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September 15, 2023

Department of Justice, Antitrust Division
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

RE: Response to Request for Public Comment on Draft Merger Guidelines

The U.S. Chamber of Commerce ("the Chamber") appreciates the opportunity to respond to the U.S. Department of Justice's Antitrust Division and Federal Trade Commission (the agencies) Request for Public Comment on Draft Merger Guidelines (Draft Guidelines).[1]

In the agencies' prior Request for Information (RFI), the Chamber expressed support for the concept of updating the Guidelines but questioned whether the agencies would use the revision to attempt to rewrite antitrust law:

> In general, although the Chamber has no qualms with the agencies updating the Merger Guidelines to reflect the latest case law and empirical economic analysis, the Chamber has serious concerns that the agencies are attempting to use the RFI to rewrite substantive antitrust law based on faulty economic and legal assumptions. For instance, many of the RFI's questions reflect a belief that economic concentration is strangling competition, that most mergers harm consumers, and that the Merger Guidelines provide an opportunity to rewrite substantive antitrust law.[2]

Unfortunately, the Draft Guidelines confirm the worst fears of the Chamber and our members. Rather than use the revisions to build upon the constructive bipartisan guidance that has evolved over the past forty years, with each new version incorporating the latest legal and economic thinking, the agencies instead are attempting to use the Draft Guidelines to replace the law with their current leadership's ideological preferences. As a result, the Draft Guidelines have garnered

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[1] Draft Guidelines, at https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

[2] Chamber comments on merger RFI, at https://www.uschamber.com/finance/antitrust/chamber-comments-on-ftc-and-doj-merger-enforcement-guidelines.

opposition from scholars, practitioners, and former enforcers from across the spectrum.

In addition to resubmitting our comprehensive earlier comments, the Chamber provides a handful of specific comments on the Draft Guidelines:

- *First*, the Draft Guidelines do not reflect the current state of the law, and therefore, unlike prior iterations, will hold little value with the courts or business community. Among other deficiencies, the Draft Guidelines rely upon outdated cases, especially when juxtaposed with the need to consider current "market realities," yet ignore multiple recent losses in which courts have rejected the theories that the agencies now advance in the Draft. As such, these Draft Guidelines seem likely to undermine the agencies' credibility, especially with the judiciary.
- *Second*, the Draft Guidelines do not reflect the current state of economic thinking and evidence, particularly the numerous recent studies and cases that recognize the pro-competitive aspects of mergers. As a result of this failure, the Draft Guidelines improperly characterize efficiencies as a narrow defense to a complaint that a merger might reduce competition, rather than as an integral part of the overall analysis. In addition, and contrary to one of the Draft Guidelines' core tenets, the latest economic data reveals that economic concentration is not increasing across the economy.
- *Third,* the proposed structural presumptions have no basis in economics or case law. The agencies spin these presumptions out of whole cloth; if adopted, they would distort the review process, giving far too much leverage to the agencies and shifting the entire review process to more of a prior approval regime.
- *Fourth,* if adopted, the Draft Guidelines would harm consumers and damage the economy. As explained in more detail in our earlier comments, the Draft Guidelines would reduce capital flows, discourage risk and innovation, and punish or deter efficient mergers and other procompetitive transactions, all to the detriment of consumers and long-term U.S. economic competitiveness.

For these reasons, and as explained more fully below, the Chamber encourages the agencies to abandon these Draft Guidelines and start over with a measured approach consistent with the past practice of incremental changes that incorporate a consensus view of the latest case law and empirical economic analysis.

I. The Draft Guidelines Do Not Reflect the Current State of the Law

In a statement, Commissioners Wilson and Phillips explained that the value of the Merger Guidelines lay in their reflection of the current state of the law, rather than their endorsement of an ideological point of view:

> Merger enforcement should be administrable, predictable, and credible. Merger guidelines advance those goals when they reflect judicial precedent, incorporate sound developments in economic analysis, and accurately describe how the antitrust agencies assess mergers.[3]

As they noted, courts routinely cite the 2010 Horizontal Merger Guidelines, which "derive their persuasive value from laying out a consensus view on the framework that the FTC and DOJ have developed, over decades of experience, to analyze the effects of mergers." Commissioner Wilson specifically warned against using the guidelines to promote "seasonal political winds"; as she cautioned, "Guidelines that depart from this tradition will lack credibility and soon fade."[4] Indeed, the RFI itself committed to "faithfully track … established case law around merger enforcement."[5]

Unfortunately, the agencies have abandoned the assurances set forth in the RFI in favor of highlighting language from outdated cases with which they agree. As pointed out by Jason Furman and Carl Shapiro, two former senior officials from the Obama Administration, the Draft "focuses on outdated legal precedents and a presumption that growth by large and successful firms is undesirable."[6] For example, although the agencies profess to want to update the guidelines "to reflect the modern economy," the Draft "draws heavily on *Brown Shoe Co. v. U.S.* (1962), a widely criticized Supreme Court case."[7] As Professor Hovenkamp pointed out, "the Supreme Court itself subsequently corrected many of *Brown Shoe's* errors."[8]

The Draft Guidelines also rely upon dicta in other older cases such as *Procter & Gamble* (1967) and *Philadelphia National Bank* (1963), which are now widely regarded as questionable. According to one analysis, "weighted by the number of citations, the

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[3] Wilson and Phillips, Statement, at https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf.
[4] Wilson, Statement, at https://www.ftc.gov/system/files/ftc_gov/pdf/Wilson-Remarks-Listening-Forum_0.pdf.
[5] See Merger RFI, at https://www.regulations.gov/document/FTC-2022-0003-0001.
[6] Furman and Shapiro, WSJ, *How Biden Can Get Antitrust Right* (July 27, 2023), at https://www.wsj.com/articles/how-biden-can-get-antitrust-right-khan-ftc-justice-department-guidelines-11364639?page=2.
[7] Id.
[8] Hovenkamp, *Pro-Market, Competitive Harm and the 2023 Draft Merger Guidelines* (July 27, 2023), at https://www.promarket.org/2023/07/27/herbert-hovenkamp-competitive-harm-and-the-2023-draft-merger-guidelines/.

average year of the 50 [cited] cases is 1975 – ages ago in antitrust law."[9] The Antitrust Modernization Commission explained the problems with these older cases:

> During the 1960s and early 1970s antitrust decisions from the Supreme Court sometimes seemed more directed to protecting small businesses than to protecting competition that would benefit consumers through lower prices, improved quality, or innovation. Indeed, in some instances the Court "condemned conduct precisely because it reduced costs or generated more desirable products [for consumers]." For example, in *FTC v. Procter & Gamble* the Court affirmed that a merger was illegal because it created efficiencies its rivals could not match. Decisions such as this were criticized as likely to deprive consumers of lower prices or other benefits from the increased competition that a more efficient merged firm could provide. Such decisions also were criticized for the absence of a coherent rule of law that could explain them.[10]

Indeed, it would be imprecise to say that the agencies cherry-picked old cases; rather, it is more accurate to say that the agencies visited an antique shop and dusted off the section labeled early-to-mid twentieth century relics.[11]

In other parts of the Draft Guidelines, the agencies seek to circumvent legal precedent entirely. In discussing the actual potential competition doctrine, for example, the agencies posit that they may establish a "reasonable probability" of entry through "[s]ubjective evidence" that a company even "considered" entering the market. As the FTC's unsuccessful attempt to enjoin Meta's acquisition of Within demonstrates, however, the courts require more than proof that a speculative possibility that a company may eventually enter the market.[12] Similarly, in discussing serial acquisitions, Draft Guideline 9 relies largely on the FTC's Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act. The FTC's Policy Statement, however, does not have the force of law and has been criticized widely as exceeding the agency's statutory authority.[13]

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[9] Int'l Ctr. On Law & Econ. (Aug. 17, 2023), at https://laweconcenter.org/geoff-manne-gus-hurwitz-on-the-draft-merger-guidelines/. See also Werden, CPI Columns, *Two Bridges Too Far: First Take on the Draft Merger Guidelines* (Sept. 2023) ("more than three-quarters of the many case law citations are to cases decided before the issuance of the 1982 [merger guidelines].").

[10] AMC Report 34 (citations omitted), at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[11] See Wilson Statement, *supra*, at fn 9. See also *United States v. Anthem, Inc.*, 855 F.3d 345, 379 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("For the majority opinion, we are apparently stuck in 1967. The antitrust clock has stopped. No *General Dynamics*. No *Continental Television v. GTE Sylvania*. No *Baker Hughes*. No *Heinz*.").

[12] *FTC v. Meta Platforms*, No. 22-cv-04325-EJD, 2023 WL 2346238, (N.D. Cal. Feb. 3, 2023).

[13] E.g., U.S. Chamber, *FTC's Section 5 Policy Statement Effectively Declares Competition* Illegal (Nov. 10, 2022), at https://www.uschamber.com/finance/antitrust/the-ftcs-section-5-policy-statement-effectively-declares-competition-illegal.

At other times, the Draft Guidelines vastly overstate the significance of the cited precedents. In footnote 29, for instance, the Draft cites several cases for the proposition that higher concentration levels support the imposition for structural presumptions, but all the cited cases involved much higher concentration levels than contemplated by the Draft Guidelines or the 2010 guidelines. Likewise, footnote 53 cites *Brown Shoe* in support of the Draft's foreclosure presumption, but in *Brown Shoe*, the Supreme Court rejected any such bright line: "in cases such as the one before us, in which the foreclosure is neither of monopoly nor *de minimis* proportions, the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive."[14]

By relying on outdated cases and ignoring modern precedent to the contrary, the agencies would diminish, if not eliminate, the value of the guidelines to the courts. As Messrs. Furman and Shapiro explain, courts valued the guidelines because they reflected current case law and economic reasoning, rather than an ideological viewpoint:

> The new draft guidelines depart sharply from previous iterations by elevating regulators' interpretation of case law over widely accepted economic principles. The guidelines have long helped courts use economic reasoning to evaluate government challenges to mergers. They shouldn't become a debatable legal brief or, worse, a political football.[15]

Even as the Draft Guidelines embrace dicta more than a half-century old, they ignore numerous important decisions from the past few years that encapsulate current law and "today's market realities."[16] From the standpoint of the agencies, these cases are almost all losses by the government. Among other notable omissions, the Draft Guidelines fail to cite or account for the reasoning of *Meta-Within* (virtual reality), *Microsoft-Activision* (cloud gaming), *Booz Allen Hamilton-EverWatch* (cybersecurity), *UnitedHealth Group-Change Healthcare* (insurance reimbursement), *AT&T-Time Warner* (content distribution), and *U.S. Sugar Corp.-Imperial Sugar*, or even successes such as *Peabody-Arch Coal* (coal reserves), *Penguin Random House-Simon & Schuster* (author compensation), and *Hackensack-Engelwood* (hospitals).[17] These court decisions reflect the latest legal guidance on numerous issues, including vertical

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[14] *Brown Shoe*, 370 U.S. at 329.

[15] Furman and Shapiro, *supra*.

[16] Cf. U.S. Chamber, *DOJ's Bank Merger Speech: Some Troubling Conclusions* (July 27, 2023), at https://www.uschamber.com/finance/antitrust/dojs-bank-merger-speech-some-troubling-conclusions.

[17] See generally, WSJ, *Biden's Antitrust Batters Strike Out* (Oct. 18, 2022), at https://www.wsj.com/articles/bidens-antitrust-batters-strike-out-department-of-justice-merger-lawsuits-unitedhealth-11665868777?utm_source=sfmc&utm_medium=email&utm_campaign=&utm_term=Comp+EO+October+Newsletter&utm_content=11/2/2022.

mergers, market definition, industry concentration, efficiencies, and remedies. If the agencies truly want to "faithfully track" established case law to reflect today's market realities, they should incorporate the teachings of these very recent cases into the Draft Guidelines.

In the past, courts could look to the guidelines with confidence that they reflected a consensus view of the law. No longer. If the agencies adopt the Draft, they will reduce the value of the guidelines to little more than an aggressive policy statement that represents an ideological viewpoint of what some current enforcers think the law should be. Every prior iteration of the guidelines survived across presidential administrations of both parties; unless the agencies revise the Draft Guidelines to account for recent case law, these are unlikely to do the same. As a result, antitrust enforcement could become a "political football" that changes possession and direction every few years, undermining predictability, and certainty for the business community, and ultimately reducing investment and innovation for everyone.

II. The Draft Guidelines Do Not Reflect the Current State of Economic Thinking and Evidence

The Draft also fails to reflect the current state of economic thinking and evidence. The Draft Guidelines focus almost entirely on artificial structural measures of competition, such as the number of competitors in a market, while ignoring the performance of markets as measured by output, price, or innovation. The Draft Guidelines also reduce the importance of economic evidence entirely, such as by downplaying the hypothetical monopolist test in favor of less rigorous criteria set out in older cases such as *Brown Shoe*.[18] As Professor Hovenkamp points out, the Draft Guidelines reflect "[a]ntitrust thinking during the mid-twentieth century," more than a half-century ago.[19] This outdated economic worldview leads to several errors.

A. Merger Efficiencies

Most notably, the Draft Guidelines improperly characterize merger efficiencies as a narrow rebuttal defense to a complaint that a merger might reduce competition,

[18] Cf. Harkrider, *Operationalizing the Hypothetical Monopolist Test* (June 25, 2015) ("Using reliable data is critically important because without such data, courts frequently resort to the *Brown Shoe* factors"), at https://www.justice.gov/atr/operationalizing-hypothetical-monopolist-test. See also Hovenkamp, *Did the Supreme Court Fix "Brown Shoe"?* (May 12, 2023) (arguing that subsequent decisions rendered *Brown Shoe* "obsolete"), at https://www.promarket.org/2023/05/12/did-the-supreme-court-fix-brown-shoe/.

[19] See Hovenkamp, *supra*.

rather than as an integral part of the overall competitive analysis.[20] As Messrs. Furman and Shapiro note, "we are troubled by the draft guidelines' claim that efficiencies won't be counted, even if they benefit consumers and workers, for a merger that furthers a trend toward horizontal concentration or vertical integration."[21] Noting that mergers can promote competition, reduce prices, and accelerate innovation, Professor Hovenkamp observed that "parts of the draft lack an adequate economic foundation. They contain a structural presumption against many vertical mergers unsupported by theory or evidence."[22]

Indeed, recent economic evidence confirms that mergers can increase economic efficiency, to the benefit of consumers and the competitive process. In particular, economic studies overwhelmingly support the view that most vertical mergers are procompetitive.[23] A 2007 study found that, "consistent with the large set of efficiency motives for vertical mergers ... the evidence on the consequences of vertical mergers suggests that consumers mostly benefit."[24] Another study emphasized that "[m]ost studies find evidence that vertical restraints/vertical integration are procompetitive."[25] Moreover, "the empirical literature on [resale price maintenance and exclusive territories], vertical integration, and non-linear contracting suggests that these practices have been used to mitigate double marginalization and induce demand increasing activities by retailers. With few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons."[26]

More recent economic research confirms these conclusions. Earlier this year, for example, former Acting Chair Maureen Ohlhausen co-authored a study on the existing empirical literature. Having surveyed the research, she found that "There is zero basis to doubt the once-settled wisdom underpinning the basic framework for merger review: mergers can and do advance procompetitive business objectives."[27]

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[20] See generally *United States v. Baker Hughes Inc*., 908 F.2d 981, 982 (D.C. Cir. 1990) (observing that Section 7 of the Clayton Act focuses on a "variety of factors," including "efficiencies"); *FTC v. H.J. Heinz Co*., 246 F.3d 708, 713 (D.C. Cir. 2001); *FTC v. Tenet Health Care Corp*., 186 F.3d 1045 (8th Cir. 1999); *FTC v. Univ. Health, Inc*., 938 F.2d 1206 (11th Cir. 1991).
[21] See Furman and Shapiro, *supra*.
[22] Hovenkamp, *supra*.
[23] 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 10A-1 (5th ed. 2021).
[24] Francine LaFontaine and Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 663 (2007).
[25] James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. OF INDUS. ORG. 639, 658 (2005).
[26] Daniel P. O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems*, *in* THE PROS AND CONS OF VERTICAL RESTRAINTS 76 (2008).
[27] U.S. Chamber, Evidence of Efficiencies in Consummated Mergers (June 1, 2023), at https://www.uschamber.com/assets/documents/20230601-Merger-Efficiencies-White-Paper.pdf.

The Draft Guidelines also ignore current case law regarding efficiencies. In the recent *Microsoft-Activision* decision, the court agreed "[f]or a vertical merger, such as the Microsoft/Activision merger, 'there is no short-cut way to establish anticompetitive effects, as there is with horizontal mergers.' *. . .* This is in part because 'many vertical mergers create vertical integration efficiencies between purchasers and sellers.'"[28] Likewise, in the *Booz Allen Hamilton-EverWatch* case, the court found that the challenged merger "could arguably increase competition in some areas" by placing the combined company in a "stronger position to challenge entrenched incumbents."[29]

In the recent past, these types of cases and studies led the agencies themselves to agree that mergers and acquisitions can promote competition. For example, former Assistant Attorney General Christine Varney, declared that "the vast majority of mergers are either procompetitive and enhance consumer welfare or are competitively benign."[30] Similarly, in a policy statement from just a few years ago, the agencies themselves recognized that mergers "are one means by which firms can improve their ability to compete. It would be illogical, then, to prohibit mergers because they facilitate efficiency or innovation in production."[31]

B. Concentration

Setting aside efficiencies, the Draft Guidelines also fail to account for other recent data and studies. For instance, Draft Guideline 8 states that "Mergers Should Not Further a Trend Toward Concentration." The latest economic data, however, reveals that *there is no trend toward concentration across the economy*. Last year, in an exhaustive study of all available census data from the past two decades -- including data that became available only recently – Dr. Robert Kulick found that, since 2002, U.S. economic concentration has remained flat.[32] In fact, since 2007 in both the manufacturing sector and the broader economy, the economy became *less* concentrated.[33] Another study, from 2021, found that "just 4 percent of U.S. industries

[28] *Microsoft*, 2023 WL 4443412, at *11 (citations omitted). See also *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 840 (D.C. Cir. 2006) ("[V]ertical integration creates efficiencies for consumers").
[29] *U.S. v. Booz Allen Hamilton*, Case 1:22-cv-01603-CCB, at 8 n.13 (D. Md. Oct. 17, 2022).
[30] Statement of Ass't Att'y Gen. Christine Varney, *Merger Guidelines Workshops*, Third Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 22, 2009).
[31] OECD, Conglomerate Effects of Mergers – Note by the United States to the Organisation for Economic Co-operation and Development (June 4, 2020) at 5, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf.
[32] See Klovers and Kulick*, Is Concentration Actually Increasing, or are We Just Defining Markets More Narrowly*? (June 1, 2022). CPI North America Column 2022, at https://ssrn.com/abstract=4344251.
[33] See U.S. Chamber, *Industrial Concentration in the U.S. is Declining, Not Increasing* (Mar. 9, 2022), at https://www.uschamber.com/finance/antitrust/u-s-chamber-study-industrial-concentration-in-the-u-s-economy-is-declining-not-increasing.

are highly concentrated, and the share of industries with low levels of concentration grew by around 25 percent from 2002 to 2017."[34]

In any event, as we explained in our response to the RFI, rising concentration does not, by itself, suggest a lack of competition. According to the Antitrust Modernization Commission, economic research finds procompetitive reasons to explain highly concentrated markets, namely, "that the most efficient firms were winning the competitive struggle and thereby achieving high market shares."[35] Indeed, the Kulick study shows that rising industry concentration often correlates with higher levels of economic output, more jobs, and higher wages.

C. Common Ownership

Similarly, the Draft Guidelines wrongly call into question the practice of common ownership of multiple companies. Citing cases from 1957, 1967, and 2005, Draft Guideline 12 asserts that, "Acquisitions of partial control or common ownership may in some situations substantially lessen competition." Numerous recent studies, however, have cast doubt on the theory that overlapping ownership alone is enough to affect companies' competitive behavior, finding no correlation, much less causation, between common owners and higher prices.[36] For these reasons, most scholars and regulators have concluded that there is no evidentiary basis for adopting new rules to regulate or prohibit common owners.[37]

D. Labor Issues

In the same vein, the Draft Guidelines misconstrue the evidence regarding labor markets. Contrary to the assumptions underlying Draft Guideline 11, the Department of Labor's former chief economist recently found that labor markets are, and have been, flush with competition during the past half century, with high rates of employee turnover, firm expansion and contraction, and regular movement of workers between states.[38] As a result, and as explained at length in our response to the RFI, merger

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[34] See Atkinson and Lage de Sousa, *No, Monopoly Has Not Grown* (June 7, 2021), at https://itif.org/publications/2021/06/07/just-4-percent-us-industries-are-highly-concentrated-itif-finds-analysis-new/.
[35] AMC Report 34, *supra*.
[36] E.g., U.S. Chamber, *U.S. Capital Markets are in Danger from Proponents of Common Ownership Hypothesis* (Spring 2022), at https://www.centerforcapitalmarkets.com/wp-content/uploads/2022/04/CCMC_CommonOwnership_v2-1.pdf; Patrick Dennis, Kristopher Gerardi, and Carola Schenone, *Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry*, Journal of Finance, (September 2021), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063465.
[37] Noah Joshua Phillips, *Taking Stock: Assessing Common Ownership* (June 1, 2018), at https://www.ftc.gov/system/files/documents/public_statements/1382461/phillips_-_taking_stock_6-1-18_0.pdf.

[38] U.S. Chamber, *New Study Demolishes White House's Assumptions about Labor Concentration* (Oct. 5, 2022), at https://www.uschamber.com/finance/antitrust/new-study-demolishes-the-white-houses-assumptions-about-labor-concentration.

policy is a poor vehicle to address labor issues: the phenomenon of labor monopsony is exceedingly rare, with only a handful of reported cases even touching upon the issue, whereas Congress and the states have enacted entire bodies of law to address labor concerns. The Draft Guidelines, however, could force merging parties to bear the upfront costs of addressing labor issues that almost never arise in practice.

Because the Draft Guidelines fail to account for the latest economic thinking and data regarding efficiencies, concentration, common ownership, labor, and other issues, the Agencies should withdraw the current draft and update it to account for the best and most recent economic analysis.

III. The Proposed Structural Presumptions Have No Basis in Economics or Case Law

Throughout the Draft Guidelines, the Agencies set forth several arbitrary presumptions. Draft Guideline 6, regarding vertical supply chains, asserts that "At or near a 50% share, market structure alone indicates the merger may substantially lessen competition." Draft Guideline 7, regarding entrenchment, states that a merging firm has a "dominant position" if it "possesses at least 30 percent market share." The Supreme Court, however, has made clear that antitrust presumptions "are generally disfavored" when they "rest on formalistic distinctions rather than actual market realities."[39] Indeed, under existing law, "the government cannot use a short cut to establish a presumption of anticompetitive effect . . . because vertical mergers produce no immediate change in the relevant market share."[40]

On their merits, the Draft Guidelines' presumptions have no basis in case law, empirical economics, or even economic theory. Today, "[m]ost economists would agree that market shares and the HHI [Herfindahl–Hirschman Index] often are poor indicators of market power."[41] In discussing the "dominant position" presumption, Professor Hovenkamp explains that, "Nothing in the statute speaks to that question,

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[39] *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 467 (1992); *see also Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 43 (2006) (per se illegality "must be supported by proof of power in the relevant market rather than by a mere presumption"); *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."); *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 208 (1968) ("In interpreting the antitrust laws . . . [w]e must look at the economic reality of the relevant transactions.").

[40] *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019).

[41] Cristina Caffarra & Serge Moresi, *Issues and Significance Beyond US Enforcement*, MLEX MAGAZINE, Apr.-June 2010, at 41, 42–43; *see also* Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714, 722–23 (2018) ("Sheer size and market power are just not the same thing."); Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1, 10 (2003) ("The [structural] paradigm was overturned because its empirical support evaporated."); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977, 978 (1991).

and certainly not to the 30 percent number . . . responsible expert testimony on such issues [is] all the more important to proper identification of competitive harm." In discussing the vertical merger presumption, Messrs. Furman and Shapiro point out that the Draft Guidelines "contain a structural presumption against many vertical mergers unsupported by theory or evidence. The proposed guideline on acquisitions of products or services that rivals may use to compete includes legal wishful thinking about how commitments made by the merging parties are treated, as the recent court rebuke of the FTC's attempt to block Microsoft's acquisition of Activision illustrates."

Indeed, the presumptions also have no basis in agency practice -- and likely would lead to arbitrary antitrust enforcement. The agencies do not actually challenge every merger that runs afoul of the various presumptions, or even issue second requests in all such matters. By laying out these arbitrary figures as gospel, the agencies could improperly chill mergers based on the threat of investigation or litigation, targeting disfavored transactions that present no competitive harm. (Guideline 7, for instance, could be read to capture virtually every large company). When agencies do challenge mergers, those decisions will necessarily lead to questions about whether the challenge arises from reasons unrelated to the protection of competition. In all cases, the presumptions would sow confusion and uncertainty and, because merging companies would have little ability to present rebuttal evidence, give the agencies unwarranted leverage. By effectively shifting the burden of proof from the agencies to the companies, the U.S. merger review framework would move closer to that in prior approval states, furthering the prospects of arbitrary enforcement.[42]

If adopted, the presumptions ultimately would harm consumers and reduce competition. As Messrs. Furman and Shapiro point out in discussing the "dominant position" presumption, "many nonhorizontal deals that enable the acquiring firm to become more efficient, and thus gain market share or compete more effectively in adjacent markets, would be considered illegal even if they benefit consumers and workers." The empirical evidence shows that most mergers, particularly vertical mergers, improve efficiency, increase competition, and benefit consumers.[43]

IV. The Draft Guidelines Would Reduce Growth, Investment, and Innovation

If adopted, the Draft Guidelines would reduce innovation, damage the economy, and disadvantage American companies relative to their global competitors. For

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[42] See Werden, *supra* ("The frightening message of the [Draft] is that nothing is safe, just as before the 1968 [merger guidelines]").
[43] E.g., AMC Report 57-60, *supra*.

decades, U.S. merger policy has served as a bipartisan success story. Across administrations, the Federal Trade Commission and Department of Justice recognized that most mergers promote competition by driving investment, reducing costs, and stimulating the development of new products and services. When agencies challenged a merger, they usually had a strong basis, grounded in economics, for believing that the merger would harm consumers. This bipartisan consensus has helped our economy remain the most dynamic and innovative in the world.[44]

If allowed to stand, the Draft Guidelines would seriously damage our nation's economic dynamism. Empirical economic papers and case studies attest to the benefits of mergers and acquisitions in increasing efficiency, improving capital flows, imposing discipline on incumbent management, and allowing companies to bring new and better products to consumers. One recent study, for example, found that mergers resulted in more patent applications and investment in research and development: "Over a three-to-four year cycle, a given merger is associated with an average increase in industry-level R&D expenditure of between $299 million and $436 million in R&D intensive industries."[45] Extrapolating to the industry level implies that "on average, mergers are associated with an increase in R&D expenditure of between $9.27 billion and $13.52 billion per year in R&D intensive industries and an increase of between 1,430 and 3.035 utility patent applications per year." [46]

By prohibiting or chilling procompetitive mergers, the Draft Guidelines would deny startups and smaller companies the capital and expertise they need to thrive. The U.S. innovation ecosystem depends on the ability of startups and small companies to sell or license technology to larger companies with the resources and complementary capabilities to translate innovative ideas into successful products. In the biopharmaceutical industry, for instance, numerous studies confirm that mergers promote competition. One study found that "recent large pharmaceutical mergers are associated with statistically significant increases in R&D productivity."[47] Other studies concluded that mergers can effectively help firms allocate innovation resources to acquired companies[48] and that "biopharmaceutical firms can successfully outsource

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[44] E.g., U.S. Chamber, *New Merger Guidelines Undercut Competitiveness* (July 24, 2023), at https://www.uschamber.com/finance/antitrust/new-merger-guidelines-undercut-competitiveness.

[45] U.S. Chamber, *Mergers, Industries, and Innovation: Evidence from R&D Expenditures and Patent Applications* (Feb. 2023), at https://www.uschamber.com/finance/antitrust/mergers-industries-and-innovation-evidence-from-r-d-expenditure-and-patent-applications.

[46] [46] U.S. Chamber, *A Shift in Merger Enforcement Risks Damaging Our Economy* (Feb. 2023), at https://www.uschamber.com/finance/antitrust/a-shift-in-merger-enforcement-risks-damaging-our-economy.

[47] Michael S. Ringel and Michael K. Choy, *Do large mergers increase or decrease the productivity of pharmaceutical R&D?,* 22 DRUG DISCOV. TODAY 1749-1753 (2017), https://pubmed.ncbi.nlm.nih.gov/28646641/.

[48] Shuxun Wang et al, *Acquisition for innovations? M&A intensity and intra-firm innovation reallocations*, 62 RSCH. IN INT'L BUS. (2022)

R&D through acquisitions."[49] Indeed, across the economy, most new companies do not want to go public or remain independent – more than half of all startups want to be acquired.[50]

The agencies themselves have recognized that "[m]ergers are one means by which firms can improve their ability to compete."[51] In a policy statement from just a few years ago, the FTC agreed that mergers can promote innovation:

> [I]n dynamic sectors characterized by high R&D costs, firms with broad scale and scope may have unique incentives and capabilities to invest in innovation. For example, where a firm can exploit synergies across product lines or earn returns on research and development projects across multiple geographies, it may have greater incentives to make investments in such projects than firms with more limited operations.[52]

In discussing the biopharmaceutical industry, the Congressional Budget Office agreed that "The acquisition of a small company by a larger one can create efficiencies that might increase the combined value of the firms by allowing drug companies of different sizes ... to specialize in activities in which they have a comparative advantage."[53]

The Draft Guidelines, however, would distort routine business decisions across the economy. Relying on a fifty-year old *concurrence* to mistakenly assert that "antitrust laws reflect a preference for internal growth over acquisition," Draft Guideline 4 states that "Subjective evidence that the company considered organic entry as an alternative to merging generally suggests that, absent the merger, entry would be reasonably probable." Of course, Draft Guideline 4 directly contradicts the holding of *Meta/Within*[54] and, as in that case, invites speculation as to what might be hypothetically possible. More generally, if adopted, this proposed guideline would transform routine corporate "build or buy" discussions into evidence that a company's

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[49] Matthew John Higgins & Dan Rodriguez, *The outsourcing of R&D through acquisitions in the pharmaceutical industry*, 80 J. FIN. ECON., 352-383 (2006), https://www.sciencedirect.com/science/article/abs/pii/S0304405X05001807.

[50] SVB Financial Group, *2020 Global Startup Outlook: Key Insights from the Silicon Valley Bank Startup Outlook Survey*, (2020), at 7. See also Werden, *supra* ("Acquisition is the goal of many startups, which prefer to let others finish what they begin. Acquisition of these startups promotes innovation").

[51] OECD, Conglomerate Effects of Mergers – Note by the United States to the Organisation for Economic Co-operation and Development (June 4, 2020) at 5, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf.

[52] *Id*. at 8.

[53] CBO, *Research and Development in the Pharmaceutical Industry* (Apr. 2021), at https://www.cbo.gov/publication/57126 . .

[54] See generally *FTC v. Meta, supra*.

organic entry into a new line of business was “reasonably probable,” even though entry through acquisition is often cheaper, faster, and more effective.

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For all these reasons, and those set forth in our prior comments on the RFI, the Draft Guidelines would degrade the very landscape of U.S. capitalism itself. The Chamber encourages the agencies to abandon these Draft Guidelines and to start over with a measured approach, consistent with past practice.

Sincerely,

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