October 5, 2021

The Honorable Dick Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Durbin, Chairman Nadler, Ranking Member Grassley, and Ranking Member Jordan:

The undersigned organizations urge Congress to maintain the current legal and regulatory framework for evaluating mergers and acquisitions. For the past forty years, this bipartisan framework has enabled rigorous competition, particularly in comparison to other parts of the world, while providing the government with the legal tools necessary to challenge transactions that could harm consumers. As a result, the American economy has flourished, leading the world in innovation and value creation.

We believe any current concerns with antitrust enforcement in the United States can and should be addressed by providing additional resources for enforcement agencies. We strongly encourage Congress to refrain from making changes to the legal structures that have served consumers well, while also advancing our economic competitiveness.

Instead of adopting proposals with the high potential for unintended consequences to consumers, markets, and economic dynamism, Congress should ensure that the merger review process remains impartial. The process should remain guided by the best interests of consumers and innovation.

Mergers and acquisitions play a vital role within our competitive economy. When companies choose to merge, that activity often adds to our economic vibrancy. Such activity can drive capital formation, enable lower prices for consumers, and lead to innovative new products and services – all without any harm to competition. Mergers also provide acquired companies with critical financing, sometimes ensuring their survival, and allow acquiring companies to bring new products to consumers faster and cheaper.

The government already has the power it needs to review and challenge the comparatively few mergers and acquisitions that raise competitive concerns, while still allowing

our markets to serve as the engine that determines economic efficiency. When and where the government needs to and does intervene, the antitrust agencies already have demonstrated that they have the power to achieve the results necessary to keep the market both free and fair.

In particular, federal antitrust agencies have proven capable of conditioning or blocking transactions when needed to address any competitive concerns. When the government chooses to intervene, it almost always wins. Over the past twenty years the federal enforcement agencies have challenged approximately 780 mergers.[1] In that same period, the merging parties have won in court only eleven times. In the remaining cases, the parties abandoned the transaction, the parties settled with the government, typically via divestiture, or the government has won in court. There can be little dispute that the government already has the ability to protect competition; where it has intervened, it has a success rate of 98.5%.

The legal framework has proven sound and effective for the government for those mergers of a certain size that are submitted, reviewed, and where needed, challenged by the government before a court. With the additional funding Congress may allocate, the antitrust agencies will have the ability to scrutinize proposed mergers even more closely. In short, the government already enjoys at least a level playing field, if not significant advantages, for those transactions it wishes to challenge.

Unfortunately, a narrative advanced by some critics ignores these facts and has spurred a dubious debate over merger policy. Some have cast aspersions on the process and legal framework under which mergers are reviewed and suggested policies that could deeply chill mergers and acquisitions activity, economic growth, and U.S. competitiveness. Taken to an extreme, such an approach could devolve to a point where, in many cases, the government would have to grant permission to private companies to engage in routine economic activity such as mergers, rather than the current well-established rule where mergers are presumptively lawful and economically beneficial absent evidence to the contrary.

This "guilty-until-proven-innocent" mindset would be antithetical to the past forty years of bipartisan antitrust enforcement – and would blunt the positive economic and competitive impacts of merger activity. For example, Executive Order 14036 ("EO"), Promoting Competition in the American Economy, is based on the premise that across every industry the markets have become too concentrated by too few market participants. These assumptions, which are unsupported by data showing any harm to consumers, seem to espouse a belief that government is better positioned to engineer market outcomes.

We oppose efforts to shift the burden of proof on mergers, or to throw up additional roadblocks that limit or prohibit the ability for a company to merge or sell itself to an acquiring firm. In reviewing the current state of merger law and policy, we respectfully remind Congress that, during the past few decades, America's dynamic and innovative economy has far

[1]This aggregate number of challenges was compiled from the Annual Reports to Congress Pursuant to The HartScott-Rodino Antitrust Improvements Act of 1976, by the FTC and the DOJ, available at https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

outstripped that of Europe, which has imposed a far more burdensome regime on its private sector.

In closing, we believe Congress has an important role to play. First, Congress should exercise its oversight authority to ensure merger analysis remains focused on consumer welfare. Second, Congress should ensure that the enforcement agencies treat merging parties fairly, affording them due process protections and predictable guidance that is testable in court. As part of protecting the process, Congress should safeguard the role courts play in deciding the ultimate fate of a proposed merger. Finally, Congress should reject calls for legislation to overhaul the process and legal standards by which mergers and acquisitions are evaluated. Such calls are unfounded and, if heeded, could do lasting damage to our economy and to consumers.

Thank you for your consideration of our views. We look forward to working with you to ensure that our antitrust system advances the interest of consumers in support of the fair and efficient functioning of our markets.

Sincerely,

AdvaMed--Advanced Medical Technology Association
American Hospital Association
American Investment Council
Angel Capital Association
Biotechnology Innovation Organization
Brick Industry Association
Business Roundtable
California Chamber of Commerce
Center for American Entrepreneurship
Consumer Data Industry Association
Consumer Technology Association
Engine
Medical Device Manufacturers Association (MDMA)
Metals Service Center Institute
National Association of Manufacturers
National Venture Capital Association
Pharmaceutical Researchers and Manufacturers of America (PhRMA)
Satellite Industry Association
Silicon Valley Leadership Group
TechNet
The Business Council of New York State, Inc.
U.S. Chamber of Commerce

cc: Members of the Senate Committee on the Judiciary
cc: Members of the House Committee on the Judiciary