



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

Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson
Regarding the Request for Information on Merger Enforcement
January 18, 2022

Merger enforcement should be administrable, predictable, and credible.¹ Merger guidelines advance those goals when they reflect judicial precedent, incorporate sound developments in economic analysis, and accurately describe how the antitrust agencies assess mergers. Those goals are also advanced by the Federal Trade Commission's long history of critical self-examination, including to inform merger policy.² We welcome the Request for Information on Merger Enforcement (RFI) issued today by the FTC and the Antitrust Division of the DOJ because it reflects this posture of continual learning. And we appreciate the diligent work of FTC staff and their counterparts at the Antitrust Division.

Sound merger enforcement ensures that the federal antitrust agencies address anticompetitive deals while allowing consumers and companies to reap the benefits of M&A markets. As the law and economic learning concerning mergers evolve, so too should our assessment of them. In addition to enforcement, the agencies expend significant resources conducting merger retrospectives, monitoring industry developments, and the like. If there are changes in legal precedent, updated and validated empirical or theoretical learning, or competitive dynamics that we are missing in merger review, consumers will benefit from reflecting them in agency guidelines. Prudence dictates, though, that any recalibration of our current approach to merger enforcement should be undertaken only if warranted by developments in legal and economic analysis, and only after a thorough evaluation of both the administrability and likely impact of that new approach. If revisions to the merger guidelines follow this path, they will stand the test of time.

The 2010 Horizontal Merger Guidelines (Guidelines) are noteworthy because, although the agencies' views are not binding on the judiciary, courts adjudicating merger challenges routinely cite them as persuasive.³ The Guidelines derive their persuasive value from laying out a consensus view on the framework that the FTC and DOJ have developed, over decades of experience, to analyze the effects of mergers. Reflecting precedent from courts and the agencies, and based on accepted economic principles, they garnered support at adoption and in case after case, serving as

¹ See Christine S. Wilson, Thomas J. Klotz, & Jeremy A. Sandford, Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate, 26 Geo. Mason L. Rev. 1435, 1452-53 (2019).

² The Vertical Merger Guidelines issued by FTC and the Antitrust Division of the Department of Justice in June 2020 are but one recent example of this tradition. FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers (June 30, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers>.

³ See e.g., *FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019); *FTC v. Sysco Corp.*, 113 F.Supp.3d 1 (D.D.C. 2015); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

the touchstone for merging parties, enforcers, and judges alike.⁴ The Guidelines are also, of course, a useful guidepost for businesses that seek to ensure their conduct is lawful. Describing the principles and analytical framework the agencies will apply in evaluating mergers increases transparency and predictability for the business community and antitrust practitioners.

The RFI requests public input on many important legal and economic questions. It is appropriate to consider, for example, what constitutes a “digital market” and how the assessment of mergers in such markets should differ, if at all, from mergers in other markets. It is equally appropriate to ensure that the agencies are accurately evaluating mergers involving potential and nascent competitors, assessing impacts on labor markets, and capturing the impact of mergers on incentives to innovate. We encourage comments from all interested and impacted constituencies.

We also encourage comments on the assumptions that appear to underlie particular questions in the RFI. For example, the RFI seeks examples of mergers that have harmed competition, including how those mergers “made it more difficult for rivals to compete with the merged firm.”⁵ The question appears to assume that difficulty for rivals equates to harm to competition. But mergers that benefit consumers through lower prices, enhanced quality, and more innovation may also make it more difficult for rivals to compete with the merged firm.⁶ We hope that comments provide a means to distinguish the two. The RFI also appears to assume that “mergers generally or often fail to realize cognizable efficiencies,” and consequently suggests that the agencies should discount or ignore efficiencies when analyzing mergers.⁷ The extent to which mergers lead to projected efficiencies is a worthy inquiry, and we hope that comments provide relevant data and an array of examples involving mergers where efficiencies were or were not achieved. These are just two of the questions that appear to be premised on debatable assumptions.⁸

Finally, we observe that much of the legal authority cited in the RFI is nearly or more than half a century old.⁹ Courts have decided quite a few antitrust cases in the intervening years, merger

⁴ See Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 Rev. Indus. Org. 51-79 (2021).

⁵ Request for Information on Merger Enforcement (hereinafter “RFI”), at 1 (Jan. 18, 2022).

⁶ The Supreme Court has instructed that the antitrust laws “were enacted for ‘the protection of competition, not competitors’”. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984). The assumption in the RFI appears to contravene the Court’s guidance.

⁷ RFI, at 9.

⁸ Others include, for example, questions based on apparent assumptions that the agencies assess product market overlaps in lieu of innovation and other aspects of competition, ignore monopsony power unless it has an impact on output markets, or exercise a single-minded focus on price effects to the exclusion of other competitive harms. Our experience leads us to question each of these assumptions. See Guidelines §§ 6.4 (“Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. . .”), 12 (when evaluating monopsony concerns, the Agencies do not “evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell”), 1 (“A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.”). Nonetheless, we welcome the input of stakeholders on these topics.

⁹ The RFI repeatedly cites language from *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967) which then-Judge Kavanaugh described as “ahistorical drive-by dicta”. *United States v. Anthem, Inc.*, 855 F.3d 345, 379 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (“For the majority opinion, we are apparently stuck in 1967. The antitrust clock has stopped. No *General Dynamics*. No *Continental T. V. v. GTE Sylvania*. No *Baker Hughes*. No *Heinz*.”).

and non-merger alike, which further elucidate the Sherman, Clayton, and FTC Acts.¹⁰ The RFI commits to “faithfully track...established case law around merger enforcement.”¹¹ We hope it does, as proposed revisions to the Guidelines should be considered in light of antitrust jurisprudence and must reflect legal precedent.

The potential revision of both the Horizontal and Vertical Merger Guidelines is a serious undertaking that could have a dramatic impact on the economy. We encourage the leadership of the FTC and the Antitrust Division to proceed with care and caution. As the agencies have done when promulgating past guidelines, we should afford the public ample time and opportunity to provide input, including through workshops and other public fora. We encourage the public to participate, and look forward to reviewing the responses to the RFI. And we hope to work closely with our colleagues at the FTC and the Antitrust Division as this process progresses.

¹⁰ See e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *FTC v. Univ. Health, Inc.* 938 F.2d 1206 (11th Cir. 1991). One recent case, *Kimble v. Marvel*, states that because antitrust questions address restraints of trade, Supreme Court rulings “necessarily” have turned on the Court’s understanding of economics. Thus, the Supreme Court has “felt relatively free to revise our legal analysis as economic understanding evolves and ... to reverse antitrust precedents that misperceived a practice’s competitive consequences.” *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 461 (2015). Although *Kimble* addressed the Sherman Act, we welcome comments on how this statement interacts with the Court’s statement highlighted in the RFI regarding “the danger of subverting congressional intent by permitting a too-broad economic investigation[.]”

¹¹ RFI, at 1.