

September 12, 2021

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comment on Agenda Items at September 15 Open Meeting

Dear Chair Khan and Commissioners Chopra, Phillips, Slaughter, and Wilson:

The Consumer Technology Association (CTA) submits this comment in advance of the Commission's September 15, 2021 open meeting to address two agenda items.¹ CTA is North America's largest technology trade association. Our members are the world's leading innovators – from startups to global brands – helping support more than 18 million American jobs. CTA owns and produces CES® – the most influential tech event in the world. CTA members operate in a competitive marketplace to produce innovative products that provide enormous benefits to consumers and power the economy.

CTA first addresses the September 15 open meeting agenda item regarding a vote to rescind the Vertical Merger Guidelines (the "Guidelines") adopted in June 2020² and the Commentary on Vertical Merger Enforcement ("Commentary") issued in December 2020.³ The Guidelines were jointly adopted by the FTC and U.S. Department of Justice ("DOJ") after significant public input, including an extensive public comment period.⁴ CTA opposes any move to rescind the Guidelines and Commentary and has serious concerns about the Commission doing so without meaningfully seeking public input on such a significant move.

¹ "FTC Announces Tentative Agenda for September 15 Open Commission Meeting," Sept. 8, 2021, <https://www.ftc.gov/news-events/press-releases/2021/09/ftc-announces-tentative-agenda-september-15-open-commission>

² "FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers," June 30, 2020, <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers>

³ "FTC Issues Commentary on Vertical Merger Enforcement," Dec. 20, 2020, <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-issues-commentary-vertical-merger-enforcement>

⁴ Draft Guidelines were released on January 10, 2020, and the public comment period was eventually extended to February 26. See "FTC and DOJ Extend Deadline for Public Comments on Draft Vertical Merger Guidelines, Announce Two Related Public Workshops," Feb. 3, 2020, <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-doj-extend-deadline-public-comments-draft-vertical-merger>.

American businesses need and deserve to operate in an environment of legal certainty. Withdrawal of the Guidelines and Commentary would re-introduce uncertainty that was addressed by the adoption of the Guidelines in 2020. More, any move should be subject to public input, at least as rigorous as the process leading up to the adoption of the Guidelines in 2020.

CTA supported the adoption of the Guidelines in 2020, in order to help provide clear and transparent rules of the road for industry.⁵ Prior to 2020, guidance on vertical mergers had become dated, and companies subject to antitrust merger review could not predict with certainty the analytical framework that government agencies would apply in the review process. CTA is concerned that withdrawing the Guidelines would return the market to this untenable situation and discourage competitively beneficial activity. Companies of all sizes benefit when reviewing agencies clearly and transparently communicate their approach, and legal certainty spurs innovation and investment that benefits consumers.

At the same time, any sudden shifts in direction in agency approaches to reviewing vertical mergers – including a shift away from the approach in the years leading up to the 2020 Guidelines and Commentary – would stifle companies’ ability to plan, invest, and innovate. As CTA noted when the Guidelines were being developed, revisions to the agency guidance should not be a process to expand or develop new regulatory principles or priorities, or attempt to create a new framework that does not already exist. Threats of sizable departures from past approaches would create confusion in the marketplace, and could substantively impede innovation by adding costs and uncertainty to business planning.

Finally, CTA believes that all stakeholders would benefit with robust notice and public input as to any significant competition policy changes. As the public comment period in response to the draft Guidelines illustrated, affording greater opportunity and time for public input can only help the Commission’s deliberations on matters that may have great impact across the economy. The Commission’s announcement of the agenda item – with less than a week to submit a comment in advance – is no substitute for a meaningful notice and comment period.

The US tech sector in particular is powered by rapid, consumer-friendly innovation, and provides the products and services that help Americans safely navigate the pandemic. The agency should tread carefully and gather evidence on which to make important decisions, rather than take sudden actions that risk chilling innovation.

We urge the Commission to reject the vote to withdraw the Guidelines and Commentary, or in the alternative, to postpone the vote and provide notice and a reasonable comment period for public consideration and input.

The September 15 meeting agenda also notes that the Commission will vote on whether to issue a policy statement on “the importance of protecting the public from privacy breaches by health apps and other connected devices.” CTA agrees on the importance of protecting sensitive health information, and to

⁵ CTA’s comment on the draft Guidelines can be found at https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/cta_letter_on_ftc_doj_guidelines_2262020.pdf.

advance this goal, it has developed and released guiding principles for the privacy of personal health data.⁶ These include: (1) be open and transparent about the personal health data collected and why; (2) be careful about use of personal health data; (3) make it easy for consumers to access and control the sharing of their personal health data and empower them to do so; (4) build strong security into technology; and (5) be accountable for practices and promises. CTA urges the Commission, in crafting any policy statement, to recognize the importance of voluntary industry engagement and leadership, given that companies must keep consumer trust top of mind when offering health-related services.

Sincerely,

CONSUMER TECHNOLOGY ASSOCIATION

/s/ Gary Shapiro

Gary Shapiro
President and CEO

/s/ Michael Petricone

Michael Petricone
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/s/ Rachel S. Nemeth

Rachel S. Nemeth
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⁶ See CTA's *Guiding Principles for the Privacy of Personal Health Data* at <https://cdn.cta.tech/cta/media/media/membership/pdfs/final-cta-guiding-principles-for-the-privacy-of-personal-health-and-wellness-information.pdf>.