February 26, 2025

The Honorable Andrew N. Ferguson
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, District of Columbia 20580

Chairman Ferguson:

ACT | The App Association is a global trade association for small and medium-sized technology companies. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. Today, the U.S. digital economy is worth more than $1.8 trillion annually and provides more than 6.1 million American jobs.[1] We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology.

Last week, you announced that, despite the change in Administrations, the 2023 joint Merger Guidelines of the Federal Trade Commission (FTC) and Department of Justice (DOJ) remain in effect and will continue to be the framework within which the FTC analyzes mergers.[2] The announcement came despite President Trump's nominee to lead DOJ's Antitrust Division not yet receiving a vote in the Senate Judiciary Committee let alone the full Senate. Since the guidelines were adopted jointly between the FTC and DOJ, it appears premature to have affirmed them before DOJ's incoming personnel has a meaningful chance to disagree. In justification of this decision, you cited the importance of regulatory stability for businesses and limited agency resources.

While it is true generally that businesses benefit from regulatory stability, it is also true that a change in Administration provides an opportunity to revisit and improve upon existing policies. Similarly, maintaining the 2023 Guidelines fails to provide any continuity because they do not reflect current antitrust law as it applies to mergers and do not provide meaningful guidance to merging parties or courts as to the kinds of transactions that do

[1] ACT | The App Association, *State of the U.S. App Economy: 2023*, https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL-1.pdf.
[2] Press release, "FTC Chairman Andrew N. Ferguson Announces that the FTC and DOJ's Joint 2023 Merger Guidelines Are in Effect" (Feb. 18, 2025), available at: https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-chairman-andrew-n-ferguson-announces-ftc-dojs-joint-2023-merger-guidelines-are-effect

not generally raise antitrust concerns. Likewise, if DOJ's Antitrust Division rightfully decides to withdraw from the 2023 Guidelines once its leadership is in place, the resulting split in agency policy will not serve any regulatory stability interest and will instead lead to unnecessary and debilitating confusion. We therefore respectfully submit the following perspective on the FTC-DOJ joint Merger Guidelines so that, when agency resources allow, the policy may be improved to better support small business.

We share the FTC's and DOJ's goals of protecting competition through appropriate guidelines that elevate the dynamic and diverse digital economy for the small business community. However, we believe that the last Administration's updates to the merger guidelines discourage pro-competitive and pro-consumer mergers that are a primary pathway for success for our small business and startup community, ultimately dampening innovation across industries.

Success for a startup or small business can take a variety of forms and be accomplished through different means, including but not limited to being acquired by a larger company with the resources and knowledge to improve the product and/or streamline market entry or an initial public offering (IPO) all to the benefit of end-consumers. Acquisition is often the best of these options for the business owner(s) and consumers, as IPOs are expensive and fraught with risk and thus reduces likelihood of consumer benefit.[3] App Association members often start their businesses with the understanding that once they have brought their idea to fruition, their business may be acquired, allowing them to move on to develop new businesses. The U.S. economy and consumers have benefitted immensely from our members' freedom to combine the novel products they create with the resources, technical knowledge, and commercial knowledge of businesses that later acquire their innovations. A merger that helps deliver better products or services for consumers is both an outcome our members seek and desirable from a competition policy standpoint. Previous merger enforcement guidance echoed this understanding.[4] The last Administration's updated FTC- DOJ merger guidelines are having and will continue to have significant long-term, negative effects on our members' businesses' ability to innovate and compete, affecting our ability to fully realize success.

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[3] *See* Will Rinehart, "Welcome to the Kill Zone? A closer look at merger and start-up data suggests it's a cultivation zone," THE BENCHMARK (Feb. 27, 2020), *available at* https://medium.com/cgobenchmark/welcome-to-the-kill-zone-852339601fbb ("For startups, going public isn't a sure path to success. Companies typically sign away 4 to 7 percent of their gross proceeds to an investment bank to sell shares of the stock. They also tend to incur an additional $4.2 million in costs to go through the process of getting listed. On top of this, a company will have to fork over another $1 to $2 million for federal compliance every year. Most IPOs perform worse than the overall market.").

[4] *Vertical Merger Guidelines*, DOJ, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf (recognizing that vertical mergers often benefit consumers); *Horizontal Merger Guidelines*, DOJ, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 (advising that the agencies should avoid obstructing mergers that are either competitively beneficial or neutral).

Going forward, the FTC has the opportunity to restore to the guidelines a deference to thorough economic analysis as a foundation of any merger review or enforcement. The last Administration's guidelines disregard these principles, reject decades of new economic and legal experience, and do not appropriately guide businesses through the competitive analysis. Instead, they list only barriers, without founded justifications, to what would otherwise be pro-consumer, pro-competitive merger activity. Diminishing the role of, or eliminating, economic analysis from the merger guidelines produces uncertainty for us and harms our ability to achieve success through pro-competitive mergers. In future updates, merger guidelines should avoid making policy-level decisions based on edge cases or hypotheticals that do not reflect the reality of our business environment. Further, the FTC should ensure that its guidelines do not frame mergers as innately anticompetitive or harmful for consumers.

Building on the above, we have significant concerns with the previous Administration's shift in approach that significantly lowered the threshold to which a merger is presumed to be anticompetitive through substantial departures from both agencies' well-grounded approach to mergers. Notably, in its updates to merger guidance, the FTC-DOJ under the Biden Administration reduced its reliance on the Herfindahl-Hirschman Index (HHI) and market share metrics that both agencies, and the private sector, have long relied on; asserted that a 30 percent market share in any relevant market is a *per se* violation of Section 7 of the Clayton Act and that firms in such a position will be subjected to increased scrutiny; and established that a vertical merger that would exclude a competitor from accessing over 50 percent of the relevant market is *per se* illegal. We consider those sweeping shifts in policy by the last Administration to broadly discourage pro-competitive transactions that our members rely on to succeed as a small business innovator community without benefit to the public.

Further, many of the last Administration's changes to its merger guidelines were based on unsupported or outdated legal theories with respect to market definition and competition law, many of which the courts have widely rejected. Such theories include the FTC-DOJ's assertion that a merger resulting in a dominant firm in one market entering a new and different market that firm is not present in may violate Section 2 of the Sherman Act in addition to Section 7 of the Clayton Act; that a firm engaging in an "anticompetitive pattern" of multiple small acquisitions may violate Section 2 of the Sherman Act in addition to Section 7 of the Clayton Act, even if no individual acquisition would violate the antitrust laws; alleging that mergers result in lowered wages/reduced wage growth, diminished worker conditions and benefits, and reduce workplace quality; and taking inappropriately narrow approaches to market definition that disregard significant substitutes. Indeed, the last Administration's goal of updating its guidelines to address the modern economy was at odds with its wide reliance on cases from the 1970s and earlier, rather than recent case law (including those decisions addressing its theories and rejecting them) that reflects accepted ideas like the consumer welfare standard. As a result, the last Administration's merger guidelines have introduced confusion into the U.S. economy and reduced the impact and deference the guidelines have.

Given these considerations, we urge you to work with DOJ's Antitrust Division to repeal the 2023 guidelines and instead adopt a set of guidelines that reflect established antitrust law as it applies to mergers and acquisitions and support the needs of innovative small businesses to engage in pro-competitive transactions that widely benefit consumers. We appreciate the consideration of our views above and welcome the opportunity to collaborate with the FTC on ways to advance competition and consumer protection across American markets.

Sincerely,

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