

Congress of the United States
Washington, DC 20510

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

December 5, 2022

Dear Chair Khan:

In light of the Federal Trade Commission's (FTC) recent statement regarding the scope of Section 5 of the FTC Act, as well as prior reports that the FTC asked nontraditional questions about environmental, social, and governance (ESG) issues when reviewing a merger, we are concerned with the direction the FTC seems to be headed in an approach to antitrust enforcement that strays from the rule of law.

In July 2021, the FTC rescinded its policy interpreting its statutory mandate to root out "unfair methods of competition" as aligned with promoting consumer welfare under the Sherman and Clayton Acts. No statement of revised policy was issued until November 10, when the FTC issued a new policy statement that relies on a much broader, more amorphous, reading of Section 5 that can easily be manipulated by the political whims of a majority of the Commission. This shift towards a vague and potentially political enforcement policy raises concerns that the FTC will add ESG issues to merger inquiries, especially since the FTC has asked about these issues in the past. It also raises the question whether the FTC will faithfully enforce the antitrust laws when companies illegally collude to push ESG-related initiatives.

After the former policy statement was rescinded in July, merging companies reported inquiries from the FTC requesting information outside the traditional scope of whether consumers have been harmed, including how a deal would affect ESG issues.¹ The FTC posted a blog related to these inquiries that stated, "*our second requests may factor in additional facets of market competition that may be impacted,*"² while providing little guidance on what guardrails would be placed on the scope of these additional inquiries.

The Biden Administration's executive order on competition raises more concerns that using ESG criteria as a political tool has spread to other regulators such as the Federal Deposit Insurance Corporation (FDIC) or the Securities & Exchange Commission (SEC).³ For example, recent reports indicate that the liberal think tank, Center for American Progress,

¹ Bryan Koenig, Law360, '*Nontraditional Questions' Appearing In FTC Merger Probes*, September 24, 2021, [Nontraditional Questions' Appearing In FTC Merger Probes - Law360](#).

² Holly Vedova, Bureau of Competition, Federal Trade Commission, Competition Matters, September 28, 2021.

³ Securities and Exchange Commission (SEC), Human Capital Management Disclosure Rulemaking, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=3235-AM88>.

recommended the SEC incorporate market power indicators, such as labor cost metrics and investment calculations, into ESG disclosures.⁴

We are also concerned that the FTC's broadened Section 5 Policy Statement and the Commission's reported promotion of ESG criteria in merger reviews makes it less likely the FTC would address collusive activities supporting ESG. During a recent Senate Judiciary Committee hearing, while Assistant Attorney General of the Antitrust Division Jonathan Kanter clearly stated there is no ESG exemption to antitrust laws, we are concerned that your statement that "those types of cooperation or agreements, in as much as they can affect competition, are always relevant," left open the possibility that collusion on ESG initiatives may not be an enforcement priority. As we see activists pushing large corporations to weaponize ESG initiatives to reshape society in ways that lack the support necessary to pass through legislation, we are concerned about collusive efforts that could restrict politically disfavored activity in ways that increase prices for consumers.

Antitrust regulators have long utilized the consumer welfare standard to measure harm to competition in antitrust law. The consumer welfare standard measures harm to consumers in terms of price, output, quality, and innovation. Adding ESG issues to merger inquiries simply creates confusion, as there are no objective standards or metrics to measure ESG, leaving room for the government to use them as a guise to implement partisan social priorities, or ignore enforcement where collusion occurs in the name of politically favored goals.

We urge you to maintain the United States' reputation for administrable, predictable, and credible antitrust enforcement. Enforcement or nonenforcement through vague and political criteria threatens this reputation. Therefore, we ask that you provide us with the following information:

1. Any communication with organizations concerning adding ESG issues into merger investigations;
2. Any communication among members and staff of the White House Competition Council concerning factoring ESG issues into antitrust investigations;
3. Plans, proposals, or other communication regarding the FTC's purpose in making inquiries related to ESG issues in merger enforcement;
4. Communications on whether the FTC has the authority to consider ESG issues in merger analysis absent legislation from Congress.
5. Complaints from collusion on ESG initiatives and any enforcement investigations related to ESG collusion.

We ask that you respond to this inquiry no later than December 19th, 2022.

⁴ Alexandra Thornton and Caius Z. Willingham, It's Time for a Workforce Disclosure Reset, Why the SEC Should Require More Specific Human Capital Information from Companies, August 2021, <https://americanprogress.org/wp-content/uploads/2021/08/WorkforceDisclosure-report1.pdf>.

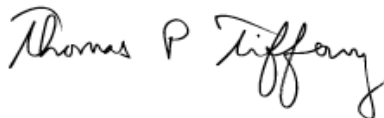
Sincerely,



Scott Fitzgerald
Member of Congress



Andy Biggs
Member of Congress



Tom Tiffany
Member of Congress



Warren Davidson
Member of Congress



Byron Donalds
Member of Congress



Michelle Fischbach
Member of Congress



W. Gregory Steube
Member of Congress



Matt Gaetz
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