COORDINATED EFFECTS AND THE HALF-TRUTH OF THE LAX ENFORCEMENT NARRATIVE

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A debate is brewing between antitrust critics who claim that merger enforcement has been weak and fading since the 1980s and establishment defenders who respond that merger enforcement has stood firm and even toughened since the Chicago revolution. Could the truth be somewhere in between? Available data reject the broad assertion that overall merger enforcement has declined in recent decades, but support the narrower assertion that coordinated effects enforcement has declined. We consider what this half-truth of the lax enforcement narrative might mean for antitrust reform opportunities.

I. THE LAX ENFORCEMENT NARRATIVE AND ITS SKEPTICS

A debate is brewing between antitrust critics who claim that merger enforcement has been weak and fading since the 1980s and establishment defenders who respond that merger enforcement has stood firm and even toughened since the Chicago revolution. Neither side is easily dismissed for their position; neither position is capable of concession or compromise.

Advocates of the lax enforcement narrative occupy the highest positions in government and academia. As House Chair of the Congressional Joint Economic Committee, Representative Donald Beyer recently railed against the "explosion" of mergers and acquisitions: "Over the past 40 years, [mergers] have been allowed to proceed at an unprecedented pace . . . due in part to our failed experiment with a more lax enforcement of antitrust laws."[2] In substance, if not in the exact same words, Beyer's talking points are echoed by other antitrust critics, including those in the current administration. In an executive order, President Biden asserts that "over the last several decades, as industries have consolidated, competition has weakened in too many markets."[3] Assistant Attorney General Jonathan Kanter promises to end previous underenforcement: "I am here to declare that the era of lax enforcement is over, and the new era of vigorous and effective antitrust law enforcement has begun."[4] The Open Markets Institute urges the agencies to shake off decades of lax enforcement: "the lax merger guidelines used over the past 40 years have contributed to unprecedented concentrations of economic and political power that threaten both America's economy and its democratic institutions."[5]

Skeptics of the lax enforcement narrative (who tend not to hold leadership positions under the Biden administration) command long experience and substantial data in raising objections to the narrative. A few months ago, John Mayo and Mark Whitener offered an exemplar of the skeptical response in a short article in the Antitrust Magazine. Synthesizing their own research and the work of others writing about merger enforcement, Mayo and Whitener argue that available evidence categorically refutes the lax enforcement narrative. Among other things, they argue the evidence shows (1) that "merger enforcement activity has increased, not declined," (2) that the agencies "have won litigated merger cases more often over time, not less," and (3) that agency policy initiatives have driven "pro-enforcement changes in judicial doctrine" during the decades of supposed backslide.[6] Others have reached similarly negative conclusions when attempting to verify claims of underenforcement[7] and rising concentration.[8]

Holding lax enforcement claims in one hand, and the skeptical response in the other, one finds an ugly, zero-sum debate. If the skeptical position is right, then proponents of the lax enforcement narrative are stunningly mistaken. Do they not realize that data refute their position? Or do they suspect their story is false but invoke it anyway to justify desired actions? In the other direction, if the lax enforcement narrative is right, then much of the antitrust bar might be written off as silly or worse. The lax enforcement narrative presupposes that entire generations of antitrust attorneys have toiled in blissful ignorance of the crumbling state of antitrust enforcement — or have even contributed to its decline.

II. SOMETHING BETWEEN THE EXTREMES

Unlike most ideological debates, disagreements tinged with empirical assertions are sometimes vulnerable to resolution, and we wonder if the present debate could be improved by a more specific interrogation of the underlying claim in the lax enforcement narrative. In short, we note that merger enforcement could be vigorously and effectively enforced in some regards but not in others. If so, then overall trends in enforcement could

2 *A Second Gilded Age: How Concentrated Corporate Power Undermines Shared Prosperity: Virtual Hearing Before the J. Econ. Comm.*, 117th Cong. 2 (2021) (Opening Statement of Hon. Donald Beyer Jr., Chairman).

3 Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021).

4 Jonathan Kanter, Antitrust Enforcement: The Road to Recovery, Remarks as Prepared for Delivery Keynote at the University of Chicago Stigler Center (Apr. 21, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler.

5 Open Markets Institute, Comment Letter on Request for Information on Merger Enforcement (Apr. 21, 2022), https://www.regulations.gov/comment/FTC-2022-0003-1123.

6 John W. Mayo & Mark Whitener, *Has Merger Enforcement Really Gone Soft? Probing the Foundations of the Antitrust Reform Narrative*, Antitrust, Fall 2022, at 4, 4–5.

7 *E.g.* C.-Philipp Heller, Robert Lauer & James Mellsop, *Is Lax Enforcement of Antitrust Policy To Blame for an Increase in Market Power?*, Concurrences: Comp. L. Rev., May 2023, at 37; Dennis W. Carlton, *Some Observations on Claims That Rising Market Power Is Responsible for U.S. Economy Ills and That Lax Antitrust Is the Villain*, CPI Antitrust Chron., Aug. 2020, at 1.

8 *E.g.* Gregory J. Werden, *Concentration and Rising Market Power: Fears and Facts, in* Research Handbook on Abuse of Dominance and Monopolization (Pinar Akman, Or Brook & Konstantinos Stylianou eds., 2022); Robert Kulick & Andrew Card, Industrial Concentration in the United States: 2002-2017(2022) , https://www.uschamber.com/assets/documents/Final-Industrial-Concentration-Paper.pdf; Robert D. Atkinson & Filipe Lage de Sousa, No, Monopoly Has Not Grown (2021), https://www2.itif.org/2021-no-monopoly-has-not-grown.pdf.

remain basically the same, while specific areas of enforcement could slide into decay. Concentration and market power could grow as claimed in some respects, but not as claimed in other respects.

That is what we argue is happening. Available evidence supports the skeptical position — rejects the lax enforcement narrative — in all but one respect. But that one respect is a doozie. Coordinated effects enforcement has declined *severely* over recent decades — to a state of underenforcement not far off from the claims of the lax enforcement narrative. This, we argue, is the half-truth of the lax enforcement narrative. An intermediate position that partly reconciles otherwise irreconcilable empirical claims and that identifies a deficiency in current merger enforcement upon which all sides might agree that change is needed to empower effective antitrust enforcement. All that one needs to entertain this intermediate position is an openness to the possibility that merger enforcement could be adequate in some respects and inadequate in others.

III. OVERALL MERGER ENFORCEMENT HAS NOT DECLINED

To be clear, we agree with Mayo and Whitener, and other skeptics, that merger enforcement has not declined in the overall sense that the most strident advocates of the lax enforcement narrative claim it has.

A. Merger Enforcement from 1960 to 2000

This is not to say that enforcement has not varied since the 1960s. Senator Amy Klobuchar points to the 1980s as a period of ostensibly weak merger enforcement, and there is at least some evidence consistent with this claim. For example, compared to the 92 horizontal merger challenges brought by the DOJ in the 1960s, and the 85 challenges in the 1970s, only 37 horizontal merger challenges were brought by the DOJ in the 1980s.[9] Also consistent with the lax enforcement claim is the qualitative impression that government merger challenges were received more credulously in the 1960s than in subsequent decades. Gone are the days when Justice Stewart was driven to exclaim, "The sole consistency that I can find is that in litigation under [section] 7, the Government always wins."[10]

But the scant data supporting the broad form of the lax enforcement narrative shrink beneath the mountain of counterevidence. Take the above-noted DOJ enforcement statistics. The drop off in horizontal merger challenges during the 1980s reversed in the 1990s, with the DOJ bringing 69 challenges over this decade, only a few less than it had brought in the supposedly stronger enforcement era of the 1970s.[11] Merger enforcement data from the FTC also conflict with the apparent trend. As Joe Sims and Deborah Majoras have observed, together the agencies challenged an average of about 20.5 mergers per year from 1968 to 1978, compared with an average of about 17.9 per year from 1979 to 1997,[12] hardly a sea change.

Even this modest reduction in challenge rates must be interpreted with care. Between 1978 and 1979 the Hart-Scott-Rodino Antitrust Improvements Act took effect, bringing with it premerger notice requirements, discovery opportunities, and compulsory waiting periods. In the decades prior to HSR, companies had no obligation to notify the government about their intent to merge and the agencies consequently failed to learn of many, perhaps most, mergers in time to seek preventative remedies.[13] Preliminary injunctions were infrequent during this period.[14] Efforts to unwind consummated mergers could be slow and costly.[15] To state the obvious, high challenge rates, in the decades before HSR, did not necessarily equate to impactful merger enforcement.

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9 Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 Rev. Indus. Org. 75, 94–96 (2000). Changes in enforcement frequency may owe to changes in enforcement priority and resource allocation.

10 *United States v. Von's Grocery Co.*, 384 U.S. 270, 301–02 (1966) (Stewart, J., dissenting).

11 Gallo, et al., *supra* note 9, at 94–96.

12 Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 Antitrust L.J. 865, 866 n.7 (1997).

13 *See* William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 Antitrust L.J. 825, 829 (1997) ("The data suggest that close to 70 percent of the problematic mergers were not detected in time to seek preliminary relief [in the decades before the HSR Act's passage].").

14 *See* Grant S. Lewis, *Preliminary Injunctions in Government Section 7 Litigation*, 17 Antitrust Bull. 1, 3–4 (1972) ("Between 1914 and 1955, the government filed twenty-one Section 7 suits and moved preliminarily to enjoin the acquisition in two of them. During the last sixteen years, 167 government Section 7 suits have been filed and the government has so moved in fifty of them. The government was successful on fifteen of these post-1955 motions, unsuccessful on twenty-five and ten were settled before decisions on the merits were rendered." (footnotes omitted)).

15 *See* Baer, *supra* note 13, at 827 (citing one instance in which the government spent 17 years trying to unwind an anticompetitive merger).

Nor would lower challenge rates in the decades following HSR necessarily equate to weak enforcement. HSR's notice and waiting period obligations probably deter some anticompetitive mergers from being attempted at all,[16] mooting the need for challenges. The HSR framework provides both opportunities and incentives for merging parties to abandon deals that seem likely to be challenged,[17] or to work with the agencies to proactively adjust mergers in ways that eliminate concerns as effectively as litigation might, again divorcing the effectiveness of merger enforcement from the rate of merger challenges. Looked at from this perspective, the slight decrease in merger challenge rates from the 1960s to the 1990s could reflect a substantial *increase* in the vigor and effectiveness of merger enforcement — an interpretation consistent with Mayo and Whitener's skeptical position.

B. Merger Enforcement from 2000 to Present

If evidence does not support the lax enforcement narrative before the turn of the century, might it reveal the claimed slump in enforcement in the years since then? In short, "No." Within the mostly apples-to-apples context of post-HSR merger enforcement,[18] we still cannot locate evidence of a broad and persistent decline in merger enforcement.

We are not alone in this assessment. In a recent survey of antitrust enforcement practices — which critiques declining challenge rates in most other areas of antitrust law — Fiona Scott Morton reports no similar trend in merger enforcement. "As to mergers," Scott Morton notes, "we do not see a trend in overall enforcement at the two antitrust enforcement agencies, despite a significant increase in economic activity over this time period."[19] The qualification about changes in economic activity could be important for interpreting these data, since stable challenge rates mean something different in comparison to stable merger activity levels than they do in comparison to sharply rising merger activity.

But adjusting for overall merger activity does not appear to resuscitate the lax enforcement narrative. Instead, in an analysis of challenge rates over the period of 1979 to 2017, Jeffrey Macher and John Mayo conclude that, after factoring in merger activity levels, the relative challenge rate appears to have increased over time.[20] To some extent, this might reflect mean reversion. Since the 1980s produced a smaller number of merger challenges than either previous or subsequent decades, a return to more average challenge frequency in subsequent decades could present as an increasing rate of enforcement.

Evidence of comparatively rising enforcement intensity is, however, echoed in at least one other empirical study. Looking at FTC investigation data, Malcolm Coate reports declines in the number of Second Requests and merger challenges since the turn of the century: the respective frequencies fall from an average of about 67 Second Requests and 26 challenges every two years before 2001, to 40 Second Requests and 20 challenges over the 16 subsequent years.[21] But the ratio of these trends, as Coate notes, reflects an increasing rate of merger challenges.[22] Within closely investigated mergers, the challenge rate rises from about 38 percent before 2001 to 49 percent thereafter.[23] Whether or not a nearly 50 percent challenge rate feels appropriate in this context, it is hard to square with the narrative of weak and declining vigor in merger enforcement.

IV. COORDINATED EFFECTS ENFORCEMENT HAS DECLINED

The claims of advocates of the lax enforcement narrative — that overall merger enforcement has declined in intensity or efficacy over a span of decades — are not supported by the evidence. But that does not mean that merger enforcement has remained constant. Consistency of merger enforcement does automatically imply consistency *within* merger enforcement.

16 *See* Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. Econ. Persps. 69, 72 (2019) ("Merger control policy greatly affects the set of deals that are proposed . . . .").

17 *Cf.* Sims & Herman, *supra* note 12, at 866 (noting the sharp decline in litigation following enactment of the HSR framework, with less than one fifth of challenged mergers continuing to litigation after HSR, as opposed to nearly half before HSR).

18 An important revision to the HSR reporting thresholds took place in February of 2001. As Thomas Wollmann notes, this revision appears to have resulted in potentially anticompetitive mergers going entirely uninvestigated by the agencies. Thomas G. Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 Am. Econ. Rev.: Insights 77, 82 (2019).

19 Fiona Scott Morton, Wash. Ctr. for Equitable Growth, Modern U.S. Antitrust Theory and Evidence Amid Rising Concerns of Market Power and Its Effects: An Overview of Recent Academic Literature 13 (2019), https://equitablegrowth.org/wp-content/uploads/2019/05/052819-antitrust-lit-rev.pdf. Like us, Scott Morton notes changes in the types of mergers that the agencies are challenging. *Id.* at 14.

20 Jeffrey T. Macher & John W. Mayo, *The Evolution of Merger Enforcement Intensity: What Do The Data Show?*, 17 J. Comp. L. & Econ. 708, 709 (2021).

21 Malcolm B. Coate, The Merger Review Process at the Federal Trade Commission from 1989 to 2016, at 33 tbl.2 (Feb. 28, 2018), https://ssrn.com/abstract=2955987.

22 *Id.* at 8–9.

23 *Id.* at 33 tbl.2.

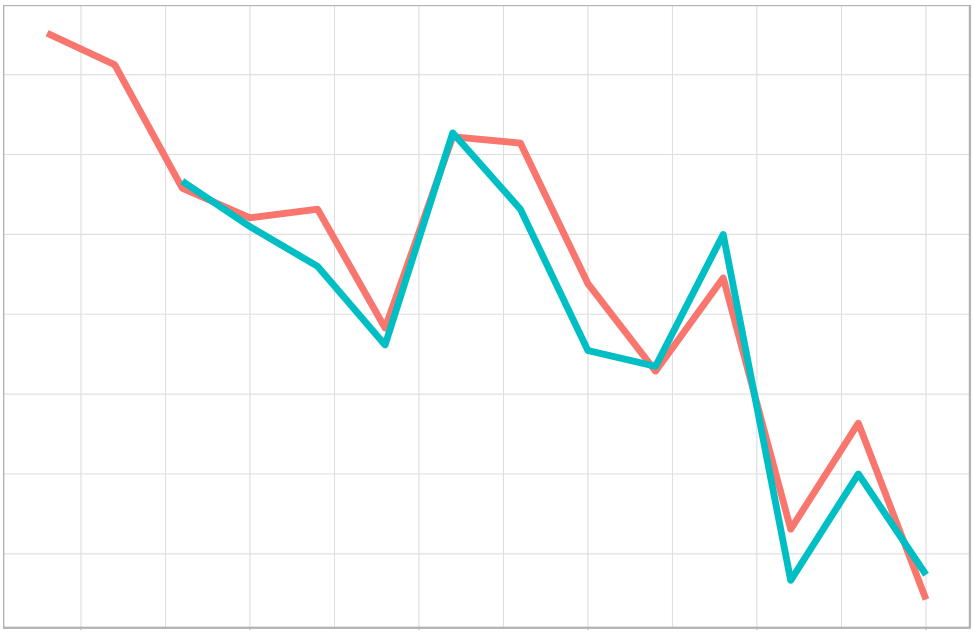
Indeed, it would be disappointing if merger enforcement had not changed over the span of decades of accumulated experience and advances in economic research. Those who would see merger enforcement forever frozen in the analysis of the 1960s, or 1980s, or any other decade, pine for a stasis that is as obnoxious to progress as it is to pragmatic decisional law. That said, changes within merger enforcement come with no manufacturer's guarantee of improvement, and our view of the evidence is that at least one development of the past decades has emerged as an error of omission. Coordinated effects enforcement has declined to a level approaching the abdication described by the lax enforcement narrative.

A. Fewer Cases, Fewer Investigations

As we develop in recent scholarship, the frequency of coordinated effects enforcement has declined — since the early 1990s — by every metric we have used to track it. This decline is evident in the paltry number of coordinated effects cases in recent decades of reported opinions.[24] It is evident in a review of recent survey data on practitioner experiences with merger investigations.[25] And, most impressively, it is evident in what limited transparency data are available on internal agency enforcement practices.

For a number of years, the FTC compiled and publicized information on its merger investigations as part of the Merger Policy Transparency Project.[26] Summarizing transparency project data on completed FTC investigations from 1989 to 2016, Malcolm Coate has previously called attention to a persistent trend of FTC investigations favoring unilateral effects analysis over coordinated effects analysis.[27] To give a sense of the pattern that Coate is observing, the following figure plots the portion of merger investigations that focused primarily on coordinated effects theories during the window for which transparency data were collected. (The two lines reflect separate but overlapping datasets in Coate's study.[28])

Figure 1. Portion of FTC Second Requests Primarily Focused on Coordinated Effects[29]



Did the FTC have it right when more than 80 percent of its serious investigations concerned coordinated effects theories at the start of the 1990s? Probably not. Mergers present more than just coordinated effects issues, and forcing most investigations through the analysis of this single theory of harm may have led Commission staff to miss problematic mergers that they would not miss today. But relegating coordinated

24 D. Daniel Sokol & Sean P. Sullivan, *The Decline of Coordinated Effects Enforcement and How to Reverse It*, 76 Fla. L. Rev. (forthcoming 2024).

25 D. Daniel Sokol, Marissa Ginn, Robert Calzaretta & Marcello Santana, *Antitrust Mergers and Regulatory Uncertainty*, Bus. Law. (forthcoming 2023).

26 *See* Malcolm B. Coate, Annotated Bibliography for the Transparency Papers: Version 3.4 (Feb. 25, 2021), https://ssrn.com/abstract=1984680; Malcolm B. Coate & Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996-2003*, 73 Antitrust L.J. 531 (2006).

27 Coate, *supra* note 21, at 2.

28 *See id.* at 14–16.

29 Figures illustrate data tabulated by Coate. *Id.* at 35 tbl.4. Mergers to monopoly have been excluded when computing relative frequencies.

effects theories the focus of less than 20 percent of investigations is no better. Just as overemphasis of coordinated effects theories may have caused the agencies to miss problematic mergers in the past, underemphasis of coordinated effects theories is likely leading the agencies to miss problematic mergers today.

B. Less Concern with Market Concentration

Perhaps this explains the dissonance one perceives in recent commentary about mergers and market concentration. Several years ago, Representative Jerry Nadler asserted a version of the lax enforcement narrative specific to changes in market concentration due to mergers:

> Over the past several decades, [waves] of anticompetitive consolidation in industry after industry [—] which has largely been the result of lax merger enforcement [—] have threatened the economic wellbeing and financial security of American families, whether through job losses and artificially low wages or higher prices and lower quality for essential goods and services. This massive concentration of economic power has arguably even frayed our nation's social fabric. [30]

Nadler's claims sound strange when compared with the intentionally reduced emphasis on market concentration in the 2010 revision of the Horizontal Merger Guidelines. That reduced emphasis, while explicitly intended to reflect a change in approach,[31] was not presented or — to our knowledge — received as a relaxion of merger enforcement. Wisely or not, it reflected an emergent consensus among economists and antitrust practitioners that reliance on market concentration evidence was often inferior to other ways of attempting to predict whether mergers would have anticompetitive effects.[32]

As we argue in recent research, that consensus is both cause and effect of the decades-long decline in coordinated effects enforcement.[33] While the number and relative size of firms in a market defined by the Hypothetical Monopolist Test is, by construction, relevant evidence when assessing the threat of coordinated effects arising from a merger within that market, this same evidence may hold little to no probative value for evaluating the threat of unilateral effects from mergers.[34] Thus, as investigations have shifted toward almost exclusive focus on unilateral effects theories, it is little wonder that market concentration evidence has decline in analytical prominence. But that is an explanation, not an excuse, and it does not justify an uncritical retreat from relying on market concentration evidence in merger view. Advocates of the lax enforcement narrative might argue that the agencies went too far in disregarding concentration considerations. We are sympathetic to that critique, at least to the extent that deemphasis of market concentration evidence has resulted in the agencies devoting less attention to coordination concerns.

V. FINDING BALANCE IN MERGER ANALYSIS

For those who are persuaded — as we are — that anticompetitive coordinated effects are being overlooked and underpoliced in merger review, the question is what can be done to rebalance enforcement priorities. It is trite to say that recognizing the problem is the first step in solving it. Here, however, there may be a special nexus between recognition and solution. Coordinated effects enforcement declined during a period of neglect in scholarship and expert commentary. No less than we need renewed focus on coordinated effects theories within the agencies, we need renewed focus on coordinated effects theories in research and commentary. Industrial organization economists need to devote more time to coordinated effects theories and to related forms and implications of interdependent exercises of market power. Legal scholarship is needed, too. The world has changed enormously since coordinated effects theories last commanded widespread academic and research interest. It would be a shock if there were not new things to say.

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30 *House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law Subcommittee Hearing of Oversight of the Antitrust Enforcement Agencies*, 115th Cong. (2018) (statement of Ranking Member of the Judiciary Committee, Jerry Nadler), unpublished transcript accessed at ProQuest Congressional.

31 *See e.g.,* Alison Oldale, Joel Schrag & Christopher Taylor, *The 2010 Horizontal Merger Guidelines at Ten: A View from the FTC's Bureau of Economics,* 58 Rev. Indus. Org. 33, 38 (2021) ("[O]ne of the most significant changes in the 2010 Guidelines is the reduced emphasis on the analysis of market definition and concentration as a central focus of horizontal merger review."); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L.J. 701, 707 (2010) ("Many observers have noted specifically that the 2010 Guidelines place less weight on market shares and market concentration than did predecessors.").

32 *E.g.* Dennis W. Carlton & Mark A. Israel, *Effects of the 2010 Horizontal Merger Guidelines on Merger Review: Based on Ten Years of Practical Experience*, 58 Rev. Indus. Org. 213, 217 (2021) (observing that "the recent industrial organization literature has shied away from — or even rejected — the notion that measures of market concentration can tell one anything about market power"); *see also* Daniel Hosken, Louis Silvia & Christopher Taylor, *Does Concentration Matter? Measurement of Petroleum Merger Price Effects*, 101 Am. Econ. Rev.: Papers & Proc. 45 (2011).

33 Sokol & Sullivan, *supra* note 24.

34 *See* Sean P. Sullivan, *Modular Market Definition,* 55 UC Davis L. Rev. 1091, 1107–17 (2021).

The hopeful note, here, is that fresh thinking and impactful research could do great work in helping to reinvigorate this area of antitrust enforcement. We believe that a greater emphasis on coordinated effects is one of the few ways that those at opposite ends of the antitrust-policy spectrum could come together to identify and address competition concerns. We also hope that, with time and assistance from the economics literature, the agencies will craft more effective legal and policy responses to coordinated effects issues.

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