

Opening Remarks for Merger Listening Forum

June 21, 2022

At the outset, I would like to thank the FTC's Office of Policy Planning and the technical team for organizing today's Listening Forum, as well as the four earlier sessions. Laying the groundwork for these events requires substantial effort, so you have my appreciation.

Thank you, also, to each of the speakers who will appear today. You have many demands on your time. It speaks volumes that you consider a revision of the Merger Guidelines to be sufficiently important to set aside the other demands competing for your attention.

I, too, consider a review of the Merger Guidelines to be a significant initiative that merits a sober and thoughtful approach. As I observed when the Commission issued the Request for Information on Merger Enforcement, I support this inquiry.¹ The Federal Trade Commission has a long history of engaging in critical self-examination to ensure that it is wisely and effectively implementing its mission of protecting consumers and competition – particularly as new industries and business practices emerge, and as economic learning advances.²

During my professional career, I have served as outside counsel, in-house counsel, and as an enforcer at the FTC. In the private sector, I counseled clients in many industries on mergers, acquisitions, and joint ventures. And during my three tours of duty at the FTC, I have analyzed the competitive effects of countless deals. I have seen mergers that would harm competition; I have also seen mergers that would benefit consumers, our society, and our economy.

The goal of antitrust enforcers should be to block mergers that would increase prices, decrease output, and stifle innovation – while permitting beneficial mergers to proceed. Mergers can facilitate expansion into new geographies. They can provide a launching pad for innovations. And they can drive down costs, making valued products and services affordable for a broader array of consumers.

The job of antitrust enforcers is to discern the difference between deals that are beneficial and those that are harmful. Mergers that would substantially lessen competition run afoul of Section 7 of the Clayton Act,³ while competitively beneficial – or even neutral – mergers should be permitted to proceed. The Merger Guidelines provide the analytical framework the agencies use

¹ See Noah Joshua Phillips and Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Statement Regarding the Request for Information on Merger Enforcement (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf.

² See, e.g., Hearings on Competition and Consumer Protection in the 21st Century, 83 Fed. Reg. 38307 (Aug. 6, 2018) (announcing hearings that began September 2018); Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace (1996) (report of 1995 hearings launched by Chairman Robert Pitofsky), <https://www.ftc.gov/reports/anticipating-21st-century-competition-consumer-protection-policy-new-high-tech-global-marketplace>.

³ 15 U.S.C. § 18.

to analyze the likely competitive effects of proposed transactions, and thus their legality under Section 7.

To date, the Merger Guidelines have served as a common touchstone for judges, merging parties, and enforcers when evaluating the legality of potential mergers. Courts considering merger challenges routinely cite the Merger Guidelines as persuasive, even though they are not binding precedent.⁴ Judges find them to be persuasive because the Guidelines reflect a consensus view the agencies have developed over decades to analyze the effects of mergers. Similarly, the Guidelines provide clarity for businesses that seek to ensure their conduct is legal. Businesses rely on the transparency and predictability that the Merger Guidelines provide.

But let's be clear: courts and other stakeholders find the Merger Guidelines persuasive only because they reflect current judicial precedent and accepted economic principles, rather than seasonal political winds. Guidelines that depart from this tradition will lack credibility and soon fade. Any recalibration of the Merger Guidelines, and our current approach to merger enforcement, should be driven by developments in legal and economic analysis.

I hope that the proposed revisions remain faithful to this tradition. And I look forward to hearing the experiences and diverse perspectives that today's speakers will provide.

⁴ See, e.g., *U.S. v. Anthem, Inc.*, 855 F.3d 345 (D.D.C. 2017); *FTC v. Sysco Corp.*, 113 F.Supp.3d (D.D.C. 2015); see generally Carl Shapiro and Howard Shelanski, *Judicial Response to the 2010 Merger Guidelines*, 58 *Rev. Ind. Org.* 51 (2021).