

COMMITTEE ON CAPITAL MARKETS REGULATION

August 15, 2023

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

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

VIA ELECTRONIC PORTAL

Re.: FTC-2023-0043 – *Draft Merger Guidelines for Public Comment*

Dear Sir or Madam:

The Committee on Capital Markets Regulation (the “Committee”) submits this letter to the Department of Justice and Federal Trade Commission (the “Agencies”) to request that the Agencies extend the public comment period for their draft merger guidelines for identifying mergers that potentially violate antitrust laws (the “Draft Guidelines”).¹

Despite making numerous radical changes to the Agencies’ current merger guidelines that would have wide-ranging and complex effects on U.S. capital markets, as well as being unaccompanied by any economic analysis, the comment period for the Draft Guidelines is open for only 60 days. This time period is wholly insufficient for commenters to analyze and respond to the Draft Guidelines effectively and is inconsistent with comment periods for significant proposals. The Committee therefore calls on the Agencies to extend the comment period to at least 180 days.

The Draft Guidelines would fundamentally remake how the Agencies analyze potential mergers for antitrust violations. For example, the Draft Guidelines would cut in half the change in industry concentration required for a presumption that a transaction would have an anticompetitive effect in a highly concentrated market.² The Draft Guidelines would also reduce by 30% the threshold at which the Agencies consider a market to be highly concentrated.³ And the Draft Guidelines would introduce an entirely new and wide-ranging presumption that a merger substantially lessens competition whenever it would create a combined firm with a market share of at least 30% and increase industry concentration, as measured by the Herfindahl-Hirschman Index (“HHI”), by 100.⁴

These proposed thresholds would be a primary basis upon which the FTC and DOJ identify a merger as potentially in violation of antitrust law, but courts do not focus on imperfect measures

¹ DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, Draft Merger Guidelines https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf [the “Draft Guidelines”].

² See CLEARY GOTTLIEB, “FTC & DOJ Propose Radical Changes to Merger Guidelines” (July 24, 2023) <https://www.clearyantitrustwatch.com/2023/07/ftc-doj-propose-radical-changes-to-merger-guidelines/>.

³ *Id.*

⁴ Draft Guidelines at 7.

of concentration, such as HHI, when evaluating the legality of a merger. Instead, courts focus on whether a merger or acquisition would actually increase costs for consumers.⁵ The Draft Guidelines should do the same.

The lowering of the existing thresholds by the Draft Guidelines has the potential to harm the U.S. economy by constricting economically beneficial merger activity.⁶ Despite this risk, the Draft Guidelines are unaccompanied by any economic analysis. To offer informed commentary it will therefore be necessary for commenters to conduct these analyses themselves, which would involve the collection and processing of large amounts of data concerning the frequency of merger activities in various sectors and the economic effects of such activities, and complex calculations concerning the marginal effects of a reduction in such activities. These analyses alone would likely take several months.

In addition, the Draft Guidelines appear to be based on dubious and incomplete readings of antitrust law and invalid policy rationales. For example, the Draft Guidelines omit discussion of recent antitrust case law that calls into question the legal reasoning reflected in the Draft Guidelines.⁷ They also indicate that acquisitions involving “partial control or common ownership” – that is, where the same investor owns stakes in competing firms – “may in some situations substantially lessen competition.”⁸ The Committee has previously shown such concerns to be unfounded.⁹ Identifying and analyzing each of these and the many other legal and policy issues raised by the Draft Guidelines is not possible within the 60 days provided.

Moreover, federal government guidance provides that commenters should have at least 180 days to respond to complex rulemaking proposals.¹⁰ The Draft Guidelines have a similar practical effect to a rulemaking, because they influence how and when the Agencies will intervene to block mergers; even if a party succeeds in challenging the Agencies’ determination, the Agencies’

⁵ See Fred Ashton, AMERICAN ACTION FORUM, “Why the Consumer Welfare Standard Is the Backbone of Antitrust Policy” (Oct. 26, 2022) <https://www.americanactionforum.org/insight/why-the-consumer-welfare-standard-is-the-backbone-of-antitrust-policy/>.

⁶ See Sean Heather, U.S. CHAMBER OF COMMERCE, “The Business Case for Mergers and Acquisitions” (Feb. 17, 2022) <https://www.uschamber.com/on-demand/economy/the-business-case-for-mergers-and-acquisitions>.

⁷ See, e.g., Michael B. Bernstein, et al., Arnold & Porter, “DOJ and FTC Issue Draft Merger Guidelines” (Aug. 1, 2023) <https://www.arnoldporter.com/en/perspectives/advisories/2023/07/doj-and-ftc-issue-draft-merger-guidelines> (“[T]he Draft Guidelines ignore more recent precedent that illustrates how market share, and market concentration more generally, can be an inaccurate way of determining whether a merger is likely to harm competition.”); see also *In re AMR Corp.*, No. 22-901, 2023 WL 2563897, at *1-2 (2d Cir. Mar. 20, 2023) (acknowledging that numerous circuits have adopted “a more nuanced and text-based interpretation of Section 7 [of the Clayton Act], refusing to blindly equate a substantial increase in market share with a likely substantial decrease in competition and instead requiring more careful consideration of a Section 7 defendant’s rebuttal evidence); *FTC v. Microsoft Corp.*, No. 23-CV02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023); *United States v. UnitedHealth Group, Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022).

⁸ Draft Guidelines at 4.

⁹ COMMITTEE ON CAPITAL MARKETS REGULATION, *Common Ownership and Antitrust Concerns* (Nov. 2017), <https://capmksreg.org/wp-content/uploads/2022/11/CCMR-Common-Ownership-1-1.pdf>; COMMITTEE ON CAPITAL MARKETS REGULATION, *Nothing but The Facts, Common Ownership: Theory Meets Reality* (Jan. 2019), <https://capmksreg.org/wp-content/uploads/2019/01/01-15-Nothing-But-The-Facts-Common-Ownership-Theory-Meets-Reality.pdf>.

¹⁰ A Guide to the Rulemaking Process, OFFICE OF THE FEDERAL REGISTER, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Aug. 2, 2023).

COMMITTEE ON CAPITAL MARKETS REGULATION

intervention can impose substantial costs and delays.¹¹ Courts also often treat the Agencies’ merger guidelines as persuasive authority when interpreting antitrust law.¹² The Draft Guidelines implicate extremely complex issues, which therefore warrants a 180-day comment period consistent with those for complex rulemaking proposals.

* * *

Thank you very much for your consideration of the Committee’s position. Should you have any questions or concerns, please do not hesitate to contact the Committee’s President, Professor Hal S. Scott (hscott@law.harvard.edu), or its Executive Director, John Gulliver (jgulliver@capmksreg.org), at your convenience.

Respectfully submitted,

John L. Thornton
Co-CHAIR

Hal S. Scott
PRESIDENT

R. Glenn Hubbard
Co-CHAIR

¹¹ See Dan Papsunc, BLOOMBERG LAW, “DOJ Sees Gains in Long-Shot Antitrust Challenges Amid Defeats” (Oct. 19, 2022) <https://news.bloomberglaw.com/antitrust/doj-sees-gains-in-long-shot-antitrust-challenges-amid-defeats> (“Companies face massive financial, time, and reputation costs by inviting merger challenges, even if they ultimately win.”).

¹² See Bernstein, et al., *supra* n.6 (“[C]ourts often use merger guidelines as persuasive authority.”).