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Repeal #NeverNeeded Antitrust Laws that Hinder COVID-19 Response

Smokestack-Era Laws Favor Established Interests and Do Not Encourage Competition

*By Jessica Melugin, Ryan Young, and Patrick Hedger**

Big technology firms have been invaluable in easing the burden of quarantine for millions of consumers[1] and businesses.[2] Unfortunately, the Department of Justice, the Federal Trade Commission (FTC), Congress,[3] and many state attorneys general are continuing their antitrust investigations[4] into major tech firms like Google,[5] Facebook,[6] Apple,[7] and Amazon.[8] Such open-ended investigations cast a destructive shadow of uncertainty over a sector that has proven critical during the COVID-19 crisis.

Facebook helping people stay in touch, Apple providing apps for curbside pickup from small businesses, Amazon's deliveries, and Google's tools for keeping informed are all enormously beneficial to consumers. These companies should be left to innovate and serve consumers as creatively, quickly, and as innovatively as needed.[9] Yet, as large tech companies try to adapt to this new environment, they may hesitate about certain innovations for fear of running afoul of antitrust rules. This provides no benefit to consumers. Therefore, this is no time to hobble tech companies with esoteric regulatory concerns.[10]

The real cost of antitrust is the innovation it prevents. The risk of precluding advances, synergies, and solutions that could prove critical to a struggling economy and a stressed people is too high to justify these investigations.

It is not just a chilling effect on innovative ideas and arrangements that can impair these companies, but also the time and energy required to comply with information requests. For instance, in response to a 48-state investigation led by Texas Attorney General Ken Paxton, Google had provided more than 100,000 pages of information by mid-April 2020.[11] Forcing tech companies to use their large, but still limited resources to comply with paperwork requests of myriad antitrust investigations is counterproductive at a time when the company's customers need them most.

Price Gouging. Price gouging is not typically an antitrust issue, but it has become one during the coronavirus crisis. On March 9, Attorney General William Barr announced:

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"The Department of Justice stands ready to make sure that bad actors do not take advantage of emergency response efforts, healthcare providers, or the American people during this crucial time."[12] In addition to federal warnings, 36 states already have price gouging legislation on their books.[13] Other states are considering similar legislation as part of their coronavirus response. There have also been calls for federal price gouging legislation, most prominently from Amazon Vice President for Public Policy Brian Huseman.[14]

Such legislation is a bad idea for several reasons. These go well beyond the typical "price controls make shortages worse" argument that is taught to every first-year economics undergraduate—and forgotten by many policy makers.

Non-Regulatory Responses. Calls for price gouging legislation show a lack of creativity. Many companies have already developed effective ways to fight price gouging without regulation. Amazon's Huseman writes, "We deploy dynamic automated technology to proactively seek out and pull down unreasonably priced offers, and we have a dedicated team focused on identifying and investigating unfairly priced products that are now in high demand, such as protective masks and hand sanitizer."[15] Company-level policies are also more adaptable than federal policies as technology and market circumstances change.

In fact, anti-price gouging technology could be a profitable business opportunity. If Amazon is not already doing so, it could license or sell its anti-price gouging technology to competitors for a profit. A startup with a killer app for use by online retailers could make a lot of money. Federal price gouging legislation would largely end this competitive behavior—precisely the opposite of antitrust regulators' stated goal.

Moreover, regulations are made by the government we have, not the government we want. Amazon's technology and in-house policies are almost certainly more effective than what Donald Trump, Nancy Pelosi, or Mitch McConnell would enact during an election year that also features a pandemic and civil unrest. The legislation would be enforced by a politicized Justice Department and Federal Trade Commission, overseen by a president who frequently threatens legal action against Amazon and other high-profile businesses he dislikes.

Social Norms. Calls for legislation also ignore the power of social norms. Early in the pandemic, brothers Matt and Noah Colvin drove around Tennessee and Kentucky and bought up 17,700 bottles of sanitizer to try to sell on Amazon for as much as $70 each. Amazon barred them within a day. eBay went further, forbidding all sales of hand sanitizer and masks.[16] Tennessee state authorities got involved, but their actions were likely not necessary. The Colvins managed to avoid being charged and donated all of their stockpiled supplies to nonprofits free of charge.[17] The public shaming that ensued when their actions became public was enough to convince them to stop stockpiling emergency supplies.

Rent-Seeking. Rent-seeking is economists' term for using government for unfair advantage.[18] Price gouging legislation would allow Amazon and other large companies to raise rivals' costs without having to improve their own offerings.

One of the strongest arguments against antitrust regulation is that it creates major rent-seeking opportunities.[19] Big companies routinely game the rules to thwart competition. Price gouging legislation is another example of the same rent-seeking process. There is a reason why established companies often favor new regulations—the rules usually keep out competitors. Price gouging regulations are no exception.

Short-Term Thinking. Amazon's call for a price gouging bill might be part of a larger effort to get itself out of antitrust crosshairs. But using price gouging legislation as a distraction tactic would only work temporarily. Those who favor expanding antitrust enforcement would gladly accept the price gouging bill, then continue their antitrust campaign the same as before. Both Amazon and the competitive process itself would be better served by avoiding short-term appeasement tactics.

Other Factors. The timing is as bad as the idea itself. Retail sales declines set new records for two months in a row in March and April, as people locked down nationwide. Despite bouncebacks in subsequent months, spending was still well below pre-COVID levels as of this writing.[20] Retailers have enough to deal with without having to spend resources complying with new rules their competitors helped to write.

There is a federalism angle, as well. A federal rule would undermine federalism by imposing standards on more than a dozen states that explicitly do not want them.

Mergers and Acquisitions Are Rarely Anti-Consumer or Anticompetitive. An idea gaining traction among Congressional Democrats is a moratorium on large-scale mergers and acquisitions. In late April, Sen. Elizabeth Warren (D-MA) and Rep. Alexandria Ocasio-Cortez (D-NY) announced the Pandemic Anti-Monopoly Act. The bill, among other things, would put a hold on all mergers and acquisitions requiring disclosure to the FTC.[21] Rep. Ocasio-Cortez claims, "With less competition, the whole country will see job loss and higher costs for consumers."[22] Other congressional Democrats have sent letters to the Federal Reserve and the Treasury Department urging officials to halt mergers and acquisitions between major firms that have received government assistance under the various coronavirus-related economic relief laws.[23]

A ban on mergers and acquisitions during the coronavirus crisis is unnecessary and would only delay the economic recovery. As FTC Commissioner Noah Phillips told *the New York Times*:

> [T]here is no evidence that the antitrust agencies are overwhelmed by filings. The Premerger Notification Office estimates a nearly 60 percent reduction in reported transactions during the past month, compared with the historical average. That is consistent with press reports indicating that M.&A. activity is down dramatically because of this crisis. Transactions reported to the F.T.C. also dropped off a cliff during the last recession. The market is funny like that.[24]

Mergers and acquisitions are simply another form of investment. In the same way that individual investors can provide needed capital and other resources to struggling businesses, saving jobs, as well as products and services for consumers, mergers and acquisitions do much of the same. A ban on investment, particularly in the middle of an economic crisis, would invite disaster. Mergers and acquisitions are not only a source of new capital, they free up other resources that can go toward serving consumers or developing new products.

Mergers and acquisitions also enable businesses to achieve economies of scale and other efficiencies. For example, companies that merge may no longer need separate offices or warehouses, so the cost savings can be redirected toward expanding production or service in other areas. In addition, companies that offer different but complementary products and services can combine to provide consumers with a wider range of options and cost savings.

A good example of the benefits of economies of scale arising from mergers and acquisitions is Facebook's acquisition of Instagram. Facebook bought Instagram in 2012 for $1 billion. At the time, Instagram had just 13 employees[25] and roughly 30 million users.[26] Five years later, Instagram had grown to 450 employees—and undoubtedly many more today.[27] The platform now has over 1 billion users and is valued at over $100 billion.[28] The combined companies can now offer users different, but complementary social media experiences while offering their customers, mostly advertisers, a wider range of products.

Ultimately, Facebook's decision to purchase Instagram was not about eliminating Instagram as a would-be competitor, but rather to allow Facebook to compete more effectively with its existing rivals. As *CNBC* reported at the time:

> Several former Facebook employees with knowledge of the Instagram acquisition tell CNBC that the company did not purchase the mobile app to squash a would-be competitor. Rather, the former employees argue, Facebook at the time was much smaller and fending off what threatened to be fierce competition from Twitter, which had already bid for Instagram, and Google's new social network.[29]

As this story demonstrates, the extent of competition in the market is not determined by the number of competitors, but by the ability of competitors to challenge one another. Competition quality is far more important than competition quantity.

Another recent merger illustrates this as well. Mobile carriers Sprint and T-Mobile completed a merger in April 2020. Of the four major carriers in the U.S., Sprint and T-Mobile were the fourth and third largest, respectively, well behind AT&T and Verizon. AT&T and Verizon have around 150 million subscribers each, compared to T-Mobile's 80 million and Sprint's 50 million.[30] Yet the combined T-Mobile/Sprint boasts a respectable 130 million subscribers, making the company a much more viable competitor to both AT&T and Verizon. What's more, Sprint was unlikely to have survived without a merger, so AT&T and Verizon would have been left with only each other and T-Mobile as viable competitors, with T-Mobile still well behind in terms of subscribers.[31]

Healthy competition is not just about bolstering existing competitors, however.

Exit Promotes Entry. Mergers and acquisitions play a critical role in fostering new market entrants. What attracts entrepreneurs and investors to a given market is the expectation that their hard work and investments will be rewarded one day. Mergers and acquisitions are a key element of that risk/reward structure. Regulations have made public stock offerings increasingly difficult for small and medium-sized firms.[32] The prospect of being bought out by major players in a given market plays an increasingly important role in encouraging investors and entrepreneurs to get into the market in the first place.

A 2004 academic study that looked at market entry in the banking sector following mergers and acquisitions concluded:

> Our findings are strongly consistent with the hypothesis that M&As are associated with subsequent increases in the probability of entry into the markets in which the M&As occur. The results are both statistically and economically significant. [33]

Relevant to the COVID-19 crisis, there are several examples of significant market entrance during past recessions. Tech giants of today, such as Microsoft, Uber, Airbnb, Venmo, and Square, among others, were all founded during recessions.[34] The companies set to challenge today's major incumbent firms in the future are being founded today. The avenues by which these nascent firms entice prospective and transformational investors must not be closed off.

Don't Expand Antitrust. The U.S. standard for antitrust law is consumer harm. With prices for many of big tech's services and products at zero, continued innovation in the industry, and companies competing vigorously for consumers' attention, it is hard to imagine the investigations currently underway at the Department of Justice, the Federal Trade Commission, the House Judiciary Committee, and nearly every state attorney general finding evidence of customers being harmed.[35]

So, with little chance of proving illegal monopoly power or consumer harm, some advocates have argued for expanding antitrust enforcement to include data practices, privacy concerns, competitor interests, the environment, economic inequality, and political power, among other sundry causes.[36]

That expansion would represent a return to the chaos that antitrust law wreaked on the U.S. economy for much of the 20th century, yielding the opposite of progress for consumers and businesses. The U.S. already ran the experiment of antitrust trying to serve more than one master when it tried to both serve consumers and protect competitors. Antitrust law was full of contradictory court decisions and internal conflicts, and often resulted in protecting competitors over consumers.[37]

Furthermore, there is little evidence of dangerous market concentration or insufficient competition in U.S. digital markets. As a recent letter by 23 prominent economists, legal scholars, and practitioners sent to the House Judiciary Committee notes:

> [T]he weight of the literature today—much of which is no more than a couple years old and some of which is still in working paper form—does not support the conclusion that the economy has been trending inexorably toward increased market power and greater consumer harm, especially for the purpose of justifying dramatic legislative changes to the antitrust framework.[38]

The authors cite several economic analyses that reach similar conclusions.[39]

With little economic evidence of a problem, legislators and agency regulators should reject this expansion of antitrust laws beyond the consumer harm standard. To do otherwise invites compromising consumer welfare and encouraging corporate welfare and rent seeking.

Conclusion. Antitrust investigations at the federal and state level should be suspended during the COVID-19 crisis and, ideally, abandoned permanently. The unintended consequences of market distortion and chilled innovation are the last thing consumers and businesses need right now—or ever. This is no time for politicians and government lawyers to promote their own careers through the posturing of antitrust enforcement. Consumer benefit and business resiliency must be preserved and antitrust enforcement must not be prioritized or expanded.

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