FEDERAL TRADE COMMISSION

UNITED STATES DEPARTMENT OF JUSTICE/ ANTITRUST DIVISION

HMG REVIEW PROJECT — COMMENT/ PROJECT No. P0929900

COMMENT SUBMITTED BY BROUILLETTTE & PARTNERS LLP

The comment below is being submitted by Brouillette & Partners LLPa boutique law firm located in *Montréal*, *Québec*, Canada founded by attorney and engineer Robert Brouillette. The firm offers legal services to start-up companies developing technology. (**www.brouillette.ca**.). The comment reflects our views, not those of any of our clients. Daniel Martin Bellemare, attorney at law, member of the *Québec* and Vermont Bar, has accepted to submit a comment on our behalf *pro bono*. Mr. Bellemare shares a business address with us.

Our comment centers on two questions in the Commission's Notice. Firstly, whether the Horizontal Merger Guidelines' ("Guidelines") five-step analytical process should be revised in order to provide more flexibility in reviewing mergers. Secondly, the weight that should be accorded non structural factors in merger analysis. These two questions are being addressed into a single comment. We are thankful to the Commission for having taken the initiative to seek public comment and for providing us with an opportunity to submit a comment on the advisability to revise the Guidelines.

SUMMARY OF COMMENT

A clarification should be brought to the Guidelines. For purposes of predictability and efficiency, the Guidelines should emphasize that the merger review process turns around three axes: (i) definition of the relevant market; (ii) increase in concentration within the relevant market; and, (iii) barriers to entry. The relevance of entry barriers in the merger review process must be

reasserted, unequivocally, as the most important countervailing factor to post-merger market concentration increase. The existence or nonexistence of barriers to entry is paramount, for absent entry barriers a merger can hardly lessen competition substantially. Entry analysis should concentrate on past actual entry and actual potential competition. Otherwise, evidence must be produced that entry would, not could, occur.

COMMENT ON HORIZONTAL
MERGER GUIDELINES REVIEW PROJECT

The merger review process under the Guidelines could be more predictable and efficient by focusing around the first three steps set out in the Guidelines: (i) definition of the relevant market; (ii) increase in concentration within the relevant market; and, (iii) barriers to entry. Under the well established legal standard used to assess the legality of an horizontal merger under 15 U.S.C. § 18, a merger that increases unduly post merger market share and concentration level is *prima facie* illegal under the Act. For the presumption to be rebutted or met, countervailing evidence other than structural factors must be produced. *Philadelphia Nat. Bank, v. U.S.* 374 U.S. 321, 363 (1963). This legal standard has been incorporated in the Guidelines. H.M.G. §§ 0.1; 1.51.

Ease of entry is the prime form of evidence put forward to rebut or meet the presumption of illegality under Clayton Act § 7. This is so because, absent barriers to entry a merger can hardly lessen competition substantially. H.M.G. § 3.0. Accordingly, from an enforcement standpoint, countervailing evidence such as changing market conditions (H.M.G. § 1.521; see also *U.S. v. General Dynamics Corp.*, 415 U.S. 486 (1974)), failing firm, or efficiencies must be considered only if the agencies find that barriers to entry exist.

The Guidelines put entry analysis in the right perspective, this factor being analyzed immediately after a determination that a proposed merger would presumptively contravene the Act. "*Time, likelihood, sufficiency*" of entry is basically a pragmatic test requiring empirical evidence, meaning evidence either of actual entry within a certain period of time prior to the merger or potential competitors on the fringe of the market. *Philadelphia Nat. Bank,* 374 U.S., at 367, n.44. See also *U.S. v. Baker Hughes Inc.,* 908 F.2d 981, 988-989 (D.C. Cir. 1990); *FTC. v. H.J. Heinz Co.,* 246 F.3d 708, 717 (D.C. Cir. 2001)); *Chicago Bridge & Iron Co., v. FTC* 534 F.3d 410, 435-436 (5th Cir. 2008).

Absent evidence of actual entry or actual potential competition there must be evidence that entry would occur on a sufficient scale — as opposed to could occur. [Emphasis Added]. The distinction between entry that would instead of could occur is critical. *Baker Hughes* 908 F.2d 989. See also, Pitofsky "*New Definitions of Relevant Market and the Assault on Antitrust*" 90 Columbia Law Review 1805 (1990)). Any mistake in assessing entry barriers — *i.e.* a finding that entry barriers are non-existent — inevitably leads to giving a green light to an anti-competitive merger. This kind of mistake should be avoided at all costs by centering entry analysis on reasonably ascertainable evidence that sustainable entry will occur in the short term (*i.e.* would as opposed to could).

The Guidelines refer to regulatory barriers to entry sparingly. H.M.G. § 3.1. Regulatory barriers deserve particular attention since this kind of barriers bear directly on whether entry is likely and would materialize in timely manner. *U.S. v. Marine Bancorporation,* 418 U.S. 602, 627-628 (1974). See also *Hospital Corp. of Am. v. FTC* 807 F.2d 1381, 1387-1388 (7th Cir. 1986). Because of high uncertainty regarding entry alternatives, a significant increase in market

concentration combined with regulatory barriers limiting effectively the number of entrants raise serious antitrust concerns. In that context, an external factor over which merger proponents and agencies have no control negates any benefits stemming from actual potential competition and would-be competition. This is something that should be addressed more specifically in the Guidelines.

The above comment means to describe more accurately how the agency handles entry analysis while suggesting an approach improving the Guidelines' merger review process accuracy in general. Moreover, the merger review process would be improved. Concentrating entry analysis on empirical evidence limits endless theoretical assumption on entry alternatives thereby yielding more time and resources for market analysis — the most important and burdensome inquiry in merger analysis.

Signed this 5th day of November 2009.

/s/

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