PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES
5335 Wisconsin Avenue, NW, Suite 440
Washington, D.C. 20015
Tel: (+1) (202) 274-0235 • Fax: (+1) (202) 318-4909
www.phoenix-center.org

Lawrence J. Spiwak, President

18 September 2023

Hon. April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Phoenix Center Comments On New Draft Merger Guidelines

Dear Ms. Tabor:

On July 19, 2023, the Antitrust Division of the Department of Justice and the Federal Trade Commission requested public comment on their new Draft Merger Guidelines. These Draft Guidelines represent a major overhaul—in fact, a transformation—of the Guidelines.

The long-standing purpose of the Merger Guidelines is to "outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission [] with respect to mergers and acquisitions involving actual or potential competitors [] under the federal antitrust laws."[1] The Merger Guidelines are thus an analytical template for competition analysis. This template, firmly rooted in economic theory, is used by many federal agencies tasked with conducting competition analysis.

In the proposed revisions, the purpose of the Guidelines is modified. The new purpose of the Guidelines is to "identify potentially illegal mergers" and "to help the public, business community, practitioners, and courts understand the factors and

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[1] *See* Department of Justice/Federal Trade Commission 2010 HORIZONTAL MERGER GUIDELINES at Section 1.

frameworks the Agencies consider when investigating mergers."[2] Gone is any sensible analytical template for competition analysis. Instead, the Draft Guidelines present a simple laundry list of thirteen talking points without any meaningful economic analysis and no meaningful standard of review (e.g., market power). The Draft Guidelines are nothing more than a template for a legal brief the Agencies will use to challenge potential mergers in court—and even in that the Draft Guidelines fail by citing outdated caselaw (sometimes incorrectly).

For the most part, it appears the Agencies seek to replace the lodestar of antitrust analysis from "market power" to "concentration." For example, Draft Guideline No. 1 states that "Mergers should not significantly increase concentration in highly concentrated markets." Similarly, Draft Guideline No. 4 states that "Mergers should not eliminate a potential entrant in a concentrated market." And Draft Guideline No. 8 states that "Mergers should not further a trend toward concentration." This change in focus is an error. As economist Thomas Philippon notes, "the relationship between concentration and competition is ambiguous."[3]

Many of the defects in the Draft Guidelines are detailed in comments filed in this proceeding by Dr. Gregory Werden—one of the nation's foremost antitrust experts.[4] We concur in almost all regards with his expert assessment, and others that make similar points.[5] Put simply, the focus of antitrust analysis should be on market power, and the analysis of market power is an *economic task*—not a legal one. The Draft Guideline's heavy reliance on legal precedent is not a feature but a bug—even a small departure from precedent in a modern court opinion would render the Draft Guidelines moot and force a revision. Such redirections due to legal opinions are properly limited to legal briefs and not the analytical tools of market analysis.

There could be some sensible improvements made to the Merger Guidelines, but the Agencies chose not to go down that route. For instance, while the current Merger Guidelines are certainly preferred to the Draft Guidelines, what both versions ignore is that—like prices and quantities—market concentration is an *equilibrium*. Concentration (or the number of firms) is not homogeneous across markets. A market's equilibrium structure does not emerge out of thin air and is not governed by wishful thinking or political desires; the structural equilibrium is a function of the size of the market, the intensity of price competition, the amount of fixed-and-sunk costs required to offer

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[2] Draft Merger Guidelines at Section I.

[3] T. Philippon, *The Economics and Politics of Market Concentration,* NBER REPORTER NO. 4 (December 2019) at 10 (available at: https://www.nber.org/reporter/2019number4/economics-and-politics-market-concentration).

[4] *See* August 12, 2023, Comments of Gregory J. Werden (comment id: FTC-2023-0043-0624).

[5] *See, e.g.,* L.M. Froeb, D.D. Sokol, and L. Wagman, *Cost-Benefit Analysis Without the Benefits or the Analysis: How Not to Draft Merger Guidelines,* SOUTHERN CALIFORNIA LAW REVIEW (forthcoming) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537425); D. Carlton, *The Draft Merger Guidelines Demote Economics To Justify Aggressive Antitrust Enforcement*, PROMARKET (September 12, 2023); H. Hovenkamp, *Competitive Harm and the 2023 Draft Merger Guidelines*, PROMARKET (July 27, 2023).

services, among other things.[6] If there are more firms in a market than the equilibrium number, then some firms will be unprofitable and will be forced to exit, often through mergers and acquisition (if permitted) so that the assets and resources can continue to provide value. If the number of firms is below the equilibrium, then firms will enter, absent barriers to entry. Due to the supply- and demand-side conditions, some markets are inherently concentrated, but high concentration does not *a fortiori* mean that a market is performing poorly, or that a merger will lead to worsened performance.[7] In fact, in markets characterized by high fixed and sunk cost, the presence of few firms may be evidence of intense price competition.[8]

If the current Guidelines are to be modified, then some recognition of the endogeneity of market structure, commonly embraced by modern economics, should be part of it. The goal of antitrust should be to maintain as much competition as possible given the supply- and demand-side conditions of the market. Professor Louis Phlips perhaps states it most clearly:

> To reach a competitive Nash equilibrium of a single-shot game is the best antitrust policy can hope for in oligopolistic markets (which is a far reaching statement, given that most real life markets are oligopolistic). Therefore, if normal competition is the objective of antirust policy, it should be defined as and have the properties of a [] perfect non-cooperative and non-collusive Nash equilibrium (whether static or dynamic). [] Such a perfect Nash equilibrium is part of a two-stage equilibrium, in which the other stage implies a market structure that is endogenously determined by the given technology and given tastes. If, at a point in time, demand is such and technology is such that, with free entry, there is room for say only two firms with a given number of products each, and if prices and quantities are at the competitive Nash equilibrium levels, what more can antitrust authorities ask for? [] Antitrust authorities want the best possible market structure given technology and tastes, and, given this market structure, as much competition as is compatible with it and with entrepreneurial freedom.[9]

Wishful thinking is no substitute for economic reality. It makes no sense to expect a market to have six firms when the market is just large enough to support two firms. It follows then that it is incorrect to presume that a merger in a market with an HHI of 1,800 is problematic. The relevant question is whether the HHI is above-or-below its

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6 *See*, *e.g.*, J. Sutton, SUNK COST AND MARKET STRUCTURE (1991); R. Clarke, *Scale Economies, Entry and Welfare*, 36 JOURNAL OF ECONOMICS AND BUSINESS 161-176 (1984).

7 George S. Ford, *Does High Market Concentration Contribute to Inflation?*, The Center for Growth and Opportunity at Utah State University (March 9, 2023) (available at: https://www.thecgo.org/research/does-high-market-concentration-contribute-to-inflation).

8 G.S. Ford, T.M. Koutsky and L.J. Spiwak, *Competition After Unbundling: Entry, Industry Structure, and Convergence*, 59 FEDERAL COMMUNICATIONS LAW JOURNAL 331 (2007).

9 L. Phlips, COMPETITION POLICY: A GAME-THEORETIC PERSPECTIVE (1995).

equilibrium value, and that equilibrium will be specific to a market. If the conditions are right, then a merger from three-to-two firms may very well be desirable, especially if two firms is inevitable due to the required exit of the third firm.

The Antitrust Division and the Federal Trade Commission, as the enforcers of our nation's antitrust laws, are certainly within their rights to revise the Merger Guidelines (even though the various iterations of the current Merger Guidelines have served America well for over thirty years and remained intact across administrations). Whether one views antitrust as too soft or too strong has nothing to do with the Merger Guidelines—it has to do with the courts' interpretation of existing antitrust law (which is now dated and cobbled together) and the judicial adherence to precedent (some of which may be wrong). The Guidelines are not legally-binding on courts—the law is. The Agencies are neither permitted nor capable of changing antitrust law. Courts considering mergers are interested in market power, not the partisan preferences of temporary leadership.

The Antitrust Division and the FTC must go back to the drawing board before issuing final revised Merger Guidelines; given the profound shortcomings of the proposed revision, it perhaps makes the most sense to abandon reform at the present time. If the Guidelines are revised, then any revisions should be directed by a team of qualified economic experts with some legal oversight. There are plenty of well-qualified economists—with ideas rooted in experience about what needs to change—that would willingly participate in such a revision. We suspect that any constructive revision would properly retain most of the existing Guidelines, with modifications limited to clarification and to reflect widely-accepted economic thinking now absent in the existing Guidelines. As the nation's antitrust laws have not changed, and courts will adhere closely to legal precedent, a wholesale refocus of the Merger Guidelines is ill-advised and pointless, especially when such revisions are rooted in personal preferences rather than economic reasoning.

Finally, it is reasonable to assume that these Draft Merger Guidelines, if approved, will not survive a change in administration. Consequently, the nation's antitrust Agencies, if not the nation as a whole, will suffer embarrassment in the global community for politicizing antitrust policy. The Merger Guidelines should be non-partisan and robust to changes in leadership, and only a document that serves as a useful template for competition analysis will do so. The Agencies should likewise recognize that, as noted above, the template for competition analysis contained in the Merger Guidelines is used by other federal and state agencies. Replacing the Guidelines with a template for a legal brief reduces the usefulness of the Guidelines for agencies tasked with competition analysis rather than writing briefs for antitrust litigation.

Respectfully submitted,

Lawrence J. Spiwak
President