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April 21, 2022

The Honorable Lina M. Khan
Chair
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

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

Re: Request for Information on Merger Enforcement; Federal Trade Commission and Department of Justice Docket No. FTC-2022-0003

Dear Chair Khan and Assistant Attorney General Kanter,

Public Citizen is a nonprofit consumer advocacy organization with 50 years of experience in advancing the public interest in federal policy. Founded in 1971, the organization has 500,000 members and supporters throughout the country. On behalf of our members and supporters, Public Citizen strongly supports the Federal Trade Commission (FTC) and the Department of Justice (DOJ) effort to modernize the enforcement of antitrust law regarding mergers.

This joint request for information is sorely needed after decades of increasing corporate concentration and record profits at individual companies, with a smaller share going to the public.[1] The Biden administration has rightfully prioritized the issue in issuing an Executive Order on Promoting Competition Policy in the United States.[2] In his recent State of the Union address, President Biden put it succinctly: "capitalism without competition isn't capitalism. It's exploitation." [3]

New merger guidelines from the FTC and DOJ (hereinafter "the agencies") must emphasize deterrence through aggressive agency intervention and reflect the original statutory intent of Congress that merger

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[1] Jan De Loecker, Jan Eeckhout, Gabriel Unger, The Rise of Market Power and the Macroeconomic Implications, 135 THE QUARTERLY JOURNAL OF ECONOMICS 561 (2020).
[2] Executive Order on Promoting Competition in the American Economy, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ (2021). ("Robust competition is critical to preserving America's role as the world's leading economy. Yet over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality.")
[3] President Biden State of the Union Address to Congress, https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/ (2022).

oversight be strict, focused on market concentration and oriented towards the future. The current guidelines also need to be updated to reflect the role of mergers in the digital economy. The agencies must additionally include a consideration of labor market effects in merger review and begin building out the foundation of racial equity analysis in antitrust policy. And new policy from the agencies should be cognizant of the sharp rise of private equity's role in controlling domestic energy infrastructure. Mergers that cement private equity influence threaten competition, as the industry's opacity exposes consumers to the potential of cloaked affiliate market power and opportunities for collusion through material, non-public information access.

I. The Agencies Must Emphasize Enforcement, Serve Congressional Intent

The joint merger guidelines set the tone for U.S. antitrust enforcement. A resolute, pro-enforcement policy statement would have the practical benefit of ensuring that regulators can identify and prosecute illegal mergers. The guidelines have a significant influence on how the private sector perceives risk associated with market consolidation. Weak guidelines will send the signal that the door is open and will stay open to a corporate merger free-for-all.[4] Judges look to the guidelines, as well, and grant the agencies' legal framing some deference when considering merger litigation.[5] The revised guidelines are an opportunity to introduce desperately needed conceptual adjustments to antitrust practice and precedent while reversing decades of lax enforcement that has resulted in increased corporate concentration.[6]

Public Citizen supports an enforcement policy and analytical framework that encourages agency intervention in close cases. The agencies should be more tolerant of litigation risk.[7] A perfect win record [8] in court in a small set of enforcement actions does not serve the public interest or deter illegal mergers.[9] Even if the agencies maintain economic efficiency as a mainstay of the analysis, a more active and deterrent-focused enforcement policy would result in considerable social good.[10] Under the 2010 horizontal merger guidelines (HMG), oversight agencies rarely take action to intervene in proposed

[4] Thomas G. Krattenmaker & Robert Pitofsky, Antitrust Merger Policy and the Reagan Administration, 33 ANTITRUST BULL. 211, 226 (1988). (The Reagan administration's 1982 merger guidelines served as "as an invitation to [corporate America] to merge with anyone.")
[5] Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 431 n. 11 (5th Cir. 2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates antitrust laws."); Hillary Greene, Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse, 48 WM. & MARY L. REV. 771, 841 (2006). ("Antitrust guidelines … have been characterized 'as a portable amicus brief.' This statement accurately identified the courts as an intended-and arguably the prime-audience of the guidelines.")
[6] Gustavo Grullon, Yelena Larkin, Roni Michaely, Are US Industries Becoming More Concentrated?, 23 REVIEW OF FINANCE 697 (2019). ("Since the late 1990s, over 75% of US industries have experienced an increase in concentration levels.")
[7] Testimony of Commissioner Rebecca Slaughter before the U.S. House Committee on the Judiciary, https://docs.house.gov/meetings/JU/JU05/20210318/111350/HHRG-117-JU05-Wstate-SlaughterR-20210318.pdf (2021).
[8] Id. ("Too often the FTC's win rate is cited as close to 100%, which is interpreted as a sign that the law is exactly where it should be, or perhaps even too favorable to the government. Not only is this untrue, I believe it is also bad math." Weak conditions on merger deals likewise do not deter illegal mergers.)
[9] Steven C. Salop, Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare, 81 FORDHAM L. REV. 2647 (2013). ("limiting the goal of merger enforcement and agency settlement policy simply to avoid welfare harms, but nothing more, is flawed as a matter of both law and policy and would compromise deterrence.")
[10] Herbert Hovenkamp, Antitrust's Protected Classes, 88 MICH. L. REV. 1 (1989). ("When the full social cost of monopoly is considered, much broader antitrust enforcement seems appropriate")

deals.[11] Although budget and personnel capacity constraints play a role in the state of underenforcement, current guidelines that give government attorneys pause in pursuing robust enforcement of the antitrust laws contribute to the problem. A set of bright line rules that more closely reflect the market share rules of the 1968 merger guidelines would alleviate the ambiguity.[12]

The current revisions to merger guidelines ought to faithfully reflect the statutory direction provided by Congress, specifically regarding merger law, expressed primarily through the 1950 Celler-Kefauver Antimerger Act.[13] A central theme of the Celler-Kefauver Act amendments to §7 of the Clayton Act was that amidst increasing corporate concentration, mergers and acquisitions should undergo tough scrutiny.[14] The U.S. Supreme Court's interpretation of the Clayton Act reflects that disposition. In Brown Shoe Co. v. U.S., Chief Justice Warren described the legislative history as informed by an atmosphere of rising corporate concentration in the United States, "The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."[15] A year later, the Court interpreted Celler-Kefauver as instituting a presumption against horizontal mergers that increased market concentration.[16]

The legislation also sent the message that merger intervention is based on incipiency; agencies must not only analyze what is before them but also what may occur absent their intervention. The Supreme Court described Celler-Kefauver as "Congress [seeking] to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency, before that trend developed to the point that a market was left in the grip of a few big companies." [17] The agencies should center the guidelines on an incipiency standard that aligns with the will of Congress and establish a framework that is extremely attentive to arresting trends toward concentration, rather than only considering existing market conditions.

The Supreme Court has established reasonably strong, intact precedent interpreting the Celler-Kefauver Antimerger Act as Congress speaking directly and forcefully on merger policy. Although a few later Supreme Court cases [18] introduced elements of economic analysis to merger review – the foundational Supreme Court interpretation of the Clayton Act amendments of 1950 *has not* been overturned. By

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[11] Testimony of Commissioner Sandeep Vaheesan before the U.S. House Committee on the Financial Services, https://financialservices.house.gov/uploadedfiles/hhrg-117-ba00-wstate-vaheesans-20220308.pdf (2022). ("The DOJ and the FTC challenge only a miniscule portion of … consolidations. For instance, out of the 1,637 mergers reported to the agencies in the fiscal year 2020, the agencies challenged just 43 of them (15 by DOJ, 28 by FTC).")
[12] U.S. DEP'T OF JUSTICE, 1968 MERGER GUIDELINES (1968), https://www.justice.gov/archives/atr/1968-mergerguidelines.
[13] Pub. L. 81-899, 64 Stat. 1125. The Hart-Scott-Rondino Antitrust Improvements Act of 1976 significantly altered the procedural oversight of mergers but had less substantive input on merger policy than the Celler-Kefauver Antimerger Act.
[14] H.R. Rep. No. 1191, 81st Cong., 1st Sess. 2-5 (1949). See also, Derek Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 234-35 (1960). ("The bill was pushed through on the basis of certain fundamental assertions of fact which were repeatedly hammered home by the many legislators who spoke in its behalf. First, it was pointed out that concentration had reached very high levels in America … in many important industries the great bulk of the business lay in the hands of three or four firms. Second, stress was placed on the assertion that concentration was still increasing. Third, it was emphasized that mergers had traditionally played an important part in the process of concentration … The fourth basic premise was that the country was in the midst of a new wave of mergers in which little businesses were being absorbed in large numbers by big firms.")
[15] 370 U.S. 294, 315 (1962).
[16] United States v. Philadelphia National Bank, 374 U.S. 321 (1963).
[17] United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966).
[18] See, United States v. General Dynamics 145 U.S. 486 (1974).

building policy guidelines with this background in mind, the agencies have an opportunity to reinvigorate the will of Congress that mergers be presumptively viewed with a skeptical eye and reviewed with the future in mind.

II. The Current Merger Guidelines Are Not Built for the Digital Economy, Neglect Key Factors

The 2010 Horizontal Merger Guidelines (HMG) are ill-suited to capture the competitive issues raised by mergers in the digital economy. Additionally, since at least 1982, merger policy has neglected crucial factors that regulators should consider when reviewing merger filings. The agencies' revised merger policy should consider labor market effects. The agencies should also take steps to understand racial equity impacts as part of their regulatory oversight and enforcement roles.

The digital economy has grown steadily since 2010 and now accounts for nine percent of total gross domestic product.[19] As internet platforms become an even more significant part of American life, the legal framework for assessing competition in the digital realm must also evolve. The HMG are an improvement over past guidelines that predominantly focused on non-price effects and market efficiencies to evaluate mergers. The HMG rightfully moved away from analyzing only price effects and "warmly embraced a consumer choice approach." [20] In the next iteration of merger review policy, the agencies should further develop the non-price factors and consumer choice approach with digital platforms in mind. The premise that price effects are the most important standard for merger approval is undermined by the maxim of digital platforms: the people are the product. The predominant profit model for online platforms requires that consumers "pay" for digital services by disclosing their personal data. The free-to-consumers model of today's digital economy subverts any analysis focused on consumer prices. The agencies must counteract the existing price-focused blind spot by issuing guidelines that take into account broader non-price factors when evaluating mergers – especially network effects and control of consumer data.

The monopolistic tendency of digital platforms arises from two factors that are underappreciated in the agencies' current competition analysis: network effects and control over consumer data.[21] Network effects are a building block of the internet's growth; the more people use a product or service, the better it becomes. Markets that rely on network effects are more likely to concentrate into a monopoly.[22] Like network effects, consumer data is a major characteristic of the digital economy. Platform control over consumer data increases the likelihood of concentration. Firms can use accumulated consumer data to enter adjacent markets and disadvantage rivals. When combined, the two factors are self-reinforcing – resulting in a dominant market position for platforms absent government intervention.[23]

Although the nature of the modern digital economy requires the agencies to consider new factors in their analytical framework, there are other considerations that have been neglected by regulators: labor market effects and racial equity.

[19] Jessica R. Nicholson, New Digital Economy Estimates, U.S. DEP'T OF LABOR BUREAU OF ECONOMIC ANALYSIS, https://www.bea.gov/system/files/2020-08/New-Digital-Economy-Estimates-August-2020.pdf (2020).
[20] Robert H. Lande, A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice, 81 FORDHAM L. REV. 2349, 2399 (2013).
[21] The HMG do reference network effects in a hypothetical, but do not elaborate on their importance in competition analysis.
[22] MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY 107, 163 (2016).
[23] Lina M. Khan, Amazon's Antitrust Paradox, 126 YALE L. J. 564, 785-86 (2017).

The HMG do not direct agency attorneys to consider the effects a merger will have on workers. The monopsony power of merging firms is mentioned, but only in the context of buyers of commodities. The consequences of a merger are not limited to competition among buyers, competition among sellers is also affected and significant for antitrust liability. [24] A merger may result in firms gaining more bargaining leverage over labor, leading to wage suppression.[25] Firms with monopsony power are more likely engage in anticompetitive practices that serve to coerce workers: noncompete agreements, training repayment agreements, worker misclassification and outright wage theft. There is a connection between the declining power of the American worker and lack of strong antitrust enforcement, including merger review.[26]

Fortunately, the agencies have moved in the right direction regarding antitrust analysis and labor market considerations. The 2016 Antitrust Guidance for Human Resource Professionals acknowledged the importance of competition in the job market.[27] The agencies must build on that notion and include labor effects in any merger policy revision.

The agencies' approach to merger enforcement also has major implications for communities of color. Decades of merger policy have not seriously interrogated how increased market concentration affects racial inequality. The agencies must correct this glaring analytical gap by developing a policy that accounts for effects on long-marginalized communities of color.

The accumulation of both private monopoly and monopsony power has negative effects on Black and Brown communities. Anticompetitive markets squelch innovation and raise barriers to entry for entrepreneurs of color, in many cases foreclosing the ability to build generational wealth.[28] Black businesspeople are more likely to be denied a loan in a concentrated market.[29] Corporate power plays a significant role in exacerbating existing societal inequity through low wages, weakened bargaining leverage, restraints on labor market competition. People of color are disproportionately employed in lower-wage jobs, making downward wage pressure even more acute.[30]

The Biden administration has made clear that racial equity considerations should be part of agency decision making.[31] Racial equity analysis as part of antitrust policy is necessary and without precedent in the law. The agencies have an opportunity to break new ground on a long-neglected aspect of antitrust

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[24] Hemphill, C. Scott and Nancy L. Rose. Mergers That Harm Sellers 127 YALE L.J. 1742, 2078 (2018).
[25] Wilmers, Nathan, Wage stagnation and buyer power: How buyer-supplier relations affect US workers' wages, 1978 to 2014, 83 AMERICAN SOCIOLOGICAL REVIEW 213 (2018).
[26] Marshall Steinbaum, Antitrust, the Gig Economy, and Labor Market Power, 82 LAW AND CONTEMPORARY PROBLEMS 45, 64 (2019).
[27] U.S. FEDERAL TRADE COMMISSION AND DEP'T OF JUSTICE, Antitrust Guidance for Human Resource Professionals, https://www.ftc.gov/public-statements/2016/10/antitrust-guidance-human-resource-professionals-department-justice (Oct. 2016).
[28] Amanda Ballantyne, Breaking Barriers to Credit and Capital Access for Black, Latinx, and Women-Owned Businesses, Rockefeller Foundation, https://www.rockefellerfoundation.org/blog/breaking-barriers-to-credit-and-capital-access-for-black-latinx-and-women-owned-businesses/ (2020).
[29] Jared Weitz, Why Minorities Have So Much Trouble Accessing Small Business Loans, Forbes, https://www.forbes.com/sites/forbesfinancecouncil/2018/01/22/why-minorities-have-so-much-trouble-accessing-small-business-loans/?sh=5b98e34355c4 (2018).
[30] U.S. DEP'T OF THE TREASURY, The State Of Labor Market Competition, https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf (2022).
[31] Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/ (2021).

policy and ought to look to examples from other countries.[32] Even if the relatively undeveloped nature of the legal parameters of racial equity analysis precludes its inclusion in merger guidelines revisions, the agencies should take action to begin the development of racial equity assessment as a key regulatory oversight tool.

III. Expanding Roles of Private Equity and Activist Hedge Funds In Energy Markets Threaten Competition

The agencies should be keenly aware and responsive to anticompetitive behavior, including through mergers and acquisitions, in energy markets. Private equity firms engage in business practices that disadvantage consumers and should be ripe for regulatory intervention through affiliation standards enforcement or an established analytical framework.

Effective competition in energy markets requires comprehensive affiliate standards, as common manipulation schemes involve capacity withholding that provide financial benefits for affiliates at the expense of consumers. Power plant owners that own any amount of equity in competing facilities have financial incentive to engage in such withholding schemes. But regulators, including the Federal Energy Regulatory Commission, do not require any disclosure of limited financial partners (a feature of private equity), or any equity amount less than 10%. The result is gaping holes in the ability of regulators to protect consumers from anticompetitive behavior. Private equity's rise in energy markets—particularly in U.S. power, where private equity is now the single largest class of owner of merchant fossil fuel generation—complicates the ability of regulators to comprehensively map financial affiliates within a given market.

In addition, there are threats to competition posed by activist hedge funds and investors. [33] Such firms routinely force companies to surrender agreements providing the activists with access to material, non-public agreements and a voting board seat despite controlling far less than 10% of the target company's equity. These activist investors frequently assemble such arrangements with multiple companies within the same industry, raising concerns that their access to competitively sensitive information across multiple energy companies operating in the same market results in anticompetitive practices. Again, the Federal Energy Regulatory Commission has declined any interest in regulating such behavior, necessitating action by the Federal Trade Commission and Justice Department to protect consumers.

IV. Conclusion

An update to the merger enforcement guidelines gives the agencies a historic opportunity to reenergize the federal government's role in detecting and preventing illegal mergers.

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[32] See ENSaftrica.com, Competition Commission prohibits merger on new public interest ground, https://www.ensafrica.com/news/detail/4330/competition-commission-prohibits-merger-on-ne
("When analysing a merger, the Competition Act, 1998 requires the competition authorities to assess whether a merger can or cannot be justified on various substantial public interest grounds. In July 2019, a new public interest ground was introduced, such that the competition authorities must also now consider the effect that the merger will have on the promotion of a greater spread of ownership, in particular, to increase the levels of ownership in firms by [historically disadvantaged persons] and workers in the market.")
[33] Sheelah Kolhatkar, Paul Singer, Doomsday Investor, THE NEW YORKER, https://www.newyorker.com/magazine/2018/08/27/paul-singer-doomsday-investor (2018).

Public Citizen strongly supports the effort and favors policy that will increase enforcement and align with the will of Congress expressed through the 1950 amendments to the Clayton Act. New merger guidance should be drafted with the structural dimensions of the digital economy in mind. The agencies should deemphasize price effects while building on the consumer choice frame in the 2010 HMG and increase the consideration of impacts on labor markets, such as was done in the 2016 Guidelines for Human Resource Professionals. Additionally, the agencies should follow the direction of the Biden administration develop racial equity impact analysis tools specific to antitrust. Enforcing strong affiliation standards for private equity and activist investors will help address anticompetitive behavior prevalent in energy markets.

Thank you for the opportunity to provide comment on this important undertaking.

Sincerely,

Matt Kent
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