

March 23, 2022

Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

**Re: Request for Information on Merger Enforcement, Docket No. FTC-2022-0003-0001**

To the Federal Trade Commission and U.S. Department of Justice:

Consumer Technology Association (CTA)<sup>®</sup> submits this comment on the Request for Information (RFI) on Merger Enforcement by the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ).<sup>1</sup> CTA is North America's largest technology trade association. Our members are the world's leading innovators – from startups to global brands – helping support more than 18 million American jobs. CTA owns and produces CES<sup>®</sup>, the world's most influential tech event. CTA members operate in a competitive market to produce innovative products that benefit consumers and power the economy.

CTA appreciates the agencies' RFI regarding federal merger enforcement guidelines. The agencies should solicit a range of input and develop any new enforcement guidance based on careful consideration of matters that will have massive impacts across the economy. This kind of deliberative process is preferable to abrupt changes in course – such as last year's withdrawal of the FTC's Vertical Merger Guidelines – that undercut predictability and inhibit innovative and pro-consumer merger activity.

CTA emphasizes two points: First, the agencies should promote clear, transparent, and predictable rules grounded in decades of antitrust precedent, and avoid departures that create uncertainty in the market. Second, the agencies should recognize that the technology startup market is flourishing and successful, and potential acquisitions are an important driver of

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<sup>1</sup> FTC & DOJ Antitrust Division, Request for Information (RFI) on Merger Enforcement (Jan. 18, 2022), <https://www.regulations.gov/docket/FTC-2022-0003/document> ("RFI").

investment and innovation in that market.

### **The Agencies Should Maintain Clear, Transparent, and Predictable Rules Grounded in Decades of Antitrust Precedent.**

CTA has long supported the agencies' efforts to craft sensible merger guidance that promotes predictability for industry and consumers. In particular, when the FTC and DOJ proposed – and ultimately adopted – new Vertical Merger Guidelines in 2020, CTA supported them, stressing that clear rules would promote certainty in the market.<sup>2</sup> However, the FTC's withdrawal of those Guidelines in 2021 was an abrupt about-face and returned uncertainty to this aspect of the market, leaving companies without clear guidance on how to evaluate potential vertical mergers.<sup>3</sup> Companies of all sizes benefit when agencies promote unified, clear, and transparent approaches to review. Legal predictability promotes innovation and investment, which translate directly to consumer benefits.

As the agencies review feedback on the specific questions in the RFI, they should remain mindful that shifts in longstanding guidance can disrupt companies' expectations and deter beneficial transactions by introducing an additional element of risk. In particular, vertical mergers are often good for competition *and* competitors. Mergers drive markets forward and create avenues for expansion and the development of new economic frontiers, and such an understanding has long informed antitrust precedent. Dismissing the efficiency gains and pro-competitive benefits of mergers would be contrary to the broad economic consensus that has existed for decades.<sup>4</sup> Departing from historical approaches may deter acquisitions that would otherwise promote innovation, based on uncertainty regarding enforcement interpretations.

Similarly, the agencies should avoid introducing novel industry-specific guidelines, such as treating mergers in digital markets differently than other markets.<sup>5</sup> Instead, the agencies

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<sup>2</sup> CTA, Comment on DOJ/FTC Draft Vertical Merger Guidelines (Feb. 26, 2020), [https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/cta\\_letter\\_on\\_ftc\\_doj\\_guidelines\\_2262020.pdf](https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/cta_letter_on_ftc_doj_guidelines_2262020.pdf).

<sup>3</sup> CTA, Comment on Agenda Items at September 15 Open Meeting (Sept. 12, 2021), <https://cdn.cta.tech/cta/media/media/advocacy/pdfs/cta-ftc-september-15-meeting-comment-9-12-21.pdf>. While the FTC officially withdrew the 2020 Vertical Merger Guidelines, the DOJ has not yet withdrawn them, while being critical of their approach, thus creating further uncertainty. *See* RFI at n.3; *see also* Press Release, DOJ, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>.

<sup>4</sup> Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, ProMarket (Sept. 23, 2021), <https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/>.

<sup>5</sup> *See* RFI at 7-8.

should recognize that antitrust principles apply consistently across markets, and should refrain from creating confusing carveouts for certain industries and specific markets. When it comes to digital markets, rapid change is often a benefit, and dynamism should not be deemed anticompetitive so prematurely.

Indeed, the record levels of success in the tech industry and dramatic benefits to consumers' lives have come against the backdrop of stability from the 2010 Horizontal Merger Guidelines, which are based on decades of established antitrust precedent.<sup>6</sup> Further, the agencies should not discard the tried-and-tested consumer welfare standard. The consumer welfare standard is grounded in objective evidence, which helps safeguard competition policy from the uncertainty of subjective or political influences. As the agencies evaluate the responses to the RFI, they should keep in mind the unparalleled explosion of innovative consumer products over the past few years, enhancing consumer welfare and U.S. competitiveness. If the agencies move in a different direction on merger guidance and enforcement, they risk undermining the predictability of the legal standards underlying many of the transactions that have fueled this pro-consumer innovation.

### **The Technology Startup Market Is Highly Competitive and Successful Because of the Balanced Approach Under Existing Guidelines.**

In the RFI, the agencies specifically ask for input related to potential and nascent competition,<sup>7</sup> in particular about the acquisition of smaller or earlier-stage companies by more established companies.

It is the very possibility of a merger or acquisition that allows the startup market to flourish, by attracting greater investment capital and encouraging startups to assume risks. Last December, at a Senate Judiciary Subcommittee hearing, startup founders explained that acquisitions are driving the startup economy.<sup>8</sup> Indeed, in 2021, during the COVID-19 pandemic, venture capital

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<sup>6</sup> CTA, 2021 Corporate Report at 2-3 (2021), [https://cdn.cta.tech/cta/media/media/who-we-are/pdfs/2021\\_cr\\_final.pdf](https://cdn.cta.tech/cta/media/media/who-we-are/pdfs/2021_cr_final.pdf) (“U.S. tech industry retail sales revenues are expected to climb to \$461 billion in 2021 – a 4.3% increase year-over-year. . . . Tech companies power the U.S. economy producing more than 18 million jobs that represent 12% of GDP.”); *see also* Press Release, CES, CTA Forecast: Consumer Tech Industry Revenue Projected to Reach Record \$505 Billion For First Time in 2022 (Jan. 3, 2022), <https://www.cta.tech/Resources/Newsroom/Media-Releases/2022/January/CTA-Forecast-Consumer-Tech-Industry-Revenue-Projec>. The report also explains how many tech solutions – such as telehealth and blood sugar and heart rate monitors – are keeping patients healthy.

<sup>7</sup> *See* RFI at 6.

<sup>8</sup> *The Impact of Consolidation and Monopoly Power on American Innovation: Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary*, 117th Cong. at 2 (Dec. 15, 2021) (statement of Bettina Hein, Founder and Chief Executive Officer, juli), <https://www.judiciary.senate.gov/imo/media/doc/Hein%20Testimony.pdf> (“Importantly, acquisitions

investments reached record heights, with estimates of \$330 billion invested in the United States – nearly double the previous record of \$166.6 billion raised in 2020 – and global funding up 111% year-over-year.<sup>9</sup> Similarly, a 2020 survey found that nearly 60 percent of startup executives listed acquisition as a realistic long-term goal, as compared to 17 percent referencing initial public offering (IPO).<sup>10</sup> It is quite clear that this startup ecosystem drives competition and innovation forward.

CTA has seen firsthand that the startup market for consumer technology is flourishing. We proudly count hundreds of startups among our 1500 members. Every year at CES, CTA’s Eureka Park is the premier arena for startups to launch new products, services, and ideas as well as showcase entrepreneurial talent.<sup>11</sup> At CES, products on display range from air taxis, connected health devices, and telemedicine to AI-enabled vehicles and robots.<sup>12</sup> This wide range is unsurprising; the current startup market is healthy, and the number of startups and the value of startups have grown over the last decade.<sup>13</sup> Many of these startups are founded by serial entrepreneurs, who use proceeds from previous acquisitions to launch new ventures.

Indeed, CES, like many other trade shows, is a welcoming free market entry point to the consumer technology industry. It enables new industry entrants – from startups to large companies, often entering new business areas – to easily break into our industry. At CES, and many other trade shows, anyone with an idea can present it to hundreds, if not thousands of

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also enable startup investors to reclaim their invested capital, realize any gains, and recycle their capital into the next generation of startups, fueling the ongoing process of innovation-led economic growth and job creation.”); *id.* at 3 (statement of Roger P. Alford, Professor of Law, Notre Dame Law School), <https://www.judiciary.senate.gov/imo/media/doc/Alford%20Testimony1.pdf> (“We should recognize and embrace the fact that one of the most common exit strategies for startups is to be acquired. That should be encouraged.”).

<sup>9</sup> Pitchbook, Venture Monitor at 5 (Jan. 13, 2021), <https://pitchbook.com/news/reports/q4-2021-pitchbook-nvca-venture-monitor>; CB Insights, State of Venture 2021 Report at 11 (2021), <https://www.cbinsights.com/research/report/venture-trends-2021/>.

<sup>10</sup> See Silicon Valley Bank, 2020 Global Startup Outlook at 7 (2020), [https://www.svb.com/globalassets/library/uploadedfiles/content/trends\\_and\\_insights/reports/startup\\_outlook\\_report/suo\\_global\\_report\\_2020-final.pdf](https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/suo_global_report_2020-final.pdf).

<sup>11</sup> Jeremy Snow, *Where Ideas Come to Life: Eureka Park™ at CES*, CES (Feb. 21, 2020), <https://www.ces.tech/Articles/2020/Where-Ideas-Come-to-Life-Eureka-Park.aspx>.

<sup>12</sup> Press Release, CES, That's a Wrap: CES 2022 Concludes In Person with Innovation to Better the World (Jan. 7, 2022), <https://www.ces.tech/News/Press-Releases/CES-Press-Release.aspx?NodeID=feda6c3c-116e-4097-8735-60b8e0d7d096>.

<sup>13</sup> Engine, The State of the Startup Ecosystem at 6 (Apr. 22, 2021), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60819983b7f8be1a2a99972d/1619106194054/The+State+of+the+Startup+Ecosystem.pdf>.

potential investors, partners, buyers, and media. It is part of CTA's culture that CES must be affordable so that anyone with an idea can participate. In fact, the Eureka Park portion of the event is subsidized to allow easy entry for startups.

CES is important for startups and new entrants to attract customers, obtain needed funding, or garner the attention of bigger companies who can acquire them and more quickly bring their ideas to market. When several larger companies, concerned about Omicron transmission, withdrew from exhibiting at CES 2022 in late 2021, we chose to still go forward with CES, knowing that several hundred smaller companies needed CES to introduce their products and attract investors.

At CES 2022, Eureka Park was the busiest area of the show, with buyers, media, and big company investors and potential acquirers helping accelerate innovation by rewarding those innovating and creating new products and services. We encourage top FTC and DOJ officials to attend CES 2023 in-person next January, as it will reveal the strong relationship between investment in innovation and exit opportunities – and will drive home the importance of legal certainty in merger guidelines as the vehicle for the virtuous cycle of investing in innovation.

In sum, CTA supports the agencies' review of market conditions from an array of stakeholders. We encourage the agencies to aim for meaningful transparency and certainty, avoiding departures from established antitrust principles that have helped support a vibrant consumer technology sector.

Sincerely,

CONSUMER TECHNOLOGY ASSOCIATION

/s/

Michael Petricone  
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/s/

J. David Grossman  
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