UNITED STATES OF AMERICA
BEFORE THE
FEDERAL TRADE COMMISSION

Hearing #3 On Competition and Consumer Protection in the 21st Century.

COMMENTS OF THE
AMERICAN ANTITRUST INSTITUTE

The American Antitrust Institute (AAI)[1] appreciates the opportunity to respond to the Commission's invitation for public comment on the topics identified for Hearing #3 On Competition and Consumer Protection in the 21st Century. Below are responses to select questions posed on the Commission's website. Certain questions associated with Hearing #3 relate to other questions associated with previous or subsequent hearings. To avoid duplication AAI may omit responses to certain questions for Hearing #3 that are addressed in comments for other hearings.

What are the defining characteristics of multi-sided platforms? Is there a way to distinguish between multi-sided and single-sided businesses? Are any adjustments to antitrust analysis necessary to account for any special characteristics of multi-sided businesses?

How should the courts and agencies define relevant antitrust markets and measure market power for multi-sided platform businesses?

What is the relevance of network effects (direct and indirect) in multi-sided platform markets?

Are there unique procompetitive justifications for these types of conduct by firms competing in multi-sided platform markets?

What is the relevant legal precedent for evaluating antitrust concerns related to multi-sided platform businesses?

We ask the Commission to consider AAI's views as reflected Brief for the American Antitrust Institute, Ohio v. American Express Co. et al., No. 16-1454, 138 S. Ct. 2274 (2018) (filed Dec. 14, 2017) and Richard M. Brunell, Ohio v. Amex: *Not So Bad After All?*, 33 Antitrust 16 (2018). The following is a relevant excerpt from the brief:

> Are two-sided platforms sufficiently unique to require an exemption from the normal rules for defining relevant markets and assigning the burdens of proof in a rule of reason case? Until the court of appeals' decision below, no court had so held. And neither the Second Circuit nor American Express (Amex) has made the legal or economic case for adopting a more demanding rule of reason for markets involving two-sided platforms than for other markets. While two-sided platforms may involve feedback effects between the two sides, such effects do not warrant special antitrust rules. Feedback effects are common in the economy and so are two-

[1] AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information about AAI, see http://www.antitrustinstitute.org.

sided platforms. Precedent and good antitrust policy favor the application of ordinary, well-established antitrust principles to two-sided platforms. *Cf. United States v. Microsoft Corp.*, 253 F.3d 34, 49-50 (D.C. Cir. 2001) (en banc) (applying traditional antitrust principles to monopolization of technologically dynamic operating system market which involved a two-sided platform characterized by substantial network effects).

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1. A prima facie case does not require showing harm to both sides of a two-sided platform. The court of appeals' conclusion to the contrary is flawed, as an initial matter, because the relevant harms and benefits are those to the market(s) and consumers as a whole; even if higher benefits to Amex cardholders fully offset the higher fees charged to Amex merchants, anticompetitive harm would remain.

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An "overall harm" requirement is not supported by a danger of "false positives." Assuming *arguendo* that increased benefits to Amex cardholders may properly be considered to be a procompetitive benefit, rather than part of the distortion of the competitive process, separating the cardholder and merchant sides of the platform means only that establishing anticompetitive harm on the merchant side shifts the burden to the defendant to establish offsetting benefits on the cardholder side. Neither Amex nor the court of appeals has suggested that the government was in a better position to *disprove* offsetting benefits to Amex cardholders than Amex was to prove them as normally required under the rule of reason. Nor does the likelihood of *some* offsetting benefits logically imply that the burden should be on the plaintiffs to show overall harm in the first place. And since only a portion of Amex's higher merchant fees were passed along to cardholders in the form of rewards, it is plain that plaintiffs did establish overall harm, at least sufficiently to shift the burden to Amex to show otherwise.

Other considerations do not warrant a heightened burden to make out a prima facie case. The fact that the restraint is vertical rather than horizontal makes no difference. In *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), this Court held that a vertical *intrabrand* price restraint is subject to the conventional rule of reason. A vertical restraint that impedes *interbrand* competition, as here, certainly warrants no more favorable treatment. On the contrary, *Leegin* identified circumstances analogous to those here as requiring "careful scrutiny." Nor is it appropriate to raise plaintiffs' initial burden based on a court's *impression* that the defendant has legitimate procompetitive justifications, as the court of appeals may have done here.

2. A relevant market may comprise one side of a two-sided platform. Indeed, combining two complementary sides of credit card platforms violates basic principles of market definition, which focus solely on demand substitution factors. That there are feedback effects between two sides of the platform is not a ground for combining the two complementary services in a single relevant market. Feedback effects can be taken into account even if the market is defined as one side, as the plaintiffs did in this case. Nor is it appropriate to combine the two sides on the theory that they are part of the same product, or have no functionality without the

other. Functionally linked products may be in separate product markets even when they are sold to the same consumers; when they involve completely different groups of consumers involving different market circumstances they are necessarily in different product markets.

Times-Picayune Publ'g Co. v. United States, 345 U.S. 594 (1953), supports applying standard market-definition principles to two-sided platforms. In that case, which involved tying sales of advertising in one newspaper edition to sales in another edition, this Court recognized the interdependence of the subscriber and advertiser markets and found error in conflating the two markets. Amex's grounds for distinguishing *Times-Picayune* lack merit.

While this Court has recognized that complementary products may sometimes be combined in "cluster" markets, the conditions for such clustering are not applicable here, namely administrative convenience or the recognition that the cost of a basket of products *sold to the same consumers* is lower than the cost of providing the products separately.

3. Raising the burden of production on plaintiffs to make out a prima facie case in cases involving two-sided platforms would harm competition by discouraging some meritorious claims and encouraging anticompetitive conduct, i.e., raising the risk of "false negatives." This is particularly of concern because, as all agree, two-sided platforms are increasingly common. And the economics of internet platforms means that successful firms often dominate their markets because they involve significant barriers to entry from network effects, among other things. Accepting the logic of the court of appeals would raise the burden on plaintiffs to show unlawful monopolization by a dominant platform even when the firm engages in exclusion for the sole purpose of raising prices or deterring innovation. Moreover it may call into question the applicability of the per se rule to price fixing on one side of a two-sided platform.

The Second Circuit's special rules would add undue complexity, cost, and uncertainty to already complicated and lengthy litigation under the rule of reason. Even without the extra burden, it is difficult for plaintiffs to win a rule of reason case. Given the existing hurdles, it makes no sense to raise the bar even higher to prove a rule of reason violation in markets involving two-sided platforms.

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Is a lack of competition among employers a significant contributor to observed macroeconomic trends in labor markets, such as the declining labor share and/or real wage stagnation? What are other explanations for these trends?

How should the agencies approach defining relevant labor markets for purposes of antitrust analysis? What (if any) reliable evidence is available on the existence and effect of employer concentration in properly defined labor markets?

Does available evidence suggest a causal relationship between employer concentration and labor market outcomes, such as wage? Does this evidence suggest a change in antitrust enforcement is needed?

Should the agencies and courts apply the consumer welfare standard to the analysis of monopsonistic labor markets in which firms are buyers and workers are sellers?

How should the agencies and courts resolve cases where evidence suggests output in the product market is likely to increase but employment and wages are likely to decline because of reduced competition in a properly defined labor market?

We ask the Commission to consider AAI's views as reflected in Randy M. Stutz, The Evolving Antitrust Treatment of Labor-Market Effects: From Theory to Practice, Am. Antitrust Inst. (July 30, 2018) and Diana Moss, *Antitrust and Inequality: What Antitrust Can and Should Do to Protect Workers*, Am. Antitrust Inst. (Apr. 2017). The following is a relevant excerpt from the 2018 paper (footnotes omitted):

BACKGROUND

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II. Grappling with Past Inattention to Labor-Market Effects

Historically, the antitrust laws have rarely been invoked to target employer restraints on the basis of anticompetitive labor-market effects. But it is not clear why. Several explanations are possible, ranging from the theoretical to the practical.

A. Cognitive Dissonance Owing to the Labor Antitrust Exemptions

One explanation is a belief held by conservative scholars that labor and antitrust policy should be kept separate because they are conceptually distinct and pose a choice among competing values. It is sometimes highlighted, for example, that the statutory and non-statutory labor exemptions combine to shield collusive behavior on both sides of labor negotiations. Moreover, the higher wages resulting from the collective bargaining process can theoretically harm downstream product-market competition by raising marginal costs and reducing output.

To be sure, the labor exemption is strong evidence that *collective bargaining* restraints in labor markets pose a choice among competing values. In exempting labor and management from antitrust scrutiny during lawful collective bargaining, Congress chose to elevate the national interest in fair wages and working conditions above the national interest in promoting competition among workers. But the "competing values" theory does not explain the relative scarcity of enforcement actions against anticompetitive employer restraints *outside* the collective bargaining context. When it does not interfere with the lawful activities of labor organizations, policing buyer restraints in labor markets can help protect workers from substandard wages and consumers from artificially high prices. It can thus serve the interests underlying both labor and antitrust policy, thereby amplifying the societal benefits of enforcement.

Conservative scholars also sometimes argue that restraints having only labor-market effects are insufficiently "commercial" to fall within the ambit of the antitrust laws. In the past, for example, conservative scholars have over-read the first sentence of Section 6 of the Clayton Act, which provides that the "the labor of a human being is not a commodity or article of commerce." Because many of the Clayton Act's prohibitions are limited to "any person engaged in commerce," such scholars maintain that "employer restraints in labor markets are illegal, if at all, because of

their intended or actual product market consequences rather than because of their labor consequences."

But this argument is defeated by longstanding case law and is contrary to the legislative intent of Section 6. Twelve years after Section 6 was enacted, the Supreme Court in *Anderson v. Shipowners' Ass'n of Pacific Coast* held unequivocally that the antitrust laws apply to wage-fixing conspiracies and that an inquiry into whether such conspiracies have additional commercial effects beyond their employment effects is unnecessary. Moreover, courts have not developed a labor exemption that is "symmetrical" in permitting both workers and employers to engage in conduct that violates the antitrust laws. Instead, courts read the second sentence of Section 6, which articulates an exemption only for workers, as limiting rather than expanding upon the first sentence. This is consistent with the view of Section 6 as a "'one-way street,' protecting labor unions but not protecting employers." To hold otherwise, courts would have to ignore congressional intent, which was to protect workers in response to misguided applications of the antitrust laws targeting unions. Indeed, to use Section 6 to shield employers who harm workers arguably would be a similar kind of perversion that prompted the provision's inclusion in the Clayton Act in the first place.

B. Mistaken, Hyper-Literal Interpretations of the "Consumer Welfare" Standard

A second theory to explain antitrust's past inattention to labor-market effects is that its traditional reference point of consumer welfare necessarily focuses scholars' and enforcers' attention on the seller side of the market rather than the buyer side. To be sure, a "consumer" is commonly understood as an end-purchaser of goods or services for personal use. And the welfare of end-purchaser consumers was a primary concern of Congress in enacting the antitrust laws. But "consumer welfare" is not akin to statutory language subject to strict construction. Rather, it is a term of art. It serves as a conceptual shorthand for the idea that antitrust protects the beneficial effects of competition in the economy, which are enjoyed by consumers, intermediate purchasers, and input suppliers (among others).

Thus, courts and enforcers have always recognized that the antitrust laws prohibit anticompetitive market distortions that harm intermediate purchasers in a supply chain even if a price effect is not traced through to final consumers. Likewise, the laws have always applied to competitive distortions on the buyer side of the market even if a harmful output effect is not traced through to a price or output effect in the downstream consumer-product market.

The term "consumer welfare" has at times been subjected to misuse or misperception. Perhaps most famously, Robert Bork's *The Antitrust Paradox* engendered long-lasting confusion by conflating the concepts of consumer welfare and total welfare. More recently, modern critics have argued that the consumer welfare standard is so intertwined with Professor Bork's vision as to be incapable of reaching beyond short-run consumer price effects to address long-run, dynamic, upstream, or non-price effects. While this is a valid descriptive critique of the consumer welfare standard as misapplied during a long era of lax antitrust enforcement, it is demonstrably incorrect as a critique of the standard on its merits.

As case law and the federal agencies' enforcement records can attest, the standard alone does not (and never has) stood in the way of enforcement actions against employer restraints in the labor market, or other buy-side restraints.

C. Taking the Legal and Evidentiary Path of Least Resistance

Other possible explanations for antitrust scholars' and enforcers' inadequate focus on the buy side are more innocent, if still not justifiable. Perhaps the sell side is simply where the disproportionate amount of harmful effects from anticompetitive conduct are most readily observable, whereas effects on the buy side may be more insidious. Or, perhaps public and private enforcers have been dissuaded by the challenges and costs of litigating buy-side restraints. They may view sell-side restraints, by comparison, as low-hanging fruit.

Finally, in labor markets in particular, perhaps there is simply a prevailing misperception that market power is unattainable because "there are a lot of jobs out there," or that it is rendered benign by the protections afforded from labor and employment law. Indeed, evidence that labor markets are no longer competitive, and the implications of sustained assaults on traditional worker protections, have come into sharper focus only relatively recently.

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ANALYSIS: EMERGING THEMES AND QUESTIONS FROM THE LITERATURE

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The remainder of this paper explores how to transform new information and insights from the recent literature into actual antitrust enforcement. It identifies emerging themes from the literature and assesses the forthcoming challenges for antitrust practitioners. It concludes with recommendations for policymakers and enforcers.

I. Mergers

For antitrust advocates, perhaps the most intriguing theme in the literature is the chorus of calls for enforcers to account for labor-market effects in merger analysis under Section 7 of the Clayton Act. Several of the articles help lay the foundation for this accounting, beginning with analytical concepts that mirror product-market merger concepts. Examples include the "hypothetical monopsonist test," a "SSNRW," "critical labor-demand elasticity," and "downward wage pressure." However, it remains to be seen how neatly these mirroring concepts map onto live litigation fact patterns, which can get messy. These concepts have not yet been applied and tested against actual mergers that threaten (or, if already consummated, have had) anticompetitive labor-market effects.

A. Measuring and Predicting Substitution

One important question is how to incorporate the unique characteristics of labor markets into supply-side and demand-side substitution analysis, which are key determinants of market definition and competitive effects analysis, respectively. In general, substitution analysis will be complicated by the bilateral nature of employment transactions, which often involve "two-sided matching." In an ordinary retail transaction, for example, a consumer can typically choose to buy the same

product on better terms at a different store, and the seller is often indifferent to the personal characteristics of the customer (other than ability to pay). But in the employment context, a worker requires a job offer before she can sell the same labor on better terms to a different employer, and the employer usually cares very much about the personal characteristics of her employees. Two-sided matching thus complicates substitution analysis.

On the supply side, "frictions" in labor markets may pose novel analytical challenges for market-definition in particular. The process of evaluating employees' ability to discipline a hypothetical monopsonist by switching jobs seems apt to be far more complex and idiosyncratic than the process of evaluating customers' ability to discipline a hypothetical monopolist by switching to other goods, services, or suppliers of other inputs. For example, some employees with medical complications, who are dependent on employer health insurance, may be constrained in switching jobs even when another viable employer offers otherwise superior wage and non-wage terms of employment.

If "frictions" and "two-sided matching" in labor markets significantly limit the ambit of a given worker's substitutable job opportunities, then this suggests the creative approach by Azar et al. of defining markets using SOC codes and USDA commuting data may, as the authors note, yield overly broad candidate markets. Of course, actual relevant antitrust labor markets could be still broader than these markets, or they could be significantly narrower (as we might suspect). The BLS SOC classifications are not designed, and cannot be presumed, to tell us anything instructive about the firms that compete to hire a given set of workers. Or, put another way, they do not necessarily denote a "competitive arena within which significant anticompetitive effects are possible." But the fact that a majority of such seemingly broad markets are highly concentrated, and that increased concentration in these markets corresponds with harmful wage effects, foreshadows the serious risks of further inattention to labor-market competition in merger analysis and otherwise.

In some instances, direct evidence of anticompetitive effects can serve as a "work-around" to market-definition challenges. It is well accepted that direct proof of market power through effects evidence is superior to, and obviates the need for, indirect proof of market power through market definition. And as Marinescu & Hovenkamp note, a no-poaching agreement between firms would be strong direct evidence of labor-market power.

Policing mergers among labor-market rivals who have previously been parties to a no-poaching agreement therefore may be a good place to begin enforcement. Indeed, the recently revealed no-poaching agreement between rail equipment suppliers, which has the ignominious distinction of being the first naked no-poaching case to settle following publication of the antitrust agencies' HR Guidance, as well as the first post-Guidance case to be the subject of a follow-on private action, was discovered during a merger review involving two members of the conspiracy. The DOJ should consider whether that now-consummated merger should be subject to retroactive challenge under Section 7 for tending to substantially lessen buyer competition in the labor market.

B. Subject Matter Jurisdiction and Efficiency Defenses

Another consideration is that we have yet to see whether merging parties will raise any novel defenses against merger challenges predicated on labor-market effects. Arguments that a merger's labor-market effects are beyond the subject matter jurisdiction of the antitrust laws, whether because they do not translate to downstream product-market effects or because labor is not "commerce," are meritless for the reasons explained in the Background section of this paper. Moreover, the Horizontal Merger Guidelines already preempt these defenses, because the Guidelines explicitly provide that mergers illegally enhance buyer power if they cause a transfer of wealth from small producers to large purchasers and inefficiently reduce supply, "even if the merger will not lead to any increase in the price charged by the merged firm for its output." Nevertheless, merging parties can be expected to pursue these arguments in the hope of finding the occasional sympathetic ear, and it is important that courts understand why they are erroneous and reject them.

Of course, merging parties may separately try to argue that increased bargaining leverage that reduces the upstream cost of labor inputs constitutes a merger "efficiency." However, the exploitation of market power upstream is not a cognizable efficiency. And this is true even if cost reductions are passed on to consumers, which is the exception rather than the rule. Moreover, crediting exploitative wage reductions as a merger efficiency would be contrary to labor policy, and refusing to do so *would* be consistent with the Clayton Act's pronouncement that "the labor of a human being is not an article of commerce," for the same reason that shielding employer restraints outside the collective-bargaining context is *not* consistent with that pronouncement.

C. Remedies

Finally, it remains to be seen how enforcers and parties will address the question of remedy. Divestitures in mergers that threaten only anticompetitive labor-market effects may be more difficult to negotiate than in mergers that threaten anticompetitive product-market effects, because the necessary labor-market divestitures in any given transaction may undermine, or alter in unexpected ways, the business rationale for the merger. This is because merging parties that compete as buyers in labor markets may not compete as sellers in *any* downstream relevant product market at all. Or, merging parties may compete in an unconcentrated, national geographic market on the product side but a concentrated, local geographic market on the labor side. Although these scenarios may raise policy questions, they should not be a barrier to enforcement because the Merger Guidelines recognize that "out-of-market" efficiencies cannot save an anticompetitive merger, except in rare circumstances.

While there are no obvious obstacles to using behavioral remedies as an alternative to structural remedies in labor-market cases, such remedies generally tend to fail in resolving the competitive problems caused by a merger. And many of the criticisms of behavioral remedies applied to product markets appear to also apply in the labor-market context. Enforcers should keep an open mind, however, and perhaps explore hybrid structural-behavioral remedies that, where circumstances

allow, draw upon the benefits of labor law, such as requiring the merged firm to recognize a union and participate in collective bargaining as a condition of clearance. But if divestiture remedies prove too difficult and behavioral or hybrid remedies too ineffective, it may be that mergers threatening anticompetitive labor-market effects will have to be altogether blocked rather than cured more often than mergers threatening anticompetitive product-market effects.

II. No-Poach Agreements

Another theme in the literature is that employer collusion via no-poaching agreements is an empirically serious problem that is causing significant harm to workers. Naked, horizontal no-poaching agreements between rival firms present an open-and-shut antitrust case. The Antitrust Division can prosecute them criminally and invoke the per se rule, and private class actions, provided they survive preliminary motions practice and class certification, can afford victim compensation and deterrence.

In the long run, the DOJ's and FTC's mere act of issuing HR Guidance could have enormous salutary benefits in curbing naked no-poaching agreements simply by putting the human resources community on notice as to what's at stake and helping to activate state and private enforcers. In the short run, it is important that the DOJ stand by its commitment to criminally prosecute companies and individuals who participate in such agreements, and that state and private enforcers bring civil cases, in order to strengthen deterrence and compensate the injured.

Krueger & Ashenfelter's finding that 58% of major franchise chains include no-poaching agreements in franchisor/franchisee contracts poses a more difficult challenge. First, franchisor/franchisee no-poaching agreements are vertical, and they would thus have to be construed as a hub-and-spoke conspiracy to earn per se treatment in court. Second, defendants can try to argue that the restraints are ancillary to a legitimate integration, and hence procompetitive.

When dominant franchisors establish no-poaching commitments from franchisees throughout an industry, these vertical agreements have the potential for substantial, harmful, horizontal effects. At the same time, when no-poach franchise agreements cover low-skilled, low-wage workers in high-turnover industries, and when they are nonetheless imposed in states that do not enforce them based on equitable contract principles, it seems especially dubious that they are motivated by (or have) any efficiency enhancing characteristics. However, unless the arrangement amounts to a hub-and-spoke conspiracy, an antitrust challenge likely would have to be won under the rule of reason, which is notoriously difficult for plaintiffs. Moreover, franchises could plausibly pursue a strategy of conscious parallelism, in which they mutually, but unilaterally, choose not to hire another firm's employees without any express or tacit agreement, which is not prosecutable.

Therefore, in the short run, state or federal legislative solutions, such as the blanket bans proposed by Krueger & Ashenfelter and Starr et al., may be a superior competition policy tool to antitrust suits. Negotiated voluntary commitments, like those recently achieved by Washington Attorney General Bob Ferguson, who was able to extract commitments from seven fast-food chains to discontinue no-poaching policies without protracted litigation, also can be beneficial. Still, individual

ad hoc agreements will not provide uniformity across industries. And insofar as the franchises get off the hook without any penalty, such commitments do not appear to provide substantial deterrence or compensation.

II. Non-Compete Agreements

Unlike no-poaching or wage-fixing agreements, traditional non-compete agreements (between employers and employees) have rarely amounted to antitrust violations in the past. They are likewise vertical, and employers typically defend them as ancillary and efficiency enhancing. They often cite (1) the protection of trade secrets, customer relationships and goodwill, (2) promotion of investment in employee training and education, and (3) protection against the business risk posed by a high-skilled employee's unique knowledge. Moreover, it is unlikely on average that a non-compete agreement between an employer and a single employee may pose a demonstrable threat to market-wide competition.

However, the pervasive use of non-compete agreements in concentrated labor markets, particularly where they are imposed upon low-skill, low-wage workers who lack alternatives, should cast these agreements in an entirely new competitive light. But again, given the practical difficulty of prosecuting antitrust rule-of-reason cases against vertical and putatively ancillary agreements, legislative or other contract-based solutions may be the superior short-run competition policy response, as the literature seems to recognize.

IV. Adapting the Administration of the Antitrust Laws to Buyer Competition in Labor Markets

Another clear theme to emerge from the literature is the need for the federal antitrust agencies to assume a leadership role in policing employer restraints that have anticompetitive labor-market effects. There is widespread agreement among authors, for example, that the FTC and DOJ should hire labor economists, and that Congress should increase the resources available to the agencies accordingly. This would be an unmitigated good and serve as a necessary and appropriate first step.

Another common refrain in the literature is that the agencies should revise the Horizontal Merger Guidelines to explicitly incorporate labor-market effects in merger analysis. However, insofar as a merger has never before been challenged on the basis of labor-market effects, revising the Guidelines may be putting the cart before the horse. Notwithstanding their persuasive precedential value in court, "The Guidelines serve the important purpose of providing broad transparency to businesses and the antitrust bar as to how the Agencies approach merger review." In other words, they are intended to be not only prescriptive but *descriptive* of the agencies' actual (as opposed to aspirational) enforcement intentions and capabilities.

To be sure, once the agencies are sufficiently armed with the legal and economic tools needed to start bringing labor-market merger cases, a Guidelines update will be necessary. But in the meantime, perhaps the DOJ's Economic Analysis Group (EAG) and the FTC's Bureau of Economics could advance the cause by allocating resources to produce an Economic Report, Issue Paper, Working Paper, or Discussion Paper exploring the institutional steps necessary to quickly and effectively ramp up enforcement to protect labor-market competition (in merger

review and otherwise). The FTC Office of Policy Planning should also consider a workshop and report.

Finally, there is disagreement in the literature as to whether the agencies are capable of effectively enforcing the antitrust laws against employer-based labor-market restraints under the consumer welfare standard. To be sure, the emerging evidence of substantial increases in labor-market concentration, coupled with near-complete inattention to labor-market effects in merger analysis historically, helps validate the progressive critique of conservative antitrust policy as too myopic. But AAI believes the solution lies in reversing an era's worth of the consumer welfare standard's misapplication under this policy, not in changing the goals of antitrust law.

CONCLUSION

Many antitrust experts feel strongly that so-called "non-competition" factors must not be factored into antitrust analysis. But there should be no serious doubt as to the propriety of enforcing the existing laws under the existing framework against mergers and conduct that harm buyer competition for workers. This is unquestionably a "competition issue."

If anything, antitrust enforcement against anticompetitive employer restraints in labor markets may be uniquely valuable insofar as it is synergistic. It can serve the goals of competition and labor policy in a single stroke, and thereby afford added societal value in an era when both policies are badly in need of a boost.

AAI believes the time has come for the antitrust community to ramp up its attention to employer mergers and conduct that have anticompetitive labor-market effects. We make the following recommendations:

- Before real progress can be made in policing mergers on the basis of anticompetitive labor-market effects, practitioners of antitrust merger law – including antitrust lawyers and economists – must begin to identify and resolve the practical challenges associated with litigating and remedying actual merger fact patterns.
- If enforcers are not yet able to adequately measure and predict employee substitution in labor markets, enforcers may wish to begin by focusing on employer mergers among labor-market rivals which have previously been parties to a no-poaching agreement, or where there is other direct evidence that a transaction threatens to create or enhance buyer labor-market power.
- Although the Clayton Act declares that "the labor of a human being is not a commodity or article of commerce," this language is designed to protect worker restraints, not employer restraints. Enforcers should not be concerned that the labor exemption or the "affecting commerce" requirement prevent merger enforcement on the basis of anticompetitive labor-market effects, notwithstanding an absence of, or inability to prove, downstream product-market harms.
- The Antitrust Division should continue to aggressively pursue criminal prosecutions to deter naked no-poaching and wage-fixing agreements, and the plaintiffs' antitrust bar and state attorneys' general should continue to

seek deterrence and compensation for victims through investigations and civil suits, including treble damages class actions.

- Given the practical difficulties of challenging vertical and putatively ancillary no-poaching and employee non-compete agreements, policy advocates should support state or federal legislative reform as a matter of sound competition policy, particularly when such agreements are imposed on low-skill, low-wage workers in concentrated, high-turnover industries.
- The FTC and DOJ should hire in-house labor economists, and Congress should increase the resources available to the agencies accordingly.
- The agencies should assimilate the new labor-antitrust literature, conduct their own policy studies on the connection between labor and product market concentration and wages, and update the Horizontal Merger Guidelines once they are institutionally prepared to police mergers on the basis of threatened anticompetitive labor-market effects.
- Effective policing of mergers and conduct on the basis of anticompetitive labor-market effects does not require legislative reform or eliminating the consumer welfare standard.

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What is the appropriate antitrust framework to evaluate acquisitions of potential or nascent competitors in high-technology markets?

Is current antitrust law sufficient for developing challenges to these types of acquisitions?

How should the antitrust agencies evaluate whether a nascent technology is likely to develop into a competitive threat in dynamic, high-technology markets?

What are some pragmatic approaches that the antitrust enforcement agencies could consider for enhancing their evaluation of these types of acquisitions?

We ask the Commission to consider AAI's views as reflected in Diana L. Moss, Merger Policy and Rising Concentration: An Active Agenda for Antitrust Enforcement, 33 Antitrust 68 (2018); John Kwoka, Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice (Oct. 9, 2018); and A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward, AM. ANTITRUST INST. (Jan. 4, 2017). The following is a relevant excerpt from the Kwoka (2018) paper (footnotes omitted):

4.4 Challenge More Mergers that Eliminate Potential Competitors

> The 1982 and all later merger guidelines focused attention on the ability of a small group of sellers to raise the price of some product and make that price rise stick. The result has been the development of ever more sophisticated modeling and testing of pricing practices among sellers in that group, and how those outcomes might change as a consequence of a particular merger. Left behind in these developments has been concern with respect to mergers that eliminate firms that threaten to enter the market, whose threatening presence may have constrained the

incumbents, and therefore whose elimination would result in higher pricing by incumbent firms. The result has been ever more common approval of potentially anticompetitive mergers between an incumbent and a threatening outside firm, commonly known as a "potential competitor." This practice needs to be reversed in order to prevent these mergers that have increased concentration, reduced competition, and ultimately harmed consumers.

At times in the past concern with potential competition has been an important component of policy. But over time both legal and practical considerations, as well as overly cautious agency practice, have largely relegated this to a subsidiary role. Court decisions made it clear that challenges to such mergers would have to clear an unusually high bar for proof: a concentrated market, an outside firm with the "characteristics, capabilities, and economic incentives to render it" a potential entrant, that potential entrant as unique or at least one of very few such well-positioned firms, and–critically–actual evidence that such a firm has "in fact tempered oligopolistic behavior" by incumbents. The result of these criteria has been ever fewer challenges to mergers involving potential competitors, although the antitrust agencies sometimes do note concerns with potential competition as secondary matters in challenges brought primarily on other grounds.

The economic theory behind the doctrine of potential competition is straightforward: In the most common case, if the incumbent firm altered its pricing or other strategy out of concern for possible entry, the elimination of that threat by merger with that incumbent permits less constrained behavior by the incumbent and causes harm similar to that from a merger between two actual incumbents. A somewhat different, but also competitively harmful, scenario is that in which the outside firm is in fact contemplating entry even though the incumbent is unaware of that. A merger between the two firms in this case eliminates the actual likelihood of future entry that would result in deconcentration of the market, but there is no pre-entry indication of the constraining influence from the outside firm.

There is empirical evidence of the adverse effects of actual mergers that eliminate a potential competitor. Research by myself and Shumilkina has examined these effects in the case of an airline merger. Our work differs from the many other studies of airline mergers that investigate the price effect on "overlap" routes--those served by both merging carriers. Rather, we look at routes served by only one of the merging carriers where the other is positioned to enter by virtue of serving one or both endpoints of the route. Using standard data and methodology, we find that the elimination of the potential entrant results in a statistically significant price increase in the range of 5 to 6 percent, about half the size of the effect on routes where the two carriers are both incumbents. This study directly tests the economic proposition that underlies the doctrine of potential competition, and confirms its importance.

Recent work by Cunningham et al have studied acquisitions among firms that account for more than 35,000 pharmaceutical drug projects. They categorize each project by its therapeutic category and mechanism of action, and focus on cases were one company acquires another that has a directly overlapping project. In these cases, of course, the acquiring company has weaker incentives to continue development since it would cannabalize its own sales and profits, and indeed may acquire the other company simply in order to kill off its development project. In its key finding,

this study reports that acquired overlappiing projects are 40 percent less likely to be continued in the development process than non-acquired drugs or acquired non-overlapping drugs. These results make clear that so-called "killer acquisitions" in pharmaceuticals are both frequent and competitive harmful.

To be sure, there are some distinctive practical difficulties in evaluating a merger with a threatening entrant that do not arise in mergers between incumbents. These difficulties begin with the threshold issue of identifying a potential competitor, since by definition such a firm does not currently operate in the market in question. In some cases there may be objective criteria for identifying potential entrants; in other cases company documents and third-party analyses may provide convincing evidence; and in yet other instances, market actions and reactions by the incumbent may signal its understanding of the threat posed by an outside firm. But all of these methods represent challenges not faced in the case of mergers involving obvious incumbent competitors. Moreover, while the theoretical framework for analyzing the competitive effect of a merger between an incumbent and a potential entrant is in principle analogous to that for a merger of incumbents, much of the now-standard apparatus for quantification is not applicable to the former. All this has led to skepticism by the courts and caution by the enforcement agencies in making such cases.

That said, there have been a few noteworthy efforts to bring such cases. In 2002, the FTC successfully prevented Questcor from acquiring U.S. development rights to a synthetic alternative to its monopoly over a drug treating certain serious infantile disorders. More recently, the FTC sought to prohibit the merger of Steris and Synergy, albeit unsuccessfully. Despite business documents indicating that Steris would likely enter Synergy's market–contract sterilization of certain devices and products--the court was unpersuaded that there were not more potential entrants, a possibility that downgraded Steris's importance. In another recent matter the FTC initially opposed the merger between Neilson and Arbitron, providers of measurement technologies for media viewing and listening, respectively. It approved the merger after securing an agreement that Arbitron would make a key technology available to third parties–other potential entrants--for a period of eight years. In 2009 a similar agreement for technology access was obtained by the Department of Justice as a condition of allowing Google to acquire ITA. This last merger posed the added enforcement difficulty that it involved the merger of two firms neither of which was active in the market in question–airline flight search–but both of which arguably might have entered. This is sometimes called a potential potential-competition merger.

But such agency challenges are dwarfed by the number of approvals of mergers involving firms with the potential to enter into an incumbent's business that simply do not register as competitively noteworthy. Permitting such mergers has almost certainly eliminated the most likely entrants and the most likely constraining outside firms in numerous markets, contributing to greater market power of incumbents but without causing an increase in measured concentration. Permitting the elimination of such firms also would seem directly responsible for the previously documented decline in the number of public firms in the U.S. economy.

I have previously proposed that mergers that eliminate a potential competitor be challenged when the market is at least moderately concentrated, when the potential competitor is one of no more than a small number of well-positioned possible entrants, and there is evidence either from documents or past experience of the outside firm's effect on the market. For conventional mergers raising concerns over the elimination of a potential competitor, this policy would reverse the current accommodating posture toward potential competition mergers, a posture that has thwarted the market's natural tendencies to bring competition to dominated markets.

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Thank you for considering the views of AAI. Questions or reactions to any of these comments may be addressed to:

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