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THE FTC AND DOJ'S DRASTIC REVISION OF THE MERGER GUIDELINES FUNDAMENTALLY MISUNDERSTANDS THE ECONOMIC REALITIES OF MERGER ACTIVITY

On July 19, 2023, the FTC and DOJ released a draft version of their updated merger guidelines, which could greatly limit companies' ability to innovate and grow. As yet another example of the agencies' recent regulatory overreach, **the drastic changes taken by the FTC and DOJ fundamentally misunderstand the nature of mergers and merger enforcement.**

Here's what you need to know about the new merger guidelines and the issues they pose to businesses and consumers:

1 Mergers inject resources that help companies and industries grow.

Mergers and acquisitions are a catalyst for economic activity and wellbeing in the U.S.—benefiting consumers, workers, and businesses. The new guidelines, however, limit growth and are a "substantial risk," according to Former Treasury Secretary Larry Summers. The International Center for Law & Economics (ICLE) states, "they deter merger activity as a whole, regardless of the risk posed to competition."

2 Merger guidelines are meant to help companies comply with existing laws, not to shift goalposts and change the law.

We must periodically review merger guidelines to reflect current practices, market realities, and economic learning: Given that today, less than 3% of merger transactions raise any competitive concerns, it is illogical to "create new concepts" based on outdated information. ICLE points out that the average year of cases cited in the new guidelines is 1982, whereas the average year weighted by number of cites is 1975. The U.S. Chamber of Commerce warned the new guidelines are "a back door attempt to change the law and ignore judicial precedent."

3 Changes to merger guidelines will disproportionately harm small to medium-sized businesses.

Furthermore, the U.S. Chamber of Commerce argues that the guidelines deny smaller companies access to the capital and expertise they need. These guidelines not only diverge from a consumer-oriented focus, but also obstruct competitive mergers altogether.

4 Changes to merger guidelines should be based on evidence, not politics.

The FTC and DOJ's new guidelines institutionalize the administration's agenda on antitrust law and are lacking bipartisan support. Such politically-motivated actions will deteriorate the credibility, independence, and expertise of the federal agencies, ignore the latest economic evidence of vertical mergers, and fail to incorporate the most recent cases. As Carl Shapiro and Jason Furman put it in the Wall Street Journal: Merger guidelines "Shouldn't become a debatable legal brief or, worse, a political football."

5 The guidelines disproportionately target innovative companies.

The Draft Guidelines take particular aim at acquisitions made by US tech firms, discouraging innovation by reducing the potential rewards that induce firms to innovate in the first place. For example, exits via acquisitions are about five times more likely than IPOs for technology ventures — creating an ex-ante incentive to innovate. In addition, investors evaluate regulatory risks as part of their due diligence when considering an investment; excessive regulatory risks and reduced exit opportunities can deter investors from investing, particularly in the early and growth stages of ventures. And as Luke M. Froeb, D. Daniel Sokol, and Liad Wagman pointed out in their recent report, the Draft Guidelines provide very little guidance about current practice, adding excess risk — "which seems to be the point."

Mergers are an essential part of industry growth and innovation. The misguided new guidelines are based on evidence that is not only outdated but inapplicable to the modern economic landscape. **Readers can submit comments to the Agencies until September 18th.** To learn more about the merger guidelines, click here.