



April 21, 2022

Department of Justice, Antitrust Division
950 Pennsylvania Avenue, NW
Washington, District of Columbia 20530

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, District of Columbia 20580

Re: Request for Information on Merger Enforcement (FTC-2022-0003-0001)

The undersigned, representing a broad and diverse community of small business and startup innovators, respectfully submit the following comments to the Federal Trade Commission (FTC) and U.S. Department of Justice's Antitrust Division (DOJ) on the joint agency Request for Information on Merger Enforcement (RFI).¹

The communities we represent are the startups and small businesses that are the driving force behind economic growth, competition, and innovation across countless consumer and enterprise markets in the United States, providing software, hardware, and Internet of things (IoT) solutions and systems for agriculture education, healthcare, manufacturing, public safety, and countless other examples. They employ tens of millions of Americans who live and work in communities in every state of the nation and are responsible for adding over \$11.5 trillion to the American gross domestic product. Together, we share the FTC and the DOJ's goals of protecting competition through timely updates to guidance when new learning and advances in jurisprudence are informative as well as through appropriate enforcement of U.S. antitrust laws.

The companies we work with are strategic and selective about the markets they enter, and they compete aggressively. Success for a startup or small business can take a variety of forms, including being purchased by a larger company that may have the resources and added expertise to enhance the product and/or bring the product to market for customers. Frequently, small businesses and startups are founded with the expectation that when their idea's potential has been sufficiently developed and demonstrated, the business will be acquired. Such an acquisition connects entrepreneurs to the scale and resources needed to develop their innovation to its full potential. Such an acquisition also allows the creative minds behind these new technologies to move on to develop new businesses, equipped with the additional skills and resources from the

¹ Request for Information on Merger Enforcement (FTC-2022-0003-0001), <https://www.regulations.gov/document/FTC-2022-0003-0001>.

successful exit. The U.S. economy and consumers have benefited tremendously from the creativity of individuals when combined with the resources and institutional knowledge of businesses that acquire their innovations.² 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, a fact that existing merger enforcement guidance reflects.³ Any updates to the FTC and the DOJ merger enforcement guidelines therefore stand to deeply impact our dynamic communities and how they realize success.

We agree with the FTC and the DOJ that, from time to time, it may be necessary to update merger enforcement guidelines. While we appreciate the RFI's invitation to provide answers to questions posed in the RFI, the FTC and the DOJ must inform any updates made to the merger guidelines by an objective data-driven evidence base and avoid making policy-level decisions based on edge-use cases and hypotheticals. Today, empirical data demonstrates that industrial concentration in the U.S. economy has decreased over the past two decades.⁴ In considering any updates to merger enforcement guidelines, the FTC and the DOJ should be mindful to avoid framing mergers, especially vertical integrations, as inherently anticompetitive or as innately having a negative effect on consumers. Such assumptions stand in stark contrast to both objective evidence and the experiences of those we work with, and we strongly urge both the FTC and the DOJ to base its next steps on empirical evidence and developed caselaw.

We further urge the FTC and the DOJ to appropriately maintain the distinction between vertical and horizontal mergers in enforcement guidance. The incentives for, dynamics driving, and potential to impact competition of both vertical and horizontal mergers very often differ significantly, and have long been categorized separately.⁵ The potential for a combined treatment of horizontal and vertical mergers in the RFI is worrying in light of the significant differences in the potential market effects of each. The FTC and DOJ have long been able to implement the two separate sets of guidelines simultaneously in challenging complex mergers that present horizontal and vertical concerns, relying on each set of guidelines and clearly evaluating the anticompetitive concerns that may result from such combinations.

² See Letter from Bobby Franklin, President & CEO of the National Venture Capital Association, to the Hon. Hakeem Jeffries and Hon. Ken Buck (June 21, 2022), available at <https://nvca.org/wp-content/uploads/2021/06/NVCA-letter-of-opposition-Platform-Competition-and-Accountability-Act.pdf>.

³ *Vertical Merger Guidelines*, DOJ, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf (recognizing that vertical mergers often benefit consumers); *Horizontal Merger Guidelines*, DOJ, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> (advising that the agencies should avoid obstructing mergers that are either competitively beneficial or neutral).

⁴ E.g., C. Lanier Benkart et al, *Concentration in Product Markets* (April 2021), at <https://www.nber.org/papers/w28745>.

⁵ <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/competitive-effects>.

We also strongly discourage the FTC and the DOJ from developing industry- or sector-specific merger enforcement guidance. To date, the flexible and industry-agnostic approach of the U.S. antitrust law concepts has proven effective in providing fairness and consistency in antitrust law enforcement. There would be substantial risks and unintended consequences associated with disparate treatment among industries if the FTC and DOJ were to carve out exemptions or specifically target certain sectors of the economy. Today's time-tested, flexible, industry-agnostic merger enforcement guidance is far superior in addressing unique and challenging use cases, promotes a harmonized and predictable legal and business environment, and will be more able to keep pace with changes to the marketplace brought on by technological advancements that cannot be anticipated. For example, the concept of a "digital market" is constantly changing as new services and products are introduced to the public. Differences in terminology between how phrases are used in commerce and how phrases are used in static industry-specific merger guidance will inevitably diverge, leading to an inconsistent application of antitrust law that would deter beneficial mergers and acquisitions.

If the merger enforcement guidelines are revisited, we urge a light touch and advocate for careful and targeted improvements to be made to existing guidelines, consistent with the above, rather than a wholesale rewrite. Any revisions to today's merger enforcement guidelines must retain rigorous economic analysis as a cornerstone of any review or enforcement. Economic analysis provides a transparent and objective method of evaluation in enforcements and allows businesses to predict when their actions will and will not create antitrust enforcement concerns. Reducing the role of or removing economic analysis from the merger guidelines would create uncertainty for businesses, disrupting legal and business certainties and limiting the ability of the innovative companies we represent to attain success through pro-competitive mergers.

Finally, we request that the FTC and the DOJ issue any proposed changes to merger enforcement guidelines for further public comment before they are finalized, consistent with the agencies' practices.

Sincerely,

ACT | The App Association

Developers Alliance

Engine

Small Business & Entrepreneurship Council

TechNet