Comments of the Software & Information Industry Association (SIIA) on the Request for Comment FTC-2023-0043, Draft Merger Guidelines for Public Comment

Submitted to the Federal Trade Commission

September 18, 2023

On behalf of the Software & Information Industry Association (SIIA), we appreciate the opportunity to provide these comments in response to the Request for Comment on the Draft Merger Guidelines by the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (the Agencies).

SIIA is the principal trade association for the software and digital information industries worldwide. Our members include over 450 companies, reflecting the broad and diverse landscape of digital content providers and users in academic publishing, education technology, and financial information, along with creators of software as well as platforms used by millions all over the world. SIIA is dedicated to fostering a healthy environment for the creation, dissemination, and productive use of information. We believe in a competition policy that is focused on engendering innovation, protecting the competitive process, and providing consumers with superior products at competitive prices.

1. Role of the Merger Guidelines

Within the statutory framework that has long governed U.S. antitrust law—primarily sections 1 and 2 of the Sherman Act, section 5 of the Federal Trade Commission Act, and section 7 of the Clayton Act—it is the latter that provides the core underpinning for mergers and acquisitions.

Section 7 of the Clayton Act provides in pertinent part that "[n]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, wherein any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."[1]

In short, mergers and acquisitions whose effect "may be substantially to lessen competition or to tend to create a monopoly" are prohibited. But because Congress only described the prohibited conduct in vague and general terms, the courts have been instrumental in developing the body of law that today comprises merger law in the United States. This is what is known as common law or judge-made law. By its nature, common law tends to develop incrementally.[2]

[1] 15 U.S.C. § 18.
[2] Hillary Greene, *Guideline Institutionalization: The Role of the Merger Guidelines in Antitrust Discourse*, William & Mary Law Review, Vol. 48, No. 3, 2006, 771, 775.

To help explain merger law and advise the public about how they intend to apply it in individual cases, the Agencies have periodically promulgated merger guidelines since 1968. In administrative law parlance, the guidelines are "general statements of policy," which means that they are not legally binding on either the Agencies themselves, the public, or the courts.[3] Rather, they "represent[] an agency position with respect to how it will [enforce] the governing legal norm…."[4]

Until now, the merger guidelines in their various iterations have generally been considered by the courts to be highly persuasive. As the D.C. Circuit explained in *U.S. v. Anthem*, where the government successfully challenged the proposed merger between Anthem, Inc., and Cigna Corporation, "the court is not bound by, and owes no particular deference to, the Guidelines, [but] this court considers them a helpful tool, in view of the many years of thoughtful analysis they represent for analyzing proposed mergers."[5]

What the D.C. Circuit also seems to indicate, however, is that the Agencies when issuing these types of policy statements need to take a prudential approach and exercise caution and not extend authority beyond what is clearly supported by the law. As long as the Merger Guidelines represent the Agencies' understanding of *what the law is*, based on their "many years of thoughtful analysis," they are considered to be persuasive and given substantial weight. If, on the other hand, the Agencies use them to expound their views of *what the law should be*, adopting the posture of a policymaker or an advocate, rather than an impartial enforcer, the guidelines' persuasive power and utility is likely to be greatly diminished.

2. 2023 Draft Merger Guidelines

On July 19, 2003, the Agencies released a draft update of the Merger Guidelines ("Draft Guidelines"). This draft follows the Agencies' long-running internal evaluation of the continued efficacy of the Horizontal Merger Guidelines that were issued in 2010, and the Vertical Merger Guidelines that were issued in 2020. (The FTC subsequently withdrew its support for the Vertical Merger Guidelines in 2021, saying that they relied on "unsound economic theories".)[6]

In announcing the Draft Guidelines, the Agencies stated that they intended to achieve three primary goals. First, to "reflect the law as written by Congress and interpreted by the highest courts." Second, to "be accessible, increasing transparency and awareness." And third, to "provide frameworks that reflect the realities of our modern economy and the best of modern economics and other analytical tools."[7]

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[3] 5 U.S.C. § 553(b)(A).
[4] Note 2, *supra*, at 778.
[5] *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017).
[6] https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary
[7] https://www.justice.gov/opa/pr/justice-department-and-ftc-seek-comment-draft-merger-guidelines

The Draft Guidelines also introduce "13 principles, or guidelines" that the Agencies "may" apply in reaching a determination about whether a merger is anticompetitive and therefore runs afoul of the antitrust laws.[8]

3. General Comments on the 2023 Draft Merger Guidelines

Conducting periodic reviews of the continued usefulness of public-facing guidance documents is an exercise in both prudence and responsible governance. The world has changed since 2010, and because of that it is reasonable to suspect that some tweaks to the old Guidelines would be in order. Against this backdrop, it is commendable that the Agencies endeavor to be "transparent" and to keep the Merger Guidelines up to date. Nevertheless, the Draft Guidelines raise several concerns, including some that are likely to affect their persuasive value materially and adversely.

As an initial matter, it seems incongruous to claim that there is a need to update the Merger Guidelines under the guise of modernization, while the average year of the cases cited in the draft released for public comment is 1982, and the average year—weighted by number of cites—is 1975.[9] Since the 1970s, the focus of antitrust law has changed significantly. Instead of a plethora of competing interests, merger review has centered on the consumer welfare standard. In practice, this means that the Agencies and the courts have been less inclined to condemn business conduct as anticompetitive than they were before. The Chair of the FTC and the head of the Antitrust Division at the DOJ may wish things were different, but it is inarguable that antitrust law today is markedly different from what it was 40 or 50 years ago. To be taken seriously, any exposition of what the law is will need to acknowledge and reflect this shift.

In a clear break with previous iterations of the Merger Guidelines, the Draft Guidelines also exhibit a clear anti-merger bias. Less than a full page in, the draft approvingly cites to the 1962 case *Brown Shoe*[10] for the proposition that "Section 7 [of the Clayton Act] itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition.'"[11] Later on the same page, the Draft Guidelines quote from another case from the early 1960s—*Philadelphia National Bank*[12]--where the Court found that a merger case sometimes can present facts that are "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[13]

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[8] *Id*.
[9] https://twitter.com/geoffmanne/status/1681727830017839106
[10] *Brown Shoe v. United States*, 370 U.S. 294 (1962).
[11] U.S. Department of Justice and the Federal Trade Commission, Merger Guidelines—Draft – For Public Comment Purposes – Not Final, (Draft Guidelines) at 2.
[12] *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).
[13] 374 U.S. at 363.

Compare this to the statement of agency intent at the beginning of the 2010 Horizontal Merger Guidelines: "The Agencies seek to identify and challenge competitively harmful mergers *while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral*."[14] Since the FTC Chair has stated that 98 percent of mergers raise no anticompetitive concerns, and that only a fraction of the remaining 2 percent actually merit legal challenge[15], the single-minded focus on the exceedingly small number of transactions that are problematic seems unbalanced.

In the 2001 case *FTC v. Heinz*, the D.C. Circuit held that "[m]erger enforcement, like other areas of antitrust law, is directed at market power. [It has] an aversion to potent power that heightens the risk of abuse; and tolerance of that degree of power required to attain economic benefits."[16] Oddly, the Draft Guidelines are not concerned with market power. Instead, the Agencies have elected to focus on market structure characteristics and rely heavily on presumptions tied to market structure.

Traditionally, the burden is on the enforcers at trial to show that they have sufficient evidence to create a presumption of anticompetitive harm from a proposed merger. Only then are the parties required to offer rebuttal evidence.[17] With the proposed changes, the Agencies, in other words, are trying to short-circuit that process by substantially lowering the initial evidentiary threshold that they will have to meet. But since the Supreme Court has been clear that neither presumptions nor structural arguments are favored, it is difficult to see how this would pass muster with the courts.[18]

Remarkable, the Draft Guidelines assert that "in analyzing a proposed merger, the Agencies do not seek to predict the future…."[19] Semantically, this obviously does not make sense since anything that has been "proposed" but not yet consummated, by its own terms, necessarily involves some type of future occurrence or event. But legally, it is also at odds with the Agencies' role in merger enforcement. And look no further than some of the old Supreme Court cases that the Agencies in other parts of the Draft quote from quite liberally. In *Brown Shoe*, for example, the Court stated that "the very wording of § 7 requires a prognosis of the probable *future effect* of the merger."[20] And more to the point, the Court in the same case held that "[i]t is the probable effect of the merger upon the future, as well as the present, which the Clayton Act *commands* the courts and the Commission to examine."[21] And, as if to underscore this particular point, the Court one year later held that Section 7 of the Clayton Act "*requires* not merely

[14] *Horizontal Merger Guidelines*, U.S. Department of Justice and the Fed. Trade Commission, August 19, 2010, at 1 (emphasis added).

[15] https://www.cnbc.com/2023/07/24/ftc-chair-lina-khan-defends-track-record-on-antitrust-challenges.html

[16] *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001)

[17] Bilal Sayyed: *The Draft Merger Guidelines Abandon the Persuasiveness of their Predecessors*, ProMarket, August 30, 2023. https://www.promarket.org/2023/08/30/bilal-sayyed-the-draft-merger-guidelines-abandon-the-persuasiveness-of-their-predecessors/

[18] *Id*.

[19] Draft Guidelines at 2.

[20] 370 U.S. at 332.

[21] 370 U.S. at 333 (emphasis added).

an appraisal of the immediate impact of the merger upon competition, but a *prediction* of its impact upon competitive conditions in the future…"[22]

Even more troubling is the fact that the Draft Guidelines suggest that the Agencies enjoy boundless discretion in their merger review. To wit: "[t]hese Guidelines create no independent rights or obligations and do not limit the discretion of the Agencies or their staff in any way."[23] Without perfect information and a crystal ball, merger review and enforcement, by its nature, make it necessary for the Agencies to have some leeway when making case-specific decisions. But that is very different than stipulating that there is no limit on the Agencies' discretion. To suggest otherwise raises serious rule of law concerns. And this points to a larger problem with the Draft Guidelines, which is that they provide confusing guidance to the public about what the Agencies intend to scrutinize and what types of questions they want answers to when evaluating proposed transactions.

One apt formulation of what adherence to the rule of law demands is that "[t]he law must be known and predictable so that persons will know the consequences of their actions. The law must be sufficiently defined and government discretion sufficiently limited to ensure the law is applied in a nonarbitrary manner."[24] Leaving aside the dearth of clear guidance, based on resource constraints alone, there is no plausible scenario in which the proposed changes to the merger review process contained in the Draft Guidelines can be consistently and predictably enforced.

Finally, the Draft Guidelines cannot be viewed in isolation. Less than two weeks after the deadline for submission of these comments, the same Agencies have requested comments on their proposed changes to the Premerger Notification and Report Form (HSR Form)[25], which implements the Hart-Scott-Rodino Act (HSR Act).[26] Whether the HSR Form is in need of an upgrade is open to debate, but the proposed changes would amount to an almost total overhaul of the premerger notification process, by, among other things, frontloading the process and dramatically increasing the scope of information that the parties would be required to submit.[27] By the Agencies' own estimates, the new requirements will increase the time it will take the parties to prepare their merger filing by four to seven times, depending on the complexity of the proposed transaction and irrespective of whether it raises any concerns or not.[28]

In light of the foregoing, it is hard to escape the strong impression that the overarching goal behind these proposed changes is not really to update the Agencies' public guidance to "reflect the realities of

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[22] 374 U.S. at 362 (emphasis added).
[23] Draft Guidelines at 5.
[24] Robert Stein, *What Exactly is the Rule of Law?*, 57 Hous. L. Rev. 185, 194 (2019).
[25] https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review
[26] Hart-Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. § 18a.
[27] https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements
[28] *Id*. at 103.

our modern economy," but to substantially chill merger activity writ large by making it as difficult and onerous as possible for interested parties to engage in.

4. Comments on Specific Guidelines

A. Guideline 4 Would Create Significant Uncertainty and Render Virtually Any Proposed Combination Subject to Increased Scrutiny

Guideline 4 concerns the potential that a merger might eliminate a potential entrant in a concentrated market. As a legal matter, while the Agencies assert that "[t]he antitrust laws reflect a preference for internal growth over acquisition,"[29] the relevant law does not support this position. The Agencies rely on *U.S. v. Falstaff*,[30] a 1973 case, which involved the attempt by the country's then-fourth largest beer producer to acquire the largest beer seller in New England instead of entering that market *de novo*, for the proposition that "surely one premise of an anti-merger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition."[31] *Falstaff* quoted the decision in *Philadelphia National Bank*. But even assuming, *arguendo*, that "internal expansion [was] socially preferable to growth by acquisition" in the 1950s, it is not at all obvious how that should inform our understanding of the proper scope of the antitrust laws today.

From a commercial perspective, the proposed approach would also be highly problematic, however, because a substantial number of procompetitive mergers involve a company buying a complementary service or product, or a startup that complements its current offering, in order to better serve the needs of their customers.

By its own standard, the Agencies would only need to find a "reasonable probability of entry," buttressed by either objective evidence—that the firm has sufficient size or resources to enter—or subjective evidence that the company, at some point, considered entering the relevant market but-for the merger. Expanding the potential competition theory of harm in this manner would allow the Agencies to conjure virtually a limitless number of scenarios where a merger or acquisition could be deemed anticompetitive. Guideline 4 has dubious legal underpinnings and should be deleted.

B. Guideline 6 Would Create a Structural Presumption Against Certain Vertical Mergers and Has Dubious Legal Support

In Guideline 6.A., the Agencies define "foreclosure share" as "the share of the relevant market that is controlled by the merged firm, such that it could foreclose rival's access to the related product on competitive terms. If the foreclosure share is above 50 percent, that factor alone is a sufficient basis to

[29] Draft Guidelines at 11.
[30] *U.S. v. Falstaff Brewing Corp*., 410 U.S. 526, 559 (1973).
[31] *Id.* (quoting *Philadelphia National Bank*, 374 U.S. at 370).

conclude that the effect of the merger may be to substantially lessen competition, subject to any rebuttal evidence."[32]

In support of this presumption, the Agencies rely again on *Brown Shoe*: "The primary vice of a vertical merger … is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition, which deprives rivals of a fair opportunity to compete."[33]

Yet a mere four years ago, the D.C. Circuit explicitly held that "unlike horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about change in market concentration, because vertical mergers produce no immediate change in the relevant market share."[34] Guideline 6 disregards this caution from the D.C. Circuit and goes even further, in a way that is not supported by *Brown Show* and would capture a potentially significant number of transactions that until now have been found to raise no anticompetitive concerns.

The Draft Guidelines, unlike the Court in *Brown Shoe*, erroneously conflates the terms market share and foreclosure share. But those are two distinct concepts, and in no way does a market share of 50 percent, which is well below what is considered monopoly proportions under U.S. law, allow for a presumption of a similar 50 percent foreclosure share in the relevant market.[35]

Guideline 6 is counter to a recent ruling from one of the country's highest courts, and it misapplies the holding of an earlier Supreme Court case that it purports to rely on. For these reasons, Guideline 6 should be deleted.

C. <u>Guideline 7 Would Allow the Agencies to Challenge Virtually any Merger Irrespective of its Pro-competitive Effects</u>

According to the Draft Guidelines, the "Agencies [will] evaluate whether a merger involving 'an already dominant [] firm may substantially reduce the competitive structure of the industry.'"[36] To determine whether such a dominant position exists, "the [A]gencies look to whether (i) there is direct evidence that one or both merging firms has the power to raise prices, reduce quality, or otherwise impose or obtain terms that they could not obtain but-for that dominance, or (ii) one of the merging firms possesses at least 30 percent market share."[37]

[32] Draft Guidelines at 17.
[33] 370 U.S. at 323-24.
[34] *U.S. v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019).
[35] Daniel Crane, *Law over Economics in the 2023 Draft Merger Guidelines*, Network Law Review, 2 August 2023, https://www.networklawreview.org/cranes-cartel-four/
[36] Draft Guidelines at 18. [Quoting *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-578 (1967).]
[37] Draft Guidelines at 19.

Although the Agencies seem to suggest that Guideline 7 will not be used to challenge mergers that lead to "simple improvements in efficiency,"[38] it would still, as written, allow them to go after virtually any merger where a party of non-trivial size seeks to merge with another company in order to better serve their customers. For example, the Agencies fail to explain how they arrive at the 30 percent number. That is regrettable, because a market share of 30 percent is not the threshold that is traditionally used to determine dominance under U.S. law.[39]

Even more troubling, the Agencies do not explain how this guideline more broadly fits with the consumer welfare standard, which for decades has been the loadstar of U.S. antitrust law. The whole point of "competing on the merits" is that market participants seek to gain an edge on their rivals. And as long as the post-merger firm generates benefits that accrue to consumers through, for example, lower prices, increased innovation, or better-quality goods or services, the merger should be presumptively legal. At a minimum, these points need to be clarified.

D. Guideline 9 Should Focus on the Effects of Proposed Mergers and Needs a Limiting Principle

It seems likely that Section 7 of the Clayton Act covers multiple acquisitions by the same buy-side party. But the principle, as articulated in the Draft Guidelines, is too broad.

The Agencies state 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 [merger] on its own [would be illegal]." But Section 7 is not concerned with a "pattern or strategy," unless the *effect* of one or more acquisitions by the same party give rise to anticompetitive concerns ("…the effect of such acquisition may be to substantially lessen competition").[40] A greater level of precision in how the principle is articulated would therefore be helpful.

The guideline also needs a clear limiting principle. From a business perspective, it is common for companies to invest in or acquire multiple, typically, smaller firms in the hope that some of them will become successful. This is often how founders, employees, and early investors in small startups get a return on their investment. As currently written, it is not clear how far back in time the Agencies might revisit already-consummated mergers. That uncertainty will chill this type of activity, which will hurt the broader economy, so a limit on how backward-looking the Agencies' investigations can be is necessary.

E. There is Insufficient Authority for Guideline 10's Platform-Based Approach to Assessing Mergers

As an initial observation, it is usually ill-advised to use generally applicable guidelines to single out specific industries for special treatment. And while the argument that platforms merit particular attention—"[c]onsistent with the Clayton Act's protection of competition 'in any line of commerce,' the

[38] *Id*.

[39] Werden, Gregory J., Comments on Draft Merger Guidelines (August 12, 2023), at 17.

[40] Note 1, *supra*.

Agencies will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform"[41]—is interesting, it is also wholly unconvincing.[42]

In addition to that, the guidelines' use of the term "conflict of interest" is peculiar. "A platform operator that is also a platform participant has a conflict of interest from the incentive to give its own products and services an advantage against other competitors participating on the platform…"[43] The context in which this alleged "conflict" arises is in regard to "self-preferencing." But that is not only a very common practice, it is also rarely unlawful under the antitrust laws.[44] Thus, as used in the Draft Guidelines, "conflict of interest" has no connection to that term's traditional legal meaning, which refers to a situation where an organization's own interests might adversely impact a duty owed to a third party. This is not a recognized element of merger review, however. As a result, Guideline 10 lacks a legal basis and should be deleted.

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SIIA thanks the Agencies for considering our views. We look forward to continuing our engagement with the Agencies on this important issue and would welcome the opportunity to answer any additional questions that they may have.

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[41] Draft Guidelines at 24.
[42] See *e.g.*, Hovenkamp, Herbert, *The 2023 Draft Merger Guidelines: A Review* (September 10, 2023), at 35.
[43] Draft Guidelines at 25.
[44] Hovenkamp at 34.