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, FTC-2023-0043

To Whom It May Concern:

I appreciate the opportunity to provide comments related to the Department of Justice (DoJ) and Federal Trade Commission (FTC)'s proposed merger guidelines. This comment does not represent the views of any particular party or special interest group but is intended to assist regulators in understanding the concerning impact these changes could have on businesses and consumers, particularly in the innovative technology sector.

The current guidelines have been largely focused on the impact on consumers rather than competitors. If the proposed guidelines are adopted, they will redirect the focus of competition policy from an objective consumer-centric approach based on law and economics to an arbitrary, politicized approach centered around concentration and firm size without evidence to support this inherent harm . The result is that consumers and businesses of all sizes will likely lose out on potentially beneficial mergers and services.

The proposed guidelines shift relies on outdated law and shift away from objective economic analysis

The proposed merger guidelines signal a troubling shift away from objective economic principles by relying on outdated and selective case law to satisfy current political views. In an ambitious move, the guidelines extend their reach to regulate labor markets within the merger context, relying on selective and dated cases that do not directly address the considerations of workers or firms in the contemporary economy.

54% of the referenced case law originates from decisions made between the 1940s and the 1970s.[1] Following this period, there's a notable decrease in cases that draw from the market-friendly policies and rulings of the 1980s. While the FTC acknowledges the profound impact of the internet and emerging technologies on business practices since the 1990s, there's a minimal reliance on case law from this era onwards.

As the FTC expands its guidelines beyond the established understanding of competition and consumer protection, it selectively picks case law and, subsequently, cherry picks dictum from such cases. For example, the FTC attempts to undertake a pre-emptory approach to preventing mergers without any detection of actual harm on competition. Rather than relying on legislative history, the FTC relies on dictum from *United States v. Microsoft Corp.,* 253 F.3d 34, 79 (D.C. Cir. 2001) to flesh out the spirit of the Sherman Act, while ignoring Supreme Court precedent, such as *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447 (1993).

This selective choice of precedent also leads the draft guidelines to police labor markets in highly speculative ways.[2] This expansive view and interpretation of agency authority under the Sherman Act poses significant challenges for talent acquisition — a core aim of many mergers. Additionally, the guidelines rely on *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) to argue that the Clayton Act opposes mergers that substantially reduce competition "in *any line* of commerce" and supports an almost unlimited view of their own authority. This interpretation grants considerable leeway for an administrative body to fundamentally reshape decades of established case law and potentially encroach upon Congress's responsibilities.

The proposed merger guidelines will negatively impact small businesses and consumers

Advocates for more zealous merger enforcement often argue that concentration harms consumers. In the tech sector, advocates for increased merger scrutiny argue that a “kill zone” has emerged where large players acquire small players before they can grow into true competitors. However, while the guidelines seem to follow such ideas, these ideas themselves are largely myths. In fact, if the agencies were to shift to and accept enforcement under the new guidelines, both consumers and small businesses would be harmed in the process.

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[1] See post by Lindsey M. Edwards, an attorney at Wilson Sonsini, Jul. 19, 2023, https://twitter.com/lmedwards_/status/1681688979958112256.

[2] The draft merger guidelines rely on three cases: (1) *Mandeville Island Farms v. American Crystal Sugar*, 334 U.S. 219 (1948), which states that the Sherman Act protects “all who are made victims of the forbidden practices,” which could apply to workers; but a merger in itself is not a forbidden practice. (2) *NCAA v. Alston*, 141 S. Ct. 2141 (2021), which addresses constraints that employers impose on employee compensation outside the scope of mergers. (3) *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) to claim that the Clayton Act opposes mergers reducing competition "in any line of commerce," and controversially interpret "line of commerce" to include workers' rights in mergers, potentially allowing an administrative body to reshape longstanding case law and overstep Congress's duties.

The idea of a "kill zone" has largely been debunked, overlooking the value of mergers to companies of all sizes and consumers. The use of acquisitions for key talent and technology is not new and predates today's scrutiny of tech giants. As Joe Kennedy writes at ITIF, "[b]etween 1993 and 2000, Cisco Systems spent roughly $9 billion buying more than 50 companies. The technology it acquired allowed it to use some of its remaining resources to focus on its core competencies and gain needed capabilities to expand in global markets."[3]

With these ideas in mind, the proposed guidelines presume mergers harmful until proven innocent, likely stifling overall M & A activity and taking away a valuable exit strategy for some small players. The US start-up sector remains incredibly active, but different companies have different goals. These guidelines would make it more difficult for companies of all sizes to pursue acquisition as an exit strategy, negatively impacting companies of all sizes and their workers.

Some innovators' products may be particularly designed to work with an existing service and being acquired will assist them in reaching more consumers. Large firms have found so-called "acqui-hiring" to be a critical way to gain complementary skills and increased talent. Smaller firms may find this relationship beneficial as well for any number of reasons, including that it allows them to focus more on their current or next product and less on the demands of the business or the fundraising of further capital.[4] Rapid acquisition of talent rather than the inefficient allocation of resources over several years to develop talent internally is a major incentive for mergers to occur. But this reflects an outdated perception of today's job –market, particularly when one considers that employees frequently change firms. Many may even work for multiple employers simultaneously. This could adversely impact companies in need of talent for innovation and potentially limit workers' access to larger opportunities within more innovative organizations.

The merger guidelines discourage such transactions, particularly with large players. As a result, they foreclose important exit strategies for small businesses. Even if companies choose not to be acquired, an initial public offering (IPO) is a costly and burdensome process that is far from a sure success.[5]

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[3] Joe Kennedy, *Monopoly Myths: Is Big Tech Creating "Kill Zones"?*, Information Technology and Innovation Foundation, Nov. 9, 2020, https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones/.
[4] *See* Jennifer Huddleston, *Implications of the Competition and Antitrust Law Enforcement Reform Act*, American Action Forum, Feb. 10, 2021, https://www.americanactionforum.org/insight/implications-of-the-competition-and-antitrust-law-enforcement-reform-act/
[5] Chris Matthews, *Investors beware: The typical IPO stock is a dud, says Goldman Sachs*, MarketWatch, Sept. 5, 2019, https://www.marketwatch.com/story/investors-beware-the-typical-ipo-stock-is-a-dud-says-goldman-sachs-2019-09-05?ns=prod/accounts-mw.

However, the harm to such business options affects not only businesses, but also the consumers who use their products. Antitrust policy has been rooted in consumer welfare as a tool to protect them from the potential harm that anti-competitive practices may have on the free market. Shifting to views that perceive concentration as inherently harmful or treat mergers as immediately deserving scrutiny will instead prioritize competitors. The proposed guidelines, coupled with recent enforcement on transactions involving leading tech companies which seem to immediately draw scrutiny from regulators regardless of their potential impact, illustrate a shift away from an objective focus on consumers and toward a more politicized use of antitrust.

The Courts have rejected the agencies' theories reflected in the draft guidelines

As discussed above, the draft guidelines are largely based on outdated law. In addition, some of the ideas behind these draft guidelines have already been argued in court and failed. The courts have recently rejected agency enforcement based on speculative concerns about what may evolve in the future. The most high-profile examples are the courts allowing both Meta's acquisition of Within[6] as well as Microsoft's acquisition of Activision to move forward.[7] Faced with this rejection, these guideline changes read at times like an attempt to change the rules not for sound policy reasons but because the agencies' strategies are losing.

The selective nature of the new guidelines is likely to meet skepticism from courts who may still rely on the entire body of antitrust law in arriving at their decision.[8] Agency officials seeking to enforce under the new guidelines may actually offer courts a more formal opportunity to overturn these outdated precedents, thereby diminishing the courts' confidence in the soundness of the agencies' guidelines and the overall perception of the agencies themselves. Cases brought under these new guidelines would continue the agencies' recent losing streak, thus increasing the cost to the taxpayer of repeated lost cases.

Conclusion

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[6] Makena Kelly and Adi Robertson, *Meta wins fight to buy VR startup Within*, The Verge, Feb. 4, 2023, https://www.theverge.com/2023/2/1/23575041/meta-within-vr-acquisition-ftc-antitrust-lawsuit-injunction-denied.

[7] Jennifer Huddleston, *With Microsoft Victory, Courts Go on Epic Killstreak Against FTC Antitrust Agenda*, Reason, Jul. 12, 2023, https://reason.com/2023/07/12/with-microsoft-victory-courts-go-on-epic-killstreak-against-ftc-antitrust-agenda/.

[8] See post by Gus Hurwitz, Academic Director of the Center for Technology, Innovation and Competition at the University of Pennsylvania Carey Law School, Jul. 19, 2023, https://twitter.com/GusHurwitz/status/1681679248677896192.

The draft merger guidelines illustrate the shift of agency enforcement from a focus on consumers to a more subjective and politicized perspective based on how agency officials envision certain markets. The result will be that consumers lose out on beneficial mergers and acquisitions that are prevented either by enforcement actions or merely by parties' concerns about completing such transactions. These consequences will not be limited solely to the technology sector — which has recently been the target — but will impact nearly every industry in the United States.

Thank you for the opportunity to comment on this important issue. I would be happy to answer any questions you may have at jhuddleston@cato.org.

Sincerely,

/s/

Jennifer Huddleston
Technology Policy Research Fellow
Cato Institute