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September 18, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

The Honorable Jonathan Kanter
Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Comments of the Progressive Policy Institute on the Draft Merger Guidelines for Public Comment (Docket FTC-2023-0043)

Dear Chair Khan and Assistant Attorney General Kanter:

The Progressive Policy Institute (PPI) is pleased to provide comments to the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) on the draft Merger Guidelines ("draft Guidelines"), issued on July 19, 2023, in Docket FTC-2023-0043.[1] PPI is a catalyst for policy innovation and political reform based in Washington, D.C., with offices in Brussels, Berlin, and the United Kingdom. Its mission is to create radically pragmatic ideas for moving America beyond ideological and partisan deadlock. PPI is home to a new center on competition advocacy that features expert analysis and commentary that is rooted in promoting competitive markets and the democratic values that support them.[2]

I. Introduction

The proposed revisions to the U.S. antitrust agencies' merger guidelines are the 7th substantive version since they were first issued 55 years ago. PPI commends the FTC and DOJ for making stronger merger enforcement in the U.S. a priority and for updates that reflect important developments in markets, consolidation, strategic competition, and business models. Merger enforcement under Section 7 of the Clayton Act is forward looking and seeks to stop harmful transactions in their incipiency.[3] As a result, merger enforcement is the "first line of defense" to rising market concentration and the emergence of dominant firms and oligopolies that exercise their market power, to the detriment of consumers, workers, and smaller businesses.

Given the unique role of merger enforcement in heading off harmful consolidation and promoting competition, PPI believes that merger guidelines should contain several important features. For example, guidelines should be administrable in the courts and promote transparency and predictability for the government, business, and the public. Guidelines should give "balance" to the

[1] U.S. Dep't. of Justice and Fed. Trade Commn., *Merger Guidelines* (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf. ("draft Guidelines").
[2] For more information on PPI, please visit progressivepolicy.org.
[3] 15 U.S.C. § 18.

roles of legal doctrine and economic, technical, and business analysis that enables thorough and accurate merger review. Moreover, guidelines should provide real-world examples to aid the government, merging parties, and courts in evaluating competitive concerns. Finally, guidelines should avoid operationalizing the goals of any particular ideological perspective, otherwise they are susceptible to withdrawal at a future date, as we have witnessed in the past.

As drafted, the Guidelines contain a number of features that could hamper administrability, transparency, and predictability. For example, the 2010 Horizontal Merger Guidelines emphasize that the government seeks to "…to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions."[4] The draft Guidelines, however, no longer contain any reference to this critical goal. They also shift the balance between the role of law and economics, relegating economic frameworks and analysis to distant sections and appendices. Perhaps most important, the draft Guidelines appear to depart from an "effects-based" analysis under the prevailing consumer welfare standard, or how a merger can enhance incentives to exercise market power, with adverse effects on price, wages, quality, innovation, and choice.

PPI is concerned that these and other features of the draft Guidelines could cause confusion and increase opacity and uncertainty, thus impeding the goal of stronger merger enforcement. PPI offers constructive comments to address this concern. They cover five major areas where the final Guidelines would benefit from clarification or modification in order to aid the government, merging parties, and courts in understanding and applying them. These include the need to:

1. **Clarify that "effects-based" analysis under the consumer welfare standard remains in force under the draft Guidelines;**

2. **Achieve better balance in caselaw citation and add examples of real-world market power scenarios the draft Guidelines seek to avoid;**

3. **Expand the discussion of efficiencies with real-world examples of failed mergers to aid the government and courts in addressing merging parties' rebuttal evidence;**

4. **Expand and convert the "applications" guidelines 9-12 to a "narrative" of possible scenarios under which guidelines 1-8 might be applied;**

5. **Provide significantly more analytical guidance for evaluating "dynamic" market power scenarios, such as serial mergers or a trend toward concentration.**

[4] U.S. Dep't. of Justice and Fed. Trade Commn., Horizontal Merger Guidelines (Aug. 19, 2010), at Section I, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

II. Section II of the Final Guidelines Should Clarify That "Effects-Based" Analysis Under the Consumer Welfare Standard Remains in Force

Section II's Guidelines 1-8 represent "frameworks" under which, in the words of the draft, "a merger should not" result in outcomes that will substantially lessen competition.[5] Several of these describe theories of harm that have been pursued by government enforcers for decades. These include: highly concentrative mergers, mergers that eliminate head-to-head competition or a potential entrant, or increase the risk of anticompetitive coordination or vertical foreclosure. Guidelines 1-8 also more firmly establish or elucidate other theories of harm, including entrenchment or extension of a dominant position and a merger that occurs during a trend toward concentration.

The "frameworks" guidelines are the major way the draft Guidelines seek to strengthen merger enforcement. Indeed, two of these guidelines include presumptions that add to the existing structural presumption (guideline 1) that a highly concentrative merger is likely to substantially lessen competition.[6] For example, guideline 7 sets forth a 30% market share threshold, above which an acquisition by a dominant firm can substantially lessen competition by entrenching or extending its market position.[7] Guideline 6 establishes a 50% market share threshold, above which a vertical merger is likely to substantially lessen competition through foreclosure of rivals.[8]

To achieve the goal of invigorating enforcement, however, it is important that the agencies clearly explain how guidelines 1-8 should be interpreted by the government, merging parties, and the courts. For example, the final Guidelines should make clear that the focus is on how a merger can enhance a firm's incentive to exercise market power through control of (1) price (or quality or innovation) or (2) the exclusion of rivals. They should also make clear the importance of showing how trading partners (e.g., consumers, workers, smaller businesses, etc.) are likely to suffer from the exercise of enhanced market power through "effects-based" analysis. This includes the likely impact of a merger on: incentives to raise prices, lower quality or slow innovation, depress wages and benefits; or a loss of bargaining power that is implicit in the prevailing consumer welfare standard.

Guidelines 1-8 do not explain this important "pathway" to a finding that a merger is likely to substantially lessen competition. This disconnect could lead to unintended effects. For example, generalist federal district court judges, or those with less experience adjudicating antitrust cases, may interpret these "should not" guidelines literally, *i.e.,* as bright line tests, or could struggle with burdens of proof and burden-shifting in the course of litigation. PPI suggests, therefore, that the final Guidelines clearly articulate that the focus of guidelines 1-8 is on how a merger can enhance the incentive to exercise market power *and* that an "effects-based" analysis is an essential part of a determination that it could substantially lessen competition.

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[5] *Supra* note 1, at pp. 3-4.
[6] *Id.*, at p. 3.
[7] *Id.*, at p. 19.
[8] *Id.*, at p. 3.

III. The Final Guidelines Would Benefit From Better Balance in Caselaw Citation and Real-World Narratives Describing the Market Power Scenarios They Seek to Avoid

A major feature of the draft Guidelines is that they are the first to include a significant number of citations to the Section 7 caselaw. This caselaw spans the period 1948 through 2021. While the 2010 Guidelines were sometimes criticized as being too economics-driven, the draft Guidelines appear to overcorrect for this perceived imbalance. Indeed, citations to binding caselaw have ascended in the draft Guidelines, while most discussion of economic tools and analysis has been relegated to Sections III and IV and appendices.

PPI commends the drafters of the Guidelines for attempting to rebalance law and economics in what is likely to be the most important antitrust agency guidance to be issued in this decade. However, it is important that in the process, the agencies strive to provide both complete and balanced guidance to aid the government, the merging parties, and the courts. The final Guidelines could be improved along these lines in two important ways.

First, the bulk of citations are to cases litigated from the early 1960s through the 1970s.[9] It is widely accepted that antitrust enforcement slowed dramatically in the 1980s.[10] Thus, it comes as no surprise that the fewest citations in the draft Guidelines are to cases that span the mid-1990s through the mid-2010s. The period from 2009 to 2015, under the Obama administration, however, featured a high rate of forced merger abandonments, restructurings, and litigations.[11] Omissions of caselaw from this period works against the draft Guideline's goal of strengthening merger enforcement.[12]

For example, in 2015, the DOJ opened an investigation into the merger of commercial health insurers Anthem and Cigna that ultimately led to an injunction.[13] The case contains important legal precedent on the treatment of merger efficiencies, namely, that lower reimbursement rates to providers resulting from the larger insurer's enhanced buying power do not equate to cost savings for health plan subscribers.[14] This case set the stage for another successful injunction in the merger of Aetna and Humana.[15] The same is true of the DOJ's case against H&R Block and Tax Act, which would have led to a duopoly in tax preparation software.[16] In light of these cases, and others that occurred during a period of stronger antitrust enforcement, PPI urges the agencies to revisit, and expand as necessary, the body of caselaw cited in the draft Guidelines.

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[9] Based on a frequency distribution of the dates of cases cited in the draft Guidelines.
[10] *See, e.g.,* statement of former FTC Chair Robert Pitofsky, Film: Fair Fight in the Marketplace, AMERICAN ANTITRUST INST., https://vimeo.com/151190144. ["….antitrust enforcement was almost asleep during the 1980s," at minute 6:07-6:20].
[11] Rates are based on merger challenge outcomes as a percentage of clearances. Data collected from Fed. Trade Comm'n. and U.S. Dep't of Justice, *Hart-Scott-Rodino Annual Reports*, fiscal years 1993-2021, https://www.ftc.gov/policy/reports/annual-competition-reports. The rate at which the antitrust agencies forced the abandonment or restructuring or litigated mergers under the Obama administration (2009-2015) was 7.5% (of total clearances), as compared to 6.8% and 5.6% for the Clinton and Bush II administrations, respectively.
[12] *Supra* note 1, at pp. 5-6.
[13] U.S. v. Anthem Inc. and Cigna Corp., Memorandum Opinion, Case 17-5024 (D.D.C., Apr. 28, 2017), https://www.justice.gov/media/899001/dl?inline.
[14] *Id.*, at p. 6.
[15] U.S. v. Aetna, Inc., Memorandum Opinion, Case 1:16-cv-01494-JDB (D.D.C., Jan. 23, 2017), https://www.justice.gov/media/889241/dl?inline.
[16] U.S. v. H&R Block Inc., et al, Memorandum Opinion, Case 1:11-cv-00948-BAH (D.D.C., Nov. 10, 2011), https://www.justice.gov/d9/atr/case-documents/attachments/2011/11/10/277287.pdf.

Second, the rebalancing of legal doctrine and economics in the draft Guidelines would be supported by narratives that provide the courts with real-world illustrations of outcomes that the draft Guidelines seek to avoid. For example, application of guideline 1 would, among other scenarios, avoid highly concentrative "4-3" mergers. 4-3 mergers significantly raise the risk of anticompetitive coordination and have been shown empirically to raise prices.[17] The DOJ's success in forcing the abandonment of the 4-3 merger of wireless facilities-based carriers AT&T and T-Mobile in 2011 is a good illustration of the importance of enforcement against a highly concentrative merger.[18]

Another example is guideline 2. The courts would be aided by real-world examples of why a merger that eliminates a head-to-head rival is likely to enhance incentives to exercise market power and harm consumers, workers, and smaller businesses. The FTC's successful block of the merger of broadline food distributors Sysco and US Foods in 2015 is a leading example of how vigorous enforcement avoided higher prices to commercial and institutional buyers, and ultimately to the final consumer.[19] Similar examples are particularly important for illustrating "what to avoid" in the more novel theories of harm included in guidelines 1-8. PPI therefore urges the agencies to consider adding this narrative to the final Guidelines.

IV. The Draft Guidelines' Significantly Scaled Back Discussion of Efficiencies Will Likely Hamper the Government and Courts in Assessing Rebuttal Evidence

As noted in Sections II and III above, there is an obvious tension in the draft Guidelines around elevating legal doctrine at the expense of economic tools and analysis. This is apparent in the series of "should not" guidelines and little mention of the importance of "effects-based" analysis under the consumer welfare standard. However, because the draft stops short of making guidelines 1-8 *non-rebuttable*, it remains that the government, defendants, and courts will need to address merging parties' defenses to potentially harmful mergers. Moreover, if the government brings more complaints on the basis of guidelines 1-8, merging companies will be spending more time framing evidence and analysis to rebut government arguments.

PPI is concerned that the draft Guidelines do not give the government or courts the ammunition to effectively address rebuttal evidence. For example, Part 3 of Section IV of the draft Guidelines addresses procompetitive efficiencies but in a much shortened version of Section 10 of the 2020 Horizontal Merger Guidelines. Moreover, the discussion no longer articulates the burden on merging parties to show that claimed pro-competitive efficiencies will reduce the merging firm's incentive to raise price or reduce quality or innovation.[20] This trimmed-down discussion of pro-competitive efficiencies will make it harder for the government and courts to address rebuttal evidence.

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[17] *See, e.g.,* John Kwoka, *The Structural Presumption And The Safe Harbor In Merger Review: False Positives Or Unwarranted Concerns?* 81 ANTITRUST LAW J. (2017), 837.
[18] U.S. v. AT&T, Inc. and T-Mobile USA, Inc., et al, Complaint, Case 1:11-cv-01560 (D.D.C., Aug. 31, 2011), https://www.justice.gov/d9/atr/case-documents/attachments/2011/08/31/274613.pdf.
[19] Fed. Trade Comm'n. v. Sysco Corp., Memorandum Opinion, Case NO. 1:15-cv-00256-APM (D.D.C., Jun. 26, 2015), https://www.oag.state.va.us/consumer-protection/files/Lawsuits/Sysco-RedactedOpinion.pdf., at p. 89.
[20] *Supra* note 4, at Section 10. The 2010 Horizontal Merger Guidelines state, for example, that "In a unilateral effects context, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price."

In anticipation of this, PPI suggests that Section IV(3) be expanded to prepare for a higher volume of rebuttal arguments and evidence. For example, the section would benefit from the inclusion of findings from retrospective analysis and evidence of failed efficiencies claims in past mergers. This would be especially helpful in cases where the courts found rebuttal evidence compelling, but such mergers were quickly unwound and efficiencies were never realized.[21] This narrative should also include reference to the business literature that finds that revenue synergies, or claims that a merger will create benefits for consumers, are rarely achieved.[22]

V. Guidelines 9-12 Omit Important "Applications" and Should be Expanded and Recast as a "Narrative" on Possible Scenarios for the Application of Guidelines 1-8

Guidelines 9-12 explain issues that often arise when the Agencies "apply those frameworks in several common settings."[23] These applications incorporate more recent developments in the types and pattern of consolidation and more novel market definition and competitive effects concerns that have emerged since the 2010 Horizontal Merger Guidelines were issued. A leading example is guideline 11, which explains that a merger can substantially lessen competition in *any* relevant market.[24] Guidelines 9-12 also include applications such as mergers involving multi-sided markets, partial ownership acquisitions, and serial acquisitions.

The applications the draft Guidelines seek to highlight in guidelines 9-12 are important and will likely be useful to the agencies, merging parties, and the courts. However, it is unclear what criteria were used to determine what applications "made" this list and whether other important applications should also be on it. The "applications" guidelines could, therefore, present the government, merging parties, and courts with an incomplete set of applications, undermining the goal of invigorating merger enforcement.

For example, additional "application" guidelines could include scenarios involving markets that are dominated by only a few vertically integrated, multi-level "systems." Both agricultural biotechnology and healthcare are home to such systems, where further horizontal or vertical consolidation exacerbates barriers to entry to smaller rivals. If access to these systems is at risk of closing off entirely, merger review will need to address the appropriate framework for evaluating the effect of a transaction, such as competition *within* a system or competition *between* systems.[25] Another scenario that is a candidate for an "application" guideline is the "ecosystem" merger, where the acquisition of an application (e.g., healthcare, fintech, etc.) in a digital ecosystem could make it easier for the

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[21] *See, e.g.,* Letter from the American Antitrust Institute and Public Knowledge to AAAG Richard Powers, Re: Strategic Consolidation, Market Power, and Efficiencies in the Media/Entertainment and Distribution Markets: Implications for Antitrust Reviews of Proposed Mergers, (Sep. 2, 2021), https://www.antitrustinstitute.org/wp-content/uploads/2021/09/AAI_PK-Ltr-on-Warner-Media-Disc_9.2.21.pdf, at Section III.

[22] See, e.g., Scott A. Christofferson, Robert S. McNish & Diane L. Sias, *Where Mergers Go Wrong*, MCKINSEY QUARTERLY (May 2004), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/where-mergers-go-wrong. ["…most buyers routinely overvalue the synergies to be had from acquisitions," finding that almost 70% of the mergers in the database studied failed to achieve expected synergies related to obtaining access to a target's customers, channels, and geographies."]

[23] *Supra* note 1, at p. 2.

[24] *Id.*, at p. 4.

[25] American Antitrust Inst., Food & Water Watch, and National Farmers Union, Letter to AAAG Andrew Finch Re: Proposed Merger of Monsanto and Bayer (Jul. 26, 2017), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/White-Paper_Monsanto-Bayer_7.26.17_0.pdf.

merged firm to leverage market power into another market.[26] For example, the DOJ noted in Google's 2011 acquisition of Admeld that the acquisition would enable Google to extend its market power in Internet search to the display advertising market.[27]

The foregoing examples highlight that there are any number of important scenarios that could rise to the level of an "applications" guideline. For this reason, PPI suggests that the best way to situate this discussion so that it is useful to the government, merging parties, and the courts, is not through "applications" guidelines. Rather, the discussion of scenarios to which guidelines 1-8 could be applied should be expanded and included as a narrative in a new section or appendix of the final Guidelines.

VI. The Draft Guidelines Should Provide Significantly More Discussion of Dynamic Scenarios Such as Serial Merger or Trends Toward Concentration

The draft Guidelines introduce scenarios under which the accretion of market power via merger *over time* could be at the center of allegations that a merger is likely to substantially lessen competition. These include guideline 8, which contemplates review of mergers that may further a trend toward concentration, as reflected in the rate of rising concentration in a market.[28] Guideline 9 states that when a merger is part of a series of multiple acquisitions, the agency may examine the whole series. Under this guideline, the agencies would look at a firm's pattern or strategy of multiple acquisitions and challenge it even if no single acquisition would risk a substantial lessening of competition or tend to create a monopoly.[29]

The intent of guidelines 8 and 9 is rooted in established concerns over rising concentration and strategies designed to consolidate and entrench market power by buying up rivals. Research shows that "growth through acquisition" has become a business model for some companies, including firms like Autodesk, the dominant purveyor of construction industry software,[30] and Salesforce, a fast-growing player in the markets for cloud-based technology and CRM software.[31] For any number of reasons, including transactions that were not reportable under the Hart Scott Rodino filing requirements, most of these acquisitions have gone unchecked by antitrust enforcers.

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[26] Diana L. Moss, Gregory T. Gundlach, and Riley T. Krotz, *Market Power and Digital Business Ecosystems: Assessing the Impact of Economic and Business Complexity on Competition Analysis and Remedies*, American Antitrust Inst. (Jun. 1, 2021), https://www.antitrustinstitute.org/work-product/aai-issues-report-market-power-and-digital-business-ecosystems-assessing-the-impact-of-economic-and-business-complexity-on-competition-analysis-and-remedies/.

[27] U.S. Dept. of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Admeld Inc. (Dec. 2, 2011), https://www.justice.gov/opa/pr/statement-department-justices-antitrust-division-its-decision-close-its-investigation-google. Likewise, the European Commission's concern in Google's acquisition of fitness wearables maker, Fitbit, was the potential extension of Google's enhanced market power in the market for health and fitness data to the broader ad-tech market. Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions, European Commission (Dec. 17, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

[28] *Supra* note 1, at p. 4.

[29] *Id.,* at p. 4.

[30] *See, e.g., Architects Versus Autodesk*, ARCHITECT (Aug. 27, 2020), https://www.architectmagazine.com/technology/architects-versus-autodesk_o

[31] Diana L. Moss and David Hummel, *Anticipating the Next Generation of Powerful Digital Players: Implications for Competition Policy*, AMERICAN ANTITRUST INST. (Jan. 18, 2022), https://www.antitrustinstitute.org/work-product/new-aai-analysis-unpacks-acquisitive-growth-by-digital-firms-warns-of-next-wave-of-expansion-and-need-for-sector-wide-approach-to-competition-policy/, at p. 10.

Similarly, mergers in airlines and agricultural biotechnology have generally occurred against the backdrop of rising concentration in relevant markets. For example, in 2015, six firms competed in the global market for the sale of seeds and agro-chemicals. In a two-year period, those six firms had merged to only three firms.[32] Likewise, the domestic passenger airline service market has been home to mergers that have eliminated seven major carriers in the last 17 years, resulting in the current Big 4 oligopoly.[33] Any further consolidation in these sectors, therefore, would occur against a backdrop of a trend toward concentration.

For these reasons, guidelines 8 and 9 are important. But without further clarification, the courts could stumble on how to apply them. For example, in cases presenting such concerns, how will the government decide what period of time encompasses a trend toward concentration, or what "set" of previous acquisitions by a serial acquirer would be evaluated? To answer these questions, and provide clarity, predictability, and administrability, PPI suggests that the final guidelines include significantly more detail and examples.

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PPI appreciates the opportunity to present comments and suggestions on the draft Guideline.

Respectfully submitted,

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/s/ Diana L. Moss_____

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[32] James M. MacDonald, *Mergers in Seeds and Agricultural Chemicals: What Happened?* U.S. Dep't. of Ag., Econ. Research Svc. (Feb. 15, 2019), https://www.ers.usda.gov/amber-waves/2019/february/mergers-in-seeds-and-agricultural-chemicals-what-happened/.

[33] Diana L. Moss and Randy Stutz, *Airline Joint Venture Agreements: Assessing Impact on Consumers and Labor*, AMERICAN ANTITRUST INST. (Nov. 21, 2022), at p. 2, https://www.antitrustinstitute.org/wp-content/uploads/2022/11/Airline-Joint-Ventures_Final_11.21.22.pdf.