COMPETITIVE ENTERPRISE INSTITUTE

1310 L Street, NW, 7th Floor | Washington, DC 20005 | 202.331.1010 | cei.org

October 27, 2025

Comments of the Competitive Enterprise Institute

RE: Request for Information: Regulatory Reform on Artificial Intelligence

Docket No.: OSTP-TECH-2025-0067

The Competitive Enterprise Institute (CEI) appreciates the opportunity to comment on the Office of Science and Technology Policy's (OSTP) Request for Information (RFI) regarding regulatory reform on artificial intelligence (AI). The RFI keenly recognizes that overregulation may unnecessarily or unintentionally hinder the progress, deployment, or adoption of beneficial AI technologies within the United States. CEI is a non-profit research and advocacy organization that focuses on regulatory policy from a free-market perspective. These comments represent the views of CEI as an organization; they do not purport to represent the views of any individual employee or of any donors.

Almost everyone now recognizes AI's vast potential for economic efficiency gains, lifesaving medical breakthroughs, environmental benefits, improvement in education, and more. There is similar consensus around the importance of the U.S. winning the global race for AI dominance, ahead of foreign adversarial regimes, notably China for reasons of national security. But within our federal bureaucracy of hundreds of thousands of rules and guidance documents, estimated to produce a regulatory cost of $2.155 trillion in 2025,[1] there are undoubtedly many government impediments to the domestic success of AI. These comments are not exhaustive and will focus primarily on antitrust policy.

However, it is worth reiterating that Congress has the responsibility to protect the free flow of interstate commerce. OSTP should encourage Congress to consider the constitutional benefits of a uniform federal framework. This would be a much-needed boon to innovations that benefit Americans, ensure U.S. dominance in the global AI race against China, and serve as a welcome assertion of constitutional congressional power.

There are currently approximately 1000 AI-related bills enacted or pending in states across the country.[2] The compliance burden of that regulatory landscape has significant negative

---

[1] Clyde Wayne Crews Jr., *Ten Thousand Commandments* (Competitive Enterprise Institute, 2025 Ed.), https://cei.org/wp-content/uploads/2025/04/10K_2025_v5.pdf.

[2] "Artificial Intelligence (AI) Legislation: Lawmakers Are Increasingly Addressing AI through Legislation, accessed October 26, 2025, https://www.multistate.ai/artificial-intelligence-ai-legislation.

consequences for U.S. innovators trying to compete in a global marketplace.[3] In a sense, we are asking our American AI innovators to compete with one arm tied behind their backs.

Beyond the practical problems with a patchwork of state rules, it is beyond question that large swaths of AI technologies obviously qualify as interstate commerce and, therefore, are a matter for federal instead of state authorities.[4] Congress is well within its proper constitutional scope to prevent the strangling of AI technologies in state cradles of regulation. In fact, federal preemption of state AI regulations is likely the single best thing Congress could do to promote the full potential of AI in the U.S.[5]

Antitrust

Legal scholarship has long discussed the imprecision and subjective application of antitrust law.[6] This is particularly true for the foundational Sherman Act of 1890, which some recent commentary suggests is unconstitutional under the void-for-vagueness doctrine.[7] Other scholarship addresses antitrust's "unelaborated competition criterion," describing it as a vague placeholder that causes indeterminacy and confusion.[8] The Federal Trade Commission (FTC) and the Department of Justice's (DOJ) Antitrust Division have issued guidance to provide more clarity and predictability in enforcement, "which can be changed or elaborated by the same judicial actors that gave it life."[9]

The White House took an important step in releasing its 2025 *AI Action Plan*.[10] Under Pillar 1: Accelerate AI Innovation, the *Plan* recommends reviewing FTC actions from the previous administration that unduly burden AI innovation.[11] The antitrust agenda of Lina Khan, particularly its targeting of the U.S. technology sector and firms at the cutting edge of AI, posed a significant threat to U.S. technological innovation, economic growth, and its competition with China, according to Joe Sullivan, former staff economist and special advisor at the White House Council of Economic Advisors. "[I]nnovators may also demur from technologically fruitful lines of inquiry for fear that it will run further afoul of Khan's FTC, at least until the courts weigh in," according to Sullivan.[12]

---

[3] Will Rinehart, "The Hidden Price Tag of California's AI Oversight Bill," American Enterprise Institute, September 9, 2025, https://www.aei.org/articles/the-hidden-price-tag-of-californias-ai-oversight-bill/.
[4] "Overview of Dormant Commerce Clause," Constitution Annotated, Congress.gov, accessed October 26, 2025, https://constitution.congress.gov/browse/essay/artI-S8-C3-7-1/ALDE_00013307/.
[5] Written Statement of Jessica Melugin, hearing on "Artificial Intelligence: Examining Trends in Innovation and Competition" before Subcommittee on the Administrative State, Regulatory Reform and Antitrust of the Committee on the Judiciary, U.S. House of Representatives, April 2, 2025, https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/melugin-testimony_0.pdf.
[6] Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978).
[7] Matthew G. Sipe, "The Sherman Act and Avoiding Void-for-Vagueness," *Florida State University Law Review*, Vol. 45, No. 3 (Spring 2018), https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=2647&context=lr.
[8] Daniel Francis, "Antitrust without Competition," *Duke Law Journal*, Vol. 74, No. 2 (November 2024), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4214&context=dlj.
[9] Francis, "Antitrust without Competition," p. 433.
[10] White House, Winning the Race: America's AI Action Plan, July 2025, https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf.
[11] White House, America's AI Action Plan, p. 3-4.
[12] Sullivan, *A Global Antitrust Paradox?*, p. 2.

At both the FTC and DOJ, the previous administration contributed to a lack of regulatory clarity relevant to the RFI's Barrier 3. Specifically, this comment will focus on the lack of regulatory clarity created by the 2023 Merger Guidelines and the withdrawal of the 2000 Antitrust Guidelines for Collaborations Among Competitors.

Merger Guidelines

Mergers and acquisitions will play an important role in America winning the global AI race.[13] According to Asheesh Agarwal, former attorney at the FTC and DOJ, "[w]hereas China uses intellectual-property theft and state industrial policy to advance its technologies, America's innovation ecosystem relies on the robust flow of private capital to encourage investment, new entry, and patent filings."[14]

Agency leadership during 2021-2025 drafted[15] and finalized[16] the 2023 Merger Guidelines, with little input from Republican officials.[17] The 2023 Guidelines were roundly criticized,[18] and some hoped that there would be revision to the guidance. Despite the goal of providing clear guidance so that businesses can plan their mergers accordingly, the 2023 Merger Guidelines create heightened regulatory risk and legal uncertainty that can deter procompetitive mergers, according to Aurelian Portuese, professor and director of the GW Competition and Innovation Lab at George Washington University.[19] "The 2023 MG will continue deterring venture capitalists from

---

[13] American Edge Project, *From AI to M&A: How Acquisitions Underpin America's Tech Leadership*, October 2025, https://americanedgeproject.org/wp-content/uploads/2025/10/AEP-MA-Issue-Brief_October-2025.pdf.

[14] Asheesh Agarwal, "How the White House's AI Action Plan Could End Antitrust Overreach," Truth on the Market (blog), October 8, 2025, https://truthonthemarket.com/2025/10/08/how-the-white-houses-ai-action-plan-could-end-antitrust-overreach/.

[15] Federal Trade Commission, "FTC and DOJ Seek Comment on Draft Merger Guidelines," press release, July 19, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines.

[16] Federal Trade Commission, "Federal Trade Commission and Justice Department Release 2023 Merger Guidelines," press release, December 18, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/12/federal-trade-commission-justice-department-release-2023-merger-guidelines.

[17] No Republican commissioners were serving on the FTC when the 2023 Merger Guidelines were approved. Three weeks prior to resigning from the FTC, Republican Commissioner Christine Wilson said she had not seen a copy of the draft Guidelines. "Fireside Chat | The Future of the FTC, Christine Wilson," at Mercatus Center's 2nd Annual Antitrust Forum: Policy in Transition, January 26, 2023, video, 3:20:00, https://www.mercatus.org/events/2023/01/mercatus-centers-2nd-annual-antitrust-forum-policy-transition.

[18] Keith N. Hylton, "Getting Merger Guidelines Right," Boston University School of Law Research Paper No. 24-3, February 28, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4741089; Ted Bolema, "Decoding the 2023 FTC and DOJ Merger Guidelines: Insights into Shifting Antitrust Enforcement," Mercatus Center, February 15, 2024; https://www.mercatus.org/research/policy-briefs/decoding-2023-ftc-and-doj-merger-guidelines-insights-shifting-antitrust; Daniel J. Gilman, "The 2023 Merger Guidelines: What Are They Good For?," International Center for Law & Economics, January 29, 2024, https://laweconcenter.org/resources/the-2023-merger-guidelines-what-are-they-good-for/; Alden Abbott, "The Porcine 2023 Merger Guidelines (The Pig Still Oinks)," Truth on the Market, January 10, 2024, https://truthonthemarket.com/2024/01/10/the-porcine-2023-merger-guidelines-the-pig-still-oinks/; Jessica Melugin, "Silver Lining? New Federal Merger Guidelines: 11 Bad Ideas Instead of 13!," Competitive Enterprise Institute, December 18, 2023, https://cei.org/blog/silver-lining-new-federal-merger-guidelines-11-bad-ideas-instead-of-13/; Ginger Zhe Jin, Mario Leccese, and Liad Wagman, "The Draft Merger Guidelines Risk Reducing Innovation," ProMarket, October 18, 2023, https://www.promarket.org/2023/10/18/the-draft-merger-guidelines-risk-reducing-innovation/.

[19] Aurelian Portuese, "The Dilemmas of the 2023 Merger Guidelines," *Notre Dame Journal of Law, Ethics & Public Policy*, Vol. 39 (2025), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1985&context=ndjlepp.

funding startups in the absence of clear exit options, and may deter large companies from acquiring small companies given the antitrust risks—both outcomes hurting the creation and expansion of small businesses," Portuese wrote.[20]

However, on February 18, 2025, FTC Chair Andrew Ferguson confirmed that the 2023 Merger Guidelines would go into effect and that the agencies would not be reworking the guidance drafted under the previous administration.[21] Some called the decision an "opening blunder," one that risks turning a flawed policy into a bipartisan consensus.[22] The 2023 Merger Guidelines lowered the Herfindahl-Hirschman Index (HHI) thresholds for market concentration that trigger antitrust action, unsupported by case law or established economic theory.[23] On the issue of lowered HHI thresholds, one of us wrote that

> Evaluating mergers through this structural lens assumes both that concentration is present or escalating in the economy at large and that concentration always and only leads to harmful anticompetitive effects. Most detrimentally, it likely precludes the more nuanced assessment of a given merger's impact on competition that the FTC had used over the preceding four decades. This shift will increase Type I errors in antitrust enforcement and rob or delay the benefits of competition-enhancing mergers to consumers.[24]

The 2023 Merger Guidelines discourage beneficial AI mergers and acquisitions. These exit points are crucial for innovative startups to raise capital and increase scale. Further, according to Portuese, the 2023 Guidelines don't provide clear guidance as to whether "business owners should make or buy the products they need to further compete against its rivals."[25]

The FTC and DOJ should review the 2023 Merger Guidelines to ensure they provide clear and predictable guidance that actively supports American innovation. A lack of clarity in the current antitrust approach creates unnecessary uncertainty for U.S. AI development, potentially hindering the nation's capacity to maintain a competitive advantage in the global AI race.

<u>Antitrust Guidelines for Collaborations Among Competitors</u>

There is a lack of regulatory clarity as to how the antitrust agencies might view AI collaborations, because the previous administration withdrew prior guidelines without plans to

[20] Portuese, "The Dilemmas of the 2023 Merger Guidelines," p. 741.
[21] Federal Trade Commission, "FTC Chairman Andrew N. Ferguson Announces that the FTC and DOJ's Joint 2023 Merger Guidelines Are in Effect," press release, February 18, 2025, https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-chairman-andrew-n-ferguson-announces-ftc-dojs-joint-2023-merger-guidelines-are-effect.
[22] Joseph V. Coniglio, "The Merger Guidelines Memoranda: An Opening Blunder by the Trump Administration," Information Technology & Innovation Foundation, February 24, 2025, https://itif.org/publications/2025/02/24/merger-guidelines-memoranda-opening-blunder-by-trump-administration/.
[23] Mariam Baksh, "Big Tech Backer Cites AI, China in Opposing Trump Administration Merger Guidelines," Inside AI Policy, February 24, 2025, https://insideaipolicy.com/share/17682.
[24] Melugin, "The Changing Role of Structural Presumption."
[25] Portuese, "The Dilemmas of the 2023 Merger Guidelines," p. 731-732.

issue new guidance. The FTC and DOJ, on December 11, 2024, jointly withdrew the 2000 Antitrust Guidelines for Collaborations Among Competitors (Collaboration Guidelines).[26] Commissioner Melissa Holyoak, in her dissent, noted that the majority was doing so "without providing any replacement guidance, or even intimating plans for future replacement, leav[ing] business grasping in the dark."[27]

The drafting of new Collaboration Guidelines might provide needed clarity for certain AI collaborations, partnerships, and joint ventures. Shortly after withdrawing the 2000 Collaboration Guidelines, the FTC released its 6(b) study on *Partnerships Between Cloud Service Providers and AI Developers*.[28] Commissioners Ferguson and Holyoak dissented to the inclusion of section 5 in the (6)b report, which was entitled "Areas to Watch Regarding Potential Implications of the AI Partnerships."[29] They noted that the report was quick and limited in scope, and Commissioner Ferguson said, "the limited, brief nature of the study should foreclose the drawing of broad conclusions about the AI industry and its future, or even about the partnerships themselves."[30]

Historically, the FTC has used comments, hearings, and public workshops to investigate evolving markets, which keeps its policies informed by current economic and technological realities. The FTC should replicate the process it utilized when considering the 2000 Collaboration Guidelines.[31] Before soliciting comments on draft Collaboration Guidelines,[32] the FTC should launch a notice of opportunity for comment and public hearing.[33] The Commission should request public comments on the nature, purpose, competitive effects, and antitrust treatment of collaborations among businesses competitors. The comment period should be 90

---

[26] Federal Trade Commission, FTC and DOJ Withdraw Guidelines for Collaboration Among Competitors," press release, December 11, 2024, https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-doj-withdraw-guidelines-collaboration-among-competitors.
[27] Dissenting Statement of Commissioner Melissa Holyoak Regarding the Withdrawal of 2000 Antitrust Guidelines for Collaboration Among Competitors, FTC Matter No. V250000, December 11, 2024, p.1, https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-collaboration-guidelines-withdrawal-statement.pdf.
[28] Federal Trade Commission, *Partnerships Between Cloud Service Providers and AI Developers: FTC Staff Report on AI Partnerships & Investments 6(b) Study*, January 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/p246201_aipartnerships6breport_redacted_0.pdf.
[29] Federal Trade Commission, *Partnerships Between Cloud Service Providers and AI Developers*, pp. 29-36.
[30] Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the FTC Staff Report on AI Partnerships & Investments 6(b) Study, Matter No. P246201, January 17, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-ai-6b-statement.pdf.
[31] William E. Cohen and Gary P. Zanfagna, "Inside the Competitor Collaboration Guidelines: the Forest Among the Trees," *University of Chicago Legal Forum*, Vol. 2000, No. 1 (2000), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1287&context=uclf
[32] 5 U.S.C. § 553.
[33] Federal Trade Commission, "Comment and Hearings on Joint Venture Project," *Federal Register*, Vol. 62, No. 81 (April 28, 1997), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/comment-and-hearings-joint-venture-project/970428jointventureproject.pdf.

days, following the process it used in the past.[34] Further, the FTC should follow past practice by hosting a series of hearings[35] and consider hosting a series of roundtable discussions.[36]

This process should be employed now to address the implications of modern collaboration, particularly in the realm of artificial intelligence (AI) and its related safety and security implications.[37] The antitrust agencies' joint statement withdrawing the 2000 Guidelines,[38] in a footnote, stipulated that the withdrawal did not affect the DOJ and FTC's 2014 Antitrust Policy Statement on Sharing of Cybersecurity Information,[39] which "make[s] it clear that they do not believe that antitrust is – or should be – a roadblock to legitimate cybersecurity information sharing."[40] The 2014 Policy Statement is limited, however, because it focuses on traditional cybersecurity threats. While calls for AI safety regulation are increasing globally,[41] the current policy discussions sometimes fail to recognize that AI safety and AI security are deeply connected and should be addressed in tandem.[42]

Changes in technology and the global marketplace led to both the initial creation and the eventual withdrawal of the Collaboration Guidelines.[43] The previous administration's actions may have created uncertainty for emerging AI collaborations and partnerships. This would be consistent with the priorities set forth in the White House's *AI Action Plan*, which recommended the "[r]eview [of] all Federal Trade Commission (FTC) investigations commenced under the

---

34 Federal Trade Commission, "Comment and Hearings on Joint Venture Project."

35 "Joint Venture Hearings on Antitrust Guidelines for Collaboration Among Competitors," Federal Trade Commission, July 1, 2997, https://www.ftc.gov/news-events/events/1997/07/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors.

36 "Joint Venture Roundtables," Federal Trade Commission, March 17, 1998, https://www.ftc.gov/news-events/events/1998/03/joint-venture-roundtables.

37 The existing policy statement on sharing cybersecurity information does not provide adequate guidance for general, proactive AI safety collaboration that goes beyond traditional cybersecurity threats. Department of Justice and Federal Trade Commission, *Antitrust Policy Statement on Sharing Cybersecurity Information*, April 10, 2014, https://www.ftc.gov/system/files/documents/public_statements/297681/140410ftcdojcyberthreatstmt.pdf.

38 "Justice Department and Federal Trade Commission Withdraw Guidelines for Collaboration Among Competitors," joint statement, December 11, 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/v250000collaborationguidelineswithdrawalstatement.pdf.

39 Justice Department and Federal Trade Commission Withdraw Guidelines for Collaboration Among Competitors, December 11, 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/v250000collaborationguidelineswithdrawalstatement.pdf.

40 Department of Justice and Federal Trade Commission, Antitrust Policy Statement on Sharing of Cybersecurity Information, April 2014, https://www.ftc.gov/system/files/documents/public_statements/297681/140410ftcdojcyberthreatstmt.pdf.

41 Jared Perlo, "Nobel Prize Winners Call for Binding International 'Red Lines' on AI," NBC News, September 22, 2025, https://www.nbcnews.com/tech/tech-news/un-general-assembly-opens-plea-binding-ai-safeguards-red-lines-nobel-rcna231973.

42 Ken Huang, "AI Safety vs. AI Security: Navigating the Commonality and Differences," Cloud Security Alliance, March 19, 2024, https://cloudsecurityalliance.org/blog/2024/03/19/ai-safety-vs-ai-security-navigating-the-commonality-and-differences.

43 Cohen and Zanfagna, "Inside the Competitor Collaboration Guidelines"; "Justice Department and Federal Trade Commission Withdraw Guidelines for Collaboration Among Competitors," joint statement, December 11, 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/v250000collaborationguidelineswithdrawalstatement.pdf ("[T]he Collaboration Guidelines fail to address the competitive implications of modern business combinations and rapidly changing technologies such as artificial intelligence, algorithmic pricing models, vertical integration, and roll ups.").

previous administration to ensure that they do not advance theories of liability that unduly burden AI innovation."[44]

Conclusion

Because antitrust law is often ambiguous, clear guidance is required to give industry the confidence to pursue innovative business decisions. While federal preemption of state AI regulation should be this administration's foremost priority when it comes to regulatory reform for AI, the FTC and DOJ should also work to reconsider the unclear antitrust guidance fostered during the prior administration. CEI appreciates OSTP's leadership in examining barriers to AI innovation and welcomes continued engagement on these issues.

Respectfully submitted,

Alex R. Reinauer
Research Fellow
Competitive Enterprise Institute
Alex.Reinauer@cei.org

Jessica Melugin
Director of the Center for Technology & Innovation
Competitive Enterprise Institute
Jessica.Melugin@cei.org

[44] White House, *Winning the Race: America's AI Action Plan*, July 2025, p. 3, https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf.