Congress of the United States

Washington, DC 20515

September 18, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

The Honorable Alvaro Bedoya
Commissioner
Federal Trade Commission
600 Pennsylvania Ave, NW
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The Honorable Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
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Dear Chair Khan, Commissioner Slaughter, Commissioner Bedoya, and Assistant Attorney General Kanter:

We write in support of the Federal Trade Commission (FTC) and Department of Justice (DOJ) Antitrust Division's draft merger guidelines. The proposed guidelines align with the congressional intent of the antitrust laws, are rooted in statute and binding Supreme Court precedent, and are necessary at a time of excessive consolidation and inequality. We urge the FTC and DOJ to move rapidly to finalize these guidelines, and consider additional ways to strengthen antitrust enforcement and protect consumers as your agencies do so.

I. Congress Intended the Antitrust Laws to Promote Fair Competition and Protect Democracy

Congress enacted bold, transformative legislation to address economic concentration during the late nineteenth and twentieth centuries – and this legislation continues to serve as the foundation of modern antitrust law. The *Sherman Act* of 1890, *Clayton Act* of 1914, and *Celler-Kefauver Antimerger Act* of 1950 each reflected legislative agreement that unchecked consolidation threatens democracy, economic vitality, individual liberty, and the well-being of local communities.

The *Sherman Act* prohibits "every contract, combination … or conspiracy, in restraint of trade,"[1] and imposes criminal liability on persons who "monopolize, … attempt to monopolize, or combine or conspire… to monopolize."[2] Congress adopted the law near-unanimously in response to Gilded Age monopolists' domination of major American industries such as railroads, mining,

[1] 15 U.S.C. 1.
[2] 15 U.S.C. 2.

and manufacturing.[3] 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."[4] Contemporaneous legislative debates "conclusively show . . . that the main cause which led to the legislation was . . . the vast accumulation of wealth in the hands of corporations and individuals . . . and the widespread impression that [trusts'] power had been and would be exerted to oppress individuals and injure the public generally."[5] At the time, "conviction was universal that the country was in real danger from . . . aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country."[6] After the Supreme Court held the *Sherman Act* prohibited only "unreasonable" agreements in restraint of trade,[7] Congress, encouraged by President Wilson, moved to strengthen the antitrust laws.[8]

Congress adopted the *Clayton Act* of 1914 with the stated purpose of "arrest[ing] the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[9] The act prohibited acquisitions that had the effect of "eliminat[ing] or substantially lessen[ing] competition" or "creat[ing] a monopoly."[10] It also barred unfair competitive practices in their incipiency, such as price discrimination,[11] exclusive or "tying" contracts,[12] and interlocking directorates.[13] Federal courts once again applied a narrow view to the antitrust legislation, holding the *Clayton Act*'s prohibition on acquisitions applied only to transactions that had a likelihood of creating a monopoly[14] and that involved the purchase of stock, rather than the purchase of assets.[15]

Congress was alarmed by accelerating mergers following World War II,[16] reflected by "substantial agreement that the level of economic concentration [was] extremely high."[17] The

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[3] U.S. National Archives, "Sherman Anti-Trust Act (1890)," https://www.archives.gov/milestone-documents/sherman-anti-trust-act

[4] N. Pac. R. Co. v. United States, 356 U.S. 1, 4 (1958) (explaining that the Sherman Act "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.").

[5] Standard Oil Co. v. United States, 221 U.S. 50 (1911).

[6] *Id.* at 83 (Harlan, J., concurring in part and dissenting in part).

[7] *Id.* at 60.

[8] California v. Am. Stores Co., 495 U.S. 271, 285-86 (1990).

[9] Senate Judiciary Committee Report, 6553 S.rp.698, p. 1.

[10] *Id.,* p. 8.

[11] An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes, Public Law 63-212, §2 (codified at 15 U.S.C. 13).

[12] *Id.* § 3 (codified at 15 U.S.C. 14).

[13] *Id.* § 8 (codified at 15 U.S.C. 19); Cornell Law School, "tying arrangement," https://www.law.cornell.edu/wex/tying_arrangement

[14] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

[15] FTC v. Western Meat Co., 272 U.S. 554 (1926) (holding that the Clayton Act of 1914 applied to acquisitions of stock but not acquisitions of assets); Senate Judiciary Committee Report, 11369 S.rp.1775, p. 2.

[16] House Judiciary Committee Report, 11300 H.rp.1191, p. 2.

[17] Senate Judiciary Committee Report, 11369 S.rp.1775, p. 3.; House Judiciary Committee Report, 11300 H.rp.1191, p. 2 ("[M]easured by practically any method and compared to practically any standard, the level of economic

legislature therefore passed the *Celler-Kefauver Antimerger Act* of 1950 to "limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions."[18] The act amended the *Clayton Act* of 1914 "by broadening its scope so as to cover the entire range of corporate amalgamations" and by "chang[ing] the test of illegality" for mergers.[19] Instead of the likelihood-based standard applied by the judiciary, Congress prohibited any acquisitions where, "in any line of commerce … in any section of the country, the effect of such acquisition[s] may be substantially to lessen competition, or to tend to create a monopoly."[20] Congress hoped these changes would empower enforcers to prevent economic concentration before it occurred,[21] or as the Supreme Court put it, "to brake this force at its outset and before it gathered momentum."[22]

In adopting these laws, Congress made clear that fair competition is vital to preserving democracy and local economic independence. The lead sponsor of the 1950 bill, Senator Estes Kefauver, framed the choice as between "permit[ting] the economy of the country to gravitate into the hands of a few corporations . . . with . . . the destiny of the people determined by the decisions of persons whom they never see," or "preserv[ing] small business, local operations, and free enterprise."[23] He warned that "[w]hen [people] lose the power to direct their economic welfare they also lose the means to direct their political future."[24] In analyzing the congressional intent underlying the antitrust laws, the Supreme Court noted "Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose," namely values such as "'local control' over industry and the protection of small businesses."[25] The antitrust laws reflect Congress' strong intent to promote competition, prevent consolidation, and protect democracy and local communities.

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concentration in the American economy is high.").

[18] Senate Judiciary Committee Report, 11369 S.rp.1775, p. 3.

[19] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); U.S. House of Representatives, "The Celler-Kefauver Act: Sixteen Years of Enforcement," October 16, 1967, pp. 14, 26.

[20] 15 U.S.C. 18.

[21] Senate Judiciary Committee Report, 11369 S.rp.1775, p. 4-5 (explaining the 1950 amendment sought "to cope with monopolistic tendencies in their incipiency").

[22] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

[23] 96 Congressional Record 16450 (1950).; Institute for Local Self Reliance, "Rolling Back Corporate Concentration: How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power," Stacy Mitchell and Ron Knox, June 2022, pp. 9-10, https://cdn.ilsr.org/wp-content/uploads/2022/06/ILSR-New-Federal-Anti-Merger-Guidelines-Can-Restore-Competition.pdf

[24] House Committee on the Judiciary, Subcommittee No. 3, 81st Cong. 12., "Amending Sections 7 and 11 of the Clayton Act: Hearing on H.R. 988," 1949; Institute for Local Self Reliance, "Rolling Back Corporate Concentration: How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power," Stacy Mitchell and Ron Knox, June 2022, https://cdn.ilsr.org/wp-content/uploads/2022/06/ILSR-New-Federal-Anti-Merger-Guidelines-Can-Restore-Competition.pdf

[25] Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 316, 344 (1962). (recognizing "Congress' desire to promote competition through the protection of viable, small, locally owned businesses"); Senate Judiciary Committee Report, 11369 S.rp.1775, p. 3; Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962), Institute for Local Self Reliance, "Rolling Back Corporate Concentration: How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power," Stacy Mitchell and Ron Knox, June 2022, https://cdn.ilsr.org/wp-content/uploads/2022/06/ILSR-New-Federal-Anti-Merger-Guidelines-Can-Restore-Competition.pdf

II. FTC and DOJ's Merger Guidelines Have Diverged from the Intent of the Antitrust Laws

The FTC and DOJ are entrusted with enforcing federal antitrust laws.[26] The agencies have issued enforcement guidelines periodically since the *Celler-Kefauver Antimerger Act* of 1950 in order to inform regulated entities of the standards used to review and potentially challenge transactions under the *Clayton Act*.[27]

The agencies issued the first merger guidelines in 1968.[28] Those guidelines adhered closely to the congressional intent of the antitrust laws, stating at the outset that the enforcers' "primary role … is to preserve and promote market structures conducive to competition."[29] The guidelines established a presumption that enforcers would challenge mergers between firms that exceeded clear thresholds of the market share of the acquiring and acquired firm.[30] For example, in markets where the four largest firms had 75 percent or more of market share, enforcers would challenge any merger in which a firm with 10 percent market share would acquire a firm with 2 percent or more market share.[31] They also provided that enforcers would apply stricter standards to mergers in markets with a trend toward consolidation and made clear that economic efficiency would not normally be accepted as justification for a merger.[32]

The 1982 guidelines marked a severe and unjustified shift in enforcement policy.[33] The guidelines proclaimed, without grounding in antitrust law or legislative history, that "mergers generally play an important role in a free enterprise economy."[34] The guidelines significantly relaxed the thresholds that triggered scrutiny of mergers and "raise[d] the benchmark levels for classifying markets as concentrated."[35] The 1982 guidelines overemphasized narrow considerations of economic efficiency, but even in doing so cautioned that enforcers should

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[26] U.S. Federal Trade Commission, "The Enforcers," https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers

[27] U. S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," pp. 1-2, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.; Institute for Local Self-Reliance, "The Biden Administration's Proposed Merger Guidelines: An Explainer," Stacy Mitchell and Ron Knox, August 10, 2023, https://ilsr.org/the-biden-administrations-proposed-merger-guidelines-an-explainer/

[28] White House, "Protecting Competition Through Updated Merger Guidelines," July 19, 2023, https://www.whitehouse.gov/cea/written-materials/2023/07/19/protecting-competition-through-updated-merger-guidelines/

[29] U.S. Department of Justice, "1968 Merger Guidelines," https://www.justice.gov/archives/atr/1968-merger-guidelines

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] U.S. Department of Justice, "1982 Merger Guidelines," https://www.justice.gov/archives/atr/1982-merger-guidelines

[34] *Id.*

[35] California Law Review, "The 1982 Department of Justice Merger Guidelines: An Economic Assessment," Janusz Ordover and Robert Willig, March, 1983, p. 535, https://www.jstor.org/stable/pdf/3480165.pdf?refreqid=excelsior%3Ad7a5905d24f7447982a743010cb72847&ab_segments=&origin=&initiator=&acceptTC=1

consider efficiency arguments only in "extraordinary cases" and that "their magnitudes would be extremely difficult to determine."[36]

Subsequent revisions to the guidelines moved further away from statutory text and congressional intent. For example, the 1984 guidelines claimed that "antitrust laws and … the Guidelines … are designed to proscribe only mergers that present a significant danger to competition"[37] when in fact the antitrust laws prohibit mergers where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[38] In addition, despite the Supreme Court's clear rejection of an efficiencies defense, the 1992 guidelines not only allowed firms to use efficiency as a defense, but also eliminated the requirement that firms establish clear and convincing evidence of efficiencies.[39] The 1997 guidelines added to the list of efficiency benefits that could be considered to include "improved quality, enhanced service, or new products."[40] And the current guidelines, issued in 2010, raised the threshold at which markets are considered to be "highly concentrated."[41] The cumulative result of these changes is a merger control regime that is "considerably more accommodating to mergers than in the past" and that has "facilitated rising concentration and diminished competition more generally."[42]

III. The FTC and DOJ's Proposed Guidelines are Grounded in Law and Reflect the Reality of Today's Hyper-Concentrated Economy

FTC and DOJ announced an initiative to update the merger guidelines in January 2022.[43] The agencies led a public comment period in which thousands of members of the public, "including consumers, workers, state attorneys general, academics, businesses, trade associations, practitioners, and entrepreneurs," provided feedback.[44] FTC and DOJ published the proposed guidelines on July 19, 2023, with a 60-day comment period to solicit feedback before finalizing the guidelines.[45]

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[36] U.S. Department of Justice, "1982 Merger Guidelines," https://www.justice.gov/archives/atr/1982-merger-guidelines

[37] U.S. Department of Justice, "1984 Merger Guidelines," https://www.justice.gov/archives/atr/1984-merger-guidelines

[38] 15 U.S.C. 18.

[39] U.S. Department of Justice, "1992 Merger Guidelines," https://www.justice.gov/archives/atr/1992-merger-guidelines

[40] U.S. Department of Justice, "1997 Merger Guidelines," https://www.justice.gov/archives/atr/1997-merger-guidelines

[41] U.S. Department of Justice, "2010 Merger Guidelines," https://www.justice.gov/atr/horizontal-merger-guidelines-08192010

[42] Social Science Research Network, "Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice," John E. Kwoka, Jr., October 9, 2018, p. 8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3332641

[43] U.S. Federal Trade Commission, "Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers," January 18, 2022, https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers

[44] U.S. Federal Trade Commission, "FTC and DOJ Seek Comment on Draft Merger Guidelines," press release, July 19, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines

[45] *Id.*

The revisions focus on "reflect[ing] the law as written by Congress and interpreted by the highest courts," "increasing transparency and awareness," and "provid[ing] frameworks that reflect the realities of our modern economy."[46] Indeed, the proposed guidelines invoke statutory language and judicial precedent to an extent far greater than previous iterations of the guidelines. And they outline a path for robust antitrust enforcement at a time when it is sorely needed.

In the last quarter century, over 75 percent of American industries have become more concentrated.[47] Without robust competition, large corporations dominate industries to the detriment of consumers, workers, and entrepreneurs of all backgrounds. Excessive market power costs American families $5,000 per year on average.[48]In concentrated markets, prices increase by at least three times,[49] wages decrease by nearly 20 percent,[50] and workers are likely to be forced into restrictive employment agreements.[51] The current level of economic concentration far outstrips the state of the American economy at the time the antitrust laws were enacted.[52] The Senate report accompanying the 1950 legislation recounted testimony showing that 0.1 percent of American corporations at the time owned 49 percent of the assets of all American corporations.[53] Now, that number is over 88 percent.[54]

A. The Proposed Guidelines Address Pressing Dangers to Competition

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[46] *Id.*

[47] Swiss Finance Institute, "Are U.S. Industries Becoming More Concentrated?," Gustavo Grullon, Yelena Larkin, and Roni Michaely, October 25, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047

[48] American Economic Liberties Project, "Confronting America's Concentration Crisis: A Ledger of Harms and Framework for Advancing Economic Liberty for All," July 2020, p. 3, https://www.economicliberties.us/wp-content/uploads/2020/08/Ledger-of-Harms-R41.pdf

[49] The White House, "Fact Sheet: Executive Order on Promoting Competition in the American Economy," press release, 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/; National Bureau of Economic Research, "The Rise of Market Power and the Macroeconomic Implications," Jan De Loecker, Jan Eeckhout, and Gabriel Unger, November 15, 2019, p. 4, https://www.janeeckhout.com/wp-content/uploads/RMP.pdf

[50] U.S. White House, "Fact Sheet: Executive Order on Promoting Competition in the American Economy," 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/; Journal of Human Resources, "Labor Market Concentration," José Azar, Ioana Marinescu, and Marshall Steinbaum, May 2020, https://jhr.uwpress.org/content/wpjhr/early/2020/05/04/jhr.monopsony.1218-9914R1.full.pdf

[51] White House, "Fact Sheet: Executive Order on Promoting Competition in the American Economy," press release, 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/; Economic Policy Institute, "Noncompete Agreements," Alexander Colvin and Heidi Shierholz, December 10, 2019, https://www.epi.org/publication/noncompete-agreements/

[52] Chicago Booth, "100 Years of Rising Corporate Concentration," Spencer Kwon, Yueran Ma, and Kaspar Zimmerman, February 2023, https://www.dropbox.com/s/04vi33osojfpeb0/Concentration100Years.pdf?dl=0

[53] Senate Judiciary Committee Report, 11369 S.rp.1775, p. 3.

[54] Chicago Booth, "100 Years of Rising Corporate Concentration," Spencer Kwon, Yueran Ma, and Kaspar Zimmerman, February 2023, p. 12, https://www.dropbox.com/s/04vi33osojfpeb0/Concentration100Years.pdf?dl=0; Business Concentration, "100 Years of Rising Corporate Concentration," Spencer Kwon, Yueran Ma, and Kaspar Zimmerman, February 2023, https://businessconcentration.com/#main_results

FTC and DOJ's proposed guidelines are responsive to current economic conditions and aligned with the congressional intent of the antitrust laws. We highlight here guidelines addressing labor market effects, serial acquisitions, and entrenchment of market dominance as particularly powerful tools to prevent harm to workers, consumers, and small businesses.

1. Serial Acquisitions

Guideline 9 states that when a merger is a part of a series of multiple acquisitions, enforcers may examine the whole series.[55] As Congress noted in adopting the 1950 amendments to the *Clayton Act*, "[a]cquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions."[56] The Supreme Court has affirmed that serial acquisitions can "convert an industry from one of intense competition among many enterprises to one in which three or four large [companies] produce the entire supply."[57]

Serial acquisitions can also go unnoticed, as many of them may not reach the reporting threshold of the *Hart-Scott-Rodino Act* of 1976, which requires parties to report certain large transactions to FTC and DOJ.[58] This is particularly true in healthcare markets, where serial acquisitions by private equity have resulted in higher prices.[59] For example, in 2012 Steward – owned by private equity firm Cerberus[60] – acquired New England Sinai Hospital for $28 million after a series of other acute care community hospital acquisitions in which Steward lost money and was forced to close or sell, hurting patients and workers.[61] By reviewing an entire history of transactions, FTC and DOJ will have a holistic view of market dominance, which will allow regulators to prevent transactions that cause unnecessary harms.

2. Entrenchment or Extension of Market Dominance

Guideline 7 provides that mergers should not entrench or extend a firm's already-dominant position.[62] Courts have recognized that entrenchment of a large firm can be an "essential"

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[55] U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," p. 4, 22, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

[56] House Judiciary Committee Report, 11300 H.rp.1191, p. 8.

[57] Brown Shoe Co. v. United States, 370 U.S. 334 (1962).

[58] U.S. Federal Trade Commission, "HSR threshold adjustments and reportability for 2023," February 16, 2023, https://www.ftc.gov/enforcement/competition-matters/2023/02/hsr-threshold-adjustments-reportability-2023; For an examination of this trend in the dialysis industry, see: National Bureau of Economic Research, "How to Get Away with Merger: Stealth Consolidation and Its Effects on US Healthcare," Thomas G. Wollmann, July 2021, https://www.nber.org/papers/w27274

[59] Antitrust Institute, "Monetizing Medicine: Private Equity and Competition in Physician Practice Markets," Richard Scheffler et al., July 10, 2023, p. 32, https://www.antitrustinstitute.org/wp-content/uploads/2023/07/AAI-UCB-EG_Private-Equity-I-Physician-Practice-Report_FINAL.pdf

[60] Center for Economic and Policy Research, "Private Equity Buyouts in Healthcare: Who Wins, Who Loses?," Eileen Appelbaum and Rosemary Batt, March 15, 2020, p. 27, https://www.cepr.net/wp-content/uploads/2020/03/WP_118-Appelbaum-and-Batt.pdf

[61] *Id.,* p. 35.

showing of anticompetitive impact underlying a Section 7 violation.[63] A transaction may entrench a dominant position by increasing barriers to entry, increasing switching costs, interfering with the use of competitive alternatives, depriving rivals of network effects or economies of scale, or eliminating an emerging competitive threat.[64] This consideration of entrenchment aligns with the 1968 guidelines, which gave special attention to mergers "in a relatively concentrated or rapidly concentrating market [that] may serve to entrench or increase the market power of that firm or raise barriers to entry in that market."[65]

FTC and DOJ are correct to also evaluate whether a merger may extend a firm's dominant position into new markets, thereby substantially lessening competition in those markets.[66] This analysis is particularly critical as digital mega-corporations extend into new sectors, as Amazon did in 2017 when it purchased Whole Foods.[67] That acquisition "was seen as a minor deal in the context of grocery retailing . . . [b]ut Amazon used the merger to further cement its dominance in online retail by, among other things, integrating Whole Foods with its Prime membership program, a key strategy for locking in consumers and monopolizing e-commerce."[68] This guideline will help ensure that the agencies are properly considering the realities of today's economy.

3. Labor Effects

Guideline 11 provides that when a merger involves competing buyers, the agencies will examine whether it may substantially lessen competition for workers or other sellers.[69] Effects on workers and labor markets generally have not been included in previous versions of the guidelines.[70] However, DOJ, FTC, and courts have rightly noticed that antitrust statutes do not limit protection only to consumers, but instead are "comprehensive in … terms and coverage, protecting all who are made victims of the forbidden practices."[71] Because workers have routinely been harmed by

[62] U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," pp. 3, 18, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf
[63] Fruehauf Corp. v. FTC, 603 F.2d 345, 353 (2d Cir. 1979); U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," p. 18 n. 58, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf
[64] U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," pp. 19-20, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf
[65] U.S. Department of Justice, "1968 Merger Guidelines," https://www.justice.gov/archives/atr/1968-merger-guidelines
[66] Ford Motor Co. v. United States, 405 U.S. 562, 571 (1972).
[67] Whole Foods Market, "Amazon to Acquire Whole Foods Market," press release, June 16, 2017, https://media.wholefoodsmarket.com/amazon-to-acquire-whole-foods-market/
[68] Institute for Local Self Reliance, "How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power," Stacy Mitchell and Ron Knox, June 2022, https://cdn.ilsr.org/wp-content/uploads/2022/06/ILSR-New-Federal-Anti-Merger-Guidelines-Can-Restore-Competition.pdf
[69] U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," pp. 25-27, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf
[70] Bloomberg Law, "Companies Must Weigh Worker Impact Under New Merger Guidelines," Dan Papscun, July 19, 2023, https://news.bloomberglaw.com/antitrust/workforce-impact-gets-close-scrutiny-in-new-merger-guidelines
[71] Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235-36 (1948).

increasing consolidation in the U.S. economy,[72] regulators will consider "whether workers face a risk that the merger may substantially lessen competition for their labor."[73] By considering the effects of mergers on labor, regulators can prevent harms such as mass layoffs and worsening work conditions that have resulted from excessive consolidation.

B. The FTC and DOJ Should Further Strengthen the Guidelines to Align with Congressional Intent

Statutory text, congressional intent, and case law show that our antitrust laws were designed to give regulators a broad set of tools to prevent consolidation. The draft merger guidelines return to these principles in the context of the modern economy. The agencies should have confidence in their correct reading of the law and stand on clear guidelines. To that end, the agencies should (1.) give weight to the guidelines' stated thresholds for structural presumption and consider lowering these thresholds, (2.) abandon their consideration of supposed efficiencies, and (3.) refrain from using behavioral or structural remedies to approve a merger that would otherwise be illegal.

1. Agencies Should Rely on Clear Thresholds – and Consider Lowering These Thresholds

A merger is illegal – and must be blocked – where its effect "may be substantially to lessen competition, or to tend to create a monopoly."[74] The draft guidelines indicate that a merger presumptively is illegal if the merged firm's market share is greater than 30 percent for horizontal mergers[75] or 50 percent for vertical mergers.[76] While we applaud the agencies' establishment of clear thresholds, 30 percent and 50 percent are too high.[77] A company whose market share is below these remarkably high thresholds may nevertheless exert incredible market power.[78] Further, the level of concentration at which competition concerns arise is substantially lower in buyer markets than in seller markets, given the unique features of certain buyer markets.[79] What is more, the DOJ knows this: the 1968 guidelines limited the size of any producer to 25 percent of a market, prohibited horizontal mergers that would result in fewer than

[72] Social Science Research Network, "Concentration in US Labor Markets: Evidence from Online Vacancy Data," José Azar et al., March 9, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133344; Social Science Research Network, "Estimating Labor Market Power," José Azar, Steven Berry, and Ioana Elena Marinescu, September 18, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3456277

[73] U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," p. 26, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

[74] 15 U.S.C. 18.

[75] U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," p. 19, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

[76] *Id.,* p. 17.

[77] Philadelphia National Bank recognized that a market share of 30 percent was a clear threat but emphasized that lower market shares may also threaten competition. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 (1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat").; U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," p. 7, n. 28, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

[78] Institute for Local Self-Reliance, "Report: Walmart's Monopolization of Local Grocery Markets," Stacy Mitchell, June 26, 2019, https://ilsr.org/walmarts-monopolization-of-local-grocery-markets/ (finding that, though Walmart nationally captures roughly 25 percent of market share, it is nevertheless able to seriously harm competing retailers by exerting near-dictatorial control over suppliers).

five market producers, and limited vertical mergers involving suppliers that controlled 10 percent of a market.[80] In certain cases, the appropriate threshold may be even lower, as when the Supreme Court blocked a merger between two grocery store chains that would have resulted in a single entity controlling 7.5 percent of the regional grocery market.[81]

FTC and DOJ should confidently rely on appropriately set market share thresholds rather than wading into the murky waters of non-structural tests. Non-structural criteria are notoriously difficult to apply. As antitrust scholar Derek Bok noted, and as the Supreme Court has recognized,[82] it is difficult to determine "reliable predictions concerning the impact on market behavior of any but the most sweeping mergers."[83] Economists may be able to analyze the causes of market concentration in retrospect, but at that point "the damage would be done and much of the value of preventive relief under [antitrust law] would be lost."[84] Antitrust regulators should not underestimate the difficulty and inefficiency of merger-related multi-factor tests, which Judge Richard Posner deemed "a real blot on the American judiciary."[85] The guidelines should confidently set clear market thresholds lower than those in the current draft to protect competition against outsized market power and avoid confusing and resource-intensive analyses.

2. Agencies Should Reject the Use of Efficiencies Defenses

The draft guidelines' discussion of "procompetitive efficiencies" begins with a straightforward recognition of where the law stands: "the Supreme Court has held that 'possible economies [from a merger] cannot be used as a defense to illegality.'"[86] As the agencies note, "[c]ompetition usually spurs firms to achieve efficiencies internally," and efficiencies are often achievable "without the full anticompetitive consequences of a merger."[87] The agencies should end the discussion there. Indeed, the law is clear: "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic

[79] Legal Times, "Beware Buyer Power," Robert H. Lande, July 12, 2004, p. 2, https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1712&context=all_fac

[80] Open Markets Institute, "Response by the Open Markets Institute to the Request by the Federal Trade Commission and the Antitrust Division of the Department of Justice for Information on Merger Enforcement," April 21, 2022, p. 14, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/6261b1cd824c931f5dfc5910/1650569677801/Open+Markets+Institute_+Request+for+Information+on+Merger+Enforcement_4-21-22.pdf; U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

[81] United States v. Von's Grocery Co. 384 U.S. 270 (1966).

[82] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963) (citing Derek Bok's article describing the challenges of a fact-intensive approach to merger review).

[83] Harvard Law Review, "Section 7 of the Clayton Act and the Merging Law and Economics," Derek Bok, p. 244, https://www.jstor.org/stable/1338755

[84] *Id.,* p. 242.

[85] C. Scott Hemphill, Philadelphia National Bank at 50: An Interview with Judge Richard Posner, 80 Antitrust Law Journal (2015), https://www.jstor.org/stable/26411536

[86] U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," p. 33, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf (quoting FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967)).

[87] U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," p. 33, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

debits and credits, it may be deemed beneficial."[88] As the Court recognized, Congress consciously chose to support competition even in the face of certain inefficiency.[89] The preservation of efficiencies defenses is a relic of an era in which regulators relied on claims of hypothetical efficiency by businesses at the expense of fidelity to the law, an era which the draft guidelines disavow. The guidelines should not weaken or disturb the law by encouraging a discussion of so-called procompetitive efficiencies.

Notwithstanding the Supreme Court's multiple explicit rejections of efficiencies,[90] consideration of efficiencies is not a productive way to determine if a merger will substantially lessen competition. The agencies have known this since at least 1968, when the merger guidelines stated the Department of Justice would not consider efficiencies as a defense or justification because, among other reasons, such efficiencies can "normally be realized through internal expansion" rather than mergers, and efficiencies are speculative and difficult to establish with certainty.[91]

3. Agencies Should Abandon the Use of Structural and Behavioral Remedies

As noted, agencies are statutorily required to block illegal mergers. But rather than doing so, DOJ and FTC have frequently used behavioral and structural remedies to attempt to restrict anti-competitive effects and allow mergers to proceed.[92] However, remedies have generally failed to maintain competitive conditions because of harmful incentives and unenforceability, among other challenges. Behavioral remedies, which require certain commitments from the merging parties,[93] are difficult to administer and enforce. Further, once the term of the agreement expires, the parties cease to be bound by their commitments and anticompetitive effects remain.[94] Structural remedies, which modify the organization of the parties and may include divestiture(s)

[88] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963).
[89] Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision").
[90] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1962); and Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
[91] U.S. Department of Justice, "1968 Merger Guidelines," https://www.justice.gov/archives/atr/1968-merger-guidelines ("Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (i.e., improvements in efficiency) because, among other reasons, (i) the Department's adherence to the standards will usually result in no challenge being made to mergers of the kind most likely to involve companies operating significantly below the size necessary to achieve significant economies of scale; (ii) where substantial economies are potentially available to a firm, they can normally be realized through internal expansion; and (iii) there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed for a merger.")
[92] U.S. Federal Trade Commission, "The Evolving Approach to Merger Remedies," press release, May 1, 2000, https://www.ftc.gov/news-events/news/speeches/evolving-approach-merger-remedies
[93] CPI Antitrust Chronicle, "Structural vs. Behavioral Remedies," Frank Maier-Rigaud and Benjamin Loertscher, April 2020, p. 4, https://www.nera.com/content/dam/nera/publications/2020/PUB_CPI_Remedies.pdf
[94] U.S. Department of Justice, "Assistant Attorney General Makan Delrahim Delivers Remarks at the Federal Telecommunication Institute's Conference in Mexico City," November 7, 2018, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-federal-institute

of parts of the business,[95] are at first glance more enforceable but also fail to maintain competitive conditions as companies have an incentive to ensure the divestitures do not succeed.[96]

Allowing structural and behavioral remedies also encourages parties to "litigate the fix" – that is, to propose remedies during ongoing litigation in order to force the judge's focus from the original transaction to the ostensible "fix."[97] This maneuver affords firms multiple bites at the apple and often resolves only some of the underlying transaction's anticompetitive effects.[98] Companies have increasingly discussed options for litigating the fix alongside merger negotiations and announcements, indicating that consideration of remedies is relevant to merger enforcement at every stage and within the merger guidelines' scope.[99] The guidelines should make clear that the agencies will not propose, entertain, or accept behavioral or structural remedies as part of merger review.

[95] CPI Antitrust Chronicle, "Structural vs. Behavioral Remedies," Frank Maier-Rigaud and Benjamin Loertscher, April 2020, p. 4, https://www.nera.com/content/dam/nera/publications/2020/PUB_CPI_Remedies.pdf

[96] Institute for Local Self-Reliance, "Strengthening Enforcement Against Illegal Mergers: Updating the Merger Guidelines," April 21, 2022, p. 29, https://cdn.ilsr.org/wp-content/uploads/2022/04/ILSR-Merger-Guidelines-Comment-Letter.pdf?_gl=1*d9wp0k*_ga*NzMwNzM3MjkwLjE2OTI4MDIwNTg.*_ga_M3134750WM*MTY5MjgwNDc0MC4yLjEuMTY5MjgwNDkxNS4wLjAuMA..*_ga_YH781K3X7X*MTY5MjgwNDc0MC4yLjEuMTY5MjgwNDkxNS4wLjAuMA..&_ga=2.266163853.329421074.1692802058-730737290.1692802058

[97] Bloomberg, "ANALYSIS: How 'Litigating the Fix' Is Upending Merger Review," Eleanor Tyler, May 11, 2023, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-litigating-the-fix-is-upending-merger-review

[98] *Id.*

[99] U.S. Department of Justice and U.S. Federal Trade Commission, "DRAFT Merger Guidelines," p. 5, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf ("The consideration of remedies appropriate for otherwise illegal mergers and acquisitions is beyond its scope.")

Conclusion

The FTC and DOJ's proposed merger guidelines are critical to addressing the ever-changing and complex American economy. Federal antitrust laws were intended to promote competition in order to protect democracy, promote economic growth and innovation, secure individual liberty, and safeguard the well-being of workers and communities. The draft guidelines address those still-vital goals. We urge you to finalize the proposed guidelines expeditiously, and make the additional modifications suggested above to strengthen them and ensure they are consistent with the letter and intent of antitrust law.

Sincerely,

Elizabeth Warren
United States Senator

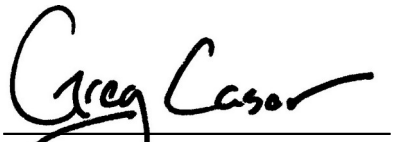
Becca Balint
Member of Congress

Barbara Lee
Member of Congress

André Carson
Member of Congress

Katie Porter
Member of Congress

Joe Neguse
Member of Congress



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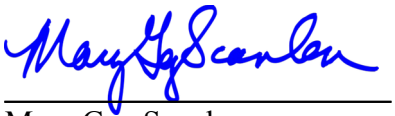

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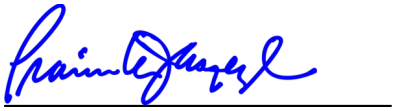

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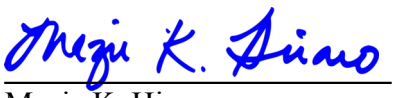

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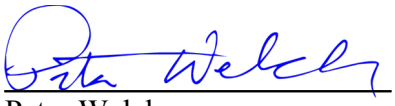

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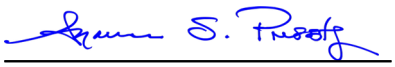
United States Senator



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