September 18, 2023

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: Federal Trade Commission-Department of Justice Request for Public Comment on Proposed Updates to its Merger Guidelines***

We are small business and startup innovators driving economic growth, competition, and innovation across countless consumer and enterprise markets in America. We research, develop, and provide internet of things (IoT) solutions across a wide range of markets and use cases. We 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 proposed draft Merger Guidelines.[1] While we share the FTC's and DOJ's goals of protecting competition through appropriate guidelines that elevate the dynamic and diverse digital economy for the small business community, we have significant concerns with proposed updates to the merger guidelines, which, unless revised, will discourage pro-competitive and pro-consumer mergers that are a primary pathway for success for our small business and startup community, ultimately derailing innovation. As a result, we request that the FTC-DOJ make significant revisions to its draft, consistent with our views below, before the merger guideline updates are finalized.

Success for a startup or small business can take a variety of forms and be accomplished through different means, including but not limited to being acquired by a larger company with the resources and knowledge to improve the product and/or streamline market entry or an initial public offering (IPO) all to the benefit of end-consumers. Acquisition is often the best of these options for the business owner(s) and consumers, as IPOs are expensive and fraught with risk and thus reduces likelihood of consumer benefit.[2] We often start our businesses with the understanding that once we have brought our idea to fruition, our business may be acquired, allowing us to move on to develop new businesses. The U.S. economy and consumers have benefitted immensely from our freedom to combine the novel products we create with the resources, technical knowledge, and commercial knowledge of businesses that later acquire our innovations. A merger that helps deliver better products or services for consumers is often our desired outcome and is desirable from a competition policy standpoint. Existing merger enforcement guidance echoes this understanding.[3] Any changes to the FTC- DOJ merger guidelines likely will significantly have long-term,

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[1] Draft FTC-DOJ Merger Guidelines, available at https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

[2] *See* Will Rinehart, "Welcome to the Kill Zone? A closer look at merger and start-up data suggests it's a cultivation zone," THE BENCHMARK (Feb. 27, 2020), *available at* https://medium.com/cgobenchmark/welcome-to-the-kill-zone-852339601fbb ("For startups, going public isn't a sure path to success. Companies typically sign away 4 to 7 percent of their gross proceeds to an investment bank to sell shares of the stock. They also tend to incur an additional $4.2 million in costs to go through the process of getting listed. On top of this, a company will have to fork over another $1 to $2 million for federal compliance every year. Most IPOs perform worse than the overall market.").

[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).

negative effects on our businesses' ability to innovate and compete, affecting our ability to fully realize success.

At the outset, we do not see a demonstrated need to revise or rewrite the existing merger guidance. If, however, the FTC-DOJ merger guidelines must be revisited, we encourage cautious and narrowly-scoped amendments be made to the existing guidelines, rather than a blanket rewrite that reduces our ability to realize success and a reward to our innovation and entrepreneurial risk-taking through an acquisition. Any modifications should maintain a deference to thorough economic analysis as a foundation of any merger review or enforcement. The draft guidelines, as written, disregard these principles, reject decades of new economic and legal learnings, and do not appropriately guide businesses through the competitive analysis. Instead, they list only barriers, without founded justifications, to what would otherwise be pro-consumer, pro-competitive merger activity. Diminishing the role of, or eliminating, economic analysis from the merger guidelines will produce uncertainty for us and harm our ability to achieve success through pro-competitive mergers. In updating the merger guidelines, it is crucial that the FTC-DOJ base any changes in settled law and experiences and effects that are well-demonstrated. The merger guidelines should avoid making policy-level decisions based on edge cases or hypotheticals that do not reflect the reality of our business environment. Further, the FTC-DOJ should ensure that its guidelines do not frame mergers as innately anticompetitive or harmful for consumers. These are leading examples of assumptions which do not reflect objective evidence or our experiences, and we request that the FTC-DOJ base any changes it makes to the merger guidelines on empirical evidence and relevant case law.

Building on the above, we have significant concerns with the FTC-DOJ's proposed shift in approach that would significantly lower the threshold to which a merger is presumed to be anticompetitive through substantial departures from both agencies' well-grounded approach to mergers. Notably, the FTC-DOJ proposes to reduce its reliance on the Herfindahl-Hirschman Index (HHI) and market share metrics that both agencies, and the private sector, have long relied on; proposes to assert that a 30% market share in any relevant market is a *per se* violation of Section 7 of the Clayton Act and that firms in such a position will be subjected to increased scrutiny; and assumes that a vertical merger that would exclude a competitor from accessing over 50% of the relevant market are *per se* illegal. We consider these sweeping proposed shifts in policy to broadly discourage pro-competitive transactions that we rely on to succeed as a small business innovator community without benefit to the public.

Further, many of the FTC-DOJ's proposed changes to its merger guidelines are based on unsupported or outdated legal theories with respect to market definition and competition law, many of which the courts have widely rejected. Such theories include the FTC-DOJ's proposed assertion that a merger resulting in a dominant firm in one market entering a new and different market that firm is not present in may violate Section 2 of the Sherman Act in addition to Section 7 of the Clayton Act; that a firm engaging in an "anticompetitive pattern" of multiple small acquisitions may violate Section 2 of the Sherman Act in addition to Section 7 of the Clayton Act, even if no individual acquisition would violate the antitrust laws; alleging that mergers result in lowered wages/reduced wage growth, diminished worker conditions and benefits, and reduce workplace quality; and taking inappropriately narrow approaches to market definition that disregard significant substitutes. Indeed, the FTC-DOJ's goal of updating its guidelines to address the modern economy is at odds with its wide reliance on cases from the 1970's and earlier, rather than recent case law (including those decisions addressing its theories and rejecting them) that reflects accepted ideas like the consumer welfare standard. As a result, the proposed merger guidelines, unless significantly changed, will introduce confusion into the US economy and reduce the impact and deference the guidelines have.

We appreciate the FTC-DOJ publishing its proposed modifications to the merger guidelines for public comment, consistent with the agencies' past practices. We welcome the consideration of our consensus views above, and welcome the opportunity to collaborate with both FTC and DOJ on ways to advance competition and consumer protection across American markets.

Sincerely,

**/n software**

**BadVR**

**Busy Bee Studios**

**ComputerWays Inc**

**Dogtown Media**

**Epic Reach**

**Faultline Group**

**FMS Inc.**

**Fresco Capital**

**GlobalForce Tech Consulting**

**Heaven Your Way**

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