U.S. Department of Justice and Federal Trade Commission
Proposed Merger Guidelines
Comments of NetChoice

September 18, 2023

NetChoice, a national trade association of tech businesses committed to defending free expression and free enterprise online, submits the following comments in response to the U.S. Department of Justice and Federal Trade Commission's Draft Merger Guidelines. Like others, NetChoice wishes the Agencies would have extended the comment period to give interested parties enough time to respond fully. The Agencies took over a year to publish the Draft Guidelines, but gave the public a mere 60 days to respond. The Agencies also launched workshops on the Draft Guidelines *before* the comment period even finished, stretching the public even thinner and further impairing its ability to meaningfully engage.

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NetChoice's comments address the Clayton Act's text, precedents interpreting the text, and the major questions doctrine's application to the Draft Guidelines. Although not exhaustive, the comments conclude that the Agencies' Draft Guidelines substantially rewrite the law and aggrandize authority for the Agencies Congress never delegated.

First, a textualist reading of § 7 of the Clayton Act reveals that the Clayton Act bans only mergers reasonably likely to choke off competition to the point of hurting the "public" through reduced output, higher prices, degraded products, and similar economic harms to consumers.

- The ordinary meaning of § 7's terms—at the time of enactment in 1914 and reenactment in 1950—reveals that Congress banned only mergers with a reasonable probability of substantially decreasing competition

to the point of hurting the public through, among other anticompetitive harms, reduced outputs and higher prices.

- Congress ratified the Supreme Court's interpretations of § 7's terms when it reenacted the Clayton Act in 1950 using the same substantive text. Although Congress did amend some statutory provisions—expanding its reach to cover all mergers and acquisitions, for example—it ratified the Supreme Court's interpretation of § 7's terms.
- At the time of Congress's 1950 reenactment, the Supreme Court had interpreted § 7 to prohibit only acquisitions that "*probably will* result in lessening competition to a substantial degree" and "will injuriously affect the public."[1] The Supreme Court has never overruled that decision. Nor has Congress overturned it through legislation.
- Congress ratified the Supreme Court's interpretation of "injuries to the public" as "the evils which were supposed to follow from the undue lessening of competition" like reduced (or restricted) output and higher prices.[2]

Second, a textualist reading of § 7 forecloses the Agencies' interpretation of, and enforcement practices under, the statute. The Agencies have exceeded Congress's delegation of power by claiming for themselves the authority to reshape businesses, markets, industries, and even the economy based on their notions of how competition should work and look.

- The Agencies do not have statutory authority to, among other things, block mergers merely because they increase concentration (even in highly concentrated markets and even if substantially). Or because they might harm competitors. In short, the Agencies have no authority

[1] *International Shoe Co. v. FTC*, 234 U.S. 291 (1930) (citing *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922)) (interpreting § 7 of the Clayton Act) (emphasis added).
[2] *Id.* at 297-98.

to waive the Clayton Act's instruction that a merger's *effects* on competition is what the statute turns on.

- The Agencies also lack statutory authority to modify Congress's use of the term "competition." Although not explicitly stated, the Draft Guidelines' pretext is clear: the Agencies are redefining competition to mean, for the most part, the number of firms in a market and their respective market shares. To be sure, Congress left competition undefined in the original Clayton Act. But its ordinary meaning in 1914—and the Supreme Court's interpretation of the statute, which Congress ratified by reenactment in 1950—rule out the Agencies' definition. Indeed, even the legislative history the Agencies (and their court citations) rely on includes evidence that Congress understood competition to refer to the pressure between rivals. Even concentrated markets dominated by a few large firms might still be highly competitive.
- The Agencies also lack statutory authority over a host of major policies proposed—for example, using merger enforcement to encourage firms to grow through internal means, not by combination. No matter the dicta in some Supreme Court cases, Congress did not authorize the Agencies (or the courts) to tell businesses how to structure their businesses beyond the Clayton Act's explicit text.

And ***third***, in rewriting the law and conjuring up authority they do not have, the Agencies have exceeded Congress's delegation of enforcement power and—in practicing what their Draft Guidelines preach—trigger the major questions doctrine. The Agencies are likely to lose at least some challenges claiming they have exceeded their statutory authority.

- All agree the Agencies have enforcement authority. But like other agencies across the administrative state, the Department of Justice and FTC claim to have authority they simply do not have. Yes, the Agencies have the power to block mergers that substantially lessen

competition. But it does not follow that the Agencies may shield small firms (or any firms) from the effects of competition. Nor does it follow that the Agencies may sit on the board of directors and call the shots about how to grow. The law ensures market forces—not the Agencies—allocate resources.

- Because the Agencies are claiming authority to regulate on issues of "economic and political significance," courts will not defer to the Agencies' interpretation of their authorizing statutes. Instead, the Court will look for clear statutory authorization from Congress for the *specific* policy, process, or power asserted. The Draft Guidelines mostly flunk that test.

DRAFT MERGER GUIDELINES

The Agencies' work product rewrites the Clayton Act under the guise of enforcing its terms. "The Draft Guidelines," an FTC fact sheet boasts, "are built around statutory text and relevant case precedent," and "are the first merger guidelines to cite case precedents."[3] Fair enough, they break new ground citing case law. But the only clarity given is that the Agencies do not intend to enforce the law as written and interpreted. Instead of accurately describing the legal frameworks governing § 7 cases specifically and relevant antitrust principles generally, the Agencies splice and dice language from only a few cases and only to extract seemingly helpful (and in some cases, nonbinding) language. They are also the first guidelines to flout the text they claim to be built on, to deceptively interpret selectively chosen cases, and to subvert Congress's Article I powers enough to trigger the major questions doctrine.

The Merger Guidelines were once meant to explain the Agencies' approach to enforcement of federal merger law—chiefly, the Clayton Act.[4] First published in

[3] Federal Trade Commission, Fact Sheet – 2023 Draft Merger Guidelines for Public Comment (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Merger-Guidelines-Fact-Sheet-07-17-2023.pdf.
[4] Department of Justice & Federal Trade Commission, Draft Merger Guidelines 1, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

1968, the Merger Guidelines "acquaint[ed]" the public with the Department of Justice's standards for enforcement under the Clayton Act.[5] The FTC later joined the Justice Department in issuing the Guidelines and explaining how the Agencies would exercise their prosecutorial discretion. Although not legally binding on the courts, the Merger Guidelines' rigor earned favorable citations in every U.S. Circuit Court of Appeals.

The Draft Guidelines shred that credibility and cast doubt on whether the Agencies are acting in good faith. That, sadly enough, comes as no surprise. Agency officials have been engaged in a campaign of misdirection since taking the administrative reins—crediting their standardless standards with the virtues of the consumer welfare standard they unilaterally tossed out[6]; projecting an intent to manipulate the law to achieve ideological goals on their predecessors' guidelines, not their own[7]; and claiming with a straightface that their guidelines flow from a textualist reading of the statute, unlike the consumer welfare standard.[8] None of that is true.

The Agencies know this, but are undeterred anyway. Antitrust litigation is expensive and exhausting. Like most, businesses prefer not to engage in costly litigation that stretches on—and on, and on. By contrast, the Agencies aren't worried about losing in court. In fact, their leaders have openly criticized concerns about bringing "losing cases." To them, no merger challenge is a bad merger challenge because each tells the business community—*this could be you!* With the Draft Guidelines, the Agencies intend to—and will—chill lawful merger activity

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[5] Department of Justice, Merger Guidelines 1 (1968), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf.

[6] *See, e.g.*, Remarks of Assistant Attorney General of the Antitrust Division Johnathan Kanter at the Federalist Society's event "Competition Policy, Corporate Concentration & Freedom of Thought: Approaching the Draft Merger Guidelines" (August 2023), https://www.youtube.com/watch?v=_FjgHHQ1_78.

[7] *See, e.g.*, Remarks of Chair Lina M. Khan As Prepared for Fordham Annual Conference on International Antitrust Law & Policy 5 (Sept. 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf.

[8] *See, e.g.*, Remarks of Assistant Attorney General of the Antitrust Division Johnathan Kanter at the Federalist Society's event "Competition Policy, Corporate Concentration & Freedom of Thought: Approaching the Draft Merger Guidelines" (August 2023), https://www.youtube.com/watch?v=_FjgHHQ1_78.

whether or not they lose in court. According to press reports, the Agencies' duplicity is already succeeding.

SETTING THE STATUTORY SCENE

Congress enacted the Sherman Act in 1890 to ban unreasonable restraints of trade[9] and the use of anticompetitive conduct to gain or maintain monopoly power[10]. Congress did so "on the belief that market forces 'yield the best allocation' of the Nation's resources."[11] When gaps in the law's coverage appeared, Congress was quick to respond. In 1914, Congress enacted the Clayton Act "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency, and before consummation."[12] When market changes revealed gaps in that law, Congress enacted the Celler-Kefauver Act in 1950 to plug them. Congress has left the law's commands untouched ever since.

Under § 7 of the Clayton Act, Congress prohibited mergers only when their "effect" "may be substantially to lessen competition, or to tend to create a monopoly," "in any line of commerce or in any activity affecting commerce in any section of the country."[13] Though short on details, the text says a lot—and none of it good for the Agencies' interpretation. ***First***, the statute expressly requires an "effects" test. Rather than probe the intent behind decisions to merge, the statute tells the Agencies and the courts to focus on the merger's probable effects. ***Second***,

[9] Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. The Supreme Court initially interpreted § 1 literally, holding that it outlawed *all* contracts. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897). The Court soon after interpreted the terms in light of their common-law background and held that § 1 bans only *unreasonable* restraints. *Standard Oil Co. v. United States*, 221 U.S. 1, 66 (1911).
[10] Section 2 of the Sherman Act makes it unlawful for any firm to "monopolize, attempt to monopolize, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. The Supreme Court has long interpreted § 2 to prohibit the creation or maintenance of monopoly power through the use of predatory, exclusionary, or other otherwise anticompetitive conduct. *Verizon Communications v. Trinko*, 540 U.S. 398 (2004); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985); *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911).
[11] *NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021) (quoting *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U. S. 85, 104, n. 27 (1984)).
[12] S. REP. NO. 698, 63d CONG., 2d Sess. 1 (1914).
[13] 15 U.S.C. § 18.

the statute singles out two kinds of effects for prohibition—(1) those that substantially lessen competition and (2) those that tend to create monopolies. Both effects are *economic*. And ***third***, the statute kicks in whenever either of those effects "may" result from a merger in any relevant market. Put another way, mergers that may increase competition or modestly decrease it are lawful.

Congress did not define § 7's terms in 1914 or 1950. But a straightforward rule emerges from their ordinary meaning: § 7 prohibits only mergers "with a probable anticompetitive effect."[14] Neither Congress nor the Supreme Court has ever spelled out all anticompetitive effects.[15] But the statute's text, structure, context, and history all underscore that the statute's chief (but not sole) concerns are reduced output and higher prices.[16]

Statutory interpretation begins "with the language of the statute."[17] When the language is clear, it "ends there as well."[18] When it's not, courts apply standard tools of statutory interpretation to determine the "ordinary public meaning of [the statute's] terms at the time of its enactment."[19] Dictionaries from the time of enactment help narrow down potential meanings.[20] And a word's context—how it's used in the statute; what historical baggage it carries—helps determine which of those meanings is the likely statutory meaning.[21]

The ordinary meaning of § 7 forecloses the Agencies' claim to expansive enforcement power—rendering the Draft Guidelines substantially unlawful.

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[14] *Brown Shoe, Inc. v. United States*, 370 U.S. 294, 323 (1962).

[15] Consistent with economic learning, however, the Supreme Court has identified evidence of higher prices or reduced output as the most common culprits, followed by degraded product quality and stifled innovation. See 11 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1901d (4th ed. 2018).

[16] Herbert Hovenkamp, *Antitrust Goals in Federal Courts* (2023), https://deliverypdf.ssrn.com/delivery.php?ID=673064096005018113026028111104026100001024071012061053073117024088121011070114109091011099101107042108110078122025066098087103031034078007004007107015016096122038047037012021119000108107005115103071101000030097075015020123065114096126078102115004&EXT=pdf&INDEX=TRUE.

[17] *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016).

[18] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

[19] *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020).

[20] *E.g.*, *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017); *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

[21] *See, e.g.*, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012).

Definitions of Effect & Lessen. Start with the easiest terms to define: effect and lessen. Dictionaries at the time of the Clayton Act's enactment defined effect as having the same meaning it has today: "Something accomplished, caused, or produced; a result, consequence."[22] The same was true in 1950.[23] The meaning of lessen—to decrease, diminish, or otherwise reduce[24]—has also been consistent through time.[25]

Although all agree that effect means effect, the devil—and disagreement—is in the details about what kind of effects the statute covers. According to the Agencies, the term is broad enough to encompass effects like harm to a competing business's bottom line and protection of favored competitors from vigorous competition.[26] They have also claimed the authority to redirect antitrust law's main purpose of preventing economic harms to consumers to preventing market concentration and reductions in competition (substantial or not).

Reading "effect" in its "context and with a view to [its] place in the overall statutory scheme"[27] clarifies that Congress meant economic harms as measured by effects on consumers. First, consider Congress's chosen language in § 7—"substantially to lessen *competition*, or to tend toward a *monopoly*." As discussed below, both terms reflect an economic focus. Second, while the Agencies point to dicta about Congress's intent to prevent concentration,[28] the statute's actual text says nothing about preventing concentration for its own sake. Concentration is relevant only when it helps reveal a merger's competitive effects. But aside from that, concentration is not itself a prohibited end. Effect, in other words, is not an empty vessel for the Agencies to fill. Otherwise, it would mean the Agencies could

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[22] *Effect*, Century Dictionary and Cyclopedia (1897).
[23] *Effect*, Webster's New International Dictionary (2d ed. 1950).
[24] *Lessen*, Webster's New International Dictionary (1913); *Lessening*, Century Dictionary and Cyclopedia (1897).
[25] *Lessen*, Webster's New International Dictionary (2d ed. 1950).
[26] *See, e.g.*, Draft Guidelines, Guideline 11, at 23-25.
[27] *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotation marks omitted).
[28] Draft Guidelines, Overview, 1-2.

decide for themselves what the law prohibits simply by manipulating what counts as an effect. That raises many concerns.

As for legislative history—well, it's a grab bag. Whatever the legislative history, it can "never" be used to "muddy" clear statutory language.[29] The Clayton Act's text is clear: prohibited effects include only substantial decreases in competition and creation of monopoly power. By contrast, the legislative history offers support for goals never enacted in the statute's text and support for goals actually enacted. In addition to some lawmakers' comments about concentration (the basis of the Agencies' claimed authority), history shows that those same lawmakers heard testimony from § 7's primary drafter explaining that one "can conceive of many instances wherein a company among the Big Three or Big Four could buy up another firm, where the effect of that acquisition would be to promote rather than lessen competition" and thus would be lawful.[30] Add to that committee reports indicating the amendment was intended to adopt the Supreme Court's interpretation of § 7 blocking only "acquisitions as probably will result in lessening competition to a substantial degree" that it "will injuriously affect the public."[31] Indeed, the House Report recommending passage of the 1950 amendment explained the language "follows closely the purpose of the Clayton Act as defined by the Supreme Court in the International Shoe case."[32]

Definition of May. The Agencies correctly point out that Congress's use of "may" means the statute's scope covers *possibilities*, not just certainties. May, after all, has been commonly understood to mean "possibility or probability" since the Clayton Act's start.[33] Then, as now, "possibility" meant: "[t]he quality or state of being possible; [t]hat which is possible."[34] And "probability": "[t]he quality or state of

[29] *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).
[30] *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 1st Sess., ser. 14, pt. 1, at 207 (1949).
[31] *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 2968 (1930).
[32] H.R. REP. No. 1191, at 7.
[33] *Maybe*, Webster's New International Dictionary (1913); *Maybe*, Webster's New International Dictionary (2d ed. 1950).
[34] *Possibility*, Webster's New International Dictionary (1913).

being probable; appearance of reality or truth; reasonable ground of presumption; likelihood."[35]

At first glance, two possible meanings emerge. The statute could apply either to all mergers capable of substantially lessening competition and tending to create monopoly, or only to those with a reasonable chance of actually doing so. The Supreme Court has consistently used the latter interpretation when interpreting the phrase:

- In 1922: "But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as *would* under the circumstances disclosed *probably* lessen competition, or create an *actual* tendency to monopoly."[36]
- In 1930: "the act deals only with such acquisitions as *probably will* result in lessening competition to a substantial degree."[37]
- In 1957: that "the test of a violation of § 7 is whether, at the time of the suit, there is a *reasonable probability* that the acquisition *is likely to* result in the condemned restraints."[38]
- In 1962: "Congress used the words 'may be substantially to lessen competition,' to indicate that its concern was with *probabilities*, not certainties."[39]
- In 1964: "The issue is whether the merger … will have *probable* anticompetitive effect."[40]

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[35] *Probability*, Webster's New International Dictionary (1913).
[36] *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356-57 (1922) (interpreting identical language under § 3 of the Clayton Act) (emphasis added).
[37] *International Shoe Co. v. FTC*, 234 U.S. 291 (1930) (citing *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922)) (interpreting § 7 of the Clayton Act) (emphasis added).
[38] *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957) (interpreting § 7 of the Clayton Act) (emphasis added).
[39] *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (interpreting § 7 of the Clayton Act) (emphasis added).
[40] *United States v. Cont'l Can Co.*, 378 U.S. 441, 458 (1964) (interpreting § 7 of the Clayton Act) (emphasis added).

- In 1974: The Clayton Act applies "when a 'tendency' toward monopoly or [a] '*reasonable likelihood*' of a substantial lessening of competition in the relevant market *is shown*." After all, "§ 7 deals in '*probabilities*,' not 'ephemeral possibilities.'"[41]

Congress affirmed the Supreme Court's interpretation when it amended and reenacted the Clayton Act in 1950. Under the ratification canon, courts presume Congress adopts judicial interpretations of statutes when it reenacts the same statute with the same language.[42] Even the FTC has long recognized that "may be" tests not mere possibility but "probability."[43] And legislative history expressly approving the Court's interpretations is icing on the cake.[44]

Definition of Substantially. Congress's use of "substantially" further limits the statute's application. In 1914, as in 1950, substantially meant "in a substantial manner; strongly, solidly," or as "in the main; essentially; by including the material or essential part."[45]

The Supreme Court's interpretation of substantially mirrors the term's ordinary meaning. In binding precedents the Agencies fail to cite, the Supreme Court defined "substantially to lessen competition" to mean decreasing competition to such a "substantial degree" that it "will injuriously affect the public."[46] In other words, if the merger's essential effect is to harm the public in economic terms, then the merger's unlawful.

Context confirms that Congress used substantially to mean essentially. As the plain reading of the statute makes clear, Congress never intended to prohibit all

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[41] *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622–23 (1974) (cleaned up) (emphasis added).
[42] *Helsinn Healthcare v. Teva Pharmaceuticals*, 139 S. Ct. 628, 633-34 (2019); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'") (internal citation omitted).
[43] Federal Trade Commission, Report on Corporate Mergers and Acquisitions 154 (1955).
[44] H.R. REP. No. 1191, at 7; 96 CONG. REC. 16435 (1950); 95 CONG. REC. 11487 (1949).
[45] *Substantially*, The Century Dictionary and Cyclopedia (1897); *Substantially*, Webster's New International Dictionary (2d ed. 1950).
[46] *Int'l Shoe*, 234 U.S. 291 at 298.

or even most mergers. Instead, it listed just two kinds of mergers for prohibition—(1) those tending to create monopoly power and (2) those likely to substantially lessen competition. Congress's division is curious—the creation of monopoly power is itself a substantial lessening of competition. But it signals that substantial means something less than full-blown monopoly power that still harms consumers through market power.

Definition of Competition. Competition as used in the Clayton Act carries its usual connotation—rivalry for the same resources—and does not depend on the number of competitors. Instead, competition has long been understood to mean a desire or drive to beat a rival in winning whatever both want. Competition rarely depends on the number of rivals in the market; it's often more about competitive pressure. Consider how competition's understood in everyday life. In politics—the general election is often more competitive than the primaries even though it features far fewer candidates. In sports—the pressure to win grows with each team knocked out of a playoff game. In love—the ex who got away poses a greater risk than a dozen unknown Tinder matches. And, of course, in business—even the established BlockBusters aren't safe from the upstart Netflixes.

What common usage suggests, ordinary meaning confirms. Americans in 1914 understood competition as "[t]he act or endeavoring to gain what another is endeavoring to gain at the same time; common contest or striving for the same object; strife for superiority; rivalry: as, the *competition* of two candidates for office."[47] A similar definition from the era: "endeavouring to gain what another endeavours to gain at the same time," and as "[a] contest for the acquisition of something; a match to determine relative excellence; a trial of ability."[48] This definition has remained largely the same throughout time. In 1930, about halfway between the Clayton Act's original enactment and amendment, dictionaries defined competition as "seeking, or endeavoring to gain, what another is endeavoring to gain at the same time; common strife for superiority; emulous contest; rivalry."[49] So

[47] *Competition*, The Century Dictionary and Cyclopedia (1897).
[48] *Competition*, Oxford English Dictionary (1908).
[49] *Competition*, Webster's New International Dictionary (2d ed. 1930).

too in 1950: "It is the struggle between rivals for the same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time."[50]

Because Congress did not define competition, courts have no reason to give the term anything other than its ordinary meaning. Its ordinary meaning does not encompass elaborate theories of competition. Indeed, Congress infused the word with no greater meaning than its everyday understanding. From that follows important implications for the law's application. It means neither the Agencies nor the courts must engage in extensive economic analysis of concentration. To be sure, the legislative history—and Supreme Court dicta—show that at least some lawmakers thought rising concentration was a significant concern. And aspects of the Supreme Court's analysis in cases like *Brown Shoe* and *Von's Grocery* could be read as viewing competition as defined by competitors. But ultimately, the statutory text—backed up by Supreme Court interpretations ratified by Congress—rejects that approach.

The Agencies get one thing right. As they state, competition presents itself in different ways across different markets. Congress's use of competition's ordinary meaning shares that view. Competition will often present itself in terms of output and prices—classic indicators of market competition in 1914, 1950, and today. But it may also appear in non-price terms. Innovation, for example, is central to competition. The two are like a double helix, each reinforcing the other. So when a merger's essential effect is to diminish innovation at the public's expense without any offsetting benefits, then the merger has diminished competition substantially.

It does not follow, however, that competition can mean whatever the Agencies think it means. For example, merely because competitive effects include non-price considerations does not mean the core meaning of competition changes. To the contrary, § 7 uses economic language, it's housed within a statute meant to supplement the Sherman Act, and both the Clayton and Sherman Acts are meant to prevent unreasonable restraints of trade and creation or maintenance of monopoly

[50] *Competition*, Black's Law Dictionary (4th ed. 1951).

power through anticompetitive means. Context provides that competition means competition for consumers. Just as politicians compete for voters, businesses compete for consumers. Just as politicians must lose when their rivals win, some businesses fail when their rivals succeed. So whether competition is understood in economic terms like allocative efficiency or total welfare or in ordinary terms like quantity and price, competition is about effects on those the businesses are competing for: consumers. It cannot mean effects on competitors—an interpretation leading to the absurd outcome of a statute meant to protect competition instead protecting competitors from competition.

On a related note, the meaning of competition requires consideration of procompetitive effects. While the Agencies maintain some talk of efficiencies, they continue to view efficiencies as a "defense" at best. But that is misleading and contradictory to the text's meaning. When a merger's efficiencies increase a business's ability to compete, competition increases. That is true even if the merger also increases an industry's concentration. In other words, not only does the statute's use of "effect" and "competition" require consideration of procompetitive effects, it also elevates procompetitive effects from gained efficiencies over unenumerated goals like battling industry concentration.

Definition of Tend. The word "tend" suggests a direction or inclination, not an absolute result. The 1914 Oxford English Dictionary defines "tend" as "to move or lie in a particular direction; to be directed or have a certain direction; to incline, be disposed."[51] Again, the meaning remained the same in 1950: "To have a leaning; serve, contribute or conduce in some degree or way, or have more or less direct bearing or effect; to be directed as to any end, object, or purpose."[52] The Agencies' Draft Guidelines adopt this understanding but stretch it too far. To cite one example, the Agencies insist that because markets can quickly consolidate, many are prone to monopolization, especially where network effects are at play. Once

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[51] *Tending*, Oxford English Dictionary (1914).
[52] *Tending*, Black's Law Dictionary (4th ed. 1951).

again, the Agencies have exceeded the statute's text—that markets might move in a concentrated direction is not the same as saying they are prone to monopolization.

Definition of Monopoly Power. The Agencies redefine monopoly power to include market dominance. But that is not how the word monopoly is commonly understood—in everyday conversation, in economics, or in the antitrust statutes. Monopoly has always been understood to mean "the ownership or control of so large a part of the market-supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices."[53] Or as the Oxford English Dictionary defined it: "The exclusive right, privilege, or power of selling or purchasing a given commodity or service in a given market; exclusive control of the supply of any given commodity or service in a given market; hence, often in popular use, any such control of a commodity, service, or traffic in a given market as enables the one having such control to raise the price of a commodity or service materially above the price fixed by free competition."[54] Black's Law Dictionary left the definition unchanged in its 1951 publication.[55]

Supreme Court precedent has long defined monopoly power as the power to exclude competitors and set prices. Congress ratified these meanings when it passed the Clayton Act in 1914 (using the same language from a similar statute) and again when it amended the law in 1950 using the same terms. For that reason, the Agencies are not free to redefine monopoly power (or substantial lessening of competition) to mean market dominance. And they are not authorized to single out dominant firms for special obligations like sharing inputs with rivals, which more or less amounts to an essential facilities doctrine—which the Supreme Court has repudiated. Mere dominance is not a prohibited effect. The Agencies are therefore not authorized to block mergers just because they may create dominant firms, let alone just because they involve dominant firms. To say otherwise is to blot out the statute's textual commands.

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[53] *Monopoly*, Black's Law Dictionary (2d ed. 1910).
[54] *Monopoly*, Oxford English Dictionary (1914)
[55] *Monopoly*, Black's Law Dictionary (4th ed. 1951).

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The Clayton Act's text means what it says. And what it says is clear: Mergers are lawful when they are reasonably expected to increase competition, leave competition untouched, or incidentally diminish competition. Mergers are unlawful when they are reasonably expected to diminish competition in ways that harm the public or tend to create monopoly power. Put simply, § 7 applies to mergers that present reasonably apparent and immediate harms to competition. The Agencies misconstrue the Clayton Act's text and replace Congress's policy judgments with their own.

Take a few more notable examples. The Agencies state early on that the Clayton Act is meant to fight the rising tide of industry concentration. And they assert the authority to block mergers merely because they might increase concentration. Whether concentration threatens competition or tends to create monopoly is a factual question relevant only in determining likely competitive effects. Even then, empirical evidence undercuts the notion that concentration is increasing and both theory and learning undercut the idea that highly concentrated markets are always less competitive than highly decentralized markets. In other words, the Agencies have no statutory leg to stand on in condemning mergers based on concentration concerns.

The Agencies also conjure up authority to block mergers based on size nowhere found in the statute. Under Guideline 10, for example, the Agencies propose special rules for so-called dominant platforms. And throughout the guidelines, the Agencies suggest the size of the merging firms may be enough to block the merger—without resorting to extensive analysis of competitive effects. But if Congress meant to vest the Agencies with authority to block mergers based principally on objections to their size, it would have said so explicitly. By transforming concentration levels and market structure into potentially prohibited effects, the Agencies seize authority to make policy judgments that Congress never delegated.

The Agencies also seize for themselves the power to steer competition. All earlier merger guidelines followed the Supreme Court's interpretation of the Clayton Act protecting competition, not competitors. The Draft Guidelines invert the rule: the Clayton Act, the Agencies claim, not only protects competitors, it authorizes the Agencies to structure markets and business practices to aid the Agencies' preferred businesses. For example, the Agencies announced that they will consider in merger reviews potential concerns over rivals' access to related products in the future even if not currently in use. And the Agencies will consider whether related products are or might someday be valuable inputs to rivals' products. So complete is the Agencies' concern over harm to rivals that the Draft Guidelines effectively rewrites the Clayton Act to be a protection-from-competition law.

INVITING JUDICIAL BACKLASH

The Agencies' rewriting of the Clayton Act will invite judicial backlash—on precedential, statutory, and even constitutional grounds. While the Merger Guidelines are not legally binding, the Agencies' enforcement actions are subject to judicial review. Indeed, if the Agencies practice what the guidelines preach, courts will demand to know where in the statute Congress delegated such authority. Under the major questions doctrine, many of the guidelines assert authority over significant "economic and political" issues nowhere given in the statute.

Courts presume "that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[56] For that reason, the "Agencies have only those powers given to them by Congress"—enabling legislation like the Clayton Act is "not an open book to which the agency [may] add pages and change the plot line."[57] Even when "regulatory assertions [have] a colorable textual basis," courts must "hesitate before concluding that Congress meant to confer such authority" over issues of "economic and political significance."[58]

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[56] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (internal quotation marks omitted).
[57] *Id.* (internal citation omitted).
[58] *Id.* at 2607-09.

All agree Congress delegated authority to enforce § 7 to the Department of Justice and FTC. But the real question is "whether Congress in fact meant to confer the power the agency has asserted" in specific instances, not general contexts.[59] For example, the Supreme Court has rejected on statutory grounds agency assertions of authority "from all corners of the administrative state"[60]:

- The Court rejected the Federal Communication Commission's argument that its statutory authority to "modify" tariff requirements allowed for *waiving* those requirements for certain common carriers.[61]
- The Food and Drug Administration claimed authority to regulate and even ban tobacco products under its authority to regulate "drugs" and "devices." The Court rejected the FDA's interpretation, reasoning that Congress never intended to delegate such sweeping authority "in so cryptic a fashion."[62]
- The Court invalidated the Attorney General's regulation of drugs used in assisted suicide on the grounds that he acted outside his authority over controlled substances.[63]
- The Court invalidated the CDC's eviction moratorium because it involved an issue of national importance (covering 80% of the United States, causing an economic impact of tens of billions, and interfering with the landlord-tenant relationship) and thus required a clear statutory basis of authority over evictions—which the CDC lacked.[64]
- The Court invalidated OSHA's emergency vaccination and testing requirements during the Covid-19 pandemic because it was a major issue (affecting over 80 million people) and OSHA lacked explicit statutory authority to impose such requirements.[65] The Court also

[59] *Id.* at 2608.
[60] *Id.*
[61] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994).
[62] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).
[63] *Gonzales v. Oregon*, 546 U.S. 243 (2006).
[64] *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam).
[65] *Nat'l Fed'n of Ind. Business v. OSHA*, 142 S. Ct. 661 (2022) (per curiam).

found it "telling that OSHA, in its half century of existence," had never before claimed its regulatory authority over occupational hazards included imposing "such a remarkable measure."[66]

- Most recently the Court invalidated the Department of Education's claim of authority to issue student-loan debt relief.[67]

Like those agencies' claims, the Department of Justice and FTC's claims of regulatory authority have "a colorable textual basis." From a bird's-eye view, the Draft Guidelines and the practices they describe are about merger enforcement and the Clayton Act's text is, well, about merger enforcement. But just as OSHA's authority to regulate occupational hazards did not include the power to require vaccination and testing requirements, the Agencies' authority to challenge mergers does not include, for example, the power to:

1. Prohibit mergers based on concerns about market structure alone.[68]
2. Gut the definition of "substantially" and thus erase it from the Clayton Act's text.
3. Prohibit mergers posing no harm to consumers (and indeed, even benefiting them) based on potential harm to competitors.
4. Invent out of whole cloth new rules for network effects, "conflicts of interest," duties to deal, and even essential facilities.
5. Create new "law" about market dominance and the duties of and special rules for dominant firms.
6. Shortcut and sometimes even eliminate defining the relevant market.

Guideline 10, for example, suggests that the Agencies will prohibit a multisided platform's merger if it "weaken[s] rival operators" or "deprive[s] rivals of

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[66] *West Virginia v. EPA*, 142 S. Ct. at 2608-09 (cleaned up).
[67] *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).
[68] *See, e.g.*, Draft Guideline 1, at 6 ("Mergers should not significantly increase concentration in highly concentrated markets."); Draft Guide 8, at 21 ("Mergers should not further a trend toward concentration.").

platform participants."[69] Neither the Clayton Act nor any statute empowers the Agencies to block a merger that enhances competition overall simply because it harms competitors. In fact, the Agencies' elevation of harms to competitors is a severe overstepping of its statutory authority. No matter the legislative history, no matter Supreme Court dicta, the Clayton Act's text and binding Supreme Court precedent make clear that the law protects competition, not competitors.

Guideline 10 also prohibits mergers posing no harm to consumers (and indeed, even benefiting them) based on what the Agencies call a "conflict of interest." It also singles out digital (multisided) platforms for additional scrutiny when brick-and-mortar competitors use the same practices.[70] The Agencies' use of the phrase is unmoored from the Clayton Act's text and even from general legal and economic concepts. Worse still, it seeks to label a common and often beneficial business practice as something nefarious when done by multisided platforms.

Think about market realities. Just as Costco benefits consumers by selling its private-label brand Kirkland alongside (and often in better locations than) its partnering businesses who are also competitors, so too with online marketplaces like Walmart's, Target's, Home Depot's, and so forth. Because brick-and-mortar retailers and multisided platforms all have the same interest—sell to customers, return a profit—it does not matter whether they "self-preference" their own products. If those products or services are unattractive to customers, the business will lose sales to its competitors. For that reason, it has the incentive to present customers with attractive options and if customers agree, then it's just the free market working. Same too if they disagree and reject the offerings. But even if none of that were true, the Agencies still do not have statutory authority to treat a common practice employed by businesses of all kinds and since the Clayton Act's enactment as an anticompetitive harm in itself.

And the Agencies seek to prohibit mergers posing no harm to consumers (and indeed, even benefiting them) based solely on whether the Agencies view the

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[69] Draft Guidelines, Guideline 10, at 24.
[70] Draft Guidelines, Principle 10, at 23-25.

platform as dominant.[71] After all, competition can increase when a dominant firm acquires another and Congress banned only mergers with anticompetitive effects. Similarly, the Agencies have no authority to dispense with Congress's market-definition requirements. As written, Guideline 10 suggests that so long as a platform is dominant in at least one multisided market, the Agencies will block even small acquisitions across all markets if in their opinion that helps displace the dominant firm. Nowhere in the statutory text is authority to shape or reshape markets along the Agencies' preferred lines.

The Agencies want to dispense with rigorous market definitions for multisided platforms. For example, Guideline 10 asserts without evidence that "[m]ergers involving platforms can give rise to competitive problems, even when a firm merging with the platform has a relationship that is not strictly horizontal or vertical."[72] The Clayton Act explicitly requires the Agencies to define the relevant market in each merger challenge. So too with Supreme Court precedent. If the merger would not harm competition in the relevant market, then the merger is lawful. No statute authorizes the Agencies to block a merger lawful in its relevant market because of "competitive concerns" that somehow exist without the products being substitutes or complements. Even if the Agencies intend to define the relevant market using tried-and-trusted techniques, the Guideline ignores the Clayton Act's "substantiality" requirement—the law prohibits only mergers that substantially lessen competition and "[s]ubstantiality can be determined only in terms of the market affected."[73]

And the Agencies presume without justification network effects are always or even mostly deserving of special scrutiny.[74] After all, if network effects are as decisive as the Agencies imply, then it stands to reason that the combining or strengthening of network effects in a given market could increase competitive pressure among rivals or entice new market entrants. Look no further than TikTok's

[71] *Id.* at 25.
[72] *Id.* at 23.
[73] *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957).
[74] *Id.* at 23-25.

success and the competitive pressure it exerts on Facebook, despite Facebook's acquisition of Instagram—which, only recently, the Agencies warned (and continue to litigate) was an unlawful acquisition entrenching monopoly power.

Each assertion of Agency authority above is enough to trigger judicial backlash. No one can disagree that each assertion of authority involves a significant economic or political issue. In fact, these are hotly contested issues that have drawn widespread public disagreement. Congress has been tightly focused on antitrust reform for years. And as the Agencies well know, antitrust reform bills have seen the light of day—even winning passage in the House of Representatives. Still, Congress has not enacted any substantive antitrust reform. Despite appearances of agreement, lawmakers are seemingly at odds over precisely what reform should look like. The Agencies' assertions of authority not only wade into this battle, they declare victory for their preferred reforms.

Another problem—the FTC's expanded use of its § 5 authority. The Draft Guidelines cite a few ways the FTC might use its FTC § 5 powers to reach mergers and acquisitions not covered by the Sherman or Clayton Acts. For example, the Draft Guidelines suggest that otherwise lawful transactions might be challenged on the grounds that their acquisition structures, regulatory frameworks, or procurement processes might lessen competition. In other words, the Draft Guidelines' sprinkle the FTC's broad—likely unconstitutionally broad—discretion under a different antitrust law to rewrite the Clayton Act to apply to any merger that might lessen competition. Of course, all mergers under the Agencies' counting method of competition reduce competition by default.

Working against the Agencies is the Clayton Act's text, the Supreme Court's precedents (and its later antitrust decisions), and a Supreme Court skeptical of law by administrative agency. The Agencies can point to statements in the legislative history to give their assertions a glint of legitimacy. But ultimately the legislative history is not controlling. In any event, the legislative history doesn't support the Agencies fully. As the Agencies surely know, the record is full of talk that is far more supportive of the consumer welfare standard than what the Agencies propose.

Congress, after all, campaigns with poetry and governs in prose. The prose Congress chose was not the soaring rhetoric about concentration's threat to democracy or corporate power's influence on democracy. It was, instead, the well-worn language of § 7 of the Clayton Act—passed in 1914 to plug gaps in the Sherman Act's enforcement scheme and readopted by Congress without further expansion of its purposes in 1950.

Congress has also considered—and rejected—amendments to the Clayton Act authorizing the Agencies' policies. In 1978, for example, Congress considered—and rejected—the Small and Independent Business Protection Act. The bill would have banned mergers above a set size outright and conditioned other sizable mergers on advancing competition, creating substantial efficiencies, or divesting certain product lines. Congress is again—right now—considering antitrust amendments. The Agencies should scrap their Draft Guidelines and repackage them as a proposed bill to Congress. Until Congress enacts such legislation, however, the Draft Guidelines are an unlawful power grab and unconstitutional usurpation of Congress's Article I powers.

CONCLUSION

Mergers often increase competition, efficiency, and innovation. When businesses in the same market merge, for example, the resulting business's increased volume allows for economies of scale. Economies of scale allow for price cuts and product improvements, which increase competitive pressure on rival firms to up their game. Integration of operations, meanwhile, allows for streamlining and cost-cutting, which sets off the same chain reaction. No matter the source, competitive pressure spurs innovation, which turns up the heat on rivals even more. Before you know it, entirely new products or services, markets, and industries are born.

Nowhere is that truer than in the technology industry. As the digital revolution continues to disrupt and displace traditional markets, often creating new ones in the process, competition backed by innovation shows no signs of slowing down. In fact, the recent mainstreaming of AI tools has upended markets as

businesses accelerate deployment of their own AI services or integrate AI services into their products. Competition—and the innovation it spurs—is unfolding in real time. And yet, in the Agencies' topsy-turvy world, digital markets allegedly suffer from a lack of competition.

Reading the Draft Guidelines leaves the impression the Agences are not operating in good faith. How else to make sense of the experts' skewed use of economic "data" related to concentration, to manipulation of market definition to inflate market shares and concentration levels, to misconstrued definitions of the statute's key terms, and on and on. Indeed, given the Draft Guidelines' unsubstantiated and unauthorized assertions of authority to block mergers based on concerns about self-preferencing, for example, it is hard not to conclude that the Agencies have entirely given up on the enterprise of protecting competition for competition's sake—and as the law commands. Combine that with the Agencies' protection of select competitors from competition and, well, the Draft Guidelines are destined ironically enough to lessen competition substantially.

* * *

Asked why he "tired of antitrust," Ronald Coase answered: "Because when the prices went up the judges said it was monopoly, when the prices went down, they said it was predatory pricing, and when they stayed the same, they said it was tacit collusion."[75] That was 1983. Two decades earlier, Justice Potter Stewart vented a similar frustration: The "sole consistency" of the Court's antitrust decisions was, he observed, "that in litigation under § 7 of the Clayton Act, the Government always wins."[76]

The courts long ago cleaned up their act. So too had the Agencies. But the Draft Guidelines promise to exhaust not just economists, businesses, lawyers, and the like. If the Agencies practice what they preach and not what the law commands, they will ensure that the sole consistency of litigation under § 7 is that the government loses. The Draft Guidelines suggest the Agencies welcome that

[75] Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago*, 26 J. L. & ECON. 163, 193 (Apr. 1983).
[76] *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

outcome—perhaps to criticize the so-called "conservative" Supreme Court, to inflame lawmakers into amending the statute, and to signal that no matter the cost to the Agencies' integrity or the rule of law, they will fight until the very end.

While the Agencies are free to make their case for reform to Congress, their interpretations of the laws under their authority make a mockery of their titles as law enforcement agencies. Congress, not the Agencies, must make the policy choices the Agencies unilaterally assigned to—and answered—themselves. Congress, not the Agencies, must amend the statute to authorize the Agencies' strong anti-merger approach to enforcement. And Congress, not the Agencies, must decide economic and political issues of significance. Whatever the Agencies may think about the so-called "corrosive effect" of corporate power, or the alleged "dangers to democracy" concentrated markets pose, Congress, not the Agencies, gets to decide what, if anything, to do about it.

The real danger to democracy is the administrative state's bottomless appetite for more power and control.

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As always, NetChoice stands ready to work with the Agencies and other stakeholders to protect competition.

Sincerely,

Carl Szabo
Vice President & General Counsel
NetChoice

Christopher Marchese
Director of Litigation
NetChoice

Paul Taske
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