Comments for the Record

Comments for the Record: Draft Merger Guidelines

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I. Introduction and Summary

The Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) (together "the agencies") issued a Request for Comment on draft Merger Guidelines published on July 19, 2023.[2] The draft Merger Guidelines are a document "designed to help the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers," but are legally non-binding.[3]

The draft Merger Guidelines are intended to combine and replace the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. [4] Traditionally, new guidelines incrementally build upon concepts included in prior iterations to better reflect current agency practices, refined and new analytical techniques, and a deeper understanding of markets. The draft Merger Guidelines signal an end to the agencies' consideration of this continuous improvement process, however. The draft Merger Guidelines discard decades of economic learning that prioritized consumer welfare and a focus on market power in favor of a regime hostile to merger activity and fixated on deconcentrating markets.

The significant disconnect between the enforcement policy and practices outlined in prior merger guidelines and those of the draft Merger Guidelines leaves participants in the economy – especially those the agencies claim the draft Merger Guidelines are intended to help – in a state of uncertainty.

While these comments are not an exhaustive analysis of the draft Merger Guidelines, I will demonstrate how they represent a fundamental shift in merger enforcement policy where consumer welfare is no longer the primary concern. The effect of these guidelines will quash merger activity and put consumers, innovation, and economic activity at risk.

II. Background

President Joseph Biden issued an executive order on "Promoting Competition in the American Economy" on July 9, 2021, the principal concern of which was market concentration.[5] President Biden asserted that market concentration had become "excessive" and "threaten[ed] economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers." My past research refutes the assertion that markets have become more concentrated over time.[6]

As part of the executive order, President Biden encouraged the FTC and DOJ to review the existing merger guidelines and "consider whether to revise those guidelines." In January 2022, the agencies announced their intention to do so.[7]

III. Market Power and Market Structure

Previous iterations of merger guidelines, specifically the 2010 Horizontal Merger Guidelines, focused on market power. The agencies asserted that market power enables a firm to "raise price, reduce output, diminish innovation, or otherwise harm consumers as the result of diminished competitive constraints or incentives." [8] The agencies dubbed this the "unifying theme of these Guidelines." [9] This "unifying theme" acted as the limiting principle of enforcement and gave the public, business community, practitioners, and courts a clear understanding that merger review would focus on harm to consumers via market power.

No such statement is included in the draft Merger Guidelines. Remarkably, the draft Merger Guidelines abandon the focus on market power and consumer welfare altogether. In its place, the agencies promote the idea that market concentration is, itself, fundamentally problematic. The draft Merger Guidelines establish several structural presumptions under which the agencies would consider a merger illegal. This approach ignores a warning in the 2010 Horizontal Merger Guidelines that "market shares may not fully reflect the competitive significance of firms in the market or the impact of the merger," and that they are to be "used in conjunction with other evidence of competitive effects." [10]

Guideline 1 of the draft Merger Guidelines clearly lays out this change in methodology. In it, the agencies lower the threshold of a market considered concentrated and, therefore, problematic – measured by the Herfindahl-Hirschman Index (HHI) – from 2,500 to 1,800. The agencies also proposed a market-share cap of 30 percent. [11] Rather than being used as an initial screen, the draft Merger Guidelines establish a structural presumption. In other words, a merger will be considered illegal if the thresholds are exceeded.

Noticeably absent from the discussion is an economic analysis of the competitive effects to justify the change. Such an omission suggests that the agencies are not concerned with market power and the effects on consumers but simply the make-up of firms operating in a market.

Merger guidelines are intended to inform the public, businesses, and courts about the agencies' criteria used in evaluating and, perhaps, challenging mergers. In an August 2023 Washington Legal Foundation webinar, former FTC Director of the Bureau of Competition Debbie Feinstein explained why the agencies adopted the HHI levels in the 2010 Horizontal Merger Guidelines. She stated, "the reason that the 2010 [Horizontal Merger] Guidelines moved to higher numbers…[was] because the evidence showed those were in fact the numbers at which the government was bringing cases. The 2010 Guidelines were really all about codifying what was happening and how [the agencies] were doing things."[12] In other words, the HHI thresholds in the 2010 Horizontal Merger Guidelines reflected mergers that the agencies believed had likely, competitive effects. By contrast, Feinstein claimed that the HHI thresholds proposed in the draft Merger Guidelines, rather than reflecting current agency practice, afford the agency an opportunity to change merger enforcement policy.

Evidence from a September 2023 piece in ProMarket written by Carl Shapiro, former DOJ Deputy Assistant Attorney General for Economics Antitrust Division, supports Feinstein's assertion that the draft Merger Guidelines do not reflect current agency practice. He concludes that "all of the horizontal merger cases litigated by the Biden Administration have involved HHI levels well above the 2010 thresholds. The HHI increases all exceed 800."[13] By lowering the thresholds in the draft Merger Guidelines, the agencies will entangle more

merger transactions under this structural presumption. Despite evidence that the agencies have not recently challenged a merger using these thresholds, this could leave business wary of engaging in a merger and, consequently, chill merger activity.

Guideline 8 adopts a similar approach focusing on trends in market structure. If, over time, a market "trend[s] toward concentration," a merger could be deemed problematic. The agencies do not explain how they will consider the economic conditions of the industry, which could likely be a factor in increased concentration.

IV. Hostility Toward Mergers

Past iterations of merger guidelines recognized that, for consumers, mergers were not uniformly beneficial or harmful and that the law requires the agencies to block them in the likelihood the merger would be harmful.

Conversely, the draft Merger Guidelines reflect of a broader policy goal directed by the Biden Administration to reduce market concentration. Coupled with other recent agency actions and statements made by agency leaders – including proposed changes to the rules governing the Hart-Scott-Rodino Act – the draft Merger Guidelines are designed to quash merger activity.

The factors outlined in the 13 guidelines jettison much of the discussion on the effects on competition and harm to consumers and replace it with various presumptions designed to increase enforcement regardless of whether the merger is likely to harm consumers.

Guideline 9 seeks to prevent "roll-up" strategies often employed by private equity firms, through which the firm accumulates a large share of the market by acquiring a series of small competitors one at a time. An individual transaction within the series may not raise concerns, but cumulatively, could afford the firm the ability to exercise market power. Given the construction of Guideline 9, however, it could ensnare other businesses and result in harm to innovation and consumers. Guideline 9 reads that a "firm that engages in an anticompetitive pattern or strategy of multiple small acquisitions in the same or related business lines may violate Section 7, even if no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly." The agencies add that such activity could violate "Guideline 8: Mergers Should Not Further a Trend Towards Concentration" or be used to "evaluate the overall pattern or strategy of serial acquisitions by the acquiring firms under Guidelines 1-7."[14] The draft Merger Guidelines fail to explain the evaluation criteria, and thus threaten certain industries in which mergers and acquisitions are common, specifically the technology and pharmaceutical sectors. Attempting to micromanage such conduct compromises the potential value creation of a merger.

The medley of theories proposed in the draft Merger Guidelines is designed to strengthen enforcement and chill merger activity. Under these guidelines, firms would face an increased probability of long and costly litigation and will undoubtedly respond by shying away from mergers, even those that pose little risk to competition.

V. Risks to Innovation

Startups are a significant source of innovation in the economy but face many challenges – including sufficient funding – to finalize a product. Many startups rely on venture capital to overcome these funding challenges. Before a venture capitalist invests in a startup, however, it is common to consider probable exit strategies. "Survey data showed that 58 percent of startups cited being acquired as a realistic long-term goal for their company compared to 17 percent wanting to go public via an initial public offering. Only 14 percent planned to

stay private.” [15],[16]

The draft Merger Guidelines threatens to curb acquisitions as a viable exit strategy. Guideline 4 seeks to prevent mergers from eliminating a potential entrant in a concentrated market but goes far beyond protecting “killer acquisitions” by which a dominant firm acquires a threat to remove it from the market. Coupled with the far-reaching effects of lower market concentration thresholds, the proposed change in policy increases the probability of a merger challenge while decreasing the probability that acquisition is a viable exit strategy. This condition could lead to an evaporation of capital available to the startup community, which is necessary to fund their innovations.

I have repeatedly warned of the chilling effect that curbing acquisitions of startups could have on economic activity and innovation. The presence of one dominant firm or several large firms in an industry could create an incentive for increased startup activity, therefore spurring innovation. This is because many startups enter the market knowing that acquisition is a possibility, and for many, a planned exit strategy. I have also cited evidence of the positive correlation between increased concentration levels and increased startup activity, most notably in the technology sector. [17]

The threat of increased enforcement based on market competition puts the dynamic startup environment and innovation at risk.

VI. Draft Merger Guidelines Are Unable to Guide the Courts

The draft Merger Guidelines reflect the agencies’ approach to evaluating merger transactions. While they are not law, the courts frequently refer to them for guidance.

Merger enforcement for much of the past 40 years relied on a balanced approach that considered a variety of factors to determine the effects of a merger on competition. This approach was guided by consumer welfare. Conversely, the draft Merger Guidelines propose an enforcement mechanism built on several presumptions, any one of which could prompt a merger challenge, and lack a limiting principle.

Given the distinct contrast, it may prove difficult for the agencies to convince the courts that the proposed approach best reflects the law.

The 2010 Horizontal Merger Guidelines faced no such problem. In my previous research, I discuss why the 2010 Horizontal Merger Guidelines were readily adopted by the courts:

“Former DOJ Deputy Assistant Attorney General for Economics, Antitrust Division and joint DOJ/FTC Horizontal Merger Guidelines working group member Carl Shapiro and former FTC Bureau of Economics Director Howard Shelanski conducted a study to measure the 2010 horizontal merger guidelines’ success. They found that ‘In the 10 years since the FTC and DO[J] issued the 2010 [Horizontal Merger Guidelines] HMGs…. At a broad level, we find no instances in which the courts rejected any of the 2010 innovations. Nor do we find any instance in which any aspect of the 2010 HMGS – notably the reduced emphasis on market definition or the higher HHI thresholds – created an impediment for the DOJ or the FTC in bringing or proving a case in court…. Beyond that, numerous courts have either discussed or expressly accepted key elements of the 2010 revisions, with the clearest impact being the increased acceptance in courts of challenges based on unilateral effects.’ They concluded: ‘All of this suggests that the 2010 HMGs will have further influence on the evolution of case law going forward.’ In other words, the courts readily accepted the revisions.” [18]

The 2010 Horizontal Merger Guidelines were recognized as having been developed, in part, by an independent and nonpartisan FTC in which all five commissioners voted in favor. By contrast, the draft Merger Guidelines were finalized by the FTC at a time when both Republican seats on the commission were vacant, leaving little opportunity for internal dissent. Moreover, broadly adopting several policy goals outlined in President Biden’s executive order could make it difficult to convince the courts that the draft Merger Guidelines best reflect the law as it is, rather than the law as the Biden Administration wishes it to be.

There is already evidence suggesting that the agencies are failing to persuade the courts. The FTC has applied some of the theories in the draft Merger Guidelines in cases against Meta, Microsoft, and Illumina/Grail.[19] All have been unsuccessful and have caused reputational damage to the agency.

VII. Conclusion

The draft Merger Guidelines represent a seismic shift in merger enforcement policy in which consumer welfare is no longer the primary concern. The draft Merger Guidelines signal that the agencies are more concerned with the structure of a market than they are with a merged firm’s ability to exercise market power where the effect harms consumers.

In doing so, businesses, consumers, innovation, and economic growth will likely suffer.

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[2] "FTC and DOJ Seek Comment on Draft Merger Guidelines" U.S. Federal Trade Commission (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines

[3] "Merger Guidelines," U.S. Department of Justice and the Federal Trade Commission (July 19, 2023), I. Overview, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

[4] The Federal Trade Commission withdrew its support of the 2020 Vertical Merger Guidelines. "Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary," Federal Trade Commission (September 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary; The DOJ did not formally withdraw its support of the 2020 Vertical Merger Guidelines, but Assistant Attorney General for the Antitrust Division of the DOJ Jonathan Kanter delivered a speech concerning vertical mergers in which he stated that "the Antitrust Division shares the FTC's substantive concerns regarding vertical merger guidelines." "Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines," U.S. Department of Justice (January 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines#:~:text=Those%20guidelines%20overstate%20the%20potential,which%20we%20are%20launching%20toda
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[5] "Executive Order on Promoting Competition in the American Economy," The White House (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

[6] To the contrary, market concentration measured at the six-digit NAICS level using market share of the four largest firms remained stable between 2002 and 2017. Just nine percent of all six-digit NAICS industries were considered highly concentrated in 2002 before falling to eight percent by 2017. "Are Monopolies Really a Growing Feature of the U.S. Economy?" Fred Ashton, American Action Forum (May 26, 2022), https://www.americanactionforum.org/research/are-monopolies-really-a-growing-feature-of-the-u-s-economy/

[7] "Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers," Federal Trade Commission (January 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers

[8] "Horizontal Merger Guidelines," U.S. Department of Justice and the Federal Trade Commission (August 19, 2010), 1. Overview, https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf

[9] “Carl Shapiro: Why Dropping Market Power from the Merger Guidelines Matters,” Carl Shapiro, ProMarket (August 7, 2023), https://www.promarket.org/2023/08/07/carl-shapiro-why-dropping-market-power-from-the-merger-guidelines-matters/

[10] “Horizontal Merger Guidelines,” U.S. Department of Justice and the Federal Trade Commission (August 19, 2010), 5.3 Market Concentration, https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf

[11] “Merger Guidelines,” U.S. Department of Justice and the Federal Trade Commission (July 19, 2023), 1. Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

[12] “Recorded Webinar–Modernization or Transformation?: An Expert Assessment of the DOJ/FTC Draft Merger Guidelines,” Washington Legal Foundation (August 24, 2023), Recorded Webinar—Modernization or Transformation?: An Expert Assessment of the DOJ/FTC Draft Merger Guidelines | Washington Legal Foundation (wlf.org)

[13] Cases included: United States Sugar/Imperial Sugar (Post-Merger HHI: over 2800, Increase in HHI: over 800); United States Sugar/Imperial Sugar (Post-Merger HHI: Over 3100, Increase in HHI: over 1100); Penguin Random House/Simon & Schuster (Post-Merger HHI: 3111, Increase in HHI: 891); UnitedHealth Group/Change Healthcare (Post-Merger HHI: at least 5625, Increase in HHI: at least 2500); Booz Allen/EverWatch (Post-Merger HHI: 10000, Increase in HHI: merger to monopoly); ASSA ABLOY/Spectrum Brands (Post-Merger HHI: at least 4000, Increase in HHI: at least 1600); ASSA ABLOY/Spectrum Brands (Post-Merger HHI: at least 3000, Increase in HHI: at least 1200); “Carl Shapiro: How Would These Draft Guidelines Work in Practice?,” Carl Shapiro, ProMarket (September 1, 2023), https://www.promarket.org/2023/09/01/carl-shapiro-how-would-these-draft-guidelines-work-in-practice/

[14] “Merger Guidelines,” U.S. Department of Justice and the Federal Trade Commission (July 19, 2023), 9. When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series, https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf

[15] “2020 Global Startup Outlook,” Silicon Valley Bank (2020), https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/suo_final.pdf

[16] “FTC and DOJ Publish New Merger (Mis)guidelines,” Fred Ashton, American Action Forum (July 20, 2023),

https://www.americanactionforum.org/insight/ftc-and-doj-publish-new-merger-misguidelines/

[17] “Industry Concentration and the Effect on Startups,” Fred Ashton, American Action Forum (June 22, 2022),

https://www.americanactionforum.org/research/industry-concentration-and-the-effect-on-startups/

[18] ““FTC and DOJ Publish New Merger (Mis)guidelines,” Fred Ashton, American Action Forum (July 20, 2023),” https://www.americanactionforum.org/insight/ftc-and-doj-publish-new-merger-misguidelines/

[19] In the case of Illumina/Grail, the FTC reversed its in-house Administrative Law Judge’s initial decision

dismissing the complaint brought by the agency. “Opinion of the Commission in the Matter of Illumina, Inc., and GRAIL, Inc.,” Federal Trade Commission (March 31, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf