TAXPAYERS PROTECTION ALLIANCE

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.: FTC-2023-0043 – *Draft Merger Guidelines for Public Comment*

On behalf of millions of taxpayers and consumers, the Taxpayers Protection Alliance (TPA) is pleased to submit comments on the Federal Trade Commission (FTC) and Department of Justice's (DOJ) draft merger guidelines. While these guidelines are not binding on the courts and cannot circumvent case law, they reflect changing agency policy and signal shifting enforcement priorities. Families and businesses across the country reasonably fear these new guidelines will lead to higher prices, lower investment, and diminished competition. Agency officials should critically re-examine newly included language and limit investigations to the rare instances in which consumer welfare is truly threatened.

When defining markets to assess mergers, regulators face a constant balancing act. Markets defined too narrowly by regulators wrongly give the impression that a product is in danger of being "monopolized" by merging parties, even if consumers could easily find a substitute product outside the scope of the defined market of the merging entities. Alternatively, defining a market too broadly may result in a merger appearing inconsequential even though consumers may well have trouble finding competitively produced, substitutable goods post-merger. Previous guidelines have relied on the "hypothetical monopolist test" to define markets, which asks whether a "hypothetical monopolist" selling that product within a given area would be able to impose a small but significant and non-transitory increase in price (SSNIP) without consumers taking their purchases elsewhere.

The draft guidelines hew to a similar analysis, but "also [incorporate] other terms (broadly defined) such as quality, service, capacity investment, choice of product variety or features, or innovative effort."[1] The problem with this additional analysis, though, is that it is far more arbitrary than the original test. For example, a "hypothetical monopolist" paring back marketing

[1] Department of Justice & Federal Trade Commission, "Draft Merger Guidelines," pg. 8, https://www.regulations.gov/document/FTC-2023-0043-0001.

efforts as a result of diminished competition could be perceived by regulators as decreasing "capacity investment," even if that market participant is keeping prices low and introducing new product features to retain consumers. Additionally, any operating system upgrade or change in user experience (UX) or user interface (UI) could be perceived as a "decline in quality." This would prompt regulators to rush to action based on arbitrary criteria. TPA urges the FTC and DOJ to eliminate these "other terms" in the hypothetical monopolist test and return to focusing on objective consumer harms versus subjective preferences.

Furthermore, the new version of the "hypothetical monopolist" test contains a subtle change that could have significant implications for the analysis. In the new formulation, agencies will act if a hypothetical seller who is the "only present and future seller of a group of products" can get away with increasing prices/lowering quality "for at least one product in the group."[2] This product can be a purely hypothetical one, meaning that the agencies are analyzing a theoretical product sold by a theoretical monopolist. In contrast, the 2010 iteration of the test requires that at least one product being analyzed is currently being "sold by one of the merging firms." Therefore, the draft guidelines move away from a reality-based analysis in favor of a hypothetical approach. TPA urges the FTC and DOJ to reject this hypothetical approach in favor of the previous framework.

The agencies also propose to lower market concentration thresholds. Under the status-quo, markets are considered "highly concentrated" if the Herfindahl-Hirschman Index (HHI; which relies on squared and summed market shares) is greater than 2,500. A transaction that increases HHI by more than 200 will garner additional scrutiny by regulators. The draft guidelines lower the market threshold from 2,500 to 1,800 and the transaction threshold from 200 to 100. As noted in an advisory post by law firm Arnold & Porter, this new approach would imply that, "a transaction between a competitor with 28% and a competitor with 2% would be presumed anticompetitive, even if no other competitors in the market had shares of more than 1%."[3]

The agencies also introduce threshold guidelines for vertical mergers, which have traditionally enjoyed relaxed scrutiny by regulators. The guidelines state that a vertical merger will be presumed to "substantially lessen competition" if the transaction meets two criteria. The first will be triggered if the firm controls a majority of the market for an input relied on by a competitor (e.g., broadband wire infrastructure). The second is if the firm accounts for most of the purchases made in the market of the merger partner.[4] This is a significant departure from the current

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[2] Ibid.

[3] Arnold & Porter, "DOJ and FTC Issue Draft Merger Guidelines," Aug. 1, 2023, https://www.arnoldporter.com/en/perspectives/advisories/2023/07/doj-and-ftc-issue-draft-merger-guidelines.

[4] "Draft Merger Guidelines" at pgs. 17.

"bird's-eye" approach of looking at the vertically merging firm's ability and incentive to foreclose competition. The agencies fail to adequately explain why they are abandoning this more holistic framework, and why 50 percent is an appropriate or relevant threshold for evaluating inputs and purchases. TPA urges the agencies to eliminate these new vertical merger thresholds.

Finally, TPA is concerned about the deterrence effect these guidelines will have on new investment and market entry, which would inherently limit competition in the long run. The obvious point of tightening merger guidelines is to signal a lower threshold for regulatory scrutiny, with the prospective costs of defending a merger or acquisition serving to deter such actions themselves. Deterring mergers and acquisitions that would otherwise avoid scrutiny under the current guidelines significantly narrows the path for investor exit, thereby dissuading investor entry into scrutinized markets. While not all companies go on to be acquired, investors expect returns. Foreclosing the potential for acquisition by major market players increases risk for initial investors and adds friction in the formation of new market players.

At a time of economic uncertainty and rising prices, it is critical that the FTC and DOJ responsibly use their regulatory authority. New, arbitrary thresholds and dubious applications of the "hypothetical monopolist" test will only hamper innovation and lead to more pain for consumers, businesses, and entrepreneurs. TPA respectfully asks the agencies to reconsider their draft guidelines and embrace a lighter-touch approach.

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