Before the

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY, AND CONSUMER RIGHTS

Prepared Statement

of

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Hearing on

"Does America Have a Monopoly Problem?

Examining Concentraton and Competition in the US Economy"

March 5, 2019

Overview of Concentration and Competition in the US Economy

Twenty years ago, the then Assistant Attorney General for Antitrust Joel Klein declared that "our economy is more competitive today than it has been in a long, long time." He credited deregulation, international trade, and aggressive antitrust enforcement by both the Justice Department and the Federal Trade Commission as causes of greater competition. As evidence of the role of antitrust, he cited in particular major price-fixing cases, the Microsoft case, and scrutiny of mergers and alliances in airlines, accounting, and other industries .

Since then, the number of major US airlines has gone from 7 to 4. The number of accounting companies has fallen from 8 to 4. The count of car rental companies has fallen even more, from 8 or 9 down to just three–each owning multiple brands. There are now only two pharmacy chains, two sizeable mattress manufacturers, two large brewers. If one dominant tech company was a concern twenty years ago, Microsoft has now been joined by four additional dominant companies, in search, social media, and e-commerce. And these five have collectively acquired more than 600 companies over the past twenty years.

These are only examples, but they illustrate a wider phenomenon, which is that concentration has been steadily rising and competition declining in a great many sectors of the economy. Study after study has reported increases in concentration, while to my knowledge no study has reported a decline. These studies range from a broad overview of about 15 sectors of the economy by the Council of Economic Advisors,[1] to a more detailed analysis of more than 900 sectors in The Economist,[2] to a considerable number of careful academic research studies covering hundreds of industries and sectors over extended periods of time. One study reported, for example, that concentration declined in hundreds of industries during the 1980s and into the 1990s, only then to begin a long period of increasing concentration. For three-fourths of all sectors surveyed in that study, measured concentration rose by about 50 percent between the late 1997and 2014.[3]

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[1] "The Benefits of Competition and Indicators of Market Power." CEA, April 2016

[2] "Too Much of a Good Thing: Profits Are Too High. America Needs a Giant Dose of Competition," *The Economist*, March 2016.

[3] Gustavo Grullon, Yelena Larkin, and Roni Michaely, "Are U.S. Industries Becoming More Concentrated?" *Review of Finance*, forthcoming. I survey this and other studies in my

These studies raise legitimate concerns about increasing market power in large swaths of the U.S. economy, essentially reversing the gains described by the antitrust chief some twenty years ago. To be sure, every one of these studies has some limitation, and so it is important not to read each in isolation. Rather, one should read them as a body of evidence, recognizing that they complement each other. By that I mean, where one study may have a weakness in detail or coverage, some other study has usually addressed that. As a result, it is the totality of this evidence that has no alternative explanation other than that concentration has been rising steadily and significantly in a great many sectors of the US economy.

Then, of course, there is the visible evidence of everyday life, where our choices of airlines, pharmacies, pet food, and myriad other goods and services keep shrinking.

## Entry, Profits, and Competition

But as every student of industry economics knows, concentration does not necessarily imply a lack of competition. While it is a strong indicator, it is also true that some markets have cost structures that do not support multiple firms. In other cases, concentration increases as a result of one company's singular success, and that company might for a time have a larger market share and greater profit. To fully assess competition, we therefore should look in addition to concentration at other determining factors. Here, too, the economic model of competitive markets points the way. A well-functioning market should be characterized by easy of entry and growth by smaller firms, which in turn will compete away the larger firm's advantage and thereby drive concentration and profit back down to normal levels.

So a full assessment of the degree of competition requires examining the ease of entry into markets and the overall level and persistence of profits. There is a great deal of economic evidence on these issues, and that evidence underscores concern about the strength of competition. Data show that firm startup rates–a key measure of entry--are at historic lows, with that rate falling by half over the past 15 years.[4] The sheer number of publicly traded firms in the

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monograph "Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice," *Antitrust Bulletin*, forthcoming (available at ssrn.com/sol3/papers.cfm?abstract_id=3332641). My discussion here is based in part on that monograph.

[4] CEA, 2016, op. cit.

economy as a whole has fallen by half since the mid 1990 and is now no greater than it was in the 1970s when the economy was only one-third as large.[5] Mergers appear to be responsible for the majority of firm disappearances.[6] The problem is so widespread that the Wiltshire 5000 stock index no longer includes 5000 firms. It is down to 3500 eligible companies.

One important reason for these sharp declines is that obstacles to entry and growth have proliferated in recent years. They are different in different industries, but take the form of distribution practices in beer and other industries, shelf space allocation in supermarkets, landing slots in airlines, pay-for-delay in pharmaceuticals, strategic patenting practices, vertical integration, and a variety of restrictions on the occupations.[7] The upshot is that we are seeing less–not more--entry and growth. Indeed, rather than rescuing us from the adverse effects of concentration, entry has become part of the competition problem, serving to further insulate the ever-smaller number of firms from competition in many markets.

The other important element of the analysis concerns corporate profits. Specifically, the questions are whether profits are at an abnormal level, and if so, whether or not they are being eroded, as would be expected if competition prevails. In fact, the evidence shows that profits have been rising and are persistent. Data from the Bureau of Economic Analysis show that profits as a fraction of GDP over the past 30 years have risen by 50 percent, and are now near an all-time high.[8] Council of Economic Advisors cited evidence that those profits are now concentrated in the very top firm or firms in each industry more than ever before–and those firms have an ever higher probability that their profits will persist over time.[9] Other studies show much the same.[10]

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[5] Grullon, et al., op. cit.

[6] Criag Doidge, Kathleen Kahle, G. Andrew Karolyi, and Rene Stulz, "Eclipse of the Public Corporation or Eclipse of the Public Markets?" NBER, January 2018.

[7] Among other sources, see "Occupational Licensing: A Framework for Policymakers," CEA, July 2015.

[8] BEA, "Relationship of Gross Domestic Product, Gross National Product, New National Product, National Income and Personal Income," Table 1.7.5, Sept. 2017

[9] CEA, 2016, op.cit.

[10] I cite and summarize these other studies in "Reviving Merger Control."

In short, profits that are rising, concentrated in fewer firms, and persistent, together with evidence of rising concentration and diminished rates of entry, leave no explanation other than diminished competition. Our economy, once vibrant, full of change and churn, and declared to be more competitive than ever before–that economy has become less dynamic, has fewer new firms challenging incumbents, and is permitting persistent excess profits on those companies. The effects are widespread. Prices rise after a very large fraction of mergers. The resulting profits have shifted economic gains from workers to owners of capital. This has in turn increased income inequality and caused wages to stagnate, as they have for decades. Even productivity growth–modest though it has become–has not benefitted workers. Innovation, too, has suffered.

Our economy started losing its competitive edge starting about 20 years ago, at almost the exact time it was declared to be very competitive. It is now, however, suffering from a hardening of its competitive arteries.

The Role and Responsibility of Antitrust Policy

Let me turn to the important questions of why this has happened, and what can be done about it. I have been studying these questions for several years now, and my research and that of others has yielded some insights and some recommendations.

To begin, we need to recognize that rising concentration is not due to some natural advantages of a few big network and tech companies. By themselves, the Amazons, Apples, Facebooks, Googles, and Microsofts of our world–however much attention they get--do not quantitatively dominate our overall economy. They cannot explain rising concentration in pet food, pharmacies, industrial gases, hospitals, meat packing, banking, supermarkets, and in countless other industries–not directly, and not indirectly.

But those companies do illustrate another important point. In their relatively short lifetimes, those five tech companies have engaged in binge-buying. As I mentioned, they have collectively acquired hundreds of other companies, and their appetite for acquisition has not diminished. To be sure, many–perhaps most--of these are probably harmless or even beneficial, as when a tech company develops and commercializes an innovation that a small company could not have done by itself.

But that scenario may not fully describe Google's acquisition of Doubleclick and Waze, or Microsoft's acquisition of LinkedIn or Skype, and certainly not Facebook's acquisitions of

Instagram and WhatsApp, to name just a few. These mergers and acquisitions do not simply develop an application; whatever else they do, these acquistions extend the reach of the tech company's dominance. They make entry into their core business even more difficult by eliminating outside firms that might pose an eventual threat to that core business. Some of these mergers and acquisitions have helped these companies consolidate their market power and prevent the emergence of future competition.

I do not think policy has been sufficiently assertive in some of these cases. I have similar concerns about the effectiveness of antitrust policy for mergers more generally. Industry after industry that I referred to at the outset has been transformed from having 6 or 8 meaningful firms down to only four or three or sometimes two, often without opposition from the antitrust agencies. One reason this has happened has been a profound shift in merger policy over the past 25 years. The evidence for this shift comes from data published by the one of the antitrust agencies on its merger enforcement practices.[11]

For the years 1996-2011, the FTC has reported on the total number of merger investigations it ran, and of those how many resulted in challenges of some sort, broken down by the level of concentration. For that overall period, quite sensibly, the fraction of investigations that resulted in challenges–the rate of challenge--has been greater for those mergers resulting in fewer remaining significant competitors. So, for example, nearly 100 percent of mergers resulting in only two firms have been challenged, but that rate is considerably lower for mergers resulting in 5 or 8 firms.

What is striking–and disturbing--is how those rates of challenge have changed over time. For mergers resulting in 2, 3, or 4 firms–the highest concentration levels--the FTC has continued with a high rate of challenge, but for mergers just below that very high level, there has been a fundamental policy shift. Between 1996 and 2003–the first half of that period--the FTC challenged 36 percent of mergers that resulted in 5, 6, 7 or 8 competitors--what can be described as medium-to-high concentration mergers. But from 2004 to 2007, for that same group of mergers, the rate of challenge fell by nearly half, from 36 percent down to 16 percent. Even

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[11] A full description can be found in my book, *Mergers, Merger Control, and Remedies: A Retrospective of U.S. Policy*, MIT Press, 2015. Although the Antitrust Division of the Justice Department provides no comparable public data, there is generally considerable similarity in practices at the two agencies

more striking, starting in 2008 and through 2011 when the published data series ends, that rate of challenge dropped from 16 percent to ziterally zero. That is, in those years the FTC did not challenged a single merger that resulted in 5, 6, 7, or 8 firms.

Just to be clear, these are the agency's own data. They are based on their definitions of the relevant markets--more than 1300 of them, over a 16 year period. And they show unambiguously how dramatically enforcement practices changed and have contributed to the rise in concentration in numerous markets.

Of course, some will say that these mergers were probably harmless or even beneficial, so that the agency's practice of permitting them was exactly correct. As it happens, there is good evidence on this issue as well, and it refutes that argument. This evidence comes from another research project that I have conducted. I have gathered all the high-quality published economic studies of the outcomes of individual mergers–about 60 in all.[12] This is, of course, a small fraction of all mergers, but it is the full extent of carefully studied mergers and their outcomes in the literature. I then analyze those outcomes to see what fraction of these mergers turned out to be anticompetitive or not, according to the number of remaining competitors. Not surprisingly, for for mergers among very few firms–going from 3 firms to 2, for example–all of those mergers result in price increases. But again, the agency data shows that it challenged most of these.

But it turns out that it is not only those mergers with the very fewest firms that are ovewhelmingly anticompetitive. The same is true for mergers with five competitors. And for those with 6 remaining firms, 80 percent were anticompetitive. And half of those with 7 remaining firms. What this evidence shows is for those very mergers where policy shifted from some challenges back 20 years ago, to none at all–those with 5 or 6 or 7 remaining competitors–those merger are in fact very often anticompetitive.

The evidence is clear: By this narrowing of focus, policy has in fact permitted numerous mergers that have harmed competition and consumers.

## Looking Forward: Recommendations for Action

Faced with this compelling evidence of rising concentration, diminished entry, excessive

[12] This analysis can be found in *Mergers, Merger Control, and Remedies*, op. cit, as well as in "The Structural Presumption and Safe Harbor in Merger Review: False Positives or Unwarranted Concerns," *Antitrust Law Journal*, 2017.

profits, lax enforcement, and competitive harms, there is, in my view, a pressing need not for more study but for action. But what needs to be done? Here there is some guidance, since many of the necessary actions are essentially reversals of those very policy changes that have led us into the present predicament. Based on my research and experience in the antitrust agencies and the antitrust process, I have several policy recommendations for reviving merger control and strengthening oversight of dominant firms. Here I would like to emphasize just a few of them.

First, the slow erosion of enforcement standards needs to be stopped and reversed. At present the agencies do not even strictly enforce their own stated Merger Guidelines, much less the tighter concentration and share thresholds that need to be enforced. There are a number of factors contributing to this, but one reason is that the agencies at present face a high burden of proof. They must analyze every merger for its unique competitive threat, regardless of how high its concentration, regardless of how obvious the competitive problem, and regardless of how difficult it may be to prove the exact mechanism by which harm will occur. This analysis consumes ever more time and resources, and moreover, by offering what arguments and evidence they have, the agencies effectively provide the parties–with the benefit of inside information and resources--with a roadmap for prevailing against those arguments.

For mergers involving large share firms in concentrated markets, I believe that the burden of proof should be shifted to the parties. In fact, as a result of a much earlier Supreme Court decision, the agencies already have the power to do this. In its Philadelphia National Bank case,[13] the Court observed that some mergers were so inherently likely to be anticompetitive that "sound and practical judicial administration" would "warrant[s] dispensing... with elaborate proof of market structure, market behavior, and anticompetitive effects." Rather, the Court said, a high-share, high-concentration merger "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."

This approach–which has come to be known as the structural presumption–would place the burden of proof squarely on the parties to these particular mergers. That is, such mergers would be presumed anticompetitive, so that the agencies would need only to demonstrate in court that the merger involved high shares in a highly concentrated market to prevail. Of course, the

[13] U.S. v Philadelphia National Bank, 374 U.S. 321 (1963).

parties could offer counter-arguments but those would not overcome the presumption unless the evidence met a "clear showing" standard.  And of course, the agencies would still be required to provide adequate support for invoking the presumption, but they would not need to to construct elaborate econometric models attempting to predict the specific and quantitative competitive harm from a particular merger, as is present practice.

Despite the court's endorsement of the structural presumption and economic evidence of its soundness, it has fallen into disuse by the agencies.  I would urge that the agencies revive use the structural presumption and integrate it into their enforcement practices.  This would simultaneously make merger control both more effective and more efficient–a hard combination to beat.  I would also urge consideration legislation establishing this presumption, which would be helpful to the agencies, the courts, and the business community.[14]

It is also important to note that the Court opinion as well as the underlying merger statute speak in terms of a "substantial lessening of competition," and "anticompetitive effects."  This language is a useful reminder of the broad purposes of antitrust, which is to preserve a marketplace where companies continually vie for customers in myriad ways.  In contrast, current merger control–as set out in the Merger Guidelines--often seems to focus on price effects to the near exclusion of other criteria such as quality, cost, and innovation, among other dimensions of performance.  To some degree these other dimensions get less attention because they are less amenable to economic modeling and measurement than is price.  That emphasis needs readjustment, so that merger analysis does not always rise and fall with detailed application of pricing models and econometric estimation of substitution, diversion, pricing pressure, and other very specific parameters.

In addition to the structural presumption, there is a second important merger doctrine that I believe should be revived in order to strengthen enforcement.  This doctrine is usually called "potential competition," a term that refers to a merger between an existing firm in a market and another firm that is not presently producing the same product but in a position to do so fairly quickly.  Since the existing firm no doubt priced with an eye toward the possible entrant, a merger that eliminates that potential competitor removes that constraint on the existing firm's pricing and other behavior.

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[14] I note that the proposed Consolidation Prevention and Competition Promotion Act of 2019 would similarly shift the burden of proof for certain proposed mergers.

This is straightforward economic theory, analogous to the case of a merger between existing firms, and with good supporting evidence from actual mergers. Despite that, the judiciary has taken a different view. In its Marine Bankcorporation ruling in 1974, the Supreme Court established a higher threshold of proof for the agencies to challenge a merger eliminating a potential competitor.[15] It required (a) that the outside firm have the requisite "characteristics, capabilities, and economic incentives," (b) that the firm be unique or at least one of very few such well-positioned firms, and ( c) that there was actual evidence that such a firm had "in fact tempered oligopolistic behavior" by incumbents. The first two of these criteria are unexceptional, but the third–proof of actual past effect–is quite different than for mergers between incumbents, and far harder to establish.

The effect of this high standard has been to largely sideline the doctrine. While concerns over potential competition do get occasional mention in certain merger challenges, there are few cases where this has played a central role. That in turn has permitted a numerous mergers that have over time altered the competitive landscape surrounding major companies and relieved them from the constraints posed by potential competitors. Given the Supreme Court's ruling, resurrecting the doctrine of potential competition will require congressional action. I would urge consideration of legislation that simply states that a merger eliminating a potential competitor should be evaluated by the same standard as a merger between existing competitors. I believe this would significantly and appropriately strengthen merger control.

A third area of reform for strengthening merger control would elevate the creation of entry barriers as a separate basis for challenging a merger. The rationale is straightforward: an acquisition could make subsequent entry more difficult if, for example, it involves one of very few capable sellers in the target company's market. Such an acquisition might then require any subsequent entrant simultaneously to be capable of entering both the first company's market but also the market for the target company's product in order for it to compete effectively. By creating or increasing impediments to new entry, existing firms are freed from concern about outside intruders into their market. This enables them to work out methods of relaxed competition, ultimately resulting in higher prices or other adverse effects.

At present, concern over heightened entry barriers plays at most a supplementary role in

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[15] *U.S. v. Marine Bancorporation*, 418 U.S. 602 (1974)

evaluating mergers for their possible anticompetitive effect. Most analysis focuses on price effects, which occur relatively soon, whereas the process by which entry limitations benefits existing firms is slower. I would urge that mergers creating or enhancing entry barriers should therefore represent a separate competitive concern distinct from an immediate price effect.

I of course, recognize that any limitation on mergers and acquisitions will inevitably be criticized as impeding efficiencies and consumer benefits. I think it is increasingly important that efficiency arguments not dominate the antitrust process with respect to the tech companies or any others. Among the important reasons is the fact that this argument proves too much: efficiencies can be argued right up until there is only one firm remaining in each industry. Perhaps more importantly, there is good evidence from economic studies and from management consulting firms[16] showing that claimed benefits from mergers generally do not materialize, or at best are so modest that they are already accounted for in the Merger Guidelines framework.

That said, it would not be wise to reject a merger with trivial anticompetitive effects if it clearly had large benefits. But that is hardly ever the case. Nonetheless the antitrust agencies evaluate all claims of efficiencies in essentially all mergers. Given the evidence, I believe that the antitrust process would be more efficient and no less effective by returning to an earlier standard by which efficiencies would be considered only in “extraordinary” circumstances. That standard, articulated in an earlier version of the Merger Guidelines, would relieve the agency of the burden of detailed analysis of every claim regardless of its magnitude or plausibility. Moreover, to be considered, any claims should be supported by evidence from the merging companies’ past practices or from documentation that was prepared well before the merger is notified to the agencies, thus limiting the weight attached to claimed efficiencies “found” only after the merger is proposed.

A final substantive area that I believe needs reform in order to improve merger policy concerns remedies. Over the past 20 or 30 years the antitrust agencies have emphasized fixing specific competition problems that arise as a result of a merger, in order to avoid the difficult choice between either banning a merger outright or clearing it in its entirety. A third way can, of course, be good public policy, but only so long as the policy does in fact preserve or restore the competition that would otherwise be lost as a result of the merger. But the evidence now shows

[16] *McKinsey on Finance*, “Where Mergers Go Wrong,” 2004.

that remedies have been overused, have often not effectively preserved competition, but rather have allowed price increases similar to what otherwise would have occurred.[17]

The reasons all too apparent. Even the most straightforward remedy–a simple divestiture of one overlapping business of the two merging firms–requires attention to critical factors such as the capability of the buyer, the adequacy of the assets to be divested, the extent of overlap, and so forth. Most remedies are more complicated than that--some, much more complicated. So-called behavioral or conduct remedies are the most problematic since they allow the merger to proceed in its entirely, but prohibit the merged firm from specific, enumerated anticompetitive actions. Unfortunately, such enumeration is almost inevitably incomplete or overtaken by events or defeated by actions of the parties, which after all have every incentive to avoid and evade the effect of the constraint. In addition, this type of remedy requires on-going oversight of a regulatory nature by the antitrust agency, a task for which they are not equipped.

I believe that the use of remedies, especially behavioral remedies, must therefore be significantly curtailed. Rather, where there are significant competitive problems with a merger, without a remedy that achieves a very high likelihood of succeeding, the agency should recognize that nothing short of a challenge will preserve competition.

## The Tech Sector

The rise of several dominant firms in the tech sector has raised particular concerns about their competitive effects and the appropriate role of policy. Here I will simply note how the reforms I have already mentioned could significantly strengthen policy with respect to mergers and acquisitions by these companies.

First, as I noted, Microsoft, Google, Facebook, Apple and Amazon have an unparalleled record of mergers and acquisitions. In many cases, these raise no competitive concerns, but in others they have acquired companies whose technology is sufficiently fungible and adaptable that they might evolve into a capable future competitor even if at present their products and service do not overlap. Such might have been the case for several of the examples that I previously mentioned. In these latter cases, a strengthened version of doctrine of potential competition could usefully be applied. Application to acquisitions by the tech companies could be directed

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[17] *Mergers, Merger Control, and Remedies*, op. cit.

not at the current or even the future products and services of the target company. Rather, the central focus could be on the potential adaptability of its technological capability. That is, where the target firm's technological capability might plausibly be adapted so as to produce a substitutable--even a partially substitutable--service, the acquisition could be prohibited as forestalling future competition.

Secondly, for the major tech companies where network effects can create irreversible marketplace advantages, it is worth considering a broad presumption against any such acquisitions. Such a presumption would not automatically prohibit such mergers, but rather, it would shift the burden of proof to the prospective merging companies to demonstrate that the technology of the to-be-acquired company is *not* capable of being adapted and becoming an alternative product or service. In fact, if so represented by the parties and the agency were then to approve the merger, the approval could be conditioned on that promise by the parties–which would, of course, deter the parties from seeking to acquire a potential competitor in the first place.

To be sure, this enhanced merger standard would not address all competitive concerns with respect to the tech companies. A further set of concerns stems from their use of their dominance of a core technology–operating systems, search, e-commerce, etc.–rather than because of mergers and acquisitions. These concerns likely require additional measures beyond those I am addressing at this time.

## Process Recommendations

I will conclude this summary of recommendations with brief mention of two necessary reforms that are procedural rather than substantive in nature. The first is that I believe that the agencies should, as a matter of regular procedure, have a program for continuous improvement of their policies and practices. Operationally, such a program would consist of regular retrospectives evaluating the outcomes of their policy decisions–their screening system for mergers to be investigated, their decisions whether or not to bring a challenge, their choice of remedy or not, and so forth. Routine evaluations would provide information about their decision process and the effectiveness of policy, informing the agencies on an on-going basis as to how to improve their enforcement practices.

The value of such retrospectives is demonstrated by past events. About 15 years ago, the

FTC conducted a series of retrospectives on hospital mergers that both strengthened its analytical approach toward such mergers and better informed the courts about their effects. Policy changed as a result, and the agency prevailed in most subsequent court cases. The FTC also, twice, has conducted evaluations of a much more summary nature on their merger remedies, leading to some useful changes. Despite these examples, neither the FTC nor the Antitrust Division has a program of regular ex post evaluation programs in place. I believe both should do so.[18]

Finally, I would note that recommendations that the agencies regularly conduct retrospectives, that they challenge more mergers rather than settling for remedies, and that they bring cases against mergers that eliminate potential competitors all involve greater workload. True, the recommendation for greater reliance on the structural presumption would reduce their burden, but on balance I suspect these recommendations would entail a greater workload and would need to be supported with additional resources.

That need is underscored by evidence that the agencies are already tightly constrained in their activities by inadequate budgets. For example, Antitrust Division's budget has been essentially flat in nominal terms since 2011, not even matching the rate of inflation. The result has been that the number of investigations that the Division has been able to conduct has remained roughly constant, even as the number of reported mergers has risen by more than 75 percent. This implies that an ever greater fraction of mergers are not even investigated.

In the context of a growing economy and rising number of mergers, especially large and complex mergers, even the present level of resources does not support the antitrust mission adequately. The need for the agencies to address a wider array of competitive concerns must therefore be matched by the necessary resources. I would urge consideration of an increase both in congressional appropriations and in filing fees structured so that the fees accrue to the agencies rather than as offsets to congressional appropriations.[19]

These procedural reforms would complement the substantive reforms I have urged, and bring merger control and antitrust more generally into conformity with the needs of our times, and the important mission of these agencies in protecting consumers and competition.

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[18] The proposed "Merger Retrospective Act of 2017" would have required a regular practice of retrospectives by the agencies.

[19] The "Merger Enforcement Improvement Act" would provide for these changes.