



TECHNET
THE VOICE OF THE
INNOVATION ECONOMY

1420 New York Avenue NW, Suite 825
Washington, D.C. 20005
www.technet.org | @TechNetUpdate

September 18, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Suite CC-5610
Washington, D.C. 20580

Re: "[Draft FTC-DOJ Merger Guidelines for Public Comment](#)" (Docket ID: FTC-2003-0043-0001; FTC Matter Number: P859910)

To Whom it May Concern:

TechNet appreciates the opportunity to provide comments on the Federal Trade Commission ("Commission") and Department of Justice ("DOJ") Draft Merger Guidelines. We are concerned that the sweeping revisions to these guidelines, particularly those targeted toward the technology industry, will have a chilling effect on merger and acquisition (M&A) activity in the United States at a time when we are in a race to win the next era of innovation, which hinges on our ability to remain the global leader in emerging technologies.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over 4.5 million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.

For years, American businesses, entrepreneurs, and workers have benefited from M&A activity. Periodic updates to merger guidelines are warranted by agencies to keep pace with updates in law and economic analysis and developments in the market. However, such updates should be supported by sound economic theory and empirical evidence, not driven by subjective policy objectives.

In response to the Commission's January 2022 [Request for Information](#) on Merger Enforcement, TechNet and several organizations representing technology startups, entrepreneurs, and innovators [urged](#) the Commission to avoid making industry or sector-specific merger enforcement guidance given the substantial risks and unintended consequences associated with disparate treatment among

industries. Among other things, we are extremely concerned that the Commission and DOJ instead chose to depart from the long-standing practice of maintaining industry-agnostic guidance to differentiate and target online platforms. This approach will undoubtedly undermine America's economic competitiveness and leadership in innovation.

TechNet has long supported federal policies that promote competition and reduce unnecessary barriers to mergers and acquisitions. This includes support for an approach to evaluating existing antitrust laws that promotes consumer welfare and reduces bias against acquisitions by large companies to avoid unintended, long-term consequences on investment and innovation. In addition, TechNet wholeheartedly supports a regulatory approach that recognizes mergers and acquisitions are essential to a thriving startup ecosystem. For the startups that do not grow large enough to become sustainable, long-term businesses, mergers and acquisitions are a common and attractive opportunity for these companies and enable new investments in the next generation of entrepreneurs which drives innovation, creates new jobs, and strengthens our economy.

Yet, the Commission and DOJ's proposed merger guidelines exhibit a general hostility to mergers and presume that mergers may substantially lessen competition despite the benefits they provide for consumers and America's leadership in innovation. Equally concerning, the guidelines scrutinize customary minority investments that startups utilize as a source of funding to grow their business while maintaining their independence. While the proposed merger guidelines are not a substitute for the law itself nor, according to the Commission and DOJ, create new rights or obligations, some courts have viewed agency guidelines as "persuasive authority."¹ This proposal, built around 13 separate guidelines, if interpreted as persuasive authority by courts, represent a significant and concerning departure from these agencies' long-standing approach to mergers and acquisitions.

Specifically, each of the 13 guidelines outline various ways that the agencies believe that mergers might harm competition, often relying on dated cases that have been rejected by the courts in recent years. In addition to the catch-all guideline 13, which undermines any certainty the guidelines might provide by stating that the agencies may find additional reasons a merger is illegal, we are highly concerned about Guideline 10, which singles out multi-sided technology platforms for added scrutiny, Guideline 12, which presumes that a minority investor can exert such influence that the transaction should be subject to scrutiny by the Agencies in the same manner as a merger or acquisition, and Guideline 5, which takes a comparable approach to the rescinded 2020 Vertical Merger Guidelines but is much more skeptical of potential defenses.

¹ See *Federal Trade Commission v. Sysco Corporation*, 113 F. Supp, 3d 1 (D.D.C. 2015)

The U.S. tech industry remains the envy of the world in part because of its dynamism and competition. Startups and entrepreneurs can innovate, grow, reach new customers, create jobs, and provide broader benefits to society through their products via a variety of pathways, including through mergers and acquisitions. As we wrote last year, a merger that helps produce better products or services for consumers is both a natural and beneficial end for some companies and is healthy from a competition policy perspective.

These proposed guidelines take an extremely concerning approach that views mergers as inherently anticompetitive. Based on the current leadership's skepticism about merger efficiencies, the Draft Guidelines set a high bar for any efficiency claims, stating that cognizable efficiencies "must be of sufficient magnitude and likelihood that *no* substantial lessening of competition is threatened by the merger in *any* relevant market" (emphasis added). Should the Commission and DOJ pursue a presumption against mergers and acquisitions with respect to the digital economy, entrepreneurial activity and America's global leadership in innovation will suffer as a result.

Startups, including venture-backed startups, are disproportionately responsible for the innovations that drive economic growth and job creation in the U.S. In fact, startups are responsible for almost all of the net new U.S. jobs created since 1997. Startups thrive when they have access to capital and markets and operate within a balanced regulatory regime that promotes innovation and does not restrict access to or is biased toward exit opportunities, including mergers and acquisitions. While the proposed guidelines purport to increase competition, we fear that they will chill entrepreneurial and business activity to such a degree that innovation and economic growth will suffer.

Startups and venture-backed startups have had access to capital markets as well as opportunities for pro-consumer mergers and acquisitions because of the Commission and DOJ's long-standing approach to merger enforcement that focused on consumer welfare. In 1982, the Commission and DOJ's proposed merger guidelines were focused on "preventing mergers that harm customers due to enhanced market power." This was echoed in the 2010 Horizontal Merger Guidelines, which states that the "unified theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise...A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."

The current proposed Merger Guidelines are a significant departure from these longstanding principles and appear designed to simply deter merger activity at the outset. We urge the Commission and DOJ to avoid an enforcement approach that chills entrepreneurial and business activity and instead focus on crafting updates to Merger Guidelines that retain rigorous economic analysis as its foundation and

provide clarity to businesses over whether their actions will create antitrust enforcement concerns.

Thank you for your attention to our views on this matter. We appreciate the opportunity to submit comments and provide feedback on the Commission's revisions to the Merger Guidelines and stand ready to serve as a resource to you in your examination of this important issue.

Sincerely,

A handwritten signature in black ink, reading "Carl Holshouser". The signature is fluid and cursive, with the first name "Carl" being more prominent than the last name "Holshouser".

Carl Holshouser
Senior Vice President