

**Administrative Antimonopoly**

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February 2022**

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## **I. Introduction**

The United States is in the middle of an unquestionable resurgence in antitrust enforcement against corporate mergers and monopolies. In October 2020, the House of Representatives Subcommittee on Antitrust, Commercial and Administrative Law published a landmark report on the technology industry detailing decades of exclusionary and predatory conduct.<sup>1</sup> After the report was published, Congress continued to hold hearings to analyze predatory and exclusionary market practices engaged in by technology companies and held other hearings on promoting fairer markets through increased regulation.<sup>2</sup> Moreover, pending in the House of Representatives are at least five proposed antitrust bills and several bills in the Senate that would fundamentally restructure the technology industry and bolster antitrust enforcement.<sup>3</sup> Federal, state, and private enforcers have also filed antitrust cases against Google and Facebook that will significantly restructure or restrain both corporations.<sup>4</sup> This resurgence directly results from lackluster enforcement against monopolization and mergers, erosion of the antitrust laws over the past 50 years by the judiciary, and a growing belief that corporate behavior should serve the public interest.

The renewed surge in antitrust enforcement and antimonopoly policy more generally in the United States has fostered broader discussions about the surfeit of enforcement mechanisms at the federal government's disposal to create an economy that is more open, fair, equitable, and free from concentrated corporate power.<sup>5</sup> This is particularly true as congressional deadlock and inaction will likely continue to impede more comprehensive and long-lasting legislative solutions, particularly those outside the technology sector.<sup>6</sup>

With President Joe Biden being just over a year into his term and signing a comprehensive executive order in July 2021 that instructs federal agencies to use the full extent of their statutory powers to prevent exclusionary and predatory conduct in the marketplace,<sup>7</sup> new opportunities arise to enact an antimonopoly policy agenda without direct congressional involvement.

Currently, much of the attention and literature on antitrust reform is confined to the enforcement actions and powers of the Department of Justice (DOJ) and Federal Trade Commission (FTC). While these administrative agencies constitute a significant part of the federal government's antitrust enforcement apparatus, these critical institutions do not encompass the entire range of antimonopoly agencies within the executive branch.

This report aims to serve as a policy guidebook and detail some of the essential federal administrative agencies with expansive, congressionally delegated, antimonopoly and fair competition powers beyond the FTC and DOJ. The agencies described in this paper can use these policy levers to deconcentrate excessive aggregations of private power and enable citizens to enjoy the benefits of fair and regulated markets. Specifically, this report will examine 10 federal agencies' antimonopoly and fair competition powers. Such powers include merger review authority, the ability to adjudicate lawsuits in an administrative forum instead of a federal court, and rulemaking authority to prohibit unfair methods of competition, restraints of trade, mergers, and other monopolistic practices.

This report concludes that the federal government has extensive but severely underutilized powers and should use its full arsenal of administrative authorities to tackle and dismantle concentrated corporate power in all sectors of the U.S. economy. The Biden administration must use all the tools outlined in this paper to create a fairer, more equitable economy for workers, consumers, and small businesses.

## **II. The Advantages of Federal Administrative Antimonopoly**

As this report details, the federal administrative antimonopoly apparatus of the United States is exceptionally broad, and there is a specialized agency that regulates almost every industry in the economy.<sup>8</sup> The sheer numerosity and regulatory scope of federal administrative agencies make them an essential facet of a robust antimonopoly agenda.

Administrative agencies have several advantages over other enforcement avenues, such as state or private enforcement. First, certain federal administrative agencies, like the Federal Communications Commission (FCC) or the U.S. Department of Agriculture, can conduct litigation within their own administrative forum. Litigation within administrative agencies is not facilitated by a traditional judge endowed with the protections of Article III of the U.S. Constitution, such as lifetime appointments. Instead, these forums use administrative law judges (commonly known as ALJs) who can be appointed by the president or agency leadership, rather than requiring Senate confirmation, and are not required to have lifetime tenure.<sup>9</sup> Since ALJs are also appointed to apply a narrow set of laws rather than the entire scope of federal law, they can have greater expertise in the relevant area of law the agency administers than generalist federal judges.

Second, reviewing courts give significant deference to agency fact-finding used in litigation to support the determination of whether a violation occurred. Section 706 of the Administrative Procedure Act (APA) prevents courts reviewing agency decisions from disregarding the agency's factual findings unless they are “unsupported by substantial evidence.”<sup>10</sup> Facts determined by agencies are upheld by reviewing courts merely if they “could satisfy a reasonable factfinder.”<sup>11</sup>

Third, in certain situations where a statute contains ambiguous language, administrative agencies have the authority to interpret a statute in a specific way to achieve certain legal outcomes and reviewing courts will defer to the agency's interpretation.<sup>12</sup> This is commonly known as Chevron Deference.<sup>13</sup> A widely used illustration of the benefits and importance of Chevron Deference is net neutrality. Congress did not strictly define what is classified as an “information service” or a “telecommunications service” in the 1996 Telecommunications Act.<sup>14</sup> Therefore, under the Chevron Doctrine, as long as the FCC provides a reasonable argument, the agency can classify internet service providers as either an information service or a telecommunications service, thus subjecting them to different degrees of regulation. This regulatory ambiguity from Congress is part of the reason internet service providers since 2002 have been regulated as an information service and as a telecommunications service.<sup>15</sup> Additionally, as long as a statute remains ambiguous (i.e., Congress does not subsequently amend it), an agency can continue to reasonably reinterpret the statute to ensure that it adheres to Congress' regulatory mandate and swiftly respond to changing market conditions or the usage of new business practices.<sup>16</sup>

Unlike traditional courts, administrative agencies are created by Congress to advance a specific policy goal.<sup>17</sup> To accomplish Congress' regulatory goals, agencies employ industry experts. Thus, along with being granted vast power by Congress to regulate specific industries, agencies have the capability to use their expertise to adequately address the unique market features of the industries they regulate. Therefore, Chevron Deference is in part an acknowledgment that experts at these agencies know how to use the expansive powers delegated by Congress to implement its demands in a prudent manner, as well as develop regulations in a less politically partisan environment.

Lastly, when enacting new regulations, the APA generally requires agencies to seek public comment on proposed rules.<sup>18</sup> Such action is taken to inform the public of what the agency is doing and serves as a means to collect information to ensure the regulation is optimally designed to promote the public interest.

Collectively, these characteristics mean that agency antimonopoly and fair competition policymaking and enforcement measures can be more accountable to the public. These characteristics also mean that agencies are capable of producing significantly more favorable outcomes for enforcement actions than a traditional Article III court.<sup>19</sup>

### **III. General Recommendations for All Federal Administrative Agencies**

This report provides specific recommendations for each of the selected administrative agencies to institute a robust antimonopoly policy agenda in the United States. This section offers a set of generalized guiding principles and policies for all agencies of the federal government to consider and implement.

#### **Philosophy of Enforcement**

- Adopt policies that take a significantly skeptical view of unfair competitive practices and mergers, particularly in highly concentrated markets.<sup>20</sup>
- Use the agency's full range of statutory powers that adheres to the broad goals envisioned by Congress.
- Use all available policy mechanisms to promote supply chain resiliency, protect our national security, promote the development of communities, and grow and develop small and independent businesses within the United States.
- Promote worker rights by enacting policies and practices that facilitate unionization, enact fair work practices, suppress employer surveillance, and enhance worker mobility (e.g., prohibiting noncompetes and mandatory arbitration agreements).<sup>21</sup>
- Use all available policy mechanisms to promote alternative corporate structures such as cooperatives.

#### **Litigation**

- When possible, regulators should initiate litigation within an administrative forum rather than in the federal courts.
- When possible, agency enforcers should submit amicus briefs to important cases explaining congressional intent with the relevant law, advocating for expansive administrative powers, detailing the success of enforcement and its deterrent effects on unlawful conduct, and clarifying the public interest benefits of enforcement.

#### **Policies and Enforcement**

- Enact clear, bright-line rules prohibiting unfair methods of competition and unfair or deceptive acts or practices including monopolization, predatory pricing, refusals to deal, tyings, and exclusive deals.<sup>22</sup>
- Enact clear, bright-line rules governing when mergers are allowed and under what conditions.
- Enact clear, bright-line rules that protect American businesses from exclusionary practices used by foreign companies, such as dumping and market manipulation.
- Use all available policy mechanisms to structurally separate conglomerated firms.
- Use all available policy mechanisms to enact common carriage rules to ensure that dominant firms in an industry must conduct business by providing fair pricing and terms to dependent businesses and consumers.
- Use all available policy mechanisms to lower structural entry barriers to promote competition and open access — particularly for industries prone to consolidation and that have high fixed costs or contain other significant barriers to entry.

- Engage in frequent investigations into the conduct of firms within the agency's jurisdiction.

### **Advocacy**

- Pressure Congress to increase funding for enforcement of antimonopoly policies.
- Pressure Congress to pass new legislation enhancing existing authority and empowering agencies to develop new and stricter market rules to prohibit unfair methods of competition and unfair and deceptive acts or practices.

## **IV. Administrative Agencies**

### **A. Federal Communications Commission**

#### ***Overview of the Agency***

Congress created the Federal Communications Commission (FCC) with the enactment of the Communications Act of 1934.<sup>23</sup> Congress tasked the FCC with protecting “the national interest involved in the new and far-reaching science of broadcasting, [and with establishing] a unified and comprehensive regulatory system for the industry.”<sup>24</sup> Congress also empowered the agency to regulate all interstate wired and wireless communications, including internet service providers and firms providing telephone, television, satellite, and cable services.<sup>25</sup>

Congress significantly changed the FCC’s powers by enacting the 1996 Telecommunications Act.<sup>26</sup> Among other changes, the 1996 Telecommunications Act imposed more procedural hurdles on the FCC to enact structural regulations.<sup>27</sup> Nevertheless, the FCC can still enact broad structural regulations governing the entire telecommunications industry.

#### ***Antimonopoly and Fair Competition Powers***

##### **Media Ownership Rules**

Section 307 grants the FCC broad powers to structure the communications market, as the agency can create rules that determine what entities can obtain broadcast licenses, the various factors in making that determination, or the terms and conditions governing how those licenses can be transferred, modified, or combined by receiving parties.<sup>28</sup> One of the most important powers given to the FCC from Section 307 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, is the ability to administer broadcast licenses to private entities only if it is in the “public convenience, interest, or necessity.”<sup>29</sup>

The 1996 Telecommunications Act made the process for the FCC to create antimonopoly and fair competition rules under Section 307 cumbersome and protracted.<sup>30</sup> However, the FCC still has considerable authority to enact and expand structural rules to govern the communications industry. Even when the agency bases its decisions on flawed or incomplete data, the Supreme Court has repeatedly affirmed the ability of the FCC to use its “comprehensive mandate” to promulgate rules that structure the communications industry in the public interest and consider a range of factors to determine what it encompasses.<sup>31</sup>

The FCC’s rules, for example, can be used to set limits on what types of entities have broadcast licenses. In one notable instance, the FCC in 1941 adopted a rule that prevented a single broadcast entity from owning two or more television stations that “substantially serve[d] the same area.”<sup>32</sup> In 1970, the agency enacted the Fin-Syn rules, which vertically separated television production (i.e., content creation) from programming distribution by prohibiting the dominant networks (such as ABC, CBS, and NBC) from both syndicating and obtaining a financial interest in the programs the networks did not produce themselves.<sup>33</sup> The FCC also had rules that limited the ownership of broadcast stations. For example, the newspaper/broadcast cross-ownership (NBCO) rule prohibited newspapers and broadcast radio or television stations from being under a common owner.<sup>34</sup>

Since the 1970s, however, the FCC has repealed many of its long-standing media ownership rules, including its prohibitions on newspapers owning a broadcast station; the Fairness Doctrine, which required broadcasters to set aside a reasonable amount of time to cover controversial issues of public importance and provide a reasonable opportunity to present conflicting points of view on those issues;<sup>35</sup> and the Fin-Syn rules.<sup>36</sup> Currently, the FCC has five media ownership rules that govern the broadcast industry.<sup>37</sup>

### *Common Carriage Obligations and Prohibition of Unjust or Unreasonable Business Practices*

The FCC's sweeping authority derived from the 1996 amendments to the 1934 Communications Act also allows the agency to classify the various sectors within the telecommunications industry either as information services or communications services. The FCC regulates information services under Title I of the 1934 Communications Act. Title I defines information services as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,"<sup>38</sup> by granting the agency the power to "make such rules and regulations ... not inconsistent with [the Communications Act], as may be necessary in the execution of its functions."<sup>39</sup> Reviewing courts uphold the FCC's regulations under Title I if they are "reasonably ancillary to the effective performance of the Commission's various responsibilities."<sup>40</sup>

The FCC regulates telecommunications services under Title II of the 1934 Communications Act. Title II regulations, also known as common carriage obligations, require companies to provide their services to the targeted population at "just and reasonable"<sup>41</sup> rates without using "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."<sup>42</sup> Firms operating under Title II regulations can be required to give competitors access to their network and can be required to implement other consumer protection regulations.<sup>43</sup> Both Title I and Title II regulations allow the FCC to regulate and prohibit specific business practices.

One of the most notable uses of the FCC's authority regarding Title I and Title II regulations involved net neutrality. In 2015, the FCC classified all internet service providers as communication services and subjected the industry to its Title II regulations.<sup>44</sup> The commission took this action to prohibit internet service providers from blocking consumers' access to the internet or specific webpages, throttling consumers' internet speeds, and charging consumers to access internet "fast lanes."<sup>45</sup> Although the agency under the Trump administration abruptly changed course,<sup>46</sup> the FCC could and, under the Biden administration, likely will attempt to reimpose Title II restrictions on internet service providers.<sup>47</sup>

The FCC has also used its regulatory powers to prohibit unfair practices that stifle competition. For example, in 2000 and 2008, the FCC used its powers to prohibit commercial and residential landlords from engaging in exclusive deal agreements with broadband providers. The commission found that the use of exclusive deals unfairly limited consumer choice to broadband providers, stifled the expansion of broadband service, unduly enhanced barriers to entry, and deterred future competition.<sup>48</sup> In February 2022, the FCC announced an expanded rule prohibiting exclusive deals in apartment buildings, which is designed to close several loopholes from its original regulations.<sup>49</sup>



### Merger Review Authority

The FCC has exceptionally expansive merger review authority over all broadcast license transfers under the Communications Act of 1934.<sup>50</sup> Section 214(a) requires that the FCC deny the merger of a broadcast company (i.e., the transfer of a broadcast license) if the agency determines that the license transfer is not in “the present or future public convenience and necessity.”<sup>51</sup> Similarly, Section 310(d) allows the agency to deny a license transfer if it is not in the “public interest, convenience and necessity.”<sup>52</sup> Section 214(a) and 310(d) of the Communications Act collectively establish the public interest standard.<sup>53</sup>

Under the public interest standard, the FCC has significant discretion when reviewing mergers or the transfer of broadcast licenses and can review various factors when analyzing a merger under its jurisdiction.<sup>54</sup> According to controlling case law, the FCC is “informed by, but not limited to, traditional antitrust principles,”<sup>55</sup> and its review should facilitate “the broad aims of the Communications Act.”<sup>56</sup> Notably, the public interest standard requires that merging parties (i.e., the applicants) bear the burden to prove that the submitted transfer would serve the “public interest, convenience, and necessity.”<sup>57</sup> The merging parties must prove that the merger would “enhance, as opposed to preserve or suppress competition.”<sup>58</sup> In this context, the public interest standard of the 1934 Communications Act has a significantly lower legal threshold than the “may be substantially to lessen competition, or to tend to create a monopoly” standard from America’s primary anti-merger statute, the Clayton Act.<sup>59</sup>

Although the commission does not have to consider merger efficiencies asserted by the applicants, it currently does. However, merger efficiencies must be specific to the merger, verifiable, and unable to be accomplished by other means that “entail fewer anticompetitive effects.”<sup>60</sup> Collectively, the public interest standard, thus, effectively acts as a rigorous presumption against mergers in the communications sector.

Additionally, the FCC also has broad authority to condition mergers and “prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions” of the Communications Act and that “such terms and conditions as in its judgment the public convenience and necessity may require.”<sup>61</sup> Typically, the parties present their own conditions that they will voluntarily adhere to remedy any exclusionary or predatory effects their merger may have.

Even with the FCC’s significant authority, the agency has seldom taken significant action to block mergers in the communications industry, particularly since the enactment of the 1996 Telecommunications Act.<sup>62</sup> For example, in 2019, the agency approved the merger between T-Mobile and Sprint, then representing the third- and fourth-largest cell phone carriers in the United States.<sup>63</sup> In 2008, the FCC approved the merger between satellite radio companies XM and Sirius, creating an effective monopoly in the industry.<sup>64</sup> The FCC’s permissive merger policy also effectively led to the reconsolidation of the former AT&T Bell operating companies after the breakup of the corporation in 1984.<sup>65</sup> More recently, despite the numerous exclusionary and predatory concerns,<sup>66</sup> the FCC in 2021 greenlighted Verizon’s acquisition of TracFone, the largest prepaid carrier in the United States.<sup>67</sup>

### ***Recommendations for Specific Agency Action***

- Re-enact net neutrality.
- Re-enact the cross-ownership rules that separated newspapers, radio stations, television stations, and telephone services.
- Investigate the communications industry and prohibit other unfair business practices using clear, bright-line rules.
- Vigorously enforce its merger review authority in all future transactions.
- Enact merger guidelines that establish clear, bright-line rules for merger enforcement, and presumptively declare certain mergers and acquisitions not in the public interest.
- For any approved mergers, set strict conditions and rigorous public oversight to ensure commitments by the merging parties are adhered to. Violations of these strict terms should result in the divestiture of the acquisition.

## **B. Department of Agriculture**

### ***Overview of the Agency***

To enhance the federal government's ability to manage agriculture throughout the entire country, in 1862, Congress created the Department of Agriculture (USDA).<sup>68</sup> Congress originally meant for the agency to have a somewhat limited role in the agricultural industry, with responsibilities that included collecting data about agricultural-related issues, improving farming and forestry methods, and conducting investigations into diseases that adversely affected American farms.<sup>69</sup> Since the agency's founding, though, Congress has continuously given the USDA expansive powers to regulate the agricultural sector.

### ***Antimonopoly and Fair Competition Powers***

#### ***Regulating Unfair Practices by Meatpacking and Livestock Corporations***

In response to a massive investigation by the Federal Trade Commission (FTC) into the meatpacking industry,<sup>70</sup> Congress enacted the Packers and Stockyards (P&S) Act in 1921.<sup>71</sup> In line with the Sherman Act passed in 1890 as well as the Clayton Act and FTC Act passed in 1914,<sup>72</sup> the primary purpose of the P&S Act was to "assure fair competition and fair trade practices in livestock marketing."<sup>73</sup> The P&S Act regulates "interstate and foreign commerce in livestock, live-stock products, dairy products, poultry, poultry products, and eggs, and for other purposes" and provides the USDA with wide-ranging structural powers to regulate those industries.<sup>74</sup>

Congress designed the P&S Act to be "the most far-reaching measure and extend[ed] further than any previous law into the regulation of private business—with few exceptions" and to give the Secretary of Agriculture "complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith."<sup>75</sup> Specifically, the P&S Act enables the Secretary of Agriculture to regulate "every unjust, unreasonable, or discriminatory regulation or practice" in the livestock industries including those acts in their incipiency before the public is harmed.<sup>76</sup>

The act explicitly prohibits a litany of specific practices, including the ability of packers to engage in "any unfair, unjustly discriminatory, or deceptive practice or device," "make or give any undue or unreasonable preference or advantage" to a particular person or locality, or engage in a business practice "for the purpose or with the effect of manipulating or controlling prices in commerce."<sup>77</sup> In essence, Congress meant for the P&S Act to transform the Secretary of Agriculture into a vigorous and proactive public regulator while at the same time effectively converting meatpacking and livestock corporations into "national public utilities."<sup>78</sup> Enforcement of the P&S Act occurs through private parties initiating litigation or formal USDA administrative adjudications against the alleged violator.<sup>79</sup> Proceedings can also take place in federal court in specific circumstances.<sup>80</sup>

Congress gave the USDA the ability to promulgate rules and regulations to further the act's enforcement.<sup>81</sup> However, the USDA has been sluggish with promulgating rules under the P&S Act.<sup>82</sup> As one Senate report bluntly concluded in the 1950s, the secretaries of agriculture since the enactment of the P&S Act engaged in "a significant and shocking record of neglect and inaction in enforcement."<sup>83</sup> The inability of the secretaries of agriculture to use the expansive antimonopoly and fair competition powers granted to them is a recurring theme for the agency.<sup>84</sup>

Until Congress mandated the USDA to propose a series of P&S Act rules in the 2008 Farm Bill,<sup>85</sup> the agency had not engaged in a significant rulemaking to adhere to the intent of the P&S Act or provide long-lasting procedural guidance to define the meaning of its terms including “unfair, unjustly discriminatory, or deceptive practice or device”<sup>86</sup> Instead, the agency has mostly relegated its efforts to fact-specific, case-by-case inquiries and adjudications.<sup>87</sup> And even when Congress did mandate PSA rulemaking, USDA struggled to implement them over the course of a decade and two presidential administrations.<sup>88</sup>

In addition to the agency’s unwillingness to enforce the P&S Act and promulgate rules to effectuate its enforcement, the federal courts have also narrowly interpreted the act, despite congressional intent and broad statutory language.<sup>89</sup> For example, some courts have wrongly decided that the P&S Act requires injury to competition to prove a violation of the act.<sup>90</sup>

As part of the growing antimonopoly movement, however, current Secretary of Agriculture Tom Vilsack announced in June 2021 the USDA will “propose a new rule that will provide greater clarity to strengthen enforcement of unfair and deceptive practices, undue preferences, and unjust prejudices.”<sup>91</sup>

### *Facilitating the Growth and Development of Agricultural Cooperatives*

To support alternative business structures for farmers that would also enhance their incomes and bargaining power against dominant agricultural purchasers and processors,<sup>92</sup> in 1922, Congress enacted the Capper-Volstead Act.<sup>93</sup> The statute, commonly referred to as the Magna Carta of American cooperatives,<sup>94</sup> was enacted by Congress to address the unique perils of the farming industry, protect farmers from powerful buyers and unfair treatment, ensure adequate financial returns to farmers, and protect cooperatives from the application of the Sherman Act, which was applied wrongfully by the courts to labor organizations.<sup>95</sup>

Section 1 of the Capper-Volstead Act provides a limited antitrust exemption to certain types of cooperatives, including “persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers[.]”<sup>96</sup> Cooperatives are an alternative corporate structure that is more democratic and decentralized since they are governed and owned by their members, who can include workers, members of the community, or even, like those protected by the Capper-Volstead Act, agricultural producing farmers.<sup>97</sup> Importantly, cooperatives function to benefit their members rather than enhance the wealth of shareholders.<sup>98</sup> By allowing and encouraging the development of cooperatives, Capper-Volstead allows certain conduct like price-fixing and standardized terms of sale between agricultural producers, which, under some circumstances, would otherwise violate the antitrust laws.<sup>99</sup>

Capper-Volstead also grants the Secretary of Agriculture significant authority to prevent cooperative producers from abusing their dominant market power and requires cooperatives to “operate[] for the mutual benefit [of their] members.”<sup>100</sup> Conduct traditionally classified as exclusionary and predatory like price-fixing is allowed as long as that cooperative’s actions are not abusive or do not lead to “unduly enhance[d]” prices of agricultural products.<sup>101</sup> However, neither Congress, through subsequent legislation, nor the USDA, through administrative guidance documents, has defined precisely what conduct causes cooperatives to unduly enhance prices.

In cases where prices are unduly enhanced, under Section 2 of the Capper-Volstead Act, the Secretary of Agriculture can file a complaint ordering the conduct to cease and desist.<sup>102</sup> Noncompliance with the USDA's order by the offending firm results in the agency filing a case in federal court.<sup>103</sup>

With these two sections, Capper-Volstead carefully balanced two opposing forces. First, by fostering the creation of cooperatives, Congress recognized the unique characteristics affecting farmers and that cooperatives would create economic stability for them. Second, Congress recognized that cooperatives themselves can become monopolistic and thus endowed the Secretary of Agriculture with sufficient "power to prevent these associations from exploiting the public" and "directs the Secretary to supervise these associations[.]"<sup>104</sup>

Like the P&S Act, Capper-Volstead has not been litigated frequently by the USDA. Between 1922 and 1978, the USDA opened seven investigations into cooperatives for potentially charging unduly enhanced prices in violation of the statute.<sup>105</sup> However, the agency has failed to bring a single case under Section 2 of the Capper-Volstead Act. As a result, no administrative rules or court decisions exist that comprehensively interpret the full reach of the statute.<sup>106</sup> The problem primarily stems from the USDA's lack of a comprehensive strategy to investigate and identify monopolistic and unfair practices engaged in by cooperatives.<sup>107</sup>

Supported by the pro-cooperative stance of the Capper-Volstead Act and other subsequent acts of Congress,<sup>108</sup> the USDA provides critical services to potential cooperatives. Thus, in addition to enforcing the Capper-Volstead Act, the USDA can also use its sizable financial budget to assist with creating cooperatives and provide materials to aid with any necessary legal compliance.<sup>109</sup> The agency can also provide essential market research to facilitate the business operations of cooperatives.

### *Anti-Merger and Interpretive Advocacy*

The USDA is a highly respected government agency and has a significant amount of authority when it submits letters and legal memoranda to other agencies or files an amicus brief advocating for a particular judicial outcome. There are at least two instances where the USDA can advocate for a fairer economy for farmers.

The Department of Agriculture does not have any formal anti-merger powers like the Department of Justice (DOJ) or the FTC.<sup>110</sup> However, the DOJ occasionally asks the USDA to comment on mergers relating to agricultural companies.<sup>111</sup> The USDA can use its ability to provide its expert commentary to the DOJ on the dangers of increased consolidation (including adverse effects such as lower prices paid to farmers) when a merger occurs within the agricultural industry. As one scholar notes, the P&S Act "provides for enforcement across a broader set of contractual margins that packers and stockyards might exploit, particularly if the increased concentration in the meatpacking industry has created increased market power" and facilitates "a symbiotic relationship for regulatory action between the USDA and DOJ."<sup>112</sup> Historically, the USDA has submitted amicus briefs to courts advocating for interpretations of the P&S Act that favor vigorous enforcement. Specifically, the USDA has argued that the P&S Act does not require injury to competition to substantiate a violation.<sup>113</sup>

Concerning Capper-Volstead, the act does not provide the USDA express powers to prohibit specific exclusionary and unfair conduct by cooperatives.<sup>114</sup> However, beyond initiating cease-and-desist orders under Section 2 of the Capper-Volstead Act, the USDA can also file legal

memoranda and amicus briefs to advocate for favorable judicial outcomes regarding the interpretation of the act. Specifically, the agency can advocate for outcomes that would promote the formation of cooperatives and prevent cooperatives from engaging in monopolistic and exclusionary practices.

### ***Recommendations for Specific Agency Action***<sup>115</sup>

- Promulgate rules under the P&S Act that:
  - Prohibit packers from owning livestock.
  - Abolish the abusive tournament payment system in which producers force farmers to compete against themselves, squeezing prices and payments to farmers.
  - Explicitly prohibit dominant agricultural firms from retaliation or discrimination against farmers for speaking to the public about any action relating to the business conduct of packers.
  - Clarify that farmers do not need to prove a harm to industry-wide competition to pursue a violation under the P&S Act.
- Work with the DOJ and the FTC to establish clear, bright-line rules for merger enforcement, and presumptively declare certain mergers and acquisitions not in the public interest.
- For any approved mergers, the USDA should work with the FTC and DOJ to set strict conditions and rigorous public oversight to ensure commitments by the merging parties are adhered to. Violations of these strict terms should result in the divestiture of the acquisition.
- Enforce Section 2 of the Capper-Volstead Act by investigating cooperatives for monopolistic and unfair practices and issuing cease-and-desist orders against companies that violate provisions of the act.
- Advocate for judicial outcomes that would:
  - Revoke antitrust protections to cooperatives that are not “operated for the mutual benefit of members” as required by the Capper-Volstead Act.
  - Interpret the P&S Act to not require injury to competition as a prerequisite for a violation.
  - Clarify when monopolistic cooperatives unduly enhance prices in violation of the Capper-Volstead Act.
- Enact guidelines that describe when cooperatives are not operating for the mutual benefit of their members and when monopolistic cooperatives unduly enhance prices.
- Pressure Congress to:
  - Allocate funds specifically devoted to supporting the creation of new cooperatives.
  - Allocate funds to expand enforcement of the P&S Act.
  - Require cooperatives to have at least one worker representative on each executive board.

## **C. Surface Transportation Board**

### ***Overview of the Agency***

The Surface Transportation Board (STB) is an independent agency of the federal government created in 1995.<sup>116</sup> It is the successor to the Interstate Commerce Commission (ICC), which was the first federal regulatory agency created by Congress in 1887 and was tasked with “shield[ing] the public against the monopoly abuses of the railroads.”<sup>117</sup> The STB’s powers govern American railroads, and the agency’s authority extends to “railroad rate, practice, and service issues and rail restructuring transactions, including mergers, line sales, line construction, and line abandonments.”<sup>118</sup>

### ***Antimonopoly and Fair Competition Powers***

#### ***Merger Review Authority***

The primary antimonopoly power of the STB is the agency’s exclusive jurisdiction to review all mergers involving railroads in the United States.<sup>119</sup> Congress has provided at least some regulation over mergers since 1890 with the enactment of the Sherman Act and then in 1920 explicitly provided the ICC with merger review powers over the railroad industry in somewhat clear (although conflicting) terms.<sup>120</sup> Congress though did not grant the agency its modern merger review authority until 1940, when it granted the ICC the power to review railroad mergers under a broad public interest standard.<sup>121</sup>

Today, the controlling law governing rail mergers is the Staggers Act.<sup>122</sup> Enacted in 1980, it took effect during a time of massive disruption in the rail industry. Between 1970 and 1975, nine of the largest railroads in North America filed for bankruptcy protection.<sup>123</sup> Penn Central’s bankruptcy in 1970 ended up being the largest bankruptcy in American history at the time.<sup>124</sup> In response to these developments, Congress used the Staggers Act to deregulate railroads in hopes of stabilizing the industry.<sup>125</sup> However, Congress still left the ICC (which became the STB) with ample authority to review, block, and condition mergers not in the public interest.

The public interest standard governing rail mergers allows the STB to consider a multitude of factors, including (1) the effect the merger has on the adequacy of public transportation; (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction; (3) the total fixed charges that result from the proposed transaction; (4) the interest of carrier employees affected by the proposed transaction; and (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.<sup>126</sup>

Importantly, the agency’s analysis can go beyond these factors. The STB has “extraordinarily broad discretion” to both approve or deny mergers and to “fashion conditions to such transactions to ensure that the public interest standard is satisfied.”<sup>127</sup> For example, the STB can use the fifth factor to consider the effects of mergers on other competitors or on the employees within the industry.<sup>128</sup>

Since the enactment of the Staggers Act in 1980, the STB has blocked only two mergers.<sup>129</sup> As a result, concentration in the industry is stunning. In 1980, there were 33 Class I railroads in the United States, which represent the largest companies in the industry.<sup>130</sup> Today there are only seven Class I railroads, two of which are Canadian companies that have U.S.-based

subsidiaries.<sup>131</sup> This is particularly problematic because after the STB approves a merger, the transaction is exempt from the antitrust laws.<sup>132</sup> Through the 1990s, the STB was so permissive in allowing rail mergers that the agency often ignored objections from the DOJ despite being required by Congress to give “substantial deference to any recommendations of the Attorney General.”<sup>133</sup> As one scholar noted, describing the actions of the STB in 1997, the agency’s “political agenda to support merger applications in virtually all circumstances” has led to “a domino effect of additional merger applications with no end in sight.”<sup>134</sup>

In the aftermath of major mergers that disrupted and compromised rail service in the 1990s, the STB imposed a 15-month merger moratorium so that the agency could revise its merger rules and prevent further consolidation of the industry.<sup>135</sup> The agency justified its action on the basis that previously approved mergers created “serious service problems,” “[p]romised customer benefits [made by the railroads] have not yet been fully realized,” and the current level of market concentration created “serious[] concern[s].”<sup>136</sup> The D.C. Circuit Court of Appeals upheld the STB’s moratorium in July 2000.<sup>137</sup>

After the moratorium, using its broad discretion to interpret the public interest standard governing railroad mergers, the STB eventually developed new merger guidelines in June 2001,<sup>138</sup> which remain controlling to this day. Since the moratorium and the new merger guidelines, no major rail mergers have taken place in two decades.<sup>139</sup> Nonetheless, due to past mergers, only four railroads today collect more than 80% of rail industry revenue.<sup>140</sup>

These giant carriers are now making record profits — with over 50% margins.<sup>141</sup> The industry claims this is the result of increased efficiency. At the same time, however, the United States has lost much of its rail infrastructure as deregulated carriers abandoned many lines and forfeited major market share to less fuel-efficient trucks.<sup>142</sup> Moreover, in recent years railroads have been using their monopolistic powers to raise shipping rates and impose new fees on shippers. Though the combination of deregulation and lax merger regulation prevented the government from having to directly bail out failing railroads in the 1980s, these measures have led to a radically downsized rail industry that uses its market power to extract increasing monopolistic prices on its remaining dependents.

Though many studies promote the supposed beneficial effects of railroad mergers, they tend to take a narrow view.<sup>143</sup> Often they use definitions of efficiency that merely focus on operating revenue or other financial margins and ignore the layoffs of workers, the increased prices to dependent firms, and the closing of routes that leaves communities without rail service.<sup>144</sup>

Since no Class I mergers have taken place since 2000, the STB’s new guidelines have not been fully tested. However, Canadian Pacific, the sixth-largest North American railroad, recently announced it intends to merge with Kansas City Southern, the seventh-largest.<sup>145</sup>

### ***Recommendations for Specific Agency Action***

- Vigorously enforce its merger review authority in all future transactions.
- Enact merger guidelines that establish clear, bright-line rules for merger enforcement, and presumptively declare certain mergers and acquisitions not in the public interest.<sup>146</sup>
- For any approved mergers, set strict conditions and rigorous public oversight mandating open access to prevent bottlenecks and fair pricing and delivery terms for all dependent parties seeking service. Violations of the terms agreed to by the merging parties should result in the divestiture of the acquisition.<sup>147</sup>



## **D. Federal Energy Regulatory Commission**

### ***Overview of the Agency***

Congress created the Federal Power Commission (FPC) with the enactment of the Federal Power Act in the 1920s.<sup>148</sup> The ICC and the FCC formed the foundation for the FPC and represented Congress' affirmative commitment to regulating the energy sectors.<sup>149</sup> The FPC eventually became the Federal Energy Regulatory Commission (FERC) when Congress enacted the Department of Energy Organization Act in 1977.<sup>150</sup>

FERC regulates two important sectors of the energy industry. First, FERC is charged with the mission "to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce" and regulating "all facilities for such transmission or sale of electric energy."<sup>151</sup> FERC also regulates the transportation of natural gas (via interstate pipelines) and has done so since 1935, after Congress enacted the Natural Gas Act in response to a report by the FTC detailing the monopolistic practices occurring in the industry.<sup>152</sup> FERC has exceptionally far-reaching authority to regulate both electrical and natural gas transmission.<sup>153</sup>

### ***Antimonopoly and Fair Competition Powers***

#### ***Prohibition of Unfair Market Practices***

##### ***Electric Transmission***

Under Section 205 of the Federal Power Act (FPA), Congress gave FERC the authority to ensure that rates for the transmission or wholesale of electricity are just and reasonable and that companies are prohibited from engaging in undue discrimination or preferential treatment.<sup>154</sup> To ensure that FERC can accomplish this task, the agency can create regulations regarding any "rule, regulation, practice, or contract affecting [a wholesale] rate."<sup>155</sup>

FERC has broad authority to determine which practices are unfair or discriminatory and prevent future harmful actions from electrical transmission companies. Section 206(a) of the FPA specifically mandates the agency determine a fair rate or practice, once a practice is determined to be unjust or discriminatory.<sup>156</sup>

FERC also has the authority to expressly prohibit certain industry-wide practices.<sup>157</sup> For example, FERC implemented Order 888 in 1996 to prevent transmission line owners from discrimination against potential competitors that need access to their facilities.<sup>158</sup> Among other things, Order 888 required public utilities that operate or control interstate transmission facilities to offer transmission service and any other ancillary services to all eligible wholesale buyers and sellers, as well as offer transmission service under the same terms and conditions as their own use.<sup>159</sup> Effectively, Order 888 functionally separates transmission and power marketing functions, prevents owners of essential infrastructure from denying access to their transmission lines, and makes fair and reasonable terms for competitors to access another firm's transmission lines.<sup>160</sup> This power can be particularly valuable to aid the development of and consumer access to renewable energy and prevent dominant electrical utilities from using practices that would block or inhibit the energy from renewable sources from getting into consumers' homes.<sup>161</sup>

## *Natural Gas*

The Natural Gas Act (NGA) is the primary law granting FERC authority to regulate the natural gas industry and has similar features to the FPA.<sup>162</sup> Congress intended the act to provide comprehensive powers to FERC to "protect consumers against exploitation at the hands of natural gas companies."<sup>163</sup> The NGA and its subsequent amendments allocate two important powers to FERC.

First, Section 7 of the NGA mandates, similar to the FCC's powers to grant broadcast licenses, that in order for a company to engage in the transportation of natural gas, it must submit an application to FERC, where the agency can only grant it if the pipeline "is or will be required by the present or future public convenience and necessity."<sup>164</sup> Additionally, FERC can also condition the issuance of licenses based on "such reasonable terms and conditions as the public convenience and necessity may require."<sup>165</sup> FERC's powers are so extensive that firms are not allowed to abandon their natural gas operations without the agency's approval.<sup>166</sup>

The Supreme Court has repeatedly affirmed that FERC has broad discretion to determine what factors to consider in making its determination.<sup>167</sup> Some considerations include "conservation, environmental, and antitrust" issues.<sup>168</sup> But generally, the act requires FERC to "evaluate all factors bearing on the public interest."<sup>169</sup>

FERC has outlined in policy statements its analysis to review when natural gas applications and new constructions are in the public interest.<sup>170</sup> The policies for administering natural gas licenses take place in two phases — an economic analysis and an environmental analysis.<sup>171</sup> But a recent study has revealed that FERC all but ignores its environmental analysis. In a 2020 review of 125 natural gas pipelines projects approved by FERC between 2014 and 2018, "[t]here was no substantive discussion of the findings of FERC's environmental review in the approval section of any decision."<sup>172</sup> This means that FERC is not only abdicating a core aspect of its review process, but the agency also seems to be preferencing economic development for corporations without considering the harms the project causes to the public.

Under Section 5 of the NGA, FERC also has extraordinary powers to shape the entire industry and has repeatedly enacted broad structural regulations.<sup>173</sup> The act states that the agency can regulate practices in the natural gas industry that are found to be "unjust, unreasonable, unduly discriminatory, or preferential."<sup>174</sup>

With this authority, FERC has all but in name transformed the natural gas sector into quasi-common carriers. FERC has enacted many rules and regulations to restructure the natural gas industry to open up the sector to competition and prevent dominant natural gas corporations from refusing to transmit lower-priced gas, connecting to alternative service providers, price squeezing of dependents, and engaging in other unfair conduct.<sup>175</sup> One notable use of FERC's Section 5 powers occurred in 1992 when the agency enacted Order 636.<sup>176</sup> Order 636 required a complete restructuring of the natural gas industry by mandating, among other things, the unbundling of storage, gathering, and transportation services so that customers can choose which companies provide them natural gas and other energy-related services. In other words, Order 636 operated as an industry-wide vertical breakup. Most importantly, Order 636 acted as a form of common carriage regulation because it requires that natural gas transportation providers treat all production companies equally by providing comparable terms and services on a non-discriminatory basis.<sup>177</sup>

## Merger Review Authority

### *Electric Transmission*

FERC is the primary, but not the exclusive,<sup>178</sup> agency to review, block, and approve mergers and acquisitions between electric utilities in the U.S.<sup>179</sup> FERC's review process operates under a broad public interest standard and is thus not restricted to the limitations set by traditional antitrust analysis under the Clayton Act.<sup>180</sup> Despite the authority to do so, FERC has never defined exactly what "public interest" means. As one author cogently stated, "In none of the FERC's merger issuances—[including its policy statements or] the 70-plus approval orders—is there a clear definition of public interest."<sup>181</sup> The clearest guidance FERC has given is its 1996 policy statement that establishes how the agency will review mergers and is based on the 1992 merger guidelines released by the DOJ and FTC.<sup>182</sup> FERC has only given a supplemental update in 2006, and other efforts to change its merger guidelines have not materialized.<sup>183</sup>

FERC's current merger review procedures consist of a five-step analysis specifically considering the effects of the transaction on competition, rates, and regulation.<sup>184</sup> Competition is the most significant factor for the agency.<sup>185</sup> Importantly, FERC's decisions are independent of the DOJ or the FTC, and merger applicants bear the ultimate burden to demonstrate that the merger is in the public interest.<sup>186</sup> FERC can also impose significant obligations and conditions on approved mergers to ensure that a dominant utility is not abusing its market power and to ensure approved mergers remain in the public interest.<sup>187</sup>

FERC has seldom used its merger review authority to block mergers. Between 2006 and 2014, FERC approved 1,273 acquisitions and dispositions,<sup>188</sup> while denying only eight.<sup>189</sup> During the same time period, FERC approved 30 mergers and did not deny a single one.<sup>190</sup> According to one scholar, FERC's actions have been so lackluster that the number of independent retail electric utilities has declined by more than half since the mid-1980s.<sup>191</sup>

### *Natural Gas*

FERC also has two sets of authority to review mergers relating to natural gas companies.<sup>192</sup> The NGA allows FERC to review transactions relating to the public interest obligations natural gas companies are required to adhere to.<sup>193</sup> However, FERC has never used its authority for this purpose.<sup>194</sup> Instead, litigation against mergers between natural gas companies are relegated to the FTC and the DOJ, with the FTC taking much of the lead.<sup>195</sup>

FERC can also review natural gas mergers with its authority derived from the FPA.<sup>196</sup> But its merger review powers from the FPA can only be used for vertical mergers where a natural gas company is merging with an electrical generation company.<sup>197</sup> Similar to other agencies with merger review authority, FERC has not used its powers vigorously.<sup>198</sup>

### ***Recommendations for Specific Agency Action***

- Use rulemaking powers to enact bright-line rules prohibiting “unjust, unreasonable, unduly discriminatory, or preferential” practices in the natural gas and electrical transmission industries.<sup>199</sup>
- Vigorously enforce its merger review authority in all future transactions.
- Enact merger guidelines that establish clear, bright-line rules for merger enforcement, and presumptively declare certain mergers and acquisitions not in the public interest.<sup>200</sup>
- For any approved mergers, set strict conditions and rigorous public oversight mandating open access and fair pricing terms for all dependent parties seeking service. Violations of the terms agreed to by the merging parties should result in the divestiture of the acquisition.

## **E. Committee on Foreign Investment in the United States**

### ***Overview of the Agency***

The Committee on Foreign Investment in the United States (CFIUS) is an interagency panel consisting of representatives from other federal agencies and is a critical arbiter of foreign investment into the U.S., particularly related to mergers involving foreign companies.<sup>201</sup> CFIUS was originally created in 1975 by an executive order.<sup>202</sup> In 1988, however, Congress passed an amendment to the Defense Production Act that formally codified CFIUS.<sup>203</sup> CFIUS serves as an additional check on foreign business transactions to ensure that they do not pose a threat to the national security of the United States.<sup>204</sup>

### ***Antimonopoly and Fair Competition Powers***

#### ***Review of Mergers and Acquisitions Involving Foreign Companies***

CFIUS's primary power is to review mergers and acquisitions involving foreign companies that are subject to its jurisdiction. Specifically, CFIUS reviews transactions that involve "any merger, acquisition, or takeover...with any foreign person that could result in foreign control of any United States business."<sup>205</sup> The term "control" in this context is construed to encompass "the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity, subject to regulations prescribed by [CFIUS]."<sup>206</sup>

CFIUS considers at least 12 factors when analyzing a merger within its jurisdiction. These factors include the effects of the transaction on national defense, product capability, adverse effects on supplying the nation's energy needs, and the likelihood that a foreign business can be controlled by a foreign government.<sup>207</sup> These considerations illuminate the agency's wide-ranging power to find and present relevant evidence that a merger (seemingly on any grounds) would pose a threat to U.S. national security.<sup>208</sup>

Except for transactions where a foreign government has a "substantial interest" (typically more than 10% ownership),<sup>209</sup> CFIUS's review authority is voluntary. However, most applicable parties seek review because if a review is not sought, CFIUS can subject the merging parties to "indefinite[] divestment or other appropriate actions by the President."<sup>210</sup>

Compared with other federal agencies with merger review authority, CFIUS does not make the final determination about merger approval. If, during its investigation, CFIUS finds or determines there are national security risks with a transaction, the committee can recommend remediating measures to the merging entities and "take any necessary actions in connection with the transaction to protect the national security of the United States."<sup>211</sup> CFIUS also presents its findings and recommendations to the president of the United States, who (within 15 days) gives the final approval or requires that the merger be abandoned.<sup>212</sup>

CFIUS investigations are quite potent to mitigate mergers — despite the agency lacking the authority to make the final approval. Evidence also shows that the agency can be a bulwark against foreign acquisitions — as more transactions are reviewed by CFIUS, merging parties withdraw and abandon more transactions,<sup>213</sup> protecting American markets from national security threats, including market concentration. However, past presidents have approved nearly all transactions presented by CFIUS. Between 1975 and 2018, the president has declined to approve only five transactions.<sup>214</sup>

CFIUS's liberal review of mergers has caused the agency to make decisions that threaten American markets and production capacity. For example, CFIUS permitted in 2013 the acquisition of Smithfield,<sup>215</sup> one of the largest pork processing companies with a 26% U.S. market share,<sup>216</sup> by the Chinese company WH Group. During the outbreak of swine fever in 2018, Smithfield prioritized Chinese markets over domestic markets.<sup>217</sup> At the time, there were concerns that this would cause pork shortages for American consumers.

In 2017, state-owned China National Cereals, Oils and Foodstuffs Corporation invested in a grain terminal in Illinois to export corn and soybeans back to China. A 2018 report from the USDA makes the case that Chinese overseas investment in agriculture has the potential to reshape agriculture trade and bolster China's influence in the world economy.<sup>218</sup>

### ***Recommendations for Specific Agency Action***

- Pressure Congress to make CFIUS review mandatory for all mergers and acquisitions involving foreign companies.
- Establish clear, bright-line rules for merger enforcement, and presumptively declare that certain mergers and acquisitions threaten the national security of the United States.
- For any approved mergers, set strict conditions and rigorous public oversight. Violations of the terms agreed to by the merging parties should result in the divestiture of the acquisition.

## **F. Department of Defense**

### ***Overview of the Agency***

The Department of Defense (DOD) is one of the original administrative bodies in the executive branch. Congress created the DOD's modern structure in 1947 with the enactment of the National Security Act.<sup>219</sup> The DOD organizes and supervises all the agencies and functions of the federal government pertaining to national security and defense. Because of its exceptionally large budget and its importance to ensuring the nation's security, the DOD is one of the most formidable agencies within the executive branch.<sup>220</sup>

### ***Antimonopoly and Fair Competition Powers***

#### ***Constructing and Moderating the Procurement Processes***

The DOD has deeply integrated relationships with contractors in the private market. The DOD contracts out its requests for certain products and materials to facilitate its operations, ranging from purchasing office supplies to aircraft.<sup>221</sup> In fact, the DOD awards almost 66% of all contract spending by the federal government.<sup>222</sup> Therefore, the agency has a significant amount of influence over not only the terms of how these contracts are awarded but how they must be carried out. This process is commonly referred to as procurement.

The procurement rules are outlined in the Competition in Contracting Act, which generally requires "full and open competition by using competitive procedures, unless otherwise authorized."<sup>223</sup> The requirements for full and open competition are defined in the Federal Acquisition Regulations (FAR).<sup>224</sup> Although FAR requires that awarded contracts must "promote full and open competition in the acquisition process," there are many vaguely provided exceptions that can be used to circumvent this requirement.<sup>225</sup> The Competition in Contracting Act also contains many loopholes and exemptions.<sup>226</sup>

Unfortunately, over the past 50 years, America's pro-concentration agenda has significantly eroded the nation's industrial and manufacturing base. One author noted that the federal contracting process has adopted a "Ronco-like 'set it and forget it' mantra approach[.]"<sup>227</sup> But recently, the DOD has come to realize the dangers of a pro-monopoly agenda. In its 2020 Industrial Capabilities report, the DOD issued a stark and stern warning: "Without...serious and targeted investment — billions instead of millions — America's defense industrial base is simply unsustainable, let alone capable of supporting our deployed forces and legacy equipment while solving the complex warfighting challenges posed by advanced technologies in the 21st century, from AI and cyber to hypersonics and autonomous air and sea systems."<sup>228</sup> The DOD's report is filled with examples of increasing concentration at all levels of its procurement supply chain and how market concentration poses a direct threat to the DOD's operations and U.S. national security.<sup>229</sup> The DOD has expressed similar concerns in other published reports.<sup>230</sup> And in 2022 the agency released a landmark report detailing the dangerous effects of concentration in the defense industry.<sup>231</sup>

Providing additional evidence of the problems associated with the DOD's current procurement process is the Advisory Panel's conclusions on Streamlining and Codifying Acquisition Regulations (also known as the Section 809 Panel). The panel consisted of experts selected to fundamentally overhaul the DOD's procurement processes.<sup>232</sup> They concluded that the DOD lacks a coherent strategy to assist small businesses.<sup>233</sup>

### Merger Review and Antitrust Input

For many of the nation's defense contractors (like Lockheed Martin and Boeing), the DOD is the sole purchaser.<sup>234</sup> As a result, the agency has a unique level of importance in providing information to other more traditional antitrust enforcers like the DOJ and the FTC.

The FTC and DOJ ask the DOD to provide critical input to their antitrust analysis, including information relating to geographic and product markets, product substitutions, and the validity and desirability of any potential efficiencies that are alleged to result from a merger.<sup>235</sup> The DOD also provides answers to the FTC's and DOJ's questions about the history of various terms relating to business conduct in an industry.<sup>236</sup> Along the same lines, the DOD is also the primary authority to express any national security concerns supporting or opposing a merger and analyzing whether the transaction adversely impacts America's defense operations and national security. The DOD's opinion is given significant weight in the merger review process for the DOJ and FTC, but it is not conclusory.<sup>237</sup> The agency has so much influence that the FTC and DOJ felt compelled to include national security implications in their merger review processes in 2016.<sup>238</sup>

The DOD can also unilaterally restrict or open entry into a specific market based on its own purchasing operations or through producing the desired product itself.<sup>239</sup> This not only means that the DOD can itself prevent potential anti-competitive and other exclusionary effects resulting from a merger, but also requires the FTC and DOJ to analyze the DOD's policies and priorities to determine the likelihood of new entry and exclusionary effects as a result of a merger.

For decades, the defense industry has consolidated into only a handful of market participants. One study found that "[b]etween 1990 and 2000, the share of federal defense contract spending awarded to the five largest private firms rose from 21.7% to 31.3%, driven by a series of several large mergers among defense contractors."<sup>240</sup> This indicates the agency has prioritized factors such as purchase price and corporate concentration over risk-spreading, supply chain resiliency, and U.S. national security.<sup>241</sup>

The DOD has used its influence to push and advocate for consolidation or weaker antitrust remedies. In 1956, the DOD successfully convinced the DOJ not to break up AT&T.<sup>242</sup> Additionally, in a now widely documented instance known as the "last supper," in 1993, then-DOD officer and later Secretary of Defense William Perry instructed the CEOs of the largest defense companies to "consolidate or evaporate."<sup>243</sup> Defense companies took the invitation, and shortly thereafter, a massive merger wave occurred in the defense industry. Between 1993 and 2000, the number of top defense suppliers collapsed from thirty-six to eight, and the number of prime contractors fell from fifty to six.<sup>244</sup>

In several instances, however, the DOD's input has proven essential to block mergers that would clearly violate the law and threaten national security. For example, the DOD expressed concerns in the late 1990s and early 2000s regarding the proposed merger between Lockheed Martin and Northrop and General Dynamics's acquisition of Newport News Shipbuilding.<sup>245</sup> Additionally, the DOD has stated that it will seek smaller independent suppliers for defense products "even in the face of apparent competitive sufficiency."<sup>246</sup>



### ***Recommendations for Specific Agency Action***

- Establish policies that promote and expand relationships with small businesses.
- Work more closely with CFIUS to prevent mergers and acquisitions of domestic corporations by foreign firms.
- Vigorously advocate against the increased consolidation of the defense sector to the DOJ and FTC.
- Whenever possible, use its vast purchasing capacity to preference small and independent manufacturers and service providers.
- Establish policies that presumptively declare certain mergers and acquisitions as a threat to U.S. national security.

## **G. Department of Transportation**

### ***Overview of the Agency***

Congress created the Department of Transportation (DOT) in 1966 and, concerning its regulation of airlines, is the successor to the Civil Aeronautics Board. Among other areas, the DOT regulates all aviation and roads in the United States. The DOT's primary antimonopoly powers stem from its regulatory authority over airlines.

### ***Antimonopoly and Fair Competition Powers***

#### ***Prohibiting and Investigating Unfair or Deceptive Acts or Practices and Unfair Methods of Competition in the Airline Industry***

The main antimonopoly authority of the DOT is Section 411 of the Federal Aviation Act.<sup>247</sup> The act states that the Secretary of Transportation can “investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation” and that such practices may be prohibited.<sup>248</sup> Congress modeled the statute after Section 5 of the FTC Act.<sup>249</sup>

With its expansive power, the DOT has used its Section 411 authority to adopt a series of regulations including prohibiting certain practices related to tarmac delays, full-fare advertising, and ticket refunds.<sup>250</sup> Section 411 is construed broadly by the federal courts and includes practices that encompass and go beyond what is prohibited by the antitrust laws, such as the prohibition of incipient violations before the unfair conduct harms the public.<sup>251</sup> The DOT also issued policy guidelines prohibiting predatory pricing in the 1990s, but they were withdrawn in 2001.<sup>252</sup>

However, the DOT has taken deliberate steps to narrow its enforcement capabilities. For example, in 2002, the DOT stated that it does not believe it has the “authority to intervene in disputes over commission levels or other aspects of the contractual relationships between carriers and travel agencies absent evidence of a violation or quasi-violation of the antitrust laws.”<sup>253</sup> Encapsulating the DOT’s deferential view, one author noted that “the DOT has shown a strong respect for the right of a carrier to choose how and under what terms to distribute services, and corresponding restraint against intervening in private contractual relationships absent clear evidence of a violation or near violation of the antitrust laws.”<sup>254</sup> Moreover, the agency mostly confines its regulations to fact-specific case-by-case inquiries.<sup>255</sup>

#### ***Merger Review and Advocacy***

Originally, the DOT had sole jurisdiction to approve airline mergers.<sup>256</sup> In 1989, Congress gave the DOJ the ability to review airline mergers because the DOT was not using its authority and approved almost every merger that came before it, including mergers that the DOJ disagreed with.<sup>257</sup> As one commentator noted, the DOT “never met a merger it did not like.”<sup>258</sup> The lax merger enforcement predominantly arose from false assumptions about how the airline industry works — particularly as it relates to barriers to entry and economies of scale.<sup>259</sup> Today, both the DOJ and the DOT have merger review authority over the airline industry.

Between 2000 and 2020, the number of major airlines in the United States was reduced by half, almost exclusively due to mergers.<sup>260</sup> The DOT has two avenues to regulate mergers in the airline industry.

First, the DOT can separately enforce the Clayton Act,<sup>261</sup> but, rather than enforce the act, the agency primarily “conducts its own competitive analysis of [transactions involving domestic airline acquisitions and mergers] and submits its views [and opinions to the DOJ] in confidence.”<sup>262</sup> Therefore, like the DOD, the DOT is a vital source of information to the DOJ and can advocate against increased market consolidation.<sup>263</sup>

Second, the DOT regulates the use of airspace and all airline route transfers. All route transfers, which are often a part of a merger or acquisition between two or more airlines, must be in accordance with the public interest.<sup>264</sup> And no route transfer can be completed without the approval of the Secretary of Transportation.<sup>265</sup> An airline’s use of airspace must also be in accordance with the public interest.<sup>266</sup>

Some of the factors the DOT uses to determine if a license transfer is in the public interest are “(1) the viability of each air carrier involved in the transfer, (2) competition in the domestic airline industry, and (3) the trade position of the United States in the international air transportation market.”<sup>267</sup> Similar to the merger authority of other federal agencies, the DOT’s route transfer authority has not been frequently litigated.<sup>268</sup>

Importantly, the DOT also works with the DOJ to structure and modify remedies that merging parties agree to mitigate any potential exclusionary and predatory conduct derived from a merger.<sup>269</sup>

### Approval or Denial of Airline Joint Ventures

The DOT also has enormous discretion to approve joint ventures between airlines. Joint ventures occur when companies agree to mutually pursue a similar goal to take advantage of both companies' industrial or technological capabilities. In some cases, joint ventures can increase competition. In other cases, joint ventures can suppress competition and exclude rivals from essential resources.<sup>270</sup>

Airlines seeking to enter any joint venture must first submit information to the DOT to demonstrate the joint venture is in the public interest and does not substantially reduce competition.<sup>271</sup> Ultimately, the burden lies with the applicants to demonstrate the benefits of the joint venture and that it does not harm the public interest and does not lessen competition.<sup>272</sup>

The DOT’s authority is so expansive the agency can even immunize airlines from antitrust claims.<sup>273</sup> The DOT has historically provided antitrust immunity liberally to airlines.<sup>274</sup>

### ***Recommendations for Specific Agency Action***

- Initiate rulemakings that promulgate clear, bright-line rules to prohibit unfair or deceptive acts or practices and unfair methods of competition in the airline industry.
- Work with the DOJ and FTC to enact merger rules that presumptively declare certain airline mergers and route transfers to be presumptively illegal.
- For any approved mergers, set strict conditions and rigorous public oversight mandating open access to prevent bottlenecks and fair pricing terms for all dependent parties seeking service. Violations of the terms agreed to by the merging parties should result in the divestiture of the acquisition.
- Joint venture applications submitted by dominant airlines should be scrutinized with a presumption that the application will be denied and, if approved, include rigorous public oversight.

## H. Financial Regulators

Many different federal agencies govern the U.S. financial sector. This report will focus on only three regulators that have a significant role in advancing antimonopoly and fair competition policies in the industry.<sup>275</sup>

The Federal Reserve, the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC) regulate different segments of the financial industry. Congress created the Federal Reserve in 1913 to manage the credit, money supply, and interest rates on the nation's new debt.<sup>276</sup> In general, the Federal Reserve develops the nation's monetary policy, works to maintain the financial system's stability, supervises and regulates financial institutions, ensures the safety and efficiency of the payment and settlement system, and promotes consumer protection and community development.<sup>277</sup>

Congress created the OCC in 1864 with the signing of the National Banking Act.<sup>278</sup> The agency's primary responsibility is to monitor and regulate federally chartered national banks to ensure that they "did not fail and thereby spark bank runs that could collapse the economy."<sup>279</sup>

Congress created the FDIC in the wake of the Great Depression in the 1930s to insure bank deposits to prevent runs on banks and promote public confidence in the banking system.<sup>280</sup>

### ***Antimonopoly and Fair Competition Powers***

#### ***Merger Review Authority***

The primary power these regulators have is their review of bank mergers. The statutes governing bank mergers include the Bank Merger Act of 1960, the Bank Merger Act Amendments of 1966, and the Bank Holding Company Act.<sup>281</sup> Each of these laws works similarly in the context of analyzing bank mergers.

Of the three laws, the Bank Merger Act of 1966 is the primary statute. Congress intended the act to "mak[e] the bank supervisory agencies give substantially more emphasis to the antitrust standards in determining the competitive effects of a merger than they did under the 1960 [Bank Merger Act], so that the trend toward ever-larger numbers of bank mergers and ever-increasing concentration in the banking industry will not continue."<sup>282</sup>

Per the Bank Merger Act of 1966, the Federal Reserve, OCC, and FDIC all have a separate role in the bank merger review process. The OCC analyzes mergers for national banks.<sup>283</sup> The Federal Reserve reviews mergers for state member banks.<sup>284</sup> The FDIC reviews mergers for state nonmember banks.<sup>285</sup>

The legal standard and analytical framework stated in the Bank Merger Act of 1966 is significantly similar to the Clayton Act.<sup>286</sup> Specifically, the Bank Merger Act of 1966 prohibits bank mergers that result in "a monopoly. . . in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States. . . whose effect in any section of the country may be substantially to lessen competition, or . . . in any other manner would be in restraint of trade[.]" The Bank Merger Act of 1966 is also similar to the Clayton Act with respect to its prophylactic construction, such that the statute prohibits exclusionary and predatory mergers before the public is harmed and concentrated power becomes entrenched. As one court stated, to prove a violation of the act,

the government merely needs to provide “objective indications of reasonably probable anticompetitive effect[s].”<sup>287</sup>

The Bank Merger Act of 1966, however, is broader than the Clayton Act. When considering the benefits or adverse effects of a bank merger, regulators are required to consider the public interest such that a bank merger cannot be approved if the adverse effects of the transaction are “clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served,”<sup>288</sup> and the “financial and managerial resources and future prospects of the existing and proposed institutions.”<sup>289</sup> Other amendments to the Bank Merger Act of 1966 also require reviewing agencies to consider the potential adverse effects of a bank merger on underserved communities and systemic risk to the economy in every bank merger.<sup>290</sup>

In other words, as one scholar notes, it is clear Congress structured the law such that “competition among commercial banks is not the sole criterion for judging a merger.” Instead, Congress requires federal agencies reviewing bank mergers to consider broader social and economic goals, particularly those affecting local communities and marginalized groups.

Although Congress has consistently strengthened the laws governing bank mergers and has empowered multiple agencies with broad review authority, like many of the other industries detailed in this report, regulators have taken a relaxed view of bank mergers since the 1970s. For example, the Federal Reserve has not denied any of the more than 3,500 merger applications before it since 2006, and the DOJ has not challenged a single bank merger since 1985.<sup>291</sup> And, between 1991 and 2003, there were at least 48 bank mergers where either the acquiring bank or the acquired bank had over \$10 billion in assets.<sup>292</sup>

The banking sector is currently experiencing some of the highest concentration levels in its history. According to the most recent IBIS World Reports, the top four companies in the investment banking sector account for 68.1% of total industry revenue in 2021, and the top five industrial banks accounted for 76.4% of industry revenue in 2021.<sup>293</sup>

The exceptionally elevated levels of concentration in the banking industry are almost entirely the result of mergers and the near nonexistent enforcement from federal agencies. In the 1960s, there were almost 24,000 banks in the United States.<sup>294</sup> Today there are less than 5,000.<sup>295</sup> Third-party data shows that between 1980 and 2021, there have been more than 16,000 bank mergers.<sup>296</sup>

### ***Recommendations for Agencies***

- Vigorously enforce their merger review authority in all future transactions.
- Establish clear, bright-line rules for merger enforcement, and presumptively declare certain mergers and acquisitions not in the public interest such that it harms the “convenience and needs of the community to be served” and the financial stability of the U.S. economy.
- For any approved mergers, set strict conditions and rigorous public oversight for all dependent parties seeking to merge. Violations of the terms agreed to by the merging parties should result in the divestiture of the acquisition.

## **V. Conclusion**

America is facing an invigorated resurgence in antimonopoly enforcement. While Congress considers new antitrust legislation, the president can use administrative agencies to enact a progressive and vigorous antimonopoly agenda. The agencies detailed in this report have exceptionally broad and latent statutory powers that in many cases have been woefully underutilized for decades. These powers can and must be used to create a fairer marketplace for consumers, workers, and small businesses.

## **Author and Acknowledgments**

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Additional contributions, edits, and commentary were made by Phillip Longman, the Policy Director at the Open Markets Institute; LaRonda Peterson, the Managing Editor at the Open Markets Institute; Sandeep Vaheesan, the Legal Director at the Open Markets Institute; and Claire Kelloway, the Food Systems Program Manager at the Open Markets Institute.

The author used some of the information detailed in this report from research conducted in 2017 by Jonathan Tsois, a former legal intern at the Open Markets Institute.



## Endnotes

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<sup>1</sup> MAJORITY STAFF OF HOUSE SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMIN. LAW, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020), [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf).

<sup>2</sup> House Committee on the Judiciary, *Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker*, YOUTUBE (Sept. 28, 2021), <https://www.youtube.com/watch?v=w8zSjr4JaiQ>; Senate Hearing on Promoting Competition and Privacy in the Tech Sector: Two Hearings in One?, JDSUPRA (Dec. 15, 2021), <https://www.jdsupra.com/legalnews/senate-hearing-on-promoting-competition-1197152/>.

<sup>3</sup> *House of Representatives Launches Assault of Legislation Aimed at Taking Down Big Tech*, OPEN MARKETS INST. (June 18, 2021), <https://www.openmarketsinstitute.org/publications/the-corner-newsletter-june-18-2021>.

<sup>4</sup> Nicolás Rivero, *A Cheat Sheet to All of the Antitrust Cases Against Big Tech in 2021*, QUARTZ (Sept. 29, 2021), <https://qz.com/2066217/a-cheat-sheet-to-all-the-antitrust-cases-against-big-tech-in-2021/>.

<sup>5</sup> Daniel A. Hanley & Sally Hubbard, *Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing Worker Power*, OPEN MARKETS INST. (Sept. 2020), <https://www.openmarketsinstitute.org/publications/eyes-everywhere-amazons-surveillance-infrastructure-and-revitalizing-worker-power>; Daniel A. Hanley, *Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing Worker Power – An Update*, OPEN MARKETS INST. (Sept. 2021), <https://www.openmarketsinstitute.org/publications/report-update-eyes-everywhere-amazons-worker-surveillance-continued>; Daniel A. Hanley, *Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing a Fair Marketplace*, OPEN MARKETS INST. (July 2021), <https://www.openmarketsinstitute.org/publications/eyes-everywhere-part-2-amazons-surveillance-of-consumers-and-competitors>.

<sup>6</sup> Rey Mashayekhi, *The Current Congress Has Been the Least productive in Decades, A Warning Sign for Biden if the Senate Stays Red*, FORTUNE (Dec. 10, 2020) (“The current 116th U.S. Congress—featuring a Republican-led Senate and a Democratic-held House of Representatives—has been the least productive in at least half a century”), <https://fortune.com/2020/12/10/biden-divided-congress-senate-georgia-runoff-mcconnell-gop-republican-majority/>; Chris Cillizza, *The Least Productive Congress Ever*, WASH. POST (July 17, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/17/the-least-productive-congress-ever/>.

<sup>7</sup> Exec. Order No. 14036, 86 Fed. Reg. 36987, <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.

<sup>8</sup> *Agencies*, FED. REG., <https://www.federalregister.gov/agencies> (last visited Jan. 26, 2022).

<sup>9</sup> James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 651 (2004).

<sup>10</sup> 5 U.S.C. § 706.

<sup>11</sup> *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 377 (1998).

<sup>12</sup> Typically, an agency's interpretation of a statute is granted Chevron Deference if:

- 1) Congress delegated authority to the specific agency to speak with the force of law. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 212 (2006); *Barnhart v. Walton*, 535 U.S. 212 (2002). Delegation is clear when Congress grants an agency “power to engage in adjudication or notice-and-comment rule-making,” *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).
- 2) “[W]hether Congress has directly spoken to the precise question at issue.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).
- 3) If the “intent of Congress is clear, that is the end of the matter” or if Congress has not spoken and the statute is “silent or ambiguous” as to the question of interpretation or meaning, then a court must determine if the agency's interpretation is a “permissible construction of the statute.” *Chevron*, 467 U.S. at 842; see also *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs. (Brand X)*, 545 U.S. 967 (2005).

<sup>13</sup> *Chevron Deference*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/chevron\\_deference](https://www.law.cornell.edu/wex/chevron_deference) (last visited Jan. 26, 2022).

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<sup>14</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. (1996).

<sup>15</sup> *Chevron*, 467 U.S. 837; *Brand X*, 545 U.S. 967 (2005); *U.S. Telecom Assoc. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

<sup>16</sup> Royce Zeisler, *Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266, 295.

In fact, extraordinary circumstances can create additional powers for administrative agencies when they believe and have evidence to support that their administration of Congress' command is being frustrated. For example, the Surface Transportation Board, the agency responsible for railroad regulation, was able to, as determined by the D.C. Circuit Court, impose a merger moratorium in the 2000s because of "considerable consolidation" and risks of "massive frustration" with Congress' command. *W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168 (D.C. Cir. 2000).

<sup>17</sup> Pfander, *supra* note 9, 652, 656-58 ("No hard and fast line separated the work of the two institutions; early Article I tribunals often filled a gap in the judicial competence of the federal courts.")

<sup>18</sup> 5 U.S.C. § 553(c).

<sup>19</sup> For example, the FTC has not lost a case in its own administrative forum in decades. Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, J. COMPETITION L. & ECON. 1, 22-23 (2016),

[https://www.ftc.gov/system/files/documents/public\\_statements/1005443/ohlhausen\\_-\\_administrative\\_litigation\\_at\\_the\\_ftc\\_effective\\_tool\\_for\\_developing\\_the\\_law\\_or\\_rubber.pdf](https://www.ftc.gov/system/files/documents/public_statements/1005443/ohlhausen_-_administrative_litigation_at_the_ftc_effective_tool_for_developing_the_law_or_rubber.pdf).

<sup>20</sup> *America's Concentration Crisis*, OPEN MARKETS INST.,

<http://concentrationcrisis.openmarketsinstitute.org/> (last visited Jan. 25, 2022).

<sup>21</sup> Citations *supra* note 5.

<sup>22</sup> For the benefits of bright-line rules see Open Markets, *Restoring Antimonopoly Through Bright-Line Rules*, PROMARKET (Apr. 26, 2019), <https://promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules/>; Daniel A. Hanley, *How Antitrust Lost Its Bite*, SLATE (Apr. 6, 2021), <https://slate.com/technology/2021/04/antitrust-hearings-congress-legislation-bright-line-rules.html>; Open Markets Institute et al., *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses* (March 2019),

<https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>; Open Markets Institute et al., *Petition for Rulemaking to Prohibit Exclusionary Contracts* (July 2020),

<https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf>.

<sup>23</sup> Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1103 (1934).

<sup>24</sup> *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 212 (1943).

<sup>25</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (The FCC was explicitly given "broad authority" to regulate "all forms of electrical communication, whether by telephone, telegraph, cable, or radio."); *What We Do*, FED. COMM. COMMISSION, <https://www.fcc.gov/about-fcc/what-we-do> (last visited Jan. 26, 2022).

<sup>26</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. (1996).

<sup>27</sup> *Id.* at § 202(h). Section 202(h) was actually written by corporate lobbyists. See Alicia Mundy, *Put the Blame on Peggy, Boys*, INDEXARTICLES (June 30, 2003), <https://indexarticles.com/technology/cable-world/put-the-blame-on-peggy-boys/>.

<sup>28</sup> 47 U.S.C. § 307.

<sup>29</sup> *Id.*

<sup>30</sup> Telecommunications Act of 1996 § 202(h).

<sup>31</sup> Beth Brodsky & Daniel A. Hanley, *The FCC Seeks to Hinder Female and Minority Broadcast Ownership for Policies Favoring Concentrated Corporate Ownership*, COMMON DREAMS (Jan. 28, 2021),

<https://www.commondreams.org/views/2021/01/28/fcc-seeks-hinder-female-and-minority-broadcast-ownership-policies-favoring>; *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021); *Nat'l Broad.*, 319 U.S. at 219; *Fed. Commc'ns Comm'n v. Sanders Radio Station*, 309 U.S. 470, 475 (1940) ("An important element of public interest and convenience affecting the issue of a license is

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the ability of the licensee to render the best practicable service to the community reached by his broadcasts.”).

<sup>32</sup> Part 4—Broadcast Services Other Than Standard Broadcast, 6 Fed. Reg. 2282, 2284-2285, (May 6, 1941).

<sup>33</sup> MARA EINSTEIN, *MEDIA DIVERSITY: ECONOMICS, OWNERSHIP, AND THE FCC* 27-29 (2004).

<sup>34</sup> Amend. of Sections 73.34, 73.240, & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, Fm, & Television Broad. Stations, 50 F.C.C.2d 1046, 1074 (1975), *recon.*, 53 FCC 2d 589 (1975), *aff'd in part and rev'd in part sub nom.* National Citizens Committee For Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978).

<sup>35</sup> Daniel A. Hanley, *Another Trump Legacy: Spreading Price Discrimination on the Internet*, WASH. MONTHLY (July 30, 2020), <https://washingtonmonthly.com/2020/07/30/another-trump-legacy-spreading-price-discrimination-on-the-internet/>.

<sup>36</sup> Daniel A. Hanley et al., *Financing Free Speech: A Typology of Government Competition Policies in Information, Communication, and Media Markets*, OPEN MARKETS INST. (Sept. 2020), [https://static1.squarespace.com/static/5efcb64b1cf16e4c487b2f61/t/5f6a6224a4d0b87437a0a7f0/1600807462241/financing-free-speech\\_cjl-sept2020.pdf](https://static1.squarespace.com/static/5efcb64b1cf16e4c487b2f61/t/5f6a6224a4d0b87437a0a7f0/1600807462241/financing-free-speech_cjl-sept2020.pdf).

<sup>37</sup> The current media ownership rules are: (1) Television duopoly rules; (2) local radio ownership rules; (3) radio/television cross-ownership rules; (4) newspaper/broadcast cross-ownership rules; and (5) the dual network rule. See 2014 Quadrennial Regul. Rev. F Rev. of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 32 F.C.C. Rcd. 9802 (2017).

<sup>38</sup> 47 U.S.C. § 153(24).

<sup>39</sup> 47 U.S.C. § 154(i).

<sup>40</sup> *Southwestern Cable*, 392 U.S. at 178.

<sup>41</sup> 47 U.S.C. § 201.

<sup>42</sup> 47 U.S.C. § 202; see generally 47 U.S.C. §§ 201-76.

<sup>43</sup> 47 U.S.C. § 251(a), (c)(2)-(3); see also 47 U.S.C. § 201(a).

<sup>44</sup> Protecting & Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015).

<sup>45</sup> Hanley, *supra* note 35.

<sup>46</sup> Restoring Internet Freedom, 33 F.C.C. Rcd. 311 (2018).

<sup>47</sup> *Brand X*, 545 U.S. 967; see also Max Ufberg, *Biden's New FCC Chair May Signal a Return to Net Neutrality, But it Could Take a While*, FORTUNE (Nov. 15, 2021), <https://fortune.com/2021/11/15/new-fcc-chair-net-neutrality-biden-jessica-rosenworcel>.

<sup>48</sup> Promotion of Competitive Networks in Loc. Telecomm. Markets, 23 F.C.C. Rcd. 5385, 5391 (2008) (residential buildings); Promotion of Competitive Networks, 15 F.C.C. Rcd. 22983, 22997 (2000) (commercial buildings); see also 47 CFR § 64.2500-01.

<sup>49</sup> *FCC Acts to Increase Broadband Competition in Apartment Buildings*, FED. COMM. COMMISSION (Feb. 15, 2022), <https://www.fcc.gov/document/fcc-acts-increase-broadband-competition-apartment-buildings-0>.

<sup>50</sup> Communications Act of 1934., Pub. L. No. 73-416, 48 Stat. 1064 (1934).

<sup>51</sup> 47 U.S.C. § 214(a).

<sup>52</sup> 47 U.S.C. § 310(d).

<sup>53</sup> Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, FED. COMM. COMMISSION (Aug. 12, 2014), <https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest>.

<sup>54</sup> See generally Consent to the Transfer of Control of Licenses Xm Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, 23 F.C.C. Rcd. 12348, 12365, 12366 (2008) (the FCC “takes a more expansive view of potential and future competition and its impact on the relevant market”) [hereinafter XM-Sirius]; Jonathan B. Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, 25 ANTITRUST 36, 38 (2011), [https://transition.fcc.gov/osp/projects/baker\\_vertical\\_mergers.pdf](https://transition.fcc.gov/osp/projects/baker_vertical_mergers.pdf); Christopher Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal 5* (Faculty Scholarship at Penn Law No. 1543) (Some of the factors that the FCC considers in its merger review include “(1) whether the

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transaction would create any violations of the communications statutes; (2) whether the transaction would create any violations of the FCC's rules; (3) whether the transaction would substantially frustrate or impair the FCC's enforcement of the communications statutes or their objectives; and (4) whether the transaction would yield affirmative public interest benefits.”).

<sup>55</sup> Applications of AT&T Inc. and DIRECTV, 30 F.C.C. Rcd. 9131, 9140, ¶ 20 (2015).

<sup>56</sup> *XM-Sirius*, 23 F.C.C. Rcd. at 12364, ¶31.

<sup>57</sup> 47 U.S.C. § 310(d).

<sup>58</sup> Consolidated Comments of Sirius Satellite Radio Inc. & XM Satellite Radio Holdings Inc., Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57 at ¶ 32 (Aug. 13, 2007); see also Jon Brodtkin, *How the US Could Block the Comcast/Time Warner Cable Merger*, ARSTECHNICA (Feb. 18, 2014), <https://arstechnica.com/tech-policy/2014/02/how-the-us-could-block-the-comcasttime-warner-cable-merger/>.

<sup>59</sup> *Western Union Division, Commercial Telegrapher's Union, A.F. of L. v. United States*, 87 F.Supp. 324, 335 (D. D.C.), *aff'd*, 338 U.S. 864 (1949); David A. Curran, *Rethinking Federal Review of Telecommunications Mergers*, 28 OHIO N.U. L. REV. 747, 758 (2002) (stating “[The Public Interest Standard] is obviously much broader than the “substantially lessens competition” standard used by the other antitrust agencies.”); Applications Filed for the Transfer of Certain Spectrum Licenses & Section 214 Authorizations in the States of Maine, New Hampshire, & Vermont from Verizon Commc'ns Inc. & Its Subsidiaries to Fairpoint Commc'ns, Inc., 23 F.C.C. Rcd. 514, 520 ¶ 12 (2008); AT&T Inc. & Bellsouth Corp., 22 F.C.C. Rcd. 5662, 5673 ¶ 20 (2007).

<sup>60</sup> Consent to the Assignment &/or Transfer of Control of Licenses Adelpia Commc'ns Corp., (& Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees Adelpia Commc'ns Corp., (& Subsidiaries, Debtors-in-Possession), Assignors & Transferors, to Comcast Corp. (Subsidiaries), Assignees & Transferees Comcast Corp., 21 F.C.C. Rcd. 8203, 8307 (2006).

<sup>61</sup> 47 U.S.C. § 303(r); 47 U.S.C. § 214(c).

<sup>62</sup> The significant actions the agency has taken are blocking the merger of Sinclair and Tribune in 2018 and the merger between AT&T and T-Mobile in 2011. See Staff Analysis and Findings, Application of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations (Nov. 29, 2011) (WT Docket 11-65), <https://docs.fcc.gov/public/attachments/DA-11-1955A2.pdf>; *Sinclair and Tribune*, MB Docket 17-179, FED. COMM. COMMISSION, <https://www.fcc.gov/transaction/sinclair-tribune> (last visited Jan. 26, 2022).

<sup>63</sup> T-Mobile Us, Inc., & Sprint Corp., for Consent to Transfer Control of Licenses & Authorizations, Applications of Am. H Block Wireless L.L.C., Dbsd Corp., Gamma Acquisition L.L.C., & Manifest Wireless L.L.C. for Extension of Time, 34 F.C.C. Rcd. 10578 (2019).

<sup>64</sup> Steven Musil, *FCC Approves Sirius-XM Satellite Radio Merger*, CNET (July 26, 2008), <https://www.cnet.com/tech/mobile/fcc-approves-sirius-xm-satellite-radio-merger/>; see generally Leigh M. Murray, *Sirius Mistake: The FCC's Failure to Stop A Merger to Monopoly in Satellite Radio*, 59 AM. U. L. REV. 83, 83 (2009).

The FCC also approved the merger between Nextstar and Tribune. See Applications of Trib. Media Co. (Transferor) & Nexstar Media Grp., Inc. (Transferee) & Nexstar Broad., Inc. (Assignor) & Scripps Broad. Holdings, LLC (Assignee) & Nexstar Broad., Inc. (Assignor) & Tegna Broad. Holdings, LLC (Assignee) & Nexstar Broad., Inc. (Assignor) & Ccb License, LLC (Assignee) & Dreamcatcher Broad., LLC (Transferor) & Loc. TV Fin., LLC (Transferee), No. BTCCDT-20190107ADJBA, 2019 WL 4440126 (OHMSV Sept. 16, 2019). See also Jim Chen, *Telecommunications Mergers*, in COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES 56-64 (Peter C. Carstensen and Susan Beth Farmer, eds., 2008).

<sup>65</sup> Thomas Gryta, et al., *AT&T Reaches Deal to Buy Time Warner for \$85.4 Billion*, WALL ST. J. (Oct. 22, 2016), <https://www.wsj.com/articles/at-t-reaches-deal-to-buy-time-warner-for-more-than-80-billion-1477157084>.



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<sup>66</sup> Daniel A. Hanley, *Federal Communications Commission Must Block Verizon's Acquisition of TracFone*, BROADBAND BREAKFAST (Aug. 6, 2021), <https://broadbandbreakfast.com/2021/08/daniel-hanley-federal-communications-commission-must-block-verizons-acquisition-of-tracfone/>.

<sup>67</sup> Makena Kelly, *FCC approves \$6 billion Verizon-Tracfone Acquisition*, VERGE (Nov. 22, 2021), <https://www.theverge.com/2021/11/22/22797281/fcc-verizon-tracfone-wireless-5g-deal-approval-lifeline>.

<sup>68</sup> Act of May 15, 1862, 12 Stat. L. 387 (1862).

<sup>69</sup> FRANCIS G. CAFFEY, A BRIEF STATUTORY HISTORY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 4 (1916).

<sup>70</sup> FED. TRADE COMM'N, FOOD INVESTIGATION: MEAT-PACKING INDUSTRY (1919); see also S. BRETT OFFUTT, THE PACKERS AND STOCKYARDS ACT OF 1921: A HISTORY OF ADMINISTRATION AND ENFORCEMENT 7 (2009) (The commission found that "packers were manipulating markets, restricting flow of foods, controlling the price of dressed meat, defrauding producers and consumers of food and crushing competition."); Matthew Berger & Christopher Bowler, *An Expansive Leap: The Grain Inspection, Packers and Stockyards Administration's Unjustified Attempt to Grow the Packers and Stockyards Act*, 43 MITCHELL HAMLINE L. REV. 345, 350 (2017).

<sup>71</sup> Packers and Stockyards Act of 1921, Pub. L. No. 67-51, 42 Stat. 159 (1921).

<sup>72</sup> Daniel A. Hanley, *How Self-Preferencing Can Violate Section 2 of the Sherman Act*, COMPETITION POL'Y INT., July 2021, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3868896](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3868896); Sandeep Vaheesan, *The Morality of Monopolization Law*, WM. & MARY L. REV. (forthcoming 2021), <https://ssrn.com/abstract=3929159>; Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91, 96 (2003) ("The statutory language and the case law thus set out the following propositions: (1) if a practice is a violation under the FTC, Clayton, Sherman or Robinson Patman Acts, it would be a violation of the P&S Act if the practice was performed by a packer or live poultry dealer; (2) even when conduct would not violate any of those Acts, it may still violate the P&S Act; and (3) when the practice is found to violate the P&S Act, possible remedies under other statutes do not affect the viability of a remedy under the P&S Act.").

<sup>73</sup> H.R. REP. NO. 85-1048 (1958). The P&S Act was also meant to ensure fair access to markets. See William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 WIS. L. REV. 1497, 1514 (2004) (citing 61 CONG. REC. at S2652. ("Swift, Armour, Morris, Cudahy, and Wilson--have attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands...The producer of live stock is at the mercy of these five companies because they control the market and the marketing facilities and . . . the rolling stock which transports the product to the market.")).

<sup>74</sup> Packers and Stockyards Act of 1921.

<sup>75</sup> Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, 2003 ARK. L. NOTES 35 (quoting 10 NEIL E. HARL, AGRICULTURAL LAW § 71.01 (1992)); 61 CONG. REC. 1801, 4783 (1921); H.R. REP. NO. 67-77, at 2 (1921); see 61 CONG. REC. 1805-06, 1920, 2698 (1921); H. REP. NO. 67-6320, at 2 (1921). Sam Rayburn stated "that although Congress [had given] the [FTC] wide powers to prohibit unfair methods of competition, such authority [was] not as wide-ranging as that given to the Secretary of Agriculture" under the P&S Act. See Rosales, *supra* note 73, at 1512; *Stafford v. Wallace*, 258 U.S. 495, 514 (1922) ("The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still, as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.") (emphasis added). *id.* at 514-15 (1922) ("The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buy."); H.R. REP. NO. 67-77, at 2 (1921) ("a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.").

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<sup>76</sup> 7 U.S.C. § 208(a); *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980); *Daniels v. United States*, 242 F.2d 39, 42 (7th Cir. 1957).

<sup>77</sup> 7 U.S.C. §§ 192-293.

<sup>78</sup> Rosales, *supra* note 73, at 1516 (“It is clear from the legislative history of the P&S Act that the USDA’s role was meant to be proactive and take into account that the industry was progressive, in the sense that the industry was continuously changing to take into account technological advances.”); *Stafford*, 258 U.S. at 516; *see also* 61 CONG. REC. at H1879 (statements of Rep. Sanders and Rep. McLaughlin).

<sup>79</sup> 7 U.S.C. §§ 193(a), 213, 209.

<sup>80</sup> 7 U.S.C. §§ 203, 207(g), 212-15.

<sup>81</sup> 7 U.S.C. §§ 193(a), 228(a), 222, 203.

<sup>82</sup> Rosales, *supra* note 73, at 1523 (“In light of the USDA’s apparent legislative authority and ability to oversee and supervise agriculture markets, it has been criticized for its lack of enforcement, in particular, of the P&S Act.”).

<sup>83</sup> S. REP. NO. 85-704 (1957).

<sup>84</sup> The P&S Act was amended in 1958; during the congressional debates enforcement of the act was discussed in detail. Between 1921 and 1958, “the Secretary had issued only 32 cease-and-desist orders. Eighteen related to refusals to pay for livestock, six to fraud and misrepresentation in weighing or grading of livestock, and only eight to monopolistic or restraint-of-trade practices. Of the latter, two had been revoked after issuance and the most recent order had been imposed in 1938.” *See* Ralph H. Folsom, *Antitrust Enforcement Under the Secretaries of Agriculture and Commerce*, 80 COLUM. L. REV. 1623, 1630 (1980).

<sup>85</sup> Open Market Inst., *The Department of Agriculture Must Strengthen the Packers and Stockyards Act* (2020),

<https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ed1585a8c3f6405dc762a85/1590777948532/Open-Markets-Institute-Undue-Preference-Rule-Comment5921.pdf>; *Agriculture Department and Justice Department Issue Shared Principles and Commitments to Protect Against Unfair and Anticompetitive Practices*, U.S. DEPT. OF AGRIC. (Jan. 3, 2022), <https://www.usda.gov/media/press-releases/2022/01/03/agriculture-department-and-justice-department-issue-shared>; Jacqui Fatka, *USDA again looks to strengthen Packers and Stockyards protections*, NAT’L HOG FARMER (Jun. 14, 2021), <https://www.nationalhogfarmer.com/regulatory/usda-again-looks-strengthen-packers-and-stockyards-protections>; *Fact Sheet: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain*, WHITE HOUSE (Jan. 3, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/>; *Food, Conservation, and Energy Act of 2008*, Pub. L. No. 110-234, § 11006, 122 Stat. 923, 1358 (2008); *USDA to Begin Work to Strengthen Enforcement of the Packers and Stockyards Act*, U.S. DEPT. OF AGRIC. (June 3, 2021), <https://www.usda.gov/media/press-releases/2021/06/11/usda-begin-work-strengthen-enforcement-packers-and-stockyards-act>.

<sup>86</sup> 17 U.S.C. § 192.

<sup>87</sup> *See* Rosales, *supra* note 73, at 1523.

<sup>88</sup> Claire Kelloway, *Trump Administration Disappoints Farmer Advocates with Last-Minute Rulemaking*, FOOD & POWER (Jan. 7, 2021), <https://www.foodandpower.net/latest/title-of-post-yla6k-74sca> (“In 2010, the Obama administration put forth a broad set of rules to redefine unfair conduct in livestock markets and give farmers greater grounds to sue meatpackers for PSA violations, but Congress blocked the implementation of the most meaningful parts of this proposal. USDA posted watered-down proposals in the final days of the Obama administration, but these rules were swiftly discarded and withdrawn by the Trump administration.”).

<sup>89</sup> Patty Judge & Aaron Belkin, *The Supreme Court Has Undermined Iowa’s Small Farms and Rural Communities*, TAKE BACK CT. (Jan. 2020) (noting that some federal courts have restricted violations of the P&S Act so that an actionable claim must have lessened and therefore harmed industry-wide competition.),

<https://static1.squarespace.com/static/5ce33e8da6bbec0001ea9543/t/5e31a3c842c06a4f5c4a1340/1580311498813/Supreme+Court+Has+Undermined+Iowa%27s+Small+Farms.pdf>; John D. Shively & Jeffrey

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S. Roberts, *Competition Under the Packers and Stockyards Act: What Now?*, 15 DRAKE J. AGRIC. L. 419, 424 (2010) (“On the basis of this authority, the Fourth, Tenth, and Eleventh Circuits subsequently pushed this proposition further. These circuits held that a plaintiff could not sustain a claim under § 202(a) and (b), in any circumstances, unless an adverse impact, or the likelihood of adverse impact, on competition could be demonstrated.”).

<sup>90</sup> London v. Fieldale Farms Corp., 410 F.3d 1295 (11th Cir. 2005).

<sup>91</sup> P. Scott Shearer, *Rules Aim to Strengthen Packers and Stockyards Act*, NAT’L HOG FARMER (June 18, 2021), <https://www.nationalhogfarmer.com/news/rules-aim-strengthen-packers-and-stockyards-act>.

<sup>92</sup> Congress expected that through cooperatives, individual farmers could respond to the factors that might otherwise contribute to lower incomes and wages to their business. See Thomas W. Paterson, *Sherman Section 2 Monopolization for Agricultural Marketing Cooperatives*, 60 TUL. L. REV. 955, 958 (1986); David P. Claiborne, *The Perils of the Capper-Volstead Act and Its Judicial Treatment: Agricultural Cooperation and Integrated Farming Operations*, 38 WILLAMETTE L. REV. 263, 266 (2002); Eduardo Castro, *“For the Mutual Benefit of Members Thereof”: Attacking Capper-Volstead Immunity and Challenging Dairy Cooperative Power*, 38 LAW & INEQ. 145, 146 (2020).

<sup>93</sup> Capper-Volstead Act, Pub. L. No. 67-146, 42 Stat. 388 (1922) (codified 7 U. S.C. §§ 291-292).

<sup>94</sup> Analee Heath Leach, *The Almighty Railroad and the Almighty Wal-Mart: Exploring the Continued Importance of the Capper-Volstead Act to the American Farmer and the Agricultural Marketplace*, 32 HAMLINE J. PUB. L. & POL’Y 261, 274 (2010).

<sup>95</sup> United States v. Dairymen, Inc., 660 F.2d 192, 194 (6th Cir. 1981) (The Capper-Volstead Act “permit[s] agricultural producers to join together to process, prepare, and market agricultural products without fear of prosecution under the antitrust laws”); 62 CONG. REC. 2059-60 (1922) (statement of Sen. Capper) (“give farm products to the consumer cheaper and at the same time yield larger returns to the man who produces by eliminating much of the excessive cost[.]”); David L. Baumer & Robert T. Masson, *Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture*, 31 VILL. L. REV. 183, 185 (1986) (“Congressional passage of the agricultural antitrust exemption encouraged the formation of agricultural cooperatives intended to countervail the monopsony power then held by the corporate purchasers.”); Peter C. Carstensen, *Agricultural Cooperatives and the Law: Obsolete Statutes in A Dynamic Economy*, 58 S.D. L. REV. 462, 466 (2013) (“Hence, Congress adopted the Capper-Volstead Act with a stated goal of enhancing the bargaining power of farmers in their dealings with buyers.”); Leach, *supra* note 94, at 269 (2010) (“The failure of the Sherman Act to exempt cooperatives from antitrust legislation left producers vulnerable to prosecution.”); Maryland & Virginia Milk Producers Ass’n, Inc. v. United States, 362 U.S. 458 (1960). See also EDWARD BERMAN, LABOR AND THE SHERMAN ACT 51-54 (1930) (detailing how the Sherman Act was not meant to apply to labor organizations).

<sup>96</sup> 7 U.S.C. § 291.

<sup>97</sup> DONALD M. BARNES & CHRISTOPHER E. ONDECK, THE CAPPER-VOLSTEAD ACT: OPPORTUNITY TODAY AND TOMORROW, AMERICAN COOPERATION 1, 6 (1998) (a cooperative is “a corporation or association organized for the purpose of rendering economic services, without gain to itself, to shareholders or members who own and control it.”) (citing United Grocers, Ltd. v. United States, 186 F. Supp. 724, 733 (N.D. Cal. 1960)), *achieved at*

<https://web.archive.org/web/20180811114231/http://www.uwcc.wisc.edu:80/info/capper.html>.

<sup>98</sup> *Id.*

<sup>99</sup> United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

<sup>100</sup> 7 U.S.C. §§ 291-292.

<sup>101</sup> Donald A. Frederick, *Legal Rights of Procedures to Collectively Negotiate*, 19 WM. MITCHELL L. REV. 433, 443-49 (1993); 7 U.S.C. § 292; *Maryland Milk Producers*, 362 U.S. at 466; *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29 (1962); *Treasure Valley Potato Bargaining Ass’n v. Ore-Ida Foods Inc.*, 497 F.2d 203, 209 (9th Cir. 1974), *cert. denied*, 419 U.S. 999 (1974); *United States v. Maryland Coop. Milk Producers, Inc.* 145 F. Supp. 151, 155 (D.C.D.C. 1956); *Fairdale Farms v. Yankee Milk, Inc.*, 635 F.2d 1037, 1044-45 (2nd Cir. 1980); 7 U.S.C. § 292.

<sup>102</sup> 7 U.S.C. § 292.

<sup>103</sup> *Id.*

<sup>104</sup> H.R. REP. NO. 67-24 (1921).

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<sup>105</sup> Baumer & Mason, *supra* note 95, at 202 n.62.

<sup>106</sup> DONALD A. FREDERICK, US DEP'T OF AGRIC., ANTITRUST STATUS OF FARMER COOPERATIVES: THE STORY OF THE CAPPER-VOLSTEAD ACT 281 (2002) (“the Secretary of Agriculture has never been called upon to determine whether an association has restrained trade to such an extent that it has unduly enhanced prices,” and as such “there are no administrative rulings or court decisions interpreting Section 2 [of the Capper-Volstead Act].”), <https://www.rd.usda.gov/files/CIR59.pdf>.

<sup>107</sup> E.V. Jesse et al., *Interpreting and Enforcing Section 2 of the Capper-Volstead Act*, 64 AM. J. AGRIC. ECON. 431, 438 (1982).

<sup>108</sup> See Agricultural Marketing Agreement Act, Pub. L. No. 75-137, 49 Stat. 750 (1935); Cooperative Marketing Act of 1926, 44 Stat. 803 (1926).

<sup>109</sup> Daniel A. Hanley, *The Climate Movement's Secret Weapon*, NOEMA MAG. (Nov. 30, 2021), <https://www.noemamag.com/the-climate-movements-secret-weapon/>.

<sup>110</sup> Bills have been submitted to grant the agency power in the past. See James F. Rill, *The Evolution of Modern Antitrust Among Federal Agencies*, 11 GEO. MASON L. REV. 135 (2002).

<sup>111</sup> U.S. GEN. ACCOUNTABILITY OFF., GAO-01-188, BETTER MANAGEMENT INFORMATION IS NEEDED ON AGRICULTURAL-RELATED MATTERS (2001), <https://www.gao.gov/assets/240/231337.pdf>; Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 CHI.-KENT L. REV. 37, 58 (2020).

<sup>112</sup> Michael Sykuta, *Concentration, Contracting and Competition: Problems In Using The Packers & Stockyards Act To Supplement Antitrust*, at 4, COMPETITION POL'Y INT., 2010, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1597886](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1597886).

<sup>113</sup> Scope of Sections 202(a) and (b) of the Packers and Stockyards Act, 82 Fed. Reg. 48594, 48596 n.2 (Oct. 18, 2017), <https://www.federalregister.gov/documents/2017/10/18/2017-22593/scope-of-sections-202a-and-b-of-the-packers-and-stockyards-act>.

<sup>114</sup> Carstensen, *supra* note 95, at 492.

<sup>115</sup> For more recommendations concerning the USDA, see *Redeeming the Democratic Promise of Agricultural Cooperatives*, OPEN MARKETS INST. (Sept. 2020), <https://www.openmarketsinstitute.org/publications/new-report-farmer-co-ops-among-predatory-monopolies-that-caused-coronavirus-food-crisis>.

<sup>116</sup> ICC Termination Act, Pub. L. No. 104-88, Title I, § 101, 109 Stat. 804 (1995).

<sup>117</sup> ARI HOOGENBOOM & OLIVE HOOGENBOOM, A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE ix (1976) [hereinafter HOOGENBOOM]; Paul S. Dempsey, *Antitrust Law and Policy in Transportation: Monopoly Is the Name of the Game*, 21 GA. L. REV. 505 (1987).

<sup>118</sup> *About STB*, SURFACE TRANSP. BOARD, <https://prod.stb.gov/about-stb/> (last visited Aug. 4, 2021).

<sup>119</sup> 49 U.S.C. § 10501(b)(2).

<sup>120</sup> Mergers were explicitly included in the Sherman Act by the Supreme Court in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

Limited merger review authority was given to the ICC by the Esch–Cummins Act, Pub. L. 66-152, 41 Stat. 456 (1920). But the 1920 act also required the ICC to create a “master plan” for consolidation of the industry, which it reluctantly accepted in 1929. See James C. Johnson & Terry C. Whiteside, *Professor Ripley Revisited: A Current Analysis of Railroad Mergers*, 42 ICC PRACTITIONER'S J. 419, 420-22 (1975).

<sup>121</sup> The Transportation Act of 1920 did contain a public interest test for mergers, but the ICC was also required to create a master plan for the railroad industry to consolidate – which, after pleading with Congress on multiple occasions to be relinquished of the responsibility, the agency begrudgingly accepted it in 1929. Transportation Act of 1920, 41 Stat. 456 (1920); HOOGENBOOM, *supra* note 117, at 107; see also Donald G. Avery and Kendra A. Ericson, *Railroad Mergers – A Coal Shipper's Perspective*, at 2, Oct. 2004, <https://www.sloverandloftus.com/images/archive/Railroad%20Mergers.pdf>; 49 U.S.C. § 11324(c) (the Surface transportation board is to approve mergers only if it finds they would be “consistent with the public interest”).

The 1940 Transportation Act gave significant discretion to the ICC. One federal judge stated, “It would be difficult to conceive of a statute which confers broader authority and greater administrative discretion than Section 5 of the Interstate Commerce Act.” *Virginia Stage Lines v. United States*, 48 F. Supp. 79, 82 (1942). Transportation Act of 1940, Pub. L. No. 785 (1940).



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<sup>122</sup> Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

<sup>123</sup> *Chronology of America's Freight Railroads*, ASS'N AM. RAILROADS, <https://www.aar.org/chronology-of-americas-freight-railroads/> (last visited Feb. 4, 2022).

<sup>124</sup> CHARLES R. GEISST, *MONOPOLIES IN AMERICA* 237 (2000).

<sup>125</sup> Rail Passenger Service Act of 1970, Pub. L. No. 91-518; Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); Staggers Rail Act of 1980.

<sup>126</sup> 49 U.S.C. § 11344(b)(1)(A)-(E); see also 47 U.S.C. § 310(d); 49 U.S.C. §§ 11324(a)-(e).

<sup>127</sup> *Com. of Pennsylvania v. Surface Transp. Bd.*, 290 F.3d 522, 527 (3d Cir. 2002) (internal citations removed); see also Peter C. Carstensen, *Replacing Antitrust Exemptions for Transportation Industries: The Potential for A "Robust Business Review Clearance"*, 89 OR. L. REV. 1059, 1066 (2011) ("[The Surface Transportation Board has the] power to authorize restrictive terms in connection with such mergers or acquisitions") (citing 49 U.S.C. § 10501(b)(2)).

<sup>128</sup> Jennier Pucci, *Antitrust Law or 'Public Interest' Standard?: An Analysis of the Surface Transportation Board's Approval of the Union Pacific-Southern Pacific Merger*, at 3, UNIV. OF VA SCH. OF L. (2006), [https://govinfo.library.unt.edu/amc/public\\_studies\\_fr28902/regulated\\_pdf/060518\\_Pucci\\_student\\_paper\\_Regulated.pdf](https://govinfo.library.unt.edu/amc/public_studies_fr28902/regulated_pdf/060518_Pucci_student_paper_Regulated.pdf).

<sup>129</sup> Curtis M. Grimm, *"Merger Analysis in the Post-Staggers Railroad Industry,"* in *COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES* 87 (Peter C. Carstensen and Susan Beth Farmer, eds.) (2008).

In some cases, rail mergers have been abandoned due to public pressure. See Jacquie McNish & Laura Stevens, *Canadian Pacific Drops Efforts to Merge With Norfolk Southern*, WALL ST. J. (April 11, 2016), <https://www.wsj.com/articles/canadian-pacific-drops-efforts-to-merge-with-norfolk-southern-1460375864>.

<sup>130</sup> Marvin Prater et al., *Railroad Concentration, Market Shares, and Rates*, U.S. DEP'T OF AGRIC. (2014), <https://www.ams.usda.gov/sites/default/files/media/Railroad%20Concentration%2C%20Market%20Share%2C%20and%20Rates.pdf>.

<sup>131</sup> *Id.*

<sup>132</sup> 49 U.S.C. § 11321.

<sup>133</sup> 49 U.S.C. § 11324; Pucci, *supra* note 128, at 2.

<sup>134</sup> Salvatore Massa, *Are All Railroad Mergers in the Public Interest? An Analysis of the Union Pacific Merger with Southern Pacific*, 24 TRANSP. L.J. 413, 441-42 (1997).

<sup>135</sup> Pub. Views on Major Rail Consolidations, 4 S.T.B. 560, 2000 WL 288400 (2000)

<sup>136</sup> *Id.*

<sup>137</sup> *Traffic League*, 216 F.3d 1168.

<sup>138</sup> Major Rail Consolidation Procedures, 66 Fed. Reg. 32582 (June 15, 2001),

<https://www.federalregister.gov/documents/2001/06/15/01-14984/major-rail-consolidation-procedures>

<sup>139</sup> The last major railroad consolidation was in 1998. Grimm, *supra* note 129, at 87.

<sup>140</sup> Dan Cook, *Rail Transportation in the US*, IBISWORLD 22 (Aug. 2021).

<sup>141</sup> *Railroads are USA's Most Profitable Industry With a 50% Profit Margin*, AM. J. OF TRANSP. (Oct. 22, 2019), <https://ajot.com/news/railroads-are-usas-most-profitable-industry-with-a-50-profit-margin>.

<sup>142</sup> Phillip Longman, *Back on Tracks*, WASH. MONTHLY (Jan. 1, 2009),

<https://washingtonmonthly.com/2009/01/01/back-on-tracks/>; Phillip Longman, *Amtrak Joe vs. the Modern Robber Barons*, WASH. MONTHLY (Nov. 7, 2021), <https://washingtonmonthly.com/2021/11/07/amtrak-joe-vs-the-modern-robber-barons/>; Matthew Jinoos Buck, *How America's Supply Chains Got Railroaded*, AM. PROSPECT (Feb. 4, 2022), <https://prospect.org/economy/how-americas-supply-chains-got-railroaded/>.

<sup>143</sup> See generally Robert G. Harris & Clifford Winston, *Potential Benefits of Rail Mergers: An Econometric Analysis of Network Effects on Service Quality*, 65 REV. ECON. & STAT. 32 (1983); Wesley W. Wilson & John Bitzan, *Industry Costs and Consolidation: Efficiency Gains and Mergers in the Railroad Industry* (Upper Great Plains Transp. Inst., MPC Report No. 03-145, 2003),

<https://www.ugpti.org/resources/reports/downloads/mpc03-145.pdf>; Alison Chapin & Stephen Schmidt, *Do Mergers Improve Efficiency? Evidence from Deregulated Rail Freight*, 33 J. TRANSP. ECON. & POL'Y 147 (1999); Clifford Winston et al., *Long-Run Effects of Mergers: The Case of U.S. Western Railroads*, 54 J.L. & ECON. 274 (2011); Brian A. Weatherford et al., *The State of U.S. Railroads: A review of Capacity*

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<sup>144</sup> Railroad employment fell from almost 540,000 in 1980 to 146,000 in 2022. *Employment in rail Transportation Heads Downhill Between November 2018 and December 2020*, U.S. BUREAU OF LAB. STAT. (Oct. 2021), <https://www.bls.gov/opub/mlr/2021/article/employment-in-rail-transportation-heads-downhill-between-november-2018-and-december-2020.htm>; *Rail Transportation: NAICS 482*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/iag/tgs/iag482.htm> (last visited Feb. 5, 2022); Buck, *supra* note 142.

<sup>145</sup> Marybeth Luczak, *Votes Are In: CP Shareholders Support CPKC*, RAILWAY AGE (Dec. 8, 2021), <https://www.railwayage.com/freight/class-i/votes-are-in-cp-shareholders-support-cpkc/>; Claire Kelloway, *Railroad Merger Raises Larger Concerns About Competition on the Tracks*, FOOD & POWER (April 1, 2021), <https://www.foodandpower.net/latest/cp-kcs-merger?rq=railroad>; Dan Primack, *Railroad Mega-Merger Keeps Getting Sidetracked*, AXIOS (Sept. 8, 2021), <https://www.axios.com/railroad-antitrust-canadian-pacific-kansas-city-southern-a7b3ff00-0a31-4c2e-9ffc-c16341a1910a.html>.

<sup>146</sup> A useful indication of the agency's power to do this is the D.C. Circuit Court of Appeals upholding the ability of the Surface Transportation Board to enact a 15-month moratorium on rail mergers in the 2000s. *Traffic League*, 216 F.3d 1168.

The current Surface Transportation Board's merger guidelines are not as strong as they could be. See, e.g., Letter from John E. Kwoka Jr., Professor of Economics, George Washington University, & Lawrence J. White, Professor of Economics, Stern School of Business, New York University, to Linda J. Morgan, Chairman, Surface Transportation Board (Nov. 17, 2000), <https://www.antitrustinstitute.org/work-product/aai-criticizes-surface-transportation-boards-railroad-merger-guidelines/>.

<sup>147</sup> 49 U.S.C. § 11324(c).

<sup>148</sup> The Federal Power Commission was created in the 1920 by the Federal Power Act. See Federal Power Act, 41 Stat. 1063, <https://www.energy.gov/sites/prod/files/2015/06/f22/FWPA1920.pdf>; see Public Utility Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 (repealed 2005).

<sup>149</sup> Harvey Reiter, *The Contracting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in the Downstream Competitive Markets*, 57 FED. COMM. L.J. 243, 247-48 (2005); Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1806 (2016) (to create the Federal Power Administration, Congress "copied the ICA's rate-setting provisions, just and reasonable standard for wholesale rates, and prohibitions on discrimination or granting any 'undue prejudice or disadvantage.'").

<sup>150</sup> Department of Energy Organization Act of 1977, Pub. L. No. 95-91, 91 Stat. 565 (1977).

<sup>151</sup> 16 U.S.C. § 824(b). FERC's authority does not extend to those sources of power explicitly made subject to regulation by the states. 16 U.S.C. § 824(b); *Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 758 (1973); 16 U.S.C. § 791a (2006).

<sup>152</sup> Natural Gas Act § 7, 15 U.S.C. § 717f (FERC is authorized to regulate "the transportation of natural gas in interstate commerce"). See also S. REP. NO. 70-84-A (1936).

<sup>153</sup> 16 U.S.C. § 824(b), (e). See *Gulf States Util.*, 411 U.S. at 758.

Wholesale means electricity sales that are for retail sale to end consumers. See 16 U.S.C. § 824(b)(1). 16 U.S.C. § 824(b); *FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 461-63 (1972).

<sup>154</sup> 16 U.S.C. §§ 824d(a)-(b).

<sup>155</sup> 16 U.S.C. §§ 824e(a), 824d(a). *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 506 (1989) (citing 15 U.S.C. §§ 717c, 717d); *NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975) ("Of the Commission's primary task there is no doubt, however, and that is to guard the consumer from exploitation by non-competitive electric power companies.").

<sup>156</sup> 16 U.S.C. § 824e(a).

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<sup>157</sup> JAMES H. MCGREW, *FERC: FEDERAL ENERGY REGULATORY COMMISSION* 146 (2d ed. 2009). See Energy Policy Act of 1992, Pub. L. No. 102-486, §711, 106 Stat. 2776, 2905-10 (1992).

<sup>158</sup> Jess B. Kincaid, *Blackouts and Oversupply or Regulatory Planning and Cooperation*, 43 ENVTL. L. 671, 679 (2013). See Order No. 888, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, 75 F.E.R.C. P 61,080 (Apr. 24, 1996) [hereinafter Order 888].

<sup>159</sup> Kincaid, *supra* note 158, at 679; Steven Ferrey, *Supreme Court Strips States of Their Power Over the World's Second Most Important Technology*, 69 BAYLOR L. REV. 315, 336 (2017).

<sup>160</sup> Laura Duos, *Order 888: Has the Federal Energy Regulatory Commission Invaded the States' Jurisdictional Territory?*, 54 ADMIN. L. REV. 1213, 1219–20 (2002). See generally, *New York v. FERC*, 122 S. Ct. 1012 (2002). Eisen, *supra* note 149, at 1792. Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1, 21 (2019) (“Order No. 888 functionally ‘unbundled’ the wholesale generation and transmission of electricity by requiring all utilities to establish a tariff with separate rates for generation, transmission, and ancillary services and to apply that tariff equally to themselves and third parties. Order No. 888 thus created an ‘open access’ regime in which third parties could utilize the transmission networks of incumbent utilities--a dynamic that established the foundation for the modern, competitive bulk power system.”).

<sup>161</sup> Hanley, *supra* note 109.

<sup>162</sup> See generally Donald F. Santa Jr. & Clifford S. Sikora, *Open Access and Transition Costs: Will the Electric Industry Transition Track the Natural Gas Industry Restructuring*, 25 ENERGY L.J. 113 (2004).

<sup>163</sup> *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972) (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944)).

<sup>164</sup> 15 U.S.C. §§ 717f(c)-(e).

<sup>165</sup> 15 U.S.C. § 717f(e).

<sup>166</sup> 15 U.S.C. § 717f(b).

<sup>167</sup> *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 n.6, 669-70 (1976). See also *Minisink Resident for Envtl. Pres. & Safety v. Fed. Energy Regulatory Comm'n*, 762 F.3d 97, 111 (D.C. Cir. 2014).

<sup>168</sup> *NAACP*, 425 U.S. at 670 n.6.

<sup>169</sup> *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961) (quoting *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959)).

<sup>170</sup> FERC, Statement of Policy, Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (Sept. 15, 1999), <http://www.ferc.gov/legal/maj-ord-reg/pl99-3-000.pdf>. See also Order Clarifying Statement of Policy, 90 FERC ¶ 61,128 (February 9, 2000), <https://www.ferc.gov/legal/maj-ord-reg/PL99-3-001.pdf>; Order Further Clarifying Statement of Policy, 92 FERC ¶ 61,094 (July 28, 2000), <https://www.ferc.gov/legal/maj-ord-reg/PL99-3-002.pdf>.

<sup>171</sup> Romany M. Webb, *Climate Change, Ferc, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act*, 28 N.Y.U. ENVTL. L.J. 179, 198-208 (2020).

<sup>172</sup> *Id.* at 210.

<sup>173</sup> See Reiter, *supra* note 149.

<sup>174</sup> 15 U.S.C. § 717d(a). See also *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *modified*, 89 P.U.R.4th 273 (F.E.R.C. 1987).

<sup>175</sup> Reiter, *supra* note 149, at 250.

<sup>176</sup> Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267 (1992) [hereinafter Order No. 636].

<sup>177</sup> *Id.*

<sup>178</sup> Garry A. Gabison, *Dual Enforcement of Electric Utility Mergers and Acquisitions*, 17 J. BUS. & SEC. L. 11, 13 (2017) (“The authority to regulate utility mergers is shared between the FERC, the SEC, the FTC, and the DOJ.”).

<sup>179</sup> 16 U.S.C. § 824b(a).

The Department of Justice and the Federal Trade Commission can also initiate litigation against merging electrical utilities.

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<sup>180</sup> 16 U.S.C. § 824b(a) (2000). MARK W. FRANKENA AND BRUCE M. OWEN, *ELECTRIC UTILITY MERGERS: PRINCIPLES OF ANTITRUST ANALYSIS* 12 (1994).

<sup>181</sup> Scott Hempling, *Inconsistent with the Public Interest: FERC's Three Decades of Deference to Electricity Consolidation*, 39 ENERGY L.J. 233, 268 (2018)

<sup>182</sup> *Id.* at 262; Order No. 592, Inquiry Concerning the Commission's Merger Policy under the Federal Power Act: Policy Statement, 61 Fed. Reg. 68,595 (Dec. 30, 1996) [1996 FERC Merger Policy Statement].

<sup>183</sup> Gabison, *supra* note 178, at 30-31. Hempling, *supra* note 181, at 267.

<sup>184</sup> 18 C.F.R. § 2.26(b).

The five steps FERC takes to analyze a merger are: (1) define the markets; (2) evaluate whether the extent of concentration of the market raise concerns about potential adverse competitive effects; (3) assess whether entry could counteract such concerns; (4) assess any efficiency gains that cannot otherwise be gauged; and (5) assess whether either party to the merger would fail without the merger, causing its assets to exit the market. See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,111 (1996), reconsideration denied, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

<sup>185</sup> 1996 FERC Merger Policy Statement.

<sup>186</sup> Gabison, *supra* note 178, at 27; Milton A. Marquis, *DOJ, FTC and FER Electric Power Merger Enforcement: Are There Too Many Cooks in the Merger Review Kitchen?*, 33 LOY. U. CHI. L.J. 783, 785 (2002); *Pac. Power & Light Co. v. Fed. Power Comm'n*, 111 F.2d 1014, 1016 (9th Cir. 1940) ("The burden is upon the applicant to show that the proposal is consistent with the public interest.").

<sup>187</sup> Hon. Joseph T. Kelliher, *Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 ENERGY L.J. 1, 28 (2005); Diana L. Moss, *Antitrust Versus Regulatory Merger Review: The Case of Electricity*, 32 REV. IND. ORGAN. 241, 254 (2008).

<sup>188</sup> Gabison, *supra* note 178, at 20 ("Acquisition and disposition refer to asset transfers where the two entities transferring assets continue to exist. The two entities end up with different portfolio pre- and post-transfer. Mergers refer to two entities joining their portfolio and becoming a single entity.").

<sup>189</sup> *Id.* at 20-21.

<sup>190</sup> *Id.*

<sup>191</sup> Hempling, *supra* note 181.

<sup>192</sup> 15 U.S.C. § 717f; 16 U.S.C. § 824b(a).

<sup>193</sup> 15 U.S.C. § 717f.

<sup>194</sup> Diana L. Moss, *Natural Gas Pipelines: Can Merger Enforcement Preserve the Gains From Restructuring?*, in *COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES* 39 (Peter C. Carstensen and Susan Beth Farmer, eds., 2008) [hereinafter Moss Natural Gas].

<sup>195</sup> *Id.* See generally United States Department of Justice & the Federal Trade Commission, Comment on the Modifications to Commission Requirements for Review of Transactions Under Section 203 of the Federal Power Act and Market-Based Rate Applications Under Section 205 of the Federal Power Act 1-6 (Nov. 28, 2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/comment-federal-trade-commission-us-department-justice-federal-energy-regulatory-commission-ferc/v170000\\_ferc\\_market\\_power\\_comment\\_28\\_nov\\_2016.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-us-department-justice-federal-energy-regulatory-commission-ferc/v170000_ferc_market_power_comment_28_nov_2016.pdf).

<sup>196</sup> Moss Natural Gas, *supra* note 194, at 39 (citing 16 U.S.C. § 824b(a)).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 40 (stating "The numerous gas pipelines mergers and acquisitions that went unchallenged by the antitrust agencies or by FERC are not listed in Table 3.1.").

<sup>199</sup> 15 U.S.C. § 717d(a); 16 U.S.C. § 824e(a).

<sup>200</sup> Hempling, *supra* note 181, at 261 ("Declaring the statutory language neutral, the Commission said it would neither apply a 'presumption against mergers' nor presume that 'all mergers are beneficial.'"). This lack of vision leads to deference.

<sup>201</sup> *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> (last visited Jan. 26, 2022). CFIUS membership includes: the Secretary of the Treasury, who serves as chair; the secretaries of State, Defense, Homeland Security, Commerce, and Energy; the



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Attorney General; the United States Trade Representative; and the Director of the Office of Science and Technology Policy. See *CFIUS Overview*, U.S. DEP'T TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> (last visited Jan. 26, 2022).

<sup>202</sup> Exec. Order No. 11,858 (1975), 40 Fed. Reg. 20263, <https://home.treasury.gov/system/files/206/EO-11858-Amended.pdf>.

<sup>203</sup> Omnibus Trade and Competitiveness Act of 1988. Pub. L. No. 100-418, § 5021, 102 Stat. 1107 (1988) (Known as the “Exon-Florio” amendment). See also National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837(a), 106 Stat. 2315 (1993).

Congress would eventually expand CFIUS in 2007. See Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (2007). Congress further expanded the authority of CFIUS in 2018. See Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, §§ 1701-28, 132 Stat. 1636 (2019).

<sup>204</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-249, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: TREASURY SHOULD COORDINATE ASSESSMENTS OF RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 3 (2018), <https://www.gao.gov/assets/gao-18-249.pdf>. [hereinafter GAO CFIUS]

<sup>205</sup> 50 U.S.C. § 4565(a)(4)(B)(i).

<sup>206</sup> 50 U.S.C. § 4565(a)(3).

<sup>207</sup> GAO CFIUS, *supra* note 204.

<sup>208</sup> A full list of review factors can be found at Defense Production Act of 1950 § 721(f), 50 U.S.C. § 4565(f).

<sup>209</sup> JAMES K. JACKSON, CONG. RESEARCH SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 16 (2020).

<sup>210</sup> *Id.* at 8.

<sup>211</sup> 50 U.S.C. § 4565(b)(2)(A).

<sup>212</sup> 50 U.S.C. § 4565(d); see also GAO CFIUS, *supra* note 204.

<sup>213</sup> Grace Maral Burnett, *CFIUS Data Show Fewer Deals Investigated, Abandoned*, BLOOMBERG L. (July 21, 2020), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-cfius-data-show-fewer-deals-investigated-abandoned>.

<sup>214</sup> GAO CFIUS, *supra* note 204, at 12-13; Peter Thomas et al., *A Primer on CFIUS: Navigating the Evolving U.S. National Security Foreign Investment Review Process*, ANTITRUST SOURCE 5 (2018), <https://www.stblaw.com/docs/default-source/Publications/thomasellisshogrenantitrustsource.pdf>.

<sup>215</sup> *U.S. Clears Smithfield's Acquisition by China's Shuanghui*, REUTERS (Sept. 6, 2013), <https://www.reuters.com/article/us-usa-china-smithfield/u-s-clears-smithfields-acquisition-by-chinas-shuanghui-idUSBRE98513120130907>.

<sup>216</sup> *Fitch Affirms Smithfield Foods, Inc.'s IDR at 'BBB'; Outlook Stable*, FITCH RATINGS (Jul. 9, 2019), <https://www.fitchratings.com/research/corporate-finance/fitch-affirms-smithfield-foods-inc-idr-at-bbb-outlook-stable-09-07-2019>.

<sup>217</sup> Tom Polansek, *At Smithfield Foods' Slaughterhouse, China Brings Home U.S. Bacon*, REUTERS (Nov. 5, 2019), <https://www.reuters.com/article/us-china-swinefever-smithfield-foods-foc/at-smithfield-foods-slaughterhouse-china-brings-home-u-s-bacon-idUSKBN1XF0XC>.

<sup>218</sup> Elizabeth Gooch & Fred Gale, *China's Foreign Agriculture Investments*, U.S. DEP'T AGRIC. ECON. RESEARCH SERV. (2018), <https://www.ers.usda.gov/webdocs/publications/88572/eib-192.pdf>

<sup>219</sup> National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (1947).

<sup>220</sup> The budget for the DOD is half of all discretionary spending. See *Discretionary Spending Breakdown*, PETER G. PETERSON FOUND. (Jul. 9, 2021), [https://www.pgpf.org/chart-archive/0070\\_discretionary\\_spending\\_categories](https://www.pgpf.org/chart-archive/0070_discretionary_spending_categories).

<sup>221</sup> Rodrigo Carril & Mark Duggan, *The Impact of Industry Consolidation on Government Procurement: Evidence from Department of Defense Contracting* 6 (Nat'l Bureau of Econ. Research, Working Paper No. 25160, 2018), [https://www.nber.org/system/files/working\\_papers/w25160/w25160.pdf](https://www.nber.org/system/files/working_papers/w25160/w25160.pdf).

<sup>222</sup> *Id.* at 2.

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<sup>223</sup> Major Nicholas C. Frommelt, *Better Buying Power and Incentivizing Public-Private Partnerships Through Non-Monetary Incentives*, ARMY LAW., Jan. 2017, at 14, 20.

<sup>224</sup> FAR 1.000-9905, <https://www.ecfr.gov/current/title-48>.

<sup>225</sup> FAR 6.000, 6.302.

<sup>226</sup> Michael J. Davidson, *Cica's Uncle Sam Exception*, PROCUREMENT L., Fall 2017, at 3 (“The most common statutory exception to [Competition in Contracting Act] is the Economy Act, but lesser-known exceptions include the Government Management Reform Act, certain revolving funds, and statutes authorizing Intergovernmental Service or Support Agreements.”); *id.* at 3 (“The Economy Act authorizes the head of one agency, or major organizational unit within an agency, to place an order for goods or services with a major organizational unit within the same agency or with another agency if (1) funds are available; (2) the ordering agency/unit determines that the order is in the best interest of the government; (3) the servicing agency is able to provide the goods or services by itself or by contract; and (4) the requesting agency determines that the goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.”). See also 31 U.S.C. § 1535.

<sup>227</sup> David Drabkin, *Is Competition in Federal Contracting Dead?*, FED. NEWS NETWORK (July 21, 2021), <https://federalnewsnetwork.com/commentary/2021/07/is-competition-in-federal-contracting-dead/>

<sup>228</sup> OSD A&S INDUSTRIAL POLICY, FISCAL YEAR 2020: INDUSTRIAL CAPABILITIES REPORT TO CONGRESS 13 (2020), <https://media.defense.gov/2021/Jan/14/2002565311/-1/-1/0/FY20-INDUSTRIAL-CAPABILITIES-REPORT.PDF>.

<sup>229</sup> *Id.* at 14 (“Fourteen defense-related new ship-construction yards have shuttered, and three have exited the defense industry. Only one new-ship-construction yard has opened. Today, the Navy contracts primarily with seven private new-construction shipyards, owned by four prime contractors, to build its future Battle Force, representing significantly less capacity than the leading shipbuilding nations.”).

<sup>230</sup> WHITE HOUSE, BUILDING RESILIENT SUPPLY CHAINS, REVITALIZING AMERICAN MANUFACTURING, AND FOSTERING BROAD-BASED GROWTH 8, 178, 208, (June 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>; see also Andrea Shalal, *Former U.S. Defense Chief Laments Extent of Defense Consolidation*, REUTERS (Dec. 3, 2015) (“[The Under-Secretary of Defense] told reporters at the time that he hoped to work with Congress to draft legislation that would give the government more leverage to prevent mergers that left the department dependent on a smaller number of larger contractors, even if they did not necessarily have anti-trust implications”); David Higbee et al., *The Department of Defense’s Role in Merger Review* 5, COMPETITION POL’Y INT., Apr. 2019, available at <https://www.competitionpolicyinternational.com/the-department-of-defenses-role-in-merger-review/>.

Other committees have been warning also about supply chain risks. HOUSE ARMED SERVICES COMM., REPORT OF THE DEFENSE CRITICAL SUPPLY CHAIN TASKFORCE (2021), [https://armedservices.house.gov/\\_cache/files/e/5/e5b9a98f-9923-47f6-a5b5-ccf77ebbb441/7E26814EA08F7F701B16D4C5FA37F043.defense-critical-supply-chain-task-force-report.pdf](https://armedservices.house.gov/_cache/files/e/5/e5b9a98f-9923-47f6-a5b5-ccf77ebbb441/7E26814EA08F7F701B16D4C5FA37F043.defense-critical-supply-chain-task-force-report.pdf).

<sup>231</sup> DEP’T OF DEFENSE, STATE OF COMPETITION WITHIN THE DEFENSE INDUSTRIAL BASE (2022), <https://media.defense.gov/2022/Feb/15/2002939087/-1/-1/1/STATE-OF-COMPETITION-WITHIN-THE-DEFENSE-INDUSTRIAL-BASE.PDF>.

<sup>232</sup> *The Section 809 Panel Overview Resource*, CAPITAL EDGE CONSULTING, <https://www.capitaledgeconsulting.com/the-section-809-panel-overview-resource/> (last visited Jan. 26, 2022).

<sup>233</sup> *Section 809 Panel*, DEF. TECHNICAL INFO. CTR., <https://discover.dtic.mil/section-809-panel/> (last visited Jan. 26, 2022); 1 SECTION 809 PANEL, REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS 169 (Jan. 2018), [https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Volume1/Sec809Panel\\_Vol1-Report\\_Jan2018.pdf](https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Volume1/Sec809Panel_Vol1-Report_Jan2018.pdf).

<sup>234</sup> FTC, DOJ Issue Joint Statement on Preserving Competition in the Defense Industry, FED. TRADE COMM. (Apr. 12, 2016), <https://www.ftc.gov/public-statements/2016/04/joint-statement-department-justice-federal-trade-commission-preserving> (“The Agencies rely on DoD’s expertise, often as the only purchaser, to evaluate the potential competitive impact of mergers, teaming agreements, and other joint

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business arrangements between firms in the defense industry.”); J. Robert Kramer II, *Antitrust Review in Banking and Defense*, 11 GEO. MASON L. REV. 111 (2002) (“The DOD is, of course, for the antitrust agencies the critical witness in any enforcement action; a status that stems from its role as sole buyer of many products.”). Carril & Duggan, *supra* note 221, at 4 (“Buyer power is likely to be of particular relevance in our context, due to a combination of two factors: (i) the government is the main (in some cases, only) customer in many of these markets, and (ii) the dynamic and repeated nature of the procurement process generates incentives not to excessively exploit short-term profit opportunities by raising markups.”).

<sup>235</sup> Dennis A. Yao & Susan S. DeSanti, *Antitrust Analysis of Defense Industry Mergers*, 23 PUB. CONT. L.J. 379, 391-92 (1994); Laura A. Wilkinson & Steven K. Bernstein, *Analyzing Defense Industry Mergers Under the 1992 Merger Guidelines*, ANTITRUST, Summer 1993, at 10 (“DoD also plays a major role in the determination of the relevant geographic market.”); *id.* at 12 (“Obviously, DoD’s views on possible efficiencies will be important, but the merging companies’ documents, the views of industry participants, and evidence regarding the limited effectiveness of audits also have to be considered.”).

<sup>236</sup> Yao & DeSanti, *supra* note 235, at 393 (“In assessing these possibilities, the FTC generally will look at evidence of DoD’s own assessment of their feasibility as reflected in planning documents, testimony, and prior conduct.”).

<sup>237</sup> Wilkinson & Bernstein, *supra* note 235, at 12 (“Where there are true national security concerns, DoD will certainly have an opportunity to make its concerns known, and the antitrust agency undoubtedly will give great weight to these concerns as it exercises its prosecutorial discretion.”); *id.* (“However, the antitrust agencies would be abdicating their responsibilities if they allowed the views of any customer to preempt an objective evaluation of all of the evidence and dictate the outcome of the ultimate antitrust enforcement analysis.”). Higbee et al., *supra* note 230, at 3, (“DOD Directive 5000.62 calls for the consideration of the impact of a defense merger on national security, access to critical inputs, the impact on DoD contracting, technologies, and innovation, and economic analyses, as well as over industries where DOD is a significant customer (even with Clayton Act Enforcement); *id.* at 4 (““The Office of Industrial Policy reviews “only the transactions with a potential impact to DoD interest[s].””).

<sup>238</sup> Higbee et al., *supra* note 230, at 5 n. 19.

<sup>239</sup> Yao & DeSanti, *supra* note 235, at 393; *id.* at 10, 11.

<sup>240</sup> Carril & Duggan, *supra* note 221, at 2.

<sup>241</sup> Yao & DeSanti, *supra* note 235, at 393 (“Thus, it arguably has less incentive to procure cheaply than would a company whose survival depends on restraining costs.”); *id.* at 394 (“DoD personnel may well weigh assurances about reliability, quality, and fielding weapons more greatly than price, at least from the viewpoint of Congress.”).

<sup>242</sup> THEODORE KOVALEFF, BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION 57 (1980).

<sup>243</sup> Matt Stoller & Lucas Kuncie, *America’s Monopoly Crisis Hits The Military*, AM. CONSERVATIVE (June 27, 2019), <https://www.theamericanconservative.com/articles/americas-monopoly-crisis-hits-the-military/>; Carril & Duggan, *supra* note 221, 8 n.11 (“According to the Washington Post, July 4, 1997, ‘The frenzy of defense industry mergers can be traced to 1993, when then Deputy Defense Secretary William Perry invited executives to dinner. At an event now referred to as “the last supper,” Perry urged them to combine into a few, larger companies because Pentagon budget cuts would endanger at least half the combat jet firms, missile makers, satellite builders and other contractors represented at the dinner that night.”).

<sup>244</sup> JACQUES S. GANSLER, DEMOCRACY’S ARSENAL CREATING A TWENTY-FIRST-CENTURY DEFENSE INDUSTRY 32 (2011); Gregory Sanders & Zach Huitink, *Evaluating Consolidation and the Threat of Monopolies within Industrial Sectors 4*, CTR. FOR STRATEGIC & INT’L STUDIES DEFENSE-INDUSTRIAL INITIATIVES GRP. (Feb. 2019), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/190208\\_Sanders\\_Monopolies\\_WEB\\_v2.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/190208_Sanders_Monopolies_WEB_v2.pdf).

<sup>245</sup> *Defense Mergers: Could Growing Monopolies Signal the End of Innovation?*, ARMY TECH. (Apr. 4, 2016), <https://www.army-technology.com/features/featuredefense-mergers-could-growing-monopolies-signal-the-end-of-innovation-4809434/>.

<sup>246</sup> Neil W. Averitt & Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 220 (2007).

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<sup>247</sup> 49 U.S.C. § 41712.

<sup>248</sup> 49 U.S.C. § 41712(a). Paul Stephen Dempsey, *Predation, Competition & Antitrust Law: Turbulence in the Airline Industry*, 67 J. AIR L. & COM. 685, 799 n. 324 (2002) (“The DOT has the power to issue cease and desist orders against any carrier it finds is engaging in unfair and deceptive practices or unfair methods of competition under section 41712 of the Federal Aviation Act.”).

<sup>249</sup> See also *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 303 (1963) (quoting *American Airlines v. North American Airlines*, 351 U.S. 79, 82 (1956) (Section 41712 “was patterned after [section] 5 of the Federal Trade Commission Act[.]”). Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1337 (1992).

<sup>250</sup> David Heffernan & Brian Doll, *Why Dot Should Interpret "Deceptive Practices" Using A "Reasonable Consumer" Standard*, AIR & SPACE L., 2020, at 1, 9 (stating “DOT has specifically cited section 41712 as authority for adopting and enforcing regulations prohibiting “deceptive practices” relating to codeshare disclosures, lengthy tarmac delays, full-fare advertising, post-purchase price increases, ticket refunds, over-sales and denied boarding compensation, and the 24-hour reservation-hold rule.”); Joe Sharkey, *Tough Rule Eliminates Most Tarmac Strandings*, N.Y. TIMES (May 4, 2011), <https://www.nytimes.com/2011/05/05/business/05TARMAC.html>; see also *Spirit Airlines, Inc. v. Dep't of Transp.*, 687 F.3d 403 (D.C. Cir. 2012); *Enhancing Airline Passenger Protections*, 74 Fed. Reg. 68,983 (Dec. 20, 2009); *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23,110 (Apr. 25, 2011); Jonathan Edelman, *Reviving Antitrust Enforcement in the Airline Industry*, 120 MICH. L. REV. 125, 142 (2021). See also *United Air Lines, Inc. v. Civ. Aeronautics Bd.*, 766 F.2d 1107 (7th Cir. 1985) (confirming DOT rulemaking authority).

<sup>251</sup> James H. Burnley IV & Andrew E. Bigart, *A Model of Consistency? The DOT's Approach to Unfair Competition in the Deregulated Air Transportation Market*, AIR & SPACE L., 2016, at 1, 15 (stating “[T]he DOT’s unfair competition authority is limited to conduct that is likely to violate the antitrust laws, or that constitutes a quasi-violation of such laws, such as an incipient violation, a near violation, or conduct plainly contrary to the spirit of the antitrust laws.”). See also *Pan Am. World Airways*, 371 U.S. at 306. Peggy J. Hoyt, *Developing Antitrust Policy on the Internet: Lessons from the Airline Industry*, 28 TRANSP. L.J. 315, 330 n.58 (2001) (“The DOT has authority under 49 U.S.C. 41712 to stop unfair exclusionary conduct in the airline industry. This statute authorizes the DOT to prohibit conduct that does not actually amount to a violation of the antitrust laws, but could be considered anticompetitive under the antitrust principles.”); Edelman, *supra* note 250, at 140-41.

<sup>252</sup> The DOT did publish guidelines concerning airline predatory pricing in the 1990s, but in response to a changing legal and political landscape they were withdrawn in 2001. See Edelman, *supra* note 250, at 145.

<sup>253</sup> Burnley & Bigart, *supra* note 251, at 1, 16.

<sup>254</sup> *Id.* at 1, 15.

<sup>255</sup> Daniel J. Gifford & Robert T. Kudrle, *How Is Competition Policy Coping with Atlantic Area Airline Markets?*, 2018 MICH. ST. L. REV. 619, 644-46 (2018).

<sup>256</sup> Alberto G. Rossi, *Grounding Future Consolidations: United-Us Airways Cancel Flight*, 54 ADMIN. L. REV. 883, 886-87 (2002).

<sup>257</sup> Alexa Naumovich, *Domestic Airline Mergers and Defining the Relevant Market: From Cities to Airports*, 83 J. AIR L. & COM. 839, 841 n.14 (2018); *Transportation Official Defends Airline Mergers*, L.A. TIMES (Nov. 5, 1987), <https://www.latimes.com/archives/la-xpm-1987-11-05-fi-18968-story.html> (“Under the Reagan Administration, the department has approved all airline merger applications it has received, including one last week for USAir and Piedmont Aviation, which was opposed by one of its own hearing judges who feared it would reduce competition.”); Donald T. Bliss & Jacob M. Lewis, *Overseeing Competition in the Airline Industry: Will the Transfer to Justice Make a Difference*, 34 FED. B. NEWS & J. 293, 293-94 (1987).

<sup>258</sup> See Paul Stephen Dempsey, *Regulatory Schizophrenia: Mergers, Alliances, Metal-Neutral Joint Ventures and the Emergence of a Global Aviation Cartel*, 83 J. AIR L. & COM. 3, 20 (2018).



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- <sup>259</sup> Peter C. Carstensen, *Airline Mergers – Second-Best Results in a Changed Environment*, in *COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES* 104-15 (Peter C. Carstensen and Susan Beth Farmer, eds., 2008).
- <sup>260</sup> Thomas Pallini, *The Past 2 Decades Saw the Number of Major Airlines in the US Cut in Half. See How Consolidation in the 2000s Left Customers with Fewer Options as Profits Soared.*, *BUS. INSIDER* (Mar. 21, 2020), <https://www.businessinsider.com/airline-mergers-and-acquisitions-in-the-us-since-2000-2020-3>; Daniel Gifford & Robert T. Kudrle, *U.S. Airlines and Antitrust: The Struggle for Defensible Policy Towards a Unique Industry*, 50 *IND. L. REV.* 539, 539-541 (2017). See also Severin Borenstein & Nancy L. Rose, *How Airline Markets Work . . . Or Do They?*, in *ECONOMIC REGULATION AND ITS REFORM: WHAT HVE WE LEARNED* 63, 87 (Nancy L. Rose ed., 2014) (stating 47 airlines had entered the industry by 1984 after deregulation by Congress, but only seven still existed in 2014).
- <sup>261</sup> 15 U.S.C. § 21(a).
- <sup>262</sup> See, e.g., *Mergers and Acquisitions*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/policy/aviation-policy/competition-data-analysis/mergers-acquisitions> (last visited Dec. 19, 2019). Hafiz, *supra* note 111, at 58.
- <sup>263</sup> See, e.g., Susan L. Kurland, Assistant Sec'y for Aviation & Int'l Affairs of the U.S. Dep't of Transp., *The Role of DOT in the Review of the Proposed American Airlines / US Airways Merger* (June 19, 2013), <https://www.transportation.gov/testimony/role-dot-review-proposed-american-airlines-us-airways-merger>.
- <sup>264</sup> 49 U.S.C. § 41105; Howard Shelanski, *Antitrust and Deregulation*, 127 *YALE L.J.* 1922, 1926 (2018) (“For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers.”).
- <sup>265</sup> 49 U.S.C. § 41105.
- <sup>266</sup> 49 U.S.C. § 40103(b).
- <sup>267</sup> *U.S. Air Carriers*, U.S. DEP'T OF TRANSP., <https://www7.transportation.gov/policy/aviation-policy/licensing/US-carriers> (last visited Jan. 26, 2022); Kurland, *supra* note 263; Jason W. Bank, *Navigating Financial Turbulence Preserving Air Carrier Certificates in Chapter 11*, *AM. BANKR. INST. J.*, June 2014, at 32, 33, [https://www.kerr-russell.com/wp-content/uploads/2019/01/4\\_ABI\\_20Journal\\_20Article\\_20-20Navigating\\_20Financial\\_20Turbulence\\_20\\_DT862859\\_.pdf](https://www.kerr-russell.com/wp-content/uploads/2019/01/4_ABI_20Journal_20Article_20-20Navigating_20Financial_20Turbulence_20_DT862859_.pdf).
- <sup>268</sup> As of a 01/9/2022 Westlaw search, only two cases cite this statute.
- <sup>269</sup> U.S. Department of Transportation Notice of Practice Regarding Proposed Airline Mergers and Acquisitions, 80 *Fed. Reg.* 2468, 2468-69 (Jan. 16, 2015), <https://www.federalregister.gov/documents/2015/01/16/2015-00599/us-department-of-transportation-notice-of-practice-regarding-proposed-airline-mergers-and>.
- <sup>270</sup> See, e.g., Complaint, *United States v. Am. Airlines Grp. Inc.* (D. Mass. 2021) (No. 21-cv-11558), <https://www.justice.gov/opa/press-release/file/1434621/download>.
- <sup>271</sup> 49 U.S.C. §§ 41308(b)-(c); 49 U.S.C. § 41309(c)(2). W. Robert Hand, *Continental Joins the (All)star Alliance: Antitrust Concerns with Airline Alliances and Open-Skies Treaties*, 33 *HOUS. J. INT'L L.* 641, 656-57 (2011).
- <sup>272</sup> Roger W. Fones, *Airline Consolidations and Competition Law-What Next?*, 10 *FIU L. REV.* 447, 462 (2015).
- <sup>273</sup> Hand, *supra* note 271, at 664 (“It is the stated policy of the DOT that a condition for receiving antitrust immunity for a proposed joint venture is that there must first be an Open Skies agreement in place with all host countries.”).
- <sup>274</sup> Fones, *supra* note 272, at 447-48 (“In 2008, USDOT granted statutory antitrust immunity (ATI) to a joint venture and alliance among Delta/Northwest, Air France/KLM, Alitalia, and Czech Airlines to operate jointly between the United States and Europe. In 2010, USDOT did the same for American, British Airways, Iberia, Finnair, and Royal Jordanian. For travel between the United States and Japan, USDOT issued ATI separately for American and JAL to coordinate their service, and for United/Continental to coordinate with All Nippon Airways. And in 2013, USDOT granted ATI to Delta, Virgin Atlantic, Air France/KLM and Alitalia to operate jointly between North America and the United Kingdom.”).

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- <sup>275</sup> Other regulators include the Commodity Futures Trading Commission, the Securities and Exchange Commission (SEC), the National Credit Union Administration, and the Consumer Financial Protection Bureau.
- <sup>276</sup> Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913).
- <sup>277</sup> FED. RESERVE, OVERVIEW OF THE FEDERAL RESERVE SYSTEM 1, [https://www.federalreserve.gov/aboutthefed/files/pf\\_1.pdf](https://www.federalreserve.gov/aboutthefed/files/pf_1.pdf) (last visited Jan. 26, 2022).
- <sup>278</sup> National Bank Act, 13 Stat. 99 (1864).
- <sup>279</sup> Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 385 (2019).
- <sup>280</sup> Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (1933). *Deposit Insurance at a Glance*, FED. DEPOSIT INS. CORP. (2014), <https://www.fdic.gov/resources/deposit-insurance/brochures/documents/deposit-insurance-at-a-glance-english.pdf>.
- <sup>281</sup> Bank Merger Act, Pub. L. No. 86-463, 74 Stat. 129 (1960) (codified as amended at 12 U.S.C. § 1828(c)).  
The Bank Merger Act Amendments of 1966, Pub. L. No. 89-356, 80 Stat. 7 (codified as amended in 12 U.S.C. § 1828(c)).  
Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841-52).
- <sup>282</sup> 112 CONG. REC. 2441 (1966).
- <sup>283</sup> Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REG. 435, 445 (2020).
- <sup>284</sup> *Id.*
- <sup>285</sup> *Id.*
- <sup>286</sup> Samuel Richardson Reid, *Legislation, Regulation, Antitrust, and Bank Mergers*, 92 BANKING L.J. 6, 14-15 (1975) (the Bank Merger Act of 1966 is the primary statute governing bank mergers. When enacted it was meant to “adopt[] the Supreme Court’s approach and brought banking directly under the Sherman and Clayton Acts[.]”).
- <sup>287</sup> *United States v. First Nat’l Bank*, 310 F. Supp. 157, 161 (D. Md. 1970).
- <sup>288</sup> 12 U.S.C. § 1828(c)(5)(A)-(B).
- <sup>289</sup> *See* 12 U.S.C. § 1828(c)(5).
- <sup>290</sup> Community Reinvestment Act of 1977, Pub. L. No. 95-128, § 804, 91 Stat. 1111, 1148 (codified at 12 U.S.C. § 2903); *see* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 604(f), 124 Stat. 1376, 1602 (2010); Kress, *supra* note 283, at 447 (citing 12 U.S.C. § 1828(c)(5)).
- <sup>291</sup> Kress, *supra* note 283, at 453, 456.
- <sup>292</sup> Bernard Shull, *Mergers and Competition Policy in the Banking Industry*, in *COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES* 161 (Peter C. Carstensen and Susan Beth Farmer, eds., 2008).
- <sup>293</sup> Derek Longhini, *Investment Banking & Securities Dealing in the US*, IBISWORLD 5, 23 (Oct. 2021) (The investment banking sector “is composed of companies and individuals that provide a range of securities services, including investment banking and broker-dealer trading services.”); Jullian Guirguis, *Industrial Banks in the US*, IBISWORLD 5, 22 (Oct. 2021) (“Industrial banks, also known as industrial loan companies, are financial institutions authorized to make consumer and commercial loans and to accept federally insured deposits.”).
- <sup>294</sup> *Number of Banks in the U.S., 1966-2017 (Graph)*, INST. LOC. SELF-RELIANCE (May 14, 2019), <https://ilsr.org/number-banks-u-s-1966-2014/>.
- <sup>295</sup> *Number of FDIC-insured commercial banks in the United States from 2000 to 2020*, STATISTA, <https://www.statista.com/statistics/184536/number-of-fdic-insured-us-commercial-bank-institutions/> (last visited Jan. 26, 2022).
- <sup>296</sup> *Bank Merger Trends*, BANKING STRATEGISTS, <https://www.bankingstrategist.com/bank-merger-trends> (last visited Jan. 26, 2022).