



March 8, 2022

**Comments on Request for Information on Merger Enforcement
Docket No.: FTC-2022-0003-0001**

National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, appreciates the opportunity to respond to the Request for Information (RFI) on Merger Enforcement.

As advocates for taxpayers and proponents of pro-growth policies, NTU has a strong interest in ensuring antitrust enforcement is appropriately focused on benefiting consumers and protecting competition. With that in mind, we have voiced concerns about prior efforts by federal agencies to skirt consumer-focused standards¹, use opaque tactics to avoid public accountability,² and regress to a failed and outdated view of antitrust enforcement.

In President Joe Biden's executive order on July 9, 2021,³ he called for the Department of Justice (DOJ) and Federal Trade Commission (FTC) to review the horizontal and vertical merger guidelines and consider revisions. On September 15, 2021, the FTC, in a rushed process that provided little opportunity for public comment, withdrew the 2020 Vertical Merger Guidelines. NTU Foundation warned⁴ that simply erasing these guidelines was bad policy, bad process, and would create substantial uncertainty for merging parties.

Mergers and acquisitions (M&A), especially vertical mergers, can be procompetitive and benefit consumers. Each M&A should be evaluated on its merits for the benefits it could yield for consumers, as well as for anticompetitive behavior. While the RFI places a focus on the impact

¹ Withrow, Josh. "NTUF Comment on FTC Draft Strategic Plan for 2022-2026." National Taxpayers Union Foundation. Accessed March 2, 2022.

<https://www.ntu.org/foundation/detail/ntuf-comment-on-ftc-draft-strategic-plan-for-2022-2026>.

² Nysten, Leah. "'Zombies' to the rescue: The arcane voting rule that could save Dems' antitrust agenda." Politico. Accessed March 2, 2022.

<https://www.politico.com/news/2021/11/08/voting-rule-democrats-antitrust-519767>

³ The White House. "Executive Order on Promoting Competition in the American Economy." Accessed March 2, 2022.

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

⁴ Withrow, Josh. "NTUF Comments on FTC Sept. 15 Open Meeting, Proposed Recension of 2020 Vertical Merger Guidelines." National Taxpayers Union Foundation. Accessed March 2, 2022.

<https://www.ntu.org/foundation/detail/ntuf-comments-on-ftc-sept-15-open-meeting-proposed-recension-of-2020-vertical-merger-guidelines>

to potential competitors, the consumer welfare standard should remain the lodestar for enforcement. As FTC Commissioners Noah Phillips and Christine Wilson rightly pointed out, M&A that benefits consumers through lower prices, enhanced quality, and more innovation may also make it more difficult for rivals to compete with a merged firm.⁵

In this RFI, the FTC and DOJ question whether it is necessary to precisely define the market in every case. Courts have repeatedly held that it is.⁶ Defining a market is an important step for the government to prove that anticompetitive conduct is occurring by a dominant firm. It is the government's obligation to prove their case based on the evidence, and while the work may be time consuming, it is critical to the objective of promoting competition instead of arbitrarily choosing winners and losers. Without robust economic analysis, the criteria could revert back to the neo-Brandesian "big is bad" standard. This would not serve consumers well.

Several bills have been proposed in Congress that would substantially change how M&A activity is evaluated, including shifting the burden of proof to private companies and outright bans on M&A for companies over an arbitrary threshold. While NTU and many other consumer advocates have concerns about the implications of these proposals, federal agencies should not use rulemaking as an end around Congress. In a virtual press conference, the FTC notes that, "the guidelines have historically been viewed as persuasive by the courts in many instances."⁷ Similarly, the 2010 Guidelines were found to influence case law and strengthen merger enforcement.⁸ The FTC and DOJ should be wary of the implications of drastically updating merger guidelines to influence the courts.

While some M&A activity should be subject to government intervention, each case should be individually scrutinized. M&A activity can produce economic efficiencies that benefit consumers. Making it harder for firms to grow and adapt could produce less innovative services and products. It could also negatively impact smaller businesses that desire to be acquired, making it more difficult for these companies to attract startup capital. The National Venture

⁵ Phillips, Noah and Wilson, Christine. "Regarding the Request for Information on Merger Enforcement January 18, 2022." Accessed March 2, 2022. https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf

⁶ Wilson, Christine. "The Unintended Consequences of Narrower Product Markets and the Overly Leveraged Nature of Philadelphia National Bank." Accessed March 3, 2022. https://www.ftc.gov/system/files/documents/public_statements/1532894/wilson_-_remarks_at_oxford_antitrust_enforcement_symposium_6-30-19_0.pdf

⁷ Merber, Kenneth. "FTC Virtual Press Conference for Merger Guidelines RFI Joint Announcement | January 18, 2022." Accessed March 3, 2022. https://www.ftc.gov/system/files/documents/videos/ftc-virtual-press-conference-merger-guidelines-rfi-joint-announcement/ftc_virtual_press_conference_for_merger_guidelines_rfi_joint_announcement_01182022.pdf

⁸ Wilson, Christine. "Antitrust on the Antiques Roadshow: Appraising U.S. Antitrust Laws in a Modern Economy." Accessed March 3, 2022. https://www.ftc.gov/system/files/documents/public_statements/1589480/wilson-netchoice-keynote.pdf

Capital Association points out taking a company public is not always an option, and is increasingly becoming more difficult, making acquisitions an important strategy to attract investors for nascent companies.⁹

Merger guidelines should be transparent, predictable, and based on economic evidence. Departing from the robust economic analysis requirement and weakening the predictability of the process would undermine the consumer welfare standard. This would be to the detriment of consumers. Last year, nearly 70 economists and legal experts signed an open letter¹⁰ arguing that consumers and markets, not the government, should be the driving force behind competition policy. Antitrust enforcement without the consumer welfare standard threatens to be less predictable and would needlessly disrupt normal economic activity.

On behalf of taxpayers and consumers, we urge the FTC and DOJ to avoid radical overhauls of the M&A guidelines. Consumers and small businesses benefit from clear, consistent, and reasonable merger guidelines.

Respectfully,

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⁹ Farrah, Jeff. "Don't Hurt Startups When Reining in Big Tech: Four Lessons from a New Academic Report." Accessed March 3, 2022.

<https://nvca.org/dont-hurt-startups-when-reining-in-big-tech-four-lessons-from-a-new-academic-report/>

¹⁰ National Taxpayers Union. "An Open Letter to Public Officials: Consumer Welfare Standard Should Guide Antitrust Policy." National Taxpayers Union. Accessed March 2, 2022.

<https://www.ntu.org/publications/detail/an-open-letter-to-public-officials-consumer-welfare-standard-should-guide-antitrust-policy>