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. 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. 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. Any changes to the FTC-DOJ merger guidelines likely will significantly have long-term,

---


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.”).

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
Homnick Systems
Ironistic
Marshall Artist
Mend VIP
Particle Health
Rimidi
SheerID
SouthernDNA
SPENDiD
TechNeed Solution
Vemos
Youdle