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**Our File No.** 69459  
**Date** April 21, 2022

**Submitted Electronically via [www.regulations.gov](http://www.regulations.gov)**

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex J)  
Washington, DC 20580

Dear Sir:

**Re: Request for Information on Merger Enforcement**

We write on behalf of the Merger Streamlining Group (“MSG” or the “Group”), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.<sup>1</sup> The MSG was founded in 2001. The cornerstone of the Group’s activity has been to work with competition agencies and governments to help implement international best practices in merger control, with particular focus on the *Guiding Principles for Merger Notification and Review* (“Guiding Principles”) and the *Recommended Practices for Merger Notification Procedures* (“Recommended Practices”) of the International Competition Network (“ICN”).<sup>2</sup> As you know, the U.S. Federal Trade Commission (“FTC”) and the Department of Justice Antitrust Division (collectively, the “Agencies”) are longstanding and active members of the ICN.

The Group’s work to date has included submissions to competition agencies and governments in more than twenty jurisdictions (e.g., Brazil, Canada, Chile, China, European

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<sup>1</sup> Accenture, BHP, Chevron, Cisco Systems, Danaher, Oracle, Procter & Gamble, Siemens, and United Technologies Corporation.

<sup>2</sup> International Competition Network, *Guiding Principles for Merger Notification and Review*, available online at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG\\_GuidingPrinciples.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidingPrinciples.pdf); International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf).

Union, France, Japan, Korea, Spain, the United Kingdom, the United States, and many others). The Group provided a submission in February 2021 in response to the consultation on the proposed amendments to the pre-merger notification rules under the *Hart-Scott-Rodino Antitrust Improvements Act*.

## 1. General Comments

The Group makes this submission in response to the Request for Information on Merger or Enforcement (the “RFI”) dated January 18, 2022.<sup>3</sup> The Group understands that the responses to the RFI will form the basis for potential revisions to the Agencies’ merger guidelines, which will be subject to further consultation.

The Group’s submissions to the Agencies and other international antitrust agencies have consistently focused on merger control process and streamlining issues rather than substantive merger policy issues. In this submission, the Group does not address the substantive questions posed in the RFI. However, guidance on how mergers are assessed is an important element of effective merger control processes. The ICN’s Recommended Practices reflect the importance of certainty and predictability, as well as efficient use of enforcement resources and avoiding unnecessary burdens on merging parties, as key considerations in the implementation of substantive merger reviews. The Group encourages the Agencies to take these principles into account as it considers revisions to its guidance on merger review.

Transparency is one of the eight core principles identified in ICN’s Guiding Principles as a critical foundation for effective merger review:

*Transparency. In order to foster consistency, predictability, and fairness, the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits.*<sup>4</sup>

Transparency and consistency in the exercise of enforcement discretion are critical contributors to predictability for merging parties and their advisors, who need to understand the Agencies’ analytical and enforcement approaches in order to plan and conduct M&A transactions in the public and private capital markets. In order for the Agencies’ merger guidelines to achieve the transparency, consistency and predictability objectives, the Group submits that the principles and analytical framework set out in the merger guidelines, as well as the Agencies’ merger enforcement practice, should accurately reflect (1) established jurisprudence that interprets and applies the existing legislative framework, and (2) broadly accepted economic principles and research.

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<sup>3</sup> FTC, Request for Information on Merger Enforcement, accessible at <<https://downloads.regulations.gov/FTC-2022-0003-0001/content.pdf>>.

<sup>4</sup> Guiding Principles, #2. See also Recommended Practices, #VIII.

## 2. Conformity with Established Jurisprudence

The Group respectfully submits that the Agencies, as law enforcement agencies, have a duty to exercise their enforcement discretion in merger cases in accordance with established jurisprudence.

If the Agencies' enforcement approach deviates significantly from established jurisprudence, the inconsistencies are likely to create uncertainty for merging parties and their advisors, which can chill competitively benign and pro-competitive transactions that have important positive productivity and other economic welfare benefits. In addition, merger enforcement decisions that are inconsistent with established jurisprudence are more likely to fail in court. This would be an ineffective use of limited enforcement resources for the Agencies and would unnecessarily impose significant burdens on merging parties.

The Group urges the Agencies to ensure that any subsequent revisions to the merger guidelines will "faithfully track the statutory text, legislative history, and established case law around merger enforcement."<sup>5</sup> The Group respectfully notes that the RFI does not include references to significant recent case law reflecting extensive developments in antitrust jurisprudence in recent decades. To the extent that the Agencies consider that material changes to the existing law are warranted, that is a legislative function that should be undertaken by elected officials.

## 3. Conformity with Broadly Accepted Economics Principles and Research

The Group further submits that the Agencies' enforcement approach, both in practice and as described in merger guidelines, should reflect the broad consensus of economics research on the potential effects of merger transactions on competition.

In this respect, the Group agrees that the merger guidelines should be reviewed and updated periodically to better reflect new scholarship and research on mergers as these developments are tested and achieve a broad-based consensus as sound economic science. However, the Group respectfully cautions that broadening the scope of merger enforcement in ways that are not consistent with broadly-accepted economic principles is likely to be counter-productive and also risks chilling economically beneficial transactions.

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<sup>5</sup> RFI, at page 1.

Thank you for considering these submissions.

Yours very truly,



Neil Campbell



William Wu

Copy to: Members of the Merger Streamlining Group