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Comments of Omidyar Network on Draft Vertical Merger Guidelines

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Omidyar Network ("ON") is a global network of innovators, entrepreneurs, technologists, advocates, investors, activists, and organizations committed to addressing the most critical economic, technological, and societal issues of our time. ON is pleased to offer these comments on the Draft Vertical Merger Guidelines ("Draft Guidelines").

ON believes that certain firms operating in digital markets have achieved dominance, and that this dominance has allowed these platforms to amass and exercise unparalleled social and political power, threatening our individual freedoms, our economies, and even our democratic institutions. Further, the platforms have achieved this dominance – in part through acquisitions – with virtually no check or oversight by regulators or the courts.

For this reason, we applaud the effort to update the 1984 non-horizontal guidelines to conform more closely to modern economic thinking. But we offer these comments because we do not believe the Draft Guidelines adequately address the competitive dangers that are specific to acquisitions affecting digital markets. The guidelines, including the explanatory examples, explain how the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") will analyze a merger between an orange grove and a juice producer, and a part supplier and a car manufacturer. But they offer little insight into whether or how the agencies will evaluate acquisitions by platforms of firms offering complementary or adjacent services, or that provide the merged firm with customer data that might give it an unfair advantage over rivals, or that might result the merged firm's providing a degraded or even dangerous user experience.

The failure specifically to address the ways in which non-horizontal mergers can harm competition in digital markets is especially worrisome in light of the announcement earlier this month that the FTC has requested five of the largest tech companies to submit information about all of their acquisitions in the last decade. The FTC asserts that the information will help it understand "whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors."[1] But given the Draft Guideline's silence on core questions about what makes an acquisition in these markets "anticompetitive," it is difficult to know how the FTC will evaluate these past mergers, and what lessons it might learn from this review or draw upon to police mergers going forward.

We therefore suggest that the agencies consider revising the Draft Guidelines in three specific ways:

1. *The Final Guidelines Should Make Clear That They Apply to Acquisitions of Firms That Provide "Complements" or "Adjacent Services"*

ON is concerned that the decision to name the guidelines *Vertical* Merger Guidelines, together with the definition of vertical mergers set forth in the Draft Guidelines at page 1 n.2, will cause certain potentially anti-competitive transactions affecting digital markets to evade review.

Specifically, it is not clear that the Draft Guidelines would apply to the evaluation of an acquisition by a platform of a firm that provides a service that is "complimentary," or "adjacent," to the services provided by the platform. An example would be the acquisition by Twitter, a social messaging service, of Vine, a video sharing application.

The Draft Guidelines indicate that a merger is "vertical" if one of the merging partners is "closer to final consumers" and the other is "farther from final consumers."[2] In the case of the merger of Twitter and Vine, though, both parties had direct interactions with users, and so it is not clear the Draft Guidelines would apply.

And yet this is precisely the sort of anticompetitive merger we know can present a significant danger to the competitive functioning of digital markets. This is because platforms, especially dominant platforms, have an incentive to prevent

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[1] *See* Press Release, FTC to Examine Past Acquisitions by Large Technology Companies, available at https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies

[2] *See* Draft Guidelines at 1 n.2.

their partners and new entrants from engaging in what is called disintermediation – a disruption of the relationship the dominant platform has with its users.[3]

Disintermediation is a key tool by which firms offering a service alongside the service offered by a popular platform can compete for the platform's users, as well as for valuable information about those users. A logical competitive step for the popular platform, therefore, is to acquire the firm offering that complementary service, and then steer its users to the complement it now owns (thus blunting the ability of the complementary service provider to engage in disintermediation and therefore eliminating its competitive threat). The popular platform, alternatively, might acquire the complementary service provider just to shut it down altogether.

Indeed, that is precisely what Twitter did after buying Vine; it shut it down.[4] We do not by this observation mean to suggest that Twitter's acquisition necessarily was anticompetitive or that the purpose was to enable Twitter to squelch a potential rival, only to note that the Draft Guidelines, as written, imply that this acquisition might be beyond their reach.

The DOJ and FTC should rethink both the name of these Draft Guidelines, as well as the explanation of the sorts of acquisitions to which they apply. Otherwise, the Final Guidelines risk directing the agencies and court to ignore an entire category of transactions that pose particular threats to digital markets.

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[3] *See*, *e.g.*, Stigler Center for the Study of the Economy and the State, Final Report of the Committee on Digital Platforms (2019) [hereinafter Stigler Report] at 72 ("If a platform's partner is able to directly access and serve the platform's customers, it can overtake the platform."). Indeed, some commentators have suggested that, because acquisitions by dominant digital firms of complements and adjacent service providers are so intrinsically dangerous to the functioning of digital markets, the agencies should adopt a "Dominant Platform Presumption." *See* Baker, Rose, Salop & Scott-Morton, *Five Principles for Vertical Merger Enforcement*, 33 Antitrust No.3 (2019) at 17 ("Rivals in vertically adjacent or complementary markets are often potential entrants, so this presumption reaches nascent threats to competition created by eliminating the potential entrants through the merger."). Because of the societal harms ON believes the dominant firms currently are inflicting, and its belief that competition could ameliorate some of those harms, ON fully concurs that the agencies should adopt this dominant platform presumption.

[4] *See* Stigler Report at 72 n.147.

2. *The Final Guidelines Should Clarify How the Agencies Will Analyze Acquisitions That Provide the Merged Firm with Valuable User Data*

ON also is seriously concerned that the Draft Guidelines say nothing about how the DOJ and FTC will evaluate the competitive dangers of acquisitions in which the acquiring firm stands to obtain access to valuable user data – data that it then might use to cement its market position and exclude rivals.

Platforms – whether they provide a search engine, facilitate e-commerce, or offer social networking – are funded principally through the sale of display ads and sponsored content. It is a truism that the more data these platforms gather about their users, the better positioned they are to sell targeted advertising and opportunities for sponsored content to businesses that want to reach those users. This means that access to the data owned by or available to a potential acquisition target can be among the most important justifications for an acquisition that affects digital markets.

As just one example, when Amazon acquired Whole Foods – clearly a vertical merger – it didn't just purchase the right to share the profits (if any) Whole Foods makes by selling high-priced groceries. It also acquired access all of the purchasing and other data that Whole Foods collects about its upscale customers. At least theoretically, Amazon can use that robust data to charge higher prices to advertisers (to their possible detriment). It also can stake out an informational advantage vis-à-vis other competing e-commerce platforms, making it more difficult for the competitors to attract advertisers, to their possible detriment or even forcing them to exit.

Given the overriding importance of user data to the financial health of digital platforms funded by advertising, it seems almost antiquated that the Draft Guidelines omit any discussion of how the DOJ and FTC will evaluate the potential anticompetitive effects of mergers that provide the merged firm with increased access to user data. The Final Guidelines should expressly explain how the agencies will address this feature of proposed mergers.

3. *The Final Guidelines Should Explain How the Agencies Will Evaluate Consumer Harm When an Acquisition Could Degrade the User Experience of a "Free" Service*

ON's concerns about the unchecked power of platforms are not merely theoretical. Rather, we believe have that platforms have, in many cases, polluted online discourse, targeted vulnerable populations, weaponized online information, degraded journalism, contributed to excessive surveillance, damaged mental health, promoted addictive behaviors, and undermined democratic processes.

It therefore is disappointing that the Draft Guidelines – consistent with their general silence about how they will be applied in digital markets – say nothing about whether or how the agencies will evaluate these sorts of quality harms in considering the competitive effects of mergers affecting digital markets.

Digital markets in particular call out for clarity on this point because the majority of platforms offer their services purportedly for "free." It therefore is unclear whether traditional methods for predicting price and output post-merger (including through economic modeling) will fully capture the competitive dangers, or the potential consumer harms, of a proposed merger.

We know, for example, that platforms utilize a variety of AI-driven techniques to grab and keep our attention so that they can serve us with more and more advertising. Social science is beginning to demonstrate that some of these techniques may be harmful or addictive.[5] Some techniques – such as the practice of suggesting increasingly violent, misogynistic, or racist content in order to keep a user's attention – might correctly be deemed to constitute evidence of a low-quality product.[6]

It is not difficult to imagine a merger that, because it gives the merged entity access to increasingly detailed user data, renders the merged firm better at deploying these dangerous techniques than either firm was pre-merger, while simultaneously raising barriers to entry for potential entrants that might have competed by electing *not* to rely on these techniques. The common-sense prediction is that the merger's potential foreclosure of that hypothetical entrant would cause more people to be exposed to more and more of these dangerous

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[5] *See id*. at 64.

[6] *See id*. at 65.

techniques. Of course, given the current economic model of most platforms, all users would continue to receive services from the merged firm purportedly for free.

Yet the Draft Guidelines say nothing about whether the agencies will recognize as consumer harm the possibility that a merger could lead to quality harms of this sort. Indeed, as other commenters presumably will note, the Draft Guidelines could be read actually to preclude the agencies from taking such considerations into account. That is because the Draft Guidelines seem to suggest that the agencies will require quantification of the harms and benefits of any proposed merger. For example, the discussion of unilateral effects in the Draft Guidelines discusses simulation models. The Draft Guidelines also discuss evaluation of the potential profitability of foreclosure, which also would seem to require detailed quantification.

The Final Guidelines should instead make explicit that the agencies will not require this sort of quantification of harms and benefits. The Final Guidelines also should make explicit that the agencies will consider quality degradations of the sort described above to constitute consumer harm, even when the merged firm will continue to offer its services purportedly for free.

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The Draft Guidelines represent a significant step forward in ensuring that vertical mergers will be reviewed in line with modern economic analysis. But they miss a critical opportunity to wrestle with and explain how the agencies will monitor mergers affecting digital markets. Certain digital platforms have achieved dominance, in large part through acquisitions, to the detriment, we think, of society and of platform users. There is no reason to think that platforms will not continue their prior pattern of acquisitions that maintain or increase that power. Given that danger, Omidyar Network urges the agencies to issue Final Guidelines that specifically address the features of competition in digital markets, and the unique dangers that mergers affecting those markets can pose.