A NATIONAL COMPETITION POLICY: UNPACKING THE PROBLEM OF DECLINING COMPETITION AND SETTING PRIORITIES MOVING FORWARD

September 28, 2016

I. Why We Need a National Competition Policy

Not since the first federal antitrust law was enacted over 120 years ago has there been the level of public concern over the concentration of economic and political power that we see today.[1] Public attention to antitrust enforcement in the U.S. has been transient at best, driven by the occasional merger wave or abusive practices by dominant firms in high profile markets. But competition is now on the front pages, as concerns over rising concentration, extraordinary profits accruing to the top slice of corporations, slowing innovation, and widening income and wealth inequality have galvanized attention.

The U.S. is in the midst of a record-setting merger wave, with the average value of deals over 20% higher than the peak of the most recent wave in 2007.[2] Over the last 30 years, many industries, including telecommunications, banking, pharmaceuticals, agriculture, healthcare, retail grocery, and airlines, have undergone significant consolidation. The now high levels of concentration in many of these industries are raising concerns about harmful effects on competition and consumers.

Other antitrust concerns are also stacking up. International cartels continue to proliferate, extracting billions of dollars from consumers and creating economic waste. And the growth of dominant firms that wield significant market power has raised the likelihood of conduct designed to push smaller rivals from the market. These problems all distort the competitive process and harm consumers through higher prices, lower quality, less choice and innovation, and higher barriers to entrepreneurial activity and market entry.

Political attention to antitrust enforcement is long overdue. The White House expressed concern about declining competition in an April 2016 Executive Order: *Steps to Increase*

[1] The American Antitrust Institute (AAI) is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. See www.antitrustinstitute.org for more information. This statement was written by AAI President, Diana Moss, with assistance from Richard Brunell, General Counsel and Vice President, and Randy Stutz, Associate General Counsel.

[2] Emily Liner, *What's Behind the All-Time High in M&A?*, THIRD WAY (Mar. 11, 2016), http://www.thirdway.org/report/whats-behind-the-all-time-high-in-m-and-a.

Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy.[3] The President highlighted the harmful effects of declining competition on economic growth, opportunities for labor, and national priorities in healthcare, energy, and telecommunications.[4] A Council of Economic Advisors (CEA) report that accompanied the Executive Order identifies three indicators of declining competition: increasing concentration, increasing rents accruing to few firms, and lower levels of firm entry and labor market mobility.[5] These concerns have made their way into the Democratic National Committee platform, which contains an antitrust "plank" for the first time since 1988.[6]

The groundswell of concern over declining competition is a product of deep-rooted and long-term trends in antitrust enforcement. For more than three decades, antitrust has pulled its punches based on assumptions about the efficiency of business behavior that lack empirical grounding or have proven to be demonstrably false. Government resistance to recent large mergers is evidence that the "chickens have come home to roost." Deals such as Comcast-Time Warner Cable, Sysco-US Foods, Staples-Office Depot, Applied Materials-Tokyo Electron, and Baker Hughes-Halliburton, had they been allowed to proceed, would have left one or two large firms in control of important markets.

The American Antitrust Institute (AAI) seeks to resets the debate over the importance of antitrust enforcement and competition policy. This statement makes the case for why we need a "National Competition Policy." It first unpacks the major problems that are symptomatic of declining competition. Next, it suggests three core principles upon which a National Competition Policy should rest:

- **Antitrust enforcement is a key instrument for furthering economic and social welfare and should therefore get high priority.**

- **Promoting consumer welfare should be the principal goal of antitrust enforcement.**

- **Mergers in highly concentrated markets and restrictive conduct that entrenches dominant firms should be presumed to violate the antitrust laws.**

The statement concludes with the priorities that should guide a new approach.[7] These are summarized in the body of this statement, while the specific recommendations are provided in the Appendix.

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[3] Exec. Order No. 13725, 81 Fed. Reg. 23,417 (Apr. 15, 2016).

[4] *Id.*

[5] Council of Economic Advisers, *Benefits of Competition and Indicators of Market Power*, THE WHITE HOUSE at 4 (Apr. 2016), https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

[6] 2016 Democratic Party Platform at 12, Promoting Competition and Stopping Corporate Concentration (Jul. 21, 2016), https://www.demconvention.com/wp-content/uploads/2016/07/Democratic-Party-Platform-7.21.16-no-lines.pdf.

[7] These priorities are discussed in detail in AMERICAN ANTITRUST INSTITUTE, TRANSITION REPORT ON COMPETITION POLICY TO THE 45TH PRESIDENT OF THE UNITED STATES (forthcoming 2016). Individual report chapters can be found at http://www.antitrustinstitute.org/2016-transition-report.

II. The Symptoms of Declining Competition

A. The First Problem: Rising Concentration

Concentration is important because it is a generally recognized gauge of market competitiveness. In more concentrated markets, only a few sellers account for a large proportion of output, and they are more likely to exercise market power, either alone or together with their competitors. Nowhere does concentration take center stage more than in merger cases. Horizontal mergers eliminate a competitor, change the structure of a market, and increase concentration. Because of the recognized risks of higher concentration, the anti-merger statute is designed to prevent mergers that *may* enhance market power and lead to anticompetitive effects.[8] The importance of this "incipiency" doctrine cannot be overstated. Once a merger is consummated and a market thus restructured, both the merger and the market are difficult, if not impossible, to unscramble.

There are many ways to measure concentration.[9] Aggregate levels of concentration reflect control of resources across the economy as a whole. Concentration can also be calculated for major sectors and industries, and for even more precisely defined markets for the purpose of evaluating an antitrust concern. To be sure, the implications of various measures of concentration have been the subject of disagreement. And, there are important distinctions between concentration, as applied in an antitrust enforcement context, versus in other contexts. But this broader debate is now becoming somewhat irrelevant, because a variety of available measures of concentration in key industries and sectors over time all now point in the same direction – up.[10] For example:

- **Council of Economic Advisors.** The CEA estimates that the revenue share earned by the top 50 firms between 1997 and 2012 increased, on average, by 4% across 13 major industries.[11] Leading in the highest changes in revenue share are transportation and warehousing (11%), retail trade (11%), and financial and insurance (10%). But these 10,000-foot level data tend to hide the severity of increases in concentration that more specific measures reveal.

- **The Economist.** The Economist magazine evaluated changes in the top four firms' share of industry revenue for almost 900 industries in the U.S., grouped into 15 sectors,

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[8] *See* Clayton Act, § 7; Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Div., Horizontal Merger Guidelines (Augst 19, 2010) [hereinafter Guidelines).

[9] *See, e.g.*, James W. Brock, *Economic Concentration and Market Power: John Flynn and a Quarter-Century of Mergers*, 56 ANTITRUST BULLETIN681-730 (2011).

[10] *See, e.g.,* ACTING ASSISTANT ATTORNEY GENERAL RENATA HESSE OF THE ANTITRUST DIVISION DELIVERS OPENING REMARKS AT 2016 GLOBAL ANTITRUST ENFORCEMENT SYMPOSIUM (Sept. 20, 2016), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening. The antitrust agencies evaluate market concentration using the Herfindahl-Hirschman Index (HHI), which is the sum of the squares of the market shares for all sellers in the market.

[11]Council of Economic Advisers, *supra* note 5 at 4.

from 1997 to 2012.[12] The share of the top four in third party administration of insurance and pension funds increased from about 10% in 1997 to over 75% in 2012.[13] The top four share for scheduled passenger air transportation increased from about 25% to 65%.[14] In wireless telecommunications, it increased from about 50% to almost 90%.[15] For credit card issuers, the top four firm share rose from about 55% to almost 80%; and in petrochemical manufacturing, it increased from over 70% to over 90%.[16]

- **Wall Street Journal.** The Wall Street Journal highlighted academic research that estimates concentration in food and staples retailing in 2013 at about 3,000 HHI, up almost 2,000 HHI points from 1996.[17] In Internet software, concentration was about 2,500 HHI, up from about 750 HHI in 1996; and in airlines, it was 2,000 HHI, almost double the level in 1996.[18]

One of the reasons for the upward creep in concentration seems clear. Before the 1980s, merger enforcement put significant stock in the "structural presumption," or the idea that mergers that significantly increase concentration in already concentrated markets are presumed to create or enhance market power. Moreover, courts and enforcers recognized the importance of stopping anticompetitive mergers in their incipiency.

But in the 1980s – and particularly under the Reagan administration – a sea change in ideology captured enforcement. The structural presumption was given less or no weight by enforcers, the balance of merger analysis shifted strongly toward complex economics, and evidence of higher prices from previous mergers played little to no role. The agencies fortified their more permissive approach by too often accepting unsubstantiated or amorphous claims that mergers would produce cost savings and consumer benefits.

While the pre-Reagan era is generally believed to have been overly hostile to mergers, it is also accepted that the superseding ideology advanced by conservative scholars during the

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[12] *Too Much of a Good Thing*, ECONOMIST, (Mar. 26, 2016), http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing. The concentration measure is essentially the 4-firm ratio, which measures the percentage of output controlled by the four largest firms.

[13] *Corporate Concentration*, ECONOMIST (Mar. 24, 2106), http://www.economist.com/blogs/graphicdetail/2016/03/daily-chart-13.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Theo Francis & Ryan Knutson, *Wave of Megadeals Tests Antitrust Limits in U.S.*, WALL STREET J. (Oct. 18, 2015), http://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306. The article cites work by Hoberg and Phillips. *See, e.g.*, Gerard Hoberg and Gordon Phillips, *Product Market Synergies and Competition in Mergers and Acquisitions: A Text-Based Analysis*, 23 Rev. Fin. Stud. 3773 (2010), *available at* https://www.researchgate.net/profile/Gordon_Phillips/publication/227349422_Product_Market_Synergies_and_Competition_in_Mergers_and_Acquisitions_A_Text-Based_Analysis/links/0912f50ac446540a04000000.pdf.

[18] Francis & Knutson, *supra* note 17.

1980s "overshot the mark."[19] The outcome was a swath of questionable merger approvals – many with no or weak remedial conditions attached – and a steady ratcheting up of concentration in many markets.

Some economists who once highlighted the folly of the overly aggressive merger policy of the 1960s have changed their tune. One economist concluded in the late 1970s, for example, that the prevalence of cost efficiencies cast doubt on any general legal rule hostile to industrial concentration. Thirty-three years later, however, this same economist identified a nexus between increases in concentration in the manufacturing sector and adoption of the more lenient merger enforcement policies adopted in the early 1980s.[20]

B. The Second Problem: Higher Profits to the Few and Slowing Rates of Start-Up Activity

The standalone indicators of declining competition examined by the CEA are revealing. But the relationships among those indicators are particularly important for framing policy responses. The CEA's work highlights the connections among market concentration, higher prices, and higher profits. Leading economist and Nobel laureate Joseph Stiglitz explains: "Monopolies and imperfectly competitive markets are a major source of rents," and "the higher prices that [monopolies] charge not only distort the economy but also act like a tax, the revenue from which doesn't, however, go to public purposes, but rather enriches the coffers of the monopolists."[21]

The CEA cites recent research indicating that returns on investments in capital for the most profitable 10% of firms are five times the median.[22] Of course, high profits can result from legitimate factors such as charging higher prices for innovative products for which there is high demand, having low costs due to investment in new technology, or being the first mover in a "winner take all" market. In markets where competition is on the merits, profits are a green light to market entrants to capitalize on an opportunity to get a share of the pie. This entry typically lowers profits to normal levels. But high profits can result from the exercise of market power gained through merger or collusion, or by abusing a dominant

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[19] *See* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008).

[20] *Compare* Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J. L. ECON. 229 (October 1977) (finding that "while price effects [of the usual profit-concentration ratio] are not absent, the cost effects so dominate them as to cast doubt on the efficacy of any general legal rule hostile to industrial concentration.") *with* Sam Peltzman, *Industrial Concentration Under the Rule of Reason*, 57 J. L. ECON., S101 (August 2014) (finding that "concentration, which had been unchanged on average for all of the 20th century, began rising at the same time that merger policy changed. Concentration has increased steadily over the entire post-Bork period.) Increases in market concentration were particularly pronounced in the consumer goods industries.

[21] JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 338-9 (2012).

[22] Council of Economic Advisers, *supra* note 5, at 5. *See also* Jason Furman and Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality: Presentation at "A Just Society" Centennial Event in Honor of Joseph Stiglitz, Columbia University* (Oct. 16, 2015), https://www.whitehouse.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf.

market position to exclude rivals. Such market power can be "durable," and the resulting monopoly profits may persist because entry barriers block new firms.

In fact, market entry by smaller, entrepreneurial start-ups is on the decline. Entrepreneurs commercialize a disproportionate number of disruptive innovations that drive market entry and productivity growth. But, as the CEA Report indicates, the rate of firm entry in the U.S. is in an almost 40-year free fall.[23] The relationship between high profits and market entry is thus the opposite of what we would expect to see in a well-functioning economy. This disconnect shines light on increasing concentration as a root concern.[24]

C. The Third Problem: Widening Inequality Gaps

There is growing agreement that income and wealth inequality are major problems in the U.S.[25] Inequality is increasing, with adverse effects on economic growth, incentives for entrepreneurship and innovation, individual opportunity and quality of life, and the political system.[26] But is there a connection to be drawn between high levels of concentration and inequality? The short answer is yes.

One explanation is that large purchasers of labor have increased their market power relative to sellers of labor. This tilts the balance of bargaining power toward powerful buyers in key industries such as food and manufacturing, resulting in higher returns and lower wage rates. Economic evidence backs this up. A recent study shows, for example, that the "prime driver of wage inequality is the growing gap between the most- and least-profitable companies."[27] Those most profitable firms have market power in labor markets. As "wage setters," they drive wages down, shifting wealth from labor to capital.[28] In high technology labor markets,

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[23] Council of Economic Advisers, *supra* note 5, at 5.

[24] *See* Jonathan D. Ostry, Andrew Berg & Charalambos G. Tsangarides, *Redistribution, Inequality, and Growth*, INTERNATIONAL MONETARY FUND (Feb. 2014), http://www.imf.org/external/pubs/ft/sdn/2014/sdn1402.pdf.

[25] *See, e.g.*, THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012). *See also* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2012); Lawrence H. Summers, *The Inequality Puzzle*, 2014 DEMOCRACY J. 91; Bill Gates, *Why Inequality Matters,* GATESNOTES (Oct. 13, 2014), http://www.gatesnotes.com/Books/Why-Inequality-Matters-Capital-in-21st-Century-Review.

[26] Economists are taking up the question in force. The 2016 American Economic Association meetings, for example, featured at least four panels on inequality. *See* Preliminary Program of the Allied Social Science Associations, AMERICAN ECONOMIC ASSOCIATION (Jan. 3-5, 2016), https://www.aeaweb.org/conference/2016/preliminary.php.

[27] Greg Ip, *Behind Rising Inequality: More Unequal Companies*, WALL STREET J. (Nov. 4, 2015) (citing Furman and Orszag, *supra* note 22), http://www.wsj.com/articles/behind-rising-inequality-more-unequal-companies-1446665769.

[28] Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (Mar. 2016), http://harvardlawreview.org/2016/03/horizontal-shareholding/.

understandings among employers not to "poach" each other's workers may also act to drive down wages.[29]

Another explanation is that the exercise of market power raises prices to consumers, which reduces the purchasing power of their wages. The larger proportion of spending on necessities and lower individual savings and investment widens the inequality gap. We know that prices have gone up as a result of past merger activity. Leading economist John Kwoka's meta-analysis of 50 studies encompassing more than 3,000 mergers over the last 25 years indicates that post-merger prices increased, on average, by 7.2%.[30]

There is a growing consensus that inadequate antitrust policy has contributed to the concentration problem and associated inequality effects. Leading law and economics experts Steven Salop and Jonathan Baker offer that the "adoption of more permissive antitrust rules during the past quarter century" likely increased the prevalence of market power, with the returns from it flowing disproportionately to the wealthy.[31] Another expert, Einer Elhauge, notes, "merger policy has the potential to be a major driver of economic inequality."[32]

III. Guiding Principles for a National Competition Policy

In a statement to the AAI in 2007, the Obama presidential campaign pointed to the Bush administration's weak record of antitrust enforcement and committed to "reinvigorate" it.[33] The Obama administration did step it up. The Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ) challenged an average of 17% of mergers between 2009 and 2015, as compared to 13% between 2001 and 2008.[34] Likewise, corporate fines levied against cartelists increased an average of 106% per year between 2009 and 2015, as compared to 45% per year between 2001 and 2008.[35] And while the Bush DOJ brought no monopolization cases under Section 2 of the Sherman Act, the Obama DOJ filed two such

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[29] *See, e.g.*, Michael Liedtke, *Apple, Google, Other Tech Firms to Pay $415M in Wage Case*, SEATTLE TIMES (Jan. 15, 2015), http://www.seattletimes.com/business/apple-google-other-tech-firms-to-pay-415m-in-wage-case. *See also* Elhauge, *supra* note 28, at 23.

[30] *See generally*, John E. Kwoka, Jr., MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2014). The studied mergers include some that were challenged but allowed to proceed with some form of remedy.

[31] *See* Jonathan Baker and Steve Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L. J. ONLINE 1 (2015). *See also* William Comanor and Robert Smiley, *Monopoly and Distribution of Wealth*, 89 Q. J. ECON. 177, 189 (1975).

[32] Elhauge, *supra* note 28.

[33] STATEMENT OF SENATOR BARACK OBAMA FOR THE AMERICAN ANTITRUST INSTITUTE (2007), http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

[34] *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Div., ANNUAL REPORTS TO CONGRESS PURSUANT TO THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, *available at* https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports (reports queried for fiscal years 2001- 2015). Merger challenges are measured as a percent of transactions "cleared" to either the DOJ or the FTC for further review.

[35] Connor, John M., The Private International Cartels (PIC) Dataset: Guide and Summary Statistics, 1990-July 2016 (Revised 2nd Edition) (Aug. 9, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821254

actions, as well as several cases against firms engaging in conduct designed to exclude rivals.[36]

Despite a relatively more aggressive enforcement record during the Obama administration, the Executive Order explicitly recognizes the longer-term, cumulative effects of declining competition in the U.S. economy. The Executive Order is an important signal to the next administration that competition enforcement and policy should receive more political attention. But the Executive Order is only a "call to arms." It does not set a policy framework, principles, or priorities for how to implement a plan to stem or reverse the trend toward declining competition. The AAI suggests that a National Competition Policy be guided by three major principles:

- **Antitrust enforcement is a key instrument for furthering economic and social welfare and should therefore get high priority**. As the founders of our antitrust laws recognized, maintaining open and competitive markets is a crucial component of democracy and support for the free-enterprise system. The fundamental importance of this concept means that the public and private institutions of antitrust enforcement that are rooted in the Clayton Act should receive better support.

- **Promoting consumer welfare should be the principal goal of antitrust enforcement**. While protecting consumers has always been important to antitrust, in the last 30 years, consumer welfare has sometimes taken a back seat to efficiency. Promoting consumer welfare should be the principal goal of antitrust enforcement. But "consumer welfare" does not mean that antitrust protects only consumers. It protects all buyers, including companies, from seller market power. Antitrust also protects sellers from being exploited by powerful buyers and it promotes open markets and entrepreneurial freedom. Moreover, properly conceived, consumer welfare takes into account not only effects on price and output, but also product or service quality and innovation.

- **Mergers in highly concentrated markets and restrictive conduct that entrenches dominant firms should be presumed to violate the antitrust laws**. A primary role of antitrust enforcement is to "referee" the markets. Without this calling of fair and foul play, our economic and political system is undermined. Mergers in highly concentrated markets and exclusionary conduct by dominant firms that preserves or extends their power should be presumed illegal, with a burden of justification being placed on the defendants to prove that consumers will not be harmed.

[36] *See* Restoring Monopoly and Exclusion as Core Competition Concerns, 4-5 AntitrustInstitute.org (Preview of Am. Antitrust Inst. Monopolization Chapter of 2016 Presidential Transition Rep., posted Apr. 19, 2016).

IV. Priorities for a National Competition Policy

Much of the commentary following the Executive Order has focused on key sectors such as healthcare that are currently in the news. Very little commentary has taken the next step to leverage the apparent consciousness-raising intent of the Executive Order. The value of a National Competition Policy is to chart a course forward by setting the major priorities for addressing competitive problems. This will require widening the lens through which to view competitive problems and drawing insights on technology, innovation, markets, and strategic competition from a variety of disciplines. There are seven major priorities that the AAI believes should form the core of a National Competition Policy.

1. Facilitating More Aggressive and Consistent Enforcement

Much of the current concern over concentration is the result of decades of overly lax antitrust enforcement. The importance of stopping anticompetitive mergers and challenging abusive market conduct that distort the competitive process has been lost in the perceived risks of over-enforcement, weak efficiency justifications, complex economics, and a narrow focus on price and output with little attention to the non-price dimensions of competition such as product or service quality and innovation.[37] The resulting under-enforcement is now widely recognized to have caused successively higher levels of concentration in key industries and markets. It is time to facilitate more aggressive and consistent enforcement.

2. Ensuring that the Agencies Have Resources to Enforce the Laws

Recent merger challenges and massive international cartel investigations have put stress on the financial and personnel resources of the federal enforcement agencies. Future merger proposals in concentrated markets are highly likely to raise competitive concerns and invite government challenges and even litigation. Aside from obtaining congressional appropriations at levels adequate to handle anticipated higher caseloads, there are a number of important additional ways to ensure that the DOJ and FTC have the resources necessary to more aggressively enforce the antitrust laws.

3. Preserving the Vital Role of Private Antitrust Enforcement

Civil public enforcement in the U.S., which pursues injunctive relief or disgorgement, is limited in its ability to effectively deter future antitrust violations. The treble damages that are threatened or levied against violators in private cases, on the other hand, can have a significant deterrent impact.[38] Private enforcement regimes, including antitrust consumer class actions, play a vital and complementary role to public enforcement. But private rights of actions are under attack on a number of fronts. These attacks should be driven back through a variety of tools and initiatives.

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[37] Lande and Averitt have advanced the important notion that consumer "choice" should be a focal point of antitrust law. *See* Robert H. Lande and Neil W. Averitt, *Using the 'Consumer Choice' Approach to Antitrust Law* 74 ANTITRUST L. J. 175 (2007).

[38] In just 60 post-1990 large cases, private enforcement returned more than $33 billion to victims of anticompetitive behavior. *See* Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 17 (2013).

4. Revitalizing the Tools Available to Antitrust Enforcers

A mix of statutory authority and agency guidelines enables effective antitrust enforcement. The Sherman Act and Clayton Act have been the major statutory tools, but there are other laws that have been underutilized or allowed to languish. Various agency guidelines have also not been updated or revised to account for changes in markets, technology, and other important factors. Moreover, as part of a broader, coordinated strategy for competition enforcement and policy in regulated industries, the agencies could coordinate better with sector regulators. Revitalizing statutory tools, revising guidelines, and codifying and streamlining inter-agency coordination are needed to supplement enforcers' toolkits in the face of new challenges to competition.

5. Recognizing New Sources and Abuses of Market Power

Combatting high concentration and conduct that subverts the competitive process will be complicated by new and evolving contexts for the exercise of market power. These are driven by information, technology, and even reaction to past consolidation. Antitrust has been slow to combat these novel forms of market power. This may be due to excessive deference by the courts to the rights of intellectual property (IP) holders and the business justifications offered for exclusionary conduct. But it is also a result of a reluctance to interfere in nascent markets where enforcement action may be perceived to threaten incentives for innovation. Antitrust enforcers should become more familiar with these new forms of market power and the threats to competition they pose, including: information and data, multichannel distribution, buying and bargaining power, innovation and intellectual property, and colluding on market "rules."

6. Ramping Up Antitrust Penalties and Remedies

Antitrust violations extract billions of dollars from victims. Despite DOJ's continued efforts to prosecute criminal cartel conduct, evidence shows that very few victims receive full compensation for their losses and that the severity of fines is declining.[39] There is also a growing body of evidence that merger remedies in many cases have failed to fully restore competition. These examples range from rental cars, to retail grocery and health insurance.[40] Finally, no recent Section 2 case has sought to employ structural relief, or divestitures, to limit a monopolist's ability or incentive to engage in abusive practices. It is time to clarify the importance of optimal-deterrence penalties and structural remedies in deterring and preventing anticompetitive behavior.

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[39] The current overall level of cartel sanctions is only 9-21% as high as it should be to achieve optimal deterrence. *See* John M. Connor & Robert H. Lande, *Cartels as Optimal Business strategy: Crime Pays*, 34 CARDOZO L. REV. 427 (2012). Recoveries are only a fraction of cartel overcharges. *See, e.g.,* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 IOWA L. REV. 1997 (2015).

[40] *See* Letter from Am. Antitrust Inst, Food & Water Watch, and National Farmers Union to Renata Hesse, Principal Deputy Assistant Att'y Gen. in re: The Proposed Dow-DuPont Merger (May 31, 2016), at 15.

7. Promoting International Coordination

Many companies are now global in scope and reach, raising questions of international treatment of issues ranging from taxes to mergers and abuse of dominance. Most international cartels ultimately harm the U.S. consumer, so investments in promoting effective enforcement abroad can achieve important benefits at home. The benefits of competition enforcement can be reaped by regular international coordination on cartels, mergers, and monopolization concerns.

V. Moving Forward with a National Competition Policy

The dominant antitrust enforcement ideology over the last several decades has likely contributed to higher concentration, higher prices, higher profits to relatively few firms, and growing inequality. These developments do not bode well for consumers, for entrepreneurs and innovators, or for preserving the integrity and benefits of a market-based system. Addressing these issues will require a concerted, bipartisan approach to reforming and focusing antitrust enforcement and competition policy priorities, and more generally to restoring broader purpose to our antitrust laws. This statement sets forth key priorities that the AAI believes should be the core of a National Competition Policy. But perhaps the highest priority, written into the subtext of the President's Executive Order, is simply to acknowledge that we need one.

APPENDIX
PRIORITIES FOR A NATIONAL COMPETITION POLICY

This appendix sets forth the AAI's specific recommendations for each of the seven priorities that are the foundation of a National Competition Policy, as discussed in the preceding statement.

1. Facilitating More Aggressive and Consistent Enforcement

- **The antitrust agencies should give greater credence to the structural presumption and to stopping anticompetitive mergers in their incipiency.** This means the agencies should not wait until markets become highly concentrated before acting, but should stop mergers in moderately concentrated markets that, if approved, threaten to invite widespread industry restructuring, as we saw in the airline industry. They should also focus on stopping mergers that enhance buyer market power and expose smaller or independent sellers to discriminatory practices, and deals that are justified by the claim that it is necessary to become larger to bargain more effectively against more powerful sellers. The agencies should implement these changes both through enforcement actions and advocacy.

- **Enforcers should adopt an appropriately critical view of claimed efficiencies, rely more on evidence from past mergers, and challenge consummated mergers that have harmed consumers.** Efficiencies claims often do not pan out, especially when they center on opening new markets or product lines, or promoting innovation. This calls into question enforcement decisions that cleared mergers on the basis that predicted efficiencies outweighed anticompetitive effects. The agencies should also rely more on evidence from past or similar mergers of sellers or buyers in proving the likelihood that a merger will have anticompetitive effects. They should challenge anticompetitive consummated mergers to the extent effective relief can be obtained.

- **Agencies and courts should presume that exclusionary conduct by monopolists that helps preserve, extend, or exploit monopoly power is anticompetitive.** Such conduct raises prices and stifles market entry and innovation. Exclusive dealing, tying, and conditional pricing practices such as loyalty and bundled discounts can be perfectly lawful. But when undertaken by dominant firms, such conduct should be presumed illegal unless the firms can show that it is unlikely to have anticompetitive effects or has countervailing procompetitive benefits to consumers. The agencies and courts should also flag competitive concerns surrounding access to monopolized essential infrastructure or networks that are important to realizing public benefits in transportation, telecommunications, and information technology.

- **The agencies should expand their efforts to increase the transparency of their decision-making in order to promote enforcement.** It is critical to inform citizens, businesses, lawmakers, and judges of the intent of the antitrust laws and the importance of their enforcement, and particularly the antitrust laws' connection to the broader goals of protecting markets and consumers. Increased transparency would aid in heading off at

the pass deals that "should never have gotten out of the boardroom."[41] The agencies should issue more frequent and detailed closing statements, encourage the courts to adopt their approach to merger analysis, and disseminate information through speeches and briefs. Merger retrospectives, which have proven value, should be performed routinely on deals that were cleared but were considered "close calls," that were challenged but settled, or that withstood a government challenge.

2. Ensuring that the Agencies Have Resources to Enforce the Laws

- **Political administrations should recruit antitrust agency leaders and sector regulators that are committed professionally and ideologically to enforcement.** The "revolving door" through which some agency leaders pass from government, to industry, to private practice, can create perverse incentives. Future administrations should work hard to install agency leaders that are not influenced by these incentives. For sector regulators, heads of agencies should focus on deepening technical industry expertise at the same time they recruit experts in competition law.

- **The agencies should pursue "litigation readiness," which will continue to aid in their preparedness for federal merger challenges and other enforcement actions.** The DOJ and FTC should periodically and systematically review whether sufficient resources are devoted to litigation preparation. They should also focus on attracting experienced litigators to the agency and training staff attorneys in litigation skills through actual experience.

- **The FTC should continue and even step up its competition advocacy work.** The agency's work consistently attracts bipartisan support and has been helpful in focusing attention on competition and nudging regulation in a pro-competition direction. For example, the FTC's advocacy against state "Certificate of Need" laws for hospitals that tend to exclude entry in an already highly concentrated sector has arguably prompted more states to re-examine or even relax those laws. The FTC has also effectively advocated in the area of occupational licensing and to liberalize the scope of practice for nurse practitioners and dental therapists. Even if the FTC's advice is not taken, it can be effective in the long-term by raising issues and arguments that often "move the needle."

- **Federal and state judges should have the tools and resources necessary to oversee complex antitrust litigation.** This includes understanding complex legal and economic concepts upon which theories of antitrust liability rest. Judicial education in antitrust law and economics has historically been dominated by private, well-funded, ideologically conservative organizations. The government should devote more resources to maintaining multidisciplinary judicial education programs that present balanced, objective views and give judges the tools to craft effective, informed antitrust opinions.

[41] Quote from then DOJ Assistant Attorney General Bill Baer, Nathan Bomey, *U.S. sues to block Halliburton-Baker Hughes merger deal*, USA TODAY (Apr. 6, 2016), http://www.usatoday.com/story/money/2016/04/06/us-justice-department-sues-halliburton-baker-hughes/82696494/.

3. Preserving the Vital Role of Private Antitrust Enforcement

- **Educating the courts, the public, and lawmakers about the virtues of vigorous private antitrust enforcement should be a priority.** There are many prongs to the attacks on private rights of action. For example, standards have escalated to make it increasingly difficult to "certify" antitrust and other class actions. In many markets, antitrust offenders have effectively immunized themselves from meaningful antitrust damages by forcing consumers to accept class action or class arbitration waivers. Pleading requirements and summary judgment standards have also been made difficult for antitrust plaintiffs to satisfy. The next administration should continue and expand current governmental efforts to limit the use of forced arbitration clauses and class action waivers that undermine private antitrust enforcement.

- **The DOJ and FTC should use amicus briefs, competition advocacy, and speeches to help restore the vitality of private enforcement.** Opponents of effective antitrust enforcement have worked to try to sweep up private antitrust class actions into the ideologically driven "tort reform movement." They cast such actions as a frequent source of abusive litigation and have fought for measures that have had the practical effect of denying relief to many of the victims of antitrust violations and increasing complexity and cost. Government advocacy is needed to dispel these myths and restore balance.

- **A comprehensive and coherent approach is needed to ensure the ability to bring indirect purchasers suits.** Private enforcement plays a vital role in compensating victims for the damaging effects of various forms of collusion and exclusionary conduct. Victims include consumers and businesses that are deprived not only of competitive prices for final products, but also of competitive prices for intermediate goods. In 2013, for example, private enforcers obtained the largest price fixing verdict ever (approximately $1 billion) on behalf of the businesses that purchased chemicals to make polyurethane foam products for re-sale to customers.[42] Both "direct" and "indirect" purchasers should be eligible to recover their damages and help deter future violations. States that have not already done so should adopt statutes that permit consumers and businesses to recover overcharges as indirect purchasers.[43] But a comprehensive federal approach is also needed to protect the ability to bring indirect purchaser suits.

4. Revitalizing the Tools Available to Antitrust Enforcers

- **Section 5 of the Federal Trade Commission Act should be revitalized in order to address anticompetitive exclusionary and other conduct not reachable under the Sherman or Clayton Acts.** Section 5 prevents unfair methods of competition. But it is an underutilized tool in the statutory antitrust toolkit. The recent FTC Section 5 policy statement re-articulated long-established principles regarding "standalone" Section 5 cases, and it has always been clear that Congress gave the agency broad powers. A

[42] The judgment was affirmed on appeal and the parties later settled for nearly $1 billion. *See In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014). *See also In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *7 (D. Kan. July 29, 2016).

[43] These are known as the "*Illinois Brick* repealer" statutes.

renewed commitment to bringing standalone Section 5 cases would signal the agency's willingness to take on important cases that address, among other things: a powerful buyer's abuse of its bargaining power; a dominant firm's use of market power in one market to restrain competition in another market, or to harm the competitive process; and an IP owner's abuse of its rights to monopolize a market or restrain competition.

- **The Robinson-Patman Act, which has fallen into disuse, should be rejuvenated.** The Act remains one of the major ways to bring enforcement actions against the harmful exercise of buyer market power and anticompetitive price discrimination. It should be reformed, however, in order to create a reliable statutory tool.

- **The agencies should revise their guidelines to provide more clarity and guidance on how they will assess various types of mergers.** The government's Horizontal Merger Guidelines apply to mergers that eliminate actual horizontal competitors. Other types of mergers may raise competitive problems, but the government's treatment of non-horizontal mergers is not transparent. The agencies should issue updated formal guidelines explaining their legal-economic framework for evaluating mergers involving potential competition or the vertical combination of a customer and supplier.[44] The agencies should also provide more guidance than is already in the Horizontal Guidelines on how they will examine mergers that impair competition in innovation markets and involve network effects or two-sided markets. This can be accomplished through comprehensive merger commentaries.

- **Antitrust and regulation should be vigorously promoted as complementary tools of competition enforcement and policy.** Sector regulators typically have the statutory authority to promote the "public interest," a standard that includes protecting competition and other objectives beyond the scope of the narrower "no harm" to competition standard applied in antitrust. Other differences set regulators and antitrust enforcers apart, including procedural approaches and the types of remedies applied.[45] Nonetheless, just as the antitrust agencies bring legal-economic expertise to the enforcement table, sector regulators add important perspective and technical expertise on the industries they oversee. This highlights the importance of cooperation between the antitrust and regulatory agencies, which should adopt standards for coordinating their reviews of mergers and other conduct affecting competition.

5. Recognizing New Sources and Abuses of Market Power

- **Information and Data.** Consumer data on buying patterns and preferences no longer raise issues exclusively about consumer protection, where the focus is on privacy and deceptive practices. The value of data as a tool for exercising market power is escalating and raises questions ranging from defining markets for "data" to strategic control of data. For example, access to large quantities of data may be necessary for effective

[44] The agencies have not updated the non-horizontal merger guidelines that guide analysis of vertical transactions since 1984.

[45] *See, e.g.*, Diana L. Moss, *Antitrust Versus Regulatory Merger Review: The Case of Electricity*, 32 REV. INDUS. ORG. 241 (2008).

competition in some markets and therefore act as a barrier to entry. Or firms may also engage in anticompetitive price discrimination based on proprietary access to data.

- **Multichannel Distribution.** Distribution through multiple channels, including the Internet, provides important options for competitors and consumers. But powerful players that are vertically integrated into distribution, including airlines and hotel chains, may have incentives to restrict distribution of their products and services to more innovative retailers. Agreements between manufacturers and retailers to impose minimum retail prices and prevent discounting ("resale price maintenance") have recently been employed in the contact lens industry and in other sectors, which limits the pricing discretion of more efficient retailers and stifles their growth.

- **Buying and Bargaining Power.** Major supply chains such as food and healthcare now feature large and powerful buyers that often exercise market power by lowering the prices they pay to vulnerable classes of smaller sellers, such as laborers, farmers, ranchers, or writers. Exclusionary conduct by powerful buyers is on the rise, including the practice of bidding above cost to drive rival buyers from the market. These developments are triggering "reactive" consolidation, or mergers that are intended to enhance the bargaining power of smaller suppliers that sell to powerful buyers. These reactive consolidation patterns are anathema to healthy competition.

- **Innovation and Intellectual Property.** Some mergers eliminate competition in innovation or R&D markets.[46] But preserving "parallel path" R&D is particularly important where the risks of commercializing new products are high. Other concerns involve "platforms," or groups of patented technologies that serve as a base for applying other technologies. Platforms are often controlled by dominant firms, some of which have the ability and incentive to stifle entry. IP holders can also abuse their rights in order to shape or control competition through selective cross-licensing in agricultural biotechnology, "pay for delay" pharmaceutical patent settlements designed to shut out generic drug entrants, and the acquisition of patent portfolios for the purpose of asserting them to raise rivals' costs.

- **Colluding on "Rules."** Collusion is not limited to fixing prices and dividing up markets. Efforts by a handful of powerful firms to collectively impose standard market "rules" have the effect of favoring powerful incumbents and excluding rivals or new entrants. These strategies can be used to disadvantage online or brick-and-mortar distributors and by state occupational licensing boards made up of industry practitioners that impose requirements that make it harder for small firms and start-ups to enter.[47] Standard-setting organizations can also be subject to abuse by developing standards that prevent would-be rivals from ever reaching the market.

[46] *See* Letter from Am. Antitrust Inst, Food & Water Watch, and National Farmers Union *supra* note 40, at 9-13.

[47] *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,, 135 S. Ct. 1101 (2015).

6. Ramping Up Antitrust Penalties and Remedies

- **The DOJ should encourage companies to create a "culture of compliance" in combatting cartels.** Effective antitrust compliance programs prevent or deter the formation of cartels and discourage repeat behavior, or "recidivism." The DOJ should advocate for changes that ensure maximum fines for corporations and individuals, jail time, and civil damage awards that are sufficient to achieve optimal deterrence. A variety of other instruments should be considered to monitor post-penalty behavior and reward good conduct, including bounties to whistleblowers and anti-retaliation protections.

- **The DOJ should use public availability of cartel enforcement information as a tool for enhancing the deterrence of illegal conduct.** This can be done through information-sharing with, among others, state attorneys general in consumer class-action cases. After a prosecution has run its course, the DOJ should provide details about how a cartel was able to reach and maintain an agreement and the harm that was caused. This can be done through a written communication similar to a competitive impact statement in a merger case**.**

- **The agencies should seek structural relief, as opposed to conduct remedies, in all but the most exceptional merger cases.** Structural approaches such as divestiture are more effective and administratively simpler than conduct remedies, and they should almost always be used instead of conduct remedies where practicable.[48] Structural relief may also be appropriate in certain Section 2 cases involving exclusionary conduct. The agencies should also continue to increase their use of equitable monetary remedies such as disgorgement and support legislation that would permit the agencies to assess civil penalties in Section 2 cases.

7. Promoting International Coordination

- **In promoting international cooperation, U.S. agencies should be aware that other countries have different economic and political problems, and that what might be wrong for the U.S. might be necessary elsewhere.** Such considerations might include, for example, whether merger law should account for effects of consolidation on employment, trade, or economic development.

- **The agencies should continue to work with the International Competition Network, the Competition Committee of the OECD, and other international organizations to help promote effective cartel and merger remedies.** An important part of this process is U.S. openness to considering innovative enforcement approaches used by other countries, and to engage in fruitful two-way dialogues.

- **The U.S. should bootstrap smaller and younger competition authorities and encourage more integration through regional alliances of smaller agencies to improve their effectiveness**.

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[48] *See, e.g.,* John E. Kwoka and Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*. 57 ANTITRUST BULL. 979 (2012).