Before the
United States Federal Trade Commission and
Department of Justice
Washington, D.C.

In re Request for Information on Merger Enforcement	Docket No. FTC-2022-003

COMMENTS OF

THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

In response to the Request for Information on Merger Enforcement released January 18, 2022 (the "RFI"),[1] the Computer & Communications Industry Association ("CCIA")[2] submits the following comments.

I. Introduction and Summary

CCIA is pleased to participate in this effort by the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") (collectively, the "Agencies") to examine whether the current iteration of the merger guidelines ("Guidelines") continues to provide clear and transparent guidance to companies that are considering a potential combination or acquisition. As a leading association of telecommunications, computing, software, application, and communications firms, CCIA will focus its comments on the application of the Guidelines to Digital Markets.[3]

The Guidelines, being the product of decades of transaction analysis in the Agencies and the courts, remain a valuable and adequate set of tools for examining transactions in today's economy. More importantly, the Guidelines have been compiled, throughout several revisions,

[1] Press Release, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), available at https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers. The RFI is available at https://www.regulations.gov/document/FTC-2022-0003-0001.

[2] CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at https://www.ccianet.org/members.

[3] RFI ¶ 11.

in a manner that is clear but not delimiting. In their substance, the Guidelines are agnostic as to type of product and service, and instead provide clear metrics and practical guidance as to whether a transaction is likely to raise competition concerns, all rooted in a framework that is theoretically sound with solid empirical support. For this reason, the Guidelines are adaptable and flexible.[4] Being so flexible, the Guidelines do not require broad revision, nor do they require the addition of industry-specific rules,[5] which would lead to disparate treatment of firms and considerable confusion for business and the courts, with negative follow-on effects in investment. The forthcoming "modernization"[6] of the Guidelines should be a refresh, not a rewrite.

II. Existing Antitrust Analysis Remains Appropriate for Mergers in 21st Century Digital Markets

The Guidelines are well-suited to the task of evaluating the competitive effects of transactions in today's digital markets as in industries across the economy, which is their appropriate purpose under Section 7 of the Clayton Act.[7] The Agencies should retain the presumption that most transactions do not raise competitive concerns and should trust in the clarity and flexibility of the Guidelines to protect the procompetitive, pro-consumer ecosystems of U.S. telecommunications and technology markets, as well as other markets that offer digital goods directly or that rely on digital assets to produce products and provide services. The flexibility and adaptability of the Guidelines ensure that merger review in digital markets does not require new or distinct guidance: the same guardrails that preserved competition in 20th-century industries have preserved competition in 21st-century digital markets and will continue to do so.

[4] CCIA continues to believe that "[t]he FTC/DOJ Guidelines were specifically designed to be adaptable to a wide spectrum of industries" and that traditional antitrust analysis should apply to all industries, including in the technology/digital sector. CCIA Comments to Antitrust Modernization Commission Working Group on the New Economy (2005) at 4, 14, available at https://www.ccianet.org/wp-content/uploads/2015/03/AMC-New-Economy-Working-Group-Comments.pdf.

[5] "There is no pressing need to create a new, untested framework for merger analysis." *Id*. at 5.

[6] *See* RFI at 1.

[7] 15 U.S.C. § 18; s*ee also* RFI ¶ 11.

A. Transparent guidelines provide clarity and predictability for market participants and investors.

The Guidelines have been and remain a vitally important tool for the Agencies, the courts, and firms in their consideration of proposed transactions for their potential to "lessen competition, or to tend to create a monopoly."[8] In fact, the Guidelines' chief value lies in the transparency that they provide to firms as they weigh potential acquisitions and mergers, which in turn helps drive investment in the startup ecosystem. Their transparency facilitates a streamlined review process in which premerger notifications are complete and thorough from the outset and, where a second request is warranted, ongoing dialog between the Agencies and applicants is substantive and expeditious. Unlike the Clayton Act and federal jurisprudence, the Guidelines are not binding federal law; however, because the Guidelines reflect evolving precedent and economic evidence they have been embraced by the courts and in turn have successfully shaped the way that U.S. firms think about and structure potential deals.

In addition to their flexibility and transparency, the Guidelines have an equally valuable trait of even-handedness. They do not single out a particular sector for heightened scrutiny or separate rules. And that nondiscriminatory treatment has not resulted in a concentration of transactions by large technology companies in various digital markets that is meaningfully higher than transactions in many other industries. A study published by the National Bureau of Economic Research in January 2022 reaches the conclusion that, "Combining all acquisitions from 2010 to 2020, [Google, Apple, Facebook, Amazon, and Microsoft] [collectively GAFAM] acquisitions are significantly less concentrated across categories than any of the top acquirer groups we considered."[9] To the contrary, transactions involving this group of firms are not "correlated with any slowdown in the number of new acquirers acquiring in the same categories after the initial acquisitions by GAFAM."[10] As such, "technology acquisition does not shield GAFAM from competition."[11] Moreover, the study found that, in general, ***all*** technology firms "expand their territory through M&As in adjacent and unrelated areas," such that any thought of

[8] *Id.*; *see also* RFI ¶ 1a.
[9] Ginger Zhe Jin *et al.*, *How Do Top Acquirers Compare in Technology Mergers? New Evidence from an S&P Taxonomy*, Nat'l Bureau of Econ. Research, at 5 (Jan. 2022), available at https://www.nber.org/papers/w29642.
[10] *Id*. at 6.
[11] *Id*.

Guidelines reform "would benefit from not being confined to GAFAM firms."[12]

Further, evidence does not support the notion that tech M&A activity has been the province solely, or disproportionately, of the largest technology firms. According to Jin *et al*., during the period 2010 to 2020, the Top 25 technology firms (according to Forbes) accounted for 1,033 of the 35,844, or **2.9%**, of the completed acquisitions.[13] The top 80 technology firms[14] accounted for only **14.24%** of acquisitions during that period.[15] This evidence does not suggest that the Guidelines are disproportionately encouraging M&A activity in the tech sector, or that greater scrutiny should be applied to this sector to quell acquisitions.

Thus, as CCIA has stated above, this refresh of the Guidelines should not contemplate the adoption of any new or distinct analyses aimed specifically at digital markets, however defined.

B. Appropriate market definition remains a crucial component of merger review that will ensure robust antitrust enforcement.

Merger analysis in today's economy depends on appropriate market definition as much as it did when previous iterations of the Guidelines were considered, if not more.[16] To the extent that the Agencies seek comment on the efficacy of the Guidelines in meeting the charge of Section 7, market definition continues to play a crucial role as part of the merger review process. The recent shift toward narrower market definitions — particularly product market definition — has made antitrust enforcement more aggressive.[17] In brief, narrower market definitions make it more difficult for applicants to rely on procompetitive efficiencies as an offset to anticompetitive effects, because the efficiencies now are falling outside the relevant market. Indeed, narrowly

[12] *Id*. at 39. For this reason, the FTC's 6(b) study, which examined only five large technology firms, does not provide a basis for concern that digital markets have experienced a greater degree of concentration through acquisitions than other sectors of the economy. *See generally* FTC, *Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: an FTC Study* (Sept. 2021), available at https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study.
[13] *Supra* n. 9, at 17. This Top 25 Tech group comprises the 25 top-ranked companies in Forbes's 2019 Top 100 Digital Companies excluding Google, Amazon, Apple, Microsoft, and Facebook. *Id*. at 13.
[14] Jin *et al*. grouped Google, Amazon, Apple, Microsoft, and Facebook as one cohort, along with the Forbes Top 25, see *supra* n. 9, and the Top 25 Private Equity firms according to Private Equity International in December 2020, and the Top S&P cohort of firms with the highest number of acquisitions in the Standard & Poor's database. *Id*. at 13.
[15] *Id*. at 16.
[16] RFI ¶ 6.
[17] Comparing merger-review jurisprudence in the last 15 years to the early Section 7 cases of the mid-20th century reveals that product market definitions have demonstrably narrowed. Christine Wilson & Keith Klovers, *Same Rule, Different Result: How the Narrowing of Product Markets Has Altered Substantive Antitrust Rules*, 84 Antitrust L.J. 1 (2021), available at https://www.ftc.gov/system/files/documents/public_statements/1598775/wilson_klovers_alj_84-1_final_pdf.pdf.

defined markets force applicants to show a greater magnitude of procompetitive efficiencies — as the *Heinz* court stated, "extraordinary efficiencies"[18] — to offset harm.

In making this observation, CCIA does not suggest that every proposed transaction be reviewed according to insupportably narrow market definitions. Rather, these comments suggest that the Agencies' own use of more sophisticated tools for identifying substitute goods, such as demand substitution and the hypothetical monopolist test, have inured to consumers' benefit and ensure strenuous enforcement of Section 7. For this additional reason, the Guidelines in their current form are effective tools that do not require substantial revision.

C. The Agencies' merger analysis should continue to rely on empirical evidence of the likely effects of proposed transactions.

Direct evidence of the likely effects of a transaction provides the best record on which the Agencies can evaluate mergers and acquisitions.[19] The Guidelines appropriately identify the salient types of evidence for measuring the likely effects of a transaction.[20]

Though properly structured predictive models may be helpful as an additive tool,[21] the Guidelines rightly focus on observed evidence — such as price increases, market share, and head-to-head competition — as the primary record for merger analysis.[22] The assumptions that are integral to predictive models can carry qualitative judgments, which might tend to create inconsistent agency action and skew the model's conclusions toward a particular normative goal. For this reason, direct evidence of the types described in the Guidelines should remain the principal basis for measuring likely effects.

As discussed further in Section III.F., evidence of non-price effects of a proposed transaction is another appropriate metric in merger review.[23] The Agencies already recognize the phenomenon of zero-price markets in the modern economy,[24] rendering non-price effects a meaningful basis for measuring consumer welfare. Merger analysis in zero-price markets should look for innovation and quality as effects in the post-transaction market.

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[18] *FTC v. H.J. Heinz Co*., 246 F.3d 708, 720 (D.C. Cir. 2001).
[19] RFI ¶ 2.
[20] FTC and DOJ, Horizontal Merger Guidelines § 2.1 (Aug. 19, 2010); *see also* FTC and DOJ, Vertical Merger Guidelines § 2 (June 30, 2020).
[21] *See* RFI ¶ 2c.
[22] Horizontal Merger Guidelines §§ 2.1.1–2.1.5.
[23] *See* RFI ¶ 2a.
[24] *Id*. ¶ 11c.

D. Remedies remain a useful tool for resolving concerns while protecting consumers.

The Hart-Scott-Rodino Act requires that parties to notify transactions above a certain threshold and provide the Agencies information relevant to their analysis. However, it does not require the merging parties to follow a formal process for remedies or suggest that the Agencies impose other deadlines; therefore, the Guidelines should not include such requirements, either.[25]

Effective merger remedies should be proportional and used to restore or preserve competition. This does not differ when the Agencies are analyzing a merger in the digital economy. In any given merger, the appropriate remedy is highly fact-specific and tailored to the harm it is intended to remedy. As the Agencies noted, "the timing of merger remedies in the United States varies depending on the factual circumstances of particular mergers."[26] In addition, "the parties should raise any concerns or complexities as early as possible and consider alternatives that may expedite the matter."[27] Over time, these principles have provided merging parties and the Agencies with the necessary flexibility to design and vet remedy proposals. Merging parties typically are interested in finishing the merger review process as quickly as possible. If remedies are necessary, it is already in the interest of the merging parties to propose them as soon as they understand the agency's concerns.

Adopting a formal process and deadlines for remedy proposals would add additional procedural barriers to the merger review process. Parties may not be often not in a position to offer remedies early in the merger review process as they might not yet be fully aware of the agency's competitive concerns. As the Agencies also noted, "because mergers can vary significantly, effective merger remedies also vary from case to case."[28] This variation is even more prevalent in digital markets, in which mergers may implicate a host of complex legal, economic, and technological issues. CCIA believes that the current rules and framework for negotiating remedies and the Agencies' model timing agreements achieve the necessary balance between flexibility and predictability.[29] Requiring parties to propose potential remedies early in

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[25] *Id.* ¶ 8.
[26] Remedies in Merger Cases (June 28, 2011), Submission of the United States, DAF/COMP/WP3/WD(2011)58, at 7, available at https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1106usremediesmergers.pdf.
[27] Federal Trade Comm'n, Negotiating Merger Remedies (Jan. 2012), available at https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.
[28] *Supra* n. 26, at 3.
[29] *See* Federal Trade Commission, Model Timing Agreement, available at https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_2-27-19_0.pdf; and

the process would potentially limit their ability to design innovative and adequate remedies that fully address the Agencies' concerns and promote economic efficiency. Moreover, courts are unlikely to ignore in any subsequent enforcement action remedies that merging parties have proposed, as long as the Agencies have had sufficient notice of the proposal.

III. Digital Markets

Although the RFI includes a set of questions on "digital markets" it does not define this term. However, the description likely encompasses a broad set of distinct market offerings by a wide and sometimes overlapping set of providers. These may include, just to name a few examples, online platforms; digital goods such as entertainment and news; apps; social media; Internet services such as broadband connectivity; online advertising; cloud computing; and online business productivity services such as customer relationship management. Most industries have digital components and digital offerings that may also compete with physical ones, such as in retail and telemedicine. Further, phenomena identified by the RFI, such as rapid evolution, two-sided markets, network effects, and data aggregation, are not limited to digital markets. Thus, digital markets are highly diverse and are not appropriate for a distinct rubric of merger analysis.[30] To create a different set of guidelines or rules would create ambiguity and inconsistency. To the extent the term "digital markets" is meant to include startups, the relative youth of these firms results in a procompetitive ecosystem characterized by low barriers to entry and swift innovation.

A. *The differentiation of vertical v. horizontal transactions remains a useful tool for merger analysis, despite its imperfect application in certain markets.*

Mergers were categorized as horizontal, vertical, or conglomerate before Section 7 was amended in 1950.[31] The Supreme Court separately considered vertical and horizontal theories of harm to competition in the first case to reach the merits under the amended Section 7.[32]

Department of Justice, Antitrust Division, Model Timing Agreement, available at https://www.justice.gov/atr/page/file/1111336/download.

[30] *See* RFI ¶ 11a.

[31] Federal Trade Commission, Report of the Federal Trade Commission on the Merger Movement: A Summary Report 29 (1948); *see also* RFI ¶ 1g.

[32] *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

Competitive relationships between merging firms may be complex in digital markets. However, all possible theories under which mergers can harm competition and thereby violate Section 7 are horizontal, vertical, or conglomerate. These theories are categorized by the mechanism of harm, but the harm itself is always harm to horizontal competition in (or for) a relevant market.

It is widely accepted that vertical mergers pose less of an anticompetitive threat than horizontal mergers.[33] Competitive harm is less likely to occur in a vertical merger than in a horizontal one because vertical mergers combine firms that operate at different levels of production. Therefore, a vertical merger does not alter concentration in any relevant market or eliminate current competition between firms.[34] Importantly, vertical mergers often yield clear economic benefits,[35] most prominently through the elimination of double marginalization ("EDM").[36] Vertical integration typically helps to lower costs, and increase the stability of supply of an important input. Furthermore, the combination of talent from the different workforces can promote new ideas that eventually become new products and/or services for the benefit of consumers. In fact, size may be a benefit in vertical mergers; the efficiencies of vertical control, especially EDM, often rise with the level of pre-existing market power.[37] Economic literature suggests these benefits from vertical mergers can offer significant and direct increases to consumer welfare, which potentially outweigh the harmful foreclosure effects of

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[33] *See*, *e.g.*, Koren W. Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teachings*, Antitrust Source, Feb. 2019, at 1, available at https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2018-2019/atsource-february2019/feb19_full_source.pdf; Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 Antitrust L.J. 943, 944 (1995), available at https://www.jstor.org/stable/40843308.

[34] Christine S. Wilson, *Vertical Merger Policy: What Do We Know and Where Do We Go?*, Keynote Address at GCR Live, at 4 (Feb. 1, 2019) available at https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf.

[35] *See*, *e.g.*, Steven C. Salop, *Revising the Vertical Merger Guidelines*, as part of FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law 5-57 (Nov. 1, 2018), available at https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf

[36] EDM reflects the merged entity's recognition that it can maximize its total profits when it sells the vertically integrated input to itself at cost. Christine S. Wilson, *There's Nothing New Under the Sun: Why Professor Roger Blair of the University of Florida Is Still Right About Vertical Integration,* Remarks at the University of Florida Competition Policy Enforcement Conference, at 14-15 (Nov. 1, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1552631/wilson_remarks_-_florida_competition_policy_enforcement_conference_11-1-19.pdf.

[37] James C. Cooper, Luke M. Froeb, Dan O'Brien, & Michael G. Vita, *Vertical Merger Policy as a Problem of Inference*, 23 Int'l J. Indus. Org. 639, 658 (2005), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=702961.

vertical mergers.[38]

The main objective of agency guidelines is to promote transparent and predictable merger enforcement. The question of whether a proposed combination is a vertical integration versus a horizontal one remains salient in merger analysis. Therefore, CCIA believes it would be helpful to companies and courts alike to maintain a distinction between the Horizontal and Vertical Merger Guidelines.

B. The Guidelines' approach to barriers to entry applies seamlessly to digital markets, providing reliable assurance that combinations in these markets do not tend to lessen competition.

The central concern of U.S. antitrust law is durable market power.[39] U.S. courts recognize that "even a very large market share does not establish market power" of any significance,[40] observing that "without barriers to entry into the market it would presumably be impossible to maintain supracompetitive prices for an extended time."[41] Digital markets, particularly in the software and applications space, are typically characterized by very low barriers to entry, for obvious reasons. Writing code is possibly the least facilities-dependent industry of the U.S. economy. Indeed, the digital economy's reliance almost solely on human ingenuity largely drives the pace and volume of transactions — and of innovation — in these markets.[42] Writ large, the digital markets have become a ***disruptor*** of entry barriers for other industries, such as finance, and so to assess them as high-barrier markets approaches a logical impossibility.

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[38] Daniel P. O'Brien, *Vertical Mergers: Is it Time for New Vertical Merger Guidelines?*, as part of FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law 59-68 (Nov. 1, 2018), available at https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf. See also generally FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law (Nov. 1, 2018), available at https://www.ftc.gov/news-events/events-calendar/ftchearing-5-competition-consumer-protection-21st-century.

[39] Barriers to Entry (Sept. 30, 2005), Note by the United States, DAF/COMP/WD(2005)58, at 2, available at https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/2005--Barriers.pdf; *see also* RFI ¶ 13.

[40] *Id. Will v. Comprehensive Acct. Corp.*, 776 F.2d 665, 672 n.3 (7th Cir. 1985). *See* also *Oahu Gas Serv., Inc. v. Pac. Res. Inc.*, 838 F.2d 360, 366 (9th Cir. 1988); *Ball Mem'l Hospital, Inc. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1336 (7th Cir. 1986).

[41] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986).

[42] *Supra* n. 9, at 3.

To the extent that the Agencies consider adopting new factors related to barriers to entry,[43] the fungibility of the assets under consideration should be a key arbiter of what now is a "barrier." For example, monetary capital, without more, is not a barrier to entry. Even access to capital, unless measurably curtailed by a party to the transaction under review, should not rise to the level of a barrier to entry. Rather, the historically recognized factors of scarcity of natural resources, time to market, and presence of regulatory constraints remain appropriate for determining whether competition in the defined market is hindered by entry barriers.

C. Nascent competition remains an appropriate factor for evaluating post-merger effects that should rely on evidence, rather than a hypothetical potential, of a firm's intent to enter the defined market.

The Agencies astutely raise the question of how nascent competition should be approached in the context of post-transaction effects.[44] In keeping with the understanding that direct evidence of measurable effects, like price and market share increases, provides the best record for decision, considerations of nascent competitors should rely on evidence that those competitors actually and already intend to enter the defined market. A firm's being "well situated to enter" is a necessary but insufficient component for demonstrating that acquisition of that firm will eliminate a potential competitor. This concept is reflected in today's Guidelines, which seek to identify "the timeliness, likelihood, and sufficiency of the entry efforts an entrant might practically employ."[45]

Even "in cases where technology and products evolve rapidly,"[46] evidence will be available to show that a firm is planning to enter the defined market. Plans could be manifested in a host of ways: R&D budgets, product management timelines, new distribution channels, and/or new advertising campaigns. Absent such evidence, identifying a potential or nascent competitor could become guesswork rather than reasoned enforcement action based on the record. One cannot, of course, demand that the Agencies reach inarguable certainty that a merging partner would, absent the transaction, become a new competitor. Credible, substantial evidence that the merging party will be entering the defined market in a reasonably short time period should be the standard for evaluating this type of merger effect.

[43] *See* RFI ¶ 13b.
[44] RFI ¶ 7b.
[45] Horizontal Merger Guidelines § 9.
[46] *Id.*

D. Innovation and the advancement of IP are pro-consumer effects and efficiencies from mergers in digital markets.

Merger analysis under the prevailing Guidelines has not rewarded or encouraged transactions that result in decreased innovation or IP advancement.[47] The Agencies need not change their approach to market definition in the context of innovation, but should consider relying on innovation as both an effect and an efficiency, and as a key factor in determining the effect on consumer welfare of a proposed transaction.[48]

1. Mergers and acquisitions in the digital space incentivize innovation.

In digital markets, mergers and acquisitions incentivize innovation and speed the commercialization of new technology.[49] The Guidelines appropriately recognize, from the outset, that "[c]ompetition often spurs firms to innovate."[50] Recent evidence supports this observation.[51]

The Agencies' concerns that large firms are harming competition by acquiring tech startups are not borne out by the results of the tech acquisitions over the last two decades.[52] To the contrary, the prospect of being acquired demonstrably has spurred innovators to create, invent, patent, and commercialize new technology to the increasing benefit of consumers. In a recent paper,[53] Susan Woodward explains that young technology companies, dependent on venture capital, look to prospective acquisition as their most reliable value proposition.[54] Such companies in the main are ill-suited or ill-equipped to launch IPOs and, during the period August 2002 through March 2020, tech founders often came away from their startups with no gains.[55] Of the 12,000 tech companies that exited the market during the study period of the paper, 35% exited via shutdown.[56] Only 4% launched IPOs.[57] It should be noted that these exits cannot

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47 *See* RFI ¶ 10.
48 *Id*. ¶ 10a.
49 *Id*.
50 Horizontal Merger Guidelines § 6.4.
51 *Supra* n. 9.
52 *Id*.
53 Susan Woodward, *Irreplaceable Acquisitions: Proposed Platform Legislation and Venture Capital* (Nov. 2021), available at http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf.
54 *See id*. at 5.
55 *Id*. at 6.
56 *Id*. at 5-6. To the extent that the Agencies believe that "innovation in markets with high failure rates," warrants special consideration, Woodward's paper provides evidence that a free flow of acquisitions of failing and flailing technology startups is a proven means of preserving and furthering innovation. RFI ¶ 10e.
57 *Id*. at 5.

reasonably be attributed to a systemic lack of access to capital: venture funding steadily and markedly increased from $29 billion in 2006 to $80 billion in 2017, with $80 billion invested in the third quarter of 2021 alone.[58]

The remaining market exits during Woodward's study period – 61% of the 12,000 startups – occurred via acquisitions, most of which brought tech founders a positive return. The annual median multiple for technology companies has been at least 1.0 every year since 2013; in 2019 it was 1.4.[59] These figures support the conclusion that technology startups are strongly incentivized to innovate ***because of the prospect of being acquired***. The majority of the acquiring firms were public companies that, one can assume, have the means to bring to market the inventions that the acquired startup could not have commercialized on its own.[60] Thus, unduly limiting established companies' ability to consummate mergers and acquisitions would lead to consumers not reaping the benefits of innovation. The Guidelines therefore should acknowledge that transactions in the digital space positively affect the incentive to innovate, and have indeed brought innovative products and services to consumers.[61]

2. <u>Merger analysis should accord substantial weight to innovation and IP as both an effect and efficiency while maintaining the current approach to market definition.</u>

Innovation and advances in IP are key considerations in merger analysis as functions of both efficiencies and effects. A potential transaction's effect on innovation and IP advancement is as crucial to consumer welfare as its effect on price. Likewise, transactions tending to create efficiencies that drive innovation also benefit consumers. The Guidelines presently discuss innovation in both of these contexts,[62] but the Agencies should consider placing greater emphasis on these twin roles of innovation in merger analysis, weighting them as heavily as post-transaction prices and costs of production.

Analysis of a transaction's effect on product innovation does not, however, warrant a different approach to market definition.[63] That is, product market definitions should not be so narrow as to exclude subsequent products that are improved or slightly different by virtue of

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[58] *Id*. at 3.
[59] *Id*. at 4.
[60] *Id*. at 7.
[61] *See* RFI ¶ 10b.
[62] Horizontal Merger Guidelines §§ 6.4, 10.
[63] RFI ¶ 10a.

innovation and consumers' responses to innovation. To do so would eliminate potential pro-consumer effects and efficiencies as being outside the relevant market, in effect dismissing applicants' demonstrations that a proposed transaction would create a net benefit for consumers.

The Agencies' suggestion that merger review should examine IP licensing as a tool for preserving competition[64] would add a valuable new component to the Guidelines. Where presently the Guidelines mention licensing as a means for a firm to "appropriate the benefits of its innovation,"[65] the prevalence of licensing for the affected technology can also act as evidence that a transaction will not squelch innovation. Firms that demonstrate a history of, or at the least a willingness to begin, licensing their IP on fair, reasonable, and non-discriminatory ("FRAND") terms should be credited for the contribution to innovation that this conduct will achieve. The Agencies should view licensing not only as a revenue source but also as a backstop to prevent a proposed transaction from bottling up IP or hindering innovation. Refining the Guidelines to reflect the procompetitive benefits of licensing will encourage firms voluntarily to employ FRAND licensing as a path to consummating desired acquisitions. Consumers will reap those benefits.

E. Efficiencies.

As the 2010 Guidelines note, "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[66] In addition, mergers can improve dynamic efficiency by serving as an alternative exit strategy, facilitating the elimination of inefficient firms and the fast expansion of successful innovators.

As the Agencies previously noted, "Mergers may also generate efficiencies that produce non-price benefits, such as improved quality, enhanced service, new products, or stronger incentives and ability to engage in, or increase, innovative efforts. The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude that the merger is

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[64] *See* RFI ¶ 10c.
[65] Horizontal Merger Guidelines § 10.
[66] *Id.*; *see also* RFI ¶ 14.

not likely to be anticompetitive in any market."[67]

Vertical mergers in particular, as discussed in Section III.A, often provide procompetitive efficiencies. In light of recent developments concerning narrower market definitions and leading to the necessity of "extraordinary efficiencies," *see* Section II.B, modifying the rules regarding merger efficiencies could potentially dissuade companies from pursuing transactions that may result in significant merger-specific benefits for consumers.

F. Transactions in zero-price markets can be assessed by improvements in quality, innovation, and privacy protections.

Measuring post-transaction effects in zero-price markets is one aspect of the Guidelines that warrant a refresh for the 21st Century.[68] Zero-price products and services are increasingly significant, and zero-pricing is particularly common in the context of economic activity on or across multi-sided platforms.[69] Importantly, zero-price markets can still be measured as to their value to consumers. Where products and services are provided free of charge, the Guidelines should take a broader view of what will have a potential impact on consumer welfare.

Consumer value can be measured without pricing analysis. The quality of products and services, the speed of innovation, the reliable protection of consumers' privacy, and other non-price factors can be analyzed by empirical evidence through, for example, internal company or industry data, Better Business Bureau reports, maintenance records, and inquiries at regulatory agencies of jurisdiction such as the Consumer Product Safety Commission, DOJ, and the FTC. As such, these criteria are ready substitutes for price that can be measured in the context of merger review. Here again we see that the Guidelines map very well to new markets, particularly digital markets, requiring not a revision but only a reflection of what the Guidelines can measure.

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[67] Non-Price Effects of Mergers (May 30, 2018), Note by the United States, DAF/COMP/WD(2011)45, at 3, available at https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/non-price_effects_united_states.pdf.
[68] RFI ¶ 11c.
[69] Quality Considerations in the Zero-Price Economy (Nov. 28, 2018), Note by the United States, DAF/COMP/WD(2018)139, at 2, available at https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/quality_considerations_in_digital_zero-price_markets_united_states.pdf.

G. Data aggregation.

Intervention in data-driven markets without evidence of harm to competition could harm consumers and deter innovation. Therefore, understanding the nature of data usage in Internet and technology services is crucial.[70]

Section 7 gives the Agencies authority to prevent mergers that may substantially lessen competition or tend to create a monopoly. Therefore, the Agencies should only focus on mergers involving data aggregation that would result in a reduction of competition in a relevant market. As agency officials and commentators noted, mergers involving data may well create substantial efficiencies and/or use data that are widely available, including improved privacy and security protections and increased data portability.[71] Whether the possession of data confers market power is a fact-specific inquiry that will depend on the specific market at issue, the nature of the data, and their competitive significance.

The existing merger enforcement framework, based on the consumer welfare standard that relies on evidence-based analyses, should continue to be applied to data-driven markets. The value of data depends on its commercial utility, and does not present special characteristics as a dimension of competition. The Agencies should therefore assess data as any other asset that companies use to compete in the market under the existing framework and tools for merger control.

The sustainability and continued growth of the digital economy require that organizations respect individuals' interests when they process personal information and consumers trust companies to protect their personal information, but merger reform is an inappropriate venue to address privacy concerns in the market writ large. Therefore, CCIA supports enactment of a comprehensive federal privacy law codifying privacy principles to ensure that data is handled responsibly, transparently, and allows consumers to exercise reasonable control over their personal information. To promote predictability and drive a healthy data ecosystem, privacy regulations should be technology neutral, meaning they should not provide specific technology mandates; sector-neutral, meaning they should apply to online and offline companies; and should

[70] *See* RFI ¶ 11f.
[71] *See*, *e.g.*, Maureen K. Ohlhausen and Alexander Okuliar, *Competition, Consumer Protection, and the Right (Approach) to Privacy* (Feb. 6, 2015). Antitrust L.J., available at https://ssrn.com/abstract=2561563.

provide for safe harbors and flexibility for companies to make adjustments according to the needs of consumers.

Privacy regulations must be designed to ensure that consumers can continue to benefit from innovation and new technologies. Restricting companies' use and collection of data may unintentionally impair digital commerce and reduce investment. Therefore, privacy regulations should focus on preventing measurable consumer harms while affording room for innovation that benefits consumers.

IV. Conclusion

CCIA is pleased to provide this and further input to the Agencies as they refresh their understanding of how best to review mergers and acquisitions in the digital space.

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