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# Can Antitrust Be Doing More to Protect Consumers?

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## EXECUTIVE SUMMARY

**Consumers and the dollars they spend are the backbone of the U.S. economy. For the last several years, consumers have grown frustrated by high prices for basic necessities like housing, food, and health care. Anger around rising prices and a high cost of living played a major role in the 2024 U.S. presidential election. Disillusionment with the "Bidenomics" agenda fueled a sense of disenfranchisement. Namely, consumers' struggle to afford necessities was put on the back burner in favor of proposals that would benefit elite demographics, not working-class voters.**

High prices in consumer-facing sectors that account for the vast bulk of spending are driven by a number of factors: inflation, economic scarcity, opportunistic price gouging, and market power wielded by powerful firms. This report by the Progressive Policy Institute (PPI) takes up the problem of market power, or the ability of powerful firms — rather than competition — to control prices.

To head off the skeptics, disentangling the role of market power from other drivers of high prices is unnecessary. There is substantial evidence that sectors that have an outsized impact on consumers' pocketbooks lack robust competition. This results, in part, from decades of consolidation, sluggish growth in productivity, and some bottlenecked supply chains that contribute to high consumer prices.

This report asks if antitrust could be doing a better job of protecting consumers. Analysis of a number of key trends over the last 15 years indicates that the answer is "yes." Indeed, by many measures, antitrust has lost touch with consumers. This finding is especially relevant with the changing of the antitrust guard from the Biden to Trump administrations. With little common bipartisan ground on a "populist" antitrust agenda, a scaling back or scrapping of the Neo-Brandeisian movement's influence at the U.S. antitrust agencies. This does not necessarily mean, however, that antitrust enforcement will decline in vigor.

The Biden antitrust enforcers focused on extending the reach of antitrust from traditional law enforcement to solve broader economic, political, and social problems; introducing new standards; and taming market power in the digital sector. This retooling of antitrust appeared in many ways to be tone deaf to the pleas of Americans besieged by high prices and living costs resulting from harmful consolidation and business practices. Moreover, it likely came at the expense of enforcement that more directly protects consumers' pocketbooks.

PPI's analysis breaks down major factors that highlight the importance of antitrust priorities focused on directly protecting consumers from the effect of market power on raising prices and their cost of living. It looks at flagging productivity in the top five sectors in which consumers spend 75% of their budgets. The analysis exposes high concentration and market power "bottlenecks" that supercharge high prices to consumers and destabilize critical supply chains, such as in health care and food. The analysis also finds lackluster merger enforcement — the most important tool for controlling consolidation that can drive up prices — in the top five consumer-facing sectors over the last 15 years.

The report concludes with policy recommendations. These range from reshuffling merger review responsibilities at the DOJ and FTC, to junking policies for approving harmful mergers subject to ineffective remedies. Other recommendations focus on how the agencies should consider the impact of market power on the stability and resiliency of critical supply chains, and call for the agencies to get up the learning curve on strengthening enforcement in consumer-facing sectors.

## I. INTRODUCTION

Competition is the lifeblood of a market system. Access to markets, choice, and fair terms of trade are hallmarks of competition for consumers, workers, and smaller businesses. The benefits of competition are tangible. The engines of economic activity and growth run at fuller throttle, income and wealth are more equitably distributed, and consumers achieve a better standard of living. Consumers and the dollars they spend are the backbone of the U.S. economy. For example, almost 70% of spending in the U.S. economy in the first quarter of 2024 was attributable to personal consumption expenditures.[1]

For the last several years, however, consumers have grown frustrated by high prices for basic necessities like food, housing, and health care.[2] Many prices increased dramatically during the COVID-19 pandemic.[3] For example, the inflation-adjusted price for a gallon of gasoline, a new car, and food prices in grocery stores increased almost 13%, 7%, and over 6%, respectively, between 2019 and 2023, well after the pandemic was over.[4] These commodities are part of the transportation and food sectors, which account for the second and third largest chunks of consumer spending in the U.S.

High prices for essential consumer goods and services force consumers to make tough choices about what to buy, where to live, and even what bills to pay. Anger around high prices and a high cost of living played a major role in the 2024 presidential election. Disillusionment with the "Bidenomics" agenda fueled a sense of disenfranchisement.[5] Namely, consumers' basic struggle to afford the necessities that account for most of their budgets were de-prioritized in favor of proposals to pay off college student loans and green the economy at whatever the cost. These and other examples arguably drove non-college-educated, working-class voters away from Democrats and toward the Republican party.

A key question for policymakers is disentangling the myriad factors that drive up prices — inflation, opportunistic price gouging, and economic scarcity — from market power. Market power is evident when a powerful firm is able to control prices, quality, or innovation, or a small number of firms collude to fix prices or divide up markets. There is abundant evidence that there is significant market power in numerous consumer-facing sectors. For the purpose of prioritizing strong antitrust enforcement that is focused on protecting consumers, therefore, there is no need to disentangle market power from other drivers of high consumer prices.[6]

PPI asks whether antitrust enforcement, as the major tool for combatting market power, is doing enough to protect consumers. This analysis comes at a critical time as the 2024 election ushers in antitrust priorities that could well diverge from ideology under the Biden administration.That is, is antitrust focusing on the sectors where high prices hit consumers the hardest in their pocketbooks and raise their cost of living?

The report takes a close look at the top five sectors in which consumers spend the vast bulk of their budgets: housing, transportation, food, insurance and retirement, and health care. It assesses flagging productivity, higher than average price inflation, high market concentration, market power "bottlenecks" in critical supply chains, and lackluster merger control. These factors highlight the need to rethink antitrust priorities for combatting market power, high consumer prices, and a high cost of living in order to more directly and effectively protect consumers.

## II. HOW THE BIDEN ADMINISTRATION MISSED THE MARK WITH CONSUMERS

The Biden administration's economic policy did not resonate soundly with working class voters, who perceived more emphasis on the "Bidenomics" agenda and less on addressing the high cost of living.[7] Political administrations have not always harnessed antitrust enforcement to tackle the role of market power in driving up consumer prices. This problem is exacerbated when ideological and political interests guide decision-making by prioritizing sectors or companies for investigations and enforcement actions.[8]

For example, the Biden administration chose to embrace the Neo-Brandeisian ideology in selecting leadership for the U.S. Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC). The Biden enforcers sought to extend the boundaries of antitrust as traditional law enforcement to reach broader economic, political, and even social goals. The major vehicle for reshaping antitrust under the Biden antitrust agencies was to push to replace the existing consumer welfare standard with bright line tests for "bigness."[9] A major outgrowth of this policy was to allocate significant resources to anti-monopoly enforcement in the fast-growing and more dynamic digital sector, likely at the expense of enforcement in more stagnant, consumer-facing sectors with market power problems.[10]

To be sure, the digital sector has its share of competition problems. But the strength of the theories and evidence in these cases vary widely. Moreover, outcomes in digital markets have far less direct impact on consumers' pocketbooks. They are also expensive to litigate and tie up limited agency resources, highlighting the opportunity cost of giving lower priority to competition problems in sectors where high prices hit consumers hard in their pocketbooks.[11] To be sure, the Biden enforcers have pursued aggressive merger control, arguably the most important tool for controlling consolidation that can drive up prices. These data show, however, that they have not been as aggressive on mergers that directly impact consumers' pocketbooks as previous administrations.

## III. THE ECONOMIC PERFORMANCE OF TOP CONSUMER SPENDING SECTORS

Consumers allocate most of their budgets to five major categories of goods and services. These include: housing, transportation, food, insurance and retirement, and health care. Together, these categories account for about 75% of total consumer spending between 2020-2023.[12] As shown in Table 1, housing is the major source of consumer spending, at 34%, followed by transportation, at 17%. Food, retirement contributions, and health care round out the top spending categories with 12%, 12%, and 8% of total spending, respectively.

### TABLE 1: TOP CATEGORIES OF CONSUMER SPENDING (2020-2023)

| CATEGORY OF SPENDING | PERCENT OF CONSUMER SPENDING |
|---|---|
| HOUSING | 34% |
| TRANSPORTATION | 17% |
| FOOD | 12% |
| INSURANCE AND RETIREMENT | 12% |
| HEALTH CARE | 8% |
| TOTAL | **75%** |

High prices are a feature of these five major areas of consumer spending. The Washington Center for Equitable Growth estimates that prices for hospital services grew faster than any other category of consumption between 2000-2023.[13] Food prices rose almost 5% annually, on average, in the decade between 2014-2024.[14] Full-coverage auto insurance premiums increased, on average, by 5% annually between 2017-2022. These increases far outstrip average rates of inflation.

Most top categories of consumer spending involve sectors that are part of large and complex supply chains. Market power exercised in these tightly inter-related markets compounds high prices ultimately paid by consumers. Food supply chains include the production of raw agricultural commodities, processed and manufactured food products, and final products purchased by consumers in grocery stores and restaurants. In health care, supply chains span markets ranging from professional medical services, to intermediaries such as health insurance and group purchasing organizations, and providers (e.g., hospitals and physician practices).

To get a sense of how major consumer-facing sectors in the top five areas of consumer spending are performing, we looked at total labor and factor productivity measures, by 3-digit NAICS code, from 1987-2022.[15] A number of sub-sectors make up the top five areas of consumer spending, including: housing (e.g., real estate); transportation (e.g. gasoline); food (e.g., food manufacturing and food and beverage stores); insurance and retirement (e.g., insurance carriers and funds, trusts, and other financial services); and health care (e.g., ambulatory health care services and hospitals).[16]

As shown in Table 2, annual changes in total factor productivity and labor productivity for the U.S. have been positive over the last 35 years. Between 1987 and 2023, total factor productivity in the private non-farm sector grew at about .8% per year, and labor productivity grew by about 1.9%.[17] Growth in productivity in the sectors that make up the bulk of consumer spending, however, tell a very different story.[18]

For example, the average annual growth rate in labor productivity across relevant sectors from 1987 to 2022 is negative, and the rate of growth in total factor productivity is stagnant. Low or declining growth in productivity is especially evident in food manufacturing, funds, trusts, and other financial vehicles, ambulatory health care services, and hospitals.

### TABLE 2: ANNUAL RATES OF CHANGE IN PRODUCTIVITY FOR CONSUMER SECTORS (1987-2022)

| NAICS CODE | SECTOR | LABOR PRODUCTIVITY | TOTAL FACTOR PRODUCTIVITY |
|---|---|---|---|
| 311 | FOOD MANUFACTURING | 0.2 | 0.0 |
| 445 | FOOD AND BEVERAGE STORES[19] | 0.8 | 1.0 |
| 531 | REAL ESTATE | 1.5 | 0.3 |
| 524 | INSURANCE CARRIERS | 1.4 | 0.2 |
| 525 | FUNDS, TRUSTS, AND OTHER FINANCIAL VEHICLES | -6.9 | -0.5 |
| 621 | AMBULATORY HEALTH CARE SERVICES | 0.0 | -0.2 |
| 622 | HOSPITALS | 0.8 | -0.6 |
| AVERAGE OF ALL SECTORS | | **-0.3** | **~0.0** |
| U.S. PRIVATE NON-FARM (1987-2023) | | **1.9** | **.8** |

Low or declining productivity in consumer-facing sectors should be a red flag for antitrust enforcement. The difficulty of new entry by disruptive firms and weak incentives for innovation are far more likely to entrench market power in low productivity, highly concentrated markets and sectors. Promoting competition through strong antitrust enforcement strengthens incentives for firms to innovate, keeps barriers to new market entry low, and disrupts the entrenchment of market power that drives up prices to consumers.

## IV. HIGH CONCENTRATION AND SUPPLY CHAIN BOTTLENECKS

Many sectors that are important to consumers feature dominant firms and tight oligopolies instead of robust competition. For example, dominant firms control markets for live events ticketing, genetic traits for transgenic crop seed, and construction software.[20] Four or fewer firms control 80% or more of markets for passenger airline service, warehouse clubs and supercenters, passenger car rental, kidney dialysis centers, phosphate fertilizer, and breakfast cereals.[21] Three major agricultural biotechnology mergers eliminated fully half the number of competitors in the two-year period between 2017-2018.[22] And a small number of large food manufacturers control markets ranging from sugar to baby formula, maintaining thousands of brands that create the illusion of competition in grocery stores.[23]

Concentrated markets that feature sluggish growth in productivity are often home to business practices by large incumbents that work to keep out smaller players that can inject important competitive discipline. Examples include generic pharmaceuticals, smaller medical device innovators, independent grocers, and independent pharmacies. Harmful business practices include strategically using patent rights to delay entry by generic drugs or transgenic crop seed; and engaging in deceptive practices or sham litigation to frustrate entry by smaller competitors. Harmful practices also include discriminating against smaller grocers and pharmacies, who may get worse terms of trade in dealing with powerful input suppliers and distributors.[24]

Concentrated markets also strengthen incentives for competitors to collude to fix prices, rather than compete head-to-head. Markets for automobile parts and financial services are particularly vulnerable to collusion that drive up prices to consumers.[25] Private antitrust enforcement is a major and important tool for obtaining restitution for consumers in these cases. Yet another problem is the market power bottleneck that can be found in some supply chains. Food processing is a well-known market power bottleneck. In 2021, four large poultry processors controlled about 60% of total U.S. output.[26] The four largest major pharmacy benefit managers control a bottleneck in the drug supply chain, with about 70% of the market.[27]

Market power bottlenecks can have harmful effects. A powerful player that controls a concentrated chokepoint in the supply chain can exercise buyer power to lower prices paid to producers of grains, animals, and other commodities. At the same time, these same firms can exercise seller market power by raising prices to consumers. High price-cost markups that result from the exercise of market power in the upper reaches of supply chains are almost always passed down to consumers at the retail level.[28]

Market power bottlenecks also trigger incentives for firms in other parts of the supply chain to bulk up to gain bargaining power over firms operating in bottleneck markets.[29] This can spur further "reactive" consolidation along a supply chain. Market power bottlenecks also destabilize supply chains because a lack of competition translates to a lack of redundancy. In contrast, competitive markets contain more suppliers that can step in when rivals fail, for whatever reason, thus preserving the stability and resiliency of a supply chain.

For example, a lack of competition in the beef packing market, 85% of which is controlled by four firms, exacerbated the breakdown of the beef supply chain in the early phase of the COVID-19 pandemic.[30] The same is true of the medical ventilator market during the pandemic and, more recently, IV fluids after a major hurricane in Florida. A common feature of both is a firm that controls a significant share of the market, with limited alternative sources of supply.[31] When demand spiked for ventilators in 2020 or when pharmaceutical company Baxter's IV fluids manufacturing facility lost capacity after a hurricane in 2024, there were few suppliers to serve as backstops.

## V. A LACKLUSTER RECORD OF MERGER CONTROL

The most active area of antitrust enforcement is merger control, enforced under Section 7 of the Clayton Act.[32] Merger law polices consolidation that is likely to substantially eliminate competition by creating a dominant firm, facilitating coordination between firms, or eliminating a potential rival.[33] Merger enforcement is considered the "first line of defense" in heading off high concentration that can foster the emergence of dominant firms and tight oligopolies.

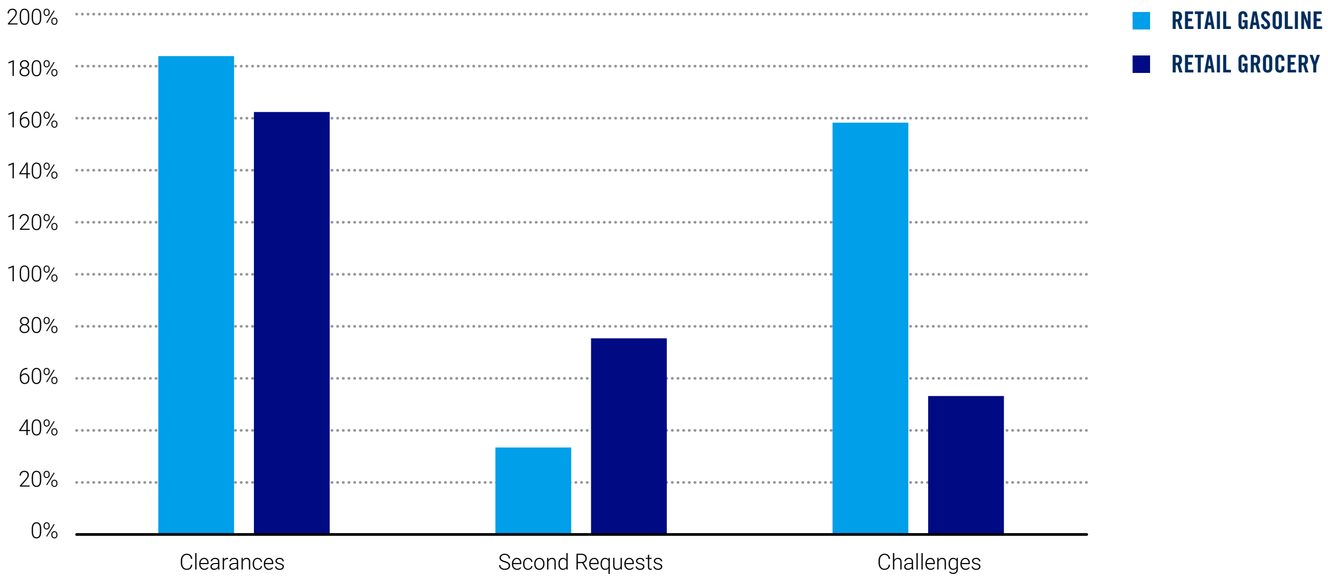
The U.S. antitrust agencies report merger enforcement activity annually.[34] PPI's analysis spans 2009-2023. This period features consistent enforcement reporting by 3-digit NAICS code in sectors that account for 75% of consumer spending.[35] It covers two terms of the Obama administration (2009-2016), one term of the Trump administration (2017-2020), and three of four years of the Biden administration (2021-2023).

We looked at three rates of enforcement. One is the rate of "clearances," or decisions by the agencies to take a closer look at a reported merger transaction. This rate is relatively low, since most mergers do not raise competitive concerns. A second enforcement metric is the rate of "second request" investigations after a deal is cleared to an agency. This rate is also relatively low, as most deals that are cleared also do not, after a closer look, reveal competitive problems. A third metric is the rate of merger "challenges" or instances where an agency finds that a merger is illegal, or likely to substantially lessen competition, and seeks to block or settle it.[36]

The average rate of clearances across the nine sectors is about 25%, or about 44% higher than average across all sectors reported by the antitrust agencies. The average rate of second requests is about 23%, or 6% higher than average across all sectors. Finally, the data show that the average rate at which the agencies challenge mergers is about 18%, or about 4% higher than average. Overall, these statistics mean that enforcers are, on average, looking much harder at deals at very early stages in the sectors that most impact consumer spending. But after this initial burst of scrutiny, they are pursuing investigations or challenges at levels that are about average.

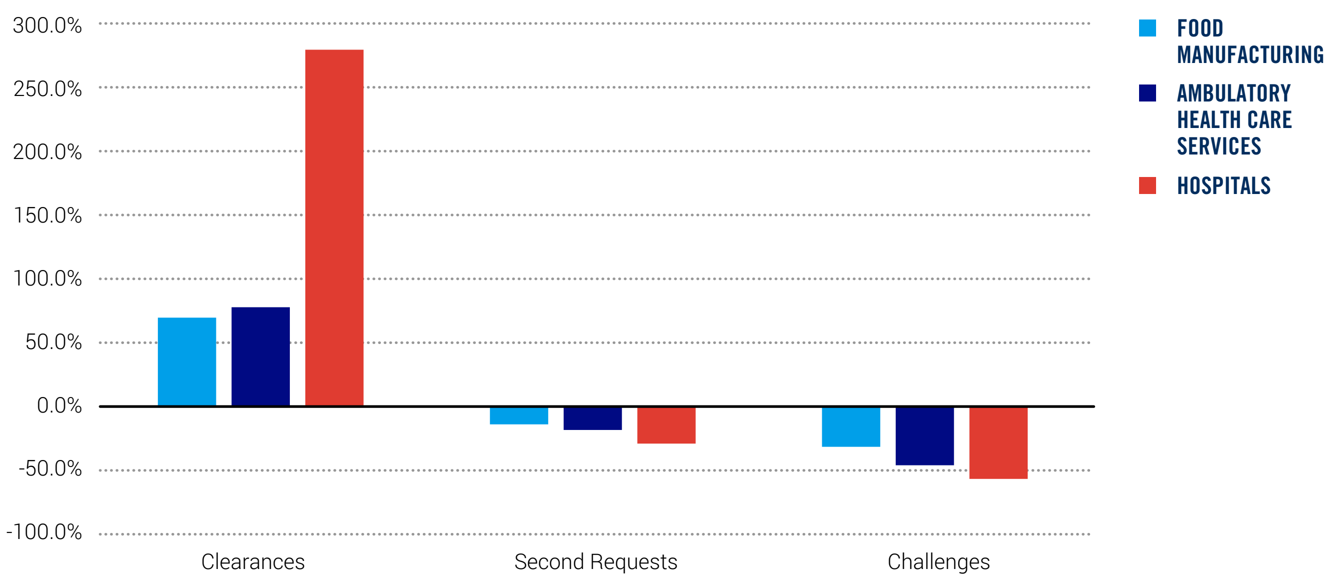
More detailed analysis reveals major takeaways at the sector level. First, the Obama and Trump administrations were, in general, the most aggressive on merger enforcement in sectors that contribute to the bulk of consumer spending.[37] Second, there are two sectors that attract intense enforcement scrutiny — retail gasoline and food and beverage stores — that are part of the transportation and food sectors. All rates of enforcement in these sectors are significantly higher than average, as shown in Figure 1. The rate at which the agencies challenge gasoline and grocery mergers, for example, is 158% and 53% higher, respectively, than the average across all sectors.

### FIGURE 1: AGRESSIVE MERGER ENFORCEMENT (% DIFFERENCE FROM ALL-SECTOR AVERAGE, 2009-2023)



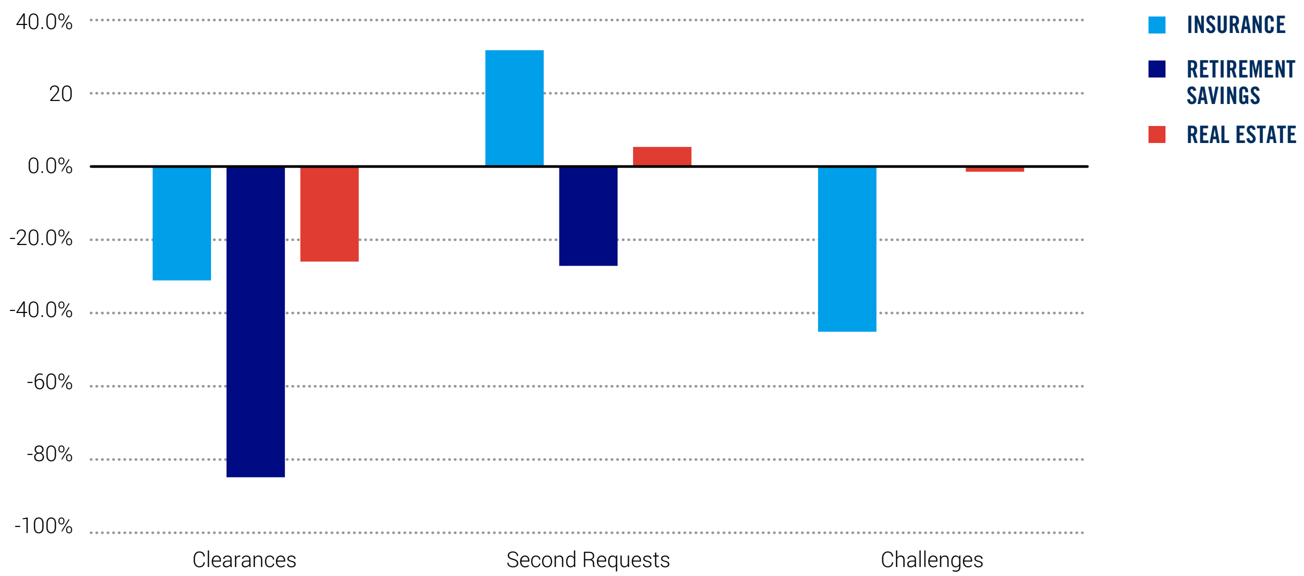

A second observation is that the agencies sometimes start out strong, but the intensity of enforcement falls off quickly. As shown in Figure 2, this pattern is clear in ambulatory health care services and hospital markets and in food manufacturing. The agencies engage in strong early-stage merger reviews but advancing to investigations and injunctions to block harmful mergers is rare, as reflected in below-average enforcement rates. For example, in hospital, ambulatory health care, and food manufacturing markets, the rates of clearances are 279%, 77%, and 69% higher than average, but later-stage enforcement rates are all markedly below average.

### FIGURE 2: STRONG EARLY-STAGE BUT WEAK LATE-STAGE MERGER ENFORCEMENT (% DIFFERENCE FROM ALL-SECTOR AVERAGE, 2009-2023)



A final observation is that *all rates* of merger enforcement in several sectors are only average or below average. As shown in Figure 3, rates of clearances are well below average for real estate, insurance, and retirement. But, with the exception of second requests in insurance mergers, rates of investigations and challenges are about average or below average for two of three sectors.

**FIGURE 3: AVERAGE OR BELOW-AVERAGE MERGER ENFORCEMENT (% DIFFERENCE FROM ALL-SECTOR AVERAGE, 2009-2023)**




## VI. MAJOR TAKEAWAYS FROM THE ANALYSIS

PPI's analysis highlights several features of the top five sectors of the economy where consumers spend most of their budgets. The results support the concern that high concentration, market power bottlenecks in some supply chains, and sluggish productivity amplify the importance of addressing market power in these sectors. In light of these features and analysis, lackluster rates of enforcement in consumer-facing sectors are not easily explained by systemically low concentration or that mergers have been generally pro-competitive.

### A. Enforcement is Inconsistent Across Key Consumer-Facing Sectors

The data show that merger enforcement is inconsistent across key sectors that comprise major consumer sectors. For example, enforcement is vigorous in the gasoline and food and beverage store sectors where higher prices have a large and visible impact on household budgets. Markets in these sectors are geographically local in scope, and mergers that are likely to substantially eliminate competition have a direct and harmful impact on consumers. Enforcers have aggressively flagged deals for early-stage scrutiny and followed through with investigations and challenges.

There is no evidence, however, that the agencies pursue merger control more vigorously across other markets that most impact consumers' pocketbooks. In some cases, deals are getting higher than average close looks early on, but rates of investigations and challenges drop off sharply or are at or below average. This is true in hospitals, ambulatory health care services, food manufacturing, real estate, insurance, and insurance, and retirement.

These patterns reveal a potential disconnect between enforcement priorities in sectors where prices and, therefore, consumers' cost of living are most affected by consolidation. The findings do not mean that agencies have not taken important enforcement actions, only that there is a lack of consistency in addressing competition concerns in consumer-facing sectors over time.

For example, the Obama DOJ successfully blocked two large health insurance mergers, Anthem-Cigna and Aetna-Humana, in the mid-2010s.[38] These enforcement actions likely headed off further consolidation.[39] But concentration remains high. In almost 60% of metropolitan statistical areas, for example, one insurer holds greater than a 50% share, and 75% of markets are highly concentrated.[40]

The antitrust agencies have pursued violations of antitrust law using other tools, such as enforcement against monopolies and anticompetitive agreements. For example, five of the 13 non-merger enforcement actions from 2009-2023 in the top five areas of consumer spending are in real estate.[41] Three additional non-merger enforcement actions are in hospitals, and another three are in food manufacturing. These cases include, most recently, DOJ's cases against the National Association of Realtors and RealPage, where anticompetitive agreements are alleged to raise housing prices to consumers.[42] The U.S. Department of Justice (DOJ) began investigating possible collusion in the beef packing sector in 2020 after the catastrophic failure of the supply chain during the pandemic.[43] But almost five years later, the DOJ has not yet brought a case.

Non-merger antitrust cases, however, are few and far between. They also take much longer to litigate, with considerable uncertainty around when they will deliver relief to consumers. For example, the Microsoft monopolization in the early 2000s spanned four years from the filing of the initial complaint to the filing of the final judgement.[44] The AT&T monopolization case took eight years. The complaint in the pending Google search monopolization case was filed in late 2020 and remains in progress four years later.[45] In contrast, merger cases between 2011-2023 were resolved, on average, in about nine months.[46] In addition to being the first line of defense in heading off the emergence of dominant firms and oligopolies that can exercise substantial market power, the timing of merger control also works more quickly to protect consumers.

### B. Policies Around Merger Settlements Work to Ratchet Up Concentration

Agencies sometimes pursue certain policies on handling illegal mergers in particular markets or sectors. These often do not work in the interest of competition and consumers. For example, a leading study analyzed the FTC's approach to pharmaceutical consolidation, where over 70 mergers were approved subject to divestitures since the late 1990s.[47] The FTC's own study, however, revealed that many of these divestitures failed. This this raises serious concerns about higher concentration in generic drug markets and potentially higher prices.

While pharmaceuticals do not account for a major source of consumer spending, the FTC's approach exposes similar problems in the top five consumer sectors. For example, despite aggressive merger enforcement in retail grocery, the FTC has overseen massive consolidation of national and regional chains. The U.S. retail grocery sector has been home to more than 20 major mergers that have been scrutinized by the FTC between 1996-2024. The Commission moved to block only one of those mergers, one was abandoned, and the rest were settled with divestitures.

The downside of the FTC's policy became clear when the Commission approved the behemoth merger of retail grocers Safeway and Albertsons in 2015. Shortly after stores were divested, however, the Pacific Northwest regional grocery chain that purchased divested stores failed to maintain them.[49] Yet the FTC allowed the merged company to repurchase the stores, shifting the burden of the failed remedy to consumers. The Safeway-Albertsons debacle likely spurred the FTC to change course and move to enjoin the pending Kroger-Albertsons merger. In the broader scheme of merger control in the food sector, however, it comes very late in a long series of mergers that have concentrated market power in the hands of only a few large national chains.[50]

### C. Complexity, Supply Chains, and New Business Models Have Outpaced Antitrust

Complexity in major consumer-facing sectors continues to increase, posing challenges for merger enforcement. For example, many sectors are undergoing a transition from traditional horizontal and vertical integration to "ecosystem" integration. The Capitol One-Discover and United Health-Change Health mergers share a similar motivation to build out digital platforms in fintech and healthtech that are at the center of a constellation of related markets. Hospital consolidation and acquisitions of physician practices create complex relationships and shifts in bargaining power between providers and third-party payers, often with effects on reimbursement rates and health care costs.[51]

PPI's analysis shows low rates of investigations and challenges in the hospital and ambulatory health care sectors. The Obama administration mounted a series of hospital merger challenges between 2011-2016 and the Biden FTC has pursued vigorous merger control.[52] Yet 90% of hospital markets in the U.S. are now considered highly concentrated.[53] Another challenge is the "cross-market" hospital merger, where a dominant hospital in one geographic market may be able to negotiate higher prices under the same health plan in a different market where the merging partner operates. Nine cross-market mergers valued at more than $5 billion have been proposed since 2021. The FTC has investigated two transactions but has not yet brought a challenge.[54]

Another major concern is whether enforcers are flagging market power bottlenecks in food supply chains, especially in food manufacturing, where markups are passed on to consumers. The rate at which the agencies challenge mergers in food manufacturing is more than 100% lower than in retail grocery, signaling that bottleneck markets may not be getting sufficient attention. The disparity in enforcement between wholesale and retail levels may be explained, in part, by how the agencies allocate cases. For example, the DOJ reviews mergers in food processing, while the FTC takes food manufacturing and retail grocery. This increases the risk that if the agencies do not coordinate on investigations, they will miss important dynamics, such as the risk of enhanced bargaining power and, further, reactive consolidation. This dynamic is also in play for health care markets, where the DOJ enforces consolidation in health insurance while the FTC takes hospital mergers. These considerations should factor into merger reviews.

The FTC is exploring ways to revitalize antitrust enforcement in the food and beverage sector under statutes other than the Sherman Act, Clayton Act, and Federal Trade Commission Act. This includes the long-dormant Robinson Patman Act (RPA), which polices anticompetitive discrimination involving commodities and input supplies.[55] The U.S. Department of Agriculture is also working to strengthen the Packers and Stockyards Act (PSA).[56] PSA enforcement is designed to prevent anticompetitive discrimination in the livestock, poultry, and meat industries.

Appropriately-framed RPA enforcement could prevent anticompetitive, discriminatory practices, thus protecting smaller and independent food and beverage retailers and wholesalers. Enforcement under both RPA and PSA can promote a more level competitive playing field and fair consumer prices; support consumer choice; and create more resiliency in food supply chains. This would bootstrap mainstream antitrust enforcement.

PPI's analysis reveals, however, that mainstream antitrust enforcement in the food and beverage sectors already faces challenges. Policymakers should carefully examine, therefore, how other antitrust statutes can be deployed as part of a coherent antitrust "toolkit" approach. This is especially true of RPA enforcement, which has remained largely dormant while significant changes in the food and beverage sectors have occurred.

For example, the U.S. antitrust agencies should develop a better understanding of changes in incentives for strategic consolidation and business practices. Consolidation has spurred significant purchasing economies and shifts in bargaining power between suppliers and distributors, spurring complex discounting practices. Changing business models and digital technology have expanded distribution beyond bricks and mortar to other channels, such as online delivery services. Smaller, regional protein supply chains, supported by smaller producers and processors, now operate in parallel to large industrial food supply chains.[57] Finally, state regulation of alcohol under the 21st Amendment and the three-tier system should also play a central role in determining the scope and effectiveness of various antitrust enforcement tools, such as RPA.[58]

## VII. POLICY IMPLICATIONS

PPI's analysis highlights the vital role of antitrust in key sectors that account for the bulk of consumer spending. While any number of factors can drive price increases, the focus is on the potential for higher prices resulting from the exercise of market power. This risk is exacerbated by high market concentration, sluggish productivity, market power bottlenecks, and enforcement policies that do not necessarily serve consumers. Moreover, the analysis exposes weakness in merger enforcement in these key consumer sectors areas of consumer spending. PPI suggests, therefore, a number of policy priorities that would sharpen antitrust priorities and bring it into closer touch with consumers:

- Merger review in the food and agriculture and health care sectors such be consolidated in one agency. Splitting up responsibility for merger reviews across two agencies risks missing important and potentially harmful competitive dynamics in supply chains and ultimately works against protecting consumers from harmful consolidation.

- The agencies should revisit policy that codifies approving virtually all retail grocery mergers subject to divestitures. Such policies, as is also clear in pharmaceutical markets, work to increase concentration over time. Failed remedies unfairly transfer the burden of an anticompetitive merger and higher prices to consumers.

- The agencies should consider the impact of consolidation and business practices on the stability and resiliency of critical supply chains. Consolidation in critical intermediary markets such as food manufacturing and insurance that connect suppliers with consumers are particularly prone to harmful market power bottlenecks that have not been adequately addressed.

- The agencies should convene a series of workshops that advance their understanding of how major consumer-facing sectors and supply chains have changed over time. These convenings would consider how technology, procurement, new business models, and integration change incentives around consolidation and strategic competitive conduct.

## ABOUT THE AUTHOR

**Diana Moss** is Vice President and Director of Competition Policy at the Progressive Policy Institute. From 2015-2023, Dr. Moss was President of the American Antitrust Institute. An economist, her work spans the economic, policy, and legal analysis of antitrust enforcement and sector regulation, with industry expertise in digital technology, energy, agriculture, airlines, telecommunications, media, and health care.

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