

ONE HUNDRED EIGHTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-6906
judiciary.house.gov

April 5, 2023

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

Dear Chair Khan:

On March 9, 2023, Republican Committee Members wrote to you requesting documents and information regarding the Federal Trade Commission's (FTC) "ill-advised current approach to mergers."¹ To date, the FTC has failed to comply with this request for information.

Accordingly, we reiterate the outstanding requests—itemized in the March 9, 2023, letter and incorporated herein—and ask that you provide this information as soon as possible, but no later than 5:00 pm on April 10, 2023.

The Committee on the Judiciary is authorized to conduct oversight of and legislate on matters relating to the "[p]rotection of trade and commerce against unlawful restraints and monopolies."² If you have any questions about this matter, please ask your staff to contact Committee staff at (202) 225-6906.

Thank you for your prompt attention to this matter.

Sincerely,



Jim Jordan
Chairman



Thomas Massie
Chairman
Subcommittee on the Administrative
State, Regulatory Reform, and
Antitrust

¹ Letter to Hon. Lina Khan, Chair, FTC, from Rep. Moran, et al. (March 9, 2023) (attached).

² Rules of the U.S. House of Representatives, R. X (2023).

The Honorable Lina Khan

April 5, 2023

Page 2

cc: The Honorable Jerrold L. Nadler, Ranking Member
The Honorable David Cicilline, Ranking Member, Subcommittee on the Administrative
State, Regulatory Reform, and Antitrust

Enclosure

Congress of the United States
Washington, DC 20515

March 9, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

We write to express our concern regarding the Federal Trade Commission's (FTC) ill-advised current approach to mergers and acquisitions, an approach that stifles innovation, impedes competition, and diminishes consumer choice. The FTC's decisions are decreasing the predictability in the merger review process that is critical for American enterprises to grow and innovate and for markets to function efficiently. As Members of Congress, we are concerned with the Biden FTC's pursuit of a partisan agenda that expands agency power and discards decades of experience to the detriment of the American people.¹ We urge the FTC to revert to a principled approach that puts consumers above partisan agendas and write to request information and documents relevant to Congress's oversight.

The consumer welfare standard, which the FTC had followed for over forty years, provides an important basis for merger review and enforcement by assessing the impact that a planned merger may have on consumers.² The analysis includes metrics such as changes in price and output, as well as product quality and innovation.³ Under this standard, enforcers must treat all businesses fairly, regardless of size, which supports the rule of law.⁴ Conversely, without the consumer welfare standard, the FTC can effectively "pick[] winners and losers" and centrally plan the economy.⁵

The Trump Administration understood the importance of focusing on consumer welfare and maintaining sound antitrust policy. For example, during the Trump Administration, the FTC

¹ See generally Christine Wilson, *Why I'm Resigning as an FTC Commissioner*, WALL ST. J. (Feb. 14, 2023).

² See, e.g., Makan Delrahim, Former Ass't Att'y Gen., Antitrust Div., Dept. of Just., Opening Remarks as Prepared for the Federalist Society National Lawyers Convention: Ensuring the Legacy of the Consumer Welfare Standard 2 (Nov. 14, 2019).

³ See James Keyte, *New Merger Guidelines: Are the Agencies on A Collision Course with Case Law?*, 36 ANTITRUST 49, 49 (2021).

⁴ See Alden Abbott, *Why Consumer Welfare Remains the Standard for Antitrust*, WALL. ST. J. (Apr. 7, 2022); see generally Phil Gramm & Christine Wilson, *The New Progressives Fight Against Consumer Welfare*, WALL ST. J. (Apr. 3, 2022).

⁵ Alden Abbott, *supra* note 4; cf. Christine S. Wilson, Comm'r, Remarks for the Joint Conference on Precautionary Antitrust: Rule of Law and Innovation Under Assault: Marxism and Critical Legal Studies Walk into the FTC: Deconstructing the Worldview of the Neo-Brandeisians (Apr. 8, 2022).

kept the 2010 Horizontal Merger Guidelines, which courts have heavily relied on in analyzing transactions.⁶ Similarly, the FTC's 2020 Vertical Merger Guidelines accounted for the effects that deals have on consumers.⁷ But in 2021, the Biden FTC voted—along party lines—to rescind those guidelines, even as the Biden Justice Department's Antitrust Division left them in place.⁸ The FTC's unilateral reversal has created uncertainty that is harming competition and the American people, and has imperiled the rule of law by allowing the merger review standard that is applied to vary depending upon which agency conducts the review.⁹

In addition to rejecting consumer-centric antitrust policy, the Biden FTC has needlessly slow-walked merger reviews and intentionally undermined dealmaking. Citing resource constraints¹⁰ and merger volume,¹¹ the Biden FTC announced in early 2021 that it would suspend “early terminations,” which allow mergers that pose no competitive risk to close before a thirty-day waiting period.¹² Accordingly, the FTC has been holding mergers—including some of the smallest and least competitively consequential—for at least thirty days.¹³ The Biden FTC's approach has “introduce[d] inefficiency into market operation, harming consumers.”¹⁴ In some cases, the Biden FTC has also sent letters informing merging parties that they are still under investigation even after the expiration of the waiting period.¹⁵ These letters, often sent without a reason to believe the merger is unlawful, effectively extend investigations past the timeline that Congress has set for the FTC's merger review.¹⁶ Threatening future litigation even when the FTC may have little reason to believe a deal is anticompetitive chills the growth and innovation of American businesses,¹⁷ and is inconsistent with Congress's intent in establishing merger review.¹⁸

⁶ Noah J. Phillips & Christine S. Wilson, Comm'rs, FTC, Statement Regarding the Request for Information on Merger Enforcement 1 (Jan. 18, 2022).

⁷ See Noah J. Phillips & Christine S. Wilson, Comm'rs, FTC, Dissenting Statement Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement 2-3 (Sep. 15, 2021).

⁸ Press Release, FTC, *Federal Trade Commission Withdraws Vertical Merger Guidelines* (Sep. 15, 2021); Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers*, PROMARKET (Sep. 23, 2021).

⁹ Cf. Noah J. Phillips & Christine S. Wilson, Comm'rs, FTC, Dissenting Statement Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement 5 (Sep. 15, 2021).

¹⁰ Holly Vedova, *Adjusting Merger Review to Deal With the Surge in Merger Filings*, FTC (Aug. 3, 2021).

¹¹ Press Release, FTC, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021).

¹² *Id.*

¹³ See Noah J. Phillips & Christine S. Wilson, Comm'rs, FTC, Statement Regarding the Commission's Indefinite Suspension of Early Terminations 2 (Feb. 4, 2021).

¹⁴ *Id.* at 4.

¹⁵ Diane Bartz, *U.S. Antitrust Enforcer Says Merger Wave Means Slower Vetting*, REUTERS (Aug. 3, 2021).

¹⁶ Noah J. Phillips, Comm'r, FTC, Prepared Remarks for the Eighth Annual Berkeley Spring Forum on M&A and the Boardroom: Disparate Impact: Winners and Losers from the New M&A Policy 9 (Apr. 27, 2022).

¹⁷ See generally Diane Bartz, *supra* note 15.

¹⁸ See Noah J. Phillips & Christine S. Wilson, Comm'rs, FTC, Statement Regarding the Commission's Indefinite Suspension of Early Terminations 1 (Feb. 4, 2021).

Despite receiving additional funding from Congress at the end of 2022,¹⁹ and a significant drop in merger activity,²⁰ the FTC has not resumed early terminations²¹ and has continued to exceed the statutory deadline for reviewing mergers. Yet, according to Commissioner Christine Wilson, FTC “enforcement numbers under this administration are significantly lower than enforcement numbers under the Trump Administration.”²² One must wonder, then, if the Biden FTC is shirking its responsibility to investigate mergers effectively and efficiently, and instead wasting new funds on partisan projects like illegal rulemaking.²³

Based on early indicators, it seems unlikely that the Biden FTC will re-embrace the consumer welfare standard. For example, the FTC’s Request for Information on Merger Enforcement foreshadows a skepticism toward mergers by dismissing out of hand potential procompetitive and cost-cutting justifications.²⁴ Instead, the FTC seems poised to implement a new approach that focuses on factors that may be unrelated to sound, economics-based merger analysis.²⁵ Additionally, it may be much harder for companies to pass the FTC’s scrutiny under any new merger guidelines, even when a merger will benefit consumers.²⁶ Focusing on new considerations other than consumer welfare without accounting for relevant economic harms is a disservice to the American people.

The Biden FTC’s approach to mergers and acquisitions ignores market realities. Many startups pursue the long-term goal of being acquired.²⁷ Accordingly, the FTC’s actions in the merger space chill investment and discourage start-ups from growing and developing their businesses, because the prospect of an acquisition may disappear.²⁸ This could have a lasting impact on the flourishing of U.S. markets. It is critical, now more than ever, to establish certainty in our marketplace that provides incentives for American innovators to continue competing. The American people would be best served if Biden antitrust enforcers would abandon partisan agendas and restore traditional antitrust principles and processes that promote competitive markets, transparency, and the rule of law.²⁹

To allow us to conduct oversight of the FTC’s approach, please provide the following information and material:

¹⁹ David Shepardson & Diane Bartz, *Government Funding Bill to Bolster U.S. Antitrust Regulators*, REUTERS (Dec. 22, 2022).

²⁰ Peter Brennan & Gaurang Dholakia, *M&A Activity Slumped in North America in 2022 After Record 2021*, S&P GLOBAL (Jan. 17, 2023).

²¹ Rebecca Farrington & Heather Greenfield, *Antitrust Scrutiny Intensifies as DOJ and FTC Step Up Enforcement*, WHITE & CASE (Jan. 27, 2023).

²² See Christine S. Wilson, Comm’r, FTC, Statement In the Matter of HSR Premerger Notification (Feb. 7, 2023).

²³ See Letter from Rep. Jim Jordan, Chair, H. Comm. on the Judiciary, et al., to Hon. Lina M. Khan, Chair, et al., FTC (Feb. 14, 2023).

²⁴ See, e.g., Alden Abbott, *FTC-DOJ RFI on Merger Guidelines: The Agencies Should Proceed with Caution*, TRUTH ON THE MKT. (Feb. 2, 2022).

²⁵ See, e.g., Lina M. Khan, Rohit Chopra, and Rebecca Kelly Slaughter, Chair and Comm’rs, FTC Statement on the Withdrawal of the Vertical Merger Guidelines 8 (Sep. 15, 2021).

²⁶ See, e.g., Mike Cowie & James A. Fishkin, *Back to the Drawing Board: The FTC and DOJ Rethink Merger Guidelines*, REUTERS (Mar. 7, 2022).

²⁷ See, e.g., Francesco Ferrati & Moreno Muffato, *Startup Exits by Acquisition: A Cross Industry Analysis of Speed and Funding*, EUR. CONF. ON INNOVATION AND ENTREPRENEURSHIP (2021).

²⁸ See generally Noah J. Phillips, *supra* note 16.

²⁹ See Christine Wilson, *Why I’m Resigning as an FTC Commissioner*, WALL ST. J. (Feb. 14, 2023).

1. A comprehensive list of each factor or consideration other than consumer welfare that the Biden FTC has used in any assessment of a proposed transaction since June 15, 2021.
2. For each factor or consideration listed in response to question one, please explain how the FTC evaluates a proposed transaction's effects on consumers relative to any effects relating to other factors or considerations.
3. The date when the Biden FTC will issue new merger guidelines.
4. All documents and communications referring or relating to the decision to withdraw the Trump Administration's 2020 vertical merger guidelines.
5. The date when the Biden FTC will reestablish the practice of early terminations. If the Biden FTC will not resume the practice of early terminations, please explain the FTC's rationale in detail, including for any types of transactions where the FTC routinely finds no anticompetitive effects.
6. The number of proposed transactions since June 15, 2021, where the FTC:
 - a. has not granted an early termination;
 - b. has not issued a second request;
 - c. has issued a second request;
 - d. has told parties to a proposed transaction that the agency would challenge a proposed transaction; or,
 - e. has challenged a proposed transaction.
7. All documents and communications, including any on personal devices and any communications with the Executive Office of the President or CFPB Director Rohit Chopra, relating to the FTC's policy concerning early terminations.
8. A precise description of how the FTC expects to spend its increased funding from December 2022 appropriations, and any merger fee revenues in 2023 in excess of appropriations, with respect to merger investigation and enforcement.

Please provide this information as soon as possible but no later than 5:00 p.m. on March 23, 2023.

Thank you for your attention to this matter.

Sincerely,



Nathaniel Moran
Member of Congress



Andy Biggs
Member of Congress



Jefferson Van Drew
Member of Congress



Scott Fitzgerald
Member of Congress



Barry Moore
Member of Congress



Laurel Lee
Member of Congress