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Re: Draft Merger Guidelines (Docket FTC-2023-0043)

Recommendations to Department of Justice and Federal Trade Commission

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Dear Assistant Attorney General Kanter, Chair Khan, and Commissioners Bedoya and Slaughter,

The undersigned organizations welcome the opportunity to comment on the merger guidelines proposed by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). We believe the proposed merger guidelines are an important step toward reining in corporate consolidation and promoting fairness and democracy in American life. We laud the agencies for pursuing this important policy initiative and offer recommendations on how to strengthen the final guidelines.

Congress enacted the antitrust laws as pro-democratic measures to protect the people of the United States in our capacities as citizens, business owners, workers, farmers, creators, and consumers. Congress did so by updating and strengthening the Constitution's systems for dispersing power in both the economic and political realms. The framers of these laws were animated by a fervent opposition to oligarchy and autocracy and aimed to protect democracy and

fairness in the political system and the marketplace against concentrated private control.[1] Senator John Sherman in a speech explaining the federal antitrust statute that bears his name warned, "If we would not submit to an emperor we should not submit to an autocrat of trade, . . ."[2] Further, Sherman made clear that these laws must be viewed mainly as a way to protect the freedom of the individual from the power of the private corporation: "It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty, and lies at the foundation of the equality of all rights and privileges."[3]

The Clayton Act and its anti-merger provision must be viewed as part and parcel of these larger economic and political aims of Congress. This project includes all laws that aim to regulate how people within society cooperate and compete with one another in the political economy. This includes, in addition to antitrust, laws designed to regulate communications, transportation, banking, finance, trade, and other related activities. Such laws are designed to restrict forms of competition that are unfair, undemocratic, and socially and economically destructive. They aim instead to structure competition in ways that build a stronger democracy, stronger society, and stronger individuals, as well as a stronger economy. The Supreme Court has described the Sherman Act and the antitrust laws in general as "a comprehensive charter of economic liberty"[4] and "the Magna Carta of free enterprise."[5]

Within this framework, Congress recognized the economic and political evils of unchecked corporate consolidation when it enacted and amended Section 7 of the Clayton Act. Through mergers, corporations can establish an oligopolistic or monopolistic market position by purchasing existing assets and capabilities or entire firms. In such concentrated markets and industries, corporations wield unaccountable power over workers, suppliers, consumers, communities, and competitors. Further, when mergers and acquisitions are easy to pursue, business executives and financiers may choose to augment their power and profits through this method rather than to grow their abilities to serve the public by hiring more workers, expanding productive capacity, and adopting new manufacturing and distribution methods. Such mergers can harm the public in many ways in both the short and long term. Accordingly, in the words of the Supreme Court, Congress in passing the Clayton Act "decided to clamp down with vigor on mergers."[6] Indeed, Congress aimed to stop harmful mergers and to check corporate consolidation in their incipiency. As such, Congress was concerned with "probabilities, not certainties."[7] A reasonable probability of harm is enough to make a merger presumptively illegal.

The undersigned organizations strongly applaud the DOJ and the FTC for returning to the statutory law and judicial interpretations of this law that they are bound to follow and apply. In

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[1] *See, e.g.*, N. Pac. Ry. Co. v. United States, 356 U.S.1, 4 (1958) (recognizing that one purpose of the Sherman Act is to provide "an environment conductive to the preservation of our democratic political and social institutions"); 15 U.S.C. § 45 (prohibiting "*unfair* methods of competition") (emphasis added).

[2] 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

[3] *Id*.

[4] *N. Pac. Ry.*, 356 U.S. at 4.

[5] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

[6] United States v. Von's Grocery Co., 384 U.S. 270, 276 (1966).

[7] Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

the early 1980s, the U.S. Executive arbitrarily abandoned the longstanding approach to regulating competition to protect democracy and liberty foremost, and instead embraced a pro-monopoly idea – that U.S. antitrust and antimonopoly laws were designed mainly to promote narrow notions of "efficiency" and low prices to the exclusion of all other considerations. Ever since, under both Republican and Democratic administrations, the DOJ and the FTC have operated as though Congress had given them a license to engage in open-ended policymaking based on the ideologies, policy preferences, and favored economic theories of their leadership and staff. And the real world result has been the concentration of power and control in almost every sector of the U.S. political economy, in ways that directly threaten our democracy, our most basic liberties, and many of the foundations of a good society.

That is not what Congress intended. Congress assigned the DOJ and the FTC the responsibility of blocking mergers whose effect "*may be* substantially to lessen competition, or to *tend* to create a monopoly."[8] The agencies are obligated to apply the text and controlling judicial interpretations of the law.

In July 2021, President Joe Biden recognized this obligation in a foundational speech on competition policy. The President then reinforced this obligation with a direct instruction to departments and agencies across the U.S. government to abandon the pro-monopoly focus on narrow efficiency. "Forty years ago, we chose the wrong path," President Biden said, "following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition. We're now 40 years into the experiment of letting giant corporations accumulate more and more power. And…what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind. Too many people who are poorer than their parents. I believe the experiment failed."

In the draft guidelines, the DOJ and the FTC clearly demonstrate they take this duty seriously, relying on the text of the Clayton Act and binding Supreme Court decisions to announce how they intended to apply the law. Whereas recent iterations of the guidelines hardly cited statutory text and case law, the draft guidelines are anchored in them. The agencies correctly recognized their role in merger policy—they apply the law as written by Congress and interpreted by the Supreme Court. In faithfully interpreting the law, the agencies admirably restored structural presumptions to their central place. They make clear that horizontal and vertical mergers involving firms with more than a stipulated share of their market will likely invite a legal challenge. In sum, the proposed guidelines demonstrate a clear intention both to restore the original principles of U.S. antitrust law and to intelligently apply those principles to today's realities. They are an important and worthy first draft.

But we believe the proposed guidelines can be clarified and strengthened in several ways.

First, the DOJ and the FTC should greatly strengthen the proposed structural market share presumptions and largely eschew fact-intensive legal tests. Specifically, they should adopt much lower structural presumptions for horizontal, vertical, and conglomerate mergers.

[8] 15 U.S.C. § 18 (emphases added).

Second, the DOJ and the FTC should clearly and unequivocally reject an efficiencies defense for presumptively illegal mergers. Unlike other sections of the Clayton Act, Section 7 has no efficiency or cost-justification defense. The Supreme Court, relying on the text and legislative history of the law, in no uncertain terms has repeatedly said no to an efficiencies defense.

Third, the DOJ and the FTC should clarify their tests for market definition. This should include: a) emphasizing the role of qualitative evidence and local knowledge in drawing the product and geographic boundaries of an antitrust market; b) developing the ability to recognize and measure concentration at all stages within industrial supply chains, including those outside the borders of the United States,[9] and c) offering clearer guidance as to how they will respond to mergers that concentrate power over patents, copyrights, trade secrets, and other potential corporate chokepoints over research and innovation.

Fourth, the DOJ and the FTC should emphasize that internal expansion is a superior alternative to mergers and acquisitions. Section 7 of the Clayton Act is an anti-merger statute, not an anti-growth statute. It is designed to promote growth through internal expansion based on the understanding that such growth promotes jobs and investment and consequently aids the creation and maintenance of more resilient supply chains.

Fifth, the DOJ and the FTC should extend the effort they began in Guideline 10 to update the guidelines to directly address more of the challenges unforeseen at the time of the last major revision of the merger guidelines in 2010. The agencies should detail how merger enforcement, in tandem with other aspects of antitrust law and competition policy, can be used to address the many political, economic, and social threats posed by:

> a) How today's online communications platforms manipulate and interfere in the ability of people to speak, debate, build community, and share news and ideas with one another on the internet.
>
> b) The concentration of control over data, and the capacities to store, manage, manipulate, extract, and competitively exploit this data.
>
> c) Arbitrary and extortionary discrimination in pricing and services by the corporations that control online platform monopolies that are essential to the ability of businesses and individual entrepreneurs to reach their customers.
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> d) The extreme concentration of manufacturing and production capacity in the domestic and international supply chains on which we rely for essential goods, components, and materials, including food, drugs, and munitions.

Sixth, the DOJ and the FTC should insert into the introduction of these guidelines a paragraph that recognizes the original and ultimate purpose of antitrust law—and competition

[9] Hirschman first developed what became the Herfindahl-Hirschman Index to measure point at which offshore dependencies become politically dangerous. ALBERT O. HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE 98-99, 155-62 (1945).

policy generally—which is to protect, promote, and achieve the full promise of American democracy, liberty, security, community, and citizenship. For the last 40 years, the merger guidelines published by these agencies have demonstrated a disregard for the instructions of Congress and their constitutional obligation to apply the law as made by Congress and interpreted by the courts. This in turn helped to foster an obtuseness in both agencies to the very real effects of their pro-monopoly theories on our political, social, and physical wellbeing. To complete the task of reestablishing U.S. antitrust law and competition policy on its original foundations, it is vital to make clear to the American people, business community, lawmakers, judiciary, and agency staffs exactly why the DOJ and FTC have undertaken this effort.

I. Strengthen Structural Presumptions for All Types of Mergers

We commend the DOJ and the FTC for reviving the structural approach to anti-merger enforcement in the draft guidelines. The use of structural market share and concentration tests for horizontal mergers builds on the longstanding *Philadelphia National Bank* presumption.[10] It also builds on numerous other laws and public policies—some of which can be traced to the founding of the United States[11]—designed to ensure a wide, safe, fair, and democratic distribution of power, capacity, responsibility, and opportunity. Just as critically, the agencies did not restrict structural presumptions only to horizontal mergers. The DOJ and FTC correctly proposed structural tests for vertical and conglomerate mergers as well. Structural tests for all types of mergers are consistent with the text of and case law on the Clayton Act and honor Congress's intent for the agencies and courts not to import the Sherman Act's court-created standards into the Clayton Act.[12]

The structural tests should be applied to consolidations concerning all types of assets. They should apply to the traditional aggregation of firms and business assets, but also intangibles. The concentration of copyrights and patents through mergers and acquisitions should be subject to structural market share tests. Likewise, the aggregation of data should be covered as well. In today's economy, the concentration of legal entitlements over intangibles can concentrate power and control just as much as concentration of ownership in land, plant, and equipment can.

We call on the agencies to adopt stronger structural tests in their final guidelines. While a revival of the structural approach to anti-merger enforcement is welcome, the proposed tests are

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[10] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 (1963). *See, e.g.*, Polypore Int'l, Inc. v. FTC, 686 F.3d 1209, 1215-16 (11th Cir. 2012), *cert. denied*, 570 U.S. 917 (2013) (applying *Philadelphia National Bank* presumption to affirm FTC decision holding that a horizontal merger is illegal). In a 1964 decision, the Supreme Court held that a horizontal merger that created a firm with a share of 25% was one that "approaches that held presumptively bad in *United States v. Philadelphia National Bank*[.]" United States v. Cont'l Can Co., 378 U.S. 441, 461 (1964). In a 1966 decision, the Supreme Court found a trend toward concentration and unwound a merger that would have created a supermarket chain with a 7.5% market share in the Los Angeles area. United States v. Von's Grocery Co., 384 U.S. 270, 272, 279 (1966).

[11] *See generally* BARRY C. LYNN, LIBERTY FROM ALL MASTERS: THE NEW AMERICAN AUTOCRACY VS. THE WILL OF THE PEOPLE (2020).

[12] United States v. Penn-Olin Chem. Co., 378 U.S. 158, 170-71 (1964) ("The grand design of the original § 7, as to stock acquisitions, as well as the Celler-Kefauver Act, as to the acquisition of assets, was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach.").

still too permissive. Under the draft guidelines, mergers outside the most highly concentrated markets would still be evaluated under fact-intensive tests. In other words, the structural presumption will apply only to the most concerning mergers in the most highly concentrated markets.

In enacting and amending the Clayton Act, Congress wanted to stop harmful mergers in their incipiency. Congress designed the Clayton Act to be a prophylactic measure that prevented unfair practices such as mergers well before they resulted in monopoly.[13] It affirmed and clarified Section 7's preventative purpose in the 1950 amendments. The drafters of the law wanted to stop more than mergers that were certain to harm consumers, suppliers, workers, or competitors. They wanted to stop consolidations that posed a reasonable probability of inflicting harm. Accordingly, they used probabilistic language in the law, proscribing mergers whose effect either "*may be* to substantially lessen competition" or "*tend* to create a monopoly."[14] In other words, a "probability of a probability."[15]

The Supreme Court and courts of appeals have appreciated the conscious choice of language. In *Brown Shoe Co. v. United States*, the Court wrote that Congress's "concern was with probabilities, not certainties."[16] Congress aimed "to arrest anticompetitive tendencies in their incipiency."[17] Although the Supreme Court has not decided a merger case on the merits in decades, the federal courts of appeals continue to follow this standard. They recognize the law requires enforcers to only show probabilistic harm, not certain harm.[18] In an important horizontal merger decision, Judge Richard Posner wrote, "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future."[19] Courts deciding merger cases in the past 10 years have echoed this theme of Section 7.[20]

Accordingly, the standard for the government and other plaintiffs in Section 7 suits is only reasonable probability of future harm. If they meet this burden, they make out a *prima facie* case and shift the legal burden to the defendants.[21]

Given this concern with incipiency, the courts historically stopped mergers at comparatively low levels of concentration. Mergers can beget mergers as firms seek to bulk up to

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[13] *See* S. REP. NO. 1775, at 4-5 (1950) ("The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."); *Brown Shoe*, 370 U.S. 294, 347 (1962) ("[A]pparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency.").
[14] 15 U.S.C. § 18.
[15] Steven C. Salop, *A 'Probability of a Probability': Understanding the Section 7 Reasonable Probability Standard*, U. BALT. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4367573.
[16] *Brown Shoe*, 370 U.S. at 323.
[17] *Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).
[18] Ford Motor Co. v. United States, 405 U.S. 562, 567 n.4 (1972).
[19] Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986).
[20] *E.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 337 (3d Cir. 2016); Saint Alphonsus Med. Ctr.-Nampa Inc. v. Saint Luke's Health Sys., Ltd., 778 F.3d 775, 783 (9th Cir. 2015).
[21] United States v. Anthem, Inc., 855 F.3d 345, 349-50 (D.C. Cir. 2017).

keep up with rivals who have grown through mergers and acquisitions, or to gain leverage over upstream or downstream counterparties that have grown large through mergers. Accordingly, courts have stopped mergers that concentrated markets at levels that typically would not raise concerns under the monopolization standard of Section 2 of the Sherman Act.[22]

As a corollary to the reasonable-probability standard, the Supreme Court rejected the traditional rule of reason in merger cases. The Clayton Act was in large part the product of congressional anger over the Supreme Court's adoption of the rule of reason in 1911.[23] Congress passed the Clayton Act in 1914 to correct this and other deficiencies in the Sherman Act, not to duplicate them.[24] Accordingly, the agencies and courts must avoid importing rule of reason-like tests into the Clayton Act, contrary to the will of both Congress and the Supreme Court. In this spirit, the Supreme Court in *United States v. Philadelphia National Bank* warned that "we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation."[25]

While the tests proposed in these draft guidelines are not a replication of the Supreme Court's rule of reason, these broad economic inquiries are not fully faithful to the text and purpose of the Clayton Act, as well as controlling precedent. For instance, while seemingly simple to apply, ascertaining head-to-head competition between merging parties and whether it is "substantial" and assessing whether a market is conducive to price coordination will be fact-intensive and likely result in open-ended inquiries. The same can be said for a history of consolidation and vertical integration. What appear to be simple tests on paper will be contested, contentious, and challenging in practice.[26]

We believe the agencies, by relying on such fact-specific inquiries for mergers outside the most concentrated markets, are repeating the exact analytical approach that the Supreme Court cautioned against applying in *Philadelphia National Bank*"[27] The likely result is protracted investigations and lawsuits and a failure to deter harmful consolidation. The inability to quickly and efficiently resolve antitrust cases has been a persistent problem—a problem that calls for radical simplification of legal standards.

In adopting stricter structural tests, the agencies should not be swayed by the corporate defense bar's fearmongering around "overdeterrence." As a matter of statutory construction, the

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[22] *See, e.g.*, FTC v. Hackensack Meridian Health, Inc., 30 F. 4th 160, 172-73 (3d Cir. 2022) (ruling that a horizontal merger that gave the combined entity a market share of 47% is presumptively illegal).
[23] 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, 231-32 (1980).
[24] Richard M. Steuer, *Incipiency*, 31 LOY. CONSUMER L. REV. 155, 160 (2019).
[25] *Philadelphia Nat'l Bank*, 374 U.S. at 362.
[26] *See* Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 295 (1960) ("[T]here are reasons for suspecting that a consideration of all relevant factors may actually detract from the accuracy of decisions made under section 7. This danger consists in part of the possibility that errors in logic and inference will increase when large amounts of complex data must be considered in a conceptual framework that is but partially understood.").
[27] *Philadelphia Nat'l Bank*, 374 U.S. at 362.

incipiency standard of the Clayton Act reflects a congressional judgment to err on the side of stopping a merger in the case of doubt about the effects of the merger.[28]

Further, stronger anti-merger rules are very unlikely to stop "efficiency-enhancing" mergers. Indeed, the bulk of empirical research finds that mergers do not enhance efficiencies.[29] Two scholars, who formerly served in the DOJ, reviewed the empirical findings on horizontal mergers and concluded the research "provide[s] little support for a belief in the prevalence of substantial efficiencies."[30] The empirical record on vertical mergers shows that these consolidations have more mixed effects but are not generally beneficial as some claim.[31] And the DOJ and the FTC should bear in mind that mergers often *reduce* the sorts of efficiencies that society values, as demonstrated through such effects as higher prices, lower quality, an increased ability to exercise power over workers and other suppliers, and less resiliency within vital systems, among many other harms.[32] With good reason, Judge Posner quipped in 2015, "I wish someone would give me some examples of mergers that have improved efficiency. There must be some."[33]

Critically, strong anti-merger policy is not an anti-growth policy by any means. As discussed further below, strong anti-merger law can channel business strategy toward internal expansion which increases output, promotes investment, and creates jobs. Firms should use internal expansion to grow and achieve scale economies.

In light of the law and empirical research on mergers, we urge the DOJ and the FTC to adopt significantly lower market share and concentration thresholds for the structural presumptions. The selection of exact figures unavoidably involves judgment, but the law and the empirical evidence favor much lower thresholds than what the DOJ and the FTC have proposed. The "may be substantially lessen competition"[34] prong of the Clayton Act supports a much lower market share threshold for horizontal mergers, which can strengthen corporate power over customers, suppliers, workers, and competitors. Lower thresholds can effectively check trends toward concentration in their incipiency. Corporations who desire to grow through mergers and acquisitions will quickly hit the market share and concentration thresholds and be restricted from

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[28] Peter C. Carstensen, *The* Philadelphia National Bank *Presumption: Merger Analysis in an Unpredictable World*, 80 ANTITRUST L.J. 219, 220 (2015). The empirical work of John Kwoka shows that the agencies have followed a policy of *under*deterrence, even using their limited criteria of price and output. *See generally* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2014).

[29] Melissa A. Schilling, *Potential Sources of Value from Mergers and Their Indicators*, 63 ANTITRUST BULL.183 (2018); F. M. Scherer, *A New Retrospective on Mergers*, 28 REV. INDUS. ORG. 327, 340-41 (2006). A study examining mergers in manufacturing concluded that they commonly led to greater pricing power but found little support for plant- or firm-level efficiencies. Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* (Nat'l Bureau of Econ. Rsch., Working Paper No. 22750, 2016).

[30] Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right*, 168 U. PENN. L. REV. 1941, 1963 (2020).

[31] Marissa Beck & Fiona Scott Morton, *Evaluating the Evidence on Vertical Mergers*, 59 REV. IDUS. ORG. 273, 274-75 (2021).

[32] Vinod Kumer & Priti Sharma, *Why Mergers & Acquisitions Fail*, *in* AN INSIGHT INTO MERGERS AND ACQUISITIONS: A GROWTH PERSPECTIVE 183 (2019).

[33] Philadelphia National Bank *at 50: An Interview with Judge Richard Posner*, 80 ANTITRUST L.J, 205, 216 (2015).

[34] 15 U.S.C. § 18.

pursuing further growth through M&A. Accordingly, we recommend replacing the 30% market share and 1,800 market HHI thresholds with 15% market share and 1,000 market HHI thresholds. Our proposed HHI test is what the DOJ announced in its 1982 Merger Guidelines.[35]

Both prongs of the Clayton Act favor a lower market share threshold for vertical mergers than what is in the draft proposal. Vertical mergers involving dominant and near-dominant firms can allow firms to engage in input and output foreclosure and fortify and extend their own power.[36] In addition, such mergers can create or reinforce dangerous chokepoints in capacities and services, as we have witnessed in the many supply chain crises of recent years. We therefore strongly urge replacing the proposed 50% market share threshold for vertical mergers with a 25% market share threshold.[37] Further, we strongly encourage the agencies to conduct a study of whether it makes logical sense—over the medium and long term—to maintain less stringent thresholds for vertical mergers as compared to horizontal mergers.

For mergers that fall outside the horizontal and vertical categories and are conglomerate in nature, we believe they should be restricted using the "tend to create a monopoly" prong of the Clayton Act. Such mergers can entrench or extend dominant positions.[38] We support replacing the 30% market share threshold with a 25% threshold and using it as the principal criterion in identifying conglomerate mergers to challenge.

In addition to lowering the thresholds significantly, we also call on the DOJ and FTC to eschew fact-intensive tests that attempt to tease out and predict the effects of mergers on a case-by-case basis. In addition to the statutory reasonable probability standard already described, we believe there are extremely compelling practical and political reasons for doing so.

Three stand out. First, the courts are not well-equipped to decide the legality of a merger on a case-by-case examination or prognostication of any merger's "effects." The Supreme Court

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[35] U.S. DEP'T OF JUSTICE, 1982 MERGER GUIDELINES § III.1, https://www.justice.gov/archives/atr/1982-merger-guidelines. We would like to express our preference for enforcers to use concentration ratios rather than HHI to determine undue market concentration. Concentration ratios have historically been used by the Supreme Court and are generally easier for the public, businesses, and judges to understand.

[36] Fruehauf Corp. v. FTC, 603 F.2d 345, 352 (1979).

[37] Sherman Act jurisprudence supports this figure. One court of appeals concluded "Visa U.S.A. and MasterCard, jointly and *separately*, have power within the market for [credit card] network services" because "Visa U.S.A. members accounted for approximately 47% of the dollar volume of credit and charge card transactions, while *MasterCard members accounted for approximately 26%*." United States v. Visa U.S.A., Inc., 344 F.3d 229, 239-40 (2d Cir. 2003) (emphases added). In an attempted monopolization case, the Ninth Circuit held that the defendant's "market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing." Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995). *See also* R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper, 462 F.3d 690, 695 (7th Cir. 2006) (rejecting a district court's determination that 25% market share is "too small to create market power" and also stating that the determination is "questionable"); Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000) (a firm has market power with only 20% market share because of significant foreclosure of competitors). Given that the Clayton Act is an incipiency statute, the market share thresholds should be lower than the screens used by courts under the Sherman Act.

[38] FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967).

recognized that the assessment of social costs and benefits are, and should be, the province of Congress, not the federal judiciary.[39]

Second, such legal tests are expensive and time-consuming, and greatly slow the legal and judicial processes in ways that tend to favor mainly the already powerful. As Tommaso Valletti, the former Chief Economist at European Commission's Department for Competition (DG Comp), said at a recent public event, "Economics is the perfect tool for corporations with market power… It is engrained in our brain to construct tradeoffs—on the one hand, on the other hand. But then of course if resources are tilted in one direction you see only one hand."

Third, such an approach undermines the rule of law by introducing extreme uncertainty into the enforcement of the law itself. True rule of law requires both complete transparency and clarity, and an impartial enforcement of the rule of law.[40]

This does not mean there is no room for science and other expertise in the establishment of the law or of the thresholds in these guidelines. As Valletti and co-author Filippo Lancieri made clear in a recent essay, it is the duty of elected officials—not antitrust enforcers—to make the "broad trade-off determinations" about the political goals of antitrust law and competition policy.[41] But there is ample opportunity, Valletti and Lancieri made clear, for social scientific research to inform the thinking of the legislators who are designing rules to govern specific human economic activities.

One way to understand why it is essential that the agencies fully eschew fact-intensive legal tests is to consider the analogy of traffic safety. A fair, equitable system of traffic safety requires, at a minimum, posted speed limits that everyone sees and can understand and follow. In the design and setting of these limits, the work of the engineer and other experts should play a

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[39] The Supreme Court rejected a case-by-case cost-benefit analysis of mergers. *Philadelphia Nat'l Bank*, 374 U.S. at 371. In a similar vein, the Court expressed the institutional limitations of the judiciary in a Sherman Act case in 1972:

> There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required. *Topco*, 405 U.S. at 611-12.

[40] As John Locke put it in The Second Treatise on Government, "[F]reedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not: and not to be subject to the inconstant, uncertain, arbitrary will of another man[.]" JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 17 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1689).

[41] Filippo Lancieri & Tommaso Valletti, *Structuring a Structural Presumption for Merger Review*, PROMARKET (Apr. 14, 2023), https://www.promarket.org/2023/04/14/structuring-a-structural-presumption-for-merger-review/.

major role. But, after the limits have been set and posted, there should be no room for police officers to engage in discretionary and subjective enforcement of the law.[42]

Structural Presumptions Proposed by DOJ and FTC

Type of Merger and Indicator	Threshold
Horizontal Mergers	
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
Vertical Mergers (market share)	50%
All Mergers that Could Entrench Dominant Position (market share)	30%

Structural Presumptions Proposed by Undersigned Organizations

Type of Merger and Indicator	Threshold
Horizontal Mergers	
Post-merger HHI	Market HHI greater than 1,000 AND Change in HHI greater than 100
Merged firm's market share	Share greater than 15% AND Change in HHI greater than 100
Vertical Mergers and Mergers That Could Entrench Dominant Positions (market share)	25%

II. Eliminate the Efficiencies Defense for Presumptively Illegal Mergers

We call on the DOJ and the FTC to follow the law and explicitly reject an efficiencies justification for a presumptively illegal merger. The language in the proposed guidelines is muddled and ultimately downright contradictory. In Section IV on Rebuttal evidence, the proposed guidelines first acknowledge the clear and unequivocal holdings of three still valid Supreme Court decisions in which the Court rejected an efficiencies defense. Then, with no explanation, the DOJ and the FTC signal that they will in fact entertain efficiencies stories from merging parties.

Congress did not include an efficiencies defense in Section 7 of the Clayton Act. It had two opportunities to do so: once in 1914, when it enacted the Clayton Act; and again in 1950, when it amended the law. By 1950, Congress was certainly familiar with the inclusion of efficiency and cost-justification defenses. In contrast to Section 7, in Section 2 of the Clayton Act, Congress included a cost-justification defense when it enacted the law in 1914 and refined

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[42] Sandeep Vaheesan, *The Social Case for Bright-Line Antitrust Rules*, THE SLING (June 11, 2023), https://www.thesling.org/the-social-case-for-bright-line-antitrust-rules/; *see also* FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY 159 (1960) ("[F]ew beliefs have been more destructive of the respect for the rules and of morals than the idea that a rule is binding only if the beneficial effect of observing it in the particular instance can be recognized.").

the defense when it amended the law in the Robinson-Patman Act of 1936.[43] Tellingly, Congress included no parallel provision in Section 7.[44]

The Supreme Court relied on the text and legislative history of Section 7 of the Clayton Act to rule out an efficiencies defense for mergers. In *Brown Shoe*, the Court confronted the possibility of an illegal merger that offered the promise of operational efficiencies. The Court unequivocally rejected an efficiencies defense and concluded that Congress "resolved these competing considerations in favor of decentralization." [45] One year later, two merging banks attempted to justify their presumptively illegal merger based on purported benefits to the public. Again, the Supreme Court said no and concluded that "Congress determined to preserve our traditionally competitive economy…[and] therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid."[46]

A few years later, the Court affirmed that an efficiencies defense was not available under Section 7 of the Clayton Act. In deciding the legality of a product-extension merger, the Court held that "[p]ossible economies cannot be used as a defense to illegality."[47] It drew on the text and legislative debates of the Clayton Act, writing, "Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[48]

The rejection of an efficiencies defense was not confined to a particular type of merger or fact pattern. Consider the mergers the Court evaluated in *Brown Shoe*, *Philadelphia National Bank*, and *Procter & Gamble*. *Brown Shoe* involved a merger with horizontal and vertical elements and economies of scale and scope in advertising and marketing.[49] In *Philadelphia National Bank*, the Court examined a horizontal merger in which two competing banks attempted to justify their consolidation by asserting that post-merger they would be better able to compete against banks in New York and to attract business and investment to Philadelphia.[50] And *Procter & Gamble* concerned a conglomerate merger that offered the possibility of cost savings in advertising household bleach.[51] These distinct fact patterns and efficiency claims foreclose the notion that the Supreme Court only said no to certain efficiency claims involving certain types of mergers. The Court rejected an efficiencies defense in general.

Several courts of appeals have recognized that these decisions are still the law. In 2016, the Third Circuit, relying on the text of the Clayton Act and Supreme Court precedent, stated,

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[43] *See* 15 U.S.C. § 13(a) ("[N]othing 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").
[44] Robert H. Lande, *Textualism as an Ally of Antitrust Enforcement: Examples from Merger and Monopolization Law*, 2023 UTAH L. REV. 813, 832-34.
[45] *Brown Shoe*, 370 U.S. at 344.
[46] *Philadelphia Nat'l Bank*, 374 U.S. at 371.
[47] *Procter & Gamble*, 386 U.S. at 580.
[48] *Id.*
[49] *Brown Shoe*, 370 U.S. at 334, 345-46.
[50] *Philadelphia Nat'l Bank*, 374 U.S. at 331, 370-71.
[51] *Procter & Gamble*, 386 U.S. at 579.

"we are skeptical that such an efficiencies defense even exists."[52] In a similar spirit, the Ninth Circuit wrote: "We remain skeptical about the efficiencies defense in general and about its scope in particular."[53] In a prior decision, this same court was even more explicit: "[The acquirer] argues that the merger can be justified because it allows greater efficiency of operation. This argument has been rejected repeatedly."[54] The D.C. Circuit described the "clear holding of *Procter & Gamble*" as rejecting an efficiencies defense.[55] Although some courts of appeals have adopted an efficiencies defense, they are doing so in defiance of clear and controlling Supreme Court precedent. They are obligated to apply the law as it stands, not as it might be someday.[56]

The DOJ and FTC should cut the section on procompetitive efficiencies entirely.[57] The proposed language does nothing more than create an enormous opportunity for mischief by pro-monopoly lawyers and economists. If left in place, this section has the potential to undercut almost every other goal the agencies seek to achieve in these guidelines. More to the point, this section would put the DOJ and FTC once again in clear opposition to the will of the American people as expressed through Congress and as reinforced by the Supreme Court.

III. Clarify and Update Market Definition Goals and Processes

Market definition is a key inquiry in merger analysis. While the geographic or product market won't be contested in some cases,[58] it will be a source of intense disagreement between the government and the merging parties in others. It is of vital importance to get this question right. Drawing a geographic market boundary too broadly can mean excusing a merger that stands to injure consumers, suppliers, and competitors. Conversely, an unduly narrow geographic or product market can mean the agencies devote scarce resources to litigating a merger that is innocuous. We offer a few recommendations on refining market definition in merger reviews.

We applaud the agencies for recognizing that quantitative and qualitative evidence can be used to define product and geographic markets. While the DOJ and the FTC, in recent times, have elevated the hypothetical monopolist test to the position of gold standard, neither the law nor practical considerations require that. In many instances, qualitative evidence, incorporating the knowledge, expertise, and experience of actual market participants, may be more illuminating than quantitative measures that demand more from statistical methods than can

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[52] *Penn State Hershey Med. Ctr.*, 838 F.3d at 348.
[53] *Saint Alphonsus Med. Ctr.-Nampa*, 778 F.3d at 790.
[54] RSR Corp. v. FTC, 602 F.2d 1317, 1325 (9th Cir. 1979).
[55] *Anthem*, 855 F.3d at 354. *See also* ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222 (11th Cir. 1991).
[56] *See Anthem*, 855 F.3d at 354 ("Put differently, our dissenting colleague applies the law as he wishes it were, not as it currently is. Even if 'the Supreme Court has not decided a case assessing the lawfulness of a horizontal merger under Section 7 of the Clayton Act' since 1975, it still is not a lower court's role to ignore on-point precedent so as to adhere to what might someday become Supreme Court precedent.") (internal citations omitted).
[57] The DOJ and the FTC recognized the important—but narrow—failing firm defense. This defense permits otherwise illegal mergers if the alternative to the proposed merger is liquidation of the failing business. For a careful recent articulation of this defense, *see In re Otto Bock HealthCare North America, Inc.*, 2019 WL 5957363 *35.
[58] *See, e.g.*, *ProMedica Health System*, 749 F.3d at 565 ("Here, the parties agree that the relevant geographic market is Lucas County.").

easily be met in real-world legal proceedings. In the final guidelines, we urge the DOJ and the FTC to treat quantitative and qualitative evidence as equally valid in drawing market boundaries.

Qualitative evidence comes in many forms. They include communications and other documents prepared in the course of business in which the merging parties' executives and managers candidly assess the competitive landscape and identify their key rivals. Mandatory filings to the Securities and Exchange Commission, such as annual 10-Ks and quarterly 10-Qs, in which companies are legally bound to tell the truth, are also probative qualitative evidence. Parties who participate in or follow an industry closely can also shed light on market boundaries. Customers, suppliers, workers, labor unions, and financial analysts can provide evidence on the metes and bounds of markets, much of which is likely to be qualitative in nature.

Local knowledge, both qualitative and quantitative evidence, will be particularly helpful and critical in certain markets. In mergers involving food retailing and healthcare, as a practical matter, the agencies will need to rely on local expertise to determine geographic market boundaries. How far shoppers travel for groceries will be different in New York than in Los Angeles, and different between the suburbs and urban core of a metropolitan area, and between rural areas and city suburbs. It is a function of infrastructure and preferred methods of transportation. Expecting shoppers to travel five miles for groceries is not realistic in a city where few people own cars. The same is true for pharmacies and health care. The agencies will need to draw on local expertise to properly identify the scope of these markets.

At the other end of the spectrum, many markets today are continental or global in scope. Consider the internationalization of systems for production and distribution of industrial goods, food, drugs, materials, and minerals. Understanding the scope of these markets will require the DOJ and the FTC to work more closely with the U.S. Trade Representative and other offices of the U.S. government—including the Department of Defense—to identify offshore chokepoints in ownership and/or capacity for manufacturing, resource extraction, and the provision of essential services.[59] It will also require the agencies to hire experts capable of understanding how manufacturers structure their operations within these markets, and how the resulting production *systems* are engineered and actually function. It will also require the agencies to trust the findings of these engineers and similar experts over those of traditional generalist antitrust economists.

IV. Emphasize That Internal Expansion Is a Socially Superior Method of Growth Compared to Mergers and Acquisitions

The agencies should recognize throughout the guidelines that internal expansion is an alternative—and a generally socially superior alternative—to mergers and acquisitions. Strong anti-merger policy can channel business strategy toward internal expansion. The Supreme Court

[59] It is worth noting that Albert O. Hirschman developed the original version of the Herfindahl-Hirschman Index for measuring market concentration as an aid to studying Nazi Germany's exploitation of industrial dependencies to exercise political control over neighboring nations. In his 1945 book *National Power and the Structure of Foreign Trade*, Hirschman left the DOJ and FTC with a simple guide for this next stage in their efforts to develop market definitions to enforce antitrust law in ways that ensure the security of the United States and its individual citizens. Any country that has developed a "power policy," Hirschman wrote, "will have fixed for the amount of its trade relations with foreign countries a *certain maximum limit* which it will think unsafe to exceed." HIRSCHMAN, *supra* note 9, at 19.

in *Philadelphia National Bank* recognized as much. It wrote, "[S]urely one premise of an antimerger statute such as s 7 [of the Clayton Act] is that corporate growth by internal expansion is socially preferable to growth by acquisition."[60]

Internal expansion means new productive capacity, innovation, and job creation. When businesses cannot engage in the easy game of mergers and acquisitions to increase power and profits, they need to pursue the path of building new plants and facilities, adopting new methods of production, and hiring more workers. It includes developing new inventions and capabilities for innovation, instead of buying existing inventions and research and development capacities. Such growth is qualitatively different from, and better than, mergers and acquisitions which involve the purchasing, combining, and swapping of existing corporations and assets.

The public benefits of internal expansion are substantial. It means more production, new products and production methods, and more jobs. The Supreme Court in *Brown Shoe* contrasted internal expansion with mergers and acquisitions:

> A company's history of expansion through mergers presents a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output.[61]

Per the criteria of investment, output, and jobs,[62] internal expansion, in general, is better than mergers and acquisition. As two well-known antitrust economists who contrasted mergers and acquisitions with internal expansion put it in the 1980s, "shuffling ownership shares" and "sterile paper entrepreneurialism" versus investment in "productivity-enhancing plant, equipment, and research and development." [63]

Two examples, one historical and one more recent, illustrate the value of internal expansion. In 1957, the DOJ blocked Bethlehem Steel from acquiring Youngstown Sheet and Tube. Instead of stagnating, Bethlehem Steel proceeded to do what it previously asserted was impossible. It constructed a new steel mill in Indiana that was the state of the art and first of its kind in the United States.[64]

The experience of the wireless industry in the 2010s shows how anti-merger policy spurs internal expansion. In 2011, the DOJ and Federal Communications Commission stopped AT&T from buying T-Mobile, which would have reduced the number of national wireless carriers from

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[60] *Philadelphia Nat'l Bank*, 374 U.S. at 370.
[61] *Brown Shoe*, 370 U.S. at 345 n.72.
[62] Some recent research has found that mergers reduce employment and wages. *E.g.*, Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021); David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* (2020).
[63] Walter Adams & James W. Brock, *The Proposed Emasculation of Section 7 of the Clayton Act*, 65 NEB. L. REV. 813, 819 (1986).
[64] *Id.* at 817.

four to three.[65] Proponents of the merger claimed that T-Mobile was destined to struggle, if not fail, and ultimately hurt wireless customers as an independent carrier.[66] In reality, T-Mobile became a dynamic competitor, slashing rates on its subscription plans and expanding and improving its network. T-Mobile injected healthy competition that had been missing from the U.S. wireless market for years.[67] Then-Chairwoman of the Federal Reserve Board Janet Yellen noted that declining wireless rates helped check inflation for several years in the 2010s.[68]

Internal expansion also contributes to more robust supply chains. When firms engage in mergers and acquisitions, they often eliminate what they view, in the short run, as redundant plants and facilities.[69] In the short term, that can mean greater profits for shareholders but in the long term it can contribute to brittle supply chains. With less spare capacity, a shock such as a global pandemic can mean disruption of the production and distribution of essential goods and services. Consider the vulnerabilities in the supply of meat. Consolidation resulted in the concentration of production in a handful of firms at a few large meatpacking plants and made the processing and sale of meat susceptible to disruptions like the pandemic and cyberattacks, to the detriment of farmers and the public.[70] By contrast to this merger-induced fragility, internal expansion contributes to the creation and maintenance of spare capacity that means a more resilient economic system.

We encourage the DOJ and the FTC to highlight the value of internal expansion throughout the final merger guidelines. As the *Philadelphia National Bank* Court noted, a corollary to anti-merger law is a pro-internal expansion policy.[71] By adopting a strong anti-enforcement guidelines and program, the DOJ and the FTC can help stimulate internal expansion across the American economy, to the benefit of workers, communities, and consumers.

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[65] Press Release, U.S. Dep't of Justice, Justice Department Issues Statements Regarding AT&T Inc.'s Abandonment of Its Proposed Acquisition of T-Mobile USA Inc. (Dec. 19, 2011), https://www.justice.gov/opa/pr/justice-department-issues-statements-regarding-att-incs-abandonment-its-proposed-acquisition.

[66] *See* Jesse Eisinger & Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers*, PROPUBLICA (Nov. 16, 2016) ("Carlton's expert report predicted that T-Mobile was doomed to failure without the merger."), https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers.

[67] *E.g.*, Jacob Kastrenakes, *T-Mobile Becomes the 'Uncarrier', Drops Contracts and Launches LTE*, THE VERGE (Mar. 26, 2013), https://www.theverge.com/mobile/2013/3/26/4149204/tmobile-new-direction-no-contracts-lte-uncarrier; Sinead Carew, *T-Mobile US International Options to Include No-Fee Data Roaming*, REUTERS (Oct. 9, 2013), https://www.reuters.com/article/us-tmobileus-international/t-mobile-us-international-options-to-include-no-fee-data-roaming-idINBRE9981CO20131009.

[68] Neil Irwin, *Janet Yellen and the Case of the Missing Inflation*, N.Y. TIMES (June 14, 2017), https://www.nytimes.com/2017/06/14/upshot/janet-yellen-and-the-case-of-the-missing-inflation.html.

[69] *See* BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010); *see also* K.C. O' Shaughnessy & David J. Flanagan, *Determinants of Layoff Announcements Following M&As: An Empirical Investigation*, 19 STRATEGIC MGMT. J. 989 (1998).

[70] *Building Food Systems Resiliency Through Different Business Scales and Forms: An Open Markets Institute Report*, OPEN MARKETS INST. 5-8 (June 2021), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/60df0e09cc8302417c732010/1625230859521/USDA_SupplyChainsComment_LR_CK_JF.pdf; Chloe Sorvina, *Consolidation Has Made the Meat Industry Vulnerable to Crises Like Covid-19*, MARKET PLACE (Dec. 6, 2022), https://www.marketplace.org/2022/12/06/consolidation-meat-industry-supply-chain/.

[71] *Philadelphia Nat'l Bank*, 374 U.S. at 370.

V. Resolve Major Outstanding Issues in Competition Policy

We strongly applaud the DOJ and FTC for their efforts to restore the original principles of U.S. anti-merger law and competition policy and to intelligently apply them to today's realities. We particularly applaud the application of these principles to new and expanding business models, such as the focus in Guideline 10 on "multi-sided platforms." In this spirit, it is vital that the DOJ and the FTC also better define and update other metrics and goals essential to competition policy in general and to merger guidelines in particular. Four stand out as paramount:

a) **How today's online communications platforms manipulate and interfere in the ability of people to speak, debate, build community, and share news and ideas with one another on the internet**. It is vital the DOJ and FTC provide guidance as to when exactly a merger transforms—or may already have transformed—a platform into an essential public infrastructure or facility. Such a designation would require the agencies either to block the deal, or to apply non-discrimination rules to govern how these corporations serve and otherwise interact with the people and businesses that depend on them to speak with and do business with one another. It is similarly vital that the agencies immediately provide guidance as to when a takeover of any such essential communications platform by new ownership will be reviewed and what sorts of restrictions will be placed on the ability of the new owners to alter existing service arrangements. An excellent example of a deal that should have been blocked, or made subject to non-discrimination rules, is Elon Musk's recent takeover of Twitter, which has resulted in a dangerous concentration of power over debate and communications in the hands of a single person.

b) **The concentration of control over data, and the capacities to store, manage, manipulate, extract, and competitively exploit this data.** Merger activity is increasingly driven by the desire to capture control over data and/or to increase a corporation's ability to wield data to increase its power vis-à-vis rivals and to increase its power over suppliers and other users. We therefore strongly urge the DOJ and FTC to provide the public, business executives, investors, and other actors with much clearer guidance as to how the agencies will respond to mergers that concentrate control over data, and/or the capacities to store, manage, manipulate, extract, and competitively exploit this data.

c) **Arbitrary and extortionary discriminations in pricing and services by the corporations that control online platform monopolies that are essential to the ability of businesses and individual entrepreneurs to reach their customers**. The present draft of the guidelines does indicate that any mergers by corporations that already enjoy positions as dominant gatekeepers will be questioned. But we also believe it is vital that the DOJ and FTC make clear exactly when and how they will act to prevent the use of gatekeeper power achieved either through a new or past merger to interfere in the ability of sellers to get to market, restrict what information is presented to buyers, charge exorbitant tolls for connecting buyers to sellers, provide differential treatment to sellers

and buyers who are in the same class and circumstance, or in any other way discriminate in the provision of the prices and terms it offers to users and trading partners.

d) **The extreme concentration of manufacturing and production capacity in the domestic and international supply chains on which we rely for essential goods, components, and materials, including food, drugs, and munitions**. We recognize that the two agencies have addressed the issue of supply chain concentration in Guideline 6. But the agencies have done so only as regards the effect of such concentration on the ability of rivals to have a "fair opportunity to compete." But, given the nature of the risks posed by extreme concentration of industrial capacity, which range from routine shortages of vital goods and drugs to the potential for economic coercion by private corporations and foreign powers, or further to the potential for a catastrophic crash of entire international industrial systems, we believe the agencies need to communicate to business, the public, policymakers, and key trading partners 1) that they fully understand these threats and have a plan to address them, including through merger enforcement, and 2) that they are prepared to work more closely with the U.S. Trade Representative and other offices of the U.S. government—including the Department of Defense—to identify offshore chokepoints in ownership and/or capacity for manufacturing, resource extraction, and the provision of essential services.[72]

VI. Explain the Original and Ultimate Purpose of Antitrust Law Within the Guidelines

We strongly applaud the DOJ and FTC for recognizing the public structuring of markets and the first principles of antitrust law and competition policy, and for taking steps to rebuild an enforcement regime based on this understanding. Unfortunately, this draft version of the guidelines does not make this point nearly as explicitly as the public deserves and has a right to expect. We therefore call on the DOJ and the FTC to insert into the introduction of these guidelines text that recognizes the original and ultimate purpose of antitrust law—and competition policy generally—which is to protect, promote, and achieve the full promise of American democracy, liberty, security, community, and citizenship. For the last 40 years, the merger guidelines published by these agencies have demonstrated a disregard for the instructions of both Congress and the Constitution and an obtuseness to the very real effects of this pro-monopoly policy on our political, social, and physical wellbeing. As President Biden recognized in his July 2021 speech, today's DOJ and FTC have a duty to fully rectify this problem and to make clear to the American people, business community, lawmakers, and judiciary why you are doing so.

[72] Importantly, U.S. Trade Representative Katherine Tai recently delivered a speech that helps to explain both the nature of these challenges and how to bring domestic antitrust law and competition policy into closer alignment with U.S. trade policy to help achieve these ends. Katherine Tai, Ambassador U.S. Trade Rep., Remarks at the National Press Club on Supply Chain Resilience (June 15, 2023), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023/june/ambassador-katherine-tais-remarks-national-press-club-supply-chain-resilience.

We thank you for the opportunity to share our perspective and expertise on the proposed merger guidelines. If you have any questions or would like to discuss our input further, please contact Barry Lynn at lynn@openmarketsinstitute.org.

Sincerely,

Open Markets Institute
Athena Coalition
Campaign for Family Farms and the Environment
Economic Security Project
Fight for the Future
Food & Water Watch
Future of Music Coalition
Governing for Impact
HEAL Food Alliance
Jobs with Justice
Main Street Alliance
NextGen Competition
Public Citizen
Rural Advancement Foundation International-USA (RAFI-USA)
Revolving Door Project
Service Employees International Union

Joining in their individual capacities (affiliations listed only for identification purposes)

Cristina Caffarra, Economist, Expert, Co-Founder, CEPR Competition Research Policy Network
Hal Singer, Professor of Economics, University of Utah
Mark Glick, Professor of Economics, University of Utah
Tommaso Valletti, Professor of Economics, Imperial College Business School