



April 21, 2022

Dear Chair Khan and Assistant Attorney General Kanter,

On behalf of the undersigned partner organizations, Small Business Rising thanks you for the opportunity to provide our perspective on a possible revision to the agencies' horizontal and non-horizontal merger guidelines. Small Business Rising – a coalition of nearly 30 independent business associations representing more than 150,000 businesses around the country – strongly urges the Federal Trade Commission (FTC) and Department of Justice (DOJ) to write and publish new guidance that adheres to Congressional intent and promotes fair and robust competition in deconcentrated industries.

As the statutory text and legislative history of the 1950 Celler-Kefauver Antimerger amendments to the Clayton Act show, Congress sought to halt growing concentration out of a conviction that dispersing economic power would ensure robust competition, broad prosperity, and a vibrant democracy. Congress was particularly intent on ensuring that small businesses had a fair opportunity to compete and that local communities could thrive. A central purpose of these amendments, as the Senate Judiciary Committee report noted at the time, was to “aid in preserving small business as an important competitive factor in the American economy.”<sup>1</sup>

In amending the Clayton Act's merger provisions, Congress banned any acquisition when “the effect of such acquisition may be substantially to lessen competition... in any line of commerce.” With this language, Congress specifically and intentionally chose to ban mergers that have the potential to reduce “the vigor of competition.” As a Senate report explained: “The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.”<sup>2</sup>

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<sup>1</sup> Senate Report, “Amending An Act Entitled “An Act To Supplement Existing Laws Against Unlawful Restraints And Monopolies, And For Other Purposes,” Approved October 15, 1914 (38 Stat. 730), As Amended,” June 2, 1950.

<sup>2</sup> Id, at 1314.

The agencies' current merger guidance deviates from the goals of Congress. These guidelines prioritize efficiency to the exclusion of Congress's broader competition goals – undermining the law's intent to foster competition by promoting decentralized industries with a multitude of smaller participants.<sup>3</sup>

We believe new guidelines should do the following:

- **Improve the clarity, efficacy, and efficiency of enforcement by setting clear market share and industry structure thresholds above which mergers are considered to be anti-competitive and presumptively unlawful.** Clear, bright-line thresholds serve two purposes. First, clear market concentration thresholds in merger enforcement help support Congress' intent in passing the Celler-Kefauver Act to prevent the accumulation of market power in its incipiency. And second, as the 1968 guidelines articulate, "an enforcement policy emphasizing a limited number of structural factors also facilitates both enforcement decision-making and business planning," while limiting the reliance on complex economic theories that can obscure or ignore clear threats to competition.

These thresholds should be considerably lower than the HHI market concentration thresholds in the current guidelines, in line with Congress' intent that the Clayton Act be used to prevent the accumulation of market power in its incipiency, before industries begin to concentrate. New guidelines should set several thresholds that independently trigger a presumption of illegality, such as the absolute size of the firms, their market shares, the number of significant competitors remaining in the market, and the overall degree of concentration.

- **Address harms from vertical integration.** New merger guidelines should recognize that vertical and conglomerate mergers have the potential to harm competition and the competitive process, and indeed often have led to market structures that allow dominant companies to foreclose small and independent businesses from the market. Enforcement practices in recent decades have vastly underappreciated the potential for foreclosure harms from vertical mergers.
- **Prioritize non-price effects.** The new merger guidelines should give significant consideration to how mergers will affect non-price factors, such as innovation, economic diversity, and ensuring multiple pathways to market for smaller producers and sellers, in line with Congressional intent. Such considerations will help promote product diversity in markets susceptible to distribution bottlenecks,

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<sup>3</sup> "2010 Horizontal Merger Guidelines," ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.")

enhancing industries' ability to deliver better service and quality.

- **Challenge mergers that create buyer power.** The new guidelines should also make clear that mergers that threaten to create a company with power as a buyer are presumptively anti-competitive and should be challenged just as the government would challenge a harmful merger among sellers. This includes mergers that unduly concentrate labor markets, and mergers that would allow the combined company to dictate terms to suppliers, causing them to raise prices to independent businesses. Buyer power over suppliers is of particular concern to small business members. Mergers in the retail, pharmaceutical, office supply and other sectors have led to price discrimination and other practices that hamper the ability for small and independent businesses to compete.
- **Block anti-competitive mergers outright.** New guidelines should sharply limit the use of structural and behavior remedies. Behavioral conditions in particular have proven ineffective in alleviating competition problems in mergers; behavioral requirements are notoriously difficult to administer, and indeed require the agencies to perform oversight and regulatory duties that, as law enforcers, they are ill-equipped to perform.<sup>4</sup> Structural remedies have a mixed track-record at best; structural remedies imposed in mergers between Safeway and Albertsons, Dollar Thrifty and Hertz, and T-Mobile and Sprint, among others, all failed, leading to significant harms to competition and local communities.<sup>5</sup> New guidelines should direct the agencies to block problematic mergers outright, avoid behavioral remedies, and rely on structural remedies only in narrow circumstances.

Small Business Rising and its partner organizations again thank you for your commitment to the robust enforcement of the antitrust laws, particularly against mergers that cut off the ability for small, independent businesses to compete on a level playing field. We hope that new horizontal and non-horizontal merger guidelines will help reinvigorate the agencies' merger control efforts by articulating clear, bright-line structural thresholds for enforcement, above which mergers are presumed to harm competition. By doing so, the agencies can help foster fair, open and competitive markets in which independent businesses across the economy can compete and thrive.

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<sup>4</sup> "Fix It Or Forget It: A 'No Remedies' Policy For Merger Enforcement," John Kwoka and Spencer Weber Waller, 2021.

<sup>5</sup> "Haggen Struggles After Trying To Digest Albertsons Stores," Brent Kendall, The Wall Street Journal, Oct. 9, 2015; "How The FTC's Hertz Antitrust Fix Went Flat," Brent Kendall and Jacqueline Palank, The Wall Street Journal, Dec. 8, 2013; "The Real Dish On the T-Mobile/Sprint Merger: A Disastrous Deal From The Start," Melody Wang and Fiona Scott Morton, ProMarket, April 23, 2021.

Thank you,

Alliance for Pharmacy Compounding

American Booksellers Association

American Independent Business Alliance

American Specialty Toy Retailing Association

Cambridge Local First

Independent Office Products and Furniture Dealers Association

Institute for Local Self-Reliance

Local First Arizona

Main Street Alliance

North American Hardware and Paint Association

Running Industry Association

Shop Local Raleigh