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Office of the Chair

Remarks of Chair Lina M. Khan at the
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Hello, everyone – it's fantastic to be here and see many familiar faces. Many thanks to President Fernandez and her colleagues at the CNMC for hosting this year's conference.

Over the last decade, we've heard mounting concerns about inadequate competition across key markets in the U.S. economy. Evidence suggests that decades of mergers have been a key driver of weakened competition and economic dynamism. As President Biden noted in his Executive Order on Promoting Competition, industry consolidation has "den[ied] Americans the benefits of an open economy," with "workers, farmers, small businesses, and consumers paying the price."[1] Evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation. A lack of competition also appears to have left segments of our economy more brittle, as consolidated supply and reduced investment in capacity can render us less resilient in the face of market disruptions.

In response to these trends and the President's Executive Order, agencies across the U.S. government are taking action to spur fair competition in the U.S. economy. The FTC and DOJ's proposed revisions of the Merger Guidelines are a core part of that effort.[2] Informed by over 5,000 public comments and several listening sessions with market participants across the country, the updates are designed to reflect the realities of how businesses grow and compete in today's economy.

Three principal goals drove our proposed revisions. First, we sought to ensure the guidelines reflect modern market realities. Second, we wanted to ensure the guidelines faithfully reflect the full scope of the laws that Congress passed and prevailing legal precedent. And third, we sought to ensure the guidelines provide a clear and administrable framework that courts and market participants can apply. Today, I'd like to discuss some of the key changes we proposed, and how recent FTC enforcement efforts demonstrate some of these updated frameworks in action.

We want the guidelines to incorporate new economic learning and accurately capture how businesses compete in today's economy. To that end, the proposed guidelines address enforcement blind spots and lay out a framework for policing mergers in a range of different

[1] Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).
[2] U.S. Dep't of Justice and Fed. Trade Comm'n, *Merger Guidelines: Draft for Public Comment Purposes* (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

contexts, including labor, platforms, serial acquisitions, partial acquisitions, and non-horizontal acquisitions. I will briefly discuss each of these in turn.

First, the revised guidelines outline how enforcers will assess whether transactions may lessen competition in labor markets. Although antitrust law from its founding has been concerned about the effects of monopoly power on workers, merger analysis in recent decades has often overlooked a merger's impact on labor markets. At the same time, empirical research shows that concentration has increased across labor markets, with a meaningful decline in worker wages. Informed by this research as well as widespread input from the public, the proposed guidelines identify how U.S. agencies assess whether a merger may lessen competition for labor—including by looking at the merging firms' power to cut or freeze pay, slash benefits, and degrade working conditions.

Along these lines, when we challenged a merger between the two largest healthcare providers in the state of Rhode Island, my colleague Commissioner Slaughter and I contended that the proposed merger would lessen competition in a relevant labor market for healthcare professionals.[3] We will continue to do this type of analysis in future cases.

Second, as more individuals and businesses depend on platforms to access key services, it is more important than ever to prevent mergers that allow incumbent gatekeepers to shield themselves from competition. That is why the proposed guidelines specifically lay out how enforcers will assess acquisitions involving platforms, drawing on recent years of experience and learning. For example, the guidelines note that we will consider not just competition between current players offering similar services, but also competition from firms selling *on* the platform and firms whose offerings could *displace* an existing platform. Recognizing the special characteristics of digital markets, the guidelines also lay out some of the precise ways that platform acquisitions can undermine competition. For example, an incumbent platform may buy up a major platform participant in order to deprive rivals of network effects, or it may buy up a player that was facilitating multi-homing *across* platforms. Either of these acquisition strategies can unlawfully lessen competition.

We recently applied some of this thinking in the FTC's lawsuit to block IQVIA, the world's largest healthcare data provider, from acquiring Propel Media.[4] The complaint states that the deal would eliminate not just head-to-head competition between the firms, but that it would also enable IQVIA to degrade rivals' access to key datasets—or to deprive them of access altogether.

Third, the proposed guidelines address serial acquisitions. Across sectors firms have deployed "roll-up" strategies to incrementally consolidate a market. While each individual

[3] Concurring Statement of Commissioner Rebecca Kelly Slaughter and Chair Lina M. Khan Regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England Health System (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf.

[4] Press Release, Fed. Trade Comm'n, *FTC Sues to Block IQVIA's Acquisition of Propel Media to Prevent Increased Concentration in Health Care Programmatic Advertising* (July 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-sues-block-iqvias-acquisition-propel-media-prevent-increased-concentration-health-care.

transaction may not rise to the level of a law violation, the roll-up scheme in the aggregate can still unlawfully lessen competition. The proposed guidelines clarify that enforcers can assess an overall pattern of serial acquisitions or examine it as part of an industry trend—rather than just look at each deal in a silo.

Consistent with those principles, in September the FTC filed a lawsuit challenging a scheme by U.S. Anesthesia Partners and private equity firm Welsh Carson to roll-up anesthesiology practices across the state of Texas.[5] The complaint lays out how these entities systematically pursued a series of smaller acquisitions to consolidate the market. In the aggregate, these deals allowed the firms to hike raise prices—resulting in Texas patients and businesses paying tens of millions of dollars more than they would have absent this scheme. Evidence suggests firms may have deployed these roll-up strategies across a range of markets, including vet practices and nursing homes. Through both bringing cases and updating policy, the FTC is moving to address these types of stealth consolidation schemes and limit our blindspots.

Fourth, the proposed guidelines lay out a framework for assessing competitive harms when an acquisition involves partial control or common ownership. Acquisitions of partial ownership or other minority interests may give the investor rights in the target firm, such as rights to appoint board members, observe board meetings, veto the firm's ability to raise capital, or impact operational decisions or access to competitively sensitive information.

For the first time in nearly forty years, in August the FTC took action against these types of unlawful interlocking directorates by blocking EQT, the nation's largest natural gas producer, from acquiring certain natural gas assets from private equity firm Quantum Energy Partners.[6] Specifically, Quantum's anticipated position as one of EQT's largest shareholders and EQT's obligation to appoint a Quantum designee to the EQT board would have allowed the firms to exchange competitively sensitive information and to influence each other's strategic decisions in improper ways.

Fundamentally, the draft guidelines take a practical and empirical approach to gauging competition and emphasize that there is no one-size-fits-all tool or method that can be applied to all contexts.

Overall, we hear that our approach to merger enforcement is promoting greater deterrence. Prominent bankers and deal lawyers have stated that the FTC and DOJ's current approach is prompting firms to assess antitrust risk on the front-end of merger discussions rather than later on. Preventing illegal deals from being proposed in the first instance is critical for promoting the rule of law. When finalized, the revised merger guidelines will provide even further notice and clarity to businesses and other market participants and, in turn, further promote deterrence and competition.

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[5] Press Release, Fed. Trade Comm'n, *FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas* (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

[6] Press Release, Fed. Trade Comm'n, *FTC Acts to Prevent Interlocking Directorate Arrangement, Anticompetitive Information Exchange in EQT, Quantum Energy Deal* (Aug. 16, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-acts-prevent-interlocking-directorate-arrangement-anticompetitive-information-exchange-eqt.

Our revisions also seek to reinvigorate the full scope of the laws Congress passed to protect Americans from mergers that may lessen competition or tend to create a monopoly. The Clayton Act seeks to preserve future competition and halt concentration in its incipiency, as courts have long recognized. So, the proposed guidelines lay out some ways a merger may further spur consolidation or undermine future competition. For example, Proposed Guideline 4 on potential entry focuses on preserving the possibility of entry in concentrated markets. Such entry can boost competition, and a merger neutralizing or preventing that entry can violate the law. Proposed Guideline 7 focuses on acquisitions involving dominant firms and lays out how enforcers will assess the risk of entrenching a dominant position. And Proposed Guideline 8 addresses markets that are trending toward concentration.

The proposed guidelines also revise the thresholds for the structural presumption to more closely conform to the law and restore traditional figures. In the United States, courts have ruled that it is presumptively illegal for a merger to significantly increase concentration in an already highly concentrated market. While the 2010 guidelines raised this threshold, our proposed guidelines reset the standard to the one used by courts and past guidelines for decades.

As we set out to update out guidelines, we had the benefit of learning from many of you, who have recently or are in the process of revising your merger guidelines to address modern market realities, particularly in digital markets. We also observed the broader scope of merger review applied in many international jurisdictions, which highlighted the importance of moving past stale theories and models. It's essential that we widen the aperture of our merger analysis to match the realities of how firms in the modern economy can use deals to stifle competition. Our international engagement has been a critical part of that effort.

We are grateful for the feedback we've received from many in the international enforcement community throughout this process. And we are confident that the forthcoming final guidelines will be stronger and more effective as a result.

As enforcers, we have the obligation to adapt to new learning while staying faithful to the law and precedent on the books. The U.S. agencies' proposed merger guidelines seek to do just that.

Thanks again to ICN for continuing to set the gold standard in antitrust policy and enforcement and for being such an important nexus for shared learning.

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