



Office of the Chair

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

**Remarks of Chair Lina M. Khan
Regarding the Request for Information on
Merger Enforcement
Docket No. FTC-2022-0003**

January 18, 2022

Good afternoon, everyone. Welcome to today's joint DOJ-FTC announcement.

I am excited to share that the FTC and DOJ today are jointly launching a review of the merger guidelines. Ever since issuing the first merger guidelines in 1968, the antitrust agencies have sought to ensure that these documents accurately set forth current enforcement policy and identify the techniques that we use to detect and assess unlawful mergers.¹

Keeping with past practice, the DOJ and FTC today are issuing a request for information, identifying key questions and topics on which we are particularly keen to receive public comment.² These public comments will be critical for informing our review of the existing guidelines and our process for considering potential revisions and updates.

While periodic review of existing guidance is good practice generally, this review of the merger guidelines is especially timely and ripe. Global deal-making in 2021 soared to \$5.8 trillion, the highest level ever recorded,³ with the FTC and DOJ receiving more than double the number of merger filings received on average in any of the past five years.⁴ Major technological and economic changes, meanwhile, have led to shifts in how businesses compete and grow, creating new interconnections and dynamics across multiple dimensions. For us to accurately detect and analyze potentially illegal transactions in the modern economy, ensuring that our merger guidelines reflect these new realities is critical.

This inquiry comes against the backdrop of a broader reassessment of the effects of mergers across the U.S. economy. Evidence suggests that decades of mergers have been a key driver of consolidation across industries, with this latest merger wave threatening to concentrate

¹ U.S. DEPT OF JUST., 1968 MERGER GUIDELINES; U.S. DEPT OF JUST., 1982 MERGER GUIDELINES; U.S. DEPT OF JUST., 1984 MERGER GUIDELINES; U.S. DEPT OF JUST., 1992 MERGER GUIDELINES; U.S. DEPT OF JUST., 1997 MERGER GUIDELINES; U.S. DEPT OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010); U.S. DEPT OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (June 30, 2020) (Fed. Trade Comm'n withdrew on Sept. 15, 2021).

² Fed. Trade Comm'n, Request for Information on Merger Enforcement, Dkt No. FTC-2022-0003 (Jan. 18, 2022).

³ Kaye Wiggins et al., *Dealmaking surges past \$5.8tn to highest levels on record*, FIN. TIMES (Dec. 30, 2021), <https://www.ft.com/content/6dfdd78a-e229-4524-a400-144396524eb6>.

⁴ *Premerger Notification Program*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/premerger-notification-program> (last visited Jan. 18, 2022).

our markets further yet. As President Biden noted in his Executive Order on Promoting Competition, industry consolidation and weakened competition have “den[ied] Americans the benefits of an open economy,” with “workers, farmers, small businesses, and consumers paying the price.”⁵ While the current merger boom has delivered massive fees for investment banks,⁶ evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation.⁷ 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.⁸

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

For over a century, Congress has codified a policy in favor of competition over consolidation. In 1890, as trusts captured the sugar, steel, oil, and railroad industries, lawmakers passed the Sherman Act, prohibiting, among other practices, monopolization, attempted monopolization, and conspiracies to monopolize.⁹ 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.”¹⁰ 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.¹¹ With each of these efforts, Congress redoubled its commitment to open markets and free and fair competition.

⁵ Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 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.”).

⁶ Ortenca Aliaj et al., *Investment bank fees soar past \$100bn on M&A boom*, FIN. TIMES (Oct. 1, 2021), <https://www.ft.com/content/a67e0300-98a8-4c29-890a-0949135933ba> (“Investment banks are raking in record sums, with fees surging past \$100bn in the first nine months of the year thanks to a rush of dealmaking.”).

⁷ See, e.g., José A. Azar et al., *Concentration in US Labor Markets* 13 (Nat'l Bureau of Econ. Res., Working Paper No. 24395, 2018); 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 PAPER ON ECON. ACTIVITY 89, 95–97 (2017); See generally JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POL’Y (2014).

⁸ 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>.

⁹ 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 conducive to the preservation of our democratic political and social institutions.”).

¹⁰ 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).

¹¹ *See* Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1225 (codified as amended at 15 U.S.C. § 18 (1994)).

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. Just as we must revise our theories and models to fit new facts and evidence, we must ensure our merger guidelines accurately reflect the realities of the modern economy. Matching our analysis to contemporary business strategy requires that our tools be dynamic and holistic rather than static and atomistic.

Our request for information identifies a broad set of topics. While each one of these is worthy of extensive study and discussion, I'd like to spotlight three in particular.

First, are the guidelines adequately attentive to the range of business strategies and incentives that might drive acquisitions, be it moat-building or data-aggregation strategies by digital platforms, or roll-up plays by private equity firms? More broadly, how should the guidelines analyze whether a merger may “tend to create a monopoly,” including in its incipency, or whether there is a “trend toward concentration” in the industry?

Second, do the guidelines adequately assess whether mergers may lessen competition in labor markets, thereby harming workers? Are there factors beyond wages, salaries, and financial compensation that the guidelines should consider when determining anticompetitive effects? And when a merger is expected to generate cost savings through layoffs or reduction of capacity, should the guidelines treat this elimination of jobs or capacity as cognizable “efficiencies”?

Third, are the guidelines unduly limited in their focus on particular types of evidence? Are there certain markets where the guidelines should provide a framework to assess direct evidence of market power? What types of indicia of market power should the guidelines consider? And more generally, what types of evidence should the guidelines consider in evaluating nonprice effects?

A wealth of scholarship and empirical research over the last decade has delivered significant learning about the effects of mergers and acquisitions. Our review process will benefit immensely from this valuable work and from the insights of experts who have long studied these issues. But I want to take this opportunity to also encourage those beyond the antitrust community—including consumers, workers, entrepreneurs, start-ups, farmers, investors, and independent businesses—to share feedback and evidence. The quality of our review and any subsequent revisions to the guidelines will depend on robust public participation, and we are especially eager to hear from a broad set of market participants.

Lastly, I'd like to give deep thanks to both FTC and DOJ staff for preparing the thoughtful set of questions we are issuing today. This process has already benefited significantly from the experience and perspective of the staff that investigate mergers day after day, and who have carried a particularly heavy load during the merger surge of the last year.

I'd now like to turn it over to Assistant Attorney General Jonathan Kanter. Since taking the helm less than two months ago, AAG Kanter has hit the ground running, bringing his wealth of experience and talent to bear on some of the most urgent questions we face. Defenders of open

markets and free competition have a fierce champion and vigorous enforcer in AAG Kanter, and I am grateful for our partnership and the close collaboration between our agencies.
