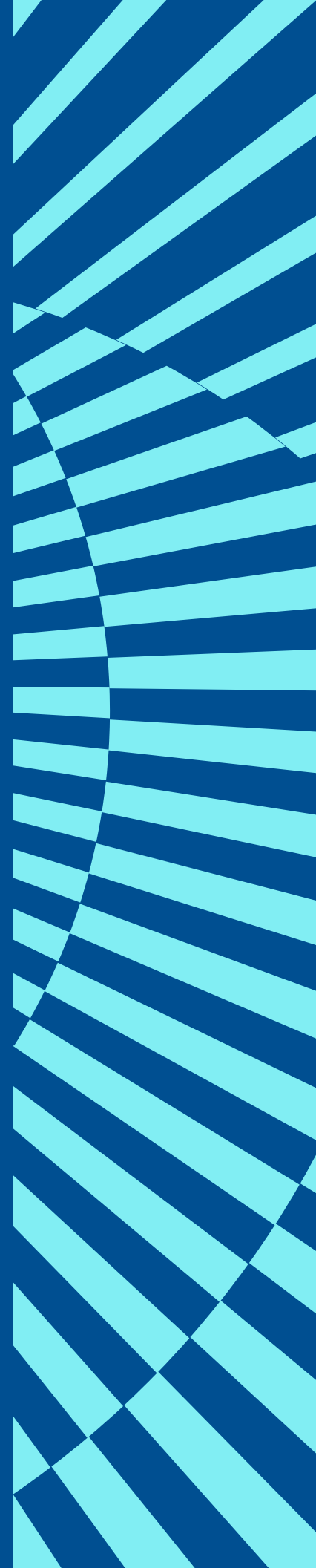




U.S. Chamber of Commerce

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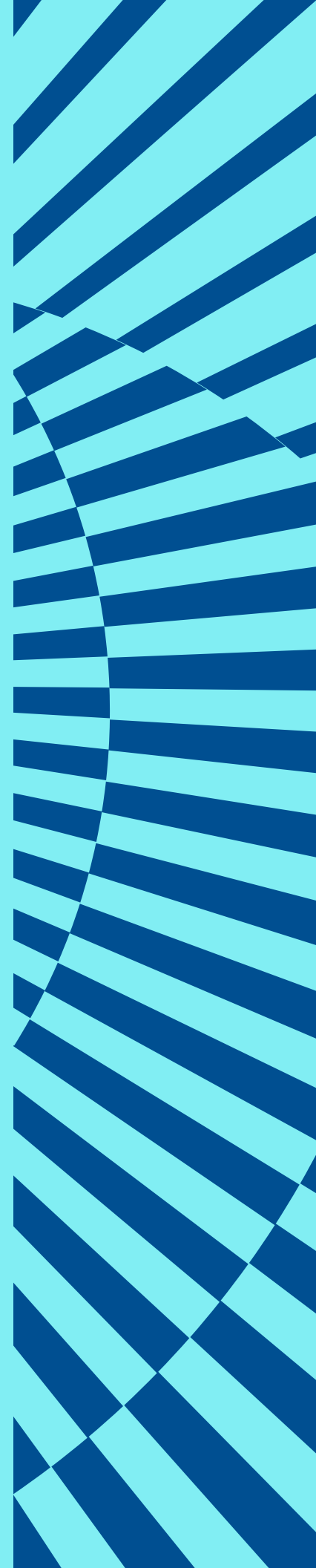


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# Executive Summary

- Interest in the competitiveness of American markets has rarely, if ever, been higher. Both houses of Congress have proposed bills that would implement sweeping changes to the antitrust laws that exist to maintain and protect competition. These bills include the Competition and Antitrust Law Enforcement Reform Act, the American Innovation and Choice Online Act, the Platform Competition and Opportunity Act, and others. In general, these bills are designed to increase the scrutiny of mergers and other types of competitive conduct, such as by altering the burdens of proof borne by plaintiffs and defendants in litigation.
- We strongly agree with these bills' supporters that competition is important and worth protecting. However, we are deeply concerned that in their zeal for vigorous antitrust enforcement, these bills could do more to harm than help American consumers and workers.
- Although there is a need to ensure that a merger does not pose an anticompetitive threat, most mergers represent an opportunity to transfer assets to the person or persons best able to create value with them. In so doing, mergers provide an important exit strategy that may incentivize entrepreneurs and investors to create new firms and to develop new technologies. A consequence of these bills would be to impose significant barriers to merging, which would, in effect, constitute a barrier to entry, thereby limiting the creation of new products and jobs. The evidence that the present antitrust regime leads to underenforcement does not come close to establishing that such potentially significant costs to consumers and workers are worth bearing.
- Furthermore, there may be other unintended consequences of these bills that also risk harming consumers and workers: Many types of normal, aggressive competition, which accrue to the benefit of consumers, may expose firms

to litigation risk if rivals complain about being outcompeted. Rather than risk antitrust scrutiny by aggressively seeking to win new customers, competing firms may instead accommodate each other's presence and charge higher prices. Far from leading to more competition, then, these bills run the risk of softening competition to the detriment of consumers.

- Overall, the evidence points strongly to the possibility that these bills represent a cure worse than the disease. The history of the US antitrust agencies shows that they can, and do, investigate and challenge precisely the types of conduct animating the underlying concerns about anticompetitive mergers and other business activity. Given this history, it is unclear what benefits can be expected that would offset the potentially very large costs of abandoning a system the evidence shows is working.

## Introduction

Several significant antitrust bills have been introduced in the Senate. In early 2021, Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act ("CALERA") with the stated goal to "reinvigorate America's antitrust laws and restore competition to American markets."<sup>1</sup> More recently, Senator Klobuchar and Senator Chuck Grassley introduced the American Innovation and Choice Online Act ("AICOA"), which limits how certain covered platforms can compete and use data.<sup>2</sup> Senator Klobuchar and Senator Tom Cotton are promoting the Platform Competition and Opportunity Act ("PCOA"),<sup>3</sup> which would shift the burden to certain covered platforms to prove that certain acquisitions do not harm competition.

In the House, numerous bills have been passed out of committee and are awaiting further action. Representative Hakeem Jeffries sponsored his own version of the Platform Competition and Opportunity Act,<sup>4</sup> and Representative David Cicilline, chairman of the House Antitrust Subcommittee, introduced the American Choice and Innovation Online Act

<sup>1</sup> See <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement>.

<sup>2</sup> See [https://www.kennedy.senate.gov/public/\\_cache/files/3/b/3b3c8d44-6d2c-4ebd-b91e-ee6947a4d7c2/A6BA4078119EB2E260F826BF87CB792A.sil21b56.pdf](https://www.kennedy.senate.gov/public/_cache/files/3/b/3b3c8d44-6d2c-4ebd-b91e-ee6947a4d7c2/A6BA4078119EB2E260F826BF87CB792A.sil21b56.pdf).

<sup>3</sup> See <https://www.cotton.senate.gov/news/press-releases/cotton-klobuchar-introduce-bipartisan-legislation-to-protect-competition-and-consumer-choice-online>.

<sup>4</sup> See <https://www.congress.gov/bill/117th-congress/house-bill/3826/text>.

(“ACIOA”),<sup>5</sup> which is similar to the Senate’s AICOA in most respects. Representative Pramila Jayapal sponsored the Ending Platform Monopolies Act,<sup>6</sup> which would prevent certain technology companies from competing in multiple related lines of business.

Though they have their differences, all of these bills carry a significant risk of causing negative unintended consequences for consumers and workers, distorting market behavior, reducing output, and worsening efficiency. In this note, we first discuss the role of mergers in the American economy. Although some mergers give rise to legitimate concerns about their competitive implications, the vast majority do not threaten a loss of consumer welfare. Instead, they enable assets to find their most productive use. Moreover, they function as a way for founders and funders to profitably exit investments. By layering on regulatory burdens that research has not shown are necessary, the various bills risk breaking something that largely works as desired.

Next, we turn to other provisions of the bills that, despite aiming to produce more competitive markets, run the risk of incentivizing wasteful litigation and softening competition. The proposed bills do this by defining problematic exclusionary conduct in terms that are both vague and broad. Furthermore, they abandon legal precedents adopted to usefully reign in enforcement that is harmful to consumer welfare (i.e., overly aggressive enforcement). In so doing, the bills create risks for firms that compete aggressively, even if that competition is entirely on the merits and to the benefit of consumers.

Finally, we present evidence that the US antitrust agencies already cope well with the challenges they face. For instance, history shows that the DOJ and FTC are challenging potentially anticompetitive acquisitions of nascent competitors, investigating and limiting the exploitation of monopsony power, and evaluating how the network effects inherent to platform markets may affect competitive dynamics. It is thus unclear how the proposed bills would improve enforcement.

## The proposed bills would impede the many mergers that benefit consumers, workers, and the economy

Mergers can facilitate the combination of complementary resources, a process that generates economic benefits for consumers, workers, and the economy.

Mergers play a key role in maintaining a healthy and vibrant market economy. Like many economic transactions, mergers serve to allocate resources to their most efficient uses. If two firms are more efficient combined than they are apart, a merger between the two unlocks new possibilities for the firm to innovate and aggressively compete for customers. For example, a merger may result in a more efficient production or distribution process through which the merged firm can produce goods of the same quality but at a lower cost, giving the firm incentives to cut prices. Alternatively, the combination of two firms’ research teams may spark ideas for new and innovative products that would never have been developed otherwise.

In addition, mergers and acquisitions play a key role in incentivizing new firm creation and the innovation that results. In many circumstances, the long-run prospects of a potential entrepreneur’s idea are unclear at the time the entrepreneur is deciding whether to pursue the idea. It may be the case that the idea can be commercialized and marketed on a standalone basis. But it may instead be the case that, although the idea has the potential to add value to the economy, it would only do so in conjunction with other technologies. The ability to be acquired if an idea turns out to be more valuable as a complement to existing products rather than as a substitute for them thus serves as an important way of encouraging new firm formation.<sup>7</sup>

<sup>5</sup> See <https://www.congress.gov/bill/117th-congress/house-bill/3816/text>.

<sup>6</sup> See <https://www.congress.gov/bill/117th-congress/house-bill/3825/text>.

<sup>7</sup> See, e.g., discussion of these issues in Brett Hollenbeck, “Horizontal mergers and innovation in concentrated industries,” *Quantitative Marketing and Economics* (2020).

A hallmark of efficiency-enhancing mergers is increased industry output. In addition to the consumer-facing benefits of higher output, more production often goes hand in hand with heightened demand for labor, thereby benefiting workers. New products enabled by mergers often require more workers to develop, refine, build, market, and sell them. This increased demand for labor can result in both higher wages and lower unemployment.

Against this backdrop of procompetitive mergers that would benefit consumers and workers alike, some mergers would have the opposite effect. Firms may seek to merge with their competitors rather than compete with them—either for customers or for workers. If consummated, such transactions may produce higher prices, lower output, and other pernicious outcomes. These anticompetitive mergers justify the scrutiny of mergers by government regulators and the law.

The fundamental challenge of antitrust enforcement, of course, is determining *ex ante* whether a transaction is of the efficiency-enhancing variety or the competition-eliminating variety. The fact that mergers may have either pro- or anti-competitive effects makes it crucial that they are evaluated on an individualized, fact-specific basis. Relying too much on extremely rough rules of thumb that would limit mergers creates a real risk of foregone gains to consumers, workers, and firms alike.

The antitrust laws and accumulated experience of antitrust practitioners provide a set of rules and frameworks for making case-by-case determinations, seeking to discourage anticompetitive mergers while simultaneously encouraging procompetitive mergers. In the absence of evidence that they are missing the mark, the proposed bills' substantial alterations to current practice are more likely to do harm than do good.

Few mergers raise significant competitive concerns and current antitrust laws provide proper foundations for the agencies to investigate and block harmful mergers.

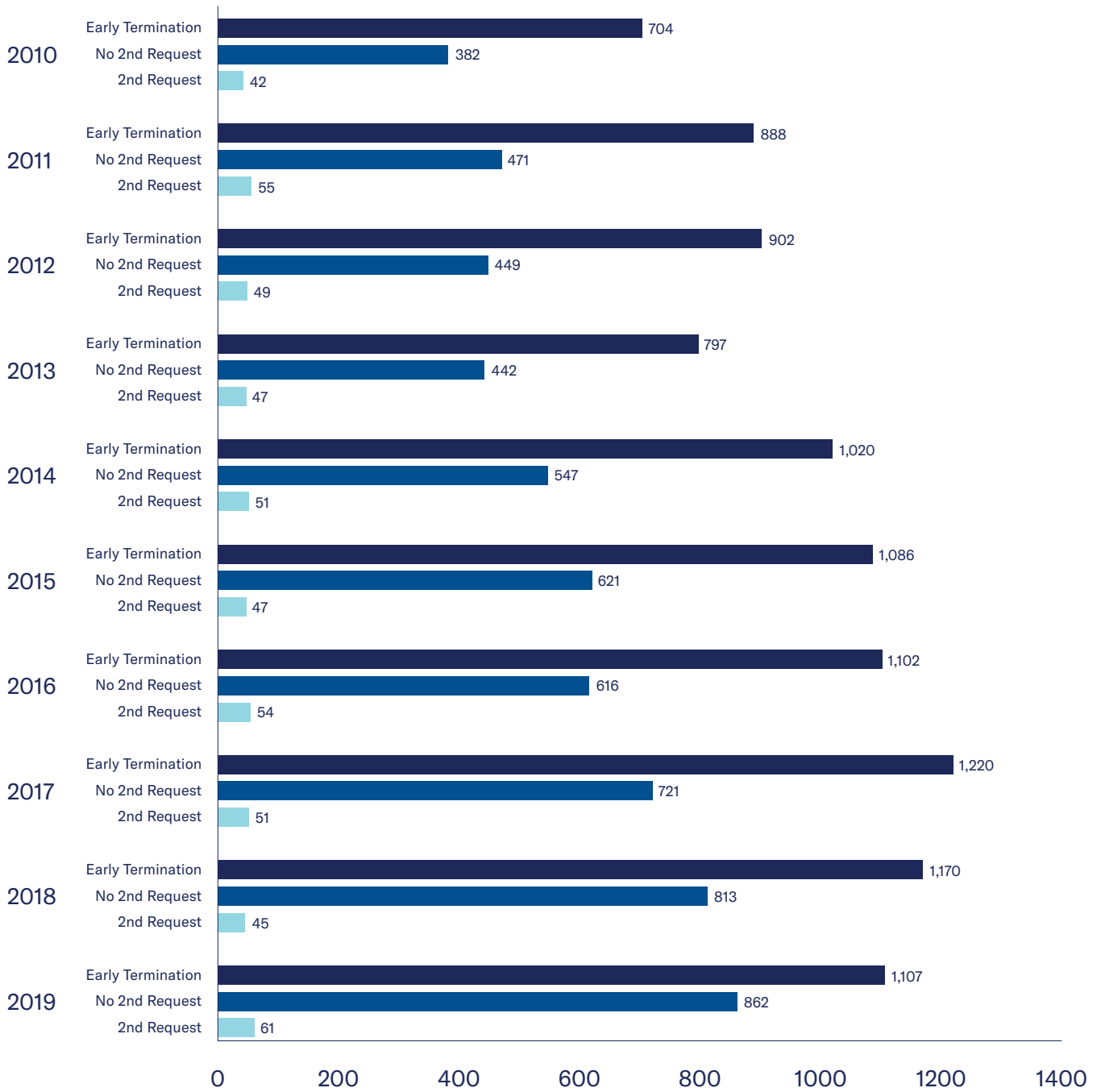
As an initial matter, it is helpful to understand the extent to which the typical merger raises significant competitive concerns. This information is a useful data point in assessing the proposed antitrust overhauls. If, for example, the typical merger involves little to no quantifiable reduction in competition, stark changes to the antitrust laws may risk breaking what did not require fixing in the first place.

Via the pre-merger notification system established by the 1976 Hart-Scott-Rodino Act, merging firms meeting certain filing thresholds must notify the FTC and DOJ of the proposed transaction, and then wait to close the transaction while the agencies review it. After a preliminary review, the agencies can either (i) terminate their investigation prior to the end of the waiting period (“early termination”), permitting the transaction to proceed; (ii) allow the waiting period to expire, permitting the transaction to proceed; or (iii) issue a request for additional information (a “second request”), which extends the waiting period while the agencies conduct a more detailed investigation.

More than 1,000 transactions go through this process every year (and that figure is closer to 2,000 in recent years), with very few resulting in a second request, let alone an enforcement action. Figure 1 illustrates this point quantitatively, depicting the number of transactions between 2010 and 2019 that were (i) granted an early termination, (ii) permitted to close after the initial waiting period, and (iii) issued a second request. In the figure, these three outcomes are labeled “Early Termination”, “No 2nd Request”, and “2nd Request”, respectively. As the figure shows, the vast majority of transactions do not receive a second request. In fiscal year 2019, for example, 1,107 transactions were granted an early termination, 862 were permitted to close after the initial waiting period, and only 61 (3 percent) received a second request. The fact that such a small fraction of mergers triggers a second request underscores that mergers are appropriately viewed as a normal part of a healthy economy.

The mergers that do receive a second request are scrutinized even more carefully by the agencies—by skilled lawyers and economists with significant expertise in antitrust law and economics. The agencies have many tools to assist them in this evaluation, including the ability to subpoena information from the merging firms and from relevant third parties such as the merging firms' competitors and customers.

**Figure 1: FTC/DOJ Early Termination and 2nd Request Statistics, Fiscal Years 2010-2019**





Aiding the agencies and courts in their efforts to distinguish procompetitive mergers from anticompetitive mergers is more than a century of accumulated wisdom—an extensive history of court cases and tomes upon tomes of economic and legal scholarship. Consider, for example, the agencies’ *Horizontal Merger Guidelines*, which originated in 1968 and were most recently revised in 2010 after an extensive public commentary process. Building on advancements in economic research, the revised *Horizontal Merger Guidelines* usefully introduce the notion of upward pricing pressure, which takes seriously the possibility that coarse structural metrics like market shares may paint a misleading picture of the true competitive environment. Upward pricing pressure is just one example in which advances in our understanding of markets and competition have positively contributed to more rigorous evaluation of mergers.

Further underscoring the argument that most mergers are, at worst, competitively innocuous is recent research looking at the competitiveness of American markets. Multiple papers that ground their analysis in the realities of how competition takes place have found that many US markets are becoming less concentrated.<sup>8</sup> If a substantial number of the mergers identified in the pre-merger notification data discussed above had actually been anticompetitive, it is difficult to see how this trend could be correct.

Overall, the real-world evidence shows that most mergers do not threaten competition. Instead, they are evidence of a functioning dynamic economy adapting to new ideas and events.

The proposed bills threaten to replace the careful assessment of mergers with arbitrary rules, thereby imposing additional costs and regulatory uncertainties on procompetitive mergers.

The various antitrust bills threaten to replace the carefully vetted principles underlying the *Horizontal Merger Guidelines*—and antitrust analysis more generally—with arbitrary rules that circumvent the

difficult but necessary work that the agencies and courts perform in assessing the competitive implications of mergers. For instance, CALERA and PCOA largely eschew the need to grapple with the realities and idiosyncrasies of real-world competition, instead instructing courts to focus strictly on market shares and subjective evaluations as to whether the company being acquired might someday compete in the same markets as the acquiring company, even if the companies do not compete at the time of the purchase. CALERA prohibits mergers meeting certain market share and market concentration thresholds unless the merging firms can establish, by a preponderance of the evidence, that their merger does not “create an appreciable risk of materially lessening competition.”<sup>9</sup> Under PCOA, the merging parties in certain transactions bear the burden to prove, by clear and convincing evidence, that the acquired company does not “constitute nascent or potential competition to the covered platform.”<sup>10</sup>

These burden-shifting proposals put firms considering procompetitive mergers in a difficult position. Much of the evidence that may be needed to establish the presence of robust competitive constraints may often be beyond the reach of the merging firms. Merging firms are apt to know the most about their own businesses and the efficiencies that may result from their combination, but may know comparatively less about the full capabilities of their active and potential rivals. The agencies, on the other hand, generally have much freer and more complete access to the kinds of market-wide data and other information that is needed to comprehensively understand the nature of industry competition and the likely effect of the merger on the industry. It is therefore sensible that the agencies should carry the burden of marshalling that data to reach their public interest assessment of a proposed merger.

Instead, some of the proposed bills, including CALERA and PCOA, place that burden squarely on the merging firms if the transaction meets any one of several vaguely defined criteria. For example, under CALERA, the burden shifts from the agency to the firms if “the [acquirer] has a market share of greater than 50 percent or otherwise has significant market power, as a seller or a buyer, in

<sup>8</sup> See, in particular, C. Lanier Benkard, Ali Yurukoglu, and Anthony Lee Zhang, “Concentration in Product Markets,” No. w28745. National Bureau of Economic Research (2021) and Esteban Rossi-Hansberg, Pierre-Daniel Sarte, and Nicholas Trachter, “Diverging trends in national and local concentration,” *NBER Macroeconomics Annual* (2021). In contrast, the papers that have purported to show increases in concentration have generally relied on data that economists from both sides of the aisle have criticized as unfit for the purpose, possibly missing the role of geography, imports, and the granularity of product markets. See, e.g., Carl Shapiro, “Antitrust in a Time of Populism,” *International Journal of Industrial Organization* (2018) and Gregory J. Werden and Luke M. Froeb, “Don’t Panic: A Guide to Claims of Increasing Concentration,” *Antitrust Magazine* (2018).

<sup>9</sup> CALERA Sec. 4(b).

<sup>10</sup> PCOA Sec. 2(b).

any relevant market, and as a result of the acquisition, the [acquirer] would obtain control over entities or assets that compete or have a reasonable probability of competing with the [acquirer] in the same relevant market.”<sup>11</sup> Such sharp discontinuities in burdens can be expected to alter firm behavior, likely in ways that are not in the interest of consumers or workers. For example, to be better informed about their regulatory burdens, firms could have stronger incentives to share information via trade associations or to invest more in their internal competitive intelligence teams. Such actions require resources, which must come from somewhere else.

Given the absence of clear evidence to anticipate that the change in burden would materially improve the level of competition, the proposed bills’ expected impact on overall output is likely negative. In addition to the resources wasted in making merging parties responsible for evidence that is particularly costly for them to develop, it is likely that at least some procompetitive transactions would be abandoned or never pursued.

## Many of the other “solutions” of the proposed bills would damage the competitive process that benefits consumers, workers, and the economy

Exclusionary conduct is defined to include vigorous competition on the merits.

Several provisions of the proposed bills would outlaw normal, healthy competitive conduct, without any showing of an actual harm to consumers. For instance, CALERA defines exclusionary conduct as conduct that “(i) materially disadvantages 1 or more actual or potential competitors; or (ii) tends to foreclose or limit the ability or incentive of 1 or more actual or potential competitors to compete.”<sup>12</sup>

Far from protecting competition, it is not difficult to imagine instances in which these broad exclusionary conduct provisions might stifle vigorous competition on the merits. Consider, for example, an aggressive price cut by a market leader on one of its popular products.

Such a price cut undoubtedly “disadvantages” competitors who may need to offer their own price cuts or risk losing customers. However, the behavior that harms competitors would—without considerable evidence otherwise—plainly benefit consumers.

The bills’ proponents might argue that the agencies can exercise their discretion in deciding what matters to pursue, such that genuinely competitive conduct will not fall under the knife of the proposed bills. But from a firm’s point of view, it would be reasonable to fear that genuine, aggressive competition on the merits would be carrying with it the possibility of antitrust liability. At a minimum, firms would need to anticipate some likelihood of answering time-consuming queries if rivals complain to the agencies after being outcompeted.

In this way, the proposed bills’ overexpansive approach to exclusionary conduct risks damaging the competitive process that it claims to protect. Moreover, rather than reduce the incentive of firms to politicize and weaponize antitrust, such vague, unfenced language on exclusionary conduct would give firms a way to raise their rivals’ costs by complaining about being “disadvantaged” by aggressive competition.

The proposed bills explicitly eliminate legal precedents and dicta that protect genuinely competitive business conduct from mislabeling and mishandling in litigation.

The proposed bills disregard decades of antitrust precedent and analysis. For example, CALERA notes that exclusionary conduct claims need not be subject to the constraint that “the unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct.”<sup>13</sup> The reference to a prior course of dealing seems specifically designed to reduce the barriers to bringing “duty-to-deal” cases. Already a fraught area, with economists raising questions about whether there could ever be an antitrust obligation for a seller to provide a product on terms they would not agree to, this language would do away with one of the limitations imposed by the Supreme Court in identifying contexts where such a claim may be cognizable.<sup>14</sup>

<sup>11</sup> CALERA Sec. 4(b).

<sup>12</sup> CALERA Sec. 26A.(a). AICOA, in Section 2, includes language that seeks to achieve similar ends as CALERA (e.g., limiting the ability of a covered platform to “unfairly preference” its own products over those of another business). We focus our discussion here on CALERA.

<sup>13</sup> CALERA Sec. 26A.(e).

<sup>14</sup> See, e.g., Dennis W. Carlton, “A General Analysis of Exclusionary Conduct and Refusal to Deal – Why Aspen and Kodak Are Misguided,” *Antitrust Law Journal* (2000).



Similarly, AICOA imposes liability on covered platforms for harming their *competitors*, not consumers, thus invalidating a decades-long bipartisan consensus as to antitrust law’s underlying purpose. For instance, AICOA makes it unlawful for a covered platform to “materially restrict” a business’s access to interoperate with the platform’s features that are available to the platform’s own products, irrespective of any showing of harm to consumers, and indeed even if the new requirement would, on balance, *harm* consumers (e.g., if the requirement deters innovation).<sup>15</sup>

By reducing firms’ scope to defend themselves when out-competed rivals protest, the proposed bills may disincentivize firms from pursuing new investments or ideas. After all, if a rival can complain of being excluded if it is not licensed on generous terms a quality-enhancing innovation it did not pursue, that reduces the expected benefits of the innovation to the firm that incurred the cost of innovating. Thus, in the hope of preventing a large firm from harming smaller rivals, the proposed bills actually create incentives that will tend to reduce firms’ interest in growing their businesses and thus becoming large. Over time, such an outcome would likely harm rather than help consumers and workers as firms invest less and compete less aggressively.

Expanding the agencies’ subpoena powers to pursue investigations untethered from evidence of misconduct, and dramatically increasing available penalties untethered from evidence of consumer harm, would increase the cost and risk of doing legitimate and beneficial business.

The proposed bills create other additional new costs and risks for firms engaged in procompetitive business activities. For example, CALERA proposes a significant expansion of the agencies’ subpoena powers, in part through the creation of the “Office of the Competition Advocate” within the FTC. Although we agree that additional empirical evidence related to antitrust is valuable, we are concerned that these expanded powers represent a considerable increase

in the cost and risk of running a business. Given that there is no requirement that the relevant government authority determine that the use of these new powers has a strong likelihood of generating a commensurate benefit, the result may very well be lower output.

Consider that successfully complying with a second request in a merger investigation can take many months of dedicated work by the merging firms and the lawyers and consultants they retain, at a significant cost. The proposed bills threaten to impose similar costs on businesses essentially at the whim of a federal antitrust agency or state attorney general, without any evidence that the companies are engaged in misconduct that harms consumers.

To be clear, we support targeted efforts by the agencies (and state attorney generals) to collect data and investigate industries where there is existing evidence of competitive concerns,<sup>16</sup> such as the FTC’s recent orders for healthcare claims data to study the impact of physician consolidation.<sup>17</sup> These targeted studies and investigations utilize existing legal authorities to investigate industries or behavior where there may be evidence-driven concerns. Crucially, these investigations are subject to checks and balances that are designed to make sure that the costs such investigations impose are likely justified by the potential benefits. In contrast, under the proposed bills, the federal agencies would receive sweeping subpoena powers and the states would receive an open invitation to investigate out-of-state firms—with businesses shouldering considerable costs as a result, irrespective of evidence that the potential benefits of the investigations outweigh the costs.

<sup>15</sup> AICOA Sec. 2.

<sup>16</sup> We also support additional efforts to conduct merger retrospectives (i.e., studying the economic effects of consummated mergers). Such studies can serve to improve our understanding of antitrust enforcement, which can then guide pro-competition and pro-consumer changes.

<sup>17</sup> <https://www.ftc.gov/news-events/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers>. For the kind of scholarship motivating the FTC’s call, see, e.g., Cory Capps, David Dranove, and Christopher Ody, “Physician practice consolidation driven by small acquisitions, so antitrust agencies have few tools to intervene,” *Health Affairs* (2017).

## Existing antitrust law is well-equipped to protect competition and consumers

### Mergers involving large firms

Several of the proposed bills, including CALERA and PCOA, propose to amend the Clayton Act to alter the burden of proof when evaluating mergers involving large firms.<sup>18</sup> Although we agree that mergers of large firms warrant scrutiny from the antitrust agencies, we strongly disagree that there is a basis for concluding that different legal standards are warranted.

Both agencies have demonstrated track records of challenging—and winning—cases involving large firms. For example, in 2016, the DOJ successfully challenged two different billion-dollar transactions involving insurance companies (Aetna/Humana and Anthem/Cigna).<sup>19</sup> Similarly, the FTC regularly challenges large transactions. For example, in 2020, it successfully challenged a joint venture that would have combined the assets of two of the largest coal mining firms in the United States (Peabody/Arch).

Thus, the proposed bills would impose a remedy where there does not appear to be an injury. As with other aspects of the proposed legislation, the imposition of asymmetric burdens could also easily have the effect of skewing firm behavior to avoid sharp increases in regulatory burdens, while also discouraging procompetitive transactions.

## Monopsony power and the conduct of platform businesses

As an amendment to the Clayton Act, CALERA proposes “clarify[ing] that an acquisition that tends to create a monopsony violates the Clayton Act.”<sup>20</sup> Although we agree that the effects of market power are not limited to output markets—market power can certainly be exercised in input markets such as the market for labor—we disagree that amendments to the Clayton Act are necessary to handle this issue.

The same principles that apply to assessing the effects of mergers on output markets apply to the analysis of input markets. Indeed, the *Horizontal Merger Guidelines* include a section making exactly this point: “[m]ergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling side of the market.”<sup>21</sup> Recent academic research on the labor market effects of mergers and market concentration further corroborates the applicability of the same bedrock principles—e.g., the availability of substitutes—to the analysis of labor markets.<sup>22</sup> Consistent with these principles, past decisions on mergers by both the FTC and the DOJ have reflected labor market concerns.<sup>23</sup> Overall, we applaud such a focus and encourage the agencies to continue considering labor market effects. However, as history indicates, new legislation is not needed for this to happen.

With respect to platform conduct, CALERA states that a plaintiff need not show that the conduct of a defendant operating a platform business “presents an appreciable risk of harming competition on more than 1 side of the multi-sided platform.”<sup>24</sup> It is not clear how this clarification would materially impact the agencies’ behavior in ways that would benefit American consumers. Both agencies have track records of evaluating mergers and conduct that involve two-

<sup>18</sup> For example, CALERA Sec. 2.(b)(4).

<sup>19</sup> For full disclosure, one of the authors was retained as the expert for Aetna/Humana in the DOJ litigation.

<sup>20</sup> CALERA Sec. 2.(b)(3).

<sup>21</sup> Horizontal Merger Guidelines Section 12.

<sup>22</sup> See, e.g., Elena Prager and Matt Schmitt, “Employer consolidation and wages: Evidence from hospitals,” American Economic Review (2021); Gregor Schubert, Anna Stansbury, and Bledi Taska, “Employer concentration and outside options,” working paper (2021).

<sup>23</sup> For example, the FTC’s complaint challenging the acquisition of Biotest by Grifols states that the acquisition would “harm competition in the markets for collection of human blood plasma” in several US cities (<https://www.ftc.gov/news-events/press-releases/2018/08/ftc-requires-grifols-sa-divest-assets-condition-acquiring-biotest>). Meanwhile, the DOJ’s recently filed complaint against the proposed merger of publishers Penguin Random House and Simon and Schuster references a concern that the transaction could result in lower advances paid to authors (<https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon>).

<sup>24</sup> CALERA Sec. 26A.(e).

sided firms.<sup>25</sup> Both have brought complaints when they believe that the evidence warranted it.<sup>26</sup>

That the number of cases against platforms is not high need not reflect a lack of statutory authority or of agency scrutiny. Rather, it is consistent with the economic literature's long recognition that network effects, which often motivate a platform business model, substantially alter the typical intuition about competitive market structures. In the presence of significant network effects, concentration need not be harmful to consumers. Consistent with that argument, theory and empirical work alike point to the possibility that mergers in multi-sided markets may lead to improvements in consumer welfare.<sup>27</sup>

## Acquisitions of nascent competitors

Several of the proposed bills emphasize that acquisitions of nascent or potential rivals may have negative effects. Although this point is certainly true in theory, it is not clear what this recognition contributes to antitrust practice. Both US antitrust agencies already scrutinize transactions that may involve an incumbent purchasing a smaller firm whose products may not yet be on the market.<sup>28</sup> For example, in 2021, Visa abandoned its proposed acquisition of Plaid in the face of DOJ opposition. Similarly, in recent years, the parties dropped their efforts to merge in the wake of at least four different FTC challenges to deals involving a substantial incumbent player and a small but rapidly growing rival—CDK/Automate (2018), Illumina/PacBio (2019), Edgewell/Harry's (2020), and P&G/Billie (2021).

Thus, there is no clear evidence that the agencies cannot prevent transactions involving nascent firms. Instead, history shows that the agencies challenge such transactions when they perceive there to be compelling support for the belief that their consummation would work to the detriment of consumers. Courts uphold such challenges when they find the facts and theory marshalled in support of that argument to be compelling. That the number of challenged and blocked transactions may be small relative to the total number of deals

involving nascent firms is consistent with the belief that in many cases the deals do not involve nascent competitors, but rather “nascent complements.”

If legislation substantially alters the burdens involved in acquiring a firm that is still in its infancy, it would risk choking off the supply of innovations that have proved to be such an engine for the US economy. Preventing a firm with desirable products from acquiring a complementary technology does not help consumers. Rather, it would deny consumers the opportunity to access better products produced more efficiently. Simultaneously, it would reduce the number of employment options available to the American labor force.

## Conclusion

In recent months, Congress has proposed multiple bills aimed at protecting competition in America. Although the proposed bills are animated by a recognition of the legitimate importance of competition, experience shows that the US antitrust agencies are well-equipped to address these concerns under existing law. The agencies can and do investigate and challenge exactly the types of business conduct motivating the proposed bills. Needlessly overhauling the antitrust laws as suggested by the proposed bills creates a significant risk of harming rather than helping competition and consumers. In short, the evidence points strongly to the possibility that the proposed bills represent a cure worse than the disease.

<sup>25</sup> See, e.g., the DOJ's history of challenging radio station mergers (e.g., Sinclair Broadcast Group, Inc./River City Broadcasting L. P. in 1996 and *United States v. Westinghouse Electric Corp. and Infinity Broadcasting Corp.* in 1996). See also the FTC's history of analyzing multiple listing services (<https://www.ftc.gov/news-events/media-resources/mergers-competition/real-estate-competition>).

<sup>26</sup> See, e.g., the FTC's 2020 Complaint challenging CoStar's proposed acquisition of RentPath.

<sup>27</sup> See, e.g., Guofu Tan and Junjie Zhou, “The effects of competition and entry in multi-sided markets,” *The Review of Economic Studies* (2021) and Ambarish Chandra and Allan Collard-Wexler, “Mergers in two-sided markets: An application to the Canadian newspaper industry,” *Journal of Economics & Management Strategy* (2009).

<sup>28</sup> See, e.g., the discussion of different cases brought by the two agencies in Andrew Sweeting, Joel Schrag, and Nathan Wilson, “Not all pre-emptive mergers are alike: A classification of recent cases,” *Competition Policy International*, 2020.



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