



March 24, 2022

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Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C., 20580

Jonathan Kanter
Assistant Attorney General, Antitrust Division
Department of Justice
Main Justice Building
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Washington, D.C. 20530

Re: Request for Information on Merger Enforcement

Dear Ms. Khan and Mr. Kanter:

President Biden’s Executive Order on Promoting Competition in the American Economy (July 9, 2021) encourages the Attorney General and the Chair of the Federal Trade Commission to “review the horizontal and vertical merger guidelines and consider whether to revise those guidelines.”¹ On January 18, 2022, the Federal Trade Commission and Department of Justice (the “agencies”) announced a “public inquiry aimed at modernizing merger guidelines.”² In support of that effort, the agencies released a set of questions on which they sought public input.³

Since the introduction of the Merger Guidelines in 1968, the “horizontal” framework of the merger guidelines has been revised every ten-to-fourteen years.⁴ The agencies’ current effort is in line with the historical timeline of revisiting and considering changes to the

¹ President Joseph R. Biden Jr., *Executive Order on Promoting Competition in the American Economy* (July 9, 2021), §5(c), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

² Press Release, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers* (January 18, 2022), available at <https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers>.

³ U.S. Department of Justice and Federal Trade Commission, Request for Information on Merger Enforcement (January 18, 2022), available at <https://www.justice.gov/opa/press-release/file/1463566/download>.

⁴ The Department of Justice first issued Merger Guidelines in 1968. The Department issued revised Merger Guidelines in 1982 and released a slightly revised version in 1984. The Department and the Federal Trade Commission issued Horizontal Merger Guidelines in 1992, and, in 1997, amended the section on efficiencies significantly to better explain the agencies’ treatment of efficiencies in horizontal merger analysis. Revised Horizontal Merger Guidelines were issued in 2010. In 2020, the Department and FTC issued updated Vertical Merger Guidelines, superseding the 1982/1984 Merger Guidelines’ treatment of vertical mergers. The FTC has since withdrawn from the Vertical Merger Guidelines. Earlier and current versions of the merger guidelines are available at the Department of Justice’s “Merger Enforcement” page, <https://www.justice.gov/atr/merger-enforcement>.

merger guidelines, and the undersigned support the agencies' inquiry into the current merger guidelines. We take no position in this letter on the substantive content of revised merger guidelines, or whether revisions are necessary or would be useful, but write to strongly discourage a view that the current request for information on merger enforcement is a substitute for seeking comment on a revised version of the merger guidelines, if the agencies determine revised merger guidelines are appropriate.

For over two decades, the agencies have followed a practice of seeking comment on a draft of new or revised antitrust enforcement guidelines before issuing a final version.⁵ We support the process identified by Assistant Attorney General Kanter in his remarks of January 18, as consistent with this practice:

Our review will follow a rigorous, thoughtful, and inclusive process. After this initial comment period, we plan to release a draft of the updated guidelines and seek further comment before finalizing. Along the way, we will engage frequently

⁵ The DOJ and FTC released proposed antitrust guidelines for collaborations among competitors on October 1, 1999. See Press Release, *FTC and DOJ Propose Antitrust Guidelines for Collaborations among Competitors* (October 1, 1999), available at <https://www.ftc.gov/news-events/press-releases/1999/10/ftc-and-doj-propose-antitrust-guidelines-collaborations-among>. The agencies released final Antitrust Guidelines for Collaborations Among Competitors on April 7, 2000. See Press Release, *FTC and DOJ Issue Antitrust Guidelines for Collaborations Among Competitors* (April 7, 2000), <https://www.ftc.gov/news-events/press-releases/2000/04/ftc-doj-issue-antitrust-guidelines-collaborations-among>. Proposed revisions to the 1992 Horizontal Merger Guidelines (as amended in 1997) were released on April 20, 2010. See Press Release, *Federal Trade Commission Seeks Views on Proposed Update of the Horizontal Merger Guidelines* (April 20, 2010), available at <https://www.ftc.gov/news-events/press-releases/2010/04/federal-trade-commission-seeks-views-proposed-update-horizontal>. Final revised Horizontal Merger Guidelines were released on August 19, 2010. See Press Release, *Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines* (August 19, 2010), available at <https://www.ftc.gov/news-events/press-releases/2010/08/federal-trade-commission-us-department-justice-issue-revised>. Proposed revisions to the 1995 Antitrust Guidelines for Licensing of Intellectual Property were released on August 12, 2016, and a final revised version of the guidelines were released on January 13, 2017. See Press Release, *DOJ and FTC Seek Views on Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property* (August 12, 2016), available at <https://www.justice.gov/opa/pr/doj-and-ftc-seek-views-proposed-update-antitrust-guidelines-licensing-intellectual-property>; and, Press Release, *DOJ and FTC Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property* (January 13, 2017), available at <https://www.justice.gov/opa/pr/doj-and-ftc-issue-updated-antitrust-guidelines-licensing-intellectual-property>. Proposed revisions to the 1995 Antitrust Enforcement Guidelines for International Operations were released on November 1, 2016, and final revised Antitrust Enforcement Guidelines for International Operations were released on January 13, 2017. See Press Release, *Justice Department and Federal Trade Commission Seek Public Comment on Proposed Updates to International Antitrust Guidelines* (November 1, 2016), available at <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-public-comment-proposed-updates> and Press Release, *Justice Department and Federal Trade Commission Announce Updated International Antitrust Guidelines* (January 13, 2017), available at <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-announce-updated-international-antitrust>. Proposed Vertical Merger Guidelines were released on January 10, 2020, and final Vertical Merger Guidelines were issued on June 30, 2020. See Press Release, *FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment* (January 10, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-doj-announce-draft-vertical-merger-guidelines-public-comment>, and Press Release, *FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers* (June 30, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers>. In all instances, the agencies sought comment on the draft proposed guidelines.

with state, federal, and international enforcers, partner agencies, and stakeholders. We hope to finish this year but have much work to do along the way.⁶

Both of you and Attorney General Garland⁷ have suggested that the agencies may be considering or are open to substantial changes to the merger guidelines. Commissioners Wilson and Phillips also recognize this possibility.⁸ Such changes may, and may be intended to, have a significant effect on the U.S. economy.

We recommend the agencies take two further procedural steps, consistent with historical practice where substantial revisions to guidelines (or the introduction of new guidelines) was contemplated.

Consistent with the practice followed prior to (i) the 1997 revisions to the Horizontal Merger Guidelines; (ii) the issuance of *Antitrust Guidelines for Collaborations Among Competitors* in 2000; (iii) the 2009/2010 revisions to the Horizontal Merger Guidelines; and (iv) the issuance of Vertical Merger Guidelines in 2020, we encourage the agencies to hold public

⁶ *Remarks of Assistant Attorney General Jonathan Kanter on Modernizing Merger Guidelines* (January 18, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines>.

⁷ *Attorney General Merrick B. Garland Delivers Remarks at the Roundtable on Promoting Competition and Reducing Prices in the Meatpacking Industry* (January 3, 2022), available at <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-roundtable-promoting-competition-and> (“Too many industries have become too consolidated over time. ... Too many companies have pursued corporate conduct and more aggressive mergers that have made all of us vulnerable.”); *Attorney General Merrick B. Garland Delivers Remarks at the White House Roundtable on the State of Labor Market Competition in the U.S. Economy* (March 7, 2022), available at <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-white-house-roundtable-state-labor> (“Our [merger guidelines] review will ensure, among other things, that merger guidelines fully address the potential for mergers to harm labor market competition.”); *Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement* (January 18, 2022) at 1-2, available at https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf (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 our markets further yet.”); *Remarks of Assistant Attorney General Jonathan Kanter on Modernizing Merger Guidelines* (January 18, 2022), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines> (“This initiative is incredibly important. We have lived through changes in our economy on a level that rivals the industrial revolution. The digital transformation has revolutionized not just the goods and services we buy, but the nature of industry. Companies today cooperate, compete, invest, and invent in profoundly different ways than they did twenty years ago. Times have changed because the advent of the digital economy has transformed industry.”).

⁸ *Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Request for Information on Merger Enforcement* (January 18, 2022) at 3, available at https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf (“The potential revision of both the Horizontal and Vertical Merger Guidelines is a serious undertaking that could have a dramatic impact on the economy.”).

workshops *prior to* seeking comment on a draft of revised merger guidelines.⁹ Public and open agency-expert discussion between the agencies, and outside lawyers and economists, businesses, and other potentially affected groups prior to the release of draft revised guidelines will better inform the agencies, and the public, of potential substantive issues that

⁹ With respect to the amendments to the efficiency section of the 1992 Horizontal Merger Guidelines, see *Prepared Remarks of FTC Chairman Robert Pitofsky, FTC Hearings* (October 12, 1995) available at https://www.ftc.gov/system/files/documents/public_statements/1398362/pitofsky_-_hearings_opening_statement_10-12-95.pdf (The hearings that we initiate today are designed to address the responsibility of insuring that the competition and consumer protection policies we enforce continue to be relevant in the modern economy. ... We do not initiate these hearings with pre-established conclusions in mind. ... We seek opinions on ... [whether] American antitrust enforcement [has] paid sufficient attention to claims of efficiency.?”); *Remarks of FTC Chairman Robert Pitofsky, FTC Staff Report on Competition Policy: Six Months After* (November 7, 1996), available at <https://www.ftc.gov/public-statements/1996/11/ftc-staff-report-competition-policy-six-months-after> (“A DOJ-FTC Joint Task Force has been organized since the FTC staff report was published, and has been meeting more or less on a weekly basis to address the details of incorporating efficiencies as a mitigating factor in merger enforcement.”); and *Global and Innovation-Based Competition Hearings* available at <https://www.ftc.gov/news-events/events-calendar/1995/10/global-innovation-based-competition-hearings> (“the FTC anticipated exploring ... how antitrust can maximize the likelihood of realizing beneficial efficiencies ... [and] when should antitrust concerns with undue increases in market power trump claims of increased efficiency.”). With respect to process for issuing the *Antitrust Guidelines for Collaborations Among Competitors*, see *Press Release, FTC Announces Project to Follow Global and Innovation-Based Competition Hearings* (January 23, 1997), available at <https://www.ftc.gov/news-events/press-releases/1997/01/ftc-announces-project-follow-global-and-innovation-based> (announcing “The Joint Venture Project to clarify and update antitrust policies regarding joint ventures and other forms of competitor collaborations. The Joint Venture Project grows out of public hearings on global and innovation-based competition held by the FTC last year.”) and *Press Release, FTC To Hold Hearings and Receive Comments on Joint Venture Project* (April 22, 1997), available at <https://www.ftc.gov/news-events/press-releases/1997/04/ftc-hold-hearings-and-receive-comments-joint-venture-project>; See also *Joint Venture Hearings on Antitrust Guidelines for Collaboration Among Competitors* (July 1, 1997), available at <https://www.ftc.gov/news-events/events-calendar/1997/07/joint-venture-hearings-antitrust-guidelines-collaboration-among> (providing transcripts of the five hearings held to discuss proposed joint venture guidelines). With respect to the revisions to the 1992/1997 Horizontal Merger Guidelines, see *Press Release, Department of Justice and Federal Trade Commission to Hold Workshops Concerning Horizontal Merger Guidelines* (September 22, 2009), available at <https://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-hold-workshops-concerning-horizontal-merger> (“The goal of the workshops will be to determine whether the Horizontal Merger Guidelines accurately reflect the current practice of merger review at the Department and the FTC as well as to take into account legal and economic developments that have occurred since the last significant Guidelines revision in 1992. ... The agencies will issue a set of questions about the current Guidelines and possible revisions. Following receipt of public comments and original research addressing those questions or other issues related to the Guidelines, the agencies will host a series of five workshops.”); see also *Horizontal Merger Guidelines Review Project* (December 3, 2009), available at <https://www.ftc.gov/news-events/events-calendar/2009/12/horizontal-merger-guidelines-review-project> (containing transcripts of five workshops on revisions to the horizontal merger guidelines). With respect to the 2020 Vertical Merger Guidelines, see *Press Release, FTC Announces Agenda for Fifth Session of its Hearings on Competition and Consumer Protection in the 21st Century* (October 12, 2018), available at <https://www.ftc.gov/news-events/news/press-releases/2018/10/ftc-announces-agenda-fifth-session-its-hearings-competition-consumer-protection-21st-century> (previewing and seeking comment on questions with respect to vertical merger guidelines and enforcement that would be discussed at the hearing session and including transcripts of the public discussion sessions held on November 1, 2018).

should be addressed, and that may or may not be supported by economics, law, or current agency practice.¹⁰

Similarly, and for the same reason, we encourage the agencies to follow the example set by the FTC and DOJ in preparing the 2020 Vertical Merger Guidelines. There, after the release of a draft of the vertical merger guidelines, the agencies announced two workshops on the proposed guidelines to “allow for a dynamic discussion about the proposed guidelines to complement the written public comments about the proposed guidelines that were submitted to the agencies.”¹¹

We recognize that the agencies have announced four listening forums (of two hours) and a half-day enforcers summit where merger policy and merger effects will be discussed. These efforts are appropriate, but quite limited, both in time and scope of participation. Neither of these formats allows for public discussion and public input from a broad range of interested parties, including lawyers and economists, not presently at the agencies or other law enforcement agencies, who have broad experience in the analysis of competitive effects of mergers, with differing perspectives on the effects of mergers and whether and how existing merger guidelines should be revised. The listening forum specifically excludes “antitrust experts” and the enforcers summit does not include participation by individuals who are not presently associated with a law enforcement agency.

The public discussion opportunities are significantly and notably less extensive than the most recent effort to review and possibly revise the scope of the Horizontal Merger Guidelines. Prior to the April 2010 release of proposed revisions to the 1992/1997 Horizontal Merger Guidelines, the agencies held five full-day public workshops. There, the leadership of the FTC (including all FTC Commissioners) and senior Antitrust Division leadership participated in and led discussions of lawyers, economists, academics, judges, in-house counsel and in-house economists, representatives of union organizations, representatives of consumer organizations, state enforcement officials and non-U.S. competition agency officials on possible revisions to the guidelines. In short, the agencies

¹⁰ Press Release, *FTC and Justice Department Launch Listening Forums on Firsthand Effects of Mergers and Acquisitions* (March 17, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-justice-department-launch-listening-forums-firsthand-effects-mergers-acquisitions>; Press Release, *Federal Trade Commission and Justice Department to Hold Joint Spring Enforcers Summit* (March 10, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/03/federal-trade-commission-justice-department-hold-joint-spring-enforcers-summit>.

¹¹ Press Release, *Department of Justice Antitrust Division Announces Agenda and Panelists for Workshop on Proposed Vertical Merger Guidelines* (March 4, 2020), available at <https://www.justice.gov/opa/pr/department-justice-antitrust-division-announces-agenda-and-panelists-workshop-proposed>; *Vertical Merger Guidelines WorkShop* (March 11, 2020), available at <https://www.ftc.gov/news-events/events/2020/03/vertical-merger-guidelines-workshop>; Press Release, *FTC and DOJ Extend Deadline for Public Comments on Draft Vertical Merger Guidelines, Announce Two Related Public Workshops* (February 3, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-doj-extend-deadline-public-comments-draft-vertical-merger>. The second workshop was canceled, per guidance from the Office of Personnel Management during the then-developing Covid-19 coronavirus pandemic. *Federal Trade Commission Cancels March 18 Workshop on Draft Vertical Merger Guidelines* (March 13, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/03/federal-trade-commission-cancels-march-18-workshop-draft-vertical>.

consulted representatives of all points of view, representing a broad spectrum of interested parties. (The agenda for each of those five workshops is attached as exhibits to this letter.) The time the agencies propose to spend on public discussion of possible revisions to the merger guidelines represents only 25% of the time they spent on public discussion of possible revisions to the 1992/1997 Horizontal Merger Guidelines, with a substantially more circumscribed class of likely and invited participants. The exclusion of public discussion between agency officials and antitrust experts may be viewed as indicative of a pre-determined outcome and unwillingness to engage with viewpoints inconsistent with a preferred outcome.

The undersigned reiterate their support for the antitrust agencies' review of, and consideration of changes to, the 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines. We believe a process that seeks significant public participation through comments and public discussion *prior to and after* a release of draft revisions to the merger guidelines is consistent with past practice and best practices. It will also best inform the agencies' revision process and increase the likelihood that revised merger guidelines will be relevant for ten-to-fifteen years and across different administrations.


Respectfully,

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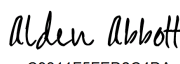
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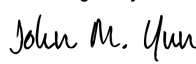
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