Before the
FEDERAL TRADE COMMISSION AND ANTITRUST DIVISION
OF THE DEPARTMENT OF JUSTICE
Washington, DC 20580

In the Matter of	)	
	)	**Docket No.**
Request for Information on Merger Enforcement	)	**FTC-2022-0003**
	)	**-0001**

COMMENTS OF THE NATIONAL HISPANIC MEDIA COALITION, NATIONAL URBAN LEAGUE, NATIONAL ACTION NETWORK, ASIAN AMERICANS ADVANCING JUSTICE (AAJC), AND HISPANIC FEDERATION

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Brenda Victoria Castillo
Daiquiri Ryan Mercado, Esq.
National Hispanic Media Coalition
12825 Philadelphia Street Suite C
Whittier, California 90601
BCastillo@nhmc.org

John C. Yang
Asian Americans Advancing Justice – AAJC
1620 L St NW #1050
Washington, DC 20036
echi@advancingjustice-aajc.org

Marc H. Morial
National Urban League
80 Pine Street 9th Floor
New York, NY 10005
avalentin@nul.org

Rev. Al Sharpton
National Action Network
818 18th Suite 630, Washington, DC 20006
eriley@nationalactionetwork.net

Frankie Miranda
Hispanic Federation
55 Exchange Place, 5th Floor
New York, NY, 10005
BWilkes@hispanicfederation.org

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The National Hispanic Media Coalition (NHMC) and the undersigned organizations respectfully submits the following comments to the Federal Trade Commision (FTC) and the Department of Justice (DOJ) regarding the Revised Merger Guidelines.[1]

NHMC is a 38-year old nonprofit civil and human rights organization that was established to eliminate hate, discrimination, and racism toward Latine communities nationwide. We are committed to increasing Latine representation from Hollywood to Washington D.C. through our intentional media advocacy and policy work, ensuring that Latinos are at the forefront of decision making and have equitable access to resources. Our values are rooted in NHMC's 2023 principle, "Latinos are the rule, not the exception," as it should be the norm that Latinos are at the forefront of decision making and have equitable opportunities across various industries. Although our work specializes in the expansion of Latino representation, we are committed to advocating for the excellence and protections of all People of Color (POC) and those from historically and intentionally underserved communities.

The National Urban League (NUL) is a historic civil rights organization with a 112-year history of advocating for civil rights and the economic empowerment of Black communities and other historically under-resourced communities through its 92 affiliates across 36 states and the District of Columbia. In particular, NUL advocates on behalf of and provides direct services to a diverse constituency in the core areas of workforce, housing, health, education, and social justice and believes that opportunities for underrepresented groups, competition, and innovation are interconnected.

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is dedicated to civil and human rights for Asian Americans and to promoting a fair and equitable society for

[1] "FTC and DOJ Seek Comment on Draft Merger Guidelines," FEDERAL TRADE COMMISSION, (July 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines ("Revised Guidelines").

all. We provide the growing Asian American community with multilingual resources, culturally appropriate community education, and public policy and civil rights advocacy. In the communications field, Advancing Justice | AAJC works to promote access to critical technology, services, and media for our consumers.

National Action Network (NAN) is one of the leading civil rights organizations in the Nation with chapters throughout the entire United States. Founded in 1991 by Reverend Al Sharpton, NAN works within the spirit and tradition of Dr. Martin Luther King, Jr. to promote a modern civil rights agenda that includes the fight for one standard of justice, decency and equal opportunities for all people regardless of race, religion, ethnicity, citizenship, criminal record, economic status, gender, gender expression, or sexuality.

Hispanic Federation (HF) is the nation's premier Latino nonprofit membership organization. Founded in 1990, HF seeks to empower and advance the Hispanic community, support Hispanic families, and strengthen Latino institutions through work in the areas of education, health, immigration, civic engagement, economic empowerment, & the environment.Hispanic Federation serves as a national model for Latino social, political, and economic empowerment. With a strong presence in New York, Florida, North Carolina, Puerto Rico, and other key states throughout the U.S., HF works to uplift millions of Hispanic children, youth, and families across the country.

I. INTRODUCTION

NHMC and the undersigned organizations strongly believe in the protection and promotion of diversity in all facets of the United States in order to sustain a competitive ecosystem for historically and intentionally marginalized communities to thrive. When it comes to mergers and acquisitions, addressing the dire need for diversity in companies, product development, and competition is no exception. These comments intend to illustrate the significance of diversity when increasing competition and preventing the monopolization of industries, which, if overlooked, can be extremely harmful for communities of color.

Our coalition's approach to these issues is shaped by our experiences working with industry to deepen their commitment to diversity and inclusion for communities of color and other marginalized groups at the consumer, employee, creator, business owner, shareholder levels. In the context of mergers in particular, we have done this work by negotiating memoranda of understanding (MOUs) with companies to ensure commitments that will benefit the communities we serve. While we are proud of this work in furtherance of our larger missions of economic empowerment, the fact remains that these are commitments and not conditions; thus, they are practically unenforceable.

II. AGENCIES SHOULD ADMIT EVIDENCE OF DIVERSITY IN THE EVALUATION OF MERGERS

For over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.[2] In an increasingly globalized and diverse society, the economic landscape should reflect the multifaceted tapestry of its constituents. For diverse communities, which have historically faced systemic barriers and underrepresentation, the evaluation of mergers should not merely be a matter of market dynamics, but also a reflection of a firm's commitment to diversity and inclusion. The Revised Guidelines, while comprehensive in its approach to evaluating mergers, can further guide the

[2] Federal Trade Commission, The Antitrust Laws, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Sept. 10, 2023).

Agencies and this Administration's commitment to competition and consumer protection by explicitly recognizing statistical diversity evidence and research, as crucial pieces of evidence for merger evaluations.

Appendix 1 of the Revised Guidelines outlines the most common sources of evidence the Agencies draw on in a merger investigation.[3] While it encompasses various facets of market dynamics, there's a conspicuous absence of diversity data. Given the profound impact mergers can have on workforce dynamics, community engagement, and representation, it's imperative that diversity data, including ethnicity data, be explicitly mentioned. For diverse communities, this data can provide insights into whether the merged entity will champion diversity or perpetuate existing disparities.

A. Agencies Should Consider a Decrease in Diversity as Evidence of a Worsened Workplace Condition and Decreased Quality in Workplace Environment When Analyzing a Merger

Under the Revised Guidelines, Guideline 11 states that "The Agencies will consider whether workers face a risk that the merger may substantially lessen competition for their labor."[4] This is further specified as whether or not a merger condition would "substantially lessen competition for workers, that reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality."[5] The undersigned organizations believe these specifications to include diversity as a key characteristic of benefits, working conditions, or workplace quality.

As the National Hispanic Media Coalition (NHMC), previously wrote to the Agencies, "[f]ailure to adequately consider diversity initiatives during the review of proposed mergers and

[3] Revised Guidelines Appendix 1 at 1-2.
[4] Revised Guidelines at 26.
[5] *Id.*

acquisitions harms competition in the labor market."[6] Diversity in leadership, workforce, and product (or content in the case of media mergers and acquisitions) are not just compelling buzz words; there is statistical support for the notion that diversity enhances competitiveness in a corporate environment. According to a study by McKenziey, "companies with the most ethnically diverse executive teams—not only with respect to absolute representation but also of variety or mix of ethnicities—are 33 percent more likely to outperform their peers on profitability."[7] Even more so, a 2021 study found that, " DEI practices have superior business performance and results, and they also create a more inclusive environment with higher employee engagement and recognition for DEI."[8] Thus, it should be seen as a factor in what makes a workplace high-quality and what creates superior working conditions for a workforce.

Further, two companies or firms who may not appear to be in competition with one another on the surface may actually be competitors due to the nature of the diversity, equity, and inclusion initiatives that make them top-of-the-line workplace environments for workers. As such, according to the draft guidelines, "workers may seek not only a paycheck but also work that they value in a workplace that matches their own preferences, as different workers may value the same aspects of a job differently."[9] This is substantiated by industry data, as "[m]ore than 3 in 4 employees and job seekers (76%) report a diverse workforce is an important factor when evaluating companies and job offers."[10] The correlation between workplace quality and diversity grows stronger for employees of color, as "[a]bout 4 in 5 Black (80%), Hispanic (80%)

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[6] NHMC Comments at 13.

[7] Vivian Hunt, Lareina Yee, Sara Prince & Sundiatu Dixon-Fyle, Delivering Through Diversity, McKinsey & Company (Jan. 18, 2018), https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/delivering-through-diversity.

[8] *Elevating Equity: The Real Story of Diversity and Inclusion*, The JohnBersin Company, at 19, 2021, https://joshbersin.com/wp-content/uploads/2021/04/202102-DEI-Report_Final_V2.pdf?utm_medium=email&_hsmi=122877344&utm_content=122877344&utm_source=hs_automation ("Elevating Equity").

[9] Revised Guidelines at 26.

[10] Glassdoor Employee Survey, https://www.glassdoor.com/employers/blog/diversity-inclusion-workplace-survey/.

and LGBTQ (79%) job seekers and employees report a diverse workforce is an important factor when evaluating companies and job offers."[11] All the while "76% of companies have no diversity or inclusion goals at all,"[12] making DEI a critical tenet of what may make one company more competitive over another for any given employee.

With regard to media mergers and acquisitions, workplace diversity–often at higher levels of the C-Suite and Board–is often first on the chopping block when economic, political, or social adversity hits. Diversity, Equity, and Inclusion initiatives are already on the decline in Corporate America,[13] putting DEI at risk overall in *every* industry in the United States. For example, in 2020, Asian Americans made up only 6% of the top 200 media companies executive boards.[14] While diversity and representation at the leadership and executive level is important to celebrate, it alone does not guarantee diverse representation. Recent media mergers saw the consolidation of diverse content and workforce, and often produce enforceable (and frequently empty) MOU promises.[15] As is starkly demonstrated through ongoing strikes by the Writers Guild of America and SAG-AFTRA in Hollywood, media and broadcasting companies should not be allowed to distend their business reach and income unchecked while diversity and workplace conditions deteriorate.

Finally, it is not only imperative that the Agencies consider DEI as a part of the labor market impact analysis of a given merger under Guideline 11, it is also required by President Joseph R. Biden's Executive Order. The undersigned organizations acknowledge and applaud the

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[11] *Id.*
[12] Elevating Equity at 8.
[13] Kiara Alfonseca and Max Zahn, *How corporate America is slashing DEI workers amid backlash to diversity programs*, ABC News, July 7, 2023, https://abcnews.go.com/US/corporate-america-slashing-dei-workers-amid-backlash-diversity/story?id=100477952.
[14] *Distribution of board members in media companies in the United States in 2020, by ethnicity*, Statistica, rel. Mar 17, 2023, https://www.statista.com/statistics/826879/media-companies-directors-ethnicity/#statisticContainer.
[15] Jason Smith and Randy Abreu, MOU or an IOU? Latina/os and the Racialization of Media Policy, Ethnic and Racial Studies, April 2018, at 19.

continued efforts by federal agencies in their respective responses to President Biden's Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. The Biden Administration states in this EO that "advancing equity requires a systematic approach to embedding fairness in decision-making processes."[16] Therefore, it is imperative that the FTC and DOJ use Diversity, Equity, and Inclusion commitments, which have already been proven to be in the public interest, as a key consideration when evaluating proposed mergers.[17] The analyses should include impacts on diverse employees and information about the benefits that would be provided to diverse consumers, creators, business owners and suppliers, and shareholders.

III. INNOVATION AND PRODUCT VARIETY CONSIDERATIONS STRENGTHEN THE PROSPECT FOR DIVERSE CONTENT IN MEDIA AND ENHANCES CONSUMER EXPERIENCE

Sustaining a competitive market is essential and beneficial for the consumer, allowing for an innovative and diverse product output, especially in the tech, telecommunications, and entertainment industries. The undersigned organizations appreciate the intention of the Revised Guidelines Appendix 2, which acknowledges that competition between firms may lead greater efforts to offer a variety of products and features which would benefit the consumer experience through innovative products and competitive prices.[18]

In terms of innovation, firms are naturally incentivized to cater to the consumer by offering diverse products, services, and features when sufficient levels of competition are

[16] Exec. Order No. 13985, 86 Fed. Reg. 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Jan. 20, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.
[17] OECD, Inclusion & Diversity, https://www.oecd.org/gov/pem/public-sector-leadership-implementation/pem-inclusion/ (last visited Sep 12, 2023).
[18] Revised Guidelines Appendix 2 at 7.

present. Innovation and diversity of product are threatened when a merger's terms decrease the natural marketforce, often leading to consolidation in product offerings and lessening consumer choice and satisfaction. The Revised Guidelines adequately address this by stating, "[o]ffering the best mix of products and features is a critically important dimension of competition that may be harmed as a result of the elimination of competition between the merging parties."[19]

The impact of competition was made clear recently between X, previously known as Twitter, and Instagram's newly developed app, Threads. X is widely known for its interactive text posts and potential for users to engage with celebrities, politicians, and other worldwide users. While Threads utilizes text posts as well, the app is centered around one's Instagram followers and niche community. Threads allows common users to engage with their own followers, share thoughts, and even promote their own creative projects. Competition promotes new avenues for consumers to stay engaged and participate in the digital economy. It also fosters opportunities for communities of color to take advantage of product expansion and contribute to the movement beyond the role of a consumer.

As outlined in Appendix 2, when assessing the degree of competition among firms, innovation may be demonstrated by a reduction in costs.[20] In recent years, consumers experienced numerous price hikes among streaming services, yet product output has remained relatively stagnant. In 2019, Disney acquired two-thirds ownership of Hulu, and combined its services in a unique streaming package to offer Disney+ subscribers discounted prices for Disney+, Hulu, and ESPN+ services.[21] At the time, the consolidation of the services incentivized other streaming providers to weigh in with their own selection of entertainment. This, however,

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[19] *Id.*
[20] *Id.*
[21] Todd Spangler, *Prices of Disney+, Hulu Premium Plans to Get Jacked Up but New Duo Bundle Will Offer Deep Discount*, VARIETY, August 9, 2023, https://variety.com/2023/digital/news/disney-plus-price-increase-hulu-espn-plus-1235692057/.

ultimately led to an increase in subscription prices taken on by consumers. The standalone ad-supported prices remain at $7.99/month, but as of October 2023, Disney+ Premium will increase by 27% at $13.99/month and by 20% for Hulu at $17.99 for their ad free services.[22] It will be the second price hike consumers have endured by these services in less than a year. Meanwhile, there are speculations that Disney+ and Hulu will further consolidate their services into one streaming app, and will offer an ad-free bundle for $19.99/ month. While the discount is ideal for households who seek both services, consolidation limits the variety of goods and in this case, the accessibility of these services.

Moreover, the packaged services neither offer exclusive perks nor enhance the quality of their services for consumers to enjoy or justify the increased prices, meaning the product offering is not innovative. This is a direct result of the merger consolidation and elimination of market forces that incentivize streaming services to be competitive with each other with their service offerings and quality of product By understanding the faults of lack of competition between firms, the undersigned organizations emphasize the importance of product diversity and the financial implications that stem from lack of product variety.

IV. MEDIA MARKETS LACK STRUCTURAL BARRIERS TO COORDINATION

Media markets differ from traditional markets in several key ways. The media industry, a cornerstone of democracy and cultural expression, plays a pivotal role in shaping public opinion, fostering community ties, and promoting diverse voices. According to Section IV of the Revised Guidelines, "structural conditions that prevent coordination are exceedingly rare in the modern

[22] *Id*.

economy."[23] The undersigned organizations emphasize that the media, broadcast, and entertainment industry is not one of the "exceedingly rare" markets where structural barriers prevent coordination.

Media markets involve a wide range of stakeholders, from content creators, advertisers, distributors, vendors, to end consumers, each having distinct interests and power dynamics, making it susceptible to coordination risks that can stifle diversity and competition. Recent events further underscore these complexities in media markets. An ongoing multi-industry union strike has erupted, driven by perceived coordination between firms. Workers across various sectors of the media industry, from content creation to distribution, have raised concerns about wage stagnation, working conditions, and lack of transparency.[24] Despite the booming profits of media conglomerates, many workers have not seen commensurate increases in their wages. In the media market landscape, there's a growing sentiment that major firms are using the transition to streaming to set new industry standards, often at the expense of smaller players and workers.[25]

By some estimates, as much as 90% of U.S. media is controlled by just six companies.[26] For diverse communities, coordination in media markets can lead to homogenized content, sidelining diverse narratives and perspectives. The rise of digital platforms, streaming services, and online advertising has transformed the media landscape, leading to rapid shifts in market power and competitive dynamics. This makes competition and regulation more complex.

Recognizing the media market's unique susceptibility to anticompetitive coordination and its profound impact on diverse communities is essential. By doing so, the Revised Guidelines can

[23] Revised Guidelines at 34.
[24] Jason P. Frank, *The 2023 Hollywood Strike for Dummies*, Vulture, Aug. 25, 2023, https://www.vulture.com/article/wga-strike-2023.html.
[25] WGA, Writers are not Keeping up, https://www.wgacontract2023.org/updates/bulletins/writers-are-not-keeping-up (last visited Sep. 11, 2023).
[26] Adam Levy, *The Big Six Media Companies Right Now*, The Motley Fool, https://www.fool.com/investing/stock-market/market-sectors/communication/media-stocks/big-6/ (last updated April 21, 2023, 3:19 PM).

protect a competitive media landscape and ensure that diverse voices, narratives, and interests are not marginalized in the face of industry coordination.

V. THE DRAFT MERGER GUIDELINES ENHANCE THE AGENCIES' ABILITY TO STOP MONOPOLY POWER OF DIGITAL PLATFORMS

The digital age has ushered in a new era of commerce, communication, and community-building, with digital platforms playing a pivotal role in shaping our socio-economic landscape. These large-scale entities are no longer seen as single applications, they are ecosystems that bring users together with a number of private and public actors. These platforms offer opportunities for entrepreneurship, cultural expression, and community engagement. The Revised Guidelines, particularly Guidelines 9 and 10, are a commendable step towards ensuring that these platforms operate within a framework of fair competition, ultimately benefiting the diverse tapestry of platform participants.

The tech platform industry has witnessed a pattern where behemoths like Facebook and Amazon preemptively acquire emerging competitors in order to maintain, consolidate, and expand their market dominance.[27] Such practices materially weaken innovation and entrepreneurship in the United States.[28] Therefore, the undersigned organizations support Guideline 9, which provides that "where one or both of the merging parties has engaged in a pattern or strategy of pursuing consolidation through acquisition, the Agencies will examine the impact of the cumulative strategy under any of the other Guidelines to determine if that strategy

[27] US House of Representatives, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendation, 7-10 (2020), https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf.

[28] Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship: Hearing Before the Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 116th Cong. 76 (2019) (statement of Timothy Wu, Julius Silver Prof. of Law, Columbia Law Sch.).

may substantially lessen competition or tend to create a monopoly."[29] Additionally, we support Guideline 9 language which states that the "Agencies may examine a pattern or strategy of growth through acquisition by examining both the firm's history and current or future strategic incentives."[30] By considering the cumulative effect of multiple acquisitions, and the historical evidence of a firm's overall strategic approach to serial acquisitions, Guideline 9 ensures that dominant platforms cannot systematically eliminate potential competition, thus enhancing innovation and entrepreneurship in the United States.

Unchecked monopolistic practices by dominant digital platforms can stifle opportunities for consumers and entrepreneurs, marginalizing the voices and economic potential of diverse communities. Guideline 10 recognizes the intricate nature of platforms and safeguards against monopolistic practices by directing the Agencies to "consider competition *between* platforms, competition *on* a platform, and competition to *displace* the platform" when a merger involves a multi-sided platform.[31] As previously mentioned, digital platforms have evolved beyond singular market entities. They are multifaceted, multi-sided ecosystems, intertwining various sectors from e-commerce to content creation. A single digital platform can be a space for business, advocacy, and cultural celebration.

The undersigned organizations support Guideline 10 and urge the Agencies to immerse themselves in the nuanced intricacies of digital platform mergers, recognizing the broader implications for competition. Historically and intentionally marginalized communities participate with and operate digital platforms in unique ways. They represent a significant and diverse consumer base with preferences, cultural nuances, and consumption patterns that can ultimately influence the success of digital platforms. Merger evaluations that do not account for these

[29] Revised Guidelines at 23.
[30] Revised Guidelines at 22.
[31] Revised Guidelines at 23.

dynamics might fail to harness the full potential of the market, stifle innovation, and limit opportunities for underrepresented communities.

Digital platforms, by their nature, serve multiple user groups that interact with each other by sharing valuable data. For example, Meta operates around five primary product offerings, including: (1) Facebook, a social network platform; (2) Instagram, a social network app for photos and videos; (3) Messenger, a cross-platform messaging app for Facebook users; (4) WhatsApp, a cross-platform messaging app; and (5) Oculus, a virtual reality gaming system. One of Meta's product offerings, Facebook, maintains an underlying and integrated network including Facebook Login, Facebook Share, Facebook Analytics, Facebook Ads, Facebook Marketplace, and Facebook Jobs, which support the capture of user data well outside the discrete boundaries of the platform, creating new conditions of economic growth and dependency which expand every time one of these services gets integrated into an app.[32] Each of Meta's product offerings and services present unique characteristics of a multi-sided platform that must be considered when applying other guidelines to a Merger. We believe Guideline 10–if applied prime facie– adequately underscores the importance of thoroughly examining the multifaceted competition dynamics of digital platforms during merger evaluations.

The Revised Guidelines should strive to analyze a digital landscape where competition thrives, and diverse communities can harness the full potential of digital platforms. By closely examining serial acquisitions and addressing the multifaceted nature of platforms as a whole, the Revised Guidelines enhance the Agencies' ability to stop monopoly power of digital platforms, safeguarding the greater good of our democracy and upholding principles of equity and justice in the realms of competition and consumer protection.

[32] Tobias Blanke & Jennifer Pybus, *The Material Conditions of Platforms: Monopolization Through Decentralization,* 3 (Social Media + Society, Oct.-Dec. 2020) https://journals.sagepub.com/doi/pdf/10.1177/2056305120971632.

VI. CONCLUSION

The undersigned organizations appreciate the opportunity to submit comments regarding the Revised Merger Guidelines. We strongly encourage the FTC and DOJ to consider our recommendations to ensure diversity is protected and promoted among mergers, which will benefit millions of consumers and the greater economy. It is vital that diversity is included in the language of the agreements and sustained in the execution of mergers and acquisitions, in order to increase competitiveness and develop innovative products and services.