

Congress of the United States
Washington, DC 20515

October 4, 2021

Mr. Richard Powers
Acting Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Powers and Chairwoman Khan,

We write to express our shared concern that the Department of Justice’s Antitrust Division (“DOJ” or the “Division”) and the Federal Trade Commission’s Bureau of Competition (“FTC” or the “Bureau”) are applying increasingly divergent standards of review to mergers and acquisitions under their shared jurisdiction.

On September 15, 2021, the FTC voted to withdraw its approval of the 2020 Vertical Merger Guidelines (“VMGs”).¹ However, on the same day the Division issued a public statement noting that the VMGs would remain in place at the Department of Justice.²

At the same meeting at which the FTC withdrew its approval for the VMGs, it also heard public comments.³ One commenter noted that,

In an increasing number of FTC merger investigations, agency staff have requested information regarding how the proposed transaction will affect unionization, ESG [Environmental, Social, and Governance] policies, or franchising. Staff have been unable to articulate how these issues relate to the agency's mission to promote competition, leaving the outside world guessing as to the role they play in agency decision making. Adding to this concern, these types of considerations are not topics in which agency staff have expertise, and devoting time to these issues has the potential to delay agency review of transactions. To the extent that these considerations are playing the role in enforcement

¹ <https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines>

² <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>

³ https://www.ftc.gov/system/files/documents/public_events/1596052/transcript_open_commission_meeting_9-15-21.pdf

decisions, I hope the Commission will give serious consideration to promptly explaining their role and how to square this with decades of Supreme Court precedent, that the impact on competition is the only proper consideration in the antitrust case.

Further reporting on this subject has revealed that this concern is shared by other members of the antitrust bar,⁴ and is consistent with the complaints that concerned parties have been sharing privately with some of our offices for months. Notably, there have been no reports that Department of Justice Antitrust Division staff are asking these types of questions.

We are worried that your agencies appear to be applying the law unequally to similarly situated respondents, raising serious concerns about the fairness of America's antitrust enforcement regime. A lack of alignment between DOJ and FTC in antitrust enforcement already has been a problem during previous administrations. We are disappointed to see that trend accelerating under President Biden's leadership.

To assist us in our exercise of Congressional oversight over the enforcement of our antitrust laws and federal competition policy, we request that each of you respond, separately, to the questions below by October 15, 2021.

1. To what extent did Division and Bureau staff consult with each other prior to the FTC's withdrawal of approval for the VMGs?
2. To what extent did DOJ and FTC leadership consult with each other prior to the FTC's withdrawal of approval for the VMGs?
 - a. To what extent was staff input taken into consideration?
3. Was there any discussion of waiting to evaluate the VMGs until after political leadership had been appointed and confirmed for the Division?
 - a. For FTC only: Why did the FTC proceed with voting to withdraw approval for the VMGs without concurrence from DOJ?
 - b. For FTC only: Why didn't the FTC wait to withdraw approval for the VMGs until replacement guidelines had been prepared?
4. To what extent have DOJ or FTC personnel consulted with each other regarding asking merging parties about their proposed transaction's effects on labor issues or Environmental, Social, and Governance ("ESG") policies?
5. Redacting only to avoid divulging party names or confidential business information, please share each and every question that has been posed to a merging party, whether in writing or orally, relating to labor issues or ESG policies. If your agency has not posed

⁴ See, e.g., Bryan Koenig, "'Nontraditional Questions' Appearing In FTC Merger Probes," Law360 (Sept. 24, 2021), <https://www.law360.com/mergersacquisitions/articles/1425218/-nontraditional-questions-appearing-in-ftc-merger-probes>.

any such questions, please state so.

6. Please share any changes—whether official or unofficial, permanent or temporary—your agency or staff have made to the Model Second Request since January 20, 2021.
7. What steps are you taking to ensure that merger enforcement policy and the legal standards applied at your agency do not substantively differ from those of your sister agency?

We look forward to receiving and reviewing your answers.

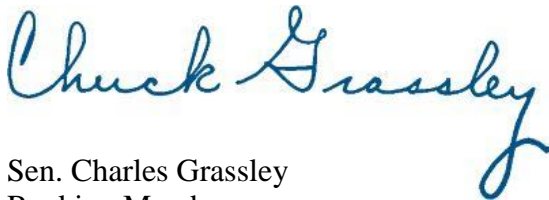
Sincerely,



Sen. Michael S. Lee
Ranking Member
Senate Judiciary Subcommittee on
Competition Policy, Antitrust, and
Consumer Rights



Rep. Ken Buck
Ranking Member
House Judiciary Subcommittee on
Antitrust, Commercial, and
Administrative Law



Sen. Charles Grassley
Ranking Member
Senate Judiciary Committee



Rep. Jim Jordan
Ranking Member
House Judiciary Committee