Before the
United States Federal Trade Commission and
Department of Justice
Washington, D.C.

In re DOJ/FTC Competitor Collaborations Guidelines RFI	Docket No. ATR-2026-0001-0001

COMMENTS OF

THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

In response to the Federal Trade Commission ("FTC") and the Department of Justice's ("DOJ") (jointly "Agencies") request for information for Guidance on Business Collaborations, released on February 23, 2026,[1] the Computer & Communications Industry Association ("CCIA")[2] submits the following comments.

I. Introduction

CCIA acknowledges the importance of reexamining the need for Agency guidance on collaborations among competitors. New guidelines would address a gap that has left businesses without meaningful regulatory certainty[3] since the withdrawal of the 2000 Antitrust Guidelines

[1] U.S. Dep't of Justice, Off. of Pub. Affairs, *Justice Department and Federal Trade Commission Seek Public Comment for Guidance on Business Collaborations* (Feb. 23, 2026), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-public-comment-guidance-business.

[2] CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

[3] *See* Dissenting Statement of Comm'r Melissa Holyoak Regarding Withdrawal of 2000 Antitrust Guidelines for Collaboration Among Competitors (Dec. 11, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-collaboration-guidelines-withdrawal-statement.pdf ("The Majority's decision to withdraw the [Collaboration Guidelines] without providing any replacement guidance . . . leaves businesses grasping in the dark."); FTC Chairman Andrew N. Ferguson, Remarks on RFI Launch (Feb. 23, 2026) ("The previous administration decided . . . to withdraw the 2000 Antitrust Guidelines for Collaborations Among Competitors. This decision . . . left millions of businesses in the dark."), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-public-comment-guidance-business.

for Collaborations Among Competitors ("2000 Guidelines")[4] in December 2024.[5] Any updated guidance should increase predictability without expanding substantive liability beyond statute and precedent, thereby preventing overenforcement and regulatory overreach that might chill innovation. Moreover, any new guidance should account for the ongoing digital transformation of the economy and the continued development of innovative, dynamic markets.

These comments provide CCIA's general observations and some specific recommendations on key issues to be addressed in any new guidelines.

II. Analytical Framework for the Guidelines

The Agencies' 2000 Guidelines were a vital resource for companies, antitrust practitioners, and judges alike. Their practical application in day-to-day business practices had been of paramount importance as companies relied heavily on this Agency guidance when considering the potential consequences of collaborations among competitors.

The 2000 Guidelines correctly recognized that the majority of competitor collaborations are procompetitive or competitively neutral,[6] and appropriately employed a rule-of-reason framework rather than a *per se* condemnation of most collaborations and partnerships among competitors.[7] The Supreme Court of the United States has consistently held that most horizontal collaborations are appropriately analyzed under the rule of reason, rather than condemned *per se*, particularly where integration is present or where the restraint is ancillary to a legitimate joint venture.[8] Any new guidelines should preserve this presumption and affirm that collaboration among competitors does not inherently warrant antitrust scrutiny. Additionally, they should clearly establish an analytical framework that distinguishes between: (i) *per se* unlawful conduct;

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[4] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[5] Fed. Trade Comm'n & U.S. Dep't of Justice, *FTC and DOJ Withdraw Guidelines for Collaboration Among Competitors* (Dec. 11, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-doj-withdraw-guidelines-collaboration-among-competitors.

[6] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* § 1.1 (2000) ("Such collaborations often are not only benign but procompetitive."), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

[7] *Id.* § 3.2 (setting forth the rule-of-reason analytical framework and distinguishing *per se* unlawful conduct from agreements subject to the rule of reason); *see also Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 96 (2021) (confirming rule-of-reason analysis for horizontal competitor arrangements).

[8] *See Texaco Inc. v. Dagher*, 547 U.S. 1, 6–7 (2006), https://supreme.justia.com/cases/federal/us/547/1/; *NCAA v. Alston*, 141 S. Ct. 2141, 2155–56 (2021), https://supreme.justia.com/cases/federal/us/141/20-512/.

(ii) ancillary restraints; and (iii) rule-of-reason collaborations, while clarifying that independent conduct is not the same as an express agreement.

Any new guidance should further clarify that restraints are lawful where they are ancillary to, and reasonably necessary for, a procompetitive collaboration, and unlawful where they are "naked" restraints lacking integration or efficiency justification.[9] This would be particularly relevant in the context of digital activities, where ancillary restraints to procompetitive platform and data-sharing collaborations are common and often mischaracterized as naked restrictions. Additionally, any new guidelines should explicitly affirm the need for courts to assess efficiencies substantively rather than disregard them solely on the grounds of potential effects on competitors. In digital activities, the primary competitive benefits of collaboration are dynamic and innovation-related, rather than static, price-based cost savings, as the former may take longer to materialize and should be weighted equally against potential anticompetitive risks over the same timeline. Moreover, safe harbors are useful for encouraging procompetitive collaborations, and any new guidelines should incorporate them to provide businesses with greater certainty about how the Agencies will enforce them.

III. Key Areas that Would Benefit from Additional Guidance

A. Safe Harbors

CCIA suggests that the Agencies adopt an explicit safe harbor for collaborations in innovation markets, particularly those involving nascent and pre-commercial technologies such as artificial intelligence (AI), advanced semiconductors, and next-generation communications infrastructure. The 2000 Guidelines used a general safety zone with a 20-percent market share threshold, and a safety zone for research and development when there were three or more independently controlled research efforts in addition to those of the collaboration.[10] Any new guidance should revisit whether those thresholds remain well calibrated for modern innovation

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[9] *Addyston Pipe & Steel Co. v. United States*, 85 F. 271, 282 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899), https://law.resource.org/pub/us/case/reporter/F/0085/0085.f.0271.pdf; *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 188–89 (7th Cir. 1985), https://openjurist.org/776/f2d/185; U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* §§ 1.2, 3.2 (2000); *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (discussing ancillary restraints reasonably necessary to a legitimate joint venture).

[10] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* (§§ 4.2–4.3) (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

markets, particularly in nascent technology sectors where market shares are difficult to measure at early stages, and the competitive landscape is constantly evolving, and should reflect modern market realities. Existing guidance, which focuses primarily on product-market shares, does not adequately capture the competitive dynamics of innovation-driven sectors, where competition often occurs "*for the market*" rather than within clearly defined existing markets.[11] In such markets, traditional market-share thresholds are poorly calibrated because they measure current commercial positions rather than the competitive dynamics that will determine future market outcomes. An innovation-market safe harbor should apply where the collaboration is limited to research, development, or pre-commercial activities and does not involve coordination on downstream pricing, output, or customer allocation. As included in the 2000 Guidelines, any new guidelines should clarify that such collaborations are presumptively lawful where (i) the participants collectively account for only a limited share of relevant R&D assets or capabilities, (ii) participation in the collaboration is non-exclusive or reasonably open, and (iii) the arrangement is reasonably necessary to achieve procompetitive efficiencies that could not be achieved unilaterally.[12]

This approach is consistent with longstanding Supreme Court precedent recognizing that joint ventures may be necessary to create new products, services, or markets and should be evaluated under the rule of reason rather than condemned categorically.[13] It also reflects modern economic understanding that R&D collaboration can generate substantial spillovers, reduce duplicative investment, and accelerate innovation.[14] In dynamic technology sectors, the absence of clear safe harbors risks deterring precisely those forms of collaboration that are most likely to yield consumer benefits.

The need for clarity is particularly important in artificial intelligence, where firms may combine large-scale computing resources, specialized talent, and diverse datasets to achieve

[11] *See* Joseph Farrell & Michael L. Katz, *Innovation, Rent Extraction, and Integration in Systems Markets*, 48 J. Indus. Econ. 413, 414 (2000); Carl Shapiro & Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* 175–76 (1999) (describing competition "for the market" in technology sectors with high fixed costs and network effects).
[12] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* § 4.2 (2000).
[13] *Texaco Inc. v. Dagher*, 547 U.S. 1, 6–7 (2006); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 23 (1979).
[14] Carl Shapiro, Competition and Innovation: Did Arrow Hit the Bull's Eye?, in *The Rate and Direction of Inventive Activity Revisited* 361, 377–78 (Josh Lerner & Scott Stern eds., 2012).

meaningful advances.[15] Without guidance, firms may underinvest in collaborative research due to uncertainty regarding antitrust exposure, as the perceived threat of potential liability, legal fees, burdensome litigation, and lengthy appeals processes may deter legitimate procompetitive collaborations. Any new guidelines should therefore articulate a safe harbor that recognizes that early-stage collaboration can foster innovation and competition.

B. Information and Data Sharing Among Competitors

CCIA recommends that the Agencies modernize potential new guidelines on information sharing by clearly distinguishing between harmful exchanges that facilitate coordination and raise competitive concerns for the Agencies, and procompetitive or competitively neutral exchanges that enhance efficiency, innovation, and consumer welfare. In particular, new guidance should recognize that data sharing is often a necessary input to collaboration in digital and technology activities, including for benchmarking, safety testing, interoperability, and the development of privacy-enhancing technologies.[16] The Agencies should clarify that information sharing is unlikely to raise competitive concerns where appropriate safeguards are in place, such as aggregation, anonymization, temporal delay, or the use of independent intermediaries,[17] as these safeguards significantly reduce the likelihood that shared information can be used to coordinate competitive variables such as price or output. The Supreme Court has cautioned that information exchanges may raise concerns where they facilitate coordination on competitive variables, but it has also recognized that such exchanges can be benign or procompetitive depending on context.[18] The new guidelines should therefore make clear that liability requires a fact-specific showing that the exchange is likely to reduce competition. At the same time, the Agencies should emphasize that the analysis must remain effects-based, recognizing that similar

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[15] *See* Fed. Trade Comm'n, *Partnerships Between Cloud Service Providers and AI Developers: Staff Report on AI Partnerships and Investments 6(b) Study* 14–18 (Jan. 2025), https://www.ftc.gov/reports/ftc-staff-report-ai-partnerships-investments-6b-study (noting that frontier AI model development requires massive computational resources and specialized talent, constraining which firms can effectively participate).

[16] *See* OECD, *Enhancing Access to and Sharing of Data: Reconciling Risks and Benefits for Data Re-Use Across Societies* 42–46 (2019), https://www.oecd.org/en/publications/enhancing-access-to-and-sharing-of-data_276add-en.html; *see also* Autorité de la concurrence & Bundeskartellamt, *Competition Law and Data* (May 2016), https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf (examining the role of data sharing in digital markets).

[17] OECD, *Consumer Data and Competition: A New Balancing Act for Online Markets?* (2021), https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/03/consumer-data-and-competition_faa8e6b4/e22e3a47-en.pdf.

[18] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978), https://supreme.justia.com/cases/federal/us/438/422/.

forms of information exchange may have different competitive implications depending on context.

Additionally, CCIA recommends that any new collaboration guidelines provide explicit guidance on joint purchasing and investment arrangements among competitors, as these forms of collaboration are increasingly important for products, including cloud computing, semiconductors, and energy inputs required for AI infrastructure. Properly structured joint purchasing arrangements can increase negotiating strength, reduce input costs, mitigate supply risk, and ultimately benefit downstream consumers.[19] The Agencies should clarify that joint purchasing and investment agreements are presumptively lawful where they (i) do not account for a substantial share of total purchasing in the relevant input market, (ii) do not involve coordination on downstream competitive variables, and (iii) are reasonably necessary to achieve efficiencies such as scale economies or risk-sharing.[20] This approach is consistent with prior Agency guidance and enforcement practice, recognizing that buying collaborations can be procompetitive, particularly where they enable participants to achieve efficiencies that would be unattainable individually.[21]

In the context of AI infrastructure, joint investment in data centers, energy procurement, and related physical inputs may be important to compete globally. Absent clear guidance, firms may be deterred from entering into such arrangements, to the detriment of innovation and U.S. competitiveness. Any new guidelines should therefore expressly recognize that such collaborations can be lawful and beneficial when appropriately structured.

IV. New Technologies & Business Models Requiring Additional Guidance

A. Open-Source Collaboration

Open-source collaboration, which also helps foster innovation and technological development, is economically one of the most significant forms of competitor collaboration in digital activities.[22] Companies contribute to foundational open-source projects, including

[19] Roger D. Blair & Jeffrey L. Harrison, Antitrust Policy and Monopsony, 76 Cornell L. Rev. 297, 315–18 (1991).
[20] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* § 4.3 (2000).
[21] *Id.*
[22] *See* Josh Lerner & Jean Tirole, *The Simple Economics of Open Source*, 50 J. Indus. Econ. 197 (2002), https://doi.org/10.1111/1467-6451.00174; Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 Yale L.J. 369 (2002).

operating systems, cloud orchestration platforms, programming languages, and AI frameworks that form the basis of the modern economy.[23] These collaborations involve horizontal competitors sharing technical specifications, contributing proprietary engineering work to commonly owned codebases, and jointly governing technical roadmaps.

CCIA recommends that the Agencies' updated guidelines recognize that open-source collaboration among competitors is presumptively procompetitive as it reduces transaction costs, promotes interoperability, and makes foundational technology available to new entrants who could not independently develop equivalent capabilities.[24] The updated guidelines should provide clear standards for identifying the limited circumstances in which open-source consortia could serve as vehicles for anticompetitive coordination, while ensuring that the presumptive procompetitive treatment of open-source collaboration is not eroded by the overbroad application of information-sharing concerns to technical collaboration that is, by design, publicly disclosed.

B. Algorithmic Pricing and Artificial Intelligence-Based Collaboration

Artificial intelligence is one of the key modern technologies that can benefit the most from lawful collaboration among competitors. Building and deploying advanced systems requires vast, specialized inputs, and sometimes shared technical standards. As such, any updated competitor collaboration guidelines should emphasize that collaboration aimed at expanding innovation, infrastructure, interoperability, privacy, and safety usually promotes competition. Overdeterrence of these collaborations can have similar negative effects on innovation as underenforcement of antitrust laws.[25]

Importantly, when analyzing dynamic and innovative markets, the consequences of deterring collaboration are not seen in real time: innovations that never occurred, a product that was never developed, or even technological developments that emerged years late. This risk is

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[23] *See* Linux Foundation, *2024 Annual Report* (2024), https://www.linuxfoundation.org (documenting contributor diversity among competing firms for foundational open-source projects); *see also* GitHub, *The State of the Octoverse* (2024), https://github.com/blog/news-insights/octoverse/octoverse-2024 (reporting cross-industry participation in open-source repositories).

[24] *See,* Fiona Scott Morton & Carl Shapiro, *Patent Assertions: Are We Any Closer to Aligning Reward to Contribution?*, 16 Innovation Pol'y & Econ. 89 (2016), https://www.journals.uchicago.edu/doi/full/10.1086/684987; *see also* NBER Working Paper No. 21678, https://www.nber.org/papers/w21678; Shane Greenstein & Frank Nagle, *Digital Dark Matter and the Economic Contribution of Apache*, 43 Res. Pol'y 623 (2014), https://www.sciencedirect.com/science/article/abs/pii/S0048733314000055; NBER Working Paper No. 19507, https://www.nber.org/papers/w19507.

[25] Alden Abbott, Truth on the Market, *Rethinking Competitor Collaboration in the AI Era* (Apr. 2, 2026), https://truthonthemarket-com.cdn.ampproject.org/c/s/truthonthemarket.com/2026/04/02/rethinking-competitor-collaboration-in-the-ai-era/amp/.

even more concerning in the rapidly evolving AI sector where entry occurs across multiple layers of the stack, from chips and cloud services to model development, fine-tuning, and application-layer deployment.[26]

Algorithmic decision-making is designed to promote efficiency by automating processes and leveraging data to improve decision-making. A wide variety of businesses use it, including to enable price optimization by automatically analyzing factors such as cost, demand, and competitor pricing.[27] Algorithms can promote disruptive innovation that results in new, enabling products and pricing that can be tailored to meet the specific needs of the consumer.[28] By enabling real-time pricing adjustments based on market conditions and personal data, algorithms help businesses save money, as well as price competitively (i.e., lower), ultimately benefiting consumers.

The increasing use of algorithmic pricing and artificial intelligence in business decision-making raises questions for competition enforcement that can be answered through established antitrust doctrine. CCIA recommends that the Agencies state that the standalone use of common algorithmic pricing tools by companies does not give rise to antitrust liability. As with traditional forms of conduct, liability should depend on the existence of an agreement or concerted action, rather than the mere presence of parallel outcomes.[29] While algorithms may facilitate tacit coordination under certain, predefined conditions,[30] the risk of over-enforcement is substantial if lawful, independent conduct is mistaken for collusion. Therefore, any new guidelines should clearly distinguish between (i) independent algorithmic decision-making, even where it leads to similar outcomes, and (ii) unlawful coordination involving agreement on algorithm design, inputs, or objectives.

Algorithms provide many procompetitive effects, and can create substantial efficiency gains and reduce costs for both supply and demand sides of a transaction.[31] On the demand side,

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[26] *Id.*
[27] Organisation for Economic Co-operation and Development (OECD), *Algorithms and Collusion: Competition Policy in the Digital Age* (2017), https://www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm.
[28] Mercatus Center, Cody Taylor, *The Case for Algorithmic Pricing: Consumer Welfare, Market Efficiency, and Policy Missteps* (May 14, 2025), at 7, https://www.mercatus.org/research/policy-briefs/case-algorithmic-pricing-consumer-welfare-market-efficiency-and-policy.
[29] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007), https://supreme.justia.com/cases/federal/us/550/544/.
[30] OECD, *Algorithms and Collusion: Competition Policy in the Digital Age* (2017); OECD, *Artificial Intelligence, Data and Competition* (2023), https://www.oecd.org/competition/artificial-intelligence-data-and-competition.htm.
[31] OECD, *Executive Summary of the Roundtable on Algorithmic Competition* (Jun. 14, 2023), at 3, https://one.oecd.org/document/DAF/COMP/M(2023)1/ANN4/FINAL/en/pdf.

they can help provide personalized pricing tailored to the specific needs of consumers, or help reduce search costs by providing consumers with a range of suitable products with comparable information.[32] Price monitoring and AI product recognition tools help increase consumers' ability to consider more products, thereby increasing competitive pressures for suppliers to keep costs low. Pricing algorithms can likewise benefit the supply side by reducing barriers to entry for small entrants, thereby increasing competitiveness and reducing costs through improved production processes, more productive workers, and allowing them to price competitively.[33]

In many cases, pricing algorithms also result in consumers receiving lower and more competitive prices for various goods and services. In addition to consumers using price comparison tools and dynamic pricing to help get the best deals at any given time, personalized pricing enabled by software can lead to more and better-targeted discounts for consumers, giving them access to better deals.[34] Prices are information, and dynamic pricing also allows businesses to signal important information about the relative availability of products at a given time. As such, CCIA would recommend that the Agencies recognize that algorithmic pricing can generate substantial procompetitive benefits, and establish an effects-based framework that is key to ensuring enforcement does not chill beneficial innovation.

Any new guidelines should also address the role of third-party algorithm providers. The use of a common vendor does not, by itself, establish an agreement among competitors, and a liability determination should require evidence that the firms knowingly used the algorithm as a mechanism for unlawful coordination or that the vendor facilitated actual collusion. Clear guidance that identifies both red flags that remove collaborations from safe harbors and examples of permissible safeguards in this area will reduce uncertainty and promote the responsible deployment of AI technologies.

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[32] *Id.*

[33] *Id.*

[34] *See*, *e.g.*, OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, Background Note by the Secretariat, *Personalised Pricing in the Digital Era* (Nov. 28, 2018), at 7, https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf; Consumers Council of Canada, *Dynamic Pricing – Can consumers achieve the benefits they expect* (2017), at 14, https://www.consumerscouncil.com/wp-content/uploads/sites/19/2020/03/809323_ccc_dynamic_pricing_final_report_web.pdf.

V. Significant Legal Developments to Address

CCIA appreciates the Agencies' interest in analyzing significant legal, economic, and technological developments since the 2000 Guidelines that warrant inclusion in the updated Guidelines, as this would ensure the updated guidance reflects current practices, market realities, and economic learning. Since the 2000 Guidelines were issued, there have been a number of Supreme Court decisions that have reframed how competitor collaborations are analyzed, as well as significant technological developments that require any potential new guidelines to account for innovation dynamics and platform competition that did not exist in their modern form in 2000.

A. Multi-Sided Markets

A key characteristic of the modern digital economy is the presence of multi-sided platform markets, which were not contemplated in the analytical frameworks of the 2000 Guidelines. The Supreme Court's decision in *Ohio v. American Express Co.*[35] significantly changed the framework for analyzing competitive effects in multi-sided platform markets. In its decision, the Court held that, for antitrust purposes, a two-sided transaction platform constitutes a single market, with both sides analyzed for anticompetitive effects, and that a showing of competitive impact only on one side of the platform is insufficient to satisfy the first step of the rule of reason analysis.[36] This decision is particularly relevant to competitor collaborations in which the collaborating companies are themselves multi-sided platforms. As such, any new guidelines should address: (i) how to define relevant markets when collaborating competitors are multi-sided platforms; (ii) how to assess competitive effects across platform sides; (iii) how indirect network effects may be procompetitive; and (iv) the justifications available to collaborating platform firms.

CCIA recommends that any new guidelines affirm *Amex* as the applicable framework for analyzing competitor collaborations among platform companies, and require that any

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[35] *Ohio v. Am. Express Co.*, 585 U.S. 529 (2018). *See also* Herbert J. Hovenkamp, *Platforms and the Rule of Reason: The American Express Case* (2019), https://scholarship.law.upenn.edu/faculty_scholarship/2058/ (analyzing the Court's extension of the rule of reason to two-sided platform restraints and its implications for platform antitrust analysis); Joshua D. Wright & John M. Yun, *Ohio v. American Express: Implications for Non-Transaction Multisided Platforms*, CPI Antitrust Chronicle (June 2019), https://ssrn.com/abstract=3308516 (analyzing whether the Cour's holding extends to non-transaction platforms, which encompass a significant portion of the technology sector).

[36] *Ohio v. Am. Express Co.*, 585 U.S. 529, 547 (2018) ("courts must include both sides of the platform – merchants and cardholders – when defining the credit-card market"), https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf.

competitive harm or procompetitive justification be assessed across all affected platform sides before drawing conclusions about the net competitive effect of a collaborative arrangement.

B. Procompetitive Efficiencies

The unanimous Supreme Court decision in *NCAA v. Alston* provides the most current articulation by the Court of the rule of reason framework applicable to horizontal competitor collaborations.[37] Justice Gorsuch's opinion confirmed the three-step burden-shifting framework for analyzing these types of cases. First, the plaintiff must show substantial anticompetitive effects in a properly defined market; then the burden shifts to the defendant to demonstrate procompetitive justifications; and finally, if the defendant succeeds, then the burden shifts back to the plaintiff to show that there are less restrictive alternatives that would achieve the same procompetitive benefits.[38]

Applicable to competitor collaborations, *Alston* offers specific features that can be applied directly. The Court affirmed that antitrust law does not require businesses to use the least restrictive means of achieving legitimate business purposes, and that courts should not second-guess degrees of reasonable necessity such that the lawfulness of conduct turns upon judgments of degrees of efficiency.[39] *Alston* also confirms that even arrangements among competitors that are necessary for the production of a jointly created product (*e.g.*, a joint venture) are subject to rule of reason analysis, rather than *per se* condemnation.[40] The Guidelines should incorporate *Alston*'s refinement of the rule-of-reason framework and clarify how the "quick look" doctrine can be applied.[41]

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[37] *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69 (2021), https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf.
[38] *Id.* at 96–100 (setting out the three-step framework and affirming the district court's application of it). *See also* Thomas C. Arthur, *NCAA v. Alston: Unanswered Questions About the Future of College Sports — and the Antitrust Rule of Reason*, 90 Geo. Wash. L. Rev. Online 1 (2021), https://www.gwlr.org/ncaa-v-alston/ (analyzing the implications of *Alston* for the rule of reason framework applicable to competitor collaborations).
[39] *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 107–08 (2021), https://www.supremecourt.gov/opinions/20pdf/20-512_gfbh.pdf (Gorsuch, J.) (rejecting a requirement to adopt the least restrictive means and cautioning that "courts should not second-guess" degrees of reasonable necessity).
[40] *Id.* at 99–100; *see also Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 23 (1979) ("[J]oint ventures and other cooperative arrangements are . . . not usually unlawful . . . where the agreement, as here, is necessary to market the product at all.").
[41] *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (articulating the "quick look" or "abbreviated rule of reason" and explaining when it applies to arrangements with "obvious anticompetitive potential"); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459–62 (1986).

C. **Concerted Actions and Joint Ventures**

American Needle, Inc. v. National Football League settled an important question regarding the threshold for when a joint venture's conduct constitutes a "concerted action" subject to Section 1 of the Sherman Act.[42] The Supreme Court's decision unanimously held that the National Football League's (NFL) teams were distinct economic actors capable of conspiring under Section 1, rejecting the argument that joint venture participants should be treated as a single economic entity, being shielded from antitrust scrutiny when acting through a jointly owned entity.[43] As the Court held, the test is whether the agreement "joins together independent centers of decision making," thereby depriving the market of independent competitive decision-making,[44] rather than whether the parties have given their joint activity a single-entity form. *American Needle* also provides important guidance for competitor collaboration analysis: restraints that are necessary for a joint venture to produce its product are more likely to be permissible and should be analyzed under the rule of reason rather than condemned *per se*.[45] Accordingly, any new guidelines should expressly incorporate the *American Needle* framework, clarifying that the key inquiry is whether an arrangement deprives the market of independent competitive decision-making, and that restraints reasonably necessary to produce a joint venture's output are subject to the rule of reason rather than *per se* condemnation.

VI. **Topics Not Appropriate for the Revised Collaboration Guidelines**

Given the breadth of this consultation and consistent with the 2000 Guidelines,[46] any new guidelines would not be a suitable vehicle to address sector-specific subject matters such as intellectual property or standards-setting. The Agencies have previously addressed standard

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[42] *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010), https://tile.loc.gov/storage-services/service/ll/usrep/usrep560/usrep560183/usrep560183.pdf.

[43] *Id.*

[44] *Id.* at 196.

[45] *Id.* at 203 ("Because many of the restraints the NFL and its teams have agreed to . . . are necessary to produce the NFL's product . . . the Rule of Reason generally should apply"); *see also Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are . . . not usually unlawful . . . where the agreement . . . is necessary to market the product at all").

[46] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors § 1.1, footnote 5 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf ("These Guidelines take into account neither the possible effects of competitor collaborations in foreclosing or limiting competition by rivals not participating in a collaboration nor the possible anticompetitive effects of standard setting in the context of competitor collaborations.").

essential patents ("SEPs") and voluntary standardization in a joint report,[47] and their longstanding Intellectual Property ("IP") Guidelines[48] serve as a more appropriate avenue for examining IP-related matters. As the fundamental conditions governing IP licensing have not changed, there is no apparent need to discuss these topics in updated collaboration guidelines.

VII. Conclusion

CCIA appreciates the Agencies' initiative to solicit public comment to inform potential new guidelines on competitor collaboration. Any new guidelines should reaffirm that the majority of competitor collaborations are procompetitive or competitively neutral, restore the presumption of rule-of-reason treatment, provide clear and workable safe harbors for innovation-market collaborations, and address the distinctive features of modern digital and AI activities. CCIA urges the Agencies to issue guidance that gives businesses the certainty they need to collaborate and innovate while maintaining meaningful protections against genuinely anticompetitive conduct.

CCIA is pleased to provide these comments and looks forward to continuing to engage with the Agencies on these important issues.

[47] *See*, U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (Apr. 2007), https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf; *see also*, U.S. Dep't of Justice & U.S. Patent & Trademark Off., Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013), https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/290994.pdf; U.S. Dep't of Justice, U.S. Patent & Trademark Off. & Nat'l Inst. of Standards & Tech., Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Dec. 19, 2019), https://www.justice.gov/atr/page/file/1228016/dl.

[48] U.S. Dep't of Justice & Fed. Trade Comm'n, for the Licensing of Intellectual Property (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.