

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

May 16, 2024

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

Dear Chair Khan:

The Committee on the Judiciary is conducting oversight of the Biden Administration's misguided approach to merger review and enforcement.¹ We are concerned that antitrust enforcers who abuse their regulatory power create uncertainty in markets, ultimately harming the American people.² In light of information that the Federal Trade Commission (FTC) and Department of Justice (DOJ) may be manipulating merger enforcement data, we wrote to you on February 27, 2024, to request information and documents related to merger review and potential abuse of regulatory powers.³ In that letter, we requested that you promptly provide, among other things, a "list of all merger enforcement actions from October 1, 2022, to present," including certain information related to those actions, such as names of the parties to the transaction, the type of enforcement, and information for the relevant antitrust counsel.⁴

¹ See, e.g., *Oversight of the Department of Justice Antitrust Division: Hearing Before the Subcomm. on the Administrative State, Regulatory Reform, and Antitrust of the H. Comm. on the Judic.*, 118th Cong. (Nov. 2023); Letter from Jim Jordan, Chair, H. Comm. on the Judic. and Thomas Massie, Chair, Subcomm. on the Administrative State, Regulatory Reform, and Antitrust, to Lina Khan, Chair, Fed. Trade Comm'n (Apr. 5, 2023); Letter from Jim Jordan, Chair, H. Comm. on the Judic., to Lina Khan, Chair, Fed. Trade Comm'n (July 17, 2023); *Oversight of the Federal Trade Commission: Hearing Before the H. Comm. on the Judic.*, 118th Cong. (July 2023); *Compliance with Committee Oversight: Hearing Before the Subcomm. on Responsiveness and Accountability to Oversight of the H. Comm. on the Judic.*, 118th Cong. (Nov. 2023).

² Cf. Adam J. White, *The Power Broke Her: The Rise and (Maybe) Fall of Lina Khan*, COMMENTARY MAGAZINE (Mar. 2024) ("... Lina Khan is teaching a new generation of regulators how to wield real power—not by writing rules but by renouncing them. Not by the certainty of clear and enforceable regulations but by the regulatory uncertainty sown by unclear regulatory policies that succeed in lieu of their actual enforcement. ... [T]he standards and procedures of administrative law are *not* well geared to grapple with a passive-aggressive regulatory agency that succeeds by weaponizing regulatory uncertainty to deter people and companies from acting in the first place.").

³ See Letter from Rep. Jim Jordan, Chair, H. Comm. on the Judic., et al. and Rep. Thomas Massie, Chairman, H. Subcomm. on Regulatory Reform, Administrative Law, and Antitrust to Hon. Lina Khan, Chair, Fed. Trade Comm'n (Feb. 27, 2024).

⁴ *Id.*

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On April 22, 2024, the FTC produced a list of its merger enforcement actions but redacted several of the names of parties to the transactions, dates of the actions, and all contact information for antitrust counsel representing each of the parties to each transaction. In light of the significant unilateral redactions contained in the FTC's production, as well as the FTC's failure to produce any other responsive material, our requests for documents, communications and lists remain outstanding.

Accordingly, the Committee reiterates the requests in its February 27, 2024, letter, which is enclosed for your convenience. As an accommodation to the FTC, the Committee will accept the FTC's prioritization and immediate production, in unredacted form, of the redacted materials that the FTC produced on April 22, 2024. If the FTC does not produce this material, the Committee may be forced to resort to compulsory process to obtain this material.

The Committee on the Judiciary is authorized by Rule X of the Rules of the House of Representatives to conduct oversight of and legislate on matters relating to the "[p]rotection of trade and commerce against unlawful restraints and monopolies."⁵ If you have any questions about this matter, please ask your staff to contact Judiciary Committee staff at (202) 225-6906. Thank you for your attention to this matter.

Sincerely,



Jim Jordan
Chairman



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

cc: The Honorable Jerrold Nadler, Ranking Member

The Honorable Lou Correa, Ranking Member, Subcommittee on the Administrative
State, Regulatory Reform, and Antitrust

Enclosure

⁵ Rules of the U.S. House of Representatives, R. X (2023).

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Chair
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
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Dear Chair Khan:

The Committee on the Judiciary is conducting oversight of the Biden Administration's misguided approach to merger review and enforcement.¹ We are concerned that antitrust enforcers who abuse their regulatory power and process create uncertainty in markets, ultimately harming the American people.² In light of information that the Federal Trade Commission (FTC) and Department of Justice (DOJ) may be manipulating merger enforcement data, we write to request information and documents related to merger review and potential abuse of regulatory powers at the Biden FTC and DOJ.

On December 21, 2023, the Federal Trade Commission (FTC) and Department of Justice (DOJ) released the Hart-Scott-Rodino Annual Report for Fiscal Year 2022 (2022 HSR Report), a report that assesses the operations of the premerger notification program.³ The 2022 HSR Report asserted that the FTC and DOJ filed 50 merger enforcement actions in fiscal year 2022, which

¹ See, e.g., *Oversight of the Department of Justice Antitrust Division: Hearing Before the Subcomm. on the Administrative State, Regulatory Reform, and Antitrust of the H. Comm. on the Judic.*, 118th Cong. (Nov. 2023); Letter from Jim Jordan, Chair, H. Comm. on the Judic. and Thomas Massie, Chair, Subcomm. on the Administrative State, Regulatory Reform, and Antitrust, to Lina Khan, Chair, Fed. Trade Comm'n (Apr. 5, 2023); Letter from Jim Jordan, Chair, H. Comm. on the Judic., to Lina Khan, Chair, Fed. Trade Comm'n (July 17, 2023); *Oversight of the Federal Trade Commission: Hearing Before the H. Comm. on the Judic.*, 118th Cong. (July 2023); *Compliance with Committee Oversight: Hearing Before the Subcomm. on Responsiveness and Accountability to Oversight of the H. Comm. on the Judic.*, 118th Cong. (Nov. 2023).

² Cf. Adam J. White, *The Power Broke Her: The Rise and (Maybe) Fall of Lina Khan*, COMMENTARY MAGAZINE (Mar. 2024) ("... Lina Khan is teaching a new generation of regulators how to wield real power—not by writing rules but by renouncing them. Not by the certainty of clear and enforceable regulations but by the regulatory uncertainty sown by unclear regulatory policies that succeed in lieu of their actual enforcement. ... [T]he standards and procedures of administrative law are *not* well geared to grapple with a passive-aggressive regulatory agency that succeeds by weaponizing regulatory uncertainty to deter people and companies from acting in the first place.").

³ FED. TRADE COMM'N & DEP'T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2022 (Dec. 21, 2023) [hereinafter 2022 HSR Report].

the FTC claimed is the “highest level” in over 20 years.⁴ Other information suggests that the agencies may have manipulated these statistics—a serious concern given the data’s relevance to Congressional oversight and appropriations decisions.⁵

Publicly available information suggests that traditional merger enforcement declined significantly under the Biden Administration. An annual report by the law firm Dechert reported an 18-percent-to-40-percent drop in merger enforcement every calendar year under the Biden Administration.⁶ This compounding reduction in merger enforcement three years into the Biden Administration led to a 64-percent drop in annual merger enforcement since the end of the Trump Administration.⁷ In addition, the data in the 2022 HSR Report appears to contradict information provided to the Committee by the FTC. In a November 2023 letter to the Committee, the FTC reported only 20 merger challenges in fiscal year 2022.⁸ The 2022 HSR Report, however, claimed that the FTC brought 24 merger enforcement challenges.⁹

Unlike the Dechert report, which has “consistently applied [the] same standards” every year, it appears that the Biden FTC and DOJ manipulated merger enforcement numbers by changing what counts as an enforcement action.¹⁰ Previous reports across administrations disclosed the amount of merger transactions that the DOJ “challenged.”¹¹ In the 2022 HSR Report, however, the FTC and DOJ now take credit for merger transactions in which the DOJ’s “enforcement efforts directly impacted” the merger.¹² In addition, under Assistant Attorney General Kanter, the two most recent HSR reports removed language stating that alleged

⁴ *Id.* at 2-3. *See also* Press Release, Fed. Trade Comm’n, FTC, DOJ Issue Fiscal Year 2022 Hart-Scott-Rodino Notification Report (Dec. 21, 2023) (“The FTC and DOJ together filed 50 merger enforcement actions in fiscal year 2022, representing the highest level of enforcement activity in over 20 years.”).

⁵ Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the FY2022 HSR Annual Report to Congress, Commission File No. P110014 (Dec. 21, 2023) (arguing that the 2022 HSR Report demonstrates the need for more resources from Congress).

⁶ DECHERT LLP, DAMITT 2023 ANNUAL REPORT: MINDING THE GAP IN MERGER ENFORCEMENT at 2 (Jan. 30, 2024) [hereinafter Dechert Report].

⁷ *Id.*

⁸ Letter from Lina M. Khan, Chair, Fed. Trade Comm’n to Rep. Scott Fitzgerald, Appendix A (Nov. 3, 2023). In addition to the low numbers in fiscal year 2022, the information provided to the Committee shows that the FTC’s merger enforcement actions dropped to only 15 actions in fiscal year 2023. The fiscal year 2023 report, if honest, should document a large decline in merger enforcement at the FTC during the Biden Administration.

⁹ *Compare id.*, with 2022 HSR Report, *supra* note 3, at 2. Although the Dechert report relies on public information, the information from the FTC to the Committee further shows an actual decline in merger enforcement compared to the claims in the 2022 HSR Report.

¹⁰ Dechert Report, *supra* note 6, at 2.

¹¹ *See, e.g.*, FED. TRADE COMM’N & DEP’T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2021 (Feb. 10, 2023) [hereinafter 2021 HSR Report] (“During fiscal year 2021, the Division challenged 14 merger transactions . . . ”); FED. TRADE COMM’N & DEP’T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2019 [hereinafter 2019 HSR Report] (July 8, 2020) (“During fiscal year 2019, the Antitrust Division challenged 17 merger transactions.”).

¹² 2022 HSR Report, *supra* note 3, at 3 (“The Division’s enforcement efforts directly impacted 26 merger transactions.”).

restructured transactions “addressed and resolved” the DOJ’s competitive concerns.¹³ The removal of this language gives further reason to examine how the antitrust enforcers account for and wield their power—especially behind closed doors— as they report to Congress.

The annual Hart-Scott-Rodino report to Congress must be truthful and consistent if it is to be relied on by Congress to make decisions regarding substantive merger enforcement legislation and agency appropriations, including any changes needed to check misguided policy and abuse of regulatory authority. Given serious concerns over your efforts to mislead Congress and the American people, please promptly provide the following documents and information to the Committee:

1. All documents and communications between the FTC and DOJ referring or relating to the creation, drafting, planning, strategy, or finalization of the Hart-Scott-Rodino Annual Report for fiscal year 2022;
2. All documents and communications between the FTC and any person or organization outside of the FTC referring or relating to the creation, drafting, planning, strategy, or finalization of the Hart-Scott-Rodino Annual Report for fiscal year 2022;
3. A list of all 50 merger enforcement actions filed by the FTC and DOJ in fiscal year 2022, including the names of the parties to the transaction, the enforcement type, the date of the action, and contact information for the antitrust counsel representing each of the parties to the transaction;
4. A list of all merger enforcement actions from October 1, 2022, to present, including the names of the parties to the transaction, the enforcement type, the date of the action, and contact information for the antitrust counsel representing each of the parties to the transaction; and
5. For any restructured mergers, a list of all structural and behavioral changes the merging parties made to allegedly restructure the transaction, and describe why these changes addressed your concerns.

Please produce this information as soon as possible but no later than 5:00 p.m. on March 12, 2024. The Committee on the Judiciary is authorized by Rule X of the Rules of the House of Representatives to conduct oversight of and legislate on matters relating to the “[p]rotection of trade and commerce against unlawful restraints and monopolies.”¹⁴

If you have any questions about this matter, please ask your staff to contact Judiciary

¹³ Compare 2019 HSR Report, *supra* note 11, at 3 (“... in the remaining instance, the parties addressed and resolved the Division’s concerns during the investigation.”), with 2022 HSR Report, *supra* note 3, at 3 (“... the parties changed the structure of their transaction such that the Division chose not to bring an enforcement action at that time.”) and 2021 HSR Report, *supra* note 11, at 2 (“... the transaction was restructured in the face of the Division’s competition concerns.”).

¹⁴ Rules of the U.S. House of Representatives, R. X (2023).

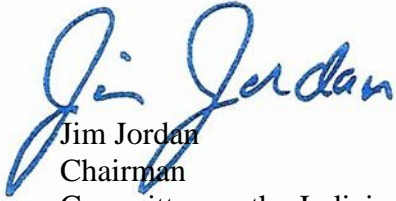
The Honorable Lina Khan

February 27, 2024

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Committee staff at (202) 225-6906. Thank you for your attention to this matter.

Sincerely,

Handwritten signature of Jim Jordan in blue ink.

Jim Jordan
Chairman
Committee on the Judiciary

Handwritten signature of Thomas Massie in blue ink.

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

cc: The Honorable Jerrold Nadler, Ranking Member

The Honorable Lou Correa, Ranking Member, Subcommittee on the Administrative
State, Regulatory Reform, and Antitrust