter Hammond, International Cartel Prosecutions] ("Antitrust authorities around the world have become increasingly aggressive in investigating and sanctioning cartels that victimize their consumers.").

[6] *See* David E. Vann Jr. & Ethan E. Litwin, *Recent Developments in International Cartel Enforcement*, *in* Global Competition Review: Cartel Regulation 3 (2006).

[7] Global Competition Review: Cartel Regulation 198–207 (2006).

[8] Hammond, International Cartel Prosecutions, at 6.

[9] ACPERA. § 113(g)(3) (codified as amended at 15 U.S.C. §§ 1–3).

[10] Scott D. Hammond, Statement at AMC Criminal Remedies Hearing, at 2–3 (Nov. 3, 2005) [hereinafter Hammond Statement].

[11] Criminal Remedies Transcript at 53 (Hammond) (Nov. 3, 2005); Thomas O. Barnett, Statement at AMC Barnett/Majoras Hearing, at attachment 2 (Mar. 21, 2006) [hereinafter Barnett Statement].

[12] In 2004 Congress enacted statutory changes to the Antitrust Division's Leniency Program that would allow a successful amnesty applicant to be liable for only single damages in a civil follow-on action, if that amnesty applicant cooperated with the civil plaintiffs. ACPERA, § 213 (codified as amended at 15 U.S.C. § 1 note).

[13] U.S.A. Patriot Improvement and Reauthorization Act, § 113(g)(3) (codified as amended at 18 U.S.C. § 2516(1)(r)) (allowing the Antitrust Division to seek wiretaps for criminal violations of Sections 1, 2, and 3 of the Sherman Act).

[14] Hammond, Recent Developments in the Antitrust Division's Criminal Enforcement Program, at 5 (the Division has entered antitrust cooperation agreements with Brazil, Israel, Japan, Mexico, Australia, Canada, the European Union, and Germany).

[15] *See* Kenneth G. Starling, *Criminal Antitrust Enforcement*, 57 Antitrust L.J. 157, 159 (1988).

[16] Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, A Summary Overview of the Antitrust Division's Criminal Enforcement Program, Speech Before New York State Bar Association Annual Meeting, at 4 (Jan. 20, 2003) ("In some matters currently under legislation, the volume of commerce affected by the suspected conspiracy is well over $1 billion per year and in more than two-thirds of our international investigations, the volume of commerce affected is over $100 million over the term of the conspiracy."); *see also* Barnett Statement, at attachment 1 (reflecting criminal fines imposed from 1996 to 2006 ranging from $10 million to $500 million, the most recent being $300 million imposed in 2006 for the DRAM conspiracy).

[17] American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Sentencing Guidelines, at 4 (Nov. 14, 2005) [hereinafter ABA Comments re Sentencing Guidelines]; Anthony V. Nanni, Statement at AMC Criminal Remedies Hearing, at 6–7 (Nov. 3, 2005) [hereinafter Nanni Statement].

[18] *See* Report of the Attorney General's National Committee to Study the Antitrust Laws 350 (1955) (limiting prosecution to price-fixing and certain other types of violations); The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and its Impact—An Assessment 110 (1967) (limiting prosecution to "willful" violations).

[19] *See* United States v. Empire Gas Co., 537 F.2d 296 (8th Cir. 1976) (unsuccessful prosecution under Section 2 for attempted monopolization through destruction of competitor's assets); United States v. Cuisinarts, Inc., Crim. No. J. 80-49 (D. Conn. 1981) (plea *nolo contendre* to Sherman Act indictment for resale price maintenance); *see also* Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693, 695 n.14 (2001).

[20] R. Hewitt Pate, Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Vigorous And Principled Antitrust Enforcement: Priorities And Goals, Address Before ABA Section of Antitrust Law Annual Meeting, at 6 (Aug. 12, 2003) (the DOJ brings criminal charges only against "hard-core cartel activity that each and every executive knows is wrongful. The cases we criminally prosecute at the Division are not ambiguous. They involve clandestine activity, concealment, and clear knowledge on the part of the perpetrators of the wrongful nature of their behavior."); Criminal Remedies Trans. at 83 (Hammond) (The DOJ will not prosecute cases in which "there is some innocent explanation here or some inadvertence, that they crossed the line without meaning to.").

[21] *Northern Pacific*, 356 U.S. at 5 (describing price-fixing as having a "pernicious effect on competition and lack[ing] . . . any redeeming virtue"); Bork, Antitrust Paradox 268.

[22] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

[23] United States v. Sealy, Inc., 388 U.S. 350, 358 (1951).

[24] *See, e.g.*, Broadcast Music, Inc. v. CBS, 441 U.S. 1, 23–24 (1978).

[25] *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) (explaining that price discounts, so long as they are above some measure of cost are always lawful in light of the high likelihood that consumers benefit from the lower prices they bring); State Oil Co. v. Kahn, 522 U.S. 3, 14 (1997) (holding that restrictions on maximum resale price imposed by distributor had the potential to "stimulate interbrand competition").

[26] ABA Comments re Sentencing Guidelines, at 4–5 (applauding the Division's "self-imposed discretion," but still advocating that this Commission make it clear that only hard-core antitrust violations be prosecuted criminally).

[27] *See, e.g.*, United States v. Wilder, 15 F.3d 1292 (5th Cir. 1994) (Section 3571(d) invoked to enhance penalty in case involving defrauding financial institutions and conspiring to defraud the federal government); United States v. Leonard, 37 F.3d 32 (2d Cir. 1994) (section 3571(d) implicated in tax evasion case); United States v. Foote, No. CR.A. 00-20091-01-KHV, 2003 WL 2466158, *1 (D. Kan. July 31, 2003) (Section 3571(d) used to enhance penalty for trafficking of counterfeit goods).

[28] 18 U.S.C. § 3571(d).

[29] Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants, Address Before ABA Section of Antitrust Law, Spring Meeting (Mar. 30, 2005).

[30] ABA Comments re Sentencing Guidelines, at 6 n.13.

[31] See Thomas O. Barnett, Public Comments Submitted to AMC, at 1 (July 24, 2006) (stating that without Section 3571(d), the DOJ and the sentencing courts would be forced to "treat companies that caused the greatest harm . . . the same as other violators"); American Antitrust Institute, Public Comments Submitted to AMC Regarding Alternative Fines Statute, at 2 (June 30, 2006) [hereinafter AAI Comments re Alternative Fines Statute] (statutory maximum not likely to be increased sufficiently to provide adequate fines for largest cartel cases); Philip C. Zane, Public Comments Submitted to AMC Regarding Alternative Fines Statute, at 1 (June 30, 2006) [hereinafter Zane Comments re Alternative Fines Statute].

[32] Hammond Statement, at 2.

[33] Apprendi v. New Jersey, 530 U.S. 466 (2000); *see also* Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 127 S. Ct. 856 (2007).

[34] *Apprendi*, 530 U.S. at 490; *see also Booker*, 543 U.S. at 244 (confirming holding of *Apprendi*).

[35] Criminal Remedies Trans. at 43 (Hammond) (stating that DOJ will "have to prove [gain or loss] to a jury beyond a reasonable doubt").

[36] AAI Comments re Alternative Fines Statute, at 3 ("Proof of gain or loss in most antitrust cases involves complex econometric analysis about how markets would have performed in the absence of the unlawful conduct."); Zane Comments re Alternative Fines Statute, at 2.

[37] Tefft W. Smith, Statement at AMC Criminal Remedies Hearing, at 27 (Nov. 3, 2005) [hereinafter Smith Statement] (stating that Section 3571(d) "cannot even be applied where, as in an antitrust case, the Division would need to engage in a civil damage trial-like proceeding, because that would 'unduly complicate the sentencing process'"); *id.* at 25 ("Isn't 'twice the gain or loss' virtually unprovable under § 3571 as 'unduly complicating the sentencing proceedings'?").

[38] ABA Comments re Sentencing Guidelines, at 9 n.20; *see* Tara L. Reinhart et al., *The Business of Sentencing: Facing the Facts After* Blakely*,* Booker*, and* FanFan, ANTITRUST SOURCE, at 4 (Jan. 1, 2005) (stating that with respect to Section 3571(d) calculations, "the Division offers little more than a stipulation, which the Probation Office adopts"); Antitrust Division and Mitsubishi Corporation Plea Agreement, No. 00-033, at 4 (May 10, 2001) ("[T]he United States and Mitsubishi stipulate that the loss to the victims and/or the gain to Mitsubishi and others from the offense is sufficient to support a fine of $134 million [under Section 3571(d)]."), *available at* http://www.usdoj.gov/atr/cases/f8200/8204.htm.

[39] U.S. SENTENCING GUIDELINES MANUAL (2005) [hereinafter U.S.S.G.].

[40] *Booker*, 543 U.S 220.

[41] U.S.S.G. § 8C2.4(a)(3); *see* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, SENTENCING GUIDELINES IN ANTITRUST: A PRACTITIONER'S HANDBOOK 43 (1999) (Robert E. Hauberg, Jr. et al. eds., 1999).

[42] U.S.S.G. § 2R1.1(d)(1). The use of the 20 percent harm proxy is not discretionary. *See id.* § 8C2.4(b) (a "special instruction for organizational fines . . . *shall* be applied") (emphasis added).

[43] A recent Supreme Court case has rendered the Sentencing Guidelines advisory only. *See Booker*, 543 U.S. at 245.

[44] *See* U.S.S.G. § 2R1.1(d)(2); *id.* at § 8C2.6.

[45] *Id.* at § 8C2.5.

[46] *Id.* at § 2R1.1 cmt. 3.

[47] Hammond Statement, at 8 (citing Supplemental Legislative History by Reps. Sensenbrenner and Conyers, 150 CONG. REC. H3658 (daily ed. June 2, 2004)).

[48] *Id.* at 7.

[49] *Id.* at 6–7.

[50] U.S.S.G. § 2R1.1 cmt. 3.

[51] *Id.* These costs derive from allocative inefficiency, which includes such inefficiencies that result from consumers who either do not purchase the product because of its artificially high price or who purchase an inferior substitute product. *See id.*

[52] John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 Tul. L. Rev. 513, 540–41 (2005); *see* Comments of the American Bar Association, Section of Antitrust Law, on the Proposed Amendments to the Antitrust Recommendations of the United States Sentencing Guidelines, at 21 (Mar. 2005) [hereinafter ABA Comments to Sentencing Commission]. For instance, in *FTC v. Mylan*, the alleged overcharge was 1900 percent to 3200 percent. Had that case been prosecuted criminally, a fine based on a 10 percent overcharge and 10 percent deadweight loss would have been well below the estimated harm. *See FTC v. Mylan Labs., Inc.*, Amended Complaint, at ¶ 29, Civ. No. 1:98CV03114 (D.D.C. Feb. 8, 1999).

[53] Nanni Statement, at 9–10; Smith Statement, at 18–19, 21.

[54] ABA Comments re Sentencing Guidelines, at 9–10 & n.21 ("If subsequent events have shown that the determination of gain or loss in antitrust cases is not as complex as the Sentencing Commission assumed in 1991, there is no need to continue to base antitrust fines or jail sentences on volume of affected commerce as opposed to actual harm as is done in most other federal economic crimes.").

[55] Hammond Statement, at 6–7.

[56] *Id.*; Charles R. Tetzlaff, Statement at AMC Criminal Remedies Hearing, at 2 (Nov. 3, 2005) (identifying Guidelines goals as punishment, deterrence, incapacitation, and rehabilitation); *id.* at 4 (noting that Congress endorsed the Guidelines' 20 percent harm proxy, finding that it was sufficient to promote the interests of justice); Criminal Remedies Trans. at 26 (Nanni) (stating that a corporation's volume of commerce "roughly reflects its importance to the conspiracy . . . [and] that the Guidelines in terms of fines gets roughly to the right place").

[57] Criminal Remedies Trans. at 104 (Hammond) (it "creates a bigger headache"); *see* Hammond Statement, at 3–4 (stating "the increases in the Sherman Act statutory maximum fines are intended to permit courts to impose fines for antitrust violations at current Guidelines levels without the need to engage in damages litigation during the criminal sentencing process") (quoting 150 Cong. Rec. H3658 (daily ed. June 2, 2004).

[58] Julie R. O'Sullivan, *Federal Criminal Code*, 96 J. Crim. L. & Criminology 643, 646 (2006) (stating that the Sentencing Commission wanted to create a "'real offense' sentencing system—that is, a system where the sentence . . . was based on the 'real' circumstances of [the offender's] case").

[59] ABA Comments re Sentencing Guidelines, at 7.

[60] *See id.* at 12 n.30 (stating that the Sentencing Guidelines generally do not create proxies for harm for other white-collar crimes and that that calculation of the actual impact "is more consistent with how penalties are imposed in other white collar prosecutions"); *see also* ABA Comments to Sentencing Commission, at 21.

[61] ABA Comments to Sentencing Commission, at 20 (stating that it is possible that the Sentencing Commission "has not considered whether [*Booker*] requires amendment or removal of the current method of calculating the base fine for an organization that commits an antitrust violation").

[62] *See* Smith Statement, at 20; Nanni Statement, at 9–10.

[63] U.S.S.G. § 2R1.1 ("Bid-rigging, Price-Fixing or Market Allocation Agreements Among Competitors"); American Bar Association, Public Comments Submitted to the AMC Regarding Alternative Fines Statute, at 4 (June 30, 2006).

[64] ABA Comments to Sentencing Commission, at 5.

[65] U.S.S.G. § 2R1.1 & Background (stating that "there is near universal agreement that . . . horizontal price-fixing (including bid-rigging) and horizontal market allocation . . . cause serious economic harm . . . [and] other types of antitrust offenses . . . are rarely prosecuted").

Chapter IV

Government Exceptions to Free-Market Competition

Chapter IV.A
The Robinson-Patman Act

1. INTRODUCTION

Congress passed the Robinson-Patman Act in 1936 to respond to the concern of small businesses—such as "mom and pop" grocery stores—that they were losing share to larger supermarkets and chain stores and in some cases were being forced to leave the market. Small businesses complained that they could not obtain from suppliers the same price discounts that larger businesses demanded and received.

To address this concern, Congress passed the Robinson-Patman Act (RP Act or Act), which prohibits sellers from offering different prices to different purchasers of "commodities of like grade and quality" where the difference injures competition.[1] Different discount levels, or lower prices, can be offered only where: (1) the same discount is practically available to all purchasers; (2) a lower price is justified by a lower per-unit cost of selling to the "favored" buyer; (3) a lower price is offered in good faith to meet (but not beat) the price of a competitor; or (4) a lower price is justified by changing conditions affecting the market or marketability of the goods, such as where goods are perishable or seasonal or the business is closing or in bankruptcy. Other provisions of the Robinson-Patman Act ensure the goal of equal pricing by restricting the use of commissions and promotional expenses, for example. The Supreme Court has described the purpose of the Act:

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages . . . .[2]

In its operation, however, the Act has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would. As one commentator has explained, the Robinson-Patman Act "was designed to protect small businesses from larger, more efficient businesses. A necessary result is higher consumer prices."[3] Moreover, the Act ironically appears increasingly to be ineffective even in protecting small businesses. Over time, many businesses have found ways to comply with the Act by, for example, differentiating products, so they can sell somewhat different products to different purchasers at different prices. Such methods are likely to increase the seller's costs—and thus increase costs to consumers—but do nothing to protect small businesses. The Act generally appears to have failed in achieving its main objective.

An act that *restricts* price and other forms of competition is fundamentally inconsistent with the antitrust laws, which *protect* price and other types of competition that benefit consumers. Less than twenty years after Congress enacted the Robinson-Patman Act, the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws expressed hope that courts would reconcile interpretations of the Robinson-Patman Act with "broader antitrust policies" and "[a]ccommodate all legal restrictions on the distribution process to dominant Sherman Act policies."[4] Fourteen years later, the Report of the White House Task Force on Antitrust Policy (Neal Report) concluded, "the Robinson-Patman Act requires a major overhaul to make it consistent with the purposes of the antitrust laws."[5] In 1977 the Department of Justice Report on the Robinson-Patman Act (1977 DOJ Report) similarly found that the evidence "raises serious questions whether the Act advances the competitive goals of other antitrust laws."[6] Both the Neal Report in 1969 and the 1977 DOJ Report recommended repeal or substantial modification of the Act due to the Act's high costs, limited or non-existent benefits, and inconsistency with other antitrust laws.[7] In particular, the 1977 DOJ Report concluded that "serious consideration" should be given to repeal of the Robinson-Patman Act,[8] and presented draft legislative options.[9]

In light of these longstanding issues, this Commission also examined the Robinson-Patman Act. The Commission makes the following recommendation.

55. Congress should repeal the Robinson-Patman Act in its entirety.*

The time has come to abandon piecemeal proposals for legislative changes to, or new court interpretations of, the Robinson-Patman Act. The Act is fundamentally inconsistent with the antitrust laws and harms consumer welfare. It is not possible to reconcile the provisions of the Act with the purpose of antitrust law; repeal of the entire Robinson-Patman Act is the best solution.

* Commissioner Shenefield does not join this recommendation in full.
Commissioner Yarowsky joins this recommendation with qualifications.

2. BACKGROUND

A. The Robinson-Patman Act and Its Case Law

1. History of the Act

The history of the Robinson-Patman Act began in 1914, when Congress first acted to prohibit certain forms of differential pricing through passage of Section 2 of the Clayton Act. At that time, Congress was primarily concerned with price predation through which the trusts might selectively reduce prices to below-cost levels to drive rivals from the market and hamper entry by would-be rivals to replace that lost competition.[10] The statutory language of Section 2 of the Clayton Act was not limited to those situations, however; it was broad enough also to prohibit price differences that disadvantaged one purchaser over another.[11]

By 1936, during the Great Depression, Congress was concerned that the growth of large chain stores was harming small "mom and pop" competitors. Congress undertook to strengthen the original Clayton Act to give small businesses greater protection from what Congress saw as large, powerful buyers extracting favorable concessions from their suppliers to the detriment of smaller competitors.[12] In particular, Congress wanted to rein in volume discounts, which were then permitted under Section 2 of the Clayton Act, as construed by the courts.[13] To achieve this purpose, Congress removed the provision permitting volume discounts.[14]

At the same time, Congress added an alternative standard for the type of competitive injury required to violate the new statute. The courts had interpreted the original language in the Clayton Act to require a plaintiff to show that the price differences it faced had caused a "generalized competitive injury."[15] The language Congress added in 1936 also prohibited price differences where the effect may be "to injure, destroy, or prevent competition *with any person . . . or with customers of either of them*."[16] This language does not ask whether the price differences have caused higher prices, lower output, or other anticompetitive effects in a relevant market. Rather, as the Supreme Court later held, this language "was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'"[17]

2. Conduct Prohibited by the Act

The Robinson-Patman Act is commonly known as a price discrimination statute. Although economists do not uniformly agree on the precise definition of price discrimination, their definitions generally focus on the sale from the seller's perspective. This Report will use the definition endorsed by some economists as the economic definition of price discrimination—that is, price discrimination is "charging different customers prices that are not in proportion to marginal costs."[18] Under this definition, whether conduct amounts to price discrimination depends on whether the seller's margin between price and cost differs among the buyers to whom it sells.

By contrast, "price differences"—that is, charging different prices to different buyers—focus on the sale from the buyer's perspective. The key question is whether different buyers pay different prices for products of like grade and quality. The Robinson-Patman Act asks this question and allows such differential pricing only if particular, limited justifications are proven. Thus, the Act is arguably more of a "price differences" statute than a "price discrimination" statute.[19] Nonetheless, because the Act is understood as a price discrimination statute, this Section generally uses the term "price discrimination" to refer to price differences that the Act addresses.

The structure of the Robinson-Patman Act is to prohibit certain conduct and then provide exceptions from those prohibitions. As a general matter, Section 2(a) of the Robinson-Patman Act prohibits non-cost-justified price discrimination that causes competitive injury.[20] For example, if a manufacturer sold the same product to a large retailer at a lower price than to a small retailer, the disfavored, small retailer could allege that the manufacturer (and possibly the favored, large buyer) violated the Robinson-Patman Act.

To establish seller liability under Section 2(a), a plaintiff must show: (1) the relevant sales were made in interstate commerce; (2) the products were of like grade and quality; (3) the seller (defendant) discriminated in price between the plaintiff and another purchaser; and (4) the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of the favored purchaser.[21] Courts have allowed the plaintiff to prove the "favored competitor received a significant price reduction over a substantial period of time" as a means to show the price discrimination substantially lessened competition.[22]

The Robinson-Patman Act addresses other forms of discrimination in the terms of sale as well, largely to prevent sellers from effectively price discriminating through other means. To prevent disguised price discrimination, Section 2(c) prohibits parties to a transaction from receiving brokerage fees or commissions, except for services rendered.[23] Sections 2(d) and 2(e) require that promotional allowances and services be available on proportionately equal terms to all competing customers.[24]

Liability under the Robinson-Patman Act is not limited to sellers. Section 2(f) of the Act makes it unlawful for buyers "knowingly to induce or receive a discrimination in price" that is prohibited by the Act.[25] This provision was designed to address concerns that large buyers would use their buyer power to extract lower prices from manufacturers or suppliers.[26] Many observers argue that it is difficult to prove buyer liability, however.[27] Buyers cannot be held liable unless the plaintiff can establish a *prima facie* case against the seller and overcome any affirmative defenses that a seller could raise.[28]

Robinson-Patman Act claims generally can be characterized as either primary-line or secondary-line claims.[29] Primary-line claims allege that price discrimination by a manufacturer injures competition at the manufacturer level by harming one or more of the manufacturer's competitors. The theory behind primary-line claims is that a manufacturer might sell its product below cost to certain stores, so that a competing manufacturer would not be able to meet the lower prices and would go out of business; this theory depends on high entry barriers that would prevent entry to replace the lost competitor. In such a case, the competing manufacturer would complain of a primary-line injury.

This type of conduct—price predation at the manufacturer level—involves the acquisition or maintenance of market power through below-cost sales. In 1993 the Supreme Court held that primary-line claims must meet standards similar to those applied to predatory pricing claims brought under Section 2 of the Sherman Act.[30] The Court explained that primary-line injury is "of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act."[31] This interpretation has largely eliminated calls for further reform regarding primary-line claims.

A broad range of cases may raise claims of secondary-line injury, however. Secondary-line claims involve injury alleged at the level of the distributor or retailer, one step removed from the manufacturer that offered the discount. For example, a small retailer that did not receive the same discount as a larger retailer from the same manufacturer might allege secondary-line injury.

Section 3 of the Robinson-Patman Act authorizes the government to seek criminal penalties against any person who participates in a transaction he knows discriminates against a competitor of the purchaser or involves charging "unreasonably low prices" or different prices in a different part of the United States "for the purpose of destroying competition or eliminating a competitor."[32] This criminal provision of the Act has not been enforced since the 1960s.[33]

3. Affirmative Defenses to Section 2(a) of the Act

Four basic affirmative defenses are available to Robinson-Patman Act defendants. Section 2(a) itself provides for an affirmative defense if the difference in price is cost-justified.[34] For example, if volume discounts for a product are attributable solely to lower per-unit production and shipping costs—that is, if it is cheaper per unit for the manufacturer to make and send 100 widgets than just 20 widgets to a retailer—then those cost savings are permitted to be passed on to that retailer in the form of a lower price per unit. Section 2(a) also provides an affirmative defense for price differences resulting from a "response to changing conditions affecting the market for or marketability of the goods concerned."[35] This defense allows price differences if the demand for the product has decreased significantly due to the perishable nature of the goods, obsolescence of seasonal goods, or discontinuance of the product.[36] Section 2(b) of the Act allows an affirmative defense to Section 2(a) claims if the discriminatory pricing is offered "in good faith to meet an equally low price of a competitor" (also known as the meeting-competition defense).[37] Lastly, courts have also provided an affirmative defense if the advantageous price was practically or functionally available to the disfavored buyer.[38]

Some affirmative defenses are difficult to prove. For example, it is generally recognized as difficult and costly to meet the requirements of the cost-justification defense because the seller must be able to prove actual cost savings equal to or greater than the price difference.[39] On the other hand, courts have become more receptive to the meeting-competition defense over time. In 1983 the Supreme Court held that a seller could meet the generally lower price structure of a competitor in a different geographic market without demonstrating that it was meeting competition on a customer-by-customer basis.[40] Thus, if there were more competition in one area than another, the meeting-competition defense would permit the seller to charge different prices in the two areas.

B. Enforcement of the Robinson-Patman Act

Private parties, the Federal Trade Commission (FTC), and the Antitrust Division of the Department of Justice (DOJ) may enforce the Robinson-Patman Act. The Act is currently enforced primarily through private treble damages actions.[41] As a practical matter, the FTC is the only government enforcer of the Act; the DOJ has left civil enforcement of the Act to the FTC and has not enforced the criminal provisions since the 1960s.[42]

During the first three decades after the Act's passage, the FTC devoted "an overwhelming preponderance" of its antitrust resources to Robinson-Patman Act enforcement.[43] Beginning in 1969, however, the FTC sharply contracted its RP Act enforcement efforts.[44] From 1965 to 1968, the FTC undertook an average of 97 formal investigations and issued an average of 27 complaints annually.[45] By contrast, from 1975 to 1978, the FTC averaged only 4.3 formal investigations and 3 complaints annually.[46] The FTC has issued only one RP Act complaint since 1992.[47]

Private litigation under the Act also has fallen, and plaintiff success has been limited. Of 200 reported cases with Robinson-Patman Act claims filed in federal court in the past ten years, only three jury verdicts in favor of plaintiffs were affirmed on appeal.[48] One of these three was reversed by the Supreme Court.[49] Some observers believe this decline is related to the adoption of more restrictive judicial interpretations of the Act.[50] For example, the Supreme Court has held that an RP Act plaintiff is not entitled to "automatic damages" equal to the amount of the discount it did not receive,[51] but rather "ordinarily must show that it lost customers or profits because the favored customer used the discount either to lower its resale prices or otherwise to solicit business."[52]

3. RECOMMENDATION AND FINDINGS

55. Congress should repeal the Robinson-Patman Act in its entirety.*

By broadly discouraging price discounts, the Robinson-Patman Act potentially harms competition and consumers. The goal of the antitrust laws is to protect *competition* that benefits consumers. The Robinson-Patman Act does not promote competition, however. Instead, the Act protects *competitors*, often at the expense of competition that otherwise would benefit consumers,[53] thereby producing anticompetitive outcomes. The Act prevents or discourages discounting that could enable retailers to lower prices to consumers. "The chief 'evil' condemned by the Act [is] low prices, not discriminatory prices."[54] The Act thus reflects "faulty economic assumptions" and a significant "misunderstanding of the competitive process."[55]

Assuming that either price differences or price discrimination (as defined by economists) always or almost always harms consumers is inconsistent with fundamental economic principles. Price discounting generally benefits consumers. Price discrimination, as defined by economists, that is directed at ultimate consumers can have beneficial or harmful impacts, depending on the circumstances.[56] However, the Robinson-Patman Act is not targeted at harmful price discrimination. Rather, it condemns low prices.[57] Economists point out that "[t]he difficulty is to distinguish in practice between [beneficial] discrimination and systematic discrimination practiced by an entrenched monopolist that may be harmful. Hence, laws against price discrimination are difficult to write and enforce if they are to promote competition."[58]

* Commissioner Shenefield does not join this recommendation in full. He recommends repeal of Section 3 of the Act (the criminal provision) as well as 2(c)—the brokerage provision. He favors amending or reinterpreting the statute to make it clear that plaintiffs in secondary-line cases must prove competitive injury through the existence either of market power or buyer power in order to prevail under 2(a). This would cover 2(f) as well. He would introduce a parallel competitive injury requirement into 2(d) and 2(e) as well. Finally, he would relax the cost-justification standard by permitting a preferential price that was "reasonably related" to cost savings attributable to dealing with the favored buyer. Commissioner Shenefield further explains his position in his separate statement.

Commissioner Yarowsky joins the recommendation with the following qualification: In his view, the question unanswered by the Commission is not whether Robinson-Patman is working well—it clearly is not—but whether any price discrimination provision has a role to play in the generic antitrust laws, not just the tortured language of the current statute. On a number of occasions, Congress has considered, or delegated to various regulatory agencies, the creation of mechanisms to oversee price discrimination activities in various industries. With the disappearance of Robinson-Patman, we may well witness the proliferation of even more industry-specific regimes to combat price discrimination. Based on that experience, he believes Congress should actively reconsider the question of whether a re-sculpted, down-sized generic provision would have utility.

The Act imposes other, more indirect costs as well. Some firms incur costs through efforts to comply with the Act. Compliance efforts—such as differentiating products solely to avoid selling "commodities of like grade and quality" to different purchasers at different prices—can raise prices to consumers. Small businesses can incur greater costs in obtaining supplies when manufacturers sell only to large, not small, retailers to avoid violating the Act. All of these costs are likely to result in higher prices to consumers than would be the case if the Robinson-Patman Act were not on the books.

The economic reality is that price differences and price discrimination typically benefit, not harm, consumers. To the extent that price discrimination (as defined by economists) may harm consumer welfare, other antitrust laws already address such conduct. For all of these reasons, as explained in detail below, the Robinson-Patman Act should be repealed.

A. The Robinson-Patman Act Is Likely to Harm Competition and Consumer Welfare by Prohibiting or Discouraging Price Discrimination that Lowers Prices to Consumers

Wide agreement exists that many forms of price discrimination are procompetitive and beneficial to consumers. As long ago as 1969, the Neal Report pointed out that "most price discrimination is affirmatively beneficial to competition," and the instances in which price discrimination harms competition "are exceptional."[59] A substantial amount of recent economic literature shows that price differences among buyers of the same product are ubiquitous and occur in industries with many competitors and free entry that are generally viewed as operating in a competitive manner.[60]

1. Many legitimate, procompetitive reasons exist for price discrimination

Prices to different purchasers for the same or similar products differ for many legitimate reasons. Manufacturers and distributors negotiate prices based not only on costs of production, but on many other factors as well. One important factor is the relative supply and demand characteristics of the parties. One buyer may value the product more than another buyer and therefore may be willing to pay more for the product. A buyer may have more leverage in price negotiations if it can purchase from another supplier or produce the item itself, if the price is not to its liking. The same would be true for the supplier, if it could sell to other purchasers if it was not satisfied with the price offered by the buyer.

Beyond the supply and demand characteristics of individual firms, price differences can reflect differences in supply and demand in different geographic markets. As the Supreme Court has pointed out, levels of competition may vary in different geographic markets, and the "very purpose of the [meeting-competition] defense is to permit a seller to treat different competitive situations differently."[61] It is not at all clear, however, that the meeting-competition defense would cover all situations in which a manufacturer might wish to differentiate in pricing to reflect different supply and demand conditions in different geographic markets.

Volume discounts further illustrate legitimate reasons for price differences between purchasers. A manufacturer may be willing to accept discounted prices on a large order for its products for a number of reasons. First, a large order may allow the seller to achieve scale economies in manufacturing, which makes the large order less costly to fill. As explained above, scale economies and their relationships to price differences can be very difficult to prove, however.[62] Second, the per-unit cost of delivering a large order may be less than delivering a small order. Third, the large order may reduce the manufacturer's risk of not being able to sell as many products overall. A volume discount also may reflect other means by which a manufacturer wishes to improve its competitiveness. A manufacturer may discount to encourage a new purchaser to try its products in hopes that the first purchase will lead to future purchases. A manufacturer may wish to compensate or provide incentives to a distributor that aggressively promotes the manufacturer's products. The Robinson-Patman Act, however, impedes agreements that afford volume discounts. Indeed, preventing volume discounts was a principal objective of the Act.

Price discrimination can lead to cost-saving distribution practices that are efficient and normally lawful under the Sherman Act.[63] Manufacturers typically prefer that their distribution systems function in a competitive manner because this helps them compete more effectively against other manufacturers. Providing greater discounts—that is, charging lower prices—to a manufacturer's more aggressive distributors is generally procompetitive. It can prevent less aggressive distributors from free riding on the promotional services or quality of service provided by the manufacturer's more aggressive distributors, and, by encouraging competition among the distributors, it also can increase the quality of service they provide.[64] Manufacturers are more likely to use price discrimination among their distributors to increase competition at both the manufacturer and distributor levels than to reduce the competitiveness of the manufacturers' distribution systems.[65]

Whether a buyer may be willing to purchase significant quantities is another factor that can influence price negotiations. Typically, buyers that account for a significant portion of a manufacturer's sales bargain hard to get price discounts from the manufacturer; they can be described as having "bargaining power."[66] The discounts obtained through bargaining power can reduce a buyer/retailer's marginal cost, and thereby allow the buyer/retailer to pass on those cost savings to consumers. In fact, empirical evidence on drugstore and grocery products indicates that the presence of large chains, which typically have bargaining power, lowers prices to consumers.[67] Retailer bargaining power also could be better used to mitigate seller market power, absent the potential for Robinson-Patman Act liability.[68]

The Robinson-Patman Act, however, aims to prevent buyers from using their bargaining power to obtain these discounts, unless certain requirements are met. Some argue that the Supreme Court's interpretation of Section 2(f) has made buyer liability difficult to prove.[69]

Nonetheless, the Act creates some level of uncertainty about whether firms with bargaining power can bargain hard to obtain lower prices than less efficient competitors, and it also may provide an excuse for sellers that do not want to lower their prices for hard-bargaining buyers. Thus, the Act can discourage discounting that otherwise would lead to lower consumer prices.

2. Price differences can increase price competition and can encourage entry

The Robinson-Patman Act inhibits price competition that could lead to lower prices in oligopolies. In oligopolies firms monitor each other and recognize their mutual interdependence. Competition in such industries is enhanced when prices vary across buyers, making it harder to keep track of one's rivals. This increased difficulty of keeping track of one's rivals leads generally to more competitive prices. Differential pricing thus can promote more aggressive pricing. Under the Robinson-Patman Act, however, sellers may not selectively lower prices to gain or to retain an important buyer.[70]

Price discrimination also provides a means for new firms to enter a market, thereby making the market more competitive. To enter a new market successfully, an entrant may need to offer prices lower than those charged by existing firms to win one or more large accounts that will provide the entrant with sufficient scale to produce its products efficiently.[71] To overcome existing commercial relationships, would-be entrants may need to reduce prices selectively to such large accounts. The Robinson-Patman Act can make such entry unprofitable, however, by requiring a potential entrant to lower prices to *all* customers. Thus, the reduced price flexibility imposed by the Act can inhibit entry.

This inhibition on entry can prevent consumers from benefiting from the many types of increased competition that a new entrant may provide. New firms entering a market can benefit consumers by offering lower prices and putting downward pressure on prices. Moreover, even the potential for entry can spur existing firms in the relevant market to lower prices and increase quality. In sum, the Robinson-Patman Act requires price rigidity that imposes costs on consumers through higher prices, lower quality, and less choice than would be the case in its absence.

B. The Robinson-Patman Act Harms Consumer Welfare by Protecting Competitors, Rather than Competition

The purpose of the antitrust laws is to protect competition overall, not individual competitors.[72] Consumer welfare is protected by competition, not necessarily by the presence of a particular competitor in a relevant antitrust market.[73]

The Robinson-Patman Act stands this notion on its head. The language Congress added in 1936 prohibited price discrimination where the effect may be "to injure, destroy, or prevent competition *with any person . . . or with customers of either of them*."[74] Courts have interpreted this language to mean that an injury to an individual competitor through price discrimination is sufficient to prove a violation of the Act.[75] This is inconsistent with the purpose of the antitrust laws as interpreted by the courts.

In 1948 the Supreme Court held that the Robinson-Patman Act "was intended to justify a finding of injury to competition by a showing of *injury to the competitor* victimized by the discrimination."[76] Moreover, the Court held, competitive injury could be inferred (the "*Morton Salt* inference") in secondary-line RP Act cases.[77] Simply showing that some merchants had to pay more than others was "adequate" to conclude that "the competitive opportunities of certain merchants were injured," the Court held.[78] Therefore, to achieve an inference of competitive injury in a secondary-line RP Act case, the *Morton Salt* inference requires that a plaintiff prove only that a "favored competitor received a significant price reduction over a substantial period of time."[79]

Most courts have applied the *Morton Salt* inference broadly, concluding that the statutory language of "competitive injury" in the Robinson-Patman Act refers solely to injury to an individual competitor, not to overall competition in a relevant market.[80] Under this standard, it does not matter if the defendant can show that competition in a relevant market in fact was *not* harmed. As the Ninth Circuit has stated (without any trace of irony), "in a secondary-line Robinson-Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition."[81]

Some circuits have applied the *Morton Salt* inference more narrowly, and held that competitive injury for purposes of the Robinson-Patman Act refers not to injury to individual competitors, but rather to competition overall in the relevant market. For example, the Eighth Circuit has held that the "Act refers not to the effect upon competitors, but to the effect upon competition in general[;] . . . analysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regardless of which competitor wins or loses."[82] Consistent with this interpretation, some circuits have held that the *Morton Salt* inference is rebuttable, provided the defendant can show that there has been no harm to overall competition in the relevant market. Specifically, the D.C. Circuit has held that the *Morton Salt* inference "*can . . . be overcome by evidence showing an absence of competitive injury . . .* [and that although] a sustained and substantial price discrimination raises an inference, . . . it manifestly does not create an irrebuttable presumption of competitive injury."[83] Similarly, in a consent decree enjoining certain conduct by McCormick & Co. found to violate the Robinson-Patman Act, the FTC stated that it was willing "to look past the *Morton Salt* factors" in certain market settings to determine whether there was injury to competition overall.[84]

Most recently, the Supreme Court's opinion in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.* renewed, albeit equivocally, the view that the Robinson-Patman Act protects competitors rather than competition.[85] When defining injury to competition, the Court stated that a "hallmark of the requisite competitive injury . . . is the diversion of sales or profits from a disfavored purchaser to a favored purchaser," and that "a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time."[86] The Court therefore reaffirmed the *Morton Salt* inference and indicated that a plaintiff must show only injury to a specific competitor, not injury to competition overall. In the final section of the opinion, however, the Court remarked that it resists "interpretation [of the Robinson-Patman Act] geared more to the protection of existing *competitors* than to the stimulation of *competition*."[87]

This very recent Supreme Court case reveals that, seventy years after passage of the Robinson-Patman Act, courts remain unable to reconcile the Act with the basic purpose of antitrust laws to protect competition and consumer welfare. The language in the Act regarding competitive injury has resulted in the protection of competitors, at the expense of competition overall and consumer welfare. There is no point in further efforts to reconcile the Act with the antitrust laws in general; the Robinson-Patman Act instead should be repealed.

C. The Robinson-Patman Act May Even Harm Small Firms in Some Cases

The methods that firms sometimes use to avoid liability under the Robinson-Patman Act can harm precisely the small businesses the Act intends to protect. For example, to avoid liability for price discrimination between larger and smaller retailers, a manufacturer can choose to sell its product exclusively to large retailers.[88] In such cases, small retailers may not be able to purchase the product at all, or may have to settle for second-best substitutes, due to the Robinson-Patman Act.[89] Alternatively, in the absence of an ability to price discriminate, manufacturers may switch to other means of promotion, such as national advertising, which (if subject to economies of scale) may disadvantage smaller competitors more than the prohibited discounts.

D. The Robinson-Patman Act Increases Costs of Doing Business and Likely Raises Prices to Consumers in a Variety of Ways

It is difficult to know the frequency and amounts of price discounts and corresponding savings for consumers that the Robinson-Patman Act has deterred.[90] In general, estimates of the effects of the Act have been based largely on anecdotal evidence and informed judgments about the way in which markets operate, rather than on systematically collected empirical evidence, which appears to be extremely limited.[91] Nonetheless, anecdotal evidence and informed judgment based on economic theory suggests that the additional costs to consumers of seventy years of forgone discounts are likely substantial. The Act's continued existence can discourage firms from taking procompetitive actions because doing so might lead to litigation asserting Robinson-Patman Act claims that, even were the litigation to be resolved in the company's favor, would involve distractions, expenses, and risks that make the procompetitive course of action not worth the cost of pursuing it.

Leaving aside the direct cost of lost discounts to consumers, the Act creates substantial compliance costs that also likely flow to consumers as higher prices. These costs include developing and operating compliance systems, training personnel, and obtaining legal advice.[92] There is typically strong interest in RP Act continuing-legal-education programs and instructional publications.[93] In addition, RP Act cases can be lengthy, complex, and expensive, even if the plaintiff does not ultimately win. These costs, too, are difficult, if not impossible, to quantify. The Commission did not receive any empirical data in response to its request for public comment on the compliance or litigation costs and benefits of the Act's enforcement. Nonetheless, there is no reason to believe that compliance and litigation costs are insignificant.

Putting aside these direct and indirect costs, the inefficient business practices that firms sometimes use to avoid liability under the Robinson-Patman Act impose costs that likely show up as higher consumer prices. For example, firms sometimes resort to inefficient product differentiation to avoid potential liability.[94] One method of avoiding liability under the Act is for a retailer to negotiate with a manufacturer to produce a product that is not "of like grade and quality" to products offered to other, possibly smaller retailers.[95] This enables the manufacturer to charge a much lower price than it legally could if it also provided the same product to smaller retailers. But the practice is wasteful because, but for the Robinson-Patman Act, there would likely be no need to package these products differently. As a result, with proper counsel and certain (albeit costly) techniques, sellers can avoid liability under the Act, but costs are added due to unnecessary product differentiation.

Finally, the existence of the Robinson-Patman Act may encourage foreign countries to adopt similar anticompetitive legislation. With increasing globalization, many foreign countries look to the United States for guidance in enacting new legislation, including antitrust legislation. To the extent that the Robinson-Patman Act is seen as a model for other countries, the continued existence of the Act can contribute to a proliferation of anticompetitive legislation worldwide.

E. The Existing Antitrust Laws Already Protect Consumers from Anticompetitive Price Discrimination

The term "buyer power" is used generally to describe two different concepts: bargaining power and monopsony power. Bargaining power refers to the bargaining power of a buyer and can increase, not decrease, consumer welfare. For example, bargaining power can help buyer/retailers reduce their marginal costs, which enables them to pass those savings on to consumers.[96]

By contrast, monopsony power is market power on the buyer side of a market.[97] In certain circumstances, monopsony power can harm consumers.[98] The main harm resulting from monopsonist conduct is the reduction of output by the seller, which harms consumer welfare by under-allocating resources to the production of the product.[99]

The Sherman Act, however, already provides a remedy against the exercise of monopsony power. Section 1 of the Sherman Act protects against unlawful price discrimination agreements based on monopsony power. Section 2 outlaws the unlawful acquisition or maintenance of monopsony power.[100] By contrast, the Robinson-Patman Act outlaws a much broader range of alleged "buyer power" that can actually benefit consumers by giving them lower prices.[101]

Some supporters of the Robinson-Patman Act argue that the Act prevents large firms from obtaining discounts larger than those offered to smaller rivals, then using those unequal concessions to lower prices to levels that small rivals cannot meet, thus eliminating the small rivals and ultimately raising prices for consumers.[102] As one comment asserted, unjustified price discriminations "may lead to *higher* consumer prices" if used by a firm to "acquire[] market power as a seller."[103] This argument suggests that large buyer/retailers may put their smaller competitors out of business by selling products below the smaller competitors' costs—but above the large buyers' costs—and thus acquire market power in the retail market and ultimately raise prices for consumers.[104]

This theory essentially argues that prices above a manufacturer's costs may be used in a price-predation scenario and should result in liability under the antitrust laws. Yet, the Supreme Court has already rejected this theory: in the context of price-predation allegations, above-cost pricing is legal.[105] To the extent that true price-predation schemes involving below-cost pricing are attempted, they may be challenged under Section 2 of the Sherman Act.

F. The Robinson-Patman Act Is Not the Right Tool Through Which to Achieve "Fairness for Small Businesses" and Other Social Objectives

The main benefits claimed by supporters of the Robinson-Patman Act flow from the Act's aim of protecting small business.[106] Such supporters claim "fairness to small businesses" as a reason to keep the Act. They argue the Act ensures equality of competitive opportunity and preserves small business by preventing power buyers from obtaining non-cost-justified preferences.[107] Supporters maintain that the Act "levels the playing field" for smaller businesses.[108]

In addition, supporters assert that benefits from the Act go beyond protecting competition by small businesses. They argue that preserving small businesses may offer advantages to consumers by expanding available choices, including "convenient locations, distinctive services, [and] superior selection,"[109] and by providing important social benefits, such as "desirable countervailing" political influence.[110] One commenter, discussing alleged price discrimination in discounts to booksellers, expressed the belief that a significant narrowing of the Act would have a "disastrous effect on the dissemination of culture and ideas in America."[111]

Consumers choose the winners and losers in the competitive process, however, through their purchasing decisions. If consumers desire diversity, for example, then they will be willing to pay for it. Indeed, allowing businesses to respond to consumer desires creates incentives for innovation in distribution and other areas that RP Act restrictions unintentionally may stifle. Firms that best meet consumers' desires in the most cost-effective way will succeed, while those that do not may fail. The competitive process can often be seen as unfair to those who lose. Nonetheless, it is competition itself—not the presence of a particular competitor—that best serves consumer welfare.

The Supreme Court has refused to give weight to arguments that harm could arise from vigorous competition in certain contexts, holding that such arguments are "nothing less than a frontal assault on the basic policy of the Sherman Act."[112] The Court has emphasized that the Sherman Act "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[113] "[T]he policy unequivocally laid down by the Act is competition."[114]

To limit price competition is not a sensible way to protect small businesses. As Judge Richard A. Posner has noted, "even if it were deemed desirable to protect small business, to do so by trying to limit price cuts given to competing big businesses would be an oblique, very costly, and probably ineffective method."[115] He argues that there are other, more direct, means of accomplishing this objective.[116] As small businesses have struggled to compete with larger chains over the past several decades, and many have gone out of business, it appears that the Robinson-Patman Act has been ineffective in truly protecting these small businesses.

G. The Potential Complexity of Future Enforcement of State Versions of the Robinson-Patman Act Is Not a Valid Justification for Continued Consumer Harm

Supporters of the Robinson-Patman Act argue that, even if the Act is repealed, state laws prohibiting price discrimination and other sector-specific restrictions will remain on the books.[117] They point out the potential for plaintiffs to respond to any repeal of the Robinson-Patman Act by bringing claims under currently underutilized state price discrimination laws.[118] They also note there could be expansions of such state laws.[119] Currently, state enforcers and state courts look to the case law developed under the Robinson-Patman Act for guidance in interpreting and applying state price discrimination laws. If the federal law is no longer available as an option for plaintiffs and a guidepost for state law, supporters argue, price discrimination will be governed by divergent state laws, thus increasing compliance costs and potentially creating a "mess."[120] Therefore, supporters argue, there could be significant costs to repealing the Robinson-Patman Act.

It is uncertain that the repeal of the Robinson-Patman Act will result in this "mess." It is possible that states will recognize that their anti-price discrimination statutes also harm their consumers and repeal those statutes. Alternatively, state courts could interpret such statutes in a manner that is less inconsistent with the antitrust laws by requiring proof of injury to competition. If states choose to continue to enforce such statutes, Congress could address that issue at that future date, and possibly consider preemption of such state statutes.

Notes

[1] 15 U.S.C. §§ 13–13a.

[2] FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948). The Court declared that "the more immediately important concern is in injury to the competitor victimized by the discrimination," although it also indicated that this would protect competition by "catch[ing] the weed in the seed." *Id.* at 49 n.18 (citing S. Rep. No. 74-1502, at 4 (1936)).

[3] Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice § 14.6a1 (3d ed. 2005) [hereinafter Hovenkamp, Federal Antitrust Policy].

[4] Dep't of Justice, Report of the Attorney General's National Committee to Study the Antitrust Laws 132 (1955) [hereinafter 1955 Attorney General's Report].

[5] Phil C. Neal et al., *Report of the White House Task Force on Antitrust Policy*, *reprinted in* 2 Antitrust L. & Econ. Rev. 11, 41 (1968–69) [hereinafter Neal Report].

[6] Dep't of Justice, Dep't of Justice Report on the Robinson-Patman Act 260 (1977) [hereinafter 1977 DOJ Report].

[7] Neal Report, at 39–41; 1977 DOJ Report, at 260–63.

[8] 1977 DOJ Report, at 260–63.

[9] *Id.* at 261–62, 272–93.

[10] Andrew I. Gavil et al., Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 756–57 (2002) [hereinafter Gavil, Antitrust Law in Perspective].

[11] *See* George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245 (1929).

[12] Gavil, Antitrust Law in Perspective, at 757.

[13] *See generally Morton Salt*, 334 U.S. at 43–44 (providing description of the Act's legislative history); Goodyear Tire & Rubber Co. v. FTC, 101 F.2d 620 (6th Cir. 1939).

[14] *See, e.g.*, H.R. Rep. No. 74-2287, at 7 (1936) (stating that the provision of the Clayton Act permitting volume discounts so weakened Section 2 "as to render it inadequate, if not almost a nullity").

[15] Gavil, Antitrust Law, at 757 (emphasis omitted).

[16] Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526 (1936) (codified as amended at 15 U.S.C. § 13(a)) (emphasis added).

[17] *Morton Salt*, 334 U.S. at 49.

[18] W. Kip Viscusi et al., Economics of Regulation and Antitrust 284 (3d ed. 2000) [hereinafter Viscusi, Economics of Regulation and Antitrust].

[19] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993).

[20] 15 U.S.C. § 13(a). For an overview of the Robinson-Patman Act, *see generally* American Bar Association, Section of Antitrust Law, A Primer on the Federal Price Discrimination Laws: A General Review of the Robinson-Patman Act For Business Managers (3d ed. 2005) [hereinafter Robinson-Patman Primer].

[21] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860, 870 (2006); *see also* 15 U.S.C. § 13(a).

[22] *Volvo*, 126 S. Ct. at 870.

[23] *See* 15 U.S.C. § 13(c); *see also* American Bar Association, Section of Antitrust Law, Antitrust Law Developments 524–30 (6th ed. 2007) [hereinafter Antitrust Law Developments]; Robinson-Patman Primer, at 17–18.

[24] *See* 15 U.S.C. § 13(d)–(e); *see also* Antitrust Law Developments, at 530–34; Robinson-Patman Primer, at 14–15. These prohibitions do not require a showing of competitive injury and do not permit defenses, such as cost-justified price discrimination, which is described below. Antitrust Law Developments, at 524, 530. Unlike Section 2(a) claims, where competitive injury is required but generally inferred, no inference is required because these types of claims do not require any showing of competitive injury.

[25] 15 U.S.C. § 13(f).

[26] H.R. Rep. No. 94-1738, at 25 (1976) ("This section was aimed at curbing the power which had been utilized by chains and other large buyers to pressure suppliers into granting them unjustified price concessions . . . .").

[27] *See, e.g.*, Robinson-Patman Transcript at 12 (Hovenkamp) (July 28, 2005) (arguing that the Supreme Court's interpretation of Section 2(f) has made buyer liability "almost impossible to prove"); Hovenkamp, Federal Antitrust Policy, § 14.6e; *see also* American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding the Robinson-Patman Act, at 11 (Apr. 10, 2006) [hereinafter ABA Comments re Robinson-Patman] (supporters of the Act also contend that buyer liability is "virtually impossible to prove").

[28] *See* Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 75–76 (1979).

[29] The Act also extends to third- and fourth-line injury, or even beyond. *See, e.g.*, Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

[30] *Brooke Group*, 509 U.S. at 221–22.

[31] *Id.*

[32] 15 U.S.C. § 13a; *see also* Antitrust Law Developments, at 547–48.

[33] *See, e.g.*, Meredith E. B. Bell & Elena Laskin, *Antitrust Violations*, 36 Am. Crim. L. Rev. 357, 357 n.2 (1999); Terry Calvani & Gilde Breidenbach, *An Introduction to the Robinson-Patman Act and its Enforcement by the Government*, 59 Antitrust L.J. 765, 775 (1990).

[34] 15 U.S.C. § 13(a).

[35] *Id.*

[36] *Id.*

[37] *Id.* § 13(b); *see also* Standard Oil Co. v. FTC, 340 U.S. 231, 251 (1951).

[38] *See, e.g.*, Comcoa, Inc. v. NEC Tels., Inc., 931 F.2d 655, 664–65 (10th Cir. 1991); *see also* Robinson-Patman Primer, at 11–12.

[39] *See* Antitrust Law Developments, at 515; *see also Morton Salt*, 334 U.S. at 48.

[40] Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 447–51 (1983); *see also id.* at 445 (stating that "[t]he very purpose of the defense is to permit a seller to treat different competitive situations differently").

[41] *See* Robinson-Patman Primer, at 19; Antitrust Law Developments, at 484.

[42] Antitrust Law Developments, at 484, 547–48; *see, e.g.*, William Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 Antitrust L.J. 377, 410 n.108 (2003) [hereinafter Kovacic, *Modern Evolution of U.S. Competition Policy Enforcement Norms*].

[43] American Bar Association, Section of Antitrust Law, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Volume I, at 3 (1980) [hereinafter ABA Monograph on Robinson-Patman].

[44] *Id.* at 41; Business Roundtable, Public Comments Submitted to AMC, at 17–18 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]; ABA Comments re Robinson-Patman, at 12.

[45] ABA Monograph on Robinson-Patman, at 41 n.158; *see also* H.R. Rep. No. 94-1738, at 127.

[46] ABA Monograph on Robinson-Patman, at 41 n.158; *see also* H.R. Rep. No. 94-1738, at 127.

[47] *See* Kovacic, *Modern Evolution of U.S. Competition Policy Enforcement Norms*, at 410, tbl.1 (citing CCH Trade Regulation Reporter looseleaf service and transfer binders on FTC Complaints, Orders, Stipulations for 1961 through 2000).

[48] The three jury verdicts affirmed on appeal were *Schwartz v. Sun Co.*, 276 F.3d 900, 905 (6th Cir. 2002), *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653 (9th Cir. 1997), and *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004), *rev'd sub. nom. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006). The cases were found through a search for every RP Act court opinion in the Westlaw database for a ten-year period (Sept. 20, 1996–Sept. 20, 2006).

[49] *Volvo*, 126 S. Ct. 860.

[50] Robinson-Patman Trans. at 11–12 (Hovenkamp).

[51] J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561 (1981).

[52] Antitrust Law Developments, at 545.

[53] *See, e.g.*, Thomas W. Ross, *The Costs of Regulating Price Differences*, 59 J. Bus. 143 (1986) (prohibitions on discrimination may cause firm to adopt policies that do not minimize costs); John L. Peterman, *The* Morton *and* International Salt *Cases: Discounts on Sales of Table Salt*, 21 Res. L. & Econ. 127 (2004) (studying two leading RP Act cases and questioning the utility of those enforcement actions).

[54] ABA Comments re Robinson-Patman, at 4; *see also* Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125, 143–44 (2000) [hereinafter Hovenkamp, *Robinson-Patman Act and Competition*]; 1955 Attorney General's Report, at 131–32.

[55] *See* 1977 DOJ Report, at 100.

[56] Viscusi, Economics of Regulation and Antitrust, at 284–89; Marius Schwartz, *Third-Degree Price Discrimination and Output: Generalizing a Welfare Result*, 80 Am. Econ. Rev. 1259 (1990); Hal R. Varian, *Price Discrimination*, in 1 Handbook of Industrial Organization 617–23 (Richard Schmalensee & Robert D. Willig eds., 1989). However, the application of this analysis is more complex in assessing the impact of price discrimination practices when the discriminations at issue are directed towards intermediate suppliers like the wholesalers and retailers in those special cases where it is likely that, to avoid the discriminations, these intermediate suppliers may inefficiently integrate backward into manufacturing. *See* Michael L. Katz, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets*, 77 Am. Econ. Rev. 154 (1987).

[57] *See* ABA Comments re Robinson-Patman, at 4; *see also* Hovenkamp, *Robinson-Patman Act and Competition*, at 143–44; 1955 Attorney General's Report, at 131–32.

[58] Viscusi, Economics of Regulation and Antitrust, at 290; *see also* Richard A. Posner, The Robinson-Patman Act: Federal Regulation of Price Differences 12–15 (1976) [hereinafter Posner, Robinson-Patman Act] (although the ability persistently to charge discriminatory prices has been taken as a possible sign of market power, sporadic or temporary price discrimination generally has procompetitive benefits; it is often difficult to distinguish between these two forms of price discrimination).

[59] Neal Report, at 13; *see also id.* at 17, 39–44.

[60] *See Symposium on Competitive Price Discrimination*, 70 ANTITRUST L.J. 593 (2003); James D. Dana, Jr., *Advance-Purchase Discounts and Price Discrimination in Competitive Markets*, 106 J. POL. ECON. 395 (1998); Mark Armstrong & John Vickers, *Competitive Price Discrimination*, 32 RAND J. ECON. 579 (2001); Severin Borenstein & Nancy L. Rose, *Competition and Price Dispersion in the U.S. Airline Industry*, 102 J. POL. ECON. 653 (1994); Severin Borenstein, *Price Discrimination in Free-Entry Markets*, 16 RAND J. ECON. 380 (1985); James C. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L.J. 327 (2005).

[61] *Vanco Beverage*, 460 U.S. at 445.

[62] *See* Texaco Inc. v. Hasbrouck, 496 U.S. 543, 561 n.18; *Morton Salt*, 334 U.S. at 48. *See generally* ANTITRUST LAW DEVELOPMENTS, at 512–17.

[63] ABA Comments re Robinson-Patman, at 6; Hovenkamp, *Robinson-Patman Act and Competition*, at 126–27; Herbert Hovenkamp, Statement at AMC Robinson-Patman Act Hearing, at 8–9 (July 28, 2005) [hereinafter Hovenkamp Statement].

[64] Hovenkamp, *Robinson-Patman Act and Competition*, at 126–27; Hovenkamp Statement at 8–9.

[65] *See* Hovenkamp, *Robinson-Patman Act and Competition*, at 126–27; Hovenkamp Statement, at 8–9.

[66] *See* Part 3.E of this Section (discussing bargaining power in more detail).

[67] Emek Basker, *Selling a Cheaper Mousetrap: Wal-Mart's Effect on Retail Prices*, 58 J. URBAN ECON. 203 (2005); Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart* (Nat'l Bureau of Econ. Research Working Paper No. 11,809, 2005).

[68] *See* Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J.L. ECON. & ORG. 296 (1994) (finding that "forbidding discriminatory discounts renders retailer bargaining power useless in mitigating manufacturer market power" so that "all retail prices rise" and welfare loses can be "substantial").

[69] *See* Robinson-Patman Trans. at 12 (Hovenkamp); HOVENKAMP, FEDERAL ANTITRUST POLICY, § 14.6e; *see also* ABA Comments re Robinson-Patman, at 11 (supporters of the Act also contend that buyer liability is "virtually impossible to prove").

[70] *See* 1977 DOJ REPORT, at 47–58; ABA Comments re Robinson-Patman, at 7–8.

[71] *See, e.g.*, NEAL REPORT, at 40; ABA MONOGRAPH ON ROBINSON-PATMAN, at 30–31; 1977 DOJ REPORT, at 70–74; ABA Comments re Robinson-Patman, at 8.

[72] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

[73] Indeed, in some circumstances, competitors may wish for their rivals to undertake anticompetitive conduct because they may be able to charge higher prices as a result of rivals' tacit collusion, for example.

[74] Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526 (1936) (codified as amended at 15 U.S.C. § 13(a)) (emphasis added).

[75] *See, e.g.*, George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 140 (2d Cir. 1998) ("It is hornbook law . . . that anti-competitive injury need not be alleged to sustain a claim for violation of the Robinson-Patman Act; a price differential, direct or indirect, between secondary-line competitors is enough.").

[76] *Morton Salt*, 334 U.S. at 49 (emphasis added; citations and quotations omitted).

[77] *Id.* at 49–51.

[78] *Id.* at 46–47.

[79] *Volvo*, 126 S. Ct. at 870. However, the Supreme Court has held that in alleging damages under Section 4 of the Clayton Act, the plaintiff "must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne*, 451 U.S. at 562. Some believe that *J. Truett Payne* has had a major impact on private litigation, because it held that a plaintiff must "prove actual

lost sales, actual injury." Robinson-Patman Trans. at 37–38 (Saferstein). Thus, a Robinson-Patman plaintiff is not entitled to "automatic damages" equal to the amount of the discrimination, but rather "ordinarily must show that it lost customers or profits because the favored customer used the discount either to lower its resale prices or otherwise to solicit business." ANTITRUST LAW DEVELOPMENTS, at 545.

80 For example, the Third Circuit has held that "evidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman Act." J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1535 (3d Cir. 1990); *see also* Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1418 n.6 (11th Cir. 1990).

81 *Chroma Lighting*, 111 F.3d at 658; *see also George Haug*, 148 F.3d at 143–44; Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182 (1st Cir. 1996).

82 Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415, 420 (8th Cir. 1986); *see also* Motive Parts Warehouse v. Facet Enters., 774 F.2d 380, 395 (10th Cir. 1985) (holding that "[t]he naked demonstration of injury to a specific competitor without more is not sufficient to show that a price discrimination 'may' substantially lessen competition; the test must always focus on injury to competition") (internal citations omitted).

83 Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1144 (D.C. Cir. 1988).

84 Statement of Chairman Robert Pitofsky & Commissioners Sheila F. Anthony & Mozelle W. Thompson, *In re* McCormick & Co., FTC File No. 961-0050 (Mar. 8, 2000), *available at* http://www.ftc.gov/os/2000/05/mccormickpitofskystmt.htm. The three-Commissioner majority stated that "[t]here may be . . . market settings in which it makes sense for . . . the Commission and Courts, in the process of considering whether there has been a violation, to look past the *Morton Salt* factors to a broader range of market conditions to determine whether there has been real injury to competition." *Id.* Based on such an inquiry, they found McCormick's conduct resulted in injury "not just to the disfavored buyers, but to secondary-line competition generally." *Id.* The majority did not define the "market settings" in which it would look past the *Morton Salt* inference. The dissent complained that, among other things, the majority's analysis still left RP Act violations too easy to prove. Dissenting Statement of Commissioners Orson Swindle & Thomas B. Leary, *In re* McCormick & Co., FTC File No. 961-0050 (Mar. 8, 2000), *available at* http://www.ftc.gov/os/2000/05/mccormickswindlelearystmt.htm.

85 *Volvo*, 126 S. Ct. 860.

86 *Id.* at 870 (citing FTC v. Sun Oil Co., 371 U.S. 505, 518–19 (1963); *Morton Salt*, 334 U.S. at 49–51).

87 *Id.* at 872.

88 ABA Comments re Robinson-Patman, at 8.

89 *Id.*

90 F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 516 (3d ed. 1990) (difficulty of determining what behavior would be in the absence of the Act); 1977 DOJ REPORT, at 37–40 (describing difficulties of measuring Act's impact).

91 Robinson-Patman Trans. at 17–18 (Saferstein) (explaining that he "tends to believe anecdotally" that the Act has negative effects, but wondering "how . . . it really work[s] in practice" and expressing concern that we may not "know enough to take major action"); *id.* at 54 (Spiva) ("We really have no idea what types of costs [the Act] imposes, if any, on sellers."); *Federal Antitrust Policy: Implications for Small Business, Hearing Before the S. Comm. on Small Business*, 97th Cong. 68 (1981) (assessments of the Act "do[] not come from a clear body of empirical evidence—in fact, the true net effects of Robinson-Patman have not, as far as I am aware, been the subject of much solid empirical work") (statement of FTC Chairman James C. Miller III); *see also* 1977 DOJ REPORT, at 37–38 (describing the lack of empirical studies and difficulty of obtaining data to assess the Act's impact).

92 U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 24 (Nov. 8, 2005) (noting "reports that entire departments have been established simply to track and process the information necessary to document compliance with the [meeting-competition] defense"); Business Roundtable Comments, at

17 (the Act results in "substantial costs on businesses as they educate employees in R-P Act compliance").

93 The Robinson-Patman Act portion of the Practicing Law Institute's major antitrust programs is "typically attended by a high number of in-house counsel," and "interest in [the Robinson-Patman] course is high." Harvey I. Saferstein, Statement at AMC Robinson-Patman Act Hearing, at 4 (July 28, 2005) [hereinafter Saferstein Statement]. Nevertheless, systematic information about RP Act compliance costs is generally lacking, and supporters of the Act further point out that the compliance burdens may be exaggerated. ABA Comments re Robinson-Patman, at 11–12 (observing that some argue that paperwork costs might be incurred in any event, and might be reduced due to the introduction of computers and the Internet).

94 *See* ABA Monograph on Robinson-Patman, at 32–33; 1977 DOJ Report, at 75–79; ABA Comments re Robinson-Patman, at 8–9. Mr. Saferstein argued that firms change the manner in which they market in order to comply with the Act, for example, using bulk packaging. Robinson-Patman Trans. at 31–32 (Saferstein).

95 This may be challenging to accomplish, however, due to the fact that courts consistently have held that differences in packaging or warranties alone do not avoid the "of like grade and quality" element of the Robinson-Patman Act. *See* Antitrust Law Developments, at 497–99.

96 *See* Part 3.A.1 of this Section.

97 *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1075 (2007).

98 *See* Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony, and Antitrust*, 36 Antitrust Bull. 1 (1991); Phillip E. Areeda & Herbert Hovenkamp, XII Antitrust Law ¶ 2011 & nn.1, 17 (2d ed. 2005).

99 *See* Hovenkamp Federal Antitrust Policy, § 1.2b; Ernest Gellhorn et al., Antitrust Law and Economics 79–80 (5th ed. 2004).

100 Hovenkamp Statement, at 14 (if price discrimination resulting from buyer power truly resulted in competitive injury, it "would almost certainly fall within the restraint of trade language of §1 of the Sherman Act or, in a few cases, the monopolization language of §2"); Robinson-Patman Trans. at 23–24 (Hovenkamp); ABA Monograph on Robinson-Patman, at 33–35.

101 *See* Part 3.A.1 of this Section.

102 *See* 1977 DOJ Report, at 145–48 (collecting authorities).

103 American Antitrust Institute, Public Comments Regarding the Robinson-Patman Act, at 13–14 (July 1, 2005) [hereinafter AAI Comments re Robinson-Patman Act]; *see also* J.H. Campbell, Jr., Statement at AMC Robinson-Patman Act Hearing, at 4 (July 28, 2005) [hereinafter Campbell Statement].

104 *See* Robinson-Patman Trans. at 42–46 (Spiva; Campbell).

105 *See Brooke Group*, 509 U.S. at 222–23.

106 *See Recent Efforts to Amend or Repeal the Robinson-Patman Act, Pt. 2: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the H. Comm. on Small Business*, 94th Cong. 1 (1975–76) (statement of Chairman Gonzales) (stating that the Robinson-Patman Act "is properly described as the Magna Carta of Small Business").

107 *See* AAI Comments re Robinson-Patman Act, at 12–13; ABA Comments re Robinson-Patman, at 10; ABA Monograph on Robinson-Patman, at 22–24.

108 Campbell Statement, at 8, 12 ("The Robinson-Patman Act is the only significant restraint in our antitrust laws on the ability of power buyers to obtain preferential treatment . . . .").

109 AAI Comments re Robinson-Patman Act, at 13; *see also* Campbell Statement, at 11–12.

110 ABA Monograph on Robinson-Patman, at 24.

111 Robinson-Patman Trans. at 22 (Spiva).

112 National Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (defendants argued unsuccessfully that competitive bidding for engineering projects might threaten such things as "public safety and the ethics of [the engineering] profession").

113 *Id.* at 695.

114 Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

115 Posner, Robinson-Patman Act, at 16.

116 *Id.* (suggesting that a lower tax rate on small firms may be a more direct means of achieving this objective).

117 Antitrust Law Developments, at 624 (a number of states have counterparts to the Robinson-Patman Act).

118 At the Robinson-Patman Committee Breakfast during the 2005 American Bar Association, Section of Antitrust Law Spring Meetings, several panelists, including Professor Stephen Ross, raised this concern. Similarly, the 2006 Spring Meeting Robinson-Patman Committee Breakfast featured a panel on state laws, described as "Sleeping Giants." *See also* ABA Comments re Robinson-Patman, at 13 (noting concerns and predicting that Congress would be unlikely to enact preemptive legislation).

119 AAI Comments re Robinson-Patman Act, at 16–17.

120 Robinson-Patman Trans. at 49–50 (Saferstein) (observing that state courts might be "unleashed" by repeal, resulting in "a bigger mess than you counted on"); *see also* Saferstein Statement, at 2; AAI Comments re Robinson-Patman Act, at 16–17 (repeal could "spur a populist backlash").

Chapter IV.B
Immunities and Exemptions, Regulated Industries, and the State Action Doctrine

1. INTRODUCTION

Free-market competition is the fundamental economic policy of the United States.[1] Competition in free markets—that is, markets that operate without either private or governmental anticompetitive restraints—spurs businesses to develop and sell as efficiently as possible the kinds and quality of goods and services that consumers desire.[2] Competitive markets also drive an economy's resources toward their fullest and most efficient uses, thereby providing a basis for economic development.[3] The U.S. economy is an example of how free markets can lead to the creation of wealth, making possible improved living standards and greater prosperity.[4] In recent decades, policymakers in many developing countries also have been persuaded that free-market competition yields productivity and other benefits far superior to the results produced by government control of the economy.[5]

Despite this record of success, a few sectors of the U.S. economy remain subject to government limitations on competition. This Section of the Report discusses three of the ways in which federal law or judicial standards currently prevent or restrain competition. They are: (1) statutory immunities or exemptions from some or all of the antitrust laws; (2) limitations on the full application of antitrust law as a consequence of continued economic regulation of certain industries; and (3) an overly broad interpretation of the state action doctrine that permits private anticompetitive conduct not authorized or supervised by state regulatory programs. Just as private restraints on competition can harm consumer welfare, so can these government restraints on competition.

Empirical studies of what happened when market forces were unleashed in previously regulated industries provide the best evidence of the harm that governmental restraints on competition can create. During the early part of the twentieth century, a belief that certain industries were either "natural" monopolies (that is, that the most efficient market structure included only one firm) or were at risk for "excessive competition" led to government regulation of prices, costs, and entry in those industries.[6] The industries tended to involve core services, such as electricity, natural gas, telecommunications, and transportation. Beginning in the 1960s and 1970s, however, attitudes changed. In some industries, such as electricity generation, technological progress made competition possible.[7] More generally, significant criticisms of the costs and market distortions that accompanied regulation prompted serious review of regulatory regimes. These two factors in particular combined to persuade policymakers to move toward deregulation in almost all regulated markets.[8]

Numerous studies of sectoral deregulation in the United States show that the unleashing of market forces has greatly increased efficiency and provided substantial benefits to consumer welfare. One comprehensive survey of empirical evidence on the U.S. deregulation experience concluded that the U.S. economy has gained at least $36 to $46 billion *annually* (in 1990 dollars) from deregulation, primarily in the transportation industries.[9] On a more specific level, an econometric analysis of trucking rates in states that continued to regulate trucking found that in the less-than-truckload (LTL) segment, regulation of entry increased rates by more than 20 percent, rate regulation increased those rates by 5 percent, and antitrust immunity for certain conduct increased rates by about 12 percent above what they would be absent regulation.[10]

These data give a sense of the order of magnitude of the costs imposed on U.S. consumers and the U.S. economy by government restraints on competition. By comparison, government restraints of the types discussed in this Section typically benefit only relatively small special interest groups. The Commission therefore makes the following general recommendation, as well as additional recommendations described below.

56. Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition.

A. Statutory Exemptions from the Antitrust Laws

1. Competitive Effects and Claimed Justifications

The antitrust laws stand as a bulwark to protect free-market competition. They prohibit anticompetitive restraints that harm consumer welfare. "[V]igorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy."[11]

Through legislation, however, Congress can exempt certain types of conduct by particular actors from some or all of the antitrust laws.[12] Currently, a wide variety of immunities, both partial and whole, exists in federal law. Congress, of course, is entitled to make judgments about the extent to which competition is in the public interest or other substantial and significant societal values trump the goal of consumer welfare.[13]

Nonetheless, antitrust exemptions can impose significant costs, which must be weighed against any benefits of an exemption. To the extent the antitrust laws do not apply, firms may take anticompetitive actions with impunity. As a practical matter, an exemption from all or part of the antitrust laws means firms can avoid the tough discipline of competition, at least to some extent. While the beneficiaries of an exemption likely appreciate reduced market pressures, consumers (as well as non-exempted firms) and the U.S. economy generally bear the harm from the loss of competitive forces.

Typically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation.[14] The concentrated benefits provide incentives for interested parties to seek immunities from Congress, but the diffuse costs often have sufficiently minimal impact on individual consumers that they are unlikely to oppose the creation of immunities. Congress therefore is unlikely to hear from those who would be adversely affected by a proposed antitrust exemption.

The Commission focused on three immunities in particular. It held hearings on the McCarran-Ferguson Act, the Export Trading Company Act, and the Shipping Act. It held hearings on these three immunities because Congress is reexamining the McCarran-Ferguson Act;[15] the European Union recently eliminated its antitrust exemption for ocean carriers, leaving the United States as the only major country that still immunizes fixing shipping rates;[16] and the Commission received extensive comments regarding the Export Trading Company Act, which many observers overseas view as tarnishing the United States' reputation for free markets. The Commission discusses its assessment of the evidence gathered on these immunities and exemptions in Part 2 of this Section.

Antitrust exemptions can harm the U.S. economy and, in the long run, reduce the competitiveness of the industries that have sought antitrust exemptions. As noted above, competition drives firms to find ways to operate more efficiently and compete more effectively. "Few roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry."[17] Statutory exemptions from the antitrust laws undermine, rather than upgrade, the competitiveness and efficiency of the U.S. economy.

2. Summary of Recommendations

For the reasons articulated above and discussed in more detail in Part 2 of this Section, the Commission makes the following recommendations.

57. Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.

A wide variety of statutory antitrust exemptions currently exists, as set forth in Annex A. Rather than performing detailed assessments of each of these individual existing immunities, the Commission concluded it could best contribute to Congress's evaluation of immunities by articulating relevant general principles that Congress may wish to use in considering whether to adopt, renew, or abolish any particular immunity. This work builds off of the analytical framework recommended by the National Commission for the Review of Antitrust Law and Procedures in its 1979 Report to the President and the Attorney General. That commission recommended that exemptions should be made only where "compelling evidence of the unworkability of competition or a clearly paramount social purpose" exists, and any exemptions should use the "least anticompetitive method of achieving the regulatory objective."[18] This Commission agrees, and the general principles that the Commission recommends follow. A more detailed discussion of these recommendations appears in Part 2 of this Section.

58. In evaluating the need for existing or new immunities, Congress should consider the following:

- **Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;**
- **The likely adverse impact of the existing or proposed immunity on consumer welfare; and**
- **Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.**

59. The following steps are important to assist Congress in its consideration of those factors:

- **Create a full public record on any existing or proposed immunity under consideration by Congress.**
- **Consult with the Federal Trade Commission and the Antitrust Division of the Department of Justice about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity.**
- **Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.**

60. **If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:**

- **Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (for example, a limit on damages to actual, rather than treble, damages).**
- **Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.**
- **Adopt a requirement that the Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.**

61. **Courts should construe all immunities and exemptions from the antitrust laws narrowly.**

B. Regulated Industries, the Transition to Deregulation, and Antitrust Law

1. The Benefits of Deregulation

For many years, a wide variety of industries was subject to economic regulation—that is, the regulation of prices, costs, and entry. In recent decades, public policy in the United States has moved toward deregulation in most of those industries.[19] Various factors have driven the movement toward deregulation. Technological progress has facilitated the growth of competition in industries previously considered natural monopolies.[20] In addition, critiques of regulation have pointed out that federal regulatory agencies were sometimes "captured" by firms they regulated, to the detriment of the public interest, and that the costs of regulation were significantly more than anticipated.[21] The general conclusion is that, in many instances, "regulation reflects successful rent-seeking by private economic interests and generally reduces consumer welfare by restricting output."[22]

2. Summary of Recommendations

Congress's decision broadly to deregulate has brought substantial benefits to U.S. consumers and the U.S. economy.[23] The trend toward deregulation should be furthered where practicable. Free-market competition generally promotes efficiency and thus benefits consumer welfare, while economic regulation often results in inefficiency that increases prices to consumers. In the vast majority of cases, competition is more likely to benefit consumers than economic regulation. For the reasons set forth above and discussed in more detail of Part 3 of this Section, the Commission makes the following recommendation.

62. Public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry. Such economic regulation should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address. In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.

a. The Application of Antitrust Law in the Context of Regulation and Deregulation

The relationship between antitrust law, regulation, and deregulation warrants careful scrutiny. In general, regulation is a substitute for competition, an alternative means by which policymakers hope to achieve the consumer welfare benefits associated with competition.[24] If competition has been entirely replaced with regulation, then the antitrust laws are generally unnecessary, because there is no competition to protect.

Given the problems arising from regulation, policymakers have searched for circumstances where competition, rather than regulation, can be relied on to benefit consumer welfare. When policymakers decide that regulation can be reduced or eliminated, because competition is feasible in particular markets, then antitrust law becomes necessary to ensure that competition flourishes.[25] In light of this, the Commission makes the following recommendation.

63. When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.

(i) Savings Clauses and Implied Immunities

Antitrust savings clauses appear in legislation to clarify the extent to which Congress intends to preserve the role of antitrust enforcement in a regulatory environment.[26] In legislation involving regulatory regimes, Congress should articulate clearly to what extent it intends the regulatory regime to displace the antitrust laws, if at all. Specific language directed to this issue can eliminate costly litigation about whether an immunity from antitrust law should be implied from the regulatory scheme. In the absence of a savings clause, courts may imply an immunity, resulting in outcomes not intended by Congress. Accordingly, the Commission makes the following recommendations.

64. **Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.***

65. **Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect.†**

In the absence of a savings clause, courts will determine whether the nature of the regulatory scheme necessarily implies that firms subject to that regime should be immune from antitrust law. Courts generally are reluctant to recognize implied immunities to the antitrust laws. For example, as the Supreme Court explained in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, "implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."[27] This issue is before the Supreme Court this term in *Billing v. Credit Suisse First Boston Ltd.*[28]

The Commission agrees that *National Gerimedical* provides the proper standard for determining whether the existence of a regulatory regime implies an immunity from antitrust law and therefore makes the following recommendation.

* Commissioner Warden does not join this recommendation.

† Commissioners Garza and Warden do not join this recommendation.

66. Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.*

The Supreme Court recently issued an opinion that has raised questions whether the Court gave sufficient deference to the savings clause that Congress adopted when it enacted the Telecommunications Act of 1996 (1996 Act), or whether it in effect implied an immunity from the antitrust laws despite that savings clause. In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* Trinko, alleged that Verizon had violated Section 2 of the Sherman Act by breaching certain network interconnection duties under the 1996 Act.[29] After deciding that the plaintiff's claim did not state a cause of action under traditional antitrust principles, the Court concluded that the specific, regulatory duties to deal established under the 1996 Act did not also create a new cause of action under the refusal-to-deal doctrine of Section 2 of the Sherman Act.[30] Based on this, the Commission makes the following recommendation.

67. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.

(ii) Filed-Rate Doctrine

The filed-rate doctrine, also known as the *Keogh* doctrine, prohibits a private plaintiff from pursuing an antitrust action seeking treble damages where the plaintiff is claiming that a rate submitted to, and approved by, a regulator resulted from an antitrust violation.[31] At the time this doctrine was created, members of a regulated industry were typically required to file their proposed rates with regulators who reviewed the rates to ensure they were "fair and reasonable." In creating the doctrine in *Keogh*, the Supreme Court explained that only the relevant regulatory authority could change these rates, even if the rate was higher than it otherwise would be due to a price-fixing conspiracy.[32]

* Commissioner Delrahim does not join this recommendation.

Since deregulation, however, few industry members must file their rates with regulators, and fewer still have those rates formally reviewed for reasonableness. Nonetheless, courts have continued to apply the filed-rate doctrine to preclude antitrust claims where a tariff has been filed with a regulatory agency, regardless of whether the agency has actually reviewed and approved the rate.[33] In 1986 the Supreme Court reviewed the filed-rate doctrine and explained that a variety of factors "seem[ed] to undermine" the continuing validity of the *Keogh* doctrine.[34] Nonetheless, the Court concluded, it was for Congress to determine whether to abolish the filed-rate doctrine.[35] The Commission believes the time has come for Congress to address that issue and accordingly makes the following recommendation.

68. Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.

b. Merger Review in Regulated Industries

The antitrust agencies examine mergers and acquisitions notified to the agencies pursuant to the Hart-Scott-Rodino Act (HSR Act) to determine whether a proposed transaction may substantially lessen competition in violation of the Clayton Act.[36] The antitrust agencies apply the same merger standards to all industries, including those that formerly were regulated.

Four industries remain, however, in which a regulatory agency also has merger review authority.[37] In those industries the regulatory authority typically reviews a proposed transaction under its statutory "public interest" standard, which varies by industry. The regulatory authority can allow a transaction to proceed if it determines that the "public interest" benefits offered by the proposed transaction outweigh its likely anticompetitive effects.

Merger review by two federal agencies can impose significant and duplicative costs on both the merging parties and the agencies.[38] In addition, it can lead to conflicts between the antitrust agencies and the regulatory agency. The Commission has considered how to structure merger review in industries still subject to some degree of regulation. The Commission makes the following recommendations.

69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.*

* Commissioner Kempf does not join this recommendation.

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70. For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.

71. The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.

72. The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.

73. Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.*

The Commission is not convinced that the public interest factors the regulatory agencies may take into account cannot be provided by competition, or should ever outweigh the substantial negative impact on consumer welfare that may result from the approval of an anticompetitive merger. If competition can provide the public interest benefits identified in the statute, or if those public interest benefits could never outweigh likely anticompetitive effects, then merger review by a regulatory agency would be unnecessary. Accordingly, the Commission makes the following recommendation.

74. Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency's "public interest" standard to determine whether in fact such regulatory review is necessary.

- **In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency's review of the proposed transaction's likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such "particular, identified interests" would be interests other than those consumers' interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition.**

* Commissioner Kempf does not join this recommendation.

C. The State Action Doctrine

1. The Origin and Contours of the State Action Doctrine

The states, like the federal government, generally rely on competition in the marketplace to produce lower prices, higher quality, and incentive to innovate. Nonetheless, also like the federal government, sovereign states can and do enact economic regulations to displace competition in particular situations. Over sixty years ago, in *Parker v. Brown*, the Supreme Court created the "state action" doctrine to identify circumstances in which a state's decision to displace competition with regulation trumps the general federal policy in favor of free markets and, therefore, overrides the application of federal antitrust law.[39] In upholding the legality of a California regulatory program that limited raisin output and thereby raised raisin prices, the Court concluded that Congress did not intend the Sherman Act expressly to preempt state economic regulation.[40] The Court explained, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[41]

Under the state action doctrine, courts can thus immunize from potential federal antitrust liability certain activity undertaken pursuant to a state regulatory regime or other state law.[42] State sovereignty and federalism were, and still are, the underpinnings of Supreme Court state action jurisprudence.[43]

The state action doctrine applies not only to state governmental actors themselves, but also, in certain circumstances, to quasi-governmental entities and private actors. The actions of state governmental actors are generally immune from antitrust liability without further inquiry.[44] This is because "[w]hen the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise."[45] What constitutes the "state," however, has given rise to extensive litigation. For example, cities and other municipalities, public service commissions, and state regulatory boards are not the "state" for purposes of the state action doctrine.[46]

The actions of private economic actors, as well as of governmental or quasi-governmental entities not considered to be the "state," are immune from antitrust liability only if they pass a two-part test. The Supreme Court set forth that test in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*: (1) the challenged restraint must be "'one clearly articulated and affirmatively expressed as state policy,'" and (2) "the policy must be 'actively supervised' by the State itself."[47] The first requirement, "clear articulation," serves to ensure that the state has affirmatively authorized departures from free-market competition.[48] The second requirement, "active supervision," is intended to ensure that state action immunity "will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies."[49] The Supreme Court's state action jurisprudence has thus recognized the importance of not immunizing conduct intended to benefit private, not governmental, purposes.

Critics warn, however, that the lower courts increasingly have applied the *Midcal* test in ways that allow defendants to obtain antitrust immunity in situations where a state did not intend to displace competition. Others question whether courts have properly taken into account the potential for one state's endorsement of anticompetitive conduct to have spillover effects that raise prices or otherwise harm consumers in other states. And there is also a serious question whether the state action doctrine should immunize conduct by state government entities and municipalities when they act as market participants.

The American Bar Association, Section of Antitrust Law (ABA Antitrust Section) believes that "[s]tate action immunity drives a large hole in the framework of the nation's competition laws."[50] In 2003 the Federal Trade Commission (FTC) issued a staff report (FTC State Action Report) recommending "clarification and re-affirmation of the original purposes of the state action doctrine to help ensure that robust competition continues to protect consumers."[51]

2. Summary of Recommendations

The Commission agrees that the federal lower courts in some cases have misinterpreted or misapplied the state action doctrine to override the federal policy in favor of free-market competition in ways inconsistent with Supreme Court rulings. The best method to resolve concerns with the state action doctrine is through the continued development of case law in the courts. The Supreme Court's articulation of core standards for the state action doctrine will lead to its correct application if applied more rigorously by the lower courts. There is no need at this time to codify those standards. Rather, the lower courts need to apply the Supreme Court's precedents with increased precision. The courts should do this with the understanding that failure to do so could result in significant consumer harm from anticompetitive conduct that has been immunized from antitrust scrutiny.

Based on its study, the Commission makes the following recommendations, which are explained more extensively in Part 4 of this Section.

75. Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.

76. The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless (1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and (2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.

The lower courts have not always properly implemented Supreme Court precedents outlining what is required to satisfy the clear articulation prong. In *Town of Hallie v. City of Eau Claire* the Supreme Court held the clear articulation standard was satisfied where the allegedly anticompetitive conduct was a "foreseeable result" of a state law.[52] Following *Town of Hallie*, however, some courts have applied a standard of "foreseeability" (and thus immunity) wherever a state authorizes conduct that does not necessarily, but might, have an anticompetitive effect.[53] To say that anticompetitive effects are a possible result of a statute, however, is not the same as finding "a deliberate and intended state policy" to replace competition with regulation, as the Court subsequently required in *FTC v. Ticor Title Insurance Co.*[54]

Another issue that demands rigorous attention is whether the relevant statute reveals a state's intent to displace competition *in the manner at issue* in the case. The Seventh Circuit's reasoning in *Hardy v. City Optical, Inc.* exemplifies the type of careful analysis that courts should use.[55] In that case, a statute required optometrists to provide patients with some, but not all, of the information needed to purchase contact lenses, which left patients unable to purchase their lenses through cheaper, mail-order sources. The court held that "Indiana has not sought to supplant . . . competition *from mail-order houses*," and therefore the clear articulation standard was not met.[56] This approach ensures that the courts do not loosely allow exceptions to competition. The Commission therefore makes the following recommendation.

77. As proposed in the FTC State Action Report, the courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.

The active supervision requirement ensures that "'the [private] actor is engaging in the challenged conduct pursuant to state policy,' rather than in pursuit of private interests."[57] Because the active supervision test applies only when there is a risk that the challenged conduct may be the product of parties' pursuing interests other than state policy, its application turns in part on whether the relevant actor is public or private.[58] The Supreme Court's one opinion in this area, *Ticor*, dealt with a situation in which state supervision of the conduct at issue was virtually nonexistent.[59] Thus, the Court has not yet provided extensive guidance on how to address more complex situations.

To focus the active supervision inquiry, courts should use a flexible, "tiered" approach that requires a different level of active supervision depending on the type of conduct at issue, the entity engaging in that conduct, the industry, the regulatory scheme, and other factors.[60] A flexible analysis would recognize that, to the extent the actor or the challenged conduct suggests an appreciable risk that the challenged conduct results from private actors pursuing their private interests, rather than state policy, courts should require a greater degree of active supervision than if that risk is lower. The Commission therefore makes the following recommendation.

78. The courts should adopt a flexible approach to the active supervision prong, with different requirements based on the situation.*

The state action doctrine has been criticized for its failure to consider interstate spillovers.[61] When one state regulates activities in a manner that overwhelmingly imposes the cost of regulation on citizens of other states, both economic efficiency and the political participation goals of the federal system suffer. State regulations producing spillover costs to consumers in other states do not deserve deference.[62] Out-of-state citizens adversely affected by spillovers typically have no political participation rights and effectively are disenfranchised on whether the conduct at issue should be authorized by the neighboring state.[63] Moreover, economics teaches that where decision-makers reap the benefits without bearing the costs of an activity, they have incentives to engage in more of that activity than is socially desirable.[64] To address the significant consumer harm and political representation concerns, the Commission makes the following recommendation.

79. Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.†

* Commissioners Garza, Kempf, and Warden do not join this recommendation.

† Commissioners Burchfield, Cannon, Delrahim, Garza, and Kempf do not join this recommendation.

A government entity's participation in a market as a competitor is likely to have market-distorting effects if that entity is not subject to the same rules of competition as private competitors. A "market participant" exception to the state action doctrine would require application of both prongs of the *Midcal* test to a government entity participating in the market. This would ensure that the government entity's behavior is consistent with state policy and the state action doctrine is applied consonant with its original purposes and goals. The possibility of such an exception was recognized by the Supreme Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*, where the majority stated in dictum that the *Parker* doctrine "does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."[65] The Commission therefore makes the following recommendation.

80. When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.*

2. STATUTORY EXEMPTIONS FROM THE ANTITRUST LAWS

A. Introduction

As discussed in Part 1.A, above, statutory antitrust exemptions should be disfavored as likely to harm both U.S. consumers and the U.S. economy.[66] A wide variety of antitrust exemptions, both partial and whole, currently exists in federal law, as listed in Annex A. Rather than examine each antitrust exemption individually, the Commission concluded that articulating relevant general principles that Congress may wish to use in determining whether to abolish, renew, or adopt particular antitrust exemptions would be its best contribution. The Commission's recommendations are discussed in more detail below.

* Commissioners Burchfield, Garza, and Kempf do not join this recommendation.

B. Background

1. History of and Justifications for Antitrust Exemptions

"[V]igorous competition, protected by the antitrust laws, does the best job of promoting consumer welfare and a vibrant, growing economy."[67] Nonetheless, in response to concerns about particular societal values, Congress has at times exempted certain groups or activities from the full or partial application of the antitrust laws.[68] Exemptions from the antitrust laws have existed since the passage of the Clayton Act in 1914.[69] Most recently, Congress passed the medical resident matching program exemption in 2004, which immunizes sponsoring, conducting, or participating in a graduate medical education residency matching program.[70] Congress, of course, is entitled to make judgments about the extent to which competition is in the public interest and when other societal values trump the aims of antitrust law.[71]

The creation of antitrust exemptions is made easier by the disparity in the nature of the benefits they create and the costs they impose.[72] While the benefits of exemptions generally flow to small, concentrated interest groups, the costs are typically passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation.[73] The concentrated benefits provide incentives for interested parties to seek immunities from Congress, while the diffuse costs often have sufficiently minimal impact on individual consumers that those consumers are unlikely to oppose the creation of immunities.[74]

2. Examples of Different Kinds of Antitrust Exemptions

Congress has adopted varying types of antitrust exemptions; most are unique. Among other things, these exemptions differ in terms of the scope of conduct exempted from antitrust law and whether some degree of potential antitrust liability remains (for example, single damages or the possibility of injunctive relief). Attempts at categorizing them are difficult and often unhelpful. Indeed, regardless of their nature, exemptions are harmful. Nonetheless, to describe the problem of exemptions without a description of specific immunities would fail to convey their pernicious nature.

Some exemptions provide a limited immunity for specific conduct. Examples include the Health Care Quality Improvement Act, which provides limited immunity from antitrust damages (but not from equitable relief) for physicians participating in professional peer review bodies in which they review other physicians' conduct;[75] and the Standards Development Organization Advancement Act, which provides for rule of reason assessment and limits antitrust damages to actual damages for certain kinds of standards development organizations that form joint ventures or engage in standards development activities.[76] Another example is Title III of the Export Trading Company Act of 1982, which allows any person engaged in export trade to request a Certificate of Review from the Department of Commerce, conferring immunity from criminal antitrust actions as well as treble damages in civil antitrust actions for activities specified in the Certificate, so long as the applicant establishes that its export trade and methods of operation will not adversely affect competition in the United States.[77] The Webb-Pomerene Act similarly provides an exemption to Sherman Act provisions for associations formed solely to engage in export trade, on the condition that the association is not adversely affecting competition in the United States.[78]

Other exemptions apply to narrow areas but provide a broader immunity—often complete immunity from the antitrust laws. Examples include antitrust immunity for marketing alliances between domestic and foreign airlines that are approved by the Department of Transportation;[79] the Charitable Donation Antitrust Immunity Act, which gives antitrust immunity to charitable institutions that set the annuity rate for gift annuities or charitable remainder trust agreements;[80] the Defense Production Act, which provides antitrust immunity for conduct undertaken in developing or carrying out a voluntary agreement or plan of action for the President that is necessary for the defense of the United States;[81] the Need-Based Educational Aid Act, which provides an antitrust exemption to certain joint actions taken by institutions of higher education regarding awards of financial aid to students;[82] and the Soft Drink Interbrand Competition Act, which provides an antitrust exemption for the grant of exclusive territories to soft-drink bottlers by soft-drink trademark holders in trademark licensing agreements.[83]

Exemptions may instead apply broadly, but provide only limited immunity (from multiple damages, for example). Examples include the Local Government Antitrust Act (LGAA), which precludes treble damages actions against local governments, their officers and employees acting in an official capacity, or private persons whose conduct is directed by a local government;[84] and the National Cooperative Research and Production Act (NCRPA), which provides for rule of reason assessment and limits antitrust damages to actual damages for joint ventures for the purpose(s) of research, development, or production (except for certain specified conduct), if the joint venture has first been notified to the Antitrust Division of the Department of Justice (DOJ) and the FTC.[85]

Finally, some exemptions create a broad immunity for entire areas or types of commerce. For example, the Capper-Volstead Act provides antitrust immunity for persons engaged in the production of agricultural products acting together in associations to process, prepare, handle, or market such products, unless the conduct would violate Section 2 of the Sherman Act or "unduly enhance" prices of agricultural products.[86] The McCarran-Ferguson Act grants an exemption to "the business of insurance" to the extent it is regulated by state law, unless the conduct involves an agreement or act to "boycott, coerce, [or] intimidat[e]."[87] The statutory labor exemption "enables workers to organize to eliminate competition among themselves, and to pursue their legitimate labor interests, so long as they do not combine with a nonlabor group."[88] The Shipping Act exempts a wide variety of agreements filed with the Federal Maritime Commission, including those in which shipping "conferences"—that is, groups of competing ocean liner shipping companies—formally agree to specific terms of service, including fixing rates.[89]

C. Recommendations and Findings

57. **Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability *and* is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.**

58. **In evaluating the need for existing or new immunities, Congress should consider the following:**

- **Whether the conduct to which the immunity applies, or would apply, could subject actors to antitrust liability;**
- **The likely adverse impact of the existing or proposed immunity on consumer welfare; and**
- **Whether a particular societal goal trumps the goal of consumer welfare, which is achieved through competition.**

Congress should first determine whether the conduct covered, or to be covered, by an antitrust exemption could in fact violate the antitrust laws. If not, immunity from the antitrust laws is unnecessary. This step is especially important given the changes in the antitrust laws over the past thirty to forty years. As discussed in Chapter I.A, the substantive application of the antitrust laws has become more economically sophisticated and flexible. Conduct that may have been at risk for the application of per se rules of automatic illegality at the time an antitrust exemption was adopted may now be far more likely to be evaluated under the rule of reason, which examines likely procompetitive, as well as anticompetitive, effects.

Congress should also carefully weigh the harms of an antitrust exemption to consumer welfare.[90] Any decision to allow an exemption should "be made reluctantly and only after thorough consideration of each particular situation."[91] A proposed exemption should be recognized as a decision to sacrifice competition and consumer welfare, and should be allowed only if Congress determines that a substantial and significant countervailing societal value outweighs the presumption in favor of competition and the widespread benefits it provides.[92]

Congress, of course, is entitled to make judgments regarding what societal values may trump the goals of antitrust law. The Commission finds two arguments in favor of antitrust exemptions particularly unpersuasive, however. First, no immunity should be granted to create increased certainty in the form of freedom from antitrust compliance and litigation risk.[93] Antitrust compliance and litigation risks are costs of doing business that hundreds of thousands of American businesses manage every day. No particular companies or industries should be specially entitled to avoid those costs; if these costs are unreasonable, broader reform applicable to all businesses is the proper remedy.* Second, no immunity should be granted to stabilize prices in order to provide an industry with certainty and predictability for purposes of investment or solvency.[94] This too is a benefit that all industries would appreciate, but that none should be singled out to receive. The costs of price "stability" typically flow to consumers and result in inflexibility that undermines economic growth. Indeed, these were two of the justifications offered in support of the three exemptions on which the Commission held hearings.

For example, some proponents of the McCarran-Ferguson Act's antitrust exemption for the business of insurance maintain the exemption is necessary to allow insurers, among other things, to collect, aggregate, and review data on losses (both historical and projected) so they can better set their rates to cover their likely costs.[95] They argue that the sharing of such historical and trending data is needed especially by smaller insurers that otherwise would be unable reasonably to assess risk and compete effectively.[96] Like all potentially beneficial competitor collaboration generally, however, such data sharing would be assessed by antitrust enforcers and the courts under a rule of reason analysis that would fully consider the potential procompetitive effects of such conduct and condemn it only if, on balance, it was anticompetitive.[97] Insurance companies would bear no greater risk than companies in other industries engaged in data sharing and other collaborative undertakings. To the extent that insurance companies engage in anticompetitive collusion, however, then they appropriately would be subject to antitrust liability.

A related and equally questionable justification appears in support of the antitrust exemption under the Shipping Act. Although Congress substantially modified the Shipping Act in 1998 to allow individually negotiated rates, which has sharply reduced ocean carriers' use of jointly set "conference rates,"[98] proponents assert that an antitrust exemption remains necessary for other purposes. They maintain that carriers need an antitrust exemption to adopt more efficient practices jointly, such as agreements that allow ocean carriers to share certain equipment at ports in order to reduce congestion.[99] Acknowledging the possibility that such agreements could withstand antitrust scrutiny, one witness maintained that the ocean carriers nevertheless would not attempt them absent the certainty that no antitrust liability would result.[100] The witness emphasized the enormous investments of ocean carriers and the need to eliminate even the potential for antitrust liability.[101]

However, this reasoning reduces to an argument that ocean carriers should not be subject to the same costs of doing business as other industries. These costs of doing business

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* Although Commissioner Burchfield agrees that increased certainty and freedom from litigation risk are not justifications for antitrust immunity, he believes that programs by federal and state governments to review business practices in advance of their implementation to confirm the legality of those practices under existing antitrust standards are useful, but currently underused, and should be encouraged.

include managing firms' conduct to comply with antitrust, and many other, laws. All kinds of businesses across the United States—including firms that make investments comparable to or greater than those of ocean carriers—comply with the antitrust laws as they plan their activities, including joint activities with competitors. This is not hypothetical economic theory;[102] it is how hundreds of thousands of firms do business every day. Because they must comply with the antitrust laws, these firms structure their activities to avoid anticompetitive effects.[103] This promotes consumer welfare. There does not appear to be anything unique about ocean carriers that would merit holding them to a lesser standard.

Indeed, contrary to the asserted need for an immunity, ocean shipping provides a good example of an industry that now operates more efficiently with competition than without. An exhaustive survey of ocean shipping has found that:

> [t]he steepest declines in observed freight rates have coincided with a generalised decrease in conference power in the face of competition from strong independent operators and the implementation of competition-enhancing legislation in the United States trades . . . . Carriers have delivered better quality and more shipper-responsive services in recent years. This improvement in shipping services has not come about because of price fixing, but, rather, has accompanied a decline in conference power and an increase in competition.[104]

These justifications are similarly wanting with respect to the Export Trading Company Act (ETC Act).[105] Title III of the ETC Act creates a limited antitrust exemption for U.S. companies that jointly export goods or services, provided there is no substantial lessening of competition within the United States. Such joint export-oriented activities are not subject to criminal antitrust liability or treble damages.[106] The ETC Act creates a rebuttable presumption that U.S. antitrust laws are not violated by a covered company's joint conduct to export with other firms as long as it complies with an Export Trade Certificate of Review issued by the Commerce Department (and reviewed by the DOJ).[107]

Proponents of the ETC Act claim that it promotes exports, especially by small and medium-sized companies that "would not be able to export, or not be able to export on a sustained basis" without an antitrust exemption for their joint conduct.[108] Small and medium-sized enterprises constitute the vast majority of companies covered by Certificates of Review.[109] Proponents argue that the ETC Act exemption is necessary for these companies because it provides assurance that specified conduct does not violate the U.S. antitrust laws and will not result in a government antitrust action against the exporters.[110]

The Commission sees no reason, however, why these companies should be held to a lesser standard of antitrust compliance than any other companies doing business. The Department of Commerce explained that the ETC Act does not actually exempt conduct from the antitrust laws because a Certificate would not issue covering conduct that would violate those laws.[111] In that case no antitrust exemption should be necessary.

The ETC Act raises a particularly acute concern insofar as it can be characterized as granting a limited immunity to U.S. companies engaging in cartel behavior in foreign markets. It is inconsistent for U.S. antitrust enforcers to emphasize to foreign antitrust enforcers the importance of cartel enforcement at the same time that U.S. law immunizes what some consider to constitute overseas cartel behavior by American firms.*

These are only three of more than thirty antitrust exemptions. The Commission does not mean to imply that these three are the only antitrust exemptions that warrant scrutiny, however. Although the Commission was not in a position to study all antitrust exemptions in depth, it heard no compelling justification for any of the exemptions on which it held hearings.[112] Such justifications, as discussed above, seemed to overestimate the potential for antitrust liability for the immunized conduct or seek a special exception from the same costs of legal compliance as are borne by other firms in the United States. Claimed justifications for antitrust exemptions require careful scrutiny and testing against legal and marketplace realities.

59. The following steps are important to assist Congress in its consideration of those factors:

- **Create a full public record on any existing or proposed immunity under consideration by Congress.**
- **Consult with the Federal Trade Commission and the Antitrust Division of the Department of Justice about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the existing or proposed immunity.**
- **Require proponents of an immunity to submit evidence showing that consumer welfare, achieved through competition, has less value than the goal promoted by the immunity, and the immunity is the least restrictive means to achieve that goal.**

* Commissioners Burchfield and Garza do not join the Commission's conclusions with respect to the ETC Act.

Commissioner Burchfield believes that the certainty provided to small exporters by the ETC Act is worthwhile. Furthermore, he would not suggest that the ETC Act is deserving of special criticism among all the other exemptions.

In Commissioner Garza's view, the ETC Act has not been shown to have had anticompetitive effects. It is also consistent with a proposal she favors to limit treble damage exposure for overt conduct subject to the rule of reason. It is also erroneous, in her view, to equate joint export activity by small and medium-sized companies with criminal "cartels," especially given that a Certificate of Review will not be issued over the objection of the Justice Department.

Congress should develop a complete public record when it considers whether to abolish, renew, or enact antitrust exemptions.[113] Gathering information from a broad range of sources and through various means, including public hearings, is vital for sound policy and well-reasoned decision-making.[114] Ensuring that the information gathered is available to all interested persons enables identification of any errors or omissions in the record, facilitates more input to Congress, and provides context regarding the purpose and scope of the immunity at issue.[115] Moreover, providing a substantial legislative history that explains the reasons for a particular exemption can provide a baseline against which to compare assumptions and conditions at the time of passage with data obtained at a later time when the immunity may once again be under consideration.[116]

Congress should consult with the antitrust agencies on whether the conduct at issue could subject the actors to antitrust liability and the competitive effects of the immunity.[117] The agencies already informally provide their views on proposed immunities and do so formally when called upon.[118]

Further, Congress should require proponents of an immunity to submit evidence demonstrating that the benefits of competition are less important than the societal value promoted by the immunity under consideration, and that the proposed immunity is the least restrictive means to achieve that value.[119] The proponent of an antitrust exemption should explain why conduct within the scope of a proposed immunity is both in the public interest and unlawful under the antitrust laws; estimate the ancillary effects of the proposed immunity; and demonstrate that the immunity is essential to achieve the desired policy outcome.[120] This would require the proponent to show there is no less restrictive alternative to achieve the benefits of the exemption.[121]

The burden of justifying any immunity should fall on the proponents of that immunity, because they "are in an inherently unique position to provide that information as to the relative merits of the immunity."[122] Exemptions from the antitrust laws should require ongoing proof of their justification and necessity.[123]

60. If Congress determines that a particular societal goal may trump the benefit of a free market to consumers and the U.S. economy in general, Congress should take the following steps:

- **Consider a limited form of immunity—for example, limiting the type of conduct to which the immunity applies and limiting the extent of the immunity (for example, a limit on damages to actual, rather than treble, damages).**

- **Adopt a sunset provision pursuant to which the immunity or exemption would terminate at the end of some period of time, unless specifically renewed.**

- **Adopt a requirement that the Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, report to Congress, before any vote on renewal, on whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity proposed for renewal.**

Limited Form of Immunity. If Congress decides an antitrust exemption may be an appropriate course of action, it first should consider precisely what conduct may require an antitrust exemption. The scope of conduct to be immunized should be as limited as possible. In addition, Congress should consider whether full immunity from antitrust liability is necessary to achieve the societal value at issue. It may be sufficient instead to limit potential civil antitrust remedies.[124] An antitrust exemption that reduces treble damages to single damages is preferable to a broader exemption that would more significantly restrict the ability of the antitrust laws to combat anticompetitive behavior.[125] Two examples of such an approach are the NCRPA and the Standards Development Organization Advancement Act, both of which restrict monetary remedies to actual damages for conduct taken in accordance with the acts' terms.[126]

Sunset Provision. Congress also should consider a "sunset" provision for any antitrust exemption it adopts or reconsiders. Sunset provisions would allow Congress to take into account changed circumstances that may make an immunity socially harmful.[127] They help ensure that immunity-granting legislation is interpreted in accordance with congressional intent.[128] Sunset provisions allow Congress to restudy an issue regularly, leading to more frequent input from interested groups.[129] To date, sunset provisions have been used only very rarely for antitrust exemptions.[130] Once an exemption is adopted, it is rarely revisited. Especially when vested interests are at stake, it is often difficult to get renewed consideration of the need for an antitrust exemption, even if it proves ineffective or harmful.

Periodic consideration of exemptions is important. Statutory exemptions can cement the economic understanding of market circumstances at a particular point in time. The justifications claimed for statutory exemptions from the antitrust laws warrant a great deal of skepticism, particularly if the exemption was originally created decades ago. Changes in technology, competitive forces, or economic learning can render an exemption completely obsolete.[131] Many were enacted at a time when the U.S. economy was very different from today. Moreover, revolutions in communications, transportation, and business methods have lowered transactions costs and substantially changed the ways in which firms and industries operate.[132] International competition now affects many more industries than previously was the case. Antitrust analysis itself has changed substantially in recent decades. Thus, even if one assumes there may have been valid economic justifications for specific industry exemptions in the past, it is highly questionable whether those justifications remain valid.[133]

To prevent the retention of antitrust exemptions for decades after their reasons for being have disappeared, Congress should impose a sunset provision on all immunities it enacts.[134] The Commission does not intend this recommendation to encourage the adoption of antitrust exemptions on the rationale that they can be reconsidered at a later time.[135] Rather, if Congress goes so far as to adopt or renew an antitrust exemption, it is important to ensure it does not become set in stone, but rather must be justified on a recurring basis. Existing immunities also should be amended to include sunset provisions and should be reviewed using the framework proposed by this Commission.

The mechanics of this approach would require all statutorily created antitrust immunities to terminate after a set period of time, unless specifically renewed by an affirmative act of Congress after thorough reconsideration of the justification for and the evaluation of the actual operation of the exemption.[136] Congress can then determine whether to initiate a renewal process. Prior to the expiration of the sunset period, policymakers should hold public hearings regarding possible renewal of the immunity.[137] In addition to examining the historical record of an immunity, policymakers should collect new information that was not available previously but could be relevant to their current analysis of that immunity. Key issues would include: (1) whether economic or legal conditions have changed such that an immunity no longer is necessary; (2) whether alternatives could remedy the alleged problem with less impact on competition; and (3) what effects the immunity has had since its passage or last renewal.[138]

Report from FTC. Congress should require that, before any vote on renewal of an exemption, the FTC, in consultation with the DOJ, report to Congress on whether the conduct at issue could subject the actors to antitrust liability, and the competitive effects of the immunity proposed for renewal. FTC Chairman Deborah Platt Majoras testified that such studies of competitive effects are very resource-intensive, but that the FTC would consider undertaking such studies if given sufficient resources.[139] Another way to implement this recommendation could be to direct the FTC to sponsor studies undertaken by academics or others as appropriate.

61. Courts should construe all immunities and exemptions from the antitrust laws narrowly.

Congress should grant only those immunities that are narrowly drafted, so that competition is reduced only to the minimum extent necessary to achieve the intended goal.[140] Congress commonly puts limits on its exemptions,[141] and has at least once explicitly directed that a statutory exemption be construed narrowly.[142]

Further, courts should construe all immunities narrowly and against the beneficiary.[143] Doing so would restrict their more expansive interpretation and emphasize the importance of Congress's enacting clear statutory language.[144]

3. REGULATED INDUSTRIES, THE TRANSITION TO DEREGULATION, AND ANTITRUST LAW

A. Introduction

During the early part of the twentieth century, a variety of industries were considered subject to market failures, such as natural monopoly or an inability to survive "excessive competition." In such industries, Congress typically created administrative agencies to oversee economic functioning, particularly prices, costs, and entry (known as "economic regulation").[145] Regulation was intended to limit the exercise of monopoly power and advance the objective of reliable service, provided on non-discriminatory terms, through rate and service regulation.[146] Under such regulation, there is only a limited role for antitrust law.[147] Indeed, economic regulation ultimately can be the "antithesis" of competition, tending to preserve monopolies and other non-competitive market structures by restricting entry, controlling price, skewing investment, and limiting or delaying innovation.[148]

A movement toward deregulation, however, now has taken place in almost all regulated industries.[149] Various factors have moved public policy in the United States toward deregulation of formerly regulated industries.[150] Technological progress has facilitated the growth of competition in industries previously considered natural monopolies.[151] In addition, critiques of regulation began to emerge as early as 1960, when a significant report concluded that "most federal regulatory agencies ha[ve] taken sides with the regulated firms at the expense of the public interest," and that the costs of regulation were significantly more than anticipated.[152] Others expanded on these critiques, pointing out that regulation often distorts firms' incentives and rewards inefficiency rather than reduced costs and innovation.[153] Some conclude that, in many instances, "regulation reflects successful rent-seeking by private economic interests and generally reduces consumer welfare by restricting output."[154]

B. Recommendations and Findings

Congress's decision broadly to deregulate has brought substantial benefits to U.S. consumers and the U.S. economy.[155] The trend toward deregulation should be furthered where practicable. Free-market competition generally promotes efficiency and thus benefits consumer welfare, while economic regulation often results in inefficiency that increases prices to consumers. In the vast majority of cases, competition is more likely to benefit consumers than is economic regulation. The Commission therefore makes the following general recommendation, and several others set forth below.

62. Public policy should favor free-market competition over industry-specific regulation of prices, costs, and entry. Such economic regulation should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address. In general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve.

1. The Application of Antitrust Law in Regulated and Deregulated Industries

When and how to apply antitrust law in the context of regulated industries and industries undergoing deregulation has prompted confusion from time to time. Even in industries governed predominantly by regulation, antitrust can still play a limited role.[156] At the other end of the spectrum, once deregulation has been completed and the public relies solely on competition and market forces, the antitrust laws should apply fully to deter or challenge anticompetitive conduct.

63. When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.

The precise point at which an industry passes from regulation to competition requiring antitrust enforcement typically is not easy to discern. The deregulation of entire industries cannot always be instantaneous, of course, so transition mechanisms may be necessary.[157] In addition, certain segments of industries may require ongoing regulation if natural monopoly characteristics remain that hinder effective competition there.[158] Thus, questions have arisen about whether antitrust law should apply to regulated industries, particularly those undergoing transition from regulation to deregulation.

In many industries that have undergone deregulation, policymakers have found particular circumstances in which monopolistic market structures and residual areas of potential monopoly power, often called "bottlenecks," continue to require some form of regulation.[159] In these circumstances, it is crucial to apply sound economic principles so that regulated and unregulated portions of industry do not work at cross-purposes and thereby harm consumer welfare.[160] One authority on deregulation stated:

> Where competition is not feasible throughout an industry or market, as in the traditional public utilities, entry of unregulated competition can introduce distortions so severe as to make the mixed system the worst of both possible worlds. The preferable remedy is not to suppress the competition, but to make the residual regulation as consistent as possible with it.[161]

As Congress continues to assess ongoing regulation and deregulation in particular industries, it is important to keep in mind that the application of antitrust law is a necessary component of a reliance on competition. Antitrust law generally has a more significant role to play as an industry moves toward less direct regulation.[162] "In essence, [the antitrust laws] promote competition so that competition itself can bring us its economic benefits."[163]

This general principle has a number of applications, two of which are explained below.

a. Savings Clauses and Implied Immunities

64. Statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all.*

65. Courts should interpret savings clauses to give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect.†

Congress can specify the extent to which antitrust law should apply to regulated industries by including savings clauses in legislation involving those industries. Antitrust savings clauses clarify the extent to which Congress intends to preserve the role of antitrust enforcement in a regulatory environment.[164] They make clear that Congress did not intend the courts to imply immunity from the antitrust laws for conduct covered by a regulatory regime.[165] Where a savings clause does not exist, the courts must "discern the intent behind complex statutes and regulatory schemes, and fill in the gaps" of such legislation.[166] This may result in outcomes not intended by Congress.

Congress should articulate clearly the extent to which it intends a regulatory regime to displace the antitrust laws, if at all. A savings clause that addresses this issue can help courts determine whether an immunity from antitrust law should be implied from the regulatory scheme, which can reduce uncertainty and litigation costs. The use of savings claus-

* Commissioner Warden does not join this recommendation. In his view, this and the following recommendation do not recognize the myriad of conflicts between regulatory and antitrust regimes that arise in the real world and are unforeseen when regulatory statutes are enacted.

† Commissioners Garza and Warden do not join this recommendation.

Commissioner Warden does not join this recommendation for the reason stated in the previous note.

es can help avoid results that conflict with Congress's intent in creating the regulatory scheme.

66. Courts should continue to apply current legal standards in determining when an immunity from the antitrust laws should be implied, creating implied immunities only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue, as stated in cases such as *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.*

In the absence of a savings clause, courts will determine whether the regulatory scheme is so pervasive that Congress is "assumed to have foresworn the paradigm of competition."[167] The analysis of implied immunities begins with the "cardinal principle of construction that repeals by implication are not favored."[168] This principle reflects a presumption that Congress does not intend to limit the scope of the antitrust laws except where it expressly says so.

As the Supreme Court explained in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, "[i]mplied antitrust immunity . . . can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."[169] The Court further stated that "[r]epeal is to be regarded as implied only if necessary to make the [subsequent regulatory scheme] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the [antitrust and regulatory] statutory schemes."[170] In fact, "[e]ven when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry."[171] An implied immunity is limited to the particular activity challenged and does not extend to other conduct regulated by the same agency."[172] Although the Supreme Court is likely to address this standard in *Billing v. Credit Suisse First Boston Ltd.* this term,[173] the Commission agrees that *National Gerimedical* provides the proper standard for determining whether to imply an immunity from antitrust law.

67. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; it does not displace the role of the antitrust laws in regulated industries.

* Commissioner Delrahim does not join this recommendation.

The appropriate application of antitrust savings clauses and when to imply an immunity from the antitrust laws was most recently raised by the Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*, involving the Telecommunications Act of 1996 (1996 Act).[174] In that case Trinko alleged that Verizon violated Section 2 of the Sherman Act by breaching certain interconnection duties under the 1996 Act.[175] Trinko was a customer of AT&T's local telephone service and allegedly suffered antitrust injury when he received "poor local phone service" due to Verizon's failure to fulfill its statutory duty to provide certain services to AT&T.[176]

When Congress enacted the 1996 Act, it permitted companies providing local telephone service to provide long-distance service as well, if they fulfilled certain duties to enable competitors to enter the local telephone service market.[177] To facilitate this new competition in the local telephone service market, local telephone companies (such as Verizon) were required to provide competitors (such as long-distance companies like AT&T) non-discriminatory access to certain network elements necessary to provide local telecommunication service.[178] Verizon agreed to abide by these new duties in order to enter the long-distance telephone service market.[179] When Verizon allegedly did not comply with its statutory duties under the 1996 Act, federal and state regulators penalized Verizon.[180] The New York state regulator issued orders requiring Verizon to pay $10 million to its injured competitors, and pursuant to a Federal Communications Commission (FCC) consent decree, Verizon agreed to pay $3 million to the U.S. Treasury.[181]

The question before the Supreme Court was "whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act."[182] The Court held that the Act's antitrust savings clause precluded the courts from implying immunity from the antitrust laws.[183] In applying the antitrust laws, however, the Court concluded that Verizon's alleged violations of the 1996 Act did not constitute a violation of the Sherman Act.[184] The Court concluded that "traditional antitrust principles" do not justify adding "insufficient assistance in the provision of service to rivals" under the 1996 Act to "the few existing exceptions from the proposition that there is no duty to aid competitors."[185] Thus, the Court's statements indicate that its holding simply confirms the limits on the circumstances that can give rise to a duty to deal under Section 2.

To be sure, there is language in the case that some have construed as suggesting that the Court failed to apply the antitrust laws fully because the alleged refusal to deal arose in the context of the regulatory regime established by the 1996 Act. Thus, they suggest, despite the savings clause, the Court created an implied immunity. For example, in part four of its decision, the Court opined that it must consider the importance of the "existence of a regulatory structure designed to deter and remedy anticompetitive harm" when evaluating antitrust claims.[186] This language must be read in the proper context, however. After deciding that Trinko's claim did not state a cause of action under traditional antitrust law, the Court then examined whether the regulatory regime established by the 1996 Act provided a reason to *expand* the contours of antitrust doctrine beyond the usual limits. The Court concluded it did not. The Court simply held that the specific, regulatory duties to deal established under the 1996 Act did not also create a new cause of action under the refusal-to-deal doctrine of Section 2 of the Sherman Act.[187] *Trinko* is thus best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act. It should not be read to displace the role of the antitrust laws in regulated industries as an implied immunity, nor should it be taken as a judicial rejection of a savings clause.

*b. Filed-Rate Doctrine (*Keogh *Doctrine)*

The filed-rate doctrine, also known as the *Keogh* doctrine,[188] prohibits a private plaintiff from pursuing an antitrust action seeking treble damages where the plaintiff is claiming that a rate submitted to, and approved by, a regulator resulted from an antitrust violation.[189] At the time this doctrine was created, members of a regulated industry were typically required to file their proposed rates with regulators who reviewed the rates to ensure they were "fair and reasonable." In creating the "filed rate" doctrine in *Keogh v. Chicago & Northwestern Railway*, the Supreme Court explained that only the relevant regulatory authority could change these rates, even if the rate was higher than it otherwise would be due to a price-fixing conspiracy.[190]

Since deregulation, however, many industry members are no longer required to file their rates with regulators. For example, rail and motor carriers are generally no longer required to file rates with the Surface Transportation Board (STB).[191] Similarly, in the electricity industry many rates are market-based and, although filed with a regulatory agency after they go into effect, are not reviewed for reasonableness.[192] Nonetheless, courts have continued to apply the filed-rate doctrine to preclude antitrust claims where a tariff has been filed with a regulatory agency, regardless of whether the agency has actually reviewed and approved the rate.[193]

68. Congress should evaluate whether the filed-rate doctrine should continue to apply in regulated industries and consider whether to overrule it legislatively where the regulatory agency no longer specifically reviews proposed rates.

Some commentators have questioned in recent years whether courts should continue to apply the filed-rate doctrine to market-based rates that are merely submitted to regulatory agencies as a formality and are not substantively reviewed.[194] In 1986 the Supreme Court reviewed the filed-rate doctrine and conceded that a variety of developments had cast the original reasoning for the *Keogh* doctrine "in a different light."[195] Nonetheless, the Court concluded, it was for Congress, not the Court, to determine whether to abolish the filed-rate doctrine.[196] The Commission believes the time has come for Congress to address the issue, especially since the movement to deregulation has continued, and even grown, since the Court's 1986 decision.

2. Merger Review in Regulated Industries

As discussed in Chapter I.B, the antitrust agencies examine mergers and acquisitions notified to the agencies pursuant to the HSR Act to determine whether a proposed transaction may substantially lessen competition.[197] The antitrust agencies apply the same merger analysis to all industries, including those that formerly were regulated.

Four industries remain in which a regulatory agency also has merger review authority: certain aspects of electricity (regulated by the Federal Energy Regulatory Commission (FERC)); telecommunications/media (regulated by the FCC); banking (regulated by various banking agencies); and railroads (regulated by the STB).[198] In those industries the regulatory authority typically reviews a proposed transaction under its statutory public interest standard. The "public interest" standard, which varies by industry, usually requires the agency to review both likely competitive effects and likely public interest effects. For example, in reviewing a proposed transaction, the FCC takes into account possible effects on the diversity of views available and the obligation to provide universal service, as well as likely effects on competition.[199] Thus, the regulatory authority could allow a transaction if it determines that the public interest benefits offered by the proposed transaction outweigh its likely anticompetitive effects.

In the first two of those four industries—electricity and telecommunications—the DOJ has full enforcement authority to investigate and challenge a proposed merger under the Clayton Act, regardless of the regulatory agency's authority pursuant to its regulatory statute.[200] In both instances, the regulatory agencies also consider competition as one part of their broader public interest review.[201]

A slightly different approach controls in the area of banking. There, the federal banking agency considers likely competitive effects, along with financial soundness and other banking-specific concerns.[202] The DOJ provides its competitive analysis to the banking agency, and, in practice, the banking agency and the DOJ usually work closely together to agree on the proposed transaction's likely competitive effects.[203] The banking agency has authority to depart from the DOJ's competition-based recommendations, however, and this has occurred a few times, although not in the recent past.[204] If the banking agency approves the merger over the DOJ's objections, the DOJ has full independent authority to challenge the banking agency's decision in court.[205] Pursuant to the Bank Merger Act, the court applies a standard that differs slightly from Section 7 of the Clayton Act: a merger can overcome an otherwise successful challenge on competition grounds if the merging parties demonstrate the anticompetitive effects are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[206]

The fourth industry is railroads, where Congress, in abolishing the Interstate Commerce Commission (ICC) in 1995, transferred the ICC's historical railroad merger review authority to the STB.[207] The STB reviews mergers under a public interest standard that incorporates several considerations, including whether the proposed transaction would have an "adverse effect on competition."[208] By statute, the STB must give "substantial weight" to the DOJ's views on whether the transaction will adversely affect competition, but the STB makes the final decision on whether to allow the merger.[209] In 1996 the STB approved the merger between Union Pacific and Southern Pacific, despite the DOJ's objections that the merger was anticompetitive.[210] Unlike under the Bank Merger Act, the DOJ does not have independent authority to challenge a transaction in this industry.[211]

a. Statutory Authority to Review Mergers in Regulated Industries

69. Even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act.*

70. For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.

71. The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.

72. The antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation.

73. Mergers in regulated industries should be subject to the requirements of the Hart-Scott-Rodino Act, if they meet the tests for its applicability, or to an equivalent pre-merger notification and investigation procedure, such as set forth in the banking statutes, so that the relevant antitrust agency can conduct a timely and well-informed review of the proposed merger.

Merger review in industries still subject to some degree of regulation should place responsibility for the analysis of particular issues with the agency with the relevant expertise and should aim to make this dual review as efficient as possible. Merger review by two federal agencies can impose significant and duplicative costs on both the merging parties

* Commissioner Kempf does not join this recommendation.

While joining this recommendation, Commissioner Warden sees no reason to alter the present regime for review of bank mergers.

and the agencies. In addition, conflicts have sometimes arisen, for example as explained above when the STB approved a railroad merger despite a conclusion by the DOJ that it would substantially lessen competition.

The antitrust agencies have unique expertise in evaluating the likely competitive effects of mergers. Therefore, the antitrust agencies should be responsible for analysis of the likely competitive effects of mergers in regulated industries. The regulatory agencies have expert understanding of the regulated industry, as well as knowledge of the particular "public interest" factors important to the regulated industry, which can be valuable to the analysis. The antitrust agencies would draw on the expertise of the industry regulator in conducting its competition analysis, much as they do today in defense industry mergers and others. The recommended approach would ensure competition policy and enforcement consistency, limit inefficiencies and delays associated with overlapping enforcement, align competition policy assessments across industries regardless of the existence of different regulatory agencies, facilitate transparency in decision-making, and allow the antitrust agencies to act where they have a comparative advantage.[212] It would also limit duplicative expenditure of resources and an inefficient allocation of scarce government resources, particularly where an industry regulator disregards the antitrust agency's analysis.[213] Moreover, because the continued transition to deregulation may result in additional proposals to consolidate firms in regulated industries, it is important to conduct proper competitive analyses to ensure such industries continue to become, or remain, competitive.[214]

This recommendation is consistent with recommendations reached by other organizations studying the interrelationship between regulatory and antitrust review of mergers. The International Competition Policy Advisory Committee (ICPAC), which reviewed this issue in 2000, recommended giving federal antitrust agencies exclusive jurisdiction to review mergers in regulated industries, as well as further study of issues relating to overlapping agency review.[215] In offering this recommendation, the ICPAC majority explained that overlapping sectoral and generalized agency authority threatens (1) efficient review; (2) substantive international convergence; (3) case-by-case cooperation; and (4) consistency and transparency.[216] The Organisation for Economic Co-operation and Development (OECD) has also addressed the issue of the relationship between antitrust and sectoral agencies, most recently during its February 2005 Global Forum on Competition. The OECD concluded that competition agencies are best suited for competition oversight and that sectoral agencies are best suited for technical regulation.[217] This view was also supported by the Business and Industry Advisory Committee to the OECD.[218]

Finally, to ensure the ability of the antitrust agencies to perform proper competitive analyses, regulated industries should be subject to HSR Act requirements. This will ensure that the antitrust agency reviewing the transaction has appropriate information with which to perform its competitive analysis. Where there is an equivalent mechanism by which the antitrust agencies are provided with information, as is the case with banking mergers, such that requiring pre-merger notification under the HSR Act would be redundant, the Commission sees no need for duplicative filing requirements.

b. Ongoing Evaluation of the Need for Regulatory Review of Mergers

74. Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency's "public interest" standard to determine whether in fact such regulatory review is necessary.

- **In its reevaluation, Congress should consider whether particular, identified interests exist that an antitrust agency's review of the proposed transaction's likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such "particular, identified interests" would be interests other than those consumers interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition.**

Congress should periodically revisit statutes providing for merger review by regulatory agencies to determine whether such review remains necessary. Economic theory and recent experience have shown that free-market competition will protect consumer interests such as price, quality, and choice of products. The Commission believes that competition can in many cases provide the same benefits to consumers that regulatory agencies' public interest review also seeks to ensure. Furthermore, the Commission is not convinced that an anticompetitive merger can ever be in the "public interest." Because of this, merger review by regulatory agencies may not be beneficial to consumer welfare.

4. THE STATE ACTION DOCTRINE

A. Introduction

The states, like the federal government, generally rely on competition in the marketplace to produce lower prices, higher quality, and innovation. Nonetheless, also like the federal government, sovereign states can enact economic regulations to replace competition in particular situations, and individual states have done so. Courts developed the "state action" doctrine to identify situations in which a state's decision to displace competition with regulation trumps the general federal policy in favor of free markets and, therefore, overrides the application of federal antitrust law. Under the state action doctrine, courts can immunize from potential federal antitrust liability certain activity undertaken pursuant to a state regulatory regime or other state law.[219]

The Supreme Court created the state action doctrine more than sixty years ago in *Parker v. Brown*.[220] There, the Supreme Court upheld the legality of a California program regulating the marketing of raisins, concluding that Congress did not intend the Sherman Act expressly to preempt state economic regulation.[221] Absent such an express statement, the Court was reluctant to assume Congress had implicitly preempted state law. The Court explained, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[222] State sovereignty and federalism were, and still are, the underpinnings of Supreme Court state action jurisprudence.[223]

The state action doctrine applies not only to state governmental actors themselves, but also, in certain circumstances, to quasi-governmental entities and private actors. The actions of state governmental actors are generally immune from antitrust liability without further inquiry.[224] This is because "[w]hen the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise."[225] What constitutes the state, however, has given rise to extensive litigation. For example, cities and other municipalities, public service commissions, and state regulatory boards are not the "state" for purposes of the state action doctrine.[226]

The actions of private economic actors, as well as of governmental or quasi-governmental entities not considered to be the "state," are immune from antitrust liability only if they pass the two-part test set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*: (1) the challenged restraint must be "'one clearly articulated and affirmatively expressed as state policy,'" and (2) "the policy must be 'actively supervised' by the State itself."[227] The first requirement, that of clear articulation, serves to ensure that the state has affirmatively authorized departures from free-market competition.[228] The second requirement, that of active supervision, is intended to ensure that state action immunity "will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies."[229] In its most recent ruling on the state action doctrine, *FTC v. Ticor Title Insurance Co.*, the Supreme Court further explained the purpose of the active supervision inquiry is "not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices," but rather "to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[230] Local governments can obtain full or partial antitrust immunity. To obtain full state action immunity, conduct by local governments must meet the "clear articulation," but not the "active supervision," portion of the *Midcal* test.[231]

The Supreme Court's state action jurisprudence has demonstrated a desire to avoid immunizing conduct intended to benefit private, not governmental, purposes. Critics warn, however, that the lower courts increasingly have applied the *Midcal* test in ways that allow defendants to obtain antitrust immunity and thereby trump competition in situations where a state did not intend to displace competition. The ABA Antitrust Section believes that "[s]tate action immunity drives a large hole in the framework of the nation's competition laws."[232] In 2003 the FTC staff issued a report (the FTC State Action Report) recommending "clarification and re-affirmation of the original purposes of the state action doctrine to help ensure that robust competition continues to protect consumers."[233]

Critics raise other troubling issues as well. Some question whether courts have properly taken into account the potential for one state's endorsement of anticompetitive conduct to have spillover effects that raise prices or otherwise harm consumers in other states. Questions also have arisen about whether the state action doctrine should immunize conduct by state government entities and municipalities when they act as market participants. The Commission's recommendations are discussed below.

B. Background

1. The Midcal *Test for Activities of Non-Sovereign State Entities*

a. Clear Articulation

The clear articulation requirement is "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy."[234] As one leading treatise explains:

> Adoption of a policy requiring a state to make a clear statement of its intention to supplant competition reconciles the interests of the states in adopting non-competitive policies with the strong national policy favoring competition . . . . [I]t ensures that the strong federal policy embodied in the antitrust laws will not be set aside where not intended by the state, and yet also guarantees that the state will not be prevented by the antitrust laws alone from supplanting those laws as long as it makes its purpose clear.[235]

The Supreme Court has established certain parameters for the "clear articulation" test. On one end of the spectrum, "clear articulation" does not require that the state *compel* the anticompetitive conduct at issue.[236] The state also need not explicitly authorize specific conduct to satisfy this prong, as long as the state legislature's intent to establish a regulatory program displacing competition is "clear."[237] At the other end, a general grant of authority that is competition-neutral, such as the authority to operate a hospital or contract for taxi service, does not suffice to show "clear articulation."[238] In *Community Communications Co. v. City of Boulder* the Supreme Court declined to accept the argument that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances" because to do so "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require."[239]

The question is whether "the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure."[240] In *Southern Motor Carriers Rate Conference, Inc. v. United States* the Supreme Court reasoned that a state legislature's decision to set rates through a public service commission, rather than through market forces, clearly demonstrated its intention to displace competition in motor carrier ratemaking and thus satisfied the clear articulation requirement.[241] The Court also has used a "foreseeability" analysis to evaluate whether a state clearly intended to replace competition with a regulatory structure.[242] In *Town of Hallie v. City of Eau Claire*, where the relevant statutes gave cities the authority to decide where to provide sewage services, the Court reasoned that potentially anticompetitive conduct—refusing to serve or imposing conditions on agreeing to serve—was a foreseeable result of allowing the cities to determine the areas to be served.[243] Accordingly, the Court concluded the statutes evidenced "a state policy to displace competition."[244]

b. Active Supervision

(i) The Purpose of the Active Supervision Requirement

The active supervision prong of the state action doctrine requires that the state has and exercises independent power to review the challenged conduct, and exercises ultimate control.[245] The state must supervise both the general regulatory scheme and the particular conduct at issue.[246] As the Supreme Court stated in *Town of Hallie*, the active supervision prong serves to ensure that the actor is engaging in the challenged conduct pursuant to state policy.[247] It applies to private actors because when they engage in anticompetitive behavior there is "a real danger" that they are acting to further their own interests, rather than those of the state.[248] The "active supervision" requirement addresses the "practical problems inherent in delegating regulatory power: a private party could carry out an initially authorized scheme in a manner inconsistent with state policy."[249]

The active supervision requirement serves other purposes as well, ensuring that the state's regulatory program "actually implements a positive regulatory policy."[250] As the Court explained in *Midcal*, a state may not circumvent the Sherman Act's proscriptions "by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[251] In addition, the active supervision requirement assigns political responsibility for actions:

> States must accept political responsibility for actions they intend to undertake . . . . For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price-fixing it has sanctioned and undertaken to control.[252]

Finally, the "active supervision" requirement promotes the "citizen participation" value of federalism.[253] Private parties on their own might not offer the public an opportunity to participate in the decision-making process, but the governmental authority that supervises them can ensure that the public has a voice in the regulatory activity.

(ii) Entities to Which the Active Supervision Requirement Applies

The active supervision test applies only when there is a risk that the challenged conduct may be the product of the parties' pursuit of interests other than state policy, and thus its application turns on whether the relevant actor is public or private.[254] Purely private actors are subject to the active supervision test;[255] cities are not. When an entity has a combination of public and private attributes, courts ask "whether the nexus between the State and the [entity in question] is sufficiently strong that there is little real danger that the [entity] is involved in a *private* . . . arrangement."[256]

(iii) Evidence of Active Supervision

To satisfy the active supervision requirement, a defendant must show the state exercises "sufficient independent judgment and control," and that "the details of the [restraint] have been established as a product of deliberate state intervention, not simply by agreement among private parties."[257] Active supervision requires the actual involvement of the state, not just a state's authority to exercise supervisory power. A "negative option" form of supervision (state authority to veto) is not sufficient unless the state has informed itself of the details of the proposed action.[258] For example, in *Midcal* active supervision sufficient to invoke the immunity did not exist because the state authorized and enforced prices established by private parties but did not review the reasonableness of the price schedules or review the terms of fair trade contracts.[259] Active supervision also is not present where the defendants' actions preclude meaningful review. In *Ticor* active supervision was not found where rate filings became effective despite the failure of the rate bureau to provide additional requested information.[260]

C. Recommendations and Findings

75. Congress should not codify the state action doctrine. Rather, the courts should apply the state action doctrine more precisely and with greater attention to both Supreme Court precedents and possible consumer harm from immunized conduct.

76. **The courts should not grant antitrust immunity under the state action doctrine to entities that are not sovereign states unless (1) they are acting pursuant to a clearly articulated state policy deliberately intended to displace competition in the manner at issue, and (2) the state provides supervision sufficient to ensure that the conduct is not the result of private actors pursuing their private interests, rather than state policy.**

Concerns with the state action doctrine should be addressed through continued development of case law in the courts. The Supreme Court's articulation of core state action doctrine standards will, if applied more rigorously, lead to the correct application of the doctrine. There is no need at this time to cement those standards into a statute. Instead, the lower courts ought to apply the Supreme Court's standards with greater precision and to recognize that immunizing anticompetitive conduct through the state action doctrine can cause significant consumer harm. Such harm should not be permitted absent authorization and supervision from the state, as required under Supreme Court precedents. Specific recommendations for how courts can best apply the Supreme Court's teachings and how the doctrine should be refined to address additional issues follow.

1. Clear Articulation

77. **As proposed in the FTC State Action Report, the courts should reaffirm a clear articulation standard that focuses on two questions: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue.**

The FTC State Action Report concluded that "[s]ome lower courts have implemented the clear articulation standard in a manner not consistent with its underlying goal."[261] To address this concern, that report recommended that courts ask two questions to flesh out the clear articulation requirement: (1) whether the conduct at issue has been authorized by the state, and (2) whether the state has deliberately adopted a policy to displace competition in the manner at issue. Together, these requirements would refocus the inquiry on the existence of deliberate and intended state policies to displace competition that can justify setting aside national competition goals. The Commission agrees. The lower courts have not always properly implemented Supreme Court teachings on what is required to show a clearly articulated state policy to displace competition.

In *Town of Hallie* the Supreme Court held that the clear articulation standard was met where the alleged anticompetitive conduct—refusing to provide, or imposing conditions on agreeing to provide, sewage service outside the areas a city had chosen to serve—was a foreseeable result of a state law authorizing cities to determine which areas to serve.[262] Following *Town of Hallie*, some courts have applied a low standard for "foreseeability," reasoning that once a state authorizes certain conduct, anticompetitive forms of that conduct may occur and therefore are "foreseeable."[263]

To say that anticompetitive types of conduct are "foreseeable" in this way, however, is not the same as finding "a deliberate and intended state policy" to replace competition with regulation.[264] In *City of Boulder* the Supreme Court emphasized that a general grant of authority does not equate with authority to engage in specific anticompetitive conduct.[265] In *City of Columbia v. Omni Outdoor Advertising Inc.* the Court explained that the relevant statutory authority must include the authority to suppress competition, not just to regulate.[266]

A more appropriate foreseeability analysis appears in *Surgical Care Center of Hammond v. Hospital Service District No. 1*. In that case the Court of Appeals for the Fifth Circuit, sitting en banc, distinguished "a statute that in empowering a municipality *necessarily contemplates the anticompetitive activity* from [a statute] that *merely allows* a municipality to do what other businesses can do."[267] It explained that to infer a policy to displace competition from the mere authority to enter joint ventures would "stand federalism on its head."[268]

As the FTC State Action Report pointed out, "'foreseeability' is a matter of degree."[269] The foreseeability test can work well if "the displacement of competition is inherent in the nature of the legislation itself."[270] If the grant of authority is "competition-neutral," however, the mere possibility of anticompetitive conduct is not sufficient to support a finding of a clearly articulated state policy to displace competition.[271]

Another issue that demands rigorous attention is whether the relevant statute reveals a state's intent to displace competition *in the manner at issue* in the case. The Seventh Circuit's reasoning in *Hardy v. City Optical, Inc.* exemplifies the type of careful analysis that courts should use. In that case, a statute required optometrists to provide patients with some, but not all, of the information needed to purchase contact lenses. An optometry chain denied its patients access to the complete prescriptions, leaving them unable to purchase their lenses through cheaper, mail-order sources. The court held that "Indiana has not sought to supplant the form of competition—competition from mail-order houses . . . that the complaint charges the defendants with attempting to suppress."[272] Therefore, the clear articulation standard was not met. Other courts should apply the state action doctrine with similar rigor.

To be sure, a state does not need to articulate a policy displacing competition in the *precise* manner at issue. Nonetheless, courts should carefully examine the relevant statute, any clear legislative history, and the nature of the authorized conduct to determine whether a state has clearly articulated a deliberate and intended state policy to immunize the particular conduct at issue.[273]

2. Active Supervision

78. The courts should adopt a flexible approach to the active supervision prong, with different requirements based on different situations.*

The active supervision requirement ensures that "'the [private] actor is engaging in the challenged conduct pursuant to state policy,' rather than in pursuit of private interests."[274] Because the active supervision test applies only when there is a risk that the challenged conduct may be the product of parties' pursuing interests other than state policy, its application turns in part on whether the relevant actor is public or private.[275]

As discussed in the FTC State Action Report, the Supreme Court has not yet "provided much specific guidance on the kind of state review of private actions that would constitute 'active' supervision."[276] The Supreme Court's main opinion in this area, *Ticor*, dealt with a situation in which state supervision of the conduct at issue was virtually nonexistent.[277] Especially because the potential antitrust violation was horizontal price-fixing, a violation most "pernicious," the Court was reluctant to formulate a rule that would too easily find active supervision.[278] These factual circumstances did not afford the Court an opportunity to explain how lower courts should address more complex situations.

To focus the active supervision inquiry, courts should use a flexible, "tiered" approach that requires a different level of active supervision depending on the type of conduct at issue, the entity engaging in that conduct, the industry, the regulatory scheme, and other factors.[279] "[W]hat is sufficiently 'active' for active supervision will vary based on the conduct, industry, regulatory scheme, as well as other factors."[280]

For example, if the conduct at issue were price-fixing, the affirmatively articulated state policy would need to be more detailed and specific than if the conduct entailed less clearly anticompetitive activity.[281] Similarly, whether an entity is more or less governmental in nature should influence the degree of active supervision that courts require. This case-by-case analysis of the entity should consider factors such as the entity's structure, membership, decision-making apparatus, and openness to the public.[282] As one leading treatise points out in discussing whether to apply the active supervision requirement, "[w]ithout reasonable assurance that the [entity undertaking the challenged conduct] is far more broadly based than the very persons who are to be regulated, outside supervision seems required."[283] Similarly, such circumstances should require more active supervision than if the entity were constituted substantially of government, not private, actors. The analysis also

* Commissioners Garza, Kempf, and Warden do not join this recommendation. They believe that the proposed "flexible approach" provides no guidance to those subject to the law and invites the courts to decide each case based on its facts alone rather than legal norms.

should examine the degree of discretion private actors had to undertake the challenged conduct,[284] with greater active supervision required to the extent that private actors had a larger degree of discretion. In sum, a flexible analysis would recognize that, to the extent the actor or the challenged conduct suggests an appreciable risk that the challenged conduct results from private actors' pursuing their private interests, rather than state policy, courts should require a greater degree of active supervision than if that risk is lower.

3. Other Refinements to the State Action Doctrine

79. Where the effects of potentially immunized conduct are not predominantly intrastate, courts should not apply the state action doctrine.*

The state action doctrine has been criticized for its failure to consider interstate spillovers.[285] A state's regulation of activities in a manner that overwhelmingly imposes the cost of regulation on citizens of other states impairs both economic efficiency and the political participation goal of the federal system. Accordingly, when the effects of potentially immunized conduct are not predominantly intrastate, the state action doctrine should not create immunity. Those effects can be measured by determining where the costs and benefits of the regulation are borne.

Parker v. Brown, the case that was the genesis of the state action doctrine, is a prime example of the courts' failure to consider interstate spillovers. *Parker* involved a California agricultural marketing program with mechanisms to prorate raisin production within California and thus limit the amount offered for sale. By reducing output, the program raised raisin prices. The vast majority of consumers that paid higher prices for raisins because of California's regulatory scheme were outside the state: between 90 and 95 percent of the California raisins were shipped out of state.[286] Thus, the benefits of the program (more money to the raisin producers) were largely concentrated in California, but the costs (higher prices for consumers) spilled largely into other states.

Such state regulations producing spillover costs to consumers in other states do not deserve deference.[287] Out-of-state citizens adversely affected by spillovers typically have no political participation rights and effectively are disenfranchised on whether the conduct at

* Commissioners Burchfield, Cannon, Delrahim, Garza, and Kempf do not join this recommendation.

Commissioners Burchfield and Garza believe that, so long as a state acts in a way that does not offend the "dormant Commerce Clause," the state action doctrine should cover actions taken by private actors pursuant to that state mandate. Private companies and individuals should, in virtually every instance, be able to comply with the mandate of a state without assessing whether its effect is "predominantly" intrastate, but if the state operates in violation of the United States Constitution by improperly trying to extend its power beyond its own borders, the action would be void and the state action doctrine should not apply.

issue should be authorized by the neighboring state.[288] This is directly contrary to the principles of federalism that form the basis for state action doctrine.

Moreover, economics teaches that where decision-makers reap the benefits without bearing the costs of an activity, they have incentives to engage in more of that activity than is socially desirable.[289] Therefore, when anticompetitive state regulations tend to produce in-state benefits but out-of-state harms, states have incentives to over-regulate. As a consequence, "[t]he resulting economic inefficiencies go unameliorated" and "nonresidents . . . remain exposed to any resulting monopoly spillovers."[290]

The Supreme Court has shown awareness of possible spillover concerns,[291] but has not yet considered whether to reject application of the state action doctrine if the effects of the conduct at issue are not primarily intrastate.[292] To address the significant consumer harm and political representation concerns discussed above, the Supreme Court and lower courts should not apply the state action doctrine when the effects of a regulation are not predominantly intrastate.

80. When government entities act as market participants, the courts should apply the same test for application of the state action doctrine to them as the courts apply to private parties seeking immunity under the state action doctrine.*

A government entity's participation in a market as a competitor is likely to have market-distorting effects if that entity is not subject to the same rules of competition as private competitors. A "market participant" exception to the state action doctrine that would require application of both prongs of the *Midcal* test would ensure that the government entity's behavior is consistent with state policy, and the state action doctrine is applied consonant with its original purposes and goals.[293]

The possibility of such an exception was recognized by the Supreme Court in *Omni* and was urged by Chief Justice Burger's concurrence in *City of Lafayette v. Louisiana Power & Light*

* Commissioners Burchfield, Garza, and Kempf do not join this recommendation.

Commissioners Burchfield and Garza believe that creating an exclusion from the state action doctrine when the state entity acts as a market participant would raise at least the following serious issues. First, when the plaintiff is not a resident of the state, a federal court may well lack jurisdiction over an antitrust action against a state entity under the Eleventh Amendment. Second, such an exclusion would require states in the first instance, and eventually courts, to determine when the action is sovereign and regulatory as opposed to commercial, an extremely difficult determination that will likely lead to inconsistencies, and imposition of liability eventually on taxpayers. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 433–34 (1978) (Stewart, J., dissenting) (referring to distinction between governmental and proprietary functions as a "quagmire"). Finally, the Commission heard no evidence that states are engaging in an amount of anticompetitive behavior in clearly commercial (as opposed to sovereign) functions that would make such an exclusion necessary or appropriate.

Co. In *Omni* the majority stated in dictum that the *Parker* doctrine "does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."[294] The Court in *Omni* stated that "with the possible market participant exception, *any* action that qualifies as state action is '*ipso facto* . . . exempt from the operation of the antitrust laws.' "[295]

Chief Justice Burger's concurrence in *City of Lafayette* also suggested a market participant exception.[296] The Chief Justice would have limited the Court's holding in that case to cities acting in a proprietary capacity, and he would have imposed a stricter standard to qualify for the state action defense. He reasoned that the same Congress that "meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade" would not have intended the courts to allow local governments to engage in such anticompetitive conduct without being subject to the Sherman Act.[297] As Burger argued, the case should turn on the conclusion that the plaintiff cities are engaging in "business activit[ies]; activit[ies] in which a profit is realized."[298] He found nothing in the state action jurisprudence to suggest that "a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality."[299]

The Federal Circuit, Third Circuit, and Ninth Circuit have appeared willing to entertain the possibility of a market participant exception.[300] For example, the Third Circuit, in dictum, wrote that there may be a market participant exception to *Parker* immunity.[301] The court relied on *Omni* to note that the state does not forfeit immunity by acting with a private party, but rather "[i]mmunity does not *necessarily* obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market."[302] It pointed out, however, that there is little guidance as to what constitutes acting as a market participant.[303] The Ninth Circuit noted that a market participant exception did not apply in the case at issue because the state entity was not "in competition with" the plaintiffs,[304] but observed that guidance in the state action doctrine jurisprudence is extremely limited. The Eighth Circuit has declined to take the lead in adopting such an exception,[305] and the Tenth and Eleventh Circuits have been hostile to the idea.[306] Those courts noted that the distinction between "governmental" and "proprietary" functions has been abandoned in other contexts.[307]

There is not always a clear distinction between a government entity's activities as a regulator and a market participant,[308] but this hurdle is not insurmountable. Horizontal situations where the government competes with private firms are clear examples of circumstances in which a market participant exception would be warranted.[309] In addition, courts might reason by analogy to the market participant exception to the dormant Commerce Clause. There, the market participant exception is appropriate where the state action "constituted direct state participation in the market."[310] In the case law, this includes a state program to pay people who remove abandoned cars from streets and junkyards, because the payment was interpreted as entry into the market for abandoned cars,[311] and a program to sell output from a state-owned-and-operated cement plant.[312] Clearer guidance regarding closer cases could be provided through case-by-case adjudication. This type of incremental line-drawing is a task to which the federal common law system is both well-accustomed and well-suited.

ANNEX A

Exemptions from the Antitrust Laws

Statutory Exemptions from the Antitrust Laws
Agricultural Marketing Agreement Act, 7 U.S.C. §§ 608b–608c
Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, 7 U.S.C. § 852
Capper-Volstead Act, 7 U.S.C. §§ 291–92
Charitable Donation Antitrust Immunity Act, 15 U.S.C. §§ 37–37a
Defense Production Act exemption, 50 U.S.C. app. § 2158
Export Trading Company Act, 15 U.S.C. §§ 4001–21
Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521–22
Health Care Quality Improvement Act, 42 U.S.C. §§ 11101–52
Labor exemptions (statutory and non-statutory), 15 U.S.C. § 17; 29 U.S.C. §§ 52, 101–15, 151–69; (and common law)
Local Government Antitrust Act, 15 U.S.C. §§ 34–36
Medical resident matching program exemption, 15 U.S.C. § 37b
National Cooperative Research and Production Act, 15 U.S.C. §§ 4301–06
Need-Based Educational Aid Act, 15 U.S.C. § 1 note
Newspaper Preservation Act, 15 U.S.C. §§ 1801–04
Non-profit agricultural cooperatives exemption, 15 U.S.C. § 17
Small Business Act exemption, 15 U.S.C. §§ 638(d), 640
Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501–03
Sports Broadcasting Act, 15 U.S.C. §§ 1291–95
Standard Setting Development Organization Advancement Act, 15 U.S.C. §§ 4301–05, 4301 note
Webb-Pomerene Export Act, 15 U.S.C. §§ 61–66

Statutory Exemptions Created as Part of a Regulatory Regime
Air transportation exemption, 49 U.S.C. §§ 41308–09, 42111
McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15
Motor transportation exemption, 49 U.S.C. §§ 13703, 14302–03
Natural Gas Policy Act exemption, 15 U.S.C. § 3364(e)
Railroad transportation exemption, 49 U.S.C. §§ 10706, 11321(a)
Shipping Act, 46 U.S.C. app. §§ 1701–19

Judicially Created Exemptions
Baseball exemption
Filed-rate/*Keogh* doctrine
Noerr-Pennington Immunity
State Action Doctrine
Various implied immunities created in specific regulatory settings

Notes

[1] *See* National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 177 (1979) [hereinafter Shenefield Report] ("[F]ree market competition, protected by the antitrust laws, should continue to be the general organizing principle of our economy.").

[2] *See, e.g.*, Terry Calvani, *What Is the Objective of Antitrust? in* Economic Analysis and Antitrust Law 12 (Terry Calvani & John Siegfried eds., 2d ed. 1988) ("In a competitive equilibrium, each firm is forced to sell at the lowest possible production cost because it otherwise faces losing customers to competitors who undercut its prices.").

[3] William W. Lewis, The Power of Productivity, Wealth, Poverty, and the Threat to Global Stability 91 (2004).

[4] Alan Greenspan, Chairman, Fed. Reserve, Economic Flexibility, Remarks Before HM Treasury Enterprise Conference, at 2 (Jan. 26, 2004).

[5] *Id.*

[6] *See* Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 Cal. L. Rev. 1005, 1008–09 (1987) [hereinafter Breyer, *Antitrust, Deregulation*]. Then-Judge Breyer explains that concerns about "excessive competition" prompted regulation in the airline industry, for example. *Id.* at 1007–08.

[7] *See, e.g.*, Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 Yale J. on Reg. 325, 327 (1990) [hereinafter Kahn, *Deregulation: Looking Backward and Looking Forward*]; Michael O. Wise, *Overview: Deregulation and Antitrust in the Electric Power Industry*, 64 Antitrust L.J. 267, 267–68 (1996).

[8] Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 237–38 (2005) [hereinafter Hovenkamp, Antitrust Enterprise].

[9] Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. Econ. Lit. 1263, 1284 (1993); *see also* Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. Econ. Persp. 89, 98–102 (1998) (each industry studied—airlines, trucking, railroads, banking, and natural gas—substantially improved its productivity and achieved real operating cost reductions ranging from 25 percent to 75 percent, and consumers have been the principal beneficiaries); Elizabeth E. Bailey, *Price and Productivity Change Following Deregulation: The U.S. Experience*, 96 Econ. J. 1, 15 (1986).

[10] Dennis W. Carlton & Randal C. Picker, *Antitrust and Regulation*, at 38–39 (John M. Olin Law & Economics Working Paper No. 312, Oct. 2006), *available at* http://ssrn.com/abstract_id=937020 [hereinafter Carlton & Picker, *Antitrust and Regulation*] (citing Timothy P. Daniel & Andrew N. Kleit, *Disentangling Regulatory Policy: The Effects of State Regulations on Trucking Rates*, 8 J. Reg. Econ. 267 (1995)).

[11] Alden F. Abbott, Statement at AMC Statutory Immunities and Exemptions Hearing, at 1–2 (Dec. 1, 2005) [hereinafter Abbott Statement]. *See generally* Richard A. Posner, *The Effects of Deregulation on Competition: The Experience of the United States*, 23 Fordham Int'l L.J. 7 (2000) [hereinafter Posner, *Effects of Deregulation on Competition*]; Statutory Immunities and Exemptions Transcript at 80 (Abbott) (Dec. 1, 2005).

[12] *See* Gellhorn et al., Antitrust Law and Economics 568–69 (5th ed. 2004) [hereinafter Gellhorn, Antitrust Law and Economics] (only Congress can expressly exempt conduct from antitrust law).

[13] *See* Paul G. Cassell, *Exemption of International Shipping Conferences from American Antitrust Laws: An Economic Analysis*, 20 New Eng. L. Rev. 1, 11–16 (1984) [hereinafter Cassell, *Exemption of International Shipping Conferences*]; American Bar Association, Section of Antitrust Law, Antitrust Law Developments 1273 (6th ed. 2007) [hereinafter Antitrust Law Developments]; *see also* American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Immunities and Exemptions, at 10 (Nov. 30, 2005) [hereinafter ABA Comments re Immunities and Exemptions]; Darren Bush, Gregory K. Leonard & Stephen F. Ross, A Framework for Policymakers to Analyze Proposed and Existing Antitrust Immunities and Exemptions, at 8–15 (Oct. 24, 2005) [hereinafter Bush, Leonard & Ross, Framework for Antitrust Immunities].

[14] *See* ABA Comments re Immunities and Exemptions, at 4–6.

[15] H.R. 1081, 110th Cong. (2007); S. 618, 110th Cong. (2007).

[16] Council Regulation (EC) No. 1419/2006 (Sept. 25, 2006) (repealing Regulation (EEC) No. 4056/86, laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and putting an end to the possibility for liner carriers to meet in conferences, fix prices, and regulate capacities on trade to and from the European Union).

[17] Michael Porter, The Competitive Advantage of Nations 662–63 (1990). Porter also observes that industries sheltered from international competition are less vigorous and successful than industries subject to such competition. *Id.* at 117–20, 225–38, 416, 708.

[18] Shenefield Report, at 177.

[19] Hovenkamp, Antitrust Enterprise, at 237–38; *see also* Kahn, *Deregulation: Looking Backward and Looking Forward*, at 325–30; Breyer, *Antitrust, Deregulation*, at 1007–11.

[20] See Hovenkamp, Antitrust Enterprise, at 238.

[21] *Id.* at 239 (citing James M. Landis, The Administrative Process (1938); James M. Landis, Report on Regulatory Agencies to the President-Elect (1960)). Landis was a member of the Federal Trade Commission from 1933 to 1934, Chair of the Securities and Exchange Commission from 1935 to 1937, and Dean of Harvard Law School from 1937 to 1946. *See* Hovenkamp, Antitrust Enterprise, at 349–50 n.24.

[22] Gellhorn, Antitrust Law and Economics, at 567; *see also* Hovenkamp, Antitrust Enterprise, at 239 ("[I]t often turned out that the principal beneficiaries of industry regulation were the regulated firms themselves, who were shielded from competition and guaranteed profit margins.") (footnote omitted); Carlton & Picker, *Antitrust and Regulation*, at 39 (after deregulation of various industries, "[c]onsumers benefit, [while] special interests are harmed").

[23] *See, e.g.*, Posner, *Effects of Deregulation on Competition*, at 15–19.

[24] See Breyer, *Antitrust, Deregulation*, at 1006–07.

[25] *See id.*

[26] *See* J. Bruce McDonald, Statement at AMC Regulated Industries Hearing, at 9 (Dec. 5, 2005) [hereinafter McDonald Statement]; American Antitrust Institute, Public Comments Submitted to AMC Regarding Regulated Industries, at 20 (July 15, 2005) [hereinafter AAI Comments re Regulated Industries].

[27] National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City, 452 U.S. 378, 388 (1981) (quoting United States v. National Ass'n of Secs. Dealers, Inc. 422 U.S. 694, 719–20 (1975)).

[28] Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130 (2d Cir. 2005), *cert. granted*, 127 S. Ct. 762 (2006).

[29] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 401–03 (2004).

[21] *Trinko*, 540 U.S. at 415–16.

[31] The doctrine originated in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922); *see also* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 (1986); Rob McKenna, Statement at AMC Regulated Industries Hearing, at 8 (Dec. 5, 2005) [hereinafter McKenna Statement]; Western Coal Traffic League, Public Comments Submitted to AMC, at 7 (July 15, 2005) [hereinafter Western Coal Comments].

[32] *See Keogh*, 260 U.S. at 162; *see also Square D*, 476 U.S. at 422.

[33] *See, e.g.*, California *ex rel.* Lockyer v. Dynegy, Inc., 375 F.3d 831, 852–53 (9th Cir. 2004) (state law claims of unfair competition in electric power industry barred by filed-rate doctrine); Utilimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303, 306 (3d Cir. 2004) ("Under the filed rate doctrine, a plaintiff may not sue the supplier of electricity based on rates that, though alleged to be the result of anticompetitive conduct, were filed with the federal agency responsible for overseeing such rates.").

[34] *Square D*, 476 U.S. at 423.

[35] *Id.* at 423–24.

[36] *See* Chapters I.B and II.B of this Report regarding substantive merger law and the Hart-Scott-Rodino Act pre-merger review process.

[37] Those industries are banking (regulated by various banking agencies); certain aspects of electricity (regulated by the Federal Energy Regulatory Commission); telecommunications/media (regulated by the Federal Communications Commission); and railroads (regulated by the Surface Transportation Board). Industries in which regulatory agencies previously had, but not longer have, authority to review mergers include trucking and airlines.

[38] *See, e.g.*, Milton A. Marquis, *DOJ, FTC and FERC Electric Power Merger Enforcement: Are There Too Many Cooks in the Merger Review Kitchen?*, 33 Loy. U. Chi. L.J. 783, 783–84 (2002).

[39] Parker v. Brown, 317 U.S. 341 (1943).

[40] *Id.* at 350–52.

[41] *Id.* at 351.

[42] *See* Antitrust Law Developments, at 1273.

[43] *See, e.g.*, FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992); *see also* Carlton A. Varner, Statement at AMC State Action Doctrine Hearing, at 2, 5 (Sept. 29, 2005) [hereinafter Varner Statement]; Federal Trade Commission Staff, Report of the State Action Task Force 5 (Sept. 2003) [hereinafter FTC State Action Report].

[44] *See Parker*, 317 U.S. at 350–52; Bates v. State Bar of Ariz., 433 U.S. 350 (1977); FTC State Action Report, at 6.

[45] Hoover v. Ronwin, 466 U.S. 558, 569 (1984).

[46] *See* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978); FTC State Action Report, at 7. Local governments may obtain partial antitrust immunity under the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (codified as amended at 15 U.S.C. §§ 34–36).

[47] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

[48] *See* Antitrust Law Developments, at 1274; Varner Statement, at 18; FTC State Action Report, at 8, 52.

[49] Patrick v. Burget, 486 U.S. 94, 100–01 (1988).

[50] American Bar Association, Section of Antitrust Law, *The State of Antitrust Enforcement—2001*, at 42 (2001), *available at* http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf.

[51] FTC State Action Report, at 1.

[52] *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 41–42 (1985).

[53] *See, e.g.*, Martin v. Memorial Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996).

[54] *Ticor*, 504 U.S. at 636; *see also* Varner Statement, at 13–14 (discussing cases misusing the foreseeability test).

[55] Hardy v. City Optical Inc., 39 F.3d 765 (7th Cir. 1994) (Posner, J.).

[56] *Id.* at 770 (emphasis added).

[57] FTC State Action Report, at 12 (citing *Town of Hallie*, 471 U.S. at 46).

[58] Phillip E. Areeda & Herbert Hovenkamp, IA Antitrust Law ¶ 227a (3d ed. 2006) [hereinafter Areeda & Hovenkamp, Antitrust Law].

[59] *See Ticor*, 504 U.S. at 639–40.

[60] *See* Comments of the American Bar Association, Section of Antitrust Law on FTC Report Re State Action Doctrine, at 17–18 (May 6, 2005), *available at* http://www.abanet.org/antitrust/at-comments/2005/05-05/at-state-action-05.pdf [hereinafter ABA Comments re FTC Report]; FTC State Action Report, at 12.

[61] *See, e.g.*, Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 Tex. L. Rev. 1203, 1271 (1997) [hereinafter Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*]; Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719, 767 (1985) [hereinafter Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*]; *see also* ABA Comments re FTC Report, at 2, 20; FTC State Action Report, at 40; Varner Statement, at 4, 19; *E-Commerce: The Case of Online Wine Sales and Direct Shipment: Hearing Before Subcomm. on Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 108th Cong. 12 (2003) (statement of Todd Zywicki, Director, FTC Office of Policy Planning); Federal Trade Commission Staff, Possible Anticompetitive Barriers to E-Commerce: Contact Lenses (Mar. 2004) [hereinafter FTC Staff, Possible Anticompetitive Barriers to E-Commerce: Contact Lenses].

[62] Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Cal. L. Rev. 227, 256 (1987) [hereinafter Jorde, *Antitrust and the New State Action Doctrine*].

[63] *See* Jorde, *Antitrust and the New State Action Doctrine*, at 253; Varner Statement, at 19; State Action Doctrine Transcript at 25–26 (Varner) (Sept. 29, 2005).

[64] *See, e.g.*, Edwin Mansfield, Microeconomics, Theory and Applications 458 (3d ed. 1979).

[65] City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 374–75 (1991).

[66] This conclusion is not novel. In its 1979 Report, the National Commission for the Review of Antitrust Laws and Procedures expressed a skeptical attitude toward exemptions and immunities in general, notwithstanding the fact that, of its twenty-two members, fully ten were sitting members of Congress. *See generally* Shenefield Report, at 177–89.

[67] Abbott Statement, at 1–2. *See generally* Posner, *Effects of Deregulation on Competition*, at 7; Statutory Immunities and Exemptions Trans. at 72 (Abbott).

[68] This Section uses the terms "exemption" and "immunity" interchangeably to mean any statutory provision that makes liability or damages under the antitrust laws less than fully applicable.

This Section considers only statutory immunities, not those created by courts. The state action doctrine, a judicially created immunity, is discussed in Part 4 of this Section. Part 3 of this Section discusses judicially created "implied" immunities in regulated industries.

[69] *See* 15 U.S.C. § 17 (creating statutory labor exemption and non-profit agricultural cooperatives exemption).

[70] *See* 15 U.S.C. § 37b.

[71] *See* Cassell, *Exemption of International Shipping Conferences*, at 11–16; *see also* ABA Comments re Immunities and Exemptions, at 10; Bush, Leonard & Ross, Framework for Antitrust Immunities, at 8–15; Antitrust Law Developments, at 1273.

[72] *See, e.g.*, ABA Comments re Immunities and Exemptions, at 4–6.

[73] *See id.* at 4.

[74] Some scholars have contended that antitrust immunities are typically the byproduct of special interest regulations spawned by well-organized groups. *See, e.g.*, Frank H. Easterbrook, *The Court and the Economic System*, 98 Harv. L. Rev. 4, 15 (1984) ("One of the implications of modern economic thought is that many laws are designed to serve private rather than public interests."). "Public choice" theory seeks to explain, among other things, how such laws can arise. *See, e.g.*, William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 285, 285–89 (1988); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873 (1987); *see also* ABA Comments re Immunities and Exemptions, at 5–6; American Antitrust Institute, Public Comments Submitted Regarding Immunities and Exemptions, at 3 (July 15, 2005).

[75] 42 U.S.C. §§ 11101–52.

[76] 15 U.S.C. §§ 4301–05, 4301 note.

77 *See generally* Antitrust Law Developments, at 1213–15.

78 *See generally id.* at 1211–13.

79 49 U.S.C. §§ 41308–09, 42111. This immunity coves a variety of agreements, including those between foreign and domestic airlines that allow individual airlines to provide tickets that include legs served only by other airlines.

80 15 U.S.C. §§ 37–37a.

81 50 U.S.C. app. § 2158.

82 15 U.S.C. § 1 note.

83 15 U.S.C. §§ 3501–03.

84 15 U.S.C. §§ 34–36.

85 15 U.S.C. §§ 4301–06.

86 7 U.S.C. § 291. *See generally* Antitrust Law Developments, at 1306–10.

87 15 U.S.C. §§ 1012(b), 1013(b). *See generally* Antitrust Law Developments, at 1438–44.

88 Antitrust Law Developments, at 1445–47.

89 *See generally id.* at 1497–1500. This Act was amended in 1998 to provide, among other things, the opportunity for individual shipping companies to compete with conferences. *See* Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998).

90 *See* ABA Comments re Immunities and Exemptions, at 7–10.

91 *See id.* at 1.

92 *See id.* at 1–2. Antitrust exemptions can limit price competition, restrict entry, produce an economically inefficient level of output, or foster cartels—all of which are contrary to the antitrust system. *See, e.g.*, Abbott Statement, at 3; ABA Comments re Immunities and Exemptions, at 2–3.

93 For arguments that this reason justifies an immunity, see John J. Sullivan, Statement at AMC Statutory Immunities and Exemption Hearing, at 1, 3 (Dec. 5, 2005) [hereinafter Sullivan Statement]; American Natural Soda Ash Corp., Public Comments Submitted to AMC, at 3 (June 28, 2005); Statutory Immunities and Exemptions Trans. at 43 (Sullivan).

94 For arguments that this reason justifies an immunity, see McCarran-Ferguson Act Transcript at 9–10, 51, 59 (McRaith) (Oct. 18, 2006); *id.* at 19, 78–79 (Gackenbach); *id.* at 25–26, 33, 73 (Zielezienski); Julie L. Gackenbach, Statement at AMC McCarran-Ferguson Hearing, at 4–5 (Oct. 18, 2006) [hereinafter Gackenbach Statement]; Stephen Zielezienski, Statement at AMC McCarran-Ferguson Hearing, at 3–4 (Oct. 18, 2006) [hereinafter Zielezienski Statement].

95 *See, e.g.*, Gackenbach Statement, at 1–3 (McCarran-Ferguson Act protects collection of loss data that would not be permitted under antitrust law); Michael T. McRaith, Statement at AMC McCarran-Ferguson Hearing, at 3, 9 (Oct. 18, 2006) [hereinafter McRaith Statement]; Zielezienski Statement, at 6–9.

96 Gackenbach Statement, at 1; McCarran-Ferguson Act Trans. at 15–17, 45–46 (Gackenbach); *see also id.* at 91 (McRaith) (allows small and medium-size insurers to participate).

97 Joint conduct to collect and use loss data might be immune from federal antitrust challenge under the state action doctrine in any case, if the state regulates such conduct. *See* McRaith Statement, at 12–14.

98 *See* Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998); Stanley Sher, Statement at AMC Shipping Act Hearing, at 2–3 (Oct. 18, 2006) [hereinafter Sher Statement]; American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Shipping Act, at 101–02 (Mar. 17, 2006, revised Oct. 24, 2006). Sher stated that almost 95 percent of ocean liner traffic occurs pursuant to individually negotiated rates, not conference rates. Sher Statement, at 2.

[99] Sher Statement, at 3–4, 12–19; Jean Godwin, Statement at AMC Shipping Act Hearing, at 6 (Oct. 18, 2006).

[100] Sher Statement, at 13–14.

[101] *Id.*

[102] *Cf. id.* at 4–5 (stating that those who oppose Shipping Act exemption should ask whether it is worth jeopardizing current benefits from the exemption merely on the basis of academic theories).

[103] The DOJ offers "business review letters" and the FTC offers "advisory opinions," which allow firms to learn the present enforcement intentions of the agencies with respect to planned conduct that may raise antitrust issues. *See* 28 C.F.R. § 50.6 (2006) (outlining DOJ business review procedure); 16 C.F.R. § 1.1–1.4 (2006) (outlining FTC advisory opinion procedure).

[104] Organisation for Economic Co-Operation and Development, Competition Policy in Liner Shipping Final Report 50, 69 (April 16, 2002), *available at* http://www.oecd.org/dataoecd/13/46/2553902.pdf.

[105] 15 U.S.C. §§ 4001–21. The Webb-Pomerene Act, 15 U.S.C. §§ 61–65, is similar to the ETC Act, although more limited in scope (it covers goods, not services) and application (only six companies are registered under Webb-Pomerene, in contrast with more than eighty registered Export Trade Certificate of Review Holders). The discussion of the Export Trading Company Act applies as well to the Webb-Pomerene Act.

[106] 15 U.S.C. § 4016(a); *id.* at § 4016(b)(1).

[107] *Id.* § 4016(b)(3).

[108] Sullivan Statement, at 1. The Commission received thirty-five comments supportive of the Export Trading Act or the Webb-Pomerene Act. *See* Appendix C to this Report (listing comments received).

[109] There are approximately eighty Certificates of Review currently in effect, covering thousands of companies that export over $10 billion per year. Sullivan Statement, at 1; Statutory Immunities and Exemption Trans. at 12 (Sullivan). $10 billion represents approximately 1.3 percent of total U.S. exports. *See* John J. Sullivan, Supplemental Statement at AMC Statutory Immunities and Exemption Hearing, at enclosure 2 (Mar. 13, 2006) [hereinafter Sullivan Supplemental Statement]; Sullivan Supplemental Statement, at enclosure 3.

[110] Sullivan Statement, at 7.

[111] Statutory Immunities and Exemptions Trans. at 14 (Sullivan).

[112] This Commission identified thirty exemptions created by statute or judicial rulings, which are listed in Annex A to this Section.

[113] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 6–8.

[114] Congress has routinely required transparency in the promotion of sound decision-making. *See* 5 U.S.C. § 553 (notice and comment rulemaking); *see also* Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 113–14 (1971) (arguing that public scrutiny protects against arbitrary decision-making by administrative agencies). In the realm of antitrust law, Congress has provided mechanisms to ensure sound decision-making and openness. *See* 15 U.S.C. § 16(b)–(h) (The Tunney Act provides for public comment and public interest review by a court regarding consent decrees.); *see also* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 4, 6–7.

[115] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 4; ABA Comments re Immunities and Exemptions, at 3–4; Statutory Immunities and Exemptions Trans. at 101–02 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); *id.* at 104 (Carstensen).

[116] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 6.

[117] *See* ABA Comments re Immunities and Exemptions, at 11; Bush, Leonard & Ross, Framework for Antitrust Immunities, at 6.

[118] *See* Barnett/Majoras Transcript at 64 (Majoras) (Mar. 21, 2006) (discussing both agencies).

[119] *See* ABA Comments re Immunities and Exemptions, at 8–11.

[120] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 4–5, 32; Cassell, *Exemption of International Shipping Conferences*, at 13; ABA Comments re Immunities and Exemptions, at 8–11.

[121] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 5; Statutory Immunities and Exemptions Trans. at 101 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); *id.* at 104 (Carstensen); ABA Comments re Immunities and Exemptions, at 8–10; Cassell, *Exemption of International Shipping Conferences*, at 13.

[122] Statutory Immunities and Exemptions Trans. at 63 (Bush); *see also* Bush, Leonard & Ross, Framework for Antitrust Immunities Hearing, at 4–5; Prof. Peter C. Carstensen, Statement at AMC Statutory Immunities and Exemptions, at 2 (Dec. 1, 2005) [hereinafter Carstensen Statement]; Abbott Statement, at 6; Statutory Immunities and Exemptions Trans. at 85, 104 (Carstensen); id. at 101 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); Vehicle Information Service, Inc., Public Comments Submitted to AMC, at 1 (July 13, 2005) [hereinafter VIS Comments]; ABA Comments re Immunities and Exemptions, at 11, 15–17.

[123] In other countries, such a burden of proof is imposed as a matter of law. *See* Treaty Establishing the European Economic Community, Art. 85(3) 298 U.N.T.S. 11 (Mar. 25, 1957) (laying out four quite restrictive conditions any exemption must meet, on a continuing basis, in order to derogate from the basic principle of free competition); European Commission, White Paper on the Review of Regulation 4056/86, Applying the EC Competition Rules to Maritime Transport ¶ 14 (Comm. Prog. 2003/COMP/18, Oct. 13, 2004) (noting than an exemption's "justification" must remain "valid in light of . . . present market circumstances. If not, there would no longer be a legal justification for the . . . exemption, which consequently would have to be either abolished or revised.").

[124] *See* ABA Comments re Immunities and Exemptions, at 9–10.

[125] *See id.* A generally less desirable alternative would be to allow only declaratory judgments and government injunctive challenges to the conduct in question. *See id.* Because the conduct at issue would remain subject to antitrust scrutiny, however, this approach would be preferable to entirely eliminating the potential for antitrust liability.

[126] 15 U.S.C. §§ 4301–06; *id.* § 4301 note.

[127] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 35–38; Statutory Immunities and Exemptions Trans. at 69–70 (Bush); ABA Comments Re Immunities and Exemptions, at 14–15; *see also* Abbott Statement, at 6; Statutory Immunities and Exemptions Trans. at 92 (Miller).

[128] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 36.

[129] *See* Statutory Immunities and Exemptions Trans. at 107 (Ross).

[130] The Need-Based Educational Aid Act, which permits some collaboration among some universities as to financial aid policies, was adopted with a sunset. Congress has extended the expiration date twice, and the statute is currently set to expire in 2008. Pub. L. No. 103-382, 108 Stat. 4060 (1994), *amended by* Pub. L. No. 105-43, 111 Stat. 1140 (1997); Pub. L. No. 107-72, 115 Stat. 648 (2001).

[131] *See* ABA Comments Re Immunities and Exemptions, at 14–15; Abbott Statement, at 6.

[132] For example, one study finds that technological advances in transportation and storage have changed the nature of competition in the dairy industry and "bolstered the market power enhancing effects of regulation." *See* David L. Baumer & Robert T. Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 210 (1986).

[133] *See* James C. Miller III, Statement at AMC Statutory Immunities and Exemptions Hearing, at 3–4 (Dec. 1, 2005); Abbott Statement, at 6.

[134] *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 5, 36; Carstensen Statement, at 10; Statutory Immunities and Exemptions Trans. at 101 (Ross); *id.* at 103 (Miller); *id.* at 103 (Abbott); *id.* at 104 (Carstensen); VIS Comments, at 1; Office of the Attorney General of New York State, Public Comments Submitted to AMC, at 4 (July 15, 2005); ABA Comments re Immunities and Exemptions, at 14–15.

135 *See* Carstensen Statement, at 10 (explaining counterarguments).

136 *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 5–6, 35–38; ABA Comments re Immunities and Exemptions, at 14–15.

137 *See* Bush, Leonard & Ross, Framework for Antitrust Immunities, at 36–38.

138 *See id.* at 37.

139 *See* Barnett/Majoras Trans. at 64 (Majoras).

140 *See* ABA Comments re Immunities and Exemptions, at 8–10.

141 *See, e.g.*, 15 U.S.C. § 1803(c) (provision of Newspaper Preservation Act providing that antitrust exemption does not reach "any . . . conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity"); 15 U.S.C. § 35(a) (barring money damages in antitrust actions against local governments or against their officials or employees, but only when such defendants act in their "official capacity").

142 Specifically, Congress did so in Section 5(d) of the Year 2000 Information and Readiness Disclosure Act, Pub. L. No. 105-271, 112 Stat. 2386 (1998), *amended by* Pub. L. 107-273, Div. C, Title IV, § 14102(e), 116 Stat. 1922 (2002) (codified as amended at 15 U.S.C. § 1 note).

143 Courts generally construe antitrust immunities narrowly and in favor of application of the antitrust laws. *See* Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 126 (1982); United States v. Gosselin World Wide Moving, N.V., 411 F.3d 502, 508 (4th Cir. 2005); Shaw v. Dallas Cowboys Football Club, Ltd., 172 F.3d 299, 301 (3d Cir. 1999).

144 *See* Carstensen Statement, at 13; ABA Comments re Immunities and Exemptions, at 8.

145 *See* Areeda & Hovenkamp, Antitrust Law, ¶ 240a; *see also* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335, 339 (2004) [hereinafter Hovenkamp, *Antitrust and the Regulatory Enterprise*].

146 Hovenkamp, *Antitrust and the Regulatory Enterprise*, at 338–40.

147 *Id.* at 341 ("When the government makes rules about price or output, market forces no longer govern. To that extent antitrust is shoved aside.").

148 *See* John Thorne, Statement at AMC Regulated Industries Hearing, at 4 (Dec. 5, 2005); Shenefield Report, at 180–81.

149 Hovenkamp, Antitrust Enterprise, at 337–38; *see also* Kahn, *Deregulation: Looking Backward and Looking Forward*, at 325–30; Stephen Breyer, *Antitrust, Deregulation*, at 1005 (discussing deregulation in telecommunication and airline industries).

150 *See* Hovenkamp, Antitrust Enterprise, at 238.

151 *See id.*

152 *Id.* at 239 (citing James M. Landis, The Administrative Process (1938); James M. Landis, Report on Regulatory Agencies to the President-Elect (1960)).

153 Hovenkamp, Antitrust Enterprise, at 241 (citing W. Viscusi, J. Vernon, & J. Harrington, Economics of Regulation and Antitrust, chs. 10–12 (4th ed. 2005)).

154 Gellhorn, Antitrust Law and Economics, at 567; *see also* Hovenkamp, Antitrust Enterprise, at 239 ("[I]t often turned out that the principal beneficiaries of industry regulation were the regulated firms themselves, who were shielded from competition and guaranteed profit margins.") (footnote omitted); Carlton & Picker, *Antitrust and Regulation*, at 39 (after deregulation of various industries, "[c]onsumers benefit [while] special interests are harmed").

155 *See, e.g.*, Posner, *Effects of Deregulation on Competition*, at 18.

156 *See, e.g.*, Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.) ("In so holding, we are not saying either that the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere.").

[157] AAI Comments re Regulated Industries, at 1–3.

[158] An example is the regulation of access to transmission lines for electricity, which continue to have natural monopoly characteristics. American Bar Association, Section of Antitrust Law, Energy Antitrust Handbook: A Guide to the Electric and Gas Industries 36 (2002) [hereinafter ABA, Energy Antitrust Handbook] ("[T]ransmission facilities are still generally considered essential, monopoly-owned facilities.").

[159] *See generally* Breyer, *Antitrust, Deregulation*, at 1006–07; Lee A. Rau, *Open Access in the Power Industry: Competition, Cooperation, and Policy Dilemmas*, 64 Antitrust L.J. 279, 286–87 (1996); Kahn, *Deregulation: Looking Backward and Looking Forward*, at 327–30.

[160] *See generally* Breyer, *Antitrust, Deregulation*, at 1006–07, 1032–44.

[161] Kahn, *Deregulation: Looking Backward and Looking Forward*, at 329.

[162] *See* AAI Comments re Regulated Industries, at 2–3; Hovenkamp, *Antitrust and the Regulatory Enterprise*, at 341; Regulated Industries Transcript at 5 (McKenna) (Dec. 5, 2005).

[163] Breyer, *Antitrust, Deregulation*, at 1006.

[164] *See* McDonald Statement, at 9; AAI Comments re Regulated Industries, at 20.

[165] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 406 (2004) (explaining that antitrust-specific savings clause "bars a finding of implied immunity").

[166] *See* McKenna Statement, at 3 (arguing that "antitrust enforcers and regulators should have complementary, seamless enforcement authority").

[167] *In re* Stock Exchanges Options Trading Antitrust Litig., 317 F.3d 134, 147 (2d Cir. 2003) (quoting Northeastern Tel. Co. v. AT&T, 651 F.2d 76, 82 (2d Cir. 1981)); *see also* Gordon v. New York Stock Exch., 422 U.S. 659, 682–84 (1975).

[168] Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)).

[169] National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City, 452 U.S. 378, 388 (1981) (quoting United States v. National Ass'n of Secs. Dealers, 422 U.S. 694, 719–20 (1975)).

[170] *Id.* at 389 (quoting *Silver*, 373 U.S. at 357).

[171] *Id.* (explaining that "[i]ntent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge") (citing, *e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366, 372–75 (1973); United States v. Radio Corp. of Am., 358 U.S. 334, 346 (1959)).

[172] *See* Antitrust Law Developments, at 1239; *National Gerimedical*, 452 U.S. at 389.

[173] Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130 (2d Cir. 2005), *cert. granted*, 127 S. Ct. 762 (2006) (granting certiorari to determine "[w]hether, in a private [antitrust] action . . . challenging conduct that occurs in a highly regulated securities offering, the standard for implying antitrust immunity is the potential for conflict with the securities laws or, as the Second Circuit held, a specific expression of congressional intent to immunize such conduct and a showing that the SEC has power to compel the specific practices at issue."); *see also* Brief for the United States as Amicus Curiae Supporting Vacatur, 2007 WL 173649 (Jan. 22, 2007) (supporting *National Gerimedical* as the appropriate test for implied immunity, but arguing that it was misapplied by the Second Circuit).

[174] *Trinko*, 540 U.S. at 401–03; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended throughout Title 47).

[175] *Trinko*, 540 U.S. at 401–05.

[176] Law Offices of Curtis V. Trinko v. Bell Atl. Corp., 305 F.3d 89, 95 (2d Cir. 2002), *rev'd*, 540 U.S. 398 (2004); *see also Trinko*, 540 U.S. at 403–05.

[177] *Trinko*, 540 U.S. at 402–03.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 403–04.

[181] *Id.*

[182] *Id.* at 401.

[183] *Id.* at 406 (stating that "the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme that might be voiced by courts exercising jurisdiction under the antitrust laws . . . . Congress, however, precluded this interpretation") (internal quotations and citations omitted); *see also* United States Telecom Association, Public Comments Submitted to AMC, at 4–5 (July 15, 2005) [hereinafter USTA Comments].

[184] *Trinko*, 540 U.S. at 410.

[185] *Id.* at 411.

[186] *Id.* at 412.

[187] *Id.* at 415–16.

[188] The doctrine originated in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922).

[189] *See* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 (1986); *see also Keogh*, 260 U.S. at 162; McKenna Statement, at 8; Western Coal Comments, at 7.

[190] *See Keogh*, 260 U.S. at 163–64.

[191] *See* 49 U.S.C. §§ 10709(a)–(c), 13710(a)(1). There are, however, specific statutory immunities for certain agreements between rail carriers and between motor carriers. 49 U.S.C. §§ 10706(a)(2)(A), 13501, 13702, 14302(f).

[192] *See, e.g.*, Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorization, FTC Staff Comment (Jan. 7, 2002), *available at* http://www.ftc.gov/be/v020005.htm.

[193] *See, e.g.*, California *ex rel.* Lockyer v. Dynegy, Inc., 375 F.3d 831, 852–53 (9th Cir. 2003) (state law claims of unfair competition in electric power industry barred by filed-rate doctrine); Utilimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303, 306 (3d Cir. 2004) ("Under the filed rate doctrine, a plaintiff may not sue the supplier of electricity based on rates that, though alleged to be the result of anticompetitive conduct, were filed with the federal agency responsible for overseeing such rates.") (citing Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251–52 (1951)).

[194] *See, e.g.*, AAI Comments re Regulated Industries, at 14–15; McKenna Statement, at 7–9. *See generally* Gregory J. Werden, Open Access Revisited, Remarks Before American Antitrust Institute Fifth Annual Energy Roundtable Workshop, at 7–9 (Jan. 11, 2005).

[195] *See Square D*, 476 U.S. at 423.

[196] *See id.* at 423–24.

[197] *See* Chapters I.B and II.B of this Report.

[198] Industries in which regulatory agencies previously had, but not longer have, authority to review mergers include trucking and airlines. FERC also has concurrent jurisdiction with the antitrust agencies to review asset acquisitions of natural gas companies. ABA, ENERGY ANTITRUST HANDBOOK, at 77 n.263; 15 U.S.C. § 717(c).

[199] *See, e.g.*, *In re* Application of General Motors Corp., Hughes Elec. Corp. & News Corp. Ltd., 19 F.C.C.R. 473, 483 (2004) (stating that "the public interest evaluation . . . includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services"). *See generally* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, TELECOM ANTITRUST HANDBOOK 70–80 (2005) [hereinafter ABA, TELECOM ANTITRUST HANDBOOK].

[200] ABA, TELECOM ANTITRUST HANDBOOK, at 58–70; ABA, ENERGY ANTITRUST HANDBOOK, at 84.

201 ABA, Telecom Antitrust Handbook, at 70–80; ABA, Energy Antitrust Handbook, at 84–90.

202 *See, e.g.*, 12 U.S.C. § 1828(c)(5).

203 *See* Scott G. Alvarez, Statement at AMC Regulated Industries Hearing, at 14–15 (Dec. 5, 2005).

204 *Id.* at 15.

205 *See* 18 U.S.C. § 1828(c)(6)–(7).

206 12 U.S.C. § 1828(c); *see* United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 366 (1967). It appears that no court has ever found that a bank merger challenged by the DOJ was anticompetitive under Section 7 of the Clayton Act, but permissible nonetheless on the basis of the convenience and needs defense—although in *United States v. First National Bank of Jackson*, 301 F. Supp. 1161 (S.D. Miss. 1969), the court found the merger did not violate Section 7 of the Clayton Act, but that even if it had, the defendants had met the convenience and needs defense.

207 *See* Interstate Commerce Commission Termination Act of 1995, Public Law No. 104-88, 109 Stat. 803, 838–41 (codified as amended at 49 U.S.C. §§ 11321–24).

208 49 U.S.C. § 11324(b).

209 *See id.* § 11324(d); *see also* Regulated Industries Trans. at 11 (McDonald).

210 *See, e.g.*, Raymond Atkins, Statement at AMC Regulated Industries Hearing, at 9–10 (Dec. 5, 2005) (describing disagreements that arose between the STB and the DOJ during the STB's review of the Union Pacific/Southern Pacific merger).

211 It remains unclear whether the DOJ could petition for review of an STB decision based on an argument that the STB failed to give "substantial weight" to DOJ's competitive analysis of the proposed merger.

212 *See* Diana L. Moss, Statement at AMC Regulated Industries Hearing, at 9 (Dec. 5, 2005) ("[R]egulatory agencies should play a role in merger review, but their function should be limited to the analysis of non-competitive issues while the antitrust agency evaluates the effect of the merger on competition."); International Competition Policy Advisory Committee, Final Report to the Attorney General and Assistant Attorney General for Antitrust 143, 150–51 (2000) [hereinafter ICPAC Report]; *see also* USTA Comments, at 10 ("The antitrust agencies have for more than 100 years demonstrated both experience and sound judgment in enforcement of the antitrust laws. No comparable record supports the intrusion of the regulatory agencies into the field of competition law.").

213 *See* ICPAC Report, at 145; Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. Chi. Legal F. 29, 31 (2000).

214 *See* Prof. Peter C. Carstensen, Public Comments Submitted to AMC, at 3 (July 15, 2005).

215 *See* ICPAC Report, at 143, 153–54. The majority of ICPAC members recommended removing the competition policy oversight duty from the sectoral regulators and vesting such power exclusively in the federal antitrust agencies. *See id.* at 143. The ICPAC Report also contains an explanation of the relationship between the antitrust agencies' authority and the regulatory agencies' authority. *Id.* at 145–48. Finally, it contains a list of examples in which the antitrust agencies and the regulatory agencies reached different conclusions regarding the likely competitive effects of proposed mergers. *Id.* at 149–50.

216 *Id.* at 145–47.

217 Competition Committee of the OECD Directorate for Financial and Enterprise Affairs, The Relationship Between Competition Authorities and Sectoral Regulators Issues Paper, at 5–6 (Feb. 2, 2005) *available at* http://www.oecd.org/dataoecd/58/7/34375749.pdf.

218 *See* Summary of Discussion Points Presented by the Business and Industry Advisory Committee to the OECD Global Forum on Competition, Session 2: Relationship Between Competition Authorities and Sectoral Regulators, at 3–6 (Feb. 17, 2005), *available at* http://www.biac.org/statements/comp/Fin_BIAC_CLP_GR_05_Session2.pdf.

219 *See* Antitrust Law Developments, at 1273.

[220] Parker v. Brown, 317 U.S. 341 (1943).

[221] *Id.* at 350–52 (states are sovereign save only as Congress may constitutionally subtract from their authority); *see* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38 (1985); Cantor v. Detroit Edison Co., 428 U.S. 579, 632 (1976); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992) ("Our decision [in *Parker*] was grounded in principles of federalism.").

[222] *Parker*, 317 U.S. at 351.

[223] *See, e.g.*, *Ticor*, 504 U.S. 621, 633; *see also* Varner Statement, at 2, 5; FTC State Action Report, at 5.

[224] *See Parker*, 317 U.S. at 350–52; Bates v. State Bar of Ariz., 433 U.S. 350 (1977); FTC State Action Report, at 6.

[225] Hoover v. Ronwin, 466 U.S. 558, 569 (1984).

[226] *See* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) (decisions by state executive departments, agencies, or special authorities do not automatically qualify as state action); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978) ("Cities are not themselves sovereign."); FTC State Action Report, at 7.

[227] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

[228] *See* Antitrust Law Developments, at 1274; Varner Statement, at 18; FTC State Action Report, at 8, 52.

[229] Patrick v. Burget, 486 U.S. 94, 100–01 (1988).

[230] *Ticor*, 504 U.S. at 634–35.

[231] *City of Lafayette*, 435 U.S. at 414. To obtain immunity from antitrust damages (but not from injunctive relief), local governments can rely on the Local Government Antitrust Act of 1984 (LGAA). Local Government Antitrust Act of 1984, Pub. L. No. 98-544, § 2, 98 Stat. 2750 (codified as amended at 15 U.S.C. §§ 34–36). The Act defines local governments as "a city, county, parish, town, township, village, or any other general function governmental unit established by State law or . . . a school district, sanitary district, or any other special function governmental unit established by State law in one or more States." 15 U.S.C. § 34(1). The LGAA bars antitrust damage actions against a local government and precludes the recovery of antitrust damages from any local government official or employee "acting in an official capacity," *id.* § 35(a), and from any private party "based on any official action directed by a local government." *Id.* § 36(a).

The LGAA does not require the actions of a local government to meet either of the prongs of the *Midcal* test. Congress enacted this statute in response to *Community Communications Co. v. City of Boulder*, in which the Supreme Court held that certain conduct by the city of Boulder, Colorado, did not qualify for state action immunity. Community Commc'ns Co. v. City of Boulder, 455 U.S. 40 (1982).

[232] American Bar Association, Section of Antitrust Law, *The State of Antitrust Enforcement—2001*, at 42 (2001).

[233] FTC State Action Report, at 1.

[234] *Ticor*, 504 U.S. at 636; *see also* Antitrust Law Developments, at 1278; Varner Statement, at 2, 16–18; FTC State Action Report, at 8, 50, 52.

[235] Areeda & Hovenkamp, Antitrust Law, ¶ 221d8; *see also* Jorde, *Antitrust and the New State Action Doctrine*, at 248; C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. Rev. 1059, 1109 (2000).

[236] *Southern Motor Carriers*, 471 U.S. at 60; *Town of Hallie*, 471 U.S. at 41–44, 64–65.

[237] *Southern Motor Carriers*, 471 U.S. at 61.

[238] *See, e.g.*, *City of Boulder*, 455 U.S. at 56.

[239] *Id.*

[240] *Southern Motor Carriers*, 471 U.S. at 64.

241 *See id.* at 65 n.25.

242 *Town of Hallie*, 471 U.S. at 42–43.

243 *See id.* at 41–42.

244 *Id.* at 41.

245 *See* FTC State Action Report, at 20; *Patrick*, 486 U.S. at 100–01; *Ticor*, 504 U.S. at 634–35.

246 *See* FTC State Action Report, at 20–21.

247 *Town of Hallie*, 471 U.S. at 46.

248 *Id.* at 47.

249 Mark A. Perry, *Municipal Supervision and State Action Antitrust Immunity*, 57 U. Chi. L. Rev. 1413, 1417–18 (1990).

250 William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust:* FTC v. Ticor Title Insurance Co., 3 Sup. Ct. Econ. Rev. 189, 210 (1993); *see also Patrick*, 486 U.S. at 100–01.

251 *Midcal*, 445 U.S. at 106 (1980); *see also Town of Hallie*, 471 U.S. at 46–47 (quoting *Midcal*).

252 *Ticor*, 504 U.S. at 636.

253 Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, at 1271; Jorde, *Antitrust and the New State Action Doctrine*, at 249.

254 Areeda & Hovenkamp, Antitrust Law, ¶ 227a.

255 *See Town of Hallie*, 471 U.S. at 46–47; *see also* Hillary Greene, *Articulating Trade-offs: The Political Economy of State Action Immunity*, 2006 Utah L. Rev. 815, 817 (2006).

256 Crosby v. Hospital Auth. of Valdosta & Lowndes County, 93 F.3d 1515, 1524 (11th Cir. 1996).

257 *Ticor*, 504 U.S. at 634–35.

258 *Id.* at 638.

259 *Midcal*, 445 U.S. at 105–06.

260 *Ticor*, 504 U.S. at 638.

261 FTC State Action Report, at 25.

262 *See Town of Hallie*, 471 U.S. at 41–42.

263 *See, e.g.*, Martin v. Memorial Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996). There, a physician challenged a hospital's contract with a physician exclusively to operate the hospital's kidney dialysis facilities. The court reasoned the alleged anticompetitive conduct—the exclusive contract—was foreseeable, because the legislature had authorized the hospital to contract (and terminate contracts) with any individual for the provision of services. *Id.* at 1400. The court also relied on a statute requiring a certificate of need to establish, expand, or relocate kidney dialysis facilities, but the exclusive contract did not raise any issue relating to the establishment of those facilities. *See id.*

264 *Ticor*, 504 U.S. at 636; *see also* Varner Statement, at 13–14 (discussing cases misusing the foreseeability test).

265 *City of Boulder*, 455 U.S. at 56.

266 City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 372 (1991).

267 Surgical Care Ctr. of Hammond v. Hospital Serv. Dist. No. 1, 171 F.3d 231, 235 (1999) (emphasis added).

268 *Id.* at 235–36 (holding that statutes authorizing a hospital district to enter contracts and to participate in joint ventures failed to evidence an intent to displace competition by shielding exclusive contracts that prohibited managed care plans from using a competitor for outpatient surgical care).

269 FTC State Action Report, at 33.

270 ABA Comments re FTC Report, at 9.

[271] *See id.*

[272] Hardy v. City Optical Inc., 39 F.3d 765, 770 (7th Cir. 1994) (Posner, J.).

[273] *See* Varner Statement, at 6, 16–17.

[274] FTC State Action Report, at 12 (citing *Town of Hallie*, 471 U.S. at 46).

[275] Areeda & Hovenkamp, Antitrust Law, ¶ 227a.

[276] FTC State Action Report, at 52–53.

[277] *See Ticor*, 504 U.S. at 639–40; FTC State Action Report, at 53.

[278] *See Ticor*, 504 U.S. at 639.

[279] *See* ABA Comments re FTC Report, at 17–18; FTC State Action Report, at 12.

[280] ABA Comments re FTC Report, at 17.

[281] *See* FTC State Action Report, at 12.

[282] *See id.* at 37.

[283] Areeda & Hovenkamp, Antitrust Law, ¶ 227a.

[284] *See* FTC State Action Report, at 56; *see also* Areeda & Hovenkamp, Antitrust Law, ¶ 227a.

[285] *See, e.g.*, Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, at 1271; Hovenkamp & Mackerron, *Municipal Regulation and Federal Antitrust Policy*, at 767; *see also* FTC State Action Report, at 40; Varner Statement, at 4, 19; *E-Commerce: The Case of Online Wine Sales and Direct Shipment: Hearing Before Subcomm. on Commerce, Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 108th Cong. 12 (2003) (statement of Todd Zywicki, Director, Office of Policy Planning, Federal Trade Commission); FTC Staff, Possible Anticompetitive Barriers to E-Commerce: Contact Lenses.

[286] *Parker*, 317 U.S. at 345.

[287] Jorde, *Antitrust and the New State Action Doctrine*, at 256. It is counter to the legislative process in general, and specifically as it is applied in the antitrust context. *See, e.g.*, Northern Sec. Co. v. United States, 193 U.S. 197, 343–47 (1904); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 231–33 (1899).

[288] *See* Jorde, *Antitrust and the New State Action Doctrine*, at 253; Varner Statement, at 19; State Action Doctrine Trans. at 25–26 (Varner).

[289] *See, e.g.*, Edwin Mansfield, Microeconomics, Theory and Applications 458 (3d ed. 1979).

[290] Inman & Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine*, at 1271, 1276.

[291] The Court recognized intrastate spillovers in *City of Lafayette*, noting that decisions of a municipal electric utility may favor the municipality at the expense of "extraterritorial impact and regional efficiency" and could burden consumers living outside the municipality without providing them "meaningful" political recourse. *City of Lafayette*, 435 U.S. at 404–06.

[292] None of the Court's recent cases involved fact patterns that would have raised interstate spillover issues. Ticor affected transactions on in-state property. *Ticor*, 504 U.S. at 627–28. *Omni* involved zoning within a single city. *Omni*, 499 U.S. at 367–69. *Patrick* involved peer review proceedings at a single hospital. *Patrick*, 486 U.S. at 97–99. *324 Liquor* involved mechanisms for raising in-state retail liquor prices. 324 Liquor Corp. v. Duffy, 479 U.S. 335, 340 (1987). *Southern Motor Carriers* involved regulation of intrastate trucking rates. *Southern Motor Carriers*, 471 U.S. at 50–53. *Town of Hallie* involved sewage treatment for areas surrounding a single city within a single state. *Town of Hallie*, 471 U.S. at 36–37. *Hoover* involved admission to the practice of law in Arizona. *Hoover*, 466 U.S. at 560–65. *City of Boulder* involved cable television regulation governing a single city. *City of Boulder*, 455 U.S. at 45–47. *Midcal* involved mechanisms for raising in-state retail wine prices. *Midcal*, 445 U.S. at 99–100.

[293] The Supreme Court has expressly rejected a market participant exception to the Eleventh Amendment's divestiture of federal courts of jurisdiction to hear certain claims against states. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999). However, some commentators have argued that the Court's reasoning is not readily transferable to the antitrust context. *See, e.g.*, Robert M. Langer & Peter A. Barile III, *Can the King's Physician (Also) Do No Wrong?: Health Care Providers and a Market Participant Exception to the State Action Immunity Doctrine*, *in* MATTHEW BENDER'S ANTITRUST REPORT 26 (1999); *see also* Robert M. Langer, Statement at AMC State Action Doctrine Hearing, at 3 (Sept. 29, 2005).

[294] *Omni*, 499 U.S. at 374–75. The Court explained that the language from *Parker* suggested only that the state action doctrine might not apply when a state acts in a commercial capacity rather than as a sovereign. *Id.*

[295] *Id.* at 379.

[296] *City of Lafayette*, 435 U.S. at 419 (Burger, C.J., concurring). Justice Stewart (joined by Justices White, Blackmun, and Rehnquist), dissenting in *Lafayette*, disagreed with the Chief Justice, arguing that the Sherman Act simply was not intended to cover the acts of governmental bodies and that "it is senseless to require a showing of state compulsion when the State itself acts through one of its governmental subdivisions." *Id.* at 428, 432. Justice Stewart also noted that the distinction between "proprietary" and "governmental" activities has been described as a "quagmire" and that a proprietary activity of government is nonetheless governmental. *Id.* at 433–34.

[297] *City of Lafayette*, 435 U.S. at 419 (Burger, C.J., concurring).

[298] *Id.*

[299] *Id.* at 418.

[300] *See* Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 948 (Fed. Cir. 1993) ("To warrant *Parker* immunity the anticompetitive acts must be taken in the state's 'sovereign capacity', and not as a market participant in competition with commercial enterprise."); A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 265 n.55 (3d Cir. 2001) ("There is also a market participant exception to actions which might otherwise be entitled to *Parker* immunity"); Hedgecock v. Blackwell Land Co., 1995 WL 161649, at *2 (9th Cir., Apr. 7, 1995) (No. 93-16604) ("While a commercial participant exception to *Parker* might be appropriate in circumstances where an arm of the state enters a market in competition with private actors . . . such is not the case here.").

[301] *See A.D. Bedell*, 263 F.3d at 265 n.55.

[302] *Id.* (quoting Parker, 317 U.S. at 352) (emphasis added).

[303] *Id.*

[304] *Hedgecock*, 1995 WL 161649, at *2.

[305] *See* Paragould Cablevision v. City of Paragould, 930 F.2d 1310, 1313 (8th Cir. 1991) ("[T]he market participant exception is merely a suggestion [in *Omni*] and is not a rule of law.").

[306] *See* Allright Colo., Inc. v. City of Denver, 937 F.2d 1502, 1510 n.11 (10th Cir. 1991); McCallum v. City of Athens, 976 F.2d 649, 653 n.7 (11th Cir. 1992).

[307] *Allright*, 937 F.2d at 1510 n.11; McCallum, 976 F.2d at 653 n.7.

[308] *See* Varner Statement, at 4, 19, 21; ABA Comments re FTC Report, at 20–22; FTC STATE ACTION REPORT, at 49; State Action Doctrine Trans. at 46–47 (Varner). Professors Areeda and Hovenkamp likewise note that Chief Justice Burger's proposed distinction between proprietary and non-proprietary municipal activities "is widely thought to have proved unworkable in identifying appropriate areas of municipal tort liability." AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 224e3. *See generally* James F. Ponsoldt, *Balancing Federalism and Free Markets: Toward Renewed Antitrust Policing , Privatization, or a "State Supervision" Screen for Municipal Market Participant Conduct*, 48 SMU L. REV. 1783 (1995).

[309] *See, e.g.*, AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 224e3.

[310] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 593 (1997).

[311] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976).

[312] Reeves, Inc. v. Stake, 447 U.S. 429, 431–32 (1980).

Separate Statement of Commissioners Burchfield, Delrahim, Jacobson, Kempf, Litvack, Valentine, and Warden

Congress created this Commission in 2002 for the purpose of examining "whether the need exists to modernize the antitrust laws and to identify and study related issues." Although federal commissions to evaluate the functioning of the antitrust laws are not new, this is the first such commission formed by Act of Congress in 65 years, and the first charged with a full scale review of the antitrust laws since the late 1970s.

Much has changed in the intervening decades. For example, international trade is less restricted and more prevalent, economic analysis of markets and marketplace behavior has become more sophisticated, American public policy has tended to be more firmly pro-competitive and anti-regulatory, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission have become more rigorous in analyzing allegations of anticompetitive behavior, state attorneys general have become more active in enforcing both federal antitrust laws and state competition laws, and courts have begun to eschew simplistic rules in favor of careful analysis. Formation of this Commission was timely and appropriate to assess the impact of these events on the administration of the nation's antitrust laws.

Against this background, the Commission came to its task with no set preconceptions. Drawn from varied political and professional backgrounds, the Commission has invited and heard testimony, and received written submissions, from distinguished academicians, practitioners, and government officials representing a variety of viewpoints on a broad array of controversial subjects. We believe that the Commission has heard and read these submissions with an open mind and, with the invaluable assistance of its outstanding staff, has carefully evaluated the diverse viewpoints.

Although the Commission has not been unanimous in all its findings, we believe it has achieved a remarkable degree of consensus, especially considering the difficult issues it has considered. We do not agree with every recommendation in the report, nor do we uniformly agree with each other, but we hope and believe the report, taken as a whole, should serve as an influential text for Congress, the President, judges, antitrust enforcers, and practicing lawyers.

Overall, the Commission's findings indicate that the antitrust laws are working reasonably well. This is due in large measure to the willingness and ability of courts in our common law system and of antitrust enforcers to revisit incumbent approaches to antitrust issues in light of advances in economic thinking and globalization. We applaud this receptiveness to new thinking by both courts and enforcers, and have every reason to believe that it will continue. If it does, the antitrust laws will continue to fit well with the ever-evolving United States and international economies. And the competition laws of the United States will continue to influence those of other nations.

The Commission did find some notable problems in particular aspects of antitrust law, however, and is therefore recommending a number of carefully considered changes. Some of the recommendations in the report, such as repeal of the Robinson-Patman Act, are not new. The Commission heard persuasive testimony and examined literature that convinced it that the Robinson-Patman Act has failed to serve its intended purpose of protecting small retailers from large chains, whereas its effect, if any, is to dampen vigorous price competition. The Justice Department ceased active enforcement of the Robinson-Patman Act decades ago, and the Federal Trade Commission has rarely enforced it in recent years. Even though it has had a formidable political constituency in the past, we believe a consensus against it has formed and the time has come for outright repeal.

In contrast to the frequent examinations of the Robinson-Patman Act, this is the first Commission to examine the practical effects of *Hanover Shoe* and *Illinois Brick*. Unquestionably, the Supreme Court's desire to save federal courts the difficult and complex task of tracing overcharges due to antitrust violations through the chain of distribution was well-intended. Nevertheless, these decisions have failed to achieve that aim and their practical consequences have proved much too costly. To begin with, under *Illinois Brick*, a direct purchaser who has succeeded in passing on all or a large part of the overcharge will realize an unjustifiable windfall. This windfall would be preserved by proposals to preempt state indirect purchaser statutes, proposals we believe are also politically unachievable. Under *Hanover Shoe*, the windfall is preserved even if federal direct purchaser actions are somehow consolidated for trial with state indirect purchaser actions. This result occurs because *Hanover Shoe* prevents a defendant from asserting or benefiting from the pass on defense against direct purchasers even if (hypothetically) the indirect purchasers were in the same courtroom in the same trial, and allowed to prove the same facts regarding pass on that *Hanover Shoe* prevents the defendant from proving.

A further unintended consequence of the *Illinois Brick* rule has been the advent of indirect purchaser lawsuits in state courts. Removal of these cases to federal court pursuant to the Class Action Fairness Act or otherwise has eviscerated the Supreme Court's desire to protect federal courts from the complexities of tracing overcharges through the chain of distribution. Indirect purchaser actions have unquestionably imposed an administrative burden on both state and federal courts. Even in those rare instances in which all state actions can be removed to federal court and then consolidated with all federal actions by the Judicial Panel on Multidistrict Litigation, current law requires that the cases be returned for trial to the federal district courts from which they were transferred.

The time has come, we believe, to overrule both *Illinois Brick* and *Hanover Shoe*, so that victims of antitrust violations receive just compensation, trebled, in a judicial environment that is efficient and fair to all concerned. We believe the Commission's recommendations regarding *Illinois Brick* and *Hanover Shoe*, though perhaps not perfect, would produce a major improvement over the current situation.

The Commission's ability to analyze these and other topics in a dispassionate way, with the benefit of considerable assistance from witnesses, public commenters, and a highly capable staff, will, we hope, contribute to the continuing reasoned evolution of the antitrust laws.

Separate Statement of Commissioner Carlton

I submit this statement in order to elaborate on certain topics covered and not covered in the Report.* I appreciate the difficulty of writing a report reflecting the views of many and compliment the Chair, Vice-Chairman, the other Commissioners, the Executive Director & General Counsel, and the staff for their work. Although differences in wording and tone undoubtedly exist from what I would have chosen, I restrict my comments here to a few select topics. I have tried to keep my comments brief and make reference to some of my articles and textbook for the reader interested in the details of my reasoning.

Tests for Exclusionary Conduct: Exclusionary conduct cases are highly varied and therefore one should not expect that a test that works well in one type of case will necessarily work well in another. Safe harbors for predation have little bearing on safe harbors for exclusive dealing. Developing different safe harbors for different types of conduct should be a priority. Proposed tests (e.g., profit sacrifice or no economic sense) that require one to specify the logic or profit of an act, but for the exclusion, can require a complex calculation subject to error. These proposed short cuts will work in only some exclusionary conduct cases. *See* Carlton (2007b).

Bundling: Although I vote in favor of the suggested safe harbors on bundling, I emphasize that they may fail to protect unobjectionable conduct. The justification for the first of the three pronged test (incremental revenues exceed incremental costs) seems to be based on an analogy to the Areeda-Turner (A-T) predation test that a safe harbor exists if price exceeds marginal cost. The analogy of bundling to price predation is faulty. In the predation model of A-T, there is one price. In the standard competitive model, it is odd for price to be below marginal cost in the absence of a predatory goal and, therefore, if one does observe this peculiar fact, one can go on to ask whether predation is likely by examining the possibility of recoupment. In the context of bundling, it is *not* odd to have the firm fail the first prong of the AMC test in the absence of a predatory goal. The reason is that bundling can be used as a method of price discrimination and it can be optimal for a firm, with no predation motivation, to set prices that fail the first prong. For example, if a razor manufacturer bundles a razor and razor blades together in a package and the bundle price is less than the price of blades plus the cost of the razor, then the pricing fails the first prong, even though this is a profitable strategy when one considers the future sales of razor blades. This type of pricing is well known to economists and not uncommon. *See* Carlton and Perloff (2005, ch.10).

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* This statement, as well as my votes and opinions in the report and in deliberations, does not necessarily reflect the views of the Antitrust Division of the Department of Justice where I am currently serving as Deputy Assistant Attorney General for Economic Analysis.

By offering product A separately from the bundle consisting of (A, B), a monopolist can separate consumers into different groups and charge different prices. *See* Carlton and Perloff (2005, pp.324–30). The first prong of the AMC recommendation ignores the revenue benefit from this separation. Moreover, adoption of the first prong could cause some firms to offer only the bundle and therefore make it impossible to apply the first prong of the test. If the first prong is adopted by courts, they must understand that a defense for the pricing based on legitimate business reasons unrelated to predation should be allowed so there should not be a presumption (as there is in the A-T price-marginal cost test) that failing the first prong should suggest that something odd is occurring. Moreover, a defense showing the challenged pricing was used either for many years (so predation is unlikely) or during a time with no possibility of predation should allow a firm to escape liability.

Tying: The laws of tying need clarification. There is no escaping that tying is ubiquitous, can be efficient, yet can also harm competition. Therefore, the per se treatment of tying makes no sense while the rule of reason as articulated in *Microsoft* does. The logic of the leading case on tying, *Jefferson Parish*, is often non-economic. "Forcing" in particular is a peculiar concept. Courts should distinguish between tying that is price discrimination (which may help or harm consumers, but which is generally legal), and tying that can alter the competitive structure even for consumers not interested in buying the tying product. Only the latter should be subject to antitrust liability. *See* Carlton and Waldman (2002, 2005, 2006, forthcoming), Carlton (2001, 2007a).

Indirect Purchasers and* Illinois Brick*: I oppose the recommendation to overrule *Illinois Brick*, a decision that eloquently spells out the difficulties of allowing indirect purchasers to sue. I recognize that in certain cases direct purchasers may not have an incentive to sue. I therefore would allow minor exceptions to a ban on allowing indirect purchasers to sue. I would recognize the exceptions described in *Illinois Brick*. I would also consider allowing an exception when an insufficient percent (by volume of sales) of direct purchasers sue within a certain time period, as can occur when direct purchasers fear suing their major supplier. Further study is needed to determine what is an appropriate time period and to define "insufficient". I would preempt state laws regarding indirect purchasers.

I oppose the AMC recommendation to allow the removal of state claims on behalf of indirect purchasers to federal court. Although I oppose the recommendation, it would be improved if instead of removal, state claims were preempted and replaced by a limited federal right allowing indirect purchasers to sue.

Treble Damages: One purpose of damages is to deter undesirable conduct. A multiple of damages is needed when detection is not certain or when some parties are unable to sue to collect damages. I favor a reduction in the multiple to single damages when the actions are overt (e.g., exclusive dealing), and an increase in the multiple when there are some parties affected by the act who are unable to sue (e.g., foreign consumers in an international price fixing case). *See* Carlton (2007a). There are already limited instances in which only single damages are available (for example in the case of research joint ventures) in recognition of the principle that treble damages can under certain circumstances deter efficient behavior.

Contribution: I do not favor allowing non-settling parties to sue each other for claims for contribution because it involves a use of court resources and I am not convinced that it leads to more efficient deterrence.

Attempts to Conspire: If person A asks person B to fix prices, and person B refuses, it is unclear whether person A faces antitrust liability. I would alter the relevant laws including civil or criminal fine authority to allow antitrust liability and penalties on person A.

Robinson-Patman (RP): If repeal of RP does not occur, I would recommend that courts impose a requirement of antitrust injury in order to trigger antitrust liability under RP.

States' Merger and Non-Merger Authority: I would confine the states' antitrust authority to local matters and to those involving price fixing, boycotts, bid rigging, and market allocation. I would eliminate the states' authority to sue in cases involving mergers or other non-merger matters. I would preserve the right of states to sue in their *parens patriae* capacity for the exceptions I discuss above regarding suits by indirect purchasers. Based on evidence presented to the Commission, I fear that some states are understaffed in the area of antitrust and that there can be differences between the objectives of state antitrust enforcers and federal antitrust enforcers where this difference could lead states to pursue antitrust actions in which there is no antitrust injury. Moreover, because the actions of one state can affect other states when matters are not local, I favor confining states' antitrust activities to those involving only local matters. I would further confine their activities to hard-core antitrust offenses because that is where they already devote a considerable amount of effort and because that is where antitrust doctrine is clearest.

Study of Antitrust: Empirical studies of antitrust policy are needed to ensure that antitrust policy is appropriate. Retrospective studies of past policies can be useful. For example, studies of allowed mergers can confirm whether prices rose or fell after particular mergers. A finding of a systematic increase in price after mergers could indicate that merger policy is too lax. A more difficult, though perhaps more important issue, is the effect of antitrust policy on the economy. For example, a decision to forbid a particular merger may dissuade other firms from merging despite the fact that the merger involving those firms may enhance efficiency. Similarly, a decision such as that in *LePage's* that cast doubt on the legality of common pricing practices could impose costs on the economy as many firms readjust their pricing to conform to the particular decision.

Clearance Disputes: The report discusses the need to assign a merger case quickly to either the FTC or DOJ when a dispute arises between the two agencies as to which agency has the better expertise to handle the merger. Resolution of this issue is related to the much broader issue of how in the long run, industries should be assigned to either the FTC or DOJ. As some industries develop and others decline, there should be some mechanism to make sure that the industries be assigned to agencies with a sense of keeping the agencies in some balance.

Consumer versus Total Surplus: There continues to be a debate as to whether the antitrust laws should focus on only consumers (consumer surplus) or on both consumers and producers (total surplus). Aside from doubting the practical significance for most cases of resolving this issue, I note that I favor total surplus and that total surplus is what is used routinely in cost-benefit analysis, a tool of widespread use in public policy. I also note that there is a gaping logical inconsistency between favoring a consumer only objective and at the same time opposing a cartel to monopsonize. A cartel to monopsonize lowers total surplus but does not affect consumers in the standard models of monopsony. This logical inconsistency is one illustration that the focus on only consumers is undesirable. *See* Carlton (2007a).

Market Definition: The misuse of market definition cases is common especially in Section 2 cases when the analyst attempts to apply the market definition procedures of the Merger Guidelines. The arbitrariness in how markets are defined undoubtedly leads to significant error. I regret that the report is silent on the topic of market definition. *See* Carlton (2007b).

Market Power: The courts and economists are often unclear what the term "market power" means. Pricing above the competitive level, which is often taken to be marginal cost, is one common definition. If the market cannot be competitive, what should be used as "the competitive level"? Should one focus on rates of return and see whether the return is above the competitive levels? What is the difference between "market power" and "monopoly power"? How much market power is significant? How durable should the power be? The AMC is silent on these issues, which are in need of clarification. *See* Carlton (2007b).

Reports on Regulatory and Legislative Actions: The agencies should have a free hand to investigate and report to the American public the consequences on competition and on American consumers of various federal, state, and regulatory actions without fear of retaliation. Once they are aware of the costs their actions impose, the relevant government bodies can then decide whether their interference in the competitive process is justified by non-economic or political goals. Aside from examining various exemptions, the effect of International Trade Commission decisions would be a useful subject to study. By making transparent the costs of interfering in the competitive process, the public might be better informed and better served than they would otherwise be.

Competition Advocacy: The FTC and DOJ have a large concentration of economists and lawyers knowledgeable about the benefits of competition. They should be, but are not always, used effectively as a resource by other federal and local government agencies for structuring regulations in a way so as to not interfere too much with the competitive process.

Foreign Training: A desirable and recent phenomenon is the development of antitrust agencies around the world. An investment in the training of foreign enforcers is a good one for the U.S. Such training should receive high priority.

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Separate Statement of Commissioner Delrahim

It has been a true pleasure and honor for me to have had the opportunity to serve on this Commission with such a distinguished and dedicated group of professionals that despite different political affiliations all recognized the value of competition in advancing the marketplace and ultimately consumer welfare.

As the Commission's work progressed over its three year mandated life, I grew increasingly pleased with the recommendations and the general consensus the Commission was able to reach on most issues. My time serving in the legislative and executive branches in the government taught me that the best way to advance policy is to have as broad consensus on issues as possible. This is often possible if the position advocated is principled and those determining the policy approach the issue in a principled and serious manner. That was the result of the Commission's work and in large part due to the thoughtful approach and process implemented by the Chairman and the Vice-Chairman, Deb Garza and Jon Yarowsky, respectively, who deserve great credit for instilling a sense of unity to the group. In addition, the professionalism and dedication to competition of each of the Commissioners made the implementation of the goals of Commissioners Garza and Yarowsky possible.

Even with the largely consensus recommendations presented here, there were, of course, differences. These differences were generally few, and Commissioners were content to have had their votes recorded accordingly. We all abided by the process whereby the majority view prevailed. In fact, we worked hard where possible, even in those situations where we found ourselves in the minority, to make suggestions so the ultimate recommendation would enjoy as close to consensus support as possible.

Antitrust and Patents:

In all aspects of the Commission's study, except for one, the Chapter on Antitrust and Patents, I believe the consensus process was followed and whether I agreed with the majority or not, I was comfortable that the Commission, through its adopted process, selected an issue for study, sought public input from those involved, fairly deliberated the issues, voted on them, debated the issue after the vote and discussed the recommendations it would make. It is the recommendations contained in the very critical chapter on Antitrust and Patents that, in my view, unfortunately the Commission does not have the benefit of the full and fair record and deliberation they warrant.

It is because of this that I feel compelled to write a separate statement to present a full background of the very complex and important issues presented for the benefit of my fellow Commissioners as well as the public and the policy makers who will consider the recommendation of this report.

In my view, without taking anything away from all of the other critical issues that the Commission studied and I participated in, the most lasting impact of the Commission's work is the effect of its commentary in two areas: (1) international; and (2) antitrust and intellectual property, and particularly as these two areas intersect.[1]

I hold these two areas for several reasons. One is the globalization of antitrust laws, with approximately 90 international trading partners with antitrust regimes without an international agreement or common standard of what the laws should be. Another is the fact that intellectual property-based exports—whether copyrighted music, movies or software, or patent-protected goods such as pharmaceuticals or electronic products—have become this country's number one export. As such, their creation and protection is critical to maintaining a vibrant economy. But, with the rapid pace of globalization, intellectual property rights are increasingly crucial to all sectors of the global economy as well. Moreover, as firms innovate, manufacture and market their products globally, licensing of the intellectual property rights they hold or need often proceeds on a global scale, and differences among nations' licensing rules have the potential to disrupt cross-border commerce. As a result, I think this Commission has an important and justified interest in the choices the U.S. Government and other jurisdictions make about how their antitrust authorities will analyze the restrictions that appear in intellectual property licensing agreements.

My colleagues on the Commission are well familiar with my passion for this area for the creative and innovation community. I am heartened that we now live in an era in which the benefits of intellectual property rights are recognized around the world and the protection of these rights, once they have been recognized in any one country or region, is often made global through a patchwork of bilateral and multilateral agreements. These agreements have played a vitally important role in creating a bundle of rights and obligations that in effect globalize the protections for intellectual property.

That is why I feel so deeply about any issues this Commission studied or recommendations it now suggests. In my view, antitrust law and policy must be careful not to constrain the legitimate exercise of intellectual property rights. The application of antitrust laws must not illegitimately stifle creators or innovation by condemning pro-competitive activities that would maximize incentives for investments or efficiency-maximizing business arrangements. Antitrust enforcers should also strive to eliminate as much as possible the unnecessary

[1] As I have disclosed to my fellow Commissioners, over the past year, I have represented many technology companies who may or may not fully support the statements that I make here. My views and passion on the topic here are a matter of public record from my speeches and articles while at the Department of Justice or while I was a staff member of the Senate Judiciary Committee. For the purposes of full disclosure, these companies have included Oracle, Microsoft, Micron, Qualcomm, Intel and Apple. I also represent other companies who might be interested in my comments here, including Johnson and Johnson, sanofi-aventis and the Medical Device Manufacturers Association. I do not and have not represented any of these companies before this Commission. I have represented Qualcomm before the US and foreign antitrust agencies on some of the topics I discuss here.

uncertainties for innovators and creators in their ability to exploit their intellectual property rights, as those uncertainties can also reduce the incentives for innovation. Only when the holders of intellectual property rights go beyond the legitimate exercise of these rights should antitrust law be used to constrain their activities, and only then in a manner that is based on sound economic policies.

There were many issues I wish we had the resources to study, as did a number of my fellow Commissioners. We all recognized early on and respected that to do a thoughtful job, we must restrain our desires and study a limited number of issues in accordance to a process adopted by the Chair and the Vice-Chair at the outset. It was within that process that a subcommittee voted on a set of issues to recommend to the full Commission and the Commission voted on those issues that a majority thought worthy of further full study to include public comment and full deliberation.

Unfortunately, the very important, yet very complex issue of the antitrust treatment of standard-setting was not one of those issues selected for study. As such, this Commission did not receive nor debate in its regular course full testimony on the topic for all Commissioners to be fully informed of all the issues at play and the policies at stake. I therefore do not support the Commission's recommendations in this chapter, nor believe it is worthy of this Commission's support given the amount of thought and deliberations other topics of study rightfully and thoughtfully received. It is in that spirit that I provide the following background so the public and my fellow Commissioners have the benefit of at least this Commissioner's thoughts on this critical issue. Moreover, I withheld my support for a wholesale endorsement of the FTC and NAS patent reform recommendations, not because I disagree with them, but as I stated during the deliberations, I believe that this Commission did not spend nor have the resources to spend to review each of the recommendations for it to put its credibility behind all recommendations the ramifications of which it did not fully consider or deliberate.

I now turn to the issue of standard-setting and antitrust and the Commission's inadequate background and debate behind its recommendations in this area.

This is undoubtedly one of the most interesting and important areas of debate in antitrust and innovation policy today. It is interesting because it challenges some of the basic concepts of intellectual property rights (IPR) and antitrust policy, and because it is an unsettled and evolving area of the law. This issue is critically important because the legal and regulatory framework for standard setting has—and will continue to have—a profound effect on the way innovative ideas get to market and innovators get compensated, and hence affects the whole innovation policy debate.

With true humility and recognition of my lack of economic training, I suggest—and I believe economists have universally recognized—that there are two types of efficiency in the context of this discussion. The first is called static efficiency, and it occurs when two or more companies are competing within a particular technology. The competition among those firms will lead to a streamlining of production and other cost-saving steps in order to reduce manufacturing costs and, ultimately, the price consumers pay. Although the benefits of static efficiency are very important, they are incremental gains. In contrast, the other type of efficiency, dynamic efficiency, results when an entirely new technology is developed and made available to consumers. Dynamic efficiency has much more dramatic effects on consumer well-being, and therefore is an appropriate focus of attention for policymakers.

Standard-setting should be viewed as a potential means for bringing about dynamic efficiency. In the words of current Deputy Assistant Attorney General Gerald Masoudi, my friend and successor at the U.S. Department of Justice Antitrust Division, "The goal of standard setting, generally speaking, is to find the best combination of technical success, cost, and time-to-market, while also delivering enough economic surplus that all parties (inventors, producers, and consumers) can share, so that the product is commercially viable."[2]

The setting of industry standards has proven useful and important to many sectors of the economy. By allowing products produced by different firms to function together, the setting of standards has made many products more valuable to consumers and often increased their utility. The setting of a standard for telephone cords and plugs, for example, has enabled the proliferation of devices and components that consumers purchase, knowing that they will plug into the phone or phone jack they have at home. As the global economy is increasingly characterized by information technology and intellectual property, the setting of industry standards has become both more critical and more complicated. Companies in high-technology industries understand the value of interoperability, which produces a strong incentive for companies within an industry to agree on a standard. Most often, standards are set in a reasonable and productive way that benefits both the companies that produce items utilizing that standard, as well as the consumers who buy them.

Standard setting is becoming a more prevalent practice particularly in the new digital marketplace. Standards for data transmission, for digital content protection, and for authentication are all becoming necessary elements for a robust and interconnected digital economy.

Industry standards can be created through de facto consumer preferences won through competition in the marketplace (*e.g.*, Microsoft's Windows Operating System) or through collaboration on *de jure* standards in formal standard setting organizations. The standards, created for the operation of 3G Wireless technology, for example, were a result of a global effort by governments and private industry participants. Another example is the collaboration of industry participants in the DVD Forum to approve a format for high definition digital versatile discs (HD-DVD), using its open standards process. Standards can also be developed through

[2] Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property*, High-Level Workshop on Standardization, IP Licensing, and Antitrust, Tilburg Law & Economic Center, Tilburg University, Chateau du Lac, Brussels, Belgium (January 18, 2007), at 5.

government-sponsored initiatives (the FCC's V-Chip regulation is one example) or through efforts by smaller groups of private industry participants (such as those efforts by the Blu-ray Disc Association (BDA) to create independently a format for "next generation" optical disk technology).

Standards are often procompetitive because they are designed to curb modern-day problems associated with network markets and interoperability requirements. Standards can also facilitate competition among competitors who are vying to have their technology selected as the "winning" standard. A good example is the "standards war" for the next generation DVD format between members of BDA (led by Sony) and supporters of Toshiba's and NEC's HD-DVD format. Although technical aspects of the Blu-ray and HD-DVD formats differ, next generation optical discs are generally attractive because they promise significantly enhanced piracy protection, more interactive features, and greater storage capacity.

The war between Blu-ray and HD-DVD may remind many of us of the Betamax/VHS struggle to become the standard technology for video cassette recorders. We know that in the end, the market could not sustain the competing formats and VHS prevailed. Perhaps history will repeat itself, and vigorous competition will create a de facto standard, achieved by operation of the market. Or perhaps market forces will drive these competitors to agree on one standard, possibly incorporating the most attractive aspects of each format. In either case, it appears this battle will be fought and won in the marketplace, where it belongs.

De jure standards that are established through collaboration raise different competition concerns, for example, when the standard setting process is used to exclude industry participants from having their technology considered by the group. Collaborative standard setting, some say, can foster collusion on the terms at which the winning intellectual property can be licensed. Some also claim that winning intellectual property owners can hold-up the implementation of the standard by imposing onerous licensing terms. I wish the Commission could have studied this claim. There doesn't seem to be much empirical evidence of this.

Problems further arise when standard setting organizations adopt uncertain disclosure rules, setting the stage for what has become known as "disclosure hold-up," the intentional failure to disclose intellectual property rights that would be infringed by complying with the standard after the standard is adopted.

The answer for the so-called patent holdup suggested by some has been *ex ante* negotiations between the patent holder and the standards participants. This is what the Commission seems to endorse, but the issue is not that simple. My concern is that without more guidance, the Commission's recommendation will have a potential to be misinterpreted and ultimately result in reduced innovation.

Let me provide some background on different approaches for competition policies in standard setting organizations. Standard-setting organizations have tried three main mechanisms to address competitive hold-up issues through their organic policies: reasonable and nondiscriminatory licensing (RAND) commitments; mandatory predisclosure; and *ex ante* licensing.

The first approach, RAND, has succeeded for the most part. Sometimes, it is the "reasonableness" of licensing prices that leads to trouble. Parties to such an agreement understandably see things much differently before a standard is set than afterward, or *ex post*. And the party whose technology is chosen as the standard may very well have a different view of what price is reasonable for the others to pay.

Mandatory disclosure, the second mechanism, relies upon the parties not only to fully disclose all of their relevant technology, but also to fully understand each other's technology prior to standard setting. Both are high burdens, particularly in light of the fact that standard setting can take unpredictable paths and can therefore encroach on technology that parties did not foresee as relevant. Predisclosure thus can suffer unintentional under-disclosure—but also can suffer from intentional under-disclosure and even over-disclosure. Either situation highlights the weakness of predisclosure agreements, even though it is probably the most effective mechanism with appropriate enforcement by private or public authorities for any fraudulent activity by the standards participant.

The third mechanism, *ex ante* licensing, the supposed subject of the recommendation of the Commission, has become the most controversial. The idea behind *ex ante* licensing is that, prior to standard setting discussions, the participants will agree on the prices to be paid for the intellectual property that may govern the selected standard. One theory behind this approach is that it eliminates so-called patent hold-up because the party whose technology is chosen as the standard is bound to license that technology at a pre-bargained or pre-disclosed maximum price.

The problem with *ex ante* licensing, however, is that it could facilitate horizontal price fixing because it is done in a group of potential horizontal competitors who are sharing prices and other terms. In addition, any joint discussions, negotiations, and setting or royalty and other licensing terms may reduce any procompetitive benefits of the standards process and raise risks of collusive exercise of monopsony or oligopoly power. For example, such collective conduct directed at establishing licensing terms may drive the value of IPR contributed for standardization below its optimal prices and toward its marginal cost—that is, zero. The Antitrust Division and Federal Trade Commission recognize the adverse competitive effects of such conduct. The DOJ/FTC *Horizontal Merger Guidelines* explain that "[m]arket power also encompasses the ability of a single buyer (a 'monopsonist'), a coordinating group of buyers, or a single buyer not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ('monopsony power') has adverse effects comparable to those associated with the exercise of market power by sellers.[3] Agency joint venture policy also includes express recognition of the serious competitive risks associated with the exercise of buyer-side mar-

[3] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (issued April 2, 1992, revised April 8, 1997), at § 0.1.

ket power. A buyer collaboration—which is what would exist if royalty and other license terms were collectively established in the standards setting context by a group comprised primarily of prospective licensees—can "create or increase market power . . . or facilitate its exercise by increasing the ability or incentive to drive [down] the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement."[4]

In fact, there are circumstances in which case law would support the continued application of a *per se* rule to ensure that there will not be a collusive buyers' cartels.[5]

Let me now mention two items that underscore the very live and active issue that the Commission, in my view, is addressing without fully appreciating the impact. These two items are the VITA Business Review Letter and the IEEE Request for Business Review Letter.

In October 2006, the Antitrust Division rendered a favorable business review letter to the VMEbus International Trade Association (VITA), a group that develops standards for certain computer bus architecture.[6] The VITA *ex ante* licensing policy included, among other things, these five provisions: (1) Disclosure of all patents or patent applications that believes may become essential to implementation of the future standard. Members must do this before a working group is formed, sixty days after the working group is formed, and then fifteen days after the draft standard is published. (2) Disclosure of maximum royalty rates and terms they will demand for essential rights. These rates and terms are binding. (3) Agreement that the commitments apply only to the particular standard being developed and not to other uses of the technology. (4) Commitment not to negotiate licensing terms among working group members or with third parties. (5) Agreement to arbitrate any disputes over members' compliance with the agreement. The policy lists some consequences for non-compliance, including that the penalty for failure to disclose an essential patent is a free license of patent rights related to the standard.

The DOJ's response letter concludes that this specific VITA policy was not likely to harm competition. It found that the prohibition on joint negotiation of licensing terms protected against unfairly low royalties due to anticompetitive acts. The patent holder is free to nego-

[4] U.S. Department of Justice and the Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, at § 3.31(a).

[5] *See* Mandeville Farms v. American Crystal Sugar, 334 U.S. 219 (1948) (finding *per se* unlawful an agreement among local sugar refiners to set the purchase price for sugar beets); National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965) (finding per se unlawful a trade association rule that fixed the percentage of durum wheat included in macaroni products produced by trade association members in order to depress market demand and price during a crop shortage).

[6] Letter from Thomas O. Barnett, Assistant Att'y Gen., U.S. Dep't of Justice, to Robert A. Skitol (Oct. 30, 2006), http://www.usdoj.gov/atr/public/busreview/219380.pdf; *see also* Press Release, U.S. Dep't of Justice, Justice Department Will Not Oppose Proposal by Standard-Setting Organization on Disclosure and Licensing of Patents (Oct. 30, 2006), http://www.usdoj.gov/atr/public/press_releases/2006/219379.pdf.

tiate after the standard is set, but will continue to be bound to the maximum terms it set forth earlier.

One month after the DOJ issued the VITA Business Review Letter, the Institute of Electrical and Electronics Engineers, Inc. (IEEE) and its Standards Association (IEEE-SA), requested a Business Review Letter concerning proposed changes to the IEEE-SA's Patent Policy. That request is still pending. The IEEE-SA request apparently would apply to more than 1300 standards in a wide array of fields. Like the VITA policy, the IEEE-SA policy would compel patent owners to disclose their rates and terms in order to avoid the possibility that their technology will be excluded from consideration in the standard setting. But unlike the VITA policy, the IEEE-SA policy, as I understand it, appears to contemplate that the rates and terms of prospective licenses will be discussed within the organization as part of its consideration of the relative costs of the competing technologies, and outside the organization as well. The IEEE-SA maintains that these provisions are reasonably necessary to prevent the imposition of "unexpected" royalties *ex post*. What are these when we deal with patented technology? The goal of any antitrust policy cannot be that the ultimate price of intellectual property inputs is or should be zero.

The VITA and IEEE-SA policies are not only changing the way standard-setting organizations operate, but also may be tilting of the process in favor of IPR users at the expense of IPR owners, and perhaps to innovation itself. After all, these policies are essentially "reverse auctions" held by a coordinated group of horizontal actors whose goal is to reduce royalties to as low a level as possible. And with the DOJ's favorable letter(s), standard-setters' fears of buy-side antitrust liability based on the district court decisions in *Sony v. Soundview*[7] and *Golden Bridge v. Nokia*[8] will be limited at best. The result could be a classic "buyers' cartel" exercising *per se* unlawful market power with the effect of: (1) reducing the incentive to innovate both in core technologies and complimentary applications; (2) depriving consumers of products based upon superior technology; (3) artificially lowering return on investment to IPR owners below market rates; and (4) ultimately increasing costs to consumers of products resulting from standardization efforts. The reason that all of this could result is that the VITA and IEEE-SA policies drive down the cost too fast. As Deputy Assistant Attorney General Masoudi said:

> The same forces that yield the benefits of static efficiency—conditions that encourage rivals quickly to adopt a new business method and drive their production toward marginal cost—can discourage innovation (and thus dynamic efficiency) if the drive toward marginal cost occurs at such an early stage that it pre-

[7] Sony Elecs., Inc. v. Soundview Techs., Inc., 157 F. Supp. 2d 180 (D. Conn. 2001).

[8] Golden Bridge Tech., Inc . v. Nokia, Inc., 416 F. Supp. 2d 525 (E.D. Tex. 2006).

> vents recoupment of development expenditures, and makes innovation uneconomical.[9]

It would be a tragedy for IPR and antitrust policy if the law were to become a hindrance to innovation rather than an incentive to efficiency.

The legality of joint discussion and negotiation of royalties and whether it is evaluated according to the "rule of reason" rather than the *per se* treatment is under serious debate in the United States and abroad. There still is not enough economic research to support the statements in the Commission report, let alone the statements by the US agencies so far.

In different contexts, the *ex ante* discussion and negotiations could have either pro- or anti-competitive effects. As explained by the Agencies in their *Collaboration Guidelines*:

> Agreements not challenged as *per se* illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered *per se* illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.[10]

This balancing approach appears to be reasonable and is essentially reflected in FTC Chairman Majoras's remarks at Stanford University in 2005, where she explained that "joint *ex ante* royalty discussions that are *reasonably necessary to avoid hold up* do not warrant per se condemnation. Rather, they merit the balancing undertaken in a rule of reason review."[11] A proper balancing must take into consideration the rights of the IPR owners as well as IPR users, and must comport with the goal of efficiency, both static and dynamic.

I again thank my fellow Commissioners for their work and indulgence and hope they find this more detailed background useful.

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[9] Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property*, High-Level Workshop on Standardization, IP Licensing, and Antitrust, Tilburg Law & Economic Center, Tilburg University, Chateau du Lac, Brussels, Belgium (January 18, 2007), at 3.

[10] U.S. Department of Justice and the Federal Trade Commission, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, at § 1.2.

[11] Deborah Platt Majoras, Chairman Federal Trade Commission, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, remarks prepared for Standardization and the Law: Developing the Golden Mean for Global Trade, Stanford University (Sept. 23, 2005), at 7 (emphasis added).

Separate Statement of Commissioner Jacobson, Joined by Commissioners Valentine (Except as to Part III) and Warden (Except as to Parts I.B and II.B)

It is difficult to overstate the importance of the antitrust laws. By pursuing antitrust, we have established competition as the means of determining market outcomes in the United States. This reliance on the free market has enabled us to avoid the far more intrusive governmental control that has characterized (and often stunted) the economies of other nations. As a result, the United States has developed an economy that is universally admired and respected—with levels of output, price, quality, and variety envied across the globe. Our choice of "antitrust" in 1890 and 1914 has thus proven to be among the best political decisions any country has made. It is a choice now being replicated in substantial part by country after country around the world.

Congress created the Antitrust Modernization Commission against this background. Our assignment has been to study, reexamine, and analyze our existing antitrust regime and to determine whether, and if so to what extent, changes are necessary or desirable. The Commission's Report, which I join enthusiastically in major part, correctly reaffirms the fundamental soundness of the antitrust laws themselves and the procedures for enforcing them. The Commission wisely proposes no changes to any of the most important substantive statutory provisions—sections 1 and 2 of the Sherman Act, sections 3 and 7 of the Clayton Act, and section 5 of the FTC Act. The Commission similarly proposes no radical change to the key mechanisms of enforcement—criminal proceedings; civil proceedings by the DOJ or FTC; private actions for treble damages and injunctive relief; and actions by the various state attorneys general. The changes the Commission recommends are instead designed to enhance, not overturn, the existing structure of antitrust enforcement.

The Commission's key reform proposals warrant the most careful attention by the Congress and the enforcement agencies. Adopting them will improve the quality and character of antitrust enforcement. Particular heed should be paid to the following recommendations:

- Repeal of the anti-consumer Robinson-Patman Act;
- Reform of indirect purchaser litigation;
- Repeal of existing judicial rules forbidding claim reduction and contribution among antitrust defendants;
- Reforming merger clearance and the process for issuing "second requests" under the Hart-Scott-Rodino Act; and
- Narrowing the number and scope of antitrust exemptions and immunities.

I write separately for three reasons: *first*, to underscore my endorsement of the Commission's most significant recommendations; *second*, to address a few important opportunities that the Commission missed; and *third*, to express my specific disagreement on one matter—the Commission's recommendation on criminal sentencing. For the most part, where I have parted company with my colleagues, I have simply noted my disagreement in footnotes to the main Report. The issues addressed here are limited to those warranting more extended comment.

I. Important Facets of the Commission Report

a. No change to the key substantive antitrust laws

The antitrust laws generate enormous benefits for U.S. consumers every day. By stopping cartels, preventing mergers that would create or enhance market power, and forbidding significant restraints of trade and exclusionary practices, the antitrust laws provide for an "unrestrained interaction of competitive forces [that] yield[s] the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). That famous statement, by Justice Black speaking for the Court almost fifty years ago, remains equally valid today.

If there is any key message to be distilled from the Commission's Report, it is simply that the antitrust laws—both substantively and procedurally—are working well and need not be displaced, rolled back, or overhauled. The Commission had the opportunity to review every aspect of our antitrust system and, in fact, did review major portions. Yet after three years of hard work and analysis, the Commission's proposals for reform, while quite important, are comparatively modest and incremental. That this is such a strong consensus conclusion of the Commission—a Commission incorrectly feared by some, at the time of the Commissioners' appointments, to be antagonistic to antitrust enforcement—is a point of great significance. The Commission's reaffirmation of the basic principles of the antitrust laws and the basic structure of its institutions may well be the single most important aspect of our Report.

Could the Commission have undertaken to comment on additional issues of substantive antitrust law? Certainly, it *could* have. Notwithstanding the general widespread acceptance of antitrust doctrine as a whole, there are many particular court decisions and other interpretations of the antitrust laws that are at least controversial if not outright wrong. In my personal view, the per se rule for tying is an example of a legal doctrine that has long outlived its usefulness. And, to me, the courts should long ago have stricken from the books the holding of *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), which held that a patent acquisition could not violate the antitrust laws if made prior to the time the relevant market for the patented product had emerged. Any list of similar examples would be lengthy.

The temptation for this Commission to address these and other perceived errors of substantive law was substantial. Our decision not to do so, however, was the correct one. A key element of what has made antitrust so successful for so long is its flexibility, its ability to adapt to changes in industrial structure and to changes in legal and economic thought. The statutes themselves establish only broad and simple principles—prohibiting "restraints of trade," "monopolization," and acquisitions that "may lessen competition substantially." These principles have gained real meaning only through the many court decisions, agency actions and guidelines, and economic analyses accumulated over a course of 117 years. As experience in antitrust has demonstrated time and again, however, the received wisdom at any given moment often proves to be quite wrong later on.[1] Any effort to change the substance of antitrust in any kind of permanent way is therefore both perilous and futile.

Antitrust tends to correct its mistakes over time. The per se rule for tying, for example, was sent nearly to its demise just last year. *Illinois Tool Works v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006). The doctrine of *SCM v. Xerox* is one that, in merger enforcement at least, the federal agencies ignore. *See* ABA Section of Antitrust Law, Antitrust Law Developments 586–88 & n.202 (6th ed. 2007). As this Report is being prepared, the Supreme Court is reexamining one of the most controversial legal rules, the per se rule for resale maintenance. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 763 (2006). In antitrust, there is little to commend any effort to freeze legal precepts in one place. Had the Commission undertaken to devote its attention to the correction of errors in substantive antitrust doctrine, we at best would have provided temporary solutions—and we would have diverted our attention from the many other areas where we have the potential to do real good. Our decision to focus on other matters was the right one.

b. Retention of multiple enforcement

The Commission's recommendations against changing private remedies or the rules that allow federal antitrust suits to be filed by state attorneys general are also important.

The federal antitrust laws are enforced in several ways: (1) proceedings for injunctive relief by the DOJ or FTC; (2) private party actions for injunctive relief and/or damages; (3) actions by state attorneys general for injunctive relief or damages; (4), in appropriate cases, crim-

[1] *Compare* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) *with* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); *compare* Albrecht v. Herald Co., 390 U.S. 145 (1968) *with* State Oil Co. v. Khan, 522 U.S. 3 (1997); *compare* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) *with* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); *compare* United States v. United States Steel Corp., 251 U.S. 85 (1920) *with* United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945) and LePage's v. 3M, 324 F.3d 141 (3d Cir. 2003); *compare* United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945) *with* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979); *compare* International Salt Co. v. United States, 332 U.S. 392 (1947) *with* Illinois Tool Works v. Independent Ink, Inc., 126 S. Ct. 1281 (2006). This list could be expanded exponentially.

inal proceedings by the Justice Department; and (5), perhaps most importantly, by voluntary counseling. It is a fair question to ask whether a system with so many enforcement mechanisms is necessary. History tells us, however, that multiple enforcers are of great importance to the preservation of antitrust, and the free market, as the means for governing our economy.

Multiple enforcement ensures that the administration of the antitrust laws will be not only vigorous but insulated, to a degree, from the vagaries of the electoral process. If antitrust is a priority of a presidential administration, we can be confident of appointees to the Justice Department and Federal Trade Commission who will pursue robust enforcement. But, as we have seen at times over the past 30 years, antitrust is not always an executive branch priority. In some instances, the executive branch may seek to curtail antitrust significantly or, more commonly, to sit on the sidelines while cases are not brought. Multiple enforcers operate as a critical check and balance on the executive branch. In any given case, the federal enforcement agencies may not elect to proceed, but injured parties and the states have the ability to fill in the gap.

It is important to remember that multiple enforcement itself is subject to a critical check and balance: the federal courts. The Justice Department or FTC, in the limited context of pre-merger notification, can prevent consummation of an acquisition for a while—until the parties have complied with the agency's second request—but every other aspect of antitrust enforcement requires judicial intervention. Neither agency can block a merger; only a court can do so. Similarly, the Justice Department can obtain civil or criminal relief only through the courts. The FTC can proceed through its administrative proceedings, but parties can always appeal to a circuit court of appeals. The states and private parties, of course, can proceed only through the courts. The upshot is that, notwithstanding multiple enforcers of the antitrust laws, only the courts can determine whether a violation of law has been established. Having multiple enforcers simply provides greater assurance that the courts have that chance.

Preservation of multiple enforcement is the principal reason why I join the Commission in urging no curtailment of the ability of the state attorneys general to sue under the antitrust laws. The record before the Commission demonstrates convincingly, in my view, that the states can effectively supplement the federal agencies by bringing cases the agencies do not; can team effectively with the federal agencies in bringing important cases; and, by their very presence, provide an important check against federal under-enforcement. *See* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673 (2003). The Commission was presented with no evidence demonstrating that state enforcement has resulted in harmful inconsistencies in legal obligations, deterrence of procompetitive conduct, or excessive costs. There was evidence, and I agree, that the *quality* of state enforcement could be improved. But there was simply no case presented to justify curtailing the states' *ability* to enforce the laws.

The Commission's decision to recommend retention of private rights of action for treble damages and injunctive relief is also welcome. There was no serious proposal to eliminate private rights of action entirely, and certainly no evidence to support any such radical change to the basic system of antitrust remedies that has served us well for so long. But a number of thoughtful observers, including some of my fellow Commissioners, have expressed concern about the tripling of damages, at least for non-cartel offenses, in contexts where the defendant's legal obligations are not entirely clear. I remain very sympathetic with those concerns in the abstract. But, nevertheless, I believe that the arguments for change are decisively outweighed by other considerations.

We have had a treble damage remedy for 117 years. It started as section 7 of the Sherman Act; in 1914, it was made section 4 of the Clayton Act. For a statute that has been a cornerstone of antitrust enforcement for that length of time, the burden to show a need for change is a particularly heavy one. The Commission had extensive hearings on the subject. There is extensive literature on the subject, which the Commission reviewed. No commenter identified a single example of a serious injustice occasioned by an actual award of improvident treble damages. That alone is compelling evidence that radical change is unwarranted.

The temptation to limit trebling to particular types of cases is understandable, but ultimately fruitless. To begin with, defining the scope of the limitation is difficult. Limiting trebling to per se (or "hard core") cases is not helpful because the line between per se and rule of reason (or hard core versus non-hard core) is ever-changing and often imperceptible. *See California Dental Ass'n v. FTC*, 526 U.S. 756 (1999). Perhaps more importantly, some of the most serious antitrust violations of all have involved conduct that was neither covert nor per se unlawful. *E.g.*, *MCI Communs. Corp. v. AT&T*, 708 F.2d 1081, 1107 (7th Cir. 1983). Since the only relief available to the government in these cases is prospective, damages remain the only deterrent. Firms will have no incentive to avoid even the most egregious restraints if the maximum penalty is limited to an injunction and single damages. Given the uncertainties within, and the length of time of, litigation, the present expected value of a single damages award will almost always be less than the profits expected to be retained as a result of the violation. Preserving the incentive of injured parties to sue in these cases is therefore of great importance. Moreover, in the litigation process as it exists today, actual recovery of treble damages is something of a myth. With the time lag between injury and recovery, and the general unavailability of prejudgment interest, damage recoveries cannot be expected to exceed the party's actual damages, including cost of capital and associated opportunity costs, even after trebling.

The hurdles today to private recoveries are very steep. The standing and antitrust injury rules have become increasingly strict since *Brunswick* was decided in 1977. *See* ABA Section of Antitrust Law, Antitrust Law Developments 817–28 (6th ed. 2007). Defense summary judgment motions are (correctly) granted vastly more frequently in antitrust cases than in other areas of the law. *E.g.*, *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d

Cir. 2002) (summary judgment "particularly favored" in antitrust litigation). And the cost of launching an antitrust case can be prohibitive. Expert witness costs are unrecoverable, and considerable capital will be tied up in attorneys' fees for years until any recovery is had. As noted, prejudgment interest is unavailable as a practical matter. Given all those factors, trebling, in my judgment, is essential to induce parties to bring cases with merit.

Importantly, moreover, reversing treble damages today would send a terrible public message. We are in an era of diminished federal enforcement of the antitrust laws. The states too have been relatively inactive over the last few years. The key enforcement mechanism today and at other periods in our history has been the private action. We send a very troubling message about our faith in the antitrust laws as the means for guiding our economy if we say we are going to cut back on the treble damages action, the foundation of private enforcement. The Modernization Commission soundly declines to do so.

c. Robinson-Patman Act repeal

The Commission does well to recommend repeal of the Robinson-Patman Act. This statute imposes significant compliance costs on U.S. businesses and, where applicable, operates as a deterrent to price competition. The harm it inflicts on U.S. consumers is great.

The statute today serves little, if any, of the purposes for which it was intended. Although designed to preserve an equal playing field among resellers, the Act is applicable only to commodities. It does not apply, thankfully, to services, and yet services represent a large and growing portion of the economy. Even as to commodities, the statute is easily avoided in ways that harm its intended constituency. So while it is a violation to charge small customer *S* more than huge customer *H* for the same good, it is not a violation to refuse to sell to *S* altogether. The effect, then, is to cause many sellers to refuse to deal with smaller sellers outright, rather than charge them the potentially higher prices that may result from normal competitive interaction in the marketplace. Most small resellers would be better off by having *some* access to the product, albeit at a higher price, than being cut out altogether.

Given the extremely rare nature of proceedings under the statute by enforcement officials; the serious difficulties of enforcing it in private proceedings; the perverse incentives for suppliers it creates; its tendency to inhibit aggressive price competition; and the significant compliance costs it imposes, the Robinson-Patman Act adds no positive value even to its own constituency. The country will benefit if it is repealed.

d. Endorsement of contribution and claim reduction

That a company with, say, 2% of the sales or 1% of the culpability might be responsible for all or substantially all of the damages in a given antitrust case has never made any sense. Yet it is the law of the land. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). That is not because of any Supreme Court analysis demonstrating that a ban on contribution is the correct policy choice. It is because of the Court's determination (1) that any policy determination should be made by Congress, and (2) that the outcome of congressional silence should be the purported common law rule, developed ages ago for other contexts, barring contribution among intentional wrongdoers. The combination of these determinations has meant that the no contribution rule exists, not by choice or analysis, but by default. I have long opposed the rule against contribution.[2] The Commission's strong recommendation to propose legislation that will eliminate that rule for cases filed in the future is most welcome.

Predictably, the Commission's recommendation has already generated some opposition. The criticism is that a system of contribution and claim reduction will provide a disincentive to plaintiffs to offer attractive settlements to the "first in" and, in that way, make settlement more difficult generally.

The criticism is easily rejected. To begin with, contribution and claim reduction are the norm in American jurisprudence. Virtually every state permits contribution among joint tortfeasors. *See, e.g.*, Uniform Contribution Among Tortfeasors Act (1955); Restatement (Third) Torts: Apportionment of Liability (2000); Annot., *Contribution Between Tortfeasors*, 17 A.L.R.6th 1 (2006). Contribution is available for many federal causes of actions as well. *See* 15 U.S.C. § 78-u4(f) (securities cases); *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286 (1993) (10b-5 cases); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (admiralty). The types of cases in which no right of contribution exists are rare. Yet the majority of cases settle, and largely at the same rate of frequency that antitrust cases do. Settlements continue to occur—as they will under the Commission proposal—because claims for contribution against defendants who have settled are precluded. *See, e.g.*, Uniform Act § 5; 15 U.S.C. § 78u4(f)(7).

Under the Commission's proposed statute, the only settlements that may be discouraged are those which *should* be discouraged. The problem is at its most acute in massive class action cases, where the potential exposure is already great. In many of these cases, plaintiffs offer settlements early on to one defendant—sometimes the one most culpable or with the greatest sales—that bear little or no relationship to that defendant's actual responsibility. The plaintiffs lose nothing by doing so; the settling defendant's responsibility becomes the problem of those not offered the sweetheart deal. The non-settling defendants may have little or no actual culpability. But they nevertheless are forced into settling by the effect of the enormous exposure they face because the earlier sweetheart settlement arrangements have effectively multiplied their potential liability. This is the kind of process that is unfair on it face and, at the extremes, even gives antitrust enforcement a bad name. Businesses comply with laws they understand and respect; and they tend not to respect laws that appear to be fundamentally unfair. Counseling compliance in the context of a regime that endors-

[2] *See* Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. Fla. L. Rev. 217 (1980).

es this kind of process can therefore be quite difficult. There is no reason that plaintiffs cannot settle early on with defendants for amounts more closely approximating the defendant's portion of the total liability. That is what the Commission proposal will encourage, and it will generate broader respect for (and compliance with) the law.

The reality is that, as has happened in all the many other areas of the law in which contribution and claim reduction have been adopted, plaintiffs and defendants will adapt quickly to the new system and cases will settle as frequently as they did before. The only difference will be that settlements will more closely reflect the responsibility of the settling defendants. That can only be a good thing.

e. Indirect purchaser reform

The burdens imposed by the inconsistency between federal and most states' laws relating to indirect purchaser litigation are considerable. But, as the Commission's Report demonstrates, there is no simple fix to the problems.

The Commission's recommended solution is not perfect. None is. But the Commission solution is one that gives due regard to all of the many constituencies affected. It allows indirect purchasers to sue, but directs them to a forum where the opportunities for inconsistent determinations and excessive or duplicative damages awards are minimized. It avoids preemption of state laws. It maintains consistency with current practice in terms of class certification. It does all this while preventing, as effectively as anyone can, the costly multiplication of proceedings that has characterized indirect purchaser practice over the past twenty years.

The Commission's suggested *Illinois Brick* reform will undoubtedly attract opposition from those with vested interests in the current regime. Indeed, one opposition, by the American Antitrust Institute, has already been posted. The attack is premised on the idea that the Commission proposal would (a) decrease incentives for both direct and indirect purchaser plaintiffs, by reducing overall recoveries to "substantially less than treble," and (b) make class certification more difficult. The first of these criticisms is unfounded. The second is frivolous.[3]

Incentives. Combining direct and indirect purchaser recoveries into a single, consolidated proceeding should not, by itself, reduce incentives for anyone to sue. Nor will consolidation reduce aggregate recoveries. Instead of reducing overall recoveries, the only effect of the Commission proposal should be to *increase* them. There are two reasons why. First, the Commission proposal will expand the universe of potential plaintiffs. Several states today

[3] American Antitrust Institute, Public Comments Submitted to AMC Regarding Indirect Purchaser Recommendation (Mar. 2, 2007). AAI goes so far as to claim that the proposed *Illinois Brick* reform "would in all likelihood eviscerate . . . private enforcement of the antitrust laws." *Id.* at 3. This, and similar statements made throughout, drain the comments of whatever credibility they might otherwise have had.

prohibit any indirect purchaser recovery. The Commission proposal will make recovery available for indirect purchasers throughout the country. Second, many state laws do not provide for trebling or make trebling discretionary. By applying section 4 of the Clayton Act, the Commission proposal, however, will make trebling mandatory.[4]

Increasing recoveries, as a general matter, should equally increase incentives to sue. The concern articulated by AAI, however, seems to be that the lack of certainty as to the amount of pass through would create a disincentive for direct purchasers to sue. I agree that this possibility exists theoretically, but it seems clear that, in the real world, the degree of reduced incentive will be trivial. If direct purchasers are overcharged, the well-organized plaintiffs' bar can still file in every case they do today. Competition to get the "lead counsel" or "executive committee" roles will be as persistent as ever and will encourage cases to be filed. I cannot imagine a single case under the current regime that would not be filed under the Commission's proposed system.

Conversely, the incentives for plaintiffs' lawyers representing indirect purchasers to sue—and to compete for lead counsel and executive committee positions—will only increase. As mentioned, indirect purchaser recoveries will be available throughout the country, rather than state by state, and will be trebled automatically. To the extent there is any diminution of the incentives affecting direct purchaser lawyers, the increase on the indirect purchaser side will more than offset it.

So what will change? Procedurally, of course, there would be a major change in that all proceedings would be consolidated before a single court—reducing litigation costs, and reducing in particular the incentives for some plaintiffs' lawyers to use procedural cost and complexity as a device for inducing settlements that would otherwise be unavailable. In addition, if the Commission's solution is adopted, then, in most cases, the proceedings that do not settle quickly should resemble an interpleader case; the aggregate overcharge would be determined first, with the allocation between direct and indirect purchasers to follow. That would allow the plaintiffs' groups to work together in the first phase of the case to maximize the total recovery. If they are as successful as I suspect they will be, then total damages recovered should be roughly the same as they are today. However, the ability of plaintiffs' lawyers to use the uncertainty in some states' laws to suggest that duplicative damages can be achieved will be eliminated. And the system we see today, with a different

[4] AAI seems to be under the impression that the system today permits multiple and duplicative recoveries, and that these would be eliminated under the Commission proposal. Apart from the basic point that duplicative recoveries are something to be avoided, not encouraged, even the underlying premise appears to be wrong. Those states to address the issue have concluded—some by express statutory provision—that multiple recoveries should be avoided, thus limiting damages overall to the specified multiple of the overcharge in issue. *See In re Vitamins Antitrust Litigation*, 259 F. Supp. 2d. 1, 3 & n.1 (D.D.C. 2003) ("First, of the twenty repealer jurisdictions, the majority (twelve) either allow a pass through defense or prohibit double recovery . . . . Of the [remaining] eight jurisdictions . . . no jurisdiction *expressly prohibits* a pass through defense.") (emphasis added).

set of plaintiffs' lawyers in each indirect purchaser state tacking their name onto a pleading and then seeking fees, will disappear. Direct plaintiffs' lawyers will have to reach settlements on the basis of their clients' actual treble damages, and indirect plaintiffs' lawyers will have to do the same. If their assessments vary enough from the defendants', the cases may have to be tried—something that never happens today because of the undue leverage that the procedural complexity provides. Outcomes based on the merits of a case are ones the law should encourage.

Class certification. The class certification objection to the Commission's proposal is nonsense. The proposal clearly states that class certification standards and procedures will remain as they are today, and that the introduction of pass-on—already an issue today in indirect purchaser class certification—will have *no effect* on the certification of direct purchaser classes.

Summary. Direct and indirect purchaser litigation today all too closely resembles both a roulette wheel and a "protection" scheme. The criticisms the AAI levels at the Commission proposal would perpetuate that impropriety. Reform is essential to place purchaser litigation on a footing where the merits count.

If enacted by Congress, the Commission's indirect purchaser recommendation will stand as a major accomplishment. There will undoubtedly be some sincere opposition to parts of the recommendation as the legislative process moves forward. I strongly urge Congress to view the recommendation as a whole, and to weigh it against the many alternatives—including the option of doing nothing. With careful review and consideration, I believe the Congress will see that this is a most elegant and practical solution to a very difficult problem.

II. Missed Opportunities

There are some opportunities for improvement in the law that the Commission unfortunately missed. The most important of these from my perspective are (1) our failure to advance recommendations for the immediate repeal of specific exemptions, and (2) our failure to endorse consumer (versus total) welfare as the touchstone for analysis of efficiency claims.

a. Exemptions

Our economy has moved significantly away from regulation and towards competition over the past 30 years, and consumers have reaped substantial benefits. Yet the economy remains riddled with exemptions allowing cartel behavior in many markets without any corresponding economic justification. The Commission's Report explains this point effectively.

The Commission, however, does not make any specific recommendations for the repeal of particular exemptions. This is in large part attributable to lack of time. The Commission elected to review 30 separate issues of law and policy (see Commission Memorandum, *Issues Selected for Study* (Jan. 2005), *available at* www.amc.gov/pdf/meetings/study_issues.pdf), many of which standing alone were extraordinarily broad. I believed then, and believe now, that we could and should have selected a much narrower set of issues than we did. Had we done so, we could have focused more time and energy on discrete and identifiable problems warranting legislative correction—including specific exemptions—than we in fact were able to do.

The Commission did hold some specific hearings on exemptions, addressing the McCarran-Ferguson insurance exemption, the Shipping Act, the Export Trading Act, and the Webb-Pomerene Act. Sufficient evidence was presented at those hearings, in my view, and sufficient independent analysis strongly confirms, that these exemptions have outlived any utility they may have had and should be repealed. At each hearing, the Commission was presented with substantial evidence of anticompetitive activities the exemptions do or can permit. And, in each case, the response was basically the same—that "our industry does many good things, does not restrain competition, and needs the exemption to avoid potential treble damage litigation." This litany provides no basis for an exemption. Virtually *every* industry does good things. Conduct that does not restrain competition is *not* prohibited, with or without an exemption. And freedom from private litigation is something, again, that *every* industry would like. If these were valid bases for an exemption, there would be immunities from the antitrust laws everywhere. The real question in each case is whether the application of normal antitrust rules will impair some important public goal, and whether an exemption is truly necessary to ensure that this goal is served. None of the industries we examined came close to meeting that standard of proof.

In my view, the Commission would have better served the country through a more focused review of these four and other widely applicable exemptions (such as the Capper-Volstead Act) than by relying purely on the generalist overview reflected in our official recommendations.

b. Consumer versus total welfare

The history of antitrust law demonstrates a longstanding commitment to a legal standard that promotes the welfare of consumers as antitrust law's primary goal. The Supreme Court's antitrust jurisprudence of the modern era has been consistent with the consumer welfare approach.[5]

The Commission correctly chose not to revisit the settled primacy of the consumer welfare standard generally. We did, however, by a divided vote, choose to evaluate the standard in the narrow context of merger efficiencies. Specifically, we asked, should efficiencies that benefit only the parties, with no prospect of being passed along to consumers, be counted

[5] *See* Robert H. Lande, *Proving the Obvious: the Antitrust Laws Were Passed to Protect Consumers (not Just to Increase Efficiency)*, 50 Hastings L.J. 959 (1999) (citing authorities); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust*, 34 Hastings L.J. 65 (1982).

in favor of a merger? Or, as the *Merger Guidelines* say, should efficiencies matter only in circumstances where consumers are likely to benefit from the cost savings the parties achieve? *See* U.S. Dep't of Justice & Federal Trade Comm'n, Revision to Section 4 of Horizontal Merger Guidelines (Apr. 10, 1997); *see also* Steven C. Salop, *What is the Real and Proper Antitrust Welfare Standard?*, Comments Submitted to AMC, Nov. 4, 2005, at 1.[6]

The Commission, surprisingly, was unable to reach a consensus on this issue. Although several Commissioners supported the consumer welfare standard reflected in the *Guidelines*, a majority to support that view in the Report could not be mustered. That is another missed opportunity. Any doubts that a consumer welfare standard better reflects the goals of the antitrust laws than a standard based on total welfare will serve only to undermine antitrust enforcement in the future.

The fundamental problem with the total welfare standard is that, by definition, it gives equal weight to the impacts of the conduct on all constituencies, including producers and competitors. By declining to focus on the effects on consumers, as the consumer welfare approach does, the total welfare standard encourages practices that transfer wealth from consumers to producers, as well as practices that benefit competitors at consumers' expense. Application of the total welfare standard, for example, would permit "a merger to monopoly that permits the merged firm to reduce costs significantly but also endows the selling firm with the ability and incentive to raise its price above the pre-merger level." *Id.* at 2. The gains to the merging firms would have to be balanced against the losses to consumers from post-merger monopoly prices and, if the benefits to the merging firms are larger, the merger would have to be allowed. Worse, because the total welfare standard protects the interests of competitors with equal vigor as the interests of consumers, a faithful application of the standard would forbid a merger that yielded cost savings that were passed onto consumers but that also harmed rivals of the merging firms by some greater amount. The net total welfare effect of such a merger would be negative because of the harm to the rivals, and a merger beneficial to consumers would have to be condemned.

Proponents of the total welfare standard do so either by ignoring these points or by making ad hoc exceptions to avoid the perverse results the standard generates. But a standard that is applied with exceptions to its basic structure is no standard at all. It is the equivalent of allowing decisions to be based on little more than the decisionmaker's whim.

The concern of at least some of the Commissioners who declined to support the consumer welfare standard appears to have been that a consumer welfare standard does not

[6] As Professor Salop explains: "The aggregate economic welfare standard would condemn conduct if it decreases the aggregate welfare of consumers (i.e., buyers) plus producers (i.e., sellers plus competitors), without regard to any wealth transfers. In contrast, the true consumer welfare standard would condemn conduct if it actually reduces the welfare of buyers, irrespective of its impact on sellers. Efficiency benefits count under the true consumer welfare standard, but only if there is evidence that enough of the efficiency benefits would be passed-through to consumers so that consumers (i.e., the buyers) would benefit from the conduct."

credit fixed cost savings that do not immediately reduce marginal or variable costs. That is a valid concern but, in this case, misdirected. The agencies have made clear that fixed cost savings will be considered under appropriate circumstances:

> [U]nder certain market or sales circumstances, fixed-cost savings may result in lower prices in the short term. Selling prices that are determined on a "cost-plus basis" (e.g., cost-based contracts) can be influenced by changes in fixed costs. Contractual arrangements also may allow fixed-cost savings to be passed through.
>
> The Agencies consider merger-specific, cognizable reductions in fixed costs, even if they cannot be expected to result in direct, short-term, procompetitive price effects because consumers may benefit from them over the longer term even if not immediately.

U.S. Dep't of Justice and Federal Trade Commission, Commentary on the Horizontal Merger Guidelines 57–59 (2006). Thus, if a market is competitive, fixed cost savings will reduce the merged firm's total costs and will tend to be passed along to consumers. If the savings are likely to be passed along within a reasonable period of time, sound application of the consumer welfare standard will count them. If, however, it will take years for consumers to see any benefit from particular fixed cost savings, or if the merger makes the market significantly less competitive, it is fair to conclude that the claimed benefit is sufficiently speculative and doubtful to warrant exclusion or minimization in the final analysis. The enforcement agencies recognize this point and, in practice, are applying a standard that accommodates legitimate efficiency concerns.

The total welfare standard has nothing to commend it. No sound antitrust policy would forbid a merger that benefits consumers because it also harms rivals. Nor would any sound policy permit a merger to monopoly that yields benefits only to the merging parties. Having undertaken to address this issue, the Commission should have endorsed the consumer welfare standard for evaluating efficiency claims in clear and unmistakable terms.

III. One Unfortunate Error: The Continued Use of § 3571(d) for Corporate Fines

The Commission has erred, I believe, in failing to recommend changes to our regime of corporate fines in criminal cases.

Few would disagree with the basic proposition that effective criminal enforcement is central to the administration of the antitrust laws, and that a system of formidable corporate fines is essential to the accomplishment of that objective. And few would disagree that the Justice Department has assembled a marvelous track record in criminal enforcement over the last several decades, especially in recent years following the Antitrust Division's revision of its corporate and individual leniency policies. Dozens of individuals have served time in prison for their crimes, and dozens of cartels, including several significant international cartels, have been shut down through the Division's efforts.

One of the most reported measures of the Division's success has been the level of corporate fines. In fiscal 2004 through fiscal 2006, the Division obtained in fines, respectively, $350 million, $338 million, and $473 million. *See* Criminal Antitrust Fines, *available at* www.usdoj.gov/atr/public/press_releases/2006/220465a.pdf. Over the past dozen years, corporate fines exceeding $100 million to single companies have been obtained in at least seven instances, including the $500 million fine assessed against Hoffmann-LaRoche in the *Vitamins* case. *See* ABA Section of Antitrust Law, Antitrust Law Developments 785 & n.332 (6th ed. 2007). This is a particularly impressive record given that the applicable maximum fine in each of these cases under section 1 of the Sherman Act was just $10 million. (The 2004 amendment increasing the fine to $100 million was inapplicable in these cases; it applies only to conduct occurring after its effective date.) These fines have been assessed through guilty pleas, reached by applying *Sentencing Guidelines* methodology using the alternative fines statute, 18 U.S.C. § 3571(d), which allows for fines up to double the gain or loss from a given offense.

The difficulty with the current regime is that it violates the Due Process Clause of the Fifth Amendment. Due process requires that all elements of a crime that affect the level of sentence be proven beyond a reasonable doubt. *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Any fine greater than $100 million (formerly $10 million) must therefore be supported by proof, beyond a reasonable doubt, of a gain or loss sufficient to justify the fine. But proof of the amount of gain or loss—in most cases, the amount of overcharge—is extremely difficult in *any* antitrust case. Typically, the proof involves dueling experts reaching reasoned but diametrically opposite conclusions. That is problem enough in civil cases, where damages must be proven by a preponderance of the evidence. In criminal cases—absent the most extraordinary circumstances—proving gain or loss *beyond a reasonable doubt* is essentially impossible, at least without reducing the fine sought to an extremely low number.

So how is the Justice Department routinely getting companies willing to pay fines in excess of $10 million (now $100 million) without apparent difficulty? The answer is that companies have no real choice but to agree. The Antitrust Division has made very clear that it "will not engage in plea negotiations with a defendant that desires to litigate gain or loss." Scott D. Hammond, *Antitrust Sentencing in the Post-*Booker *Era* 10 (Mar. 30, 2005). The Division says: "If a defendant wants to contest gain or loss, it "will have to wait until the end of the investigation for its day in court. . . . Not only will the company go to the end of the line, but so will its executives, unless they desire to approach the Division on their own and negotiate separately with the Division, which will obviously strengthen the Division's case against the company." *Id.* The Division recognizes the impact of this policy in actual practice: "[M]any companies are likely to continue to forgo the litigation of gain or loss because of the many positive consequences resulting from early cooperation, such as fine reductions, non-prosecution coverage for some executives and favorable plea agreements for others, and possible limitations in the scope of the charged offense or attributable commerce." *Id.*[7]

It appears, in fact, that every company faced with a Justice Department demand for a fine in excess of the Sherman Act § 1 amount based on the double the gain or loss provision of section 3571(d) has given up and paid the fine. Given the leverage that the Justice Department wields in these matters, a litigated legal challenge to a 3571(d) antitrust fine by anyone could be many years away. The issue, therefore, is not one that the Commission should wait for the courts to resolve. If there is a problem—and there is—it should be addressed now. The Commission may be the only practical forum to recommend correction.

There can be little doubt that the continued routine insistence of fines based on double the gain or loss violates the Due Process Clause. In the vast majority of the past cases, perhaps all, there was no plausible expectation that gain or loss at any level close to the relevant fine amount could be proven beyond a reasonable doubt. To continue to support a regime of this sort is to express contempt for Due Process or, just as bad, knowingly to look the other way.

The fix, moreover, is easy. Fines calculated by a judge under the *Sentencing Guidelines* (on an advisory basis) are entirely constitutional provided that the fine amount is within the range established by the underlying statute. The problem, therefore, can be solved simply by raising the maximum fine under Sherman Act § 1 substantially, say to $500 million. The only objection advanced for not making that recommendation is that Congress just raised the amount in 2004 and it is therefore "too soon" to ask again. Nonsense. The current fines administration routinely violates the Constitution. Placing it on a footing that assure compliance with the Due Process Clause will only breed greater respect for the law—and is well worthy of congressional time.

We should recommend repeal of section 3571(d) insofar as it relates to antitrust crimes and, simultaneously, seek to amend section 1 of the Sherman Act to permit fines of up to $500 million.

Conclusion

The Antitrust Modernization Commission has now responded, in this Report, to the congressional request for counsel on the administration of the antitrust laws. The overwhelming majority of the Report expresses recommendations and conclusions with which I agree wholeheartedly.

[7] Others put it more starkly, saying that "the Division's enforcement approach appears to be a willingness to trade people (particularly senior executives) for money." Tefft W. Smith, Statement at AMC Criminal Remedies Hearing, at 5 (Nov. 3, 2005). I personally doubt that the Division is intentionally trading senior executive jail time for companies' concessions to a higher fine, but it is indisputable that any company faced with a large and likely unconstitutional fine amount must weigh the negative of agreeing to that fine against the positive of keeping key executives out of jail.

It has been a great personal honor to have participated in the Commission's work over the past three years and to have done so with such an impressive array of distinguished fellow Commissioners. Considerable thanks go to our Chair, Deborah Garza, for her tireless efforts in leading the Commission's efforts.

I also want to thank our staff: Andrew Heimert, Susan DeSanti, Bill Adkinson, Nadine Jones, Marni Karlin, and former staffer Todd Anderson; advisors Andy Gavil, Michael Klass, and Alan Meese, and former advisor (now FTC Commissioner) Bill Kovacic; and Hiram Andrews, Kristen Gorzelany, Christopher Bryan, and Sylvia Boone. You have been a wonderful team.

Separate Statement of Commissioner Kempf

I join—enthusiastically—in the vast majority of the Commission's recommendations. I write this separate statement to discuss those few areas where I do not join in recommendations and to expand on my views as to a few other matters. In so commenting, I do not wish to distract from or diminish the significance of the Commission's principal recommendations. They were fashioned on the anvil of rigorous discussion and debate—a process in which all of the Commissioners fully participated. In my view, a number of the recommendations are quite exciting and truly momentous. These include, for example, (1) repeal of the Robinson-Patman Act that is so harmful to consumers, (2) a rational and sensible approach to direct and indirect purchaser claims in price-fixing cases, and (3) some excellent suggestions to the agencies as to steps they should consider—both domestically and around the globe—to simplify the merger reporting process and to speed up coming to a decision on whether to clear or challenge a proposed merger.

Before turning to a discussion of the Commission's recommendations and report, I want to emphasize at the outset that serving on the Commission turned out to be a genuine pleasure for me. Before we began to meet, I wasn't so sure that that would be the case. I was concerned that, with six Republican appointees and six Democrat appointees, the Commission's proceedings might mirror the partisanship that Americans have come to see on TV regularly in certain other government activities. That never happened. Quite the contrary, the Commissioners—all of them—worked together cooperatively and collegially to try to do the best individual and collective jobs they could. Thus, I was able to work to fashion sensible consensus positions on difficult issues not only with Commissioners Garza, Burchfield and other fellow Republican appointees, but also with Commissioners Jacobson, Yarowsky and other Democrat appointees.

There were substantive differences among members of the Commission from time to time, to be sure, and some of those are discussed in what follows. During our three years working together, however, all of our proceedings took place in a spirit of good fellowship. At every turn, Commissioners listened to each other carefully and respectfully in an effort to come up with the best possible recommendations to the President and Congress that we possibly could. I came away from the experience with the greatest respect possible for my fellow Commissioners.

Below, after first addressing the two areas where my views may vary significantly from those of some of my fellow Commissioners (mergers and exemptions/immunities), I will discuss briefly several other matters on which I want to comment beyond what appears with respect to my individual views in the footnotes to the recommendations.

Mergers. I agree with and join most of the Commission's recommendations in the merger field—both substantive and procedural. Nonetheless, it is in the merger area that I depart the most and the most seriously from my fellow Commissioners. According to them, when it comes to antitrust and mergers, almost everything is hunky dory. As they see it, for example, "the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound." I don't think so—at least as to the agencies.

The Merger Guidelines. To me, the "basic framework" used by the agencies—as articulated by them in their *Merger Guidelines*—is fundamentally flawed. Forty years after their initial appearance in 1968, the *Merger Guidelines* remain bottomed on a "basic framework" that is analytically bankrupt. They lack intellectual respectability, and they have for a long time. *See, for example*, H. Goldschmid, et al., eds., INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Little Brown & Co. 1974).

The bedrock for today's version of the *Merger Guidelines*, as it was for the original version back in 1968, is concentration data. From the outset—and today—the *Merger Guidelines* have rested on the erroneous notion that increasing concentration leads to decreasing competition. That may be true when two firms merge to monopoly. Short of that, however, most increases in concentration lead to an increase in competition, not a decrease. The reason for that, of course, is that the concentration-increasing mergers result in cost-saving efficiencies that enable the combined firms to lower prices, increase quality and improve service. That is why opposition to such mergers usually comes from the combining firms' competitors, not from their customers.

When all this was discussed at Commission hearings and meetings, my colleagues on the Commission didn't disagree with me so much as they said, in effect, that the agencies don't really follow their *Guidelines* and that experienced legal and economic practitioners in the merger area know this and can so advise their clients. Those "in the know," for example, can tell their clients that a merger that increases the HHI by 150 points and results in an industry HHI of 2000, far from being likely to create or enhance market power or facilitate its exercise, is likely in a safe harbor with no real prospect of attack. And so on.

Maybe I'm just too old fashioned, but I've always thought that *Guidelines* should give guidance, not disinformation. In any field. For anyone who is not a schooled aficionado of antitrust, the *Merger Guidelines* are a misleading trap for the unwary. Were plain old business people to read them and take them at face value, they would be deterred from pursuing pro-competitive transactions that would benefit consumers. That is a sad state of affairs. The mitigating circumstance is that, in fact, most business people, instead of looking to the *Guidelines* for guidance, are forced to hire an army of advisors (a regiment of lawyers, a battalion of economists, a squad of psychics and so forth) who can tell them that the *Merger Guidelines* are not to be taken seriously when it comes to concentration data. These advisors will comfort their clients by telling them of combinations that resulted in astronomical increases in concentration and yet were accomplished without antitrust challenge—as was true, for example, in the case of Whirlpool's acquisition of Maytag (where some said post-merger HHIs were close to 6000 and jumped by more than 2000 points as a result of the merger—*see* D. Moss, *Antitrust Analysis of the Whirlpool's Proposed Acquisition of Maytag* (January 17, 2006); http://www.antitrustinstitute.org/archives/files/477.pdf). They will tell their clients that a host of "other factors" that relate to the real world will always trump the concentration data benchmarks set forth in the *Guidelines*, if those factors demonstrate that the transaction will increase rather that decrease competition (as they did in the case of Whirlpool-Maytag—*see* DOJ Press Release, "Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag" (March 29, 2006); http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm.).

The development of sound merger policy, in my view, has not been led by the agencies, but rather by the courts. The Supreme Court's landmark decision in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), completely recast the "basic framework" for analyzing mergers—despite opposition from the agencies. *See generally*, D. Kempf, *Merger Litigation: From the Birth of General Dynamics to the Death of Section 7*, 65 Antitrust L.J. 564 (1997). Before that, at the urging of the agencies, efficiencies were ignored (or worse) and wrong-headed concentration data ruled the day. Since then, the courts have been in the vanguard of constructive further development of the law—mainly in court decisions rejecting agency challenges to competitively beneficial (or benign) mergers. As a result, there has been continual and substantial progress toward an ever more sound merger policy. One thing that has helped in this regard is that the courts, early on, recognized that the *Merger Guidelines* aren't law and aren't binding on the courts. So the courts ignore the *Guidelines* when they are at odds with the court's own analysis or cite the *Guidelines* when they support it. Thanks to the courts, merger policy today is better than it has been in 100 years. In this context, to paraphrase the line from *The Treasure of the Sierra Madre*, "We don't need no stinking *Guidelines*."

For one thing, as discussed above, the *Merger Guidelines* decidedly do not provide useful guidance. No one really disputes this. Instead, antitrust practitioners say things like "Well, maybe not, but the *Guidelines*, taken together with speeches by agency personnel, enforcement actions, economic studies and the advice of economic experts and experienced antitrust practitioners does provide useful guidance." That may be true, but it is no real answer to the deficiencies of the *Guidelines* themselves when it comes to giving guidance. It does not reflect well on the agencies when the first thing an experienced practitioner will tell his client is that the client *should not* look to the *Guidelines* for guidance. The *Merger Guidelines* should be withdrawn or substantially revised. I favor the former—in part because I fear further efforts to tinker with the *Guidelines* are more likely to make them worse than better. And the army of advisors that is now *de rigueur* doesn't need them.

Efficiencies. Even though there has already been a genuine sea-change in the role efficiencies play in merger analysis, much room remains for further improvement. In the "bad old days," efficiencies were viewed as a reason to attack a merger under Section 7. Indeed, the then-prevailing view was that the greater the efficiencies the greater the need to attack the merger. The merged firms, with their increased efficiencies, could charge lower prices that other competitors could not meet and, because of that, the other competitors would be driven out of business. This approach elevates the façade of competition over the reality of competition. It preserves the "appearance" of vigorous competition that purportedly results from having a whole bunch of small competitors scurrying about in the marketplace. Never mind that they are inefficient and can survive only by charging high prices to consumers. This is the mind-set of those who equate the number of competitors (and, thus, level of concentration) with the intensity of competition. It is the thinking behind the original merger guidelines published in 1968: more competitors equals more competition. That's the *façade of competition. Real competition*—and increased competition—results from this: mergers that lead to fewer, but more efficient, competitors that charge consumers lower prices. You need a sufficient number of competitors, of course, to ensure there won't be monopoly pricing. But that number is not very large.

The good news is that the agencies no longer view efficiencies negatively. But embracing efficiencies as a positive rather than negative competitive factor has come slowly—and begrudgingly at times. And agency analysis is still not totally sound. The agencies, for example, require that the gains from efficiencies be "passed on" to consumers before the agencies will "count" them as a positive factor. That sounds noble and egalitarian, of course: "Why should the fat-cats get to keep the gains; pass them on to the little guy." But it makes no sense. Efficiency gains eliminate dead-weight loss and are always a plus for society—whatever is done with them. And the management of the merged firm will know far better than a bunch of bureaucrats what best to do with the efficiency gains. Management could decide that, instead of passing them on in the form of lower prices in the short run, it will invest the gains in de-bottlenecking production facilities or perhaps even building a completely new, more efficient plant—in either case leading to even lower prices in the long run than would result from a pass-on. Or they might decide to go into a new line of products, resulting in increased competition there as well. Suppose, for example, that management had a project that gave real promise of developing a cure for cancer. Do we really want to tell management that it can't pursue that project because we want the money passed on to widget consumers instead? I don't think so. Let's take the most extreme example. Suppose management says, "Hey, we just want to give the gains to our shareholders in the form of increased dividends." Does it make sense for antitrust enforcers to say "No can do."? Again, I think not. Shareholders also go by another name: consumers. Hello. Should that set of consumers—the consumers who, incidentally invested their capital to own the company—be told that they can't have the money because the government insists that another set of consumers get it instead?

In terms of antitrust lingo, the issue is framed as one of "consumer welfare" versus "total welfare." In reality, of course, total welfare always translates into consumer welfare in the long run. To the extent that "consumer welfare" is a proxy for things like "pass on," it should be rejected as counterproductive and anticompetitive officious intermeddling.

Notwithstanding my criticisms, the fact is that (as I said at the outset) much progress has been made in moving toward a proper analytical approach to analyzing efficiencies in the merger context. I am hopeful that, before too much more time goes by, efficiencies will be—as they should be—fully and properly taken into account in merger analysis.

Publishing enforcement statistics. The reason I don't join in the recommendation that the agencies publish more statistics on merger enforcement is that I fear that doing so will create an irresistible temptation for agencies to bring ill-considered enforcement actions in order to "improve" their statistical score-card. Such data has been misused in the past with some frequency to complain of "under enforcement" or to trumpet "rigorous enforcement." During Bill Baxter's time at the Antitrust Division, for example, there was a significant increase in cases under Section 1 challenging price-fixing. At the same time, Baxter put an end to the steady stream of improvident merger and monopolization cases that had characterized prior enforcement activities. He was routinely lambasted by some for being "lax" in antitrust enforcement. One of his successors, with an eye to the numbers, brought lots of cases that were routinely settled with a consent decree. At the time, I characterized this as "the McDonald's approach to vigorous antitrust enforcement"—"the government wants its quarter-pound of flesh." D. Kempf, *Antitrust Law Developments*, 33rd Annual Northwestern Corporate Counsel Institute (October 13, 1994). I told the business group to whom I was speaking that this approach had good news and bad news for them. The bad news was that many mergers that were competitively benign still would likely require a consent decree to close—another notch in the antitrust enforcement gun. The good news was that mergers with serious anticompetitive implications would also be permitted to close—so long as the closing was accompanied by an acceptable consent decree—and ever more robust (albeit nonsensical) enforcement statistics.

Updating the Merger Guidelines to cover innovation and non-horizontal mergers. This strikes me as a bad idea. The most likely outcome would be "innovation" in fuzzy merger-enforcement theories. The role of innovation will develop better if it is done in the context of actual cases—with the assistance of the courts if need be. As for non-horizontal mergers, those are almost never challenged. For good reason. An effort to "explain" this carries with it the temptation to fashion "creative" new theories as to when such mergers can be anticompetitive and should be challenged. Again, it would be better to leave well enough alone and let "guidance," to the extent it is needed at all, develop in the context of actual proposed transactions and, also again, with the assistance of the courts if need be.

The HSR Act. The sky was not falling before the HSR Act became law, and HSR was not, as the report seems to suggest, the greatest thing since sliced bread. To the contrary, the

HSR Act, at least at the time it was passed, was viewed as simply something that would make it a little easier for the agencies to get a preliminary injunction blocking a prospective anticompetitive merger. Thus, as noted in the report, the stated purpose of the HSR Act at the time it was passed was just "to provide advance notification . . . of very large mergers" and "to improve procedures to facilitate enjoining illegal mergers before they [were] consummated."

As things have turned out, however, HSR has had a quite different effect on merger enforcement. To begin, it appears to have made it *harder* for the agencies to get a PI in merger cases. Before the passage of HSR, the government sought to enjoin mergers far more that it does today. Not only that, but the government almost always got a PI blocking a merger when it sought one. Indeed, as Justice Stewart observed in *Von's*, "The sole consistency that I can find is that in litigation under [Section] 7, the Government always wins." *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966). That's not true anymore. Now the government loses merger cases with a fair degree of regularity. In my view, the way that HSR proceedings have evolved over time is one of the reasons for that.

As originally envisioned, there was to be a three-step HSR process—(1) a 30-day waiting period after notification of the proposed merger was provided to give to the enforcement agencies time to review it; (2) if an agency wanted any additional information to help it decide whether or not seek a PI blocking the merger during the pendency of a case it would bring on the merits, it could make a "second request" for more information; and (3) there would be a very short second waiting period (20 days) after substantial compliance with the second request during which the agency could decide whether or not to bring a PI action seeking to block the proposed merger. That dream has long since vanished.

As the report notes, second requests have become draconian in nature (compliance with a second request now "typically takes six months and costs $5 million"), and "the reviews in more complex investigations can take eighteen months and cost the merging parities up to $20 million." Moreover, the HSR phase, instead of merely a way to assist in the PI process, has become the whole ball game when it comes to merger enforcement. The agency doesn't seek *limited* information to assist it in deciding whether or not to seek a PI but rather *comprehensive* information that, absent clearance, it can use either in a consent decree negotiation or in a full-scale assault on the transaction. And one of the Commission's recommendations (in which I did not join) urges Congress to drive the nail in the coffin by precluding the FTC from even pursuing a Section 7 case against a merger once the agency has failed in an effort to get a PI.

Given the changes that have occurred under HSR compared to what was originally envisioned, I have mixed feelings about the Commission's recommendation that the FTC be barred from bringing an administrative complaint challenging a merger where it has sought to get a PI blocking the transaction but failed in that effort. As the system now operates, I favor the recommendation. But I don't like the way the system now operates. I would prefer that the focus of the HSR proceedings return to being a relatively quick and simple exercise by the agency to decide whether or not it will seek a PI to block the transaction during the pendency of a case on the merits—with the FTC using its authority to combine the PI proceeding with its case on the merits in appropriate cases (as the DOJ routinely does). As now-Justice Ginsburg emphasized in *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981), the district court's ruling in a PI case "must be made under time pressure and on incomplete evidence" and "the risk of an erroneous assessment is therefore higher than it is after a full evidentiary presentation." In that context, a subsequent FTC administrative proceeding should not be barred. (Indeed, the *Weyerhaeuser* case itself came to reflect the wisdom of this approach. There, the district court thought the transaction was likely anticompetitive, but let it close and proceed to an administrative trial on the merits because of powerful "equities" considerations. At that trial, an FTC ALJ determined that the merger was not anticompetitive—a decision that was affirmed on appeal by the full Commission.)

In short, what I would prefer to a one-bite-at-the-apple rule for the FTC or DOJ is a return to fast-track HSR review, followed by an expeditious PI proceeding and, if needed, a full trial on the merits. I find it disgraceful that HSR proceedings currently drag on as long as they do. My hunch is that, under a fast-track regime, just as many consent decrees would be entered into as is now the case. It would just be done faster, cheaper and better. If I had my druthers, I would urge Congress to take steps to get the HSR procedure back to what was originally intended. No more calls from agencies to parties wishing to merge saying "We can make a decision now if you force us to do so, but it may not be in your interest for us to do that. How about, instead, extending the waiting period so that we can continue our review of the transaction?" Usually (though not always), the temptation to do so proves irresistible to the business people. Then, unfortunately (and increasingly), things just seem to drag on forever.

Exemptions and immunities. The antitrust laws suffer from Rodney Dangerfield Syndrome: they get "no respect." Or at least they don't get the respect they should.

There is a reason for this, of course. Citizens don't think that something is truly "evil" when lots of people are expressly authorized to do it. People see massive price-fixing every day by their friends and neighbors—all perfectly legal, because it is done pursuant to some immunity or exemption that excludes those particular price-fixing activities from the reach of the antitrust laws. So when people learn that yet another friend or neighbor has also engaged in price-fixing (but without the benefit of an exemption or immunity), they don't seem to think it is so "bad." After all, every one else does it, and they don't get into trouble. So why should Joe?

I sometimes tell the story of two brothers who successfully engage in price-fixing—one of dairy-farm products and the other of dairy-farm implements. When it all comes to light, one brother is named Farmer-of-the-Year, has his picture on the cover of *Iowa Gazette* and goes to a big dinner in his honor in a black tux, while the other brother is named Felon-of-the-Year, has his picture on the cover of *Police Gazette* and goes to the big house in an orange prison suit. (*See* addendum, *A Tale of Two Guys*)

What I take from this unfortunate state of affairs is that exemptions and immunities from the antitrust laws have a double-barreled adverse effect. First, they countenance anticompetitive activity that adversely affects consumers. Second, they breed disrespect for laws generally and for the antitrust laws in particular.

Nearly everyone—including the Antitrust Modernization Commission—waxes on about how antitrust exemptions and immunities are not a good idea, should seldom be granted and, when they are, should be reviewed frequently thereafter to see if the time is ripe to get rid of them. I certainly join in the Commission's principal recommendations in this regard. But you have to wonder how serious it all is. If exemptions and immunities are such a bad idea, how come we have so many of them? And why do they seem to persist in perpetuity? Something doesn't quite square.

Perhaps most revealing is the shape of the discussion when it turns to the subject of which particular antitrust exemptions and immunities should be eliminated. There is a lot of support for eliminating those that are inconsequential, but there is little support for eliminating those whose adverse competitive impact is greatest. In fact, there is little appetite even to discuss the subject.

And so it was with the Commission. Early on, there was talk at Commission meetings/hearings about how maybe we should consider recommending to Congress that it get rid of things like the baseball exemption and the Webb-Pomerene Act. But the impact of those exemptions on the average American doesn't amount to a hill of beans. Baseball is so afraid of losing its antitrust exemption that it conducts it affairs as if it didn't have one to start with. Thus, in baseball, as in other sports, there is free-agency for players, mobility for teams, etc. As for Webb-Pomerene, it authorizes American firms to do business abroad jointly under certain circumstances. Thus, for example, two widget manufacturers might be able to sell their widgets to consumers in Bolivia and Bulgaria at jointly-determined prices—hardly a big event for your average American consumer.

The big exemptions and immunities—the ones that count—are the ones for labor and agriculture. They impact much of what the average American eats and drinks and uses to do things. And they do it every day. All day. These exemptions cost American consumers billions of dollars a year. Every year. As things turned out, there wasn't much interest in facing up to those exemptions and immunities. Too much of a political football, I suppose. The thinking—probably correct—ran something like this: No Democrat from an industrial state can support repeal of labor antitrust exemptions and no Republican from an agricultural state can support repeal of food and dairy antitrust exemptions; so you get a bipartisan standoff: "I'll let you keep your exemption, if you'll let me keep mine."

The Commission's recommendations do state that "immunities from the antitrust laws should be disfavored." The recommendations go on to urge narrow construction, periodic review, sunsetting and other positive reforms. Some of my fellow Commissioners bemoan the fact that the Commission did not take the next step and recommend the elimination of specific exemptions and immunities. Maybe we should have. After all, the arguments for specific exemptions and immunities, as others have noted, are all pretty much the same and not convincing. And any exemption or immunity that becomes an ex-exemption or an ex-immunity is perhaps a step in the right direction. Still, I think we would have looked silly—probably even cowardly—had we recommended the elimination of third-string exemptions and immunities that don't have much impact and ducked addressing those exemptions and immunities that have widespread reach and do serious harm to hundreds of millions of Americans every day. I don't see much glory or accomplishment from swatting an irritating gnat to death while ignoring an 800-pound gorilla that is wreaking havoc in the room. If we're serious about our opposition to exemptions and immunities from the antitrust laws, then let's approach it in a serious manner. Let's start with the mortal sins, not the venial sins. Let's start with those that cause major harm, not with those that are minor irritants.

Regulated industries. The antitrust analysis of regulated industries is a close cousin to the antitrust analysis of exemptions and immunities. In both cases, the workings of free markets are displaced. In the case of exemptions and immunities, they are replaced with sanctioned price-fixing; in the case of regulation, they are replaced with government regulation. For the most part, government regulation hasn't worked out very well. It leads to a host of problems—not the least of which is "regulatory capture." Over time, instead of the regulators protecting the public from those being regulated, the regulators end up protecting those being regulated from the public.

Over the past several decades these realities and the other inadequacies of regulation have become increasingly apparent and there has been a commendable movement toward deregulation. As the Commission recommendations state: "In recent decades, public policy in the United States has moved towards partial or full deregulation in industries formerly subject to economic regulation—that is, regulation of prices, costs, and entry. The trend toward deregulation has benefited consumers and the economy and should be furthered where practicable." I wholeheartedly concur with this view. The only reason I did not join in some of the specific recommendations that follow with respect to what Congress should or shouldn't do when they decide to go in the opposite direction is that those recommendations strike me as a bit presumptuous. Once Congress has decided that there are good and sufficient reasons for regulation of some sort, then I think that those reasons—and not antitrust considerations—should guide Congress as to what is the best course. I would likely disagree with the starting premise in almost all cases, but that is beside the point. Once Congress concludes that there are sound reasons to regulate, then it is those sound reasons that should drive what follows.

Does antitrust matter? I'd like to believe it does, and I do believe it does—at least when it comes to price-fixing and other naked restraints that clearly violate Section 1 of the

Sherman Act. To me at least, the economic theory is rock solid and the evidence with which I am familiar is wholly persuasive. But there is a lack of empirical studies to back up these beliefs. More importantly, some recent work by distinguished scholars calls the question into issue. (*See, for example*, R. Crandall & C. Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. of Econ. Perspective 2 (2003).)

In a thoughtful early written submission to the Commission, the then-sitting Assistant Attorney General for the Antitrust Division, R. Hewitt Pate, suggested that the Commission undertake to study this question in depth. As he put it:

> Some antitrust commentators contend that there is no empirical foundation for the conviction that antitrust enforcement benefits consumers and the economy. It seems plain to me that combating cartels and forestalling perceived needs for regulation have alone provided great benefits, but more empirical evaluation of the effects of antitrust enforcement would certainly be desirable. The Commission should consider engaging respected experts (including those who do not earn their living providing antitrust services) to design a rigorous study of the effects of antitrust enforcement. Data could be collected and evaluated, with case selection criteria and evaluation standards objectively designed in advance. Such a study might run for several years. Bolstering empirical evaluation of antitrust enforcement could be an important and lasting achievement of the Commission. (Letter to D. Garza from R. H. Pate, January 5, 2005; http://www.amc.gov/comments/pate.pdf).

Unfortunately, in my view, the Commission decided not to do follow this suggestion. At our hearings, several of those who testified endorsed Hew Pate's suggestion, including another former head of the Antitrust Division and a former Chairman of the Federal Trade Commission. As one outgrowth of such testimony and other considerations, our Commission did recommend that such studies be undertaken in the merger area (and that consideration be given to commissioning outsiders to do them). I certainly hope both that that will be done and that, over time, the undertaking will be expanded to include the kind of more fundamental study recommended by Mr. Pate.

Patents and antitrust. The first antitrust statute, the Sherman Act, was enacted in 1890. The patent laws predate that by more than a century. Indeed, the framers of the Constitution thought patent laws were so important that they expressly provided for them in the Article I, Section 8. Patent and antitrust are complementary in some respects, but there are also some tensions between them. After all, antitrust condemns monopolies and patents grant them. An effort to harmonize the two is all to the good, of course, and I join in the thrust of the Commissions recommendations in this regard.

I do have some concern, however, that some who labor in the antitrust vineyard give the antitrust laws a primacy over other fields that is not always warranted. This is understandable; those who spend all day, every day in a particular field can be expected to view the importance of that field as paramount. It is such concern that leads me not to join in the Commission's unqualified recommendation that Congress give consideration to the suggestions of the FTC with regard to possible changes in the patent laws. The FTC's report pays lip service to the importance of the patent laws, but some of its suggestions strike me as betraying a deeper hostility to the patent laws and a desire to have antitrust considerations improperly trump the patent laws. Let me give an example of to what I'm referring.

The FTC's first recommendation is that there be an administrative procedure at the PTO "for post-grant review and opposition that allows for meaningful challenges to patent validity short of federal court litigation." This sounds fine; after all, the PTO is where the "experts" reside. When there is some controversy as to the validity of a just-issued patent, let's let these experts take a fresh look, and let's do it in a proceeding that allows both sides of the story to be told—and tested on cross-examination. In its second recommendation, however, the FTC appears to do an about-face. It says that, should a patent then be attacked in court, the deference traditionally awarded to the validity of the patent because of the review by the experts at the PTO—now even involving a second review—should be thrown out the window. The FTC proposes that this be accomplished by replacing the "clear and convincing" evidentiary test for rebutting the presumption that a patent is valid with the "preponderance of the evidence" test. To me at least, some of the FTC's suggestions come across more as efforts to torpedo patents so that there will be more competition than efforts aimed a making the patent system work better so that only truly deserving patents are issued.

Direct/Indirect purchaser claims. I've always thought that the strange twin rulings in *Hanover Shoe* and *Illinois Brick* are explainable mainly by the order in which they arrived at the Supreme Court. Had *Illinois Brick* been the first case, I can't imagine that the Court would have held that persons clearly injured by an antitrust violation could not recover. Quite the contrary, I think that argument would have been rejected out of hand. And for good reason. Then, when *Hanover Shoe* came along next, the Court likely would have said that defendants can, of course, assert a "pass-on" defense to ensure that those who weren't damaged don't get windfall recoveries.

But it didn't happen that way. Instead, *Hanover Shoe* was the first of the two cases to come before the Court. The rest, as they say, is history. Fearful that antitrust violators would escape without consequence were a "pass-on" defense countenanced, the Court said defendants could not assert such a defense. Then, when *Illinois Brick* reached the Court, it stated, in a burst of deference to symmetry, that indirect purchasers could not sue. So there we were: people who weren't injured (because they had passed on the overcharges to their customers—sometimes with a mark-up that meant they actually made a profit on their supplier's price-fixing) could not only get windfall recoveries, but huge windfall recoveries—three times the damages they didn't suffer. To make matters worse, their customers, who were the ultimate target of the price-fixing activities to start with, couldn't recover bubkes.

Various States looked at this and—understandably—said "Hey, this makes no sense." So they passed state laws that said, in effect, of course indirect purchasers can sue and recover for price-fixing that causes them (as it was intended to do) actual injury and damages. What has followed has been a nightmare—both substantively and procedurally. We have the spectacle of massive recoveries by people who didn't suffer the loss of a dime (and in some cases actually made money) and the denial of recovery (at least at the federal level and many States) to many of those who suffered substantial damages. The situation cries out for corrective action.

The Commission thoughtfully considered a wide range of possible recommendations, including federal preemption, an overturning of only *Illinois Brick* and others. In the end, the Commission decided—wisely, in my view—to make a recommendation that would serve to conform antitrust to the way things generally work in other areas. Specifically, we fashioned a recommendation whose aim, as it expressly states, is to prevent "duplicative recoveries, denial of recoveries to persons who suffered injury or windfall recoveries to persons who did not suffer injury"—all three of which can occur under the present regime. I believe we succeeded, and I hope Congress will implement our recommendation.

One last observation on this subject. The Commission's final recommendations with regard to the subject of direct and indirect purchaser claims were not settled upon until our February 22, 2007 meeting, and our ultimate recommendation differed from the draft pending as we began that meeting. The drafting of that section of the report, however, had been substantially completed before the February meeting. While there was tinkering after the meeting to get that section of the report to conform to the final recommendation, I fear that the report may not capture adequately the spirit of the final recommendation. These recommendations were not about procedural convenience and ease of administration. While they may contain some useful suggestions on that front, the recommendations were driven primarily by the desire to achieve fairness and a just result.

Some thoughts about the Commission and its work. I suspect that all of the Commissioners have reflected on their experiences serving on the Antitrust Modernization Commission—certainly I have. Let me close with some observations on that subject.

The AMC leadership and staff. The Commissioners were fortunate to have Deb Garza and Jon Yarowsky at the helm as our Chair and Vice-Chair, respectively. Together, they provided a steady hand on the rudder and quiet, but effective, leadership. All of the Commissioners are indebted to them for all they did for the rest of us. In addition, the work of the Commissioners, both individually and collectively, was made easier by the assistance of an able staff—from our Executive Director and Senior Counsel to our clerical personnel. Not only did they do an outstanding job, but they did it under tight deadlines, often having to integrate a great deal of input (sometimes conflicting) from various Commissioners. Throughout, they did their jobs with a positive and cheerful disposition.

The "inside baseball" perspective. Looking back, there are some things that might have been done differently. One is the composition of the Commission. Many of the Commissioners are "experts" in the antitrust field and have spent most of their professional careers laboring in the antitrust field. That proved valuable in many ways. Still, the Commission might have benefited had its membership included more individuals who were not part of the antitrust "inside baseball" establishment. Among other things, such individuals generally have a balanced perspective of all relevant considerations and do not elevate antitrust to an unwarranted primacy as a consideration that should be taken into account more than other important considerations.

The same can be said of the witnesses who appeared before us. They too came from the antitrust establishment for the most part. No one was excluded, of course, and the Commission extended a broad invitation for testimony and written submissions that was published in the *Federal Register*. But not a lot of people sit around reading the *Federal Register* to see what they want to do next week. Fortunately, some individuals from the business world or otherwise outside the antitrust arena did provide the Commission with their views by way of valuable testimony or written submissions. Some others were also invited, but declined to participate—perhaps not wanting to raise their antitrust profile. Whatever the circumstance, however, in retrospect, the Commission should have done more to get the views of "real" people from the commercial world who have to live out their business lives under the rules of the antitrust laws day-in and day-out.

The recommendations and the report. The fingerprints of the Commissioners—all twelve of them—are all over each and every one of the recommendations made to the President and Congress. That is not true as to the report that accompanies the recommendations. In short, the recommendations are decidedly the work product of the Commissioners, while the report is primarily the work product of the staff. Each Commissioner had an opportunity to read and comment on the report, of course, but the Commissioners did not do the same kind of intense scrutiny, study and discussion and debate that was done in the case of the recommendations. I say this not so much as a criticism of the report but rather so that those who review the work of the Commission will understand that the Commissioners' individual, collective and collaborative efforts were directed to the recommendations far more than to the report.

Miscellaneous. There are many issues the Commission didn't address. We had to pick and choose among many possible topics and attempt to use our limited time most effectively. Looking back, there are some things we didn't address that I wish we had. Specifically, for example, I wish we had taken a closer look at whether it makes sense to have two antitrust enforcement agencies whose responsibilities often overlap. The FTC seems to have gotten away from what was envisioned as one of its primary ongoing activities at the time of its creation, scholarly studies of matters of importance to sound antitrust policy. Perhaps if its enforcement responsibilities were limited to areas that did not overlap with those of the DOJ, its efforts could be more productively redirected to an area it has largely abandoned. We should also have examined Section 5 of the FTC Act and whether it plays a positive or negative role in the ongoing effort to achieve sound antitrust enforcement. Finally, the Commission's examination of the topics on which we chose to focus was done within the construct of the existing antitrust framework. Some suggested that we take a more bottoms-up approach, starting with a blank sheet of paper and trying to fashion a "better" framework from scratch. Some of the submissions we received in this regard were quite exciting; I wish we had had the time to give the consideration to them that they warranted.

Addendum: A Tale of Two Guys

It was the best of times; it was the worst of times. The best of times for John Doe, and the worst of times for James Doe. Here's how it all happened.

John and Jim Doe were brothers, twin brothers, in fact—the only two children of Frank and Mary Doe. They were born and raised on the Doe family farm, just outside of Smallville, Iowa.

Frank Doe ran a very successful dairy farm. In the early 1950s, he decided to expand by opening a dairy-farm equipment dealership in Smallville. With the post-war boom in farm mechanization, it too was a big success. When John and Jim returned home from their stint in the Army during the Korean War, they went into the family businesses with their dad, John running the dairy farm and Jim running the dairy-farm equipment dealership. And when Frank died in the mid-1970s, he left the farm to John and the dealership to Jim.

John and Jim Doe became successful businessmen. Over time, they also became industry leaders. John eventually became head of the local dairy-farm coop, and Jim the head of the local association of dairy-farm implement dealers. One of the things that both John and Jim did as heads of their respective organizations, was lead the effort to establish fair prices for their respective industries to charge customers. They were good at this too.

When people realized what an outstanding job John had done in setting prices for dairy-farm products, he was named Farmer-of-the-Year, there was picture of him on the cover of *Iowa Gazette* and he went to a big dinner honoring him in a black tux. When people realized what an outstanding job Jim had done in setting prices for dairy-farm implements, however, he was named Felon-of-the-Year, there was a picture of him on the cover of *Police Gazette* and he went to a big jail in an orange prison suit.

Fixing prices, you see, is legal for certain dairy farm products but illegal for dairy-farm implements. Dairy farm coops persuaded Congress to pass laws making it okay for them to fix prices—one of the many so-called "exemptions and immunities" from the antitrust laws. Those selling dairy-farm implements, however, failed in their efforts to secure such legislation making it okay for them to fix prices.

And so our story ends. John Doe is a hero, and Jim Doe is a villain. And yet they both did exactly the same thing.

Separate Statement of Commissioner Shenefield

I write separately to address the Commission's views on antitrust exemptions and immunities, and also on the Robinson-Patman Act.

Exemptions and Immunities

The central organizing principle of the U.S. economy is competition, which will spur productivity and enhance innovation. Notwithstanding the prominence of the free market model, the economy nevertheless tolerates some notable exceptions to the rule of competitive markets. Frequently, those exceptions are marked by statutory exemptions and immunities from the full application of the antitrust laws. The Commission's report ably describes the background and explains the continued persistence of these occasional deviations from the competitive principle.

The Commission's broad mandate and compressed schedule made it impossible to investigate any of the specific exemptions and immunities sufficiently to allow the Commission to feel comfortable in recommending the repeal of any of them, including some of the most ill-considered and egregious examples. Although understandable, that shortcoming in the Commission's work was an opportunity missed. Empirical data on sectoral deregulation suggest the magnitude of the missed opportunity, and counsel the way forward. I believe the President and Congress should create another commission of experts to undertake a broad-ranging evaluation of the antitrust exemptions and immunities now on the books. Although the repeal of some of the most unfortunate, including particularly the McCarran-Ferguson Act, the Shipping Act exemption and the Export Trading Company Act and Webb-Pomerene exemptions should not be delayed, the creation of such a commission would set the stage for a thorough and long-overdue policy review of all exemptions and immunities, thus going a long way to complete the deregulation work so well begun in the administrations of Presidents Ford and Carter.

Robinson-Patman Act

Notwithstanding its reticence with respect to the repeal of specific exemptions and immunities, the Commission recommends total repeal of the Robinson-Patman Act. Moreover it does so on a record composed more of academic opinion than of solid evidence. There is no serious disagreement that enforcement of the Act has on occasion had unnecessarily anticompetitive effects. The question for judgment is whether there is a rationale for conserving a kernel of the Act, amended to address the most serious criticisms. The Commission believes there is not, and accordingly recommends total repeal. I am unpersuaded by the record before the Commission, and thus do not support the Commission's recommendation.

Instead, I believe reform is in order. Any such reform should import into the Robinson-Patman Act two fundamental concepts that would preserve the benefit of maintaining a law prohibiting anticompetitive discrimination but avoid the unnecessary disadvantages of the Act in its current form. First, I favor amending or reinterpreting the statute to make it clear that plaintiffs in secondary line cases under section 2(a) of the Act must prove competitive injury through the existence either of market power or buyer power (which would also affect liability under section 2(f) as well). I would also amend the statute to introduce a parallel competitive injury requirement into sections 2(d) and 2(e). Second, I would relax the cost justification standard by permitting a preferential price that was "reasonably related" to cost savings attributable to dealing with the favored buyer.

I join the Commission in recommending repeal of section 3 of the Act (the criminal provision). I would also repeal section 2(c).

My recommendation has the advantage over that proposed by the Commission of being politically feasible. I opt for sensible and incremental reform that has at least a chance of making important progress.

Separate Statement of Commissioner Warden

My views depart from those of a majority of Commissioners as to three significant issues: (1) the role of state law; (2) state "enforcement" of federal law; and (3) the rules as to costs and damages in private actions.*

The Role of State Law

I believe that state law—whether called antitrust law, consumer protection law or unfair competition law—that regulates the same business activity with the same purported objectives as the federal antitrust laws should be preempted except in its application to strictly local activities affecting a particular State.

While the Commission has found no compelling factual case for preemption, the potential for the development of inconsistent standards to serve parochial, idiosyncratic or even private interests is clearly present. Business today is increasingly global in scope, and firms are subject to the laws of the United States, the European Union and an increasing number of developed and developing nations and to scrutiny by the enforcement authorities of all those jurisdictions. The exercise of legislative and enforcement jurisdiction by 50 plus additional entities within the United States is a burden on interstate and foreign commerce in terms of merger review and monopolization cases and provides little, if any, countervailing benefit.

Legitimate interests of the States and their citizens regarding multistate and multinational conduct are fully protected by their respective ability, appropriately circumscribed by standing and antitrust injury requirements, to assert claims under the federal antitrust laws. I am not persuaded by arguments for preserving state law based on historical legal developments during the 19th century. Our notions of the federal commerce power, of the States' ability to exercise their police powers against claims of freedom of contract and of many other matters are far different today, as, of course, is the nature and scope of economic activity. And, as our Report notes, even in 1890, when urging the adoption of what became the Sherman Act, Senator Sherman stated: "Each state can deal with a combination within the State, but only the General Government can deal with combinations reaching to not only the several States, but the commercial world."

Nor am I persuaded by a supposed need for the States to act when federal enforcement is "lax" in the eye of some beholder. The development and enforcement of a coherent, effective and balanced national competition policy by the federal enforcement authorities includes

* Commissioner Garza joins this statement with respect to the role of state law and state "enforcement" of federal law.

decisions on what not to pursue as fully as it does decisions on what to pursue. A national competition policy must be just that—national. As discussed in the next section, both the Supreme Court and Congress have at least implicitly recognized this obvious reality.

State "Enforcement" of Federal Law

I have no quarrel with Congress's decision to grant the States standing to sue under the federal antitrust laws in their capacity as *parens patriae* to recover damages for injured consumers in their respective jurisdictions. As our Report notes, such actions may be preferable in terms of cost and efficiency to consumer class actions. Likewise, the States' right to sue for damages in their proprietary capacity raises no issue.

Nor do I question the Supreme Court's long line of decisions allowing the States suing *parens patriae* to seek equitable relief for state-specific injury in federal courts pursuant to Section 16 of the Clayton Act, which governs actions by all private parties. As is further discussed below, the Supreme Court has not, however, conferred on the States general "law enforcement" authority under the federal antitrust laws. Rather, its decisions, which do not distinguish between state actions under Section 16 and other state *parens patriae* actions, clearly require a State to allege and prove injury particularized to its economy and not common to all or a large part of the nation. *See, e.g., Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 443, 447–49 (1945); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 270–71 (1972); *see generally Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602–07 (1982).

Permitting the States to seek equitable relief on the same footing as the federal enforcement authorities would pose the same problems as permitting state law to govern national and global activities, as Congress has recognized. When the Clayton Act was enacted in 1914, the Senate rejected an amendment that would have given the States power to enforce the antitrust laws in the name of the United States. 51 Cong. Rec. S14, 526 (daily ed. Sept. 1, 1914).[1] Among the reasons advanced for rejection were "the great danger of having a diversity of conclusions" (Senator Gallinger, 51 Cong. Rec. S14,477, daily ed. Aug. 31, 1914); the prevention of "the carrying out of any uniform policy in the enforcement of the antitrust law" (Senator Colt, 51 Cong. Rec. S14,518, daily ed. Sept. 1, 1914); and the fear that state attorneys general would "desert their own duties for another field that, for one reason or another, they might find to be more attractive" (Senator Pomerene, *id.*, at 14,519.)[2]

The Clayton Act as enacted makes no provision for actions in equity specifically by the States. Given the Supreme Court's earlier rejection of state standing to enforce the Sherman

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[1] The portions of the Congressional Record here cited are reprinted in 3 Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes (1978).

[2] Recent experience has shown Senator Pomerene to have been more prescient than Nostradamus and with no inkling of the magnetism of television cameras.

Act, *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 70–71 (1904) (those "acting under the direction of the Attorney General" are to enforce the Sherman Act, "according to some uniform plan, operative throughout the entire country"); *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) ("the vindication of the freedom of interstate commerce is not committed to the State of Louisiana"), and the Senate's affirmation of that rejection, any claim of state standing to "enforce" the antitrust laws broader than that enjoyed by any private party or that conferred by the Supreme Court's general *parens patriae* decisions discussed above, is not sustainable.

Because I am convinced that the Supreme Court will reject a claim by one or more States that they may sue as *parens patriae* in equity under the federal antitrust laws for other than state-specific injury if such a claim is squarely presented to it, I see no need for legislative action in this respect. I emphasize the point in this statement because the Commission's Report assumes the States are "enforcement authorities" and because it has a clear impact on the nature of the relief to which a State might conceivably be entitled as a private party suing under Section 16—in contrast to the scope of relief available to the federal enforcement authorities—in any future action that like, for example, *Microsoft*, involves conduct global or national in scope.

Predominantly local matters have in fact been the principal focus of state enforcement, and the States have played a useful and effective role in protecting competition through such enforcement. Their Section 16 actions, as their legislation, should be directed solely to such local matters in the global economy of the 21st century.

Private Damage Actions

Government injunctive actions, with limited exceptions, seek prospective relief barring conduct claimed to be illegal.[3] These actions have served to develop the law and, in my judgment, have thereby saved the Sherman Act from constitutional vagueness challenges. *See generally United States v. United States Gypsum Co.*, 438 U.S. 422, 440–42 (1978); *compare United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921). At the other end of the enforcement spectrum lie criminal prosecutions, which the Department of Justice has, properly, brought only in cases involving "hard core" cartel activity and which, of course, require proof beyond a reasonable doubt. Without endorsing every enforcement decision or the result reached in every case, I join the vast majority of observers in concluding that both of these enforcement mechanisms are working well.

The same cannot be said, in my judgment, of private treble damage actions. Such actions are brought not by enforcement agencies exercising discretion and concerned not to do more harm than good, but by private parties seeking only their own self-interest. The "enforce-

[3] The limited exceptions are cases seeking dissolution or divestiture or what might be termed regulatory relief. Dissolution and divestiture cases have been rare since *AT&T*; the obvious recent example of regulatory relief is *Microsoft*.

ment" aspect of these actions—lauded by many—is purely incidental to their self-seeking motivation. Moreover, the statutory provision for trebling of damages renders relief in these cases punitive, as has been universally recognized. *See, e.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579, 599 (1976); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1945). When that provision is joined with joint and several liability, as it now is, the punitive sanction visited upon a defendant that goes to trial and loses can be truly draconian—indeed, far greater than the maximum criminal fine. *See generally*, II AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 303 (2d ed. 2000); II AREEDA & TURNER, ANTITRUST LAW 32–36 (1978).

The Commission's recommendations for legislation providing for claim reduction and contribution are a solid start toward redressing the Kafkaesque dilemma of a defendant confronted with charges it believes unfounded and wishes to contest. Those who oppose this, and indeed any alleviation of the dilemma, invoke a single mantra—"cartel." To favor cartels is, of course, in a league with opposing motherhood and apple pie. But the issue is hardly so simple and, I hasten to add, neither the problem nor its resolution has anything to do with cartel cases. Indeed, criminal prosecutions are better suited to deterring and punishing cartel behavior than are private civil actions, whose purpose should be to compensate, not to sanction.

The Supreme Court has recognized the dangers of chilling competitive behavior by the threat of punishment in the context of criminal prosecutions, *Gypsum*, *supra*, and Professor Areeda has observed the obvious fact that the same dangers are presented by treble-damage penalties, AREEDA & HOVENKAMP, *supra*; AREEDA & TURNER, *supra*. But while "over deterrence" is clearly at stake, so are other interests, including fundamental fairness in the judicial process.

First, fundamental fairness requires that before the punitive sanction of trebling is invoked, there be proof by clear and convincing evidence of clearly unlawful conduct.[4] This should pose no problem for those seeking to recover overcharges from cartels, and it at least reduces the likelihood of punishing the innocent through what the academics call "false positives" and I call miscarriages of justice. Single damages seem entirely fair to an antitrust tort plaintiff who can prove its case only by a preponderance of the evidence and cannot demonstrate that the conduct so proven was clearly unlawful, the latter determination to be made taking into consideration both prior legal precedent and whether the conduct was overt and unchallenged for some years.

Second, actions brought by competitors have the potential for themselves being anticompetitive. It is sad, but true, that some firms take the view—to paraphrase General von Clausewitz—that litigation is an extension of business rivalry by means other than competition. All types of antitrust actions can impose on the parties huge costs (often running into

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[4] Professor Areeda appears to have endorsed such an approach in the 1978 edition of ANTITRUST LAW, and that endorsement has been continued by his successors in the 2000 edition.

eight figures) from discovery and motion practice, even if ultimately resolved on summary judgment. A prevailing plaintiff, in addition to damages, recovers its attorneys' fees, while a prevailing defendant recovers nothing but narrowly defined "costs." This imbalance probably cannot practicably be redressed in consumer class actions, but it can be in competitor cases where the plaintiff is a substantial firm. Accordingly, I urge that Congress provide for the award of attorneys' fees to prevailing defendants in such cases absent a determination by the court that an award would be manifestly unjust in a particular case. This would not only provide a measure of fairness to the defendant but would discourage rivals from bringing cases that are merely tactical, and would thereby serve the public goal of fostering competition on the merits.

Third, I would award full prejudgment interest to a prevailing plaintiff in any case where treble damages are not awarded. Where damages are trebled, I would make no change in existing law as to the award of interest, since prejudgment interest is not necessary to secure full compensation.

Final Comments

I offer additional comments on three other topics: patents, regulated industries and civil process.

Patents. The Constitution allows patents to be issued only for "inventions." *See* Article I, § 8. That requirement—termed "nonobviousness" in the implementing statute, 35 U.S.C. § 103—"may not be ignored." *Graham v. John Deere Co.*, 383 U.S.1, 6, 13–17 (1966). Despite the Supreme Court's repeated admonitions, both the PTO and the Federal Circuit appear consistently to have ignored the constitutional mandate. It is simply not possible to believe that true "inventions" have reached the level of 174,000 a year, but that is the number of patents the PTO issued in fiscal 2006.

Patents on the obvious impede not only competition but commerce itself by subjecting investment to uncertainty and the expense of litigation. I have little direct experience in this area, but that little has convinced me that a radical rethinking of doctrine is required. The review of "prior art" may be too narrowly confined by looking only to the art of a very specific field. The fact that two—or three or four or more—putative inventors unaware of each other's work dispute which of them was first by a margin of weeks or months to complete an "invention" may itself be evidence of obviousness; it may be that the "invention" was simply the inevitable next step in the evolution of technology by those skilled in the art. The statutory presumption of validity and reinforcing subsidiary presumptions devised by the Federal Circuit may be unwarranted by reality.

I can carry this inquiry no further, but I think Congress should and should do so with the assistance of talented generalists in business, law and science, not just patent specialists. In urging this undertaking, I am not seeking to accord antitrust primacy over patents. There is no conflict between antitrust law and patent law, but there is a conflict between the present administration of the patent laws and the Constitution—a conflict that would exist were there no antitrust laws.

Regulated Industries. While I subscribe in large measure to the section of our Report dealing with regulated industries, in my judgment its usefulness is limited by a failure to distinguish sufficiently between businesses traditionally treated as utilities and now partially or wholly "deregulated" and businesses, particularly those providing financial services, that were never viewed as utilities but have long been subject to economic regulation and are likely to remain so.

Civil Process. The Commission did not study process in civil antitrust litigation, but I would be remiss were I not to include in this statement an exhortation to the courts on that subject. I have made my entire career in the field of commercial litigation, but, as a citizen, it seems incontrovertible to me that such litigation is a social overhead cost that should be minimized to the fullest extent consistent with the objectives of law enforcement, dispute resolution and tort compensation.

Today, the process costs of antitrust cases, like other major commercial cases in the United States, can become truly outlandish. From my 40 years of experience, I am convinced beyond peradventure that this level of cost is orders of magnitude beyond that necessary to fair and reasoned adjudication. The only effective solution lies with the courts themselves; judges must begin to apply cost/benefit analysis to process, rather than the "no stone unturned" approach that often seems to be the order of the day despite the provisions of Rule 26(b)(2). The cost of justice should not, itself, be unjust.

Appendix A
Relevant Statutes

(Excerpts)

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Antitrust Modernization Commission Act of 2002, as amended

Pub. L. No. 107-273, 116 Stat. 1856 (2002), as amended by the Antitrust Modernization Commission Extension Act of 2007, Pub. L. No. 110-6, 121 Stat. 61 (2007)

Sec. 11051. Short Title.

This subtitle may be cited as the "Antitrust Modernization Commission Act of 2002."

Sec. 11052. Establishment.

There is established the Antitrust Modernization Commission (in this subtitle referred to as the "Commission").

Sec. 11053. Duties of the Commission.

The duties of the Commission are—

(1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues;

(2) to solicit views of all parties concerned with the operation of the antitrust laws;

(3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and

(4) to prepare and to submit to Congress and the President a report in accordance with section 11058.

Sec. 11054. Membership.

(a) Number and Appointment.—The Commission shall be composed of 12 members appointed as follows:

(1) Four members, no more than 2 of whom shall be of the same political party, shall be appointed by the President. The President shall appoint members of the opposing party only on the recommendation of the leaders of Congress from that party.

(2) Two members shall be appointed by the majority leader of the Senate.

(3) Two members shall be appointed by the minority leader of the Senate.

(4) Two members shall be appointed by the Speaker of the House of Representatives.

(5) Two members shall be appointed by the minority leader of the House of Representatives.

(b) Ineligibility for Appointment.—Members of Congress shall be ineligible for appointment to the Commission.

(c) Term of Appointment.—

(1) In general.—Subject to paragraph (2), members of the Commission shall be appointed for the life of the Commission.

(2) Early termination of appointment.—If a member of the Commission who is appointed to the Commission as—

(A) an officer or employee of a government ceases to be an officer or employee of such government; or

(B) an individual who is not an officer or employee of a government becomes an officer or employee of a government;

then such member shall cease to be a member of the Commission on the expiration of the 90-day period beginning on the date such member ceases to be such officer or employee of such government, or becomes an officer or employee of a government, as the case may be.

(d) Quorum.—Seven members of the Commission shall constitute a quorum, but a lesser number may conduct meetings.

(e) Appointment Deadline.—Initial appointments under subsection (a) shall be made not later than 60 days after the date of enactment of this Act [Nov. 2, 2002].

(f) Meetings.—The Commission shall meet at the call of the chairperson. The first meeting of the Commission shall be held not later than 30 days after the date on which all members of the Commission are first appointed under subsection (a) or funds are appropriated to carry out this subtitle, whichever occurs later.

(g) Vacancy.—A vacancy on the Commission shall be filled in the same manner as the initial appointment is made.

(h) Consultation Before Appointment.—Before appointing members of the Commission, the President, the majority and minority leaders of the Senate, the Speaker of the House of Representatives, and the minority leader of the House of Representatives shall consult with each other to ensure fair and equitable representation of various points of view in the Commission.

(i) Chairperson; Vice Chairperson.—The President shall select the chairperson of the Commission from among its appointed members. The leaders of Congress from the opposing party of the President shall select the vice chairperson of the Commission from among its remaining members.

Sec. 11055. Compensation of the Commission.

(a) Pay.—

(1) Nongovernment employees.—Each member of the Commission who is not otherwise employed by a government shall be entitled to receive the daily equivalent of the annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5 United States Code, as in effect from time to time, for each day (including travel time) during which such member is engaged in the actual performance of duties of the Commission.

(2) Government employees.—A member of the Commission who is an officer or employee of a government shall serve without additional pay (or benefits in the nature of compensation) for service as a member of the Commission.

(b) Travel Expenses.—Members of the Commission shall receive travel expenses, including per diem in lieu of subsistence, in accordance with subchapter I of chapter 57 of title 5, United States Code.

Sec. 11056. Staff of Commission; Experts and Consultants.

(a) Staff.—

(1) Appointment.—The chairperson of the Commission may, without regard to the provisions of chapter 51 of title 5 of the United States Code (relating to appointments in the competitive service), appoint and terminate an executive director and such other staff as are necessary to enable the Commission to perform its duties. The appointment of an executive director shall be subject to approval by the Commission.

(2) Compensation.—The chairperson of the Commission may fix the compensation of the executive director and other staff without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5 of the United States Code (relating to classification of positions and General Schedule pay rates), except that the rate of pay for the executive director and other staff may not exceed the rate of basic pay payable for level V of the Executive Schedule under section 5315 of title 5 United States Code, as in effect from time to time.

(b) Experts and Consultants.—The Commission may procure temporary and intermittent services of experts and consultants in accordance with section 3109 (b) of title 5, United States Code.

Sec. 11057. Powers of the Commission.

(a) Hearings and Meetings.—The Commission, or a member of the Commission if authorized by the Commission, may hold such hearings, sit and act at such time and places, take such testimony, and receive such evidence, as the Commission considers to be appropriate. The Commission or a member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission or such member.

(b) Official Data.—The Commission may obtain directly from any executive agency (as defined in section 105 of title 5 of the United States Code) or court information necessary to enable it to carry out its duties under this subtitle. On the request of the chairperson of the Commission, and consistent with any other law, the head of an executive agency or of a Federal court shall provide such information to the Commission.

(c) Facilities and Support Services.—The Administrator of General Services shall provide to the Commission on a reimbursable basis such facilities and support services as the Commission may request. On request of the Commission, the head of an executive agency may make any of the facilities or services of such agency available to the Commission, on a reimbursable or nonreimbursable basis, to assist the Commission in carrying out its duties under this subtitle.

(d) Expenditures and Contracts.—The Commission or, on authorization of the Commission, a member of the Commission may make expenditures and enter into contracts for the procurement of such supplies, services, and property as the Commission or such member considers to be appropriate for the purpose of carrying out the duties of the Commission. Such expenditures and contracts may be made only to such extent or in such amounts as are provided in advance in appropriation Acts.

(e) Mails.—The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

(f) Gifts, Bequests, and Devises.—The Commission may accept, use, and dispose of gifts, bequests, or devises of services or property, both real and personal, for the purpose of aiding or facilitating the work of the Commission. Gifts, bequests, or devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in the Treasury and shall be available for disbursement upon order of the Commission.

Sec. 11058. Report.

Not later than 3 years after the first meeting of the Commission, the Commission shall submit to Congress and the President a report containing a detailed statement of the findings and conclusions of the Commission, together with recommendations for legislative or administrative action the Commission considers to be appropriate.

Sec. 11059. Termination of the Commission.

The Commission shall cease to exist 60 days after the date on which the report required by section 11058 is submitted.

Sec. 11060. Authorization of the Commission.

There is authorized to be appropriated $4,000,000 to carry out this subtitle.

Sherman Act

15 U.S.C. § 1 (Section 1 of the Sherman Act)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (Section 2 of the Sherman Act)

Every person who shall monopolize, 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, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Clayton Act

15 U.S.C. § 12 (Section 1 of the Clayton Act)

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the "Clayton Act."

15 U.S.C. § 13 (Section 2 of the Clayton Act)

[See Robinson-Patman Act, below]

15 U.S.C. § 15 (Section 4 of the Clayton Act)

(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b)

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

15 U.S.C. § 15a (Section 4A of the Clayton Act)

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by it sustained and the cost of suit. The court may award under this section, pursuant to a motion by the United States promptly made, simple interest on actual damages for the period beginning on the date of service of the pleading of the United States setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether the United States or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(2) whether, in the course of the action involved, the United States or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings;

(3) whether the United States or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof; and

(4) whether the award of such interest is necessary to compensate the United States adequately for the injury sustained by the United States.

15 U.S.C. § 15b (Section 4B of the Clayton Act)

Any action to enforce any cause of action under sections [4, 4A, or 4C] of this [Act] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

15 U.S.C. § 15c (Section 4C of the Clayton Act)

(a) (1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act]. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief

(A) which duplicates amounts which have been awarded for the same injury, or

(B) which is properly allocable to

(i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and

(ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee. The court may award under this paragraph, pursuant to a motion by such State promptly made, simple interest on the total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this paragraph for any period is just in the circumstances, the court shall consider only—

(A) whether such State or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(B) whether, in the course of the action involved, such State or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(C) whether such State or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b)

(1) In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

(2) Any person on whose behalf an action is brought under subsection (a)(1) of this section may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

(3) The final judgment in an action under subsection (a)(1) of this section shall be res judicata as to any claim under section [4 of this Act] by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this subsection.

(c) An action under subsection (a)(1) of this section shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

(d) In any action under subsection (a) of this section—

(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

15 U.S.C. § 15d (Section 4D of the Clayton Act)

In any action under section [4C](a)(1) of this [Act], in which there has been a determination that a defendant agreed to fix prices in violation of [the Sherman Act], damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

15 U.S.C. § 15e (Section 4E of the Clayton Act)

Monetary relief recovered in an action under section [4C](a)(1) of this [Act] shall—

(1) be distributed in such manner as the district court in its discretion may authorize; or

(2) be deemed a civil penalty by the court and deposited with the State as general revenues;

subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

15 U.S.C. § 15f (Section 4F of the Clayton Act)

(a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

(b) To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.

15 U.S.C. § 15g (Section 4G of the Clayton Act)

For the purposes of sections [4C, 4D, 4E, and 4F] of this [Act]:

(1) The term "State attorney general" means the chief legal officer of a State, or any other person authorized by State law to bring actions under section [4C] of this [Act], and includes the Corporation Counsel of the District of Columbia, except that such term does not include any person employed or retained on—

(A) a contingency fee based on a percentage of the monetary relief awarded under this section; or

(B) any other contingency fee basis, unless the amount of the award of a reasonable attorney's fee to a prevailing plaintiff is determined by the court under section [4C](d)(1) of this [Act].

(2) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(3) The term "natural persons" does not include proprietorships or partnerships.

15 U.S.C. § 15h (Section 4H of the Clayton Act)

Sections [4C, 4D, 4E, 4F, and 4G] of this [Act] shall apply in any State, unless such State provides by law for its nonapplicability in such State.

15 U.S.C. § 16 (Section 5 of the Clayton Act)

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section [5 of the Federal Trade Commission Act] which could give rise to a claim for relief under the antitrust laws.

(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violations in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that

(1) extraordinary circumstances require such shortening and

(2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section [4A] of this [Act] nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section [4A] of this [Act], the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section [4] or [4C] of this [Act] is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

15 U.S.C. § 18 (Section 7 of the Clayton Act)

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section [10 of the Public Utility Holding Company Act of 1955], the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

15 U.S.C. § 18a (Hart-Scott-Rodino Antitrust Improvements Act; Section 7A of the Clayton Act)

(a) Except as exempted pursuant to subsection (c) of this section, no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired, if—

  (1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce; and

  (2) as a result of such acquisition, the acquiring person would hold an aggregate amount of the voting securities and assets of the acquired person—

    (A) in excess of $200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 8(a)(5) [of the Act] to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003); or

    (B)

      (i) in excess of $50,000,000 (as so adjusted and published) but not in excess of $200,000,000 (as so adjusted and published); and

      (ii)

        (I) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more;

        (II) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of $100,000,000 (as so adjusted and published) or more; or

(III) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of $10,000,000 (as so adjusted and published) or more.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d) of this section.

(b)

(1) The waiting period required under subsection (a) of this section shall—

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the "Assistant Attorney General") of—

(i) the completed notification required under subsection (a) of this section, or

(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance, from both persons, or, in the case of a tender offer, the acquiring person; and

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2) of this section.

(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

(3) As used in this section—

(A) The term "voting securities" means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

(c) The following classes of transactions are exempt from the requirements of this section—

(1) acquisitions of goods or realty transferred in the ordinary course of business;

(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;

(4) transfers to or from a Federal agency or a State or political subdivision thereof;

(5) transactions specifically exempted from the antitrust laws by Federal statute;

(6) transactions specifically exempted from the antitrust laws by Federal statute

if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

(7) transactions which require agency approval under [§ 301 of the Financial Institutions Reform, Recovery, and Enforcement Act, 12 U.S.C. § 1467a(e), § 18(c) of the Federal Deposit Insurance Act, 12 U.S.C. § 1828(c), or § 3 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842], except that a portion of such a transaction is not exempt under this paragraph if such portion of the transaction

(A) is subject to [§ 103(a) of the Gramm-Leach-Bliley Act, 12 U.S.C. § 1843(k)]; and

(B) does not require agency approval under [§ 3 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842];

(8) transactions which require agency approval under [§ 4 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1843, or § 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464], if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction, except that a portion of such a transaction is not exempt under this paragraph if such portion of the transaction

(A) is subject to [§ 103(a) of the Gramm-Leach-Bliley Act, 12 U.S.C. § 1843(k)]; and

(B) does not require agency approval under [§ 3 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842];

(9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;

(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of

(A) voting securities pursuant to a plan of reorganization or dissolution; or

(B) assets in the ordinary course of its business; and

(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B) of this section.

(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of Title 5, consistent with the purposes of this section—

(1) shall require that the notification required under subsection (a) of this section be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and

(2) may—

(A) define the terms used in this section;

(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

(e)

(1)

(A) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section, require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) of this section prior to the expiration of the waiting period specified in subsection (b)(1) of this section, or from any officer, director, partner, agent, or employee of such person.

(B)

(i) The Assistant Attorney General and the Federal Trade Commission shall each designate a senior official who does not have direct responsibility for the review of any enforcement recommendation under this section concerning the transaction at issue, to hear any petition filed by such person to determine—

(I) whether the request for additional information or documentary material is unreasonably cumulative, unduly burdensome, or duplicative; or

(II) whether the request for additional information or documentary material has been substantially complied with by the petitioning person.

(ii) Internal review procedures for petitions filed pursuant to clause (i) shall include reasonable deadlines for expedited review of such petitions, after reasonable negotiations with investigative staff, in order to avoid undue delay of the merger review process.

(iii) Not later than 90 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall conduct an internal review and implement reforms of the merger review process in order to eliminate unnecessary burden, remove costly duplication, and eliminate undue delay, in order to achieve a more effective and more efficient merger review process.

(iv) Not later than 120 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall issue or amend their respective industry guidance, regulations, operating manuals and relevant policy documents, to the extent appropriate, to implement each reform in this subparagraph.

(v) Not later than 180 days after December 21, 2000, the Assistant Attorney General and the Federal Trade Commission shall each report to Congress—

(I) which reforms each agency has adopted under this subparagraph;

(II) which steps each has taken to implement such internal reforms; and

(III) the effects of such reforms.

(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) of this section for an additional period of not more than 30 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person,

(A) all the information and documentary material required to be submitted pursuant to such a request, or

(B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2) of this section.

(f) If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates [§ 7] of this [Act], or [§ 5 of the Federal Trade Commission Act], or an action is filed by the United States, alleging that a proposed acquisition violates such [§ 7] of this [Act], or section 1 or 2 of this [Act], and the Federal Trade Commission or the Assistant Attorney General

(1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and

(2) certifies the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection, then upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes.

(g)

(1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) of this section or any request for the submission of additional information or documentary material under subsection (e)(1) of this section within the waiting period specified in subsection (b)(1) of this section and as may be extended under subsection (e)(2) of this section, the United States district court—

(A) may order compliance;

(B) shall extend the waiting period specified in subsection (b)(1) of this section and as may have been extended under subsection (e)(2) of this section until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate, upon application of the Federal Trade Commission or the Assistant Attorney General.

(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.

(i) (1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act [15 U.S.C. §§ 1311 et seq.], the Federal Trade Commission Act [15 U.S.C. §§ 41 et seq.], or any other provision of law.

(j) Reserved.

(k) If the end of any period of time provided in this section falls on a Saturday, Sunday, or legal public holiday (as defined in section 6103(a) of title 5), then such period shall be extended to the end of the next day that is not a Saturday, Sunday, or legal public holiday.

15 U.S.C. § 18a note

(a) Five working days after enactment of this Act [Nov. 21, 1989] and thereafter, the Federal Trade Commission shall assess and collect filing fees established in subsection (b) which shall be paid by persons acquiring voting securities or assets who are required to file premerger notifications by the [sic] section 7A of the Clayton Act (15 U.S.C. 18a) and the regulations promulgated thereunder. For purposes of said Act, no notification shall be considered filed until payment of the fee required by this section. Fees collected pursuant to this section shall be divided evenly between and credited to the appropriations, Federal Trade Commission, 'Salaries and Expenses' and Department of Justice, 'Salaries and Expenses, Antitrust Division': Provided, That fees in excess of $40,000,000 in fiscal year 1990 shall be deposited to the credit of the Treasury of the United States: Provided further, That fees made available to the Federal Trade Commission and the Antitrust Division herein shall remain available until expended.

(b) The filing fees referred to in subsection (a) are—

(1) $45,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a (a)(2)) is less than $100,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 8(a)(5) of the Clayton Act (15 U.S.C. 19 (a)(5)) to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003);

(2) $125,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a (a)(2)) is not less than $100,000,000 (as so adjusted and published) but less than $500,000,000 (as so adjusted and published); and

(3) $280,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a (a)(2)) is not less than $500,000,000 (as so adjusted and published).

15 U.S.C. § 25 (Section 15 of the Clayton Act)

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

15 U.S.C. § 26 (Section 16 of the Clayton Act)

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections [2, 3, 7, and 8] of this [Act], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Robinson-Patman Act

15 U.S.C. § 13 (Section 1 of the Robinson-Patman Act)

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

15 U.S.C. § 13a (Section 3 of the Robinson-Patman Act)

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

Federal Trade Commission Act

15 U.S.C. § 41 (Section 1 of the Federal Trade Commission Act)

A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party. The first Commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from September 26, 1914, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed: Provided, however, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. The President shall choose a chairman from the Commission's membership. No Commissioner shall engage in any other business, vocation, or employment. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.

The Commission shall have an official seal, which shall be judicially noticed.

15 U.S.C. § 45 (Section 5 of the Federal Trade Commission Act)

(a)

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 App. U.S.C. §§ 1301 et seq.], and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. §§ 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such persons, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice, and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that

(1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals in the United States, in the manner provided in subsection (c) of this section; and

(2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, 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, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28 [the U.S. Code]. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have the power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commending obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28 [of the U.S. Code].

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either

 (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or

 (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or

(c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt of said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section.

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if

(i) a petition for review of such order is pending in such court, and

(ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) of this section and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) If the order of the Commission is modified or set aside by the court of appeals, and if

(1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(2) the petition for certiorari has been denied, or

(3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing; and if

(1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or

(2) the petition for certiorari has been denied, or

(3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m)

(1)

(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraph (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by public statement of its reasons and is approved by the court.

(n) The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

15 U.S.C. § 53 (Section 13 of the Federal Trade Commission Act)

(a) Whenever the Commission has reason to believe—
    (1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and
    (2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) Whenever the Commission has reason to believe—
    (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
    (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

    the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(c) Any process of the Commission under this section may be served by any person duly authorized by the Commission—

(1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;

(2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or

(3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same.

(d) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement, the court shall exclude such issue from the operation of the restraining order or injunction.

Foreign Trade Antitrust Improvements Act of 1982

15 U.S.C. § 6a

[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

 (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

 (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of [the Sherman Act], other than this section.

 If [the Sherman Act applies] to such conduct only because of the operation of paragraph (1)(B), then [the Sherman Act] shall apply to such conduct only for injury to export business in the United States.

International Antitrust Enforcement Assistance Act of 1994 (IAEAA)

15 U.S.C. § 6201 (Section 2 of the IAEAA)

In accordance with an antitrust mutual assistance agreement in effect under this chapter, subject to section 6207 of this title, and except as provided in section 6204 of this title, the Attorney General of the United States and the Federal Trade Commission may provide to a foreign antitrust authority with respect to which such agreement is in effect under this chapter, antitrust evidence to assist the foreign antitrust authority—

(1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) in enforcing any of such foreign antitrust laws.

15 U.S.C. § 6202 (Section 3 of the IAEAA)

(a) Request for investigative assistance

 A request by a foreign antitrust authority for investigative assistance under this section shall be made to the Attorney General, who may deny the request in whole or in part. No further action shall be taken under this section with respect to any part of a request that has been denied by the Attorney General.

(b) Authority to investigate

 In accordance with an antitrust mutual assistance agreement in effect under this chapter, subject to section 6207 of this title, and except as provided in section 6204 of this title, the Attorney General and the Commission may, using their respective authority to investigate possible violations of the Federal antitrust laws, conduct investigations to obtain antitrust evidence relating to a possible violation of the foreign antitrust laws administered or enforced by the foreign antitrust authority with respect to which such agreement is in effect under this chapter, and may provide such antitrust evidence to the foreign antitrust authority, to assist the foreign antitrust authority—

(1) in determining whether a person has violated or is about to violate any of such foreign antitrust laws, or

(2) in enforcing any of such foreign antitrust laws.

(c) Special scope of authority

An investigation may be conducted under subsection (b) of this section, and antitrust evidence obtained through such investigation may be provided, without regard to whether the conduct investigated violates any of the Federal antitrust laws.

(d) Rights and privileges preserved

A person may not be compelled in connection with an investigation under this section to give testimony or a statement, or to produce a document or other thing, in violation of any legally applicable right or privilege.

15 U.S.C. § 6203 (Section 4 of the IAEAA)

(a) Authority of district courts

On the application of the Attorney General made in accordance with an antitrust mutual assistance agreement in effect under this chapter, the United States district court for the district in which a person resides, is found, or transacts business may order such person to give testimony or a statement, or to produce a document or other thing, to the Attorney General to assist a foreign antitrust authority with respect to which such agreement is in effect under this chapter—

(1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) in enforcing any of such foreign antitrust laws.

(b) Contents of order

(1) Use of appointee to receive evidence

(A) An order issued under subsection (a) of this section may direct that testimony or a statement be given, or a document or other thing be produced, to a person who shall be recommended by the Attorney General and appointed by the court.

(B) A person appointed under subparagraph (A) shall have power to administer any necessary oath and to take such testimony or such statement.

(2) Practice and procedure

(A) An order issued under subsection (a) of this section may prescribe the practice and procedure for taking testimony and statements and for producing documents and other things.

(B) Such practice and procedure may be in whole or in part the practice and procedure of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority with respect to which the Attorney General requests such order.

(C) To the extent such order does not prescribe otherwise, any testimony and statements required to be taken shall be taken, and any documents and other things required to be produced shall be produced, in accordance with the Federal Rules of Civil Procedure.

(c) Rights and privileges preserved

A person may not be compelled under an order issued under subsection (a) of this section to give testimony or a statement, or to produce a document or other thing, in violation of any legally applicable right or privilege.

(d) Voluntary conduct

This section does not preclude a person in the United States from voluntarily giving testimony or a statement, or producing a document or other thing, in any manner acceptable to such person for use in an investigation by a foreign antitrust authority.

15 U.S.C. § 6204 (Section 5 of the IAEAA)

Sections 6201, 6202, and 6203 of this title shall not apply with respect to the following antitrust evidence:

(1) Antitrust evidence that is received by the Attorney General or the Commission under section 18a of this title. Nothing in this paragraph shall affect the ability of the Attorney General or the Commission to disclose to a foreign antitrust authority antitrust evidence that is obtained otherwise than under section 18a of this title.

(2) Antitrust evidence that is matter occurring before a grand jury and with respect to which disclosure is prevented by Federal law, except that for the purpose of applying Rule 6(e)(3)(C)(iv) of the Federal Rules of Criminal Procedure with respect to this section—

    (A) a foreign antitrust authority with respect to which a particularized need for such antitrust evidence is shown shall be considered to be an appropriate official of any of the several States, and

    (B) a foreign antitrust law administered or enforced by the foreign antitrust authority shall be considered to be a State criminal law.

(3) Antitrust evidence that is specifically authorized under criteria established by Executive Order 12356, or any successor to such order, to be kept secret in the interest of national defense or foreign policy, and—

    (A) that is classified pursuant to such order or such successor, or

    (B) with respect to which a determination of classification is pending under such order or such successor.

(4) Antitrust evidence that is classified under section 2162 of title 42.

15 U.S.C. § 6205 (Section 6 of the IAEAA)

Section 1313 of this title, and sections 46 (f) and 57b-2 of this title, shall not apply to prevent the Attorney General or the Commission from providing to a foreign antitrust authority antitrust evidence in accordance with an antitrust mutual assistance agreement in effect under this chapter and in accordance with the other requirements of this chapter.

15 U.S.C. § 6206 (Section 7 of the IAEAA)

(a) Publication of proposed antitrust mutual assistance agreements

Not less than 45 days before an antitrust mutual assistance agreement is entered into, the Attorney General, with the concurrence of the Commission, shall publish in the Federal Register—

(1) the proposed text of such agreement and any modification to such proposed text, and

(2) a request for public comment with respect to such text or such modification, as the case may be.

(b) Publication of proposed amendments to antitrust mutual assistance agreements in effect

Not less than 45 days before an agreement is entered into that makes an amendment to an antitrust mutual assistance agreement, the Attorney General, with the concurrence of the Commission, shall publish in the Federal Register—

(1) the proposed text of such amendment, and

(2) a request for public comment with respect to such amendment.

(c) Publication of antitrust mutual assistance agreements, amendments, and terminations

Not later than 45 days after an antitrust mutual assistance agreement is entered into or terminated, or an agreement that makes an amendment to an antitrust mutual assistance agreement is entered into, the Attorney General, with the concurrence of the Commission, shall publish in the Federal Register—

(1) the text of the antitrust mutual assistance agreement or amendment, or the terms of the termination, as the case may be, and

(2) in the case of an agreement that makes an amendment to an antitrust mutual assistance agreement, a notice containing—

(A) citations to the locations in the Federal Register at which the text of the antitrust mutual assistance agreement that is so amended, and of any previous amendments to such agreement, are published, and

(B) a description of the manner in which a copy of the antitrust mutual assistance agreement, as so amended, may be obtained from the Attorney General and the Commission.

(d) Condition for validity

An antitrust mutual assistance agreement, or an agreement that makes an amendment to an antitrust mutual assistance agreement, with respect to which publication does not occur in accordance with subsections (a), (b), and (c) of this section shall not be considered to be in effect under this chapter.

15 U.S.C. § 6207 (Section 8 of the IAEAA)

(a) Determinations
Neither the Attorney General nor the Commission may conduct an investigation under section 6202 of this title, apply for an order under section 6203 of this title, or provide antitrust evidence to a foreign antitrust authority under an antitrust mutual assistance agreement, unless the Attorney General or the Commission, as the case may be, determines in the particular instance in which the investigation, application, or antitrust evidence is requested that—

(1) the foreign antitrust authority—

(A) will satisfy the assurances, terms, and conditions described in subparagraphs (A), (B), and (E) of section 6211 (2) of this title, and

(B) is capable of complying with and will comply with the confidentiality requirements applicable under such agreement to the requested antitrust evidence,

(2) providing the requested antitrust evidence will not violate section 6204 of this title, and

(3) conducting such investigation, applying for such order, or providing the requested antitrust evidence, as the case may be, is consistent with the public interest of the United States, taking into consideration, among other factors, whether the foreign state or regional economic integration organization represented by the foreign antitrust authority holds any proprietary interest that could benefit or otherwise be affected by such investigation, by the granting of such order, or by the provision of such antitrust evidence.

(b) Limitation on disclosure of certain antitrust evidence

Neither the Attorney General nor the Commission may disclose in violation of an antitrust mutual assistance agreement any antitrust evidence received under such agreement, except that such agreement may not prevent the disclosure of such antitrust evidence to a defendant in an action or proceeding brought by the Attorney General or the Commission for a violation of any of the Federal laws if such disclosure would otherwise be required by Federal law.

(c) Required disclosure of notice received

If the Attorney General or the Commission receives a notice described in section 6211 (2)(H) of this title, the Attorney General or the Commission, as the case may be, shall transmit such notice to the person that provided the evidence with respect to which such notice is received.

15 U.S.C. § 6208 (Section 9 of the IAEAA)

(a) Determinations

Determinations made under paragraphs (1) and (3) of section 6207 (a) of this title shall not be subject to judicial review.

(b) Citations to and descriptions of confidentiality laws

Whether an antitrust mutual assistance agreement satisfies section 6211 (2)(C) of this title shall not be subject to judicial review.

(c) Rules of construction

(1) Administrative Procedure Act

The requirements in section 6206 of this title with respect to publication and request for public comment shall not be construed to create any availability of judicial review under chapter 7 of title 5.

(2) Laws referenced in section 6204 of this title

Nothing in this section shall be construed to affect the availability of judicial review under laws referred to in section 6204 of this title.

15 U.S.C. § 6209 (Section 10 of the IAEAA)

(a) In general

The authority provided by this chapter is in addition to, and not in lieu of, any other authority vested in the Attorney General, the Commission, or any other officer of the United States.

(b) Attorney General and Commission

This chapter shall not be construed to modify or affect the allocation of responsibility between the Attorney General and the Commission for the enforcement of the Federal antitrust laws.

15 U.S.C. § 6210 (Section 11 of the IAEAA)

In the 30-day period beginning 3 years after November 2, 1994, and with the concurrence of the Commission, the Attorney General shall submit, to the Speaker of the House of Representatives and the President pro tempore of the Senate, a report—

(1) describing how the operation of this chapter has affected the enforcement of the Federal antitrust laws,

(2) describing the extent to which foreign antitrust authorities have complied with the confidentiality requirements applicable under antitrust mutual assistance agreements in effect under this chapter,

(3) specifying separately the identities of the foreign states, regional economic integration organizations, and foreign antitrust authorities that have entered into such agreements and the identities of the foreign antitrust authorities with respect to which such foreign states and such organizations have entered into such agreements,

(4) specifying the identity of each foreign state, and each regional economic integration organization, that has in effect a law similar to this chapter,

(5) giving the approximate number of requests made by the Attorney General and the Commission under such agreements to foreign antitrust authorities for antitrust investigations and for antitrust evidence,

(6) giving the approximate number of requests made by foreign antitrust authorities under such agreements to the Attorney General and the Commission for investigations under section 6202 of this title, for orders under section 6203 of this title, and for antitrust evidence, and

(7) describing any significant problems or concerns of which the Attorney General is aware with respect to the operation of this chapter.

15 U.S.C. § 6211 (Section 12 of the IAEAA)

For purposes of this chapter:

(1) The term "antitrust evidence" means information, testimony, statements, documents, or other things that are obtained in anticipation of, or during the course of, an investigation or proceeding under any of the Federal antitrust laws or any of the foreign antitrust laws.

(2) The term "antitrust mutual assistance agreement" means a written agreement, or written memorandum of understanding, that is entered into by the United States and a foreign state or regional economic integration organization (with respect to the foreign antitrust authorities of such foreign state or such organization, and such other governmental

entities of such foreign state or such organization as the Attorney General and the Commission jointly determine may be necessary in order to provide the assistance described in subparagraph (A)), or jointly by the Attorney General and the Commission and a foreign antitrust authority, for the purpose of conducting investigations under section 6202 of this title, applying for orders under section 6203 of this title, or providing antitrust evidence, on a reciprocal basis and that includes the following:

(A) An assurance that the foreign antitrust authority will provide to the Attorney General and the Commission assistance that is comparable in scope to the assistance the Attorney General and the Commission provide under such agreement or such memorandum.

(B) An assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that may be received under section 6201, 6202, or 6203 of this title and will give protection to antitrust evidence received under such section that is not less than the protection provided under the laws of the United States to such antitrust evidence.

(C) Citations to and brief descriptions of the laws of the United States, and the laws of the foreign state or regional economic integration organization represented by the foreign antitrust authority, that protect the confidentiality of antitrust evidence that may be provided under such agreement or such memorandum. Such citations and such descriptions shall include the enforcement mechanisms and penalties applicable under such laws and, with respect to a regional economic integration organization, the applicability of such laws, enforcement mechanisms, and penalties to the foreign states composing such organization.

(D) Citations to the Federal antitrust laws, and the foreign antitrust laws, with respect to which such agreement or such memorandum applies.

(E) Terms and conditions that specifically require using, disclosing, or permitting the use or disclosure of, antitrust evidence received under such agreement or such memorandum only—

  (i) for the purpose of administering or enforcing the foreign antitrust laws involved, or

  (ii) with respect to a specified disclosure or use requested by a foreign antitrust authority and essential to a significant law enforcement objective, in accordance with the prior written consent that the Attorney General or the Commission, as the case may be, gives after—

    (I) determining that such antitrust evidence is not otherwise readily available with respect to such objective,

    (II) making the determinations described in paragraphs (2) and (3) of section 6207 (a) of this title, with respect to such disclosure or use, and

    (III) making the determinations applicable to a foreign antitrust authority under section 6207 (a)(1) of this title (other than the determination regarding the assurance described in subparagraph (A) of this paragraph), with respect to each additional governmental entity, if any, to be provided such antitrust evidence in the course of such disclosure or use, after having received adequate written assurances applicable to each such governmental entity.

(F) An assurance that antitrust evidence received under section 6201, 6202, or 6203 of this title from the Attorney General or the Commission, and all copies of such evidence, in the possession or control of the foreign antitrust authority will be returned to the Attorney General or the Commission, respectively, at the conclusion of the foreign investigation or proceeding with respect to which such evidence was so received.

(G) Terms and conditions that specifically provide that such agreement or such memorandum will be terminated if—

(i) the confidentiality required under such agreement or such memorandum is violated with respect to antitrust evidence, and

(ii) adequate action is not taken both to minimize any harm resulting from the violation and to ensure that the confidentiality required under such agreement or such memorandum is not violated again.

(H) Terms and conditions that specifically provide that if the confidentiality required under such agreement or such memorandum is violated with respect to antitrust evidence, notice of the violation will be given—

(i) by the foreign antitrust authority promptly to the Attorney General or the Commission with respect to antitrust evidence provided by the Attorney General or the Commission, respectively, and

(ii) by the Attorney General or the Commission to the person (if any) that provided such evidence to the Attorney General or the Commission.

(3) The term "Attorney General" means the Attorney General of the United States.

(4) The term "Commission" means the Federal Trade Commission.

(5) The term "Federal antitrust laws" has the meaning given the term "antitrust laws" in subsection (a) of section 12 of this title but also includes section 45 of this title to the extent that such section 45 applies to unfair methods of competition.

(6) The term "foreign antitrust authority" means a governmental entity of a foreign state or of a regional economic integration organization that is vested by such state or such organization with authority to enforce the foreign antitrust laws of such state or such organization.

(7) The term "foreign antitrust laws" means the laws of a foreign state, or of a regional economic integration organization, that are substantially similar to any of the Federal antitrust laws and that prohibit conduct similar to conduct prohibited under the Federal antitrust laws.

(8) The term "person" has the meaning given such term in subsection (a) of section 12 of this title.

(9) The term "regional economic integration organization" means an organization that is constituted by, and composed of, foreign states, and on which such foreign states have conferred sovereign authority to make decisions that are binding on such foreign states, and that are directly applicable to and binding on persons within such foreign states, including the decisions with respect to—

(A) administering or enforcing the foreign antitrust laws of such organization, and

(B) prohibiting and regulating disclosure of information that is obtained by such organization in the course of administering or enforcing such laws.

15 U.S.C. § 6212 (Section 13 of the IAEAA)

The Attorney General and the Commission are authorized to receive from a foreign antitrust authority, or from the foreign state or regional economic integration organization represented by such foreign antitrust authority, reimbursement for the costs incurred by the Attorney General or the Commission, respectively, in conducting an investigation under section 6202 of this title requested by such foreign antitrust authority, applying for an order under section 6203 of this title to assist such foreign antitrust authority, or providing antitrust evidence to such foreign antitrust authority under an antitrust mutual assistance agreement in effect under this chapter with respect to such foreign antitrust authority.

Alternative Fines Statute

18 U.S.C. § 3571

(a) In General.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

(b) Fines for Individuals.—Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of—

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than $250,000;
- (4) for a misdemeanor resulting in death, not more than $250,000;
- (5) for a Class A misdemeanor that does not result in death, not more than $100,000;
- (6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or
- (7) for an infraction, not more than $5,000.

(c) Fines for Organizations.—Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of—

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section;
- (3) for a felony, not more than $500,000;
- (4) for a misdemeanor resulting in death, not more than $500,000;
- (5) for a Class A misdemeanor that does not result in death, not more than $200,000;
- (6) for a Class B or C misdemeanor that does not result in death, not more than $10,000; and
- (7) for an infraction, not more than $10,000.

(d) Alternative Fine Based on Gain or Loss.—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

(e) Special Rule for Lower Fine Specified in Substantive Provision.—If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense.

Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Subtitle A

15 U.S.C. § 1 note (Section 211 of the ACPERA)

(a) In General.—Except as provided in subsection (b), the provisions of sections 211 through 214 shall cease to have effect 5 years after the date of enactment of this Act.

(b) Exception.—With respect to an applicant who has entered into an antitrust leniency agreement on or before the date on which the provisions of sections 211 through 214 of this subtitle shall cease to have effect, the provisions of sections 211 through 214 of this subtitle shall continue in effect.

15 U.S.C. § 1 note (Section 212 of the ACPERA)

In this subtitle:

(1) Antitrust division.—The term “Antitrust Division” means the United States Department of Justice Antitrust Division.

(2) Antitrust leniency agreement.—The term “antitrust leniency agreement,” or “agreement,” means a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement.

(3) Antitrust leniency applicant.—The term “antitrust leniency applicant,” or “applicant,” means, with respect to an antitrust leniency agreement, the person that has entered into the agreement.

(4) Claimant.—The term “claimant” means a person or class, that has brought, or on whose behalf has been brought, a civil action alleging a violation of section 1 or 3 of the Sherman Act or any similar State law, except that the term does not include a State or a subdivision of a State with respect to a civil action brought to recover damages sustained by the State or subdivision.

(5) Cooperating individual.—The term “cooperating individual” means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement.

(6) Person.—The term “person” has the meaning given it in subsection (a) of the first section of the Clayton Act.

15 U.S.C. § 1 note (Section 213 of the ACPERA)

(a) In General.—Subject to subsection (d), in any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.

(b) Requirements.—Subject to subsection (c), an antitrust leniency applicant or cooperating individual satisfies the requirements of this subsection with respect to a civil action described in subsection (a) if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include—

  (1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

  (2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

  (3)

    (A) in the case of a cooperating individual—

      (i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and

      (ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or

    (B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).

(c) Timeliness.—If the initial contact by the antitrust leniency applicant with the Antitrust Division regarding conduct covered by the antitrust leniency agreement occurs after a State, or subdivision of a State, has issued compulsory process in connection with an investigation of allegations of a violation of section 1 or 3 of the Sherman Act or any similar State law based on conduct covered by the antitrust leniency agreement or after a civil action described in subsection (a) has been filed, then the court shall consider, in making the determination concerning satisfactory cooperation described in subsection (b), the timeliness of the applicant's initial cooperation with the claimant.

(d) Continuation.—Nothing in this section shall be construed to modify, impair, or supersede the provisions of sections 4, 4A, and 4C of the Clayton Act relating to the recovery of costs of suit, including a reasonable attorney's fee, and interest on damages, to the extent that such recovery is authorized by such sections.

15 U.S.C. § 1 note (Section 214 of the ACPERA)

Nothing in this subtitle shall be construed to—

(1) affect the rights of the Antitrust Division to seek a stay or protective order in a civil action based on conduct covered by an antitrust leniency agreement to prevent the cooperation described in section 213(b) from impairing or impeding the investigation or prosecution by the Antitrust Division of conduct covered by the agreement;

(2) create any right to challenge any decision by the Antitrust Division with respect to an antitrust leniency agreement; or

(3) affect, in any way, the joint and several liability of any party to a civil action described in section 213(a), other than that of the antitrust leniency applicant and cooperating individuals as provided in section 213(a) of this title.

amending 15 U.S.C. § 1 (Section 215 of the ACPERA)

(a) Restraint of Trade Among the States.—Section 1 of the Sherman Act (15 U.S.C. 1) is amended by—

  (1) striking "$10,000,000"' and inserting "$100,000,000";

  (2) striking "$350,000" and inserting "$1,000,000"; and

  (3) striking "three" and inserting "10."

(b) Monopolizing Trade.—Section 2 of the Sherman Act (15 U.S.C. 2) is amended by—

  (1) striking "$10,000,000" and inserting "$100,000,000";

  (2) striking "$350,000" and inserting "$1,000,000"; and

  (3) striking "three" and inserting "10."

(c) Other Restraints of Trade.—Section 3 of the Sherman Act (15 U.S.C. 3) is amended by—

  (1) striking "$10,000,000" and inserting "$100,000,000";

  (2) striking "$350,000" and inserting "$1,000,000"; and

  (3) striking "three" and inserting "10."

Appendix B
Antitrust Modernization Commission Hearings

By Hearing Topic

Merger Enforcement (November 17, 2005)

Panel I—Assessment of U.S. Merger Enforcement Policy

William Baer, Arnold & Porter LLP, Washington, D.C.

James F. Rill, Howrey LLP, Washington, D.C.

David T. Scheffman, LECG, LLC, Washington, D.C.

Prof. Robert D. Willig, Competition Policy Associates (COMPASS), Princeton, New Jersey

Panel II—Treatment of Efficiencies in Merger Enforcement

Prof. Jonathan Baker, Washington College of Law, American University, Washington, D.C.

George S. Cary, Cleary Gottlieb Steen & Hamilton LLP, Washington, D.C.

Kenneth Heyer, U.S. Department of Justice, Antitrust Division, Washington, D.C.

Charles F. (Rick) Rule, Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C.

Michael Salinger, Federal Trade Commission, Bureau of Economics, Washington, D.C.

Panel III—Hart-Scott-Rodino Second Request Process

Wayne Dale Collins, Shearman & Sterling LLP, New York, New York & Washington, D.C.

Susan A. Creighton, Federal Trade Commission, Washington, D.C.

J. Robert Kramer, II, U.S. Department of Justice, Antitrust Division, Washington, D.C.

David P. Wales, Jr., Cadwalader, Wickersham & Taft, LLP, Washington, D.C.

Mark D. Whitener, General Electric Company, Washington, D.C.

Economists' Roundtable on Merger Enforcement (January 19, 2006)

Prof. Timothy F. Bresnahan, Stanford University, Stanford, California

Prof. Steven Neil Kaplan, University of Chicago Graduate School of Business, Chicago, Illinois

Prof. Peter C. Reiss, Graduate School of Business, Stanford University, Stanford, California

Prof. Daniel L. Rubinfeld, Boalt Hall School of Law, University of California at Berkeley, Berkeley, California

Prof. Lawrence J. White, Leonard N. Stern School of Business, New York University, New York, New York

Exclusionary Conduct (September 29, 2005)

Kenneth L. Glazer, Coca-Cola Co., Atlanta, Georgia

Prof. Timothy J. Muris, O'Melveny & Myers LLP, Washington, D.C.

R. Hewitt Pate, Hunton & Williams LLP, Washington, D.C.

Prof. Robert Pitofsky, Georgetown University Law Center, Washington, D.C.

M. Laurence Popofsky, Heller Ehrman LLP, San Francisco, California

Charles F. (Rick) Rule, Fried, Frank, Harris, Shriver & Jacobson LLP, Washington, D.C.

Prof. Steven C. Salop, Georgetown University Law Center, Washington, D.C.

Prof. Carl Shapiro, Haas School of Business, University of California at Berkeley, Berkeley, California

Willard K. Tom, Morgan, Lewis & Bockius LLP, Washington, D.C.

New Economy (November 8, 2005)

Panel I—Antitrust and the New Economy

Daniel Cooperman, Oracle Corporation, Redwood Shores, California

Prof. Richard J. Gilbert, University of California at Berkeley, Berkeley, California

M. Howard Morse, Drinker Biddle & Reath LLP, Washington, D.C.

James J. O'Connell, Jr., U.S. Department of Justice, Antitrust Division, Washington, D.C.

John E. Osborn, Cephalon, Inc., Frazer, Pennsylvania

Prof. Carl Shapiro, Haas School of Business, University of California at Berkeley, Berkeley, California

Panel II—Patent Law Reform

Susan DeSanti, Federal Trade Commission, Washington, D.C.

Peter Detkin, Intellectual Ventures, Bellevue, Washington

Prof. Mark A. Lemley, Stanford Law School, Stanford, California

Stephen A. Merrill, National Academies' Board on Science, Technology and Economic Policy (STEP), Washington, D.C.

Stephen M. Pinkos, United States Patent and Trademark Office, Alexandria, Virginia

Stephen A. Stack, Jr., Dechert LLP, Philadelphia, Pennsylvania

Federal Enforcement Institutions (November 3, 2005)

Panel I—Harmonizing FTC and DOJ Injunction Procedures

William Blumenthal, Federal Trade Commission, Washington, D.C.

Craig Conrath, U.S. Department of Justice, Antitrust Division, Washington, D.C.

Joe Sims, Jones Day, Washington, D.C.

Michael N. Sohn, Arnold & Porter LLP, Washington, D.C.

Panel II—The FTC-DOJ Clearance Process

Prof. Timothy J. Muris, O'Melveny & Myers LLP, Washington, D.C.

John M. Nannes, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, D.C.

Joe Sims, Jones Day, Washington, D.C.

Michael N. Sohn, Arnold & Porter LLP, Washington, D.C.

State Enforcement Institutions (October 26, 2005)

Prof. Michael E. DeBow, Cumberland School of Law, Samford University, Birmingham, Alabama

Prof. Harry First, New York University School of Law, New York, New York

Phillip A. Proger, Jones Day, Washington, D.C.

Hon. G. Steven Rowe, Attorney General, State of Maine, Augusta, Maine

International Antitrust (February 15, 2006)

James R. Atwood, Covington & Burling, San Francisco, California

Michael D. Blechman, Kaye Scholer LLP, New York, New York

Prof. Eleanor M. Fox, New York University School of Law, New York, New York

Gerald F. Masoudi, U.S. Department of Justice, Washington, D.C.

Randolph W. Tritell, Federal Trade Commission, Washington, D.C.

Civil Remedies (July 28, 2005)

Panel I—Damages Multiplier, Attorneys' Fees, and Prejudgment Interest

David Boies, Boies, Schiller & Flexner LLP, Armonk, New York

Prof. Edward Cavanagh, St. John's University School of Law, Jamaica, New York

Prof. Robert H. Lande, University of Baltimore School of Law, Baltimore, Maryland

Abbott (Tad) B. Lipsky, Latham & Watkins LLP, Washington, D.C.

Stephen D. Susman, Susman Godfrey LLP, Houston, Texas

Panel II—Joint & Several Liability, Contribution, and Claim Reduction

Lloyd Constantine, Constantine Cannon, PC, New York, New York

Hon. Frank H. Easterbrook, United States Court of Appeals for the Seventh Circuit, Chicago, Illinois

Michael D. Hausfeld, Cohen, Milstein, Hausfeld & Toll, PLLC, Washington, D.C.

Don T. Hibner, Jr., Sheppard, Mullin, Richter & Hampton LLP, Los Angeles, California

Harry M. Reasoner, Vinson & Elkins L.L.P., Houston, Texas

Indirect Purchaser Litigation (June 27, 2005)

Hon. Mark J. Bennett, Attorney General, State of Hawaii, Honolulu, Hawaii
Ellen Cooper, Maryland Attorney General's Office, Antitrust Division, Baltimore, Maryland
Jonathan W. Cuneo, Cuneo Waldman & Gilbert, LLP, Washington, D.C.
Michael L. Denger, Gibson, Dunn & Crutcher LLP, Washington, D.C.
Prof. Andrew I. Gavil, Howard University Law School, Washington, D.C.
Daniel E. Gustafson, Gustafson Gluek PLLC, Minneapolis, Minnesota
H. Laddie Montague, Jr., Berger & Montague, PC, Philadelphia, Pennsylvania
Richard M. Steuer, Mayer, Brown, Rowe & Maw LLP, New York, New York
David B. Tulchin, Sullivan & Cromwell LLP, New York, New York
Margaret M. Zwisler, Latham & Watkins LLP, Washington, D.C.

Government Civil Remedies (December 1, 2005)

Kevin J. Arquit, Simpson Thatcher & Bartlett LLP, New York, New York
Prof. Stephen Calkins, Wayne State University Law School, Detroit, Michigan
John D. Graubert, Federal Trade Commission, Washington, D.C.
Thomas B. Leary, Federal Trade Commission, Washington, D.C.

Criminal Remedies (November 3, 2005)

Scott D. Hammond, U.S. Department of Justice, Antitrust Division, Washington, D.C.
Anthony V. Nanni, Fried, Frank, Harris, Shriver & Jacobson LLP, Washington, D.C.
Tefft W. Smith, Kirkland & Ellis LLP, Washington, D.C., Chicago, Illinois
Charles R. Tetzlaff, U.S. Sentencing Commission, Washington, D.C.

Robinson-Patman Act (July 28, 2005)

J. H. Campbell, Jr., Associated Grocers, Inc., Baton Rouge, Louisiana
Professor Herbert Hovenkamp, The University of Iowa College of Law, Iowa City, Iowa
Harvey Saferstein, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo P.C., Santa Monica, California
Bruce V. Spiva, Tycko, Zavareei & Spiva LLP, Washington, D.C.

Statutory Immunities and Exemptions (December 1, 2005)

Alden F. Abbott, Federal Trade Commission, Washington, D.C.
Prof. Darren Bush, University of Houston Law Center, Houston, Texas
Prof. Peter C. Carstensen, University of Wisconsin Law School, Madison, Wisconsin
Gregory K. Leonard, National Economic Research Associates, Inc., San Francisco, California
James C. Miller III, CapAnalysis and Howrey LLP, Washington, D.C.
Prof. Stephen F. Ross, University of Illinois College of Law, Champaign, Illinois
John J. Sullivan, U.S. Department of Commerce, Washington, D.C.

McCarran-Ferguson Act (October 18, 2006)

Jay B. Angoff, Roger G. Brown & Associates, Jefferson City, Missouri

Julie L. Gackenbach, Confrere Strategies, Washington, D.C.

Michael T. McRaith, Illinois Department of Financial and Professional Regulation, Division of Insurance, Chicago, Illinois

Theodore Voorhees, Jr., Covington & Burling LLP, Washington, D.C.

J. Stephen Zielezienski, American Insurance Association, Washington, D.C.

Shipping Act (October 18, 2006)

Fabrizia Benini, Directorate General for Competition of the European Commission, Brussels, Belgium

Steven R. Blust, Federal Maritime Commission, Washington, D.C.

Jean Godwin, American Association of Port Authorities, Alexandria, Virginia

Edward Greenberg, Galland, Kharasch, Greenberg, Fellman & Swirsky, PC, Washington, D.C.

Prof. Chris Sagers, Cleveland-Marshall College of Law, Cleveland State University, Cleveland, Ohio

Stanley Sher, Sher & Blackwell, Washington, D.C.

Greg P. Stefflre, Rail Delivery Services, Inc., Fontana, California

State Action Doctrine (September 29, 2005)

John C. Christie, Jr., Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.

Robert M. Langer, Wiggin and Dana, Hartford, Connecticut

Maureen K. Ohlhausen, Federal Trade Commission, Washington, D.C.

Carlton A. Varner, Sheppard Mullin Richter & Hampton, Los Angeles, California

Regulated Industries (December 5, 2005)

Scott G. Alvarez, Board of Governors of the Federal Reserve System, Washington, D.C.

Raymond A. Atkins, Surface Board of Transportation, Washington, D.C.

Mark Cooper, Consumer Federation of America, Washington, D.C.

Harold Furchtgott-Roth, Furchtgott-Roth Economic Enterprises, Washington, D.C.

J. Bruce McDonald, U.S. Department of Justice, Antitrust Division, Washington, D.C.

Hon. Rob McKenna, Attorney General, State of Washington, Olympia, Washington

Diana L. Moss, American Antitrust Institute, Washington, D.C.

John Thorne, Verizon Communications, Arlington, Virginia

Barnett/Majoras (March 21, 2006)

Thomas O. Barnett, U.S. Department of Justice, Antitrust Division, Washington, D.C.

Deborah Platt Majoras, Federal Trade Commission, Washington, D.C.

By Witness

Alden F. Abbott (Statutory Immunities and Exemptions)
Scott G. Alvarez (Regulated Industries)
Jay Angoff (McCarran-Ferguson Act)
Kevin J. Arquit (Government Civil Remedies)
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William Baer (Merger Enforcement)
Prof. Jonathan Baker (Merger Enforcement)
Thomas O. Barnett (Barnett/Majoras)
Fabrizia Benini (Shipping Act)
Hon. Mark Bennett (Indirect Purchaser Litigation)
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Prof. Stephen F. Ross (Statutory Immunities and Exemptions)
Hon. G. Steven Rowe (State Enforcement Institutions)
Prof. Daniel L. Rubinfeld (Economists' Roundtable on Merger Enforcement)
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Prof. Carl Shapiro (New Economy)
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Tefft W. Smith (Criminal Remedies)
Michael N. Sohn (Federal Enforcement Institutions)
Bruce V. Spiva (Robinson-Patman Act)
Stephen A. Stack, Jr. (New Economy)
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Richard Steuer (Indirect Purchaser Litigation)
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David P. Wales, Jr. (Merger Enforcement)
Stephen D. Susman (Civil Remedies)
Charles R. Tetzlaff (Criminal Remedies)
John Thorne (Regulated Industries)
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Prof. Lawrence White (Economists' Roundtable on Merger Enforcement)
Mark D. Whitener (Merger Enforcement)
Prof. Robert D. Willig (Merger Enforcement)
J. Stephen Zielezienski (McCarran-Ferguson Act)
Margaret Zwisler (Indirect Purchaser Litigation)

Appendix C
Comments Received by the Antitrust Modernization Commission

COMMENTS ON ISSUES SELECTED FOR STUDY*

By Submitter

Alliance for Rail Competition et al. (July 15, 2005)
American Antitrust Institute, re Alternative Fines Statute (June 30, 2006)
American Antitrust Institute, re Civil Remedies (June 17, 2005)
American Antitrust Institute, re Consumer Welfare Standard (May 22, 2006)
American Antitrust Institute, re Contribution and Claim Reduction (Feb. 19, 2007)
American Antitrust Institute, re Enforcement Institutions (July 15, 2005)
American Antitrust Institute, re Exclusionary Conduct (July 15, 2005)
American Antitrust Institute, re Immunities and Exemptions (July 15, 2005)
American Antitrust Institute, re Indirect Purchaser Litigation (July 10, 2006)
American Antitrust Institute, re Indirect Purchaser Recommendation (Mar. 2, 2007)
American Antitrust Institute, re International Antitrust (July 15, 2005)
American Antitrust Institute, re Merger Enforcement (July 15, 2005)
American Antitrust Institute, re New Economy (July 15, 2005)
American Antitrust Institute, re Regulated Industries (July 15, 2005)
American Antitrust Institute, re Robinson-Patman Act (July 1, 2005)
American Antitrust Institute, re Sentencing Guidelines (Sept. 30, 2005)
American Bar Association, Section of Antitrust Law, re Alternative Fines Statute (June 30, 2006)
American Bar Association, Section of Antitrust Law, re Contribution and Claim Reduction (Dec. 5, 2005)
American Bar Association, Section of Antitrust Law, re Differential Merger Enforcement Standards (Oct. 28, 2005)
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Appendix D
Biographies

COMMISSIONERS

Deborah A. Garza, *Chair*

Deborah Garza is a partner in Fried, Frank, Harris, Shriver & Jacobson LLP's Washington, D.C., office. Previously, Ms. Garza was a partner at Covington & Burling, where she was an attorney from 1989 to 2001. Prior to that, she served in the Antitrust Division of the Department of Justice as Chief of Staff and Counselor, from 1988 to 1989, and as Special Assistant to the Assistant Attorney General for Antitrust from 1984 to 1985. Ms. Garza received her J.D. from the University of Chicago Law School in 1981. She received her B.S. from Northern Illinois University in 1978.

Jonathan R. Yarowsky, *Vice-Chair*

Jonathan Yarowsky is a partner in Patton Boggs LLP's Washington, D.C., office. Previously, Mr. Yarowsky served in a number of government positions. Most recently, he was Special Associate Counsel to President Clinton, responsible for advising the President on antitrust, telecommunications, and other matters, including judicial selection for the federal judiciary. Prior to that, he served for five years as General Counsel to the House Committee on the Judiciary, where he had supervisory responsibility for numerous subject matter areas. Mr. Yarowsky also served as Chief Counsel to the House Judiciary Subcommittee on Economic and Commercial Law, prior to assuming the position of General Counsel for the Full Committee. Mr. Yarowsky received his J.D. from U.C.L.A. Law School in 1977 and his A.B. from the University of Michigan in 1971. Mr. Yarowsky also holds an M.S. from Cornell University, which he received in 1974.

Bobby R. Burchfield, *Commissioner*

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Circular No. A-4

November 9, 2023

TO THE HEADS OF EXECUTIVE AGENCIES AND ESTABLISHMENTS

Subject: **Regulatory Analysis**

Circular No. A-4 provides the Office of Management and Budget's (OMB's) guidance to Federal agencies on the development of regulatory analysis as required under Section 6(a)(3)(C) of Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), as amended; the Regulatory Right-to-Know Act, Pub. L. 106–554, § 624, 114 Stat. 2763, 2763A–161 (2000) (codified as amended at 31 U.S.C. 1105 note); and a variety of related authorities. The Circular also provides guidance to agencies on the regulatory accounting statements that are required under the Regulatory Right-to-Know Act.

This Circular supersedes and rescinds the previous version of OMB Circular No. A-4, issued on September 17, 2003.

This update to Circular No. A-4 was subject to interagency review, public comment, and peer review. OMB is grateful for feedback from interagency reviewers, public commenters, and peer reviewers. OMB itself is solely responsible for the content of this Circular.

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1. Introduction

This Circular is designed to assist analysts in regulatory agencies by providing guidance on conducting high-quality and evidence-based regulatory analysis—referred to as either "regulatory analysis" or "analysis" in this Circular for brevity—and standardizing the way benefits and costs of Federal regulatory actions are measured and reported. Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review) requires agencies to conduct a regulatory analysis for regulatory actions that are significant as defined by Section 3(f)(1) of that Executive Order, as amended, and more generally to assess the benefits and costs of other significant actions.[1] These requirements apply to regulatory actions that rescind or modify existing regulations, as well as to new regulatory actions, and apply to the extent consistent with applicable law. This Circular is intended to aid agencies in their analysis of the benefits and costs of regulations, when such analysis is required, and when agencies undertake such analysis as a matter of discretion.

Analysts may find it useful to consult additional supporting information relevant to the materials in this Circular, contemporaneously published in a separate document by OMB, entitled *OMB Circular No. A-4: Explanation and Response to Public Input*.[2]

a. The Need for Analysis of Regulatory Actions

Regulatory analysis is a tool that regulatory agencies use to anticipate and evaluate the likely consequences of their regulatory actions. It provides a formal way of organizing the evidence on the key effects of the various alternatives that should be considered in developing regulations. A high-quality regulatory analysis is designed to inform policymakers, other government stakeholders, and the public about the effects of alternative actions. Regulatory analysis can help agencies in developing regulations by clarifying the likely effects of a regulation under consideration, and it is meant to inform the public about the anticipated consequences of government action (and alternatives).

Benefit-cost analysis is the primary analytical tool used for regulatory analysis. As stated in Section 1(a) of Executive Order 12866, "The Regulatory Philosophy":

> Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

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[1] Exec. Order No. 12866 of September 30, 1993, 58 Fed. Reg. 51,735 (Oct. 4, 1993). This requirement is reiterated and elaborated upon in Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review), 76 Fed. Reg. 3821 (Jan. 21, 2011) and Executive Order 14094 of April 6, 2023 (Modernizing Regulatory Review), 88 Fed. Reg. 21,879 (Apr. 11, 2023).

[2] Office of Management & Budget, *OMB Circular No. A-4: Explanation and Response to Public Input* (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4Explanation.pdf.

Section 1(b) of Executive Order 12866, "The Principles of Regulation," states that, to the extent permitted by law and where applicable, agencies "shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."

Benefit-cost analysis of a regulation and alternative regulatory approaches provides policymakers and the public with information about the important advantages and disadvantages of different courses of action. When all benefits and costs (including distributional impacts) can be quantified and expressed in monetary units, regulatory alternatives' monetized net benefits—the difference between the monetized benefits and the monetized costs—are an indication of the alternative, from the set of analyzed alternatives, that generates the largest welfare improvement to society. In practice, it is often difficult to quantify and express all of the important effects of a regulation in monetary units. When it is not possible to monetize all of the important benefits and costs, the alternative with the greatest monetized net benefits will not necessarily be the alternative that generates the greatest social welfare. It follows that, while monetized net benefits are an important guide for agencies deciding what course of action to pursue, regulatory analyses should encompass additional relevant factors; in particular, analyses should include any important non-monetized and unquantified effects. You should consider, as discussed below, how to be as specific as possible in presenting such non-monetized and unquantified effects.

Regulatory analysis, as described in this Circular, does not supplant any analytic or other requirements set out in the statutes that authorize or require agency action, though when appropriate, the regulatory analysis guided by this Circular may inform or be combined with other analytic requirements. The section "*Specialized Analytical Requirements*" discusses analytic requirements that may be relevant.

b. Developing a Regulatory Analysis

In general, key elements of a regulatory analysis include:

- identifying and evaluating the need for the regulatory action;
- defining the baseline;
- identifying a range of regulatory alternatives;
- assessing the benefits and costs of regulatory alternatives by:
    - gathering evidence relevant to the effects of the various alternatives;
    - quantitatively estimating or qualitatively describing the benefits and costs of each regulatory alternative; and
- summarizing the regulatory analysis.

There are detailed descriptions of each of these elements in the subsequent sections of this Circular (see the *Table of Contents* above for a list of sections). As you produce the elements of a regulatory analysis, you may gain additional insight that prompts refinement of previous work. These elements may be iterative, and some elements of the analysis should be repeated as you gain a deeper understanding of the relevant issues.

You will find that you cannot conduct a good regulatory analysis according to a formula. Conducting high-quality analysis requires competent professional judgment. Different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key modeling choices. A regulatory analysis should, all else equal, aim for specificity in identifying how the state of the world in the regulation's presence would differ from the state of the world in its absence. When there are data or methodology challenges, less-specific inputs—such as qualitative accounts or numerical ranges—are sometimes used; however, even when a relatively general approach was the best available in the past, it is appropriate to reconsider whether greater specificity could, given scientific advances, be practicable in the regulatory analysis currently being conducted. For example, it might be possible to quantify some effects that could not be quantified a decade earlier, and it might be possible to monetize some effects that could not be monetized a decade earlier.

You should aim for transparency about the key methods, data, and other analytical choices you make in your analysis.

As you design, execute, and write your regulatory analysis, you should, when feasible and appropriate, seek out the opinions of those who will be affected by the regulation as well as the views of those individuals and organizations who may not be affected but have special knowledge or insight into the regulatory issues.[3] For example, to better characterize a regulation's dignity, equity, or fairness effects, you should consider soliciting the perspectives of individuals likely to be affected by the regulation, drawing from their own experiences, on how the regulation may enhance or diminish dignity, equity, or fairness. Consultation can also be useful in ensuring that your analysis addresses all of the relevant issues and that you have access to all pertinent data. Early consultation can be especially helpful. You should not limit consultation to the final stages of your analytical efforts.

2. Analytical Approaches

Both benefit-cost analysis (BCA) and cost-effectiveness analysis (CEA) provide a systematic framework for identifying and evaluating the likely outcomes of alternative regulatory choices. When a regulatory analysis is required by Executive Order 12866, a BCA is generally the more informative of the two types of analysis, because it is a better way of capturing the effects of regulations on social welfare.

a. Benefit-Cost Analysis

A distinctive feature of BCA is that both benefits and costs are expressed in monetary units to the extent feasible, which allows you to evaluate different regulatory options with a variety of attributes using a common measure. By measuring incremental benefits and costs of successively more stringent regulatory alternatives, you can identify the alternative that maximizes net benefits.

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[3] Such consultations may be subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520, among other statutes.

The size of net benefits is the absolute difference between the projected benefits and costs. The ratio of benefits to costs is not a meaningful indicator of net benefits and should not be used for that purpose. Considering such ratios alone can yield misleading results, as such ratios do not clarify which alternative yields the greatest net benefits, and are sensitive to whether negative willingness to pay (WTP) or willingness to accept (WTA) valuations are subtracted from benefits or added to costs.[4]

When a benefit or cost cannot be expressed in monetary units, it is often informative to measure it in terms of physical or other quantitative units that may indicate the direction of welfare change. If it is not possible to estimate quantitatively, you should describe the benefit or cost qualitatively using the best methods available. For guidance on describing qualitative information, see the section "*Assessing Benefits and Costs*."

When important benefits and costs cannot be expressed in monetary units, relying on the monetized net benefits alone will be less useful, and can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs. In other words, a materially incomplete monetized BCA does not offer an adequate summary of the effects on social welfare or of the evidence intended to inform determination of the most net-beneficial alternative.

You should exercise professional judgment in identifying the importance of unquantified factors and assess, as best you can, how they might change the ranking of alternatives based on estimated net benefits. This discussion should also include a clear explanation that supports your determination that these unquantified factors are important. In this case, you may also consider conducting a threshold analysis to help decision makers and other users of the analysis to understand the potential significance of these factors to the overall analysis. For additional discussion, see the section "*Methods for Treating Non-Monetized Benefits and Costs*."

b. Cost-Effectiveness Analysis[5]

Cost-effectiveness analysis can provide a rigorous way to identify options that achieve the most effective use of a given amount of resources, without requiring monetization of all relevant benefits or costs. Generally, cost-effectiveness analysis is designed to compare a set of regulatory actions with the same primary outcome or multiple outcomes that can be integrated into a single meaningful numerical index (*e.g.*, units of health improvement).

A cost-effectiveness ratio is calculated by dividing a numerator of cost by a denominator of units of some effectiveness or performance measure to arrive at cost per unit of effectiveness or performance. The value of CEA is enhanced when there is consistency in the ratio across a diverse set of possible regulatory actions. To achieve consistency, you need to have the same two key components of any CEA: (1) the cost, and (2) the effectiveness or performance measures for

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[4] Anthony E. Boardman et al., *Cost-Benefit Analysis: Concepts and Practice*, 5th ed. (Cambridge: Cambridge University Press, 2018), 35.
[5] For a fuller discussion of CEA, *see* Peter J. Neumann et al., eds., *Cost-Effectiveness in Health and Medicine*, 2nd ed. (New York: Oxford University Press, 2016).

the alternative policy options.

With regard to measuring costs, you should be sure to include all the important costs to society, whether public or private, when feasible.[6] Regulations may also yield cost savings (*e.g.*, energy savings associated with new technologies). The numerator in a cost-effectiveness ratio should reflect net costs, defined as the gross cost incurred to comply with the requirements (sometimes called "total" costs) minus any cost savings. You should be careful to avoid double-counting effects in both the numerator and the denominator of cost-effectiveness ratios. For example, it would be incorrect to reduce gross costs by an estimated monetary value on life extension if life-years are already used as the effectiveness measure in the denominator.

In constructing measures of "effectiveness," final outcomes, such as injuries reduced, lives saved, or life-years saved, are preferred to measures of intermediate outputs, such as tons of pollution reduced, crashes avoided, or cases of disease avoided. When the quality of the measured unit varies (*e.g.*, acres of wetlands may vary substantially in terms of their ecological benefits), it is important that the measure capture the variability in the value of the selected "outcome" measure (*e.g.*, an index value that weights the quality of each acre). You should provide an explanation of your choice of effectiveness measure.

Cost-effectiveness ratios need to be treated with great care. They suffer from the same drawbacks as benefit-cost ratios. The alternative that exhibits the smallest cost-effectiveness ratio may not be the best option, just as the alternative with the highest benefit-cost ratio is not always the one that maximizes net benefits. Incremental cost-effectiveness analysis (discussed later in this section) can help to avoid mistakes that can occur when policy choices are based on average cost-effectiveness.

CEA can also be misleading when the "effectiveness" measure does not appropriately weight the consequences of the alternatives. For example, if effectiveness were measured in tons of reduced emissions encompassing multiple types of pollutants, cost-effectiveness estimates will be misleading unless each ton of reduced emissions of each pollutant results in the same health and environmental benefits. Such simplified effectiveness measures should generally be avoided.

When you have identified a range of alternatives (*e.g.*, different levels of stringency), you should determine the cost-effectiveness of each option compared with the baseline as well as its incremental cost-effectiveness compared with successively more stringent requirements. Ideally, your CEA would present an array of cost-effectiveness estimates that would allow comparison across alternatives. However, analyzing all possible combinations is not practical when there are many options (including possible interaction effects). In these cases, you should use your judgment to choose reasonable alternatives for careful consideration.

[6] Gillian D. Sanders et al., "Recommendations for Conduct, Methodological Practices, and Reporting of Cost-Effectiveness Analyses: Second Panel on Cost-Effectiveness in Health and Medicine," *JAMA* 316, no. 10 (2016): 1093-1103 and David D. Kim et al., "Perspective and Costing in Cost-Effectiveness Analysis, 1974–2018," *PharmacoEconomics* 38, no. 10 (2020): 1135-1145 warn about numerous inconsistencies in the published health and medical cost-effectiveness literature. For a database of this literature, *see,* "Cost-Effectiveness Analysis (CEA) Registry," Center for the Evaluation of Value and Risk in Health, https://cevr.tuftsmedicalcenter.org/databases/cea-registry.

When constructing and comparing incremental cost-effectiveness ratios, you should be careful to determine whether the various alternatives are mutually exclusive or whether they can be combined. If they can be combined, you should consider which alternatives might be favored under different regulatory budget constraints (implicit or explicit). You should also make sure that inferior alternatives identified by the principles of strong and weak dominance are eliminated from consideration.[7]

When regulation may yield several different beneficial outcomes, a cost-effectiveness comparison becomes more difficult to interpret because there is more than one measure of effectiveness to incorporate in the analysis. To arrive at a single measure, you will need to weight the value of disparate benefit categories, but this computation raises some of the same difficulties you will encounter in BCA. If you can assign a reasonable monetary value to all of the regulation's different benefits, then you should do so. But in this case, you will be doing BCA, not CEA.

When you can estimate the monetary value of some, but not all, of the benefits of a regulation, but cannot assign a monetary value to the primary measure of effectiveness, the appropriate approach is to subtract the monetary value of the estimated benefits from the gross cost estimate to yield an estimated net cost. (This net cost estimate for the regulation may turn out to be negative: that is, the monetized benefits exceed the cost of the regulation.) If you are unable to estimate the value of some of the benefits, the cost-effectiveness ratio (the net costs per unit of the outcome variable) will be overstated, and this should be acknowledged in your analysis. CEA does not yield an unambiguous choice when there are benefits or costs that have not been incorporated in the net-cost estimates. You also may choose to use CEA to compare regulatory alternatives in cases when the statute specifies the level of benefits to be achieved.

OMB does not require agencies to perform cost-effectiveness analysis. In fact, OMB encourages agencies to use BCA as the typically more informative analytical approach.

3. Scope of Analysis

a. Spatial Scope of Analysis

In many circumstances, your primary analysis should focus on the effects of a regulation that are experienced by citizens and residents[8] of the United States (which will often be the primary effects of the regulation). When feasible and appropriate, all such important effects should be included, regardless of whether they result from a regulation's domestic applicability, or from a regulation's impact on foreign entities. Effects on foreign entities may arise through markets (*e.g.*, regulatory costs incurred by foreign producers that affect U.S. consumers or

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[7] Peter J. Neumann et al., eds., *Cost-Effectiveness in Health and Medicine*, 2nd ed. (New York: Oxford University Press, 2016). An option strongly dominates another option if it is more effective and less costly; an option weakly dominates another option if it is more effective and equally costly, or equally effective and less costly.
[8] The term "citizen" in this Circular refers to a person who is a citizen or national of the United States. The term "residents" in this Circular includes all non-U.S. citizens who live in the United States.

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investors) or outside of markets (*e.g.*, changes in foreign ecosystem services[9] that affect U.S. citizens and residents but are not reflected in market transactions). Relevant effects also include the effects of a regulation on U.S. strategic interests, including the potential for inducing strategic reciprocity or other policy changes from actors abroad, or effects on U.S. government assets located abroad. Such effects are particularly likely to occur when your regulation bears on a global commons or a global public good.[10] In addition, relevant effects include those that occur entirely outside the United States when they affect U.S. citizens and residents, such as effects experienced by citizens residing abroad. These examples of relevant effects experienced by U.S. citizens and residents are not exhaustive, and appropriate care should be taken to identify all such important effects in your regulatory analysis. To better inform policymakers and the public of the effects of your regulation, it may be appropriate to also analyze effects on noncitizens residing abroad[11] in a supplementary analysis when your primary analysis focuses on the effects on U.S. citizens and residents.

In certain contexts, it may be particularly appropriate to include effects experienced by noncitizens residing abroad in your primary analysis. Such contexts include, for example, when:

- assessing effects on noncitizens residing abroad provides a useful proxy for effects on U.S. citizens and residents that are difficult to otherwise estimate;
- assessing effects on noncitizens residing abroad provides a useful proxy for effects on U.S. national interests that are not otherwise fully captured by effects experienced by particular U.S. citizens and residents (*e.g.*, national security interests, diplomatic interests, etc.);
- regulating an externality on the basis of its global effects supports a cooperative international approach to the regulation of the externality by potentially inducing other countries to follow suit or maintain existing efforts; or
- international or domestic legal obligations require or support a global calculation of regulatory effects.

When your primary analysis focuses on the global effects of the regulation, it is generally appropriate to produce a separate supplementary analysis of the effects experienced by U.S. citizens and residents, unless you determine that such effects cannot be separated in a practical and reasonably accurate manner in light of the factors detailed above.[12]

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[9] See the section "*Accounting for the Benefits and Costs from Environmental Services, Ecosystem Services, and Natural Capital*" regarding ecosystem services.
[10] See the section "*Externalities, Common Property Resources, Club Goods, and Public Goods*" for discussion of these concepts.
[11] The term "noncitizen" in this Circular refers to a person who is not a citizen or national of the United States. The phrase "noncitizens residing abroad," therefore, refers to those residing in countries other than the United States who are not U.S. citizens or nationals.
[12] For example, OMB determined in 2021, in its role as a co-chair of the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG), that the effects of changes in greenhouse gas emissions experienced by U.S. citizens and residents could not be separated from the global effects of changes in greenhouse gas emissions in a practical or reasonably accurate manner. At the time, OMB and the IWG noted available models could produce only an unreasonably incomplete underestimate of damages accruing to U.S. citizens and residents. OMB and the IWG recommended use of the IWG's global estimates of damages because—among other reasons—regulating greenhouse gas emissions on the basis of their global effects supports a cooperative international approach to the

You should be consistent in your treatment of noncitizens residing abroad in your benefit and cost estimates. If you include some effects experienced by such noncitizens in your primary analysis, consistency generally requires also including countervailing effects on noncitizens residing abroad in your primary analysis. For example, if benefits that are experienced by noncitizens residing abroad are included in your analysis, compliance costs borne by noncitizens residing abroad should generally be included in your analysis as well, and vice versa. Whatever decisions you make regarding the inclusion and exclusion of effects in your analysis, the basis for those decisions should be transparent and clear, and should focus on capturing the significant effects of a regulation. Similarly, you should be transparent about any data limitations or other sources of uncertainty regarding who will experience regulatory impacts.

You should recognize that regulatory effects on firms, nongovernmental organizations, or other similar entities ultimately accrue to those entities' individual consumers, owners of assets or liabilities, workers, program beneficiaries, and so forth, and those individuals may comprise a mix of U.S. citizens and residents and noncitizens residing abroad.[13] You should consider the principles above in determining how to appropriately include or exclude such effects. When it is too difficult in practice to separate such regulatory impacts—for example, effects on the foreign versus U.S. owners, customers, or employees of regulated firms may not be practical to separate—you should be consistent and transparent in whether and how important impacts to noncitizens residing abroad are included in your analysis.

Consistent with Executive Order 13609,[14] agencies often engage in international regulatory cooperation (IRC), which can include information exchange, work sharing, scientific collaboration, pilot programs, and alignment of regulatory requirements. IRC activities may aim to address or prevent unnecessary differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts that may unnecessarily impair economic growth, innovation, competitiveness, and job creation. In addition to the conditions above, inclusion of the foreign effects of a regulation in your primary analysis will often be appropriate when such analysis would help inform cooperative efforts with foreign regulators that aim to minimize

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regulation of greenhouse gas emissions by potentially inducing other countries to follow suit or maintain existing efforts, and the global estimates were a useful proxy for effects on U.S. citizens and residents that were difficult to estimate and for effects on U.S. national interests that were not otherwise fully captured. *See* Interagency Working Group on Social Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990* (February 2021), https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

[13] Unless it can be demonstrated using appropriate empirical evidence that regulatory costs imposed on foreign manufacturers or other producers will not be passed through to U.S. citizens or residents, a reasonable estimate of the portion of the costs that are passed through should be included in a primary regulatory analysis that focuses exclusively on effects that are experienced by U.S. citizens and residents. You should transparently present the total costs imposed abroad to clarify your estimate of the share of those costs that are passed through. Similarly, such an analysis should not exclude benefits to U.S. persons merely because they flow through foreign channels, but rather provide a reasonable estimate of the benefits that are passed through.

[14] Exec. Order No. 13609 of May 1, 2012 (Promoting International Regulatory Cooperation), 77 Fed. Reg. 26,413 (May 4, 2012).

unnecessary regulatory differences and meet shared challenges.[15] As noted below—see the section "*Showing Whether Regulation at the Federal Level Is the Best Way to Solve the Problem*"—you should, when required or otherwise appropriate, evaluate a regulation's effects on international trade. Changes to import and export volumes may be useful metrics that form part of your analysis, but changes in such volumes are not themselves welfare measures.

Finally, you should seek to ensure that you are providing informative analysis to policymakers and the public. For example, regulations may impose costs on international visitors entering the United States such as through pre-arrival out-of-pocket expenses (*e.g.*, fees for medical exams); screening or testing products or people prior to entry into the United States; or delay at the port of entry due to additional processing requirements. While the most directly affected individuals may include noncitizens residing abroad, you should still estimate and present the potential effects of the regulation on non-immigrant visa holders, and report these effects in your primary regulatory analysis to ensure that the regulatory analysis is informative.

b. Temporal Scope of Analysis

The time frame for your analysis should include a period before and after the date of compliance that is long enough to encompass all the important benefits and costs likely to result from the regulation.[16] A logical beginning point for your stream of estimates would be the year in which the regulation will begin to have effects, even if that is expected to be some time in the future.[17] The ending point for your analysis should be far enough in the future to encompass, to the extent feasible, all the important benefits and costs likely to result from all regulatory alternatives being assessed.[18] You generally should not, for example, end an analysis at a point before benefits or costs are likely to change in a way that could change the sign of the estimated net benefits, change the relative ranking of regulatory alternatives, or otherwise have effects relevant to the public or policymakers. If benefits or costs become more uncertain or harder to quantify over time, it does not follow that you should exclude such effects by artificially shortening your analytic time frame; instead, consult—as appropriate—the discussion in the section "*Treatment of Uncertainty*" or "*Accounting for Benefits and Costs that Are Difficult to Quantify or Monetize*."

[15] Regulatory Working Group, *Regulatory Working Group Guidelines: Executive Order 13609 "Promoting International Regulatory Cooperation"* (June 26, 2015), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/inforeg/inforeg/eo_13609/eo13609-working-group-guidelines.pdf; *see also* Administrative Conference of the United States, *Recommendation 2011-6: International Regulatory Cooperation*, 77 Fed. Reg. 2259 (Jan. 17, 2012), https://www.acus.gov/document/international-regulatory-cooperation (recommending that agencies document cost savings and regulatory benefits from mutual regulatory arrangements with foreign authorities).

[16] For example, when assessing the benefits of a regulation that could prevent a catastrophic event with some probability, it may be appropriate for you to consider not only the near-term effects of averting the catastrophic event on those who would be immediately affected, but also the long-run effects on others—including future generations—who would be affected by the catastrophic event.

[17] You may also choose to use a different starting date if you have compelling reasons to do so.

[18] For example, if an alternative would extend a regulation's compliance date to five years after issuance, the time horizon of the regulatory analysis should be meaningfully longer than five years, even if the regulation as proposed or finalized would have effects that are estimated to plateau before five years due to an earlier compliance date.

4. Developing an Analytic Baseline

The benefits and costs of a regulation are generally measured against a no-action baseline: an analytically reasonable forecast of the way the world would look absent the regulatory action being assessed, including any expected changes to current conditions over time. Such a forecast focuses on the issues or phenomena relevant to the effects of the regulation—for example, the number of foodborne illnesses, the level of emissions, the number of automobile crashes, or the availability of wheelchair-accessible facilities—that would most likely exist or occur without the regulation. This forecast should, to the extent feasible, be grounded in sound theories and empirical evidence about current conditions and ongoing and anticipated future trends in the areas of interest.[19]

The choice of appropriate baseline may require consideration of a wide range of potential factors, including:

- evolution of markets;
- changes in regulations promulgated by the agency or other government entities;
- other external factors affecting markets;
- the degree of compliance by regulated entities with other regulations; and
- the scale and number of entities or individuals that will be subject to, or experience the benefits or costs of, the regulation.

In some cases, it may be reasonable to forecast that the world absent the regulation will resemble the present. In other cases, particular attention should be paid to ways in which conditions will change absent the regulation—*e.g.*, technological advances, demographic changes, changes in the economy, or alterations to the climate—that will significantly affect the estimated effects of the regulation. Consulting with other Federal agencies that have specific data or models on such trends may be helpful.

If a harm addressed by a regulation is expected to become more severe over time, the baseline should reflect that trend. Thus, when calculating the effects of the regulation, your analysis would use a baseline in which the harm is becoming more severe. Depending on the specific circumstances, the use of this baseline may result in greater benefits (because the harm being addressed by the regulation is becoming more severe), greater costs (because larger investments may be required to address the increasing severity of the harm), or both. On the other hand, if a harm is expected to become less severe over time, your baseline should reflect that assessment as well. In either case, the use of an appropriate baseline—meaning one in which the severity of the harm changes over time in a manner consistent with a reasonable assessment of the future—could potentially yield substantially different estimates of the net benefits (or other impacts) of a regulation than a baseline in which the harm is assumed to remain at current levels.

Your baseline should reflect, when appropriate and feasible, the future effect of current

[19] The same data that are used to establish the analytic baseline are likely to be relevant to the regulatory analysis's discussion of the need(s) for Federal regulation; see the section "*Identifying the Potential Needs for Federal Regulatory Action*" for more details.

government programs and policies. More specifically, the baseline should attempt to reflect relevant final rules (especially if their requirements are being modified by the regulation under consideration) and proposed rules or other previously announced policy changes that the agency is reasonably certain will be finalized before the rule under consideration is finalized.[20] Agencies are encouraged to consider the likely paths of future government programs and policies when relevant and appropriate, either reflecting them in the primary or in a supplemental baseline (in either approach, carefully describe the ways in which the future government programs or policies may affect your analysis). The regulations and policies reflected in a primary baseline and any supplementary baselines at the final rule stage for a given rule typically will align with those reflected at the proposed rule stage, but the baseline may need to be adjusted if, for example, the finalization of a separate (but related) proposed rule has been unexpectedly delayed.[21] For guidance about incorporating the extent of compliance with earlier regulations in an analytic baseline, please see the section "*Accounting for Compliance and Take-up*" for more details.[22]

Regulatory analysis should assist policymakers in choosing among policy options available to the regulating agency at the time decisions are made and inform the public about the likely effects of the policies adopted. In general, an agency's first regulatory action implementing a new statutory authority should be assessed in a manner that accounts for the effects of the statute itself—that is, assessed against a without-statute baseline.[23] However, in some cases, substantial portions of a regulation may simply restate statutory requirements that are self-implementing even in the absence of the regulatory action or over which an agency clearly has essentially no regulatory discretion. In these rare cases, you may use a with-statute baseline in your regulatory analysis, focusing on the discretionary elements of the action and potential alternatives. Such an analysis should be accompanied by a brief description of (and citation to) the relevant statute. If you plan to use a with-statute baseline for a regulation, you should consult with OMB as early as possible in the process of developing your regulatory analysis, including about how to describe—in sufficient detail—the with-statute baseline that is being used.

When choosing an appropriate analytic baseline, analysts should generally consider: transparency, the goal of informing policy decisions, data availability, a general emphasis on

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[20] The effects of regulatory and other policy changes induced by the regulation under consideration should not be incorporated into your baseline. Furthermore, if two or more related regulations are issued in sequence, the most appropriate approach would generally be for the second regulation to account for the effects of the first regulation in its baseline. However, there may be exceptions to this general guidance if the first regulation induces the later regulatory or other policy changes. Please consult with OMB for more specific guidance in particular cases.
[21] It facilitates analysis of a subsequent final rule for the analysis of a proposed rule to include at least one baseline that omits other proposals. For example, if finalization of the relevant other proposals is delayed, then adjustments of the final rule's analysis to account for these circumstances may involve minimal effort if a proposal-excluding baseline can be carried forward from the preceding proposed rule.
[22] Updating assessments of compliance illustrates how analytic approaches—including choice of baseline—that serve the purpose of informing policy options at the time decisions are made do not universally lend themselves to aggregation of estimates across regulations over time.
[23] The terms "pre-statute baseline" and "post-statute baseline" were used in OMB Circular No. A-4 as originally issued in 2003. However, as noted elsewhere, the baseline for a regulatory analysis is (and has been) the predicted future state of the world in the absence of the policy being assessed, so more precise terms—that avoid the potentially misleading temporal element of the prefixes "pre-" or "post-"—without-statute or with-statute are now used.

empirical evidence, and the timing of interrelated policies. Several important points and illustrative cases are discussed below:

- An agency's regulation should generally be assessed in a manner that compares against a state of the world that accounts for any relevant previously issued regulations as though there has not been any intervening sub-regulatory action (*e.g.*, agency guidance). Attention should also be given to analysis that isolates meaningful changes relative to any such sub-regulatory action in a supplementary analysis. This dual-baseline approach allows for assessment relative to both a previous regulation and any subsequent guidance. Relatedly, the dual-baseline approach acknowledges the range of possible future behavior patterns by affected entities, which may not match what is observed at the time the regulatory analysis is conducted.
- Subsequent finalization of an interim final rule (IFR) should generally be assessed with at least two baselines: one with a state of the world that (hypothetically) lacks the IFR *and* one that includes the IFR (if the finalized rule differs from the IFR). In order to ensure an informative analysis, the former should be your primary baseline.[24] When appropriate, analysis of a subsequent finalization of an IFR could refer back to the analysis in the IFR for the first baseline, while also providing a new analysis that isolates changes relative to the IFR.
- If a recently finalized regulation is clarified, delayed, or otherwise revised or reversed by a new agency action, the primary baseline of the new action would be a baseline where the recently finalized regulation is issued as originally stated. In these cases, estimates from the earlier regulation's regulatory analysis are presumably readily available and, especially if the previous regulation is very recent, probably can be used to characterize that primary baseline in assessment of the new action. However, analysts are encouraged to update this analysis with an assessment that reflects newly available data or meaningful updates or changes in circumstances that affect the baseline.
- If a previous policy has been clarified, delayed, or otherwise revised by a new regulatory or sub-regulatory action, then among the factors needing careful accounting are costs and benefits associated with past compliance activity that have already been incurred. The analysis should carefully document costs that have been incurred, and cannot be recovered (and that may yield benefits), versus other types of costs.
- If a regulatory preamble states or implies that changes caused by a regulation will have large effects, but the regulatory analysis states that there will be minimal effects, it may be that the preamble and analysis are comparing the regulation to different baselines. If a given baseline is important enough to inform discussion in the preamble, then there should generally be consideration given to addressing it in the regulatory analysis as well.

The preceding discussion notes various circumstances in which multi-baseline analysis may be the most informative approach to assessing a policy's impacts. Even in multi-baseline analysis, benefits and costs must be compared to each other only when assessed relative to the same baseline.[25] Moreover, when an agency considers one category of impact (benefits or costs) to be appropriately assessed relative to a particular baseline, the other types of impacts should

[24] Consistent with the next bullet point, the primary baseline of the *rescission* of an IFR should be a baseline that includes changes relative to a state of the world in which the IFR remains in place.
[25] Assessment of policy alternatives should also be presented relative to a consistent baseline.

also receive analytic attention relative to that same baseline. You may also consider exploring, in sensitivity analyses, the reasonableness of the baselines used. For each baseline you use, it is helpful to identify the key uncertainties in your forecast. Regardless of the number of baselines used in the analysis, presentation of effects without transparent characterization of the relevant baseline(s) is generally not appropriate.

Uncertainty about outcomes in the baseline and uncertainty about outcomes in a regulatory alternative both contribute to uncertainty about the relative magnitude of benefits and costs. See the section "*Treatment of Uncertainty*" for more information on accounting for uncertainty (for example, that section's guidance might facilitate the use of expert elicitation as a tool to address uncertainty in long-term baseline conditions). Discussing uncertainty in the baseline is particularly important when it informs uncertainty about a regulation's net benefits. Baseline-related uncertainty may be less analytically important in cases in which a source of uncertainty will affect outcomes in both the baseline and the regulatory alternatives equally, and thus have little effect on the difference between the two.

5. Identifying the Potential Needs for Federal Regulatory Action

Section 1(a) of Executive Order 12866, "The Regulatory Philosophy," states that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people." Section 1(b), "The Principles of Regulation," further provides that each agency, as applicable and permitted by law: "shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem."

Section 6(a)(3)(B)(i) of Executive Order 12866 requires agencies to provide OMB's Office of Information and Regulatory Affairs (OIRA) with "text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need," in addition to the required assessments and analyses of benefits and costs. It is helpful for agencies to describe the need for action in their regulatory preambles. In addition, including a summary in regulatory analyses of the needs being addressed may provide useful background and help ensure that the description of the needs informs the scope of the analyses (and vice versa) to the extent relevant, appropriate, and consistent with the best available evidence and best practices for objective analysis.

Regardless of its nature, you should generally describe the potential need for a regulation qualitatively and (when applicable) quantitatively. It is important to analyze any potential need before determining that it is present and relevant in your particular regulatory context. Your analysis of the effects of the regulation should not presuppose that there is a need for the regulation, and your analysis of the potential need for the regulation should not presuppose the effectiveness of your regulation.

Modeling underlying market, institutional, or behavioral distortions is a standard starting point for conducting benefit-cost analysis of a regulatory action or other government intervention,[26] but these concepts do not capture all the underlying circumstances that may spur regulatory action. Common needs for regulation include, but are not limited to:

- correcting market failure, which may implicate externalities, common property resources, public goods, club goods, market power, and imperfect or asymmetric information;
- addressing behavioral biases;
- improving government operations and service delivery;
- promoting distributional fairness and advancing equity; and
- protecting civil rights and civil liberties or advancing democratic values.

A regulation can be needed for multiple interconnected reasons, several distinct reasons, or one primary reason. For example, regulations that address a market failure may also promote distributional fairness. Regardless of the particular reasons for the regulation, all regulations can benefit from evidence-based qualitative and (when applicable) quantitative analysis of their effects. Identifying the potential need or needs for regulation is not about "checking a box" to confirm there is at least one need; for example, if an agency identifies that a regulation is necessary to implement or interpret a statute, that does not end the inquiry. Instead, analysts should conduct reasonable inquiries to identify any relevant potential needs for regulatory action—such as correcting a market failure—because doing so may inform the analysis of important categories of benefits and costs.

a. Potential Needs that Federal Regulatory Actions Commonly Address

i. Externalities, Common Property Resources, Club Goods, and Public Goods

An externality can occur when one party's actions impose uncompensated benefits or costs on another party.[27] Environmental problems are a classic case of externalities. For example, the emissions from a factory may adversely affect the health of local residents while soiling the property in nearby neighborhoods; an externality exists because the marginal cost of producing the goods at the factory does not account for these effects, enabling the factory to sell its goods at a lower price. In theory, if bargaining were costless and all property rights were well defined, fully informed people could eliminate externalities through bargaining without the need for government regulation.[28] From this perspective, externalities can arise from high transaction costs or poorly-defined/costly-to-enforce property rights that prevent people from reaching efficient outcomes through bargaining.

Externalities are related to the concepts of common pool resources (resources that are rivalrous and non-excludable), club goods (which are non-rivalrous and excludable), and public goods (which are non-rivalrous and non-excludable). A good is non-rivalrous if there is no

[26] Richard E. Just, Darrell L. Hueth, and Andrew Schmitz, *The Welfare Analysis of Public Policy: A Practical Approach to Project and Policy Evaluation* (Cheltenham, UK: Edward Elgar, 2004).
[27] *See* Hal R. Varian, *Intermediate Microeconomics: A Modern Approach*, 9th ed. (New York: W. W. Norton & Company, 2014), 663-685.
[28] *See* Ronald H. Coase, "The Problem of Social Cost," *Journal of Law & Economics* 3 (1960): 1-44.

marginal cost to also providing it to another individual. A good is non-excludable if the provision of the good to some individuals cannot occur without providing the same amount of goods to other individuals, free of charge. Common pool resources, such as many fisheries or the broadcast spectrum, may become congested or overused. Public goods, such as defense or basic scientific research, by contrast, do not generally suffer from congestion problems, but may be underprovided because their benefits fall on a large number of people while their costs often fall only on a few.[29] Externalities can also be associated with positional goods, which can exist if any increase in the relative position of one person lowers the relative position of others (and vice versa),[30] or network benefits, which can exist when a greater degree of adoption and standardization in the use of a good or service increases the value of a good or service for all users. For example, network benefits are generally realized when there is standardization of which side of the road cars drive on, of the gauge of railroad tracks, or of weights and measures used in commerce. Regulatory benefits and costs should reflect relevant positive and negative externalities and the extent to which they interact with the regulation being analyzed, regardless of the form those externalities take.

ii. Market Power

A firm or group of firms has market power as a seller ("monopoly power" or "oligopoly power") when it can influence or determine the price at which it sells its goods and services; analogously, a firm or group of firms has market power as a purchaser ("monopsony power" or "oligopsony power") when it can influence or determine the wages or other prices paid for goods and services it buys. Firms may also have market power that manifests in non-price ways, such as the ability to decrease product quality, restrict the range of products available to consumers, worsen wage or non-wage attributes of employee positions, or disproportionately influence the terms of service available to consumers, workers, or other firms. Firms may be able to exercise greater market power on those who are in more disadvantaged and vulnerable communities or groups.[31] Firms may exercise market power collectively or unilaterally. Government action can facilitate market power, such as when regulatory actions exclude lower-cost imports. More generally, market power may arise from a variety of sources, including but not limited to barriers to entry for competitors, economies of scale, control of inherently scarce resources, intellectual property protections, privileged access to infrastructure, control over commercial platforms or networks, unlawful exclusionary conduct, and monopoly access to detailed consumer data.

There are limited circumstances in which government may choose to grant a monopoly in a market and regulate the monopolist. If a market can be served at lowest cost only when production is limited to a single producer—historically, local gas and electricity distribution

[29] There may be instances when your regulation provides information that is a public good and addresses incomplete/imperfect or asymmetric information, which is discussed below. For example, regulations requiring public disclosure of information may both provide a public good and alter transactions that would have otherwise been characterized by asymmetric information. When discussing the potential need for your regulation in such cases, your discussion of market failures should be inclusive, addressing these different reasons for regulation together.
[30] *See* Robert H. Frank, "Positional Externalities Cause Large and Preventable Welfare Losses," *American Economic Review* 95, no. 2 (2005): 137-141.
[31] *See, e.g.*, Caitlin Knowles Myers et al., "Retail Redlining: Are Gasoline Prices Higher in Poor and Minority Neighborhoods?," *Economic Inquiry* 49, no. 3 (2011): 795-809; Jennifer L. Doleac and Luke C.D. Stein, "The Visible Hand: Race and Online Market Outcomes," *Economic Journal* 123, no. 572 (2013): F469-F492.

services have been examples—a natural monopoly is said to exist. In such cases, the government may choose to grant a monopoly and regulate prices or production decisions.

Analyses should reflect that technological advances often affect economies of scale. As a result, technological advances may transform what was once considered a natural monopoly into a market where competition can flourish. Alternatively, technological advances can transform what was once considered a competitive market into a monopolistic or monopsonistic one. Please see the section "*Accounting for the Effects of Market Power*" for further discussion of related analytic issues.

iii. Asymmetric or Imperfect Information

Asymmetric information exists when one party in a transaction has more information than the other, which can result in a market failure. Asymmetric information provides an advantage to one side of a market over the other when negotiating a transaction. Asymmetric information can also worsen inefficient dynamics that may exist between principals and their agents (principal-agent problems). Imperfect information exists when buyers and sellers do not have all of the necessary information to make an informed decision about the transaction. Imperfect information may lead to inefficient markets.

Asymmetric and imperfect information can be common features of markets. However, although the market may supply less than the full amount of information, the amount it does supply may be reasonably adequate in light of the marginal benefits and costs of producing more information, and therefore may not require government regulation. Sellers often have an incentive to provide information through advertising that can increase sales by highlighting distinctive characteristics of their products. Buyers may also acquire reasonably adequate information about product characteristics through other channels, such as a seller offering a warranty or a third party providing information. Nonetheless, absent government regulation, imperfect or asymmetric information substantially affects important sectors of the economy, such as the agricultural, insurance, consumer credit, healthcare, and real estate markets.[32] Imperfect information can be relevant to game-theoretic modeling of interactions between market participants,[33] and should be given consideration when performing such modeling as part of a regulatory analysis.

iv. Behavioral Biases

Behavioral biases can be categorized in two groups: limitations on information processing and decision-making biases.[34]

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[32] *See, e.g.*, Liran Einav, Amy Finkelstein, and Paul Schrimpf, "Optimal Mandates and the Welfare Cost of Asymmetric Information: Evidence from the U.K. Annuity Market," *Econometrica* 78, no. 3 (2010): 1031-1092; Liran Einav, Mark Jenkins, and Jonathan Levin, "Contract Pricing in Consumer Credit Markets," *Econometrica* 80, no. 4 (July 2012): 1387-1432; Pablo Kurlat and Johannes Stroebel, "Testing for Information Asymmetries in Real Estate Markets," *Review of Financial Studies* 28, no. 8 (2015): 2429-2461.
[33] Robert Gibbons, *Game Theory for Applied Economists* (Princeton: Princeton University Press, 1992).
[34] *See* Richard H. Thaler, "Behavioral Economics: Past, Present, and Future," *American Economic Review* 106, no. 7 (2016): 1592-94 (distinguishing between "behavioral beliefs" and "behavioral preferences").

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Because of limited capacity to process information, even when adequate information is available, people can make systematic mistakes; limited attention, focus, and time can lead to the use of heuristics (rules of thumb). These heuristics may or may not be reasonable at the level of individual decision-making, but they can produce serious errors. If, for example, people have a clear mental image of an event (which makes it cognitively "available," or vivid and salient), they might overstate the probability that such an event will occur (*e.g.*, the risk of airplane travel may be overestimated following an airplane crash due to intense media coverage). This is an example of the use of a well-known heuristic, the availability heuristic, which might lead to availability bias.[35] Such heuristics can lead to inefficient outcomes when they produce systematic errors.

People also exhibit various decision-making biases,[36] such as those stemming from framing effects, anchoring effects, loss aversion, present bias, unrealistic optimism, inertia, and a preference for the status quo.[37] Another sort of decision-making bias stems from challenges like imperfect self-control. When individuals exhibit imperfect self-control, they make a decision that increases short-term well-being by less than it decreases future well-being (appropriately discounted; see the section "*Discount Rates*" for more information). Imperfect self-control is often associated with present bias.

Unlike most of the types of market or public institution failure[38] discussed in this section, accounting for behavioral biases requires a departure from an assumption that typically underlies regulatory analyses conducted in accordance with this Circular: that individuals optimize their own lifetime well-being subject to budget and other relevant constraints.[39] You should carefully consider the degree to which the evidence available indicates that behavior reflects fully rational preferences and the degree to which it indicates that such behavior is the product of a behavioral bias observed in, or applicable to, the specific regulatory context.[40] When you have gathered evidence that the latter is the case—for example, studies demonstrating private undervaluation or overvaluation of relevant consumer products—that evidence will likely provide a key input in your quantification of regulatory net benefits.

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[35] Amos Tversky and Daniel Kahneman, "Availability: A Heuristic for Judging Frequency and Probability," *Cognitive Psychology* 5, no. 2 (1973): 207-232.

[36] Such biases may result from internalities: uncompensated harms that people impose on their future selves. The concept of internalities was adapted from the canonical market failure of externalities, with a consumer's future self as the third-party on whom direct parties to a transaction (including the consumer's current self) impose costs. As with externalities' interpersonal effects, internalities can reduce intrapersonal welfare when the present value of a harm to one's future self exceeds the value of the benefits to one's present self. David L. Weimer, *Behavioral Economics for Cost-Benefit Analysis: Benefit Validity When Sovereign Consumers Seem to Make Mistakes* (Cambridge: Cambridge University Press, 2017); Raj Chetty, "Behavioral Economics and Public Policy: A Pragmatic Perspective," *American Economic Review* 105, no. 5 (2015): 1-33.

[37] Thomas Gilovich, Dale Griffin, and Daniel Kahneman, eds., *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge: Cambridge University Press, 2002).

[38] See the section "*Improving Government Operations and Service Delivery*."

[39] As discussed in the section "*The Key Concepts Needed To Estimate Benefits and Costs*," internalities can also affect the interpretation of willingness to pay and willingness to accept evidence.

[40] Lisa A. Robinson and James K. Hammitt, "Behavioral Economics and the Conduct of Benefit-Cost Analysis: Towards Principles and Standards," *Journal of Benefit-Cost Analysis* 2, no. 2 (2011).

v. Improving Government Operations and Service Delivery

Regulations are necessary for the day-to-day functioning of government and can also help promote a government that operates more smoothly, is more transparent, and delivers public services more efficiently. For example, a regulation may further effective government operations by setting performance criteria that government must follow. Regulations can also help government deliver services to more individuals at lower cost, such as by reducing administrative burdens or by simplifying public-facing or internal processes. When any public institution could take action to reduce costs without proportionately reducing the quantity or quality of services it provides, or improve the quantity or quality of services it provides without proportionately increasing costs, the fact that such an action has not been taken can be referred to as a failure of public institutions.

vi. Promoting Distributional Fairness and Advancing Equity

Regulations can play a key role in promoting distributional fairness and advancing equity. Such regulations are sometimes issued pursuant to statutes that reflect congressional determinations that advancing these goals serves a compelling public need. For example, some statutes create social welfare programs, such as Medicaid or the Supplemental Nutrition Assistance Program. Congress has enlisted agencies to implement these programs, including through agency regulations addressing who is eligible for program benefits and what sorts of benefits they may receive under various circumstances.

vii. Protecting Civil Rights and Civil Liberties or Advancing Democratic Values

Government plays a key role in protecting civil rights and civil liberties and in safeguarding democratic institutions. Regulations can protect free exercise of religion, secure due process rights, and promote personal freedom and dignity. Regulations can prevent discrimination by public or private actors. Regulations can also protect privacy, by ensuring that government and private entities that lawfully collect, maintain, and use large amounts of personal information do so in a way that protects and promotes individual privacy.

b. Integrating Assessments of Potential Needs for Federal Regulatory Action into the Regulatory Analysis

Observing the mere possibility of market failure, failure of public institutions, or behavioral biases is only an initial step in your analysis; you should consider the likelihood of various explanations for why the phenomenon under consideration occurs, and tailor your regulatory analysis accordingly. Ideally, to the extent feasible, you should quantify the extent of any relevant market failure, failure of public institutions, or behavioral bias, with the resulting estimates integrated into your regulatory analysis. You could also integrate estimates of distributional effects into your analysis, as explored in the section "*Distributional Effects*" below. Quantitative (or qualitative) assessments of other potential needs for regulation can also be used as inputs to benefit-cost analysis or cost-effectiveness analysis.

As various portions of a regulatory analysis are developed, there should be a continual assessment of whether the analysis as a whole achieves internal consistency. For example, if a market failure, failure of public institutions, or behavioral bias cannot be identified, then an estimate of positive monetized net benefits may be the result of missing cost categories, inappropriate methods or data, or implausible assumptions.[41] If negative net benefits are estimated after accounting for all important monetized and non-monetized effects, then the size of the identified market failure, failure of public institutions, or behavioral biases or the degree to which the regulation addresses those phenomena may need to be qualified. More generally, if the analysis identifies categories of benefits or costs beyond those implicated by the potential need(s) for regulation as originally articulated, the relationship between those effects and another market failure, failure of public institutions, or behavioral bias that the regulation addresses is something that you should endeavor to describe.

c. Showing Whether Federal Regulation Is the Best Way to Solve the Problem

It can be informative to consider other policy actions in addition to, or instead of, Federal regulation. Alternatives to Federal regulation that may be appropriate in certain contexts, or analytically informative even when not feasible as policy options, include antitrust enforcement, consumer-initiated litigation in the product liability system, reframing programmatic context to induce behavior change, or administrative compensation systems. These other approaches will sometimes be a means of securing some of the benefits of regulation. In many contexts, however, these alternatives will not be available at all or, even if they are available, they will not be as efficient or as effective as Federal regulatory means of obtaining the relevant benefits.

In assessing whether Federal regulation is the best approach, it is also helpful to consider, when relevant, whether State, local, territorial, or Tribal governments are well-positioned to address the issue and whether they are acting to do so. In some cases, the relevant need for regulatory action may suggest the most appropriate governmental level of regulation. For example, problems that spill across State lines (such as acid rain, whose precursors are transported widely in the atmosphere) are probably best addressed by Federal regulation. More localized problems, including those that are common to many areas, may be better addressed locally, provided State, local, territorial, or Tribal authorities are able to do so and are effectively acting to address the relevant problem. Importantly, the fact that State, local, territorial, or Tribal authorities are empowered to address an issue does not mean that they are likely to do so effectively, universally, or at all. If State, local, territorial, or Tribal governments are failing to appropriately address a problem, analysis may indicate that Federal action is the best approach.

Generally, there are advantages and disadvantages to regulating at different levels of government. If preferences differ by region, those differences can be reflected in varying State, local, territorial, and Tribal regulatory policies. Moreover, States, localities, territories, and Tribal lands can serve as a testing ground for experimentation with alternative regulatory policies. One State can learn from another's experience while local jurisdictions may compete with each other to establish the best regulatory policies. The opposite is also possible: jurisdictions may compete in "races to the bottom," and this is of particular concern when

[41] This may not be the case if an agency that is interested in accounting for diminishing marginal utility weights benefits and costs by, for example, income; see the section "*Distributional Effects*" for more details.

activities conducted in one State or locality impose externalities on the residents of other States or localities.

Though a diversity of regulations may generate gains for the public, duplicative regulations can also be costly. The local benefits of State regulation may not justify the aggregate costs of a fragmented, inconsistent, or patchwork regulatory system, especially for regulated entities that operate or conduct commerce across multiple jurisdictions. For example, the increased compliance costs for firms to meet different State, local, territorial, and Tribal regulations may exceed any advantages associated with the diversity of State, local, territorial, and Tribal regulation. Your analysis should consider, in light of the factors above, the advantages and disadvantages of regulatory alternatives that reduce or expand State and local regulation (if such alternatives are legally available).

When feasible and appropriate, the role of Federal regulation in facilitating U.S. participation in global markets and diplomatic agreements should also be considered. Many societal concerns cannot be fully addressed through the regulatory actions of one country. Differences between the U.S. regulatory approach and those of foreign governments, though sometimes necessary, might impair the ability of American businesses to export and compete internationally. Concerns that new U.S. regulations could act as non-tariff barriers to imported goods should be evaluated carefully. Efforts to align or harmonize U.S. and international regulations may require a strong Federal regulatory role.

6. Alternative Regulatory Approaches

You should consider reasonable regulatory alternatives deserving careful analysis. In approaching the assessment of alternative regulatory approaches, you ordinarily will be able to eliminate some alternatives through a preliminary analysis, leaving a manageable number of alternatives to be evaluated according to the principles of Executive Orders 12866 and 13563.

The number and choice of alternatives selected for detailed analysis is a matter of judgment. There must be some balance between thoroughness and practical limits, such as the limits on your analytical capacity. With this qualification in mind, it is generally informative to explore modifications of some or all of a regulation's key individual attributes or provisions to identify appropriate alternatives. When feasible and appropriate, you should analyze at least three options for each key attribute or provision, including: the proposed or finalized option; at least one option that achieves additional benefits (and presumably costs more due to, for example, greater stringency); and at least one option that costs less (and presumably generates fewer benefits due to, for example, less stringency).[42] An attribute or provision is key if the choice among alternatives has substantial implications for the welfare effects of the rule.

If a regulation includes a number of distinct provisions, you should analyze the benefits and costs of alternatives to key individual provisions separately, when feasible and appropriate. If the existence of one provision affects the benefits or costs arising from another provision, the

[42] The less-costly regulatory alternative should be a policy option other than agency inaction. The anticipated state of the world in the absence of agency action restates the analytic baseline, and thus its inclusion in the alternatives assessment would not serve the goal of increasing the informational content of the overall regulatory analysis.

analysis becomes more complicated, but it is important to examine provisions separately to the extent feasible and appropriate. In such a case, you should evaluate each specific provision by determining the net benefits of the proposed regulation with and without it.

As noted at the outset of this section, it is usually not sufficiently informative simply to report a comparison of the agency's proposed or finalized option to the analytic baseline(s). When reporting the benefits and costs of alternative options, consider presenting both total and incremental benefits and costs between alternatives.[43] If doing so, you should present incremental benefits and costs as differences from the corresponding estimates associated with the next less-stringent alternative.[44] It is important to emphasize that incremental effects are usually simply differences between successively more stringent alternatives. For alternatives that cannot be ordered by stringency, this type of comparison may not be possible.

Analyzing all possible combinations of provisions is impractical if the number of provisions is large and interaction effects are widespread. You need to use judgment to select the most significant or relevant provisions for such analysis. Some regulatory alternatives may merit relatively formal assessment because they provide richer insights into evidence, models, or other analysis details than might be available from a sole focus on the regulatory approach being proposed or finalized. You are expected to document all of the alternatives that were assessed in a list or table and note which were selected for emphasis in the main analysis.

Different alternatives may also have different distributional effects; some alternatives may change distributional effects even without significantly changing stringency. When the distributional effects of your regulation merit specific attention, it may be worthwhile to consider preliminarily analyzing regulatory alternatives that may have important differences in distributional effects. See the section "*Distributional Effects*" for details regarding identifying relevant groups and approaches to analyzing distributional effects.

The following subsections list regulatory alternatives that may warrant analysis, as feasible and appropriate.

a. Different Choices Defined or Identified by Statute

When a statute establishes a specific regulatory requirement or requires an agency to periodically consider updating a regulation, it is generally helpful for the agency to also consider whether to add discretionary provisions (such as increasing stringency above the minimum set by statute or by existing regulations). When considering such discretionary provisions, you should examine the benefits and costs of reasonable alternatives that reflect the range of the agency's statutory discretion, including the specific statutory requirement.

If legal or other constraints prevent the selection of a regulatory action that best satisfies

[43] See the section "*Presentation of Results and Accounting Statement*" on how to clearly present incremental benefits and costs between alternatives.
[44] For the least stringent alternative, you should estimate the incremental benefits and costs relative to the baseline. Thus, for this alternative, the incremental effects would be the same as the corresponding totals.

the philosophy and principles of Executive Orders 12866,[45] you may consider identifying these constraints and estimating their opportunity cost (and effects more generally). Such information may, for example, be useful to Congress under the Regulatory Right-to-Know Act or in considering statutory reforms.

b. Different Compliance Dates

The compliance dates of a regulation may have an important effect on its net benefits. Benefits may vary significantly with different compliance dates when a delay in implementation may result in a substantial loss in future benefits (*e.g.*, a delay in implementation could result in a significant reduction in spawning stock and jeopardize a fishery); any reduction in benefits should be assessed against any reduction in costs from the delay. Similarly, the cost of a regulation may vary substantially with different compliance dates for an industry that requires a year or more to plan its production runs. In this example, a regulation that provides sufficient lead time is likely to achieve its goals at a much lower overall cost than a regulation that is effective immediately; that reduction in cost should be assessed against any reduction in benefits from the delay.

c. Different Methods to Ensure Compliance

There are many options for designing regulations so that compliance, and the potential benefits and costs, are far more likely to occur. For example, third-party reporting increases compliance with tax regulations, and establishing default values that will be attributed to the regulated party when it does not submit required reports creates an incentive for greater compliance.[46]

Enforcement also facilitates compliance. Federal, State, or local enforcement can include on-site inspections, periodic reporting, and noncompliance penalties structured to provide the most appropriate incentives. When alternative monitoring and reporting methods vary in their benefits and costs, you should gather evidence relevant to identifying the most appropriate method for ensuring compliance. Advances in monitoring technology should be considered in setting monitoring standards. Regarding analysis of differing levels of compliance, see the section "*Accounting for Compliance and Take-up*."

d. Different Degrees of Stringency

In general, both the benefits and costs associated with a regulation will increase with the level of stringency (although marginal costs generally increase with stringency, whereas marginal benefits may decrease). It is informative to study alternative levels of stringency to understand more fully the relationship between stringency and the size and distribution of benefits and costs among different groups. As noted previously, it may be appropriate to compare the proposed alternative to one that is less stringent and to one that is more stringent.

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[45] As reaffirmed and elaborated upon in Executive Orders 13563 and 14094.
[46] *See* Cynthia Giles, *Next Generation Compliance: Environmental Regulation for the Modern Era* (Oxford: Oxford University Press, 2022).

e. Different Requirements for Different-Sized Entities

You should consider assessing different requirements for large and small firms (or other entities), basing the requirements on estimated differences in the anticipated costs of compliance and in the anticipated benefits. Benefits and costs can differ depending on the size of the firms being regulated. Small firms may find it more costly to comply with regulation, especially if there are large fixed costs required for compliance. This can potentially lead small firms to exit the market, resulting in reduced competition in some markets. On the other hand, it is not necessarily efficient to place a heavier burden on one segment of a regulated industry solely because it can better afford the higher cost. This has the potential to load costs on the most productive firms, which may be disproportionate to the marginal harms those firms' actions cause. Size-based requirements may also induce strategic responses in firms[47]; these responses should be carefully analyzed.[48]

f. Different Requirements for Different Geographic Regions

Where there are significant regional variations in benefits or costs, you should consider assessing the consequences of setting different requirements for the different regions. Assuming that all regions of the country benefit uniformly from a regulation is possibly an oversimplification, as is assuming that costs are uniformly distributed across the country.

g. Pilot Projects, Data Collection, and Learning Through Variation

If it is difficult to determine which regulatory alternative is the optimal choice, and if timing and other circumstances allow, consider analyzing the alternative of developing one or more pilot projects to test the measures under consideration. Other design alternatives that may help agencies evaluate the costs and benefits of potential regulatory measures—when feasible and appropriate—include varying geographic and temporal requirements; allowing variation in local implementation; setting thresholds to facilitate comparison of entities above and below such thresholds; and creating waiver or exemption conditions, among other options.[49]

More generally, agencies may consider the benefits and costs of regulatory alternatives that would facilitate data collection to support future analyses or retrospective review. These alternatives may be especially valuable if there are significant uncertainties about benefits or costs, or if benefits or costs may change over time. See "*Treatment of Uncertainty*" for more details on addressing uncertainty over time, including through a real options framework.

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[47] Louis Kaplow, "Optimal Regulation with Exemptions," *International Journal of Industrial Organization* 66 (2019): 1-39; Stacy Sneeringer and Nigel Key, "Effects of Size-Based Environmental Regulations: Evidence of Regulatory Avoidance," *American Journal of Agricultural Economics* 93, no. 4 (2011): 1189-1211.

[48] You should also remember that a rule with a significant economic impact on a substantial number of small entities will trigger the requirements set forth in the Regulatory Flexibility Act, 5 U.S.C. 603(c), 604. See the section "*Impact on Small Businesses and Other Small Entities*" for more details.

[49] *See* Administrative Conference of the United States, Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61,728 (Dec. 29, 2017), https://www.acus.gov/document/learning-regulatory-experience.

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h. Performance Standards and Design Standards

Performance standards express requirements in terms of outcomes rather than specifying the means to those ends. When outcomes are straightforward to measure, and a reliable method to conduct such measurements will be used, performance standards may be superior to engineering or design standards, because they give the regulated parties the flexibility to achieve regulatory objectives in the most cost-effective way. As a result, performance standards are likely to allow for innovation that may ultimately result in greater net benefits than an otherwise similarly net-beneficial (in the near-term) design standard. However, you should consider not just cost savings to regulated parties stemming from the greater flexibility of performance standards, but also (1) the costs of assuring compliance for both performance standard and design standard alternatives, (2) any differences in the likely degree of compliance, and (3) the resulting effects on the net benefits of these alternatives. Because it may be less costly to ensure compliance with performance standards than with design standards in some circumstances, and the reverse in other circumstances, you should avoid relying on broad generalizations about the relative cost of ensuring compliance with these regulatory approaches; context-specific assessments of such costs will be more accurate. For more details, see the section "*Accounting for Compliance and Take-up*."

i. Market-Oriented Approaches and Direct Controls

Market-oriented approaches should be explored when permissible and appropriate. These alternatives include fees, penalties, subsidies, marketable permits or offsets, changes in liability or property rights (including policies that alter the incentives of insurers and insured parties), and required bonds, insurance, or warranties. One example of a market-oriented approach is a program that allows for averaging, banking, or trading (ABT) of credits for achieving emissions reductions or other goals. ABT programs can be extremely valuable in reducing costs for regulated firms and can achieve earlier or greater benefits than other approaches, particularly when the costs of achieving compliance vary across production lines, facilities, or firms. ABT can be allowed on a plant-wide, firm-wide, region-wide, or nation-wide basis.

Still, analysis may reveal that some ABT design options in some regulatory contexts produce distributional effects that are deemed unacceptable, as—for example—when trading across firms in different geographic locations results in locally concentrated pollution "hot spots" that degrade air quality for vulnerable populations. When assessing market-oriented approaches, you should give analytic attention to whether the behavior being penalized or rewarded is being verified (measured accurately); whether fees, credits, offsets, or other penalties or rewards lead to behavior that produces real changes in social benefits and costs compared to a realistic baseline; and whether the costs of monitoring compliance and overseeing market activities have been accounted for.

j. Informational Approaches to Regulation and Nudges

If intervention is contemplated to address a market failure that arises from asymmetric or imperfect information, or certain behavioral biases, you should consider assessing whether informational remedies or nudges (modifications of choice architecture that alter behavior) may be appropriate.

Measures to improve the availability of information include government establishment of a standardized testing and rating system (the use of which could be mandatory or voluntary), mandatory disclosure requirements (*e.g.*, advertising, labeling, or enclosures), and government provision of information (*e.g.*, government print or internet publications, telephone hotlines, or public interest broadcast announcements). To be effective, measures to improve information availability should be clear, meaningful, timely, salient, and designed to be sensitive to how people process and make choices based on that information. Improving information availability—particularly about otherwise concealed, shrouded, or non-transparent product characteristics or prices—may provide consumers or firms more choices than a mandatory product standard or ban.

Measures that serve as nudges—such as changing the default or pre-selected options, or changing the manner in which information is presented—can also improve consumer welfare without restricting choice. Such nudges can include simplifying choices through sensible default rules (such as setting automatic enrollment with opt-out versus opt-in); reducing complexity; requiring active choice; increasing the salience of certain factors or variables; and promoting desirable social norms. For the same reasons, nudges can also reduce consumer welfare, including by adopting defaults that are not sensible or by increasing complexity.

Careful analysis may help with the important task of matching underlying problems to the regulatory action that is best designed to address those problems. Informational remedies often make most sense when an underlying market failure involves an informational issue, though even in such cases, informational remedies may not necessarily be either helpful or sufficient. Similarly, nudges often make most sense when the market failure involves a behavioral bias, though—again—even in such cases, nudges may not necessarily be either appropriate or sufficient. Analytic attention may be usefully directed to assessing whether it is possible or preferable to combine informational remedies and nudges with other regulatory approaches or to apply them alone.

Specific informational measures or nudges, like other measures, should be evaluated in terms of their benefits and costs.[50] Some effects of informational measures are easily overlooked. For example, the benefits of a mandatory disclosure requirement for a consumer product potentially include not only the benefits arising from consumers' ability to make more welfare-enhancing choices, but also the benefits arising from any shifts in the composition of, and innovative additions to, products within the market (the costs of such shifts and additions should be accounted for as well). These other benefits also could include reductions in markups by increasing product comparability, or the development of products or services that meet new consumer demand resulting from the disclosure. The costs of a mandatory disclosure requirement for a consumer product will potentially include not only the cost of gathering and communicating the required information, but also the opportunity costs of the loss of any information displaced by the mandated information. Other costs also may include the effect of

[50] The section "*The Key Concepts Needed to Estimate Benefits and Costs*" discusses how willingness to pay and willingness to accept measures may need to be adjusted when analyzing informational measures or nudges that interact with behavioral biases.

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providing information that is ignored or misinterpreted (as when a truthful disclosure causes excessive or misplaced fear), and inefficiencies arising from the incentive that mandatory disclosure may give to overinvest in a particular characteristic of a product or service.

When information on the benefits and costs of alternative informational measures or nudges is insufficient to provide a clear choice between them, you should consider the least intrusive alternative sufficient to accomplish the regulatory objective.

k. A Note Regarding Certain Types of Economic Regulation

In light of both economic theory and actual experience, it is particularly difficult to demonstrate positive net benefits for any of the following types of regulations:

- price controls in well-functioning competitive markets;
- production or sales quotas in well-functioning competitive markets;
- mandatory uniform quality standards for goods or services, if the potential problem can be adequately dealt with through voluntary standards or by disclosing information of the hazard to buyers or users; or
- controls on entry into employment or production in well-functioning competitive markets.

7. Assessing Benefits and Costs

a. Some General Considerations

The regulatory analysis should discuss the anticipated benefits and costs of the selected regulatory option and reasonable alternatives. Your approach should be transparent and consistent, and avoid double-counting. The analysis should describe how the action is expected to cause the anticipated effects.[51] It should, if feasible, report the monetized value of the anticipated benefits and costs to society. To present your results, you should:

- separately list the monetized benefits, costs, and net benefits and identify their source and timing, and include a table expressing the estimates by year in dollars that are:
  - constant (all indexed to inflation as of the same year), and
  - undiscounted (for more on discounting see the section *"Discount Rates"* below);
- when the distribution of benefits and costs[52] is analyzed, list the monetized net benefits for each subgroup, and include a table that expresses the estimates by year in undiscounted dollars;

[51] Where statistical methods are used in addressing this type of question, they should be transparent, well suited for the analysis, based on peer-reviewed methods, and applied with rigor and care. Please see the "*Quality, Objectivity, Transparency, and Reproducibility of Results*" section of this Circular, as well as standard reference texts including Jeffrey M. Wooldridge, *Econometric Analysis of Cross Section and Panel Data* (Cambridge, Mass.: MIT Press, 2010), and more recent publications: Susan Athey and Guido W. Imbens, "The State of Applied Econometrics: Causality and Policy Evaluation," *Journal of Economic Perspectives* 31, no. 2 (2017): 3-32; Clément De Chaisemartin and Xavier D'Haultfoeuille. "Two-Way Fixed Effects and Differences-in-Differences With Heterogeneous Treatment Effects: A Survey," *The Econometrics Journal* 26, no. 3 (2023): C1-C30.

[52] For additional guidance on analyzing distributional effects, see the section "*Distributional Effects*" below.

- describe the benefits and costs that you can quantify, but cannot monetize, including their timing;
- describe the benefits and costs that you cannot quantify; and
- identify or cross-reference the data or studies on which you base the benefit or cost estimates.

See the section "*Presentation of Results and Accounting Statement*" for more details on presenting the results of your analysis.

When benefit and cost estimates are uncertain (for more on this see the section *"Treatment of Uncertainty"* below), you should report estimates of effects that reflect as full a probability distribution of potential consequences as is feasible and appropriate, recognizing that some categories of benefits and costs may be unquantified. If factors such as fundamental scientific disagreement or lack of knowledge prevent construction of a scientifically defensible probability distribution, you should describe benefits or costs under plausible scenarios and characterize the evidence and assumptions underlying each of those scenarios.

Minor additional benefits or costs may not be worth further formal analysis. At the same time, the fact that benefits and costs often are uncertain, or difficult to monetize or quantify, does not necessarily make them minor, and low-probability but high-impact effects may be important to assess (whether or not those effects can be quantified or monetized). Analytic priority should be given to those additional benefits and costs that are important enough to potentially change the rank ordering of the main alternatives in the analysis.

b. The Key Concepts Needed To Estimate Benefits and Costs

"Opportunity cost" is the appropriate concept for valuing benefits and costs. There are two primary frameworks for measuring opportunity cost: "willingness to pay" (WTP) and "willingness to accept" (WTA). Both assume voluntary transactions and measure an individual's willingness to forgo an opportunity. WTP captures the notion of opportunity cost by measuring what individuals are willing to pay to obtain a particular good or service (*i.e.*, as the buyer). WTA captures the notion of opportunity cost by measuring what individuals are willing to accept to forgo a particular good or service (*i.e.*, as the seller). In other words, WTP and WTA differ in who starts with the good or service.

Under certain circumstances, WTP and WTA will produce similar estimates of opportunity cost.[53] The empirical literature is complex and evolving, but some evidence suggests that similar estimates are more likely when: prices change but quantities do not; the change being evaluated is small; there are reasonably close substitutes available; and the income/wealth effect

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[53] In markets for fungible goods or services, observed prices often reflect both WTP and WTA simultaneously. John D. Graham, "Saving Lives Through Administrative Law and Economics," *University of Pennsylvania Law Review* 157 (2008): 427 (citing W. Michael Hanemann, "Willingness to Pay and Willingness to Accept: How Much Can They Differ?," *American Economic Review* 81, no. 3 (1991): 635). In many cases, however, there can be large differences between WTP and WTA measures. Thomas C. Brown and Robin Gregory, "Why the WTA-WTP Disparity Matters," *Ecological Economics* 28, no. 3 (1999): 323-335.

is small.[54] However, empirical evidence from experimental economics and psychology shows that even when income/wealth effects are "small," the measured differences between WTP and WTA can be large, especially in cases with uncertainty, irreversibility, and limited opportunities to learn.

In practice, the evidence available for your regulatory analysis may constrain your choice of WTP and WTA measures. As always, you should use your professional judgment to determine the most appropriate use of the available evidence. This may include using WTP or WTA data as a proxy for the other measure, in a situation in which the other measure might be preferable but is unavailable. When this is the case, you should be cognizant of—and discuss as appropriate—the potential directional errors that may result in your analysis, noting that generally the value of WTA will be greater than or equal to the value of WTP.

Market prices provide rich data for estimating benefits and costs based on WTP or WTA if the goods and services affected by the regulation are traded in well-functioning competitive markets. The opportunity cost of an alternative includes the value of the benefits forgone as a result of choosing that alternative. For instance, the opportunity cost of banning a product—for example, a consumer good, food additive, or hazardous chemical—is the forgone net benefit (including lost consumer and producer surplus[55]) of that product, taking into account the mitigating effects of potential substitutes.

The use of any resource has an opportunity cost regardless of whether the resource is already owned or has to be purchased, rented, or otherwise acquired. That opportunity cost is equal to the net benefit the resource would have provided in the next best use in the absence of the requirement. For example, if regulation of an industrial plant affects the use of additional land or buildings within the existing plant boundary, there is an opportunity cost of using the additional land or facilities. To the extent feasible, you should monetize any such forgone benefits and add them to the other costs of that alternative. You should also, to the extent feasible, monetize any cost savings as a result of an alternative and either add it to the benefits or subtract it from the costs of that alternative, in a manner reflecting the incidence of cost savings.

Estimating benefits and costs is more difficult when markets are distorted (due to market failure, failure of public institutions, or behavioral biases), market prices are difficult to measure, or markets do not exist and allocation of resources is via some other mechanism, such as household production.[56] In these cases, estimating the value of the benefit or cost that you are

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[54] *See* W. Michael Hanemann, "Willingness to Pay and Willingness to Accept: How Much Can They Differ?," *American Economic Review* 81, no. 3 (1991): 635-647; Jinhua Zhao and Catherine L. Kling, "A New Explanation for the WTP/WTA Disparity," *Economics Letters* 73, no. 3 (2001): 293-300.
[55] Consumer surplus is the difference between what a consumer pays for a unit of a good and the maximum amount the consumer would be willing to pay for that unit, holding income and the prices of other goods constant. It is measured by the area between the price paid and the demand curve for that unit. Producer surplus is the difference between the amount a producer is paid for a unit of a good and the minimum amount the producer would accept to supply that unit. It is measured by the area between the price and the supply curve for that unit.
[56] When markets are distorted, the extent of such distortions should provide a key input in your quantification of regulatory net benefits; please see the sections "*Partial and General Equilibrium Analysis,*" "*Transfers,*" and "*Integrating Assessments of Potential Needs for Federal Regulatory Action into the Regulatory Analysis*" for related discussion.

interested in requires developing appropriate proxies.

Adoption of either WTP or WTA as the measure of value implies that individual preferences of the affected population should be a guiding principle in the regulatory analysis. However, in some cases adjustments to observed values or alternative methods of estimating values are required to obtain WTP or WTA estimates appropriate for benefit-cost analysis, such as when there are distortions caused by market failures.

An important class of cases in which the observed WTP or WTA may need to be adjusted to obtain estimates appropriate for benefit-cost analysis involves behavioral biases. A high observed WTP or WTA may reflect a truly high valuation for the underlying good or service or it may reflect a smaller WTP or WTA coupled with a bias that increases consumers' observed WTP or WTA. Similarly, a low observed WTP or WTA could reflect a higher true valuation coupled with a bias that decreases consumers' observed values. In these cases, you should endeavor to separate these two components, the true valuation and the bias, to accurately measure benefits and costs in your regulatory analysis. For example, when there is evidence that manipulative, rather than informational, aspects of advertising influence individuals' WTP or WTA, the observed or measured WTP or WTA should accordingly be adjusted.[57] Another class of cases involves situations in which the relevant population's preferences may not be appropriately measured using traditional techniques, and alternative approaches to valuation are necessary. See the section "*Benefits and Costs that Are Difficult to Quantify or Monetize*" below for more details.

As already mentioned regarding the use of market prices, estimates of WTP or WTA based on revealed preference methods can be useful (see the section "*Appropriate Use of Revealed Preference Methods, Including Direct and Indirect Uses of Market Data*" below for more discussion). As one example, analysts sometimes use "hedonic price equations" based on regression analysis of market behavior to identify the implicit prices for the attribute of interest.[58] The hedonic technique allows analysts to develop an estimate of the WTP for specific attributes associated with a product. For instance, a house is a product characterized by a variety of attributes, including the number of rooms, total floor area, type of heating and cooling, and access to environmental amenities. If there are enough data on transactions in the housing market, it is possible to develop an estimate of the implicit price for specific attributes, such as the implicit price of an additional bathroom or for central air conditioning. This technique can be extended, as well, to develop an estimate for the implicit price of public goods that property provides access to, or other goods or services that are not directly traded in markets (or, even if traded in markets, are bundled with other attributes), such as access to environmental amenities.

[57] Relatedly, if a regulation causes measured WTP for a product to rise, it could mean that the regulation reduced the source of a behavioral bias associated with that product, yielding a regulatory benefit (or, if WTP falls due to an increase in behavioral bias, yielding a regulatory cost). Conversely, if a regulation causes measured WTP for a product to fall, it could be because consumers are now accounting for what was formerly an internality, also yielding a regulatory benefit (or, again, thus indicating a cost if WTP rises because an internality was exacerbated). You should use good evidence to assess whether such the case at hand is characterized by this type of ambiguity and to augment direct WTP or WTA studies with appropriate other evidence before monetizing quantitative estimates.

[58] *See, e.g.*, Kelly C. Bishop et al., "Best Practices for Using Hedonic Property Value Models to Measure Willingness to Pay for Environmental Quality," *Review of Environmental Economics and Policy* 14, no. 2 (2020): 260-281.

An analyst can develop such implicit WTP estimates for goods or services like air quality, access to public parks, and public-school quality by assessing the effects of these goods on the housing market. However, such estimates may be incomplete (*e.g.*, if home buyers are not fully aware of the effects of the environmental amenity, and therefore housing prices do not fully reflect such effects).

Alternatively, estimates of WTP or WTA based on stated preference methods can also be useful (see the section "*Appropriate Use of Stated Preference Methods*" below for more discussion). In the example above, stated preference data could also be used to estimate WTP for a specific attribute of a house. One advantage of such techniques is that they can be used even when there is not enough data on transactions—such as if there have been insufficient housing transactions in a particular geographic area to value a local amenity through a hedonic study—to apply a revealed preference approach.

You should try to account for the shares of the same benefits and costs captured by different estimates as you refine your analysis. In other words, you need to guard against double-counting, since some benefits or costs are embedded in other broader measures. To balance this goal with concerns about under-counting meaningful effects by excluding potentially overlapping benefits or costs, it may be helpful to include a range—with the lower-bound estimate prioritizing the avoidance of double-counting and the upper-bound estimate prioritizing the avoidance of omitted categories of impacts. A primary estimate, however, should generally not be derived by averaging these bounds; see the section "*Treatment of Uncertainty*" for more details.

To illustrate potential overlaps and gaps, consider a policy that reduces air pollutants in a community. If you were to measure the public health benefits of the regulation exclusively using the change in the net present value of expected lifetime wage income of those in the community—contrary to the guidance in the section "*Monetizing Health and Safety Benefits and Costs*"—then you would have excluded benefits that accrue to those who do not earn wage incomes, health benefits reflected incompletely (or not at all) in lifetime wages, aesthetic value, etc. Even if you develop a complete measure of the public health benefits of the regulation, note that the air pollutant regulation may also improve the quality of the environment in a community, and the value of real estate in the community will generally rise to reflect the greater attractiveness of living in a better environment. However, simply adding the increase in property values to the estimated value of improved public health would be double counting if the increase in property values fully or partly reflects the improvement in public health. To avoid this problem, you should try to separate the embedded effects on the value of property arising from improved public health. At the same time, an analysis that fails to incorporate the change in value caused by any land use changes will not capture the full effects of regulation.

c. Appropriate Use of Revealed Preference Methods, Including Direct and Indirect Uses of Market Data

Revealed preference methods develop estimates of the value of goods or services—or

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attributes of those goods or services—based on observable tradeoffs that people actually make.[59] These methods are well grounded in economic theory. When designing or evaluating a revealed preference study, the following principles should be considered:

- consistency of the results with up-to-date economic theory and the best available economic science;
- validity of the research design and framework for analysis;
- if the market is not efficient, identification of the relevant market failure, failure of public institutions, or behavioral bias (and, as feasible, adjustments such that the resulting WTP/WTA estimates reflect the social value of the benefits and costs)[60];
- the representativeness of the specific market participants being studied relative to the population that will likely be affected by the regulation under consideration; and
- the appropriateness of the theoretical, statistical, and econometric models employed, the potential for explicit identification of key parameters, and the robustness of the resulting estimates in response to plausible changes in model specification and estimation technique.[61]

You should try to determine whether there are multiple revealed-preference studies of the same good or service and whether anything can be learned by comparing the methods, data, and findings from different studies or by synthesizing them in a meta-analysis. Professional judgment is required to determine the appropriate use of each available study. You should analyze the available evidence and related literature to determine the quality of studies in your analysis and the weight you give them in your analysis, if any, and discuss any relevant limitations of such studies.

Economists ordinarily consider market prices as the most accurate measure of the marginal value of goods and services to society. This is most likely to be the case for goods and services exchanged in competitive markets with no externalities or other market failure. When goods or services are not exchanged in well-functioning markets or there are spillover benefits or costs, then market prices generally do not reflect the marginal social value of goods and services. Goods whose market prices may not reflect their social value include those whose production or consumption results in substantial positive or negative external effects, other distortions, etc. For example, the observed consumer price of gasoline does not necessarily reflect the marginal social value of a gallon of gasoline because of taxes, other government interventions, and negative externalities (*e.g.*, the impacts of pollution on the local environment and global climate change).

If a regulation involves a market where the price does not reflect the value to society, you should try to identify and estimate the additional benefits and costs external to the market that result from changes in the quantity of goods and services in the market in your analysis. For

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[59] *See* Catherine L. Kling, ed. “Symposium: Best Practices for Using Revealed Preference Methods for Nonmarket Valuation,” special issue, *Review of Environmental Economics and Policy* 14, no. 2 (Summer 2020): 240-323.

[60] If relevant types of distortions are not accounted for in the source study, you should attempt to make adjustments that account for them when applying the study into your regulatory analysis, as discussed previously.

[61] Emily Oster, “Unobservable Selection and Coefficient Stability: Theory and Evidence,” *Journal of Business & Economic Statistics* 37, no. 2 (2019): 187-204; Ethan T. Addicott et al., “Toward an Improved Understanding of Causation in the Ecological Sciences,” *Frontiers in Ecology and the Environment* 20, no. 8 (2022): 474-480.

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example, suppose damage to pollinator habitat reduces crop yields. One of the benefits of controlling the loss of pollinator habitat is the value of the crop yield maintained or increased as a result of the controls. That value is typically measured by the price of the crop. However, if a government program has distorted the agricultural market and increased the crop's price above what it would otherwise be, then the change in crops valued at the prevailing price may overstate the value of the additional yield that results from controlling habitat loss. In this case, some adjustment of the value implied by the market data on price alone may more appropriately reflect the net social effects of the increased crop yield and, hence, the associated value of protecting against the loss of pollinator habitat.

Many goods or attributes of goods that are affected by regulation—such as many environmental or cultural amenities—are not traded directly in markets. The value of these goods or attributes arises from use and non-use. When feasible, these values should be included in your estimates of benefits and costs. Estimation of these values is challenging relative to observing prices in markets, though techniques for estimating implicit prices that are not observed in markets are well developed.

"Use values" arise when an individual derives satisfaction from using a resource irrespective of whether the resource is consumed or degraded in the process. Some use values are exclusionary and directly alter ownership of a good, such as mineral extraction and sale. In other cases, the marginal use is less excludable, and each additional user may reduce the value of the resource to each other user as crowding occurs (*i.e.*, use is rivalrous), as is the case for fisheries. At times, exclusive and non-exclusive uses are incompatible. Importantly, non-exclusionary use values can be passive (*i.e.*, non-consumptive).

One example of such passive use values is storage of future opportunities, *e.g.*, holding minerals in the ground to hedge against price risk or holding fossil fuels in the ground to avoid the need for additional expenditures on greenhouse gas abatement. Holding the opportunity or option—the possibility, but not the obligation—to use the resource in the future is a type of use value (often called option value). One way to account for passive use values is to think of them as valuable "real options" (see "*Treatment of Uncertainty*" below for more details on real options).

Another example is storm protection generated by natural infrastructure. Undeveloped sand dunes, mangrove forests, or coastal wetlands help manage flooding risks to homes without the homeowners acting. In such cases, a minimum value (though not the total value) of these ecosystem services is revealed by homeowners' choice not to interfere with existing natural infrastructure or nature-based solutions.[62] Indeed, in many relevant economic cases, doing nothing can be the "action" that generates the greatest welfare.[63]

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[62] *See generally* White House Council on Environmental Quality, White House Office of Science and Technology Policy, and White House Domestic Climate Policy Office, *Opportunities for Accelerating Nature-Based Solutions: A Roadmap for Climate Progress, Thriving Nature, Equity, and Prosperity: A Report to the National Climate Task Force* (Nov. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/11/Nature-Based-Solutions-Roadmap.pdf.

[63] Nancy L. Stokey, *The Economics of Inaction: Stochastic Control Models with Fixed Costs* (Princeton: Princeton University Press, 2008); Yukiko Hashida and Eli P. Fenichel, "Valuing Natural Capital When Management Is Dominated by Periods of Inaction," *American Journal of Agricultural Economics* 104, no. 2 (2022): 791-811.

"Non-use values" arise when an individual places value on a resource, good, or service even though the individual will not use the resource, now or in the future. Non-use value includes bequest and existence values. That is, individuals might value the ability to pass a resource on to another person, or value the existence of a resource (such as a pristine area or an endangered species) independent of any use of it. You should endeavor to give due weight to the tradeoffs people make and preferences people have with respect to such non-use values.[64] Techniques consistent with the best available economic science enabling estimates of these non-use values should be employed when appropriate and feasible.[65]

Preferences regarding the welfare of others is a closely related concept but may not be strictly considered a "non-use" value.[66] A pure concern for the welfare of all others, as measured by others' WTP for or WTA regulatory effects, supplements both benefits and costs (when appropriately weighted) proportionally, and therefore does not have an effect on rank ordering of the net benefits of different policy alternatives; in such cases, it is not necessary to measure the amount of such general altruism in regulatory analysis. If other-regarding preferences instead vary with the benefit or cost (*e.g.*, is greater for health benefits or costs than for other benefits or costs) or depend on the individuals affected, then they can affect the rank ordering of the net benefits of different policy alternatives.[67]

Some goods and services are indirectly valued in markets, which means that their value is reflected in the prices of related goods and services that are directly traded in markets. Their use values are typically estimated through revealed preference methods. Examples include estimates of the values of environmental amenities derived from recreation demand studies, the cost of defensive expenditures taken to avoid a negative health outcome, and hedonic price models that measure differences or changes in the value of real estate. You should take particular care when developing a revealed preference model that you are designing protocols for reliably estimating the values of these attributes.

d. Appropriate Use of Stated Preference Methods

Stated preference methods (SPM) have been developed and used in the peer-reviewed literature to estimate use and non-use values of goods and services in many contexts. They also have been widely used in regulatory analyses by Federal agencies, in part because these methods can be employed to address a wide variety of goods and services that are not easy to study through revealed preference methods.

The distinguishing feature of these methods is that hypothetical questions about use or non-use values are posed to survey respondents in order to obtain WTP or WTA estimates relevant to benefit or cost estimation. Some examples of SPM include contingent valuation,

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[64] *See, e.g.*, John V. Krutilla, "Conservation Reconsidered," *American Economic Review* 57, no. 4 (1967): 777-786.
[65] See the section "*Appropriate Use of Stated Preference Methods*" below.
[66] *See* Kenneth E. McConnell, "Does Altruism Undermine Existence Value?," *Journal of Environmental Economics and Management* 32, no. 1 (1997): 22-37.
[67] *See* Lisa A. Robinson and James K. Hammitt, "Behavioral Economics and the Conduct of Benefit-Cost Analysis: Towards Principles and Standards," *Journal of Benefit-Cost Analysis* 2, no. 2 (2011): 25-28; Theodore C. Bergstrom, "Benefit-Cost in a Benevolent Society," *American Economic Review* 96, no. 1 (2006): 339.

attribute-based methods (sometimes called choice experiments), and risk-tradeoff analysis. The surveys used to obtain the health-utility values used in cost-effectiveness analysis are similar to stated-preference surveys but do not entail monetary measurement of value. The principles governing quality stated-preference research, with some obvious exceptions involving monetization, are also relevant in designing quality health-utility research.

When you are evaluating a stated-preference study, the following principles should be considered, including whether the study[68]:

- Explained the good or service being evaluated to the respondent in a clear, complete, and objective fashion, with a clear baseline or status quo scenario.
- Provided evidence that respondents understand, accept, and view the information presented in the scenarios as credible.
- Developed the survey instrument based on formative work, including focus groups and pre-testing, and documented such formative work.
- Designed WTP or WTA questions to relate to how respondents see the good or service, focusing them on the reality of budgetary limitations, and alerting them to the availability of substitute goods or services and alternative expenditure options.
- Had experimental designs that yield efficient and unbiased estimates of preference parameters. Ideally, designs should allow for interactions among attributes.
- Ensured questions are incentive compatible, randomized question order across respondents, and used a decision rule and payment vehicle that is realistic and binding. For public goods, referendum formats should be considered, but are not always the right choice. It is important that analysts attempt to account for any strong preferences that respondents may have concerning the payment vehicle itself (*e.g.*, a tax payment vehicle).
- Designed the survey instrument to probe beyond general attitudes (*e.g.*, a "warm glow" effect for a particular use or non-use value) and focus on the magnitude of the respondent's economic valuation.
- Included auxiliary questions to enhance validity.
- Ensured that the analytic results are consistent with economic theory using "internal" (within respondent) and "external" (among respondents) scope tests, such that the willingness to pay is larger (or smaller) when more (or less) of a good is provided (absent confounding influences).
- Selected/sampled the subjects being interviewed in a statistically appropriate manner, had a sample frame adequately covering the target population, and had a sample drawn using probability methods from a known sampling frame in order to generalize the results to the target population.
- Had response rates that are as high as reasonably possible, that is, followed best survey practices to achieve high response rates. Low response rates increase the potential for statistical bias and raise concerns about the generalizability of the results. If response rates are not adequate, you should consider conducting an analysis of non-response bias or further studies. Caution should be used in assessing the representativeness of the sample based solely on demographic profiles. Statistical adjustments to reduce non-

[68] Robert J. Johnston et al., "Contemporary Guidance for Stated Preference Studies," *Journal of the Association of Environmental and Resource Economists* 4, no. 2 (2017): 319-405.

response bias should be undertaken whenever feasible and appropriate.

- Had a mode of administration of surveys (in-person, phone, mail, internet, or multiple modes) that was appropriate in light of the nature of the questions being posed to respondents and the length and complexity of the instrument.
- Provided documentation about the target population, the sampling frame used and its coverage of the target population, respondent recruitment method, the design of the sample (including any stratification or clustering), the cumulative response rate (including response rate at each stage of selection if applicable), the item non-response rate for critical questions, the exact wording and sequence of questions and other information provided to respondents, and the training of interviewers and techniques they employed (as appropriate).
- Used statistical and econometric methods to analyze the collected data that are transparent, well suited for the analysis, based on peer-reviewed methods, and applied with rigor and care.
- Addressed observed and unobserved preference heterogeneity.
- Used methods of computing WTP or WTA that are transparent, consistent with theory, and provide an estimated central tendency and dispersion.
- Included an internal validity assessment in stated preference and stated behavior assessments, with formally constructed validity tests and assessment of content validity.

Professional judgment is necessary to apply these criteria to one or more studies, and thus there is no mechanical formula that can be used to determine the appropriate use of any given study in regulatory analysis. You should analyze the available evidence and related literature to determine the quality of studies in your analysis as well as the weight you give them in your analysis. You should also discuss any relevant limitations of such studies.

Since SPM generate data from respondents in a hypothetical setting, sometimes on complex and unfamiliar goods, special care is needed in the design and execution of surveys, analysis of the results, and characterization of the uncertainties. Examples exist that illustrate these challenges being overcome.[69] A stated-preference study may be the only way to obtain quantitative information about non-use values, though—as is the case more generally—a number based on a poor-quality study is not necessarily superior to a qualitative analysis of the non-use value. Non-use values that are not quantified should be discussed qualitatively.

A single study can use a mix of revealed and stated preference information. Augmenting revealed preference data with stated preference data can help reduce biases that stem from unobservable features of the respondents, extend estimates beyond range of observed variability, or offer greater confidence in stated preference information.

In some cases, either revealed-preference or stated-preference studies will not be directly applicable to the regulatory analysis; for example, certain revealed-preference studies may not capture non-use values relevant to a regulatory analysis. If both revealed-preference and stated-preference studies that are directly applicable to regulatory analysis are available, you should

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[69] *See, e.g.*, Richard C. Bishop et al., 2017. "Putting a Value on Injuries to Natural Assets: The BP Oil Spill," *Science* 356, no. 6335 (2017): 253-254.

consider both kinds of evidence and compare or combine[70] the findings when feasible. If the results diverge significantly, you should, when feasible, compare the overall quality of the two bodies of evidence.

Other things equal, revealed preference data are preferable to stated preference data because revealed preference data are based on actual decisions, where market participants enjoy or suffer the consequences of their decisions. This is not generally the case for respondents in non-consequential stated preference surveys, who may not have similar incentives to offer thoughtful responses that are consistent with their preferences or may be likely to bias their responses. However, it is generally appropriate to—all else equal—give less credence to a lower-quality revealed preference study than a higher-quality stated-preference study (*e.g.*, when a stated preference study is better targeted at valuing the particular good being analyzed than a revealed preference study). Consultation with OMB is advisable, prior to initiating a regulatory analysis, for further guidance on selecting between or combining revealed preference and stated preference studies.

e. Benefit Transfer Methods

It is often helpful to collect timely, case-specific data on revealed preference or stated preference values to support regulatory analysis. Yet conducting an original study may not be feasible due to the time and expense involved, or such a study may not be able to produce evidence that yields sufficient additional insight. One alternative to conducting an original study is the use of "benefit transfer" methods. (Such transfer methods may be applied to cost estimates as well.) The practice of "benefit transfer" begins with transferring existing estimates or functions obtained from indirect market, other revealed preference, and stated preference studies to new contexts (*e.g.*, the context posed by the regulation). The principles that guide transferring estimates from indirect market, other revealed preference, and stated preference studies should apply to direct market studies as well.

Benefit transfer can provide a lower-cost, readily implementable approach for obtaining desired monetary values for regulatory analysis. However, transferring estimates or functions from one context to another requires attending to external validity, and may create additional uncertainties of unknown magnitude. Nonetheless, benefit transfer methods are appropriate when more direct and specific valuations are unavailable or inferior, or when time, resources, or other constraints do not permit conducting studies specific to the regulatory context.

In conducting benefit transfer, the first step is to describe the regulatory alternative and identify potential sources of information for the regulatory analysis. You should identify the relevant measure of the policy change at this initial stage. For instance, you can derive the relevant willingness to pay measure by specifying an indirect utility function. This identification

[70] Tools such as systematic review, meta-analysis, and expert elicitation may enable combination across studies or data sources. *See* Lisa A. Robinson and James K. Hammitt, "Introduction to the Special Series on Research Synthesis: A Cross-Disciplinary Approach," *Risk Analysis* 35, no. 6 (2015): 963-970.

allows you to "zero in" on key aspects of the benefit transfer.[71]

The next step is to identify appropriate studies that provide the basis for the benefit transfer. In selecting transfer studies for either value transfers or function transfers, you should consider the following criteria, as feasible and appropriate[72]:

- The selected studies are based on adequate data, and on sound and defensible empirical methods and techniques.
- The selected studies document parameter estimates of the valuation function.
- The existing study's context and the new policy context have similar populations (*e.g.*, demographic characteristics). For example, a study valuing water quality improvement in one locality may not necessarily be a suitable proxy for valuing a policy that will affect water quality throughout the United States if the affected populations are different in relevant ways.
- The good or service, and the magnitude of change in that good or service, are similar in the study and policy contexts.
- The relevant characteristics of the study and the policy contexts are similar. For example, the effects examined in the original study should be "reversible" or "irreversible" to a degree that is similar to the regulatory actions under consideration.
- The distribution of property rights is similar so that the analysis uses the same welfare measure. If the property rights in the study context support the use of WTA measures while the rights in the regulatory context support the use of WTP measures, use of that study when conducting benefit transfer may not be appropriate.
- The availability of substitutes across study and policy contexts are similar.

If you can choose between transferring a function or a point estimate, transferring the entire function (referred to as benefit function transfer) is generally preferable to adopting a single point estimate (referred to as benefit point transfer).[73] At times, it may be appropriate to transfer some parameters that are inputs to a transfer function, while estimating other parameters

[71] Sapna Kaul et al., "What Can We Learn from Benefit Transfer Errors? Evidence from 20 Years of Research on Convergent Validity," *Journal of Environmental Economics and Management* 66, no. 1 (2013): 90-104; Kevin J. Boyle et al., "The Benefit-Transfer Challenges," *Annual Review of Resource Economics* 2, no. 1 (2010): 161-182; Randall S. Rosenberger and John B. Loomis, "Benefit Transfer," in *A Primer on Nonmarket Valuation*, ed. Patricia A. Champ, Kevin J. Boyle, and Thomas C. Brown (New York: Springer Science & Business Media, 2003), 445-482; Robert J. Johnston et al., eds., *Benefit Transfer of Environmental and Resource Values: A Guide for Researchers and Practitioners* (Springer Dordrecht, 2015), 14; Robert J. Johnston et al., "Guidance to Enhance the Validity and Credibility of Environmental Benefit Transfers," *Environmental and Resource Economics* 79, no. 3 (2021): 575-624.

[72] Stephen Newbold et al., "Benefit Transfer Challenges: Perspectives from U.S. Practitioners," *Environmental and Resource Economics* 69, no. 3 (2018): 467-481.

[73] *See* John B. Loomis, "The Evolution of a More Rigorous Approach to Benefit Transfer: Benefit Function Transfer," *Water Resources Research* 28, no. 3 (1992): 701-705; Stephanie Kirchoff, Bonnie G. Colby, and Jeffrey T. LaFrance, "Evaluating the Performance of Benefit Transfer: An Empirical Inquiry," *Journal of Environmental Economics and Management* 33, no. 1 (1997): 75-93. Transfer of point estimates are most likely to be appropriate when the study and policy contexts are very similar. Robert J. Johnston et al., "Guidance to Enhance the Validity and Credibility of Environmental Benefit Transfers," *Environmental and Resource Economics* 79, no. 3 (2021): 575-624.

for the specific case.[74]

Finally, it is generally advisable not to use a study to conduct benefit transfer in estimating benefits or costs when doing so would lack external validity, as may be the case in the following circumstances:

- The study involves small, marginal changes, while the policy context involves much larger changes, or vice versa.
- There are significant problems with applying an *ex ante* valuation estimate to an *ex post* policy context. If a policy yields a significant change in the attributes of the good, it is usually inappropriate to use the study estimates to value the change using a benefit transfer approach.
- Differences in context prevent the study from illuminating the context at hand. This may be especially relevant for studies or regulations that concern natural resources with unique attributes. For example, if a study values visibility improvements at the Grand Canyon, these results should not be used to value visibility improvements in urban areas, and vice versa.

You should attempt to satisfy as many of these criteria as possible when choosing studies from the existing economic literature. Professional judgment is required in determining whether a particular transfer is too speculative to use in regulatory analysis.

f. Valuation for Use in Multiple Analyses

When the same outcome is caused by many regulations, monetary valuations can sometimes be developed once and used across regulatory analyses. Various estimates of benefits per ton of emissions reductions or costs of labeling changes are examples of such valuations that are used across many regulations. Developing a valuation in this manner promotes consistency across regulatory contexts and reduces agencies' costs—as developing valuations can be an expensive and time-consuming endeavor—and can be beneficial when appropriate. However, you should consider the degree of similarity of outcomes and whether the use of common valuation is useful in your particular context. For example, emissions reductions in different locations may affect different numbers of people, or affect those exposed to the emissions differently. If you intend to develop a valuation that would be relevant for regulatory analyses conducted by multiple agencies, you should consult with OMB prior to beginning the work, to learn whether other agencies have data, tools, or estimates relevant to the valuation, or are interested in collaboration.

g. Additional Benefits and Costs

Your analysis should look beyond the obvious benefits and costs of your regulation and consider any important additional benefits or costs, when feasible. An additional benefit may be

[74] When a large number of potential study sites are available, a meta-analysis could be constructed for the purpose of benefit transfer. Jon P. Nelson, "Meta-Analysis: Statistical Methods," in *Benefit Transfer of Environmental and Resource Values: A Guide for Researchers and Practitioners*, eds. Robert J. Johnston et al. (Springer Dordrecht, 2015), 329-356.

a favorable impact (financial, health, safety, environmental, or other consequence) of the regulation that is unrelated to the main purpose of the regulation (*e.g.*, reduced refinery emissions due to more stringent fuel economy standards for light trucks), while an additional cost may be an adverse impact (financial, health, safety, environmental, or other negative consequence) that occurs due to a regulation and is not already accounted for in the obvious costs of the regulation. These sorts of effects sometimes are referred to by other names: for example, indirect or ancillary benefits and costs, co-benefits, or countervailing risks.

It is often helpful to begin by listing the possible additional benefits and costs. In exactly the same manner as is the case for direct benefits and costs, additional effects that are important enough to potentially change the rank ordering of the main alternatives in the analysis should be given analytic priority.[75] In some cases, directing attention to these effects may help in the generation of a superior regulatory alternative with greater additional benefits and reduced additional costs.[76]

For some regulations, costs are associated with activity that does not itself yield benefits, but instead may prompt intermediate actions that connect those effects with ultimate beneficial outcomes. For instance, a regulation may require collection and dissemination of information related to safety practices; the information itself does not make anyone safer, but its greater availability may prompt more widespread use of effective safety practices.[77] You should avoid the inappropriate omission of the costs of these activities (such as more widespread safety practices, in the example above) when indicating, quantitatively or qualitatively, that there will ultimately be beneficial outcomes resulting from such regulation.

Like other benefits and costs, an effort should be made to quantify and monetize additional effects when feasible and appropriate. If monetization is not feasible, quantification should be attempted through use of informative physical (or other quantitative) units. If monetization and quantification are not feasible, then these issues should be presented as unquantified benefits and costs. The same standards of information and analysis quality that apply to any obvious benefits and costs should be applied to additional benefits and costs.

h. Partial and General Equilibrium Analysis

i. Partial and General Equilibrium Modeling Methods Generally

Partial equilibrium economic analysis considers a single market or several related markets in isolation from the rest of the economy, that is, not modeling feedback effects from the

75 See the section "*Some General Considerations*" above.

76 Exploring the data and methods associated with an effect that seems additional may reveal an evidence base that is at least as extensive, or chains of cause and effect at least as integrated with outcomes attributable to the regulation, as those effects that are ostensibly more direct.

77 As another example, a new regulation may clarify existing regulatory requirements. This clarification may increase compliance, increasing both regulatory costs and benefits. Please see the "*Accounting for Compliance and Take-up*" section for more guidance relevant to such issues. (Evidence may indicate positive WTP or WTA associated with information even when it does not change targeted behavior; informed people may feel more confident in their decisions, may find other applications for the information, or may value the information for other reasons.)

rest of the economy. For example, a partial equilibrium analysis of a regulation that impacts production of a crop may look only at the market for that crop or related markets (*e.g.*, markets for fertilizer or complimentary and substitute goods). General equilibrium economic analysis considers all markets jointly. A general equilibrium analysis of the same crop regulation might look at how the regulation affects the economy at large, including the market for the crop, the markets for other related crops, the markets for relevant agricultural inputs, and interactions with all other relevant markets in the economy and pre-existing policies. In practice, benefit-cost analyses may combine elements of a partial equilibrium analysis and elements of a general equilibrium analysis.[78]

Partial equilibrium analysis is most useful when the effects of a regulation are likely to occur mostly within the modeled sector(s) of the economy and are unlikely to interact with pre-existing distortions in other markets not modeled. An implicit assumption of this approach is that effects that occur in other markets are either fully captured in the analysis of the directly affected markets or are small. For example, if a regulation affecting a particular crop causes farmers to reduce the acreage devoted to that crop and increase the acreage devoted to another, but there are no price effects in the market for the alternative crop, a partial equilibrium analysis examining the decline in the acreage devoted to the first affected crop may fully capture the relevant effects. Similarly, if the regulation reduces acreage devoted to the affected crop but does not cause any changes in non-agricultural production decisions, a partial equilibrium analysis that captures all agricultural markets may be sufficient.[79] Partial equilibrium analysis may also be particularly useful when significant sectoral resolution is required to accurately model the behavioral response to, and thus the benefits and costs of, a regulation. Such resolution may be able to be achieved in a partial equilibrium model, but such resolution may not be possible in a general equilibrium model (*e.g.*, due to computational limitations).

General equilibrium analysis is most useful when a regulation affects many markets simultaneously or the effects in one market have important spillovers into many other markets, interact with pre-existing distortions or policies, or lead to behavioral shifts related to non-market allocation mechanisms. For example, if a safety regulation increases the cost of a good and causes buyers to substitute other goods and, in addition, the increased demand for those other goods leads to higher prices for those goods that further affect purchasing decisions, a general equilibrium analysis may be necessary to capture the full range of effects. General equilibrium analysis is also useful in instances when a regulation is likely to have important impacts on macroeconomic aggregates (*e.g.*, GDP or employment), with important feedback effects across the economy.[80] In determining the appropriate analytic approach, the nature and extent of relationships between the effects in different markets is more important than the size of the

[78] A commonality across equilibrium concepts is that they are often associated with a time span that is sufficient for a new steady state to be reached in the market(s) affected by the regulatory intervention being assessed. Such considerations are likely to be important when selecting a time horizon for your regulatory analysis.

[79] When using partial equilibrium analysis, it is important to identify potential offsetting effects that could occur outside of the market or geographic area covered by the analysis. For example, an analysis may indicate that there are net benefits within a particular region, but if those net benefits result, in part, because costs would be borne in another region, the preliminary analysis could be misleading. Refinement might take the form of expanding to multi-market analysis or revising the single-market analysis to define the market to encompass a wider geographic range.

[80] Regarding the effects of recessions and recoveries on regulatory benefits and costs, see the section "*Accounting for Business Cycle Dynamics*" for more details.

markets, though regulations affecting a larger market may also be more likely to have important effects in other markets.

There are many circumstances in which general equilibrium analysis, or partial equilibrium analysis extending beyond direct impacts to secondarily affected markets, may be particularly useful. As suggested in the examples above, one such circumstance is when a regulation causes substantial price changes in markets other than the directly affected market or noteworthy reallocation of time or services not allocated through markets. However, the appropriate mode of analysis in a specific regulatory context is necessarily a question that requires professional judgment. When the differences in estimates of benefits and costs between a partial equilibrium analysis and a general equilibrium analysis are unlikely to be substantial, it will often be the case that it is more useful to improve and refine a partial equilibrium analysis than to develop a general equilibrium analysis.

Both partial equilibrium and general equilibrium analytic approaches can be appropriate in a regulatory analysis.[81] The choice between the two may depend on the nature of the regulation under consideration, the anticipated effects of the regulation, the available data and evidence for use in the analysis, and the feasibility of the different approaches. You may also combine aspects of the two approaches, such as by conducting a partial equilibrium analysis of several markets or conducting a quantitative partial equilibrium analysis supplemented by a qualitative general equilibrium analysis.[82] Integrating a partial or general equilibrium model with either other economic models or physical system models (such as an atmospheric model) can also provide further insights into regulatory benefits and costs.

ii. Considerations When Conducting General Equilibrium Analysis

As with the use of any other methodological approach, analysts conducting a general equilibrium analysis will need to make a variety of assumptions. Consistent with the general guidance of this Circular, analysts should take care to detail and explain the assumptions they make when conducting a general equilibrium analysis. Two general equilibrium-specific situations requiring guidance are discussed next; however, other assumptions may also need to be addressed.

First, general equilibrium modeling often imposes budget constraints on each household, firm, or government in the model. A household budget constraint may, for example, limit household spending to the sum of income and borrowing. However, the development of an

[81] However, input-output models, such as the Bureau of Economic Analysis's RIMS II model, are not generally appropriate as the primary basis for assessing the benefits and costs of regulatory actions. Input-output models quantitatively assess the interdependencies between different sectors in an economy. Input-output models generally do not account for any feedback effects, including general equilibrium macroeconomic feedback effects that depend on the current state of the business cycle, and often produce measures such as changes in output or wages which should not be conflated with estimates of benefits. See the section "*Accounting for Business Cycle Dynamics*" for more details. Input-output models may still be a useful part of an analysis (*e.g.*, establishing baseline conditions), even when not appropriate as a primary basis for assessing the benefits and costs of regulatory actions.
[82] For an example of qualitative general equilibrium analysis being used in a policy-relevant fashion, *see* J. Peter Neary, "Intersectoral Capital Mobility, Wage Stickiness, and the Case for Adjustment Assistance," in *Import Competition and Response*, ed. Jagdish N. Bhagwati (Chicago: University of Chicago Press, 1982), 39-71.

appropriate Federal government budget constraint for use in regulatory analysis is challenging because typical implementations of such constraints assume Federal policy changes that are not part of the regulation under consideration. For example, a regulation that has the effect of discouraging production may reduce the quantity of labor supplied and reduce income tax revenues. A general equilibrium model may assume that the reduction in income tax revenues is offset by a reduction in transfer payments, but such a reduction in transfer payments is not part of the regulation. Assumptions about the policies the government will use to balance the budget in these models are sometimes known as fiscal closure rules. You should take care to ensure that such rules do not inappropriately affect the results of your analysis.

In estimating the net benefits of a regulation, it is generally important to account for relevant government transfer effects. For example, an analysis of a regulation that increases payments to recipients of a public benefits program needs to reflect the budgetary cost of those payments to ensure that net benefit estimates are not overstated.[83] Fiscal closure rules are a common means of accounting for these transfer effects in general equilibrium modeling, but fiscal closure rules are hypothetical because they assume policy changes that are not part of the regulation. Application of fiscal closure rules can thus make the results of a regulatory analysis sensitive to these assumptions about hypothetical policy. Special attention should be paid to the development and presentation of your estimates to appropriately reflect this sensitivity.

In general, you may consider using adjustments in lump-sum transfers from households to balance net government transfers. This approach can be straightforward and tractable to implement analytically, and in certain models it can be used to transparently present the role of such transfers. When behavioral responses to a private-sector mandate or other similar regulation cause material increases or decreases in Federal deficits, you may present results that isolate the role of these behavioral effects on Federal deficits, and you may present estimates of the net benefits including and excluding these effects. This range illustrates the sensitivity of the results to assumptions about the fiscal closure rule and can be used in place of an analysis using alternative fiscal closure rules.

More generally, you should take care to ensure that your results are minimally affected by any policy changes that are not part of the regulation of interest, and you should not include in your primary estimates effects that depend on future Federal legislation or regulation. For example, if you use lump-sum transfers to close a fiscal shortfall in your general equilibrium analysis, the corresponding distributional analysis should report the effects on people excluding the effect of these lump-sum transfers, accompanied by an estimate of the net effect on the Federal budget absent the lump-sum transfer. This approach allows for presentation of the direct distributional consequences of the regulation.

Second, in all modeling the analyst must decide what parameters are chosen outside the

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[83] All else being equal, a one-dollar increase in benefit payments would be offset by a one-dollar cost to the Federal government and have no net benefits. All else is not always equal; for example, in a recession, such government outlays may have benefits that exceed the size of the outlay. These are often referred to as "multiplier effects." See the section "*Accounting for Business Cycle Dynamics*" for more discussion. And as noted in the section "*Transfers*," transfers may also have important distributional effects and effects on incentives and behavior that should be captured in your analysis, and may affect the net benefits of the outlay.

model and what parameters are determined within the model. Many parameters chosen outside the model in partial equilibrium analysis may be determined within the model in general equilibrium analysis. This is often viewed as a strength of general equilibrium analysis. Therefore, it may be appropriate to use a general equilibrium model that would imply parameter values different from those recommended elsewhere in this Circular. One example of this issue is the case of a general equilibrium model in which the model specification—resulting from analysis-specific considerations—implies a discount rate schedule differing from the default values recommended in this Circular. See the section "*Discount Rates*" for more discussion. In these cases, you should take care in how you combine elements of your analysis that rely on different implicit assumptions. You should take similar care when elements of general equilibrium analyses are combined with partial equilibrium analyses. There may also be other endogenously determined parameters in general equilibrium analyses. The discount rate is merely an example, and similar principles apply to other such cases.

i. Methods for Treating Non-Monetized Benefits and Costs

Sound quantitative estimates of benefits and costs, where feasible, are preferable to qualitative descriptions of benefits and costs, because quantitative estimates succinctly summarize the magnitudes of the effects of alternative actions. However, some important benefits and costs may be either difficult to quantify or difficult to monetize. When you determine that it is not possible or appropriate, given the state of the evidence, to quantify or monetize certain effects, you should carefully identify and assess the non-monetized and unquantified benefits and costs.

When it is not possible to quantify or monetize all of the important benefits and costs of a regulation, the policy that most enhances social welfare will not necessarily be the one with the largest quantified and monetized net-benefit estimate. In such cases, you should present the evidence available in a manner that will allow policymakers and the public to determine how important the unquantified benefits or costs may be in the context of the overall analysis. This section discusses how such benefits and costs can be considered.

i. Benefits and Costs that Are Difficult to Quantify or Monetize

Possible reasons that a benefit or cost may be difficult to quantify or monetize include, but are not limited to:

- The social value of a benefit or cost cannot be appropriately measured through individual choice.[84] For example, it would not be appropriate to attempt to fully measure the value of human dignity, civil rights and liberties, equity, justice, or indigenous cultures through individual choice as measured by WTP or WTA. It is possible to conceptualize a WTP or WTA for certain such impacts, but because such impacts may have value over and above their welfare value, attempting to monetize such impacts will—in many cases—misrepresent their full social value.
- The value of a benefit or cost cannot be measured through individual choice, because

[84] See related discussion in Daniel Acland, "What's in, What's out? Towards a Rigorous Definition of the Boundaries of Benefit-Cost Analysis," *Economics & Philosophy* 38, no. 1 (2022): 34-50.

traditional WTP or WTA measures are predicated on assumptions about behavior, decision-making, or appropriate valuation that do not apply. For a regulation that affects the safety of young children, for example, it is possible to use market transactions or survey evidence to estimate the WTP or WTA of others (such as parents) but generally not of the children themselves; for that reason, traditional WTP or WTA measures may yield incomplete estimates.

- The approach to measurement is conceptually clear, but difficulty in collecting the relevant data or conducting the relevant experiment prevents measurement. For example, science might not have progressed to the point where it is possible to quantify the harm done by some pollutant, or technical analysis might not enable an agency to quantify the benefits of some measure designed to reduce safety risks on the highways, or of some measure designed to reduce the importation of contraband. Alternatively, or in addition, directly measuring the valuation of the avoidance of some harm may be inconsistent with research ethics and a relevant quasi- or natural experiment may not be apparent.
- The data exist and the proper method of measurement is clear, but expenditure of the time or resources needed to measure the benefit or cost in the specific regulatory context would be unreasonable.

These reasons why benefits or costs may be difficult or inappropriate to quantify or monetize are merely examples and are by no means exhaustive.

When you are unable to quantify or monetize important benefits or costs due to difficulty in collecting data or time and resource constraints, it is helpful to outline the data collection or analysis that would enable quantification or monetization, even if doing such data collection or analysis is currently infeasible. Doing so may encourage research that would allow for such effects to be quantified or monetized in future regulations.

Benefits and costs that are difficult to quantify or monetize differ from those that are uncertain (although an effect of a regulation can be both difficult to quantify or monetize and also uncertain). Uncertain effects are those that may or may not come to pass or that have uncertain magnitudes, but where some aspects of the underlying probability of occurring or of potential outcomes are known. It is important that your analysis, to the extent feasible, account for both effects that are difficult to quantify or monetize (whether or not they are especially uncertain) and those that are uncertain (whether or not they are difficult to quantify or monetize). See the section "*Quantitative Analysis of Uncertainty*" for details on how to quantify or monetize uncertain effects, where doing so is possible.

ii. Accounting for Benefits and Costs that Are Difficult to Quantify or Monetize

If you are not able to quantify certain effects of a regulation, you should present any relevant information that would inform an understanding of those effects (including their magnitude and probability) along with a description of the unquantified effects, such as (in the context of assessing a regulation that affects the environment) ecological gains or ecosystem services, improvements in quality of life, viewshed improvement, and indigenous culture preservation. You should generally discuss the strengths and limitations of the qualitative information. The discussion should include the reason(s) why the relevant benefits and costs are not quantified.

Even when it is possible to quantify certain effects of a regulation, it might not be possible or sensible to express those effects in monetized terms. In such cases, you should generally explain why this is the case and present all available quantitative information. For example, if you can quantify but cannot monetize improvements in water quality and fish populations resulting from water quality regulation, you can describe recreation benefits in terms of changes in visitation to recreational fishing areas or changes in recreational fish landings. You should endeavor to describe the timing and probability of such effects and avoid double-counting of benefits when estimates of monetized and non-monetized effects are mixed in the same analysis. Similarly, it is important to endeavor to avoid double-counting costs. You should, when feasible and appropriate, accompany this quantitative information with qualitative categorization and discussion of the likely welfare effects (benefits or costs) of the quantified changes.

For cases in which the unquantified or non-monetized benefits or costs could be meaningful in informing a policy choice, it is important, when feasible, to provide detailed information on the nature, timing, probability, location, and distribution of the unquantified or non-monetized benefits or costs.[85] In addition to a detailed description of the meaningful unquantified and non-monetized effects, you should also include a summary table that lists all the unquantified or non-monetized benefits and costs, and when feasible and appropriate highlight (*e.g.*, with categories or rank ordering) those that you believe are most important along with a reasoned explanation for your determination (*e.g.*, by highlighting factors such as the degree of certainty, expected magnitude such as the number of individuals affected, and reversibility of effects). The discussion and summary table of important unquantified and non-monetized effects should be placed prominently in your analysis to facilitate its consideration by policymakers and the public.

While the focus is often placed on benefits of regulatory action that are difficult to quantify or monetize, costs can be difficult to quantify or monetize as well.[86] For example, certain permitting requirements may restrict the decisions of production facilities to shift to new products and adopt innovative methods of production. While costs to innovation may be substantial, it is difficult to quantify and monetize these effects. When important costs cannot be analyzed quantitatively, they should be analyzed qualitatively, specifying who is affected and how.

[85] *See, e.g.*, Daniel A. Farber, "Breaking Bad? The Uneasy Case for Regulatory Breakeven Analysis," *California Law Review* 102, no. 6 (2014): 1469-1493; Rachel Bayefsky, Note, "Dignity as a Value in Agency Cost-Benefit Analysis," *Yale Law Journal* 123, no. 6 (2014): 1732-1782.
[86] Opportunity costs (or cost savings) of a regulation might not be reflected in agency budgets, which can create challenges in quantification. As an example of this phenomenon, an agency might not immediately devote fewer resources to processing applications when it issues a new regulation that shortens an application form, but the labor and other resources previously used for processing the longer form would, in the presence of the regulation, be freed for some other valuable purpose, such as achieving greater speed in the processing of the applications. Hence, there would be a cost savings attributable to the regulation. By the same reasoning, there is a cost attributable to a regulation if an agency will be performing enforcement activities or otherwise using resources in connection with that regulation, even if the agency's budget is not increasing.

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For benefits or costs that are difficult to quantify or monetize, it may be helpful to solicit the views of outside experts or members of the public. Additional discussion of methods for doing so are included in the section on "*Quantitative Analysis of Uncertainty*."

iii. Threshold, Break-Even, Screening, and Order-of-Magnitude Comparisons

If the non-monetized benefits and costs are likely to be important, a "threshold" or "break-even" analysis may be considered for inclusion in a regulatory analysis. Threshold or break-even analysis asks what magnitude non-monetized benefits and costs would need to have for the regulation at issue to yield positive net benefits or to change which regulatory alternative is most net beneficial. Put differently, the method answers the question, "How small could the value of the non-monetized benefits be (or how large would the value of the non-monetized costs need to be) before the regulation would yield zero net benefits (or before the most net-beneficial regulatory alternative changes)?"

Break-even comparisons have strengths and limitations that you should be conscious of when employing them. It may be useful to focus a break-even analysis on whether the action under consideration will change the probability of events occurring or the potential magnitude of those events. For example, there may be instances when you have estimates of the expected outcome of a type of catastrophic event, but assessing the change in the probability of such an event may be difficult. Your break-even analysis could demonstrate how much a regulatory alternative would need to reduce the probability of a catastrophic event occurring in order to yield positive net benefits or change which regulatory alternative is most net beneficial. Regardless, you should avoid giving the impression that whether net benefits will be positive or negative, or which regulatory alternative is most net beneficial, is known with certainty in cases where such certainty is not possible.[87]

Break-even presentations may reflect situations in which multiple inputs are available (A,B) and other inputs are missing (X,Y). The analysis would demonstrate how A and B combine to quantify what is known about the scope and timing of the potential benefits (or costs), and how X and Y would need to combine for a regulatory provision to break even; a diagonal dividing line—which can be thought of as a break-even curve, as it represents all of the combinations of points that causes the analysis to break even—could divide a diagram with X and Y axes, or a table with X and Y rows and columns, into regions with positive and negative net benefits. In other words, a range of outcomes that represents the break-even state may be constructed from a set of combinations of outcomes and probabilities such that the levels of unknown benefits or costs allow the equality between them to hold.[88]

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[87] For more on break-even analysis, *see, e.g.*, Cass R. Sunstein, "The Limits of Quantification," 102 *California Law Review* 102, no. 6 (2014): 1369-1421; Clark Nardinelli, "Some Pitfalls of Practical Benefit-Cost Analysis," *Journal of Benefit-Cost Analysis* 9, no. 3 (2018): 519-530.

[88] Suppose a pollution regulation's costs are estimated at $200 million per year and mortality-related benefits at $190 million per year. Suppose further that baseline evidence indicates 100,000 individuals experience non-fatal health harms—perhaps such that they stay home from work or school—on an average of two days per year, due to the pollution. Two challenging areas for estimating morbidity-related regulatory benefits might be quantifying the regulation's effectiveness at reducing health harm and monetizing the per-day benefit of avoiding the health harm.

Similarly, agencies may deploy "screening" or "order-of-magnitude" analysis when the quantitative information they have may not be of sufficient quantity or quality to produce precise estimates, but may be suited to produce information about the potential magnitude of the effects. For example, suppose there are three facilities emitting by-products of their production process through their air vents, and suppose there is insufficient information to model air transport, which would be necessary to estimate who might be exposed. If the agency knows the population of the nearby towns, by invoking reasonable assumptions about the transport distance of the air emissions, the agency would likely be able to present screening or order-of-magnitude analysis encompassing various scenarios.

j. Monetizing Health and Safety Benefits and Costs

In monetizing health benefits and costs, a WTP or WTA measure is the conceptually appropriate measure as compared to other alternatives (*e.g.*, cost of illness or lifetime earnings), in part because it attempts to capture pain and suffering and other quality-of-life effects. Using a WTP or WTA measure for health and safety allows you to directly compare your results to the other benefits and costs in your analysis, which will typically be based on WTP or WTA.

The valuation of fatal and nonfatal risk reduction is an evolving area in both results and methodology. You should utilize valuation methods that are appropriate for your regulatory circumstances. You should clearly indicate the methodology used and document your choice.

i. Nonfatal Health and Safety Risks

With regard to nonfatal health and safety risks, there is enormous diversity in the nature and severity of impaired health states. A traumatic injury that can be treated effectively in the emergency room without hospitalization or long-term care is different from a traumatic injury resulting in paraplegia. Severity differences are also important in evaluation of chronic diseases. The duration of an impaired health state, which can range from a day or two to several years or even a lifetime, need to be considered carefully, along with severity, when monetizing.

When monetizing nonfatal health effects, it is important to consider two components: (1) the private demand for prevention of the nonfatal health effect, to be represented by the

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Points along the locus of break-even thresholds would include 100% effectiveness and $50 per day, 50% effectiveness and $100 per day, and 10% effectiveness and $500 per day.

Regulatory Effectiveness / **Daily Value**	10%	25%	50%	75%	100%
$500	0	+	+	+	+
$200	-	0	+	+	+
$100	-	-	0	+	+
$67	-	-	-	0	+
$50	-	-	-	-	0

Regulatory effectiveness (at preventing missed days of work or school) and the monetized value of daily absenteeism combine to yield negative net benefits (-), positive net benefits (+), or break-even status (0).

preferences of the target population at risk, and (2) the externalities associated with poor health.[89] Revealed-preference or stated-preference studies are necessary to estimate the private demand; health economics data from published sources may help estimate the externalities caused by changes in health status. If you use literature values to monetize nonfatal health and safety risks, it is important to make sure that the values you have selected are appropriate for the severity and duration of health effects to be addressed by your regulation.

If data are not available to support monetization using more direct WTP or WTA data, you might consider an alternative approach that makes use of health-utility measures like "quality-adjusted life years" (QALYs) and then monetizing using an estimate of the value per QALY.[90] Bear in mind, however, that a main drawback of integrated measures of this type is that they must meet some restrictive assumptions to represent a valid measure of individual preferences.[91] If you use this approach, you should be careful to acknowledge your assumptions and the limitations of your estimates.

ii. Fatality Risks

Since agencies often design health and safety regulations to reduce risks to life, evaluation of these benefits can be the key part of the analysis. A good analysis must present these benefits clearly and show their importance. Applying WTP is the best approach to use when monetizing reductions in fatality risk.

Some describe the monetized value of small changes in fatality risk as the "value of statistical life" (VSL). This term refers to the measurement of willingness to pay for reductions in only small risks of premature death. It has no application to an identifiable individual or to very large reductions in individual risks. It does not suggest that any individual's life can be expressed in monetary terms.

The term "statistical life" refers to the sum of risk reductions expected in a population. For example, if the annual risk of death is reduced by one in a million for each of two million people, that is said to represent two "statistical lives" extended (2 million people x 1/1,000,000 = 2). If the risk of death is reduced by one in 10 million for each of 20 million people, that also represents two statistical lives extended.

The adoption of a value for the projected reduction in the risk of premature mortality is the subject of continuing discussion within the economics and public policy analysis community. A considerable body of academic literature is available on this subject. Agencies have engaged in a consistent practice, over the course of several decades, of relying on this literature to

[89] Although this two-component guidance is presented for simplicity, distinguishing between private preferences and externalities is not always obvious. For example, if sick workers lose income, then changes in economic production—which otherwise may seem to represent externalities—may be partially or largely internalized in private demand for illness prevention.
[90] Although many academic studies calculate QALYs associated with both fatal and non-fatal outcomes, we note that, for regulatory analysis purposes, quality adjustment (the QA of QALY) should be used only in the portion of the analysis that focuses on non-fatal injury or illness.
[91] Joseph S. Pliskin, Donald S. Shepard, and Milton C. Weinstein, "Utility Functions for Life Years and Health Status," *Operations Research* 28, no. 1 (1980): 206-224.

estimate VSL. Based on this consistent practice, agencies typically utilize central estimates of VSL between $10 million to $12 million as of 2022, and regularly update these values to reflect inflation and real income growth.[92]

Another approach for expressing reductions in fatality risks is the life expectancy method, the "value of statistical life-years (VSLY) extended." If a regulation protects individuals whose average remaining life expectancy is 40 years, a risk reduction of one fatality is expressed as "40 life-years extended." Those who favor this alternative approach emphasize that the value of a statistical life is not a single number relevant for all situations. In particular, when there are significant differences between the effect on life expectancy for the population affected by a particular health risk and the populations studied in the labor market studies, they prefer to adopt a VSLY approach to reflect those differences. You should consider using estimates of both VSL and VSLY, while recognizing the developing state of knowledge in this area.

Longevity may be only one of a number of relevant considerations pertaining to a regulation. You should keep in mind that regulations with greater numbers of life-years extended are not necessarily better than regulations with fewer numbers of life-years extended. In any event, when you present estimates based on the VSLY method, you should adopt a larger VSLY estimate for senior citizens.[93]

When a regulation reduces mortality risk for a population that happens to experience a high rate of disability (where the regulation is not designed to affect the disability), the number of life-years saved should not be diminished simply because the regulation reduces risk for people with life-shortening disabilities. Both analytic simplicity and fairness suggest that the estimated number of life-years saved for the disabled population should be based on average life expectancy information for the relevant age cohorts.

iii. Valuation of Reductions in Health and Safety Risks to Children

The valuation of health outcomes for children and infants poses special challenges. It is rarely feasible to measure a child's willingness to pay for health improvement, and adults' concern for their own health is not necessarily relevant to valuation of child health. For example, the wage premiums demanded by workers to accept hazardous jobs are not necessarily appropriate to use for regulations that accomplish health gains for children. Some studies suggest that parents may value children's health more strongly than their own health. Although this parental perspective has been a promising research strategy, it may need to be expanded to include a societal interest in child health and safety.

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[92] *See* Environmental Protection Agency, *Guidelines for Preparing Economic Analyses* (2016); Department of Health and Human Services, *Guidelines for Regulatory Impact Analysis* (2016) and Department of Health and Human Services. Guidelines for Regulatory Impact Analysis, Appendix D: Updating Value per Statistical Life (VSL) Estimates for Inflation and Changes in Real Income (2021); Department of Transportation, *Treatment of the Value of Preventing Fatalities and Injuries in Preparing Economic Analyses* (2021). Agencies' standard practice has been to apply VSLs in regulatory analysis that do not vary by income at a given point in time for any U.S. citizens and residents.

[93] John D. Graham, Memorandum to the President's Management Council, *Benefit-Cost Methods and Lifesaving Rules* (May 30, 2003), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/regulatory_matters_pdf/pmc_benefit_cost_memo.pdf.

Where the primary objective of a regulation is to reduce the risk of injury, disease or mortality among children, you may develop a benefit-cost analysis to the extent that valid monetary values can be assigned to the primary expected health outcomes. For regulations where health gains are expected among both children and adults and you decide to perform a benefit-cost analysis, the monetary values for children should be at least as large as the values for adults (for the same probabilities and outcomes) unless there is specific and compelling evidence to suggest otherwise.

k. Accounting for the Benefits and Costs from Environmental Services, Ecosystem Services, and Natural Capital

In order to provide policymakers with relevant information, an analysis should account for effects on environmental or ecosystem services, or changes in the value of natural assets, if relevant and feasible, in your benefit-cost analysis. The phrase "ecosystem services" refers to the contributions to human welfare from the environment or ecosystems; the phrase "environmental services" refers to the abiotic portion of ecosystem services.[94] Natural assets, or natural capital, are physical biotic or abiotic natural resources capable of providing—or contributing to—future welfare, potentially through environmental or ecosystem services. Natural capital is distinguished from ecosystem services in that natural capital is a stock (measure of quantity) whereas ecosystem services are a flow (measure of change in quantity over time). The two are connected, as flows are the changes of a stock over time.

Many regulations will influence environmental or ecosystem services that directly impact the welfare of relevant populations. For example, a housing regulation may interact with air quality or open space influencing health outcomes, leisure opportunities, or both. It is helpful to identify relevant ecosystem services potentially impacted by the regulation under consideration. Where you identify relevant ecosystem services, you should seek to monetize their impacts when feasible, quantify impacts when monetization is not feasible, and describe qualitatively impacts that are not monetized or quantified. See the section "*Methods for Treating Non-Monetized Benefits and Costs*" and forthcoming OMB guidance on ecosystem services[95] for additional information and guidance. As with other benefits and costs, your analysis should be designed to account for each effect of a regulation exactly once.

8. Other Key Considerations

a. Other Benefit and Cost Considerations

i. Important Benefits and Costs to Consider

You should generally, if feasible, include these effects in your analysis and provide

[94] James Boyd and Spencer Banzhaf, "What Are Ecosystem Services? The Need for Standardized Environmental Accounting Units," *Ecological Economics* 63, no. 2-3 (2007): 616-626.
[95] Office of Management & Budget, *Guidance for Assessing Changes in Environmental and Ecosystem Services in Benefit-Cost Analysis* (forthcoming). A draft of this guidance was published for public review in August 2023 and is available at https://www.whitehouse.gov/wp-content/uploads/2023/08/DraftESGuidance.pdf.

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estimates of their monetary values when they are substantial:

- private-sector compliance costs and savings;
- government administrative costs and savings;
- gains or losses in consumers' or producers' surpluses;
- discomfort or inconvenience costs and benefits; and
- gains or losses of time in work, leisure or commuting/travel settings.[96]

ii. Accounting for Technological and Other Changes Induced by Regulations

To the extent feasible, regulatory analysis should carefully forecast potential changes in technology and other economic or social conditions over time, and the implications of those changes for estimated benefits and costs. Technological, economic, social, and other conditions may evolve due to forces outside the regulatory framework under consideration. A baseline constitutes an analytically reasonable assessment of the way the world would look absent the regulatory action being assessed (see the section "*Developing an Analytic Baseline*" above), so these potential changes should be carefully considered in constructing one or more appropriate baselines for your analysis. That includes considering the likely technological changes that would have occurred in the absence of the regulatory action. If you assume that technology will remain unchanged in the absence of regulation when technological changes are likely, then your analysis may misstate both the benefits and costs attributable to the regulation.

Technological, economic, social, and other conditions also may evolve due to the design of the regulation under consideration. Regulations may provide incentives to increase technology innovation or impede such progress.[97] You should, when appropriate and feasible, consider cost-saving innovations that may result from a shift to regulatory performance standards and incentive-based policies. In addition, costs may result from a slowing in the rate of innovation or slowing of adoption of new technology due to delays introduced or exacerbated by the regulatory approval process or the setting of more stringent standards for new facilities than for existing ones. You should carefully account for the effects of incentives of your regulation.

In some cases, agencies are limited under statute to set regulatory standards based only on technologies that have been demonstrated to meet a legal standard of feasibility. In these situations, it is nevertheless appropriate to estimate benefits and costs in a manner that accounts for a wider range of technical possibilities in order to provide information to the public or policymakers.

There are other phenomena that may affect benefits and costs over time unrelated to the

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[96] Estimating the opportunity cost of time is challenging and is often context dependent (*e.g.*, W. Douglass Shaw, "Searching for the Opportunity Cost of an Individual's Time," *Land Economics* 68, no. 1 (1992): 107-115). Analysts can develop their own well-reasoned estimates for the value of time. For time spent by workers that would have been spent doing other work, their compensation rate (*e.g.*, per unit of time) inclusive of taxes, overhead, and fringe benefits may be used as a proxy for the value of time. In the absence of more refined evidence, the same compensation estimate may also be used as a proxy for the value of time that non-working individuals could have spent doing other activities, with appropriate caveats.

[97] *See* Knut Blind, "The Influence of Regulations on Innovation: A Quantitative Assessment for OECD Countries," *Research Policy* 41, no. 2 (2012): 391-400.

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development of novel technologies. For example, retrospective studies have provided some evidence that learning reduces the costs of a regulation in future years because the variable costs of deploying new technologies, or existing technologies in new applications, decrease.[98] The examination of variable cost reduction due to learning has an extensive history in the economics and engineering literatures. In your regulatory analysis, you may wish to consider any relevant studies of past rates of cost reductions resulting from such effects as learning, with due regard for the studies' timeliness and applicability to the regulation under consideration.

b. Accounting for Compliance and Take-up

You should endeavor to clearly present any key assumptions about compliance with a regulation. Assuming full compliance may be inappropriate when available evidence suggests imperfect compliance is likely. Both under-compliance and over-compliance may occur. Under-compliance occurs when regulated entities do not fulfill all of their obligations under a regulation. This often occurs when compliance costs exceed the expected costs of noncompliance.[99] Over-compliance occurs when regulated entities surpass the requirements set forth in a regulation. This is usually driven by uncertainty regarding compliance, the "lumpiness" of compliance technologies, risk aversion, or market factors such as consumer or shareholder preferences. When compliance issues are relevant to the analysis of a regulation, to the extent that doing so is feasible, your analysis should examine risks of non-compliance and reflect available evidence about compliance, in terms of the percentage of regulated entities in significant noncompliance or the level of compliance across various entities.

In the absence of evidence indicating that under-compliance or over-compliance with your regulation is likely, or when compliance issues are not material to the outcome of your analysis, assuming full compliance is often a reasonable default. If full compliance is assumed in other cases, agencies should generally try to explain why strong compliance is reasonably expected and whether alternative regulatory approaches could make compliance more likely. It may be helpful to specifically address the form of compliance strategies, communications, and enforcement; the resources needed, and availability of those resources, for those approaches; and how regulatory design and enforcement decisions will affect compliance and administrative costs. There is a rich economic literature in this area to build on.[100] It also may be helpful to consider the distributional effects of uneven compliance.

Consideration of compliance issues is especially important when analyzing regulatory actions intended to address compliance problems associated with prior regulations. In these

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[98] *See* Art Fraas, Elizabeth Kopits, and Ann Wolverton, "A Review of Retrospective Cost Analyses," *Review of Environmental Economics and Policy* 17, no. 1 (2023): 22-42 for a meta-analysis of retrospective reviews.

[99] Although not an instance of non-compliance, an analytically similar case may occur when agencies grant regulated parties waivers or exemptions to regulatory requirements.

[100] *See* A. Mitchell Polinsky and Steven Shavell, "The Economic Theory of Public Enforcement of Law," *Journal of Economic Literature* 38, no. 1 (2000): 45-76 for a review of literature in this area; *see also* Anthony Heyes, "Implementing Environmental Regulation: Enforcement and Compliance," *Journal of Regulatory Economics* 17, no. 2 (2000): 107-129; Wayne B. Gray and Jay P. Shimshack, "The Effectiveness of Environmental Monitoring and Enforcement: A Review of the Empirical Evidence," *Review of Environmental Economics and Policy* 5, no. 1 (2011): 3-24; Jay P. Shimshack, "The Economics of Environmental Monitoring and Enforcement," *Annual Review of Resource Economics* 6, no. 1 (2014): 339-360 for an analysis of enforcement of environmental regulations.

cases, assuming a full-compliance baseline could lead to inaccurate conclusions about the effects of the new regulatory action. Suppose, for example, that an existing regulation was assessed at the time of its issuance assuming full eventual compliance, but this assumption turns out to have been overly optimistic, motivating the issuance of a new policy designed to improve compliance with the existing regulation. In this case, hewing to the assumption of full compliance with the original regulation would attribute zero benefits and zero (or otherwise-underestimated) costs to the new regulation, undermining the ability of a new regulatory analysis to inform decisions about the compliance-improvement policy. Instead, it would be most informative for the analytic baseline of the new regulation to reflect the best available evidence regarding the incomplete compliance with the earlier regulation.[101]

Estimates of incomplete compliance are most useful when noncompliance is identified with as much specificity as possible. For example, if noncompliance is driven by high compliance costs, estimating the costs of compliance separately for compliant and noncompliant facilities (that do not incur those costs) would likely be more accurate than simply scaling costs by the percentage of noncompliant facilities. More generally, a description of imperfect compliance in the baseline—consistent with the best available evidence—is generally the optimal starting point for analyzing the effects of policies meant to increase compliance.[102]

Sometimes entities anticipate more stringent regulations in the future and undertake actions to preemptively comply with or exempt themselves from such regulations, and it may be helpful for your analysis to examine data on relevant trends, the shape of cost curves for regulated entities, and other such considerations. When analyzing anticipatory compliance, you should capture the effects of regulatory anticipation consistently across both benefits and costs, such that both benefits and costs of compliance are attributed to the forthcoming regulation or both reflected in the baseline. If you estimate that entities will anticipatorily comply, you should generally provide the evidence supporting that estimate.

Consistency is similarly important when analyzing firms undertaking additional compliance measures not because of regulatory actions, but instead to meet consumer demand, to comply with overlapping legal requirements, or other reasons. For example, if you estimate that removing regulatory requirements will not have significant costs (forgone benefits) because regulated entities will continue to comply with the previous regulatory requirements either voluntarily or because of overlapping legal requirements (such as State or local laws), the same assumption should be applied to the estimation of benefits (cost-savings).

Similar issues can arise with respect to imperfect take-up of government program

[101] In these situations, it may be informative to present new estimates of the benefits and costs of the prior regulation, reflecting the lower-than-expected compliance.

[102] If systematic data about past compliance is not available, a multi-baseline analysis may be an especially informative approach. For example, if a delay of a previous regulation is announced—via rulemaking or a statement of enforcement discretion—between the issuance of a regulation and its impending compliance date, one set of estimates of the delay's effect should be calculated relative to a baseline of full compliance, even if this quantification is accompanied by an acknowledgement that the full-compliance baseline is overly simplistic. Information on compliance strategies or resources for enforcement would be a possible key input to a useful second baseline analysis, in which the incentives created by such strategies or enforcement lead to other compliance patterns.

benefits. Fewer individuals or entities may claim a benefit than are eligible to do so, potentially because of the costs of claiming the benefit, administrative burdens, informational barriers, or cognitive biases.[103] Just as with compliance, when take-up questions are relevant to the analysis, your analysis should reflect available evidence about take-up to the extent that doing so is feasible and appropriate. It may be particularly relevant to consider whether take-up rates may systematically vary across groups identified in any distributional analysis, as this could alter the expected distribution of benefits.

c. Accounting for Business Cycle Dynamics

Benefit-cost analysis often excludes consideration of business-cycle fluctuations in economic activity, which is a reasonable and tractable approach to conducting an analysis in most cases. However, in certain regulatory contexts—such as those relating to automatic stabilizers—an examination of how the frequency or severity of recessions interacts with the benefits and costs of a regulation can be useful. Whether such an analysis is useful will require both an assessment of the regulation's anticipated effects and the relevance of any interactions with business cycle dynamics.

If you determine that a regulation is likely to have substantially different effects over the course of recessions and recoveries, you should consider how to account for the benefits and costs attributable to these effects in your estimate of net benefits. Since the timing of business cycles is uncertain, these effects will also be uncertain. As a result, they should be presented and calculated in a manner that reflects their uncertainty. See the section "*Treatment of Uncertainty*" for additional discussion. Approaches you may consider range in formality from qualitative discussion of the issues to quantification of the expected benefits and costs (if applicable) in a calibrated economic model. It is helpful, in such an analysis, to carefully distinguish between the underlying causes of business cycles and the economic response to them generated by the regulation in question.

In any such analysis, you should focus on the benefits and costs attributable to a regulation's interactions with the business cycle. These results should be presented in whichever way most clearly conveys your findings while appropriately describing relevant underlying uncertainties. While impacts on macroeconomic aggregates such as consumption, employment,[104] or gross domestic product may be useful elements in estimating these benefits and costs, they are not themselves measures of benefits or costs. See the section "*Developing Benefit and Cost Estimates*" for a more detailed discussion of how to estimate such benefits and costs using the information available to you.

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[103] *See* Wonsik Ko and Robert A. Moffitt, "Take-up of Social Benefits" (Working Paper No. 30148, National Bureau of Economic Research, June 2022), https://www.nber.org/papers/w30148; Marianne Bertrand, Sendhil Mullainathan, and Eldar Shafir, "Behavioral Economics and Marketing in Aid of Decision Making among the Poor," *Journal of Public Policy & Marketing* 25, no. 1 (2006): 8-23.

[104] *See* Office of Management & Budget, *2015 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act* 42 (March 10, 2016), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/inforeg/inforeg/2015_cb/2015-cost-benefit-report.pdf (noting potential pitfalls in assessing employment effects of individual regulations, including the need to consider the timing of the business cycle and long-run market adjustments).

d. Accounting for the Effects of Market Power

The presence of market power may affect your benefit and cost estimates. You generally should account for the presence of market power—and changes in market power induced by your regulation—when it is relevant to the effects of the regulation under consideration. Regulations may affect market power in many ways. Examples include, but are not limited to, creating or lowering barriers to entry for new firms, increasing or decreasing the costs to consumers of switching among suppliers of a good, strengthening or limiting labor market competition in ways that impact workers, or limiting or enhancing monopoly power stemming from procurement decisions. Regulatory analysis should keep in mind the effects of government regulation in markets that are both "upstream" and "downstream" from the market that is directly affected. For a regulation that leads to a substantial increase or decrease in market power, for example, your analysis generally should examine the benefits and costs arising from these effects, which could arise from changes in the price and quantity of goods sold in that industry, quality of goods and services produced, or incentives to innovate, among other possibilities.

You should also be attentive to the possibility that regulations directly addressing issues other than market power may have meaningful indirect effects on market structure and competition, and it is informative to discuss and, if feasible, to quantify the benefits and costs arising from such effects in your analysis. For example, licensing or permitting requirements intended to increase safety may act as a barrier to entry, allowing incumbent firms to charge higher-than-competitive prices. In such cases, you should consider whether the regulation's safety benefits (along with the regulation's other benefits) outweigh any losses in consumer surplus caused by higher prices (along with the regulation's other costs), and whether there are alternatives that promote greater competition and would therefore have greater net benefits.

e. Accounting for Imperfect or Asymmetric Information

Generally, for regulations that materially reduce the burden of gathering and interpreting information, it will be informative to explain how that reduction in burden would impact market participants. When possible and appropriate, you should quantify such cost reductions for market participants and other affected individuals and entities. When relevant to your analysis of the presence of imperfect or asymmetric information, you should consider how information proliferation and access to information may fail to remedy information burden by resulting in information overload, producing a degree of confusion, or raising the cost of interpreting the information.[105] Simpler presentation of information might have higher benefits. On one hand, search technologies may have improved information access for many consumers and other market participants even as, on the other hand, label proliferation and other forms of information overload can lead to information-processing issues (and associated behavioral biases).

Some policies may make information available in a way that reduces information asymmetries, reducing or eliminating problems of adverse selection or moral hazard. For example, when product quality cannot be observed by consumers but is known by firms, requiring producers to disclose information about product quality may increase efficiency by

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[105] *See* Oren Bar-Gill, David Schkade, and Cass R. Sunstein, "Drawing False Inferences from Mandated Disclosures," *Behavioural Public Policy* 3, no. 2 (2019): 209-227.

addressing adverse selection. To use another example, when limited liability creates an incentive for those shielded by it to take excessive risks, this moral hazard problem can be addressed by regulations that limit excessive risk-taking.

Policies that alter the availability of information can also impact producers directly. In some cases, increasing or decreasing the availability of information may have market power effects, for example by increasing or decreasing the ability of producers or employers to collude. In other cases, increasing the availability of information may increase producer efficiency, and therefore lead to benefits for the relevant firms' consumers, workers, or owners.[106]

9. Transfers

A transfer payment, in its simplest form, is a shift in money (or other item of value) from one party to another. More generally, when a regulation generates a gain for one group and an equal-dollar-value loss for another group, the regulation is said to cause a transfer from the latter group to the former. The term "transfer" is perhaps most commonly used in situations where a single effect of a regulation causes linked, exactly offsetting impacts on different groups. However, this linkage is not necessarily a defining feature of transfers, and different approaches to thinking about these effects are discussed below.

a. Consistent Treatment of Transfers in Your Estimates of Regulatory Impacts

There are two approaches to accounting for transfers, either of which you may apply in your regulatory analysis[107]:

i. Accounting for Transfers Separately from Benefits and Costs

This accounting approach excludes both sides of a transfer from your estimates of benefits and costs and provides a separate accounting of transfers. If you adopt this approach, you must, for consistency, exclude both sides of the transfer from your estimates of benefits and costs. (If you classify one side of a transfer as a benefit and the other as a transfer, or one side as a cost and the other side as a transfer, your estimate of net benefits will be incorrect.) Under this approach, distinguishing between benefits or costs and transfers can sometimes be difficult, and OMB is available as a resource if you are unsure of how to categorize particular effects.

When taking this accounting approach, it is informative to distinguish between analysis of transfers and assessment of who experiences regulatory benefits and costs. For instance, if a regulation implements a statute that calls for costly compliance activities and also expends Federal funds to reimburse entities performing such activities, the regulation's impact is

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[106] Sang-Hyun Kim and Serguei Netessine, "Collaborative Cost Reduction and Component Procurement under Information Asymmetry," *Management Science* 59, no. 1 (2013): 189-206; Xavier Vives, "Information Sharing: Economics and Antitrust," in *The Pros and Cons of Information Sharing* (Stockholm: Swedish Competition Authority, 2006), 83-100; Carl Shapiro, "Exchange of Cost Information in Oligopoly," *Review of Economic Studies* 53, no. 3 (1986): 433-446; Alison J. Kirby, "Trade Associations as Information Exchange Mechanisms," *RAND Journal of Economics* 19, no. 1 (1988): 138-146.

[107] It is generally helpful to use the same accounting approach across analyses of related regulations. OMB is available if case-by-case consultations would be helpful.

appropriately categorized as a cost borne by the Federal government for the share that is paid by the Federal government.

It will generally be appropriate to categorize an effect as a transfer if its effects on one group are exactly offset by its effects on another group or if there is a similarly direct link between the effect on one group and the effect on another group. Examples of *transfers* potentially include the following:

- Fees to government agencies for goods or services.[108]
- Tax payments from individuals or businesses to the government (monetary transfers from taxpayers to the government) and tax refunds from the government to individuals or businesses (monetary transfers from the government to taxpayers).[109]
- Payments by the government for goods or services provided by the private sector (that is, monetary transfers by the government to service providers, such as reimbursements by the Medicare program).
- Reductions in sales of a good or service by one business that are matched by increases in sales of the same good or service by another (that is, transfers in economic activity from one business to another).[110]
- Reductions in resources for some consumers that are matched by increases for others (that is, transfers of resources among consumers).

Separately, under this approach, examples of *benefits or costs*—as opposed to transfers—potentially include:

- Changes in use of goods and services to comply with relevant regulatory requirements.
- Changes in consumer and producer well-being resulting from regulation-induced price or quantity changes.
- Changes in premature death, illness, or disability.

Additionally, agency analysts should consider asking the following questions, which are likely to be helpful in the task of categorizing regulatory impacts:

- *Are effects naturally dollar-denominated?* If not, the impacts in question are unlikely to

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[108] In some cases, user fees (or user fee changes) may provide a reasonable approximation of the incremental societal opportunity cost of a service that the government would not provide to the same extent, or at all, in the absence of the regulatory action. But when a fee is not a good proxy for the underlying cost to the government of providing the service, the cost to the government should be separately reported from the fee (with the fee categorized as a transfer). Regardless of whether that is the case, your presentation of transfers should complement other portions of your analysis—portions that may be accounting for the value of the goods or services to the feepayer as a benefit or the expense (to the government) of providing those goods or services as a cost.
[109] As a first-order approximation, tax payments are categorized as transfers. Tax payments may also have important negative or positive impacts on net benefits, for example through incentive effects or by funding socially valuable expenditure. Tax payments are only pure transfers when the marginal benefit of a dollar collected is equal to the marginal cost of a dollar collected.
[110] As a first-order approximation, such sales shifts are categorized as transfers. They may also have important negative or positive impacts on net benefits, for example if the relevant businesses have different costs of production or produce different externalities.

be transfers. For example, time spent on a compliance activity must be transformed into a monetary value using a wage or fee estimate; in other words, it is not naturally dollar-denominated, and thus is typically a cost.

- *Do estimates depend on behavior change?* If so, the impact for which the estimates have been developed is less likely to *purely* be a transfer.[111]

If you take this accounting approach, it is helpful to distinguish transfers caused by Federal budget actions, such as those stemming from a regulation affecting public benefits payments, from those that involve transfers between non-governmental parties, such as regulations that effectuate transfers between employers and employees or regulations that confer monopoly rents on a private party.[112] You can use as many categories of transfers as necessary to describe the major effects of a regulatory action.

ii. Accounting for Transfers as Offsetting Benefits and Costs

An alternative approach that you may choose to adopt is to include one side of a transfer as a benefit and the other side of a transfer as a cost, such that the transfer is treated symmetrically in your estimate of net benefits. Under this approach, a larger transfer will result in larger benefits and larger costs and a smaller transfer will result in smaller benefits and smaller costs. If you adopt this approach, it is important that you ensure that you include both sides of a transfer in your accounting. For example, a grant paid by the government to an individual should be included in your analysis as both a benefit to the individual and a cost to the government.[113]

One advantage of this second approach is that it can provide greater clarity in documenting the impacts on different parties. When you conduct a distributional analysis, and in particular when you compute an income-weighted estimate of the net benefits of a regulation in accordance with the section "*Weights and Benefit-Cost Analysis*," adopting this approach is necessary to ensure that all the significant effects on different groups are accounted for. This approach can also be useful if it is difficult to categorize whether or not various effects are transfers, but straightforward to account for them as benefits and costs. Under this second approach, you would not need to present a separate category of benefits and costs that are transfers unless you believe that the presentation of this information is valuable.

The proceeding discussion describes a transfer as a payment from one group to another. However, the ultimate effects of a transfer may not be so straightforward. For example, if the analysis evaluates the economic incidence of the transfer, those whose welfare is ultimately increased or decreased may be different from who initially pays the transfer and who initially receives it (see the section "*Distributional Effects*" for more details). Furthermore, there may be multiple groups contributing to the transfer and multiple groups receiving it, potentially making the exact amount transferred between any two groups unidentifiable. For these reasons, you should try to identify the groups that contribute to the transfer and those that receive the transfer

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[111] See the section "*Further Guidance on Net Benefits from a Society-Wide Perspective*" for more detail on this point.
[112] See the section "*Presentation of Results and Accounting Statement*" for a suggested format for doing so.
[113] There may be some exceptions to this general statement—for example, if following it would generate double-counting when considered in combination with other portions of your analysis.

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when summarizing the impacts of a regulation, rather than only who pays or receives the transfer. The sum of the transfers contributed to and received should still be equal in a traditionally-weighted analysis.

b. Further Guidance on Net Benefits from a Society-Wide Perspective

Transfers can induce important behavioral changes. These effects include, but are not limited to: changes in the net use of social resources; changes in consumer or producer welfare; or changes in premature death, illness, or disability (these categories overlap in some cases). A full analysis would incorporate estimates of relevant and significant behavioral effects, if feasible. A market model may be a useful tool for achieving appropriate society-wide accounting of net benefits that captures such effects; please see the section *"Partial and General Equilibrium Analysis.*"

For example, consider a regulation that increases payments to recipients of a public benefits program available only to retired individuals by five percent. The most straightforward impact of this regulation is a transfer to these recipients. In addition, this regulation might have important implications for retirement decisions for individuals eligible for the public benefits program. This, in turn, could have broad impacts across the labor market, with potentially large implications for the benefits and costs of the regulation.

As a further illustration, consider a regulation that implements a new Federal spending program in a market characterized by some distortion, such as a positive externality. The payment amount may be most readily categorized as a transfer. This effect would be accompanied by external benefits, that is, benefits experienced by individuals not directly receiving payments.

c. The Marginal Cost of Public Funds

Regulations that affect net transfers from the government will lead to changes in the Federal debt, taxes or other revenues, or government spending. As governmental transfers make up a larger share of a regulation's total effects, partial estimation of that regulation's net benefits—*i.e.*, estimates that do not account for resulting changes to the Federal debt, taxes, or government spending—becomes increasingly less informative. Relatedly, net benefits comparisons across regulatory alternatives are likely to be more informative if the alternatives have similar effects on governmental transfers.

One approach to estimating welfare effects associated with transfers from the government to other entities is to apply a factor known as the marginal cost of public funds. This factor is an estimate of the distortionary cost of taxation. For example, people take actions to avoid paying tax, such as choosing to work fewer hours, sheltering more income from tax using available deductions, or hiring a tax lawyer to set up trusts to minimize tax liabilities. Whether or not to apply this factor in an analysis can be particularly consequential for regulations that cause a material increase or decrease in Federal outlays, such as a regulation that modifies the eligibility criteria for an existing policy or program.[114] However, agencies generally should not make this adjustment in analyses of regulations associated with spending programs.

This longstanding approach of not making such adjustments in analysis of individual regulations is due to several reasons, including because such regulations typically do not make offsetting changes to tax policy. For example, if a regulation would increase Medicare spending by some amount but would not directly affect the tax system, applying a marginal cost of public funds in the primary analysis may inappropriately express false certainty about the attribution to the Medicare regulation of effects of an assumed change in tax rates. In practice, these two policies (*i.e.*, changes to Medicare, and changes to tax rates) may not be correlated at all. Additionally, any such analysis could be further complicated by the nature of how the tax system is designed. The benefits and costs of behavioral responses to taxation will vary with the form of taxation enacted; for example, taxation of a negative externality may produce behavioral responses with substantial net social benefits.[115] Another challenge in using a marginal cost of public funds is that estimates of the distortionary costs of taxation often ignore distributional considerations.[116]

10. Distributional Effects

The benefits and costs of a regulation are ultimately experienced by people. For some regulations, different groups of people may be impacted differently. Distributional analysis, whether quantitative or qualitative, can help illustrate these effects. This section provides agencies guidance on undertaking distributional analysis when they choose to do so.[117]

a. General Issues

The term "distributional effect" refers to how the benefits and the costs of a regulatory action are ultimately experienced across the population and economy, divided up in various ways (*e.g.*, income groups, race or ethnicity, sex, gender, sexual orientation, disability, occupation, or geography; or relevant categories for firms, including firm size and industrial sector). The benefits and costs of a regulation may also be distributed unevenly over time, resulting in regulatory benefits and costs falling on different individuals or different groups of individuals; for example, lead remediation will have costs concentrated at the time of remediation, but benefits that persist over many decades. A regulation may deliver net benefits to one group while imposing net costs on other groups. A regulation may also deliver relatively more net benefits to one group than to another: for example, because of differences in cumulative exposures or underlying health risk factors, reducing the emissions of harmful pollution may benefit certain

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[114] *See* Office of Management & Budget, Circular No. A-94, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs* 17-18 (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-94.pdf.

[115] Amy Finkelstein and Nathaniel Hendren, "Welfare Analysis Meets Causal Inference," *Journal of Economic Perspectives* 34, no. 4 (2020): 155-156.

[116] Bas Jacobs, "The Marginal Cost of Public Funds Is One at the Optimal Tax System," *International Tax and Public Finance* 25, no. 4 (2018): 883-912.

[117] *See also* Office of Management & Budget, *OMB Circular No. A-4: Explanation and Response to Public Input* (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4Explanation.pdf for additional guidance on this topic.

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exposed populations more or less than others (as measured by absolute or relative reductions in health risks).

A "distributional analysis" is performed to estimate the likely effects of the regulation on those in the groups being analyzed. This analysis involves estimation of the benefits, costs, and net benefits expected for each of these groups, if such data are available. You should not assume that average incidence of a regulatory benefit or cost is equally applicable to particular groups, or that incidence for only one population group is equally applicable to other groups, without justification. If the relevant disaggregated quantitative data is not available, you may still be able to provide a qualitative distributional analysis.

The question of who will ultimately experience the benefits and bear the costs of any regulation warrants close attention in a distributional analysis. For example, if a regulation is expected to raise a manufacturer's costs of production, that manufacturer may be able to pass on a portion of those costs to its customers in the form of higher prices. The portion of the cost burden that remains with the manufacturer may be split between owners of the manufacturer and its workers. Estimating where the incidence of such costs will fall may be uncertain. Your analysis should account for any important sources of uncertainty in your estimates. When data does not support quantification of incidence, you should still describe qualitatively which groups are likely to be most affected and how, whenever feasible and appropriate.

In evaluating the distributional effects of a regulation, contextual considerations can be critical; for example, what appears to be a policy with an inequitable distribution of net benefits when analyzed in isolation may in fact be remedying inequitable conditions that exist in the baseline. For that reason, it is often important to assess and present the distribution of conditions in the baseline, in addition to the distribution of regulatory effects. It may be useful for agencies to produce agency-specific guidance regarding the analysis of distributional effects, identifying particular groups likely to be affected by that agency's regulations or any methodological or other issues that are particularly relevant for that agency.

b. When to Perform Distributional Analysis

Reasonably available methodologies and data, as well as input from experts and the public, can inform an agency's determination as to whether production of a distributional analysis is practical, appropriate, consistent with law, and will produce relevant and useful information in a specific context. Distributional effects may merit specific attention when disaggregated analysis is required by the statute(s) under which the regulation is issued, warranted by the need for regulatory action identified in your regulatory analysis, or called for by an Executive Order.

Distributional effects exist whether or not a distributional analysis is produced. But by producing a distributional analysis, you may be able to better identify alternative regulatory options or costs that can be mitigated through other regulatory or non-regulatory decisions, whether by your agency or others. Production of a distributional analysis may allow for more effective consideration of regulatory alternatives. Accordingly, when you decide to conduct a distributional analysis of a regulation, you should also conduct distributional analyses for each of the regulatory alternatives presented in the regulatory analysis, consistent with the availability of resources, appropriate methods, and data. Such analysis can be particularly useful when the distributional effects are likely to be material to your agency's decision to move forward with the regulation or to adopt one regulatory approach over other alternatives.

c. Group Identification for Distributional Analysis

If you conduct a distributional analysis, you will need to identify the groups across which estimates of the benefits, costs, and net benefits of a regulation are to be disaggregated. The groups that are relevant to the analysis will vary depending on the regulatory context. In general, it is most informative to focus analytic efforts on the groups for which the variation of regulatory effects is likely to be important in the context of your regulatory action. To the extent possible given available evidence, it is advisable for agencies to be consistent when identifying groups of interest across their regulations—particularly for regulations addressing similar concerns—or else explain their rationale for not doing so. For example, using consistent definitions of income groups across regulations may facilitate comparison of distributional effects across an agency's regulations. Relatedly, if an agency identifies different groups of interest when analyzing regulations because of differences in the relevant statutory provisions underlying those regulations, the agency should state so explicitly.

It will sometimes be informative to consider whether a regulation's effects will differ by income group. A distributional analysis that focuses on income groups should be tailored to the context of the regulation under consideration. Frequently, an analysis by income ranges or percentiles (*e.g.*, quintiles or deciles of the income distribution, if such data are available to you) will be most tractable and appropriate. However, other approaches may be more appropriate in certain circumstances. For statutory frameworks that operate by reference to the Federal poverty thresholds or the Federal poverty guidelines, for example, an analysis by reference to those thresholds or guidelines may be most informative. But subject to data availability and statutory frameworks, there are advantages to using consistent groupings across analyses.

When choosing how to identify groups for evaluation, you should consider whether the choice of groups could obscure the relevant distributional effects. For example, if a regulation affects only individuals in the lowest decile of income, grouping individuals by income quartile will make the average size of such effects on the lowest decile appear smaller than they are. This concern is magnified if there are both positive and negative effects for subgroups within the constructed group. You will also need to consider whether to analyze income per individual, per family, or per household, and how to account for differences in household or family size when measuring income by group. Whenever it is feasible and appropriate to do so, you should use estimates of income that account for government taxes and transfer programs.

Other economic and demographic categories such as those based on race and ethnicity, sex, gender, geography, wealth, disability, sexual orientation, religion, national origin, age or birth cohort, family composition, occupation, or veteran status—among others—may be relevant to a particular regulation.[118] When this is the case, when consistent with law, and if relevant data

[118] Certain groups that are defined by Federal agencies, such as food-insecure or energy-insecure, may also provide context-relevant categories.

are available, it may be useful to analyze the incidence of regulatory effects on each group of interest, or combinations of those groups. If identifying groups for distributional analysis by race and ethnicity, you should follow OMB's guidance on the topic.[119] Similarly, distributional analysis by gender should define gender categories according to OMB guidance.[120]

d. Producing a Distributional Analysis

The guidance provided in this section is particularly relevant to quantitative distributional analyses, but may also be helpful in designing some qualitative analyses. Both types of analysis may be useful approaches for agencies looking to explore distributional effects.

If you determine that a distributional analysis is appropriate, it may be necessary to identify the baseline relevant to each group. For example, if a regulation is expected to have a differential effect on a specific geographical region, the change in relevant demographics in that region over time may differ from other regions, and the distributional analysis should account for those baseline differences.[121] For more discussion on this point, see the section "*Developing an Analytic Baseline*."

You should estimate the regulation's effects on relevant groups, relative to the baseline, as well as the effects of regulatory alternatives under consideration. In some cases, members of different groups may exhibit systematically different responses to the same regulation, which could be relevant to estimating the regulation's effects on each group. For each group, you should account for all benefits expected to be experienced by members of the group as a result of the regulation, and subtract all of the costs expected to be borne by members of the group, to the extent feasible.[122] It is important to account for key categories of benefits and costs in your analysis of each alternative, including both monetized and non-monetized effects, as feasible and appropriate.

In a distributional analysis, sound monetized estimates are preferred to non-monetized estimates, if their production is feasible and appropriate. When data limitations make monetization difficult, evidence related to distributional effects could be presented quantitatively or qualitatively. For example, if a regulation reduces certain types of accidents, but the WTP to

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[119] As of the writing of this Circular, the most recent guidance on race and ethnicity categories is available in Office of Management & Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782 (Oct. 30, 1997). Please attend to any updates to this guidance over time.
[120] As of the writing of this Circular, the most recent guidance on gender categories is available in Interagency Technical Working Group on Sexual Orientation and Gender Identity, *Items in the Household Pulse Survey: Report and Recommendations* (Apr. 30, 2021), https://omb.report/icr/202106-0607-003/doc/112605500. OMB's Statistical and Science Policy Office chaired this Interagency Technical Working Group (ITWG), and the ITWG provides recommendations to guide OMB. Please attend to any updates to this guidance over time.
[121] Consistent with the following paragraph, you could also compare demographic changes in the baseline (if any) to how demographics are likely to change under each regulatory alternative under consideration.
[122] When estimating the effects of a regulation on different groups, it is appropriate to take into account how the regulation will impact government tax collection where it is feasible to do so. For example, if a regulation increases wages of a given income group by $100, but that group's wage tax rate is 20%, only $80 of income should be attributed to the group, and the other $20 should be counted as increasing government revenues. *See* Nathaniel Hendren and Ben Sprung-Keyser, "A Unified Welfare Analysis of Government Policies," *Quarterly Journal of Economics* 135, no. 3 (2020): 1209-1318.

reduce such accidents is unknown, the frequency of accident reduction by group can be reported. In some cases, the distribution of regulatory effects may be clear from the available evidence, but the nature of the regulatory effect itself renders it difficult to monetize. See the section "*Methods for Treating Non-Monetized Benefits and Costs*" for more detail on how to incorporate non-monetized effects into regulatory analysis. Agencies may also consider collecting additional data that would help estimate the monetized incidence of certain regulatory effects if they expect to issue regulations that could be informed by such information in the future.

Finally, when distributional effects are relevant to the agency's decision, you should summarize your results and describe your analysis in a manner that supports transparency and comprehensibility for policymakers and the public. For example, if your regulation is likely to have geographically differentiated effects, maps may help to clarify where the benefits or costs will be felt. While graphs or maps may be illustrative, care should be taken to ensure that the format of such figures is accessible. It is generally not sufficient for your analysis to merely state that the chosen regulatory alternative does not reduce net benefits for relevant groups; it is important to analyze and describe the benefits and costs of different regulatory alternatives for relevant groups.

Further, in such cases, agencies should endeavor to be specific, in a regulatory preamble or in the brief background section that introduces a regulatory analysis, about the nature of the distributional interests the agency is considering, in order to allow policymakers and the public to better understand the connection between the distributional interest being pursued and the analysis of the regulation. This interest may lead an agency to select a regulatory alternative with lower monetized net benefits over another with higher monetized net benefits because of the difference in how those net benefits are distributed in each alternative.[123]

e. Weights and Benefit-Cost Analysis

In traditional benefit-cost analysis, the sum of the net benefits across society equals the aggregate net benefits of the regulation. Any approach to estimating aggregate net benefits uses distributional weights. An analysis that sums dollar-denominated net benefits across all individuals to measure aggregate net benefits—as the traditional approach generally does—adopts weights such that a dollar is equal in value for each person, regardless of income (or other economic status).

Agencies may choose to conduct a benefit-cost analysis that applies weights to the benefits and costs accruing to different groups in order to account for the diminishing marginal utility of goods when aggregating those benefits and costs. Diminishing marginal utility means that an additional unit of a good is more valuable to a person (in welfare terms) if they have fewer total goods than if they have more total goods. Weights of this type are most commonly applied in the context of variation in net benefits by income, consumption, or other measures of economic status.

If you decide to produce an estimate of net benefits utilizing such weights, you may treat it as your primary estimate of net benefits, or as a supplemental estimate. The same weights

[123] See Section 1 of Executive Order 12866. 58 Fed. Reg. 51,735 (Oct. 4, 1993)

should be applied to benefits and costs consistently in each analysis, and the weights that you used in each analysis should be communicated clearly. Analyses applying weights that account for diminishing marginal utility will be more informative in proportion to the quality of the evidence on the distribution of benefits and costs experienced across the population.

Note that the characteristics of the parties who bear the *costs* of a regulation, not only the characteristics of the parties who experience the *benefits*, can greatly influence the estimate of net benefits when such weights are used. In addition, analyses applying weights of this type to benefits and costs that are estimated with more granularity will, holding all else equal, be more informative than if benefits and costs are estimated with less granularity. Conversely, such analyses are less informative about the welfare effects of the regulation the less precisely agencies identify and monetize the distributional incidence of benefits and costs. Accordingly, as analytic methods improve, agencies' ability to produce informative estimates using such weights—and the quality of those estimates—will increase.

Agencies should not treat estimates using weights that account for diminishing marginal utility as primary if they are less informative about the welfare effects of the regulation than traditionally-weighted estimates (sometimes, albeit inaccurately, referred to as "unweighted" estimates). As noted in the section "*Some General Considerations*" you should also present traditionally-weighted estimates when conducting an analysis using weights that account for diminishing marginal utility, and present the distribution of monetized net benefits for each analyzed group in undiscounted dollars.

One practical approach to implementing weights that account for diminishing marginal utility uses a constant-elasticity specification to determine the weights for subgroups defined by annual income.[124] To compute an estimate of the net benefits of a regulation using this approach, you first compute the traditional net benefits for each subgroup. You can then compute a weighted sum of the subgroup-specific net benefits: the weight for each subgroup is the median income[125] for that subgroup divided by the U.S. median income, raised to the power of the absolute value of the income elasticity of marginal utility times negative one.[126] OMB has

[124] As noted previously, income—as used here—is inclusive of government taxes and transfer programs. Subgroups can also be defined by lifetime income, consumption, or other measures of economic status when data is available and doing so is appropriate and relevant in the regulatory context.

[125] There may be circumstances when specifying weights as a function of the mean, rather than median, income for each subgroup is appropriate for your analysis, such as when it increases consistency between the calculated weight and the incidence of benefits and costs within the subgroup. For example, if the incidence of net benefits is proportional to income, mean income may be the more appropriate measure of income, whereas if the incidence of net benefits is per capita, median may be the more appropriate measure.

[126] In other words, you can compute a weighted sum of the subgroup-specific net benefits where the weight for subgroup i, denoted w_i, is

$$w_i = \left(\frac{\bar{y}_i}{y_{\text{med}}}\right)^{-\varepsilon}$$

In this formula, $\bar{y}_i$ is the median income for subgroup i, y_{med} is U.S. median income, and ε is the absolute value of the elasticity of marginal utility. As noted previously, you will need to consider how to account for differences in household or family size when measuring income by group.

More generally, calculating the income-weighted sum of subgroup-specific net benefits is most useful when net transfers to government—if the analysis does not account for what such governments do with such determined that 1.4 is a reasonable estimate of the absolute value of the income elasticity of marginal utility for use in regulatory analyses.[127]

If you are using population averages for benefits or costs, you should consider that such values are often implicitly income weighted already, and strive to weight all benefits and costs consistently.[128] For example, it is appropriate to use a value for mortality risk reductions (sometimes referred to as the value of a statistical life, or VSL) that does not depend on the income of the sub-population to which the mortality risk reduction benefits accrue, consistent with the guidance provided elsewhere in this Circular.[129] This amounts to weighting mortality risks by the income elasticity of marginal utility (given that it is also the income elasticity of individuals' valuations of a marginal mortality risk). In practice, therefore, you should not apply income weights to such values of mortality risk reductions; they have already been weighted by income.

11. Treatment of Uncertainty

The precise consequences (benefits and costs) of regulatory options are not generally known for certain, as there may be uncertainty regarding the incidence and magnitudes of such consequences and the probability of their occurrence. However, reasonable estimates of such uncertain consequences can often be developed. An effect of a regulation should not be excluded from a regulatory analysis simply because its estimation is highly uncertain. There may be other reasons to exclude effects (*e.g.*, because the size of the effect is negligible). But even for highly uncertain effects, it is often possible to use available evidence to produce estimates of those effects for inclusion in a regulatory analysis that are more accurate than assuming uncertain effects do not occur or have no benefits or costs. Moreover, inclusion of uncertain effects is necessary for the robustness of a regulatory analysis when those uncertain effects are an important contributor to the benefits and costs of a regulation. However, you should be particularly careful when interpreting effects that are highly speculative.

It will often be helpful to begin your analysis of uncertainty at the earliest possible stage

transfers—are small relative to other effects, and thus the estimate of income-weighted net benefits is relatively insensitive to the weighting applied to such transfers. Note that an appropriate weighting for effects on government budgets depends on the use or source of funds, which will often be indeterminate in regulatory contexts. Calculating the income-weighted sum of subgroup-specific net benefits will also be useful when net government transfers are essentially unchanged across regulatory alternatives, as the ranking of alternatives will be unaffected by the weighting of government transfers. Also note that altering this approach may be appropriate when analyzing regulations with an international scope. See the section "*Scope of Analysis*" for more discussion of such regulations.

[127] *See* Office of Management & Budget, *OMB Circular No. A-4: Explanation and Response to Public Input* (Nov. 9, 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4Explanation.pdf*. As the economic literature estimating the income elasticity of marginal utility continues to improve, OMB's best estimate of this value may be refined in future revisions of this Circular, and agencies may determine that another estimate of the income elasticity of marginal utility is most appropriate in the context of a particular regulatory analysis.

[128] See *OMB Circular No. A-4: Explanation and Response to Public Input* (Nov. 9, 2023), *https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4Explanation.pdf*, for further details on how to adjust population-average metrics that are implicitly weighted by income already.

[129] Agencies' standard practice, which this Circular has implicitly endorsed since 2003, has been to apply VSLs in regulatory analysis that do not vary by income for all U.S. citizens and residents at a given point in time. This can be viewed as a way in which income weighting has long been integrated into the traditional approach to regulatory analysis.

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in developing your analysis. It may be informative to consider both the statistical variability[130] of key elements underlying the estimates of benefits and costs (for example, the expected change in the distribution of automobile accident deaths that might result from a change in automobile safety standards) and the incomplete knowledge about these key elements or relationships among key elements (for example, the uncertain knowledge of how driver behavior might affect automobile accident outcomes).[131] Assessing important sources of uncertainty and the way in which benefit and cost estimates may be affected under plausible assumptions often provides useful information to decision makers and the public about the effects and the uncertainties of alternative regulatory actions. Both qualitative and quantitative assessments of uncertainty can provide useful information. It is generally helpful to distinguish between uncertainties regarding the accuracy of estimates and the precision of estimates.[132]

The treatment of uncertainty should be guided by the same principles of full disclosure and transparency that apply to other elements of your regulatory analysis. Your analysis should be credible, objective, realistic, and scientifically balanced.[133] You should generally discuss the sources of the available data used and any particularly significant aspects of its quality. Inferences and assumptions used in your analysis should be identified, and your analytical choices should be adequately justified. If the analytic results are sensitive to a given assumption or data source, alternative modeling assumptions or data sources can be used to demonstrate the sensitivity of the results. Alternative data and models that you use to analyze uncertainty should be described in detail or with references to ensure the public can find such information. In your presentation, it is informative to delineate the strengths of your analysis along with important uncertainties about its conclusions. Your presentation should also generally explain, when relevant, how your analytical choices have significantly affected your results.

In some cases, the level of scientific uncertainty—including economic uncertainty—may

[130] In some contexts, the word "variability" or "risk" is used as a synonym for statistical variation that can be described by a theoretically valid distribution function, whereas "uncertainty" refers to a more fundamental lack of knowledge. This Circular uses the terms "risk" and "uncertainty" to refer to both concepts.

[131] In addition to distinguishing between the underlying probabilistic nature of an element (aleatory uncertainty) and incomplete knowledge about elements (epistemic uncertainty) noted previously, it may be useful to distinguish between two types of epistemic uncertainty: measurement uncertainty and model (or process) uncertainty. Measurement uncertainty exists because of the challenges in accurately and precisely measuring various properties in the world. This sort of uncertainty can usually be described statistically; when considering measurement uncertainty, you may wish to describe the robustness of estimates to alternative measurement techniques and assumptions. Model uncertainty refers to uncertainty about which model—*i.e.*, description of the causal relationship among elements—best describes the underlying relationships. While modeling choices should be grounded in the best available science, there is often more than one model that is consistent with the available evidence. Model uncertainty is more difficult to describe statistically than measurement uncertainty, often because of conceptual challenges or a lack of variability in data that would enable the model uncertainty to be reduced to measurement uncertainty. Still, when feasible, you could consider multiple models to establish robustness and reduce model uncertainty.

[132] Accuracy refers to how close an estimate is to the true value in question. Precision refers to the resolution of that estimate (*e.g.*, the number of significant figures for a numerical estimate). See the section "*Precision of Estimates*" for more details.

[133] When disseminating information, agencies should follow their own information quality guidelines, issued in conformance with the OMB government-wide guidelines. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452 (Feb. 22, 2002).

be so large that you can only present discrete alternative scenarios without assessing the relative likelihood of each scenario quantitatively. In such cases, you might choose to present results from a range of plausible scenarios, together with any available information that might help in qualitatively determining which scenario is most likely to occur and the likelihood relative to other scenarios.

In some situations, particularly where irreversibility is material to your analysis, such as when you are regulating an exhaustible resource or an endangered species, or when the timing of economic developments is central to your regulation's benefits and costs, it may be useful to analyze a regulation with uncertain effects as an option (referred to in the academic literature as "real options" analysis).[134] The assessment of real options allows you to monetize the benefits and costs of changing the timing of regulatory effects in light of the value of information about potential states of the world that can be learned over time. The costs of shifting the timing of regulatory effects further into the future may be especially high when regulating to protect against irreversible harms. For example, a regulation that preserves a natural resource today may preserve option value associated with future uses of that resource that are unknown today. Over the duration of time that regulatory effects are deferred, you may learn additional information that reduces uncertainty about some of those regulatory effects. When uncertainty about the regulation's effects stems from a lack of data sources, you may want to collect appropriate data as part of regulatory action to help inform future analyses. Formal tools for assessing the value of additional information are well developed in the applied decision sciences and can be used when appropriate.[135] You may wish to consider doing original research, if feasible and appropriate to your regulation. Decision trees may be helpful visual devices in analyzing real option value.

a. Quantitative Analysis of Uncertainty

Uncertainty can often be subject to quantitative analysis, broadly defined. Examples would include quantitative estimates of the probabilities of environmental damage (for example, to soil or water, the possible loss of habitat, or endangered species), probabilities of harm to human health and safety, etc. There are also uncertainties associated with monetizing estimates of economic benefits and costs, such as improved consumer health associated with a regulation that increases safety (a regulatory benefit) or the additional costs of implementing these safety improvements (a regulatory cost). Thus, your analysis may benefit from including multiple components of uncertainty, reflective of the number of inputs used to generate an impact estimate; for example, a quantitative analysis characterizing the probabilities of the relevant outcomes (that are not already valued in monetary terms) and an assignment of economic value to the projected outcomes. It is essential that both parts be conceptually consistent. In particular, the quantitative analysis should be conducted in a way that permits it to be applied within a more

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[134] *See* Avinash K. Dixit and Robert S. Pindyck, *Investment under Uncertainty* (Princeton: Princeton University Press, 1994); Anthony E. Boardman et al., "Risk, Option Price, and Option Value," in *Cost-Benefit Analysis: Concepts and Practice*, 5th ed. (Cambridge: Cambridge University Press, 2018); Nancy L. Stokey, *The Economics of Inaction: Stochastic Control Models with Fixed Costs* (Princeton: Princeton University Press, 2009); Joe Vladeck, Note, "Valuing Regulatory Flexibility: A Real Options Approach to Cost-Benefit Analysis," *Georgetown Law Journal* 103, no. 3 (2015): 797-824.

[135] *See, e.g.*, Warren B. Powell and Illya O. Ryzhov, *Optimal Learning*, (Hoboken, NJ: John Wiley & Sons, 2012); Adam M. Finkel and John S. Evans, "Evaluating the Benefits of Uncertainty Reduction in Environmental Health Risk Management," *Journal of the Air & Waste Management Association* 37, no. 10 (1987): 1164-1171.

general analytical framework, such as benefit-cost analysis. For example, you should address explicitly the implications for benefits and costs of any probability distributions developed in your analysis.

As with other elements of regulatory analysis, you will need to balance thoroughness with the practical limits on your analytical capabilities and the opportunity cost of more thorough analysis of uncertainty. Your analysis does not have to be exhaustive, nor is it necessary to evaluate each alternative at every step. Your analysis should target the inputs, approaches, and assumptions that have particularly significant effects on the analytic results, and that are subject to significant uncertainty. The overall goal is for the inputs, approaches, and assumptions in your analysis to be clearly identified and consistent with the relevant science. Your analysis should provide sufficient information for decision makers to grasp the degree of scientific uncertainty and the robustness of estimated probabilities, benefits, and costs to changes in key assumptions.

Your estimates cannot usually be more precise than their most uncertain component.[136] Thus, your analysis should, when feasible and appropriate, report estimates in a way that reflects the degree of uncertainty and does not create a false sense of precision (see the section "*Precision of Estimates*" for more details), including using appropriate significant figures. Worst-case or bounding analyses do not adequately convey the complete probability distribution of outcomes, and are therefore of limited use in the context of conducting uncertainty analysis. Whenever it is feasible to quantitatively characterize the probability distributions, you should provide some estimates of central tendency (*e.g.*, mean or median) in addition to ranges, variances, specified low-end and high-end percentile estimates, and other characteristics of the distribution. Expert elicitation, discussed in more detail below, can be helpful in bridging the gap between existing evidence and the information required to produce such estimates. Even when probability distributions are unknown, an assumption about the distribution may be implied in your analysis. When this is the case, you should try to make these assumptions explicit.[137]

When feasible, you should use appropriate statistical techniques to determine a probability distribution of the relevant outcomes. For rules with large consequences (such as regulations with projected annual economic effects of $1 billion or more), you should, when feasible and appropriate, present a formal quantitative analysis of the relevant uncertainties about benefits and costs, *i.e.*, provide an estimate of the probability distribution of regulatory effects. This approach is often appropriate for complex regulations where there are large, multiple uncertainties whose analysis raises technical challenges, or where the effects cascade. At the same time, you should consider performing formal quantitative analysis for rules that have smaller impacts when you determine such analysis is appropriate.

[136] The exception is distributions where component variables have negative covariance, as this could produce estimates with more precision than the most uncertain component.
[137] In many health and safety regulations, analysts rely on formal risk assessments that address a variety of risk management questions, such as the baseline risk for the affected population, the safe level of exposure, or the amount of risk that would be reduced by various interventions. Because the answers to some of these questions are directly used in benefits analyses, the risk assessment methodology must allow for the determination of expected benefits in order to be comparable to expected costs. This means that bounding exercises unaccompanied by central estimates are likely to result in benefit estimates that exceed the appropriate certainty-equivalent (see the section "*Economic Values of Uncertain Outcomes*") or expected value measure.

For regulations with projected gross annual benefits or costs of $200 million[138] to $1 billion, you should seek to use appropriately rigorous approaches to account for uncertainty. Relatively more rigorous tools may be especially helpful when net benefits are projected to be close to zero and uncertainty is substantial. On the other hand, rigorous uncertainty analysis may not be valuable for regulations in this category if simpler techniques are sufficient to show robustness, *i.e.*, that the net benefit values are relatively unaffected by changes in uncertain parameters or models.

You may find it helpful to consider the following analytical approaches that entail increasing levels of complexity:

- Discuss qualitatively the main uncertainties in each important input to the calculation of benefits and costs. These disclosures would address the uncertainties in the data as well as in the analytical results. However, as previously mentioned, regulations above the $1 billion annual threshold generally should also receive a formal treatment when feasible and appropriate.
- Use a numerical sensitivity analysis to examine how the results of your analysis vary with plausible changes in assumptions, choices of input data, valuation metrics, and alternative analytical approaches. Sensitivity analysis is especially valuable when the information is lacking to carry out a formal probabilistic simulation. Sensitivity analysis can be used to find "switch points," critical parameter values at which estimated net benefits change sign or the alternative with the most net benefits switches. Sensitivity analysis usually proceeds by changing one variable or assumption at a time, but it can also be done by varying a combination of variables simultaneously to learn more about the robustness of your results to widespread changes.
- Apply a formal probabilistic analysis of the relevant uncertainties, possibly using simulation models or expert judgment as revealed, for example, through Delphi methods.[139] Expert judgment is often elicited through a survey process which eliminates certain interactions between experts, and may be a useful way to fill key gaps in your ability to assess uncertainty.[140] These expert elicitations, along with other sources of data, can be combined in Monte Carlo simulations to derive a probability distribution of benefits and costs.

New methods of analyzing uncertainty may become available in the future. This Circular is not intended to discourage or inhibit their use (or the use of other available and appropriate methods), but rather to encourage and stimulate their adoption as appropriate.

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[138] As updated under Exec. Order No. 14094 of April 6, 2023 (Modernizing Regulatory Review), 88 Fed. Reg. 21,879 (Apr. 11, 2023).
[139] The purpose of Delphi methods is to generate suitable information for decision making by eliciting expect judgment. *See* M. Granger Morgan and Max Henrion, *Uncertainty: A Guide to Dealing with Uncertainty in Quantitative Risk and Policy Analysis* (Cambridge: Cambridge University Press, 1990).
[140] *See* Anthony O'Hagan et al., *Uncertain Judgements: Eliciting Experts' Probabilities* (Hoboken, NJ: John Wiley & Sons, 2006); Robert T. Clemen, *Making Hard Decisions: An Introduction to Decision Analysis*, 2nd ed. (Duxbury, 1996); Committee on Assessing Approaches to Updating the Social Cost of Carbon, National Academies of Sciences, Engineering, and Medicine, "Appendix C: Elicitation of Expert Opinion," in *Valuing Climate Changes: Updating Estimation of the Social Cost of Carbon Dioxide* (The National Academies Press: 2017), 221-228.

b. Economic Values of Uncertain Outcomes

In developing benefit and cost estimates, you may develop probability distributions of values for each outcome. When this is the case, you will need to combine these probability distributions to provide estimates of total benefits or costs. Where there is a distribution of outcomes, you may often find it useful to emphasize summary statistics or figures that can be readily understood and compared to achieve the broadest public understanding of your findings.

In measuring the value of uncertain outcomes, you will need to determine how to account for risk preferences, including risk aversion.[141] People are risk averse when they prefer more certain outcomes to less certain outcomes with the same expected value. Risk aversion is widespread, and an underlying motivation for insurance and savings behavior. For example, people often purchase life insurance because they value the financial protection for their beneficiaries in the case of their premature death more than the insurance premiums that they must pay. However, not all relevant parties are risk averse in all contexts, and therefore risk aversion may not be an appropriate assumption in all parts of your analysis. For example, firms are often not risk averse[142]; in such cases, if your regulation is, for instance, intended to encourage investments in novel technology to reduce harmful emissions, modeling firms as risk averse would often result in incorrect adoption or diffusion rate estimates.[143] To the extent practicable and when appropriate, you should develop an analysis that takes risk aversion into account. The below paragraphs provide some guidance on how to account for risk aversion.

You should attempt to determine the risk preferences of the population impacted by your regulation when it is material to your analysis. As noted previously, risk aversion is widespread, and is consistent with common models of rational preferences.[144] Nevertheless, there are a variety of circumstances in which risk aversion may not be material to your analysis and you could appropriately assume risk neutrality. First, and perhaps most commonly, when a regulation has modest effects on each person or group that is affected, or when a regulation's net benefits are almost identical in different states of the world, it will often be reasonable to ignore risk preferences in your analysis because the consequences of incorporating them would be negligible. Second, when people are already fully insured against a risk or could choose to be so, regulations affecting that risk may not offer any additional insurance benefits (that is, value in excess of what would be estimated by assuming risk-neutrality) to the affected policyholders (or potential future policyholders).[145] As a result, when a regulation only addresses such risks, consideration of risk aversion may not be material to estimating the benefits and costs of the regulation. However—due to incomplete markets, the existence of uninsurable risks, and other distortions—full insurance may not be obtainable, and it is generally not appropriate to presume

[141] It is important to note that this guidance is not intended to preclude the use of any reasonable and appropriate assumptions about risk preferences suitable to your regulatory context.
[142] But there are various reasons why even risk-neutral firms may behave as if they are risk averse. *See* Louis Eeckhoudt, Christian Gollier, and Harris Schlesinger, "The No-Loss Offset Provision and the Attitude Towards Risk of a Risk-Neutral Firm," *Journal of Public Economics* 65, no. 2 (1997): 207-217.
[143] Firms may also be slow to adopt novel technologies for reasons other than risk aversion, such as first-mover disadvantages, loss aversion, etc.
[144] Charles A. Holt and Susan K. Laury, "Chapter 4 - Assessment and Estimation of Risk Preferences," in *Handbook of the Economics of Risk and Uncertainty*, eds. Mark J. Machina and W. Kip Viscusi (2014), 135-201.
[145] This result may not hold if the transaction costs of becoming fully insured are substantial.

the existence of full insurance unless there is evidence that it is present. In these circumstances, if your analysis takes a risk-neutral approach, you should explain why. Finally, as noted previously, while risk aversion is widespread, there may be contexts in which some people are risk-neutral or risk-seeking. If there is evidence that this is the case in a context that is relevant to your regulation, you should alter your analysis accordingly.[146] These three cases are not intended to be exhaustive.

When considering risk, it is critical to consider how uncertainty about a regulation's effects relates to the uncertainty about the baseline (or uncertainty that people are exposed to in the baseline). All else held equal, a regulation that has more beneficial effects when outcomes in the baseline are better, and less beneficial effects when outcomes in the baseline are worse, is worth relatively less than a regulation that has more beneficial effects when outcomes in the baseline are worse, and less beneficial effects when outcomes in the baseline are better. That is, due to diminishing marginal utility, a regulation with benefits that are positively correlated with baseline outcomes has a lower value than an otherwise identical regulation with benefits that are negatively correlated with baseline outcomes.

Certainty-equivalent valuations provide a useful tool for comparing different possible outcomes. For an uncertain benefit, the certainty-equivalent is the number of certain dollars that the uncertain benefit is worth to its recipient. A certainty-equivalent valuation can be thought of as the expected value of a benefit or cost less or plus a premium that reflects risk aversion. For example, suppose that a particular regulation reduces the probability of fire in a particular type of facility. As part of a benefit-cost analysis for this regulation, the dollar value of the expected reduction in fire losses might be calculated.[147] The owners of the protected facilities may place a higher dollar value on the lessening of risk of a fire than the expected dollar value of the loss. If so, it would be demonstrated by a willingness to pay for fire insurance in excess of the expected value of claims. Therefore, the facility owners' net cost (the difference between insurance premiums and expected value of insurance company claims payments) for fire insurance can be used to increase the value of expected loss from a fire to its certainty-equivalent value.

One way to incorporate risk aversion into a regulatory analysis is to directly determine individuals' certainty-equivalent valuations for relevant benefits or costs through their willingness to pay for (or willingness to accept) specific outcomes related to a regulation. In some cases, it may be possible to infer this valuation via revealed preference—using individuals' behaviors in markets—or other situations involving trade-offs, as discussed previously. Individuals' willingness to pay for insurance, for example, may be indicative of their valuation of the protection from a risk that may be achieved by regulatory intervention (in a related context for which insurance is not available). You may also be able to rely on stated preferences to

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[146] You should be cautious before adopting an assumption that evidence supports risk-seeking behavior. For example, people who gamble—despite zero expected gains or even expected losses—may be both risk-averse and put a positive value the social or competitive aspect of their particular game. John Conlisk, "The Utility of Gambling," *Journal of Risk and Uncertainty* 6, no. 3 (1993): 255-275. Alternatively, those individuals may instead erroneously overrate their skill, or be addicted to gambling; see the section "*Behavioral Biases*" on accounting for such benefits and costs.

[147] Market conditions—especially availability of insurance, as noted above—would affect the relevance of the expected value of fire losses to a benefit-cost analysis, but for simplicity of explanation, such considerations are set aside in this illustrative example.

produce certainty-equivalent valuations. Both of these methods of eliciting certainty-equivalent valuations can be flawed, however, as individuals often display both decision-making and judgment biases when considering decisions that would generate small changes in the probabilities of low-probability events that have large costs when they occur.[148] For similar reasons, there are challenges in eliciting the willingness to pay to avoid risks that are unprecedented, or that primarily accrue to other people (*e.g.*, future generations).

Another approach is to translate the valuation of uncertain outcomes into certainty-equivalent valuations by modeling individual preferences, for example, using an assumed utility function. Under this approach, you would first estimate the distribution of possible outcomes, and then convert these estimates of outcomes into *ex ante* certainty-equivalent values using an appropriate utility function. One simple approach uses a constant elasticity utility function.[149] Other methods of incorporating risk aversion are also available. To allow for a distinction between risk aversion and the intertemporal elasticity of substitution, economists frequently employ Epstein-Zin preferences.[150] Similarly, you may determine that the assumption of constant relative risk aversion, implicit in the constant elasticity approach, is inappropriate in your context. As with other aspects of your regulatory analysis, you should balance thoroughness with practical constraints, including when deciding whether to calculate certainty equivalents or use other methods to value outcomes that are uncertain.

c. Alternative Inputs, Approaches, and Assumptions

If benefit or cost estimates depend heavily on particular inputs, approaches, or assumptions, it is often informative to make those details explicit and carry out sensitivity analyses using plausible alternatives. If the value of net benefits changes from positive to negative (or vice versa) or if the relative ranking of regulatory options changes with alternative plausible inputs, approaches, or assumptions, you should generally consider conducting further

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[148] Colin F. Camerer and Howard Kunreuther, "Decision Processes for Low Probability Events: Policy Implications," *Journal of Policy Analysis and Management* 8, no. 4 (1989): 565-592.

[149] A constant elasticity utility function takes the form

$$u(i) = \begin{cases} \dfrac{i^{1-\varepsilon}}{1-\varepsilon} & \varepsilon \geq 0, \varepsilon \neq 1 \\ \ln(i) & \varepsilon = 1 \end{cases}$$

In this formula, i is an individual's income and ε is the absolute value of the elasticity of marginal utility. Consider a policy that increases or decreases income in one year by a factor α with probability p. This means that under the policy, income, i, is αi with probability p and i with probability $1-p$. The expected income resulting from the policy is $p\alpha i + (1-p)i$. To convert expected costs or benefits into certainty-equivalent costs or benefits, you can multiply the expected effect by the change in certainty-equivalent income relative to baseline divided by the expected change in income, which is equal to

$$\frac{[p\alpha^{1-\varepsilon} + (1-p)]^{\frac{1}{1-\varepsilon}} - 1}{p\alpha - p}.$$

OMB provides a default estimate of the absolute value of the elasticity of marginal utility of 1.4 for use in income-weighted benefit-cost analysis. (See the section "*Distributional Effects*" for more discussion of income-weighted benefit-cost analysis.) The constant elasticity utility function uses the same parameter to value the aversion to uncertain outcomes and aversion to inequality across a population, but empirical estimates of risk aversion vary, and different values may be appropriate in different regulatory contexts.

[150] *See* Larry G. Epstein and Stanley E. Zin, "Substitution, Risk Aversion, and the Temporal Behavior of Consumption and Asset Returns: An Empirical Analysis," *Journal of Political Economy* 99, no. 2 (1991): 263-286.

analysis to inform the determination of which of the alternatives is more appropriate. Because different estimation methods may embed different assumptions, you may find it helpful to analyze estimation methods carefully to make any hidden assumptions explicit.

12. Discount Rates

Benefits and costs often take place in different time periods. When this occurs, simply adding all of the expected benefits or costs without regard for when they actually occur fails to account for differences in those values that result from the differences in timing. If benefits or costs are delayed or otherwise separated in time from each other, the difference in timing should be reflected in your analysis through appropriate discounting.

As a first step, you should present the undiscounted annual time stream of benefits and costs expected to result from a regulation, clearly identifying when they are expected to occur.

To avoid the misleading effects of inflation in your estimates, it is important to measure the stream of effects in constant dollars. If the benefits and costs are initially measured in prices reflecting expected future inflation, you can convert them to constant dollars by using an appropriate inflation index that corresponds to the affected markets.[151]

a. The Rationale for Discounting

All future effects, regardless of what form they take (*e.g.*, changes to consumption, health, environmental amenities, etc.), should be discounted to reflect changes in valuation of impacts across time. The present value of an impact depends on the timing of the impact and the appropriate discount rate. Benefits or costs that occur sooner are generally understood to be more valuable, all else equal. The main rationales for the discounting of future impacts are:

(a) If consumption continues to increase over time—as it has for most of U.S. history—an increment of consumption will be less valuable in the future than it would be today (all else equal); as total consumption increases, the value of a marginal unit of consumption declines.
(b) People may exhibit "pure time preference," meaning that even in the absence of future changes in consumption, people may rationally prefer consumption now rather than later.
(c) In addition, regulations that displace or induce capital investments at a point in time can affect future consumption differently than regulations that increase or decrease consumption at a point in time (see the discussion in the section "*Accounting for Effects on Capital*").

Somewhat different considerations apply in the context of discounting long-term effects, as explored further in the section "*Long-Term Discounting*" below. Several reasonable

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[151] Please note any conversion into constant dollars is a separate calculation from discounting future effects to present value, as described below.

approaches to discounting are presented in this section.[152]

b. Discounting in General

A discount factor is used to adjust the estimated benefits and costs of a regulation for differences in timing. The further in the future the effects are expected to occur, the more they are discounted. If the discount rate is constant, the discount factor for a particular year can be calculated as $1/(1 + \text{the discount rate})^t$ where "t" measures the number of years[153] in the future that the benefits or costs are expected to occur. Effects that have been adjusted in this way are called "discounted present values" or simply "present values." Only when the estimated benefits and costs have been discounted can effects occurring across different time periods be added together to determine the overall present value of net benefits.

In your analysis, it is advisable to carefully consider the types of effects that need to be discounted. Depending on the effects that you are analyzing, you may be discounting using rates reflecting either society's perspective or a private entity's perspective. The social rate of time preference corresponds to the rate at which society is willing to trade current consumption for future consumption. However, you may be estimating underlying private behavioral changes that inform estimates of the effects of your regulation. Modeling private behaviors requires the use of appropriate private discount rates faced by the relevant populations. When estimating private discount rates, ideally the appropriate distribution of rates faced by affected populations should be considered. You should consider if readily available market rates are appropriate approximations of private discount rates. Once necessary private behaviors are modeled, then the social discount rate can be applied to ascertain the social welfare effects (benefits and costs) of a regulation. The guidance below generally pertains to society's perspective rather than private entities' perspective.

The real (inflation-adjusted) rate of return on long-term U.S. government debt provides a fair approximation of the social rate of time preference. It is the rate available on riskless personal savings and is therefore a rate at which individuals may increase future consumption at the expense of current consumption. It is also the rate at which society as a whole can trade current consumption for future consumption.[154]

Over the last thirty years,[155] this rate has averaged around 2.0 percent per year in real terms on a pre-tax basis. OMB arrives at this figure by considering the 30-year average of the yield on 10-year Treasury marketable securities:[156]

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[152] For more detail on rationales for and approaches to discounting, see Office of Management & Budget, *OMB Circular No. A-4: Explanation and Response to Public Input* (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4Explanation.pdf.
[153] For simplicity, units of whole years are typically used.
[154] Depending on assumptions about the mechanisms by which, for example, the government shifts the timing of consumption.
[155] As of the time of this Circular's writing, these thirty years cover 1993 through 2022.
[156] For more details on the selection of data and methodology, see Office of Management & Budget, *OMB Circular No. A-4: Explanation and Response to Public Input* (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4Explanation.pdf.

- the yield on 10-year Treasury Inflation Protected Securities (TIPS)—which measure inflation using the consumer price index (CPI)—over the period they have been available (as of this writing, 2003 to 2022) and
- the yield on 10-year Treasury notes minus the average annual rate of change in the CPI for the years when TIPS were not available, (as of this writing, 1993 to 2002).[157]

This approach produces (as of this writing) a real rate of 1.7 percent per year, to which OMB adds a 0.3 percent per-year rate to reflect inflation as measured by the personal consumption expenditure (PCE) inflation index (rather than CPI). The result is an estimate of the social rate of time preference of 2.0 percent per year. Updates to this estimate, using this formula, will be published every three years in the Appendix to this Circular.[158]

For simplicity, transparency, and tractability, OMB is setting one default rate for social rate of time preference for all effects from the present through thirty years into the future, rather than a more elaborate discount rate schedule.[159] Corresponding discount factors over this period of thirty years are available in an Appendix to this Circular. For the longer term, see the section "*Long-Term Discounting*" below.

There are other appropriate approaches to discounting.[160] For example, you may also analyze the welfare effects of your regulation in an economic model in which the evolution of the discount rates is endogenous. If you take such an approach to discounting, a number of assumptions need to be made in order to inform the selection of parameter values. Consequently, any agency that wishes to use alternative approaches to discounting should confer with OMB before proceeding.

c. Accounting for Effects on Capital

Regulations that displace or induce capital investments at a point in time may affect present and future consumption differently than regulations that increase or decrease consumption at a point in time. This arises because the return on capital need not equal the social rate of time preference, as taxes on capital, other economic distortions, risk premia, and missing markets can create a sustained divergence between these rates of return and among rates of

[157] The 2003 version of this Circular similarly estimated the social rate of time preference using a 30-year average of 10-year Treasury notes less the average annual rate of change in the CPI. OMB believes that 10-year Treasury Inflation Protected Securities, which were not an available measure in 2003, provide a more accurate measure of the real (inflation-adjusted) return of 10-year Treasury notes.
[158] Agencies may generally continue to refer to the discount rate estimate in the version of the Appendix in effect at the time that a regulatory analysis for a proposed regulation is received by OMB, even if the Appendix is updated before the regulation is finalized. However, if the Appendix has been updated more than once since the proposed regulation was received by OMB, agencies should refer to the most recent version of the Appendix.
[159] Thirty years matches the term of the longest-duration Treasury bond, and therefore the limit on directly observed interest rates on long-term U.S. government debt. Beyond this point, it becomes more important to allow for dynamic rates, as the effect of "[u]ncertainty about future interest rates … does not 'kick in' until we are out of the range of a near-future period within which we can feel confident projecting forward today's relevant interest rates." Martin L. Weitzman, "Just Keep Discounting, but…" in *Discounting and Intergenerational Equity*, eds. Paul R. Portney and John P. Weyant (New York: Resources for the Future, 1999), 23-29.
[160] They may be particularly appropriate when regulations have general equilibrium effects that affect the appropriate discount rate. See the section "*Partial and General Equilibrium Analysis*" for more details.

return to different capital. Such distortions may include, for example, returns to capital investments stemming from unpriced social externalities or market power.[161] This divergence can persist despite the tendency for capital to flow to where it can earn the highest rate of return.

The analytically preferred method of handling temporal differences between benefits and costs is to adjust all the benefits and costs to reflect their value in equivalent units of consumption before discounting them. This approach to discounting is sometimes called the "shadow price" approach, because doing such calculations requires you to value benefits and costs using shadow prices, especially for capital goods, to correct for market distortions. Shadow prices are notional, unobserved prices that reflect the social opportunity cost of an activity.

Analyzing a regulation using a shadow price of capital approach—converting benefits and costs into consumption-equivalent values before discounting—is generally preferred if a shadow price appropriate for the regulatory context can be approximated and the incidence of regulatory effects on capital can be estimated.[162] However, this often may not be feasible: a shadow price specific to the regulatory context may not be well established, or the distribution of impacts from the regulation on capital and consumption may not be readily quantifiable. In such cases, you may wish to consider an appropriate range of shadow prices.

When substantial incidence on capital is anticipated, as a default, OMB recommends consideration of a lower value of 1.0, reflecting an economy with perfect capital mobility, *i.e.*, an open economy estimate (which, when applied to your analysis, will result in no change to your estimates of benefits and costs discounted at the social rate of time preference),[163] and a high

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[161] While such considerations may or may not be relevant to private preferences for trading off present versus future consumption (sometimes called private discount rates), they are generally not relevant to social discount rates. *See* Council of Economic Advisers, *Discounting for Public Policy: Theory and Recent Evidence on the Merits of Updating the Discount Rate* 4 (Jan. 2017) ("Market rates also reflect risks faced in the private sector, which may not be relevant for public sector evaluation. In addition, private returns that involve unpriced externalities or monopoly rents will likely be higher than the true social return.").

[162] In some particular cases, it may be appropriate to assume a shadow price of approximately one or that regulatory effects are not likely to significantly displace or induce investment. When you have reason to make such an assumption, conversion of benefits and costs to consumption-equivalent values may be unnecessary, as the benefits and costs can be discounted with the social rate of time preference. Factors contributing to such a situation may include the substantial availability of foreign funds, and the contribution of risk and economic rents (such as those accruing to market power) to the spread between the risk-free rate and the average private return to capital. Conversely, accounting for the incidence of effects on capital may be especially important when there is reason to believe that the appropriate shadow price of capital is not one, and the time horizon of regulatory analysis is short or the uncertainty about the incidence of the regulation's effects on natural, human, or physical capital is large.

[163] Robert C. Lind, "Reassessing the Government's Discount Rate Policy in Light of New Theory and Data in a World Economy with a High Degree of Capital Mobility," *Journal of Environmental Economics and Management* 18, no. 2 (1990): S–8-S–28; Jonathan A. Lesser and Richard O. Zerbe, "Discounting Procedures for Environmental (and Other) Projects: A Comment on Kolb and Scheraga," *Journal of Policy Analysis and Management* 13, no. 1 (1994): 140-156 (building on Robert C. Lind, "Reassessing the Government's Discount Rate Policy in Light of New Theory and Data in a World Economy with a High Degree of Capital Mobility," *Journal of Environmental Economics and Management* 18, no. 2 (1990): S–8-S-28, and concluding: "Private capital in an open economy comes primarily at the expense of consumption, not from crowding out other private capital. Thus, even where private funds are involved, the SPC [shadow price of capital] approach would use the consumer's rate of time preference in an open economy.").

value of 1.2, reflecting a closed economy estimate with no foreign capital flows.[164] If the incidence of benefits and costs falling on capital are not directly estimated, one approach is to test your analysis's sensitivity to assumptions about the incidence of regulatory effects on capital by analyzing two outer-bound cases: one assuming all benefits and no costs fall on capital, and another assuming all costs and no benefits fall on capital, as lower- and upper-bound estimates of the effect of capital on your estimate of net benefits. An example of such sensitivity analyses is presented in the footnote below.[165] This approach can be useful to regulatory analysis, but does not suggest that agencies should consider the ratio of benefits to costs—as opposed to net benefits—when analyzing regulatory alternatives, as noted in the section "*Benefit-Cost Analysis*." Rather, this approach suggests circumstances in which agencies may consider additional steps, such as more detailed discussions or, to the extent feasible, estimation of an appropriate shadow price of capital or of the likely incidence of regulatory effects on capital in a particular regulatory context. Alternatively, as noted previously, accounting for shadow prices can also be done endogenously in a well-calibrated general equilibrium model.

In certain cases, it may be clear that that your regulation likely has little or no incidence on capital,[166] or the magnitudes of costs falling on capital and benefits falling on capital are the same in every period.[167] In such cases, you can simply discount at the social rate of time

[164] Richard G. Newell, William A. Pizer, and Brian C. Prest, "The Shadow Price of Capital: Accounting for Capital Displacement in Benefit-Cost Analysis," (Working Paper No. 31526, National Bureau of Economic Research, August 2023), https://www.nber.org/papers/w31526 (citing Qingran Li and William A. Pizer, "Use of the Consumption Discount Rate for Public Policy over the Distant Future," *Journal of Environmental Economics and Management* 107 (2021): 102428). *See also* Jonathan A. Lesser and Richard O. Zerbe, "Discounting Procedures for Environmental (and Other) Projects: A Comment on Kolb and Scheraga," *Journal of Policy Analysis and Management* 13, no. 1 (1994): 140-156; Mark A. Moore et al., "'Just Give Me a Number!' Practical Values for the Social Discount Rate," *Journal of Policy Analysis and Management* 23, no. 4 (2004): 789-812.

[165] For example, if a regulation has $100 million in costs in the first year, and $50 million in benefits for five years, the analysis with a shadow price equal to 1.0 is unchanged (values in millions, discounted at 2.0% in parentheses):

	Year 1	**Year 2**	**Year 3**	**Year 4**	**Year 5**
Benefits	$50 ($49.0)	$50 ($48.1)	$50 ($47.1)	$50 ($46.2)	$50 ($45.3)
Costs	$100 ($98.0)	$0 ($0)	$0 ($0)	$0 ($0)	$0 ($0)

Assuming a shadow price of 1.0, discounted net benefits would be about $137.6 million. You could then consider a case where 100% of benefits fall on capital and 0% of costs fall on capital, and the shadow price is 1.2 (values in millions, discounted at 2.0% in parentheses):

	Year 1	**Year 2**	**Year 3**	**Year 4**	**Year 5**
Benefits	$60 ($58.8)	$60($57.7)	$60 ($56.5)	$60 ($55.4)	$60 ($54.3)
Costs	$100 ($98.0)	$0 ($0)	$0 ($0)	$0 ($0)	$0 ($0)

In this outer-bound case, discounted net benefits would be about $184.8 million. And, conversely, you could consider a case where 0% of benefits fall on capital and 100% of costs fall on capital, and the shadow price is 1.2 (values in millions, discounted at 2.0% in parentheses):

	Year 1	**Year 2**	**Year 3**	**Year 4**	**Year 5**
Benefits	$50 ($49.0)	$50 ($48.1)	$50 ($47.1)	$50 ($46.2)	$50 ($45.3)
Costs	$120 ($117.6)	$0 ($0)	$0 ($0)	$0 ($0)	$0 ($0)

In this outer-bound case, discounted net benefits would be about $118.0 million. More precise estimates of the incidence of effects on capital and consumption are preferable to these outer-bounds analyses, if available.

[166] This happens if a regulation is unlikely to significantly impact private investment rather than consumption, such as when regulatory costs will predominantly be passed through to consumers and do not affect investment decisions.

[167] Mark A. Moore et al., "'Just Give Me a Number!' Practical Values for the Social Discount Rate," *Journal of Policy Analysis and Management* 23, no. 4 (2004): 792 (citing Jonathan A. Lesser and Richard O. Zerbe, "Discounting Procedures for Environmental (and Other) Projects: A Comment on Kolb and Scheraga," *Journal of Policy Analysis and Management* 13, no. 1 (1994): 140-156).

preference.

d. Long-Term Discounting

Special ethical considerations arise when comparing benefits and costs across generations. Although most people demonstrate time preference in their own consumption behavior, which may vary by the good or service at hand, it may not be appropriate for society to demonstrate a similar preference when deciding between the well-being of current and future generations. Future citizens and residents who are affected by such choices cannot take part in making them, and today's society must act with some consideration of their interest.

Some believe that it is ethically impermissible to discount the utility of future generations.[168] That is, government should treat all generations equally. Even under an approach that does not discount the utility of future generations, it is often appropriate to discount long-term consumption benefits and costs—although at a lower rate than the near-term effects more likely to fall on a single generation—if there is an expectation that future generations will be wealthier and thus will value a marginal dollar of benefits or costs by less than those alive today, or if there is a non-zero probability of sufficiently catastrophic risks. To account for these special ethical considerations, an extensive literature uses a "prescriptive" approach to long-term discounting, determining the appropriate degree of weight that society should place on the welfare of future generations.

A distinct reason for discounting the benefits and costs accruing to future generations at a lower rate is uncertainty about the appropriate value of the discount rate.[169] Private market rates provide a reasonably reliable reference for determining the rate at which society is willing to trade consumption over time within a few decades, but for extremely long time periods no comparable private rates exist. Because future changes in the social rate of time preference are uncertain but correlated over time, the certainty-equivalent discount rate will have a declining schedule.[170] The appropriate discount rate declines because it is the average of the cumulative discount factors, not an average of the discount rates, that matters.[171]

There are various reasonable approaches to long-term discounting that account for uncertainty and other relevant factors, and therefore lead to dynamic discount rates over time. One approach uses data from historical interest rates in financial markets to project uncertainty in the future path of such rates. This approach is a way of extending the use of financial market data to determine the discount rate in the long-term. OMB has provided a default schedule of long-term discount rates in the Appendix using a model that takes this approach, which will be

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[168] *See, e.g.*, Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984); Frank P. Ramsey, "A Mathematical Theory of Saving," *Economic Journal* 38, no. 152 (1928): 543-559.
[169] *See* Kenneth J. Arrow et al., "Should Governments Use a Declining Discount Rate in Project Analysis?," *Review of Environmental Economics and Policy* 8, no. 2 (2014): 145-163.
[170] Uncertainty about long-term growth rates can also be understood as causing a precautionary response to save more for the future, and increased rates of savings correspond to a lower discount rate. *See* Maureen L. Cropper et al., "Declining Discount Rates," *American Economic Review* 104, no. 5 (2014): 538-543.
[171] Martin L. Weitzman, "Why the Far-Distant Future Should Be Discounted at Its Lowest Possible Rate," *Journal of Environmental Economics and Management* 36, no. 3 (1998): 201-208.

updated every three years.[172]

Another approach is to explicitly use an economic model for welfare analysis to endogenously generate a discount rate schedule tailored to the regulatory context.[173] When taking this alternative approach, agencies should report information on their discount rate schedule in order to provide useful information to the public.

e. The Relationship between Discounting and Risk

As discussed in the section "*Economic Values of Uncertain Outcomes*," you should endeavor to estimate certainty equivalents[174] when risk is material to your analysis. This approach is favored over the use of higher discount rates as a means of accounting for risk due to its potential for greater accuracy. Simple examples illustrate the point: using a higher discount rate to account for risk would be inappropriate when evaluating regulations that reduce "systematic" risk (meaning that they have higher net benefits when other societal outcomes are worse, and vice versa); accounting for this risk reduction would be akin to using a lower, not higher, discount rate. Investments in pandemic preparedness could fall in this category. Conversely, for a regulation that increases risk (meaning that it has lower net benefits when outcomes are worse, and vice versa), accounting for risk through certainty equivalents could be mathematically equivalent to the use of a higher discount rate. For an example of when the two could be mathematically equivalent, the use of a stock market-based (or stock and bond market-based) discount rate could be equivalent to the use of certainty-equivalent valuations for regulations relating to pension funding, or when a regulation induces investment that closely mimics the risk profile of private sector investment (such as programs that provide debt financing to businesses). However, as a general matter, using discount rates to account for risk requires rigid assumptions about the form that risks take over time, and therefore creates the potential for increased inaccuracy relative to the certainty equivalents approach.[175]

In cases where risk is material to the regulation, you should generally account for relevant risk in your regulatory analysis explicitly. When you do not account for risk— either the "idiosyncratic" risks that are the primary focus of the section "*Economic Values of Uncertain Outcomes*" or "systematic" risk as discussed in this section—in your monetized estimates of benefits or costs, you should treat risk as a non-monetized effect. *See* "*Methods for Treating Non-Monetized Benefits and Costs*" for more details.

While use of certainty equivalents is the preferred method of accounting for risk, you

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[172] See the Appendix and Office of Management & Budget, *OMB Circular No. A-4: Explanation and Response to Public Input* (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4Explanation.pdf, for more details on rationale and methodology for the default schedule of long-term rates.
[173] For example, the Ramsey model. *See, e.g.*, Richard G. Newell, William A. Pizer, and Brian C. Prest, "A Discounting Rule for the Social Cost of Carbon," *Journal of the Association of Environmental and Resource Economists* 9, no. 5 (2022): 1017-1046; Kevin Rennert et al., "The Social Cost of Carbon: Advances in Long-Term Probabilistic Projections of Population, GDP, Emissions, and Discount Rates," *Brookings Papers on Economic Activity* (Fall 2021).
[174] Other methods to incorporate risks into your analysis may also be useful.
[175] Anthony E. Boardman et al., *Cost-Benefit Analysis: Concepts and Practice*, 5th ed. (Cambridge: Cambridge University Press, 2018), 263.

may choose to account for systematic risk using a risk-adjusted discount rate. One approach is to estimate an economy-wide systematic risk premium and the regulation-specific correlation of regulatory benefits and costs with that systematic risk—either positive or negative—combining the two to obtain a regulation-specific discount rate.[176] For example, Circular No. A-94 provides a method for risk-adjusted discounting in benefit-cost analysis of Federal programs. These methods imply a risk premium of 2.5% and a correlation factor of 0.45 for relevant programs. These values, under a risk-free rate of 2.0%, imply a risk-adjusted discount rate of 3.1%.[177] Any agency that wishes to account for risk using alternative discount rates in primary or sensitivity analyses should provide specific justification for their approach, and should confer with OMB before proceeding.

f. Time Preference for Non-Monetized Benefits and Costs

Differences in timing should be accounted for through discounting even for benefits and costs that are not expressed in monetary units, including health benefits.

Alternatively, it may be possible in some cases to avoid discounting non-monetized benefits. If the expected flow of benefits begins as soon as the cost is incurred and the flow of benefits is expected to be constant over time, then annualizing the cost stream is sufficient, and further discounting of benefits is unnecessary as annualized benefits and annual benefits are the same.

13. Quality, Objectivity, Transparency, and Reproducibility of Results

Pursuant to the Information Quality Act (Public Law 106-554),[178] OMB has issued *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies* ("Guidelines").[179] The Guidelines describe expectations for pre-dissemination review[180] of the quality of information disseminated by Federal agencies (as is relevant here, your regulatory analysis, including the underlying data). During your pre-dissemination review of your regulatory analysis, you should ensure objective presentation of the analysis and consider the appropriate level of information quality for your

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[176] However, the parameters necessary to pursue this approach can be difficult to estimate, the approach inherently offers limited flexibility in modeling changes to risk over time (*e.g.*, it is only valid if uncertainty grows exponentially over time), and this type of risk is not always the most material type of risk in regulatory analysis. Note that for many regulations, an appropriate risk premium adjustment to the discount rate would be negligible (or negative), as many regulations provide their largest value to society when mitigating the harms of a number of risks or market inefficiencies in bad states of the world. (By contrast, the benefits of many Federal investments are positively correlated with future economic outcomes.) Accordingly, this Circular does not broadly recommend this approach in regulatory analysis at this time.

[177] That is, $2.0\% + 0.45 \times 2.5\% = 3.13\%$. Office of Management & Budget, Circular No. A-94, *Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs* Appendix D (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-94.pdf.

[178] Information Quality Act, 44 U.S.C. 3516 note.

[179] Office of Management & Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication*, 67 Fed. Reg. 8452 (Feb. 22, 2002).

[180] Pre-dissemination review, as it applies to regulatory analyses, refers to the process used by agencies to evaluate whether information quality is consistent with the planned use for it, prior to making the information public or using it as a basis for a policy decision.

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specific regulatory analysis based on the likely use of that information.

The Guidelines explain that quality encompasses utility, integrity, and objectivity. Objectivity refers to whether the disseminated information is accurate, reliable, and unbiased as a matter of presentation and substance. The focus on the information's usefulness is critical; the Guidelines recognize that some government information may need to meet higher or more specific quality standards than those that would apply to other types of government information, due to the information's expected use. For this reason, the Guidelines characterize a subset of agency information as "influential," which is subject to certain requirements.

Under the Guidelines, information is influential if "the agency can reasonably determine" that it "will have or does have a clear and substantial impact on important public policies or important private sector decisions." In the context of a policy decision, a specific piece or body of information is "influential" when it is a principal basis for a decision by a Federal policymaker—that is, if the same decision would be difficult to reach in the information's absence or if the decision would lose its fundamental scientific, financial, or statistical underpinnings absent the information. Even if a decision is very important, a particular piece of information supporting it may or may not be "influential," depending on whether the decision could be reached in the information's absence.

Because of its potentially influential nature and special role in the rulemaking process, it is appropriate to set minimum quality standards for regulatory analysis. Each agency is authorized to define whether its regulatory analyses, or the information contained within such analyses, is likely to be "influential" given the nature of the issues for which the agency is responsible and the particular analysis in question. The Guidelines include a "reproducibility standard" for influential information such that, absent compelling interests,[181] agencies should generally disseminate their influential analyses with sufficient descriptions of data and methods to allow them to be reproduced by qualified third parties who may want to test the sensitivity of agency analyses.

When the regulatory analysis is driven by scientific information, that scientific information may be influential itself, and thus OMB's *Final Information Quality Bulletin for Peer Review* (Bulletin) would apply. The Bulletin includes guidance on the selection of reviewers, the appropriate mechanism for peer review, the importance of providing explicit instructions to reviewers (*i.e.*, a peer review charge), the transparency of the agency's review plans, and the expectations regarding the resolution and dissemination of peer reviewer comments.

A good analysis is transparent in its methods, data sources, and analytic choices. Not only is a good analysis designed to inform policymakers, other government stakeholders, and the public about the effects of alternative actions, but transparency is also integral to the concept of reproducibility of regulatory analysis. Consistent with the expectations in the academic literature, a qualified third party reading the analysis should be able to understand your analysis, underlying

[181] In this Circular, consistent with the Guidelines, the term "compelling interests" includes, but is not limited to, policies related to protecting the privacy of persons, confidentiality of data, intellectual property, national or homeland security, scientific integrity, and cost to the government.

assumptions, and the way in which you developed your estimates. There may be situation-specific challenges related to conveying some types of information, but best effort should be made within the scope of the analysis. Regulatory analyses subject to this Circular should provide documentation that the analysis reflects the highest quality evidence (including scientific, technical, economic, and indigenous knowledge[182]) and analytical methods, as feasible and appropriate, and consistent with Federal policies for evidence building and information quality.

Since the Guidelines were originally published in 2002, Federal data access policies have been promulgated to both increase taxpayer return on Federal investment and to spur private sector innovation.[183] These Federal data access policies, in conjunction with responsibilities under the Guidelines mean that reproducibility requires more than simply documenting sources used. For example:

- The underlying data that are pivotal to the conclusions of the regulatory analysis should be made available to the public absent compelling interests.[184]
- When results are generated by, for instance, a statistical model or machine-augmented learning, reproducibility generally requires, at minimum, transparency about the specific methods, design parameters, equations or algorithms, parameters, and assumptions used.
- When an agency has performed an analysis using a specialized set of computer code, the computer code used to process it should be made available to the public for further analysis, if consistent with applicable law and policy. When appropriate and feasible, this code should be written in a programming language that does not require a commercial license.

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[182] Many types of original information exist. For example, local or affected communities may possess important original scientific, technical, or economic information—including, but not limited to, indigenous knowledge—that is relevant to your analysis. *See* Office of Science and Technology Policy and Council on Environmental Quality, *Guidance for Federal Departments and Agencies on Indigenous Knowledge* (2022), https://whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf, for information on how to foster collaboration with Tribal Nations and knowledge holders so that indigenous knowledge can inform evidence-based Federal government decision-making, where appropriate.
[183] *See, e.g.*, the Open, Public, Electronic, and Necessary (OPEN) Government Data Act, Pub. L. No. 115-435, 132 Stat. 5534 (2019) (Title II of the Foundations for Evidence-Based Policymaking Act of 2018). Office of Management & Budget, Circular No. A-130, *Managing Information as a Strategic Resource* (July 28, 2016), requires agencies to collect and create information in a way that supports public transparency as well as downstream, secondary information dissemination and processing by third parties, thereby making government information accessible, discoverable, and usable.
[184] *See* footnote 181 above for examples of compelling interests. Cutting-edge technologies reduce the risk of re-identification and therefore may mitigate certain privacy risks associated with providing access to the data underlying regulatory analysis. Risk reduction techniques include creating multiple versions of a single dataset with varying levels of specificity and protection (sometimes referred to a "tiered access"). Public access data sets are the lowest tier, whereas access to the most restricted versions is limited to authorized researchers. To maintain confidentiality, less restricted "middle tier" versions of datasets typically reduce specificity or granularity in exchange for easier access that allows users to replicate statistical analyses and explore sensitivity of conclusions to alternative assumptions without having access to the original data file that includes personally identifiable information. *See, e.g.*, Advisory Committee on Data for Evidence Building, *Advisory Committee on Data for Evidence Building: Year 2 Report* (October 14, 2012), https://www.bea.gov/system/files/2022-10/acdeb-year-2-report.pdf.

Agencies should refer to the most recent best practices[185] regarding how and where to provide electronic access to their analysis, including all the supporting documents, so the public can easily access this material. Because one purpose of a regulatory analysis is to inform the public regarding the potential impacts of a proposed or final rule, it is critical that such documentation be made available promptly and reliably for public review and comment during the proposed or interim final phase of the rulemaking process and for public review when the rule is final.[186] Where other compelling interests prevent the public release of data or key elements of the analysis, certain generally-recommended practices (*e.g.*, robustness checks and sensitivity analyses and their documentation) should be performed in an especially rigorous manner.

Agencies should, whenever feasible and appropriate, disclose the use of outside consultants and the nature of their contributions.

14. Specialized Analytical Requirements

In preparing analysis of your regulation, you should be aware that there are a number of analytic requirements imposed by law. When developing a regulatory analysis consistent with the requirements of Executive Order 12866 (as amended),[187] you should also consider whether your regulation will need specialized analysis.

The differences across the various analyses listed below can create practical challenges but also offer opportunities for enhanced understanding of the available evidence and how it can be quantitatively compiled. For instance, if small entities experience the most direct effects of a regulation, an Initial Regulatory Flexibility Analysis may be an intuitive starting point for generating the suite of required assessments. Then, when you broaden the analytic perspective to be society-wide, in order to conduct a regulatory analysis consistent with Executive Order 12866, you may find that some benefits or costs experienced by small entities are accompanied by offsetting benefits or costs experienced by other entities and thus are often transfers of value within society (that is, they do not affect aggregate societal benefits or costs).[188] For example, grant funding received by small business, small non-profit, or small government entities from the

[185] For instance, Section 2 of Executive Order 13563 directs agencies (to the extent feasible and permitted by law) to give the public timely online access to the rulemaking docket on Regulations.gov, including relevant scientific and technical findings. For proposed rules, agencies are required to include an opportunity for public comment on the rulemaking docket, including comment on relevant scientific and technical findings. Examples of supporting materials include notices, significant guidance, environmental impact statements, regulatory impact analyses, and information collections. *See* Exec. Order No. 13563 of Jan. 18, 2011 (Improving Regulation and Regulatory Review), 76 Fed. Reg. 3821 (Jan. 21, 2011).

[186] For example, disseminating regulatory analyses and other supporting documents simultaneously with disseminating a proposed or final rule—for example, on the agency's website—prior to sending the rule to the Federal Register. Because weblinks can become broken over time, regulatory analyses and associated materials should be made available in regulatory dockets, even when also published on agency websites.

[187] Reaffirmed and elaborated upon in Executive Orders 13563 and 14094.

[188] Further related discussion appears in the "*Scope of Analysis*" and "*Transfers*" sections above. Moreover, distributional effects may be relevant in such an analysis; see the section "*Distributional Effects*" for more details on how to account for such effects.

Federal government would often be a transfer of value within society.[189]

Specialized analytic requirements are sometimes prescribed by statute. Some examples include:

a. Impact on Small Businesses and Other Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. chapter 6), agencies must prepare an initial and final "regulatory flexibility analysis" (RFA) if the rulemaking could "have a significant economic impact on a substantial number of small entities." In this case, "significant" is context dependent, and is not necessarily the same standard as used to determine "significant" for Executive Order 12866 review. You should post your RFA on the internet so the public can review your findings.

Your agency should have guidelines on how to prepare an RFA and you are encouraged to consult with the Chief Counsel for Advocacy of the Small Business Administration on expectations concerning what is an adequate RFA. Under the Small Business Regulatory Enforcement Fairness Act of 1996, as amended, the Environmental Protection Agency, Occupational Safety and Health Administration, and Consumer Financial Protection Bureau are required to consult with small entities prior to developing a proposed rule that would have a significant effect on a substantial number of such entities.

b. Analysis of Unfunded Mandates

Under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), you must prepare a written statement about benefits and costs prior to issuing a proposed or final rule (for which your agency published a proposed rule) that may result in aggregate expenditure by State, local, and Tribal governments, or by the private sector, of $100,000,000 or more in any one year (adjusted annually for inflation since enactment). Analytic concepts under Executive Order 12866 are generally similar to the "written statement" analytic concepts under the Unfunded Mandates Reform Act, and thus an analysis produced pursuant to Executive Order 12866 will usually satisfy the analytic requirements for a written statement under the Unfunded Mandates Reform Act. For intergovernmental mandates, the assessment should also include an analysis of "the extent to which there are available Federal resources to carry out the intergovernmental mandate."

c. Information Collection, Paperwork, and Recordkeeping Burdens

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), you will need to consider whether your regulatory action will create any additional information collection,

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[189] As another example of the interaction between various analyses, estimating the effects of a new regulation may bring to light data that would also be relevant to updating past estimates of the effects of related earlier actions. Performing such updates would serve the goal of keeping a running tally of paperwork burden, in accordance with the Paperwork Reduction Act; however, for analysis as set forth in Executive Order 12866 (among numerous others listed below), the focus should be on effects attributable to the new regulation.

paperwork, or recordkeeping burdens. These burdens are permissible only if you can justify the practical utility of the information for the implementation of your regulatory action. OMB approval will be required of any new requirements for a collection of information imposed on 10 or more persons[190] and a valid OMB control number must be obtained for any covered paperwork. Your agency's Chief Information Officer (CIO) should be able to assist you in complying with the Paperwork Reduction Act.

d. Information Quality Guidelines

Under the Information Quality Act, agency guidelines, in conformance with the OMB government-wide guidelines, have established basic quality performance goals for all information disseminated by agencies, including information disseminated in support of proposed and final rules. The data and analysis that you use to support your regulation must meet these agency and OMB quality standards; see the section "*Quality, Objectivity, Transparency, and Reproducibility of Results*" for more information. Your agency's CIO should be able to assist you in assessing information quality. The Statistical and Science Policy Branch of OMB's Office of Information and Regulatory Affairs can provide you with assistance. This Circular defines OMB's minimum quality standards for regulatory analysis.

e. National Environmental Policy Act

The National Environmental Policy Act (NEPA, 42 U.S.C. 4321 – *et seq*.) and related statutes, regulations, and executive orders require agencies to consider the environmental impacts of certain agency decisions, including regulations. Unless a rulemaking is exempt from NEPA, you must complete the required NEPA documentation at the required time. The White House Council on Environmental Quality has issued regulations (40 C.F.R. 1500 *et seq*.) and associated guidance for implementation of NEPA.

Specialized analytic requirements are also sometimes prescribed by Executive Order. Some examples include:

f. Health and Environmental Impacts on Communities with Environmental Justice Concerns

Under Executive Order 14096, "Revitalizing Our Nation's Commitment to Environmental Justice for All" (which builds upon Executive Order 12898[191]) agencies must, as appropriate and consistent with applicable law, identify, analyze, and address the disproportionate and adverse human health and environmental effects (including risks) and hazards of rulemaking actions and other Federal activities on communities with environmental

[190] "Persons" under the Paperwork Reduction Act refers to any members of the public, including non-U.S. citizens, residences, and businesses. The 10-person maximum may be lowered if the entities represent the majority or all of a sector or industry. *See* "Do I Need Clearance?," U.S. General Services Administration and Office of Management & Budget, *https://pra.digital.gov/do-i-need-clearance/* for additional guidance.
[191] Exec. Order No. 12898 of Feb. 11, 1994 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations), 59 Fed. Reg. 7629 (Feb. 16, 1994).

justice concerns.[192]

g. Environmental Health or Safety Impacts on Children

Under Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks,” each agency must, with respect to its rules, “to the extent permitted by law and appropriate, and consistent with the agency’s mission,” “address disproportionate risks to children that result from environmental health risks or safety risks.” For any substantive rulemaking action that “is likely to result in” a rule that may be significant under Section 3(f)(1) of Executive Order 12866 (as amended), and that may concern “an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children,” the agency must provide OIRA “an evaluation of the environmental health or safety effects of the planned regulation on children,” as well as “an explanation of why the planned regulation is preferable to other potentially and reasonably feasible alternatives considered by the agency,” unless prohibited by law.

h. Energy Impacts

Under Executive Order 13211, agencies are required to prepare and submit to OMB a Statement of Energy Effects for significant energy actions, to the extent permitted by law. This Statement is to include a detailed statement of “any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies) should the proposal be implemented” for the action and reasonable alternatives and their effects. You need to publish the Statement or a summary in the related notice of proposed rulemaking and final rule. For further information, see OMB guidance on implementing Executive Order 13211.[193]

15. Presentation of Results and Accounting Statement

For each regulation that is significant under Section 3(f)(1) of Executive Order 12866 (as amended) an analysis should include, preferably in an executive summary or otherwise in a prominent early place, an accounting statement with tables reporting benefit and cost estimates. You should use the guidance outlined above to report these estimates. A suggested format is included at the end of this section.

a. Categories of Benefits and Costs

To the extent feasible, you should quantify all potential incremental benefits and costs. You should report benefit and cost estimates within the following three categories: monetized; quantified, but not monetized; and unquantified.

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[192] For further information, including the definition of environmental justice, see Exec. Order No. 14096 of Apr. 21, 2023 (Revitalizing Our Nation's Commitment to Environmental Justice for All), 88 Fed. Reg. 25,251 (Apr. 26, 2023).

[193] Office of Management & Budget, *Memorandum M-01-27 (Guidance for Implementing E.O. 13211)* (July 13, 2001), *https://www.whitehouse.gov/wp-content/uploads/2017/11/2001-M-01-27-Guidance-for-Implementing-E.O.-13211.pdf*.

These categories are mutually exclusive and exhaustive. Throughout the process of listing estimates of benefits and costs, agencies should avoid double-counting. This problem may arise if more than one way exists to express the same change in social welfare.

As noted in the section "*Accounting for Benefits and Costs that Are Difficult to Quantify or Monetize*," you should consider, if feasible given the state of the evidence, categorizing or ranking non-monetized or unquantified effects in terms of their importance. You should distinguish the effects that evidence indicates are likely to be significant enough to warrant serious consideration by decision makers from those that are likely to be minor.

b. Reporting Benefits and Costs over Time

You should present undiscounted streams of benefit, cost, and net benefit estimates for each year of the analytic time horizon in a table separate from your accounting statement. Also, you should generally present annualized[194] benefits and costs in accordance with guidance provided in the section "*Discount Rates*." The streams of annualized estimates should start in the year when the regulation will begin to have effects, even if the regulation is not legally effective immediately. Report all monetized effects in constant (*e.g.*, 2022, representing the real purchasing power in that year) dollars. You should convert dollars expressed in different years' dollars using the most appropriate and reliable inflation index (*e.g.*, the Bureau of Economic Analysis's GDP price deflator or personal consumption expenditures price index) for your analysis.

c. Treatment of Risk and Uncertainty

You should provide central estimates as well as distributions about those estimates, where such information exists. When you provide only upper and lower bounds (in addition to best estimates), you should, if possible and appropriate, use the 95 and 5 percent confidence bounds. You are encouraged to develop estimates that capture the distribution of plausible outcomes.

d. Precision of Estimates

Reported estimates should reflect, to the extent feasible, the precision in the analysis. For example, an estimate of $220 million implies rounding to the nearest $10 million and thus a precision of +/-$5 million; similarly, an estimate of $222 million implies rounding to the nearest $1 million and thus, a precision of +/-$0.5 million.

[194] Computing annualized costs and benefits from present values spreads the costs and benefits equally over each period, taking account of the discount rate. The annualized value equals the present value divided by the sum of discount factors. Many spreadsheet packages, such as Excel or Sheets, include a PMT function, which calculates the annualized amount needed over a number of years to equal a given present value at a particular discount rate. If the formula returns a negative number the result should be multiplied by -1 to obtain the annualized amount.

e. Effects on State, Local, and Tribal Governments, Small Business, Wages, and Economic Growth

You may need to identify in your analysis the portions of benefits and costs received or otherwise experienced by State, local, and Tribal governments.[195] To the extent feasible, you also should identify the effects of the regulation or program on small businesses, wages, and economic growth.[196]

[195] This identification may be required by, for example, the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532(a)(2).
[196] Regulatory Flexibility Act, 5 U.S.C. 603(c), 604.

OMB #: **Agency/Program Office:**
Rule Title:
RIN#: **Date:**

Category	*Primary Estimate*	*Low Estimate*	*High Estimate*	*Dollar Year*	*Discount Rate*	*Time Horizon*	*Notes (e.g., Risk Assumptions; Source Citations; Whether Inclusion of Capital Effects Differs Across Low, Primary, High Estimates; etc.)*
BENEFITS							
Annualized monetized benefits							
Annualized quantified, but non-monetized, benefits							
Unquantified benefits							
COSTS							
Annualized monetized costs							
Annualized quantified, but non-monetized, costs							
Unquantified costs							
TRANSFERS							
Annualized monetized Federal budgetary transfers							
Bearers of transfer gain and loss?							
Other annualized monetized transfers							
Bearers of transfer gain and loss?							
NET BENEFITS							
Annualized monetized net benefits							

Category	*Effects*	*Notes*
Effects on State, local, or Tribal governments		
Effects on small businesses		
Effects on wages		
Effects on growth		

16. Effective Date

The effective date of this Circular is March 1, 2024, for regulatory analyses received by OMB in support of proposed rules, interim final rules, and direct final rules, and January 1, 2025, for regulatory analyses received by OMB in support of other final rules. In other words, this Circular applies to the regulatory analyses for draft proposed rules that are formally submitted to OIRA after February 29, 2024, and for draft final rules that are formally submitted to OIRA after December 31, 2024. (However, if the Circular applies to the draft proposed rule, then the Circular also applies to the draft final rule, even if it is submitted prior to January 1, 2025.) To the extent feasible and appropriate, as determined in consultation with OMB, agencies should follow this Circular's guidance earlier than these effective dates. Agencies may, on a case-by-case basis, ask OMB if deviation from this Circular's guidance would be appropriate due to practical challenges related to following the guidance by these effective dates.

United States Government Accountability Office

Report to Congressional Committees

October 2023

DEFENSE INDUSTRIAL BASE

DOD Needs Better Insight into Risks from Mergers and Acquisitions

GAO-24-106129

GAO Highlights

Highlights of GAO-24-106129, a report to congressional committees

Why GAO Did This Study

DOD has reported that consolidation of its suppliers through M&A is a key risk imperiling the health and resilience of the defense industrial base. While M&A may create benefits, such as improving a supplier's financial health, they may also reduce competition and increase the risk of higher costs and reduced innovation.

To help manage these risks, DOD has established a process for assessing the potential effects of defense-related M&A. Under certain circumstances, DOD also provides input to the federal antitrust agencies, which review and, when necessary, take action to mitigate competition risks from M&A.

Congressional reports included provisions for GAO to evaluate DOD's efforts to assess the effects of M&A on the defense industrial base. This report assesses (1) the extent to which DOD has insight into defense-related M&A, and (2) the extent to which DOD monitors the effects of M&A on the defense industrial base, among other things. GAO reviewed agency policy and documentation, analyzed agency-provided and commercially available data, and interviewed agency officials.

What GAO Recommends

GAO is making four recommendations for DOD to: provide additional direction on assessing all risks and benefits identified in policy, clarify which defense suppliers' M&A need to be prioritized for assessment, assess whether Industrial Base Policy's M&A office is adequately resourced, and require monitoring of identified risks. DOD concurred with the recommendations and described its actions to address them.

View GAO-24-106129. For more information, contact W. William Russell at (202) 512-4841 or RussellW@gao.gov.

October 2023

DEFENSE INDUSTRIAL BASE

DOD Needs Better Insight into Risks from Mergers and Acquisitions

What GAO Found

The Department of Defense (DOD) has estimated that hundreds of defense companies undergo mergers and acquisitions (M&A) each year. DOD's Industrial Base Policy office and DOD stakeholders work together to conduct assessments of such M&A's risks and benefits. When M&A present risks to competition, DOD's Industrial Base Policy office also works with the antitrust agencies, which review and regulate M&A that may substantially lessen competition.

Source: Ngampol/stock.adobe.com. | GAO-24-106129

DOD's insight into defense M&A is limited. Industrial Base Policy's M&A office and DOD stakeholders assessed an average of 40 M&A per year in fiscal years 2018 through 2022, which represents a small portion of defense M&A. DOD's most recently published statistics on defense M&A, which were included in its *Fiscal Year 2017 Annual Industrial Capabilities* report, indicated that approximately 400 defense M&A occurred annually.

Most DOD assessments are initiated in response to antitrust reviews of large M&A valued over a certain dollar threshold, currently $111.4 million. Therefore, Industrial Base Policy's M&A office and DOD stakeholders focus on evaluating competition risks in their M&A assessments. While DOD policy directs Industrial Base Policy and DOD stakeholders to assess other types of risks, such as national security and innovation risks, they have not routinely done so. Moreover, DOD policy does not provide clear direction about which M&A DOD should prioritize for assessment, beyond those conducted in response to antitrust reviews. DOD officials noted that the M&A office—which is comprised of two to three staff—does not have the staff resources to initiate more assessments of smaller M&A that may also present risks. Assessing whether the M&A office has adequate resources to meet its responsibilities and clarifying which defense suppliers' M&A should be prioritized would help DOD better assess risks.

DOD generally does not monitor whether risks identified in its M&A assessments were realized. GAO found that DOD policy does not require Industrial Base Policy and DOD stakeholders to conduct monitoring. As a result, they cannot determine if risks occurred and whether further action is needed to mitigate them.

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Abbreviations

DCMA	Defense Contract Management Agency
DOD	Department of Defense
DOJ	Department of Justice
FTC	Federal Trade Commission
HSR	Hart-Scott-Rodino
IBP	Industrial Base Policy
M&A	mergers and acquisitions
NDAA	National Defense Authorization Act

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U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

October 17, 2023

Congressional Committees

The White House and Department of Defense (DOD) have stated that a healthy and resilient defense industrial base is a critical element of U.S. power and a national priority. For decades, DOD has reported on complex challenges and risks facing the defense industrial base, including the consolidation of its supplier base through mergers and acquisitions (M&A). For example, DOD's 2022 *State of Competition within the Defense Industrial Base* reported that since the 1990s, the number of aerospace and defense prime contractors supporting DOD's weapon systems has decreased from 51 to five companies.[1] The DOD report stated that consolidation of the industrial base reduces competition for DOD contracts and leads DOD to rely on a more limited number of suppliers. This lack of competition may in turn increase the risk of supply chain gaps, price increases, reduced innovation, and other adverse effects, according to the DOD report.[2] DOD also reported that consolidation of the defense industrial base had reached historically high levels and that it needed to reevaluate its internal process for assessing M&A and continue working with the federal antitrust agencies to strengthen oversight of M&A.[3]

Members of Congress have noted similar concerns about declining competition in the defense industrial base and the potential adverse effect that industry consolidation has on weapon system programs and innovation. The Joint Explanatory Statement accompanying the National Defense Authorization Act (NDAA) for Fiscal Year 2022 and the Senate Armed Services Committee Report accompanying a bill for the James M. Inhofe NDAA for Fiscal Year 2023 included provisions for GAO to evaluate DOD's efforts to monitor and assess the effects of potential M&A

[1]Department of Defense, *State of Competition within the Defense Industrial Base* (February 2022).

[2]DOD, *State of Competition within the Defense Industrial Base*.

[3]For the purposes of this report, we refer to the Department of Justice (DOJ) and the Federal Trade Commission (FTC) as the federal antitrust agencies. The antitrust agencies enforce the antitrust laws, which prohibit business practices that unreasonably deprive consumers of the benefits of competition. Reduced competition can result in higher prices for, lower quality of, or less innovative products and services.

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on the defense industrial base, as well as DOD's oversight processes for vetting potential M&A within the defense industrial base.[4]

This report addresses (1) the extent to which DOD has insight into defense-related M&A; (2) how DOD's role as a stakeholder to the antitrust agencies affects how it conducts M&A assessments; and (3) the extent to which DOD monitors the effects of M&A on the defense industrial base.

To address the extent to which DOD has insight into defense-related M&A, we compared DOD data on defense M&A to commercially available data to determine how many occurred, how many were assessed by DOD, and the reliability of DOD's data.[5] Our analysis covered fiscal years 2018 through 2022, the years for which DOD officials stated they had complete data on the M&A that DOD assessed. We determined these data were sufficiently reliable for the purposes of determining which M&A DOD had assessed in these years. We assessed the reliability of these data through manual data testing and interviews with DOD officials.[6] We also interviewed DOD officials to discuss their M&A policy and staff capacity, and to determine if DOD has efforts to assess the effects of industry consolidation writ large.

To further assess the extent to which DOD has insight into defense-related M&A, we analyzed agency documents to compare DOD's actual implementation of M&A assessments to the requirements established in agency policy. As part of this effort, we selected a nongeneralizable sample of nine M&A that DOD assessed in fiscal years 2018 through 2022 as illustrative examples. Our selection was generated using several criteria, including representation of a variety of outcomes (proceeded

[4]The Joint Explanatory Statement accompanying the NDAA for Fiscal Year 2022 included a provision for GAO to assess DOD's actions to monitor and assess the effects of potential mergers and acquisitions on its defense industrial base. See National Defense Authorization Act for Fiscal Year 2022: Legislative Text and Joint Explanatory Statement to Accompany S. 1605, Public Law 117-81 (Dec. 2021). The Senate Armed Services Committee report accompanying a bill for the James M. Inhofe NDAA for Fiscal Year 2023 included a provision for GAO to evaluate DOD's oversight processes for vetting proposed mergers and acquisitions within the defense industrial base. See S. Rep. No. 117-130, at 204 (2022).

[5]For the purposes of this report, defense-related M&A indicates that one or more companies involved in a merger or acquisition supplies the defense industry.

[6]DOD officials told us that data from fiscal years before 2018 may be incomplete in part due to problems arising from a server migration and changes in data collection practices.

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without further review, remedied, or blocked), merger values, and fiscal year of assessment.

To address how DOD's role as a stakeholder to the antitrust agencies affects how it conducts M&A assessments, we reviewed DOD and antirust agency policy and guidance to determine how DOD is expected to support antitrust reviews led by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). In doing so, we determined what information DOD has access to when it conducts M&A assessments and the nature and extent of its role in determining the outcome of antitrust reviews. We also interviewed DOD and antitrust agency officials and analyzed information from our nine illustrative examples to understand how DOD and the antitrust agencies interacted and shared information during those assessments.

To address the extent to which DOD monitors the effects of M&A on the defense industrial base, we reviewed agency policy to determine DOD's requirements for monitoring the effects of completed M&A. We also interviewed DOD officials and reviewed agency documentation to determine if DOD has efforts underway to assess the effects of specific M&A. A more detailed description of our scope and methodology is included in appendix I.

We conducted this performance audit from June 2022 to October 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The U.S. defense industrial base includes the people, technology, institutions, technological know-how, and facilities used to design, develop, manufacture, and maintain the weapons and other goods and services needed to meet U.S. national security objectives. The defense industrial base is composed of several tiers: top tiers that include prime contractors and major subcontractors, and lower tiers that include suppliers of parts, electronic components, and raw materials.

DOD stated in its 2022 *State of Competition within the Defense Industrial Base* report that a robust defense industrial base is essential to meeting

U.S. national security objectives.[7] Accordingly, DOD views any risk to the industrial base—any event or condition that can disrupt or degrade DOD supplier capabilities or capacity needed to equip or sustain military forces now and in the future—as a threat to U.S. national security. Industry consolidation caused by M&A between defense contractors and suppliers is one type of risk affecting the defense industrial base.[8]

Federal Antitrust Reviews of Mergers and Acquisitions

The antitrust agencies are responsible for the enforcement of the antitrust statutes: the Sherman Act, the Clayton Act, and the FTC Act.

- The Sherman Act is the oldest law governing antitrust, and outlaws all contracts, combinations (such as trusts), and conspiracies that restrain interstate and foreign trade and commerce. The Sherman Act also prohibits the monopolization or attempts to monopolize any part of interstate and foreign trade.[9]
- The Clayton Act provided more detail on certain practices not included under the Sherman Act. The current version of the statute generally prohibits mergers or acquisitions that may substantially lessen competition or tend to create a monopoly, among other things.[10]
- The FTC Act created FTC and bans unfair methods of competition.[11]

To enforce the antitrust laws, the antitrust agencies review M&A and evaluate whether they may substantially lessen competition or may tend to create a monopoly. These reviews can occur in any sector of the economy and, regardless of the specific companies or markets involved, the antitrust agencies' focus is primarily on the potential risks to competition. For example, during antitrust reviews of defense-related

[7]DOD, *State of Competition within the Defense Industrial Base.*

[8]Industry consolidation is one risk among many affecting the defense industrial base. Other types of industrial base risks include, but are not limited to, workforce shortfalls, foreign dependency, cybersecurity, obsolescence, and erosion of U.S.-based infrastructure.

[9]Ch. 647, 26 Stat. 209, § 1-2 (1890) (codified as amended at 15 U.S.C. § 1-2).

[10]Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 12-27; 29 U.S.C. § 52-53). The current version of the Clayton Act prohibits individuals subject to FTC's jurisdiction from acquiring the whole or any part of the assets of another person engaged in commerce or in an activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the United States, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. See 15 U.S.C. § 18.

[11]Ch. 311, 38 Stat. 717, § 1, 5 (1914) (codified as amended at 15 U.S.C. § 41, 45(a)).

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M&A, the antitrust agencies evaluate how a merger or acquisition would affect competition in the defense industrial base. Antitrust agency officials told us that they will consider other types of risks, such as risks to national security and innovation, only if they can link those risks to a potential lessening of competition.

The antitrust agencies can review any M&A, but receive notice from the merging parties only if the merger or acquisition is valued over certain dollar thresholds and meets other requirements. The Hart-Scott-Rodino Antitrust Improvements (HSR) Act of 1976 amended the Clayton Act and established the Premerger Notification Program.[12] The HSR Act requires companies to notify the antitrust agencies when initiating and prior to completing certain M&A over certain dollar thresholds and to wait for a period—generally 30 days—before conducting the merger or acquisition.[13] This provides DOJ and FTC an opportunity to evaluate the potential competitive effects of the merger or acquisition. As of February

[12]See Pub. L. No. 94-435, § 201 (1976) (codified as amended at 15 U.S.C. § 18a). For the HSR Act to apply to a particular transaction, it must generally satisfy three tests: the commerce test, the size of transaction test, and the size of person test. An acquisition will satisfy the commerce test if either of the parties to a transaction is engaged in commerce or in any activity affecting commerce. See 15 U.S.C. § 18a(a)(1). The size of transaction test is met if, as a result of the acquisition, the acquiring person will hold an aggregate amount of voting securities, and assets of the acquired person valued at more than $50 million, as adjusted (currently $111.4 million). For M&A exceeding $50 million, as adjusted (currently $111.4 million), but less than $200 million, as adjusted (currently $445.5 million), the size of person test is met if a person who has total assets or annual net sales of at least $100 million, as adjusted (currently $222.7 million) acquires (1) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of at least $10 million, as adjusted (currently $22.3 million); (2) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10 million, as adjusted (currently $22.3 million); or (3) any voting securities or assets of a person with annual net sales or total assets of $10 million, as adjusted (currently $22.3 million). See 15 U.S.C. § 18a(a)(2)(B). Transactions in excess of $200 million, as adjusted (currently $445.5 million), do not need to meet the size of the person test to qualify. See 15 U.S.C. § 18a(a)(2)(A). Certain transactions that meet these tests may be exempt from premerger notification rules and the waiting period. See 15 U.S.C. § 18a(c). For the current thresholds, see Federal Trade Commission: Revised Jurisdictional Thresholds, 88 Fed. Reg. 5004 (Jan. 26, 2023).

[13]The initial waiting period under the HSR Act is generally 30 days, except for cash tender offers where it is reduced to 15 days. See 15 U.S.C. § 18a(b)(1). The waiting period starts on the date that FTC and the Assistant Attorney General of DOJ's Antitrust Division receive completed notification of the merger as required by law, or if notification is not completed, notification to the extent completed and a statement of reasons for noncompliance. See 15 U.S.C. § 18a(b)(1)(A). FTC and the Assistant Attorney General may terminate the waiting period in individual cases and allow a person to proceed with the acquisition. 15 U.S.C. §18a(b)(2). FTC or the Assistant Attorney General may also extend the waiting period under certain circumstances.

2023, the adjusted HSR premerger notification transaction threshold for a merger or acquisition is $111.4 million.[14] DOJ and FTC may also review smaller M&A that may substantially lessen competition or tend to create a monopoly. However, for these smaller M&A, the HSR Act does not require companies to report the M&A to the antitrust agencies and they do not have to wait until the end of a 30-day waiting period to carry out their merger or acquisition.

Federal antitrust reviews have different stages, depending on whether the antitrust agencies initially determine that competition risks are present.

- The **initial review** stage usually takes place during the 30-day waiting period, during which time the antitrust agencies review the M&A to determine any potential antitrust concerns that warrant additional scrutiny. Officials from DOD's Office of Industrial Base Policy (IBP) told us that during this initial review, the antitrust agencies solicit input on potential competition risks from affected customers and interested parties, such as federal agencies that may contract with the merging companies. For example, IBP officials told us that if the antitrust agencies determine that a merger or acquisition involves a company with a defense equity, they may request DOD's input on how the M&A could affect DOD programs.[15] After collecting information from these affected parties and conducting their own analysis, the antitrust agencies determine whether there is evidence that the potential M&A would substantially lessen competition or tend to create a monopoly. The Hart-Scott-Rodino Annual Report for Fiscal Year 2021 showed that about 98 percent of M&A proceeded after this initial review.
- The antitrust agencies can initiate a **second request** to request additional information on how the M&A will affect competition. The second request can extend the waiting period, during which the merging parties cannot complete their M&A until they have substantially complied with the second request. Second requests are infrequent and about 2 percent of reviews carried out in response to HSR filings proceeded to that stage, according to Hart-Scott-Rodino Annual Report for Fiscal Year 2021.

M&A subject to federal antitrust reviews can have multiple potential outcomes. The antitrust agencies allow nearly all M&A to proceed without

[14]See Federal Trade Commission: Revised Jurisdictional Thresholds, 88 Fed. Reg. 5004 (Jan. 26, 2023).

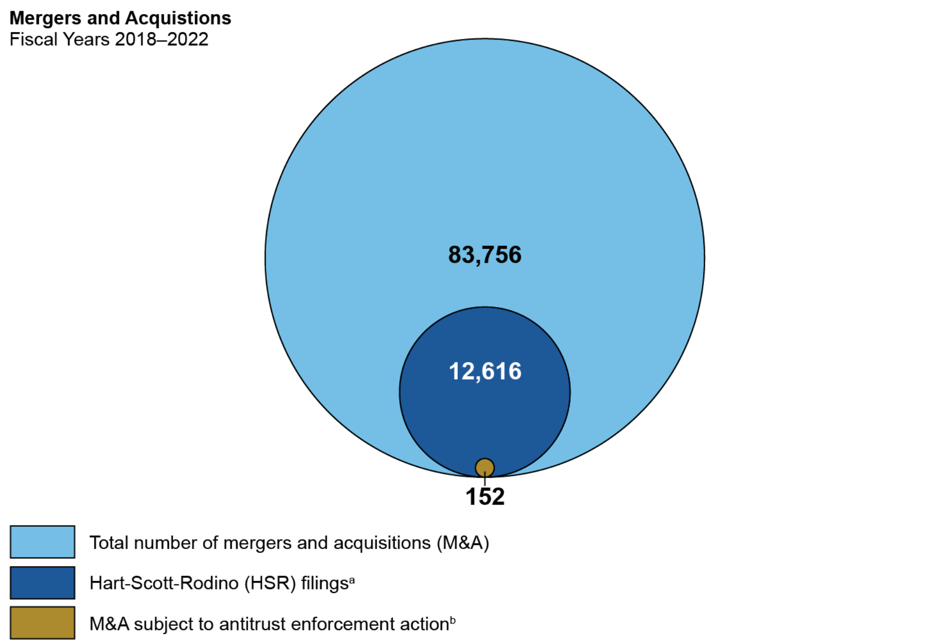
[15]For the purposes of this report, a merger or acquisition with a defense equity indicates that one or more companies involved supplies the defense industry.

challenge after an initial review under the HSR process. If the antitrust agencies have reason to believe a merger or acquisition could result in potential violations of certain antitrust statutes, they can take enforcement action to remedy the risks. For example, the antitrust agencies may negotiate an agreement with the parties to remedy the competition concerns. The agreement could result in a structural remedy (e.g., the divestiture of a line of business) or a behavioral remedy (e.g., creating firewalls between certain lines of business). If the antitrust agencies and the merging parties cannot negotiate an agreement or the antitrust agencies believe that the risks are too challenging to mitigate, either of the antitrust agencies may request a preliminary injunction in federal district court to block the M&A from proceeding.[16] Between fiscal years 2018 and 2022, there were at least 83,756 M&A in the U.S. economy, according to commercially available data. The antitrust agencies received 12,616 filings under the HSR Act during the same period, which resulted in approximately 152 enforcement actions, as shown in figure 1 below.[17] On average, around 1 percent of HSR filings result in an enforcement action.

[16]See 15 U.S.C. § 18a(f).

[17]Data on fiscal year 2022 enforcement actions were not available at the time of our report, so the statistic on enforcement actions includes fiscal years 2018-2021.

Figure 1: Mergers and Acquisitions Subject to Antitrust Enforcement Action



Source: GAO analysis of Hart-Scott-Rodino Annual Reports and publicly available antitrust agency data. | GAO-24-106129

[a]The HSR Act requires companies to notify the antitrust agencies when initiating and prior to completing certain M&A over certain dollar thresholds and to wait for a period of 30 days before conducting the merger or acquisition. During this 30-day period, the antitrust agencies and interested parties, such as the Department of Defense, review whether the M&A may substantially reduce competition or tend to create a monopoly.

[b]Data on fiscal year 2022 enforcement actions were not available at the time of GAO's report, so this total includes enforcement actions in fiscal years 2018-2021.

DOD Process for Assessing Risks and Benefits Posed by Defense M&A

To identify and better understand the effects of consolidation on the defense industrial base, DOD can conduct assessments of defense M&A. DOD's M&A policy, DOD Directive 5000.62, outlines a department-wide policy for assessing M&A in the defense industrial base.[18] DOD's M&A policy stipulates that through these assessments, DOD will consider the effect of M&A on competition for DOD contracts and subcontracts, innovation of defense technologies, DOD costs, and national security, among other things. For example, DOD may assess if the M&A will reduce competition when contracting for a particular product or service purchased by defense programs. DOD officials stated that they may also

[18]Department of Defense, *Review of Mergers, Acquisitions, Joint Ventures, Investments, and Strategic Alliances of Major Defense Suppliers on National Security and Public Interest*, DOD Directive 5000.62 (Feb. 27, 2017).

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assess if the M&A would result in a foreign company or a commercial company owning a critical defense supplier, which could pose a national security risk. DOD officials told us that under certain circumstances, DOD will share information requested by the antitrust agencies and coordinate its M&A assessments with the antitrust agencies, which, as noted above, have the authority to challenge certain M&A that that violate certain antitrust statutes.

According to DOD's M&A policy, DOD's M&A assessments are a department-wide effort supported by multiple organizations across DOD. Under the authority, direction, and control of the Under Secretary of Defense for Acquisition and Sustainment, IBP determines the need to assess certain M&A involving major defense suppliers, develops DOD's recommended position on reviewed M&A, and seeks input from program offices and certain DOD stakeholders, among other duties.[19] IBP's M&A office, comprised of two to three full-time equivalent employees, initiates and coordinates the DOD-wide assessment. A department-wide network of DOD stakeholders supports the M&A office by providing input on the assessments. IBP officials told us that 33 stakeholder organizations across DOD help IBP identify relevant M&A and provide input on the potential risks and benefits of M&A based on the nature and scope of their interactions with the merging companies. According to IBP officials, these stakeholders generally work in acquisitions for their respective military departments, field activities, or defense agencies (such as the Defense Logistics Agency or the Missile Defense Agency). Figure 2 depicts DOD's notional M&A assessment process and the key organizations involved.

[19]DOD Directive 5000.62 provides that the Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy undertake certain responsibilities related to industrial base assessments under the authority, direction, and control of the Under Secretary of Defense for Acquisition, Technology, and Logistics. The National Defense Authorization Act for Fiscal Year 2017 reorganized the Office of the Secretary of Defense by dissolving the Under Secretary of Defense for Acquisition, Technology, and Logistics and establishing the Under Secretary of Defense for Acquisition and Sustainment and the Under Secretary of Defense for Research and Engineering. See Pub. L. No. 114-328, § 901(a)-(b) (2016) (codified as amended at 10 U.S.C. § 133a-133b). IBP officials told us that the office of the Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy was reorganized, and IBP now assumes the directive's roles and responsibilities for Manufacturing and Industrial Base Policy, and they operate under the authority, direction, and control of the Under Secretary of Defense for Acquisition and Sustainment.

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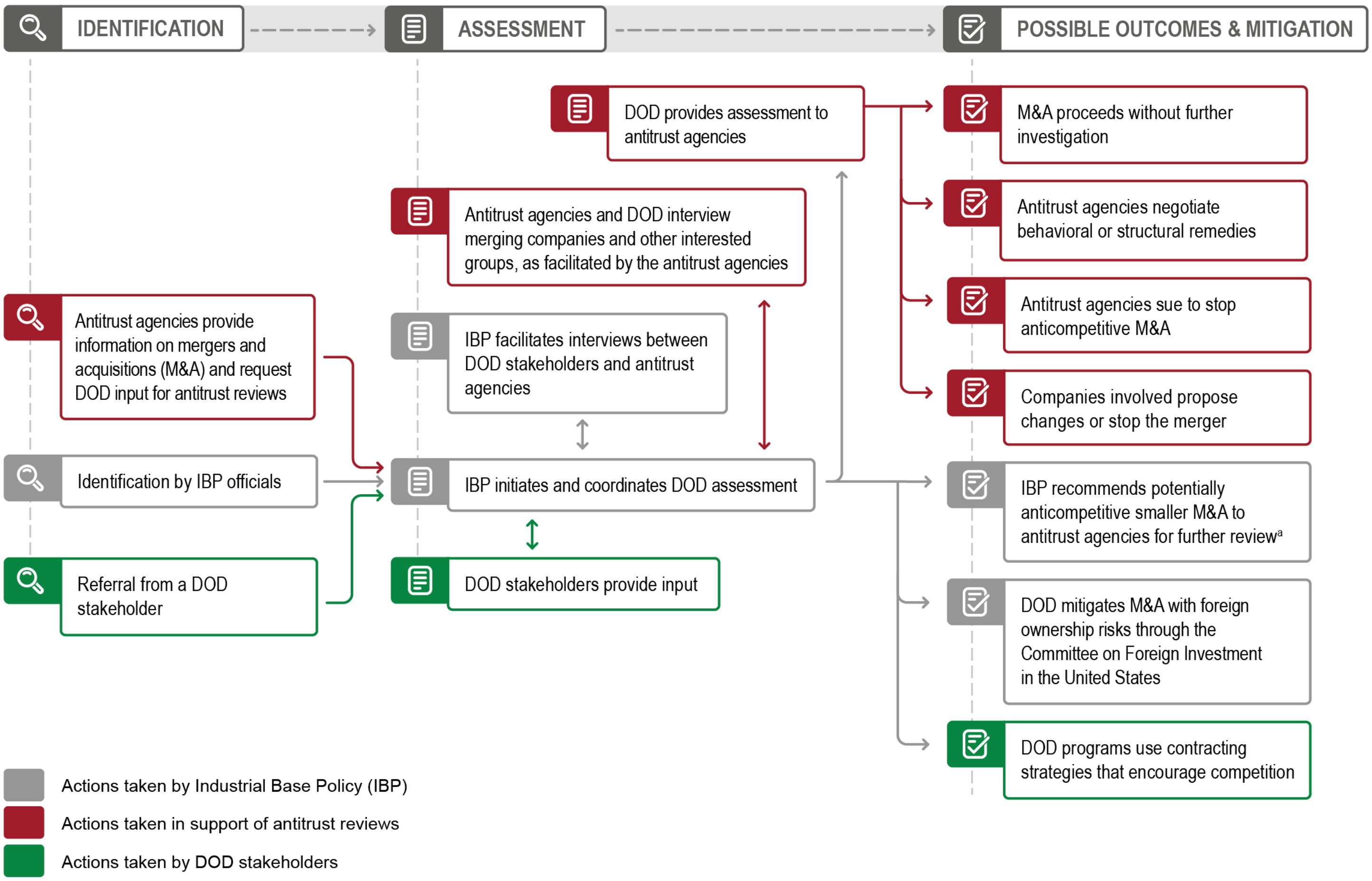
Figure 2: Notional Department of Defense (DOD) Process for Merger and Acquisition Assessments



Source: GAO analysis of DOD and antitrust agency information. | GAO-24-106129

[a]The antitrust agencies can review any M&A, but receive notice from the merging parties only if the merger or acquisition is valued over certain dollar thresholds and meets other requirements, as established in the Hart-Scott–Rodino Antitrust Improvements (HSR) Act of 1976. As of February 2023, the adjusted HSR premerger notification threshold for a merger or acquisition was $111.4 million. The Department of Justice and the Federal Trade Commission may also review smaller M&A, but the HSR Act does not require companies to report these M&A to the antitrust agencies. Instead, antitrust officials said they learn about these M&A from news reporting or affected market participants, such as DOD.

Identifying M&A. IBP initiates a DOD M&A assessment after learning about a defense merger or acquisition through one of three ways:

- Requests for input from one of the antitrust agencies: During an antitrust review, the antitrust agencies may solicit DOD input if they determine that the merger or acquisition has defense equities and DOD is an affected customer. DOD provides input on how the proposed M&A may affect competition in the defense industrial base.

- IBP's own research: IBP identifies proposed M&A on its own through several means, including news reporting and public data sources. For example, IBP officials told us that, in some cases, they identify announced M&A involving DOD suppliers through their subscriptions to market intelligence services and determine whether the proposed M&A warrants further DOD assessment and potential elevation to the antitrust agencies for review. According to DOD's M&A policy, IBP should consider risks related to national security, the industrial and technological base, competition, innovation, or other issues, including those related to the public interest, when deciding if a DOD assessment is needed.
- Referral from a DOD stakeholder: Stakeholders across DOD notify IBP if they become aware of M&A that could affect their programs. Stakeholders told us that they become aware of such M&A through a variety of ways, including public news reporting and acquisition program officials' day-to-day interactions with contractors.

Assessing M&A. When IBP officials begin an M&A assessment, they conduct initial research about the companies involved and reach out to DOD stakeholders to solicit their input on how the M&A could affect their acquisition programs. According to IBP officials, the M&A office generally sends out a wide call for stakeholder input, but also tries to identify the particular offices likely to be most affected by the proposed M&A to make sure their views are incorporated. These stakeholders have subject matter experts who are able to conduct deep-dive analyses on how a proposed M&A could affect particular acquisition programs. IBP collects responses from stakeholders and develops a consolidated DOD position on the likely risks and benefits of the proposed M&A.

Mitigating M&A risks. When IBP and DOD stakeholders identify potential risks to the defense industrial base through their M&A assessments, there are several ways they can mitigate these risks. According to IBP officials, the most effective way to mitigate identified competition risks is to provide this information to the antitrust agencies, which are statutorily empowered to take enforcement action, as appropriate, to preserve competition.

There are also mitigation measures that DOD can implement on its own to address any of the risks it identifies. For example, IBP officials said that DOD programs are able to increase opportunities for competition by

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breaking up a large contract or requirement into several smaller contracts or including competition effects in the source selection criteria for contract awards. Additionally, if the M&A involves a foreign company, the Committee on Foreign Investment in the United States, which is an interagency group that addresses national security risks that result from foreign investment in U.S. companies, may examine the transaction.[20] Furthermore, DOD manages funding designated to support the defense industrial base, which can also help mitigate M&A risks. DOD's Industrial Base Analysis and Sustainment program, for instance, supports initiatives to increase industrial manufacturing capabilities and supply chain resiliency. DOD can also use funding under Defense Production Act authorities to establish, expand, maintain, or restore domestic production capacity for critical components and technologies.[21]

Prior GAO Work on DOD Industrial Base Efforts

GAO has issued several reports on DOD's efforts to manage risks affecting the defense industrial base, such as risks related to M&A. We have found that DOD's management of the defense industrial base poses a risk to its acquisition of weapons systems, and this management challenge is included in our *High-Risk Series* report as an area of significant concern.[22] In our prior reports, we found the following:

- In June 2018, we recommended that DOD make better use of existing supplier data to identify risks to the industrial base, as well as identify the appropriate workforce mix of government personnel and contractor support staff needed to work with business-sensitive data.[23] DOD partially concurred with these recommendations and has since taken action to implement both of them. To implement our

[20]The Committee on Foreign Investment in the United States is responsible for assessing, reviewing, and investigating covered transactions—which include, for example, mergers, acquisitions, or takeovers carried out by a joint venture that could result in control of a U.S. business by a foreign government or an entity controlled by or acting on behalf of a foreign government. In examining covered transactions, committee members seek to identify and address, as appropriate, any national security concerns that arise as a result of the transaction.

[21]See Defense Production Act of 1950, Pub. L. No. 81-774 (1950) (codified as amended at 50 U.S.C. §§ 4501 et seq.).

[22]GAO, *High-Risk Series: Efforts Made to Achieve Progress Need to Be Maintained and Expanded to Fully Address All Areas,* GAO-23-106203 (Washington, D.C.: Apr. 20, 2023).

[23]IBP relied extensively on contractor support staff in its workforce but could not provide contractors with access to business-sensitive proprietary data due to its interpretation of the Trade Secrets Act. GAO, *Defense Industrial Base: Integrating Existing Supplier Data and Addressing Workforce Challenges Could Improve Risk Analysis*, GAO-18-435 (Washington, D.C.: June 13, 2018).

supplier data recommendation, IBP worked with the military departments and other DOD organizations to compile data on the prime contractors and first and second tier suppliers supporting certain weapon systems. These data will be integrated into a DOD-wide data system and used to assess industrial base risks. DOD implemented our workforce recommendation by conducting a staffing assessment and, as a result, requesting 14 additional staff members for its industrial base analytics office.

- In June 2022, we recommended that DOD update its industrial base assessment instruction to ensure that DOD has greater insight into industrial base risks across the department.[24] DOD concurred with this recommendation and plans to update the instruction by September 2025.
- In July 2022, we reported that DOD had yet to develop a congressionally mandated analytical framework for mitigating industrial base risks across the acquisition process.[25] We additionally found that DOD did not have a consolidated and comprehensive strategy to mitigate risks in the defense industrial base and was not collecting the information that such a strategy would require to track the status of those risks. As a result, we recommended that DOD develop a consolidated and comprehensive industrial base strategy. DOD partially concurred with this recommendation, noting that it agrees with the importance of a comprehensive strategy. According to DOD officials, IBP is in the process of developing an overarching DOD industrial base strategy and expects to release it by May 2024.

A list of our prior work on DOD's industrial base efforts is provided at the end of this report.

DOD Has Limited Insight into the Potential Risks of Most Defense M&A

DOD has limited insight into most defense-related M&A, as it focuses its resources on assessing high-dollar-value M&A for competition risks in support of antitrust reviews. While DOD's most recent estimates found there were approximately 400 M&A occurring each year in the defense industrial base, IBP and DOD stakeholders assessed an average of 40 M&A per year between fiscal years 2018 and 2022. DOD policy states that IBP is responsible for determining the need to assess any M&A involving a major defense supplier, but the office's efforts have largely focused on assessing high-dollar-value M&A so DOD could provide input

[24]GAO, *Weapon Systems Annual Assessment: Challenges to Fielding Capabilities Faster Persist*, GAO-22-105230 (Washington, D.C: June 8, 2022).

[25]GAO, *Defense Industrial Base: DOD Should Take Actions to Strengthen Its Risk Mitigation Approach*, GAO-22-104154 (Washington, D.C.: July 7, 2022).

to antitrust reviews.[26] For the M&A that IBP and DOD stakeholders did assess, they primarily focused on evaluating competition risks to provide information needed for antitrust reviews. Their assessments placed less emphasis on potential benefits, such as strengthening the financial position of a supplier, or other types of risks identified in DOD policy, such as national security or innovation risks.

DOD Assessments Are Generally Limited to High-Dollar-Value Defense M&A

DOD assessed an average of 40 M&A each year in fiscal years 2018 through 2022, out of hundreds of M&A estimated to occur in the defense industrial base each year. DOD's most recently published statistics on defense M&A—which were included in its *Fiscal Year 2017 Annual Industrial Capabilities* report—indicated that approximately 400 defense-related M&A were occurring annually in the aerospace and defense sector.[27] IBP officials could not say with certainty how many defense-related M&A now occur annually because they no longer track or maintain data on all M&A in the defense industrial base. IBP officials said they stopped collecting and reporting these data because they faced challenges in identifying the universe of defense-related M&A due to the complex structure of the defense industrial base. IBP officials told us that the defense industrial base is comprised not only of companies in the aerospace and defense sector, but also of companies in other sectors of the economy that support both defense and commercial customers, such as shipbuilders or semiconductor companies. IBP officials noted that collecting data on M&A across multiple sectors of the economy makes it challenging and time-consuming for DOD to estimate the total number of defense-related M&A.[28]

[26]DOD's M&A policy defines a "major defense supplier" as any prime contractor or subcontractor that IBP or certain other officials designate as a main source of supply, including any company that "supplies or could supply goods or services directly or indirectly to DOD or any company with technology potentially significant to defense capabilities." The policy also specifies that the following are considered a major defense supplier even if they have not been designated as one: (1) any prime contractor of a major system, as defined by provisions currently codified at 10 U.S.C. § 3041(a)-(b), and (2) any prime contractor of a contract awarded pursuant to provisions currently codified at 10 U.S.C. § 3204(a)(3) for reasons outlined in clause (A) of that subsection.

[27]DOD, *Fiscal Year 2017 Annual Industrial Capabilities* (Washington, D.C.: Apr. 12, 2018).

[28]In attempting to validate how many defense-related M&A occur annually, we analyzed commercially available M&A data and encountered data limitations similar to those experienced by DOD officials. Appendix I includes more information about our analysis of defense-related M&A using commercially available data.

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DOD’s M&A assessments between fiscal years 2018 and 2022 largely concentrated on high-dollar-value M&A that were subject to antitrust reviews, as shown in table 1 below.

Table 1: DOD-Assessed Mergers and Acquisitions (M&A) Compared to HSR Thresholds, Fiscal Years 2018-2022

	2018	2019	2020	2021	2022
Total number of assessed M&A	17	65	36	48	32[a]
Number of M&A assessed by DOD that were above applicable HSR thresholds for antitrust review[b]	17	22	27	48	26
Number of M&A assessed by DOD that were below applicable HSR thresholds for antitrust review	0	43[c]	9	0	5

Source: GAO analysis of Department of Defense (DOD) data, based on the Hart-Scott-Rodino (HSR) transaction threshold at the time of the merger or acquisition. | GAO-24-106129

[a]In fiscal year 2022, there was one case for which DOD could not provide information on whether the M&A exceeded the HSR threshold.

[b]From fiscal years 2018 through 2022, the HSR transaction threshold ranged from $80.8 million to $101 million.

[c]Industrial Base Policy officials attributed the 1-year spike in below-threshold M&A assessments in fiscal year 2019 to an M&A office initiative to identify whether smaller-dollar-value M&A posed risks to the defense industrial base.

In 4 of the 5 years from fiscal years 2018 through 2022, nearly all of IBP’s assessments focused on M&A that surpassed the applicable HSR transaction threshold, according to IBP’s data. Fiscal year 2019 was the only exception to this trend, during which year IBP assessed 43 M&A that its data indicated were below the HSR transaction threshold. IBP officials attributed this to an M&A office initiative in fiscal year 2019 to identify whether smaller-dollar-value M&A posed risks to the defense industrial base by scanning for such transactions and initiating internal assessments. IBP officials stated that they did not identify major concerns from such M&A at the time and, as a result, stopped scanning for such M&A.

We found that IBP infrequently identifies M&A that may present a risk to DOD through methods outside of antitrust agencies’ requests for input, such as through stakeholder referrals or IBP-led trend analyses. DOD’s M&A policy allows DOD stakeholders to submit referrals for potential assessments, but IBP officials and stakeholders stated that stakeholders infrequently submit such referrals. Additionally, IBP officials said their M&A office is not collecting robust data or conducting recurring trend analyses that could help them identify M&A in risky areas of consolidation among defense suppliers. For example, DOD's annual reports on the industrial base describe specific above-threshold M&A that DOD assessed in a given fiscal year in support of antitrust reviews, but no longer describe all M&A involving major defense suppliers or consolidation trends. IBP also conducted new sector-specific M&A trend analyses in support of the February 2022 *State of Competition within the Defense Industrial Base* report, which found that there was significant consolidation among contractors for major weapon systems. IBP officials told us that these were onetime efforts and they have not kept these trend analyses up to date.

Unclear Policy and Limited Resourcing Hinder IBP's Ability to Assess Defense M&A

Although most of DOD's focus is on assessing high-dollar-value M&A, its M&A policy states that IBP is responsible for determining the need to initiate DOD assessments for a broad range of defense-related M&A. According to DOD's M&A policy, IBP can initiate an assessment of an actual or proposed merger or acquisition involving any major defense supplier. IBP officials told us this broad authority is useful because it allows DOD to assess a wide range of companies they or DOD stakeholders deem critical to DOD programs.

We found that IBP focuses on assessing high-dollar-value M&A instead of a broader range of defense M&A, in part, because of unclear policy on which major defense suppliers to prioritize for assessment and limited staff resources within IBP. These factors hinder IBP's ability to identify and assess additional M&A that may present risks to the defense industrial base. GAO's *Standards for Internal Control in the Federal Government* state that agency management should define objectives clearly to enable the identification of risks and establish the organizational structure necessary to achieve its objectives.[29] Doing so helps agencies ensure that they identify relevant risks and have the appropriate amount of staff resources to mitigate those risks.

Unclear direction in DOD's M&A policy and no additional guidance. DOD's M&A policy states that IBP is responsible for determining the need to assess any merger or acquisition involving a major defense supplier, but the policy does not provide clear direction on which major defense suppliers IBP and DOD stakeholders should prioritize for the purposes of conducting M&A assessments. According to IBP officials, DOD also does not currently have additional guidance to supplement its M&A policy and

[29]GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Sept. 10, 2014).

provide implementation instructions. As a result, IBP officials said they do not have any documented DOD-specific criteria in the M&A policy or additional guidance to help prioritize their efforts to assess defense-related M&A that pose risks. In the absence of clear direction in the DOD policy or additional guidance, IBP officials told us that they prioritize the high-value M&A the antitrust agencies notify them about as a proxy for identifying which M&A present the highest risk. IBP officials said this approach helps them ensure DOD is being responsive to antitrust agency requests for input and assessing M&A the antitrust agencies have determined may present risks to competition. IBP and stakeholder officials said, however, that this focus on high-value M&A has resulted in DOD not comprehensively assessing the M&A of smaller suppliers, including those that supply critical products to DOD.

The DOD M&A policy generally defines a major defense supplier as any prime contractor or subcontractor that certain DOD officials, including those within IBP, designate as a main source of supply, as well as prime contractors that meet certain criteria.[30] Companies qualifying for designation as major defense suppliers include any firm that supplies or could supply goods or services, directly, or indirectly, to DOD or any company with technology potentially significant to defense capabilities. In addition, all prime contractors supporting major systems are automatically considered major defense suppliers.[31] DOD officials estimate that the defense industrial base is comprised of approximately 200,000 contractors. Under DOD's M&A policy, a potentially large number of these contractors could be considered or could qualify for designation as a major defense supplier. As a result, IBP officials and DOD stakeholders

[30]DOD's M&A policy specifies that the following are considered a major defense supplier even if they have not been designated as one: (1) any prime contractor of a major system, as defined by provisions currently codified at 10 U.S.C. § 3041(a)-(b), and (2) any prime contractor of a contract awarded pursuant to provisions currently codified at 10 U.S.C. § 3204(a)(3) for reasons outlined in clause (A) of that subsection.

[31]Major systems generally refer to a combination of elements that will function together to produce the capabilities required to fulfill a mission need, including hardware, equipment, software, or any combination thereof, but excluding construction or other improvements to real property. A DOD system is considered a major system if (1) the milestone decision authority designates it as a major system; or (2) it is estimated to require an eventual total expenditure for research, development, test, and evaluation of more than $200 million in fiscal year 2020 constant dollars, or for procurement of more than $920 million in fiscal year 2020 constant dollars. See 10 U.S.C. § 3041(a)-(c); DOD Instruction 5000.85, *Major Capability Acquisition* (Aug. 6, 2020) (incorporating change 1, Nov. 4, 2021) (reflecting statutory major system cost thresholds in fiscal year 2020 constant dollars).

told us that they have to focus their efforts for identifying relevant M&A due to the number of potential M&A to assess.

DOD’s M&A policy, however, does not provide clear direction on how IBP and DOD stakeholders should determine which of these defense companies present the most risk to prioritize their efforts. We discussed with IBP potential mechanisms officials could use to help prioritize M&A for assessment, but officials stated that they had not used them. For example, IBP officials we met with stated that there is not a comprehensive list of suppliers that DOD considers to be major defense suppliers for the purposes of conducting M&A assessments. Additionally, the M&A policy does not specifically direct IBP to use existing DOD determinations of high-priority supply chains or industrial base risks to prioritize M&A assessments. For example, DOD’s most recent annual Industrial Capabilities Report identifies its five highest priority supply chains and four industrial base strategic risk areas. IBP officials said that focusing on M&A related to these high-priority supply chains and strategic industrial base risks is one way they could prioritize their efforts, but they have not used these existing determinations to guide which defense suppliers to prioritize for M&A assessments.

IBP officials also said that DOD’s understanding of which companies comprise the defense industrial base has evolved over time, expanding from just prime contractors in the aerospace and defense sector to also include sub-tier aerospace and defense suppliers and contractors in other sectors. For example, IBP officials told us that since 2018, IBP has expanded its understanding of the defense industrial base to include sectors that support defense programs outside of the traditional aerospace and defense sector, such as pharmaceuticals, information technology, and semiconductors. DOD’s broadened understanding of the defense industrial base underscores how the absence of more clear direction on how to prioritize among major defense suppliers hinders IBP’s ability to ensure it identifies and assesses M&A that present risks to DOD.

Furthermore, we found two of the military department stakeholders we spoke with were using proxy criteria to identify and prioritize defense-related M&A, in the absence of clear direction in the DOD policy. For example, one stakeholder told us that they consider whether the M&A would affect a critical DOD program, if it involves a contractor that produces a unique military item, and if one or more of the companies involved is a sole source vendor (i.e., the vendor is the only source capable of providing the item). Another stakeholder told us that due to the

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high volume of M&A identified through their publicly available data source, they filter what they refer to IBP for further assessment based on those companies with which it has contracts.

IBP resource constraints. IBP has a small M&A office, so there are limits on the amount of work it can conduct to identify and assess defense-related M&A. According to IBP officials, DOD established IBP's M&A office in 2017 with one full-time equivalent staff member and expanded it to two to three full-time equivalents in fiscal year 2021. IBP officials told us that if DOD is providing input for many antitrust reviews or if there is a large or complex M&A assessment, those assessment activities can consume the majority of the M&A office's staff resources. IBP officials said that, to the best of their knowledge, IBP has not studied how many additional staff it would need to conduct additional assessments. They also noted that the DOD stakeholders that support IBP during M&A assessments similarly face resource constraints.

IBP officials identified multiple activities that they cannot conduct due to limited staff resources.

- IBP officials said they have limited capacity to scan for M&A above the HSR transaction threshold that do not have an obvious defense equity. IBP officials told us that if a merger undergoing an antitrust review primarily affects commercial customers, it may not be immediately clear to the antitrust agencies that there is a defense equity. IBP, DOJ, and FTC officials told us that IBP can proactively reach out and ask to provide input on M&A with a defense equity even if DOD is not contacted by the antitrust agencies—but that is contingent upon DOD being aware that the defense merger or acquisition is occurring.
- IBP officials said they are limited in their ability to scan for defense-related M&A under the HSR transaction threshold. IBP officials told us that their efforts to scan for smaller M&A (for which merging parties do not have to notify the antitrust agencies) is secondary to their efforts to respond to existing antitrust reviews and they often do not have the capacity to conduct this additional research.
- IBP officials told us that their office does not have the capacity to conduct any recurring macro-level trend analyses or a complete analysis of markets following mergers to assess defense industrial base consolidation. If they become aware of a particular company conducting several M&A, they will review whether the company has

acquired concentrated market power, but they do not conduct broader consolidation analyses.

We found numerous examples of defense-related M&A that potentially presented risks to DOD, but which IBP did not identify for a DOD assessment.

- Our comparison of IBP's list of assessed M&A with a commercially available list of defense-related mergers from fiscal year 2018 through fiscal year 2022 found that IBP did not initiate a DOD assessment for at least 17 M&A with a defense equity that were above the HSR transaction threshold.[32] IBP officials told us that while they could not provide a specific reason as to why DOD did not assess these specific M&A, they were probably unaware of the M&A at the time or the antitrust agencies did not request their input during the HSR process. In that regard, FTC officials told us that they could not find evidence that they reached out to DOD on those M&A that FTC reviewed. DOJ officials stated that they did not track M&A for which they sought DOD's input.
- Our comparison of IBP's list of assessed M&A with a commercially available list of defense-related mergers from fiscal years 2018 through 2022 also found that IBP did not assess at least 13 smaller-dollar-value M&A involving companies with a defense equity. For example, IBP's records indicate that DOD did not assess a $36 million acquisition of a sub-tier supplier that provides computing capabilities to multiple defense programs. IBP officials stated that they likely did not assess these M&A because IBP and the stakeholders were not aware of them.
- In at least one other instance, DOD did not participate in the initial antitrust review for a high-dollar-value M&A but did provide input during the second request. IBP officials told us that the antitrust agencies sometimes do not realize that DOD is an affected customer until later in the antitrust review process, such as during the second request. While DOD did not have data on the number of instances in which it only participated during the second request, our analysis of nine illustrative examples of M&A assessed by DOD found one such

[32]We obtained commercially available Bloomberg data on M&A where at least one party in the transaction was in the aerospace and defense sector. However, these data were not an exhaustive list of all DOD suppliers and their M&A, so our analysis identifies the minimum number of M&A above the HSR transaction threshold that were not assessed by IBP. DOD's definition of the defense industrial base includes not only aerospace and defense suppliers, but suppliers in other sectors, as well. See appendix I for more information about our analysis of Bloomberg M&A data.

instance. In this case, IBP was not aware of an ongoing merger involving a DOD prime contractor until an antitrust agency contacted DOD during the second request, when the antitrust agency recognized the defense equity. IBP initiated DOD's assessment of that M&A over a year after the companies publicly announced their merger. The majority of M&A proceed after the initial review, so not getting involved early in the antitrust review presents the risk that M&A are proceeding without DOD's input.

Collectively, these examples underscore that IBP does not always identify defense-related M&A, which means M&A that could present risks to the defense industrial base are proceeding without assessment by DOD. Until IBP and DOD stakeholders receive clear direction on how to prioritize M&A involving major defense suppliers that need to be assessed, such as those in critical supply chains, and IBP assesses whether it has adequate staff resources to carry out its responsibilities, DOD will likely continue to miss opportunities to assess M&A that may pose a risk to the defense industrial base.

DOD M&A Assessments Do Not Consistently Evaluate All Types of Risks and Benefits

IBP and DOD stakeholders primarily focus on evaluating competition risks during M&A assessments, even though DOD's M&A policy calls for the consideration of a broader range of potential risks and benefits. According to DOD policy, DOD's M&A assessments must consider a variety of effects, such as effects on competition, national security, and innovation.[33] In practice, however, we found that DOD did not consistently assess all of these types of potential effects. IBP officials and DOD stakeholders we spoke with said they assess competition risks, but the extent to which they assess other types of risks and benefits, if any, varies.

In our analysis of nine M&A assessments selected as illustrative examples, we found that DOD primarily assessed competition risks and less consistently evaluated other types of risks and benefits, including innovation effects, national security effects, and DOD benefits, such as potential cost savings. Table 2 summarizes the types of effects identified in DOD's M&A policy and how frequently DOD stakeholders assessed those effects in the nine illustrative examples we selected.

[33]DOD, DOD Directive 5000.62, Para. 1.2.a.

Table 2: Types of Effects Evaluated in a Selection of Nine DOD Merger and Acquisition (M&A) Assessments

Types of effects that must be assessed, per DOD policy	Number of M&A assessments in which DOD stakeholders specifically evaluated each type of effect
National security effect[a]	0 of 9
Industrial and technological base effect[b]	4 of 9
Innovation effect[c]	1 of 9
Effect on competition for DOD contracts and subcontracts, including future programs and technologies of interest to DOD	9 of 9
Restriction or impaired access of a critical supplier to a competitor, or restriction or impaired market access by a supplier	2 of 9
Benefits for DOD, including anticipated cost savings	1 of 9
Risks to the financial stability and continued stewardship of critical military capabilities, including anticipated increased costs	2 of 9
Risks to the satisfactory completion of current or future DOD programs or operations	4 of 9
Effect on DOD access to affordable or innovative sources, including impediments to obtain essential data rights	1 of 9
Other potential issues[d]	7 of 9

Source: GAO analysis of Department of Defense (DOD) Directive 5000.62 and DOD information from nine illustrative examples. | GAO-24-106129

Note: DOD's M&A policy states that assessments must consider each of the risks and benefits listed above, and when applicable, assessments must be conducted in cooperation with antitrust agencies under section 18a, title 15 of the U.S. Code (pertaining to premerger notification and waiting periods under the Hart-Scott-Rodino Act). DOD coordinated its assessments with antitrust agencies for seven of the nine examples we reviewed.

[a]For example, a DOD stakeholder said that a national security risk would be created if a commercial company acquired a defense supplier and closed the production line supporting DOD programs. Industrial Base Policy officials, for their part, consider the national security risk type to be represented by the other risks identified in the policy, even though DOD's M&A policy identifies national security as a separate and distinct risk to be assessed.

[b]According to DOD stakeholders, a merger or acquisition could create an industrial and technological base effect if, for example, it enabled the companies to offer their customers a wider selection of products or broader range of expertise.

[c]DOD stakeholders said a merger or acquisition could affect innovation if, for example, the companies would be able to pool their resources and increase their investment in research and development.

[d]Other potential issues include any additional risks to the public interest. Examples of such issues are foreign ownership risks or effects on pre-existing DOD industrial base investments.

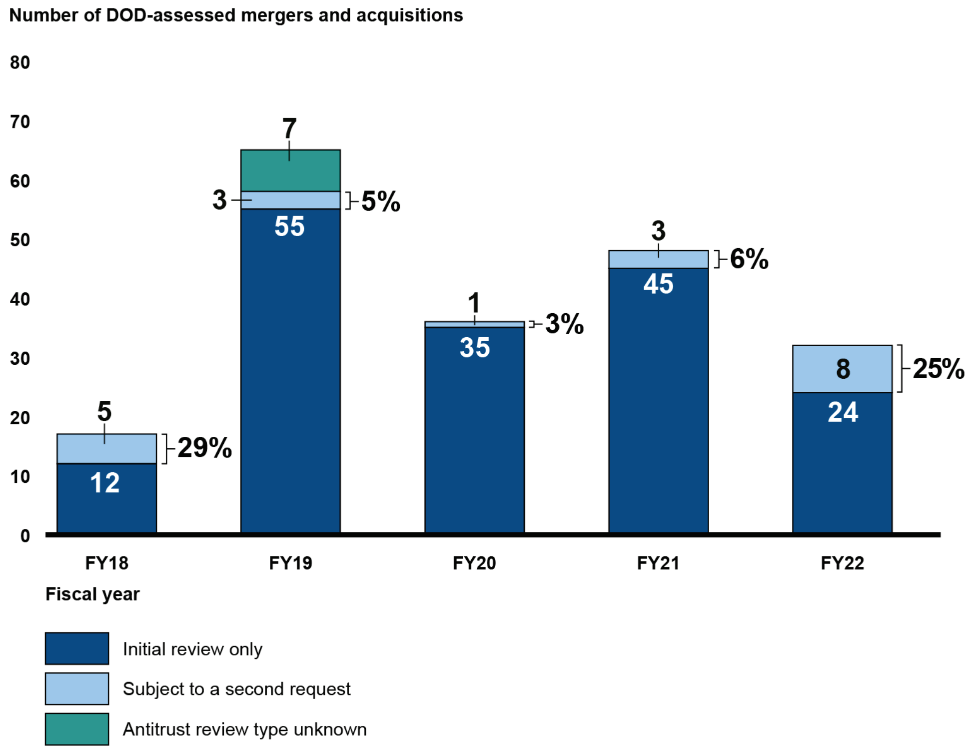
Among our illustrative examples, competition risks were the only type of risk or benefit that DOD stakeholders said they assessed in all nine cases. In two of those examples, DOD stakeholders did not assess any other risks or benefits beyond competition. DOD stakeholders also did not identify national security as a specific risk in any of the documentation we reviewed or interviews we conducted for our illustrative examples. One of the DOD stakeholders we spoke with said it did not evaluate national security concerns during its M&A assessments, while two other stakeholders said that risks not related to competition, such as national security risks, are generally not in the scope of their M&A assessments. IBP officials stated that while national security was not specifically assessed as a distinct risk type, as is required by the policy, in practice, they consider every other risk identified to represent a potential national security risk.

We found that DOD stakeholders do not consistently assess the full range of risks and benefits identified in DOD policy because of direction they receive from IBP to focus on competition risks. IBP officials and some DOD stakeholders said that because DOD's M&A assessments often occur in support of antitrust reviews, this influences how they assess the potential risks. In particular, they focus on competition because this is the only type of risk the antitrust agencies review and can take enforcement action to address.

IBP officials said that when they initiate a DOD M&A assessment in response to an antitrust agency request for input, they have to ensure that the DOD assessment, at a minimum, collects information on potential competition risks that the antitrust agencies requested. The initial phase of an antitrust review is short, so IBP and antitrust agency officials said the antitrust agencies generally request that IBP provide DOD's initial input within 2 weeks or less.[34] Given the limited time available for the DOD assessment, IBP officials said they and DOD stakeholders prioritize their M&A assessment efforts on the competition risks the antitrust agencies asked them to assess. IBP officials and DOD stakeholders said they often save their assessment of potential benefits and risks not related to competition for the second request stage of an antitrust review, if one occurs. Second requests, however, occurred for approximately 10 percent of the M&A that DOD assessed between fiscal years 2018 and 2022, as shown in figure 3. Therefore, in most instances, IBP and DOD stakeholders did not evaluate other types of risks and benefits once their initial assessment was complete.

[34]The HSR Act generally requires merging companies subject to the premerger notification requirements to wait for 30 days after the antitrust agencies receive notification and before merging, with some exceptions. See 15 U.S.C. § 18a(b)(1). During this period, antitrust agencies review the filing for potential antitrust issues. During the 2 weeks or less that the antitrust agencies generally provide for DOD to submit input on the merger or acquisition under review, IBP officials said they conduct initial research, solicit input from affected DOD stakeholders, and develop a consolidated DOD position to communicate to the antitrust agencies. IBP and DOD stakeholders said the stakeholders generally have 5 to 10 days within this 2-week period to gather information and conduct their analysis.

Figure 3: Type of Antitrust Review for DOD-Assessed Mergers and Acquisitions, Fiscal Years 2018-2022



Source: GAO analysis of Department of Defense (DOD) data. | GAO-24-106129

IBP recently made a change in how it solicits input from stakeholder during M&A assessments. During M&A assessments, IBP uses a questionnaire to request input from DOD stakeholders.[35] The questionnaire that IBP used until the end of fiscal year 2022 specifically asked stakeholders to provide information on the potential competition effects the merger or acquisition posed for DOD programs and their suppliers. The questionnaire did not include assessment questions about any of the risks and benefits identified in the policy that are not related to competition. All of the DOD stakeholders we spoke with stated that IBP's competition-focused questionnaire was a major determinant of the types of analysis they conducted to develop their inputs for M&A assessments. We found in our nine illustrative examples that the DOD stakeholders involved in those M&A assessments focused their analysis on identifying

[35]IBP uses the same questionnaire regardless of whether the DOD assessment is being carried out in support of an antitrust review or on DOD's own initiative.

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competition risks and evaluated the scale and scope of their contracts with the merging companies, the effect on competition dynamics in the relevant market, and the availability of substitute goods or services from competitors, among other competition-related analyses.

In fiscal year 2023, IBP began using a new stakeholder questionnaire during M&A assessments that aligns more closely with DOD's policy and prompts stakeholders to consider all types of risks and benefits identified in DOD's M&A policy. In addition to questions about potential competition risks, the new questionnaire now also asks stakeholders to discuss potential national security effects, innovation effects, cost risks, and potential benefits, among other things. For example, the new questionnaire prompts stakeholders to describe potential effects of the merger or acquisition that could impair or enhance national security.

IBP officials said they are also developing a new DOD instruction to help improve the implementation of DOD's M&A assessments, but do not have an estimate of when it will be completed. IBP officials have not yet finalized this new instruction, but they plan for it to supplement DOD's existing M&A policy and provide additional guidance on how to operationalize the assessment requirements established in the policy. According to IBP officials, they intend for this instruction to increase the standardization and rigor of DOD's M&A assessments, including how they and DOD stakeholders assess all of the potential risks and benefits identified in the policy.

IBP's efforts to revise their stakeholder questionnaire and create a new DOD instruction demonstrate IBP's recognition that DOD needs to do more to assess the full range of risks and benefits identified in DOD policy. The new DOD instruction that IBP is currently developing may be able to provide this additional direction, but it is too soon to tell what will be in that instruction and how IBP and DOD stakeholders will implement it. Until IBP and DOD stakeholders routinely assess the full range of risks and benefits identified in DOD policy during their M&A assessments, there will continue to be a chance that they are missing potential M&A risks that DOD needs to address.

DOD's Supporting Role to Antitrust Agencies Influences How It Conducts M&A Assessments

DOD has a supporting role in antitrust reviews, which affects the information it has access to when conducting its M&A assessments and its ability to determine how competition risks are mitigated. When developing DOD's inputs for antitrust reviews, IBP and DOD stakeholders are generally not able to access the large amounts of information the antitrust agencies collect on the merging companies and the markets in which they operate. IBP and DOD stakeholders can, however, leverage a number of DOD and publicly available information sources, such as contracting data and insights from DOD subject matter experts. DOD also does not determine the outcome of an antitrust review, such as deciding if an enforcement action is warranted to prevent competitive harm. Instead, DOD's input during antitrust reviews is focused on identifying potential competition effects. IBP and DOD stakeholders occasionally provide feedback on potential enforcement actions being considered by the antitrust agencies to mitigate those risks, when the antitrust agencies request they do so.

DOD Does Not Have Access to All Information Available to Antitrust Agencies When Conducting Its M&A Assessments

When conducting M&A assessments, IBP and DOD stakeholders collect data from a number of internal DOD and external publicly available information sources. Officials from IBP and DOD stakeholder organizations, such as the military departments and Defense Contract Management Agency (DCMA), said the information sources they leverage during their M&A assessments include DOD contracting data, internal data on suppliers, institutional knowledge of subject matter experts, and public data sources such as financial analysis subscription services. IBP and DOD stakeholder officials explained that contracting data, for example, help them determine the potential scope and magnitude of DOD's risk exposure. In particular, IBP and DOD stakeholders are able to use contracting data to assess the programs that could be affected by the M&A, whether there was competition for the companies' contracts, and the size of the companies' contracts. Additionally, IBP officials and stakeholders in the military departments said that DOD subject matter experts provide key insights during M&A assessments. These insights include information on the potential effects for acquisition programs, the dynamics of particular sectors of the defense industrial base, the state of competition in specific markets, and future DOD acquisition needs.

We found that the information available to IBP and DOD stakeholders drives the nature and extent of their analyses during M&A assessments. For example, since IBP and DOD stakeholders rely on DOD's internal contracting and supplier data, their insights into DOD's potential risk exposure is dependent upon where the merging companies are in DOD's supply chains. Officials from IBP, the military departments, and DCMA

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said that while they have robust information on prime contractors, they have less information on most of the sub-tier suppliers in the supply chains supporting DOD programs. Additionally, IBP and DOD stakeholders said DOD's contracting data help them assess how much business DOD programs have with the merging companies, but these data do not provide them with broader insights into the merging companies' shares of the relevant market. As a result, DOD stakeholder officials with whom we spoke said they do not have complete market share information and therefore cannot use the Herfindahl-Hirschman Index during their assessments.[36] This index is a widely accepted metric used to evaluate the level of consolidation in a given market and assess how a merger or acquisition would affect future consolidation.

While the antitrust agencies collect a substantial amount of information during their antitrust reviews, antitrust and IBP officials said the antitrust agencies generally cannot share all of this information with DOD due to confidentiality restrictions established in statute.[37] The information collected by the antitrust agencies during an antitrust review can include the structure of the merger or acquisition, certain company financial data, the types of products and services the companies provide, the geographic areas in which they operate, and their history of M&A, among other things. The antitrust agencies may also collect information such as customer lists, sales data, market share data, research and development plans, production information, and competition assessments. The antitrust agencies can use this information in their own analyses to evaluate

[36]The Herfindahl-Hirschman Index is based on market share analyses and provides one way to evaluate if a merger or acquisition may raise competitive concerns. The higher the post-merger index and the higher the increase in the index, the greater the potential for competitive concerns.

[37]The HSR Act provides that any information or documentary material filed with FTC or the Assistant Attorney General is exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552), and the information may not be made public except as may be relevant to an administrative or judicial action or proceeding. See 15 U.S.C. § 18a(h). According to DOJ officials, statutes that govern information the antitrust agencies gather from other interested parties also restrict the agencies' ability to share the information with outside parties. Antitrust agency and IBP officials said there are occasionally special circumstances under which the merging companies will sign a confidentiality waiver to permit the antitrust agencies to share their information with DOD, such as during an antitrust review involving a large defense prime contractor. In these special cases, antitrust officials said the information sharing would be limited to IBP officials; DOD stakeholders would still not have access to the information. DOD's M&A policy directs DOD to conduct M&A assessments under strict confidentiality with regard to proprietary information and in accordance with any confidentiality agreements between DOD's Office of the General Counsel and the major defense suppliers or other interested parties.

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potential competition risks from the proposed M&A and to supplement the inputs provided by DOD and other interested parties. For example, the antitrust agencies often use their access to market share data collected from the merging companies and other companies in the industry to calculate the Herfindahl-Hirschman index.

DOD Does Not Decide How Competition Risks Will Be Mitigated by Antitrust Agencies

IBP and DOD stakeholders have largely focused on evaluating competition risks during their M&A assessments, as discussed above, but they do not have a decision-making role in determining how these competition risks will be mitigated by the antitrust agencies. DOD participates in antitrust reviews in the role of an affected “customer” of the companies involved in the M&A, rather than in a decision-making role. In this supporting role, DOD provides input to the antitrust agencies on the M&A’s potential competition risks for the defense industrial base and DOD programs. The antitrust agencies then decide if the M&A under review will be subjected to enforcement action. In a 2016 joint statement on preserving competition in the defense industry, the antitrust agencies noted that DOD is in a unique position to assess the potential implications of defense M&A, and that they give DOD’s input substantial weight during their reviews. According to the antitrust agencies, DOD’s perspective is valuable because it is often the only customer for products and services offered by defense companies. The antitrust agencies noted in their joint statement, however, that they ultimately determine whether a defense merger or acquisition should be challenged, not DOD.[38]

At the conclusion of an antitrust review, the antitrust agencies determine if any of the identified competition risks—including those risks identified by IBP and DOD stakeholders—are significant enough to warrant enforcement action to mitigate their effects. The antitrust agencies’ enforcement actions could include, for example, seeking an injunction to block the M&A or negotiating a settlement with the companies that requires them to divest certain lines of business to other companies to remedy the competition risk.

According to DOD’s M&A policy, DOD can recommend actions to mitigate the risks of a merger or acquisition if requested to do so by the antitrust agencies.[39] According to IBP and DOD stakeholder officials, however, it is

[38]Department of Justice and Federal Trade Commission, *Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry*, Matter Number P130500 (Washington, D.C.: Apr. 12, 2016).

[39]DOD, DOD Directive 5000.62.

rare for the antitrust agencies to request an official DOD recommendation on specific enforcement actions to mitigate the risks from a merger or acquisition. IBP officials said DOD typically defers to the antitrust agencies' expertise and experience in determining the best course of action to mitigate the risks that they and DOD stakeholders identified during their M&A assessments. Instead, DOD and antitrust agency officials said the antitrust agencies will often discuss potential enforcement actions antitrust officials are considering with IBP and DOD stakeholders and ask for their feedback on the extent to which such measures would address the risks they identified.

Officials from IBP and DOD stakeholder organizations also said the antitrust agencies have not consistently notified DOD about the final outcome of their antitrust reviews and the enforcement actions they decided to pursue to mitigate the risks DOD identified, if any. IBP officials and DOD stakeholders said they instead try to learn about the outcomes and any enforcement actions to mitigate identified risks through news reports or public announcements made by the antitrust agencies and the companies. Among our five illustrative examples for which there was a related antitrust review, DOD officials learned of the review's outcome from a public information source in all but one case. DOD and antitrust officials said that DOD has historically not been privy to this decision information due to antitrust agencies' concerns about the confidentiality of the information. FTC officials also said their internal processes—in which the outcome of an antitrust review is not decided until the FTC Commissioners vote on it—limits their ability to notify DOD before the commissioners publicly announce their decision. However, IBP officials said that DOJ, which is the antitrust agency with which DOD most frequently interacts, recently agreed to start sharing information about the outcomes of defense-related antitrust reviews with DOD.

Among the defense-related M&A that DOD assessed in the past 5 years, few were subjected to an enforcement action by the antitrust agencies. Figure 4 summarizes the outcomes for the M&A that DOD assessed from fiscal years 2018 through 2022.

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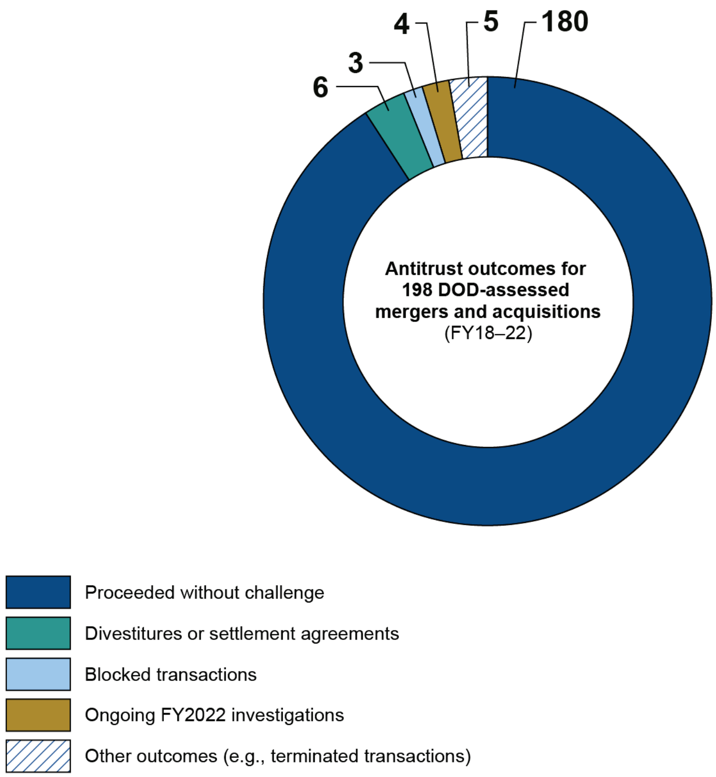
Figure 4: Outcomes for Mergers and Acquisitions Assessed by the Department of Defense (DOD), FY 2018-2022



Source: GAO analysis of Department of Defense data. | GAO-24-106129

Note: As of May 2023, DOD officials said they did not yet know the outcome of four of the M&A that DOD assessed in fiscal year (FY) 2022 and they were likely still under review by the antitrust agencies.

As shown in figure 4 above, more than 90 percent of the M&A that DOD assessed between fiscal years 2018 and 2022 were not challenged by the antitrust agencies. IBP officials said that in the uncommon cases where the antitrust agencies pursued enforcement action, the antitrust agencies usually determined that divestures were the most effective means to mitigate the identified competition risks. When FTC filed a suit against an acquisition involving two defense contractors in 2022, it stated in a press release that it was the first defense-related case FTC had litigated in decades.[40]

DOD Generally Does Not Monitor the Effects of Completed M&A on the Industrial Base

DOD has limited efforts underway to monitor the effects of M&A on the defense industrial base and determine if any of the potential risks identified by IBP or DOD stakeholders during their assessments were realized. According to IBP officials and stakeholders from the military departments that we met with, they monitor the outcome of M&A only if the antitrust agencies ask them to do so, which is rare. In the past 10 years, the antitrust agencies have asked DOD to monitor the outcomes of two M&A out of all the antitrust reviews for which DOD has provided input. DOD and antitrust agency officials we met with said there are particular circumstances under which the antitrust agencies will ask DOD to assist with the monitoring of M&A—namely, when an antitrust review results in a long-term agreement for a defense company to engage in certain behaviors to maintain competition.[41] Since antitrust reviews focus exclusively on competition risks, these monitoring efforts are limited to a merger or acquisition's effect on competition in the defense industrial base. Other types of risks and benefits—such as the merger or acquisition's effect on national security—are not the focus of DOD's monitoring in these cases.

In the two cases in which antitrust agencies asked DOD to monitor the outcome of an antitrust review, DOD helped monitor compliance with the agreement negotiated by the antitrust agency to mitigate identified competition risks. For example, in one of these cases, FTC asked DOD to participate in the monitoring effort for a 2018 agreement involving two defense companies in the missile sector.[42] In this case, a large company was acquiring a critical supplier of missile components and FTC

[40]Federal Trade Commission, *For Release: FTC Sues to Block Lockheed Martin Corporation's $4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc.* (Washington, D.C.: Jan. 25, 2022).

[41]The antitrust agencies refer to these types of long-term agreements between the government and the merging companies as behavioral remedies. The structure of the behavioral remedy depends on the circumstances of each M&A and the competition risks that need to be mitigated. For example, if one company is acquiring a key supplier in its and its competitors supply chains, the antitrust agencies may negotiate a behavioral remedy that requires the acquiring company to maintain its competitors' access to the supplier or to separate the management of the supplier from the management of the larger company to preserve the supplier's independence.

[42]In the other case, DOD helped FTC monitor a 2007 agreement involving two aerospace companies that were forming a joint venture. That antitrust agreement terminated in 2017, so DOD is no longer monitoring it.

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determined there was a risk the acquiring company would restrict or disadvantage its competitors' access to the supplier, thereby reducing their ability to compete. For a period of 20 years, designated officials within DOD will monitor the behavior of the acquiring company to see if it unfairly disadvantages its competitors by restricting their access to the goods, services, and information of the critical supplier.[43] To carry out this monitoring, DOD will be able to review compliance reports from the companies involved in the acquisition, conduct interviews with relevant company personnel, inspect company documents and facilities, and review complaints made by the companies' competitors or other outside parties, among other things.

Beyond these two monitoring efforts, however, IBP officials and stakeholders in the military departments said they do not proactively monitor the effects of M&A to determine if the potential risks they assessed were realized. For all nine of our illustrative examples, the IBP and DOD stakeholder officials we spoke with confirmed they did not monitor the effects of the merger or acquisition once they concluded their assessment. This was the case even in two examples where IBP or DOD stakeholder officials determined during the assessment that further monitoring was warranted because potential risks existed. In these two examples, some stakeholders found in their initial M&A assessments that ongoing consolidation was creating potential competition risks in the relevant market. In both of these cases, the antitrust agency, IBP, and stakeholder officials eventually concluded upon further analysis that the competition risks associated with the merger or acquisition were not significant enough to merit antitrust intervention or DOD mitigation efforts at that time. Instead, the DOD and antitrust agency officials noted a need for DOD to monitor these M&A for evidence of future competition concerns or additional consolidation involving the companies. According to the IBP and DOD stakeholder officials we spoke with, however, they did not monitor either of these M&A to determine if the risks they were concerned about were realized.

In the absence of dedicated monitoring efforts, IBP officials and stakeholders in the military departments we spoke with said they sometimes learn about realized negative effects on the industrial base if a program office encounters issues with the merged company, such as rising costs or declining quality. In such cases, officials said the affected

[43]According to IBP officials, IBP currently leads the DOD monitoring of this agreement, with support from DOD General Counsel and other DOD stakeholders, as appropriate.

program will raise the challenges they are experiencing through DOD's acquisition oversight process, which is a separate process from DOD's M&A assessments. For instance, in one of our illustrative examples, DOD stakeholders said they learned that the potential risks they had identified during an M&A assessment were actually occurring when acquisition programs and contract administration offices working with the relevant companies began observing and reporting quality and production issues.

We found that officials in IBP and stakeholders in the military departments are generally not monitoring the actual effects of M&A unless asked by the antitrust agencies because there is not a requirement for them do so in DOD's M&A policy or in military department guidance we reviewed. Instead, as described above, IBP focuses DOD's efforts on assessing high-value M&A in response to antitrust agency requests for input. According to *Standards for Internal Control in the Federal Government*, government agencies should design and implement control activities to achieve objectives and respond to risks. This includes, for example, monitoring the status of risks and documenting responsibility for monitoring in policy.[44] Although DOD has an M&A assessments policy and some of the military departments told us they have additional guidance to supplement the DOD policy, this policy and guidance primarily outline how DOD should conduct assessments to identify potential risks. We found that neither IBP nor the military departments have a requirement in DOD's M&A policy or the additional guidance we reviewed to monitor the actual effects of M&A after they complete their assessments to determine if any of the risks they identified were realized.

DCMA officials were the only stakeholders with whom we spoke who said they attempt to monitor the risks identified in the M&A assessments in which they participated. DCMA officials said they conduct such monitoring because their guidance requires it. In particular, DCMA guidance for defense industrial base monitoring and reporting assigns DCMA's Industrial Analysis Division with responsibility for monitoring the effectiveness of industrial base risk mitigation measures, including those related to M&A.[45] DCMA Industrial Analysis Division officials said their subject matter experts are tasked with maintaining awareness of the potential risks identified in M&A assessments and how these risks are

[44]GAO-14-704G.

[45]Defense Contract Management Agency, *Defense Industrial Base Monitoring and Reporting,* DCMA Manual 3401-05 (Dec. 6, 2018) (incorporating change 1, Dec. 22, 2020).

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affecting DOD programs. To determine if any of the identified risks have been realized and affected DOD programs, DCMA officials said these subject matter experts collect information from several sources, including the program offices affected by the merger or acquisition, other DCMA offices, the companies involved in the M&A, and publicly available sources. DCMA's monitoring, however, is limited to only those M&A assessments in which it participated. According to DCMA officials, they generally participate in M&A assessments that involve suppliers for major weapon systems, but do not participate in assessments for other types of suppliers, such as those in the information technology or services sectors. For example, DCMA participated in four of nine of our illustrative examples.

As a result of DOD's limited monitoring efforts, IBP and DOD stakeholders have incomplete insight into the actual effects of defense-related M&A. In the rare cases in which IBP or DOD stakeholders have conducted monitoring, these efforts have been focused on monitoring a merger or acquisition's effect on competition. IBP officials with whom we spoke said that conducting more robust monitoring would help support their efforts to manage M&A risks and there is an opportunity for them to better track the potential risks they and DOD stakeholders identified during their assessments.

Until DOD updates its M&A policy to require monitoring when its assessments identified risks, IBP and DOD stakeholder officials will miss opportunities to determine if the potential risks they identified actually occurred and, in turn, whether there are adverse effects on the defense industrial base that need to be addressed.

Conclusions

DOD has not effectively aligned its concerns about continued industrial base consolidation with the resources and robustness of its efforts to assess M&A risks to its industrial base. In all stages of the M&A assessment process—identifying M&A of potential concern, assessing the risks and benefits, and monitoring the outcomes on the defense industrial base—IBP and DOD stakeholders largely react and respond to requests from the antitrust agencies. This approach is not proactive and does not analyze the full range of risks that defense-related M&A pose to the defense industrial base. This is due, in part, to the fact that DOD has not devoted adequate resources to this high-priority and high-risk area of work. It is also driven by the fact that DOD's policy for M&A assessments does not provide clear direction on which major defense suppliers' M&A DOD should prioritize for assessment. In addition, IBP and DOD stakeholders do not have clear direction on DOD's expectations for assessing the potential risks and benefits of M&A, beyond the competition risks of interest to the antitrust agencies and DOD. Furthermore, DOD's M&A policy does not require IBP and DOD stakeholders to monitor completed M&A and check if any of the potential risks they identified during their assessments were realized. With its current reactive approach, DOD is missing opportunities to proactively identify risky M&A in the defense industrial base and to manage the full range of risks they present for DOD programs.

Recommendations for Executive Action

We are making the following four recommendations to DOD:

The Secretary of Defense should ensure that the Assistant Secretary of Defense for Industrial Base Policy provides clear direction as to which major defense suppliers IBP should prioritize for the purposes of conducting M&A assessments. (Recommendation 1)

The Secretary of Defense should ensure that the Assistant Secretary of Defense for Industrial Base Policy assesses whether its M&A office is adequately resourced to consistently carry out its responsibilities. (Recommendation 2)

The Secretary of Defense should ensure that the Assistant Secretary of Defense for Industrial Base Policy provides the Office of Industrial Base Policy and DOD stakeholders with additional direction on assessing the full range of risks and benefits identified in DOD's M&A policy, such as national security effects, when developing the new DOD instruction or other appropriate guidance. (Recommendation 3)

The Secretary of Defense should ensure that the Assistant Secretary of Defense for Industrial Base Policy revises DOD's M&A policy to direct the Office of Industrial Base Policy, with support from relevant DOD stakeholders, to monitor the effects of concluded mergers or acquisitions in cases in which DOD identified risks during its assessment, to determine if risks were realized or if additional action is needed. (Recommendation 4)

Agency Comments

We provided a draft of this report to DOD, DOJ, and FTC for review and comment. DOD concurred with all four recommendations and described its plans to address them. DOD also provided technical comments, which we incorporated, as appropriate. DOJ did not have any comments on the report. FTC provided technical comments, which we incorporated, as appropriate.

We are sending copies of this report to the appropriate congressional committees, the Secretary of Defense, the Attorney General, and the Chair of the FTC. In addition, the report is available at no charge on the GAO website at https://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-4841 or russellw@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix III.

W. William Russell
Director, Contracting and National Security Acquisitions

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Appendix I: Objectives, Scope, and Methodology

The Joint Explanatory Statement accompanying the National Defense Authorization Act (NDAA) for Fiscal Year 2022 and the Senate Armed Services Committee Report accompanying a bill for the James M. Inhofe NDAA for Fiscal Year 2023 included provisions for GAO to evaluate Department of Defense (DOD) efforts to monitor and assess the effects of potential mergers and acquisitions (M&A) on the defense industrial base, as well as DOD's oversight processes for vetting potential M&A within the defense industrial base.[1] This report addresses (1) the extent to which DOD has insight into defense-related M&A; (2) how DOD's role as a stakeholder to the antitrust agencies affects how it conducts M&A assessments; and (3) the extent to which DOD monitors the effects of M&A on the defense industrial base.

To address the extent to which DOD has insight into defense-related M&A, we reviewed DOD's M&A policy to determine DOD's requirements for identifying and assessing M&A in the defense industrial base.[2] We also reviewed guidance specific to DOD stakeholders, as available, to determine what direction DOD stakeholders have to identify M&A for assessment. To compare DOD's actual implementation of M&A assessments to the requirements established in agency policy, we interviewed DOD officials about methods they use to identify defense M&A and any challenges they encounter in doing so. We also compared DOD's efforts to identify and assess M&A to *Standards for Internal Control in the Federal Government* to evaluate the extent to which its policy and practices aligned with internal control standards for federal entities.[3]

Furthermore, we analyzed Industrial Base Policy (IBP) data on DOD M&A assessments to evaluate how many M&A DOD assessed, how many

[1]The Joint Explanatory Statement accompanying the NDAA for Fiscal Year 2022 included a provision for GAO to assess DOD's actions to monitor and assess the effects of potential mergers and acquisitions on its defense industrial base. See NDAA for Fiscal Year 2022: Legislative Text and Joint Explanatory Statement to Accompany S. 1605, Public Law 117-81 (Dec. 2021). The Senate Armed Services Committee report accompanying a bill for the James M. Inhofe NDAA for Fiscal Year 2023 included a provision for GAO to evaluate DOD's oversight processes for vetting proposed mergers and acquisitions within the defense industrial base. See S. Rep. No. 117-130, at 204 (2022).

[2]Department of Defense*, Review of Mergers, Acquisitions, Joint Ventures, Investments, and Strategic Alliances of Major Defense Suppliers on National Security and Public Interes*t, DOD Directive 5000.62 (Feb. 27, 2017).

[3]GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington, D.C.: Sept.10, 2014).

were in response to antitrust reviews, and the outcome of those reviews, among other things. Our analysis of these data covered fiscal years 2018 through 2022, the years for which IBP officials stated they had complete data on the M&A that DOD assessed. We determined IBP's data were sufficiently reliable for the purposes of determining which M&A DOD had assessed in these years. We assessed the reliability of these data through manual data testing, comparisons to commercially available M&A data from Bloomberg, and interviews with DOD officials.[4]

We used commercially available data from Bloomberg to determine how many defense-related M&A occurred in fiscal years 2018 through 2022. We analyzed information from this commercially available data source in an attempt to validate DOD estimates of the number of defense-related M&A that occur annually. When selecting which database to use for this analysis, we considered using government contracting data sources such as the Federal Procurement Data System and SAM.gov databases, as well as other commercial M&A data sources, such as S&P's Capital IQ. We found that none of the available options, including Bloomberg, has readily available information to capture the universe of M&A in the defense industrial base at both the prime contractor and subcontractor level. We chose to use the Bloomberg database due to its demonstrated data reliability through its use in prior GAO reports and additional data reliability testing conducted for this report.

In attempting to determine how many defense-related M&A occurred in fiscal years 2018 through 2022 to validate DOD's data, we used the Bloomberg M&A database's "aerospace & defense" industry classification to collect data on defense M&A. We focused our analysis on M&A where Bloomberg categorized at least one of the companies involved in the M&A as part of the aerospace and defense sector. We used these data to determine a minimum estimate of how many M&A occurred amongst defense-related suppliers in each fiscal year. These data indicated that, on average, there were at least 147 defense-related M&A occurring annually in this period. Bloomberg's aerospace & defense industry classification, however, does not include all defense suppliers. Companies that supply both DOD and commercial customers may be included under other industry classifications. For example, we found that while the aerospace & defense category includes some naval shipbuilders, it does not include other shipbuilders that supply both DOD

[4]DOD officials told us that data from fiscal years before 2018 may be incomplete in part due to problems arising from a server migration and changes in data collection practices.

and commercial markets. As a result, our estimate of the number of defense M&A in fiscal years 2018 through 2022 is a minimum estimate and does not account for M&A among companies that support both defense and commercial customers, such as shipbuilders or semiconductor companies. Given these limitations, we determined that DOD's most recent estimates of the number of defense-related M&A, as reported in the *Fiscal Year 2017 Annual Industrial Capabilities* report, were a more comprehensive estimate. As such, we are using DOD's estimate for the purposes of this report.

We also compared Bloomberg data on aerospace and defense M&A to IBP's data on DOD assessments to assess the extent to which DOD assessed M&A involving aerospace and defense companies in fiscal years 2018 through 2022. Through this analysis, we identified a number of defense-related M&A that DOD did not assess. Since the Bloomberg data did not include all defense suppliers, as noted above, this analysis identified a minimum number of defense-related M&A that DOD did not assess, but is not comprehensive. As a result, when discussing the results of this analysis, we use terms such as "at least" to note that these figures are minimum estimates. After identifying M&A with defense equities that DOD did not assess, we interviewed IBP officials again to discuss why they may not have been aware of such M&A. For M&A that had values that surpassed the applicable Hart-Scott-Rodino Antitrust Improvements (HSR) Act transaction threshold, we also reached out to the antitrust agencies to confirm if DOD had a role in any HSR reviews that may have occurred for such M&A.

To further assess DOD's insight into defense-related M&A, we evaluated the extent to which IBP and DOD stakeholders conducted M&A assessments in alignment with DOD's M&A policy. We reviewed the policy to determine which DOD organizations have a role in conducting M&A assessments and the types of risks and benefits they are expected to assess.[5] We analyzed the questionnaires that IBP used to solicit DOD stakeholder inputs during M&A assessments from fiscal years 2018 to 2023 to determine what risk and benefit information they requested. We also conducted interviews with IBP officials and DOD stakeholders in the military departments and Defense Contract Management Agency (DCMA) to understand how they implement DOD's M&A assessments in practice.

[5]DOD, DOD Directive 5000.62.

To further compare the implementation of DOD's M&A assessments to the requirements in policy, we selected a nongeneralizable sample of nine M&A that DOD assessed between fiscal years 2018 through 2022 as illustrative examples. We selected these examples from a DOD-provided list of all M&A assessments it conducted during these fiscal years, including assessments DOD initiated in response to an antitrust request or on its own initiative. For each example, we analyzed agency documentation and interviewed IBP officials and DOD stakeholders to understand how they conducted these assessments. This included analyzing which stakeholders participated, the types of risks and benefits DOD stakeholders assessed and reported to IBP, and the information sources and analyses they leveraged, among other things. In doing so, we evaluated the extent to which IBP and DOD stakeholders' actual assessment activities aligned with the requirements in DOD's M&A policy, which IBP officials told us is the key policy that guides their assessments. Our selection was generated using several criteria, including representation of a variety of outcomes (proceeded without further review, remedied, or blocked), merger values, and fiscal year of assessment.

Table 3 includes an overview of the nine illustrative examples we selected. The company names are sensitive information and are not included in the table.

Table 3: DOD Merger and Acquisition (M&A) Assessments Selected as Illustrative Examples

	Fiscal year of M&A assessment	Industrial base sector	M&A value above or below transaction thresholds for Hart-Scott-Rodino antitrust review	M&A outcome
Illustrative example 1	2021	Aerospace/Aviation	Above	Antitrust agency sued to block
Illustrative example 2	2018	Industrial Gas	Above	Divestiture of certain lines of business, then allowed to proceed
Illustrative example 3	2019	Aerospace and Defense	Above	Divestiture of certain lines of business, then allowed to proceed
Illustrative example 4	2020	Protective Gear	Above	Proceeded without challenge
Illustrative example 5	2021	Logistics	Above	Proceeded without challenge
Illustrative example 6	2019	Engineered Products	Below	Proceeded without challenge

	Fiscal year of M&A assessment	Industrial base sector	M&A value above or below transaction thresholds for Hart-Scott-Rodino antitrust review	M&A outcome
Illustrative example 7	2020	Systems Engineering	Below	Proceeded without challenge
Illustrative example 8	2022	Navigation and Inertial Sensing	Below	Proceeded without challenge
Illustrative example 9	2022	Aerospace	Below	Proceeded without challenge

Source: GAO analysis of Department of Defense (DOD) data. | GAO-24-106129

To address how DOD's role as a stakeholder to the antitrust agencies affects its conduct of M&A assessments, we reviewed DOD and antirust agencies' policy and guidance to determine how DOD is expected to support antitrust reviews led by the Department of Justice (DOJ) and Federal Trade Commission (FTC). This included assessing what information DOD is able to access and its role in determining the outcome of an antitrust review. For example, we reviewed DOD's M&A policy and FTC guidance on antitrust reviews conducted under the HSR premerger notification program.[6] We also reviewed federal antitrust statutes to understand how DOJ and FTC's role as enforcement agencies in the antitrust process differs from DOD's role as an interested party affected by the M&A. Furthermore, we reviewed a joint DOJ/FTC statement on DOD's role in antitrust reviews of defense-related M&A.[7] We interviewed DOD and antitrust agency officials to further our understanding of DOD and the antitrust agencies' respective roles and responsibilities, as well as to discuss how DOD's inputs are used in antitrust reviews. We analyzed information from our nine illustrative examples to demonstrate how DOD and the antitrust agencies interacted and shared information during those M&A assessments.

To address the extent to which DOD monitors the effects of M&A on the defense industrial base, we reviewed DOD policy and guidance to determine IBP and DOD stakeholders' requirements for monitoring the effects of M&A, if any. This included, for example, DOD's M&A policy and

[6]DOD, DOD Directive 5000.62. Federal Trade Commission, *Introductory Guide I: What is the Premerger Notification Program?* (March 2009).

[7]Department of Justice and Federal Trade Commission, *Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry*, Matter Number P130500 (Apr. 12, 2016).

DCMA Manual 3401-05.[8] To further our understanding, we interviewed IBP officials and DOD stakeholders in the military departments and DCMA about the nature and extent of their M&A monitoring activities. During these interviews, we discussed their monitoring efforts in general and in the context of our nine illustrative examples. We learned that the antitrust agencies can assign DOD officials a role in monitoring long-term behavioral agreements negotiated during antitrust reviews, so we collected a list of DOD's monitoring assignments from fiscal years 2012 through 2022 from the antitrust agencies. For these antitrust monitoring assignments, we reviewed the terms of the final agreement between the antitrust agency and the merging companies to determine DOD's responsibilities for monitoring compliance with the long-term behavioral agreement. We interviewed IBP and stakeholder officials involved in these antitrust monitoring assignments to determine how DOD conducts monitoring and ensures compliance with the antitrust agencies' behavioral agreements. Finally, we compared DOD's monitoring activities to *Standards for Internal Control in the Federal Government* to evaluate the extent to which DOD monitoring practices aligned with internal control standards for federal entities.[9]

We conducted this performance audit from June 2022 to October 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

[8]DOD, DOD Directive 5000.62. Defense Contract Management Agency, *Defense Industrial Base Monitoring and Reporting,* DCMA Manual 3401-05, Change 1 (Dec. 22, 2020).

[9]GAO-14-704G.

AR_003251

Appendix II: Comments from the Department of Defense

THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

ACQUISITION AND SUSTAINMENT

SEP 22 2023

Mr. Bill Russell
Director, GAO Contracting and National Security Acquisition
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Russell:

Attached please find the Department of Defense (DoD) response to GAO Draft Report GAO-23-106129, "Defense Industrial Base: DoD Needs Better Insight Into Risks From Mergers and Acquisitions" dated September 2023 (GAO Code 106129).

The Department has conducted a security review of the draft GAO report and found no issues with public release of the draft report.

Sincerely,

WA LaPlante

William A. LaPlante

GAO DRAFT REPORT DATED SEPTEMBER 2023
GAO-23-106129 (GAO CODE 106129)

"DEFENSE INDUSTRIAL BASE: DOD NEEDS BETTER INSIGHT INTO RISKS FROM MERGERS AND ACQUISITIONS"

DEPARTMENT OF DEFENSE COMMENTS TO GAO RECOMMENDATIONS

RECOMMENDATION 1: The GAO recommends that the Secretary of Defense ensure that the Assistant Secretary of Defense for Industrial Base Policy (IBP) provides clear direction as to which major defense suppliers IBP should prioritize for the purposes of conducting mergers and acquisitions (M&A) assessments.

DoD RESPONSE: Concur. IBP intends to promulgate a new Department of Defense Instruction (DoDI) to provide guidance on conducting assessments of M&A transactions. This new DoDI will incorporate direction on prioritizing assessments.

RECOMMENDATION 2: The GAO recommends that the Secretary of Defense ensures that the Assistant Secretary of Defense for Industrial Base Policy assesses whether its M&A team is adequately resourced to consistently carry out its responsibilities.

DoD RESPONSE: Concur. IBP currently executes the M&A mission without dedicated funding. This includes M&A assessments, due diligence, and serving as the Compliance Officer and Government Compliance Team lead on the monitoring of an FTC consent order. However, IBP has developed issue papers and is requesting dedicated funding in support of DoD's Fiscal Year 2025 Program Objective Memorandum (POM) and annual increases thereafter that will allow IBP to increase M&A workforce and resources. IBP plans to conduct an additional assessment on the resources required to fulfill GAO's recommendation to expand DoD M&A activities.

RECOMMENDATION 3: The GAO recommends that the Secretary of Defense ensures that the Assistant Secretary of Defense for Industrial Base Policy provides the Office of Industrial Base Policy and DoD stakeholders with additional direction on assessing the full range of risks and benefits identified in DoD's M&A policy, such as national security, when developing the new DoD instruction or other appropriate guidance.

DoD RESPONSE: Concur. DoD's policy on M&A reviews, DoDD 5000.62 effective 27 February 2017, provides 13 factors that it must consider when assessing the potential implications of covered M&A transactions. IBP intends to provide more detailed guidance in the forthcoming DoDI as to assessing the full range of risks and benefits to the DoD. IBP will also update its processes and tools to ensure that it is consistent with any revision to policy. IBP expects to complete a draft of the DoDI in the next few months and begin coordination shortly thereafter.

AR_003253

RECOMMENDATION 4: The GAO recommends that the Secretary of Defense ensure that the Assistant Secretary of Defense for Industrial Base Policy revises DoD's M&A policy to direct the Office of Industrial Base Policy, with support from relevant DoD stakeholders, to monitor the effects of conducted mergers or acquisitions in cases in which DoD identified risk during its assessment to determine if risks were realized or if additional action is needed.

DoD RESPONSE: Concur. DoD currently supports the Federal Trade Commission (FTC) in monitoring a major defense firm in its compliance of an FTC Consent Order governing the terms of its acquisition of a key component supplier. DoD does not currently monitor transactions beyond those identified by the FTC or the Department of Justice, but concurs with GAO's recommendation and will assess the design and implementation of a M&A monitoring mission and resources needed to support it to include those transactions with identified risks. The forthcoming DoDI will incorporate guidance on evaluating identified risks after transactions have closed.

Appendix III: GAO Contact and Staff Acknowledgments

GAO Contact

W. William Russell, (202) 512-4841 or russellw@gao.gov

Staff Acknowledgments

In addition to the contact named above, Justin Jaynes (Assistant Director), Jillian Schofield (Analyst-in-Charge), Peter Anderson, Vinayak Balasubramanian, Brandon Booth, Donna Calderone, Gioia Chaouch, Lorraine Ettaro, Kurt Gurka, Anne Kolesnikoff, Alec McQuilkin, Pamela Snedden, Alyssa Weir, and Adam Wolfe made key contributions to this report.

Seto Bagdoyan, Michael E. Clements, Joseph Cruz, Kimberly Gianopoulos, Gretta Goodwin, Heather Dunahoo, Julia Vieweg, and Christina Werth also provided support to this report.

Related GAO Products

High-Risk Series: *Efforts Made to Achieve Progress Need to Be Maintained and Expanded to Fully Address All Areas.* GAO-23-106203. Washington, D.C.: April 20, 2023.

Defense Industrial Base: DOD Should Take Actions to Strengthen Its Risk Mitigation Approach. GAO-22-104154. Washington, D.C.: July 7, 2022.

Weapon Systems Annual Assessment: Challenges to Fielding Capabilities Faster Persist. GAO-22-105230. Washington, D.C.: June 8, 2022.

Defense Industrial Base: Integrating Existing Supplier Data and Addressing Workforce Challenges Could Improve Risk Analysis. GAO-18-435. Washington, D.C.: June 13, 2018.

Committee on Foreign Investment in The United States: Action Needed to Address Evolving National Security Concerns Facing the Department of Defense. GAO-18-494. Washington, D.C.: July 10, 2018.

Committee on Foreign Investment in the United States: Treasury Should Coordinate Assessments of Resources Needed to Address Increased Workload. GAO-18-249. Washington, D.C.: February 14, 2018.

Department of Defense: A Departmentwide Framework to Identify and Report Gaps in the Defense Supplier Base Is Needed. GAO-09-5. Washington, D.C.: October 7, 2008.

Defense Infrastructure: Management Actions Needed to Ensure Effectiveness of DOD's Risk Management Approach for the Defense Industrial Base. GAO-07-1077. Washington, D.C.: August 31, 2007.

Highlights of a GAO Forum: Managing the Supplier Base in the 21st Century. GAO-06-533SP. Washington, D.C.: March 31, 2006.

Defense Industry: Consolidation and Options for Preserving Competition. GAO/NSIAD-98-141. Washington, D.C.: April 1, 1998.

Defense Industry Consolidation: Competitive Effects of Mergers and Acquisitions. GAO/T-NSIAD-98-112. Washington, D.C.: March 4, 1998.

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Billions of Dollars, Seasonally Adjusted Annual Rate

Frequency:
Quarterly

1Y | 5Y | 10Y | Max

1947-01-01 to 2024-04-01

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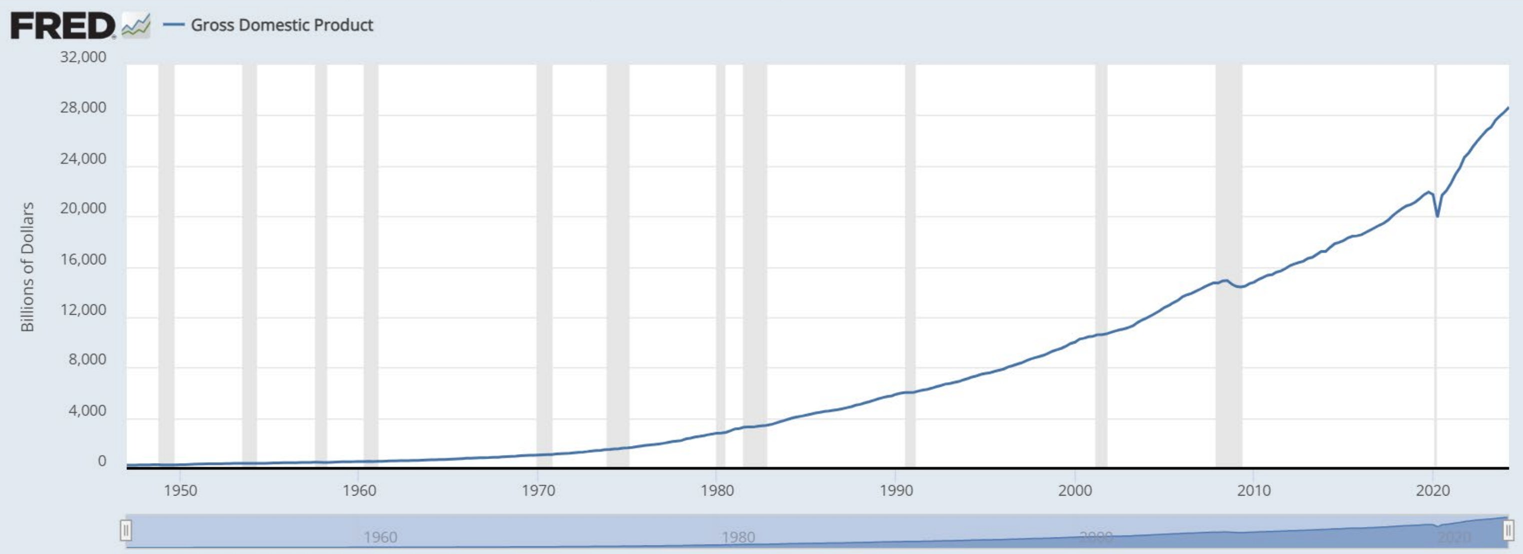

Shaded areas indicate U.S. recessions.

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An official website of the United States government Here's how you know

Market research and competitive analysis

Market research helps you find customers for your business. Competitive analysis helps you make your business unique. Combine them to find a competitive advantage for your small business.

Content

Use market research to find customers

Use competitive analysis to find a market advantage

Free small business data and trends

Use market research to find customers

Market research blends consumer behavior and economic trends to confirm and improve your business idea.

It's crucial to understand your consumer base from the outset. Market research lets you reduce risks even while your business is still just a gleam in your eye.

Gather demographic information to better understand opportunities and limitations for gaining customers. This could include population data on age, wealth, family, interests, or anything else that's relevant for your business.

Then answer the following questions to get a good sense of your market:

- **Demand:** Is there a desire for your product or service?
- **Market size:** How many people would be interested in your offering?
- **Economic indicators:** What is the income range and employment rate?
- **Location:** Where do your customers live and where can your business reach?
- **Market saturation:** How many similar options are already available to consumers?
- **Pricing:** What do potential customers pay for these alternatives?

You'll also want to keep up with the latest small business trends. It's important to gain a sense of the specific market share that will impact your profits.

You can do market research using existing sources, or you can do the research yourself and go direct to consumers.

Existing sources can save you a lot of time and energy, but the information might not be as specific to your audience as you'd like. Use it to answer questions that are both general and quantifiable, like industry trends, demographics, and household incomes. Check online or start with our list of market research resources.

Asking consumers yourself can give you a nuanced understanding of your specific target audience. But, direct research can be time consuming and expensive. Use it to answer questions about your specific business or customers, like reactions to your logo, improvements you could make to buying experience, and where customers might go instead of your business.

Here are a few methods you can use to do direct research:

- Surveys
- Questionnaires
- Focus groups
- In-depth interviews

For guidance on deciding which methods are worthwhile for your small business, the U.S. Small Business Administration (SBA) provides counseling services through our resource partner network.

Use competitive analysis to find a market advantage

Competitive analysis helps you learn from businesses competing for your potential customers. This is key to defining a competitive edge that creates sustainable revenue.

Your competitive analysis should identify your competition by product line or service and market segment. Assess the following characteristics of the competitive landscape:

- Market share
- Strengths and weaknesses
- Your window of opportunity to enter the market
- The importance of your target market to your competitors
- Any barriers that may hinder you as you enter the market
- Indirect or secondary competitors who may impact your success

Several industries might be competing to serve the same market you're targeting. The Department of Justice provides a diagram of Porter's Five Forces as one way you can differentiate your competitive analysis by industry. Important factors to consider include level of competition, threat of new competitors or services, and the effect of suppliers and customers on price.

Free small business data and trends

There are many reliable sources that provide customer and market information at no cost. Free statistics are readily available to help prospective small business owners.

Consider the following federal business statistics in your market research and competitive analysis:

Focus	Goal	Reference
General business statistics	Find statistics on industries, business conditions.	• NAICS • U.S. Census Business Builder
Consumer statistics	Gain info on potential customers, consumer markets.	• Consumer Credit Data • Consumer Product Safety
Demographics	Segment the population for targeting customers.	• U.S. Census Bureau • Bureau of Labor Statistics
Economic indicators	Know unemployment rates, loans granted and more.	• Consumer Price Index • Bureau of Economic Analysis
Employment statistics	Dig deeper into employment trends for your market.	• Employment and Unemployment Statistics

Focus	Goal	Reference
Income statistics	Pay your employees fair rates based on earnings data.	• Earnings by Occupation and Education • Income Statistics
Money and interest rates	Keep money by mastering exchange and interest rates.	• Daily Interest Rates • Money Statistics via Federal Reserve
Production and sales statistics	Understand demand, costs and consumer spending.	• Consumer Spending • Gross Domestic Product (GDP)
Trade statistics	Track indicators of sales and market performance.	• Balance of Payments • USA Trade Online
Statistics of specific industries	Use a wealth of federal agency data on industries.	• Statistics of U.S. Businesses

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Last updated May 31, 2024

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Private Equity Funds

What are private equity funds?

When you invest in a private equity fund, you are investing in a fund managed by a private equity firm—the *adviser*. Similar to a mutual fund (/investing-basics/investment-products/mutual-funds) or hedge fund (/introduction-investing/basics/investment-products/hedge-funds) , a private equity fund is a pooled investment vehicle where the adviser pools together the money invested in the fund by all the investors and uses that money to make investments on behalf of the fund. Unlike mutual funds or hedge funds, however, private equity firms often focus on long-term investment opportunities in assets that take time to sell with an investment time horizon typically of 10 or more years.

A typical investment strategy undertaken by private equity funds is to take a controlling interest in an operating company or business—the *portfolio company*—and engage actively in the management and direction of the company or business in order to increase its value. Other private equity funds may specialize in making minority investments in fast-growing companies or startups.

Although a private equity fund may be advised by an adviser that is registered with the SEC, private equity funds themselves are not registered with the SEC. As a result, private equity funds are not subject to regular public disclosure requirements. Information about a private equity fund's adviser that is registered with the SEC is available here (https://adviserinfo.sec.gov/) .

Who can invest?

A private equity fund is typically open only to *accredited investors* (/additional-resources/news-alerts/alerts-bulletins/investor-bulletin-accredited-investors) and *qualified clients* (https://www.sec.gov/rules/other/2016/ia-4421.pdf) . Accredited investors and qualified clients include institutional investors, such as insurance companies, university endowments and pension funds, and high income and net worth individuals. The initial investment amount for a private equity investment is often very high.

Even if you are not invested in private equity funds directly, you may be indirectly invested in a private equity fund if you participate in a pension plan or own an insurance policy, for example. Pension plans and insurance companies may invest some portion of their large portfolios in private equity funds.

What should I know?

Illiquidity

Because of their long-term investment horizon, an investment in a private equity fund is often illiquid and it may be necessary to hold an investment in a private equity fund for several years before any return is realized. Private equity funds typically impose limitations on investors' ability to withdraw their investment. Investors in private equity funds should be able to wait the requisite time period before realizing their return. For an institutional investor, a private equity investment may represent only a small portion of its diversified investment portfolio.

Fees and expenses

When investing in a private equity fund, an investor usually receives offering documents detailing material information about the investment and enters into various agreements as a limited partner of the fund. These offering documents and agreements should disclose and govern the terms of the investor's investment throughout the fund's life, including the fees and expenses to be incurred by funds and their investors. The SEC has brought enforcement actions, for example here (https://www.sec.gov/litigation/admin/2015/ia-4219.pdf) , involving fees and expenses that were incurred by funds and their investors without being adequately consented to or disclosed. Investors should be vigilant (/additional-resources/news-alerts/alerts-bulletins/updated-investor-bulletin-how-fees-expenses-affect) about the fees and expenses incurred in connection with their investment.

In addition, advisers may be managing multiple funds that are jointly invested in multiple portfolio companies. The adviser has a legal obligation to act in the best interests of each of the funds it manages and must allocate expenses among itself, its funds and the funds' portfolio companies in accordance with this fiduciary duty. The SEC has brought several enforcement actions, for example here (https://www.sec.gov/litigation/admin/2015/ia-4131.pdf) , related to shifting and allocation of expenses.

Conflicts of interest

Private equity firms often have interests that are in conflict with the funds they manage and, by extension, the limited partners invested in the funds. Private equity firms may be managing multiple private equity funds as well as a number of portfolio companies. The funds typically pay the private equity firm for advisory services. In addition, the portfolio companies may also pay the private equity firm for services such as managing and monitoring the portfolio company. Affiliates of the private equity firm may also play a role as service providers to the funds or the portfolio companies. As fiduciaries, advisers must make full disclosure of all conflicts of interest between themselves and the funds they manage in order to get informed consent.

The SEC has brought several enforcement actions, for example here (https://www.sec.gov/litigation/admin/2015/ia-4253.pdf) , related to an adviser's alleged failure to disclose certain conflicts of interest to the funds it manages. Through its various relationships, including with affiliates and portfolio companies, there exists opportunity for advisers to benefit themselves at the expense of the funds they manage and their investors. It is important for an investor to be aware and alert about the conflicts that exist, or that may arise, in the course of an investment in a private equity fund.

Additional Information

Securities Enforcement Forum West 2016 Keynote Address: Private Equity Enforcement (https://www.sec.gov/news/speech/private-equity-enforcement.html)

Private Equity: A Look Back and a Glimpse Ahead – May 13, 2015 (https://www.sec.gov/news/speech/private-equity-look-back-and-glimpse-ahead.html)

Spreading Sunshine in Private Equity – May 4, 2014 (https://www.sec.gov/news/speech/2014--spch05062014ab.html)

Mutual Funds and ETFs – A Guide for Investors (/additional-resources/general-resources/publications-research/publications/mutual-funds-etfs-%E2%80%93-guide)

Investor Bulletin: Hedge Funds (/additional-resources/news-alerts/alerts-bulletins/investor-bulletin-hedge-funds)

Investor Bulletin: Accredited Investors (/additional-resources/news-alerts/alerts-bulletins/investor-bulletin-accredited-investors)

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United States Census Bureau (https://www.census.gov)

North American Industry Classification System

Menu

NAICS Search

Enter keyword or 2-6 digit code

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Enter keyword or 2-6 digit code

2017 NAICS Search Go

Enter keyword or 2-6 digit code

2012 NAICS Search Go

2022 NAICS Definition

T = Canadian, Mexican, and United States industries are comparable.

518210 Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services

This industry comprises establishments primarily engaged in providing computing infrastructure, data processing services, Web hosting services (except software publishing), and related services, including streaming support services (except streaming distribution services). Data processing establishments provide complete processing and specialized reports from data supplied by clients or provide automated data processing and data entry services.

Illustrative Examples:

Application hosting
Cloud storage services
Computer data storage services

Is this page helpful?

Yes No

Computing platform infrastructure provision
Infrastructure as a service (IaaS)
Optical scanning services
Platform as a service (PaaS)
Video and audio technical streaming support services
Web hosting

Cross-References. Establishments primarily engaged in--

- Providing video and audio streaming distribution services--are classified in Industry 516210, Media Streaming Distribution Services, Social Networks, and Other Media Networks and Content Providers;
- Providing audiovisual postproduction services, including film/tape transfers and digitization (except digitization as a technical streaming support service)--are classified in U.S. Industry 512191, Teleproduction and Other Postproduction Services;
- Providing text processing and related document preparation activities--are classified in Industry 561410, Document Preparation Services;
- Software design, development, and publishing, or software publishing only--are classified in Industry 513210, Software Publishers;
- Developing custom software to meet the needs of a particular customer, without providing infrastructure or hosting services--are classified in U.S. Industry 541511, Custom Computer Programming Services;
- Providing computer hardware, software, and communication technologies integration services, with or without product sales--are classified in U.S. Industry 541512, Computer Systems Design Services;
- Selling computer hardware, packaged software, and communications equipment without providing systems integration services--are classified in Sector 42, Wholesale Trade, or Sector 44-45, Retail Trade;
- Providing on-site management and operation of a client's data processing facilities--are classified in U.S. Industry 541513, Computer Facilities Management Services;
- Providing wired broadband Internet access services using own operated telecommunications infrastructure, in combination with Web hosting--are classified in U.S. Industry 517111, Wired Telecommunications Carriers;
- Providing Internet access via client-supplied telecommunications connections in combination with Web hosting--are classified in Industry 517810, All Other Telecommunications;
- Operating Web search portals--are classified in Industry 519290, Web Search Portals and All Other Information Services;
- Providing access to computers and office equipment, as well as other office support services--are classified in Industry 56143, Business Service Centers;
- Processing financial transactions--are classified in Industry 522320, Financial Transactions Processing, Reserve, and Clearinghouse Activities; and
- Providing payroll processing services--are classified in U.S. Industry 541214, Payroll Services.

Is this page helpful?
Yes No

2012 NAICS	2017 NAICS	2022 NAICS	Corresponding Index Entries
518210	518210	518210	Application hosting (excluding software publishing)
518210	518210	518210	Automated data processing services
518210	518210	518210	Cloud computing services (except software publishing and computer systems design)
518210	518210	518210	Cloud storage services
518210	518210	518210	Colocation services (i.e., rental of server and networking space in data centers)
518210	518210	518210	Computer data storage services
518210	518210	518210	Computer input preparation services
518210	518210	518210	Computer time leasing
518210	518210	518210	Computer time rental
518210	518210	518210	Computer time sharing services
518210	518210	518210	Computing infrastructure provision
518210	518210	518210	Computing platform infrastructure provision
518210	518210	518210	Data capture imaging services
518210	518210	518210	Data entry services
518210	518210	518210	Data processing computer services
518210	518210	518210	Data processing services (except payroll services, financial transaction processing services)
518210	518210	518210	Disk and diskette conversion services
518210	518210	518210	Disk and diskette recertification services
518210	518210	518210	Electronic data processing services
518210	518210	518210	Game server hosting providers
518210	518210	518210	Infrastructure as a service (IaaS)

Is this page helpful?
Yes No

2012 NAICS	2017 NAICS	2022 NAICS	Corresponding Index Entries
518210	518210	518210	Media streaming data storage services
518210	518210	518210	Media streaming technical support services
518210	518210	518210	Microfiche recording and imaging services
518210	518210	518210	Microfilm recording and imaging services
518210	518210	518210	Optical scanning services
518210	518210	518210	Platform as a service (PaaS)
518210	518210	518210	Scanning services, optical
518210	518210	518210	Video and audio technical streaming support services
518210	518210	518210	Video tape and film stock technical streaming support services
518210	518210	518210	Virtual currency (cryptocurrency) mining
518210	518210	518210	Web hosting (excluding software publishing)

2022 NAICS Manual

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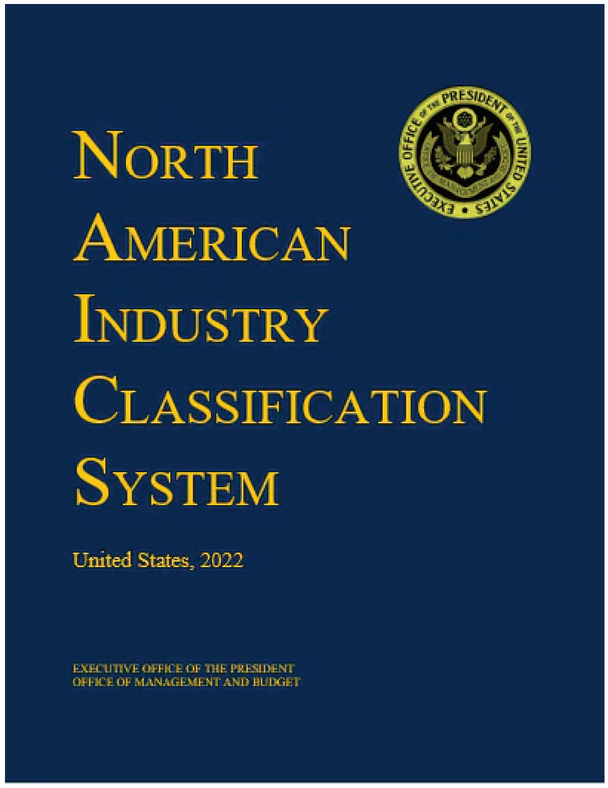

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Reference Files

2022 NAICS

2017 NAICS

2012 NAICS

2007 NAICS

2002 NAICS

1997 NAICS

Concordances

Is this page helpful?

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Downloadable Files

NAICS Update Process Fact Sheet (reference_files_tools/NAICS_Update_Process_Fact_Sheet.pdf) [PDF, 91.0KB]

Announcements

September 14, 2023
NAICS Update Process Fact Sheet is now available.

December 21, 2021 (federal_register_notices/notices/fr21dc21.pdf) [PDF, 203KB] North American Industry Classification System—Revision for 2022; Update of Statistical Policy Directive No. 8, North American Industry Classification System: Classification of Establishments; and Elimination of Statistical Policy Directive No. 9, Standard Industrial Classification of Enterprises; Notice. Vol. 86, No. 242

2022 NAICS Structure with Change Indicator (2022NAICS/2022_NAICS_Structure.xlsx) [XLSX, 86KB]

July 02, 2021 (federal_register_notices/notices/fr02jy21.pdf) [PDF, 372KB] North American Industry Classification System (NAICS) Updates for 2022; Update of Statistical Policy Directive No. 8, Standard Industrial Classification of Establishments; and Elimination of Statistical Policy Directive No. 9, Standard Industrial Classification of Enterprises; Notice. Vol. 86, No. 125

January 28, 2021 Welcome to the transformed site, which delivers an improved look and feel as well as enhanced mobile device capabilities. At this time, users will no longer be able to access the previous version of the site.

February 26, 2020 (federal_register_notices/notices/fr26fb20.pdf) [PDF, 281KB] 2017 North American Industry Classification System (NAICS) - Updates for 2022; Update of Statistical Policy Directive No. 8, Standard Industrial Classification of Establishments; and Elimination of Statistical Policy Directive No. 9, Standard Industrial Classification of Enterprises.; Notice. Vol. 85, No. 38

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Contact Us

Source: U.S. Census Bureau
North American Industry Classification System (NAICS)
(888) 756-2427 (tel:1-888-756-2427)
naics@census.gov (mailto:naics@census.gov)
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Measuring America's People, Places, and Economy

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OCCUPATIONAL OUTLOOK HANDBOOK

Lawyers

Summary

Quick Facts: Lawyers	
2023 Median Pay	$145,760 per year $70.08 per hour
Typical Entry-Level Education	Doctoral or professional degree
Work Experience in a Related Occupation	None
On-the-job Training	None
Number of Jobs, 2023	859,000
Job Outlook, 2023-33	5% (As fast as average)
Employment Change, 2023-33	44,200

What Lawyers Do

Lawyers advise and represent clients on legal proceedings or transactions.

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Status: Open
Location: Victor, CA
Region Assigned: Region 32, Oakland, California

Statesman Group LLC

E-File Follow

Case Number: 28-CA-343625
Date Filed: June 3, 2024
Status: Open
Location: Phoenix, AZ
Region Assigned: Region 28, Phoenix, Arizona

AWPPW (Graphic Packing International)

E-File Follow

Case Number: 19-CB-343478
Date Filed: June 3, 2024
Status: Open
Location: Portland, OR
Region Assigned: Region 19, Seattle, Washington

Samaritan Summit Village

E-File Follow

Case Number: 03-CA-343483
Date Filed: June 3, 2024
Status: Open
Location: Watertown, NY
Region Assigned: Region 03, Buffalo, New York

United States Postal Service

E-File Follow

Case Number: 10-CA-343499
Date Filed: June 3, 2024
Status: Open
Location: Columbus, GA
Region Assigned: Region 10, Atlanta, Georgia

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Pacific Weather Incorporated

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Search

In this section:

- Estimating Burden
- Burden activities
- How to estimate burden

Estimating Burden

Burden hours and cost

One of the goals of the PRA is for the federal government to consider and account for the impact on the public when asking for information. This impact is called **burden**, and includes the value of both the time and the effort required to fulfill a collection along with the financial cost.

The PRA requires that agencies estimate burden to understand what is involved for the public to comply with a request.

Some common burden activities include:

- Reviewing instructions.
- Compiling materials necessary for collection.
- Acquiring, installing, and utilizing technology and systems.
- Adjusting existing ways to comply with previous instructions and requirements.

- Searching data sources.
- Completing and reviewing collected information.
- Compiling and sending information.

Overall, burden can seem intimidating, especially in a large collection. Our burden activity questions are a starting point to help you begin thinking about scope.

Avoiding excessive burden

Some examples of excessive burden include:

- Addressing more respondents than necessary.
- Asking questions that aren't relevant or essential.
  - You must justify questions about personally sensitive matters like religious beliefs or political affiliation, or questions that may cause persons to incriminate themselves.
- Asking for a reporting frequency that is higher than necessary.
- Not considering an alternative approach to obtain the information.
- Requesting information in a different format than is usually maintained.

If your collection involves activities seen as excessive, you must justify them in the *purpose* and *need* sections of the collection in your supporting statement.

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- annualized cost
- burden
- capital cost

- clearance
- contractor
- control number
- de minimis
- desk officer
- exempt
- extension request
- fast-track
- Federal Register
- generic clearance
- IC
- ICB
- ICR
- information collection
- information collection request
- non-substantive change
- OIRA
- OMB
- person
- PII
- PRA
- recordkeeping
- reinstatement request
- revision request
- ROCIS
- sponsor
- the public

INVESTIGATION OF COMPETITION IN DIGITAL MARKETS

MAJORITY STAFF REPORT AND RECOMMENDATIONS

SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY

Jerrold Nadler, Chairman, Committee on the Judiciary

David N. Cicilline, Chairman, Subcommittee on Antitrust, Commercial and Administrative Law

UNITED STATES
2020

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I. INTRODUCTION

A. Chairs' Foreword

In June 2019, the Committee on the Judiciary initiated a bipartisan investigation into the state of competition online, spearheaded by the Subcommittee on Antitrust, Commercial and Administrative Law. As part of a top-to-bottom review of the market, the Subcommittee examined the dominance of Amazon, Apple, Facebook, and Google, and their business practices to determine how their power affects our economy and our democracy. Additionally, the Subcommittee performed a review of existing antitrust laws, competition policies, and current enforcement levels to assess whether they are adequate to address market power and anticompetitive conduct in digital markets.

Over the course of our investigation, we collected extensive evidence from these companies as well as from third parties—totaling nearly 1.3 million documents. We held seven hearings to review the effects of market power online—including on the free and diverse press, innovation, and privacy—and a final hearing to examine potential solutions to concerns identified during the investigation and to inform this Report's recommendations.

A year after initiating the investigation, we received testimony from the Chief Executive Officers of the investigated companies: Jeff Bezos, Tim Cook, Mark Zuckerberg, and Sundar Pichai. For nearly six hours, we pressed for answers about their business practices, including about evidence concerning the extent to which they have exploited, entrenched, and expanded their power over digital markets in anticompetitive and abusive ways. Their answers were often evasive and non-responsive, raising fresh questions about whether they believe they are beyond the reach of democratic oversight.

Although these four corporations differ in important ways, studying their business practices has revealed common problems. First, each platform now serves as a gatekeeper over a key channel of distribution. By controlling access to markets, these giants can pick winners and losers throughout our economy. They not only wield tremendous power, but they also abuse it by charging exorbitant fees, imposing oppressive contract terms, and extracting valuable data from the people and businesses that rely on them. Second, each platform uses its gatekeeper position to maintain its market power. By controlling the infrastructure of the digital age, they have surveilled other businesses to identify potential rivals, and have ultimately bought out, copied, or cut off their competitive threats. And, finally, these firms have abused their role as intermediaries to further entrench and expand their dominance. Whether through self-preferencing, predatory pricing, or exclusionary conduct, the dominant platforms have exploited their power in order to become even more dominant.

To put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons. Although these firms have delivered clear benefits to society, the dominance of Amazon, Apple, Facebook, and Google has come at a price. These firms typically run the marketplace while also competing in it—a position that enables them to write one set of rules for others, while they play by another, or to engage in a form of their own private *quasi* regulation that is unaccountable to anyone but themselves.

The effects of this significant and durable market power are costly. The Subcommittee's series of hearings produced significant evidence that these firms wield their dominance in ways that erode entrepreneurship, degrade Americans' privacy online, and undermine the vibrancy of the free and diverse press. The result is less innovation, fewer choices for consumers, and a weakened democracy.

Nearly a century ago, Supreme Court Justice Louis Brandeis wrote: "We must make our choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we cannot have both." Those words speak to us with great urgency today.

Although we do not expect that all of our Members will agree on every finding and recommendation identified in this Report, we firmly believe that the totality of the evidence produced during this investigation demonstrates the pressing need for legislative action and reform. These firms have too much power, and that power must be reined in and subject to appropriate oversight and enforcement. Our economy and democracy are at stake.

As a charter of economic liberty, the antitrust laws are the backbone of open and fair markets. When confronted by powerful monopolies over the past century—be it the railroad tycoons and oil barons or Ma Bell and Microsoft—Congress has acted to ensure that no dominant firm captures and holds undue control over our economy or our democracy. We face similar challenges today. Congress—not the courts, agencies, or private companies—enacted the antitrust laws, and Congress must lead the path forward to modernize them for the economy of today, as well as tomorrow. Our laws must be updated to ensure that our economy remains vibrant and open in the digital age.

Congress must also ensure that the antitrust agencies aggressively and fairly enforce the law. Over the course of the investigation, the Subcommittee uncovered evidence that the antitrust agencies failed, at key occasions, to stop monopolists from rolling up their competitors and failed to protect the American people from abuses of monopoly power. Forceful agency action is critical.

Lastly, Congress must revive its tradition of robust oversight over the antitrust laws and increased market concentration in our economy. In prior Congresses, the Subcommittee routinely examined these concerns in accordance with its constitutional mandate to conduct oversight and perform its legislative duties. As a 1950 report from the then-named Subcommittee on the Study of Monopoly Power described its mandate: "It is the province of this subcommittee to investigate factors which tend to eliminate competition, strengthen monopolies, injure small business, or promote undue concentration of economic power; to ascertain the facts, and to make recommendations based on those findings."[1]

Similarly, the Subcommittee has followed the facts before it to produce this Report, which is the product of a considerable evidentiary and oversight record. This record includes: 1,287,997 documents and communications; testimony from 38 witnesses; a hearing record that spans more than 1,800 pages; 38 submissions from 60 antitrust experts from across the political spectrum; and interviews with more than 240 market participants, former employees of the investigated platforms, and other individuals totaling thousands of hours. The Subcommittee has also held hearings and roundtables with industry and government witnesses, consultations with subject-matter experts, and a careful—and at times painstaking—review of large volumes of evidence provided by industry participants and regulators.

In light of these efforts, we extend our deep gratitude to the staff of the Subcommittee and Full Committee for their diligent work in this regard, particularly during the COVID-19 pandemic and other challenging circumstances over the past year.

Finally, as an institutional matter, we close by noting that the Committee's requests for information from agencies and any non-public briefings were solely for the purpose of carrying out our constitutionally based legislative and oversight functions. In particular, the information requested was vital to informing our assessment of whether existing antitrust laws are adequate for tackling current competition problems, as well as in uncovering potential reasons for under-enforcement. The Report by Subcommittee staff is based on the documents and information collected during its investigation, and the Committee fully respects the separate and independent decisional processes employed by enforcement authorities with respect to such matters.

Although the companies provided substantial information and numerous documents to the Subcommittee, they declined to produce certain critical information and crucial documents we requested. The material withheld was identified by the Committee as relevant to the investigation and included, primarily, two categories of information: (1) documents the companies' claimed were protected by common law privileges; and (2) documents that were produced to antitrust authorities in ongoing investigations, or that related to the subject matter of these ongoing investigations.

Institutionally, we reject any argument that the mere existence of ongoing litigation prevents or prohibits Congress from obtaining information relevant to its legislative and oversight prerogatives. We strongly disagree with the assertion that any requests for such materials and any compliance with those requests interfere with the decisional processes in ongoing investigations. Furthermore, while Congress is fully subject to constitutional protections, we cannot agree that we are bound by common

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[1] H. REP. NO. 255, at 2 (1951) (Aluminum: Report of the Subcomm. On Study of Monopoly Power of the H. Comm. on the Judiciary).

law privileges as asserted by the companies. While we determined that insufficient time exists to pursue these additional materials during this Congress, the Committee expressly reserves the right to invoke other available options, including compulsory process, to obtain the requested information in the future.

The views and conclusions contained in the Report are staff views and do not necessarily reflect those of the Committee on the Judiciary or any of its Members.

B. Executive Summary

1. Subcommittee's Investigation

On June 3, 2019, the House Judiciary Committee announced a bipartisan investigation into competition in digital markets,[2] led by the Subcommittee on Antitrust, Commercial and Administrative Law.[3] The purpose of the investigation was to: (1) document competition problems in digital markets; (2) examine whether dominant firms are engaging in anticompetitive conduct; and (3) assess whether existing antitrust laws, competition policies, and current enforcement levels are adequate to address these issues.[4] The Committee initiated the investigation in response to broad-ranging investigative reporting, and activity by policymakers and enforcers, that raised serious concerns about the platforms' incentives and ability to harm the competitive process.[5]

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[2] Press Release, H. Comm. on the Judiciary, House Judiciary Committee Launches Bipartisan Investigation into Competition in Digital Markets (June 3, 2019), https://judiciary.house.gov/news/press-releases/house-judiciary-committee-launches-bipartisan-investigation-competition-digital.

[3] We extend our sincere thanks to Peter Karafotas, Rich Luchette, and Francis Grubar, in the Office of Congressman David N. Cicilline, for their relentless work and selfless devotion throughout the investigation. We would also like to recognize the following staff for their significant contributions during the investigation: Dick Meltzer, Michael Tecklenburg, Kenneth DeGraff, and Victoria Houed in the Office of the Speaker of the U.S. House of Representatives; Daniel Flores, former Minority Chief Counsel, Subcommittee on Antitrust, Commercial and Administrative Law; Danny Johnson, former Minority counsel, Committee on the Judiciary; Jacqui Kappler, Legislative Director, the Honorable Henry "Hank" Johnson, Jr.; Devon Ombres, Legislative Counsel, the Honorable Jamie Raskin; Elly Kugler, Senior Counsel, the Honorable Pramila Jayapal; Jennifer Chan, Legislative Director, the Honorable Pramila Jayapal; Stuart Styron, Senior Legislative Assistant, the Honorable Val Demings; Keanu Rivera, Legislative Assistant, the Honorable Mary Gay Scanlon; Lindsey Garber, Legislative Counsel, the Honorable Joe Neguse; Miya Patel, former Legislative Assistant, the Honorable Joe Neguse; and Natalie Knight, Legislative Counsel, the Honorable Lucy McBath. Staff would also like to thank Matthew Bisenius in the Office of F. James Sensenbrenner, as well as Garrett Ventry in the Office of Congressman Ken Buck, for their commitment to bipartisan cooperation. We also thank Hillary Marston, Legal Intern for the Committee on the Judiciary, for her assistance. Finally, we thank Clare Cho and Mari Lee at the Congressional Research Service for their support, as well as graphics and data visualization used within this Report.

[4] Press Release, H. Comm. on the Judiciary, House Judiciary Committee Launches Bipartisan Investigation into Competition in Digital Markets (June 3, 2019), https://judiciary.house.gov/news/press-releases/house-judiciary-committee-launches-bipartisan-investigation-competition-digital.

[5] *See, e.g.*, Meehreen Khan, *EU Targets Tech Giants over Unfair Business Practices*, FIN. TIMES (Apr. 25, 2018), https://www.ft.com/content/d7228bec-4879-11e8-8ee8-cae73aab7ccb; Adam Satariano, *Google is Fined $57 Million Under Europe's Data Privacy Law*, N.Y. TIMES (Jan. 21, 2019), https://www.nytimes.com/2019/01/21/technology/google-europe-gdpr-fine.html; Richard Waters et al., *Global Regulators' Net Tightens Around Big Tech*, FIN. TIMES, (June 5, 2019), https://www.ft.com/content/973f8b36-86f0-11e9-97ea-05ac2431f453.

As part of the investigation, the Subcommittee held seven oversight hearings that provided Members of the Subcommittee with an opportunity to examine the state of competition in digital markets and the adequacy of existing antitrust laws. A diverse group of witnesses offered testimony on topics related to the effects of market power on the free and diverse press, on innovation, and on privacy. Other witnesses who testified included executives from businesses with concerns about the dominance of the investigated firms. The hearings also provided an opportunity for key executives from Facebook, Google, Amazon, and Apple—including the Chief Executive Officers of these firms—to address evidence that was uncovered during the investigation in a public-facing venue. After each of the hearings, Members of the Subcommittee submitted questions for the record (QFRs) to the witnesses.

The Committee requested information from the dominant platforms, from market participants, from the Federal antitrust agencies, and from other relevant parties, for the purpose of obtaining information that was not otherwise publicly available but was important to assembling a comprehensive record. The Committee also sent requests for submissions to various experts in the field, including academics, representatives of public interest groups, and practicing antitrust lawyers. The responses to these requests were indispensable to staff's ability to complete this Report and its recommendations for congressional oversight of the antitrust agencies and legislative action.

This Report is intended to provide policymakers, antitrust enforcers, market participants, and the public with a comprehensive understanding of the state of competition in the online marketplace. The Report also provides recommendations for areas of legislative activity to address the rise and abuse of market power in the digital economy, as well as areas that warrant additional congressional attention.

2. Findings

a. Overview

The open internet has delivered significant benefits to Americans and the U.S. economy. Over the past few decades, it has created a surge of economic opportunity, capital investment, and pathways for education. The COVID-19 pandemic has underscored the importance of internet access that is affordable, competitive, and widely available for workers, families, and businesses.

The online platforms investigated by the Subcommittee—Amazon, Apple, Facebook, and Google—also play an important role in our economy and society as the underlying infrastructure for the exchange of communications, information, and goods and services. As of September 2020, the combined valuation of these platforms is more than $5 trillion—more than a third of the value of the S&P 100. As we continue to shift our work, commerce, and communications online, these firms stand to become even more interwoven into the fabric of our economy and our lives.

Over the past decade, the digital economy has become highly concentrated and prone to monopolization. Several markets investigated by the Subcommittee—such as social networking, general online search, and online advertising—are dominated by just one or two firms. The companies investigated by the Subcommittee—Amazon, Apple, Facebook, and Google—have captured control over key channels of distribution and have come to function as gatekeepers. Just a decade into the future, 30% of the world's gross economic output may lie with these firms, and just a handful of others.[6]

In interviews with Subcommittee staff, numerous businesses described how dominant platforms exploit their gatekeeper power to dictate terms and extract concessions that no one would reasonably consent to in a competitive market. Market participants that spoke with Subcommittee staff indicated that their dependence on these gatekeepers to access users and markets requires concessions and demands that carry significant economic harm, but that are "the cost of doing business" given the lack of options.

This significant and durable market power is due to several factors, including a high volume of acquisitions by the dominant platforms. Together, the firms investigated by the Subcommittee have acquired hundreds of companies just in the last ten years. In some cases, a dominant firm evidently acquired nascent or potential competitors to neutralize a competitive threat or to maintain and expand the firm's dominance. In other cases, a dominant firm acquired smaller companies to shut them down or discontinue underlying products entirely—transactions aptly described as "killer acquisitions."[7]

In the overwhelming number of cases, the antitrust agencies did not request additional information and documentary material under their pre-merger review authority in the Clayton Act to examine whether the proposed acquisition may substantially lessen competition or tend to create a monopoly if allowed to proceed as proposed. For example, of Facebook's nearly 100 acquisitions, the Federal Trade Commission engaged in an extensive investigation of just one acquisition: Facebook's purchase of Instagram in 2012.

During the investigation, Subcommittee staff found evidence of monopolization and monopoly power. For example, the strong network effects associated with Facebook has tipped the market toward

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[6] Catherine Fong et al., *Prime Day and the broad reach of Amazon's ecosystem*, MCKINSEY & CO. (Aug. 2, 2019), https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/prime-day-and-the-broad-reach-of-amazons-ecosystem ("This ecosystem strategy in particular has significant competitive implications because McKinsey estimates that in ten years, 30 percent of the world's gross economic output will be from companies that operate a network of interconnected businesses, such as those run by Amazon, Alibaba, Google, and Facebook.").

[7] Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 1 (Yale Sch. of Mgmt. Working Paper, Mar. 2019), https://perma.cc/L6YL-YL8K (describing the practice of "acquir[ing] innovative targets solely to discontinue the target's innovative projects and preempt future competition."). *See also* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. (forthcoming 2020) (manuscript at 2), https://perma.cc/62HH-34ZL ("A nascent competitor is a firm whose prospective innovation represents a serious future threat to an incumbent.").

monopoly such that Facebook competes more vigorously among its own products—Facebook, Instagram, WhatsApp, and Messenger—than with actual competitors.

As demonstrated during a series of hearings held by the Subcommittee and as detailed in this Report,[8] the online platforms' dominance carries significant costs. It has diminished consumer choice, eroded innovation and entrepreneurship in the U.S. economy, weakened the vibrancy of the free and diverse press, and undermined Americans' privacy.

These concerns are shared by the majority of Americans. On September 24, 2020, Consumer Reports (CR) published a survey titled "Platform Perceptions: Consumer Attitudes on Competition and Fairness in Online Platforms."[9] Among its findings:

- 85% of Americans are concerned—either very concerned or somewhat concerned—about the amount of data online platforms store about them, and 81% are concerned that platforms are collecting and holding this data in order to build out more comprehensive consumer profiles.

- 58% are not confident that they are getting objective and unbiased search results when using an online platform to shop or search for information.

- 79% say Big Tech mergers and acquisitions unfairly undermine competition and consumer choice.[10]

- 60% support more government regulation of online platforms, including mandatory interoperability features, to make it easier for users to switch from one platform to another without losing important data or connections.

b. <u>Facebook</u>

Facebook has monopoly power in the market for social networking. Internal communications among the company's Chief Executive Officer, Mark Zuckerberg, and other senior executives indicate that Facebook acquired its competitive threats to maintain and expand its dominance. For example, a senior executive at the company described its acquisition strategy as a "land grab" to "shore up" Facebook's position,[11] while Facebook's CEO said that Facebook "can likely always just buy any

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[8] *See infra* Section V.

[9] CONSUMER. REPS., PLATFORM PERCEPTIONS: CONSUMER ATTITUDES ON COMPETITION AND FAIRNESS IN ONLINE PLATFORMS (2020), https://advocacy.consumerreports.org/wp-content/uploads/2020/09/FINAL-CR-survey-report.platform-perceptions-consumer-attitudes-.september-2020.pdf.

[10] *Id.*

[11] Production from Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00045388 (Feb. 18, 2014), https://judiciary.house.gov/uploadedfiles/0004538800045389.pdf ("[W]e are going to spend 5-10% of our market cap every

competitive startups,"[12] and agreed with one of the company's senior engineers that Instagram was a threat to Facebook.[13]

Facebook's monopoly power is firmly entrenched and unlikely to be eroded by competitive pressure from new entrants or existing firms. In 2012, the company described its network effects as a "flywheel" in an internal presentation prepared for Facebook at the direction of its Chief Financial Officer.[14] This presentation also said that Facebook's network effects get "stronger every day."[15]

More recent documents produced during the investigation by Facebook show that it has tipped the social networking market toward a monopoly, and now considers competition within its own family of products to be more considerable than competition from any other firm. These documents include an October 2018 memorandum by Thomas Cunningham, a senior data scientist and economist at Facebook,[16] for Mr. Zuckerberg and Javier Olivan, Facebook's Director of Growth.[17] Among other things, the Cunningham Memo found that the network effects of Facebook and its family of products are "very strong,"[18] and that there are strong tipping points in the social networking market that create competition for the market, rather than competition within the market.[19]

According to a former senior employee at Instagram who was involved in the preparation of this document for review by Mr. Zuckerberg and Mr. Olivan, the Cunningham Memo guided Facebook's growth strategy, particularly with regard to Instagram.[20] They explained:

> The question was how do we position Facebook and Instagram to not compete with each other. The concern was the Instagram would hit a tipping point . . . There was brutal in-fighting between Instagram and Facebook at the time. It was very tense. It was back when Kevin Systrom was still at the company. He wanted Instagram to grow

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couple years to shore up our position . . . I hate the word 'land grab' but I think that is the best convincing argument and we should own that.").

[12] *Id.* at FB-HJC-ACAL-00067600 (Apr. 9, 2012), https://judiciary.house.gov/uploadedfiles/0006760000067601.pdf.

[13] *Id.*

[14] *Id.* at FB-HJC-ACAL-00049006 (Apr. 18, 2012) (on file with Comm.) ("Network effects make it very difficult to compete with us - In every country we've tipped we are still winning.")

[15] *Id.*

[16] *Id.* at FB-HJC-ACAL-00111406 (Oct. 2018) [hereinafter Cunningham Memo] ("Facebook has high reach and time-spent in most countries. User growth is tracking internet growth: global reach is roughly stable.").

[17] *Id.*

[18] *Id.* at 11.

[19] *Id.* at 9.

[20] *Id.*

> naturally and as widely as possible. But Mark was clearly saying "do not compete with us." . . . It was collusion, but within an internal monopoly. If you own two social media utilities, they should not be allowed to shore each other up. It's unclear to me why this should not be illegal. You can collude by acquiring a company.[21]

Facebook has also maintained its monopoly through a series of anticompetitive business practices. The company used its data advantage to create superior market intelligence to identify nascent competitive threats and then acquire, copy, or kill these firms. Once dominant, Facebook selectively enforced its platform policies based on whether it perceived other companies as competitive threats. In doing so, it advantaged its own services while weakening other firms.

In the absence of competition, Facebook's quality has deteriorated over time, resulting in worse privacy protections for its users and a dramatic rise in misinformation on its platform.

c. Google

Google has a monopoly in the markets for general online search and search advertising. Google's dominance is protected by high entry barriers, including its click-and-query data and the extensive default positions that Google has obtained across most of the world's devices and browsers. A significant number of entities—spanning major public corporations, small businesses, and entrepreneurs—depend on Google for traffic, and no alternate search engine serves as a substitute.

Google maintained its monopoly over general search through a series of anticompetitive tactics. These include an aggressive campaign to undermine vertical search providers, which Google viewed as a significant threat. Documents show that Google used its search monopoly to misappropriate content from third parties and to boost Google's own inferior vertical offerings, while imposing search penalties to demote third-party vertical providers. Since capturing a monopoly over general search, Google has steadily proliferated its search results page with ads and with Google's own content, while also blurring the distinction between paid ads and organic results. As a result of these tactics, Google appears to be siphoning off traffic from the rest of the web, while entities seeking to reach users must pay Google steadily increasing sums for ads. Numerous market participants analogized Google to a gatekeeper that is extorting users for access to its critical distribution channel, even as its search page shows users less relevant results.

A second way Google has maintained its monopoly over general search has been through a series of anticompetitive contracts. After purchasing the Android operating system in 2005, Google used contractual restrictions and exclusivity provisions to extend Google's search monopoly from desktop to mobile. Documents show that Google required smartphone manufacturers to pre-install and give default status to Google's own apps, impeding competitors in search as well as in other app

[21] Interview with Former Instagram Employee (Oct. 2, 2020).

markets. As search activity now migrates from mobile to voice, third-party interviews suggest Google is again looking for ways to maintain its monopoly over search access points through a similar set of practices.

Since capturing the market for online search, Google has extended into a variety of other lines of business. Today Google is ubiquitous across the digital economy, serving as the infrastructure for core products and services online. Through Chrome, Google now owns the world's most popular browser—a critical gateway to the internet that it has used to both protect and promote its other lines of business. Through Google Maps, Google now captures over 80% of the market for navigation mapping service—a key input over which Google consolidated control through an anticompetitive acquisition and which it now leverages to advance its position in search and advertising. And through Google Cloud, Google has another core platform in which it is now heavily investing through acquisitions, positioning itself to dominate the "Internet of Things," the next wave of surveillance technologies.

Internal communications also reveal that Google exploits information asymmetries and closely tracks real-time data across markets, which—given Google's scale—provide it with near-perfect market intelligence. In certain instances, Google has covertly set up programs to more closely track its potential and actual competitors, including through projects like Android Lockbox.

Each of its services provides Google with a trove of user data, reinforcing its dominance across markets and driving greater monetization through online ads. Through linking these services together, Google increasingly functions as an ecosystem of interlocking monopolies.

d. Amazon

Amazon has significant and durable market power in the U.S. online retail market. This conclusion is based on the significant record that Subcommittee staff collected and reviewed, including testimonials from third-party sellers, brand manufacturers, publishers, former employees, and other market participants, as well as Amazon's internal documents. Although Amazon is frequently described as controlling about 40% of U.S. online retail sales, this market share is likely understated, and estimates of about 50% or higher are more credible.

As the dominant marketplace in the United States for online shopping, Amazon's market power is at its height in its dealings with third-party sellers. The platform has monopoly power over many small- and medium-sized businesses that do not have a viable alternative to Amazon for reaching online consumers. Amazon has 2.3 million active third-party sellers on its marketplace worldwide, and a recent survey estimates that about 37% of them—about 850,000 sellers—rely on Amazon as their sole source of income.[22]

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[22] JUNGLESCOUT, THE STATE OF THE AMAZON SELLER 2020 4 (2020), https://www.junglescout.com/wp-content/uploads/2020/02/State-of-the-Seller-Survey.pdf.

Amazon achieved its current dominant position, in part, through acquiring its competitors, including Diapers.com and Zappos. It has also acquired companies that operate in adjacent markets, adding customer data to its stockpile and further shoring up its competitive moats. This strategy has entrenched and expanded Amazon's market power in e-commerce, as well as in other markets. The company's control over and reach across its many business lines enable it to self-preference and disadvantage competitors in ways that undermine free and fair competition. As a result of Amazon's dominance, other businesses are frequently beholden to Amazon for their success.

Amazon has engaged in extensive anticompetitive conduct in its treatment of third-party sellers. Publicly, Amazon describes third-party sellers as "partners." But internal documents show that, behind closed doors, the company refers to them as "internal competitors." Amazon's dual role as an operator of its marketplace that hosts third-party sellers, and a seller in that same marketplace, creates an inherent conflict of interest. This conflict incentivizes Amazon to exploit its access to competing sellers' data and information, among other anticompetitive conduct.

Voice assistant ecosystems are an emerging market with a high propensity for lock-in and self-preferencing. Amazon has expanded Alexa's ecosystem quickly through acquisitions of complementary and competing technologies, and by selling its Alexa-enabled smart speakers at deep discounts. The company's early leadership in this market is leading to the collection of highly sensitive consumer data, which Amazon can use to promote its other business, including e-commerce and Prime Video.

Finally, Amazon Web Services (AWS) provides critical infrastructure for many businesses with which Amazon competes. This creates the potential for a conflict of interest where cloud customers are forced to consider patronizing a competitor, as opposed to selecting the best technology for their business.

e. Apple

Apple has significant and durable market power in the mobile operating system market. Apple's dominance in this market, where it controls the iOS mobile operating system that runs on Apple mobile devices, has enabled it to control all software distribution to iOS devices. As a result, Apple exerts monopoly power in the mobile app store market, controlling access to more than 100 million iPhones and iPads in the U.S.

Apple's mobile ecosystem has produced significant benefits to app developers and consumers. Launched in 2008, the App Store revolutionized software distribution on mobile devices, reducing barriers to entry for app developers and increasing the choices available to consumers. Despite this, Apple leverages its control of iOS and the App Store to create and enforce barriers to competition and discriminate against and exclude rivals while preferencing its own offerings. Apple also uses its power to exploit app developers through misappropriation of competitively sensitive information and to charge app developers supra-competitive prices within the App Store. Apple has maintained its dominance due to the presence of network effects, high barriers to entry, and high switching costs in the mobile operating system market.

Apple is primarily a hardware company that derives most of its revenue from sales of devices and accessories. However, as the market for products like the iPhone has matured, Apple has pivoted to rely increasingly on sales of its applications and services, as well as collecting commissions and fees in the App Store. In the absence of competition, Apple's monopoly power over software distribution to iOS devices has resulted in harm to competitors and competition, reducing quality and innovation among app developers, and increasing prices and reducing choices for consumers.

f. Effects of Market Power

The Subcommittee also examined the effects of market power in digital markets on the free and diverse press, innovation, privacy and data, and other relevant matters summarized below for ease of reference.

As part of this process, the Subcommittee received testimony and submissions showing that the dominance of some online platforms has contributed to the decline of trustworthy sources of news, which is essential to our democracy.[23] In several submissions, news publishers raised concerns about the "significant and growing asymmetry of power" between dominant platforms and news organizations, as well as the effect of this dominance on the production and availability of trustworthy sources of news. Other publishers said that they are "increasingly beholden" to these firms, and in particular, to Google and Facebook.[24] Google and Facebook have an outsized influence over the distribution and monetization of trustworthy sources of news online,[25] undermining the quality and availability of high-quality sources of journalism.[26] This concern is underscored by the COVID-19 pandemic, which has laid bare the importance of preserving a vibrant free press in both local and national markets.

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[23] *Online Platforms and Market Power, Part 1: The Free and Diverse Press: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 1–3 (2019) [hereinafter Free and Diverse Press Hearing] (statement of David Pitofsky, Gen. Counsel, News Corp).

[24] Submission from Source 53 to H. Comm. on the Judiciary, 7 (Oct. 14, 2019) (on file with Comm.) Although Apple News and Apple News Plus are increasingly popular news aggregators, most market participants that the Subcommittee received evidence from during the investigation do not view it as a critical intermediary for online news at this time. Some publishers raised competition concerns about the tying of payment inside Apple's news product. Others, however, did raise concern about Apple News and Apple News Plus, noting that it is "not creating any original journalism itself" and competes "against publishers' news products . . . for subscription revenues." *Id.* at 6.

[25] Submission of Source 52 to H. Comm. on the Judiciary, 12 (Oct. 30, 2019) (on file with Comm.).

[26] Free and Diverse Press Hearing at 3 (statement of David Chavern, Pres. & CEO, News Media Alliance) ("In effect, a couple of dominant tech platforms are acting as regulators of the digital news industry.").

The rise of market power online has also materially weakened innovation and entrepreneurship in the U.S. economy.[27] Some venture capitalists, for example, report that there is an innovation "kill zone" that insulates dominant platforms from competitive pressure simply because investors do not view new entrants as worthwhile investments.[28] Other investors have said that they avoid funding entrepreneurs and other companies that compete directly or indirectly with dominant firms in the digital economy.[29] In an interview with Subcommittee staff, a prominent venture capital investor explained that due to these factors, there is a strong economic incentive for other firms to avoid head-on competition with dominant firms.[30]

Additionally, in the absence of adequate privacy guardrails in the United States, the persistent collection and misuse of consumer data is an indicator of market power online.[31] Online platforms rarely charge consumers a monetary price—products appear to be "free" but are monetized through people's attention or with their data.[32] In the absence of genuine competitive threats, dominant firms offer fewer privacy protections than they otherwise would, and the quality of these services has deteriorated over time. As a result, consumers are forced to either use a service with poor privacy safeguards or forego the service altogether.[33]

Finally, the market power of the dominant platforms risks undermining both political and economic liberties. Subcommittee staff encountered a prevalence of fear among market participants

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[27] *Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary,* 116th Cong. 1 (2019) [hereinafter Innovation and Entrepreneurship Hearing] (statement of Timothy Wu, Julius Silver Prof. of Law, Columbia Law Sch.); *Online Platforms and Market Power, Part 3: The of Role of Data and Privacy in Competition: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 1–3 (2019) [hereinafter Data and Privacy Hearing] (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.).

[28] Raghuram Rajan, Sai Krishna Kamepalli & Luigi Zingales, *Kill Zone* (Becker Friedman Inst. Working Paper No. 2020-19), https://ssrn.com/abstract=3555915.

[29] *See generally* United States Department of Justice Antitrust Division Public Workshop on Venture Capital and Antitrust (Feb. 12, 2020) [hereinafter Venture Capital and Antitrust Workshop], https://www.justice.gov/atr/page/file/1255851/download; CHICAGO BOOTH STIGLER CTR. FOR THE STUDY OF ECON. & STATE, STIGLER CMTE. ON DIG. PLATFORMS 9 (2019) [hereinafter Stigler Report], https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf.

[30] *See* Interview with Source 146 (May 28, 2020).

[31] Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet,* 161 U. PA. L. REV. 1663, 1689 (2013) ("One measure of a platform's market power is the extent to which it can engage in [privacy exploitation] without some benefit to consumers that offsets their reduced privacy and still retain users.").

[32] Data and Privacy Hearing at 3 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.); Data and Privacy Hearing at 4–5 (statement of Tommaso Valletti, Prof. of Econs., Imperial Coll. Bus. Sch.).

[33] DIG. COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION 43 (2019) ("[T]he misuse of consumer data and harm to privacy is arguably an indicator of low quality caused by a lack of competition,") [hereinafter Dig. Competition Expert Panel Report]; Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 88 (2019) ("Consumers effectively face a singular choice—use Facebook and submit to the quality and stipulations of Facebook's product or forgo all use of the only social network.").

that depend on the dominant platforms, many of whom expressed unease that the success of their business and their economic livelihood depend on what they viewed as the platforms' unaccountable and arbitrary power. Additionally, courts and enforcers have found the dominant platforms to engage in recidivism, repeatedly violating laws and court orders. This pattern of behavior raises questions about whether these firms view themselves as above the law, or whether they simply treat lawbreaking as a cost of business. Lastly, the growth in the platforms' market power has coincided with an increase in their influence over the policymaking process. Through a combination of direct lobbying and funding think tanks and academics, the dominant platforms have expanded their sphere of influence, further shaping how they are governed and regulated.

3. Recommendations

As part of the investigation of competition in digital markets, the Subcommittee conducted a thorough examination of the adequacy of current laws and enforcement levels. This included receiving submissions from experts on antitrust and competition policy who were selected on a careful, bipartisan basis to ensure the representation of a diverse range of views on these matters. The Subcommittee also received other submissions from leading experts—including Executive Vice President Margrethe Vestager of the European Commission and Chair Rod Sims of the Australian Competition and Consumer Commission—to inform this inquiry. Most recently, on October 1, 2020, the Subcommittee held an oversight hearing on "Proposals to Strengthen the Antitrust Laws and Restore Competition Online" to examine potential solutions to concerns identified during the investigation to further inform the Report's recommendations.

Based on this oversight activity, Subcommittee Chairman Cicilline requested that staff provide a menu of reforms to Members of the Subcommittee for purposes of potential legislative activity during the remainder of the 116th Congress and thereafter. As he noted in remarks to the American Antitrust Institute in June 2019:

> [I]t is Congress' responsibility to conduct oversight of our antitrust laws and competition system to ensure that they are properly working and to enact changes when they are not. While I do not have any preconceived ideas about what the right answer is, as Chairman of the Antitrust Subcommittee, I intend to carry out that responsibility with the sense of urgency and serious deliberation that it demands.[34]

In response to this request, Subcommittee staff identified a broad set of reforms for further examination by the Members of the Subcommittee for purposes of crafting legislative responses to the findings of this Report. These reforms include proposals to: (1) address anticompetitive conduct in

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[34] Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, Keynote Address at American Antitrust Institute's 20th Annual Policy Conference (June 20, 2019), https://cicilline.house.gov/press-release/cicilline-delivers-keynote-address-american-antitrust-institute%E2%80%99s-20th-annual-policy.

digital markets; (2) strengthen merger and monopolization enforcement; and (3) improve the sound administration of the antitrust laws through other reforms. We intend these recommendations to serve as a complement to vigorous antitrust enforcement. Consistent with the views expressed by Chairman Nadler and Subcommittee Chairman Cicilline in the Foreword to this Report, we view these recommendations as complements, and not substitutes, to forceful antitrust enforcement.

For ease of reference, these recommendations for further examination are summarized below.

a. Restoring Competition in the Digital Economy

- Structural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business;

- Nondiscrimination requirements, prohibiting dominant platforms from engaging in self-preferencing, and requiring them to offer equal terms for equal products and services;

- Interoperability and data portability, requiring dominant platforms to make their services compatible with various networks and to make content and information easily portable between them;

- Presumptive prohibition against future mergers and acquisitions by the dominant platforms;

- Safe harbor for news publishers in order to safeguard a free and diverse press; and

- Prohibitions on abuses of superior bargaining power, proscribing dominant platforms from engaging in contracting practices that derive from their dominant market position, and requirement of due process protections for individuals and businesses dependent on the dominant platforms.

b. Strengthening the Antitrust Laws

- Reasserting the anti-monopoly goals of the antitrust laws and their centrality to ensuring a healthy and vibrant democracy;

- Strengthening Section 7 of the Clayton Act, including through restoring presumptions and bright-line rules, restoring the incipiency standard and protecting nascent competitors, and strengthening the law on vertical mergers;

- Strengthening Section 2 of the Sherman Act, including by introducing a prohibition on abuse of dominance and clarifying prohibitions on monopoly leveraging, predatory pricing, denial of essential facilities, refusals to deal, tying, and anticompetitive self-preferencing and product design; and

- Taking additional measures to strengthen overall enforcement, including through overriding problematic precedents in the case law.

c. Reviving Antitrust Enforcement

- Restoring robust congressional oversight of the antitrust laws and their enforcement;

- Restoring the federal antitrust agencies to full strength, by triggering civil penalties and other relief for "unfair methods of competition" rules, requiring the Federal Trade Commission to engage in regular data collection on concentration, enhancing public transparency and accountability of the agencies, requiring regular merger retrospectives, codifying stricter prohibitions on the revolving door, and increasing the budgets of the FTC and the Antitrust Division; and

- Strengthening private enforcement through elimination of obstacles such as forced arbitration clauses, limits on class action formation, judicially created standards constraining what constitutes an antitrust injury, and unduly high pleading standards.

II. THE INVESTIGATION OF COMPETITION IN DIGITAL MARKETS

A. Requests for Information and Submissions

1. First-Party Requests for Information

On September 13, 2019, the Committee sent bipartisan requests for information (RFIs) to each of the four investigated platforms: Alphabet,[35] Amazon, Apple, and Facebook. For each company, the RFI asked for a comprehensive set of information about each of the company's products and services. In addition, the RFI asked the company to submit communications among high-level executives relating to various potentially anticompetitive acquisitions and conduct. The Committee requested that the platforms respond to the RFIs by October 14, 2019.

[35] In 2015, Google reorganized under a new name and parent company, Alphabet, separated various businesses, and placed Sundar Pichai as chief executive of Google. Larry Page, chief executive of Google, became head of Alphabet with Sergey Brin. *See* Conor Dougherty, *Google to Reorganize as Alphabet to Keep Its Lead as an Innovator*, N.Y. TIMES (Aug. 10, 2015), https://www.nytimes.com/2015/08/11/technology/google-alphabet-restructuring.html.

a. Alphabet

The Committee's RFI to Alphabet, the parent company of Google, asked for information necessary to understand how the company operates and its role in the digital marketplace.[36] For example, in Request A, the RFI asked for detailed financial statements and a description of Alphabet's relevant products and services, including Google Ads, Google Search, YouTube, and Waze. In addition, the RFI asked for information helpful for determining whether Alphabet has monopoly power for any of its products or services, including for each product or service: (i) a list of Alphabet's top ten competitors; and (ii) internal or external analyses of Alphabet's market share relative to its competitors. Request A also asked for copies of documents and information that Alphabet had submitted to any U.S. or international antitrust enforcement agency for antitrust investigations that took place in any of those agencies within the past decade.[37]

Request B asked for all communications from high-level executives, including former CEO Larry Page and current CEO Sundar Pichai, relating to a number of Alphabet's key acquisitions and potentially anticompetitive conduct, most of which have been widely reported in the news.[38] The RFI asked for communications, including, but not limited to, discussions relating to the deal rationale and any competitive threat posed by the acquired company for the following acquisitions: Google/Android in 2005, Google/YouTube in 2006, Google/DoubleClick in 2007, Google/AdMob in 2009, and Google's acquisition of a minority stake in Vevo in 2013. Request B of the Alphabet RFI also requested executive communications relating to certain categories of potential anticompetitive conduct.[39]

In response to this request, Alphabet produced 1,135,398 documents, including strategy memoranda, presentations, and materials produced in prior investigations. Although Google produced a significant amount of material, Subcommittee staff did not view this volume as a proxy for quality.

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[36] Letter from Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary to Larry Page, CEO, Alphabet Inc. (Sept. 13, 2019) [hereinafter Committee Request for Information, Alphabet], https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/alphabet%20inc.%20rfi%20-%20signed%20(003).pdf.

[37] *Id.* at 1–4.

[38] The Alphabet RFI defines the term "Relevant Executives" as Larry Page, Sergey Brin, Ruth Porat, David Drummond, Eric Schmidt, Sundar Pichai, Susan Wojcicki, Philipp Schindler, Prabhakar Raghavan, Thomas Kurian, Hiroshi Lockheimer, Rishi Chandra, Keith Enright, and Kent Walker. *See id.* at 4.

[39] *Id.* at 4–9.

b. Amazon

The Committee's RFI to Amazon asked for similar types of information helpful for understanding the competitive dynamics of the digital marketplace and the company's role.[40] For example, in Request A, the RFI asked for detailed financial statements and a description of Amazon's relevant products and services, including Alexa, Amazon Marketplace, Amazon Prime, and Amazon Web Services (AWS). In addition, the RFI asked for information helpful for determining whether Amazon has monopoly power for any of its products or services, including for each product or service: (i) a list of Amazon's top ten competitors; and (ii) internal or external analyses of Amazon's market share relative to its competitors. Request A also asked for copies of documents and information that Amazon had submitted to any U.S. or international antitrust enforcement agency for antitrust investigations that took place in any of those agencies within the past decade.[41]

Request B asked for all communications from high-level executives, including CEO Jeff Bezos and Jay Carney, Senior Vice President for Global Corporate Affairs, relating to a number of Amazon's key acquisitions and potentially anticompetitive conduct, most of which have been widely reported in the news.[42] The RFI asked for communications, including, but not limited to, discussions relating to the deal rationale and any competitive threat posed by the acquired company for the following acquisitions: Amazon/Audible in 2008, Amazon/Zappos in 2009, Amazon/Quidsi (Diapers.com) in 2010[43], Amazon/Whole Foods in 2017, and Amazon/Ring in 2018. Request B of the Amazon RFI also requested executive communications relating to certain categories of potential anticompetitive conduct.[44]

In response to the Committee's requests, Amazon produced 24,299 documents, including internal emails among the company's senior executives, memoranda, presentations, and other materials.

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[40] Letter from Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary to Jeff Bezos, CEO, Amazon.com, Inc. (Sept. 13, 2019) [hereinafter Committee Request for Information, Amazon], https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/amazon%20rfi%20-%20signed.pdf.

[41] *Id.* at 1–3.

[42] The Amazon RFI defines the term "Relevant Executives" as Jeff Bezos, Jeff Wilke, Andy Jassy, Jeff Blackburn, Dave Limp, Brian Olsavsky, David Zapolsky, and Jay Carney. *See id.* at 3.

[43] Amazon acquired "Quidsi, the e-commerce company that runs Diapers.com" in 2010. Claire Cain Miller, *Amazon Has a Reported Deal to Buy Parent of Diapers.com*, N.Y. TIMES (Nov. 7, 2010), https://www.nytimes.com/2010/11/08/technology/08amazon.html.

[44] Committee Request for Information, Amazon at 3–7.

c. Apple

The Committee's RFI to Apple also asked for information helpful for understanding the company's role in the digital marketplace. For example, in Request A, the RFI asked for detailed financial statements and a description of Apple's relevant products and services, including the iPhone, App Store, and Apple Pay.[45] In addition, the RFI asked for information helpful for determining whether Apple has monopoly power for any of its products or services, including for each product or service: (i) a list of Apple's top ten competitors; and (ii) internal or external analyses of Apple's market share relative to its competitors. Request A also asked for copies of documents and information that Apple had submitted to any U.S. or international antitrust enforcement agency for antitrust investigations that took place in any of those agencies within the past decade.[46]

Request B asked for all communications from high-level executives, including CEO Tim Cook and Eddy Cue, Senior Vice President of Internet Software and Services, relating to potentially anticompetitive conduct, most of which has been widely reported in the news.[47] The RFI asked for communications, including, but not limited to, discussions relating to certain categories of potentially anticompetitive conduct.[48]

In response to the Committee's requests, Apple produced 2,246 documents. These documents include internal communications among the company's senior executives describing governance of the App Store, as well as the company's internal deliberations and strategy responding to recent controversies.

d. Facebook

The Committee's RFI to Facebook also asked for information helpful for understanding how the company operates and its role in the digital marketplace.[49] For example, in Request A, the RFI

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[45] Letter from Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary to Tim Cook, CEO, Apple Inc. (Sept. 13, 2019) [hereinafter Committee Request for Information, Apple], https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/apple%20rfi%20-%20signed.pdf.

[46] *Id.* at 1–3.

[47] The Apple RFI defines the term "Relevant Executives" as Tim Cook, Katherine Adams, Eddy Cue, Philip Schiller, Johny Srouji, Dan Riccio, Jonathan Ive, Craig Frederighi, Luca Maestri, Jeff Williams, Steve Dowling, Tor Myhren, Lucas Maestri, and Jane Horvath. *See id.* at 3.

[48] *Id.* at 3–6.

[49] Letter from Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary to Mark Zuckerberg, CEO, Facebook, Inc. (Sept. 13, 2019) [hereinafter

asked for detailed financial statements and a description of Facebook's relevant products and services, including Facebook, Instagram, and WhatsApp. In addition, the RFI asked for information helpful for determining whether Facebook has monopoly power for any of its products or services, including for each product or service: (i) a list of Facebook's top ten competitors; and (ii) internal or external analyses of Facebook's market share relative to its competitors. Request A also asked for copies of documents and information that Facebook had submitted to any U.S. or international antitrust enforcement agency for antitrust investigations that took place in any of those agencies within the past decade.[50]

Request B asked for all communications from high-level executives, including Founder and CEO Mark Zuckerberg and Sheryl Sandberg, Chief Operating Officer, relating to a number of Facebook's key acquisitions and potentially anticompetitive conduct, most of which have been widely reported in the news.[51] The RFI asked for communications, including, but not limited to, discussions relating to the deal rationale and any competitive threat posed by the acquired company for the following acquisitions: Facebook/Instagram in 2012, Facebook/Onavo in 2013, and Facebook/WhatsApp in 2014. Request B of the Facebook RFI also requested executive communications relating to certain categories of potentially anticompetitive conduct.[52]

In response to the Committee's requests, Facebook produced 41,442 documents, including documents produced in response to prior investigations into Facebook's acquisitions and into whether it had abused its dominance. Facebook also produced 83,804 documents in connection with litigation in an ongoing matter. Among other items, these documents include internal communications among the company's senior executives describing Facebook's acquisition and overall competition strategy. In response to supplemental requests by Subcommittee staff, Facebook produced internal market data over a multi-year period, as well as a memorandum prepared by a senior data scientist and economist at the company related to competition among Facebook's family of products and other social apps.

2. Process for Obtaining Responses to First-Party Requests

After sending the RFIs, Subcommittee staff invested considerable time and resources in making themselves available for calls with the platforms to answer any questions the platforms had about responding to the requests, on a nearly weekly basis from October 2019 through March 2020. On these calls, staff addressed a range of issues, including clarifying the meaning and intent of language in the

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Committee Request for Information, Facebook], https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/facebook%20rfi%20-%20signed.pdf.

[50] *See id.* at 1–2.

[51] The Facebook RFI defines the term "Relevant Executives" as Mark Zuckerberg, Sheryl Sandberg, Jennifer Newstead, Javier Olivan, Chris Cox, Mike Schroepfer, David Wehner, Colin Stretch, Will Cathcart, Adam Mosseri, Stan Chudnovsky, Fidji Simo, Chris Daniels, Erin Egan, and Kevin Martin. *See id.* at 2–3.

[52] *See id.* at 2–5.

request; maintaining the confidentiality of sensitive business information; and, where appropriate, narrowing requests in an effort to balance the Committee's need for relevant information against the platforms' burden of production. Each of the investigated platforms failed to meet the October 14, 2019 deadline, citing various difficulties.

On December 4, 2019, nearly three months after the deadline for submitting the RFI responses, the Committee sent a letter to the platforms' CEOs pointing out their failure to comply. The Committee stated its expectation that the platforms would complete production by December 18, 2019 for Request A and January 2, 2020 for Request B, to avoid the need to invoke other processes and procedures to obtain the requested materials.[53]

After the platforms failed to meet the revised deadlines, in early February 2020, staff asked for the companies' outside counsel to attend in-person meetings to discuss the substantial gaps in production that remained, and to identify ways to address any obstacles the platforms identified to filling those gaps. Despite the Committee's best efforts to address those obstacles—and allowing substantial time for the platforms to navigate delays relating to the COVID-19 pandemic—staff again had to reach out to the platforms regarding the deficiency of their responses. On June 9, 2020, in a final effort to avoid resorting to issuing subpoenas to the platforms to compel the production of documents and information, staff requested that the platforms voluntarily provide information responsive to a reduced list of targeted requests by June 22, 2020.

3. Third-party Requests for Information

As part of the investigation, the Subcommittee collected a large amount of information from market participants, including customers and competitors of Amazon, Apple, Facebook, and Google. Staff also received information and analysis from other third parties, including academics, former antitrust government officials, public interest organizations, and trade associations.

a. Market Participants

In September, the Committee sent a request for information to over 80 market participants. The RFI asked the recipient to voluntarily provide information regarding the state of competition in the digital marketplace for various products and services, including number and identity of market participants, market shares, and barriers to entry. These third-party RFIs also asked for a description of any conduct by Amazon, Apple, Facebook, or Google that raises competition concerns, and the impact of such conduct on the recipient's business. The Committee also sought to gather information through

[53] *See e.g.*, Letter from Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary to Mark Zuckerberg, CEO, Facebook, Inc. (Dec. 4, 2019) (on file with Comm.).

these RFIs regarding broader questions based on the recipient's experience in the digital marketplace, including (i) whether market participants are able to compete on the merits of their goods and services; (ii) the adequacy of antitrust enforcement relating to merger review and anticompetitive conduct; (iii) the adequacy of current antitrust law to address anticompetitive mergers and anticompetitive conduct; and (iv) suggestions for improving enforcement of antitrust law and making changes to antitrust law itself, statutory or otherwise.

On January 7, 2020, the Committee sent a second round of RFIs to 29 market participants. These RFI recipients consisted of additional businesses and individuals that staff had identified during the first half of the investigation as likely to have relevant information and an interest in sharing that information with the Committee. These RFIs asked for similar information to the September RFIs and provided staff with additional valuable information and insights into the functioning and challenges of operating in the digital marketplace.

Unfortunately, some market participants did not respond to substantive inquiries due to fear of economic retaliation. These market participants explained that their business and livelihoods rely on one or more of the digital platforms. One response stated, "Unfortunately, [the CEO] is not able to be more public at this time out of concern for retribution to his business," adding, "I am pretty certain we are not the only ones that are afraid of going public."[54] Another business that ultimately declined to participate in the investigation expressed similar concerns, stating, "We really appreciate you reaching out to us and are certainly considering going on the record with our story. . . . Given how powerful Google is and their past actions, we are also quite frankly worried about retaliation."[55] Stacy Mitchell, Co-Director of the Institute for Local Self-Reliance, similarly testified that many businesses have a fear of speaking out about Amazon, stating, "I spend a lot of time interviewing and talking with independent retailers, manufacturers of all sizes. Many of them are very much afraid of speaking out publicly because they fear retaliation."[56]

b. <u>Antitrust Experts</u>

The Committee's final round of outreach to third parties involved sending letters on March 13, 2020, soliciting insights and analysis from several dozen antitrust experts who were identified on a bipartisan basis and whose submissions represent a diverse range of experience and perspectives. In support of the investigation's objective to assess the adequacy of existing antitrust laws, competition

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[54] Email from Source 685 to Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary (July 11, 2020) (on file with Comm.).

[55] Email from Source 147 to Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary (July 15, 2019) (on file with Comm.).

[56] Innovation and Entrepreneurship Hearing at 250 (statement of Stacy F. Mitchell, Co-Dir., Inst. for Local Self-Reliance).

policies, and current enforcement levels, the Committee invited submissions on three main topics. The first topic covered the adequacy of existing laws—case law and statutes—that prohibit monopolization and monopolistic conduct. The second topic similarly dealt with the adequacy of existing law, but focused on its sufficiency to address anticompetitive mergers and acquisitions, including vertical and conglomerate mergers, serial acquisitions, data acquisitions, and strategic acquisitions of potential competitors. Third, the Committee sought feedback on whether the institutional structure of antitrust enforcement is adequate to promote the robust enforcement of the antitrust laws, including current levels of appropriations to the antitrust agencies, existing agency authorities, and congressional oversight of enforcement.

c. Additional Outreach and Submissions

In addition to sending the RFIs in September and January, Subcommittee staff engaged in extensive outreach to additional third parties based on public reports and non-public information gathered throughout the investigation, suggesting that such entities had relevant information.

Subcommittee staff also received submissions from numerous individuals and businesses throughout the course of the investigation. These submissions came from a wide range of sources and in a variety of forms. For example, an anonymous source sent thumb drives to the Committee's main office in the Rayburn House Office Building. Other examples included former or current employees submitting tips to the Subcommittee's investigation email address, or through the form for anonymous submissions posted on the Subcommittee's investigation website.

4. Antitrust Agencies Requests for Information

As part of the Committee's September 2019 efforts to gather information, the Committee also sent requests for information to the Federal Trade Commission and the Department of Justice. In part, the Committee sought this information to carry out its function as the principal oversight authority for the Department of Justice, including its component agencies, its personnel, and its law enforcement activities.[57] Similarly, the Committee's jurisdiction extends to the FTC's antitrust-related work, and to administrative practice and procedure, including at the FTC.[58] The Committee's RFIs requested documents relating to the agencies' decisions to open or close investigations into potential violations of antitrust law in digital markets, decisions to challenge mergers or conduct in federal district court or in administrative action, and decisions to forego litigation in favor of a settlement agreement.[59] Senior

[57] *Government Oversight*, U.S. HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE, https://judiciary.house.gov/issues/government-oversight/.

[58] RULES OF THE HOUSE OF REPRESENTATIVES, 116th Cong., lst Sess., Rule X, cl. (1)(1)(2) (2019), http://clerk.house.gov/legislative/house-rules.pdf.

[59] Subcommittee staff recognizes that publication of these documents could cause competitive injury to firms that cooperated with prior investigations or in ongoing investigations. Where possible, this Report summarizes or draws conclusions from these sources without reproducing them.

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officials from the FTC and the Antitrust Division also provided several briefings to Members of the Subcommittee and staff in response to the requests of the Subcommittee Chairman and Ranking Member. These briefings served as an opportunity for Members to obtain information and updates about the current state of antitrust law and enforcement in digital markets.

B. Hearings

On June 11, 2019, the Subcommittee held part one of its series of investigation hearings titled "Online Platforms and Market Power, Part 1: The Free and Diverse Press." At this hearing, the Subcommittee heard testimony from the following Majority witnesses: David Chavern, President of the News Media Alliance; Gene Kimmelman, President and CEO of Public Knowledge; Sally Hubbard, Director of Enforcement Strategy at Open Markets Institute (OMI); and Matthew Schruers, Vice President for Law and Policy at Computer and Communications Industry Association (CCIA). The Minority witnesses were David Pitofsky, General Counsel for News Corp; and Kevin Riley, Editor of the *Atlanta-Journal Constitution*.[60]

On July 16, 2019, the Subcommittee held its second hearing, a two-paneled hearing titled "Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship." On the first panel, the Subcommittee heard testimony from the following: Adam Cohen, Director of Economic Policy at Google; Nate Sutton, Associate General Counsel, Competition, at Amazon; Matt Perault, Head of Global Policy Development at Facebook; and Kyle Andeer, Vice President and Corporate Law and Chief Compliance Officer at Apple. On the second panel, the Subcommittee heard testimony from the following Majority witnesses: Timothy Wu, Julius Silver Professor of Law, Science and Technology at Columbia Law School; Fiona Scott Morton, Theodore Nierenberg Professor of Economics at Yale University School of Management; and Stacy Mitchell, Co-Director of the Institute for Local Self-Reliance. On the second panel, the Minority witnesses were Maureen Ohlhausen, Partner at Baker Botts and former Commissioner and Acting Chairwoman of the Federal Trade Commission; Morgan Reed, Executive Director of The App Association; and Carl Szabo, Vice President and General Counsel at NetChoice.[61]

On October 18, 2019, the Subcommittee held its third hearing titled "Online Platforms and Market Power, Part 3: The Role of Data and Privacy in Competition." At this hearing, the Subcommittee heard testimony from the following Majority witnesses: the Honorable Rohit Chopra, Commissioner at the Federal Trade Commission; Dr. Jason Furman, Professor of the Practice of Economic Policy at Harvard Kennedy School and former Chairman of the Council of Economic Advisers (CEA); and Dr. Tommaso Valletti, Professor of Economics and Head of the Department of

[60] Free and Diverse Press Hearing, https://judiciary.house.gov/legislation/hearings/online-platforms-and-market-power-part-1-free-and-diverse-press.

[61] Innovation and Entrepreneurship Hearing, https://judiciary.house.gov/legislation/hearings/online-platforms-and-market-power-part-2-innovation-and-entrepreneurship.

Economics & Public Policy at Imperial College Business School and former Chief Competition Economist of the European Commission's Directorate General for Competition (DG-Comp). The Minority witness at the hearing was Dr. Roslyn Layton, Visiting Scholar at the American Enterprise Institute.[62]

On November 13, 2019, the Subcommittee held its fourth hearing titled "Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies." At this hearing, the Subcommittee heard testimony from the following witnesses: the Honorable Makan Delrahim, Assistant Attorney General for the Antitrust Division at the Department of Justice; and the Honorable Joseph J. Simons, Chairman of the Federal Trade Commission.[63]

On January 17, 2020, the Subcommittee held its fifth hearing titled "Field Hearing: Online Platforms and Market Power, Part 5: Competitors in the Digital Economy." At this hearing, which took place in the congressional district of Subcommittee Vice Chairman Joe Neguse (D-CO) at the University of Colorado School of Law, the Subcommittee heard testimony from the following Majority witnesses: Patrick Spence, Chief Executive Officer of Sonos; David Barnett, Founder and Chief Executive Officer of PopSockets; and Kirsten Daru, Vice President and General Counsel at Tile. The Minority witness at the hearing was David Heinemeier Hansson, Cofounder and Chief Technology Officer of Basecamp.[64]

On July 29, 2020, the Subcommittee held its sixth hearing titled "Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google." At this hearing, the Subcommittee heard testimony from the following witnesses: Jeff Bezos, Chief Executive Officer at Amazon; Sundar Pichai, Chief Executive Officer at Alphabet and Google; Tim Cook, Chief Executive Officer at Apple; and Mark Zuckerberg, Chief Executive Officer at Facebook.[65]

On October 1, 2020, the Subcommittee held its seventh hearing titled "Proposals to Strengthen the Antitrust Laws and Restore Competition Online." The Majority witnesses at the hearing included: William Baer, Visiting Fellow, Brookings Institution, and former Associate Attorney General, Department of Justice; Zephyr Teachout, Associate Professor of Law, Fordham University School of Law; Michael Kades, Director of Markets and Competition Policy, Washington Center for Equitable

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[62] Data and Privacy Hearing, https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2248.

[63] *Online Platforms and Market Power, Part 4: Perspectives of the Antitrust Agencies: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2019) [hereinafter Antitrust Agencies Hearing], https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2287.

[64] *Online Platforms and Market Power, Part 5: Competitors in the Digital Economy: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2020) [hereinafter Competitors Hearing], https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2386.

[65] *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2020) [hereinafter CEO Hearing], https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3113.

Growth; Sabeel Rahman, Associate Professor of Law, Brooklyn Law School and President, Demos; and Sally Hubbard, Director of Enforcement Strategy, Open Markets Institute. The Minority witnesses at the hearing were Christopher Yoo, John H. Chestnut Professor of Law, Communication, and Information Science, University of Pennsylvania Carey Law School; and Rachel Bovard, Senior Director of Policy, Conservative Partnership Institute; and Tad Lipsky, Antonin Scalia Law School, George Mason University.[66]

C. Roundtables

In addition to holding public hearings, the Subcommittee also held a series of bipartisan roundtables for Members of the Subcommittee and staff to provide Members with an opportunity to conduct further oversight of: (1) the state of competition and problems in digital markets; (2) whether dominant firms have engaged in anticompetitive conduct; and (3) if antitrust laws, competition policies, and current enforcement levels are adequate to address these issues. In total, the Subcommittee held twelve briefings and roundtables in Washington, D.C.; four roundtables in Boulder, Colorado; and a virtual roundtable with stakeholders from Rhode Island and elsewhere in New England.[67]

The Subcommittee hosted multiple briefings and roundtables with experts on the digital economy on a range of topics. Experts included state antitrust enforcers, former officials from the Antitrust Division of the Department of Justice and the Federal Trade Commission, former technology industry executives, small business owners, representatives from the news industry, entrepreneurs, antitrust scholars, representatives from civil society, and representatives from libraries.

The briefings and roundtables covered a broad array of topics related to competition in the digital marketplace. These topics included:

- The effect that small algorithm changes by dominant platforms can have on small businesses that rely on the platform;

- The data advantages that dominant online platform companies have over smaller competitors and startups, and how those data advantages can reinforce dominance and serve as a barrier to entry;

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[66] *Online Platforms and Market Power, Part 7: Proposals to Strengthen the Antitrust Laws and Restore Competition Online: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. (2020) [hereinafter Remedies Hearing], https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3367.

[67] This roundtable was originally scheduled to take place physically as a field hearing in Providence, Rhode Island, but was held virtually due to the COVID-19 pandemic.

- The effect of dominant online platform company power and practices on a free and diverse press and the local newsgathering and reporting;

- The impact of dominant online platform company power and practices on investment in startups by venture capital firms;

- The fear of economic retaliation by dominant platforms against smaller companies that raise concerns about anticompetitive conduct in the digital marketplace;

- Other features of digital markets—including, but not limited to, network effects, economies of scale and scope, and barriers to entry—that make them prone to high concentration and monopolization;

- Enforcement of the antitrust laws; and

- Modernization of antitrust statutes and competition policy.

Additionally, the Subcommittee held briefings also allowed representatives from Google, Amazon, Facebook, and Apple to make their own presentations to Subcommittee staff and to answer questions and provide details regarding their companies' business practices, structures, and strategies in the marketplace.

D. Prior Investigations

The Subcommittee's current review of competition in the digital marketplace continues a long oversight tradition. Over many decades, the House Judiciary Committee and its antitrust subcommittee have conducted careful, fact-based inquiries into industrial sectors showing signs of undue concentration and anticompetitive conduct. As a 1951 report from the then-named Subcommittee on the Study of Monopoly Power described its mandate, "It is the province of this subcommittee to investigate factors which tend to eliminate competition, strengthen monopolies, injure small business, or promote undue concentration of economic power; to ascertain the facts, and to make recommendations based on those findings."[68]

The Subcommittee followed the same process "to ascertain the facts" in this investigation. It has included hearings with industry and government witnesses, consultations with subject-matter experts, and a careful—and at times painstaking—review of large volumes of evidence provided by industry participants and regulators. Recognizing that antitrust investigations are by their nature fact-

[68] H. REP. NO. 255, at 2 (1951) (Aluminum: Report of the Subcomm. On Study of Monopoly Power of the H. Comm. on the Judiciary).

dependent, teams of investigators invested significant resources to study the structure of the relevant markets and the important firms in those markets.[69]

The purpose of these exercises was not to supersede the activities of antitrust enforcers such as the Federal Trade Commission (FTC) and the Department of Justice (DOJ), but to compile the Committee's own record about current market conditions; to assess how antitrust laws and principles are being applied in the current business environment; and to determine whether revised laws, or new laws, or better enforcement are needed to protect competition.

While the Committee's investigations were not intended to interfere with the enforcement activities of antitrust enforcers or regulators, they often conducted inquiries into the same sectors and issues that DOJ, the FTC, the Federal Communications Commission (FCC), and other agencies with authority over competition policy or enforcement were also examining. As Members and staff of the Committee charged with the "protection of trade and commerce against unlawful restraints and monopolies,"[70] these investigators exercised their legislative authority to probe any aspect of antitrust that they deemed warranted attention.

These investigations were guided by the principle that "[h]istory has proven that the most conducive environment for innovation and new product availability is a competitive market,"[71] and that a "free competitive economy" is an important American value.[72] It was a value that had been formally embedded in our economy and society by the Sherman Act of 1890, "the peculiarly American charter of economic freedom."[73] In a 1958 report on the airline industry, the then-named Antitrust Subcommittee explained that Americans' social and political freedoms depended on "opportunity for market access and market rivalries in a private-enterprise economy."[74] The "freedom of entry into any industry or field of endeavor," a 1962 Subcommittee report explained, is a cornerstone of U.S. antitrust policy that has "encouraged extensive individual proprietorship . . . and has made our free enterprise system great and strong."[75] A 1992 Committee report recommended restrictions on the monopolistic

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[69] *See, e.g.*, H. REP. NO. 1419, at 2 (1962) (The Ocean Freight Industry: Report of the Antitrust Subcomm. of the H. Comm. on the Judiciary) [hereinafter 1962 Ocean Freight Industry Report] (describing how Subcommittee staff spent more than nine months examining "tens of thousands of documents in the files of over 50 ocean-freight conferences" and other materials).

[70] RULES OF THE HOUSE OF REPRESENTATIVES, 116th Cong., lst Sess., Rule X, cl. (1)(1)(16) (2019), http://clerk.house.gov/legislative/house-rules.pdf.

[71] H. REP. NO. 102-850, at 15 (1992) (Report on Antitrust Reform Act of 1992, H. Comm. on the Judiciary) [hereinafter Antitrust Reform Act of 1992].

[72] H. REP. NO. 1217, at 1 (1951) (The Mobilization Program: Report of the Subcomm. on Study of Monopoly Power of the H. Comm. on the Judiciary) [hereinafter 1951 Mobilization Program Report].

[73] *Id.* at 2.

[74] H. REP. NO. 1328, at 1 (1958) (The Airlines Industry: Report of the Antitrust Subcomm. of the H. Comm. on the Judiciary) [hereinafter 1958 Airlines Industry Report].

[75] 1962 Ocean Freight Industry Report at 394.

Regional Bell Operating Companies (RBOCs) "[f]or the sake of the democratic economic and political values which depend on the preservation of free markets."[76]

In some cases, antitrust investigations exposed antitrust problems that the Committee concluded required attention from regulators. For example, a 1958 Antitrust Subcommittee report on the rapidly growing domestic airline industry exposed the behind-the-scenes anticompetitive campaign that incumbent air carriers and their advocacy group, the Air Transport Association of America (ATA), had been waging to prevent the Civil Aeronautics Board (CAB) from approving market entry by new air carriers (known at the time as "nonskeds").[77] The Committee found the conduct of the ATA so egregious that it recommended an investigation by the DOJ Antitrust Division.[78] As for international air transportation, the report concluded that Pan American's dominance in the market was the "result of its use of devices to foreclose competition in order to secure and maintain control over markets in which it does business," and recommended that the CAB undertake a broad investigation of the company.[79]

In other cases, the Committee investigated matters that were currently under review by antitrust enforcers. In a 1957 report on the broadcast television industry, which was quickly reshaping Americans' consumption of news and entertainment, the then-named Antitrust Subcommittee described the anticompetitive tactics CBS and NBC were using to promote their own content at the expense of independent content producers.[80] According to the report, networks were improperly using their power as vertical distributors of content to extract financial concessions from independent competitors seeking to place their programming on network affiliates.[81] There was also evidence that the networks were using their substantial power with advertisers to unfairly favor their own content.[82] After praising the DOJ Antitrust Division's "alertness to vindicate the competitive dictates of the antitrust laws," the Subcommittee urged the Division to press its investigation into this conduct with "vigor and dispatch."[83]

In the case of the Committee's inquiry into the RBOCs' conduct in the aftermath of the 1984 breakup of AT&T, we concluded that federal courts and regulators were not adequately protecting competition in the telecommunications marketplace and that new legislation was necessary. A 1992

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[76] Antitrust Reform Act of 1992 at 10.

[77] Airlines Industry Report at 268–69.

[78] *Id.* at 272.

[79] *Id.* at 278.

[80] H. REP. NO. 607, at 143 (1957) (The Television Broadcasting Industry: Report of the Antitrust Subcomm. of the Comm. on the Judiciary).

[81] *Id.*

[82] *Id.*

[83] *Id.*

Committee report reviewed the long, troubled history of attempts by DOJ and the FCC[84] to check the monopolistic power of AT&T, culminating in the famous Modified Final Judgment (the "MFJ") that Judge Harold Greene approved in August 1982 to break up the company.[85] But even after the MFJ, the report found, the FCC had failed to prevent the RBOCs from using their local monopolies to commit a number of anticompetitive violations, "many eerily reminiscent of pre-divestiture Bell System abuses."[86] We were also critical of the DOJ's actions to water down the MFJ's procompetitive line-of-business restrictions on the RBOCs. Describing the massive lobbying campaign that the RBOCs were waging to enter the business lines the MFJ had opened up to competitors, we observed, "The thousands upon thousands of competitive enterprises now thriving in information service, telecommunications equipment, and long distance markets face the prospect of their future prosperity being decided by the self-interested designs of a monopoly with 'bottleneck' control over the local telephone exchange on which they all depend."[87] In light of the antitrust agencies' demonstrated failure to protect competition, the Committee approved legislation that would codify the MFJ's line-of-business restrictions into law.[88]

Finally, in these prior investigations, the Committee has not hesitated to recommend that antitrust authorities further investigate suspicious conduct. After examining the conduct of the Air Transport Association of America, the industry group representing the established passenger airline carriers in the 1950s, the Antitrust Subcommittee recommended that the Antitrust Division of the Department of Justice further investigate the "serious antitrust problems" it had identified.[89]

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[84] Antitrust Reform Act of 1992 at 39 ("The FCC, while claiming boldly to be a forum where complaints about monopolistic practices would be received and vigorously pursued had, instead, become a regulatory 'graveyard' for telecommunications competition policy, characterized by inaction and equivocation.").

[85] *Id.* at 45.

[86] *Id.* at 51.

[87] Antitrust Reform Act of 1992 at 10. The report explained that the RBOCs' bottleneck, in antitrust terminology, functioned as an "essential facility," which gave them "an inherent ability and – for activities in which they are engaged themselves – a natural incentive to impede competition in lines of business dependent upon that essential facility." *Id.* at 13.

[88] H.R. 5096 (102nd Cong.); H.R. 3626 (103rd Cong.); *see* H. REP. NO. 103-559, pt. II at 25 (1994) (Report on Antitrust and Communications Reform Act of 1994, H. Comm. on the Judiciary) ("The Judiciary Committee has resolved that the Government not lose its nerve once again and allow an industry born in monopoly to be reborn in monopoly.") The pro-competitive policies proposed in this legislation later became law, in modified form, as part of the Telecommunications Act of 1996. P.L. 104-104, 110 Stat. 56, §§271-6 (codified at 47 U.S.C., §§ 271-76).

[89] Airlines Industry Report at 272.

III. BACKGROUND

A. Overview of Competition in Digital Markets

1. The Role of Competition Online

At a fundamental level, competition has been a key engine of economic activity in the United States,[90] resulting in the "pioneering of entire industries that, in time, come to employ millions and generate trillions."[91] This is especially true in the digital economy. As in other industries, competition in digital markets incentivizes incumbent firms and new entrants to build new technologies and improve business processes.[92] It spurs capital investment and incentivizes firms to improve the quality of their offerings.[93] In its absence, incumbent firms lack the incentive to invest in research and development.[94] This in turn slows the rate of innovation across the industry.[95] Disruptive new products or services are replaced with slow, incremental alterations[96] "designed to protect [incumbent firms'] existing revenue streams."[97] Slowly but surely, venture capitalists lose the incentive to invest in new

[90] Innovation and Entrepreneurship Hearing at 1 (statement of Tim Wu, Julius Silver Prof. of Law, Columbia Univ. School of Law).

[91] *Id.* at 1; Roger McNamee, Cofounder and Managing Dir., Elevation Partners, Remarks at U.S. Dep't of Justice Antitrust Div. Public Workshop on Venture Capital and Antitrust 34 (Feb. 12, 2020), https://www.justice.gov/atr/page/file/1255851/download ("[T]here is a case that antitrust has in fact been a major catalysis of growth in every wave of technology.").

[92] Antitrust Agencies Hearing at 8 (statement of Makan Delrahim, Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div.) ("Competition also promotes improvements and upgrades to the quality and functionality of existing offerings."); Jeffrey A. Rosen, Deputy Att'y Gen., U.S. Dep't of Justice, Speech at the Free State Foundation's 12th Annual Telecom Policy Conference (Mar. 10, 2020), https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-speaks-free-state-foundations-12th-annual-telecom; Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption* 1 (Nat'l Bur. of Econ. Res. Working Paper No. 26005, June 2019), https://www.nber.org/papers/w26005.pdf.

[93] Innovation and Entrepreneurship Hearing at 4 (statement of Maureen K. Ohlhausen, Partner, Baker Botts L.L.P.) ("Antitrust law's focus on protecting the competitive process does not mean that it cannot reach many of the competitive concerns. . . [that] may include price effects, reductions in quality, and impacts on innovation, as well as the ability of a dominant player to acquire and neutralize a nascent competitor."); Innovation and Entrepreneurship Hearing at 2 (statement of Fiona Scott Morton, Theodore Nierenberg Prof. of Econs., Yale Sch. of Mgmt.) ("The harms from insufficient competition appear in prices that are higher than competitive prices, quality that is lower than competitive quality, and less innovation than consumers would benefit from in competitive markets.").

[94] Innovation and Entrepreneurship Hearing at 2 (statement of Fiona Scott Morton, Theodore Nierenberg Prof. of Econs, Yale Sch. of Mgmt.).

[95] *See generally* Jeffrey A. Rosen, Deputy Att'y Gen., U.S. Dep't of Justice, Speech at the Free State Foundation's 12th Annual Telecom Policy Conference (Mar. 10, 2020), https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-speaks-free-state-foundations-12th-annual-telecom. (referencing research by economist Kenneth Arrow.).

[96] Data and Privacy Hearing at 3 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.).

[97] Innovation and Entrepreneurship Hearing at 4 (statement of Tim Wu, Julius Silver Prof. of Law, Columbia Univ. Sch. of Law).

entrants willing to challenge the dominance of incumbent firms through direct competition.[98] What we are left with are so-called "kill zones"— the near-complete absence of competition.

The benefits of robust competition in the digital economy go beyond innovation and productivity. It can also spur firms to compete along other dimensions such as privacy and data protection. As a general matter, inadequate competition not only leads to higher prices and less innovation in many cases, but it can also reduce the quality of goods and services.[99] Given that many digital products do not charge consumers directly for services, these firms often compete on quality.[100] Along these lines, lack of competition can result in eroded privacy and data protection.[101] Growing evidence indicates that a lack of competition goes hand in hand with just such quality degradation.[102]

2. Market Structure

a. Winner-Take-All Markets

Certain features of digital markets—such as network effects, switching costs, the self-reinforcing advantages of data, and increasing returns to scale—make them prone to winner-take-all economics.[103] As a result, many technology markets "tip" in favor of one or two large companies,[104] shifting the "the competitive process from competition *in* the market to competition *for* the market."[105] In turn, high barriers to entry may diminish the ability of new firms to challenge incumbent firms, further undermining the competitive process and protecting

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[98] Innovation and Entrepreneurship Hearing at 2 (statement of Fiona Scott Morton, Theodore Nierenberg Prof. of Econs., Yale Sch. of Mgmt.). *See also* Sai Krishna Kamepalli, Raghuram Rajan & Luigi Zingales, *Kill Zone* (Univ. of Chicago, Becker Friedman Inst. for Econ. Working Paper No. 2020-19, Apr. 2020), https://ssrn.com/abstract=3555915.

[99] Data and Privacy Hearing at 4 (statement of Tommaso Valletti, Prof. of Econs., Imperial Coll. Bus. Sch.) ("Quality, choice, and innovation are also important aspects for competition and for consumer welfare."); Innovation and Entrepreneurship Hearing at 2–4 (statement of Maureen K. Ohlhausen, Partner, Baker Botts L.L.P.).

[100] *Id.* at 3 (statement of Rohit Chopra, Comm'r, Fed. Trade Comm'n) ("These services do have a price, and you are paying for them with your data."); Data and Privacy Hearing at 3 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.) ("Consumers may think they are receiving 'free' products but they are paying a price for these products in a number of ways.").

[101] Innovation and Entrepreneurship Hearing at 4 (statement of Maureen K. Ohlhausen, Partner, Baker Botts L.L.P.); Data and Privacy Hearing at 3–4 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.); 1 (statement of George Slover, Justin Brookman & Jonathan Schwantes) ("[A] dominant platform can disregard the interests of consumers in protecting their privacy, and design their platform to maximize its ability to monitor, monetize, and manipulate our personal interactions as consumers and as citizens.").

[102] Data and Privacy Hearing at 5 (statement of Tommaso Valletti, Prof. of Econs., Imperial Coll. Bus. Sch.).

[103] *Id.* at 2 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.) Other anticompetitive practices in digital markets—such as product design, self-preferencing, and anti-competitive contracting, among others—may also contribute to barriers that impede entry by rivals or new firms. While these issues are also present in other markets, they are much more pronounced in digital markets.

[104] *Id.*

[105] Stigler Report at 29, 35.

the dominance of existing firms.[106] As the United Kingdom's Competition and Markets Authority explains:

> [I]f potential competitors face substantial barriers to entry and expansion, such that the market is no longer properly contestable, then a high market share can translate into market power, giving the platform the opportunity to increase prices, reduce quality or leverage market power to undermine competition in potentially competitive markets and deny innovative rivals the chance to bring new services to market.[107]

b. Market Concentration

Consistent with winner-take-all dynamics, the digital economy is highly concentrated.[108] A number of key markets online—such as social media, general online search, and online advertising—are dominated by just one or two firms.[109] In some instances, this concentration is the result of a high volume of acquisitions by the dominant digital platforms. Together, the largest technology firms have acquired hundreds of companies in the last ten years.[110] Antitrust enforcers in the United States did not block any of these transactions,[111] many of which eliminated actual or potential competitors.[112] In some instances these acquisitions enabled the dominant firm to neutralize a competitive threat; in other instances, the dominant firm shut down or discontinued the underlying product entirely—transactions aptly described as "killer acquisitions."[113]

[106] Data and Privacy Hearing at 2–3 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.).

[107] COMPETITION & MKTS. AUTH., ONLINE PLATFORMS AND DIGITAL ADVERTISING, MARKET STUDY FINAL REPORT 10–11 (2020) [hereinafter Competition & Mkts. Auth. Report].

[108] Data and Privacy Hearing at 1 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.).

[109] *Id.* at 2; Innovation and Entrepreneurship Hearing at 3 (statement of Tim Wu, Julius Silver Prof. of Law, Columbia Univ. Sch.of Law).

[110] Tim Wu & Stuart A. Thompson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html; *see "Visualizing Tech Giants' Billion-Dollar Acquisitions,"* CB INSIGHTS (May 5, 2020) https://perma.cc/KJD9-HT3Z.

[111] Although several transactions, including Google's acquisition of ITA in 2010, were subject to settlements, U.S. antitrust enforcers did not attempt to prevent the consummation of these transactions.

[112] Tim Wu & Stuart A. Thompson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html; Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 739–40 (2018), https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf.

[113] Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions* 1 (Yale Sch. of Mgmt. Working Paper, 2020), https://ssrn.com/abstract=3241707 (describing the practice whereby "an incumbent firm may acquire an innovative target and terminate the development of the target's innovations to preempt future competition"). *See also* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. (forthcoming 2020) (manuscript at 2), https://perma.cc/62HH-34ZL ("A nascent competitor is a firm whose prospective innovation represents a serious future threat to an incumbent.").

Evidence also suggests that the venture capital industry, which plays a critical role in funding innovative startups, contributes to market consolidation by encouraging startups to exit via a sale to an incumbent firm.[114] As initial public offerings (IPOs) have become more expensive and time-consuming in recent decades, venture capitalists have shown a preference for realizing their investments through acquisitions rather than through public markets.[115]

c. The Role of Online Platforms as Gatekeepers

As Amazon, Apple, Facebook, and Google have captured control over key channels of distribution, they have come to function as gatekeepers. A large swath of businesses across the U.S. economy now depend on these gatekeepers to access users and markets. In interviews with Subcommittee staff, numerous businesses described how dominant platforms exploit this gatekeeper power to dictate terms and extract concessions that third parties would not consent to in a competitive market.[116] According to these companies, these types of concessions and demands carry significant economic harm but are "the cost of doing business" given the lack of options.

Their role as gatekeepers also gives the dominant platforms outsized power to control the fates of other businesses. Reflecting this fact, several major publicly owned firms that rely on the dominant platforms have noted in investor statements that this dependent relationship creates an inherent risk to their businesses.[117] For example, Lyft, a ride-sharing company, has cited its use of Amazon's cloud services and Google Maps as a potential risk to its business model.[118] As Lyft stated in a filing, "Some of our competitors or technology partners may take actions which disrupt the interoperability of our platform with their own products or services."[119] Pinterest, a photo-sharing service, likewise noted in a financial filing that changes to Google's search algorithm may harm Pinterest. As it noted, Pinterest's "ability to maintain and increase the number of visitors directed to our service from search engines is not within our control. Search engines, such as Google, may modify their search algorithms and policies or enforce those policies in ways that are detrimental to us."[120] In submissions and interviews with Subcommittee staff, many companies reiterated the general concern that a single act or decision by one of the dominant platforms could wreck their businesses.

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[114] Mark Lemley & Andrew McCreary, *Exit Strategy* at 24–45 (Stanford Law & Econs. Olin Working Paper No. 542, 2020), https://ssrn.com/abstract=3506919.

[115] *Id.*

[116] *See infra* Section V.

[117] Gerrit De Vynck, *The Power of Google and Amazon Looms Over Tech IPOs*, BLOOMBERG (July 1, 2019), https://www.bloomberg.com/news/articles/2019-07-01/google-s-and-amazon-s-power-looms-over-procession-of-tech-ipos (noting that 17 of 22 initial public offerings by technology companies cited online platforms as competitors or risks to their businesses).

[118] *Id.*

[119] *Id.*

[120] *Id.*

Since the dominant platforms in many cases have also integrated into adjacent lines of business, these firms operate both as key intermediaries for third-party companies as well as direct competitors to them. Numerous entrepreneurs, small businesses, and major companies told Subcommittee staff that the dominant platforms' dual role raises significant competition concerns.[121] In recent years, significant reporting has documented how the dominant platforms can exploit this dual role, through data exploitation,[122] self-preferencing,[123] appropriation of key technologies,[124] and abrupt changes to a platform's policies.[125] The Subcommittee's investigation uncovered numerous examples of this exploitative conduct, suggesting that these are increasingly systemic, rather than isolated, business practices.

3. Barriers to Entry

a. Network Effects

Digital markets tend to be characterized by strong network effects, making them prone to concentration and monopolization.[126] There are two types of network effects: direct and indirect. In markets with direct network effects, the more people who use a product or service, the more valuable that product or service becomes to other users.[127] By contrast, indirect network effects arise when greater use of a product or service forms a new type of standard and increases the incentive for third parties to invest in developing compatible technologies, which in turn reinforces the popularity of the original product or service with users.[128]

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[121] *See infra* Section V.

[122] *See* Press Release, Eur. Comm'n, Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon (July 17, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291 ("Based on the Commission's preliminary fact-finding, Amazon appears to use competitively sensitive information – about marketplace sellers, their products and transactions on the marketplace.").

[123] Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, WALL ST. J. (July 23, 2019), https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221.

[124] Jack Nicas & Daisuke Wakabayashi, *Sonos, Squeezed by the Tech Giants, Sues Google*, N.Y. TIMES (Jan. 7, 2020), https://www.nytimes.com/2020/01/07/technology/sonos-sues-google.html.

[125] Reed Albergotti, *Apple says recent changes to operating system improve user privacy, but some lawmakers see them as an effort to edge out its rivals*, WASH. POST (Nov. 26, 2019), https://www.washingtonpost.com/technology/2019/11/26/apple-emphasizes-user-privacy-lawmakers-see-it-an-effort-edge-out-its-rivals/; Jason Del Rey, *An Amazon revolt could be brewing as the tech giant exerts more control over brands*, Vox: RECODE (Nov. 29, 2018), https://www.vox.com/2018/11/29/18023132/amazon-brand-policy-changes-marketplace-control-one-vendor.

[126] JAY SHAMBAUGH, RYAN NUNN, AUDREY BREITWISER & PATRICK LIU, BROOKINGS INST., THE STATE OF COMPETITION AND DYNAMISM: FACTS ABOUT CONCENTRATION, START-UPS, AND RELATED POLICIES, 10 (June 2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_THP_20180611_CompetitionFacts_20180611.pdf.

[127] *See* Luigi Zingales & Guy Rolnik, *A Way To Own Your Social-Media Data*, N.Y. TIMES (June 30, 2017), https://www.nytimes.com/2017/06/30/opinion/social-data-google-facebook-europe.html.

[128] MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY 163 (2016).

Online platforms display strong network effects because they connect disparate market segments. For example, online commerce platforms like Amazon connect buyers and sellers. Just as with social networks, the value of Amazon Marketplace increases as more users—both sellers and buyers—engage with the platform.[129] Similarly, the value of online platforms that facilitate advertising, such as Google, increases with the number of users, as advertisers gain access to a larger consumer base and therefore to a larger trove of consumer data.[130]

Similarly, social networks like Facebook exhibit powerful direct network effects because they become more valuable as more users engage with the network—no person wants to be on a social network without other users.[131] Meanwhile, once a firm captures a network it can become extremely difficult to dislodge or replace. As Mark Zuckerberg explained to then-CFO David Ebersman the benefits that would accrue to Facebook from acquiring Instagram:

> [T]here are network effects around social products and a finite number of different social mechanics to invent. Once someone wins at a specific mechanic, it's difficult for others to supplant them without doing something different. It's possible someone beats Instagram by building something that is better to the point that they get network migration, but this is harder as long as Instagram keeps running as a product.[132]

Strong network effects serve as a powerful barrier to entry for new firms to enter a market and displace the incumbent.[133] When combined with other entry barriers such as restrictions on consumers or businesses easily switching services, network effects all but ensure not just market concentration but durable market power.[134]

b. Switching Costs

Switching costs present another barrier for potential market entrants. In many cases, large technology firms can maintain market power in part because it is not easy for users to switch away from the incumbent's technology. A market exhibits "lock-in" when switching costs are sufficiently high that users stay with an incumbent firm rather than switch to a firm whose product or service they

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[129] *Id.*

[130] *Id.*

[131] Stigler Report at 38.

[132] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00063222 (Feb. 27, 2012), https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf.

[133] *See* Stigler Report at 40.

[134] *See* Dig. Competition Expert Panel Report at 35.

would prefer.[135] Over time, lock-in tends to reduce competition, deter market entry, and may even worsen data privacy.[136]

High switching costs are a central feature of digital search and social media platforms, such as Google and Facebook, where users contribute data to the platform but may not be able to migrate that data to a competing platform. For example, a user may upload a variety of data to Facebook, including photos and personal information, but may not be able to easily download that data and move it to another social media site; instead, the user would have to start from scratch, re-uploading her photos and re-entering her personal information to the new platform.[137] An online seller who has generated hundreds of product reviews and ratings on Amazon may face a similar challenge when considering migrating to a different platform. Other significant factors that contribute to switching costs in digital markets include anticompetitive contracting terms, default settings, product design that favor dominant platforms.[138]

c. Data

The accumulation of data can serve as another powerful barrier to entry for firms in the digital economy. Data allows companies to target advertising with scalpel-like precision, improve services and products through a better understanding of user engagement and preferences, and more quickly identify and exploit new business opportunities.[139]

Much like a network effect, data-rich accumulation is self-reinforcing. Companies with superior access to data can use that data to better target users or improve product quality, drawing more users and, in turn, generating more data—an advantageous feedback loop.[140] In short, new users and greater engagement bring in more data, which enables firms to improve user experiences and develop new products—in turn capturing more data.[141] While data is non-rivalrous—meaning that one party's

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[135] MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY 159 (2016).

[136] *Id.*

[137] Data and Privacy Hearing at 3 (statement of Dina Srinivasan, Fellow, Yale Thurman Arnold Project).

[138] Dig. Competition Expert Panel Report at 36. Unlike the European Union, which provides internet users with a right to data portability, the U.S. does not have any law requiring online platforms to make data portable. Platforms like Google and Facebook are therefore largely uninhibited in imposing switching costs for users, hurting competition in the process. Allen St. John, *Europe's GDPR Brings Data Portability to U.S. Consumers*, CONSUMER. REPS. (May 25, 2018), https://www.consumerreports.org/privacy/gdpr-brings-data-portability-to-us-consumers; *see* Chris Dixon, *The Interoperability of Social Networks*, BUS. INSIDER (Nov. 10, 2010), https://www.businessinsider.com/the-interoperability-of-social-networks-2011-2; Josh Constine, *Friend Portability Is the Must-Have Facebook Regulation*, TECHCRUNCH (May 12, 2019), https://technologycrunch.com/2019/05/12/friends-wherever.

[139] Dig. Competition Expert Panel Report at 23.

[140] Maurice E. Stucke, *Should We Be Concerned About Data-opolies?,* 2 GEO. L. TECH. REV. 275, 323 (2018) (discussing the dynamics of data-driven network effects).

[141] MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY 36–50 (2016); PATRICK BARWISE & LEO WATKINS, *The Evolution of Digital Dominance: How and Why We Got to GAFA*, *in* DIGITAL DOMINANT: THE POWER

use does not prevent or diminish use by another—firms may nonetheless exclude rivals from using their data through technical restrictions and legal contracts.[142] These exclusionary tactics can close off markets and shield incumbents from competition.[143]

In addition to serving as a barrier to entry, superior access to data can enable and exacerbate anticompetitive conduct in digital markets. This is particularly true when a dominant platform operates as both a marketplace for third-party goods as well as a seller of its own products on that same marketplace.[144] Through this dual role, a dominant platform can mine commercially valuable information from third-party businesses to benefit its own competing products.[145] Additionally, a dominant platform can use its market power to extract more data from users, undermining their privacy.[146]

Persistent data collection can also create information asymmetries and grant firms access to non-public information that gives them a significant competitive edge. These insights include information on user behavior as well as on broader usage trends that enable the dominant platforms to track nascent competitive threats. In an interview with Subcommittee staff, a senior executive at a social media company referred to this ability as akin to having "a spy camera on the production floor" of a competitive threat.[147] Roger McNamee, the Co-Founder of Elevation Partners, has noted that the dominant platforms' role as digital infrastructure gives them both leverage and insights that other competitors lack:

> Essentially, the interplay of Google's dominant position in … infrastructure elements [such as] ad tech infrastructure, Chrome browser, [and Nest] … collectively provide leverage over other market participants, which include not just startups, but also advertisers, and other would-be competitors. And the key thing is, it's not just about Google's infrastructure. When you add in Gmail, Search, Maps, apps, and all the other things that Google does so well … [t]hey provide further levels of user lock-in—further protective modes that really limit the opportunity of competitors and even, frankly,

OF GOOGLE, AMAZON, FACEBOOK, AND APPLE 28–29 (2018), http://www.lse.ac.uk/law/Assets/Documents/orla-lynskey/orla-3.pdf.

[142] MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY 23–34 (2016).

[143] *Id.* at 34 (2016).

[144] JACQUES CRÉMER, YVES-ALEXANDRE DE MONJOYE & HEIKE SCWHEITZER, EUR. COMM'N, COMPETITION POLICY FOR THE DIGITAL ERA 66–67 (2019) [hereinafter Eur. Comm'n Competition Report].

[145] *Id.* at 66.

[146] *See* Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 70 (2019); Data and Privacy Hearing at 1 (statement of Dina Srinivasan, Fellow, Yale Thurman Arnold Project).

[147] Interview with Source 247 (June 4, 2020).

suppliers and advertisers, to do the things that they should be able to do in a freely competitive economy.[148]

This significant data advantage also enables dominant platforms to identify and acquire rivals early in their lifecycle. Leading economists and antitrust experts have expressed concern that serial acquisitions of nascent competitors by large technology firms have stifled competition and innovation.[149] This acquisition strategy exploits dominant firms' information advantages in order to acquire rapidly growing companies just before those companies become true threats.[150] Lacking access to this same information or failing to appreciate its significance, enforcers may fail to identify these acquisitions as anticompetitive. This is more likely when the dominant platform buys a nascent threat before it has fully developed into a rival.

In a briefing before Members of the Subcommittee, Jonathan Sallet, former Deputy Assistant Attorney General at the Antitrust Division, explained that data-driven acquisitions of nascent or potential rivals can significantly undermine competition while systematically evading antitrust scrutiny.[151] One reason is that upstart competitors are often data-rich but cash-poor, a combination that is unlikely under a price-centric framework to trigger antitrust scrutiny if the acquisition is priced below the relevant threshold for merger review.[152] For example, had Microsoft sought to exploit its monopoly power in the market for personal computer operating systems by *acquiring* Netscape—rather than by foreclosing it—it is unlikely that antitrust enforcers would have taken action. He noted that this type of acquisition can tip the market in favor of a dominant firm, having the same ultimate effect as monopolistic conduct but escaping the antitrust enforcement that monopolistic conduct has triggered in the past.[153]

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148 Roger McNamee, Co-Founder and Managing Dir., Elevation Partners, Remarks at U.S. Dep't of Justice Antitrust Div. Public Workshop on Venture Capital and Antitrust 30 (Feb. 12, 2020), https://www.justice.gov/atr/page/file/1255851/download.

149 *See, e.g.*, Stigler Report at 74, 87.

150 *See* Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, 2 GEO. L. TECH. REV. 275, 309 (2018) (discussing the growing concern with "kill zone" tactics and the chilling effect on "entrepreneurism and autonomy").

151 Briefing by Jonathan Sallet, Deputy Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div. (July 11, 2020).

152 Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions* at 53 (Yale Sch. of Mgmt. Working Paper, Apr. 2020), https://ssrn.com/abstract=3241707 (finding that killer acquisitions "routinely avoid regulatory scrutiny" because they "disproportionately occur just below [HSR] thresholds for antitrust scrutiny").

153 Jonathan Sallet, *Competitive Edge: Five Building Blocks For Antitrust Success: The Forthcoming FTC Competition Report*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 1, 2019), https://equitablegrowth.org/competitive-edge-five-building-blocks-for-antitrust-success-the-forthcoming-ftc-competition-report/.

d. Economies of Scale and Scope

Increasing returns to scale are another feature of technology markets that make them prone to tip towards concentration and monopolization.[154] In markets with increasing returns to scale, as sales increase, average unit cost decreases.[155] Because entry into these markets requires significant up-front costs, the market favors firms that are already large, making it difficult for new firms to enter the market and challenge large incumbents.[156]

Likewise, a dominant firm that enjoys economies of scope can extend its reach across adjacent markets through an expansive ecosystem of its own products while incurring relatively low cost.[157] For example, if a firm has sufficient technical expertise or access to consumer data, the cost of applying this resource into a new market is relatively low.

Businesses that specialize in providing information, such as Google, frequently benefit from increasing returns to scale.[158] These businesses require high upfront fixed costs, but then may scale with relatively low increases in cost. For example, "Google can update Google Calendar for 100 million users with similar fixed expenses as would be needed for only a fraction of such users."[159] Facebook is another company that benefits from increasing returns to scale.[160] Although building the Facebook platform required a large upfront investment, the platform was able to grow exponentially with relatively little increase in costs. With the benefit of increasing returns to scale, Facebook was able to grow from one million users in 2004, the year of its founding, to more than 350 million users in only five years.[161]

Recent economic evidence indicates that economies of scale achieved through data collection allow platforms to get more out of consumers than consumers get out of platforms.[162] In exchange for "free" services, users provide valuable *social* data—information that may also shed light on other people's behavior—in addition to their own *personal* information. For instance, a person's location

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[154] Innovation and Entrepreneurship Hearing at 81 (statement of Fiona Scott Morton, Theodore Nierenberg Prof. of Econs., Yale Sch. of Mgmt.); Dig. Competition Expert Panel Report at 32; Stigler Report at 13; *see also* JAY SHAMBAUGH, RYAN NUNN, AUDREY BREITWIESER & PATRICK LIU, THE BROOKINGS INST., THE STATE OF COMPETITION AND DYNAMISM: FACTS ABOUT CONCENTRATION, START-UPS, AND RELATED POLICIES 10 (June 2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_THP_20180611_CompetitionFacts_20180611.pdf

[155] Stigler Report at 36.

[156] Dig. Competition Expert Panel Report at 32.

[157] *Id.*

[158] Stigler Report at 37.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 36–37.

[162] *See generally* Dirk Bergemann, Alessandro Bonatti & Tan Gan, *The Economics of Social Data* (Cowles Foundation Discussion Paper No. 2203R, Sept. 2019), https://ssrn.com/abstract=3459796.

history using Google Maps reveals valuable and sensitive information about others as well—such as traffic patterns and other data. According to Professors Dirk Bergemann, Alessandro Bonatti, and Tan Gan, the creation of this "data externality" means that, for firms like Google, Amazon, and Facebook, "the cost of acquiring … individual data can be substantially below the value of the information to the platform."[163] In other words, notwithstanding claims that services such as Google's Search or Maps products or Facebook are "free" or have immeasurable economic value to consumers,[164] the social data gathered through these services may exceed their economic value to consumers.

B. Effects of Platform Market Power

1. Innovation and Entrepreneurship

Competition is a critical source of innovation, business dynamism, entrepreneurship, and the "launching of new industries."[165] Vigorously contested markets have been a critical competitive asset for the United States over the past century.[166] While large firms with significant resources may invest in research and development for new products and services, competition forces companies to "run faster" in order to offer improved products and services.[167] Without competitive pressure, some level of innovation may still occur, but at a slower, iterative pace than would be present under competitive market conditions.[168]

In recent decades, however, there has been a sharp decline in new business formation as well as early-stage startup funding.[169] The number of new technology firms in the digital economy has declined,[170] while the entrepreneurship rate—the share of startups and young firms in the industry as a

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[163] *Id.* at 4.

[164] *See, e.g.*, Erik Brynjolfsson & Avinash Collis, *How Should We Measure the Digital Economy?*, HARV. BUS. REV. (Nov.–Dec. 2019), https://hbr.org/2019/11/how-should-we-measure-the-digital-economy.

[165] Innovation and Entrepreneurship Hearing at 1 (statement of Tim Wu, Julius Silver Prof. of Law, Columbia Univ. Sch. of Law).

[166] *Id.*

[167] Stigler Report at 74.

[168] Innovation and Entrepreneurship Hearing at 1 (statement of Tim Wu, Julius Silver Prof. of Law, Columbia Univ. Sch. of Law).

[169] This is trend is also present in the broader U.S. economy as well. *See, e.g.*, Ufuk Akcigit & Sina T. Ates, *Knowledge in the Hands of the Best, Not the Rest: The Decline of U.S. Business Dynamism*, VOXEU (July 4, 2019), https://voxeu.org/article/decline-us-business-dynamism.

[170] IAN HATHWAY, EWING MARION KAUFFMAN FOUND., TECH STARTS: HIGH-TECHNOLOGY BUSINESS FORMATION AND JOB CREATION IN THE UNITED STATES 5 (2013), https://www.kauffman.org/-/media/kauffman_org/research-reports-and-covers/2013/08/bdstechnologystartsreport.pdf.

whole—has also fallen significantly in this market.[171] Unsurprisingly, there has also been a sharp reduction in early-stage funding for technology startups.[172]

The rates of entrepreneurship and job creation have also declined over this period. The entrepreneurship rate—defined as the "share of startups and young firms" in the industry as a whole—fell from 60% in 1982 to a low of 38% as of 2011.[173] As entry slows, the average age of technology firms has skewed older.[174] Job creation in the high-technology sector has likewise slowed considerably.[175] In 2000, the job creation rate in the high-technology sector was approaching 20% year-over-year. Within a decade, the rate had halved to about 10%.[176] Although the job creation rate in the high-technology sector has fallen substantially since the early 2000s, the job destruction rate in 2011 was roughly unchanged from 2000.[177] As a result, in 2011 the rate of job destruction in the high-technology sector was higher than the rate of job creation, a reversal from the year 2000, when the job-creation rate far outpaced the job-destruction rate.[178]

In line with this trend, there is mounting evidence that the dominance of online platforms has materially weakened innovation and entrepreneurship in the U.S. economy.[179] Some venture capitalists, for example, report that they avoid funding entrepreneurs and other companies that compete directly with dominant firms in the digital economy.[180]

Often referred to as an innovation "kill zone," this trend may insulate powerful incumbent firms from competitive pressure simply because venture capitalists do not view new entrants as good

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[171] *Id.*

[172] The number of technology startup financings fell from above 10,000 startup financings in 2015 to just above 6,000 in 2018. In 2014, startups closed 4,255 deals in which they raised seed money from investors. By 2018, however, that figure had dropped by nearly a half, to 2,206. Gené Teare, *Decade in Review: Trends in Seed- and Early-Stage Funding*, TECHCRUNCH (Mar. 13, 2019), https://technologycrunch.com/2019/03/16/decade-in-review-trends-in-seed-and-early-stage-funding. *See also American Technology Giants Are Making Life Tough for Startups*, THE ECONOMIST (June 2, 2018), https://www.economist.com/business/2018/06/02/american-technology-giants-are-making-life-tough-for-startups.

[173] John Haltiwanger, et al., *Declining Business Dynamism in the U.S. High-Technology Sector* at 8, EWING MARION KAUFFMAN FOUND. (Feb. 2014), https://www.kauffman.org/-/media/kauffman_org/research-reports-and-covers/2014/02/declining_business_dynamism_in_us_high_technology_sector.pdf.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 4.

[177] *Id.*at 5.

[178] *Id*. at 4.

[179] Innovation and Entrepreneurship Hearing at 1 (statement of Tim Wu, Julius Silver Prof. of Law, Columbia Univ. School of Law); Data and Privacy Hearing at 1–3 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.).

[180] *See generally* Venture Capital and Antitrust Workshop; Stigler Report at 9.

investments.[181] Albert Wenger, the managing partner of Union Square Ventures, commented that the "scale of these companies and their impact on what can be funded, and what can succeed, is massive."[182] Paul Arnold, an early-stage investor and founder of Switch Ventures, commented at the Justice Department's recent workshop on the intersection between venture capital and antitrust law that he considers markets dominated by large platforms to be kill zones.[183] He explained:

> [T]here's an incredibly, concentrated market share because of the economies of scale or because of network effects, it's a really hard barrier to overcome. And sometimes there's an answer and often, that will kill things. And I think that that's my view, that's my, sort of, lived experience as a venture investor, but I think it's a common view of a lot of venture investors.[184]

In the same vein, Mr. Arnold said in a submission to the Subcommittee that:

> Venture capitalists are less likely to fund startups that compete against monopolies' core products … As a startup investor, I see this often. For example, I will meet yet another founder who wants to disrupt Microsoft's LinkedIn. They will have a clever plan to build a better professional social network. I always pass on the investment. It is nearly impossible to overcome the monopoly LinkedIn enjoys. It is but one example of an innovation kill zone.[185]

For example, the entrenched power of firms with weak privacy protections has created a kill zone around the market for products that enhance privacy online.[186] To the extent that a firm successfully offers a service to give people tools to control their privacy, "Google or Facebook are going to want to pull that back as fast as they possibly can. They don't want you aggressively limiting their extremely valuable information collection."[187]

Other prominent venture capitalists, such as Roger McNamee, the Co-Founder of Elevation Partners, have commented that these trends harm more than just startups. The advantages of dominant

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[181] Raghuram Rajan, Sai Krishna Kamepalli & Luigi Zingales, *Kill Zone* (Becker Friedman Institute Working Paper No. 2020-19, 2020), https://ssrn.com/abstract=3555915.

[182] Asher Schechter, *Google and Facebook's "Kill Zone": "We've Taken the Focus Off of Rewarding Genius and Innovation to Rewarding Capital and Scale,"* PROMARKET (May 25, 2018), https://promarket.org/2018/05/25/google-facebooks-kill-zone-weve-taken-focus-off-rewarding-genius-innovation-rewarding-capital-scale/.

[183] Venture Capital and Antitrust Workshop Transcript at 24 (statement of Paul Arnold, Founder & Partner, Switch Partners).

[184] *Id.*

[185] Submission from Paul Arnold, General Partner, Switch Ventures, to H. Comm. on the Judiciary, 2 (Sept. 3, 2020) (on file with Comm.).

[186] Venture Capital and Antitrust Workshop Transcript at 24 (Paul Arnold, Founder & Partner, Switch Partners).

[187] *Id.*

firms online—access to competitively significant sources of data, network effects, intellectual property, and excess capital—are "a barrier to a wide range of activities, not just startups, but actually a lot of other market participants."[188]

Merger activity may be another contributor to reduced venture capital investment of startups. In a recent study, several leading economists and researchers at the University of Chicago—Raghuram G. Rajan, Luigi Zingales, and Sai Krishna Kamepalli—found that major acquisitions by larger firms in sectors of the digital economy led to significantly less investment in startups in this same sector.[189] As they note, in the wake of an acquisition by Facebook or Google, investments in startups in the same space "drop by over 40% and the number of deals falls by over 20% in the three years following an acquisition."[190]

The threat of entry from a large platform has had significant effects on other firms' incentives to innovate,[191] while the actual entry of the larger online platform can result in less innovation and an additional increase in prices.[192] During the investigation, Subcommittee staff interviewed a prominent venture capital investor in the cloud marketplace who explained that this power imbalance creates a strong economic incentive for other firms to avoid head-on competition. As he noted:

> I think of Amazon as the sun. It is useful but also dangerous. If you're far enough away you can bask. If you get too close you'll get incinerated. So, you have to be far enough from Amazon and be doing something that they wouldn't do. If you're a net consumer of Amazon's infrastructure, like Uber, then you're okay. As long as Amazon doesn't want to get into ridesharing. But it's hard to predict what Amazon wants to get into. If they were going to stop at retail and computing, you're safe. But you can't know.[193]

As discussed in this Report, other behavior by dominant firms—such as cloning the products of new entrants—may also undermine the likelihood that new entrants will be able to compete directly or that early adopters will switch to a new entrant's product, lowering the valuation of these companies as well as their profitability.[194]

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188 *Id.* at 29 (statement of Roger McNamee, Cofounder & Managing Dir., Elevation Partners).

189 Raghuram Rajan, Sai Krishna Kamepalli & Luigi Zingales, *Kill Zone* 5 (Becker Friedman Inst.Working Paper No. 2020-19, 2020), https://ssrn.com/abstract=3555915.

190 *Id.*

191 *See* Wen Wen & Feng Zhu, *Threat of Platform-Owner Entry and Complementor Responses: Evidence from the Mobile App Market*, 40 STRATEGIC MGMT. J. 1336 (2019); Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 STRATEGIC MGMT. J. 2618 (2018).

192 *Id.*

193 Interview with Source 146 (May 28, 2020).

194 Raghuram Rajan, Sai Krishna Kamepalli & Luigi Zingales, *Kill Zone* 5 (Becker Friedman Inst. Working Paper No. 2020-19, 2020), https://ssrn.com/abstract=3555915.

In July 2019, the Subcommittee held a hearing to examine the effects of market power on innovation and entrepreneurship. There, a panel of experts noted that the lack of competitive pressure in the U.S. economy has reduced innovation and business formation, while also allowing dominant firms to control innovation.[195] Professor Tim Wu of Columbia Law School, a pioneer in internet policy, said that there is:

> [N]o question as to whether there were barriers to entry and whether the tech economies have, in fact, become a very difficult place for people to get started . . . the decline in the number of startups, almost unthinkable in the United States, which has always had a comparative advantage in being the place where startups will get their start.[196]

Professor Fiona Scott Morton of the Yale University School of Management reinforced this concept in her testimony, noting that insufficient competition has given dominant firms the ability to channel innovation in the direction they prefer "rather than being creatively spread across directions chosen by entrants."[197]

In addition to innovation harms in the digital marketplace, Stacy Mitchell, the Co-Director of the Institute for Local Self Reliance, explained that entrepreneurism among locally owned businesses has also suffered as a result of this power. As she noted, "Local businesses are disappearing and, with them, a pathway to the middle class. Producers are struggling to invest in new products and grow their companies. New business formation is down to historic lows."[198]

At the Subcommittee's field hearing, senior executives representing different businesses across the economic spectrum offered similar testimony about the effects of market power on innovation and entrepreneurship. Patrick Spence, the CEO of Sonos, testified that the lack of fair competition diminishes innovation, particularly for firms that cannot afford to sell products at a loss.[199] He explained:

> These companies have gone so far as demanding that we suppress our inventions in order to work with them. The most recent example of this is Google's refusal to allow

[195] Innovation and Entrepreneurship Hearing at 81 (statement of Fiona Scott Morton, Theodore Nierenberg Prof. of Econs., Yale Sch. of Mgmt.).

[196] *Id.* at 74 (statement of Tim Wu, Julius Silver Prof. of Law, Columbia Univ. Sch. of Law).

[197] *Id.* at 81 (statement of Fiona Scott Morton, Theodore Nierenberg Prof. of Econs, Yale Sch. of Mgmt.); Data and Privacy Hearing at 3 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.) ("[M]ajor platforms have reduced incentives to innovate and incumbents have distorted incentives to make more incremental improvements that can be incorporated into the dominant platforms rather than more paradigmatic changes that could challenge these platforms.").

[198] Innovation and Entrepreneurship Hearing at 187 (statement of Stacy F. Mitchell, Co-Dir., Inst. for Local Self-Reliance).

[199] Competitors Hearing at 7 (statement of Patrick Spence, CEO, Sonos, Inc.).

> us to use multiple voice assistants on our product simultaneously. . . . I think the whole spirit of trying to encourage small companies, encourage new innovations and new startups is at risk, given how dominant these companies are.[200]

Furthermore, the ability of a dominant firm to extract economic concessions from smaller companies that rely on it to reach the market can also depress innovation. David Barnett, the CEO and Founder of PopSockets, testified at the field hearing that Amazon required his company "to pay almost two million in marketing dollars in order to remove illegal product from the Amazon marketplace."[201] In response to questions from Representative Ken Buck (R-CO) on the effect of this policy on innovation, Mr. Barnett testified that this money could have been used to double the number of employees dedicated to developing innovative products at the company.[202]

2. Privacy and Data Protection

The persistent collection and misuse of consumer data is an indicator of market power in the digital economy.[203] Traditionally, market power has been defined as the ability to raise prices without a loss to demand, such as fewer sales or customers.[204] Scholars and market participants have noted that even as online platforms rarely charge consumers a monetary price—products appear to be "free" but are monetized through people's attention or with their data[205]—traditional assessments of market power are more difficult to apply to digital markets.[206]

The best evidence of platform market power therefore is not prices charged but rather the degree to which platforms have eroded consumer privacy without prompting a response from the market.[207]

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[200] *Id.*

[201] Competitors Hearing at 3 (statement of David Barnett, Founder & CEO, PopSockets LLC).

[202] *Id.* at 57.

[203] Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet,* 161 U. PA. L. REV. 1663, 1689 (2013) ("One measure of a platform's market power is the extent to which it can engage in [privacy exploitation] without some benefit to consumers that offsets their reduced privacy and still retain users.").

[204] W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 164 (3d ed. 2000).

[205] Data and Privacy Hearing at 3 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.); 5 (statement of Tommaso Valletti, Prof. of Econs., Imperial Coll. Bus. Sch.).

[206] Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet,* 161 U. PA. L. REV. 1663, 1687 (2013) ("While increased competition, at least on its own, will not always cause firms to better use or protect customer information, any competitive effects analysis that misses these two nonprice dimensions of platform market performance will be incomplete and could be biased toward underenforcement.").

[207] *See, e.g.*, Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice Antitrust Div., Remarks for the Antitrust New Frontiers Conference (June 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers ("It is well-settled, however, that competition has price and non-price dimensions."); Maurice E. Stucke & Ariel Ezrachi, *When Competition Fails to Optimize Quality: A Look at Search Engines*, 18 YALE J.L. & TECH. 70, 103 (2016); ELEONORA OCELLO & CRISTINA SJOODIN, EUR. COMM'N, COMPETITION

As scholars have noted, a platform's ability to maintain strong networks while degrading user privacy can reasonably be considered equivalent to a monopolist's decision to increase prices or reduce product quality.[208] A firm's dominance can enable it to abuse consumers' privacy without losing customers.[209] In the absence of genuine competitive threats, a firm offers fewer privacy protections than it otherwise would. In the process, it extracts more data, further entrenching its dominance.[210] When paired with the tendency toward winner-take-all outcomes, consumers are forced to either use a service with poor privacy safeguards or forego the service altogether.[211] As the United Kingdom's Competition and Markets Authority observes, "The collection and use of personal data by Google and Facebook for personalised advertising, in many cases with no or limited controls available to consumers, is another indication that these platforms do not face a strong enough competitive constraint."[212]

Given the increasingly critical role platforms play in mediating access to everyday goods and services, users are also far more likely to surrender more information than to cease using the service entirely.[213] Without adequate competition, firms are able to collect more data than a competitive market would allow,[214] further entrenching their market power while diminishing privacy in the process.[215]

MERGER BRIEF: MICROSOFT/LINKEDIN: BIG DATA AND CONGLOMERATE EFFECTS IN TECH MARKETS 5 (2017), http://ec.europa.eu/competition/publications/cmb/2017/kdal17001enn.pdf.

[208] Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 44 (2019) ("Facebook is a monopolist, and what Facebook extracts overtly from consumers today, from a quality perspective, is a direct function of Facebook's monopoly power."); *see also* Katharine Kemp, *Concealed Data Practices and Competition Law: Why Privacy Matters* (UNSW Law Research Paper No. 19-53, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3432769; OECD, BIG DATA: BRINGING COMPETITION POLICY TO THE DIGITAL ERA (2016), https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf.

[209] Data and Privacy Hearing at 5 (statement of Tommaso Valletti, Prof. of Econs., Imperial Coll. Bus. Sch.); Dig. Competition Expert Panel Report at 42–45.

[210] David N. Cicilline & Terrell McSweeny, *Competition Is at the Heart of Facebook's Privacy Problem*, WIRED (Apr. 24, 2018), https://www.wired.com/story/competition-is-at-the-heart-of-facebooks-privacy-problem.

[211] Dig. Competition Expert Panel Report at 43 ("[T]he misuse of consumer data and harm to privacy is arguably an indicator of low quality caused by a lack of competition."); Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 40 (2019) ("Consumers effectively face a singular choice—use Facebook and submit to the quality and stipulations of Facebook's product or forgo all use of the only social network.").

[212] Competition & Mkts. Auth. Report at 318.

[213] Giuseppe Colangelo & Mariateresa Maggiolino, *Data Protection in Attention Markets: Protecting Privacy through Competition?*, 8 J. OF EUR. COMPETITION L. & PRACTICE 363, 365 (2017).

[214] Data and Privacy Hearing at 4 (statement of Dina Srinivasan, Fellow, Yale Thurman Arnold Project); Innovation and Entrepreneurship Hearing at 82 (Fiona Scott Morton, Theodore Nierenberg Prof. of Econs., Yale Sch. of Mgmt.).

[215] Data and Privacy Hearing at 2 (statement of Jason Furman, Prof. of the Practice of Econ. Pol'y, Harvard Kennedy Sch.); Data and Privacy Hearing at 5 (statement of Tommaso Valletti, Prof. of Econs., Imperial College Bus. Sch.); Dig. Competition Expert Panel Report at 4 ("It can be harder for new companies to enter or scale up."); Giuseppe Colangelo & Mariateresa Maggiolino, *Data Protection in Attention Markets: Protecting Privacy through Competition?*, 8 J. OF EUR. COMPETITION L. & PRACTICE 363, 365 (2017) ("Similarly, in such a market, a dominant firm could abuse its power to exclude a rival producing privacy-friendly goods that consumer would otherwise prefer."); Stigler Report at 67 ("When

Because persistent data collection online is often concealed,[216] it is more difficult to compare privacy costs across different products and services.[217] Consumers are largely unaware of firms' data collection practices, which are presented in dense and lengthy disclosures.[218] The use of manipulative design interfaces has also become a pervasive tool "to increase the likelihood of users consenting to tracking."[219] These behavioral nudges—referred to as dark patterns—are commonly used in online tracking and advertising markets to enhance a firm's market power and "maximize a company's ability to extract revenue from its users."[220] And in e-commerce, Jamie Luguri and Lior Strahilevitz observe that dark patterns "are harming consumers by convincing them to surrender cash or personal data in deals that do not reflect consumers' actual preferences and may not serve their interests. There appears to be a substantial market failure where dark patterns are concerned—what is good for ecommerce profits is bad for consumers."[221]

More recently, as remote work became commonplace during the COVID-19 pandemic, Google attempted to manipulate users into using its Google Meet videoconferencing tool instead of upstart competitor Zoom. As Zoom emerged as the market leader during the early stages of the pandemic, Google introduced a new widget for Meet inside Gmail. A similar message could be found inside Google Calendar, which prompted users to "Add Google Meet video conferencing" to their appointments. "For people with the Zoom Video Communications Inc. extension on their Chrome browsers, the prompt sits directly above the option to: 'Make it a Zoom Meeting.'"[222]

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facing a zero-money price, and when quality is difficult to observe, consumers are not receiving salient signals about the social value of their consumption because the price they believe they face does not reflect the economics of the transaction, and they are ignorant of those numbers.").

[216] Data and Privacy Hearing at 4–5 (statement of Tommaso Valletti, Prof. of Econs., Imperial Coll. Bus. Sch.).

[217] Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, 2 GEO. L. TECH. REV. 275, 311 (2018).

[218] *See, e.g.*, Paul Hitlin & Lee Rainie, *Facebook Algorithms and Personal Data*, PEW RES. CTR. (Jan. 16. 2019), https://www.pewinternet.org/2019/01/16/facebook-algorithms-and-personal-data/. *See* AUSTL. COMPETITION & CONSUMER COMM'N, DIG. PLATFORMS INQUIRY FINAL REPORT 11 (2019) [hereinafter Austl. Competition & Consumer Comm'n Report]; Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017); Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 41 (2019) ("[A]ccepting Facebook's policies in order to use its service means accepting broad-scale commercial surveillance.").

[219] Arvind Narayanan, Arunesh Mathur, Marshini Chetty & Mihir Kshirsagar, *Dark Patterns: Past, Present, and Future*, 18(2) ACM QUEUE 67, 77 (2020) https://queue.acm.org/detail.cfm?id=3400901.

[220] *Id.* at 77 (2020); NORWEGIAN CONSUMER COUNCIL, DECEIVED BY DESIGN (June 27, 2018) (describing the use of "dark patterns"), https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf.

[221] Jamie Luguri & Lior Strahilevitz, *Shining a Light on Dark Patterns* 29 (Univ. of Chicago Public Law Working Paper No. 719, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431205.

[222] Mark Bergen, *Google Really Wants You to Try Its New Video Tool*, BLOOMBERG (May 19, 2020), https://www.bloomberg.com/news/newsletters/2020-05-19/google-really-wants-you-to-try-its-new-video-tool.

To the extent that consumers are aware of data collection practices, it is often in the wake of scandals involving large-scale data breaches or privacy incidents such as Cambridge Analytica.[223] As Dina Srinivasan notes, "Today, nuances in privacy terms are relegated to investigative journalists to discover and explain. When the media does report on them—as they did around Google's practice of letting employees and contractors read Gmail users' emails—consumers often switch to a competitor that offers a better product or service."[224] The opacity of data collection and use contributes to consumer confusion and the misperception that consumers do not care about their privacy—the so-called privacy paradox—simply because they use services that have become essential.[225]

While insufficient competition can lead to reduced quality in many markets, the loss of quality due to monopolization—and in turn, privacy and data protection—is even more pronounced in digital markets because product quality is often the "relevant locus of competition."[226] Without transparency or effective choice, dominant firms may impose terms of service with weak privacy protections that are designed to restrict consumer choice,[227] creating a race to the bottom.[228] As David Heinemeier Hansson, the Co-Founder and Chief Technology Officer of Basecamp,[229] explained in his testimony before the Subcommittee:

> When businesses do not have to account for the negative externalities they cause, it's a race to the bottom. The industrial-scale exploitation of privacy online is much the same. Facebook and Google have built comprehensive dossiers on almost everyone, and they can sell incredibly targeted advertisement on that basis. When Facebook knows you're pregnant, or worse, thinks it knows when you're pregnant, they can target ads for baby clothes or strollers with striking efficiency. But doing so represents an inherent violation of the receiver's privacy. Every ad targeted using personal information

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[223] Dig. Competition Expert Panel Report at 45; David N. Cicilline & Terrell McSweeny, *Competition Is at the Heart of Facebook's Privacy Problem*, WIRED (Apr. 24, 2018), https://www.wired.com/story/competition-is-at-the-heart-of-facebooks-privacy-problem.

[224] Data and Privacy Hearing at 4 (statement of Dina Srinivasan, Fellow, Yale Thurman Arnold Project).

[225] Brooke Auxier, et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RES. CTR. (Nov. 15 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/; Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 GEO. WASH. L. REV. (forthcoming 2021).

[226] Data and Privacy Hearing at 4 (statement of Tommaso Valletti, Prof. of Econs., Imperial Coll. Bus. Sch.).

[227] *Id.*

[228] Competitors Hearing at 11 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp); Dig. Competition Expert Panel Report at 6 ("[W]ell-functioning competitive digital markets have the potential to develop new solutions and increased choice for consumers, where privacy and quality of service can be differentiating factors."); Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet,* 161 U. PA. L. REV. 1663, 1691 (2013) ("Competition, however, may drive platforms to adopt and adhere to stronger privacy policies, making it worthwhile for a platform to advertise such policies to consumers in order to differentiate itself from its competitors.").

[229] Basecamp is an internet software firm based in Chicago, Illinois, that sells project-management and team-collaboration tools. Competitors Hearing at 2 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp).

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> gathered without explicit, informed consent is at some level a violation of privacy. And Facebook and Google are profiting immensely by selling these violations to advertisers. Advertisers who may well feel that purchasing these violations go against their ethics, but see no choice to compete without participating.[230]

In addition to creating a race to the bottom, this same dynamic can also prevent new firms from offering products with strong privacy protections or reduce the incentive of new entrants or rivals to compete directly.[231] Roger McNamee, the Co-Founder and Managing Director of Elevation Partners, has also explained that to the extent there is direct competition between a firm with a privacy-centric business model, such as DuckDuckGo's search engine, they can "still have trouble applying different business models once they're not compatible with the business models that have made the Internet platforms so successful."[232]

Conversely, without adequate safeguards in place, measures that appear to improve privacy for consumers may also have anticompetitive effects. Kirsten Daru, Chief Privacy Officer and General Counsel of Tile, told the Subcommittee: "Apple has used the concept of privacy as a shield by making changes in the name of privacy that at the same time give it a competitive advantage."[233] In particular, she testified at the Subcommittee's field hearing:

> Apple has attempted to justify its own collection of sensitive information and disparate treatment of competitors because FindMy is 'part of the OS,' as well as due to a need for enhanced consumer privacy. But the changes don't meaningfully improve or enhance privacy of third-party app developers.[234]

Ram Shriram, a prominent investor who is a founding board member of Google, noted that "[p]rivacy does impact how you think about dominance, for example, in a market because Google and Apple both eliminated third-party cookies, which then makes your data a little more private. But it ironically will hurt the young companies that are trying to build digital advertising businesses while improving user privacy.[235]

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[230] Competitors Hearing at 11 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp).

[231] Data and Privacy Hearing at 3–4 (statement of Dina Srinivasan, Fellow, Yale Thurman Arnold Project); Venture Capital and Antitrust Workshop at 24 (Paul Arnold, Founder & Partner, Switch Partners).

[232] Venture Capital and Antitrust Workshop at 30 (statement of Roger McNamee, Cofounder & Managing Dir., Elevation Partners).

[233] Competitors Hearing at 3 (response to Questions for the Record of Kirsten Daru, Chief Privacy Officer & Gen. Counsel, Tile, Inc.).

[234] Competitors Hearing at 2 (statement of Kirsten Daru, Chief Privacy Officer & Gen. Counsel, Tile, Inc.).

[235] Venture Capital and Antitrust Workshop at 36 (Ram Shriram, Managing Partner, Sherpalo Ventures LLC).

The Subcommittee held several hearings during the investigation that examined the role of competition and privacy online.

In September 2016, the Subcommittee held a hearing on the role of data and privacy in competition. There, Federal Trade Commissioner Rohit Chopra testified that dominant firms have the ability to impose "complex and draconian" terms of service that can change suddenly "to collect and use data more expansively and more intensely."[236] As he noted, this behavior is the equivalent of a price hike that would be difficult to impose unilaterally in a competitive marketplace.[237] Without sufficient competition, however, "companies can focus on blocking new entrants and limiting choice to protect their dominance and pricing power."[238] Tommaso Valletti, the former Chief Competition Economist for the European Commission, noted that it is "self-evident that data is key to digital platforms, and that some applications imply real-time knowledge of consumer behaviour as well as cross linkages across apps that only very few digital players have access to."[239] And finally, Jason Furman, the former Chairman of the Council of Economic Advisers and an author of the "Unlocking Digital Competition" report, said that "the misuse of consumer data and harm to privacy is arguably an indicator of low quality caused by a lack of competition."[240]

At the Subcommittee's oversight hearing in November 2019, Makan Delrahim, the Assistant Attorney General of the Justice Department's Antitrust Division, testified that because privacy is a dimension of quality, protecting competition "can have an impact on privacy and data protection."[241] And finally, Maureen Ohlhausen, the former Acting Chair of the FTC, echoed this point at the Subcommittee's hearing on innovation and entrepreneurship, noting that quality reductions online could "include factors such as reduced features, restricted consumer choice, or lessened control over privacy."[242]

Leading international antitrust enforcers offered similar testimony before the Subcommittee. Margrethe Vestager, the European Union's Competition Commissioner, testified that due to the Commission's finding that data protection is an important dimension of competition that could be undermined by certain merger activity, the Commission "has … integrated, where appropriate, data protection as a quality parameter for the assessment of merger cases."[243] Similarly, Rod Sims, the

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[236] Data and Privacy Hearing at 3 (statement of Rohit Chopra, Comm'r, Fed. Trade Comm'n).

[237] *Id.*

[238] *Id.*

[239] Data and Privacy Hearing at 2 (statement of Tommaso Valletti, Prof. of Econs., Imperial College Bus. Sch.).

[240] Dig. Competition Expert Panel Report at 43.

[241] Antitrust Agencies Hearing at 15 (statement of Makan Delahim, Assistant Attorney General, United States Dep't of Justice, Antitrust Div.).

[242] Innovation and Entrepreneurship Hearing at 4 n.14 (statement of Maureen K. Ohlhausen, Partner, Baker Botts, L.L.P.).

[243] Data and Privacy Hearing at 4 (statement of Margrethe Vestager, then-Eur. Comm'r for Competition).

Chair of the Australian Competition and Consumer Commission, told the Subcommittee that the ACCC's "Digital Platforms Inquiry" report recommends "[u]pdating Australia's merger law to incorporate … the nature and significance of assets, including data and technology, acquired through a merger."[244]

3. The Free and Diverse Press

A free and diverse press is essential to a vibrant democracy. Whether exposing corruption in government, informing citizens, or holding power to account, independent journalism sustains our democracy by facilitating public discourse.

Since 2006, newspaper advertising revenue, which is critical for funding high-quality journalism, fell by over 50%.[245] Despite significant growth in online traffic among the nation's leading newspapers,[246] print and digital newsrooms across the country are laying off reporters or folding altogether.[247] As a result, communities throughout the United States are increasingly going without sources for local news. The emergence of platform gatekeepers—and the market power wielded by these firms—has contributed to the decline of trustworthy sources of news.[248]

a. Journalism in Decline

Since 2006, the news industry has been in economic freefall, primarily due to a massive decrease in advertising revenue. Both print and broadcast news organizations rely heavily on advertising revenue to support their operations, and as the market has shifted to digital platforms, news organizations have seen the value of their advertising space plummet steeply.[249] For newspapers, advertising has declined from $49 billion in 2006 to $16.5 billion in 2017.[250] This decrease has been

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[244] *Id.* at 8 (statement of Rod Sims, Chair, Austl. Competition & Consumer Comm'n).

[245] Noah Smith, Opinion, *Goodbye, Newspapers. Hello, Bad Government.*, BLOOMBERG (June 1, 2018), https://www.bloomberg.com/opinion/articles/2018-06-01/goodbye-newspapers-hello-bad-government.

[246] Free and Diverse Press Hearing at 2 (statement of David Chavern, Pres. & CEO, News Media Alliance).

[247] Douglas McLennan & Jack Miles, Opinion, *A Once Unimaginable Scenario: No More Newspapers*, WASH. POST: THE WORLDPOST (Mar. 21, 2018), https://www.washingtonpost.com/news/theworldpost/wp/2018/03/21/newspapers/?utm_term=.c1b57c9efcd7.

[248] Free and Diverse Press Hearing at 2–3 (statement of David Pitofsky, Gen. Counsel, News Corp).

[249] eMarketer estimates that Google's and Facebook's U.S. ad revenues will be $39.58 billion and $31.43 billion, respectively, in 2020. EMARKETER, *Google Ad Revenues to Drop for the First Time* (June 23, 2020). According to BIA, local TV and radio station ad revenues (counting both their OTA and much more limited digital revenues) will total $31.3 billion this year. *See* BIA Advisory Services, *BIA Revises Local Radio Advertising Estimates Down to $12.8B in 2020 Due to Pandemic* (June 25, 2020); BIA Advisory Services, *BIA Lowers 2020 Local Television Station Advertising Revenue Forecast to $18.5B* (May 21, 2020).

[250] Michael Barthel, *Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RES. CTR.: FACTTANK (June 1, 2017), https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-

felt by national and local news sources alike. As total annual advertising revenues have fallen over 62% across the industry since 2008, one major national newspaper told the Subcommittee that its annual advertising revenue has fallen 48% over that period.[251] Additionally, ethnic news outlets have suffered from the shift from broadcast and print ads to digital ads.[252] Regarding television and radio broadcast news, the National Association of Broadcasters told the Subcommittee, "[T]his year, the U.S. advertising revenue of a single company—Google—are projected to exceed the *combined* ad revenue of *all* TV and radio stations in the country by over $8 billion."[253]

While the decline of advertising revenue has most severely affected local news publishers, prominent digital publishers have also been affected. In January 2019, Buzzfeed announced layoffs of 220 employees, about 15% of its workforce, due to advertising losses.[254] Jonah Peretti, the Chief Executive Officer of BuzzFeed, commented prior to the layoffs that consolidation of digital publishers into a single large digital media company may be the only path forward for profitability, suggesting that publishers' lack of bargaining power in negotiations with online platforms is the central obstacle to long-term survival.[255]

Despite a recent boost in the number of digital subscriptions and the level of online traffic for the top newspapers in the United States, these increases did not offset losses in online advertising or circulation in the industry overall.[256] As one news publisher told the Subcommittee, "For the vast majority of news publishers, digital subscription revenues remain a minor revenue stream and do not appear to be on a path to replace the decline in print subscriptions."[257] Over the past two decades,

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revenue-fall-for-newspaper-industry; *Newspapers Fact Sheet*, PEW RES. CTR. (June 13, 2018), https://www.journalism.org/fact-sheet/newspapers.

251 Submission from Source 220, to H. Comm. on the Judiciary, 7 (Oct. 14, 2019) (on file with Comm.).

252 *See* PENELOPE MUSE ABERNATHY, UNIV. N.C. SCH. OF MEDIA AND JOURNALISM, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE 45 (2020), https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf.

253 Submission from Nat'l Ass'n of Broads., to H. Comm. on the Judiciary, 2 (Oct. 14, 2019), http://www.nab.org/documents/newsRoom/pdfs/09220_HJC_Local_Journalism_At_Risk_Submission.pdf.

254 Oliver Darcy & Tom Kludt, *Media Industry Loses About 1,000 Jobs as Layoffs Hit News Organizations*, CNN (Jan. 24, 2019), https://edition.cnn.com/2019/01/24/media/media-layoffs-buzzfeed-huffpost-gannett/index.html; Edmund Lee, *Founder's Big Idea to Revive BuzzFeed's Fortunes? A Merger with Rivals*, N.Y. TIMES (Nov. 19, 2018), https://www.nytimes.com/2018/11/19/business/media/buzzfeed-jonah-peretti-mergers.html.

255 Edmund Lee, *Founder's Big Idea to Revive BuzzFeed's Fortunes? A Merger with Rivals*, N.Y. TIMES (Nov. 19, 2018), https://www.nytimes.com/2018/11/19/business/media/buzzfeed-jonah-peretti-mergers.html.

256 Michael Barthel, *Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RES. CTR.: FACTTANK (June 1, 2017), https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/; *Newspapers Fact Sheet,* PEW RES. CTR (July 9, 2019), https://www.journalism.org/fact-sheet/newspapers; David Chavern, Opinion, *Protect the News From Google and Facebook*, WALL ST. J. (Feb. 25, 2018), https://www.wsj.com/articles/protect-the-news-from-google-and-facebook-1519594942.

257 Submission from Source 220, to H. Comm. on the Judiciary, 7 (Oct. 14, 2019) (on file with Comm.).

hundreds of local news publishers have been acquired or gone bankrupt.[258] In some cases, private equity firms and hedge funds have purchased major regional chains and newspapers, resulting in mass layoffs of journalists and increased debt burdens for publishers.[259]

In recent years, news consumption has largely shifted to a model of content aggregation, through which platforms consolidate content from multiple news sources.[260] In submissions to the Subcommittee and public statements, publishers across the spectrum say they have little choice but to participate in content aggregation, particularly those run by dominant platforms because the aggregators' "use of news publishers' content does send substantial traffic to news publishers."[261] But this can also prevent traffic from flowing to newspapers. As some publishers have noted, news aggregators package and present content to users using attention-grabbing quotes from high points of stories, which can make it unnecessary for the user to click through to the publisher's website.[262] As these publishers noted, this dynamic forces news organizations to effectively compete with their own content, lowering the potential revenue from user traffic to news organizations' websites.[263]

As a result of falling revenues, newspapers and broadcast stations are steadily losing the ability to financially support their newsrooms, which are costly to maintain but provide immense value to their communities.[264] A robust local newsroom requires the financial freedom to support in-depth, sometimes years-long reporting, as well as the ability to hire and retain journalists with expertise in fundamentally local issues, such as coverage of state government.[265]

The societal value of local news is significant**.** As noted by the National Association of Broadcasters, local broadcast stations provide on-the-air programming which is "rooted in localism and the public interest," offering content which "[is] still free to the public and accessible to all Americans."[266] Kevin Riley, the editor of *The Atlanta Journal-Constitution*, similarly testified before

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[258] PENELOPE MUSE ABERNATHY, UNIV. N.C. SCH. OF MEDIA AND JOURNALISM, THE EXPANDING NEWS DESERT 33 (2018), https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf.

[259] Alex Shephard, *Finance Is Killing the News*, NEW REPUBLIC (Apr. 18, 2018), https://newrepublic.com/article/148022/finance-killing-news.

[260] Lesley Chiou & Catherine Tucker, *Content Aggregation by Platforms: The Case of the News Media* (NBER Working Paper No. 21404, 2015), https://www.nber.org/papers/w21404.pdf.

[261] NEWS MEDIA ALLIANCE, HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM 2 (2020), http://www.newsmediaalliance.org/wp-content/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf.

[262] *Id.* at 12.

[263] *Id.* at 12–14 (2020).

[264] Submission from the Nat'l Ass'n of Broads., to H. Comm. on the Judiciary, 9 (Sept. 2, 2020), http://www.nab.org/documents/newsRoom/pdfs/09220_HJC_Local_Journalism_At_Risk_Submission.pdf.

[265] Free and Diverse Press Hearing at 3–4 (statement of Kevin Riley, Editor, The Atlanta Journal-Constitution).

[266] Submission from the Nat'l Ass'n of Broads., to H. Comm. on the Judiciary, 1 (Sept. 2, 2020), http://www.nab.org/documents/newsRoom/pdfs/09220_HJC_Local_Journalism_At_Risk_Submission.pdf.

the Subcommittee that "it would be impossible to even put a cost estimate on the work" of local journalists.[267]

The COVID-19 pandemic has particularly highlighted the importance of local news sources. Despite taking major revenue losses,[268] local journalists have provided valuable reporting on the transmission of the novel coronavirus, particularly for underserved and vulnerable communities.[269] For example, PBS New Mexico provided an in-depth focus on the effects of the coronavirus on Native Americans "dealing with scarce resources as they respond to novel coronavirus outbreaks on tribal lands."[270] Apart from serving their communities, local news stories bring national attention to these critical issues.[271] In addition to news coverage, the National Association of Broadcasters aired public-service announcements in response to the pandemic "more than 765,000 times for an estimated ad value of more than $156,500,000," a number which "do[es] not include the likely much greater number of other coronavirus-related PSAs" aired by local television and radio stations across the United States.[272]

To run a new operation, broadcast stations must be able to sustain "the basic costs of running a station, including engineering, sales, [and] programming" costs, and must make significant capital expenditures in equipment, such as satellite trucks.[273] These expenses must be satisfied before broadcast stations can invest in improvements to keep pace with changing technologies, "including ultra-high definition programming, better emergency alerting, mobile services, interactivity, hyper-local content and more."[274]

The costs of news production add up. From 2003 to 2013, these costs "accounted for nearly 24 percent of TV stations' total expenses (and nearly 26 percent of the total expenses of ABC/CBS/Fox/NBC stations)."[275] In light of the expenses associated with producing high-quality

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[267] Free and Diverse Press Hearing at 2 (statement of Kevin Riley, Editor, The Atlanta Journal-Constitution).

[268] Sara Fischer & Margaret Harding McGill, *Coronavirus Sends Local News Into Crisis,* AXIOS (Mar. 21, 2020), https://www.axios.com/coronavirus-local-news-853e96fa-51aa-43cc-a990-eb48cc896b17.html.

[269] Mark Glaser, *6 Ways Local News Makes a Crucial Impact Covering COVID-19*, KNIGHT FOUND. (Apr. 20, 2020), https://knightfoundation.org/articles/6-ways-local-news-makes-a-crucial-impact-covering-covid-19/.

[270] *COVID-19 Response from Native Tribes*, NEW MEXICO PBS (Mar. 30, 2020), https://www.newmexicopbs.org/productions/newmexicoinfocus/covid-19-response-from-native-tribes/.

[271] *See, e.g.*, Bill Chappell, *Coronavirus Cases Spike In Navajo Nation, Where Water Service Is Often Scarce*, NPR (Mar. 26, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/822037719/coronavirus-cases-spike-in-navajo-nation-where-water-service-is-often-scarce.

[272] Submission from the Nat'l Ass'n of Broads., to H. Comm. on the Judiciary, 2 (Sept. 2, 2020), http://www.nab.org/documents/newsRoom/pdfs/09220_HJC_Local_Journalism_At_Risk_Submission.pdf.

[273] *Id.* at 4, 7 n.16.

[274] *Id.* at 7.

[275] *Id.* at 4 (citing NAB Television Financial Reports 2004–19)

journalism, declining revenue has major implications for the maintenance—let alone enrichment—of quality news production.

Budget cuts have also led to a dramatic number of newsroom job losses. This decline has been primarily driven by a reduction in newspaper employees, who have seen employment fall by half over a recent eight-year period, from 71,000 in 2008 to 35,000 in 2019.[276] In 2019 alone, 7,800 media industry employees were laid off.[277] The Bureau of Labor Statistics estimates that the total employment of reporters, correspondents, and broadcast news analysts will continue to decline by about 11% between 2019 and 2029.[278]

Researchers at the University of North Carolina School of Media and Journalism found that the United States has lost nearly 1,800 newspapers since 2004 either to closure or merger, 70% of which were in metropolitan areas.[279] As a result, the majority of counties in America no longer have more than one publisher of local news, and 200 without any paper.[280] At the Subcommittee's hearing on online platforms' effects on a free and diverse press, Mr. Riley described this new media landscape characterized by digital platform dominance and disappearing local newspapers:

> We produce journalism that is distinguished by its depth, accuracy and originality. That costs money and is expensive, but if the system works correctly, it also makes money that the paper uses to investigate and develop the next story or cover the next local event. If others repackage our journalism and make money off it, yet none of that money makes its way back to the local paper, then it makes breaking that next story or exposing the next scandal more challenging. If that cycle continues indefinitely, quality local journalism will slowly wither and eventually cease to exist.[281]

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[276] Elizabeth Grieco, *U.S. newspapers have shed half of their newsroom employees since 2008*, PEW RES. CTR: FACTTANK (Apr. 20, 2020), https://www.pewresearch.org/fact-tank/2020/04/20/u-s-newsroom-employment-has-dropped-by-a-quarter-since-2008/.

[277] Benjamin Goggin, *7,800 People Lost Their Media Jobs in a 2019 Landslide,* BUS. INSIDER (Dec. 10, 2019), https://www.businessinsider.com/2019-media-layoffs-job-cuts-at-buzzfeed-huffpost-vice-details-2019-2#spin-media-group-29-jobs-september-and-january-18.

[278] *Occupational Outlook Handbook: Reporters, Correspondents, and Broadcast News Analysts*, U.S. DEP'T OF LABOR: BUR. OF LABOR STATS. (last modified Apr. 12, 2019), https://www.bls.gov/ooh/media-and-communication/reporters-correspondents-and-broadcast-news-analysts.htm.

[279] PENELOPE MUSE ABERNATHY, UNIV. N.C. SCH. OF MEDIA AND JOURNALISM, THE EXPANDING NEWS DESERT 10-11 (2018), https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf.

[280] *Id.* at 8, 10.

[281] Free and Diverse Press Hearing at 3 (statement of Kevin Riley, Editor, The Atlanta Journal-Constitution)

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This cycle has a profoundly negative effect on American democracy and civic life. Communities without quality local news coverage have lower rates of voter turnout.[282] Government corruption may go unchecked, leaving communities vulnerable to serious mismanagement.[283] Relatedly, these communities see local government spending increase.[284] Towns without robust local news coverage also exhibit lower levels of social cohesion, undermining a sense of belonging in a community.[285] As fewer publishers operate in local markets, local news is supplanted by aggregation of national coverage, reducing residents' knowledge of local happenings and events, and generally leaving them less connected to their communities.[286]

Compounding this problem, the gap created by the loss of trustworthy and credible news sources has been increasingly filled by false and misleading information. Once communities lack a local newspaper source, people tend to get their local news from social media. As local news dies, it is filled by unchecked information, some of which can spread quickly and can have severe consequences.

b. The Effect of Market Power on Journalism

During the Subcommittee's investigation, news publishers raised concerns about the "significant and growing asymmetry of power" between dominant online platforms and news publishers, as well as the effect of this dominance on the production and availability of trustworthy sources of news. In interviews, submissions, and testimony before the Subcommittee, publishers with distinct business models and distribution strategies said they are "increasingly beholden" to these firms, and in particular, Google and Facebook.[287] As a result, several dominant firms have an outsized

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282 Matthew Gentzkow, et al., *The Effects of Newspaper Entry and Exit on Electoral Politics*, 101 AM. ECON. REV. 2980 (2011) ("We find that newspapers have a robust positive effect on political participation, with one additional newspaper increasing both presidential and congressional turnout by approximately 0.3 percentage points.").

283 Mary Ellen Klas, *Less Local News Means Less Democracy*, NIEMAN REPS. (Sept. 20, 2019), https://niemanreports.org/articles/less-local-news-means-less-democracy/.

284 Noah Smith, Opinion, *Goodbye Newspapers. Hello, Bad Government*, BLOOMBERG (June 1, 2018), https://www.bloomberg.com/opinion/articles/2018-06-01/goodbye-newspapers-hello-bad-government ("[T]he authors show that without local newspapers, local governments tend to engage in more inefficient or dubious financing arrangements.").

285 Amy Mitchell, et al., *Civic Engagement Strongly Tied to Local News Habits*, PEW RES. CTR. (Nov. 3, 2016), https://www.journalism.org/2016/11/03/civic-engagement-strongly-tied-to-local-news-habits.

286 Danny Hayes & Jennifer L. Lawless, *As Local News Goes, So Goes Citizen Engagement: Media, Knowledge, and Participation in U.S. House Elections*, 77 J. POL. 447, 447 (2014).

287 Submission from Source 220, to H. Comm. on the Judiciary, 7 (Oct. 14, 2019) (on file with Comm.). Although Apple News and Apple News Plus are increasingly popular news aggregators, most market participants interviewed by Subcommittee staff do not view it as a critical intermediary for online news at this time, although some publishers raised concerns about the tying of payments inside Apple's news product.

influence over the distribution and monetization of trustworthy sources of news online,[288] undermining the availability of high-quality sources of journalism.[289]

i. Distribution of News Online

Several dominant platforms function as intermediaries to news online. Due to their outsized role as digital gateways to news, a change to one of these firm's algorithm can significantly affect the online referrals to news publishers,[290] directly affecting their advertising revenue.[291] One news publisher stated in its submission to the Subcommittee that it and other news organizations "depend on a few big tech platforms to help them distribute their journalism to consumers."[292]

In submissions to the Subcommittee, several news publishers noted that the dominance of Google and Facebook allows them to "pick winners" online by adjusting visibility and traffic.[293] For example, an update to Google's search algorithm in June 2019 decreased a major news publisher's online traffic "by close to 50%" even as their referrals from other sources—such as their home page and apps—grew during the same period.[294] As they noted, a "smaller business would have been crushed" by this decline.[295]

Similarly, news organizations were negatively affected when, in January 2018, Facebook adjusted its News Feed algorithm to prioritize content based on audience engagement.[296] According to an internet analytics firm, these changes significantly affected the visibility of news content on Facebook, resulting in a 33% decrease in referral traffic from Facebook to news publishers' sites.[297] As one publisher noted in its submission to the Subcommittee, this change "was made without notice,

[288] Submission of Source 955, to H. Comm. on the Judiciary, 12 (Oct. 30, 2019) (on file with Comm.).

[289] Free and Diverse Press Hearing at 3 (statement of David Chavern, Pres. & CEO, News Media Alliance) ("In effect, a couple of dominant tech platforms are acting as regulators of the digital news industry.").

[290] *See, e.g.*, Submission of Source 140, to H. Comm. on the Judiciary, 2 (Oct. 15, 2019) (on file with Comm.) ("Facebook's decision, announced in June 2016, to make significant changes to its algorithm to [favor] content from friends and family, which was made without notice, consultation or warning to the market, and which led to significant disruption for a range of businesses.").

[291] Submission of Source 114, to H. Comm. on the Judiciary, 12 (Oct. 2, 2019) (on file with Comm.); Data and Privacy Hearing at 6 (statement of Rod Sims, Chair, Austl. Competition & Consumer Comm'n).

[292] Submission of Source 220, to H. Comm. on the Judiciary, 3 (Mar. 10, 2020) (on file with Comm.).

[293] Submission of Source 955, to H. Comm. on the Judiciary, 12 (Oct. 15, 2019) (on file with Comm.).

[294] *Id.* at 17.

[295] *Id.*

[296] Adam Mosseri, *Bringing People Closer Together*, FACEBOOK: NEWSROOM (Jan. 11, 2018), https://newsroom.fb.com/news/2018/01/news-feed-fyi-bringing-people-closer-together.

[297] *How Much Have Facebook Algorithm Changes Impacted Publishers?*, MARKETING CHARTS (Apr. 4, 2019), https://www.marketingcharts.com/digital/social-media-107974.

consultation or warning to the market, [leading] to significant disruption for a range of businesses."[298] Nicholas Thompson, the Editor-in-Chief of *Wired* magazine, and *Wired* contributing editor Fred Vogelstein described the relationship between publishers and Facebook as being "sharecroppers on Facebook's massive industrial farm," writing that:

> Even at the best of times, meetings between Facebook and media executives can feel like unhappy family gatherings. The two sides are inextricably bound together, but they don't like each other all that much. . . . And then there's the simple, deep fear and mistrust that Facebook inspires. Every publisher knows that, at best, they are sharecroppers on Facebook's massive industrial farm. The social network is roughly 200 times more valuable than the *Times*. And journalists know that the man who owns the farm has the leverage. ***If Facebook wanted to, it could quietly turn any number of dials that would harm a publisher—by manipulating its traffic, its ad network, or its readers***.[299]

The Subcommittee has also received evidence that the dominance of several online platforms has created a significant imbalance of bargaining power. In several submissions, news publishers note that dominant firms can impose unilateral terms on publishers, such as take-it-or-leave-it revenue sharing agreements.[300] A prominent publisher described this relationship as platforms having a "finger on the scales" with the ability to suppress publishers that do not "appease platforms' business terms."[301]

During the Subcommittee's hearing on the effects of market power on journalism,[302] several witnesses also testified about the lack of equal bargaining power between news publishers and dominant platforms.[303] At the Subcommittee's hearing on market power and the free and diverse press, Sally Hubbard, Director of Enforcement Strategy at the Open Markets Institute, testified that the lack of competition online has led to diminished bargaining power among news publishers. Consequently, in response to changing terms and algorithmic treatment by platforms, "publishers have little choice but to adapt and accommodate regardless of how the changes may negatively affect their own

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[298] Submission from Source 140, to H. Comm. on the Judiciary, 2 (Oct. 15, 2019) (on file with Comm.).

[299] Nicholas Thompson & Fred Vogelstein, *Inside the Two Years That Shook Facebook—and the World*, WIRED (Feb. 12, 2018), https://www.wired.com/story/inside-facebook-mark-zuckerberg-2-years-of-hell/ (emphasis added).

[300] *See, e.g.*, Submission of Source 140, to H. Comm. on the Judiciary, 2 (Oct. 15, 2019) (on file with Comm.) ("Apple's decision to tie all payments made through iOS apps to its own payment system, which takes a 30% share of any contributions and subscriptions made to news [publishers] through news apps downloaded from the Apple store.").

[301] Submission of Source 114, to H. Comm. on the Judiciary, 12 (Oct. 2, 2019) (on file with Comm.).

[302] Free and Diverse Press Hearing.

[303] Data and Privacy Hearing at 4 (statement of Rod Sims, Chair, Austl. Competition & Consumer Comm'n) (testifying that the power of dominant platforms "creates an imbalance of bargaining power between digital platforms and news media businesses, meaning that agreements they reach are likely much different to those that would be reached in a competitive market").

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profitability."[304] David Chavern, President of the News Media Alliance, similarly testified that publishers have a "collective action problem," stating that "no news organization on its own can stand up to the platforms. The risk of demotion or exclusion from the platforms is simply too great."[305]

In June 2020, the News Media Alliance published a white paper examining the relationship between news publishers and Google based on interviews with its members over the course of more than a year.[306] As it notes, "Google has exercised control over news publishers to force them into several relationships that benefit Google at the publishers' expense."[307] In the context of Google's placement of news on accelerated mobile pages (AMP)—a format for displaying web pages on mobile devices—publishers raised concerns that "Google effectively gave news publishers little choice but to adopt it," requiring the creation of parallel websites "that are hosted, stored and served from Google's servers rather than their own."[308]

While this format has benefits in terms of loading information quickly on mobile devices, publishers argue that these benefits "could have been achieved through means that did not so significantly increase Google's power over publishers or so favor its ability to collect data to foster its market domination."[309] And when a publisher attempts to avoid this cost by moving its content behind a paywall, its rise in subscriptions was offset by declines in traffic from Google and other platforms.[310] Referring to this tradeoff as a "Hobson's choice," the News Media Alliance explained:

> Newspapers such as *The Wall Street Journal* employ a highly customized paywall on their websites, significantly varying the number of free articles that a user is permitted to read before being asked to subscribe to the newspaper. This flexibility is highly beneficial, allowing them to maximize engagement and increase subscriptions. For AMP articles, however, Google restricts the paywall options. Unless publishers rebuild their paywall options and their meters for AMP, they can only provide *all* of their content for free or *none* of their content for free. The only other option is to use Subscribe with Google, which has many benefits for Google and downsides for news publishers.[311] Accordingly, unless they invest in building another and separate paywall,

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[304] Free and Diverse Press Hearing at 8 (statement of Sally Hubbard, Dir. of Enforcement Strategy, Open Mkts. Inst.).

[305] *Id.* at 5 (statement of David Chavern, Pres., News Media Alliance).

[306] NEWS MEDIA ALLIANCE, HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM (2020), http://www.newsmediaalliance.org/wp-content/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf.

[307] *Id.* at 1.

[308] *Id.* at 5.

[309] *Id.* at 7.

[310] *Id.* at 6.

[311] *Id.* at 8 n.14 ("These include the following: (1) Google gets the subscriber data; (2) the user must use Google Wallet or Google Pay, instead of providing its credit card to the news publisher and establishing a direct relationship with the publisher; and (3) Google takes a 5-15% cut. *See* Nushin Rashidian, George Civeris & Pete Brown, *Platforms and*

news publishers who do not want to use Subscribe with Google have a *de facto* all-or-nothing choice regarding the imposition of a paywall, which lowers subscriber conversion rates.[312]

Google has responded to this concern by noting that AMP does not prevent publishers from placing ads on AMP pages, but restricting the number of ads "leads to improved page load times, increased site traffic, superior ad engagement, and thus typically increases advertising revenue overall."[313] Google also said in its responses to Subcommittee Chairman Cicilline's questions for the record that it "does not privilege publishers who use AMP over publishers that adopt non-Google technical solutions that would also guarantee fast-loading pages."[314]

Finally, because news is often accessed online through channels other than the original publication—including search results, voice assistants, social platforms, or news aggregators—journalism has increasingly become "atomized" or removed from its source and placed alongside other content.[315] In the context of audio news, one market participant noted that aggregating different news sources can create a bad experience for users.[316] The aggregation of different news sources without editorial oversight can also cause reputational harm to news publishers, such as when highly credible reporting appears alongside an opinion-based news source.[317]

Indirectly, the atomization of news may increase the likelihood that people are exposed to disinformation or untrustworthy sources of news online. When online news is disintermediated from its source, people generally have more difficulty discerning the credibility of reporting online. This

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Publishers: The End of an Era, COLUM. JOURNALISM REV. (Nov. 22, 2019), https://www.cjr.org/tow_center_reports/platforms-and-publishers-end-of-an-era.php.")).

312 *Id.* at 8.

313 Submission from Google Australia Pty. Ltd., to Austl. Competition & Consumer Comm'n, 45–46 (Feb. 18, 2019), https://www.accc.gov.au/system/files/Google%20%28February%202019%29.PDF. *But see* Austl. Competition & Consumer Comm'n Report at 240 ("[T]here is a broader issue about the extent to which Google, by way of AMP, retains users within its ecosystem and reduces monetisation opportunities for media businesses outside of AMP. That is, rather than directing users to the websites of media businesses, AMP's design encourages users to stay within the Google ecosystem. As a result, media businesses are less likely to monetise content on their own properties, either through advertising or subscription revenue.").

314 Innovation and Entrepreneurship Hearing at 27 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC).

315 Austl. Competition & Consumer Comm'n at 297 (describing atomization as "the process by which news is 'decoupled from its source' and consumed on a 'story-by-story basis."); Free and Diverse Press Hearing at 3 (statement of David Chavern, Pres., News Media Alliance) ("These tech giants use secret, unpredictable algorithms to determine how and even whether content is delivered to readers. They scrape news organizations' content and use it to their own ends, without permission or remuneration for the companies that generated the content in the first place. They also suppress news organizations' brands, control their data, and refuse to recognize and support quality journalism.").

316 Submission of Source 114, to H. Comm. on the Judiciary, 12 (Oct. 2, 2019) (on file with Comm.);

317 Interview with Source 114 (Oct. 2, 2019).

process may also "foster ambivalence about the quality and nature of content that garners users' attention," particularly among young people.[318]

For example, during the Subcommittee's sixth hearing, Subcommittee Chairman David N. Cicilline presented Facebook CEO Mark Zuckerberg with evidence of a Breitbart video that claimed that "you don't need a mask and hydroxychloroquine is a cure for COVID."[319] As he noted, within the first five hours of this video being posted, it had nearly "20 million views and over 100,000 comments before Facebook acted to remove it."[320] Mr. Zuckerberg responded that "a lot of people shared that, and we did take it down because it violate[d] our policies."[321] In response, Chairman Cicilline asked if "20 million people saw it over the period of five hours . . . doesn't that suggest, Mr. Zuckerberg, that your platform is so big that, even with the right policies in place, you can't contain deadly content?"[322] Mr. Zuckerberg responded by claiming that Facebook has a "relatively good track record of finding and taking down lots of false content."[323]

Moreover, because there is not meaningful competition, dominant firms face little financial consequence when misinformation and propaganda are promoted online.[324] Platforms that are dependent on online advertising have an incentive to prioritize content that is addictive or exploitative to increase engagement on the platform.[325] And the reliance on platforms by advertisers has generally diminished their ability to push for improvements in content standards. As a news publisher explained in a submission to the Subcommittee:

> As advertisers have become more reliant on dominant search and social platforms to reach potential consumers, they have lost any leverage to demand change in the policies or practices of the platforms. In the era of newspapers, television, radio, or indeed direct sales of digital advertising online, there was a connection between advertising and the

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[318] Submission of Source 140, to H. Comm. on the Judiciary, 2 (Oct. 15, 2019) (on file with Comm.).

[319] CEO Hearing Transcript at 143 (statement of Rep. David N. Cicilline (D-RI), Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[320] *Id.*

[321] *Id.* (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

[322] *Id.* at 143–144 (statement of Rep. David N. Cicilline (D-RI), Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[323] *Id.* at 144 (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

[324] Free and Diverse Press Hearing at 8 (statement of Sally Hubbard, Dir. of Enforcement Strategy, Open Mkts. Inst.); Charlie Warzel, Opinion, *Facebook Can't Be Reformed*, N.Y. TIMES (July 1, 2020), https://www.nytimes.com/2020/07/01/opinion/facebook-zuckerberg.html.

[325] Conversely, the decline of trustworthy sources of news due to rising market power and declining ad revenue has also contributed to this harm. Competition & Mkts Auth. Report at 9 ("[C]oncerns relating to online platforms funded by digital advertising can lead to wider social, political and cultural harm through the decline of authoritative and reliable news media, the resultant spread of 'fake news' and the decline of the local press which is often a significant force in sustaining communities.").

content it funds, creating a high degree of accountability for both parties in that transaction. This maintained high content standards, and enabled advertisers to demand or pursue change from publishers whose content standards fell. While many high-quality publishers continue to operate stringent policies in relation to the digital advertising that they permit to appear within their services, in a world of programmatic audience trading that self-regulated compact between advertisers and platform does not exist.[326]

During the Subcommittee's sixth hearing, Representative Jamie Raskin (D-MD) raised this concern. As he noted, in July 2020, Facebook faced an advertiser boycott by hundreds of companies.[327] This effort, which has been spearheaded by the Stop Hate for Profit campaign, a coalition of civil rights groups organizing in protest of "the rapid spread of hate messages online, the presence of boogaloo and other right-wing extremist groups trying to infiltrate and disrupt Black Lives Matter protests and the fact that alt-right racists and anti-Semitic content flourishes on Facebook."[328]

As a result of this campaign, more than a thousand major companies—including Disney, Coca-Cola, and General Motors—announced that they would pull $7 billion in advertisements on Facebook as part of the Stop Hate for Profit boycott.[329] But as Representative Raskin pointed out during the hearing Facebook does not "seem to be that moved by their campaign."[330]

Representative Pramila Jayapal (D-WA) also noted during the hearing that Mr. Zuckerberg reportedly told Facebook's employees at an internal meeting that the company is "not gonna change our policies or approach on anything because of a threat to a small percent of our revenue, or to any percent of our revenue."[331] During that meeting, Mr. Zuckerberg reportedly acknowledged that the boycott "hurts us reputationally," but said that the company was insulated from threats by large advertisers due to advertising revenue from small businesses.[332] In response to this report, Ms. Jayapal asked Mr. Zuckerberg whether Facebook is "so big that you don't care how you're impacted by a

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[326] Submission of Source 140, to H. Comm. on the Judiciary, 5 (Oct. 15, 2019) (on file with Comm.).

[327] CEO Hearing Transcript at 57 (Rep. Jamie Raskin (D-MD), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[328] *Id.* Stop Hate for Profit was established by the Anti-Defamation League, the NAACP, Color of Change, and other civil rights groups in the wake of the May 2020 police killing of George Floyd, an unarmed black man, in Minneapolis and the ensuing national protests. Shirin Ghaffary & Rebecca Heilweil, *Why Facebook Is "The Front Line in Fighting Hate Today,"* VOX: RECODE (July 15, 2020), https://www.vox.com/recode/2020/7/15/21325728/facebook-stop-hate-for-profit-campaign-jonathan-greenblatt-anti-defamation-league.

[329] Steven Levy, *Facebook Has More to Learn From the Ad Boycott*, WIRED (Aug. 6, 2020), https://www.wired.com/story/rashad-robinson-facebook-ad-boycott/.

[330] CEO Hearing Transcript at 57 (statement of Rep. Jamie Raskin (D-MD), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[331] *Id.* (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

[332] *Id.*

major boycott of 1,100 advertisers?"[333] Mr. Zuckerberg responded that "[o]f course we care. But we're also not going to set our content policies because of advertisers. I think that that would be the wrong thing for us to do."[334]

Since then, the civil rights groups have said that although Facebook made some changes in response to the boycott—such as the creation of a position within the company dedicated to overseeing civil rights and algorithmic bias—it ultimately has not made meaningful changes at scale, and "lags competitors in working systematically to address hate and bigotry on their platform."[335]

The group organized further action in September 2020, when it called for companies and public figures to stop posting on Instagram beginning September 16th.[336] This protest, aimed again at Facebook's treatment of hate groups, was spurred by the police shooting of Jacob Blake in Kenosha, Wisconsin.[337] In the aftermath, Facebook failed to remove a group promoting the coalescence of an armed militia in the streets of Kenosha, despite numerous users reporting the page.[338] Mr. Zuckerberg called this failure an "operational mistake."[339]

ii. Monetization

The rise of market power online has severely affected the monetization of news, diminishing the ability of publishers to deliver valuable reporting.[340]

The digital advertising market is highly concentrated, with Google and Facebook controlling the majority of the online advertising market in the United States,[341] capturing nearly all of its growth

[333] *Id.* at 216 (question of Rep. Pramila Jayapal (D-WA), Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[334] *Id.* at 216 (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

[335] *Statement from Stop Hate For Profit on July 2020 Ad Pause Success and #StopHateForProfit Campaign*, STOP HATE FOR PROFIT (July 30, 2020), https://www.stophateforprofit.org/.

[336] Donie O'Sullivan, *Group That Led Facebook Boycott Is Back With New Action*, CNN BUSINESS (Sept. 14, 2020), https://www.cnn.com/2020/09/14/tech/facebook-boycott-return/index.html.

[337] *Id.*

[338] Brian Fung, *Facebook CEO Admits 'Operational Mistake' In Failure To Remove Kenosha Militia Page*, CNN BUSINESS (Sept. 4, 2020), https://www.cnn.com/2020/08/28/tech/zuckerberg-kenosha-page/index.html.

[339] *Id.*

[340] *See, e.g.*, Austl. Competition & Consumer Comm'n Report at 7; David Chavern, Opinion, *Protect the News from Google and Facebook*, WALL ST. J. (Feb. 25, 2018), https://www.wsj.com/articles/protect-the-news-from-google-and-facebook-1519594942; *infra* section II.C.3.

[341] *See e.g.*, Hamza Shaban, *Digital Advertising To Surpass Print and TV for the First Time, Report Says*, WASH. POST: TECH. (Feb. 20, 2019), https://www.washingtonpost.com/technology/2019/02/20/digital-advertising-surpass-print-tv-first-time-report-says/.

in recent years.[342] Although Amazon has grown its digital advertising business to become the third largest competitor in the market,[343] it still accounts for a relatively small percentage.[344]

News publishers have raised concerns that this significant level of concentration in the online advertising market—commonly referred to as the digital ad duopoly—has harmed the quality and availability of journalism.[345] They note that as a result of this dominance, there has been a significant decline in advertising revenue to news publishers,[346] undermining publishers' ability to deliver valuable reporting, and "siphon[ing] revenue away from news organizations."[347]

Jason Kint, the CEO of Digital Content Next, a trade association that represents both digital and traditional news publishers, notes that there is "a clear correlation between layoffs and buyouts with the growth in market share for the duopoly—Google and Facebook."[348] David Chavern, the President and CEO of the News Media Alliance, has likewise said that "[t]he problem is that today's internet distribution systems distort the flow of economic value derived from good reporting."[349] The effects of this revenue decline are most severe at the local level, where the decimation of local news sources is giving rise to local news deserts.[350]

Other news publishers have expressed concerns about the dual role of platforms as both intermediaries and platforms for people's attention.[351] By keeping people inside a "walled garden," platforms can monetize their attention through ads, creating a strong economic incentive to minimize

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[342] Sarah Sluis, *Digital Ad Market Soars To $88 Billion, Facebook And Google Contribute 90% Of Growth*, AD EXCHANGER (May 10, 2018), https://adexchanger.com/online-advertising/digital-ad-market-soars-to-88-billion-facebook-and-google-contribute-90-of-growth.

[343] Jean Baptiste Su, *Amazon Is Now The #3 Digital Ad Platform In The U.S. Behind Google And Facebook, Says eMarketer*, FORBES (Sept. 20, 2018), https://www.forbes.com/sites/jeanbaptiste/2018/09/20/amazon-is-now-the-3-digital-ad-platform-in-the-u-s-behind-google-and-facebook-says-emarketer/#333342de3926.

[344] *Id.*

[345] *See, e.g.*, Shannon Bond, *Google and Facebook Build Digital Ad Duopoly*, FIN. TIMES (Mar. 14, 2017), https://www.ft.com/content/30c81d12-08c8-11e7-97d1-5e720a26771b; John Diaz, Opinion, *How Google and Facebook Suppress the News*, S.F. CHRON. (Apr. 5, 2019), https://www.sfchronicle.com/opinion/diaz/article/How-Google-and-Facebook-suppress-the-news-13745431.php.

[346] Data and Privacy Hearing at 5 (statement of Rod Sims, Chair, Austl. Competition & Consumer Comm'n); Free and Diverse Press Hearing at 3 (statement of David Pitofsky, Gen. Counsel, News Corp).

[347] Free and Diverse Press Hearing at 3 (statement of David Chavern, Pres., News Media Alliance).

[348] Daniel Funke, *What's Behind the Recent Media Bloodbath? The Dominance of Google and Facebook*, POYNTER (June 14, 2017), https://www.poynter.org/business-work/2017/whats-behind-the-recent-media-bloodbath-the-dominance-of-google-and-facebook.

[349] David Chavern, Opinion, *How Antitrust Undermines Press Freedom*, WALL ST. J. (July 9, 2017), https://www.wsj.com/articles/how-antitrust-undermines-press-freedom-1499638532.

[350] PENELOPE MUSE ABERNATHY, UNIV. N.C. SCH. OF MEDIA AND JOURNALISM, THE EXPANDING NEWS DESERT 33 (2018), https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf.

[351] Submission of Source 140, to H. Comm. on the Judiciary, 11 (Oct. 15, 2019) (on file with Comm.); Submission of Source 114, to H. Comm. on the Judiciary, 13 (Oct. 2, 2019) (on file with Comm.).

outbound referrals that lead to a decline in users' attention and engagement. In turn, this diminishes the incentives of publishers to invest in high-quality journalism.[352] David Pitofsky, the General Counsel of NewsCorp, described this as a free-riding problem in his testimony before the Subcommittee, explaining that platforms:

> [D]eploy our highly engaging news content to target our audiences, then turn around and sell that audience engagement to the same advertisers news publishers are trying to serve. Dominant platforms take the overwhelming majority of advertising revenue without making any investment in the production of the news, all while foreswearing any responsibility for its quality and accuracy. As a result, one of the pillars of the news industry's business model, advertising revenue, is crumbling.[353]

c. International Scrutiny

Several of the concerns regarding the distribution and monetization of news through platform intermediaries were raised as part of a comprehensive inquiry by the Australian Competition and Consumer Commission (ACCC). Over the span of several years, the Commission collected evidence from more than a hundred market participants and organizations as part of its review. Following its publication of a Preliminary Report in December 2018 and an Issues Paper in February 2018, the ACCC issued an extensive Final Report spanning more than 600 pages and including submissions from more than 100 market participants.[354]

Among its findings, the ACCC concluded that Facebook and Google have significant and durable market power over the distribution of news online.[355] As the ACCC noted, "Google and Facebook are the gateways to online news media for many consumers," accounting for a significant amount of referral traffic to news publishers' websites.[356] As a result, news publishers are reliant on these platforms for reaching people online, which affects publishers' ability to monetize journalism, particularly on formats such as Google's Accelerated Mobile Pages (AMP).[357]

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352 Competition & Mkts Auth. Report at 319.

353 Free and Diverse Press Hearing at 2 (statement of David Pitofsky, Gen. Counsel, News Corp).

354 Press Release, Austl. Competition & Consumer Comm'n, Holistic, Dynamic Reforms Needed to Address Dominance of Digital Platforms (July 26, 2019), https://www.accc.gov.au/media-release/holistic-dynamic-reforms-needed-to-address-dominance-of-digital-platforms.

355 Austl. Competition & Consumer Comm'n Report at 226.

356 *Id.* at 296.

357 *Id.* at 206, 247 (concluding that AMP is a "must have" product for publishers).

The ACCC made 23 recommendations to address concerns across a broad range of issues, including antitrust, privacy, and consumer protection.[358] Within the context of addressing the effects of market power on the news industry—particularly as it relates to the imbalance of bargaining power between platforms and publishers—the Commission recommended developing "a code of conduct to govern the relationship between media businesses and digital platforms [which] seeks, among other things, to address this imbalance."[359]

On July 31, 2020, the Commission released a draft code to address a "fundamental bargaining power imbalance" between news publishers and dominant platforms that has led to "news media businesses accepting less favourable terms for the inclusion of news on digital platform services than they would otherwise agree to in response to a request by the Australian government."[360]

Under this code, Facebook, Google, and other platforms with significant bargaining power designated by Australia's Treasurer must negotiate with covered news publishers "in good faith over all issues relevant to news on digital platform services."[361] News publishers may negotiate either individually or collectively over a three-month period, allowing local and rural publishers "to negotiate from a stronger position than negotiating individually."[362]

If publishers are unable to reach an agreement during the mediated negotiation period, they may bring the dispute to compulsory arbitration. As part of this process, the arbitrator must consider the parties' final offers covering: (1) the benefits of news content to the platform; (2) the costs of producing news by the publisher; and (3) whether a payment model would unduly burden the commercial interests of the platform.[363] The arbitrator must choose one of the parties' proposals, encouraging both parties to make reasonable offers.[364]

Facebook and Google have responded to the draft code by warning that they may no longer display news on their respective platforms in Australia. Despite an "unprecedented surge in audiences

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[358] Press Release, Austl. Competition & Consumer Comm'n, ACCC Commences Inquiry Into Digital Platforms (Dec. 4, 2017), https://www.accc.gov.au/media-release/accc-commences-inquiry-into-digital-platforms.

[359] Austl. Competition & Consumer Comm'n Report at 245.

[360] AUSTL. COMPETITION & CONSUMER COMM'N, DRAFT NEWS MEDIA BARGAINING CODE, https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code (last visited on Sept. 27, 2020).

[361] AUSTL. COMPETITION & CONSUMER COMM'N, Q&AS: DRAFT NEWS MEDIA AND DIGITAL PLATFORMS MANDATORY BARGAINING CODE 7 (July 2020), https://www.accc.gov.au/system/files/DPB%20-%20Draft%20news%20media%20and%20digital%20platforms%20mandatory%20bargaining%20code%20Q%26As.pdf.

[362] *Id.* at 6.

[363] *Id.* at 9.

[364] *Id.*

for news websites and TV news,"[365] Google claims that the draft code does not reflect the "more than $200 million in value that Google provides to publishers each year by sending people to their websites."[366] Facebook described the draft code as "unprecedented in its reach," notwithstanding similar proposals in other countries, including France,[367] as well as the United States.[368]

In response to Google's threat to boycott journalism in Australia, ACCC Chair Rod Sims said that Google's statement contained "misinformation" about the draft code, asserting that the draft code responds to "a significant bargaining power imbalance between Australian news media businesses and Google and Facebook."[369] Australia's Treasurer, Josh Frydenberg, similarly said that the country would not "respond to coercion or heavy-handed threats wherever they come from."[370]

4. Political and Economic Liberty

During the investigation, the Subcommittee examined the effects of market power on political and economic liberty. Concerns about the democratic effects of private monopolies trace back to the foundational antitrust statutes, where lawmakers worried that monopolies were "a menace to republican institutions themselves."[371] The Subcommittee's examination of these matters follows a long tradition of congressional attention to this issue.[372]

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[365] Amanda Meade, *News Corp To Suspend Print Editions Of 60 Local Newspapers As Advertising Revenue Slumps*, THE GUARDIAN (Mar. 31, 2020), https://www.theguardian.com/media/2020/apr/01/news-corp-to-suspend-print-editions-of-60-local-newspapers-as-advertising-revenue-slumps.

[366] *Update To Our Open Letter to Australians*, GOOGLE, https://about.google/google-in-australia/an-open-letter/ (last visited Oct. 5, 2020).

[367] Natasha Lomas, *France's Competition Watchdog Orders Google To Pay For News Reuse*, TECHCRUNCH (Apr. 9, 2020), https://techcrunch.com/2020/04/09/frances-competition-watchdog-orders-google-to-pay-for-news-reuse/.

[368] Ashley Cullins, *National Association of Broadcasters Warns Congress Tech Giants Could Kill Local Journalism*, HOLLYWOOD REPORTER (Sept. 3, 2020), https://www.hollywoodreporter.com/thr-esq/national-association-of-broadcasters-warns-congress-tech-giants-could-kill-local-journalism.

[369] Naaman Zhou, *Google's Open Letter To Australians About News Code Contains 'Misinformation', ACCC Says*, THE GUARDIAN (Aug. 17, 2020), https://www.theguardian.com/technology/2020/aug/17/google-open-letter-australia-news-media-bargaining-code-free-services-risk-contains-misinformation-accc-says.

[370] Jamie Smyth & Alex Barker, *Battle Lines Drawn As Australia Takes On Big Tech Over Paying For News*, FIN. TIMES (Sept. 2, 2020), https://www.ft.com/content/0834d986-eece-4e66-ac55-f62e1331f7f7.

[371] 21 CONG. REC. 3146 (1890) (statement of Sen. Hoar).

[372] *Id*. at 2459 (statement of Sen Sherman); *see* 95 CONG. REC. 11486 (statement of Rep. Celler) ("[B]usiness concentration is politically dangerous, leading inevitably to increasing Government control."); also 96 CONG. REC. 16,452 (1950) (statement of Rep. Kefauver) ("[T]he history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of a very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.").

Based on interviews and submissions from market participants, along with other evidence examined by the Subcommittee, there are several ways in which the market power of the dominant platforms affects political and economic power.

First, the Subcommittee encountered a prevalence of fear among market participants who depend on the dominant platforms. Repeatedly, market participants expressed deep concern that speaking about the dominant platforms' business practices—even confidentially without attribution—would lead a platform to retaliate against them, with severe financial repercussions. The source of this fear was twofold. Some firms were so dependent on the platform that even potentially risking retaliation caused alarm. Others had previously seen a platform retaliate against someone for raising public concerns about their business practices and wanted to avoid the same fate.

Several market participants told the Subcommittee that they "live in fear" of the platforms. One said, "It would be commercial suicide to be in Amazon's crosshairs . . . If Amazon saw us criticizing, I have no doubt they would remove our access and destroy our business."[373] Another told the Subcommittee, "Given how powerful Google is and their past actions, we are also quite frankly worried about retaliation."[374] An attorney representing app developers said they "fear retaliation by Apple" and are "worried that their private communications are being monitored, so they won't speak out against abusive and discriminatory behavior."[375]

Market participants also expressed unease about the success of their business and their economic livelihood depending on the decision-making of the platforms. A single tweak of an algorithm, intentional or not, could cause significant costs if not financial disaster—with little recourse. Market participants routinely characterized the platforms as having arbitrary and unaccountable power—the same forms of undue power that antitrust laws were designed to prevent. As Senator John Sherman (R-OH) explained, antitrust was essential to preserve liberty "at the foundation of the equality of all rights and privileges" because concentrations of power outside of democratic institutions were a "kingly prerogative, inconsistent with our form of government."[376]

Additionally, courts and regulators have found that several of the dominant platforms have engaged in recidivism. For example, Facebook settled charges brought in 2012 by the Federal Trade Commission (FTC) that it had "deceived consumers by telling them they could keep their information on Facebook private, and then repeatedly allowing it to be shared and made public."[377] As part of this

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[373] Interview with Source 636 (Mar. 11, 2020)

[374] Submission from Source 147 (on file with Comm.).

[375] Submission from Source 88 (on file with Comm.).

[376] 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

[377] Press Release, Federal Trade Comm'n, Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises (Nov. 29, 2011) (proposed settlement), https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep.

settlement, Facebook agreed to abide by an administrative order requiring that Facebook not misrepresent its privacy protections.[378] Seven years later, the FTC concluded that Facebook had almost immediately begun violating that order following its adoption.[379] Ruling on the FTC's subsequent settlement with Facebook, District Court Judge Timothy Kelley wrote that "the unscrupulous way in which the United States alleges Facebook violated both the law and the administrative order is stunning."[380] The FTC has similarly sanctioned Google on several occasions for privacy violations.[381] In 2010, Apple settled charges it had entered into no-poach agreements with six other technology companies.[382] Two years later, Apple was found guilty of orchestrating a price-fixing conspiracy.[383] In that case, the presiding judge stated that the record "demonstrated a blatant and aggressive disregard" by Apple "for the requirements of the law," noting that the conduct "included Apple lawyers and its highest level executives."[384]

Lastly, the growth in the platforms' market power has coincided with an increase in their influence over the policymaking process. Over the past decade, the dominant online platforms have significantly increased their lobbying activity,[385] which tends to create a feedback loop for large

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[378] *Id.*

[379] United States v. Facebook, Inc., No. CV 19-2184 (TJK), 4 (D.D.C. 2020), https://www.courtlistener.com/opinion/4748088/united-states-v-facebook-inc/ ("The United States now alleges that Facebook violated the 2012 Order by "subvert[ing] users privacy choices to serve its own business interests" in several ways, starting almost immediately after agreeing to comply with the 2012.").

[380] *Id.* at 1.

[381] Press Release, Federal Trade Comm'n, FTC, Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law (Sept. 4, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations.

[382] Press Release, Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

[383] United States v. Apple Inc., 952 F. Supp. 2d 638, 644 (S.D.N.Y. 2013) (No. 12-cv-2826), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

[384] Hr'g Tr. at 17:1-6, United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y., August 27, 2013) (No. 12-cv-2826). During the investigation, the Subcommittee also encountered instances in which the platforms did not appear fully committed to telling lawmakers the truth, including one incident in which members of the Subcommittee were forced to question whether Amazon had committed perjury. Letter from Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, et al., to Jeff Bezos, CEO, Amazon.com, Inc. (May 1, 2020), https://judiciary.house.gov/uploadedfiles/2020-05-01_letter_to_amazon_ceo_bezos.pdf.

[385] *See e.g.*, Spencer Soper et al., *Amazon's Jeff Bezos Can't Beat Washington, So He's Joining It: The Influence Game*, BLOOMBERG, (Feb. 14, 2018), https://www.bloomberg.com/graphics/2018-amazon-lobbying/. This is a trend for the industry. The total reported lobbying expenditures by digital platforms increased from $1,190,000 a year in 1998, to $74,285,000 in 2019 as the industry consolidated and gained market power. LOBBYING SPENDING DATABASE, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/lobby/top.php?indexType=i&showYear=2019 (last visited on Sept. 27, 2020).

companies. More money spent on lobbying may deliver higher equity returns and market share,[386] which, in turn, may spur more lobbying.

Outside of traditionally reported and regulated lobbying, firms with market power and dispensable income fund think tanks and nonprofit advocacy groups to steer policy discussion. For example, Facebook, Google, and Amazon reportedly donated significant amounts to the American Enterprise Institute (AEI), which, in turn, has argued that antitrust critiques of the big platforms are "astonishingly weak."[387] More recently, Google and Amazon have contributed significant funding to the Global Antitrust Institute at the George Mason University's Antonin Scalia School of Law, which advocates against antitrust scrutiny of the dominant platforms.[388] By funding academics and advocacy groups, the dominant platforms can expand their sphere of influence, further shaping how they are governed and regulated.

At several hearings, Members of the Subcommittee noted that the outsized political influence of dominant firms has adverse effects on the democratic process. At the Subcommittee's field hearing in Colorado, Representative Ken Buck (R-CO) asked each of the witnesses about this issue.[389] As Representative Buck noted, the dominant platforms are generally well represented in the policymaking process:

> Part of what we are dealing with here is the reality that [dominant firms] walk into our offices and they tell us their side of the story and we very rarely hear the other side of the story, and somehow part of this solution has to be that public policymakers elected, appointed, have to have access to that kind of information. So I thank you for being here and I also would encourage you to make sure that, you know, we are accessible. We are trying our best to make sure that we continue to create the environment for your kinds of companies.[390]

During the Subcommittee's sixth hearing, Subcommittee Chairman David N. Cicilline (D-RI) noted the democratic stakes of the Subcommittee's work. He said, "Because concentrated economic power

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[386] *See* J.H. Kim, *Corporate Lobbying Revisited*, 10 BUS. AND POL, 1 (2008) (analyzing lobbying's effect on equity returns); Brian Shaffer et al., *Firm Level Performance Implications of Nonmarket Actions*, 39 BUS. AND SOC. 126 (2000) (analyzing lobbying's effect on market share).

[387] Andrew Perez and Tim Zelina, *Facebook, Google, Amazon are ramping up their secretive influence campaigns in D.C.*, FAST CO. (Oct. 31, 2019), https://www.fastcompany.com/90424503/facebook-google-amazon-are-ramping-up-their-secretive-influence-campaigns-in-dc.

[388] Daisuke Wakabayashi, *Big Tech Funds a Think Tank Pushing for Fewer Rules. For Big Tech.,* N.Y. TIMES (July 24, 2020), https://www.nytimes.com/2020/07/24/technology/global-antitrust-institute-google-amazon-qualcomm.html.

[389] Competitors Hearing at 57 (question of Rep. Ken Buck (R-CO), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm on the Judiciary).

[390] *Id.*

also leads to concentrated political power, this investigation also goes to the heart of whether we, as a people, govern ourselves, or whether we let ourselves be governed by private monopolies."[391]

IV. MARKETS INVESTIGATED

A. Online Search

Online search engines enable users to retrieve webpages and information stored on the Internet. After a user enters a query into the search engine, the search provider returns a list of webpages and information that are relevant to the search term entered.

There are two types of search engines: horizontal and vertical. Horizontal search engines are designed to retrieve a comprehensive list of general search results. Vertical search engines are designed to retrieve a narrower category of content, such as photo images (e.g., Dreamstime) or travel (e.g., Expedia). The majority of general search engines monetize the service through selling ad placements rather than charging search users a monetary price. The overwhelmingly dominant provider of general online search is Google, which captures around 81% of all general search queries in the U.S. on desktop and 94% on mobile. Other search providers include Bing, which captures 6% of the market, Yahoo (3%), and DuckDuckGo (1%).[392]

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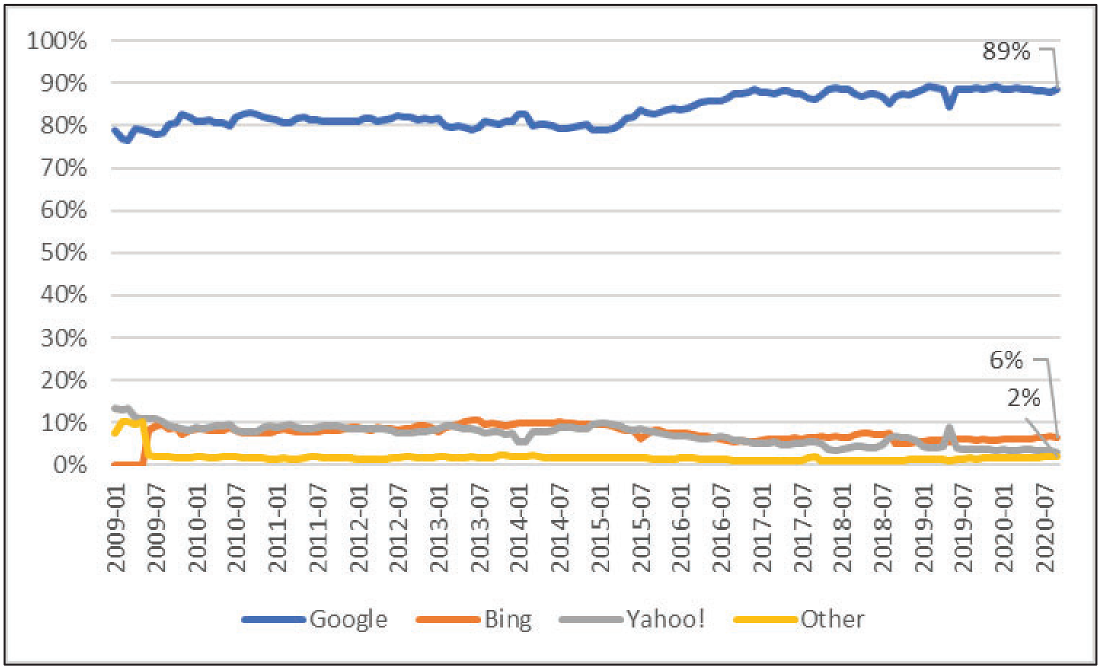
[391] CEO Hearing Transcript at 7 (statement of Rep. David N. Cicilline (D-RI), Chairman, Subcomm. on Antitrust, Commercial and Admin Law of the H. Comm. on the Judiciary).

[392] *Search Engine Market Share United States of America: Sept. 2019–Sept. 2020*, STATCOUNTER, http://gs.statcounter.com/search-engine-market-share/all/united-states-of-america (last visited Oct. 3, 2020).

U.S. Desktop and Mobile Search Market Share[393]



Online search is comprised of three distinct activities. First, an engine must "crawl" the Internet by using an automated bot to collect copies of all of the webpages it can find. Once a crawler has recorded all of this material, it must be collated and organized into an "index," or a map of the Internet that can be searched in real-time. Indexing organizes the information into the formats and databases required for the querying function. When a user enters a query into the search engine, the engine draws from the index to pull a list of responsive websites, ordered in terms of relevance. The relevance, in turn, is determined by the search algorithm applied by the search engine. A search engine can function only if it has access to an index, and an index can exist only once web pages have been crawled and collated into a repository.[394] Indexing has high fixed costs and requires significant server storage and

[393] Prepared by the Subcomm. based on *Desktop & Mobile Search Engine Market Share United States Of America, January 2009 to September 2020,* STATCOUNTER https://gs.statcounter.com/search-engine-market-share/desktop-mobile/united-states-of-america/#monthly-200901-202009. The "Other" category includes AOL, Ask Jeeves, DuckDuckGo, MSN, Webcrawler, Windows Live, AVG Search, Baidu, Comcast, Babylon, Dogpile, Earthlink, Norton Safe Search, and YANDEX RU. *Id.*

[394] Submission from Source 531, to H. Comm. on the Judiciary, Source 531-000017 (Nov. 21, 2011) (on file with Comm.) According to one market participant, "[t]he greatest challenges in building a search index are finding the URLs for documents stored on the Web and then being able to parse the best URLs and documents to include in the index. Overcoming these challenges requires massive amounts of data on user interactions with websites to discover new URLs and then filter down to the 5% of known URLs [the search engine] uses to determine which documents to index, and how frequently these documents should be refreshed."

compute power.[395] The ability to invest heavily in computing power and storage yields a significant advantage.[396]

Several online search features tilt the market towards the dominant incumbent and make entry by new market participants difficult. First, web crawling is costly and strongly favors first-movers.[397] In a submission to the Subcommittee, one expert described how Google's early efforts have locked in its dominance.[398] In particular, Google was the first company to crawl the entirety of the Internet, a feat motivated in part due to its PageRank algorithm, which used links between pages to identify the most relevant webpages for specific topics and queries. Unlike most search engine algorithms at the time, the quality of PageRank results improved with more webpages, incentivizing Google to crawl a greater portion of the web.

The web has grown exponentially over the last two decades, [399] which means the cost of crawling the entire Internet has increased too, despite advances in crawling technology. Today several major webpage owners block all but a select few crawlers, in part because being constantly crawled by a large number of bots can hike costs for owners and lead their webpages to crash. The one crawler that nearly all webpages will allow is Google's "Googlebot," as disappearing from Google's index would lead most webpages to suffer dramatic drops in traffic and revenue.[400] Any new search engine crawler, by contrast, would likely be blocked by major webpage owners unless that search engine was driving significant traffic to webpages—which a search engine cannot do until it has crawled enough webpages.[401]

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[395] Submission from Source 531, to H. Comm. on the Judiciary, Source 531-000016–19 (July 26, 2011) (on file with Comm.).

[396] Submission from Source 209, to H. Comm. on the Judiciary, Source 209-000537–38 (Aug. 24, 2009) (on file with Comm.) ("Comprehensiveness, freshness, and responsiveness are all directly related to the amount of computing power and storage capacity brought to bear on the problem of crawling and indexing the web. It would therefore be implausible to attribute Google's massive search advantage to superior technology. Rather, the main driver of search performance is scale. Scale is driven primarily by the level of financial investment in search infrastructure.").

[397] *See, e.g.*, Submission from Source 534, to H. Comm. on the Judiciary, 1 (Oct. 14, 2019) (on file with Comm.) ("[The Company] does not own its own search index and is not planning to invest into building an own index because of the high investment costs."; Google Search (Shopping) Commission Decision (non-confidential version), European Commission 66 (June 27, 2017); Submission from Source 481, to H. Comm. on the Judiciary ("Bing and Google each spend hundreds of millions of dollars a year crawling and indexing the deep Web. It costs so much that even big companies like Yahoo and Ask are giving up general crawling and indexing. Therefore, it seems silly to compete on crawling and, besides, we do not have the money to do so.").

[398] Submission from Zack Maril, to H. Comm. on the Judiciary (Sept. 30, 2019) (on file with Comm.).

[399] *Total Number of Websites*, INTERNET LIVE STATS, https://www.internetlivestats.com/total-number-of-websites (last visited Oct. 3, 2020) (In 2000, the Internet had around 17,000 websites; today, it has more than 1.8 billion. Internet Live Stats, Total Number of Websites.).

[400] Submission from Submission from Zack Maril, to H. Comm. on the Judiciary (Sept. 30, 2019) (on file with Comm.); *see also* Submission from Source 481, to H. Comm on the Judiciary (Feb. 20, 2020) (on file with Comm.); Innovation and Entrepreneurship Hearing at 2 (statement of Megan Gray, Gen. Counsel & Pol'y Advocate, DuckDuckGo).

[401] Submission from Submission from Zack Maril, to H. Comm. on the Judiciary (Sept. 30, 2019) (on file with Comm.).

The high cost of maintaining a fresh index and the decision by many large webpages to block most crawlers significantly limits new search engine entrants. In 2018, Findx—a privacy-oriented search engine that had attempted to build its own index—shut down its crawler, citing the impossibility of building a comprehensive search index when many large websites only permit crawlers from Google and Bing.[402] Today the only English-language search engines that maintain their own comprehensive webpage index are Google and Bing.[403] Other search engines—including Yahoo and DuckDuckGo—must purchase access to the index from Google and/or Bing through syndication agreements that provide syndicated search engines with access to search results and search advertising.[404] While Yahoo previously maintained an independent index, it entered a deal with Microsoft in 2009 to integrate search technologies—a move driven by the two firms' belief that combining was necessary to provide a real alternative to Google.[405]

A second major competitive advantage enjoyed by search engine incumbents is their access to voluminous click-and-query data. This data, which tracks what users searched for and how they interacted with the search results, benefits search engines in several key ways.[406] First, search engines rely on click-and-query data to guide their search index's upkeep, as this data helps identify which webpages are most relevant and should be most regularly updated in the index.[407] Second, click-and-query-data is used to refine the search algorithm and the relevance of search results, as past user interactions improve the algorithm's ability to predict future interactions.[408] In particular, data on "tail"

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[402] Findx, *Game over* (Sept. 21, 2019), https://web.archive.org/web/20190921180535/https://privacore.github.io ("Many large websites like LinkedIn, Yelp, Quora, Github, Facebook and others only allow certain specific crawlers like Google and Bing to include their webpages in a search engine index. . . . That meant that the Findx search index was incomplete and was not able to return results that were likely both relevant and good quality. When you compare any independent search engine's results to Google for example, they have no chance to be as relevant or complete because many large websites refuse to allow any other search engine to include their pages."); Submission from Source 407, to H. Comm. on the Judiciary, Source 407-000024 (Nov. 21, 2011) (on file with Comm.); Competition & Mkts. Auth. Report at 91.

[403] Competition & Mkts. Auth. Report at 89.

[404] Innovation and Entrepreneurship Hearing at 3 (statement of Megan Gray, Gen. Counsel & Pol'y Advocate, DuckDuckGo) (noting that alternatives to serving ads through Google or Microsoft, such as only showing product ads from Amazon or travel ads from Booking.com, as "not sufficiently lucrative to cover the costs of purchasing organic links," which means "an aspiring search engine start-up today (and in the foreseeable future) cannot avoid the need to sign a search syndication contract").

[405] Submission from Source 209 to H. Comm. on the Judiciary, Source 209-0000346 (Aug. 24, 2009) (on file with Comm.).

[406] Competition & Mkts. Auth. Report at 11–12.

[407] Submission from Source 26, to H. Comm. on the Judiciary, Source 26-000016 (Nov. 21, 2011) (on file with Comm.) ("Queries are a critical component of the user data necessary to identify and rank URLs and documents for inclusion in a search index. Fewer queries mean fewer opportunities to identify relevant URLs and documents, which ultimately means a smaller usable search index."); rep-000026 (Nov. 21, 2011) ("Index freshness also is an important factor in the quality of a search engine's result . . . A [] survey found that a lack of freshness was a significant driver of dissatisfaction among users searching in the Entertainment and News categories.").

[408] *Id.* at Source 531-000015 ("The more user queries the search engine handles, the more data it obtains to improve the relevance of the search results it serves."); Source 531-000060 ("The secret to successful algorithmic search matching algorithms is user feedback . . . Ultimately this feedback helps the engine improve core relevance and other experience factors—driving higher engagement."); Innovation and Entrepreneurship Hearing at 3 (statement of Megan Gray, Gen.

(or rare) queries enable a search engine to offer relevant results across a higher set of potential queries—improving the overall quality of the search engine—and Google's internal documents show that the company recognizes its long-tail advantage.[409] And third, increased query scale increases advertiser engagement rates, given that more user queries generally translate to more advertisement clicks, generating greater revenue for advertisers.[410]

Overall there are significant advantages to scale in click-and-query data, though the marginal benefit of additional data on tail queries is higher than the marginal benefit of additional data on "head" (or relatively common) queries.[411] Some market participants also stated that the benefits of scale diminish once a search engine reaches a certain size.[412] The benefits of scale create a feedback loop, where access to greater click-and-query data improves search quality, which drives more usage and generates additional click-and-query data.

A third barrier to competition in general online search is that Google has established extensive default positions across both browsers and mobile devices. Among desktop browsers, Google enjoys default placement in Chrome (which captures 51% of the U.S. market), Safari (31%), and Firefox (5%)—or 87% of the browser market.[413] Meanwhile, Microsoft's Edge, which captures 4% of the desktop browser market, sets Bing as its search default, leaving little opening for independent search

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Counsel & Pol'y Advocate, DuckDuckGo) ("Another barrier facing a start-up search engine is that it needs data, such as the most commonly clicked links for a particular query, in order to produce a useful ranking of organic links, i.e., what organic link is first, second, etc."); Submission from Source 209, to H. Comm. on the Judiciary, Source 209-0000346–52 (Aug. 24, 2009) (on file with Comm.) ("Increased search traffic brings more indications of user intent, facilitating more experimentation and allowing a search platform to generate more relevant natural and paid search results."); *see also* D. Kannan, et al., '*Scale Effects in Web Search', International Conference on Web and Internet Economics*, 294–310 (2017).

[409] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-03815864 (Apr. 23, 2010) ("Google leads competitors. . . Our long-tail precision is why users continue to come to Google. Users may try the bells and whistles of Bing and other competitors, but Google still produces the results. As soon as this ceases to be the case, our business is in jeopardy."); Competition & Mkts. Auth. Report Appendix I at 15 ("[A]round 1% of Google 'tail' search events are for queries which are seen by Bing," whereas "31% of Bing 'tail' search events are for queries which are seen by Google." Furthermore, "0.8% of Google's 'tail' distinct queries are seen by Bing, whereas 30% of Bing's 'tail' distinct queries are seen by Google."); *see also* Submission from Source 209, to H. Comm. on the Judiciary, Source 209-0000532 (Feb. 17, 2011) (on file with Comm.) ("[W]ithout strong tail performance, a horizontal search engine cannot compete against Google."); Source 209-0000535–36 ("[P]oor search engine performance in the tail means overall weak search engine performance.").

[410] *See, e.g.*, Submission from Source 531, to H. Comm. on the Judiciary, Source 531-000056 (July 11, 2011) (on file with Comm.) (stating that query scale increases advertiser engagement, since at scale the platform "makes better matches, has higher value generation").

[411] *See* Competition & Mkts. Auth. Report Appendix I at 18.

[412] Submission from Source 531, to H. Comm. on the Judiciary, Source 531-000874 (May 5, 2011) (on file with Comm.) ("As a platform gains more and more scale, the associated benefits begin to taper off such that eventually additional scale provides only modest returns."); Source 531-000025 (Nov. 21, 2011) (on file with Comm.) ("Above 30 billion documents, user satisfaction improves rapidly with increased index size; above 90 billion documents, it still continues to improve albeit at a slower rate.").

[413] Innovation and Entrepreneurship Hearing at 5 (statement of Megan Gray, Gen. Counsel & Pol'y Advocate, DuckDuckGo).

engines.[414] In mobile, Google Search is primarily the default on Android and on Apple's iOS mobile operating system—together Android and iOS account for over 99% of smartphones in the United States.[415] This default position provides Google with a significant advantage over other search engines, given users' tendency to stick with the default choice presented. Moreover, market participants identified several ways Google dissuades even those users who do attempt to switch default search engines on Chrome.[416]

Google won itself default placement across the mobile and desktop ecosystem through both integration and contractual arrangements. By owning Android, the world's most popular mobile operating system, Google ensured that Google Search remained dominant even as mobile replaced desktop as the critical entry point to the Internet. Documents submitted to the Subcommittee show that at certain key moments, Google conditioned access to the Google Play Store on making Google Search the default search engine, a requirement that gave Google a significant advantage over competing search engines.[417] Through revenue-sharing agreements amounting to billions of dollars in annual payments, Google also established default positions on Apple's Safari browser (on both desktop and mobile) and Mozilla's Firefox.[418]

In public statements, Google has downplayed the significance of default placement, claiming that "competition is just a click away."[419] However, Google's internal documents show that when Google was still jostling for search market share, Google executives closely tracked search defaults on Microsoft's Internet Explorer and expressed concern that non-Google defaults could impede Google Search.[420] In an internal presentation about Internet Explorer's default search selection, Google recommended that users be given an initial opportunity to select a search engine and that browsers minimize the steps required to change the default search engine.[421] These discussions—along with the steep sums Google pays Apple and various browsers for default search placement—further highlight the competitive significance of default positions.

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[414] *Id.*

[415] *Mobile Operating System Market Share in United States Of America – September 2020*, STATCOUNTER, https://gs.statcounter.com/os-market-share/mobile/united-states-of-america (last visited Oct. 3, 2020).

[416] Submission from Source 534, to H. Comm. on the Judiciary, 1 (Oct. 14, 2019) (on file with Comm.).

[417] *See infra* Section V.

[418] Innovation and Entrepreneurship Hearing at 12 (response to Questions for the Record of Kyle Andeer, Vice Pres., Corp. Law, Apple Inc.).

[419] *See, e.g.*, Adam Kovacevich, *Google's approach to competition*, GOOGLE PUBLIC POL'Y BLOG (May 8, 2009), https://publicpolicy.googleblog.com/2009/05/googles-approach-to-competition.html.

[420] *See, e.g.*, Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-01196214 (May 31, 2005) (on file with Comm.).

[421] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-01680749 (February 16, 2006) (on file with Comm.) (identifying several recommendations, including, "[f]ewest clicks required to change default, which promotes search innovation by facilitating the user's ability to switch.").

Independent search engines told the Subcommittee that because they are not set as the default search engine on popular browsers, they face significant business challenges. As a result, DuckDuckGo said it was compelled to invest in browser technology, including creating its own browser for Android and iOS and various browser extensions.[422] It noted, however, that "the same default placement challenges exist in the browser market, just one level up – with the device makers requiring millions or billions of dollars to become a default browser on a device."[423]

A fourth challenge facing upstart search engines is the growing number of features and services that a general search provider must offer to be competitive with Google. Through the mid-2000s, a general search engine could compete through providing organic links alone. Since Google and Bing now incorporate information boxes and various specialized services directly onto their general search results page, a market entrant would similarly need to provide a broader set of search features and services. One market participant told the Subcommittee that this set of "mandatory high-quality search features" includes maps, local business answers, news, images, videos, definitions, and "quick answers."[424] Delivering this variety of features requires access to various sources of data, raising the overall costs of entry.

Vertical search providers differ from horizontal search engines in several ways. By offering specialized search focused on a particular topic or activity, they fulfill a separate role and require distinct tools and expertise. The necessary inputs vary by search vertical. Flight search, for example, requires access to flight software and data, whereas certain local search providers rely on user-generated content such as reviews. Many vertical providers use structured data feeds that pull from third-party databases, rather than from a general index.

A significant challenge for vertical providers is reaching users. Although they serve distinct needs, most vertical search providers still depend on horizontal search engines—and specifically on Google—to reach users.[425] In submissions to the Subcommittee, even some of the largest and most well-known verticals stated that they depend on Google for up to 80–95% of their traffic.[426] Since Google now also provides vertical search services, it has the incentive and ability to use its dominance in horizontal search to disfavor vertical providers that compete with its own vertical search services. Internal documents from Google show that it has used its dominance in general search to closely track

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[422] Innovation and Entrepreneurship Hearing at 5 (statement of Megan Gray, Gen. Counsel & Pol'y Advocate, DuckDuckGo).

[423] *Id*. at 5–6.

[424] *Id.* at 1.

[425] Submission from Source 564, to H. Comm. on the Judiciary, 5 (Nov. 12, 2019) (on file with Comm.) ("The most important source of traffic for local search services are general search websites.").

[426] Submission from Source 564, to H. Comm. on the Judiciary, 5 (Nov. 12, 2019) (on file with Comm.); Submission from Source 115, to H. Comm. on the Judiciary, 19 (Dec. 27, 2019) (on file with Comm.); Submission from Source 887, to H. Comm. on the Judiciary, 3 (Oct. 28, 2019) (on file with Comm.); Submission from Foundem, to H. Comm. on the Judiciary, 9 (Dec. 12, 2016) (on file with Comm.).

traffic to competing verticals, demanding that certain verticals permit Google to scrape their user-generated content and demote several verticals. Several market participants told the Subcommittee that Google's preferential treatment of its own verticals, as well as its direct listing of information in the "OneBox" that appears at the top of Google search results, has the net effect of diverting traffic from competing verticals and jeopardizing the health and viability of their business.[427]

Google's internal documents and submissions from third-party market participants suggest that verticals are both a complement to horizontal search as well as a competitive threat to it. One market participant explained that while vertical search providers can increase demand for horizontal search engines in the short-term, they can divert traffic from horizontal search providers in the long-term, as the growing popularity of a vertical may lead users to navigate to it directly.[428] Diverting traffic from general search providers, in turn, would deprive them of both advertiser revenue as well as valuable click-and-query data. Given these dynamics, a dominant horizontal search provider that also enters vertical search faces a significant conflict of interest that can skew search results to the detriment of third-party businesses and users alike.

B. Online Commerce

Online commerce, also known as e-commerce, is the activity of buying or selling products or services using the Internet.[429] E-commerce transactions take place through a variety of channels, including online marketplaces like Amazon Marketplace, where a wide variety of brands and products from different sellers are sold in one place, or a business's direct to consumer website like Nike.com. In 2019, the U.S. Census Bureau estimated e-commerce retail sales to be about $600 billion,[430] compared to just under $33 billion in 2001.[431] As the COVID-19 pandemic pushes more American shoppers online, e-commerce growth has exploded.[432] This is particularly true for online marketplaces,

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[427] Submission from Source 564, to H. Comm. on the Judiciary, 5 (Nov. 12, 2019) (on file with Comm.); Submission from Source 115, to H. Comm. on the Judiciary, 19 (Dec. 27, 2019) (on file with Comm.); Submission from Source 887, to H. Comm. on the Judiciary, 3 (Oct. 28, 2019) (on file with Comm.); Submission from Foundem, to H. Comm. on the Judiciary, 9 (Dec. 12, 2016) (on file with Comm.).

[428] Submission from Source 407, to H. Comm. on the Judiciary, Source 407-000071 (Nov. 12, 2019) (on file with Comm.).

[429] Press Release, U.S. Dep't of Commerce, U.S. Census Bur., Retail E-Commerce Sales in Fourth Quarter 2001 Were $10.0 Billion, Up 13.1 Percent from Fourth Quarter 2000, Census Bureau Reports (Feb. 20, 2002), https://www2.census.gov/retail/releases/historical/ecomm/01q4.pdf (defining e-commerce as "sales of goods and services where an order is placed by the buyer or price and terms of sale are negotiated over an Internet, extranet, Electronic Data Interchange (EDI) network, electronic mail, or other comparable online system. Payment may or may not be made online").

[430] Press Release, U.S. Dep't of Commerce, U.S. Census Bur., Quarterly Retail E-Commerce Sales 4th Quarter 2019, https://www2.census.gov/retail/releases/historical/ecomm/19q4.pdf.

[431] Press Release, U.S. Dep't of Commerce, U.S. Census Bur., Retail E-Commerce Sales in Fourth Quarter 2001 Were $10.0 Billion, Up 13.1 Percent from Fourth Quarter 2000, Census Bureau Reports (Feb. 20, 2002). https://www2.census.gov/retail/releases/historical/ecomm/01q4.pdf.

[432] Gayle Kesten, *As Online Prices Increase, Consumers' Purchasing Power Declines*, ADOBE: RETAIL (July 13, 2020), https://blog.adobe.com/en/2020/07/13/as-online-prices-increase-consumers-purchasing-power-declines.html#gs.dv6lwa ("[T]otal online spending of $73 billion in June marked a 76.2 percent increase year-over-year."); *see also* ANDREW

where sales for essential items like groceries, masks, and electronics for home offices increased sharply in the wake of the pandemic.[433]

An online marketplace's most basic function is to serve as a platform that connects buyers and sellers. Marketplaces include product listings from a variety of sellers. Some online marketplaces, such as Amazon and eBay, aim to be fully integrated, multi-category e-commerce sites. Other marketplaces, however, operate as vertical, single-category sites, such as Newegg.com, for computer hardware and consumer electronics. The primary customers of e-commerce marketplaces are customers looking to buy an item or service online, and businesses looking to sell goods or services to customers online. Because of this, a successful marketplace must be attractive to consumers and third-party sellers.

The consumer-facing side of the marketplace allows users to search for and purchase products. Most online marketplaces offer features that enable users to compare competing products based on details like their price, popularity, and customer satisfaction reviews. Amazon is by far the largest marketplace.[434] Other marketplaces that are popular with consumers include eBay, Walmart, and Wayfair.[435]

Online marketplaces also serve third-party sellers. Third-party sellers have needs that are distinct from consumers visiting the marketplace to make a purchase. The seller-facing side of the business consists of providing third-party sellers with a platform to list their products for consumers to purchase. Often, the marketplace will supply vendors with services such as inventory tracking and pricing recommendations. Online marketplaces usually offer additional paid services to third-party sellers such as advertising and fulfillment services, consisting of warehousing, packing, and shipping.

The businesses that own and operate e-commerce marketplaces may host only independent, third-party seller listings, or list their own items for sale alongside third-party sellers. Amazon

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LIPSMAN, EMARKETER, US ECOMMERCE BY CATEGORY 2020: HOW THE PANDEMIC IS RESHAPING THE PRODUCT CATEGORY LANDSCAPE (July 22, 2020), https://www.emarketer.com/content/us-ecommerce-by-category-2020 ("US ecommerce sales will surge 18.0% to $709.78 billion, while brick-and-mortar retail sales will experience a historically significant decline of 14.0% to $4.184 trillion.").

[433] FEEDVISOR, 2020 Q4 TRENDS AND PROJECTIONS: THE DIGITAL REVOLUTION OF RETAIL AND E-MARKETPLACES at 2–3, 5 (2020) (showing that Grocery and Gourmet sales on Amazon and Walmart were up 91% and 46% over the months of March and April 2020, respectively, compared to February); s*ee also* Giselle Abramovich, *How COVID-19 is Impacting Online Shopping Behavior*, ADOBE: COVID-19 (Mar. 26, 2020), https://blog.adobe.com/en/2020/03/26/how-covid-19-is-impacting-online-shopping-behavior.html#gs.dv63z7 (reporting that after the COVID-19 outbreak, "purchases for cold, cough & flu products increased 198%, while online purchases for pain relievers increased 152%").

[434] *See, e.g.*, ANDREW LIPSMAN, EMARKETER, TOP 10 US ECOMMERCE COMPANIES 2020 (Mar. 10, 2020), https://www.emarketer.com/content/top-10-us-ecommerce-companies-2020 (forecasting Amazon's e-commerce market share for 2020 at 38.7%, compared to second-place Walmart at 5.3% and third-place eBay at 4.7%); *see also* Production of Amazon, to H. Comm. on the Judiciary, AMAZON_HJC_00061156 (Oct. 30, 2019) (on file with Comm.) (showing that Amazon.com was about five times larger than eBay in 2018, its next closest marketplace competitor at the time).

[435] ANDREW LIPSMAN, EMARKETER, TOP 10 US ECOMMERCE COMPANIES 2020 (Mar. 10, 2020), https://www.emarketer.com/content/top-10-us-ecommerce-companies-2020.

Marketplace is an example of the latter, in that customers view Amazon Retail offers for its own private-label brands, such as AmazonBasics,[436] alongside independent, third-party seller offers. Amazon Retail also acts as a reseller of brand-name items, purchasing items like Levi's jeans from a wholesaler, and then reselling them on the marketplace. In these circumstances, third-party sellers are both customers and competitors of online marketplaces.

Marketplace operators benefit financially from the sale of services to third-party sellers and consumers.[437] On the seller-facing side of their business, marketplaces usually take a cut of third-party sales and charge fees for sales-related services like fulfillment, payment, and advertising. If the marketplace operators also sell products on their own platforms, they make money like a typical retailer from the difference between the wholesale and retail price. Marketplaces may also make money from fees paid by customers to participate in membership programs. For example, Amazon offers Amazon Prime for $119 per year as a paid membership program that provides customers with benefits such as unlimited free shipping on eligible items and digital streaming video.[438] Other revenue sources for marketplaces may include credit card and gift card services that are tied to the platform.[439]

A few large companies dominate the e-commerce industry, and Amazon is the clear leader among them. The market research company eMarketer estimates that Amazon is about eight times larger than eBay and Walmart in terms of market share.[440] Other metrics further demonstrate Amazon's role as a gatekeeper for e-commerce. Amazon is the most-visited website globally for e-commerce and shopping,[441] and recent analyses suggest that over 60% of all online product searches in the U.S. begin on Amazon.com.[442]

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[436] Production of Amazon, to H. Comm. on the Judiciary, 1 (Oct. 14, 2019) (on file with Comm.) ("AmazonBasics is an Amazon private brand that launched in 2009. The brand offers a number of products, including electronics accessories, luggage, and office products.").

[437] *See, e.g.*, Amazon.com, Inc., Quarterly Report (Form 10-Q) 18 (July 31, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/a77b5839-99b8-4851-8f37-0b012f9292b9.pdf (showing net sales for third-party seller services increased from $23 billion in the first six months of 2019 to $32 billion in the first six months of 2020).

[438] Production of Amazon, to H. Comm. on the Judiciary, 1–2 (Oct. 14, 2019) (on file with Comm.).

[439] *See, e.g.*, Amazon.com, Inc., Annual Report (Form 10-K) 23, 47 (Jan. 31, 2017), https://www.sec.gov/Archives/edgar/data/1018724/000101872417000011/amzn-20161231x10k.htm.

[440] ANDREW LIPSMAN, EMARKETER, TOP 10 US ECOMMERCE COMPANIES 2020 (Mar. 10, 2020), https://www.emarketer.com/content/top-10-us-ecommerce-companies-2020.

[441] *Worldwide E-Commerce and Shopping Category Performance*, SIMILARWEB (July 2020), https://pro.similarweb.com/#/industry/overview/E-commerce_and_Shopping/999/1m/?webSource=Total (showing that Amazon had 2.6 billion visits compared to 940.8 million for eBay in July 2020).

[442] Lucy Koch, *Looking for a New Product? You Probably Searched Amazon*, EMARKETER (Mar. 31, 2019), https://www.emarketer.com/content/looking-for-a-new-product-you-probably-searched-amazon (last visited Oct. 3, 2020) (citing FEEDVISOR, THE 2019 AMAZON CONSUMER BEHAVIOR REPORT 14 (2019))*; see also* WUNDERMAN THOMPSON COMMERCE, THE FUTURE SHOPPER REPORT 2020, 11 (2020) (on file with Comm.).

Amazon's dominance in e-commerce extends to its role as a marketplace operator and its relationship with sellers. Because of its size and scale, no other marketplace comes close to providing sellers with access to such a large pool of buyers, as well as sales-related services. There are over 112 million Prime members in the United States—about 44% of the adult population. The number of Prime members has doubled since reaching 50 million members in 2015, with Amazon projecting additional growth.[443] Amazon.com has 2.3 million active sellers on its marketplace worldwide.[444] In comparison, Amazon's closest e-commerce competitor, Walmart, has roughly 54,000 sellers on its marketplace.[445] In general, the more sellers a platform has, the more buyers it can attract and vice versa.[446] According to a competing online marketplace, sellers feel forced to be on Amazon because that is where the buyers are.[447]

If current trends continue, no company is likely to pose a threat to Amazon's dominance in the near or distant future. Although some alternatives to Amazon have experienced growth during the pandemic, there is still a massive gap between the market leader and its competitors.[448] Several factors privilege Amazon as the dominant e-commerce marketplace, and also make entry or expansion by a challenger unlikely. While some of these barriers to entry are inherent to e-commerce—such as economies of scale and network effects—others result from Amazon's anticompetitive conduct. As discussed elsewhere in the Report, Amazon's acquisition strategy and many of its business practices were successfully designed to protect and expand its market power. An Amazon executive referred to some of these tactics as the company's "Big Moats," and suggested "doubl[ing] down" on them in a business strategy document.[449] Similarly, in 2018, an investment analyst report expressed skepticism

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[443] Press Release, Consumer Intelligence Res. Partners, LLC, U.S. Amazon Prime Members – Slow, Steady Growth (Jan. 16, 2020), https://files.constantcontact.com/150f9af2201/9f9e47b4-0d66-4366-ad76-552ae3daa4f0.pdf (last visited Oct. 3, 2020); *see* Todd Bishop, *Amazon Tops 150M Paid Prime Subscribers Globally After Record Quarter for Membership Program*, GEEKWIRE (Jan. 30, 2020) https://www.geekwire.com/2020/breaking-amazon-tops-150m-paid-prime-members-globally-record-quarter/; Parkev Tatevosian, *Will Amazon Prime Reach 200 Million Members by the End of 2020?*, MOTLEY FOOL (July 18, 2020), https://www.fool.com/investing/2020/07/18/will-amazon-prime-reach-200-million-members-by-the.aspx (noting a 29% increase in Amazon's revenue in the second quarter of 2020 versus the same quarter in 2019, primarily as a result of COVID-19).

[444] *Number of Sellers on Amazon Marketplace*, MARKETPLACE PULSE, https://www.marketplacepulse.com/amazon/number-of-sellers (last visited Oct. 3, 2020).

[445] *Walmart's Fulfillment Service for Sellers Not Seeing Adoption*, MARKETPLACE PULSE, (Sept. 1, 2020), https://www.marketplacepulse.com/articles/walmarts-fulfillment-service-for-sellers-not-seeing-adoption.

[446] Stigler Report at 38 (describing indirect, multi-sided network effects in e-commerce, noting that "in ecommerce platforms, which intermediate trade between sellers and buyers, a buyer does not directly benefit from the presence of other buyers but does benefit from the presence of more sellers—who are in turn attracted by the presence of the buyers").

[447] Submission from Source 718, to H. Comm. on the Judiciary, 5 (Oct. 14, 2019) (on file with Comm.).

[448] ANDREW LIPSMAN, EMARKETER, TOP 10 US ECOMMERCE COMPANIES 2020 (Mar. 10, 2020), https://www.emarketer.com/content/top-10-us-ecommerce-companies-2020 (illustrating that although Walmart's increased share of the U.S. retail e-commerce market will allow it to overtake eBay for second place, it will remain a distant second to Amazon).

[449] Production of Amazon, to H. Comm. on the Judiciary, AMAZON_HJC_00068510 (Sep. 8, 2010) (on file with Comm.).

about Walmart's ability to challenge Amazon, commenting, "[W]e are concerned Amazon's Prime membership program is fortifying an impenetrable moat around its customers."[450]

C. Social Networks and Social Media

Social media products and services include social networking, messaging, and media platforms designed to engage people by facilitating sharing, creating, and communicating content and information online.[451] Although the boundaries of the social media market are imprecise,[452] social media platforms generally allow users on their networks to interact with people or groups they know, display content through linear feeds, or otherwise add socially layered functionality for services online, usually through a mobile app. In response to the Committee's requests for information, several market participants said they view social media as driven by networks, while many social media products and services include common functionalities, such as public profiles, curated feeds, followers, messaging, and other use cases.[453] Others focus on certain aspects of public and private communications.[454]

A principal feature of social media platforms is that they typically offer their services for a zero monetary price to the platform's users.[455] The platform develops a service it hopes will attract a critical mass of users to then attract advertisers to the platform.[456] Some social media companies offer additional services to users for a price or allow users to pay for additional functionality. For example, LinkedIn Premium provides users with an option to pay for additional features, such as their network and in-app messaging insights.[457]

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[450] *See* Lydia Ramsey Pflanzer, *Walmart's talks with an insurance giant could be part of an assault on Amazon Prime*, BUS. INSIDER (Apr. 3, 2018), https://www.businessinsider.com/morgan-stanley-why-walmart-could-bid-on-humana-2018-4.

[451] Competition & Mkts. Auth. Report at 53.

[452] Jan H. Kietzmann, Kristopher Hermkens, Ian P. McCarthy & Bruno S. Silvestre, *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241 (2011), http://summit.sfu.ca/system/files/iritems1/18103/2011_social_media_bh.pdf.

[453] Submission from Source 247, to H. Comm. on the Judiciary, Source 247-0000000006 (Oct. 23, 2019) (on file with Comm.); Competition & Mkts. Auth. Report at 53.

[454] Submission from Source 471, to H. Comm. on the Judiciary, 4 (Oct. 15, 2019) (on file with Comm.) ("[T]here are a number of other competitors who focus on different or additional aspects of public and private communication. For example, some competitors focus on sharing and expression though images and other media (e.g., Instagram, YouTube, and Pinterest). Some companies focus more on private communications (e.g., WhatsApp, Snap (for the most part), Facebook, Signal, and Telegram). Other companies focus on communications about specific topics (e.g., Discord for gaming and Slack for workplace communications).").

[455] Submission from Source 164, to H. Comm. on the Judiciary, Source 164-000015 (Oct. 28, 2019) (on file with Comm.) (describing how online advertising requires building an ad product, a sales team to sell that product, the engineering and product capacity to target and measure the effectiveness of those ads.).

[456] FIONA M. SCOTT MORTON & DAVID C. DINIELLI, OMIDYAR NETWORK, ROADMAP FOR AN ANTITRUST CASE AGAINST FACEBOOK 3 (June 2020) [hereinafter Omidyar Network Report] https://www.omidyar.com/wp-content/uploads/2020/06/Roadmap-for-an-Antitrust-Case-Against-Facebook.pdf.

[457] LINKEDIN PREMIUM, https://premium.linkedin.com/ (last visited Oct. 3, 2020).

Social media platforms with a larger network of users are more likely to attract users and advertisers.[458] In a briefing to Subcommittee members and staff, Brad Smith, the President of Microsoft, described this value:

> You don't always need to have a proven business model to attract capital. You just need an idea that will get a lot of users. And then people assume you'll find a way to turn that usage into a business model that will produce revenue. That's been very important for the US. It distinguishes us and allows venture funding. There's something magical about 100 million active monthly users (MAU) in the United States. At that level a company becomes a force unto themselves. If you see a company acquire another company that's in the same product market and is on the path to reach 100 million MAU, that's more likely to raise a competitive concern. Historically, I think regulators were slow to notice that issue.[459]

As another market participant describes it, "attracting a critical mass of users is essential to delivering a viable social network, as there is no reason for users to start using a social network if there is no one there with whom they can connect."[460]

Social media companies may also focus on attracting particular types or groups of consumers to differentiate themselves from larger companies.[461] Many of the top-ranking apps on iOS are complementary to popular social media applications. For example, Dazz Cam, a vintage-inspired photo-editing app used with TikTok, was popular in the U.S. in 2020.[462] Similarly, Lens is a popular iOS app that allows users to browse, like, and comment on photos and videos on Instagram using the Apple Watch.[463]

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[458] Production from Facebook, to H. Comm. on the Judiciary, FB_HJC_ACAL_00059100 (Apr. 6, 2012) (on file with Comm.) ("Advertising is a scale thing, it wasn't until we reached 350 million users did we become interesting to big brands.").

[459] Briefing with Brad Smith, President, Microsoft, in Washington, D.C. (June 23, 2020).

[460] Submission from Source 164, to H. Comm. on the Judiciary, Source 164-000014 (Oct. 28, 2019) (on file with Comm.). *But see* Bundeskartellamt, B6-22/16, Case Summary, *Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate* data processing, 8 (Feb. 15, 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4 ("At least as far as the services affected in this case are concerned, it is not sufficient to have a 'critical mass' of users or technical, financial and personal expertise in order to be able to enter neighbouring markets and be as successful as on the original market. As the example of Google+ has shown, a service cannot expect to have the same reach when providing a different type of service, due to strong direct network effects.").

[461] Competition & Mkts. Auth. Report at 115.

[462] Michelle Santiago Cortes, *These Are the TikTok Editing Apps You've Been Seeing on Your 'For You' Page*, REFINERY29 (Mar. 25, 2020), https://www.refinery29.com/en-us/tik-tok-editing-apps (last visited Oct. 3, 2020).

[463] Zac Hall, *Lens Is a Modern and Feature-Packed Instagram App for Apple Watch that Works Without the iPhone*, 9TO5MAC (Apr. 24, 2019), https://9to5mac.com/2019/04/24/lens-instagram-for-apple-watch/ (last visited Oct. 3, 2020).

Due to network effects in the social media market, new entrants may choose to begin as a complement by relying on the incumbent platform's application programming interfaces (APIs) such as Facebook's Open Graph or Twitter's search API.[464] However, because incumbent platforms control access to these APIs and can foreclose access to a complementary app that is successful or gaining users,[465] some market participants view relying on these platforms to reach users as a constant business risk.[466] One market participant noted that in addition to harming their business, these actions also "restrict users' ability to multi-home and increase barriers to entry, including network effects and switching costs."[467]

Given Facebook's dominance, the primary way for new entrants to compete is to attract a subgroup or niche.[468] One market participant explained, "competitors may be limited to niche strategies that do not challenge the incumbent directly. For example, Facebook (including Instagram) is by far the most popular social networking platform. Although there are several competitors, such as LinkedIn, and fast-growing new entrants, such as TikTok, most or all employ niche strategies to varying degrees, and most have far less user engagement, attention, and data and a smaller share of advertising revenue than Facebook."[469]

1. <u>Social Networks are Distinguishable from Social Media</u>

While a broad view of the social media market is useful for considering the wider landscape for social data and online advertising,[470] it is important to focus on the actual use, demand, and substitutability of social products when examining competition among social platforms online.[471] The critical distinction between social networking and social media markets is how people use the

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464 Omidyar Network Report at 22.

465 *Id.* at 22–25; Submission from Source 471, to H. Comm. on the Judiciary, 8 (Oct. 15, 2019) (on file with Comm.) ("In or around 2010, [Source 471] restricted the access of our API by some third-party developers because we had significant concerns regarding some third-party developers use of [Source 471]'s private data. In order to protect private data, [Source 471] determined such changes were necessary to ensure that these data were not used improperly.").

466 Submission from Source 164, to H. Comm. on the Judiciary, Source 164-00023 (Oct. 28, 2019) (on file with Comm.); Submission from Source 471, to H. Comm. on the Judiciary, 10 (Oct. 15, 2019) (on file with Comm.) ("[Our company's] business would be affected if other social networking networks were to disallow cross-posting . . . to their platforms or discontinue APIs central to the functionality of our products or services.").

467 Submission from Source 471, to H. Comm. on the Judiciary, 10 (Oct. 15, 2019) (on file with Comm.).

468 Omidyar Network Report at 16.

469 Submission from Source 407, to H. Comm. on the Judiciary, 4 (Nov. 1, 2019); Competition & Mkts. Auth. Report at 55 ("Differentiation can incentivise consumers to access multiple platforms, allowing for the co-existence of platforms.").

470 Submission from Source 164, to H. Comm. on the Judiciary, Source-32-000014 (Oct. 28, 2019) (on file with Comm.) (discussing how they see "social media sites" as competitors for ads even though they don't think they are in that market.).

471 *See* United States v. Microsoft Corp., 253 F.3d 34, 51–52 (D.C. Cir. 2001) ("[T]he relevant market must include all products 'reasonably interchangeable by consumers for the same purposes.'") (quoting United States v. Du Pont & Co., 351 U.S. 377, 395 (1956))*; see also* Competition & Mkts. Auth. Report at 117–18 ("[T]he closeness of competition between different platforms depends on the degree to which consumers consider them substitutes, rather than the extent to which they share common functionalities.").

platform. As Germany's Federal Cartel Office (Bundeskartellamt) and the United Kingdom's Competition and Markets Authority (CMA) have noted, the specific demand for social networks "is fundamentally different from the demand for other social media."[472]

Social network platforms facilitate their users finding, interacting, and networking with other people they already know online, and by providing a "rich social experience" through features on their products.[473] People regularly use social network platforms to exchange "experiences, opinions and contents among specific contacts which the users define based on identity."[474]

In contrast, social media platforms principally facilitate the distribution and consumption of content. Much of the content on YouTube, for example, can be enjoyed by users with a wide range of relationships to the person posting, including by strangers.[475] Similarly, TikTok describes itself as a "global platform for users to express their ideas by sharing videos with a broader community."[476] In light of this distinction, the CMA concluded that YouTube is focused on offering content and does not compete with Facebook, facilitating communication and sharing content among groups of friends who choose each other and enjoy content in large part because of those relationships.[477]

In sum, social networking sites have a robust social graph, whereas content-centric sites do not.[478] Although users can share videos or stream events on Facebook and YouTube in similar ways, there is a fundamental difference between sharing a video among a person's social network on Facebook, Instagram, or WhatsApp—such as a child's first steps—and broadcasting it publicly on YouTube. While people may spend significant time on both YouTube and Facebook,[479] these firms provide distinct services to their users, and including both in the same market would be inconsistent with how users engage with each platform.

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[472] Competition & Mkts. Auth. Report at 54 (citing Bundeskartellamt (Feb. 6, 2019), B6-22/16, para. 249, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5).

[473] *Id.*

[474] *Id.*

[475] Omidyar Network Report at 6.

[476] Letter from Michael Beckerman, Vice Pres., Head of U.S. Public Pol'y, TikTok, to Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary & Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary (July 29 2020) at 1, https://docs.house.gov/meetings/JU/JU05/20200729/110883/HHRG-116-JU05-20200729-SD005.pdf.

[477] Omidyar Network Report at 6.

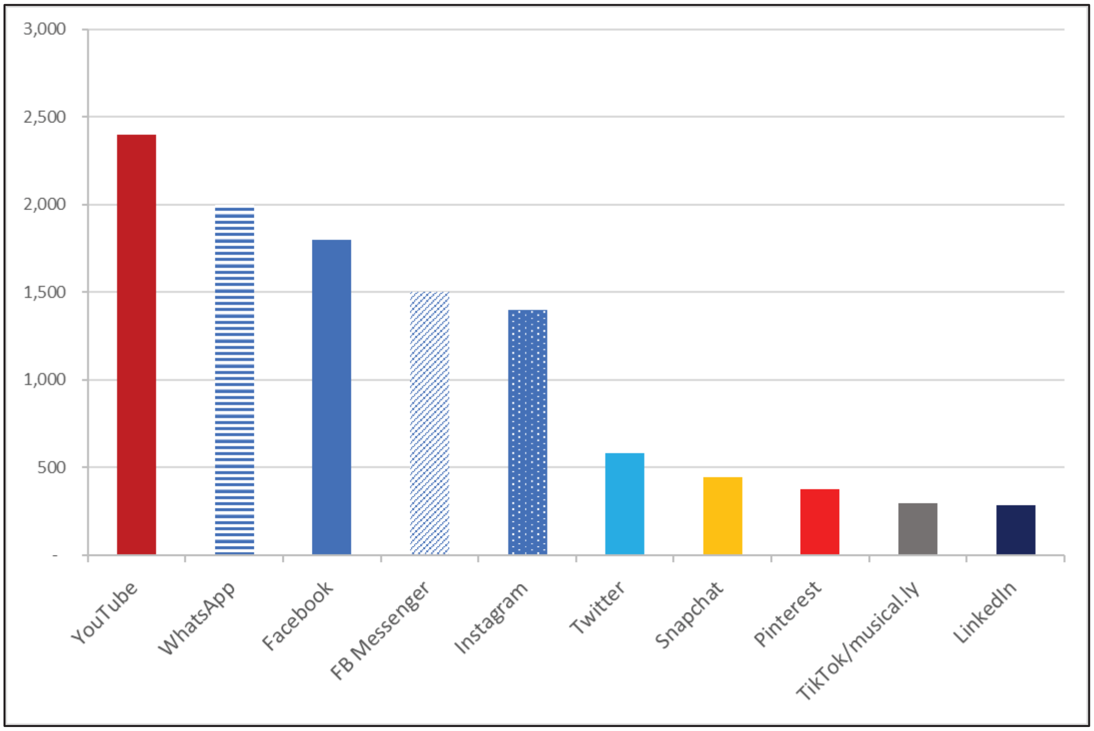
[478] THOMAS CUNNINGHAM, POSSIBLE END STATES FOR THE FAMILY OF APPS (2018) (on file with Comm.) (discussing social networking platforms with comparable and orthogonal social graphs.).

[479] *Average Time Spent Daily on Social Media (Latest 2020 Data)*, BROADBAND SEARCH, https://www.broadbandsearch.net/blog/average-daily-time-on-social-media#post-navigation-4 (last visited Oct. 3, 2020).

2. Market Concentration

Social platforms that are within a broad definition of social media include YouTube, Facebook and its family of products—Instagram, Messenger, and WhatsApp—as well as TikTok, Twitter, LinkedIn, Pinterest, Reddit, and Tumblr.[480] According to Facebook's internal market data, YouTube and Facebook's family of products were by far the most popular social media sites by Monthly Active Persons (MAP) as of December 2019.[481]

Social Media Companies by Monthly Active Persons (MAP) in Millions[482]



The social network marketplace is highly concentrated. Facebook (1.8 billion users) and its family of products—WhatsApp (2.0 billion users), Instagram (1.4 billion users)— have significantly more users and time spent on its platform than its closest competitors, Snapchat (443 million users) or Twitter (582 million users).[483] TikTok is growing quickly and is often referenced as evidence that the

[480] Competition & Mkts. Auth. Report at 115 n.140 (indicating that there are several other smaller firms that conform to this definition of social media but lack a significant user base).

[481] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-00086585 (Jan. 2020) (on file with Comm.).

[482] Prepared by the Subcomm. based Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-00086585 (Jan. 2020) (on file with Comm.). (metrics collected by Facebook, Inc.).

[483] THOMAS CUNNINGHAM, POSSIBLE END STATES FOR THE FAMILY OF APPS (2018) (on file with Comm.) (discussing social networking platforms with comparable and orthogonal social graphs.).

social media landscape is competitive.[484] Although it meets the broad definition of social media as a social app for distributing and consuming video content, TikTok is not a social network.

D. Mobile App Stores

Mobile application stores (app stores) are digital stores that enable software developers to distribute software applications (apps) to mobile device users.[485] A mobile app is a standardized piece of software optimized for use on a mobile device. Users can install this software to access digital content or services, share content, play games, or make transactions for physical goods and services. Apps are configured to run on a device's operating system as "native apps." These apps may be pre-installed on a mobile device as a component of the operating system or by the device manufacturer, downloaded from an app store, or loaded directly from the web using a browser—a process referred to as sideloading. Software developers upload apps and updates to app stores, and mobile device users can then install apps by downloading them from the app store to their device.

App stores include free and paid apps that charge a fee. In addition to allowing users to install apps, app stores enable users to search, browse, and find reviews for apps, as well as remove apps from their devices.[486] The leading app stores also offer tools and services to support developers to building apps for the app store.[487] App stores have rules that govern the types of apps permitted in the app store, conduct of app developers, how users pay for apps, the distribution of revenue between the app and the app store, and other details regarding the relationship between the app store operator and the app developers that distribute apps through the store.[488]

App stores provide mobile device users with a sense of trust and security that the apps they install from an app store have been reviewed, will not harm the user's mobile device, will function as

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[484] *See* Alex Sherman, *TikTok reveals detailed user numbers for the first time*, CNBC (Aug. 24, 2020), https://www.cnbc.com/2020/08/24/tiktok-reveals-us-global-user-growth-numbers-for-first-time.html.

[485] *See e.g.*, Production of Apple, to H. Comm. on the Judiciary, HJC_APPLE_000003 (Oct. 14, 2019) (on file with Comm.); Letter from Executive at Source 736, to Members of the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 4 (Oct. 31, 2019) (on file with Comm.); BRICS COMPETITION, INNOVATION, LAW & POL'Y CTR, DIGITAL ERA COMPETITION: A BRICS VIEW 347 (2019), http://bricscompetition.org/upload/iblock/6a1/brics%20book%20full.pdf.

[486] NETH. AUTH. FOR CONSUMERS & MKTS. MARKET STUDY INTO MOBILE APP STORES 20 (2019), https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf [hereinafter Neth. Auth. for Consumers & Mkts Study].

[487] *Id.*

[488] *See Apple App Store Review Guidelines*, APPLE, https://developer.apple.com/app-store/review/guidelines/#legal; *Apple Developer Program License Agreement*, APPLE, https://developer.apple.com/services-account/agreement/XV2A27GUJ6/content/pdf; *Google Play Developer Policy Center*, GOOGLE, https://play.google.com/about/developer-content-policy/; *Google Play Developer Distribution Agreement*, GOOGLE, https://play.google.com/intl/ALL_us/about/developer-distribution-agreement.html .

intended, and will not violate user privacy.[489] App stores also reduce customer acquisition costs for app developers by allowing developers to reach an extraordinarily large consumer base—every mobile device user in the U.S. is addressable by developing for the Apple App Store and the Google Play Store. By reducing the costs of app developers, app stores help make software applications more affordable for consumers.[490]

Deloitte has explained that app stores provide developers with various benefits, including providing a consistent interface and experience for users on a mobile operating system, a secure platform for apps, storage systems for hosting apps and managing downloads and updates, and billing and payment management systems that can reduce overhead for developers.[491] Apple and Google also provide developers with software-development tools to create, test, and publish apps; technical support and analytics tools; and tutorials.[492]

The mobile operating system on a device determines which app stores the user can access. The provider of the mobile operating system determines which app stores may be pre-installed on devices running the operating system, and whether and how additional app stores may be installed. As discussed elsewhere in the Report, both Apple and Google have durable and persistent market power in the mobile operating system market; iOS and Android run on more than 99% of mobile devices in the U.S. and globally.[493] There are high switching costs in the mobile operating system market and high barriers to entry. Due to their dominance in the mobile operating system market, Apple and Google have the power to dictate the terms and extent of competition for distributing software on to mobile devices running their respective mobile operating systems.[494]

The Google Play Store is the primary app store installed on all Android devices. The Apple App Store is the only app store available on iOS devices.[495] Apps are not interoperable between operating systems—native apps developed for iOS only work on iOS devices, and native apps

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[489] *See* CEO Hearing Transcript at 3 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.) https://docs.house.gov/meetings/JU/JU05/20200729/110883/HHRG-116-JU05-20200729-QFR054.pdf; *See also* John Bergmayer, Public Knowledge, Tending the Garden: How to Ensure that App Stores Put Users First 1, 5, 18 (2020), https://www.publicknowledge.org/wp-content/uploads/2020/06/Tending_the_Garden.pdf.

[490] Production of Apple, to H. Comm. on the Judiciary, HJC_APPLE_000003 (Oct. 14, 2019) (on file with Comm.); Neth. Auth. for Consumers & Mkts. Study at 108.

[491] Deloitte, The App Economy in the United States 8 (2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0121-155299.pdf

[492] Neth. Auth. for Consumers & Mkts. Study at 29.

[493] *Id.* at 15.

[494] *See* Data and Privacy Hearing at 15 (statement of Maurice E. Stucke, Prof. of Law, Univ. of Tennessee, and Ariel Ezrachi, Slaughter and May Prof. of Competition Law, Univ. of Oxford, Fellow, Pembroke Coll., Dir., Oxford Ctr. For Competition Law and Pol'y), https://docs.house.gov/meetings/JU/JU05/20191018/110098/HHRG-116-JU05-20191018-SD010.pdf.

[495] Neth. Auth. for Consumers & Mkts. Study at 4, 21.

developed for Android only work on Android devices.[496] The App Store and the Play Store do not compete against one another. Android users cannot access the Apple App Store, and iOS users cannot access the Google Play Store, so the dominance of the Play Store is not constrained by the App Store and vice versa.[497]

Statista reports that in the first quarter of 2020 there were approximately 2.56 million apps available in the Google Play Store and 1.847 million apps available in Apple's App Store.[498] Apple's App Store is the only means to distribute software on iOS devices.[499] The Google Play Store is the dominant app store on Android devices; however, Google does permit users to sideload alternative app stores. Some Android device partners, such as Samsung, pre-install their own app stores on their devices.[500] Leading alternative Android app stores include Amazon's Appstore, Aptoide, F-Droid, and the Samsung Galaxy Store.[501] App developers who want to reach the entire addressable market of U.S. or global smartphone users must have an app in both the App Store and the Play Store.[502] Apple and Google also determine the terms and conditions app developers must agree to in order to distribute software through the App Store and Play Store, respectively. As a result, app developers and industry observers agree that Apple and Google control the app distribution market on mobile devices.[503]

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[496] *See* Interview with Source 407 (Sept. 10, 2020); Interview with Source 143 (Aug. 27, 2020); Neth. Auth. for Consumers & Mkts. Study at 51–52, 67, 73.

[497] *See* Press Release, Eur. Comm'n, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018) https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581; Letter from Executive at Source 181, to Members of the Subcomm.on Antitrust, Commercial and Admin. Law, 4 (Oct. 31, 2019) (on file with Comm.); Submission from Source 301, to H. Comm. on the Judiciary, 5, 7 (Oct. 15, 2019) (on file with Comm.).

[498] *Number of Apps Available in Leading App Stores as of 1st Quarter 2020,* STATISTA, https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/ (last visited Oct. 5, 2020).

[499] Neth. Auth. for Consumers & Mkts. Study at 50; Interview with Source 766 (July 2, 2020).

[500] Neth. Auth. for Consumers & Mkts. Study at 50. *See* Press Release, Eur. Comm'n, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 (explaining that worldwide, excluding China, "the Play Store accounts for more than 90% apps downloaded on Android devices").

[501] Joe Hindy, *10 Best Third Party App Stores for Android and Other Options Too*, Android Authority (Aug. 28, 2020), https://www.androidauthority.com/best-app-stores-936652/.

[502] Neth. Auth. for Consumers & Mkts. Study at 15.

[503] *See e.g.*, Interview with Source 143 (Aug. 27, 2020); Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00045377 (Feb. 14, 2014) (on file with Comm.) (demonstrating that Facebook COO Sheryl Sandberg explained to Facebook's Board of Directors that Apple and Google's positions as dominant mobile operating system and app store operators posted a "significant strategic threat" to Facebook's business and adding another popular mobile app to Facebook's suite of apps "would make it more difficult for operating system providers to exclude the Company's mobile applications from mobile platforms."); Letter from Executive at Source 181, to Members of the Subcomm. on Antitrust, Commercial and Admin. Law, 4 (Oct. 31, 2019) (on file with Comm.); Kara Swisher, *Is It Finally Hammer Time for Apple and Its App Store*, N.Y. TIMES (June 19, 2020), https://www.nytimes.com/2020/06/19/opinion/apple-app-store-hey.html?referringSource=articleShare.

There is no method for a third-party app store to challenge the App Store on iOS devices. Apple CEO Tim Cook told the Subcommittee that Apple has no plans to open iOS to alternative app stores.[504] For a third-party app store to successfully challenge the Play Store, consumers must be able to install the app store and the store must have popular apps that users want. As with mobile operating systems, network effects create momentum so that as more consumers install software from the app store, more developers will build apps for the app store, increasing the value of the app store for users and attracting more consumers. Once users have migrated to a large platform—such as an operating system and its app store, it is difficult for smaller competitors to attract users and app developers.[505]

The United Kingdom's Competition and Markets Authority observed that "almost all mobile app downloads are made through the App Store, on iOS devices, or Google Play, on Android devices."[506] Alternatives app distribution methods such as third-party app stores, gaming platforms, or sideloading are often irrelevant to the mobile applications market, not always practical options for users, have significant disadvantages compared to the pre-installed app stores, and offer only limited functionality.[507]

Web sites and web apps are not competitively significant alternatives to the dominant app stores on iOS and Android devices for distributing software to mobile devices. Apps provide a deeper, richer user experience and can provide additional functionality by accessing features within the mobile device's hardware and operating system, such as a camera or location services.[508] Web apps and browsers are also reliant on the device being connected to the Internet. Native apps can continue to work even when a device loses access to the Internet.[509] Apple's App Store Review Guidelines differentiate apps from websites, explaining that apps submitted to the App store "should include

[504] CEO Hearing at 3 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

[505] Data and Privacy Hearing at 5 (statement of Maurice E. Stucke, Prof. of Law, Univ. of Tennessee, and Ariel Ezrachi, Slaughter and May Prof. of Competition Law, Univ. of Oxford, Fellow, Pembroke Coll., Dir., Oxford Ctr. For Competition Law and Pol'y).

[506] Competition & Mkts. Auth. Report at 29*; see also* Japan Fair Trade Commission, Press Release, Report Regarding Trade Practices on Digital Platforms: Business-to-Business Transactions on Online Retail Platform and App Store 24–25 (Oct. 2019), https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Report.pdf (explaining that consumers rely on pre-installed app stores to install apps, so developers believe they "have no choice but to use the app store services" to reach consumers).

[507] *See* Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00068877 (Feb. 21, 2012) (on file with Comm.) ("Native apps will dominate over mobile-web for a long time (maybe forever) and we cannot prop up HTML-5 / are not strong enough to lead a shift - The mobile OS makers have a strong incentive in native apps performing better / working better than the web? so theory / what is possible aside, native apps will work better & be better experiences than the mobile web."); Neth. Auth. for Consumers & Mkts. Study at 42–51, 69.

[508] *See* Letter from Executive at Source 181, to Members of the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 1 (Oct. 31, 2019) (on file with Comm.); Neth. Auth. for Consumers & Mkts. Study at 59, 81.

[509] *See* Interview with Source 88 (May 12, 2020).

features, content and [a user interface] that elevate [the app] beyond a repackaged website."[510] Curation and centralized review of apps is an advantage touted by app store operators. Apple CEO Tim Cook explained to the Subcommittee that on iOS devices, Apple's control of software installation through the App Store ensures downloaded apps "meet our high standards for privacy, performance, and security," which is important for maintaining user trust.[511] Additionally, distributing software via app stores lowers customer acquisition costs for software developers.[512]

Consumers do access content on their mobile devices via the open Internet. However, mobile apps are the primary way users access content and services on mobile devices and have become integral in Americans' daily lives for basic communication, business transactions, entertainment, and news. In the U.S., nearly 90% of the time users spend online on mobile devices occurs in apps.[513] Software distribution via web apps or through a website accessible on a browser is not a competitively significant alternative to distributing apps through the dominant app store on a mobile device and does not discipline the market power of the dominant app stores controlled by Apple and Google.

Similarly, the ability for consumers to sideload apps—installing apps without using an app store—does not discipline the dominance of Apple and Google in the mobile app store market. Apple does not permit users to sideload apps on iOS devices, and few consumers have the technical savvy to "jailbreak" an iOS device to sideload apps.[514] Google does permit sideloading on Android devices, but developers find that given the option, consumers prefer to install apps from app stores and few opt for sideloading.[515] Google has created significant friction for sideloading apps to Android devices. One developer explained to Subcommittee staff that sideloading entails a complicated twenty-step process, and users encounter multiple security warnings designed to discourage sideloading.[516] Additionally, software developers that have left the Play Store to distribute software to Android users via sideloading have experienced precipitous declines in downloads and revenue and report problems updating their

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[510] *App Store Review Guidelines, § 4.2*, APPLE, https://developer.apple.com/app-store/review/guidelines/#design (last visited Oct. 4, 2020).

[511] CEO Hearing at 3 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

[512] *See* Production of Apple, to H. Comm. on the Judiciary, HJC_APPLE_000003 (Oct. 14, 2019) (on file with Comm.); Neth. Auth. for Consumers & Mkts. Study at 102.

[513] COMSCORE, 2019 REPORT GLOBAL STATE OF MOBILE 7 (2019); s*ee also* Letter from Executive at Source 181, to Members of the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 1 (Oct. 31, 2019) (on file with Comm.); Submission from Source 301, to H. Comm. on the Judiciary, 7 (Oct. 15, 2019) (on file with Comm.).

[514] Neth. Auth. for Consumers & Mkts. Study at 45–46; Submission from Source 736, to H. Comm. on the Judiciary, Source 736-00000166 (July 1, 2019).

[515] Interview with Source 59 (May 13, 2020).

[516] Interview with Source 83 (June 30, 2020).

apps.[517] Thus, the option for sideloading apps on mobile devices does not discipline the market power of dominant app stores.

There are no competitive constraints on the power Apple and Google have over the software distribution marketplace on their mobile ecosystems. The core benefit of mobile app stores—centralizing and curating software distribution—also gives Apple and Google control over which apps users discover and can install.[518] As the gateways to the primary way users access content and services on mobile devices, the App Store and the Play Store can extract revenue from and exercise control over everything users do on their devices.[519] This dominance enables Apple and Google to establish terms and conditions app developers have to comply with, leaving developers with the choice of complying or losing access to consumers. The terms and conditions app stores impose include requirements regarding app functionality, content, interactions with consumers, collection, and distribution of revenue between the app and app store.[520]

Mobile app stores charge app developers commissions on sales of paid apps through the app store. Apple and Google, along with other mobile app stores on Android devices, charge a 30% commission when users install the app.[521] Apple established its 30% commission on paid apps in 2009 with the introduction of the App Store, and that rate has become the industry standard.[522]

Apple and Google have both developed mechanisms for collecting payments from users for purchases within applications—these transactions are called in-app purchases (IAP). Apple and Google both charge developers a standard 30% for IAP.[523] In collecting IAP, Apple and Google collect user personal and payment information, process the payment, and then remit the payment to the app developer, minus a processing fee or commission.[524] Developers selling digital content through their

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[517] *See* Neth. Auth. for Consumers & Mkts. Study at 48; JOHN BERGMAYER, PUBLIC KNOWLEDGE, TENDING THE GARDEN: HOW TO ENSURE THAT APP STORES PUT USERS FIRST 44 (June 2020), https://www.publicknowledge.org/wp-content/uploads/2020/06/Tending_the_Garden.pdf; Interview with Source 83 (June 30, 2020).

[518] *See* JOHN BERGMAYER, PUBLIC KNOWLEDGE, TENDING THE GARDEN: HOW TO ENSURE THAT APP STORES PUT USERS FIRST 19 (2020), https://www.publicknowledge.org/wp-content/uploads/2020/06/Tending_the_Garden.pdf.

[519] *See id.* at 7, 19.

[520] *See* Neth. Auth. for Consumers & Mkts. Study at 3, 15.

[521] *See* ANALYSIS GROUP, APPLE'S APP STORE AND OTHER DIGITAL MARKETPLACES: A COMPARISON OF COMMISSION RATES 4–6 (July 22, 2020), https://www.analysisgroup.com/globalassets/insights/publishing/apples_app_store_and_other_digital_marketplaces_a_comparison_of_commission_rates.pdf.

[522] *See id.* at 4.

[523] *See* Neth. Auth. for Consumers & Mkts. Study at 23, 29, 86, 89.

[524] *See e.g.*, Letter from Executive at Source 181, to Members of the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3, 5–6 (Oct. 31, 2019) (on file with Comm.); Submission from Source 736, to H. Comm. on the Judiciary, Source 736-00000009 (on file with Comm.); Submission from Source 304, to H. Comm. on the Judiciary, 7–8 (Sept. 3, 2020); *see also* Reed Albergotti & Tony Romm, *Tinder and Fortnite criticize Apple for its 'App Store*

apps on iOS and Android devices are required to use the app store operator's IAP.[525] For subscription services, like news apps or streaming media, the commission is 15% for the second year and thereafter.[526] IAP systems provide mobile device users with convenience by allowing consumers to make transactions in their apps and only enter their payment details a single time, and protects user privacy by limiting sharing of sensitive financial information.[527] However, developers have noted that lack of competition in pricing by app stores, particularly given the scale the App Store and Play Store have achieved since introducing their standard commission rates for paid apps and in-app purchases, demonstrates the lack of competition in the software distribution market on both the iOS and Android ecosystems.[528] Developers have also said that the 30% commissions charged by app stores have led them to increase prices for consumers and diminished innovation by software developers.[529]

Apple and Google also develop and distribute apps that directly compete against third-party developers in their app stores.[530] This dynamic, coupled with the fact that App Store and Play Store are dominant distribution channels and can exert gatekeeper power over their platforms, has the potential to distort competition, lead to discrimination and higher entry barriers for third-party developers, and result in the app store operator self-preferencing its own apps, harming consumers and competition.[531]

New app stores face high barriers to entry. It is unlikely that a third strong mobile app ecosystem can emerge. To offer a new mobile app store that is compelling to consumers, the app store must have a built-in customer base to attract developers to build apps for the store and must have popular apps to attract customers. Before the introduction of the App Store, third-party apps were not a central component of the user experience on mobile devices. New entrants, such as Apple, could disrupt the mobile device and operating system market by offering superior handset design, user interface, and first-party applications. Now, third-party apps are critical to the success of any mobile ecosystem. Millions of apps are developed for iOS and Android, and leading device manufacturers have built their device ecosystems around those operating systems. As a result, it is unlikely that a new

monopoly', WASH. POST (June 16, 2020), https://www.washingtonpost.com/technology/2020/06/16/apple-antitrust-european-commission/.

[525] *See* Neth. Auth. for Consumers & Mkts. Study at 29.

[526] *Id.* at 29.

[527] *Id*. at 7.

[528] *See* Interview with Source 83 (June 30, 2020); Competitors Hearing at 8 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp).

[529] *See* Letter from Executive at Source 181 to Members of the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 9–10 (Oct. 31, 2019) (on file with Comm.) (internal citations omitted); Submission from Source 736, Source 736-00000236 (Oct. 23, 2019) (on file with Comm.).

[530] Japan Fair Trade Comm'n, Press Release, Report Regarding Trade Practices on Digital Platforms: Business-to-Business Transactions on Online Retail Platform and App Store 21 (Oct. 2019), https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Report.pdf.

[531] *See e.g.*, Neth. Auth. for Consumers & Mkts. Study at 22, 31–32, 69, 89–90, 95–99.

mobile operating system entrant can disrupt the current market dynamics.[532] Because of the control that Apple and Google exert over software distribution on their mobile ecosystems and the unlikelihood of entry by a new competitive mobile operating system, it is unlikely that a new, competitive app store will be able to successfully challenge the existing, dominant app store operators.

E. Mobile Operating Systems

A mobile operating system (OS) provides a mobile device with its underlying functionality, such as user interface, motion commands, button controls, and facilitates the operation of the device's features, such as the microphone, camera, and GPS. The mobile OS is the interface between the mobile device hardware, such as the smartphone handset or tablet, and the applications that run on the device, like email or streaming apps. The mobile OS is pre-installed on mobile devices; an alternative mobile OS cannot be installed or substituted. The characteristics of the mobile OS determine aspects of the mobile device's performance and functionality, including the app stores and apps that can run on the device. The mobile OS also determines which company's ecosystem of products and services the device is integrated with.[533]

Google's Android and Apple's iOS are the two dominant mobile operating systems.[534] Combined, they run on more than 99% of all smartphones in the world.[535] The third-largest mobile operating system is KaiOS, which runs on feature phones (i.e., non-smartphone mobile devices).[536] Apple's mobile devices run on Apple's proprietary iOS operating system, while other leading handset manufacturers, such as Samsung, LG, and Motorola, run on Android.[537] iOS is not available on non-Apple devices.

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[532] Dig. Competition Expert Panel Report at 29–30.

[533] *See* Steven Böhm, Fabian Adam & Wendy Colleen Farrell, *Impact of the Mobile Operating System on Smartphone Buying Decisions: A Conjoint-Based Empirical Analysis*, MOBILE WEB AND INTELLIGENT INFORMATION SYSTEMS 198 (Muhammad Younas, Irfan Awan & Massimo Mecella eds., 2015), https://doi.org/10.1007/978-3-319-23144-0_18.

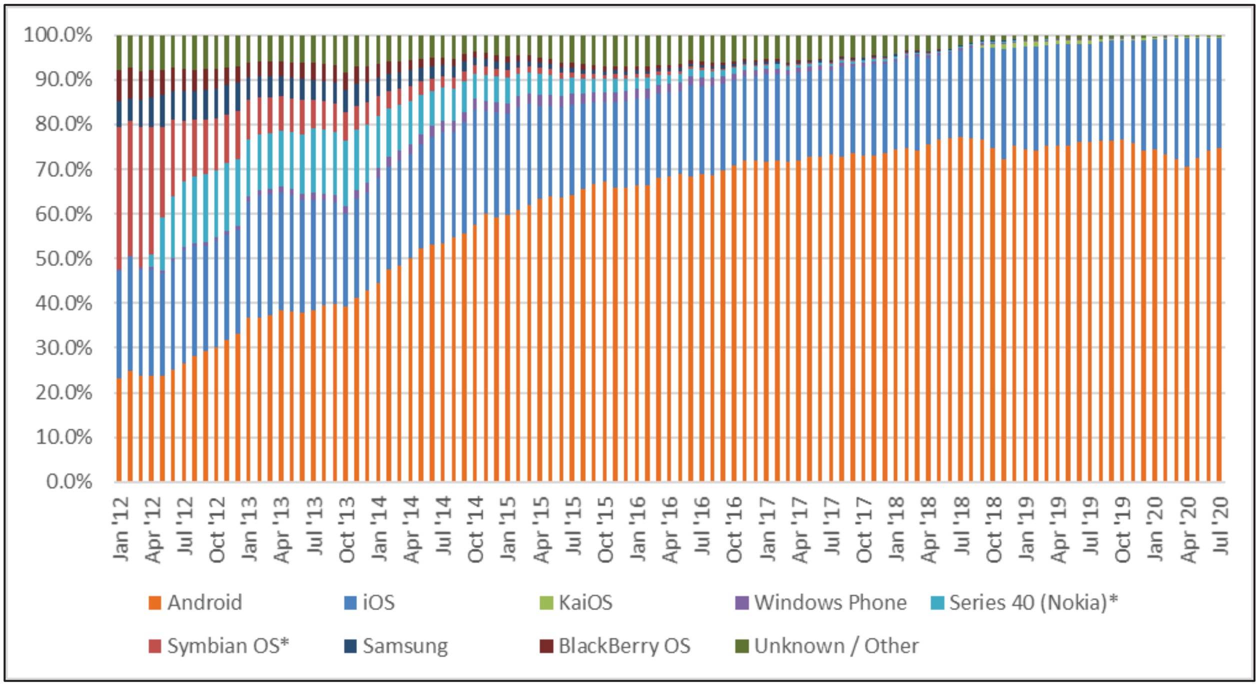
[534] *See* GSMA INTEL., GLOBAL MOBILE TRENDS 2020: NEW DECADE, NEW INDUSTRY?, 6, 26 (2019), https://data.gsmaintelligence.com/api-web/v2/research-file-download?id=47743151&file=2863-071119-GMT-2019.pdf.

[535] Neth. Auth. for Consumers & Mkts. Study at 15; *see also* Dig. Competition Expert Panel Report at 29 ("However market shares are measured, Google (Android) and Apple (iOS) have a global duopoly over mobile phone operating systems."); Michael Muchmore, *Android vs. iOS: Which Mobile OS Is Best?*, PC MAG (Aug. 11, 2020), https://www.pcmag.com/comparisons/android-vs-ios-which-mobile-os-is-best ("[W]e're locked in a duopoly when it comes to mobile operating system choice").

[536] *A Short History of KaiOS*, KAIOS, https://developer.kaiostech.com/introduction/history (last visited Oct. 4, 2020); Stephen Shankland, *Mozilla helps modernize feature phones powered by Firefox tech*, CNET (Mar. 11, 2020), https://www.cnet.com/news/mozilla-helps-modernize-feature-phones-powered-by-firefox-tech/.

[537] *See* Production of Apple, to H. Comm. on the Judiciary, HJC_APPLE_000021 (Oct. 14, 2019) (on file with Comm.) ("Many smartphone brands around the world compete with iPhone on the basis of price, performance, features, and design. These smartphones generally incorporate Google's Android operating system.").

Mobile OS Market Share Worldwide[538]



Over the past decade, once-strong competitors have exited the mobile OS market, and Google and Apple have built dominant positions that are durable and persistent.[539] While there are other mobile OSs—such as Tizen, Sailfish OS, and Ubuntu Touch—those OSs make up less than 1% of the global mobile OS market.[540]

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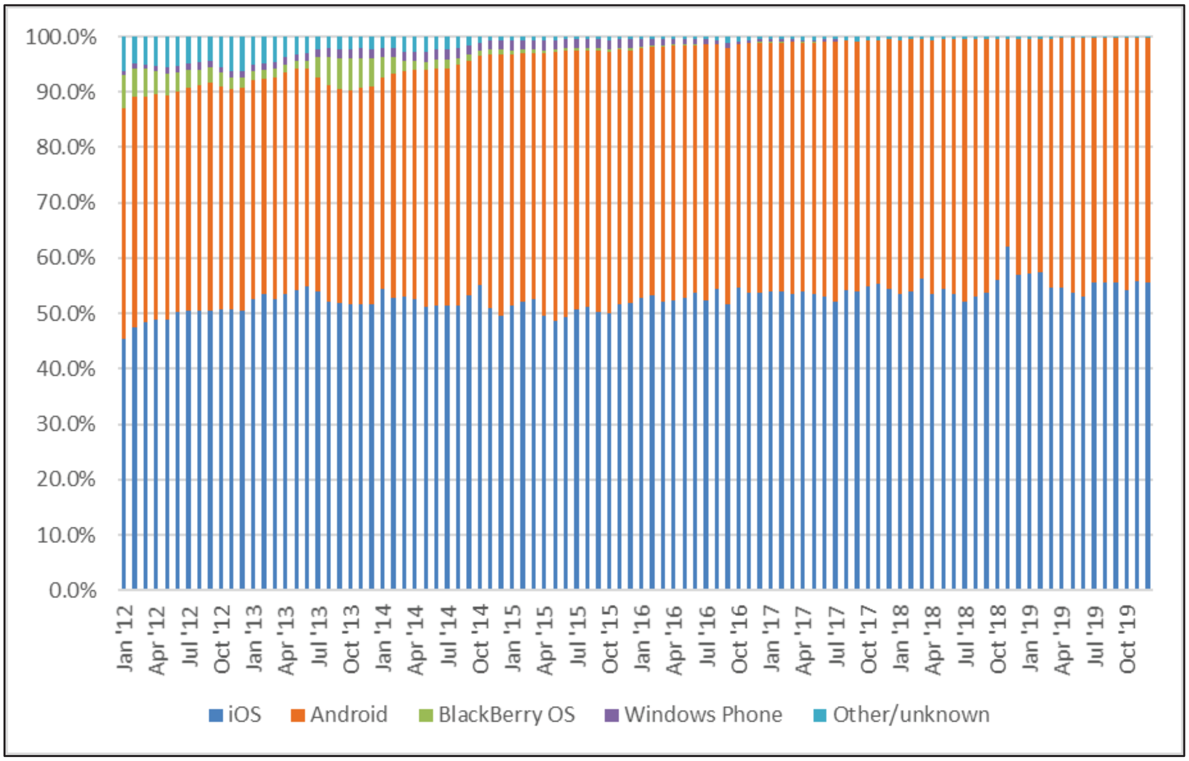
[538] Prepared by the Subcomm. based on Felix Richter, *The Smartphone Market: The Smartphone Duopoly*, STATISTA (July 27, 2020), https://www.statista.com/chart/3268/smartphone-os-market-share/ (citing *Mobile Operating System Market Share Worldwide*, STATCOUNTER GLOBALSTATS StatCounter "calculates the data based on more than 1.7 billion page views per month worldwide. StatCounter defines a mobile device as a pocket-sized computing device. As a result, tablets are not included . . . Nokia devices (including some S40 devices) had been grouped largely under Symbian OS.").

[539] *See* Felix Richter, *The Smartphone Market: The Smartphone Duopoly*, STATISTA (July 27, 2020), https://www.statista.com/chart/3268/smartphone-os-market-share/ (citing citing *Mobile Operating System Market Share Worldwide*, STATCOUNTER GLOBALSTATS) ("Having started out as a multi-platform market, the smartphone landscape has effectively turned into a duopoly in recent years, after Apple's iOS and Google's Android crowded out any other platform including Microsoft's Windows Phone, BlackBerry OS and Samsung's mobile operating system called Bada."); Data and Privacy Hearing at 7 (statement of Maurice E. Stucke, Prof. of Law, Univ. of Tennessee, and Ariel Ezrachi, Slaughter and May Prof. of Competition Law, Univ. of Oxford, Fellow, Pembroke Coll., Dir., Oxford Ctr. For Competition Law and Pol'y) ("The mobile operating system market went from multiple competitors in 2010 (with Google and Apple collectively accounting for 39 percent of unit sales), to a duopoly eight years later."); Matthew Feld, *Microsoft Is Finally Killing Off the Windows Phone*, The TELEGRAPH (Oct. 9, 2017), https://www.telegraph.co.uk/technology/2017/10/09/microsoft-finally-killing-windows-phone/; Arjun Kharpal, *TCL Launches New $549 Smartphone Under BlackBerry's Banner, Featuring Android Software*, CNBC (Feb. 25, 2017), https://www.cnbc.com/2017/02/25/blackberry-keyone-launch-physical-keyboard-android-specs-price.html); Jack Schofield, *Can I Buy a Phone that Doesn't Use Anything from Google or Apple?*, THE GUARDIAN (July 4, 2019), https://www.theguardian.com/technology/askjack/2019/jul/04/can-i-buy-a-phone-that-does-not-use-anything-from-google-or-apple.

[540] *See, e.g.*, Simon O'Dea, *Market Share of Mobile Operating Systems in the United States from January 2012 to December 2019*, STATISTA (Feb. 27, 2020), https://www.statista.com/statistics/272700/market-share-held-by-mobile-operating-systems-in-the-us-since-2009/.

Market Share of Mobile Operating Systems in the U.S.[541]



Although both Google Android and Apple iOS both have dominant positions in the mobile OS market, high switching costs and a lack of on-device competition mean that neither firm's market power is disciplined by the presence of the other. The European Commission's investigation into Google's Android platform found that because iOS is not available on non-Apple devices, it cannot constrain Google's dominance in the mobile OS market.[542] Conversely, Android is not available on Apple devices and does not constrain Apple's dominant position and conduct on Apple mobile devices. An investment research firm recently noted that switching costs were high for Apple users because iOS is not available on non-Apple devices.[543]

There are significant barriers to switching between the dominant mobile operating systems. As a general matter, consumers rarely switch mobile operating systems. SellCell's 2019 survey found that more than 90% of users with iPhones tend to stick with Apple when they replace their current

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[541] Prepared by Subcomm. based on S. O'Dea*, Market share of mobile operating systems in the United States from January 2012 to December 2019*, STATISTA (Feb. 27, 2020), https://www.statista.com/statistics/272700/market-share-held-by-mobile-operating-systems-in-the-us-since-2009/ (citing *Mobile Operating System Market Share in United States Of America*, STATCOUNTER).

[542] Press Release, Eur. Comm'n, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018) https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

[543] MORNINGSTAR EQUITY ANALYST REPORT, APPLE INC 1 (Aug. 6, 2020) (on file with Comm.).

device.[544] In 2018, Consumer Intelligence Research Partners reported that more than 85% of iOS users who purchased a new device purchased another iOS device, and more than 90% of Android users who bought a new device purchased a new Android device.[545] A 2017 study from Morgan Stanley found that 92% of iPhone owners intending to buy a new mobile device planned to buy another iPhone.[546] Mobile carriers—a main retail distribution channel for mobile devices—agreed that it is rare for customers to switch from one mobile OS because once customers are used to the mobile OS they generally do not switch.[547] App developers also said in interviews with Subcommittee staff that they observed minimal customer switching between iOS and Android.[548]

In addition to the cost of buying a new mobile device, consumers encounter other costs to switch to a new operating system. Android and iOS have different operating concepts, user interface designs, and setting and configuration options. As a result, instead of switching operating systems, "users pick one, learn it, invest in apps and storage, and stick with it."[549]

Other barriers to switching include the loss of compatibility with other smart devices designed to work in conjunction with the mobile device and its OS, the hassle of porting data from one OS to another, re-installing apps and configuring settings, and learning an unfamiliar user interface.[550] Apple's co-founder and former CEO Steve Jobs advocated this approach, noting Apple should "[t]ie all of our products together, so we further lock customers into our ecosystem."[551] Recently, Morningstar observed that people using Apple's other products such as the Apple Watch and AirPods

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[544] *iPhone vs. Android – Cell Phone Brand Loyalty Survey 2019*, SELLCELL (Aug. 20, 2019), https://www.sellcell.com/blog/iphone-vs-android-cell-phone-brand-loyalty-survey-2019/; *see also* MORNINGSTAR EQUITY ANALYST REPORT, APPLE INC. 2 (Aug. 6, 2020) (on file with Comm.) ("Recent survey data shows that iPhone customers are not even contemplating switching brands today. In a December 2018 survey by Kantar, 90% of U.S.-based iPhone users said they planned to remain loyal to future Apple devices.").

[545] Press Release, Consumer Intel. Res. Partners, LLC, Mobile Operating System Loyalty: High and Steady, (Mar. 8, 2018), http://files.constantcontact.com/150f9af2201/4bca9a19-a8b0-46bd-95bd-85740ff3fb5d.pdf.

[546] Martin Armstrong, *Most iPhone Users Never Look Back*, STATISTA (May 22, 2017), https://www.statista.com/chart/9496/most-iphone-users-never-look-back/.

[547] Interview with Source 72 (June 23, 2020).

[548] Interview with Source 83 (June 30, 2020).

[549] Press Release, Consumer Intel. Res. Partners, LLC, Mobile Operating System Loyalty: High and Steady (Mar. 8, 2018), http://files.constantcontact.com/150f9af2201/4bca9a19-a8b0-46bd-95bd-85740ff3fb5d.pdf.

[550] *See* Neth. Auth. for Consumers & Mkts. Study at 55–56; Press Release, Eur. Comm'n, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581; *see also iPhone vs. Android – Cell Phone Brand Loyalty Survey 2019*, SELLCELL (Aug. 20, 2019), https://www.sellcell.com/blog/iphone-vs-android-cell-phone-brand-loyalty-survey-2019/ (finding "21% of iPhone users might be tempted to switch if they weren't too tied into the Apple Ecosystem or it wasn't so much hassle changing operating system from iOS to Android" and "13% of Samsung users might be tempted to switch if they weren't too tied into the Google/Android Ecosystem or it wasn't so much hassle changing operating system").

[551] Don Reisinger, *Steve Jobs wanted to 'further lock customers' into Apple's 'ecosystem'*, CNET (Apr. 2, 2014), https://www.cnet.com/news/steve-jobs-wanted-to-further-lock-customers-into-apples-ecosystem/.

"lose significant functionality when paired with a smartphone other than the iPhone," locking iPhone users into the iOS ecosystem.[552] Competition regulators in the Netherlands explained that this strategy creates "path dependency" for consumers. Although mobile devices have a limited lifespan and consumers might be expected to "break the lock-in cycle" when it is time to upgrade to a new device, consumers often have software, data and files, and other hardware and accessories that are only compatible with one product ecosystem, making it unlikely they switch to a non-compatible mobile device.[553]

There are significant entry barriers in the mobile operating system market. One former mobile OS competitor observed that its experience showed that it was doubtful that a new, competitive mobile OS will emerge in the U.S.[554] Another former mobile OS provider explained that it exited the market after concluding "the market for mobile operating systems was too established for a new entry."[555] To compete, a new OS must offer a superior product packaged in an attractive handset, as well as a fully realized suite of apps and compatible devices comparable to what Apple and Google (and Google's hardware partners) currently offer. Industry experts have testified before the Subcommittee that the "reality is that it would be very difficult for a new mobile phone operating system today" to compete with Apple and Google, "even if it offered better features."[556] Investment analysts agree, noting it is likely Android and iOS "will continue to power nearly every smartphone around the world in the long run."[557]

The mobile OS market is also characterized by strong network effects. In short, a new mobile OS must have a sufficiently large user base to attract app developers to build apps to run on the OS. An OS with an insufficient number of users and developers is unlikely to receive support from mobile device manufacturers that will install the OS on their devices, or mobile network operators that will support those devices on their networks.[558]

The most important factor that developers consider before building apps for an OS is the install base of the OS—how many users have devices running the OS that can install the app. Developers will

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[552] MORNINGSTAR EQUITY ANALYST REPORT, APPLE INC 2 (Aug. 6, 2020) (on file with Comm.).

[553] Neth. Auth. for Consumers & Mkts. Study at 21, 55–56.

[554] Interview with Source 407 (Sept. 10, 2020).

[555] Submission from Source 385, to H. Comm. on the Judiciary, 2 (Sept. 18, 2020) (on file with Comm.).

[556] Data and Privacy Hearing at 8 (statement of Maurice E. Stucke, Prof. of Law, Univ. of Tennessee, and Ariel Ezrachi, Slaughter and May Prof. of Competition Law, Univ. of Oxford, Fellow, Pembroke Coll., Dir., Oxford Ctr. For Competition Law and Pol'y)*; see also* Richard Trenholm, *Elegant Ubuntu Touch OS Impresses for Phones and Tablets (Hands-On)*, CNET (Feb. 28, 2013), https://www.cnet.com/reviews/ubuntu-touch-preview/; Adrian Covert, *The Ubuntu Smartphone (Which No One Will Use) Is a Glimpse of the Future*, CNN BUS. (Jan. 2, 2013), https://money.cnn.com/2013/01/02/technology/mobile/ubuntu-smartphone-linux/ (explaining success in the mobile market required more than merely building a superior OS to Android or iOS, it also requires a robust app ecosystem).

[557] MORNINGSTAR EQUITY ANALYST REPORT, APPLE INC 3 (Aug. 6, 2020) (on file with Comm.).

[558] Interview with Source 407 (Sept. 10, 2020).

not build apps for an OS with few users.[559] This reinforces the power of dominant mobile operating systems. The more consumers use the OS, the more developers will build apps for the OS, increasing the value of the OS for users and attracting more consumers.[560] Consumers are unlikely to purchase a device with an OS that cannot run the most popular apps and lacks a robust app ecosystem comparable to what is offered by iOS and Android. Due to the dominance of Apple and Google in the mobile OS and app store markets, "there is little incentive for app developers to go the trouble and expense of ensuring their apps work on any smaller rival operating systems," because the user base would be too small.[561]

Additionally, the third-party app ecosystem advantages of iOS and Android make new market entry unlikely. The U.K.'s Competition and Markets Authority explained that, before the iPhone, third-party apps were not part of the mobile experience. As a result, new entrants like Apple could enter the market and compete by offering a superior product. But now, there are "millions of apps that have been written for Apple's iOS and Google's Android, making it hard for a new entrant mobile operating system to offer a competitive and attractive product."[562] The European Commission (E.C.) has similarly observed that strong network effects have created high entry barriers in the mobile OS market.[563]

Over the past decade, several large technology companies have attempted and failed to leverage their large user bases to compete against Apple and Google in the mobile OS market.[564] Facebook and Amazon both tried to enter the market with variants of Google's Android OS. Both companies quickly exited the market because consumers were mostly accessing Facebook and Amazon content through apps on iOS and Android devices.[565] Technology reviewers also expressed disappointment that

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559 *Id.*

560 MORNINGSTAR EQUITY ANALYST REPORT, APPLE INC 3 (Aug. 1, 2020) (on file with Comm.).

561 Dig. Competition Expert Panel Report at 29.

562 *Id.* at 40.

563 *See* Press Release, Eur. Comm'n, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018) https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

564 *See* GSMA INTEL., GLOBAL MOBILE TRENDS 2020: NEW DECADE, NEW INDUSTRY? 26 (2019), https://data.gsmaintelligence.com/api-web/v2/research-file-download?id=47743151&file=2863-071119-GMT-2019.pdf; Interview with Source 83 (June 30, 2020).

565 *See* Ryan Mac, *What Amazon Can Learn from The Failed Facebook Phone*, FORBES (Jun. 17, 2014), https://www.forbes.com/sites/ryanmac/2014/06/17/what-amazon-can-learn-from-the-failed-facebook-phone/#7f7d402f47de; Roger Cheng, *Here's Why the Facebook Phone Flopped*, CNET (May 8, 2013), https://www.cnet.com/news/heres-why-the-facebook-phone-flopped/; Marcus Wohlsen, *The Amazon Fire Phone Was Always Going to Fail*, WIRED (Jan. 6, 2015), https://www.wired.com/2015/01/amazon-fire-phone-always-going-fail/; Austin Carr, *The Inside Story of Jeff Bezos' Fire Phone Debacle*, FAST CO. (Jan. 6, 2015), https://www.fastcompany.com/3039887/under-fire.

Amazon's Fire Phone did not offer the same extensive library of apps and services as iOS or Android devices.[566]

Companies like Mozilla and Alibaba have also attempted to enter the mobile OS market. Mozilla unveiled its Firefox OS in 2013 and exited the market altogether by 2016.[567] In 2012, Chinese tech giant Alibaba developed a mobile OS called Aliyun for the Chinese market. However, Acer, Alibaba's hardware partner, abruptly canceled its collaboration with Alibaba before the launch of Acer's device running the OS[568]

Over the past decade, once-competitive mobile operating systems like Nokia, BlackBerry, and Microsoft struggled to survive as Apple and Google grew more dominant, eventually exiting the marketplace altogether. BlackBerry—once a leading mobile OS developer—now licenses the BlackBerry name to TCL to market TCL's smartphones. TCL's BlackBerry phones run on Android.[569] In the last quarter of 2016, Windows devices accounted for less than half of 1% of new smartphone sales.[570] In 2017 Microsoft abandoned its mobile OS business, and by that time, more than 99% of all new smartphones were running on iOS or Android and market observers expressed no confidence that new competition would emerge.[571] One key factor leading to Microsoft's withdrawal from the mobile

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[566] *See* Austin Carr, *The Inside Story of Jeff Bezos' Fire Phone Debacle*, FAST CO. (Jan. 6, 2015), https://www.fastcompany.com/3039887/under-fire.

[567] *See* J. Sullivan, *Firefox OS: Looking Ahead*, MOZILLA BLOG (Jan. 6, 2014), https://blog.mozilla.org/blog/2014/01/06/firefox-os-looking-ahead/; Ingrid Lunden, *Mozilla Will Stop Developing And Selling Firefox OS Smartphones*, TECHCRUNCH (Dec. 8, 2015), https://techcrunch.com/2015/12/08/mozilla-will-stop-developing-and-selling-firefox-os-smartphones/; Chris Hoffman, *Mozilla Is Stopping All Commercial Development on Firefox OS*, PC WORLD (Sept. 28, 2016), https://www.pcworld.com/article/3124563/mozilla-is-stopping-all-commercial-development-on-firefox-os.html.

[568] *See* Don Reisinger, *Acer Taps Alibaba's Aliyun OS for New Smartphone*, CNET (Sept. 12, 2012), https://www.cnet.com/news/acer-taps-alibabas-aliyun-os-for-new-smartphone/; Edward Moyer, *Alibaba: Google Just Plain Wrong About Our OS*, CNET (Sept. 15, 2012), https://www.cnet.com/news/alibaba-google-just-plain-wrong-about-our-os/ ; Roger Cheng, *Alibaba: Google Forces Acer to Drop Our New Mobile OS*, CNET (Sept. 13, 2012), https://www.cnet.com/news/alibaba-google-forced-acer-to-drop-our-new-mobile-os/; T.C. Sottek, *Acer Cancels Phone Launch with Alibaba, Allegedly in Response to Threats from Google*, THE VERGE (Sept. 13, 2012), https://www.theverge.com/2012/9/13/3328690/acer-google-alibaba-phone; Dieter Bohn, *Google Explains Why It Stopped Acer's Aliyun Smartphone Launch (Updated)*, THE VERGE (Sept. 14, 2012), https://www.theverge.com/2012/9/14/3335204/google-statement-acer-smartphone-launch-aliyun-android; Jon Brodkin, *Google Blocked Acer's Rival Phone to Prevent Android "Fragmentation"*, ARS TECHNICA (Sept. 14, 2012), https://arstechnica.com/gadgets/2012/09/google-blocked-acers-rival-phone-to-prevent-android-fragmentation/.

[569] *See* Arjun Kharpal, *TCL Launches New $549 Smartphone Under BlackBerry's Banner, Featuring Android Software*, CNBC (Feb. 27, 2017), https://www.cnbc.com/2017/02/25/blackberry-keyone-launch-physical-keyboard-android-specs-price.html.

[570] *See* Press Release, Gartner, Gartner Says Worldwide Sales of Smartphones Grew 7 Percent in the Fourth Quarter of 2016 (Feb. 15, 2017), https://www.gartner.com/en/newsroom/press-releases/2017-02-15-gartner-says-worldwide-sales-of-smartphones-grew-7-percent-in-the-fourth-quarter-of-2016).

[571] Tom Warren, *Windows Phone Dies Today*, THE VERGE (July 11, 2017), https://www.theverge.com/2017/7/11/15952654/microsoft-windows-phone-end-of-support*; see also* Press Release, Gartner, Gartner Says Worldwide Sales of Smartphones Grew 7 Percent in the Fourth Quarter of 2016 (Feb. 15, 2017), https://www.gartner.com/en/newsroom/press-releases/2017-02-15-gartner-says-worldwide-sales-of-smartphones-grew-7-

marketplace was that developers were reluctant to develop apps for a third mobile operating system when already building apps for iOS and Android.[572] These market dynamics remain in place today.

F. Digital Mapping

Digital mapping provides users with virtual maps of the physical world. There are two sets of customers for mapping services: consumers, who use map products for navigation, and businesses, who use underlying mapping libraries and design tools to produce customized maps. With the proliferation of smart devices, digital mapping has become a critical resource for users and businesses alike.

The essential input for both types of services is a digital-map database. Mapping data can be gathered in a few ways, including through the collection of imagery from satellites and streets, the tracking of global positioning system (GPS) traces, and the collation of public domain mapping data. Building a digital map database is costly and time-intensive, requiring significant investment in mapping technologies and data collection.[573] The leading provider of digital mapping data is Google. Smaller providers include HERE and TomTom, as well as open-source providers like OpenStreetMap (OSM).[574] Waze, which developed navigable maps by relying on driver-generated live maps and crowd-sourced updates, was an additional mapping provider purchased by Google in June 2013.

Consumer-facing providers of mapping services license map databases and layer search and traffic technologies atop of the map data. Consumers use these search and traffic tools either through a standalone turn-by-turn navigation service that licenses the underlying data—like MapQuest or Bing Maps—or through a vertically integrated provider, like Google Maps, Waze, or Apple Maps.[575] The dominant providers of consumer mapping applications are Google Maps and Google-owned Waze, followed by Apple Maps and MapQuest.[576] Google and Apple set their mapping products as the default

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percent-in-the-fourth-quarter-of-2016; James Vincent, *99.6 Percent of New Smartphones Run on Android or iOS*, THE VERGE (Feb. 16, 2017), https://www.theverge.com/2017/2/16/14634656/android-ios-market-share-blackberry-2016.

[572] Dig. Competition Expert Panel Report at 40.

[573] Innovation and Entrepreneurship Hearing at 6 (response to Questions for the Record by Kyle Andeer, Vice Pres., Corp. Law, Apple Inc.); Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04208423 (on file with Comm.) (showing that prior to being acquired by Google, a Waze presentation stated, "There are very few companies in the world that are making navigable maps, and the process is very expensive."); Submission from Source 531, to H. Comm. on the Judiciary, Source 531-000628 (on file with Comm.).

[574] Submission from Source 531, to H. Comm. on the Judiciary, Source 531-000628 (on file with Comm.).

[575] Although Apple Maps licensed U.S. mapping data from TomTom upon launching in 2012, in 2015 it began developing its own map database by deploying cars with cameras and sensors to collect images and mapping data that it could combine with anonymized iPhone data to create an independent underlying base map. Lauren Goode, *The Biggest Apple Maps Change Is One You Can't See*, WIRED (Jan. 31, 2020), https://www.wired.com/story/apple-maps-redesign/.

[576] Submission from Source 572, to H. Comm. on the Judiciary, 1 (Oct. 29, 2019) (on file with Comm.) ("For vehicle navigation, and excluding OEM-provided in-console automotive systems, Google's Waze and Google Maps are currently

options on Android and iOS products—their respective devices—which also enables them to maintain and expand their market position.

These providers of consumer mapping services generally do not charge users a monetary fee. Instead, they monetize maps through selling location-based advertisements or by subsidizing consumer-facing mapping with enterprise contracts or other lines of business. Although data on the value of the consumer-facing digital mapping industry is not publicly available, analysts have estimated that Google Maps earned Google around $2.95 billion in revenue last year and that the standalone product is worth up to $60 billion.[577]

Business-facing providers serve map design tools and mapping libraries required to produce customized maps. The leading providers of business-to-business mapping software are Google, HERE, Mapbox, and TomTom, followed by Apple Maps, Bing, ESRI, Comtech, and Telenav.[578] Some of these providers operate in more specialized markets. For example, HERE and TomTom primarily serve automotive customers, while ESRI provides desktop GIS software used by governments and spatial analysts.[579]

Market participants cite several factors that privilege dominant digital map incumbents and impede entry. First is the capacity of dominant firms to invest heavily in creating mapping databases and technology without needing to turn a profit. For example, prior to its acquisition by Google, Waze executives observed that Google Maps had "disrupted the market" primarily through "financial disruption," namely that it had "unlimited funds" and was giving away Google Maps to users for free.[580] Startups seeking to enter this market yet lacking the financial cushion that permits them to incur losses while developing the product will be at a relative disadvantage.

Another factor is that incumbents that are integrated can collect relevant map and location data from across complementary lines of business, feeding this data back into mapping. For example, one market participant noted that Google "collects an unparalleled amount of data used in digital mapping from users of its dominant search engine and Android smartphone OS."[581] Another market participant

the most used consumer apps by a wide margin."); Submission from Source 333, to H. Comm. on the Judiciary, 2 (Oct. 21, 2019) (on file with Comm.).

[577] Daniel Schaal, *Google Maps Poised to Be an $11 Billion Business in 4 Years*, SKIFT (Aug. 30, 2019), https://skift.com/2019/08/30/google-maps-poised-to-be-an-11-billion-business-in-4-years/; ROSS SANDLER, BARCLAYS, ALPHABET INC., STEADY COMPOUNDER, WITH PLENTY OF INNOVATION AHEAD 20 (Mar. 28, 2017) (on file with Comm.).

[578] Submission from Source 572, to H. Comm. on the Judiciary, 1 (Oct. 29, 2019) (on file with Comm.).

[579] *Id.*

[580] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04209630 (Nov. 2012) (on file with Comm.)

[581] Submission from Source 531, to H. Comm. on the Judiciary, Source 531-000624 (on file with Comm.); Production of Google, H. Comm. on the Judiciary, GOOG-HJC-04211078 (July 24, 2013) (on file with Comm.) Google made a similar observation in July 2013. In a letter responding to the FTC's request for information relating to its acquisition of Waze,

stated that Google's dominant position in search and advertising incentivizes businesses to closely monitor and maintain the accuracy of their information in Google's systems, "leading to a dynamic by which Google enjoys a free, crowdsource effort to improve and maintain their data's quality," thereby improving the quality of Google Maps.[582] Firms without concurrent positions in web search and the smartphone market are comparatively disadvantaged.

A third factor is the superior distribution that integrated firms in maps-adjacent lines of business can provide their own mapping product at the expense of third-party mapping products. Google gives Google Maps default placement on its Android devices, while Apple does the same with Apple Maps on iOS devices. Together, Android and iOS account for 99% of the smartphone operating systems in the United States.[583]

Market participants explained that the default placement of Google Maps on Android devices also disadvantages third-party mapping providers technologically. If a developer chooses a third-party mapping provider when building an app, downloading that app on Android would involve downloading both the app features and the mapping functionality. Choosing to develop the app with Google Maps, by contrast, would reduce the app's file size on Android, as Google Maps is already on the device.

Lastly, incumbents benefited from a lack of prohibitions on collecting location data—an advantage that startups today lack given the passage of new data restrictions that limit the development of digital mapping technology. Notably, many of these rules came into existence following public outrage prompted by Google Street View. By the time these rules were implemented, Google had already mapped out most of the planet.

Except for Apple's independent mapping database, there has been no recent entry in the market for underlying mapping data. Similarly, the list of leading providers of consumer mapping services and business-to-business services has mostly been unchanged since 2013.

G. Cloud Computing

Cloud computing refers to the service that enables remote storage and software programs on demand through the Internet. Prior to cloud computing, data was stored locally on a computer's hard drive, in a local server room, or remote data center where companies managed all of the I.T.

Google wrote, "Apple has access to as much or more US GPS traffic data than Google does, with tens of millions of Apple iOS users potentially providing Apple with real-time traffic speed and flow information throughout the country.".

[582] Submission from Source 572, to H. Comm. on the Judiciary, 3 (Oct. 29, 2019) (on file with Comm.).

[583] Neth. Auth. for Consumers & Mkts. Study at 15.

services.[584] Today, companies can essentially rent "network access to a shared pool of configurable computing resources . . . [including] networks, servers, storage, applications and services."[585] As a result of the convenience and cost savings associated with the ability to scale up or down on demand, cloud computing has grown into one of the technology sector's largest and most lucrative businesses.[586] It has enabled the growth of enterprise businesses such as Netflix, Airbnb, Lyft, Slack, and the Weather Channel, as well as new startups that are not yet household names.

Cloud computing is a critical input to many of the digital markets the Subcommittee investigated, providing infrastructure for online commerce, social media and networking, digital advertising, voice assistants, and digital mapping—technologies that benefit from dynamic storage and computational power. In a future with smart homes, autonomous vehicles, and artificial intelligence applications in nearly every sector from agriculture to healthcare, understanding the dynamics of the cloud market becomes critical. These ground-breaking technologies work because they can access and analyze massive amounts of data in real time, companies looking to innovate in these spaces will struggle to rely solely on traditional I.T. and will likely turn to public cloud vendors. The testimony of Morgan Reed on behalf of ACT, the App Association, illustrates how important "continuous cloud access [is] to create custom software solutions that adapt quickly and rival the products and services of larger SaaS companies."[587]

Cloud computing service models vary by vendor, and new models are being developed continually. The Subcommittee's investigation focused on the dynamics between the three models most referenced and defined by the National Institute of Standards and Technology.

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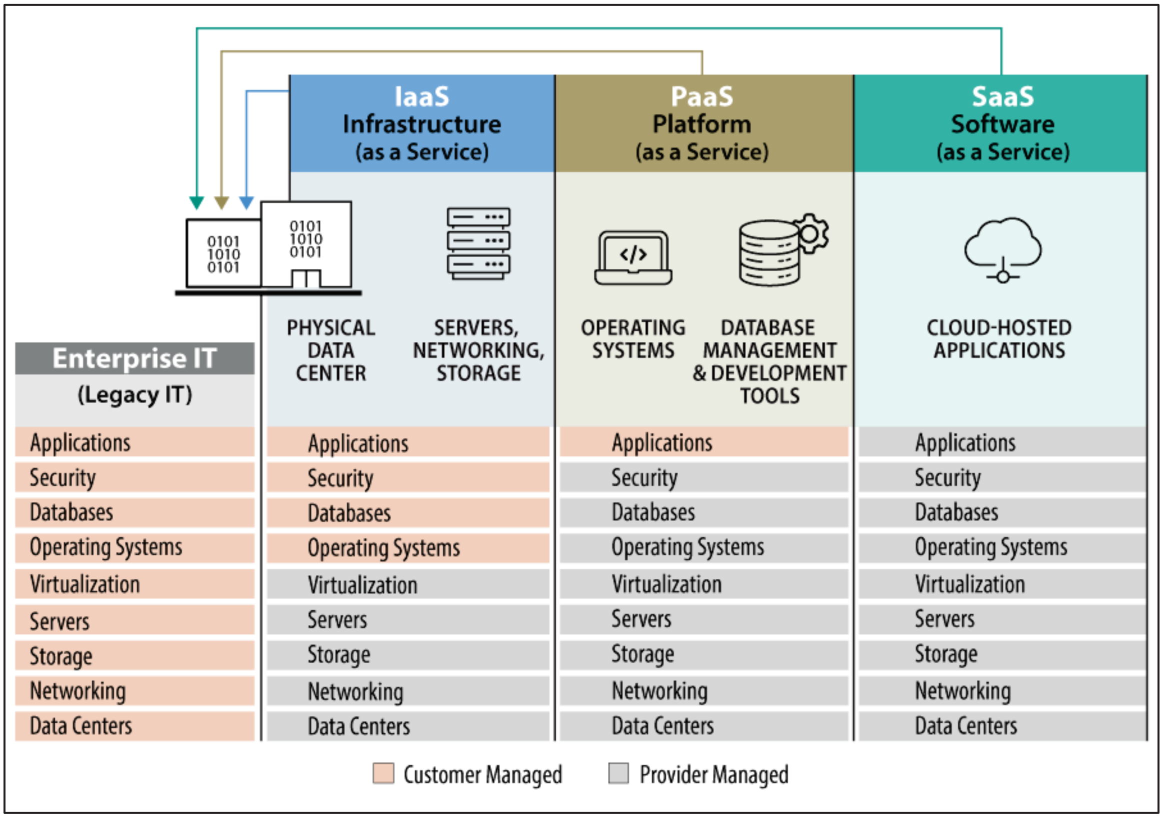
[584] *See generally* HEIDI M. PETERS, CONG. RESEARCH SERV., R45847, THE DEPARTMENT OF DEFENSE'S JEDI CLOUD PROGRAM (2019).

[585] *See* NAT'L INST. OF STANDARDS AND TECH, THE NIST DEFINITION OF CLOUD COMPUTING 2 (Sept. 2011), https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf.

[586] MARKET SHARE ANALYSIS; IAAS AND IUS, WORLDWIDE (July 5, 2019); Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00219352 (on file with Comm.).

[587] Innovation and Entrepreneurship Hearing at 7 (statement of Morgan Reed, Pres., ACT | The App Ass'n).

Cloud Computing Services[588]



In the Software as a Service (SaaS) model, the user accesses applications from various client devices "through either a thin client interface, such as a web browser, or a program interface."[589] Common examples include Google Docs, Slack, and Mailchimp. In the Platform as a Service (PaaS) model, the user, most often a cloud application developer, builds new applications by accessing programming languages, libraries, services, and tools supported by the cloud provider.[590] Common PaaS tools include AWS Elastic Beanstalk, Google App Engine, and Salesforce's Heroku. In the Infrastructure as a Service (IaaS) model, the user, most often an engineer, can deploy and run software, which can include operating systems and applications while the cloud provider provisions fundamental computing resources including processing, storage, and network applications.[591] Common IaaS tools include Amazon Elastic Compute Cloud (EC2), Google Compute Engine, and Microsoft Azure.[592]

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[588] Prepared by the Subcomm. based on data from Nat'l Inst. of Standards and Tech.

[589] NAT'L INST. OF STANDARDS AND TECH., THE NIST DEFINITION OF CLOUD COMPUTING 2 (Sept. 2011), https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf.

[590] *Id.* at 2.

[591] *Id.* at 3.

[592] HEIDI M. PETERS, CONG. RESEARCH SERV., R45847, THE DEPARTMENT OF DEFENSE'S JEDI CLOUD PROGRAM 1 (2019).

SaaS, PaaS, and IaaS can be deployed through several different models.[593] Subcommittee staff focused primarily on the market for public cloud services in which the cloud provider provisions infrastructure for open use by the general public. The infrastructure resides on the premise of the cloud provider.[594]

To review market dynamics, Subcommittee staff examined two types of cloud service providers. The first type is infrastructure providers. Amazon Web Services (AWS), Microsoft Azure, and Google Cloud Platform (GCP) are the most common domestic infrastructure providers. They offer customers IaaS, PaaS, and SaaS offerings through their customer consoles or portals, but are distinct in their ability to offer IaaS at scale. This Report refers to them as infrastructure providers. They also operate online marketplaces for third-party software vendors to list cloud offerings that integrate with their infrastructure services.

The second type is third-party software vendors, sometimes referred to as Independent Software Vendors (ISVs). Companies such as Salesforce, MariaDB, and The Apache Foundation provide operating systems, databases, security, and applications. Third-party software can be delivered as a packaged software or managed service. When a third party provides packaged software, it can be installed onto a customer's existing cloud infrastructure. The packaged software can be listed on the infrastructure provider's marketplace or through a third-party vendor's website.

When third-party software is sold as a managed service, the customer pays a subscription based on the number of services used, and the third-party software vendor manages all the underlying infrastructure.[595] In this scenario, the software has become a cloud offering sold "as-a-service." The underlying infrastructure can be owned and managed by the third-party software vendor or the third-party software vendor may have contracts with an infrastructure provider, and in some cases, the software vendor uses a combination of owned and rented servers. For example, Salesforce's Heroku—a PaaS product—is built using AWS IaaS offerings.[596] When a company purchases a Heroku license, Salesforce's use of AWS is included in the price. In the case that a PaaS or SaaS offering uses its own infrastructure, it is likely it will need to be able to integrate with products managed by the infrastructure providers as it grows and, to expand to new regions, it will need to contract with infrastructure providers.[597]

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[593] NAT'L INST. OF STANDARDS AND TECH., THE NIST DEFINITION OF CLOUD COMPUTING 3 (Sept. 2011).

[594] *Id.*

[595] *Id.*

[596] *See e.g.*, Kelly Cochran, *Simplify Your Customer Engagement with AWS and Salesforce Heroku*, AWS PARTNER NETWORK (APN) BLOG (June 9, 2017), https://aws.amazon.com/blogs/apn/simplify-your-customer-engagement-with-aws-and-salesforce-heroku/.

[597] Mark Innes, *Salesforce is live on AWS Cloud Infrastructure in Australia*, SALESFORCE BLOG (Oct. 17, 2017), https://www.salesforce.com/au/blog/2017/10/salesforce-is-live-on-aws-cloud-infrastructure-in-australia.html. For example, for many years Salesforce.com's CRM ran on self-managed infrastructure but when the company expanded to Australia in 2007, they entered into a contract with AWS.

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In 2018, public cloud services, including IaaS, PaaS, SaaS, and management services, accounted for $182.4 billion of the overall $3.7 trillion information technology (I.T.) infrastructure spending worldwide—less than 1%.[598] Despite being a small fraction of I.T. spending, Gartner projects the market size of the cloud services industry to increase at nearly three times the rate of overall I.T. services through 2022, to reach $331 billion.[599] AWS is the market leader, capturing approximately 24% of the U.S. spend on cloud computing in 2018.[600]

Amazon—the leading cloud platform—is dominant in the cloud market due to the concentration of the IaaS market.[601] According to Gartner, "the worldwide IaaS market grew 31.3% in 2018 to total $32.4 billion, up from $24.7 billion in 2017."[602] As seen in the chart below, AWS is the unquestioned leader in the cloud computing infrastructure market, with triple the market share of Microsoft. Alibaba, Google, and Microsoft are growing at the fastest rates—rates double that of Amazon. Gartner expects the IaaS Worldwide Public Cloud Service Revenue to grow faster than any other set of services, and to be worth $76.6 billion in 2022.[603]

[598] Letter from David Zapolsky, Gen. Counsel, Amazon.com, Inc., to Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 6 (July 26, 2019) (on file with Comm.).

[599] Press Release, Gartner, Gartner Says Global IT Spending to Reach $3.7 Trillion in 2018 (July 29, 2019), https://www.gartner.com/en/newsroom/press-releases/2019-07-29-gartner-says-worldwide-iaas-public-cloud-services-market-grew-31point3-percent-in-2018.

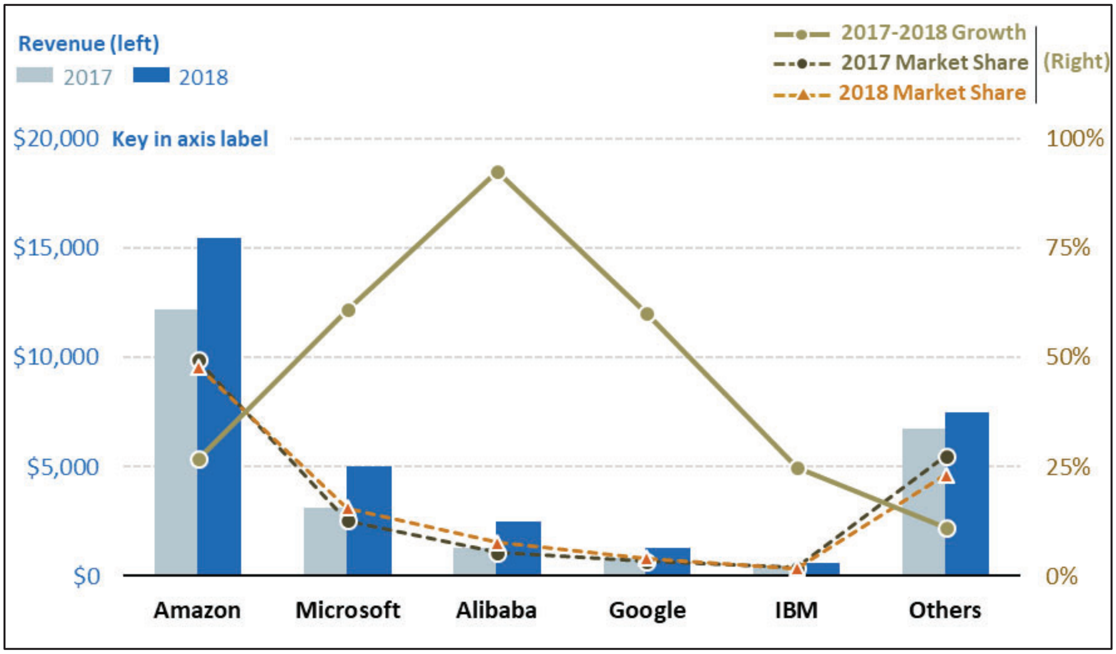
[600] Letter from David Zapolsky, Gen. Counsel, Amazon.com, Inc., to Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 6 (July 26, 2019) (on file with Comm.).

[601] Submission from Source 170 to H. Comm. on the Judiciary, 6 (Nov. 21, 2011) (on file with Comm.).

[602] Press Release, Gartner, Gartner Forecasts Worldwide Public Cloud Revenue to Grow 17.5 Percent in 2019 (Apr. 2, 2019), https://www.gartner.com/en/newsroom/press-releases/2019-07-29-gartner-says-worldwide-iaas-public-cloud-services-market-grew-31point3-percent-in-2018.

[603] *Id.*

IaaS Worldwide Public Cloud Services Revenue (Millions of US Dollars)[604]



Industry reports suggest that the cloud computing market is consolidating around three providers domestically—AWS, Microsoft Azure, and Google Cloud Platform.[605]

Market leaders benefit from early-mover advantage coupled with network effects and high switching costs that lock-in customers. AWS pioneered cloud computing, launching officially in March 2006 with Simple Storage Service (S3) and Elastic Compute Cloud (EC2), two fundamental IaaS offerings.[606] Microsoft announced Azure in October 2008 along with core services that made up the "Azure Services Platform."[607] Google's first public cloud service, App Engine, a PaaS offering, was released in 2008.[608] Google's Compute Engine, an AWS Elastic Compute Cloud and Microsoft Azure Virtual Machines competitor, went live as a preview in June 2012.[609]

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[604] Prepared by Subcomm. based on Press Release, Gartner, Gartner Forecasts Worldwide Public Cloud Revenue to Grow 17.5 Percent in 2019 (Apr. 2, 2019), https://www.gartner.com/en/newsroom/press-releases/2019-07-29-gartner-says-worldwide-iaas-public-cloud-services-market-grew-31point3-percent-in-2018.

[605] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00219350 (July 5, 2019) (on file with Comm.).

[606] *What's New*, AMAZON (Oct. 4, 2006) https://aws.amazon.com/about-aws/whats-new/2006/.

[607] Press Release, Microsoft, Microsoft Unveils Windows Azure at Professional Developers Conference (Oct. 27, 2008), https://news.microsoft.com/2008/10/27/microsoft-unveils-windows-azure-at-professional-developers-conference/#IP8XlBTCMpvORgaV.97.

[608] Paul McDonald, *Introducing Google App Engine + our new blog*, GOOGLE DEVELOPER BLOG (Apr. 7, 2008), http://googleappengine.blogspot.com/2008/04/introducing-google-app-engine-our-new.html.

[609] Ryan Lawler, *Google Launches Computer Engine to Take on Amazon Web Services*, TECHCRUNCH (June 28, 2012), https://techcrunch.com/2012/06/28/google-compute-engine/.

A 2010 Google strategy document predicted that the cloud computing market would concentrate. An internal document titled "Where Industry is Headed in 5 Years," stated that there would be some concentration in the market within five years, with cloud service providers consisting of Google, Amazon, Microsoft, and a hybrid of Cisco and VMWare.[610] According to this document, each company would offer cloud-based apps and other tools.[611] Later, in a 2018 strategy document, Google emphasized the importance of first-mover advantage in the space, writing "AWS and Azure have had more years to gain customers, and cloud customers typically grow [in] scale over time; in contrast" reiterating the tendency for cloud customers to choose a single vendor as their primary cloud service provider.[612] In a roundtable held by Subcommittee Chairman Cicilline, Mark Tracy, the CEO of Cloudacronomics, described these concerns:

> We pull down terabytes of data, and they have to upload it to the cloud to improve farmers practices. The two cloud providers are AWS and Azure. Since so many businesses and so much value can be extracted by improving health and data, this concentration of cloud services is a concern.[613]

As seen in the figure below, IaaS prices have decreased over time, with the three dominant U.S. providers able to price their services at less than $30/GB RAM according to a 2018 RBC Capital Markets report. [614] Market participants reference economies of scale and a focus on increasing revenue from PaaS and SaaS offerings, as opposed to IaaS offerings, as an explanation for this trend. IaaS vendors benefit from economies of scale both with regards to the size of the datacenters and the ability to operate multiple data centers across the globe. To enter the market and reach the economies of scale needed to compete with the incumbents, infrastructure providers must invest significant capital and be able to offer competitive prices to lure customers.

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[610] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-01777633 (on file with Comm.).

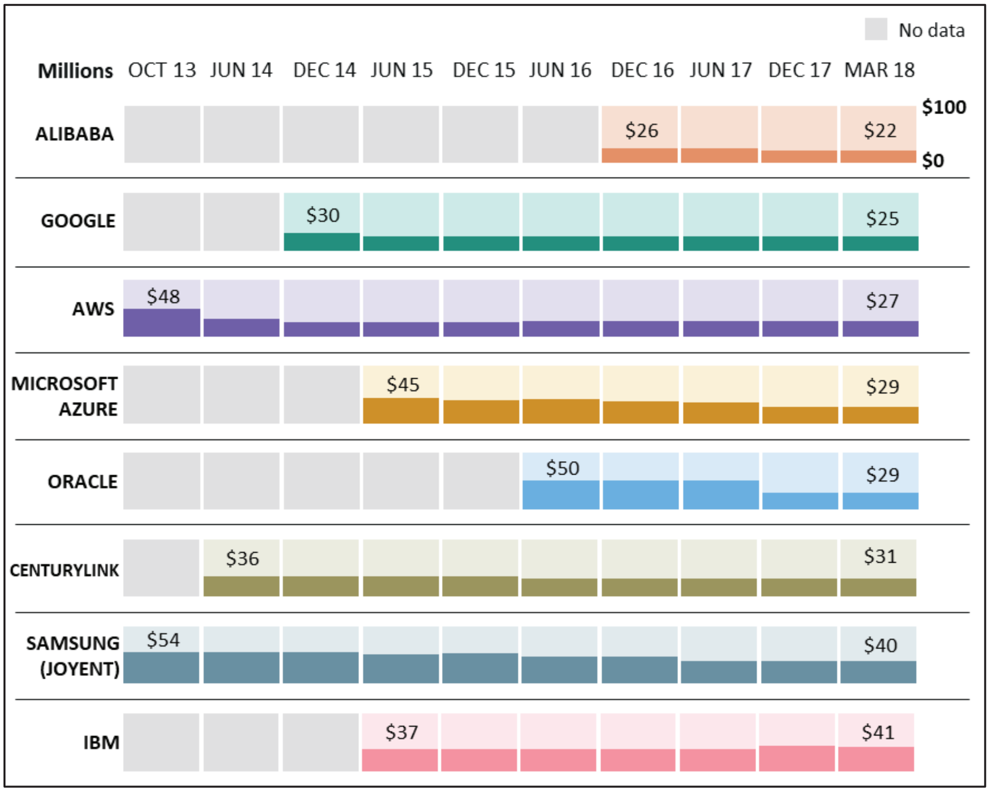
[611] *Id.*

[612] *Id.* at GOOG-HJC-04167638–66 (June 3, 2019).

[613] Rhode Island Roundtable (Mar. 17, 2020) (statement of Mark Tracy, CEO, Cloudacronomics) (on file with Comm.).

[614] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00183326 (Dec. 4, 2018) (on file with Comm.) (showing a 2018 RBC Capital Markets Report which analyzed the cost of IaaS across five usage scenarios: Standard, High Compute, High Memory, High Storage, High Input/Output (I/O) and three workload sizes, small, medium and large, to create 15 cases).

Average Monthly Costs Per GB RAM Across 15 Use Cases[615]



The "cloud" is a system of cables connected to a wide network of data centers—all underground, underwater, or in large industrial buildings. Building data centers in dozens of regions worldwide costs billions of dollars.[616] Market participants described the investment as "bigger than building a cellular network" and only "for countries and major companies."[617]

Two additional inputs that can provide a barrier to becoming a leading infrastructure provider are compliance certifications and reputation. Federal Risk and Authorization Management Program (FedRAMP) authorization is required for any service that holds U.S. federal data.[618] The

[615] Prepared by Subcomm. based Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00183326 (Dec. 4, 2018) (on file with Comm.) (2018 RBC Capital Markets Report which analyzed the cost of IaaS across five usage scenarios: Standard, High Compute, High Memory, High Storage, High Input/Output (I/O) and three workload sizes, small, medium and large, to create 15 cases).

[616] Submission from Source 170, to H. Comm. on the Judiciary, 8 (Nov. 21, 2011) (on file with Comm.).

[617] Interview with Source 144 (April 17, 2020).

[618] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, SECURITY AUTHORIZATION OF INFORMATION SYSTEMS IN CLOUD COMPUTING ENVIRONMENTS (2011), https://www.fedramp.gov/assets/resources/documents/FedRAMP_Policy_Memo.pdf.

FedRAMP authorization process can be resource and time-intensive as vendors have to undergo a process of technical and security reviews and audits.[619]

When a customer chooses to use cloud computing, they must trust that their data will be secure and available to access quickly. The leading cloud infrastructure providers are major technology companies that handle massive amounts of data and run large technical operations before offering managed services. Market participants have shared with Subcommittee staff that a smaller company attempting to enter the IaaS market to contest these firms must convince large customers that they can provide a reliable service that is compliant with industry-specific regulations.[620]

Market participants and industry reports highlight that IaaS offerings have become commoditized. To compete, infrastructure providers must offer a range of PaaS and SaaS services to attract users and developers to their platform.[621] First-party PaaS and SaaS offerings are made available in the infrastructure provider's console. As of this Report, AWS, Azure, and GCP all list over 100 first-party cloud offerings.[622] Each cloud infrastructure provider has taken its own approach to building its platform, but all involve acquisitions, in-house software development, and the use of open-source software. Google and Azure have also relied on their company's existing products—Microsoft leveraging its Office 360 Suite and Google leveraging its collection of APIs.[623]

In the case that a new entrant can overcome this entry barrier, it must also invest substantial resources to overcome network effects within the market. Infrastructure providers benefit from network effects—the more customers on a platform, the more third parties build services that integrate well with that platform leading to more services to attract customers. Amazon, Microsoft, and Google all have hundreds of products listed in their third-party marketplace, while Amazon lists 9,250.[624] In interviews with Subcommittee staff, third-party software vendors said that they had little choice but to integrate their products with the incumbents, most notably, AWS.

Cloud infrastructure providers also need to ensure that the knowledge and expertise of their platform's technology are available to their customers. To achieve this, cloud infrastructure providers launch partner networks that include consulting firms trained to help enterprise customers move to the

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[619] *Get Authorized: Joint Authorization Board*, FEDRAMP, https://www.fedramp.gov/jab-authorization/ (last visited on Sept. 26, 2020).

[620] Interview with Source 407 (Sept. 10, 2020).

[621] Submission from Source 264, to H. Comm. on the Judiciary, 58 (Nov. 21, 2011) (on file with Comm.).

[622] *AWS Marketplace*, AMAZON https://aws.amazon.com/marketplace (last visited on Oct. 4 2020); *Find solutions to support innovation*, MICROSOFT AZURE https://azure.microsoft.com/en-us/marketplace/ (last visited on Oct. 4, 2020); GOOGLE CLOUD PLATFORM, https://console.cloud.google.com/marketplace (last visited on Oct. 4, 2020).

[623] Submission from Source 170, to H. Comm. on the Judiciary (Nov. 21, 2011) (on file with Comm.); Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-02456801 (2010) (on file with Comm.).

[624] *AWS Marketplace*, AMAZON https://aws.amazon.com/marketplace (last visited on Oct. 4, 2020).

public cloud, such as AWS Partner Network (APN) Consulting Partners[625] and Microsoft Solution Providers.[626] Cloud infrastructure providers also offer trainings and exams to certify members of the workforce as proficient in various uses of their technology. Additionally, infrastructure providers have programs to support third-party software vendors working to integrate with the infrastructure provider's cloud.

Many market participants interviewed by Subcommittee staff believe that surpassing the incumbents in the market will be challenging because of the potential for vendor lock-in. Other evidence reviewed by Subcommittee staff bolsters this concern, suggesting that lock-in exists because switching costs for cloud computing customers are high.[627]

Subcommittee staff has identified several common techniques infrastructure providers use to initially lock-in customers, including contract terms, free tier offerings, and egress fees. The first is long-term contracts. In several responses to the Committee's requests for information, third parties explained they have contracts lasting from 3-to-5 years with the infrastructure providers.

Another common technique is using free tier products, where each cloud platform offers a free tier of services ranging from always free to trial offers.[628] Market participants suggest that while the free tier products vary slightly among the major firms, they are relatively similar. When a customer's free trial expires, it is faced with switching to another provider or starting to pay for service. Switching requires an investment of time and resources to adapt to the new service provider, as well as possibly paying egress fees to the prior vendor. As a result, customers may decline to switch at the conclusion of free trials.

Whether a customer begins using cloud on free tier products or not, once they have substantially built and migrated to a platform, they face high switching costs in the form of fees to move the data, along with the technical and labor costs associated with switching the data. When a company moves data into the cloud from hard drives or private servers, they are often charged ingress fees, which are generally low or free.[629] When a company, however, chooses to move data to another infrastructure provider, they are charged an egress fee. Egress fees vary slightly by company and region.

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[625] *Partners*, AMAZON, https://aws.amazon.com/partners/ (last visited on Sept. 26, 2020).

[626] *Solution Providers*, MICROSOFT, https://www.microsoft.com/en-us/solution-providers/home (last visited on Oct. 4, 2020).

[627] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04215099 (Dec. 31, 2018) (on file with Comm.).

[628] *See, e.g.*, *AWS Free Tier*, AMAZON, https://aws.amazon.com/free/ (last visited on Oct. 4, 2020).

[629] *All Network Pricing*, GOOGLE CLOUD, https://cloud.google.com/vpc/network-pricing (last visited on Oct. 4, 2020).

Market participants explain that egress fees are often not transparent and are sometimes charged even when data is not leaving the datacenter.[630] One market participant said that these fees "can create significant financial barriers to migrating away from particular cloud storage providers."[631]

Additionally, when a customer decides to move any of its operations to a different infrastructure provider, it often must overcome technical design challenges. Several market participants spoke to the challenges of finding cloud developers that know the underlying technology of multiple cloud infrastructures as a barrier to both switching, either from one cloud to another or to set up multi-cloud operations. As one third party describes, "businesses often have to calibrate a complex set of technical frameworks, settings, and customized interfaces to adapt their business to the potentially unique way the cloud storage provider has chosen to operate their service."[632] For example, in an investor statement in 2020, Snap explained:

> [T]he vast majority of our computing [runs] on Google Cloud and AWS, and our systems are not fully redundant on the two platforms. Any transition of the cloud services currently provided by either Google Cloud or AWS to the other platform or to another cloud provider would be difficult to implement and will cause us to incur significant time and expense.[633]

When asked about lock-in, many market participants discussed how in response to the rise of a few dominant platforms in the cloud market, new strategies have emerged to increase portability between vendors and allow customers to use multiple clouds. Market participants note, however, that today interoperability is a challenge, and it is unclear how cooperative dominant cloud infrastructure providers will be in supporting partnerships and standards to facilitate these strategies. Given the current trends towards concentration in the cloud infrastructure market, further scrutiny of the role standards play toward decreasing switching costs and enabling portability and interoperability is warranted.

Finally, Subcommittee staff interviewed market participants about related competition concerns facing third-party software vendors. Many third-party software vendors compete with first-party products listed in the infrastructure provider's console. Market participants explain that these competitive offerings are often the first products customers see because they are displayed within the customer's existing console in a format that makes it easier for users to add to their existing cloud

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[630] Interview with Source 465 (May 27, 2020).

[631] Submission from Source 264, to H. Comm. on the Judiciary, 6 (Nov. 21, 2011) (on file with Comm.).

[632] *Id.* at 5.

[633] Snap Inc., Annual Report (Form 10-K) 11 (Dec. 31, 2019), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001564408/0cfebc98-816e-44ac-8351-5067b4f88f0c.pdf.

stack, seamlessly including the product in their billing and licenses and with minimal technical set-up.[634]

As a result, it is difficult for customers to compare prices and features included in the offerings when they are not listed side-by-side. Although third-party vendors can sell their service directly to consumers through their own websites, many smaller cloud vendors use the marketplaces of the dominant infrastructure providers to reach customers, which require fees and are subject to competition concerns that are similar to other marketplaces examined by Subcommittee staff during the investigation. Market participants have raised concerns that cloud infrastructure providers can preference their own offerings, or offer these products with exceedingly steep discounts, making it difficult for third-party software vendors with fewer products to compete.[635]

Significantly, because the leading infrastructure providers have access to competitively significant data in the marketplace, they have insight into usage metrics regarding any managed service that runs on their infrastructure.[636] Market participants told the Subcommittee that they have concerns that this data can be used by infrastructure providers to make decisions regarding which types of software to acquire or replicate to offer through their first-party console.[637]

H. Voice Assistant

Voice assistants act as a user interface that enables exchanges between computing devices through a person's voice.[638] Today users can ask their electronic devices to play the morning news or start a conference call.[639] When combined with smart speakers, voice assistants can become a gateway to the internet, and can also be used to connect other "smart" devices, such as lighting, thermostats, security monitors, and even kitchen appliances.[640] While voice assistants began as mobile phone apps, they have become integrated into other devices, including cars and homes.[641]

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[634] *Getting Started*, AMAZON WEB SERVICES, https://docs.aws.amazon.com/awsaccountbilling/latest/aboutv2/billing-getting-started.html (last visited on Oct. 4, 2020).

[635] Submission from Source 170, to H. Comm. on the Judiciary, 7 (Oct. 18, 2019) (on file with Comm.).

[636] Innovation and Entrepreneurship Hearing at 93 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC), 44–45 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[637] *See* Alistair Barr, *Amazon Finds Startup Investments in the 'Cloud,'* REUTERS (Nov. 9, 2011), http://www.reuters.com/article/amazon-cloud-idUSN1E7A727Q20111109.

[638] Submission from Source 301, to H. Comm. on the Judiciary, Source 301-00000080 at 2 (Oct. 15, 2019) (on file with. Comm.).

[639] Submission from Source 918, to H. Comm. on the Judiciary, 2 (Nov. 4, 2019) (on file with. Comm.).

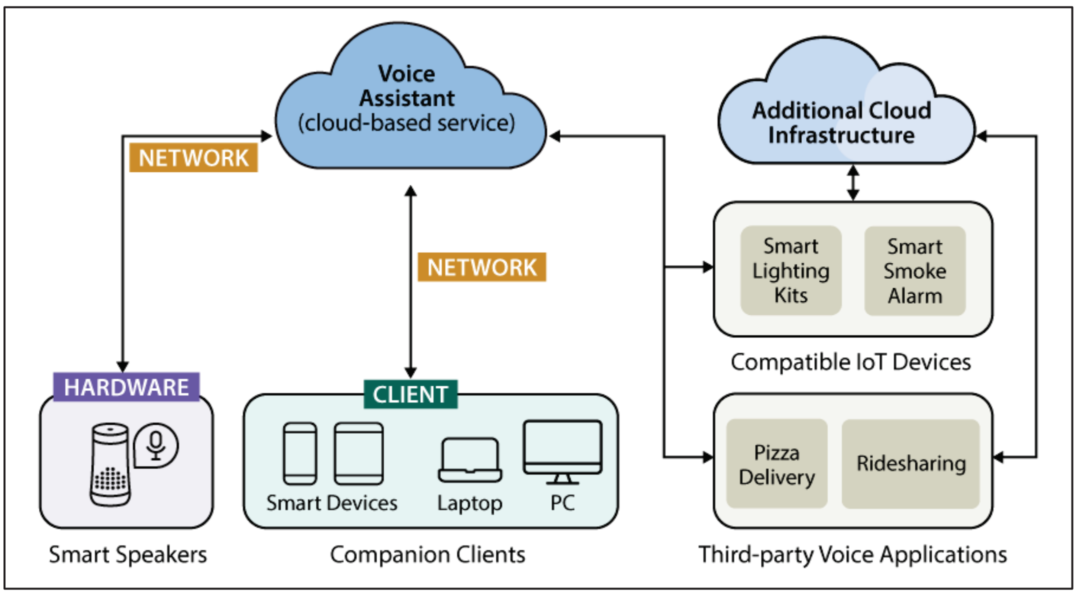
[640] *Id.* at Source 918-0002029.

[641] Submission from Source 711, to H. Comm. on the Judiciary, Source 711-00000080 at 13 (Oct. 15, 2019) (on file with. Comm.).

There are two types of voice assistants on the market: general and specialized. General voice assistants—such as Siri, Alexa, and Google Assistant—can respond to queries and interact with a range of applications. Specialized voice assistants focus on a specific vertical—such as healthcare or banking—where there is a limited vocabulary universe and more specific responses.[642] For example, Snips, a privacy-centric voice assistant owned by Sonos, specializes in commands for playing music on smart speakers.[643]

Today, voice assistants interact with humans by receiving specific requests and sending feedback through a voice response. The first step is to deliver the "wake word"—such as "hey, Siri" on iPhones—designed to activate the system. Once activated, a voice assistant can execute a command, which triggers a voice application.[644]

Voice Assistant Ecosystem[645]



Although there are multiple types of voice assistants within the ecosystem, Subcommittee staff focused primarily on voice assistant platform vendors and third-party hardware manufacturers, including smart speaker manufacturers and Internet of Things (IoT) compatible device manufacturers. The business model for these two groups varies. A Voice assistant platform vendors can monetize its platform by using its ecosystem to drive revenue to complementary lines of business such as e-

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[642] *Id.*

[643] Thomas Ricker, *Sonos buys Snips, a privacy-focused voice assistant*, THE VERGE (Nov. 21, 2019), https://www.theverge.com/2019/11/21/20975607/sonos-buys-snips-ai-voice-assistant-privacy.

[644] Hyunji Chung, Jungheum Park & Sangjin Lee, *Digital Forensic Approaches for Amazon Alexa Ecosystem*, DFRWS (2017), https://arxiv.org/ftp/arxiv/papers/1707/1707.08696.pdf

[645] Prepared by the Subcomm. based on Hyunji Chung, Jungheum Park & Sangjin Lee, *Digital Forensic Approaches for Amazon Alexa Ecosystem,* DFRWS (2017), https://arxiv.org/ftp/arxiv/papers/1707/1707.08696.pdf

commerce, search, or entertainment.[646] It can also charge voice-application developers to be the recommended application for a specific command.[647] As they become widely adopted, stores on voice assistant platforms—such as the "Alexa Skills Store"—can offer premium content and collect revenue share on payments.[648] Third-party hardware manufacturers generate income by selling hardware, and in some cases, by offering subscription services such as home monitoring.[649]

Voice assistants have grown in popularity over recent years due to technological advancements in natural language processing. Although the market is nascent, market participants and industry experts view voice-enabled devices as an opportunity to lock consumers into information ecosystems. The smartphone and smart speaker are the two main portals for voice assistants. Apple and Google lead in the smartphone market, and Amazon leads in the smart speaker market.[650] According to one consulting firm, of the 1.1 billion shipments of virtual assistants in 2019, Apple's Siri (35%) has the highest market share globally, followed by Google Assistant (9%) and Amazon Alexa (4%).[651] Although a significant share of shipments is attributed to Microsoft Cortana (22%) because of the popularity of Windows PCs globally, Cortana is generally not considered a voice assistant platform.[652]

Market participants emphasize that smart speakers represent an essential "hub" or gateway for smart homes and are driving voice-assistant adoption.[653] Smart speakers are estimated to currently have 35% U.S. household penetration, which is predicted to grow to 75% by 2025.[654] As of January 2019, Amazon had a significant lead in the U.S. market at 61.1%, followed by Google at 23.8%, Apple at 2.7%, and Sonos at 2.2%.[655]

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[646] Production from Google, to H. Comm. on the Judiciary, GOOG-HJC-04257931 (Mar. 9, 2017) (on file with Comm.).

[647] *Id.*

[648] *Id.*

[649] Alison DeNisco Rayome, *How to Monetize Your IoT Project*, TECHREPUBLIC (June 20, 2018), https://www.techrepublic.com/article/6-steps-to-monetizing-your-iot-project/.

[650] Submission from Source 918, to H. Comm. on the Judiciary, Source 918-0002763 (Nov. 4, 2019) (on file with Comm.).

[651] Press Release, Futuresource Consulting, Virtual Assistants to Exceed 2.5 Billion Shipments in 2023 (Dec. 18, 2019) https://www.futuresource-consulting.com/press-release/consumer-electronics-press/virtual-assistants-to-exceed-25-billion-shipments-in-2023/.

[652] *Id*. Mary Jo Foley, *Microsoft CEO Nadella makes it official: Cortana is an app, not a standalone assistant*, ZDNET (Jan. 18, 2019), https://www.zdnet.com/article/microsoft-ceo-nadella-makes-it-official-cortana-is-an-app-not-a-standalone-assistant/.

[653] Production from Google, to H. Comm. on the Judiciary, GOOG-HJC-04258666 (Jan. 28, 2019) (on file with Comm.) ("Speakers still going to be very important. [company] cited stats that suggested that only 20% of their "smart home" customers are new to the category. And it's fair to say that many/most of these existing smart home customers started with sound.").

[654] *See generally* Submission from Source 918, to H. Comm. on the Judiciary (Nov. 4, 2019) (on file with Comm.).

[655] *Id.* at 7.

A voice assistant platform vendor can expand its ecosystem by adding IoT devices and voice applications. Both IoT devices and voice applications can be first-party—owned by the voice assistant platform vendor—or third-party, if the vendor has set up services to allow for manufacturers to create voice assistant-enabled devices. Amazon's Alexa ecosystem, measured in terms of compatible IoT devices and voice applications, is the largest of the three primary ecosystems. In 2017, voice assistants made their first serious moves beyond smart speakers into other product categories.[656] The voice assistant-compatible device market is vast and includes kitchen appliances, security cameras, and even trash cans.[657]

Market participants suggest there are several barriers to entry to compete with general voice assistant platforms. These include overcoming the network effects early entrants have benefited from, including financial investment in hardware, software, and infrastructure, and the ability to sell voice assistant-enabled devices at a discount.

Like many platform-based businesses, the voice assistant market benefits from network effects. The more users on a platform, the more third-party devices and applications become available, which attracts more users to the platform.[658] These network effects for voice assistant platforms are amplified by machine learning and artificial intelligence (AI). Improvements in Natural Language Processing (NLP) and AI are expected to improve the quality of voice assistants and contribute to wider adoption.[659] Voice assistant technology improves at a faster rate when there are more users providing the voice samples needed to train AI. In testimony to the Subcommittee, Professors Maurice Stucke and Ariel Ezrachi describe this a "Learning-by-Doing." As they note:

> Learning–by–doing network effect is not limited to online searches, but will be present in any environment in which algorithms evolve and adapt based on experience, such, for example, the development of voice recognition or other instances based on machine learning.[660]

[656] Submission from Source 918, to H. Comm. on the Judiciary, Source 918-0002024 (Nov. 4, 2019) (on file with Comm.).

[657] *See, e.g.*, Christopher Mims, *All Ears: Always-On Listening Devices Could Soon Be Everywhere*, WALL ST. J. (July 12, 2018), https://www.wsj.com/articles/all-ears-always-on-listening-devices-could-soon-be-everywhere-1531411250.

[658] Submission of Source 918, to H. Comm. on the Judiciary, Source 918-0002025 at 12 (Oct. 15, 2019) (on file with Comm.).

[659] Submission of Source 711, to H. Comm. on the Judiciary, Source 711-00000080 at 12 (Oct. 15, 2019) (on file with Comm.).

[660] Data and Privacy Hearing at 6–7 (statement of Maurice E. Stucke, Prof. of Law, Univ. of Tennessee, and Ariel Ezrachi, Slaughter and May Prof. of Competition Law, Univ. of Oxford, Fellow, Pembroke Coll., Dir., Oxford Ctr. For Competition Law and Pol'y).

The scale of users generating data is arguably the most important asset in terms of AI.[661] The incumbents have access to large data sets that—when combined with machine learning and AI—position them to benefit from economies of scope in the smart home.[662]

Competing as a voice assistant platform also requires significant financial resources. A firm must make significant investments to design and train a voice assistant, as well as acquiring the physical infrastructure: hardware and cloud computing. Additionally, incumbents have also acquired various firms that specialize in voice recognition and natural language processing, a functionality that is used in their voice assistants. For example, both Apple and Amazon acquired companies to develop their core voice recognition technologies, and every incumbent has continually invested in AI startups to improve their voice assistant ecosystem.[663]

Currently, voice assistant software is built on cloud computing infrastructure. In the case of Amazon Alexa and Google Assistant, the voice assistant platforms also own the underlying cloud infrastructure, AWS, and GCP, respectively. Market participants note that advancements in voice assistant ecosystems are beginning to rely on edge computing technology, which brings the computation and data storage closer to the device and is a technology in which the incumbent cloud market leaders have a head start.[664]

Market participants have also raised concerns about incumbent firms offering voice-enabled hardware—specifically hubs such as smart speakers—to both collect large amounts of personal user data and strengthen other lines of business. At the Subcommittee's field hearing, Sonos CEO Patrick Spence explained:

> Google and Amazon have flooded the market with dramatically price-subsidized products. Indeed, they make no pretense of the fact that the products themselves are money losers and they routinely give them away at steep discounts, even for free. It is difficult to predict the impact that voice assistants will have on search and e-commerce, but voice activated speakers have the potential to dramatically alter the way that consumers interact with the internet. We believe that Google and Amazon have been willing to forgo profits in smart speakers for this reason, in addition to their ability to monetize the valuable household data that these products vacuum up. And if voice purchasing and voice search do become the next big thing, they will own the market because their strategy is succeeding. Those two companies now control roughly 85% of

[661] Submission of Source 918, to H. Comm. on the Judiciary, Source 918-0002763 at 12 (Oct. 15, 2019) (on file with Comm.).

[662] Submission of Source 918, to H. Comm. on the Judiciary, 37 (Sept. 1, 2019) (on file with Comm.).

[663] *See, e.g.*, *How Big Tech Is Battling To Own the $49B Voice Market*, CB INSIGHTS (Feb. 13, 2019), https://www.cbinsights.com/research/facebook-amazon-microsoft-google-apple-voice/.

[664] FUTURE TODAY INST., 2020 TECH TRENDS REPORT (2020), https://futuretodayinstitute.com/2020-tech-trends/.

the U.S. smart speaker market . . . It's not because their hardware businesses are profitable in and of themselves.[665]

As the voice assistant market expands, it may be difficult for users to switch between platforms. Because voice assistant platforms are not always interoperable, users would incur costs to purchase one or more new devices. Moreover, voice assistant technology is designed to learn its user's preferences over time. These preferences range from settings like billing information and default services for responding to music commands to more advanced learning like past voice commands and shopping history. As a voice assistant improves its "understanding" of its user, it may increase the costs associated with switching to another platform. As one market participant noted in a submission to the Subcommittee, "the user may become more dependent on that particular voice assistant and be far less likely to use a rival voice assistant that has not yet 'caught up' with the user's preferences."[666]

The design of most voice assistants—specifically on screenless devices—amplifies the ability of voice assistant platforms to favor their services as a default or as a response with limited choice.[667] This dynamic makes it easier for popular voice assistants to favor their first-party services.

There is also a significant potential for misuse of data to harm competition or consumers. Similar to other platforms, such as cloud and operating systems, voice assistant platforms collect and store users' interactions with the voice assistant.[668] During the investigation, several companies shared concerns that voice assistant platforms would be able to use this vantage to glean competitive insights from third-party voice applications or smart appliances that are performing well. As a result, platforms could use that data to acquire competitive threats or integrate their features into the company's product.

Privacy and data experts have also commented that the smart home ecosystem is some of the most sensitive data that can be collected.[669] Voice assistant platforms not only record voice interactions, but also receive information about the skills used—"whether a light is on or off. Or, if a customer links Alexa to a third-party calendar skill, Alexa may receive information about the events on the customer's calendar."[670] This raises significant concerns regarding whether a person has provided consent to data collection. Voice assistants not only collect information on the primary user, but also people in their environment, including children.

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[665] Competitors Hearing at 3 (statement of Patrick Spence, CEO, Sonos, Inc.).

[666] Submission of Source 711, to H. Comm. on the Judiciary, Source 711-00000080 at 20 (Oct. 15, 2019) (on file with Comm.).

[667] *Id.* at 17.

[668] Innovation and Entrepreneurship Hearing at 86–87 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC).

[669] *See generally* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM (2019).

[670] Innovation and Entrepreneurship Hearing at 40 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

Finally, leaders in the voice assistant ecosystem set the rules for third parties. To make a voice assistant enabled device, market participants must comply with voice assistant platform vendor specifications. As Mr. Spence of Sonos noted in his testimony before the Subcommittee:

> To gain access to their platforms and integrate with their services, these companies issue all manner of take-it-or-leave-it demands, from early and technically detailed access to our product roadmaps, to proprietary business data, including sales forecasts, to waivers of essential contractual rights.[671]

The Subcommittee also heard from multiple voice assistant developers that have struggled to gain access to key functionality needed to build their applications, such as the unprocessed user commands.[672] While still developing, the voice assistant market shows early signs of market concentration.

I. Web Browsers

A web browser is software that retrieves and displays pages from the Internet. People often use browsers to navigate to and spend time on websites and to search the web. Most other activities online, whether it is on a mobile phone or a television screen, are made possible through a browser.[673]

Behind every browser is a "browser engine," also known as a layout engine or rendering engine. A browser engine is the central software component of a web browser, transforming content hosted on web servers into a graphic depiction that people can interact with. Browsers interpret control codes within web pages, which indicate the structure of the data, such as the beginning and end of an item, and the way to present it to the user, such as headings, paragraphs, lists, or embedded images. The browser engine takes this code to "draw the web page" on the user's screen and noting which parts of it are interactive. The non-engine components of the browser typically include the menus, toolbars, and other user-facing features, which are layered over top of the engine.[674]

Browsers abide by standards to ensure that anyone can properly use features within a website on any browser. For example, standards such as CSS and XML help ensure that a website functions the same in every browser.[675] Web browser standards organizations include the World Wide Web Consortium (W3C), Web Hypertext Application Technology Working Group (WHATWG), and

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[671] Competitors Hearing at 4 (2020) (statement of Patrick Spence, CEO, Sonos, Inc.).

[672] Submission of Source 301, to H. Comm. on the Judiciary, Source 301-00000080 at 23 (Oct. 15, 2019) (on file with Comm.).

[673] Submission from Source 385, to H. Comm. on the Judiciary, 3 (Oct. 11, 2019) (on file with. Comm.).

[674] *Id.* at 4.

[675] *Standards*, W3C, https://www.w3.org/standards/ (last visited on Sept. 26, 2020).

Internet Engineering Task Force (IETF). Through these organizations, stakeholders work in partnership to ensure that browser engines and web pages are interoperable.[676] W3C has become one of the most important organizations for browser standards. W3C standards undergo a rigorous review process prior to implementation.[677]

Browser vendors monetize their access to users, usually through search royalties. For example, whenever someone types a search query into the search bar on Firefox, Google records that action, and the Mozilla corporation receives a royalty.[678] Browsers also bring in ad revenues. For example, Brave sells advertisers the option to run desktop notification ads to users who choose to see ads.[679]

The browser market is highly concentrated. Google's Chrome and Apple's Safari control roughly 80% of the browser market.[680] As of August 2020, Chrome is the leader in the U.S. desktop browser market (58.6%), followed by Safari (15.8%), Edge (8.76%), Firefox (7.6%), and Internet Explorer (5.36%).[681] On mobile devices, Safari (55.5%) and Chrome (37.4%) have significant leads on their rivals, such as Samsung Internet (5.01%), Firefox (0.77%), and Opera (0.44%).[682] Additionally, the browser market has concentrated around three browser engines: Gecko, WebKit, and Blink, used in Firefox, Apple's Safari, and Google's Chrome, respectively.[683]

Google's hold on the browser market extends beyond Chrome. Google releases the code base used to make the Chrome browser as the free, open-source project Chromium.[684] Chromium is used in Microsoft's Edge browser, Amazon's Silk browser, Opera, and other browsers that are often referred to as "Chromium-based."[685] Similarly, Apple extends its power by mandating that all browser applications on the iPhone use Apple's browser engine, WebKit.[686]

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676 Submission from Source 993, to H. Comm. on the Judiciary (Oct. 11, 2019) (on file with. Comm.).

677 *Process for 2020*, W3C, https://www.w3.org/wiki/Process2020 (last visited on Sept. 26, 2020).

678 Innovation and Entrepreneurship Hearing at 42 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC).

679 *Expand your business with Brave Ads*, BRAVE, https://brave.com/brave-ads-waitlist/ (last visited on Sept. 26, 2020).

680 *U.S. Browser Market Share*, STATCOUNTER https://gs.statcounter.com/browser-market-share/all/united-states-of-america (last visited on Sept. 26, 2020).

681 *U.S. Desktop Market Share*, STATCOUNTER https://gs.statcounter.com/browser-market-share/desktop/united-states-of-america (last visited on Sept. 26, 2020).

682 *U.S. Mobile Market Share*, STATCOUNTER, https://gs.statcounter.com/browser-market-share/mobile/united-states-of-america (last visited on Sept. 26, 2020).

683 Submission from Source 993, to H. Comm. on the Judiciary, 5 (Oct. 11, 2019) (on file with. Comm.).

684 THE CHROMIUM PROJECTS, https://www.chromium.org/.

685 Submission from Source 993, to H. Comm. on the Judiciary, 3 (Oct. 11, 2019) (on file with. Comm.).

686 Innovation and Entrepreneurship Hearing at 1–2 (response to Questions for the Record of Kyle Andeer, Vice Pres., Corp. Law, Apple Inc.).

Browser competition has also led to the creation of a browser extension submarket. A browser extension adds additional features to a web browser, including user interface modifications and ad-blocking. They can also provide for niche browser customization and experimentation of new functionality before it is implemented into the main browser functionality.[687] Popular add-ons include ad blockers, LastPass, and Grammarly.[688]

Competition in this market is important to promoting innovation online. In a submission to the Subcommittee, a market participant explained:

> Competing browser engines push each other for innovations in raw performance in several respects, including faster rendering, greater reliability, and a number of other technical improvements; this competition is qualitatively different from, and greater than, competition over just the browser product.[689]

Browser diversity is also important for ensuring an open internet and reduces the risk that web developers will build sites optimized for the leading engine as opposed to web standards.[690] Moreover, as developers work on advancing browser engine technology, they create technologies that can improve the overall internet ecosystem. For example, Rust is a programming language that Mozilla engineers developed while writing the Servo layout technology for browser engines.[691] Developers use Rust for other applications today, including gaming, operating systems, and other new software applications.[692] There is a general concern that without vibrant competition this form of innovation will suffer, discouraging the development of new browser engine technology.[693]

Browsers protect their dominance through default settings, which create a barrier to entry.[694] Defaults exist in both desktop and mobile markets. Although users can set different browsers more easily for desktop computers than on mobile devices, "settings can impact the stickiness over time," such as when a software update overrides a user's preference, requiring them to take "complex steps to restore their browser choice."[695] In some cases, consumers are unable to delete the preloaded browser. For example, on Apple iOS devices and Facebook's Oculus, users are unable to delete the preloaded

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687 Interview with Source 27 (June 29, 2020).

688 Tyler Lacoma, *The best Google Chrome extensions*, DIG.TRENDS (Apr. 4, 2020), https://www.digitaltrends.com/computing/best-google-chrome-extensions/.

689 Submission from Source 993, to H. Comm. on the Judiciary, 5 (Oct. 11, 2019) (on file with. Comm.).

690 *Id.*

691 *Rust language*, MOZILLA RESEARCH, https://research.mozilla.org/rust/ (last visited on Sept. 26, 2020).

692 *Id.*

693 Interview with Source 481 (July 2, 2020).

694 Submission from Source 993, to H. Comm. on the Judiciary, 10–11 (Oct. 11, 2019) (on file with. Comm.); Submission from Source 269, to H. Comm. on the Judiciary, 2–3 (July 23, 2019) (on file with. Comm.).

695 Submission from Source 993, to H. Comm. on the Judiciary, 10 (Oct. 11, 2019) (on file with. Comm.).

browser. Some popular mobile applications can preset webpage links to a predetermined browser, such as the Apple Mail App (Safari) and the Search widget on an Android device (Chrome).[696]

J. Digital Advertising

There are two principal forms of digital advertising: search advertising and display advertising. Search advertising refers to digital ads on desktop or mobile search engines, such as the Google.com homepage, displayed via "search ad tech" alongside search engine results. Search advertising is often bought and sold via real-time bidding (RTB) auctions among advertisers, where advertisers set the prices they are willing to pay for a specific keyword in a query.[697] Display advertising refers to the delivery of digital ad content to ad space on websites and mobile apps, which is referred to as "inventory." Like search advertising, buying and selling display ads often involves real-time bidding.[698]

Within display advertising, there are two separate "ad tech" markets that Subcommittee staff reviewed during the investigation: first-party and third-party. "First-party" platforms refer to companies such as Facebook, Twitter, and Snap, which sell ad space on their own platforms directly to advertisers. Google also uses first-party ad tech to sell display ads on its own properties, most notably YouTube. Third-party display ad tech platforms are run by intermediary vendors and facilitate the transaction between third-party advertisers, such as the local dry cleaner or a Fortune 500 company, and third-party publishers, such as *The Washington Post* or a blog.[699] Third-party ad tech providers include Google, Flashtalking, Sizmek (owned by Amazon), and the Trade Desk, among others.[700]

Software in display ads is programmatic, meaning that specialized software automates the buying and selling of digital ads. Market participants explain that this automated approach provides greater liquidity, better return-on-investment metrics, more precise ad targeting, and lower transaction costs. One major drawback, however, is that this process lacks transparency.[701] Google, specifically, "does not disclose to the publishers on the other ends of these trades what their space ultimately sold for and how much Google keeps as its share."[702] As another market participant told Subcommittee

[696] *Id.* at 5; Submission from Source 269, to H. Comm. on the Judiciary, 2 (July 23, 2019) (on file with. Comm.).

[697] Submission from Source 465, to H. Comm. on the Judiciary, 6 (June 3, 2019) (on file with Comm.).

[698] *Id.*

[699] *Id.* at 5.

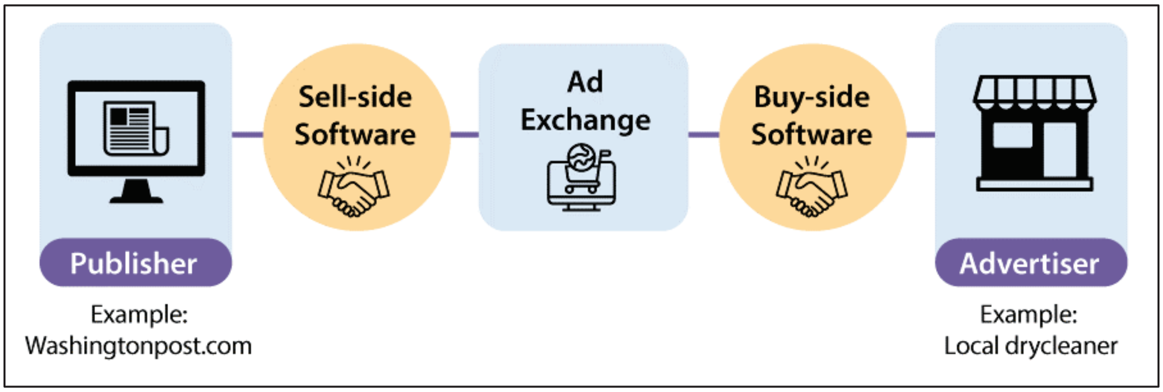
[700] Competition & Mkts. Auth. Report at 266.

[701] Dina Srinivasan, *Why Google Dominates Advertising Markets*, 24 STAN. TECH. L. REV. (forthcoming 2020) (manuscript at 7–8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500919.

[702] *Id.* at 8.

staff, Google could make the process "more transparent," but given Google's financial stake in maintaining secrecy, "there is no incentive to."[703]

The Ad-Tech Suite[704]



Ad exchanges refer to the "ad trafficking system that connects advertisers looking to buy inventory with publishers selling inventory."[705] Sales on ad exchanges occur primarily through: (1) open real-time bidding auctions; (2) closed real-time bidding auctions; or (3) programmatic direct deals.[706]

Sell-side software includes publisher ad servers.[707] The primary function of a publisher ad server is to fill ad space on a publisher's website that is personalized to the interests of a specific website viewer.[708] Sell-side software also includes ad networks, which aggregate ad inventory from many different publishers and divide that inventory based on user characteristics—such as age or location. Ad networks sell the pool of inventory through ad exchanges or demand-side platforms (DSPs).[709]

Buy-side software includes advertiser ad servers, software that stores, maintains, and delivers digital ads to the available inventory. Ad servers facilitate the programmatic process that makes instantaneous decisions about which ads to display on which websites to which users and helps executes to display the ad on that site. Ad servers collect and report data, such as ad impressions and

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[703] Interview with Source 004 (Apr. 23, 2020).

[704] Prepared by Subcomm. based on Dina Srinivasan, *Why Google Dominates Advertising Markets*, 23 STAN. TECH. L. REV. (forthcoming 2020) (manuscript at 15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500919.

[705] Submission from Source 465, to H. Comm. on the Judiciary, 9 (June 3, 2019) (on file with Comm.).

[706] *Id.*

[707] Competition & Mkts. Auth. Report at 263.

[708] Submission from Source 465, to H. Comm. on the Judiciary, 8 (June 3, 2019) (on file with Comm.).

[709] *Id.* at 9.

clicks, for advertisers to monitor ad performance and track conversion metrics.[710] Buy-side software also includes demand-side platforms, software that allows advertisers to buy advertising inventory from a range of publishers. Demand-side platforms use data to create targeted ad audiences and engage in purchasing and bidding.[711]

The ad tech suite also includes analytics tools that allow advertisers and publishers to measure ad campaign efficiency, including consumers' interactions with an ad. Similarly, data management platforms (DMPs) aggregate and store consumer data from various sources and process the data for analysis. Advertisers and publishers use data management platforms to track, partition, and target consumer audiences across websites.[712]

Over the last decade, the digital advertising market has experienced double-digit year-over-year growth. The market, however, has become increasingly concentrated since the advent of programmatic trading. In 2017, *Business Insider* reported that Google and Facebook accounted for 99% of year-over-year growth in U.S. digital advertising revenue.[713] Today, advertisers and publishers alike have few options when deciding how to buy and sell online ad space.[714]

Market participants suggest this concentration likely exists in part due to high barriers to entry. Google and Facebook both have a significant lead in the market due to their significant collection of behavioral data online, which can be used in targeted advertising. Additionally, Google and Facebook do not provide access to this unique data in open data exchanges. Advertisers' only access to this information is indirect—through engagement with Google and Facebook's ad tech.[715]

Amazon's advertising business is starting to obtain a portion of the U.S. year-over-year digital advertising revenue growth.[716] Amazon has been able to enter the market because it has its own trove of user data—namely, competitively significant first-party data related to retail searches and purchases. Moreover, Amazon's 50% penetration across U.S. households and its reach with high-income customers are likely to help drive its ad revenue growth.[717] While Amazon can leverage its ecosystem to overcome some of the barriers to entry in ad tech, the recent U.K. Competition and Markets

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[710] Competition & Mkts. Auth. Report at 263.

[711] Submission from Source 888, to H. Comm. on the Judiciary, 8 (June 3, 2019) (on file with Comm.).

[712] *Id.* at 10.

[713] Alex Heath, *Facebook and Google Completely Dominate the Digital Ad Industry*, BUS. INSIDER (Apr 26, 2017), https://www.businessinsider.com/facebook-and-google-dominate-ad-industry-with-a-combined-99-of-growth-2017-4.

[714] Dina Srinivasan, *Why Google Dominates Advertising Markets*, 23 STAN. TECH. L. REV. (forthcoming 2020) (manuscript at 4–5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500919.

[715] *Id.* at 92.

[716] Kiri Masters, *What's Driving Amazon's $10 Billion Advertising Business*, FORBES (July 26, 2019), https://www.forbes.com/sites/kirimasters/2019/07/26/whats-driving-amazons-10bn-advertising-business/#4cc9c84aa043.

[717] *Id.*

Authority report found that, as of today, Amazon's ad tech likely only has advantages in the retail sector.[718]

V. DOMINANT ONLINE PLATFORMS

A. Facebook

1. Overview

Founded in 2004 by Mark Zuckerberg, Eduardo Saverin, Chris Hughes, and Dustin Moskowitz,[719] Facebook is the largest social networking platform in the world. Its business operates around five primary product offerings, including: (1) Facebook, a social network platform; (2) Instagram, a social network app for photos and videos; (3) Messenger, a cross-platform messaging app for Facebook users; (4) WhatsApp, a cross-platform messaging app; and (5) Oculus, a virtual reality gaming system.

Facebook reported in July 2020 that its platform includes 1.79 billion daily active users (DAUs),[720] 2.7 billion monthly active users (MAUs),[721] and an average revenue per user (ARPU) of $7.05.[722] Last year, Facebook's businesses collected about $70 billion in revenue—a 27% increase from the prior year—earning about $24 billion in income from its operations.[723] Facebook reported that its family of products—including Facebook, Instagram, Messenger, and WhatsApp—includes 2.47 billion daily active people (DAP),[724] 3.14 billion monthly active people (MAP), and a family average revenue per person (ARPP) of $6.10.[725]

In addition to the Subcommittee's investigation of Facebook's monopoly power, state and federal antitrust authorities are investigating Facebook for potential violations of the U.S. antitrust laws. In July 2019, Facebook disclosed that the Federal Trade Commission (FTC) had opened an

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718 Competition & Mkts. Auth. Report at 282.

719 STEVEN LEVY, FACEBOOK: THE INSIDE STORY 65–69 (2020).

720 Facebook, Inc., Quarterly Report (Form 10-Q) 29 (July 31, 2020), https://investor.fb.com/financials/sec-filings-details/default.aspx?FilingId=14302237.

721 *Id.* at 30.

722 *Id.* at 32.

723 *Id.* at 35. *See generally* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 6 (2001) ("High profit margins might appear to be the benign and necessary recovery of legitimate investment returns in a Schumpeterian framework, but they might represent exploitation of customer lock-in and monopoly power when viewed through the lens of network economics.").

724 Facebook, Inc., Quarterly Report (Form 10-Q) 25 (July 31, 2020), https://investor.fb.com/financials/sec-filings-details/default.aspx?FilingId=14302237.

725 *Id.* at 35.

AR_003423

antitrust investigation of Facebook in June 2019.[726] Facebook also disclosed that in July 2019 the Department of Justice announced that it would begin an antitrust review of market-leading online platforms.[727] In September 2019, New York Attorney General Letitia James announced that she joined with eight other attorneys general to lead a multistate investigation of Facebook, Inc.[728] In October 2019, Attorney General James reported that the investigation into Facebook grew to include 47 attorneys general.[729]

2. Social Networking

a. Market Power

Facebook has monopoly power in the market for social networking.[730] According to internal documents produced by Facebook to the Committee, it has high reach, time-spent, and significantly more users than its rivals in this market. Despite significant changes in the market—such as the advent of mobile devices, applications, and operating systems—Facebook has held an unassailable position in the social network market for nearly a decade, demonstrating its monopoly power.[731]

Facebook's monopoly power is firmly entrenched and unlikely to be eroded by competitive pressure from new entrants or existing firms. Documents produced during the investigation by Facebook, including communications among its senior executives on market strategy, as well as a memorandum by a senior data scientist and economist at Facebook,[732] support the conclusion that Facebook's monopoly is insulated from competitive threats. The social network market has high entry barriers—including strong network effects, high switching costs, and Facebook's significant data advantage—that discourage direct competition by other firms to offer new products and services.[733]

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[726] Facebook, Inc., Quarterly Report (Form 10-Q) 42 (July 24, 2019), https://investor.fb.com/financials/sec-filings-details/default.aspx?FilingId=13550646.

[727] *Id.* at 53.

[728] Press Release, N.Y. Attorney General, AG James Investigating Facebook For Possible Antitrust Violations (Sept. 6, 2009), https://ag.ny.gov/press-release/2019/ag-james-investigating-facebook-possible-antitrust-violations.

[729] Press Release, N.Y. Attorney General, Attorney General James Gives Update On Facebook Antitrust Investigation (Oct. 22, 2019), https://ag.ny.gov/press-release/2019/attorney-general-james-gives-update-facebook-antitrust-investigation.

[730] Facebook has argued to other antitrust enforcement bodies that limiting the product market to social networks at the exclusion of other markets, such as user attention, "would be artificial and would not reflect the competitive realities," and that "competitive pressures to which Facebook reacts are global in nature." *See, e.g.*, Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00012074 (2016) (White Paper on Relevant Markets and Lack of Dominance for Federal Cartel Office) (on file with Comm.).

[731] Omidyar Network Report.

[732] Cunningham Memo ("Facebook has high reach and time-spent in most countries. User growth is tracking internet growth: global reach is roughly stable.").

[733] Instead of competing directly with Facebook, such as Google attempted but failed to do with Google+, other social platforms provide niche products with social graphs that are orthogonal to Facebook's graph. *See id.* at 4; FB-HJC-ACAL-

Facebook has also maintained and expanded its dominance through a series of acquisitions of companies it viewed as competitive threats, and selectively excluded competitors from using its platform to insulate itself from competitive pressure. Together, these factors have tipped the social networking market toward a monopoly.[734]

Several antitrust enforcement agencies have examined Facebook's monopoly in recent years and reached similar conclusions. In July 2020, the United Kingdom's Competition and Markets Authority (CMA) found that Facebook is dominant in the markets for social networks and digital display ads, and that its market power "derives in large part from strong network effects stemming from its large network of connected users and the limited interoperability it allows to other social media platforms."[735] In July 2019, Germany's Federal Cartel Office (Bundeskartellamt) found that "Facebook is the dominant company in the market for social networks," and that in Germany's social network market, "Facebook achieves a user-based market share of more than 90%."[736] And in June 2019, the Australian Competition & Consumer Commission (ACCC) found that "Facebook has substantial market power in a number of markets and that this market power is unlikely to erode in the short to medium terms."[737]

Facebook's responses to the Committee's requests for information claimed that it competes in a "rapidly evolving and dynamic marketplace in which competition is vigorous," citing Twitter, Snapchat, Pinterest, and TikTok as examples of competition Facebook faces for "every product and

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00111394 ("Linkedin, and Nextdoor coexist in the US with similar userbases but orthogonal graphs: Facebook connects friends and family, LinkedIn connects coworkers, Nextdoor connects neighbors.").

[734] *See* Bundeskartellamt, B6-22/16, Case Summary, *Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate* data processing, 8 (Feb. 15, 2019) ("The facts that competitors can be seen to exit the market and that there is a downward trend in the user-based market shares of the remaining competitors strongly indicate a market tipping process which will result in Facebook.com becoming a monopolist."), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

[735] Competition & Mkts. Auth. Report at 26.

[736] In addition to Facebook's high market share, the Bundeskartellamt also found that Facebook has market power based on other measures, including its "access to competitively relevant data, economies of scale based on network effects, the behaviour of users who can use several different services or only one service and the power of innovation-driven competitive pressure were seen as relevant factors of market power." Press Release, Bundeskartellamt, Bundeskartellamt prohibits Facebook from combining user data from different sources 4 (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6. The Bundeskartellamt also noted that in terms of assessing market share by time spent on the network, "the Facebook group would have a combined market share far beyond the market dominance threshold pursuant to Section 18(4) GWB, even if YouTube, Snapchat, Twitter, WhatsApp, and Instagram were included in the relevant market." *Id.* at 6.

[737] Austl. Competition & Consumer Comm'n Report at 9; 78 (adopting a broader view on Facebook's product market to include Twitter and Snapchat).

service" that it offers.[738] According to Facebook, its users "have many choices and can leave Facebook if they're not happy,"[739] allowing people to quickly abandon it. The ability of users to "explore the myriad other options available . . . creates strong competition for every product and service Facebook offers, as well as pressure to develop new products to attract and retain users."[740]

In response to other antitrust inquiries, Facebook said that it competes for users' attention broadly.[741] In a 2016 white paper prepared in response to an investigation by Germany's Federal Cartel Office, Facebook stated that it "faces intense competition for user attention and engagement at every level," listing companies as diverse as Candy Crush and Clash of the Clans—popular mobile gaming apps—along with YouTube, Twitter, Pinterest, Snapchat and others as competitors for users' attention.[742] Facebook similarly submitted to the ACCC that if the company does not compete vigorously, users will go to other "platforms, websites, apps, and other services—not just social media services—that compete for their attention."[743] In an interview conducted by Subcommittee staff, a former employee explained that as a product manager at Facebook, "your only job is to get an extra minute. It's immoral. They don't ask where it's coming from. They can monetize a minute of activity at a certain rate. So the only metric is getting another minute."[744]

Facebook describes a diverse list of other firms as competitive substitutes for Facebook, including Microsoft's Bing, a search engine; Yelp, a publisher of crowd-sourced business reviews; and BuzzFeed, a digital news publisher.[745] According to Facebook, these firms exert competitive pressure on Facebook in the market for users' attention.[746] Most recently, in response to an inquiry by the United Kingdom's Competition and Markets Authority, Facebook calculated its market share as "time captured by Facebook as a percentage of total user time spent on the internet, including social media, dating, news and search platforms."[747] Based on these measures, Facebook concluded that it lacks monopoly power.

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[738] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-APP0004 (Oct. 14, 2019); Innovation and Entrepreneurship Hearing at 1 (statement of Matt Perault, Dir. of Public Pol'y, Facebook, Inc.), https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-Wstate-PeraultM-20190716.pdf.

[739] Innovation and Entrepreneurship Hearing at 1 (response to Questions for the Record of Matt Perault, Dir. of Public Pol'y, Facebook, Inc.).

[740] *Id.*

[741] *See, e.g.*, Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00012074 (2016) (on file with Comm.).

[742] *Id.*

[743] FACEBOOK, FACEBOOK'S RESPONSE TO THE DIGITAL PLATFORMS INQUIRY FOR AUSTRALIAN COMPETITION AND CONSUMER COMMISSION 25 (Sept. 12, 2019), https://fbnewsroomus.files.wordpress.com/2019/09/facebook-submission-to-treasury-on-digital-platforms-inquiry.pdf.

[744] Interview with Former Instagram Employee (Oct. 2, 2020).

[745] *Id.*

[746] *Id.*

[747] Competition & Mkts. Auth. Report at 121 n.152.

Facebook's position that it lacks monopoly power and competes in a dynamic market is not supported by the documents it produced to the Committee during the investigation. Instead, Facebook's internal business metrics show that Facebook wields monopoly power. In response to a supplemental information request by Subcommittee staff,[748] Facebook produced industry updates prepared in the ordinary course of business by Facebook's Market Strategy team.[749] It has described these reports as both "internal competitive metrics" and as a "competitive survey regularly prepared for Facebook's management team [that] tracks a variable set of competitors not by specific products or features, but by the degree of user attention and engagement that they command in terms of monthly active users ('MAU') and daily active users ('DAU')."[750]

Facebook's industry updates were shared internally with senior executives, including Mark Zuckerberg, Facebook's CEO.[751] Facebook used data collected through Onavo, a virtual private network (VPN) app, to provide detailed competitive insights into the usage and engagement of other firms.[752] Facebook also relied on this data in response to inquiries by the European Commission and the Bundeskartellamt,[753] as well as to prepare detailed internal reports on market strategy.[754]

i. Usage and Reach

Facebook has monopoly power in the social networking market. Based on its internal documents, Facebook and its family of products—Facebook, Instagram, Messenger, and WhatsApp—control a significant share of users and high reach in the social networking market.[755] Facebook's family of products includes three of the seven most popular mobile apps in the United States by monthly active persons, reach, and percentage of daily and monthly active persons.[756]

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[748] Subcommittee staff made a supplemental request after identifying Facebook's industry updates during the review of documents produced in response to the Committee's September 2019 request for information.

[749] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-000025 (Mar. 5, 2020) (on file with Comm.).

[750] *Id.* at *FB*-HJC-ACAL-00012074, FB-HJC-ACAL-00012090 (2016) (on file with Comm.).

[751] *Id.* at FB-HJC-ACAL-00054944 (Apr. 27, 2012) (on file with Comm.).

[752] Although it does not include data from users of Apple's iMessage, which is relevant for purposes of usage on WhatsApp and Messenger, Facebook's documents note that iMessage's growth is limited by the adoption of iPhones, whereas Facebook's products can be used across different devices. *See generally* Cunningham Memo at 15.

[753] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00012090 (2016) (on file with Comm.).

[754] Cunningham Memo at 9 (citing data from MINT, another name used for Onavo within Facebook, Inc.).

[755] *Id.* at 2, 16 ("Facebook has high reach and time-spent in most countries. User growth is tracking internet growth: global reach is roughly stable.").

[756] Production of Facebook, to Comm. on the Judiciary, 38 (Jan. 2020) (Monthly Update for December 2019) (based on Facebook's internal calibrations of App Annie data) (on file with Comm.). According to Facebook, monthly active persons (MAP) is "based on the activity of users who visited at least one of Facebook, Instagram, Messenger, and WhatsApp (collectively, our 'Family' of products) during the applicable period of measurement." *See* Facebook, Inc., Quarterly Report (Form 10-Q) 29 (Apr. 30, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/bfe31518-2e18-48fb-8d98-5e8b07d94b2a.pdf-.

As a standalone product, the Facebook app had *the third highest reach* of all mobile apps,[757] with 200.3 million users in the United States, reaching 74% of smartphone users as of December 2019.[758] Facebook Messenger had the *fourth highest reach*, with 183.6 million monthly active persons, reaching 54.1% of U.S. smartphone users.[759] Finally, Instagram had the *sixth highest reach,* with 119.2 million users, reaching 35.3% of smartphone users.[760] In contrast, Snapchat, the mobile app with the seventh highest reach, had 106.5 million users in the United States, reaching 31.4% of smartphone users.[761]

Facebook's maintenance of these high market shares over a long time period demonstrates its monopoly power.[762] From September 2017 to September 2018, Facebook reached more than 75% of users internationally with at or near 100% market penetration in nine of the twenty most populous countries in the world.[763] In the United States, Facebook alone reached more than 75% of internet users during this period, while Messenger and Instagram both achieved significant reach as well.[764] According to a white paper prepared by a senior data scientist and economist at Facebook, the Facebook app has high reach in most countries, and its growth is in line with that of the Internet, whereas Instagram and WhatsApp are still growing "very rapidly."[765] For Instagram, "there appear to be ***no*** countries in which growth has hit a ceiling."[766]

Facebook's family of products are more immersive of users' attention.[767] According to Facebook's internal market data, its users spend significantly more time on its family of products than

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[757] Interview with Former Instagram Employee (Oct. 2, 2020) ("Reach is closer to market penetration [than usage and engagement]. It applies to the number of internet users we think are in that country, how many use a Facebook Family app and have taken one meaningful action. What people forget is that Facebook believes its total addressable market being anyone that has access to the internet.").

[758] Production of Facebook, to H. Comm. on the Judiciary, 38 (Jan. 2020) (on file with Comm.) (Monthly Update for December 2019) (on file with Comm.); Production of Facebook, to H. Comm. on the Judiciary, 32 (Oct. 2019) (on file with Comm.) (Monthly Update for September 2019, based on Facebook's internal calibrations of App Annie data).

[759] *Id.*

[760] *Id.*

[761] *Id.*

[762] *See generally* Omidyar Network Report at 11.

[763] Cunningham Memo at 2.

[764] *Id.*

[765] *Id.* at 12.

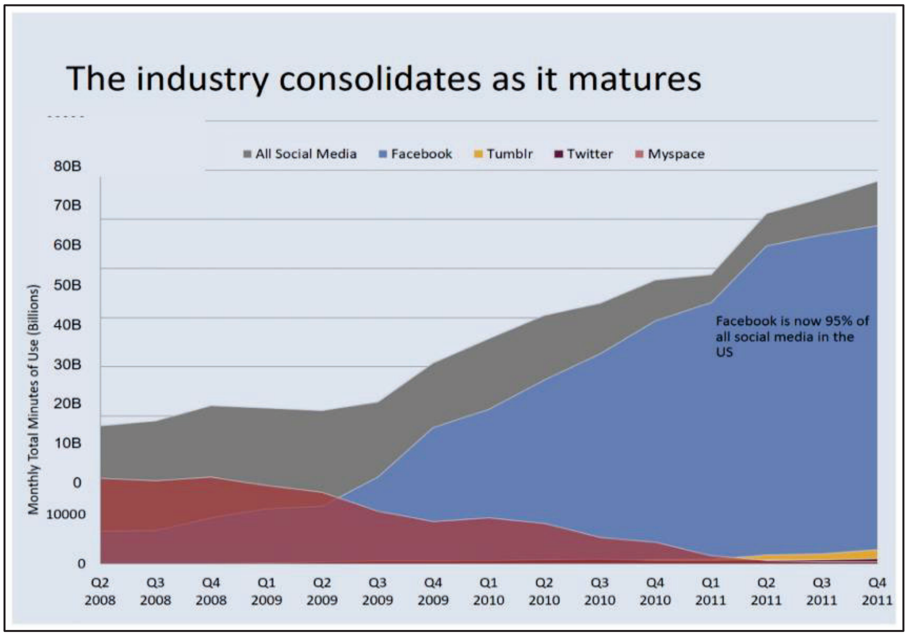
[766] *Id.* at 16. (emphasis added).

[767] *Id.* ("Facebook has high reach and time-spent in most countries. User growth is tracking internet growth: global reach is roughly stable.").

on competing services. For example, social media users spent more time on Facebook (48.6 minutes) than on Snapchat (21 minutes) or Twitter (21.6 minutes) in 2018.[768]

Since at least 2012, Facebook's documents show that Facebook believed it controlled a high share of the social networking market.[769] In a presentation prepared for Sheryl Sandberg, Facebook's Chief Operating Officer, to deliver at a large telecommunications firm, Facebook said that it controlled "95% of all social media" in the United States in terms of monthly minutes of use—as compared to Twitter, Tumblr, Myspace, and all other social media—and noted that the "industry consolidates as it matures."[770]

Facebook Investor Presentation[771]



A 2012 investor presentation prepared for Facebook described it as having an "enduring competitive advantage" similar to other historically dominant firms.[772] According to this document, which was reviewed and edited by Facebook's Chief Financial Officer to present to investors,[773] Facebook had nearly 100% market penetration among 25-34 year-olds in the United States.[774] It also

[768] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00086798 (Aug. 22, 2020) (Monthly Update for August 2018) (on file with Comm.).

[769] *Id.* at FB-HJC-ACAL-00057113; FB-HJC-ACAL-00049006 (Jan. 28, 2012) (on file with Comm.).

[770] *Id.* at FB-HJC-ACAL-00057113, https://judiciary.house.gov/uploadedfiles/00057113_picture.pdf.

[771] Prepared by Subcommmittee based on *id.*

[772] *Id.* at FB-HJC-ACAL-00049006 (Apr. 30, 2012) (on file with Comm.).

[773] *Id.* at FB-HJC-ACAL-00064320 (Apr. 18, 2012).

[774] *Id.* at FB-HJC-ACAL-00049006 (Apr. 30, 2012).

had more than 85% penetration in certain countries.[775] As noted in the presentation, "In every country we've tipped, we have maintained that penetration."[776] This point was underscored by a suggestion in the presentation that within a decade, it would be doubtful that entrepreneurs could compete with Facebook.[777]

At the Subcommittee's sixth hearing, Subcommittee Vice Chairman Joe Neguse (D-CO) asked Mr. Zuckerberg about Facebook's monopoly power.[778] As Mr. Neguse noted, based on this evidence, "most folks would concede Facebook was a monopoly as early as 2012."[779] Since then, he added that Facebook's strategy has been to "protect what I describe as a monopoly" by acquiring, copying, or eliminating its competitors.[780] Mr. Zuckerberg responded by characterizing the social networking market as "a very large space."[781] However, Facebook did not corroborate this claim through the evidence it produced during the investigation.

Lastly, after reviewing relevant market data and documents provided during the investigation, the Subcommittee found that there are distinct, relevant markets for social networking and social media. Facebook proposes that online services with social functions, such as YouTube, are social networks that compete in the same product market as Facebook and its other products for user attention.[782] For example, in a white paper submission, Facebook compares its News Feed, which includes a stream of posts and videos uploaded by users, as similar to the content feed that users encounter on YouTube.[783] However, longstanding antitrust doctrine describes relevant product markets as those that are "reasonably interchangeable by consumers for the same purposes."[784] Although YouTube is a dominant social app, it is primarily used to consume video content online. It does not provide the core functionality of Facebook or its family of products, such as Pages, Marketplace, or limited sharing within a person's network.

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775 *Id.*

776 *Id.*

777 *Id.* ("Imagine 10 years from now . . . [a] [l]ocal TV show asking an entrepreneur how he can hope to compete with Facebook.").

778 CEO Hearing Transcript at 85 (question of Rep. Joe Neguse (D-CO), Vice Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm on the Judiciary).

779 *Id.* at 86.

780 *Id.*

781 *Id.* (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

782 FACEBOOK, SUBMISSION TO AUSTL. COMPETITION AND CONSUMER COMM'N 13 (Sept. 12, 2019), https://assets.publishing.service.gov.uk/media/5e8c827ae90e070774c61fdb/Facebook_response_to_interim_report_with_cover_letter.pdf.

783 Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00012074 (2016) (on file with Comm.).

784 *See* United States v. Microsoft Corp., 253 F.3d 34, 51–52 (D.C. Cir. 2001); *see also* Competition & Mkts. Auth. Report at 117–18 ("[T]he closeness of competition between different platforms depends on the degree to which consumers consider them substitutes, rather than the extent to which they share common functionalities.").

The United Kingdom's Competition and Markets Authority reached a similar conclusion, finding that YouTube is primarily a market for consuming video content rather than a market for communication.[785] As it noted, "consumers seem to access YouTube for particularly distinctive reasons . . . YouTube does not currently appear to compete closely with Facebook's platforms, despite its comparable reach and levels of consumer engagement."[786] Internal documents produced to the United Kingdom bolstered this finding, indicating "that the most common reasons consumers in the UK access YouTube are for entertainment and to view 'how-to' videos on the platform."[787]

ii. Barriers to Entry

Facebook's persistently high market share is not contestable due to high barriers to entry that discourage competition. These barriers to entry include its strong network effects, high switching costs for consumers, and data advantages.

1) Network Effects

Facebook's significant reach among users, and high levels of engagement, create very strong network effects.[788]

As a result, Facebook has tipped the market in its favor,[789] primarily facing competitive pressure from within its ***own*** family of products—such as through Instagram competing with Facebook or WhatsApp competing with Messenger—rather than actual competition from other firms in the market.[790] This finding is supported by Facebook's documents and internal analysis. These include a

785 Competition & Mkts. Auth. Report at 126 ("[T]here are particularly important differences between YouTube, which most consumers use for video streaming, and platforms such as those of Facebook, which focus more on consumer needs related to social networking.").

786 *Id.* at 127.

787 *Id.*

788 *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 20 (D.D.C. 1999) ("A positive network effect is a phenomenon by which the attractiveness of a product increases with the number of people using it."). Conversely, a negative or reverse network effect exists when the attractiveness of a product decreases as less people use it, which can tip the market in favor of another firm if there are low entry barriers. Dig. Competition Expert Panel Report at 35.

789 *See generally* Omidyar Network Report at 18.

790 *See, e.g.*, Cunningham Memo at 7 ("Messenger and WhatsApp clearly compete for time-spent."). While Facebook's overall penetration and network effects are high in the United States and across many other large countries, Facebook appears to have intermediate reach in some countries due to differing levels of adoption among users of certain ages. *Id.* at 12 ("In Japan and South Korea Facebook has significantly higher penetration among youth than among elderly. The role of an intergenerational social network is partly filled by other apps (LINE and Kakao).").

memorandum on Facebook's family of products prepared in October 2018 by Thomas Cunningham, a senior data scientist and economist,[791] as well as communications among senior executives.[792]

Mr. Cunningham's 2018 memorandum on "Possible End States for the Family of Apps" is an analysis of user trends among Facebook's products and other competitors.[793] It is based on the company's Onavo data from September 2017 to September 2018.[794] It was prepared for review by Facebook's senior executives, including Mr. Zuckerberg and Mr. Olivan, Facebook's Director of Growth.[795] The Subcommittee's staff interviewed a former senior employee at the company who attended meetings preparing the document for presentation to Mr. Zuckerberg and Mr. Olivan. The former employee noted that "this specific working group—and Tom Cunningham's work in particular—was guiding Mark's views" on the company's growth strategy.[796] The former employee explained the purpose of the Cunningham Memo:

> The question was how do we position Facebook and Instagram to not compete with each other. The concern was that Instagram would hit a tipping point . . . There was brutal in-fighting between Instagram and Facebook at the time. It was very tense. It was back when Kevin Systrom was still at the company. He wanted Instagram to grow naturally and as widely as possible. But Mark was clearly saying "do not compete with us." . . . It was collusion, but within an internal monopoly. If you own two social media utilities, they should not be allowed to shore each other up. It's unclear to me why this should not be illegal. You can collude by acquiring competitors and forbidding competition.[797]

The Cunningham Memo characterized the network effects of Facebook, WhatsApp, and Messenger are "very strong."[798] The memorandum notes that social apps have tipping points such that "either everyone uses them, or no-one uses them."[799] Importantly, it distinguishes between apps with a social graph that are used for broadcast sharing and messaging—Facebook, Instagram, Messenger,

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[791] Subcommittee staff requested the 2018 memorandum prepared by Tom Cunningham on July 1, 2020 in response to earlier reporting about the memorandum. *See* Alex Heath, *Facebook Secret Research Warned of 'Tipping Point' Threat to Core App*, THE INFO. (July 23, 2020), https://www.theinformation.com/articles/facebook-secret-research-warned-of-tipping-point-threat-to-core-app. Subcommittee staff appreciates that Facebook cooperated with this supplemental request.

[792] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00063222 (Feb. 27, 2012), https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf.

[793] Cunningham Memo at 1, 3.

[794] During this period, Facebook referred to data derived from Onavo as MINT data.

[795] Interview with Former Instagram Employee (Oct. 2, 2020).

[796] *Id.*

[797] *Id.*

[798] Cunningham Memo at 11.

[799] *Id.* at 9.

WhatsApp, and Snapchat—and social apps for music or video consumption, such as YouTube or Spotify.[800] In contrast, non-social apps "can exist along a continuum of adoption."[801]

Network effects and tipping points are particularly strong in messaging apps. Because WhatsApp and other regional messaging apps have bimodal distribution of reach in countries—an all-or-nothing reach at above 90% or below 10%—messaging tends toward consolidation and market tipping.[802] Most countries have a single messaging app or protocol because they cannot support multiple messaging apps."[803] As a result of this dynamic, there are "tradeoffs in time-spent between Messenger and WhatsApp,"[804] demonstrating "very strong tipping points."[805]

Facebook already has high reach in many countries,[806] including the United States, so a primary concern addressed in Mr. Cunningham's "Possible End States" memorandum is whether cross-app sharing among Facebook's family of products poses a competitive threat to its flagship product, the Facebook app.[807] While the Cunningham Memo concluded that it is unclear whether Instagram and Facebook can coexist, it is much less concerned with Facebook's user loss due to cannibalization by Instagram than with market tipping (i.e., Instagram tipping the market in its favor and Facebook rapidly losing value due to negative or reverse network effects). It notes:

> The most important concern should be network effects, not within-user cannibalization. We have reviewed many studies which estimate cannibalization among apps for individual users, all of which find positive incrementality across the family: i.e. when a user increases their use of one app, they tend to decrease their use of other apps, but the total family effect is positive. This should not be surprising - it is unlikely that any of

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[800] To underscore this point, the Cunningham Memo does not characterize YouTube as a direct competitor, noting that YouTube would only be a danger if it "becomes more social." Cunningham Memo at 16.

[801] *Id.* at 9.

[802] *Id.* at 10, 14 ("Most countries have a single messaging app with 70%+ daily reach. The most common app is WhatsApp. Others include Messenger, LINE, and Kakotalk.").

[803] *Id.* at 3.

[804] *Id.*

[805] *Id.* at 12 ("WhatsApp does very well when it is the market-leader (in many Latin American countries WhatsApp has nearly 90% daily reach and users spend 60 minutes/day), this suggests that it would be worth a substantial investment to try to push WhatsApp over its tipping point in other countries."). An exception to this trend appears to be where a messaging app exists as part of a social network—such as messaging services on Snapchat—but these apps operate with reduced reach. Another exception is in markets with high penetration by Apple's iPhone, but this growth is limited by adoption of iPhones since iMessage is its native app. *Id.* at 15.

[806] *Id.* at 16 ("Facebook has high reach and time-spent in most countries. User growth is tracking internet growth: global reach is roughly stable. DAP is showing weakness in developed countries and especially teens.").

[807] The Cunningham Memo refers to Facebook's flagship product as "Facebook-Blue" or "Blue" as a reference to the app's color. *Id.* at 15. There is overlap and cross-use among Facebook's products in the United States. While 40% of Instagram users' friends are also their friends on Facebook, only 12% of Facebook users' friends are "reciprocal follows" on Instagram. *Id.* at 9.

> our apps are perfect substitutes for an individual user. However a serious concern is network effects: when you use an app less, that makes it less appealing to other people, and at certain times and places those effects could be very large.[808]

As a result of this dynamic, even though there may be several social apps that exist in an ecosystem, they are unlikely to gain traction among users once a firm has tipped the market in their favor or is otherwise dominant. As the study notes, while mobile phone users tend to use five different social maps in a month, they only use "1.5 messaging apps and 1 social app, out of 10 total apps per day."[809]

Facebook's executives—including Mr. Zuckerberg—have extensively discussed the role of network effects and tipping points as part of the company's acquisition strategy and overall competitive outlook. For example, Mr. Zuckerberg told the company's Chief Financial Officer in 2012 that network effects and winner-take-all markets were a motivating factor in acquiring competitive threats like Instagram. He said:

> [T]here are network effects around social products and a finite number of different social mechanics to invent. Once someone wins at a specific mechanic, it's difficult for others to supplant them without doing something different. It's possible someone beats Instagram by building something that is better to the point that they get network migration, but this is harder as long as Instagram keeps running as a product . . . one way of looking at this is that what we're really buying is time. Even if some new competitors springs[sic] up, buying Instagram now . . . will give us a year or more to integrate their dynamics before anyone can get close to their scale again. Within that time, if we incorporate the social mechanics they were using, those new products won't get much traction since we'll already have their mechanics deployed at scale.[810]

Mr. Zuckerberg also stressed the competitive significance of having a first-mover advantage in terms of network effects prior to acquiring WhatsApp.[811] In the context of market strategies for Messenger competing with WhatsApp, Mr. Zuckerberg told the company's growth and product management teams that "being first is how you build a brand and a network effect."[812] He also told

[808] *Id.* at 9.

[809] *Id.* at 6. A recent investor report similarly noted that although "many users access more than one social network per day, it does not appear to be at the cost of declining users or user engagements within the Facebook ecosystem." MORNINGSTAR EQUITY ANALYST REPORT, FACEBOOK INC 3 (Aug. 3, 2020) (on file with Comm.).

[810] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00063222 (Feb. 28, 2012), https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf.

[811] *Id.* at FB-HJC-ACAL-00046826–34 (Dec. 13, 2013) (on file with Comm.).

[812] *Id.*

them that Facebook has "an opportunity to do this at scale, but that opportunity won't last forever. I doubt we have even a year before WhatsApp starts moving in this direction."[813]

In 2012, the company described its network effects as a "flywheel" in an internal presentation prepared for Facebook at the direction of its Chief Financial Officer.[814] This presentation also said that Facebook's network effects get "stronger every day."[815] Around that time, prominent investors similarly noted that the social networking market had "extreme network effects," making it "increasingly hard to see a materially successful new entrant, even with all of Google's resources."[816]

2) Switching Costs

In addition to the competitive insulation resulting from strong network effects, Facebook is also unlikely to face direct competition from other firms or new entrants due to the high costs for users to switch from Facebook to a competing social network.[817]

Other social network platforms are not interoperable with Facebook. Facebook users invest significant time building their networks on Facebook. This investment includes uploading and curating photos, engaging with their friends, other users, and businesses, and otherwise interacting with their social graph.[818] To switch to another platform, Facebook users have to rebuild their social graph elsewhere. In the process, they lose access to their data—including photos, posts, and other content—

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[813] *Id.*

[814] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00049006 (Apr. 18, 2012) (on file with Comm.) ("Network effects make it very difficult to compete with us - In every country we've tipped we are still winning.").

[815] *Id.*

[816] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00086834–38 (Apr. 3, 2012) (on file with Comm.) (Citi Summary of Investment Outlook). Comscore noted in 2012 that "Facebook has proven to be a dominant global force in social networking that shows no immediate signs of slowing down." According to Comscore, Facebook was the "third largest web property in the world . . . and accounted for approximately 3 in every 4 minutes spent on social networking sites and 1 in every 7 minutes spent online around the world." FB-HJC-ACAL-00051905 (Mar. 12, 2012) (Comscore 2012 Report).

[817] Omidyar Network Report at 11 ("A very significant reason that Facebook has market power is that a user cannot change platforms and expect to be able to stay in contact with her friends. Because Facebook has a near monopoly, the vast majority of the people with whom they want to exchange feeds are likely on Facebook already. The switching cost for any one user is therefore enormous.").

[818] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00045349 (Feb. 15, 2014) (on file with Comm.).

along with other elements of their social graph.[819] They also have to learn how to use a new service and rebuild their network.[820] As a result, Facebook's users are effectively "locked in" to its platform.[821]

Facebook's internal documents and communications reveal that Facebook employees recognize that high switching costs insulate Facebook from competition. In 2014, Facebook's Chief Financial Officer told the company's director of growth that investors like this quality about Facebook and "the idea is that after you have invested hours and hours in your friend graph or interest graph or follower graph, you are less likely to leave for a new or different service that offers similar functionality."[822] Similarly, an internal survey prepared for Facebook's senior management team about Google+ explained that "[p]eople who are big fans of G+ are having a hard time convincing their friends to participate because . . . switching costs would be high due to friend density on Facebook."[823] And in 2012, the company indicated that people's significant time investment on Facebook building their identity and connections on the platform increased the company's "stickiness."[824]

In contrast to its public statements, Facebook has not done enough to facilitate data portability for its consumers. Facebook offers a tool called "Download Your Information," which provides users with a limited ability to download their data and upload it elsewhere. But in practice, this tool is unusable for switching purposes given that it allows users to do little other than move their photos from Facebook to Google Photos. Another barrier for switching associated with this tool is that Facebook's users can only download their data in PDF or .zip format. The result is that, while Facebook publicly claims to support data portability,[825] its users seldom leave Facebook due to the challenges of migrating their data. An interview with a former employee at the company reinforces this conclusion. As the former employee noted, this tool is behind a series of menu, explaining:

> If you hide something behind more than one menu, no one sees it and they know it. Then they advertise features that they don't expect anyone to find or use. They say: "It's data portable, you can send it to Google drive?" But who cares? They've just done it to

[819] *See, e.g.*, Nicole Nguyen, *If You Created A Spotify Account With Facebook, It Is Forever Tied To Facebook*, BUZZFEED (Oct. 3, 2018), https://www.buzzfeednews.com/article/nicolenguyen/disconnect-facebook-account-from-spotify.

[820] *See, e.g.*, Danny Crichton, *Why no one really quits Google or Facebook*, TECHCRUNCH (Feb. 4, 2019), https://techcrunch.com/2019/02/04/why-no-one-really-quits-google-or-facebook/ ("I have 2,000 contacts on Facebook Messenger — am I just supposed to text them all to use Signal from now on? Am I supposed to completely relearn a new photos app, when I am habituated to the taps required from years of practice on Instagram?"); United States v. Microsoft Corp., 84 F. Supp. 2d 9, 15 (D.D.C. 1999) (noting that switching costs include "the effort of learning to use the new system, the cost of acquiring a new set of compatible applications, and the work of replacing files and documents that were associated with the old applications").

[821] *See generally* Austl. Competition & Consumer Comm'n Report at 99; Dig. Competition Expert Panel Report at 42.

[822] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00045349 (Feb. 15, 2014) (on file with Comm.).

[823] *Id.* at FB-HJC-ACAL-00048755–57 (Dec. 14, 2011).

[824] *Id.* at FB-HJC-ACAL-00049006 (Apr. 18, 2012).

[825] *See, e.g.*, DATA TRANSFER PROJECT, https://datatransferproject.dev/ (last visited on Sept. 28, 2020).

generate talking points. They are not allowing you to export your social graph, which is actually valuable.[826]

Leaving Facebook may create additional costs in other key respects. Switching from Facebook may degrade a person's other social apps that integrate with Facebook's Platform APIs. For example, Spotify users who signed up with Facebook "can't disconnect it."[827] To leave Facebook, they must set up a new account on Spotify.[828] In the process, they lose access to their playlists, listening history, social graph of other friends on Spotify, and their other data on the app.[829]

People who leave Facebook may also lose access to popular features on Facebook that, due to its scale and network effects, are not available on other social apps (e.g., events, marketplace, and groups).[830] For example, a church may actively maintain a Facebook page for its parishioners and not on other social apps. Furthermore, some Facebook users who believe they are switching from the company's platform may nevertheless continue using its family of products, such as Instagram or WhatsApp.[831] As the United Kingdom's Competition and Markets Authority noted, this reinforces Facebook's market power.[832]

In response to the concern about switching costs, Facebook replied that its users have meaningful choices and alternatives to Facebook.[833] Additionally, Facebook notes that its users have been able to download their data since 2010.[834] The company describes its users' ability to download their data as a "robust portability tool."[835] However, in March 2019, Mr. Zuckerberg explained that a

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[826] Interview with Former Instagram Employee (Oct. 2, 2020).

[827] *Facebook Login Help*, SPOTIFY, https://support.spotify.com/us/article/using-spotify-with-facebook/ (last visited Oct. 5, 2020).

[828] *Id.*

[829] Spotify users can manually attempt to recreate playlists or request that Spotify transfer their data, but this is not intuitive. Samantha Cole, *How to Unlink Spotify from Your Facebook Account*, VICE (Dec. 21, 2018), https://www.vice.com/en_us/article/wj3anm/how-to-unlink-spotify-from-your-facebook-account.

[830] *See* Cunningham Memo at 3.

[831] *See, e.g.*, Tiffany Hsu, *For Many Facebook Users, a 'Last Straw' That Led Them to Quit*, N.Y. TIMES (Mar. 21, 2018), https://www.nytimes.com/2018/03/21/technology/users-abandon-facebook.html#:~:text=In%20the%20wake%20of%20the,easy%20as%20pressing%20%E2%80%9Cdelete.%E2%80%9D ("The Cambridge Analytica scandal led her to remove the Facebook app from her phone . . . But she is keeping the messaging function open for professional purposes and will continue using Instagram.").

[832] Competition & Mkts. Auth. Report at 179, 256.

[833] Innovation and Entrepreneurship Hearing at 1 (response to Questions for the Record of Matt Perault, Dir. of Public Pol'y, Facebook, Inc.).

[834] Erin Egan, *Charting a Way Forward*, FACEBOOK 6 (Sept. 2019), https://about.fb.com/wp-content/uploads/2020/02/data-portability-privacy-white-paper.pdf.

[835] *Id.*

Facebook user's ability to download their data is not "[t]rue data portability."[836] Instead, he said its users should be able to sign in to other services in "the way people use our platform to sign into an app."[837]

Currently, Facebook's users lack the ability to port their social networks to a different platform. To switch social networking platforms, a Facebook user can import their contacts from their mobile devices, such as email addresses or phone numbers, to build a network on a different platform. But importing contacts is not a substitute for a person's social graph and, as the CMA concluded, this method is likely limited to a person's close friends.[838] In recognition of this, Javier Olivan, Facebook's Director of Growth, told the company's senior management team that information from a person's address book on their mobile device is "incomplete" because people typically only store limited information in their contacts (e.g., a person's first name, last name, and their phone number).[839] In contrast, Facebook users "have a much richer profile—which creates a much richer experience (we have data that shows how . . . profile pictures make for better / more functional [user interfaces]."[840]

3) Access to Data

Facebook has a significant data advantage in the social networking market. While data may be non-rivalrous—meaning users can provide the same piece of data to more than one platform—it creates another entry barrier, reinforcing Facebook's monopoly power.

Subcommittee staff conducted interviews with market participants that described Facebook as having nearly perfect market intelligence. Facebook's data dominance creates self-reinforcing advantages through two types of "feedback loops."[841] First, by virtue of its significant number of users, Facebook has access to and collects more user data than its competitors.[842] And second, Facebook uses this data to create a more targeted user experience, which in turn attracts more users and leads those users to spend more time on the platform.[843] In contrast, smaller platforms with less access to data must compete by providing a different user experience with less targeting capacity. Facebook's data advantage is thus compounded over time, cementing Facebook's market position and making it even more difficult for new platforms to provide a competitive user experience.

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[836] Mark Zuckerberg, *The Internet Needs New Rules*, WASH. POST (Mar. 29, 2019), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html.

[837] *Id.*

[838] Competition & Mkts. Auth. Report at 137.

[839] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00045364 (Feb. 4, 2014) (on file with Comm.).

[840] *Id.*

[841] Dig. Competition Expert Panel Report at 33.

[842] Competition & Mkts. Auth. Report at 143–44.

[843] *Id.*

Facebook's data advantages also provide a monetization feedback loop. Revenue generated through targeted advertising to existing users can be reinvested into the platform, thereby attracting more users. Facebook's ability to provide targeted advertising is highly valuable to advertisers and allows Facebook to monetize its service. Meanwhile, smaller entrants are less attractive to advertisers since "no de novo entrant [has] access to anywhere near the volume or quality of data" as Facebook.[844] As with its user feedback loop, Facebook's monetization feedback loop creates a runaway virtuous circle that serves as a powerful barrier to entry.

Facebook's data also enables it to act as a gatekeeper because Facebook can exclude other firms from accessing its users' data.[845] Beginning in 2010, Facebook's Open Graph provided other companies with the ability to scale through its user base by interconnecting with Facebook's platform. Some companies benefited immensely from this relationship, experiencing significant user growth from Open Graph and in-app signups through Facebook Connect, now called Facebook Login.[846] Around that time, investors commented that Open Graph gave some companies "monstrous growth," referring to it as "steroids for startups."[847] For example, documents produced by Facebook indicate that it was the top referrer of traffic to Spotify, driving 7 million people "to install Spotify in the month after [Facebook] launched Open Graph."[848] At one point, nearly all of Spotify's growth originated from Facebook, while Pinterest "grew to 10 million users faster than any standalone site in the history of the Internet."[849]

Conversely, interconnecting with the Facebook Platform also gave the company the ability to prioritize access to its social graph—effectively picking winners and losers online.[850] These tools also gave Facebook advanced data insights into other companies' growth and usage trends. For example, a daily report on metrics for Facebook Login included daily and monthly active users for companies interconnecting with Facebook, referral traffic, and daily clicks, among other metrics. As this report

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[844] Omidyar Network Report at 18.

[845] *See, e.g.*, MAURICE STUCKE & ALLEN GRUNES, BIG DATA AND COMPETITION POLICY 46 (2017).

[846] Also referred to as Facebook login, Facebook Connect allowed its users to connect their Facebook identity—their profile, friends, and other data—to other social apps through Facebook's APIs. The company explained in 2008 that "[w]ith Facebook Connect, users can bring their real identity information with them wherever they go on the Web, including: basic profile information, profile picture, name, friends, photos, events, groups, and more." Dave Morin, *Announcing Facebook Connect*, FACEBOOK (Mar. 9, 2008), https://developers.facebook.com/blog/post/2008/05/09/announcing-facebook-connect/.

[847] Ben Popper, *Startup steroids: Pinterest feels the burn of Facebook's Open Graph*, THE VERGE (May 3, 2012), https://www.theverge.com/2012/5/3/2993999/pinterest-burn-facebook-open-graph-startup-steroids.

[848] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00049471 (Script of Keynote for Mobile World Congress (on file with Comm.).

[849] *Id.*

[850] *See, e.g.*, MAURICE STUCKE & ALLEN GRUNES, BIG DATA AND COMPETITION POLICY 46 (2017).

noted, 8.3 million distinct sites used Facebook Connect on a monthly basis in March 2012.[851] Facebook was also able to exclude others from accessing this data.[852] As the United Kingdom's Competition and Markets Authority observed, "the inability of smaller platforms and publishers to access user data creates a significant barrier to entry."[853]

b. Relevant Acquisitions

i. Overview

Since its founding in 2004, Facebook has acquired at least 63 companies.[854] The majority of these acquisitions have involved software firms, such as Instagram, WhatsApp, Face.com, Atlas, LiveWire, and Onavo.[855] Facebook has also acquired several virtual reality and hardware companies, such as Oculus.[856] More recently, the company has acquired several niche social apps,[857] a blockchain platform,[858] Oculus game developers,[859] and a prominent GIF-making and sharing company.[860]

Facebook's internal documents indicate that the company acquired firms it viewed as competitive threats to protect and expand its dominance in the social networking market. As discussed earlier in this Report, Facebook's senior executives described the company's mergers and acquisitions strategy in 2014 as a "land grab" to "shore up our position."[861] In 2012, Mr. Zuckerberg told

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851 Production of Facebook, to H. Comm. on the Judiciary, FB_FTC_CID_00364078–147 (Mar. 24, 2012) (email on Daily Metrics Report) (on file with Comm.).

852 *See* Stigler Report at 43.

853 Competition & Mkts. Auth. Report at 15.

854 *See* Aoife White, *Facebook Told by U.K. Watchdog to Monitor Giphy Independence*, BLOOMBERG (Aug. 10, 2020), https://www.bloomberg.com/news/articles/2020-08-10/facebook-told-by-u-k-watchdog-to-monitor-giphy-independence.

855 *Id.*; BERKELEY, THE ACQUISITION TAKEOVER BY THE 5 TECH GIANTS, http://people.ischool.berkeley.edu/~neha01mittal/infoviz/dashboard/ (last visited on Sept. 28, 2020).

856 *See, e.g.*, Josh Constine, *Facebook's $2 Billion Acquisition Of Oculus Closes, Now Official*, TECHCRUNCH (July 21, 2014), https://techcrunch.com/2014/07/21/facebooks-acquisition-of-oculus-closes-now-official/.

857 *See, e.g.*, Jacob Kastrenakes, *Facebook is shutting down a teen app it bought eight months ago*, THE VERGE (July 2, 2018), https://www.theverge.com/2018/7/2/17528896/facebook-tbh-moves-hello-shut-down-low-usage.

858 Stan Schroeder, *Facebook acquires team behind blockchain startup Chainspace*, MASHABLE (Dec. 5, 2019), https://mashable.com/article/facebook-acquires-blockchain-team-chainspace/.

859 Dean Takahashi, *Facebook acquires Lone Echo VR game maker Ready At Dawn*, VENTURE BEAT (June 22, 2020), https://venturebeat.com/2020/06/22/facebook-acquires-lone-echo-vr-game-maker-ready-at-dawn/; Lucas Matney, *Facebook acquires the VR game studio behind one of the Rift's best titles*, TECHCRUNCH (Feb. 25, 2020), https://techcrunch.com/2020/02/25/facebook-acquires-the-vr-game-studio-behind-one-of-the-rifts-best-games/.

860 Chaim Gartenberg, *Facebook is buying Giphy and integrating it with Instagram*, THE VERGE (May 15, 2020), https://www.theverge.com/2020/5/15/21259965/facebook-giphy-gif-acquisition-buy-instagram-integration-cost.

861 Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00045388 (Feb. 18, 2014), https://judiciary.house.gov/uploadedfiles/0004538800045389.pdf ("[W]e are going to spend 5-10% of our market cap every couple years to shore up our position . . . I hate the word 'land grab' but I think that is the best convincing argument and we should own that."). Mr. Wehner is currently Facebook's Chief Financial Officer. He replaced David Ebersman, Facebook's

Facebook's former Chief Financial Officer that the purpose of acquiring nascent competitors like Instagram was to neutralize competitive threats and to maintain Facebook's position. Documents show that when Facebook acquired WhatsApp, Mr. Zuckerberg and other senior executives, as well as data scientists, viewed WhatsApp as a potential threat to Facebook Messenger, as well as an opportunity to further entrench Facebook's dominance. Facebook used critical acquisitions to increase the adoption of its social graph and expand its reach in markets. Finally, Facebook's serial acquisitions reflect the company's interest in purchasing firms that had the potential to develop into rivals before they could fully mature into strong competitive threats.[862]

ii. Instagram

Instagram was founded in February 2010 by Kevin Systrom and Mike Krieger.[863] Originally launched as Burbn, a location-sharing social app,[864] the company released Instagram as a photo-sharing app for Apple iPhones in October 2010,[865] and released its app in the Google Play Store on April 3, 2012.[866]

On April 9, 2012, Facebook proposed its acquisition of Instagram for approximately $1 billion.[867] Facebook formally acquired Instagram in August 2012.[868] The Federal Trade Commission (FTC) opened an investigation into the acquisition but closed it in August 2012 without taking

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former Chief Financial Officer, in June 2014. David Cohen, *Facebook CFO David Ebersman Leaving Company; David Wehner To Assume Post June 1*, ADWEEK (Apr. 23, 2014), https://www.adweek.com/digital/cfo-david-ebersman-leaving-david-wehner/.

[862] Austl. Competition & Consumer Comm'n Report at 81 ("While any of these acquisitions may not have amounted to a substantial lessening of competition, there appears to be a pattern of Facebook acquiring businesses in related markets which may or may not evolve into potential competitors, which has the effect of entrenching its market power.").

[863] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00087590 (July 19, 2011) (on file with Comm.) (Valuation of Burbn, Inc. as of May 31, 2011).

[864] *Id.*

[865] MG Siegler, *Instagram Launches With The Hope Of Igniting Communication Through Images*, TECHCRUNCH (Oct. 6, 2010), https://techcrunch.com/2010/10/06/instagram-launch/. The company received $500,000 in seed funding in March 2010 from Baseline Ventures and Andreesen Horowitz. It later received $7 million in another round of financing in December 2010 primarily from Benchmark Capital and Baseline Ventures. Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00101426 (Dec. 5, 2011) (on file with Comm.) (Instagram Financial History and Projections).

[866] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00106124 (Apr. 13, 2012) (on file with Comm.) (Instagram Chat Log); *see also* Matt Burns, *Instagram's User Count Now at 40 Million, Saw 10 Million New Users in Last 10 Days,* TECHCRUNCH (Apr. 13, 2012), https://techcrunch.com/2012/04/13/instagrams-user-count-now-at-40-million-saw-10-million-new-users-in-last-10-days/.

[867] The transaction's value was approximately $300 million in cash and roughly $700 million in shares of Facebook at the time of the transaction. Due to changes in the company's value following the launch of its IPO, the final transaction value was worth about $300 million in cash and $460 million in Facebook stock. *See* Facebook, Inc., Quarterly Report (Form 10-Q) 9 (Sept. 30, 2012), https://www.sec.gov/Archives/edgar/data/1326801/000132680112000006/fb-9302012x10q.htm.

[868] Facebook, Inc., Annual Report (Form 10-K) 5 (Dec. 31, 2012), https://www.sec.gov/Archives/edgar/data/1326801/000132680113000003/fb-12312012x10k.htm.

action.[869] According to the FTC, "Upon further review of this matter, it now appears that no further action is warranted by the Commission at this time."[870] The letter added that the FTC's closing of the investigation "is not to be construed as a determination that a violation may not have occurred . . . . The Commission reserves the right to take such further action as the public interest may require."[871]

In the context of reports that Facebook was planning to integrate Whatsapp, Instagram, and Facebook Messenger,[872] and concerns about the company's motives for doing so,[873] a former employee of Instagram explained the ease with which Facebook and Instagram came together—and could potentially be pulled apart. They explained:

> Why can't Facebook fork the backend of the product? Facebook makes an odd argument that they use the same system. But you can just copy and paste code, make a copy of the system, and give it to the new company. If you can put them together, you can pull them apart. Facebook can always pull out the data that Instagram would not need. They spent the last year pushing the two products together, it just simply doesn't make sense that they can't work back to where they were in 2019. It's not like building a skyscraper and then suddenly needing to knock the building down again. They can just roll back the changes they've been making over the past year and you'd have two different apps again. It's not about the pipeline. It's an intangible object. You can just copy and paste. Right now, they have a switch inside the app. They could just change something from true to false and it would work. It's not building a skyscraper; it's turning something on and off.[874]

According to Facebook's internal documents, Facebook acquired Instagram to neutralize a nascent competitive threat. In 2012, Mark Zuckerberg wrote to several Facebook executives citing concerns that Instagram posed a risk to Facebook. In February 2012, he said to David Ebersman, Facebook's Chief Financial Officer, that he had "been thinking about . . . how much [Facebook] should be willing to pay to acquire mobile app companies like Instagram . . . that are building networks that

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[869] Letter from April Tabor, Acting Sec. of the Fed. Trade Comm'n, to Thomas Barnett (Aug. 22, 2012), https://www.ftc.gov/sites/default/files/documents/closing_letters/facebook-inc./instagram-inc./120822barnettfacebookcltr.pdf.

[870] *Id.*

[871] *Id.*

[872] *See, e.g.*, Mike Isaac, *Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html?auth=login-facebook.

[873] *See, e.g.*, Makena Kelly, *Facebook's messaging merger leaves lawmakers questioning the company's power*, THE VERGE (Jan. 28, 2019), https://www.theverge.com/2019/1/28/18200658/facebook-messenger-instagram-whatsapp-google-congress-markey-blumenthal-schatz-william-barr-doj-ftc.

[874] Email from Former Instagram Employee (Oct. 4, 2020).

are competitive with our own."[875] Mr. Zuckerberg told Mr. Ebersman that these "businesses are nascent but the networks are established, the brands are already meaningful and if they grow to a large scale they could be very disruptive to us."[876]

In response, Mr. Ebersman asked Mr. Zuckerberg whether the goals of the acquisition would be to: (1) neutralize a potential competitor; (2) acquire talent; or (3) integrate Instagram's product with Facebook's to improve its service.[877] Mr. Zuckerberg replied that a purpose of the transaction would be to neutralize Instagram, saying that the goals of the deal were "a combination of (1) and (3)." He explained:

> One thing that may make (1) more reasonable here is that there are network effects around social products and a finite number of different social mechanics to invent. Once someone wins at a specific mechanic, it's difficult for others to supplant them without doing something different. It's possible someone beats Instagram by building something that is better to the point that they get network migration, but this is harder as long as Instagram keeps running as a product.[878]

Mr. Zuckerberg wrote that acquiring Instagram would allow Facebook to integrate the product to improve its service. But, he added, that "in reality we already know these companies' social dynamics and will integrate them over the next 12-24 months anyway."[879] He explained:

> By a combination of (1) and (3), one way of looking at this is that ***what we're really buying is time***. Even if some new competitors springs [sic] up, buying Instagram, Path, Foursquare, etc [sic] now will give us a year or more to integrate their dynamics before anyone can get close to their scale again. Within that time, if we incorporate the social mechanics they were using, those new products won't get much traction since we'll already have their mechanics deployed at scale.[880]

In March 2012, Mr. Zuckerberg told Mike Schroepfer, Facebook's Chief Technology Officer,[881] that acquiring Instagram would provide the company with "[i]nsurance" for Facebook's

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[875] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00063220–23 (Feb. 27, 2012) (on file with Comm.).

[876] *Id.*

[877] *Id.*

[878] *Id.*

[879] *Id.*

[880] *Id.* (emphasis added).

[881] Mr. Schroepfer was Facebook's Vice President of Engineering at the time of the Instagram acquisition. He was elevated to Chief Technology Officer in March 2013. *See* Tomio Geron, *Facebook Names Mike Schroepfer CTO*, FORBES (Mar. 15, 2013), https://www.forbes.com/sites/tomiogeron/2013/03/15/facebook-names-mike-schroepfer-cto/#1a88880b20e3.

main product.[882] Mr. Schroepfer agreed, responding that "not losing strategic position in photos is worth a lot of money."[883] He added that the "biggest risk" would be if Facebook were to "kill" Instagram "by not investing in the company and thereby opening a window for a new entrant."[884]

In a message to another Facebook employee on April 5, 2012, Mr. Zuckerberg said that "Instagram can hurt us meaningfully without becoming a huge business."[885] In contrast, he did not view other smaller firms, such as Pinterest and Foursquare, as comparable competitive threats.[886] As he noted, if these companies "become big we'll just regret not doing them . . . Or we can buy them then, or build them along the way."[887] In an all-hands meeting the following day, Mr. Zuckerberg responded to a question about Instagram's rapid growth by saying that "we need to dig ourselves out of a hole." [888] He also told employees at the company that Instagram is "growing really quickly" and that it would be "tough to dislodge them."[889]

Following the announcement of the transaction, Mr. Zuckerberg said internally that Facebook "can likely always just buy any competitive startups," and agreed with one of the company's senior engineers that Instagram was a "threat" to Facebook.[890] Mr. Zuckerberg concluded that "[o]ne thing about startups though is you can often acquire them."[891]

At the Subcommittee's sixth hearing, Judiciary Committee Chairman Jerrold Nadler (D-NY) asked Mr. Zuckerberg about his characterization of Instagram as a competitive threat prior to the acquisition.[892] In response, Mr. Zuckerberg said that Facebook has always viewed Instagram as "both a

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[882] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00063184–85 (Mar. 9, 2012), https://judiciary.house.gov/uploadedfiles/0006318000063197.pdf. These documents are consistent with reporting. Following the acquisition, Gregor Hochmuth, an Instagram engineer, was reportedly told by employees on the Facebook Camera team that "our job was to kill you guys." Following the acquisition, Instagram's employees were also reportedly told by Facebook's growth team "Instagram wouldn't get any help adding users unless they could determine, through data, that the product wasn't competitive with Facebook." SARAH FRIER, NO FILTER 90 (2020).

[883] *Id.* at FB-HJC-ACAL-00063180, https://judiciary.house.gov/uploadedfiles/0006318000063197.pdf.

[884] *Id.* at FB-HJC-ACAL-00063184–85, https://judiciary.house.gov/uploadedfiles/0006318000063197.pdf.

[885] *Id.* at FB-HJC-ACAL-00063319, https://judiciary.house.gov/uploadedfiles/0006331600063321.pdf.

[886] *Id.* at FB-HJC-ACAL-00063319–20 (Apr. 5, 2012), https://judiciary.house.gov/uploadedfiles/0006331600063321.pdf.

[887] *Id.*

[888] *Id.* at FB-HJC-ACAL-00047340 (Apr. 6, 2012) (on file with Comm.).

[889] *Id.*

[890] *Id.* at FB-HJC-ACAL-00067600 (Apr. 9, 2012), https://judiciary.house.gov/uploadedfiles/0006760000067601.pdf.

[891] *Id.* at FB-HJC-ACAL-00063341 (Apr. 9, 2012), https://judiciary.house.gov/uploadedfiles/0006334000063341.pdf

[892] CEO Hearing Transcript at 43 (question of Rep. Jerrold Nadler (D-NY), Chairman, H. Comm. on the Judiciary).

competitor and as a complement to our services."[893] He added that at the time of the transaction, Instagram was a competitor in mobile photos and camera apps.[894]

Chairman Nadler also asked that if this "was an illegal merger at the time of the transaction, why shouldn't Instagram now be broken off into a separate company?"[895] In response, Mr. Zuckerberg said that "with hindsight, it probably looks obvious that Instagram would have reached the scale that it has today."[896] But he elaborated:

> It was not a guarantee that Instagram was going to succeed. The acquisition has done wildly well, largely because not just of the founders' talent but because we invested heavily in building up the infrastructure and promoting it and working on security and working on a lot of things around this, and I think that this has been an American success story.[897]

This response, however, is not consistent with many of the documents Facebook provided to the Subcommittee.[898]

Instagram was growing significantly at the time of the transaction. In December 2011, with only 13 employees, Instagram already had 14 million users.[899] Instagram's internal financial history and projections noted that it did not plan to charge for its app or for downloading filters due to its "rapid user growth" and "implied network value."[900] Instagram's internal market projections showed the company growing to nearly 20 million users by January 2012 with a 22% monthly growth rate.[901] By March 31, 2012, Instagram had 30.2 million users and a 17% user growth rate.[902] After releasing its

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[893] *Id.* at 44 (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

[894] *Id.* (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

[894] *Id.*

[895] *Id.* at 45 (question of Rep. Jerrold Nadler (D-NY), Chairman, H. Comm. on the Judiciary).

[896] *Id.* at 46 (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

[897] *Id.* (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

[898] *Id.* at 46 (statement of the Rep. Jerrold Nadler (D-NY), Chairman, H. Comm. on the Judiciary) ("Facebook, by Mr. Zuckerberg's own admission and by the documents we have from the time, Facebook saw Instagram as a threat that could potentially syphon business away from Facebook. And so, rather than compete with it, Facebook bought it. This is exactly the type of anticompetitive acquisition that the antitrust laws were designed to prevent. This should never have happened in the first place. It should never have been permitted to happen, and it cannot happen again.").

[899] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00101426 (Dec. 5, 2011) (on file with Comm.) (Instagram Financial History and Projections).

[900] *Id.*

[901] *Id.* at FB-HJC-ACAL-00101473 (Dec. 5, 2011) (Instagram Budget).

[902] *Id.* at FB-HJC-ACAL-0110268 (2012) (Instagram Growth and Projections).

app in the Google Play Store on April 3, 2012, Instagram added ten million users within ten days,[903] growing to nearly 50 million users by April 30, 2012,[904] and 100 million users by the time the acquisition closed in August 2012.[905]

Instagram's growth also appeared to be sustainable. In an email between senior executives at both companies on April 16, 2012, Instagram's head of business operations said that Instagram had not had difficulties with scaling or cloud storage availability, noting that "[s]caling has been really easy" despite the need to "keep adding machine capacity."[906] They also noted that user uptake on Android devices exceeded the company's expectations, but did not raise concerns about their ability to scale in response to this demand.[907]

Facebook's support of Instagram's growth after acquiring it is overstated. Before acquiring Instagram, Mr. Zuckerberg said that Facebook should "invest a few more engineers in it" but let Instagram "run relatively independently."[908] Prior to being acquired, Instagram's internal projections showed the company gaining nearly 88 million users by January 2013,[909] and that its growth trajectory would not be significantly affected by the transaction.[910]

iii. WhatsApp

1) Overview

WhatsApp was founded in February 2009 by Jan Koum and Brian Acton.[911] Originally designed to allow users to provide temporary updates to their contacts,[912] WhatsApp is a cross-platform messaging and calling service.[913] Unlike traditional text and multimedia messages sent over a

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[903] *Id.* at FB-HJC-ACAL-00106124 (Apr. 13, 2012) (Instagram Chat Log).

[904] *Id.* at FB-HJC-ACAL-00106131 (Apr. 30, 2012).

[905] Facebook, Inc., Annual Report (Form 10-K) 5 (Dec. 31, 2012), https://www.sec.gov/Archives/edgar/data/1326801/000132680113000003/fb-12312012x10k.htm.

[906] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00110279 (Apr. 16, 2012) (on file with Comm.) (Instagram's Growth Projections); *see generally* SARAH FRIER, NO FILTER (2020) ("Every hour, Instagram seemed to grow faster. D'Angelo eventually helped the company transition to renting server space from Amazon Web Services instead of buying their own.").

[907] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00110279 (Apr. 16, 2012) (on file with Comm.) (Instagram's Growth Projections).

[908] *Id.* at FB-HJC-ACAL-00063184–85 (Mar. 9, 2012), https://judiciary.house.gov/uploadedfiles/0006318000063197.pdf.

[909] *Id.* at FB-HJC-ACAL-0110268 (2012) (on file with Comm.) (Instagram's Growth Projections).

[910] *Id.*

[911] STEVEN LEVY, FACEBOOK: THE INSIDE STORY 317–18 (2020).

[912] *Id.* at 319.

[913] Letter from Reginald Brown and Jon Yarowsky to H. Comm. on the Judiciary (Oct. 14, 2019), FB-AJC-ACAL-APP00003.

cellular network at the time, WhatsApp messages and calls do not require a cellular connection, and are transmitted by an internet connection.[914] A main distinction between Facebook Messenger and WhatsApp is the network that people are able to communicate with on each messaging service. A Facebook user can only send messages to other Facebook users on the Messenger app, whereas a WhatsApp user can send messages to other people based on contacts on their mobile device.[915]

Until 2016, WhatsApp monetized its service through subscriptions for a nominal fee after the first year of use.[916] Around that time, WhatsApp was the only messaging app that competed using this business model.[917] Importantly, WhatsApp's founders strongly opposed an advertisement-based business model. In June 2012, they wrote that "when advertising is involved **you the user** are the product," explaining:

> Advertising isn't just the disruption of aesthetics, the insults to your intelligence and the interruption of your train of thought. At every company that sells ads, a significant portion of their engineering team spends their day tuning data mining, writing better code to collect all your personal data, upgrading the servers that hold all the data and making sure it's all being logged and collated and sliced and packaged and shipped out.[918]

WhatsApp also maintained robust privacy policies. In its June 2012 privacy policy, WhatsApp stated that it does not collect names, emails, location data, or the contents of messages sent through WhatsApp.[919] According to its policy, "WhatsApp is currently ad-free and we hope to keep it that way forever."[920]

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[914] *Id.* Although WhatsApp originally charged a subscription fee after the first year of use, it removed fees in January 2016. *See also Making WhatsApp free and more useful*, WHATSAPP (Jan. 18, 2016), https://blog.whatsapp.com/making-whats-app-free-and-more-useful.

[915] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00042171 (2014) (on file with Comm.).

[916] STEVEN LEVY, FACEBOOK: THE INSIDE STORY 320 (2020) ("'We were building a communication service,' says Acton. 'You pay forty bucks a month to Verizon for their service, I figured a dollar a year was enough for a messaging service.'").

[917] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00042157 (2014) (on file with Comm.) ("To the best of WhatsApp's knowledge, Threema is the only other provider that has adopted a model based on usage fees. In contrast to WhatsApp's subscription model, users of Threema pay a one-time fee for a life-time service.").

[918] *Why we don't sell ads*, WHATSAPP (June 18, 2012), https://blog.whatsapp.com/why-we-don-t-sell-ads. ("Advertising has us chasing cars and clothes, working jobs we hate so we can buy shit we don't need.").

[919] *Privacy Notice,* WHATSAPP (July 7, 2012), https://www.whatsapp.com/legal?doc=privacy-policy&version=20120707.

[920] *Id.*

2) Acquisition Review

On February 19, 2014, Facebook announced its proposed acquisition of WhatsApp for approximately $16 billion at the time of the announcement.[921] Following the transaction, WhatsApp's co-founder wrote that the company would "remain autonomous and operate independently" from Facebook, and that "nothing" will change for users because there "would have been no partnership between our two companies if we had to compromise on the core principles that will always define our company, our vision and our product."[922] Mr. Zuckerberg said that "[w]e are absolutely not going to change plans around WhatsApp and the way it uses user data."[923]

The Federal Trade Commission opened an initial investigation into the proposed transaction on March 13, 2014. On April 10, 2014, the FTC's Director of the Bureau of Consumer Protection sent a letter advising the companies that WhatsApp "must continue to honor" its privacy data security commitments to its users, and that "a failure to keep promises made about privacy constitutes a deceptive practice under section 5 of the FTC Act."[924] The Commission did not initiate a full-phase investigation into the acquisition.

In September 2014, the European Commission initiated a review of Facebook's proposed acquisition of WhatsApp.[925] At the time of the transaction, Facebook calculated that the combined share of Facebook Messenger and WhatsApp in February 2014 was approximately 36% of the European Economic Area (EEA) market.[926] In a filing in support of the transaction, Facebook told the European Commission that multi-homing—the use of multiple apps with similar features—was a key characteristic of the messaging market, saying that "approximately 70% of consumers use at least two, and 43% use at least three, communications apps in parallel."[927] Facebook characterized the WhatsApp

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921 The transaction included $4 billion in cash and approximately $12 billion of Facebook shares. *Facebook to Acquire WhatsApp*, FACEBOOK (Feb. 19, 2014), https://about.fb.com/news/2014/02/facebook-to-acquire-whatsapp/. The final value of WhatsApp exceeded $21 billion due to changes in the value of Facebook's stock during the transaction and due to the addition of granting $3 billion in Facebook shares following the closing of the transaction. Sarah Frier, *Facebook $22 Billion WhatsApp Deal Buys $10 Million in Sales,* BLOOMBERG (Oct. 29, 2014), https://www.bloomberg.com/news/articles/2014-10-28/facebook-s-22-billion-whatsapp-deal-buys-10-million-in-sales.

922 *Facebook*, WHATSAPP (Feb. 19, 2014), https://blog.whatsapp.com/facebook ("Here's what will change for you, our users: nothing.").

923 Jessica Guynn, *Mark Zuckerberg: WhatsApp worth even more than $19 billion*, L.A. TIMES (Feb. 24, 2014), https://www.latimes.com/business/la-xpm-2014-feb-24-la-fi-tn-mark-zuckerberg-whatsapp-worth-even-more-than-19-billion-20140224-story.html.

924 Letter from Jessica Rich, Dir., Bur. of Consumer Protection of the Fed. Trade Comm'n, to Erin Egan, Chief Privacy Officer, Facebook, Inc., & Anne Hoge, Gen. Counsel, WhatsApp, 1–2 (Apr. 10, 2014), https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

925 Facebook noticed the proposed transaction to the European Commission on August 29, 2014. Press Release, Eur. Comm'n, Mergers: Commission approves acquisition of WhatsApp by Facebook (Oct. 3, 2014), https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1088.

926 Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00042161 (on file with Comm.).

927 *Id.* at FB-HJC-ACAL-00042160.

product market as being distinct from the social networking market because WhatsApp "does not offer social features," and represented that it had "no plans to make changes to WhatsApp's current strategy" after closing the proposed acquisition.[928]

On October 3, 2014, the European Commission approved the proposed transaction, finding that "Facebook Messenger and WhatsApp are not close competitors and that consumers would continue to have a wide choice of alternative consumer communications apps after the transaction."[929] Although the European Commission noted that the messaging apps are characterized by network effects, it concluded that Facebook would "continue to face sufficient competition after the merger."[930] The Commission acknowledged that there is overlap between social networking and messaging apps. As it noted, the distinction between these apps is "becoming blurred and each of these services adopts traditional functionalities of the other." [931] However, the Commission concluded that social networking services generally provide more social features than messaging apps—such as commenting on or "liking" other users' posts and photos—whereas messaging apps had more limited functionality that is focused on real-time communication.[932]

In 2016, the European Commission fined Facebook after it concluded that Facebook provided "incorrect or misleading information" during the Commission's review of the transaction.[933] In its Statement of Objections to Facebook, the Commission concluded that Facebook provided misleading evidence on whether the company could match its users' accounts with those of WhatsApp's users.[934] In August 2016, WhatsApp had updated its policies to allow the linking of Facebook user identities with WhatsApp user phone numbers.[935] As discussed below, Facebook intended to create this functionality at the time of the transaction.[936]

Documents obtained by the Subcommittee indicate that Facebook acquired WhatsApp to expand its dominance. Prior to acquiring WhatsApp, Facebook viewed the acquisition as providing an opportunity to expand its reach in countries with intermediate levels of penetration.[937] Facebook's

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[928] *Id.* at FB-HJC-ACAL-00042173.

[929] Press Release, Eur. Comm'n, Mergers: Commission approves acquisition of WhatsApp by Facebook (Oct. 3, 2014), https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1088.

[930] *Id.*

[931] Facebook/WhatsApp Android (Case M.7217) Commission Decision No. 139/2004 [2014], para. 52, https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

[932] *Id.* at para. 54.

[933] Press Release, Eur. Comm'n, Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover (May 18, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369.

[934] *Id.*

[935] *Id.*

[936] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00045364 (Feb. 4, 2014) (on file with Comm.).

[937] *Id.*

internal documents at the time of the transaction reveal that WhatsApp had already tipped markets in its favor where it had high penetration.[938]

In an internal email to Facebook's management team, Facebook Director of Growth Javier Olivan wrote that WhatsApp had higher levels of reach and usage than Facebook in countries that it had penetrated. For example, based on Facebook's internal data, WhatsApp reached 99.9% of the smartphone population in Spain, or as Mr. Olivan described it, "literally everyone."[939] By purchasing WhatsApp, Mr. Olivan suggested that they could "grow Facebook even further" by exposing new users to Facebook.[940] Additionally, by bundling free services with WhatsApp and Facebook's other services, the transaction could serve as another mechanism to expand Facebook's reach among WhatsApp users.[941] Mr. Zuckerberg responded supportively, saying that "I really agree with this analysis."[942]

In an email to David Ebersman, Facebook's Chief Financial Officer, Mr. Olivan wrote that WhatsApp's "reach amongst smartphone users is actually bigger than ours . . . we have close to 100% overlap, our user-base being a subset of theirs."[943] He explained that "in markets where they do well, they literally reach 100% of smartphone users—which is a big part of the population."[944] In the company's internal documents describing the transaction rationale, there was a heavy emphasis on WhatsApp's growth and usage—450 million users, a clear path to a billion users, and adding one million new users every day with no marketing—and expanding Facebook's social graph to phones.[945] Prior to the acquisition, Mr. Zuckerberg had requested a list of all mobile apps with more than 100 million daily and monthly active users globally.[946] Facebook's data showed that WhatsApp had the second most daily active users and fourth most monthly active users of any freestanding mobile app.[947]

Finally, a week after announcing the transaction, David Wehner, then-Vice President of Corporate Finance and Business Planning at Facebook, said to Mr. Ebersman that "we are going to spend 5-10% of our market cap every couple years to shore up our position."[948] Mr. Wehner said that

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[938] *See, e.g.*, *id.*

[939] *Id.*

[940] *Id.*

[941] *Id.*

[942] *Id.* at FB-HJC-ACAL-00045363.

[943] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00045388 (Feb. 18, 2014), https://judiciary.house.gov/uploadedfiles/0004538800045389.pdf.

[944] *Id.*

[945] *Id.* at FB-HJC-ACAL-00045379–87 (Feb. 19, 2014) (on file with Comm.).

[946] *Id.*

[947] *Id.*

[948] *Id.* at FB-HJC-ACAL-00045388 (Feb. 18, 2014), https://judiciary.house.gov/uploadedfiles/0004538800045389.pdf.

"I hate the word 'land grab' but I think that is the best convincing argument and we should own that."[949]

Other documents indicate that Facebook viewed WhatsApp as a maverick competitor. In December 2013, Mr. Zuckerberg sent an email to Facebook's management team on competitive issues facing the company. In this email, he called attention to a feature that WhatsApp had implemented on its platform, and warned that Facebook should move quickly:

> I want to call out two competitive near term issues we face. The first is WhatsApp adding a feature like this for public figures . . . If the space is going to move in this direction, being the leader and establishing the brand and network effects matters a lot. This alone should encourage us to consider this soon. . . . When the world shifts like this, being first is how you build a brand and network effect. We have an opportunity to do this at scale, but that opportunity won't last forever. I doubt we even have a year before WhatsApp starts moving in this direction.[950]

Facebook's documents also indicate that the company monitored WhatsApp closely to determine whether it was a threat to the Messenger app. Prior to consummating the merger, Facebook's data scientists used Onavo data to model WhatsApp's engagement and reach to determine whether it was "killing Facebook Messenger,"[951] as well as how its usage trends compared to Snapchat.[952]

c. Conduct

In addition to protecting and expanding its dominance by acquiring firms that Facebook identified as competitive threats over the past decade, Facebook abused its monopoly power to harm competition in the social networking market. Facebook used its data advantage to create superior market intelligence to identify nascent competitive threats and then acquire, copy, or kill these firms. Once dominant, Facebook selectively enforced its platform policies based on whether it perceived other companies as competitive threats. In doing so, it advantaged its own services while weakening other firms.

i. Facebook's Use of Non-Public Data to Identify Competitive Threats

Prior to Facebook's acquisition of Instagram, Facebook used internal data to track the growth of Instagram and other popular apps. While this data was probative for companies that interconnected

[949] *Id.*

[950] *Id.* at, FB-HJC-ACAL-00046826–34 (Dec. 13, 2013) (on file with Comm.).

[951] *Id.* at FB-HJC-ACAL-00014564–74 (Mar. 27, 2014).

[952] *Id.* at FB-HJC-ACAL-00014575.

with Facebook through Open Graph, it was incomplete for studying mobile app usage trends across the entire mobile ecosystem. In April 2012, Facebook's Director of Growth Javier Olivan emailed Mr. Zuckerberg and Facebook Chief Product Officer Chris Cox, about improving Facebook's "competitive research."[953] He said that "getting our data in great shape is going to require effort."[954] Although the company had made "some good progress" using data from Comscore, a data analytics and measurement firm, Mr. Olivan said that with a significant investment, Facebook could build its own custom panel for mobile data that would "allow us to get 10x better at understanding" the mobile ecosystem:

> I keep seeing the same suspects (instagram, pinterest, …) [sic] both on our competitive radar / platform strategy as wins . . . I think having the exact data about their users [sic] engagement, value they derive from [Facebook] . . . would help us make more bold decisions on whether they are friends or foes. Back to your thread about "copying" vs. "innovating" we could also use this info to inspire our next moves.[955]

Mr. Zuckerberg responded: "Yeah, let's do it. We can find some time periodically during my weekly reviews to go over this stuff."[956]

A year later, on October 14, 2013, Facebook acquired Onavo, a virtual private network (VPN), for $115 million and other consideration.[957] In an email to Facebook's board, Facebook's Vice President and Deputy General Counsel said the purpose of the acquisition was to "enhance our analytics related to cross-app user engagement data, as well as user behavior and market trends, and also to improve advertising effectiveness through demand data and audience targeting in the long term."[958] Importantly, Facebook planned to place the incoming Onavo employees, including its cofounder, Guy Rosen, under Facebook's Growth team reporting to Javier Olivan.[959]

Facebook's acquisition of Onavo provided the company with the ability to track potential competitors through non-public, real-time data about engagement, usage, and how much time people spend on apps. Following this acquisition, Facebook used Onavo data as an "early bird warning

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[953] *Id.* at FB-HJC-ACAL-00068928 (Apr. 3, 2012).

[954] *Id.*

[955] *Id.*

[956] *Id.* at FB-HJC-ACAL-00068929.

[957] Hayley Tsukayama, *Facebook acquires Israeli start-up Onavo to bolster data compression and mobile tech*, WASH. POST (Oct. 14, 2013), https://blogs.wsj.com/digits/2013/10/14/facebook-deal-gives-it-office-in-israel/.

[958] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00072168 (Oct. 9, 2013) (on file with Comm.).

[959] *Id.*

system,"[960] identifying fast-growing apps that could potentially threaten Facebook's market position or enable it to protect and expand its dominance. For instance, days prior to Facebook's acquisition of WhatsApp in 2014, Facebook senior executives provided Mark Zuckerberg with a list of all mobile apps with greater than 90 million monthly active users—WhatsApp, one of the only top mobile apps not owned at the time by either Facebook or Google, was fourth on the list.[961]

In August 2018, Apple removed Onavo from its app store following reporting that Facebook was using the app to track users and other apps.[962] An Apple spokesperson said the company intended to make "it explicitly clear that apps should not collect information about which other apps are installed on a user's device for the purposes of analytics or advertising/marketing and must make it clear what user data will be collected and how it will be used."[963] In January 2019, Apple removed Facebook's functional successor to Onavo, the Facebook Research app, following reports by *TechCrunch* that Facebook paid "teenagers and adults to download the Research app and give it root access to network traffic in what may be a violation of Apple policy so the social network can decrypt and analyze their phone activity."[964]

Most recently, Facebook acquired Giphy, a platform for sharing GIFs online and through messaging apps, for $400 million in May 2020.[965] As several reporters have noted, this transaction would give Facebook competitive insights into other messaging apps. One commenter said, "While you may successfully block trackers like the Facebook ad pixel following you around online, or even delete your Facebook account, the majority of us wouldn't suspect we're being monitored when we're sending funny images to friends."[966]

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[960] Betsy Morris & Deepa Seetharaman, *The New Copycats: How Facebook Squashes Competition From Startups*, WALL ST. J. (Aug. 9, 2017), https://www.wsj.com/articles/the-new-copycats-how-facebook-squashes-competition-from-startups-1502293444.

[961] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00045412–14 (Feb. 16, 2014), https://judiciary.house.gov/uploadedfiles/0004541200045414.pdf.

[962] Deepa Seetharaman, *Facebook Removes Data-Security App From Apple Store*, WALL ST. J. (Aug. 22, 2018), https://www.wsj.com/articles/facebook-to-remove-data-security-app-from-apple-store-1534975340.

[963] Taylor Hatmaker, *Apple removed Facebook's Onavo from the App Store for gatherine app data*, TECHCRUNCH (Aug. 22, 2018), https://techcrunch.com/2018/08/22/apple-facebook-onavo/.

[964] Josh Constine, *Facebook pays teens to install VPN that spies on them*, TECHCRUNCH (Jan. 29, 2019), https://techcrunch.com/2019/01/29/facebook-project-atlas/; Josh Constine, *Apple bans Facebook's Research app that paid users for data*, TECHCRUNCH (Jan. 30, 2019), https://techcrunch.com/2019/01/30/apple-bans-facebook-vpn/.

[965] Kurt Wagner & Sarah Frier, *Facebook Buys Animated Image Library Giphy for $400 Million*, BLOOMBERG (May 15, 2020), https://www.bloomberg.com/news/articles/2020-05-15/facebook-buys-animated-image-library-giphy-to-boost-messaging; *see, e.g.*, Vivek Karuturi (@VivekxK), TWITTER (May 15, 2020, 11:43 AM), https://twitter.com/VivekxK/status/1261321201210626048.

[966] Owen Williams, *How Facebook Could Use Giphy to Collect Your Data*, ONEZERO (May 15, 2020), https://onezero.medium.com/how-facebook-could-use-giphy-to-collect-your-data-70824aa2647b.

ii. Facebook's Strategy to Acquire, Copy, or Kill Competitors

Facebook's internal documents indicate that once it identified a competitive threat, it attempted to buy or crush them by cloning their product features or foreclosing them from Facebook's social graph. Facebook took these steps to harm competitors and insulate Facebook from competition, not just to grow or offer better products and services.

In a March 2012 email to other senior executives at Facebook, Mr. Zuckerberg wrote that cloning other apps could help Facebook move faster by "building out more of the social use cases ourselves and prevent our competitors from getting footholds."[967] Other senior employees at Facebook agreed with this strategy. Sheryl Sandberg, Facebook's Chief Operating Officer, said that "it is better to do more and move faster, especially if that means you don't have competitors build products that takes some of our users." Sam Lessin, Facebook's Product Management Director, added, "I would love to be far more aggressive and nimble in copying competitors. . . Let's 'copy' (aka super-set) Pinterest!"[968] Another senior executive responded, "I've been thinking about why we haven't moved faster on Roger and Snap . . . I'm increasingly concerned as I watch startups siphon our graph and create awesome new experiences faster than we can."[969]

Prior to its acquisition of Instagram in 2012, Facebook's senior executives had identified Instagram as a growing threat. Mr. Zuckerberg told employees at an internal meeting that the "bad news is that [Instagram is] growing really quickly, they have a lot of momentum, and it's going to be tough to dislodge them."[970] One engineer wrote in an internal company chat that "Instagram is eating our lunch. We should've owned this space but we're already losing quite badly."[971] In response, another engineer asked, "Isn't that why we're building an Instagram clone?" referencing Facebook's development of Facebook Camera, a standalone photo app.[972]

During negotiations to acquire Instagram, Mr. Zuckerberg referenced Facebook's development of a similar app to Kevin Systrom, Instagram's Chief Executive Officer.[973] In messages between Mr. Zuckerberg and Mr. Systrom, Mr. Systrom said that it was difficult to evaluate the transaction independently of reports that Facebook was developing a similar product. He told Mr. Zuckerberg that

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967 Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00053511–16 (Mar. 30, 2012) (on file with Comm.).

968 *Id.*

969 *Id.* at FB-HJC-ACAL-00067549 (Apr. 3, 2012).

970 *Id.* at FB-HJC-ACAL-00047340 (Apr. 6, 2012).

971 *Id.* at FB-HJC-ACAL-00063367 (Jan. 26, 2012), https://judiciary.house.gov/uploadedfiles/0006336700063373.pdf.

972 Josh Constine, *FB launches Facebook Camera—An Instagram-Style Photo Filtering, Sharing, Viewing iOS App*, TECHCRUNCH (May 24, 2012), https://techcrunch.com/2012/05/24/facebook-camera/.

973 Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00091648–50 (Mar. 20, 2012) (on file with Comm.).

he "wouldn't feel nearly as strongly [about the acquisition] if independently you weren't building a mobile photos app that makes people choose which engine to use."[974] Similarly, Mr. Zuckerberg suggested that refusing to enter into a partnership with Facebook, including an acquisition, would have consequences for Instagram, referencing the product Facebook was developing at the time:

> At some point soon, you'll need to figure out how you actually want to work with us. This can be an acquisition, through a close relationship with Open Graph, through an arms length relationship using our traditional APIs, or perhaps not at all. . . Of course, at the same time we're developing our own photos strategy, so how we engage now will determine how much we're partners vs. competitors down the line—and I'd like to make sure we decide that thoughtfully as well.[975]

In an earlier conversation with Matt Cohler, an Instagram investor and former senior Facebook adviser, Mr. Systrom asked whether Mr. Zuckerberg would "go into destroy mode if I say no" to being acquired, saying that the companies "have overlap in features."[976] Mr. Cohler responded "probably" and that Mr. Zuckerberg would "conclude that it's best to crush [I]nstagram."[977]

Facebook's approach towards rival social networking app Snapchat is another case study in how Facebook enters "destroy mode" when its market position is threatened. In 2013, as the company was growing rapidly, Snapchat co-founder Evan Spiegel turned down an offer from Mr. Zuckerberg to acquire the company for $3 billion.[978] Thereafter, Instagram—owned by Facebook—introduced the Instagram Stories feature, which allows users to post content that is available for only 24 hours, and which was "nearly identical to the central feed in Snapchat, which [was] also called Stories."[979]

Less than a year after its introduction, Instagram Stories had more daily active users (200 million) than Snapchat Stories (161 million).[980] By 2018, Instagram Stories had doubled the number of

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[974] *Id.*

[975] *Id.*

[976] *Id.* at FB-AJC-ACAL-0010438 (Feb. 13, 2012), https://judiciary.house.gov/uploadedfiles/0010143800101441.pdf.

[977] *Id.*

[978] Evelyn Rusli & Douglas MacMillan, *Messaging Service Snapchat Spurned $3 Billion Facebook Bid*, WALL ST. J. (Nov. 13, 2013), https://www.wsj.com/articles/messaging-service-snapchat-spurned-facebook-bid-1384376628.

[979] Casey Newton, *Instagram's new stories are a near-perfect copy of Snapchat stories*, THE VERGE (Aug. 2, 2016), https://www.theverge.com/2016/8/2/12348354/instagram-stories-announced-snapchat-kevin-systrom-interview.

[980] Kaya Yurieff, *Instagram's Snapchat clone is more popular than Snapchat*, CNN BUS. (Apr. 13, 2017), https://money.cnn.com/2017/04/13/technology/instagram-stories-snapchat/index.html.

Snapchat Stories daily users.[981] When discussing Instagram's decision to clone the Snapchat feature, Instagram VP of Product Kevin Weil remarked: "This is the way the tech industry works."[982]

In another example, Facebook executives approached Houseparty, a social networking app,[983] about a potential acquisition. Houseparty's founders turned down Facebook's offer, and released the product they referred to as "the internet's living room."[984] Shortly thereafter, Facebook announced that its Messenger app would become a "virtual living room."[985] Houseparty's active user base fell by half between 2017 and 2018.[986]

At the Subcommittee's sixth hearing, Representative Henry C. "Hank" Johnson, Jr. (D-GA) asked Mr. Zuckerberg about Facebook's use of data to identify competitive threats. Representative Johnson noted that "over nearly a decade, Mr. Zuckerberg, you led a sustained effort to surveil smaller competitors to benefit Facebook. These were steps taken to abuse data, to harm competitors, and to shield Facebook from competition."[987] He asked Mr. Zuckerberg whether Facebook used Onavo data to purchase WhatsApp. Mr. Zuckerberg responded:

> I think every company engages in research to understand what their customers are enjoying so they can learn and make their products better. And that's what we were trying to do. That is what our analytics team was doing. And I think, in general, that allowed us to make our services better for people to be able to connect in a whole lot of different ways, which is our goal. . . . [Onavo] was one of the signals that we had about WhatsApp's trajectory, but we didn't need it. Without a doubt, it was pretty clear that WhatsApp was a great product.[988]

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[981] *Id.*

[982] Josh Constine, *Instagram on copying Snapchat: "This is the way the tech industry works,"* TECHCRUNCH (May 16, 2017), https://techcrunch.com/2017/05/16/to-clone-or-not-to-clone/.

[983] Betsy Morris & Deepa Seetharaman, *The New Copycats: How Facebook Squashes Competition From Startups,* WALL ST. J. (Aug. 9, 2017), https://www.wsj.com/articles/the-new-copycats-how-facebook-squashes-competition-from-startups-1502293444.

[984] *Id.*

[985] *Id.*

[986] Mansoor Iqbal, *Houseparty Revenue and Usage Statistics* (2020) (June 23, 2020), https://www.businessofapps.com/data/houseparty-statistics/.

[987] CEO Hearing Transcript at 149–50 (question of Rep. Henry C. "Hank" Johnson, Jr. (D-GA), Chairman, Subcomm. on Courts & Intellectual Property, H. Comm. on the Judiciary).

[988] *Id.* (statement of Mark Zuckerberg, CEO, Facebook, Inc.).

iii. Facebook Weaponized Access to its Platform

Internal communications by Facebook's senior executives and interviews with former employees at the company indicate that Facebook selectively enforced its platform policies based on whether it perceived other companies as competitive threats.

Facebook developed the Facebook Platform to connect other applications to Facebook's social graph. In an interview in 2007, Mr. Zuckerberg described the goals of the Facebook Platform as making "Facebook into something of an operating system so you can run full applications."[989] A year later, in an email to senior executives at Facebook, Mr. Zuckerberg described Facebook Platform as key to the company's long term success:

> Platform is key to our strategy because we believe that there will be a lot of different social applications and ways that people communicate and share information, and we believe we can't develop all of them ourselves. Therefore, even though it's a challenge for us to get this right, it's important for us to focus on it because the company that defines this social platform will be in the best position to offer the most good ways for people to communicate and succeed in the long term.[990]

Over the next few years, Facebook recognized that access to its social graph provided other applications with a tool for significant growth. In exchange, Facebook hosted content that kept users engaged on its social graph, and considered other ways to monetize this relationship, such as through revenue sharing or advertisements.

By 2012, however, Facebook's senior executives realized that apps could use the Facebook Platform to build products that were competitive with Facebook and "siphon our users."[991] Mike Vernal, Facebook's Vice President of Product and Engineer, described this dynamic to Doug Purdy, Facebook's Director of Product Management:

> When we started Facebook Platform, we were small and wanted to make sure we were an essential part of the fabric of the Internet. We've done that—**we're now the biggest service on earth**. When we were small, apps helped drive our ubiquity. **Now that we are big, (many) apps are looking to siphon off our users to competitive services**. We

[989] David Kirkpatrick, *Facebook's plan to hook up the world*, CNN MONEY (May 29, 2007), https://money.cnn.com/2007/05/24/technology/facebook.fortune/.

[990] Production of Facebook, to H. Comm. on the Judiciary, FB_FTC_CID_00072185–88 (Feb. 14, 2008) (on file with Comm.).

[991] *Id.* at FB_FTC_CID_00072020–23 (Feb. 14, 2013) (emphasis added).

> need to be more thoughtful about what integrations we allow and we need to make sure that we have sustainable, long-term value exchanges.[992]

In another conversation between Sam Lessin, Facebook's Director of Product Engagement, and other executives, Facebook's senior employees agreed that competitive apps used Facebook Platform to "steal our engagement" and "could be viewed as replacing Facebook functionality," adding that they planned to raise this concern with Mr. Zuckerberg.[993] Mr. Lessin raised these concerns with Mr. Zuckerberg in October 2012. In response, Mr. Zuckerberg agreed with this conclusion:

> Reading your responses, I do think you are right . . . I would be more comfortable with competition if I thought we knew better how to leverage our scale asset (and if scale weren't becoming cheaper and cheaper to achieve every day). What I think is that we should effectively not be helping our competitors more / much more than how they could get help from elsewhere in the market. They can acquire users in ways other than us so obviously we shouldn't be failing to take their money when they will just give it to someone else and get the same outcome. I do, however, again think that we want as much control here as we can get. I agree we shouldn't help our competitors whenever possible. **I think the right solution here is to just be a lot stricter about enforcing our policies and identifying companies as competitors.**[994]

Recognizing that some social apps had grown too popular and could compete with Facebook's family of products, Facebook cut off their access to Facebook's social graph.[995]

In 2013, Facebook claimed that the short-form video app Vine, a video-sharing app that Twitter acquired in 2012, "replicated Facebook's core News Feed functionality."[996] In response, Facebook cut off Vine's access to Facebook APIs.[997] In doing so, "Facebook was able to degrade consumers'

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[992] *Id.*

[993] *Id.* at FB_FTC_CID_0008058182 (Sept. 15, 2012).

[994] *Id.* at FB_FTC_CID_00491746–63 (Oct. 27, 2012) (emphasis added); (Elena Botella, *Facebook Earns $132.80 From Your Data per Year*, SLATE (Nov. 15, 2019), https://slate.com/technology/2019/11/facebook-six4three-pikinis-lawsuit-emails-data.html.

[995] Olivia Solon & Cyrus Farivar, *Mark Zuckerberg Leveraged Facebook User Data to Fight Rivals and Help Friends, Leaked Documents Show*, NBC NEWS (Apr. 16, 2019), https://www.nbcnews.com/tech/social-media/mark-zuckerberg-leveraged-facebook-user-data-fight-rivals-help-friends-n994706.

[996] Innovation and Entrepreneurship Hearing at 3 (response to Questions for the Record of Matt Perault, Dir. of Public Pol'y, Facebook, Inc.).

[997] Rachel Kraus, *Mark Zuckerberg gave the order to kneecap Vine, emails show*, MASHABLE (Dec. 5, 2018), https://mashable.com/article/mark-zuckerberg-helped-thwart-vine/.

experience of Vine and reduce the platform's competitive threat."[998] Twitter shut down Vine in 2016.[999]

Facebook's actions in the wake of the Cambridge Analytica scandal raise concerns about pretextual anticompetitive enforcement in the name of privacy. In 2019, Facebook cut off marketing firm Stackla's access to its APIs "due to data scraping, which violates [Facebook's] policies."[1000] Damien Mahoney, the Chief Executive Officer of Stackla, denied these allegations.[1001] In an interview with the Subcommittee, Mr. Mahoney explained the economic harm of the company's foreclosure from the Facebook Platform:

> What we went through with Facebook was company altering, and if not for the resolve of our team and board, would have destroyed it. We had to lay off half our team. We made huge investments in the company in the previous 12 months, having raised $4m to increase our sales capacity by 160% and other functions in the business, then this occurred. It was a critical blow that almost forced us to close the doors. We were approaching 75 employees and 30% growth after 8 long years of toil. Now we have 26 employees, declining revenue and ongoing collateral damage that we continue to sink time and money into. While we try and stabilize, and get the company back to a position of growth, it's a long way off as we continue, to this very day, deal with the after-effects. The fact this all resulted from a single erroneous and factually incorrect news article, combined with zero consultation from Facebook prior to their damaging actions, remains baffling and completely unfair.[1002]

Around that time, Facebook became aware of MessageMe, a fast-growing app that used Facebook graph data to support its "Find Friends" feature. Recognizing that MessageMe could compete with Facebook Messenger, Facebook's then-director of platform partnerships cut off the app's access to Facebook's Graph API.[1003]

In a submission to the Subcommittee, a former Facebook employee who handled platform management at the company said that Facebook unevenly enforced its platform policies based on the

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[998] Competition & Mkts. Auth. Report at at 141.

[999] Casey Newton, *Why Vine died*, THE VERGE (Oct. 28, 2016), https://www.theverge.com/2016/10/28/13456208/why-vine-died-twitter-shutdown.

[1000] Innovation and Entrepreneurship Hearing at 3 (statement of Matt Perault, Dir. of Public Pol'y, Facebook, Inc.).

[1001] Rob Price, *Facebook is reviewing hundreds of its official 'Facebook Marketing Partners' over Instagram data-scraping issues*, BUS. INSIDER (Aug. 23, 2019), https://www.businessinsider.com/facebook-review-all-marketing-partners-instagram-data-scraping-2019-8.

[1002] Interview with Damien Mahoney, CEO, Stackla (Apr. 14, 2020).

[1003] Olivia Solon & Cyrus Farivar, *Mark Zuckerberg Leveraged Facebook User Data to Fight Rivals and Help Friends, Leaked Documents Show*, NBC NEWS (Apr. 16, 2019), https://www.nbcnews.com/tech/social-media/mark-zuckerberg-leveraged-facebook-user-data-fight-rivals-help-friends-n994706.

degree of another firm's competition with Facebook and whether it could extract concessions from other firms. According to this former employee, Facebook was primarily concerned with whether a company was "a competitive threat," and it "was biasing its enforcement actions against [firms] they saw as competitors."[1004] In a submission to the Subcommittee, the former Facebook employee provided an example:

> [I]n one Facebook Messages conversation involving the CEO, Mr. Zuckerberg, and various executives in mid-2012, Mr. Zuckerberg expressed concern about an app called Ark that was accessing large amounts of user data in a way that could enable showing user content to people who didn't have permission to see the content. An investigation was conducted, and it was determined that Ark was violating Facebook's platform policies regarding the use of data from friends of Facebook users. Ultimately, leadership decided to terminate Ark's access to Facebook's APIs and ban Ark from the platform for six months. This was a harsh punishment relative to other developers conducting similar activity—indeed, Mr. Zuckerberg had been informed on the thread that "tons" of other apps were acquiring data the same way and there was not further investigation or action taken against those apps. Other apps that had been accused of violating data policies similarly had been treated much more leniently. **It seemed clear that leadership imposed the more severe punishment against Ark because Mr. Zuckerberg viewed Ark as competitive with Facebook, as Facebook was exploring an acquisition of Ark at the same time as it was being investigated for policy violations.**[1005]

In contrast to punishing rivals, according to the former employee and other market participants interviewed by the Subcommittee, Facebook used "whitelists" to give preferential treatment to friends of the company.[1006] For example, in a report published by NBC, Facebook gave Amazon extended API access because Amazon was spending money on advertising and partnering with Facebook on the launch of its Fire smartphone. Facebook's Director of Business Development asked, "Remind me, why did we allow them to do this? Do we receive any cut of purchases?" In response, a Facebook employee who worked with Facebook's "strategic partners" responded, "No, but Amazon is an advertiser and supporting this with advertisement . . . and working with us on deeper integrations for the Fire."[1007]

In response to these concerns, Facebook told the Subcommittee that it "does not restrict access to its Platform APIs simply because an app competes with a Facebook product or service; but

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[1004] Interview with Former Facebook Employee (Jan. 14, 2020).

[1005] Submission from Former Facebook Employee, to H. Comm. on the Judiciary, 2 (Apr. 2, 2020) (on file with Comm.).

[1006] *Id.*

[1007] Olivia Solon & Cyrus Farivar, *Mark Zuckerberg Leveraged Facebook User Data to Fight Rivals and Help Friends, Leaked Documents Show*, NBC NEWS (Apr. 16, 2019), https://www.nbcnews.com/tech/social-media/mark-zuckerberg-leveraged-facebook-user-data-fight-rivals-help-friends-n994706.

Facebook will restrict apps that violate its policies."[1008] This is, however, inconsistent with the company's internal communications and other evidence examined by the Subcommittee during the investigation.

3. Digital Advertising

a. Overview

Facebook monetizes its platform through the sales of digital advertising.[1009] Facebook garnered over $70 billion in revenue in 2019, a nearly 27% increase from 2018.[1010] It generates this revenue predominately from selling advertisement placements.

Facebook has monopoly power in online advertising in the social networking market.[1011] Notwithstanding Google's dominance, Facebook also has a significant share of revenue and growth in online advertising with many market participants referring to them as duopolies in this broad market. Some market participants interviewed by the Subcommittee consider Facebook "unavoidable" or "must have" due to the reach and scale of its platform. In particular, some businesses consider Facebook's identity product—its ability to persistently track users' online and offline conduct to serve tailored ads—as a unique feature.[1012] For example, at the Subcommittee's fifth hearing, David Heinemeier Hansson, the Chief Technology Officer and Cofounder of Basecamp, testified that the nature of Facebook's targeted advertising makes it difficult to replace, saying:

> At Basecamp, we ultimately ended up swearing off the use of targeted advertisement based on the exploitation of personal data. Facebook's record of protecting people's privacy, and gathering their consent in the exploitation of their data for advertisement purposes, is atrocious, and we decided that we wanted no part of it. But choosing to opt out of targeted advertisement on the internet is like competing with one arm behind your back. It is very clear why most companies feel compelled to do this kind of advertisement, even if it's a violation of their ethics. If their competitors are doing it, they're at a significant disadvantage if they don't. And the same is true for us. We have

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[1008] Innovation and Entrepreneurship Hearing at 3 (response to Questions for the Record of Matt Perault, Dir. of Public Pol'y, Facebook, Inc.).

[1009] *Transcript of Mark Zuckerberg's Senate hearing*, WASH. POST (Apr. 10, 2018) ("'Senator, we run ads,' Zuckerberg replied."), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing.

[1010] *Id.*

[1011] Competition & Mkts. Auth. Report at 211.

[1012] Competitors Hearing at 10 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp).

> undoubtedly given up growth to competitors because we've refrained from pursuing targeted ads.[1013]

Facebook's advantages in terms of access to data and its reach contribute to its ability to earn higher revenue per user than other firms in the social networking market.[1014] Facebook reported an average revenue per user (ARPU) of $7.05 worldwide and $36.49 in the United States and Canada in July 2020.[1015] It has also averaged significant annual growth—26% on average over the past five years.[1016] In contrast, its closest competitor, Snap, reported in July 2020 that its ARPU "remained flat" at $1.91 worldwide and $3.48 in North America.[1017] A recent investment report underscored this point, noting that Facebook enjoys a significant economic moat illustrated by the inability of Snap and other firms to meaningfully challenge its dominance.[1018] As a result, entry or success by other firms is unlikely:

> With more users and usage time than any other social network, Facebook provides the largest audience and the most valuable data for social network online advertising. Facebook's ad revenue per user is growing, demonstrating the value that advertisers see in working with the firm . . . Facebook has also expanded its user base in the growing mobile market, which positively affected the network effect as it became more valuable to advertisers, and resulted in more ad revenue growth. The main drivers behind growth in online advertising have been growths in the mobile ad market and the video ad format. Most Facebook users are now accessing Facebook and its apps via mobile devices.[1019]

Facebook's internal documents reinforce this finding. In a presentation prepared to deliver to investors ahead of the company's initial public offering, Facebook characterized its advertising product as having a significant advantage over the industry average in accuracy and narrowly targeted campaigns due to its reach, engagement, and using people's "real identity—people as their real

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[1013] *Id.*

[1014] Competition & Mkts. Auth. Report at 211.

[1015] FACEBOOK, FACEBOOK Q2 2020 RESULTS (July 31, 2020), https://s21.q4cdn.com/399680738/files/doc_financials/2020/q2/Q2-2020-FB-Earnings-Presentation.pdf.

[1016] MORNINGSTAR EQUITY ANALYST REPORT, FACEBOOK INC 2 (Aug. 3, 2020) (on file with Comm.) ("The value of such data and advertisers' willingness to use it is demonstrated by the 26% average annual growth of Facebook's average ad revenue per user, or ARPU, during the past five years, which we view as indicative of the price that advertisers pay Facebook for ad placement. During the same period, Facebook's monthly average users have grown 12% annually.").

[1017] Snap, Inc., Quarterly Report (Form 10-Q) 25, 27 (June 30, 2020), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001564408/9aacfdca-55a1-4928-9a31-c2462d2386c0.pdf.

[1018] MORNINGSTAR EQUITY ANALYST REPORT, FACEBOOK INC 1–2 (Aug. 3, 2020) (on file with Comm.).

[1019] *Id.*

selves."[1020] In comparison to television broadcasters, the company noted that in the United States, "everyday on Facebook is like the season finale of American idol—the most popular show on TV—times two."[1021]

These findings are also consistent with those of Australian,[1022] British,[1023] French,[1024] and German antitrust authorities, which conducted an extensive examination of Facebook's market power in the social networking market and in digital advertising. For example, the United Kingdom's Competition and Markets Authority (CMA) found in July 2020 that Facebook and Instagram generated over half of display advertising revenues in 2019" in the United Kingdom, which it found to be a relevant market.[1025] In contrast to other firms in the same market, Facebook's lead was significantly larger than its closes competitor, YouTube, which "earned between 5 and 10%."[1026] In June 2019, the Australian Competition and Consumer Commission (ACCC) found that Facebook has "substantial market power in the supply of display advertising in Australia."[1027] Similar to the CMA's findings, the ACCC concluded that the share of the display advertising market controlled by Facebook and Instagram is significant—more than half—and growing, while the rest of the market is highly fragmented.[1028]

b. Relevant Acquisitions

On February 27, 2013, Facebook executed an agreement to purchase Atlas, an advertiser-side platform to manage and measure ad performance, from Microsoft for $100 million.[1029]At the time of the transaction, Atlas captured data to track conversions—when a specific action is taken in response to an ad, such as making a purchase—through clicks and impressions.[1030] In other words, if someone saw a BestBuy ad, Atlas enabled serving the ad, recording the user seeing the ad via a browser identifier, and recorded the impression as well as if the person clicked on the ad. Later, if the same user

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[1020] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00054106 (Apr. 9, 2012) (on file with Comm.).

[1021] *Id.*

[1022] Competition & Mkts. Auth. Report at 9.

[1023] *Id.* at 11–12, 211.

[1024] FRENCH AUTORITÉ DE LA CONCURRENCE & BUNDESKARTELLAMT, COMPETITION LAW AND DATA (2016), https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=D86CD9D13899F2590F84E82092187858.2_cid362?__blob=publicationFile&v=2.

[1025] Competition & Mkts. Auth. Report at 10.

[1026] *Id.*

[1027] Austl. Competition & Consumer Comm'n Report at 97.

[1028] *Id.*

[1029] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00043659 (Mar. 2013) (on file with Comm.).

[1030] *Id.*

bought the item from BestBuy.com, Atlas recognized the user through their browser and would record the conversion if the user purchased the item advertised.

Prior to the acquisition, Amin Zoufonoun, Facebook's Vice President for Corporate Development, described the "primary thesis" of the acquisition to Sherly Sandberg as giving Facebook "immediate scale to retarget, provide premium insights, do look-alike modeling, prove and measure efficacy of [Facebook] as a marketing medium, [and] enhance custom audiences and associated revenue."[1031] Facebook's primary strategic rationale for integrating Atlas into its ad product was to improve its ability to measure ad performance and use identity-based targeting through Facebook Identity—its unique identifier for Facebook users across all browsers and devices—to serve highly targeted ads.[1032] Facebook described the value of Facebook Identity as its ability to "target *people* across browsers and devices" and to "activate offline data to enrich online targeting," among other features.[1033] The company believed that its "unique data" and "unique reach and engagement (across devices and platforms)" would boost its value to advertisers.[1034]

Facebook also noted in its summary of the deal at the time of the transaction that the major opportunities of the transaction were: (1) to become the "buy-side desktop tool that media planners fire up first thing in the day;" and (2) to acquire "a deep installed base of pixels which we can immediately turn on to power conversion tracking and attribution of ads across offerings."[1035]

Absent the transaction, Facebook raised concerns that Google's "lead in this market may become insurmountable" and limit Facebook's ads in other ways.[1036] The company also raised concerns that Facebook's Custom Audiences tool would not be able "to scale beyond click-oriented advertisers."[1037] Among other potential risks of the deal, such as rebuilding the product on Facebook's ad stack, the company identified "[m]anaging perceptions around privacy" as an area of concern.[1038]

[1031] *Id.* at FB-HJC-ACAL-00043509 (Oct. 18, 2012) (internal punctuation omitted).

[1032] *Id.* at FB-HJC-ACAL-00043660.

[1033] *Id.* at FB-HJC-ACAL-00043680 (emphasis in original).

[1034] *Id.* at FB-HJC-ACAL-00043705.

[1035] *Id.* at FB-HJC-ACAL-00043710.

[1036] *Id.* at FB-HJC-ACAL-00043660.

[1037] *Id.* at FB-HJC-ACAL-00043697.

[1038] *Id.* at FB-HJC-ACAL-00043658.

B. Google

1. Overview

Google was launched in 1998 as a general online search engine.[1039] Founded by Larry Page and Sergey Brin, the corporation got its start by serving users web results in response to online queries. Google's key innovation was its PageRank algorithm, which ranked the relevance of a webpage by assessing how many other webpages linked to it.[1040] In contrast with the technology used by rival search engines, PageRank enabled Google to improve the quality of its search results even as the web rapidly grew. While Google had entered a crowded field, by 2000 it had become the world's largest search engine.[1041] Later that year Google launched AdWords, an online advertising service that let businesses purchase keywords advertising to appear on Google's search results page—an offering that would evolve to became the heart of Google's business model.[1042]

Today Google is ubiquitous across the digital economy, serving as the infrastructure for core products and services online. It has grown and maintained its search engine dominance, such that "Googling" something is now synonymous with online search itself. The company is now also the largest provider of digital advertising, a leading web browser, a dominant mobile operating system, and a major provider of digital mapping, email, cloud computing, and voice assistant services, alongside dozens of other offerings. Nine of Google's products—Android, Chrome, Gmail, Google Search, Google Drive, Google Maps, Google Photos, Google Play Store, and YouTube—have more than a billion users each.[1043] Each of these services provides Google with a trove of user data, reinforcing its dominance across markets and driving greater monetization through online ads.

In several markets, Google established its position through acquisition, buying up successful technologies that other businesses had developed. In a span of 20 years, Google purchased well over 260 companies—a figure that likely understates the full breadth of Google's acquisitions, given that many of the firm's purchases have gone unreported.[1044] Documents collected by the Subcommittee

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[1039] Google Inc., Registration Statement (Form S-1) 1 (Apr. 29, 2004), https://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm.

[1040] *Id*. at 65 ("PageRank is a query-independent technique for determining the importance of web pages by looking at the link structure of the web.").

[1041] Press Release, Google, Google Launches World's Largest Search Engine (June 26, 2000), http://googlepress.blogspot.com/2000/06/google-launches-worlds-largest-search.html (stating that Google had indexed over 1 billion webpages).

[1042] Press Release, Google, Google Launches Self-Service Advertising Program (Oct. 23, 2000), http://googlepress.blogspot.com/2000/10/google-launches-self-service.html.

[1043] Harry McCracken, *How Google Photos joined the billion-user club*, FAST CO. (July 24, 2019), https://www.fastcompany.com/90380618/how-google-photos-joined-the-billion-user-club.

[1044] *See infra* Appendix; Leena Rao, *Google Spent Nearly $2 Billion on 79 Acquisitions in 2011*, TECHCRUNCH (Jan. 27, 2012), https://techcrunch.com/2012/01/27/google-spent-nearly-2-billion-on-79-acquisitions-in-2011/ ("As of Q3, Google reveal that executives recognized as early as 2006 that Google's "tremendous cash resources" could be deployed to help execute Google's "strategic plan."[1045]

Google is now one of the world's largest corporations. For 2019, Google reported total revenues of $160.7 billion—up 45% from 2017—and more than $33 billion in net income.[1046] Although Google has diversified its offerings, it generates the vast majority of its money through digital ads, which accounted for over 83% of Google's revenues in 2019.[1047] Search advertising, in particular, is critical to Google, accounting for approximately 61% of its total sales.[1048] In recent months Google reported a drop in ad revenue due to pandemic-related cuts in spending, though the company partly made up for the decline through revenue growth in Google Cloud, Google Play, and YouTube.[1049] Google has enjoyed strong and steady profits, with profit margins greater than 20% for nine out of the last 10 years, close to three times larger than the average for a U.S. firm.[1050] Financial analysts predict that Google is well positioned to maintain its dominance, noting that "Alphabet has established unusually deep competitive moats around its business."[1051]

In 2015 Google underwent a reorganization, introducing Alphabet as a parent company under which Google would reside as a wholly owned subsidiary.[1052] Alphabet also houses the company's non-search ventures, such as Calico, the biotech company focused on longevity, and Waymo, which develops self-driving cars.[1053] In December 2019, Page and Brin stepped down from their management

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had spent over $1.4 billion on 55 acquisitions for the year. Google ended 2011 spending $1.9 billion (including cash and stock) on completing 79 acquisitions during the entirety of the year.").

1045 Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04232284 at 2 (Sept. 25, 2006) (on file with Comm.) (stating that Google viewed transactions as falling into three categories: (1) bolt-on; (2) outside existing efforts; and (3) around existing efforts).

1046 Alphabet Inc., Annual Report (Form 10-K) 26–30 (Feb. 3., 2020), https://www.sec.gov/Archives/edgar/data/1652044/000165204420000008/goog10-k2019.htm.

1047 *Id*. at 30.

1048 *Id.*

1049 Alphabet Inc., Quarterly Report (Form 10-Q) (June 30, 2020) https://abc.xyz/investor/static/pdf/20200731_alphabet_10Q.pdf?cache=f16f989; *Alphabet Q2 Earnings Call* (July 30, 2020), https://abc.xyz/investor/static/pdf/2020_Q2_Earnings_Transcript.pdf?cache=6bfce23.

1050 Alphabet Inc., Annual Report (Form 10-K) (2009–2019)

1051 MARC S.F. MAHANEY, ROYAL BANK OF CANADA, DIGGING FOR BURIED TREASURE – THE GOOGLE MAPS OPPORTUNITY 2 (Sept. 23, 2019) (on file with Comm.) [hereinafter Royal Bank of Canada Report].

1052 Letter from Larry Page, CEO, Alphabet Inc., and Sundar Pichai, CEO, Google LLC (2015), https://abc.xyz/investor/founders-letters/2015/index.html#2015-larry-alphabet-letter.

1053 *Id*.

roles at Alphabet, though they remain on the board and together control approximately 51.3% of the voting power.[1054] Sundar Pichai now serves as the CEO of both Google and Alphabet.[1055]

For years Google has been the subject of antitrust investigations and enforcement actions around the world. From 2011 to 2013, the Federal Trade Commission investigated Google's role in search and advertising markets, culminating in a staff recommendation to file a complaint against Google—although the Commission ultimately decided not to do so. At various points over the last decade, Mississippi, Missouri, and Texas have each separately investigated Google for antitrust violations, and, in September 2019, attorneys general from 50 U.S. states and territories announced that they were opening a fresh antitrust inquiry into the search and advertising giant.[1056] The Department of Justice has also been investigating Google since the summer of 2019, and recent news reports state that a lawsuit may be imminent.[1057] These ongoing U.S. investigations follow multiple antitrust inquiries worldwide, as well as antitrust-related penalties levied on Google by the European Commission, France, India, and Russia.[1058]

2. Search

a. Market Power

Google overwhelmingly dominates the market for general online search. Publicly available data suggest the firm captures over 87% of U.S. search and over 92% of queries worldwide.[1059] Despite

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1054 Alphabet Inc., Quarterly Report (Form 10-Q) 60 (June 30, 2020) https://abc.xyz/investor/static/pdf/20200731_alphabet_10Q.pdf?cache=f16f989 ("The concentration of our stock ownership limits our stockholders' ability to influence corporate matters… Through their stock ownership, Larry and Sergey have significant influence over all matters requiring stockholder approval, including the election of directors and significant corporate transactions, such as a merger or other sale of our company or our assets, for the foreseeable future.").

1055 Letter from Larry Page, CEO, Alphabet Inc., and Sundar Pichai, CEO, Google LLC (2015), https://abc.xyz/investor/founders-letters/2015/index.html#2015-larry-alphabet-letter.

1056 Tony Romm, *50 US states and territories announce broad antitrust investigation of Google*, WASH. POST (Sept. 9, 2019), https://www.washingtonpost.com/technology/2019/09/09/states-us-territories-announce-broad-antitrust-investigation-google/.

1057 Alphabet Inc., Annual Report (Form 10-Q) (July 30, 2020), https://abc.xyz/investor/static/pdf/20200731_alphabet_10Q.pdf?cache=f16f989; Leah Nylen, *Trump administration to launch antitrust suit against Google as soon as next week*, POLITICO (Oct. 2, 2020), https://www.politico.com/news/2020/10/02/trump-doj-google-antitrust-lawsuit-425617.

1058 Aditya Kalra and Aditi Shah, *Exclusive: Google faces antitrust case in India over payments app – sources,* REUTERS (May 27, 2020), https://www.reuters.com/article/us-india-google-antitrust-exclusive/exclusive-google-faces-antitrust-case-in-india-over-pagos-app-sources-idUSKBN2331G3; Thomas Grove, *Russia Fines Google $6.75 Million in Antitrust Case,* WALL ST. J. (Aug. 11, 2016), https://www.wsj.com/articles/russia-fines-google-6-75-million-in-antitrust-case-1470920410; Charles Riley and Ivana Kottasová, *Europe hits Google with a third, $1.7 billion antitrust fine,* CNN (Mar. 20, 2019), https://www.cnn.com/2019/03/20/tech/google-eu-antitrust/index.html; Natasha Lomas, *France slaps Google with $166M antitrust fine for opaque and inconsistent ad rules*, TECHCRUNCH (Dec. 20, 2019) https://techcrunch.com/2019/12/20/france-slaps-google-with-166m-antitrust-fine-for-opaque-and-inconsistent-ad-rules/.

1059 *Search Engine Market Share Worldwide*, STATCOUNTER, https://gs.statcounter.com/search-engine-market-share (last visited Sept. 29, 2020).

notable changes in the market—such as the switch from desktop to mobile—Google has maintained this dominance for more than a decade, a period during which its lead over its most significant competitors has only increased.[1060] Over that time, Google benefited from economies of scale and the self-reinforcing advantages of data, as well as from aggressive business tactics that Google wielded at key moments to thwart competition. The combined result is that Google now enjoys durable monopoly power in the market for general online search.

Several factors render Google's power in online search generally immune to competition or threat of entry. General online search strongly favors scale due to: (1) the high fixed costs of servers needed for crawling and indexing the entire web; and (2) the self-reinforcing advantages of click-and-query data, which let a search engine constantly improve the relevance of search results. Even an upstart that was able to secure the necessary capital to invest heavily in computing infrastructure would find itself at a considerable disadvantage given that Google's search algorithm has been refined through trillions upon trillions of queries.[1061] Meanwhile, steps that website owners take to block non-Google crawlers have rendered the task of creating an independent comprehensive index extremely challenging, if not effectively impossible.

Even search engines that choose to syndicate their search results rather than create their own index and algorithm face major obstacles. This is primarily because Google—through both integration and contractual agreements—has established itself as the default search provider on 87% of desktop browsers and the vast majority of mobile devices. Specifically, Google used its search dominance to promote the use of its Chrome browser on laptops, personal computers, and workstations, which sets Google Search as its default. For mobile devices, Google imposed a set of restrictive contractual terms effectively requiring manufacturers of devices that used its Android operating system to pre-install both Chrome and Google Search. Additionally, Google pays Apple an undisclosed amount, estimated

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[1060] Enforcers and courts have held that Google dominates the market for online search in various cases stretching back over a decade. *See, e.g.*, Press Release, U.S. Dep't of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), https://www.justice.gov/archive/opa/pr/2008/November/08-at-981.html ("The Department's investigation revealed that Internet search advertising and Internet search syndication are each relevant antitrust markets and that Google is by far the largest provider of such services, with shares of more than 70 percent in both markets."); Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc. (Feb. 18, 2010), https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation-internet ("The proposed transaction will combine the back-end search and paid search advertising technology of both parties. U.S. market participants express support for the transaction and believe that combining the parties' technology would be likely to increase competition by creating a more viable competitive alternative to Google, the firm that now dominates these markets."); Author's Guild v. Google, No. 05 Civ. 8136 (DC), 2011 WL 986049, *12 (S.D.N.Y. Mar. 22, 2011) (recognizing "Google's market power in the online search market").

[1061] *See* Innovation and Entrepreneurship Hearing at 1 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC) ("Google Search responds to trillions of user queries from around the world every year."); *see also* MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY 12.10 (2016) ("Entry barriers into the search engine market are already high. Microsoft reportedly invested in 2010 'more than $4.5 billion into developing its algorithm and building the physical capacity necessary to operate Bing.").

to be $12 billion per year, to secure the search default across iOS devices.[1062] In general, users tend to stick with the default presented.[1063] Moreover, Google takes steps to hamper and dissuade even those users that do attempt to switch search engines on Chrome.[1064] With these factors combined, Google's conduct significantly impedes other search providers from reaching users at scale—and further expands and entrenches Google's dominance.

In submissions to the Committee, Google states that Google Search "operates in a highly competitive environment," facing a "vast array of competitors" in general online search, including Bing, DuckDuckGo, and Yahoo!.[1065] Google also claims that for any given search query, Google competes against a "wide range of companies," including Amazon, eBay, Kayak, and Yelp.[1066] Google argues that this broader set of competitors means that public estimates of its share of general online search "do not capture the full extent of Google's competition in search."[1067]

Despite these statements, Google failed to provide the Subcommittee with contemporary market share data that would corroborate its claims. In response to the Committee's written request for market share data, combined with several follow-ups from Subcommittee staff, Google stated that the company "doesn't maintain information in the normal course of business about market share in its products."[1068] After the Subcommittee identified communications where Google executives had discussed regularly tracking search market share data and further developing internal tools for doing so, Google told the Subcommittee that this data is either no longer collected or no longer used for examining site traffic.[1069] It added, "[W]hile Google may have examined certain 'shares' of usage,

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1062 Lisa Marie Segarra, *Google to Pay Apple $12 Billion to Remain Safari's Default Search Engine in 2019: Report*, FORTUNE (Sept. 29, 2018), https://fortune.com/2018/09/29/google-apple-safari-search-engine/.

1063 Competition & Mkts. Auth. Report at 194.

1064 *See, e.g.*, Submission from Source 481 to H. Comm. on the Judiciary (Jan. 30, 2020) (on file with Comm.).

1065 Production of Google, to H. Comm. on the Judiciary, A-11 (Nov. 22, 2019) (on file with Comm.).

1066 *Id.*; *see also* Innovation and Entrepreneurship Hearing at 6 (statement of Adam Cohen, Dir. of Econ. Pol'y, Google LLC). Although the specialized search providers that Google lists as competitors may, in some instances, compete with Google for queries, "[t]he competition between Google and vertical search engines" is "to some extent asymmetrical. From a user's point of view, a generalist search engine that fully covers a given vertical can be a complete substitute for the vertical search engine, while the reverse is not generally true. Consequently, Google imposes more significant competitive constraints on a vertical search engine than vice versa." *See* Submission from Source 209, to H. Comm. on the Judiciary, Source 209-0000540 (Feb. 17, 2011) (on file with Comm.).

1067 Production of Google, to H. Comm. on the Judiciary, A-11 (Nov. 22, 2019) (on file with Comm.). In certain regards, Google's argument echoes the claim Microsoft made when it contested the district court's decision to exclude "middleware" from its definition of the relevant market. The court found that although it was true that middleware could "usurp the operating system's platform function and might eventually take over other operating system functions," it was also true that no middleware product "could now, or would soon, expose enough APIs to serve as a platform for popular applications, much less take over all operating system functions." United States v. Microsoft Corp., 253 F.3d 34, 53–54 (D.C.C. 2001). Similarly, although certain vertical search providers could under certain circumstances "usurp" the horizontal provider's platform function, no vertical provider does or would soon serve this function.

1068 Meeting with Google (Feb. 10, 2020).

1069 Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-01967913 (Jan. 27, 2007) (on file with Comm.) ("Each quarter we gather comprehensive search and market share data even though we NOT share it with the board clicks, queries, or traffic in limited and incomplete data sets over time, we do not believe any of this constitutes 'market share' analysis."[1070]

Market share information that Google did provide from over a decade ago reveals that Google viewed itself as a leader in general search as early as 2007. One slide deck tracking search query volume and revenues stated that "[c]ontinued leadership in search underpins the whole business."[1071] In 2009, a top executive circulated market share analysis documenting that Google captured 71.5% of general search in the United States, followed by Yahoo with 17%, and Bing with 7.5%.[1072] And in 2010, one Google employee observed, "Google leads competitors. This is our bread-and-butter. Our long-tail precision is why users continue to come to Google. Users may try the bells and whistles of Bing and other competitors, but Google still produces the best results."[1073] Noting that Bing was "making clear, significant progress" on "bringing the two search engines closer to parity," the employee stated it was "critical to redouble our efforts to maintain our lead."[1074]

The Subcommittee has not seen any compelling evidence to suggest that Google's dominance over the last decade has diminished; to the contrary, there is compelling evidence that Google has only strengthened and solidified what was already a leading market position. For example, in 2009, Microsoft and Yahoo!—Google's closest competitors—entered an agreement to integrate their search platforms, an effort to team up to tackle Google's dominance.[1075] A decade later, the two collectively have a lower share of the general search market than they did at the time of their deal, whereas Google's share has increased.[1076] As of 2016, Google employees were calculating that Bing had suffered a 30% year-over-year decline in query volume and that Bing's revenue per million impressions (RPM) was "70-77% lower" than Google's own U.S. search RPM.[1077] More recently, the United Kingdom's Competition and Markets Authority found that Google's index of the web is anywhere from three to five times the size of Bing's.[1078] Furthermore, the fact that no new general

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anymore. I am pleased to say that we've finally turned the corner on getting decent data of our own rather than ComScore….Next steps include further work on internal sources such as the toolbar and AFC referrals which we believe will give us more data to model and help us adjust for the biases of external sources."); GOOG-HJC-01529590 (Oct. 11, 2011) (listing "internal US search share metrics" for Q2 2011); Email from Google to Staff of the H. Comm on the Judiciary (Apr. 16, 2020) (on file with Comm.).

[1070] Email from Google to Staff of the H. Comm. on the Judiciary (Apr. 16, 2020) (on file with Comm.).

[1071] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04231168 at 2 (on file with Comm.).

[1072] *Id.* at GOOG-HJC-01207063 (Oct. 27, 2009) (attachment to email from Marissa Mayer).

[1073] *Id.* at GOOG-HJC-03815864 (Apr. 23, 2010).

[1074] *Id.*

[1075] Submission from Source 209, to H. Comm. on the Judiciary, Source 209-0000346 at 351–52 (Aug. 24, 2009) (on file with Comm.).

[1076] *Search Engine Market Share Worldwide*, STATCOUNTER, https://gs.statcounter.com/search-engine-market-share (last visited Sept. 29, 2020).

[1077] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04259758–59 (Apr. 20, 2016) (on file with Comm.).

[1078] Competition & Mkts. Auth. Report at 89.

search entrant over the last decade has ever accounted for more than 1% of all U.S. searches in any given year further confirms that Google's monopoly power is durable and its lead insurmountable.[1079]

Google's claim that it "operates in a highly competitive environment" is also at odds with the lived reality of market participants. Numerous companies—spanning major public corporations, small businesses, and upstart entrepreneurs—told the Subcommittee that they overwhelmingly depend on Google for traffic and that no alternate search engine even remotely approaches serving as a substitute. For example, J&J Smith, a printer repair shop based in Rhode Island, stated, "Google is our lifeblood."[1080] Foundem, a UK-based comparison shopping search provider, has noted that Google's "overwhelming global dominance" of horizontal search creates for most websites an "uncomfortable but unavoidable reliance on Google."[1081] Many other companies described their dependence on Google in similar terms.

Furthermore, some of the same specialized search providers that Google identifies as competitors stated that their own businesses heavily rely on Google, in some cases for up to 80% of traffic on both desktop and mobile devices.[1082] One specialized search provider wrote that Google's business practices "have a very material effect on [our] business, but due to Google's monopoly power in search, there is nowhere else for [us] to turn for additional search traffic. The company is beholden to how Google decides to structure its search results page and algorithm."[1083] Another told the Subcommittee, "From [our] perspective, there are no adequate substitutes for Google,"[1084] and, "[T]hanks to its monopoly in general internet search, Google has become the gatekeeper for vertical search rivals."[1085] One specialized search provider said that 97.6% of its traffic comes from Google; another said that Google accounted for such an outsized share of traffic that "we don't even track non-Google sources."[1086]

At the Subcommittee's field hearing in January 2020, David Heinemeier Hansson, Cofounder and Chief Technology Officer of Basecamp, testified that Google increasingly functions as "the front door of the internet."[1087] He noted, "[Google is] the start page for millions. It's a form of navigation around the internet. People these days rarely bother to remember the specific internet address of a

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[1079] Submission from Source 115, to H. Comm. on the Judiciary, 6 (Oct. 22, 2019) (on file with Comm.).

[1080] Interview with J&J Smith (Aug. 24, 2020).

[1081] Submission from Foundem, to H. Comm. on the Judiciary, 4 (Jan. 21, 2018) (on file with Comm.).

[1082] Submission from Source 564, to H. Comm. on the Judiciary, 5 (Nov. 13, 2019) (on file with Comm.); Submission from Source 3, to H. Comm. on the Judiciary, 34 (Nov. 22, 2019) (on file with Comm.).

[1083] Submission from Source 887, to H. Comm. on the Judiciary, 4 (Oct. 28, 2019) (on file with Comm.).

[1084] Submission from Source 626, to H. Comm. on the Judiciary, 2 (Oct. 15, 2019) (on file with Comm.).

[1085] Submission from Source 972, to H. Comm. on the Judiciary, 10 (Dec. 9, 2019) (on file with Comm.).

[1086] Interview with Source 147 (June 26, 2019).

[1087] Competitors Hearing at 3 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp).

company they want to do business with, they just google it."[1088] Commenting on the stark asymmetry in the general search market, Hansson stated that Yahoo, Bing, and DuckDuckGo all "could drop [Basecamp] from their listings tomorrow and we'd barely notice," but "[w]e lose our listing in Google and we may go out of business."[1089]

Google obtained default placement across the mobile and desktop ecosystem through both integration and contractual arrangements. Through owning Android, the world's dominant mobile operating system, Google was able to ensure that Google Search remained dominant even as mobile replaced desktop as the critical entry point to the Internet. As discussed elsewhere in the Report, documents submitted to the Subcommittee show that, at certain key moments, Google conditioned access to the Google Play Store on exclusively pre-installing Google Search, a requirement that gave Google a significant advantage over competing search engines. Through revenue-sharing agreements amounting to billions of dollars in annual payments, Google also established default positions on Apple's Safari browser (on both desktop and mobile) and on Mozilla's Firefox.[1090]

In public statements, Google has downplayed the significance of default placement, claiming that "competition is just a click away."[1091] However, Google's internal documents show that, at a time when Google was still jostling for search market share, Google executives closely tracked search defaults on Microsoft's Internet Explorer and expressed concern that non-Google defaults could impede Google Search.[1092] In an internal presentation about Internet Explorer's default search selection, Google recommended that users be given an initial opportunity to select a search engine and that browsers minimize the steps required to change the default search provider.[1093] These discussions, as well as the steep sums Google pays Apple and various browsers for default search placement, further highlight the competitive significance of default positions.

Independent search engines told the Subcommittee that the lack of defaults available to them creates significant business challenges. DuckDuckGo said this lack of options compelled it to invest in browser technology, including the creation of its own browser for Android and iOS and various browser extensions.[1094] It noted, however, that "the same default placement challenges exist in the browser

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[1088] *Id.*

[1089] *Id.*

[1090] Innovation and Entrepreneurship Hearing at 12 (response to Questions for the record by Kyle Andeer, Vice Pres., Corp. Law, Apple Inc.).

[1091] *See, e.g.*, Adam Kovacevich, *Google's approach to competition*, GOOGLE PUBLIC POL'Y BLOG (May 8, 2009), https://publicpolicy.googleblog.com/2009/05/googles-approach-to-competition.html.

[1092] *See, e.g.*, Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-01196214 (May 3, 2005) (on file with Comm.).

[1093] *Id.* at GOOG-HJC-01680749 (2006) (identifying several recommendations, including "Fewest clicks required to change default, which promotes search innovation by facilitating the user's ability to switch.").

[1094] Innovation and Entrepreneurship Hearing at 5 (statement of Megan Gray, Gen. Counsel & Pol'y Advocate, DuckDuckGo).

market, just one level up – with the device makers requiring millions or billions of dollars to become a default browser on a device."[1095]

Lastly, the Subcommittee's findings are consistent with conclusions reached by several enforcement bodies that recently have investigated Google's market dominance. For example, in July 2020 the United Kingdom's Competition and Markets Authority found that "Google has significant market power in the general search sector," a position maintained through "three key barriers to entry: economies of scale in developing a web index; access to click-and-query data at scale; and Google's extensive default positions."[1096] In July 2019, the Australian Competition and Consumer Commission (ACCC) found that Google has "substantial market power in supplying general search services," and that it is "likely to retain its dominant share of the market at least in the short- to medium-term."[1097] And in two separate enforcement actions in 2017 and 2018, the European Commission found that Google possessed market power in the market for online general search.[1098] While each of these enforcers focused on their respective national and regional markets, Google has failed to identify any factors that would compel the Subcommittee to reach a different conclusion for the U.S. market.

b. Conduct

i. Google Leverages Dominance Through Data Misappropriation and Self-Preferencing

When Google launched in 1998, the search listings it delivered were "ten blue links," or a set of organic results that guided users off Google's webpage to locate relevant information. In the years since, Google, as well as Bing, has evolved to displaying blue links alongside a variety of Google's own content as well as "information boxes" that list responses directly on the search results page.

While this model may, in certain instances, provide users with direct information more quickly, documents collected by the Subcommittee show that Google built some of these features through aggressive tactics that exploited its search dominance. Google's conduct helped maintain its monopoly in online search and search advertising while dissuading investment in nascent competitors, undermining innovation, and harming users and businesses alike.

[1095] *Id*. at 5.

[1096] Competition & Mkts. Auth. Report at 73.

[1097] Austl. Competition & Consumer Comm'n Report at 58.

[1098] *Google Search (Shopping)* (Case AT.39740) Comm'n Decision of 27/6/2017 [2017], para. 271, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf [hereinafter Google Search (Shopping) Comm'n Decision] ("The Commission concludes that Google holds a dominant position in each national market for general search services since 2008, apart from in the Czech Republic, where Google holds a dominant position since 2011."); *Google Android* (Case AT.40099) Comm'n Decision of 18/7/2018 [2018], para. 439, https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf [hereinafter "Google Android Comm'n Decision"] ("[T]he Commission concludes that Google holds a dominant position in the following relevant markets since 2011: . . . (3) each national market for general search services in the EEA.").

According to internal documents, Google executives recognized as early as 2005 that specialized—or "vertical"—search engines could pose a threat to Google's long-term dominance. That year one program manager wrote:

> [W]hat is the real threat if we don't execute on verticals?
> (a) loss of traffic from google.com because folks search elsewhere for some queries
> (b) related revenue loss for high spend verticals like travel
> (c) missing [opportunity] if someone else creates the platform to build verticals
> (d) if one of our big competitors builds a constellation of high quality verticals, we are hurt badly[1099]

Google's apprehension about vertical search providers persisted. For example, a 2006 strategy memo identifying challenges asked, "How do we deal with the problem of 'proliferating verticals?'"[1100] Another message noted, "Vertical search is of tremendous strategic importance to Google. Otherwise, the risk is that Google is the go-to place for finding information only in the cases where there is sufficiently low monetization potential that no niche vertical search competitor has filled the space with a better alternative."[1101] In short, Google executives feared that vertical search providers would build direct relationships with users, thereby bypassing Google Search and diverting traffic, valuable data, and ad revenue. While vertical search providers were complements to Google in the short term, Google recognized their potential for disintermediating Google and therefore viewed them as a major competitive threat. The fact that several of these verticals specialized in commercial queries that were among the most valuable for Google further raised the stakes.[1102]

Documents show that Google developed a multi-pronged strategy to thwart the threat. Two of these tactics included: (1) misappropriating third-party content; and (2) privileging Google's own services while demoting those of third parties. Through these practices, Google exploited its dominance to weaken potential rivals and boost its search advertising revenue.

1) <u>Misappropriating Third-Party Content</u>

In the years following 2005, Google invested in building out its own vertical services. Documents reveal that Google partly did so through lifting content directly from third-party providers to bootstrap Google's own vertical services. In the process, Google leveraged its search dominance—demanding that third parties permit Google to take their content, or else be removed from Google's search results entirely.

[1099] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04137557 (Nov. 29, 2005) (on file with Comm.).

[1100] *Id.* at GOOG-HJC-01099230 (Oct. 20, 2006).

[1101] *Id.* at GOOG-HJC-03815865 (Apr. 23, 2010).

[1102] *Id.* at GOOG-HJC-04276684–87 (Sept. 21, 2012).

For example, after identifying local search as a "particularly important" vertical to develop, Google built Google Local, which licensed content from local providers, including Yelp.[1103] In 2010 Google rolled out a service directly competing with Yelp, even as Google continued to license Yelp's content—prompting Yelp's CEO to request that Google immediately remove Yelp's proprietary content from Google's own service.[1104] At a time when Google Local was failing to gain momentum, Google told Yelp that the only way to have its content removed from Google's competing product was to be removed from Google's general results entirely.[1105] Yelp relied so heavily on Google for user traffic that the company could not afford to be delisted—a fact that Google likely knew.[1106] In short, Google weaponized its search dominance, demanding that Yelp surrender valuable content to Google's competing product or else risk heavy losses in traffic and revenue.

Evidence gathered by the Subcommittee identifies additional instances in which Google has intercepted traffic from third-party websites by forcibly scraping their content and placing it directly on Google's own site. For example, a submission from entrepreneur Brian Warner described how he built a database from scratch and developed it into a sustainable and growing business—only to watch Google lift his content and sink his traffic.[1107] Warner, the founder of Celebrity Net Worth, told the Subcommittee that in 2012 the content he had initially developed as a side-project had such high demand that Warner was able to quit his day job and hire 12 staff members. In 2014 Google contacted Warner to ask if he would provide Google with an API that would display his webpage's content in an "answer box" that would appear directly on Google's search results page. Warner declined, observing that handing over his company's "most valuable asset" would "cause a catastrophic drop in traffic."[1108]

[1103] *Id.* at GOOG-HJC-03665122–26 (Apr. 24, 2007) (internal Google discussion noting the strength of Yelp's local product) ("[T]here is nothing else 'yelp like' in our current lineup," and also noting that "[Yelp's CEO] just contacted the account manager here and asked that their contract be revised so that they could cancel it immediately if we launch reviews, that doesn't mean that they would do it, but clearly this is a big deal to them.").

[1104] *Id.* at GOOG-HJC-03249494 (Aug. 10, 2010) ("Given that this App directly competes with the Yelp App and offers little value to Yelp we cannot allow Google to continue leveraging our content in this way. We've communicated to Patrick and Carter that your team needs to remove our content within the next week. Since you already communicated to me that it would be un-Googley to not remove our content when requested, I'm confident your team will do the right thing.").

[1105] *See, e.g.*, *id.* at GOOG-HJC-03255279 (Oct. 28, 2010) ("[I] want to tell you that my feelings are really hurt by the 'local is a failure' stuff that Nikesh has been lobbing around"); GOOG-HJC-03790807–08 (Apr. 24, 2007) ("[W]e are still waiting to be removed from Places (while remaining in organic and local merge results), which you initially agreed to (but more recently pulled away from)."); GOOG-HJC-01234494–96 (Aug. 10, 2011) ("I was surprised to find that by opting out of Google's local product, Yelp was automatically opted out of portions of Google's search results. Carter Maslan and John Hanke last year said they couldn't/wouldn't remove Yelp content from Google's local product because local was powered by the same index as web search, sounds like this was never really the case."); *see* GOOG-HJC-01234494–96 ("To be able to reference Yelp's content in the parts of search results we discussed, our local service needs to be at least aware of the existence of Yelp pages. Since we stopped using any crawled Yelp pages for our local services in response to your request, this currently isn't possible. That said, I think that the approach we discussed, with Google making limited use of Yelp data in the ways you described, is a constructive way to get a comprehensive view for our users.").

[1106] *See, e.g.*, *id.* at GOOG-HJC-03664462 (Apr. 23, 2007) ("78% of their uniques come from google. if they are acquired, i [sic] would assume that they wouldn't turn us off.").

[1107] *See generally* Innovation and Entrepreneurship Hearing (statement of Brian Warner, Founder, Celeb. Net Worth).

[1108] *Id*. at 4.

Within two years, Google began populating its answer boxes with Celebrity Net Worth's content anyway—displaying net worth results for each of the 25,000+ celebrities from Warner's database directly on Google's search results page.[1109]

Combined with changes that pushed Warner's webpage from the top of organic listings to the middle of the second page, Google's scraping caused traffic to Celebrity Net Worth to drop by 50% overnight.[1110] Warner wrote, "With the flip of a switch, Google turned our original content into its own content. And with that move, Google would keep the searcher within its walled garden indefinitely. That is far more valuable to Google than taking a small cut of our AdSense revenue."[1111] Today Celebrity Net Worth's traffic is down 80% from 2014, and—due to the resulting drop in revenue—Warner has had to lay off half of his staff.[1112]

In a submission to the Subcommittee, lyrics site Genius described similar misappropriation by Google. Genius noted that it has invested "a decade and millions of dollars" developing a lyrics repository that relies on user-generated content as well as partnerships with songwriters.[1113] For years, however, Google has copied lyrics from Genius's website and displayed them in information boxes that it places at the top of its search results page.[1114] Although Genius shared with Google evidence showing that the platform was scraping lyrics directly from Genius, Google for two years "did nothing to address the issue."[1115] It was only after the *Wall Street Journal* published Genius's claims that Google responded, taking steps to remove the evidence that Google had copied the lyrics but leaving the lyrics in place.[1116] Google later announced that it would attribute lyrics placed in the information box to the underlying content provider. "This would be encouraging," Genius wrote, "except for the fact that all of the lyrics we flagged for Google as featuring our watermark—and thus clearly copied from Genius—are currently attributed to another company."[1117]

At the Subcommittee's hearing on July 29, 2020, multiple members questioned Mr. Pichai about Google's misappropriation of third-party content. Subcommittee Chairman David N. Cicilline (D-RI) recounted Google's scraping of Celebrity Net Worth, asking, "[W]hy does Google steal content

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[1109] *Id*. Because Warner had added several conjured celebrities to his site to gauge whether Google was scraping his content or lifting it from elsewhere, he was able to determine that Google was sourcing its answers directly from Celebrity Net Worth.

[1110] *Id*. at 5.

[1111] *Id*.

[1112] *Id*.

[1113] Innovation and Entrepreneurship Hearing at 1 (statement of Ben Gross, Chief Strategy Officer, Genius).

[1114] *Id.* at 2.

[1115] *Id.*

[1116] *Id.*

[1117] *Id*.

from honest businesses?"[1118] Mr. Pichai responded that he "disagree[d] with that categorization." Representative Ken Buck (R-CO) followed up by noting that Genius seemed to have collected clear evidence of Google's misappropriation:

> When Genius suspected this corporate theft was occurring, the company incorporated a digital watermark in its lyrics that spelled out red-handed in Morse code. Google's lyric boxes contained the watermark showing that your company stole what you couldn't or didn't want to produce yourself. After Google executives stated that they were investigating this problematic behavior, Genius created another experiment to determine the scope of the misappropriation. It turns out that, out of 271 songs where the watermark was applied, 43 percent showed clear evidence of matching. Your company, which advertises itself as a doorway to freedom, took advantage of this small company, all but extinguishing Genius' freedom to compete."[1119]

Mr. Pichai responded that Google "license[s] content from other companies," and that this issue was "a dispute between Genius and other companies in terms of where the source of the content is."[1120] In its response to Questions for the Record from the Subcommittee, Google also stated that it now gives webpage owners the ability to exclude certain content from appearing in information boxes on Google's search results page.[1121] However, multiple webpage publishers stated that, in practice, this option fails to mitigate the harm given that Google will continue to source and display content from others, thereby still intercepting traffic and displacing organic listings. One publisher described Google's claim to give webpage owners more control as "an empty offering."[1122]

In an interview with Subcommittee staff, one webpage owner stated that he felt deceived by Google's decision to use its crawling advantages to misappropriate third-party content. The webpage owner said:

> A major violation occurred when Google used robotic information scraped by its crawler to create content of its own which is displayed in the search result page. We never would have created sitemaps for Google if those were the terms. Google wouldn't have had sitemaps from every website on earth feeding it content if those were the terms from the beginning. They would have been forced to create a new system in order

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[1118] CEO Hearing Transcript at 36 (question of Rep. David N. Cicilline (D-RI), Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm on the Judiciary).

[1119] *Id.* at 48–49 (Rep. Ken Buck (R-CO), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1120] *Id*. at 49.

[1121] Innovation and Entrepreneurship Hearing at 8 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC) (Sept. 13, 2019).

[1122] Interview with Source 489 (Sept. 19, 2020).

to convince sites to comply or a new search service would have been born that had different options.[1123]

Google's practice of misappropriating third-party content to bootstrap its own rival search services and to keep users on Google's own webpage is further evidence of its monopoly power and an example of how Google has abused that power. Google seized value from third-party businesses without their consent. These businesses had no effective choice but to allow Google's misappropriation to continue, given Google's search dominance. In this way, Google leveraged its search dominance to misappropriate third-party content, free-riding on others' investments and innovations.

2) <u>Self-Preferencing</u>

Evidence shows that once Google built out its vertical offerings, it introduced various changes that had the effect of privileging Google's own inferior services while demoting competitors' offerings. This conduct has undermined the vertical search providers that Google viewed as a threat. It has also boosted Google's ad revenue by keeping users on Google's domains for longer and by compelling demoted firms to pay Google more ad fees to reach users.

In 2007 Google introduced "Universal Search," which presented users with search results that integrated Google's various specialized search services, including Google Images, Google Local, and Google News.[1124] Universal Search was designed to improve users' search experience, as well as to increase traffic to Google's own offerings—even when those offerings weren't the best or most relevant for users.[1125] Google's documents suggest that shortly after launching Universal Search, traffic to Google's own vertical services increased.[1126] Even early in its conception, Google executives were exploring how Universal Search could be used to show a "results page promo" to "bootstrap traffic" to Google's other products.[1127]

[1123] *Id.*

[1124] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-01230600 (Dec. 8, 2004) (on file with Comm.) ("Googlers have long argued for some type of 'universal' search that integrates all of Google's indices, including those that contain different media, like Images, and those that contain structured data, like Local and Froogle"); GOOG-HJC-03815864–65 (Apr. 23, 2010) (noting that universal search marked a shift to "increase our ability to provide new types of media in search results").

[1125] *Id.* at GOOG-HJC-02734893 (Dec. 15, 2006) (introducing Universal Search to help solve the problem that "Google search user experience has been internally and externally perceived as stagnant for the last 7 years").

[1126] *Id.* at GOOG-HJC-03804474 (May 23, 2007) (on file with Comm.) (noting "large increases in absolute coverage for all five purposes," including a 4.5% increase in News and 4% increase in Local Search").

[1127] *Id.* at GOOG-HJC-01230599 (Dec. 8, 2004) (on file with Comm.) ("Including some of Urs ideas around promoting the Labs property on the Google.com results pages for some subset of users ("New! Try your search on the next version of Google"). Urs main concern was that Lab gets limited traffic, and the set of users is not representative of Google's user base. He didn't mind the idea of a Labs launch in principle, but he suggested we show a results page promo for some small percentage of users to bootstrap traffic to the property with a more diverse set of users.").

When Google launched Universal Search, it gave prominent placement to Google's vertical content over superior, more relevant competitors' products. Google's documents show that Google adjusted its search algorithm to automatically elevate the ranking of some of Google's services above those offered by rivals.[1128] These perks are generally not available to competing verticals, placing them at an instant disadvantage.[1129] Given that the likelihood that a user will click on a listing sharply declines with each drop in placement, traffic to rivals demoted by Google has fallen significantly.[1130] The effect is magnified on mobile search, where the small screen means fewer results are displayed on the first page of results.[1131]

In a submission to the Subcommittee, one vertical search provider described the practical effects of Google's discriminatory treatment:

> When the Local OneBox appears on the page, links to [the company's] website with highly relevant [results] get pushed down the page into the lower section for organic search results. This demotion puts [the company] at a competitive disadvantage relative to Google's local search results and jeopardizes the health of [our] business—and this problem is further exacerbated in the growing mobile context where links to [our] website may be pushed off the small screen or the first page of search results altogether. In evaluating options to reduce this harm, [the company] has reached out to Google to explore whether [we] or [our] providers' listings on [our] website could be included in Google's local search results, but Google has either refused outright or taken no steps to allow such inclusion.[1132]

A submission from another vertical search provider stated that once Google began automatically placing its own competing service at the top of its search results page, the vertical provider's organic search traffic fell by approximately 20%.[1133] The vertical provider observed that Google's service is worse for users—showing higher prices and fewer choices than Google's

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[1128] *See, e.g.*, *id.* at GOOG-HJC-01081099 (Oct. 11, 2007) ("We added a "cooccurring sites" signal to bias ourselves towards triggering when a local-oriented aggregator site (i.e. Citysearch) shows up in the web results.").

[1129] Submission from Source 564, to H. Comm. on the Judiciary, 9 (Nov. 13, 2020) (on file with Comm.).

[1130] Matt Southern, *Over 25% of People Click the First Google Search Result*, SEARCH ENGINE J. (July 14, 2020) https://www.searchenginejournal.com/google-first-page-clicks/374516/#close.

[1131] *Why Page 2 of Google Search Results Is the Best Place to Hide a Dead Body*, DIG. SYNOPSIS (Oct. 29, 2019) https://digitalsynopsis.com/tools/google-serp-design/ (stating that the first organic result on the first search engine results page receives around 32.5% of overall click-based traffic, the second result receives around 17.6%, and the seventh receives 3.5%).

[1132] Submission from Source 887, to H. Comm. on the Judiciary, 4 (Oct. 28, 2019) (on file with Comm.).

[1133] Submission from Source 925, to H. Comm on the Judiciary, 11 (Nov. 4, 2019) (on file with Comm.).

competitors.[1134] However, Google continues to give its service top placement, occupying close to 100% of the above-the-fold mobile search results page and around 25% of desktop.[1135]

Additional market participants echoed the view that Google's self-preferencing comes at the expense of users. One search provider stated that Google prohibits it from displaying live prices on Google's results page, even as Google's own competing service is permitted to do so. Stating that there was no pro-competitive justification for this differential treatment, the firm also noted that Google's limits on rival vertical search providers likely prevent consumers from seeing the cheapest or best-valued prices.[1136]

In addition to placing its vertical offerings at the top of the search results page, Google has also actively demoted certain rivals through imposing algorithmic penalties. For example, in 2007 and in 2011, Google launched an algorithm that demoted sites that Google considered "low quality."[1137] Among the websites especially hit were comparison shopping providers, which enable users to compare product offers from multiple merchant websites.[1138] In a submission to the Subcommittee, one publisher stated that Google's algorithmic penalty caused search leads and revenues to its website to fall by 85%.[1139] Kelkoo, previously a leading comparison shopping site, explained that Google's demotion set off a "cyclic trend" whereby a reduction in traffic leads to fewer consumers, which leads to fewer listings and less revenue, which leads to reduced investment—which, in turn, contributes to a further decline in traffic, a "network effect in reverse."[1140]

In external messaging, Google justified the algorithmic penalties it imposed on third-party sites as a response to users' desire to see less "low quality" sites in their search results.[1141] However, Google did not subject its own vertical sites to the same algorithmic demotion, even though Google's vertical services aggregated and copied content from around the web—just like the third-party sites that Google had demoted.[1142] Indeed, Google's documents reveal that employees knew Google's own

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[1134] *Id.*

[1135] *Id.* at 9.

[1136] Submission from Source 3, to H. Comm. on the Judiciary, 32 (Oct. 29, 2019) (on file with Comm.).

[1137] Amit Singhal & Matt Cutts, *Finding more high-quality sites in search*, GOOGLE: OFFICIAL BLOG (Feb. 24, 2011), https://googleblog.blogspot.com/2011/02/finding-more-high-quality-sites-in.html (defining "low-quality sites" as those that are "low-value add for users, copy content from other websites or sites that are just not very useful" and defining "high-quality sites" as "sites with original content and information such as research, in-depth reports, thoughtful analysis and so on").

[1138] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC- 00090248-49 (Jan 27, 2011) (on file with Comm.).

[1139] Submission from Kelkoo, to H. Comm. on the Judiciary, Kelkoo-0032 at 6 (Nov. 4, 2019) (on file with Comm.).

[1140] Submission from Kelkoo, to H. Comm. on the Judiciary, Kelkoo-0006 at 6 (Nov. 4, 2019) (on file with Comm.); Kelkoo-0044 at 19 (Nov. 4, 2019).

[1141] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-00632668 (on file with Comm.).

[1142] *Id.* at GOOG-HJC-02507422 (Apr. 4, 2006) (on file with Comm.) ("Keep in mind that, as we discussed, most of the information that is on pages that we create is aggregated from various sources, and those sources often have that material vertical sites would likely fit the demotion criteria that Google applied to other sites. When one employee suggested that Google index its comparison shopping site, Froogle, another responded that it was unlikely Froogle would get crawled "without special treatment," noting, "We'd probably have to provide a lot of special treatment to this content in order to have it be crawled, indexed, and rank well."[1143]

Despite the fact that Google's own comparison shopping service was of such low quality that Google's product team couldn't even get it indexed, Google continued to give Froogle top placement on its search results page, listing its results in the OneBox, a display box that Google populates with information on its search results page.[1144] Bill Brougher, a product manager, acknowledged that Google was privileging low-quality content, writing:

> Our algorithms specifically look for pages like [Froogle's] to either demote or remove from our index, and there are active projects to improve the integration into web search. The bigger problem these projects have is to improve their own result quality. For instance with Froogle, the onebox trigger is now very good and relevant, but the three results we show from Froogle in that onebox generally rate very low in our search quality evaluation. It is often the same with Local.[1145]

Another Google team member replied: "Yes, you're right that the Onebox result items often stink."[1146] A few years later, a Google employee again acknowledged that if Google ranked its own content according to the same criteria that it applied to competitors, "it will never rank."[1147]

In an interview with Subcommittee staff, one vertical site stated that Google had not only demoted the firm but had at least one instance removed it from Google's index entirely.[1148] The search provider stated that after Google purchased its rival, Google demoted the provider in search rankings while vaulting those of its rival.[1149] The search provider observed that Google's demotions sometimes followed favorable press that highlighted the search provider's popularity with users. "There was an

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online already. Because of this, the search quality team has some concerns as to if/when this Google-created content will be indexed. And once it is indexed, it is unlikely to appear high in the search results.").

[1143] *Id.*

[1144] *Id.*

[1145] *Id.*; *see also* GOOG-HJC-03201904 (Mar. 22, 2006) (on file with Comm.) ("Generally we like to have the destination page in the index, not the aggregated pages. So if our local pages are lists of links to other pages, its [sic] more important that we have the other pages in the index. In addition, our pages would probably not rank well because of this.").

[1146] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-02507420 (Apr. 5, 2006) (on file with Comm.).

[1147] *Id.* at GOOG-HJC-01069289 (May 6, 2009) (on file with Comm.) ("From a principal perspective it would be good if we could actually just crawl our product pages and then have the rank organically. Problem is that today if we crawl it will never rank.").

[1148] Interview with Source 147 (June 2019).

[1149] *Id*.

article that came out in the press that painted [us] in a positive light and quoted an executive noting that [we are] the top result when a user searches [for a particular search term]. The next day, Google de-indexed [us] for [that search term]."[1150]

In July, the *Wall Street Journal* reported that Google also gives preferential treatment to YouTube.[1151] Tests conducted by the *Journal* found that searching Google for videos delivered YouTube in results much more prominently than competing video providers, even when competitor videos had more engagement. Reflecting interviews with those familiar with the matter, the piece stated that Google engineers:

> [M]ade changes that effectively preference YouTube over other video sources. Google executives in recent years made decisions to prioritize YouTube on the first page of search results, in part to drive traffic to YouTube rather than to competitors, and also to give YouTube more leverage in business deals with content providers seeking traffic for their videos." [1152]

In response to Questions for the Record from Subcommittee Chairman David N. Cicilline (D-RI), the company denied that Google Search is designed to favor YouTube. Although Google stated that it disagreed with the methodology used by the *Journal*, Google did not provide the Subcommittee with any data or internal reports that would support its claim.[1153]

Numerous market participants noted that Google's favoring of its own sites and demoting those of third parties has effectively increased their cost of distribution. Since demoted sites can generally only recover traffic through advertising on Google, the platform "essentially requires competitors to pay for their websites to appear above Google's own links," according to one market participant.[1154] Another business recalled that in 2016 Google demoted one of its vertical offerings, citing a policy of diversifying content.[1155] The firm stated that once it was penalized in organic rankings, it "could not get an appropriate customer service response for months" and ultimately "had to increase [marketing spend on Google] to regain lost traffic—a win-win for Google but a loss for [our business] and its users."[1156]

[1150] *Id.*

[1151] Sam Schechner, Kristen Grind & John West, *Searching for Video? Google Pushes YouTube Over Rivals*, WALL ST. J. (July 14, 2020), https://www.wsj.com/articles/google-steers-users-to-youtube-over-rivals-11594745232.

[1152] *Id.*

[1153] Innovation and Entrepreneurship Hearing at 13 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC).

[1154] Submission from Source 3, to H. Comm. on the Judiciary, 32 (Oct. 29, 2019) (on file with Comm.).

[1155] Submission from Source 972, to H. Comm. on the Judiciary, 9 (Dec. 9, 2019) (on file with Comm.).

[1156] *Id.*

Meanwhile, Google's own competing vertical "is always listed at the top" of search results.[1157] The incident highlights how demoting rivals can enrich Google in two ways: first, through diverting greater traffic and business to its own products; and second, through earning ad revenues from the penalized sites that are subsequently scrambling to recover their search placement. When demoting firms that Google views as actual or potential competitive threats, Google is effectively raising rivals' costs.

Another firm noted that demoted vertical providers that go on to buy ads on Google not only feed revenue to a potential or actual competitor in specialized search, but also risk handing Google more commercially sensitive information. The market participant wrote:

> Google thus deceptively siphons internet traffic away from its vertical competitors in online travel and forces them to pay more for [search engine monetization] and [] Ads in order to get meaningful placement on Google's [search engine results page]. Importantly, Google also requires its vertical competitors to provide their inventory feed to populate the ads, allowing Google to appropriate vertical service providers' valuable inventory data.[1158]

A significant number of the website publishers that the Subcommittee interviewed noted the outsized effect that a single algorithmic change by Google can have on their business. Brian Warner, Celebrity Net Worth founder, stated, "All website owners live in constant fear of Google's algorithm updates. Without explanation or recourse, Google can deliver a fatal blow to a website's search ranking visibility."[1159] Foundem, the UK-based comparison shopping site, wrote, "An unjustified Google search penalty, whether imposed anticompetitively or in error, has the power to cause grave and irreparable harm to virtually any online business."[1160]

3) Threatening Innovation and the Open Internet

Through misappropriating third-party content and giving preferential treatment to its own vertical sites, Google abused its gatekeeper power over online search to coerce vertical websites to surrender valuable data and to leverage its search dominance into adjacent markets. Google's conduct both thwarted competition and diminished the incentive of vertical providers to invest in new and innovative offerings.

[1157] *Id.*

[1158] Submission from Source 115, to H. Comm. on the Judiciary, 16 (Oct. 22, 2019) (on file with Comm.).

[1159] Submission from Celebrity Net Worth, to H. Comm. on the Judiciary, 10 (Oct. 14, 2019) (on file with Comm.).

[1160] Submission from Foundem, to H. Comm. on the Judiciary, 42 (Oct. 22, 2019) (on file with Comm.). Foundem was the lead complainant in the European Commission's antitrust investigation and case on Google Shopping.

In an interview with the Subcommittee, one market participant observed that Google's conduct has sapped investment, as "investors don't want to invest in companies that are producing content that relies on Google traffic," resulting in "less capital invested in companies reliant on traffic from Google."[1161] The website noted that Google's business practices have also skewed the website's own investment decisions, leading it to allocate the vast majority of its revenue to creating "news-like temporary content" rather than "evergreen content."[1162] It added, "If we could trust that Google was not engaging in unfair search practices, we would be producing different content."[1163]

A vertical provider, meanwhile, said that Google's conduct had held the firm's growth "at bay" and risks reducing innovation over the long term, as providers whose growth is capped by Google may be more reluctant to invest and expand.[1164] It added:

> Competitors are not the only ones who have a reduced incentive to innovate as a result of Google's conduct. The anticompetitive effects reduce Google's own incentives to improve the quality of its services, because it does not need to compete on the merits with rival services.[1165]

To illustrate this point, Yelp offers a contrast between its own efforts to maintain high-quality user reviews and Google's efforts. It states that of the approximately 150 million user reviews submitted to Yelp since 2005, Yelp has displayed only 72% of them to users, while flagging 21% as "not recommended."[1166] Yelp cites investment research noting that Google, by contrast, does not invest in curating its reviews: "25% of Google's reviews have zero characters and are simply Netflix-style one-click star ratings from which the user can derive few, if any, insights about the trustworthiness of the submission."[1167]

Several market participants told the Subcommittee that Google's business practices in online search have already foreclosed opportunity. In a submission, Celebrity Net Worth founder Brian Warner wrote:

> It is my view that Google has removed essentially all of the oxygen from the open internet ecosystem. There is no longer any incentive or even basic opportunity to innovate as I did back in 2008. If someone came to me with an idea for a website or a

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[1161] Interview with Source 507 (July 10, 2019).

[1162] *Id*.

[1163] *Id*.

[1164] Submission from Source 564, to H. Comm. on the Judiciary, 4 (Nov. 13, 2019) (on file with Comm.).

[1165] *Id*.

[1166] PIPERJAFFRAY, INTRODUCING REVIEW GROWTH FOR YELP VS. GOOGLE PLUS, (Apr. 16, 2014) (on file with Comm.).

[1167] *Id*.

web service today, I would tell them to run. Run as far away from the web as possible. Launch a lawn care business or a dog grooming business—something Google can't take away as soon as he or she is thriving.[1168]

More broadly, market participants expressed concern that Google has evolved from a "turnstile" to the rest of the web to a "walled garden" that increasingly keeps users within its sites.[1169] Many observers have noted that when Google filed its initial public offering, Google co-founder Larry Page identified the company's mission as the following: "We want you to come to Google and quickly find what you want…We want you to get you out of Google and to the right place as fast as possible."[1170] In recent years, however, studies have shown that more than half of all queries on Google either terminate on Google or result in a click to Google's own properties—a share that is growing over time.[1171] In July, *The Markup* published results showing that Google allocated 41% of the first search results page on mobile devices to Google's own content."[1172]

On several occasions over the course of the investigation, Subcommittee Chairman David N. Cicilline (D-RI) asked Google about this trend.[1173] At the Subcommittee's July 16, 2019 hearing, Google's Director of Economic Policy, Adam Cohen, stated that Google's goal is "to provide users information as quickly and efficiently as possible," adding that he was "not familiar" with studies showing that a majority of queries now terminate on Google.[1174] In its July 26, 2019 response to a follow-up letter from Chairman Cicilline, Google wrote that it strives to "give users the most relevant, highest quality information as quickly as possible," a goal that Google claims is "[c]onsistent with Mr. Page's comments in 2004."[1175] When asked whether it was true that less than 50% of all searches on Google resulted in clicks to non-Google websites, Google responded that it "has long sent large

[1168] Innovation and Entrepreneurship Hearing at 6 (statement from Brian Warner, Founder, Celeb. Net Worth).

[1169] *See, e.g.*, Submission from Source 972, to H. Comm. on the Judiciary, 9 (Dec. 9, 2019) (on file with Comm.) ("As opposed to cataloguing the internet and sending travelers to the most relevant websites, Google is instead creating a walled garden, using its place at the top of the internet funnel to ensure that the majority of users transact on Google's own pages and products.").

[1170] Google Inc., Registration Statement, (Form S-1) B-6 (2004), https://www.sec.gov/Archives/edgar/data/1288776/000119312504139655/ds1a.htm .

[1171] Rand Fishkin, *Less Than Half of All Google Searches Now Result in a Click*, SPARKTORO (Aug. 13, 2019), https://sparktoro.com/blog/less-than-half-of-google-searches-now-result-in-a-click/.

[1172] Adrianne Jeffries & Leon Yin, *Google's Top Search Result? Surprise! It's Google*, THE MARKUP (July 28, 2020), https://themarkup.org/google-the-giant/2020/07/28/google-search-results-prioritize-google-products-over-competitors.

[1173] *See, e.g.*, Innovation and Entrepreneurship Hearing at 38–40 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC); CEO Hearing Transcript at 1 (response to Questions for the Record from Sundar Pichai, CEO, Alphabet Inc.).

[1174] Innovation and Entrepreneurship Hearing at 38–40 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC); 42 (statement of Adam Cohen, Dir. of Econ. Pol'y, Google LLC).

[1175] Letter from Kent Walker, Senior Vice Pres., Global Affairs & Chief Legal Officer, Google, to Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 1 (July 26, 2019).

amounts of traffic to other sites."[1176] In response to the Subcommittee's request for query metrics that would document the underlying trends, however, Google did not produce the relevant data.[1177]

Several enforcement bodies have examined these business practices. Between 2011 and 2013, the Federal Trade Commission pursued an inquiry into Google's data misappropriation and self-preferencing, among other conduct. Staff at the Bureau of Competition concluded that "the natural and probable effect" of Google's misappropriation was "to diminish the incentives of vertical websites to invest in, and to develop, new and innovative content."[1178] On Google's self-preferencing, staff concluded that Google's conduct had "resulted in anticompetitive effects,"[1179] but that Google had offered "strong procompetitive justifications."[1180] In 2017, the European Commission concluded that Google's self-preferencing in comparison shopping services constituted an illegal abuse of dominance and ordered Google to implement a remedy of "equal treatment."[1181] The European Commission stated that Google had not "provided verifiable evidence to prove that its conduct is indispensable" to any procompetitive effects.[1182]

ii. Google Increased Prices for Market Access and Degraded Search Quality

In 2000, Google launched AdWords, which allowed advertisers to pay for keyword-based ads that would appear to the right of Google's search results.[1183] In the years since, Google has changed the display of the ads on its search engine results page in several ways, most notably by (1) increasing the number of ads placed above organic search results, and (2) blurring the distinction between how ads and organic listings are presented on Google's search results page. These changes have effectively raised the price that businesses must pay to access users through Google. Market participants told the Subcommittee that Google's conduct has undermined competition, misled consumers, and degraded the overall quality of Google's search results—all while enabling Google to further exploit its monopoly over general online search.

[1176] *Id.* at 2.

[1177] In a September 2020 response to Chairman Cicilline on this same question, Google disputed Fishkin's analysis of the data. Google wrote "The fact that a user does not click on a link on a Google Search results page does not mean that the user has been "kept" on Google properties. Searches on Google may result in zero website clicks for many reasons, which is not discernable without directly asking the user why they did not click a link." CEO Hearing at A-2 (response to Questions for the Record of Sundar Pichai, CEO, Alphabet Inc.).

[1178] FED. TRADE COMM'N, THE FTC REPORT ON GOOGLE'S BUSINESS PRACTICES iii (Aug. 8, 2012), in WALL ST. J. (Mar. 24, 2015), http://graphics.wsj.com/google-ftc-report/.

[1179] *Id*. at 80.

[1180] *Id*. at 86.

[1181] Google Search (Shopping) Comm'n Decision at para. 671.

[1182] Summary of Google Search (Shopping) Comm'n Decision at O.J. C 9/13, para. 26 (Dec. 1, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0112(01)&from=EN.

[1183] Press Release, Google, Google Launches Self-Service Advertising Program (Oct. 23, 2000), http://googlepress.blogspot.com/2000/10/google-launches-self-service.html.

Google's clear dominance in online search also gives it significant control over the search advertising market. Publicly available data suggests Google captured around 73% of the search advertising market in 2019.[1184] Submissions from market participants show that many firms spend the vast majority of their ad budgets on Google. For example, one major vertical provider spent significantly more than half of its total ad spend on Google each year from 2016 to 2019, with the second top provider receiving less than 15%.[1185] Public reporting suggests that, as of 2019, Google had increased the price of search ads by about 5% per year, exceeding the U.S. inflation rate at that time of 1.6%.[1186]

Several market participants told Subcommittee staff that their ad spend on Google has increased in large part because Google has made it more difficult for businesses to obtain organic traffic. Partly this follows from Google's preferencing of its own products, which compels demoted firms to pay Google for ad placement as a way to regain visibility. Another notable factor has been Google's decision to increase the number of ads posted above organic search results.

Prior to 2016, Google's design of its search results page placed 8 ads to the right of organic search listings and 3 ads above them.[1187] Google's internal communications show that, as of 2011, the rate of user engagement with right-hand side ads was declining.[1188] Since Google made money from search ads only when users clicked on them, less user engagement meant those ads were becoming less valuable to Google. In February 2011, Sridhar Ramaswamy, senior vice president of ads at Google, noted that "users are no longer looking at the [right-hand side ads]," and stated that Google either needed to "retrain people to look there by putting really good stuff there," or "live with the fact that users are going to stop looking there."[1189] By August 2011, a team at Google known as "Project

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[1184] Submission from Source 115, to H. Comm. on the Judiciary, 6 (Oct. 22, 2019) (on file with Comm.) (citing Megan Graham, *Amazon Is Eating into Google's Most Important Business: Search Advertising,* CNBC (Oct. 15, 2019), https://www.cnbc.com/2019/10/15/amazon-is-eating-into-googles-dominance-in-search-ads.html).

[1185] Submission from Source 3, to H. Comm. on the Judiciary, 8 (Oct. 29, 2019) (on file with Comm.).

[1186] Alistair Barr & Garrit De Vynck, *Airlines, Hotels and Other Brands Are Tired of Paying Google for Their Own Names,* BLOOMBERG (Mar. 9, 2019); *see also* Mark Irvine, *Average Cost per Click by Country: Where in the World Are the Highest CPCs?,* WORDSTREAM BLOG (Nov. 8, 2018) https://www.wordstream.com/blog/ws/2015/07/06/average-cost-per-click (showing that the cost-per-click that Google charges search advertisers in the United States is notably higher than the rate it charges in countries where Google faces more competition).

[1187] Dr. Peter J. Meyers, *Four Ads on Top: The Wait Is Over*, MOZ (Feb. 19, 2016), https://moz.com/blog/four-ads-on-top-the-wait-is-over.

[1188] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-02981172–73 (Aug. 12, 2011) (on file with Comm.) ("RHS CTR has been steadily dropping over time to today's level…For the best ads on the RHS, some indication that CTR is lower than quality would suggest it should be"); GOOG-HJC-02983169–93 (Aug. 12, 2011) (stating that RHS is 16.5% of search revenue, 26% of queries have a RHS ad, and "Opportunity is accelerating due to declining RhsCTR").

[1189] *Id.* at GOOG-HJC-02983830 (Feb. 16, 2011).

Manhattan" was working on a redesign of Google's desktop search results page that focused on reducing or eliminating right-hand side ads.[1190]

In 2016, Google rolled out the redesigned page, which eliminated the right-hand side ads while adding a fourth ad above organic listings and 3 at the bottom of the page.[1191] The practical effect of adding a fourth ad at the top of the search results page was to push organic listings further down, requiring users to scroll down further before reaching a non-paid result. According to *Bloomberg*, when Google tested the addition of a fourth ad, some employees objected on the grounds that the fourth ad would be of lower quality than the first organic result, but Google altered the search results page anyway.[1192]

Google's decision to monetize a fourth ad at the expense of an organic listing fits a broader pattern of steps taken by Google to rank search results based on what is best for Google, rather than what is best for search users—be it preferencing its own vertical sites or allocating more space for ads. Several market participants noted that Google could afford to make these changes only once it had achieved a dominant position in the market for general search and search advertising.[1193] Now that Google is "unconstrained by competitors," one market participant noted, it "consistently reserves the top of the [search engine results page] for its own vertical products or advertisements paid for through search engine marketing, pushing its rivals' organic results to the bottom, regardless of how relevant or useful they might be."[1194]

Internal data shown by one market participant to the Subcommittee demonstrates that "organic search listings have been pushed down over time, and 'click-throughs' (clicking to visit a site) on the first organic results have decreased by two-thirds over the past 3 years."[1195] The market participant's analysis also shows that the first organic listing on mobile now appears on the bottom of the third search results screen, which "effectively forces advertising customers to bid for a paid advertisement listing if they want their service or product to meaningfully reach consumers in a mobile search."[1196]

[1190] *Id.* at GOOG-HJC-00482674–76 (Aug. 18, 2011).

[1191] Matt McGee, *Confirmed: Google To Stop Showing Ads On Right Side Of Desktop Search Results Worldwide*, SEARCH ENGINE LAND (Feb. 19, 2016), https://searchengineland.com/google-no-ads-right-side-of-desktop-search-results-242997.

[1192] Gerrit De Vynck, *Google Search Upgrades Make It Harder for Websites to Win Traffic*, BLOOMBERG (July 13, 2020) https://www.bloomberg.com/news/articles/2020-07-13/how-google-search-changes-make-it-more-expensive-to-win-traffic.

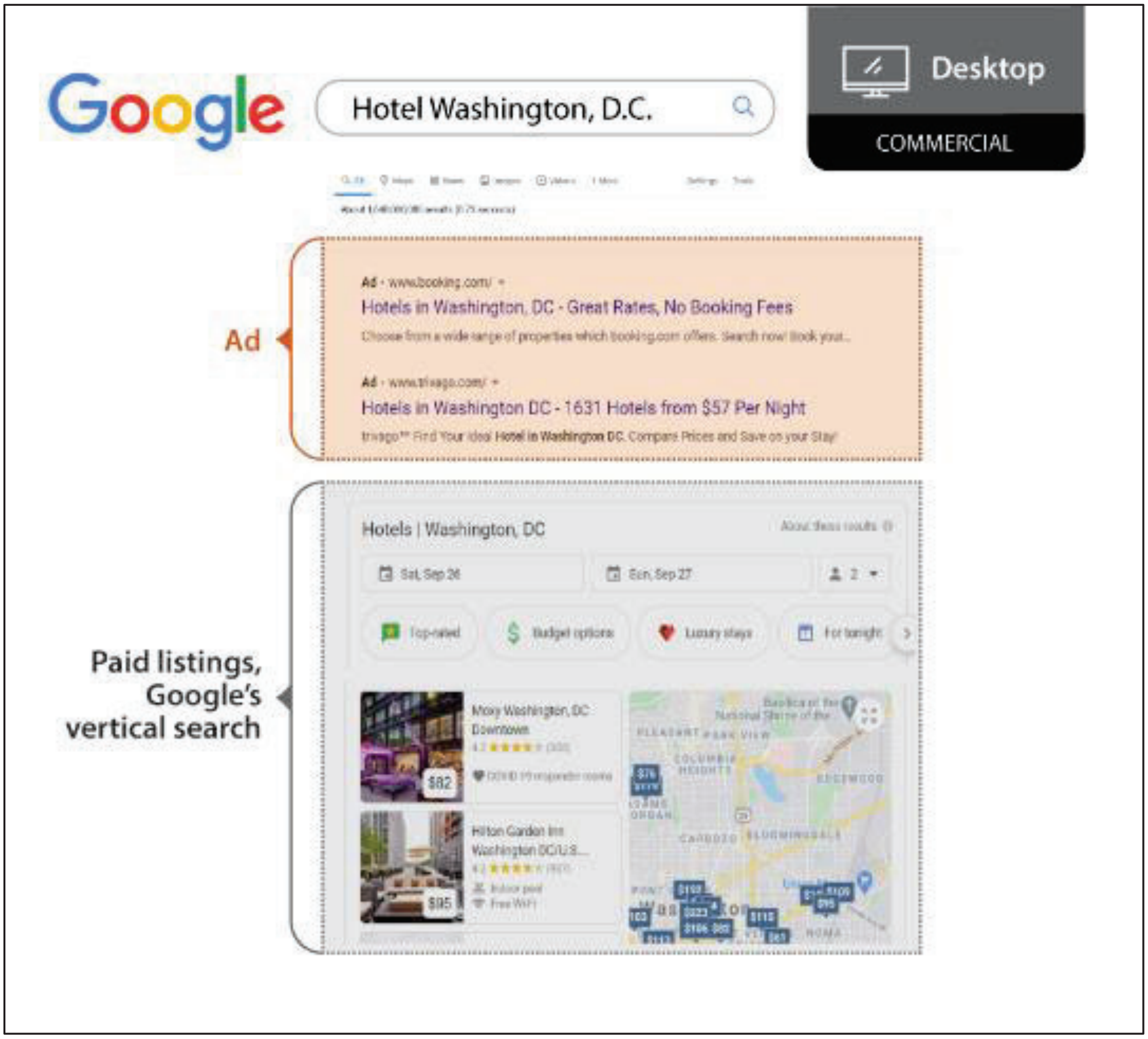
[1193] *See, e.g.*, Submission from Source 972, to H. Comm. on the Judiciary, 14 (Dec. 9, 2019) (on file with Comm.); Submission from Source 115, to H. Comm. on the Judiciary, 10 (Oct. 22, 2019) (on file with Comm.); Submission from Source 3, to H. Comm. on the Judiciary, 34 (Oct. 29, 2019) (on file with Comm.); Competitors Hearing at 3 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp).

[1194] Submission from Source 972, to H. Comm. on the Judiciary,14 (Dec. 9, 2019) (on file with Comm.).

[1195] Submission from Source 3, to H. Comm. on the Judiciary, 33 (Oct. 29, 2019) (on file with Comm.).

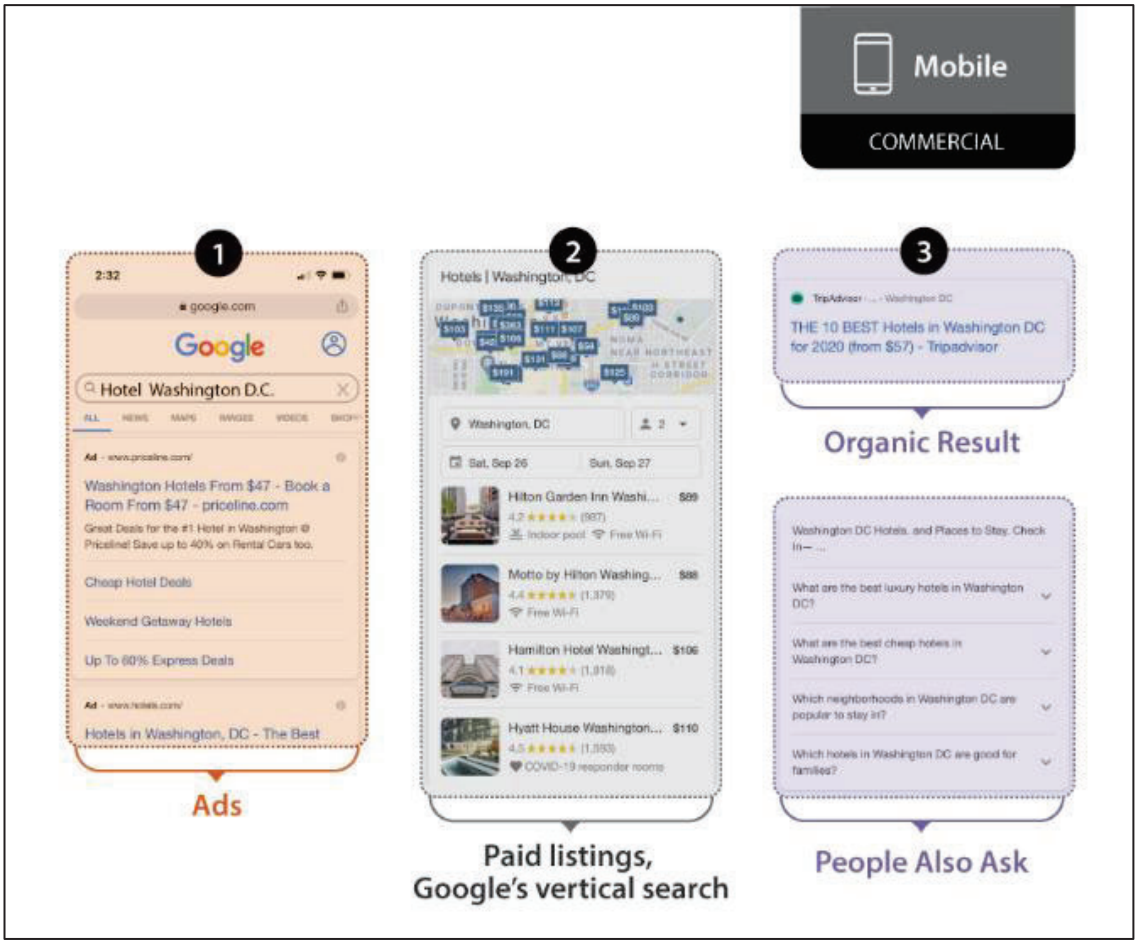
[1196] *Id.*

Google Search on Desktop Ad Placement[1197]



[1197] Prepared by the Subcomm.

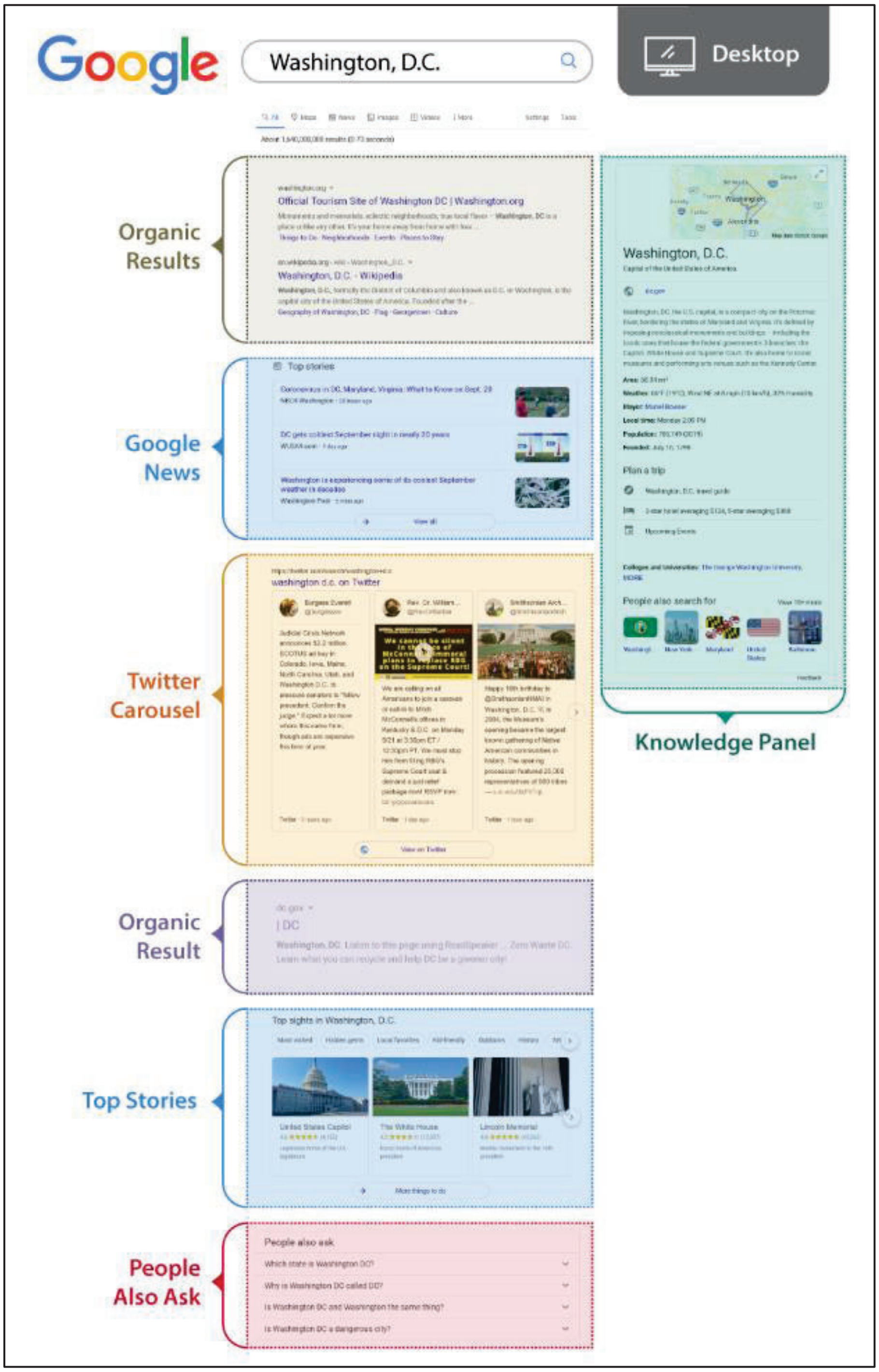
Google Search on Mobile Phone[1198]



[1198] Prepared by the Subcomm.

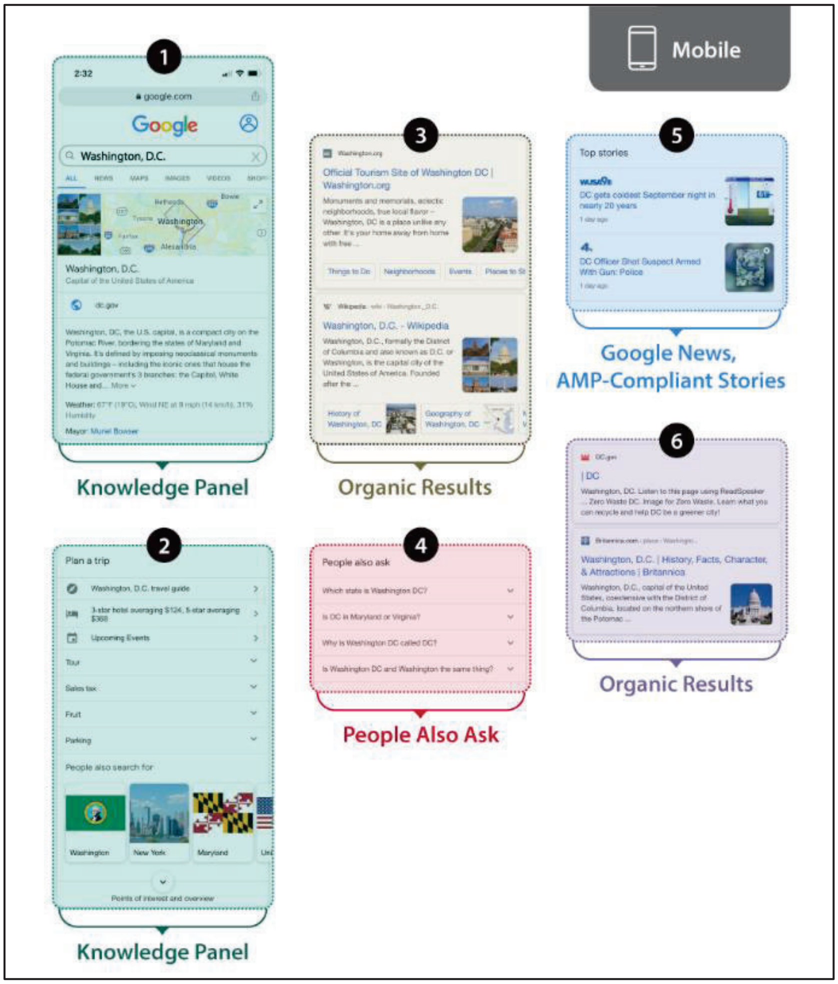
AR_003490

Google Search on Desktop[1199]



[1199] Prepared by the Subcomm.

Google Search on Mobile Phone[1200]



One result of these changes is that users click less on organic search results. As Google has reduced the share of top real estate that it devotes to organic listings, studies show that organic click-through as a share of all click-through plus zero-click searches has fallen.[1201] According to an analysis by Rand Fishkin, the trend is especially pronounced in mobile, where organic click-through rates fell by more than 30% between January 2016 and June 2019, while paid click-through rates over that same period more than tripled.[1202]

For businesses that depend on Google to reach users, these trends amount to a toll hike, as traffic that firms could previously draw through organic listings is now increasingly pay-for-play. Instead of competing for users by offering high-quality webpages and services that should lead to

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[1200] Prepared by the Subcomm.

[1201] Rand Fishkin, *Less than Half of Google Searches Now Result in a Click*, SPARKTORO (Aug. 13, 2019) https://sparktoro.com/blog/less-than-half-of-google-searches-now-result-in-a-click/.

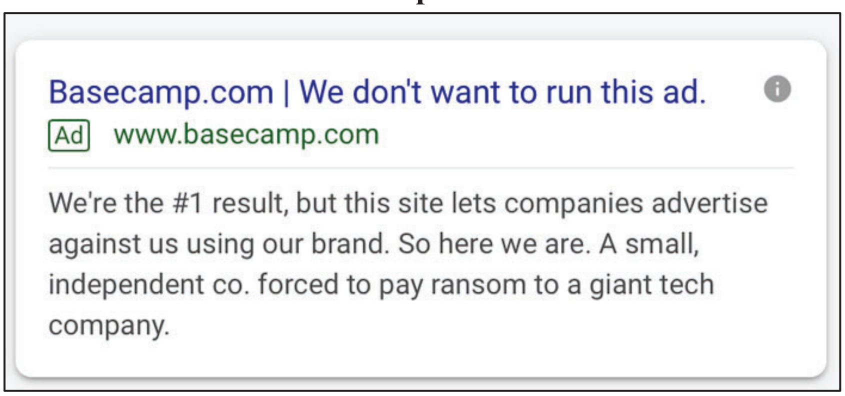
[1202] *Id.* (showing organic fell from 41.1% in January 2016 to 26.68% in June 2019, a period over which paid click-through rates increased from 3.29% to 11.38%).

better organic search listings, these businesses must now compete for users based on how much money they pay Google. Several market participants analogized Google to a gatekeeper that is extorting users for access to its critical distribution channel.

At the Subcommittee's January 2020 field hearing in Colorado, David Heinemeier Hansson, chief technology officer and co-founder of Basecamp, testified that Google's decision to increase the number of ads listed above organic search results has hurt search users.[1203] Expanding on his criticism, Hansson stated that Google's decision to sell ad placement against a company's brand names is another way that Google extracts revenue from dependent businesses.

Hansson said, "Google uses this monopoly to extort businesses like ours to pay for the privilege that consumers who search for our trademarked brand name can find us because if we don't they will sell our brand name as misdirection to our competitors."[1204] He noted that while Google purports to recognize trademark law by prohibiting the use of trademark terms in ad copy, Google "puts the onus of enforcement on victims and does nothing to stop repeat offenders, unless, of course, the trademark terms are belonging to Google itself."[1205] Hansson added, "You will find no competitor ads for any of Google's own important properties."[1206]

Basecamp's Ad[1207]



Other market participants generally echoed these views in submissions to the Subcommittee. One wrote that Google "effectively forces its advertising customers to pay for the ability to reach

[1203] Competitors Hearing Transcript at 62 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp) ("Today, if a consumer goes to Google on their mobile device and search [sic] for Basecamp, the first thing that they will find is whoever bought that trademark term, which is usually one of our competitors. Ergo, consumers are not finding what they are looking for . . . . They are being presented with an ad and that is the tollbooth that [Google is] erecting.").

[1204] *Id.* at 23.

[1205] *Id.*

[1206] *Id.*

[1207] Jason Fried (@jasonfried), TWITTER (Sep. 3, 2019, 4:39 PM), https://twitter.com/jasonfried/status/1168986962704982016?lang=en.

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consumers who are searching specifically for the customer's brand."[1208] The business added, "Facing no remotely comparable advertising and search engine alternative, Google has the ability to charge potentially inflated prices for its advertising services by forcing customers to increase their bids in order to receive a more favorable position."[1209]

A second factor that several third parties cited as contributing to both higher ad prices and the degradation of search for users is Google's effort over the years to blur the distinction between organic listings and paid ads.

Google's Ad Shading and Labeling: 2007–2013[1210]

The diagram above depicts Google's practice between 2007 and 2013 of labeling its paid ads with a shaded background. As shown below, in 2013, Google abandoned the shaded background and instead inserted a small yellow square that states "Ad." Since 2016, Google has made various changes that make ads more subtle, culminating in a label that renders the overall appearance of paid ads much more similar to organic listings. Market participants have noted that Google also neglects to label some

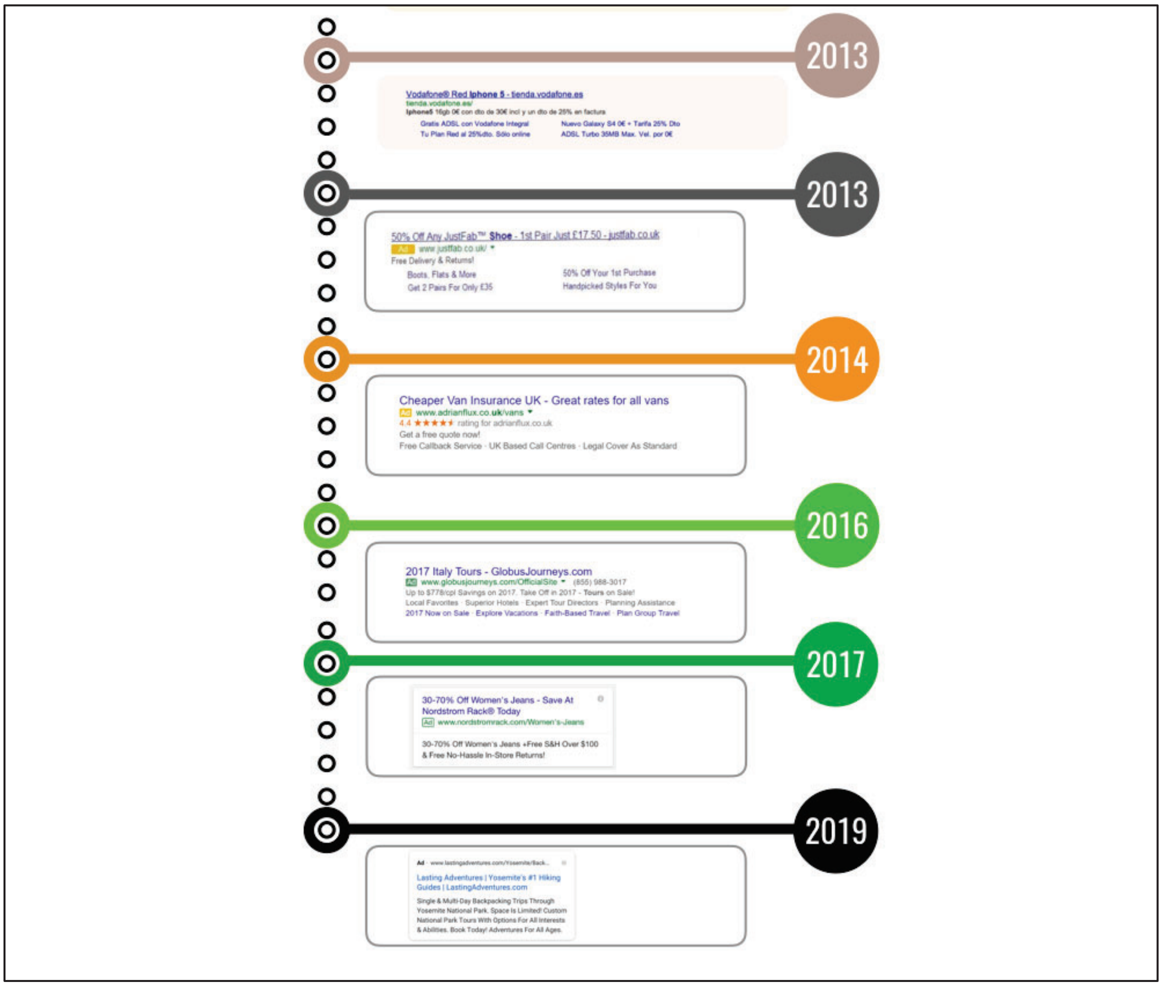
[1208] Submission from Source 3, to H. Comm. on the Judiciary, 32 (Oct. 29, 2019) (on file with Comm.).

[1209] *Id.*

[1210] Ginny Marvin, *A Visual History of Google Ad Labeling in Search Results,* SEARCH ENGINE LAND, (Jan. 28, 2020). https://searchengineland.com/search-ad-labeling-history-google-bing-254332.

paid ads entirely, particularly those that appear in Google's vertical search offerings, such as listings for hotels that appear alongside maps.[1211]

Google's Ad Shading and Labeling: 2013–2019[1212]



The natural result of Google's decision to blur the distinction between paid ads and organic listings is that users click on more ads and less organic search results. This misleading practice has likely contributed to the growth of paid click-through rates on Google. One study found that over 59% of consumers were not aware of the difference between organic results and paid ads on Google, and about 34% of those who did recognize paid ads said they would deliberately avoid clicking on them.[1213] The Federal Trade Commission has recognized that search engines that fail to "prominently

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[1211] *Google Hotel Ads*, GOOGLE, https://ads.google.com/hotels/ (last visited Oct. 5, 2020) (offering paid listings to hotels, but neglecting to designate these listings as "ads" on the search results page).

[1212] Ginny Marvin, *A Visual History of Google Ad Labeling in Search Results,* SEARCH ENGINE LAND, (Jan. 28, 2020). https://searchengineland.com/search-ad-labeling-history-google-bing-254332.

[1213] Mark Jones, *Two-thirds of people don't know the difference between Google paid and organic search results,* MARKETING TECH NEWS (Sept. 6, 2018) https://marketingtechnews.net/news/2018/sep/06/two-thirds-people-dont-know-difference-between-google-paid-and-organic-search-results/.

distinguish" paid ads from organic listings could be liable for deceiving consumers under Section 5 of the FTC Act.[1214]

Making ads less conspicuous makes it more likely that users will unwittingly click on them. Market participants note that, like Google's decision to increase the number and prominence of paid ads, Google's decision to blur the distinction between paid listings and organic results deceives consumers and compels businesses to purchase ads from Google in order to be located by users.[1215]

In submissions and interviews with Subcommittee staff, businesses noted that higher advertising costs come at the expense of investments in innovation and consumer benefits.[1216] One vertical search provider stated:

> If the search market were fair, the internet would have four times more content on it, dramatically improving the web for consumers. Google's gatekeeper power allows it to show more advertisements for search queries with higher commercial intent. . . . The harm to consumers is not necessarily a lack of content, but a lack of quality content (requiring money to produce).[1217]

At the Subcommittee's January 2020 field hearing, Hansson testified that Google's conduct, which harms business customers and users alike, is enabled by its dominance:

> Google's monopoly on internet search must be broken up for the sake of a fair marketplace. Google would never be able to get away with such a user-hostile design as showing a full-page ad for something other than what you were searching for, if it had real competition. They would never have been able to establish their monopoly if this had been the design from the get-go. These are the monopoly spoils of complete domination.[1218]

At the Subcommittee's sixth hearing, Subcommittee Chairman David N. Cicilline (D-RI) noted that Google's search results page now features more ads and more of Google's own sites and asked

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[1214] Letter from Mary K. Engle, Assoc. Dir. for Advert. Practices, Fed. Trade Comm'n (June 24, 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf.

[1215] Submission from Source 115, to H. Comm. on the Judiciary, 10-12 (Oct 22, 2019) (on file with Comm.); Submission from Source 972, to H. Comm. on the Judiciary, 21 (Dec. 9, 2019) (on file with Comm.); Submission from Source 3, to H. Comm. on the Judiciary (Oct. 29, 2019) (on file with Comm.).

[1216] Submission from Source 3, to H. Comm. on the Judiciary 32 (Oct. 29, 2019) (on file with Comm.).

[1217] Interview with Source 507 (July 10, 2019).

[1218] Competitors Hearing at 7 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp).

Google CEO Sundar Pichai whether this trend highlights a misalignment of Google's incentives.[1219] He asked, "Isn't there a fundamental conflict of interest between serving users who want to access the best and most relevant information and Google's business model, which incentivizes Google to sell ads and keep users on Google's own sites?"[1220] In response, Mr. Pichai stated that Google has "always focused on providing users the most relevant information," and stated that Google shows ads "only for a small subset of queries where the intent from users is highly commercial."[1221] However, Mr. Pichai did not explain why the percentage of queries for which Google shows ads would implicate whether or not Google's business model compromises the integrity of its search results. Google also failed to produce data that would enable the Subcommittee to make an independent assessment of Pichai's assertion.

3. Digital Advertisements

a. Overview and Dominance

Google makes the vast majority of its revenue by selling advertising placement across the internet. In 2019, Google's ad revenue accounted for approximately 83.3% of Alphabet's overall sales.[1222] Google is a prominent player in both search advertising and digital display advertising, and it captures over 50% of the market across the ad tech stack, or the set of intermediaries that advertisers and publishers must use to buy, sell, and place ads. Specifically, Google runs the leading ad exchange, while also running buy-side and sell-side intermediary platforms trade on the exchange.[1223]

Internationally, antitrust enforcers are currently investigating Google's dominance in digital advertising, including the United Kingdom's Competition and Markets Authority (CMA),[1224] and the Australian Competition and Consumer Commission (ACCC).[1225] In July 2020, the CMA concluded

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[1219] CEO Hearing Transcript at 37 (question of Rep. David N. Cicilline (D-RI), Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm on the Judiciary); Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-01099375 (Mar. 30, 2012) (on file with Comm.); Sergey Brin & Larry Page, *The Anatomy of a Large-Scale Hypertextual Search Engine*, http://infolab.stanford.edu/~backrub/google.html (expressing reservations about an ad-based business model, noting that "the goals of the advertising business model do not always correspond to providing quality search to users," and given the conflicting motives that a search engine might face between serving users the most relevant information and selling more ads, arguing that "advertising funded search engines will be inherently biased towards the advertisers and away from the needs of the consumers.").

[1220] CEO Hearing Transcript at 37 (question of Rep. David N. Cicilline (D-RI), Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1221] *Id.* (statement of Sundar Pichai, CEO, Alphabet Inc.); Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-01099375 (Mar. 30, 2012) (on file with Comm.).

[1222] Alphabet Inc., Annual Report (Form 10-K) 10 (Feb. 3, 2020), https://www.sec.gov/Archives/edgar/data/1652044/000165204420000008/goog10-k2019.htm.

[1223] Competition & Mkts. Auth. Report at 10.

[1224] *Id.*

[1225] *See generally* Austl. Competition & Consumer Comm'n Report.

that Google has "significant market power" in search advertising and its market power had enabled it to charge prices 30-40% higher than those set by Bing.[1226] In September 2020, the Senate Judiciary Committee held a hearing on the effects of Google's dominance in digital ads, where members expressed bipartisan concern that Google's market power across the ad tech stack was enabling anticompetitive conduct and harming publishers and advertisers alike.[1227] Lastly, public reports note that both the Justice Department and several state attorney generals are investigating Google's market power and conduct in digital ads, with reports that a lawsuit may be imminent.[1228] In light of the extensive attention already given to this issue, a comprehensive examination of the digital advertising market is beyond the scope of this Report.

Market participants and Google's documents suggest that Google is likely to maintain its lead in search and display advertising due to high entry barriers. Most critically, as other sections of this Report found, Google can mine its ecosystem—including Search, Chrome, Android, and Maps—to combine a unique set of user data points and build troves of online behavioral data that drive its ad business. Furthermore, its dominance across markets increasingly enables Google to set the terms of commerce. One third party described:

> Google is now not only a seller and broker of digital advertising across the Internet, but they now also control significant portions of the web browsers, operating systems, and platforms upon which these digital ads are delivered. This gives Google the ability to single-handedly shift an entire ecosystem in nearly any direction they decide, based simply on their scale. Google can then use its dominance to demand a higher share of ad revenues from buyers and sellers, and there is little leverage available to counteract this position in a negotiation.[1229]

One key factor that market participants and industry experts cite when accounting for why Google is likely to maintain its dominance in digital ads is its conflict of interest. With a sizable share in the ad exchange market, ad intermediary market, and as a leading supplier of ad space, Google simultaneously acts on behalf of publishers and advertisers, while also trading for itself—a set of conflicting interests that market participants say enable Google to favor itself and create significant information asymmetries from which Google benefits.[1230] At the Subcommittee's sixth hearing,

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[1226] Competition & Mkts. Auth. Report at 211.

[1227] *Stacking the Tech: Has Google Harmed Competition in Online Advertising? Hearing Before S. Subcomm. on Antitrust and Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. (2019).

[1228] Sara Forden & David McLaughlin, *DOJ Scrutinizes Google Advertising, Search in Antitrust Probe*, BLOOMBERG (Aug. 8, 2019), https://www.bloomberg.com/news/articles/2019-08-08/doj-scrutinizes-google-advertising-search-in-antitrust-probe.

[1229] Submission from Source 688, to H. Comm. on the Judiciary, 2 (Oct. 24, 2019) (on file with Comm.).

[1230] Dina Srinivasan, *Why Google Dominates Advertising Markets*, 24 STAN. TECH. L. REV. (forthcoming 2020) (manuscript at 10–11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500919.

Representative Pramila Jayapal (D-WA) questioned Google CEO Sundar Pichai about this conflict of interest:

> So [Google is] running the marketplace, it's acting on the buy side, and it's acting on the sell side at the same time, which is a major conflict of interest. It allows you to set rates very low as a buyer of ad space from newspapers, depriving them of their ad revenue, and then also to sell high to small businesses who are very dependent on advertising on your platform. It sounds a bit like a stock market, except, unlike a stock market, there's no regulation on your ad exchange market.[1231]

Mr. Pichai responded by citing the sums that Google has paid to publishers, describing it as a "low-margin business" for Google that it pursues "because we want to help support publishers."[1232] Google's overall margins have averaged over 20% for nine of the last ten years.[1233]

b. Merger Activity

Google came to control a sizable market share across the ad tech stack through acquisitions. Google acquired DoubleClick in 2007 for $3.1 billion.[1234] At the time of the acquisition, *The New York Times* described DoubleClick as a "Nasdaq-like exchange for online ads," and Google's own early description of DoubleClick describes it as "a stock exchange," such as "the NYSE."[1235] Google purchased DoubleClick to enter the display advertising market, a segment that Google's internal documented calculated at around $4.3 billion in 2006—and an area where Google at the time noted it "has no meaningful presence."[1236] A presentation from July 2006 included a slide titled "Build a Self-Reinforcing Online Ads Ecosystem," which noted that acquiring DoubleClick or Atlas could create these "self-reinforcing benefits" for Google's ecosystem.[1237] The slide asked, "[I]s there some framework we have to demonstrate the synergies/inter-relationships from owning all these pieces?"[1238] Nine months later, Google announced its bid to buy DoubleClick.

[1231] CEO Hearing Transcript at 169 (Rep. Pramila Jayapal (D-WA), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm on the Judiciary).

[1232] *Id*. at 170.

[1233] Data compiled by Cong. Research Serv. (on file with Comm.).

[1234] Louise Story & Miguel Helft, *Google Buys DoubleClick for $3.1* Billion, N.Y. TIMES (Apr. 14, 2007), https://www.nytimes.com/2007/04/14/technology/14DoubleClick.html.

[1235] *Id*. *See also The DoubleClick Ad Exchange,* GOOGLE, https://static.googleusercontent.com/media/www.google.com/en//adexchange/AdExchangeOverview.pdf.

[1236] Submission from Google, to H. Comm. on the Judiciary, GOOG-HJC-04189346 (July 26, 2006) (on file with Comm.).

[1237] *Id.* at GOOG-HJC-04189347.

[1238] *Id*.

When reviewing the deal, the Federal Trade Commission assessed both horizontal and non-horizontal theories of harm and noted that, prior to announcing the acquisition, Google had been planning to enter the market and compete against DoubleClick directly.[1239] Ultimately the Commission concluded that the display advertising market was highly competitive, and therefore the loss of Google's potential entry would not be competitively significant.[1240] Examining the potential effects of the deal on privacy, the FTC said it found no evidence that competition between Google and DoubleClick affected their respective privacy policies.[1241] In December 2007, the FTC approved the acquisition.[1242]

In 2010, Google acquired AdMob, the leading mobile ad network at the time. In the FTC's approval of the merger, it stated that "the combination of the two leading mobile advertising networks raised serious antitrust issues," but that these concerns were "overshadowed by recent developments in the market, most notably a move by Apple Computer Inc. – the maker of the iPhone – to launch its own competing mobile ad network."[1243] The Commission's assumption that Apple would continue to build its presence in the mobile ad market prompted it to approve the deal.[1244] In the coming years, however, Apple's product never fully took off and in 2016, Apple abandoned the effort completely.[1245]

In 2011 Google also acquired AdMeld, a leading supply-side platform.[1246] The Justice Department's Antitrust Division investigated the acquisition and concluded that the deal was "unlikely to cause consumer harm."[1247]

[1239] Press Release, Fed. Trade Comm'n, Federal Trade Commission Closes Google/DoubleClick Investigation (Dec. 20, 2007), https://www.ftc.gov/news-events/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation.

[1240] *Id.*

[1241] *Id.*

[1242] *Id.*

[1243] Press Release, Fed. Trade Comm'n, FTC Closes its Investigation of Google AdMob Deal (May 21, 2010), https://www.ftc.gov/news-events/press-releases/2010/05/ftc-closes-its-investigation-google-admob-deal.

[1244] *Id.*

[1245] *About the iAd App Network Shutdown*, APPLE DEVELOPER (Dec. 31, 2016), https://developer.apple.com/support/iad/.

[1246] Press Release, Fed. Trade Comm'n, FTC Closes its Investigation of Google AdMob Deal (May 21, 2010), https://www.ftc.gov/news-events/press-releases/2010/05/ftc-closes-its-investigation-google-admob-deal.

[1247] Press Release, U.S. Dep't of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Admeld Inc. (Dec. 2, 2011) https://www.justice.gov/opa/pr/statement-department-justices-antitrust-division-its-decision-close-its-investigation-google.

c. Conduct

i. Combination of Data

When Google purchased DoubleClick, it told Congress and the FTC that it would not combine the data collected on internet users via DoubleClick with the data collected throughout Google's ecosystem.[1248] In 2016, however, Google reversed this commitment and subsequently combined DoubleClick data with personal information collected through other Google services—effectively combining information from a user's personal identity with their location on Google Maps, information from Gmail, and their search history, along with information from numerous other Google products. At the Subcommittee's sixth hearing, Representative Val Demings (D-FL) asked Mr. Pichai about his direct involvement in the decision to renege on Google's commitment to lawmakers:

> When Google proposed the merger[,] alarm bells were raised about the access to data Google would have, specifically the ability to connect to users' personal identity with their browsing activity. Google, however, committed to Congress and to the antitrust enforcers that the deal would not reduce user privacy. Google's chief legal adviser testified before the Senate Antitrust Subcommittee that Google wouldn't be able to merge this data even if it wanted to, given contractual restrictions. But in June of 2016, Google went ahead and merged its data anyway, effectively destroying anonymity on the internet . . . Did you sign off on this decision to combine the sets of data with—that Google had told Congress would be kept separate? [1249]

Mr. Pichai confirmed that he approved the deal, claiming that "Today [we] make it very easy for users to be in control of their data."[1250] Representative Demings also noted that at the time of the transaction, DoubleClick executives had noted that Google's founders were concerned that combining the data in this way—through a cross-site cookie—would lead to a privacy backlash. She stated:

> So, in 2007, Google's founders feared making this change because they knew it would upset their users, but in 2016, Google didn't seem to care. Mr. Pichai, isn't it true that what changed between 2007 and 2016 is that Google gained enormous market power. So. While Google had to care about user privacy in 2007. It no longer had to in 2016? Would you agree that what changed was Google gained enormous market power?[1251]

[1248] Dina Srinivasan, *Why Google Dominates Advertising Markets*, 24 STAN. TECH. L. REV. (forthcoming 2020) (manuscript at 24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500919.

[1249] CEO Hearing Transcript at 73–74 (Rep. Val Demings (D-FL), Member, Subcomm. on Antitrust, Commercial and Admin Law of the H. Comm. on the Judiciary).

[1250] *Id*. at 75.

[1251] *Id*. at 74–75

She closed by noting she was concerned that Google's "bait-and-switch" was "part of a broader pattern where Google buys up companies for the purposes of surveilling Americans, and because of Google's dominance users have no choice but to surrender."[1252] In recent months, Google's reversal on this commitment has become salient for enforcers now assessing Google's bid to purchase FitBit.[1253]

ii. Other Areas of Concern

While a comprehensive examination of this market is beyond the scope of this Report, the Subcommittee heard from numerous market participants about a set of alleged practices by Google that invite investigation. These include:

- Depriving advertisers and publishers of key market and pricing information and maintaining market opacity;
- Leveraging its market power in search advertising to compel advertisers to use Google's products in the display market;
- Leveraging control over YouTube to foreclose competition in digital video ad serving, in part by excluding rival ad servers from having access to YouTube;
- Inhibiting interoperability between Google's ad platforms and non-Google ad platforms; and
- Using its search dominance to impose standards like AMP that, by further depriving publishers of user data, benefit Google's ad business.

4. Android and Google Play Store

a. Android

i. Overview

Android is a dominant mobile operating system, running on approximately 75% of the world's mobile devices.[1254] In the United States, the only alternative to Android is Apple's iOS. Android

[1252] *Id.* at 75.

[1253] CEO Hearing at 32 (response to Questions for the Record of Sundar Pichai, CEO, Alphabet Inc.), https://docs.house.gov/meetings/JU/JU05/20200729/110883/HHRG-116-JU05-20200729-QFR051-U1.pdf.

[1254] Felix Richter, *The Smartphone Market: The Smartphone Duopoly*, STATISTA (July 27, 2020), https://www.statista.com/chart/3268/smartphone-os-market-share/ (citing *Mobile Operating System Market Share Worldwide*, STATCOUNTER GLOBALSTATS).

captures about 47% of the U.S. mobile operating system market, and Apple captures about 52% of it.[1255]

Google acquired Android in July 2005 for an estimated $50 million.[1256] Since then, Google has purchased a set of technologies to strengthen its mobile ecosystem, including both software and hardware.[1257] Notably, Google purchased Motorola Mobility in 2011 for $12.5 billion, the largest acquisition in Google's history.[1258]

Google describes Android as "a free, open-source mobile operating system" that is available to anyone to download and modify on a royalty-free basis.[1259] Indeed, Android is unique in that Google does not generally monetize its operating system by selling proprietary hardware or demanding licensing fees. In practice, however, smartphone manufacturers that seek to use Android must sign Google's licensing agreements, as Google limits the functionality of non-licensed usage. Only through Google's licensing agreements can smartphone manufacturers access Google's proprietary apps, such as Gmail, YouTube, Chrome, Google Maps, and Google Play Store.[1260] In return, Google requires that certain apps must be pre-installed and must receive prominent placement on mobile devices.[1261] Device manufacturers must also enter an agreement that prevents them from customizing Android,[1262] and

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[1255] S. O'Dea, *Market share of mobile operating systems in the United States from January 2012 to December 2019*, STATISTA (Feb. 27, 2020), https://www.statista.com/statistics/272700/market-share-held-by-mobile-operating-systems-in-the-us-since-2009/ (citing *Mobile Operating System Market Share in United States Of America*, STATCOUNTER GLOBALSTATS).

[1256] Farhad Manjoo, *A Murky Road Ahead for Android, Despite Market Dominance*, N.Y. TIMES (May 27, 2015), https://www.nytimes.com/2015/05/28/technology/personaltech/a-murky-road-ahead-for-android-despite-market-dominance.html.

[1257] *See infra* Appendix.

[1258] *Google Buys Motorola Mobility For $12.5B, Says "Android Will Stay Open,"* TECHCRUNCH (Aug. 15, 2011), https://techcrunch.com/2011/08/15/breaking-google-buys-motorola-for-12-5-billion/ (reporting that Google purchased Motorola primarily to protect the Android ecosystem from patent litigation). In 2014, Google sold Motorola to Lenovo. *Facts about Google's acquisition of Motorola*, GOOGLE, https://www.google.com/press/motorola/) (lasted visited Oct. 4, 2020).

[1259] Production of Google, to H. Comm. on the Judiciary, A-6 (Nov. 22, 2019) (on file with Comm.) Android is managed by the Open Handset Alliance, a group of more than eighty hardware, software, and mobile network operators, including Samsung, LG, HTC, and Lenovo. *See Members*, OPEN HANDSET ALLIANCE, https://www.openhandsetalliance.com/oha_members.html (last visited Oct. 4, 2020); *Licenses*, ANDROID OPEN SOURCE PROJECT, https://source.android.com/setup/start/licenses (last visited Oct. 4, 2020) (stating that the Android source code is freely available for use under an open-source license).

[1260] *See* Google Android Comm'n Decision at paras. 160–63.

[1261] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-02393308 (Mar. 11, 2011) (on file with Comm.) (The Mobile Application Distribution Agreement (MADA) is an agreement that specifies which apps Google requires hardware manufacturers to pre-install and where on the phone the apps should be placed.).

[1262] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-02393318 (Feb. 25, 2011) (Google's Antifragmentation Agreement).

from building an Android fork that would make the version of Android running on a device incompatible with apps built for the Android ecosystem.[1263]

The Subcommittee's investigation revealed that Google has used Android to entrench and extend its dominance in a host of ways that undermine competition. These include: (1) using contractual restrictions and exclusivity provisions to extend Google's search monopoly from desktop to mobile and to favor its own applications; and (2) devising Android Lockbox, a covert effort to track real-time data on the usage and engagement of third-party apps, some of which were Google's competitors. Additionally, Google's Play Store now functions as a gatekeeper, which Google is increasingly using to hike fees and favor its own apps. Overall, Android's business practices reveal how Google has maintained its search dominance through relying on various contractual restrictions that blocked competition and through exploiting information asymmetries, rather than by competing on the merits.

ii. Using Contracts to Extend Google's Search Monopoly and Self-Preference

Early communications within Google show that it began investing in the mobile ecosystem because it recognized that the rise of smartphone usage threatened to disintermediate Google Search. Since losing its monopoly on search would mean losing its valuable trove of user data, maintaining dominance over search access points was paramount.

To maintain its search dominance, Google invested in Android, which it recognized it could use to extend its search dominance onto mobile devices.[1264] Google required that any smartphone manufacturer seeking to license Android preinstall Google Search and Google Play Store, alongside a host of other rotating apps selected by Google.[1265] Google also offered mobile device manufacturers revenue-share agreements, under which smartphone manufacturers would receive a cut of the search advertising revenue that Google made from the use of Google's apps on their devices,[1266] as well as a cut of Play Store revenues.[1267] In return, however, manufacturers had to not only carry Google's apps, but also ensure that Google Search was the default *and* exclusive search app pre-installed on the manufacturers' devices. For example, one revenue share agreement reviewed by the Subcommittee stated that hardware manufacturers shall not "pre-install, install, or incorporate on any Covered Device

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1263 *Id.*; Google Android Comm'n Decision at paras. 170–71; *see also Device compatibility overview*, ANDROID DEVELOPERS, https://developer.android.com/guide/practices/compatibility (last visited Oct. 4, 2020). In 2017, Google released an alternative to its Antifragmentation Agreement called the Android Compatibility Commitment (ACC), which "would permit OEMs to manufacture incompatible Android devices for a third party that are marketed under a third-party brand." Google Android Comm'n Decision at paras. 170–71.

1264 Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04216470 (May 2009) (on file with Comm.).

1265 *Id.* at GOOG-HJC-02393308 (Mar. 11, 2011) (on file with Comm.) (Mobile Application Distribution Agreement).

1266 *Id.* at GOOG-HJC-00660371 (Apr. 11, 2011).

1267 *Id.* at GOOG-HJC-04216470 (May 2009).

any application which is the same or substantially similar to a Google Search Client or the Google Search Services."[1268]

Documents show that Google executives knew that conditioning access to Android and to Google's suite of apps on the prominent placement of Google Search would disrupt existing partnerships between mobile network operators and rival search engines. For example, a 2009 slide deck stated that "[p]artners may have deals in place with other search providers," and noted that "T-Mobile and AT&T have closed deals with Yahoo…Verizon has tight relationship with MSFT re: search…Expect MSFT & Yahoo to aggressively pursue 'pre-load' deals on Android phones."[1269] Google's strategy of licensing Android for free to hardware partners and conditioning access to Google's must-have apps on favorable treatment for Google Search enabled Google to box out rivals in mobile search and other markets. Google's strategy was successful. These agreements, which were reached with the leading smartphone providers, solidified Google Search as the default search option on a majority of the world's smartphones.

As Android gained market share, its demands grew and hardened. The European Commission found that between 2009 and 2014, Google increased the number of pre-installed Google apps that it required from 12 to 30.[1270] Documents submitted to the Subcommittee also show that instructions to heavily push Google Search were coming from the company's top management. Summarizing a meeting with Sundar Pichai, then-Vice President of Product Development, Director of Engineering for Android Patrick Brady recalled, "His main feedback was . . . Search is sacred, must be front and center."[1271] He added, "Our proposal covers that through more prescriptive search placement requirements."[1272]

Google's licensing agreement gave Google the right to amend the list of apps it required device manufacturers to pre-install.[1273] Documents show that market participants expressed frustration at Google's ability to set the terms and also change them routinely. Explaining the situation, Mr. Brady wrote, "Some OEMs . . . do not like the idea of signing up to undefined requirements, but most of our partners are somewhat used to this as the [c]ompatibility requirements evolve with each release, and our [Google Mobile Services] suite expands (incl. mandatory apps) over time."[1274] When one hardware manufacturer attempted to secure additional rights, Google pushed back. In 2014, John Lagerling, Senior Director of Android Global Partnerships, responded to such an effort:

[1268] *Id.* at GOOG-HJC-00660364 (Apr. 11, 2011).

[1269] *Id.* at GOOG-HJC-04217467 (May 2009) (on file with Comm.).

[1270] Google Android Comm'n Decision at para. 182.

[1271] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-00050146 (May 23, 2013) (on file with Comm.).

[1272] *Id.*

[1273] *See* Google Android Comm'n Decision at para. 183.

[1274] *Id.* at GOOG-HJC-00050145 (May 23, 2013).

> In your redlines on [the contract], you are suggesting [OEM] approves any new additions to GMS. This has never been the case in our past history[,] and I think it is the wrong message for [OEM] to send Google. We just spent some hours explaining . . . that one of the main reasons we do Android is in order to secure distribution of Google services.[1275]

Other smartphone manufacturers also attempted to resist Google's terms, noting that the requirements were crowding out placement for other apps while also taking up significant memory. For example, in 2014 one hardware manufacturer requested that Google "reduce the number of preloaded apps on the device . . . so that we don't clutter our products with apps that may not be necessary for the majority of users and we give them as much space as possible," adding that this would also "help us deal with complaints from governments, NGOs and end users."[1276] Forwarding the email to others at Google, Mr. Langerling noted that the manufacturer's grievance was "not about clutter but about system memory," adding that "[u]sers have been complaining to [the device maker] that [it] sells them a 16Gb phone and delivers something that only has 7-8Gb free."[1277]

Despite complaints that Android's pre-install conditions favored Google's products at the expense of user experience, Google maintained its requirements. Interviews with market participants suggest that Google's ability to set the terms of commerce hurt mobile device manufacturers as well as third-party developers, both of which had their own apps they were seeking to distribute. In a submission to the Subcommittee, one third party recalled being informed by a device manufacturer "that it could not provide home screen placement for our preloaded app due in part to contractual agreements to preload [Google's competing app]."[1278]

Market participants noted that pre-installation on devices can be critical for successful distribution. One developer explained that "integration into the initial device setup," in particular, can "meaningfully drive the acquisition of new users."[1279] Google's documents show that it recognized the importance of pre-installation, with one internal presentation stating that "activation and defaults are a known issue that we should explore, as OEM/carrier pre-installed apps are among the most used."[1280]

Documents also show that Google uses its leverage to push hardware manufacturers to privilege Google's products over the manufacturers' products. Discussing the agenda for an upcoming

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[1275] *Id.* at GOOG-HJC-04300658 (Jan. 21, 2014).

[1276] *Id.* at GOOG-HJC-04308614 (Jan. 17, 2014).

[1277] *Id.*

[1278] Submission from Source 104, to H. Comm. on the Judiciary, Source 104-00000439 (Jan. 18, 2019) (on file with Comm.).

[1279] *Id.* at Source 104-00000437 (Jan. 8, 2019).

[1280] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04200778 (May 25, 2017) (on file with Comm.).

meeting with a hardware manufacturer, one Google manager noted that the manufacturer should discourage the use of its email client for Gmail accounts, stating, "They should use Gmail native app."[1281] In a separate discussion in 2016, Google employees explained how Android Pay, a predecessor to Google Pay, would be given preferential treatment over the manufacturer's own mobile payment app.[1282] Recent reporting that Google is pressuring Samsung to promote Google apps over those offered by Samsung is consistent with the company's past conduct.[1283]

Lastly, Google appears to use its licensing agreements to deter mobile device manufacturers from collaborating with alternative mobile operating system providers. In 2012, for example, Acer, a hardware manufacturer, and Alibaba had planned to release a variant of Android, called Aliyun OS.[1284] Reporting suggests that Google threatened to terminate its partnership with Acer in retaliation, leading Acer to cancel the launch of devices running on the Aliyun OS.[1285] Google also requires hardware partners to agree that they will not run unsanctioned versions of Android on other hardware products, with the understanding that any manufacturer who violates this condition risks losing access to the Google Play Store and other popular apps across all of the manufacturer's devices.[1286]

After investigating Google's licensing agreements, the European Commission concluded in 2018 that Google's conduct had illegally benefited Google's own services while blocking the rise of rival operating systems.[1287] Although Google argued that users were free to download other apps and that Google's own apps were superior, the Commission determined that "users who find search and

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[1281] *Id.* at GOOG-HJC-04204875 (Jan. 18, 2014).

[1282] *Id.* at GOOG-HJC-04299009 (Feb. 4, 2016) (discussing how the manufacture's mobile payment app would be placed inside of an apps folder while Google's mobile payment app would be placed more prominently outside the folder of Google apps).

[1283] *See, e.g.*, Mark Bergen & Sohee Kim, *Google in Talks to Take Over More Search Tasks on Samsung Phones*, BLOOMBERG (July 28, 2020), https://www.bloomberg.com/news/articles/2020-07-29/google-in-talks-to-take-over-more-search-tasks-on-samsung-phones; Paresh Dave & Hyunjoo Jin, *Samsung weighs dropping Bixby as Google dangles new mobile apps deal*, REUTERS (July 29, 2020), https://www.reuters.com/article/us-google-samsung/samsung-weighs-dropping-bixby-as-google-dangles-new-mobile-apps-deal-idUSKCN24U0TF.

[1284] *See, e.g.*, Dieter Bohn, *Google explains why it stopped Acer's Aliyun smartphone launch (updated)*, THE VERGE (Sept. 14, 2012), https://www.theverge.com/2012/9/14/3335204/google-statement-acer-smartphone-launch-aliyun-android; Roger Cheng, *Alibaba: Google forced Acer to drop our new mobile OS*, CNET (Sept. 13, 2012), https://www.cnet.com/news/alibaba-google-forced-acer-to-drop-our-new-mobile-os/; T.C. Sottek, *Acer cancels phone launch with Alibaba, allegedly in response to threats from Google*, THE VERGE (Sept. 13, 2012), https://www.theverge.com/2012/9/13/3328690/acer-google-alibaba-phone.

[1285] *Id.*

[1286] *See e.g.*, Janko Roettgers, *How Google kneecapped Amazon's smart TV efforts*, PROTOCOL (Mar. 11, 2020), https://www.protocol.com/google-android-amazon-fire-tv; James Brumley, *Google Just Made Sure It's Going to Win the Smart TV War*, MOTLEY FOOL (Mar. 20, 2020) https://www.fool.com/investing/2020/03/20/google-just-made-sure-its-going-to-win-the-smart-t.aspx.

[1287] Press Release, Eur. Comm'n, Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

browser apps pre-installed on their devices are likely to stick to these apps."[1288] Responding to Google's claims that its tying agreements were necessary in order for Google to be able to monetize its investment in Android, the European Commission stated:

> Google achieves billions of dollars in annual revenues with the Google Play Store alone, it collects a lot of data that is valuable to Google's search and advertising business from Android devices, and it would still have benefitted from a significant stream of revenue from search advertising without the restrictions.[1289]

iii. Accessing Real-Time Market Data

The Subcommittee's investigation also revealed that Android gives Google unparalleled access to data on its users and developers. This includes information that Google can monetize through its ad business, as well as strategic intelligence that lets Google track emerging competitors and general business trends.

Android's dominance in the mobile operating system market enables it to extensively surveil its users. This surveillance is partly enabled through Google's technology. In key ways Google also uses its dominance and its integration across markets to increase the number of touchpoints from which it is constantly mining user data.

Google's documents show that it has used its leverage over hardware manufacturers to demand that they structure their devices in ways that facilitate Google's data collection efforts. Google's agreements with device manufacturers, for example, require that manufacturers configure a "Client ID," which is a unique alphanumeric code incorporated in the smartphone that enables Google to combine metrics tracked via the hardware with all the other data Google collects on users.[1290] Additionally, Google's own documents also show that it has asked device manufacturers to use a Google Account as their identifier rather than a non-Google account—a way of ensuring that Google can capture a broader picture of its users.[1291] On the Play Store, meanwhile, Google does not permit users to download apps unless they have a Google Account, further funneling users into the Google ecosystem.[1292] Combined with location data, which Android also extensively collects, Google can build sophisticated user profiles reflecting a person's demographic, where they are, and where they go, as well as which apps they use at what time and for how long.[1293] These intimate user profiles,

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[1288] *Id.*

[1289] *Id.*

[1290] Google Android Comm'n Decision at para. 187.

[1291] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04204875 (Jan. 18, 2014) (on file with Comm.).

[1292] Innovation and Entrepreneurship Hearing at 76 (response to Questions for the Record of Adam Cohen, Dir. Of Econ Pol'y, Google LLC).

[1293] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04198806–55 (Jan. 13, 2017) (on file with Comm.).

spanning billions of people, are a key source of Google's advantage in its ad business. In this way, Android's location data feeds into Google's dominance in ads.

Documents and information reviewed by Subcommittee staff also show that Google has used Android to closely monitor competing apps, data that amounts to near-perfect market intelligence. Since at least 2012, Google has collected installation metrics for third-party apps, [1294] which it combined with data analyzing search queries.[1295] These early documents outline the early stages of Google's "Lockbox," a project to collate data that provided Google with a range of competitor insights and market intelligence, ranging from an understanding of how installation of the Amazon app corresponded to a trend in Amazon shopping queries[1296] to a close tracking of trends relating to Candy Crush and Angry Birds.[1297]

While Lockbox began as a way to collect data on the installation of apps, Google quickly realized it could harness it to yield other insights as well. One document from 2013 identified a list of additional data points that the company desired, including "[m]ore signals (including uninstalls and device app mapping)" and "reliable and long term app usage data," for which the document noted Google Play Services could help.[1298] In short, Google began seeking out ways to collect specific usage data that enabled Google to track not just which apps a user has, but also how frequently they use the apps and for how long.

Documents obtained by the Subcommittee suggest that by 2015, Google's Lockbox data had succeeded in tracking more than just install rates.[1299] Google's internal reports show that Google was tracking in real-time the average number of days users were active on any particular app,[1300] as well as their "total time spent" in first- and third-party apps.[1301] Google subsequently used this data to benchmark the company's first-party apps against third-party apps, suggesting that Google was using Lockbox data to assess the relative strengths and weaknesses of its own offerings.[1302] Google's documents show how Lockbox furnishes Google with near-perfect market intelligence, which Google has used to inform strategic moves and potential business transactions.[1303] Recent reporting by *The*

[1294] *Id.* at GOOG-HJC-00055102 (Nov. 2013).

[1295] *Id.* at GOOG-HJC-02598471 (June 6, 2010).

[1296] *Id.* at GOOG-HJC-00055102 (Nov. 2013).

[1297] *Id.*

[1298] *Id.*

[1299] Alex Heath, Nick Bastone & Amir Efrati, *Internal Google Program Taps Data on Rival Android Apps*, THE INFO. (July 23, 2020), https://www.theinformation.com/articles/internal-google-program-taps-data-on-rival-android-apps.

[1300] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04198806–55 (Jan. 13, 2017) (on file with Comm.).

[1301] *Id.* at GOOG-HJC-04198814 (Jan. 13, 2017).

[1302] *Id.* at GOOG-HJC-04198812. (Jan. 13, 2017).

[1303] *Id.* at GOOG-HJC-04199726. (Jan. 13, 2017).

Information documented how YouTube employees used Lockbox data to track TikTok usage in India as Google was developing and planning its own rival to TikTok.[1304]

During the Subcommittee's sixth hearing, Subcommittee Vice Chairman Joe Neguse (D-CO) asked Mr. Pichai about allegations that Google had used Android to surveil rival apps and develop competing products.[1305] Mr. Pichai responded, "Congressman, because we try to understand what's going on in [the] market and we are aware of, you know, popularity of apps," adding, "But, in general, the primary use for that data is to improve the health of Android."[1306]

In follow-up questions to Mr. Pichai, Google was asked to identify all acquisitions or product decisions that had been informed by data from Android Lockbox. Google's answer was not responsive to the question.[1307]

b. Play Store

The Play Store is the dominant app store on Android devices. Early documents reviewed by the Subcommittee show that Google chose for a single app store to control software distribution on the Android ecosystem, with one executive noting that "we would strongly prefer to have one Market that everyone focuses on."[1308]

Because Google's Play Store is the primary way that users install applications on Android devices, the Play Store effectively functions as a gatekeeper for software distribution on a majority of the world's mobile devices. The Subcommittee's investigation reveals that Google uses this gatekeeper power in several key ways.

First, Google uses its Play Store gatekeeper power to charge high fees to mobile developers. Amazon, Spotify, Netflix, Epic Games, and Tinder have all expressed public concerns about Google's app store fees, along with Apple.[1309] As a lawsuit recently filed by Epic Games stated, "Google has thus installed itself as an unavoidable middleman for app developers who wish to reach Android users and vice versa. Google uses this monopoly power to impose a tax that siphons monopoly profits for

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[1304] Alex Heath, Nick Bastone & Amir Efrati, *Internal Google Program Taps Data on Rival Android Apps*, THE INFO. (July 23, 2020), https://www.theinformation.com/articles/internal-google-program-taps-data-on-rival-android-apps.

[1305] Jon Porter, *Google reportedly keeps tabs on usage of rival Android apps to develop competitors*, THE VERGE (July 24, 2020), https://www.theverge.com/2020/7/24/21336946/google-android-lockbox-data-rival-apps-antitrust-scrutiny.

[1306] CEO Hearing Transcript at 196 (statement of Sundar Pichai, CEO, Alphabet Inc.).

[1307] CEO Hearing at A-10 (response to Questions for the Record of Sundar Pichai, CEO, Alphabet Inc.).

[1308] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04218465 (Nov. 26, 2009) (on file with Comm.).

[1309] *See infra* Section V.

itself every time an app developer transacts with a consumer for the sale of an app or in-app digital content."[1310]

Although Google doesn't block off all alternative channels for accessing apps—allowing, for example, both some app stores and sideloading—in practice, these options do not provide meaningful alternatives to the Google Play Store. In contrast, the dual dominance of the Play Store and the Android ecosystem enables Google to exert control and engage in conduct that harms competition by exploiting, excluding, and discriminating against rivals.

Google charges developers of paid apps a 30% commission for downloads from the Play Store.[1311] Google also charges developers a 30% fee for in-app purchases.[1312] According to documents obtained by the Subcommittee, from 2011 to 2015, revenue from the Play Store accounted for 85% of Google's total revenue from the Android operating system, hardware sales, and the Play Store." [1313]

Third-party apps can also avoid the Play Store's commissions and fees by directing consumers to sideload the app, that is, to install the app using a browser, outside of an app store. Rival app stores that are not pre-installed on the device, such as the Amazon Appstore, must be sideloaded. Although sideloading is technically an option for rival app stores and app developers, market participants explained that Google goes out of its way to make sideloading difficult. Epic's recent lawsuit against Google alleges:

> Google ensures that the Android process is technically complex, confusing and threatening, filled with dire warnings that scare most consumers into abandoning the lengthy process. For example, depending on the version of Android running on a mobile device, downloading and installing *Fortnite* on an Android device could take as many as 16 steps or more, including requiring the user to make changes to the device's default settings and manually granting various permissions while being warned that doing so is dangerous.[1314]

Additionally, Epic's complaint notes that when it attempted to work with LG, another Android device manufacturer, LG told Epic that it had a contract with Google "to block side downloading off

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[1310] Complaint for Injunctive Relief at 2, Epic Games, Inc. v. Google LLC, No. 3:20-cv-05671 (N. D. Cal., Aug. 13, 2020).

[1311] *Play Console Help: Service* Fees, GOOGLE, https://support.google.com/googleplay/android-developer/answer/112622?hl=en (last visited Oct. 4, 2020).

[1312] *Transaction fees for merchants*, GOOGLE PAYMENTS HELP CENTER, https://support.google.com/paymentscenter/answer/7159343?hl=en#:~:text=The%20transaction%20fee%20for%20all,distribution%20partner%20and%20operating%20fees (last visited Oct. 4, 2020).

[1313] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04217474 (on file with Comm.).

[1314] Complaint for Injunctive Relief at 7, Epic Games, Inc. v. Google LLC, No. 3:20-cv-05671 (N.D. Cal., Aug. 13, 2020).

Google Play Store this year."[1315] If a user is able to install the competing app store, Google blocks them "from offering basic functions, such as automatic updating of apps in the background, which is available for apps downloaded from the Google Play Store."[1316]

The Play Store's dominance over app distribution on Android devices has enabled Google to begin to require the use of its in-app payment system (IAP). As a result, Google has become the middleman between app developers and their customers. This was not always the case. Market participants explain that Google has changed its stance and re-interpreted policies over time to require more app developers to use Google Pay. Beginning in 2014, for example, Google designated specific categories of applications—including mobile games—that would be required to use Google Play In-App Billing.[1317] Recently, however, several market participants have informed the Subcommittee that Google has begun insisting that a broader category of apps will be required to use Google IAP exclusively, no longer allowing the option of a third-party payment processor.[1318]

In interviews with Subcommittee staff, developers state that one way Google exercises its gatekeeper power over third-party app developers is through its arbitrary and unaccountable enforcement of Play Store policies. One developer that spoke with the Subcommittee described Google's Play Store policies as an "opaque system [that] threatens the ability of app developers to develop and compete in the market for consumers, who should ultimately determine which apps they use."[1319] Another developer explained, "When apps allegedly violate Google Play Store standards, Google does not ever explain how, other than to quote the policy above and attach pictures of the allegedly violating image. When the imagery does not fit the above definitions, app publishers such as [third party] are put in a position of having to guess how to apply these standards."[1320]

Developers also alleged that Google uses control over the Play Store to protect the dominance of its own services and stifle rivals. For example, Callsome, a mobile app that provided productive follow-up to phone calls or text messages, such as prompting a calendar entry or a reminder to text back, has sued Google and claimed it was banned from the Google Play store for "Ad Policy" violations only to later learn that a "fundamentally identical product" was able to stay and thrive in the

[1315] *Id.* at 28.

[1316] *Id.* at 7.

[1317] Innovation and Entrepreneurship Hearing at 85 (response to Questions for the Record of Adam Cohen, Dir. Of Econ Pol'y, Google LLC).

[1318] Submission from Source 736, to H. Comm. on the Judiciary (Sept. 25, 2020) (on file with Comm.).

[1319] Submission from Source 62 to H. Comm. on the Judiciary, 1 (July 31, 2020) (on file with Comm.)

[1320] Submission from Source 685, to H. Comm. on the Judiciary, 8 (Oct. 15, 2019) (on file with Comm.).

Play Store.[1321] Callsome believes it was banned because of its partnership with StartApp, which—at the time—was widely considered a nascent but rising rival to Google in the Russian search market.[1322]

Subcommittee staff also spoke with several market participants that said Google has abused its control of the Play Store by using rule violations as a pretext for retaliatory conduct. For example, one third party described how soon after it ceased using Google's AdMob, an in-app ads monetization tool,[1323] Google began sending the third-party notifications of policy violations related to content the third party had included in its app for years.[1324]

In response to questions from the Subcommittee, Google stated that it "only suspends apps from the Google Play Store if it finds the app in violation of Google Play Program Policies . . . or in violation of the Developer Distribution Agreement."[1325] Google also stated that it gives developers opportunities to address what they may view as incorrect enforcement decisions of Play Store policies, adding that a "developer can easily contact the Policy Support Team (Appeals) in order to challenge the enforcement decision or receive additional clarification on the infraction."[1326]

App developers, in contrast, said that challenging a Play Store decision was like navigating a black box. One third party explained that it "tried for over a month through several channels to get a full explanation from Google of the problem and resolve it amicably. Google responded with silence, then roadblocks and runarounds."[1327] However, one third party told the Subcommittee:

> When apps allegedly violate Google Play Store standards, Google does not ever explain how, other than to quote the policy above and attach pictures of the allegedly violating image. When the imagery does not fit the above definitions, app publishers such as [third party] are put in a position of having to guess how to apply these standards.[1328]

In theory, one way that app developers could avoid Google's commissions and fees would be to negotiate with a mobile device manufacturer to have the app pre-installed on the device. In practice, however, Google's restrictive contracts with smartphone manufacturers have strictly limited—if not excluded—third-party apps from being pre-installed. In this way, Google's licensing agreements not

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1321 Submission from Callsome, to H. Comm. on the Judiciary, 3 (Apr. 28, 2020) (on file with Comm.).

1322 *Id.* at 7.

1323 *Google AdMob*, GOOGLE, https://admob.google.com/home/ (last visited Oct. 4 2020).

1324 Submission from Source 685, to H. Comm. on the Judiciary (on file with Comm.).

1325 Innovation and Entrepreneurship Hearing at 83 (response to Questions for the Record of Adam Cohen, Dir. Of Econ Pol'y, Google LLC).

1326 *Id.* at 84.

1327 Submission from Callsome, to H. Comm. on the Judiciary, 5 (Apr. 28, 2020) (on file with Comm.).

1328 Submission from Source 685, to H. Comm. on the Judiciary, 12 (Oct. 15, 2019) (on file with Comm.).

only preclude the vast majority of third-party apps from being pre-installed, but they also funnel those apps into the Google Play Store, subject to Google's commissions and arbitrarily enforced policies.

5. Chrome

a. Overview

Google launched its web browser, Google Chrome, in 2008.[1329] Chrome makes a significant portion of its underlying code base available through the open-source Chromium Project,[1330] which has been used to build a series of "chromium-based" browsers such as Microsoft Edge and Opera.[1331] In 2010, Google introduced the Chrome web store, which enables users to access and install browser extensions, such as Easy Ad Blocker, Grammarly, and Netflix Party.[1332]

Prior to Chrome's launch, Internet Explorer, Firefox, and Safari were the most popular browsers. Firefox leaned heavily on a partnership with Google Search, which documents show enabled Google to closely track Firefox's growth.[1333]

Chrome initially set itself apart by offering an address bar that also functioned as a Google search bar, and by enabling users to sign in to the browser, offering a faster browsing experience compared to other browsers.[1334] Chrome was also integrated with other Google products. By signing in to the browser, Chrome automatically signed users into Gmail, YouTube, and additional Google services when users visited those sites, while also allowing users to sync their bookmarks, passwords, and other browser settings.[1335] While automatic sign-in provided a more streamlined user experience, it also helped Google build more detailed user profiles by connecting activity data to the user's Google Account.[1336]

[1329] *Google Chrome: A New Take on the Browser*, GOOGLE PRESS (Sept. 2, 2008), http://googlepress.blogspot.com/2008/09/google-chrome-new-take-on-browser_02.html.

[1330] THE CHROMIUM PROJECTS, https://www.chromium.org/Home (last visited on Oct. 4, 2020).

[1331] Catalin Cimpanu, *All the Chromium-based browsers*, ZDNET (Jan. 29, 2019), https://www.zdnet.com/pictures/all-the-chromium-based-browsers/4/.

[1332] *An update on Chrome, the Web Store and Chrome OS*, CHROME BLOG (Dec. 7, 2010), https://chrome.googleblog.com/2010/12/update-on-chrome-web-store-and-chrome.html.

[1333] Submission from Google, to H. Comm. on the Judiciary, GOOG-HJC-00125917–29, GOOG-HJC-00125937 (April 25, 2005) (on file with Comm.).

[1334] Trefis Team, Great Speculations, *Rising Chrome Use Means Search Advertising Growth for Google*, FORBES (Aug. 23, 2012) https://www.forbes.com/sites/greatspeculations/2012/08/23/rising-chrome-use-means-search-advertising-growth-for-google/#579c604f2d66; MG Siegler, *Here It Is: Google's Kick-Ass Chrome Speed Test Video*, TECHCRUNCH (May 5, 2010) https://techcrunch.com/2010/05/05/google-chrome-video-test/.

[1335] *Turn sync on and off in Chrome,* GOOGLE CHROME HELP, https://support.google.com/chrome/answer/185277?co=GENIE.Platform%3DDesktop&hl=en (last visited on Oct. 4, 2020).

[1336] *Google Privacy Policy*, GOOGLE PRIVACY AND TERMS, https://policies.google.com/privacy (last visited on Oct. 4, 2020) ("When you're signed in, we also collect information that we store with your Google Account.").

In a 2019 presentation to the Justice Department's Antitrust Division, Google explained that it had launched Chrome as a defensive move to protect users' access to Google's products.[1337] Internally, however, Google frequently referred to Chrome as part of Google's growth strategy. For example, in 2010, one of Google's strategy documents listed Chrome as a driver of "significant value,"[1338] and Eric Schmidt gave a company-wide speech stating that the rise of cloud computing meant that the browser—the primary way users access cloud—would be increasingly critical to Google's success.[1339]

Perhaps most critically, Chrome serves as a way for Google to control the entry points for its core markets: online search and online advertising.[1340] Chrome uses Google Search as its default search engine, a default setting that market participants say Google makes it difficult to change.[1341] Chrome also provides Google with another source of user data that the company can feed into its ad business to offer behavioral ads.[1342]

b. Market Power

Chrome became a leading web browser as early as 2012.[1343] In the U.S. market, Chrome captures an estimated 59% of desktop browser usage and 37% of mobile browser usage,[1344] while capturing an estimated 66% of overall browser usage worldwide.[1345]

[1337] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04214204 (Sept. 17, 2019) (on file with Comm.) ("Alternatives to IE (Firefox, Opera, Safari) proved unattractive: Google initially partnered with Mozilla, but Firefox had technical limitations and faced uncertain prospects, Apple launched Safari for Windows in 2007. If Firefox was displaced by Safari, Apple could further constrain user access to Google.").

[1338] *Id.* at GOOG-HJC-00005661.

[1339] *Id.* at GOOG-HJC-00086891 (Jan. 24, 2011).

[1340] Competition & Mkts Auth. Report at 18–19.

[1341] Submission from Source 534, to H. Comm. on the Judiciary, 3 (Oct. 14, 2019) (on file with Comm.).

[1342] *Google Privacy Policy*, GOOGLE PRIVACY AND TERMS, https://policies.google.com/privacy (last visited on Sept. 29, 2020) ("We collect information to provide better services to all our users . . . which ads you'll find most useful . . . which YouTube videos you might like."). At the Subcommittee's sixth hearing, Committee Chairman Jerrold Nadler (D-NY) asked Google CEO Sundar Pichai to explain how Google uses data on browsing activity, asking "Does Google use that data for its own purposes, either in advertising or to develop and refine its algorithms?" Mr. Pichai responded that Google uses data "to improve our products and services for our users." CEO Hearing Transcript at 73 (statement of Sundar Pichai, CEO, Alphabet Inc.).

[1343] *Id;* Trefis Team, Great Speculations, *Rising Chrome Use Means Search Advertising Growth for Google*, FORBES, (Aug. 23, 2012) https://www.forbes.com/sites/greatspeculations/2012/08/23/rising-chrome-use-means-search-advertising-growth-for-google/#579c604f2d66. (observing that Google captured 67% of desktop searches across all browsers and 95% of shares conducted on Chrome, noting "This large discrepancy in search market share, depending on which browser is used, is one of the reasons why we think that the Chrome browser has helped increase Google's revenues.").

[1344] *Desktop Browser Market Share in the United States*, STATCOUNTER, https://gs.statcounter.com/browser-market-share/desktop/united-states-of-america (last visited Sept. 27, 2020); *Mobile Browser Market Share in the United States*, STATCOUNTER, https://gs.statcounter.com/browser-market-share/mobile/united-states-of-america (last visited Sept. 27, 2020).

[1345] *Browser Market Share*, STATCOUNTER, https://gs.statcounter.com/browser-market-share/all/united-states-of-america (last visited Sept. 27, 2020).

Several factors suggest that Google is likely to maintain its lead in the browser market. First, Google has established Chrome as the default browser on the majority of Android devices, which make up around 75% of smartphones globally.[1346] While Google does allow users to change default browsers on Android, in practice users rarely do. As the United Kingdom's Competition and Markets Authority recently found, even platforms that do provide users with options often end up using "defaults and choice architecture that make it difficult for consumers to exercise this choice."[1347]

Second, Chrome is likely to remain dominant because it benefits from network effects. Web developers design and build for the Chrome browser because it has the most users, and users, in turn, are drawn to Chrome because webpages work well on it. And third, Chrome is likely to maintain its lead because Google can leverage the popularity of its apps to favor Chrome. Specifically, Google's documents show that the company has focused on designing Chrome features to provide a better experience of apps like YouTube and Search, advantages that other browsers lack.

c. Conduct

Google used its search engine dominance and control over the Android operating system to grow its share of the web browser market and favor its other lines of business. Reciprocally, Chrome's dominance in the browser market gives it significant gatekeeper power over managing and monitoring users' browsing activity—power Google can wield to shape outcomes across markets for search, mobile operating systems, and digital advertising. These advantages across markets feed back into and reinforce one another, advantages that standalone browsers lack.

i. Exploiting Information Asymmetries

Even before it developed Chrome, Google's search business and popular web-based applications gave it unique insights into the browser market. Because Google.com is accessible through all browsers, Google Search usage data includes data on the browser where the search query began. Documents show that Google used search origination trends as early as 2004 to track Firefox's growth—and Internet Explorer's decline—in the browser market. [1348] Google's collection of Google Apps has also enabled it to monitor browser growth and performance. For example, in 2009 a Chrome team member explained:

> I've looked at the Gmail numbers a little—enough to know that we have per-browser breakdowns of performance already. In the Gmail case, it's quite clear which browsers

[1346] *Mobile operating systems' market share worldwide from January 2012 to July 2020,* STATISTA (July 2020), https://www.statista.com/statistics/272698/global-market-share-held-by-mobile-operating-systems-since-2009/.

[1347] Competition & Mkts Auth. Report at 149.

[1348] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-00126978–85 (November 2004) (on file with Comm.).

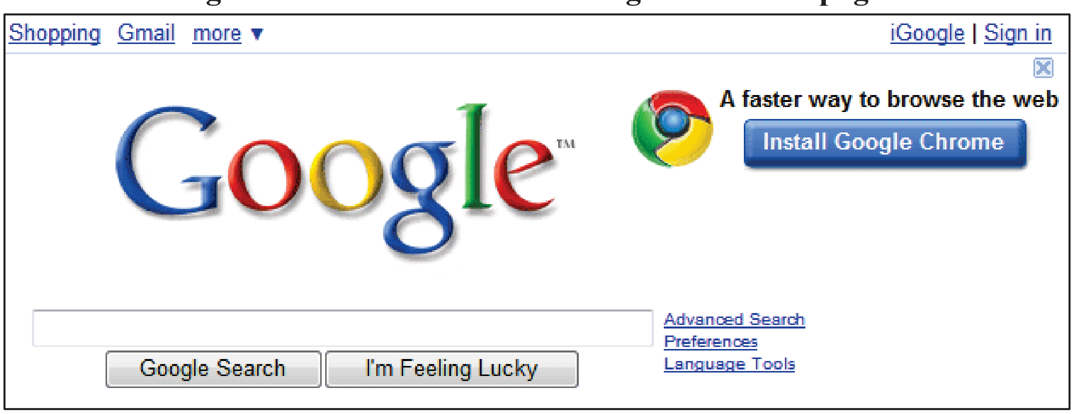
are faster. There are a zillion numbers we collect, including Gmail startup times. I am confident that the other Google Apps teams also have numbers. We could pull together a collection of 2-3 stats from each app, normalize the scores somehow, and produce a number.[1349]

This data from Google's adjacent lines of business helped the Chrome team track their performance against competitors. Most of Chrome's competitors then and now lack access to this type of data at Google's scale.

ii. Favoring Google's Products in Adjacent Markets

Through design choices and default settings, Google can use its dominance in any one market to favor its other lines of business. For example, when Chrome launched in 2008, Google Search was already the most popular search engine in the world.[1350] Shortly after releasing Chrome, Google began promoting the browser in the top corner of the Google.com homepage. The display was referred to internally as the "Google Chrome Promotion," and it was frequently discussed by Google's Chrome team within the company.[1351] Internet Explorer users that visited Google's home page would see the Google Chrome installation button in the top-right corner, as shown below:

Google Chrome Promotion on Google.com Homepage[1352]



[1349] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04214714 (Jan. 4. 2009) (on file with Comm.).

[1350] Danny Sullivan, *Search Market Share 2008: Google Grew, Yahoo & Microsoft Dropped & Stabilized,* SEARCH ENGINE LAND (Jan. 26, 2009), https://searchengineland.com/search-market-share-2008-google-grew-yahoo-microsoft-dropped-stabilized-16310.

[1351] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-01465906 (Apr. 22, 2009) (on file with Comm.) ("We've been experimenting with some novel homepage promos for Chrome in preparation for the IE8 autoupgrade [sic]. Using 0.1% experiments, we found a few that performed very well. The promo on the homepage right now should be running for IE users only."); GOOG-HJC-01164689 (Apr. 23, 2009).

[1352] Christopher Williams, *Google Chrome takes second place from Firefox*, THE TELEGRAPH (Dec. 2, 2011), https://www.telegraph.co.uk/technology/news/8930759/Google-Chrome-takes-second-place-from-Firefox.html.

At the time, several Google employees expressed concerns internally that this promotion strategy was unfairly harnessing Google's search dominance to boost Chrome. In an email among Chrome employees in 2009, one employee wrote, "I find the very, very high-profile promotion of Google Chrome on Google.com quite frankly, startling."[1353] Senior executives at the company pushed to continue this strategy. For example, in 2009, Sundar Pichai, then-Vice President of Product Development, encouraged the Chrome team to "promote through Google.com" and to push users to set Chrome as their default browser.[1354]

This strategy drove significant growth to Chrome. In 2009, Director of Product Management Brian Rakowski informed his team that the promotion was "performing exceptionally well" and was "driving tremendous number of downloads."[1355] When Google halted the promotion, Chrome's growth rate dropped. In 2011, Chrome employees noted that "organic growth slowed a bit because our homepage promo was down for a couple of weeks."[1356]

Market participants view this behavior as an example of how Chrome does not compete on the merits. One firm stated, "Google has abused its dominant position in the search space to build up another dominant position in the browser space."[1357] In response to questions about this use of Google's search page, Google told the Subcommittee that these "promotional campaigns on Google.com on Internet Explorer have been run for over a decade."[1358]

Google has reinforced its market power in the browser market through its dominance in the mobile operating system market. Chrome is preinstalled on every mobile device that runs Google's Android operating system, and Android powers approximately 75% of the world's mobile devices. Beginning in 2014, Google mandated that Chrome be pre-installed and prominently placed on all certified Android devices that had entered a Mobile Application Distribution Agreement (MADA), which grants smartphone manufacturers access to Google's Play Store and other proprietary Google applications.[1359] During negotiations with Android manufacturers for revenue share agreements, meanwhile, Google required that Chrome be set as the default browser.[1360]

[1353] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-01465903 (Apr. 22, 2009) (on file with Comm.) ("I find the very, very high profile promotion of Google Chrome on Google.com quite frankly, startling.").

[1354] *Id.* at GOOG-HJC-04214743 (Apr. 03, 2009).

[1355] *Id.* at GOOG-HJC-01465906 (Apr. 22, 2009).

[1356] *Id.* at GOOG-HJC-04195391 (Mar. 4, 2011) ("[O]rganic growth slowed a bit because our homepage promo was down for a couple of weeks due to a change in the HPP system. It's back up now.").

[1357] Submission from Source 534, to H. Comm. on the Judiciary, 2 (Oct. 14, 2019) (on file with Comm.).

[1358] CEO Hearing at A-12 (response to Questions for the Record by Sundar Pichai, CEO, Alphabet Inc.).

[1359] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-02393308 (Mar. 1, 2011) (on file with Comm.).

[1360] *See generally* Press Release, Eur. Comm'n, Antitrust: Commission Fines Google €4.34 Billion For Illegal Practices Regarding Android Mobile Devices To Strengthen Dominance Of Google's Search Engine (July 17, 2018), https://europa.eu/rapid/press-release_IP-18-4581_en.htm.

For the remaining portion of the global mobile phone market—Apple iOS—Google uses the popularity of its mobile applications to promote Chrome installations. Although Apple does not permit Chrome to be set as the default browser on an iPhone, Google provides users the option to use Chrome whenever a user selects a link within a Google application, such as Gmail or YouTube.[1361]

While Apple requires that Safari also be included as a choice,[1362] Google does not allow any other browser to be listed. If the user has not previously installed the Chrome browser, then the menu displays a "Get" button that prompts the user to install Google's browser.[1363]

Similarly, Google privileges its own line of businesses by setting Google Search as the default in Chrome. Although users can change this setting, the process is not intuitive and involves multiple steps, including:

1. At the top right, click More > **Settings**.
2. Under "Search engine," click **Manage search engines**.
3. Find "Other search engines."
   - **Add**: To the right of "Other search engines," click **Add**. Fill out the text fields and click **Add**.
   - **Set as default**: To the right of the search engine, click More > **Make default**.
   - **Edit**: To the right of the search engine, click More > **Edit**.
   - **Delete**: To the right of the search engine, click More > **Remove from list**.[1364]

One third party told the Subcommittee that in some cases, Google prompts users to change their default search engine back to Google Search even after they have switched:

> After a user installs the extension, Chrome is showing continuous warning prompts which ask users to restore their search settings back to Google. In user tests, we observe that most people are very confused about this prompt and often click "restore settings" even though they actually want to keep using [our search engine]. In many Chrome versions the button "restore settings" is even highlighted which makes it highly likely that users will click this button and thereby completely remove [our search engine] from

[1361] Submission from Source 269, to H. Comm on the Judiciary, 3 (July 23, 2019) (on file with Comm.).

[1362] *Id.*

[1363] *Id.*

[1364] *Set your default search engine*, GOOGLE CHROME HELP, https://support.google.com/chrome/answer/95426?co=GENIE.Platform%3DDesktop&hl=en (last visited Oct. 2, 2020).

their computers. We believe that we have already lost millions of users because of this prompt.[1365]

iii. Unilaterally Setting Standards

By virtue of its dominance in the browser market, Google can effectively set standards for the industry in two ways.

First, changes to Chrome's functionality create *de facto* standards. Market participants must adhere to these standards or risk their technology no longer being compatible with most websites. Market participants explain that Google will often build features quickly without using the standard-setting process or giving smaller browsers time to implement new features. Once web developers start building to these specifications, however, smaller browsers are under pressure to quickly implement these changes, often with little notice.[1366] If smaller browsers cannot keep up, users are flooded with "[b]rowser not supported" messages on webpages that have already been built to Chrome's specifications.[1367] Several market participants told the Subcommittee that they felt "bullied" by this process.[1368]

Second, Google has an outsized role in the formal stakeholder standards-making processes. As explained earlier in this Report, the World Wide Web Consortium (W3C) is one of the leading standards organizations in the browser market. Its stated mission is to be "open and collectively empowering."[1369] Other market participants believe that Google is significantly overrepresented in the W3C web platform incubator community group (WICG). They note that Google's employees comprise 106 members, more than eight times the number of employees from Microsoft, the next largest stakeholder represented. Most companies, meanwhile, have only one representative.[1370] One market participant said:

> Though standards bodies like the W3C give the impression of being a place where browser vendors collaborate to improve the web platform; in reality Google's monopoly position and aggressive rate of shipping non-standard features frequently reduce standards bodies to codifying web features and decisions Google has already made.[1371]

[1365] Submission from Source 534, to H. Comm. on the Judiciary, 3 (Oct. 14, 2019) (on file with Comm.).

[1366] Submission from Source 269, to H. Comm. on the Judiciary (Jan. 2020) (on file with Comm.).

[1367] Martin Brinkmann, *The new Skype for Web does not work in Firefox or Opera*, GHACKS.NET (Mar. 8, 2019), https://www.ghacks.net/2019/03/08/the-new-skype-for-web-does-not-work-in-firefox-or-opera/.

[1368] Interview with Source 482 (July 2, 2020).

[1369] *W3C Mission*, W3C https://www.w3.org/Consortium/mission (last visited on Oct. 4, 2020).

[1370] Submission from Source 269, to H. Comm. on the Judiciary, 4 (July 23, 2019) (on file with Comm.).

[1371] *Id.* (Apr. 1, 2020).

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Recent events underscore how Google's ad-based business model can prompt questions about whether the standards Google chooses to introduce are ultimately designed primarily to serve Google's interests. In January 2020, Google announced that it plans to phase out third-party cookies in Chrome within two years.[1372] Unlike other browsers that have limited cross-site tracking, Google's decision appears to be motivated by "trying to cut down on tracking without kneecapping revenue for websites."[1373]

Several observers have noted that this change would have the likely effect of reinforcing Google's power and harming rivals, shifting more advertisers toward Google.[1374] In particular, market participants are concerned that while Google phases out third-party cookies needed by other digital advertising companies, Google can still rely on data collected throughout its ecosystem.

During the Subcommittee's sixth hearing, Representative Kelly Armstrong (R-ND) asked Mr. Pichai, "[D]o you have other ways of collecting it [data] through Gmail or consumer facing platforms?"[1375] Mr. Pichai responded, "[T]o the extent on the services where we provide ads and if users have consented to ads personalization, yes, we do have data."[1376]

6. Maps

a. Overview

Google dominates the market for digital maps with over a billion users.[1377] Between Google Maps and Waze—which Google also owns—the corporation captures an estimated 80% of the navigation app market.[1378] Financial analysts have described navigation maps as a "utility" that people cannot do without,[1379] and one bank estimated that if Google Maps were a standalone product, its market capitalization would hit $61.5 billion.[1380]

[1372] Sarah Sluis, *Google Chrome Will Drop Third-Party Cookies in 2 Years*, AD EXCHANGER (Jan. 14, 2020), https://www.adexchanger.com/online-advertising/google-chrome-will-drop-third-party-cookies-in-2-years/.

[1373] Dieter Bohn, *Google to 'phase out' Third-party cookies in Chrome, but not for two years*, THE VERGE (Jan. 14, 2020), https://www.theverge.com/2020/1/14/21064698/google-third-party-cookies-chrome-two-years-privacy-safari-firefox.

[1374] Nick Bastone, *In Ironic Twist, Google's Pro-Privacy Move Boosted U.S. Antitrust Probe,* THE INFO. (Sept. 18, 2020), https://www.theinformation.com/articles/in-ironic-twist-googles-pro-privacy-move-boosted-u-s-antitrust-probe.

[1375] CEO Hearing Transcript at 125 (question of Rep. Kelly Armstrong (R-ND), Member, Subcomm. on Antitrust, Commercial & Admin. Law of the H. Comm on the Judiciary).

[1376] *Id.* (statement of Sundar Pichai, CEO, Alphabet Inc.).

[1377] Ethan Russell, *9 things to know about Google's maps data: Beyond the Map*, GOOGLE CLOUD (Sept. 30, 2019), https://cloud.google.com/blog/products/maps-platform/9-things-know-about-googles-maps-data-beyond-map.

[1378] Royal Bank of Canada Report at 5.

[1379] *Id.*

[1380] ROSS SANDLER, BARCLAYS, ALPHABET INC., STEADY COMPOUNDER, WITH PLENTY OF INNOVATION AHEAD 20 (Mar. 28, 2017) (on file with Comm.).

Google Maps can be traced to a series of acquisitions. In September 2003, Google Labs launched "Search by Location," a feature that sought to filter search results based on a user's geographic location.[1381] Because Google lacked mapping data, however, the feature stalled.[1382] In October 2004, a few months after Google's IPO, Google acquired Where 2 Technologies, an Australian startup that created web-based dynamic maps.[1383] Google soon followed this acquisition with two additional purchases: Keyhole, a firm that used satellite images and aerial photos to create digital-mapping software, and ZipDash, a provider of real-time traffic information captured through GPS.[1384] In February 2005, Google launched Google Maps.[1385]

The following year, Google introduced Google Maps API, which enabled developers to use and build on top of its digital maps.[1386] In 2008, it launched "Ground Truth," a project devoted to assembling and refining underlying mapping data and images.[1387] This effort included Google Street View Cars, which drove around the country—and, eventually, the world—taking pictures of the surrounding buildings and landscapes, and delivering Google structured data that it could use to create digital maps.[1388] As part of Project Ground Truth, Google also obtained mapping information from satellite and aerial imagery, as well as from public databases.[1389]

A 2008 budget request for Ground Truth stated that the goal of the project was "long term independence from Tele Atlas and Navteq," two sources of mapping data that Google had been using at the time and that were owned by TomTom and Nokia, respectively.[1390] The presentation stated that achieving independence would take several years and requested a 5- to 7-year renewal of the Tele

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[1381] Scarlett Pruitt, *Google Test Drives New Search Tool*, PC WORLD (Sept. 23, 2003), https://www.pcworld.com/article/112604/article.html.

[1382] Google Maps, ACQUIRED (Aug. 26, 2019), https://www.acquired.fm/episodes/google-maps.

[1383] *Id*.

[1384] *Google Acquires Keyhole*, WALL ST. J.: NEWS ROUNDUP (Oct. 27, 2004); Michael Bazeley, *Google acquires traffic info start-up ZipDash*, VENTUREBEAT (Mar. 30, 2005) https://venturebeat.com/2005/03/30/google-acquires-traffic-info-start-up-zipdash/#:~:text=According%20to%20the%20company's%20web,the%20GPS%20in%20their%20phones.

[1385] Elizabeth Reid, *A look back at 15 years of mapping the world*, THE KEYWORD (Feb. 6, 2020), https://blog.google/products/maps/look-back-15-years-mapping-world/.

[1386] *Id.*

[1387] Frederic Lardinois, *Google's Ground Truth Initiative for Building More Accurate Maps Now Covers 50 Countries*, TECHCRUNCH (Sept. 3, 2014), https://techcrunch.com/2014/09/03/googles-ground-truth-initiative-for-building-more-accurate-maps-now-covers-50-countries/.

[1388] Greg Miller, *The Huge, Unseen Operation Behind the Accuracy of Google Maps*, WIRED (Dec. 8, 2014), https://www.wired.com/2014/12/google-maps-ground-truth/ ("As of December 2014, Google's "Street View cars ha[d] driven over 7 million miles, including 99 percent of the public roads in the U.S.").

[1389] *Id.*

[1390] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-03386002 (Dec. 6, 2007) (on file with Comm.).

Atlas contract to help Google bridge "between now and completion of Google Truth initiatives."[1391] Although Google Maps was not generating revenues, Google was investing in it heavily. Google's documents show that from 2008 to 2009, the company spent $32 million on the Street View program and $88.7 million on Ground Truth overall.[1392] When Google launched Google Maps in 2005, MapQuest had been the "king of Internet-based maps and driving directions," with Yahoo gearing up to heavily compete.[1393] By 2008, Google's internal documents show that Google was "#1 in Maps usage" as well as at the top in capturing online local search.[1394]

In 2009, Google introduced Google Maps for Mobile, a navigation service featuring turn-by-turn directions, live traffic updates, and automatic rerouting.[1395] Whereas market leaders TomTom and Garmin sold navigation services through subscriptions, Google was offering its service for free[1396]—a fact widely seen as disfavoring the incumbents, whose stock prices fell upon Google's announcement.[1397] As one analyst noted at the time, "If it's free and a good service, why would you pay for something you can get for free?"[1398]

As smartphones overtook personal navigation devices, Google Maps further eclipsed TomTom and Garmin.[1399] When asked in 2015 what had accounted for TomTom's decline, its CEO cited two factors: the 2008 economic crisis and the fact that "Google began offering navigation for free."[1400]

Some market participants at the time questioned whether Google was using its search dominance to give Google Maps a boost. In 2009, one publisher noted that "61% of visits to Google

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[1391] *Id.*

[1392] *Id.* at GOOG-HJC-04211018 (Oct. 17, 2010).

[1393] Chris Gaither, *Overtaking MapQuest a Challenge for Yahoo*, L.A. TIMES (Jan. 10, 2005), https://www.latimes.com/archives/la-xpm-2005-jan-10-fi-maps10-story.html.

[1394] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-03610422 (Oct. 28, 2008) (on file with Comm.).

[1395] *Announcing Google Maps Navigation for Android 2.0*, GOOGLE OFFICIAL BLOG (Oct. 28, 2009), https://googleblog.blogspot.com/2009/10/announcing-google-maps-navigation-for.html.

[1396] Jenna Wortham & Miguel Helft, *Hurting Rivals, Google Unveils Free Phones GPS*, N.Y. TIMES (Oct. 28, 2009), https://www.nytimes.com/2009/10/29/technology/companies/29gps.html.

[1397] Arik Hesseldahl, *Garmin, TomTom Slash Prices Amid Google Threat*, BLOOMBERG (Dec. 8, 2009), https://www.bloomberg.com/news/articles/2009-12-08/garmin-tomtom-slash-prices-amid-google-threat (stating that upon Google's announcement, Garmin stock dropped around 16% and TomTom stock fell by around 29%).

[1398] Jenna Wortham & Miguel Helft, *Hurting Rivals, Google Unveils Free Phones GPS*, N.Y. Times (Oct. 28, 2009), https://www.nytimes.com/2009/10/29/technology/companies/29gps.html (internal quotation marks omitted).

[1399] Kevin J. O'Brien, *Smartphone Sales Taking Toll on G.P.S. Devices*, N.Y. TIMES (Nov. 14, 2010), https://www.nytimes.com/2010/11/15/technology/15iht-navigate.html.

[1400] Charles Arthur, *Navigating decline: what happened to TomTom?*, THE GUARDIAN (July 21, 2015), https://www.theguardian.com/business/2015/jul/21/navigating-decline-what-happened-to-tomtom-satnav.

Maps came directly from Google," giving it an advantage over MapQuest.[1401] The publisher wrote, "As long as Google dominates search, MapQuest will face a tough battle for visits."[1402] A few years later, Consumer Watchdog wrote a letter to the Antitrust Division noting that Google "was able to muscle its way to dominance by unfairly favoring its own service ahead of such competitors as Mapquest in its online search results."[1403]

In 2013, Google purchased Waze, an Israeli crowd-sourced mapping provider, for $1.3 billion.[1404] The acquisition solidified Google's dominance in turn-by-turn navigation, eliminating its only meaningful competitive threat.

While Google captured the navigation market by offering Google Maps for free, even as it generated no revenue, Google now monetizes both Waze and Google Maps through selling ads. In 2013 Google introduced a limited form of maps advertising, and in recent years it has expanded the program, allowing local businesses to purchase advertising on maps to maximize foot traffic.[1405] Research by Google shows that 76% of users who search for locations nearby end up visiting a related business within a day and that 28% of those searches ultimately lead to a purchase.[1406] This high conversion rate leads analysts to believe that Google Maps alone could help drive between $1.9 billion and $3.7 billion of incremental revenue by 2021.[1407] Commenting on the value of Google Maps to the Google ecosystem, one analyst noted:

> [Google Maps'] user base has been impressive for years, crossing 1B a few years ago, but monetization is just getting started … Maps is the closest thing to a platform that Google has at the application layer, with three stakeholders in the ecosystem: 1) users; 2) publishers; and 3) advertisers. The importance of Maps to mobile, including both the advertising and transportation-on-demand spaces, is one of the biggest potential markets Google is servicing in the future.[1408]

[1401] Experian Marketing Services, *Google Maps Edges Closer to Mapquest*, EXPERIAN BLOG (Feb. 11, 2009), http://www.experian.com/blogs/marketing-forward/2009/02/11/google-maps-edges-closer-to-mapquest/.

[1402] *Id.*

[1403] Letter from John M. Simpson, Privacy Project Dir., Consumer Watchdog, to William J. Baer, U.S. Dep't of Justice, Ass't Att'y Gen., Antitrust Div. (June 12, 2013), https://www.consumerwatchdog.org/resources/cltrdojwaze061213.pdf.

[1404] Brian McClendon, *Google Maps and Waze, outsmarting traffic together*, GOOGLE BLOG (June 11, 2013), https://googleblog.blogspot.com/2013/06/google-maps-and-waze-outsmarting.html; Vindu Goel, *Google Expands Its Boundaries, Buying Waze for $1 Billion*, N.Y. TIMES (June 11, 2013), https://bits.blogs.nytimes.com/2013/06/11/google-expands-its-boundaries-buying-waze-for-1-billion/.

[1405] Royal Bank of Canada Report at 10–11.

[1406] *How Mobile Search Connects Users to Stores*, THINK WITH GOOGLE (May 2016), https://www.thinkwithgoogle.com/marketing-strategies/app-and-mobile/mobile-search-trends-consumers-to-stores/.

[1407] *See, e.g.*, Royal Bank of Canada Report at 20.

[1408] ROSS SANDLER, BARCLAYS, ALPHABET INC., STEADY COMPOUNDER, WITH PLENTY OF INNOVATION AHEAD 20 (Mar. 28, 2017) (on file with Comm.).

b. Market Power

Google Maps is the dominant provider of mapping data and turn-by-turn navigation services. The company declined to provide the Committee with information about the market share captured by Google Maps.[1409] According to a third-party estimate, however, Google Maps combined with Waze captures 81% of the market for turn-by-turn navigation services.[1410] One market participant, meanwhile, estimated that Google Maps API captures over 90% of the business-to-business market.[1411]

Several developers stated that Google Maps introduced greater licensing restrictions as it gained a stronger market position. One noted that Google's control over what now serves as a key mapping technology has allowed Google to call all the shots.[1412] "We license Google Maps and it's essentially a contract of adhesion. It's full of restrictions and we aren't able to negotiate any changes," the developer said.[1413] The developer added that they have explored switching to alternative mapping providers, but that no other provider has the same geographic depth and coverage as Google Maps. "Other providers still value us and want to know how they can accommodate us," they said. "With Google, we just have to comply with all their restrictions."[1414]

Several factors suggest that Google Maps is well-positioned to maintain its dominance. The high fixed costs of creating mapping data pose a significant barrier to entry. Apple, which recently built its mapping database from the ground up, told the Subcommittee that the effort required billions of dollars.[1415] Google, moreover, also benefits from an enormous lead in the tracking and processing of location data, as well as from the prevalence of tracking-enabled Android devices.[1416] Commenting on

[1409] Production of Google, to H. Comm. on the Judiciary, A-4 (Nov. 22, 2019) (on file with Comm.) ("Google Maps has a number of features, including maps, turn-by-turn navigation and directions, Street View, and information on local businesses (such as restaurants and services)and travel destinations (such as hotels and tourist spots) that are also offered by competitors. These competitors include Apple Maps, Bing Maps, TomTom, Yelp, TripAdvisor, Angie's List, and Facebook . . . . All of these competitors are widely used, with some having a strong presence on key platforms: for example, one report from 2015 estimated that iPhone users use Apple Maps three times more than Google Maps. However, we are not aware of any public market share estimates that reflect the frequency of multi-homing among users or that account for competitors like TripAdvisor, OpenTable, Yelp, or directory apps such as Yellow Pages that overlap with many of the features of Google Maps, which would reflect the full range of robust competition in maps that drives Google to continually invest and innovate in the Google Maps product.").

[1410] Royal Bank of Canada Report at 4.

[1411] Submission from Source 564, to H. Comm. on the Judiciary, 2 (Nov. 13, 2019) (on file with Comm.).

[1412] Interview with Source 703 (June 22, 2020).

[1413] *Id.*

[1414] *Id.*

[1415] Innovation and Entrepreneurship Hearing at 6 (response to Questions for the record from Kyle Andeer, Vice Pres., Corp. Law, Apple Inc.).

[1416] Royal Bank of Canada Report at 10–11.

its monetization potential, an analyst recently wrote that Google Maps has "reasonably sustainable moats."[1417]

Certain businesses have made public disclosures about their reliance on Google Maps. For example, in 2019, Uber disclosed that it relies on Google Maps for "the mapping function that is critical to the functionality" of its platform.[1418] It added, "We do not believe that an alternative mapping solution exists that can provide the global functionality that we require to offer our platform in all of the markets in which we operate."[1419] Uber disclosed that between January 1, 2016 and December 31, 2018, the company paid Google $58 million for use of Google Maps.[1420]

In a submission to the Subcommittee, one market participant who uses Google Maps to power its reservation system, website, and mobile app, stated that there are no alternatives to using Google Maps. It wrote, "Local businesses are most likely to use Google's tools to index their websites because Google controls the search engine space, which has the ability to deliver—or restrict—whether these websites appear in corresponding links in consumer search results."[1421] The market participant added that this dependence reinforces Google's market power, as it "provides Google with another opportunity to monetize companies' supply chains and leverage its pricing power over companies that need to promote their businesses and/or purchase ad space to grow."[1422] This business predicted that "the data advantages that Google incorporates into its tools will only grow with time, making it impossible for a new player to ever achieve the scale, user base, or database necessary to compete."[1423]

c. Merger Activity

Google has made several acquisitions related to digital mapping: Where2Technologies (2004); Keyhole (2004); Skybox (2011); and Waze (2013). Of these acquisitions, only Waze—for which Google paid $1.1 billion—was subject to an antitrust investigation. Although Google did not originally report the Waze transaction, both the Federal Trade Commission and the United Kingdom's Office of Fair Trading (OFT) reviewed the deal.[1424] Both enforcers initially approved the transaction but have

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[1417] *Id.* at 1.

[1418] Uber Technologies, Inc., Registration Statement (Form S-1) 46 (Apr. 11, 2019), https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm.

[1419] *Id*. It is unclear whether Uber pays Google for the underlying maps data or for the place search function, both of which are part of "Google Maps Core Services."

[1420] *Id*. at 254.

[1421] Submission from Source 333, to H. Comm. on the Judiciary, 5 (Oct. 21, 2019) (on file with Comm.).

[1422] *Id.*

[1423] *Id.*

[1424] Mark Bergen & Ben Brody, *Google's Waze Deal Is a Likely Target in FTC Antitrust Sweep*, BLOOMBERG (Feb. 14, 2020), https://www.bloomberg.com/news/articles/2020-02-14/google-s-waze-deal-is-a-likely-target-in-new-ftc-antitrust-sweep.

since revisited the decision. In 2019 the OFT commissioned a study reviewing its past merger cases, including Google/Waze, and the FTC is reportedly examining the Waze deal as part of its broader review of previous tech mergers.[1425]

Materials that the FTC produced to the Subcommittee suggest that the Commission's analysis of the Google/Waze deal was limited. A document from the FTC shows that the agency focused on assessing the quality of Waze's data and concluded that its maps were "not a Google maps replacement."[1426] It is unclear if or how closely the agency considered that Google was acquiring Waze not for its mapping features (which Google's own documents had suggested were inferior to Google's), but in order to eliminate an independent source of mapping data.[1427]

In acquiring Waze, Google bought out one of the few companies in the world making navigable maps while also providing turn-by-turn navigation service.[1428] Founded in Israel, Waze had entered the U.S. market by initially relying on public domain public data, which it refined through input from drivers.[1429] Waze's model has relied on user-generated maps, whereby drivers using Waze's app feed real-time data back into the app, and volunteer "editors" proactively fine-tune the maps by fixing street names, adding businesses, and making other updates. Waze's documents reveal that through 2012 the firm had prioritized achieving growth and attracting users over earning revenue, although it had begun to monetize its navigation app through location-based advertising.[1430]

Internal Waze presentations stated that its crowd-sourced data was one of the company's defining features. One presentation stated, "The DNA of the company is of a social network, and user generated, we are merely the stage, and not the performers."[1431] In a 2013 document, Waze identified its two main competitive advantages: first, the fact that Waze was a real-time map with fresh data, accounting for updates such as car accidents and road closures; and, second, that its business involved "zero cost."[1432]

Google's documents reveal that by 2012, Google Maps was the top provider of digital maps in desktop, mobile, and API,[1433] and it was closely tracking Waze's fast growth. One Google presentation

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[1425] *Id*.

[1426] *Id.*

[1427] *Id.*

[1428] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04208423 (June 2013) (on file with Comm.)

[1429] *Id.* at GOOG-HJC-04211080 (Jul 24, 2013) (citing the U.S. Census Bureau's TIGER mapping data as one source).

[1430] *Id.* at GOOG-HJC-04208066 (June 2013) (Waze was "earning $250k in revenue in January 2013 and less than $1 million in revenue in 2012").

[1431] *Id.* at GOOG-HJC-04208423 (June 2013).

[1432] *Id.*

[1433] *Id.* at GOOG-HJC-04208281 (May 2012).

in 2012 noted that Waze was the most-downloaded app in the navigation category, and that it was seeing a 30% increase in daily downloads and averaging around 100,000 downloads a day.[1434] Google also honed in on the fact that Waze was the only other mapping provider that was vertically integrated across the full stack, spanning the provider, application, map, traffic, and search layers.[1435]

In an internal presentation, Google identified several strategic rationales for acquiring Waze.[1436] These included obtaining a "highly-engaged community of map contributors and expertise" in order to "nurture/grow communities," which Google said it struggled with; achieving a "scalable solution" for maintaining a fresh map with "real-time incident data"; using Waze as a "sandbox" to "test map/navigation features"; and acquiring a "highly-talented team" with "deep experience in maps."[1437] Google also ranked Waze poorly on several metrics, including the accuracy of its results in smaller cities and its limited map search capabilities.[1438] Commenting on Waze's mapping tiles, Google wrote, "[D]ata is missing and rendering is overly simple and missing detail."[1439] Meanwhile, Google described Waze's future financial projections as "highly speculative,"[1440] and noted that its purchase price of just under $1 billion was "expensive for a company with < $1 million in 2012 revenue."[1441]

In its correspondence with the FTC, Google stated that "there is no shortage of full-featured navigation alternatives for users," which it said reflected the "low (and continually decreasing) barriers to entry."[1442] Google emphasized Waze's entry, in particular, focusing on how Waze "spent far less than $20 million *for all purposes* in the two years preceding its US launch" and noting that it was able to enter the market using only public domain data.[1443]

In contrast, market participants viewed Google and Waze as close competitors in a "highly concentrated" market for navigable digital map databases and turn-by-turn navigation applications. Prior to the transaction, Waze had observed that it and Google were "the only vertically integrated stacks."[1444] One market participant told antitrust enforcers that it viewed Waze as "Google's closest competitor for real-time, updated [turn-by-turn] navigation services" and that Waze "was the digital-

[1434] *Id.* at GOOG-HJC-04208072 (Nov. 2012).

[1435] *Id.* at GOOG-HJC-04209632. (Nov. 2012).

[1436] *Id.* at GOOG-HJC-04208127 (May 2013)

[1437] *Id.*

[1438] *Id.* at GOOG-HJC-04208140 (May 2013).

[1439] *Id*.

[1440] *Id.* at GOOG-HJC-04213996 (June 2013).

[1441] *Id.* at GOOG-HJC-04208047. (June 2013).

[1442] *Id.* at GOOG-HJC-04211046 (July 24, 2013).

[1443] *Id.* at.GOOG-HJC-04211080 (July 24, 2013).

[1444] *Id.* at GOOG-HJC-04208696.

map competitor with the best opportunity to overcome Google's significant data and funding advantage."[1445]

Market participants cited a few reasons the transaction would undermine competition. First, they noted that barriers to entry in the market for turn-by-turn navigation providers were high and that it would be difficult for new firms to enter. One market participant stated, "Navigable digital map databases contain far more information than maps and addresses. For example, Google's database includes a range of other information, including traffic, conditions and rerouting information, interior and exterior photographs, reviews, commentary from Google+ friends."[1446] And Waze, in particular, had a unique crowd-sourced model that would be difficult for other firms to replicate. Although Waze had secured a "first-mover advantage" and acquired a "critical mass of users," the group of self-selected volunteers who edited Waze's maps were "unlikely to fill such a role (without payment) for more than one set of mapping data."[1447] The market participant added, "Once those editors provide the benefit of their input into Waze they create a powerful map that passive Waze users will turn to as well given the lack of other real-time-updated maps of comparable quality. As a result, passive Waze users likely will have no incentive to multi-home."[1448]

Second, market participants pointed to the fact that Waze was the only firm meaningfully positioned to dislodge Google Maps because it—like Google—lacked financial pressures. One entrepreneur noted, "Google and Waze do not care how much it costs to keep the maps up-to-date. Google because it has a lot of money, and Waze because it relies on the community."[1449] One market participant stated:

> The acquisition would effectively lead to the elimination of Waze as a market disrupting force that would otherwise be capable of challenging the model adopted by Google's dominant Google Maps. In essence, Google's acquisition of Waze is defensive - seeking to remove a disruptive force from the market.[1450]

Several market participants and advocates who opposed the deal noted that Waze's own CEO, Noam Bardin, had recently stated that Waze was "the only reasonable competition" to Google Maps, which would suggest that Google may have been pursuing the acquisition in efforts to quash its most significant competitor.[1451]

[1445] Submission from Source 26, to H. Comm. on the Judiciary, Source 26-000622 (Sept. 21, 2013) (on file with Comm.).

[1446] *Id. See also* Interview with Source 572 (Sept. 24, 2020).

[1447] Interview with Source 572 (Sept. 24, 2020).

[1448] *Id.*

[1449] *Id.*

[1450] *Id.*

[1451] Letter from John M. Simpson, Privacy Project Dir., Consumer Watchdog, to William J. Baer, Ass't Att'y Gen., U.S. Dep't of Justice, Antitrust Div. (June 12, 2013), https://www.consumerwatchdog.org/resources/cltrdojwaze061213.pdf.

And third, market participants argued that the acquisition would give Google both the incentive and ability to foreclose rivals, including those apps that offer mobile navigation and social networking services. Seeking to mitigate this concern, Google's letter to the FTC emphasized the "numerous providers who license mapping, traffic, and incident" data for use in mobile apps.[1452]

Today, the Google Maps and Waze teams remain separate. Analysts have reported that Google has used Waze as a tool to "test and iterate on monetizing Navigation without disrupting its much larger Google Maps asset."[1453] One market participant stated, "Google has used Waze as an ads guinea pig,"[1454] noting that Waze has released efficacy reports of location-tailored ads, information that seems to have informed Google Maps' recent expansion of advertising.[1455]

Since completing the Waze acquisition, Google has reportedly come to capture 81% of the market for navigation mapping services.[1456] Despite Google's claims that entry barriers were low and alternate offerings abundant, no meaningful competitor has emerged since Google acquired Waze. Based on the materials the FTC provided to the Subcommittee, it is unclear whether the Commission fully assessed the barriers to entry. It instead appears the FTC primarily took a static view—focusing on the existing quality of Waze's maps—rather than assessing the dynamic effects of the acquisition.

d. Conduct

i. Raising Prices

For years, Google offered a free tier of the Maps API, incentivizing developers to build their apps with Google Maps. In 2018, however, Google Maps introduced a single "pay-as-you-go" pricing plan for the core mapping APIs.[1457] This shift dramatically reduced the number of free Maps API calls a firm could make—from 25,000 per day to around 930 per day.[1458] Developers stated that the change amounted to a price increase of 1,400%.[1459]

[1452] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04211030 (July 24, 2013) (on file with Comm.).

[1453] Royal Bank of Canada Report at 14.

[1454] Interview with Source 572 (Sept. 24, 2020).

[1455] *Id*.

[1456] Royal Bank of Canada Report at 5.

[1457] Jagmeet Singh, *Google Maps API Price Hike is Threatening the Future of Some Companies*, GADGETS 360 (Aug. 28, 2018), https://gadgets.ndtv.com/apps/features/google-maps-apis-new-pricing-impact-1907242.

[1458] *Id*.

[1459] Ishveena Singh, *Insane, shocking, outrageous: Developers react to changes in Google Maps API*, GEO AWESOMENESS (May 3, 2018), https://geoawesomeness.com/developers-up-in-arms-over-google-maps-api-insane-price-hike/ ("The Standard (no access to customer support) and Premium plans are being merged into one pay-as-you-go pricing plan. And the new fee structure is not pretty. Google is raising its prices by more than 1,400%. Obviously, no direct comparison

In a submission to the Subcommittee, one market participant said that Google instituted this price hike after "gaining dominance."[1460] Since becoming a Google Maps customer, the market participant's costs "have increased over 20x" and "there are no viable alternatives."[1461] Another developer stated that the 2018 pricing change "took our bill from $90/month in October to $20,000/month in December."[1462] The developer stated that it was able to subsequently reduce its bill through making a change that enabled the location-retrieval function to occur directly on a user's device—a change that gave Google a "greater ability to identify and track" the device user.[1463]

Several developers expressed their frustrations publicly, noting that Google's decision to hike prices so sharply, and without giving developers significant notice, underscored its power to set the terms of commerce. One developer stated:

> I understand that Google wants to make this into a line of business. But it feels like they're taking advantage of us. They know that they're the best, and that no one else is even close. Instead of just giving us Maps for free or very cheap, in exchange for collecting all our usage data, they now feel they need to charge really high prices.[1464]

In effect, Google makes market participants pay twice to access Google Maps—first by giving Google their valuable usage data and then again by paying Google's volume-based fees for API calls.

ii. <u>Tying</u>

Business-facing mapping products usually consist of a core set of features to provide greater mapping functionality. For example, the "Google Maps Platform" offers developers traffic data and places data (also known as place search) as well as map data.[1465] Some developers choose to mix and match, using map data from one firm but placing data from another. Google, however, prohibits developers from using any part of its mapping tools alongside any non-Google mapping features. Until April 2020, Google's Maps Platform Terms of Service included the following provision:

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figures of old and new prices have been provided by Google, but that's the average surge that is being reported by developers.").

[1460] Submission from Source 564, to H. Comm. on the Judiciary, 2 (Nov. 13, 2019) (on file with Comm.).

[1461] *Id.* at 4.

[1462] Submission from Source 685, to H. Comm. on the Judiciary, 4 (Oct. 15, 2019) (on file with Comm.).

[1463] *Id.*

[1464] Jagmeet Singh, *Google Maps API Price Hike is Threatening the Future of Some Companies*, GADGETS 360 (Aug. 28, 2018), https://gadgets.ndtv.com/apps/features/google-maps-apis-new-pricing-impact-1907242.

[1465] *Google Maps Platform Terms of Service, 21. Definitions*, GOOGLE, https://cloud.google.com/maps-platform/terms (last visited on Oct. 3, 2020) ("'Google Maps Content' means any content provided through the Service (whether created by Google or its third-party licensors), including map and terrain data, imagery, traffic data, and places data (including business listings).").

> (e) No Use With Non-Google Maps. Customer will not use the Google Maps Core Services in a Customer Application that contains a non-Google map. For example, Customer will not (i) display Places listings on a non-Google map, or (ii) display Street View imagery and non-Google maps in the same Customer Application.[1466]

In April 2020, Google amended the language slightly:

> (e) No Use With Non-Google Maps. To avoid quality issues and/or brand confusion, Customer will not use the Google Maps Core Services with or near a non-Google Map in a Customer Application. For example, Customer will not (i) display or use Places content on a non-Google map, (ii) display Street View imagery and non-Google maps on the same screen, or (iii) link a Google Map to non-Google Maps content or a non-Google map.[1467]

Both versions of this provision prohibit developers from using *any* component of the Google Maps Core Service with mapping services provided by non-Google firms. The April 2020 change to the terms of service is even more restrictive: it prohibits developers from even displaying any component of Google Maps "near" any other map. In practice, Google's contractual provision has led several major companies to switch entirely to Google's ecosystem, even in cases where they preferred mapping services from a non-Google provider, such as Mapbox.

Through interviews with market participants, the Subcommittee learned that Google now enforces this provision aggressively. According to one firm, Google closely tracks and pressures developers who use Google's place data in conjunction with mapping data from a non-Google firm, effectively forcing them to choose whether they will use all of Google's mapping services or none of them.[1468] One firm described Google's coercive tactics, stating, "It's a bigger player putting a gun to our head saying 'switch or else.'"[1469]

Because Google's monopoly in online search has furnished it with a trove of data, as well as a robust index, its place search feature is also seen by many market participants effectively as a must-have. One market participant that has lost business partnerships due to Google's coercive restrictions stated that Google is "using access to its dominant search products as leverage to intimidate businesses

[1466] *Id.* at 3.2.2(e).

[1467] *Id.*

[1468] Interview with Source 572 (Sept. 24, 2020).

[1469] Interview with Source 157 (Sept. 25, 2020).

out of working with other map providers."[1470] He noted that Google's conduct now threatens his firm's survival, saying, "This is existential for us."[1471]

Google was asked to identify and justify any limits it places on the ability of app developers who use the Google Maps Platform to use non-Google mapping services.[1472] Google responded that it does "restrict developers from incorporating Google Maps Core Services into an application that uses a non-Google map" in order to "prevent brand confusion and other negative user experiences."[1473] As described above, Google subsequently changed its terms of service to mirror its response to the Subcommittee's question. However, developers and mapping providers questioned Google's rationale, noting that developers were the ones best positioned to determine whether combining mapping services from multiple providers created a "negative user experience." One provider added, "The developers we partner with are extremely sophisticated. They're not confused."[1474]

Google has also used its dominance in mapping to acquire cloud computing customers for its Google Cloud Platform (GCP). Specifically, in 2018, Google implemented a change requiring all API calls to use a valid API key, which must be linked to a Google Cloud Platform account. All keyless calls to the Maps JavaScript API and Street View API trigger low-resolution maps that are watermarked with "for development purposes only."[1475] Developers who do not have a Google Cloud account, and therefore do not have an API key, are effectively locked out of Google Maps. Even if an application is built on a non-Google cloud platform, developers are forced to use GCP for the Maps API portion of their app.[1476] By one estimate, revenue from Google Cloud Platform has more than tripled since 2017, the year before Google began tying access to Google Maps to Google Cloud Platform.[1477]

iii. Self-Preferencing through Contractual Restrictions

Some developers told the Subcommittee that Google uses its control over digital mapping to favor its own products in other lines of business. Since Google provides mapping services but also

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[1470] Interview with Source 572 (Sept. 24, 2020).

[1471] *Id.*

[1472] Innovation and Entrepreneurship Hearing at 29 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC).

[1473] *Id.*

[1474] Interview with Source 572 (Sept. 24, 2020).

[1475] *Guide for Existing Users*, GOOGLE CLOUD, https://cloud.google.com/maps-platform/user-guide (last visited Oct. 3, 2020).

[1476] Daria Bulatovych, *Mapbox as a Worthy Alternative to Google Maps Price Hike,* YALANTIS, https://yalantis.com/blog/mapbox-maps-ready-mobile-apps/ (last visited Oct. 5, 2020).

[1477] Larry Dignan, *Top cloud providers in 2020: AWS, Microsoft Azure, and Google Cloud, hybrid, SaaS players*, ZDNET (Oct. 1, 2020), https://www.zdnet.com/article/the-top-cloud-providers-of-2020-aws-microsoft-azure-google-cloud-hybrid-saas/.

offers non-mapping products that use mapping as an input, Google can selectively degrade access for third parties that rely on its mapping product to disfavor them as competitors to its non-mapping products. For example, market participants noted that Google has added various restrictions to the license agreement for Google Maps API—restrictions that apply to third-party developers but not to Google's own competing products.

One example is unequal rights to map caching. Map caching occurs when a server stores copies of map images that it can speedily distribute when next recalled. Without caching, a map is drawn each time it is requested, a much slower process.[1478] Although previous versions of the Google Maps API agreement permitted caching by developers, the recent versions prohibit caching of maps with limited exceptions.[1479] Third-party apps built on Google Maps API can no longer store a map cache. Market participants note, however, that Google's own products built on Google Maps—ranging from its local search service to its hotel finder—face no similar restrictions, enabling them to load faster than those run by third parties.

Commenting on the asymmetry, one market participant stated that Google's decision to deny third parties caching "denigrates the service that our maps can provide compared to Google's."[1480] They added, "[T]hat's why we can't create an app that provides directions as well as Google or we can't update a user's location as quickly as Google."[1481]

iv. Strategic Platform Mismanagement

Although Google's responses to the Subcommittees' questions about its conduct regarding Google Maps emphasized "quality" and "user experience,"[1482] public reporting has documented that Google Maps' listings are "overrun with millions of false business addresses and fake names."[1483] A fake listing can occur when a business creates a fake listing or when a fraudulent business hijacks the name of a legitimate business on Google Maps, diverting user calls or visits from the legitimate business to a fraudulent one. A survey of experts conducted by the *Wall Street Journal* estimated that

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[1478] WHAT IS MAP CACHING?, ARCGIS ENTERPRISE, https://enterprise.arcgis.com/en/server/latest/publish-services/linux/what-is-map-caching-.htm (last visited Oct. 3, 2020).

[1479] *Places API Policies, Google Maps Platform*, GOOGLE, https://developers.google.com/places/web-service/policies (last visited Oct. 3, 2020) (stating "that you must not pre-fetch, index, store, or cache any Content except under the limited conditions stated in the terms").

[1480] Interview with Source 521 (June 22, 2020).

[1481] *Id.*

[1482] Innovation and Entrepreneurship Hearing at 8 (response to Questions for the Record of Adam Cohen, Dir. of Econ. Pol'y, Google LLC).

[1483] Rob Copeland & Katherine Bindley, *Millions of Business Listings on Google Maps Are Fake—and Google Profits*, WALL ST. J. (June 20, 2019), https://www.wsj.com/articles/google-maps-littered-with-fake-business-listings-harming-consumers-and-competitors-11561042283.

Google Maps hosts around 11 million falsely listed businesses on any given day.[1484] The same experts stated that "a majority" of the listings on Google Maps for businesses such as "contractors, electricians, towing and car repair services, movers and lawyers," as well as others, are not actually located at the location given by Google Maps.[1485]

These fake listings endanger consumer safety, giving rise to situations where users of Google Maps have unknowingly requested home repairs and other services from fraudulent providers, ultimately, paying inflated prices for shoddy work.[1486] The fraudulent listings also disadvantage legitimate businesses, both those whose listings have been hijacked as well as those whose own listings appear below those of sham businesses. Marketers have weaponized this problem to demand ransom payments from businesses under the threat of wiping out their listings through a flood of fake businesses. When the listing of one auto junkyard fell from the first to the second page of Google Maps results, the owner's income fell by half and pushed him to the edge of closing shop entirely.[1487]

Legitimate businesses hurt by fake listings say that contacting Google to report the situation generally fails to resolve the problem. In practice, the only way legitimate businesses can shield themselves from fake listings is to buy ads from Google. Ad prices for categories that are most susceptible to ad fraud have increased more than 50% over the last two years.[1488]

The Subcommittee asked Google about this practice on several occasions. At the Subcommittee's July 16, 2019 hearing, Congresswoman Lucy McBath (D-GA) asked Adam Cohen, Google's director of economic policy, what steps Google was taking to identify and remove fraudulent listings on Google Maps.[1489] She added, "Is it a lack of competition in online search that allows Google to be so complacent by addressing this problem head on?"[1490] Mr. Cohen responded that he was "not familiar" with the relevant facts.[1491] In response to a follow-up letter sent by Chairman Cicilline, Google wrote that it has "no evidence" that the number of fake listings on Google Maps is around 10

[1484] *Id.*

[1485] *Id.*

[1486] *Id.* (reporting that a 67-year-old-woman contacted a local home repair service she found through Google, only to be serviced by a man who was pretending to be from the company she had hired. The man charged almost twice the cost of previous repairs and demanded a personal check or cash. The woman told the *Wall Street Journal*, "I'm at my house by myself with this guy. He could have knocked me over dead.").

[1487] *Id.*

[1488] *Id.*

[1489] Innovation and Entrepreneurship Hearing at 67 (question of Rep Lucy McBath (D-GA), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1490] *Id.*

[1491] *Id.* (statement of Adam Cohen, Dir. of Econ. Pol'y, Google LLC).

million.[1492] Google stated that, as of July 2019, it had taken down more than 3 million fake business profiles and that it has "implemented strict policies and created tools that enable people to flag false content."[1493]

Both digital advertisement experts and individuals engaging in fraudulent activity believe that Google has turned a blind eye to the problem. According to the *Wall Street Journal*, one ad specialist who was invited by Google to help root out the problem left after concluding that Google "has obviously chosen not to solve the problem."[1494] A business owner who helps facilitate the fake listings says his activity leaves a "huge footprint" and yet Google is "just letting it happen." He added, "I know Google knows."[1495]

7. Cloud

Google Cloud Platform (GCP) is Google's suite of public cloud computing services that first launched in 2008.[1496] Today, Google Cloud is Alphabet's fastest-growing line of business, with revenues in Q1 2020 hitting $2.78 billion, up 52% from $1.83 billion in Q1 2019.[1497] Documents provided to the Subcommittee make clear that the cloud market is a priority for the company.[1498] GCP is the third largest provider of IaaS services in the United States and has a year-over-year growth rate twice that of Amazon Web Services—the current market leader.[1499] Today, GCP boasts long term contracts with data-intensive companies such as SNAP, Spotify and TikTok.[1500]

[1492] Letter from Kent Walker, Senior Vice Pres., Global Affairs and Legal Officer, Google to the Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary (July 26, 2019), https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/07.26.19%20-%20google%20response.pdf.

[1493] *Id*.

[1494] Rob Copeland & Katherine Bindley, *Millions of Business Listings on Google Maps Are Fake—and Google Profits*, WALL ST. J. (June 20, 2019), https://www.wsj.com/articles/google-maps-littered-with-fake-business-listings-harming-consumers-and-competitors-11561042283 (internal quotation marks omitted).

[1495] *Id*. (internal quotation marks omitted).

[1496] Michael Arrington. *Google Jumps Head First Into Web Services With Google App Engine,* TECHCRUNCH (Apr.8, 2008), https://techcrunch.com/2008/04/07/google-jumps-head-first-into-web-services-with-google-app-engine/ (reporting that GCP's first public cloud offering, App Engine, launched as a private preview for developers in April 2008).

[1497] Benjamin Pimentel*, Google just reported cloud revenue for the first time ever, showing that it's growing fast but nowhere close to Amazon Web Services*. BUS. INSIDER (Feb 3, 2020), https://www.businessinsider.com/google-cloud-revenue-first-time-thomas-kurian-2020-2.

[1498] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04266215 (on file with Comm.).

[1499] GCP's position in the cloud market is explained in the cloud computing market overview section. *See infra* Section IV.

[1500] Snap Inc., Annual Report (Form 10-K) 11 (Feb 4, 2020) (indicating that Snap had committed to spend $2.0 billion with Google Cloud over five years beginning January 2017); Kevin McLaughlin and Amir Efrati, *TikTok Agreed to Buy More Than $800 Million in Cloud Services From Google*, THE INFO. (July 14, 2020), https://www.theinformation.com/articles/tiktok-agreed-to-buy-more-than-800-million-in-cloud-services-from-google (reporting that TikTok signed a three-year agreement with GCP in 2019, with a minimum commitment of $800 million over the time-period).

Subcommittee staff reviewed internal documents that outline Google's plans to invest significantly in acquisitions.[1501] To date, these acquisitions include Orbitera,[1502] Cask Data, Velostrata, and Elastifile, among others.[1503] Most recently, Google purchased Looker for $2.6 billion to "add a new analytics tool for Google Cloud's customers."[1504] In some instances, Google acquired firms that were multi-cloud solutions but, after acquisition, Google made them compatible only with Google's cloud infrastructure, at times integrating them into first-party PaaS and SaaS offerings only available through the Google Cloud Portal.[1505]

According to interviews with market participants and Google's internal documents, Google employs two strategies that raise concerns about potential anticompetitive conduct. First, Google appears to leverage its dominant business lines, including popular APIs such as Google Search and Maps, along with machine learning services, to attract customers to its platform through discounts and free tier services.[1506] For example, according to internal strategy documents, in 2018, Google "launched a program with the Play team to provide GCP credits to game developers based on their Play Store spend, to increase focus on Play and incentivize migration to GCP."[1507] By harnessing Google's advantages in existing markets, GCP is undermining competition on the merits.

Second, Google's documents suggest the company is considering bundling its popular machine learning service with other services that Google is seeking to promote. One recent Google cloud pricing strategy document explains, "the question that we need to think about is whether we use our entry point with Big Query to get a customer to use all the services such as Data Proc, Data Flow, as a suite and give them a price break on the Analytics Suite because it will be much harder for them to migrate away from us if they use all the other services."[1508] The document goes on to describe potential

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[1501] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04266215 (on file with Comm.).

[1502] Nan Boden, *Orbitera joins the Google Cloud Platform team*, GOOGLE (Aug. 8, 2016), https://cloud.google.com/blog/products/gcp/orbitera-joins-the-google-cloud-platform-team (noting that GCP leveraged Orbitera technology to offer automated test drives and lead management, custom pricing and billing, cloud cost visibility and control, self-serve onboarding to be fully integrated into the GCP console).

[1503] Ingrid Lunden, *Google acquires Cask Data to beef up its tools for building and running big data analytics*, TECHCRUNCH (May 16, 2018), https://techcrunch.com/2018/05/16/google-acquires-cask-data-to-beef-up-its-tools-for-building-and-running-big-data-analytics/.

[1504] Lauren Feiner & Jordan Novet, *Google cloud boss Thomas Kurian makes his first big move -- buys Looker for $2.6 billion*, CNBC (June 6, 2019), https://www.cnbc.com/2019/06/06/google-buys-cloud-company-looker-for-2point6-billion.html.

[1505] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04167298–381. (July 2, 2019) (on file with Comm.). *See also*, Donna Goodison, *Google Cloud's New Alooma Migration Service Won't Accept New AWS, Microsoft Azure Customers*, CRN (Feb 20, 2019) https://www.crn.com/news/cloud/google-cloud-s-new-alooma-migration-service-won-t-accept-new-aws-microsoft-azure-customers.

[1506] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-02456801 (on file with Comm.). *See also* GOOG-HJC-04214427 (Aug 4, 2016).

[1507] *Id.* at GOOG-HJC-04266213 (May 23, 2018).

[1508] *Id.* at GOOG-HJC-04215099 (December 31, 2018).

discounts and ultimately a plan to have "a pricing model that makes it advantageous for customers to put 80% of their workload on GCP."[1509] As described elsewhere in this Report, absent interventions, the barriers to entry and network effects in this market mean there is a high potential for single-homing and an overall concentrated market.[1510] As Google grows in this space, regulators and enforcers should be watchful for potential anticompetitive conduct.

C. Amazon

1. Overview

Amazon.com, Inc. was founded in 1994 as an online bookseller.[1511] Today, it is one of the largest companies in the world. Based in Seattle, Amazon is estimated to be the second-largest private employer in the United States, with over 500,000 employees.[1512] The company operates across a wide range of direct-to-consumer and business-to-business markets, including e-commerce, consumer electronics, television and film production, groceries, cloud services, book publishing, and logistics. Amazon went public in 1997 but did not post its first full-year profit until 2003.[1513] This is partly because Amazon's business strategy has generally focused on long-term growth over short-term profits.[1514] Amazon is currently one of the most valuable companies in the world, and its CEO, Jeff Bezos, is reported to be the wealthiest person in the world.[1515]

[1509] *Id.*

[1510] *See infra* Section IV.

[1511] Amazon.com, Inc., Annual Report (Form 10-K) 3 (Jan. 31, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/4d39f579-19d8-4119-b087-ee618abf82d6.pdf.

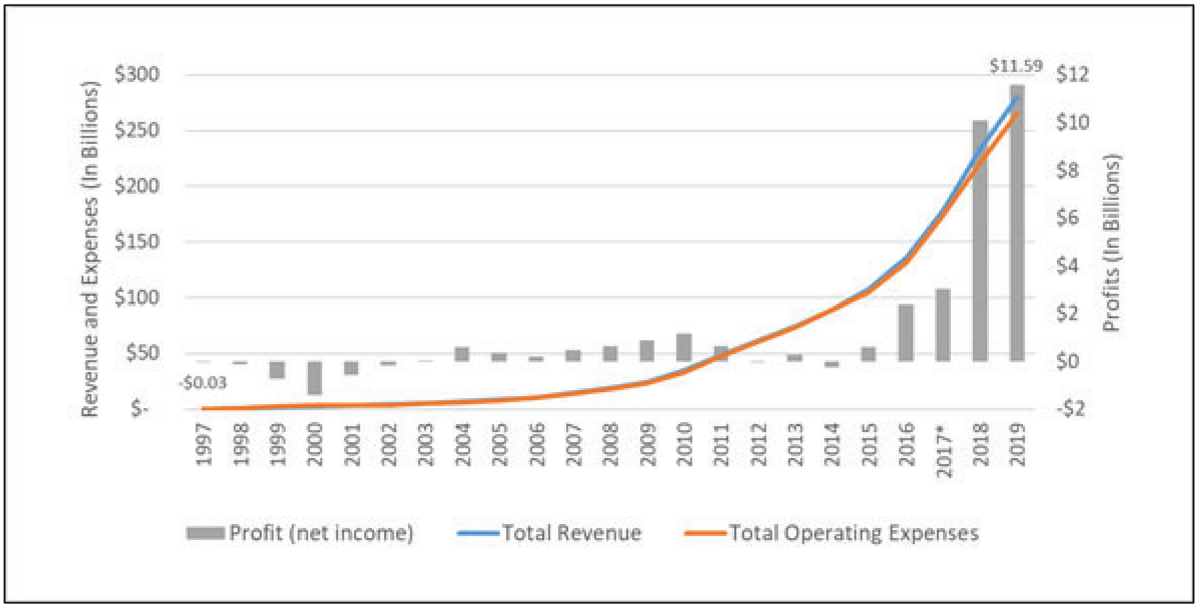
[1512] Press Release, Amazon, Amazon.com Announces Second Quarter Results 2 (July 30, 2020), https://s2.q4cdn.com/299287126/files/doc_financials/2020/q2/Q2-2020-Amazon-Earnings-Release.pdf; Charles Duhigg, *Is Amazon Unstoppable?*, THE NEW YORKER (Oct. 21, 2019), https://www.newyorker.com/magazine/2019/10/21/is-amazon-unstoppable.

[1513] Amazon.com, Inc., Annual Report (Form 10-K) 83–84 (Mar. 9, 2005), https://www.annualreports.com/HostedData/AnnualReportArchive/a/NASDAQ_AMZN_2004.pdf; Saul Hansell, *Amazon Reports First Full-Year Profit*, N.Y. TIMES (Jan. 28, 2004), https://www.nytimes.com/2004/01/28/business/technology-amazon-reports-first-full-year-profit.html.

[1514] *See, e.g.*, CEO Hearing at 3 (statement of Jeff Bezos, CEO, Amazon.com, Inc.) ("As I have said since my first shareholder letter in 1997, we make decisions based on the long-term value we create . . ."); Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00035545 (July 14, 2010) (on file with Comm.) ("Membership programs are created with a long-term, company-wide perspective with the goal of increasing loyalty and cross-category shopping behavior. The programs do not optimize for short-term gain or profitability in a single category.").

[1515] *See, e.g.*, Annie Palmer, *Jeff Bezos is Now Worth More than $200 Billion*, CNBC (Aug. 26, 2020), https://www.cnbc.com/2020/08/26/amazon-ceo-jeff-bezos-worth-more-than-200-billion.html.

Amazon's Annual Revenue, Operating Expenses, and Profits[1516]



Amazon reports financial information for three business segments: North America, International, and Amazon Web Services (AWS), Amazon's cloud services business.[1517] Despite the fact that Amazon is already so large that it dominates several important industries, it continues to report strong and steady growth—as well as increasing profits. For 2019, Amazon reported total revenue of about $280 billion, up 20% from the previous year, and a net income of over $11 billion.[1518] AWS's revenue increased by 37% in 2019 to $35 billion.[1519] Retail operations continue to be the platform's largest source of revenue, but AWS is a key source of its overall profits.[1520] In 2019, Amazon's cloud business contributed over 60% of Amazon's total operating income, despite accounting for only 12.5% of its total revenue.[1521]

Sales on Amazon.com fall into one of two categories. First-party sales are those where Amazon retails its own private-label products or sources products wholesale from a vendor or manufacturer. Third-party sales, in contrast, refer to sales by independent merchants who sell through the Amazon

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[1516] Prepared by Subcomm. based on Amazon.com, Inc., Annual Reports (Form 10-K) (1997–2019).

[1517] Amazon.com, Inc., Annual Report (Form 10-K) 3 (Jan. 31, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/4d39f579-19d8-4119-b087-ee618abf82d6.pdf.

[1518] *Id.* at 18.

[1519] *Id.* at 24.

[1520] *Id.* at 3; *see also* Nathan Reiff, *How Amazon Makes Money*, INVESTOPEDIA (Aug. 12, 2020), https://www.investopedia.com/how-amazon-makes-money-4587523 ("Retail remains Amazon's primary source of revenue, with online and physical stores accounting for the biggest share.").

[1521] Amazon.com, Inc., Annual Report (Form 10-K) 24–25 (Jan. 31, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/4d39f579-19d8-4119-b087-ee618abf82d6.pdf.

Marketplace. When a consumer visits Amazon.com, Amazon's private-label products, such as AmazonBasics or its Kindle E-Readers, are listed for sale alongside independent merchants' offers.

One of the unique features of Amazon's e-commerce site is its fast and free shipping on an extremely broad selection of products. Amazon Prime Members can choose from over 100 million items that are available for free two-day delivery in the continental United States. Walmart, by contrast, has only single-digit millions of products eligible for free two-day shipping.[1522] In response to questions from the Subcommittee, Amazon represented that it offers approximately 158,000 private-label products across 45 in-house brands, not including some additional private-label products sold through Amazon Fresh.[1523] Amazon also hosts 2.3 million active third-party sellers from around the world,[1524] about 45 times more than the 52,000 third-party sellers that Walmart hosts on its marketplace.[1525] A recent survey estimated that about 37% of Amazon's third-party sellers, representing over 850,000 sellers, rely on Amazon as their sole source of income.[1526]

Amazon does not limit the number of sellers that can offer the same product for sale on its platform. Because of this, the same product may be sold by multiple sellers, as well as by Amazon. Each time a consumer clicks on a product, Amazon chooses a single seller from all the vendors offering that product to display as the featured offer in the "Buy Box."[1527] In its response to questions from the Subcommittee, Amazon stated that the featured merchant algorithm, also commonly referred to as the Buy Box algorithm, is designed to predict the offer that consumers would choose after comparing all the available offers in detail.[1528]

[1522] J.P. MORGAN, RETAIL VS. AMAZON: LIFE IN A POST COVID-19 WORLD (2020), https://markets.jpmorgan.com/research/email/-lbk68f4/Alp1kP9tQUPS29jlzW_bOg/GPS-3397412-0.

[1523] Innovation and Entrepreneurship Hearing at 3 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[1524] *Number of Sellers on Amazon Marketplace*, MARKETPLACE PULSE, https://www.marketplacepulse.com/amazon/number-of-sellers (last visited Sept. 25, 2020); *see also* CEO Hearing at 5 (statement of Jeff Bezos, CEO, Amazon.com, Inc.) ("There are now 1.7 million small and medium-sized businesses around the world selling in Amazon's stores.").

[1525] *Number of Sellers on Amazon Marketplace*, MARKETPLACE PULSE, https://www.marketplacepulse.com/amazon/number-of-sellers (last visited on Oct. 5, 2020).

[1526] JUNGLESCOUT, THE STATE OF THE AMAZON SELLER 2020 4 (2020), https://www.junglescout.com/wp-content/uploads/2020/02/State-of-the-Seller-Survey.pdf.

[1527] Innovation and Entrepreneurship Hearing at 2 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[1528] *Id.*

The *Amazon Buy Box Playbook*, a well-known guide for sellers, explains this in lay terms:

> When a shopper lands on a product detail page, Amazon chooses one seller whose details appear in the Buy Box—the white box on the right hand side of the page. When a customer clicks on the "Add to Cart" button, the sale goes to the seller in this box.[1529]

Industry experts estimate that about 80% of Amazon sales go through the Buy Box, and the percentage is even higher for mobile purchases.[1530] In response to a question from the Subcommittee, Amazon provided only high-level information about how it chooses which offer will win the Buy Box, stating that the algorithm considers criteria such as price, delivery speed and cost, Prime eligibility, and seller performance.[1531] Despite the importance of winning the Buy Box to sellers on its platform, only Amazon knows exactly how its featured merchant algorithm works.

As Amazon's e-commerce business has grown, it has also developed a significant logistics business providing fulfillment and delivery services to third-party sellers through its Fulfillment by Amazon (FBA) program. Nearly 85% of the top 10,000 Amazon Marketplace sellers reportedly rely on this program to fulfill and deliver their orders.[1532] Third-party sellers that use FBA keep their inventory in Amazon's fulfillment centers.[1533] After a consumer places an order online, Amazon does the picking, packing, and shipping, and provides customer service to complete the order.[1534] The figure below explains the different types of sellers on Amazon.com and the various modes of delivery and fulfillment they use.

[1529] FEEDVISOR, THE AMAZON BUY BOX PLAYBOOK FOR SELLERS AND RETAILERS 4 (2020).

[1530] *Id.* at 5.

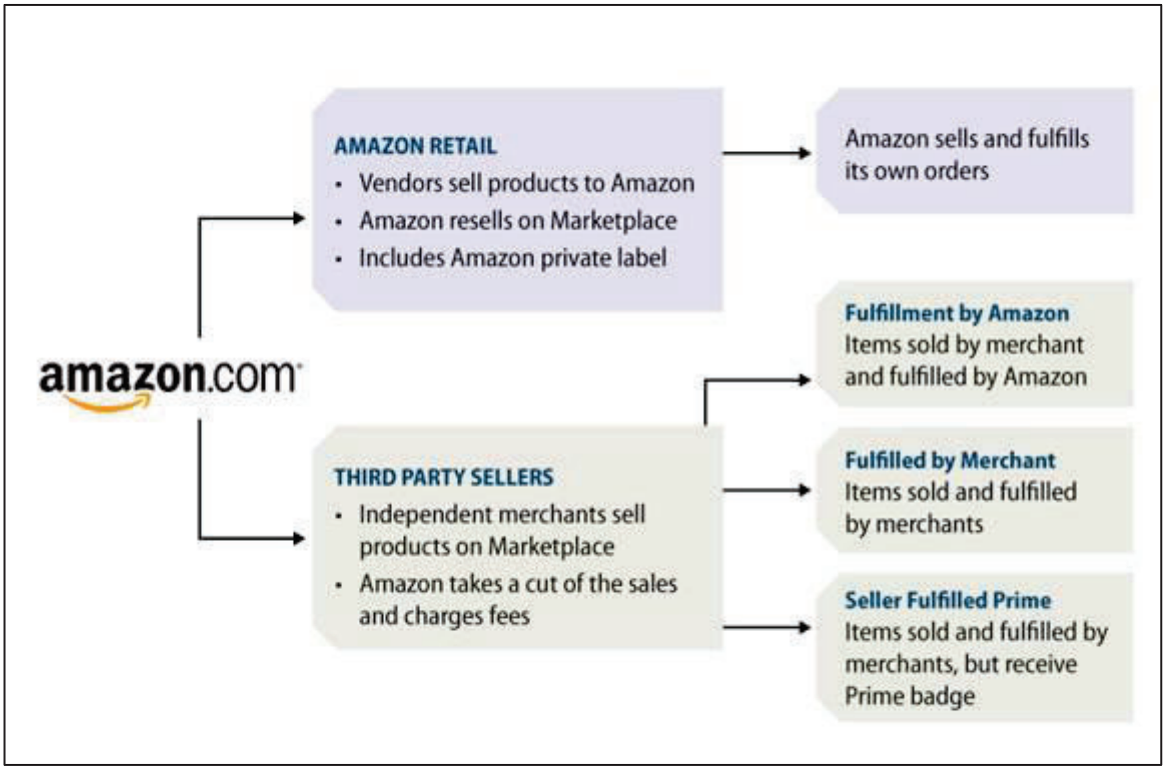
[1531] CEO Hearing at 3 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

[1532] *FBA Usage Among Amazon Marketplace Sellers*, MARKETPLACE PULSE, https://www.marketplacepulse.com/amazon/fulfillment-by-amazon-fba (last visited Oct. 5, 2020).

[1533] *Fulfillment by Amazon*, AMAZON, https://sell.amazon.com/fulfillment-by-amazon.html (last visited Sept. 28, 2020).

[1534] *Id.*

Types of Sellers on Amazon and Shipping Options[1535]



Amazon generates a significant amount of revenue from the fees that it charges third-party sellers. According to a recent SEC filing, net sales for services provided to third-party sellers increased from $23 billion in the first six months of 2019 to $32 billion over the same period in 2020—an increase of 39%.[1536] For the ability to sell a product on the platform, a seller might pay the company a monthly subscription fee, a high-volume listing fee, a referral fee on each item sold, and a closing fee on each item sold.[1537] Amazon charges additional fees for fulfillment and delivery services, as well as for advertising.[1538]

AWS, the company's cloud services business, offers digital infrastructure services to businesses that require increased computing infrastructure, such as increased capacity for servers to host or store data. Amazon is the dominant provider of infrastructure as a service. AWS accounts for close to half of all global spending on cloud infrastructure services, and the business has three times

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[1535] Prepared by the Subcomm. based on *Amazon 1P vs. 3P: What Are the Differences?*, FEEDVISOR, https://feedvisor.com/university/amazon-1p-vs-3p/ (last visited Sept. 24, 2020).

[1536] Amazon.com, Inc., Quarterly Report (Form 10-Q) 18 (July 31, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/a77b5839-99b8-4851-8f37-0b012f9292b9.pdf.

[1537] *Selling on Amazon Fee Schedule*, AMAZON SELLER CENTRAL, https://sellercentral.amazon.com/gp/help/external/200336920 (last visited Sept. 25, 2020).

[1538] *Pricing Overview,* AMAZON SELLER CENTRAL (2020), https://sell.amazon.com/pricing.html (last visited Sept. 25, 2020); *see also* Production of Amazon, to H. Comm. on the Judiciary, 12 (Oct. 14, 2019) (on file with Comm.) (noting that advertising revenue is not included in seller services).

the market share of Microsoft, its closest competitor.[1539] Cloud services are an essential and increasingly expensive line item for many companies. Given AWS's role as a dominant cloud provider, some of Amazon's competitors in other business lines often end up dependent on the platform. For example, Netflix, a competitor of Amazon Prime Video, paid AWS $500 million in 2018 to store its streaming video library.[1540]

While the pandemic has harmed many businesses, Amazon has experienced a surge in sales.[1541] The company's operating profit of $5.8 billion during the second quarter of 2020 significantly outperformed the -$1.5 billion to +$1.5 billion projection that Amazon had issued to investors.[1542] One analyst described the magnitude of Amazon's recent sales growth outperformance as a "paradigm-shifting update."[1543] In October 2020, Amazon's stock price was about $3,000, giving it a market valuation of about $1.5 trillion[1544]—greater than that of Walmart, Target, Salesforce, IBM, eBay, and Etsy combined.[1545] The company is consistently one of the highest-priced stocks on Wall Street,[1546] which is a clear indication investors expect Amazon to maintain and expand its market power.

The Subcommittee initiated its investigation of Amazon's market power and its role as a gatekeeper for digital markets in June 2019. Before and concurrent with the Subcommittee's investigation, many international and U.S. enforcement authorities also opened antitrust investigations

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1539 Press Release, Gartner, Gartner Says Worldwide IaaS Public Cloud Services Market Grew 31.3% in 2018 (July 29, 2019), https://www.gartner.com/en/newsroom/press-releases/2019-07-29-gartner-says-worldwide-iaas-public-cloud-services-market-grew-31point3-percent-in-2018; *see also* Letter from David Zapolsky, Gen. Counsel, Amazon.com, Inc., to Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary at 6 (July 26, 2019) (on file with Comm.).

1540 Kevin McLaughlin, *Amazon's Cloud King: Inside the World of Andy Jassy*, THE INFO. (Jan. 23, 2019), https://www.theinformation.com/articles/amazons-cloud-king-inside-the-world-of-andy-jassy.

1541 *See, e.g.*, Alana Semeuls, *Many Companies Won't Survive the Pandemic. Amazon Will Emerge Stronger Than Ever*, TIME (July 28, 2020), https://time.com/5870826/amazon-coronavirus-jeff-bezos-congress/ ("Consumer spending on Amazon between May and July was up 60% from the same time frame last year.").

1542 MORNINGSTAR EQUITY ANALYST REPORT, AMAZON.COM INC. 6 (Aug. 27, 2020) (on file with Comm.); Press Release, Amazon, Amazon.com Announces First Quarter Results (Apr. 30, 2020), https://s2.q4cdn.com/299287126/files/doc_financials/2020/Q1/AMZN-Q1-2020-Earnings-Release.pdf.

1543 MORNINGSTAR EQUITY ANALYST REPORT, AMAZON.COM INC. 6 (Aug. 27, 2020) (on file with Comm.).

1544 *Amazon.com, Inc. Common Stock (AMZN),* NASDAQ https://www.nasdaq.com/market-activity/stocks/amzn (last visited Oct. 3, 2020).

1545 *See Walmart, Inc. Common Stock (WMT),* NASDAQ https://www.nasdaq.com/market-activity/stocks/wmt (last visited Oct. 5, 2020) ($398 billion); *Target Corp. Common Stock (TGT)*, NASDAQ https://www.nasdaq.com/market-activity/stocks/tgt (last visited Oct. 5, 2020) ($79.6 billion); *Salesforce.com Inc. Common Stock (CRM)*, NASDAQ https://www.nasdaq.com/market-activity/stocks/crm (last visited Oct. 5, 2020) ($225.5 billion); *Int'l Bus. Machines Corp. Common Stock (IBM)*, NASDAQ https://www.nasdaq.com/market-activity/stocks/ibm (last visited Oct. 5, 2020) ($107 billion); *eBay, Inc. Common Stock (EBAY),* NASDAQ https://www.nasdaq.com/market-activity/stocks/ebay (last visited Oct. 5, 2020) ($36.2 billion); *Etsy, Inc. Common Stock (ETSY),* NASDAQ https://www.nasdaq.com/market-activity/stocks/etsy (last visited Oct. 3, 2020) ($16.7 billion).

1546 *See, e.g.*, Gabe Alpert, *Top 5 Highest Priced Stocks in America*, INVESTOPEDIA (May 19, 2020), https://www.investopedia.com/financial-edge/0711/the-highest-priced-stocks-in-america.aspx.

into Amazon's business practices. Some of these investigations have led to Amazon making policy changes.[1547] The European Commission began its in-depth antitrust investigation of Amazon on July 17, 2019.[1548] According to Executive Vice President Margrethe Vestager, the European Commission's investigation "focuses on the use by Amazon of accumulated, competitively sensitive information about marketplace sellers, their products and transactions on the Amazon marketplace, which may inform Amazon's retail business decisions."[1549] In the United States, the Federal Trade Commission (FTC) is investigating Amazon's past acquisition activity.[1550] The FTC is also reportedly investigating Amazon's treatment of third-party sellers and its cloud services business.[1551] Additionally, Amazon reportedly faces antitrust scrutiny by state attorneys general offices in California, Washington, and New York.[1552]

During the course of the investigation, Amazon displayed a lack of candor to the Subcommittee in response to questions about its business practices. As Chairman Nadler, Subcommittee Chairman Cicilline, and Ranking Member Sensenbrenner, along with other members of the Committee, wrote to Mr. Bezos in a bipartisan letter in May of this year, the Subcommittee was troubled that some of the "statements Amazon made to the Committee about the company's business practices appear to be

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[1547] *See, e.g.*, Data and Privacy Hearing at 3 (statement of Margrethe Vestager, then-Eur. Comm'r for Competition) ("[I]n 2017 we accepted commitments from Amazon not to introduce or enforce what are sometimes called 'most-favoured nation' clauses in the e-books market."); Press Release, Bundeskartellamt, Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces (July 17, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html ("In response to the competition concerns expressed by the Bundeskartellamt, Amazon is amending its terms of business for sellers on Amazon's online marketplaces."); *Amazon online retailer: investigation into anti-competitive practices*, COMPETITION & MKTS. AUTH. (Oct. 1, 2013), https://www.gov.uk/cma-cases/amazon-online-retailer-investigation-into-anti-competitive-practices ("In light of [Amazon's] decision to remove the price parity policy and subsequent steps to implement that decision . . . the [Office of Fair Trading] has decided to close its investigation on administrative priority grounds.").

[1548] Press Release, Eur. Comm'n, Antitrust: Commission Opens Investigation into Possible Anti-competitive Conduct of Amazon (July 17, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

[1549] Submission from Margrethe Vestager, Exec. Vice-Pres., Eur. Comm'n, to H. Comm. on the Judiciary, 4 (July 24, 2020) (on file with Comm.).

[1550] Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[1551] Jason Del Rey, *Amazon May Soon Face an Antitrust Probe. Here are 3 Questions the FTC is Asking About It.*, VOX: RECODE (June 4, 2019), https://www.vox.com/recode/2019/6/4/18651694/amazon-ftc-antitrust-investigation-prime; Dina Bass, David McLaughlin & Naomi Nix, *Amazon Faces Widening U.S. Antitrust Scrutiny in Cloud Business*, BLOOMBERG (Dec. 4, 2019), https://www.bloomberg.com/news/articles/2019-12-04/amazon-faces-widening-u-s-antitrust-scrutiny-in-cloud-business.

[1552] Tyler Sonnemaker, *Amazon is Reportedly Facing a New Antitrust Investigation into its Online Marketplace Led by the FTC and Attorneys General in New York and California*, BUS. INSIDER (Aug. 3, 2020), https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8; Karen Weise & David McCabe, *Amazon Said to Be Under Scrutiny in 2 States for Abuse of Power*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/technology/state-inquiry-antitrust-amazon.html.

misleading, and possibly criminally false or perjurious."[1553] In light of this concern, Subcommittee staff views Amazon's other claims and representations with a degree of skepticism in instances where they conflict with credible sources, such as investigative reporting, interviews with market participants, or other evidence uncovered by Subcommittee staff during the investigation.

2. Amazon.com

a. Market Power

Amazon has significant and durable market power in the U.S. online retail market.[1554] The company's actual share of U.S. e-commerce is unknown outside of Amazon because it does not report the gross merchandise volume of third-party sales made on its marketplace. A frequently cited analysis by market research company eMarketer estimates that Amazon's share in this market is 38.7%.[1555] eMarketer's estimate, however, is likely understated because its definition of e-commerce is overly broad. For example, under eMarketer's approach to e-commerce, the Auto and Parts category includes online sales of cars.[1556] In contrast, marketing analytics company Jumpshot estimates that Amazon captures an average of 74% of digital transactions across a wide range of product categories.[1557] The Jumpshot analysis may overstate Amazon's share because it calculates market share as a percentage of transactions made on well-known market participants' websites, like Amazon, Walmart, and Target, but excludes small, online retailers.[1558] Based on the information Subcommittee staff gathered during its investigation, estimates that place Amazon's share of U.S. e-commerce at about 50% or higher are more credible than lower estimates of 30-40%.[1559]

[1553] Bipartisan Letter from the Chairman, Ranking Member, and Members of H. Comm. on the Judiciary to Jeff Bezos, CEO, Amazon.com, Inc. (May 1, 2020), https://judiciary.house.gov/uploadedfiles/2020-05-01_letter_to_amazon_ceo_bezos.pdf.

[1554] *See generally* Dig. Competition Expert Panel Report at 30 (finding that recent financial indicators suggest Amazon's "dominan[ce] in a meaningfully distinct sector of online retail" will endure and that "investors are expecting it to retain its dominant position, and to earn significantly higher profits in future"); Stigler Report at 78 ("[T]he evidence thus far does suggest that current digital platforms face very little threat of entry . . . . [T]he key players in this industry remained the same over the last two technology waves, staying dominant through the shift to mobile and the rise of AI. In the past, dominant business found it difficult to navigate innovation or disruption waves. By contrast, Facebook, Google, Amazon, Apple, and even Microsoft were able to ride these waves without significant impact on market share or profit margins.").

[1555] ANDREW LIPSMAN, TOP 10 US ECOMMERCE COMPANIES 2020, EMARKETER (Mar. 10, 2020), https://www.emarketer.com/content/top-10-us-ecommerce-companies-2020.

[1556] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00206583 (2019) (on file with Comm.) (eMarketer Inc. – Global Ecommerce 2019 Report).

[1557] *See* Kimberly Collins, *Google + Amazon: Data on Market Share, Trends, Searches from Jumpshot*, SEARCH ENGINE WATCH (Aug. 1, 2019), https://www.searchenginewatch.com/2019/08/01/amazon-google-market-share/.

[1558] *See id.*

[1559] *See* Submission from Source 11, to H. Comm. on the Judiciary, 2 (Oct. 14, 2019) (on file with Comm.) ("Amazon has amassed at least a 50% share of the ecommerce market and continues to expand, both its market share and the breadth of its offerings."); PYMNTS.COM, WALMART VS. AMAZON, WHOLE PAYCHECK TRACKER: BATTLE FOR THE DIGITAL FIRST CONSUMER 6 (2020), https://securecdn.pymnts.com/wp-content/uploads/2020/09/Amazon-Walmart-Whole-Paycheck-092020.pdf (estimating Amazon's market share at 51.2% in Q1 2020 and 44.4% in Q2 2020, but noting U.S. e-commerce

In a number of key product categories, ranging from household essentials to sports, fitness and outdoors, Amazon is reported to account for well over 50% of online sales.[1560] The platform also has significant market power over the entire book industry, including sales, distribution, and publishing. In the U.S. market, Amazon accounts for over half of all print book sales and over 80% of e-book sales.[1561]

Amazon is the dominant online marketplace. It reportedly controls about 65% to 70% of all U.S. online marketplace sales.[1562] The platform's market power is at its height in its dealings with third-party sellers, as well as many of its suppliers, which Amazon refers to as vendors. Increasingly, Amazon is also gaining market power in certain business-to-business (B2B) online markets through Amazon Business, its B2B marketplace.[1563]

In response to the Committee's requests for information, Amazon claims that "estimates of total retail share are the most appropriate and relevant method of estimating" Amazon's market share.[1564] This approach is inconsistent with evidence gathered by Subcommittee staff, conventional antitrust analysis of relevant product markets, and common sense. In a recent investigation, for example, the FTC concluded that a "relevant market may be divided by channel of sale, resulting in separate markets for brick-and-mortar sales and online sales."[1565] Illustrating the extent of Amazon's overly broad approach to identifying the relevant market and its top competitors, in response to the

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increased by 44% over the same period, and that "[f]or Amazon to drop only 7 percent in total eCommerce share with that kind of overall increase is actually quite an achievement.").

1560 *See, e.g.*, Kimberly Collins, *Google + Amazon: Data on Market Share, Trends, Searches from Jumpshot*, SEARCH ENGINE WATCH (Aug. 1, 2019), https://www.searchenginewatch.com/2019/08/01/amazon-google-market-share/; *see also* J.P. MORGAN REPORT: RETAIL VS. AMAZON: LIFE IN A POST COVID-19 WORLD 13 (Amazon's market share of online sales of Books & Magazines is 75%).

1561 *See, e.g.*, Ben Evans, *What's Amazon market share?*, BENEDICT EVANS https://www.ben-evans.com/benedictevans/2019/12/amazons-market-share19#:~:text=Amazon%20has%2050%25%20or%20more,it%20has%20over%2050%25 ("Amazon has 50% or more of the US print book market"); Submission from Source 17, to H. Comm. on the Judiciary, 33 (Nov. 14, 2019) (on file with Comm.) ("Amazon accounts for roughly 83 percent of all e-book sales, about 90 percent of online print sales, and about 90 percent of digital audiobook sales."); Dig. Competition Expert Panel Report at 30 ("In the e-book market, Amazon was reported in February 2017 to account for around 88% of total annual unit sales.").

1562 Submission from Top Shelf Brands, to H. Comm. on the Judiciary, 26 (Oct. 26, 2019) (on file with Comm.) (citing DIG. COMMERCE 360, 2019 ONLINE MARKETPLACES REPORT).

1563 *See* MARKETPLACE PULSE, MARKETPLACES YEAR IN REVIEW 48 (2019), https://cdn.marketplacepulse.com/misc/marketplaces-year-in-review-2019.pdf ("Amazon's 'business-to-business', or B2B, marketplace is gaining market share faster than its retail operation."); Phone Interview with Nat'l Ass'n of Wholesaler-Distributors (Sept. 3, 2020); STACY MITCHELL & OLIVIA LAVECCHIA, REPORT: AMAZON'S NEXT FRONTIER: YOUR CITY'S PURCHASING 4 (2018), https://ilsr.org/amazon-and-local-government-purchasing/ ("Amazon is leveraging its growing relationship with local governments to induce more businesses to join its Marketplace.").

1564 Production of Amazon, to H. Comm. on the Judiciary, 3 (Oct. 14, 2019).

1565 *See* Complaint at 4, In the Matter of Edgewell Personal Care Co.& Harry's Inc., No. 9390 (F.T.C., Feb. 2, 2020), https://www.ftc.gov/system/files/documents/cases/public_p3_complaint_-_edgewell-harrys.pdf.

Committee's request for "A list of the Company's top ten competitors," Amazon identified 1,700 companies, including Eero (a company Amazon owns), a discount surgical supply distributor, and a beef jerky company.[1566]

Amazon also included single-category companies in response to the Committee's request for a list of Amazon's top ten competitors. Yet documents produced by Amazon suggest that even in its early days it did not view such retailers as direct competitors. For instance, a recap of an Amazon marketing presentation identified one of its key points as: "No direct competitors, closest competitors would be what you refer to as category driven i.e. Best Buy, Barnes and Noble...etc."[1567]

Regardless of the precise boundaries of e-commerce or online marketplaces, the sum of evidence that Subcommittee staff examined demonstrates that Amazon functions as a gatekeeper for e-commerce. Amazon is the most-visited website in the world for e-commerce and shopping.[1568] In a submission to the Committee, an e-commerce market participant said that "many of the 64% of American households that have Prime memberships are effectively locked into Amazon for their online shopping."[1569] Meanwhile, recent market analysis suggests that over 60% of all online product searches in the U.S. begin on Amazon.com.[1570]

At the Subcommittee's hearing on innovation and entrepreneurship, Stacy Mitchell, the Co-Director of the Institute for Local Self-Reliance, described one independent retailer's attempt to survive in e-commerce independent of Amazon:

> As its customers moved online, so too did the company. Gazelle Sports built a robust e-commerce site. With scores of enthusiastic reviews on Google and Yelp, the site came right up in online searches, yielding a brisk stream of customers and sales.
>
> But, in 2014, sales began to decline. The problem was that many people in Michigan and across the country were no longer starting their online shopping on a search engine, where they might find Gazelle Sports. Instead, they were going straight to Amazon. By

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[1566] *See* Production of Amazon, to H. Comm. on the Judiciary, 17 (Oct. 14, 2019) (on file with Comm.).

[1567] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-0059575 (Nov. 22, 2010) (on file with Comm.).

[1568] SIMILARWEB, WORLDWIDE E-COMMERCE AND SHOPPING CATEGORY PERFORMANCE (July 2020), https://pro.similarweb.com/#/industry/overview/E-commerce_and_Shopping/999/1m/?webSource=Total (Amazon had 2.6 billion visits in July 2020 compared to 940.8 million visits for eBay).

[1569] Submission from Source 11, to H. Comm. on the Judiciary, 5 (Oct. 14, 2019) (on file with Comm.).

[1570] Lucy Koch, *Looking for a New Product? You Probably Searched Amazon*, EMARKETER (Mar. 31, 2019), https://www.emarketer.com/content/looking-for-a-new-product-you-probably-searched-amazon (citing FEEDVISOR, THE 2019 AMAZON CONSUMER BEHAVIOR REPORT 14 (2019)); *see also* WUNDERMAN THOMPSON, THE FUTURE SHOPPER REPORT 2020 11 (2020), https://insights.wundermanthompsoncommerce.com/hubfs/@UK/Landing%20Pages/2020/The%20Future%20Shopper%20 2020/WTC%20-%20The%20Future%20Shopper%20Report%202020.pdf?hsCtaTracking=24d37c38-db5d-4797-bd6c-2ea35127ad21%7C70cdff40-3236-48fb-a2ec-c4b298453df9.

> 2016, the share of online shoppers bypassing search engines and beginning their product search on Amazon had grown to 55 percent. With sales flagging and staff reductions underway, the owner of Gazelle Sports . . . made what seemed like a necessary decision: Gazelle Sports would join Amazon Marketplace, becoming a third-party seller on the digital giant's platform. "If the customer is on Amazon, as a small business you have to say, 'That is where I have to go,'" he explained. "Otherwise, we are going to close our doors."[1571]

Interviews with sellers, as well as documents that Subcommittee staff reviewed, make clear that Amazon has monopoly power over most third-party sellers and many of its suppliers.[1572] Numerous sellers told Subcommittee staff in interviews that they cannot turn to alternative marketplaces, regardless of how much Amazon may increase their costs of doing business or how badly they are treated. David Barnett, the CEO and Founder of PopSockets, a former third-party seller and current Amazon supplier, testified about Amazon's coercive tactics at one of the Subcommittee's hearings:

> I suspect that Amazon is accustomed to behaving this way because most brands cannot afford to leave Amazon. They evidently have no choice but to endure tactics that would be rejected out of hand in any ordinary relationship whereby the two parties enter into the relationship by preference rather than necessity.[1573]

Sellers feel forced to be on Amazon because that is where the buyers are.[1574] At the Subcommittee's sixth hearing, Representative Lucy McBath (D-GA) noted that the evidence the Subcommittee collected is at odds with how Amazon describes its relationship with third-party sellers. She asked Mr. Bezos:

> [Y]ou referred to third party sellers today as "Amazon's partners" and that your success depends on their success. But, over the past year, we've heard a completely different story. As part of this investigation, we've interviewed many small businesses, and they use the words like "bullying," "fear," and "panic" to describe their relationship with Amazon. . . . . You said that sellers have many other attractive options to reach customers, but that's not at all what we found in our investigation . . . . If Amazon

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[1571] Innovation and Entrepreneurship Hearing at 3–4 (statement of Stacy F. Mitchell, Co-Dir., Inst. for Local Self-Reliance).

[1572] *See, e.g.*, Submission from Top Shelf Brands, to H. Comm. on the Judiciary, 49 (Oct. 26, 2019) ("98% of all of Top Shelf's transaction has taken place on Amazon's platform."); *see also* Dig. Competition Expert Panel Report at 30 ("Regardless of the view on dominance over a particular defined market, it is clear that for thousands of smaller independent online sellers in particular, Amazon's marketplace is a strategically important gateway to consumers.").

[1573] Competitors Hearing at 3 (statement of David Barnett, CEO & Founder, Popsockets LLC).

[1574] Submission from Source 11, to H. Comm. on the Judiciary, 5 (Oct. 14, 2019) (on file with Comm.).

didn't have monopoly power over these sellers, do you think they would choose to stay in a relationship that is characterized by bullying, fear, and panic?"[1575]

Mr. Bezos responded that "there are a lot of options" for sellers, and that "[t]here are more and more every day."[1576] This claim is inconsistent with the Subcommittee's investigative record. In a submission to the Committee, the Online Merchants Guild, a trade association for small and medium-sized online sellers, said that its members who try to diversify sales across multiple platforms often report that they are unable to generate many sales outside of Amazon.[1577]

An important limit on a seller's ability to switch from selling on Amazon to selling on its own site or a competing platform is that Amazon generally forbids sellers from contacting their customers.[1578] The packaging and even the order confirmation email for third-party sales feature the Amazon brand prominently and do not reference the seller. A typical Amazon customer is unaware of the source of the sale.[1579] According to the Online Merchants Guild, "Many Amazon sellers use websites such as Shopify to try and establish their own eCommerce presence, but without the ability to market to their supposed core customer base, their Amazon customers, it's pretty futile."[1580]

Subcommittee staff heard from several market participants that Amazon also has significant market power over suppliers. For example, third-party sellers told Subcommittee staff that Amazon frequently ignores manufacturer policies that bind sellers.[1581] For example, brand manufacturers may establish minimum advertised pricing guidelines (MAP) to prevent online retailers from freeriding off brick-and-mortar stores' investments in product display or expertise—such as how to fit a running shoe. Amazon's leverage over suppliers gives it the ability to "break" minimum advertised pricing

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1575 CEO Hearing Transcript at 88–89 (question of Rep. Lucy McBath (D-GA), Member, Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

1576 *Id.* at 91 (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

1577 Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 4 (Oct. 23, 2019) (on file with Comm.) ("Members who sell across multiple platforms often report the amount of revenue generated outside of Amazon including their own eCommerce site, is insignificant, with over 90% of their sales being generated on the platform."); *see also* Submission from Top Shelf Brands, to H. Comm. on the Judiciary, 60–61 (Oct. 26, 2019) (explaining that it has "no viable alternatives" to Amazon, where 98% of its transactions have taken place on Amazon's platform, eBay accounts for 1% of its income, and Walmart accounts for less than 1%).

1578 *Selling Polices and Seller Code of Conduct*, AMAZON SELLER CENTRAL, https://sellercentral.amazon.com/gp/help/external/G1801?language=en_US&ref=efph_G1801_cont_200386250 (last visited Sept. 28, 2020); *see also* Submission from Source 100, to H. Comm. on the Judiciary (Sept. 26, 2020) (raising concerns that Amazon permits itself to contact customers about negative reviews for Amazon branded products, while third-party sellers are largely barred from customer engagement).

1579 Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 4 (Oct. 23, 2019) (on file with Comm.); *see also* Submission from Source 11, to H. Comm. on the Judiciary, 3 (Oct. 14, 2019) (on file with Comm.) (explaining that "[w]henever an order is shipped through [Fulfillment by Amazon], even if the purchase is made through another marketplace, it is likely to arrive in an Amazon-branded box, creating confusion" for customers).

1580 Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 5 (Oct. 23, 2019) (on file with Comm.).

1581 *See, e.g.*, Phone Interview with Source 84 (Mar. 4, 2020).

rules and undercut competing sellers on price. In contrast, third-party sellers must abide by the rules. As a former third-party seller explained, "Given Amazon's immense clout, we believe that suppliers have no realistic threat to stop selling on Amazon in response to Amazon 'breaking' MAP."[1582] Amazon's internal documents suggest that it does not fear any consequences for failing to comply with most vendor policies.[1583]

Another way that Amazon leverages its market power is to force certain brand manufacturers that would prefer to be third-party sellers into being wholesalers. A discussion among Amazon executives suggests that certain brands may only be allowed to have a wholesale relationship with Amazon even if the brand would prefer to be a third-party seller. In 2016, Sebastian Gunningham, then senior vice president of Amazon Marketplace, commented on a list of proposed seller tenets, "I would add that there are x,000 suppliers around the world that do not get this choice... I am talking about the apple, nikes and p&g, etc... We don't want to open that door, relationship has to be reseller."[1584] Consistent with this stance, Popsockets CEO and Founder David Barnett testified that Amazon attempted to force him into maintaining a wholesale relationship with Amazon Retail despite his preference to be a third-party seller or make sales on the marketplace through an authorized distributor.[1585] A former Amazon employee confirmed that it was not uncommon for Amazon to use its brand standards policy to shut down a brand's third-party seller account and force brands into an exclusive wholesaler relationship.[1586]

Amazon also enjoys significant market power over online consumers. Amazon uses Prime and its other membership programs to lock consumers into the Amazon ecosystem. According to an internal analysis, Amazon was willing to pay a credit card company a significant sum in 2013 for signing up new Prime members under the assumption that each new member would contribute $527 to Amazon's gross merchandise sales and $46 of gross profit.[1587] Amazon estimated that the deal had a five-year net present value of $17 million, assuming that it delivered 100,000 paid Prime members.[1588]

[1582] Submission from Source 48, to H. Comm. on the Judiciary, 8 (Nov. 8, 2019) (on file with Comm.).

[1583] *See, e.g.*, Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00151722 (Feb. 9, 2009) (on file with Comm.) ("[P]lease audit that we are price matching . . . any diapers.com pricing. If this puts us in the soup with P&G on their pampers map price, so be it."); AMAZON-HJC-00206714 (Mar. 8, 2018) ("Why did Walmart break MAP and we didn't?").

[1584] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00190108 (June 6, 2016) (on file with Comm.).

[1585] Competitors Hearing at 3 (statement of David Barnett, CEO & Founder, Popsockets LLC).

[1586] Submission from Source 91, to H. Comm. on the Judiciary (Sept. 22, 2020) (on file with Comm.).

[1587] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00199845 (Oct. 23, 2013) (on file with Comm.).

[1588] *Id.*

Once Prime members pay the upfront annual membership fee, they are likely to concentrate their online purchases with Amazon.[1589] According to a recent survey, Prime members spend an average of $1,400 annually on Amazon, versus $600 for non-members.[1590] As one market participant observed, "Prime members will continue to use Amazon and not switch to competing platforms, despite higher prices and lower-quality items on Amazon compared to other marketplaces, and despite recent increases in the price of a Prime membership."[1591]

Other retailers are unable to match Amazon on its ability to provide free and fast delivery for such a large volume and inventory of products. Even Walmart, with its extensive national distribution network, does not come close to matching Amazon on this measure.[1592] Amazon currently offers Prime members free, next-day delivery on over 10 million items anywhere in the continental United States.[1593] Walmart, by contrast, has only about 200,000 products eligible for two-day shipping in select markets.[1594]

Amazon's market power is durable and unlikely to erode in the foreseeable future. There are several factors that make successful entry or expansion by a challenger to Amazon unlikely. Barriers to entry include: (1) network effects, which make it difficult for another marketplace to achieve a comparable number of buyers and sellers; (2) switching costs associated with consumers shopping outside of the Amazon ecosystem; and (3) the steep costs of building a logistics network comparable in size and scope to Amazon's massive international footprint in fulfillment and delivery. Amazon's internal documents recognize that entry into online commerce "require[s] significant incremental investments in brand development, inventory, and marketing/customer acquisition."[1595] Further,

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[1589] *See* Submission from Source 11, to H. Comm. on the Judiciary, 3 (Oct. 14, 2019) (on file with Comm.) ("Amazon has been quite frank about the reality that once consumers invest in Prime, they do most of their online shopping on Amazon in order to gain value from the investment in shipping, whereas they might otherwise multisource.").

[1590] Tonya Garcia, *Amazon Prime membership exceeds 100 million*, MARKETWATCH (Jan. 17, 2019), https://www.marketwatch.com/story/amazon-prime-membership-exceeds-100-million-2019-01-17; *see also* Brian Olsavsky, Sr. Vice Pres. and Chief Fin. Officer, Amazon.com, Inc., *Q1 2020 Earnings Call* (Apr 30, 2020, 5:30 PM) ("We see our Prime customers are shopping more often and they have larger basket sizes.").

[1591] Submission from Source 11, to H. Comm. on the Judiciary, 3 (Oct. 14, 2019) (on file with Comm.).

[1592] *See* J.P. MORGAN, RETAIL VS. AMAZON: LIFE IN A POST COVID-19 WORLD (2020), https://markets.jpmorgan.com/research/email/-lbk68f4/Alp1kP9tQUPS29jlzW_bOg/GPS-3397412-0 ("We believe there are no comparable unlimited free shipping offerings available at scale, with Amazon's large and growing infrastructure investments serving as a significant barrier to entry.")

[1593] *Prime*¸ AMAZON, https://www.amazon.com/b?ie=UTF8&node=15247183011 (last visited Sept. 28, 2020) ("Free One-Day Delivery . . . Available coast-to-coast on more than 10 million items with no minimum purchase.").

[1594] Press Release, Marc Lore, Pres. & CEO, Walmart eCommerce US, Free NextDay Delivery Without a Membership Fee (May 14, 2019), https://corporate.walmart.com/newsroom/2019/05/14/free-nextday-delivery-without-a-membership-fee; *Walmart Help Center: NextDay Delivery*, https://www.walmart.com/help/article/nextday-delivery/fd3f1c5cf0ec4682abca8c83f5f0e977 (last visited Sept. 28, 2020) ("Currently, NextDay Delivery is only available in select markets.").

[1595] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00154659 (Nov. 23, 2010) (on file with Comm.).

Amazon expanded its market power by avoiding taxes, extracting state subsidies, and engaging in anticompetitive conduct—tactics that have given the company an unfair advantage over actual and potential competitors.

As the COVID-19 pandemic pushes more American shoppers online, Amazon's market power has grown. Evidence shows that Amazon is willing to use its increased market power in e-commerce during this crisis to exert pressure on suppliers and favor its own first-party products over those sold by third-party sellers. Amazon initially responded to the sudden surge in sales by refusing to accept or deliver non-essential supplies from its third-party sellers—a stance that would seem reasonable except that Amazon continued to ship its own non-essential products while restricting third-party sellers' ability to use alternative distribution channels to continue selling through Prime.[1596] As for suppliers, Subcommittee staff heard concerns that the platform used its power as a large buyer to pressure suppliers into prioritizing Amazon over other retail customers such as independent grocers.[1597] Meanwhile, numerous reports suggest that Amazon is in talks to convert real estate in vacated malls into additional Amazon distribution centers, further highlighting how it will continue to amass further scale even as its brick-and-mortar counterparts crater.[1598]

b. Merger Activity

Amazon's acquisition strategy has primarily focused on purchasing its competitors and companies that operate in adjacent markets, providing access to additional valuable customer data. This strategy has effectively protected and expanded Amazon's market power in e-commerce and helped Amazon extend that power to other markets.

Over the past two decades, Amazon has acquired at least 100 companies.[1599] It has been particularly aggressive over the past few years, making deals that are bigger and more ambitious

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[1596] Ron Knox & Shaoul Sussman, *How Amazon Used the Pandemic to Amass More Monopoly Power*, THE NATION (June 26, 2020), https://www.thenation.com/article/politics/amazon-bezos-pandemic-monopoly/.

[1597] Phone Interview with Nat'l Grocers Ass'n (May 28, 2020) (raising concerns that Amazon and some Big Box retailers may have used their buyer power over suppliers during the pandemic to secure inventory at the expense of smaller businesses); Letter from Int'l Bhd. Of Teamsters, Commc'n Workers of Am., United Food & Commercial Workers Int'l Union & Change to Win to Comm'rs of the Fed. Trade Comm'n, 6 (July 23, 2020) (stating that if seller reports are true, "Amazon's hold over sellers effectively took food from the shelves of neighborhood grocery stores . . . and moved it to Amazon's own warehouses, where it earned fees for Amazon."); *see also* Renee Dudley, *The Amazon Lockdown: How an Unforgiving Algorithm Drives Suppliers to Favor the E-Commerce Giant Over Other Retailers*, PROPUBLICA (Apr. 26, 2020), https://www.propublica.org/article/the-amazon-lockdown-how-an-unforgiving-algorithm-drives-suppliers-to-favor-the-e-commerce-giant-over-other-retailers.

[1598] Esther Fung & Sebastian Herrera, *Amazon and Mall Operator Look at Turning Sears, J.C. Penney Stores Into Fulfillment Centers*, WALL ST. J. (Aug. 9, 2017), https://www.wsj.com/articles/amazon-and-giant-mall-operator-look-at-turning-sears-j-c-penney-stores-into-fulfillment-centers-11596992863.

[1599] *See infra* Appendix.

relative to its historical approach.[1600] In 2017, the company made its largest acquisition to date by purchasing Whole Foods for $13.7 billion.[1601] Amazon's other large purchases include Ring, which it bought for $1.2 billion in 2018; PillPack, which it bought for $1 billion in 2018; and Zappos, which it bought for $1.2 billion in 2009.[1602] Over the years, Amazon has acquired an assortment of highly recognizable companies, including IMDB.com, which it bought in 1998; Audible, which it bought in 2008; Goodreads, which it bought in 2013; and Twitch, which it bought in 2014.[1603]

Amazon's acquisition strategy has led to fewer choices for consumers in terms of differentiated online retail channels, as well as reduced competitive pressure in terms of price and quality. Additionally, Amazon's expansion into a diverse array of business lines—from brick-and-mortar supermarkets to home security—has reinforced its significant stockpile of consumer data. With more data about online and offline consumer behavior, Amazon's acquisitions set in motion a self-reinforcing cycle, creating an ever-widening gap between the platform and its competitors. As one former Amazon employee told Subcommittee staff, "Amazon is first and foremost a data company, they just happen to use it to sell stuff."[1604]

Over its history, Amazon has acquired a number of its rivals.[1605] A decade ago, Amazon acquired two of its direct competitors: Zappos and Quidsi.[1606] Documents reviewed by Subcommittee staff show that Amazon viewed both online retailers as competitive threats prior to acquiring them.

Amazon's 2009 acquisition of Zappos, an online shoe-retailer, marked the company's first $1 billion-plus purchase.[1607] Acquiring Zappos provided Amazon with two important advantages. First, it

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[1600] *Infographic: Amazon's Biggest Acquisitions,* CB INSIGHTS (June 19, 2019), https://www.cbinsights.com/research/amazon-biggest-acquisitions-infographic/.

[1601] *Id.*

[1602] *Id.*

[1603] *Amazon Acquisitions*, MICROACQUIRE, https://acquiredby.co/amazon-acquisitions/ (last visited Oct. 3, 2020).

[1604] Interview with Source 91 (May 8, 2020); *see also* Submission from Artist Rights Alliance, to H. Comm. on the Judiciary, 2 (July 31, 2019) (on file with Comm.) ("With respect to the music world, at the heart of this problem lies a simple, economic truth – companies like . . . Amazon are not music businesses. They are advertising platforms and data machines. As our then-President, Melvin Gibbs, told the *New York Times* back in 2017, 'None of these companies that are supposedly in the music business are actually in the music business. They are in the data-aggregation business. They're in the ad-selling business. The value of music means nothing to them.'").

[1605] *See* Stigler Report at 75 n.152 ("The number of potential competitors purchased by the tech giants is large. For example, Amazon has purchased Zappos, Fabric, CDNow, Quorus, Audible, Goodreads, and Quidsi"); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 124 (Columbia Global Reports ed., 2018) ("Amazon acquired would-be competitors like Zappos, Diapers.com, and Soap.com.").

[1606] *Amazon Closes Zappos Deal, Ends Up Paying $1.2 Billion*, TECHCRUNCH (Nov. 2, 2009), https://techcrunch.com/2009/11/02/amazon-closes-zappos-deal-ends-up-paying-1-2-billion/; *Confirmed: Amazon Spends $545 Million on Diapers.com Parent Quidsi*, TECHCRUNCH (Nov. 8, 2010, 9:04 AM), https://techcrunch.com/2010/11/08/confirmed-amazon-spends-545-million-on-diapers-com-parent-quidsi/.

[1607] Eric Engleman, *Amazon and Zappos, Six Months Later: How They're Fitting Together*, PUGET SOUND BUS. J. (May 21, 2010), https://www.bizjournals.com/seattle/blog/techflash/2010/05/amazon_and_zappos_how_theyre_fitting_together.html.

enabled Amazon to add significant selection to its category of shoes and other fashion-related items at a time when expanding its selection was critical to the company's success.[1608] The added selection included access to "hold-out" brands, which had previously refused to sell on Amazon.com or Amazon's other online retail store Endless.com.[1609] Second, Zappos' unique approach to customer service, marked by "a deeply felt connection with customers," added an emotional and psychological element to Amazon's relationship with consumers.[1610] An Amazon internal planning document from 2008 referred to Zappos as one of Endless's "primary competitors," and notes that "Zappos offers the largest selection of brands and styles and carries all of our top holdouts including Nike, Merrell, Keen, Cole Haan and Michael Kors."[1611]

About a year later, Amazon acquired Quidsi, the parent company of Diapers.com and Soap.com, for about $540 million.[1612] Prior to buying it, Amazon identified Diapers.com as its "largest and fastest growing competitor in the on-line diaper and baby care space,"[1613] and its "#1 short term competitor."[1614] Amazon's internal documents said that Diapers.com "keep[s] the pressure on pricing on us" and provided extremely high customer service levels, which—prior to the merger—had forced Amazon to up its game.[1615] Amazon executives took swift and predatory action in response to this competitive threat. As Representative Mary Gay Scanlon (D-PA) summarized at the Subcommittee's sixth hearing, Amazon's internal documents "show that Amazon employees began strategizing about ways to weaken this company, and, in 2010, Amazon hatched a plot to go after Diapers.com and take it out."[1616] Specifically, Amazon's documents show that the firm entered into an aggressive price war, in which Amazon was willing to bleed over $200 million in losses on diapers in one month.[1617] Addressing Mr. Bezos, Representative Scanlon added, "Your own documents make clear that the price

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1608 Bill Taylor, *Amazon and Zappos: A Savvy Deal*, HARV. BUS. REV. (July 23, 2009), https://hbr.org/2009/07/a-savvy-deal-from-amazon-to-za.

1609 Alistair Barr, *Amazon to Close Fashion Website endless.com*, REUTERS: INDUS., MATERIALS AND UTILS. (Sept. 18, 2012), https://www.reuters.com/article/amazon-endless/amazon-to-close-fashion-website-endless-com-idUSL1E8KINKD20120918 (quoting an Amazon spokesman who stated that Amazon shut down Endless.com as an independent site in 2012 and incorporated it into Amazon's main website, Amazon.com, "in order to focus on the Amazon Fashion experience").

1610 Bill Taylor, *Amazon and Zappos: A Savvy Deal*, HARV. BUS. REV. (July 23, 2009), https://hbr.org/2009/07/a-savvy-deal-from-amazon-to-za.

1611 Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00170649 (Sept. 23, 2008) (on file with Comm.).

1612 Claire Cain Miller, *Amazon Has a Reported Deal to Buy Parent of Diapers.com*, N.Y. TIMES (Nov. 7, 2010), https://www.nytimes.com/2010/11/08/technology/08amazon.html.

1613 Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00142833 (May 12, 2009) (on file with Comm.).

1614 *Id.* at AMAZON-HJC-00151722 (Feb. 9, 2009).

1615 *Id.* at AMAZON-HJC-00151722–24 (Feb. 9, 2009).

1616 CEO Hearing Transcript at 81–82 (question of Rep. Mary Gay Scanlon (D-PA), Vice Chair, H. Comm. on the Judiciary).

1617 Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00057007 (Apr. 5. 2010) (on file with Comm.).

war against Diapers.com worked, and within a few months it was struggling, and so then Amazon bought it."[1618]

In 2017, Amazon shut down Diapers.com, citing profitability issues, though some industry experts questioned the legitimacy of this rationale.[1619] In shutting down the company, Amazon eliminated a differentiated online retailer that consumers loved[1620]—reducing the number of online options for consumers in the diaper and baby care markets. Further, it eliminated a potential competitor in other verticals such as household goods, toys, and pets.[1621]

More recently, Amazon acquired Whole Foods, a strategic move to acquire both a competitor,[1622] and a new source of customer data.[1623] Amazon purchased Whole Foods at around $13.7 billion, more than 10 times the cost of its second-most expensive acquisition.[1624] In addition to bolstering its position in the grocery market, Amazon's purchase of Whole Foods expanded its touchpoints with Prime members and gave it access to a unique set of customer information.[1625] Specifically, the deal enabled Amazon to monitor and compile data on how the same person shops

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[1618] CEO Hearing Transcript at 82–83 (question of Rep. Mary Gay Scanlon (D-PA), Vice Chair, H. Comm. on the Judiciary).

[1619] *See, e.g.*, Jason Del Rey, *Why Amazon's Explanation for Shutting Down Diapers.com and Quidsi Stunned Employees*, VOX: RECODE (Apr. 2, 2017), https://www.vox.com/2017/4/2/15153844/amazon-quidsi-shutdown-explanation-profits.

[1620] *See, e.g.*, Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00034097 (Nov. 8, 2010) (on file with Comm.) (email from Diapers.com founder Vinit Bharara forwarding a customer testimonial in the form of a poem titled "An Ode to Diapers.com," beginning, "Oh how do I love thee, my Diapers.com?" and ending with "Don't ever leave me, my Diapers.com").

[1621] *Id.* at AMAZON-HJC-00154656 (noting that "[a]lthough Quidsi is still primarily an online baby care specialty retailer, it has recently begun selling new items such as household goods and personal-care products with the launch of Soap.com . . . . In the future, management intends to launch additional vertical shopping categories such as beauty, toys and pets."); AMAZON-HJC-00132026 (June 8, 2010) (email from Doug Herrington, Vice President of Consumables, to Jeff Bezos stating, "While we find no evidence that alice.com has gotten traction with vendors or customers, and can't see an economic model for them that pencils out, soap.com feels like a more credible threat").

[1622] *Id.* at AMAZON-HJC-00172932 (June 22, 2017) (showing analysis that for Amazon Fresh customers who don't do 100% shopping on Amazon Fresh, Whole Foods is consistently among the top 5 stand-alone national chains where Amazon Fresh customers do their grocery shopping).

[1623] Lauren Hirsch, *A year after Amazon announced its acquisition of Whole Foods, here's where we stand*, CNBC (June 15, 2018), https://www.cnbc.com/2018/06/15/a-year-after-amazon-announced-whole-foods-deal-heres-where-we-stand.html.

[1624] *Infographic: Amazon's Biggest Acquisition*, CB INSIGHTS (June 19, 2019), https://www.cbinsights.com/research/amazon-biggest-acquisitions-infographic/.

[1625] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00172090 (June 22, 2017) (on file with Comm.) ("[A] survey said about 45% of WFM customers are Prime; and about 20% of Prime members shop at [Whole Foods Market]."); Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00173652 (June 23, 2017) (on file with Comm.) ("Based on our survey results, we estimate that approximately 46% of Prime members have shopped at a [Whole Foods] store in the last four weeks.").

both online and in person, data that is particularly useful for targeted advertising and promotional campaigns.[1626]

While the deal was under review by the FTC, then-Ranking Member Cicilline raised concerns that "the proposed acquisition w[ould] result in additional consolidation in the retail sector, erode American jobs through increased automation, and threaten local communities through diminished economic opportunity for hardworking Americans."[1627] Amazon's acquisition of Whole Foods has added to the platform's market power in retail by increasing its buyer power over suppliers,[1628] adding to the platform's capabilities in online grocery, and expanding the company's brick-and-mortar retail footprint. In addition, it appears that concerns about diminished economic opportunities may have been well-founded as Amazon reportedly plans to implement cashier-less technology across all of its Whole Foods stores.[1629]

In recent years, Amazon has also made several significant acquisitions of home security companies, further expanding its reach and visibility into Americans' homes. An Amazon executive described the company's in-home strategy by noting, "Two senses matter – eyes and ears."[1630] In 2017, Amazon paid $90 million to acquire Blink, a home security camera company whose technology and energy-efficient chips could be used by Amazon in its Echo speakers and other products.[1631] In 2018, Amazon spent $1.2 billion to acquire Ring, a home-security system spanning cameras, doorbells, and floodlights.[1632] Ring's "eyes and ears" add significant value to Amazon's smart home, allowing customers to virtually interact with Amazon delivery personnel and instruct them on where to drop off Amazon packages.[1633] Amazon's significant investments in the Internet of Things ecosystem and its strategy, centered on Amazon's voice assistant, Alexa, are discussed in other parts of this Report.

1626 Lauren Hirsch, *A Year After Amazon Announced Its Acquisition of Whole Foods, Here's Where We Stand*, CNBC (June 15, 2018), https://www.cnbc.com/2018/06/15/a-year-after-amazon-announced-whole-foods-deal-heres-where-we-stand.html.

1627 Letter from Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary to Hon. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, Hon. Tom Marino, Chairman, Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 3 (July 13, 2017), https://cicilline.house.gov/sites/cicilline.house.gov/files/images/Amazon_Whole_Foods_Acquistion.pdf.

1628 *See, e.g.*, Interview with Source 153 (May 11, 2020); Interview with Nat'l Grocers Ass'n (May 28, 2020).

1629 Taylor Lyles, *Amazon Go's Cashierless Tech May Come to Whole Foods As Soon As Next Year*, THE VERGE (Aug. 24, 2020), https://www.theverge.com/2020/8/24/21399607/amazon-cashierless-go-technology-whole-foods-2021-rumor.

1630 Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00170877 (Oct. 11, 2017) (on file with Comm.).

1631 Jeffrey Dastin, *Amazon Quietly Dropped $90 Million on a Camera Startup Last Year to Acquire its Unique Chip Technology*, BUS. INSIDER (Feb. 12, 2018), https://www.businessinsider.com/amazon-blink-camera-maker-acquisition-2018-2.

1632 Dennis Green, *Amazon's $1 Billion Acquisition of the Door Camera Startup Ring is the Company Doing What It Does Best – and it Should Terrify Every Other Retailer*, BUS. INSIDER (Mar. 3, 2018), https://www.businessinsider.com/why-amazon-acquired-ring-2018-3.

1633 *Id.*

Other notable acquisitions include Kiva Systems in 2012, which provided Amazon with a robotics company that accelerated its ability to streamline picking, packing, and shipping e-commerce products;[1634] and PillPack in 2018, which equips Amazon with an online pharmacy and marks its entry into the pharmaceutical market.[1635]

Amazon's acquisition of Kiva gave it power over an important input for competitors. When Amazon bought the robotics company, Kiva was supplying technology to a large number of retailers, including Gap, Staples, and Walgreens.[1636] Many of these customers had invested a sunk cost of $4 million to $6 million per warehouse in order to make use of Kiva's technologies.[1637] Kiva had promised to keep shipping its technology to non-Amazon customers—regardless of whether they competed with Amazon—but in 2015, Amazon rebranded the company as Amazon Robotics and announced it would stop servicing other firms.[1638] Amazon stated that retailers seeking to use Kiva's robots would need to use Amazon Services to fulfill orders with Amazon's technology in Amazon's warehouses.[1639]

Documents Subcommittee staff reviewed relating to the PillPack deal, meanwhile, give insight into how Amazon views some acquisitions as opportunities to collect additional customer data and to cross-sell across its different business lines. One Amazon executive summarized a potential upside of the PillPack deal, asking, "Is there a cross-selling opportunity with amazon.com based on known maladies from prescriptions? Or is this prohibited by privacy law? My understanding is there is a number of different ways we could cross-sell customers in both directions (Rx<>non-Rx)."[1640] Though it is unclear whether and the extent to which Amazon implemented this strategy, the exchange reveals how Amazon assesses potential acquisitions and the cross-business opportunities they create, suggesting that the firm views its vast operations in a highly integrated manner.

[1634] Leena Rao, *Amazon Acquires Robot-Coordinated Order Fulfillment Company Kiva Systems For $775 Million In Cash*, TECHCRUNCH (Mar. 19, 2012), https://techcrunch.com/2012/03/19/amazon-acquires-online-fulfillment-company-kiva-systems-for-775-million-in-cash/.

[1635] Christina Farr, *The Inside Story of Why Amazon Bought PillPack in its Effort to Crack the $500 Billion Prescription Market*, CNBC (May 13, 2019), https://www.cnbc.com/2019/05/10/why-amazon-bought-pillpack-for-753-million-and-what-happens-next.html.

[1636] Evelyn M. Rusli, Amazon.com to Acquire Manufacturer of Robotics, N.Y. TIMES: DEALBOOK (Mar. 19, 2012), https://dealbook.nytimes.com/2012/03/19/amazon-com-buys-kiva-systems-for-775-million/.

[1637] Mick Mountz, *Kiva the Disrupter*, HARV. BUS. REV. (Dec. 2012), https://hbr.org/2012/12/kiva-the-disrupter.

[1638] Adam Putz, M&A flashback: Amazon announces $775M Kiva Systems acquisition, PITCHBOOK (Mar. 19, 2018), https://pitchbook.com/news/articles/ma-flashback-amazon-announces-775m-kiva-systems-acquisition.

[1639] *Id.*

[1640] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00172665 (May 23, 2018) (on file with Comm.).

The FTC investigated several of these transactions, including Amazon's acquisition of Quidsi, the parent company of Diapers.com,[1641] and Whole Foods.[1642] The agency declined, however, to challenge any of them as a violation of antitrust law despite: (1) strong evidence, in some cases, of direct head-to-head competition on price and quality between the merging firms; and (2) evidence that many of these mergers would enable Amazon to expand or entrench its market power, particularly in e-commerce. For most, if not all, of the acquisitions discussed in this Report, the FTC had advance notice of the deals but did not attempt to block any of them.

In addition to eliminating competitive threats, Amazon's acquisition strategy has expanded and protected the company's dominance. The company's significant expansion into new markets, paired with Amazon's wealth of data from its retail business, has fueled the platform's increasing market power. Amazon Associate General Counsel Nate Sutton testified at the Subcommittee's hearing last July that "Amazon is proud to be a company of builders and we have built our company from within, not through acquisitions."[1643] But the evidence examined during the investigation demonstrates that Amazon's acquisitions—including acquisitions of its direct competitors—have been key to Amazon's attainment, maintenance, and expansion of market power.

c. Conduct

i. Treatment of Third-Party Sellers

1) Bullying

While Amazon has referred to third-party sellers on its Marketplace as "partners," and "customers,"[1644] numerous small and medium-sized businesses told the Subcommittee that Amazon routinely bullies and mistreats them. The Online Merchants Guild, a trade association representing the interests of sellers engaged in online commerce, stated that they "have seen Amazon use their position of strength to take advantage of sellers."[1645]

Underlying Amazon's public-facing rhetoric is the reality that it views many of the sellers on its platform as competitors. In its internal documents, Amazon refers to third-party sellers as "internal

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1641 Letter from April Tabor, Acting Sec. of the Fed. Trade Comm'n, to Thomas Barnett (Aug. 22, 2012).

1642 Press Release, Fed. Trade Comm'n, Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc. (Aug. 23, 2017), https://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau.

1643 Innovation and Entrepreneurship Hearing Transcript at 39 (statement of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

1644 *See, e.g.*, CEO Hearing at 44 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.) ("Amazon makes significant investments to support Amazon's selling partners."); 41 ("Amazon recognizes that third-party sellers are our customers too, and their trust is critical to Amazon's success.").

1645 Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 3 (Oct. 29, 2019) (on file with Comm.).

competitors."[1646] At the Subcommittee's sixth hearing, Subcommittee Chairman Cicilline asked Mr. Jeff Bezos about Amazon's apparent doublespeak.[1647] In response, Mr. Bezos conceded, "[I]t wouldn't surprise me. In some ways, we are competing."[1648]

Over the course of the investigation, the Subcommittee heard from numerous sellers who described abusive tactics or mistreatment by Amazon in a variety of circumstances. For example, at the Subcommittee's fifth hearing, CEO and Founder of PopSockets David Barnett testified about Amazon's bullying tactics, which he said were enabled by "the asymmetry in power between Amazon and its partners."[1649] He stated that after the two companies decided on a minimum price at which Amazon would sell PopSockets, Amazon sold the products for a lower price and then demanded that PopSockets pay for the lost margin.[1650] As a result, PopSockets decided to end its relationship with Amazon Retail.[1651] When PopSockets communicated this intent to Amazon, its response was, "No, you are not leaving the relationship."[1652] PopSockets did sever its relationship with Amazon Retail for a period of time, but reestablished it about a year later.[1653] Mr. Barnett estimates that in 2019 his company incurred losses of $10 million in revenue from when he stopped selling to Amazon Retail and Amazon blocked one of his authorized distributors from selling on the marketplace.[1654]

Subcommittee staff learned about numerous other instances of Amazon employing strong-arm tactics in negotiations. A company that conducts business with multiple divisions of Amazon described how the platform leveraged its dominance in e-commerce to force acceptance of certain terms and conditions during negotiations over a different part of its business.[1655] According to this company, Amazon knows the power they have as a retailer. In the midst of negotiations, the platform repeatedly referenced its power to destock the company's products on Amazon.com as a "bargaining chip to force terms" unrelated to retail distribution on the company.[1656] The company added, "Amazon know[s] they

[1646] *See, e.g.*, Production from Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00206715 (Mar. 8, 2016) (on file with Comm.) (describing change to manual Pricing Rules when Amazon offer is competing with "internal 3P competitor" offers); AMAZON-HJC-00038917 (Sept. 2009) (describing proposal on "how to treat FBA sellers differently from other Buy Box (BB) eligible 3P sellers when we're matching *internal* competitors for non-media categories."); AMAZON-HJC-00142724 (defining Amazon's "Standard Price Matching Policy," and conditions when "Internal competitors (3P merchants) are matched" on price").

[1647] CEO Hearing Transcript at 93 (question of Rep. David N. Cicilline (D-RI), Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1648] *Id.* (statement of Jeff Bezos, CEO, Amazon, Inc.)

[1649] Competitors Hearing at 5 (statement of David Barnett, CEO & Founder, Popsockets LLC),

[1650] *Id.* at 22 (statement of David Barnett, CEO & Founder, Popsockets LLC).

[1651] *Id.*

[1652] *Id.* at 23.

[1653] *Id.* at 3–4 (statement of David Barnett, CEO & Founder, Popsockets LLC).

[1654] *Id.* at 4 (statement of David Barnett, CEO & Founder, Popsockets LLC).

[1655] Interview with Source 148 (Aug. 26, 2020).

[1656] *Id.*

have a lot of power [in retail e-commerce] and they are not afraid to use it to get terms they want in other markets."[1657]

Book publishers described a similar asymmetric power dynamic with Amazon. According to one publisher, "Amazon has used retaliation . . . to coerce publishers to accept contractual terms that impose substantial penalties for promoting competition" with Amazon's rivals.[1658] The publisher added that the platform's retaliatory conduct shows "Amazon's ability and willingness to leverage its market power to prevent publishers from working effectively with rival e-book retailers and, thereby, maintain and enhance its dominance in e-book distribution."[1659] Amazon's retaliatory tactics against publishers include removing the "buy" button, which blocks a customer's ability to purchase a publisher's current titles;[1660] and removing the "pre-order" button, which eliminates the ability for a consumer to pre-order a publishers' forthcoming titles.[1661] Another form of retaliation that Amazon reportedly engaged in was showing publishers' titles as out of stock or with delayed shipping times.[1662] According to credible reports, Amazon used these tactics in its public battle with Hachette Book Group in 2014 over e-book pricing,[1663] and has used them or threatened to use them in more recent negotiations.[1664] Publishers, authors, and booksellers have "significant fear" because of Amazon's dominance.[1665]

Amazon can treat sellers in this manner because it knows that sellers have no other realistic alternatives to the platform. As Mr. Barnett noted in his testimony:

> When there is bullying by an extremely successful company with all these partners that continue to do business with it, one has to ask how is it that such a successful business maintains partnerships with so many companies while bullying them. It is because of the power asymmetry . . . that companies tolerate this.[1666]

[1657] *Id.*

[1658] Submission from Source 17, to H. Comm. on the Judiciary, 13 (Nov. 14, 2019) (on file with Comm.).

[1659] *Id.* at 3 (Sept. 22, 2020) (on file with Comm.).

[1660] *See, e.g.*, David Streitfeld, *Amazon Pulls Thousands of E-Books in Dispute*, N.Y TIMES: Bits (Feb. 22, 2012), https://bits.blogs.nytimes.com/2012/02/22/amazon-pulls-thousands-of-e-books-in-dispute/?hpw.

[1661] *See, e.g.*, Polly Mosendz, *Amazon Blocks Pre-orders Of Hachette Books*, THE ATLANTIC (May 23, 2014), https://www.theatlantic.com/business/archive/2014/05/amazon-blacklists-hachette-books/371545/.

[1662] *See, e.g.*, David Streitfeld, *Writers Feel an Amazon-Hachette Spat*, N.Y. TIMES (May 9, 2014), https://www.nytimes.com/2014/05/10/technology/writers-feel-an-amazon-hachette-spat.html.

[1663] *Id.*

[1664] *See* Interview with Source 155 (Sept. 29, 2020); Submission from Source 17, to H. Comm. on the Judiciary, 13–18 (Nov. 14, 2019) (on file with Comm.).

[1665] Interview with Ass'n of Am. Publishers, Authors Guild & Am. Booksellers Ass'n (Aug. 26, 2020).

[1666] Competitors Hearing at 23 (statement of David Barnett, CEO & Founder, Popsockets LLC).

A recent complaint filed against Amazon described the situation as follows, "From the third-party retailers' perspective, Amazon Marketplace is like Hotel California, a lovely place to start or expand an online retail business, but check out from Amazon Marketplace and you can quickly find your business in bankruptcy."[1667] Additional comments from sellers that Subcommittee staff interviewed include, "We're stuck. We don't have a choice but to sell through Amazon,"[1668] and, referring to Amazon, "They've never been a great partner, but you have to work with them."[1669]

As Stacy Mitchell, Co-Director of the Institute for Local Self-Reliance, noted during the Subcommittee's hearing on Innovation and Entrepreneurship, "Among the most egregious examples of Amazon's arbitrary treatment of sellers are its abrupt suspensions of their accounts, frequently made without explanation."[1670] Once Amazon suspends a seller's account or delists its products, the business is left with largely ineffective remedies as they watch their sales disappear. Sellers shared with Subcommittee staff that communications to Amazon's Seller Support Central generally prompt automated, unhelpful responses, which may be entirely unrelated to the specific case, question, or concern raised by the seller.[1671]

The founder of an infant product sold on Amazon told Subcommittee staff that after her products were mistakenly delisted, "[i]t would take weeks of repeated calls—at least 10 or 15 contacts with Seller Support—before somebody inside would determine that it was a mistake and error," and take action to fix the problem.[1672] She stated that this happened at least six times, and that in each instance her listings would be down for two to three weeks at a time.[1673] Describing how Amazon's mistakes can threaten a new business's survival, this small-business owner said:

> When you're a new company and Amazon suddenly delists you, it creates fear in the customer. "Where did it go? Is there something wrong with the product? What happened?" If a customer searched and it's no longer there, they're unlikely to ever come back and buy it . . . You've probably lost that customer for good.[1674]

[1667] Class Action Complaint at 20, Frame-Wilson v. Amazon.com, Inc., No. 20-cv-00424 (W.D. Wash., Mar. 9, 2020).

[1668] Interview with Source 150 (July 11, 2020).

[1669] Interview with Source 151 (July 2, 2020).

[1670] Innovation and Entrepreneurship Hearing at 9 (statement of Stacy F. Mitchell, Co-Dir., Inst. for Local Self-Reliance).

[1671] Interview with Source 125 (Jan. 9, 2020)*; see also* Submission from Joel Hellmann, to H. Comm. on the Judiciary (July 31, 2019) (on file with Comm.) (responding to automated messaged, "If you were a person and not a robot you would have read that I already tried this and it failed.").

[1672] Interview with Source 149 (July 22, 2020).

[1673] *Id.*

[1674] *Id.*

In another example, a third-party bookseller told Subcommittee staff that Amazon delisted 99% of his business's inventory in September 2019.[1675] The bookseller requested that Amazon return its products, which were stored in Amazon's warehouses.[1676] As of July 2020, Amazon had only returned a small fraction of the bookseller's inventory and continued to charge him storage fees.[1677] Amazon blocked the bookseller both from selling its products on its marketplace and retrieving its inventory, precluding the seller from trying to recover some of his losses by making sales through another, albeit lesser, channel. At the Subcommittee's sixth hearing, Representative Lucy McBath (D-GA) presented the bookseller's story to Mr. Bezos, who responded that this treatment is "not the systematic approach that [Amazon] take[s]."[1678] However, evidence Subcommittee staff collected through extensive seller interviews shows that Amazon's poor treatment of sellers is far from an isolated incident—a fact supported both by public posts on Amazon's Seller Central forum,[1679] as well as pleas for help routinely sent directly to Mr. Bezos.[1680]

Because of the severe financial repercussions associated with suspension or delisting, many Amazon third-party sellers live in fear of the company.[1681] For sellers, Amazon functions as a "quasi-state," and many "[s]ellers are more worried about a case being opened on Amazon than in actual court."[1682] This is because Amazon's internal dispute resolution system is characterized by uncertainty, unresponsiveness, and opaque decision-making processes.

[1675] Interview with Source 125 (July 7, 2020).

[1676] *Id.*

[1677] *Id.*

[1678] CEO Hearing Transcript at 89 (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1679] *See, e.g.*, iNOVATECH_MEDICAL, *Inventory being held hostage by Amazon for 3 months*, AMAZON SERVICES SELLER FORUMS (Apr. 8, 2020, 10:30 PM), https://sellercentral.amazon.com/forums/t/inventory-being-held-hostage-by-amazon-for-3-months/607892.

[1680] *See* Josh Dzieza, *Prime and Punishment: Dirty Dealing in the $175 Billion Amazon Marketplace*, THE VERGE (Dec. 19, 2018), https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement ("Emailing the richest man in the world is actually the standard method of escalating an Amazon seller appeal. It's called a Jeff Bomb, or . . . a Jeff Letter."); Interview with Chris McCabe, Founder, ecommerceChris LLC (Dec. 30, 2019) ("Out of desperation, some sellers try to email Jeff Bezos directly."); Submission from Source 125, to H. Comm. on the Judiciary (Jan. 27, 2020) (on file with Comm.); Submission from Source 150, to H. Comm. on the Judiciary (Aug. 16, 2017) (on file with Comm.).

[1681] *See, e.g.*, Submission from Source 125, to H. Comm. on the Judiciary (July 17, 2020) (on file with Comm.) ("My pregnant wife had to visit the ER due to increased anxiety and fear for the future . . . . Due to Amazon's stature, influence, and bullying nature, we are afraid of retaliation."); Interview with Source 154 (July 2, 2019) ("[Amazon] know[s] that small sellers have no power and no ability to avoid them," because "they are the powerhouse giant in the transaction and they could crush us."). *See also* Submission from Nat'l Ass'n of Wholesaler-Distributors, to H. Comm. on the Judiciary, 3 (July 22, 2020) (on file with Comm.) ("Small businesses that depend upon Amazon for access to their markets, including many of our members, fear retribution by Amazon if they speak up.").

[1682] Josh Dzieza, *Prime and Punishment: Dirty Dealing in the $175 Billion Amazon Marketplace*, THE VERGE (Dec. 19, 2018), https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement.

Additionally, the sellers interviewed by Subcommittee staff generally indicated that Amazon's customer service and treatment towards them have declined significantly in recent years. One business owner, who has been selling on Amazon for over a decade, told Subcommittee staff that in the past, a seller could get meaningful assistance by talking to an Amazon representative over the phone.[1683] He said, "I used to think that Amazon was a partner," but, now, "I don't think they care about the third party seller . . . . They treat us as a commodity."[1684] Internal Amazon documents suggest that the company's hyper-focus on a cost-cutting strategy to adopt automated processes for nearly everything—which Amazon refers to as "HOTW" or "Hands off the wheel"[1685]—combined with the platform's monopoly power over sellers may be to blame for Amazon's atrocious levels of customer service for sellers.

Amazon has recently monetized the degradation of its seller services, rolling out a program where sellers can pay an extra fee for a dedicated account representative. Sellers are supposed to pay for representatives to help them solve the very problems that Amazon created in the first place. Many sellers say, however, that even with paid Amazon account managers they are often unable to get their issues resolved. One seller told Subcommittee staff, "It [i]s a problem that an algorithm can make a decision that just shuts off my income stream and there's nothing I can do to get it back . . . . The only thing I can do to get it back is pay $6,000 a month for a dedicated rep and even then, it doesn't always work."[1686]

The last resort for sellers facing these circumstances is the "Jeff Bomb," or "Jeff Letter," in which a seller sends an email to Mr. Bezos to plead their case.[1687] As the Online Merchants Guild explained in its submission, "a 'Jeff Letter' is almost like a Writ of Certiorari within Amazon's internal kangaroo court system."[1688] But by the time this point is reached, "a seller could be locked out of their account, or denied funds, for weeks, losing hundreds of thousands of dollars even if the mistake was

[1683] Interview with Source 152 (Sept. 18, 2020).

[1684] *Id.*

[1685] *See, e.g.*, Production from Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00227277 (on file with Comm.) ("The implementation of Hands Off the Wheel in [Site Merchandising] will mean that through automation . . . there is less work for humans. . . . Project Tiger combines all Hands off the Wheel (HOTW) programs and Amazon spans of control guidelines."); AMAZON-HJC-00227278 (Apr. 27, 2017) ("We are pursuing three tracks to drive Productivity savings: 1) FCF initiatives; 2) HOTW; and 3) Defect Reduction & Catalog Improvement.").

[1686] Interview with Source 149 (July 22, 2020). *See also* Submission from Source 100, to H. Comm. on the Judiciary (identifying one concern with Amazon's treatment of sellers as, "Pay or Die - Forcing sellers to pay for their support services to correct Amazon's wrong doings").

[1687] Josh Dzieza, *Prime and Punishment: Dirty Dealing in the $175 Billion Amazon Marketplace*, THE VERGE (Dec. 19, 2018), https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement ("Emailing the richest man in the world is actually the standard method of escalating an Amazon seller appeal. It's called a Jeff Bomb, or . . . a Jeff Letter."). *See also* Interview with Chris McCabe, Founder, ecommerceChris LLC (Dec. 30, 2019) ("Out of desperation, some sellers try to email Jeff Bezos directly."); Submission from Source 125, to H. Comm. on the Judiciary (Jan. 27, 2020) (on file with Comm.); Submission from Source 150, to H. Comm. on the Judiciary (Aug. 16, 2017) (on file with Comm.).

[1688] Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 3 (Oct. 29, 2019) (on file with Comm.).

Amazon's."[1689] Because of the large volume of sellers who reach this point of last resort, sending a "Jeff Letter" is not a realistic avenue for most sellers to get their issues addressed.

2) Forced Arbitration

All of Amazon's third-party sellers and most of its vendors are subject to a pre-dispute, binding ("forced") arbitration clause,[1690] requiring them to sign away the right to their day in court if a dispute with Amazon arises. Subcommittee staff heard from sellers who said that if it were not for Amazon's market power over them, they would not agree to this term.[1691] As noted by the Online Merchants Guild, "Through arbitration, Amazon knows it holds all the cards, and in many ways has the final say whenever there is a dispute."[1692] As a result, sellers rarely initiate arbitration actions against Amazon. Between 2014 and 2019, even as the number of Amazon sellers continued to grow by hundreds of thousands per year, only 163 sellers and 16 vendors initiated arbitration proceedings.[1693] Because sellers are generally aware that the process is unfair and unlikely to result in a meaningful remedy, they have little incentive to bring an action.

As extensive scholarship has shown, forced arbitration often fails to provide a legitimate forum for resolving disputes and instead usually serves to insulate those engaging in wrongdoing from liability.[1694] The case of Amazon sellers is no different. In practice, arbitration functions as a way for Amazon to keep disputes within its control, with the scales tipped heavily in its favor. As such, Amazon can withhold payments from sellers, suspend their accounts without cause, and engage in other abusive behavior without facing any legal consequences for its actions.[1695]

3) Seller Fee Increases

Amazon's treatment of sellers indicates that it sees them as a source of profit, rather than
"Amazon's treatment of sellers indicates that it sees them as a source of profit, rather than

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[1689] *Id.*

[1690] Data and Innovation Hearing at 49–50 (response to Questions for the Record, Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.); *Amazon Services Business Solutions Agreement*, AMAZON SELLER CENTRAL, https://sellercentral.amazon.com/gp/help/external/G1791 (last visited Sept. 29, 2020).

[1691] *See, e.g.*, Interview with Source 125 (Jan. 9, 2020) (explaining reason for agreeing to Amazon's terms, "What can I do? They don't give me much choice. You are so small that you don't have any leverage.").

[1692] Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 3 (Oct. 29, 2019) (on file with Comm.).

[1693] Data and Innovation Hearing at 49–51 (response to Questions for the Record, Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[1694] *See* Cynthia Estlund, *The Black Hole of Mandatory* Arbitration, 96 N.C. L. REV. 679, 684 (2018) (stating that mandatory arbitration "effectively enables employers to nullify employee rights and to insulate themselves from the liabilities that back up crucial public policies"); see *also* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2873 (2015) ("Mandated arbitration is also common in web-based sales.").

[1695] *See* Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 3 (Oct. 29, 2019) (on file with Comm.).

"partners."[1696] Individuals and small businesses who depend on access to the platform to make sales report that Amazon has raised seller fees significantly over the past decade. Over the past five years, a recent Institute for Local Self-Reliance report estimates that Amazon added an extra 11% to its cut of third-party sales.[1697] The platform now takes an average of 30% of each sale compared to 19% in 2015.[1698] In 2018, third-party sellers paid Amazon $39.7 billion in fees, which totaled about 25% of Amazon's $160 billion in Gross Merchandise Volume.[1699] This amount includes commissions, fulfillment and shipping fees, and other third-party seller services, but does not include revenue from the advertising fees for third-party sellers,[1700] which are often substantial.[1701] An internal Amazon document suggests the company can increase fees to third-party sellers without concern for them switching to another marketplace. The document notes that the amount of "seller attrition as a result of [2018] fee increases" for its Fulfillment by Amazon program was "[n]othing significant."[1702]

Amazon's pattern of exploiting sellers, enabled by its market dominance, raises serious competition concerns. For many sellers, there is no viable alternative to Amazon, and a significant number of sellers rely on its marketplace for their entire livelihood.[1703]

4) Appropriation of Third-Party Seller Data

One of the widely reported ways in which Amazon treats third-party sellers unfairly centers on Amazon's asymmetric access to and use of third-party seller data.[1704] During the investigation, the Subcommittee heard repeated concerns that Amazon leverages its access to third-party sellers' data to

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1696 *See, e.g.*, Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00206936 (Nov. 8, 2013) (on file with Comm.) ("Seems like we should be making more on the seller loans. . . . Net takeaway is that sellers may be getting too good of a deal… There are different ways to fix… commitment fees, higher rates, etc.. We should get rewarded for satisfying a timing spike like this.").

1697 STACY MITCHELL, RON KNOX & ZACH FREED, INST. OF LOCAL SELF-RELIANCE, REPORT: AMAZON'S MONOPOLY TOLLBOOTH 3 (2020), https://ilsr.org/amazons_tollbooth/.

1698 *Id. See also* Interview with Jason Boyce, Founder & CEO, Avenue7Media, LLC (Sept. 15, 2020) (estimating that most sellers are currently paying an average of 35% in fees to Amazon when you add up the referral fees and payments for ads based on his experience).

1699 MARKETPLACE PULSE, MARKETPLACES YEAR IN REVIEW 4 (2019), https://cdn.marketplacepulse.com/misc/marketplaces-year-in-review-2019.pdf.

1700 *Id.*

1701 *See, e.g.*, Interview with Top Shelf Brands (Sept. 29. 2020) (estimating Top Shelf paid Amazon over $1 million in fees for advertising in one year); Submission from Top Shelf, to H. Comm. on the Judiciary, Ex. 1 (Oct. 26, 2019) (on file with Comm.).

1702 Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00186540 (Jan. 30, 2018) (on file with Comm.).

1703 *See, e.g.*, JUNGLESCOUT, THE STATE OF THE AMAZON SELLER 2020 4 (2020), https://www.junglescout.com/wp-content/uploads/2020/02/State-of-the-Seller-Survey.pdf ("More than a third (37%) of sellers [surveyed] earn income from Amazon sales alone.").

1704 Innovation and Entrepreneurship Hearing at 5 (statement of Stacy Mitchell, Co-Dir., Inst. for Local Self-Reliance) ("Amazon's [gatekeeper power] allows it to maintain a God-like view of the transactions of rival businesses and customers, and use this data to move into new markets with a built-in advantage.").

identify and replicate popular and profitable products from among the hundreds of millions of listings on its marketplace.[1705] Armed with this information, it appears that Amazon would: (1) copy the product to create a competing private-label product[1706]; or (2) identify and source the product directly from the manufacturer to free ride off the seller's efforts, and then cut that seller out of the equation.[1707]

Amazon claims that it has no incentive to abuse sellers' trust because third-party sales make up nearly 60% of its sales, and that Amazon's first-party sales are relatively small.[1708] Amazon has similarly pointed out that third-party listings far outnumber Amazon's first-party listings.[1709] In a recent shareholder letter, CEO Jeff Bezos wrote, "Third-party sellers are kicking our first-party butt. Badly."[1710] In response to a question from the Subcommittee, however, Amazon admitted that by percentage of sales—a more telling measure—Amazon's first-party sales are significant and growing in a number of categories. For example, in books, Amazon owns 74% of sales, whereas third-party sellers only account for 26% of sales.[1711] At the category level, it does not appear that third-party sellers are kicking Amazon's first-party butt. Amazon may, in fact, be positioned to overtake its third-party sellers in several categories as its first-party business continues to grow.

[1705] *See, e.g.*, Interview with Source 158 (July 2, 2020); Submission from Nat'l Ass'n of Wholesaler-Distributors, to H. Comm. on the Judiciary (July 22, 2020) (on file with Comm.).

[1706] *See, e.g.*, Interview with Jason Boyce, Founder & CEO, Avenue7Media (Sept. 15, 2020).

[1707] *See, e.g.*, Submission from Nat'l Ass'n of Wholesaler-Distributors, to H. Comm. on the Judiciary (July 22, 2020) (on file with Comm.).

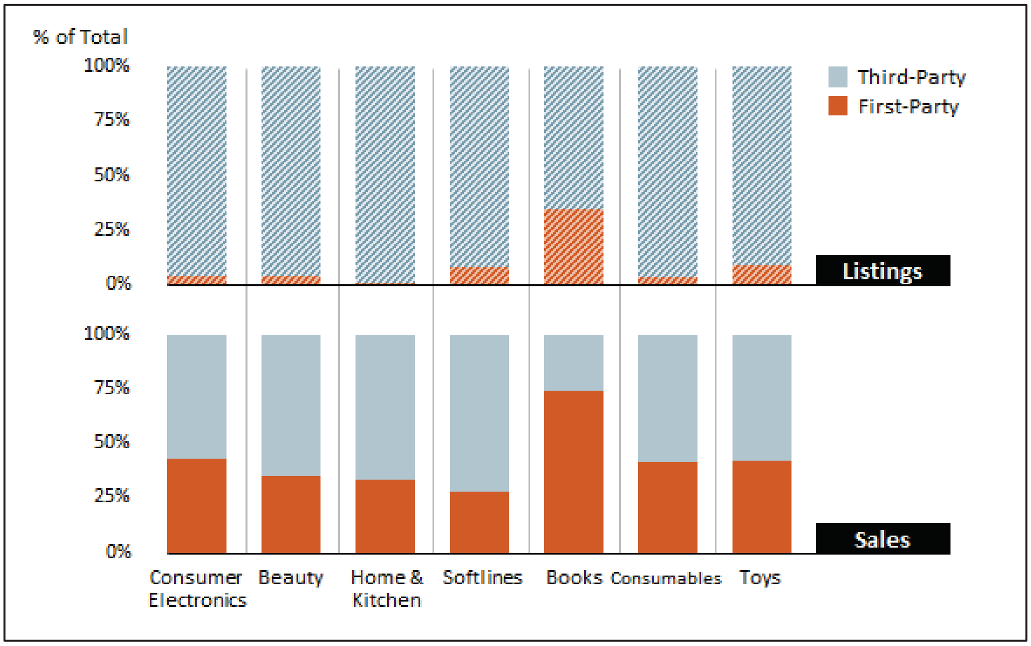
[1708] CEO Hearing at 23 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

[1709] *Id.* at 24.

[1710] Jeff Bezos, *2018 Letter to Shareholders*, THE AMAZON BLOG: DAY ONE (Apr. 11, 2019), https://blog.aboutamazon.com/company-news/2018-letter-to-shareholders.

[1711] CEO Hearing at 25 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

Third-Party vs. First-Part Listings and Sales on Amazon[1712]



Amazon recognizes that it competes against many of its third-party sellers.[1713] In response to concerns about its unfair use of third-party seller data, Amazon points to its Seller Data Protection Policy, which it instituted in 2014.[1714] According to the company:

> Amazon recognizes that third-party sellers are our customers too, and their trust is critical to Amazon's success. In an effort to further this partnership, Amazon decided years ago to take additional voluntary steps to protect seller data by instituting its voluntarily-adopted Seller Data Protection Policy, which prohibits Amazon Retail teams from using non-public seller-specific data to compete against third-party sellers.[1715]

Following up on public reporting and information collected during the investigation suggesting that Amazon might be abusing its access to third-party sellers' data, Representative Pramila Jayapal (D-WA) asked Amazon lawyer Nate Sutton about this precise issue at a Subcommittee hearing in July 2019. Sutton testified: "We do not use [third-party sellers'] individual data when we're making decisions to launch private brands."[1716]

[1712] *Id.* at 24–25 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

[1713] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00142724 (on file with Comm.).

[1714] CEO Hearing at 2 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

[1715] *Id.* at 41 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

[1716] Innovation and Entrepreneurship Hearing Transcript at 51 (statement of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

Since the July 2019 hearing, public reporting has made clear that, contrary to its own internal policy and testimony before Congress, Amazon routinely appropriates seller data to benefit its own private-label and retail businesses. After the hearing, according to a July 2019 report, a former employee who worked in product management told *The Capitol Forum*, "I used to pull sellers' data to look at what the best products were when I was there … That was my job."[1717] In September 2019, employees reported to *Yahoo Finance* that access to data is a "free-for-all" and that Amazon Retail and Marketplace teams "share the same access to the data warehouse, which makes it possible for the retail team to use the data from marketplace sellers to develop private labels."[1718]

Earlier this year, in a groundbreaking article, the *Wall Street Journal* reported that executives in Amazon's private-label division "had access to data containing proprietary information that they used to research bestselling items they might want to compete against, including on individual sellers on Amazon's website."[1719] In one case, Amazon employees reportedly used non-public sales data about a third-party seller of car-trunk organizers named Fortem to develop an Amazon private-label version of the very same product.[1720]

In light of the April 2020 report from the *Wall Street Journal*, the Committee requested that Jeff Bezos testify before Congress to address the possibility that Amazon's lawyer had misled Congress.[1721] Despite significant public reporting on the issue and references to it in Amazon's internal documents, Mr. Bezos claimed to be unaware of these practices. According to Mr. Bezos, "Amazon first learned about the alleged violations of Amazon's voluntarily adopted Seller Data Protection Policy recently reported in the *Wall Street Journal* from the *Wall Street Journal*."[1722] When Representative Pramila Jayapal (D-WA) again asked in July 2020 about whether Amazon uses third-party seller data to benefit its private-label products, Bezos could only respond: "I can't answer that

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[1717] *Amazon: Former Employee Challenges Executives' Denial About Company's Use of Sellers' Data*, THE CAPITOL FORUM (July 18, 2019).

[1718] Krystal Hu, *Amazon Uses Third-Party Seller Data to Build a Private Label Juggernaut*, YAHOO FIN. (Sept. 27, 2019), https://finance.yahoo.com/news/amazon-uses-thirdparty-sellers-data-to-build-private-labels-145813238.html.

[1719] Dana Mattioli, *Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020), https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015.

[1720] *Id*.

[1721] Letter from Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, Hon. Joe Neguse, Vice-Chair, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, Hon. Pramila Jayapal, Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, Hon. Ken Buck, Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. Matt Gaetz, Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, to Jeff Bezos, CEO, Amazon.com, Inc. (May 1, 2020) (on file with Subcomm.).

[1722] CEO Hearing at 1 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

question yes or no . . . we have a policy against using seller-specific data to aid our private-label business, but I can't guarantee you that that policy has never been violated."[1723]

Representative Ken Buck (R-CO) similarly raised this issue with Mr. Bezos, stating, "I'm concerned that you've used Amazon's dominant market position to unfairly harm competition. We've heard from a number of companies that Amazon uses proprietary data from third-party companies to launch its own private-label products."[1724] Later in the hearing, Representative Kelly Armstrong (R-ND) described this as an "important issue," and asked whether "Amazon is conducting an internal investigation into the use of third-party data," to which Mr. Bezos answered in the affirmative. Mr. Bezos agreed to inform the Subcommittee of the outcome of that investigation.

In October 2020, approximately six months after Amazon said that it had initiated the investigation,[1725] the company informed the Committee that it had completed it.[1726] According to Amazon's Vice President of Public Policy, Brian Huseman, "Amazon's records of past data queries related to the two products cited in the *Wall Street Journal* report show that a single former employee pulled and analyzed only aggregate data for both products in compliance with the Seller Data Protection Policy."[1727] The results of this limited investigation do not alter the views of Subcommittee staff on Amazon's use of third-party seller data as set forth in this Report.

Subcommittee staff uncovered evidence in interviews with former Amazon employees, as well as current and former sellers, that is consistent with the public reporting about Amazon's misuse of seller data.[1728] In a submission to the Subcommittee, a former employee said:

> In 2010, I started working on the Amazon marketplace team … It was widely known that many (10+) of my peers were running very successful [third-party] accounts, where they were pulling private data on Amazon seller activity, so they could figure out

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[1723] CEO Hearing Transcript at 66 (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1724] *Id.* at 128 (question of Rep. Ken Buck (R-CO), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1725] Amazon Policy (@amazon_policy), TWITTER (Apr. 24, 2020, 3:36 PM), https://twitter.com/amazon_policy/status/1253769684425625601.

[1726] Letter from Brian Huseman, Vice Pres., Public Pol'y, Amazon.com, Inc., to Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary (Oct. 4, 2020) (on file with Comm.).

[1727] *Id.*

[1728] *See* Submission from Nat'l Ass'n of Wholesaler-Distributors, to H. Comm. on the Judiciary (July 22, 2020) (on file with Comm.) (describing a member's experience in which Amazon allowed a distributor to sell a product for about a year, "then went out and replicated the product and began selling their own branded product, terminating the distributor . . . Amazon became the winner and the distributor was left empty handed").

market opportunity, etc. Totally not legitimate, but no one monitored or seemed to care.[1729]

Referring to accessibility of third-party seller data, the same individual told Subcommittee staff, "It's a candy shop, everyone can have access to anything they want," and added, "There's a rule, but there's nobody enforcing or spot-checking. They just say, don't help yourself to the data … it was 'wink wink,' don't access."[1730]

Subcommittee staff interviewed a third-party seller who described how Amazon uses a request for proof of authenticity to collect proprietary information about a seller's business. According to the seller, Amazon will submit a product authenticity claim to sellers, forcing the retailer to submit their original sales receipts as proof that the items are authentic.[1731] Although a seller is supposed to be able to black out price information, sometimes the platform will reject a submission on the basis that is an "altered document."[1732] With insight into the seller's costs and supplier, combined with its knowledge of the seller's retail price among a virtually unfathomable amount of other data, it appears that Amazon Retail can easily replicate the seller's listing to offer a competing product.

A former third-party seller and retired U.S. Marine told Subcommittee staff about several instances over his seventeen years as a seller when Amazon leveraged his work, undercut him on price, and eventually drove him out of business. In each instance, he had to change his business model after Amazon took over the Buy Box for his listings, "killing" his sales.[1733] On at least two different occasions, his company did all the legwork to create a new, top-selling product or product line, as well as creating the product listings, only to have Amazon copy the idea and offer a competing product. Amazon used different tactics each time, but the result was always the same: Amazon profited from his work and made it impossible for him to fairly compete.[1734]

As part of his last attempt to sell on Amazon, his business created its own line of table game products with a unique design and color palette. Once these products became top sellers, Amazon again swooped in to reap the rewards of his work. Amazon copied his designs, down to the color palette, and started selling their competing products at unsustainable prices. Ultimately, he exited his seller business, gave up on trying to bring new products to consumers, and founded a consulting agency for Amazon sellers.[1735]

1729 Submission from Source 91, to H. Comm. on the Judiciary (Sept. 16, 2020) (on file with Comm.).

1730 *Id*.

1731 Interview with Source 154 (July 2, 2019).

1732 *Id*.

1733 Interview with Jason Boyce, Founder & CEO, Avenue7Media (Sept. 15, 2020).

1734 *Id*.

1735 *Id*.

In addition to its private-label business, Amazon also uses third-party seller data to benefit its Amazon Retail business, where the company functions more like a retailer. At the Subcommittee's sixth hearing, Chairman David N. Cicilline (D-RI) asked Mr. Bezos about this conduct, recounting the story that a former third-party seller shared with Subcommittee staff:

> During this investigation, we have heard so many heartbreaking stories of small businesses who sunk significant time and resources into building a business and selling on Amazon, only to have Amazon poach their best-selling items and drive them out of business.
>
> So I want to talk to you about one company that really stood out from the rest. I want you to pay close attention to how they described your partnership, Mr. Bezos. We heard from a small apparel company that makes and sells what they call "useful apparel" for people who work on their feet and with their hands, like construction workers and firefighters.
>
> This particular business discovered and started selling a unique item that had never been a top seller for the brand. They were making about $60,000 a year on just this one item. One day, they woke up and found that Amazon had started listing the exact same product, causing their sales to go to zero overnight. Amazon had undercut their price, setting it below what the manufacturer would generally allow it to be sold so that, even if they wanted to, they couldn't match the price.[1736]

Amazon has tried to draw a meaningful distinction between individual and aggregate data, but this is largely beside the point when it comes to the concerns that Subcommittee members have about the platform's conduct and its effect on competition. Amazon says it only uses "aggregate" seller data across multiple sellers, not "individual" data about any specific seller.[1737] Importantly, though, it chooses how those terms are defined and uses various methods to deem seller data as aggregate rather than individual. According to the *Wall Street Journal* report, because Fortem accounted for 99.95% of total sales in the car-trunk organizer product category, not 100%, Amazon considered that data aggregate rather than individual.[1738] And at the Subcommittee's hearing in July 2020, Bezos confirmed that Amazon indeed allows the use of aggregate data to inform private-label brands when there are

[1736] CEO Hearing Transcript at 117 (question of Rep. David N. Cicilline (D-RI), Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1737] Letter from David Zapolsky, Gen. Counsel, Amazon.com, Inc., to Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary (July 26, 2019) (on file with Comm.).

[1738] Dana Mattioli, *Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020), https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015.

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only two or three sellers of a product.[1739] Separately, if there is only one seller of an item, and Amazon is selling returned or damaged versions of that item through its Amazon Warehouse Deals program, that data is considered aggregate.[1740]

An Amazon "Frequently Asked Questions" (FAQ) document from 2014 suggests that Amazon was aware that the Seller Data Protection Policy had significant loopholes. For example, the document indicates that even seller-specific data can be used for "strategic business decision at the category level or above."[1741] The answer to an FAQ also makes clear that the line between "aggregated" data and "Seller-specific" data is fuzzy: "As a general rule, if information isn't directly tied or easily attributed to a specific Seller, it can be considered aggregated and non-Seller-specific." As to how aggregated information attributed to a small group of Sellers should be treated, the guidance is also ambiguous: "This is a high judgment area. If Seller-specific information could be easily derived from aggregated information, it should be treated as Seller-specific."[1742]

In addition to collecting data relating to sales, Amazon may also be able to reverse engineer third-party sellers' cost structures through the tools that it offers sellers to track profits, costs, ad spend, and other expenses, as well as fulfillment services through Fulfillment by Amazon (FBA). An internal document suggests that Amazon may use its FBA service as an avenue to identify popular third-party seller items and gather competitively sensitive information about them.[1743] FBA provides another avenue for Amazon to access competing sellers' third-party data.

The documents and information that Subcommittee staff reviewed suggest that instances of Amazon's data misappropriation go beyond what is in the public domain. Furthermore, Subcommittee staff rejects Amazon's contention that Amazon's use of third-party seller data is no different from a traditional brick-and-mortar retailer's use of data. Subcommittee staff also does not believe that the marketplace-derived data the platform uses to inform Amazon Retail's product pipeline, among other decisions, is equally available to all Amazon Marketplace sellers.

On many fronts, Amazon makes inconsistent arguments depending on the forum and issue in support of its attempts to escape liability. In the context of lawsuits regarding liability for counterfeits

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[1739] CEO Hearing Transcript at 155 (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1740] Dana Mattioli, *Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020), https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015.

[1741] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00221869 (June 30, 2014) (on file with Comm.).

[1742] *Id*.

[1743] *See, e.g.*, Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00207035–36 (Sept. 19, 2013) (on file with Comm.) ("On the top selling Owl necklace . . . we should go deep and see what we can learn including how much it would costs [sic] to manufacture this?").

and unsafe products sold on its site, Amazon insists it is a marketplace and not a retailer.[1744] By contrast, in his testimony before the Subcommittee, Mr. Bezos referred to Amazon as a "store" and a "retailer."[1745] Similarly, when Nate Sutton testified before the Subcommittee, he stated, "Amazon is one of the leading retailers."[1746] In response to price gouging allegations, Amazon switches back to the position that it is just a marketplace. As Public Citizen observed in a recent report titled *Prime Gouging*:

> Amazon is trying to have the best of both worlds by enabling third-party sellers to exploit the crisis (and benefiting from facilitating those sales), but also seeking to immunize itself from responsibility for directly engaging in price gouging by shifting the focus on to the unscrupulous actions of third-party sellers, not only in the eye of the public but also in the eye of the law.[1747]

Amazon identified a few types of non-public seller data that it has access to, but which are supposed to be protected by its Seller Data Protection Policy.[1748] It is obvious from this small glimpse into the data Amazon has at its disposal that the type and scope of data the platform can access is very different from the information available to traditional brick-and-mortar stores. Physical stores have much less detailed information about the competing products they offer for sale alongside their private-label items. Physical stores also have far less information about customers' shopping habits and preferences.[1749]

5) <u>Self-Preferencing</u>

By virtue of its role as an intermediary in the marketplace, Amazon can give itself favorable treatment relative to competing sellers. It has done so through its control over the Buy Box, as well as by granting itself access to data and tools that are off-limits for third-party sellers. Most recently, there have been reports that Amazon has given preferential treatment to its own non-essential products over competitors' non-essential products during the pandemic.

[1744] *See* Colin Lecher, *How Amazon escapes liability for the riskiest products on its site*, THE VERGE (Jan. 28, 2020), https://www.theverge.com/2020/1/28/21080720/amazon-product-liability-lawsuits-marketplace-damage-third-party.

[1745] *See generally* CEO Hearing (statements of Jeff Bezos, CEO, Amazon.com, Inc.).

[1746] *See generally* Innovation and Entrepreneurship Hearing (statements of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[1747] PUBLIC CITIZEN, PRIME GOUGING: HOW AMAZON RAISED PRICES TO PROFIT FROM THE PANDEMIC 5 (2020), https://www.citizen.org/article/prime-gouging/ (also noting "a pattern of significant price increases on essential products sold directly by Amazon, as well as price gouging by third-party sellers").

[1748] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00221867 (June 30, 2014) (on file with Comm.) (listing information protected by the Seller Data Protection policy as "Seller pricing plans (e.g., future promotions), Seller inventory levels, Seller sourcing information, Seller sales (e.g., unit sales, GMS), [and] Seller performance (e.g., non-public metrics)").

[1749] *See* Stigler Report at 45 ("Traditional brick-and-mortar stores and online platforms differ greatly in their advertising and personalization capabilities.").

a) Critical Inputs

Amazon has control over critical inputs for competing sellers and other types of competitors—including consumer data, fulfillment and delivery services, and advertising and other marketing tools—that give it the ability to advantage itself over rivals. During the investigation, Subcommittee staff conducted numerous interviews with market participants that, along with credible public reporting and Amazon's documents, confirm that Amazon employed this business strategy as early as 2009 and continues to do so today.

b) Access to Market Data

Amazon has access to data that gives it greater insight into consumer behavior and preferences than competing sellers on its platform. A former Amazon employee that Subcommittee staff interviewed summarized the significance of this information asymmetry:

> It's important to understand that Amazon has access to every piece of data on what products each customer has searched and purchased [or] not purchased. . . . With information about what customers have searched, Amazon is able to create customized marketing [and] targeting of products for the individual customer. "Is Amazon using a particular [third-party] seller's data here? No," but it is using all of the aggregate site data to develop a highly targeted marketing plan for each customer. Should Amazon choose to use that targeting information to focus [on] its own products, it can, while [third-party] sellers don't have access to similar data.[1750]

Although Amazon provides its sellers with access to some helpful data and tools—which is a key differentiator from other marketplaces with no or limited seller tools—there is a large amount of data that is off-limits, only available at a largely prohibitive cost, or unhelpful because it is outdated or inaccurate. One paid service that Amazon offered sellers was called Amazon Retail Analytics Premium. Sellers who paid extra to participate in this program could access some, but not all, of the data Amazon collected on marketplace activity. But the program was expensive: vendors reportedly had to pay a minimum of $30,000 to get access to this database.[1751]

Another example of this asymmetric access to data is evident from an Amazon internal email discussion. The discussion began with a consultant alerting Amazon employees about a problem with its Marketplace Web Services APIs that caused it to report information to sellers that is "disconnected

[1750] Submission from Source 91, to H. Comm. on the Judiciary (Sept. 22, 2020) (on file with Comm.).

[1751] Robyn Johnson, *Amazon Just Made the $30k Amazon Retail Analytics Premium Data Free*, SEARCH ENGINE J. (Feb. 26, 2020), https://www.searchenginejournal.com/amazon-retail-analytics-premium-data-free/350692.

from the reality and often misleading."[1752] According to the representative, "This is a huge issue and causes sellers losses and inconvenience."[1753] In response, an Amazon employee said that there was not a problem with the API functionality; rather, the Pricing APIs just do not provide sellers with information at the level of granularity requested. Further, she explained that this is "a feature request for adding location aware information to the Pricing APIs," which is "currently below the line for 2018 for the pricing team."[1754]

c) Marketing Tools

One tool that Amazon Retail uses to benefit its own business is Amazon Vine, a review-generating program.[1755] In interviews with market participants, many sellers said that good reviews are critical for a product to be successful online.[1756] Accordingly, sellers aim to obtain as many positive reviews as possible early in a product's life cycle. At one time, it was permissible for Amazon sellers to provide incentives such as free samples to reviewers. However, in 2016, it was widely reported that some sellers were generating fake reviews.[1757] In response to these reports, Amazon announced that it would ban incentivized reviews except for those obtained through its own incentivized review program, Amazon Vine.[1758] As a result, sellers lost access to this program, regardless of whether they were engaged in bad conduct or not.

For many years, including after the incentivized-reviews ban, the Amazon Vine program was not available to third-party sellers, while Amazon continued to enjoy the program's ability to "minimize marketing costs associated with generating awareness early in a product's lifecycle," among other benefits.[1759] An Amazon internal document describes other advantages of the program as,

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1752 Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00188405–06 (Dec. 14, 2017) (on file with Comm.).

1753 *Id.*

1754 *Id.* at AMAZON-HJC-00188536 (Dec. 15, 2017).

1755 Innovation and Entrepreneurship Hearing at 13 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

1756 *See, e.g.*, Interview with Source 125 (July 7, 2020) (explaining that the inability to move customer reviews from Amazon to other marketplaces is a barrier to use of other marketplaces, due to the importance of customer feedback for seller reputation).

1757 Elizabeth Weise, *Amazon Bans 'Incentivized' Reviews*, USA TODAY (Oct. 3, 2016), https://www.usatoday.com/story/tech/news/2016/10/03/amazon-bans-incentivized-reviews/91488702/.

1758 *Id.*

1759 Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00146732 (Dec. 14, 2017) (on file with Comm.); Spencer Soper, *Amazon Doles out Freebies to Juice Sales of Its Own Brands*, BLOOMBERG NEWS (Oct. 16, 2018), https://www.bloomberg.com/news/articles/2018-10-16/amazon-doles-out-freebies-to-juice-sales-of-its-own-brands.

"[d]rive conversion and sales with more insightful reviews on detail pages," and "can contribute to higher order counts and sales."[1760]

By both banning incentivized reviews and excluding third-party sellers from the Amazon Vine program, Amazon allocated to itself a significant marketing advantage over the other businesses with which it competes on its platform.

Amazon's dual position as both operator and seller on its online marketplace also provides it with the ability to disadvantage competitors that seek to sell or advertise on its platform. One way that Amazon does this is by limiting certain rivals' ability to buy Amazon.com search advertising—ads that present products at the top of the search results when consumers enter specific search terms or a product name. Although "search advertising is a lucrative part of the company's business," Amazon "won't let some of its own large competitors buy sponsored-product ads tied to searches for Amazon's own devices."[1761] The *Wall Street Journal* reported this month that Roku, Inc. "can't even buy [] Amazon ads tied to its own products."[1762] Consistent with this report, a competitor of Amazon that manufacturers voice-enabled devices told Subcommittee staff that Amazon prohibited it from buying ads on Amazon.com.[1763] The competitor expressed concerns about the harm this could cause consumers, who may be confused or deceived when they receive ads promoting Amazon products even when they specifically search for a competitor's product on Amazon.com.[1764]

The Subcommittee's investigation also uncovered internal documents showing that Amazon executives have long understood the competitive advantage Amazon wields due to the company's control over search advertising on Amazon.com. In an internal email describing an ad block against Groupon and other "deal site ecommerce competitors,"[1765] an Amazon executive wrote that "Groupon is blocked + let's keep a clear line on this. No deal site ecommerce competitors allowed to advertise on amazon.x sites."[1766]

Similarly, an email discussion in 2009 among high-level Amazon executives discussed the possibility of implementing an ad block against Diapers.com, saying:

[1760] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00146732 (Dec. 14, 2017) (on file with Comm.); *see also* AMAZON-HJC-0059576 (Nov. 22, 2010) (describing program as "[g]reat for new product launches - good for seeding").

[1761] Dana Mattioli, et al., *Amazon Restricts How Rival Device Makers Buy Ads on Its Site*, WALL ST. J. (Sept. 22, 2020), https://www.wsj.com/articles/amazon-restricts-advertising-competitor-device-makers-roku-arlo-11600786638.

[1762] *Id.*

[1763] Interview with Source 148 (Aug. 26, 2020).

[1764] *Id.*

[1765] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00129156 (Dec. 14, 2017) (on file with Comm.).

[1766] *Id.*

> Do we really think it is ok that Diapers.com flipped from selling on the platform to being a large scale user of Product Ads totally unscrrutinized [sic]? I don't. . . . We're under no obligation to allow them to advertise on our site. I'd argue we should block them from buying Product Ads immediately or at minimum price those ads so they truly reflect the opportunity cost of a lost diaper buyer (or to reflect the true value of a new customer to such a competitor.).[1767]

The executive suggests that Amazon should maintain a "watch list" of strategic competitors and set up "[a]n automatic trigger when a merchant on [the] watch list . . . attempts to launch a significant quantity of product ads-with escalated approval required to allow their ads to launch."[1768] The *Wall Street Journal* report, based on discussions with Amazon employees, confirms that Amazon ultimately implemented a plan of this type. According to the report, "Tier 1 Competitors" are blocked from buying certain ads and employees are allegedly instructed to "mark any discussion of this practice . . . with 'privileged and confidential' to evade regulators."[1769]

In March 2020, Amazon announced that it would begin temporarily delaying shipments of all non-essential products from its warehouses, regardless of whether they were sold by Amazon or by competing third-party sellers.[1770] The company claimed it was doing so to better serve customers in need while also helping to ensure the safety of warehouse workers. The effect of this change was to block third-party sellers of items that Amazon designated "non-essential" from shipping new inventory using fulfillment by Amazon.

Amazon reportedly excepted itself from this policy and continued to ship non-essential items sold by Amazon Retail from its warehouses. According to a survey of Amazon workers conducted by Change to Win between April 29 and May 9, 2020, workers reported that Amazon had "continued to ship non-essential items such as hammocks, fish tanks, sex toys, and pool floaties."[1771] More than two-thirds of fulfillment center workers reported that 50% or more of the items they handled during this period were non-essential. Based on the survey results, Change to Win concluded that "Amazon has continued to place workers in danger of contracting COVID-19 in order to ship non-essential goods."[1772] A number of market participants that Subcommittee staff interviewed also indicated that

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[1767] *Id.* at AMAZON-HJC-00065094 (May 28, 2009) (on file with Comm.).

[1768] *Id.*

[1769] Dana Mattioli, et al., *Amazon Restricts How Rival Device Makers Buy Ads on Its Site*, WALL ST. J. (Sept. 22, 2020), https://www.wsj.com/articles/amazon-restricts-advertising-competitor-device-makers-roku-arlo-11600786638.

[1770] CEO Hearing Transcript at 7–8 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.)

[1771] CHANGE TO WIN, AMAZON COVID-19 WORKER SURVEY DATA BRIEF 3 (2020), https://static1.squarespace.com/static/5d374de8aae9940001c8ed59/t/5ec67b15a155792a0f9ef435/1590065963743/Amazon-Worker-COVID-19-Data-Brief.pdf.

[1772] *Id.*

Amazon prioritized shipping its own items over those sold by third-party sellers.[1773] Amazon confirmed that it did give preferential treatment to its own products for a period of time, but claimed it was "unintentional."[1774]

6) Tying and Bundling – Fulfillment by Amazon and Advertising

a) Fulfillment by Amazon

There is a strong link between Amazon Marketplace and Fulfillment by Amazon (FBA), Amazon's paid logistics service. Amazon uses its dominance in each of these markets to strengthen and reinforce its position in the other.

Amazon's FBA program combines warehousing, packing, and shipping services, and most importantly, access to Prime customers.[1775] For a seller's products to get the Prime badge, which is essential to making sales on the platform, a seller must either qualify for Amazon's Seller Fulfilled Prime (SFP) program or use Amazon's FBA service. On August 18, 2020, Amazon informed sellers of changes to Seller Fulfilled Prime which render it an entirely impractical option for most sellers.[1776] Even before this change, only a very small percentage of sellers could meet the onerous eligibility requirements for Seller Fulfilled Prime.[1777] This means FBA is functionally the only way for sellers to get the Prime badge for their product listings.[1778] A document setting forth draft Q&A before a 2018 earnings call for Amazon Chief Financial Officer Brian Olsavsky explained the connection between Prime and FBA: "Prime and FBA reinforce each other – they are inextricably linked. FBA adds Prime eligible selection. Prime member growth and purchasing habits attract sellers to FBA."[1779]

[1773] *See, e.g.*, Submission from Source 91, to H. Comm. on the Judiciary (Sept. 16, 2020) ("When we looked at Amazon private-label products during April/early May, they were almost all available for immediate Prime delivery, while comparable national brands were not able to get the same shipment times. Definitely preference was given to many Amazon private-label products during times of "essential"/"non-essential" classification."); Interview with Source 152 (Sept. 18, 2020).

[1774] CEO Hearing at 8 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.) ("After instituting these changes, Amazon became aware that shipments of certain Amazon devices that did not fall into the priority categories had been inadvertently included in the list of products with faster delivery promises. This was unintentional.").

[1775] *Fulfillment by Amazon*, AMAZON, https://sell.amazon.com/fulfillment-by-amazon.html (last visited Oct. 4, 2020).

[1776] Pascal, The Seller Fulfilled Prime Team, *Important Updates to Seller Fulfilled Prime*, AMAZON SERVICES SELLER FORUMS (Aug. 18, 2020), https://sellercentral.amazon.com/forums/t/important-updates-to-seller-fulfilled-prime/682240.

[1777] *See, e.g.*, Interview with Jason Boyce, Founder & CEO, Avenue7Media, LLC (Sept. 15, 2020) ("It used to be possible, but hard, to be a Seller Fulfilled Prime seller. There were only 200 sellers that were able to meet the requirements. What's changing recently is that they used to allow you to have the Prime badge in certain regions, but now they say you need the Prime badge nationally, i.e., you need to have multiple warehouses across the country plus ship on Saturdays, etc.").

[1778] Regan McPhee, *How to Sell on Amazon Prime in 2020*, JUNGLESCOUT (May 27, 2020), https://www.junglescout.com/blog/how-to-sell-on-amazon-prime/.

[1779] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00186643 (July 23, 2018) (on file with Comm.).

Due to a lack of alternatives, third-party sellers have no choice but to purchase fulfillment services from Amazon. More than 73% of all Marketplace sellers worldwide reportedly rely on FBA services.[1780] Numerous third-party sellers told the Subcommittee that they feel they have no choice but to pay for FBA to maintain a favorable search result position, to reach Amazon's more than 112 million Prime members, and to win the Buy Box—through which the vast majority of Amazon sales are made.[1781] A recent consumer survey indicated that 75% of Amazon Prime customers specifically search for products flagged as Prime-eligible.[1782] As a result, as the Online Merchant's Guild told Subcommittee staff, many sellers will "say that without Prime you are dead."[1783]

In response to concerns about Amazon tying a seller's ability to make sales on its platform to participation in FBA, Amazon has offered contradictory statements. In the Subcommittee's second hearing, Representative Lucy McBath (D-GA) asked Amazon's Associate General Counsel Nate Sutton whether Amazon "privileged vendors who use Amazon Fulfillment Services over those who chose not to."[1784] Mr. Sutton asserted that Amazon "do[es] not favor . . . products that use FBA over others."[1785] He also indicated that Fulfillment by Amazon is not a factor in Amazon's ranking algorithm.[1786]

At the Subcommittee's sixth hearing, Representative Mary Gay Scanlon (D-PA) asked Mr. Bezos about whether there is a connection between a seller's use of FBA and its ability to win the Buy Box.[1787] In response, Mr. Bezos said, "I'm not sure if it's direct, but, indirectly, I think the Buy Box does favor products that can be shipped with Prime."[1788] Given that FBA is effectively the only way for sellers to get a Prime badge, this indicates that Amazon does favor sellers who use FBA over those who do not for both its search rankings and the Buy Box. Amazon claims that it favors sellers who use FBA because it is in the best interest of consumers and that it "does not consider profitability as part of the Featured Merchant Algorithm."[1789] Documents reviewed by Subcommittee staff, however, suggest

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[1780] *See* J. Clament, *Fulfillment by Amazon (FBA) Usage Among Top Marketplace Sellers Worldwide 2017–2018*, STATISTA (Jan. 7, 2020) https://www.statista.com/statistics/1020046/global-fba-usage-top-amazon-sellers/.

[1781] *See, e.g.*, Submission from Source 43, to H. Comm. on the Judiciary, 30 (Oct. 26, 2019) (on file with Comm.).

[1782] FEEDVISOR, THE 2019 AMAZON CONSUMER BEHAVIOR REPORT 10 (2019), https://fv.feedvisor.com/CN_2019_Amazon-Consumer-Behavior-Report.html.

[1783] Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 7 (Oct. 23, 2019) (on file with Comm.).

[1784] Innovation and Entrepreneurship Hearing Transcript at 53 (question of Rep. Lucy McBath (D-GA), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1785] *Id.*

[1786] *Id.* at 3 (response to Questions for the Record of Nate Sutton, Associate Gen. Counsel, Competition, Amazon.com, Inc.).

[1787] CEO Hearing Transcript at 175 (question of Rep. Mary Gay Scanlon (D-PA), Vice Chair, H. Comm. on the Judiciary).

[1788] *Id.* (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1789] CEO Hearing at 3 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

that Amazon has used profitability—also referred to internally as "contribution profit" or "CP"—as a factor in awarding the Buy Box.[1790]

Furthermore, Amazon's own documents show that it has considered FBA participation for purposes of determining the Buy Box winner.[1791] An Amazon document that sets forth pricing rules for a pilot program appears to favor third-party sellers that use FBA over those who do not for awarding the Buy Box.

Internal Pricing Strategy Document[1792]

From: Wales, Chance
To: VanDuine, Jason
Sent: 3/25/2010 11:26:35 AM
Subject: RE: SIGN OFF REQUESTED: Pre-WBR Follow-up: Healthcare Pricing Strategy

ok

From: VanDuine, Jason
Sent: Thursday, March 25, 2010 9:46 AM
To: Wales, Chance
Cc: VanDuine, Jason
Subject: SIGN OFF REQUESTED: Pre-WBR Follow-up: Healthcare Pricing Strategy
Chance – please sign off (or provide fdbk) before I send to Doug.
Jason
Doug,
You had asked me to help you understand the 'size of the issue' with regards to diverted product as well as clarification on pricing rules/matching for the image competitor simulation in the Healthcare category. Some current data (from February):

1. The top 25 negative CP ASINs in Health & Beauty (all Image ASINs) accounted for $265k in negative CP, 46k units and $1.6M in product revenue.
2. The diverted product ASINs (8 of the top 25) accounted for $109k in negative CP (41% of ttl), 14k units (31% of ttl) and $366k (21% of ttl) in product revenue.
3. Babycare products accounted for 14 of the top 25 ASINs (13 diaper and 1 wipe ASIN) and the remaining 3 ASINs are vendor or operational cost issues that are being addressed.
4. The image competitor pilot in Healthcare will address 6 of the 8 ASINs referenced in #2 (it will not address Align and Alli – both in Nutrition & Wellness)

We do not plan any manipulation to pricing rules in the Healthcare category other than the setting of number of image ASINs to zero.
Use cases (for Pricing Rules): using Prilosec as the example (CP neutral = $27)

Ref #	Use Case	Amazon Landed Cost	Comp Box Price	Comp Shipping Cost	Comp Landed Price	Amazon Match Price	Non-Prime (1% pad to FBA, 2% pad to 3P)	Prime (5% pad)
1	Walmart (Image Competitor)	$27.00	$28.00	$0.97	$28.97	$28.00	Amzn wins buy box	Amzn wins buy box
2	DAB Nutrition (3P) + FBA	$27.00	$26.50	$0.00	$26.50	$27.00	3P wins buy box	Amzn wins buy box
3	DAB Nutrition (3P) + no FBA	$27.00	$26.50	$0.00	$26.50	$27.00	Amzn wins buy box	Amzn wins buy box
4	AlltheTimeWholesale + no FBA	$27.00	$22.00	$4.50	$26.50	$27.00	Amzn wins buy box	Amzn wins buy box

The primary change coming is that we will now lose the buy box if 3P merchants continue to price below CP neutral (we will stop at CP neutral unless matching to an image competitor). As long as Prilosec is priced below $27 landed price (excluding buffers), we will lose the buy box. Currently, the lowest landed is under $20.
Estimated impact (based on simulation completed by the Pricing team) is a 6% negative impact on Healthcare category growth and a $.74/unit positive impact on CP. Using OP2 as the base, this would translate to ($750k) in revenue loss and ($775k) gain in CP. We will begin the pilot in April and will measure results on a weekly basis (with highlights in the pre-WBR as appropriate).
If you have any further questions, please let me know.
Jason

One third-party seller provided the Subcommittee with anecdotal evidence that Amazon favors sellers who participate in Amazon's fulfillment program over sellers who do not. The seller set up an experiment where he sold the same product, one self-fulfilled and the other fulfilled through FBA, and ran different test cases.[1793] The seller found that "Even when the consumer price of the self-fulfilled

[1790] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00141750 (Mar. 25, 2010) (on file with Comm.).

[1791] *Id.* at AMAZON-HJC-00142724.

[1792] Prepared by Subcomm. based on Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00141750 (Mar. 25, 2010) (on file with Comm.).

[1793] Submission from Source 43, to H. Comm. on the Judiciary, 29 (Oct. 26, 2019) (on file with Comm.).

order was reduced and sold for a lower price (7% lower) than the FBA offer, the FBA still 'won' the 'Buy Box.'"[1794] The seller indicated that, without this favorable treatment for FBA, they would not choose to use FBA, as they found Amazon's fulfillment service was often slower and less reliable than self-fulfillment.[1795]

Although Jeff Bezos told the Subcommittee that Fulfillment by Amazon "is probably the greatest invention that we ever created for sellers," and that "it's working for sellers," information that Subcommittee staff reviewed suggests that it has significant shortfalls.[1796] One third-party seller told Subcommittee staff, "We use both FBA and self-fulfillment, all of our negative comments are on items shipped through FBA."[1797] According to another seller that uses FBA, at one point, Amazon decided to change the packaging on her products from cardboard boxes to padded envelopes, causing damage to her products in transit. When the damaged items started arriving at her customers' homes in a damaged state, this caused a surge of negative reviews and requests for returns. When she asked Amazon to remove these bad reviews, which were caused by FBA's shipping methods, Amazon refused.[1798]

A competing online marketplace described how Amazon effectively forcing sellers into its FBA program makes it more difficult to compete with Amazon for sellers, stating, "[T]hrough anticompetitive strategies and practices by Amazon, many . . . sellers are being pulled into Amazon's tied marketplace-and-ecommerce-fulfilment ecosystem in a manner that makes them not only less independent but directly dependent on Amazon."[1799] It further explained that because of Amazon's dominance in online commerce, "Even sellers who sell on other marketplaces are pushed into FBA, because it is the only practicable way to obtain sales on the Amazon marketplace.[1800] In addition to the Subcommittee's investigation, antitrust enforcement agencies are currently investigating Amazon for tying these two services together.[1801]

[1794] *Id.*

[1795] *Id*; *see also* Interview with Source 920 (July 14, 2020); Interview with Source 100 (July 24, 2020).

[1796] CEO Hearing Transcript at 174 (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1797] Interview with Source 89 (July 22, 2020).

[1798] Interview with Source 149 (Feb. 26, 2020).

[1799] Submission from Source 11, to H. Comm. on the Judiciary, 1 (Oct. 14, 2019) (on file with Comm.).

[1800] *Id.* at 2.

[1801] *See. e.g.*, Press Release, Ital. Competition Auth., Amazon: Investigation Launched on Possible Abuse of a Dominant Position in Online Marketplaces and Logistic Services (Apr. 15, 2019), https://en.agcm.it/en/media/press-releases/2019/4/A528 (announcing launch of investigation into whether "Amazon would unduly exploit its dominant position in the market for e-commerce platforms intermediary services in order to significantly restrict competition in the e-commerce logistics market, as well as - potentially - in the e-commerce platform market, to the detriment of final consumers").

b) Advertising

Consistent with public reporting,[1802] evidence that Subcommittee staff reviewed suggests that Amazon may require sellers to purchase their advertising services as a condition of making sales on the platform. Because 44% of consumers tend to only look through the first two search pages when shopping on Amazon, a seller is practically invisible if it does not show up on one of the first two pages.[1803] Amazon's Sponsored Products and Sponsored Brand tools allow sellers to ensure they are prioritized in search results for specific key terms. A 2020 survey of large brands found that at least 73% used Amazon's advertising services, with 65% spending at least $40,000 a month on advertising on the site.[1804] In just one year, the number of brands with this monthly advertising spend increased by 33%.[1805]A recent report issued by the Institute for Local Self-Reliance explained:

> Sellers that decline to advertise risk losing their place in Amazon's organic search results, no matter how many glowing customer reviews they have. That's because the Amazon algorithm that delivers the search results favors products with more sales. As more orders are driven by ads, sellers than don't advertise lose out on those sales and, as their share of sales declines, they also slip in the search rankings, further reducing their sales in a negative cycle.[1806]

Similarly, the Online Merchants Guild told the Subcommittee in a submission, "[i]t is now common belief in the Amazon seller community that the only way to sell on Amazon is through Amazon's Pay-Per-Click ('PPC') offering." The submission describes the situation as "pay-to-play," adding that "[Pay-Per-Click advertising] has become a major point of frustration for many sellers, with many sellers left feeling as if they are paying a mandatory fee, and have even described [Pay-Per-Click] as a way for Amazon to increase their seller fees without looking like they are increasing their seller fees."[1807]

At the same time that advertising services have become "less of an option and more of a requirement for sellers to compete" on the platform, Amazon's ads have also become more

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[1802] *See, e.g.*, Shira Ovide, Amazon Advertising Is Just a Toll in Disguise, BLOOMBERG (July 15, 2019), https://www.bloomberg.com/opinion/articles/2019-07-15/amazon-advertising-is-just-a-toll-in-disguise.

[1803] FEEDVISOR, THE 2019 AMAZON CONSUMER BEHAVIOR REPORT 5 (2019), https://fv.feedvisor.com/CN_2019_Amazon-Consumer-Behavior-Report.html.

[1804] FEEDVISOR, BRANDS AND AMAZON IN THE AGE OF E-COMMERCE, 2020 EDITION 12 (2020), https://fv.feedvisor.com/CN_2020_Brands-and-Amazon-in-the-Age-of-E-Commerce.html.

[1805] *Id.*

[1806] STACY MITCHELL, RON KNOX & ZACH FREED, INST. OF LOCAL SELF-RELIANCE, REPORT: AMAZON'S MONOPOLY TOLLBOOTH 9 (2020), https://ilsr.org/amazons_tollbooth/.

[1807] Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 8 (Oct. 23, 2019) (on file with Comm.); *see also* Interview with Jason Boyce, Founder & CEO, Avenue7Media, LLC (Sept. 15, 2020) ("Pay-Per-Click is now mandatory.").

expensive.[1808] The ads' costs are determined by reverse auction—businesses bid on keywords that customers may use to search for a given product. In just a year, "the cost-per-click for sponsored ads increased by about 15% on average," and for some, by as much as 127%.[1809] A former third-party seller told Subcommittee staff that this harms both sellers and consumers, adding that "the good old days before [Pay-Per-Click], products would rise on the merits."[1810] Similarly, the Online Merchants Guild said, "[i]n the past, the belief was more reviews would create a trending product."[1811]

In response to concerns about tying, Amazon claims that it provides non-discriminatory access to the Buy Box and that participation in fulfillment by Amazon and its pay-per-click advertising program is voluntary.[1812] Amazon's revenue from these sources is increasing, however, and sellers continue to raise concerns that increased fees for compulsory fulfillment and advertising services are squeezing their business.

7) Strategic Platform Management and Mismanagement

During the investigation, the Subcommittee also heard concerns that Amazon engages in strategic mismanagement of its platform by: (1) allowing the proliferation of counterfeit and unsafe goods; (2) using its ability to control the flow of counterfeits as leverage; and (3) putting in place ineffective counterfeit prevention tools that result in the suspension of a large number of innocent sellers.[1813]

As Amazon's dominance in e-commerce has grown, so has the proliferation of dangerous and counterfeit products on its marketplace.[1814] A 2019 *Wall Street Journal* investigation found that

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[1808] Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 8 (Oct. 23, 2019) (on file with Comm.).

[1809] STACY MITCHELL, RON KNOX & ZACH FREED, INST. OF LOCAL SELF-RELIANCE, REPORT: AMAZON'S MONOPOLY TOLLBOOTH 10 (2020), https://ilsr.org/amazons_tollbooth/.

[1810] Interview with Jason Boyce, Founder & CEO, Avenue7Media, LLC (Sept. 15, 2020).

[1811] Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 8 (Oct. 23, 2019) (on file with Comm.).

[1812] *See, e.g.*, CEO Hearing Transcript at 134 (statement of Jeff Bezos, CEO, Amazon.com, Inc.) ("I think what you're referring to is the fact that we offer an advertising service basically for third party sellers to drive additional promotion to their products. That is a voluntary program. Some sellers use it. Some don't.").

[1813] During the investigation, the Committee also heard concerns about Amazon using "brand gating" to block competitors from selling certain products on its platform. *See, e.g.*, Submission from Source 5, to H. Comm. on the Judiciary (Sept. 15, 2020) (on file with Comm.) (raising concerns about "brand gating," which allows Amazon, on its own, or in concert with "a trademark owner/manufacturer/seller, who is registered on the Brand Registry, to block other third party sellers from selling a particular brand, unless certain conditions are met"); Source 100, to H. Comm. on the Judiciary (Jan. 10, 2020) (on file with Comm.) (raising concerns that Amazon "gates" a brand when it decides that it wants to source items directly from the manufacturer and limit competition from third-party sellers and stating, "[w]e have lost literally millions of dollars on [inventory from] brands that Amazon has gated, purchases directly from manufacturers and we are no longer able to sell on Amazon").

[1814] Alexandra Berzon, Shane Shifflett & Justin Scheck, *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL ST. J. (Aug. 23, 2019), https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990.

Amazon had active listings for over 4,000 items "that have been declared unsafe by federal agencies [and] are deceptively labeled or are banned by federal regulators."[1815] In the worst cases, these products have even caused bodily injury or even death to unsuspecting consumers.[1816] As recently as September 2020, CNN released a report describing multiple instances in which Amazon's own private-label products, such as a phone charging cable, have caught fire while in use by consumers.[1817]

The spread of counterfeit products also has serious consequences for vendors and brand manufacturers who rely on consumer trust and their reputation to maintain successful businesses. Amazon's marketplace platform is designed in a way that makes it difficult for consumers to identify counterfeit products. As the Retail Industry Leaders Association (RILA) noted in a submission to the Subcommittee, "Where a platform both obfuscates the origin or source and provides fulfillment services, a seller of counterfeits is harder for consumers to uncover because the item appears to have the backing of the platform."[1818]

Although it claims to take its counterfeit problem seriously, Amazon's business model incentivizes it to do less, not more. Because Amazon's profits increase with the number of sales on the platform, the company has an incentive to turn a blind eye to counterfeit products that contribute to its increased sales volume. Regardless of the source, more sales generally result in more profits for Amazon because it typically "profits twice from a sale through purchase and fulfillment[,] and potentially three times through advertising."[1819]

For example, Subcommittee staff uncovered evidence during the investigation that Amazon has used its ability to police counterfeits more or less aggressively as leverage in contract negotiations with brands who attempt to resist Amazon pressure to sell on its platform—referred to internally at Amazon as "holdouts."[1820] This recently occurred when it agreed to increase efforts to crack down on counterfeit Apple products as part of Apple agreeing to establish a wholesale relationship with Amazon Retail.[1821] Documents received by the Subcommittee suggest that Apple was dissatisfied with Amazon's anti-counterfeiting program and sought the following as a condition of selling Apple

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1815 *Id.*

1816 *Id.*

1817 Blake Ellis & Melanie Hicken, *Dozens of Amazon's Own Products Have Been Reported As Dangerous – Melting, Exploding or Even Bursting Into Flames. Many Are Still on the Market*, CNN BUS. (Sept. 10, 2020), https://www.cnn.com/2020/09/10/business/amazonbasics-electronics-fire-safety-invs/index.html.

1818 Submission from Retail Industry Leaders Ass'n, to H. Comm. on the Judiciary, 9 (July 16, 2019) (on file with Comm.).

1819 *Id.*

1820 Competitors Hearing Transcript at 2–3 (statement of David Barnett, CEO & Founder, Popsockets LLC); *see also* Laura Stevens & Sara Germano, *Nike Thought It Didn't Need Amazon – Then the Ground Shifted*, WALL ST. J. (June 28, 2017), https://www.wsj.com/articles/how-nike-resisted-amazons-dominance-for-years-and-finally-capitulated-1498662435.

1821 Jouzas Kaziukenas, *Amazon's Apple Moment*, MARKETPLACE PULSE (Nov. 27, 2018), https://www.marketplacepulse.com/articles/amazon-apple-moment.

products wholesale to Amazon: "Amazon must proactively monitor platform for counterfeits/knockoffs and cooperate with Apple to remove and prevent them."[1822]

At the Subcommittee's field hearing in Colorado, PopSockets founder David Barnett testified that "Amazon was aware that large quantities" of counterfeit PopSockets products were selling on its platform, but that Amazon allowed the problem to continue until PopSockets agreed to spend nearly two million dollars on Amazon marketing services.[1823] Mr. Barnett further testified that Amazon was not just facilitating the sale of counterfeit PopSockets products, but that Amazon itself was engaged in selling knockoffs. Representative Ken Buck (R-CO) and Representative Henry C. "Hank" Johnson, Jr. (D-GA) confronted Mr. Bezos on Amazon's behavior towards PopSockets at the Subcommittee's sixth hearing. Mr. Bezos responded, "if those are the facts and if someone somewhere inside Amazon said, you know, 'Buy X dollars in ads, and then we'll help you with your counterfeit problem,' that is unacceptable. And I will look into that, and we'll get back to your office with that." To date, however, Amazon has not followed up with the Subcommittee to provide additional information.

In response to criticism and negative publicity about the proliferation of counterfeit products on its platform, Amazon announced several initiatives to combat fake products.[1824] During the Subcommittee's sixth hearing, Mr. Bezos testified that Amazon "invest[s] hundreds of millions of dollars in systems" that police counterfeits.[1825] However, Amazon's approach appears to be ineffective, resulting in suspensions of many innocent, third-party sellers, with devastating effects on some sellers' businesses.[1826]

For example, Subcommittee staff interviewed a former Amazon employee and current consultant for Amazon sellers who described recent unfair changes in Amazon's treatment of sellers suspected of being counterfeiters. He said that, in the past, Amazon would only suspend accounts and withhold funds from third-party sellers it confirmed were selling counterfeit goods.[1827] However, increasingly, "Amazon rejects invoices or fails to verify suppliers without any justification or basis as to why . . . and they are using that as a reason to hold funds indefinitely."[1828]

[1822] *See* Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00190195 (Feb. 15, 2018) (on file with Comm.) ("We understand Apple's IP team may not be happy with elements of our anti-counterfeiting program.").

[1823] Competitors Hearing Transcript at 2–3 (statement of David Barnett, CEO & Founder, PopSockets LLC).

[1824] *See, e.g.*, Press Release, Amazon, Amazon Establishes Counterfeit Crimes Unit to Bring Counterfeiters to Justice (June 24, 2020), https://press.aboutamazon.com/news-releases/news-release-details/amazon-establishes-counterfeit-crimes-unit-bring-counterfeiters.

[1825] CEO Hearing Transcript at 132 (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1826] *See, e.g.*, Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00173394 (Sept. 6, 2016) (on file with Comm.) ("Additional gating requirements were put in place to reduce counterfeit and improve product safety, but did not have the right processes in place to limit the number of false negatives (declining Seller applications despite the seller's ability to provide the correct documentation).").

[1827] Interview with Chris McCabe, Founder, ecommerceChris, LLC (June 12, 2020).

[1828] *Id.*

One third-party seller told the Subcommittee that Amazon blocked some of her listings, citing a number of her products as "inauthentic."[1829] The seller provided evidence to Amazon that, not only were her vendor's products authentic, but Amazon actively sold the same products, sourced from the same vendor, through its first-party sales.[1830] Despite elevating the issue to Amazon executives in July 2020, this issue has still not been resolved as of September 2020.[1831]

ii. Most-Favored-Nation and Price Parity Provisions

Amazon also uses its dominant position in e-commerce as leverage with other businesses to require most-favored-nation (MFN) clauses or similar price parity provisions to guarantee that it will always receive the best prices and most favorable terms. While these clauses are not inherently anticompetitive, Amazon has a history of using MFN clauses to ensure that none of its suppliers or third-party sellers can collaborate with an existing or potential competitor to make lower-priced or innovative product offerings available to consumers.

The anticompetitive effects of Amazon's use of MFN clauses are particularly pronounced in the book market. According to a book publisher, Amazon used its market power in print and e-book sales to force a price MFN on it and other book publishers.[1832] As the publisher explained, the result has been that "publishers are completely handcuffed from stimulating platform competition because Amazon's price MFN causes publishers to incur significant financial penalties if they offer Amazon's rivals better pricing."[1833] Another publisher told the Subcommittee that "Amazon always has and still does require MFNs."[1834] According to this publisher, the MFN provisions prevent publishers from partnering with any of Amazon's competitors and reinforces Amazon's "stranglehold" and "control" over book distribution.[1835] Although Amazon has changed the name and specific mechanisms over the years, it appears that the company continues to impose contract provisions that effectively function as MFNs on book publishers.

In a joint letter to Subcommittee Chairman Cicilline following the Subcommittee's sixth hearing, a group of organizations representing authors, publishers, and booksellers wrote that Amazon's use of MFNs has "stifle[d] the emergence and growth of competitive alternatives in the

[1829] Submission from Source 100, to H. Comm. on the Judiciary (Sept. 18, 2020) (on file with Comm.).

[1830] *Id.*

[1831] *Id.*

[1832] Submission from Source 17, to H. Comm. on the Judiciary, 9 (Nov. 15, 2019) (on file with Comm.).

[1833] *Id.* at 10 (Nov. 15, 2019).

[1834] Interview with Source 155 (Sept. 29, 2020).

[1835] *Id.*

book distribution marketplace."[1836] When Amazon entered the e-book market through its release of the Kindle and Kindle Store in 2007, it unseated incumbent booksellers in market position by offering steep discounts on best-selling books.[1837] Over a decade later, Amazon's dominance in e-books and its anticompetitive application of price parity clauses to its business relationships in this market "eliminate[s] the ability of rivals or new entrants to gain any meaningful competitive advantage relative to Amazon."[1838] Essentially, Amazon disrupted this market, dominated it, and now wields its immense power to effectively guarantee that no competitor could possibly do the same.

Amazon also aggressively enforces price parity rules on Amazon marketplace's third-party sellers. It imposed MFN provisions on U.S. sellers until 2019. In response to antitrust scrutiny, the platform replaced those provisions with a "Fair Pricing Policy," which has the same effect of blocking sellers from offering lower prices to consumers on other retail sites.[1839] To enforce the policy, Amazon uses "computer software to regularly scan listings on competitors' websites, and pressuring their sellers to change their price if their Amazon price is substantially higher."[1840] A violation, or even a perceived violation, of the policy can lead to suspension of a seller's account, with dire consequences for the seller. A former third-party seller explained that Amazon uses "Buy Box Suppression," where Amazon will remove a seller's ability to win the Buy Box, as a way to penalize sellers that offer products at a lower price on competing sites.[1841]

One of Amazon's competitors told the Subcommittee that "as Amazon raises the costs to sellers, and requires that Amazon have the lowest prices available, for a seller to be able to make significant sales on its marketplace, these sellers will raise the price on competitor sites to match Amazon's price."[1842] Amazon's "Fair Price Policy," which has been described as a "thinly-veiled MFN

[1836] Letter from Maria A. Pallante, Pres. & CEO, Ass'n of Am. Publishers, Mary E. Rasenberger, Exec. Dir., Authors Guild, Allison K. Hill, CEO, Am. Booksellers Ass'n, to Hon. David. N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 2 (Aug. 17, 2020), https://publishers.org/wp-content/uploads/2020/08/Joint-Letter-to-Rep-Cicilline-081720.pdf.

[1837] George Packer, *Cheap Words*, NEW YORKER (Feb. 10, 2014), https://www.newyorker.com/magazine/2014/02/17/cheap-words (last visited Oct. 4, 2020) (noting that in 2007, the prices of e-books on Kindle were "below wholesale in some cases, and so low that [they] represented a serious threat to the market . . . By 2010, Amazon controlled ninety per cent of the market in digital books—a dominance that almost no company, in any industry, could claim.").

[1838] Letter from Maria A. Pallante, Pres. & CEO, Ass'n of Am. Publishers, Mary E. Rasenberger, Exec. Dir., Authors Guild, Allison K. Hill, CEO, Am. Booksellers Ass'n, to Hon. David. N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (Aug. 17, 2020), https://publishers.org/wp-content/uploads/2020/08/Joint-Letter-to-Rep-Cicilline-081720.pdf.

[1839] Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 7 (Oct. 29, 2019) (on file with Comm.).

[1840] *Id.* at 8.

[1841] Submission from Jason Boyce, Founder & CEO, Avenue7Media (Sept. 25, 2020) (on file with Comm.).

[1842] Submission from Source 11, to H. Comm. on the Judiciary, 4 (Oct. 14, 2019) (on file with Comm.); *see also* Submission from Jason Boyce, Founder & CEO, Avenue7Media (Sept. 25, 2020) (on file with Comm.) ("Amazon prohibiting sellers from offering lower prices on other online retail platforms clearly hurts consumers if the only way for restriction," is likely anticompetitive with respect to blocking competition from other marketplaces, and does not result in lower prices for consumers as Amazon has claimed.[1843]

iii. Predatory Pricing

As part of its business strategy, Amazon has historically placed a higher premium on long-term growth at the expense of short-term profitability. As noted earlier in this Report, Amazon did not post its first full-year profit until 2003—a decade after the company was founded.[1844] Consistent with this trend, Amazon has adopted a predatory-pricing strategy across multiple business lines at various stages in the company's history.[1845]

Because of the nature of its marketplace business, Amazon's below-cost prices on products and services tend to lock customers into Amazon's full marketplace ecosystem. As a former Amazon employee told the Subcommittee, "[A]bove all else, Amazon's goal is to keep the customer shopping on Amazon."[1846] Once a customer is locked in, they are less likely to change their behavior even when Amazon's pricing is not competitive.

1) Prime

The most prominent example of Amazon's use of strategic losses to lock customers into the platform's ecosystem is its popular membership program, Amazon Prime. As of August 2020, a Prime membership costs $119 per year, up from its original $79 at its launch in February 2005 and $99 from March 2014 to April 2018. An Amazon executive wrote in 2013, in reference to pricing Prime, "the better course is to let the existing Prime program grow . . . and then raise prices later assuming a lower elasticity in future years,"[1847] once customers are locked in.

An Amazon internal document describes the rationale behind Amazon Prime and its other membership programs: "Membership programs are created with a long-term, company-wide perspective with the goal of increasing loyalty and cross-category shopping behavior. The programs do

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sellers to regain their listing on Amazon is to raise their prices on other platforms or remove their listings all together, therefore limiting competition.").

1843 Submission from Int'l Bhd. Of Teamsters, Commc'n Workers of Am., United Food & Commercial Workers Int'l Union, Service Employees Int'l Union & Change to Win, to H. Comm. on the Judiciary, 4 (March 10, 2020) (on file with Comm.).

1844 Saul Hansen, *Technology; Amazon Reports First Full-Year Profit*, N.Y. TIMES (Jan. 28. 2004), https://www.nytimes.com/2004/01/28/business/technology-amazon-reports-first-full-year-profit.html.

1845 In this Report, the term "predatory pricing" should be understood in its broadest sense to refer to any situation where a dominant firm prices a good or service below cost in a way that is harmful to competition.

1846 Submission from Source 91, to H. Comm. on the Judiciary (Sept. 22, 2020) (on file with Comm.).

1847 Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00216088 (Oct. 28. 2013) (on file with Comm.).

not optimize for short-term gain or profitability in a single category."[1848] Another internal Amazon document describes these membership programs as, "[d]oubl[ing] down on 'Big Moats,'" aiming to create an impenetrable barrier around its dominant position.[1849]

Despite Amazon Prime's popularity and wide membership base, it is a loss-leader for the company. Many industry analysts have estimated Amazon's Prime losses over the years, finding that it is unprofitable, and that Amazon is willing to spend significant amounts of money to prop up the program.[1850] In 2016, a Forrester Research analysis estimated that Prime costs Amazon $1 billion per year.[1851] In 2019, J.P. Morgan estimated that, though priced at $119, a Prime subscription is valued at about $860, up 10% from its estimated value in 2018.[1852] A Prime membership also includes access to Prime Video, its library of digital video content, and Amazon Music, its music streaming service.

The Artists Rights Alliance, an advocacy group for the digital rights of music creators, raised concerns that Amazon's inclusion of a streaming music services in its Prime program poses a severe risk of "driv[ing] down royalties in an uncompetitive way."[1853]According to its submission:

> Amazon's ongoing efforts to launch a streaming music service as part of its Prime family of products should be carefully scrutinized . . . . [W]e are concerned about the dangers of predatory/sub-market pricing in a service that Amazon operates as a "loss leader." In general, creators need an economy that more accurately sees and values their work; not one with cut-rate prices that entangles music even more deeply in a web of soulless data collection and 'content distribution' operations.[1854]

Although Amazon Prime is a loss leader for the company, it is one of Amazon's most effective drivers of growth. Amazon Prime members account for 65% of Amazon shoppers as of Q4 2019.[1855]

[1848] *Id.* at AMAZON-HJC-00068510 (Sept. 8, 2010).

[1849] *Id.*; *see also* AMAZON-HJC-00184863 (May 7, 2015) ("The value differentiation for Prime members accelerates the Prime flywheel creating an additional reason to become a Prime member and concentrate household spend with Amazon.").

[1850] *See, e.g.*, Stu Woo, *Amazon 'Primes' Pump for Loyalty*, WALL ST. J. (Nov. 14, 2011), http://www.wsj.com/articles/SB10001424052970203503204577036102353359784.

[1851] Nanette Byrnes, *How Amazon Loses on Prime and Still Wins*, MIT TECH. REV. (July 12, 2016), https://www.technologyreview.com/2016/07/12/158869/how-amazon-loses-on-prime-and-still-wins/ (last visited Oct. 4, 2020).

[1852] J.P. MORGAN, RETAIL VS. AMAZON: LIFE IN A POST COVID-19 WORLD (June 11, 2020), https://markets.jpmorgan.com/research/email/-lbk68f4/Alp1kP9tQUPS29jlzW_bOg/GPS-3397412-0; Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00184863 (May 7, 2015) (on file with Comm.).

[1853] Submission from Artist Rights Alliance, to H. Comm. on the Judiciary, 5 (July 31, 2019) (on file with Comm.).

[1854] *Id.*

[1855] Fareeha Ali, *Amazon Prime Has 112 Million Members in the U.S.*, DIG. COMMERCE 360 (Jan. 24, 2020) https://www.digitalcommerce360.com/article/amazon-prime-membership/.

While the average Amazon customer spends about $600 per year on Amazon.com, Prime members reportedly spend more than double that—an average of $1400 per year.[1856]

In 2010, Amazon started its Amazon Mom program, now called Amazon Family, another membership service that offers discounts on diapers and other items associated with parenthood.[1857] At the outset, Amazon was willing to lose money to ensure the success of this program. A 2010 document outlining the lead-up to the official launch of Amazon Mom included a plan to discount diapers and wipes at a rate that would "put [their] product below cost."[1858] And selling diapers was not the goal of this program—instead Amazon recognized that "a long-lasting, sticky relationship" with Amazon Mom members was the source of its true value.[1859] Additionally, an internal presentation observed that "[e]arly results from our Amazon Mom program" showed that "[n]ew Amazon customers, whose first purchase included diapers, spend over three times as much ($292 vs. $91) during their first year as the average new Amazon customer."[1860]

Some of Amazon's rivals view this dynamic as harmful to competition, saying that Amazon is "[u]nderpricing Prime to consumers to build a huge and highly targetable share of ecommerce demand."[1861] Once consumers have paid the yearly fee for Prime, they are incentivized to use it as much as possible to maximize return on their investment, "whereas they might otherwise multisource."[1862]

2) Diapers.com

The Amazon Mom program served another important function and had a central role in one of Amazon's early applications of its predatory-pricing strategy. In 2009, Bezos and other Amazon executives noticed and began discussing the rise of Diapers.com, a competitor in the baby and personal-care product markets.[1863] What followed was a year-long price war, ending in Amazon's eventual acquisition of Quidsi, the parent company of Diapers.com.

[1856] Jack Houston & Irene Anna Kim, *How Amazon Gets You to Spend More Money*, BUS. INSIDER (Sept. 17, 2020), https://www.businessinsider.com/amazon-prime-members-spend-more-money-sneaky-ways-2019-9.

[1857] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00130737 (Aug. 31, 2010) (on file with Comm.).

[1858] *Id.* at AMAZON-HJC-00159560 (Apr. 2010).

[1859] *Id.* at AMAZON-HJC-00035545 (July 20, 2010) ("[W]e can see that Moms . . . have a favorable year one downstream value relative to the average customer.").

[1860] *Id.* at AMAZON-HJC-00154656.

[1861] Submission from Source 11, to H. Comm. on the Judiciary, 2 (Oct. 14, 2019) (on file with Comm.).

[1862] *Id.* at 3.

[1863] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00151723 (Feb. 9, 2009) (on file with Comm.).

At the Subcommittee's hearing, Mr. Bezos testified that Amazon was always a price follower in its war with Diapers.com.[1864] However, Amazon's "'plan to win' against [D]iapers.com" explicitly included price-leading on diapers.[1865] Recognizing that Diapers.com was the company's "#1 short term competitor," Amazon executives decided that going after them required a "need to match pricing . . . no matter what the cost."[1866] Amazon internal documents indicate that Amazon was willing to lose $200 million in one month alone on products in the relevant competitive categories.[1867] Offering 30% cash back on diapers and a free year's worth of Prime membership to Amazon Mom members, an Amazon executive predicted in November 2010 that it would seriously wound Quidsi, stating, "[T]hey expect to lose lots of money over the nxt [sic] few yrs [sic]-this will make it worse."[1868] Quidsi explicitly identified "Predatory Pricing" as a "Near-Term Risk" in a 2009 presentation.[1869] In November 2010, Amazon acquired its self-described "largest and fastest growing competitor in the on-line diaper and baby care space."[1870]

3) "Can't Realize Any Profit"

Once Amazon succeeds in trapping enough customers in its "flywheel" to secure dominant position across varied markets, it can then raise prices or remove incentives or allowances for Marketplace sellers to sell products at favorable prices for consumers. One example of the latter is Amazon's treatment of "CRAP," a term coined internally which refers to products on which Amazon "Can't Realize Any Profit."[1871] CRAP products are low-priced items that are heavy and expensive to ship—often consumables, like packs of bottled water.[1872]

These items were integral to Amazon's pursuit of dominance in the e-commerce market. But once Amazon began to switch its focus from pure growth to profitability, it reversed course on these products, engaging in an ongoing "CRAP-Out Process," by which Amazon attempts to make CRAP profitable through a variety of methods, such as raising delivery fees or requiring vendors to repackage products.[1873] This increases costs for sellers and brands, who have no choice but to acquiesce to the

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[1864] CEO Hearing Transcript at 83 (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1865] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00132026 (June 8, 2010) (on file with Comm.).

[1866] *Id.* at AMAZON-HJC-00151722 (Feb. 9, 2009).

[1867] *Id.* at AMAZON-HJC-00057007 (Apr. 5, 2010)

[1868] *Id.* at AMAZON-HJC-00009716 (Sept. 21, 2010)

[1869] *Id.* at AMAZON-HJC-00009596 (Nov. 2, 2010).

[1870] *Id.* at AMAZON-HJC-00142833 (May 12, 2009).

[1871] *Id.* at AMAZON-HJC-00167480.

[1872] Laura Steven, Sharon Terlep & Annie Gasparro, *Amazon Targets Unprofitable Items, with a Sharper Focus on the Bottom Line*, WALL ST. J. (Dec. 16, 2018), https://www.wsj.com/articles/amazon-targets-unprofitable-items-with-a-sharper-focus-on-the-bottom-line-11544965201.

[1873] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00167484 (on file with Comm.) ("How to deal with CRAP.").

changed shipping and packaging rules given their dependence on Amazon for e-commerce sales. Amazon executives acknowledged that CRAP was an element of its plan for growth, noting in a strategy session that, "We want to ensure that if despite all our efforts to improve our cost structure, we lose money on an ASIN [Amazon Standard Identification Number] it is for the long term strategic growth of Amazon."[1874]

Amazon documents provided in response to the Committee's requests show the extent to which Amazon was committed to below-cost pricing. A 2010 review of its baby formula business identified Amazon's "most frequently matched internal competitor" as ABCBabyFormula, which "typically [ ] price[d] 15-20% below [Amazon's] cost."[1875] Identifying this company as the most significant influence on Amazon's baby formula profit loss, the document notes of ABCBabyFormula that "[m]anufacturers do not sell to them directly and believe they are sourcing black market stolen goods."[1876] Amazon frequently price-matched, at significantly below-cost, a competitor that it had reason to believe was sourcing baby formula from illegal and potentially dangerous sources—indicating the lengths to which Amazon was willing to go to ensure product selection and, in turn, growth.

4) Amazon Devices

Finally, Amazon sells its own branded hardware devices on its Marketplace and has often priced those devices below cost in an attempt to corner the market for those devices and adjacent markets. In Amazon's effort to "own the smart home," for example, Amazon sometimes prices its Echo Speaker below-cost. Market estimates suggest that Amazon's Echo Dot third generation materials cost is $37.68,[1877] while the company listed it at $22 during its 2019 Prime Day.[1878] Other market research of Amazon products found that Amazon Echo products are on sale as often as they are at full price.[1879] Illustrating how low prices may not always be in consumers' best interest, Patrick Spence, the CEO of Sonos, testified before the Subcommittee that these pricing habits "hamstring[] those companies that have better products that cannot be sold at a loss."[1880] At the Subcommittee's

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1874 *Id.*

1875 *Id.* at AMAZON-HJC-0014302 (Sept. 30, 2010).

1876 *Id.*

1877 Submission from Source 38, to H. Comm. on the Judiciary, 19 (Sept. 1, 2019) (citing TECHINSIGHTS).

1878 *Id.*; *see also* Samantha Gordon, *Prime Day is Almost Over—These Are the Best Deals You Can Still Get*, USA TODAY (July 15, 2019), https://www.usatoday.com/story/tech/reviewedcom/2019/07/15/prime-day-2019-best-amazon-deals-you-can-get-during-massive-sale/1683589001/ (last visited Oct. 4, 2020) ("Echo Dot—$22").

1879 Sean Hollister, *Amazon Doesn't Sell Echo Speakers at a Loss, Says Bezos — Unless They're on Sale*, THE VERGE (July 29, 2020), https://www.theverge.com/2020/7/29/21347121/amazon-echo-speaker-price-undercut-rivals-loss-sale-antitrust-hearing.

1880 Competitors Hearing at 4–5 (statement of Patrick Spence, CEO, Sonos, Inc.).

hearing, Representative Jamie Raskin (D-MD) raised this concern with Mr. Bezos.[1881] In response, Mr. Bezos responded that the Amazon Echo is "often on promotion, and sometimes when it's on promotion it may be below cost."[1882]

3. Fulfillment and Delivery

a. Market Power

As Amazon's e-commerce business has grown, it has also developed a significant logistics business surrounding fulfillment and delivery of third-party orders with its Fulfillment by Amazon (FBA) program. More than 73% of all Amazon Marketplace sellers reportedly rely on this program to fulfill their orders.[1883] Because of this, a trade association that represents third-party sellers refers to Amazon's fulfillment operation "as the railroad of [e-commerce]."[1884] In addition to its fulfillment operation, Amazon is also one of the largest shippers in the world. The company provides global shipping services for its own products and independent sellers that sell on Amazon.com, as well as other e-commerce sites.[1885]

Amazon's ground shipping infrastructure consists of "trucks, trailers, intermodal containers, and delivery vehicles."[1886] Its truck fleet consists of more than 10,000 trailers.[1887] It also has its own freight airline, Amazon Air, with about 50 leased aircraft,[1888] and plans to expand its fleet to 70 by 2021.[1889] Amazon has also built hundreds of package sorting and delivery centers across the United

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[1881] CEO Hearing Transcript at 107 (question of Rep. Jamie Raskin (D-MD), Member, Subcomm. On Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1882] *Id.* (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1883] *See Fulfillment by Amazon Usage Among Top Sellers Worldwide 2017–2018*, STATISTA, https://www.statista.com/statistics/1020046/global-fba-usage-top-amazon-sellers/ (last visited Oct. 4, 2020).

[1884] Submission from Online Merchants Guild, to H. Comm. on the Judiciary, 8 (Oct. 23, 2019) (on file with Comm.).

[1885] *Fill Orders from Other Sales Channels (Multi-Channel Fulfillment)*, AMAZON SELLER CENTRAL, https://sellercentral.amazon.com/gp/help/external/200332450#:~:text=Multi%2DChannel%20Fulfillment%20(MCF),ships%20them%20to%20your%20customers (explaining that "Multi-Channel Fulfillment (MCF) is a program within Fulfillment by Amazon (FBA)," that fills orders from sales channels placed on sites other than Amazon.com) (last visited Oct. 4, 2020).

[1886] Innovation and Entrepreneurship Hearing at 19 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[1887] Press Release, Amazon, Continued Growth for Amazon's Air Network (June 28, 2019), https://press.aboutamazon.com/news-releases/news-release-details/continued-growth-amazons-air-network-expand-prime-fast-free.

[1888] Innovation and Entrepreneurship Hearing at 19 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[1889] Press Release, Amazon, Continued Growth for Amazon's Air Network (June 28, 2019), https://press.aboutamazon.com/news-releases/news-release-details/continued-growth-amazons-air-network-expand-prime-fast-free.

States and has established its own network of contracted delivery providers exclusively dedicated to delivering packages for Amazon.[1890]

In recent years, the size and scope of Amazon's delivery services network have grown significantly. When Amazon first launched Fulfillment by Amazon, it stored products and packed orders in its warehouses, but relied on other carriers to handle shipping and delivery. Today, Amazon ships a growing number of products itself. In 2019, "Amazon delivered about half of its own packages, up from 15 percent just two years before."[1891] Amazon has also lessened its use of large delivery companies during this time, using "800 small, independent contractors [which] are now responsible for around 48 percent of Amazon's last mile deliveries."[1892] These smaller providers are economically-dependent on Amazon, and "many are in fact reliant on Amazon for 100 percent of their business."[1893]

Parcel volume handled by Amazon's delivery service now rivals the top carriers, including UPS, FedEx, and the U.S. Postal Service. "In 2019, Amazon delivered 2.5 billion parcels, or about one-fifth of all e-commerce deliveries,"[1894] and anticipates growth. In a July 2020 investor call, Amazon CFO Brian Olsavsky stated that Amazon "expect[s] a meaningfully higher year-over-year square footage growth of approximately 50%," which includes "strong growth in new fulfillment center space as well as sort centers and delivery stations."[1895]

An analysis by Morgan Stanley concluded that Amazon will overtake UPS and FedEx in market share for delivery by 2022. Amazon has already surpassed the U.S. Postal Service, which has been downsized dramatically under its current leadership.[1896] Last year, the U.S. Postal Service had a decrease in parcel volume for the first time in nearly a decade.[1897]

[1890] INST. FOR LOCAL SELF-RELIANCE, AMAZON'S MONOPOLY TOLLBOOTH 8 (2020), https://cdn.ilsr.org/wp-content/uploads/2020/07/ILSR_Report_AmazonTollbooth_Final.pdf.

[1891] *Id.*

[1892] Submission from Int'l Bhd. Of Teamsters, Commc'n Workers of Am., United Food & Commercial Workers Int'l Union, Service Employees Int'l Union & Change to Win, to H. Comm. on the Judiciary, 13 (March 10, 2020) (on file with Comm.).

[1893] *Id.* at 14.

[1894] INST. FOR LOCAL SELF-RELIANCE, AMAZON'S MONOPOLY TOLLBOOTH 8 (2020), https://cdn.ilsr.org/wp-content/uploads/2020/07/ILSR_Report_AmazonTollbooth_Final.pdf.

[1895] Rachel Premack, *Amazon Is Piling Up Fulfillment Center Square Footage, and It Shows Bezos Thinks the Pandemic-Driven Online Shopping Surge Is Here to Stay*, BUS. INSIDER: MKTS. (Jul 31, 2020), https://markets.businessinsider.com/news/stocks/amazon-fulfillment-center-growth-reveals-pandemic-online-ordering-surge-2020-7-1029456709# (last visited Oct. 4, 2020).

[1896] INST. FOR LOCAL SELF-RELIANCE, AMAZON'S MONOPOLY TOLLBOOTH 8 (2020), https://cdn.ilsr.org/wp-content/uploads/2020/07/ILSR_Report_AmazonTollbooth_Final.pdf.

[1897] *Id.*

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b. Monopsony Power

Amazon exercises monopsony power in labor markets directly and indirectly. As one of the largest employers in America, Amazon exercises direct power over hundreds of thousands of workers across the United States.[1898] Amazon employees make up 22% of the U.S. labor market in warehousing and storage, excluding seasonal workers.[1899] There has been a growing amount of public reporting in recent years regarding Amazon's treatment of warehouse employees, including strenuous working conditions, unforgiving packing and sorting quotas, and unfair firings.[1900] Amazon warehouses also have a tendency to depress wages when they enter a local labor market. For example, since Amazon opened a warehouse in Lexington County, South Carolina in 2011, the county has seen average annual wages for warehouse workers fall more than 30%, from $47,000 to $32,000 annually.[1901]

Indirectly, Amazon has wage-setting power through its ability to set route fees and other fixed costs for independent contractors in localities in which it dominates the delivery labor market. These entities are dependent on Amazon for a large majority—or even 100%—of their delivery business.[1902] As a result, they have little choice but to "submit to Amazon's prices and other terms."[1903] Amazon's dominance also enables it to compel logistics employees to quit their jobs and instead act as independent contractors, removing employment protections. A group of labor unions stated in their submission to the Subcommittee, "By virtue of its size and power as a buyer of delivery services, Amazon can impose monopolistic restraints on the treatment of workers within its supply chain while, at the same time, avoiding legal responsibility for their fair treatment."[1904]

Despite the loss of jobs and economic activity in the wake of the COVID-19 pandemic, Amazon's monopsony power has likely increased. In response to higher demand for goods and

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[1898] Submission from Int'l Bhd. Of Teamsters, Commc'n Workers of Am., United Food & Commercial Workers Int'l Union, Service Employees Int'l Union & Change to Win. to H. Comm. on the Judiciary, 12 (March 10, 2020) (on file with Comm.).

[1899] *What Amazon Does to Wages*, THE ECONOMIST (Jan. 20, 2018), https://www.economist.com/united-states/2018/01/20/what-amazon-does-to-wages.

[1900] *See, e.g.*, Colin Lecher, *How Amazon Automatically Tracks and Fires Warehouse Workers for 'Productivity,'* THE VERGE (Apr. 25, 2019), https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations.

[1901] *What Amazon Does to Wages*, THE ECONOMIST (Jan. 20, 2018), https://www.economist.com/united-states/2018/01/20/what-amazon-does-to-wages.

[1902] Submission from Int'l Bhd. Of Teamsters, Commc'n Workers of Am., United Food & Commercial Workers Int'l Union, Service Employees Int'l Union & Change to Win, to H. Comm. on the Judiciary, 14 (March 10, 2020) (on file with Comm.).

[1903] *Id.*

[1904] *Id.* at 13.

services, Amazon hired 175,000 temporary workers in March and April of 2020, making 125,000 of those jobs permanent in May 2020.[1905]

4. Alexa's Internet of Things Ecosystem

a. Overview

Amazon has significant investments in the Internet of Things ecosystem, centering its strategy around Amazon's voice assistant, Alexa. In 2014, Amazon launched the Alexa-enabled Echo smart speaker.[1906] Since then, Amazon has built the largest ecosystem of devices and applications connected to the Internet of Things,[1907] creating a broad portfolio of services, development tools, and devices for its Alexa platform. Amazon's research and development team, Lab126, leads the development of Amazon's Internet of Things hardware expansion, including the development of Amazon Echo and Fire TV.[1908] These devices represent a "critical touchpoint that generates insights into user behavior, which can then be used to deepen the relationship with consumers and expose them to new products through personalized recommendations."[1909] Amazon encourages consumers to use Alexa through its Echo smart speakers and other Alexa compatible devices, ranging from smart microwaves to its Echo Frames.[1910]

In 2015, Amazon launched a kit for independent developers to access Alexa in the cloud and create new Alexa apps, which Amazon refers to as "skills."[1911] Two years later, in an effort to expand its ecosystem of devices, Amazon launched Alexa Voice Service. This suite of services allows manufacturers of hardware with microphones and speakers to receive and respond to Alexa voice

[1905] Sebastian Herrera, *Amazon to Keep Most of the Jobs It Added During Pandemic*, WALL ST. J. (May 28, 2020). https://www.wsj.com/articles/amazon-to-keep-most-of-the-jobs-it-added-during-pandemic-11590661802.

[1906] *See e.g.*, Chris Welch, *Amazon just surprised everyone with a crazy speaker that talks to you*, THE VERGE (Nov. 6, 2014), https://www.theverge.com/2014/11/6/7167793/amazon-echo-speaker-announced; Nick Statt, *Amazon wants Alexa to be the operating system for your life*, THE VERGE (Sept. 27, 2018), https://www.theverge.com/2018/9/27/17911300/amazon-alexa-echo-smart-home-eco-system-competition.

[1907] *See infra* Section IV.

[1908] *Amazon Jobs, Lab126*, AMAZON, https://amazon.jobs/en/teams/lab126/ (last visited Sept. 29, 2020).

[1909] *See* Johanna Ambrosio, *Amazon smart devices to expand in homes and businesses*, TECHTARGET (Mar. 23, 2020), https://searchaws.techtarget.com/feature/Amazon-smart-devices-to-expand-in-homes-and-businesses

[1910] *Echo Frames – Eyeglasses with Alexa – Black – A Day 1 Editions product,* AMAZON, https://www.amazon.com/dp/B07W72XKPJ. *See also AmazonBasics Microwave, Small, 0.7 Cu. Ft, 700W, Works With Alexa,* AMAZON, https://www.amazon.com/dp/B07894S727 (last visited Sept. 29, 2020).

[1911] David Isbitski, *Introducing the Alexa Skills Kit, Enabling Developers to Create Entirely New Voice Driven Capabilities*, AMAZON DEVELOPER (June 25, 2015), https://developer.amazon.com/blogs/post/Tx205N9U1UD338H/Introducing-the-Alexa-Skills-Kit-Enabling-Developers-to-Create-Entirely-New-Voic.

commands, making the device "Alexa-enabled,"[1912] or "Alexa built-in."[1913] Additionally, Amazon oversees Works with Alexa, an Alexa-compatible device certification program for devices that receive commands through an Alexa-enabled device, such as a smart speaker.[1914] Amazon does not charge third-party device manufacturers for access to its integration services, which promotes rapid adoption of Alexa in a larger number of devices, which, in turn, drives greater adoption by consumers.[1915]

These programs indicate that Amazon is focused on expanding Alexa's reach rather than short-term profitability, consistent with the early stages of its marketplace strategy. Amazon CFO Brian Olsavsky confirmed this in an earnings call in July 2019, saying that the company's "emphasis is around expanding the reach of Alexa and the usefulness."[1916] He added that at the time, Alexa had "over 45,000 skills" and was in "over 13,000 smart home devices from 2,500 unique brands."[1917]

Lastly, Amazon's Alexa ecosystem is a major source of consumer data; it tracks if the home owner's lights are off and the events on their calendar.[1918] Amazon is also building a series of devices that allow people to have "Alexa in [their] ears, on [their] eyes, and around [their] fingers."[1919]

b. Market Power

Amazon's Alexa represents one of three emerging voice assistant platforms domestically, along with Google Assistant and Apple's Siri, but has a more expansive collection of integrated devices and voice applications than its competitors.[1920] The Echo collection of smart speakers—the hub of Alexa's ecosystem—captures over 60% of the smart speaker market in the U.S.[1921]

1912 Satish Iyer, *Introducing the Alexa Voice Service Device SDK for Commercial Device Makers*, AMAZON ALEXA (Aug. 17, 2017), https://developer.amazon.com/blogs/alexa/post/7a72f14e-66d6-42fb-b369-c60af364489a/introducing-the-alexa-voice-service-avs-device-sdk-for-commercial-device-makers.

1913 *What are Alexa Built-in Devices?*, AMAZON ALEXA, https://developer.amazon.com/en-US/alexa/devices/alexa-built-in (last visited Sep. 29, 2020).

1914 *Works with Alexa Program*, AMAZON ALEXA, https://developer.amazon.com/en-US/alexa/connected-devices/launch/works-with-alexa (last visited Sept. 29, 2020).

1915 Class Action Complaint at 8, B.F. v. Amazon.com, Inc., No. 2:19-cv-910 (W.D. Wash., June 11, 2019).

1916 Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00200464 (July 26, 2018) (on file with Comm.).

1917 *Id*.

1918 Innovation and Entrepreneurship Hearing at 40 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

1919 Daniel Newman, *Opinion: Amazon's Alexa is about to become even more of a fixture in our lives*, MARKETWATCH (Sept. 30, 2019), https://www.marketwatch.com/story/amazons-alexa-is-about-to-become-even-more-of-a-fixture-in-our-lives-2019-09-27.

1920 *See infra* Section IV.

1921 Submission from Source 38, to H. Comm. on the Judiciary, 7 (Sept. 1, 2019).

As of September 2019, there were 85,000 Works with Alexa devices available for consumers to purchase.[1922] The current network of Alexa-enabled devices includes companies like Sonos, Hewlett-Packard, and BMW.[1923] The U.S.-based Alexa Skills Store as of January 2020 includes 70,729 skills.[1924] In comparison, as of December 2019, Google's voice application ecosystem had just over 18,826 Google Actions.[1925]

The voice assistant market has strong entry barriers due to the significant investments required to compete in the market. These include investments in artificial intelligence, voice-enabled hardware, and cloud computing infrastructure, which are critical inputs Amazon has been developing for years. Amazon's Alexa Voice Service is also hosted on Amazon Web Services, allowing it to bind products and developers to its cloud platform. [1926] In turn, this relationship gives Amazon a potential head-start on turning its Alexa business partners into customers through the cross-sale of Amazon Web Services and other Amazon products and services down the line.

Voice assistants collect significant amounts of personal data and learn users' preferences over time. For example, when Alexa users add more devices that integrate with Alexa, they often manage the settings for these devices through mobile applications and websites that are tied to their Amazon credentials, thereby creating a robust user profile. [1927] As Amazon continues to expand Alexa's reach, this customization of features allows Amazon to better "understand" its users, which may affect their willingness to retrain a new voice assistant.[1928] In addition to the cost of replacing their devices, this friction—retraining a new voice assistant—may increase costs associated with switching to another voice assistant ecosystem.

c. Merger Activity

Amazon has expanded its voice assistant ecosystem by acquiring artificial intelligence companies to strengthen Alexa's functionality and voice-enabled device manufacturers to expand

[1922] Kyle Wiggers, *The Alexa Skills Store now has more than 100,000 voice apps*, VENTUREBEAT (Sept. 25, 2019), https://venturebeat.com/2019/09/25/the-alexa-skills-store-now-has-more-than-100000-voice-apps/.

[1923] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00200465 (July 26, 2018) (on file with Comm.).

[1924] H. Tankovska, *Total number of Amazon Alexa skills in selected countries as of January 2020*, STATISTA (Aug. 27, 2020), https://www.statista.com/statistics/917900/selected-countries-amazon-alexa-skill-count/.

[1925] Shanhong Liu, *Number of Google Assistant Actions Worldwide 2019, by Language*, STATISTA (June 17, 2020), https://www.statista.com/statistics/1062722/worldwide-google-action-disappearance-by-language.

[1926] *Build the future of the connected home with AWS IoT and Amazon Alexa*, AWS, https://aws.amazon.com/iot/solutions/connected-home/iot-and-alexa/ (last visited Sept. 29, 2020).

[1927] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00172104 (Mar. 9, 2018) (on file with Comm.).

[1928] Submission from Source 39, to H. Comm. on the Judiciary, Source 39-00000098 at 19 (Sept. 16, 2019) (on file with Comm.).

Alexa's reach.[1929] In 2011, Amazon acquired Yap, a speech recognition platform.[1930] The next year, in 2012, Amazon acquired Evi, a technology for understanding natural language.[1931] Over the years, Amazon has continued to acquire other businesses engaged in natural language processing, machine learning, and other related technologies in support of its continued efforts to improve Alexa's artificial intelligence functionality.[1932]

One of Amazon's strategic goals for Alexa has been to use its voice assistant to reinforce the company's dominance in e-commerce and strengthen its presence in offline retail. In 2017, Amazon acquired Graphiq, a technology company that collects and organizes details about "products, places, and people to simplify online research."[1933] This acquisition appears to have been part of Amazon's effort to improve Alexa's overall search capabilities, most notably product search, as the technology includes "features to tailor comparisons around individual preferences."[1934]

In 2017, Amazon purchased Blink, followed by Ring in 2018—both to solidify its position in the home security market.[1935] In an internal document, Amazon recognized that security could "feed our flywheels (Prime, Alexa) while being a large, profitable business in its own right."[1936] Prior to these acquisitions Jeff Helbling, Vice President at Amazon, emailed a group of Amazon executives, recapping a discussion on the transactions he had with Mr. Bezos. There, he detailed the twin justification for the acquisitions, saying that "two senses matter—eyes and ears."[1937] Amazon had already locked down "ears" through its continued development of Alexa. Ring and Blink would act as Amazon's "eyes" right outside the home.

Amazon's internal documents show that, in large part, it purchased Ring to capture the company's share of the smart home security market. In December 2017, Mr. Bezos wrote to Dave Limp, the Senior Vice President of Devices & Services, that Amazon was really "buying market

[1929] *See infra* Appendix.

[1930] Sam Byford, *Amazon Acquires Yap, move into Speech Recognition?,* THE VERGE (Nov. 9, 2011), https://www.theverge.com/2011/11/9/2550764/amazon-acquires-yap-speech-recognition-siri.

[1931] Emma Bryce, *How Amazon's Alexa was 'born' and where voice-controlled tech will take us next*, WIRED (Feb. 14, 2017), https://www.wired.co.uk/article/amazon-alexa-ai-evi.

[1932] *See infra* Appendix.

[1933] Paresh Dave, *Amazon acquires Santa Barbara start-up Graphiq to try to bolster Alexa*, L.A. TIMES (July 20, 2017), https://www.latimes.com/business/technology/la-fi-tn-graphiq-amazon-20170719-story.html.

[1934] *Id.*

[1935] Jacob Kastrenakes, *Amazon buys smart camera and doorbell startup Blink*, THE VERGE (Dec. 22, 2017), https://www.theverge.com/circuitbreaker/2017/12/22/16810516/amazon-blink-acquisition-smart-camera-doorbell-company; *see also* Samuel Gibbs, *Amazon buys video doorbell firm Ring for over $1bn*, THE GUARDIAN (Feb. 28, 2018), https://www.theguardian.com/technology/2018/feb/28/amazon-buys-video-doorbell-ring-smart-home-delivery.

[1936] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00169702 (Mar. 9, 2018) (on file with Comm.).

[1937] *Id.* at AMAZON-HJC-00170877 (Oct. 11, 2017).

position" by acquiring Ring.[1938] During the Subcommittee's sixth hearing, Representative Jamie Raskin (D-MD) asked Mr. Bezos about this exchange.[1939] Mr. Bezos responded:

> Sir, market position is valuable in almost any business, and it's one of the primary things that one would look at in an acquisition. There are multiple reasons that we might buy a company. Sometimes we're trying to buy some technology or some IP. Sometimes it's a talent acquisition. But the most common case is market position, that the company has traction with customers, they've built a service, maybe they were the first mover. There could be any number of reasons why they have that market position. But that's a very common reason to acquire a company.[1940]

This response suggests that adding Ring's users to the Alexa ecosystem quickly was also important to Amazon's rationale.

A 2017 internal memorandum further explains Amazon's strategy behind these acquisitions. As the memorandum notes, while acquiring each company independently would make Amazon stronger, acquiring both "would put us in a meaningfully better position than we are today (and we would not want to stake our chances in the segment on closing any one opportunity)."[1941] Douglas Booms, the Vice President of Corporate Development at Amazon, sent an email summarizing the thoughts of other senior executives at the company, which included: "I don't know how we can get big fast in that segment without an [sic] acquiring someone."[1942]

The documents and other relevant information reviewed by Subcommittee staff demonstrate that Amazon acquiring Ring and Blink was in part to expand and reinforce its market power for its other business lines. Internally, Amazon executives discussed how home surveillance acquisitions would help them implement unattended package delivery. Similarly, they discussed the idea that the acquisitions would help Amazon develop its Alexa Doorbell application program interface, an AWS service that allows Alexa Skills developers to build apps that respond to a ringing doorbell.[1943] Amazon referred to this strategy as an "integration approach" to "remove impediments to future growth." [1944]

[1938] *Id.* at AMAZON-HJC-00173560 (Dec. 15, 2017).

[1939] CEO Hearing Transcript at 108 (question of Rep. Jamie Raskin (D-MD), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1940] *Id.* (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1941] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00169706 (Mar. 9, 2018) (on file with Comm.).

[1942] *Id.* at AMAZON-HJC-00170869 (Nov. 1, 2017).

[1943] *Id.* at AMAZON-HJC-00169706 (Mar. 9, 2018); *Alexa.DoorbellEventSource Interface*, AMAZON ALEXA, https://developer.amazon.com/en-US/docs/alexa/device-apis/alexa-doorbelleventsource.html (last visited Sept. 30, 2020).

[1944] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00172104 (Mar. 9, 2018) (on file with Comm.).

More recently, Amazon purchased Eero, a mesh networking company, for $97 million in 2019.[1945] The purchase was part of Amazon's strategy to offer "frustration-free setup" for smart home devices in the Alexa ecosystem, another move aimed at removing impediments to growing the platform's presence in the home.[1946] "Amazon Wi-fi Simple Setup" scans the user's Eero network during initial set-up of an Alexa-enabled device, applying the user's stored credentials to automatically connect to other smart devices, such as outlets and Fire TV devices.[1947] To achieve this, Eero must continually understand which devices are connected to the network, including the IP addresses of those devices.[1948] This acquisition gives Amazon access to another important input for consumer data.[1949]

d. Conduct

During the Subcommittee's investigation, market participants raised concerns about Amazon's business practices in the smart home market. As these market participants note, Amazon uses Alexa to favor its own goods and services, including AmazonBasics and Prime Music. Amazon has also imposed barriers to entry for other voice-enabled device manufacturers through predatory pricing of Alexa-enabled devices, and through its dominance as a leading distribution channel for smart home devices.

i. Self-Preferencing

Amazon has the largest voice application "store" of third-party skills, as well as first-party services that represent popular voice assistant applications, such as Amazon Music and an e-commerce platform that it can favor over third-party applications.[1950] Amazon favors its services in Alexa by making them defaults for common voice commands. For example, Amazon.com is the default store for

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[1945] Lisa Eadicicco & Alexei Oreskovic, *Amazon paid $97 million to acquire Eero in a fire sale deal that left some shareholders with practically nothing, according to leaked documents*, BUS. INSIDER (Apr. 5, 2019), https://www.businessinsider.com/amazon-paid-97-million-to-acquire-eero-in-fire-sale-leaked-documents-2019-4.

[1946] *See* Lisa Eadicicco, *A year after selling to Amazon for $1 billion, the chief inventor of the Ring video doorbell explains how he's bringing his entrepreneurial spirit to the online retailer*, BUS. INSIDER (Apr. 9, 2019), http://static7.businessinsider.com/ring-founder-jamie-siminoff-life-after-amazon-acquisition-2019-4 (quoting Jamie Siminoff, Founder of Ring, describing the importance of Eero and his support of Amazon's acquisition, "[Ring is] a product that requires great Wi-Fi connectivity. We use a lot of bandwidth so we we're certainly very sensitive to Wi-Fi networks.").

[1947] *Amazon Frustration-Free Setup Frequently Asked Questions,* AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=GMPKVYDBR223TRPY (last visited Oct. 4, 2018).

[1948] *Legal: Privacy policy for eero Devices, Applications and Services*, EERO, https://eero.com/legal/privacy (last visited Sept. 29, 2020); *Legal: Privacy policy for eero Websites*, EERO, https://eero.com/legal/privacy-website (last visited Sept. 29, 2020).

[1949] Innovation and Entrepreneurship Hearing at 41 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[1950] Competitors Hearing at 4 (statement of Patrick Spence, CEO, Sonos, Inc.).

basic voice commands related to shopping. "Alexa, add milk to my cart," adds milk to the user's Amazon shopping cart.[1951]

Besides favoring Amazon services with default voice commands, Alexa also allows Amazon to favor its retail products over products offered by third-party sellers. When users shop via voice command, they are presented with one spoken offer and an option for a follow-up question, which is distinct from an online user interface that shows the additional offers ranked. This increases the importance of being Alexa's featured offer.[1952]

For example, *The New York Times* reported in 2018 that when a user says, "Alexa, buy batteries," Alexa responds with the AmazonBasics option [1953] Similarly, a study conducted by Bain & Company found that for categories in which Amazon offered a private-label product, Alexa recommended those products 17% of the time, despite its private-label goods representing only about 2% of total volume sold.[1954] During the Subcommittee's sixth hearing, Representative Jamie Raskin (D-MD) asked Mr. Bezos "[H]as Alexa ever been trained to favor Amazon products when users shop by voice?"[1955] Mr. Bezos responded that he didn't "know if it's been trained in that way," but "it wouldn't surprise me if Alexa sometimes does promote our own products."[1956]Amazon chooses the products Alexa suggests based on a range of features, including products that "customers frequently purchase based on their past orders" and Amazon's Choice designation.[1957] Amazon's method for determining "Amazon's Choice" is opaque.[1958]

Amazon minimizes concerns about favoring its first-party goods through voice shopping by highlighting how rare it is for people to purchase goods through Alexa.[1959] Reporting suggests, however, that there is an increasing number of queries from users who expect to hear product

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[1951] *Do more with Alexa*, AMAZON, https://www.amazon.com/alexa-voice-shopping/b?ie=UTF8&node=14552177011 (last visited Sept. 30, 2020).

[1952] Submission from Source 39, to H. Comm. on the Judiciary, Source 39-00000097 at 19 (Sept. 16, 2019) (on file with Comm.).

[1953] Julie Creswell, *How Amazon Steers Shoppers to Its Own Products*, N.Y. TIMES (June 23, 2018), https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html.

[1954] Aaron Cheris, Darrell Rigby & Suzanne Tager, *Dreaming of an Amazon Christmas*, BAIN & CO. (Nov. 9, 2017), https://www.bain.com/insights/retail-holiday-newsletter-2017-issue-2/.

[1955] CEO Hearing Transcript at 120 (question of Rep. Jamie Raskin (D-MD), Member, Subcomm. on Antirust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1956] *Id.* at 121 (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1957] CEO Hearing at 5 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.); *see also* Aaron Cheris, Darrell Rigby & Suzanne Tager, *Dreaming of an Amazon Christmas*, BAIN & CO. (Nov. 9, 2017), https://www.bain.com/insights/retail-holiday-newsletter-2017-issue-2/.

[1958] Aaron Cheris, Darrell Rigby & Suzanne Tager, *Dreaming of an Amazon Christmas*, BAIN & CO. (Nov. 9, 2017), https://www.bain.com/insights/retail-holiday-newsletter-2017-issue-2/.

[1959] Innovation and Entrepreneurship Hearing at 39 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

information or to complete a transaction while interacting with a voice assistant.[1960] Amazon also justified the fact that third-party sales through Alexa are lower than third-party sales on Amazon.com—42% compared to 58%—by saying that "customers disproportionately use Alexa to order household consumable items (like paper towels or batteries) for which Amazon's offers are particularly competitive."[1961] This demonstrates the problem, however, given that voice shopping is most useful for products in which consumers do not have to do much research or engage in price comparison. Alexa's algorithm, in conjunction with the AmazonBasics business model, provides a convenient avenue for Amazon to favor first-party products.

Although it is technically possible for Alexa users to voice shop at other stores, there is significant friction. Users must first enable the shopping skills for other online retailers, which then requires the user to set up a completely separate billing profile, even though it contains similar information to their Amazon user profile. [1962] Alexa-enabled devices are tied to the user's Amazon account, which populates the user's saved credit card and shipping information for use during general shopping commands. [1963]

ii. Predatory Pricing and Bundling

Amazon uses a predatory pricing strategy to increase its sales of smart home devices by pricing its products below cost.[1964] It is common for Amazon to sell these products in bundles at steep discounts. Several smart home device manufacturers told the Subcommittee that when Amazon sells certain devices in a bundle or at a steep discount, it makes it nearly impossible for companies who specialize in making one piece of voice-assistant enabled hardware to compete on its merits.[1965] Furthermore, as described earlier in this Report, aggressive pricing of smart home devices—specifically "hubs" such as the Echo—has created a significant barrier to entry for companies that want to compete with the leading voice assistant platforms.

[1960] Khari Johnson, *Voicelabs ditches analytics service to launch Alpine.ai for ecommerce voice apps*, VENTUREBEAT (Jan. 29, 2018), https://venturebeat.com/2018/01/29/voicelabs-ditches-analytics-service-to-launch-alpine-ai-for-ecommerce-voice-apps/.

[1961] CEO Hearing at 5 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

[1962] *See Alexa Skills: Shopping,* AMAZON, https://www.amazon.com/s/ref=lp_13727921011_nr_n_16?fst=as%3Aoff&rh=n%3A13727921011%2Cn%3A%2113727922011%2Cn%3A14284862011&bbn=13727922011&ie=UTF8&qid=1600864849&rnid=13727922011 (last visited Sept. 30, 2020).

[1963] *Set Up Your Echo*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=GKFJXZCLQ83HGHQZ (last visited Oct. 3, 2020).

[1964] *Id.* at 119 (statement of Jeff Bezos, CEO, Amazon.com, Inc.).

[1965] Competitors Hearing at 3–4 (statement of Patrick Spence, CEO, Sonos, Inc.).

iii. Use of Gatekeeper Power

Amazon Marketplace is an important distribution channel for voice-enabled electronics in its Alexa ecosystem. Amazon decides the availability and placement of products on its site. As a result, Amazon can use the threat of delisting a product on its marketplace to ensure that Alexa is enabled on other company's devices or to secure other favorable contractual terms.

In an interview with Subcommittee staff, a seller that sells a significant number of its device on Amazon.com said that during contract negotiations, Amazon repeatedly refers to its power to delist the company's product if Amazon's services are not prominent enough on the device.[1966] In 2017, Amazon also reportedly informed one of its main home security competitors—the Google-owned smart home company Nest—that it would not list any of its recently announced products, including its latest smart thermostat and home security system.[1967] Notwithstanding its own market power, Google's internal communications describe Amazon as having "changed the dynamics," observing that there is a "built in incentive to partner with Alexa, since [Amazon] will pull you from their store if you don't support it."[1968]

Additionally, Amazon controls the prominence of competing voice-enabled devices on its marketplace and promotes its first-party voice-enabled devices on Amazon.com. In an internal memorandum to Amazon executives about the Ring acquisition, Michael Deal, Amazon's Vice President and Associate General Counsel, said that Amazon "can promote Ring's products and subscription plans heavily on our sites as we do with our current [first-party] devices."[1969]

Relatedly, Amazon can also use advertisement placement as leverage during negotiations with other device manufacturers. In interviews with Subcommittee staff and submissions to the Subcommittee, several market participants said that ad placement was used as leverage in negotiations. In one instance, Amazon placed a competing brand's ad beneath the product of the firm it was negotiating with "to influence negotiations."[1970] Additionally, Subcommittee staff heard from a voice-enabled device manufacturer that offers a competitive product to Amazon's first-party devices that it was prohibited from buying ads on Amazon.com.[1971] The competitor expressed concern about the

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[1966] Interview with Source 148 (Aug. 26, 2020).

[1967] Steve Kovach, *Amazon Will Stop Selling Nest Smart Home Devices, Escalating Its War With Google*, BUS. INSIDER (Mar. 2, 2018), https://www.businessinsider.com/amazon-wont-sell-nest-products-from-google-2018-3.

[1968] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC- 04258793–993 (Jan. 29, 2019) (on file with Comm.).

[1969] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00172104 (Mar. 9, 2018) (on file with Comm.).

[1970] Submission from Source 38, to H. Comm. on the Judiciary, 27 (Sept. 1, 2019) (on file with Comm.).

[1971] Interview with Source 148 (Aug. 26, 2020).

harm this causes consumers, who may be confused or deceived when they receive ads promoting Amazon products even when they specifically search for a competitor's product on Amazon.com.[1972]

Even Google, which ranks just behind Amazon in online shopping queries, believes it has a disadvantage with Amazon. In an internal email about smart speakers, a Google employee noted that "fighting Amazon with a very-hard-to-differentiate product and a channel disadvantage and a huge economic disadvantage (due to channel mix margin differences) is already like fighting a shark on a surfboard."[1973]

iv. Misuse of Data

Amazon has access to information about consumer use of third-party applications on Alexa-enabled devices and uses its dominant position in the voice assistant market to collect more data from within the Alexa ecosystem.

Amazon has insight into which Alexa skills are invoked by Alexa users and the frequency of usage.[1974] Considering Amazon's use of third-party seller's data in e-commerce and cloud customer's data on Amazon Web Services, Amazon may use the same tactics with other firms' voice application data to determine which voice assistant skills it should invest in.

Additionally, Amazon uses its market power to collect third-party voice application data. According to a July 2020 report by the *Wall Street Journal*, Amazon told Vivint, a manufacturer of smart-home devices that, "it would only allow the company to remain on the Echo if Vivint agreed to give it not only the data from its Vivint function on Echo, but from every Vivint device in those customers' homes at all times."[1975]

Amazon has also faced civil suits related to its storage of voice data. [1976] When Alexa hears a "wake" word— such as "Alexa" or "Echo"—it records the user's voice command, including conversations in the background, and saves a permanent recording of the user's voice to its own servers, as opposed to temporary storage for artificial intelligence training purposes.[1977]

1972 *Id.*

1973 Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04261582–85 (Nov. 27, 2018) (on file with Comm.).

1974 Innovation and Entrepreneurship Hearing at 40 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

1975 Dana Mattioli & Cara Lombardo, *Amazon Met With Startups About Investing, Then Launched Competing Products*, WALL ST. J. (July 23, 2020), https://www.wsj.com/articles/amazon-tech-startup-echo-bezos-alexa-investment-fund-11595520249.

1976 *See* Tice v. Amazon.com, Inc., No. 5:10-cv-1311 (C.D. Cal., Mar. 25, 2020); C.O. v. Amazon.com, Inc., No. C19-910 (W.D. Wash., Sept. 23, 2019).

1977 *Id.*

v. Copying Nascent Competitors Technology

The Subcommittee's investigation produced evidence consistent with public reporting that Amazon uses information collected through Alexa Fund investments to inform and improve Amazon's smart home ecosystem. When Amazon invests in a startup, it obtains access to the company's non-public financial information, strategic plans, and other proprietary information.[1978] According to a recent *Wall Street Journal* report, eight months after Alexa Fund invested in Nucleus, Amazon announced the Echo Show, a very similar Alexa-enabled video-chat device.[1979] This report described several other examples, including Vocalife, the inventors of a "speech-detection technology," which filed a lawsuit against Amazon alleging it improperly used proprietary technology.[1980] At the Subcommittee's sixth hearing, Representative Ken Buck (R-CO) said that allegations that Amazon incorporated features demonstrated to it by Vocalife's founders during an investment meeting "are serious, especially because the size and scope of these practices couldn't happen without Amazon's monopolistic control of the marketplace."[1981]

Prior to Amazon's acquisition of Ring, Amazon invested in Ring through the Alexa Fund, and internal emails about meetings during this time demonstrate how Amazon is able to obtain crucial insights into young companies. Amazon was able to learn about Ring's "roadmap, future products, [and] two acquisitions they have done."[1982] While Amazon often denies public reporting that it steals and copies technology from young startups, Amazon's emails suggest that it does replicate some of the startups it meets with or invests in. An email out of Amazon's Lab 126 regarding Ring indicated that Amazon "could easily replicate all of their hardware to be better, [and] operate in a more secure and robust infrastructure, for a LOT less than [the] cost of buying them."[1983] In the same email chain, Amazon employees wondered, "[I]f we move forward with due diligence, then decide not to buy [Ring], could we have legal issues if we go into the market by ourselves as a competitor and materially impact their business?"[1984]

[1978] Dana Mattioli & Cara Lombardo, *Amazon Met With Startups About Investing, Then Launched Competing Products*, WALL ST. J. (July 23, 2020), https://www.wsj.com/articles/amazon-tech-startup-echo-bezos-alexa-investment-fund-11595520249.

[1979] *Id.*

[1980] *Id.*

[1981] CEO Hearing Transcript at 102 (statement of Rep. Ken Buck (R-CO), Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[1982] Production from Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00214240 (Oct. 18, 2017) (on file with Comm.).

[1983] *Id.* at AMAZON-HJC-00220705 (Nov. 4, 2017).

[1984] *Id.* at AMAZON-HJC-00220703 (Nov. 4, 2017).

5. Amazon Web Services

a. Overview

Amazon Web Services (AWS) is considered the pioneer of cloud computing and has sustained a first-mover advantage for over a decade.[1985] AWS officially launched in 2006, featuring two of its core IaaS offerings, Simple Storage Service (S3) and Elastic Compute Cloud (EC2).[1986] While Amazon.com was AWS's first customer, in the early 2000s AWS began creating cloud offerings for third-party merchants, who could use AWS to "build online shopping sites on top of Amazon's e-commerce engine."[1987] For AWS, meanwhile, this partnership with third parties gave the company experience in creating well-documented APIs for internal developers.[1988] Over the next few years, AWS rolled out additional programs to expand its network of third-party software vendors and implementation partners, including AWS Marketplace[1989] and the AWS Partnership Network (APN) in 2012.[1990]

Over the last decade, AWS has also secured significant government contracts. Most notably, in 2014, AWS signed a $600 million Commercial Cloud Services (C2S) contract to build the AWS Secret Region, a cloud offering tailored for the U.S. intelligence community.[1991] The deal marked the largest cloud infrastructure contract at the time and signaled the government's shift from investing in on-premise server capacity to cloud services.[1992] Today, AWS boasts work "with over 6,500 government agencies" and states that Amazon has been "among the first to solve government compliance challenges facing cloud computing," while also "consistently help[ing] our customers navigate procurement and policy issues related to adoption of cloud computing."[1993]

AWS contributes immense value to Amazon's overall business. In each quarter since Amazon began publicly reporting its financials for cloud, AWS has accounted for an outsized share of

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1985 Ron Miller, *How AWS Came To Be*, TECHCRUNCH (July 2, 2016), https://techcrunch.com/2016/07/02/andy-jassys-brief-history-of-the-genesis-of-aws/.

1986 *What's New,* AMAZON WEB SERVICES (Oct. 4, 2006), https://aws.amazon.com/about-aws/whats-new/2006/.

1987 *Id.*

1988 Ron Miller, *How AWS Came To Be*, TECHCRUNCH (July 2, 2016), https://techcrunch.com/2016/07/02/andy-jassys-brief-history-of-the-genesis-of-aws/.

1989 *Introducing AWS Marketplace*, AMAZON WEB SERVICES (Apr. 19, 2012), https://aws.amazon.com/about-aws/whats-new/2012/04/19/introducing-aws-marketplace/.

1990 Jeff Barr, *Announcing the AWS Partner Network*, AWS NEWS BLOG (Apr. 17, 2012), https://aws.amazon.com/blogs/aws/announcing-the-aws-partner-network/. (in beta).

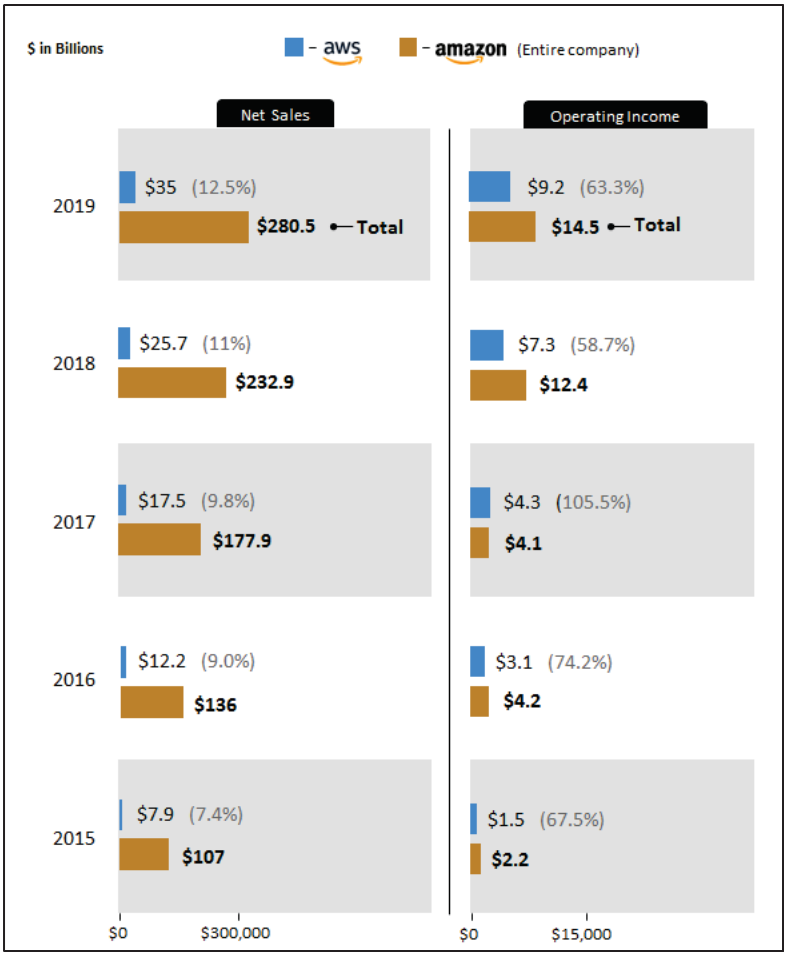
1991 Frank Konkel, *Federal Cloud Spending Trends Toward All-Time High*, NEXTGOV (Sept. 12, 2018), https://www.nextgov.com/it-modernization/2018/09/federal-cloud-spending-trends-toward-all-time-high/151221/.

1992 *Id.*

1993 *The Trusted Cloud for Government*, AMAZON WEB SERVICES, https://aws.amazon.com/government-education/government/ (last visited Sept. 30, 2020).

Amazon's operating profits. While AWS contributes to less than 15% of Amazon's annual revenue, it consistently accounts for over 50% of the company's operating income. In 2017, AWS accounted for over 100% of Amazon's operating income, due to losses in the company's international business.[1994] In the first quarter of 2020, AWS accounted for 13.5% of Amazon's total revenues but 77% of its operating income.[1995]

Contributions to Amazon's Revenue and Operating Profit over Time[1996]



Profits earned through its cloud services enable Amazon to invest heavily in expanding its cloud operation, as well as to support its other lines of business. Several market participants expressed concerns to Subcommittee staff that Amazon uses its high and steady profits from AWS to subsidize

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1994 Amazon.com, Inc., Annual Report (Form 10-K) 26 (Feb. 1, 2018), https://s2.q4cdn.com/299287126/files/doc_financials/annual/Amazon_AR.PDF.

1995 Amazon.com, Inc., Quarterly Report (Form 10-Q) 17 (Apr. 30, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/708a19c5-7d8c-4fc9-ab37-bfaa7a31629b.pdf.

1996 Prepared by the Subcomm. based on Amazon.com, Inc., Annual Report (Form 10-K) (2015–2019), https://www.sec.gov/Archives/edgar/data/1018724/000101872419000004/amzn-20181231x10k.htm these other lines of business, including its retail operation.[1997] In an internal document produced in response to the Committee's requests for information, Amazon instructs its employees to rebut this claim by referring to it as a "myth."[1998] However, Amazon failed to produce the financial data that would have enabled Subcommittee staff to make an independent assessment.[1999]

b. Market Power

As discussed earlier in this Report, AWS is the largest provider of cloud computing services, capturing approximately 24% of the U.S. spend in 2018 on cloud computing services, including IaaS, PaaS, and SaaS.[2000] AWS represents close to half of global spending on cloud infrastructure services, with three times the market share of Microsoft, its closest competitor.[2001] Its growth continues to soar. In the first quarter of 2020, AWS crossed $10 billion in quarterly revenue while growing 33% on an annualized basis.[2002]

Amazon has a "lion's share of the government cloud infrastructure market."[2003] Exact data on AWS's share of government cloud expenditure is opaque because most of AWS's public sector revenue comes through subcontracts, which are harder to track, and contracts related to the intelligence community, which are listed as classified spending and are rarely reported. Market participants, however, emphasize that AWS is considered a major player in federal cloud contracts.[2004]

In its submissions to the Subcommittee, Amazon describes itself as a relatively small player representing "less than 1% of IT spending globally and less than 2% in the United States."[2005] Amazon

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[1997] Submission from Source 48, to H. Comm. on the Judiciary, 8 (Nov. 8, 2019) (on file with Comm.).

[1998] Production of Amazon, to H. Comm on the Judiciary, AMAZON-HJC-00216209 (Aug. 24, 2018) (on file with Comm.).

[1999] Letter from Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, to Jeff Bezos, CEO, Amazon.com, Inc., 2 (on file with Comm.).

[2000] Letter from David Zapolsky, Gen. Counsel, Amazon.com, Inc., to Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 6 (July 26, 2019) (on file with Comm.).

[2001] *Id.*; Press Release, Katie Costello, Gartner, *Gartner Forecasts Worldwide Public Cloud Revenue to Grow 17.5 Percent in 2019* (Apr. 2, 2019), https://www.gartner.com/en/newsroom/press-releases/2019-04-02-gartner-forecasts-worldwide-public-cloud-revenue-to-g.

[2002] Jordan Novet, *AWS Tops $10 Billion in Quarterly Revenue for the First Time,* CNBC (Apr. 30, 2020) https://www.cnbc.com/2020/04/30/aws-earnings-q1-2020.html.

[2003] David Ramel, *AWS vs. Azure Heats Up in Federal Market,* WASH. TECH. (Sept. 14, 2018) https://washingtontechnology.com/articles/2018/09/14/aws-vs-azure-public-sector.aspx.

[2004] Interview with Source 31 (May 27, 2020).

[2005] Letter from David Zapolsky, Gen. Counsel, Amazon.com, Inc., to Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 6 (July 26, 2019) (on file with Comm.).

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states that AWS competes with a large array of offerings including on-premise computing.[2006] In other contexts, however, Amazon has highlighted its leading position, describing itself as the "largest cloud software marketplace" and the "only cloud provider with existing classified infrastructure."[2007]

Through a careful review of Amazon's internal documents and other evidence during the investigation, Subcommittee staff found that Amazon has a dominant position in cloud computing. Amazon's dominance in cloud computing traces in part to its first-mover advantage and the high fixed costs and economies of scale associated with this market.[2008] But evidence suggests that Amazon has also taken steps to lock in and extend this dominance in ways that risk harming customers, businesses, and the broader public.

Network effects incentivized Amazon to build out AWS offerings quickly. As with other sectors of the digital economy, the value of Amazon's cloud offerings increases with the number of businesses and customers that use it. Introducing more services and partnership programs draws more customers, attracts more developers and implementation partners, which, in turn, draws additional customers.[2009]

AWS is considered to have the largest collection of cloud offerings. Its AWS Management Console and supporting technologies span many categories, including storage and computing, databases, migration services, and machine learning tools.[2010] Many of these products are based on open-source software or on the technology of companies that Amazon acquired.[2011] In addition to selling cloud offerings directly, AWS also runs a cloud marketplace where third-party vendors can list their products. The AWS Marketplace enjoys over 1,300 vendors as of 2018, and over 9,000 products, functioning as the largest cloud marketplace in the sector.[2012]

The widespread adoption of AWS's developer certification programs, partner networks, and student programs has meant that there are far more engineers familiar with AWS technology than with any other platform.[2013] Several market participants listed the availability of AWS-trained engineers as a

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[2006] *Id*.

[2007] Complaint at 5, Amazon Web Servs, Inc. v. United States, 147 Fed. Cl. 146 (2020) (No. 1:19-cv-01796), https://www.courthousenews.com/wp-content/uploads/2019/12/amazon-trump-cafc.pdf.

[2008] *See infra* Section IV.

[2009] Production of Google, to H. Comm. on the Judiciary, GOOG-HJC-04260401 (Aug. 25, 2016) (on file with Comm.).

[2010] *AWS Marketplace*, AMAZON WEB SERVICES, https://aws.amazon.com/marketplace (last visited Sept. 30, 2020).

[2011] CEO Hearing at 6 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

[2012] *AWS Marketplace*, AMAZON WEB SERVICES, https://aws.amazon.com/marketplace (last visited Sept. 30, 2020); Brad Lyman, *See What's New for AWS Marketplace Sellers*, AWS PARTNER NETWORK BLOG (Mar. 9, 2018), https://aws.amazon.com/blogs/apn/see-whats-new-for-aws-marketplace-sellers.

[2013] Interview with Source 736 (June 10, 2020).

reason for selecting AWS over other cloud vendors and as a barrier for switching platforms or attempting to multi-cloud.[2014]

High switching costs reinforce Amazon's dominance in the cloud market.[2015] A cloud-based application company interviewed by Subcommittee staff explained these costs:

> We've looked at other services (Google, Microsoft, Oracle) but we've relied on AWS for so long that we couldn't just flip a switch, and we've run down a lot of engineering problems with AWS . . . There are other providers we could go to, but it would take work. We could also build some functionality internally, but that would also take a lot of work.[2016]

For cloud-based application developers, whose entire product is dependent on AWS, the fears of lock-in are even greater. One marketplace participant said:

> "[A]ny transition of the cloud services currently provided by AWS to another cloud service provider would be difficult to implement and would cause us to incur significant time and expense and could disrupt or degrade our ability to deliver our products and services. Our business relies on the availability of our services for [users] and advertisers.[2017]

Amazon has also taken steps to lock-in its position, including through long-term contracts, volume minimums, and the use of fees to move data to other cloud providers, which are also known as egress fees. In submissions to the Subcommittee, numerous market participants noted that AWS often seeks multi-year contracts during negotiations.[2018] These contracts are also commonplace in companies' investor statements. For example, according to Lyft's 2020 investor filing, they agreed to pay "an aggregate of at least $300 million between January 2019 and December 2021 on AWS services."[2019] According to Slack's investor filling, in 2018 it committed to a five-year contract with minimum annual commitments of $50 million.[2020]

[2014] Interview with Source 126 (June 29, 2020).

[2015] *See infra* Section IV.

[2016] Interview with Source 111 (Apr. 6, 2020).

[2017] Submission from Source 32, to H. Comm. on the Judiciary, Source 32-000009 (Oct. 29, 2019) (on file with Comm.).

[2018] *Id.* at Source 32-000017.

[2019] Lyft, Annual Report (Form 10-K) 7 (Feb. 28, 2020), https://investor.lyft.com/static-files/981ad93a-5d97-4f7f-8937-5682ca83cba7.

[2020] Slack, Registration Statement (Form S-1) 90 (Apr. 26, 2019), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001764925/b6da15ae-25c5-4447-ba38-c287bf11e624.pdf.

Subcommittee staff also uncovered evidence that Amazon sometimes requires a volume agreement when a large company seeks to negotiate lower prices. In an internal email discussion on this topic, a senior executive at AWS wrote that Amazon has "a private rate card which has a commit level for bandwidth pricing. Rates at or above the private rate card are pre-approved. Anything below that has to be first approved by me and then the price goes to service GM."[2021]

When an Amazon customer chooses to move data to another cloud provider, they are charged an egress fee. Market participants told Subcommittee staff that they view these fees less as a cost for Amazon to transport data and more as friction imposed by Amazon for switching providers, noting that Amazon charges egress fees even when data is staying locally within the same data center.[2022]

The COVID-19 pandemic has underscored the centrality of cloud computing to the functioning of an increasing swath of businesses—highlighting how cloud services have come to resemble critical infrastructure. Reporting by *The Information* in April 2020 discussed how the major cloud providers are facing requests from many customers for financial relief, while the demand for cloud computing has increased.[2023] As this reporting noted, "AWS has been the least willing to offer flexible terms on customer bills, according to numerous customers. That stands in contrast to Microsoft and Google which have shown some flexibility, partners say."[2024]

c. Merger Activity

Amazon has acquired a significant number of cloud computing firms over the past decade. Although a full discussion of this activity is beyond the scope of this Report, Amazon's acquisition activity in the cloud market appears to be part of a broader trend among dominant cloud providers to make serial acquisitions, any one of which may seem insignificant but which collectively serve to solidify and expand their dominance.[2025] In some instances AWS has acquired cloud technologies that previously integrated with multiple clouds, only for AWS to make it an AWS-specific product after acquisition, foreclosing competitors and increasing consumers' switching costs.[2026]

[2021] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00206893 (May 11, 2017) (on file with Comm.).

[2022] Interview with Source 170 (May 27, 2020).

[2023] Kevin McLaughlin & Amir Efrati, *AWS Holds the Line on Cloud Bills as Customers Ask for Relief*, THE INFO. (Apr. 17, 2020) https://www.theinformation.com/articles/aws-holds-the-line-on-cloud-bills-as-customers-ask-for-relief.

[2024] *Id*.

[2025] *See infra* Section IV.

[2026] Ron Miller, *Update: Amazon Has Acquired Israeli Disaster Recovery Service CloudEndure for Around $200M*, TECHCRUNCH (Jan. 8, 2019), https://techcrunch.com/2019/01/08/amazon-reportedly-acquired-israeli-disaster-recovery-service-cloudendure-for-around-200m/. *See also CloudEndure deprecation*. GOOGLE CLOUD, https://cloud.google.com/compute/docs/deprecations/cloudendure (last visited Oct. 4, 2020).

d. Competitive Significance of AWS to Amazon's Other Lines of Business

Amazon's dual role as a dominant provider of cloud infrastructure and as a dominant firm in other markets creates a conflict of interest that Amazon has the incentive and ability to exploit.

Amazon's dominance in cloud computing alongside its integration across an array of businesses—online retail, music and video, and smart home devices—creates a core conflict of interest. Cloud computing customers like Netflix and Target are in the position of competing with Amazon while also relying on AWS. Firms in their position effectively have to choose between switching to one of the alternative cloud infrastructure providers or funding their primary competitor.[2027] One venture capitalist described Amazon as "useful but dangerous" because "it's hard to predict what Amazon wants to get into . . . you can't know."[2028] Similarly, a business-to-business application developer told Subcommittee staff that they felt pressure to switch their entire product to Microsoft Azure because of its client's concerns with Amazon's anticompetitive conduct in the online retail sector.[2029]

Amazon acknowledges that its cloud customers which are also its competitors are wary of using AWS. One internal document had guidance on how to discuss the issue with customers. One FAQ sheet listed, "What do you say to customers who are worried that using AWS services will support Amazon's competitive growth in the retail space?" Amazon's sample answer stated, "How can you afford to not compete with the best possible tools in such a tough market like retail?"[2030]

Subcommittee staff also spoke with market participants that expressed concern about how this conflict of interest shapes Amazon's behavior in its other lines of business. For example, in 2015, Amazon kicked Google Chromecast and Apple TV—direct competitors with the Amazon Fire Stick and Fire TV cube—out of its retail store.[2031] AWS is also positioned to use customer and seller data from one line of business to inform decisions in other lines of business, analogous to its conduct in Amazon Retail. At least one market participant who spoke with Subcommittee staff had evidence that AWS engaged in this cross-business data sharing.[2032] In another internal document with guidance for staff on "AWS Competitive Messaging," employees were advised to offer the following response:

[2027] Christina Farr & Ari Levy, *Target Is Plotting a Big Move Away From AWS As Amazon Takes Over Retail*, CNBC (Aug. 29, 2017), https://www.cnbc.com/2017/08/29/target-is-moving-away-from-aws-after-amazon-bought-whole-foods.html); *See also Netflix on AWS,* AMAZON WEB SERVICE, https://aws.amazon.com/solutions/case-studies/netflix/ (last visited Sept. 30, 2020).

[2028] Interview with Source 146 (May 28, 2020).

[2029] Interview with Source 126 (June 29, 2020).

[2030] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00216210 (Aug. 24, 2018) (on file with Comm.).

[2031] Barb Darrow, *Why Cloud Users Should Care That Amazon Just Kicked Apple TV to the Curb*, FORTUNE (Oct. 2, 2015), http://fortune.com/2015/10/02/why-aws-users-should-care-that-amazon-nixed-apple-tv/.

[2032] Interview with Source 126 (June 29, 2020).

> Q. Walmart is warning its suppliers that they don't want them to be running on AWS because they don't want Amazon.com, a competitor of Walmart's, to have access to their data. How are you addressing that?
>
> A: Even though Amazon's consumer business has no access to any customer data in AWS, I can understand why Walmart would be paranoid in making sure that their data is private. So, I think it's a pretty reasonable expectation for them to ask their suppliers to encrypt that data in AWS.[2033]

Engineers and market participants have also raised concerns that AWS employees may have access to Amazon's Key Management Services (KMS), which customers can use to store encryption keys.[2034] If an employee were able to access a customer's encryption keys, they could potentially see the contents of a customer's application, including proprietary code, business transactions, and data on their users. In response to questions from the Subcommittee, Amazon said that the company's "policies prohibit employees from accessing and reading customer keys in KMS. KMS is designed such that customer keys in the service cannot be retrieved in plain text (unencrypted) form by anybody, including AWS employees."[2035] Even if AWS employees can never access the content of their customers applications, AWS tracks a host of commercially sensitive metrics, including any changes in demand for storage and compute services, the components of their application's architecture, the requests to a specific database per second, database size, and the types of requests.[2036] One industry expert told Subcommittee staff:

> They don't need to see the encrypted content of a movie to see that there are a ton of requests to particular data. If Netflix announced five new movies this weekend and there's a ton of data to five new objects. So, you don't need all the information to know what's happening.[2037]

Finally, AWS provides Amazon with unparalleled insights into the trajectory of startups using its services, information that it can use to guide acquisitions and replicate promising technology. Data that AWS collects on cloud computing customers can provide unique business intelligence, information that investors, other firms, and entrepreneurs lack.

[2033] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00216213 (Aug. 24, 2018) (on file with Comm.).

[2034] Interview with Source 146 (May 28, 2020).

[2035] CEO Hearing at 17 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

[2036] Interview with Source 146 (May 28, 2020); Innovation and Entrepreneurship Hearing at 44 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[2037] Interview with Source 146 (May 28, 2020).

A report from 2011 published in *Reuters,* profiling the AWS Start-up Challenge, describes cases where AWS has used insights gleaned from its cloud computing service to inform its venture capital investment decisions.[2038] Adam Selipsky, then Vice President of AWS, told *Reuters*, "AWS has great relationships with many young companies and there have been cases where we've been able to help with investment opportunities."[2039] Today, one way Amazon leverages AWS is through relationships with startups. The AWS Activate program provides startups with free credits, technical support, and training.[2040]

Subcommittee staff interviewed a startup and beneficiary of AWS Activate that had engaged in partnership conversations with Amazon. During these discussions, the startup shared information about how its product was built with AWS. Within a few years, the startup learned that Amazon had introduced a replica product. This company said that Amazon "had so many incentives. Rate cuts, and free services. Not having a lot of resources, it's hard to turn that down. But fast forward, we basically helped them build their offering that they copied from us."[2041]

As part of its investigation, the Subcommittee asked Amazon whether it uses or has ever used AWS usage patterns or data to inform its investment decisions. Amazon responded:

> AWS uses data on individual customers' use of AWS to provide or improve the AWS services and grow the business relationship with that customer. This data may inform AWS's decisions about how AWS invests in infrastructure, such as data centers, edge networks, hardware, and related software solutions in order improve the customer experience.[2042]

Amazon's response leaves unclear whether it would view it appropriate to use a firm's AWS data to develop products competing with that firm, so long as Amazon could identify some benefit to the broader "customer experience."

Prior to 2017, Amazon also required that AWS customers agree "not to assert any intellectual property claim against any AWS service used by that customer."[2043] Amazon removed that condition from the AWS online customer agreement on June 28, 2017.[2044]

[2038] Alistair Barr, *Amazon Finds Startup Investments in the 'Cloud,'* REUTERS (Nov. 9, 2011), http://www.reuters.com/article/amazon-cloud-idUSN1E7A727Q20111109.

[2039] *Id.*

[2040] *AWS Activate*, AMAZON WEB SERVICES, https://aws.amazon.com/activate/ (last visited Sept. 30, 2020).

[2041] Interview with Source 126 (June 29, 2020).

[2042] Innovation and Entrepreneurship Hearing at 45 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[2043] *Id.* at 43.

[2044] *Id.* at 42.

In addition to creating a significant information advantage for Amazon, AWS may also reinforce its market power in other ways. Because startups often rely heavily on AWS, Amazon is a natural choice when pursuing a sale or seeking investment. In an internal email produced to the Subcommittee, Peter Krawiec, Amazon's Vice President of Worldwide Corporate Development, recapped a meeting with a recently acquired company, noting that the company was, "[s]uper excited about Amazon and relieved that Walmart will not be the buyer. Engineering team thrilled that they won't have to unplug from AWS under a Walmart world."[2045]

e. Conduct

The leading position AWS enjoys in the market traces in part to its first-mover advantage, network effects, and steep investments that the company made in building out the physical infrastructure on which cloud resides. However, AWS has also engaged in a series of business practices designed to maintain its market dominance at the expense of choice and innovation. Through a combination of self-preferencing, misappropriation, and degradation of interoperability, Amazon has sought to eliminate cross-platform products with Amazon-only products. Amazon's conduct has already led several open-source projects to become more closed, a move driven by a need for protection from Amazon's misappropriation. If unchecked, Amazon's tactics over the long-term risk solidifying lock-in and diminishing the incentive to invest. Because cloud is the core infrastructure on which the digital economy runs, ensuring its openness and competitiveness is paramount.

i. Misappropriation of Data

As described earlier in this Report, cloud platform vendors compete by expanding their first-party cloud offerings, such as those offered through the AWS Management Console.[2046] Market participants note that one way AWS has expanded its offerings is by creating proprietary versions of products that have been developed under open-source licenses.[2047]

Open-source licenses allow software to be freely used, modified, and shared.[2048] Open-source software can run on any infrastructure, local machine, server room, or on the cloud, reducing lock-in to a specific hardware vendor.[2049] Companies based on open-source software bring in revenue by selling

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[2045] Production of Amazon, to H. Comm. on the Judiciary, AMAZON-HJC-00225832 (June 15, 2018) (on file with Comm.).

[2046] *See infra* Section IV.

[2047] Interview with Source 152 (Apr. 15, 2020).

[2048] *Open Source Licenses by Category*, OPEN SOURCE INITIATIVE, https://opensource.org/licenses/category (last visited Sept. 30, 2020).

[2049] Nicholas Loulloudes et al., *Enabling Interoperable Cloud Application Management Through an Open Source Ecosystem*, 19 IEEE INTERNET COMPUTING 54 (2015), https://ieeexplore.ieee.org/document/7111887.

additional features under proprietary licenses or services.[2050] In recent years, open-source development has been a leading model for software development, attracting significant venture capital investment.[2051]

Market participants note that the rise of cloud computing services has led to a shift in the way open-source software is delivered and used. Many open-source software companies allowed engineers to download free versions of their software from their website, often without collecting any personal data about their users. As engineers outgrew the functionality of the free version, they would purchase more powerful versions.[2052] As cloud computing grew in popularity, open-source software vendors began offering versions of their software on the AWS Marketplace, where application developers could easily integrate the software. Market participants explain that AWS was able to use the data collected on their customers, including usage metrics, to learn which third-party software was performing well and ultimately to create their own proprietary version offered as a managed service. Creating a "knock-off" version of software was particularly easy when the product was using an open-source license, which provides more visibility to the underlying code.[2053]

In interviews with Subcommittee staff, market participants repeatedly said that AWS relied on innovations from open-source software communities to gain dominance. A venture capitalist told Subcommittee staff that "open-source is critical for AWS getting market power. They're standing on the shoulders of giants and they're not paying the giants."[2054] A long-time cloud vendor likewise said that "Amazon never built a database, never built cloud services, never built any of their AWS offerings. They took open source and offered it out on cloud. At the time that was innovative."[2055]

AWS has developed many of its offerings using this practice and has created products that are only accessible as first-party offerings through the AWS Management Console.[2056] An example frequently cited by market participants is Amazon Elasticsearch Service (AESS), a tool for searching and analyzing data, and a first-party product listed on the AWS Management Console.[2057] According to public reporting and interviews with market participants, this product is a copy of Elastic's,

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[2050] Max Schireson & Dharmesh Thakker, *The Money in Open-Source Software*, TECHCRUNCH (Feb. 9, 2016), https://techcrunch.com/2016/02/09/the-money-in-open-source-software/.

[2051] Interview with Source 152 (Apr. 15, 2020).

[2052] *Id.*

[2053] *Id.*

[2054] Interview with Source 146 (May 28, 2020).

[2055] Interview with Source 31 (May 27, 2020).

[2056] *What Is the AWS Management Console*, AMAZON WEB SERVICES, https://docs.aws.amazon.com/awsconsolehelpdocs/latest/gsg/getting-started.html#learn-whats-new (last visited Sept. 30, 2020).

[2057] Daisuke Wakabayashi, *Prime Leverage: How Amazon Wields Power in the Technology World,* N.Y. TIMES (Dec. 16, 2019), https://www.nytimes.com/2019/12/15/technology/amazon-aws-cloud-competition.html. *See also* Interview with Source 152 (Apr. 15, 2020).

Elasticsearch open-source product that was available for purchase on the AWS Marketplace.[2058] According to public reporting, within a year of introducing the product, Amazon was generating more money from its replica of Elasticsearch than Elasticsearch itself was generating. One key advantage that Amazon's "knock-off" had was that Amazon had given it superior placement in AWS Management Console.[2059] Additionally, as described in the *Elasticsearch vs Amazon* case, AWS can name their open-source "knock-off" products in a way that can mislead customers into believing that the "knock-off" product is sponsored by the open-source software vendor.[2060]

The Subcommittee's investigation uncovered evidence relating to numerous instances in which Amazon has offered proprietary managed services based on knock-offs of open-source code. One open-source market participant interviewed by Subcommittee staff said that because of this conduct, the benefits of open source "weren't accruing to [the] open-source community. People were feeling, we develop all this work and then some large company comes and monetizes that."[2061] MongoDB, a document-based database, has similarly commented that "once an open source project becomes interesting, it is too easy for large cloud vendors to capture all the value but contribute nothing back to the community."[2062]

When the Subcommittee inquired about this practice, Amazon responded, that "Projects where AWS has developed distributions on top of OSS [open-source software], like Open Distro for Elasticsearch and Amazon Corretto, add to, not supplant, the set of capabilities provided by the upstream open-source projects… it allows them to move between deploying OSS themselves and using managed services for open-source."[2063] Market participants told Subcommittee staff, however, that in the instances when AWS creates a "knock-off" version of an open-source software by adding "additional developments," those additional developments often only work with AWS infrastructure and are no-longer cross-platform—heightening the risk of lock-in.[2064] As one third-party explains, "So, the earlier benefits of open-source go out the window as Amazon takes over each of these product areas."[2065]

For example, while MongoDB is an open-source document-based database project, Amazon offers a proprietary product called Amazon DocumentDB. According to AWS, DocumentDB

[2058] *Id.*

[2059] *Id.*

[2060] Complaint at 2, Elasticsearch, Inc. v. Amazon.com, Inc., No. 4:19-cv-06158 (N.D. Cal., Sept. 27, 2019), http://ipcasefilings.com/wp-content/uploads/2019/10/ElasticSearch_Amazon.pdf.

[2061] Interview with Source 144 (Apr. 17, 2020).

[2062] *Server Side Public License FAQ*, MONGODB, https://www.mongodb.com/licensing/server-side-public-license/faq (last visited Sept. 30, 2020).

[2063] CEO Hearing at 6 (response to Questions for the Record of Jeff Bezos, CEO, Amazon.com, Inc.).

[2064] Interview with Source 152 (Sept. 24, 2020).

[2065] *Id.*

implements the open-source MongoDB API and is designed to "emulate the responses that a MongoDB client expects from a MongoDB server."[2066] When a cloud customer chooses to build an application using DocumentDB they are tied to AWS's infrastructure. If they ever wanted to switch to another provider they would have to extensively re-engineer their product in another software, whereas, had they built their application using MongoDB—on AWS or any other cloud provider's infrastructure—their applications could move to other platforms.[2067]

ii. Harms to Innovation

Amazon's practice of offering managed service versions of open-source software has prompted open-source software companies to make defensive changes, such as closing off advanced features and changing their open-source license to be less permissive.[2068] One open-source vendor that recently started offering premium closed-sourced features said they were "paranoid" in light of Amazon cloning Elastic's features, noting that if this had happened to them they "would not have a business."[2069] Amazon's conduct has also reduced the availability of features in open-source software. Confluent,[2070] Redis Labs,[2071] and CochroachDB,[2072] along with several other open-source software vendors, have made similar license and business model changes, reducing the level of access to their software.[2073]

Market participants believe these changes significantly undermine innovation. Several noted that more closed-off licenses will result in fewer free, open-source features available to startups building prototypes and research labs that cannot afford access to paid features.[2074] Subcommittee staff also spoke with cloud computing customers in the public sector who worry about the changes and ambiguity in open-source licenses. One cloud computing customer told Subcommittee staff that three

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2066 Jeff Barr, *New-Amazon DocumentDB (with MongoDB Compatibility): Fast, Scalable, and Highly Available*, AMAZON WEB SERVICES: AWS NEWS BLOG (Jan. 9, 2019), https://aws.amazon.com/blogs/aws/new-amazon-documentdb-with-mongodb-compatibility-fast-scalable-and-highly-available/.

2067 Interview with Source 152 (Sept. 24, 2020).

2068 *Open Source Licenses by Category*, OPEN SOURCE INITIATIVE, https://opensource.org/faq#permissive (last visited Sept. 30, 2020) ("A 'permissive' license is simply a non-copyleft Open source license – one that guarantees the freedoms to use, modify, and redistribute, but that permits proprietary derivative works.").

2069 Interview with Source 144 (Apr. 17, 2020).

2070 *Confluent Community License FAQ*, CONFLUENT, https://www.confluent.io/confluent-community-license-faq/ (last visited Sept. 30, 2020).

2071 Frederic Lardinois, *Redis Labs Changes Its Open-Source License – Again*, TECHCRUNCH (Feb. 21, 2019), https://techcrunch.com/2019/02/21/redis-labs-changes-its-open-source-license-again/.

2072 Tom Krazit, *Another Open-Source Database Company Will Tighten Its Licensing Strategy, Wary of Amazon Web Services*, GEEKWIRE (Jun. 4, 2019), https://www.geekwire.com/2019/another-open-source-database-company-will-tighten-licensing-strategy-wary-amazon-web-services/.

2073 Interview with Source 152 (Apr. 15, 2020).

2074 Interview with Source 146 (May 28, 2020).

pieces of open-source software that they use underwent license changes in the last year and that, due to strict "open source only" policies, they are "now stuck using older versions of the software [from] before the license change which requires additional work to improve the code base, implement the same functionality in-house or switch to a competitive product."[2075]

iii. Self-Preferencing

According to market participants, once a product—based on open source or otherwise—is available in the AWS Management Console, it becomes an easier choice for existing AWS customers relative to purchasing a managed service from a third-party vendor or self-managing open-source software. In an interview with Subcommittee staff, one startup said they purchased software services through the AWS Management Console as opposed to identical or nearly identical software from a third-party vendor because they were a small company and "instead of us managing everything, it was hit a button . . . they are all in one, it was easier."[2076] As with all cloud services offered through the AWS Management Console, customers benefit from a single sign-on with billing information already in place.[2077]

Market participants also note that Amazon makes certain functionality available to its first-party products that it doesn't make available to the companies managing the original version of the open-source software.[2078] For example, AWS services can run inside Amazon's Virtual Private Could (Amazon VPC) offering, which allows users to provision an "isolated section of the AWS Cloud," but third-party services cannot do so.[2079]

While Amazon failed to provide the Subcommittee with financial data identifying what AWS makes in revenue from individual cloud offerings, many marketplace participants believe that AWS makes more from managed versions of open-source software than the third-party vendors and managers of the software. In 2019, *The New York Times* reported that the Chief Executive of MariaDB, an open-source relational database company, estimated that "Amazon made five times more revenue from running MariaDB software than his company generated from all of its businesses."[2080] Market participants suggest this multiple of difference in income is likely for other AWS products based on open-source projects.[2081]

[2075] Interview with Source 49 (May 20, 2020).

[2076] Interview with Source 126 (June 29, 2020).

[2077] Interview with Source 146 (May 28, 2020).

[2078] Interview with Source 152 (Sept. 24, 2020).

[2079] *Amazon Virtual Private Cloud*, AMAZON WEB SERVICES, https://aws.amazon.com/vpc/ (last visited Sept. 30, 2020).

[2080] Daisuke Wakabayashi, *Prime Leverage, How Amazon Wields Power in the Technology World,* N.Y. TIMES (Dec. 16, 2019), https://www.nytimes.com/2019/12/15/technology/amazon-aws-cloud-competition.html.

[2081] Interview with Source 146 (May 28, 2020).

D. Apple

1. Overview

Apple was incorporated in 1977 and is headquartered in Cupertino, California.[2082] Apple was an early pioneer in designing and marketing mass-produced personal computers.[2083] Today, the company "designs, manufacturers, and markets smartphones, personal computers, tablets, wearables, and accessories, and sells a variety of related services."[2084] Apple's hardware products include the iPhone, iPad, Mac, Apple TV, and AirPods; its Services business segment includes the App Store, iCloud, AppleCare, Apple Arcade, Apple Music, Apple TV+, and other services and software applications.[2085] Apple tightly integrates its services and software applications with its products to ensure a seamless experience for consumers.[2086]

[2082] Apple Inc., Annual Report (Form 10-K) 1 (Sept. 28, 2019), https://s2.q4cdn.com/470004039/files/doc_financials/2019/ar/_10-K-2019-(As-Filed).pdf.

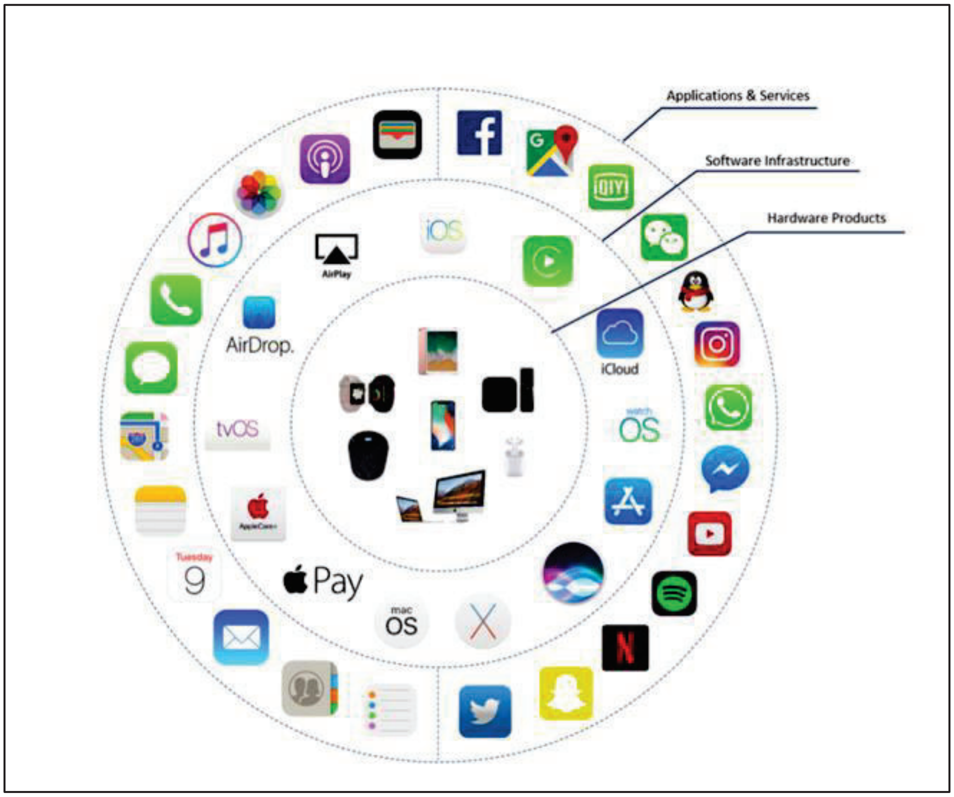
[2083] *See* Angelique Richardson & Ellen Terrell, *Apple Computer, Inc.*, LIB. OF CONGRESS (Apr. 2008), https://www.loc.gov/rr/business/businesshistory/April/apple.html.

[2084] Apple Inc., Annual Report (Form 10-K) 1 (Sept. 28, 2019), https://s2.q4cdn.com/470004039/files/doc_financials/2019/ar/_10-K-2019-(As-Filed).pdf.

[2085] *Id*. at 1–2.

[2086] *See* Apple, *Apple: Distinctive Products with a Seamless, Integrated User Experience* 1 (July 13, 2020) (on file with Comm.)

Apple's Ecosystem: Hardware, Software Infrastructure, Apple & Third-Party Apps[2087]



Apple reports financial information for two business categories: Products and Services.[2088] For Fiscal Year 2019, Apple reported total revenue of approximately $260 billion, down 2% from 2018, but up nearly 13.5% from 2017.[2089] Apple's margins totaled 37.8%, with profits of $98.3 billion.[2090] As of September 2020, Apple is the most valuable public company in the world and, in August 2020, became the first publicly traded U.S. firm to be valued at $2 trillion.[2091] Apple's stock rose by 60% in the first 8 months of 2020.[2092]

[2087] *Are domestic investors missing out?*, SWELL, (June 22, 2018), https://swellasset.com.au/2018/06/domestic-investors-missing/.

[2088] Apple Inc., Annual Report (Form 10-K) 19 (Sept. 28, 2019), https://s2.q4cdn.com/470004039/files/doc_financials/2019/ar/_10-K-2019-(As-Filed).pdf.

[2089] *Id*. at 17–19; *see also Apple's 1 Crazy Number Key to $800 Billion in Stock Growth*, FORBES (July 13, 2020), https://www.forbes.com/sites/greatspeculations/2020/07/13/how-did-apple-add-800-billion-in-value-over-3-years/#5b9250df20f8.

[2090] *Id. at* 21, 29.

[2091] Jessica Bursztynsky, *Apple becomes first U.S. company to reach a $2 trillion market cap*, CNBC (Aug. 19, 2020), https://www.cnbc.com/2020/08/19/apple-reaches-2-trillion-market-cap.html.

[2092] Kif Leswing, *Apple's $2 trillion value is proof that Tim Cook's services plan worked*, CNBC (Aug. 19, 2020), https://www.cnbc.com/2020/08/19/apples-2-trillion-value-proof-that-tim-cooks-services-plan-worked.html.

Apple is the leading smartphone vendor in the U.S., accounting for approximately 45% of the domestic market,[2093] with more than 100 million iPhone users nationwide.[2094] Apple's iOS is also one of two dominant mobile operating systems—the other operating system, Android, is discussed elsewhere in this Report. iOS runs on more than half of U.S. smartphones and tablets.[2095] Globally, Apple accounts for less than 20% of the smartphone market, and roughly 25% of smartphones and tablets run on iOS worldwide.[2096] In 2018, Apple sold its 2 billionth iOS device and is projected to sell its 2 billionth iPhone by 2021.[2097]

Apple also owns and operates the App Store for iOS devices. Launched in 2008, Apple highlights that the App Store allows app developers to reach consumers in 155 countries, and that more than 27 million app developers have published millions of apps in the App Store. Apple credits the App Store with creating 1.5 million jobs in the United States and more than $120 billion in worldwide revenue for app developers.[2098] According to Apple, the App Store ecosystem, including direct sales of apps, sales of goods and services inside of apps, and in-app advertising, facilitated more than $138 billion in economic activity in the U.S. last year.[2099]

[2093] *See* S. O'Dea, *Manufacturers' market share of smartphone sales in the United States from 2016 to 2020*, STATISTA (Sept. 3, 2020), https://www.statista.com/statistics/620805/smartphone-sales-market-share-in-the-us-by-vendor/; S. O'Dea, *Manufacturers' market share of smartphone subscribers in the United States from 2013 and 2019, by month**, STATISTA (June 9, 2020), https://www.statista.com/statistics/273697/market-share-held-by-the-leading-smartphone-manufacturers-oem-in-the-us/; *US Smartphone Market Share: By Quarter*, COUNTERPOINT RES. (Aug. 17, 2020), https://www.counterpointresearch.com/us-market-smartphone-share/; S. O'Dea, *Share of smartphone users that use an Apple iPhone in the United States from 2014 to 2021*, STATISTA (Sept. 10, 2020), https://www.statista.com/statistics/236550/percentage-of-us-population-that-own-a-iphone-smartphone/.

[2094] S. O'Dea, *Share of smartphone users that use an Apple iPhone in the United States from 2014 to 2021*, STATISTA (Sept. 10, 2020), https://www.statista.com/statistics/236550/percentage-of-us-population-that-own-a-iphone-smartphone/.

[2095] *See* S. O'Dea, *Subscriber share held by smartphone operating systems in the United States from 2012 to 2020*, STATISTA (Aug. 17, 2020), https://www.statista.com/statistics/266572/market-share-held-by-smartphone-platforms-in-the-united-states/; *Mobile Operating System Market Share United States of America Aug. 2019 – Aug. 2020*, GLOBALSTATS (on file with Comm.).

[2096] *See Global Smartphone Market Share: By Quarter*, COUNTERPOINT RES., (Aug. 18, 2020), https://www.counterpointresearch.com/global-smartphone-share/; *Mobile Operating System Market Share Worldwide Aug. 2019 – Aug. 2020*, GLOBALSTATS (on file with Comm.).

[2097] Malcolm Owen, *How Apple has hit 2 billion iOS devices sold, and when it will hit 2 billion iPhones*, APPLE INSIDER (Sept. 13, 2018), https://appleinsider.com/articles/18/09/13/how-apple-has-hit-2-billion-ios-devices-sold-and-when-it-will-hit-2-billion-iphones.

[2098] *See* Letter from Kyle Andeer, Vice Pres. Legal & Chief Compliance Officer, Apple Inc., to Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 2 (Oct. 14, 2019) (on file with Comm.); Letter from Kyle Andeer, Vice Pres., Corp. Law and Chief Compliance Officer, Apple Inc., to Hon. Jerrold Nader, Chairman, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (Sept. 21, 2020) (on file with Comm.).

[2099] Letter from Kyle Andeer, Vice Pres., Corp. Law and Chief Compliance Officer, Apple Inc., to Hon. Jerrold Nader, Chairman, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F.

In addition to the Subcommittee's investigation of Apple's market power and conduct, federal antitrust authorities are investigating the company for potential violations of the U.S. antitrust laws. In June 2019, *The New York Times* and the *Wall Street Journal* reported that the Justice Department had opened investigations into potential violations of the antitrust laws by Apple.[2100] Apple is also under investigation by multiple international competition authorities for antitrust violations and anticompetitive practices,[2101] in addition to facing private antitrust lawsuits in the U.S.[2102]

Previously, the Justice Department and Attorneys General of 33 states sued Apple for orchestrating a conspiracy to fix prices in the eBooks market in 2012.[2103] Apple was found to have violated state and federal antitrust laws and was forced to pay $450 million.[2104] In 2010, Apple settled an antitrust complaint with the Department of Justice that it conspired with several other technology

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James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 2 (Sept. 21, 2020) (on file with the Subcomm.) (citing JONATHAN BORCK ET AL., ANALYSIS GRP., HOW LARGE IS THE APPLE APP STORE ECOSYSTEM: A GLOBAL PERSPECTIVE FOR 2019, 4 (2020), https://www.apple.com/newsroom/pdfs/app-store-study-2019.pdf).

[2100] *See* Celia Kang et al., *Antitrust Troubles Snowball for Tech Giants as Lawmakers Join In*, N.Y. TIMES (June 3, 2019), https://www.nytimes.com/2019/06/03/technology/facebook-ftc-antitrust.html; Brent Kendall & John McKinnon, *Congress, Enforcement Agencies Target Tech*, WALL ST. J. (June 3, 2019), https://www.wsj.com/articles/ftc-to-examine-how-facebook-s-practices-affect-digital-competition-11559576731.

[2101] *See e.g.*, Press Release, Eur. Comm'n, Antitrust: Commission opens investigation into Apple practices regarding Apple Pay (June 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075; Foo Yun Chee, *Apple in Dutch Antitrust Spotlight for Allegedly Promoting Own Apps*, REUTERS (Apr. 11, 2019), https://www.reuters.com/article/us-apple-antitrust-netherlands/apple-in-dutch-antitrust-spotlight-for-allegedly-promoting-own-apps-idUSKCN1RN215; *Italy Antitrust Opens Inquiry into Google, Apple, Dropbox on Cloud Computing*, REUTERS (Sept. 7, 2020), https://www.reuters.com/article/us-google-italy-antitrust/italy-antitrust-opens-inquiry-into-google-apple-dropbox-on-cloud-computing-idUSKBN25Y0YM; Tim Hardwick, *Apple and Amazon Under Investigation By Italian Watchdog for Alleged Price Fixing*, APPLE INSIDER (July 22, 2020), https://www.macrumors.com/2020/07/22/apple-amazon-italy-alleged-price-fixing/.

[2102] *See e.g.*, Nick Statt, *Epic Games is suing Apple*, THE VERGE (Aug. 13, 2020), https://www.theverge.com/2020/8/13/21367963/epic-fortnite-legal-complaint-apple-ios-app-store-removal-injunctive-relief; Reed Albergotti, *Apple suppressed competitors in its App Store – until it got caught, a lawsuit alleges*, WASH. POST (Dec. 20, 2019), https://www.washingtonpost.com/technology/2019/12/20/apple-suppressed-competitors-its-app-store-until-it-got-caught-lawsuit-alleges/; Bob Van Voris & Peter Blumberg, *Apple App Developers Jump on Silicon Valley Antitrust Bandwagon*, BLOOMBERG (June 4, 2019), https://www.bloomberg.com/news/articles/2019-06-04/apple-inc-sued-by-app-developers-claiming-antitrust-violations; David G. Savage & Suhauna Hussain, *Supreme Court Rules Apple can face antitrust suits from iPhone owners over App Store sales*, L.A. TIMES (May 13, 2019), https://www.latimes.com/politics/la-na-pol-supreme-court-apple-smart-phone-20190513-story.html.

[2103] *See* Complaint, United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y., Apr. 11, 2012) (No. 12-02826-UA).

[2104] *See* United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013), *aff'd by* United States v. Apple Inc., 791 F.3d 209 (2d Cir. 2015); Dawn Chmielewski, *Apple to Pay $450 Million E-Book Settlement After Supreme Court Waves Off Case*, VOX: RECODE (Mar. 7, 2016), https://www.vox.com/2016/3/7/11586748/apple-to-pay-450-million-e-book-settlement-after-supreme-court-waves; *see also* Hr'g Tr. at 17:1-6, United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y., August 27, 2013) (No. 12-cv-2826) ("The record at trial demonstrated a blatant and aggressive disregard at Apple for the requirements of the law. Apple executives used their considerable skills to orchestrate a price-fixing scheme that significantly raised the prices of E-books. This conduct included Apple lawyers and its highest level executives."); Philip Elmer-Dewitt, '*I'd do it again,' says the man at the center of Apple's e-book case*, FORTUNE (Dec. 2, 2014), https://fortune.com/2014/12/02/id-do-it-again-says-the-man-at-the-center-of-apples-e-book-case/.

companies to eliminate competition in hiring for employees.[2105] It later entered into a $415 million joint settlement agreement in a class-action lawsuit by affected employees.[2106]

2. iOS and the App Store

a. Market Power

Apple has significant and durable market power in the market for mobile operating systems and mobile app stores, both of which are highly concentrated.[2107] Apple's iOS mobile operating system is one of two dominant mobile operating systems, along with Google's Android, in the U.S. and globally.[2108] Apple installs iOS on all Apple mobile devices and does not license iOS to other mobile device manufacturers. More than half of mobile devices in the U.S. run on iOS or iPadOS, an iOS derivation for tablets introduced in 2019.[2109] Apple's market power is durable due to high switching costs, ecosystem lock-in, and brand loyalty. It is unlikely that there will be successful market entry to contest the dominance of iOS and Android.

As a result, Apple's control over iOS provides it with gatekeeper power over software distribution on iOS devices. Consequently, it has a dominant position in the mobile app store market and monopoly power over distribution of software applications on iOS devices.[2110]

[2105] Press Release, U.S. Dep't of Justice, Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

[2106] Dawn Chmielewski, *Silicon Valley Companies Agree to Pay $415 Million to Settle "No Poaching" Suit*, VOX: RECODE (Jan. 15, 2015), https://www.vox.com/2015/1/15/11557814/silicon-valley-companies-agree-to-pay-415-million-to-settle-no.

[2107] *See* Stigler Report at 78 ("[T]he evidence thus far does suggest that current digital platforms face very little threat of entry. … [T]he key players in this industry remained the same over the last two technology waves, staying dominant through the shift to mobile and the rise of AI. In the past, dominant businesses found it difficult to navigate innovation or disruption waves. By contrast, Facebook, Google, Amazon, Apple, and even Microsoft were able to ride these waves without significant impact on market share or profit margins. This indirect evidence corroborates the argument that these companies are facing few competitive threats.").

[2108] *See infra* Section IV.

[2109] *See* S. O'Dea, *Subscriber share held by smartphone operating systems in the United States from 2012 to 2020*, STATISTA (Aug. 17, 2020), https://www.statista.com/statistics/266572/market-share-held-by-smartphone-platforms-in-the-united-states/; *Mobile Operating System Market Share United States of America Aug. 2019 – Aug. 2020*, GLOBALSTATS (on file with Comm.); Jason Cipriani, *iPad turns 10: Why did it take a decade for Apple's tablet to get its own operating system*, ZDNET (Jan. 24, 2020), https://www.zdnet.com/article/a-decade-old-device-why-did-it-take-nine-years-for-the-ipad-to-get-its-own-operating-system/.

[2110] *See infra* Section IV.

Apple's App Store is the only method to distribute software applications on iOS devices.[2111] It does not permit installation of alternative app stores on iOS devices, nor does it permit apps to be sideloaded. As discussed earlier in this Report, consumers have a strong preference for native apps to web apps,[2112] and Apple has acknowledged key differences between them. Developers have explained that Apple actively undermines the open web's progress on iOS "to push developers toward building native apps on iOS rather than using web technologies."[2113] As a result, Apple's position as the sole app store on iOS devices is unassailable. Apple fully controls how software can be installed on iOS devices, and CEO Tim Cook has explained that the company has no plan to permit an alternative app store.[2114] The former director of the app review team for the App Store observed that Apple is "not subject to any meaningful competitive constraint from alternative distribution channels."[2115]

In response to these concerns, Apple has not produced any evidence that the App Store is not the sole means of distributing apps on iOS devices and that it does not exert monopoly power over app distribution. Apple says it does not create—nor is it aware of third-party data—that tracks market share in the app distribution market.[2116] Apple claims the App Store competes in a larger software distribution market that includes other mobile app stores as well as the open internet, personal computers, gaming consoles, smart TVs, and online and brick-and-mortar retail stores.[2117] While consumers can access software and developers can distribute software through those platforms, none of those platforms permit consumers to access apps on an iOS device or developers to distribute apps to iOS devices.

Apple's monopoly power over software distribution on iOS devices appears to allow it to generate supranormal profits from the App Store and its Services business. Apple CEO Tim Cook set a goal in 2017 to rapidly double the size of the Services business by the end of 2020.[2118] Apple met this goal by July 2020, six months ahead of schedule.[2119] The Services business accounted for nearly 18%

[2111] CEO Hearing Transcript at 50 (statement of Tim Cook, CEO, Apple Inc.) (responding to question about whether Apple alone determines whether apps are admitted to the App Store Mr. Cook replied "If it's a native app, yes, sir. If it's a web app, no.").

[2112] *See infra* Section IV.

[2113] Owen Williams, *Apple Is Trying to Kill Web Technology*, ONEZERO (Nov. 7, 2019), https://onezero.medium.com/apple-is-trying-to-kill-web-technology-a274237c174d.

[2114] CEO Hearing Transcript at 3 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

[2115] Phillip Shoemaker, *Apple v. Everybody*, MEDIUM (Mar. 29, 2019), https://medium.com/@phillipshoemaker/apple-v-everybody-5903039e3be.

[2116] Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-000008 (Oct. 14, 2019) (on file with Comm.).

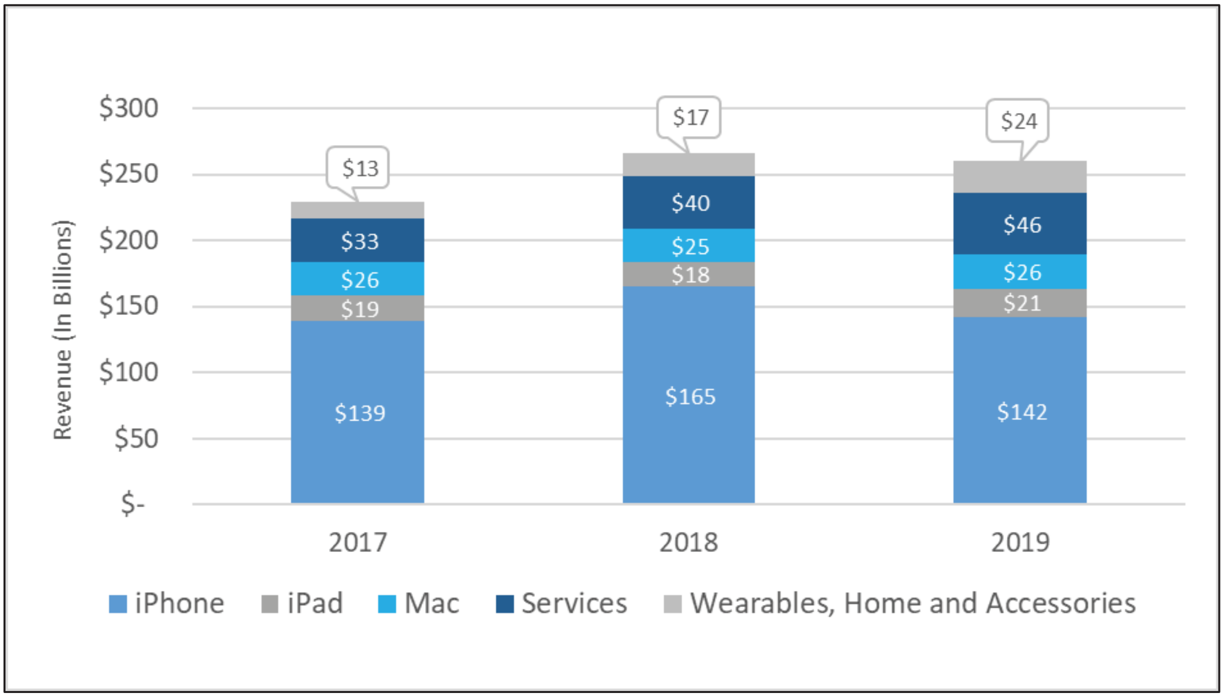
[2117] *See* CEO Hearing Transcript at 52, 164 (statement of Tim Cook, CEO, Apple Inc.); *see also* Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-000012–13 (Oct. 14, 2019) (on file with Comm.).

[2118] Anita Balakrishnan, *Tim Cook: Goal is to double Apple's services revenue by 2020*, CNBC (Jan. 31, 2017), https://www.cnbc.com/2017/01/31/tim-cook-on-apple-earnings-call-double-services-revenue-by-2020.html.

[2119] *See Apple (AAPL) Q3 2020 Earnings Call Transcript*, MOTLEY FOOL (July 31, 2020), https://www.fool.com/earnings/call-transcripts/2020/07/31/apple-aapl-q3-2020-earnings-call-transcript.aspx.

of total revenue in Fiscal Year 2019, about $46.2 billion. Services grew faster than Products in recent years, increasing by more than 41% since 2017.[2120] The Services category is also Apple's highest margin business at 63.7% in Fiscal Year 2019 and 67.2% for the quarter ending in June 2020.[2121]

Annual Revenue by Segment[2122]



Industry observers credit Apple's successful focus on growing the Services business with its rising valuation and future long-term.[2123] Apple has attributed the growth of Services as a driver of the firm's profits from sales and an important factor supporting Apple's overall margins as hardware sales

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[2120] Apple Inc., Annual Report (Form 10-K) 19 (Sept. 28, 2019), https://s2.q4cdn.com/470004039/files/doc_financials/2019/ar/_10-K-2019-(As-Filed).pdf.

[2121] *Id.* at 21; Apple Inc., Quarterly Report (Form 10-Q) 28 (June 27, 2020), https://s2.q4cdn.com/470004039/files/doc_financials/2020/q3/_10-Q-Q3-2020-(As-Filed).pdf.

[2122] Prepared by the Subcomm. based on Apple Inc., Annual Report (Form 10-K) (2017–2019), https://www.sec.gov/Archives/edgar/data/320193/000032019318000145/a10-k20189292018.htm.

[2123] *See e.g.*, Kif Leswing, *Apple's $2 trillion value is proof that Tim Cook's services plan worked*, CNBC (Aug. 19, 2020), https://www.cnbc.com/2020/08/19/apples-2-trillion-value-proof-that-tim-cooks-services-plan-worked.html; Anne Sraders, *As Apple stock tops $500, bulls cite these key reasons it could still go higher*, FORTUNE (Aug. 24, 2020), https://fortune.com/2020/08/24/apple-stock-tops-500-can-it-go-higher/.

slowed or declined.[2124] The company has consistently credited the App Store, licensing sales, and AppleCare for the success of Services.[2125]

b. Merger Activity

In 2019, Apple CEO Tim Cook told CNBC that Apple buys a new company every 2 to 3 weeks, focusing on acquiring "talent and intellectual property."[2126] In July 2020, Mr. Cook explained that Apple's "approach on acquisitions has been to buy companies where we have challenges, and IP, and then make them a feature of the phone."[2127] An Apple submission to the Subcommittee explains that it:

> [H]as not embarked on a strategy of acquiring nascent competitors in service of its growth and market position. Instead, Apple's acquisitions generally are meant to complement its product business by accelerating innovation and building out new features and technologies for Apple's hardware and software offerings.[2128]

In 2020, Apple continued acquiring small firms, including artificial intelligence and virtual reality startups, an enterprise software maker, a contactless payment startup, and a weather application,

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2124 Apple Inc., Annual Report (Form 10-K) 22, 26 (Sept. 29, 2018), https://www.sec.gov/Archives/edgar/data/320193/000032019318000145/a10-k20189292018.htm; Apple Inc., Annual Report (Form 10-K) 22, 26 (Sept. 30, 2017), https://www.sec.gov/Archives/edgar/data/320193/000032019317000070/a10-k20179302017.htm.

2125 Apple Inc., Annual Report (Form 10-K) 19 (Sept. 28, 2019), https://s2.q4cdn.com/470004039/files/doc_financials/2019/ar/_10-K-2019-(As-Filed).pdf.; Apple Inc., Annual Report (Form 10-K) 25 (Sept. 29, 2018), https://www.sec.gov/Archives/edgar/data/320193/000032019318000145/a10-k20189292018.htm; Apple Inc., Annual Report (Form 10-K) 25 (Sept. 30, 2017), https://www.sec.gov/Archives/edgar/data/320193/000032019317000070/a10-k20179302017.htm. AppleCare is Apple's extended warranty products for Apple devices. *See* Jason Cross, *AppleCare+: Everything you need to know about Apple's extended warranty program*, MACWORLD (Sept. 16, 2020), https://www.macworld.com/article/3227045/applecare-warranty-faq.html. In addition to the markets discussed in this section, the Committee sought information and continues to investigate competition and conduct in the resale and repair markets for Apple products.

2126 Lauren Feiner, *Apple buys a company every few weeks, says CEO Tim Cook*, CNBC (May 6, 2019), https://www.cnbc.com/2019/05/06/apple-buys-a-company-every-few-weeks-says-ceo-tim-cook.html.

2127 Kif Leswing, *Tim Cook says Apple buys innovation, not competitors*, CNBC (July 31, 2020), https://www.cnbc.com/2020/07/31/tim-cook-contrasts-apple-ma-with-other-big-tech.html.

2128 Apple, *Apple: Distinctive Products with a Seamless, Integrated User Experience* 2 (July 13, 2020) (on file with Comm.).

among others.[2129] One of Apple's largest transactions occurred in 2019 when it paid $1 billion to acquire Intel's smartphone modem business.[2130]

Apple has also recently acquired software companies to create a foundation from which it could launch new apps. For example, after purchasing the digital magazine subscription service Texture in 2018, Apple integrated most of Texture's functionality into its own Apple News+ service, which debuted the following year.[2131] Similarly, one of Apple's largest purchases to date—its $3 billion acquisition of Beats Electronics in 2014—was instrumental to the 2015 launch of Apple Music.[2132] Apple sought to grow Apple Music quickly after its introduction. Apple pre-installed the service on iPhones and made it the only music service accessible through Siri, Apple's virtual assistant. Apple also offered Apple Music with a free month trial period and made it available on Android devices. The strategy saw Apple gain 10 million paying subscribers within six months.[2133] Apple supplemented its music services business in 2018 by acquiring the music recognition app Shazam, and most recently, by acquiring podcast app Scout FM in 2020.[2134]

It is common for Apple to integrate apps it purchases into its own pre-existing apps or into the iOS mobile operating system. Examples of this include the 2014 acquisition of Swell, a podcast app, and the 2013 acquisition of HopStop, a transit navigation app.[2135]

[2129] *See* Jordan Novet, *Apple buys an A.I. start-up that came from Microsoft co-founder Paul Allen's research lab*, CNBC (Jan. 15, 2020), https://www.cnbc.com/2020/01/15/apple-acquires-xnor-ai-startup-that-spun-out-of-allen-institute.html; Mark Gurman, *Apple Acquires AI Startup to Better Understand Natural Language*, BLOOMBERG (Apr. 3, 2020), https://www.bloomberg.com/news/articles/2020-04-03/apple-acquires-ai-startup-to-better-understand-natural-language; Kif Leswing, *Apple buys virtual reality company NextVR*, CNBC (May 14, 2020), https://www.cnbc.com/2020/05/14/apple-buys-virtual-reality-company-nextvr.html; Kif Leswing, *Apple buys Fleetsmith, a company making it easier to deploy iPhones and Macs at workplaces*, CNBC (June 24, 2020), https://www.cnbc.com/2020/06/24/apple-acquires-device-management-company-fleetsmith.html; Jessica Bursztynsky, *Apple buys popular weather app Dark Sky and plans to shut down Android versions*, CNBC (Mar. 31, 2020), https://www.cnbc.com/2020/03/31/apple-buys-popular-weather-app-dark-sky.html; Mark Gurman, *Apple Buys Startup to Turn iPhones Into Payment Terminals*, BLOOMBERG (July 31, 2020), https://www.bloomberg.com/news/articles/2020-08-01/apple-buys-startup-to-turn-iphones-into-payment-terminals.

[2130] Press Release, Apple, Apple to acquire the majority of Intel's smartphone modem business (July 25, 2019), https://www.apple.com/newsroom/2019/07/apple-to-acquire-the-majority-of-intels-smartphone-modem-business/.

[2131] Anita Balakrishnan, *Apple buys Texture, a digital magazine subscription service*, CNBC (Mar. 12, 2018), https://www.cnbc.com/2018/03/12/apple-buys-texture-a-digital-magazine-subscription-service.html.

[2132] Billy Steele, *Apple's $3 billion purchase of Beats has already paid off*, ENGADGET (May 28, 2019), https://www.engadget.com/2019-05-28-apple-beats-five-years-later.html.

[2133] Neth. Auth. For Consumers & Mkts. Study at 62.

[2134] Press release, Apple, *Apple acquires Shazam, offering more ways to discover and enjoy music* (Sept. 24, 2018), https://www.apple.com/newsroom/2018/09/apple-acquires-shazam-offering-more-ways-to-discover-and-enjoy-music/; Mark Gurman, *Apple Buys Startup That Creates Radio-Like Stations for Podcasts*, BLOOMBERG (Sept. 24, 2020), https://www.bloomberg.com/news/articles/2020-09-24/apple-buys-startup-that-creates-radio-like-stations-for-podcasts.

[2135] Chris Gayomali, *Swell Shuts Down Following Apple Acquisition*, FAST CO. (July 29, 2014), https://www.fastcompany.com/3033698/swell-shuts-down-following-apple-acquisition; Andrew Nusca, *Apple Maps vs. Google Maps heats up as Apple shuts down HopStop*, FORTUNE (Sept. 12, 2015), https://fortune.com/2015/09/12/hopstop-apple-shutdown/.

Apple has followed a similar strategy for integrating the Dark Sky weather app. Apple shut down Dark Sky's Android app in August 2020 and plans to integrate the app's features with the iPhone's Weather widget on iOS 14.[2136] In addition to its app, Dark Sky supplied data to independent weather apps, like Carrot, Weather Line, and Partly Sunny. As a result of Apple's takeover of Dark Sky, independent weather apps will lose access to the inexpensive, hyper-local weather data that Dark Sky supplied, leading some weather apps to shut down and others to rely on higher-priced suppliers for forecast data.[2137]

c. Conduct

i. Commissions and In-App Purchases

The Committee sought information regarding Apple's policy of collecting commissions from apps sold through the App Store and purchases made in iOS apps. Apple charges a 30% commission on paid apps—those that charge a fee for users to download—downloaded from the App Store. It also takes a 30% fee for in-app purchases (IAP) of "digital goods and services."[2138] For app subscriptions, Apple charges a 30% commission for the first year and a 15% commission for subsequent years.[2139] Apps are not permitted to communicate with iOS users that the app may be available for purchase at a lower price outside the App Store, provide links outside of the app that may lead users to find alternative subscription and payment methods, or offer their own payment processing mechanism in the app to avoid using Apple's IAP.[2140] Apps that violate Apple's policies can be removed from the App Store, losing access to the only means of distributing apps to consumers with iOS devices.[2141]

[2136] Hannah Klein, *The Dark Sky Android App Is Officially Kaput*, SLATE (Aug. 4, 2020), https://slate.com/technology/2020/08/dark-sky-app-android-shuts-down.html.

[2137] Jared Newman, *Apple's Dark Sky acquisition could be bad news for indie weather apps*, FAST CO. (Apr. 2, 2020), https://www.fastcompany.com/90485131/apples-dark-sky-acquisition-could-be-bad-news-for-indie-weather-apps; *but see* CEO Hearing Transcript at 9 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.) (noting Dark Sky will "continue to make its API available to Dark Sky's existing customers until the end of 2021").

[2138] *App Store: Dedicated to the best store experience for everyone*, APPLE, https://www.apple.com/ca/ios/app-store/principles-practices/ (last visited Oct. 4, 2020).

[2139] *Id.*

[2140] *See* Innovation and Entrepreneurship Hearing at 1–2 (response to Questions for the Record of Kyle Andeer, Vice Pres., Corp. Law, Apple Inc.); Submission from ProtonMail, to H. Comm. on the Judiciary, 5 (Aug. 22, 2020) (on file with Comm.); Interview with Source 143 (Aug. 27, 2020).

[2141] *See e.g.*, Sara Morrison, *Apple's Fortnite ban, explained*, VOX: RECODE (Sept. 8, 2020), https://www.vox.com/recode/2020/8/20/21373780/fortnite-epic-apple-lawsuit-app-store-antitrust; Nick Statt, *Apple doubles down on controversial decision to reject email app Hey*, THE VERGE (June 18, 2020), https://www.theverge.com/2020/6/18/21296180/apple-hey-email-app-basecamp-rejection-response-controversy-antitrust-regulation.

Apple describes its policies as standard industry practice and says that other app stores charge the same fees.[2142] In 2020, Apple funded a study that concluded that other software distribution platforms run by Google, Amazon, Samsung, Microsoft, and others charge identical or similar commissions on software downloads and transactions, and that commissions are common in other digital markets.[2143] Apple also highlighted that its commissions are lower than the cost of software distribution by brick-and-mortar retailers, which dominated the marketplace prior to the introduction of the App Store.[2144] The Apple-commissioned study explained Apple funds the App Store through a $99 annual fee it charges to developers and $299 for developers building enterprise apps, as well as the commission and fees collected on apps and in-app purchases.[2145]

Apple also noted that 84% of all apps distributed through the App Store pay no commissions or fees.[2146] Apple does not take a commission on purchases from apps like Uber or Etsy that sell "physical goods or services that will be consumed outside the app."[2147] Apple also makes some exceptions to its rules and may change or update its rules.[2148] For example, Apple has an exception for "Reader" apps such as Netflix and Kindle that permit users to access content purchased outside the

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[2142] Innovation and Entrepreneurship Hearing at 2 (response to Questions for the Record of Kyle Andeer, Vice Pres., Corp. Law, Apple Inc.); *see also* Mark Gurman, *Apple Defends App Store Revenue Take Ahead of Antitrust Hearing*, BLOOMBERG (July 22, 2020), https://www.bloomberg.com/news/articles/2020-07-22/apple-defends-app-store-revenue-cut-ahead-of-antitrust-hearing; David Pierce & Emily Birnbaum, *Apple defends its App Store tax ahead of antitrust hearings*, PROTOCOL (July 22, 2020), https://www.protocol.com/apple-app-store-commission-study.

[2143] *See* JONATHAN BORCK ET AL., ANALYSIS GRP., APPLE'S APP STORE AND OTHER DIGITAL MARKETPLACES: A COMPARISON OF COMMISSION RATES 2, 5–6 (2020), https://www.analysisgroup.com/globalassets/insights/publishing/apples_app_store_and_other_digital_marketplaces_a_comparison_of_commission_rates.pdf.

[2144] *See* CEO Hearing Transcript at 30 (statement of Tim Cook, CEO, Apple Inc.); Letter from Kyle Andeer, Vice Pres., Corp. Law and Chief Compliance Officer, Apple Inc., to Hon. Jerrold Nader, Chairman, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (Sept. 21, 2020) (on file with Comm.).

[2145] *See* JONATHAN BORCK ET AL., ANALYSIS GRP., APPLE'S APP STORE AND OTHER DIGITAL MARKETPLACES: A COMPARISON OF COMMISSION RATES 4, n.5, Appendix A-3 (2020), https://www.analysisgroup.com/globalassets/insights/publishing/apples_app_store_and_other_digital_marketplaces_a_comparison_of_commission_rates.pdf.

[2146] *See e.g.*, Innovation and Entrepreneurship Hearing at 68 (statement of Kyle Andeer, Vice Pres., Corp. Law, Apple Inc.); Letter from Timothy Powderly, Apple Inc., to Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (July 15, 2019).

[2147] *App Store Review Guidelines 3.1.3(e): Goods and Services Outside of the App*, APPLE, https://developer.apple.com/app-store/review/guidelines/#goods-and-services-outside-of-the-app (last visited Sept. 27, 2020).

[2148] *See e.g.*, Sarah Perez & Anthony Ha, *Apple revises App Store rules to permit game streaming apps, clarify in-app purchases and more*, TECHCRUNCH (Sept. 11, 2020), https://techcrunch.com/2020/09/11/apple-revises-app-store-rules-to-permit-game-streaming-apps-clarify-in-app-purchases-and-more/; Phillip Shoemaker, *Apple v. Everybody*, MEDIUM (Mar. 29, 2019), https://medium.com/@phillipshoemaker/apple-v-everybody-5903039e3be.

app, but do not allow for in-app subscriptions or purchases.[2149] Apple also makes exceptions for "third-party premium video apps" that integrate with Apple TV and other Apple services.[2150] Mr. Cook explained, "[t]oday, there are over 130 apps that participate in this program," and "[t]he reduced 15% commission is available to all developers offering premium video content on the same terms as Amazon Prime Video, with the same qualification criteria."[2151] Amazon Prime Video, Altice One, and Canal+ have been publicly confirmed as participants.[2152]

During the investigation, the Subcommittee received evidence from app developers regarding Apple's commissions and fees for IAPs. ProtonMail, a secure email provider, explained that Apple's justification of its 30% commission overlooks the dynamics of the marketplace for distributing software to consumers with iOS devices—conflating practices that may be unremarkable in competitive markets but abusive in monopoly markets.[2153]

For example, personal computer (PC) users can install software from app stores run by Microsoft, Google, Amazon, and others or download software directly from the software developer's website and bypass app stores altogether. Similarly, Apple's Mac App Store is one of many options for Mac users to download software. While Samsung is a global leader in smartphones, the Samsung Galaxy Store is one of several app stores available on Samsung's mobile devices. Google's Play Store dominates app distribution on Android devices and is the most apt comparison to the App Store, but Google permits some competition via sideloading and alternative app stores.[2154]

In contrast, Apple owns the iOS operating system as well as the only means to distribute software on iOS devices. Using its role as an operating system provider, Apple prohibits alternatives to the App Store and charges fees and commissions for some categories of apps to reach customers. It responds to attempts to circumvent its fees and commissions with removal from the App Store.[2155] Because of this policy, developers have no other option than to play by Apple's rules to reach customers who own iOS devices. Owners of iOS devices have no alternative means to install apps on

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[2149] *App Store Review Guidelines 3.1.3(a): "Reader" Apps*, APPLE, https://developer.apple.com/app-store/review/guidelines/#reader-apps (last visited Sept. 27, 2020).

[2150] CEO Hearing Transcript at 8 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

[2151] *Id*.

[2152] Nick Statt, *Apple now lets some video streaming apps bypass the App Store cut*, THE VERGE (Apr. 1, 2020), https://www.theverge.com/2020/4/1/21203630/apple-amazon-prime-video-ios-app-store-cut-exempt-program-deal. *See also*, Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-015111 (Nov. 1, 2016) (showing details of negotiations between Eddy Cue, Senior Vice Pres., Internet Software and Services, Apple Inc., and Jeff Bezos, CEO, Amazon.com, Inc.) (on file with Comm.).

[2153] *See* Submission from ProtonMail, to H. Comm. on the Judiciary, 11–12 (Aug. 22, 2020) (on file with Comm.).

[2154] *See id*. Apple has pointed to these as benchmarks for the App Store. *See* JONATHAN BORCK ET AL., ANALYSIS GRP., APPLE'S APP STORE AND OTHER DIGITAL MARKETPLACES: A COMPARISON OF COMMISSION RATES 4–6 (2020), https://www.analysisgroup.com/globalassets/insights/publishing/apples_app_store_and_other_digital_marketplaces_a_comparison_of_commission_rates.pdf.

[2155] *See* Submission from ProtonMail, to H. Comm. on the Judiciary, 5 (Aug. 22, 2020) (on file with Comm.).

their phones. Apple notes that its 30% commission has remained static for most apps for more than a decade.[2156] A group of developers that filed a lawsuit against Apple challenging this policy argue that the persistence of Apple's 30% rate over time, "despite the inevitable accrual of experience and economies of scale," indicates there is insufficient competition.[2157] Additionally, as previously noted, there is little likelihood for new market entry in the mobile operating system or mobile app store markets to compel Apple to lower its rates.[2158]

Industry observers have also challenged Apple's implicit claim that the iPhone was the start of the online software distribution market. For example, Mac and iOS developer Brent Simmons remarked that "when the App Store was created, developers were selling and distributing apps over the web, and it worked wonderfully," noting that he began distributing software over the internet in the 1990s.[2159] Software designer and technology writer John Gruber agreed, explaining that in the mid-1990s there was "a thriving market for software sold directly over a thing called 'The Internet,'" and that Apple's omission of the fact that "direct downloads and sales over the web" pre-dated the iPhone by more than a decade "is flat-out dishonest."[2160]

Many developers have stressed that, because Apple dictates that the App Store is the only way to install software on iOS devices and requires apps offering "digital goods and services" to implement the IAP mechanism, Apple has illegally tied IAP to the App Store.[2161] Consumers with iOS devices account for a disproportionately high amount of spending on apps—spending twice as much as Android users.[2162] Further, iOS users seldom switch to Android.[2163] Thus, developers cannot abandon

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[2156] *See* CEO Hearing Transcript at 52 (statement of Tim Cook, CEO, Apple Inc.); Letter from Kyle Andeer, Vice Pres., Corp. Law and Chief Compliance Officer, Apple Inc., to Hon. Jerrold Nader, Chairman, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (Sept. 21, 2020) (on file with Comm.).

[2157] Class Action Complaint at 2, Cameron v. Apple Inc., No. 5:19-cv-3074 (N.D. Cal., June 4, 2019).

[2158] *See infra* Section IV.

[2159] *See* Rob Pegoraro, *What Tim Cook Left Out Of His Version of App Store History*, FORBES (July 29, 2020), https://www.forbes.com/sites/robpegoraro/2020/07/29/what-tim-cook-left-out-of-his-version-of-app-store-history/.

[2160] John Gruber, *Parsing Tim Cook's Opening Statement from Today's Congressional Antitrust Hearing*, DARING FIREBALL (July 29, 2020), https://daringfireball.net/2020/07/parsing_cooks_opening_statement.

[2161] *See e.g.*, Submission from Source 711, to H. Comm. on the Judiciary, Appendix A at 4–8 (Oct. 15, 2019) (on file with Comm.); Submission from Source 202, to H. Comm. on the Judiciary, 22–41 (Oct. 18, 2018); Submission from Source 736, to H. Comm. on the Judiciary, 6–10 (Oct. 31, 2019) (on file with Comm.).

[2162] *See Global App Revenue Grew 23% Year-Over-Year Last Quarter to $21.9 Billion*, SENSORTOWER (Oct. 23, 2019), https://sensortower.com/blog/app-revenue-and-downloads-q3-2019; Prachi Bhardwaj & Shayanne Gal, *Despite Android's growing market share, Apple users continue to spend twice as much money on apps as Android users*, BUS. INSIDER (July 6, 2018), https://www.businessinsider.com/apple-users-spend-twice-apps-vs-android-charts-2018-7.

[2163] *See Mobile Operating System Loyalty: High and Steady*, CONSUMER INTEL. RES. PARTNERS (Mar. 8, 2018), http://files.constantcontact.com/150f9af2201/4bca9a19-a8b0-46bd-95bd-85740ff3fb5d.pdf; *iPhone vs. Android – Cell Phone Brand Loyalty Survey 2019*, SELLCELL (Aug. 20, 2019), https://www.sellcell.com/blog/iphone-vs-android-cell-phone-brand-loyalty-survey-2019/; *see also* MORNINGSTAR EQUITY ANALYST REPORT, APPLE INC 3 (Aug. 6, 2020) (on file the App Store—it is where the highest value customers are and will remain. As a result, developers say that Apple abuses control over its valuable user base by prohibiting alternative payment processing options to compete with Apple's IAP mechanism.

Developers further argue that Apple's 30% commission from IAP is a "payment processing" fee and not a distribution fee.[2164] In a submission to the Committee, Match Group said, "Apple distorts competition in payment processing by making access to its App Store conditional on the use of IAP for in-app purchases, thus excluding alternative payment processors. IAP eventually becomes the vessel through which Apple extracts its extraordinary commissions."[2165] Two app developers that offer services that compete with Apple explained that IAP is a payment processing fee and not a distribution fee. Both pointed out that Apple does not charge apps for distribution, evidenced by the fact Apple admits distributing most apps for free. Instead, Apple generates revenue by adding a 30% processing fee on transactions in the App Store and using IAP.[2166] Apple's Developer Program website explains that Apple does charge for distribution—it requires enrollment in the Apple Developer Program and payment of a $99 fee to distribute apps on the App Store.[2167]

Apple responded that its "commission is not a payment processing fee" and that it "reflects the value of the App Store as a channel for the distribution of developers' apps and the cost of many services" it incurs to maintain the App Store.[2168] It said that "[t]he commission also enables Apple to

with Comm.) ("Recent survey data shows that iPhone customers are not even contemplating switching brands today. In a December 2018 survey by Kantar, 90% of U.S.-based iPhone users said they planned to remain loyal to future Apple devices."); Martin Armstrong, *Most iPhone Users Never Look Back*, STATISTA (May 22, 2017), https://www.statista.com/chart/9496/most-iphone-users-never-look-back/.

[2164] *See e.g.*, Competitors Hearing at 9 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp); Interview with Source 143 (Aug. 27, 2020); Submission from Match Group, to H. Comm. on the Judiciary, MATCH-GRP_00000168 (July 1, 2019) (on file with Comm.); Submission from Source 482, to H. Comm. on Judiciary, 9 (Oct. 15, 2019) (on file with Comm.).

[2165] Submission from Match Group, to H. Comm. on the Judiciary, MATCH_GRP_00000238 (Nov. 1, 2019) (on file with Comm.).

[2166] *See* Submission from ProtonMail, to H. Comm. on the Judiciary, 11 (Aug. 22, 2020) (on file with Comm.); Submission from Spotify, to H. Comm. on the Judiciary, Appendix A at 7–8 (Oct. 15, 2019) (on file with Comm.).

[2167] *See Apple Developer Program, How the Program Works*, APPLE, https://developer.apple.com/programs/how-it-works/ (last visited Sept. 27, 2020) ("If you're new to development on Apple Platforms, you can get started with our tools and resources for free. If you're ready to build more advanced capabilities and distribute your apps on the App Store, enroll in the Apple Developer Program. The cost is 99 USD per membership year.").

[2168] Letter from Kyle Andeer, Vice Pres., Corp. Law & Chief Compliance Officer, Apple Inc. to Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (Feb. 17, 2020), https://docs.house.gov/meetings/JU/JU05/20200117/110386/HHRG-116-JU05-20200117-SD004.pdf; *see also* Letter from Kyle Andeer, Vice Pres., Corp. Law and Chief Compliance Officer, Apple Inc., to Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (Sept. 21, 2020) (on file with Comm.).

realize a return on its investment in the App Store and in Apple's intellectual property, and to fund future App Store innovation."[2169] Similarly, a study commissioned by Apple in 2020 explained that the annual fees paid by developers, commissions, and charges for in-app purchases fund investments in the App Store ecosystem, such as app review, developer tools, marketing, search functionality, application program interfaces, and software development kits.[2170] Apple has also argued that its App Store Developer Guidelines—including its requirement to use Apple's in-app purchase mechanism—is "designed to keep the store safe for our users."[2171]

Apple's rationale for its commissions and fees has evolved over time. Its recent explanations of the basis for its 30% commission differs significantly from its explanation of its fee and revenue expectations in the early years of the App Store. Prior to the App Store's debut in 2008, then-Apple CEO Steve Jobs explained, "We don't intend to make any money off the App Store . . . . We're basically giving all the money to the developers and the 30 percent that pays for running the store, that'll be great."[2172] In 2011, Apple's Chief Financial Officer Peter Oppenheimer explained to Apple's shareholders that Apple runs the App Store "just a little over break even."[2173]

Apple's financial reports indicate that the App Store is faring far better than the modest business Apple originally contemplated. According to a 2019 market analysis, Apple's net revenue from the App Store is projected to be $17.4 billion for Fiscal Year 2020.[2174] CNBC estimated the App Store had total sales of nearly $50 billion in 2019, generating "about $15 billion in revenue for Apple."

[2169] Apple, *Apple: Distinctive Products with a Seamless, Integrated User Experience* 14 (July 13, 2020) (on file with Comm.)*; see also* Letter from Kyle Andeer, Vice Pres., Corp. Law and Chief Compliance Officer, Apple Inc., to Hon. Jerrold Nader, Chairman, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (Sept. 21, 2020) (on file with Comm.).

[2170] *See* JONATHAN BORCK ET AL., ANALYSIS GRP., APPLE'S APP STORE AND OTHER DIGITAL MARKETPLACES: A COMPARISON OF COMMISSION RATES 2–3 (2020), https://www.analysisgroup.com/globalassets/insights/publishing/apples_app_store_and_other_digital_marketplaces_a_comparison_of_commission_rates.pdf; *see also* Letter from Kyle Andeer, Vice Pres., Corp. Law & Chief Compliance Officer, Apple Inc. to Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 2 (Feb. 17, 2020) (on file with Comm.), https://docs.house.gov/meetings/JU/JU05/20200117/110386/HHRG-116-JU05-20200117-SD004.pdf.

[2171] Kif Leswing, *Apple sued by Fortnite maker after kicking the game out of the App Store for payment policy violations*, CNBC (Aug. 13, 2020), https://www.cnbc.com/2020/08/13/apple-kicks-fortnite-out-of-app-store-for-challenging-payment-rules.html.

[2172] Peter Cohen, *'App Store' will distribute iPhone software*, MACWORLD (Mar. 6, 2008), https://www.macworld.com/article/1132402/appstore.html.

[2173] Daniel Eran Dilger, *Inside Apple's shareholder meeting and Q&A with Tim Cook*, APPLE INSIDER (Feb. 23, 2011), https://appleinsider.com/articles/11/02/23/tim_cook_presides_over_annual_apple_shareholder_meeting.

[2174] Eric J. Savitz, *App Stores Could Be Ripe for Regulation. Here's Who Benefits if Commissions Fall*, BARRONS (July 25, 2019), https://www.barrons.com/articles/news-updates-51599747657.

With $50 billion in annual sales, CNBC explained, "the App Store alone would be no. 64 on the Fortune 500, ahead of Cisco and behind Morgan Stanley."[2175] An analytics firm concluded that Apple likely made $15.5 billion from the App Store in 2018, and estimated $18.8 billion for 2022. *Bloomberg* reported that analysts forecasting Apple's third-quarter 2020 performance predicted growth from Services "up 15% from a year earlier," and that growth would largely be attributable to the App Store and licensing, not new services.[2176] In addition to Apple's commissions and fees for IAP, App Store revenue also includes $2.67 billion Apple would make through the $99 annual fee paid by Apple's 27 million iOS developers.[2177] Apple also reportedly made $9 billion in 2018 and $12 billion in 2019 to set Google as the default search engine on the Safari browser.[2178] Revenue from setting Google as Safari's default search engine is attributed to Apple's Services business, which is the business unit that includes the App Store.[2179]

In an interview with Subcommittee staff, Phillip Shoemaker, Apple's former Senior Director of App Store Review, estimated that Apple's costs for running the App Store are less than $100 million. Other analysts estimate that the App Store has significantly higher profits. A gaming developer explained that the fees it pays Apple's add up to millions of dollars—or even tens or hundreds of millions of dollars for some developers—far in excess of the developer's estimate of Apple's costs of reviewing and hosting those apps.[2180] Although only estimates, these figures indicate that as the mobile app economy has grown, Apple's monopoly power over app distribution on iPhones permits the App Store to generate supra-normal profits. These profits are derived by extracting rents from developers, who either pass on price increases to consumers or reduce investments in innovative new services. Apple's ban on rival app stores and alternative payment processing locks out competition, boosting Apple's profits from a captured ecosystem of developers and consumers.[2181]

[2175] Kif Leswing, *Apple's App Store had gross sales around $50 billion last year, but growth is slowing*, CNBC (Jan. 8, 2020), https://www.cnbc.com/2020/01/07/apple-app-store-had-estimated-gross-sales-of-50-billion-in-2019.html.

[2176] Mark Gurman, *Apple's New Services Off to a Slow Start in First Year*, BLOOMBERG (July 28, 2020), https://www.bloombergquint.com/business/apple-s-new-services-off-to-a-slow-start-in-first-year.

[2177] *See* Letter from Kyle Andeer, Vice Pres., Corp. Law and Chief Compliance Officer, Apple Inc., to Hon. Jerrold Nader, Chairman, H. Comm. on the Judiciary, Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (Sept. 21, 2020) (on file with Comm.) ("[T]here are more than 1.8 million apps on the App Store, and a thriving community of more than 27 million iOS developers."); *Developer Support, Purchase and Activation*, APPLE, https://developer.apple.com/support/purchase-activation/ (last visited Sept. 27, 2020) ("The Apple Developer Program annual fee is $99 USD and the Apple Developer Enterprise Program annual fee is $299 USD.").

[2178] *See* Lisa Marie Segarra, *Google to Pay Apple $12 Billion to Remain Safari's Default Search Engine in 2019: Report*, FORTUNE (Sept. 29, 2018), https://fortune.com/2018/09/29/google-apple-safari-search-engine/.

[2179] *See* Mark Gurman, *Apple's New Services Off to a Slow Start in First Year*, BLOOMBERG (July 28, 2020), https://www.bloombergquint.com/business/apple-s-new-services-off-to-a-slow-start-in-first-year.

[2180] Interview with Source 143 (Aug. 27, 2020).

[2181] Dr. Carl Shapiro of the University of California, Berkeley—the former top economist for the Justice Department's Antitrust Division during the Obama Administration—has noted that persistently high corporate profits that are not eroded by competitive forces over time are an indicator of market power. It also suggests the rise of incumbency rents, or the earning of excess profits "by firms whose positions are protected by high barriers to entry." Carl Shapiro, *Antitrust in a*

To address this concern without compromising the security or quality of the App Store, some developers argue in favor of allowing third-party payment processors like PayPal, Square, and Stripe to compete in the App Store. They explain that the most likely competitors are already trusted and widely used for e-commerce transactions.[2182] David Heinemeier Hansson, Cofounder and CTO of Basecamp, testified at the Subcommittee's fifth hearing that Apple's market power allows it to keep fees "exorbitantly high."[2183] By comparison, he noted that other markets, such as credit card processes, are "only able to sustain a 2 percent fee for merchants. Apple, along with Google, has been able to charge an outrageous 30 percent for years on end."[2184] Several other firms observed that Apple's control over app distribution allows it to extract high fees on a minority of apps, and that competition for processing payments would drive prices down. For example, developers explain that payment processing typically costs less than 5% of the transaction value.[2185] Before the App Store, one developer reportedly explained that "[w]e typically paid about 5%—not 30%—to a payment processor," and it "worked just as well for small developers as for large."[2186]

Other developers have noted that alternative payment processing providers charge significantly lower rates than Apple's fee for IAP. Match Group estimates that Apple's expenses related to payment processing "justify charging no more than 3.65% of revenue."[2187] Some app developers would prefer to implement in-house payment processing. In August 2020, Epic Games introduced a direct payment option in its Fortnite app, allowing gamers to elect to use Apple's IAP or pay Epic directly. Epic's payment processing option that charged consumers 10%—a 20% discount from purchases using IAP.[2188] In response, Apple disabled updates for Fortnite for violating the App Store Guidelines.[2189]

Time of Populism, 61 INT'L J. INDUS. ORG. 714, 733–37 (2018), https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf.

[2182] Submission from ProtonMail, to H. Comm. on the Judiciary, 13 (Aug. 22, 2020) (on file with Comm.).

[2183] Competitors Hearing at 8 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp); *see also* Interview with Source 88 (May 12, 2020).

[2184] Competitors Hearing at 8 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp); *see also* Interview with Source 873 (May 12, 2020).

[2185] *See e.g.*, Competitors Hearing at 8 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp); Submission from Source 202, to H. Comm. on the Judiciary, 15 (Oct. 18, 2018) (on file with Comm.).

[2186] Rob Pegoraro, *What Tim Cook Left Out Of His Version of App Store History*, Forbes (July 29, 2020), https://www.forbes.com/sites/robpegoraro/2020/07/29/what-tim-cook-left-out-of-his-version-of-app-store-history/.

[2187] Submission of Match Group, to H. Comm. on the Judiciary, 6 (Oct. 31, 2019) (on file with Comm.).

[2188] *See* Andrew Webster, *Epic offers new direct payment in Fortnite on iOS and Android to get around app store fees*, THE VERGE (Aug. 13, 2020), https://www.theverge.com/2020/8/13/21366259/epic-fortnite-vbucks-mega-drop-discount-iphone-android.

[2189] Nick Statt, *Apple just kicked Fortnite off the App Store*, THE VERGE (Aug. 13, 2020), https://www.theverge.com/2020/8/13/21366438/apple-fortnite-ios-app-store-violations-epic-payments.

Developers have also detailed that Apple attempts to lock in its fees by preventing apps from communicating with customers about alternatives. Under the App Store Guidelines, apps may not provide any information "that direct[s] customers to purchasing mechanisms other than in-app purchase."[2190] They also cannot communicate with iOS app customers about purchasing methods other than IAP.[2191]

In an interview with Subcommittee staff, one developer that offers a "freemium" app—a popular business model where the app is available for free but users can purchase upgrades—recalled that it sent an email to customers with iOS devices with information about how to upgrade to a paid subscription, including a link to the service's website where customers could upgrade their subscription. Apple responded by threatening to remove the app from the App Store and blocked its updates, including security patches.[2192] A game developer described Apple's rules as reaching outside the App Store itself to police the communications that an app can have with its own customers, including communications intended to improve customer experience and offer discounts.[2193]

In his questions for the record for the Subcommittee's second hearing, Representative W. Gregory Steube (R-FL) asked Apple about banning communications to customers by app providers. Apple responded that its restrictions on communications between apps and customers are to ensure Apple can collect commissions and "prevent free-riding."[2194] Apple explained that it restricts developers from using the iOS ecosystem to "direct customers they have acquired through Apple to purchase content elsewhere for the purpose of avoiding Apple's rightful commission."[2195] The company described its policy as a prohibition "on developers promoting, via the App Store, transactions outside the App Store," and said Apple's policies were no different than most other retailers.[2196]

In June 2020, the European Commission announced that it had opened a formal antitrust investigation of Apple's App Store rules and conduct, including "the mandatory use of Apple's own

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[2190] *App Store Developer Guidelines 3.1.1: In-App Purchase*, APPLE, https://developer.apple.com/app-store/review/guidelines/#in-app-purchase (last visited Sept. 27, 2020).

[2191] *Apple, App Store Developer Guidelines 3.1.3: Other Purchase Methods*, APPLE, https://developer.apple.com/app-store/review/guidelines/#other-purchase-methods (last visited Sept. 27, 2020).

[2192] Submission from ProtonMail, to H. Comm. on the Judiciary, 5 (Aug. 22, 2020) (on file with Comm.).

[2193] Interview with Source 143 (Aug. 27, 2020).

[2194] Innovation and Entrepreneurship Hearing at 2 (response to Questions for the Record of Kyle Andeer, Vice Pres., Corp. Law, Apple Inc.).

[2195] *Id.* at 1.

[2196] *Id*. at 1–2.

proprietary in-app purchase system and restrictions on the availability of developers to inform iPhone and iPad users of alternative cheaper purchasing possibilities outside of apps."[2197]

As Apple has emphasized growing its Services business, app developers and technology writers have observed Apple is increasingly insistent that apps implement IAP—cutting Apple in on revenue from more developers—and threatening apps that do not comply with expulsion from the App Store.[2198] In June 2020, HEY, an email app developed by Basecamp, was approved by the App Store and then abruptly told it would have to implement Apple in-app purchasing or face removal from the platform.[2199] While HEY's app updates were eventually allowed, Apple did force it to create a free trial option for iOS customers.[2200] Basecamp Cofounder and CTO David Heinemeier Hansson observed that Apple threatened and abused small app developers for years, and that the conflict with HEY amounted to a "shakedown."[2201] In August 2020, Apple denied WordPress the ability to update its app unless it implemented IAP, even though the WordPress app does not sell anything. Apple ultimately backed off its demands only after the issue received negative attention on social media.[2202] ProtonMail told the Subcommittee that its privacy-focused email app competes with an Apple's email app, and after being in the App Store for two years, Apple demanded the ProtonMail implement IAP or be removed from the App Store. ProtonMail complied to avoid damage to its business.[2203]

Internal Apple communications reviewed by Subcommittee staff indicate that Apple has leveraged its power over the App Store to require developers to implement IAP or risk being thrown

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[2197] Press Release, Eur. Comm'n, Antitrust: Commission opens investigations into Apple's App Store rules (June 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1073.

[2198] *See e.g.*, Jeremy Howitz, *Apple's antitrust woes stem from its obsessions with control and money*, VENTURE BEAT (Aug. 7, 2020), https://venturebeat.com/2020/08/07/apples-antitrust-woes-stem-from-its-obsessions-with-control-and-money/ ("Apple might act like it's too large to care about money, but the company has recently sniped at developers who have succeeded on iOS without paying Apple anything, while doing as much as possible to push other developers — and users — into coughing up recurring subscription fees for both apps and games.").

[2199] *See e.g.*, Nilay Patel, *Apple approves Hey email app, but the fight's not over*, THE VERGE (June 22, 2020), https://www.theverge.com/2020/6/22/21298552/apple-hey-email-app-approval-rules-basecamp-launch; Rob Pegoraro, *Apple To Basecamp's Hey: Expect to Pay Us If You Want To Sell Privacy*, FORBES (June 17, 2020), https://www.forbes.com/sites/robpegoraro/2020/06/17/apple-to-basecamps-hey-expect-to-pay-us-if-you-want-to-sell-privacy/.

[2200] Chaim Gartenberg, *Hey opens its email service to everyone as Apple approves its app for good*, THE VERGE (June 25, 2020), https://www.theverge.com/2020/6/25/21302931/hey-email-service-public-launch-apple-approves-app-fight-policy-price.

[2201] *Apple v. Hey*, HEY, https://hey.com/apple/ (last visited Sept. 27, 2020).

[2202] *See* Sean Hollister, *WordPress founder claims Apple cut off updates to his completely free app because it wants 30 percent*, THE VERGE (Aug. 21, 2020), https://www.theverge.com/2020/8/21/21396316/apple-wordpress-in-app-purchase-tax-update-store; Sean Hollister, *Apple apologizes to WordPress, won't force the free app to add purchases after all*, THE VERGE (Aug. 23, 2020), https://www.theverge.com/2020/8/22/21397424/apple-wordpress-apology-iap-free-ios-app.

[2203] Submission from ProtonMail, to H. Comm. on the Judiciary, 5 (Aug. 22, 2020) (on file with Comm.).

out of the App Store.[2204] Then-Apple CEO Steve Jobs once explained, "there will be some roadkill because of it. I don't feel guilty" when confronted with developer complaints about Apple's commission and requirement to use IAP.[2205] The Netherlands Authority for Consumers and Markets has noted that some app developers attribute Apple's inconsistent application of its rules to inattention to apps that are infrequently updated, and that Apple likely focuses on requiring IAP for high revenue-generating apps.[2206]

In response to the COVID-19 pandemic, some businesses moved physical events online, often booking through an app and holding the event through a video chat application. Educators have also shifted resources online, including through apps. *The New York Times* reported that Apple demanded a 30% commission from these virtual class offerings. As a result, one company stopped offering virtual classes to users of its iOS app. The *Times* reported that Apple threatened Airbnb that it would remove its app from the App Store if Airbnb did not comply with Apple's demand for a share of its revenues.[2207]

In interviews with Subcommittee staff, multiple app developers confirmed *The New York Times*' reporting.[2208] Airbnb spoke with Subcommittee staff and described conversations with the App Store team in which Apple said it had observed an uptick in the number of apps offering virtual classes in lieu of in-person classes due to the COVID-19 pandemic. As a result, Apple began canvassing the App Store to require app developers implement IAP, entitling Apple to take 30% of in-app sales. Airbnb explained that Apple's commission, plus compliance with Apple's pricing tiers for in-app purchases would ultimately result in a 50-60% price increase for consumers.[2209]

Technology industry observers have reported similar conduct. On June 17, 2020, Ben Thompson, a prominent business analyst, wrote that app developers told him that Apple was demanding 30% commissions from businesses that have had to change their business models from live, in-person events to virtual events as a result of the COVID-19 pandemic. Mr. Thompson quoted one developer who explained that Apple was taking advantage of small businesses in the midst of the ongoing public health crisis.[2210]

[2204] *See* Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-014701–02 (Nov. 23, 2010) (on file with Comm.).

[2205] Patrick McGee & Javier Espinoza, *Apple conflict with developers escalates ahead of worldwide conference*, FIN. TIMES (June 22, 2020) https://www.ft.com/content/733ae8d4-e516-4418-9998-30414c368c6f.

[2206] *See* Neth. Auth. for Consumers & Mkts. at 89, 92–93.

[2207] Jack Nicas & David McCabe, *Their Business Went Virtual. Then Apple Wanted a Cut.*, N.Y. TIMES (July 28, 2020), https://www.nytimes.com/2020/07/28/technology/apple-app-store-airbnb-classpass.html.

[2208] *See e.g.*, Interview with Airbnb; Interview with Source 147 (Sept. 10, 2020).

[2209] *See* Interviews with Airbnb.

[2210] *See* Ben Thompson, *Xscale and ARM in the Cloud, Hey Versus Apple, Apple's IAP Campaign*, STRATECHERY (June 17, 2020), https://stratechery.com/2020/xscale-and-arm-in-the-cloud-hey-versus-apple-apples-iap-campaign/.

At the Subcommittee's sixth hearing, Chairman Jerrold Nadler (D-NY) asked Mr. Cook about the allegations that Apple was canvassing the App Store to extract commissions from businesses that have been forced to change their business model in order to survive during the pandemic. Mr. Cook responded that Apple "would never take advantage" of the pandemic, but justified the conduct, explaining that the app developers were now offering what Apple defined as a "digital service" and Apple was entitled to commissions.[2211] Responding to *The New York Times'* reporting on the matter, Apple defended its conduct, explaining that "[t]o ensure every developer can create and grow a successful business, Apple maintains a clear, consistent set of guidelines that apply equally to everyone."[2212]

App developers affected by these changes said that after Apple's conduct became public it created an exception to its policies until the end of 2020. However, on January 1, 2021, those businesses will be required to implement IAP or remove the ability to book virtual classes in their apps.[2213]

Developers have submitted evidence that Apple's commissions and fees, combined with the lack of competitive alternatives to the App Store and IAP, harm competition and consumers. For instance, Match Group called Apple's fee for IAP "unreasonable," saying that it leads to higher prices for consumers and "an inferior user experience and a reduction of innovation."[2214]

One developer that offers an app that directly competes with Apple told the Subcommittee it was forced to raise prices to pay Apple's commission. As a result, it was less competitive, and fewer iOS users purchased its service. The company said that because apps often have small margins, they cannot absorb Apple's fees, so the price consumers pay for its app is more than 25% higher than it would otherwise be.[2215] Small developers described Apple's 30% cut as "onerous."[2216] Epic Games, which recently filed an antitrust complaint against Apple, has told a federal court that Apple's fees and commissions force developers "to increase the prices they charge in order to pay Apple's app tax. There is no method app developers can use to avoid this tax."[2217] Mac and iOS app developer Brent

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2211 CEO Hearing Transcript at 156 (statement of Tim Cook, CEO, Apple Inc.)

2212 Jack Nicas & David McCabe, *Their Business Went Virtual. Then Apple Wanted a Cut.*, N.Y. TIMES (July 28, 2020), https://www.nytimes.com/2020/07/28/technology/apple-app-store-airbnb-classpass.html.

2213 Interview with Airbnb (Aug. 31, 2020).

2214 Submission by Match Group, to H. Comm. on the Judiciary, MATCH_GRP_00000236, MATCH_GRP_00000238 (Oct. 23, 2019) (on file with Comm.).

2215 Submission from ProtonMail, to H. Comm. on the Judiciary, 6 (Aug. 22, 2020) (on file with Comm.); *see also* Neth. Auth. for Consumers & Mkts. Study at 91.

2216 Interview with Source 143 (Aug. 27, 2020).

2217 Complaint at 3, Epic Games, Inc. v. Apple Inc., 4:20-cv-05640 (N.D. Cal., Aug. 13, 2020), https://cdn2.unrealengine.com/apple-complaint-734589783.pdf.

Simmons explained Apple's fees reduce innovation and lead to fewer apps in the marketplace, observing:

> [T]he more money Apple takes from developers, the fewer resources developers have. When developers have to cut costs, they stop updating apps, skimp on customer support, put off hiring a graphic designer, etc. They decide not to make apps at all that they might have made were it easier to be profitable.[2218]

In Apple's internal documents and communications, the company's senior executives previously acknowledged that the IAP requirement would stifle competition and limit the apps available to Apple's customers. For example, in an email conversation with other senior leaders at Apple about whether to require IAP for e-Book purchases, then-CEO Steve Jobs concluded, "I think this is all pretty simple—iBooks is going to be the only bookstore on iOS devices. We need to hold our heads high. One can read books bought elsewhere, just not buy/rent/subscribe from iOS without paying us, which we acknowledge is prohibitive for many things."[2219]

International competition authorities have also examined the competitive effects of Apple's App Store commissions and fees. The Australian Competition and Consumer Commission (ACCC) observed that Apple's control over app distribution on iOS devices gives it leverage to extract commissions from apps, reducing the revenue that app providers like media businesses can invest in content.[2220] The Netherlands Authority for Consumers and Markets, which completed a comprehensive study of mobile app stores in 2019, noted that developers have increased prices to account for commissions and fees.[2221] The study also remarked that Apple's 30% commission on in-app purchases may distort competition because Apple's requirement to use IAP often applies to apps competing directly against Apple's apps. As a result, app developers with small margins cannot simply absorb the cost of Apple's commission, so they increase their price, which gives Apple's competing service an advantage.[2222] Developers cited in the study "mentioned that it is highly unlikely that it is a coincidence that these digital services that are required to use IAP face competition from Apple's own apps, or possibly will do in the future."[2223]

[2218] Brent Simmons, *I Got Teed Off and Went on a Long Rant About This Opinion Piece on the App Store,* INESSENTIAL (July 28, 2020), https://inessential.com/2020/07/28/untrue.

[2219] Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-014816–18 (Feb. 6, 2011) (on file with Comm.).

[2220] *See* Austl. Competition & Consumer Comm'n at 223, 225 (2019); *see also* Ben Thompson, *Antitrust, the App Store, and Apple*, STRATECHERY (Nov. 27, 2018), https://www.stratechery.com/2018/antitrust-the-app-store-and-apple ("Apple makes a huge amount of money, with massive profit margins, by virtue of its monopolistic control of the App Store. It doesn't make the games or the productivity applications or the digital content, it simply skims off 30%, and not because its purchasing experience is better, but because it is the only choice.").

[2221] Neth. Auth. for Consumers & Mkts. Study at 91.

[2222] *See id*. at 7.

[2223] *Id*. at 89.

ii. Pre-Installed Apps, Default Settings, Private App Programming Interfaces (APIs), and Device Functionality

In addition to investigating whether Apple abuses its monopoly power over app distribution to leverage high commissions and fees from app developers, the Subcommittee also examined whether Apple abuses its role as the owner of iOS and the App Store to preference its own apps or harm rivals. The Committee requested information regarding Apple's practice of locking-in Apple's apps as defaults on the iPhone, and Subcommittee Chairman David N. Cicilline (D-RI) requested information from Apple regarding its practice of pre-installing its own apps on the iPhone. Subcommittee Chairman Cicilline also asked whether Apple's policy of reserving certain application programming interfaces (APIs) and access to certain device functionalities for its apps gives Apple's services a competitive advantage.

It is widely understood that consumers usually do not change default options.[2224] This is the case "even if they can freely change them or choose a competitive alternative."[2225] Subcommittee staff reviewed communications between Apple employees that demonstrate an internal understanding that pre-loading apps could be advantageous when competing against third-party apps.[2226]

Apple pre-installs about 40 Apple apps into current iPhone models.[2227] Several of these apps are set as defaults and are "operating system apps" that are "integrated into the phone's core operating system and part of the combined experience of iOS and iPhone."[2228] According to Apple, users can delete most of these pre-installed apps.[2229] Apple does not pre-install any third-party apps, and until the September 2020 release of iOS 14, it did not allow consumers to select third-party web browsers or email apps as defaults.[2230] Apple says that it is making "more than 250,000 APIs available to developers in iOS 14."[2231]

[2224] *See e.g.,* Dig. Competition Expert Panel Report at 36 ("[C]onsumers in digital markets display strong preferences for default options and loyalty to brands they know."); Stigler Report at 8, 41 ("Consumers do not replace the default apps on their phones… and take other actions that may look like poor decisions if those consumers like to choose among options and experience competition.").

[2225] JOHN BERGMAYER, PUBLIC KNOWLEDGE, TENDING THE GARDEN: HOW TO ENSURE THAT APP STORES PUT USERS FIRST 19 (2020), https://www.publicknowledge.org/wp-content/uploads/2020/06/Tending_the_Garden.pdf.

[2226] *See* Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-011035–36 (Mar. 12, 2019) (on file with Comm.) (noting that Apple pre-loading software products on to iOS devices "would clearly be even more problematic" than "Apple releasing its apps via the App Store").

[2227] CEO Hearing Transcript at 1 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

[2228] *Id.* at 2.

[2229] *Id.*

[2230] *Id*. *See also* Press Release, Apple, Apple reveals new developer technologies to foster the next generation of apps (June 22, 2020), https://www.apple.com/newsroom/2020/06/apple-reveals-new-developer-technologies-to-foster-the-next-generation-of-apps/ ("Email and browser app developers can offer their apps as default options, selectable by users.").

[2231] CEO Hearing Transcript at 3 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

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The Netherlands Authority for Consumers and Markets report on mobile app stores observed that app providers believe they "have a strong disadvantage" when competing with Apple's apps due to the fact that those services are often pre-installed on iOS devices.[2232] The study also noted that "pre-installation of apps can create a so-called status-quo bias. Consumers are more likely to use the apps that are pre-installed on their smartphones."[2233] Consumers will download apps that compete with pre-installed apps only when there is a noted quality difference, and even then, lower-quality pre-installed apps will still enjoy an advantage over third-party apps.[2234] The European Commission's 2019 report on competition in digital markets explained that privileging access to APIs can provide an advantage to those with greater access over those with more innovative products.[2235] Public Knowledge concluded that Apple's control of iOS and the App store enables it to advantage its own apps and services by pre-installing them on iOS devices, leading consumers to rely on the pre-installed apps rather than looking for alternatives in the App Store.[2236]

Mobile operating system providers develop APIs to permit apps to access a device's features, such as the microphone, camera, or GPS, or other software programs, and determine what information on the device apps can access.[2237] Public APIs for iOS are made available to app developers to ensure apps are integrated with the device and function as intended. These public APIs also control the services that are opened via default when users click a link to open a webpage or an address to open a map application. Private APIs access functionality that is not publicly released. Apple is permitted to use private APIs on iOS devices, but third-party developers are not.[2238]

Apple's public APIs default to Apple's pre-installed applications. As a result, when an iPhone user clicks on a link, the webpage opens in the Safari Browser, a song request opens in Apple Music, and clicking on an address launches Apple Maps.[2239] With some recent exceptions, iPhone users are

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[2232] Neth. Auth. for Consumers & Mkts. Study at 5, 15, 85–86.

[2233] *Id*. at 84 (citing Press Release, Eur. Comm'n, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/ip_18_4581).

[2234] *Id.*

[2235] Eur. Comm'n Competition Report at 34.

[2236] JOHN BERGMAYER, PUBLIC KNOWLEDGE, TENDING THE GARDEN: HOW TO ENSURE THAT APP STORES PUT USERS FIRST 20 (2020), https://www.publicknowledge.org/wp-content/uploads/2020/06/Tending_the_Garden.pdf. *See also* DIG. COMPETITION EXPERT PANEL, PUBLIC RESPONSES TO CALL FOR EVIDENCE FROM ORGANISATIONS, RESPONSE OF BRITISH BROAD. CORP. 44 (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785549/DCEP_Public_responses_to_call_for_evidence_from_organisations.pdf ("Apple's control of devices and operating system allows it to pre-load and favour its own services i.e. Apple Podcasts.").

[2237] Competition & Mkts. Auth. Report at 42; Neth. Auth. for Consumers & Mkts. Study at 59.

[2238] *See* Thomas Claburn, *Apple Frees a Few Private API, Makes them Public*, THE REGISTER (June 13, 2017), https://www.theregister.com/2017/06/13/apple_inches_toward_openness/.

[2239] Neth. Auth. for Consumers & Mkts. Study at 59–60.

unable to change this default setting.[2240] However, they are able to send app-specific links from inside many popular apps. For example, a person can share a link to a song in a third-party music streaming app such that it would open that song in the same app if it is already downloaded on the recipient's smartphone. One app developer has argued, however, that Apple uses its control over iOS to give its own apps and services advantages that are not available to competitors. For example, the developer explained that for years it was barred from integrating with Siri, Apple's intelligent virtual assistant that is built into Apple devices. Although Siri can now integrate with the app, users must explicitly request that Siri launch the third-party app. Otherwise, it will default to launch Apple's service.[2241]

Like setting advantageous defaults and pre-installing its own apps, Apple is also able to preference its own services by reserving access to APIs and certain device functionalities for itself. ACM and technology reporters have both noted that "private APIs have the potential to give Apple apps a competitive advantage," and that "Apple has for a long time favored its own services through APIs."[2242] For example, from the release of iOS 4.3 until iOS 8, "third-party developers had to rely on the UIWebView API to render web pages in iOS apps, while Apple gave its own apps access to a private, faster API," and as a result, "Google's mobile version of Chrome for iOS could not compete with Apple's mobile version of Safari in terms of speed."[2243]

Apple's mobile payments service, Apple Pay, is an example of an in-house app that enjoys an advantage due to its ability to access certain functionalities, such as near-field communication (NFC), on the iPhone that are off-limits to third-party apps. According to Apple, "NFC is an industry-standard, contactless technology" that enables communications between the mobile device and payment terminal.[2244] Apple Pay uses the iPhone's NFC chip to allows users to make contactless payments at retail outlets that use the technology.[2245] However, Apple blocks access for third-party apps. In June 2020, the European Commission opened a formal antitrust investigation into Apple's conduct in the mobile payments market, including "Apple's limitation of access to the Near Field Communication . . . functionality ('tap and go') on iPhones for payments in stores."[2246] In response to questions from

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2240 *See* Press Release, Apple, *Apple Reveals New Developer Technologies to Foster the Next Generation of Apps* (June 22, 2020), https://www.apple.com/newsroom/2020/06/apple-reveals-new-developer-technologies-to-foster-the-next-generation-of-apps/ ("Email and browser app developers can offer their apps as default options, selectable by users.").

2241 Submission from Source 711, to H. Comm. on the Judiciary, Source 711-00000080 at 23 (Oct. 15, 2019) (on file with Comm.).

2242 Thomas Claburn, *Apple Frees a Few Private API, Makes them Public*, THE REGISTER (June 13, 2017), https://www.theregister.com/2017/06/13/apple_inches_toward_openness/; *see also* Neth. Auth. for Consumers & Mkts. Study at 82.

2243 Thomas Claburn, *Apple Frees a Few Private API, Makes them Public*, THE REGISTER (June 13, 2017), https://www.theregister.com/2017/06/13/apple_inches_toward_openness/.

2244 *Apple Pay Security and Privacy Overview*, APPLE, https://support.apple.com/en-us/HT203027 (last visited Oct. 4, 2020).

2245 *Id.*

2246 Press Release, Eur. Comm'n, Antitrust: Commission Opens Investigation into Apple Practices Regarding Apple Pay (June 16, 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075.

Subcommittee Chairman David N. Cicilline (D-RI) and Representative Kelly Armstrong (D-ND) about Apple's treatment of third-party mobile payment apps and access to the iPhone's NFC chip, Apple said that it limits access to the NFC chip to protect the security of the iPhone and has detailed the differences between Apple's treatment of Apple Pay and third-party mobile payment apps.[2247]

The advantage Apple provides Apple Pay may be heightened during the COVID-19 pandemic. During the pandemic, consumers have accelerated their adoption of contactless payments, with more than half of global consumers preferring contactless payments over cash or traditional credit cards.[2248] In April 2020, MasterCard reported a 40% rise in contactless payments, with the trend expected to continue after the pandemic. MasterCard CEO Ajay Banga explained the trend was driven by shoppers "looking for a quick way to get in and out of stores without exchanging cash, touching terminals, or anything else."[2249]Apple itself has capitalized on the perception that contactless is the safest way to make transactions, marketing Apple Pay as "a safer way to pay that helps you avoid touching buttons or exchanging cash."[2250]

Like Apple Pay, Safari is another pre-installed app that enjoys advantages over rivals. Safari is Apple's default browser on iOS and Mac devices. When someone using an Apple device clicks on a website link, the webpage opens in the Safari browser.[2251] Until the September 2020 release of iOS 14, Apple did not allow consumers to select a third-party web browser as a default.[2252] This was unique to iOS. Other mobile device operating systems allow the user to set a default browser across all applications.[2253]

2247 CEO Hearing Transcript at 1, 3 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

2248 *See* DYNATA, GLOBAL CONSUMER TRENDS: COVID-19 EDITION, THE NEW NORMAL, A BREAKTHROUGH FOR CONTACTLESS PAYMENTS 2 (2020), http://info.dynata.com/rs/105-ZDT-791/images/Dynata-Global-Consumer-Trends-COVID-19-The-New-Normal-Breakthrough-for-Contactless-Payments.pdf; *see also* Press Release, Eur. Comm'n, Antitrust: Commission Opens Investigation into Apple Practices Regarding Apple Pay (June 16, 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1075 ("Executive Vice-President Margrethe Vestager, in charge of competition policy, said: 'Mobile payment solutions are rapidly gaining acceptance among users of mobile devices, facilitating payments both online and in physical stores. This growth is accelerated by the coronavirus crisis, with increasing online payments and contactless payments in stores.'").

2249 Kate Rooney, *Contactless payments jump 40% as shoppers fear germs on cash and credit cards, Mastercard says*, CNBC (Apr. 29, 2020) https://www.cnbc.com/2020/04/29/mastercard-sees-40percent-jump-in-contactless-payments-due-to-coronavirus.html.

2250 *Apple Pay*, APPLE, https://www.apple.com/apple-pay/ (last visited Sept. 26, 2020).

2251 Neth. Auth. for Consumers & Mkts. Study at 59–60.

2252 *See* Mark Gurman, *Apple's Default iPhone Apps Give It Growing Edge Over App Store Rivals*, BLOOMBERG (Oct. 2, 2019), https://www.bloomberg.com/news/articles/2019-10-02/iphone-ios-users-can-t-change-default-apps-safari-mail-music; Press Release, Apple, Apple reveals new developer technologies to foster the next generation of apps (June 22, 2020), https://www.apple.com/newsroom/2020/06/apple-reveals-new-developer-technologies-to-foster-the-next-generation-of-apps/ ("Email and browser app developers can offer their apps as default options, selectable by users.").

2253 *See e.g.*, *Google Chrome Help*, GOOGLE https://support.google.com/chrome/answer/95417?co=GENIE.Platform%3DAndroid&hl=en-GB (last visited Sept. 26, 2020); *Support*, MOZILLA, https://support.mozilla.org/en-US/kb/make-firefox-default-browser-android (last visited Sept.

Apple's policies require alternative browsers apps for iOS (iPhone) to use Apple's WebKit browser engine. As a result, all competing web browser companies must rebuild their product to make it available for iOS users.[2254] Additionally, browser engines are used in other applications that link to web content, such as email applications.[2255] Market participants explained to Subcommittee staff that these guidelines cost significant internal resources and create a hurdle for market entry on iOS. These requirements also make alternative browsers on iOS less technically distinct from Safari, limiting product differentiation.[2256] Further, market participants expressed concern that because Apple mandates the use of WebKit, as opposed to allowing options for developers, WebKit has become slower to innovate and adopt standards.[2257]

At the Subcommittee's second hearing, Chairman David N. Cicilline (D-RI) asked Apple about its policies related to web browser engines. Apple responded, "By requiring use of WebKit, Apple can provide security updates to all our users quickly and accurately, no matter which browser they decide to download from the App Store."[2258] While market participants agree that Apple's WebKit mandates would allow for easier updates to browser apps, there is disagreement about whether WebKit is measurably less secure than other browser engines.[2259]

The Netherlands Authority for Consumers and Markets has noted app providers have limited access to some APIs "that are essential for the functioning of apps. In certain cases, these functionalities are, however, used by Apple for their own apps,"[2260] which may limit competitive alternatives to Apple's products and services.[2261]

26, 2020); *Support*, MICROSOFT, https://support.microsoft.com/en-us/help/4028606/windows-10-change-your-default-browser (last visited Sept. 26, 2020).

[2254] *App Store Review Guidelines 2.5.6*, APPLE: DEVELOPER, https://developer.apple.com/app-store/review/guidelines/#software-requirements (last visited Sept. 26, 2020) ("Apps that browse the web must use the appropriate WebKit framework and WebKit Javascript.").

[2255] *See* Michael Krasnov, *Browser Engine Diversity or Internet of Google*, EVERDAY.CODES (Dec. 15 2019), https://everyday.codes/google/browser-engine-diversity-or-internet-of-google/.

[2256] Interview with Source 269 (July 23, 2019) ("Apple prohibits competitors from deploying their own web browsing engines on its mobile operating system. Web browsing engines provide the distinctive features of a web browser. Apple forces competitors to base their web browsers on a reduced version of its own web browser engine, 'WebKit'.").

[2257] *See* Owen Williams, *Apple is Trying to Kill Web Technology*, ONEZERO (Nov. 7, 2019), https://onezero.medium.com/apple-is-trying-to-kill-web-technology-a274237c174d.

[2258] Innovation and Entrepreneurship Hearing at 2 (response to Questions for the Record of Kyle Andeer, Vice Pres., Corp. Law, Apple Inc.).

[2259] *See* Andy Greenberg, *How Safari and iMessage Have Made iPhones Less Secure*, WIRED (Sept. 9, 2019), https://www.wired.com/story/ios-security-imessage-safari/.

[2260] Neth. Auth. for Consumers & Mkts. Study at 85–86.

[2261] *Id.* at 103.

In January 2020, Kirsten Daru, Chief Privacy Officer and General Counsel of Tile, offered testimony to Subcommittee about this dynamic.[2262] Tile is a company that makes hardware and software that helps people find lost items. [2263] Ms. Daru testified that for years Tile successfully collaborated with Apple. However, in 2019 reports surfaced that Apple planned a launch a hardware product to compete with Tile.[2264] Ms. Daru said that Apple's 2019 release of iOS 13 harmed Tile's service and user experience while simultaneously introducing a new pre-installed Apple finder app called Find My.[2265] Changes to iOS 13 made it more difficult for Tile's customers to set up the service, requiring several confusing steps to grant Tile permission to track the phone's location.[2266] Meanwhile, Apple's Find My app was pre-installed on iOS devices and activated by default during iOS installation. Users are unable to opt out of Find My's location tracking "unless they go deep into Apple's labyrinthine menu of settings."[2267] Tile's response to the Subcommittee's Questions for the Record included detailed location permission flow comparisons between Tile and Find My.[2268] Tile explained that as a result of Apple's changes to iOS 13, it saw significant decreases in users and a steep drop-off in users enabling the proper settings on iOS devices.[2269]

A group of app developers wrote to Apple CEO Tim Cook in 2019 arguing that Apple's new location notification permission policies will hurt their businesses and accused Apple of acting anticompetitively by was treating its own services differently:

> The developers conclude their email by asserting that Apple's own apps don't have to jump through similar hoops to get access to user location. An Apple app called Find My for tracking the location of other iPhone users, for example, bypasses the locating tracking requests that apps from outside developers must go through, the email reads.

[2262] *See* Competitors Hearing (statement of Kirsten Daru, Chief Privacy Officer & Gen. Counsel, Tile, Inc.).

[2263] *Id.* at 1.

[2264] *See* Guilherme Rambo, *Apple revamping Find My Friends & Find My iPhone in unified app, developing Tile-like personal item tracking*, 9TO5MAC (Apr. 17, 2019), https://9to5mac.com/2019/04/17/find-my-iphone-revamp/.

[2265] Competitors Hearing at 2 (statement of Kirsten Daru, Chief Privacy Officer & Gen. Counsel, Tile, Inc.).

[2266] *Id.*

[2267] Reed Albergotti, *Apple says recent changes to operating system improve user privacy, but some lawmakers see them as an effort to edge out its rivals*, WASH. POST (Nov. 26, 2019), https://www.washingtonpost.com/technology/2019/11/26/apple-emphasizes-user-privacy-lawmakers-see-it-an-effort-edge-out-its-rivals/; *see also* Competitors Hearing at 3 (statement of Kirsten Daru, Chief Privacy Officer & Gen. Counsel, Tile, Inc.).

[2268] Competitors Hearing at 4–14 (response to Questions for the Record of Kirsten Daru, Chief Privacy Officer & Gen. Counsel, Tile, Inc.).

[2269] Competitors Hearing at 6 (response to Questions for the Record of Kirsten Daru, Chief Privacy Officer & Gen. Counsel, Tile, Inc.); Interview with Kirsten Daru, Vice Pres. & Gen. Counsel, Tile, Inc. (July 10, 2020).

Instead, Find My gains location access through a process that occurs as users install the new operating system.[2270]

The app developers—including Tile, Arity, Life360, Happn, Zenly, Zendrive, and Twenty—explained that this gives Apple products that compete against their apps an advantage. "Apple says Find My and other apps are built into iOS and that it doesn't see a need to make location-tracking requests from users for the apps after they install the operating system."[2271] Apple also differentiates Find My by pointing out that "'Find My' stores user location data *locally* on the user's iPhone, and Apple only transmits the location upon the user's request."[2272]

In response to the Subcommittee's questions after its second hearing, Apple explained that the iOS 13 changes give users more control over background location tracking by apps. Apple also explained that turning on location tracking to Apple's Find My service was "essential" for users, and that the disparate treatment between Find My and Tile was due to the fact that data from Find My remains on the device, while Tile stores data externally.[2273] Additionally, during Apple's June 2020 World Wide Developers Conference, Apple announced that the Find My app would work with third-party finder hardware like Tile's.[2274] However, Apple's service would require companies like Tile to abandon their apps and the ability to differentiate their service from Apple's and other competitors.[2275] Apple's solution would continue to put Tile and other apps and hardware developers offering finder services at a competitive disadvantage.[2276]

[2270] Aaron Tilley, *Developers Call Apple Privacy Changes Anti-Competitive*, THE INFO. (Aug. 16, 2019), https://www.theinformation.com/articles/developers-call-apple-privacy-changes-anti-competitive.

[2271] *Id.*

[2272] Letter from Kyle Andeer, Vice Pres., Corp. Law & Chief Compliance Officer, Apple Inc., to Hon. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Hon. Doug Collins, Ranking Member, H. Comm on the Judiciary, Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary & Hon. F. James Sensenbrenner, Ranking Member, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (Feb. 17, 2020), https://docs.house.gov/meetings/JU/JU05/20200117/110386/HHRG-116-JU05-20200117-SD004.pdf.

[2273] *See id.* at 2.

[2274] *See* Ben Lovejoy, *Comment: This week's keynote quietly tackled five of Apple's antitrust issues*, 9TO5MAC (Jun. 24, 2020), https://9to5mac.com/2020/06/24/apples-antitrust-issues-2/.

[2275] *See* Interview with Kirsten Daru, Vice Pres. & Gen. Counsel, Tile, Inc. (July 10, 2020); APPLE, FIND MY NETWORK ACCESSORY SPECIFICATION, DEVELOPER PREVIEW: RELEASE R1 14 (2020), https://images.frandroid.com/wp-content/uploads/2020/06/Find_My_network_accessory_protocol_specification.pdf (prohibiting "an accessory that supports the Find My network accessory protocol" from "operat[ing] simultaneously on the Find My network and another finder network").

[2276] Interview with Kirsten Daru, Vice Pres. & Gen. Counsel, Tile, Inc. (Jun. 26, 2020). *See* Reed Albergotti, *Amid antitrust scrutiny, Apple makes quiet power moves over developers*, WASH. POST (July 24, 2020), https://www.washingtonpost.com/technology/2020/07/24/apple-find-my-competition/.

iii. App Search Rankings

In response to extensive reporting on the subject, Subcommittee staff has also examined the competitive effects of Apple's search rankings in its App Store. In 2019, the *Wall Street Journal* and *The New York Times* both conducted extensive investigations and reported that Apple appeared to be favoring its apps in the App Store search results.[2277] The *Wall Street Journal* explained that "Apple's mobile apps routinely appear first in search results ahead of competitors in its App Store, a powerful advantage that skirts some of the company's rules on search rankings."[2278] *The New York Times* reported that six years of analysis of App Store search rankings found Apple-owned apps ranked first for at least 700 common search terms. "Some searches produced as many as 14 Apple apps before showing results from rivals," although app developers could pay Apple to place ads at the top of the search results.[2279] Searches for the app titles of competing apps even resulted in Apple's apps ranked first.[2280]

Apple's apps "ranked first in more than 60% of basic searches, such as for 'maps'" and "Apple apps that generate revenue through subscriptions or sales, like Music or Books, showed up first in 95% of searches related to those apps."[2281] *The Wall Street Journal* noted that growing revenue from its apps is core to Apple's strategy of offsetting sluggish hardware sales by increasing revenue from its Services business.[2282]

Rival app developers slipped down the search rankings as Apple introduced new services in their product categories. For example, Spotify had long been the top search result for the query "music," but Apple Music quickly became the top search result shortly after it joined the App Store in June 2016. By the end of 2018, eight of Apple's apps appeared in the first eight search results for "music," and Spotify had fallen to the 23rd result. Similarly, Audiobooks.com was the top-ranked result for "audiobooks" for nearly two years but was overtaken by Apple Books shortly after Apple began marketing for Books. Audiobooks explained to *The Wall Street Journal* that losing the top search ranking to Apple "triggered a 25% decline in Audiobooks.com's daily app downloads."[2283]

[2277] *See* Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, WALL ST. J (July 23, 2019), https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221; Jack Nicas & Keith Collins, *How Apple's Apps Topped Rivals in the App Store it Controls*, N.Y. TIMES (Sept. 9, 2019), https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html.

[2278] Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, WALL ST. J (July 23, 2019), https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221.

[2279] Jack Nicas & Keith Collins, *How Apple's Apps Topped Rivals in the App Store it Controls*, N.Y. TIMES (Sept. 9, 2019), https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html.

[2280] Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, WALL ST. J (July 23, 2019), https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221.

[2281] *Id.*

[2282] *Id.*

[2283] *Id.*

Reporting on App Store search revealed that Apple may also advantage its apps by holding them to a different standard when they appear in the App Store search rankings. Apple told *The Wall Street Journal* "it uses 42 factors to determine where apps rank," and that the four most important factors are "downloads, ratings, relevance, and 'user behavior,'" with user behavior the most important factor because it measures how often users select and download an app.[2284] Approximately 40 of Apple's apps come preinstalled on iPhones. These apps do not have reviews and consumers cannot rate them. Mr. Cook explained at the Subcommittee sixth hearing that Apple's "apps that are integrated into the iPhone are not reviewable by users on the App Store."[2285] Apple has also said that its search algorithm works the same for all apps, including its own.[2286]

Despite the fact that Apple's pre-installed apps do not have ratings or reviews—factors that Apple says are most influential in determining app ranking—many of Apple's pre-installed apps "still tend to be ranked first, even when users search for exact titles of other apps."[2287] For example, Apple Books has no reviews or rankings and appears first in a search for "books," while competing apps have tens-of-thousands of customer reviews and ratings of 4.8 or 4.9 stars on Apple's five-star rating system.[2288] A search by Subcommittee staff of terms "music," "news," "TV," and "podcast" returned Apple Music, News, TV, and Podcasts as top-ranked search results, although those apps do not have any reviews or ranking.[2289]

Despite the lack of reviews or rankings, Apple told the *Wall Street Journal* that "the No. 1 position for Books in a 'books' search is reasonable, since it is an exact name match."[2290] Philip Schiller, Apple's Senior Vice President, Worldwide Marketing, who oversees the App Store, and Eddy Cue, Apple's Senior Vice President Internet and Software Services, said "there was nothing underhanded about the algorithm the company had built to display search results in the store,"[2291] and

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[2284] *Id.*

[2285] CEO Hearing Transcript at 2 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

[2286] *See* Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, WALL ST. J (July 23, 2019), https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221.

[2287] *Id.*

[2288] Search Results: "books," IOS APP STORE (Sept. 17, 2020).

[2289] Search Results: "music," "news," "TV," "podcast," IOS APP STORE (Sept. 17, 2020).

[2290] Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, WALL ST. J (July 23, 2019), https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221.

[2291] Jack Nicas & Keith Collins, *How Apple's Apps Topped Rivals in the App Store it Controls*, N.Y. TIMES (Sept. 9, 2019), https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html.

that Apple's apps tend to rank highly because they are popular and their generic names like Books and Music closely match common search terms.[2292]

It appears that Apple does not apply the same rule to third-party apps. Documents reviewed by Subcommittee staff show that Apple previously punished non-Apple apps that attempted to "cheat" the app store rankings. Apple determined that at least one third-party app had achieved its high search ranking because its name was a generic name that was also a common search term. Apple's employees determined it was cheating to give an app the name of a common search term.

In February 2018, Apple's App Store search team noted that an app named "Photo Editor—Stylo" was the top-ranked result when users searched the App Store for "photo editor."[2293] In an email thread with Philip Schiller, Apple's Senior Vice President, Worldwide Marketing, an Apple employee wrote that "[s]ince the app name matched a broad query term like 'photo editor' the developer was able to game the query with a direct name match."[2294] The Apple employee explained that "[t]he app has been added to the Search Penalty Box for rank demotion," and the action was labeled as complete.[2295] Additional action was slated to disable the initial boost that new apps are given in the app store if the app name is an "exact match to broad queries."[2296] Here, Apple punished an app for the same conduct it said justified Apple's position atop the App Store rankings.

Apple's position as the provider of iOS enables it to designate the App Store as the sole means for app developers to distribute software to iPhone users. Apple's public statements, including testimony by Mr. Cook that Apple's apps "go through the same rules" as more than 1.7 million third-party apps appear to be inconsistent with Apple's actual practices.[2297] In this case, Apple leveraged its control of iOS and the App Store to give its own apps preferential treatment, and applied a different set of rules than third-party apps, punishing them for the very conduct Apple engaged in. Subcommittee staff did not have access to additional evidence from Apple to determine how widespread this practice is within the company.

iv. Competitively Sensitive Information

In addition to investigating allegations Apple engages in self-preferencing in the App Store, the Committee sought information regarding whether Apple exploits third-party developers that rely on

[2292] *Id.*; *see also* Apple, *Apple: Distinctive Products with a Seamless, Integrated User Experience* 23 (July 13, 2020) (on file with Comm.) ("Because many of Apple's apps are named after generic topics (such as Music, Maps, and Podcasts), those apps benefit from functional queries that have essentially become navigational.").

[2293] Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-008082–86 (Feb. 9, 2018) (on file with Comm.).

[2294] *Id.*

[2295] *Id.*

[2296] *Id.*

[2297] CEO Hearing Transcript at 176 (statement of Tim Cook, CEO, Apple Inc.).

distribution in the App Store. Developers have alleged that Apple abuses its position as the provider of iOS and operator of the App Store to collect competitively sensitive information about popular apps and then build competing apps or integrate the popular app's functionality into iOS.[2298] The practice is known as "Sherlocking." The antitrust laws do not protect app developers from competition, and platforms should continue to innovate and improve their products and services. However, Sherlocking can be anticompetitive in some instances.[2299]

Some app developers have complained that Apple leverages its control of iOS and the App Store to glean business intelligence that enables it to better compete against third-party apps.[2300] For example, after a stress relief app called Breathe was Sherlocked in 2016, the app's developers said that Apple used third-party developers "as an R&D arm."[2301] *The Washington Post* reported on the phenomenon, explaining:

> Developers have come to accept that, without warning, Apple can make their work obsolete by announcing a new app or feature that uses or incorporates their ideas. Some apps have simply buckled under the pressure, in some cases shutting down. They generally don't sue Apple because of the difficulty and expense in fighting the tech giant—and the consequences they might face from being dependent on the platform.[2302]

At the Subcommittee's fifth hearing, Subcommittee Vice Chairman Joe Neguse (D-CO) asked Ms. Daru of Tile about how Apple used competitively sensitive information it collects as the owner of the iOS ecosystem to compete against third-party apps. She explained that as an operating system provider and App Store operator, Apple knows who Tile's customers are, the types of apps those customers preferred, and the demographics of iOS users that look at Tile's app or search for similar apps—information that would give Apple a competitive advantage against Tile.[2303] Ms. Daru testified

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[2298] *See e.g.*, Brian Heater, *The makers of Duet Display and Luna on life after Apple's Sidecar*, TECHCRUNCH (Jun. 7, 2019), https://techcrunch.com/2019/06/07/the-makers-of-duet-display-and-luna-on-life-after-apples-sidecar/.

[2299] *See* JOHN BERGMAYER, PUBLIC KNOWLEDGE, TENDING THE GARDEN: HOW TO ENSURE THAT APP STORES PUT USERS FIRST 21, 58 (2020), https://www.publicknowledge.org/wp-content/uploads/2020/06/Tending_the_Garden.pdf.

[2300] *See e.g.*, Reed Albergotti, *How Apple uses its App Store to copy the best ideas*, WASH POST (Sept. 5, 2019), https://www.washingtonpost.com/technology/2019/09/05/how-apple-uses-its-app-store-copy-best-ideas/. *See also* William Gallagher, *Developers talk about being 'Sherlocked' as Apple uses them 'for market research'*, APPLE INSIDER (Jun. 6, 2019), https://appleinsider.com/articles/19/06/06/developers-talk-about-being-sherlocked-as-apple-uses-them-for-market-research; John Patrick Pullen, *Why These People Are Upset About Apple's Latest Updates*, TIME (Jun. 21, 2016), https://time.com/4372515/apple-app-developers-wwdc-sherlock-sherlocked/; Adi Robertson, *Apple restores mail app after developer tries to rally 'Sherlocked' victims*, THE VERGE (Feb. 11, 2020), https://www.theverge.com/2020/2/11/21133023/apple-bluemail-blix-restored-mac-app-store-sherlocking-patent-lawsuit.

[2301] John Patrick Pullen, *Why These People Are Upset About Apple's Latest Updates*, TIME (Jun. 21, 2016), https://time.com/4372515/apple-app-developers-wwdc-sherlock-sherlocked/.

[2302] Reed Albergotti, *How Apple uses its App Store to copy the best ideas*, WASH POST. (Sept. 5, 2019), https://www.washingtonpost.com/technology/2019/09/05/how-apple-uses-its-app-store-copy-best-ideas/.

[2303] Competitors Hearing Transcript at 53 (statement of Kirsten Daru, Chief Privacy Officer & Gen. Counsel, Tile, Inc.).

that Apple had harmed Tile's service and user experience while simultaneously introducing a rival app and preparing to launch a rival hardware product.[2304] Blix, developer of email management app BlueMail, has sued Apple in federal court claimed Apple has engaged in Sherlocking and infringed the patents underlying BlueMail:

> Apple frequently takes other companies' innovative features, adds those ideas to Apple's own software products without permission, and then either ejects the original third-party application from the App Store (as it did with Blix's software) or causes the third-party software developer to close its doors entirely.[2305]

In response to the requests for information, Match Group told the Subcommittee that Apple has a history of "closely monitoring the success of apps in the App Store, only to copy the most successful of them and incorporate them in new iPhones" as a pre-installed app.[2306] Phillip Shoemaker, Apple's former Senior Director of App Store Review, similarly told Subcommittee staff that during his time at Apple, an app developer proposed an innovative way to wirelessly sync the iPhone and Mac.[2307] The app did not violate any of Apple's Guidelines, but it was rejected from the App Store nonetheless.[2308] Apple then appropriated the rejected app's feature for its own offerings.[2309]

During the Subcommittee's sixth hearing, Subcommittee Vice Chairman Joe Neguse (D-CO) asked Mr. Cook about Tile's testimony. In particular, he asked if Apple has access to the confidential information of app developers, and whether Apple's Developer Agreement explicitly authorizes Apple to use developers' information to build apps to compete against them.[2310] Mr. Cook's answer was non-responsive regarding allegations of Sherlocking. Instead, he said that Apple does not violate other companies' intellectual property rights.[2311]

[2304] *See* Competitors Hearing at 4 (statement of Kirsten Daru, Chief Privacy Officer & Gen. Counsel, Tile, Inc.); Guilherme Rambo, *Apple revamping Find My Friends & Find My iPhone in unified app, developing Tile-like personal item tracking*, 9TO5MAC (Apr. 17, 2019), https://9to5mac.com/2019/04/17/find-my-iphone-revamp/.

[2305] Amended Complaint at 4, Blix Inc. v. Apple Inc., No. 1:19-cv-1869-LPS (D. Del., Dec. 20, 2019).

[2306] Submission from Source 736, to H. Comm. on the Judiciary, Source 736_00000243 (Oct. 23, 2019) (on file with Comm.).

[2307] Interview with Phillip Shoemaker, former Senior Dir., App Store Review, Apple Inc. (Sept. 21, 2020).

[2308] *Id.*

[2309] *Id.*

[2310] CEO Hearing Transcript at 177 (question of Rep. Neguse (D-CO), Vice Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary).

[2311] *Id.* at 177–78 (statement of Tim Cook, CEO, Apple Inc.) ("[Apple] run[s] the App Store to help developers, not hurt them. We respect innovation. It's what our company was built on. We would never steal somebody's IP.").

In contrast, Apple co-founder and former CEO Steve Jobs once noted that "[w]e have always been shameless about stealing great ideas."[2312] The Apple Developer Agreement, which Apple requires every app developer to agree to, appears to warns developers that in exchange for access to the App Store, Apple is free to build apps that "perform the same or similar functions as, or otherwise compete with" apps in the App Store.[2313] Additionally, "Apple will be free to use any information, suggestions or recommendations you provide to Apple pursuant to this Agreement for any purpose, subject to any applicable patents or copyrights."[2314]

Mr. Cook's statement that Apple's apps play by the same rules as other apps appears contrary to Apple's stated policies. While the Apple Developer Agreement provides Apple the right to replicate third-party apps, Apple's Guidelines direct developers not to "copy another developer's work" and threaten removal of apps and expulsion from the Developer Program for those that do.[2315] Further, the Guidelines instruct developers to "[c]ome up with your own ideas" and admonishes them to not "simply copy the latest popular app on the App Store, or make some minor changes to another app's name or UI and pass it off as your own."[2316] Lastly, Apple differentiates between—rather than conflates or confuses—copycat apps and intellectual property infringement, which are both prohibited in the App Store.[2317]

v. Excluding Rival Apps

During the Subcommittee's sixth hearing, Representatives Val Demings (D-FL) and Lucy McBath (D-GA) asked questions regarding Apple's removal of parental control apps from the App Store in 2018 and 2019. In 2018, Apple announced its Screen Time app, a new feature bundled with iOS 12 that helped iOS users limit the time they and their children spent on the iPhone. Thereafter, Apple began to purge many of the leading rival parental control apps from the App Store. Apple explained the apps were removed because they used a technology called Mobile Device Management (MDM). MDM technology allowed parents to remotely take over their children's phones and block

[2312] Reed Albergotti, *How Apple uses its App Store to copy the best ideas*, WASH POST. (Sept. 5, 2019), https://www.washingtonpost.com/technology/2019/09/05/how-apple-uses-its-app-store-copy-best-ideas/.

[2313] *Apple Developer Agreement, Clause 11: Apple Independent Development*, APPLE: DEVELOPER, https://developer.apple.com/terms/apple-developer-agreement/Apple-Developer-Agreement-English.pdf (last visited Sept. 27, 2020).

[2314] *Id.*

[2315] *App Store Review Guidelines: Introduction*, APPLE: DEVELOPER, https://developer.apple.com/app-store/review/guidelines/ (last visited Sept. 27, 2020).

[2316] *App Store Review Guidelines 4.1: Copycats*, APPLE: DEVELOPER, https://developer.apple.com/app-store/review/guidelines/#copycats (last visited Sept. 27, 2020).

[2317] *App Store Review Guidelines 4.1: Copycats, 5.2: Intellectual Property*, APPLE: DEVELOPER, https://developer.apple.com/app-store/review/guidelines/ (last visited Sept. 27, 2020).

content. Apple noted that MDM could allow the app developer to access sensitive content on the device.[2318]

According to *The New York Times*, the parental control apps using MDM had been offered in the App Store for years, and hundreds of updates to those apps had been approved by Apple.[2319] As a result, many apps were forced to shut down,[2320] although some were given a reprieve.[2321] Two parental control apps filed a complaint with the European Commission, alleging Apple's App Store policies were anticompetitive. The complaint alleged that Apple purged competitors when it introduced Screen Time, pre-installed Screen Time on iOS 12 and activated it by default, and gave Screen Time access to iOS functionalities it denied to competing third-party apps.[2322]

Subcommittee staff reviewed emails from parents who contacted Apple to complain about the removal of one of the purged parental control apps.[2323] They said that Screen Time was a comparably worse option for consumers—and described it as "more complicated" and "less restrictive" than competitors.[2324] In emails to the company reviewed by Subcommittee staff, parents complained about Apple's monopoly power over app distribution on iOS and claimed that self-interest in promoting

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2318 *See* Jack Nicas, *Apple Cracks Down on Apps that Fight iPhone Addiction*, N.Y. TIMES (Apr. 27, 2019), https://www.nytimes.com/2019/04/27/technology/apple-screen-time-trackers.html. *See also* Sarah Perez, *Apple puts third-party screen time apps on notice*, TECHCRUNCH (Dec. 5, 2018), https://techcrunch.com/2018/12/05/apple-puts-third-party-screen-time-apps-on-notice/.

2319 Jack Nicas, *Apple Cracks Down on Apps that Fight iPhone Addiction*, N.Y. TIMES (Apr. 27, 2019), https://www.nytimes.com/2019/04/27/technology/apple-screen-time-trackers.html. *See also* Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-012255–59 (Apr. 28, 2019); HJC-APPLE-013251–53 (Apr. 28, 2019).

2320 *See e.g.*, Nick Kuh, *Mute App: Startup to Shutdown*, MEDIUM (Oct. 22, 2018), https://medium.com/@nick.kuh/mute-app-startup-to-shutdown-a1db01440c56; Georgie Powell, *In the Kill Zone – Update for Space on iOS*, SPACE (Nov. 6, 2018), https://findyourphonelifebalance.com/news/2018/11/6/in-the-kill-zone-an-update-for-space-on-ios; *Is Apple Systematically Destroying the Time Management Industry?*, KIDSLOX (Nov. 8, 2018), https://kidslox.com/blog/apple-destroying-screen-time-industry/; OurPact, *There Used to Be an App for That*, MEDIUM (May 1, 2019), https://medium.com/@ourpactapp/there-used-to-be-an-app-for-that-41344f61fb6f; Justin Payeur, *Letter to Users About Apple Parental Controls*, BOOMERANG (Jan. 31, 2020), https://useboomerang.com/2020/01/31/letter-users-apple-parental-controls/.

2321 *See* Nick Kuh, *Apple Called…*, MEDIUM (Oct. 27, 2018), https://medium.com/@nick.kuh/apple-called-a229d86ece30; Georgie Powell, *Space is Back! An Update on our Discussions with Apple.*, SPACE (Nov. 7, 2018), https://findyourphonelifebalance.com/news/2018/11/7/space-versus-apple.

2322 Press Release, Qustodio & Kidslox File a Complaint Against Apple with the European Commission over Abuse of Dominant Position, GLOBENEWSWIRE (Apr. 30, 2019), https://www.globenewswire.com/news-release/2019/04/30/1812192/0/en/Qustodio-Kidslox-File-a-Complaint-Against-Apple-with-the-European-Commission-over-Abuse-of-Dominant-Position.html#.

2323 *See e.g.*, Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-012242–43 (May 6, 2019) (on file with Comm.); HJC-APPLE-012245–46 (May 6, 2019); HJC-APPLE-012247–48 (June 5, 2019); HJC-APPLE-013220 (May 14, 2019); HJC-APPLE-013219 (May 5, 2019); HJC-APPLE-013251–53 (Apr. 28, 2019).

2324 Jack Nicas, *Apple Cracks Down on Apps That Fight iPhone Addiction*, N.Y. TIMES (Apr. 27, 2019), https://www.nytimes.com/2019/04/27/technology/apple-screen-time-trackers.html.

Screen Time motivated Apple's actions.[2325] In response, Apple's Senior Vice President, Worldwide Marketing, Phil Schiller, explained that Screen Time was "designed to help parents manage their children's access to technology."[2326] He added that Apple would "work with developers to offer many great apps on the App Store for these uses, using technologies that are safe and private for us and our children."[2327]

Internally, Apple's Vice President of Marketing Communications, Tor Myhren, stated,"[t]his is quite incriminating. Is it true?" in response to an email with a link to *The New York Times*' reporting.[2328] Apple's communications team asked CEO Tim Cook to approve a "narrative" that Apple's clear-out of Screen Time's rivals was "not about competition, this is about protecting kids [sic] privacy."[2329]

Developers of the purged apps also contacted Apple, outraged that they had been removed from the App Store while other apps that used MDM remained.[2330] One developer explained it had invested more than $200,000 building its parental control app, then another $30,000 to fix the problem Apple identified, only to be told that Apple would no longer support parental control apps in the App Store.[2331]

Although Apple claimed its conduct was motivated to protect privacy and not intended to clear out competitors to Screen Time, Apple reinstated many of the apps the same day that it was reported the Department of Justice was investigating Apple for potential antitrust violations. [2332] Apple's solution to address privacy concerns was to ask the apps to promise not to sell or disclose user data to third parties, which could have been achieved through less restrictive means and without removing those apps from the App Store.[2333]

[2325] *See e.g.*, Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-013210–11 (Apr. 27, 2019) (on file with Comm.); HJC-APPLE-013215 (May 17, 2019); HJC-APPLE-013216 (May 6, 2019); HJC-APPLE-013221–23 (Apr. 29, 2019); HJC-APPLE-013265–66 (Apr. 27, 2019).

[2326] *See e.g.*, *id.* at HJC-APPLE-013210–11 (Apr. 27, 2019) (on file with Comm.); HJC-APPLE-013217 (Apr. 27, 2019); HJC-APPLE-013221–23 (Apr. 29, 2019).

[2327] *Id.* at HJC-APPLE-013221–23 (Apr. 29, 2019).

[2328] *Id.* at HJC-APPLE-013175 (Apr. 27, 2019).

[2329] *Id.* at HJC-APPLE-012223 (June 2, 2019). *See also* CEO Hearing Transcript at 127 (statement of Tim Cook, CEO, Apple Inc.) ("It was that the use of technology called MDM, mobile device management, placed kids' data at risk, and so we were worried about the safety of kids."); CEO Hearing Transcript at 139 (statement of Tim Cook, CEO, Apple Inc.) ("We were concerned, Congresswoman, about the privacy and security of kids.").

[2330] *See, e.g.*, Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-012255–59 (Apr. 28, 2019) (on file with Comm.); HJC-APPLE-012275–79 (Jan. 17, 2019); HJC-APPLE-012286–87 (Jan. 17, 2019).

[2331] *Id.* at HJC-APPLE-012286–87 (Jan. 17, 2019) (on file with Comm.).

[2332] Jack Nicas, *Apple Cracks Down on Apps that Fight iPhone Addiction*, N.Y. TIMES (Apr. 27, 2019), https://www.nytimes.com/2019/04/27/technology/apple-screen-time-trackers.html.

[2333] *Id. See App Store Review Guidelines 5.5: Mobile Device Management*, APPLE, https://developer.apple.com/app-store/review/guidelines/#mobile-device-management (last visited Sept. 27, 2020).

Developers of parental control apps asked Apple to "release a public API granting developers access to the same functionalities that Apple's native 'Screen Time' uses."[2334] Eventually, Apple did grant some apps access to APIs,[2335] but only after rival app developers were accused of being a risk to children's privacy, removed from the App Store, and forced to incur significant costs.[2336] As one developer noted, Apple's new MDM privacy policies resulted in "really nothing much changing from the developer side as far as the technology goes."[2337]

Here, Apple's monopoly power over app distribution enabled it to exclude rivals to the benefit of Screen Time. Apple could have achieved its claimed objective—protecting user privacy—through less restrictive means, which it ultimately did only after significant outcry from the public and a prolonged period of harm to rivals.[2338] Apple's conduct here is a clear example of Apple's use of privacy as a sword to exclude rivals and a shield to insulate itself from charges of anticompetitive conduct.

Subcommittee staff learned that Apple has engaged in conduct to exclude rivals to benefit Apple's services in other instances. For example, Mr. Shoemaker explained that Apple's senior executives would find pretextual reasons to remove apps from the App Store, particularly when those apps competed with Apple services.[2339]

vi. Opaque Guidelines and Arbitrary Enforcement

At the Subcommittee's sixth hearing, Representative Henry C. "Hank" Johnson, Jr. (D-GA) asked Mr. Cook about how the App Store Developer Guidelines are interpreted and applied to developers in the App Store. Subcommittee Chairman David N. Cicilline (D-RI) requested similar information about the Guidelines as well, including how they have evolved and whether there are "unwritten rules" developers must comply with.

The Guidelines are the rules with which more than 20 million iOS app developers and more than 1.8 million apps in the App Store must comply to reach "hundreds of millions of people around

2334 SCREEN TIME API, https://screentimeapi.com/ (last visited Sept. 27, 2020).

2335 *See* Joe Rossignol, *Apple Reverses Course and Allows Parental Control Apps to Use MDM Technology With Stricter Privacy Requirements*, MACRUMORS (Jun. 4, 2019), https://www.macrumors.com/2019/06/04/apple-lets-parental-apps-use-mdm-strict-privacy/.

2336 *See, e.g.*, Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-012275–79 (Jan. 17, 2019) (on file with the Comm.); HJC-APPLE-013210–11 (Apr. 27, 2019).

2337 Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-012273–74 (June 4, 2019) (on file with Comm.).

2338 *See* Damien Geradin & Dimitrios Katsifis, *The Antitrust Case Against the Apple App Store* 55–56 (Apr. 22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583029.

2339 Interview with Phillip Shoemaker, former Senior Dir., App Store Review, Apple Inc. (Sept. 21, 2020).

the world."[2340] Apple notes that the App Store is "highly curated" and that "every app is reviewed by experts."[2341] The introductory section of the Guidelines warns that Apple can create new rules at any time, and explains "[w]e will reject apps for any content or behavior that we believe is over the line. What line, you ask? Well as a Supreme Court Justice once said, 'I'll know it when I see it.' And we think that you will also know it when you cross it."[2342]

App developers the Subcommittee spoke with expressed frustration with Apple's curation of the App Store. Cofounder and Chief Technology Officer of Basecamp, David Heinemeier Hansson, testified before the Subcommittee and explained:

> It's complete tyranny, and the rules are often interpreted differently by different reviewers because they're intentionally left vague. So we live in constant fear we may have violated these vague rules, and that the next update to our applications will be blocked by Apple. There are countless examples where developers large and small have been denied access to publish their applications without explanation for days or even weeks at a time. It's insufferable.[2343]

One social media platform expressed concern that Apple has absolute discretion about whether to approve apps or accept updates.[2344] Developers are frustrated that Apple's interpretation and enforcement of the Guidelines have changed over time, despite prior precedents and the fact developers rely on understanding the Guidelines to operate their businesses. One developer described Apple's Guidelines as "arbitrarily interpreted," and another party called them "opaque and arbitrary."[2345] Internally, after an app was rejected from the App Store, an Apple employee wrote to the leadership of the App Store that Apple's decision "still isn't obvious to people inside the company that work directly on the App Store."[2346]

In 2017, *Gizmodo* reported that iOS app maker Deucks saw its Finder for AirPods app removed from the App Store. The app used the iPhone's Bluetooth signal to locate lost AirPods, helping its users find a missing earbud and save money by not having to purchase replacements. After the app was reviewed and approved, it disappeared from the App Store. Deucks told Gizmodo that Apple's app

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[2340] *App Store Review Guidelines: Introduction*, APPLE: DEVELOPER, https://developer.apple.com/app-store/review/guidelines/ (last visited Sept. 27, 2020).

[2341] *Id.*

[2342] *Id.*

[2343] Competitors Hearing at 9 (statement of David Heinemeier Hansson, Cofounder & Chief Tech. Officer, Basecamp).

[2344] Submission from Source 247, to H. Comm. on the Judiciary, Source 247_0000000002 (Oct. 14, 2019) (on file with Comm.).

[2345] Submission from Source 736, to H. Comm. on the Judiciary, Source 736_00000236 (Oct. 23, 2019) (on file with Comm.); Interview with Source 88 (May 12, 2020).

[2346] Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-014848 (May 30, 2018) (on file with Comm.).

review team "didn't find anything wrong with the app itself, but rather they didn't like the 'concept' of people finding their AirPods and hence [the app] was deemed 'not appropriate for the App Store.'"[2347] At the time, Deucks had several other finder apps, such as Finder for Fitbit and Finder for Jawbone, that remained available in the App Store.[2348]

Developers also say that Apple uses its power over the App Store to change the Guidelines when convenient in ways that benefit Apple. The Guidelines—along with their interpretation and enforcement—all change over time in ways that always appear to benefit Apple.[2349] Spotify noted that "[t]he reality is Apple continues to move the goal posts and change the rules to its advantage and the detriment of developers," and that the company's "selective and capricious enforcement [of its App Store policies] is designed to put companies like [Spotify] at an untenable competitive disadvantage."[2350] ProtonMail explained that it offered a free version of its app in the App Store for years, but then Apple abruptly changed the way it applied its IAP requirement and demanded the app add the ability for consumers to purchase upgraded functionality through the app—giving Apple a 30% cut from those subscriptions. ProtonMail noted that its app competes with an Apple service and that requiring it to implement IAP would increase its customer acquisition costs and make it less competitive, benefitting Apple.[2351] Another third party Subcommittee staff spoke with said that when Apple introduces a new app, developers with rival apps know they may be targeted for a violation of a rule Apple has suddenly decided to interpret or enforce differently.[2352] Another app developer that competes with Apple services noted the Guidelines are constantly shifting, that Apple arbitrarily decides when an app no longer complies with the rules, and those decisions always favor Apple's interests.[2353]

Others have noted that Apple unilaterally determines if, how, and when to apply its Guidelines, and that it also freely makes up "unwritten rules" when convenient.[2354] For example, Apple's

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[2347] Michael Nunez, *'Finder for AirPods' App Mysteriously Disappears From App Store Without Much Explanation from Apple*, GIZMODO (Jan. 9, 2017), https://gizmodo.com/finder-for-airpods-app-mysteriously-disappears-from-app-1790999059.

[2348] *Id.*

[2349] *See* Dieter Bohn, *Apple's App Store policies are bad, but its interpretation and enforcement are worse*, The VERGE (June 17, 2020), https://www.theverge.com/2020/6/17/21293813/apple-app-store-policies-hey-30-percent-developers-the-trial-by-franz-kafka ("The key thing to know is that the text of this policy is not actually the policy. Or rather, as with any law, the text is only *one* of the things you need to understand. You also need to know how it is *enforced* and how the enforcers *interpret* that text.").

[2350] Kara Swisher, *Is It Finally Hammer Time for Apple and Its App Store*, N.Y. TIMES (June 19, 2020), https://www.nytimes.com/2020/06/19/opinion/apple-app-store-hey.html?referringSource=articleShare.

[2351] Submission from ProtonMail, to H. Comm. on the Judiciary, 5 (Aug. 22, 2020) (on file with Comm.).

[2352] Interview with Source 88 (May 12, 2020).

[2353] Interview with Source 766 (July 2, 2020).

[2354] *See* JOHN BERGMAYER, PUBLIC KNOWLEDGE, TENDING THE GARDEN: HOW TO ENSURE THAT APP STORES PUT USERS FIRST 27 (2020), https://www.publicknowledge.org/wp-content/uploads/2020/06/Tending_the_Garden.pdf; Bapu Kotapati, distinction between "business" and "consumer" apps to justify its June 2020 decision to require Basecamp to redesign its app to permit in-app signups—and attempt to require implementation of IAP—was not a distinction that appeared in Apple's Guidelines until an update on September 11, 2020.[2355] Apple said that it has a "set of standard terms for Amazon, and every other video-streaming service that met the criteria, to launch their service on Apple TV and iOS."[2356] One of Apple's business partners told Subcommittee staff that it suspects Amazon receives preferential treatment by being exempt from sharing revenue for some categories of transactions.[2357]

Subcommittee staff reviewed communications between Apple CEO Tim Cook and an executive from Baidu regarding whether Apple would provide Baidu with preferential treatment. At the Subcommittee's sixth hearing, Representative Henry C. "Hank" Johnson, Jr. (D-GA) questioned Mr. Cook about whether Apple differentiates in its treatment of app developers. Representative Johnson also asked if it was true that Apple assigned Baidu two employees to help it navigate the App Store bureaucracy, and whether other app developers receive the same access to Apple personnel. Mr. Cook responded, "we treat every developer the same," and explained the App Store Guidelines "apply evenly to everyone."[2358] He also said, "I don't know about that, sir," in response to Representative Johnson's inquiry about Baidu, adding, "We do a lot of things with developers including looking at their beta test apps regardless of whether they're large or small."[2359]

Communications reviewed by Subcommittee staff show that in 2014 Baidu requested, among other things, that Apple "set up a fast track for the review process for Baidu APPs," along with setting Baidu as the default search and mapping services on "all Apple devices in China."[2360] Mr. Cook solicited feedback from Apple's senior executives regarding these and other requests from Baidu, also noting, "I think we should have someone focus on them as we have done with Facebook. Thoughts?"[2361] Responding to the email thread with Mr. Cook's request that Apple focus on Baidu as it had with Facebook, one executive explained, "Engineering proposal is for extensions to be our path

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et al., *The Antitrust Case Against Apple*, YALE UNIV., THURMAN ARNOLD PROJECT, DIGITAL PLATFORM THEORIES OF HARM PAPER SERIES: PAPER 2, 22 (2020), https://som.yale.edu/sites/default/files/DTH-Apple-new.pdf.

[2355] *See* Ben Thompson, *Xscale and ARM in the Cloud, Hey Versus Apple, Apple's IAP Campaign*, STRATECHERY (Jun. 17, 2020) https://stratechery.com/2020/xscale-and-arm-in-the-cloud-hey-versus-apple-apples-iap-campaign/; John Gruber, *The Flimsiness of 'Business vs. Consumer' as a Justification for Apple's Rejection of Hey From the App Store for Not Using In-App Purchases*, DARING FIREBALL (June 16, 2020), https://daringfireball.net/2020/06/hey_app_store_rejection_flimsiness; Sarah Perez & Anthony Ha, *Apple revises App Store Rules to permit game streaming apps, clarify in-app purchases and more*, TECHCRUNCH (Sept. 11, 2020), https://techcrunch.com/2020/09/11/apple-revises-app-store-rules-to-permit-game-streaming-apps-clarify-in-app-purchases-and-more/.

[2356] CEO Hearing Transcript at 8 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

[2357] Interview with Source 77 (Sept. 10, 2020).

[2358] CEO Hearing Transcript at 51 (statement of Tim Cook, CEO, Apple Inc.).

[2359] *Id*.

[2360] Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-011082 (June 3, 2015) (on file with Comm.).

[2361] *Id.* at HJC-APPLE-011081 (Aug. 3, 2014).

for integration," and responded to Baidu's app review fast track request, "I believe we put a lot of work into having a fast review process for all apps."[2362]

Within two weeks, Mr. Cook responded to the Baidu executive's requests. "I'd like Apple to have a deeper relationship with Baidu," Cook wrote, noting that "some of" the Baidu executive's requests were "great starts."[2363] In response to the Baidu executive's request for "APP Review Fast Track," Mr. Cook wrote, "We can set up a process where Baidu could send us a beta app for review and this can often speed up the process."[2364] Mr. Cook then noted he had assigned Baidu two employees from App Store chief Phil Schiller's team to "help manage through Apple."[2365]

When asked about these issues in questions submitted for the record following the hearing, Mr. Cook explained his view that "There is no 'fast track' for App Review special to Baidu," that "any developer can request expedited review from App Review by submitting a formal expedite request," and "[t]he beta app review process I referenced in my email has been available to developers since 2009."[2366] Mr. Cook also noted, "The key contacts referenced in my email were focused on other strategic opportunities outlined by Baidu. Neither individual had responsibility for App Store review."[2367]

In a subsequent interview with Phillip Shoemaker, Apple's former Senior Director of App Store Review, Subcommittee staff asked about Apple's treatment of app developers. Mr. Shoemaker responded that Apple "was not being honest" when it claims it treats every developer the same.[2368] Mr. Shoemaker has also written that the App Store rules were often "arbitrary" and "arguable," and that "Apple has struggled with using the App Store as a weapon against competitors."[2369] He has noted that "Apple has complete and unprecedented power over their customers' devices. The decisions they make with regards to third-party apps needs to be above reproach, and currently are not."[2370]

Mr. Shoemaker also admitted that Apple advantages its own apps over third-party apps. In an interview with Subcommittee staff, he described it as inaccurate to say Apple does not favor its own

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[2362] *Id.* at HJC-APPLE-011079–80 (Aug. 3, 2014).

[2363] *Id.* at HJC-APPLE-011083 (June 3, 2015).

[2364] *Id.* at HJC-APPLE-011084 (June 3, 2015).

[2365] *Id.*

[2366] CEO Hearing Transcript at 8 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

[2367] *Id*. at 9.

[2368] Interview with Phillip Shoemaker, former Senior Dir., App Store Review, Apple Inc. (Sept. 21, 2020).

[2369] Phillip Shoemaker, *A Modern Content Store*, MEDIUM (Dec. 12, 2017), https://medium.com/@phillipshoemaker/a-modern-content-store-3344bbe79edc.

[2370] Phillip Shoemaker, *Apple v. Everybody*, MEDIUM (Mar. 29, 2019), https://medium.com/@phillipshoemaker/apple-v-everybody-5903039e3be.

apps over third-party apps.[2371] He has previously noted that apps that compete against Apple's services often have problems getting through the App Store's review process. For example, Apple's gaming service, Apple Arcade, is a type of app that was "consistently disallowed from the store" when offered by third-party developers, but Apple allowed its own app in the store, "even though it violates existing [App Store] guidelines."[2372] Mr. Shoemaker explained to Subcommittee staff that Apple's new Guideline 3.1.2a, related to streaming game services, was likely written to "specifically exclude Google Stadia," describing the decision as "completely arbitrary."[2373] Similar conduct has been commented on by the courts,[2374] as well as international antitrust authorities.[2375]

Apple disputes that its rules are opaque and arbitrarily applied. In response to questions from Representative Henry C. "Hank" Johnson, Jr. (D-GA), Mr. Cook insisted the Guidelines are "open and transparent" and that Apple "treat[s] every developer the same."[2376] In response to Questions for the Record from Subcommittee Chairman David N. Cicilline (D-RI), Mr. Cook reiterated that "[t]he Guidelines provide transparency and act as a practical guide to help developers better understand the app approval process. . . . Apple attempts to apply the Guidelines uniformly to all developers and all types of apps."[2377]

Apple appears to have recently revised some of its App Store policies under the scrutiny of the Subcommittee, the Department of Justice, and global competition authorities. In June 2020, Apple announced new policies for its App Store review that will allow app developers to appeal decisions by app reviewers and even challenge the Guidelines governing the App Store. Apple also announced that app updates with bug fixes would no longer be held up due to a violation of an App Store guideline. Additionally, on September 11, 2020, Apple changed its App Developer Guidelines to address some of the questions which arose from recent controversies described earlier in this Report.[2378]

2371 Interview with Phillip Shoemaker, former Senior Dir., App Store Review, Apple Inc. (Sept. 21, 2020).

2372 Phillip Shoemaker, *Apple v. Everybody*, MEDIUM (Mar. 29, 2019), https://medium.com/@phillipshoemaker/apple-v-everybody-5903039e3be.

2373 Interview with Phillip Shoemaker, former Senior Dir., App Store Review, Apple Inc. (Sept. 21, 2020).

2374 United States v. Apple Inc., 952 F. Supp. 2d 638, 662 (S.D.N.Y. 2013), *aff'd* 791 F.3d 290 (2d Cir. 2015).

2375 *See e.g.*, Neth. Auth. for Consumers & Mkts. Study at 5–6, 68, 79; Killian Bell, *Apple Rejects Samsung Pay app for iOS*, CULT OF MAC (Dec. 12, 2016), https://www.cultofmac.com/457916/apple-rejects-samsung-pay-app-ios/; Gil Jaeshik & Park Sora, *Apple Rejects Samsung Pay Mini to Be Registered on Its App Store*, KOREA IT NEWS (Dec. 12, 2016), http://english.etnews.com/20161212200003.

2376 CEO Hearing Transcript at 61 (statement of Tim Cook, CEO, Apple Inc.).

2377 *Id.* at 5 (response to Questions for the Record of Tim Cook, CEO, Apple Inc.).

2378 *See* Sarah Perez & Anthony Ha, *Apple Revises App Store Rules to permit game streaming apps, clarify in-app purchases and more*, TECHCRUNCH (Sept. 11, 2020), https://techcrunch.com/2020/09/11/apple-revises-app-store-rules-to-permit-game-streaming-apps-clarify-in-app-purchases-and-more/.

3. Siri Intelligent Voice Assistant

a. Market Power

Apple describes Siri as "an intelligent assistant that offers a faster, easier way to get things done on Apple devices," helping users to "make calls, send text messages or email, schedule meetings and reminders, make notes, search the Internet, find local businesses, get directions, get answers, find facts, and more just by asking."[2379] Apple integrated Siri into iPhone 4S at its release in October 2011. As of January 2018, Apple said Siri was active on over 500 million devices, making Siri one of the most widely used voice assistants in the world.[2380]

In a production to the Committee, Apple stated that it neither creates market share data for Siri nor tracks third-party market share data for integrated voice assistants.[2381] Market research firm FutureSource Consulting found that as of December 2019, Siri was the leading intelligent virtual assistant with a 35% market share globally.[2382] A third-party supplied the Subcommittee with additional market research showing that, in the first half of 2018, Apple's Siri was built into 42% of virtual assistant-enabled devices sold worldwide.[2383] Apple, Google, Amazon, and Microsoft are the leading providers of intelligent virtual assistants.[2384] Siri's success reflects its integration into the iPhone and other Apple hardware, such as the iPad, Mac, Apple Watch, Apple TV, and HomePod.[2385] Siri is the hub of Apple's ecosystem of smart-home devices. Users can control Apple HomeKit-compatible devices using Siri on an Apple device.[2386]

[2379] Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-000007 (Oct. 14, 2019) (on file with Comm.).

[2380] Press Release, Apple, HomePod arrives February 9, available to order this Friday (Jan. 13, 2018), https://www.apple.com/newsroom/2018/01/homepod-arrives-february-9-available-to-order-this-friday/.

[2381] Production of Apple, to H. Comm. on the Judiciary, HJC-APPLE-000011 (Oct. 14, 2019) (on file with Comm.).

[2382] Press Release, FutureSource Consulting, Virtual Assistants to Exceed 2.5 Billion Shipments in 2023 (Dec. 18, 2019), https://www.futuresource-consulting.com/press-release/consumer-electronics-press/virtual-assistants-to-exceed-25-billion-shipments-in-2023/.

[2383] Submission from Source 918, to H. Comm. on the Judiciary, Source 918-0001578 (Nov. 4, 2019) (on file with Comm.).

[2384] *See e.g.*, Press Release, FutureSource Consulting, Virtual Assistants to Exceed 2.5 Billion Shipments in 2023 (Dec. 18, 2019), https://www.futuresource-consulting.com/press-release/consumer-electronics-press/virtual-assistants-to-exceed-25-billion-shipments-in-2023/; Submission from Source 918, to H. Comm. on the Judiciary, Source 918-0001578 (Nov. 4, 2019) (on file with Comm.).

[2385] *See* Press Release, FutureSource Consulting, Virtual Assistants to Exceed 2.5 Billion Shipments in 2023 (Dec. 18, 2019, https://www.futuresource-consulting.com/press-release/consumer-electronics-press/virtual-assistants-to-exceed-25-billion-shipments-in-2023/; Juli Clover, *Siri: Everything You Need to Know*, MAC RUMORS (July 27, 2020), https://www.macrumors.com/guide/siri/.

[2386] Daniel Wroclawski, *How to Use Siri and Apple HomeKit to Control Your Smart Home*, CONSUMER REPS. (Oct. 5, 2019), https://www.consumerreports.org/home-automation-systems/how-to-use-siri-to-control-smart-home/.

b. Merger Activity

The startup Siri, Inc launched the Siri app for iOS in February 2010 based on a prototype developed by Adam Cheyer while working at SRI International Research Lab.[2387] Apple acquired the company two months later.[2388] Apple has followed up on its acquisition of Siri with a series of additional acquisitions to strengthen Siri's underlying technology and natural language processing. For example, in 2019, Apple acquired Laserlike, technology to help Siri improve at delivering personalized results for users.[2389] In 2020, Apple acquired Inductiv, an AI technology for correcting data flaws, Xnor.ai, which specializes in low-power, edge-based artificial-intelligence tools needed for smart home devices, and Voysis, to increase Siri's speech recognition accuracy.[2390]

c. Conduct

As with many of Apple's other products and services, Apple has taken a walled garden approach to the intelligent voice assistant market by, among other tactics, limiting interoperability by restricting how digital voice assistants work on Apple devices and how Siri works with non-Apple devices, and by using Siri to guide users to its own products and services.

Apple does not allow competing digital voice assistants to replace Siri as the default on Apple devices. On iOS devices, the user must download the app for a competing digital voice assistant and then either use Siri to access that voice assistant or use that app directly.[2391] Additionally, Apple does not allow third-party device manufacturers to install a speaker that receives Siri commands; only Apple devices can respond to the "Hey Siri" prompt.[2392] While third-party hardware manufacturers can make their products Siri-compatible through the Works with Apple HomeKit, the voice commands needed to

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[2387] Catherine Clifford, *Here's how Siri made it onto your iPhone*, CNBC (Jun. 29, 2017), https://www.cnbc.com/2017/06/29/how-siri-got-on-the-iphone.html.

[2388] Jenna Wortham, *Apple Buys a Start-Up for Its Voice Technology*, N.Y. TIMES (Apr. 29, 2010), https://www.nytimes.com/2010/04/29/technology/29apple.html.

[2389] Jeremy Horwitz, *Apple acquires Laserlike, an ML startup that might make Siri smarter*, VENTURE BEAT (Mar. 13, 2019), https://venturebeat.com/2019/03/13/apple-bought-laserlike-an-ml-startup-that-might-make-siri-smarter/.

[2390] *See* Lisa Eadicicco, *Apple just bought another AI startup to help Siri catch up to rivals Amazon and Google*, BUS. INSIDER (May 28, 2020), https://www.businessinsider.com/apple-buys-ai-startup-inductiv-siri-catch-up-amazon-google-2020-5; Mark Gurman, *Apple Acquires AI Startup to Better Understand Natural Language*, BLOOMBERG (Apr. 3, 2020), https://www.bloomberg.com/news/articles/2020-04-03/apple-acquires-ai-startup-to-better-understand-natural-language; Charlie Wood, *Apple has acquired the artificial-intelligence startup Xnor.ai for a reported $200 million*, BUS. INSIDER (Jan. 16, 2020), https://www.businessinsider.com/apple-reportedly-buys-xnor-ai-200-million-2020-1.

[2391] *See, e.g.*, Ben Lovejoy, *Alexa iPhone app can now operate hands-free — with a little help from Siri*, 9TO5MAC (July 8, 2020), https://9to5mac.com/2020/07/08/alexa-iphone-app/; Chris Welch, *Google Assistant just got much better and more convenient on iOS thanks to Siri Shortcuts*, THE VERGE (Nov. 20, 2018), https://www.theverge.com/2018/11/20/18105693/google-assistant-siri-shortcuts-feature-iphone-ios.

[2392] *How 'Hey Siri' works with multiple devices*, APPLE, https://support.apple.com/en-us/HT208472 (last visited Sept. 27, 2020).

control the smart devices must still be directed to Siri on an Apple device, such as an iPhone or iPad.[2393]

In addition to keeping Siri closely tied to Apple hardware, Apple has used its voice-enabled devices to strengthen consumer engagement with its own services and apps. For example, as of October 2020, by default, requests to Siri to play music open the Apple Music app, requests for directions open the Apple Maps app, and requests for web searches open the Safari app.[2394] To use a competing service through Siri, a user must adjust the device's settings and identify the service in the command to Siri—for example, "Hey Siri, play the National Anthem on Spotify."[2395] For streaming music services, this integration only became possible with the introduction of iOS 13 in 2019.[2396] Previously, even when a user said the name of a third-party streaming service in the voice command, Apple opened an Apple-branded alternative.[2397] In June 2020, Apple announced that it would update its HomePod smart speaker system to support third-party music services.[2398] It remains unclear how seamless the integration will be and if Apple Music will remain the pre-installed default service.[2399]

One app developer that spoke with Subcommittee staff described Siri as a "closed" intelligent virtual assistant that limits the types of voice interactions voice app developers have access to.[2400] The app developer explained that SiriKit, which allows iOS apps to work with Siri, relies on a pre-designed list of basic interactions that third parties can use, such as messaging, calling, or payments. The very limited set of interactions permitted by Apple can make it impossible to launch an app for the third party's services, including those that compete with an Apple service.[2401]

[2393] *Homekit*, APPLE, https://developer.apple.com/homekit/ (last visited Oct. 3, 2020).

[2394] *E.g.*, *Use Siri to play music or* podcasts, APPLE, https://support.apple.com/en-us/HT208279 (last visited Sept. 27, 2020); David Phelan, *Apple Mulls Letting You Choose Default iOS 14 Apps: Why it Matters*, FORBES (FE. 21, 2010) https://www.forbes.com/sites/davidphelan/2020/02/21/apple-mulls-letting-you-switch-default-iphone-apps-in-ios-14/#70330c9c11f8.

[2395] Kate Kozuch, *How to Use Siri to Control Spotify in iOS 13*, TOM'S GUIDE (Oct. 7, 2019), https://www.tomsguide.com/how-to/how-to-use-siri-to-control-spotify-ios-13.

[2396] Jason Cross, *iOS 13 enables Siri support in third party media apps: Spotify, Pandora, Overcast, and much more*, MACWORLD (Jun. 7, 2019), https://www.macworld.com/article/3400881/ios-13-enables-siri-support-in-third-party-media-apps.html.

[2397] *See* Submission from Source 301, to H. Comm. on the Judiciary, Source 301-00000080 at 23 (Oct. 15, 2019) (on file with Comm.)

[2398] Kif Leswing, *Apple will let iPhone users change default mail and browser apps, addressing antitrust concerns*, CNBC (June 22, 2020), https://www.cnbc.com/2020/06/22/apple-allows-users-to-change-default-mail-and-browser-apps-at-wwdc.html.

[2399] Filipe Esposito, *iOS 14 includes option to change default services on HomePod for each user*, 9TO5MAC (July 7, 2020), https://9to5mac.com/2020/07/07/ios-14-includes-option-to-change-default-services-on-homepod-for-each-user/.

[2400] Submission from Source 711, to H. Comm. on the Judiciary, Source 711-00000080 at 6–7 (Oct. 15, 2019) (on file with Comm.).

[2401] *Id*.

These practices have recently come under scrutiny by antitrust authorities. In March 2019, Spotify filed a complaint against Apple before the European Commission, reportedly alleging, among other things, that Apple is restricting Spotify's access to Siri.[2402] In July 2020, the European Commission's antitrust authority announced that it had opened an inquiry into the use of digital assistants and smart home products by Apple, Google, and Amazon, among other companies.[2403] In her statement accompanying the announcement, Margrethe Vestager, the Commission's Executive Vice President, identified interoperability and self-preferencing as areas of concern.[2404]

VI. RECOMMENDATIONS

As part of its top-to-bottom review of competition in digital markets, the Subcommittee examined whether current laws and enforcement levels are adequate to address the market power concerns identified through this investigation. In pursuit of this goal, on March 13, 2020, the Subcommittee requested submissions from antitrust and competition policy experts. These experts were chosen on a careful, bipartisan basis to ensure the representation of a full range of views. Throughout the investigation, the Subcommittee received additional submissions and written statements from antitrust enforcers and other leading experts, including Margrethe Vestager, the Executive Vice President of the European Commission, and Rod Sims, the Chair of the Australian Competition and Consumer Commission. Most recently, the Subcommittee held an oversight hearing on October 1, 2020 regarding "Proposals to Strengthen the Antitrust Laws and Restore Competition Online," its seventh and final hearing as part of the investigation.

[2402] Thomas Ricker, *Apple to be formally investigated over Spotify's antitrust complaint, says report*, THE VERGE (MAY 6, 2019), https://www.theverge.com/2019/5/6/18530894/apple-music-monopoly-spotify-app-store-europe.

[2403] Margrethe Vestager, Exec. Vice Pres., Eur. Comm'n, Statement by Executive Vice-President Margrethe Vestager on the launch of a Sector Inquiry on the Consumer Internet of Things (July 16, 2020), https://ec.europa.eu/commission/presscorner/detail/en/speech_20_1367.

[2404] *Id.*

Subcommittee Chairman David N. Cicilline (D-RI) requested that staff provide Members of the Subcommittee with a series of recommendations, informed by this investigation, on how to strengthen the antitrust laws and restore competition online. As he noted in remarks to the American Antitrust Institute in June 2019:

> No doubt, other branches of government have a key role to play in the development of antitrust law. But Congress—not the courts, agencies, or private companies—enacted the antitrust laws, and Congress ultimately decides what the law should be and whether the law is working for the American people. As such, it is Congress' responsibility to conduct oversight of our antitrust laws and competition system to ensure that they are properly working and to enact changes when they are not. While I do not have any preconceived ideas about what the right answer is, as Chairman of the Antitrust Subcommittee, I intend to carry out that responsibility with the sense of urgency and serious deliberation that it demands.[2405]

In response to this request, Subcommittee staff identified a broad set of reforms for further examination by the Members of the Subcommittee for purposes of crafting legislative and oversight responses to the findings of this Report. These reforms include proposals to: (1) promote fair competition in digital markets; (2) strengthen laws relating to mergers and monopolization; and (3) restore vigorous oversight and enforcement of the antitrust laws.

Subcommittee staff intends for these recommendations to serve as a complement, not a substitute, to strong enforcement of the antitrust laws. This is particularly true for acquisitions by dominant firms that may have substantially lessened competition or tended to create a monopoly in violation of the Clayton Act. In these cases, Subcommittee staff supports as a policy matter the examination of the full range of remedies—including unwinding consummated acquisitions or divesting business lines—to fully restore competition that was harmed as a result of these acquisitions and to prevent future violations of the antitrust laws.[2406]

A. Restoring Competition in the Digital Economy

For more than a century, Congress has addressed the market power of dominant intermediaries using a robust antitrust and antimonopoly toolkit.[2407] The antitrust laws prohibit anticompetitive

[2405] Hon. David N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, Keynote Address at American Antitrust Institute's 20th Annual Policy Conference (June 20, 2019), https://cicilline.house.gov/press-release/cicilline-delivers-keynote-address-american-antitrust-institute%E2%80%99s-20th-annual-policy.

[2406] Due to separation of powers concerns and other relevant considerations, we do not take a position on the outcome of any individual matter before the Justice Department or Federal Trade Commission.

[2407] *See, e.g.*, Subcomm. on Study of Monopoly Power of the H. Comm. on the Judiciary, 81st Cong. 2d Sess., *The Antitrust Laws: A Basis for Economic Freedom* iii (1950) (identifying an extensive list of statutes "dealing directly with the

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mergers and monopolistic conduct in order to promote open markets and prevent undue concentration of economic power. In many critical sectors of the economy—including financial services, telecommunications, and transportation—Congress has also relied on a broad set of policies to create the conditions necessary for fair competition, even when economies of scale may favor concentration.

In a similar vein, the remedies identified in this section seek to restore competition online by addressing harmful business practices as well as certain features of digital markets that tend to tip the market towards concentration.

1. <u>Reduce Conflicts of Interest Thorough Structural Separations and Line of Business Restrictions</u>

In addition to controlling one or multiple key channels of distribution, the dominant firms investigated by the Subcommittee are integrated across lines of business. When operating in adjacent markets, these platforms compete directly with companies that depend on them to access users, giving rise to a conflict of interest. As discussed earlier in this Report, the Subcommittee's investigation uncovered several ways in which Amazon, Apple, Facebook, and Google use their dominance in one or more markets to advantage their other lines of business, reducing dynamism and innovation.

First, the investigation revealed that the dominant platforms have misappropriated the data of third parties that rely on their platforms, effectively collecting information from customers only to weaponize it against them as rivals. For example, the investigation produced documents showing that Google used the Android operating system to closely track usage trends and growth patterns of third-party apps—near-perfect market intelligence that Google can use to gain an edge over those same apps. Facebook used its platform tools to identify and then acquire fast-growing third-party apps, thwarting competitive threats at key moments. A former Amazon employee told the Subcommittee that Amazon has used the data of third-party merchants to inform Amazon's own private label strategy, identifying which third-party products were selling well and then introducing copycat versions. These and other examples detailed in this Report demonstrate a dangerous pattern of predatory conduct that, if left unchecked, risk further concentrating wealth and power.

Some have suggested that there is little difference between the dominant platforms' access to and use of this data and the way that brick-and-mortar retailers track popular products. The Subcommittee's investigation, however, produced evidence that the platforms' access to competitively significant market data is unique. Specifically, the dominant platforms collect real-time data which, given the scale of their user-base, is akin to near-perfect market intelligence. Whereas firms with a choice among business partners might seek to protect their proprietary data, the platforms' market power lets them compel the collection of this data in the first place.

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preservation of the American competitive economy" and reflecting the legislative policy that "under no circumstances should [laws] foster the growth of monopoly").

Second, dominant platforms can exploit their integration by using their dominance in one market as leverage in negotiations in an unrelated line of business. For example, evidence produced during the investigation showed that Amazon has leveraged its dominance in online commerce as pressure during negotiations with firms in a separate line of business. Market participants that depend on Amazon's retail platform are effectively forced to accept its demands—even in markets where Amazon would otherwise lack the power to set the terms of commerce.

Third, dominant platforms have used their integration to tie products and services in ways that can lock in users and insulate the platform from competition. Google, for example, required that smartphone manufacturers seeking to use Android also pre-install and give default status to certain Google apps—enabling Google to maintain its search monopoly and crowd out opportunities for third-party developers.

And fourth, these firms can use supra-competitive profits from the markets they dominate to subsidize their entry into other markets. Documents uncovered during the Subcommittee's investigation indicate that the dominant platforms have relied on this strategy to capture markets, as startups and non-platform businesses tend to lack the resources and capacity to bleed billions of dollars over multiple years in order to drive out rivals. For dominant platforms, meanwhile, this strategy appears to be a race to capture ecosystems and control interlocking products that funnel data back to the platforms, further reinforcing their dominance.

By using market power in one area to advantage a separate line of business, dominant firms undermine competition on the merits. By functioning as critical intermediaries that are also integrated across lines of business, the dominant platforms face a core conflict of interest. The surveillance data they collect through their intermediary role, meanwhile, lets them exploit that conflict with unrivaled precision. Their ability both to use their dominance in one market as negotiating leverage in another, and to subsidize entry to capture unrelated markets, have the effect of spreading concentration from one market into others, threatening greater and greater portions of the digital economy.

To address this underlying conflict of interest, Subcommittee staff recommends that Congress consider legislation that draws on two mainstay tools of the antimonopoly toolkit: structural separation and line of business restrictions.[2408] Structural separations prohibit a dominant intermediary from operating in markets that place the intermediary in competition with the firms dependent on its infrastructure. Line of business restrictions, meanwhile, generally limit the markets in which a dominant firm can engage.

[2408] *See* Submission from Sally Hubbard, Dir. of Enforcement Strategy, Open Mkts. Inst. et al., to H. Comm. on the Judiciary, 7–8 (Apr. 17, 2020) (on file with Comm.) [hereinafter Hubbard Submission]; Submission from Stacy Mitchell, Co-Dir., Inst. for Local Self-Reliance, to H. Comm. on the Judiciary, 4 (May 4, 2020) (on file with Comm.) [hereinafter Mitchell Submission]; Submission from Zephyr Teachout, Assoc. Prof. of Law, Fordham Univ. Sch. of Law, to H. Comm. on the Judiciary, 6 (Apr. 23, 2020) (on file with Comm.) [hereinafter Teachout Submission]; Submission from Ams. for Fin. Reform, to H. Comm. on the Judiciary, 3–4 (Apr. 17, 2020) (on file with Comm.).

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Congress has relied on both policy tools as part of a standard remedy for dominant intermediaries in other network industries, including railroads and telecommunications services.[2409] In the railroad industry, for example, a congressional investigation found that the expansion of common carrier railroads' into the coal market undermined independent coal producers, whose wares the railroads would deprioritize in order to give themselves superior access to markets. In 1893, the Committee on Interstate and Foreign Commerce wrote that "[n]o competition can exist between two producers of a commodity when one of them has the power to prescribe both the price and output of the other."[2410]

Congress subsequently enacted a provision to prohibit railroads from transporting any goods that they had produced or in which they held an interest.[2411] Congress has legislated similar prohibitions in other markets. The Bank Holding Company Act of 1956 broadly prohibited bank holding companies from acquiring nonbanking companies.[2412] Vertically integrated television networks, meanwhile, were subject to "fin-syn" rules, which prohibited networks from entering production and syndication markets.[2413]

Both structural separations and line of business restrictions seek to eliminate the conflict of interest faced by a dominant intermediary when it enters markets that place it in competition with dependent businesses. In certain cases, structural separations have also been used to prevent monopolistic firms from subsidizing entry into competitive markets and to promote media diversity.[2414]

At a general level, there are two forms of structural separation: (1) ownership separations, which require divestiture and separate ownership of each business; and (2) functional separations, which permit a single corporate entity to engage in multiple lines of business but prescribe the particular organizational form it must take.[2415] Importantly, both forms of structural limits apply on a market-wide basis, while divestitures in antitrust enforcement generally apply to a single firm or merging party.

[2409] Mitchell Submission at 4.

[2410] H.R. REP. NO. 52-2278, vii–viii (1893).

[2411] Hepburn Act, Pub. L. No. 59-337, § 1, 34 Stat. 584, 585 (1906).

[2412] Bank Holding Company Act of 1956, Pub. L. No. 84-511, § 2(a), 70 Stat. 133, 133 (codified as amended at 12 U.S.C. § 1841(a) (2012)).

[2413] Competition & Responsibility in Network Television Broad., 23 F.C.C.2d 382, 398, para. 30 (1970) (report and order).

[2414] Mitchell Submission at 4.

[2415] John Kwoka & Tommaso Valletti, *Scrambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Dominant Firms* 22 (forthcoming Oct. 2020) (on file with Comm.).

A benefit of these proposals is their administrability. By setting rules for the underlying structure of the market—rather than policing anticompetitive conduct on an *ad hoc* basis—structural rules are easier to administer than conduct remedies, which can require close and continuous monitoring.[2416]

The challenges of crafting and implementing structural solutions vary by market and market participants. In response to the Subcommittee's requests for comments on potential reforms, some antitrust experts have cautioned that crafting separations can pose a major cost and challenge, especially in dynamic markets.[2417] Others have responded by identifying certain principles that can make identifying the fault lines easier. In the case of separations undoing vertical mergers, the fault lines designating the separate companies are likely to still be apparent, even in the new structure.[2418] In cases where a firm grew through internal expansion or when the constituent parts are no longer clearly distinguishable, scholars have suggested identifying distinct business operations.[2419] Experts have also noted that business-initiated corporate restructuring and divestitures may in some cases also provide a guide to designing and implementing successful break-ups.[2420]

Several enforcement bodies around the world are exploring the use of structural separations in digital markets. In July 2020, the United Kingdom's Competition and Markets Authority recommended that its digital regulatory body have powers to "implement ownership separation or operational separation," concluding that "there could be significant benefits if there were more formal separation between businesses with market power" in digital advertising markets in particular.[2421] Meanwhile, the OECD in 2001 adopted recommendations to structurally separate vertically integrated regulated firms that operate in concentrated markets.[2422] In its 15-year overview, the OECD concluded that "structural separation remains a relevant remedy" and identified other market areas where it might be adopted.[2423]

[2416] OECD, STRUCTURAL SEPARATION IN REGULATED INDUSTRIES: REPORT ON IMPLEMENTING THE OECD RECOMMENDATION 9 (2016), https://www.oecd.org/daf/competition/Structural-separation-in-regulated-industries-2016report-en.pdf ("[S]eparation limits the need for regulation that is difficult and costly to devise and implement, and may be only partly effective; it improves information; and it eliminates the risk of cross-subsidies by the incumbent from its non-competitive to its competitive segments.").

[2417] *See, e.g.*, Submission from Maureen K. Ohlhausen, Partner, Baker Botts L.L.P., to H. Comm. on the Judiciary, 5 (Apr. 17, 2020) (on file with Comm.).

[2418] John Kwoka & Tommaso Valletti, *Scrambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Dominant Firms* 11 (forthcoming Oct. 2020) (on file with Comm.).

[2419] *Id*. at 15.

[2420] *Id.*; Rory Van Loo, *In Defense of Breakups: Administering a 'Radical' Remedy*, 105 CORNELL L. REV (forthcoming 2020), https://ssrn.com/abstract=3646630.

[2421] Competition & Mkts. Auth. Report at 405–06.

[2422] OECD, STRUCTURAL SEPARATION IN REGULATED INDUSTRIES: REPORT ON IMPLEMENTING THE OECD RECOMMENDATION 9 (2016), https://www.oecd.org/daf/competition/Structural-separation-in-regulated-industries-2016report-en.pdf.

[2423] *Id.* at 3.

2. Implement Rules to Prevent Discrimination, Favoritism, and Self-Preferencing

As discussed throughout this Report, the Subcommittee identified numerous instances in which dominant platforms engaged in preferential or discriminatory treatment. In some cases, the dominant platform privileged its own products or services. In others, a dominant platform gave preferential treatment to one business partner over others. Because the dominant platform was, in most instances, the only viable path to market, its discriminatory treatment had the effect of picking winners and losers in the marketplace.

Google, for example, engaged in self-preferencing by systematically ranking its own content above third-party content, even when its content was inferior or less relevant for users. Web publishers of content that Google demoted suffered economic losses and had no way of competing on the merits. Over the course of the investigation, numerous third parties also told the Subcommittee that self-preferencing and discriminatory treatment by the dominant platforms forced businesses to lay off employees and divert resources away from developing new products and towards paying a dominant platform for advertisements or other ancillary services. They added that some of the harmful business practices of the platforms discouraged investors from supporting their business and made it challenging to grow and sustain a business even with highly popular products. Without the opportunity to compete fairly, businesses and entrepreneurs are dissuaded from investing and, over the long term, innovation suffers.

In response to these concerns, the Subcommittee recommends that Congress consider establishing nondiscrimination rules to ensure fair competition and to promote innovation online. Nondiscrimination rules would require dominant platforms to offer equal terms for equal service and would apply to price as well as to terms of access. As several experts noted, nondiscrimination has been a mainstay principle for governing network intermediaries, especially those that play essential roles in facilitating transportation and communications.[2424]

The 1887 Interstate Commerce Act, for example, prohibited discriminatory treatment by railroads.[2425] In the century years since, Congress and policymakers have continued to apply nondiscrimination principles to network monopolies, even as technologies have rapidly evolved. Most recently, the Open Internet Order written by the Federal Communications Commission (FCC) in 2015 was effectively a nondiscrimination regime, prohibiting internet service providers from picking

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[2424] *See, e.g.*, Submission from Harry First, Charles L. Denison Prof. of Law, N.Y.U. Sch. of Law & Eleanor Fox, Walter J. Derenberg Prof. of Trade Reg., N.Y.U. Sch. of Law, to H. Comm. on the Judiciary (Aug. 6, 2020) [hereinafter First & Fox Submission] ("[Google, Amazon, Facebook, and Apple] are akin to essential facilities for many smaller businesses. Many businesses, to do business, must use the platform. They have almost no choice. The GAFA compete with the businesses on their platforms.") (on file with Comm.); Submission from Albert A. Foer, Founder & Sr. Fellow, Am. Antitrust Inst., to H. Comm. on the Judiciary, 1–2 (Apr. 14, 2020) (on file with Comm.) [hereinafter Foer Submission]; Hubbard Submission at 5–7; Remedies Hearing 6–7 (statement of K. Sabeel Rahman, Pres., Demos).

[2425] Hubbard Submission at 4–5.

winners and losers among content providers and other users.[2426] Other jurisdictions have begun to apply nondiscrimination principles to digital markets. For example, after determining that Google had engaged in illegal self-preferencing, the European Commission required that Google follow "the simple principle of equal treatment."[2427]

Historically, Congress has implemented nondiscrimination requirements in a variety of markets. With railroads, the Interstate Commerce Commission oversaw obligations and prohibitions applied to railroads designated as common carriers.[2428] More recently, the Cable Act of 1992 included a provision requiring the Federal Communications Commission to oversee a nondiscrimination requirement for cable operators.[2429] Some experts have proposed establishing a similar venue to adjudicate discrimination disputes between dominant platforms and the third parties that depend on them.[2430] Others note that the Federal Trade Commission could also use its existing competition rulemaking authority to "require dominant gatekeepers to apply a rule of neutrality in operating their platforms."[2431]

Finally, on several occasions, nondiscrimination rules have been treated as an important complement to divestitures in antitrust enforcement. For example, the Justice Department combined AT&T's divestiture of the Regional Bell Operating Companies with an equal access obligation, requiring AT&T to offer independent long-distance providers access to its network on equal terms of quality and price.[2432] The DOJ argued that requiring equal access without mandating divestiture would be insufficient due to AT&T's incentive and ability to discriminate against local carriers.[2433]

[2426] Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5603, para. 4 (2015) ("[C]arefully-tailored rules that would prevent specific practices we know are harmful to Internet openness—blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness.").

[2427] Press Release, Eur. Comm'n, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_1785.

[2428] Hubbard Submission at 5.

[2429] *See, e.g.*, Submission from Hal Singer, Managing Dir., Econ One Research, to H. Comm. on the Judiciary, 4–5 (Mar. 30, 2020) (on file with Comm.) [hereinafter Singer Submission].

[2430] *Id*.

[2431] First & Fox Submission at 12.

[2432] *See* United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982).

[2433] Mitchell Submission at 4 ("It's important to note here that applying this kind of [nondiscrimination-based] regulatory oversight to the big tech firms will not be effective unless it's done in conjunction with breakups. In the case of Amazon, it's my view that several factors make it virtually impossible to establish a system of oversight and adjudication that would be robust enough to protect competition and fair market access, absent spinning off its shopping platform from its other divisions. These factors include the enormous number of sellers and transactions, the low dollar value of most transactions, and the many subtle and hard-to-detect ways that Amazon can skew outcomes to favor its own interests. Therefore, oversight must be combined with structural separation, which would do much of the work by removing the underlying conflicts of interest, thus allowing for an effective and less bureaucratic system of oversight.").

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3. Promote Innovation Through Interoperability and Open Access

As discussed elsewhere in the Report, digital markets have certain characteristics—such as network effects, switching costs, and other entry barriers—that make them prone to tipping in favor of a single dominant firm. As a result, these markets are no longer contestable by new entrants,[2434] and the competitive process shifts from "competition *in* the market to competition *for* the market."[2435]

This dynamic is particularly evident in the social networking market. As discussed earlier in the Report, Facebook's internal documents and communications indicate that due to strong network effects and market tipping, the most significant competitive pressure to Facebook is from within its own family of products—Facebook, Instagram, Messenger, and WhatsApp—rather than from other social apps in the market, such as Snapchat or Twitter. In the case of messaging apps, Facebook's documents show that network effects can be even more extreme. And because Facebook is not interoperable with other social networks, its users face high costs to switch to other platforms, locking them into Facebook's platform.

High switching costs are also present in other markets. In the smartphone market, switching costs include learning a new operating system, which can discourage users from leaving Google or Apple due to familiarity with their distinct operating systems, as well as the inability to easily port all of their data, such as messages, call history, and photos. In online commerce, sellers have high switching costs associated with their reputation. Sellers can be locked into an incumbent platform for online commerce if they are unable to transfer their reputation—ratings and customer reviews accrued over a long period of time—to a different platform. Switching costs involving data for other services, such as email, can also contribute to user lock-in.[2436] In response to these concerns, Subcommittee staff recommends that Congress consider data interoperability and portability to encourage competition by lowering entry barriers for competitors and switching costs for consumers. These reforms would complement vigorous antitrust enforcement by spurring competitive entry.

a. Interoperability

Interoperability is fundamental to the open internet.[2437] It is present in email, which is an open, interoperable protocol for communicating online regardless of a person's email service or the type of

[2434] Competition & Mkts. Auth. Report at 10–11.

[2435] *See* Stigler Report at 29; Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks*, WASH. CTR. FOR EQUITABLE GROWTH 1 (Sept. 2020) (on file with Comm.) ("The monopolist operates in a market with significant network effects, scale and scope economies, and low distribution costs. Therefore, the competition that matters most is often *for* the market not *within* the market. Anticompetitive conduct is more likely to succeed. And, the harm to consumers greater because the market tends to be winner-take-all, or most.").

[2436] Chris Riley, *A Framework for Forward-Looking Tech Competition Policy*, MOZILLA 10 (2019), https://blog.mozilla.org/netpolicy/files/2019/09/Mozilla-Competition-Working-Paper.pdf.

[2437] *See generally id.* at 18–24.

device they use to send the email.[2438] It has also been built into numerous other services online[2439] and is a "core technical structure of the Internet."[2440] Interoperability standards are also present in other communications systems, from telephones to telegraphs.[2441] Telecommunications would not work without the ability of users on one carrier's network to interconnect with other carriers.[2442] And in the absence of interoperability, dominant carriers could foreclose new entrants from offering lower prices or better services, reinforcing their monopoly power while harming consumers and competition.[2443]

An interoperability requirement would allow competing social networking platforms to interconnect with dominant firms to ensure that users can communicate across services.[2444] Foremost, interoperability "breaks the power of network effects" by allowing new entrants to take advantage of existing network effects "at the level of the market, not the level of the company."[2445] It would also lower switching costs for users by ensuring that they do not lose access to their network as a result of switching.

The implementation cost of requiring interoperability by dominant firms would be relatively low. Unlike interconnecting in traditional communications markets, there is little direct cost associated with interoperating with dominant platforms.[2446]

[2438] Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks* 14 (Sept. 2020) (on file with Comm.).

[2439] Becky Chao & Ross Schulman, *Promoting Platform Interoperability*, NEW AM. FOUND. (May 13, 2020), https://www.newamerica.org/oti/reports/promoting-platform-interoperability/.

[2440] Chris Riley, *A Framework for Forward-Looking Tech Competition Policy*, MOZILLA 18 (2019), https://blog.mozilla.org/netpolicy/files/2019/09/Mozilla-Competition-Working-Paper.pdf.

[2441] Becky Chao & Ross Schulman, *Promoting Platform interoperability*, NEW AM. FOUND. (May 13, 2020), https://www.newamerica.org/oti/reports/promoting-platform-interoperability/.

[2442] Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks* 13–14 (Sept. 2020) (on file with Comm.).

[2443] *Id*.

[2444] *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms: Hearing Before Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. 21 (2020) (statement of Sally Hubbard, Dir. of Enforcement Strategy, Open Mkts. Inst.) ("Interoperability is an anti-monopoly tool that has been used successfully many times to promote innovation by reducing barriers to entering markets.").

[2445] Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks* 13–14 (Sept. 2020) (on file with Comm.).

[2446] *Id.* at 15 ("Unlike the familiar AT&T example, there would be no cost to interconnection in the digital platform context. The standard is simply a way to present and transfer information that is already being presented and transferred. No wire needs to be connected to achieve it, nor do machines need to be co-located, or special workers employed. Transferring digital files has almost zero cost, but regardless of that cost, Facebook would be transferring those files to serve its users in any case. Facebook might need to pay some costs to redesign the format in which it transfers text and images, but if it has been found liable for monopolization by a court, it is expected that a remedy will have costs. The real cost of ongoing interoperability to Facebook.com is the possibility that it loses customers once the barriers to entry fall. But that risk is what every firm faces in a competitive market and represents a benefit to consumers.").

Finally, interoperability is an important complement, not substitute, to vigorous antitrust enforcement. As discussed in this Report, Facebook has tipped the social network toward a monopoly, and due to its strong network effects, does not face competitive pressure. On its own, interoperability is unlikely to fully restore competition in the social networking market due to the lack of meaningful competition in the market today. On the other hand, in the absence of pro-competitive policies like interoperability, it is also possible that enforcement alone may provide incomplete relief due to future market tipping.[2447]

b. Data Portability

Data portability is also a remedy for high costs associated with leaving a dominant platform. These costs present another barrier to entry for competitors and a barrier to exit for consumers. Dominant platforms can maintain market power in part because consumers experience significant frictions when moving to a new product.[2448] Users contribute data to a platform, for example, but can find it hard to migrate that data to a rival platform.[2449] The difficulty of switching tends to keep users on incumbent platforms.[2450] Providing consumers and businesses with tools to easily port or rebuild their social graph, profile, or other relevant data on a competing platform would help address these concerns.[2451] Although complementary to interoperability, data portability alone would not fully address concerns related to network effects since consumers would still need to recreate their networks on a new platform and would not be able to communicate with their network on the incumbent platform.[2452]

[2447] *Id.* at 10. ("A divestiture may reduce the existing market power of the dominant network but not eliminate the market power due to network effects that was achieved through anticompetitive conduct. And, alone, divestiture may not prevent future tipping. Thus, on their own, they risk being insufficient to fully restore the lost competition.").

[2448] *See* JOSHUA GANS, THE HAMILTON PROJECT, ENHANCING COMPETITION WITH DATA AND IDENTITY PORTABILITY 5 (June 2018), http://www.hamiltonproject.org/assets/files/Gans_20180611.pdf.

[2449] *See id.*

[2450] *See* Josh Constine, *Friend Portability Is the Must-Have Facebook Regulation*, TECHCRUNCH (May 12, 2019), https://technologycrunch.com/2019/05/12/friends-wherever; Chris Dixon, *The Interoperability of Social Networks*, BUS. INSIDER (Nov. 10, 2010), https://www.businessinsider.com/the-interoperability-of-social-networks-2011-2; Data and Privacy Hearing at 2 (statement of Dina Srinivasan, Fellow, Yale Thurman Arnold Project).

[2451] Submission from Charlotte Slaiman, Competition Policy Dir., Public Knowledge, to H. Comm. on the Judiciary (May 14, 2020) (on file with Comm.); Appendix I at 3–4 (statement of Gene Kimmelman, Sr. Advisor, Public Knowledge) [hereinafter Slaiman Submission].

[2452] *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms: Hearing Before Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. 21 (2020) (statement of Sally Hubbard, Dir. of Enforcement Strategy, Open Mkts. Inst.) (on file with Comm.). Last year, Senators Mark R. Warner (D-VA), Josh Hawley (R-MO), and Richard Blumenthal (D-CT) introduced S.2648, the "Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act," bipartisan legislation to require that dominant platforms make user data portable and their services interoperable. Additionally, this proposal would also allow users to delegate management of their privacy preferences to a third-party service. Press Release, Sen. Mark R. Warner, Senators Introduce Bipartisan Bill to Encourage Competition in Social Media (Oct. 22, 2019), https://www.warner.senate.gov/public/index.cfm/2019/10/senators-introduce-bipartisan-bill-to-encourage-competition-in-social-media.

4. Reduce Market Power Through Merger Presumptions

The firms investigated by the Subcommittee owe part of their dominance to mergers and acquisitions. Several of the platforms built entire lines of business through acquisitions, while others used acquisitions at key moments to neutralize competitive threats. Although the dominant platforms collectively engaged in several hundred mergers and acquisitions between 2000-2019, antitrust enforcers did not block a single one of these transactions. The Subcommittee's investigation revealed that several of these acquisitions enabled the dominant platforms to block emerging rivals and undermine competition.

Despite a significant number of ongoing antitrust investigations, the dominant platforms have continued to pursue significant deal-making. Over the last year, for example, Google purchased Fitbit for $2.1 billion and Looker for $2.6 billion; Amazon purchased Zoox for $1.3 billion; and Facebook acquired Giphy for an undisclosed amount.[2453] Meanwhile, all four of the firms investigated by the Subcommittee have recently focused on acquiring startups in the artificial intelligence and virtual reality space.[2454]

Ongoing acquisitions by the dominant platforms raise several concerns. Insofar as any transaction entrenches their existing position, or eliminates a nascent competitor, it strengthens their market power and can close off market entry. Furthermore, by pursuing additional deals in artificial intelligence and in other emerging markets, the dominant firms of today could position themselves to control the technology of tomorrow.

It is unclear whether the antitrust agencies are presently equipped to block anticompetitive mergers in digital markets. The record of the Federal Trade Commission and the Justice Department in this area shows significant missteps and repeat enforcement failures. While both agencies are currently pursuing reviews of pending transactions, it is not yet clear whether they have developed the analytical tools to challenge anticompetitive deals in digital markets. For example, the Justice Department in February permitted Google's acquisition of Looker, a data analytics and business intelligence startup, despite serious risks that the deal would eliminate an independent rival and could allow Google to cut

[2453] Chaim Gartenberg, *Google buys Fitbit for $2.1 billion*, THE VERGE (Nov. 1, 2019), https://www.theverge.com/2019/11/1/20943318/google-fitbit-acquisition-fitness-tracker-announcement; Lauren Feiner & Jordan Novet, *Google cloud boss Thomas Kurian makes his first big move — buys Looker for $2.6 billion*, CNBC (June 6, 2019), https://www.cnbc.com/2019/06/06/google-buys-cloud-company-looker-for-2point6-billion.html; Karen Weise & Erin Griffith, *Amazon to Buy Zoox, in a Move Toward Self-Driving Cars*, N.Y. TIMES (June 26, 2020), https://www.nytimes.com/2020/06/26/business/amazon-zoox.html; Kurt Wagner & Sarah Frier, *Facebook Buys Animated Image Library Giphy for $400 Million*, BLOOMBERG (May 15, 2020), https://www.bloomberg.com/news/articles/2020-05-15/facebook-buys-animated-image-library-giphy-to-boost-messaging.

[2454] *See infra* Appendix.

off access to rivals.[2455] These concerns are especially acute today, given the combined national health and economic crises, which have widened the gap between the dominant platforms and businesses across the rest of the economy.

To address this concern, Subcommittee staff recommends that Congress consider shifting presumptions for future acquisitions by the dominant platforms. Under this change, any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion. This process would occur outside the current Hart-Scott-Rodino Act (HSR) process, such that the dominant platforms would be required to report *all* transactions and no HSR deadlines would be triggered. Establishing this presumption would better reflect Congress's preference for growth through ingenuity and investment rather than through acquisition.

5. <u>Create an Even Playing Field for the Free and Diverse Press</u>

The free and diverse press—particularly local press—is the backbone of a healthy and vibrant democracy. But as discussed in this Report, the rise of market power online has corresponded with a significant decline in the availability of trustworthy sources of news.[2456] Through dominating both digital advertising and key communication platforms, Google and Facebook have outsized power over the distribution and monetization of trustworthy sources of news online,[2457] creating an uneven playing field in which news publishers are beholden to their decisions.[2458]

To address this imbalance of bargaining power, we recommend that the Subcommittee consider legislation to provide news publishers and broadcasters with a narrowly tailored and temporary safe harbor to collectively negotiate with dominant online platforms.

In April 2019, Subcommittee Chairman Cicilline and Doug Collins (R-GA), the former-Ranking Member of the Committee on the Judiciary, introduced H.R. 2054, the "Journalism

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[2455] Letter from Diana L. Moss, Pres., Am. Antitrust Inst., to Hon. Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div. (July 8, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/07/AAI-Ltr-to-DOJ_Google-Looker_7.8.19.pdf.

[2456] Free and Diverse Press Hearing at 3 (statement of David Chavern, Pres. & CEO, News Media Alliance) ("In effect, a couple of dominant tech platforms are acting as regulators of the digital news industry.").

[2457] Submission of Source 52, to H. Comm. on the Judiciary, 12 (Oct. 30, 2019) (on file with Comm.).

[2458] Submission from Source 53, to H. Comm. on the Judiciary, 7 (Oct. 14, 2019) (on file with Comm.). Although Apple News and Apple News Plus are increasingly popular news aggregators, most market participants that the Subcommittee received evidence from during the investigation do not view it as a critical intermediary for online news at this time. Some publishers raised competition concerns about the tying of payment inside Apple's news product.

Competition and Preservation Act of 2019."[2459] H.R. 2054 would allow coordination by news publishers under the antitrust laws if it: (1) directly relates to the quality, accuracy, attribution or branding, or interoperability of news; (2) benefits the entire industry, rather than just a few publishers, and is non-discriminatory to other news publishers; and (3) directly relates to and is reasonably necessary for these negotiations, instead of being used for other purposes. As Subcommittee Chairman Cicilline noted at the time of the bill's introduction:

> The free press is a cornerstone of our democracy. Journalists keep the public informed, root out corruption, and hold the powerful accountable. This bill will provide a much-needed lifeline to local publishers who have been crushed by Google and Facebook. It's about time we take a stand on this issue.[2460]

Mr. Collins added that the proposed legislation would allow "community newspapers to more fairly negotiate with large tech platforms that are operating in an increasingly anti-competitive space," which would "help protect journalism, promote competition and allow communities to stay informed."[2461]

We recommend the consideration of this legislation as part of a broader set of reforms to address the rise of market power online. This proposed legislation follows a long congressional tradition of allocating coordination rights to individuals or entities that lack bargaining power in a marketplace.[2462] Although antitrust exemptions have been disfavored, at various times lawmakers have created exemptions in order to rectify imbalances of power or to promote non-competition values.[2463] In this instance, the risk associated with antitrust exemptions to preserve the free and diverse press—a bedrock constitutional value—is low, while the benefits of preserving access to high-quality journalism are difficult to overstate. As discussed earlier in the Report, the bill would follow steps that other jurisdictions are similarly taking to rebalance the power between news publishers and the dominant platforms.

6. Prohibit Abuse of Superior Bargaining Power and Require Due Process

By virtue of functioning as the only viable path to market, dominant platforms enjoy superior bargaining power over the third parties that depend on their platforms to access users and markets.

[2459] Press Release, Rep. David N. Cicilline, Collins Introduce Bill to Provide Lifeline to Local News (Apr. 3, 2019), https://cicilline.house.gov/press-release/cicilline-collins-introduce-bill-provide-lifeline-local-news.

[2460] *Id.*

[2461] *Id.*

[2462] *See generally* Submission from Sanjukta Paul, Ass't Prof. of Law, Wayne State Univ., to H. Comm. on the Judiciary, 2–4 (Apr. 21, 2020) (on file with Comm.) [hereinafter Paul Submission].

[2463] *See, e.g.*, Clayton Act, 15 U.S.C. § 17 (1914); Capper-Volstead Act, ch. 57, 42 Stat. 388–89 (1922) (codified as amended at 7 U.S.C. §§ 291, 292 (2012)).

Their bargaining leverage is a form of market power,[2464] which the dominant platforms routinely use to protect and expand their dominance.

Through its investigation, the Subcommittee identified numerous instances in which the dominant platforms abused this power. In several cases, dominant platforms used their leverage to extract greater money or data than users would be willing to provide in a competitive market. While a firm in a competitive market would lose business if it charged excessive prices for its goods or services because the customer would switch to a competitor, dominant platforms have been able to charge excessive prices or ratchet up their prices without a significant loss of business. Similarly, certain dominant platforms have been able to extort an ever-increasing amount of data from their customers and users, ranging from a user's personal data to a business's trade secrets and proprietary content. In the absence of an alternative platform, users effectively have no choice but to accede to the platform's demands for payment whether in the form of dollars or data.

The Subcommittee's investigation found that dominant platforms have also leveraged their market power in negotiations with businesses and individuals to dictate the terms of the relationship. The dominant platforms frequently impose oppressive contractual provisions or offer "take-it-or-leave-it" terms in contract negotiations—even when dealing with relatively large companies represented by sophisticated counsel.[2465] Lacking bargaining power, dependent third parties often find themselves at the whims of the platform's arbitrary decisions. Subcommittee staff encountered numerous instances in which a third party had been abruptly delisted or demoted from a platform, without notice or explanation, and often without a clear avenue for recourse.

The dominant platforms' ability to abuse their superior bargaining power in these ways can cause long-term and far-reaching harm. To address these issues, the Subcommittee recommends that Congress consider prohibiting the abuse of superior bargaining power, including through potentially targeting anticompetitive contracts, and introducing due process protections for individuals and businesses dependent on the dominant platforms.[2466]

[2464] Aviv Nevo, Deputy Assistant Att'y Gen. for Econ., U.S. Dep't of Justice, Antitrust Div., Mergers that Increase Bargaining Leverage, Remarks at the Stanford Institute for Economic Policy Research, 7 (Jan. 22, 2014), https://www.justice.gov/atr/file/517781/download ("[A]s a matter of economic theory and case law bargaining leverage is a source of market power.").

[2465] *See, e.g.*, Dig. Competition Expert Panel Report at 45 (noting how a report commissioned by the UK's Department for Digital, Culture, Media & Sport found that as "a consequence of their high market share, ownership of key technologies and strong user data assets, Google and Facebook are, to some extent, able to set their own terms to advertisers and publishers").

[2466] Foer Submission at 2–3; Submission from Marshall Steinbaum, Assistant Prof. of Econ., Univ. of Utah, to H. Comm. on the Judiciary, 8 (Apr. 2020) (on file with Comm.) [hereinafter Steinbaum Submission]. *See generally* Austl. Competition & Consumer Comm'n Report at 205–79; Competition & Mkts. Auth. Report at 328–49.

B. Strengthening the Antitrust Laws

1. Restore the Antimonopoly Goals of the Antitrust Laws

The antitrust laws that Congress enacted in 1890 and 1914—the Sherman Act, the Clayton Act, and the Federal Trade Commission Act—reflected a recognition that unchecked monopoly power poses a threat to our economy as well as to our democracy.[2467] Congress reasserted this vision through subsequent antitrust laws, including the Robinson-Patman Act of 1936, the Celler-Kefauver Act of 1950, and the Hart-Scott-Rodino Act of 1976.[2468]

In the decades since Congress enacted these foundational statutes, the courts have significantly weakened these laws and made it increasingly difficult for federal antitrust enforcers and private plaintiffs to successfully challenge anticompetitive conduct and mergers.[2469] By adopting a narrow construction of "consumer welfare" as the sole goal of the antitrust laws, the Supreme Court has limited the analysis of competitive harm to focus primarily on price and output rather than the competitive process[2470]—contravening legislative history and legislative intent.[2471] Simultaneously, courts have adopted the view that underenforcement of the antitrust laws is preferable to overenforcement, a position at odds with the clear legislative intent of the antitrust laws, as well as the view of Congress that private monopolies are a "menace to republican institutions."[2472] In recent decades, the Justice Department and the Federal Trade Commission have contributed to this problem by taking a narrow view of their legal authorities and issuing guidelines that are highly permissive of market power and its abuse. The overall result is an approach to antitrust that has significantly diverged from the laws that Congress enacted.

[2467] *See generally* First & Fox Submission at 10–11; Steinbaum Submission; Submission from Robert H. Lande, Venable Prof. of Law, Univ. of Balt. Sch. of Law, to H. Comm. on the Judiciary (Apr. 16, 2020) (on file with Comm.) [hereinafter Lande Submission]; Paul Submission at 2–4; Submission from Maurice Stucke, Douglas A. Blaze Distinguished Prof. of Law, Univ. of Tennessee, to H. Comm. on the Judiciary, 2 (Mar. 13, 2020) (on file with Comm.) [hereinafter Stucke Submission].

[2468] Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U.N.H. L. REV. 179 (2018).

[2469] *See generally* Submission from Tim Wu, Julius Silver Prof.of Law, Columbia Law Sch., to H. Comm. on the Judiciary (Apr. 25, 2020) (on file with Comm.) [hereinafter Wu Submission]; Submission from Spencer Weber Waller, John Paul Stevens Chair in Competition Law, Loyola Univ. Chicago Sch. of Law, to H. Comm. on the Judiciary (Apr. 28, 2020) (on file with Comm.) [hereinafter Waller Submission].

[2470] Jonathan Sallet, *Protecting the "Competitive Process"—The Evolution of Antitrust Enforcement in the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 31, 2018), https://equitablegrowth.org/competitive-edge-protecting-the-competitive-process-the-evolution-of-antitrust-enforcement-in-the-united-states/.

[2471] Submission from John Newman, Assoc. Prof. of Law, Univ. of Miami Sch. of Law, to the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 2 (Apr. 1, 2020) (on file with Comm.) [hereinafter Newman Submission]; Stucke Submission at 2.

[2472] 21 CONG. REC. 3146 (1890) (statement of Sen. Hoar).

In part due to this narrowing, some of the anticompetitive business practices that the Subcommittee's investigation uncovered could be difficult to challenge under current law.[2473] In response to this concern, this section identifies specific legislative reforms that would help renew and rehabilitate the antitrust laws in the context of digital markets. In addition to these specific reforms, the Subcommittee recommends that Congress consider reasserting the original intent and broad goals of the antitrust laws by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.[2474]

2. Invigorate Merger Enforcement

Section 7 of the Clayton Act of 1914 prohibits any transaction where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[2475] In 1950, Congress passed the Celler-Kevauver Anti-Merger Act to broaden the types of transactions covered by the Clayton Act, specifically to include vertical mergers, conglomerate mergers, and purchases of assets.[2476]

As noted above, since 1998, Amazon, Apple, Facebook, and Google collectively have purchased more than 500 companies.[2477] The antitrust agencies did not block a single acquisition. In one instance—Google's purchase of ITA—the Justice Department required Google to agree to certain terms in a consent decree before proceeding with the transaction.[2478]

The Subcommittee's review of the relevant documents revealed that several of these acquisitions lessened competition and increased market power. In several cases, antitrust enforcers permitted dominant platforms to acquire a competitive threat. For example, documents produced during the investigation demonstrate that Facebook acquired Instagram to neutralize an emerging rival, while Google purchased Waze to eliminate an independent provider of mapping data. In other instances, the platform engaged in a series of acquisitions that enabled it to gain a controlling position across an entire supply chain or ecosystem. Google's acquisitions of DoubleClick, AdMeld, and AdMob, for example, let Google achieve a commanding position across the digital ad tech market.

2473 *See* Wu Submission at 2 ("If read broadly, the prohibitions on 'monopolization,' 'unfair means of competition,' and 'restraints on trade' could be used to handle the challenges of our time. But 'broadly' is manifestly not how the laws are read by the judiciary at this point. For the courts have grafted onto these laws burdens of proof, special requirements and defenses that are found nowhere in the statutes, and that have rendered the laws applicable only to the narrowest of scenarios, usually those involving blatant price effects. And it is this that makes the laws inadequate for the challenges presented by digital markets.").

2474 *See generally* First & Fox Submission at 10–11; Stucke Submission at 2; Wu Submission; Waller Submission.

2475 Clayton Act, 15 U.S.C. § 18 (1914).

2476 Celler-Kefauver Anti-Merger Act, 64 Stat. 1125 (1950).

2477 *See infra* Appendix.

2478 Stipulation and Order, United States v. Google Inc. & ITA Software Inc., No. 1:11-cv-00688 (D.D.C. 2011).

In light of this, Subcommittee staff recommends that Congress considers a series of reforms to strengthen merger enforcement.

a. Codify Bright-Line Rules and Structural Presumptions in Concentrated Markets

A major change in antitrust enforcement over the last few decades has been the shift away from bright-line rules in favor of "rule of reason" case-by-case analysis. Although the rule of reason approach is said to reduce errors in enforcement through fact-specific analysis, in practice the standard tilts heavily in favor of defendants.[2479] The departure from bright-line rules and presumptions has especially affected merger enforcement, where enforcers seeking to challenge a merger must fully prove that it will have anticompetitive effects, even in cases where the merging parties are dominant firms in highly concentrated markets. Scholarship by Professor John Kwoka of Northeastern University shows that the antitrust agencies acted in only 38% of all mergers that led to price increases, suggesting that the current approach to merger review is resulting in significant underenforcement.[2480]

To respond to this concern, the Subcommittee recommends that Members consider codifying bright-line rules for merger enforcement, including structural presumptions.[2481] Under a structural presumption, mergers resulting in a single firm controlling an outsized market share, or resulting in a significant increase in concentration, would be presumptively prohibited under Section 7 of the Clayton Act.[2482] This structural presumption would place the burden of proof upon the merging parties to show that the merger would not reduce competition. A showing that the merger would result in efficiencies should not be sufficient to overcome the presumption that it is anticompetitive. It is the view of Subcommittee staff that the 30% threshold established by the Supreme Court in *Philadelphia National Bank* is appropriate, although a lower standard for monopsony or buyer power claims may deserve consideration by the Subcommittee.

By shifting the burden of proof to the merging parties in cases involving concentrated markets and high market shares, codifying the structural presumption would help promote the efficient allocation of agency resources and increase the likelihood that anticompetitive mergers are blocked.

[2479] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009).

[2480] JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES 155 (2014).

[2481] For support of codifying the structural presumption, *see* Submission from John Kwoka, Finnegan Prof. of Econ., Northeastern Univ., to H. Comm. on the Judiciary, 3 (Apr. 17, 2020) (on file with Comm.) [hereinafter Kwoka Submission]; Submission from Michael Kades, Dir., Mkts. & Competition Pol'y, Wash. Ctr. for Equitable Growth et al., to H. Comm. on the Judiciary, 9 (Apr. 30, 2020) (on file with Comm.) [hereinafter Kades Submission]; Lande Submission at 5; Slaiman Submission at 3; Foer Submission at 9. *See also* Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996 (2018); Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269 (2015).

[2482] Although some courts still follow the structural presumption adopted by the Supreme Court in *Philadelphia National Bank*, it is not universally followed, especially given the D.C. Circuit's decision in *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

b. Protect Potential Rivals, Nascent Competitors, and Startups

The Subcommittee's investigation produced evidence that several of the dominant platforms acquired potential rivals and nascent competitors. Potential rivals are firms that are planning to enter or could plausibly enter the acquirer's market. Nascent competitors are firms whose "prospective innovation represents a serious future threat to an incumbent."[2483] In digital markets, potential rivals and nascent competitors play a critical role in driving innovation, as their prospective entry may dislodge incumbents or spur competition. For this reason, incumbents may view potential rivals and nascent competitors as a significant threat, especially as their success could render the incumbent's technologies obsolete.

To strengthen the law relating to potential rivals and nascent competitors, Subcommittee staff recommends strengthening the Clayton Act to prohibit acquisitions of potential rivals and nascent competitors. This could be achieved by clarifying that proving harm on potential competition or nascent competition grounds does not require proving that the potential or nascent competitor would have been a successful entrant in a but-for world.[2484] Given the patchwork of cases that are unfavorable to potential and nascent competition-based theories of harm, this amendment should also make clear that Congress intends to override this case law.[2485]

Since startups can be an important source of potential and nascent competition, the antitrust laws should also look unfavorably upon incumbents purchasing innovative startups. One way that Congress could do so is by codifying a presumption against acquisitions of startups by dominant firms, particularly those that serve as direct competitors, as well as those operating in adjacent or related markets.[2486]

Lastly, Subcommittee staff's review of relevant documents produced by the Federal Trade Commission and Justice Department demonstrated that the antitrust agencies consistently underestimated—by a significant margin—the degree to which an acquisition would undermine competition and impede entry. In light of this tendency, Subcommittee staff recommends that Congress consider strengthening the incipiency standard by amending the Clayton Act to prohibit acquisitions that "may lessen competition or tend to increase market power."[2487] Revising the law

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2483 Wu Submission at 4–5; *see also* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. (forthcoming 2020); Kades Submission at 14.

2484 Wu Submission at 6; Kwoka Submission at 6.

2485 *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

2486 Submission from Mark Lemley, William H. Neukom Prof. of Law, Stanford Law Sch., to H. Comm. on the Judiciary, 7–8 (Apr. 8, 2020) (on file with Comm.) [hereinafter Lemley Submission].

2487 Submission from Consumer Reports, to H. Comm. on the Judiciary, 5 (Apr. 17, 2020) (on file with Comm.) [hereinafter Consumer Reports Submission]; Submission from Richard M. Steuer, Adjunct Prof., Fordham Univ. Sch. of Law, to H. Comm. on the Judiciary (Apr. 8, 2020) (on file with Comm.) [hereinafter Steuer Submission]; Peter C. Carstensen &

would "arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." [2488]

c. Strengthen Vertical Merger Doctrine

The Subcommittee's investigation identified several ways in which vertical integration of dominant platforms enabled anticompetitive conduct. For this reason, the Subcommittee recommends that Congress examine proposals to strengthen the law relating to vertical mergers. The current case law disfavors challenges to vertical mergers. Specifically, courts tend to defer to claims from the merging parties that the transaction will yield efficiencies through the "elimination of double marginalization" and are skeptical about claims that the merger will result in foreclosure.

To address this concern, the Subcommittee recommends that Congress explore presumptions involving vertical mergers, such as a presumption that vertical mergers are anticompetitive when either of the merging parties is a dominant firm operating in a concentrated market, or presumptions relating to input foreclosure and customer foreclosure.[2489]

3. Rehabilitate Monopolization Law

Section 2 of the Sherman Act makes it illegal to "monopolize, 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."[2490] Over recent decades, courts have significantly heightened the legal standards that plaintiffs must overcome in order to prove monopolization. Several of the business practices the Subcommittee's investigation uncovered should be illegal under Section 2. This section briefly identifies the relevant business practices and the case law that impedes effective enforcement of Section 2 of the Sherman Act.

a. Abuse of Dominance

Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of 'Redundant' Competitors*, 2018 WIS. L. REV. 783 (2018).

[2488] S. REP. NO. 698 (1914) in EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1744–52 (1978) (noting that the Senate Judiciary Committee report stated that the purpose of the bill was to supplement the Sherman Act "by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation").

[2489] Kades Submission at 5; Jonathan Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 3 (2019).

[2490] Sherman Act, 15 U.S.C. § 2 (1890).

The Subcommittee's investigation found that the dominant platforms have the incentive and ability to abuse their dominant position against third-party suppliers, workers, and consumers. Some of these business practices are a detriment to fair competition, but they do not easily fit the existing categories identified by the Sherman Act, namely "monopolization" or "restraint of trade." Since courts have shifted their interpretation of the antitrust law to focus primarily on the formation or entrenchment of market power, and not on its exploitation or exercise, many of the business practices that Subcommittee staff identified as undermining competition in digital markets could be difficult to reach under the prevailing judicial approach.

To address this concern, Subcommittee staff recommends that Congress consider extending the Sherman Act to prohibit abuses of dominance.[2491] Furthermore, the Subcommittee should examine the creation of a statutory presumption that a market share of 30% or more constitutes a rebuttable presumption of dominance by a seller, and a market share of 25% or more constitute a rebuttable presumption of dominance by a buyer.[2492]

b. Monopoly Leveraging

The Subcommittee's investigation found that the dominant platforms have engaged in "monopoly leveraging," where a dominant firm uses its monopoly power in one market to boost or privilege its position in another market. For example, Google's use of its horizontal search monopoly to advantage its vertical search offerings is a form of monopoly leveraging. Although monopoly leveraging was previously a widely cognizable theory of harm under antitrust law, courts now require that use of monopoly power in the first market "actually monopolize" the secondary market or "dangerously threaten[] to do so."[2493] The Subcommittee's investigation identified several instances in which use of monopoly power in one market to privilege the monopolist's position in the second market injured competition, even if the conduct did not result in monopolization of the second market. For this reason, Subcommittee staff recommends overriding the legal requirement that monopoly leveraging "actually monopolize" the second market, as set out in *Spectrum Sports, Inc. v. McQuillan.*[2494]

c. Predatory Pricing

[2491] First & Fox Submission at 2; Foer Submission at 2–4; Newman Submission at 7–8; Stucke Submission at 14; Waller Submission at 13.

[2492] Waller Submission at 12.

[2493] 506 U.S. 447 (1993).

[2494] *Id. See also* Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991).

The Subcommittee's investigation identified several instances in which a dominant platform was pricing goods or services below-cost in order to drive out rivals and capture the market. For example, documents produced during the investigation revealed that Amazon had been willing to lose $200 million in a single quarter in order to pressure Diapers.com, a firm it had recognized as its most significant rival in the category. Amazon cut prices and introduced steep promotions, prompting a pricing war that eventually weakened Diapers.com. Amazon then purchased the company, eliminating its competitor and subsequently cutting back the discounts and promotions it had introduced.

Predatory pricing is a particular risk in digital markets, where winner-take-all dynamics incentivize the pursuit of growth over profits, and where the dominant digital platforms can cross-subsidize between lines of business. Courts, however, have introduced a "recoupment" requirement, necessitating that plaintiffs prove that the losses incurred through below-cost pricing subsequently were or could be recouped. Although dominant digital markets can recoup these losses through various means over the long term, recoupment is difficult for plaintiffs to prove in the short term. Since the recoupment requirement was introduced, successful predatory pricing cases have plummeted.[2495]

The Subcommittee recommends clarifying that proof of recoupment is not necessary to prove predatory pricing or predatory buying, overriding the Supreme Court's decisions in *Matsushita v. Zenith Ratio Corp.*,[2496] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[2497] and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*[2498]

d. Essential Facilities and Refusals to Deal

The Subcommittee's investigation uncovered several instances in which a dominant platform used the threat of delisting or refusing service to a third party as leverage to extract greater value or more data or to secure an advantage in a distinct market. Because the dominant platforms do not face meaningful competition in their primary markets, their threat to refuse business with a third party is the equivalent of depriving a market participant of an essential input. This denial of access in one market can undermine competition across adjacent markets, undermining the ability of market participants to compete on the merits.

To address this concern, the Subcommittee recommends that Congress consider revitalizing the "essential facilities" doctrine, the legal requirement that dominant firms provide access to their

[2495] Hubbard Submission at 20; Stucke Submission at 7; Teachout Submission at 12; Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013).

[2496] 475 U.S. 574 (1986).

[2497] 509 U.S. 209 (1993).

[2498] 549 U.S. 312 (2007).

infrastructural services or facilities on a nondiscriminatory basis.[2499] To clarify the law, Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm.[2500]

e. Tying

The Subcommittee's investigation identified several instances in which a dominant platform conditioned access to a good or service that the dominant platform controlled on the purchase or use of a separate product or service. This business practice undermines competition on the merits by enabling a firm with market power in one market to privilege products or services in a distinct market.

Although antitrust law has long treated tying by a monopolist as anticompetitive, in recent decades, courts have moved away from this position. Subcommittee staff recommends that Congress consider clarifying that conditioning access to a product or service in which a firm has market power to the purchase or use of a separate product or service is anticompetitive under Section 2, as held by the Supreme Court in *Jefferson Parish Hosp. Dist. v. Hyde*.[2501]

f. Self-Preferencing and Anticompetitive Product Design

The Subcommittee's investigation uncovered several instances in which a dominant platform used the design of its platform or service to privilege its own services or to disfavor competitors. This practice undermines competition by enabling a firm that controls an essential input to distort competition in separate markets. The Subcommittee recommends that Congress consider whether making a design change that excludes competitors or otherwise undermines competition should be a violation of Section 2, regardless of whether the design change can be justified as an improvement for consumers.[2502]

4. Additional Measures to Strengthen the Antitrust Laws

In response to the Subcommittee's requests for submissions, experts identified other proposals that Subcommittee staff believes warrant review by Congress. These include:

[2499] Submission from the Am. Antitrust Inst., to H. Comm. on the Judiciary, 4 (Apr. 17, 2020) (on file with Comm.) [hereinafter AAI Submission]; Waller Submission at 13.

[2500] Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398 (2004); Pacific Bell Telephone Co. v. LinkLine Commc'ns, Inc., 555 U.S. 438 (2009).

[2501] 466 U.S. 2 (1984).

[2502] This would require overriding *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991 (9th Cir. 2010).

- Overriding *Ohio v. American Express* by clarifying that cases involving platforms do not require plaintiffs to establish harm to both sets of customers;[2503]

- Overriding *United States v. Sabre Corp*., clarifying that platforms that are "two-sided," or serve multiple sets of customers, can compete with firms that are "one-sided";[2504]

- Clarifying that market definition is not required for proving an antitrust violation, especially in the presence of direct evidence of market power;[2505] and

- Clarifying that "false positives"—or erroneous enforcement—are not more costly than "false negatives"—or erroneous non-enforcement—and that, in relation to conduct or mergers involving dominant firms, "false negatives" are costlier.[2506]

C. Strengthening Antitrust Enforcement

1. Congressional Oversight

As discussed earlier in the Report, Congress has a strong tradition of performing vigorous oversight of the enforcement and adequacy of the antitrust laws. Over the last century, Congress at key moments responded forcefully to the courts' narrowing of antitrust laws, the rising tide of economic concentration, or other challenges to the sound and effective administration of the antitrust laws.[2507]

This tradition includes the creation of the Federal Trade Commission and concurrent enactment of the Clayton Antitrust Act in 1914, as both a response to the Supreme Court's narrow construction of the Sherman Act in 1911 and an effort to limit the discretion of the courts.[2508] It also includes Congress's broadening of merger enforcement to cover non-horizontal acquisitions and other transactions in the Celler-Kefauver Anti-Merger Act of 1950 as well as establishing a mechanism for judicial oversight of consent decrees in response to political interference in merger enforcement with

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[2503] AAI Submission at 4; Submission from Herbert Hovenkamp, James G. Dinan Univ. Prof., Univ. of Pa. Law Sch., to H. Comm. on the Judiciary, 3 (Apr. 17, 2020) (on file with Comm.) [hereinafter Hovenkamp Submission]; Hubbard Submission at 20; Kades Submission at 8.

[2504] United States *v*. Sabre Corp., 452 F. Supp. 3d 97 (D. Del. 2020). *See also* Kades Submission at 10.

[2505] Hovenkamp Submission at 3–4; Newman Submission at 5–6.

[2506] Subcommittee staff believes that Congress could clarify that the views set out by then-Professor Frank Easterbrook in *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) do not reflect the views of the Congress in enacting the antitrust laws. *See also* Submission from Bill Baer, Visiting Fellow, Brookings Inst., to H. Comm. on the Judiciary, 3 (May 19, 2020) (on file with Comm.) [hereinafter Baer Submission] ("That is my fundamental concern with the state of antitrust enforcement today. It is too cautious, too worried about adverse effects of "over enforcement" (so called Type I errors).").

[2507] *See generally,* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

[2508] Clayton Act, 15 U.S.C. § 12; Fed. Trade Comm'n Act, 15 U.S.C. § 41.

the Tunney Act of 1974.[2509] Additionally, Congress has regularly investigated the rise and abuse of market power in important markets.[2510] In support of these efforts, Congress dedicated substantial congressional and agency resources to perform the task of identifying and responding to anticompetitive conduct.[2511]

In recent decades, Congress has departed from this tradition, deferring largely to the courts and to the antitrust agencies in the crafting of substantive antitrust policy.[2512] Its inaction has been read as acquiescence to the narrowing of the antitrust laws and has contributed to antitrust becoming "overly technical and primarily dependent on economics."[2513]

In other cases, congressional attention has fallen short as lawmakers tried to address competition problems without sustained efforts to implement enforcement changes, leading some reform efforts in recent decades to misfire.[2514] Responding to these concerns, Congress has increased appropriations and provided modest improvements to the Federal Trade Commission's budget and remedial authority during this period. But these efforts were insufficient without sustained support in the face of "ferocious opposition" from large defendants and businesses lobbying Congress.[2515]

To remedy these broader trends, Subcommittee staff recommends that Congress revive its long tradition of robust and vigorous oversight of the antitrust laws and enforcement, along with its

[2509] 5 U.S.C. § 16. *See also Consent Decree Program of the Dep't of Justice: Hearings Before the Subcomm. on Antitrust of the H. Comm. on the Judiciary, 85th Cong.* (1957); REPORT OF THE SUBCOMM. ON ANTITRUST OF THE H. COMM. ON THE JUDICIARY, CONSENT DECREE PROGRAM OF THE DEP'T OF JUSTICE, 86TH CONG., 1ST SESS. (1959).

[2510] In the 1990s, the Committee on the Judiciary conducted significant oversight of competition in the telecommunications market in the wake of the breakup of Ma Bell and through oversight of the 1982 consent decree. These efforts culminated in the passage of H.R. 3626, the "Antitrust and Communications Reform Act," by the House of Representatives in 1994 by a vote of 423 to 5. Chairman Jack B. Brooks introduced this bill—a precursor to the Telecommunications Act of 1996—to address monopolization in the telecommunications market. *See generally* H. REP. NO. 103-559 (1994); Robert M. Frieden, *The Telecommunications Act of 1996: Predicting the Winners and Losers*, 20 HASTINGS COMM. & ENT. L.J. 11, 57 n.8 (1997).

[2511] Submission from Alison Jones & William E. Kovacic, to H. Comm. on the Judiciary, 4 (Apr. 17, 2020) (on file with Comm.) [hereinafter Jones & Kovacic Submission].

[2512] Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2556 (2013) ("[D]espite a history of bipartisan congressional support for the importance of the antitrust laws and their enforcement, of late Congress has done little. And when it has done something, it has focused on the micro rather than the macro changes that have occurred in the field.").

[2513] *Id*. at 2559.

[2514] Jones & Kovacic Submission at 4 ("The miscalculation of Congress (and the agencies) about the magnitude of implementation tasks in this earlier period came at a high price. Implementation weaknesses undermined many investigations and cases that the federal agencies launched in response to congressional guidance. The litigation failures raised questions about the competence of the federal agencies, particularly their ability to manage large cases dealing with misconduct by dominant firms and oligopolists. The wariness of the federal agencies since the late 1970s to bring cases in this area—a wariness that many observers today criticize as unwarranted—is in major part the residue of bitter litigation experiences from this earlier period.").

[2515] *Id.* at 6.

commitment to ongoing market investigations and legislative activity. Additionally, greater attention to implementation challenges will enable Congress to better see its reform efforts through.

2. Agency Enforcement

Over the course of the investigation, the Subcommittee uncovered evidence that the antitrust agencies consistently failed to block monopolists from establishing or maintaining their dominance through anticompetitive conduct or acquisitions. This institutional failure follows a multi-decade trend whereby the antitrust agencies have constrained their own authorities and advanced narrow readings of the law. In the case of the Federal Trade Commission, the agency has been reluctant to use the expansive set of tools with which Congress provided it, neglecting to fulfill its broad legislative mandate. Restoring the agencies to full strength will require overcoming these trends.

As a general matter, Congress created the FTC to police and prohibit "unfair methods of competition,"[2516] and to serve as an "administrative tribunal" that carefully studied ongoing business practices and economic conditions.[2517] To enable the agency to carry out these functions, Congress assigned the Commission powers to "make rules and regulations for the purpose of carrying out the [FTC Act's] provisions," as well as broad investigative authority to compel business information and conduct market studies.[2518] Notably, Congress established the provision prohibiting "unfair methods of competition" to reach beyond the other antitrust statutes, "to fill in the gaps in the other antitrust laws, to round them out and make their coverage complete."[2519] Lawmakers delegated to the FTC the task of defining what constituted an "unfair method of competition," recognizing that an expert agency equipped to continuously monitor business practices would be best positioned to ensure the legal definition kept pace with business realities.

[2516] *See* S. REP. NO. 63-597, 13 (1914) ("The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.").

[2517] Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980); *see also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

[2518] 15 U.S.C. § 46.

[2519] Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 251 (1980) ("Section 5 is not confined to conduct that actually violates, or that threatens to violate, one of the other antitrust statutes. If it were limited to this extent it would be a largely duplicative provision. The legislative purpose instead assigned to Section 5 a broader role. It was to be an interstitial statute: it was to fill in the gaps in the other antitrust laws, to round them out and make their coverage complete. In addition to overt violations, therefore, Section 5 would reach closely similar conduct that violates the policy or 'spirit' of the antitrust laws, even though it may not come technically within its terms.").

In practice, however, the Commission has neglected to play this role. In its first hundred years, the FTC promulgated only one rule defining an "unfair method of competition."[2520] In 2015 the Commission adopted a set of "Enforcement Principles," stating that the FTC's targeting of "unfair methods of competition" would be guided by the "promotion of consumer welfare," a policy goal absent from any legislative directive given to the Commission.[2521] Since the adoption of this framework, the FTC has brought only one case under its standalone Section 5 authority.[2522] The agency has also failed to regularly produce market-wide studies, having halted regular data collection in the 1980s.[2523]

Together with the DOJ, the FTC has also chosen to stop enforcing certain antitrust laws entirely. For two decades, neither agency has filed a suit under the Robinson-Patman Act, which Congress passed in order to limit the power of large chain retailers to extract concessions from independent suppliers.[2524] In 2008, the Justice Department issued a report recommending that Section 2 of the Sherman Act be curbed dramatically.[2525] Although the report was subsequently rescinded, the Justice Department has not filed a significant monopolization case in two decades. Meanwhile, both agencies have targeted their enforcement efforts on relatively small players—including ice skating teachers and organists—raising questions about their enforcement priorities.[2526]

The agencies have also been hamstrung by inadequate budgets. In 1981, FTC Chairman Jim Miller won steep budget cuts at the Commission, a drastic rollback from which the agency has not yet recovered. Prior to this Congress, appropriations for both agencies have reached historic lows.[2527] To

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[2520] Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 C.F.R. pt. 412 (1968).

[2521] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[2522] The one exception is FTC's recent suit against Qualcomm. Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019) (5:17-cv-00220).

[2523] FED. TRADE COMM'N, BUR. OF ECON., ANNUAL LINE OF BUSINESS REPORT 1977 (1985), https://www.ftc.gov/reports/us-federal-trade-commission-bureau-economics-annual-line-business-report-1977-statistical.

[2524] In a memo submitted on behalf of the United States to the OECD, the Justice Department stated that "a shift in emphasis based on economic analysis resulted in a significant reduction in enforcement actions brought by the Agencies under the Robinson-Patman Act. As a result, current enforcement of the Act occurs mainly through private treble damages actions." Note by the United States, Roundtable on "Price Discrimination," OECD (Nov. 2016), https://www.justice.gov/atr/case-document/file/979211/download.

[2525] Thomas O. Barnett & Hill B. Wellford, *The DOJ's Single-Firm Conduct Report: Promoting Consumer Welfare Through Clearer Standards for Section 2 of the Sherman Act* (Sept. 8, 2008), https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/238599.pdf.

[2526] Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019). *See also* Brief for the United States and the Fed. Trade Comm'n as Amicus Curiae in Support of Appellant and in Favor of Reversal, Chamber of Commerce of the United States of America and Rasier, LLC, v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640).

[2527] MICHAEL KADES, WASH. CTR. FOR EQUITABLE GROWTH, THE STATE OF U.S. FEDERAL ANTITRUST ENFORCEMENT (2019), https://equitablegrowth.org/wp-content/uploads/2019/09/091719-antitrust-enforcement-report.pdf.

restore the antitrust agencies to full strength, Subcommittee staff recommends that Congress consider the following:

- Triggering civil penalties and other relief for violations of "unfair methods of competition" rules, creating symmetry with violations of "unfair or deceptive acts or practices" rules;

- Requiring the Commission to regularly collect data and report on economic concentration and competition in sectors across the economy, as permitted under Section 6 of the FTC Act;

- Enhancing the public transparency and accountability of the antitrust agencies, by requiring the agencies to solicit and respond to public comments for merger reviews, and by requiring the agencies to publish written explanations for all enforcement decisions;[2528]

- Requiring the agencies to conduct and make publicly available merger retrospectives on significant transactions consummated over the last three decades;

- Codifying stricter prohibitions on the revolving door between the agencies and the companies that they investigate, especially with regards to senior officials;[2529] and

- Increasing the budgets of the Federal Trade Commission and the Antitrust Division.[2530]

3. Private Enforcement

Private enforcement plays a critical role in the nation's antitrust system. The Sherman Act and Clayton Act both include a private right of action. This reflected lawmakers' desire to ensure that those abused by monopoly power have an opportunity for direct recourse.[2531] It also reflected a recognition that public enforcers would be susceptible to capture by the very monopolists that they were supposed to investigate, necessitating other means of enforcement.

Empirical surveys of trends in antitrust enforcement indicate that private enforcement deters anticompetitive conduct and strengthens enforcement overall.[2532] In recent decades, however, courts

[2528] Mitchell Submission at 9–10.

[2529] *See* submission from Source 17.

[2530] *See* Baer Submission at 7–8; Kades Submission at 12–13.

[2531] *See, e.g.*, 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb) (stating that private Section 7 remedies "open the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and give the injured party ample damages for the wrong suffered").

[2532] Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269, 1276 (2013).

have erected significant obstacles for private antitrust plaintiffs, both through procedural decisions and substantive doctrine.

One major obstacle is the rise of forced arbitration clauses, which undermine private enforcement of the antitrust laws by allowing companies to avoid legal accountability for their actions.[2533] These clauses allow firms to evade the public justice system—where plaintiffs have far greater legal protections—and hide behind a one-sided process that is tilted in their favor.[2534] For example, although Amazon has over two million sellers in the United States, Amazon's records reflect that only 163 sellers initiated arbitration proceedings between 2014 and 2019.[2535] This data seems to confirm studies showing that forced arbitration clauses often fail to provide a meaningful forum for resolving disputes and instead tend to suppress valid claims and shield wrongdoing.[2536]

Several other trends in judicial decisions have hampered private antitrust plaintiffs, including in cases involving dominant platforms. To address these concerns, the Subcommittee recommends that Congress consider:

- Eliminating court-created standards for "antitrust injury"[2537] and "antitrust standing,"[2538] which undermine Congress's grant of enforcement authority to "any person . . . injured . . . by reason of anything forbidden in the antitrust laws;"[2539]

- Reducing procedural obstacles to litigation, including through eliminating forced arbitration clauses[2540] and undue limits on class action formation;[2541] and

[2533] *Justice Denied: Forced Arbitration and the Erosion of our Legal System: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 2 (2019) (statement of Myriam Gilles, Paul R. Verkuil Research Chair in Public Law & Prof. of Law, Benjamin N. Cardozo Sch. of Law).

[2534] *Justice Denied: Forced Arbitration and the Erosion of our Legal System*: *Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm on the Judiciary*, 116th Cong. 2 (2019) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC).

[2535] Innovation and Entrepreneurship Hearing at 49 (response to Questions for the Record of Nate Sutton, Assoc. Gen. Counsel, Competition, Amazon.com, Inc.).

[2536] Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804 (2015).

[2537] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[2538] Assoc. Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983).

[2539] Clayton Act, 15 U.S.C. § 15 (1914).

[2540] American Express v. Italian Colors, 570 U.S. 228 (2013); AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

[2541] Comcast v. Behrend, 569 U.S. 27 (2013).

- Lowering the heightened pleading requirement introduced in *Bell Atlantic Corp. v. Twombly*.[2542]

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[2542] 550 U.S. 544 (2007).

VII. APPENDIX: MERGERS AND ACQUISITIONS BY DOMINANT PLATFORMS[2543]

A. Amazon

Amazon			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Zoox	2020	Autonomous Vehicles, Robotics, Transportation	1,200,000,000
Health Navigator	2019	Health Care	--
Internet Gaming Database (IGDB)	2019	Video Games, Content, Media and Entertainment	--
INLT	2019	Enterprise Applications, Freight Service, Logistics, SaaS, Shipping, Transportation	--
E8 Storage	2019	Cloud Computing, Enterprise Software, Flash Storage, Software	50,000,000
Bebo	2019	Internet, Video Games	25,000,000
Sizmek Ad Server	2019	Advertising, Marketing	--
CANVAS Technology	2019	Robotics	--
Eero	2019	Internet, IoT, Wireless	97,000,000
CloudEndure	2019	Cloud Computing, Cloud Storage, Enterprise Software, SaaS	200,000,000

[2543] Prepared by Subcomm. based on BERKELEY, THE ACQUISITION TAKEOVER BY THE 5 TECH GIANTS, http://people.ischool.berkeley.edu/~neha01mittal/infoviz/dashboard/ (last visited on Sept. 28, 2020); *see also* BIG TECH MERGERS, AMERICAN ECON. LIBERTIES PROJ., https://www.economicliberties.us/big-tech-merger-tracker/ (last visited Oct 4, 2020); *see also* Search: Acquisitions, CRUNCHBASE, https://www.crunchbase.com/ (last visited Oct 4, 2020).

Amazon			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
TSO Logic	2019	Analytics, Cloud Computing, Cloud Management, Data Center, Software	--
Tapzo	2018	E-Commerce, Mobile, Software	40,000,000
PillPack	2018	Pharmacy, E-Commerce	753,000,000
Ring	2018	Consumer Electronics, Security, Smart Home	--
Immedia	2018	Semiconductors	--
Sqrrl	2018	Cybersecurity	40,000,000
Dispatch	2017	Robotics	--
Blink	2017	Consumer Electronics, Electronics, Hardware, Security	90,000,000
Goo Technologies	2017	3D Technology, Internet, Software, Web Development	--
Body Labs	2017	3D Technology, Artificial Intelligence, Computer Vision, Developer APIs, Machine Learning	50,000,000
Wing	2017	Information Technology, Logistics, Mobile, SaaS	--
GameSparks	2017	E-Commerce, Mobile, Software	10,000,000
Graphiq	2017	Artificial Intelligence, Big Data, Data Visualization, Market Research, Search Engine, Semantic Web	50,000,000

Amazon			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Souq.com	2017	Consumer Electronics, E-Commerce, Shopping	580,000,000
Whole Foods	2017	Food and Beverage, Grocery, Organic Food	13,700,000,000
Do.com	2017	Internet, Meeting Software, Software	--
Thinkbox Systems	2017	Software	--
Colis Privé	2017	Shipping & Delivery, Logistics	--
Harvest.ai	2017	Artificial Intelligence, Cloud Security, Cyber Security, Predictive Analytics	19,000,000
Biba Systems	2016	Apps, Messaging, Mobile	--
Partpic	2016	Photo Recognition	--
Westland	2016	Publishing	--
Curse Inc.	2016	Digital Media, Gaming, Video Games	--
Cloud9 IDE	2016	Cloud Computing, Enterprise Software, Mobile, Open Source, Software	--
Orbeus	2016	Artificial Intelligence, Photo Recognition	--
NICE	2016	Cloud Infrastructure, Enterprise Software, Power Grid	--

Amazon			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Emvantage Payments	2016	Mobile Payments, Payments	--
Elemental Technologies	2015	Content Delivery Network, Enterprise Software, Video, Video Streaming	500,000,000
Safaba Translation Systems	2015	Software	--
AppThwack	2015	Android, Cyber Security, iOS, Mobile, SaaS, Test and Measurement	--
Shoefitr	2015	E-Commerce, Fashion, Personalization, Software	--
ClusterK	2015	Software	--
Amiato	2015	Analytics, Real Time, Service Industry	--
2lemetry	2015	Cloud Computing, IoT, Software	--
Annapurna Labs	2015	Cloud Computing, Cloud Storage, Data Storage	350,000,000
GoodGame	2014	Video Games, Social Media	--
Rooftop Media	2014	Content, Digital Entertainment, Audio	--
ComiXology	2014	Cloud Data Services, Comics, Digital Entertainment, Digital Media, Reading Apps	--
Twitch	2014	Social Media, Video, Video Games, Video Streaming	970,000,000

Amazon			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Double Helix Games	2014	Developer Platform, PC Games, Video Games	--
TenMarks Education	2013	E-Learning, EdTech, Education	--
Liquavista	2013	Electronics, Hardware, Manufacturing, Software	--
Goodreads	2013	E-Learning, Social Media	--
INOVA Software	2013	Software	--
UpNext	2012	3D Mapping	--
Evi	2012	Mobile, Search Engine	26,000,000
Avalon Books	2012	Books, Education	--
Kiva Systems	2012	Hardware, Mobile, Robotics, Software	775,000,000
Teachstreet	2012	Charter Schools, Education	--
Yap	2011	Artificial Intelligence, Audio, Messaging, Mobile, Speech Recognition, Telecommunications	--
Pushbutton	2011	Content, Digital Entertainment, TV	--
The Book Depository	2011	E-Commerce, Retail	--

Amazon			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Toby Press	2010	Books	--
Quidsi	2010	Beauty, Child Care, E-Commerce	545,000,000
BuyVIP	2010	E-Commerce, Marketing, Shopping	96,500,000
Amie Street	2010	Media and Entertainment, Music, Music Streaming	--
Woot.com	2010	Electronics, Fashion, Wine And Spirits	110,000,000
Touchco	2010	Hardware, Software	--
Zappos	2009	E-Commerce, Retail, Shoes	1,200,000,000
SnapTell	2009	Advertising, Marketing, Mobile	--
Lexcycle	2009	iOS, Mobile, Software	--
AbeBooks	2008	E-Commerce, Marketplace, Shopping	--
Reflexive Entertainment	2008	Gaming, Mobile, Video Games	--
Shelfari	2008	Social Media	--
Box Office Mojo	2008	Analytics, Film, Media and Entertainment	--

Amazon			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Fabric.com	2008	E-Commerce, Fashion, Retail	--
LoveFilm	2008	Digital Entertainment, Gaming, Internet	312,000,000
Without A Box	2008	Video	--
Audible	2008	Audio, Audiobooks, Digital Entertainment, E-Commerce, Media and Entertainment	300,000,000
Brilliance Audio	2007	E-Commerce	--
Digital Photography Review	2007	E-Commerce, News, Publishing	--
Text Pay Me	2006	Messaging, Payments	--
Shopbop.com	2006	E-Commerce, Lifestyle, Shopping	--
CustomFlix	2005	Digital Media, DVDs	--
Small Parts Inc.	2005	3D Printing, E-Commerce, Manufacturing, Retail	--
MobiPocket	2005	Shopping	--
Createspace	2005	Digital Media, Printing, Publishing	--
Joyo.com	2004	E-Commerce, Internet, Music, Video	75,000,000

Amazon			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Egghead.com	2002	E-Commerce, Retail	6,100,000
OurHouse	2001	E-Commerce, Retail	--
Leep Technology	1999	CRM, Information Technology, Software	--
Back to Basics	1999	Internet, Toys, Video Games	--
Tool Crib	1999	Tools, E-Commerce	--
Convergence Corp.	1999	Enterprise Software, Internet, Wireless	23,000,000
Accept.com	1999	E-Commerce Platforms, Photography, Retail	101,000,000
Alexa	1999	Digital Marketing, SEO, Web Development	250,000,000
LiveBid	1999	Auctions	--
Exchange.com	1999	Books, Music	--
MindCorps	1999	Web Development, Consulting	--
Bookpages	1998	E-Commerce, Internet	--
Internet Movie Database (IMDb)	1998	Content, Media and Entertainment, TV	55,000,000

Amazon			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Junglee	1998	E-Commerce, Retail, Shopping	250,000,000
PlanetAll	1998	Internet, Social Media, Web Development	--
Telebook	1998	E-Commerce, Internet	--

B. Apple

Apple			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Spaces	2020	AR/VR	--
Mobeewave	2020	Software	100,000,000
Fleetsmith	2020	Software, Security	--
NextVR	2020	AR/VR	100,000,000
Inductiv	2020	AI, Machine Learning, Software	--
Voysis	2020	AI, Machine Learning, Software	--
Dark Sky	2020	Software, Apps	--

Apple			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Xnor.ai	2020	AI, Machine Learning, Software	200,000,000
Spectral Edge	2019	Photography, Software, Artificial Intelligence	--
iKinema	2019	Graphics, 3D Animation, Digital Media	--
Intel Smartphone Modem Business	2019	Hardware	1,000,000,000
Drive.ai	2019	Autonomous Vehicles	--
Tueo Health	2019	Health Care, Information Technology	--
Laserlike	2019	Machine Learning	--
Stamplay	2019	Cloud Computing, Data Integration, Developer Tools, SaaS, Sales Automation	5,600,000
DataTiger	2019	Marketing	--
PullString	2019	Voice Recognition	--
Platoon	2018	Talent Search/Acquisition	--
Silk Labs	2018	AI, Machine Learning, Software	--
Dialog	2018	Semiconductors	300,000,000

Apple			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Shazam	2018	Android, iOS, Music, Audio Recognition	400,000,000
Akonia	2018	Glasses, AR	--
Texture	2018	Content, Digital Entertainment, Digital Media	--
Buddybuild	2018	Developer Tools, Mobile, Software	--
Pop Up Archive	2017	Audio, Podcasts, Software	--
Spektral	2017	Photography, Software, AR	30,000,000
InVisage	2017	Photography, Software	--
Vrvana	2017	Computer, Hardware, Information Technology, Virtual Reality	30,000,000
Init.ai	2017	Artificial Intelligence, B2B, Developer Platform, Developer Tools, Machine Learning, Messaging, Natural Language Processing, Virtual Assistant	--
PowerbyProxi	2017	Consumer Electronics, Industrial, Wireless	--
Regaind	2017	Artificial Intelligence, Computer Vision, Photo Sharing, Photography	--
SensoMotoric Instruments	2017	Computer Vision, Image Recognition, Psychology, Software	--

Apple			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Beddit	2017	Fitness, Health Care, Wellness	--
Lattice Data	2017	Big Data, Information Technology, Machine Learning	200,000,000
Workflow	2017	Mobile, Productivity Tools, Software	--
RealFace	2017	Facial Recognition	--
Indoor.io	2016	Mapping Services, Navigation, Service Industry, Internet	--
Tuplejump	2016	Analytics, Artificial Intelligence, Big Data, Data Visualization, Machine Learning, Software	--
Turi	2016	Analytics, Artificial Intelligence, Big Data, Machine Learning, Software	200,000,000
Gliimpse	2016	Health Care, Information Technology	--
Emotient	2016	Artificial Intelligence, Machine Learning, Software, Video	--
LearnSprout	2016	Analytics, Big Data, EdTech, Education, Predictive Analytics	--
Flyby Media	2016	Augmented Reality, Computer Vision, Internet, Location Based Services, Mobile, Social Media, Video	--
Faceshift	2015	Broadcasting, Content Creators, Digital Media, Facial Recognition, Information Technology, Video Conferencing	--

Apple			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
LegbaCore	2015	Consulting, Information Technology, Security	--
VocalIQ	2015	Artificial Intelligence, Audio, Automotive, Machine Learning, Mobile, Wearables	--
Perceptio	2015	Artificial Intelligence, Digital Media, Machine Learning	--
Mapsense	2015	Geospatial, Location Based Services, Web Hosting	25,000,000
Coherent Navigation	2015	Apps, Software	--
Metaio	2015	Advertising, Augmented Reality, Mobile, Software	--
LinX	2015	Mobile, Social Media	20,000,000
Dryft	2015	Hardware, Software	--
FoundationDB	2015	Analytics, Database, Enterprise Software	--
Camel Audio	2015	Audio, Music	--
Semetric	2015	Analytics, Content Discovery, Predictive Analytics	50,000,000
Prss	2014	iOS, Publishing	--
Beats Electronics	2014	Consumer Electronics, Hardware, Manufacturing, Media and Entertainment, Music, Software	3,000,000,000

Apple			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
BookLamp	2014	Content Discovery, Reading Apps, Software	--
Spotsetter	2014	Big Data, Social Media	--
Swell	2014	Content Discovery, Machine Learning, Mobile, Personalization	30,000,000
LuxVue Technologies	2014	Consumer Electronics, Hardware, Software	--
Burstly	2014	Advertising, Analytics, iOS, Mobile Advertising	--
SnappyLabs	2014	Photography	--
Acunu	2013	Analytics, Big Data, Software	--
Topsy	2013	Analytics, Internet, Real Time, Search Engine, Social Media	200,000,000
BroadMap	2013	Geospatial, Software	--
PrimeSense	2013	3D Technology, Consumer Electronics, Hardware	345,000,000
Cue	2013	Internet, Mobile Apps	35,000,000
Passif Semiconductor	2013	Manufacturing, Semiconductor, Wireless	--
Matcha	2013	Content, Online Portals, Video	--

Apple			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Embark	2013	Mobile, Mobile Apps, Public Transportation	--
AlgoTrim	2013	Mobile	--
Catch.com	2013	Android, iOS, Mobile	--
Locationary	2013	Analytics, Crowdsourcing, Location Based Services	--
HopStop.com	2013	Android, iOS, Navigation	--
OttoCat	2013	Apps, Internet, Mobile	--
WiFiSlam	2013	Location Based Services, Mobile, Wireless	20,000,000
Novauris Technologies	2013	Information Services, Mobile, VoIP	--
Anobit	2012	Electronics, Flash Storage, Semiconductor	390,000,000
Chomp	2012	Mobile	50,000,000
AuthenTec	2012	Biometrics, Cyber Security, Identity Management, NFC, Security, Semiconductor, Sensors	356,000,000
Particle	2012	Developer Platform, Mobile, Web Development	--
Redmatica	2012	Music, Music Streaming	--

Apple			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
C3 Technologies	2011	Assistive Technology, Enterprise Software, Information Technology	240,000,000
Quattro Wireless	2010	Ad Network, Advertising, Advertising Platforms, Mobile, Publishing	275,000,000
Intrinsity	2010	Manufacturing, Mobile, Semiconductor	121,000,000
Siri	2010	Consumer Electronics, iOS, Software, Virtualization	--
Gipsy Moth Studios	2010	App Localization	--
Poly9	2010	Geospatial, Software	--
Polar Rose	2010	Internet, Browser Extensions, Image Recognition, Photography	22,000,000
IMSense	2010	Image Recognition, Photography, Software	--
Placebase	2009	Database, Developer APIs, Developer Tools	--
Lala	2009	Internet, Music, Music Streaming	17,000,000
P.A. Semi	2008	Electronics, Manufacturing, Semiconductor	278,000,000
Silicon Color	2006	Film, Software, Video	--
Proximity	2006	Media Asset Management	--

Apple			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
SchemaSoft	2005	Software	--
FingerWorks	2005	Hardware, Human Computer Interaction, Software	--
Nothing Real	2002	Software	--
Zayante	2002	Software	13,000,000
Emagic	2002	Software	30,000,000
Prismo Graphics	2002	Robotics, Software, Video	20,000,000
Silicon Grail Corp-Chalice	2002	Software	20,000,000
Propel Software	2002	Computer, Internet, Software	--
PowerSchool	2001	EdTech, Education, SaaS, Software	62,000,000
Spruce Technologies	2001	Information Technology	15,000,000
Bluebuzz	2001	Internet Service Provider	--
Bluefish Labs	2001	Database, Mobile Apps, Web Apps	--
Astarte	2000	DVD Authoring	--

Apple			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
NetSelector	2000	Information Technology, Internet, Software	--
SoundJam MP	2000	MP3 Player, Audio Player, Software	--
Raycer Graphics	1999	3D Technology, Graphic Design, Information Technology	15,000,000
Xemplar Education	1999	Education	5,000,000
NeXT	1997	Education, Hardware, Software	404,000,000
Power Computing Corp.	1997	Manufacturing, Software	100,000,000
Coral Software	1989	Artificial Intelligence, Information Technology, Software	--
Nashoba Systems	1988	Software	--
Network Innovations	1988	Information Technology, Software, Virtualization	--
Orion Network Systems	1988	Communications Infrastructure, Satellite Communication	--
Styleware	1988	Internet, IoT, Software, Web Hosting	--

C. Facebook

Facebook			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Giphy	2020	Software	400,000,000
Ready at Dawn	2020	VR, Video Games	--
Mapillary	2020	Software, Mapping	--
Sanzaru Games	2020	VR, Video Games	--
Scape Technologies	2020	AR/VR, Computer Vision, Software	40,000,000
PlayGiga	2019	Digital Media, Video Games	--
Beat Games	2019	VR, Video Games	--
Packagd	2019	E-Commerce, Shopping	--
GrokStyle	2019	Artificial Intelligence	--
CTRL-labs	2019	Augmented Reality	--
Servicefriend	2019	AI, Messaging	--
Chainspace	2019	Apps, Blockchain, Information Technology	--
Vidpresso	2018	Broadcasting, Software	--

Facebook			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Redkix	2018	Productivity, Enterprise Collaboration	--
Bloomsbury AI	2018	AI, Machine Learning	30,000,000
Confirm.io	2018	Identity Management	--
Tbh	2017	iOS, Mobile Apps, Social, Social Media	--
Fayteq	2017	Software	--
Source3	2017	Content Rights Management	--
Ozlo	2017	Artificial Intelligence, Computer, Information Services, Mobile	--
Zurich Eye	2017	AR/VR, Computer Vision, Robotics	--
CrowdTangle	2016	Brand Marketing, Non-Profit, Social Media	--
FacioMetrics	2016	Machine Learning, Mobile Apps, Social Media, Software	--
InfiniLED	2016	Lighting, Hardware	--
Nascent Objects	2016	Manufacturing, Product Design, Software	--
Two Big Ears	2016	Audio, Consumer Electronics, Software, Virtual Reality	--

Facebook			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Masquerade	2016	Consumer Applications, Mobile, Photo Editing	--
Endaga	2015	Communications Infrastructure, Impact Investing, Infrastructure, Mobile, Telecommunications	--
Pebbles Interfaces	2015	Digital Media, Hardware, Mobile	60,000,000
Surreal Vision	2015	Software	--
TheFind	2015	Coupons, E-Commerce, Lifestyle, Local, Mobile, Search Engine, Shopping	--
QuickFire Networks	2015	Cloud Data Services, Video	--
Wit.ai	2015	Artificial Intelligence, Computer, Developer APIs, Machine Learning, Software	--
WaveGroup Sound	2014	Music, Product Design	--
PRYTE	2014	Mobile Devices, Emerging Markets	--
PrivateCore	2014	Cyber Security, Security	--
LiveRail	2014	Advertising, Enterprise Software, Video	500,000,000
ProtoGeo Oy	2014	Mobile	--
Ascenta	2014	Aerospace, Manufacturing	20,000,000

Facebook			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
WhatsApp	2014	Android, Messaging, Mobile, Subscription Service	19,000,000,000
Oculus VR	2014	Augmented Reality, Consumer Electronics, Hardware, Video Games, Virtual Reality, Virtualization	2,000,000,000
Branch	2014	Internet, Messaging, Social	15,000,000
Little Eye Labs	2014	Android, Mobile, Test and Measurement	15,000,000
SportStream	2013	Consumer Electronics, Mobile, Sports	--
Onavo	2013	Finance, Mobile, Social Network	--
Jibbigo	2013	Apps, Audio, Big Data, Language Learning, Mobile	--
Monoidics	2013	Analytics, Enterprise Software, Information Technology	--
Parse	2013	Android, Cloud Computing, Enterprise Software, iOS, Mobile, PaaS	85,000,000
Hot Studio	2013	Internet, Social Media, Web Design	--
Spaceport	2013	Gaming, Mobile, Mobile Devices, Online Games, Web Development	--
Atlas Solutions	2013	Advertising, Advertising Platforms, Internet	100,000,000

Facebook			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Osmeta	2013	Hardware, Software	--
Storylane	2013	Social Media	--
Threadsy	2012	Messaging, Social Media, Social Network	--
Spool	2012	Enterprise Software, Mobile, Social Bookmarking, Video	--
Acrylic Software	2012	Software	--
Karma	2012	Gifts, Mobile, Social	--
Face.com	2012	Artificial Intelligence, Cloud Storage, Facial Recognition, Machine Learning, Photography, Social Network	100,000,000
TagTile	2012	Direct Marketing, Loyalty Programs, Mobile, Social Media	--
Glancee	2012	Android, Dating, iOS, Location Based Services, Mobile, Public Relations, Search Engine	--
Lightbox.com	2012	Android, Mobile, Photo Sharing	--
Instagram	2012	Mobile, Photo Sharing, Photography, Social Media	1,000,000,000
Caffeinated Mind	2012	File Transfer, Big Data	--

Facebook			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Gowalla	2011	Location Based Services, Photography, Private Social Networking, Travel, Internet	--
Strobe	2011	iOS, Mobile, Software, Web Development	--
Friend.ly	2011	Blogging Platforms, Social Media	--
Push Pop Press	2011	Advertising, Digital Media, Marketing	--
MailRank	2011	Email, CRM, Information Technology, Software	--
DayTum	2011	Analytics, Big Data, Database	--
Sofa	2011	Developer Tools, Software	--
RecRec	2011	Computer Vision	--
Beluga	2011	Messaging, Mobile, Social Media	--
Rel8tion	2011	Advertising, Advertising Platforms	--
Snaptu	2011	Mobile	70,000,000
ShareGrove	2010	Real Time, Social Network, Web Hosting	--
Drop.io	2010	EdTech, Education, Email, File Sharing, Finance, FinTech, Flash Storage, Mobile	10,000,000

Facebook			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Hot Potato	2010	Social, Social Media, Social Media Marketing	10,000,000
Nextstop	2010	Digital Entertainment, Social, Travel	2,500,000
Chai Labs	2010	Software	10,000,000
Zenbe	2010	Android, Email, Location Based Services, Messaging, Mobile, Software, Web Apps	--
Divvyshot	2010	Photo Sharing, Social Network, Web Hosting	--
Octazen	2010	Enterprise Software, Social Network, Web Browsers	--
FriendFeed	2009	Social Media	47,500,000
ConnectU	2009	Social Media	--
Parakey	2007	Social Media, Web Browsers, WebOS	--
AboutFace	2007	Internet	--

D. Google

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Stratozone	2020	Cloud, Platform Migration	--
North	2020	Hardware, Glasses	180,000,000
Looker	2020	Big Data, Analytics	2,600,000,000
Cornerstone Technology	2020	Cloud, Platform Migration	--
AppSheet	2020	Enterprise Software	--
Pointy	2020	Software, Inventory	163,000,000
Fitbit	2019	User Data, Mobile Devices, Fitness Tracking, Health Care	2,100,000,000
Typhoon Studios	2019	Video Games, Video Streaming	--
CloudSimple	2019	Cloud	--
Elastifile	2019	Cloud, Storage	--
Nightcorn	2019	Internet, Social Media, Video Streaming	--
Alooma	2019	Data Integration, Cloud, Platform Migration	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Superpod	2019	Software	60,000,000
DevOps Research and Assessment	2018	Cloud	--
Sigmoid Labs	2018	Software	--
Workbench	2018	Software, Education	--
Onward	2018	AI, Customer Service, Sales	--
GraphicsFuzz	2018	Graphics Drivers, Security	--
Velostrata	2018	Cloud Migration, Data Centers	--
Cask Data	2018	Big Data, Analytics	--
Lytro	2018	Photography, Film, Hardware, VR	--
Tenor	2018	Messaging, Social Media, Video	--
Socratic	2018	AI, Software	--
Xively	2018	Enterprise Software, IoT, SaaS	--
Redux	2018	Speakers, Mobile Devices	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
HTC Smartphone Division	2018	Consumer Electronics, Manufacturing, Mobile	1,100,000,000
Banter	2017	Mobile Software, Messaging	--
Relay Media	2017	Analytics	--
60db	2017	Audio, Media and Entertainment, Social Media, Video Streaming	--
Bitium	2017	Cloud Computing, Cyber Security, Identity Management, SaaS, Security, Software	--
AIMatter	2017	Artificial Intelligence, Computer Vision, Software	--
Senosis Health	2017	Health, Mobile Device, Software	--
Halli Labs	2017	Artificial Intelligence, Machine Learning, Software Engineering	--
Owlchemy Labs	2017	Gaming, Software Engineering, Virtual Reality	--
Kaggle	2017	Analytics, Big Data, Data Mining, News, Predictive Analytics	--
AppBridge	2017	Apps, Data Storage, Google	--
Crashlytics	2017	Android, iOS, Mobile, SaaS	--
Fabric	2017	Cloud Infrastructure, Developer APIs, Developer Tools, Enterprise Software, Mobile Apps, Real Time	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Limes Audio	2017	Audio, Communication Hardware, Telecommunications	--
Cronologics	2016	Hardware, Software, Wearables	--
LeapDroid	2016	Software	--
Qwiklabs	2016	Cloud Computing, Information Technology, Software	--
FameBit	2016	Internet, Music, Video	--
Eyefluence	2016	Consumer Electronics, Manufacturing, Wearables	--
Apigee	2016	Cloud Data Services, Enterprise Software, Information Technology	625,000,000
Urban Engines	2016	Analytics, Big Data, GovTech, Mobile, Software, Transportation	--
Api.ai	2016	Natural Language Processing, Voice Recognition	--
Orbitera	2016	Analytics, Cloud Computing, E-Commerce, Marketing Automation, SaaS, Software	100,000,000
Apportable	2016	Developer Tools, Enterprise Software, Mobile, iOS	--
Moodstocks	2016	Artificial Intelligence, Hardware, Image Recognition, Machine Learning, Mobile, QR Codes, Real Time, Visual Search	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Anvato	2016	Software, Video Conferencing, Video Streaming	--
Kifi	2016	Analytics, Artificial Intelligence, Big Data, Content Discovery, Knowledge Management	--
LaunchKit	2016	Developer Tools, Mobile Apps	--
Webpass	2016	Internet, ISP, Wireless	--
Synergyse	2016	Apps, Search Engine, Software, Training	--
BandPage	2016	Consumer, Facebook, Marketplace, Music	--
Pie	2016	Automotive, Incubators	--
Fly Labs	2015	iOS	--
Bebop	2015	Business Development, Enterprise, Enterprise Software	380,000,000
Digisfera	2015	Images	--
Oyster	2015	Email, Web Design, Web Hosting	--
Jibe Mobile	2015	File Sharing, Messaging, Mobile, Social Media	--
Pixate	2015	Computer, Enterprise Software, Mobile	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Timeful	2015	Analytics, Artificial Intelligence, Database, Machine Learning, Task Management	--
Pulse.io	2015	Apps, Mobile	--
Thrive Audio	2015	Audio, 3D Technology	--
Skillman & Hackett	2015	Software, Virtual Reality	--
Launchpad Toys	2015	Apps, Education, iOS	--
Odysee	2015	Enterprise Software, Mobile Apps, Photo Sharing	--
Softcard	2015	Apps, Mobile Payments	--
Red Hot Labs	2015	Advertising Platforms, Apps, Mobile, Software	--
Granata Decision Systems	2015	Analytics, Artificial Intelligence, Machine Learning	--
Vidmaker	2014	Collaboration, Social Media, Video	--
Lumedyne Technologies	2014	Consumer Electronics, Information Technology, Semiconductors	--
RelativeWave	2014	Apps, Developer Tools	--
Agawi	2014	EdTech, Gaming, Mobile Apps, Mobile Devices	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Firebase	2014	Cloud Infrastructure, Developer APIs, Developer Tools, Enterprise Software, Mobile Apps, Real Time	--
Dark Blue Labs	2014	Artificial Intelligence, Data Visualization, Machine Learning	--
Vision Factory	2014	Artificial Intelligence, Computer Vision, Machine Learning, Search Engine, Software	--
Revolv	2014	Internet of Things, Smart Home, Software	--
Lift Labs	2014	Hardware, Health Care, Medical, Software	--
Polar	2014	Fitness, Health Care, Wearables	--
Skybox Imaging	2014	Cloud Security, Cyber Security, Enterprise Software, Network Security, Security, Software	500,000,000
Emu	2014	E-Commerce	--
Directr	2014	Energy, Solar	--
Jetpac	2014	AI, ML	--
Gecko Design	2014	Product Design	--
Zync Render	2014	Digital Media, Flash Storage, Social Media	--
Dropcam	2014	Consumer Electronics, Hardware, SaaS	555,000,000

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Songza	2014	Music	--
DrawElements	2014	Enterprise Software	--
mDialog	2014	Advertising, Information Technology, Video Streaming	--
Aplental Technologies	2014	Information Technology, Wireless	--
Baarzo	2014	Video, Search	--
Appurify	2014	Android, Apps, iOS, Mobile, Test and Measurement	--
Rangespan	2014	Analytics, E-Commerce, Supply Chain Management	--
Adometry	2014	Advertising, Analytics, SaaS	--
Appetas	2014	Network Security, Restaurants, SaaS	--
Stackdriver	2014	Apps, Cloud Computing, Enterprise Software, Infrastructure	--
Quest Visual	2014	Data Visualization, iOS, Software	--
Gridcentric	2014	Software, Virtualization	--
Divide	2014	Enterprise Software, Information Technology, Mobile, SaaS, Software	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Titan Aerospace	2014	Aerospace, Manufacturing	--
GreenThrottle	2014	Console Games, Consumer Electronics, Mobile	--
Nest Labs	2014	Sensor, Manufacturing, Smart Home	3,200,000,000
SlickLogin	2014	Mobile, Mobile Apps, Security	--
Spider.io	2014	Advertising, Analytics, Fraud Detection, Internet, Security	--
Bitspin	2014	Apps, Web Development	--
Impermium	2014	Security	--
DeepMind Technologies	2014	AI, ML	500,000,000
Flutter	2013	Content, Software	40,000,000
FlexyCore	2013	Software	23,000,000
Calico	2013	Biotech, Genetics, Health Care	--
Bump	2013	Mobile, Contact Sharing	--
WIMM Labs	2012	Hardware, Software, Wearables	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Waze	2013	Mobile Apps, Navigation, Transportation	966,000,000
Makani Power	2013	Energy	--
MyEnergy	2013	Clean Energy, Energy Efficiency	--
Behavio	2013	Software	--
Wavii	2013	ML, AI	30,000,000
Channel Intelligence	2013	Manufacturing, Product Search, Shopping	125,000,000
DNNresearch	2013	AI	--
Talaria Technologies	2013	Software, Web Design, Web Development	--
Schaft	2013	Hardware, Robotics	--
Industrial Perception	2013	AI	--
Redwood Robotics	2013	Robotics	--
Meka Robotics	2013	Robotics	--
Holomni	2013	Mobile, Robots	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Bot & Dolly	2013	Software, Robotics	--
Autofuss	2013	Product Design	--
Incentive Targeting	2012	Public Relations, Retail	--
BufferBox	2012	E-Commerce, Marketplace, Shopping	17,000,000
Viewdle	2012	Analytics, Augmented Reality, Computer Vision, Mobile, Facial Recognition	45,000,000
VirusTotal.com	2012	Security	--
Nik Software	2012	Image Recognition, Software	--
Sparrow	2012	Email, Messaging	25,000,000
Wildfire Interactive	2012	Consulting, Content, Data Integration, Developer Tools	450,000,000
Cuban Council	2012	Consulting, Consumer Electronics, Search Engine	--
Meebo	2012	Internet, Messaging, Web Development	100,000,000
Quickoffice	2012	Enterprise Software, iOS, Mobile	--
TxVia	2012	Finance, FinTech, Mobile, PaaS	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Milk, Inc	2012	Apps, Mobile, Software	--
RightsFlow	2011	Accounting, Music, Legal	--
Clever Sense	2011	ML, AI	--
Apture	2011	Advertising	--
Katango	2011	Social Media	--
Anthony's Robots	2011	Autonomous Vehicles	--
510 Systems	2011	Autonomous Vehicles, Software	--
SocialGrapple	2011	Analytics, Social Media	--
Zave Networks	2011	Apps, Mobile	--
Zagat	2011	Consumer Reviews	151,000,000
DailyDeal	2011	Beauty, Shopping	114,000,000
Dealmap	2011	Coupons, Local, Mobile, Search Engine, Social Media	--
Motorola Mobility	2011	Mobile Apps	12,500,000,000

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Punchd	2011	Android, iOS, Loyalty Programs, Mobile	--
Fridge	2011	Photo Sharing	--
PittPatt	2011	Facial Recognition	--
PostRank	2011	Analytics, Social Media, Test and Measurement	--
Admeld	2011	Advertising, Auctions, Software	400,000,000
SageTV	2011	Digital Entertainment, Events, Media and Entertainment	--
Modu	2011	Mobile, Telecommunications, Wireless	--
Sparkbuy	2011	Consumer Electronics, E-Commerce, Shopping	--
PushLife	2011	Digital Media, E-Commerce, Mobile	25,000,000
ITA Software	2011	Information Technology	676,000,000
TalkBin	2011	Messaging	--
BeatThatQuote.com	2011	Auto Insurance, E-Commerce, Price Comparison	65,000,000
Next New Networks	2011	Video, Video Streaming	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Green Parrot Pictures	2011	Digital Media, Enterprise Software, Video	--
Zynamics	2011	Security	--
eBook Technologies	2011	Content, E-Books	--
SayNow	2011	Messaging, Social Network, Telecommunications	--
Phonetic Arts	2010	Software	--
Widevine Technologies	2010	Digital Entertainment, Digital Media, Video	--
Zetawire	2010	Mobile Payments, NFC	--
BlindType	2010	Mobile	--
Plannr	2010	Mobile	--
Quiksee	2010	Digital Media	10,000,000
MentorWave Technologies	2010	Software, 3D Visualization	--
Slide.com	2010	Developer Tools, Software	228,000,000
Jambool	2010	Apps, Internet	70,000,000

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Like.com	2010	Image Recognition	100,000,000
Angstro	2010	Enterprise Software, Facebook, Social Network	--
SocialDeck	2010	Mobile, Social Website	--
Metaweb	2010	Database, Infrastructure	--
Invite Media	2010	Advertising	81,000,000
Instantiations	2010	Software	--
Global IP Solutions	2010	Software	68,200,000
Simplify Media	2010	Digital Entertainment, Digital Media, Mobile	--
Ruba.com	2010	Guides, Internet	--
PinkArt	2010	Software	--
Agnilux	2010	Hardware	--
LabPixies	2010	Software	--
BumpTop	2010	Software	30,000,000

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Picnik	2010	Photosharing	--
DocVerse	2010	Document Management	25,000,000
Episodic	2010	Broadcasting, Internet	--
reMail	2010	Email, Messaging, Mobile Apps	--
Aardvark	2010	Internet, Search Engine, Social	50,000,000
AdMob	2009	Ad Network, Advertising, Apps, Marketing, Mobile	750,000,000
Gizmo5	2009	Public Relations, VoIP	30,000,000
Teracent	2009	Advertising, Machine Learning	--
AppJet	2009	Software, Web Development	--
reCAPTCHA	2009	Security	--
On2	2009	Content, Internet, SaaS, Software, Video	133,000,000
Eluceon Research	2009	Internet, Software	--
TNC	2008	Google, Web Browsers, Web Hosting	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Begun	2008	Advertising	--
Omnisio	2008	File Sharing, Video	15,000,000
Jaiku	2007	Mobile	--
Zingku	2007	Digital Media, Social Media, Social Network	--
Postini	2007	Cyber Security, Internet, Security	625,000,000
ImageAmerica	2007	Software, Document Scanning	--
FeedBurner	2007	Blogging Platforms, Internet, Podcast	100,000,000
PeakStream	2007	Apps, Developer APIs, GPU, Software	--
Zenter	2007	Content, E-Commerce, Web Hosting	--
GrandCentral	2007	Mobile, Telecommunications, VoIP	45,000,000
GreenBorder	2007	Computer, Internet, Software	--
Panoramio	2007	Photo Sharing, Photography, Social Media	--
Crusix	2007	Social Networking	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
DoubleClick	2007	Advertising	3,100,000,000
Tonic Systems	2007	Web Development	--
Marratech	2007	Software, Video Conferencing	15,000,000
Trendalyzer	2007	Visual Statistics, Data Visualization, Software	--
Adscape	2007	Advertising, Digital Media, Marketing	23,000,000
Endoxon	2006	Information Technology	28,000,000
JotSpot	2006	Collaboration, Enterprise Software, Software	--
YouTube	2006	Internet, Music, Video	1,650,000,000
Neven Vision	2006	Software	--
2Web Technologies	2006	Software	--
Orion	2006	Content, Search Engine, Web Hosting	--
Upstartle	2006	Software	--
@Last Software	2006	3D Technology, Developer Tools	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
Measure Map	2006	Advertising, Analytics, Big Data	--
dMarc Broadcasting	2006	Advertising, Advertising Platforms, Internet Radio	102,000,000
Phatbits	2005	XML Desktop Applications	--
allPAY GmbH	2005	Mobile	--
bruNET GmbH	2005	Digital Entertainment, Social Media	--
Skia	2005	Graphic Design	--
Akwan Information Technologies	2005	Information Technology, IT Management, Search Engine	--
Android	2005	Linux, Mobile, Search Engine	50,000,000
Reqwireless	2005	Wireless	--
Dodgeball	2005	Mobile Devices, Software	--
Urchin Software Corporation	2005	Software	--
Where 2 Technologies	2004	Software	--
Keyhole	2004	Geospatial, Software	--

Google			
Company	**Year Acquired**	**Categories**	**Acquisition Value (USD)**
ZipDash	2004	Automotive, E-Commerce, Mobile, Real Time, Travel	--
Picasa	2004	Photos, Photo Editing	--
Ignite Logic	2004	Internet, Software, Web Design	--
Sprinks	2003	Online Advertising	--
Genius Labs	2003	Developer APIs, Developer Tools, Software	--
Neotonic Software	2003	CRM, Software	--
Applied Semantics	2003	Developer APIs, Enterprise Software, Mobile Apps	102,000,000
Kaltix	2003	SEO, Web Hosting	--
Pyra Labs	2003	Blogging Platforms, Developer APIs, Developer Tools, Enterprise Software, Project Management, Social Media	--
Outride	2001	Energy, Information Technology, Online Portals	--
Deja	2001	Information Technology, Internet, Web Development	--

Congressional Budget Office
Cost Estimate

September 27, 2022

At a Glance

H.R. 3843, Merger Filing Fee Modernization Act of 2021

As reported by the House Committee on the Judiciary on September 26, 2022

By Fiscal Year, Millions of Dollars	2022	2022-2027	2022-2032
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	0	-1,405	not estimated

Statutory pay-as-you-go procedures apply?	No	**Mandate Effects**	
		Contains intergovernmental mandate?	No
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2033?	No	Contains private-sector mandate?	Yes, Over Threshold

The bill would

- Change the structure and amount of premerger filing fees levied by the Federal Trade Commission under its Premerger Notification Program
- Impose mandates by raising the fees for companies that file premerger notifications

Estimated budgetary effects would mainly stem from

- Decreases in spending subject to appropriation because of increases in fee collections

Detailed estimate begins on the next page.

See also *CBO's Cost Estimates Explained*, www.cbo.gov/publication/54437;
How CBO Prepares Cost Estimates, www.cbo.gov/publication/53519; and *Glossary*, www.cbo.gov/publication/42904.

Bill Summary

H.R. 3843 would change the structure and the amount of filing fees levied by the Federal Trade Commission (FTC) under its Premerger Notification Program. That program requires companies to notify the FTC and the Department of Justice (DOJ) before proceeding with a large merger or acquisition. The bill also would adjust filing fee amounts each year based on changes in the Consumer Price Index; under current law, fee amounts remain unchanged from year to year.

Estimated Federal Cost

The estimated budgetary effect of H.R. 3843 is shown in Table 1. The costs of the legislation fall within budget functions 370 (commerce and housing credit) and 750 (administration of justice).

Table 1.
Estimated Increases in Spending Subject to Appropriation Under H.R. 3843

	By Fiscal Year, Millions of Dollars						
	2022	2023	2024	2025	2026	2027	2022-2027
Estimated Authorization	0	-110	-294	-314	-333	-354	-1,405
Estimated Outlays	0	-110	-294	-314	-333	-354	-1,405

Basis of Estimate

CBO assumes that H.R. 3843 will be enacted near the end of calendar year 2022 and that the new fee structure would be effective starting on January 1, 2023.

Filing Fees

As of March 3, 2022 (the last time the ranges were updated), companies must pay the following filing fees based on the size of the transaction:

- $45,000 if the transaction size is between $101 million and $202 million,
- $125,000 if the transaction size is between $202 million and $1 billion, or
- $280,000 if the transaction size is $1 billion or greater.

The transaction size ranges are updated annually based on changes in the gross national product. Filing fees are collected by the FTC and distributed evenly between the FTC and the DOJ’s Antitrust Division and credited to their respective salaries and expenses appropriations accounts as discretionary offsetting collections.

The bill would change the number of ranges for transaction size and would require acquiring companies to pay the following filing fees:

- $30,000 if the transaction size is between $92 million and $161.5 million,
- $100,000 if the transaction size is between $161.5 million and $500 million,
- $250,000 if the transaction size is between $500 million and $1 billion,
- $400,000 if the transaction size is between $1 billion and $2 billion,
- $800,000 if the transaction size is between $2 billion and $5 billion, and
- $2.25 million if the transaction size is at least $5 billion.

Spending Subject to Appropriation
Using information from the FTC about historic filings, CBO estimates that H.R. 3843 would increase filing fees by $1.4 billion over the 2023-2027 period. Because those collections are treated as discretionary offsetting collections they are shown as a reduction in spending subject to appropriation. CBO estimates that total collections would increase because the bill would create additional tiers with higher fees and would index those fees to changes in the Consumer Price Index.

For fiscal year 2022, the bill would authorize the appropriation of $252 million for DOJ's Antitrust Division's salaries and expenses account and $418 million for the FTC's salaries and expenses account. CBO has not estimated any budgetary effect for those authorizations because appropriations for 2022 have already been completed.

Pay-As-You-Go Considerations: None.

Increase in Long-Term Deficits: None.

Mandates

H.R. 3843 would increase the cost of an existing private-sector mandate on some businesses by increasing the fees to file a premerger notification with the FTC. CBO estimates that the aggregate cost of the private-sector mandate would be about $325 million in each of the first five years the mandate is in effect, exceeding the annual threshold established in the Unfunded Mandates Reform Act (UMRA) ($184 million in 2022, adjusted annually for inflation).

H.R. 3843 contains no intergovernmental mandates as defined in UMRA.

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