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Department of Justice, Antitrust Division
950 Pennsylvania Avenue, NW
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Federal Trade Commission
600 Pennsylvania Avenue, NW
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Re: Response to Request for Information on Merger Enforcement

On behalf of the U.S. Chamber of Commerce ("the Chamber"), we are pleased to 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").

In general, although the Chamber has no qualms with the agencies updating the Merger Guidelines to reflect the latest case law and empirical economic analysis, the Chamber has serious concerns that the agencies are attempting to use the RFI to rewrite substantive antitrust law based on faulty economic and legal assumptions. For instance, many of the RFI's questions reflect a belief that economic concentration is strangling competition, that most mergers harm consumers, and that the Merger Guidelines provide an opportunity to rewrite substantive antitrust law. As explained in more detail below, these assumptions, and several others, are mistaken.

First, most mergers are procompetitive. An entire library of empirical economic papers and case studies attests to the benefits of mergers and acquisitions in increasing efficiency, improving capital flows, and allowing companies to bring new and better products to consumers.[1] The Vertical Merger Guidelines acknowledge that "vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm."[2] The Horizontal

[1] E.g., Antitrust Modernization Commission Report 57-60 ("AMC Report"), at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. See also Statement of Ass't Att'y Gen. Christine Varney, *Merger Guidelines Workshops*, Third Annual Georgetown Law Global Antitrust Enforcement Symposium, Sept. 22, 2009 ("Let me start by pointing out that the vast majority of mergers are either procompetitive and enhance consumer welfare or are competitively benign.").
[2] Vertical Guidelines, at https://www.justice.gov/atr/page/file/1290686/download.

Merger Guidelines recognize that the agencies should avoid "unnecessary interference with mergers that are either competitively beneficial or neutral."[3]

Unfortunately, through an unbalanced series of questions in the RFI, it appears that the agencies are seeking to broadly stack the deck against mergers. For instance, even before asking the first question, the RFI emphasizes that "the agencies seek specific examples of mergers that have harmed competition, with descriptions of how the merger harmed competition, including how those mergers made it more difficult for customers, workers, or suppliers to work with the merged firm or competitors of the merged firm or made it more difficult for rivals to compete with the merged firm." This is not an objective approach to gathering information.

Second, and contrary to the RFI's apparent assumption, the U.S. economy is not becoming more concentrated. In an exhaustive analysis of all available census data from the past two decades, Dr. Robert Kulick finds that since 2002, U.S. economic concentration has remained flat.[4] In fact, since 2007 in both the manufacturing sector and the broader economy, the economy became *less* concentrated. The data also shows some normal regression to the mean; less concentrated industries became more concentrated, while more concentrated industries became less so. Another study, also analyzing the most recent data, confirms that "census data show U.S. industries have not become more concentrated."[5]

Indeed, the Council of Economic Advisers itself rejected the overconcentration narrative. In 2020, CEA concluded that "the argument that the U.S. economy is suffering from insufficient competition is built on a weak empirical foundation and questionable assumptions."[6] As it explained:

> Research purporting to document a pattern of increasing concentration and increasing markups uses data on segments of the economy that are far too

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[3] Horizontal Guidelines, at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

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

[5] 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). Similarly, a recent working paper by Stanford and Chicago economists finds "that product market concentration has been decreasing since 1994." Benkard et al, *Concentration in Product Markets*, at https://www.nber.org/papers/w28745. See also Rossi-Hansberg et al, Diverging Trends in National and Local Concentration (2020), U. Chicago Press Journals, at https://www.journals.uchicago.edu/doi/abs/10.1086/712317.

[6] CEA, 2020 Economic Report to the President, Chapter 6, at https://www.govinfo.gov/content/pkg/ERP-2020/pdf/ERP-2020-chapter6.pdf. See also Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. of Indus. Org. 714, at 722 (2018); Testimony of Carl Shapiro, Committee on the Judiciary, U.S. Senate, The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?, Dec. 13, 2017, at 1:11:00.

broad to offer any insights about competition, either in specific markets or in the economy at large. Where data do accurately identify issues of concentration or supercompetitive profits, additional analysis is needed to distinguish between alternative explanations, rather than equating these market indicators with harmful market power.

The bottom line: the economy is not becoming more concentrated over time.

Moreover, rising concentration does not, by itself, suggest a lack of competition. According to the bipartisan Antitrust Modernization Commission, economic research finds procompetitive reasons to explain highly concentrated markets, namely, "that the most efficient firms were winning the competitive struggle and thereby achieving high market shares."[7] Indeed, the Kulick study shows that rising industry concentration often was correlated with higher levels of economic output, more jobs, and higher wages. For example, taxis and specialty retail stores have become more concentrated, yet competition is thriving in these sectors because of innovative entrants like ride-sharing services and e-commerce channels.

Third, the guidelines do not provide the agencies with a forum for changing substantive antitrust law. The Merger Guidelines are just that, guidelines, not substantive law. The D.C. Court of Appeals has cautioned against using agency guidelines as substantive law:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrase, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining, and often expanding the commands on the regulations. ... Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. ... The agency may also think there is another advantage — immunizing its lawmaking from judicial review.[8]

In a recent memorandum, the Office of Attorney General itself confirmed that, "The Department's guidance documents should be drafted with the recognition that they do not bind the public."[9] Instead, as Commissioners Wilson and Phillips write, the

[7] AMC Report 34, at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.
[8] *Appalachian Power Co. v EPA*, 208 F. 3d. 1015, at 1020 (D.C. Cir. 2000). See also Executive Order 13891 (Promoting the Rule of Law Through Improved Agency Guidance Documents) (explaining that guidance documents must go through the rulemaking process to have the force of law), *revoked by* Executive Order 13992, Executive Order on Revocation of Certain Executive Orders Concerning Regulation.
[9] Memorandum from the Office of Attorney General, Issuance and Use of Guidance Documents by DOJ (July 1, 2021), at https://www.justice.gov/opa/page/file/1408606/download, *rescinding* Memorandum

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."[10]

The 2010 Horizontal Guidelines have been widely embraced by courts, businesses, practitioners, and economists, across presidential administrations and Congresses, because they lay out a consensus view grounded in case law and empirical economics. The guidelines were adopted at the Antitrust Division and unanimously, on a 5-0 vote, at the FTC. They are regularly cited with approval by the courts and, as far as the Chamber knows, have never been cited disapprovingly by any court. Over the years, the agencies have brought countless successful enforcement actions in reliance on the guidelines' framework and deterred many other mergers from moving forward at all.[11] The business community has come to rely on the guidelines as a predictable, objective, and transparent source of intelligence for the state of the law.

Nevertheless, the RFI suggests that the agencies may attempt to rewrite substantive antitrust law and discard decades of antitrust jurisprudence. For instance, the RFI repeatedly asks about topics that the courts have long settled, such as Questions 2(g) ("Should the guidelines' traditional distinctions between horizontal and vertical mergers be revisited in light of recent economic trends in the modern economy?") and 6(a) ("Is it necessary to define a market in every case?"). The case law already answers these questions. Neither the Department of Justice nor the Federal Trade Commission have the authority to erase the distinction between horizontal and vertical mergers, or to avoid the necessity of market definition in merger cases. Any attempt to do so would undermine the utility of new guidelines by creating a large gap between judicial precedents and the agencies' analysis.

Moreover, without a broad consensus, such new guidelines would face a high probability of repeal during a future presidential administration. Such a "yo-yo effect" would severely undermine the predictability and certainty that has surrounded antitrust law during the last three decades or more, when the agencies first started to issue guidelines. In short, if the agencies want to move antitrust law in a different direction, they should lay out their vision in a dialogue with Congress, or through

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from DOJ's Office of Associate Attorney General, Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Jan. 25, 2018), at https://www.justice.gov/opa/press-release/file/1028756/download.

[10] See 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.

[11] E.g., FTC statements relating to Lockheed and Nvidia, at https://www.ftc.gov/news-events/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations and https://www.ftc.gov/news-events/press-releases/2022/02/statement-termination-of-nvidia-attempted-acquisition-of-arm-ltd.

enforcement actions brought before the courts, not through a rewrite of the guidelines.

Fourth, the guidelines should reflect the *current* state of the law and economic analysis, rather than a point in time from prior decades that may reflect certain policy preferences. The guidelines should describe how the agencies apply existing law to proposed transactions. As Commissioners Phillips and Wilson explain, "Merger enforcement should be administrable, predictable, and credible. 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."[12]

Unfortunately, in framing its questions, the RFI relies heavily on decisions from the 1960s and 1970s that have long been discredited by both the courts and economists. The reliance on these cases, as in footnotes 6-14 and 18, suggests an antitrust worldview stuck in time, "nostalgia without memory."[13] The Antitrust Modernization Commission explained the problems with these older cases:

> During the 1960s and early 1970s antitrust decisions from the Supreme Court sometimes seemed more directed to protecting small businesses than to protecting competition that would benefit consumers through lower prices, improved quality, or innovation. Indeed, in some instances the Court "condemned conduct precisely because it reduced costs or generated more desirable products [for consumers]." For example, in *FTC v. Procter & Gamble* the Court affirmed that a merger was illegal because it created efficiencies its rivals could not match. Decisions such as this were criticized as likely to deprive consumers of lower prices or other benefits from the increased competition that a more efficient merged firm could provide. Such decisions also were criticized for the absence of a coherent rule of law that could explain them.[14]

Discredited decisions from decades past do not provide a proper foundation for sound merger policy today.

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[12] See also Barry Wright Corp. v. Itt Grinnell Corp., 724 F.2d 227 (1st Cir. 1983) (Breyer, J.) (affirming the dismissal of a Sherman Act Section 2 complaint based on "unreasonably low" prices) ("[W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.").
[13] Greg Werden, Foundations of Antitrust: Events, Ideas, Doctrines (2020).
[14] AMC Report 34 (citations omitted).

Fifth, and finally, any revised guidelines should retain the objectivity and transparency that have allowed the existing guidelines, and their predecessors, to serve as effective tools for the courts, business community, and enforcement agencies. The Horizontal Merger Guidelines note that they "are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the agencies' enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws." Objective criteria also enable the agencies to focus resources on transactions that raise genuine competitive concerns. Therein lies the value of the guidelines.

The RFI, however, suggests that the agencies want more discretion to interpret and enforce the antitrust laws, with fewer objective constraints. For instance, the RFI suggests a desire to move away from objective criteria such as price competition (Question 2) and market definition (Question 6), and toward presumptions that favor the government (Question 5) and speculative analysis (Question 7). If the agencies move in this direction, they will diminish the usefulness and persuasiveness of the guidelines for both companies and courts.

Finally, the Chamber believes it is important that the agencies circulate for comment any draft revised guidelines that result from this consultation ahead of them being finalized. The Chamber would also note that it supports sound and efficient merger review and responsible enforcement of the antitrust laws. The Chamber has publicly expressed support to Congress to ensure the agencies are appropriately funded. With these opening comments in mind, the Chamber is pleased to answer the RFI's specific questions. We would be delighted to maintain an open dialogue with both the Department and the Commission.

Question 1: Purpose, Harms, and Scope

The requests for information in the first question concerning the purpose, harms, and scope of the merger guidelines foreshadow potential changes to the guidelines based on four premises. Each of these premises is flawed.

First, several subparts of the first question presume or suggest that the current guidelines deviate from the text of the statute, even if they conform to governing case law (*e.g.*, subparts a, b, c, d, h). The agencies, however, may not jettison decades of precedent interpreting the statutory text in an attempt to unearth the until-now-hidden meaning of the statutory text.

As an initial matter, we applaud the agencies for following established canons of statutory interpretation. The text of the statute is the beginning of any proper statutory interpretation.[15] Yet, we are not at the beginning of judicial interpretation of the Clayton Act. Over the last several decades, the Supreme Court has set forth its interpretation of the text of the statute. These precedents are the law. They set forth the tests that govern merger control in the United States.

These court decisions also create predictability for regulated parties. Indeed, one reason the Supreme Court grounds statutory interpretation in the text is that it leads to predictable results for regulated parties. Predictability is critical in the interpretation of the antitrust laws. As Justice Brennan wrote in an opinion oft quoted by the RFI, "unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded."[16] And these precedents have stood the test of time.[17]

Indeed, the Constitution requires that the guidelines align with the judiciary's binding precedent. From the earliest days of the Republic, the Supreme Court has emphasized that, "The federal government's powers, however, are not general but limited and divided."[18] A recent opinion explained that "Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution's separation of powers."[19] It would be unwarranted and unlawful to jettison these precedents in favor of a newly-discovered test for merger control.

Second, several subparts presume or suggest that the current guidelines do not encompass all potential harms arising from certain mergers in the modern economy (*e.g.*, subparts a, b, d, g). The agencies, however, should not attempt to turn the guidelines into a comprehensive list of potential harms from mergers in the modern economy. The current guidelines explicitly state that they define harm broadly, including upstream and downstream markets, and do not attempt to enumerate all harms.[20] By contrast, overly detailed guidelines fail to account for myriad fact patterns, chill beneficial commercial activity, and impose transaction costs on the

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[15] *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019) (rejecting interpretation of Sherman and Clayton Acts that is inconsistent with text of statutes).
[16] *United States v. Phil. Nat'l Bank*, 374 U.S. 321, 362 (1963).
[17] See *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (persisting in interpretation in part "given the long passage of time without any expression of congressional dissatisfaction and sound policy considerations of judicial economy and expertise").
[18] See *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819).
[19] *National Federation of Business v. Dep't of Labor*, 595 U.S., slip op. at 2 (2022) (Gorsuch, J. concurring).
[20] See Guidelines, Overview ("[A] merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."); ("When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition."); ("The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers.").

economy. That is especially true in the antitrust space, where, as the RFI admits, economic learning continuously informs our understanding of problematic practices.[21]

Third, certain subparts presume or suggest that the current guidelines impose too precise or high a burden for challenging a merger in light of the limits of economic evidence (*e.g.*, subparts e, f). The agencies, however, should not revise the guidelines to reduce the role that economic evidence plays in merger enforcement. One of the major advances in antitrust enforcement over the past several decades is a reduced focus on the aggressive instincts and intent to beat competitors in the marketplace that characterizes robust competition—most often reflected in quotable and colorful documents and communications of business executives—and an increased focus on the economic effects of mergers (and conduct)—most often reflected by economic modeling. This shift implements the principles, among others, that the antitrust laws focus on harm to competition, not to competitors,[22] and that although anticompetitive behavior is unlawful, "[h]ypercompetitive behavior is not."[23] It also reflects the principle that a businessman who does not write down the reasons for his actions should not be treated better than a businessman who takes the same measures but is explicit. It would be a significant step backward in antitrust law for the agencies to return to an era when economic analysis did not play a significant role. It would also reduce the objectivity of the guidelines.

The current guidelines acknowledge this progress, while also recognizing that economic analysis is not, as it has been colorfully put, a "crystal ball."[24] Indeed, recent enforcement activity indicates that the agencies do not hesitate to bring enforcement actions under the current guidelines when economic modeling does not yield "a ready and precise answer."[25] In addition, the agencies retain discretion to challenge a transaction even if the guidelines suggest that the transaction may pass muster under the antitrust laws. A converse rule would chill potentially procompetitive transactions to which the guidelines may ascribe excessive risk. Therefore, the guidelines are most effective if they provide notice of reasonable risk while encouraging procompetitive transactions.

Finally, several subparts presume or suggest that the current guidelines improperly explain agency functioning in light of current case law (*e.g.*, subparts i, j). The agencies, however, should not turn the guidelines into the type of guidance document that ignores the decades-long bipartisan consensus on the core principles of antitrust law. Guidance documents earn respect and merit judicial deference by the

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[21] See*, e.g.*, Question 1, subpart g.
[22] See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).
[23] *FTC v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020).
[24] *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 191 (D.D.C. 2018).
[25] See Question 1, subpart 3 (quoting *Phila. Nat'l Bank*).

force of their reasoning.[26] When they attempt to go beyond or change the law, they falter in the eyes of the bar, the judiciary, and the public.[27] At a minimum, such guidance documents must proceed through the elaborate procedures established by regulation for review.[28] It would be a significant harm to antitrust law should the merger guidelines overreach and lose their influence with the bar, the judiciary, and the public.

Question 2: Types and Sources of Evidence

The RFI seeks comments on whether the agencies should revise the guidelines concerning the types and sources of evidence used to evaluate the competitive effects of a transaction. In particular, the RFI suggests the guidelines have been interpreted too narrowly on the pricing effects of mergers. It similarly asks whether the guidelines should place more emphasis on a broader range of evidence, for instance, when defining markets or considering the ability or incentives of the merging parties to reduce competition. In practice, however, the guidelines have not unduly narrowed the focus of the agencies' review to the exclusion of certain evidence, and the agencies should not expand the guidelines beyond the law as set out in the Clayton Act and applied by the courts.

The "Guidelines describe the principal analytical techniques and the main types of evidence" used by the agencies when reviewing a proposed merger transaction.[29] Their purpose is to illuminate the agencies' mode of analysis, not to create law or to define the universe of permissible evidence used in merger review. As such, the guidelines state that competitive analysis "does not consist of uniform application of a single methodology" but instead applies "a range of analytical tools to the reasonably available and reliable evidence . . . "

The 2010 guidelines were a significant expansion on the types of evidence the agencies will rely on in their merger analyses. For example, Section 2.1 enumerates several specific types of evidence the agencies will consider, including "Substantial Head-to-Head Competition" and the "Disruptive Role of a Merging Party." The guidelines also expand on the analysis of unilateral effects and price discrimination markets and memorialize the practice of looking to "[e]vidence of competitive effects" to "inform market definition." Of course, the types of evidence detailed in the guidelines are "not exhaustive." Rather, the agencies will "consider any reasonably

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[26] *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (agency guidance document's authority depends on "character and context of the agency interpretation").
[27] 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.").
[28] See id.; see generally Executive Order 12,866 (June 1994).
[29] Horizontal Merger Guidelines, § 1 (2010).

available and reliable evidence to address the central question of whether a merger may substantially lessen competition."

Courts have embraced the guidelines' tools and modes of analysis to evaluate whether a challenged merger may substantially lessen competition while continuing to abide by the well-developed law in this area.[30] So, for example, one court began its review by defining the relevant market — "[m]erger analysis begins with defining the relevant product market,"[31] — and then proceeded to evaluate that market using the various types of evidence as specified in the guidelines: defendants' documents, critical loss analysis, likelihood of coordinated effects, head-to-head competition, and unilateral effects. Since the guidelines were revised in 2010, many other courts have cited them approvingly.[32]

Question 3: Coordinated Effects

The guidelines are incredibly valuable as a tool to document the DOJ's and FTC's mutual understanding of the current state of U.S. antitrust law and economics as applied by federal courts. The guidelines assist market participants in anticipating legal risks from proposed transactions. Importantly, the guidelines have historically been consistent with federal court precedent applying the relevant statutory provisions, i.e., Section 7 of the Clayton Act, 15 U.S.C. § 18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1–2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

The Horizontal Merger Guidelines have long contained an overview of the risks of lessening competition through coordinated effects, parallel effects, what conditions may be conducive to reaching terms of coordination, and what conditions are conducive to detecting and punishing deviations.[33]

Of course, as the current guidelines make clear, traditional evidence of the existence of a conspiracy in the relevant product market is the type of additional factor that would take merely parallel conduct across the line into anticompetitive territory, providing a basis to challenge a proposed merger.[34]

The evidence and factors identified in Section 7.2 of the Horizontal Guidelines are well established and objectively verifiable. They permit potential transacting parties to analyze and understand potential arguments suggesting that their

[30] E.g., United States v. Baker Hughes, 908 F.3d 981 (D.C. Cir. 1990) (Thomas, J.); U.S. v. Oracle, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (thorough analysis of then-existing Guidelines).
[31] *U.S. v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011) (internal quotes omitted).
[32] See, e.g., *FTC v. Wilhelmsen*, 341 F. Supp. 3d 27 (D.D.C. 2018) (following the Guidelines analysis of market definition, targeted customers, market concentration, entry, power buyers, and efficiencies); *U.S. v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017) (citing the Guidelines on market definition, market concentration, entry, and efficiencies).
[33] See Horizontal Merger Guidelines, § 7.1, 7.2.
[34] See *In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 361 (3d Cir 2004).

transaction might introduce anticompetitive risks to a given market. However, there is nothing unique to the "modern economy" or current academic literature that requires any material shift or change as to how these coordinated factors are applied or that would justify the creation of any presumptions of economic harm based on market generalities.

Question 4: Unilateral Effects

a. Perhaps the most important advances in merger analysis over the past several decades have been in unilateral effects. Unilateral effects analysis enabled the agencies and the courts to take a more rigorous approach to analyzing mergers involving differentiated products. These developments were among the main reasons the guidelines were reviewed and revised in 2010. In keeping with precedent and principles of sound policy guidance, the 2010 revisions were more evolutionary than revolutionary – applying new learning and experience to build on fundamental economic methods and concepts that were already present in the prior guidelines and employed in agency practice.[35] Since 2010, the guidelines' unilateral effects analysis has continued to be applied by the agencies and, importantly, has increasingly been embraced by the courts, leading to a greater receptivity to agency claims that mergers harm competition through unilateral effects. While some elements of the current guidelines arguably tilt too much toward identifying potential unilateral competitive concerns,[36] unilateral effects are a good example of an area where the guidelines accord with agency practice, economic theory, and (increasingly) judicial precedent.[37]

The concept of unilateral effects was introduced into the merger guidelines in 1992. Subsequent advances in practice and in economic theory fleshed out more thoroughly how competition – particularly in markets for differentiated goods – could potentially be harmed by the loss of competition between the merging firms, without the need for coordination with other rivals. A substantial body of economic literature refined this analysis and developed tools and methods for evaluating the potential for unilateral price effects. [38] At the same time, the agencies' practices were evolving to

[35] See Carl Shapiro, "The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years," Antitrust Law Journal 77:701, 713 (2010).
[36] For example, the unilateral effects section takes an unduly skeptical approach to dynamic market responses, such as competitor repositioning, by subjecting them to the same analysis as new entry – despite the fact that repositioning by firms with existing, similar offerings to those of the merging firms often is much easier, faster, and more likely than greenfield entry. 2010 Guidelines, Sec. 2.212 n.23; see also Shapiro, supra, at 717-18. Narrow issues such as this can, however, be dealt with over time in case practice; they do not warrant a wholesale reopening of the Guidelines to revisions, particularly when the Guidelines as a whole have been so successful in meeting their core objectives.
[37] See Carl Shapiro, "The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years," Antitrust Law Journal 77:701, 713 (2010).
[38] See*,* e.g., the literature cited in Shapiro, supra, at 717 n.57.

incorporate these concepts and methods into their investigations and cases.[39] Although the 2010 guidelines had their critics, including those who were concerned about either over- or under-enforcement due to the guidelines' more nuanced reliance on market shares and structural presumptions, the 2010 revisions have generally been well-received.[40]

An important measure of the current guidelines' success is how they have fared in the courts. What has happened when the guidelines' analytical framework, and the enforcement actions that emerge from that framework, have been scrutinized by an independent judiciary? Have they helped, or hindered, the agencies in their efforts to challenge mergers? These are among the questions that were the subject of a study by Carl Shapiro and Howard Shelanski, two prominent antitrust economists who were principal drafters of the 2010 Guidelines revisions while serving as the lead economists at the Antitrust Division and the FTC during the Obama Administration.[41] Their study examined all federal judicial decisions in litigated horizontal merger cases from 2000 to 2020 — from approximately 10 years before to 10 years after the 2010 guidelines revisions — and reported both on case outcomes, as well as on instances when courts cited the guidelines and addressed substantive issues covered by the guidelines.

Among the Shapiro and Shelanski study's significant findings:

- In the 10 years after the 2010 Guidelines were issued, the DOJ and FTC had a win rate in merger cases litigated in federal court of 79% (15 out of 19) – higher than their 62% win rate (8 of 13) in the 10 years preceding the 2010 Guidelines.[42]

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[39] See U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006), at https://www.justice.gov/atr/file/801216/download.

[40] See, e.g., Herbert Hovenkamp, "Merger policy and the 2010 Merger Guidelines (2014), at https://scholarship.law.upenn.edu/faculty_scholarship/1847/.

[41] Carl Shapiro and Howard Shelanski, "Judicial Response to the 2010 Horizontal Merger Guidelines" (2021), Review of Industrial Organization 58:51-79 ("Shapiro and Shelanski").

[42] Id. at 54. This is consistent with a broader study that examined all U.S. litigated merger challenges from 1979-2019 to evaluate the narrative that antitrust law, and the courts that apply it, have become increasingly hostile to antitrust merger enforcement. The study found that, contrary to this narrative, judicial outcomes in litigated merger cases have shifted *in favor of* enforcement, over the same timeframe in which enforcement was purportedly being undermined by undue influence of the Chicago School. The probability that merger challenges went to trial (rather than resulting in a consent decree, or the transaction being abandoned) has declined over time, a result that is consistent with increasingly pro-enforcement outcomes in cases that are litigated. Finally, the study found no statistically significant difference in litigated merger outcomes depending on whether the deciding judges were appointed by Republican or Democratic presidents – a finding that is inconsistent with the narrative that changes in the ideological composition of the federal judiciary have led to anti-antitrust outcomes. Jeffrey Macher, John W. Mayo, David E. M. Sappington and Mark Whitener, "The Evolution of Judicial Standards: Evidence from Litigated Merger Trials" (March 21, 2021), Georgetown McDonough School of Business Research Paper No. 3809174, at SSRN: http://dx.doi.org/10.2139/ssrn.3809174.

- The courts have consistently referenced the guidelines and afforded them respect. In no reported instance did a court explicitly reject any aspect of the guidelines as flawed or inconsistent with the case law or statutory text.[43] (This is unlikely to continue to be the case if some of the novel and unsupported policies and principles intimated in the RFI were to become formal agency policy and be presented to the courts.)

- Many aspects of the guidelines have been well-received by the courts, but their most significant impact has come in the area of unilateral effects. The study found numerous examples where the guidelines' analytical framework was embraced by courts and enhanced the agencies' ability to demonstrate anticompetitive effects in meritorious cases.[44]

- In particular, the 2010 guidelines elevated both the prominence and acceptance of unilateral effects theories. Of the 21 litigated merger cases decided after the 2010 revisions, at least 10 expressly addressed unilateral effects claims, and the courts accepted those claims in a number of notable cases, including *H&R Block/TaxAct*, *Sysco/US Foods*, *Staples/Office Depot (2017)*, *Aetna/Humana, Anthem/Cigna,* and *Wilhelmsen/Drew Marine*.[45]

In sum, the major developments in the antitrust analysis of unilateral effects from mergers are already reflected in the current guidelines, as the result of a thoughtful evolution over successive guidelines iterations that culminated in the 2010 revisions. The resulting guidance is broadly consistent with fundamental economics, established agency practice, judicial precedent, and sound policy. While aspects of that guidance could always be updated, there is no basis for reopening or significantly revising the guidelines' unilateral effects analysis.

b. Subpart (b) asks, "Should evidence of substantial competition between the merging parties be sufficient to establish the loss of competition due to a merger?" First, as a threshold matter, "substantial competition" is a term that would need to be defined before it could be applied in any meaningful way to merger enforcement policy. By contrast, the terms, principles, and analytical approaches to evaluating the potential competitive effects of mergers, as articulated in the current guidelines, are well understood, and are backed by a highly developed base of economic and legal principles and experience.

Second, establishing the fact of "the loss of competition" from a merger is at most an initial, and essentially meaningless, step in analyzing a merger's competitive

[43] Shapiro and Shelanski, supra, at 58.
[44] Id. at 53.
[45] Id. at 67-69.

effects. By definition, all horizontal mergers, even between firms with trivial market shares, involve the loss of a competitor. This alone obviously is insufficient as a legal, economic, or policy matter to conclude that the merger should be viewed as anticompetitive.

Third, if the question intends to ask whether a merger between two firms that are "substantial competitors" (assuming some meaningful definition of the term) should be sufficient to condemn the merger, then the answer is, unequivocally, no. This is, again, at most a threshold question in a merger analysis that must proceed to address other issues before the merger's likely competitive effects can be gauged. How many other "substantial competitors" exist in the relevant market or competitive space? How similar are they competitively to the merging firms, and how similar are the merging firms to each other? How readily can other firms enter, expand, or reposition? What efficiencies and other benefits to consumers will result from the combination? Ultimately, what effect will the combination have on competition and consumers, whether in terms of price, quality, innovation, or other competitive parameters? Fortunately, we have an existing analytical template that asks all of these questions and provides a coherent framework for how to address them: the 2010 guidelines.

Question 5: Presumptions

RFI 5 asks about potential modifications to the presumptions in the 2010 guidelines, as well as whether presumptions should be implemented for non-horizontal mergers (i.e., mergers of complementary goods or vertical mergers). The 2010 guidelines presume that a merger is "likely to enhance market power" when it is in a highly concentrated market (defined as an HHI exceeding 2500) and results in an HHI increase over 200 points.[46] Declaring a presumption in guidelines does not make it law — it must be adopted by the courts to have legal effect, which has happened with the HHI presumption in previous and current guidelines.[47] The Supreme Court has made clear that antitrust presumptions "are generally disfavored" when they "rest on formalistic distinctions rather than actual market realities."[48] The Court "prefer[s] to resolve antitrust claims on a case-by-case basis, focusing on the particular facts

[46] Horizontal Merger Guidelines § 5.3.
[47] E.g., *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (applying HHIs in prior guidelines to establish a presumption); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 42 (D.D.C. 2017) (similar with 2010 Guidelines).
[48] *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 467 (1992); *see also Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 43 (2006) (per se illegality "must be supported by proof of power in the relevant market rather than by a mere presumption"); *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."); *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 208 (1968) ("In interpreting the antitrust laws . . . [w]e must look at the economic reality of the relevant transactions.").

disclosed by the record."[49] The D.C. Circuit has held that a "restraint is presumed unlawful" only "[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition."[50] Similarly, in *Federal Trade Commission v. Actavis* and in *California Dental Association v. Federal Trade Commission*, the Supreme Court denied the FTC's efforts to apply a quick-look analysis — which would have resulted in a rebuttable presumption that the conduct at issue harmed competition.[51] The Court held that quick-look analysis is appropriate only "when the great likelihood of anticompetitive effects can easily be ascertained"[52] and "the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one."[53]

Based upon these precedents, the Chamber believes that presumptions in the revised guidelines will win support from the federal courts only if they are supported by well-established economic theory and evidence. Failure to do so will result in the same fate as *Actavis* and *California Dental*, where the Court denied the Agency's requested presumption.

1. Horizontal Mergers

Neither economic theory nor empirical evidence supports share-based presumptions as an effective indicator of market power or competitive harm. Granted, under the Cournot model of competition, increased concentration may result in competitive harm, but this is not necessarily the case because many other factors also impact whether competitive harm occurs.[54] Share-based presumptions, including from

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[49] *Eastman Kodak Co.*, 504 U.S. at 467 (internal quotation marks omitted).

[50] *Polygram Holding, Inc. v. F.T.C.*, 416 F.3d 29, 36 (D.C. Cir. 2005); see also *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) ("[D]eparture from a rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.").

[51] *F.T.C. v. Actavis, Inc.*, 570 U.S. 136, 158–59 (2013); *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 775 (1999).

[52] *California Dental*, 526 U.S. at 770.

[53] *California Dental Ass'n v. F.T.C.*, 526 U.S. at 781; see also *Actavis*, 570 U.S. at 159 (refusing to apply the FTC's quick-look analysis because it is "appropriate only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets'" (quoting *California Dental*, 526 U.S. at 770)).

[54] Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: *Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 201, 210 (2015) ("We agree that market concentration and market shares can be relevant to merger analysis. But we can find no serious defense of the proposition that a *PNB*-like presumption reflects the best of modern economic thinking about mergers or that presuming the illegality of transactions above the any particular threshold is good economic policy for consumers."); Nathan Miller et al., *On the Misuse of Regressions of Price on the HHI in Merger Review* at 2 (Nov. 22, 2021), at http://www.nathanhmiller.org/hhiregs.pdf ("Whether the HHI is positively or negatively correlated with price depends on what gives rise to the variation across the markets or periods. As we develop, if a small firm reduces its costs, then both its price and the HHI in its market may decrease, creating a positive correlation between price and the HHI. But if instead a large firm reduces its costs,

Philadelphia National Bank, rely upon outdated economics.[55] Today, "[m]ost economists would agree that market shares and the HHI often are poor indicators of market power."[56]

Though the 2010 guidelines rely upon HHIs and concentration, a great strength comes from their reliance upon gross upward pricing pressure. As Carl Shapiro, one of the principal architects of the 2010 guidelines, wrote, "[T]he treatment of unilateral price effects in the Guidelines now rests on a rock-solid economic foundation. The economic principles used are extremely basic and robust…Because the gross upward pricing pressure index is so well grounded in basic economics, a quasi-safe-harbor based on this index does not suffer from the mismatch between the economic logic of unilateral price effects and a quasi-safe-harbor based on the HHI level."[57] The dubious nature of concentration-based presumptions and the strength of unilateral effects analysis under the 2010 guidelines suggests that a path forward, if anything, should not increase the emphasis upon the former while sacrificing the latter. Finally, as

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then its price may decrease and the HHI in its market may increase, creating a negative correlation."). Despite existing, albeit outdated Supreme Court precedent, the limitations of market concentration in analyzing anticompetitive effects have been acknowledged by the courts. E.g., *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) ("That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis. Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.") (Thomas, J.).

[55] E.g., Dennis w. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 268 (4th ed. 2005) ("[P]erhaps the most significant criticism is that concentration itself is determined by the economic conditions of the industry and hence is not an industry characteristic that can be used to explain pricing or other conduct."); Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. Theoretical Econ., Vol. 10, No. 1, Art. 9 (2010), at 1, www.bepress.com/bejte/vol10/iss1/art9 ("The established approach uses market concentration . . . . [T]hat approach can be clumsy and inaccurate in industries with differentiated products where the theory of harm is related to unilateral (rather than coordinated) effects.").

[56] Cristina Caffarra & Serge Moresi, *Issues and Significance Beyond US Enforcement*, MLEX Magazine, Apr.-June 2010, at 41, 42–43; *see also* Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714, 722–23 (2018) ("Sheer size and market power are just not the same thing."); Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 Geo. Mason. L. Rev. 1, 10 (2003) ("The [structural] paradigm was overturned because its empirical support evaporated."); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. Pol. Econ. 977, 978 (1991) ("Our empirical results suggest that competitive conduct changes quickly as market size and the number of incumbents increase. In markets with five or fewer incumbents, almost all variation in competitive conduct occurs with the entry of the second and third firms. Surprisingly, once a market has between three and five firms, the next entrant has little effect on competitive conduct. . . . These data show that prices fall when the second and third firms enter and then level off.")

[57] Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L. J. 701, 727 (2010); see also Ginsburg & Wright, supra note 9, at 218 ("The GUPPI approach has a significant advantage over the structural presumption . . . .").

discussed earlier, the most recent analysis shows that economic concentration has fallen since 2007.[58]

2. Vertical Mergers

The need for economic theory and evidence to support presumptions applies even more so to vertical mergers or mergers of complementary products because, for vertical mergers, the economic evidence shows procompetitive benefits that undermine any presumptions of illegality.

Under existing law, "the government cannot use a short cut to establish a presumption of anticompetitive effect . . . because vertical mergers produce no immediate change in the relevant market share."[59] Rather, to meet their burden, the agencies "must make a 'fact-specific' showing that the proposed merger is 'likely to be anticompetitive.'"[60] As discussed in more detail below, this precedent is consistent with the economics literature on vertical transactions, which undermines illegality presumptions for vertical mergers. Given the extent of this literature, it is outside the realm of possibility that the Supreme Court would uphold *any* presumption of illegality with respect to vertical mergers.

At the outset, it bears repeating that the distinction between horizontal and vertical issues in American antitrust law is not established by the Agencies' guidelines (though this distinction is recognized in multiple existing guidelines[61]). Rather, the

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[58] Kulick, supra. See also Michal Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 Antitrust L.J. 361, 363–64 (2018) (finding that Kwoka's methods have "substantial methodological issues" because he fails to "employ well established meta-analytic techniques," and concluding that Kwoka's analysis "provides little support for the conclusion that enforcement standards have become weaker over time"); Shapiro, supra, at 721–37 (2018) (undermining the basis and impact of studies claiming an increase in concentration); Michael Vita, *Kwoka's Mergers, Merger Control, and Remedies: Rejoinder to Kwoka*, (Aug 2018), at https://www.ftc.gov/system/files/documents/biographies/michael-g-vita/vita_rejoinder_to_kwoka_1.pdf ("Empirical findings and policy conclusions emerging from methodological black boxes are not credible."); Joshua D. Wright, *Towards a Better Understanding of Concentration: Measuring Merger Policy Effectiveness*, OECD Competition Committee Hearing on Market Concentration (2018) (similar); Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, Antitrust Magazine at 11 (Fall 2018) ("The evidence does not show increasing ***market*** concentration, so DON'T PANIC." (emphasis in original)).

[59] *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019).

[60] Id.

[61] *See* Horizontal Merger Guidelines (2010); Vertical Merger Guidelines (2020); Antitrust Guidelines for the Licensing of Intellectual Property § 3.3 (2017) ("As with other property arrangements, antitrust analysis of intellectual property licensing arrangements examines whether the relationship among the parties to the arrangement is primarily horizontal or vertical in nature, or whether it has substantial aspects of both"); Antitrust Guidelines for Collaborations Among Competitors (2000) (applying only to collaborative arrangements among *competitors*); Statements of Antitrust Enforcement Policy in Health Care (1996) (describing separate analysis for "vertical issues").

distinction has been clearly and unequivocally established by the Supreme Court of the United States, in numerous cases over the course of decades,[62] and reaffirmed recently.[63]

The doctrinal distinction between horizontal and vertical restraints is manifest in many legal approaches to analyzing antitrust cases. Certain price agreements by horizontal competitors are illegal *per se*,[64] whereas price agreements between firms with a vertical relationship are governed by the rule of reason.[65] Territorial market division agreements between competitors are illegal *per se*, [66] whereas a supplier may grant its dealers exclusive territories subject to application of the rule of reason.[67] An agreement among competitors to boycott a firm is illegal *per se*,[68] whereas an individual firm's right to choose its trading partners, including vertically related firms, is subject only to narrow exceptions.[69]

Although much of this precedent relates to cases challenging anticompetitive conduct, the Supreme Court and lower courts have clearly established that the horizontal-vertical distinction also informs the appropriate analysis in merger cases. In *Brown Shoe*, the Court explained that, from 1914 through 1950, §7 of the Clayton Act did not even cover mergers between non-competing firms.[70] In 2019, the D.C. Circuit explained that "unlike horizontal mergers, the government cannot use a short cut to

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[62] See, e.g, Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 348 n.18 (1982) ("horizontal restraints are generally less defensible than vertical restraints"); Business Electronics v. Sharp, 485 U.S. 717, 734 (1988) ("notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality was explicitly rejected in *GTE Sylvania*"); *see also* Leegin Creative Leather Prods. V. PSKS, 551 U.S. 877, 888 (2007) (prior precedent "treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors. In later cases, however, the Court rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones."). One lower court has observed that "[t]he antitrust laws . . . have long drawn a sharp distinction between contractual restrictions that occur up and down a distribution chain—so-called vertical restraints—and restrictions that come about as a result of agreements among competitors, or horizontal restraints." Toys "R" Us v. FTC, 221 F.3d 928, 930 (7th Cir. 2000) (Wood, J.).

[63] Ohio v. American Express, 138 S. Ct. 2274, 2285 n.7 (2018) ("Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. *But vertical restraints are different*. Vertical restraints often pose no risk to competition.") (emphasis supplied) (internal citations omitted).

[64] *See* United States v. Socony-Vacuum Oil, 310 U.S. 150 (1940).

[65] *See* Leegin Creative Leather Prods. v. PSKS, 551 U.S. 877 (2007).

[66] *See* Northern Pacific Railway v. United States, 356 U.S. 1 (1958).

[67] *See* Continental TV v. GTE Sylvania, 433 U.S. 36 (1977).

[68] *See* Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959).

[69] *See* United States v. Colgate & Co., 250 U.S. 300 (1919).

[70] Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962) (explaining that 1950 Amendments to § 7 of the Clayton Act were made, in part "to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition")

establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share."[71]

The Agencies cannot eradicate this distinction by fiat in an advisory document that lacks the force of law. Any enforcement action pursued by either agency will be subject to judicial review applying existing law, which establishes a clear difference between horizontal and vertical mergers.

Further, "modern market realities" do not counsel in favor of eradicating the distinction between mergers between direct competitors and mergers involving firms that (currently) operate at different levels of the same distribution chain. First, a firm's acquisition of another firm that, at present, is a non-competing supplier or customer can be challenged by the agencies as an acquisition of a potential competitor, if the facts support such an allegation. The 2010 Guidelines explicitly account for the possibility that vertically integrated firms can be considered actual or potential competitors depending upon the circumstances.[72]

Second, under the prevailing Guidelines, the Agencies have pursued numerous cases in which they have alleged that the merger will result in a firm with dominant share as a buyer or seller to the competitors of one of the parties[73] or that an input is

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[71] United States v. AT&T, 916 F.3d 1029, 1032 (D.C. Cir. 2019).

[72] Horizontal Merger Guidelines §5.1 (2010) ("All firms that currently earn revenues in the relevant market are considered market participants. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants. Firms that are not current producers in a relevant market, but that would very likely provide rapid responses with direct impact in the event of a SSNIP, without incurring significant sunk costs, are also considered market participants. These firms are termed 'rapid entrants' . . . . Firms that clearly possess the necessary assets to supply into the relevant market may also be rapid entrants").

[73] Compl. at 2, 4, UnitedHealth Group Inc., Collaborative Care Holdings, LLC, DaVita Inc. & DaVita Med. Holdings, LLC, FTC Docket No. C-4677 (Jun. 19, 2019) (post-acquisition, the combined firm would "cover over 80%" of the upstream market); Silicon Graphics, Inc., 120 F.T.C. 928 (1995) 930–33 (Silicon Graphics, which had a 90% share in the market for entertainment graphics workstations, sought to acquire Alias and Wavefront, "two of the three leading developers" of entertainment graphics software for those workstations); Compl. at 2–3, Northrop Grumman Corp. & Orbital ATK, Inc., FTC Docket No. C-4652 (Jun. 5, 2018) (Orbital ATK was the larger of only two U.S. suppliers of solid rocket motors, "an essential component of missile systems"); Lockheed Corp., 119 F.T.C. 618, 619–23 (1995) (Martin Marietta was the only supplier of LANTIRN Systems, sensory systems used on military aircraft such as Lockheed's, and entry was "difficult and unlikely"); General Electric Co., 156 F.T.C. 255 at 3 (2013) (GE sought to acquire Avio, the supplier of accessory gearboxes to P&W, GE's "only" downstream competitor in the supply of certain engines; Avio had "sole design responsibility" for the accessory gearbox that P&W used for its engines, and other component suppliers were not "acceptable substitutes" for that upstream input, "because switching component manufacturers at this stage in development would be cost prohibitive"); Energy Transfer Equity, L.P. & Williams Cos., Inc., FTC Docket

critical, unique, or a "must have."[74] Further, nothing in the current Guidelines or the case law prevents the Agencies from alleging that a single transaction is illegal under both a horizontal theory and a vertical theory, which the Agencies have done in prior cases.[75] And, of course, it is axiomatic that a plaintiff in federal court can pursue multiple theories of harm in the alternative.

No. C-4577 at 3 (2016) (ETE and Williams each owned a 50 percent interest in "the only interstate natural gas pipelines [] transporting natural gas to Peninsular Florida," and a third interstate pipeline to enter the market "relied on a leased section of the Transco pipeline" fully owned by Williams); Compl. at 23, CMS Energy Corp., FTC Docket No. C-3877 (Jun. 2, 1999) (CMS operates "the only transmission [i.e., distribution] system from which customers [in Michigan] receive natural gas" and sought to acquire certain upstream natural gas pipelines, giving it the ability and incentive to disadvantage other upstream pipeline operators).

[74] Compl. at 11–12, Nvidia Corp., FTC Docket No. 9404 (Dec. 2, 2021) ("Arm Processor Technology [upstream] is a critical input for [downstream] DPU SmartNIC products. Virtually all major DPU SpartNIC suppliers . . . incorporate Arm Processor Technology and rely on the Arm architecture as a critical component in their products . . . [t]here are no close substitutes"); Valero L.P., Valero Energy Corp., Kaneb Servs. LLC & Kaneb Pipe Line Partners, L.P., Analysis of Proposed Consent Order to Aid Pub. Comment, 140 F.T.C. 40, 59, 93 (2005) (("No other independent terminals in Northern California can economically receive and distribute bulk supplies of ethanol. ... Ethanol is a necessary input in producing California-grade 'CARB' gasoline .... There are no substitutes for [Kaneb's] services." The acquisition would give Valero "control over an input necessary to finish gasoline for portions of Northern California."); TRW Inc., 125 F.T.C. 496, 497–498 (1998) (TRW sought to acquire BDM, "the only provider" of systems engineering and technical assistance for ballistic missile defense); Compl. at 19–22, Teva Pharm. Indus. Ltd. & Allergan PLC, FTC Docket No. C-4589 (Jul. 26, 2016) (Teva's acquisition of Allergan could foreclose access to active ingredients from current or future competitors that "cannot easily switch to alternative [active ingredient] suppliers because a drug manufacturer must use [active ingredients] from a source designated in its [FDA filing]," and "it can take up to two years for an [active ingredient] manufacturer to be qualified as a new [] supplier" by the FDA, "during which time the drug manufacturer has no alternative to its existing qualified [active ingredient] supplier or suppliers."); Shell Oil Co. & Texaco Inc., 125 F.T.C. 769, 769–75 (1998) (in a proposed joint venture, Texaco owned "the only pipeline that supplies undiluted heavy crude oil to the San Francisco Bay Area ... For the competitor [to Shell], there are no economic substitutes for undiluted heavy crude oil in refining asphalt."); Compl. at *2–4, Par Petroleum Corp., 159 F.T.C. 1812 (2015) (Par sought to acquire Mid Pac, which had a long-term contract in place at the only harbor/terminal that could accept bulk imports of petroleum and was not already owned by Par or Chevron, such that "[n]o alternative exist[ed] to the bulk supply"); Barnes & Noble (1999), Richard G. Parker, Former Dir., Bureau of Competition, Fed. Trade Comm'n, Global Merger Enforcement at 2–3 (Sept. 28, 1999), https://www.ftc.gov/public-statements/1999/09/global-merger-enforcement (book wholesaler Ingram was "an important upstream supplier" with "critical [] services," as even the largest wholesaler alternatives to Ingram were far smaller than it).

[75] *See*, *e.g.*, Press Release, Justice Department Requires Divestitures in Merger Between UTC and Raytheon to Address Vertical and Horizontal Antitrust Concerns (Mar. 26, 2020), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-merger-between-utc-and-raytheon-address-vertical-and; Press Release, Justice Department Sues to Block UnitedHealth Group's Acquisition of Change Healthcare (Feb. 24, 2022), https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare; Press Release, FTC Requires Teva to Divest Over 75 Generic Drugs to Settle Competition Concerns Related to its Acquisition of Allergan's Generic Business (July 27, 2016), https://www.ftc.gov/news-events/news/press-releases/2016/07/ftc-

In evaluating vertical mergers, one must remember that vertical mergers are fundamentally different from mergers between competing firms, and consequently do not warrant the same legal treatment. A horizontal merger eliminates competition between rivals and will, to some degree, result in harm absent efficiencies, repositioning, entry, or other considerations.[76] A vertical merger, however, which combines firms offering complementary products, does not result in a loss of competition between rivals as there is no direct rivalry to eliminate.[77] Further, a vertical merger can cause efficiencies that do not occur in the horizontal context.

Vertical mergers result in production and transaction cost efficiencies and eliminate double marginalization. "By far the most common result of vertical mergers—and presumably the reason why most occur—is savings in either the cost of production or the cost of using the market."[78] Though production cost savings may not result from every merger, "transaction cost savings undoubtedly explain the motive for many vertical mergers, and also explain why many are efficient."[79] Vertical mergers also eliminate double marginalization. When two vertical firms merge, even if one or both are monopolists, "eliminating one firm with market power from the chain" will result "in higher final output and lower prices, even though the acquiring firm continues to set its own profit-maximizing price."[80] Further, "the only occasions when no gains can be anticipated from the elimination of double marginalization is when at

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requires-teva-divest-over-75-generic-drugs-settle-competition-concerns-related-its-acquisition ("In addition to the product divestitures, to address the anticompetitive effects likely to arise in markets for 15 pharmaceutical products where Teva supplies active pharmaceutical ingredients to current or future Allergan competitors, the FTC order additionally requires Teva to offer these existing API customers the option of entering into long-term API supply contracts.").

[76] *See* Joseph Farrell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, 80 AM. ECON. REV. 107, 118 (1990).

[77] *See* Francine Lafontaine & Margaret E. Slade, *Presumptions in Vertical Mergers: The Role of Evidence*, 59 REV. INDUS. ORG. 255, 256 (2021) ("[T]here is not a direct expectation that vertical mergers will lead to higher prices for consumers."); Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347, 347 (1950) ("Vertical integration, on the contrary, does not, as such, serve to reduce competition and may, if the economy is already ridden by deviations from competition, operate to intensify competition."); *but see* Serge Moresi & Steven C. Salop, *Quantifying the Increase in "Effective Concentration" from Vertical Mergers that Raise Input Foreclosure Concerns: Comment on the Draft Vertical Merger Guidelines* (Feb. 24, 2020), https://ssrn.com/abstract=3543774 ("[T]here [is] an inherent loss of an *indirect competitor* and competition when there is an input foreclosure concern" (emphasis in original)).

[78] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1021 (2021) [hereinafter "ANTITRUST LAW"].

[79] *Id.*; Marissa Beck and Fiona Scott Morton, *Evaluating the Evidence on Vertical Mergers*, 59 REV. INDUS. Org. 273, 276 (2021) (discussing why contracting is not always a substitute to merger because, "[i]n practice, contracts can come in a variety of forms with varying implications, and there can be various frictions that make contracts imperfect substitutes for vertical integration.").

[80] ANTITRUST LAW at ¶ 1022.

least one of the two merger levels is very nearly perfectly competitive. But in that case, it is hard to establish any rationale for competitive harm."[81]

The cost savings generated from vertical mergers not only allow the merged firm to pass those savings on to consumers, they incentivize innovation and provide the resources to bring products to market. As an example, in the media industry, increasingly companies are able to combine the knowledge it gains as a distributor with the investment decisions that it makes as a content creator, tailoring that content by using its data about what content viewers consume.[82] Without vertical integration, in many circumstances, entities will not be able to innovate efficiently and provide consumers with the outputs they demand.[83]

The Chamber cautions against over aggressive enforcement of vertical mergers in any revised guidelines because the empirical evidence generally finds that vertical mergers are procompetitive. If the agencies revise the guidelines to deter more vertical

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[81] *Id.* at ¶ 1022; *see also id.* at ¶ 1001 ("We remind the reader that the most common result of both vertical mergers and internal vertical expansion is resource saving or more competitive pricing. Such beneficial possibilities undercut any basis found in the scenarios just noted for prima facie condemnation of all nontrivial vertical mergers, or even for a presumption against them."). The Chamber has noted the FTC's incorrect view that the prior vertical guidelines' "reliance on EDM is theoretically and factually misplaced . . . because the economic model predicting EDM is limited to . . . mergers that involve one single-product monopoly buying another single-product monopoly in the same supply chain, where both charge monopoly prices pre-merger and the product from one firm is used as an input by the other in a fixed-proportion production process." Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission File No. P810034 at 4 (Sep. 15, 2021). As Professors Shapiro and Hovenkamp explain:

> This statement is flatly incorrect as a matter of microeconomic theory. EDM applies (a) to multi-product firms, (b) regardless of whether the firms at either level have monopoly power or charge monopoly prices, and (c) regardless of whether the downstream production process involves fixed proportions. All of this has been included in economics textbooks for decades, building on a seminal 1950 paper by Joseph Spengler. None of the conditions cited by the majority are required for EDM to apply, although they are clearly relevant when one is measuring EDM in a specific vertical merger. While EDM does not save every vertical merger, it should be part of any vertical merger inquiry and is not nearly as limited as the majority's statement suggests.

Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?* PROMARKET (Sep. 23, 2021), https://www.promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/.

[82] Dennis W. Carlton et al., *Lessons from AT&T/Time Warner*, ANTITRUST CHRONICLE (Jul. 24, 2019), https://www.competitionpolicyinternational.com/lessons-from-att-time-warner/.

[83] *See id.* The Agencies' current practice of sending letters to merging parties, advising that they close transactions "at their own risk," may delay or even prevent merging parties from fully integrating a transaction and realizing efficiencies that benefit consumers, for fear of later having to undo the deal. If legitimate concerns remain regarding a transaction, pursuing remedies would be preferable to leaving merging parties in limbo. *E.g.*, European Comm'n, Mergers: Commission Clears Acquisition of Kustomer By Meta (formerly Facebook), Subject to Conditions (Jan. 27, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_652.

mergers, then consumers will be the primary victims. "Most studies find evidence that vertical restraints/vertical integration are procompetitive,"[84] and "evidence on the consequences of vertical mergers suggests that consumers mostly benefit."[85] More recent summaries of the empirical evidence on vertical integration reaches comparable conclusions: (1) "While vertical integration can certainly foreclose rivals in theory, there is only limited empirical evidence supporting that finding in real markets";[86] (2) "vertical merger retrospectives at this point do not provide the type of evidence that is needed to support particular presumptions";[87] and (3) "in our view the conclusions are not robust enough to justify a procompetitive (or anticompetitive) presumption for policy purposes."[88]

Finally, the Chamber cautions against shoehorning alternative types of mergers under the "vertical" umbrella. Conglomerate mergers are "thought to be competitively irrelevant,"[89] and have failed to find "much favor in the courts or even among commentators."[90] With respect to "cross-market" mergers, a theory of harm resulting from conglomerate merger, harm may be theoretically possible, but the Chamber agrees that "the difficulties of proof are so severe, and administrable presumptions so lacking in foundation, that the issue should probably be disregarded altogether."[91]

Question 6: Market Definition

Market definition is a cornerstone of antitrust law. It sets forth an objective and fact-intensive rubric that has continuously evolved to reflect the current consensus of both economic analysis and jurisprudence. While market definition is not dispositive, defining a market allows key decision makers to frame the analysis of competitive

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[84] James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 658 (2005); *see also Daniel P. O'Brien, The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in* REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 76 (2008) ("[T]he empirical literature on [vertical agreements] suggests that these practices have been used to mitigate double marginalization and induce demand increasing activities by retailers. With few exceptions, the literature does not support the view that these practices are used for anticompetitive reasons.").
[85] Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LITERATURE. 629, 663 (2007).
[86] Global Antitrust Institute, *Comment Letter on DOJ/FTC Draft 2020 Vertical Merger Guidelines* (George Mason Law & Economics Research Paper No. 20-03, Feb. 7, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id =3534352 (citing to 12 studies of vertical integration between 2009 and 2018, finding only one showing a negative welfare effect while others had a positive or no effect on welfare).
[87] *See* Francine Lafontaine & Margaret E. Slade, *Presumptions in Vertical Mergers: The Role of Evidence*, 59 REV. INDUS. ORG. 255, 268 (2021).
[88] Marissa Beck and Fiona Scott Morton, *Evaluating the Evidence on Vertical Mergers*, 59 REV. INDUS. ORG. 273, 276 (2021).
[89] ANTITRUST LAW at ¶ 1100a.
[90] *Id.* at ¶ 1140.
[91] *Id.* at 1141e.

interaction, closely examine a firm's power over price and output, and measure market concentration.[92] Without market definition, the administrability and predictability of outcomes would erode, leaving agencies and courts with unbridled discretion and little framework on which to rely.

Courts have readily accepted that market definition is a "necessary predicate" for antitrust analysis, and have deftly defined markets across decades of jurisprudence,[93] with market definitions evolving to incorporate economic learning.[94] As former FTC Chief Economist Jonathan Baker noted, "[t]hroughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue."[95] Many substantive legal rulings either explicitly or implicitly rely on market definition. For example, in cases under Section 7 of the Clayton Act, market definition determines whether the merging parties compete and whether a merger would substantially diminish competition.[96] The importance of market definition is reinforced in case law for both horizontal and vertical mergers, and agencies generally use the methodology set forth in the 2010 guidelines to define relevant markets for both vertical and horizontal mergers.[97]

However, the 2010 Horizontal Merger Guidelines acknowledge that market definition is not an end in itself, and "[s]ome of the analytical tools used by the

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[92] Steven C. Salop, Serge Moresi, John R. Woodbury, *Market Definition in Merger Analysis*, Antitrust Economics for Lawyers 2 (2017).

[93] See, e.g., United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957) ("Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition." (internal quotation marks omitted)); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284-85 (2018) (*Amex*) ("Here, the plaintiffs rely exclusively on direct evidence to prove that Amex's anti-steering provisions have caused anticompetitive effects in the credit card market. *To assess this evidence, we must first define the relevant market.*" (emphasis added)).

[94] *Compare United States v. Von's Grocery*, 384 U.S. 270, 272 (1966) ("The market involved here is the retail grocery market in the Los Angeles area") with *FTC v. Whole Foods Market*, 548 F.3d 1028, 1032 (D.C. Cir. 2008) ("The FTC contended Whole Foods and Wild Oats are the two largest operators of what it called premium, natural, and organic supermarkets. Such stores focus on high-quality perishables, specialty and natural organic produce, prepared foods, meat, fish, and bakery goods; generally have high levels of customer service; generally target affluent and well educated customers and are mission driven with an emphasis on social and environmental responsibility") (internal citations and quotation marks omitted).

[95] Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L.J. 129 (2007).

[96] Christine S. Wilson and Keith Klovers, *Same Rule, Different Result: How the Narrowing of Product Markets Has Altered Substantive Antitrust Rules*, 84 Antitrust L. J. 55, 57 (2021) (citing United States v. Sabre Corp., 452 F. Supp. 3d 97, 136 (D. Del. 2020), *vacated*, No. 20-1767, 2020 WL 4915824 (per curiam)).

[97] See, e.g., *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 195 (D.D.C. 2018) (requiring a market definition despite the vertical nature of the merger and acknowledging the importance of market definition in vertical mergers).

agencies to assess competitive effects do not rely on market definition."[98] These analytical tools, such as diversion ratios, were contained in the updates to the 2010 guidelines and reflect current economic consensus and agency practice.[99] Yet, as noted previously, any update to these guidelines should reflect incremental changes in judicial precedent and economic analysis.[100] Courts often rely on the guidelines to reflect the current state of the law while examining market definition and the agencies should take great care to steer the courts to an appropriate summary of the current legal consensus.[101]

The 2010 guidelines clearly describe the steps needed to perform such a market definition exercise and provide sufficient flexibility to arrive at a variety of different definitions that all fall within the guideline's ambit. The 2010 guidelines explicitly state that "[r]elevant markets need not have precise metes and bounds," as there is significant variation in each application.[102] While these guidelines acknowledge the practical imprecision that may result from their application, it is not implied that the market definition exercise as a whole is superficial or overly imprecise. Rather, the guidelines appropriately consider the varying nature of market realities and seek to simplify the market definition exercise to apply to a variety of situations. Similarly, inputs used to define relevant markets should aim for precision, but at the very least will serve as a next-best proxy for the current states of the market.

The 2010 guidelines also sufficiently explain that qualitative evidence can be used while defining a relevant market, and judges have relied on such evidence in conjunction with key quantitative evidence.[103] For example, in *FTC v. Whole Foods*, the court considered qualitative evidence such as "practical indicia as industry or public recognition of the [relevant market] as a separate economic entity, the product's

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[98] Horizontal Merger Guidelines § 4 (also acknowledging that "evaluation of competitive alternatives available to customers is *always* necessary at some point in the analysis.") (emphasis added).
[99] See Carl Shapiro, *2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L. J. 712, 717 (2010).
[100] See Christine A. Varney, *The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution*, 77 Antitrust L. J. 651, 652 (2010) (rejecting attacks on the 2010 Guidelines that "run contrary to years of enforcement practice, rest on distortions of congressional intent and judicial precedent, and proceed from a rejection of the economic approach that has guided antitrust for decades."); *see also* Federal Trade Commission, *Statement of Chairman Leibowitz on the Release of the 2010 Horizontal Merger Guidelines* (Aug. 19, 2010) ("the new Guidelines provide a clearer and more accurate explanation to merging parties, courts and antitrust practitioners of how the agencies review transactions.").
[101] See FTC v. Sysco Corp., 113 F. Supp. 3d 1, 38 (D.D.C. 2015) (relying on the 2010 Horizontal Merger Guidelines when determining product markets); F.T.C. v. Staples, Inc., 970 F. Supp. 1066, 1076 n. 8 (D.D.C. 1997) (relying on the 1992 Horizontal Merger Guidelines when determining product markets).
[102] Horizontal Merger Guidelines § 4.
[103] Id. The 2010 Guidelines explicitly provide an example of market definition that accounts for buyer preferences and perceptions ("However, motorcycle buyers see Brand B motorcycles as much more similar to Brand A motorcycles than are cars.").

peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors" alongside other quantitative evidence such as estimates of critical loss.[104] It is important to consider qualitative data alongside quantitative, as descriptors of the perceptions of competition and end uses are often those qualities that provide an enhanced understanding of the confines of the relevant market.

The key need to define a market is to determine whether a firm has significant market power, or where the industry's behavior deviates from perfect competition.[105] While some courts have found that market definition is not necessary when it is possible to prove monopoly power by relying instead on evidence of direct harm, this is the exception to the rule, not the rule itself.[106] Though the Hypothetical Monopolist Test and SSNIP focus solely on demand substitution factors, the 2010 guidelines also consider that responsive actions of suppliers are important to the competitive analysis and are addressed in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.[107]

While the standard definition of market power is the ability to set price profitably above the competitive level, the current market definition analysis provides flexibility to address when the potential harm to competition stems not from the risk of an immediate price increase, but instead from other longer-term or non-price factors. Further, the current market definition process allows for considerations of R&D and future products, particularly when the alleged harm focuses on the reduction of competition in innovation. Courts have had no problem evaluating competition where the relevant market had non-price effects, including a diminished incentive to provide valuable features.[108] In addition, the 2010 guidelines also provide for a range of increasingly sophisticated economic tools to assess competitive effects that can be

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[104] FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1037-38 (D.C. Cir. 2008 (Brown, J.)) (quoting *Brown Shoe*, 370 U.S. at 325).
[105] Department of Justice, Economic Analysis Group Discussion Paper, Dennis Carlton, *Market Definition: Use and Abuse* (Apr. 2007), https://www.justice.gov/atr/market-definition-use-and-abuse.
[106] FTC v. Indiana Federation of Dentists, 476 U.S. 447, 461 (1986) (avoiding market definition where agreements that eliminate entire competitive strategies were examined and deemed anticompetitive).
[107] Horizontal Merger Guidelines § 4.
[108] See, e.g., FTC v. Sysco Corp., 113 F.Supp. 3d 1 (D.D.C. 2015) (broadline foodservice distribution is a relevant market for national customers that prefer suppliers with a wide selection of products, distinct facilities, timely and reliable delivery, national pricing, and value-add services such as menu planning), 66 ("Sysco and USF are the country's two largest broadliners by any measure. They have far more distribution centers, SKUs, private label products, sales representatives, and delivery trucks than any other broadline distributor. . . . [B]ecause the proposed merger would eliminate head-to-head competition between the number one and number two competitors in the market for national customers, the merger is likely to lead to unilateral anticompetitive effects in that market.").

tailored to the particular competitive dynamics at play, including those that consider various dynamic competition issues.[109]

In short, the 2010 guidelines provide a flexible and administrable test for market definition that currently needs little tweaking to reflect the realities of the marketplace and antitrust law.

Question 7: Potential and Nascent Competition

Sound antitrust policy must provide a framework to evaluate acquisitions of nascent and potential competitors that focuses on the potential competitive effects of such transactions. Nascent competitors, by definition, are firms whose prospective innovation represents a potential future threat to incumbents. The approach set out in the 2010 Horizontal Merger Guidelines provides an effective analytic framework for evaluating the anticompetitive potential of mergers involving a nascent competitor. Indeed, the agencies have engaged in robust enforcement to challenge allegedly anticompetitive acquisitions of nascent competitors. Thus, the RFI erroneously presumes that guidelines need to be strengthened to facilitate enforcement involving nascent competitors. Of course, acquisitions of nascent competitors can also enhance competition by, for example, accelerating the growth of a lesser rival to challenge a dominant incumbent. The agencies should evaluate acquisitions of nascent competitors in a manner that balances all appropriate factors around the nascent competitor's competitive significance, practical indicia that support finding that the firm is a nascent competitor, and potential competition-enhancing benefits to ensure that enforcement efforts are appropriately trained on transactions that harm competition.

a. Nascent Competition Policy Must Navigate Scylla and Charybdis

Depending on the facts, nascent acquisitions, like all mergers, can harm or help competition. On one hand, the antitrust agencies should protect against anticompetitive acquisitions that may inhibit market competition over an expanded time horizon. This is particularly true in markets exhibiting strong network effects or prone to tipping, where ignoring the competitive threat posed by nascent competitors can have long term anticompetitive effects on market dynamics. In this context, new firms with innovative technologies can inject competition and dynamism, potentially disrupting a dominant firm or prolonging the competitive phase of the market's evolution.

On the other hand, nascent acquisitions can promote competition. For instance, such transactions can inject critical capital and technical expertise into smaller companies, allowing them to compete more effectively and to offer more and

[109] Delegation of the United States, *Roundtable on Market Definition*, June 7, 2012 https://www.justice.gov/sites/default/files/atr/legacy/2012/08/22/286279.pdf.

better products and services. This is especially true in high risk, high investment industries. Any revision to the guidelines that would preclude exit opportunities for startups could have significant damaging effects on competition and innovation. In the extreme, strict liability against any incumbent acquisition of a potential competitor would remove a key exit path, leading to lower levels of investment, partnerships, and other fuel of innovation in the longer term. Such an approach may also harm the shorter-term competition it is designed to protect, as some entrepreneurs may be ill-suited to build certain vertical or auxiliary services that might be necessary to facilitate the best-case competitive product or service. Allowing companies to acquire these firms to boost their competitiveness against an entrenched leader is critical to maximizing competition in many markets.

b. Defining Nascent Competition

Crucial to effective antitrust enforcement is developing a rigorous definition of what constitutes a "nascent competitor." Generally speaking, a nascent competitor is a firm whose prospective innovation represents a potential future threat to an incumbent. Nascent competitors can come in two forms: one is a firm that seeks to enter the market of the acquirer with a product or service that it is developing, and the other a firm that currently offers a product that is not competitive, but the market or technology may evolve in a way that it becomes competitive. In both instances, the potential threat to competition is in the future.

The first category of nascent competitors are firms that seek to develop products that do not exist yet, similar to "actual potential" competitors in the Section 7 lexicon. The potential competitor seeks to offer a new product or service, but its offering is either still emerging or in development.[110] The competitive threat is that its entry will increase the competitiveness of the target market, a benefit that would be lost with the acquisition. One frequently cited example that falls into this first category is the so-called "killer acquisition." According to this narrative, in such situations, the incumbent acquirer has weaker incentives to continue development of a potential rival product than the entrepreneur, and the acquisition eliminates the potential benefits to competition that could come with continued development. Similarly, in a "reverse killer acquisition" the incumbent acquirer has a reduced incentive to build an overlapping product, and the benefits of competition are lost because of the abandoned innovations by the acquirer. Acquisitions of emerging or developing technologies in

[110] See e.g., Complaint at 8, *U.S. v. Visa*, 3:20-cv-07810 (Nov. 5, 2020) ("While Plaid's existing technology does not compete directly with Visa today, Plaid is planning to leverage that technology, combined with its existing relationships with banks and consumers, to facilitate transactions between consumers and merchants in competition with Visa"); Complaint at 2-3, FTC v. Mallinckrodt ARD Inc., No. 1:17-cv-00120 (D.D.C. Jan. 30, 2017) (alleging that Questcor's drug Synacthen was a nascent competitor to Mallinkrodt's Acthar since they treated provided similar treatments for the same condition despite Synacthen's approval only outside the United States).

lieu of internal development are not in and of themselves problematic. However, if these acquisitions would eliminate a unique competitor or deny rivals an important input, then the acquisition by the incumbent of the innovative entrant could harm competition.

The second category of nascent competitors are firms that offer products that exist but do not overlap with those of the acquirer today. Despite that lack of current competition, however, there is a prospect of competition in the future. In these hypothetical situations, the acquiring firm eliminates the threat of future competition by acquiring a nascent competitor before the different products can converge and compete.[111] In these scenarios, a powerful incumbent is commonly concerned with technological development, combinations, or new innovations that can enable a product to "cross-over."

Although firms across all industries face potential competition from both types of nascent competitors, the relevant attributes that constitute a serious future threat will vary significantly by acquisition and by industry. Different companies have vastly different business models, entry and exit strategies, and incentives and abilities to behave in an anticompetitive manner. Due to the variability, fact-intensive differences, and unique circumstances at play in each antitrust market, inquiries that consider anticompetitive behavior directed against nascent competitors is best handled by experienced antitrust investigators on a case-by-case basis. Rather than assist with the analysis, a uniform rule that elevates certain evidence as proof of a nascent competitive threat is likely to produce an overly rigid and potentially inaccurate view of market realities. However, a consistent analytic approach that evaluates the key factors in acquisitions of potential competitors would provide enormous predictability and certainty benefits and strengthen the rule of law.

c. The Guidelines' Framework

The approach set out in the 2010 guidelines provides an effective analytic framework for evaluating mergers that may constitute a nascent competitor acquisition. Under the guidelines, the analytic framework for incumbent acquisitions of a potential competitor considered "the market share of the incumbent," the "competitive significance of the potential entrant," and the "competitive threat posed

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[111] See e.g., Complaint at 2, *In re Proctor & Gamble*, FTC Docket No. 9400, (Dec. 8, 2020) (alleging that P&G sought to acquire Billie "on the eve of Billie's expansion into brick-and-mortar retail"); Email from Mark Zuckerberg, Chairman and CEO of Facebook, Inc. to David Ebersman, CFO of Facebook, Inc. (Feb. 27, 2012), available at https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf ("One business question I have been thinking about is how much we should be willing to pay to acquire mobile app companies like Instagram and Path that are building networks that are competitive with our own… [t]he businesses are nascent but the networks are established"); *U.S. v. Microsoft*, 87 F. Supp. 2d 30 (D. D.C., 2000) ("Microsoft strove…to prevent middleware technologies from [developing] full-featured, cross-platform applications to erode the applications barrier).

by this potential entrant relative to others."[112] Where a proposed transaction represents a substantial threat to competition and fails to offset the loss of the competitive threat with procompetitive rationales, the conduct should be prohibited. This is consistent with the approach advocated by commentators,[113] and reflects an approach that regulators have applied to prohibit anticompetitive conduct.[114]

The agencies should articulate objective criteria that they will use to conclude that a firm constitutes a nascent competitive threat. Experience[115] shows that the following sources are all important to reaching that conclusion: (a) the views of the industry that a firm is a significant threat and has the requisite technical ability; (b) the acquiring firm's assessment of the target as a competitive threat; and (c) the acquired firm's view of its own capabilities and potential. With these "practical indicia," the agencies can effectively distinguish firms that are credible threats to entrenched incumbents from the many other firms that have some chance of potentially competing in the future.[116]

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[112] Horizontal Merger Guidelines § 5.3.

[113] C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. Rev. 1879, 1895 (2020) ("The appropriate analytic focus is the nature and potential of the unproven competitor's product, rather than anticipated competition in existing products from an established firm."); Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Proposed Remarks on Antitrust in the Technology Sector: Policy Perspectives and Insights From the Enforcers, *Reasonably Capable? Applying Section 2 to Acquisitions of Nascent Competitors,* 9 (April 29, 2021) (proposed remarks available on the FTC website) ("The adjustment I propose is for cases with compelling evidence that a nascent rival is one of only a few firms with a decent chance of meaningfully competing against the monopolist and that the merger could generate significant cognizable efficiencies"); Richard M. Steuer, *Incipiency*, 31 Loyola Consumer Law Review 155, 156 [(2019)] ("If Congress wants to assure that courts apply the Clayton Act effectively, a more meaningful amendment to the Act would be to change the word "lessen" to "threaten," so that Section 7 would forbid acquisitions, the effect of which "is substantially [or "materially" if that term is preferred] to threaten competition, or to tend to create a monopoly" in any relevant market."); Majority Staff of Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. On The Judiciary, 116th Cong., *Investigation Of Competition In The Digital Marketplace: Majority Staff Report And Recommendations*, 394 (2020) ("To strengthen the law relating to potential rivals and nascent competitors, Subcommittee staff recommends strengthening the Clayton Act to prohibit acquisitions of potential rivals and nascent competitors. This could be achieved by clarifying that proving harm on potential competition or nascent competition grounds does not require proving that the potential or nascent competitor would have been a successful entrant in a but-for world").

[114] See Complaint *In re Proctor & Gamble*, FTC Docket No. 9400, (Dec. 8, 2020); Complaint, *U.S. v. Visa*, 3:20-cv-07810 (Nov. 5, 2020).

[115] See *U.S. v. Microsoft*, 87 F. Supp. 2d 30 (D. D.C., 2000).

[116] See *U.S. v. Visa*, 3:20-cv-07810 (Nov. 5, 2020) (alleging that (a) aid "supports over 2,600 apps including 80% of the largest such apps," "has a network of more than 11,000 US financial institutions," and "connects with over 200 million consumer bank accounts," (b) Visa analogized Plaid to a "volcano" whose current capabilities are just "the tip showing above the water" and "[w]hat lies beneath, though, is a massive opportunity – one that threatens Visa," and that (c) Plaid is regarded by the industry as the best of breed among companies that provide similar services); *FTC v. Mallinckrodt (Questcor)*, 1:17-cv-

Identifying a nascent competitor, however, is only the start of the analysis. Given that the focus of the analysis is on competitive effects, the agencies must also analyze the ability and incentives of the parties to reduce competition. The Chamber explains this analysis further in its response to Question 10 below. Likewise, consistent with the view that competitive effects should remain the focus of the inquiry, the agencies should make clear that they are open to the possibility that acquisitions of innovative firms can enrich competition. For example, an acquisition by a smaller competitor in a two-sided market prone to tipping can give the smaller competitor the boost it needs to forestall the emergence of a dominant firm or challenge a dominant incumbent. Moreover, especially in complex fields, a larger company may have expertise that a smaller, nascent competitor lacks that would make it more likely for the nascent competitor's products to reach the market than if it had proceeded independently. Otherwise, a strict rule against acquisitions of nascent competitors by any incumbent could have the unfortunate effect of insulating market leaders from the best-positioned challengers.

Finally, the Chamber cautions against revising the guidelines to embrace the use of Section 2 of the Sherman Act as an end run around the Clayton Act. Efforts to pursue mergers under Section 2 of the Sherman Act, relying on the "reasonably capable" standard established under the Microsoft case, are unlikely to be successful and do not somehow lessen the burden on the government.[117] According to the Supreme Court, the Clayton Act is to be "less stringent" than the Sherman Act[118] and *Microsoft*, which was not a merger case, condemns only "exclusionary conduct lacking any procompetitive justification."[119]

Question 8: Remedies

There are several reasons not to revise the guidelines to include a formal process or deadline for remedy proposals, which are inherently fact specific.

First, such a process is unnecessary. The desire to clear merger review and close the transaction creates a strong incentive for the parties to engage the reviewing agency early to propose and evaluate a remedy. To this end, the Bureau of Competition's 2012 Statement on Negotiating Merger Remedies encourages parties to raise the issue of remedies as early as possible, because it is difficult to predict how

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00120 (D.D.C. 01/25/17)) (alleging that (a) Synacthen is in the same pharmaceutical class as Acthar and posed a "nascent competitive threat" to Acthar's monopoly, (b) Mallinkrodt identified Synacthen with the ability to "decimate [Questcor's] business", and (c) other bidders "would have acquired Synacthen and pursued its plan to develop Synacthen . . . to compete directly with Acthar at a lower price").

[117] Timothy Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 CRITERION J. INNOVATION 29, 39 (2020).

[118] *Id.* (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 328–29 (1962)).

[119] *Id.*

long it will take to negotiate a merger remedy.[120] As the Statement suggests, the varying complexities in merger remedies make devising formal deadlines or schemes for proposing remedies arbitrary at best.

Second, establishing within the guidelines a formal procedure or deadlines for proposing remedies will not save the reviewing agency significant resources or time. Again, as expressed in the Statement, "[e]ach merger is unique . . . and any proposed remedy is evaluated on the particular facts of the case." To understand and evaluate a proposed remedy, the reviewing agency first must understand the market and the competitive implications of the proposed transaction. In other words, the reviewing agency must investigate the competitive effects of the proposed transaction as part of its review of a proposed remedy. Forcing the parties to propose and engage in discussions about remedies within some specified timeline will not significantly lessen the competitive analysis the reviewing agency has to perform.

Third, artificial deadlines or unnecessary procedures for proposing remedies would run counter to the foundational principle that the law favors settlement and compromise. This tact would prejudice the parties by effectively relieving the agencies of the initial burden of demonstrating anticompetitive effects. The case law is clear: the initial burden of establishing competitive harm from a transaction is on the government.[121] Forcing the parties to propose remedies according to a preconceived schedule, especially if required before the reviewing agency has completed its competitive effects investigation, runs counter to this requirement and would necessarily divert the investigation from one focused on whether the transaction potentially harms competition to one in which competitive effects are presumed.

Question 9: Monopsony Power and Labor Markets

a. The guidelines are the wrong place to address perceived imbalances in the labor market.

The RFI starts from a false premise. It posits that monopsony power in labor markets is a widespread risk threatening to drive wages below competitive levels. It then assumes that these wage imbalances should be corrected through new merger review guidelines.[122] That has never been the plan of Congress. To the contrary, while Congress has centered merger review on promoting competition, it has deliberately suppressed competition in labor markets. It has addressed what it perceives as unequal employer bargaining power by introducing countervailing market distortions through labor and employment law.

[120] See Statement of the Bureau of Competition of the Federal Trade Commission, Negotiating Merger Remedies at 21 (January 2012) (the "Statement").
[121] See, e.g., *United States v. Baker Hughes*, 908 F.2d 981, 982–83 (D.C. Cir. 1990).
[122] See RFI 6–7 (assuming that employer monopsony power should be addressed in the Guidelines).

The critique of employer bargaining power is an old one.[123] In its basic form, it asserts that an employee enters each employment negotiation at a disadvantage. That disadvantage stems in large part from the employee's disproportionate investments in the relationship. To succeed, the employee must live within commuting distance of the employer; learn the employer's processes, policies, and strategies; and tailor her skills to meet the employer's needs. These investments build over time and provide a strong disincentive to exiting the relationship. That is, they make it expensive for her to quit. She therefore continues to work under conditions she might otherwise refuse to accept. She gives the employer a discount.[124]

Recent events cast doubt on that viewpoint,[125] but whatever its merits, it raises questions that Congress has determined should be traditionally addressed outside antitrust law. While antitrust law promotes social welfare by fostering competition,[126] national labor policy deliberately suppresses it.[127] Labor policy offsets employer power by giving employees an artificial leg up. It shuns competition in favor of coordination.[128] In that way, it represents an approach fundamentally at odds with the one reflected in the antitrust laws.

Modern labor law, in fact, sprung from the idea that antitrust was ill-suited to policing labor markets.[129] Courts historically saw labor markets as no different from other markets.[130] They scrutinized labor-market activity, including union organizing, through an antitrust lens.[131] They therefore classified many union activities as

[123] See 29 U.S.C. § 151 (declaring that the "inequality of bargaining power between employees . . . and employers" tends to "depress[] wage rates" and "prevent[] the stabilization of competitive wage rates and working conditions within and between industries"); State Limitations on Collective Bargaining, 8 Stan. L. Rev. 105, 106 (1955) ("Collective bargaining is founded on the premise that the individual employee is at an economic disadvantage in negotiating with his employer.").
[124] See, e.g., Eric Posner, How Antitrust Failed Workers 146 (2021) (giving an account of how systemic advantages prevent employees from improving their bargaining power by threatening exit).
[125] See Job Openings and Labor Turnover Summary, U.S. Bureau of Labor Statistics (Feb. 1, 2022) (reporting that 4.2 million Americans quit their jobs in December 2021).
[126] See Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 689 (1975) ("[T]he sole aim of antitrust legislation is to protect competition . . . .").
[127] Connell Constr. Co. v. Plumbers & Steamfitters Loc. No. 100, 421 U.S. 616, 622 (1975) ("[L]abor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.").
[128] See 29 U.S.C. § 151 (expressing intent to counterbalance employer power with collective bargaining).
[129] See Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption*, 22 LOY. L. REV. 151, 151 (1988) (noting that antitrust and labor law represent conflicting policy goals: one seeks to maintain unimpeded commercial competition; the other to improve working conditions by eliminating competition in labor market).
[130] Loewe v. Lawlor, 208 U.S. 274, 305–07 (1908) (analyzing union boycott as a restraint of trade under § 1 of the Sherman Act, 15 U.S.C. § 1).
[131] See id.; see also Greenslade, supra, at 162–65 (reviewing courts' historical treatment of labor activity under antitrust law).

restraints on trade and aggressively intervened in labor disputes.[132] In the years between 1890 and 1930 alone, they issued more than 4,000 labor injunctions.[133]

That approach sat poorly with Congress. Responding to what it saw as an improper extension of antitrust law, Congress passed sections 6 and 20 of the Clayton Act.[134] Section 6 declared that the "labor of a human being is not a commodity or article of commerce."[135] Section 20 exempted certain unilateral union actions, including strikes, boycotts, and picketing — all of which had until then been treated as restraints on competition.[136]

Courts at first viewed these exemptions with skepticism. Hewing to a pro-competition model, they read the Clayton Act's labor provisions narrowly.[137] For example, in *Duplex Co. v. Deering*,[138] the Supreme Court held that section 20 applied only to disputes between workers and their direct employers. The statute did not protect restraints aimed at third parties, nor did it protect union activity with "illegitimate" goals. [139] In effect, the Court read the statute to merely codify the Court's pro-competition caselaw.[140]

Incensed by this narrow approach, Congress again moved to exempt labor disputes from antitrust law. In 1932, it passed the Norris–LaGuardia Act,[141] which strictly limited federal courts' authority to issue labor injunctions. Three years later, Congress adopted the Wagner Act, better known as the National Labor Relations Act (NLRA).[142] The NLRA declared collective bargaining between employers and employees

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132 See, e.g., *Loewe*, 208 U.S. at 295–96, 308–09 (affirming judgment against union under Sherman Act because the union's boycott restrained the free course of trade); Gompers v. Bucks Stove &. Range Co., 221 U.S. 418, 438–39 (1911) (affirming *Loewe* approach and again applying Sherman Act to union activity); Greenslade, *supra*, at 164 (noting that, after Loewe, courts routinely used antitrust law to circumscribe labor activities).
133 Megan Stater Shaw, *"Connote No Evil": Judicial Treatment of the Secondary Boycott Before Taft-Hartley*, 96 N.Y.U. L. REV. 334, 337 (2021).
134 See Elinor R. Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 Brook. L. REV. 1, 20–23 (1983) (surveying Congress's reaction to early Sherman Act decisions in lead-up to Clayton Act).
135 15 U.S.C. § 17.
136 29 U.S.C. § 52.
137 See Hoffman, supra, at 24 (reviewing court decisions quickly narrowing the scope of Clayton Act as applied to labor activity).
138 254 U.S. 443 (1921).
139 Id. at 468–69 (holding that nothing in Clayton Act exempts a union's activities when it departs "from its normal and legitimate objects and engage[s] in an actual combination or conspiracy in restraint of trade"); see also Am. Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 201 (1921) (affirming *Duplex* approach to Clayton Act).
140 See *Duplex*, 254 U.S. at 470 (reasoning that section 20 of the Clayton Act was "but declaratory of the law as it stood before").
141 Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115).
142 Pub. L. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169). See also Hoffman, supra, at 25 (describing Norris–LaGuardia Act and, to a lesser extent, the NLRA as reactions to narrow judicial interpretation of the Clayton Act).

to be the official policy of the United States.[143] Employers and employees, speaking through unions, would collectively decide their applicable wages, hours, and terms of employment.[144]

In this way, national labor policy reflected a judgment incompatible with antitrust law.[145] The lodestar of antitrust law was and is competition. However, labor policy subordinates competition to coordination.[146] It countenances collectively negotiated wage settlements between employees and employers — indeed, even between employees and groups of employers.[147] This kind of vertical and horizontal bargaining allows private parties — ostensible competitors — to negotiate for the price of labor across markets and industries.[148] Pure antitrust law would never permit such naked price restraints.[149] Yet, in labor markets, Congress has made a different judgment.[150]

The same judgment is reflected in national employment law. Employment law eschews pure competition in favor of regulated floors on wages and benefits. For example, the Fair Labor Standards Act fixes a minimum per-hour price of labor.[151] It also imposes a time-and-a-half surcharge for hours worked over 40 in a single workweek.[152] Likewise, the Affordable Care Act and the Family Medical Leave Act mandate certain minimum fringe benefits.[153] These minimums cannot be negotiated down or waived.[154] Individual workers cannot forgo their minimum compensation to

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143 29 U.S.C. § 151.
144 Id. §§ 151, 158(d).
145 Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797, 806 (1945) (observing tension between antitrust laws, which promote competition, and labor laws, which countenance certain anticompetitive behavior).
146 See Am. Fed'n of Musicians of U.S. & Canada v. Carroll, 391 U.S. 99, 106 (1968) (noting that it is the legitimate aim of any national labor union to eliminate competition over wages and working conditions).
147 See Brown v. Pro Football, Inc., 518 U.S. 231, 239–40 (1996) (observing that multiemployer bargaining is both widespread and well accepted under labor law, but would be impossible without an antitrust exemption).
148 See id. at 237 (noting that it is logically impossible to allow parties to bargain collectively without also allowing them to restrain trade).
149 See *Allen Bradley*, 325 U.S. at 811 ("Thus, these congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly.").
150 See *Brown*, 518 U.S. at 237 (observing that to enable collective bargaining, Congress by necessity licensed some conduct that would otherwise be considered anticompetitive).
151 29 U.S.C. § 206.
152 29 U.S.C. § 207.
153 26 U.S.C. § 4980H (minimum affordance health coverage provided by employers); 29 U.S.C. § 2612 (minimum unpaid leave for qualifying employees).
154 See Jewell Ridge Coal Corp. v. Loc. No. 6167, United Mine Workers of Am., 325 U.S. 161, 167 (1945) (holding that employees could not waive FLSA statutory minimums by contract).

undercut their rivals in the labor market.[155] They must start at the floor and, if they can, bargain up from it.[156]

This approach shows that, in the eyes of Congress, competition has its limits in labor markets. Congress has decided that competition alone cannot guarantee worker welfare.[157] In fact, according to the theory outlined in the statutes, competition may even harm individual workers, who might otherwise be driven to compete at levels harmful to their wellbeing.[158] So rather than emphasize competition, as it has in product markets, Congress has introduced countervailing distortions.[159] It has suppressed competition to promote other policy aims.[160]

For that reason, it would be misguided to address perceived labor-market imbalances through merger review. The merger review process focuses on a merger's expected effect on competition.[161] It aims to enhance competition and thus the welfare of consumers,[162] but national labor policy points in the opposite direction. It presumes that too much competition is inconsistent with the welfare of workers.[163] It therefore suppresses competition and promotes welfare through mechanisms that, in the

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[155] See Boaz v. FedEx Customer Info. Servs., Inc., 725 F.3d 603, 606 (6th Cir. 2013) (making same observation and citing *Jewel Ridge*).
[156] See *Jewel Ridge*, 25 U.S. at 167.
[157] See 29 U.S.C. §§ 151 (declaring national policy of collective bargaining to counter employer bargaining power), 206 (setting minimum hourly compensation), 207 (requiring time-and-a-half compensation, at minimum, for hours worked over 40 in a single week).
[158] See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) ("The [FLSA] was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce."). See also David Weil, The Fissured 76–77 (2014) (arguing that excessive deconsolidation of employers—i.e., "fissuring"—has led to greater price competition among small firms and thus lower compensation for the firms' employees).
[159] See E. Posner, supra, at 126 ("[L]abor market mandates [e.g., minimum wages and benefits], just like quality standards in product markets, may have a role to play in curbing the distortion in job design induced by monopsony").
[160] See 29 U.S.C. § 151 (declaring national policy of collective bargaining to offset employer power); *Brown*, 518 U.S. at 237 (noting that the labor laws license anticompetitive conduct to promote labor policy).
[161] 15 U.S.C. § 18 (forbidding mergers or acquisitions which may "substantially . . . lessen competition"); *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 298 (1930) ("[T]he act deals only with such acquisitions as probably will result in lessening competition to a substantial degree . . . .").
[162] See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (observing that "Congress designed the Sherman Act as a 'consumer welfare prescription'" (quoting Robert Bork, The Antitrust Paradox 66 (1978))); *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2166 (2021) (reiterating consumer-welfare principle).
[163] See 29 U.S.C. § 151 (declaring a national labor policy of setting wages, hours, and working conditions through collective bargaining); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940) ("[A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization.").

product market, would be treated as bald restraints on trade.[164] It raises labor prices not through market forces, but through legal minimums.[165] It also expressly forbids parties from competing by offering prices below those minimums.[166]

Reasonable people can disagree about whether modern employment and labor laws sufficiently promote worker welfare. Both regimes have been the subject of significant discussion.[167] Even if one concludes that labor and employment law are no longer doing their jobs, the answer is not to rebalance labor markets through merger review. It is instead to address those shortcomings directly, by reforming those laws.

In fact, a too-aggressive application of antitrust law could blunt reform efforts. Critics of modern labor and employment law have argued that both fall short in part because they fail to bring all important parties to the table.[168] Labor markets, they argue, have become too "fissured" to hold employers responsible.[169] Large employers can spin-off ancillary functions to other firms, and by doing so, avoid liability for minimum employment guarantees or bargaining obligations.[170]

If these critics are right — if the problem with labor markets is excessive decentralization — the cure is unlikely to be strict merger review. If anything, that kind of review would encourage further atomization and prevent the aggregation of responsibility in a single firm. It would exacerbate a trend that many critics have placed at the heart of the modern workplace's ills.[171] The agencies should therefore refrain from wading into territory already well covered by other bodies of law.

Besides, it is unclear that even the closest merger review could correct perceived imbalances in labor markets. A recent governmental report acknowledges

[164] See *Apex*, 310 U.S. at 503 ("Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards.").
[165] See, e.g., 29 U.S.C. §§ 206, 207 (minimum wages and overtime).
[166] See *O'Neil*, 324 U.S. 706–07 (explaining that agreements to waive FLSA minimum protections are void).
[167] See, e.g., E. Posner, supra, at 122 (describing employment and labor law as "weak or limited"); David Madland, Re-Union: How Bold Labor Reforms Can Repair, Revitalize, and Reunite the United States 7–8 (2021) (arguing that federal labor law has failed to adjust to modern economic trends); Economic Policy Institute, Why the U.S. Needs a $15 Minimum Wage (2021), https://files.epi.org/pdf/219045.pdf (arguing that federal minimum wage has failed to keep pace with productivity growth).
[168] See Madland, supra, at 97 (arguing that one of the chief problems with modern labor law is that it "allows employers ways to avoid unions and collective bargaining by outsourcing and shifting their business strategy," such as by contracting out lines of work); David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 Econ. & Labor Relations Rev. 33, 33–35 (2011) (arguing that employment standards were easier to enforce in prior decades, when there was more often a single, often large, employing entity).
[169] See Weil, supra, at 33–35.
[170] Madland, supra, at 97.
[171] See id. at 8–9 (arguing that increasing decentralization has made it harder for workers to gain leverage through collective bargaining).

that the connection between corporate consolidation and labor-market power is, at best, disputed. In *The State of Labor Market Power*, the Department of Treasury noted that the empirical research points both ways.[172] Some research suggests that consolidation may contribute to labor-market power, but other research shows that power more often stems from "inherent" conditions, such as job-search frictions and informational imbalances.[173] Those conditions can exist even in highly competitive markets.[174] One therefore cannot address these conditions through merger reviews.

b. The guidelines cannot evaluate labor-market effects in a vacuum

As noted previously, the Merger Guidelines are not law and cannot change how the law views a merger or the merger's potential effect on labor markets. [175] Thus, if the agencies do amend the guidelines to address labor-market effects, they should do so holistically and in accordance with established antitrust principles. To that end, two points deserve special mention. First, the guidelines should not unduly fixate on workforce reductions, which are both common and generally regarded as procompetitive in the absence of significant employer monopsony power. Second, the guidelines should balance any potential harms in the labor market against procompetitive efficiencies in the product market.[176]

The antitrust laws are already well equipped to address the rare case of labor monopsony and mergers to monopsony. Without some intervening change in the law, there is no basis to take a different approach in the guidelines.

Workforce reductions. Some commentators have suggested that the guidelines should consider a merger's effects on labor markets beyond its effects on

[172] U.S. Dept. of Treasury, State of Labor Market Competition 23–24 (March 2022), at https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.
[173] Id*.* at i, 23–24, 27 ("This white paper has argued that frictions are a more important source of labor market power than concentration.").
[174] See id. at i ("These conditions can enable firms to exert market power, and consequently offer lower wages and worse working conditions, even in labor markets that are not highly concentrated.").
[175] See, e.g., *Anthem*, 855 F.3d at 349 (stating that while courts often view the Guidelines as a "helpful tool," the Guidelines are not binding on courts, and courts owe them no deference); United States v. Hammermill Paper Co., 429 F. Supp. 1271, 1280 (W.D. Pa. 1977) ("These Guidelines do not have the force of law and are not binding on the court . . . .").
[176] See, e.g., FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054–55 (8th Cir. 1999) ("[T]he district court should nonetheless have considered evidence of enhanced efficiency in the context of the competitive effects of the merger."); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991) ("We conclude that in certain circumstances, a defendant may rebut the government's prima facie case with evidence showing that the intended merger would create significant efficiencies in the relevant market."); *H.J. Heinz Co.*, 246 F.3d at 720 ("As the Merger Guidelines now recognize, efficiencies 'can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, or new products.'" (quoting Guidelines § 4)).

consolidation and competition.[177] In particular, these commentators argue that the guidelines should account for collateral harm to workers, such as layoffs, redundancies, and reduced hiring. Under this view, if a merger would cause collateral harms and not offset them with other benefits (e.g., higher wages for the remaining workers), it should be rejected.[178]

However, that proposal misunderstands the purpose of Section 7 of the Clayton Act. Section 7 is not a jobs program. It does not seek to preserve employment for employment's sake. Its watchword is competition,[179] which it promotes in part through efficiency.[180] It therefore treats efficiencies as reasons to favor proposed mergers.[181]

In at least one sense, labor is like any other input: it is a cost of production.[182] If a firm can reduce its costs while maintaining its production, it can sell its product for less.[183] These cost savings help it attract customers and compete with rivals.[184]

The commentators, however, would treat labor differently. They would consider workforce reductions anticompetitive regardless of their negligible effect on the actual relevant labor market, and potential positive effects in the merging firms' relevant

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177 See Suresh Naidu, Eric Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harvard L. Rev. 537, 586–87 (2018) (arguing that review should incorporate a "worker welfare" standard).
178 See id.; Sharon Block et al., *Inequality and the Labor Market* 19 (2021) (arguing that antitrust enforcers should consider workforce reductions, such as layoffs, as anticompetitive effects, or at least as the symptoms of reduced competition).
179 See 15 U.S.C. § 18 (barring mergers that substantially reduce competition).
180 See, e.g., Richard Posner, Antitrust Law 28 (2d ed. 2009) ("Efficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow courts to look no further."); *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020) (noting that lower courts increasingly consider evidence of efficiencies gained by merged firm to rebut allegations that merger will be anticompetitive).
181 See Horizontal Merger Guidelines § 10 ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."). See also Antitrust Developments 379 (8th Ed. 2016) (observing that efficiencies achieved through, among other things, "eliminating duplicative activities" are "recognized under the law and by the antitrust enforcement agencies as merger-related efficiencies and form part of the rubric under which the legality of a transaction is judged").
182 See R. Posner, supra, at 197 (analyzing labor as a cost input and noting that a firm with higher labor inputs will be at a competitive disadvantage).
183 See David Lam, et al., *Merger Synergies Through Workforce Reduction*, IVY BUS. J. (2007), at https://iveybusinessjournal.com/publication/merger-synergies-through-workforce-reduction/ ("[P]ure head-count reduction continues to be one of the most direct approaches in delivering efficiency targets.").
184 See United States v. Anthem, Inc., 855 F.3d 345, 377 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("Efficiencies can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, or new products" (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001))).

product market and for the consumers of their products.[185] Such an approach would break with existing law[186] — which requires an evaluation of the effect of the merger on the relevant labor market as a whole, and not on an artificially circumscribed labor market consisting of the merging firms' workforces alone. Moreover, nearly every merger will create some redundancies.[187] Some functions once handled by both firms will be consolidated in the new firm.[188] So if workforce reductions were a reason to reject mergers, few would ever be approved.

Product market benefits. The second point flows from the first. Again, a merger may have effects in the labor market that enhance the merged firm's ability to compete in the relevant product market. The merged firm may be leaner, more efficient, and better positioned to compete against rival producers.[189] Antitrust law is first and foremost a consumer-oriented legal regime; it ultimately seeks to enhance consumer welfare.[190] So even if a merger causes some anticompetitive effects in a properly defined labor market, the guidelines should balance those effects with any likely procompetitive benefits in the relevant product market.[191]

This point is important because, in some cases, product-market benefits could arise from a firm's increased bargaining power in a labor market. Recent commentators have treated bargaining power with skepticism; they have argued that employer bargaining power is a main cause of consistently depressed wage levels.[192] Legally speaking, bargaining power is not itself anticompetitive.[193] It instead allows a firm to demand lower prices from its suppliers, and in turn to offer lower prices to its customers.[194] So enhanced bargaining power is often procompetitive.[195]

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[185] See Naidu et al., supra, at 587 (arguing that merging parties should have to show that efficiencies will lead to higher wages for remaining employees).

[186] See *Deutsche Telekom AG*, 439 F. Supp. 3d at 207 (surveying recent caselaw considering efficiency a net good in merger analysis); 2010 Guidelines § 10 (describing efficiency gains of merged firms as generally procompetitive); *Anthem*, 855 F.3d at 377 (Kavanaugh, J., dissenting) ("Under current antitrust law, we must take account of the efficiencies and consumer benefits that would result from this merger. Any suggestion to the contrary is not law.").

[187] See S.A. Rhoades, et al., J. of Banking & Finance 273, 277 (1998) (noting that "closing 'redundant,' or directly competing offices is believed to be a source of cost reductions").

[188] See, e.g., *United States v. AT & T Inc.*, 310 F. Supp. 3d 161, 191 n.17 (D.D.C. 2018) (noting potential efficiencies through elimination of redundant positions), *aff'd sub nom. United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

[189] See R. Posner, supra, at 38 (observing that some mergers increase competition by combining firms' assets and allowing them to achieve economies of scale, which in turn help them compete on price).

[190] See *Gordon*, 422 U.S. at 689.

[191] *Cf. Anthem*, 855 F.3d at 375 (Kavanaugh, J., dissenting) (pointing to benefits in a related market—higher salaries paid to employees because of savings generated by a merger of two health-insurance firms—as a pro-competitive benefit).

[192] See Naidu et al., supra, at 554–55, 560.

[193] See *Anthem*, 855 F.3d at 378 (Kavanaugh, J., dissenting).

[194] Id.

[195] See id.

Bargaining power becomes a problem only when it rises to the level of monopsony.[196] That situation, however, is rarer than some commentators suggest.[197] Properly defined, monopsony is the inverse of monopoly: it denotes a firm that can reduce its offer price without affecting its purchasing power.[198] Realistically, few employers will meet that description. An employer might be able to reduce the wages it offers to candidates in some cases, but those reductions are hard to accomplish while maintaining wages for an existing workforce.[199] Even when reductions can be accomplished, they will likely lead to significant disruption, turnover, and recruitment shortfalls.[200] Few employers can offset these effects through raw bargaining power alone.

In reality, an employer's ability to set wages more often depends on market conditions. Consider the worker shortage currently plaguing American business. With workers in short supply, job openings hit a record high in December 2021, with nearly 11 million positions sitting vacant.[201] The shortage has lingered for months, hitting employers large and small.[202] Even large employers have responded by raising wages — often significantly.[203]

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[196] Id.

[197] See Naidu et al., supra note [], at 564 (arguing that low labor-market elasticity is "surprisingly common throughout the economy").

[198] See, e.g., *Monopsony*, Black's Law Dictionary (11th ed. 2019) (defining *monopsony* as "[a] market situation in which one buyer controls the market"); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) ("[A] monopsony is to the buy side of the market as a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'"); Roger D. Blair Jeffrey, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297, 297–98 (1991) (describing classical price theory of monopsony, under which monopsonist can unilaterally reduce market price by reducing the amount of its own purchases).

[199] See Naidu et al., supra note [], at 558 (observing difficulty employers have in discriminating in wages offered to different sets of workers) ("[Employers] have little information about workers' options and are deterred by powerful pay fairness norms.").

[200] See Wayne F. Cascio, *The High Cost of Low Wages*, Harvard Bus. Rev. (Dec. 2006), at https://hbr.org/2006/12/the-high-cost-of-low-wages (reporting lower turnover rates at firms paying above-market compensation).

[201] See Press Release, U.S. Bureau of Labor Statistics, Job Openings and Labor Turnover Summary (March 9, 2022), at https://www.bls.gov/news.release/jolts.nr0.htm.

[202] See, e.g., Kimberlee Speakman, *51% of Small Businesses Unable to Fill All Job Openings in September as Labor Shortage Grows*, Forbes (Oct. 7, 2021), at https://www.forbes.com/sites/kimberleespeakman/2021/10/07/51-of-small-businesses-unable-to-fill-all-job-openings-in-september-as-labor-shortage-grows/?sh=14336792a610; Ian Siegel, *The Labor Shortage is Creating Unprecedented Hiring Challenges. Who's Coming Out on Top.*, Barron's (Dec. 17, 2021), at https://www.barrons.com/articles/labor-shortage-hiring-businesses-innovation-51639687051.

[203] See Amelia Lucas, *McDonald's Raises Hourly Wages for Company-Owned Restaurants*, CNBC (May 13, 2021), at https://www.cnbc.com/2021/05/13/mcdonalds-raises-hourly-wages-for-company-owned-restaurants.html; Richa Naidu, *Walmart's Wage Bump Signals Pressure to Raise Industry Battle for Labor*, Reuters (Sept. 2, 2021), at https://www.reuters.com/business/retail-consumer/walmart-bumps-

Many of these same employers were once lambasted as labor monopsonists.[204] As recent trends show, their power to set wages depends less on their size and more on broader market forces. They often compete for the same workers in the same labor pools. When those pools shrink, their bargaining power largely evaporates.[205]

Lower bargaining power is hardly an unalloyed good. Again, firms often use their bargaining power to drive down prices and compete in the product market.[206] Bargaining power thus helps keep prices in check. It may also help control inflation.[207] Both effects are net goods for consumers, the people whom antitrust law aims first to protect.[208] The guidelines should therefore consider these benefits whenever evaluating a merger's potential effects on labor markets. In some cases, harm in the labor markets may be offset by benefits in product markets, benefits that all workers enjoy as consumers.

Question 10: Innovation and IP

The Chamber offers the following views regarding innovation and IP considerations as part of merger review. First, market definition remains an essential tool for transactions involving innovation and substantial intellectual property.

Market definition is a legally required step in any effort to challenge a merger,[209] and for good reason: it is an essential tool to properly evaluate the competitive effect

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up-hourly-wages-565000-workers-by-1-ahead-holidays-2021-09-02/; Jeffrey Dastin, *Amazon Hikes Average U.S. Starting Pay to $18, hires for 125,000 Jobs*, Reuters (Sept. 14, 2021), at https://www.reuters.com/business/exclusive-amazon-hikes-starting-pay-18-an-hour-it-hires-125000-more-logistics-2021-09-14/.

[204] See Naidu et al., supra, at 571, 597 (singling out McDonald's and Walmart for allegedly anticompetitive labor-market practices).

[205] See Lisa Baertlein, et al., *Amazon Labor Shortage Hinders One-Day Delivery Ambitions*, Reuters (Oct. 29, 2021), at https://www.reuters.com/business/retail-consumer/amazon-labor-shortage-hinders-one-day-delivery-ambitions-2021-10-29/ (reporting on company's inability to hire enough workers to expand faster delivery options amid market-wide labor shortage).

[206] See *Anthem*, 855 F.3d at 378 (Kavanaugh, J., dissenting).

[207] See Jeanna Smialek, *Could Wages and Prices Spiral Upward in America?*, The New York Times (Feb. 17, 2022), at https://www.nytimes.com/2022/02/17/business/economy/wages-rise-labor-shortage.html?referringSource=articleShare (describing how labor shortages may be driving up wages—and prices—across the economy).

[208] See *Reiter*, 442 U.S. at 343.

[209] See, e.g., FTC v. Rag-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020) (holding that the FTC must "first meet its prima facie burden by . . . defining a relevant product market"); FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 884 (E.D. Mo. 2020) (stating market definition is "mission-critical for all FTC merger challenges"); FTC v. Swedish Match N. Am., Inc., 131 F. Supp. 2d 151, 159 (D.D.C. 2000) ("B]ecause Section 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in any line of commerce,' it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 235 (1962));

of mergers. As the current merger guidelines explain, "market definition helps specify the line of commerce and section of the country in which the competitive concern arises," and allows for measurement of market shares and market concentration, which is "useful to the extent it illuminates the merger's likely competitive effects."[210]

For mergers involving technology and intellectual property specifically, defining the relevant market to consider all relevant substitutable products and services, rather than relying on broad presumptions about the technologies, remains a critical step to determine the transactions' likely competitive effects. In many industries, products are distinguishable by patented as well as unpatented features, and demand is dependent, in part, on the presence or absence of such features and combinations of features. Likewise, simply owning patents that are also being licensed by a target entity does not automatically mean that the parties' products or technologies overlap or contribute to the same relevant market. A thorough analysis of these features, including employing relevant and robust economic tools, is necessary to fully illuminate the range of alternative technologies that inform the competitive analysis.

The existing merger guidelines appropriately address the market definition assessment for mergers involving innovation or the transfer of intellectual property.[211] Any update to the guidelines should continue to reflect the existing guidelines' caution in assessing the impact of patents on competition between different technologies. As the agencies have emphasized, and as courts recognize, the ownership of patents alone does not constitute market power.[212] Instead, market

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FTC v. Cardinal Health, 12 F. Supp. 2d 34, 45 (D.D.C. 1998) ("Defining the relevant market is critical in an antitrust case because the legality of the proposed mergers in question almost always depends upon the market power of the parties involved."); FTC v. Lundbeck, Inc., No. 08-6379, 2010 U.S. Dist. LEXIS 95365, at *60 (D. Minn. Aug. 31, 2010) ("The determination of the relevant market is a 'necessary predicate' to a finding of a Clayton Act violation") (quoting FTC v. Freeman Hosp., 69 F.3d 260, 268 (8th Cir. 1995)).

[210] U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines §4 (Aug. 19, 2010), at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf; see United States v. Anthem, Inc., 855 F.3d 345, 349 (D.C. Cir. 2017) (assessing market definition even though "as the Justice Department acknowledges, the court is not bound by, and owes no particular deference to, the [Horizontal Merger] Guidelines . . ."); FTC v. Thomas Jefferson Univ., 505 F. Supp. 3d 522, 539 n.7 (E.D. Pa. 2020) (same); *Rag-Stiftung*, 436 F. Supp. 3d 278 (applying the principles of the merger guidelines and holding that the FTC must "first meet its prima facie burden by . . . defining a relevant product market").

[211] See Section II, below.

[212] U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property, at 2 (Jan. 12, 2017), at https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf ("[T]he Agencies do not presume that intellectual property creates market power in the antitrust context"); *Ill. Tool Works Inc. v. Indep. Ink, Inc*. 547 U.S. 28, 45–46 (2006) ("Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion.").

power, particularly as related to differing technologies, must be evaluated on a case-by-case basis in the context of a well-defined relevant market.

Second, analysis of mergers involving innovation and substantial intellectual property should continue to be fact-based and grounded in economics.

The agencies' RFI presumes that the existing merger analysis tools, including in cases involving innovation and intellectual property, are inadequate. Not so. U.S. merger control antitrust enforcement has long focused on and assessed price *and* non-price factors, including innovation effects (where, as mentioned above, market definition helps to illuminate these effects),[213] and the agencies have successfully used existing fact-based techniques in cases involving innovation and intellectual property.[214] For example, using existing merger analysis tools, the agencies have required divestment of research assets, divestment of pipeline R&D projects, and mandatory licensing of overlapping activities when a merging party may have the incentive to cut off rivals' access to necessary intellectual property.[215] The agencies have also considered whether companies acquiring large patent portfolios will commit to providing downstream competitors with access to standard essential patents.[216] We

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[213] See, e.g., United States v. Anthem, Inc., 855 F.3d 345, 358 (D.C. Cir. 2017) ("The record shows that, by its own account, Cigna has been unable to match Anthem's volume-based discounts and instead has had to compete on quality and innovation."); Complaint at 2-3, In the Matter of Nvidia/Arm, No. 9404 (F.T.C. Dec. 6, 2021), https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf; Complaint at 2-3, 9, In the Matter of Otto Bock HealthCare North America, Inc., No. 9378 (F.T.C. Dec. 20, 2017), https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf.

[214] See, e.g., Note by the Delegation of the United States, OECD Roundtable on Market Definition, at 12 (June 7, 2012), https://www.justice.gov/sites/default/files/atr/legacy/2012/08/22/286279.pdf; Complaint, United States v. Dow Chemical Co. No. 1:17-cv-01176 (D.D.C. June 15, 2017), https://www.justice.gov/opa/press-release/file/973936/download; Complaint, United States v. Syngenta AG, No. 04-cv-01442 (D.D.C. Aug. 25, 2004), http://www.justice.gov/atr/cases/f205100/205199.pdf; Complaint, Amgen Inc. and Immunex Corp., No. C-4043 (F.T.C. July 12, 2002), https://www.ftc.gov/sites/default/files/documents/cases/2002/09/amgencomplaint.pdf; Complaint, United States v. Lockheed Martin Corp., No. 98-cv-00731 (D.D.C. Mar. 23, 1998), http://www.justice.gov/atr/cases/f212600/212680.pdf. Ciba-Geigy Ltd., No. C-3725, (F.T.C. Apr. 8, 1997), https://www.ftc.gov/sites/default/files/documents/cases/1997/04/c3725cmp.pdf.

[215] See, e.g., Press Release, Dep't of Justice, Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto, (May 29, 2018), https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened; In the Matter of Amgen Inc. and Immunex Corp., No. C-4043, (F.T.C. July 12, 2002), http://www.ftc.gov/os/2002/07/amgencomplaint.pdf.

[216] See Closing Statement, Dep't of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp., and Research in Motion Ltd.

encourage the agencies to continue to apply a predictable, fact-based approach grounded in sound economics.[217] The success of this approach is evidenced by the United States' global leadership in innovation for the past several decades.

A case study illustrates this point. In assessing the merger of Genzyme Corporation and Novazyme Pharmaceuticals, the FTC scrutinized whether post-merger innovation incentives would lead to increased R&D or improved efficiency of R&D expenditures, as both companies were engaged in the testing of treatments for Pompe disease, a rare condition affecting children and infants, for which no effective treatment existed at the time.[218] The review marked the first time the outcome of a merger review hinged solely on innovation considerations. In explaining his vote, then-Chairman Timothy Muris emphasized that "careful, intense factual investigation is necessary" when assessing innovation, and analysis of a merger's impact on innovation must be "based on the specific facts of this case."[219] Importantly, Chairman Muris noted:

> [N]either economic theory nor empirical research supports an inference regarding the merger's likely effect on innovation (and hence patient welfare) based simply on observing how the merger changed the number of independent

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(Feb. 13, 2012), https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations.

[217] See, e.g., Roger Alford, Dep't of Justice, The Role of Antitrust in Promoting Innovation (Feb. 23, 2018), at 5, https://www.justice.gov/opa/speech/file/1038596/download (Merger reviews "require factual investigation, including careful economic analysis, a review of relevant documents, and interviews of the parties, customers and competitors. We must assess the import of intellectual property with similar rigor."); see, e.g., Analysis to Aid Public Comment, In the Matter of NXP Semiconductors N.V., No. 151 0090 (F.T.C. Nov. 25, 2015), https://www.ftc.gov/system/files/documents/cases/151125nxpanalysis.pdf; Analysis to Aid Public Comment, In the Matter of Nielsen Holdings N.V. and Arbitron Inc., No. 131 0058 (F.T.C. Sept. 20, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitronanalysis.pdf; Analysis to Aid Public Comment, In the Matter of Honeywell Int'l Inc., No. 131 0070 (F.T.C. Sept. 13, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/09/130913honeywellanalysis.pdf; Analysis to Aid Public Comment, In the Matter of Graco, Inc., No. 101-0215 (F.T.C. April 18, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130418gracoanal.pdf; Closing Statement, Dep't of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp., and Research in Motion Ltd. (Feb. 13, 2012), https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations.

[218] Press Release, Fed. Trade Comm'n, FTC Closes its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc. (Jan. 13, 2004), https://www.ftc.gov/news-events/press-releases/2004/01/ftc-closes-its-investigation-genzyme-corporations-2001.

[219] Statement of Chairman Timothy J. Muris in the Matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc. Fed. Trade Comm'n, No. 021 0026, at 3 (Jan. 2004), https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf.

R&D programs. Rather, one must examine whether the merged firm was likely to have a reduced incentive to invest in R&D, and also whether it was likely to have the ability to conduct R&D more successfully.[220]

As a result of this proper analysis, the FTC approved a merger that eventually enabled a life-saving drug to come to market, thus saving and improving the lives of many American children and infants like Megan Crowley, the reason why Novazyme was first founded.[221] Conversely, if the FTC had used an approach designed to make entering into transactions affecting innovation and intellectual property more difficult, as the RFI appears to suggest, the outcome of this success story may have been very different, and many futures may have been lost to diseases such as the one here.[222]

Equally important to note is that, using existing merger control analytical tools, the FTC reached the opposite conclusion in a subsequent transaction. Challenging Thoratic Corporation's acquisition of HeartWare International, the FTC found that the proposed acquisition would eliminate future competition and decrease innovation.[223] In that case, the FTC determined that, although HeartWare's product was only in clinical development, it had "forced Thoratec to innovate." Thus, the merger would not incentivize Thoratec to bring HeartWare's devices to market.[224]

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[220] Id. at 4–5.
[221] See Brendan O'Shaughnessy, *High Heeled Wheeler*, U. Notre Dame, 2017, https://www.nd.edu/stories/high-heeled-wheeler/.
[222] As the market in Genzyme/Novazyme can be characterized as one with high failure rates, this example also demonstrates that the Agencies have been effectively using the existing tools to address innovation considerations in such markets. Thus, for these markets, as with all other markets, the analysis must continue to be guided by the facts and evidence on a case-by-case basis, rather than based on broad assumptions about certain types of market.
[223] Complaint, In the Matter of Thoratec Corp. and HeartWare International, Inc., No. 9339 (F.T.C. July 28, 2009), https://www.ftc.gov/sites/default/files/documents/cases/2009/07/090730thorateadminccmpt.pdf.
[224] Id. at 2. The Agencies have successfully challenged numerous other mergers that the Agencies alleged would diminish innovation. *See, e.g.,* United States v. Novelis Inc. and Aleris Corporation, No. 1:19-cv-02033 (N.D. Ohio Sept. 4, 2019), https://www.justice.gov/opa/press-release/file/1199441/download;
Initial Order, In the Matter of Otto Bock, No. 9378 (F.T.C. May 6, 2019), https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf; Complaint, In the Matter of CDK Global, Inc., CDK Global, LLC, Auto/Mate, Inc., Robert Eustace, Elsa Eustace, G. Larry Colson, Jr., Michael Esposito, and Glen Eustace, No. 9382 (F.T.C. March 20, 2018), https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf; Complaint, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, No. 9356 (F.T.C. June 28, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf; Complaint, United States v. v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V., No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013), https://www.justice.gov/atr/case-document/file/486606/download;; Complaint, United States v. 3D Systems Corp. and DTM Corp., No. 1:01-cv-01237 (D.D.C. June 6, 2001),

Ultimately, there is no evidence that the tools provided by the current guidelines, including technology-by-technology analysis, are impractical or inadequate, despite the agencies' RFI's presumption otherwise. Any revisions to the guidelines or tools added for the agencies to assess the competitive effects of mergers involving innovation and intellectual property must continue to be guided by facts and economic evidence, rather than broad presumptions.[225]

Finally, the guidelines should reflect the reality that mergers can often enhance companies' incentives and ability to innovate. Some of the RFI's assumptions, if incorporated into the guidelines, likely would result in legal uncertainty and overregulation, which will deter companies from using M&A as a growth strategy as well as investors from taking risks in start-ups that drive innovation and competition. An assessment of potential harms to innovation should therefore be contextualized

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https://www.justice.gov/atr/case-document/file/517151/download; United States v. Premdor Inc., et al., No. 1:01-cv-01696 (D.D.C. Aug. 3, 2001), https://www.justice.gov/atr/case-document/file/507701/download; Complaint, In the Matter of Glaxo Wellcome plc, and SmithKline Beecham plc, No. 3990 (F.T.C. Dec. 15 , 2000), https://www.ftc.gov/sites/default/files/documents/cases/2001/01/glaxosmithklinecmp.pdf; Complaint, United States v. Miller Indus., Inc. and Chevron, Inc., No. 1:00-cv-00305 (D.D.C. Feb. 17, 2000), https://www.justice.gov/atr/case-document/file/504391/download; Complaint, In the Matter of Hoechst AG and Rhone-Poulenc S.A., to be renamed Aventis S.A, No. 3919 (F.T.C. Dec. 7, 1999), https://www.ftc.gov/sites/default/files/documents/cases/1999/12/hoechstcmp.htm.

[225] See Michael L. Katz and Howard A. Shelanski, *Mergers and Innovation*, 74 Antitrust L. J. 1, 78 (2007) ("Merger-policy enforcers should recognize that innovation will depend more heavily on factual inquiries specific to a given case and less on systematic presumptions of the kind merger policy has long applied to static, product-market competition. Thus, while we do not urge antitrust enforcers to retreat from markets with significant innovation, we do urge that they proceed with great caution.").

alongside the numerous benefits to innovation.[226] In addition to lower prices, acquisitions often generate increased innovation around new products and services.[227]

The merger guidelines should continue to recognize that mergers can and do enable innovation that would not otherwise occur.[228] Some mergers bring together complementary capabilities that can only be unlocked through a combination of entities. Some acquisitions provide acquired companies and their owners with critical financing, ensuring their survival and ensuring continued innovation. Some mergers ensure that inventions, particularly intangible inventions in the form of intellectual property, remain available to the relevant ecosystem. Mergers can also aid innovation by providing resources to bring more broadly and quickly to market a small firm's new product, which may be critically important in R&D intensive industries, including those involving life-saving treatments and technologies.

Thus, merging parties' incentives to continue contributing to an innovative ecosystem, keeping assets open to the ecosystem, and continuing to invest in and advance the respective technologies, should be evaluated and properly accounted for by the agencies as procompetitive benefits. There should be no presumption that mergers are anticompetitive. The burden should remain within the reviewing agency to prove anticompetitive effects based on existing analytical tools.

Question 11: Digital Markets

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[226] Statement of Chairman Timothy J. Muris in the matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc., Fed. Trade Comm'n, FTC File No. 021 0026, at 23 (Jan. 13, 2004), https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf ("There is no reason to believe, a priori, that a particular merger is more likely to harm innovation than help it . . . there is no empirical basis for a presumption.").

[227] See also Makan Delrahim, Assistant Attorney Gen., Dep't of Justice, "As Time Goes By" Protecting the Future of Innovation Through Effective Antitrust Enforcement (Nov. 18, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-abas-2019-antitrust-fall-forum ("When it comes to innovation effects, however, the cost of under- and over-enforcement may be much more pronounced. That is because innovation is cumulative; one new innovation can unlock an entire array of new innovations. Thus, if antitrust enforcers get an enforcement decision wrong and stifle or delay innovation, consumers not only will miss out on that particular product improvement, they also could lose the opportunity to enjoy dozens of additional new products or services.").

[228] David Crawford and Michael Schallehn, *Regulate with Care: The Case for Big Tech M&A*, Bain & Co. (2021), at 14, https://www.bain.com/globalassets/noindex/2021/bain_report_technology-report-2021.pdf ("When the facts are reviewed, most big tech M&A spending actually benefits consumers and doesn't hamper competition."); Guillermo Marshall and Alvaro Parra, *Mergers in Innovative Industries: The Role of Product Market Competition* (2016), at 2, https://wwws.law.northwestern.edu/research-faculty/clbe/events/innovation/documents/parra_d-mii_n_m.pdf ("[E]ven mergers that would be anticompetitive for a given state of the technology may increase social welfare thanks to their positive impact on innovation.").

Question 11 asks whether "the guidelines' analysis of mergers in digital markets [should] differ from mergers in other markets." To assess this question with analytical rigor, the agencies must identify and adopt a parsimonious definition of "digital markets."[229] As far as the Chamber can discern, the Supreme Court has never used the phrase "digital market," nor have we found an antitrust decision by a circuit court of appeals that uses the phrase. Before addressing some of the specific questions in the RFI, we offer some thoughts on this important threshold issue.

First, we believe it is a misnomer to refer to digital *markets*. A product or service offering can be "digital" in the sense that the seller offers something to the buyer that has no physical component, *i.e.*, a software program distributed via the Internet. Although there are certainly contexts in which a properly defined relevant market includes only such digital offerings, we do not think the agencies should assume that a digital product competes only with other digital products in what might be referred to as a "digital market."[230] Rather, we think the agencies should follow a general approach to defining relevant antitrust markets recognizing that, in many contexts, there is competition between digital and non-digital products.

Second, if the agencies do adopt a different approach to analyzing mergers involving firms that offer digital products or services, then to provide reliable guidance to the business community, the agencies must explain clearly what they mean by the term "digital."[231] In the Chamber's view, this is a challenging problem.

Third and related, if the agencies pursue this path, then the guidelines ought to address the fact that many firms that offer digital products also offer related physical products. If one purpose of the guidelines is to enable firms to predict how their transactions are going to be analyzed by the reviewing agencies, then the guidelines must account for this fact.[232]

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[229] See *Antitrust Guidelines for the Licensing of Intellectual Property*, § 1.0 (identifying with specificity the categories of intellectual property to which the Guidelines apply) (Jan. 12, 2017), at https://www.justice.gov/atr/IPguidelines/download.

[230] The Agencies' IP licensing Guidelines take a fact-based and practical approach to defining relevant markets, rather than make general assumptions about competition involving IP. Id. § 3.2 ("the Agencies normally will identify one or more relevant markets in which the effects are likely to occur. The Agencies will typically analyze the competitive effects of licensing arrangements within the relevant market for goods affected by the arrangements. In other cases, however, the Agencies may analyze the effects within a market for technology or a market for research and development.").

[231] One way to approach this issue is to define digital in contrast to the physical. One example might be to contrast a firm that offers paper calendars for sale—a physical offering—with a firm that offers calendar software—a digital offering. In the Chamber's view, there are numerous examples where the distinction between physical and digital offerings may be clear; however, there are likely many examples where the distinction is fuzzy.

[232] Examples are myriad, and include firms like Apple, which offers physical devices such as the iPhone and the iPad as well as digital-only marketplaces such as the App Store; Amazon, which provides a

Regarding more specific issues, questions 11(a) and 11(b) ask whether the agencies should adopt a different analysis for "mergers in digital markets . . . where products and services undergo rapid change," and "in markets subject to tipping toward oligopoly or monopoly, such as may result from significant network effects." The Chamber's view is that the agencies should strive to adopt a general approach to analyzing mergers that is robust to all types of markets and should avoid approaches that differ from industry to industry.[233] The 2010 guidelines reflect the fact that markets are heterogenous. Markets that feature firms that offer digital products and services are also heterogenous. Moreover, the characteristics the RFI identifies as being significant characteristics of digital markets — rapid change, markets subject to tipping, and significant network effects — are not unique to markets that feature digital products. Indeed, classic examples of markets that feature network effects involve physical products such as the VCR[234] and the QWERTY keyboard.[235]

Moreover, there is well-developed precedent in cases involving antitrust challenges to conduct and transactions involving firms that supply digital products. In *U.S. v. Microsoft*, the D.C. Circuit held that Microsoft had violated Section 2 of the Sherman Act through conduct related to its digital computer operating system software.[236] The court explicitly emphasized the importance of significant network effects, recognizing that Microsoft benefitted from the "applications barrier to entry," which created a "'chicken-and-egg' situation [that] ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems."[237] Moreover, the court squarely addressed and rejected the argument that the pace of antitrust enforcement is too slow to work in dynamic, fast-moving industries: "[e]ven in those cases where forward-looking remedies appear limited, the Government will continue to have an interest in defining the contours of the antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not. And the threat of

digital retail experience to customers through Amazon.com, as well as physical fulfillment centers and a delivery network, which delivers physical items to the consumers that purchase those items on the website; and Microsoft, which offers digital software such as the Windows operating system, along with physical devices such as the Surface tablet.

[233] In the past, the Agencies have adopted antitrust guidance related to specific industries or issues, but this separate guidance has not supplanted the general applicability of the merger guidelines to those industries. *See Statements of Enforcement Policy in Health Care*, (August 1996), https://www.justice.gov/atr/page/file/1197731/download; *Antitrust Guidelines for the Licensing of Intellectual Property*, (Jan. 12, 2017), https://www.justice.gov/atr/IPguidelines/download.

[234] Michael L. Katz and Carl Shapiro, *Technology Adoption in the Presence of Network Externalities*, 94 J. Pol. Econ 822 (1986).

[235] Paul A. David, *Clio and the Economics of QWERTY*, 75 Am. Econ. Rev. 332 (1985).

[236] 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

[237] Id. at 55.

private damage actions will remain to deter those firms inclined to test the limits of the law."[238]

The agencies also have pursued many successful challenges to mergers or other transactions involving firms that offer digital products and services. In 2008, Yahoo! and Google abandoned an agreement that would have "enabled Yahoo! to replace a significant portion of its own Internet search results advertisements with search results advertisements sold by Google" after the DOJ "informed the companies that it would file an antitrust lawsuit to block the implementation of the agreement."[239] In 2009, the FTC successfully enjoined a merger between CCC Information Services and Mitchell International, two firms that supply specialized computer software to estimate the cost of repair or the value of replacement vehicles to automotive repair shops.[240] In 2011, the DOJ successfully challenged H&R Block's acquisition of TaxACT — a company that sold "digital do-it-yourself tax preparation products" — as a violation of Section 7 of the Clayton Act.[241] Also in 2011, the DOJ filed a lawsuit to block AT&T's acquisition of T-Mobile, alleging that the transaction "would substantially lessen competition for mobile wireless telecommunications services across the United States, resulting in higher prices, poorer quality services, fewer choices and fewer innovative products for the millions of American consumers who rely on mobile wireless services,"[242] after which the parties abandoned the transaction.

More recent examples also exist. In 2013, in another case involving software, the DOJ successfully won a lawsuit declaring illegal Bazaarvoice's acquisition of PowerReviews — "the unquestioned market leading provider of Ratings and Reviews Platforms [] to companies involved in online commerce . . . [and] its primary competitor."[243] In 2014, the FTC challenged Verisk Analytics's proposed acquisition of EagleView Technology on the ground that the acquisition would "result in a virtual

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[238] Id. at 49.

[239] Press Release, *Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement*, https://www.justice.gov/archive/opa/pr/2008/November/08-at-981.html. After Yahoo! and Google abandoned their transaction, Yahoo! and Microsoft—then represented by now-Assistant Attorney General Jonathan Kanter—reached a similar arrangement, which was not challenged by the DOJ. *See Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of the Internet Search and Paid Search Advertising Agreement between Microsoft and Yahoo! Inc.*, https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation-internet ("The Antitrust Division obtained extensive information from Microsoft, Yahoo! and a wide range of market participants. Experience and expertise developed during our 2008 investigation of the proposed Google/Yahoo! search advertising agreement also informed our analysis. After a thorough review of the evidence, the division has determined that the proposed transaction is not likely to substantially lessen competition in the United States.").

[240] *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009).

[241] *U.S. v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 43 (D.D.C. 2011).

[242] Press Release, *Justice Department Files Antitrust Lawsuit to Block AT&T's Acquisition of T-Mobile*, https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-att-s-acquisition-t-mobile.

[243] *U.S. v. Bazaarvoice, Inc.*, Memorandum Opinion, Case No. 13-cv-11033 (N.D. Cal. 2014).

monopoly in the U.S. market for rooftop aerial measurement products used by the insurance industry to assess property claims," after which Verisk abandoned the proposed acquisition.[244] In 2018, the FTC challenged CDK's proposed acquisition of Auto/Mate, two firms that offered "Dealer Management System" software used by automobile dealers, which caused the parties to abandon the transaction.[245] In each of these cases, the challenging agency followed the approach set forth in the then-prevailing merger guidelines to successfully challenge mergers or other transactions involving sellers of digital products and services.

Question 11(c) asks, in the context of analyzing markets that do not feature products with explicit prices, *i.e.*, "zero-price markets" or "negative-price markets," whether "'quality' and other characteristics [can] play the same role as price in market definition." The 2010 guidelines explicitly recognize the relevance of "quality and other characteristics" in the market definition exercise: "Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a *reduction in product quality or service*."[246] Moreover, the 2010 guidelines do not limit the relevance of changes in product quality or service to markets that feature "zero" or "negative" prices; under the 2010 guidelines, quality is always relevant as it should be.

One potential issue with using quality in defining relevant markets is that assessing the magnitude of a change in quality can be a challenge. The 2010 guidelines also recognize this issue: "[t]he SSNIP is intended to represent a 'small but significant' increase in the prices charged by firms in the candidate market for the value they contribute to the products or services used by customers . . . This methodology is used because normally it is possible to quantify 'small but significant' adverse price effects on customers and analyze their likely reactions, not because price effects are more important than non-price effects."[247] In the Chamber's view, the 2010 guidelines approach this issue in the correct way, recognizing the inherent relevance of changes to product or service quality in the market definition exercise, but also stating the challenges associated with doing so. Any revisions to the guidelines should recognize these challenges.

RFI 11(d) and 11(e) ask several questions related to evaluating mergers and assessing market power in markets that feature firms that operate two-sided or multi-sided platforms. The Chamber is concerned that the agencies are conflating "multi-sidedness" on the one hand, with "digital products and services" on the other. These

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[244] Verisk/EagleView, In the Matter of, https://www.ftc.gov/enforcement/cases-proceedings/141-0085/veriskeagleview-matter.
[245] CDK Global and Auto/Mate, In the Matter of, https://www.ftc.gov/enforcement/cases-proceedings/171-0156/cdk-global-automate-matter.
[246] Horizontal Merger Guidelines § 4 (emphasis supplied).
[247] Horizontal Merger Guidelines § 4.1.2.

are not the same thing: there are many examples of firms that offer digital products and services that do not operate a multi-sided platform, *e.g.*, the vast majority of mobile applications are sold directly to consumers; as are examples of firms that operate multi-sided platforms that do not only sell digital products and services, *e.g.*, a print newspaper or magazine. If the agencies pursue a separate mode of analysis for either transactions involving sellers of digital products or services or for transactions involving firms that operate multi-sided platforms, then the agencies must disentangle these separate concepts. Regarding multi-sided platforms, the Chamber encourages the agencies to follow the advice of Nobel laureate and expert on the economics of multi-sidedness Jean Tirole, who is no friend of combinations but who acknowledges that the "main lesson" from his research on multi-sidedness is that "[b]oth authorities and private decisionmakers must analyze the two sides at the same time. . . [W]e cannot just conclude . . . that Google or Visa are undeserving monopolies on one side and are preying against their rivals on the other side. We need to consider the market as a whole."[248] In the Chamber's view, considering the market as a whole must be a part of the agencies' analyses of all transactions involving firms that operate multi-sided platforms.[249]

Question 12: Special Characteristic Markets

Subparts (a) and (b) of question 12 touch upon bargaining and auctions. The 2010 guidelines correctly recognize that the elimination of a competitor by merger may create or increase the unilateral market power of the combined firm. The guidelines also correctly recognize that markets where parties "bargain," and markets where multiple sellers participate in an auction, are not immune from the potential loss of competition caused by a horizontal merger.[250] This was an important inclusion in the 2010 guidelines as earlier merger case law had sometimes indicated that "bidding" and "negotiating" may protect a customer from a merged firm's exercise of market power.[251] The 2020 Vertical Merger Guidelines similarly recognize that a vertical merger may allow the combined firm enhanced negotiating power and leverage that allows it to raise costs to its rivals; such rivals may set higher downstream prices, removing or lessening a competitive constraint on the merged firm.[252]

The guidelines should not be amended to provide a significantly detailed discussion of how a merger may create competitive harm in markets characterized by

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[248] David A. Price, *Econ Focus: Interview Jean Tirole*, Federal Reserve Bank of Richmond (Fourth Quarter 2017), https://www.richmondfed.org/publications/research/econ_focus/2017/q4/interview; *see also* Jean-Charles Rochet and Jean Tirole, *Platform Competition in Two-Sided Markets*, 1. J. Euro. Econ. Ass'n 990 (2003); Jean-Charles Rochet and Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 Rand J. of Econ. 645 (2006).
[249] *Accord Ohio v. American Express*, 138 S. Ct. 2274 (2018).
[250] Horizontal Merger Guidelines, Section 6.2.
[251] See Baker Hughes, supra.
[252] Vertical Merger Guidelines, Example 3.

bidding or auctions. As the guidelines explain, "[t]he mechanisms of these anticompetitive unilateral effects, and the indicia of their likelihood, differ somewhat according to the bargaining practices used, the auction format, and the sellers' information about one another's costs and about buyers' preferences."[253] Therefore, it is likely that any such discussion will be unnecessarily complex (and therefore confusing) for general purpose guidelines. They may also work to limit the agencies' application of the general principles to specific cases — in practice, the models used to evaluate harms from horizontal and vertical mergers are different and require different information; this may especially handicap the agency in court, as courts parse whether the agencies' theory of harm is articulated in the guidelines and, if not, ask why the agency is advancing a theory inconsistent with or not mentioned in the guidelines.

However, modest additions to the guidelines are appropriate. In any future guidelines, the agencies should describe the types of economic and qualitative evidence that would suggest to the agencies that a merger may increase the likelihood of coordinated interaction in markets characterized by negotiations or bargaining, or where the inclusion of price and non-price terms are set through auctions. The agencies should also add an example or two, as was done for the 2006 commentary on the guidelines, to illustrate facts relevant to whether and how a horizontal merger may eliminate or lessen competition in a market characterized by auctioning or bargaining.

Subpart (c) addresses bundled products. The guidelines do not adequately explain how the agencies evaluate mergers of firms offering bundled products or a merger that will create an entity that can offer a bundle or expand its bundled offering. The 2020 Vertical Merger Guidelines postulate that some vertical mergers, by combining complementary products, may require a firm to engage in "two level entry." This concern may apply to mergers where one or both firms offer a bundle pre-merger, or where the merger will create the opportunity for the merged firm to offer a bundle.

If the agencies anticipate defining a market to include a bundle of products, or are prepared to allege competitive harm to a market consisting of a bundle of products, or believe a merger that creates the ability to offer a bundle of products can be anticompetitive, the guidelines should describe the following:

- under what conditions a bundle of products will be considered a relevant market;
- whether and under what conditions a firm offering less than the full bundle of products will be considered able to constrain the price and non-price behavior of a firm that offers a full bundle;
- under what conditions will a merger that creates the opportunity to offer a bundle be considered anticompetitive or procompetitive;

[253] Horizontal Merger Guidelines, Section 6.2

- how the efficiencies and price discounts associated with offering a bundle will be evaluated, and whether such efficiencies and discounts will be recognized as a competitive benefit; and
- whether and how the entry analysis of the current guidelines will be adjusted for a relevant market defined as a bundle of products.

Subpart (d) asks about cluster markets. The guidelines approach to cluster markets is not adequate. The FTC, especially, has begun to allege cluster markets on a relatively routine basis in hospital and health care matters, and has also alleged cluster markets in food-distribution, office supplies, and marine chemicals.[254] If the agencies anticipate defining cluster markets more frequently, future guidelines should do the following:

- Define and identify the characteristics of a cluster market, and how or whether it is different from a mere collection of goods;
- Clarify whether and when the identification of a cluster market is a supply-side or demand-side analysis; and
- Define and identify the conditions under which the agencies will define a cluster market for administrative convenience.

Subpart (f) implicates non-horizontal mergers. The short answer is that the current guidelines are adequate. The Horizontal Merger Guidelines address mergers involving firms in an actual or potential horizontal relationship, including firms that are presently in a vertical relationship but that, over time, may operate in the same relevant market, including a future relevant market. The Vertical Merger Guidelines address mergers involving firms in a vertical relationship and so-called diagonal relationship. The agencies should not expand their analysis, or the guidelines, to firms not in an existing or future horizontal relationship, an existing vertical relationship, or existing diagonal relationship.

Moreover, the guidelines need not address the acquiring firm's market power in markets adjacent to the target's business. The guidelines set out a framework for identifying a relevant market, market participants (both current and future market participants, whether rapid or committed), a related product (in the vertical merger guidelines), entry considerations, and competitive effects analysis of proposed or consummated acquisitions. Those principles can be applied to specific situations where market power in a market adjacent to the relevant market is relevant to the competitive effects analysis of a particular transaction.

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[254] See, e.g., *FTC v. Advocate Health Care Network,* 841 F.3d 460, 467 (7th Cir. 2016); *FTC v. Wilhelm Wilhelmsen Holding ASA,* 341 F. Supp. 3d 27, 48 (D.D.C. 2018); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 127 (D.D.C. 2016); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 24 (D.D.C. 2015); *Promedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565-68 (6th Cir. 2014).

Likewise, the guidelines do not require revision to address the possibility that a large firm entering a new market comprised of smaller companies, by acquiring one of those market participants, may eliminate potential competition or raise entry barriers and thereby substantially lessen competition. The guidelines apply to acquisitions of, or combinations involving, potential competitors. When a firm (large or small) is not presently in a relevant market but has plans to enter a relevant market de novo, a toehold acquisition of a small firm as an alternative means of entry conceivably could be illegal in some circumstances. In the alternative, a toehold acquisition may be efficient and procompetitive, as it may provide a fast way for a firm with superior resources to enter a market and expand the market position of the acquired entity. To the extent the guidelines are revised, they should be revised to reference the potential procompetitive benefits associated with a toe-hold acquisition. The vertical merger guidelines address acquisitions that may raise entry barriers of future competitors in the discussion of foreclosure and two-stage entry. No further explication is necessary.

Subpart (g) involves consummated mergers. The current guidelines are adequate, but the agencies should refrain from the assumption that the lack of evidence of price or non-price changes post-merger are explained by combined firm's concern that such an action will draw agency scrutiny.

In terms of subpart (h), the agencies have not challenged a merger or acquisition on the basis of common owners or horizontal stock holding by widely diversified investment firms. They have reviewed many mergers where widely diversified investors held small but significant positions in both merging parties, and in competitors to the merging parties. Neither agency has identified such holdings as relevant to a finding of anticompetitive effects from a merger.

Indeed, there is little or no empirical evidence that common owners and/or horizontal stock holding have anticompetitive effects. In December 2018, the Commission held a hearing on common ownership; the learning from that hearing, and relevant comments, and relevant economic papers, should be summarized and released. Until the agencies analyze the available literature and release a report, the agencies should not incorporate theories of common ownership into the guidelines.

In short, the existing guidelines are adequate. Many investors hold a non-controlling interest in competing companies. This practice is a pillar of American capital markets, one that helps companies attract capital, enables both institutional and individual investors to diversify risk, and results in lower fees for consumers of financial services. There is little or no persuasive empirical evidence that common owners limit competition, and with efforts to suppress competition already illegal, there is no need for the agencies to revise the guidelines to address this topic.[255]

Similarly, with respect to subpart (i), private equity, no changes to the guidelines are necessary. The mere fact that an acquiring firm or acquired firm is a private equity firm is irrelevant to the competitive analysis.

Question 13: Barriers to Firm Entry and Growth

The current treatment of entry in the Horizontal Merger Guidelines is generally sophisticated and rigorous. It incorporates modern economic and business learning.[256] The current formulation, which asks whether entry would be "timely, likely, and sufficient" in its "magnitude, character, and scope" to address effects of concern, is also sufficiently flexible and broad to apply to numerous markets and industries. We offer the following suggestions to ensure the guidelines continue to reflect a consensus analytical approach and evolve over time in ways that protect competition and still maintain predictability, transparency, and fairness.[257]

As a threshold matter, any analysis of entry or expansion should remain practical, administrable, and easily intelligible to merging parties. The agencies also should continue to use a flexible, fact-based approach to their analysis.[258] Each market or industry functions differently, with wide variations in competitive dynamics from one to the next. The question of entry is therefore not susceptible to easy presumptions or truncated analysis, as it involves complex dynamics between how consumers may respond to new offerings in the market with how current and future firms act to meet their response. Moreover, overbroad and inflexible rules that

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[255] A new paper reviews the existing empirical evidence regarding the "common ownership hypothesis." U.S. Chamber of Commerce White Paper, *U.S. Capital Markets are in Danger from Proponents of the "Common Ownership Hypothesis,"* at https://www.centerforcapitalmarkets.com/wp-content/uploads/2022/04/CCMC_CommonOwnership_v2-1.pdf.

[256] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Remarks at the Ninth Annual Global Antitrust Enforcement Symposium, Georgetown Univ. Law Ctr. 3 (Sept. 29, 2015), https://www.ftc.gov/system/files/documents/public_statements/805441/ramirez_-_georgetown_antitrust_enforcement_symposium_9-29-15_0.pdf (noting 1992 Guidelines revision strengthened the entry analysis); Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 Antitrust Law J. 189 (2003), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2513&context=facsch_lawrev (discussing history of 1992 Guidelines revision to entry).

[257] Any revision to the agencies' approach should be incremental, grounded in economics, and attuned to the limits of antitrust. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2152&context=journal_articles.

[258] As noted by the United States, it is critical to consider "whether the facts of a particular case make it likely that entry would prevent the creation or enhancement of market or monopoly power that otherwise would follow from a merger of . . . competitors." Organisation for Economic Co-operation and Development (OECD), *Series Roundtables on Competition Policy: Barriers to Entry* 238, DAF/COMP (2005) 42 (Mar. 6, 2006), https://www.oecd.org/competition/abuse/36344429.pdf.

erroneously condemn beneficial behavior risk losing those benefits forever.[259] Former Assistant Attorney General William F. Baxter noted this risk is heightened in dynamic, innovative industries, like markets involving digital products: "the contribution of technological advances to our economic well-being is very substantial when compared to the damage that could be caused by restrictive behavior the antitrust laws seek to halt."[260]

Since Section 7 often requires "making a prediction about the future," another key attribute of entry analysis is that it should be primarily prospective in nature.[261] While the history of entry, expansion, and exit can be a relevant consideration in many situations, the fact that entry or expansion has not yet been observed in a market does not mean it is necessarily unlikely in the face of a merger. Products, markets, and business models evolve, and an acquisition can be a competitive response to an increased likelihood of entry and can signal to others that an overlooked segment is ripe for entry.

The guidelines also should continue to acknowledge the importance of innovation in business models and that, as a result, entry frequently can come from markets adjacent to those directly affected by a transaction — even where such entry has been historically absent. A broad lens is especially important in newer or evolving industries, where participants often can have multiple commercial touchpoints and can transform themselves in ways often not fully captured by traditional horizontal and vertical categories.[262]

The guidelines' entry analysis should not abandon the analytical factors shown to be relevant historically by the world's competition authorities. Depending on the matter, these factors have included: (a) the existence of sunk costs or high capital costs; (b) the competitive benefits and implications of economies of scale and scope (and, for example, the need to achieve minimum viable scale to compete effectively); (c) reputational advantages of incumbents; (d) network effects; (e) legal or regulatory requirements; (f) first-mover advantages; and (g) strategic behavior by incumbents directed at entrants.[263] In addition, the mere fact that investment is required should not be considered a barrier to entry.[264]

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[259] Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 2 (1984).
[260] William F. Baxter, *Antitrust Law and Technological Innovation*, 1 Issues Sci. & Tech. 80, 82 (1985).
[261] *United States v. AT&T Inc.*, 310 F.Supp.3d 161, 190 (D.D.C. 2018).
[262] David Evans, *Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies*, *in* Douglas H. Ginsburg Liber Amicorum: An Antitrust Professor on the Bench (Nicholas Charbit et al. eds., 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438.
[263] 2005 OECD at 25–38, 41. Organisation for Economic Co-operation and Development (OECD), Series *Roundtables on Competition Policy: Barriers to Entry* 26-39, DAF/COMP(2005)42 (Mar. 6, 2006), *https://www.oecd.org/competition/abuse/36344429.pdf*.
[264] International Competition Network, *ICN Merger Guidelines Workbook* 55-56 (2006), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_MergerGuidelinesWorkbook.pdf.

The guidelines should also continue to be informed by agency-led industry research initiatives and workshops, as well as merger retrospectives. Such research activity advances the agencies' understanding of business dynamics in the global economy and the effectiveness, strengths, and weaknesses of the federal merger review program. Retrospectives have been a valuable tool for improvement of enforcement policies.[265]

Finally, entry analysis should rest on empirically sound economic principles and tools. Significantly, in revising the guidelines, the agencies should avoid repeating historic errors, such as the evaluation of entry without the proper use of economic analysis, including the treatment of efficiency enhancing outcomes as grounds to block mergers.[266]

For these reasons, we would respectfully recommend incremental changes to better align the guidelines.

First, the revised guidelines should look beyond static competition and more directly account for dynamic competition.[267] The agencies and other leading antitrust authorities have acknowledged consistently the value and importance of innovation and dynamic competition.[268]

Second, the guidelines should integrate consensus views of the mitigating effects technology has had on barriers to entry and expansion across numerous industries. For example:

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[265] Fed. Trade Comm'n, *Merger Retrospective Program*, https://www.ftc.gov/policy/studies/merger-retrospectives (last visited Feb. 24, 2022).

[266] Nobel laureate Oliver Williamson has recounted how abstract concerns about "barriers to entry" led to gross excesses in merger enforcement in the 1950s and 1960s, including treating pro-competitive outcomes from mergers as themselves "barriers to entry." Oliver E. Williamson, *The Merger Guidelines of the U.S. Department of Justice: In Perspective*, Remarks at the 20th Anniversary of the 1982 Merger Guidelines 2-4, Dep't of Justice (June 10, 2002), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11257.pdf. In *Foremost Dairies*, the Federal Trade Commission held that "the necessary proof of violation of Section 7 'consists of types of evidence showing that the acquiring firm possesses significant power in some markets *or* that its over-all organization gives it a decisive advantage in efficiency over its smaller rivals.'" Id. at 3. This thinking culminated in the egregious and economically illiterate analysis of Procter & Gamble's acquisition of Clorox in which the Federal Trade Commission (and subsequently the Supreme Court) condemned the merger precisely because it would make the merged firm too efficient, harming (and deterring from entry) less efficient competitors. Id. In fact, Procter & Gamble attempted to defend the merger on the grounds that there were no efficiency gains from the acquisition. Id. at 4 n.6; see also Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 209 (2008).

[267] Nicolas Petit & David J. Teece, *Innovating Big Tech Firms and Competition Policy*, 30 Industrial & Corporate Change 1168 (Sept. 3, 2021), https://academic.oup.com/icc/article/30/5/1168/6363708; David J. Teece, *Towards a Dynamic Competition Approach to Big Tech Merger Enforcement: The* Facebook-Giphy *Example*, Competition Policy Int'l (Dec. 6, 2021), https://www.competitionpolicyinternational.com/towards-a-dynamic-competition-approach-to-big-tech-merger-enforcement-the-facebook-giphy-example/#_ftnref14.

[268] Teece, supra.

- Free open-source software allows entrepreneurs to build products inexpensively;
- Cloud infrastructure and services allow entrepreneurs to scale easily with low marginal costs, reducing capital costs of entry or expansion;[269]
- General purpose technology (*e.g.*, smart phones) makes platform multi-homing feasible, reducing switching and trial costs and allowing for rapid growth; and
- Cheap memory and faster devices mean users can sample new services without needing to abandon familiar ones.[270]

In addition, digital platform businesses can exhibit indirect network effects, which can fuel rapid adoption for sufficiently distinct and desirable products, as has been the case with many new innovative services in recent years.[271]

Third, the guidelines should better reflect competitive dynamics and ease of entry associated with contestable markets. For example, digital platforms can sometimes be characterized by competition *for all or most of the market*. Incumbents in these businesses are always at risk that they will be disrupted not by just an imitator, but by the introduction of an entirely new product or tool. Entry analysis unduly focused on a narrow product market could insufficiently account for the disciplining effect of such future innovation.

Finally, the guidelines should more comprehensively consider barriers to entry or expansion associated with government policy,[272] including federal and state merger

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[269] See David S. Evans, *Why The Dynamics of Competition For Online Platforms Leads to Sleepless Nights, But Not Sleepy Monopolies* 7, *in* Douglas H. Ginsburg Liber Amicorum: An Antitrust Professor on the Bench (Nicholas Charbit et al. eds., 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438.

[270] Moreover, many platforms operate at least in part as two-sided attention markets, with zero out-of-pocket cost to consumers, but even paid subscription services can easily offer free trials for new users thanks to online payments technology and digital rights management.

[271] While a naïve view of network effects would indicate that nobody would ever leave a communications platform for fear of losing their contacts, the possibility of multi-homing makes this switching much easier over time. History shows that this creative destruction occurs regularly as AIM, MSN Messenger, and BlogSpot were all once giants in their field, but now are greatly diminished, while iMessage, SnapChat, and Twitter have been able to differentiate themselves to reach similar heights. To be sure, network effects can create barriers to entry in digital markets, especially when buttressed by regulation, certain long-term, exclusive contractual arrangements, or anticompetitive behavior, but on the whole technology has resulted in markets that are fundamentally contestable and unstable in a way that older markets dependent on physical infrastructure are not. *See* David J. Teece, *Towards a Dynamic Competition Approach to Big Tech Merger Enforcement: The* Facebook-Giphy *Example*, Competition Policy Int'l (Dec. 6, 2021), https://www.competitionpolicyinternational.com/towards-a-dynamic-competition-approach-to-big-tech-merger-enforcement-the-facebook-giphy-example/#_ftnref14.

[272] This topic is particularly relevant as U.S. government considers potential *ex ante* regulation of digital markets. Ania Thiemann et al., *Ex Ante Regulation and Competition in Digital Markets*, Organisation for Economic Co-operation and Development (OECD) (Dec. 2021),

enforcement policy as well as regulatory requirements beyond those currently in the guidelines.[273]

In terms of objective indicators, the question of entry — both ease of and barriers to — must be fact and industry specific. While any of the factors enumerated in question 13(c) could be relevant, none are sufficiently probative on their own to justify presumptions or a truncated analysis.

First, the presence of an incumbent with high and durable market share is not necessarily indicative that its position is protected by barriers to entry (or anticompetitive conduct). While problematic barriers could protect the incumbent's position, it could just as easily mean that the incumbent is more innovative or more quickly responsive to consumer preferences. Such an incumbent might create and sell products or services of higher quality or for lower prices than prior entrants.[274] Truncating the analysis risks repeating the mistakes of prior eras and condemning fundamentally efficiency-enhancing, procompetitive mergers as illegal.[275]

Second, phenomena sometimes perceived as barriers to entry, such as network effects, may sometimes reflect consumer preferences and contribute to the value of the product. Moreover, as noted above, the advent of technology combined with the existence of multi-homing and network effects empowers new entrants with unique and innovative products to scale quickly and compete *for the market* against the largest incumbents.[276]

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https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf.

[273] E.g., changes by the FDIC to evaluating banking mergers. Relatedly, the agencies should be sensitive to the risk to procompetitive deals posed by overdeterring mergers.

[274] This outcome would be the natural and desirable consequence of the larger firm being more efficient. Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890-1955*, 94 Minn. L. Rev. 311, 359 (2009), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1482&context=mlr.

[275] Oliver E. Williamson, *The Merger Guidelines of the U.S. Department of Justice: In Perspective*, Remarks at the 20th Anniversary of the 1982 Merger Guidelines 2-4, Dep't of Justice (June 10, 2002), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11257.pdf. Likewise, the agencies should also be careful not to incorporate factually incorrect assumptions into any revised merger guidelines, e.g., that there are "Kill Zones." *See* Susan E. Woodward, *Irreplaceable Acquisitions: Proposed Platform Legislation and Venture Capital* 1, Sand Hill Economics (Nov. 2021), http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf ("There appears to be no "Kill Zone" discouraging investment at present[.]").

[276] For example, in 2006, the BlackBerry was the peak of business communications technology. Many consumers could not imagine a world without their BlackBerry, its QWERTY keyboard, or the proprietary BlackBerry Messenger. But in 2007, Apple announced the iPhone and the multitouch display, "it just works" operating system, and the eventual further innovation of the AppStore completely disrupted BlackBerry. This mass mobile revolution had additional knock-on effects that undermined traditional web-based platforms like AOL and Yahoo. But in the 2010s, it would be Apple's turn to be disrupted. In 2010, the iTunes store accounted for 70% of all online music sales in the United States and 28% of all U.S. music sales through any channel. Consumers used iTunes because it was an easy and integrated

Third, no matter what "objective" criteria of entry barriers are selected, any bright line metric will be over-inclusive, potentially condemning beneficial conduct because the rule failed to account properly for the dynamism that characterizes many industries.[277] An "objective" indicator that fails to take into account this type of disruption risks stifling a procompetitive tie-up that enables these firms to become more efficient and survive in the new status quo.

Finally, although the guidelines should be concerned with mergers resulting in market power, in the absence of durable market power, barriers to entry do not represent a harm to competition. The agencies should be careful to avoid the mistakes of the past and condemning mergers as creating "barriers to entry" and "harming competition" where the likely result is a procompetitive increase in efficiency.[278]

Question 14: Efficiencies

This RFI foreshadows revisions in search of a problem.

First, and contrary to the suggestion in subpart (a), the Guidelines are consistent with prevailing and well-established law. At least three circuits, including the influential D.C. Circuit, have recognized that efficiencies are a defense to a

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way to get music on their new iPhones or iPods (the iTunes store, conveniently, featured prominently on every new iPhone). Commentator's characterized iTunes as a dominant force that competitors could only complement, not unseat. David Evans, *Why the Dynamics of Competition for Online Platforms Leads to Sleepless Nights But Not Sleepy Monopolies* 30, *in* Douglas H. Ginsburg Liber Amicorum: An Antitrust Professor on the Bench (Nicholas Charbit et al. eds., 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438 , *citing* Mark Mulligan, *Why Apple's Dominance of the Download Market Is A Big Deal*, Forrester Blogs (Aug. 23, 2010), http://blogs.forrester.com/mark_mulligan/10-08-23-why_apple%E2%80%99s_dominance_download_market_really_big_deal. However, in 2011, the music streaming service Spotify made its U.S. debut, giving users the ability to stream any song in the Spotify catalog for free with ads, or ad-free with a paid subscription. By 2016, Apple's music download sales were 63% of their 2012 peak and Apple was forced to respond by launching its own streaming service, Apple Music, in June 2015.

[277] An example is found in a recent McKinsey report about changes in the market for machinery and industrial automation. An ostensibly objective measure of entry barriers might look at a traditional market definition and see a capital-intensive industry with high barriers to entry based on a decades-long history of limited changes to revenue or market share. But a more holistic analysis shows that this sector is seeing increased entry as new software, platform, and application providers bring new business models that provide increased customization to consumers. This is expected to cause a significant disruption that all players must respond to as "[s]trategic control points that have long been owned by specific market participants are now in play, creating the potential for a shift in traditional value pools." Harald Bauer et al., *Changing Market Dynamics: Capturing Value in Machinery and Industrial Automation* 15, McKinsey & Company (July 2019), https://www.mckinsey.com/~/media/McKinsey/Industries/Advanced%20Electronics/Our%20Insights/Capturing%20value%20in%20machinery%20and%20industrial%20automation%20as%20market%20dynamics%20change/Changing-market-dynamics-Capturing-value-in-machinery-VF.pdf.

[278] Oliver E. Williamson, *The Merger Guidelines of the U.S. Department of Justice: In Perspective*, Remarks at the 20th Anniversary of the 1982 Merger Guidelines 2-4, Dep't of Justice (June 10, 2002), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11257.pdf.

Section 7 challenge to a merger.[279] That recognition is more than thirty years old.[280] It draws from the Supreme Court's 1974 decision in *United States v. General Dynamics Corp*.[281] This approach also comports with the statutory language. As two scholars explained, "If a merger will generate procompetitive effects and thus will *promote* competition, on what basis can [the agencies] claim that the merger will substantially *lessen* competition, a requirement that is explicit in the text of the statute?"[282]

Perhaps as important, treating efficiencies as a defense to a Section 7 challenge to a merger enjoys widespread support from a broad consensus of courts, commentators, and scholars. As the D.C. Circuit put it, "the trend among lower courts is to recognize the defense."[283] In 1997, the Department of Justice and the Federal Trade Commission amended the merger guidelines solely to recognize the efficiencies defense. The economic literature supporting the efficiencies defense is tremendous.[284]

There simply is no need to change the guidelines' provisions on efficiencies to reflect current law. The guidelines statement that "[t]he agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market" is, in its essence, a recognition that a contrary policy would not prevail in court.

Second, several subpart questions suggest that the current guidelines do not adequately set forth a skeptical standard regarding an efficiencies defense (subparts b, c, e, g). Yet, the guidelines already establish a very high burden regarding an efficiencies defense — arguably too high in light of prevailing case law treating efficiencies as an ordinary issue of proof.[285] Once again, there is no need to alter this approach in a way that raises the bar to an efficiency defense.

Finally, at least one subpart suggests that some "efficiencies" should be treated not as a defense to a merger challenge but rather as evidence in favor of a merger challenge (subpart d, concerning elimination of "excess" workers). This is a dangerous proposition that has been rejected for nearly forty years. As one authority puts it, "no

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[279] See *FTC v. H.J. Heinz Co*., 246 F.3d 708, 713 (D.C. Cir. 2001); *FTC v. Tenet Health Care Corp*., 186 F.3d 1045 (8th Cir. 1999); *FTC v. Univ. Health, Inc*., 938 F.2d 1206 (11th Cir. 1991).
[280] *United States v. Baker Hughes Inc*., 908 F.2d 981, 982 (D.C. Cir. 1990) (observing that Section 7 focuses on a "variety of factors," including "efficiencies").
[281] 415 U.S. 486 (1974).
[282] Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers*, Promarket (Sep. 23, 2021), at https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/.
[283] *Heinz Co*., 246 F.3d at 720.
[284] See, e.g., Timothy J. Muris, The Government and Merger Efficiencies: Still Hostile After All These Years, 7 *Geo. Mason L. Rev.* 729, 734 (1999) (collecting articles).
[285] See, e.g., Sec. 10 ("Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms."); id. ("Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means.").

modern observer, and no modern court, espouses the old *FTC v. Procter & Gamble Co.* (1967) position that efficiencies might be reason to condemn a merger."[286] The subpart's examples indicate, by their own terms, one of the problems with this approach: determining in advance which efficiencies are preferred and which are disfavored.

Question 15: Failing and Flailing Firms

Revised guidelines should expand the availability of the failing and flailing firm defense. The existing guidelines erect a very high burden to invoking this defense — one that few firms can satisfy, even in the midst of a global pandemic.[287] From the standpoint of the efficient allocation of assets, consumers and competition would benefit if failing and flailing firms had earlier opportunities to merge with more successful companies that could inject critical capital or better manage their assets.

Revised guidelines should relax merger scrutiny for failing and flailing firms that have suffered a consistent pattern of reduced output or actual losses, instead of the current rule, which relaxes scrutiny only when such firms move to the brink of bankruptcy.

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Again, the Chamber appreciates the opportunity to answer the RFI's specific questions, and we would be pleased to maintain an open dialogue with both the Department and the Commission.

Sincerely,

Sean Heather
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[286] Ernest Gellhorn, William E. Kovacic, & Stephen Calkins, Antitrust Law and Economics in a Nutshell 463 (5th ed. 2004); see *Anthem*, supra ("even a cursory reading of the court's opinion today puts to rest any suggestion that it 'espouses the old ... position that efficiencies might be reason to *condemn* a merger'"); Muris, supra, at 731 (observing that "the government abandoned attacking mergers because they were efficient").
[287] E.g., FTC Blog, *On Failing Firms – and Miraculous Recoveries*, at https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries.