Background on Proposals to Expand Antitrust Laws

March 2021 NVCA Board Meeting

The purpose of this document is to provide background information in advance of NVCA's March 2021 board meeting. During the board meeting, a breakout session will be held to gain board feedback on the impact of the below proposals and strategize on proposed changes.

Several proposals have circulated on how antitrust or competition law may be refined to address the power and practices of certain large technology companies. NVCA is unlikely to engage in the broader antitrust debate but is concerned about proposals to restrict acquisitions by larger competitors due to its impact on venture and VC-backed companies.

The most prominent example in this space is Senator Klobuchar's *Competition and Antitrust Law Enforcement Reform Act* (CALERA), which would provide federal agencies with new tools to restrict acquisitions. Klobuchar is Chair of the Judiciary Committee's Antitrust Subcommittee, and therefore has a megaphone in this policy area. In addition to CALERA, last year the House Judiciary Democrats released the findings of its *Investigation of Competition in Digital Markets*. Like CALERA, the report recommends restricting the acquisitions of smaller competitors, though no legislation has been introduced along these lines.

Details on CALERA and scope of its impact: CALERA defines several categories of M&A activity that are "significant risks to competition" and shifts the burden of proof for merging parties—*i.e.,* for the first time the merging parties would need to prove that M&A activity in these categories *do not* create a risk of lessening competition. As a practical matter, this would allow the Justice Department of Federal Trade Commission (FTC) to challenge the acquisition and place the burden of proof on the parties to the transaction instead of with the government.

The categories that are "significant risks to competition" include:

- Acquisitions of nascent competitors by a dominant firm;
- Acquisition of a "maverick firm that plays a disruptive role in the market";
- Transactions valued at $5 billion *or* where the acquiring party has a market cap, assets, or revenue of more than $100 billion; and the acquisition is for $50 million or more.

A company can be in any industry and be subjected to enhanced scrutiny. The legislative text of the bill does *not* define what constitutes an acquisition of a "nascent" competitor or "maverick firm," though Klobuchar's background document specifically identifies those as areas of concern. Klobuchar's staff told NVCA that these concepts are "implicit" in current antitrust law. For example, in announcing termination of the Visa – Plaid acquisition, the Justice Department wrote: "[T]he transaction would have enabled Visa to eliminate this competitive threat to its online debit business before Plaid had a chance to succeed." NVCA will spend its advocacy efforts on shaping the third bullet above ($100 billion/$50 million

test) because our ability to change current DOJ/FTC practice is limited.

The $100 billion/$50 million test would pick up a significant portion of venture activity. An NVCA analysis of Pitchbook data demonstrates that since January 2017 there have been 126 acquisitions of VC-backed companies for $50 million or more when the acquirer has a market capitalization of $85 billion or more. NVCA used a floor of $85 billion market cap because companies of that size could soon grow to be $100 billion companies. The following companies acquired multiple VC-backed companies in the past three years: Amazon; Apple; AT&T; Cisco; Eli Lilly; Facebook; Mastercard; Medtronic; Merck; Microsoft; Novartis; PayPal; Procter & Gamble; Roche; Salesforce; SAP; Stryker; Thermo Fisher Scientific; Uber; and Walmart. Many others had a single transaction during that time period.

Capitol Hill Advocacy: NVCA is working to ensure the venture industry's voice is heard in this debate**.** We have met with the top Republican and Democrat of both the House and Senate antitrust subcommittees (Klobuchar/Lee/Cicilline/Buck). Here you can find a background document we have used in these meetings. Among these meetings was one with the staff of Senator Klobuchar. It was a constructive discussion and we do not believe Klobuchar is hostile to acquisitions as a general matter. However, it is clear Klobuchar is concerned about acquisitions *beyond* those done by large tech companies, which is why the bill picks up companies beginning at $100 billion. In addition, Klobuchar has more faith in regulators to determine when companies are competing or might compete than the venture industry might.

In our meetings, we have raised the following arguments:

- For VC-backed companies there are effectively three outcomes: standalone company (often via initial public offering); M&A; or bankruptcy. Many entrepreneurs and their investors begin the company building process with the hope of creating a standalone, public company. However, in most cases an IPO is not possible, and the preferred exit opportunity becomes an acquisition by another company. Ultimately, more than 10 times as many startups are acquired than complete an IPO (ratio of 836 to 82 in 2019).
- These acquisitions contribute to the health of the startup ecosystem, as entrepreneurs who realize liquidity through the sale of their company regularly go on to found new, innovative companies, and often invest in other startups as angel investors or VCs. Furthermore, acquisitions help power the returns of VC funds, thereby allowing VCs to raise new funds and invest in the next generation of entrepreneurs. This "recycling effect" is one of the key drivers of dynamism in our economy.
- Acquisitions have become more common as public markets have become more hostile to smaller companies.
- This proposal could have a chilling effect on the startup and venture ecosystem, as it may make it harder for startups to be acquired, elongate the timeline for liquidity, and increase the regulatory and legal costs of an acquisition.

Specific to CALERA, NVCA raised the following points:

- The $100 billion market cap figure brings in a very large group of acquirers—far exceeding the typical players that have received antitrust scrutiny recently.
- The bill would shift the burden on transactions that are *even smaller* than the threshold for Hart-Scott-Rodino filings (HSR filings currently begin with a $94 million deal).
- As drafted, the legislation applies not only to M&A, but would apply to corporate venture deals of $50 million or more if the parent company of the CVC is valued at $100 billion.