March 18, 2021

The Honorable David Cicilline, Chair
The Honorable Kenneth Buck, Ranking Member
House Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Buck:

We write to you regarding your hearing, "Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power." Restoring the country's antitrust laws would help confront monopoly power and produce broad-based prosperity and economic freedom for all, not only the large corporations who dominate increasing number of markets. In the subcommittee's 2020 "Investigation of Competition in Digital Markets" report, you published a history set of findings of the extent of monopoly power in the technology sector, as well as ground-breaking recommendations for statutory and policy changes to address this crisis.[1]

We are including our recommendations in this letter, with the overall suggestion that the subcommittee act on its recommendations and eliminate the consolidation-friendly consumer welfare standard. In doing so, the subcommittee can return antitrust law to its original form, as a legal framework to protect citizens and communities from concentrated capital by disbursing private power.

There is urgency to this task. Large technology firms are more dominant than they were before the pandemic, when the subcommittee began its investigation. As *The New York Times* reported in August, five firms - Apple, Google, Amazon, Microsoft, and Facebook - "now constitute 20 percent of the stock market's total worth, a level not seen from a single industry in at least 70 years."[2] The problem of corporate concentration goes far beyond tech, with scholars and researchers finding a rise in market power over recent decades.[3] And while size does not necessarily equate to illegal behavior, the American Economic Liberties Project just released a new dataset finding that of the 76 corporations valued at more than $100 billion, over 80 percent faced antitrust scrutiny in the last thirty years.[4]

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[1] MAJORITY STAFF OF H. SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 375-404 (2020) [hereinafter HOUSE DIGITAL MARKETS REPORT].
[2] Peter Eavis & Steve Lohr, *Big Tech's Domination of Business Reaches New Heights,* N.Y. TIMES, Aug. 19, 2020. https://www.nytimes.com/2020/08/19/technology/big-tech-business-domination.html.
[3] Ufuk Akcigit, Wenjie Chen, Federico J. Diez, Romain A. Duval, Philipp Engler, Jiayue Fan, Chiara Maggi, Marina Mendes Tavares, Daniel A. Schwarz, Ippei Shibata & Carolina Villegas-Sánchez, *Rising Corporate Market Power: Emerging Policy Issues* (Int'l Monetary Fund, Staff Discussion Notes No. 2021/001, Mar. 15, 2021). https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2021/03/10/Rising-Corporate-Market-Power-Emerging-Policy-Issues-48619.
[4] Am. Econ. Liberties Project, "Antitrust Scrutiny of $100 Billion U.S. Corps.," https://www.economicliberties.us/100_bil_investigations/.

The post-Covid environment may worsen the problem. Over the last 4 months, the FTC received 1130 Hart-Scott-Rodino filings, a 65% increase in filings as compared to the same period last year.[5] Policymakers should expect a wave of consolidation throughout the country as richer companies buy smaller competitors struggling amidst the ongoing COVID-19 pandemic.[6] As the International Monetary Fund recently noted, due to the pandemic, "concentration could now increase in advanced economies by at least as much as it did in the fifteen years to end of 2015."[7] In sectors like accounting and defense, industry observers warn that a merger wave could be coming.[8]

Without action, most of this merger wave will occur with little resistance. The federal enforcement agencies' records over the past decades show that the DOJ and FTC challenge no more than 2 or 3 percent of all large mergers in any year, with a high of 4.5 percent in 2009.[9] Though the agencies' enforcement record is due in large part to enforcers' ideology that is cautious about challenging corporate power, laws with per se rules against large or serial mergers would stop this wave of consolidation.

Unmaking a Flawed Ideology

Congress passed the antitrust laws to disperse unchecked economic and political power. As Judge Learned Hand wrote in 1945, "[A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."[10] Congress reinforced the Sherman Act multiple times in the 20th century to emphasize that protecting people and small business against concentrated private power was indeed their goal.[11] Since 1977, however, judges and enforcers have rewritten the law to facilitate not

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[5] *Premerger Notification Program*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/premerger-notification-program (last visited Mar. 17, 2021); Krista Brown (@kristakbrown), TWITTER (Mar. 17, 2021, 12:51 PM), https://twitter.com/KristaKBrown/status/1372229050194927623.

[6] Nuno Fernandes, *How to Capitalize on the Coming M&A Wave*, HARVARD BUS. REV., Feb. 12, 2021, https://hbr.org/2021/02/how-to-capitalize-on-the-coming-ma-wave. A writer for the *Harvard Business Review* observed in February, "Well-capitalized companies will soon face a once-in-a-generation opportunity to make acquisitions and consolidate power."

[7] Ufuk Akcigit et al., *supra* note 3.

[8] Sridhar Natarajan, *Goldman Warns of More Job Losses With Jumbo Mergers on the Rise,* BLOOMBERG, Oct. 16, 2020, https://www.bloomberg.com/news/articles/2020-10-16/goldman-warns-of-more-job-losses-with-jumbo-mergers-on-the-rise?sref=ZvMMMOkz; Ira Rosenbloom, *Get Ready for the Next Merger Wave in Accounting*, ACCT. TODAY, Nov. 18, 2020, https://www.accountingtoday.com/opinion/get-ready-for-the-next-merger-wave-in-accounting; Jon Harper, *Defense Industry Could See Another Wave of Mergers, Acquisitions*, NAT'L DEF., Feb. 2, 2021, https://www.nationaldefensemagazine.org/articles/2021/2/2/defense-industry-could-see-another-wave-of-mergers-acquisitions.

[9] Krista Brown et al., *The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New Structuralist Approach* 170 (Jan. 12, 2021) [hereinafter *Courage to Learn*], https://www.economicliberties.us/our-work/courage-to-learn/.

[10] *See* United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945) *see also* MATT STOLLER, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY 185-186 (2019).

[11] *See* Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1660-61 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)) ("In the lead-up to the passage of the Anti-Merger Act of 1950, both of the bill's chief sponsors discussed how halting the rising tide of economic concentration was critical for avoiding totalitarianism.").

distributed power, but efficiency. Doing so was done under the rubric of the consumer welfare standard, and two separate but related intellectual movements. The first was the conservative Chicago School law and economics movement, led by antitrust scholar Robert Bork, which sought to orient efficiency as the goal of antitrust law. The second was the left-leaning post-Chicago approach, which, while maintaining efficiency and consumer welfare as the lodestar of antitrust policy, disputed the economic models used to achieve this ideological objective. Restoring antitrust laws to confront monopoly power requires discarding not only Chicago School approaches, but *post*-Chicago School approaches too. As noted in Economic Liberties' "Courage to Learn:"

> Chicago School theorists pushed for judges to take practices that had been ruled illegal per se, such as restrictions by manufacturers on distributors, dealers, or other customers ("vertical restraints"), or had strong presumptions of illegality, such as pricing below cost ("predatory pricing") or buying companies that are not direct competitors but are in the same supply chain ("vertical mergers") and make them per se legal. Their rhetorical strategy was to make the case that under the consumer welfare standard, the only important value was efficiency. Since these practices, according to price theory, do not in theory reduce output, they must be "procompetitive" and thus legal.
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> Liberal scholars of the "post-Chicago School" criticized the Chicago School, but in a narrow way that led them to accept and ratify the corporate concentration that Chicago School theorists had initiated. Largely from within the Democratic Party, these critics of the Chicago School attacked the specific economic models used by Reagan's antitrust enforcers but accepted the ideological narrowing of antitrust Bork had imposed by agreeing to tether the purpose of antitrust to economic efficiency. As one liberal critic of the Chicago School, Jonathan Baker, put it in 1989, "economics has become the essence of antitrust" and the center-left "challenges to Chicago arise from within the efficiency paradigm."[12] Consumer welfare adherents on the center-left agreed with Bork that larger political goals so core to the antimonopoly tradition, such as protecting democratic access to markets, were irrelevant. While Chicago School thinkers would argue that corporate concentration was good, post-Chicago scholars argued that, as Lina Khan notes, "it depends."[13]
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> The interplay between Chicago School and post-Chicago School enforcers played out in the judiciary. Chicago School thinkers asked the judiciary to make clear that nearly all business conduct is legal, while post-Chicago School enforcers sought to have judges avoid bright-line prohibitions on certain types of conduct.
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> Because post-Chicago scholars believe corporate concentration can be efficient, and efficiency is the point of antitrust laws, they favor what is known as the rule of reason, in which every potential action must be reviewed on case-by-case basis, with harms and

[12] Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 ANTITRUST L.J. 645, 646 (1989), www.jstor.org/stable/40841261.
[13] Khan, *supra* note 11, 1669.

> benefits aggregated and weighed against each other. Post-Chicago scholars have won much of the argument over how to organize antitrust law.[14]

The result of the consumer welfare standard is that judges and enforcers *facilitate* the very consolidations of private power that the drafters of the antitrust laws would have abhorred. In addition, the law itself is so vague under the consumer welfare-oriented rule of reason framework that it ceases to offer any resemblance to the rule of law itself.[15]

Two examples illustrate this dynamic.

First, T-Mobile bought Sprint, with Judge Victor Marrero explicitly choosing to allow consolidation under the guise of efficiency. Though a coalition of attorneys general had successfully established that the merger would remove a competitor from an already concentrated market, Judge Marrero determined that the combination would produce efficiencies. Notably, the Department of Justice Antitrust Division *opposed* the state attorneys general, and the judge accepted that a settlement proposed by the Department of Justice would mitigate concerns about competition. Not only did this merger consolidate power, lead to layoffs and higher prices,[16] but it illustrated that the consumer welfare-oriented rule of reason is so vague that multiple law enforcement agencies reach opposite conclusions. A crime to one, is a benefit to the other. That is not the rule of law, nor is it reasonable.[17] Just yesterday *The Wall Street* Journal reported that the FTC decided not to appeal the decision, likely out of concern that the Supreme Court would adopt the Ninth Circuit's flawed reasoning.[18]

Second, the Ninth Circuit's decision in FTC v. Qualcomm also shows the extreme extent to which judges rewrite antitrust law in vague and confusing ways that fosters consolidations of power. While overturning a district court judge's decision that Qualcomm had abused its chips monopoly, a unanimous Ninth Circuit panel based its decision in part on the fact that the victims of Qualcomm's monopolization, equipment manufacturers, "are Qualcomm's *customers*, not its competitors" and that consumer "harms, even if real, are not 'anticompetitive' in the antitrust sense – at least not *directly* – because they do not involve restraints on trade or exclusionary conduct in 'the area of effective competition.'"[19] Thus, antitrust harms are not even harms to consumers but violations on what a judge understands to be "competition."

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[14] *Courage to Learn,* 14-16.

[15] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?,* 42 U.C. DAVIS L. REV. 1375 (2009).

[16] Karl Bode, *T-Mobile Promised Its Megamerger Would Create Jobs. It Laid off 5,000 Workers Instead*, VICE, Mar. 1, 2021, https://www.vice.com/en/article/m7adpn/t-mobile-promised-its-megamerger-would-create-jobs-it-laid-off-5000-workers-instead; Hal Singer, *The Terrible T-Mobile/Sprint Merger Must Be Undone*, WIRED, Feb. 25, 2021, https://www.wired.com/story/opinion-the-terrible-t-mobilesprint-merger-must-be-undone/.

[17] The "weakened competitor" defense to T-Mobile's acquisition of Sprint is particularly troublesome as it opens up decisionmaking to what a judge considers "weak." The Seventh Circuit has called "weakened competitor" defenses to mergers "probably the weakest ground of all for justifying a merger." Kaiser Aluminum & Chem. Corp. v. FTC, 652 F.2d 1324, 1339 (7th Cir. 1981). The Sixth Circuit has called it "the Hail-Mary pass of presumptively doomed mergers." Promedica Health System, Inc. v. FTC, 749 F.3d 559, 572 (2014).

[18] Brent Kendall, *U.S. Antitrust Officials Unlikely to File Supreme Court Appeal in Qualcomm Case,* Wall St. J., Mar. 17, 2021, https://www.wsj.com/articles/u-s-antitrust-officials-unlikely-to-file-supreme-court-appeal-in-qualcomm-case-11616008111.

[19] Fed. Trade Comm'n v. Qualcomm Incorporated, 969 F.3d 974, 992 (2020) (quoting *Ohio v. Am. Express*, 138 S. Ct. 2274, 2285 (2018)).

Proponents of the status quo approach to antitrust agree that the goal of antitrust law is to promote "consumer welfare" and should focus only on consumers as determined largely by price theory. Doing so is said to offer certainty to the law. Yet, not only did judges offer confusing and contradictory interpretations that fail the consumer welfare standard on its own merits, but once again, in this case, the Federal Trade Commission and the Antitrust Division took opposing sides, with one interpreting a set of behaviors as an illegal activity, and another viewing that activity as the essence of capitalism.[20]

Both of these cases demonstrate how the consumer welfare-oriented rule of reason framework foster incoherence in the law, with the only rule seeming to be that dominant firms win. Judges themselves are confused are frustrated. Judge Marrero, in his opinion on T-Mobile's acquisition of Sprint, has said that a judge's job in merger cases is to predict the future by sifting through expensive legal and economic analyses, or as he wrote, "competing crystal balls."[21]

Competing crystal balls have become necessary not out of inexorable technical complexity but because of antitrust law's post-Chicago turn toward the rule of reason and the assumption that judges can and should evaluate every case individually. Since 1977, the Supreme Court has moved away from per se rules of illegality – deeming certain actions illegal regardless of their economic effects – and toward rule of reason analyses, which weigh the "procompetitive" and "anticompetitive" aspects of a corporate action.[22]

The rule of reason, however, has in practice resulted in per se *legality*. In a study of all antitrust cases that went to a final judgment from February 1999 to May 5, 2009, Michael Carrier found that "plaintiffs almost never win under the rule of reason. In 221 of 222 cases … the defendant won."[23] Legislation that would marginally shift the scale in the plaintiffs' favor in the rule of reason framework would not change the underlying fact that the rule of reason overwhelmingly favors monopolists.

Recommendations

To effectively fight monopoly power, Congress has to retake the power to set antitrust standards and empower public and private enforcers to challenge monopolies. Congress must disempower monopoly-friendly, confused judges by eliminating rule of reason analyses and put back in place bright-line rules clearly delineating fair and unfair conduct as well as per se standards or strong presumptions of illegality to judge that conduct.[24]

In drafting new legislation, we recommend that lawmakers protect people from unchecked corporate power in at least two ways. First, new law should instruct judges clearly, with little

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[20] *See* Kadhim Shubber, *US Regulators Face Off in Court Tussle Over Qualcomm,* FIN. TIMES, Feb. 9, 2020, https://www.ft.com/content/adbca366-49d3-11ea-aeb3-955839e06441.
[21] 439 F.Supp.3d at 187.
[22] Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977).
[23] Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009).
[24] Open Markets Institute, *Restoring Antimonopoly Through Bright-Line Rules*, PROMARKET, Apr. 26 2019, https://promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules/.

leeway, on how to decide cases and eliminate and unwieldy judicial balancing of "procompetitive" benefits and "anticompetitive" harms. Currently, judges have far too much discretion to shape the law in corporate-friendly directions. Second, new law should reinforce the original purpose of the Sherman Act, which was to deconcentrate markets and protect the individual from concentrated capital. Congress can achieve both of these goals by implementing the House antitrust subcommittee's majority staff report recommendations issued in its 2020 "Investigation of Competition in Digital Markets" report. [25]

Our recommendations are as follows:

(1) Structural Separations and Line of Business Restrictions

The first and most important step is structural separation and line of business restrictions to prevent dominant companies from using their infrastructure-like power for their, and not the public's, benefit. Currently, dominant firms serve as integrated infrastructure for commerce, with embedded conflicts of interest and a level of internal complexity that make them difficult to govern. First, these firms collect real-time data over the markets they control and can use that data in unfair ways to compete with those who must use their infrastructure. Second, these firms leverage their dominance from one market into another. Third, big tech firms can tie products and services together to fortify their barriers against competitors. And finally, these firms use their low cost of capital and high profits to subsidize entry into new market categories and capture new product ecosystems.

Splitting dominant companies up into smaller pieces or by lines of business would help to make them governable. The testimony of Mapbox CEO Eric Gundersen before this subcommittee in February is illustrative of the various problems that large dominant vertically integrated platforms induce, even if they are regulated to achieve objectives such as interoperability. According to Gundersen, if application developers want to use Google Search on a map in their program, they must also use Google Maps, not rival mapping software such as Mapbox. Google enticed Ford into a long-term deal to use its Mapping software, bundled with its cloud services, and in doing so garnered access to significant amounts of data that it can use to fortify its other lines of business.[26] In other words, although Google has made its Search interoperable, it has tied Google Maps to its dominant Search business, and unfairly boosted both its store of data and its cloud subsidiary. A Google Search independent of Google Maps would not be able to shut out rival mapping businesses. Instead, Google Maps would have to compete on the merits of being a better mapping software and not succeed by dint of its connection to a search monopoly.

Even if publicly mandated interoperability or other regulations officially forbade tying products across lines of business, structural separations would bolster administrability and help make such regulations work. American policymakers have a long history of attempting conduct remedies on dominant networks, before concluding structural separation was required to make such firms

[25] HOUSE DIGITAL MARKETS REPORT, 375-404.

[26] *Reviving Competition, Part 1: Proposals to Address Gatekeeper Power and Lower Barriers to Entry Online Before the Subcomm. on Antitrust, Com. & Admin. L. of the H. Comm. on the Judiciary*, 117th Cong. 2-3 (Feb. 25, 2021) (statement of Eric Gundersen, Chief Executive Officer, Mapbox), https://docs.house.gov/meetings/JU/JU05/20210225/111247/HHRG-117-JU05-Wstate-GundersenE-20210225.pdf.

governable in the first place.[27] Rules on conduct require ongoing monitoring by government agencies to ensure compliance. The firms in the House antitrust subcommittee's Digital Markets report last year have an extensive record of flouting or ignoring the law with some even challenging whether they have to follow it at all.[28] And without breakups, dominant companies will still have incentives to hurt competitors dependent on their services. Economists John Kwoka and Tommaso Valletti writing in support of breaking companies up, observe that the complicated and technical nature of many dominant online intermediaries' businesses "confer on the company[ies] enormous pretextual rationales for actions that adversely affect competition with and by rival companies."[29] Finally, the antitrust agencies that would likely oversee monopolists' compliance with interoperability or conduct remedies themselves have a concerning record of weak and deferential enforcement across administrations.[30]

Structural separations should prevent dominant intermediaries from expanding outside of that line of business. If necessary, as deemed by Congress or a court, structural separations should also include horizontal breakups, such as the potential unwinding of Instagram and WhatsApp from Facebook.[31]

(2) Revitalize Monopolization Law

We also recommend reform of Section 2 of the Sherman Act. Outlawing "monopolization," will require at least three elements. First, we recommend an "abuse of dominance" standard for certain firms or groups of firms ("shared dominance"). Dominant firms will have heightened obligations and potential liability under antitrust law. Second, in keeping with the need to avoid giving judges' excessive discretion under the rule of reason, unfair conduct by dominant or monopolistic companies should be illegal per se and rule of reason analyses minimized and even eliminated entirely for most monopolistic conduct. A monopolist exercising its power to hurt competitors unfairly should not be able to justify that behavior by pointing to purportedly lower prices or higher output. Third, the law should establish a way to remedy – through a break-up or conduct requirement – persistent monopolies and oligopolies, without the need for a showing of unfair behavior. Such a measure would foster beneficial competition in markets with comfortable

[27] Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).
[28] *See e.g.* Cecilia Kang, *F.T.C. Approves Facebook Fine of About $5 Billion,* N.Y. TIMES, July 12, 2019, https://www.nytimes.com/2019/07/12/technology/facebook-ftc-fine.html; Karen Weise, *Amazon Sues New York Attorney General to Block Covid-19 Charges*, N.Y. TIMES, Feb. 12, 2021, https://www.nytimes.com/2021/02/12/technology/amazon-letitia-james-coronavirus.html;
[29] John Kwoka & Tommaso Valletti, *Scrambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Dominant Firms* 15 (Dec. 14, 2020) (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736613.
[30] *See* Leah Nylen, *How Washington Fumbled the Future*, POLITICO, Mar. 16, 2021 ("[A]t a crucial moment when Washington's regulators might have had a chance to stem the growth of tech's biggest giants, preventing a handful of trillion-dollar corporations from dominating a rising share of the economy, they misread the evidence in front of them and left much of the digital future in Google's hands."), https://www.politico.com/news/2021/03/16/google-files-ftc-antitrust-investigation-475573; *see also generally Courage to Learn*, *supra* note 9.
[31] Complaint for Injunctive and Other Equitable Relief at 52, Fed. Trade Comm'n v. Facebook (2020) (No. 20-cv-03590).

incumbents and avoid the need for agencies to engage in resource-intensive investigations aimed at proving that coordinated pricing is explicit collusion.[32]

(3) Strengthen Merger Law

Constructive reforms to merger law should discard the speculative presumption that mergers are always good for any stakeholder besides financiers and executives.[33] To prevent corporations and Wall Street from buying success and rolling up markets, Congress should ban large mergers, as measured by the companies' revenues or assets, the transaction's size, or the companies' market shares. Congress should also make medium-sized mergers presumptively illegal, only able to be overcome with a strong showing of benefits. Serial acquisitions should also be preemptively stopped so as to arrest tendencies to consolidation. And federal agencies and state attorneys general should receive high judicial deference to block mergers. Agencies should also open up all mergers to public comment, issue statements explaining their enforcement actions, and study past mergers to improve enforcement practices.

(4) *Re-Empower Private Attorneys General to Enforce Antitrust Law*

Strengthening the antitrust laws also means removing the procedural hurdles that courts have placed in the path of any private antitrust plaintiff looking to protect consumers and businesses from monopolistic abuse. Mandatory arbitration clauses, class action waivers, forum selection clauses, and confessions of judgment should be outlawed. In addition, Congress should lower pleading and summary judgment standards, eliminate antitrust standing and antitrust injury requirements, empower competitors to sue to block mergers, remove barriers to class action certification, outlaw retaliation against whistleblowers who report monopolization and provide them a bounty, award prejudgment interest or require monopolists to disgorge damages in escrow before judgment, and simplify antitrust jury instructions.

(5) Impose Non-Discrimination Obligations and Interoperability Mandates on Critical Tech Infrastructure

Congress should also forbid unfair discrimination and self-preferencing and implement interoperability and open access requirements for dominant companies where such remedies would result in greater fairness and openness. But these proposals, especially interoperability, must come after structural separation has rendered these firms governable.

(6) Closely Oversee Antitrust Agencies' Practices

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[32] *See* Press Release, Am. Econ. Liberties Project, "Investigate Insulin Now" Launches to Take Aim at Deadly Insulin Cartel (Mar. 11, 2021) ("[T]hree companies – Eli Lilly, Novo Nordisk, and Sanofi – have colluded with one another to hike insulin prices in lockstep for years."), https://www.economicliberties.us/press-release/investigate-insulin-now-launches-to-take-aim-at-deadly-insulin-cartel/; *Investigate Insulin Now*, AM. ECON. LIBERTIES PROJECT (2021), https://investigateinsulinnow.com/.

[33] *See* Robert H. Lande & Sandeep Vaheesan, *Ban All Big Mergers. Period.* THE ATLANTIC, Feb. 25, 2021, https://www.theatlantic.com/ideas/archive/2021/02/ban-all-big-mergers/618131/; Matt Stoller & Sarah Miller, *No More Payoffs For Layoffs*, BUZZFEED NEWS, May 3, 2019, https://www.buzzfeednews.com/article/mattstoller1/no-more-payoffs-for-layoffs.

Congress should also exercise close oversight over the federal antitrust agencies. More active enforcement will undoubtedly require greater resources, but the agencies also must show that they have revamped their past, deficient enforcement approach. The subcommittee should undertake a thorough examination of why the Federal Trade Commission, in particular the Bureau of Economics, failed to bring monopolization charges against Google in 2012.[34]

We appreciate your work on this important matter, and we are hopeful that you will continue to meet this important historic obligation to protect the American republic from dangerous concentrations of private power.

Sincerely,

American Economic Liberties Project
Public Citizen

[34] Nylen, *supra* note 30.

Appendix

At Least 80% of the Time, Big Actually Is Bad

Our dataset documents major antitrust investigations into U.S. corporations valued at more than $100 billion. Of those 76 corporations, more than 80 percent have faced antitrust scrutiny at some point in the last thirty years, including monopolization claims, merger challenges, price fixing suits, and no-poach suits. This data, which is composed almost entirely of government investigations and complaints, shows that when firms are too big, they tend to abuse their dominance through illegal business practices.

One way to stop the problem of corporate bigness from getting worse is to bar firms above certain size thresholds from engaging in mergers. Currently, stopping a merger requires costly antitrust litigation, significant prosecutorial discretion, and unwieldy 'rule of reason' analysis by judges unequipped to handle market analysis. This data provides support for a Congressional ban on mergers above a certain size.

Similarly, this data also provides support for codifying an abuse of dominance standard that presumes certain business practices are illegal when undertaken by dominant firms. Currently, antitrust law often requires proving that abusive business practices resulted in "anticompetitive effects," with analysis focusing on a narrow set of harms, and using a 'rule of reason' framework that significantly favors defendants. Legislative reform that holds certain business practices by dominant firms to be an illegal "abuse of dominance" would help protect against predatory conduct.

What appropriate size thresholds should be is open to debate, but at the very least, it's time for Congress to write clear bright-line merger control and abuse of dominance rules to provide clarity to businesses and market participants.

Company Name	Market Cap	Antitrust Claims	Notes	Type of Action
Apple	1.953T	Various	• App Store – monopolization claim • App Store rules, EU Commission investigation	• Ongoing • Ongoing
Microsoft	1.715T	Various	• Windows - monopolization claim by DOJ and 20 states in 1998	• Settled - Conduct
Amazon	1.486T	Various	• e-book price fixing	• Ongoing
Alphabet	$1.361T	Various	• DOJ, 38 attorneys general – self preferencing in search • Texas – digital ads monopoly	• Ongoing • Ongoing

Facebook	$727.04 B	Various	• Instagram, WhatsApp - monopolization by FTC and 48 state attorneys general in 2020	• Ongoing
Berkshire Hathaway	593.162 B	Price fixing	• Individual price fixing lawsuits – railroad subsidiary	• Ongoing
Tesla	540.398 B	None		
Visa	485.662 B	Various (civil/criminal)	• DOJ sued for Plaid acquisition • Colluding with Mastercard and banks on interchange fees (2006-2018) • Walmart/Visa settle on debit routing fees (2017) • DOJ suit on collusion (1998)	• Abandoned • Settled - Monetary • Settled - Not Disclosed • Guilty - Conduct
JPMorgan Chase	466.606 B	Various (criminal/civil)	• Price fixing on foreign currency exchange – DOJ (2015) • Interchange fees - price fixing/colluding with Mastercard and banks (2006-2018) • Conspiring on stock prices (2018) • Rigging prices on bonds issued by Fannie Mae and Freddie Mac (2019)	• Pled guilty - fined • Fined • Settled - Monetary • Settled - Monetary
Johnson & Johnson	413.754 B	Various civil, price fixing	• Remicade FTC civil investigation (2019) • Merger – TachoSil (investigation closed)	• Ongoing • Abandoned • Settled - Divestiture

AMERICAN ECONOMIC LIBERTIES PROJECT

			• Merger – Synthes (2012)	
Walmart	361.81B	No major investigations	• Predatory pricing - Wisconsin Dept. of Ag (2001)	• Settled
Mastercard	368.865 B	Various (criminal/civil)	• Colluding with Visa and banks on interchange fees (2006-2018)	• Settled - Monetary
Walt Disney	366.519 B	Mergers; no poach	• No poach (DOJ; class action) (2000s-2010s) • Merger – 21st Century Fox acquisition – DOJ (2019)	• Settled - Conduct (DOJ); Settled - Monetary (Class Action) • Settled - Divestiture
UnitedHealth	331.022 B	Various	• No-poach suit against subsidiary – DOJ (2021) • Merger – DaVita (FTC 2019)	• Ongoing • Settled - Divestiture
Bank of America	320.55B	Various (criminal/civil)	• Bid rigging on sale of municipal bond derivatives – settled with DOJ (2010) • Rigging prices on bonds issued by Fannie Mae and Freddie Mac (2019) • Municipal bond rate collusion, class action lawsuit (2020)	• Settled - Monetary • Settled - Monetary • Ongoing
Procter & Gamble	313.498 B	Various	• Merger – Billie, Inc. acquisition (FTC 2020)	• Merger - Abandoned

Nestle	295.612 B	Various; Mergers	• Price fixing chocolate prices (2014) • Merger- Ralston (FTC 2006) • Exclusive dealing, discriminatory pricing by bottled water competitor Nirvana (2015)	• Thrown out on Summary Judgment • Settled - Divestiture • Dismissed
NVIDIA	287.513 B	Merger	• Merger - ARM deal facing antitrust scrutiny (2021)	• Ongoing
Home Depot	278.872 B	None		
PayPal	264.792 B	Various	• No Poach agreements (2011) – settled (2014) – *eBay owned PayPal until 2015 • Reported collusion with Visa ib 2016 (2020)	• Settled - Conduct (DOJ); Settled - Monetary (state) • Uncertain
Exxon Mobil	257.692 B	Various; Mergers	• Merger – Exxon acquisition of Mobil (1999) • Price-fixing class action (2015) • Allegedly colluding with BP for conspiring charged by Alaska state agency (2005)	• Settled - Divestiture • Ongoing • Dismissed
Comcast	254.112 B	Various; mergers; monopolization	• Time Warner acquisition – abandoned (2015) • Monopolization – local ad market (7th circuit)	• Merger - Abandoned • Ongoing

Intel	243.171 B	Various (monopolization claims/Section 5 violations from FTC case); Mergers	• Investigation into microprocessor manufacturing (1991) • Mergers – Chips and Technologies (1997) • Monopolization - microprocessors (FTC 1998) • Monopolization - microprocessors (FTC 2009) • Cyrix suit – exclusionary conduct & patent-misuse (1992)	• Closed without Action (1993) • Second Request - Not Challenged (1999) • Settled - Conduct (1999) • Settled - Conduct (2010) • Settled - Conduct & Monetary (1994)
Verizon	235.006 B	Various	• Illegal standards setting behavior, DOJ closed probe (2019)	• Closed without Action
Netflix	218.493 B	None		
Coca-Cola	222.533 B	Various	• Mergers – Coca-Cola Enterprise (2010) settled with FTC • Pepsi sued Coca Cola for monopoly abuse (1998) – dismissed.	• Settled - Conduct • Dismissed
AT&T	213.881 B	Various	• Mergers – Time Warner (2017) • DOJ investigation into wireless collusion (2018) - dismissed with no charges	• Merger - Cleared in Court • Dismissed
Chevron	211.42B	Various; Mergers	• Price-gouging – class action case in CA (2015); other price gouging cases as well • Acquisition – Unocal, FTC	• Ongoing • Settled - Conduct

			consent orders approved (2005)	
Oracle	212.441 B	Various	• Merger related – DOJ suit against PeopleSoft acquisition (2004)	• Merger - Cleared in Court
Nike	212.132 B	None	• No antitrust claims in the US	
Adobe	210.614 B	No Poach	• No poach settlement with DOJ (2010)	• Settled - Conduct
Abbott Laboratories	208.952 B	Various; Mergers; Price fixing; Section 2	• Merger – Acquired Alere, with FTC approving divestiture (2017) • Merger – Acquired St. Jude Medical, Inc., with FTC approving divestiture of two med. Devices (2016) • 1992 FTC charges for bid-rigging • Monopolization - anti-HIV medicine: Meijer, Inc., et al. v. Abbott Laboratories (2011)	• Settled - Divestment • Settled - Divestment • Settled - Monetary • Settled - Monetary
Cisco	202.899 B	Various; Mergers	• Conduct - suit by competitor Arista (2016) • Merger – Tandberg acquisition (2010)	• Settled • Not Challenged
Eli Lilly	202.65B	Various; Criminal	• Price Fixing investigation by FTC (1996) • Novartis merger (2015)	• Unclear • Settled - Divestment

Pfizer	193.507 B	Various; Mergers; Criminal	• Price Fixing – 46 attorneys general file suit against drug makers (2020) • Pay for delay (Celebrex 2017) • Tying, reverse payments, and exclusive dealings – (EpiPen class action)	• Ongoing • Settled - Monetary • Ongoing
Salesforce	195.991 B	Mergers	• Slack deal - DOJ investigation ongoing (2021)	• Ongoing
AbbVie	191.351 B	Various conduct	• Pay for delay (2014-2020) • Patent thicket (2020)	• Overturned • Dismissed
Pepsico	183.75B	Various; mergers	• Pepsi Bottling Group and PepsiAmericas, Inc. deal (2010) - approved with behavioral settlement • Monopolization case filed by indep. bottler (2016) • Settled First Class Vending antitrust civil suit in CA (2007)	• Settled - Conduct • Ongoing - Pepsi adverse judgement Nov. 2019) • Settled
Broadcom	178.705 B	Various; mergers, exclusive dealing	• FTC exclusive dealing probe (2019) • European Commission civil investigations into chipset exclusive dealings (2019) – settle with weak commitments, end investigation (2020) • Merger with Brocade – FTC settles with	• Ongoing • Settled - Conduct • Settled - Conduct

			behavioral agreement (2017)	
Thermo Fisher	178.672 B	Mergers	• Roper Technologies merger deal abandoned (2019) • Acquired Life Technologies Corp. -settled FTC concerns (2014)	• Merger - Abandoned • Settled - Divestment
Accenture	167.525 B	None		
Medtronic	159.045 B	Various; mergers; civil	• DOJ investigation right now into ventilator price fixing • Merger with Covidien – settled FTC concerns (2015)	• Ongoing • Settled - Divestment
McDonalds	157.107 B	No poach	State AGs (examples below) • Illinois no poach lawsuit (2020) • Washington no poach investigation, ending provisions (2018)	• Ongoing • Settled - Conduct
Wells Fargo	157.22B	Various civil and criminal; Mergers	• Price fixing settlement – ATM fee class-action lawsuit (2020) • Merger with First Interstate Bancorp – settled (1996) • VRDO bond rate collusion, class	• Settled - Monetary • Settled - Divestment • Ongoing

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			action lawsuit (2020)	
T-Mobile	159.103 B	Mergers	• Sprint merger deal – won in court (2020) • AT&T failed merger deal – sued by DOJ (2011)	• Merger - Cleared in Court • Merger - Abandoned
Texas Instruments	154.416 B	None		
Morgan Stanley	151.055 B	Various; criminal	• Price-fixing case - anti-competitive agreement with KeySpan Corp., restraining trade and manipulating electricity prices in NY– settled DOJ (2011) • Stock lending antitrust lawsuit brought by investors - class action (2017) • Rigging prices on bonds issued by Fannie Mae and Freddie Mac – settled (2019) • VRDO bond rate collusion, class action lawsuit (2020)	• Settled - Monetary • Ongoing • Settled - Monetary • Ongoing

Citigroup	147.511 B	Various; criminal; civil	• Price-fixing – DOJ case on foreign currency exchange – guilty plea agreement (2015) • State-led Libor manipulation lawsuit – settled (2018) • Rigging prices on bonds issued by Fannie Mae and Freddie Mac (2019) – settled with fine • VRDO bond rate collusion, class action lawsuit (2020)	• Guilty - Fined • Settled - Monetary • Settled - Monetary • Ongoing
Qualcomm	145.544 B	Various; FTC; Mergers; Numerous antitrust losses abroad	• FTC monopolization case – failed in court (2017-2020) • Merger, abandoned NXP acquisition after China antitrust challenge (2018)	• Dismissed • Merger - Abandoned
Honeywell	144.768 B	Various; Mergers	• FTC investigated potential collusion with DuPont (only two suppliers of a new refrigerant for automotive AC) – closed (2017) • Merger with General Electric – faced no opposition from US regulators, but blocked by European Commission (2001)	• Closed without Action • Merger - Blocked

UPS	142.455 B	Various	• DOJ investigation into UPS and FedEx potentially blocking out bargain shipping consultants (2011) ○ DOJ investigation brought about by civil case AFMS LLC v. United Parcel Service Co – plaintiff failed to define market (decided 2017)	• Closed without Action ○ Thrown Out on Summary Judgement
Costco	139.768 B	None		
Union Pacific Corp.	142.171 B	Price fixing	• Ongoing rate litigation – claiming surcharge on rail rates between 2003-2008	• Ongoing
Philip Morris International	134.205 B	Mergers	• Altria deal abandoned after antitrust concerns (2019)	• Merger - Abandoned
Bristol-Myers Squibb	138.462 B	Various; Mergers	• Celgene merger – settled (2019)	• Settled - Divestment
Amgen	134.076 B	Various	• Sensipar reverse payment/ pay-for-delay lawsuit (2020)	• Ongoing
Shopify	138.367 B	None		

Boeing	130.832 B	Various	• FTC settled with Boeing and Lockheed's United Launch Alliance joint venture, behavioral agreements made (2007) • FTC exclusive dealing investigation on rocket engine supply (2014)	• Settled - Conduct • Closed without Action
Starbucks	125.547 B	None		
Anheuser-Busch Inbev	123.366 B	Mergers	• Inbev acquires AB with divestitures approved by DOJ (2008) • Grupo Modelo merger approved with divestitures (2013) • SAB merger approved with divestiture (2016)	• Settled - Divestment • Settled - Divestment • Settled - Divestment
Charles Schwab	118.531 B	None		
Charter Communications	119.063 B	Mergers	• Time Warner Cable merger settled with behavioral agreements (2016)	• Settled - Conduct
General Electric	122.357 B	Mergers; old conduct cases	• Electrolux merger abandoned after antitrust concerns (2015) • US v. GE –civil non-merger suit (1996-1999) • Baker Hughes Inc. merger – approved by DOJ with divestitures (2017)	• Merger - Abandoned • Settled - Conduct • Settled - Divestment

Caterpillar	118.996 B	None	• Some private litigation	
American Express	116.747 B	Various	• The DOJ and 17 State AGs sued Visa, MasterCard, and American Express (2010) – regarding merchant fees - Visa and MasterCard settled. American Express litigated to the U.S. Supreme Court, and won (2018) *DOJ had dropped case in 2017, but 11 states went to Supreme Court	• Not guilty
Raytheon Technologies	114.204 B	Mergers	• United Technologies merger settled with divestiture (2020)	• Settled - Divestment
Lowe's Companies	122.581 B	None		
Goldman Sachs	113.645 B	Various civil and criminal	• Price fixing fine, settling investor lawsuit for rigging prices on bonds issued by Fannie Mae and Freddie Mac (2019) • VRDO bond rate collusion, class action lawsuit (2020) • Subsidiary fined by EU for cartel with cable makers (2021)	• Settled - Monetary • Ongoing • Guilty - Fined

IBM	112.646 B	Various	• DOJ opened antitrust probe following T3 Technologies antitrust suit – which was dismissed (2009)	• Closed without Action
Deere & Company	111.268 B	Merger blocked	• Precision Planting acquisition blocked by DOJ (2017)	• Merger - Blocked
Estee Lauder	102.099 B	None		
3M	106.21B	Merger; Private litigation	• Avery Dennison Corp. merger abandoned after DOJ challenge (2012) • LePage wins private litigation against 3M for violating Section 2 of Sherman Act (2003) – 3rd circuit	• Merger - Abandoned • Guilty - Monetary
BlackRock	109.054 B	No major investigations	• Common ownership FTC investigations (2019)	• None
Intuit	105.077 B	Various civil	• No poach with eBay – settled (2014) • Merger with Credit Karma led to DOJ investigation, but cleared after a small divestment (2021)	• Settled - Monetary & Conduct • Settled - Divestment