April 21, 2022

The Honorable Jonathan Kanter
Assistant Attorney General, Department of Justice Antitrust Division
950 Pennsylvania Avenue NW
Washington, D.C. 20530

The Honorable Lina Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Department of Justice/ Federal Trade Commission's Guidelines Modernization Inquiry

On behalf of the Open Competition Center, I write with concerns that the Federal Trade Commission/Department of Justice's Guidelines Modernization Inquiry runs against decades of antitrust precedent and may significantly chill mergers and acquisitions that benefit innovation and the U.S. economy.

The Open Competition Center (OCC) is a special project of Americans for Tax Reform, a 501(c)(4) taxpayer advocacy group that opposes all tax increases and supports limited government, free-market policies. OCC advocates for a rule-of-law, consumer-based approach to antitrust regulation.

For over half a century, merger guidelines have served a key role for parties looking to engage in mergers. The guidelines are meant to provide transparency on how antitrust agencies will review deals as well as an administration's general posture toward mergers and acquisitions.

This process is mutually beneficial for antitrust agencies and the business community. By providing clear guardrails, agencies avoid wasting time and resources reviewing a deal that they will likely not approve. For parties contemplating mergers, clear guidance allows businesses to avoid the risks and costs of pursuing mergers that may be unadvisable.

The guidance has developed over decades of economic and legal research. Over time, revisions have been made as necessary to ensure that the guidance appropriately reflects agency practice. The recent Request for Information (RFI) demonstrates a stark departure from decades of good-government precedent.

Instead of reflecting new learning, the revisions "seek new learning" to "adequately equip enforcers to identify and proscribe unlawful, anticompetitive transactions." In plain English, the RFI wants the public to offer unelected bureaucrats ammunition to bolster the Biden Administration's aggressively anti-merger posture.

Instead of providing transparency to merging parties, the RFI appears to pursue sweeping changes to antitrust law under the guise of "guidance documents." The RFI lays out 15 questions with multiple subparts that illustrate how the agencies would like to challenge or depart from case law that has developed over decades.

Recent revisions processes have reiterated that "the vast majority of mergers are either pro-competitive and enhance consumer welfare or are competitively benign."[1] This RFI contains no such sentiment, instead strongly signaling a desire to prevent future mergers without articulating any animating principle for doing so.

The RFI broadly aligns with the Biden Administration's anti-merger posture that has already chilled M&A activity – five of six significant FTC/DOJ investigations concluded in Q1 of 2022 ended in a complaint or abandoned transaction.[2] Even absent significant revisions to merger guidelines, antitrust enforcement agencies are already using the heavy hand of government to block M&A activity.

The FTC voted in July 2021 to rescind a 2015 statement that limited the FTC's "standalone" unfair methods of competition authority when addressing anticompetitive conduct outside of the scope of the Sherman or Clayton Acts. The statement emphasized the FTC's commitment to prioritizing consumer welfare when applying antitrust law and imposed important guardrails on the FTC's UMC authority.

The FTC has also been sending letters warning certain companies engaged in mergers or acquisitions to proceed "at their own risk" until the FTC weighs in. Under current law, parties engaging in mergers over a certain threshold must notify the antitrust agencies before the transaction is consummated.

After a company provides the FTC and Department of Justice (DOJ) with a detailed filing with information about the transaction, the agencies have 30 days to determine if the transaction is anticompetitive in nature and can request an additional 30 days if necessary to review additional information.

The FTC letters threaten legal action and "aggressive enforcement" of antitrust law against companies that consummate a transaction after the waiting period expires and before the FTC weighs in. This could lead to deals being delayed for months or even years as

[1] Varney, A. A. G. C. (2009, September 22). *Merger guidelines workshops*. The United States Department of Justice. Retrieved April 21, 2022, from https://www.justice.gov/atr/speech/merger-guidelines-workshops

[2] Dechert LLP. *Damitt Q1 2022: Significant merger investigations face steeper hurdles to settlement*. JD Supra. (2022, April 21) Retrieved April 21, 2022, from https://www.jdsupra.com/legalnews/damitt-q1-2022-significant-merger-9007657/

companies wait for an FTC bureaucrat's approval.[3]

Not to be outdone, in March 2022 the DOJ sent a letter to the Senate Judiciary Committee endorsing S. 2992, the "American Innovation and Choice Online Act" sponsored by Sen. Amy Klobuchar (D-Minn.). S. 2992 would ban companies over a government-determined size from engaging in "self-preferencing," where a company promotes its own private-label goods or services next to name-brand goods. It should be noted that this practice is not endemic to the technology sector, as brick-and-mortar retailers commonly sell generic products on the shelves next to the name brands.

Between overturning precedent to expand enforcement authority and weighing in on pending legislation, the Biden Administration is clearly driving the left's effort to rewrite antitrust law and overturn the consumer welfare standard.

For nearly half a century, American antitrust law has operated under the consumer welfare standard. The standard is simple and straightforward: when evaluating alleged anti-competitive conduct, judges and regulators must look to whether the business practices in question have harmed consumers. Enforcers must also consider if there is a pro-competitive justification for the business conduct in question, and whether the conduct results in countervailing benefits to consumers and competition. Consumer harm is measured through tangible effects like price, quality, and innovation.

Without the consumer welfare standard anchoring antitrust enforcement, government actors could punish politically disfavored companies or reward political allies without any regard for consumers. With unaccountable bureaucrats arbitrarily picking economic winners and losers, businesses would be reticent to engage in the robust competition that delivers low prices and wide-ranging access to innovative goods and services for American consumers.

Abandoning the consumer welfare standard would also chill M&A activity, a massive driver of economic growth and innovation in the United States. Entrepreneurs would have little incentive to start a new company in the face of anti-merger posturing, given that more than half of startups say their most realistic long-term goal is to be acquired by another company.[4] According to research from Gordon Phillips and Alexei Zhadnov, mergers and

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[3] Hebert, T. (2021, August 4). *FTC letters put American companies in "Mother-May-I" relationship with unelected bureaucrats*. Open Competition Center. Retrieved April 21, 2022, from https://www.opencompetitioncenter.org/ftc-letters-put-american-companies-in-mother-may-i-relationship-with-unelected-bureaucrats/ https://www.opencompetitioncenter.org/ftc-letters-put-american-companies-in-mother-may-i-relationship-with-unelected-bureaucrats/

[4] Peterson, B. (2019, February 23). *Half of all startups expect to get acquired, but the number of companies that don't have a plan is growing*. Business Insider. Retrieved April 21, 2022, from https://www.businessinsider.com/silicon-valley-bank-survey-half-of-all-startups-expect-to-be-acquired-2019-2

acquisitions were the main exit strategy for startups, where "13.74% of exits are IPOs, [and] mergers constituted 76.61% of exits."[5]

Any changes to merger guidance should uphold the consumer welfare standard and reflect the reality that mergers and acquisitions are beneficial to consumers and the economy writ large. Guidance that further deters or discourages mergers and acquisitions would increase economic uncertainty, reduce consumer choice, squash innovation and economic growth, and increase prices for American shoppers already grappling with record-high inflation.

Sincerely,

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[5] Phillips, G. M., & Zhadnov, A. (2021, August 29). *Venture Capital Investments, Merger Activity, and Competition Laws around the World*. Retrieved April 21, 2022, from https://faculty.tuck.dartmouth.edu/images/uploads/faculty/gordon-phillips/VC_Investments_and_Merger_Competition_Laws.pdf