

February 26, 2020

The Honorable Makan Delrahim, Assistant Attorney General
United States Department of Justice Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Joseph Simons, Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comment on DOJ/FTC Draft Vertical Merger Guidelines (P810034)

Dear Assistant Attorney General Delrahim and Chairman Simons:

Consumer Technology Association® (“CTA”)¹ appreciates the opportunity to comment on the draft 2020 Vertical Merger Guidelines (“Draft Guidelines”) released by the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) (collectively, the “Agencies”).²

As the Agencies aptly have noted, it is well past time to update the guidance on vertical mergers, which was last revised in 1984.³ Since that time, the U.S. economy has changed markedly, to say the least. In the consumer technology marketplace, for example, 1984 was the year the original Macintosh computer and Sony Discman were introduced. Microsoft had

¹ As North America’s largest technology trade association, CTA® is the tech sector. Our members are the world’s leading innovators—from startups to global brands—helping support more than 18 million American jobs. CTA owns and produces CES®—the largest, most influential tech event on the planet.

² U.S. Dep’t of Justice & Fed. Trade Comm’n, Draft Vertical Merger Guidelines, Released for Public Comment on January 10, 2020.

³ See, e.g., Fed. Trade Comm’n, Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law, Nov. 1, 2018.

not yet rolled out its Windows operating system, and the Nintendo video game console had not yet arrived in the United States. At the 1984 Winter Consumer Electronics Show, top products on display included a double-density, double-sided floppy disk drive from Coleco, a Timex thermal printer with a speed of two lines per second, a 14-inch composite video color monitor from Samsung with 250 x 320 pixel graphics resolution (compared to today's ultra HD resolution of 7680 x 4320), a word processing program for the Commodore 64 (touted for its ability to move blocks of text), American Tourister hard-sided computer carrying cases, and "micro TV sets" from Casio and Citizen. Indeed, technology has evolved so rapidly and expansively over the past 35 years that, in some cases, 1984 may as well be 1884. Accordingly, CTA welcomes the withdrawal of the 1984 Non-Horizontal Merger Guidelines,⁴ to be replaced with guidance that offers industry greater transparency and certainty for current-day mergers and acquisitions—and that better tracks and explains the Agencies' contemporary practices.

The Agencies Should Make Available Clear and Transparent Rules of the Road

Many vertical mergers are competitively beneficial or neutral, allowing companies to grow and change, using increased scale and efficiencies to provide better value to consumers. Of course, some may not be. The Agencies have an important role to play in determining which transactions are anticompetitive and in challenging such transactions; their work ensures the marketplace is a fair place for all companies in all sectors to compete. Yet although the Agencies' practices have evolved since the 1984 guidance, the public has not received any comprehensive information on the more modernized approach. Companies subject to antitrust merger review cannot predict with certainty the process and analytical framework that government will apply, and this lack of information may cause delays or inhibit competitively beneficial acquisition activity. Clearly and transparently communicating the current rules of the road will benefit companies in the tech space and beyond, as certainty spurs innovation and investment in direct response to consumer demand. For example, it will be useful to CTA member companies to access a formalized compilation of the Agencies' current thinking on potential anticompetitive effects resulting from vertical mergers, the Agencies' analytical framework for analyzing those effects, and helpful examples.

The Agencies Should Not Impose Additional Burdens on Industry

The benefits of greater understanding of the Agencies' approach to vertical mergers will be lost, however, if the processes set forth in new guidelines impose additional burdens on industry—in terms of cost, time, or otherwise. Particularly in the tech industry, the heart of U.S. innovation and rapid change, such burdens would impede progress that contributes to U.S. global leadership and benefits consumers. Instead, throughout this process, the Agencies should adhere to their stated purpose of reflecting their current enforcement approach, rather than using the process to expand or develop new regulatory principles or priorities. Now is not the time for the Agencies to determine new theories of what transaction reviews "should" encompass. It is not the time to create a comprehensive framework that does not already

⁴ U.S. Dep't of Justice & Fed. Trade Comm'n, Non-Horizontal Merger Guidelines (1984).

exist. Rather than bring greater certainty, any sizable departure from the Agencies' current approaches would actually create more confusion in the marketplace. It also could substantively impede innovation by adding costs and time to the acquisition process.

Moreover, with a small but loud faction of policymakers here and abroad seeking radical departures from tried-and-true antitrust approaches, the market is watching any and every signal from the Agencies very closely. To that end, the Agencies should not undermine the new certainty and predictability they are poised to create through the guidelines by suggesting—either expressly or implicitly—that they would consider unraveling or otherwise penalizing acquisitions long after consummation. Companies have a right to know what the law is when they enter into a transaction. And they have the right to expect that the rules will not later change retroactively. Concerns that the Agencies might in the normal course look to turn back the clock and take action to unwind a merger would lead to substantial business uncertainty. This, in turn, could lead to stagnation in the most vibrant of industries. Merger retrospectives that even hint at the possibility of unwinding transactions would not just be a look backward; they would have a negative impact on innovation.

The Agencies Should Ensure Their Efforts Do Not Impede Innovation

Policymakers, industry, and consumers all benefit when government has a stronger understanding of technology and economics. This is why, through CES and many other efforts, CTA works to educate policymakers on new technologies and business models.⁵ It is laudable for the Agencies to seek to deepen their understanding of how the technology industry and marketplace work, such as through the FTC's recent hearings on competition and consumer protection in the 21st century. CTA appreciates that the tech sector is a focus for both its rapid, consumer-friendly innovation and its acquisition activity. However, the government must tread carefully and not adopt assumptions that lack factual bases regarding anticompetitive behavior. The tech sector is comparatively young when considered next to other industries that contribute significantly to U.S. GDP, such as insurance, professional services, real estate, health care, construction, and transportation⁶ -- many so-called "internet giants" are themselves just adolescents compared to mature market leaders in other industries that have survived vigorous competition for decades and decades. Meanwhile, competition in the tech sector is fierce, with record levels of R&D investment and a thriving startup scene. In the internet space, the marketplace works to replace bad players because financial barriers to entry are lower. And when the marketplace cannot provide corrections, guardrails against specific bad behavior can.

Leading in innovation is, and must be, our national strategy. It drives economic growth and creates jobs. This did not happen by magic: Our nation took calculated risks and passed thoughtful laws that have allowed innovation to flourish. These laws encourage new

⁵ Gary Shapiro, CES 2020: Why our leaders need to look to Las Vegas, Opinion, Fox News (Jan. 6, 2020) <https://www.foxnews.com/opinion/ces-2020-leaders-las-vegas-gary-shapiro>.

⁶ See U.S. Department of Commerce, Bureau of Economic Analysis, GDP By Industry, <https://www.bea.gov/data/gdp/gdp-industry>.

businesses by not overregulating entrepreneurship. Thus, above all, in updating the vertical merger guidelines and in any related initiatives, the Agencies should ensure that their efforts to uphold the nation's antitrust laws do not impede innovation.

In sum, in issuing new vertical merger guidelines, the Agencies have an opportunity to provide meaningful transparency and much-needed certainty. They can do so without undermining American innovation and ingenuity through burdensome process and retroactive merger reviews. CTA welcomes the opportunity to be a resource to the Agencies as they balance these goals.

Sincerely,

/s/ Michael Petricone
Michael Petricone
Sr. VP, Government and Regulatory Affairs

/s/ Jamie Susskind
Jamie Susskind
Vice President, Policy and Regulatory Affairs