

September 18, 2023

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

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Draft Merger Guidelines for Public Comment, Docket No. FTC-2023-0043-0001, Matter P859910

To the Federal Trade Commission and U.S. Department of Justice:

The Consumer Technology Association® (“CTA”) submits these comments on the Federal Trade Commission’s (“FTC” or “Commission”) and U.S. Department of Justice’s (“DOJ,” and collectively, the “Agencies”) Draft Merger Guidelines (“Draft Guidelines”).¹ CTA is North America’s largest technology trade association. CTA’s members are the world’s leading innovators – from startups to global brands – helping support more than 18 million American jobs. CTA also 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 is concerned that the Draft Guidelines have a reflexive anti-merger bent that prioritizes unwarranted skepticism of transactions by companies of all sizes, while giving short shrift to entrepreneurial companies that benefit from a healthy transactional market and consumers who benefit from an innovative economy. CTA is particularly concerned with the Draft Guidelines’ sharp departure from the consumer welfare standard, which is grounded in objective evidence and case law and places the consumer front and center in determining whether mergers have harmful effects. The consumer welfare standard also helps safeguard competition policy from being subject to the uncertainty of subjective or political influences which can stifle innovation as companies must try to weigh agency policy preferences instead

¹ Draft Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission (July 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf (“Draft Guidelines”).

of predictable factors. The uncertainty caused by the Draft Guidelines will fall hardest on smaller companies, including startups, with limited resources. As CTA's CEO Gary Shapiro explained, "For the ensuing four decades, through successive administrations, the FTC . . . focused on a consumer welfare standard that preserves competition and advances the common good. But in the past 18 months, the FTC has shifted to ideological attacks on big companies rather than considering what consumers want."²

CTA emphasizes two points in these comments. First, the Agencies should recognize that the highly competitive technology startup market depends on routine acquisitions (and the potential for acquisitions) to drive investment and spur innovation that benefits consumers. Deterring such acquisitions is harmful both to competition (in the form of deterring potential new market entrants), and ultimately to consumers who benefit from consumer-friendly innovation. Second, and more broadly, the Agencies should realign the Draft Guidelines to focus on consumer welfare and established precedent, in lieu of arbitrary guidelines about market positioning that fail to account for whether transactions would ultimately benefit consumers.

The Draft Guidelines Fail to Acknowledge That Transactions Drive Investment and Innovation in the Highly Competitive Technology Startup Market.

As CTA explained in its comment on the Request for Information on the development of the Draft Guidelines, the very possibility of a merger or acquisition drives the startup technology market by attracting greater investment capital and encouraging startups to assume risks.³ Startup founders have explained that "acquisitions enable startup investors to reclaim their invested capital, realize any gains, and recycle their capital into the next generation of startups, fueling the ongoing process of innovation-led economic growth and job creation."⁴ A 2020 report backs this up, finding that "most entrepreneurs never expect to reach a public market

² Gary Shapiro, *I lead the Consumer Technology Association and I've never commented on an FTC lawsuit until now. Lina Khan's new case against Meta is laughable*, *Fortune* (Aug. 3, 2022, 10:53 A.M. EST), <https://fortune.com/2022/08/03/consumer-tech-cta-ftc-lawsuit-lina-khan-case-v-meta-acquisition-gary-shapiro/>.

³ Comments of the Consumer Technology Association, FTC Docket No. FTC-2022-0003-0001, at 3 (filed Mar. 23, 2022).

⁴ *The Impact of Consolidation and Monopoly Power on American Innovation: Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary*, 117th Cong. at 2 (Dec. 15, 2021) (statement of Bettina Hein, Founder and Chief Executive Officer, juli), <https://www.judiciary.senate.gov/imo/media/doc/Hein%20Testimony.pdf>. See also *id.* at 3 (statement of Roger P. Alford, Professor of Law, Notre Dame Law School), <https://www.judiciary.senate.gov/imo/media/doc/Alford%20Testimony1.pdf> ("We should recognize and embrace the fact that one of the most common exit strategies for startups is to be acquired. That should be encouraged.").

exit” because they expect that their companies will be acquired beforehand.⁵ And startups’ long-term goal of being acquired contributes to increased investments and innovation in the United States. One report estimated that capital investments reached record heights in 2021, with \$330 billion invested in the United States – nearly double the previous record of \$166.6 billion raised in 2020 – with global funding up 111% year-over-year.⁶

CTA has experienced firsthand that the consumer technology startup market continues to drive innovation – we proudly count hundreds of startups among our more than 1200 members. And CTA’s Eureka Park at CES® is the premier arena for startups to launch new products, services, and ideas, as well as to showcase entrepreneurial talent every year.⁷ CES is critical for startups and entrepreneurs that need to attract new customers, obtain funding, or draw the attention of bigger companies that may want to more quickly bring their ideas to consumers through acquisition. Products on display at Eureka Park in 2023 ranged from electric passenger aircraft, unmanned robotic lawnmowers, smart city light poles that sense pedestrians and traffic flows, fully electric autonomous mover vehicles, and “novel counters to mental illness, retinal disease and other conditions that interfere with wellbeing.”⁸ CTA again encourages the Agencies to attend CES in-person, as it demonstrates the strong relationship between technology investments and acquisitions, and will crystallize the importance of ensuring legal certainty and a focus on consumer benefits in merger guidelines to preserve the cycle of investment in technology and innovation.

The Draft Guidelines fail to account for this factor throughout the proposed new guidance. For example, Proposed Guideline 7 (“Mergers should not entrench or extend a dominant position”) makes overly sweeping generalizations about the treatment of “nascent competitive threats.”⁹ The guidance focuses on whether the “nascent” threat (e.g., a startup with an innovative new product) would have weakened the market position of the larger company, but ignores whether such an acquisition might in fact incentivize investment in new companies with new

⁵ See Silicon Valley Bank, 2020 Global Startup Outlook at 7 (2020), https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/suo_global_report_2020-final.pdf.

⁶ See Pitchbook, Venture Monitor, 5 (Jan. 13, 2021), <https://pitchbook.com/news/reports/q4-2021-pitchbook-nvca-venture-monitor>; CB Insights, State of Venture 2021 Report, 11 (2021), <https://www.cbinsights.com/research/report/venture-trends-2021/>.

⁷ Jeremy Snow, *Where Ideas Come to Life: Eureka Park™ at CES*, CES (Feb. 21, 2020), <https://www.ces.tech/Articles/2020/Where-Ideas-Come-to-Life-Eureka-Park.aspx>.

⁸ Grace Venes-Escaffi, *CES is Back – Innovators, Product Debuts and Company Announcements Open World’s Most Influential Tech Event Focused on Sustainability and Solving Global Challenges*, Consumer Technology Association (Jan. 5, 2023), <https://www.cta.tech/Resources/Newsroom/Media-Releases/2023/January/CES-is-Back>; Alice Ducq, *CES 2023 Spotlights Tech for Good* (Feb. 13, 2023), <https://www.ces.tech/articles/2023/february/ces-2023-spotlights-tech-for-good.aspx>.

⁹ Draft Guidelines at 18-20, Guideline 7.

consumer-friendly products, and the potential consumer benefits of the larger company offering the product at scale. Similarly, Proposed Guideline 9 broadly suggests looking at a “whole series” of acquisitions and the “overall strategic approach to serial acquisitions.”¹⁰ Proposed Guideline 4 on potential competition would have a similar effect of eliminating exit strategies and reducing investment in startups.¹¹ This approach is also overly focused on evaluating factors like “strategic approaches” of established companies rather than evaluating the effect on innovation in the market, and it departs from examining whether the conduct ultimately hurts consumers.

The Draft Guidelines’ Shift Away From Consumer Welfare Creates Unpredictability, Dampens Innovation, and Does Not Benefit Consumers.

The Draft Guidelines’ overall departure from the established consumer welfare standard and towards novel guidelines is mistaken. Instead of focusing on the impact on consumers, the Draft Guidelines seem broadly suspicious of merger activity generally. Departing from established antitrust standards merely interjects unpredictability and likely substantial additional costs into the market, which dampens beneficial pro-consumer innovation.

CTA has long supported the Agencies’ efforts to craft contemporary merger guidance that reflects industry realities. When the Agencies proposed and adopted the new Vertical Merger Guidelines in 2020, CTA supported them, noting that the transparent rule proposals would promote certainty in the transactions market.¹² CTA did, however, caution the Agencies against imposing additional burdens on startups.¹³

As currently constructed, the Draft Guidelines would pose significant additional compliance burdens on small businesses, create legal uncertainty, and expand the scope of the Agencies’ merger review by altering the thresholds for determining whether a merger is presumptively anti-competitive. The Draft Guidelines also incorporate novel legal theories on antitrust that depart sharply from the consumer welfare standard. Several of the new proposed guidelines will lead to greater uncertainty in the business community, including the following:

- The Draft Guidelines propose to lower the concentration and market share thresholds at which a merger will be presumptively anti-competitive, which will open a wider range of transactions to greater scrutiny and regulatory uncertainty. Specifically, the Draft

¹⁰ *Id.* at 22, Guideline 9.

¹¹ *Id.* at 11-13, Guideline 4.

¹² Comments of the Consumer Technology Association, DOJ/FTC Draft Vertical Merger Guidelines, at 2 (Feb. 26, 2020).

¹³ *Id.* at 3-4.

Guidelines propose that mergers will be presumptively anti-competitive at a much stricter threshold than the 2010 Horizontal Merger Guidelines, even those that have been in place and proven to be successful during a time of substantial technological innovation.¹⁴

- The Draft Guidelines create a new presumption that vertical mergers substantially lessen competition where the merged firm controls more than 50 percent of a related market, subject to any rebuttal evidence.¹⁵ This would shift longstanding guidance and data about vertical mergers, which counsels that such transactions are often beneficial to consumers and competition.¹⁶
- As noted above, the Draft Guidelines propose that where a firm engages in multiple small acquisitions in the same or related business lines, the Agencies should evaluate the entire series of acquisitions, even if no single acquisition would risk substantially lessening competition or creating a monopoly.¹⁷ This guidance is unprecedented, creates uncertainty in the context of specific transactions, and unduly shifts the focus away from the potential pro-consumer benefits of a particular transaction.
- The Draft Guidelines propose to consider the competitive effects of an acquisition or merger on the labor market.¹⁸ This new policy goal creates ambiguity and uncertainty for companies considering transactions, and may deter transactions that can benefit consumers and workers.

Ultimately, the Agencies have still not justified their precipitous departure from the 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines, which each reflect decades of established antitrust precedent and consensus. Instead, the Draft Guidelines demonstrate a

¹⁴ The Draft Guidelines propose that mergers will be presumptively anticompetitive where, post-merger, market concentration levels measured using the Herfindahl-Hirschman Index (“HHI”) is greater than 1,800 points and increases the HHI by more than 100, or where the merger creates a firm with greater than 30 percent market share and increases the HHI by more than 100. *Id.* at 6-7, Guideline 1. This is a much more strict threshold than the 2010 Horizontal Merger Guidelines, which categorized markets with HHIs of more than 2,500 points as “highly concentrated.” Horizontal Merger Guidelines, DOJ and FTC, at § 5.3 (Aug. 19, 2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>.

¹⁵ Draft Guidelines at 17, Guideline 6A.

¹⁶ See Vertical Merger Guidelines, DOJ and FTC, at 2 (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf (“[V]ertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm.”).

¹⁷ Draft Guidelines at 22, Guideline 9.

¹⁸ *Id.* at 25, Guideline 11.

general skepticism about transactions that dismisses broad economic consensus that mergers lead to procompetitive benefits and efficiency gains.¹⁹ This is especially true in digital markets, where rapid change and cutting-edge innovations often spur competition.

In sum, CTA supports the goal of providing merger guidelines to the public, business community, and practitioners that are clear and durable, and that provide insight into objective merger review considerations, and respect longstanding antitrust precedent. However, the Draft Guidelines do not accomplish these objectives, and would instead have a chilling effect on procompetitive transactions that would fall hardest on the smaller companies, including startups, that drive consumer-benefiting innovation. The Agencies should reconsider their approach and revise the Draft Guidelines to preserve the consumer welfare standard, which has spurred the unmatched development of new consumer products and services. Overall, the Agencies should focus less on abstract views of the proper level of competition or how competitors should act, and more on how to improve consumers' lives by spurring innovation.

Sincerely,

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¹⁹ Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, ProMarket (Sept. 23, 2021), <https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/>.