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Office of the Chair

Remarks of Chair Lina M. Khan
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Good morning, everyone. Thanks so much for the introduction—it's great to be here.

Each year this conference does a terrific job of convening a vibrant group of enforcers, practitioners, and leading academic thinkers from across the international community. The opportunity for shared learning here is tremendous—especially as we in the United States are at the forefront of a broader reassessment of antitrust policy and enforcement.

One key area of reassessment has been our merger enforcement program.

Over the last decade, we've heard mounting concerns about inadequate competition across key markets in the U.S. economy. Evidence suggests that decades of mergers have been a key driver of weakened competition. As President Biden noted in his Executive Order on Promoting Competition, industry consolidation has "den[ied] Americans the benefits of an open economy," with "workers, farmers, small businesses, and consumers paying the price."[1] Evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation.[2] A lack of competition also appears to have left segments of our economy more brittle, as consolidated supply and reduced investment in capacity can render us less resilient in the face of shocks.[3]

These facts have prompted us to assess how our merger policy tools can better equip us to discharge our statutory obligations and halt this trend.

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[1] Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 9, 2021). *See also* Fact Sheet: Executive Order on Promoting Competition in the American Economy, The White House (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ (noting that "economists find that as competition declines, productivity growth slows, business investment and innovation decline, and income, wealth, and racial inequality widen").

[2] *See, e.g.*, José A. Azar, et al., *Concentration in US Labor Markets: Evidence From Online Vacancy Data* 66 LAB. ECON. (2020); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421, 2422-45, 48 (2020); Jan De Loecker, et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON 561, 644 (2020); Germán Gutiérrez & Thomas Philippon, *Investmentless Growth: An Empirical Investigation*, BROOKINGS PAPERS ON ECON. ACTIVITY 89, 95–97 (2017); *see generally* JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2014).

[3] *See, e.g.*, David Dayen, *The Great Supply Shock We Brought Upon Ourselves*, AM. PROSPECT (Sept. 22, 2021), https://prospect.org/economy/great-supply-shock-we-brought-upon-ourselves.

For over a century, Congress has codified a policy in favor of competition over consolidation. In 1890, as industrial trusts captured the sugar, steel, oil, and railroad sectors, lawmakers passed the Sherman Act, prohibiting, among other practices, monopolization, attempted monopolization, and conspiracies to monopolize.[4] Once it became clear that this statute was failing to prevent monopolization through acquisition, Congress in 1914 passed the Clayton Act, prohibiting mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[5] When businesses began exploiting loopholes in the Clayton Act, Congress once again stepped in, passing the 1950 Celler-Kefauver Antimerger Act to ensure the law captured vertical and conglomerate deals as well as acquisitions of assets.[6] Discussions leading up to the 1950 amendments made clear that lawmakers viewed protecting America from monopolies as critical to maintaining our system of free enterprise.

With each of these efforts, Congress redoubled its commitment to open markets and free and fair competition.

The durability and public legitimacy of our antitrust regime depends on the ability of enforcers and courts to adapt, remaining faithful to these legislative mandates even as markets and business practices shift and evolve.

Our proposed revisions of the Merger Guidelines are a core part of this effort. The draft guidelines we released in July were animated by two overarching goals. First, we wanted to ensure the guidelines faithfully reflect the full scope of the laws that Congress passed and prevailing legal precedent. And second, we sought to ensure the guidelines reflect the reality of how firms do business in the modern economy.

One of the first steps our team took was to chart key developments in the merger guidelines since 1968. Revisiting this history highlighted the extent to which the 1982 guidelines departed from controlling law and precedent—*and* how deep and lasting the impact of the 1982 guidelines has been.

As is happening now, the publication of the 1982 guidelines was followed by extensive commentary from antitrust practitioners and academics. A striking theme across comments was a recognition of how sharply the guidelines had broken from the statutes Congress had passed and prevailing legal precedent.

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[4] Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*. (1890); *see also N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.").

[5] Clayton Act, 15 U.S.C. § 12 *et seq*. (1914). Congress in 1914 also passed the Federal Trade Commission Act, supplementing the Sherman and Clayton Acts by creating the Federal Trade Commission and assigning it with checking "unfair methods of competition." Federal Trade Commission Act, 15 U.S.C. § 41 *et seq*. (1914).

[6] *See* Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1225 (codified as amended at 15 U.S.C. § 18 (1994)).

For example, Professor Eleanor Fox noted that the 1982 guidelines embedded "an ideology at war with the legislation… [disavowing] the will of Congress to be skeptical of mergers and to stop increasing concentrations in their incipiency."[7] Similarly, former Assistant Attorney General Thomas Kauper described the 1982 guidelines as choosing to "err on the side of nonintervention rather than on the side of precedent," ultimately asking "what is the duty of the government to enforce the law?" University of Pennsylvania's Professor Louis Schwartz put it more bluntly, noting, "The Guidelines virtually ignore Section 7 of the Clayton Act."[8]

Even those who were overall supportive of the new guidelines noted the departure from controlling law. Prominent practitioners Don Baker and Bill Blumenthal wrote,[9] "Virtually every provision deviates from precedent [in some particular], however, and thus is exposed to the risk of judicial rejection." Indeed, courts did not immediately accept DOJ's break from precedent. By spring of 1983, DOJ had litigated two merger cases under the theories laid out in the 1982 Guidelines. As one observer summarized, "In both [cases], DOJ was summarily trounced."[10]

The 1982 merger guidelines set forth assumptions and frameworks that have stayed intact and shaped merger policy for 40 years—even as the agencies issued updates in 1984, 1992, 1997, and 2010.

Against this backdrop, the 2023 proposed merger guidelines seek to close the gap between prevailing law and agency practice. As federal enforcers, our job is to enforce the laws as Congress has written and as the courts have interpreted. We cannot substitute that mandate from Congress with our own policy preferences or a set of tidier or more quantifiable goals that we wish Congress had set out instead.

Accordingly, the proposed guidelines root each core proposition in prevailing law. It has been striking to see how much discussion and debate this aspect of the proposed guidelines has prompted—underscoring, perhaps, how fully the 1982 guidelines and their progeny departed from this basic exercise.

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[7] Eleanor Fox, *Tackling the Critics of the Draft Merger Guidelines*, PROMARKET (Sept. 5, 2023), https://www.promarket.org/2023/09/05/eleanor-fox-tackling-the-critics-of-the-draft-merger-guidelines; *see also*, Eleanor M. Fox, *The 1982 Merger Guidelines: When Economists Are Kings?*, 71 CAL. L. REV. 281 (1983).

[8] Louis Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?* 71 CAL. L. REV. 600 (1983). ("That section is treated as indistinguishable from the Sherman Act, despite Congress' expressed intention in 1914, and again in 1950, to cast the antimerger net more widely. Notably, where the Sherman Act forbade mergers only if an unreasonable restraint of trade would result, the criterion under the Clayton Act became whether 'the effect *may be* substantially to lessen competition.' The inquiry was thus shifted from demonstrable restraint to plausible risk… Effect was to be judged not merely by the impact on competition of the particular merger before the court, but also by the likelihood that the approval of the merger would trigger similar mergers by other firms in the industry. Trends toward concentration would be stopped 'in their incipiency.' Anticompetitive consequences in a relevant market would not, under the Clayton Act, be outweighed by procompetitive consequences in another market. The courts recognized that Congress had sought to narrow the scope of issues and evidence in merger cases, so that they could be disposed of expeditiously without the extended and inconclusive litigation entailed by the Sherman Act rule of reason.")

[9] Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law* 71 CAL. L. REV. 312 (1983).

[10] *Id. at* 347.

The proposed guidelines also take a functional approach to gauging competition. Rather than relying on a formalistic set of theories, they seek to understand the practical ways that firms compete and exert control over markets. Reflecting the multitude of ways that mergers can lessen competition or tend to create a monopoly, they identify several ways to analyze transactions. Key to the proposed revisions is the idea that no single method or tool has primacy, and that the specific context will determine which tools are most effective at assessing harm to competition.

We want the guidelines to incorporate new economic learning and accurately capture how businesses compete in today's economy. To that end, the proposed guidelines address blind spots and lay out a framework for policing mergers in labor markets, in platform and digital markets, and in markets characterized by serial acquisitions.

Public feedback has been a key input throughout our merger review process. Last year, we conducted a series of listening sessions and received over 5,000 comments in response to the initial request for comments. As of Monday, we had gotten over 3,000 public comments in response to the proposed draft. My review so far suggests these comments overwhelmingly support stronger merger enforcement. More significantly, these comments have underscored the high stakes of getting this right. Across sectors and professions, people have shared with us how unchecked consolidation has hurt their paycheck, their job opportunities, their health, their communities.

Take a few stories from people across healthcare. One ER doctor told us about how mergers in his industry had hurt the ability of emergency physicians to provide quality care in life-or-death moments.[11] A healthcare startup told us that healthcare mergers have made it extremely difficult for patients living in rural areas to access critical services for mental health.[12] An organization representing more than 200,000 nurses told us that hospital consolidation had reduced options for employees, and that the resulting "threat of being blacklisted from further hiring in a system that controls many of the hospitals in the area makes workers afraid to file complaints, organize their workplace, or leave before the end of a contract."[13]

Similarly, a writer explained to us that mergers across Hollywood have meant that compensation for scripts is a fraction of what it was 15 years ago—even for writers who produce major hits.[14] Farmers shared an instance where even 15% of the market being foreclosed drove one of the country's largest dairy processor's to bankruptcy, suggesting, they wrote, that "the

[11] Comment Submitted by Mitchell Li, FTC and DOJ Host Listening Forum on Effects of Mergers in Health Care Industry (Apr. 14, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-DOJ-Listening-Forum-%20Health-Care-Transcript.pdf.
[12] Comment Submitted by Shohini Gupta, Regulations.gov (July 25, 2023), https://www.regulations.gov/comment/FTC-2023-0043-0435.
[13] Nat'l Nurses United, Comment Letter on Fed. Trade Comm'n and Dep't of Justice Draft Merger Guidelines 2 (Sept. 18, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1485.
[14] Comment Submitted by Jane Lee, Regulations.gov (July 26, 2023), https://www.regulations.gov/comment/FTC-2023-0043-0477.

Agencies should address mergers that increase vertical foreclosure in buyer markets in their incipiency."[15]

Across the country, people know that unlawful mergers aren't a distant abstraction. Rather, they directly threaten peoples' ability to live stable and secure lives.

As enforcers, we have an obligation to listen closely to and learn from these experiences, and I can assure anyone who submitted a comment to us that we will review it carefully as we consider next steps.

Yesterday the FTC filed a lawsuit challenging a scheme by USAP and private equity firm Welsh Carson to roll-up anesthesiology practices across Texas.[16] A primary component of this strategy was a series of smaller acquisitions, which in the aggregate allowed USAP to consolidate control. After rolling up markets, the firms would raise prices—resulting in Texas patients and businesses paying tens of millions of dollars more than they would have absent this scheme. The proposed merger guidelines explain that when we confront mergers that are part of a series of multiple acquisitions, we may look to the series as a whole, rather than assess each deal in a silo. Updating our approach in this way could help ensure we are addressing unlawful roll-ups on the front end and protecting people like those patients in Texas.

More generally, there is growing recognition across government that the old approach—which relied on overly simplistic theories of markets—hasn't served the American people. Across domains—trade, economics, national security—we are seeing the need to revisit one-dimensional, outdated assumptions about how markets work and update our approach to meet the challenges of today. Earlier this year for example, National Security Advisor Jake Sullivan, in a seminal speech, tied unchecked corporate concentration to the fraying of the socioeconomic foundations on which any strong and resilient democracy rests.[17] Our policy frameworks must recognize that questions of market structure and competition determine not just the price and quantity of goods, but also the trajectory of innovation, the shape of economic opportunity, the resiliency of our markets, and the strength of our democracy.

Our proposed revisions to the guidelines not only reflect new learning and new realities in the marketplace, but also fundamentally restore fidelity to statutory text, legislative history, judicial precedent, and congressional intent. As we finalize the guidelines, our goal is to reinvigorate the full scope of the law while ensuring our merger analysis is dynamic enough to address the myriad ways consolidation threatens Americans—as consumers, workers, and businesspeople.

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[15] Comment Submitted by Farm Action, Regulations.gov (Sept. 19, 2023), https://www.regulations.gov/comment/FTC-2023-0043-1515.

[16] Press Release, Fed. Trade Comm'n, FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

[17] Jake Sullivan, Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brookings Institution (Apr. 27, 2023), https://www.whitehouse.gov/briefing-room/speechesremarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economicleadership-at-the-brookings-institution/.

We cannot predict the many ways that markets and business strategies will evolve. But we can commit to staying vigilant, updating our tools and frameworks when the facts call for it, and using the full scope of our authorities to safeguard free and fair competition for the American people.

Thank you.

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