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Freezing Innovation: How the Platform Competition and Opportunity Act Will Freeze Funds in the Tech Start-Up Market

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Freezing Innovation: How the Platform Competition and Opportunity Act Will Freeze Funds in the Tech Start-Up Market

Abstract

The rise of technological giants like Amazon, Apple, Google, and Facebook motivated the House Judiciary Committee to pass a slew of new antitrust legislation bills to curb these companies' considerable market power. The Platform Competition and Opportunity Act proposes to significantly cut a dominant online platform's ability to continue growing by deeming certain acquisitions presumptively unlawful. The Act shifts the burden to the acquiring company to prove the proposed transaction would not be anticompetitive by eliminating a potential competitor.

In an effort to protect competition, the Act has good intentions to protect start-up companies that are fearful of being acquired by big tech companies. However, severely limiting transactions in the tech industry could have significant ramifications for both the start-up companies and the consumers it seeks to protect. Venture capital firms play a crucial role in developing a start-up company by providing considerable capital at the onset. Part of the evaluation process for start-up companies involves valuing the exit opportunities, like acquisitions. Eliminating this option will decrease the value of start-up companies and cause a domino effect detrimental to innovative development. Venture capital firms will be even more selective in their investing, entrepreneurs will be hesitant to enter the market, and, with less ideas funded, innovation will freeze.

TABLE OF CONTENTS

I. INTRODUCTION 402

II. BACKGROUND: VENTURE CAPITALISTS’ ROLE IN THE RISE OF BIG TECH AND THE CLASH WITH ANTITRUST LAWS 404

 A. *The U.S. Created Antitrust Laws to Bust the Trusts: Are They Enough to Contain Big Tech?* 405

 B. *Platform Markets Need More Users and Acquisitions to Help Platform Operators Attract New Users with Improved Products.*..... 408

 1. Amazon Users Want More Options 411

 2. Google’s Growth Spurred by Acquisition..... 412

 3. The Social Network That Keeps Growing 413

 4. Apple’s Acquisitions 413

 C. *Start-Up Companies Need Money to Develop into Formidable Tech Competitors—Venture Capital Firms Provide a Critical Path to Funding* 414

III. CURRENT STATE OF THE LAW 418

 A. *Is the Current Antitrust Framework Too Lenient Against Big Tech Acquisitions?* 418

 B. *The Apprehensive Acquisitions the Agencies Think Are Anticompetitive.*..... 421

 1. Facebook Fuels Instagram and WhatsApp..... 421

 2. Amazon’s New Baby: Quidsi..... 422

 3. Apple Aggregating Artificial Intelligence (AI) Start-Ups.. 423

 4. Google’s “Double[click]” Up..... 424

IV. THE PLATFORM COMPETITION AND OPPORTUNITY ACT WILL MAKE BIG TECH ACQUISITIONS PRESUMPTIVELY ILLEGAL..... 425

 A. *What Is the Platform Competition and Opportunity Act?* 426

 B. *How Can the Act Affect Big Tech Acquisitions?* 427

 C. *Investing More Resources Will Neutralize Anticompetitive Mergers and Acquisitions and Save Innovation* 429

V. THE DOMINO EFFECT: VENTURE CAPITALISTS LEAVE THE MARKET, ENTREPRENEURS STOP STARTING BUSINESSES, AND INNOVATION DIES. 430

 A. *Start-Up Valuations Will Drop Dramatically, Leading to a Substantial Decrease in Venture Capitalists’ Investment Funding in the Start-Up Market.* 432

 B. *The Downstream Effects: Entrepreneurs Scared to Enter a*

	<i>Market Without Adequate Funding and an Inability to Sell Their Ideas.....</i>	436
C.	<i>Acquisitions Drive Growth: Making Big Tech Acquisitions Presumptively Illegal Will Tank Innovation and Hurt the Consumer.....</i>	438
VI.	CONCLUSION	441

I. INTRODUCTION

The war on Big Tech has culminated in a proposed bill, the Platform Competition and Opportunity Act (the Act), that will unwittingly harm the competitive markets it seeks to protect.¹ The rise of Big Tech companies like Amazon, Apple, Google, and Facebook has members across both aisles concerned that their collective market power “pose[s] a substantial threat to competition.”² For over a century, the courts have applied the same antitrust laws to markets; but now, Congress is calling for new legislation to hold the tech giants in check.³ The Platform Competition and Opportunity Act arms the government and private actors with the means to make acquisitions by large companies presumptively illegal.⁴ It hopes to freeze “killer acquisitions” and provide start-up companies with the breathing room necessary to compete in the technology platform sector.⁵ While the government has good intentions, it ought to tread carefully, or it may risk stifling innovation even more.⁶

Killer acquisitions⁷ allow dominant companies to suffocate nascent competitors by offering them large sums of money in exchange for their ideas.⁸ The Act would effectively neutralize Big Tech’s ability to knockout any credible threats to their market power by making covered platforms prove their

1. See Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021); Bettina Hein, *Lawmakers Plan to Tank the Startup Economy*, WALL ST. J. (Oct. 18, 2021, 6:47 PM), <https://www.wsj.com/articles/lawmakers-plan-to-tank-the-startup-economy-acquisition-antitrust-ipo-11634592207?page=1> (“In this way—ironically—the bill would likely deepen and widen the competitive moat protecting large incumbent companies from smaller, more innovative challengers.”).

2. See Ryan Tracy & Brent Kendall, *Antitrust Law: What Is It and Why Does Congress Want to Change It?*, WALL ST. J. (Mar. 12, 2021, 8:00 AM), <https://www.wsj.com/articles/antitrust-law-what-is-it-and-why-does-congress-want-to-change-it-11615554000>.

3. See *id.*

4. See H.R. 3826 (explaining the Bill’s rules and limitations against large acquisitions); *infra* Part IV (discussing how this bill will limit the legality of certain acquisitions).

5. See H.R. 3826. The Platform Competition and Opportunity Act was part of a package of six proposed bills that would target particularly large technology companies. Press Release, House Comm. on the Judiciary, Chairman Nadler Applauds Committee Passage of Bipartisan Tech Antitrust Legislation (June 24, 2021), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4622>.

6. See Hein, *supra* note 1.

7. Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2045 (2021) (“A killer acquisition occurs when a firm buys another firm in order to remove its productive assets from the market.”). Killer acquisitions do not produce efficiencies for merging companies, rather the purchasing firm pays a premium for the target business to maintain its market power. *Id.* at 2046.

8. See Amy C. Madl, *Killing Innovation? Antitrust Implications of Killer Acquisitions*, 38 YALE J. ON REG. BULL. 28, 31 (2020) (“[K]iller acquisitions buy competing technologies—and bury them.”).

mergers and acquisitions would not be anticompetitive.⁹ In theory, the Act opens the doorway for smaller companies to grow their platforms without pressure from investors to sell out in their early stages.¹⁰ Without the danger of competition, Big Tech wields the market power to charge higher prices to consumers because of the lack of acceptable alternatives.¹¹ Moreover, the lack of competition could stagnate growth because Big Tech companies do not have the same external pressure to continue innovating and producing higher quality products.¹² The fear of uprising companies stealing market share incentivizes incumbent firms to continue improving their own products to maintain their large market shares.¹³ In making acquisitions by covered platform companies illegal, the Act will produce some positive effects by forcing these companies to prove their acquisitions will not stifle their competition.¹⁴

Unfortunately, the Act “risks hurting the startups it aims to benefit.”¹⁵ The bleak reality is that mergers and acquisitions drive the economy, especially in the technology sector.¹⁶ While the Act will block acquisitions with

9. H.R. 3826 (noting the Act aims “[t]o promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.”).

10. See Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1, 36 (2021) (discussing how the “pressure of being obliged to have exited the investments by the end of the fund’s lifetime and the allocation of resources to new funds can lead to premature exits” (quoting Carolin Bock & Maximilian Schmidt, *Should I Stay, or Should I Go?—How Fund Dynamics Influence Venture Capital Exit Decisions*, 27 REV. FIN. ECON. 68, 68 (2015))).

11. See ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 32 (W. Acad., 3d ed. 2017) (discussing how firms with market power “would increase profits by reducing output and raising price”).

12. See *id.* (noting a lack of competition could lead to a “decrease in the resources devoted to pursuing innovation”).

13. See Martha C. White, *Momentum Is Building for Antitrust Reform. Here’s What That Means for Big Tech*, TIME (Nov. 12, 2021, 12:55 PM), <https://time.com/6116953/antitrust-reform-big-tech-congress-biden/> (explaining that competition incentivizes rival companies “to improve their products”).

14. Press Release, House Comm. on the Judiciary, Chairman Nadler Statement for the Markup of H.R. 3826, the Platform Competition and Opportunity Act of 2021 (Jun. 23, 2021), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4619> (noting Chairman Nadler believes the Act would “improve[] merger enforcement in the digital economy by shifting the burden of proof for transactions involving a dominant platform that are most likely to harm competition, eliminate consumer choice, and prevent new competition from entering the market”).

15. Hein, *supra* note 1.

16. See *U.S. Tech Companies Aren’t Monopolies*, BLOOMBERG (Nov. 24, 2021, 5:00 AM), <https://www.bloomberg.com/opinion/articles/2021-11-24/antitrust-bills-miss-the-point-big-tech-isn-t-a-monopoly> (“Mergers and acquisitions are typically a spur to efficiency, not a barrier, because they

insidious intentions, it will freeze far more deals that would facilitate growth for tech start-ups and the technology market as a whole.¹⁷

This Comment examines the potential pitfalls of the Act and how it could inadvertently harm technological growth.¹⁸ Part II discusses the history of antitrust and the rise of the leaders in the technology sector, including the critical role venture capitalists played in transforming start-ups into dominant forces in the market.¹⁹ Part III examines how the Agencies and courts presently handle mergers and acquisitions and delves into prominent acquisitions occurring under the current law, and Part IV analyzes the proposed Platform Competition and Opportunity Act.²⁰ Part V analyzes the mechanics of the proposed legislation and three potentially negative effects the Act will have on the market.²¹ Part VI concludes that the potential domino effect from passing the Act should caution lawmakers from passing legislation that could do more harm than good.²²

II. BACKGROUND: VENTURE CAPITALISTS' ROLE IN THE RISE OF BIG TECH AND THE CLASH WITH THE ANTITRUST LAWS

Antitrust laws serve “to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.”²³ Over time, the Federal Trade Commission (FTC) and Department of Justice Antitrust Division (DOJ) have enforced the laws in ever-changing markets, starting with the railroad monopolies and leading to the present Big Tech goliaths.²⁴ For over one hundred years, courts have applied the same laws to changing markets, but recent dominance in the technology sector has Congress, the Executive Branch, and governmental agencies—the DOJ and FTC (the Agencies)—

allow companies to create synergies, boost productivity, diversify risk, and gain economies of scale or scope.”).

17. *See id.* (“It would effectively ban big tech companies from making acquisitions, on the theory that this would stimulate competition and better serve consumers.”).

18. *See infra* Part IV.

19. *See infra* Part II.

20. *See infra* Parts III and IV.

21. *See infra* Part V.

22. *See infra* Part VI.

23. *See The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Jan. 25, 2022).

24. *See id.*

clamoring for new antitrust legislation to temper the growth of overpowering technology companies.²⁵ Companies like Apple, Google, Amazon, and Facebook are stalwarts in the technology sector who often acquire young start-up companies to bolster their existing products.²⁶ These four companies, like many others, did not become industry leaders overnight.²⁷ Venture capitalists helped them, and many other companies, realize their visions by providing money, guidance, and structure to their businesses.²⁸ Part A discusses the creation and development of the current antitrust laws and delves into why Congress and the Agencies have called for antitrust legislation reform.²⁹ Part B starts with a discussion of the intricacies of platform markets, which differ from traditional markets, and how platform companies amass considerable market power.³⁰ Part B then examines acquisitions by Apple, Google, Amazon, and Facebook from the past thirty years that the Act would seek to eliminate to maintain market competition.³¹

A. The U.S. Created the Antitrust Laws to Bust the Trusts: Are They Enough to Contain Big Tech?

In 1890, Congress enacted the Sherman Act to neutralize the anticompetitive behaviors of trusts—the first set of antitrust laws.³² Section 1 of the Sherman Act empowered the DOJ to bring suit against companies for two reasons: (1) restraining or conspiring to restrain trade, and (2) monopolizing

25. See Tracy & Kendall, *supra* note 2.

26. See *infra* Section III.B (discussing how these companies have integrated their acquisitions to continue to improve their products).

27. See *infra* Section II.C (discussing the rise of the Silicon Valley and the dynamic role venture capitalists played).

28. See *infra* Section II.C (discussing how venture capitalists invest more than money with the time and effort they give to each of their investments).

29. See *infra* Section II.A (discussing the rise of the Sherman Act, Clayton Act, and case law that has emerged over the hundred-year-long history of antitrust law in the United States).

30. See *infra* Section II.B (discussing how platform markets are two-sided markets which demands a different framework than traditional one-sided markets).

31. See *infra* Section II.B (examining acquisitions that have spurred growth for Apple, Google, Amazon, and Facebook).

32. GAVIL ET AL., *supra* note 11, at 102 (“The Sherman Act of 1890 was the first federal antitrust statute in the United States.”).

or attempting to monopolize.³³ The Sherman Act flexed its monopoly-breaking power when the Supreme Court split Standard Oil into thirty-four different companies because the combined companies' stock constituted an unlawful restraint of trade.³⁴ In 1914, Congress bolstered its antitrust legislation with the Clayton Act.³⁵ Under the Clayton Act, Congress may enjoin mergers that might substantially lessen competition or have a tendency to create a monopoly.³⁶ In addition, Congress created the Federal Trade Commission (FTC) in the same year to “prevent unfair methods of competition in commerce as part of the battle to ‘bust the trusts.’”³⁷

Nowadays, the Agencies have their eyes set on the technology sector.³⁸ The government and the Agencies seek to rein in the likes of Facebook, Google, Amazon, Apple, and Microsoft because these companies have

33. *Id.* (“The language has long been interpreted to mean that there are two elements to an offense under Section 1: (1) concerted action—a ‘contract, combination . . . or conspiracy,’ and (2) an anti-competitive effect—a ‘restraint of trade.’”); see also *The Enforcers*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Jan. 1, 2022) (“Both the FTC and the U.S. Department of Justice (DOJ) Antitrust Division enforce the federal antitrust laws. In some respects their authorities overlap, but in practice the two agencies complement each other. Over the years, the agencies have developed expertise in particular industries or markets.”).

34. *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911) (“[T]he main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.”).

35. See GAVIL ET AL., *supra* note 11, at 672. The Agencies commonly prosecute mergers under Section 7 of the Clayton Act (current version at 15 U.S.C. § 18). *Id.* However, the Agencies may also challenge mergers under the Sherman Act Sections 1 and 2 and under the unfair methods of competition provision of Section 5 of the FTC Act. *Id.*

36. *Id.* (“The distinguishing characteristic of the anti-merger prohibitions of the Clayton Act is its objection to mergers that ‘may *** substantially *** lessen competition’”). Mergers enhance market power for the combined firm and are the principal concern for antitrust laws. *Id.* at 675. When there is a greater concentration of market power in fewer firms, there is a greater likelihood firms coordinate their actions as a “cartel.” *Id.*

37. *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> (last visited Sept. 26, 2022); see also *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Jan. 1, 2022) (describing how the FTC Act combats similar activities that violate the Sherman Act and “also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act”).

38. See generally Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 976 (2019) (discussing the growing concerns of dominant digital platforms).

amassed too much market power.³⁹ Unlike the trusts of old, the Big Tech business model presents a unique challenge for antitrust legislation.⁴⁰ Where much of the old antitrust case law examined traditional markets, the tech giants operate two-sided platform markets.⁴¹

Members of both the White House and Congress have called for antitrust reform to help control Big Tech companies that they believe have grown too large under the current consumer welfare standard.⁴² In his first year, President Biden “tapped antitrust scholar and Big Tech critic Lina Khan to lead the FTC, putting a proponent of more robust antitrust regulation in charge of the agency.”⁴³ The major concern for the Big Tech sector is clear—“access to data on millions” gives the large companies an overwhelming advantage and ability to stifle nascent competitors.⁴⁴

39. See David McCabe & Jim Tankersley, *Biden Urges More Scrutiny of Big Businesses, Such as Tech Giants*, N.Y. TIMES (Sept. 16, 2021), <https://www.nytimes.com/2021/07/09/business/biden-big-business-executive-order.html> (“President Biden signed a sweeping executive order on Friday intended to increase competition within the nation’s economy and to limit corporate dominance . . .”); Diane Bartz, *Breaking Up Big Tech in Focus as New U.S. Antitrust Bills Introduced*, REUTERS, <https://www.reuters.com/technology/us-house-lawmakers-introduce-bipartisan-bills-target-big-tech-2021-06-11/> (June 11, 2021, 1:45 PM) (“A bipartisan group of lawmakers in the U.S. House of Representatives introduced four bills on Friday aimed at reining in the power of the tech giants, with one potentially leading to their break-up.”); see also *Market Capitalization of Largest Companies in S&P 500 Index as of April 22, 2022*, STATISTA, <https://www.statista.com/statistics/1181188/sandp500-largest-companies-market-cap/> (last visited Mar. 8, 2022) (displaying Apple, Microsoft, Alphabet (Google’s parent company), and Amazon, as four of the six largest companies by market capitalization).

40. Khan, *supra* note 38, at 984 (“The dominant digital platforms differ in important ways: They have different business models, different value chains, and different primary markets. But one critical feature they share is the dual role they play in select markets: as both an operator of a dominant platform that hosts third-party merchants, content creators, or app developers, and as a market participant that competes with those same producers.”).

41. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018) (citations omitted) (“Two-sided platforms differ from traditional markets in important ways. Most relevant here, two-sided platforms often exhibit what economists call ‘indirect network effects.’ Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate.”).

42. See Martha C. White, *Momentum Is Building for Antitrust Reform. Here’s What That Means for Big Tech*, TIME (Nov. 12, 2021, 12:55 PM), <https://time.com/6116953/antitrust-reform-big-tech-congress-biden/>. The consumer welfare standard refers to companies competing for “the same pool of customers . . . incentiviz[ing] them to improve their products and keep prices low, both of which benefit consumers.” *Id.*

43. *Id.* President Biden also called on Jonathan Kanter, an “anti-monopoly legal crusader,” as Assistant Attorney General for the Antitrust Division of the DOJ. *Id.*

44. *Id.*

To combat the anticompetitive threat, Congress proposed a slew of new bills that “would bulk up antitrust agencies.”⁴⁵ The potential reforms to antitrust law would “make it harder to acquire potential rivals and prevent platforms from selling or promoting their own products to disadvantage competitors.”⁴⁶ For instance, the Platform Competition and Opportunity Act places the burden on covered platform operators to prove by clear and convincing evidence that their potential acquisition is not anticompetitive.⁴⁷ The proposed bills carefully target the dominant tech companies, as lawmakers believe restraining their power will foster more innovation and competition.⁴⁸

B. Platform Markets Need More Users and Acquisitions to Help Platform Operators Attract New Users with Improved Products.

Platforms need to attract users by enhancing their product, which in turn helps them sell advertising spaces to businesses.⁴⁹ Traditionally, firms sell a selection of services or products to one set of consumers in a single-sided market.⁵⁰ When firms begin to sell distinct products or services to two or more distinct groups of consumers, a two-sided market develops.⁵¹ For example,

45. Cecilia Kang & David McCabe, *Antitrust Overhaul Passes Its First Tests. Now, the Hard Parts.*, N.Y. TIMES (June 29, 2021), <https://www.nytimes.com/2021/06/24/technology/antitrust-overhaul-congress.html>.

46. *Id.*

47. Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021); *see infra* Section IV.A (outlining what constitutes a covered platform and what is considered anticompetitive conduct).

48. *See* Michael W. Scarborough & M. Kevin Costello, *Senate Zeroes in on Big Tech with Latest Antitrust Reform Bill*, NAT'L L. REV. (Nov. 2, 2021), <https://www.natlawreview.com/article/senate-zeros-big-tech-latest-antitrust-reform-bill>.

49. *See, e.g.*, Megan Graham & Jennifer Elias, *How Google's \$150 Billion Advertising Business Works*, CNBC (Oct. 13, 2021, 12:52 PM), <https://www.cnbc.com/2021/05/18/how-does-google-make-money-advertising-business-breakdown-.html> (“Over the years, Google has built and acquired a slew of ad tech tools that enable content publishers to make money through advertising and let ad buyers seek out the kinds of people they would like to get in front of on Google Search, YouTube, Maps and on other websites across the internet.”).

50. *See* Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293, 295 (2014) (discussing how antitrust law designed the “small significant non-transitory increase in price test,” or SSNIP test, for traditional, single-sided markets, where “a single firm could sustainably raise prices or otherwise exercise market power”).

51. *See id.* (“[I]n a two-sided market a firm sells two different products or services to two different groups of consumers”); *see also* David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REGUL. 325, 325 (2003) (“Competition among platforms takes place in multi-sided markets in which seemingly distinct customer groups are connected through interdependent demand and a platform that, acting as an intermediary, internalizes the resulting indirect network

Facebook operates a social network platform where users can connect with other users.⁵² In addition, Facebook sells advertising spots to companies who want to advertise their products to Facebook's users.⁵³ Multi-sided markets need to serve both consumers to continue generating demand from each side.⁵⁴ These platform markets "increase [their] social surplus when three necessary conditions are met."⁵⁵ First, businesses with two or more distinct groups of customers compete in multi-sided markets.⁵⁶ Second, the platform connects the two sets of customers in a way benefitting both sides.⁵⁷ Third, the platform market emerges when the intermediary platform "is necessary to internalize the externalities created by one group for the other group."⁵⁸ Due to the nature of the "indirect network effects on the demand side and fixed costs of establishing platforms," few firms compete in multi-sided platform markets.⁵⁹

In a technological world led by Amazon, Google, Facebook, Apple, and Netflix, "digital platforms exert increasing control over key arteries of

externalities."); Hovenkamp, *supra* note 7, at 1969 ("[A] two-sided market is a platform that interacts between at least two groups of interdependent users and profits by determining both the optimal price and the optimal distribution of prices or benefits between the groups.").

52. See Michele R.J. Allinotte, *Finding Friends (and Clients) on Facebook*, 38 L. PRAC. 31, 31–32 (2012) (discussing Facebook as a platform to connect with friends and family as well as potential business clientele).

53. See Daniel A. Hanley, *A Topology of Multisided Digital Platforms*, 19.2 CONN. PUB. INT. L.J. 271, 307 n. 205 (2020) ("Facebook makes \$12 billion from digital advertising.").

54. Evans, *supra* note 51, at 336 ("Multi-sided markets differ from the traditional single-sided markets because platform businesses have to serve two or more of these distinct types of consumers . . .").

55. *Id.* at 331.

56. See *id.* at 328, 331–32 ("In some cases, these customers are immutably different entities—men and women; shopping mall retailers and customers; individuals who have debit cards, merchants who take debit cards; software developers and software users. In other cases, these customers are different only for the purpose of the transaction at hand—eBay users are sometimes buyers, sometimes sellers; mobile phone users are sometimes callers, sometimes receivers.").

57. See, e.g., Evans, *supra* note 51, at 332 ("A shopper benefits when she can shop at her favorite retail store at the mall next door; a retailer benefits from being in a location that attracts such shoppers. A cardholder benefits when a merchant takes his card for payment; a merchant benefits when a cardholder has a form of payment he accepts."). These "[i]ndirect network effects occur when the value obtained by one kind of customer increases with measures of the other kind of customer." *Id.*

58. *Id.*

59. *Id.* at 354 ("The benefits of demand and cost-side scale economies are often limited . . . by the existence of heterogenous customers on one side of the market. As a result, we see few firms in each market, but also few monopolies.").

American commerce and communications.”⁶⁰ As these dominant platforms amass size, and subsequently market power, antitrust regulators worry their dominance will hamstring further technological growth and substantially raise barriers to enter their platform markets.⁶¹ Their access to more and more users equips these companies with data, the equivalent to gold in the digital platform arena.⁶² For platform operators, increasing the number of users is critical to sustain their business because users want to connect with other users, and advertisers want to reach as many consumers as possible.⁶³ Section II.B.1 discusses why Amazon attracts a wide range of consumers and how it continues to evolve and meet consumers’ growing needs.⁶⁴ Section II.B.2 examines important acquisitions that allowed Google to grow into the world’s leading search engine.⁶⁵ Section II.B.3 comments on Facebook’s successful integration of acquired companies, Instagram and WhatsApp, and its growing success in the social media platform industry.⁶⁶ Lastly, Section II.B.4 looks at Apple’s history of acquisitions and their key role in Apple’s industry-leading products.⁶⁷

60. Khan, *supra* note 38, at 976 (“[T]hese firms function as gatekeepers for billions of dollars in economic activity.”).

61. *Id.* at 976–77 (“One feature dominant digital platforms share is that they have integrated across business lines such that they both operate a platform and market their own goods and services on it. This structure places dominant platforms in direct competition with some of the businesses that depend on them, creating a conflict of interest that platforms can exploit to further entrench their dominance, thwart competition, and stifle innovation.”).

62. Peter Coy, *Facebook and Others Should Pay Us for Our Data. Here’s One Way.*, BLOOMBERG (May 5, 2021, 4:24 AM), <https://www.bloomberg.com/news/articles/2021-05-05/facebook-and-others-should-pay-us-for-our-data-here-s-one-way> (“Customer data becomes valuable when billions of bits of it are aggregated and analyzed.”).

63. *See infra* Section II.B.3 (discussing Facebook’s success in relation to their acquisitions of WhatsApp and Instagram, which allowed for more users to connect with one another and attracted new users and third-party advertisers).

64. *See infra* Section II.B.1 (discussing how Amazon leverages its data and resources to continue expanding its business).

65. *See infra* Section II.B.2 (discussing Google’s acquisition of DoubleClick and YouTube).

66. *See infra* Section II.B.3 (examining how Facebook helped Instagram and WhatsApp develop).

67. *See infra* Section II.B.4 (discussing key acquisitions, like “Siri,” that helped Apple develop new technologies).

1. Amazon Users Want More Options

Consumers love Amazon because it is a one-stop shopping market.⁶⁸ Amazon's rise to dominance started with its online marketplace, which supplied the company the leverage to evolve and provide a variety of other services.⁶⁹ Amazon leveraged the data collected through its online marketplace to continuously adapt the platform to the needs of its customers and to enter the market as a seller of its own products.⁷⁰ Several years ago, Amazon entered the voice computing market, via Alexa, where the company "serves as a primary platform and competes with platform services."⁷¹ To continue cultivating Alexa's ecosystem, "Amazon launched [a] \$100 million Alexa Fund"—the only issues were that Amazon actively competed with the developers and used the fund to attract new ideas to copy.⁷² Similar to its online marketplace, Amazon seeks to consistently improve its Alexa product by adding more functions, thus offering users a higher-quality product.⁷³ To spur innovation, Amazon has invested a considerable amount of money in start-ups' ideas.⁷⁴

68. See Kiri Masters, *89% of Consumers Are More Likely to Buy Products from Amazon Than Other E-Commerce Sites: Study*, FORBES (Mar. 20, 2019, 10:20 AM), <https://www.forbes.com/sites/kirimasters/2019/03/20/study-89-of-consumers-are-more-likely-to-buy-products-from-amazon-than-other-e-commerce-sites/?sh=787b1534af1e>.

69. Khan, *supra* note 38, at 985 (discussing how Amazon started purchasing goods at wholesale prices but pivoted to "Amazon Marketplace, an open platform on which other merchants could list their products to sell directly to consumers"). The shift to an open platform exponentially expanded Amazon's product selection, offered greater benefits to its consumers, and helped establish Amazon as "the dominant online marketplace in the United States." *Id.*

70. *Id.* at 992–93 ("While even large brick-and-mortar stores can track consumer purchase histories and brand sales, the information Amazon harvests is far more sophisticated and precise.").

71. *Id.* at 994 ("Amazon jump-started the voice assistant market in 2015 when it publicly rolled out the Echo, its smart speaker, embedded with Alexa, the artificial intelligence software that serves as a voice assistant.").

72. *Id.* at 995 ("While startups backed by the Alexa Fund sometimes get unique access to Amazon, some investors advise businesses 'to be wary of accepting Amazon's investment, because of the risk of Amazon copying ideas.'" (quoting Patience Haggin, *Startups Weigh Pros, Cons of Alexa Fund*, WALL ST. J. (Aug. 28, 2017, 7:30 AM), <https://www.wsj.com/articles/startups-weigh-pros-cons-of-alexa-fund-1503919800>).

73. See Jon Porter, *Amazon's Latest Echo Show Update Adds More Live Video News Providers*, THE VERGE (Jan. 7, 2022, 5:01 AM), <https://www.theverge.com/2022/1/7/22871785/amazon-echo-show-update-people-tv-et-live-bloomberg-tv-plus-visual-id-navigation-eta-sharing>.

74. See Haggin, *supra* note 72.

2. Google's Growth Spurred by Acquisition

Only twenty years ago, Google received a meager \$100,000 investment that sparked its journey to becoming the preeminent internet search engine in the United States.⁷⁵ Similar to Amazon, Google utilizes its users' search data to sell targeted advertisements to its business consumers.⁷⁶ As Google became increasingly popular, more angel investors⁷⁷ poured money into the company before the likes of Sequoia Capital and Kleiner Perkins invested \$25 million in 1999.⁷⁸ Google went public in 2004, and it expended considerable money for the next five years to acquire companies that would help establish it as a force in the internet search engine business and allow it to deliver high-quality services to its consumers.⁷⁹ Acquiring YouTube simultaneously helped Google develop an online video trafficking presence its users craved and gave YouTube, a young start-up, the ability to grow through Google's wealth of resources and the expertise of such an established corporation.⁸⁰ On the advertising side, acquiring DoubleClick maximized the efficiency of Google's display advertisements.⁸¹ In order for Google to provide a state-of-the-art search engine, the company needed to acquire innovative ideas that would

75. *Worldwide Desktop Market Share of Leading Search Engines From January 2010 to July 2022*, STATISTA <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/> (last visited July 27, 2022) ("Google has dominated the search engine market, maintaining a 92.47 percent market share as of June 2021.").

76. See Ben Popken, *Google Sells the Future, Powered by Your Personal Data*, NBC NEWS (May 10, 2018, 1:30 AM) <https://www.nbcnews.com/tech/tech-news/google-sells-future-powered-your-personal-data-n870501> (highlighting Google's controversial practice of using consumers' search data to create customized advertising). In 2020, advertising revenue (~\$147 billion) represented 80.4% of Google's parent company, Alphabet's, total revenue (~\$183 billion). See Alphabet Inc., Annual Report (Form 10-K) 33 (Feb. 2, 2021).

77. See Brian O'Connell & Benjamin Curry, *What Are Angel Investors?*, FORBES, <https://www.forbes.com/advisor/investing/what-are-angel-investors/> (July 9, 2022, 5:19 AM) ("Angel investors are individuals who offer promising startup companies funding in exchange for a piece of the business, usually in the form of equity or royalties.").

78. *Google Turns 20: How an Internet Search Engine Reshaped the World*, THE VERGE, <https://www.theverge.com/2018/9/5/17823490/google-20th-birthday-anniversary-history-milestones> (Sept. 27, 2018, 5:52 AM).

79. Catherine Gray, *How Google Became the World's Most Popular Search Engine*, TECH. MAG. (Sept. 27, 2018), <https://technologymagazine.com/digital-transformation/how-google-became-worlds-most-popular-search-engine>.

80. *Id.* ("In this mutually beneficial deal, YouTube gained access to all of Google's resources. Proving itself to be an incredibly successful acquisition, YouTube which was only just a year old at the time, is now a cornerstone of modern culture creating the careers of many content creators.").

81. *Id.* ("Google acquired DoubleClick for \$3.1 billion in 2007 to gain access to its specialised ad technology which allowed the company to further expand its pervasive ad empire across the web.").

help transcend its existing services.⁸²

3. The Social Network That Keeps Growing

Over the seventeen years since Mark Zuckerberg founded Facebook, the social media network has amassed approximately 2.89 billion monthly active users, making it the largest social media network in the world.⁸³ Facebook's acquisitions of other social media apps have allowed it to grow its network into an ecosystem⁸⁴ Acquiring apps like WhatsApp and Instagram allowed Facebook to connect more users with one another, attracting new users and third-party advertisers.⁸⁵ Facebook seamlessly integrated the two companies with its own while also providing endless resources that enabled the companies to grow on their own too.⁸⁶ Facebook needed Instagram and WhatsApp to continue to innovate for its users, and Instagram and WhatsApp needed Facebook's capital and expertise to allow their products to mature and become profitable.⁸⁷

4. Apple's Acquisitions

Apple, the premier provider of mobile devices and operating systems in the United States, became the first publicly traded corporation to reach \$1

82. *Id.*

83. *Number of Monthly Active Facebook Users Worldwide as of 2nd Quarter 2022*, STATISTA, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (last updated Aug. 22, 2022).

84. See Ben Sperry, *Killer Acquisition or Successful Integration: The Case of the Facebook/Instagram Merger*, THE HILL (Oct. 8, 2020, 2:00 PM), <https://thehill.com/blogs/congress-blog/politics/520211-killer-acquisition-or-successful-integration-the-case-of-the->

85. See, e.g., *id.* ("Facebook is rolling out functionality that allows users of Facebook Messenger and Instagram's direct messaging service to message each other across apps.")

86. See Gabrielle Canon, *Facebook Faces Antitrust Allegations over Deals for Instagram and WhatsApp*, THE GUARDIAN (Dec. 8, 2020, 2:12 PM), <https://www.theguardian.com/technology/2020/dec/08/facebook-antitrust-lawsuits-instagram-whatsapp> (discussing Facebook's acquisitions of Instagram and WhatsApp, noting that "Facebook executives have also argued that their company has helped the apps grow").

87. See *id.* (asserting that WhatsApp and Instagram were not as popular or profitable until Facebook acquired them and suggesting that Facebook needed to acquire the companies in order to remain relevant in the social media market).

trillion, \$2 trillion, and \$3 trillion valuations.⁸⁸ Yet its rise to prominence did not happen without key acquisitions spurring its innovation and growth.⁸⁹ In 2010, Apple acquired SRI International Research Lab, better known to consumers as “Siri,” which allowed it to equip its smartphones with voice-assistant technology.⁹⁰ In the past five years, Apple continued to acquire new technologies, allowing it to consistently deliver high-quality, cutting-edge products to its customers year after year.⁹¹ Because of its continued success in the technology market, Apple’s balance sheet is flush with cash, and the company invests in young start-up companies in hopes of facilitating the development of its products while supplementing its existing lines.⁹²

C. *Start-Up Companies Need Money to Develop into Formidable Tech Competitors—Venture Capital Firms Provide a Critical Path to Funding.*

Start-up companies require considerable funding if they hope to compete against the likes of Apple, Google, and Facebook.⁹³ Apple, Google, and Facebook transformed Silicon Valley into the technology center of the world.⁹⁴

88. Jack Nicas, *Apple Becomes First Company to Hit \$3 Trillion Market Value*, N.Y. TIMES (Jan. 3, 2022) <https://www.nytimes.com/2022/01/03/technology/apple-3-trillion-market-value.html> (“Apple’s value is even more remarkable considering how rapid its recent ascent has been. In August 2018, Apple became the first American company ever to be worth \$1 trillion, an achievement that took 42 years. It surged past \$2 trillion two years later. Its next trillion took just 16 months and 15 days.”).

89. See Timothy B. Lee, *How Apple Became the World’s Most Valuable Company*, VOX, <https://www.vox.com/2014/11/17/18076360/apple> (Sep. 9, 2015, 10:17 PM) (discussing the turbulent beginning of Apple Inc. and how it almost went bankrupt in 1997).

90. See Erick Schonfeld, *Silicon Valley Buzz: Apple Paid More Than \$200 Million for Siri to Get into Mobile Search*, TECHCRUNCH (Apr. 28, 2010, 3:30 PM), <https://techcrunch.com/2010/04/28/apple-siri-200-million/>.

91. See Mike Peterson, *Apple Was Leading Buyer of AI Companies Between 2016 and 2020*, APPLEINSIDER (Mar. 25, 2021), <https://appleinsider.com/articles/21/03/25/apple-was-leading-buyer-of-ai-companies-between-2016-and-2020>.

92. See Madhukumar Warriar, *Apple Acquired the Highest Number of AI Startups in Last 5 Years*, YAHOO! (Mar. 26, 2021), https://www.yahoo.com/now/apple-acquired-highest-number-ai-072416018.html?soc_src=social-sh&soc_trk=ma.

93. See Abdo Riani, *The Importance of Money in the Different Startup Stages*, FORBES (May 17, 2021, 6:05 PM), <https://www.forbes.com/sites/abdoriani/2021/05/17/the-importance-of-money-in-the-different-startup-stages/?sh=76b6d2a57fc1>.

94. Rowan Moore, *The Billion-Dollar Palaces of Apple, Facebook, and Google*, THE GUARDIAN (July 23, 2017, 4:00 AM), <https://www.theguardian.com/artanddesign/2017/jul/23/inside-billion-dollar-palaces-of-tech-giants-facebook-apple-google-london-california-wealth-power> (discussing Tech Giant companies’ headquarters in Silicon Valley).

Working behind the scenes, venture capitalists on Sand Hill Road⁹⁵ played a vital role in the development of technology through their capital investments.⁹⁶ While financial institutions were wary to invest substantial money in high-risk companies without an established, profitable track record, venture capitalists viewed the start-up market as an opportunity to yield high returns.⁹⁷ Venture capitalists are vital to innovation because, in many ways, their involvement accelerates a company's progression from a nascent start-up to a competitive threat.⁹⁸ Though the influx of capital draws major headlines, venture capitalists also play a pivotal role by providing "managerial and technical expertise for emerging companies."⁹⁹

Unlike financial institutions that disburse loans to businesses, venture capitalists mainly invest in start-ups through equity stakes.¹⁰⁰ To obtain a loan, banks often look at the start-up company's purpose for the loan, business plan, credit score, available collateral (which can help subsidize a lower credit score), and financials (cash flows, income statements, and balance sheets).¹⁰¹ While banks offer fixed interest rates, these financial institutions scrutinize start-ups' eligibility for their loans; alternatively, start-ups could seek funding

95. See Davey Alba, *How Sand Hill Road Became the Main Street of Venture Capital*, WIRED (Oct. 24, 2017, 8:00 AM), <https://www.wired.com/story/how-sand-hill-road-became-the-main-street-of-venture-capital/> ("Like Hollywood, Sand Hill Road is a metonym for an industry based on dreams: VCs gathered in low-slung office buildings funding startups that aim to change the world (sometimes they even succeed).").

96. Bushra Samimi, *The Antitrust Impact of Venture Capital Firms on Concentration in the Technology Sector*, 11 HASTINGS SCI. & TECH. L.J. 155, 157 (2020) ("The evolution of the technology sector began in the Silicon Valley in the 1970s . . . and was accompanied by the development of a new type of financing provided by a new type of institutional investor: venture capitalists. Venture capital funding significantly contributed to funding and building Apple, eBay, Yahoo, Google, and Facebook." (footnote omitted)).

97. Samimi, *supra* note 96, at 158; see *Venture Capital Definition & Legal Meaning*, THE L. DICTIONARY, <https://thelawdictionary.org/venture-capital/> (defining venture capital as "[f]unds invested in new high risk opportunities.").

98. Samimi, *supra* note 96, at 158 ("VCs have become a fundamental part of the startup ecosystem and a major source for startups to raise capital. VC funding is more widely available than other funding like private equity or bank loans which is crucial to startups attempting to begin or grow their businesses.").

99. *Id.*

100. Mike Sullivan & Richard D. Harroch, *A Guide to Venture Capital Financings for Startups*, FORBES (Mar. 29, 2018, 11:00 AM), <https://www.forbes.com/sites/allbusiness/2018/03/29/a-guide-to-venture-capital-financings-for-startups/?sh=26c98c8151c9> (discussing the various forms venture capitalists use to invest in start-ups).

101. Andrew Martins, *How to Get a Bank Loan for Your Small Business*, BUS. NEWS DAILY, <https://www.businessnewsdaily.com/15750-get-business-loan-from-bank.html> (Aug. 30, 2022).

from less-stringent, direct online lenders, but the interest rates can skyrocket and cripple a start-up that cannot turn a profit quickly.¹⁰² In contrast, venture capitalist funding offers money in exchange for equity in the company.¹⁰³ The upside for this type of funding is that the start-up will not have to make scheduled interest and principal payments on its loans; further, it will receive a wealth of knowledge from its venture capital backer.¹⁰⁴ The flipside is that, as partial owners of the business, venture capitalists can exercise control over the company's direction to the extent of their equity percentage.¹⁰⁵ Not only will the venture capitalists have a seat in the board meetings, but the start-up will also have to share its profits with its backer as opposed to paying off a fixed loan amount while retaining full control and profit.¹⁰⁶

Where bank loans have a finite life, ending when the company repays its principal amount plus interest, venture capitalists are often involved throughout the life of the company—or at least until they sell their equity.¹⁰⁷ Commonly, start-up companies will have multiple rounds of investment.¹⁰⁸ Cooked into their initial funding agreement, venture capitalists often have the option of preferential treatment in the following investment stages.¹⁰⁹ Venture capitalists want this ability to maintain their share of the company both to

102. See Anna Baluch, *How Do Small Business Loans Work?*, EXPERIAN (Aug. 25, 2019), <https://www.experian.com/blogs/ask-experian/how-do-small-business-loans-work/>; see also Lemley & McCreary, *supra* note 10, at 15 (describing banks and public markets as “conservative institutions—happy to give money, but only to safe bets. . . . [s]o banks won’t lend to [start-ups] except at implausibly high interest rates”).

103. See Sullivan & Harroch, *supra* note 100. Although equity stakes are the most common form of venture capital funding, there are alternative mechanisms VCs will use to contribute capital—preferred stock and convertible bonds. *Id.*

104. Samimi, *supra* note 96, at 157–58.

105. See *id.* at 158 (“VCs cultivate incredible influence over a startup through ownership and board representation.”).

106. See *id.* at 158–59 (“The cash flow rights of preferred stock incentivize VCs to concentrate more on liquidation in the short term rather than the sustainability of the company in the long run.”).

107. See e.g., Bob Zider, *How Venture Capital Works*, HARV. BUS. REV. (Nov.–Dec. 1998), <https://hbr.org/1998/11/how-venture-capital-works> (“In a typical start-up deal, for example, the venture capital fund will invest \$3 million in exchange for a 40% preferred-equity ownership position . . .”).

108. See Samimi, *supra* note 96, at 159 (“The future of the startups depends upon the VC’s decision to either continue to fund the project, and in the process gain more power in the company, or to abandon the startup altogether.”).

109. See Zider, *supra* note 107 (“[T]he deal often includes blocking rights or disproportional voting rights over key decisions, including the sale of the company or the timing of an IPO. The contract is also likely to contain downside protection in the form of antidilution clauses, or *ratchets*. Such clauses protect against equity dilution if subsequent rounds of financing at lower values take place.”).

protect their interest in the company and to continue to exert influence on the company's direction.¹¹⁰ Ultimately, venture capital funding is an optimal route for start-ups that lack the financial ability to obtain traditional lending or the business acumen necessary to establish a framework to thrive.¹¹¹ However, the road to venture capital funding can also be tough to navigate—one that will only get tougher with the passing of the Platform Competition and Opportunity Act.¹¹²

When venture capitalists invest in a start-up, there are three exit opportunities: initial public offering (IPO), acquisition, and dissolution.¹¹³ Before choosing to invest in a start-up company, venture capitalists assess “the portfolio of the entrepreneur, size of the market opportunity, traction, progress towards a minimally viable product, capital efficiency, and whether the company is hot.”¹¹⁴ These factors determine the ultimate pre-money valuation—the value of the company—before the venture capitalist invests its money.¹¹⁵ Venture capitalists “can cash out their equity: by selling it to the public through an IPO or by selling it to another firm.”¹¹⁶ With IPOs becoming less

110. See Samimi, *supra* note 96, at 159 (“VCs attempt to gain a foothold in startup boards in order to control key strategic decisions and dictate the future of the company.”).

111. See Zider, *supra* note 107 (“Entrepreneurs—and their friends and families—usually lack the funds to finance the opportunity. Many entrepreneurs also recognize the risks in starting their own businesses, so they shy away from using their own money. Some also recognize that they do not possess all the talent and skills required to grow and run a successful business.”).

112. Paul Gompers et al., *How Venture Capitalists Make Decisions*, HARV. BUS. REV. (Mar.–Apr. 2021), <https://hbr.org/2021/03/how-venture-capitalists-make-decisions> (“Even for entrepreneurs who do gain access to a VC, the odds of securing funding are exceedingly low. Our survey found that for each deal a VC firm eventually closes, the firm considers, on average, 101 opportunities. Twenty-eight of those opportunities will lead to a meeting with management; 10 will be reviewed at a partner meeting; 4.8 will proceed to due diligence; 1.7 will move on to the negotiation of a term sheet with the start-up; and only one will actually be funded. A typical deal takes 83 days to close, and firms reported spending an average of 118 hours on due diligence during that period, making calls to an average of 10 references.”).

113. See Samimi, *supra* note 96, at 158 (“With the weakening of the IPO market, and dissolution truly an unsavory and unviable option, mergers have become the preferred liquidation event.”).

114. *Id.* at 160.

115. Sullivan & Harroch, *supra* note 100 (“For example, if the investors plan to invest \$5 million in a financing where the pre-money valuation is agreed to be \$15 million, that means that the ‘post-money’ valuation will be \$20 million, and the investors expect to obtain 5/20, or 25%, of the company at the closing of the financing.”).

116. Lemley & McCreary, *supra* note 10, at 16 (“[T]here are other choices: the VC could sell her interests in the venture capital fund itself (‘secondaries’), sell her shares in the company to other financiers (‘secondary sales’), prompt the company to sell off assets to others (‘liquidation’), take

frequent¹¹⁷ and costly to start-ups, “[o]ver the last ten years, more than 50% of the deal value of each year’s top ten acquisitions has been generated by dominant firms acquiring horizontal competitors—an amount so large that it reflects over 40% of all reported VC-backed acquisition value across those years.”¹¹⁸ The trend reflects the reality of venture capital funding—venture capitalists prefer “startups to be acquired rather than go public and stay in the market.”¹¹⁹

III. CURRENT STATE OF THE LAW

A. *Is the Current Antitrust Framework Too Lenient Against Big Tech Acquisitions?*

Mergers and acquisitions typically fall under three categories—horizontal, vertical, and conglomerate.¹²⁰ Because the Act specifically targets acquisitions of nascent and potential competitors, this Comment will analyze horizontal mergers, and this Section will look at the development of horizontal mergers in antitrust law.¹²¹ For horizontal mergers,¹²² the Agencies utilize the Horizontal Merger Guidelines (HMG or the Guidelines) to determine which

dividends or a share of the profits of a going concern, or write off the investment. But these options face practical concerns and are often considered signs of failure.” (footnote omitted). An IPO is “the gold standard,” but has recently been less frequent despite increased VC-backing. *Id.* at 17.

117. See Paul Rose & Steven Davidoff Solomon, *Where Have All the IPOs Gone? The Hard Life of the Small IPO*, 6 HARV. BUS. L. REV. 83, 84 (2016) (discussing different theories for a dramatic drop in small-company IPOs). The regulatory theory offers federal regulatory choices, such as the Sarbanes-Oxley Act of 2002, as reasons why IPOs have dropped substantially. *Id.* Similarly, there is a theory that “heightened regulatory enforcement via public and private litigation has stunted the small IPO market.” *Id.* Then, there is the market theory arguing there are too many economic barriers, and the economic scope theory stating the landscape of our current economic market provides little for small IPOs. *Id.*

118. Lemley & McCreary, *supra* note 10, at 18–19.

119. See *id.* at 26 (“VCs sometimes profit most by selling the firms they fund to incumbents, even or especially if the firms in which they invest threaten the incumbents’ markets.”).

120. GAVILET AL., *supra* note 11, at 671 (noting horizontal mergers “involve sellers of substitutes,” vertical mergers “involve firms and their suppliers, customers, or other sellers of complements,” and conglomerate mergers “involve firms that sell neither substitutes nor complements”).

121. See Section III.A; see also Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021).

122. Marleina Paz, *Almost But Not Quite Perfect: The Past, Present, and Potential Future of Horizontal Merger Enforcement*, 45 LOY. L.A. L. REV. 1045, 1054 (2012) (noting a horizontal merger occurs when the parties involved are “competitors in a single industry and region that have decided to become one company”).

mergers to prosecute.¹²³ The Guidelines highlight key areas the Agencies examine, which include market definition, market participants, market shares, market concentration, unilateral and coordinated effects, powerful buyers, entry, and efficiencies.¹²⁴ Market definition encompasses both the product and geographic markets, and while “not an end in itself . . . [it] is useful to the extent it illuminates the merger’s likely competitive effects.”¹²⁵ Defining the market helps identify the market participants, market shares, and market concentration, often indicating potentially anticompetitive effects.¹²⁶ In analyzing market concentration, the Agencies calculate the Herfindahl-Hirschman Index (HHI), a good litmus test that often helps the government establish a *prima facie* case.¹²⁷ To bolster its case, the government will also highlight potentially unilateral and/or coordinated effects the merger might create.¹²⁸ Ease of entry, sophisticated buyers, and merger-specific efficiencies, on the other hand, may dissuade the Agencies from prosecutorial action.¹²⁹ The

123. U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 1 (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf> [hereinafter *DOJ & FTC Merger Guidelines*] (“These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the ‘Agencies’) with respect to mergers and acquisitions involving actual or potential competitors . . .”).

124. *Id.* Identifying market participants and market shares is critical to calculating market concentration which can be a key indicator of potential unilateral and coordinated effects. *Id.*; see GAVIL ET AL., *supra* note 11, at 728. Market participants include all firms that compete in the defined market and with an accurate depiction of all participants, market share can be ascertained. *Id.* With few firms, there is a high market concentration, which could “lead to harmful monopolistic activity or collusion in the form of oligopolistic behavior.” Paz, *supra* note 122, at 1054.

125. DOJ & FTC Merger Guidelines, *supra* note 123, at 7. Market definition, although not necessary, helps define the scope of the potential competitive effects. See GAVIL ET AL., *supra* note 11, at 727.

126. See DOJ & FTC Merger Guidelines, *supra* note 123, at 15. (“The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.”).

127. Compare GAVIL ET AL., *supra* note 11, at 766 (analyzing market concentration solely on the number and relative size of the firms in the market), with *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990) (noting if there are better ways to estimate market power, the court should use them).

128. See DOJ & FTC Merger Guidelines, *supra* note 123, at 20, 24. Unilateral effects commonly occur “in a merger to monopoly in a relevant market, but are by no means limited to that case.” *Id.* at 20. Coordinated effects “involve[] conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others.” *Id.* at 24.

129. See *id.* at 28. Entry “will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern.” *Id.* Powerful buyers have the ability to resist merging parties’ intent to raise prices. *Id.* The Agencies consider efficiencies only to the extent they outweigh anticompetitive effects. *Id.*

Guidelines provide the framework for the Agencies but do not bind court decisions.¹³⁰

In 1990, *Baker Hughes* established a burden-shifting framework to analyze horizontal mergers.¹³¹ The plaintiff (government or private party) must present a prima facie “showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area . . . [that] will substantially lessen competition.”¹³² The HHI helps estimate market concentration but “cannot guarantee litigation victories.”¹³³ Once the government establishes its prima facie case, the burden of producing contrary evidence to rebut the presumption shifts to the defendant.¹³⁴ The defendant “must show that the prima facie case inaccurately predicts the relevant transaction’s probable effect on future competition.”¹³⁵ The defendant can rebut either “by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government’s favor.”¹³⁶ During the rebuttal phase, the defendant can also offer cognizable, merger-specific efficiencies.¹³⁷ If the defendant is successful, the burden shifts back to the government, who must produce additional evidence and bears the ultimate burden of persuasion.¹³⁸

Modernly, dominant firms can acquire innovative start-ups and give them the resources and capital to thrive, while adding value to their own business and consumers.¹³⁹ With the rise of Facebook, Amazon, Google, and Apple, “[t]he government is upping its scrutiny of Big Tech.”¹⁴⁰ Currently, through

130. See GAVIL ET AL., *supra* note 11, at 719 (noting the Guidelines “bind the agencies but not the courts”).

131. See *Baker Hughes, Inc.*, 908 F.2d at 991–92.

132. *Id.* at 982.

133. *Id.* at 992.

134. *Id.* at 982.

135. *Id.* at 991.

136. *Id.*; see also *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 500–01 (1974) (finding the government inaccurately calculated market share statistics because the government focused on mining production even though General Dynamic’s ability to compete rested on uncontracted reserves).

137. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001).

138. See *Baker Hughes, Inc.*, 908 F.2d at 983.

139. See e.g., Kevin A. Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrust Policy*, 87 U. CHI. L. REV. 331, 331 (2018) (“Well-known examples include acquisitions of WhatsApp and Instagram by Facebook; Waze and DoubleClick by Google; and GitHub and LinkedIn by Microsoft.”).

140. See Toria Rainey, *Is Breaking Up Amazon, Facebook, and Google a Good Idea?*, BU TODAY (Oct. 7, 2019), <https://www.bu.edu/articles/2019/break-up-big-tech/>; see also McCabe & Tankersley,

the Clayton Act, Sherman Act, and FTC Act, the Agencies maintain prosecutorial discretion for any merger or acquisition they believe would result in anticompetitive behavior.¹⁴¹

B. The Apprehensive Acquisitions the Agencies Think Are Anticompetitive.

1. Facebook Fuels Instagram and WhatsApp

Without Facebook’s guidance, would Instagram have reached the vaunted two billion monthly active-user milestone?¹⁴² In 2012, when Facebook acquired Instagram, the young social media app had a far smaller user base and zero profit.¹⁴³ Many saw Facebook as luring a nascent competitor into the fold merely to “maintain its dominance in social networking.”¹⁴⁴ Despite clearing initial agency review, nearly a decade later, the FTC sued Facebook, alleging that the company “targeted potential competitive threats to its dominance . . . [and] Facebook executives, including CEO Mark Zuckerberg, quickly recognized that Instagram was a vibrant and innovative personal social network and an existential threat to Facebook’s monopoly power.”¹⁴⁵ The suit initially failed, but the FTC continues to build its case against Facebook.¹⁴⁶

supra note 39 (“Lina Khan, the F.T.C. chair, and Richard A. Powers, who is serving as the acting assistant attorney general for antitrust, said that their agencies would review the current guidelines ‘with the goal of updating them to reflect a rigorous’ approach toward mergers.”). Specifically, the government seems ready to take aim at mergers involving big tech companies acquiring nascent competitors. *Id.*

141. Clayton Act of 1914 § 7, 15 U.S.C. §§ 12–27 (2002); Sherman Antitrust Act of 1890 §§ 1, 2, 15 U.S.C. §§ 1–38 (2004); Fed. Trade Comm’n Act, 15 U.S.C. §§ 41–58 (2012); *see also* FED. TRADE COMM’N, *supra* note 33 (“Before opening an investigation, the agencies consult with one another to avoid duplicating efforts.”).

142. Salvador Rodriguez, *Instagram Surpasses 2 Billion Monthly Users While Powering Through a Year of Turmoil*, CNBC (Dec. 14, 2021, 1:28 PM), <https://www.cnbc.com/2021/12/14/instagram-surpasses-2-billion-monthly-users.html>.

143. *See* Sperry, *supra* note 84.

144. *Id.*

145. Press Release, Fed. Trade Comm’n, *FTC Sues Facebook for Illegal Monopolization* (Dec. 9, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

146. Shannon Bond, *Facebook Asks Court to Toss FTC Lawsuit Over Its Buys of Instagram and WhatsApp*, NPR (Oct. 4, 2021, 1:52 PM), <https://www.npr.org/2021/10/04/1043093307/facebook-asks-dismiss-ftc-complaint-instagram-whatsapp>. The FTC argued that “Facebook holds monopoly

The current law allows the government to unwind unlawful, anticompetitive acquisitions if the government can offer a prima facie case.¹⁴⁷ The government initially failed in its suit against Facebook because it did not convince the court that Facebook maintained a monopoly position in the market.¹⁴⁸ Two years after acquiring Instagram, Facebook spent \$19 billion to add WhatsApp to its team.¹⁴⁹ WhatsApp “offered a reliable and affordable cross-platform technology for text, voice, image, and video sharing in one-to-one or group contexts that worked across national borders complete with end-to-end encryption.”¹⁵⁰ Facebook and WhatsApp represented two of the leading messaging-app services with 200 and 450 million users, respectively, at the time of the merger.¹⁵¹ The move resulted in Facebook claiming “ownership of the world’s top two messaging companies in terms of market share by user numbers.”¹⁵² Like the Instagram acquisition, the FTC green-lit the merger, only reminding the companies of WhatsApp’s still-existing privacy agreements.¹⁵³

2. Amazon’s New Baby: Quidsi

In 2009, Amazon approached Quidsi with an interest in acquiring the e-commerce company because of its subsidiary, *diapers.com*.¹⁵⁴ After Quidsi rebuffed Amazon’s initial offer, Amazon cut prices to compete with

power in the market for personal social networking services . . . in the United States” and the two acquisitions were moves “to squelch those threats.” Complaint at 2, Fed. Trade Comm’n v. Facebook Inc., 581 F.Supp. 3d 34 (D.D.C. 2022) (No. 20-CV-03590) [hereinafter *Complaint*].

147. See *Complaint*, *supra* note 146, at 1. The Unfair Methods of Competition provision of the FTC Act allows the FTC to “undo and prevent [] anticompetitive conduct and unfair methods of competition in or affecting commerce.” *Id.* The Sherman Act Sections 1 and 2 are also ex-post statutes, meaning the Agencies have the power to look at past mergers, while the Agencies primarily use Clayton Act Section 18 to block potential mergers because of its ex-ante verbiage. Sherman Antitrust Act of 1890 §§ 1, 2, 15 U.S.C. §§ 1–38 (2004); Clayton Act of 1914 § 18, 15 U.S.C. §§ 12–27 (2002).

148. See Bond, *supra* note 146 (“Facebook has argued it faces plenty of competition from the likes of TikTok, YouTube, Twitter, LinkedIn and Apple’s iMessage. The FTC has argued those companies don’t fall in the same category of providing ‘personal social networking.’”).

149. Kurt Wagner, *Facebook Sees WhatsApp as Its Future, Antitrust Suit or Not*, BLOOMBERG (Dec. 9, 2020, 6:35 PM), <https://www.bloomberg.com/news/features/2020-12-09/facebook-fb-plans-to-turn-messaging-app-whatsapp-into-a-moneymaking-business>.

150. Mark Glick et al., *Big Tech’s Buying Spree and the Failed Ideology of Competition Law*, 72 HASTINGS L.J. 465, 498 (2021).

151. See *id.* at 500.

152. *Id.* at 501.

153. See *id.*

154. See Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 710, 768–69 (2017).

diapers.com and gain ground in the online diapers market.¹⁵⁵ Losing a substantial share of the market, Quidsi had to reconsider selling its business, and in 2010, Amazon acquired Quidsi.¹⁵⁶

The FTC reviewed the acquisition under Section 7 of the Clayton Act and Section 5 of the FTC Act.¹⁵⁷ While the deal raised red flags about the potential elimination of a major competitor in the industry, the FTC ultimately allowed the merger.¹⁵⁸ In declining to take action, the FTC noted it was “not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred.”¹⁵⁹ With the benefit of ex-post statutes, the FTC wields the authority to re-open its investigations and bring an action against an acquisition at any time.¹⁶⁰

3. Apple Aggregating Artificial Intelligence (AI) Start-Ups

Apple has quietly amassed the most AI acquisitions in the past five years.¹⁶¹ In fact, in the past six years, it has totaled nearly a hundred acquisitions, with only a handful of notable deals—like Beats Music.¹⁶² In 2014,

155. *See id.* at 769 (noting that Amazon cut prices by up to thirty percent and introduced “Amazon Mom, a new service that offered a year’s worth of free two-day Prime shipping”).

156. *See id.* at 769; Matt Day, *Amazon Emails Show Effort to Weaken Diapers.com Before Buying It*, BLOOMBERG (July 29, 2020, 2:00 PM), <https://www.bloomberg.com/news/articles/2020-07-29/amazon-emails-show-effort-to-weaken-diapers-com-before-buying-it> (“Amazon acquired Quidsi Inc. for \$545 million in 2010, absorbing a competitor then making headway in the lucrative market for products to new parents.”).

157. *See Khan, supra* note 154, at 770 n.305.

158. *Id.*

159. Letter from Donald S. Clark, Secretary, Fed. Trade Comm’n, to Peter C. Thomas (Mar. 23, 2011), https://www.ftc.gov/sites/default/files/documents/closing_letters/amazon.com-inc./quidsi-inc./110323amazonthomas.pdf.

160. *Id.* Currently, the action would be moot as Amazon has discontinued diapers.com because of its inability to profit off the transaction. Spencer Soper & Hugh Son, *Amazon Closes Money-Losing Quidsi to Narrow Focus on Groceries*, BLOOMBERG (Mar. 29, 2017, 3:08 PM), <https://www.bloomberg.com/news/articles/2017-03-29/amazon-to-shut-quidsi-unit-after-failure-to-reach-profitability?leadSource=uverify%20wall>.

161. Filipe Espósito, *Apple Bought More AI Companies Than Anyone Else Between 2016 and 2020*, 9TO5MAC (Mar. 25, 2021, 4:19 PM), <https://9to5mac.com/2021/03/25/apple-bought-more-ai-companies-than-anyone-else-between-2016-and-2020/>.

162. Kif Leswing, *How Apple Does M&A: Small and Quiet, With No Bankers*, CNBC (May 1, 2021, 9:27 AM), <https://www.cnbc.com/2021/05/01/how-apple-does-ma-small-and-quiet-with-no-bankers.html>.

Apple unloaded three billion dollars to purchase Beats Electronics and Beats Music.¹⁶³ The FTC examined the acquisition to determine if Apple leveraged its position “as the largest seller of music downloads through its iTunes store to put rival music services like Spotify Ltd. At a disadvantage.”¹⁶⁴ At the time, Universal Music Group, Sony Music Entertainment, and Warner Music Group dominated the music industry.¹⁶⁵ Simultaneously, streaming services were disrupting the music industry, and a large number of companies entered the market, including Apple.¹⁶⁶ With a distorted view of the market, the FTC allowed Apple to acquire Beats, which ultimately led to Apple gaining a stronghold in the headphone and music streaming markets.¹⁶⁷

4. Google’s “Double[click]” Up

Founded in 1996, DoubleClick provided “display ads on Web sites like MySpace, The Wall Street Journal and America Online as well as software to help those sites maximize ad revenue.”¹⁶⁸ DoubleClick helped “ad buyers—advertisers and ad agencies—manage and measure the effectiveness of their rich media, search and other online ads.”¹⁶⁹ In 2007, struggling to break into online advertising, Google acquired DoubleClick for \$3.1 billion, gaining “access to DoubleClick’s advertisement software and, more importantly, its relationships with Web publishers, advertisers and advertising agencies.”¹⁷⁰ More than a decade later, former Google executive, Timothy Armstrong, called the deal “a total game changer” for Google, which now operates as the leading

163. Press Release, Apple, Apple to Acquire Beats Music & Beats Electronics (May 28, 2014), <https://www.apple.com/newsroom/2014/05/28Apple-to-Acquire-Beats-Music-Beats-Electronics/>.

164. David McLaughlin et al., *U.S. Is Probing Apple Over Its Deals for Beats Music*, BLOOMBERG (May 5, 2015, 6:28 PM), <https://www.bloomberg.com/news/articles/2015-05-06/apple-said-under-u-s-scrutiny-over-deals-for-new-beats>.

165. Alexa Klebanow, *Is Music the Next eBooks? An Antitrust Analysis of Apple’s Conduct in the Music Industry*, 39 COLUM. J.L. & ARTS 119, 127 (2015).

166. *See id.* (“[W]ithin streaming there is a divide between companies offering online radio services, like Pandora, and other services offering on-demand listening, like Spotify or Rdio.”).

167. *See id.* at 128–30; *see also* Jonathan Kim, *Why Apple’s Beats Acquisition Keeps Improving with Age*, MEDIUM (Apr. 21, 2020), <https://medium.com/macoclock/why-apples-beats-acquisition-keeps-improving-with-age-7aaa6e7965d8>.

168. Louise Story & Miguel Helft, *Google Buys DoubleClick for \$3.1 Billion*, N.Y. TIMES (Apr. 14, 2007), <https://www.nytimes.com/2007/04/14/technology/14DoubleClick.html>.

169. *Id.*

170. *Id.*

search engine in the world.¹⁷¹ The FTC reviewed the transaction for eight months and concluded the acquisition was unlikely to substantially lessen competition.¹⁷² The Commission noted, “the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition,” and the Commission found the third-party ad serving the market’s competition to be “vigorous.”¹⁷³ Therefore, DoubleClick did not have market power to enable Google to “effectively foreclose competition.”¹⁷⁴ Ultimately, the FTC rejected evidence showing that Google could leverage DoubleClick in a way that would give it a significant advantage over its competitors in the advertising market.¹⁷⁵

IV. THE PLATFORM COMPETITION AND OPPORTUNITY ACT WILL MAKE BIG TECH ACQUISITIONS PRESUMPTIVELY ILLEGAL.

On June 24, 2021, the House Judiciary Committee passed a package of bipartisan legislation that targets the technology sector, particularly large tech companies.¹⁷⁶ The following six bills were part of the package: (1) H.R. 3843—the Merger Filing Fee Modernization Act, (2) H.R. 3460—the State Antitrust Enforcement Venue Act, (3) H.R. 3849—the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, (4) H.R. 3826—the Platform Competition and Opportunity Act, (5) H.R. 3816—the American Choice and Innovation Online Act, and (6) H.R. 3825—the Ending Platform Monopolies Act.¹⁷⁷ This Section outlines the key takeaways

171. Steve Lohr, *This Deal Helped Turn Google into an Ad Powerhouse. Is That a Problem?*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/09/21/technology/google-doubleclick-anti-trust-ads.html>.

172. Press Release, Fed. Trade Comm’n, Federal Trade Commission Closes Google/DoubleClick Investigation (Dec. 20, 2007), <https://www.ftc.gov/news-events/news/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation>. One of the four assenting voters, William Kovacic, noted that this deal could have been challenged under the current antitrust laws, but the FTC chose not to pursue action. *Id.*

173. *Id.*

174. *Id.*

175. See Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Policy Should Lean on the Principles of Financial Market Regulation*, 24 STAN. TECH. L. REV. 55, 91–92 (2020).

176. Press Release, House Comm. on the Judiciary, Chairman Nadler Applauds Committee Passage of Bipartisan Tech Antitrust Legislation (Jun. 24, 2021), <https://judiciary.house.gov/news/document-single.aspx?DocumentID=4622>.

177. *Id.*

of the Platform Competition and Opportunity Act,¹⁷⁸ discusses why Congress believes it is critical for competitiveness in the technology platform sector,¹⁷⁹ and delves into a solution that could keep Congress, big tech firms, start-ups, and venture capitalists satisfied if the bill does not pass.¹⁸⁰

A. *What Is the Platform Competition and Opportunity Act?*

H.R. 3826, or the Platform Competition and Opportunity Act of 2021 (the Act), aims “[t]o promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.”¹⁸¹ The Act shifts the burden to the acquiring company to prove by clear and convincing evidence that: (1) the acquisition falls under Clayton Act § 7A(c);¹⁸² and (2) the acquired company does not currently compete with the acquiring company, the acquired company does not “constitute nascent or potential competition,” and the acquisition would not increase the acquiring company’s market position or ability to maintain its position.¹⁸³

Under the Act, a covered platform¹⁸⁴ includes: (1) any company that, within the last year, has at least fifty million “United States-based monthly active users on the online platform,” or 100,000 United States-based monthly active *business* users; (2) any company with net annual sales, or a market capitalization greater than \$600 billion within the last two years; and (3) any “critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform.”¹⁸⁵ The Act gives the FTC power under the FTC Act and the DOJ power under the Sherman Act and Clayton

178. *See infra* Section IV.A (examining the Act’s guidelines and how it would operate if it passes).

179. *See infra* Section IV.B (discussing the House Judiciary Committee Chairman’s speech regarding the proposed bills and why they are necessary for the protection of the technology sector).

180. *See infra* Section IV.C (proposing Congress bolster the Agencies with resources that allow them to better identify potentially anticompetitive deals and pursue action under the current legal framework).

181. Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021).

182. *See* 15 U.S.C. § 18 (1996) (allowing stock purchases “solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition”).

183. *See* H.R. 3826.

184. *See id.* § 3 (noting the DOJ and FTC have the power to designate companies as covered platform operators). The designation as a covered platform lasts for ten years but could be removed if the covered platform operator requests removal and can show the company no longer meets the criteria. *Id.* § 4.

185. *Id.* § 3.

Act to enforce the Act.¹⁸⁶ Congress seemingly seeks to revive the old structure-conduct-performance paradigm by targeting large technology companies and shifting an onerous burden¹⁸⁷ onto these companies to prove every acquisition they make does not violate the Act.¹⁸⁸

B. *How Can the Act Affect Big Tech Acquisitions?*

Facebook would not acquire Instagram, Amazon would be blocked from buying Quidsi, DoubleClick would never join Google, and Apple would never touch another start-up AI—this is how the Act would effectively neutralize the Big Tech companies.¹⁸⁹ House Judiciary Committee Chairman, Jerrold Nadler, has stated the Act would “improve[] merger enforcement in the digital economy by shifting the burden of proof for transactions involving a dominant platform that are most likely to harm competition, eliminate consumer choice, and prevent new competition from entering the market.”¹⁹⁰ The Act places a heavy burden on covered platform operators and is a major departure from the current framework, where the government must establish a prima facie case of anticompetitive conduct.¹⁹¹ By making all covered platform transactions presumptively illegal, the costs of dealing will rise astronomically and deter

186. *Id.* § 5. A violation of the Platform Competition and Opportunity Act would also be a violation of the “Unfair Method of Competition” under Section 5 of the FTC Act. *Id.*

187. *See supra* Section III.A (noting under the current framework, the government, or private party, must establish a prima facie case showing the acquisition has anticompetitive effects).

188. Christopher M. Grengs, *Verizon v. Trinko: From Post-Chicago Antitrust to Resource-Advantage Competition*, 2 J.L., ECON. & POL’Y 105, 121 (2006) (“[G]enerally, ‘big is bad; small is good’ as far as sellers and market structure are concerned.”). In the 1950s, antitrust utilized the SCP paradigm and focused on the mere presence of market power rather than examining the substance of acquisitions. *Id.* at 121–22.

189. *See supra* Section III.B.2.

190. Press Release, House Comm. on the Judiciary, Chairman Nadler Statement for the Markup of H.R. 3826, the Platform Competition and Opportunity Act of 2021 (June 23, 2021) <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4619>. Congress believes the shift in policy is necessary to counteract dominant firms reinforcing their market power and eliminating competition through acquisitions. *Id.*

191. *See generally* *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990) (discussing the framework where the government establishes a presumption that a transaction will substantially lessen competition when analyzing a merger, which then shifts the burden of producing evidence to the defendant). The *Baker Hughes* framework gives considerable weight to market concentration in its analysis but affords companies the opportunity to rebut the government’s argument. *Id.* at 991–92.

impactful acquisitions simply because the Act's cost is too high.¹⁹²

From Nadler's perspective, the Act fixes the issue by "prohibiting the largest online platforms from engaging in mergers that would eliminate competitors, or potential competitors, or that would serve to enhance or reinforce monopoly power."¹⁹³ His concern is legitimate because nascent competitor acquisitions "raise inherent anticompetitive concerns."¹⁹⁴ If the acquired competitor could have competed with the acquiring firm, the acquisition effectively eliminates competition and reinforces the dominant firm's monopoly power in the market.¹⁹⁵ Congress further justifies the shift in policy because "antitrust enforcers closely reviewed only a handful of these transactions, and none were challenged."¹⁹⁶ However, the absence of challenges does not necessarily mean the current legal framework does not work; it is entirely possible that acquisitions in the technology platform industry are largely not anticompetitive.¹⁹⁷ The Act allows for the Agencies to short circuit the process of identifying potential competitors by making covered platform operators show their acquisitions would not be anticompetitive.¹⁹⁸ Ultimately, Congress' concerns about mergers and acquisitions in the tech sector are valid, but making acquisitions for designated companies presumptively illegal is an

192. See generally *Federal Trade Commission – Antitrust Investigations – What You Should Know*, BAKERHOSTETLER (Oct. 16, 2019), <https://www.bakerlaw.com/webfiles/Litigation/2019/Events/Federal-Trade-Commission-Antitrust-Investigations-What-You-Should-Know-Webinar-10-16-19.pdf> (noting the current median costs for flagged mergers and acquisitions is \$4.2 million, with a range between \$2 million and \$9 million).

193. Press Release, House Comm. on the Judiciary, *supra* note 191.

194. Geoffrey A. Manne et al., *Technology Mergers and the Market for Corporate Control*, 86 MO. L. REV. 1047, 1076 (2021) (quoting Steven C. Salop, *Potential Competition and Antitrust Analysis: Monopoly Profits Exceed Duopoly Profits* 6 (Geo. U. L. Ctr., Working Paper, 2021)). But see *id.* at 1075 (noting nascent competitor acquisitions increase consumer satisfaction because these acquisitions often add new features to the acquiring firm's product).

195. *Id.* at 1076. An underlying assumption for this anticompetitive theory is that potential challengers can be identified with precision. *Id.* at 1077–78. Even assuming identifying potential challengers is possible, these companies should not hold the same value, in analyzing anticompetitive effects, as actual competitors. *Id.* at 1077 (noting that "a potential competitor may have between one-eighth to one-third the effect on competition as an actual competitor.").

196. Press Release, House Comm. on the Judiciary, *supra* note 191.

197. See generally Manne et al., *supra* note 195; Section V.B (discussing the existence of killer acquisitions in the tech sector and whether Amazon, Apple, Facebook, and Google's acquisitions can correctly be categorized as "killer acquisitions," or are merely smart investments).

198. See *supra* Section IV.A (analyzing how the Act will shift the burden from the government to the acquiring firm). Under the current antitrust legislation, nascent and potential competition is accounted for in Clayton Act § 7 and Sherman Act § 2. John M. Yun, *Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust*, 104 MARQ. L. REV. 613, 628–29 (2021).

overbroad reaction that will severely damage tech growth.¹⁹⁹ If the Act fails to move forward, Congress may be better suited to redirect its efforts to the stem of the issue—reinforcing the Agencies’ resources.²⁰⁰

C. *Investing More Resources Will Neutralize Anticompetitive Mergers and Acquisitions and Save Innovation*

Under the current antitrust statutes, the Agencies have the power to challenge all the worrisome transactions.²⁰¹ With the Facebook-Instagram acquisition, the FTC struggled to prove that Facebook maintained a monopoly position because the FTC failed to adequately define the market.²⁰² In the Amazon-Quidsi deal, the FTC investigated an acquisition that ultimately turned into a failure for Amazon.²⁰³ With the Apple-Beats and Google-DoubleClick deals, the FTC wrongly forecasted the market concentration effects.²⁰⁴

Proponents of the Act have merit in their beliefs about the type of acquisitions discussed above because eliminating competitors can have serious anticompetitive effects.²⁰⁵ With start-ups, VCs focus heavily on exit strategies that pressure start-up owners to sell their companies despite potential to grow without being acquired.²⁰⁶ While start-ups might have an opportunity to go public, VCs prefer their start-ups to sell because it is quicker and provides a more certain return on investment.²⁰⁷ As a result, VC-funded start-ups are

199. See Manne et al., *supra* note 195, at 1113–14 (discussing several counterarguments that start-up acquisitions enhance the quality of the tech sector).

200. See *infra* Section IV.C (discussing an alternative solution to addressing Congress’ concerns about anticompetitive tech acquisitions).

201. See *supra* Section II.A (discussing the Sherman Act and Clayton Act giving the Agencies the power to review potentially anticompetitive transactions).

202. See Khan, *supra* note 154, at 793.

203. See Lauren Thomas, *Amazon Is Shutting Down Quidsi, After the Diapers.com Parent Failed to Make Money*, CNBC (Mar. 29, 2017, 5:20 PM), <https://www.cnbc.com/2017/03/29/amazon-shuts-down-quidsi.html>.

204. See *supra* Section III.B.3 (discussing the evolution of streaming services, making analyzing the deal more difficult); *supra* Section III.B.4 (noting the FTC rejected evidence there could be anticompetitive effects).

205. See GAVIL ET AL., *supra* note 11, at 774, 799 (discussing coordinated and unilateral effects).

206. Samimi, *supra* note 96, at 165 (“VCs pressure startups to sell while their products have not yet been duplicated by tech giants and they are still ‘hot’ on the tech scene.”).

207. See *id.* at 167 (“Empirical results demonstrate that while 13.74% of exits are IPOs, mergers constituted 76.61% of exits.”).

more likely to agree to anticompetitive acquisitions rather than grow into substantial competitors in the market.²⁰⁸

The main fear with anticompetitive acquisitions is that the dominant acquiring firm will block rival competitors from its newly acquired technology.²⁰⁹ This hurts competition, first and foremost, because the acquiring firm might not have use for the technology and could discard the technology because it already has similar technology.²¹⁰ This would be a loss of technology not only for its current rivals, but also for its potentially competitive rivals.²¹¹ As a result, this sort of acquisition could lead to a loss of innovation because the dominant firm's purpose is to maintain market power.²¹² While these concerns are valid, the cost of making deals by dominant firms presumptively illegal outweighs the benefits mergers and acquisitions have on market innovation.²¹³

V. THE DOMINO EFFECT: VENTURE CAPITALISTS LEAVE THE MARKET, ENTREPRENEURS STOP STARTING BUSINESSES, AND INNOVATION DIES.

By designating acquisitions by companies deemed “too large” presumptively illegal, antitrust legislation could have three potentially negative effects on the technology market.²¹⁴ First, making acquisitions by covered platforms presumptively illegal will close one of the key exit strategies for start-ups,

208. *See id.* at 175–76 (discussing how VCs set up their start-ups for “rapid low-quality growth that sacrifices” the corporate governance policies necessary to be a successful public company).

209. *See* Bryan & Hovenkamp, *supra* note 139, at 341 (“[I]f the acquirer is dominant in its product market, then its motivation for the acquisition may be (in whole or in part) to exclude its smaller rivals from gaining access to the startup technology.”).

210. *Id.* at 342 (noting that while the acquirer may not have use for the technology, the rivals could have used it to elevate their own products).

211. Samimi, *supra* note 96, at 175 (“If a startup gets acquired, it is essentially eliminated from competing against incumbent tech firms.”).

212. *Id.* (“This leads to stagnation of innovation because startups will not have the opportunity to innovate new technology, create business models or push other companies to innovate.”); Bryan & Hovenkamp, *supra* note 139, at 342–43 (“In this case, there is no static welfare improvement from the acquisition, since the startup technology is simply not used. Consumers are thus worse off than they would have been if rivals had been able to utilize the new processor.”).

213. *See infra* Part V (discussing the costs of making deals presumptively illegal: VCs funding freezing, entrepreneurs reluctant to start businesses, and innovation coming to a halt).

214. *See infra* Part V (discussing the three potentially negative effects: lack of funding, scared entrepreneurs, and loss of innovation).

forcing venture capitalists to hesitate in investing in technology start-ups.²¹⁵ Second, a lack of funding and inability to sell ideas to covered platforms will make entrepreneurs shy away from entering the market.²¹⁶ Third, acquisitions in the technology market spur growth because covered platforms will be unable to provide start-up companies with the resources to realize their ideas, and the first two effects will result in an even smaller pool of start-ups.²¹⁷

By shifting the burden from requiring the government to show that the merger or acquisition would be anticompetitive to requiring the company to show with clear and convincing evidence its merger or acquisition would not be anticompetitive, the proposed legislation hampers innovation and ultimately hurts the consumer.²¹⁸ The proposed Act effectively neutralizes Big Tech companies' ability to acquire innovative start-ups, but it may inadvertently halt innovation in the technology sector.²¹⁹ Congress has good intentions; if it makes these large companies prove their deals are not anticompetitive, it can even the playing field for start-up companies.²²⁰ The glaring issue is that while the Act blocks anticompetitive acquisitions, it will block acquisitions that spur innovation as well.²²¹ Pro-competitive acquisitions are vital to the tech ecosystem for four key reasons.²²²

First, acquisitions drive the market, particularly in the technology sector, and are one of the key exit strategies for start-ups.²²³ By making these acquisitions presumptively illegal, technology start-ups will become less valuable

215. *See infra* Section V.A (discussing how venture capitalists highly value acquisition opportunities in start-ups).

216. *See infra* Section V.B (theorizing that a lack of funding and inability to profit from acquisitions will scare off potential entrepreneurs).

217. *See infra* Section V.C (noting how a freeze in acquisitions will slow technological innovation).

218. Lauren Feiner, *Start-Ups Will Suffer From Antitrust Bills Meant to Target Big Tech, VCs Charge*, CNBC (July 24, 2021, 9:44 AM), <https://www.cnbc.com/2021/07/24/vcs-start-ups-will-suffer-from-antitrust-bills-targeting-big-tech.html> (“The ultimate concern is for a loss of innovation, they say, which is exactly what lawmakers are hoping to fend off with restrictions on the largest buyers.”).

219. *See supra* Part IV (examining how the Act would make all acquisitions by covered platform operators presumptively illegal).

220. *See supra* Section III.C (discussing the implications of the Act and how it would be enforced).

221. Sperry, *supra* note 84 (noting that not “all acquisitions by major companies harm competition, just because we can imagine a scenario where the two parties go on to compete with each other”).

222. *See infra* Part V.

223. *See supra* Section II.B (discussing the three main exit strategies for start-up companies); *see also* Manne et al., *supra* note 195, at 1113–14. While there are arguments that start-up acquisitions lead to higher concentration in the tech sector, acquisitions incentivize VC investment when IPOs are not realistic for start-up companies. *Id.*

because, without the possibility of a buyout, they will need to compete with Big Tech.²²⁴ With lower values, venture capital firms will be more reluctant to invest in technology start-ups, which will result in fewer start-ups receiving money to develop their ideas.²²⁵ Second, venture capitalists provide invaluable knowledge and expertise in addition to cash to start-up companies, but an inability to sell their investment will make them wary of investing at all.²²⁶ With a lack of funding available, entrepreneurs will be reluctant to start their own businesses.²²⁷ Third, many entrepreneurs find the ability to sell their idea for profit enticing and would be hesitant to start a business if they knew they would have to compete against Big Tech companies.²²⁸ Lastly, the lack of funding and entrepreneurs will ultimately lead to consumer harm.²²⁹ Without acquisitions, there will be a major stall in innovation because start-ups cannot connect with the resources they need, and Big Tech companies will be cut off from a major source of innovation.²³⁰

A. Start-Up Valuations Will Drop Dramatically, Leading to a Substantial Decrease in Venture Capitalists' Investment Funding in the Start-Up Market.

Under the Platform Competition and Opportunity Act, a covered platform operator cannot acquire the stock or assets of another company “engaged in commerce or in any activity affecting commerce.”²³¹ The antitrust enforcement agencies seek to eliminate false-negative acquisitions by prohibiting

224. See *supra* Section IV.B; see also Manne et al., *supra* note 195, at 1113 (noting “it is not clear that VC funding would remain at its current levels if exit by acquisition were taken off the table”).

225. Manne et al., *supra* note 195, at 1114 (“[B]arriers to market exit have been known to slow investments.”).

226. See *supra* Section II.C (discussing how VCs evaluate exit opportunities in determining a start-up’s value).

227. See *infra* Section V.B (noting that a lack of funding could have a domino-effect, leading to less entrepreneurs starting businesses).

228. See *infra* Section V.B (discussing how some entrepreneurs enter the market in hopes of being acquired by a large company).

229. See *infra* Section V.C (examining how innovation could come to a halt because there will be fewer start-up ideas with a smaller pool of funding available).

230. See *infra* Section V.C (noting that less acquisition opportunities will not allow big companies to continue enhancing their products at the same rate).

231. Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021) §2 (a)(1).

dominant technology platforms from acquiring potential competitors.²³² The Act's main purpose is to protect innovation by making large firm acquisitions presumptively illegal, but the Act may have a detrimental effect on one of the most important aspects of the start-up cycle: funding.²³³

Unestablished start-up companies have an especially difficult time acquiring bank loans, leaving venture capital funding to fill the gap.²³⁴ Venture capitalists offer capital to these start-ups in exchange for a stake in the company, but these are not handouts.²³⁵ Venture capitalists want results and profits.²³⁶ In their search for value, venture capitalists focus on their exit strategy—IPOs or acquisitions.²³⁷ Because the path towards IPOs is improbable,²³⁸ acquisitions are increasingly attractive and occur long before IPOs are a viable option.²³⁹ Because of the high-risk, high-reward nature of start-up investments, venture capitalists' model favors "homerun" acquisitions to maintain profits because the vast majority of their start-up investments fail.²⁴⁰ Admittedly, venture capital firms may have a company with potential to disrupt an entire market but choose to sell prematurely; however, venture capitalists have a critical need for liquidity to fund more start-ups, which in turn promotes more innovation.²⁴¹

232. See H.R. 3826; Feiner, *supra* note 219 (noting venture capitalists are particularly concerned with the slowdown of acquisitions because the proposal would shift "the burden of proof onto those firms in merger cases to show their deals would not harm competition.").

233. Feiner, *supra* note 219 (noting that entrepreneurs might "think harder about whether to raise venture funding at all" in light of greater merger restrictions).

234. See Lemley & McCreary, *supra* note 10, at 15 ("Most companies started by garage inventors, college dropouts, or moonlighting professors fail, however, and leave little to sell off to compensate funders.").

235. See *id.* at 26.

236. See *id.*

237. *Id.* at 6–7.

238. See Rose & Solomon, *supra* note 117, at 83. The costs of IPOs has risen significantly since the passing of Sarbanes-Oxley, which heightened regulatory measures for all publicly traded companies. *Id.* at 88. Moreover, investors are wary to invest in small companies because of "their inability to survive and grow in the public markets." *Id.* at 87.

239. See *Considering an IPO? First, Understand the Costs*, PRICEWATERHOUSECOOPERS, <https://www.pwc.com/us/en/services/deals/library/cost-of-an-ipo.html> (last visited Oct. 31, 2021) ("Regardless of the nuances surrounding a private company's transformation into a public one, all IPOs share a common thread: a substantial investment of time and resources."); see also Lemley & McCreary, *supra* note 10, at 33 ("Offerings commonly occur six to eight years after investment—or one to two years slower than acquisitions.").

240. Lemley & McCreary, *supra* note 10, at 32.

241. *Id.* at 36.

Currently, without the shadow of the Act, start-ups already struggle to obtain venture capital funding.²⁴² Nearly sixty percent of U.S. start-ups expect to be acquired, and the passing of this Act will significantly decrease the value of start-ups to venture capitalists.²⁴³ The Act will devalue start-ups, making it much harder for them to secure funding, because a lack of an early exit opportunity makes the investment much riskier for venture capitalists.²⁴⁴ The Act threatens to block venture capitalists' preeminent exit strategy and could have far-reaching effects on their ability to fund future start-ups.²⁴⁵ Without the possibility of acquisitions, venture-backed start-ups will need to plan for an IPO for the venture capital firm to realize substantial gains on its investment.²⁴⁶ Because the IPO process takes substantially longer and requires much more capital than an acquisition, venture capital firms will not have the same liquidity to continue to back new start-ups—or worse, venture capital firms will shy away from the start-up market altogether.²⁴⁷ Not only is it a long path towards an IPO, but going public does not guarantee a young company will thrive in a public market where it must meet regulatory demands and satisfy shareholders.²⁴⁸

242. See Gompers et al., *supra* note 112 (“Even for entrepreneurs who do gain access to a VC, the odds of securing funding are exceedingly low.”).

243. See Connor Hussey, *Anti-Trust Legislation Sends More Warnings To Large VC Managers*, VENTURE CAP. J. (June 24, 2021), <https://www.venturecapitaljournal.com/antitrust-legislation-sends-more-warnings-to-vc-industry/> (“[S]maller VC-backed companies, or those most likely to be acquired, will suffer and see lower valuations as a result of anti-trust legislation.”); see also Gompers et al., *supra* note 112 (“VCs focus on finding companies that have the potential for big exits rather than on estimating near-term cash flows.”).

244. See Hussey *supra* note 244 (“If we now change the rules, specifically with regards to ESG and investing in diverse communities, and that they no longer have the opportunity to exit, we’re actually creating a much larger negative impact specifically in those areas . . .”).

245. Feiner, *supra* note 219 (“While most start-ups fail, VCs bank on the minority having large enough exits to justify their [sic] rest of their investments.”).

246. Jonathan M. Barnett, *Startup Exit Strategies in the New Antitrust Era*, BLOOMBERG L. (Aug. 11, 2021, 1:01 AM), <https://news.bloomberglaw.com/mergers-and-acquisitions/startup-exit-strategies-in-the-new-antitrust-era> (discussing how the proposed antitrust legislation might force start-ups to “favor abandoning M&A for exit strategies involving IPOs (or close equivalents) or acquisitions by private equity firms or larger firms in unrelated markets”).

247. See Feiner, *supra* note 219.

248. See Alistair Barr et al., *The Big Money in Startups Comes From Investing Before the IPO*, BLOOMBERG BUSINESSWEEK (Oct. 22, 2019, 2:00 AM), <https://www.bloomberg.com/news/articles/2019-10-22/the-big-money-in-startups-comes-from-investing-before-the-ipo> (“[T]he IPO may not be the payday investors hope for.”); Kate Ashford, *What is an IPO?*, FORBES, <https://www.forbes.com/advisor/investing/initial-public-offering-what-is-an-ipo/> (Sept. 22, 2022, 5:17 PM) (“Many people think of IPOs as big money-making opportunities—high-profile companies grab

A lack of venture capital involvement, or even a substantial drop in investments in start-ups due to the Act, could prove fatal to the start-up market.²⁴⁹ Venture capital firms give start-up companies three very important assets: cash, industry knowledge, and guidance.²⁵⁰ Venture capitalists offer start-ups more than capital to fund their visions; they offer the knowledge necessary to realize visions and help developing companies establish an infrastructure that will allow them to grow.²⁵¹ As the company continues to grow, they can provide equity or debt to secure more capital to grow, or they can consider acquisitions that would allow the start-up access to exponentially more capital and resources.²⁵²

Without the hopes of an incumbent firm coming in to buy their companies, the only option left for start-ups is to become a public company.²⁵³ The grim reality start-ups will face is that the IPO market has weakened considerably and does not appear to be a viable path for a vast majority of start-up companies.²⁵⁴ Less than one-tenth of start-ups successfully go public, and since the Sarbanes-Oxley Act of 2002, IPOs have become substantially more expensive.²⁵⁵ To qualify for an IPO, start-ups must comply with countless

headlines with huge share price gains when they go public. But while they're undeniably trendy, you need to understand that IPOs are very risky investments, delivering inconsistent returns over the longer term.”).

249. See Feiner, *supra* note 219 (“[T]ech investors say they’re more concerned with how the bills could squash the buying market for start-ups and discourage further innovation.”).

250. See Gompers et al., *supra* note 112 (“Once VCs have put money into a company, they roll up their sleeves and become active advisers.”).

251. See *id.* (“[VCs] provide a large number of post-investment services: strategic guidance (given to 87% of their portfolio companies), connections to other investors (72%), connections to customers (69%), operational guidance (65%), help hiring board members (58%), and help hiring employees (46%). Intensive advisory activities are the main mechanism VCs use to add value to their portfolio companies.”).

252. Jason Gordon, *Series or Rounds of Financing (Startups) – Explained*, THE BUS. PROFESSOR, https://thebusinessprofessor.com/en_US/business-transactions/series-or-rounds-of-financing-startups-definition (Apr. 15, 2022) (“There are several stages or rounds that a company may require capital injection, with each funding round having a designated identity.”).

253. Ashford, *supra* note 249 (“An IPO is an initial public offering. In an IPO, a privately owned company lists its shares on a stock exchange, making them available for purchase by the general public.”).

254. See Hussey, *supra* note 244 (“[I]t is 10 times more likely that your company would be acquired than it would go public.”).

255. See Rose & Solomon, *supra* note 117, at 89–90 (discussing how Sarbanes-Oxley increased regulatory costs because companies needed to conduct more thorough internal assessments and pay for auditor fees); see also *Considering an IPO? First, Understand the Costs*, *supra* note 240.

regulatory measures,²⁵⁶ many of which are hard to comply with as a smaller company—especially one without adequate funding and infrastructure.²⁵⁷ For the successful start-ups able to traverse the IPO journey, a more daunting challenge awaits: taking on the incumbent tech behemoths.²⁵⁸

B. The Downstream Effects: Entrepreneurs Scared to Enter a Market Without Adequate Funding and an Inability to Sell Their Ideas.

Without sufficient funding from venture capitalists, entrepreneurs will soon realize the impact the Act will have on their hopes to sell their innovations or build their own companies.²⁵⁹ Many entrepreneurs start companies with their innovative ideas and hope to sell their businesses to large firms.²⁶⁰ The Act would punish these hopefuls and force them to take on the tall task of competing with entrenched, dominant firms in the market.²⁶¹ Not only will this discourage entrepreneurs hoping to sell from entering the market, it will also make the task of competing exponentially more difficult for those who want to build a business and bring their product to market.²⁶²

256. See Rose & Solomon, *supra* note 117, at 88 (noting after the passing of Sarbanes-Oxley, public companies needed to implement controls complying with Section 404 and hire external auditors to verify their financial statements). One Section 404 requirement is filing internal control reports which disclose management (CEO, CFO, etc.) responsible for establishing and overseeing an internal control structure. *Id.*

257. See *id.*; *Considering an IPO? First, Understand the Costs*, *supra* note 240 (“[T]he costs required to prepare the business to operate as a public company, or the costs of being public, may be even higher. Most private companies have rightly focused historical investment on scaling their business and often postponed investment in systems, people, processes and broader infrastructure that will be required to operate as a public company. There are also other incremental, annual costs borne by a public company, primarily relating to additional regulatory compliance obligations.”).

258. See *infra* Section V.B.

259. Feiner, *supra* note 219 (“While proponents argue such bills would prevent so-called killer acquisitions where big companies scoop up potential rivals before they can grow—Facebook’s \$1 billion acquisition of Instagram is a common example—tech investors say they’re more concerned with how the bills could squash the buying market for start-ups and discourage further innovation.”).

260. See Lemley & McCreary, *supra* note 10, at 45 (“[S]elling a firm privately may be generally more profitable than taking it public.”).

261. See *U.S. Tech Companies Aren’t Monopolies*, BLOOMBERG (Nov. 24, 2021, 5:00 AM), https://www.bloomberg.com/opinion/articles/2021-11-24/antitrust-bills-miss-the-point-big-tech-isn-t-a-monopoly?cmpid%3D=socialflow-twitter-view&utm_campaign=socialflow-organic&utm_content=view&utm_medium=social&utm_source=twitter (“[The proposed bill] would actually make it harder for new entrants to disrupt existing markets.”).

262. See, e.g., Alex Kantrowitz, *The One Big Tech Bill That Could Backfire Spectacularly*, BIG TECH. (Jun. 17, 2021), <https://bigtechnology.substack.com/p/the-big-tech-bill-that-could-backfire> (“If

Without venture capitalists' funding, many start-up firms lacking business expertise will find it increasingly hard to develop a strategic plan to turn an idea into a profitable business.²⁶³ As mentioned previously, start-ups will find it increasingly difficult to secure the initial influx of capital because dominant firms cannot acquire them; furthermore, because those firms are unable to acquire start-ups' innovations, they will work to copy those innovations and beat start-ups to market.²⁶⁴ Start-ups with venture capital funding often sell their businesses to large companies out of fear that if they do not, the large companies will pour major resources into offering a competitive product, or perhaps a superior one, first.²⁶⁵ Without venture capital funding, start-ups will lack any capacity to seriously compete against these giants.²⁶⁶ There are already some venture capitalists that do not believe in investing in "kill-zone" areas, fearing that Facebook will copy the idea and their investment will be futile.²⁶⁷ The Act will magnify this issue because, where the likes of Facebook, Amazon, and Apple could previously acquire an innovative start-up and give it resources to flourish, the incumbent firms will be more likely to invest in researching nascent competitor ideas due to the prohibition on acquiring

prevented by law from acquiring startups, Big Tech would likely move straight to copying their features.").

263. See *supra* Section III.B. (discussing how venture capitalists provide not only money to fund business ideas but also expertise in developing products and building an infrastructure that will allow a company to grow).

264. See, e.g., Kantrowitz, *supra* note 263 ("Facebook, for instance, began testing its Clubhouse clone in public this week, a move that typically would've been preceded by an attempt to buy the company. Facebook's contemplation of a deal, and the ensuing negotiations, would've given Clubhouse some time to grow independently. But instead, Clubhouse is now looking at a carbon copy of itself on a 2 billion-user platform. 'Destroy Mode' is kind of Facebook's thing. But a broad ban on acquisitions could easily make it commonplace among all the tech giants.").

265. Michael Regard, *Venture Capital Kill Zones: Defining Harm to Consumers by Big Tech's Long Shadow*, VAND. J. ENT. & TECH. L. BLOG (Mar. 13, 2021), <https://www.vanderbilt.edu/jetlaw/2021/03/13/02/> (discussing how large companies like Apple, Amazon, Google, and Facebook will leverage their capital and resources to beat nascent competition "through mimicry, acquisition, or refusals to deal").

266. *Id.* ("This capital is vital, because tech startups often have to operate at a loss for many years before gaining enough market share to become profitable.").

267. *Id.* ("Big Tech companies have raised barriers to entry using psychological intimidation, as highlighted by reports from venture capital funds who say there is a 'kill zone' around any tech startup that my [sic] challenge the industries represented by the big four: Apple, Amazon, Google, and Facebook.").

them.²⁶⁸

C. *Acquisitions Drive Growth: Making Big Tech Acquisitions Presumptively Illegal Will Tank Innovation and Hurt the Consumer.*

Facebook’s beginnings predate the smartphone era, hence the desktop being the platform’s original home.²⁶⁹ Soon after Facebook’s rise to prominence in the social networking market, the company “struggled to reorient its network from a desktop-based platform, and . . . it had yet to monetize its mobile user base by incorporating advertising on the limited display area available on mobile screens.”²⁷⁰ Enter Instagram.²⁷¹ When Facebook acquired Instagram in 2012, the company had “13 employees and hadn’t made a single penny in profit.”²⁷² The young social media company “had not entered the digital advertising market and had no advertising revenue.”²⁷³ Post-merger, the two networks integrated and created a dynamic interface for consumers.²⁷⁴ The growth of the two apps’ user bases greatly increased, largely due to the added value to the consumers.²⁷⁵ Consequently, the spike in the consumer user base created value for the other set of users—the advertisers.²⁷⁶ Now, Instagram

268. See *supra* Section III.B (discussing how Facebook integrated Instagram and WhatsApp to create a superior social network allowing users to connect on a greater level and how Google acquired DoubleClick to transcend the online advertising market).

269. See Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (July 25, 2007, 5:29 AM), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia> (“As of September 2006, the network was extended beyond educational institutions to anyone with a registered email address.”); see also Dan Gallagher, *iPhone 1: Look Who’s Talking*, WALL ST. J. (Jun. 30, 2017, 2:22 PM), <https://www.wsj.com/articles/iphone-1-look-whos-talking-1498846976> (“When he presented the iPhone for the first time on stage in early 2007, then-CEO Steve Jobs spent a lot of time talking about the actual phone in the iPhone.”).

270. Glick et al., *supra* note 150, at 487.

271. *Id.* at 488 (“On Instagram, users could upload, edit, and share pictures from their iPhones and follow, comment, and like the images posted by others.”).

272. Amelia Tait, *How Instagram Changed Our World*, THE GUARDIAN (May 3, 2020, 6:00 AM), <https://www.theguardian.com/technology/2020/may/03/how-instagram-changed-our-world>.

273. Glick et al., *supra* note 150, at 497.

274. Sperry, *supra* note 84 (“After Facebook acquired Instagram in 2012, they began to integrate the two by making it easier to share photos between them. A ‘like’ or comment on Instagram could then appear on the Facebook user’s news feed. The integration also offered Instagram users the ability to find and connect with Facebook friends.”).

275. *Id.* (“Scholarship suggests this integration greatly increased Instagram’s user base and demand for third-party photo applications on Facebook’s platform.”).

276. Erik Hovenkamp, *Platform Antitrust*, 44 J. CORP. L. 713, 720 (2019) (For two-sided markets, “each side’s demand for the platform’s service depends not only on the price it is charged by the platform, but also the number of users participating on the other side”).

thrives as a “profitable venture” with the help of Facebook’s advertising expertise, and the two companies leverage their technological capabilities to offer a better end product to consumers.²⁷⁷ Two years later, Facebook continued to improve its network through its acquisition of WhatsApp.²⁷⁸ A year before Facebook acquired it, “WhatsApp operated at a \$138 million loss.”²⁷⁹ Similar to the Instagram acquisition, WhatsApp offered Facebook an opportunity to integrate its application with Facebook’s to create a better product for both companies’ existing user bases.²⁸⁰

Similarly, under the proposed legislation, Google would have likely been unable to acquire DoubleClick in 2007.²⁸¹ Though it was only one-tenth of the size it is today, Google would have fallen under a covered platform, and the injunction of the deal would likely have prohibited Google from producing the search engine we have today.²⁸² Moreover, the Act would enjoin a deal that the acquired company sought not only because of potential profit, but also because it lacked expertise in the advertising field and actively looked to sell its business.²⁸³ The acquisition mutually benefitted both companies and allowed them to integrate their products and develop a dynamic search engine that has changed the world.²⁸⁴

At first glance, Amazon’s acquisition of Quidsi seems to be the epitome of why the Platform and Competition Act would benefit antitrust law and a more competitive technology market.²⁸⁵ Amazon acquired Quidsi and

277. Sperry, *supra* note 84.

278. See Wagner, *supra* note 149.

279. Glick et al., *supra* note 150, at 501.

280. *Id.* at 498 (“The app offered a reliable and affordable cross-platform technology for text, voice, image, and video sharing in one-to-one or group contexts that worked across national borders complete with end-to-end encryption.”).

281. See *infra* note 284 and accompanying text.

282. See *infra* note 284 and accompanying text; Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. § 3 (2021) (defining covered platform operators).

283. Lohr, *supra* note 172 (“To diversify, DoubleClick created an ad exchange, or marketplace, as a new business and a buffering source of revenue. ‘But we were terrified,’ recalled Michael Rubenstein, a former DoubleClick executive. The DoubleClick managers and investors decided it was a good time to sell.”).

284. *Google—Statistics & Facts*, STATISTA (July 6, 2022), <https://www.statista.com/topics/1001/google/#dossierKeyfigures> (noting Google holds 61.4% of the market share as the leading U.S. search engine).

285. See Khan, *supra* note 154, at 772–73 (“Amazon’s history with Quidsi has sent a clear message to potential competitors—namely that, unless upstarts have deep pockets that allow them to bleed money in a head-to-head fight with Amazon, it may not be worth entering the market.”).

subsequently scaled back on the discounts and promotions that supposedly forced Quidsi into considering selling its business.²⁸⁶ However, there is no evidence that Amazon had monopoly power in the diaper industry before or after the acquisition, especially when considering that eighty percent of the manufacturing output came from Kimberly-Clark and Proctor & Gamble.²⁸⁷ In fact, Amazon's \$545 million investment turned out to be a poor bet, as the company shut down operations only seven years later despite considerable efforts to make Quidsi's business profitable.²⁸⁸ Meanwhile, Quidsi founder, Marc Lore, used the acquisition money to start Jet.com, an online retail market that competed with Amazon.²⁸⁹ Jet.com had enough success that Walmart, in an effort to gain an edge in the online retail market, acquired the company for \$3.3 billion.²⁹⁰ Though Jet.com eventually faded, the acquisition equipped Walmart with the necessary tools to compete with Amazon in the online retail market.²⁹¹

Ultimately, Big Tech acquisitions positively impact technological growth and are major economic drivers for the United States.²⁹² Acquisitions allow Big Tech companies to enhance their existing product and create a better value

286. *Id.* at 770 (“[A] year after buying out Quidsi, Amazon shut down new memberships in its Amazon Mom Program. Though the company has since reopened the program, it has continued to scale back the discounts and generous shopping terms of the original offer.”). In addition, Amazon gradually reduced discounts given to members. *Id.*

287. Jeffrey Eisenach, *Who Should Antitrust Protect? The Case of Diapers.com*, AM. ENTER. INST. (Nov. 5, 2018), <https://www.aei.org/technology-and-innovation/who-should-antitrust-protect-the-case-of-diapers-com/>.

288. Sarah Perez, *Amazon to Shut Down Diapers.com and Other Quidsi Sites*, TECHCRUNCH (Mar. 29, 2017, 2:20 PM), <https://techcrunch.com/2017/03/29/amazon-shuts-down-diapers-com-and-other-quidsi-sites/> (“Amazon will shut down Diapers.com and the other websites operated by its Quidsi division, the company confirmed to Bloomberg today, citing the division’s lack of profitability as the reason behind the decision.”).

289. Thomas W. Hazlett, *The Nirvana Fallacy in “Hipster Antitrust,”* 28 GEO. MASON L. REV. 1253, 1273 (2021) (“Soon thereafter, Lore founded a new online retail platform, Jet.com, that competed frontally, across hundreds of product lines, with Amazon.”)

290. *Id.*

291. Jeremy Bowman, *Jet.com May Be History, but Walmart Got What it Needed*, THE MOTLEY FOOL (May 20, 2020, 5:41 PM), <https://www.fool.com/investing/2020/05/20/jetcom-may-be-history-but-walmart-got-what-it-need.aspx> (“[T]he reality is that Jet.com and its founder Marc Lore, who now runs Walmart's own e-commerce division, fueled Walmart's own e-commerce growth, making the company No. 2 in e-commerce sales market share, behind only Amazon.”).

292. See *supra* Section V.C (discussing how Facebook and Google’s acquisitions led to more innovation and more consumer benefits and how the Quidsi acquisition money sparked the fire for another successful startup to emerge).

for all users.²⁹³ Compelling Big Tech acquisitions to be presumptively illegal will obstruct companies from acquiring start-ups to help them innovate and prevent start-ups from gaining valuable guidance and capital from large companies that they need to help realize their ideas.²⁹⁴ This hurts consumers and could also lead to a significant hit in venture capital funding, which is vital to the success of many start-up companies.²⁹⁵

VI. CONCLUSION

The Platform Competition and Opportunity Act will dramatically decrease the number of mergers and acquisitions in the technology sector.²⁹⁶ Undoubtedly, the Act will achieve its goal of preventing acquisitions seeking to kill innovation or to maintain market power, but is the cost worth the price?²⁹⁷ The start-up market requires large influxes of capital from venture capitalists to produce competitors in the technology sector.²⁹⁸ A company's likelihood that it could be acquired increases its value to venture capitalists, and removing that ability to sell their idea will make the technology start-up market less appealing to venture capitalists.²⁹⁹ In fact, it may dry out the market significantly.³⁰⁰ Entrepreneurs will have a difficult time securing adequate funding, and those who do will face a tremendous uphill battle in competing against the incumbent market leaders.³⁰¹ Many entrepreneurs also wish to make their living by selling their ideas to large tech companies, but the Act will deprive them of that opportunity.³⁰² The end result is a decrease in mergers and acquisitions, one of the biggest drivers of economic growth and

293. Glick et al., *supra* note 150, at 494 (“The drive to exploit user attention and access to data may translate to gains for consumers who enjoy higher quality services and seemingly individuated advertising.”). Moreover, more consumer data entices advertisers who seek to reach as many consumers as possible. *Id.*

294. *See supra* Part V; Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021).

295. *See supra* Section V.A (discussing the crucial role venture capitalists play for emerging companies to receive funding necessary to grow their business).

296. *See supra* Section IV.A.

297. *See supra* Section IV.A.

298. *See supra* Section II.C.

299. *See supra* Section V.A.

300. *See supra* Section V.A.

301. *See supra* Section V.B.

302. *See supra* Section V.B.

innovation.³⁰³ The Agencies narrow-sighted goal of curbing Big Tech's growth will harm the innocent entrepreneurs and start-ups it seeks to protect.³⁰⁴

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303. *See supra* Section V.C.

304. *See supra* Part V.

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