

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

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January 28, 2009

The Honorable Christine Varney
Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: HMG Review Project – Comment, Project No. P092900

Dear Assistant Attorney General Varney and Chairman Leibowitz:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, is pleased that the Antitrust Division and the Federal Trade Commission are taking a deliberative, yet cautious approach to any potential revisions to the Horizontal Merger Guidelines (Guidelines). With the conclusion of the five workshops on this topic, the Chamber wanted to take the opportunity to highlight our thoughts and concerns as the process moves forward and the Agencies determine what, if any, revisions need to be made to the Guidelines.

The Chamber believes that the existing Guidelines have largely worked effectively and efficiently since the last major review and series of revisions in 1992. We urge caution during the process to ensure that any changes or clarifications as a result of the current review not result in any substantial policy shift or lead to the creation of uncertainty. Business relies on antitrust enforcement practices that are transparent, predictable, and largely stable overtime.

The Guidelines provide important guidance to the Agencies, the private sector and the courts. The Chamber does not see a need through this current review in any way to overhaul the current guidelines that govern merger review. Any modifications should be changes measured in degrees, and should be clearly articulated and supported by the mainstream consensus of antitrust academics and practitioners with sound analytical evidence provided to justify the need for such modifications. In fact, a completely appropriate result of your review process may be a conclusion that no substantial modifications to the Guidelines are required. Finally, any proposed changes, substantive or otherwise, should be published in the Federal Register to allow for public comment prior to being made final.

Modifications to the existing Guidelines may be most sensible in situations in which the actual actions and practices undertaken by the Agencies do not follow the prescribed procedures due to advances in economic theory or the way the process and system has evolved over time.

However, this only holds true if the current practices undertaken by the Agencies that stray from the existing Guidelines are well-reasoned and justified. If they are not, the Agencies should reiterate and reinforce the Guidelines in those areas in order to curtail such divergence in practice. Regardless, as an outcome of this review, the Chamber supports the actual practices of the Agencies being aligned with the Guidelines thereby enhancing transparency of the process for companies and practitioners.

Mergers are increasingly complex and often global resulting in review by multiple jurisdictions. This reality needs to be taken into account as part of the review of the Guidelines. Antitrust experts and scholars who have been educated and have practiced for years in the United States may understand the nuances of any changes and appreciate their limited impact and the reasoning behind them; however, a world of antitrust onlookers educated elsewhere and who speak languages other than English will be influenced by any changes resulting from the current review.

The Chamber urges careful consideration of the international audience in drafting any final report or press release which seeks to explain any modifications to the Guidelines. Finally, as part of the international message it is important to promote the deliberate and careful approach that the two agencies have taken in conducting this review, from the willingness to do the review in the first place, to seeking public comment and consultation, to the communication of the outcome. Many agencies around the world could learn from such an approach and the U.S. demonstration of procedural leadership.

Many suggestions and recommendations have been made as a result of the review and in response to the twenty specific questions that the Agencies proposed in September 2009. The Chamber urges caution and restraint as you begin to deliberate and consider potential changes. Again, the Chamber strongly urges any proposed revisions be published in the Federal Register for public comment before being issued in final form.

Sincerely,

R. Bruce Josten

Cc. Commissioner Pamela Jones Harbour, Commissioner William Kovacic, and
Commissioner J. Thomas Rosch