New Ideas in Competition Policy

Vanderbilt
Policy Accelerator
for Political Economy & Regulation

VANDERBILT UNIVERSITY

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Introduction

Nearly three years ago, President Biden signed a landmark executive order to promote competition in the American economy. That action was a watershed moment in the revival of competition policy in America, as it obligated all executive departments and agencies, not just antitrust enforcers, to use their authority to promote competition in the markets under their purview. And it ordered specific actions that have made – or will make – life better for millions of Americans: from seniors purchasing hearing aids over the counter, to workers freed from non-compete contracts, to consumers soon to be protected from junk fees.

Despite all that the President's executive order did to promote competition—along with the tireless work of agency officials and staff across the government—there is still more to be done. Since 2021, the scale of anticompetitive business practices across the American economy has only been further revealed—as have the tools at the government's disposal to address them. As President Biden's first term comes to an end, this paper compiles new ideas for competition policy. These ideas are drawn from a combination of VPA's original research, conversations with scholars and policy experts, and recommendations from organizations that work on competition and economic policy.

This paper is not intended to offer a comprehensive list of actions the President could take in this area, nor is it intended to provide a framework for prioritizing which actions are most important. Rather, it is our hope that compiling these policies in a single brief can serve as a jumping-off point for discussion and further exploration by policymakers and general readers across a wide range of policy areas. Each of the actions listed here, if undertaken, would advance the President's commitment to fostering a whole-of-government approach to competition, thereby protecting Americans from the many risks of concentrated economic power.

Department of Agriculture

1. *Define livestock under the Packers & Stockyards Act as both alive and dead.* At least one recent antitrust case has hinged on the question of whether PSA covers both livestock farmers and meat producers.[1] Though the court ruled that such a distinction did not matter in that case, it is possible that this claim may be further litigated. In a rulemaking or policy statement, the USDA could clarify the scope of PSA to include both categories.

2. *Issue a policy statement on the enforcement of the Capper-Volstead Act.* The Capper-Volstead Act of 1922 provides for antitrust exemptions for agricultural cooperatives, so long as they operate for the "mutual benefit of the members thereof."[2] But for cooperatives that do not operate in such a way, Section 2 of Capper-Volstead empowers the Secretary of Agriculture to hold hearings and issue cease-and-desist orders against those engaged in monopolization or restraint of trade—a strong pro-competition law that has rarely, if ever, been enforced.[3] The USDA should issue a policy statement and commit to enforcing Section 2 of Capper-Volstead in line with its statutory obligations. As proposed by Daniel Hanley of the Open Markets Institute, the USDA could, as part of such a policy statement, issue guidelines to specify the conditions under which cooperatives are operating for the "mutual benefit of [their] members," and thus whether their antitrust exemptions are granted.[4] If cooperatives are found not to operate in such a manner, they should be referred to the Attorney General and the Federal Trade Commission for investigation. Ideally, though, such guidelines would instead serve to promote the antimonopoly spirit of

[1] *In Re* Pork Antitrust Litigation, 2023 U.S. Dist. LEXIS 171137, 25-26 (2023) ("Defendants read Section 209 to mean that DAPs cannot sustain an action under the PSA because they are not purchasers of 'livestock.' However, whether the DAPs purchase livestock or meat food products is irrelevant. A plaintiff has a cause of action under the PSA as long as they were injured by a defendant's violation of a PSA 'provision . . . relating to the purchase, sale, or handling of livestock.' The plaintiffs' injury need not relate to the purchase of livestock—only the PSA provision that the defendant violated does. There is no requirement for the plaintiff other than that they sustained injuries "in consequence of such violation." (citations omitted))

[2] 7 U.S.C. § 291.

[3] 7 U.S.C. § 292; Daniel Hanley, *Administrative Antimonopoly*, OPEN MARKETS INST. 13 (Feb. 2022).

[4] Hanley, *supra* note 3, at 14.

cooperative organization in agriculture that Congress originally sought to promote.[5]

3. *Investigate price gouging in the poultry egg market.* In 2023, advocacy group Farm Action reported that the price of eggs increased by 138% from the year before.[6] Though industry cited an outbreak of avian flu, the dominant player, Cal-Maine Foods, which controls 20% of the U.S. egg market, reported no positive avian flu tests at its facilities while reporting a 600% increase in profits.[7] USDA should investigate the market structure, potentially anticompetitive behavior, and pricing decisions in this critical market, and submit its findings to the White House Competition Council, the Attorney General, and the Federal Trade Commission with recommendations for further investigative, legal, or policy action.

Department of Commerce

4. *Direct the National Telecommunications and Information Administration (NTIA) to update its programmatic waiver for small- and medium-sized ISPs to better access Broadband, Equity, Access, and Deployment (BEAD) funding.*[8] Section 60102(g)(2)(A)(ii) of Division F, Title V of the Infrastructure Act requires that state broadband offices (or other eligible entities) distribute funds only to subgrantees who have "financial and managerial capacity." Based on this language, NTIA initially required that all grant recipients obtain an irrevocable standby letter of credit ("LOC") as a way to mitigate financial risk.[9] A LOC is a

[5] *See* Sandeep Vaheesan and Nathan Schneider, *Cooperative Enterprise as an Antimonopoly Strategy*, 124 PENN ST. L. REV. 1, 20-21 (Oct. 19, 2022).
[6] LETTER FROM BASEL MUSHARBASH, LEGAL COUNSEL, FARM ACTION, TO LINA KHAN, CHAIR, FED. TRADE COMM'N (Jan. 19, 2023), https://farmaction.us/wp-content/uploads/2023/01/Farm-Action-Letter-to-FTC-Chair-Lina-Khan.pdf.
[7] Leah Douglas, *High egg prices should be investigated, U.S. farm group says*, REUTERS (Jan. 23. 2023), https://www.reuters.com/markets/us/high-egg-prices-should-be-investigated-us-farm-group-says-2023-01-20/.
[8] We are indebted to Ben Dinovelli for this suggestion.
[9] NAT'L TELECOMM. & INFO. ADMIN., NOTICE OF FUNDING OPPORTUNITY: BROADBAND EQUITY, ACCESS, AND DEPLOYMENT PROGRAM, https://broadbandusa.ntia.doc.gov/funding-programs/policies-waivers/BEAD-Letter-of-Credit-Waiver.

promise from a bank to pay money under certain conditions. Specifically, NTIA required all subgrantees to obtain a LOC from an FDIC bank with a Weiss rating of B- or better for 25% of the award amount (e.g., for a $10 million project, a subgrantee would need a $2.5 million LOC). Banks providing a LOC typically require that the borrower collateralize the LOC with cash (or a cash-equivalent). This requirement disadvantaged many smaller ISPs, nonprofits, cooperatives, and municipalities, who do not have significant cash lying around. In addition, they also do not have significant excess income to pay the interest on a LOC (it is not free; if one takes out a LOC, the bank will charge interest).

a. In response to public and private pressure,[10] the NTIA issued a programmatic waiver modifying this requirement.[11] The NTIA (1) expanded the universe of institutions that can supply a LOC; (2) allowed the use of performance bonds equal to 100% of the grant; (3) allowed subgrantees to reduce the obligation upon completion of project milestones; and (4) reduced the LOC percentage to 10%. While these steps are helpful, they still do not mitigate the fact that obtaining an LOC or performance bond will be time consuming and costly (regardless of who it comes from or the specific dollar threshold).[12] For newer entities without existing assets, they may not be able to convince banks to give LOCs *or* performance bonds for a concept (a greenfield project that has only been proposed). Consequently, this requirement – even in its modified state – still advantages larger incumbents. NTIA could eliminate this requirement entirely for subgrantees below a certain dollar threshold (e.g., $10 million) or for certain types of subgrantees (e.g., nonprofits) to expand the universe of potential subgrantees.

[10] LETTER FROM JOCHAI BEN-AVIE, CEO, CONNECTING HUMANITY, ET AL. TO THE HONORABLE GINA M. RAIMONDO, SECRETARY OF COMMERCE, U.S. DEP'T OF COM., ET AL. (Sept. 6, 2023), https://connect-humanity.shorthandstories.com/bead-letter-of-credit-alternatives/index.html#group-section-Read-the-Letter-43KkAcKLW6.

[11] *BEAD Letter of Credit Waiver*, NAT'L TELECOMM. & INFO. ADMIN. (last visited Mar. 20, 2024), https://broadbandusa.ntia.doc.gov/funding-programs/policies-waivers/BEAD-Letter-of-Credit-Waiver.

[12] Institute for Local Self-Reliance, *ACP, MDU Solutions, and the Letter of Credit Problem?*, YOUTUBE (Nov. 1, 2023), https://www.youtube.com/watch?v=VekXbYSnsVo&t=2711s.

5. *Direct NTIA to better coordinate grant funding with other federal agencies.*[13]
    a. Several federal broadband grant programs exist that have very similar goals (reaching unserved and underserved areas), including the recently passed BEAD program (led by NTIA), the Rural Digital Opportunity Fund (RDOF) program (led by FCC), the ReConnect Program (led by USDA), and the Capital Projects Fund (led by Treasury Department). The prior competition EO encouraged agencies with "overlapping jurisdiction" to "coordinate their efforts . . . with respect to (i) the investigation of conduct potentially harmful to competition; (ii) the oversight of proposed mergers, acquisitions, and joint ventures; and (iii) the design, execution, and oversight of remedies."[14] A new EO should extend this coordination to grant programs – so funding is facilitating competition and not unintentionally entrenching incumbents.
        i. As mentioned, section 60102(h)(1)(A)(i) requires state broadband offices (and other eligible entities) to "award funding in a manner that . . . prioritizes unserved projects [and] underserved service projects." In the Notice of Funding Opportunity (NOFO), NTIA defined "unserved" or "underserved" as excluding areas "already subject to an enforceable federal, state, or local commitment to deploy qualifying broadband."
    b. NTIA should allow areas that are currently earmarked for funding from RDOF (and other grant programs) to also qualify as "unserved" or "underserved" for BEAD funding through a programmatic waiver.[15] While this in theory sounds duplicative, NTIA should consider doing so because:
        i. Several RDOF grant recipients have defaulted.[16] Many state broadband offices will make their BEAD awards this year. It is crucial that areas subject to RDOF (or other) defaults do not also lose out on BEAD funding.

[13] We are indebted to Ben Dinovelli for this suggestion.
[14] Exec. Order 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).
[15] Jericho Casper, *Alabama, Florida Propose Making RDOF Locations BEAD-Eligible,* BROADBAND BREAKFAST (Jan. 8, 2024), https://broadbandbreakfast.com/alabama-florida-propose-making-rdof-locations-bead-eligible/.
[16] *FCC Getting Serious About RDOF Defaults*, POTS & PANS BY CCG CONSULTING (Jan. 17, 2024), https://potsandpansbyccg.com/2024/01/17/fcc-getting-serious-about-rdof-defaults/.

ii. It may be difficult to identify which areas actually are subject to RDOF or other grant programs. State broadband offices will have better visibility into whether an area is actually being served or not. Rather than restricting state broadband offices from servicing such areas entirely, NTIA should allow state broadband offices to exercise discretion as is appropriate.

6. *Initiate a rulemaking at NTIA that preempts state law restrictions on municipal broadband networks.*[17] Municipal broadband offers a public option that can place competitive pressure on private ISPs to offer better service and lower prices.[18] However, currently 16 states have laws that ban municipalities from broadband.[19] The FCC has historically faced hurdles in challenging / preempting these state laws under the Telecommunications Act of 1996:
    a. In *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), SCOTUS held that the FCC lacked the ability to preempt anti-municipal-broadband state laws under section 253 of the Act.[20] Despite clear language in the Act that "[n]o state or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," Justice Souter – invoking the federalism canon – argued that Congress was not explicitly clear that "any entity" in the provision applied to municipal broadband.[21]

[17] We are indebted to Ben Dinovelli for this suggestion.
[18] John Brodkin, *City-owned Internet services offer cheaper and more transparent pricing*, ARS TECHNICA (Jan. 15, 2018), https://arstechnica.com/tech-policy/2018/01/city-owned-internet-services-offer-cheaper-and-more-transparent-pricing/.
[19] Tyler Cooper, *Municipal Broadband 2023: 16 States Still Restrict Community Broadband,* BROADBAND NOW (Nov. 17, 2023), https://broadbandnow.com/report/municipal-broadband-roadblocks.
[20] 47 U.S.C. § 253.
[21] Some have suggested that the FCC should try to reinvoke this authority again. Part of the argument is that reclassifying broadband service under Title II of the Act (vs. Title I) justifies the FCC's preemption as Title II invokes a greater level of regulation. We are not sure that this approach would succeed: First, given the current composition of the Court, SCOTUS may still find the federalism canon argument persuasive (regardless of whether the FCC classifies broadband as Title I or Title II); and second, some have expressed doubts more generally over whether the FCC can even reclassify broadband services under Title II again given *West Virginia v. EPA*. This is not to say the FCC shouldn't try to do so, but it provides an additional hurdle to using Section 253 for rulemaking.

b. In *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016), the Sixth Circuit argued that section 706 of the Act (allowing the FCC to "take immediate action to accelerate deployment of [high-speed broadband] by removing barriers to infrastructure investment and by promoting competition in the telecommunications market") did not allow the FCC to preempt state anti-municipal broadband laws either, relying on a similar clear statement rule as *Nixon*.

c. BEAD offers the NTIA another bite at the apple. Section 60102(h)(1)(A)(iii) prohibits states from "exclud[ing] cooperatives, nonprofit organizations, public-private partnerships, private companies, public or private utilities, public utility districts, or local governments from eligibility for [subgrant] funds."[22] Section 60102(g)(3) also allows the Assistant Secretary to "deobligate" a state broadband office's award if that office violates certain obligations, including an obligation to "distribute the funds in an equitable and non-discriminatory manner."[23] To date, NTIA has interpreted this provision more narrowly than it should. While NTIA has stated that it will not give grant funds to states that pass new anti-municipal-broadband laws, NTIA only "strongly encourages Eligible Entities to waive all [*pre-existing* anti-municipal-broadband laws]." NOFO, section IV.C.1.a. NTIA has also publicly stated that state anti-municipal-broadband laws will not inhibit states from receiving BEAD funding.[24] If NTIA wanted to be more aggressive, the Assistant Secretary at NTIA could:

   i. Refuse to accept final grant proposals from states that have anti-municipal-broadband laws. This should not be an issue under *Dole* or *Sebelius* (as BEAD funding is not tied to pre-existing funding, e.g., Medicaid, that states currently rely upon).

   ii. Issue a rule preempting state laws to the extent a state agency accepts the NTIA's funding. Section 60102(i) grants the Assistant Secretary authority to "issue such regulations . . . as may be

[22] 47 U.S.C. § 1702.

[23] Id.

[24] Diana Goovaerts, *States, NTIA say municipal broadband laws won't delay BEAD funding*, FIERCE NETWORK (Apr. 17, 2023), https://www.fierce-network.com/telecom/municipal-broadband-laws-probably-wont-delay-bead-funding.

necessary or appropriate to carry out the programs, projects, or activities authorized under this section, including to ensure that those programs, projects, or activities are completed in a timely and effective manner."[25]

7. *Direct the CHIPS Program Office (CPO) to work with the FTC to establish pro-competitive criteria for funding allocation and eligibility requirements.* As recently proposed in a report by the American Economic Liberties Project, the CPO should be directed to sign a memorandum of understanding with the FTC on information-sharing to promote competition in the industries affected by CHIPS Act implementation.[26] CPO should be vigorous in prohibiting CHIPS funding recipients from anticompetitive behavior including tying, exclusive dealing, and discriminatory and predatory pricing, and should make commitments against such behavior a criterion of funding allocation.[27] The CPO could also work with other agencies across government to promote competition, including the Patent and Trademark Office to protect against patent abuse by semiconductor firms.[28]

8. *Implement FRAND (fair, reasonable, and nondiscriminatory) licensing requirements under the CHIPS Act.* As also proposed by AELP, the terms of funding and other privileges granted to semiconductor firms under the CHIPS Act could include FRAND licensing requirements.[29] Section 9909(a)(1) of the CHIPS Act allows the Secretary of Commerce to enter into "agreements, including contracts, grants and cooperative agreements, and other transactions as may be necessary and on such terms as the Secretary considers appropriate," giving the Secretary broad discretion to set pro-competitive terms.[30] Two options could be (1) to require participation in an open patent pool of all CHIPS funding recipients for

[25] Id.
[26] Todd Achilles, Erik Peinert, and Daniel Rangel, *Reshoring and Restoring: CHIPS Implementation for a Competitive Semiconductor Industry,* AM. ECON. LIBERTIES PROJECT 53 (Feb. 2024), https://www.economicliberties.us/wp-content/uploads/2024/02/20240117-AELP-IndPolSeries-CHIPS-Paper_v4-1.pdf.
[27] Id.
[28] Id.
[29] Id. at 49.
[30] 15 U.S.C. § 4659.

semiconductor technologies, and (2) to condition membership in the National Semiconductor Technology Center, an innovation hub, on FRAND licensing requirements.[31]

Department of Defense

9. *Consistently monitor significant transactions in the defense industrial base and refer anticompetitive mergers to the DOJ for investigation.* A 2023 Government Accountability Office report found that DOD "needs better insight into risks from mergers and acquisitions."[32] Part of the problem is simply a lack of information-gathering: The GAO found that "DOD generally does not monitor the effects of completed M&A on the industrial base."[33] DOD should comply with GAO's recommendations, and ensure that it consistently monitors the risks of defense industrial base consolidation for competition, innovation, resilience, and national security.

Department of the Interior

10. *Investigate price gouging, declining quality, and consolidation by National Parks Service concessionaires.* Visitors to America's national parks have complained in recent years of surging prices for lodging and concessions, along with a notable decrease in quality.[34] Prices have become so excessive at some parks that, as one traveler commented, "Sadly, the average American will be priced out of our national parks."[35] Unsurprisingly, the market for NPS contractors has become

[31] Achilles et al., *supra* note 26, at 49.
[32] GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE INDUSTRIAL BASE: DOD NEEDS BETTER INSIGHT INTO RISKS FROM MERGERS AND ACQUISITIONS (Oct. 2023).
[33] ID. at 31; *see also* Matt Stoller, *Why America Is Out Of Ammunition*, BIG (Oct. 20, 2023), https://www.thebignewsletter.com/p/why-america-is-out-of-ammunition.
[34] David & Kay Scott, *The Increasing Cost Of Staying In America's National Park Lodges*, NAT'L PARKS TRAVELER (Apr. 10, 2019), https://www.nationalparkstraveler.org/2019/04/traveler-special-report-increasing-cost-staying-americas-national-park-lodges; Olivia Harden, *NPS terminates Crater Lake contract following numerous complaints at national park*, SF GATE (Mar. 5, 2024), https://www.sfgate.com/travel/article/nps-terminates-contract-crater-lake-18705995.php.
[35] Kurt Repanshek, *The National Parks' Lodging Problem*, NAT'L PARKS TRAVELER (Oct. 16, 2023), https://www.nationalparkstraveler.org/2023/10/national-parks-lodging-problem.

increasingly consolidated, with Aramark's acquisition of Forever Resorts' concessions business and Xanterra's dominance in lodging at major national parks including Grand Canyon, Zion, and Yellowstone.[36] NPS, which contracts with these firms, should assess whether it can condition concessions contracts on charging reasonable rates and maintaining adequate quality levels to prevent profiteering. It should also conduct a review of price gouging and market consolidation in lodging and concessions and submit its findings to the White House Competition Counsel, Attorney General, and Federal Trade Commission with recommendations for additional investigative, legal, or policy action.

Department of Justice

11. *Investigate whether judgment-sharing agreements are anticompetitive under the Sherman Act.* To mitigate risk from price-fixing charges, companies in the same industry sometimes enter into "judgment-sharing agreements": contracts that require damage contributions from each party in the case of an antitrust fine.[37] The DOJ should investigate whether these types of preemptive agreements may violate the Sherman Act.

Department of Labor

12. *Prohibit 401(k) asset managers from investing in private equity funds.* Under President Biden, the DOL has already begun reversing a Trump-era directive allowing 401(k) asset managers from investing in private equity funds, which increased risk for retirement savers and has implications for economic stability. Despite the progress already made, the administration continues to permit 401(k) managers who also manage pension plans to continue private equity investments.[38] As Brendan Ballou has argued, the DOL should go further and

[36] *Aramark To Acquire Forever Resorts National Park Operations*, NAT'L PARKS TRAVELER (Apr. 16, 2022), https://www.nationalparkstraveler.org/2022/04/aramark-acquire-forever-resorts-national-park-operations.
[37] Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L. J. 747 (2009).
[38] BRENDAN BALLOU, PLUNDER: PRIVATE EQUITY'S PLAN TO PILLAGE AMERICA 229 (2023).

prohibit private equity from accessing 401(k) funds entirely,[39] thereby both protecting retirees from market instability and closing off a potential revenue source for private equity firms to fund harmful anticompetitive activity.

Department of Transportation

13. *Require airlines to publish a fixed and publicly-available exchange rate between dollars and points in their loyalty programs.* DOT should use its authority to define and prohibit unfair and deceptive practices to require airlines to publish a fixed and publicly-available exchange rate between dollars and points in their loyalty programs.[40]

14. *Prohibit airlines from charging above published exchange rates when selling points, as an unfair and deceptive practice.* In conjunction with requiring airlines to publish a fixed exchange rate between points and dollars, DOT should prohibit them from charging above this exchange rate for buying additional points outside of those accrued through booking flights.[41]

15. *Prohibit airlines from charging excessive fees to transfer points.* Airlines often charge customers a percentage of the value of points in order to transfer points, even though the number of points transferred is unrelated to the costs of transferring points. Airlines sometimes also charge fixed fees on top of that for point transfers. DOT should study these fees and ban them as an unfair and deceptive practice.[42]

16. *Clamp down on majority-in-interest (MII) clauses at airports as an unfair method of competition.*[43] An MII clause allows an airline with more than a certain

[39] ID.
[40] William J. McGee & Ganesh Sitaraman, *How To Fix Flying*, VAND. POL'Y ACCELERATOR 17-18 (Jan. 2024), https://cdn.vanderbilt.edu/vu-sub/wp-content/uploads/sites/281/2024/01/26143159/20240124-AELP-airlines-final.pdf.
[41] Id.
[42] Id.
[43] This proposal is taken from McGee & Sitaraman, *supra* note 39, with minor edits and revisions.

percentage of an airport's business to block capital expenditures at the airport.[44] While airlines with significant business do have an interest in ensuring the airport is well run, it is easy to see how an MII allows a dominant airline to block growth that might facilitate competition by refusing to allow expansion that would be used by a competitor or new entrant. The Department of Transportation could increase its oversight of such clauses to ensure they are not used for anticompetitive purposes or potentially ban such clauses altogether. Under 49 U.S.C. § 41712(a), the Secretary of Transportation can take "initiative" to "decide whether an air carrier … 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." If the Secretary "after notice and an opportunity for a hearing" determines the practice or method to be unfair, the Secretary "shall order [the offending entity] to stop the practice or method." Such an action would be consistent with other statutory directives. § 155(d) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("Aviation Reform Act") instructs the Secretary of Transportation to "ensure that gates and other facilities are made available at costs that are fair and reasonable to air carriers at covered airports (as defined in section 47106(f)(4) of title 49, United States Code) where a 'majority in interest clause' of a contract or other agreement or arrangement inhibits the ability of the local airport authority to provide or build new gates or other facilities."[45] Indeed, the justification for this provision was concern about concentration. As Congress observed, "15 large hub airports today are each dominated by one air carrier, with each such carrier controlling more than 50 percent of the traffic at the hub" and that "such levels of concentration lead to higher air fares."[46] Congress found that "[t]he United States Government must take every step necessary to reduce those levels of concentration."[47]

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[44] *See, e.g.*, *Airline-Airport Use and Lease Agreement*, AIRPORTS COUNCIL 20-21 (2009), https://airportscouncil.org/wp-content/uploads/2018/08/msy.pdf.

[45] 49 U.S.C. § 47101 note (Availability of Gates and Other Essential Services).

[46] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. 106-181, § 155(a) (2000).

[47] Id.

17. *Reform airport slot regulations.*[48] At several of the largest "constrained" domestic airports, the Federal Aviation Administration (FAA) grants "slots" to airlines, which are authorizations to take-off or land at an airport on a given day during a time period.[49] According to the FAA, "[s]lots may be withdrawn at any time to fulfill the Department [of Transportation's] operational needs, such as providing slots for international or essential air service operations or eliminating slots."[50] There is also a two-month "use-or-lose" requirement.[51] If a slot is not used 80 percent of the time over a two month period, the FAA will recall it.[52] While this provision seems like it would help address concentration issues, the airlines often sub-lease underutilized slots to competitors at above market rates.[53] This allows them to keep control of the slot, satisfy use requirements, make a profit, and control potential competitors.[54] In short, subleases can facilitate control and concentration. The Department of Transportation can address this problem by limiting the sub-leasing of slots. Sub-leasing appears to be allowed because of 14 C.F.R. § 93.227(f), a regulation that DOT could amend on the basis of increasing competition.[55] New regulations could allow airlines to sublease a slot, but not count the sublease towards 14 C.F.R. § 93.227(a)'s usage requirements.

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[48] This proposal is taken from McGee & Sitaraman, *supra* note 39, with minor edits and revisions.
[49] *Slot Administration – Slot Definition*, FED. AVIATION ADMIN. (Apr. 24, 2010), https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_administration/slot_definition.
[50] 14 C.F.R. § 93.223(a).
[51] *Slot Administration – Compliance and Oversight*, FED. AVIATION ADMIN. (Feb. 1, 2021), https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/perf_analysis/slot_administration/compliance_oversight.
[52] 14 C.F.R. § 93.227(a). The exceptions are found in 14 C.F.R. § 93.227(b)–(d), (g), and (l).
[53] John Sabel, *Airline-Airport Facilities Agreements: An Overview*, 69 J. AIR L. & COM. 769, 782-83 (2004); Federico Ciliberto & Jonathan W. Williams, *Limited Access to Airport Facilities and Market Power in the Airline Industry*, 53 J.L. & ECON. 467, 471–72 (2010).
[54] Sabel, *supra* note 52, at 782-83. Subleases are permitted under 14 C.F.R. 93.227(f) ("Persons holding slots but not using them pursuant to the provisions of paragraphs (b), (c) and (d) may lease those slots for use by others. A slot obtained in a lottery may not be leased after the expiration of the applicable time period specified in paragraph (b) of this section unless it has been operated for a 2-month period at least 65 percent of the time by the operator which obtained it in the lottery").
[55] *See* 49 U.S.C. § 41714(e)(1)(D) ("The Secretary shall continue the Secretary's current examination of slot regulations and shall ensure that the examination includes consideration of . . . the impact of such allocation process on the ability of new entrant air carriers to obtain slots in time period that enable them to provide service . . . .").

This would still enable some de minimis subleasing – as in a case where an airline is unable to use a slot for a short period of time – while increasing the likelihood of reallocating slots to those airlines that will actually use them.

18. ***Publish guidelines for the review of route license transfers and joint ventures that function like merger guidelines.*** In joining with the DOJ to block the recent Spirit-JetBlue merger, DOT revived its long-dormant role in the merger review process. It did so by blocking the parties' common ownership exemption application and investigating its route transfer application under its UMC authority and statutory obligation to ensure that transfers are in the "public interest."[56] This should not be a one-off occurrence: The DOT should commit to exercise these authorities on an ongoing basis.[57] The DOT should publish guidelines for its review of route license transfers and its review of joint ventures, against conduct that may harm competition. They should review these applications under the presumption that they will be denied unless the parties can prove that a route license transfers or shared investments and resources will benefit competition and consumers.

19. ***Repeal the Regulations Constraining DOT's Ability to Address Unfair and Deceptive Practices.*** In 2020, the Trump administration's DOT promulgated regulations circumscribing DOT's authority to address unfair and deceptive practices in the airline industry.[58] These rules have since been revised slightly,[59] but DOT should repeal them outright. The rules are not based in the statute and potentially limit the ability of the DOT to address unfair and deceptive practices in line with its statutory obligations.

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[56] *Statement On The Justice Department's Lawsuit To Block Proposed JetBlue-Spirit Merger*, Department of Transportation (Mar. 7, 2023), https://www.transportation.gov/briefing-room/usdot-statement-justice-departments-lawsuit-block-proposed-jetblue-spirit-merger.
[57] 49 U.S.C. §41105; *U.S. Air Carriers*, DEP'T OF TRANSP. (Apr. 24, 2018), https://www.transportation.gov/policy/aviation-policy/licensing/US-carriers; U.S. Department of Transportation Notice of Practice Regarding Proposed Airline Mergers and Acquisitions, 80 Fed. Reg. 2,468 (Jan. 16, 2015).
[58] Defining Unfair or Deceptive Practices, 85 Fed. Reg. 78,807 (2020).
[59] Guidance Regarding Interpretation of Unfair and Deceptive Practices, 87 Fed. Reg. 52,677 (2022).

Department of the Treasury

20. *Update the national security review guidelines of the Committee on Foreign Investment in the United States (CFIUS) to include competition analysis.* CFIUS is required under the Defense Production Act to review the acquisition of American firms by foreign companies.[60] Though competition is not among the specific criteria enumerated in the Act, the list does include "such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation."[61] The national security risks of concentration have become evident in many sectors. The guidelines should be updated to reflect this understanding. CFIUS should publish review guidelines that account for not only the national security risks, but also the competition risks of foreign M&A.

Federal Communications Commission

21. *Implement new legislation with rules to require just and reasonable prices for interstate prison phone calls and teleconferencing services.* In 2022, Congress passed the Martha Wright-Reed Just and Reasonable Communications Act, which amended Communications Act of 1934 to require the FCC to ensure just and reasonable charges for "any audio or video communications service used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held, regardless of technology used."[62] Prison telecommunications is an industry particularly dominated by private equity, where a lack of competition has enabled companies to charge exorbitant prices for these services and thereby harm incarcerated people and their families. The FCC should implement this legislation with a new rule to require these services to be priced at cost.[63]

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[60] *See* Hanley, *supra* note 3, at 21-22.
[61] 50 U.S.C. § 4565(f).
[62] *Congress Enacts Martha Wright-Reed Just and Reasonable Communications Act of 2022*, FED. COMMC'NS COMM'N. (Jan. 9, 2023), https://www.fcc.gov/congress-enacts-martha-wright-reed-just-and-reasonable-communications-act-2022-updated-link.
[63] BALLOU, *supra* note 38.

22. *Issue merger guidelines under the public interest standard of the Communications Act of 1934.* As documented by Daniel Hanley of the Open Markets Institute, the FCC has broad merger review authority under the public interest standard found in the Communications Act of 1934, which serves as a "rigorous presumption against mergers in the communications sector."[64] Despite this authority, it has allowed numerous mergers and acquisitions in recent years. Moreover, its published guidance on merger review is limited to a blog post on its website from 2014.[65] It should issue comprehensive merger review guidelines taking a strong presumption that significant mergers and acquisitions in telecommunications are not in the public interest.

Federal Energy Regulatory Commission

23. *Revise Guidelines for Mergers, Acquisitions, and Dispositions.* As reported in a paper published by Daniel Hanley of the Open Markets Institute, between 2006 and 2014, the FERC approved 1,273 acquisitions and dispositions, and denied only 8.[66] Of the 30 mergers it reviewed, it did not deny a single one.[67] The Commission should rewrite its policies for evaluating significant transactions in the energy sector, to clearly define the "public interest" in which mergers are to take place.[68] At a minimum, it should assess whether to adopt a presumption that combinations of utilities that are not geographically contiguous are not in the public interest.[69]

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[64] Hanley, *supra* note 3, at 9.
[65] Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, FED. COMMC'NS. COMM'N. (Aug. 12, 2014), https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest.
[66] Hanley, *supra* note 3.
[67] Garry Gabison, *Dual Enforcement of Electric Utility Mergers and Acquisitions,* 17 J. BUS. & SEC. L. REV. 11, 21 (2017).
[68] *See* Scott Hempling, *Inconsistent With the Public Interest: FERC's Three Decades of Deference to Electricity Consolidation*, 39 ENERGY L. J. 233 (2018).
[69] This was a core principle of electric utility regulation as Congress established it in the Public Utility Holding Company Act (PUHCA). *See* MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON, & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY 677 (2022).

Federal Maritime Commission

24. *Fully implement the Ocean Shipping Reform Act of 2022.* The Federal Maritime Commission has begun OSRA implementation with a final rule on demurrage and detention billing requirements as well as a proposed rule on unreasonable refusals to deal and prohibitions on unreasonably refusing cargo space.[70] It should also publish a final rule on other unfair or unjustly discriminatory methods, as required in Sec. 7(c) of the Act.[71] Such unfair or unjustly discriminatory methods may include unjust or unreasonable rates and charges. The FMC should also report to the White House Competition Council and the public on its implementation of the shipping exchange registry required by the Act.[72]

Federal Trade Commission

25. *Issue a Policy Statement on Robinson-Patman Act Enforcement.* The FTC could issue a policy statement on the enforcement of the Robinson-Patman Act, which prohibits price discrimination in commerce for products in like degree and quality where the result may tend to create a monopoly.[73] While the law has been interpreted to provide an exception for certain volume discounts where the parties offered legitimate cost justifications, it has been under-enforced for nearly its entire 90-year history.[74] As analysts at the Open Market Institute have documented, small manufacturers have suffered most from this under-

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[70] Demurrage and Detention Billing Requirements, 89 Fed. Reg. 14,330 (2024); Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, 88 Fed. Reg. 38, 789 (2023).
[71] Ocean Shipping Reform Act of 2022, Pub. L.117–146, §7(c) (2022), https://www.congress.gov/117/plaws/publ146/PLAW-117publ146.pdf. The Act required the FMC to publish a final rule on this subject no later than one year after the Act's enactment. Nearly two years later, it is not clear that such a rulemaking has been initiated. See *Ocean Shipping Reform Act of 2022 Implementation*, FED. MAR. COMM'N (last visited Mar. 14, 2024), https://www.fmc.gov/osra-2022-implementation/; *see also* 46 U.S.C. § 41104.
[72] 46 U.S.C. § 40504.
[73] 15 U.S.C. § 13.
[74] Daniel Hanley, *Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman Act*, HOFSTRA L. REV. (forthcoming 2023).

enforcement because dominant distributors like Walmart or Amazon pressure them to offer discounts not offered to other customers.[75] The Act may also prohibit other forms of price discrimination, like when chain stores get a better deal from wholesalers than other retailers, making it harder for smaller retailers to compete.[76] The FTC could also investigate these preferential deals and hold public hearings with small business owners who may be affected by the RPA's under-enforcement.

26. *Investigate and potentially ban exclusionary payments and rebates between food vendors and retailers.* Recent research suggests the prevalence of exclusionary rebates between dominant food vendors and retailers (like grocery stores and cafeterias). An exclusionary rebate is kind of like a kickback: a retailer gets a financial reward so long as it refuses to deal with a vendor's rivals.[77] These kickbacks make it more difficult for small and community-based businesses to compete in the food retail industry. The FTC should open an investigation into exclusionary payments in the food industry and consider banning them as an unfair method of competition.

27. *Investigate spam calls and spam texts as unfair and deceptive practices.* The FTC should investigate spam calls and spam texts by firms as unfair and deceptive practices under its Section 5 authority. American consumers receive billions of spam calls every month. Extending its work done to protect businesses against AI-assisted robocalls,[78] the FTC should consider initiating a rulemaking on all types of spam calls and spam texts to protect businesses and consumers.

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[75] Brian Callaci, Sandeep Vaheesan, and Daniel Hanley, *The Robinson-Patman Act as a Fair Competition Measure*, OPEN MARKETS INST. 7 (Dec. 2023).
[76] Hanley, *supra* note 74.
[77] Claire Kelloway and Matthew Jinoo Buck, *Kickbacks and Corporate Concentration: How Exclusionary Discounts Limit Market Access for Community-Based Food Businesses*, YALE L. & Pol'y Rev. (Dec. 30, 2023), https://yalelawandpolicy.org/inter_alia/kickbacks-and-corporate-concentration-how-exclusionary-discounts-limit-market-access#_ftn87.
[78] FTC Implements New Protections for Businesses Against Telemarketing Fraud and Affirms Protections Against AI-enabled Scam Calls, Fed. Trade Comm'n (Mar. 7, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-implements-new-protections-businesses-against-telemarketing-fraud-affirms-protections-against-ai.

28. *Investigate algorithmic collusion and potentially prohibit it as an unfair method of competition.* A good deal of recent public reporting and antitrust scholarship has documented firms using algorithms to collude with each other on prices and wages.[79] In some cases, this has resulted in legal action, with states like Arizona bringing suit against platforms that facilitate collusion in the market for real estate rentals.[80] While the FTC has reminded would-be lawbreakers in a blog post that "price fixing by algorithm is still price fixing,"[81] it could go further and conduct an investigation into algorithmic collusion across the economy, and it should consider a rulemaking to prohibit the use of algorithms to facilitate collusion under its Section 5 authority.

29. *Examine and prohibit worker misclassification as an unfair method of competition.* One estimate suggests that up to 2.1 million U.S. workers in the construction industry alone are currently misclassified as independent contractors.[82] Economists estimate that misclassification may cost a worker north of $16,000

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[79] *See, e.g.,* ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION: THE PROMISES AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (2019); Joseph E. Harrington, Jr., *Developing Competition Law for Collusion by Autonomous Price-Setting Agents*, 14 J. COMP. L. & ECON. 331 (2018); Joseph E. Harrington, Jr., *The Effect of Outsourcing Pricing Algorithms on Market Competition*, 68 Mgmt. Science 6355 (2022); Veena Dubal, *On Algorithmic Wage Discrimination,* 123 COLUM. L. REV. 1929 (2023); Aneesa Mazumdar, *Algorithmic Collusion: Reviving Section 5 of the FTC Act*, 122 COLUM. L. REV. 449 (2022); Heather Vogell, *Rent Going Up? One Company's Algorithm Could Be Why*, PROPUBLICA (Oct. 15, 2022), https://www.propublica.org/article/yieldstar-rent-increase-realpage-rent; Ziad Buchh, *Online pricing algorithms are gaming the system, and could mean you pay more*, NPR (July 25, 2022), https://www.npr.org/2022/07/25/1113004433/online-shopping-deals-algorithm-pricing-regulation.

[80] Peter Valencia & Alexis Cortez, *Arizona attorney general sues RealPage, landlords; accuses them of conspiring to illegally raise rents*, AZ FAMILY (Feb. 28, 2024), https://www.azfamily.com/2024/02/28/arizona-attorney-general-sues-realpage-landlords-accuses-them-conspiring-illegally-raise-rents/.

[81] Hannah Garden-Monheit & Ken Merber, *Price-Fixing by Algorithm Is Still Price Fixing*, FED. TRADE COMM'N (Mar. 1, 2024), https://www.ftc.gov/business-guidance/blog/2024/03/price-fixing-algorithm-still-price-fixing.

[82] Laura Valle-Guttierez, Russ Ormiston, Dale L. Belman, & Jody Calemine, *Up to 2.1 Million U.S. Construction Workers Are Illegally Misclassified or Paid Off the Books*, CENTURY FOUND. (Nov. 12, 2023), https://tcf.org/content/report/up-to-2-1-million-u-s-construction-workers-are-illegally-misclassified-or-paid-off-the-books/.

each year in wages.[83] Honest employers suffer from misclassification, too, as they face a competitive disadvantage when they play by the rules. In the Fair Labor Standards Act of 1938, Congress determined that conditions detrimental to laborers' minimum standard of living constitute "an unfair method of competition in commerce."[84] Section 5 of the FTC Act, of course, gives the FTC the power to define and prohibit "unfair methods of competition" in commerce.[85] FTC Commissioner Alvaro Bedoya has recently proposed that the FTC examine worker misclassification under its Section 5 authority.[86] This would be a logical extension of the FTC's highly impactful work to ban noncompetes, and it would promote collaboration between the FTC and the National Labor Relations Board to protect American workers.[87]

30. *Retract the 2016 statement with DOJ on mergers in the defense industrial base and commit to thorough national security and competition merger review.* In 2016, DOJ and FTC published a joint statement on their standard of analysis used when evaluating the legality of defense mergers, which included reference to the now-retracted 2010 guidelines.[88] Since that time, the problems posed by an increasingly concentrated and monopolistic defense industrial base have

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[83] John Schmitt, Heidi Shierholz, Margaret Poydock, & Samantha Sanders, *The Economic Costs of Worker Misclassification,* ECON. POL'Y INST. (Jan. 25, 2023), https://www.epi.org/publication/cost-of-misclassification/.

[84] 29 U.S.C. § 202(a)(3).

[85] 15 U.S.C. § 45.

[86] "OVERAWED": WORKER MISCLASSIFICATION AS A POTENTIAL UNFAIR METHOD OF COMPETITION, REMARKS OF COMMISSIONER ALVARO M. BEDOYA, U.S. FED. TRADE COMM'N, GLOBAL COMPETITION REVIEW: LAW LEADERS GLOBAL SUMMIT, MIAMI, FLORIDA (Feb. 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Overawed-Speech-02-02-2024.pdf.

[87] *See* MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL TRADE COMMISSION (FTC) AND THE NATIONAL LABOR RELATIONS BOARD (NLRB) REGARDING INFORMATION SHARING, CROSS-AGENCY TRAINING, AND OUTREACH IN AREAS OF COMMON REGULATORY INTEREST (July 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf.

[88] JOINT STATEMENT OF THE DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION ON PROMOTING COMPETITION IN THE DEFENSE INDUSTRY (Apr. 12, 2016), https://www.ftc.gov/system/files/documents/public_statements/944493/160412doj-ftc-defense-statement.pdf.

persisted, and the DOJ and FTC have promulgated new merger guidelines.[89] The DOJ and FTC should retract the 2016 statement, which offers an outdated standard of review. The Assistant Attorney General for Antitrust and Chair of the FTC should work with the Secretary of Defense to reach a new memorandum of understanding on information-sharing in defense merger reviews, including exploring whether to adopt a presumption that significant defense mergers are illegal and harmful to competition and national security.

Procurement

31. *Require nondiscrimination rules for platforms that are federal contractors.*[90] Nondiscrimination rules have historically been used in highly concentrated industries to combat oligopolistic abuses of power. One such highly concentrated industry subject to government contracts is cloud computing, including to support artificial intelligence (AI) applications. Nondiscrimination rules "allow a firm to operate two or more vertically-linked business lines, but require the firm to treat downstream businesses neutrally—including its own vertically integrated business lines."[91] Requiring government vendors and contractors to treat downstream businesses neutrally is one way to address OMB's recent concerns about self-preferencing, "ensuring that vendors do not inappropriately favor their own products at the expense of competitors' offerings."[92] Importantly, as market participants, agencies have a legitimate interest in seeking these rules: In developing an AI model, for example, an

[89] *See, e.g.,* Ganesh Sitaraman, *The National Security Case For Breaking Up Big Tech*, KNIGHT FIRST AMEND. INST. (Jan. 30, 2020), https://knightcolumbia.org/content/the-national-security-case-for-breaking-up-big-tech; Matt Stoller & Lucas Kunce, *America's Monopoly Crisis Hits The Military,* AM. CONSERVATIVE (June 27, 2019), https://www.theamericanconservative.com/americas-monopoly-crisis-hits-the-military/; U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, MERGER GUIDELINES (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[90] This proposal is taken from Ramsay Eyre, *Promoting Competition in Federal AI Procurement*, VAND. POL'Y ACCELERATOR (Feb. 22, 2024), with minor edits and revisions.

[91] Tejas Narechania and Ganesh Sitaraman, *An Antimonopoly Approach to Governing Artificial Intelligence*, VAND. POL'Y ACCELERATOR 43 (Oct. 10, 2023).

[92] OFF. OF MGM'T & BUDGET, PROPOSED MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE 21 (NOV. 2, 2023).

agency should not be charged a higher price for cloud services than a provider's own vertically-integrated model developers. Nor should it be arbitrarily prohibited from accessing cloud services available to other customers. Nondiscrimination rules can therefore be an effective mechanism for ensuring that an agency gets the "best value" from a given acquisition. Importantly, because vendors would likely deny that they discriminate against users, they may agree to such provisions willingly.

   a. Beyond AI contracts, the Office of Federal Procurement Policy and FAR Council could also consider requiring nondiscrimination rules for all firms offering platform-like services under government contracts. Despite recent case law that may limit the President's ability to place conditions on federal contracts under the Federal Property and Administrative Services Act of 1949, there are other statutory authorities that may support implementing nondiscrimination rules in contracts through executive action, including the Small Business Act, the Competition in Contracting Act, and the Robinson-Patman Act.[93]

32. *Prohibit egress fees for cloud computing contracts.*[94] As part of their contracts, agencies could be instructed to prohibit egress fees—either as a practice for all companies with federal cloud infrastructure contracts, or at a minimum, in the federal contracts themselves. These fees, which are common in the cloud computing industry,[95] add costs to users to switch from one cloud provider to another, thereby reducing competition and facilitating lock-in.[96]

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[93] *See* Eyre, *supra* note 90, at 10-12.

[94] This proposal is taken from Eyre, *supra* note 90, with minor edits and revisions.

[95] Investigation of Competition in Digital Markets: H. Comm. On The Judiciary, 117th Congress, 98 (2020); Stephen Pritchard, *Cloud egress costs: What they are and how to dodge them*, COMPUTER WEEKLY (Jan. 23, 2023), https://www.computerweekly.com/feature/Cloud-egress-costs-What-they-are-and-how-to-dodgethem.

[96] One provider, Google Cloud Platform, recently announced that it would end egress fees for users, likely in response to European and American antitrust investigations. But this policy does not apply to all the platform's users, only to users who remove their data from their cloud entirely and close their account. Moreover, it requires that users apply to have their egress fees waived, giving the provider yet another opportunity to engage in discriminatory treatment of its users. *See* Tobias Mann, *Why Google is waiving egress fees for disgruntled customers ditching GCP*, REGISTER (Jan. 11, 2024), https://www.theregister.com/2024/01/11/google_cloud_egress_fees/.

33. *Mandate data isolation and intellectual property control mechanisms in federal AI contracts.*[97] AI models rely on enormous amounts of data for training and inference. Therefore, whether the underlying models are acquired or built by in-house technologists, government AI applications may rely extensively on government data. This raises at least two concerns: one regarding security, given that sensitive government data is housed on private cloud servers; and another regarding concentrated power, given that dominant firms may have privileged access to public data to train their own proprietary models. OMB's draft guidance recognizes these risks and directs agencies to consider policies to address them. To address these issues, agencies could require that government data housed on private servers is separated from all other data. Data isolation is an established data management practice, done either through physical separation in distant server locations or electronic separation via secure copies with strict access controls or other computational isolation mechanisms.[98] Each of the leading cloud providers advertises their capacity to isolate sensitive customer data using these procedures, and this approach could be made mandatory in procurement contracts.[99]

34. *Direct the National Institute for Standards and Technology to conduct a study on multicloud strategies and AI interoperability.*[100] Determining exactly how interoperability might apply in the cloud computing context is a subject that merits serious study. Some technologists have proposed that an interoperable cloud would require a shared compatibility layer—a solution that, while addressing the risks of lock-in, might disincentivize competition between

[97] This proposal is taken from Eyre, *supra* note 90, with minor edits and revisions.
[98] *Data isolation*, COHESITY, https://www.cohesity.com/glossary/data-isolation/ (last visited Oct. 23, 2023).
[99] *Isolation in the Azure Public Cloud*, MICROSOFT (Oct. 12, 2023), https://learn.microsoft.com/en-us/azure/security/fundamentals/isolation-choices; *Google infrastructure security design overview*, GOOGLE CLOUD (June 2023), https://cloud.google.com/docs/security/infrastructure/design; *Logical Separation on AWS*, AMAZON WEB SERVICES (July 28, 2020), https://docs.aws.amazon.com/whitepapers/latest/logical-separation/welcome.html.
[100] This proposal is taken from Eyre, *supra* note 90, with minor edits and revisions.

platforms and be difficult to administer through the procurement process.[101] To inform debate about what technical specifications might be necessary to implement interoperability rules in procurement contracts, the National Institute for Standards and Technology (NIST) should conduct a study on AI models and cloud platforms and report its findings. The study should consider whether and what types of interoperability requirements would be suitable to prevent lock-in and simultaneously promote competition between platforms on use cases, security, and other features.

Small Business Administration

35. *Direct the Office of Advocacy to uphold its statutory obligation to promote competition on behalf of small businesses.* The SBA Office of Advocacy can potentially play an important role in promoting competition in the American economy, particularly in its review of federal regulations. Though it is charged with considering the burden of regulations on small businesses, it is also obligated by statute to make recommendations for "creating an environment in which all businesses have the opportunity to compete effectively."[102] Despite this directive, many of the Office's recent letters to agencies on proposed regulations do not make such recommendations, nor do they consider the potential harms to competition of *not* regulating, which may negatively impact small businesses, as well as their consumers and workers.[103]

[101] Richard MacManus, *Sky Computing, The Next Era After Cloud Computing*, NEXT STACK (Aug. 9, 2021), https://thenewstack.io/sky-computing-the-next-era-after-cloud-computing/.
[102] 15 U.S.C. § 643b(9).
[103] *See, e.g., Letters to Agencies*, SMALL BUS. ADMIN. OFF. OF ADVOC., https://advocacy.sba.gov/category/regulation/letters-to-agencies/ (last visited Mar. 18, 2024); LETTER FROM MAJOR L. CLARK III, DEPUTY CHIEF COUNSEL, OFF. OF ADVOC., U.S. SMALL BUS. ADMIN., TO APRIL J. TABOR, SECRETARY, FED. TRADE COMM'N (Mar. 7, 2024), https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf (raising concerns about a proposed FTC rule regarding unfair and deceptive fees).

Surface Transportation Board

36. *Revise Railroad Merger Guidelines.* The STB has not revised its guidelines for railroad mergers since 2001.[104] At a minimum and as far as is possible under their own legal authorities, the STB should (a) adopt the standards of the new DOJ and FTC merger guidelines, (b) add provisions related to unique characteristics of the railroad industry, and (c) condition approved mergers on strict terms. As proposed by the Open Markets Institute, the STB should commit to mandate divestitures if there are violations.[105] The STB should also consider extending these new merger guidelines to other industries under its purview, including intercity buses.

37. *Investigate the Market Structure of Intercity Buses.* Recent news reports have highlighted private equity rollups of Greyhound bus terminals and the threats they pose to the availability of buses as a mode of transportation, particularly for Americans who rely on them in lieu of air travel.[106] But problems with the market structure of intercity buses date back to 1982, when Congress passed the Bus Regulatory Reform Act and deregulated the industry.[107] The STB should investigate the market structure of intercity buses and major recent acquisitions. It should study concentrated ownership's effects on the health and stability of the intercity bus system, as well as its intermodal effects across our transportation sector, which also includes airlines and passenger rail. It should report its findings to the White House Competition Council, the Federal Trade Commission, and the Attorney General, with recommendations for further investigatory, legal, or policy action under the antitrust laws.

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[104] Major Rail Consolidation Procedures, 66 Fed. Reg. 32,582 (June 15, 2001), https://www.federalregister.gov/documents/2001/06/15/01-14984/major-rail-consolidation-procedures.
[105] Daniel Hanley, *Administrative Antimonopoly*, OPEN MARKETS INST. 15-16 (Feb. 2022).
[106] Nathaniel Meyersohn, *Greyhound bus stops are valuable assets. Here's who's cashing in on them*, CNN BUSINESS (Dec. 18, 2023), https://www.cnn.com/2023/12/17/business/greyhound-buses-transportation-cities/index.html.
[107] Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261 (1982).

Other

38. *Invoke the International Emergency Economic Powers Act (IEEPA) to regulate the satellite industry.* Low Earth orbit satellites are a critical technology in the Russo-Ukraine War. The dominant player in the market for manufacturing and deploying these satellites is Starlink. But with power over the technology concentrated in one company, the satellite industry as it currently exists poses a threat to the national security of the U.S. and its allies. Under IEEPA, the President has broad authority to regulate economic interactions in the interest of national security.[108] The President could issue an EO, pursuant to IEEPA, regulating satellites and space-connected hardware linking American and foreign geographies,. Such regulations could include nondiscrimination rules to prevent satellite monopolies from picking and choosing when to allow users to have access to device capabilities.

39. *Other agencies with authority to ban noncompetes and* de facto *noncompetes should do so.* As documented by research and advocacy group Governing for Impact, several other agencies besides the FTC have independent authority to ban non-competes and various types of *de facto* noncompetes, like stay-or-pay contracts and training repayment agreement provisions, in the sectors under their jurisdiction.[109] Independent enforcement authority, among other benefits, allows for a wider distribution of enforcement resources across the federal government. At minimum, the following departments and agencies should exercise such authority:
    a. Federal Motor Carrier Safety Administration (FMCSA)

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[108] Christopher A. Casey, Dianne E. Rennack, and Jennifer K. Elsea, *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, CONG. RSCH. SERV. (Jan. 30, 2024), https://crsreports.congress.gov/product/pdf/r/r45618.

[109] GOVERNING FOR IMPACT, STAY-OR-PAY: FEDERAL ACTIONS TO END MODERN-DAY INDENTURED SERVITUDE ACROSS THE ECONOMY (Dec. 2023), https://governingforimpact.org/wp-content/uploads/2023/12/stay-or-pay-compendium_12-2023_FINAL.pdf; *see also* Sandeep Vaheesan and Matthew Jinoo Buck, Non-Competes And Other Contracts of Dispossession, 2022 MICH. ST. L. REV. 113 (2022). While the FTC's proposed noncompetes ban did not originally include a ban on stay-or-pay contracts, the final rule was updated to include them. *See* Jonathan F. Harris and Sandeep Vaheesan, *The FTC Abolishes Non-Compete Clauses,* LPE BLOG (Apr. 25, 2024), https://lpeproject.org/blog/the-ftc-abolishes-non-complete-clauses/.

b. DOT
c. DOL Wage & Hour Division
d. National Labor Relations Board (NLRB)
e. HHS (for healthcare providers receiving Medicare or Medicaid funds)
f. The Office of Federal Procurement Policy and FAR Council (for federal contractors)

40. *Universal competition guidelines review.* In addition to the agencies specifically listed herein, all agencies should be directed to consider their authority to evaluate and/or regulate significant transactions, like mergers and acquisitions, in the sectors under their jurisdiction, and monitor their competitive dynamics. If they possess the necessary authority, they should exercise it, and publish guidelines that at minimum adopt the standards of the recent DOJ and FTC merger guidelines, as well as adding sector-specific guidance. Independent enforcement authority of merger guidelines allows for a wider distribution of enforcement resources across the federal government to promote competition.