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The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Chair Khan and General Garland,

On behalf of the more than one million members and supporters of Citizens Against Government Waste, I offer the following comments in response to the [draft merger guidance](#) released on July 19, 2023.

The draft merger guidance being issued by the agencies will reduce competition, impose burdensome requirements on businesses across all industries making it more difficult for small businesses to compete, reduce U.S. competitive leadership globally, particularly against foreign governments like China and Russia, and disincentivize our nation's innovation economy. The 13 merger guidelines presume that our economy lacks competition, and this must be foremost in the eyes of regulators when approving or disapproving mergers or acquisitions. This assumption is false and instead demonstrates a lack of understanding of what is in the best interest of the consumer.

The guidelines are premeditatively anti-merger and demonstrate the will at both agencies of prohibiting rather than approving mergers. The guidance also imposes new barriers to small businesses seeking to succeed and grow in the marketplace and make it more difficult for small innovators to sell their services to a larger company that can expand their brand. These adverse impacts of the merger guidance echo the comments provided in an April 19, 2022, letter from a coalition of industry groups that, "Through the RFI, the agencies suggest that most mergers harm competition and that the agencies can revisit foundational issues of antitrust law through revising the guidelines. In these respects, the RFI is misguided. We would urge the agencies to abandon an unconstrained approach to merger law. Instead, as before the agencies should update the guidelines – not rewrite them – in an incremental fashion to build on their long and successful record of informing the courts, agencies, and business community."¹

In his July 24, 2023, [article](#) U.S. Chamber of Commerce Senior Vice President for International Regulatory Affairs & Antitrust Sean Heather wrote, "The Federal Trade Commission and Department of

¹ Coalition Response to Request for Information on Merger Enforcement, Letter to the Department of Justice, Antitrust Division, and the Federal Trade Commission, April 19, 2022, <https://www.siiia.net/wp-content/uploads/2022/04/FINAL-Merger-Coalition-Letter-4-18-22.pdf>.

Justice are likely to use these guidelines and form to grant themselves discretion to reject more mergers without regard for what the evidence shows.” Mr. Heather further noted, “Under the current administration, these agencies have repeatedly utilized every available tactic to chill, delay, block, and unwind U.S. mergers – irrespective of any evidence that those mergers would harm consumers. In fact, it has now been more than two years since the agencies announced a suspension of grants of early termination – a process that quickly cleared mergers raising no competitive concerns.”²

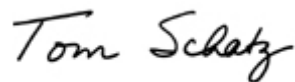
The recent series of highly visible judicial [failures](#) of the FTC in courts to prevent mergers, or dismantle companies through regulatory fiat, appears to be the impetus for the agencies to attempt to circumvent both the judicial and legislative branches of the government to unilaterally rewrite the rules.³

Instead of focusing on the consumer welfare mission, the FTC, and in turn the rules, are focused on “potential competitive harm,” when evaluating merger agreements. Rather than protecting consumers or preventing monopolies, the guidance will create a business atmosphere of fear that the federal government will take away a company’s ability to succeed.

An [evaluation](#) of the 13 merger guideline points in the draft document was provided in an August 3, 2023 Latham & Watkins client alert, which noted that, “The New Guidelines’ expansive approach to merger enforcement brings in new, largely untested theories of antitrust harm and significantly lowers the standards by which the Agencies say they will presume a merger is substantially likely to lessen competition. The New Guidelines lack force of law, but they do illuminate how the Agencies currently approach merger enforcement and what types of transactions are likely to draw regulatory scrutiny.”⁴

Instead of adopting novel merger guidelines that will damage not only domestic companies but also U.S. global competitiveness, the agencies should refocus their efforts on consumer welfare and promulgate policies that will increase competition and innovation.

Sincerely,



² Sean Heather, “New Merger Guidelines Undercut Competitiveness,” U.S. Chamber of Commerce, July 24, 2023, <https://www.uschamber.com/finance/antitrust/new-merger-guidelines-undercut-competitiveness>.

³ Kyle Peterson, “The FTC Loses Another Antitrust Court Case,” *The Wall Street Journal*, July 12, 2023, <https://www.wsj.com/podcasts/opinion-potomac-watch/the-ftc-loses-another-antitrust-court-case/ae3b34be-770b-4d87-9d6c-79c4cfba5d31#:~:text=And%20Allysia%2C%20this%20is%20another,and%20a%20virtual%20reality%20company>.

⁴ Latham and Watkins, “Client Alert: The DOJ and FTC Draft Merger Guidelines: Key Takeaways,” August 3, 2023, Number 3137, <https://www.lw.com/admin/upload/SiteAttachments/The-DOJ-and-FTC-Draft-Merger-Guidelines-Key-Takeaways.pdf>.