Competition and Antitrust Law Enforcement Reform Act:
Bolstering antitrust enforcement to build a stronger economy and a fairer society

THE PROBLEM

Competitive markets and effective antitrust enforcement are critical to ensuring low prices for consumers and fair wages for American workers, spurring innovation, promoting economic equity, and fostering an environment in which American entrepreneurs can start and grow new businesses.

Yet today's economy is characterized by falling levels of competition across multiple industries. We see growing consolidation in many of our markets as ever larger mergers and acquisitions become the norm, and large companies buy out upstart competitors before they can become a competitive threat. Harmful exclusionary practices by dominant companies – such as refusals to deal with rivals, restrictive contracting, and predatory pricing – prevent actual and potential rivals from competing on the merits. As a result, U.S. enforcement against the anticompetitive conduct of powerful firms has lagged efforts in other developed countries, particularly when it comes to enforcement against the dominant digital platforms and other larger corporations.

Amid concerns about rising monopoly power, the public has increasingly called on the Federal Trade Commission (FTC) and Department of Justice's Antitrust Division (DOJ) to take action to protect competition, consumers, and innovation in our economy. But decades of federal court decisions – many of which rely on inaccurate economic assumptions – have sapped existing laws of their vitality, weakening enforcers' ability to stop harmful consolidation and prevent anticompetitive conduct. In addition, over the years, Congress has failed to ensure that competition enforcers at the FTC and DOJ are adequately funded, leaving fewer enforcement staff to confront mounting demands. This, combined with a diminished set of legal tools to deter violations, has left enforcers short-handed, chilling competition enforcement.

The result is an increased danger of our markets becoming less competitive and our economy becoming less dynamic and less prosperous.

PRACTICAL SOLUTIONS

American markets were once the most competitive in the world because they were protected by strongest antitrust laws in the world. That is no longer true. *The Competition and Antitrust Law Enforcement Reform Act* will reinvigorate America's antitrust laws and help restore competition to the American markets by strengthening prohibitions on anticompetitive conduct and mergers, giving federal enforcers the resources they need, and making additional reforms to improve enforcement effectiveness.

I. Strengthening Prohibitions Against Anticompetitive Mergers

The bill would restore the original intent of Section 7 of the Clayton Act, which was designed stop anticompetitive mergers in order to address competitive problems in their "incipiency" before they ripened and caused harm. But because the courts have required proof of a high degree of anticompetitive effect to a near certainty, enforcers can block only the most egregious acquisitions, allowing many harmful merger to escape scrutiny and close unimpeded.

a. Updating the legal standard

The bill amends the Clayton Act to forbid mergers that "create an appreciable risk of materially lessening competition" rather than mergers that "substantially lessen competition," where "materially" is defined as "more than a de minimus amount." By adding a risk-based standard and clarifying the amount of likely that harm enforcers must prove, enforcers can more effectively stop anticompetitive mergers that currently slip through the cracks. The bill also clarifies that mergers that create a monopsony (the power to unfairly lower the prices its pays or wages it offers because of lack of competition among buyers or employers) violate the statute.

b. Shifting the burden of proof to merging parties

This bill defines several categories of mergers that pose significant risks to competition and shifts the legal burden to the merging parties to prove that mergers falling into those categories do *not* create an appreciable risk of materially lessening competition or tend to create a monopoly or monopsony. Those categories are:

(1) Mergers that significantly increase market concentration;
(2) Acquisitions of competitors or nascent competitors by a dominant firm (defined a 50% market share or possession of significant market power);
(3) Acquisition of a disruptive maverick firm by a competitor;
(4) Acquisitions resulting in anticompetitive effects
(5) Mega-mergers – transactions (a) valued at more than $5 billion, or (b) where the acquiring party (i) has assets, net revenue, or market capitalization of more than $100 billion and (ii) makes an acquisition of $50 million or more.

II. Preventing Harmful Dominant Firm Conduct

Decades of flawed court decisions have weakened the effectiveness of Section 2 of the Sherman Antitrust Act to prevent anticompetitive exclusionary conduct. The bill creates a new provision under the Clayton Act to prohibit "exclusionary conduct" (conduct that materially disadvantages competitors or limits their opportunity to compete) that presents an "appreciable risk of harming competition." As exclusionary practices by dominant companies present the greatest risks to competition, when a company that has a market share of greater than 50% or otherwise has significant market power engages in exclusionary conduct, it create a rebuttable presumption that the conduct presents an "appreciable risk of harming competition." If the presumption applies, the dominant firm will bear the legal burden of justifying its exclusionary conduct in court.

III. Increasing Enforcement Resources

For years, enforcement budgets at the Antitrust Division and Federal Trade Commission have failed to keep pace with the growth of the economy, the steady increase in merger filings, and increasing demands on the agencies resources. There were modest increases to agency appropriations last year, but not nearly enough to make up for a decade of flat budgets. To enable the agencies to fulfill their missions and protect competition against the richest, most sophisticated companies in the world, this bill would authorize $300 million increases to each agency's annual budget, providing $484.5 million to the Antitrust Division and $651 million to the FTC.

IV. Additional Reforms to Enhance Antitrust Enforcement

(1) **Substantial Civil Fines for Violations** – Federal enforcers cannot currently seek fines for violations of the antitrust laws in the first instance. The bill authorizes the federal antitrust agencies to seek civil fines in court for violation of Sections 1 and 2 of Sherman Act and the exclusionary conduct offense established under this bill. These civil fines are in addition to, not in lieu of, other remedies for these offenses under, including injunctions and company break-up remedies. The amount of civil fines is capped at the greater of:
    a. 15 percent of the total United States revenues of the person for the previous calendar year; or
    b. 30 percent of the United States revenues of the person in any line of commerce affected or targeted by the unlawful conduct during the period of the unlawful conduct.

(2) **Establish a Competition Advocate and a Division of Market Analysis** – The bill would create an independent Competition Advocate within the FTC to help consumers raise complaints about anticompetitive activity, encourage antitrust investigations, and issue public reports on merger activity. Within the Office of the Competition Advocate, the bill establishes a Division of Market Analysis to conduct independent industry competition studies and retrospective studies of prior mergers to inform enforcement policy and identify potential enforcement opportunities.

(3) **Require Parties to a Merger Settlement to Provide Post-Merger Data to Enforcers** – Companies would need to provide the agencies with information regarding post-merger effects, whether alleged efficiencies and consumer benefits have materialized, and the effectiveness of settlement conditions. As a result, the antitrust agencies will better understand which mergers can be resolved and which are too big to fix.

(4) **Eliminate Unnecessary "Market Definition" Requirements** – Courts often require claimants to prove a relevant market to establish liability under the antitrust laws, even in the face of clear evidence of competitive harm. The bill clarifies that the antitrust laws do not require definition of a relevant market, unless the statutory language explicitly requires it to resolve the case.

(5) **Limitations on Implied Immunity from Antitrust Laws** – Courts have implied immunity from the antitrust laws for certain conduct based on the existence of federal regulation, in some circumstances even ignoring statutory savings clauses passed by Congress. The bill limits the ability of courts to imply antitrust immunity for regulated conduct.

(6) **Whistleblower Protections & Incentives** – This bill would extent the protections recently granted to criminal whistleblowers to civil whistleblowers as well. It would also establish a bounty system to reward criminal whistleblowers for providing evidence in antitrust cases resulting in the collection of a criminal fines.

(7) **Prejudgment Interest for Antitrust Plaintiffs** – Entitling successful antitrust to recover prejudgment interest on their antitrust damages awards, providing additional deterrence against violations and litigation delay tactics by defendants.

(8) **Competition Studies** – The bill would require studies on (a) of the broader impacts of industry consolidation on society, (b) institutional investors' cross-ownership of competing companies in concentrated sectors, and (3) merger remedies and the impact of mergers on wages, employment, innovation, and new business formation.