NEXTGEN COMPETITION

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Lina Khan
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RE: Draft Merger Guidelines (Docket FTC-2023-0043)

We submit the following comments in support of the new Draft Merger Guidelines ("Draft Guidelines") circulated by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC).

Our Mission

At NextGen Competition, we support public policies designed to ensure an equitable and thriving technology ecosystem where fairness, accessibility, and justice are at the forefront. We stand firmly against anticompetitive business practices that allow tech behemoths to hoard power and influence while stifling a democratic digital landscape.

We support the DOJ and FTC's efforts to protect consumers and deter harmful consolidation in the tech industry, a practice that has long eroded worker rights, undermined employer accountability, and jeopardized competition, personal digital privacy, and data security. These guidelines will help foster a robust and competitive technology ecosystem by stopping anticompetitive business practices and promoting greater industry accountability.

We proudly endorse the FTC/DOJ Draft Guidelines. They are a significant step toward holding Big Tech accountable and steering the industry toward upholding justice and inclusivity for all.

Background: Big Tech's Threat to Competition

In recent decades, Big Tech companies have become a significant and increasing threat to competition through their immense market power, dominance over consumer data, and anticompetitive practices. These firms have become the largest and most powerful companies in world history through harmful practices—predatory pricing, acquisitions or copying potential rivals, abusing and monopolizing consumer data—that stifle innovation and limit consumer choice.

Their control over vast user data enables them to create high barriers to entry for new competitors. They exploit network effects to further entrench their dominant positions, making it immensely challenging, if not downright impossible, for smaller players to challenge their supremacy.

Rampant consolidation and lax (or lack of) regulation have characterized the tech industry for decades, enabling Big Tech companies to violate consumer privacy, squash competition, and dominate emergent technologies, from cloud computing to artificial intelligence.

America faces a monopolization crisis. Years of inaction from Congress and flawed rulings from the judiciary have hamstrung regulators' ability to address the crisis. We support the DOJ/FTC's effort to update merger guidelines for the agencies' review of mergers and acquisitions to determine compliance with federal antitrust laws.

In the notice seeking comment on the Draft Guidelines, FTC Chair Lina Khan said:

> *Open, competitive, resilient markets have been a bedrock of America's economic success and dynamism throughout our nation's history. Faithful and vigorous enforcement of the antitrust laws is key to maintaining that success. With these draft Merger Guidelines, we are updating our enforcement manual to reflect the realities of how firms do business in the modern economy. Informed by thousands of public comments—spanning healthcare workers, farmers, patient advocates, musicians, and entrepreneurs—these guidelines contain critical updates while ensuring fidelity to the mandate Congress has given us and the legal precedent on the books.*

NextGen Competition agrees with this assessment and applauds the agencies for their essential work to rein in Big Tech and other powerful monopolies. Consumers, competition, and our economy's health depend on these guidelines. They must empower the agencies with the decisive law enforcement tools needed to stay ahead of this continually evolving landscape.

Comments on the Draft Merger Guidelines

We strongly support the Draft Guidelines to contain and eventually reverse the adverse effects of Big Tech dominance that harms consumers, workers, and democracy. Particularly, they contain several provisions directly relevant to the competition risks Big Tech poses. These provisions, if consistently enforced, would have blocked some previous anticompetitive mergers and will hopefully prevent similar mergers in the future.

Particularly:

- **Guideline #4** states that mergers should not be permitted to eliminate a *potential* entrant in a concentrated market. Many technology markets are already highly concentrated—often to the point of monopoly. In this context, Big Tech firms have a track record of acquiring smaller competitors, aiming to suppress or eliminate emerging competitive threats and entrench their dominant positions. Big Tech's strategy of "killer acquisitions" has been widely criticized but not sufficiently addressed through enforcement actions. The Draft Guidelines includes a sliding-scale approach where the higher the market concentration, the lower the probability of successful entry necessary to raise competitive concerns. We endorse the approach and encourage the agencies to pursue aggressive enforcement against mergers that eliminate potential competitors.

- **Guidelines #5 and #6** state that a dominant firm should not be permitted to acquire control of products, services, or customers necessary to its competitors' ability to compete effectively. Microsoft's acquisition of Activision (and its iconic *Call of Duty* game) raised this concern, underscoring why that and such similar "vertical" transactions should be blocked. Similar concerns were raised by Google's acquisition of DoubleClick a decade ago. The government's failure to act permitted Google to dominate the ad tech space and disadvantage advertisers and publishers. Dominant Big Tech firms must not be allowed to acquire businesses in adjacent spaces they can then weaponize to disadvantage competitors and lock in their monopoly positions.

  Anticompetitive practices and the unchecked power of just three companies—Amazon's subsidiary AWS, Microsoft Azure, and Google Cloud Platform—in the cloud computing industry present a similar danger. NextGen Competition joined the Athena Coalition to call for stricter FTC enforcement against anticompetitive practices in this sector. Because barriers to entry into the cloud computing market are significant, we encourage the FTC to consider these practices and consumer harms when reviewing future mergers. Enabling these dominant players to acquire additional firms could exacerbate network effects and further enable them to leverage their position to exploit customers through vendor lock-in, bundling, and other unfair practices.

- **Guideline #7** states that an already dominant firm (defined generally as a firm with 30% market share) should not be able to entrench or extend its dominance through acquisition—even of relatively small companies. Under this principle, the FTC should have challenged Amazon's acquisitions of Whole Foods and MGM because of Amazon's dominance in delivery and streaming services. Going forward, the agencies should challenge such acquisitions to prevent Big Tech firms from deepening their dominant market positions.

- **Guideline #9** states that when a merger is part of a *series* of multiple acquisitions, the agencies will review the series *as a whole*—rather than one acquisition at a time. This is particularly important because large tech companies have made hundreds of small acquisitions over the last decade, most of which were never subject to regulatory review because of their size. This "under the radar" acquisition scheme has allowed Big Tech companies to gradually accumulate market power, eliminate competition, and build impregnable "moats" around their businesses. The antitrust agencies need to evaluate and challenge these anticompetitive strategies *as a whole*.

- **Guideline # 10** establishes specific and more stringent guidance for evaluating mergers involving multi-sided platforms—i.e., platforms that connect multiple groups of participants and facilitate transactions or interactions among these participants. All or virtually all Big Tech firms could be characterized as multi-sided platforms. This guideline properly recognizes that multi-sided platforms have unique characteristics and require special and more stringent antitrust scrutiny.

- **Guideline #11** states that mergers should not be permitted to create buyer power, *especially concerning workers*. While this guidance is important throughout the economy, it is particularly important for transactions that involve Big Tech—including in streaming and entertainment. We have seen how Big Tech has damaged and devalued the video and film ecosystem in ways that have disadvantaged actors, writers, and other creative talents. One result is the current actors and writers' strikes.

  As Chair Khan noted recently, "Increasingly, we see some of the red flags that suggest the market structure is not actually serving the creators or the ultimate viewers." Left unchecked, Big Tech's combined $8 trillion market power could easily swallow the entertainment industry. As former Secretary of Labor Robert Reich warned, "The real power with regard to the entertainment industry is in Apple, Amazon, Alphabet, Microsoft and Meta." Strong enforcement of these guidelines would prevent these already dominant firms from further monopolizing the entertainment industry through predatory pricing, loss leader strategies, and unregulated use of AI to replace and undermine workers.

  We strongly endorse the FTC's increased focus on protecting workers in connection with mergers and encourage the agency to apply this focus to the entertainment industry, especially in light of the anticompetitive and harmful business practices at the root of the strikes.

Conclusion

NextGen Competition strongly supports the Draft Guidelines as part of an effort to rein in a set of business practices that have mutated the digital marketplace, harming consumers, workers, and competition in the marketplace. These provisions, if consistently enforced, would have blocked several anticompetitive mergers that have already caused harm. Hopefully, they can prevent similar mergers from proceeding in the future.

In an era where digital platforms are towering over consumers' everyday lives, regulators must be armed with the law enforcement tools necessary to curb Big Tech's consolidation. Unchecked, these monopolies can override the principles of a free market, stifling innovation and restricting consumer choice to a few dominant players. Robust regulatory mechanisms can and will protect the digital landscape and ensure it remains fertile for innovation.

Thank you for the opportunity to comment on the proposed Draft Guidelines. If you have any questions, please contact George Rakis at george@nextgencomp.tech.

Sincerely,
NextGen Competition