

June 25, 2024

Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Washington, DC 20530

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Former Enforcers Comment on Request for Information on Corporate Consolidation Through Serial Acquisitions and Roll-Up Strategies

As former antitrust enforcers and alumni of the Federal Trade Commission (“FTC”), we are pleased to submit these comments to the FTC and Department of Justice’s Antitrust Division (“DOJ”) (collectively, “Agencies”) in response to your [Request for Information on Corporate Consolidation Through Serial Acquisitions and Roll-Up Strategies](#) (“RFI”). We have devoted significant portions of our careers to protecting consumers and competition and we continue to care deeply about the Agencies and their mission. Moreover, we agree that mergers and acquisitions merit further study and applaud the Agencies for tackling these issues.

We write to suggest several ways in which the Agencies might adjust and supplement the RFI to build confidence in its objectivity and comprehensiveness. As written, the RFI creates an appearance that the Agencies are mainly seeking negative information about acquisitions, rather than seeking to learn about their benefits to competition as well as their potential harms, and that the Agencies are seeking information about ideological topics untethered from their mission. Such an approach could distort the Agencies’ perspective, degrade public confidence, and ultimately lead the Agencies to challenge pro-competitive or competitively neutral acquisitions.

I. The Agencies should issue a supplemental RFI to inquire into the pro-competitive aspects of serial acquisitions

As they have in the past, the Agencies should examine mergers and acquisitions in an objective fashion. In recent years, for example, the Agencies themselves have recognized that mergers “are one means by which firms can improve their ability to compete.”¹ In one paper, from 2020, the FTC’s staff examined a large potash merger and concluded that the “evidence does not indicate that the firms were able to impose an anticompetitive price increase in the wake of the merger.”² Another retrospective from 2009, into hospital mergers, found mixed results; one

¹ OECD, Conglomerate Effects of Mergers – Note by the United States to the Organisation for Economic Co-operation and Development (June 4, 2020) at 5, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf.

² See Kreisler, Bureau of Economics, *Price Effects from the Merger of Agricultural Fertilizer Manufacturers Agrium and PotashCorp* (July 2020), https://www.ftc.gov/system/files/documents/reports/price-effects-merger-agricultural-fertilizer-manufacturers-agrium-potashcorp/working_paper_345.pdf.

merger resulted in higher prices, the other did not.³ Finally, a retrospective into grocery mergers found that “mergers in highly concentrated markets are most frequently associated with price increases, while mergers in less concentrated markets are most often associated with price decreases.”⁴ In each instance, the Agencies examined the markets and acquisitions objectively.

The current RFI, however, suggests that the Agencies have already concluded that “serial acquisitions” harm competition. Although several questions take a neutral approach, many of them solicit negative information about acquisitions, and not one asks about any benefits. For example, Question 2(c) asks whether serial acquisitions encourage “actual or attempted coordination or collusion between competitors” and Question 3 posits nine subparts about ways in which an acquirer might harm competition, including tying and refusals to deal. By contrast, the RFI includes no questions that solicit information about possible pro-competitive benefits from acquisitions; at most, Question 4 asks the public to identify “claimed” business objectives and whether they came to pass.

Accordingly, we suggest that the Agencies supplement the RFI with additional questions that solicit information about the benefits of serial acquisitions. Below is proposed Question 6, mirroring existing Question 3:

Proposed Question 6

Serial Acquisition Business Practices (Part 2): If you identified serial acquisitions in the preceding questions, please share whether the acquisitions affected the relevant market in in any of the following ways:

- a. A reduction in price for consumers, either by the acquirer, its competitors, or both;
- b. An increase in output, either by the acquirer, its competitors, or both;
- c. An increase in product offerings, including new varieties of products or products offered at different price points, either from the acquirer, its competitors, or both;
- d. An increase in product quality, either from the acquirer, its competitors, or both;
- e. An increase in investment, financing, or innovation, as measured by patent filings or any other metric, either by the acquirer, its competitors, or both;
- f. An increase in efficiency (e.g., lower unit costs), either by the acquirer, its competitors, or both;
- g. Any other market effects that show the benefits of the acquisitions; and
- h. Any other market effects that show that the acquisitions were competitively neutral in terms of their effect on price, quality, variety, investment, or any other metric.

At a minimum, the addition of these questions, or something similar, would build public confidence that the Agencies are approaching the topic in an objective manner.

Moreover, the answers also could yield valuable, current information about the benefits of acquisitions -- and thereby improve the Agencies’ ability to develop better enforcement actions.

³ See Haas-Wilson and Garmon, Bureau of Economics, *Two Hospital Mergers on Chicago’s North Shore: A Retrospective Study* (Jan. 2009), at https://www.ftc.gov/sites/default/files/documents/reports/two-hospital-mergers-chicago%E2%80%99s-north-shore-retrospective-study/wp294_0.pdf.

⁴ See Hosken et al, Bureau of Economics, *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (Dec. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/do-retail-mergers-affect-competition%C2%A0-evidence-grocery-retailing/wp313.pdf>.

In the past, of course, the Agencies have stated that “the vast majority of mergers are either procompetitive and enhance consumer welfare or are competitively benign”⁵ and that “[m]ergers are one means by which firms can improve their ability to compete.”⁶ In a policy statement from just a few years ago, the FTC agreed that mergers can promote innovation:

[I]n dynamic sectors characterized by high R&D costs, firms with broad scale and scope may have unique incentives and capabilities to invest in innovation. For example, where a firm can exploit synergies across product lines or earn returns on research and development projects across multiple geographies, it may have greater incentives to make investments in such projects than firms with more limited operations.⁷

Many other studies agree that mergers can promote competition and innovation. The Antitrust Modernization Commission,⁸ antitrust treatises,⁹ and a recent, comprehensive literature survey¹⁰ all have found that mergers can and do advance procompetitive business objectives. Another recent study found that mergers resulted in more patent applications and investment in research and development.¹¹ In the biopharmaceutical industry, for instance, the Congressional Budget Office agreed that “The acquisition of a small company by a larger one can create efficiencies that might increase the combined value of the firms by allowing drug companies of different sizes ... to specialize in activities in which they have a comparative advantage.”¹² Numerous recent court decisions also find that mergers can create integration efficiencies that ultimately promote competition and benefit consumers.¹³

Against this backdrop, the Agencies could use this RFI to supplement, in the context of serial acquisitions, the empirical studies that find that mergers and acquisitions promote competition. Accordingly, the Agencies would build public confidence and gain more fulsome, complete, and current information about serial acquisitions by supplementing the current RFI.

⁵ Statement of Ass’t Att’y Gen. Christine Varney, *Merger Guidelines Workshops*, Third Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 22, 2009).

⁶ OECD, *Conglomerate Effects of Mergers – Note by the United States to the Organisation for Economic Co-operation and Development* (June 4, 2020) at 5, https://www.ftc.gov/system/files/attachments/us-submissions-oced-2010-present-other-international-competition-fora/oced-conglomerate_mergers_us_submission.pdf.

⁷ *Id.* at 8.

⁸ E.g., Antitrust Modernization Commission Report 57-60, at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

⁹ 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 10A-1 (5th ed. 2021).

¹⁰ U.S. Chamber, *Evidence of Efficiencies in Consummated Mergers* (June 1, 2023), at <https://www.uschamber.com/assets/documents/20230601-Merger-Efficiencies-White-Paper.pdf>.

¹¹ U.S. Chamber, *Mergers, Industries, and Innovation: Evidence from R&D Expenditures and Patent Applications* (Feb. 2023), at <https://www.uschamber.com/finance/antitrust/mergers-industries-and-innovation-evidence-from-r-d-expenditure-and-patent-applications>.

¹² CBO, *Research and Development in the Pharmaceutical Industry* (Apr. 2021), at <https://www.cbo.gov/publication/57126> . .

¹³ *Microsoft*, 2023 WL 4443412, at *11 (citations omitted). See also *U.S. v. Booz Allen Hamilton*, Case 1:22-cv-01603-CCB, at 8 n.13 (D. Md. Oct. 17, 2022); *Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 840 (D.C. Cir. 2006) (“[V]ertical integration creates efficiencies for consumers”).

II. The Agencies should explain or withdraw certain questions that create an appearance of focusing on ideological issues unrelated to their statutory mission

Within the RFI, certain questions may create an appearance that the Agencies are interested in ideological issues unrelated to their statutory mission. For example, Question 2(d) and its subparts inquire into labor topics unrelated to the rare phenomenon of a labor monopsony, such as “Have workers been reclassified (i.e., from employees to independent contractors) or outsourced to/from third-party providers?” and questions about “work conditions” and “employment stability.” It is not obvious how any of these questions relate to the Agencies’ statutory mission or historical practice. The RFI cites no statutory provisions or cases, and we are unaware of any, in which a court has found that issues of worker classification, work conditions, or employment stability had any relevance to a merger analysis.

Similarly, Question 5 asks a series of questions about private equity and the role that investors play in managing an acquired company. Again, the RFI cites no statutory provisions or cases, and we are unaware of any, in which a court has found that the identity of a purchaser as a private equity firm has any relevance to a merger analysis, except to the extent that the firm may own other companies in the same market.

For these reasons, we recommend that the Agencies withdraw these questions or explain their relevance to the antitrust laws and this inquiry. By narrowing the RFI to topics that relate directly to the antitrust laws and merger analysis, and that have grounding in the statutory language and historical precedent, the Agencies would gather more useful information and would increase public confidence in the necessity and utility of this inquiry.

As former enforcers, we strongly support the Agencies’ mission and the importance of vigorous enforcement. We hope that our suggestions will help the Agencies to improve the quality and utility of the information that they receive in response to this RFI.

Thank you for your attention to these comments.

Signed,

Alumni of the FTC¹⁴

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¹⁴ Every signatory is signing in his or her individual capacity, rather than on behalf of an organization.

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