NEW MERGER GUIDELINES SHOULD KEEP THE CONSUMER WELFARE STANDARD

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Recent statements by the heads of the Federal Trade Commission and Department of Justice suggest that new merger guidelines may replace the tried-and-tested consumer welfare standard with a series of alternate goals. Proponents of such a shift see a need to promote goals other than consumer welfare and believe the consumer welfare standard is inadequate to enforce against mergers resulting in certain types of harms. We disagree. Shifting away from the consumer welfare standard will necessarily harm consumers, resulting in higher prices and lower output. In contrast, sticking with the consumer welfare standard is not biased toward or against enforcement, is consistent with enforcement against a variety of types of harm (as reflected in the agencies' recent enforcement decisions), and provides ample room for greater enforcement if that is what the agencies desire. Shifting away from the consumer welfare standard would also replace a clear standard with a series of vague standards, undermining the agencies' credibility, which would also harm consumers.

I. INTRODUCTION

The Federal Trade Commission ("FTC") and Department of Justice ("DOJ") are preparing to revise the 2010 Horizontal Merger Guidelines ("HMG") and the 2020 Vertical Merger Guidelines ("VMG"). To the extent the revisions incorporate new scholarship and accumulated enforcement experience, we applaud efforts to update the public on such matters. However, we are concerned about some of the directions suggested in the agencies' Request for Information ("RFI") and about recent statements of the heads of both agencies. In particular, it appears that new guidelines may explicitly or implicitly move away from the consumer welfare standard ("CWS"). From an economic perspective, such a policy step would be a significant mistake.

The apparent hostility toward the CWS from some appears to derive from two premises: first, that the CWS ignores broad classes of harm, and second, that the CWS has directly led to systematic underenforcement. As we will explain in more detail, both of these premises are false.

The CWS defines the goal of merger enforcement as preventing mergers that harm consumers through a reduction in competition. We argue that this definition is consistent with the agencies' actual enforcement records, including cases alleging nonprice harms, long-run harms, and harms to sellers. Critically, from an economic perspective, the CWS makes merger enforcement credible: It separates efficient mergers, which create benefits for consumers (even if they harm rivals and sellers), from mergers that do not benefit consumers. A CWS replacement would (necessarily) lack this feature, to the detriment of the very people that the Neo-Brandeisians seek to help.

Moreover, the CWS is not biased for or against enforcement. If the agencies desire to bring more merger challenges, they have ample tools to do so within the CWS. Replacing the CWS may appear to offer a shortcut to greater enforcement, but such a shortcut would trade credibility for expediency. In the long run, this tradeoff would damage the agencies' ability to block harmful mergers. More immediately, shifting to an alternative standard would necessarily lower consumer welfare through higher prices and lower output. Such an outcome is an inevitable consequence of shifting focus away from consumer welfare and towards other goals.

II. NEO-BRANDEISIAN VIEWS OF THE CWS

The leadership of the FTC and DOJ, as well as other Neo-Brandeisians, have made clear their views on the CWS. For example, FTC Chair Khan's academic scholarship defines the consumer welfare standard as encompassing merely "short-term price effects."[2] She also argues that the CWS "fails to register certain forms of anticompetitive harm and therefore is unequipped to promote real competition."[3] She endorses, in the place of any single goal, a "general vision" of "keeping markets open and keeping them free from industrial monarchs" and avoiding "concentration of economic power."[4] To avoid such concentration, she endorses a greater focus on market structure.

For his part, DOJ Assistant Attorney General ("AAG") Kanter refers to the CWS in a recent speech as a "catch phrase, not a standard," because he believes that the CWS is not well-defined.[5] He derides the CWS as a "central planning standard" given what he sees as the standard's focus on "econometric quantification of price or output effects, with a "blind spot to workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy."[6] In place of the CWS, he advocates refocusing antitrust enforcement on a series of goals, including "corporate power," "choice and opportunity for individuals and small businesses," "the liberty of our nation," and "all the benefits of competition, not just the ones we think we can measure or calculate." He argues that ignoring these alternate goals systematically biases antitrust toward underenforcement. We disagree for reasons we will make clear below.

Neo-Brandeisian commentators view the CWS as powerless against a variety of perceived societal ills. For instance, the 2020 House Antitrust Subcommittee's Report — led by a team including Chair Khan — complains about the undue influence of a "narrow construction of 'consumer welfare' as the sole goal of the antitrust laws," and recommends prohibiting *all* acquisitions of "potential rivals and nascent com-

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2 Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 710 (2017).

3 *Id.* at 737.

4 *Id.* at 740.

5 Jonathan Kanter, Remarks at New York City Bar Association's Milton Handler Lecture (May 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association.

6 *Id.*

petitors."[7] To consider another example, Chair Khan blames sees the CWS as inadequate to address "concentrated control over data" and any accompanying effects.[8] Finally, both Chair Khan[9] and AAG Kanter[10] argue that the CWS inadequately considers harm to sellers. Again, we disagree, and we explain why abandoning the CWS would actually lead to many of the harms that Chair Kahn, AAG Kanter, and neo-Brandeisians more generally say they wish to prevent.

The agencies' recent actions are — unsurprisingly — consistent with the views of their leaders. For instance, upon the FTC's withdrawal from the 2020 VMG, a majority of the FTC endorsed replacing that document's focus on the merged firm's incentives to affect consumer welfare with market concentration screens, citing the "fundamental difficulty" of analyzing the competitive effects of a vertical transaction.[11] The statement additionally questions the relevance of the Elimination of Double Marginalization ("EDM"), which incentivizes the merged firm to have a single margin, instead of both independent firms having the their own (double) margins. EDM is a direct benefit to consumers of many vertical mergers, producing *lower* prices and *greater* output, yet the statement calls into question its importance.

Further, the agencies' RFI foreshadows a shift away from what it characterizes as "unduly narrow" focus on price effects and "too broad economic investigation[s]."[12] While new merger guidelines have not been released at the time of writing, Chair Khan has previewed that they will shift focus to concentration screens and will view skeptically benefits to consumers from merger efficiencies.[13] All of this points to standards that will end up harming consumers in the name of ill-defined alternative goals.

III. THE CWS DOES NOT INAPPROPRIATELY RESTRICT MERGER ENFORCEMENT

The attacks on the CWS outlined in the previous section do not comport with our experiences working both for and against the agencies. In the early days of an investigation, FTC and DOJ staff interview dozens of market participants, examine the parties' merger-related documents, request additional documents and data from the parties, examine structural factors, and model potential harms. Should a matter proceed to a Second Request, ten or more lawyers and economists will look for evidence of a merger's potential anticompetitive effects, often across several theories of harm. The idea that the CWS inappropriately circumscribes this process, by restricting staff to look only at a narrow class of harms, simply does not match reality. In reality, the CWS *strengthens* enforcement, by freeing staff to ignore a merger's effects on competitors and instead focus on a merger's effects on competition, but with a consistent metric to assess those effects.

Below, we first explain why Neo-Brandeisian criticisms of the CWS does not match the agencies' actual enforcement records under the standard. We then explain that the CWS is not biased for or against enforcement, and we discuss ways in which enforcement could be expanded under the CWS, if that is what the agencies desire.

A. Harms to Innovation and Quality; Mergers of Nascent and Potential Competitors; Mergers involving Data

The CWS does not rule out nonprice effects as theories of merger harm, including harms to innovation or quality. This is because such effects can harm consumers. The CWS's approach to such harms is reflected in the 2010 HMG, which explicitly states that "enhanced market power can also be manifested in non-price terms and conditions [...] including reduced product quality, reduced product variety, reduced service, or diminished innovation." It is also reflected in the numerous agency enforcement actions against perceived harms to innovation or quality; such recent cases include: *Whole Foods/Wild Oats* (FTC, 2007); *Steris/Synergy* (FTC, 2015); *Methodist/Tenet* (FTC, 2020); *Hackensack/Englewood*

7 Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets, 2020, at 391 and 394.

8 Khan, *supra*, note 2, at 783.

9 Khan, *supra*, note 2, at 737 ("the undue focus on consumer welfare is misguided. It betrays legislative history, which reveals that Congress passed antitrust laws to promote a host of political economic ends – including our interests as workers").

10 Kanter, *supra*, note 2 (arguing that "the consumer welfare standard has a blind spot to workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy."

11 Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (September 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

12 U.S. Department of Justice and Federal Trade Commission, Request for Information on Merger Enforcement (January 18, 2022), https://www.justice.gov/opa/press-release/file/1463566/download.

13 Khan, Lina, Remarks of Chair Lina M. Khan As Prepared for Delivery, (September 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf.

(FTC, 2020), and *CoStar/Rentpath* (FTC, 2020). Indeed, Chair Khan seems to acknowledge this point, stating in her academic work that "by some measures the FTC has alleged potential harm to innovation in roughly one-third of merger enforcement actions" between 2004-2014.[14]

The economic literature offers useful tools the agencies use to help assess nonprice harms, rather than relying solely on structural factors. To take just a small sample, Willig (2011) describes a framework for assessing merger quality effects,[15] while Gaynor (2021) summarizes empirical results on hospital merger quality.[16] Thinking of innovation effects, Federico, et al. (2017) develop a model in which mergers generically reduce the incentive for innovation,[17] while An & Zhao (2019) retrospectively analyze investment effects of the 1997 Boeing/McDonnell Douglas merger.[18]

Similarly, the Neo-Brandeisian rhetoric on mergers of nascent and potential competitors does not match reality. The agencies have condemned recent acquisitions of potential or nascent competitors, including *Inverness/Acon* (FTC, 2008), *Thoratec/HeartWare* (FTC, 2009), Steris/Synergy (FTC, 2015), *Mallinckrodt/Synacthen Depot* (FTC, 2017), and *Illumina/PacBio* (FTC, 2019). While potential competition cases may present unique issues for merger enforcers, these challenges stem from the need to predict a "but-for world" based on historical information and the inherent uncertainty about the future, not the CWS. Once again, the potential for mergers of nascent competitors to harm consumers is much studied in the economics literature, with a representative paper being Cunningham et al. (2021).[19]

As another example, notwithstanding Neo-Brandeisian anxiety about "concentrated control of data" in the hands of merging parties, the CWS provides a consistent framework for assessing harms that may result from mergers involving data. Once again, the agencies' actual record suggests that mergers involving data were challenged if they were though likely to harm consumers. Recent examples include: *Thompson/Reuters* (DOJ, 2008, involving financial data); *Reed Elsevier NC/ChoicePoint* (FTC, 2009, the provision of electronic public records data to law enforcement); *CCC/Mitchell* (FTC, 2009, automobile damage estimating software and underlying parts and labor data); *Dun & Bradstreet/QED* (FTC, 2010, K-12 educational marketing databases); *Nielsen/Arbitron* (FTC, 2014, national syndicated cross-platform audience measurement services); *CoreLogic/DataQuick* (FTC, 2018, national assessor and recorder bulk data); and *United/Change* (DOJ, 2022, insurance software and associated data).

B. Mergers Involving Upstream and Labor Market Harms

The Neo-Brandeisian view that the CWS is impotent against harms to sellers does not stand up to examination. Instead, as we demonstrate, the CWS makes enforcement against mergers that harm sellers more credible, by distinguishing different mechanisms for harm to sellers, only some of which are potentially anticompetitive.

As the 2010 HMG recognize, some mergers that leave sellers worse off are not anticompetitive and should not be condemned. For example, suppose a merger made the merging firms more efficient by allowing them to produce the same output with fewer inputs. This would benefit consumers to the extent that lower costs are passed through to lower prices. It would leave sellers worse off, because they would sell fewer units to the combined firm, but that is a product of economic efficiency, not of harm to competition. In contrast, a merger that increased the buyer power of the combined firm, and thereby lowered an input price and quantity would, *ceteris paribus*, reduce output, and thus harm consumers. The CWS appropriately distinguishes the two cases.

In some matters, it may be difficult to determine accurately whether or through what path seller harm results in harm to consumers. We do not think this difficulty precludes agency enforcement under the CWS. As the 2010 HMG explain, harm to sellers not linked to merger efficiencies may be actionable, even without a showing of harm to consumers. For instance, in a non-merger matter, Weyerhaeuser was found to have obtained a monopsony in an upstream market, but likely lacked market power in any downstream market.[20] Absent downstream effects, the Court treated harm to sellers symmetrically with harm to buyers, essentially interpreting Weyerhaeuser's suppliers as "consumers."

14 Khan, supra note 2, at 721.

15 Robert Willig, *Unilateral Competitive Effects of Mergers: Upward Pricing Pressure, Product Quality, and Other Extensions*, 39 REV. IND. ORD., Article 19 (2011).

16 Martin Gaynor, *Antitrust Applied: Hospital Consolidation Concerns and Solutions*, Statement before the Committee on the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights, (May 19, 2021).

17 Giulio Federico et al., *Horizontal mergers and product innovation*, 59 INT. J. IND. ORD. 1 (2018).

18 Yonghong An & Wei Zhao, *Dynamic efficiencies of the 1997 Boeing-McDonnell Douglas merger*, 50 RAND J. ECON. 666 (2019).

19 Colleen Cunningham, et al., *Killer Acquisitions*, J. POL. ECON. (2021).

20 549 U.S. 312 (2007), at 321 ("[T]his case does not present […] a risk of significantly increasing concentration in […] the market for finished lumber.").

Seller harms resulting from a reduction in competition often occur in concert with product market harms, and there may be limited upside to allocating resources to additionally investigate seller harms. As a result, product market harms appear more prominently in the agencies' complaints, as noted by Nancy Rose, a former Deputy AAG for Economics.[21] Nonetheless, the agencies can and do investigate seller harms under the CWS. One recent example is Breakthru/RNDC, a merger that was abandoned in 2019 while under FTC investigation on theories that included harms to suppliers.[22]

The economic literature offers analytical tools that can aid the agencies in their evaluation of such mergers. To take one representative paper, Prager & Schmitt (2021) empirically identify conditions under which there is evidence for harms to workers resulting from hospital mergers.[23]

C. The CWS is not Biased Towards or Against Enforcement

Much of the Neo-Brandeisians' antipathy towards the CWS appears to stem from a belief that it is inherently anti-enforcement. This belief is without merit. In fact, the CWS does not bias decisions in favor of or against enforcement; instead, it provides a tool to aid in separating beneficial from harmful mergers. In our experiences, the binding constraints on the agencies' enforcement decisions are case law and resources. Neither constraint can be lessened by shifting away from the CWS. While the agencies' RFI at times appears to imagine greatly streamlined antitrust in which enforcement decisions involve nothing more than counting the number of firms, such a simplistic approach will quickly run into the same two constraints. First, mergers that do not harm consumers are unlikely to be condemned by courts. Second, figuring out which firms to count and which not to count requires the agencies to do the work of an investigation so they can assess the contours of competition faced by the merging firms.

We believe there is ample room for additional merger enforcement within the CWS, if this is what the agencies desire. If so, we agree that it would be useful for the agencies to clarify how their approaches will shift. To take just one example, Carl Shapiro, who was then serving as the Deputy AAG for Economics and was one of the principal architects of the 2010 HMG, stated in 2010 that current Division practice was to treat expected unilateral price effects of less than 5 percent (as proxied by GUPPI) as falling within a safe harbor.[24] If such a safe harbor no longer reflects the agencies' approach, this could usefully be clarified.

To take another example, if the agencies revise how structural criteria are applied, they could draw on a rich body of academic work studying the likelihood of harm from mergers across different market structures. To consider just three examples, Farrell and Shapiro (1990) show that as a theoretical matter HHI can give a misleading picture of merger price effects. Hosken et al. (2011) find no consistent empirical relationship between HHI and merger price effects. Nocke & Whinston (AER, 2022) argue for greater reliance on delta HHI, and less reliance on the level of HHI, as predictors of merger price effects.[25] Again, if these approaches will be used by the agencies, the guidelines could usefully clarify this.

As a final example, we explained above in Section 3.B that the CWS is consistent with more enforcement against anticompetitive mergers thought to harm sellers. If the agencies plan to more closely scrutinize such harms, they could usefully clarify the criteria they will apply in distinguishing anticompetitive and procompetitive mergers (both of which can leave sellers worse off).

IV. ABANDONING THE CWS WOULD RESULT IN VAGUE OR CONCLUSORY STANDARDS, UNDERMINING THE AGENCIES' CREDIBILITY

To be useful, guidelines must identify characteristics not only of mergers that the agencies are likely to condemn, but also of mergers that the agencies would not typically view as illegal (while recognizing that, under any standard, a fuzzy middle ground will remain). As Assistant Attorney

21 Federal Trade Commission, Competition and Consumer Protection in the 21st Century, https://www.ftc.gov/system/files/documents/public_events/1413712/ftc_hearings_session_3_transcript_day_2_10-16-18_1.pdf (at 56, saying "we probably haven't missed anything in the hospital setting because a delta HHI of 3,000 is going to get the FTC's attention on the product market side. And we don't need to allege labor market harm if we're blocking a merger because of product market harm").

22 Statement of the FTC's Bureau of Competition (April 8, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/04/statement-ftcs-bureau-competition-regarding-announcement-republic-national-distributing-company.

23 Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021).

24 Carl Shapiro, Update from the Antitrust Division (November 18, 2010), https://www.justice.gov/atr/file/518246/download, (at 24, "Current Division practice is to treat the value of diverted sales as proportionately small if it is no more than 5% of lost revenues").

25 Joseph Farrell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, 80 AM. ECON. REV. 107 (1990); Daniel Hosken, et al., *Does Concentration Matter? Measurement of Petroleum Merger Price Effects*, 101 AM. ECON. REV. 45 (2011); Volker Nocke & Michael Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 AM. ECON. REV. 1915 (2022).

General Donald Turner — who was responsible for the 1968 Merger Guidelines — said, “People wishing to comply with what the Government thinks the law is can only do so if the Government’s views are made known.” The consumer welfare standard establishes such a benchmark: Agencies gauge a merger’s legality by its effect on consumers.

Neo-Brandeisians complain about what they perceive to be a high standard of proof for merger enforcement and imagine a future in which “clear” structural criteria can replace the CWS. However, in actual practice, any replacement is likely to result in inconsistent and unpredictable enforcement. For instance, courts commonly cite the current HMG. If a replacement document reflects vague criteria — or current politics — more than sound economics, this will undermine judicial acceptance and make enforcement more difficult. Unfortunately, the agencies’ RFI foreshadows new merger guidelines that discard the CWS in favor of a series of vague and conclusory (rather than evidence-based) standards, which are likely to undermine the reliance of the guidelines by courts. We select four such standards for further discussion below.

First, the RFI mentions a “trend toward concentration in the industry” as a relevant factor in merger analysis. While such a standard may have some rhetorical appeal, it does not have substantive support in the economics literature as a standard to distinguish beneficial mergers from harmful ones. In particular, levels of concentration do not determine the welfare effects of a merger on anyone, and thus are not a useful standard on their own.[26] The current HMG recognize this fact, stating (accurately, in our experience) that agencies rely more on measures of consumer harm than concentration thresholds.

Second, the agencies’ RFI mentions “the danger of [permitting] a too-broad economic investigation.” But pre-limiting the scope of economic analysis would seem to cut *against* the goal of considering harder-to-measure harms and benefits from mergers, which require more care, not less. For instance, the economics literature recognizes that a firm’s incentive to engage in investment is nuanced, and does not clearly or monotonically track market concentration measures. Even measuring merger price effects is more difficult than it first appears, and it requires all of the tools in an enforcer’s arsenal (and perhaps particularly economic tools).

Third, the RFI appears to endorse eliminating distinctions between vertical and horizontal mergers, despite quite different mechanisms for potential harms and benefits. Failure to recognize these distinctions is likely to lead to less clarity in decisions, whether in favor of or against enforcement. Indeed, the RFI discusses structural presumptions for vertical mergers — which the agencies tested in the draft VMG and ultimately rejected — despite there being no evidence-based rationale for such thresholds.[27]

Fourth, the RFI appears to simultaneously endorse both structural criteria (e.g. “number of significant competitors”) and doing away with rigorous market definition tests (e.g. “evidence of substantial competition between the merging parties is one way to define a market,” questioning whether it is “necessary to precisely define the market in every case”). Taken together, these criteria suggest a standard in which there is simultaneously both more focus on market structure and less focus on carefully defining markets. Such an approach will inevitably lead to misguided enforcement decisions since one cannot reliably determine the “number of significant competitors” without defining the scope of the relevant market, and market definition, for all its imperfections, as least provides courts with some guardrails when assessing the relevant set of competitors.

V. A CWS REPLACEMENT IS LIKELY TO HARM CONSUMERS THROUGH LOWER OUTPUT AND HIGHER PRICES

If the CWS is replaced, then, by definition, the agencies would condemn some mergers that make consumers better off, while failing to act against some mergers that harm consumers; if not, a new standard would simply be the CWS under a different name. Proponents of a change in standard may argue that a new standard can consider *both* the welfare of consumers *and* other groups, such as workers, farmers, or other parties. But once again, if a new standard condemned mergers that harmed workers only if consumers were also harmed, it would be equivalent to the CWS. Instead, the unambiguous statements of Chair Khan and AAG Kanter describe a preference for considering other factors *instead* of consumer welfare. Regardless of the merits of these alternative factors, such a move would shift enforcement to disfavor consumers.

The consequences of such a move are predictable: lower output, higher prices, and lower consumer welfare. Indeed, some Neo-Brandeisians appear to view these consequences as a feature, and not a bug. We strongly disagree; for all the rhetoric of the Neo-Brandesians, they fail to explain how lower output — which means that willing buyer and sellers have failed to make mutually beneficial trades — can be a good thing.

26 See *e.g.* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L. J. 49, 63 (noting “There is no good link between the level of the HHI and unilateral price effects with differentiated products.”).

27 See e.g. Gloria Sheu & Charles Taragin, *Simulating mergers in a vertical supply chain with bargaining*, 52 RAND J. ECON. 596, 616-617 (finding no clear relationship between the number of upstream or downstream firms and harm resulting from a vertical merger).

By way of example, in her scholarship, Chair Khan appears to express hostility towards benign forms of vertical integration, regardless of the integration's effect on consumers.[28] But while vertical integration can cause consumer harm in some circumstances, it often results in procompetitive consumer benefits through its realization of EDM and efficiencies (e.g. increased investment incentives) that result from the aligning of incentives or the lowering of transaction costs. However, Chair Khan and allies question the relevance of such procompetitive effects, referring to EDM as a "non-statutory defense" and stating that "we should be highly skeptical that EDM will ever be realized — let alone passed on to end-users."[29] They claim (incorrectly) that EDM is limited to very specific factual circumstances, and that it is "simply not relevant to the legality of a merger" unless it results "in the preservation of competition in the post-merger market, with the assessment of competition not limited to price."[30] In a recent statement, Chair Khan appears to go further still, dismissing the weighing of *any* benefit of vertical or horizontal mergers as "directly contravening Congress."[31]

Vertical mergers are tricky to analyze precisely *because* they can often result in both procompetitive and anticompetitive effects, as the government's case in AT&T/Time Warner recognized. By scrutinizing only harms, and ignoring benefits of such mergers, the agencies could indeed simplify enforcement decisions. But such simplification comes at the cost of condemning procompetitive mergers, intentionally depriving consumers of their benefits.

In another example, Chair Khan and allies express a willingness to enforce against *low* prices, and mergers that may facilitate lower price. In her scholarship, Chair Khan advocates "abandoning the recoupment requirement in cases of below-cost pricing by dominant platforms" and decries low prices on e-books set by Amazon.[32] In a recent speech, Commissioner Bedoya describes what he sees as the negative effects of low wholesale prices available to large grocers and pharmacies, but not their "independent" counterparts.[33] Bedoya explicitly favors "fairness" as a goal of enforcement, and speaks skeptically of "efficiency."[34] But whatever the merits of such "fairness," it will come at a cost of harm to consumers since it will deprive them of the "low price" option. Low-prices may be difficult for competitors to match, but this is a reflection of the fact that competition is hard; one cannot seriously claim to support the competitive process without recognizing that the process will inherently result in winners and losers.

To consider one final example, neo-Brandeisians appear to favor small enterprises over large enterprises, regardless (or even because) of their higher cost structure and prices. For instance, Chair Khan's academic work decries Amazon's size and network effects for reasons including the "concentration of data," the potential negative consequences of a potential hack of a large platform, and "undue economic and political power" that may result from Amazon's scale.[35] Once again, antitrust hostility towards large firms, regardless of their prices, can only lower consumer welfare.

VI. CONCLUSION

Abandoning the CWS will, by definition, harm consumers, increase prices, and lower output. Such a lowering of output will tend to harm workers and other sellers of inputs. Harm will result from anticompetitive mergers that are waived through while enforcers focus on priorities other than consumer welfare. Harm will additionally result from procompetitive mergers that are enjoined for failing to pass the new, impressionistic standards. This second class of harm is very difficult to measure, as it involves a comparison to a counterfactual reality in which a procompetitive merger is allowed to be consummated. Because of this, such harms will occur largely without the affected parties — especially consumers — being aware that they are harmed. These harms to the very people Neo-Brandeisians claim to be protecting should be weighed seriously before the CWS is abandoned.

28 Khan, *supra*, note 2 at 797 suggests "Limiting Amazon's reach through prophylactic bans on vertical Integration."

29 *Supra*, note 11.

30 *Id.*

31 Khan, *supra* note 9.

32 Khan, *supra*, note 2, at 791 (recommending abandoning the recoupment requirement for predatory pricing cases); at 756 (describing Amazon's e-book pricing).

33 Bedoya, Alvaro, Returning to Fairness, Midwest Forum on Fair Markets (September 22, 2202), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

34 *Id.*

35 Khan, *supra*, note 2, at 796-796.