



Office of the Chair

UNITED STATES OF AMERICA
Federal Trade Commission
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**Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter and
Commissioner Alvaro M. Bedoya
Regarding FTC-DOJ Proposed Merger Guidelines
Commission File No. P234000**

July 19, 2023

Today, the Federal Trade Commission and the Department of Justice's Antitrust Division are issuing proposed merger guidelines for public comment. Our agencies have a long history of updating their guidance to reflect new experience and learning so that the public can understand how the FTC and the DOJ will analyze transactions.

Seeking direct input from the public has been a vital part of bringing our merger enforcement in line with the realities of today's markets. Since launching our review of the guidelines, we have received over 5,000 comments and held numerous public listening sessions to hear directly from a wide variety of market participants, including state attorneys general, workers, farmers, physicians, pharmacists, restaurant owners, and creators. Beyond showcasing the consolidation that has occurred across sectors, the comments capture the tangible effects that mergers have had on people's lives.

Three principal goals drove our proposed revisions. First, we sought to ensure the guidelines reflect the reality of how firms do business in the modern economy. Second, we wanted to ensure the guidelines faithfully reflect the full scope of the laws that Congress passed and prevailing legal precedent. And third, we sought to ensure the guidelines provide a clear and administrable framework that courts and market participants can apply.

I. Today's Economic Realities

Several updates in the proposed guidelines are designed to reflect how businesses compete in today's economy. They also seek to reflect new learning and experience.

For example, the revised guidelines lay out how enforcers will assess whether transactions may lessen competition in labor markets. Although antitrust law from its founding has been concerned about the effects of monopoly power on workers,¹ merger analysis in recent decades has neglected to focus on labor markets.² Empirical research, meanwhile, shows that

¹ See Statement of Comm'r Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter Regarding the Proposed Merger Guidelines Issued by the Federal Trade Commission & U.S. Department of Justice, Fed. Trade Comm'n (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p234000_merger_guidelines_statement_bedoya_final.pdf.

² See Concurring Statement of Comm'r Rebecca Kelly Slaughter and Chair Lina M. Khan Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System, Fed. Trade Comm'n (Feb. 17,

concentration has increased across labor markets, with a meaningful reduction in worker wages.³ Informed by significant public input, the proposed guidelines identify how the Agencies will assess whether a merger may lessen competition for labor—including by looking at the merging firms’ power to cut or freeze pay, slash benefits, and degrade working conditions.

Reflecting the growth of platform intermediaries across markets, the proposed guidelines also identify how enforcers will assess acquisitions involving platforms. For example, we will consider not just competition between players offering similar services, but also competition from firms whose offerings could replace or disintermediate an existing platform. The proposed guidelines also lay out some different ways that platform acquisitions can risk lessening competition—including acquisitions that eliminate players that were enabling users to easily switch among platforms, or acquisitions that deprive rivals of the scale and network effects needed to fully compete. Especially as more individuals and businesses depend on platforms to access key services, preventing mergers that block competition and lock-in gatekeepers is critical.

Informed by recent enforcement experience, the proposed guidelines also address serial acquisitions. A variety of sectors have seen firms consolidate markets through roll-up strategies that rely on a series of smaller acquisitions.⁴ The proposed draft clarifies that enforcers may evaluate an overall pattern of serial acquisitions or examine it as part of an industry trend.

The proposed guidelines 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, exert control, or block rivals. And 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 methods and tools are most probative.

II. Promoting Rule of Law

Our revisions seek to reinvigorate the full scope of the laws Congress passed to protect Americans from mergers that may lessen competition or tend to create a monopoly. Prior guidelines focused on theories and fact patterns that the FTC and the DOJ have historically been most likely to pursue. However, the most common scenarios are not the only ones covered by

2022),
https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf.

³ See, e.g., *The State of Labor Market Competition*, U.S. DEP’T OF TREASURY 24-25 (Mar. 7, 2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf> (surveying empirical evidence on the wage impacts of labor market power and finding that in the current economy “we believe the best available empirical evidence suggests that labor market power reduces wages by at least 15 percent”).

⁴ See, e.g., Press Release, Fed. Trade Comm’n, *FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm’s Rollup of Veterinary Services Clinics* (Jun. 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics>; Brendan Ballou, *Private Equity Is Killing Your Pets*, THE NATION (Apr. 25, 2013), <https://www.thenation.com/article/economy/private-equity-pets-veterinarian/>.

Section 7 of the Clayton Act or other antitrust laws.⁵ Neglecting to explicitly consider these scenarios may inadvertently convey to businesses that certain mergers are permissible, when in fact the law prohibits them. The proposed guidelines thus seek to address the multitude of ways a transaction might raise competition concerns so that law-abiding businesses can plan accordingly.

The Clayton Act seeks to preserve future competition, as courts have long recognized. The proposed guidelines lay out some ways a merger may further spur consolidation or block future competition.⁶ For example, Proposed Guideline 4, on potential entry, focuses on preserving the possibility of entry in concentrated markets. Such entry can boost competition, and a merger neutralizing or preventing that entry can violate the law.⁷ Proposed Guideline 7 focuses on acquisitions involving dominant firms and lays out how enforcers will assess the risk of entrenching a dominant position.⁸ And Proposed Guideline 8 addresses markets that are trending toward concentration. Because the Clayton Act seeks to halt concentration in its incipiency, enforcers must be vigilant early.⁹

The proposed guidelines also revise the thresholds for the structural presumption to more closely conform to the law and restore traditional figures.¹⁰ While the 2010 guidelines adopted higher thresholds, enforcers did so to reflect contemporary agency practice rather than to suggest

⁵ See Statement of Comm’r Rebecca Kelly Slaughter Joined by Chair Lina M. Khan and Commissioner Alvaro M. Bedoya Regarding FTC-DOJ Proposed Merger Guidelines (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p234000_bks_statement_re_draft_merger_guidelines_final.pdf (discussing the “tend to create a monopoly” provision of Section 7).

⁶ The 2010 guidelines were, of course, interested in future competition as well, for example introducing analysis of competition in innovation.

⁷ The 2010 guidelines apply to “mergers and acquisitions involving actual **or potential** competitors,” and provides guidance on when certain committed or rapid entrants should be treated as current market participants. It does not, however, specifically address the analysis for a merger involving a potential entrant who is not a committed or rapid entrant, apart from the possibility of assigning predicted market shares to such an entrant. See U.S. DEPT. OF JUSTICE AND FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter “2010 HORIZONTAL MERGER GUIDELINES”], § 5.2 (emphasis added).

⁸ The 2010 guidelines state that mergers “should not be permitted to ... entrench market power,” but did not expand on this point. *Id.* at § 1.

⁹ *Brown Shoe Co. v. United States*, 370 U.S. 294, 333-34 (1962) (citing Congressional concern with situations “[w]here several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply.”).

¹⁰ The Supreme Court first created the structural presumption in *Philadelphia National Bank*, explaining that: “[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.” *United States v. Philadelphia Nat. Bank*, 374 US 321, 363 (1961). What level of concentration is “undue” and what increase is “significant” has been the subject of decades of litigation and guidance, all attempting to determine the level of risk that Congress intended to permit when it prohibited mergers that “may” substantially lessen competition.

any change in the law.¹¹ In order to provide market participants with fair notice about potential legal risks, the proposed guidelines hew to thresholds reflected in prevailing case law.¹²

III. Administrability and Accessibility

Finally, the proposed guidelines are designed to be more administrable and accessible to market participants and to courts.¹³ The proposed guidelines provide brief summaries of each guideline in the overview, with additional detail in the body of the guidelines. The guidelines include appendices identifying various technical tools and methods that can be used in competition analysis—preserving our ability to use these tools and methods without obscuring our core enforcement principles.

Our proposed revisions seek to address major changes in the modern economy and stay faithful to the law and precedent on the books. We are deeply grateful to the joint FTC-DOJ drafting team for its careful and exhaustive work on these proposed revisions, as well as to staff and my fellow Commissioners for closely reviewing and providing feedback on the draft. We look forward to reviewing public comments as we continue our work to execute on the critical mandate Congress has given us.

¹¹ Remarks of Assistant Attorney General Christine A. Varney, An Update on the Review of the Horizontal Merger Guidelines (Jan. 26, 2020), <https://www.justice.gov/atr/speech/update-review-horizontal-merger-guidelines> (discussing revisions to the guidelines and noting that “it is relatively rare for the Agencies to challenge mergers that will lead to HHI concentration levels below 1,800. Yet the Guidelines indicate that such mergers ‘potentially raise significant competitive concerns.’ Similarly, the Guidelines suggest that a 100 point increase in an HHI concentration level raises competitive concerns. In actual practice, however, the Agencies have only infrequently challenged mergers unless they increase concentration several times that much.”).

¹² Note that the Agencies did, in fact, take action against approximately two-thirds of the transactions that would have been presumptively subject to challenge under the longstanding 1982 thresholds, but were not presumptively subject to challenge under the 2010 guidelines.

¹³ Complexity has not clearly led to better decision-making by federal agencies or by courts. See Rohit Chopra, *Rethinking the Approach to Regulations*, Consumer Fin. Prot. Bureau (Jun. 17, 2022), <https://www.consumerfinance.gov/about-us/blog/rethinking-the-approach-to-regulations> (“Markets work best when rules are simple, easy to understand, and easy to enforce.”).