

April 19, 2022

Department of Justice, Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

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

Re: Coalition Response to Request for Information on Merger Enforcement

The undersigned organizations represent thousands of companies in vast and diverse sectors of the U.S. economy including healthcare, manufacturing, metals, technology, innovation, software, information, finance, private equity, venture capital, start-ups, motion pictures, television, and streaming services. Our members employ many millions of Americans with good jobs, support their communities, and provide important and innovative goods and services across the country. We respectfully submit these comments to the U.S. Department of Justice's Antitrust Division and Federal Trade Commission in response to the request for information on merger enforcement ("RFI").

We agree that the agencies should periodically update the Merger Guidelines to reflect the most recent guidance from the courts and from economic studies. We therefore appreciate the RFI and the opportunity to provide these comments. We also strongly believe that the agencies should follow prior practice and submit any revised guidelines for public comment prior to implementing them. Process matters. As before, a transparent process will allow the public to digest any proposed revisions and to offer critical feedback.

While we appreciate the RFI, we question many of its assumptions. Through the RFI, the agencies suggest that most mergers harm competition and that the agencies can revisit foundational issues of antitrust law through revising the guidelines. In these respects, the RFI is misguided. We would urge the agencies to abandon an unconstrained approach to merger law. Instead, as before, the agencies should update the guidelines – not rewrite them -- in an incremental fashion to build on their long and successful record of informing the courts, agencies, and business community.

In particular, any revised guidelines should continue to recognize that most mergers promote competition. Mergers drive capital formation, create efficiencies, reduce costs, and lead to innovative new products and services. They provide

acquired companies with critical financing and allow acquiring companies to bring new products to consumers faster, better, and cheaper. The Vertical Merger Guidelines acknowledge that “vertical mergers often benefit consumers.” The Horizontal Merger Guidelines recognize that the agencies should avoid “unnecessary interference with mergers that are either competitively beneficial or neutral.”

Indeed, existing merger guidance has helped to create a very competitive economy. In a recent study, Dr. Robert Kulick finds that U.S. economic concentration has declined since 2007.¹ Other studies, as well as the Council of Economic Advisers, confirm these findings.² The bipartisan Antitrust Modernization Commission and economic studies find that, in some sectors of the economy with higher concentration levels, rising concentration often correlates with higher levels of output, jobs, and wages.³

To the extent that the agencies update the guidelines, the agencies should do so in a manner consistent with longstanding, seminal case law and precedent. FTC Commissioners Wilson and Phillips explain that the Guidelines derive “their persuasive value from laying out a consensus view on the framework that the FTC and DOJ have developed, over decades of experience, to analyze the effects of mergers.”⁴ As they continue, “Merger guidelines advance those goals when they reflect judicial precedent, incorporate sound developments in economic analysis, and accurately describe how the antitrust agencies assess mergers.” The guidelines cannot overrule judicial precedent. They should not selectively endorse court cases from the 1960s and early 1970s while discounting more recent cases. Indeed, the Office of the Attorney General itself confirmed that, “The Department’s guidance documents should be drafted with the recognition that they do not bind the public.”⁵

¹ Robert Kulick and Andrew Card, *Industrial Concentration in the United States: 2002-2017* (March 2022), at <https://www.uschamber.com/finance/antitrust/industrial-concentration-in-the-united-states-2002-2017>.

² Robert D. Atkinson & Filipe Lage de Sousa, *No, Monopoly Has Not Grown* (June 2021), at <https://itif.org/publications/2021/06/07/no-monopoly-has-not-grown>; C. Lanier Benkard et al, *Concentration in Product Markets* (April 2021), at <https://www.nber.org/papers/w28745>; CEA, 2020 Economic Report to the President, Chapter 6, at <https://www.govinfo.gov/content/pkg/ERP-2020/pdf/ERP-2020-chapter6.pdf>.

³ AMC Report 34, at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf; Kulick study, *supra*.

⁴ Phillips and Wilson statement (Jan. 18, 2022), at https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf.

⁵ See Interim Final Rule, Processes and Procedures for Issuance of Guidance Documents, 86 Fed. Reg. 37674 (July 16, 2021) (“[T]he Department is not departing from the principle that guidance documents cannot impose legal requirements beyond those found in relevant constitutional provisions, statutes, and legislative rules.”).

Finally, any revised guidelines should continue to embrace the principles of objectivity and transparency as touchstones for antitrust law. The Horizontal Merger Guidelines, as well as the Vertical Merger Guidelines, acknowledge that they are intended to assist the business community and antitrust practitioners by increasing transparency as to the analytical process underlying the Agencies' enforcement decisions. Any revised guidelines should continue to serve these vital functions by enabling economists, lawyers, and other advisors to rely on them to properly counsel the business community.

Again, we appreciate the opportunity to provide these comments and would be happy to discuss these topics at greater length.

Sincerely,

American Hospital Association

American Investment Council

Biotechnology Innovation Organization (BIO)

Business Roundtable

Developers Alliance

Federation of American Hospitals

Information Technology Industry Council

Metals Service Center Institute

Motion Picture Association of America

National Association of Manufacturers

National Venture Capital Association

Silicon Valley Leadership Group

Software and Information Industry Association

TechNet

U.S. Chamber of Commerce