On January 18, 2021, the Federal Trade Commission and the Antitrust Division of the Department of Justice issued a request for information about “how the agencies can modernize enforcement of the antitrust laws regarding mergers.” This letter responds with several conceptual points and their associated evidence.

First, it may be more useful to firms and practitioners to collapse the current Vertical Merger Guidelines and Horizontal Merger Guidelines into one Merger Guidelines document that more clearly lays out the two types of theories of harm and explains their relationship. In particular, the competition that protects consumers and gives them price, quality, and innovation is between head-to-head competitors (“horizontal”). This competition can be directly impeded in three broad ways: by using contracts, mergers, or direct exclusion among rivals in that market. Competition in that focal market can also be impeded using contracts, mergers, or direct exclusion through a related market (“vertical”). Of these three related market strategies, only the acquisition category falls under the Clayton Act even though the other two strategies may have a similar effect on competition in the focal market.

The attached slide deck demonstrates the issue.

Secondly, an important category of related market mergers includes those involving two-sided platforms. Because two-sided platforms often have strong network effects, multihoming by users of those platforms creates tremendously important competition. Tools that help users multihome or interoperate across platforms intensify competition between platforms because users can switch or move business between platforms more easily. For this reason, a leading platform may want to acquire a multihoming tool and use the acquisition to reduce the relative quality of rival platforms by degrading interoperability or making multihoming more costly, thereby harming the volume or quality of rivals and their viability. These mergers, which we term “platform annexation,” can harm competition between platforms but they often do not fit easily into standard models.

A paper by myself and Professor Susan Athey (Platform Annexation by Fiona M. Scott Morton, Susan Athey :: SSRN) explains how transactions that give incentive and ability to impede multihoming or degrade interoperability are particularly dangerous to competition. It will help the agencies enforce more effectively if the revised Merger Guidelines incorporate more analysis of 2-sided markets as these are common in the new economy. In particular, I recommend that
revised Merger Guidelines help the agencies and the courts identify acquisitions by large platforms that are likely to harm competition.

Thirdly, new guidelines should allow the agencies to enforce against harmful common ownership going forward. “Common ownership” refers to the situation where firms that are product market rivals have many of the same partial owners. For example, ten asset managers might each own 5% of three publicly traded competing oligopolists. Each transaction, at 5% of the value of the company, is relatively small, yet collectively the common owners own a large fraction of each company, and those companies compete head to head in a product market. At present we have well-established economic theory regarding common owners: they have both the incentive and the ability to reduce competition, while the empirical work on the topic is growing. Anton et al (Common Ownership, Competition, and Top Management Incentives (florianederer.github.io)) is a paper that demonstrates how common owners flatten executive competition which theory shows will lessen competition. Boller and Scott Morton (Testing the Theory of Common Stock Ownership by Lysle Boller, Fiona M. Scott Morton :: SSRN) shows that stock prices rise when common ownership increases. Ederer et al (Innovation: The Bright Side of Common Ownership? (florianederer.github.io)) demonstrates that R&D increases with common ownership when it has positive spillovers among competitors. This is an active area of research and I expect empirical findings to become numerous and robust before the next revision of the Guidelines. Likewise, the FTC might undertake a useful 6b study of this problem before the next revision is carried out. Therefore, the Guidelines should be designed to allow the agency to enforce based on available evidence that arises in the near term. Posner et al (attached) offers one suggestion.

And last, Steven Salop and I have several suggested improvements to the guidelines that we published last year in the Review of Industrial Organization. I believe it would be particularly valuable for the new Guidelines to discuss the proper interpretation and treatment of testimony by executives of the merging parties. The other points in the paper are self-explanatory so I will not detail them any further except to note that they also rely on the most up to date economic evidence. The paper is included in the submission.

Please do not hesitate to get in touch if I can be helpful in any way.

Sincerely yours,