MERGER ANTITRUST LAW

Unit 2: Predicting Merger Antitrust Outcomes

Class 2

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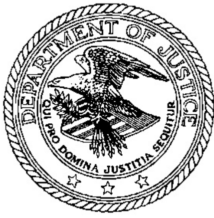
[1] The 2023 draft guidelines address horizontal, vertical, and conglomerate mergers. We will focus on the sections addressing horizontal mergers in this unit.

July 21, 2023

2010 DOJ/FTC
Horizontal Merger Guidelines



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DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION ISSUE REVISED HORIZONTAL MERGER GUIDELINES

2010 Guidelines More Accurately Represent Agencies' Merger Review Process

WASHINGTON – The Department of Justice and the Federal Trade Commission (FTC) issued today revised Horizontal Merger Guidelines that outline how the federal antitrust agencies evaluate the likely competitive impact of mergers and whether those mergers comply with U.S. antitrust law. These changes mark the first major revision of the merger guidelines in 18 years, and will give businesses a better understanding of how the agencies evaluate proposed mergers.

A primary goal of the 2010 guidelines is to help the agencies identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that either are competitively beneficial or likely will have no competitive impact on the marketplace. To accomplish this, the guidelines detail the techniques and main types of evidence the agencies typically use to predict whether horizontal mergers may substantially lessen competition.

The revised merger guidelines derive from the agencies' collective experience in assessing thousands of transactions focusing on the types of evidence the department and the FTC use to decide whether a merger of competitors may harm competition. Many of the proposed refinements and changes reflect issues previously identified in the "Commentary on the Horizontal Merger Guidelines," which the agencies jointly issued in 2006. In crafting the revisions, the agencies considered a wide range of opinions gathered through a series of joint public workshops, as well as hundreds of public comments submitted by attorneys, academics, economists, consumer groups and businesses.

"The revised guidelines better reflect the agencies' actual practices," said Christine Varney, Assistant Attorney General in charge of the Department of Justice's Antitrust Division. "The guidelines provide more clarity and transparency, and will provide businesses with an even greater understanding of how we review transactions. This has been a successful process due to the commitment of the talented staff from both agencies and the excellent working relationship with the FTC led by Jon Leibowitz."

"Because of the hard work of all involved at both agencies, private parties and judges will be better equipped to understand how the agencies evaluate deals. That improvement in clarity and predictability will benefit everyone," said FTC Chairman Jon Leibowitz. "We thank Christine Varney and her team at DOJ for their terrific work on this initiative, demonstrating once again how effectively and collegially the two agencies work together."

The agencies jointly announced the project in September 2009, followed by a series of workshops over the course of the winter. The FTC issued proposed revisions for public comment on April 20, 2010. All of the written comments are posted on the FTC's website at www.ftc.gov/os/comments/hmgrevisedguides/index.shtm.

The 2010 guidelines are different from the 1992 guidelines in several important ways. The guidelines:

- Clarify that merger analysis does not use a single methodology, but is a fact-specific process through which the agencies use a variety of tools to analyze the evidence to determine whether a merger may substantially lessen competition.

- Introduce a new section on "Evidence of Adverse Competitive Effects." This section discusses several categories and sources of evidence that the agencies, in their experience, have found informative in predicting the likely competitive effects of mergers.

- Explain that market definition is not an end itself or a necessary starting point of merger analysis, and market concentration is a tool that is useful to the extent it illuminates the merger's likely competitive effects.

- Provide an updated explanation of the hypothetical monopolist test used to define relevant antitrust markets and how the agencies implement that test in practice.

- Update the concentration thresholds that determine whether a transaction warrants further scrutiny by the agencies.

- Provide an expanded discussion of how the agencies evaluate unilateral competitive effects, including effects on innovation.

- Provide an updated section on coordinated effects. The guidelines clarify that coordinated effects, like unilateral effects, include conduct not otherwise condemned by the antitrust laws.

- Provide a simplified discussion of how the agencies evaluate whether entry into the relevant market is so easy that a merger is not likely to enhance market power.

- Add new sections on powerful buyers, mergers between competing buyers, and partial acquisitions.

The 2010 guidelines are available on the Department of Justice's website at www.justice.gov/atr/public/guidelines/hmg-2010.html.

The Horizontal Merger Guidelines, which were first adopted in 1968, and revised in 1992, serve as an outline of the main analytical techniques, practices and enforcement policies the Department of Justice and the FTC use to evaluate mergers and acquisitions involving actual or potential competitors under federal antitrust laws.

The guidelines issued today take into account the legal and economic developments since the 1992 guidelines were issued. They are not intended to represent a change in the direction of merger review policy, but to offer more clarity on the merger review process to better assist the business community and, in particular, parties to mergers and acquisitions.

The Bank Merger Competitive Review guidelines, which the federal banking agencies and the Department of Justice developed in 1995 to facilitate the competitive review of bank mergers, remain unchanged. The Bank Merger Competitive Review guidelines can be found at www.justice.gov/atr/public/premerger.htm.

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Horizontal Merger Guidelines

U.S. Department of Justice

and the

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1. Overview

These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to mergers and acquisitions involving actual or potential competitors ("horizontal mergers") under the federal antitrust laws.[1] The relevant statutory provisions include 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. Most particularly, Section 7 of the Clayton Act prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral. Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.

These Guidelines describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition. They are not intended to describe how the Agencies analyze cases other than horizontal mergers. These Guidelines 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 in the horizontal merger context.

These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time. Where these Guidelines provide examples, they are illustrative and do not exhaust the applications of the relevant principle.[2]

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[1] These Guidelines replace the Horizontal Merger Guidelines issued in 1992, revised in 1997. They reflect the ongoing accumulation of experience at the Agencies. The Commentary on the Horizontal Merger Guidelines issued by the Agencies in 2006 remains a valuable supplement to these Guidelines. These Guidelines may be revised from time to time as necessary to reflect significant changes in enforcement policy, to clarify existing policy, or to reflect new learning. These Guidelines do not cover vertical or other types of non-horizontal acquisitions.

[2] These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring. Although relevant in that context, these Guidelines neither dictate nor exhaust the range of evidence the Agencies may introduce in litigation.

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. 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. In evaluating how a merger will likely change a firm's behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm.

A merger can enhance market power simply by eliminating competition between the merging parties. This effect can arise even if the merger causes no changes in the way other firms behave. Adverse competitive effects arising in this manner are referred to as "unilateral effects." A merger also can enhance market power by increasing the risk of coordinated, accommodating, or interdependent behavior among rivals. Adverse competitive effects arising in this manner are referred to as "coordinated effects." In any given case, either or both types of effects may be present, and the distinction between them may be blurred.

These Guidelines principally describe how the Agencies analyze mergers between rival suppliers that may enhance their market power as sellers. Enhancement of market power by sellers often elevates the prices charged to customers. For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. 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. Enhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct. Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers. The Agencies examine effects on either or both of the direct customers and the final consumers. The Agencies presume, absent convincing evidence to the contrary, that adverse effects on direct customers also cause adverse effects on final consumers.

Enhancement of market power by buyers, sometimes called "monopsony power," has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers. See Section 12.

2. Evidence of Adverse Competitive Effects

The Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition. This section discusses several categories and sources of evidence that the Agencies, in their experience, have found most informative in predicting the likely competitive effects of mergers. The list provided here is not exhaustive. In any given case, reliable evidence may be available in only some categories or from some sources. For each category of evidence, the Agencies consider evidence indicating that the merger may enhance competition as well as evidence indicating that it may lessen competition.

2.1 Types of Evidence

2.1.1 Actual Effects Observed in Consummated Mergers

When evaluating a consummated merger, the ultimate issue is not only whether adverse competitive effects have already resulted from the merger, but also whether such effects are likely to arise in the future. Evidence of observed post-merger price increases or other changes adverse to customers is given substantial weight. The Agencies evaluate whether such changes are anticompetitive effects resulting from the merger, in which case they can be dispositive. However, a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct. Consequently, the Agencies also consider the same types of evidence they consider when evaluating unconsummated mergers.

2.1.2 Direct Comparisons Based on Experience

The Agencies look for historical events, or "natural experiments," that are informative regarding the competitive effects of the merger. For example, the Agencies may examine the impact of recent mergers, entry, expansion, or exit in the relevant market. Effects of analogous events in similar markets may also be informative.

The Agencies also look for reliable evidence based on variations among similar markets. For example, if the merging firms compete in some locales but not others, comparisons of prices charged in regions where they do and do not compete may be informative regarding post-merger prices. In some cases, however, prices are set on such a broad geographic basis that such comparisons are not informative. The Agencies also may examine how prices in similar markets vary with the number of significant competitors in those markets.

2.1.3 Market Shares and Concentration in a Relevant Market

The Agencies give weight to the merging parties' market shares in a relevant market, the level of concentration, and the change in concentration caused by the merger. See Sections 4 and 5. Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

2.1.4 Substantial Head-to-Head Competition

The Agencies consider whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors. Such evidence can be especially relevant for evaluating adverse unilateral effects, which result directly from the loss of that competition. See Section 6. This evidence can also inform market definition. See Section 4.

2.1.5 Disruptive Role of a Merging Party

The Agencies consider whether a merger may lessen competition by eliminating a "maverick" firm, i.e., a firm that plays a disruptive role in the market to the benefit of customers. For example, if one of the merging firms has a strong incumbency position and the other merging firm threatens to

disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition. Likewise, one of the merging firms may have the incentive to take the lead in price cutting or other competitive conduct or to resist increases in industry prices. A firm that may discipline prices based on its ability and incentive to expand production rapidly using available capacity also can be a maverick, as can a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition.

2.2 Sources of Evidence

The Agencies consider many sources of evidence in their merger analysis. The most common sources of reasonably available and reliable evidence are the merging parties, customers, other industry participants, and industry observers.

2.2.1 Merging Parties

The Agencies typically obtain substantial information from the merging parties. This information can take the form of documents, testimony, or data, and can consist of descriptions of competitively relevant conditions or reflect actual business conduct and decisions. Documents created in the normal course are more probative than documents created as advocacy materials in merger review. Documents describing industry conditions can be informative regarding the operation of the market and how a firm identifies and assesses its rivals, particularly when business decisions are made in reliance on the accuracy of those descriptions. The business decisions taken by the merging firms also can be informative about industry conditions. For example, if a firm sets price well above incremental cost, that normally indicates either that the firm believes its customers are not highly sensitive to price (not in itself of antitrust concern, see Section 4.1.3[3]) or that the firm and its rivals are engaged in coordinated interaction (see Section 7). Incremental cost depends on the relevant increment in output as well as on the time period involved, and in the case of large increments and sustained changes in output it may include some costs that would be fixed for smaller increments of output or shorter time periods.

Explicit or implicit evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts after the merger, or explicit or implicit evidence that the ability to engage in such conduct motivated the merger, can be highly informative in evaluating the likely effects of a merger. Likewise, the Agencies look for reliable evidence that the merger is likely to result in efficiencies. The Agencies give careful consideration to the views of individuals whose responsibilities, expertise, and experience relating to the issues in question provide particular indicia of reliability. The financial terms of the transaction may also be informative regarding competitive effects. For example, a purchase price in excess of the acquired firm's stand-alone market value may indicate that the acquiring firm is paying a premium because it expects to be able to reduce competition or to achieve efficiencies.

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[3] High margins commonly arise for products that are significantly differentiated. Products involving substantial fixed costs typically will be developed only if suppliers expect there to be enough differentiation to support margins sufficient to cover those fixed costs. High margins can be consistent with incumbent firms earning competitive returns.

2.2.2 *Customers*

Customers can provide a variety of information to the Agencies, ranging from information about their own purchasing behavior and choices to their views about the effects of the merger itself.

Information from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant, especially when corroborated by other evidence such as historical purchasing patterns and practices. Customers also can provide valuable information about the impact of historical events such as entry by a new supplier.

The conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate competitive effects, because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers. In evaluating such evidence, the Agencies are mindful that customers may oppose, or favor, a merger for reasons unrelated to the antitrust issues raised by that merger.

When some customers express concerns about the competitive effects of a merger while others view the merger as beneficial or neutral, the Agencies take account of this divergence in using the information provided by customers and consider the likely reasons for such divergence of views. For example, if for regulatory reasons some customers cannot buy imported products, while others can, a merger between domestic suppliers may harm the former customers even if it leaves the more flexible customers unharmed. See Section 3.

When direct customers of the merging firms compete against one another in a downstream market, their interests may not be aligned with the interests of final consumers, especially if the direct customers expect to pass on any anticompetitive price increase. A customer that is protected from adverse competitive effects by a long-term contract, or otherwise relatively immune from the merger's harmful effects, may even welcome an anticompetitive merger that provides that customer with a competitive advantage over its downstream rivals.

> *Example 1:* As a result of the merger, Customer C will experience a price increase for an input used in producing its final product, raising its costs. Customer C's rivals use this input more intensively than Customer C, and the same price increase applied to them will raise their costs more than it raises Customer C's costs. On balance, Customer C may benefit from the merger even though the merger involves a substantial lessening of competition.

2.2.3 *Other Industry Participants and Observers*

Suppliers, indirect customers, distributors, other industry participants, and industry analysts can also provide information helpful to a merger inquiry. The interests of firms selling products complementary to those offered by the merging firms often are well aligned with those of customers, making their informed views valuable.

Information from firms that are rivals to the merging parties can help illuminate how the market operates. The interests of rival firms often diverge from the interests of customers, since customers normally lose, but rival firms gain, if the merged entity raises its prices. For that reason, the Agencies do not routinely rely on the overall views of rival firms regarding the competitive effects of the

merger. However, rival firms may provide relevant facts, and even their overall views may be instructive, especially in cases where the Agencies are concerned that the merged entity may engage in exclusionary conduct.

> *Example 2:* Merging Firms A and B operate in a market in which network effects are significant, implying that any firm's product is significantly more valuable if it commands a large market share or if it is interconnected with others that in aggregate command such a share. Prior to the merger, they and their rivals voluntarily interconnect with one another. The merger would create an entity with a large enough share that a strategy of ending voluntary interconnection would have a dangerous probability of creating monopoly power in this market. The interests of rivals and of consumers would be broadly aligned in preventing such a merger.

3. Targeted Customers and Price Discrimination

When examining possible adverse competitive effects from a merger, the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products. Such differential impacts are possible when sellers can discriminate, e.g., by profitably raising price to certain targeted customers but not to others. The possibility of price discrimination influences market definition (see Section 4), the measurement of market shares (see Section 5), and the evaluation of competitive effects (see Sections 6 and 7).

When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers. A price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would substitute away. When discrimination is reasonably likely, the Agencies may evaluate competitive effects separately by type of customer. The Agencies may have access to information unavailable to customers that is relevant to evaluating whether discrimination is reasonably likely.

For price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage.

First, the suppliers engaging in price discrimination must be able to price differently to targeted customers than to other customers. This may involve identification of individual customers to which different prices are offered or offering different prices to different types of customers based on observable characteristics.

> *Example 3:* Suppliers can distinguish large buyers from small buyers. Large buyers are more likely than small buyers to self-supply in response to a significant price increase. The merger may lead to price discrimination against small buyers, harming them, even if large buyers are not harmed. Such discrimination can occur even if there is no discrete gap in size between the classes of large and small buyers.

In other cases, suppliers may be unable to distinguish among different types of customers but can offer multiple products that sort customers based on their purchase decisions.

Second, the targeted customers must not be able to defeat the price increase of concern by arbitrage, e.g., by purchasing indirectly from or through other customers. Arbitrage may be difficult if it would void warranties or make service more difficult or costly for customers. Arbitrage is inherently impossible for many services. Arbitrage between customers at different geographic locations may be

impractical due to transportation costs. Arbitrage on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a discriminatory pricing strategy.

4. Market Definition

When the Agencies identify a potential competitive concern with a horizontal merger, market definition plays two roles. First, market definition helps specify the line of commerce and section of the country in which the competitive concern arises. In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Second, market definition allows the Agencies to identify market participants and measure market shares and market concentration. See Section 5. The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.

The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.

Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects. For example, evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market. Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.

Where analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects.

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. The responsive actions of suppliers are also important in competitive analysis. They are considered in these Guidelines in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.

Customers often confront a range of possible substitutes for the products of the merging firms. Some substitutes may be closer, and others more distant, either geographically or in terms of product attributes and perceptions. Additionally, customers may assess the proximity of different products differently. When products or suppliers in different geographic areas are substitutes for one another to varying degrees, defining a market to include some substitutes and exclude others is inevitably a simplification that cannot capture the full variation in the extent to which different products compete against each other. The principles of market definition outlined below seek to make this inevitable simplification as useful and informative as is practically possible. Relevant markets need not have precise metes and bounds.

Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market. Although excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance as proportional to their shares in an expanded market.

> *Example 4:* Firms A and B, sellers of two leading brands of motorcycles, propose to merge. If Brand A motorcycle prices were to rise, some buyers would substitute to Brand B, and some others would substitute to cars. However, motorcycle buyers see Brand B motorcycles as much more similar to Brand A motorcycles than are cars. Far more cars are sold than motorcycles. Evaluating shares in a market that includes cars would greatly underestimate the competitive significance of Brand B motorcycles in constraining Brand A's prices and greatly overestimate the significance of cars.

Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. As a result, properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers. However, a group of products is too narrow to constitute a relevant market if competition from products outside that group is so ample that even the complete elimination of competition within the group would not significantly harm either direct customers or downstream consumers. The hypothetical monopolist test (see Section 4.1.1) is designed to ensure that candidate markets are not overly narrow in this respect.

The Agencies implement these principles of market definition flexibly when evaluating different possible candidate markets. Relevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term "market."

Section 4.1 describes the principles that apply to product market definition, and gives guidance on how the Agencies most often apply those principles. Section 4.2 describes how the same principles apply to geographic market definition. Although discussed separately for simplicity of exposition, the principles described in Sections 4.1 and 4.2 are combined to define a relevant market, which has both a product and a geographic dimension. In particular, the hypothetical monopolist test is applied to a group of products together with a geographic region to determine a relevant market.

4.1 Product Market Definition

When a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the Agencies define a relevant product market around Product A to evaluate the importance of that competition. Such a relevant product market consists of a group of substitute products including Product A. Multiple relevant product markets may thus be identified.

4.1.1 The Hypothetical Monopolist Test

The Agencies employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets. The Agencies use the

hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms.

The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.[4] For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. The SSNIP is employed solely as a methodological tool for performing the hypothetical monopolist test; it is not a tolerance level for price increases resulting from a merger.

Groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose. The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase.

> *Example 5:* Products A and B are being tested as a candidate market. Each sells for $100, has an incremental cost of $60, and sells 1200 units. For every dollar increase in the price of Product A, for any given price of Product B, Product A loses twenty units of sales to products outside the candidate market and ten units of sales to Product B, and likewise for Product B. Under these conditions, economic analysis shows that a hypothetical profit-maximizing monopolist controlling Products A and B would raise both of their prices by ten percent, to $110. Therefore, Products A and B satisfy the hypothetical monopolist test using a five percent SSNIP, and indeed for any SSNIP size up to ten percent. This is true even though two-thirds of the sales lost by one product when it raises its price are diverted to products outside the relevant market.

When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product. The third product is a closer substitute if, in response to a SSNIP on the first product, greater revenues are diverted to the third product than to the second product.

> *Example 6:* In Example 5, suppose that half of the unit sales lost by Product A when it raises its price are diverted to Product C, which also has a price of $100, while one-third are diverted to Product B. Product C is a closer substitute for Product A than is Product B. Thus Product C will normally be included in the relevant market, even though Products A and B together satisfy the hypothetical monopolist test.

The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market

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[4] If the pricing incentives of the firms supplying the products in the candidate market differ substantially from those of the hypothetical monopolist, for reasons other than the latter's control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment.

satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects. Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.

> *Example 7:* In Example 4, including cars in the market will lead to misleadingly small market shares for motorcycle producers. Unless motorcycles fail the hypothetical monopolist test, the Agencies would not include cars in the market in analyzing this motorcycle merger.

4.1.2 Benchmark Prices and SSNIP Size

The Agencies apply the SSNIP starting from prices that would likely prevail absent the merger. If prices are not likely to change absent the merger, these benchmark prices can reasonably be taken to be the prices prevailing prior to the merger.[5] If prices are likely to change absent the merger, e.g., because of innovation or entry, the Agencies may use anticipated future prices as the benchmark for the test. If prices might fall absent the merger due to the breakdown of pre-merger coordination, the Agencies may use those lower prices as the benchmark for the test. In some cases, the techniques employed by the Agencies to implement the hypothetical monopolist test focus on the difference in incentives between pre-merger firms and the hypothetical monopolist and do not require specifying the benchmark prices.

The 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 properly directs attention to the effects of price changes commensurate with those that might result from a significant lessening of competition caused by the merger. 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.

The Agencies most often use a SSNIP of five percent of the price paid by customers for the products or services to which the merging firms contribute value. However, what constitutes a “small but significant” increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms’ positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five percent. Where explicit or implicit prices for the firms’ specific contribution to value can be identified with reasonable clarity, the Agencies may base the SSNIP on those prices.

> *Example 8:* In a merger between two oil pipelines, the SSNIP would be based on the price charged for transporting the oil, not on the price of the oil itself. If pipelines buy the oil at one end and sell it at the other, the price charged for transporting the oil is implicit, equal to the difference between the price paid for oil at the input end and the price charged for oil at the output end. The relevant product sold by the pipelines is better described as “pipeline transportation of oil from point A to point B” than as “oil at point B.”

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[5] Market definition for the evaluation of non-merger antitrust concerns such as monopolization or facilitating practices will differ in this respect if the effects resulting from the conduct of concern are already occurring at the time of evaluation.

Example 9: In a merger between two firms that install computers purchased from third parties, the SSNIP would be based on their fees, not on the price of installed computers. If these firms purchase the computers and charge their customers one package price, the implicit installation fee is equal to the package charge to customers less the price of the computers.

Example 10: In Example 9, suppose that the prices paid by the merging firms to purchase computers are opaque, but account for at least ninety-five percent of the prices they charge for installed computers, with profits or implicit fees making up five percent of those prices at most. A five percent SSNIP on the total price paid by customers would at least double those fees or profits. Even if that would be unprofitable for a hypothetical monopolist, a significant increase in fees might well be profitable. If the SSNIP is based on the total price paid by customers, a lower percentage will be used.

4.1.3 Implementing the Hypothetical Monopolist Test

The hypothetical monopolist's incentive to raise prices depends both on the extent to which customers would likely substitute away from the products in the candidate market in response to such a price increase and on the profit margins earned on those products. The profit margin on incremental units is the difference between price and incremental cost on those units. The Agencies often estimate incremental costs, for example using merging parties' documents or data the merging parties use to make business decisions. Incremental cost is measured over the change in output that would be caused by the price increase under consideration.

In considering customers' likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to:

- how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions;
- information from buyers, including surveys, concerning how they would respond to price changes;
- the conduct of industry participants, notably:
    - sellers' business decisions or business documents indicating sellers' informed beliefs concerning how customers would substitute among products in response to relative changes in price;
    - industry participants' behavior in tracking and responding to price changes by some or all rivals;
- objective information about product characteristics and the costs and delays of switching products, especially switching from products in the candidate market to products outside the candidate market;
- the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market, with a higher recapture percentage making a price increase more profitable for the hypothetical monopolist;
- evidence from other industry participants, such as sellers of complementary products;

- legal or regulatory requirements; and
- the influence of downstream competition faced by customers in their output markets.

When the necessary data are available, the Agencies also may consider a "critical loss analysis" to assess the extent to which it corroborates inferences drawn from the evidence noted above. Critical loss analysis asks whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits. While this "breakeven" analysis differs from the profit-maximizing analysis called for by the hypothetical monopolist test in Section 4.1.1, merging parties sometimes present this type of analysis to the Agencies. A price increase raises profits on sales made at the higher price, but this will be offset to the extent customers substitute away from products in the candidate market. Critical loss analysis compares the magnitude of these two offsetting effects resulting from the price increase. The "critical loss" is defined as the number of lost unit sales that would leave profits unchanged. The "predicted loss" is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase. The price increase raises the hypothetical monopolist's profits if the predicted loss is less than the critical loss.

The Agencies consider all of the evidence of customer substitution noted above in assessing the predicted loss. The Agencies require that estimates of the predicted loss be consistent with that evidence, including the pre-merger margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction (see Section 7), high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price.[6] Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture percentage necessary for the candidate market to satisfy the hypothetical monopolist test.

Even when the evidence necessary to perform the hypothetical monopolist test quantitatively is not available, the conceptual framework of the test provides a useful methodological tool for gathering and analyzing evidence pertinent to customer substitution and to market definition. The Agencies follow the hypothetical monopolist test to the extent possible given the available evidence, bearing in mind that the ultimate goal of market definition is to help determine whether the merger may substantially lessen competition.

4.1.4 Product Market Definition with Targeted Customers

If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP. Markets to serve targeted customers are also known as price discrimination markets. In practice, the Agencies identify price discrimination markets only where they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers.

> *Example 11:* Glass containers have many uses. In response to a price increase for glass containers, some users would substitute substantially to plastic or metal containers, but baby food manufacturers would not. If a

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6 While margins are important for implementing the hypothetical monopolist test, high margins are not in themselves of antitrust concern.

hypothetical monopolist could price separately and limit arbitrage, baby food manufacturers would be vulnerable to a targeted increase in the price of glass containers. The Agencies could define a distinct market for glass containers used to package baby food.

The Agencies also often consider markets for targeted customers when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product. If prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are as narrow as individual customers (see also Section 6.2 on bargaining and auctions). Nonetheless, the Agencies often define markets for groups of targeted customers, i.e., by type of customer, rather than by individual customer. By so doing, the Agencies are able to rely on aggregated market shares that can be more helpful in predicting the competitive effects of the merger.

4.2 Geographic Market Definition

The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Both supplier and customer locations can affect this. The Agencies apply the principles of market definition described here and in Section 4.1 to define a relevant market with a geographic dimension as well as a product dimension.

The scope of geographic markets often depends on transportation costs. Other factors such as language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability may impede long-distance or international transactions. The competitive significance of foreign firms may be assessed at various exchange rates, especially if exchange rates have fluctuated in the recent past.

In the absence of price discrimination based on customer location, the Agencies normally define geographic markets based on the locations of suppliers, as explained in subsection 4.2.1. In other cases, notably if price discrimination based on customer location is feasible as is often the case when delivered pricing is commonly used in the industry, the Agencies may define geographic markets based on the locations of customers, as explained in subsection 4.2.2.

4.2.1 Geographic Markets Based on the Locations of Suppliers

Geographic markets based on the locations of suppliers encompass the region from which sales are made. Geographic markets of this type often apply when customers receive goods or services at suppliers' locations. Competitors in the market are firms with relevant production, sales, or service facilities in that region. Some customers who buy from these firms may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future producer of the relevant product(s) located in the region would impose at least a SSNIP from at least one location, including at least one location of one of the merging firms. In this exercise the terms of sale for all products produced elsewhere are held constant. A single firm may operate in a number of different geographic markets, even for a single product.

Example 12: The merging parties both have manufacturing plants in City X. The relevant product is expensive to transport and suppliers price their products for pickup at their locations. Rival plants are some distance away in City Y. A hypothetical monopolist controlling all plants in City X could profitably impose a SSNIP at these plants. Competition from more distant plants would not defeat the price increase because supplies coming from more distant plants require expensive transportation. The relevant geographic market is defined around the plants in City X.

When the geographic market is defined based on supplier locations, sales made by suppliers located in the geographic market are counted, regardless of the location of the customer making the purchase.

In considering likely reactions of customers to price increases for the relevant product(s) imposed in a candidate geographic market, the Agencies consider any reasonably available and reliable evidence, including:

- how customers have shifted purchases in the past between different geographic locations in response to relative changes in price or other terms and conditions;
- the cost and difficulty of transporting the product (or the cost and difficulty of a customer traveling to a seller's location), in relation to its price;
- whether suppliers need a presence near customers to provide service or support;
- evidence on whether sellers base business decisions on the prospect of customers switching between geographic locations in response to relative changes in price or other competitive variables;
- the costs and delays of switching from suppliers in the candidate geographic market to suppliers outside the candidate geographic market; and
- the influence of downstream competition faced by customers in their output markets.

4.2.2 Geographic Markets Based on the Locations of Customers

When the hypothetical monopolist could discriminate based on customer location, the Agencies may define geographic markets based on the locations of targeted customers.[7] Geographic markets of this type often apply when suppliers deliver their products or services to customers' locations. Geographic markets of this type encompass the region into which sales are made. Competitors in the market are firms that sell to customers in the specified region. Some suppliers that sell into the relevant market may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region would impose at least a SSNIP on some customers in that region. A region forms a relevant geographic market if this price increase would not be defeated by substitution away from the relevant product or by arbitrage,

[7] For customers operating in multiple locations, only those customer locations within the targeted zone are included in the market.

e.g., customers in the region travelling outside it to purchase the relevant product. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

> *Example 13:* Customers require local sales and support. Suppliers have sales and service operations in many geographic areas and can discriminate based on customer location. The geographic market can be defined around the locations of customers.

> *Example 14:* Each merging firm has a single manufacturing plant and delivers the relevant product to customers in City X and in City Y. The relevant product is expensive to transport. The merging firms' plants are by far the closest to City X, but no closer to City Y than are numerous rival plants. This fact pattern suggests that customers in City X may be harmed by the merger even if customers in City Y are not. For that reason, the Agencies consider a relevant geographic market defined around customers in City X. Such a market could be defined even if the region around the merging firms' plants would not be a relevant geographic market defined based on the location of sellers because a hypothetical monopolist controlling all plants in that region would find a SSNIP imposed on all of its customers unprofitable due to the loss of sales to customers in City Y.

When the geographic market is defined based on customer locations, sales made to those customers are counted, regardless of the location of the supplier making those sales.

> *Example 15:* Customers in the United States must use products approved by U.S. regulators. Foreign customers use products not approved by U.S. regulators. The relevant product market consists of products approved by U.S. regulators. The geographic market is defined around U.S. customers. Any sales made to U.S. customers by foreign suppliers are included in the market, and those foreign suppliers are participants in the U.S. market even though located outside it.

5. Market Participants, Market Shares, and Market Concentration

The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects. The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.

Market shares can directly influence firms' competitive incentives. For example, if a price reduction to gain new customers would also apply to a firm's existing customers, a firm with a large market share may be more reluctant to implement a price reduction than one with a small share. Likewise, a firm with a large market share may not feel pressure to reduce price even if a smaller rival does. Market shares also can reflect firms' capabilities. For example, a firm with a large market share may be able to expand output rapidly by a larger absolute amount than can a small firm. Similarly, a large market share tends to indicate low costs, an attractive product, or both.

5.1 Market Participants

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 supply responses with direct competitive impact in the event of a SSNIP, without incurring

significant sunk costs, are also considered market participants. These firms are termed “rapid entrants.” Sunk costs are entry or exit costs that cannot be recovered outside the relevant market. Entry that would take place more slowly in response to adverse competitive effects, or that requires firms to incur significant sunk costs, is considered in Section 9.

Firms that produce the relevant product but do not sell it in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are close to the geographic market.

> *Example 16:* Farm A grows tomatoes halfway between Cities X and Y. Currently, it ships its tomatoes to City X because prices there are two percent higher. Previously it has varied the destination of its shipments in response to small price variations. Farm A would likely be a rapid entrant participant in a market for tomatoes in City Y.

> *Example 17:* Firm B has bid multiple times to supply milk to School District S, and actually supplies milk to schools in some adjacent areas. It has never won a bid in School District S, but is well qualified to serve that district and has often nearly won. Firm B would be counted as a rapid entrant in a market for school milk in School District S.

More generally, if the relevant market is defined around targeted customers, firms that produce relevant products but do not sell them to those customers may be rapid entrants if they can easily and rapidly begin selling to the targeted customers.

Firms that clearly possess the necessary assets to supply into the relevant market rapidly may also be rapid entrants. In markets for relatively homogeneous goods where a supplier’s ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available “swing” capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant.[8] However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm’s possession of idle or swing capacity alone does not make that firm a rapid entrant.

5.2 Market Shares

The Agencies normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data. The Agencies also calculate market shares for other market participants if this can be done to reliably reflect their competitive significance.

Market concentration and market share data are normally based on historical evidence. However, recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm’s future competitive significance. The Agencies consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agencies may conclude that that firm’s historical market share

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[8] If this type of supply side substitution is nearly universal among the firms selling one or more of a group of products, the Agencies may use an aggregate description of markets for those products as a matter of convenience.

overstates its future competitive significance. The Agencies may project historical market shares into the foreseeable future when this can be done reliably.

The Agencies measure market shares based on the best available indicator of firms' future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, annual data are used, but where individual transactions are large and infrequent so annual data may be unrepresentative, the Agencies may measure market shares over a longer period of time.

In most contexts, the Agencies measure each firm's market share based on its actual or projected revenues in the relevant market. Revenues in the relevant market tend to be the best measure of attractiveness to customers, since they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers. In cases where one unit of a low-priced product can substitute for one unit of a higher-priced product, unit sales may measure competitive significance better than revenues. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively few revenues. In cases where customers sign long-term contracts, face switching costs, or tend to re-evaluate their suppliers only occasionally, revenues earned from recently acquired customers may better reflect the competitive significance of suppliers than do total revenues.

In markets for homogeneous products, a firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in the relevant market in response to a price increase or output reduction by others in that market. As a result, a firm's competitive significance may depend upon its level of readily available capacity to serve the relevant market if that capacity is efficient enough to make such expansion profitable. In such markets, capacities or reserves may better reflect the future competitive significance of suppliers than revenues, and the Agencies may calculate market shares using those measures. Market participants that are not current producers may then be assigned positive market shares, but only if a measure of their competitive significance properly comparable to that of current producers is available. When market shares are measured based on firms' readily available capacities, the Agencies do not include capacity that is committed or so profitably employed outside the relevant market, or so high-cost, that it would not likely be used to respond to a SSNIP in the relevant market.

> *Example 18:* The geographic market is defined around customers in the United States. Firm X produces the relevant product outside the United States, and most of its sales are made to customers outside the United States. In most contexts, Firm X's market share will be based on its sales to U.S. customers, not its total sales or total capacity. However, if the relevant product is homogeneous, and if Firm X would significantly expand sales to U.S. customers rapidly and without incurring significant sunk costs in response to a SSNIP, the Agencies may base Firm X's market share on its readily available capacity to serve U.S. customers.

When the Agencies define markets serving targeted customers, these same principles are used to measure market shares, as they apply to those customers. In most contexts, each firm's market share is based on its actual or projected revenues from the targeted customers. However, the Agencies may instead measure market shares based on revenues from a broader group of customers if doing so would more accurately reflect the competitive significance of different suppliers in the relevant market. Revenues earned from a broader group of customers may also be used when better data are thereby available.

5.3 Market Concentration

Market concentration is often one useful indicator of likely competitive effects of a merger. In evaluating market concentration, the Agencies consider both the post-merger level of market concentration and the change in concentration resulting from a merger. Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger. They are used in conjunction with other evidence of competitive effects. See Sections 6 and 7.

In analyzing mergers between an incumbent and a recent or potential entrant, to the extent the Agencies use the change in concentration to evaluate competitive effects, they will do so using projected market shares. A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others.

The Agencies give more weight to market concentration when market shares have been stable over time, especially in the face of historical changes in relative prices or costs. If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger. By contrast, even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings. However, if competition by one of the merging firms has significantly contributed to these fluctuations, perhaps because it has acted as a maverick, the Agencies will consider whether the merger will enhance market power by combining that firm with one of its significant rivals.

The Agencies may measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure revenues in the relevant market. The Agencies also may consider the combined market share of the merging firms as an indicator of the extent to which others in the market may not be able readily to replace competition between the merging firms that is lost through the merger.

The Agencies often calculate the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual firms' market shares,[9] and thus gives proportionately greater weight to the larger market shares. When using the HHI, the Agencies

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[9] For example, a market consisting of four firms with market shares of thirty percent, thirty percent, twenty percent, and twenty percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about firms with small shares is not critical because such firms do not affect the HHI significantly.

consider both the post-merger level of the HHI and the increase in the HHI resulting from the merger. The increase in the HHI is equal to twice the product of the market shares of the merging firms.[10]

Based on their experience, the Agencies generally classify markets into three types:

- Unconcentrated Markets: HHI below 1500
- Moderately Concentrated Markets: HHI between 1500 and 2500
- Highly Concentrated Markets: HHI above 2500

The Agencies employ the following general standards for the relevant markets they have defined:

- *Small Change in Concentration:* Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Unconcentrated Markets:* Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Moderately Concentrated Markets:* Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
- *Highly Concentrated Markets:* Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration. The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns and the greater is the likelihood that the Agencies will request additional information to conduct their analysis.

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[10] For example, the merger of firms with shares of five percent and ten percent of the market would increase the HHI by 100 ($5 \times 10 \times 2 = 100$).

6. Unilateral Effects

The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition. Such unilateral effects are most apparent in a merger to monopoly in a relevant market, but are by no means limited to that case. Whether cognizable efficiencies resulting from the merger are likely to reduce or reverse adverse unilateral effects is addressed in Section 10.

Several common types of unilateral effects are discussed in this section. Section 6.1 discusses unilateral price effects in markets with differentiated products. Section 6.2 discusses unilateral effects in markets where sellers negotiate with buyers or prices are determined through auctions. Section 6.3 discusses unilateral effects relating to reductions in output or capacity in markets for relatively homogeneous products. Section 6.4 discusses unilateral effects arising from diminished innovation or reduced product variety. These effects do not exhaust the types of possible unilateral effects; for example, exclusionary unilateral effects also can arise.

A merger may result in different unilateral effects along different dimensions of competition. For example, a merger may increase prices in the short term but not raise longer-term concerns about innovation, either because rivals will provide sufficient innovation competition or because the merger will generate cognizable research and development efficiencies. See Section 10.

6.1 Pricing of Differentiated Products

In differentiated product industries, some products can be very close substitutes and compete strongly with each other, while other products are more distant substitutes and compete less strongly. For example, one high-end product may compete much more directly with another high-end product than with any low-end product.

A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.

The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice. The Agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. This includes documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys. The types of evidence relied on often overlap substantially with the types of evidence of customer substitution relevant to the hypothetical monopolist test. See Section 4.1.1.

Substantial unilateral price elevation post-merger for a product formerly sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view

products formerly sold by the other merging firm as their next-best choice. However, unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority. For this purpose, incremental cost is measured over the change in output that would be caused by the price change considered. A merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner.

> *Example 19:* In Example 5, the merged entity controlling Products A and B would raise prices ten percent, given the product offerings and prices of other firms. In that example, one-third of the sales lost by Product A when its price alone is raised are diverted to Product B. Further analysis is required to account for repositioning, entry, and efficiencies.

In some cases, the Agencies may seek to quantify the extent of direct competition between a product sold by one merging firm and a second product sold by the other merging firm by estimating the diversion ratio from the first product to the second product. The diversion ratio is the fraction of unit sales lost by the first product due to an increase in its price that would be diverted to the second product. Diversion ratios between products sold by one merging firm and products sold by the other merging firm can be very informative for assessing unilateral price effects, with higher diversion ratios indicating a greater likelihood of such effects. Diversion ratios between products sold by merging firms and those sold by non-merging firms have at most secondary predictive value.

Adverse unilateral price effects can arise when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm and thereby divert sales to products previously sold by the other merging firm, boosting the profits on the latter products. Taking as given other prices and product offerings, that boost to profits is equal to the value to the merged firm of the sales diverted to those products. The value of sales diverted to a product is equal to the number of units diverted to that product multiplied by the margin between price and incremental cost on that product. In some cases, where sufficient information is available, the Agencies assess the value of diverted sales, which can serve as an indicator of the upward pricing pressure on the first product resulting from the merger. Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration. The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products. If the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.[11]

Where sufficient data are available, the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger. These models often include independent price responses by non-merging firms. They also can incorporate merger-specific efficiencies. These merger simulation methods need not rely on market definition. The Agencies do not treat merger simulation evidence as conclusive in itself, and they place more weight on whether their merger simulations consistently predict substantial price increases than on the precise prediction of any single simulation.

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[11] For this purpose, the value of diverted sales is measured in proportion to the lost revenues attributable to the reduction in unit sales resulting from the price increase. Those lost revenues equal the reduction in the number of units sold of that product multiplied by that product's price.

A merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes for the products offered by the merging firms. In some cases, non-merging firms may be able to reposition their products to offer close substitutes for the products offered by the merging firms. Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency. See Section 9. The Agencies consider whether repositioning would be sufficient to deter or counteract what otherwise would be significant anticompetitive unilateral effects from a differentiated products merger.

6.2 Bargaining and Auctions

In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade. In that process, buyers commonly negotiate with more than one seller, and may play sellers off against one another. Some highly structured forms of such competition are known as auctions. Negotiations often combine aspects of an auction with aspects of one-on-one negotiation, although pure auctions are sometimes used in government procurement and elsewhere.

A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger. The Agencies analyze unilateral effects of this type using similar approaches to those described in Section 6.1.

Anticompetitive unilateral effects in these settings are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business. These effects also are likely to be greater, the greater advantage the runner-up merging firm has over other suppliers in meeting customers' needs. These effects also tend to be greater, the more profitable were the pre-merger winning bids. All of these factors are likely to be small if there are many equally placed bidders.

The 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. For example, when the merging sellers are likely to know which buyers they are best and second best placed to serve, any anticompetitive unilateral effects are apt to be targeted at those buyers; when sellers are less well informed, such effects are more apt to be spread over a broader class of buyers.

6.3 Capacity and Output for Homogeneous Products

In markets involving relatively undifferentiated products, the Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price. A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another so as to raise the price in the former market. The competitive analyses of these alternative modes of output suppression may differ.

A unilateral output suppression strategy is more likely to be profitable when (1) the merged firm's market share is relatively high; (2) the share of the merged firm's output already committed for sale at prices unaffected by the output suppression is relatively low; (3) the margin on the suppressed output is relatively low; (4) the supply responses of rivals are relatively small; and (5) the market elasticity of demand is relatively low.

A merger may provide the merged firm a larger base of sales on which to benefit from the resulting price rise, or it may eliminate a competitor that otherwise could have expanded its output in response to the price rise.

> *Example 20:* Firms A and B both produce an industrial commodity and propose to merge. The demand for this commodity is insensitive to price. Firm A is the market leader. Firm B produces substantial output, but its operating margins are low because it operates high-cost plants. The other suppliers are operating very near capacity. The merged firm has an incentive to reduce output at the high-cost plants, perhaps shutting down some of that capacity, thus driving up the price it receives on the remainder of its output. The merger harms customers, notwithstanding that the merged firm shifts some output from high-cost plants to low-cost plants.

In some cases, a merger between a firm with a substantial share of the sales in the market and a firm with significant excess capacity to serve that market can make an output suppression strategy profitable.[12] This can occur even if the firm with the excess capacity has a relatively small share of sales, if that firm's ability to expand, and thus keep price from rising, has been making an output suppression strategy unprofitable for the firm with the larger market share.

6.4 Innovation and Product Variety

Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.

The first of these effects is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm. The second, longer-run effect is most likely to occur if at least one of the merging firms has capabilities that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm. The Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.

The Agencies evaluate the extent to which successful innovation by one merging firm is likely to take sales from the other, and the extent to which post-merger incentives for future innovation will be lower than those that would prevail in the absence of the merger. The Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together

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[12] Such a merger also can cause adverse coordinated effects, especially if the acquired firm with excess capacity was disrupting effective coordination.

complementary capabilities that cannot be otherwise combined or for some other merger-specific reason. See Section 10.

The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties. Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.

If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product. If there is evidence of such an effect, the Agencies may inquire whether the reduction in variety is largely due to a loss of competitive incentives attributable to the merger. An anticompetitive incentive to eliminate a product as a result of the merger is greater and more likely, the larger is the share of profits from that product coming at the expense of profits from products sold by the merger partner. Where a merger substantially reduces competition by bringing two close substitute products under common ownership, and one of those products is eliminated, the merger will often also lead to a price increase on the remaining product, but that is not a necessary condition for anticompetitive effect.

> *Example 21:* Firm A sells a high-end product at a premium price. Firm B sells a mid-range product at a lower price, serving customers who are more price sensitive. Several other firms have low-end products. Firms A and B together have a large share of the relevant market. Firm A proposes to acquire Firm B and discontinue Firm B's product. Firm A expects to retain most of Firm B's customers. Firm A may not find it profitable to raise the price of its high-end product after the merger, because doing so would reduce its ability to retain Firm B's more price-sensitive customers. The Agencies may conclude that the withdrawal of Firm B's product results from a loss of competition and materially harms customers.

7. Coordinated Effects

A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm's incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.

Coordinated interaction includes a range of conduct. Coordinated interaction can involve the explicit negotiation of a common understanding of how firms will compete or refrain from competing. Such conduct typically would itself violate the antitrust laws. Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction. Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by

retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms. Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.

The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals' responses to a price change or other competitive initiative. Under some circumstances, a merger can result in market concentration sufficient to strengthen such responses or enable multiple firms in the market to predict them more confidently, thereby affecting the competitive incentives of multiple firms in the market, not just the merged firm.

7.1 Impact of Merger on Coordinated Interaction

The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction. The Agencies seek to identify how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct. There are, however, numerous forms of coordination, and the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof. Therefore, the Agencies evaluate the risk of coordinated effects using measures of market concentration (see Section 5) in conjunction with an assessment of whether a market is vulnerable to coordinated conduct. See Section 7.2. The analysis in Section 7.2 applies to moderately and highly concentrated markets, as unconcentrated markets are unlikely to be vulnerable to coordinated conduct.

Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place. The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm (see Section 2.1.5) in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.

7.2 Evidence a Market is Vulnerable to Coordinated Conduct

The Agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have since changed significantly. Previous express collusion in another geographic market will have the same weight if the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market. Failed previous attempts at collusion in the relevant market suggest that successful collusion was difficult pre-merger but not so difficult as to deter attempts, and a merger may tend to make success more likely. Previous collusion or attempted collusion in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market.

A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals. This is more likely to be the case if the terms offered to customers are relatively transparent. Price transparency can be greater for relatively homogeneous products. Even if terms of dealing are not transparent, transparency regarding the identities of the firms serving particular customers can give rise to coordination, e.g., through customer or territorial allocation. Regular monitoring by suppliers of one another's prices or customers can indicate that the terms offered to customers are relatively transparent.

A market typically is more vulnerable to coordinated conduct if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case, the stronger and faster are the responses the firm anticipates from its rivals. The firm is more likely to anticipate strong responses if there are few significant competitors, if products in the relevant market are relatively homogeneous, if customers find it relatively easy to switch between suppliers, or if suppliers use meeting-competition clauses.

A firm is more likely to be deterred from making competitive initiatives by whatever responses occur if sales are small and frequent rather than via occasional large and long-term contracts or if relatively few customers will switch to it before rivals are able to respond. A firm is less likely to be deterred by whatever responses occur if the firm has little stake in the status quo. For example, a firm with a small market share that can quickly and dramatically expand, constrained neither by limits on production nor by customer reluctance to switch providers or to entrust business to a historically small provider, is unlikely to be deterred. Firms are also less likely to be deterred by whatever responses occur if competition in the relevant market is marked by leapfrogging technological innovation, so that responses by competitors leave the gains from successful innovation largely intact.

A market is more apt to be vulnerable to coordinated conduct if the firm initiating a price increase will lose relatively few customers after rivals respond to the increase. Similarly, a market is more apt to be vulnerable to coordinated conduct if a firm that first offers a lower price or improved product to customers will retain relatively few customers thus attracted away from its rivals after those rivals respond.

The Agencies regard coordinated interaction as more likely, the more the participants stand to gain from successful coordination. Coordination generally is more profitable, the lower is the market elasticity of demand.

Coordinated conduct can harm customers even if not all firms in the relevant market engage in the coordination, but significant harm normally is likely only if a substantial part of the market is subject to such conduct. The prospect of harm depends on the collective market power, in the relevant market, of firms whose incentives to compete are substantially weakened by coordinated conduct. This collective market power is greater, the lower is the market elasticity of demand. This collective market power is diminished by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market.

Buyer characteristics and the nature of the procurement process can affect coordination. For example, sellers may have the incentive to bid aggressively for a large contract even if they expect strong responses by rivals. This is especially the case for sellers with small market shares, if they can realistically win such large contracts. In some cases, a large buyer may be able to strategically undermine coordinated conduct, at least as it pertains to that buyer's needs, by choosing to put up for bid a few large contracts rather than many smaller ones, and by making its procurement decisions opaque to suppliers.

8. Powerful Buyers

Powerful buyers are often able to negotiate favorable terms with their suppliers. Such terms may reflect the lower costs of serving these buyers, but they also can reflect price discrimination in their favor.

The Agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices. This can occur, for example, if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry, or if the conduct or presence of large buyers undermines coordinated effects. However, the Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger. Even buyers that can negotiate favorable terms may be harmed by an increase in market power. The Agencies examine the choices available to powerful buyers and how those choices likely would change due to the merger. Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.

> *Example 22:* Customer C has been able to negotiate lower pre-merger prices than other customers by threatening to shift its large volume of purchases from one merging firm to the other. No other suppliers are as well placed to meet Customer C's needs for volume and reliability. The merger is likely to harm Customer C. In this situation, the Agencies could identify a price discrimination market consisting of Customer C and similarly placed customers. The merger threatens to end previous price discrimination in their favor.

Furthermore, even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers.

> *Example 23:* In Example 22, if Customer C instead obtained the lower pre-merger prices based on a credible threat to supply its own needs, or to sponsor new entry, Customer C might not be harmed. However, even in this case, other customers may still be harmed.

9. Entry

The analysis of competitive effects in Sections 6 and 7 focuses on current participants in the relevant market. That analysis may also include some forms of entry. Firms that would rapidly and easily enter the market in response to a SSNIP are market participants and may be assigned market shares. See Sections 5.1 and 5.2. Firms that have, prior to the merger, committed to entering the market also will normally be treated as market participants. See Section 5.1. This section concerns entry or adjustments to pre-existing entry plans that are induced by the merger.

As part of their full assessment of competitive effects, the Agencies consider entry into the relevant market. The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.

The Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence. Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult. Market values of incumbent firms greatly exceeding the replacement costs of their tangible assets may indicate that these firms have valuable intangible assets, which may be difficult or time consuming for an entrant to replicate.

A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger. Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.

The Agencies examine the timeliness, likelihood, and sufficiency of the entry efforts an entrant might practically employ. An entry effort is defined by the actions the firm must undertake to produce and sell in the market. Various elements of the entry effort will be considered. These elements can include: planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements. Recent examples of entry, whether successful or unsuccessful, generally provide the starting point for identifying the elements of practical entry efforts. They also can be informative regarding the scale necessary for an entrant to be successful, the presence or absence of entry barriers, the factors that influence the timing of entry, the costs and risk associated with entry, and the sales opportunities realistically available to entrants.

If the assets necessary for an effective and profitable entry effort are widely available, the Agencies will not necessarily attempt to identify which firms might enter. Where an identifiable set of firms appears to have necessary assets that others lack, or to have particularly strong incentives to enter, the Agencies focus their entry analysis on those firms. Firms operating in adjacent or complementary markets, or large customers themselves, may be best placed to enter. However, the Agencies will not presume that a powerful firm in an adjacent market or a large customer will enter the relevant market unless there is reliable evidence supporting that conclusion.

In assessing whether entry will be timely, likely, and sufficient, the Agencies recognize that precise and detailed information may be difficult or impossible to obtain. The Agencies consider reasonably available and reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency.

9.1 Timeliness

In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect.

Even if the prospect of entry does not deter the competitive effects of concern, post-merger entry may counteract them. This requires that the impact of entrants in the relevant market be rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry.

The Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices.

9.2 Likelihood

Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits. Profitability depends upon (a) the output level the entrant is likely to obtain, accounting for the obstacles facing new entrants; (b) the price the entrant would likely obtain in the post-merger market, accounting for the impact of that entry itself on prices; and (c) the cost per unit the entrant would likely incur, which may depend upon the scale at which the entrant would operate.

9.3 Sufficiency

Even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern. For example, in a differentiated product industry, entry may be insufficient because the products offered by entrants are not close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable. Entry may also be insufficient due to constraints that limit entrants' competitive effectiveness, such as limitations on the capabilities of the firms best placed to enter or reputational barriers to rapid expansion by new entrants. Entry by a single firm that will replicate at least the scale and strength of one of the merging firms is sufficient. Entry by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage.

10. Efficiencies

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, 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. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets. In a unilateral effects context, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price. Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price. In a

coordinated effects context, incremental cost reductions may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm. Even when efficiencies generated through a merger enhance a firm's ability to compete, however, a merger may have other effects that may lessen competition and make the merger anticompetitive.

The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies.[13] Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical.

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. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process. By contrast, efficiency claims substantiated by analogous past experience are those most likely to be credited.

Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

The 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.[14] To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price

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[13] The Agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing. If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.

[14] The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.

increases in that market.[15] In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.

In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly. Just as adverse competitive effects can arise along multiple dimensions of conduct, such as pricing and new product development, so too can efficiencies operate along multiple dimensions. Similarly, purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value.

The Agencies have found that certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production, are more likely to be susceptible to verification and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost, are less likely to be merger-specific or substantial, or may not be cognizable for other reasons.

When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation. Research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify or result from anticompetitive reductions in innovative activities.

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[15] The Agencies normally give the most weight to the results of this analysis over the short term. The Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict. Efficiencies relating to costs that are fixed in the short term are unlikely to benefit customers in the short term, but can benefit customers in the longer run, e.g., if they make new product introduction less expensive.

11. Failure and Exiting Assets

Notwithstanding the analysis above, a merger is not likely to enhance market power if imminent failure, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market. This is an extreme instance of the more general circumstance in which the competitive significance of one of the merging firms is declining: the projected market share and significance of the exiting firm is zero. If the relevant assets would otherwise exit the market, customers are not worse off after the merger than they would have been had the merger been enjoined.

The Agencies do not normally credit claims that the assets of the failing firm would exit the relevant market unless all of the following circumstances are met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.[16]

Similarly, a merger is unlikely to cause competitive harm if the risks to competition arise from the acquisition of a failing division. The Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless both of the following conditions are met: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill;[17] and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition.

12. Mergers of Competing Buyers

Mergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling side of the market. Buyer market power is sometimes called "monopsony power."

To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market. In defining relevant markets, the Agencies

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[16] Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Liquidation value is the highest value the assets could command for use outside the relevant market.

[17] Because the parent firm can allocate costs, revenues, and intra-company transactions among itself and its subsidiaries and divisions, the Agencies require evidence on these two points that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

focus on the alternatives available to sellers in the face of a decrease in the price paid by a hypothetical monopsonist.

Market power on the buying side of the market is not a significant concern if suppliers have numerous attractive outlets for their goods or services. However, when that is not the case, the Agencies may conclude that the merger of competing buyers is likely to lessen competition in a manner harmful to sellers.

The Agencies distinguish between effects on sellers arising from a lessening of competition and effects arising in other ways. A merger that does not enhance market power on the buying side of the market can nevertheless lead to a reduction in prices paid by the merged firm, for example, by reducing transactions costs or allowing the merged firm to take advantage of volume-based discounts. Reduction in prices paid by the merging firms not arising from the enhancement of market power can be significant in the evaluation of efficiencies from a merger, as discussed in Section 10.

The Agencies do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power. Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.

> *Example 24:* Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.

13. Partial Acquisitions

In most horizontal mergers, two competitors come under common ownership and control, completely and permanently eliminating competition between them. This elimination of competition is a basic element of merger analysis. However, the statutory provisions referenced in Section 1 also apply to one firm’s partial acquisition of a competitor. The Agencies therefore also review acquisitions of minority positions involving competing firms, even if such minority positions do not necessarily or completely eliminate competition between the parties to the transaction.

When the Agencies determine that a partial acquisition results in effective control of the target firm, or involves substantially all of the relevant assets of the target firm, they analyze the transaction much as they do a merger. Partial acquisitions that do not result in effective control may nevertheless present significant competitive concerns and may require a somewhat distinct analysis from that applied to full mergers or to acquisitions involving effective control. The details of the post-acquisition relationship between the parties, and how those details are likely to affect competition, can be important. While the Agencies will consider any way in which a partial acquisition may affect competition, they generally focus on three principal effects.

First, a partial acquisition can lessen competition by giving the acquiring firm the ability to influence the competitive conduct of the target firm. A voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, can permit such influence. Such

influence can lessen competition because the acquiring firm can use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm.

Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete. Acquiring a minority position in a rival might significantly blunt the incentive of the acquiring firm to compete aggressively because it shares in the losses thereby inflicted on that rival. This reduction in the incentive of the acquiring firm to compete arises even if cannot influence the conduct of the target firm. As compared with the unilateral competitive effect of a full merger, this effect is likely attenuated by the fact that the ownership is only partial.

Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can lead to adverse unilateral or coordinated effects. For example, it can enhance the ability of the two firms to coordinate their behavior, and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the acquiring firm to the target firm.

Partial acquisitions, like mergers, vary greatly in their potential for anticompetitive effects. Accordingly, the specific facts of each case must be examined to assess the likelihood of harm to competition. While partial acquisitions usually do not enable many of the types of efficiencies associated with mergers, the Agencies consider whether a partial acquisition is likely to create cognizable efficiencies.

STATEMENT OF CHAIRMAN LEIBOWITZ ON THE RELEASE OF THE 2010 HORIZONTAL MERGER GUIDELINES
Project No. P092900
August 19, 2010

The process for modifying the Horizontal Merger Guidelines has concluded more successfully than I could have predicted at the outset. The result is a clear and systematic description of the techniques the FTC and the Antitrust Division of the Department of Justice use to review mergers, and a document that has received bi-partisan and unanimous support from the Commission. Because of the hard work of all involved at both agencies, private parties and judges will be better equipped to understand how the agencies evaluate deals. That improvement in clarity and predictability will benefit everyone.

In revising the Guidelines, the Commission jointly with the Antitrust Division solicited public comments on a number of questions, and held a series of public workshops around the country. Fifty-one parties filed comments in response to those questions, and the agencies incorporated the input they received through those responses and workshops into the draft of the Guidelines that the Commission put out for public comment in April. The Commission received 31 public comments on that draft from a wide variety of sources, including lawyers, economists, corporations, trade associations, and public interest groups. Those comments played a critical role in staff's compilation of the final Guidelines we release today.

The Guidelines have been improved through this process in ways – large and small – that are too numerous to mention. But several major advances stand out: first, the Guidelines emphasize the competitive effects of a deal over the more rigid, formulaic approach imposed by some interpretations of the 1992 Guidelines. Second, for the first time the Guidelines provide a clear description, and many examples, of the range of evidence the agencies consider when evaluating the competitive effects of a transaction. Third, the Guidelines explain in more detail the role of market-concentration measures and revise the concentration thresholds from which the agencies will draw inferences about the likely effects of a merger on market power. Finally, the new Guidelines contain revised discussions of several factors that may be important in analyzing a merger, among them innovation and product variety, coordinated effects, price discrimination, and market entry.

With these and other changes, the new Guidelines provide a clearer and more accurate explanation to merging parties, courts, and antitrust practitioners of how the agencies review transactions. We thank everyone who participated in this process.

STATEMENT OF COMMISSIONER J. THOMAS ROSCH ON
THE RELEASE OF THE 2010 HORIZONTAL MERGER GUIDELINES

Project No. P092900

August 19, 2010

It would be wrong not to acknowledge that this project makes at least one monumental contribution to the guidance that the Agencies are providing to the business community, practitioners, and the courts. The 1992 Guidelines treated evidence of competitive effects as relevant to merger analysis. However, those Guidelines considered market structure and shares first and considered the competitive effects of a merger only after that. That created the misimpression that proof of market structure and shares are "gating items," without which competitive effects cannot be considered. These Guidelines properly consider competitive effects first, and market definition second, thereby making clear that while market definition is important to assessing competitive effects and that the market must be defined at some point in the process, ultimately merger analysis must rest on the competitive effects of a transaction. Additionally, these Guidelines make a substantial contribution by listing at the outset a variety of empirical evidence that may illuminate those competitive effects.

At the same time, it would be wrong not to acknowledge that these Guidelines are still flawed both as a description of how the staff (at the Commission at least) conducts ex ante merger review and what the Agencies should tell courts about merger analysis. Things have changed substantially since the 1992 Guidelines were issued twenty years ago. *First*, the Commission is increasingly challenging mergers in preliminary injunction and administrative (Part 3) proceedings. *See* Federal Trade Commission, The FTC in 2010, at 2 (Apr. 2010) (identifying merger enforcement rates); Federal Trade Commission & U.S. Department of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2008, at Appendix A (identifying the number of reported transactions and second requests issued). Thus, the staff's ex ante merger reviews are and must be tethered to the evidence that it plans to present and defend in those litigation proceedings. *Second*, economic theories embedded in the 1992 Guidelines emphasized price effects almost exclusively. Increasingly, the Agencies and courts have considered non-price effects, like effects on quality, variety, and innovation, to be no less important. *Third*, for a variety of reasons, many, if not most, courts have relied on empirical evidence instead of economic evidence, and have considered economic evidence as corroborative of that empirical evidence, if they have considered it at all. *See, e.g.*, *FTC v. Staples, Inc*., 970 F. Supp. 1066 (D.D.C. 1997); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009). As previously discussed, that in turn has led the staff reviewing mergers ex ante to devote more attention to the empirical evidence that can be presented and defended at trial.

The process used in this project virtually ensured that the Merger Guidelines resulting from it would not fully reflect these substantial changes. I had hoped that this would be an instance in which the Commission would lead, not be led by, the staff. Lamentably, that did not happen.

More specifically, the perspectives of all stakeholders were not considered equally. First, of the six architects of the project, three were economists trained and steeped in price theory. To

be sure, some of the Commission attorneys responsible for reviewing mergers ex ante and/or explaining to the Commission how they planned to present and defend their challenges in court or in Part 3 were consulted in connection with the project. But the three economists initiated and largely managed this project. Second, there was indeed a series of workshops held around the country, and a number of comments were submitted respecting these Guidelines. But the participants in the workshops were mostly members of the defense bar, academics, and other kindred souls, and the comments apparently given the most serious attention by the project's architects (and incorporated in these Guidelines) largely reflected those same perspectives. Third, long before these Guidelines were finalized, representations were made to the ABA Antitrust Section about the changes in the 1992 Guidelines that were likely to occur. Indeed at least one private meeting was held with the Section's leadership regarding their desire for changes in the April 2010 draft of the Guidelines.

This process inevitably led to overemphasis on economic formulae and models based on price theory. For example, Sections 4.1.1 and 4.1.2 retain the SSNIP test, an economic test which posits that a small but significant profitable price increase over "benchmark prices" may be used to define a relevant market's structure. Section 5.3 builds on the markets defined by the SSNIP test and provides what amount to "safe harbors" for mergers that result in certain levels of market concentration.

The architects of the project included colleagues who co-authored papers and articles proposing economic models relying largely on margins (prices minus incremental costs) to determine whether a merger was likely to result in coordinated or unilateral anticompetitive effects. As a result, many of the economic theories in the revised Guidelines are based wholly or partially on margins. For example, the April 20, 2010 draft of Section of 2.2.1 treated margins as a species of empirical evidence and asserted that "if a firm sets price well above marginal cost, that normally indicates either that the firm is coordinating with its rivals or that the firm believes its customers are not highly sensitive to price." The final version adds that in the absence of coordinated behavior, the presence of high margins is "not in itself of antitrust concern." But that should fool no one: that a sinister inference is intended to be drawn from this provision is unmistakable not only because the prior version omitted any benign explanation for high margins, but because the alternative—i.e., the existence of coordinated interaction—is unambiguously pernicious. To be sure, footnotes 3 and 6 acknowledge that "high margins are not in themselves of antitrust concern" and identify several benign factors explaining why margins may be high. However, the acknowledgement is contained only in footnotes, and the benign factors noted are nowhere mentioned in the text. If there were any doubt about the inferences to be drawn from high margins, those doubts are dispelled by Section 4.1.3, which opines that "[u]nless the firms are engaging in coordinated interaction . . ., high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price."

Section 4.1.3 goes on to discuss the role of margins in a critical loss analysis, saying that "[h]igher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture percentage necessary for the candidate market to satisfy the hypothetical monopolist test." Indeed, both Section 4.1.3, blessing for the first time the use of critical loss analysis in dealing with market definition, and Section 6.1, dealing with the likelihood of unilateral effects in differentiated product mergers,

incorporate the concepts, if not the exact models, that two of the architects of the project have proposed in economic papers and articles in order to determine whether such effects were likely.

In contrast to heavy reliance on prices and margins (as described above, which are based in large measure on prices), the new Guidelines say comparatively little about non-price competitive effects, such as how a transaction affects quality, service, innovation, and product variety. To be sure, the Guidelines note in the introduction that "[e]nhanced market power can also be manifested in non-price terms and conditions" and contain a new section on innovation and product variety (Section 6.4). However, this same section asserts that "[m]any reductions in variety following a merger are not anticompetitive" and that "[m]ergers can lead to the efficient consolidation of products." (This observation, it should be emphasized, applies to factors other than reductions in variety. For example, economies of scale can be an efficiency in some contexts but a barrier to entry in others.) These additions are significant improvements over the 1992 Guidelines, but their comparative brevity (and their ambivalence respecting a merger's effect on variety) leaves the misimpression that non-price factors are far less significant than price factors to the Commission.

In addition, the Guidelines fail to offer a clear framework for analyzing non-price considerations. First, Section 4 mentions that non-price considerations can be incorporated into the SSNIP test but does not explain what a "small but significant" change in quality or service is. Second, the Guidelines do not offer any details as to how to evaluate a merger's effect on product quality or service, saying only that the agencies "employ an approach analogous to that used to evaluate price competition." (Section 1.) Third, the test for analyzing the loss of product variety raises more questions than answers. For example, how are the agencies to determine whether a reduction of variety is due to "a loss of competitive incentives attributable to the merger"? (Section 6.4.) Fourth, the Guidelines do not address some of the key issues involving innovation market analysis. For example, how should enforcers resolve cases when the predicted price effects of a merger suggest one enforcement outcome but the innovation effects suggest a different outcome? What role, if any, do entry and repositioning play in the analysis? How does one determine a diversion ratio for products that have not been invented? Are innovation concerns limited to unilateral effects, as suggested by the Guidelines, or can innovation concerns result from coordinated behavior? These deficiencies are illustrative and not exhaustive.

This process cannot be justified on the ground that the Guidelines are supposed to be transparent—i.e., to reflect the way that ex ante merger review is conducted. These Guidelines do not describe the way that the Bureau of Competition and enforcement staff at the Commission proceed today. They also do not reflect the way that the courts proceed. Time and again, appellate courts have rejected "high" prices as a basis for inferring market or monopoly power. *See, e.g.*, *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1411-12 (7th Cir. 1995) (Posner, J.); *United States v. Eastman Kodak Co.*, 63 F.3d 95, 107-09 (2d Cir. 1995); *Harrison Aire, Inc. v. Aerostar Int'l Inc.*, 423 F.3d 374, 381 (3d Cir. 2005). The district courts have likewise eschewed reliance on economic models based on margins for a variety of reasons, including their complexity (*see Staples*, 970 F. Supp. 1066; *CCC*, 605 F. Supp. 2d 26; *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004)), because margins are dependent on exogenous factors (*see Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408, 428 (D.

Del. 2006)), or because the use of such economic simulation models, in the absence of substantial, verified efficiencies, will almost always predict that a transaction will have price effects (*see CCC*, 605 F. Supp. at 68-72). To the contrary, economic theories based on prices and margins are considered to be just that—theories. Although they may be considered in order to corroborate the inferences drawn from the empirical evidence, they are not substitutes for that evidence.

The antitrust defense bar and its clients do not need safe harbors. That bar (including the many who are members of the Antitrust Section) are among the best and brightest lawyers in the world. What that bar and their clients deserve is what these Guidelines promise at the outset—namely, that they will be a complete and accurate description of what our enforcement staff considers in merger investigations and that they will be a helpful guide to courts. These Guidelines are neither. Notwithstanding these flaws, however, I concur with issuance of these Guidelines. The significant advancements described at the outset warrant and deserve the Commission's support.

August 2010

The 2010 DOJ and FTC Horizontal Merger Guidelines: Increasing Realism While Reducing Predictability

On August 19, 2010, the DOJ and FTC released a comprehensive revision of the horizontal merger guidelines that had been issued almost two decades ago.[1] An overhaul was in order, since the agencies have not followed the prior guidelines for years. The revised Guidelines better reflect current agency thinking, including a greater range of potentially actionable transactions and greater roles for analytical flexibility and agency judgment in assessing transactions. The more aggressive and flexible tone of the revised Guidelines is likely intended to help the agencies in litigation, where some courts have criticized the agencies for departing from the more structured approach of the prior guidelines. However, since the agencies have been operating internally under the new models for some time, we expect no major change going forward in merger enforcement decision making.

The context

In principle, merger guidelines describe the approach the agencies use in analyzing mergers and acquisitions for the benefit of the agency staff, who must make enforcement recommendations to senior management, as well as the business community and the bar, who must consider how the antitrust agencies are likely to react to potential transactions. Guidelines also serve to educate the courts about the analytics the agencies use in evaluating transactions, presumably with the hope that the courts will defer to the agencies' expertise and gravitate to the same approach.

Beginning in the 1960s and continuing today, courts have held that a horizontal merger is presumptively unlawful if the transaction produces a combined firm with an "undue" market share in a sufficiently concentrated market. But the early standards for defining markets—which determine both market shares and market concentration—were nebulous at best. Without a meaningful standard, courts tended to defer to the government agencies, resulting in Justice Potter Stewart's famous observation "that the sole consistency that I can find [in antitrust merger litigation] is that the government always wins."

In 1982, the DOJ issued merger guidelines that, among other things, rejected limiting market concentration as the objective of merger antitrust law in favor of preventing mergers that create or facilitate the exercise of market power to the harm of

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1 The revised guidelines may be found at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

consumers. Using this consumer welfare standard, the 1982 Guidelines provided a rigorous analytical approach to defining relevant antitrust markets and raised the thresholds of market share and concentration necessary to invoke a presumption of likely anticompetitive effect. The 1982 Guidelines, which many mark as a milestone of modern antitrust law, were intentionally rigid and formulaic, precisely because they were designed to eliminate fuzziness and unpredictability in merger antitrust analysis. The 1982 Guidelines also focused almost exclusively on the price effects of transactions, because the economic theory of price effects was reasonably well-developed and accepted, while the theory on nonprice effects—product quality, product choice, and innovation—was far behind in development, acceptance, and predictive value.

The 1992 DOJ/FTC revisions, which introduced the theories of "coordinated interaction" and "unilateral effects" and required that the anticompetitive mechanism of a putatively unlawful transaction strictly fit into one of these theories, retained the basic design, price focus, and programmatic approach of the 1982 Guidelines. Horizontal merger analysis was to follow a strict sequence: market definition, calculation of market shares and market concentration, application of the thresholds of presumptive illegality, fitting of the facts into one of the two theories of anticompetitive harm, and consideration of entry and efficiencies defenses.

The impetus for change

Two developments motivated the 2010 revisions. First, the agencies came to believe that the Guidelines were too inflexible in their approach and if strictly followed would allow some anticompetitive mergers to avoid challenge. Over time, the agencies internally adopted new approaches to merger analysis to the point where many elements of the 1992 Merger Guidelines—including market definition—were largely irrelevant to prosecutorial decision-making.

Second, despite some initial reluctance, courts increasingly accepted the Guidelines approach, especially as to market definition. But some courts rejected agency challenges when they concluded that the agency had departed from the Guidelines, either because the agencies failed to prove an element required by the Guidelines or because the court applied the Guidelines algorithms—especially on market definition—to the facts to reach different conclusions than the agencies.

The changes

The 2010 revisions are designed to conform the Guidelines to the actual practices of the agencies and, although not explicitly acknowledged by the agencies, to provide the agencies with more flexibility in challenging transactions in court without the prospect that the Guidelines will be cited or otherwise used against them. To this end, the 2010 revisions make four major thematic changes and a number of other less significant modifications.

New, flexible approach to analyzing competitive effect

Although the revised Guidelines continue to view the purpose of antitrust merger enforcement as preventing the creation, enhancement, or entrenchment of market power to the harm of consumers, they stress that the agencies need not and do not approach merger analysis in the linear fashion prescribed by the guidelines for the last 28 years. Rather, in addressing the central question of whether consumers will be harmed, the revised Guidelines—consistent with current practice over the last several years—hold that the agencies may use whatever tools and approaches the agencies thinks are appropriate. In other words, the agencies, "guided by their extensive experience," may employ any reliable means of analyzing the competitive effect of a transaction on customers.

The revised Guidelines are explicit that they only illustrate and not exhaust the range of tools and approaches the agencies may use in analyzing a transaction. And even for the approaches they illustrate, they are mostly qualitative rather than quantitative in their explication. For example, the 2010 Guidelines have eliminated several quantitative thresholds that were designed to prevent aggressive enforcement applications, notably the two-year period for evaluating ease of entry and the requirement in an

unilateral effects challenge that the merging firms have a combined market share of at least 35 percent. Moreover, while the revised Guidelines offer a large number of helpful illustrative examples, the examples tend to be factually specific and the guidelines give little or no guidance of how much the facts can change before the conclusions also change.

The upshot is that the 2010 Guidelines will be less useful in predicting agency enforcement behavior. A literal reading of the 2010 Guidelines will yield far more actionable transactions than we believe the agencies will choose to challenge. We believe that this is an intentional feature of the revised Guidelines, designed to permit the agencies to exercise more judgment in evaluating the potential competitive effects of a merger without the risk that a party or a court will cite the Guidelines against them when they do bring a challenge. However, because the agencies have already been applying for some time the approaches described in the revisions, experienced practitioners should be able to predict agency decision-making in particular transactions reasonably well.

New emphasis on nonprice dimensions of anticompetitive harm

With a more flexible approach to analyzing anticompetitive effect, the revised Guidelines also place much greater emphasis on harm to customers arising from reduced product quality, reduced product variety, reduced service, or diminished innovation. This is a substantial change to the prior guidelines, which made only a passing reference to nonprice anticompetitive effects.

There is little experience, and almost no jurisprudence, on the relationship between mergers and these nonprice variables, although the agencies have obtained consent decrees, almost all in the pharmaceutical sector, on the basis that the merger will reduce incentives to continue with existing product development efforts. If the agencies elect to challenge mergers based on their predicted nonprice effects, they will be operating in largely uncharted waters. The existing economic theory and legal precedent on the relationship between mergers and nonprice welfare effects remains mostly ad hoc and sensitive to the assumptions of the model. In this context, reduced product variety could be especially problematic for the parties, since in many mergers the combined firm will seek to reduce costs by consolidating two differentiated premerger product offerings into a single postmerger offering.

Our view, however, is that the agencies will not aggressively pursue transactions solely on the basis of nonprice effects. Rather, they are likely to devote attention to potential welfare-reducing nonprice effects in cases that are otherwise actionable because of their price effects. However, when the direct evidence of a consumer welfare-reducing nonprice effect is sufficiently strong, we expect the agencies to challenge the transaction even in the absence of adverse price effect.

Deemphasis of market definition in favor of more direct evidence of competitive effect

For almost 50 years, courts consistently have used market definition, and the resulting market shares and market concentration in the defined market, as the sole means to assess the legality of horizontal transactions under the antitrust laws. Under this approach, horizontal combinations are unlawful when they create a firm with an “undue” market share in a sufficiently concentrated market.

Until now, the DOJ and FTC have accepted this approach and with rare exception tried their merger cases in the courts accordingly. In both their judicial challenges and their merger guidelines, the agencies focused on creating an algorithm to make market definition analytically sound and to specify market share and market concentration thresholds that were more consistent with the economic theory of the day.

The 2010 Guidelines move in a decidedly different direction. The revised Guidelines relegate market definition to just one of a number of tools the agencies may use in assessing competitive effect. In place of market definition, the revised Guidelines place much greater emphasis on more direct evidence of competitive effects. This direct evidence approach, which the

agencies have used internally for several years, is consistent with many rule of reason cases under Section 1 of the Sherman Act. To date, however, the agencies have not pressed this approach on the courts, and given the language of the Clayton Act and the multiple Supreme Court precedents that expressly require the courts to locate the threatened anticompetitive effect in a "line of commerce" (product market) and a "section of the country" (geographic market), it is questionable whether the courts will be receptive to the direct evidence approach contained in the Guidelines in the absence of a traditional analysis of market definition, market shares and market concentration.

According to the revised Guidelines, direct evidence of anticompetitive effect may include, among other things, (1) documents or testimony from the merging parties indicating an intention to raise prices or otherwise harm consumers through means enabled by the merger; (2) the financial terms of the transaction, especially when they suggest that the combined firm will have to raise prices or otherwise act anticompetitively to make the transaction profitable to the buyer's owners; (3) information from customers about the extent to which they could protect themselves from an anticompetitive price increase or other harm by the merged firm; (4) "natural experiments" resulting from the historical impact of mergers, entry, expansion, or exit in same or a similar marketplace; (5) indications of substantial head-to-head competition that would be eliminated with the merger; and (6) indications of disruptive or "maverick" conduct of a merging party, which is likely to be eliminated by the merger.

For consummated transactions, the agencies will give "substantial weight" to any actual consumer harm attributable to the transaction. Indeed, the 2010 Guidelines suggest that, in a proper case, nothing more than a price increase may be necessary to support an agency decision to challenge the transaction. By contrast, consistent with the case law, the agency may give only limited weight to the absence of an actual anticompetitive effect in a consummated transaction, especially if there is reason to believe that the combined firm was moderating its conduct in light of the prospect of a postmerger review.

The revised Guidelines recognize that market shares and market concentration also can provide important, although not essential, evidence. When this evidence is used, markets must be defined using the traditional "hypothetical monopolist" test first introduced in the 1982 Guidelines to identify relevant markets in which market power can be exercised. But unlike the prior guidelines, which were designed to arrive at a unique market definition, the 2010 Guidelines appear to recognize essentially any market definition where a hypothetical monopolist could exercise market power. This approach could lead to multiple market definitions existing simultaneously, significantly increasing the agencies' flexibility to define markets and hence bring challenges.

The 2010 Guidelines also increase the market share and market concentration thresholds that trigger a presumption that a transaction may be anticompetitive.[2] We do not consider this change to be of much practical significance. It has been commonly accepted for many years that the thresholds in the prior guidelines were much too low compared to the agencies' actual enforcement decisions. Our view is that the 2010 thresholds will prove to continue to be too low and the agencies will rarely challenge transactions unless they are significantly above the new thresholds, at least in cases that depend on the standard presumption and not direct evidence of anticompetitive effect. Nonetheless, by continuing to set the thresholds at a relatively low level, the agencies will be able to argue in court that most challenged transactions far exceed their guidelines as well as reserve the ability to challenge lower concentration combinations without the Guidelines being cited against them.

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[2] The Guidelines' thresholds are measured in terms of the postmerger Herfindahl-Hirschman Index (HHI), which is the sum of the squares of the market shares for all of the firms in the relevant market. Under the 2010 Guidelines, mergers that result in an unconcentrated market (HHI less than 1500, which would result from a market containing a little more than six equivalently-sized firms) or mergers that produce a change in the HHI of less than 100 are regarded as unlikely to have adverse competitive effects and ordinarily will require no further analysis. Mergers in moderately concentrated markets (HHI between 1500 and 2500, or between four and six equivalently-sized firms) that produce a change in the HHI of over 100 potentially raise significant competitive concerns. Mergers in highly concentrated markets (HHI over 2500) that produce a change in the HHI of between 100 and 200 potentially raise significant competitive concerns, while those that produce a change in the HHI of over 200 are presumed to be anticompetitive.

Increased emphasis on unilateral effects and on targeted customers

Merger antitrust law has historically been grounded in oligopoly theory, which holds combinations of significant competitors in concentrated markets are anticompetitive because they increase the prospect of collusion across the market. The 1992 Guidelines termed this theory "coordinated interaction" and distinguished it from "unilateral effects," which depends only on the elimination of significant competition between the merging firms and not on any marketwide coordination. Significantly, under the unilateral effects theory, a transaction can eliminate substantial premerger competition between the merging parties and result in an actionable competitive threat even in an unconcentrated market.

Unilateral effects theory quickly became the dominant method employed by the agencies for evaluating horizontal mergers, since it was relatively easy to apply in practice—especially as the agencies gravitated away from the quantitative requirements contained in the prior guidelines and hence did not require the agencies to define markets—and adverse unilateral effects were almost always present in every actionable coordinated effects case anyway. But for the most part the agencies did not seriously press a pure unilateral effects theory on the courts in what might appear otherwise to be relatively unconcentrated markets. Rather, the agencies attempted to define relevant markets narrowly around the products of the merging firms, so that the market shares and market concentration would be sufficiently high to trigger the standard judicial presumption of anticompetitiveness.

Not surprisingly, some courts rejected the prosecuting agency's narrow market definitions as artificial, finding the markets were much broader and concluding that competition in these broader markets was sufficient to ensure that the markets remained competitive postmerger. Other courts rejected the application of the theory of unilateral effects to the facts, finding that the agency had not satisfied some of the requirements in the existing Guidelines.

The 2010 Guidelines seek to elevate the theory of unilateral effects to a level at least on par with coordinated interaction and to make the application of the theory more robust. The reduced role of market definition is a major element in this effort. The 2010 Guidelines also eliminate certain requirements of the prior guidelines—specifically that the merged firm have a combined 35 percent share in the relevant market and that the products of the merging parties be each other's next best substitutes for a large fraction of customers—in order to give the theory more flexibility and reach in application.

The 2010 Guidelines also state that competition between the merging firms may exist for only certain customers and not be marketwide. In many situations, the nature of the product or service being offered will not permit arbitrage or resale in a secondary market, so that different groups of customers may be treated differently. In the extreme, as may occur when sales are individually negotiated, each customer may be treated differently and constitute its own group. The 2010 Guidelines hold that the unilateral effects theory can reach a transaction even if the threatened anticompetitive effect extends to only a targeted group of customers and not to customers in the market as a whole.

While the new qualitative nature of the theory, especially the broadened scope permitted by customer targeting, will give the agencies more flexibility and call for the exercise of more agency judgment, the agencies have been applying this approach for some time. Although a strict reading of the 2010 Guidelines is likely to substantially overpredict enforcement challenges, experienced practitioners should be able to assess with reasonable accuracy when the agencies will actually employ the theory to challenge a transaction in the future.

Raising the bar on entry and repositioning defenses

The case law recognizes several defenses to a presumption of anticompetitive effect in a properly defined market. One of the most important is entry. The idea is that when entry is easy, even if a merger creates a firm with a large combined share in a highly concentrated market, entry will ensure that the market continues to function competitively postmerger.

The agencies, and the prior merger guidelines, always have been demanding in the evidence required to make a valid entry defense. The 2010 Guidelines increase the demands on the parties: while the prior guidelines permitted entry to be evaluated over a period of two years, the revised Guidelines adopt the more ambiguous but presumably more restrictive requirement that entry be "rapid enough" to ensure that no meaningful anticompetitive effect will result from the merger. We believe that under this requirement the agencies will demand that the parties show that sufficient entry is likely to occur in a timeframe considerably shorter than two years in most cases.

Repositioning by nonmerging firms to take advantage of and thereby compete away any attempt by the merged firm to act anticompetitively can also be an important element of a merger defense. In some recent transactions, the agencies have exhibited significant skepticism as an analytical matter to repositioning as a means of ensuring competition. The 2010 Guidelines view repositioning as a supply-side response that should be evaluated much like entry, and we expect the agencies to apply the same demanding standards to repositioning as they are towards entry.

Other areas

The 2010 Guidelines make modifications in other areas, but these are not likely to be as significant to horizontal merger enforcement as the areas just discussed. For example, the revised Guidelines ease the requirements for applying a coordinated interaction theory, but even as reformulated coordinated effects almost surely will continue to take a back seat to unilateral effects as the primary theory motivating agency challenges. Likewise, the 2010 Guidelines make a number of changes to the treatment of efficiencies, including a greater acceptance of fixed cost efficiencies, but maintain the historical agency antipathy toward efficiency defenses. If anything, the revisions are even more demanding on the reliability and quantum of proof necessary to advance an efficiencies defense than the prior guidelines.

The revised Guidelines also cover a number of areas that have been a standard part of horizontal merger review that were not addressed in the prior guidelines. These include the competitive analysis of auction markets, the countervailing influence of powerful buyers, mergers of competing buyers (monopsony), and acquisitions of minority positions involving competing firms (partial acquisitions).

This publication is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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2022 Merger Guidelines Review

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers

Agencies Launch Joint Public Inquiry Aimed at Modernizing Merger Guidelines to Better Detect and Prevent Anticompetitive Deals

January 18, 2022
Tags: Competition | Bureau of Competition

WASHINGTON – Today, the Federal Trade Commission (FTC) and the Justice Department's Antitrust Division launched a joint public inquiry aimed at strengthening enforcement against illegal mergers. Recent evidence indicates that many industries across the economy are becoming more concentrated and less competitive – imperiling choice and economic gains for consumers, workers, entrepreneurs, and small businesses. These problems are likely to persist or worsen due to an ongoing merger surge that has more than doubled merger filings from 2020 to 2021. To address mounting concerns, the agencies are soliciting public input on ways to modernize federal merger guidelines to better detect and prevent illegal, anticompetitive deals in today's modern markets.

"Illegal mergers can inflict a host of harms, from higher prices and lower wages to diminished opportunity, reduced innovation, and less resiliency," said FTC Chair Lina M. Khan. "This inquiry launched by the FTC and DOJ is designed to ensure that our merger guidelines accurately reflect modern market realities and equip us to forcefully enforce the law against unlawful deals. Hearing from a broad set of market participants, especially those who have experienced first-hand the effects of mergers and acquisitions, will be critical to our efforts."

"Our country depends on competition to drive progress, innovation, and prosperity," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "We need to understand why so many industries have too few competitors, and to think carefully about how to ensure our merger enforcement tools are fit for purpose in the modern economy."

Competition is critical to the success of the economy. It ensures that Americans have the freedom to choose among different suppliers and different employers. When businesses face competition, it spurs them to improve their products, develop new ones, and lower prices. Mergers can reduce choices for consumers, workers, and other businesses, leaving them increasingly dependent on larger and more powerful firms that have purchased greater power to dictate the terms of their deals. To protect competition and prevent increased consolidation, Congress passed a series of antitrust laws and authorized the FTC and the Justice Department to enforce them.

The antitrust laws charge the FTC and the Justice Department with preventing mergers that may substantially lessen competition or tend to create a monopoly. Merger guidelines are frameworks for the analysis of mergers under the antitrust laws. The Justice Department first published merger guidelines in 1968, with the goal of providing transparency into the standards it applied in reviewing mergers. Since then, the agencies have published a number of updates, generally specified by

whether the transaction is considered horizontal (within the same market) or vertical (within the same supply chain). Although the guidelines identify some of the competitive harms mergers present, markets may fall outside the frameworks under the current approach.

The public inquiry launched today seeks comments on developments in the modern economy and new evidence of mergers' effects on competition to inform potential revisions to the guidelines. The agencies encourage the public, including market participants, government entities, economists, attorneys, academics, unions, employees, farmers, workers, businesses, franchisees, and consumers, to share feedback, evidence, and ideas that may inform revisions to the guidelines. Some of the specific areas of inquiry on which the agencies are seeking public input and information include:

- **Purpose and scope of merger review:** The agencies seek information on whether the guidelines explain and implement the statutory ban on transactions that "may" substantially lessen competition or tend to create a monopoly, and what harms are contemplated by those standards. The agencies further seek input on whether distinctions between horizontal and vertical transactions reflected in the guidelines should be revisited in light of trends in the modern economy.

- **Presumptions that certain transactions are anticompetitive:** The guidelines identify certain market circumstances that justify a presumption of competitive harm based on market concentration. The agencies seek information on whether concentration thresholds should be adjusted to improve the efficiency and effectiveness of enforcement, whether alternative metrics or qualitative factors should also trigger presumptions of competitive harm, and evidence regarding the accuracy of such presumptions.

- **Use of market definition in analyzing competitive effects:** The agencies seek input on potential updates to the guidelines' market definition analysis to better account for non-price competition. They also seek to input on when direct evidence of a transaction's likely competitive effects, such as evidence of head-to-head competition, may eliminate the need for a separate market definition exercise.

- **Threats to potential and nascent competition:** The agencies seek input on potential updates to the guidelines' discussion of potential and nascent competitors, which may be key sources of innovation and competition.

- **Impact of monopsony power, including in labor markets:** The agencies seek input on how to address the issue of buyer power in more detail in the guidelines. Labor markets are a key example of buyer power, and the agencies seek information regarding how the guidelines should analyze labor market effects of mergers.

- **Unique characteristics of digital markets:** The agencies seek information on how to account for key areas of the modern economy like digital markets in the guidelines, which often have characteristics like zero-price products, multi-sided markets, and data aggregation that the current guidelines do not address in detail.

The Request for Information is available at: https://www.regulations.gov/docket/FTC-2022-0003/document.

The comment period is open for 60 days. Comments can be submitted to regulations.gov and must be received no later than Monday, March 21, 2022. The information will be used by the agencies to consider updates and revisions to the guidelines. If such revisions are contemplated in light of the evidence received and the agencies' independent research, the agencies will publish proposed guidelines for public comment.

In a press event, Chair Lina M. Khan gave remarks as did Assistant Attorney General Jonathan Kanter. Commissioners Noah Joshua Phillips and Christine S. Wilson issued a statement.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Regarding the Request for Information on Merger Enforcement
January 18, 2022

Merger enforcement should be administrable, predictable, and credible.[1] 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. Those goals are also advanced by the Federal Trade Commission's long history of critical self-examination, including to inform merger policy.[2] We welcome the Request for Information on Merger Enforcement (RFI) issued today by the FTC and the Antitrust Division of the DOJ because it reflects this posture of continual learning. And we appreciate the diligent work of FTC staff and their counterparts at the Antitrust Division.

Sound merger enforcement ensures that the federal antitrust agencies address anticompetitive deals while allowing consumers and companies to reap the benefits of M&A markets. As the law and economic learning concerning mergers evolve, so too should our assessment of them. In addition to enforcement, the agencies expend significant resources conducting merger retrospectives, monitoring industry developments, and the like. If there are changes in legal precedent, updated and validated empirical or theoretical learning, or competitive dynamics that we are missing in merger review, consumers will benefit from reflecting them in agency guidelines. Prudence dictates, though, that any recalibration of our current approach to merger enforcement should be undertaken only if warranted by developments in legal and economic analysis, and only after a thorough evaluation of both the administrability and likely impact of that new approach. If revisions to the merger guidelines follow this path, they will stand the test of time.

The 2010 Horizontal Merger Guidelines (Guidelines) are noteworthy because, although the agencies' views are not binding on the judiciary, courts adjudicating merger challenges routinely cite them as persuasive.[3] The 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. Reflecting precedent from courts and the agencies, and based on accepted economic principles, they garnered support at adoption and in case after case, serving as

[1] *See* Christine S. Wilson, Thomas J. Klotz, & Jeremy A. Sandford, Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate, 26 Geo. Mason L. Rev. 1435, 1452-53 (2019).

[2] The Vertical Merger Guidelines issued by FTC and the Antitrust Division of the Department of Justice in June 2020 are but one recent example of this tradition. FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers (June 30, 2020), https://www ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers.

[3] *See e.g.,* FTC v. Sanford Health, 926 F.3d 959 (8th Cir. 2019); FTC v. Sysco Corp., 113 F.Supp.3d 1 (D.D.C. 2015); ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014).

the touchstone for merging parties, enforcers, and judges alike.[4] The Guidelines are also, of course, a useful guidepost for businesses that seek to ensure their conduct is lawful. Describing the principles and analytical framework the agencies will apply in evaluating mergers increases transparency and predictability for the business community and antitrust practitioners.

The RFI requests public input on many important legal and economic questions. It is appropriate to consider, for example, what constitutes a "digital market" and how the assessment of mergers in such markets should differ, if at all, from mergers in other markets. It is equally appropriate to ensure that the agencies are accurately evaluating mergers involving potential and nascent competitors, assessing impacts on labor markets, and capturing the impact of mergers on incentives to innovate. We encourage comments from all interested and impacted constituencies.

We also encourage comments on the assumptions that appear to underlie particular questions in the RFI. For example, the RFI seeks examples of mergers that have harmed competition, including how those mergers "made it more difficult for rivals to compete with the merged firm."[5] The question appears to assume that difficulty for rivals equates to harm to competition. But mergers that benefit consumers through lower prices, enhanced quality, and more innovation may also make it more difficult for rivals to compete with the merged firm.[6] We hope that comments provide a means to distinguish the two. The RFI also appears to assume that "mergers generally or often fail to realize cognizable efficiencies," and consequently suggests that the agencies should discount or ignore efficiencies when analyzing mergers.[7] The extent to which mergers lead to projected efficiencies is a worthy inquiry, and we hope that comments provide relevant data and an array of examples involving mergers where efficiencies were or were not achieved. These are just two of the questions that appear to be premised on debatable assumptions.[8]

Finally, we observe that much of the legal authority cited in the RFI is nearly or more than half a century old.[9] Courts have decided quite a few antitrust cases in the intervening years, merger

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[4] *See* Carl Shapiro & Howard Shelanksi, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 Rev. Indus. Org. 51-79 (2021).

[5] Request for Information on Merger Enforcement (hereinafter "RFI"), at 1 (Jan. 18, 2022).

[6] The Supreme Court has instructed that the antitrust laws "were enacted for 'the protection of competition, not competitors'". Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984). The assumption in the RFI appears to contravene the Court's guidance.

[7] RFI, at 9.

[8] Others include, for example, questions based on apparent assumptions that the agencies assess product market overlaps in lieu of innovation and other aspects of competition, ignore monopsony power unless it has an impact on output markets, or exercise a single-minded focus on price effects to the exclusion of other competitive harms. Our experience leads us to question each of these assumptions. S*ee* Guidelines §§ 6.4 ("Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. . ."), 12 (when evaluating monopsony concerns, the Agencies do not "evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell"), 1 ("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."). Nonetheless, we welcome the input of stakeholders on these topics.

[9] The RFI repeatedly cites language from *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967) which then-Judge Kavanaugh described as "ahistorical drive-by dicta". United States v. Anthem, Inc., 855 F.3d 345, 379 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("For the majority opinion, we are apparently stuck in 1967. The antitrust clock has stopped. No *General Dynamics*. No *Continental T. V. v. GTE Sylvania*. No *Baker Hughes*. No *Heinz*.").

and non-merger alike, which further elucidate the Sherman, Clayton, and FTC Acts.[10] The RFI commits to "faithfully track…established case law around merger enforcement."[11] We hope it does, as proposed revisions to the Guidelines should be considered in light of antitrust jurisprudence and must reflect legal precedent.

The potential revision of both the Horizontal and Vertical Merger Guidelines is a serious undertaking that could have a dramatic impact on the economy. We encourage the leadership of the FTC and the Antitrust Division to proceed with care and caution. As the agencies have done when promulgating past guidelines, we should afford the public ample time and opportunity to provide input, including through workshops and other public fora. We encourage the public to participate, and look forward to reviewing the responses to the RFI. And we hope to work closely with our colleagues at the FTC and the Antitrust Division as this process progresses.

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[10] *See e.g.,* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016); FTC v. H.J. Heinz Co., 246 F.3d 708 (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). One recent case, *Kimble v. Marvel*, states that because antitrust questions address restraints of trade, Supreme Court rulings "necessarily" have turned on the Court's understanding of economics. Thus, the Supreme Court has "felt relatively free to revise our legal analysis as economic understanding evolves and … to reverse antitrust precedents that misperceived a practice's competitive consequences." Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 461 (2015). Although *Kimble* addressed the Sherman Act, we welcome comments on how this statement interacts with the Court's statement highlighted in the RFI regarding "the danger of subverting congressional intent by permitting a too-broad economic investigation[.]"

[11] RFI, at 1.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

FTC and DOJ Seek Comment on Draft Merger Guidelines

Proposed guidelines would address the many ways mergers can weaken competition, harming consumers, workers, and businesses

July 19, 2023

Tags: Competition | Bureau of Competition | Merger | Horizontal | Vertical | attempted monopolization | dual enforcement/DOJ | efficiencies | Herfindahl-Hirschman Index (HHI) | market power | monopolization | vertical restraint

Today, the Federal Trade Commission and the Department of Justice are releasing a draft update of the Merger Guidelines, which describe and guide the agencies' review of mergers and acquisitions to determine compliance with federal antitrust laws. The goal of this update is to better reflect how the agencies determine a merger's effect on competition in the modern economy and evaluate proposed mergers under the law. Both agencies encourage the public to review the draft and provide feedback through a public comment period that will last 60 days.

"Open, competitive, resilient markets have been a bedrock of America's economic success and dynamism throughout our nation's history. Faithful and vigorous enforcement of the antitrust laws is key to maintaining that success," said FTC Chair Lina M. Khan. "With these draft Merger Guidelines, we are updating our enforcement manual to reflect the realities of how firms do business in the modern economy. Informed by thousands of public comments—spanning healthcare workers, farmers, patient advocates, musicians, and entrepreneurs—these guidelines contain critical updates while ensuring fidelity to the mandate Congress has given us and the legal precedent on the books."

"Unchecked consolidation threatens the free and fair markets upon which our economy is based," said Attorney General Merrick B. Garland. "These updated Merger Guidelines respond to modern

market realities and will enable the Justice Department to transparently and effectively protect the American people from the damage that anticompetitive mergers cause."

"Competitive markets and economic opportunity go hand in hand. Today, we are issuing draft guidelines that are faithful to the law, which prevents mergers that threaten competition or tend to create monopolies. As markets and commercial realities change, it is vital that we adapt our law enforcement tools to keep pace so that we can protect competition in a manner that reflects the intricacies of our modern economy. Simply put, competition today looks different than it did 50 — or even 15 — years ago." said Assistant Attorney General Jonathan Kanter of the Antitrust Division. "There will be a substantial process for public to review and provide comments before we finalize these guidelines."

The agencies protect competition through enforcement of the antitrust laws and other federal competition statutes. Since 1968, the agencies have issued and revised merger guidelines to enhance transparency and promote awareness of how the agencies carry out that charge with respect to mergers and acquisitions.

The draft guidelines build upon, expand, and clarify frameworks set out in previous versions. At the outset, the guidelines give an overview of thirteen principles that the agencies may use when determining whether a merger is unlawfully anticompetitive under the antitrust laws. These guidelines are not mutually exclusive, and a given merger may implicate multiple guidelines. The document then describes in greater depth the frameworks and tools that may be used when analyzing a merger with respect to each guideline.

The thirteen guidelines are:

1. Mergers should not significantly increase concentration in highly concentrated markets.
2. Mergers should not eliminate substantial competition between firms.
3. Mergers should not increase the risk of coordination.
4. Mergers should not eliminate a potential entrant in a concentrated market.
5. Mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete.

6. Vertical mergers should not create market structures that foreclose competition.

7. Mergers should not entrench or extend a dominant position.

8. Mergers should not further a trend toward concentration.

9. When a merger is part of a series of multiple acquisitions, the agencies may examine the whole series.

10. When a merger involves a multi-sided platform, the agencies examine competition between platforms, on a platform, or to displace a platform.

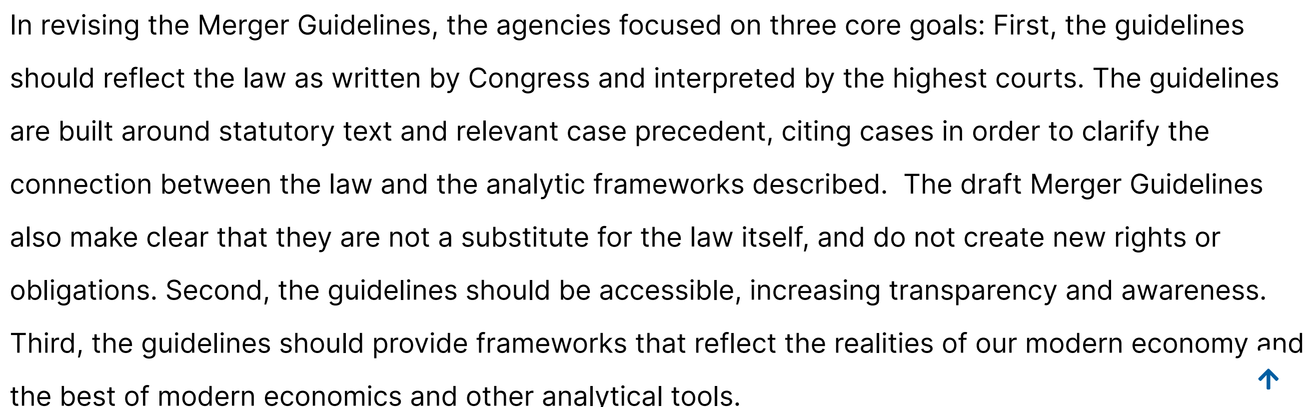
11. When a merger involves competing buyers, the agencies examine whether it may substantially lessen competition for workers or other sellers.

12. When an acquisition involves partial ownership or minority interests, the agencies examine its impact on competition.

13. Mergers should not otherwise substantially lessen competition or tend to create a monopoly.

The agencies have amended the guidelines several times since the first guidelines were released in 1968, including in 1982, 1984, 1992, 1997, 2010, and 2020. In January 2022, the agencies announced a broad initiative to evaluate potential updates and revisions to the Horizontal Merger Guidelines, issued in 2010, and the Vertical Merger Guidelines issued in 2020.

Following a public comment period, which included a request for information, more than 5,000 members of the public—including consumers, workers, state attorneys general, academics, businesses, trade associations, practitioners, and entrepreneurs—contributed feedback. The agencies also conducted four listening sessions that highlighted the potential for mergers and acquisitions to undermine open, vibrant, and competitive markets in industries ranging from food and agriculture to health care.



In revising the Merger Guidelines, the agencies focused on three core goals: First, the guidelines should reflect the law as written by Congress and interpreted by the highest courts. The guidelines are built around statutory text and relevant case precedent, citing cases in order to clarify the connection between the law and the analytic frameworks described. The draft Merger Guidelines also make clear that they are not a substitute for the law itself, and do not create new rights or obligations. Second, the guidelines should be accessible, increasing transparency and awareness. Third, the guidelines should provide frameworks that reflect the realities of our modern economy and the best of modern economics and other analytical tools.

The public is invited to provide comments to the Draft Guidelines for a period of 60 days. The deadline is September 18, 2023. The agencies will use the public comments to evaluate and update the draft before finalizing the guidelines. Visit the fact sheet on Draft Merger Guidelines.

The Commission vote to approve the draft Merger Guidelines was 3-0. Chair Khan, along with Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya, issued separate statements that were each joined by the other commissioners.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

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Fact Sheet – 2023 Draft Merger Guidelines for Public Comment

The Department of Justice (DOJ) and the Federal Trade Commission (FTC) are jointly releasing the *2023 Draft Merger Guidelines* (Draft Guidelines) for public comment.

1. **Under U.S. antitrust law, the DOJ and FTC review proposed transactions in order to prevent anticompetitive mergers and acquisitions.**
   The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) imposes a mandatory reporting and waiting period for certain transactions. The agencies have authority to investigate all mergers (including those that are not subject to HSR or have already closed) for potential violations of the Clayton Act. Following an investigation, the agencies can challenge the legality of a merger under Section 7 of the Clayton Act and/or other applicable antitrust laws.

2. **The agencies publish merger guidelines to help the public understand how the agencies assess the potential for a merger to harm competition.**
   Merger guidelines increase transparency and awareness by explaining how the agencies undertake substantive merger review. The Department of Justice published the first merger guidelines in 1968 and since then the agencies have worked collaboratively to update the guidelines periodically to reflect changes in the law and market realities. The Draft Guidelines build on decades of agency expertise to reflect significant advancements in the law and fundamental changes in our economy.

3. **The Draft Guidelines focus on the words of Congress and Supreme Court precedent.**
   The Draft Guidelines are built around statutory text and relevant case precedent. Notably, these are the first merger guidelines to cite case precedents. The document draws extensively on Supreme Court and appellate cases to ensure it is rooted in the law.

4. **The Draft Guidelines directly address the potential for harm to all market participants and any dimension of competition, including for workers.**
   Since 1982, the merger guidelines have devoted increasing attention to mergers that reduce competition among buyers, including employers as buyers of labor services. The Draft Guidelines build on this principle and explain that the agencies will evaluate the impact of a merger on labor as a stand-alone basis to challenge a transaction.

5. **The Draft Guidelines recognize the growing importance of platform competition.**
   Platform markets present distinct competitive considerations from the traditional market structures of the 20th century economy, as they often present high entry barriers and are likely to tip in ways that entrench dominant firms. The Draft Guidelines describe the distinctive characteristics and considerations that arise when platforms are part of an acquisition.

6. **The Draft Guidelines include the concentration thresholds for mergers between competitors reflected in relevant court precedent and restore decades of agency practice dating back to 1982.**
   The first merger guidelines to reference a threshold based on a market concentration index were the merger guidelines issued in 1982. Subsequently, courts routinely cited to the guidelines and these concentration thresholds. In practice, the agencies tended to challenge mergers that greatly exceeded these thresholds to focus their limited resources on the most problematic transactions. The 2010 Horizontal Merger Guidelines therefore adopted more permissive thresholds based on this agency practice, rather than on changes in the law. The Draft Guidelines restore a threshold of a post-merger 1,800 Herfindahl-Hirschman Index (HHI) alongside an increase in HHI of 100 to better reflect both the law and the risks of competitive harm.

7. **The Draft Guidelines are the result of a rigorous and inclusive process.**
   The Draft Guidelines follow a public comment period that yielded over 5,000 comments, orders of magnitude more than in prior updates to the guidelines. Drafting the guidelines was a collaborative effort that depended heavily on the input and work of many career attorneys and economists at both agencies. There was an extensive internal comment and feedback process to obtain input from all attorneys and economists at both agencies. The drafting teams were led by Dr. Susan Athey and David Lawrence at the DOJ, and Dr. Aviv Nevo and Ken Merber at the FTC.

8. **The Draft Guidelines are built around 13 core "guidelines" that reflect the most common issues that arise in merger review.**
   The Draft Guidelines set forth a clear and digestible framework at the outset to help the reader assess whether a merger raises common issues. The document then provides more in-depth analysis and tools that may apply to each category. Given the complexity of the modern economy, a single merger may implicate multiple guidelines.

   Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets. Concentration refers to the number and relative size of rivals competing to offer a product or service to a group of customers. The agencies examine whether a merger between competitors would significantly increase concentration and result in a highly concentrated market. If so, the agencies presume that a merger may substantially lessen competition based on market structure alone.

   Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms. The agencies examine whether competition between the merging parties is substantial, since their merger will necessarily eliminate competition between them.

   Guideline 3: Mergers Should Not Increase the Risk of Coordination. The agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the agencies will presume that the merger may substantially lessen competition. In a market that is not yet highly concentrated, the agencies investigate whether facts suggest a greater risk of coordination than market structure alone would suggest.

Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market. The agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete. When a merger involves products or services rivals use to compete, the agencies examine whether the merged firm can control access to those products or services to substantially lessen competition and whether they have the incentive to do so.

Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition. The agencies examine how a merger would restructure a vertical supply or distribution chain. At or near a 50% share, market structure alone indicates the merger may substantially lessen competition. Below that level, the agencies examine whether the merger would create a "clog on competition…which deprives rivals of a fair opportunity to compete."

Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position. The agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

Guideline 8: Mergers Should Not Further a Trend Toward Concentration. If a merger occurs during a trend toward concentration, the agencies examine whether further consolidation may substantially lessen competition or tend to create a monopoly.

Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series. If an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the agencies consider the cumulative effect of the pattern or strategy.

Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The agencies consider the distinctive characteristics of multi-sided platforms carefully when applying the other guidelines.

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers. Section 7 protects competition among buyers and prohibits mergers that may substantially lessen competition in any relevant market. The agencies therefore apply these guidelines to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition. Acquisitions of partial control or common ownership may in some situations substantially lessen competition.

Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly. The guidelines are not exhaustive of the ways that a merger may substantially lessen competition or tend to create a monopoly.

9. **The agencies are seeking public comment on the Draft Guidelines.**
   The public is encouraged to comment on the Draft Guidelines during a 60-day comment period. The comment period will close on September 18, 2023, after which the agencies will review the comments received and finalize the new Merger Guidelines.

Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

I. Overview

These Merger Guidelines explain how the Department of Justice and the Federal Trade Commission (the "Agencies") identify potentially illegal mergers. They are designed to help the public, business community, practitioners, and courts understand the factors and frameworks the Agencies consider when investigating mergers.

The Agencies enforce the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Sections 3, 7, and 8 of the Clayton Act[1], 15 U.S.C. §§ 14, 18, 19. Congress has charged the Agencies with administering these statutes as part of a national policy to promote open and fair competition, including by preventing mergers and acquisitions that would violate these laws.

Section 7 of the Clayton Act is the antitrust law that most directly addresses mergers and acquisitions.[2] Section 7 prohibits mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[3] Section 7 is a preventative statute that reflects the "mandate of Congress that tendencies toward concentration

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[1] As amended under the Celler-Kefauver Antimerger Act of 1950, Public Law 81-899, 64 Stat. 1125, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.
[2] Mergers may also violate, *inter alia*, Sections 1 and 2 of the Sherman Act or Section 5 of the FTC Act.
[3] 15 U.S.C. § 18.

in industry are to be curbed in their incipiency."[4]

The Clayton Act requires the Agencies to assess the risk to competition from mergers. As the Supreme Court has explained, "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition.'"[5] This is because "[t]he grand design of…Section 7, as to stock acquisitions [and] the acquisition of assets, was to arrest incipient threats to competition which the [more broadly applicable] Sherman Act did not ordinarily reach."[6] Accordingly, in analyzing a proposed merger, the Agencies do not seek to predict the future or the precise effects of a merger with certainty. Rather, the Agencies assess the risk that the merger may lessen competition substantially or tend to create a monopoly based on the totality of the evidence available at the time of the investigation.

Across the economy, competition plays out in many ways and on a variety of dimensions. In recognition of this fact, "Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry."[7] The Agencies therefore begin their merger analysis with the question: how does competition present itself in this market and might this merger risk lessening that competition substantially now or in the future?

The Agencies apply the following Guidelines to help answer this question. In some cases, "it is possible…to simplify the test of illegality" by focusing on discrete facts that, when present, suggest a merger is "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[8]

Guidelines 1-8 identify several frameworks that the Agencies use to assess the risk that a merger's effect may be substantially to lessen competition or to tend to create a monopoly. Guidelines 9-12 explain issues that often arise when the Agencies apply those frameworks in several common settings. Guideline 13 explains how the Agencies consider mergers and acquisitions that raise competitive concerns not addressed by the other Guidelines.

These Guidelines are not mutually exclusive, as a single transaction can have multiple effects or trigger concern in multiple ways. To promote efficient review, for any given transaction the Agencies may limit their analysis to any one Guideline or subset of Guidelines that most readily demonstrates the risks to competition from the transaction.

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[4] *Brown Shoe Co. v. United States*, 370 U.S. 294, 346 (1962) ("*Brown Shoe*").
[5] *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).
[6] *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 170-71 (1964).
[7] *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974) (quoting *Brown Shoe*, 370 U.S. at 321-22) ("*Gen. Dynamics*").
[8] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362-63 (1963) (*Phila. Nat'l Bank*).

Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.[9] Concentration refers to the number and relative size of rivals competing to offer a product or service to a group of customers. The Agencies examine whether a merger between competitors would significantly increase concentration and result in a highly concentrated market. If so, the Agencies presume that a merger may substantially lessen competition based on market structure alone.

Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms.[10] The Agencies examine whether competition between the merging parties is substantial, since their merger will necessarily eliminate competition between them.

Guideline 3: Mergers Should Not Increase the Risk of Coordination.[11] The Agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the Agencies will presume that the merger may substantially lessen competition. In a market that is not yet highly concentrated, the Agencies investigate whether facts suggest a greater risk of coordination than market structure alone would suggest.

Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.[12] The Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.[13] When a merger involves products or services rivals use to compete, the Agencies examine whether the merged firm can control access to those products or services to substantially lessen competition and whether they have the incentive to do so.

Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition.[14] The Agencies examine how a merger would restructure a vertical supply or distribution chain. At or near a 50% share, market structure alone indicates the merger may substantially lessen competition. Below that level, the Agencies examine whether the merger would create a "clog on competition…which deprives rivals of a fair opportunity to compete."[15]

Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position.[16] The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

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[9] *See, e.g., Phila. Nat'l Bank*, 374 U.S. at 363, *modified by Gen. Dynamics*, 415 U.S. at 498 (see Section IV).
[10] *See, e.g., ProMedica Health System, Inc. v. FTC*, 749 F.3d 559, 568-70 (6th Cir. 2014), *cert. denied*, 575 U.S. 996 (2015).
[11] *See, e.g., Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387-89 (7th Cir. 1986) (Posner, J.).
[12] *See, e.g., United States v. Marine Bancorp.*, 418 U.S. 602, 623-26 (1974).
[13] *See United States v. AT&T*, 916 F.3d 1029, 1035-36 (D.C. Cir. 2019).
[14] *See, e.g., Ford Motor Co. v. United States*, 405 U.S. 562 (1972).
[15] *Brown Shoe*, 370 U.S. at 324.
[16] *See, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-78 (1967).

Guideline 8: Mergers Should Not Further a Trend Toward Concentration.[17] If a merger occurs during a trend toward concentration, the Agencies examine whether further consolidation may substantially lessen competition or tend to create a monopoly.

Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.[18] If an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy.

Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The Agencies consider the distinctive characteristics of multi-sided platforms carefully when applying the other Guidelines.

Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.[19] Section 7 protects competition among buyers and prohibits mergers that may substantially lessen competition in any relevant market. The Agencies therefore apply these Guidelines to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.[20] Acquisitions of partial control or common ownership may in some situations substantially lessen competition.

Guideline 13: Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly. The Guidelines are not exhaustive of the ways that a merger may substantially lessen competition or tend to create a monopoly.

* * *

These Guidelines consolidate, revise, and replace the various versions of Merger Guidelines issued by the Agencies since the Department of Justice's first Merger Guidelines in 1968. This revision builds on the learning and experience reflected in those prior Guidelines and successive revisions. These Guidelines reflect the collected experience of the Agencies over many years of merger review in a changing economy.

[17] *See, e.g., Gen. Dynamics*, 415 U.S. at 497-98; *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552–53 (1966).
[18] *See* H.R. Rep. No. 1191, 81st Cong., 2d Sess. 12-13 (1950).
[19] *See, e.g.*, *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948).
[20] *See, e.g.*, *Denver & Rio Grande v. United States*, 387 U.S. 485, 504 (1967).

To make their content both accessible to new readers and useful for experts, these Guidelines are organized at varying levels of detail:

- The Overview outlines the guidelines in summary form to help the public and market participants identify potential concerns and understand the Agencies' approach.
- Section II discusses the application of these Guidelines in further detail.
- Section III identifies some of the tools the Agencies use to define relevant markets; and
- Section IV explains how the Agencies approach several common types of rebuttal evidence.[21]

Several appendices follow these Guidelines. The Appendices describe evidentiary and analytical tools the Agencies often use.

- Appendix 1 discusses sources of evidence commonly relied on by the Agencies.
- Appendix 2 describes tools sometimes used to evaluate competition among firms.
- Appendix 3 discusses additional details regarding the process for defining relevant markets.
- Appendix 4 explains how the Agencies typically calculate market shares and concentration metrics.

These Guidelines create no independent rights or obligations and do not limit the discretion of the Agencies or their staff in any way. Although the Guidelines identify the factors and frameworks the Agencies consider when investigating mergers, the Agencies' enforcement decisions will necessarily continue to require prosecutorial discretion and judgment. Because the specific standards set forth in these Guidelines must be applied to a broad range of factual circumstances, the Agencies will apply them reasonably and flexibly to the specific facts and circumstances of each merger.

Similarly, the factors contemplated in these Guidelines neither dictate nor exhaust the range of evidence that the Agencies may introduce in merger litigation. Instead, they set forth various methods of analysis that may be applicable depending on the availability and/or reliability of information related to a given market or transaction. Given the variety of markets, market participants, and acquisitions that the Agencies encounter, merger analysis does not consist of uniform application of a single methodology. The Agencies assess any relevant and meaningful evidence to evaluate whether the effect of a merger may be substantially to lessen competition or to tend to create a monopoly. Merger review is ultimately a fact-specific exercise. The Agencies follow the facts in analyzing mergers, as they do in other areas of law enforcement.

These Guidelines include citations to binding legal precedent. Citations to court decisions in these Guidelines do not necessarily suggest that the Agencies would analyze the facts in those cases identically today. While the Agencies adapt their analytical tools to new learning, legal

[21] These Guidelines pertain only to the consideration of whether a merger or acquisition is illegal. The consideration of remedies appropriate for otherwise illegal mergers and acquisitions is beyond its scope. The Agencies review proposals to revise a merger in order to alleviate competitive concerns consistent with applicable law regarding remedies.

holdings reflecting the Supreme Court's interpretation of a statute apply unless subsequently modified. These Guidelines therefore cite binding propositions of law to explain core principles that the Agencies apply in a manner consistent with modern analytical tools and market realities.

II. Applying the Merger Guidelines

1. Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.

In highly concentrated markets, a merger that eliminates even a relatively small competitor creates undue risk that the merger may substantially lessen competition. As a result, even a relatively small increase in concentration in a relevant market can provide a basis to presume that a merger is likely to substantially lessen competition. The Supreme Court has held that "[a] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[22] In the Agencies' experience, this type of structural presumption provides a highly administrable and useful tool for identifying mergers that may substantially lessen competition.

"Concentration" reflects the number and relative size of firms competing to offer a product[23] or service to a group of customers.[24] Concentration is "high" when the market only has a few significant competitors. An analysis of concentration begins with calculating pre-merger market shares within a relevant market (see Section III and Appendix 4), then proceeds to assess whether the merger would lead to or increase undue concentration in that market.[25]

The Agencies generally measure concentration levels using the Herfindahl-Hirschman Index ("HHI"). The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm. Markets with post-merger HHI greater than 1,800 are highly concentrated.[26] A merger causes undue concentration and triggers a structural presumption that the merger may substantially lessen competition or tend to create a monopoly when it would result in a highly concentrated market and produce an increase in the HHI of more

[22] *Phila. Nat'l Bank*, 374 U.S. at 363 (1963).
[23] These Guidelines use the term "products" to encompass anything that is traded between firms and their suppliers, customers, or business partners, including physical goods, services, or access to assets. Products can be as narrow as an individual brand, a specific version of a product, or a product that includes specific ancillary services such as the right to return it without cause, or delivery to the customer's location.
[24] In the context of buyers, concentration reflects the number and relative size of firms competing to purchase a product or service.
[25] Typically, a merger eliminates a competitor by bringing two market participants under common control. Similar concerns arise if the merger threatens to cause the exit of a current market participant, such as a leveraged buyout that puts the target firm at significant risk of failure.
[26] For illustration, the HHI for a market of five equal firms is 2,000 ($5 \times 20^2 = 2{,}000$), and for six equal firms is 1,667 ($6 \times 16.67^2 = 1667$). Markets with HHI between 1,000 and 1,800 are referred to as "concentrated markets."

than 100 points.[27] The Agencies also may examine the market share of the merged firm: a merger that significantly increases concentration and creates a firm with a share over thirty percent presents an impermissible threat of undue concentration regardless of the overall level of market concentration.[28]

Indicator	Threshold for Structural Presumption
Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm's Market Share	Share greater than 30% AND Change in HHI greater than 100

Higher concentration levels suggest even greater risk that the merger may substantially lessen competition.[29]

2. Mergers Should Not Eliminate Substantial Competition Between Firms.

A merger eliminates competition between the merging firms by bringing them under joint control. If evidence demonstrates substantial competition between the merging parties prior to the merger, the Agencies can determine that the merger may substantially lessen competition.[30]

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[27] The change in HHI from a merger of firms with shares a and b is equal to $2ab$. For example, in a merger between a firm with 20% market share and a firm with 5% market share, the change in HHI is 2 x 20 x 5 = 200.

[28] *Phila. Nat'l Bank*, 374 U.S. at 364-65 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

[29] The first merger guidelines to reference an HHI threshold were the merger guidelines issued in 1982, which used the 1,800 HHI threshold for a highly concentrated market, and 100 HHI for a significant increase. Each subsequent iteration until 2010 maintained those thresholds. *See* Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines (1992), § 1.51; Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines (1997), § 1.51; U.S. Dep't of Justice Merger Guidelines (1982), § 3(A). During this time, courts routinely cited to the guidelines and these HHI thresholds in decisions. *See, e.g., Chicago Bridge & Iron Co. N.V. v. FTC.*, 534 F.3d 410, 431 (5th Cir. 2008); *FTC. v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001); *FTC. v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 (11th Cir. 1991); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986) (relying on Department of Justice's 1984 merger guidelines); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990) (referencing the Department of Justice's 1984 guidelines). In practice, the Agencies tended to challenge mergers that greatly exceeded these thresholds to focus their limited resources on the most problematic transactions. The more permissive thresholds included in the 2010 Horizontal Merger Guidelines reflected that agency practice, rather than a judgment of the appropriate thresholds for competitive concern or the requirements of the law. The Agencies consider a threshold of a post-merger 1,800 HHI and an increase in HHI of 100 to better reflect both the law and the risks of competitive harm and have therefore returned to those thresholds here.

[30] 15 U.S.C. § 18. *See also United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 669-70 (1964) ("it [is] clear that the elimination of significant competition between [merging parties] constitutes an unreasonable restraint of trade in violation of § 1 of the Sherman Act.... It [can be] enough that the two…compete[ ]. That their

Focusing on the competition between the merging parties can reveal that a merger between competitors may substantially lessen competition even where market shares are difficult to measure or where market shares understate the competitive significance of the merging parties to one another.

Competition often involves firms trying to win business by offering lower prices, new or better products and services, more attractive features, higher wages, improved benefits, or better terms relating to various additional dimensions of competition. The more the merging parties have shaped one another's behavior, or have affected one another's sales, profits, valuation, or other drivers of behavior, the more significant the competition between them.

The Agencies examine a variety of indicators to identify substantial competition. For example:

Strategic Deliberations or Decisions. The Agencies may analyze the extent of competition between the merging firms by examining evidence relating to strategic deliberations or decisions in the regular course of business. For example, in some markets, the firms may monitor each other's pricing, marketing campaigns, facility locations, improvements, products, capacity, output, and/or innovation plans. This can provide evidence of competition between the merging firms, especially when they react by taking steps to preserve or enhance the competitiveness or profitability of their own products or services.

Prior Merger, Entry, and Exit Events. The Agencies may look to historical events to assess the presence and substantiality of direct competition between the merging firms. For example, the Agencies may examine the impact of recent relevant mergers, entry, expansion, or exit events.

Customer Substitution. Customers' willingness to switch between different firms' products is an important part of the competitive process. Firms are closer competitors the more that customers are willing to switch between their products. The Agencies use a variety of tools, detailed in Appendix 2, to assess customer substitution.

Impact of Competitive Actions on Rivals. Competitive actions by one firm can increase its sales at the expense of its rivals. The Agencies may gauge the extent of competition between the merging firms by considering the impact that competitive actions by one of the merging firms has on the other merging firm. The impact of a firm's competitive actions on a rival is generally greater when customers consider their products to be closer substitutes, so that a firm's competitive actions result in greater lost sales for the rival, and when the profitability of the rival's lost sales is greater.

Impact of Eliminating Competition Between the Firms. In some instances, evidence may be available to assess the impact of competition from one firm on the other's actions, such

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competition [is] not insubstantial and that the combination [would] put an end to it."); *ProMedica Health System, Inc. v. FTC*, 749 F.3d 559, 568-70 (6th Cir. 2014), *cert. denied*, 575 U.S. 996 (2015). The effect on competition of the elimination of competition between the merging firms, without considering the risk of coordination among the remaining firms, is sometimes referred to as "horizontal unilateral effects."

as firm choices about price, quality, wages, or another dimension of competition. Appendix 2 describes a variety of approaches to measuring such impacts.

Additional Evidence, Tools, and Metrics. The Agencies may use additional evidence, tools, and metrics to assess the loss of competition between the firms. Depending on the realities of the market, different evidence, tools, or metrics may be appropriate. Appendix 2 provides examples and detail on several tools and settings.

3. Mergers Should Not Increase the Risk of Coordination.

The Agencies determine that a merger may substantially lessen competition when it meaningfully increases the risk of coordination among the remaining firms in a relevant market or makes existing coordination more stable or effective.[31] Firms can coordinate across any or all dimensions of competition, such as price, product features, customers, wages, benefits, or geography. Coordination among rivals lessens competition whether it occurs explicitly—through collusive agreements between competitors not to compete or to compete less—or tacitly, through observation and response to rivals. Because tacit coordination may be difficult to address under Section 1 of the Sherman Act, vigorous enforcement of Section 7 of the Clayton Act to prevent market structures conducive to such coordination is especially critical.

To assess the extent to which a merger may increase the likelihood, stability, or effectiveness of coordination, the Agencies often consider three primary factors and several secondary factors. The Agencies may consider additional factors depending on the market.

A. Primary Factors

The Agencies presume that post-merger market conditions are susceptible to coordinated interaction if any of the three primary factors are present.

Highly Concentrated Market. By reducing the number of firms in a market, a merger increases the risk of coordination. The fewer the number of competitively meaningful rivals prior to the merger, the greater the likelihood that merging two competitors will facilitate coordination. Markets that are highly concentrated after a merger that significantly increases concentration (see Guideline 1) are presumptively susceptible to coordination. If merging parties claim that a highly concentrated market is not susceptible to coordination, the Agencies will assess this evidence using the framework described in Section IV.4. Where a market is not highly concentrated, the Agencies may still consider other risk factors.

Prior Actual or Attempted Attempts to Coordinate. Evidence that firms representing a substantial share in the relevant market appear to have previously engaged in express or tacit coordination to lessen competition is highly informative as to the market's susceptibility to coordination. Evidence of failed attempts at coordination in the relevant market suggest that successful coordination was not so difficult as to deter attempts, and a merger reducing the number of rivals may tend to make success more likely.

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[31] *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 229-30 (1993) ("In the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the Act prohibits.").

Elimination of a Maverick. A maverick is a firm with a disruptive presence in a market. The presence of a maverick only reduces the risk of coordination so long as the maverick retains the disruptive incentives that drive its behavior. A merger that eliminates a maverick or significantly changes its incentives increases the susceptibility to coordination.[32]

B. Secondary Factors

The Agencies also examine whether secondary factors demonstrate that a merger may meaningfully increase the risk of coordination, even absent the primary risk factors. Not all secondary factors must be present for a market to be susceptible to coordination.

Market Concentration. Even in markets that are not highly concentrated, coordination becomes more likely as concentration increases. The more concentrated a market with an HHI above 1,000, the more likely the Agencies are to conclude that the market structure suggests susceptibility to coordination.

Market Transparency. A market is more susceptible to coordination if a firm's behavior can be promptly and easily observed by its rivals. Rivals' behavior is more easily observed when the terms offered to customers are readily discernible and relatively transparent (that is, known to rivals). Transparency can refer to the ability to observe prices, terms, the identities of the firms serving particular customers, or any other competitive actions of other firms. Information sharing arrangements among market participants, such as public exchange of information through announcements or private exchanges through trade associations or publications, increase market transparency. Regular monitoring of one another's prices or customers can indicate that the terms offered to customers are relatively transparent. Use of algorithms or artificial intelligence to track or predict competitor prices or actions likewise increases the transparency of the market.

Competitive Responses. A market is more susceptible to coordination if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case the stronger and faster the responses from its rivals because such responses reduce the benefits of competing more aggressively. Some factors that increase the likelihood of strong or rapid responses by rivals include: (1) the market has few significant competitors, (2) products in the relevant market are relatively homogeneous, (3) customers find it relatively easy to switch between suppliers, (4) suppliers use algorithmic pricing, or (5) suppliers use meeting-competition clauses.

Aligned Incentives. Removing a firm that has different incentives from most others in a market can increase the risk of coordination. For example, a firm with a small market share may have less incentive to coordinate because it has more potential to gain from winning new business than do other firms. The same issue can arise when a merger more closely aligns one or both merging firms' incentives with the other firms in the market.

Profitability or Other Advantages of Coordination for Rivals. The Agencies regard coordinated interaction as more likely to occur when participants in the market stand to gain more from successful coordination. Coordination generally is more profitable or otherwise

[32] *United States v. Alcoa*, 377 U.S. 271, 280-81 (1964).

advantageous for the coordinating firms the less often customers substitute outside the market when firms offer worse terms.

4. Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.

Mergers can substantially lessen competition by eliminating a potential entrant. For instance, a merger can eliminate the possibility that entry or expansion by one or both firms would have resulted in new or increased competition in the market in the future. A merger can also eliminate current competitive pressure exerted on other market participants by the mere perception that one of the firms might enter. Both of these risks can be present simultaneously.

A merger that eliminates a potential entrant into a concentrated market can substantially lessen competition or tend to create a monopoly.[33] The more concentrated the market, the greater the magnitude of harm to competition from any lost potential entry and the greater the tendency to create a monopoly. Accordingly, for mergers involving one or more potential entrants, the higher the market concentration, the lower the probability of entry that gives rise to concern.

A. Actual Potential Competition: Eliminating Reasonably Probable Future Entry

The antitrust laws reflect a preference for internal growth over acquisition.[34] In contrast to internal growth, merging a current and a potential market participant eliminates the possibility that the potential entrant would have entered on its own.[35]

To determine whether an acquisition that eliminates a potential entrant into a concentrated market may substantially lessen competition,[36] the Agencies examine (1) whether one or both of the merging firms had a reasonable probability of entering the relevant market other than through an anticompetitive merger, and (2) whether such entry offered "a substantial likelihood of ultimately producing deconcentration of [the] market or other significant procompetitive effects."[37]

Reasonable Probability of Alternative Entry. The Agencies' starting point for assessment of a reasonable probability of entry is objective evidence regarding the firm's available feasible means of entry, including its capabilities and incentives. Relevant objective evidence can include, for example, evidence that the firm has sufficient size and resources to enter; evidence of any advantages that would make the firm well-situated to enter; evidence that

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[33] *United States v. Marine Bancorp.*, 418 U.S. 602, 630 (1974). A concentrated market is one with an HHI greater than 1,000 (See Guideline 1).

[34] *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 559 n.13 (1973) (Marshall, J., concurring) ("[S]urely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." (quoting *Phila. Nat'l Bank*, 374 U.S. at 370)).

[35] *See, e.g.*, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 560–61 (1973) (Marshall, J., concurring).

[36] Harm from the elimination of a potential entrant can occur in markets that do not yet consist of commercial products, even if the market concentration of the future market cannot be measured using traditional means. Where there are few equivalent potential entrants including one or both of the merging firms, that indicates that the future market, once commercialized, will be concentrated. The Agencies will consider other potential entrants' capabilities and incentives in comparison to the merging potential entrant to assess equivalence.

[37] *United States v. Marine Bancorp.*, 418 U.S. 602, 633 (1974).

the firm has successfully expanded into other markets in the past or already participates in adjacent or related markets; evidence that the firm has an incentive to enter; or evidence that industry participants recognize the company as a potential entrant.[38] This analysis is not limited to whether the company could enter with its pre-merger production facilities, but also considers overall capability, which can include the ability to expand or add to its capabilities on its own or in collaboration with someone other than the acquisition target.

Subjective evidence that the company considered entering absent the merger can also indicate a reasonable probability that the company would have entered without the merger.[39] Subjective evidence that the company considered organic entry as an alternative to merging generally suggests that, absent the merger, entry would be reasonably probable.

Likelihood of Deconcentration or Other Significant Procompetitive Effects. New entry can yield a variety of procompetitive effects, including market deconcentration, increased output or investment, higher wages or improved working conditions, greater innovation, higher quality, and lower prices.[40] If the merging firm had a reasonable probability of entering the concentrated relevant market, the Agencies will usually presume that the resulting deconcentration and other benefits that would have resulted from its entry would be competitively significant, unless there is substantial direct evidence that the competitive effect would be *de minimis*.[41] To supplement the presumption that new entry yields procompetitive effects, the Agencies will consider projections of the potential entrant's competitive significance, such as market share, its business strategy, the anticipated response of competitors, or customer preferences or interest.

A merger of two potential entrants can also result in a substantial lessening of competition. The merger need not involve a firm that has a commercialized product in the market or an existing presence in the same geographic market. The Agencies analyze similarly mergers between two potential entrants and those involving a current market participant and a potential entrant.

B. Perceived Potential Competition: Lessening of Current Competitive Pressure

A perceived potential entrant can stimulate competition among incumbents. That pressure can prompt current market participants to make investments, expand output, raise wages, increase product quality, lower product prices, or take other procompetitive actions. The acquisition of a firm that is perceived by market participants as a potential entrant can substantially lessen competition by eliminating or relieving competitive pressure.[42]

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[38] As to all of these types of evidence, see *Marine Bancorp.*, 418 U.S. at 636–37; *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 978 (8th Cir. 1981).
[39] *Yamaha Motor Co.*, 657 F.2d at 978.
[40] *Brown Shoe Co.*, 370 U.S. at 345 n.72 ("Internal expansion is . . . more likely to provide increased investment . . . more jobs and greater output.").
[41] For example, where state banking laws prohibit alternative *de novo* entry and dictate that alternative entry via toehold acquisition "would be frozen at the level of its initial acquisition," the Agencies would not presume such alternative entry would yield deconcentration as a significant procompetitive effect. *Marine Bancorp., Inc.*, 418 U.S. 602, 633-39 (1974).
[42] This elimination of present competitive pressure is sometimes known as an anticompetitive "edge effect" or a loss of "perceived potential competition." *E.g., Marine Bancorp.*, 418 U.S. at 639.

To assess whether the acquisition of a perceived potential entrant may substantially lessen competition, the Agencies consider whether a current market participant could reasonably consider one of the merging companies to be a potential entrant and whether that potential entrant has a likely influence on existing competition.

Market Participant Could Reasonably Consider a Firm to Be a Potential Entrant. The starting point for this analysis is evidence regarding the company's capability of entering or applying competitive pressure.[43] Objective evidence is highly probative and includes evidence of feasible means of entry or communications by the company indicating plans to expand or reallocate resources in a way that could increase competition in the relevant market. Objective evidence can be sufficient to find that the firm is a potential entrant; it need not be accompanied by any subjective evidence of current market participants' internal perceptions or direct evidence of strategic reactions to the potential entrant. If such evidence is available, it can weigh in favor of finding that a current market participant could reasonably consider the firm to be a potential entrant.

Likely Influence on Existing Rivals. Objective evidence establishing that a current market participant could reasonably consider one of the merging firms to be a potential entrant can also establish that the firm has a likely influence on existing market participants.[44] Subjective evidence indicating that current market participants, including for example customers, suppliers, or distributors, internally perceive the merging firm to be a potential entrant can also establish a likely influence. Direct evidence that the firm's presence or behavior has affected or is affecting current market participants' strategic decisions can also establish a likely influence.[45] Circumstantial evidence that the firm's presence or behavior had a direct effect on the competitive reactions of firms in the market may also show likely influence.[46]

The existence of a perceived potential entrant does not override or counteract harm from mergers between companies that already participate in the relevant market. The impact of perceived potential entrants is secondary to the competition provided by current market participants. Accordingly, when evaluating a merger of current competitors, the Agencies will assess whether firms are likely to enter the market to replace the lost competition using the standards discussed in Section IV.2. Concentrated markets often lack robust competition, and so the loss of even a secondary source of competition, like perceived potential entrants, may substantially lessen competition.

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[43] *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533–36 (1973) (identifying "specific question" as "whether, given [the acquirer's] financial capabilities and conditions in the market, it would be reasonable to consider it a potential entrant into that market").

[44] *Falstaff Brewing Corp.*, 410 U.S. at 534.

[45] *FTC v. Procter & Gamble*, 386 U.S. 568, 581 (1967) (relying on objective evidence that "barriers to entry . . . were not significant" for the acquirer, that the number of potential entrants was "not so large that the elimination of one would be insignificant," and that "the acquiring firm was the most likely entrant," in addition to direct evidence of current edge effects on existing competitors' behavior).

[46] For instance, a market participant may have expressed concerns that certain competitive actions would hurt its ability to compete against the potential entrant.

5. Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete.

The Agencies evaluate whether a merger may substantially lessen competition by giving a firm control over access to a product, service, or customers that its rivals use to compete. Control of rivals' access to these tools of competition can enable the merged firm to weaken its rivals and, in so doing, lessen competition or tend to create a monopoly.

This concern applies to any transaction involving access to products, services, or customers rivals use to compete, whether or not they involve traditional vertical supply and distributor relationships. The Agencies' analysis focuses on the risk that the merged firm would have the ability and incentive to make it harder for rivals to compete and thereby harm competition.[47]

The relevant market for this analysis can be the market in which the merged firm competes with its rivals, while the product, service, or customer that rivals use to compete in that market is termed the "related product" or "related service." Many types of related products or services can implicate this concern, such as: (1) related products rivals may use, now or in the future, as inputs; (2) related products that provide distribution services for rivals or otherwise influence consumer purchase decisions, or the firm's own purchases of intermediate products; (3) related products that provide the merged firm access to competitively sensitive information about its rivals; or (4) related products that are complementary to, and therefore increase the value of, rivals' products. Even if the related product or service is not currently being used by rivals, it might be competitively significant because, for example, its availability enables rivals to obtain better terms from other providers in negotiations.

A. The Ability and Incentive to Weaken or Exclude Rivals

A merger involving products, services, or customers that rivals use to compete may substantially lessen competition when it results in a firm with both the ability and incentive to make it harder for its rivals to compete in the relevant market, or to eliminate them or deter the entry of new firms into the relevant market. Because the merged firm may have the ability to control access to the related product in many different ways, the Agencies do not seek to specify the precise actions the merged firm would take to weaken rivals.

(1) Ability

The Agencies assess the merged firm's ability to make it harder for its rivals to compete by examining (1) the extent to which the firm can limit or degrade its rivals' access to a related product, service, or customers, and (2) the extent to which the related product, service, or customers affects those rivals' competitiveness.

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[47] The inquiry in Guideline 6 into vertical market structures is distinct from this ability and incentive analysis.

Ability to Limit Access. The Agencies assess whether the merged firm may be able to limit or degrade rivals' access to the related product or service by looking at the availability of substitutes. In particular, the merged firm might be able to deny rivals access altogether or might be able to worsen the terms on which rivals can access the related product or service. For example, the merged firm might raise price, reduce quality, provide less reliable access, or delay access to product improvements or information relevant to making efficient use of the product.

Competitive Significance of Limiting Rivals' Access. The Agencies consider the potential impact on competition from limiting or degrading rivals' access to the related product or service. This inquiry focuses on whether doing so would make it harder for rivals to compete or raise barriers to entry by new firms and expansion by existing firms. For example, it would be harder for rivals to compete if raising rivals' costs as a result of the merger led rivals to charge higher prices, made their products less attractive to customers, or meant those products were less readily available to customers. The merged firm's ability to exclude or weaken rivals is greater, the worse are rivals' alternative options to the merged firm's related product or service.

(2) Incentive

The Agencies assess whether the merged firm may have an incentive to worsen the terms on which rivals can access the related product and thereby benefit from substantially lessened competition. This incentive discourages the merged firm from providing those rivals with access to the related product or service. Evidence regarding the merged firm's incentives can include evidence about the structure, history, and probable future of the market.

Competition with Rivals That Use the Related Product or Service. The merged firm's incentives to worsen terms for the related product depend on the extent to which it competes with rivals that use the related product. The merged firm may benefit from higher sales or prices in the relevant market if they worsen terms for rivals. This benefit can make it profitable to worsen the terms offered to rivals for the related product and thereby substantially lessen competition, even though it would not have been profitable for the firm that controlled the related product prior to the merger.

The Agencies may assess the extent of competition with rivals using analogous methods to the ones used to assess the extent of competition between the merging firms (see Guideline 2 and Appendix 2). For example, the Agencies may consider evidence about the impact on the merged firm of competitive actions by rivals that use the related product.

Prior Transactions or Prior Actions. If firms used prior acquisitions or engaged in prior actions to limit rivals' access to the related product, or other products its rivals use to compete, that suggests that the merged firm has an incentive to lessen competition in the relevant market. However, lack of past action does not necessarily indicate a lack of incentive in the present transaction.

Internal Documents. Business planning and merger analysis documents prepared by the merging firms might identify instances where the firms themselves believe they have incentives

to raise rivals' costs. Such documents, where available, are highly probative of an incentive to raise rivals' costs. The lack of such documents, however, is less informative.

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If the merged firm has the ability and incentive to make it harder for its rivals to compete in the relevant market, there are many ways it could act on those incentives. The merging parties may put forward evidence that there are no plausible ways in which they could profitably worsen the terms for the related product and thereby make it harder for rivals to compete, or that the merged firm will be more competitive as a result of the merger. When evaluating whether this rebuttal evidence is sufficient to conclude that no substantial lessening of competition is threatened by the merger, the Agencies will give little weight to claims that are not supported by an objective analysis, including, for example, speculative claims about reputational harms. Moreover, the Agencies are unlikely to credit claims or commitments to protect or otherwise avoid harming their rivals that do not align with the firm's incentives.[48] The Agencies' assessment will be consistent with the principle that firms act to maximize their overall profits and valuation rather than the profits of any particular business unit.[49] A merger may substantially lessen competition or tend to create a monopoly regardless of the claimed intent of the merging companies or their executives.[50] (See Section IV.)

B. Mergers Involving Access to Rivals' Competitively Sensitive Information

If rivals would continue to access or purchase a related product controlled by the merged firm post-merger, the merger may substantially lessen competition if the merger would grant the firm access to rivals' competitively sensitive information. This situation could arise in many settings, including, for example, if the merged firm learns about rivals' sales volumes or projections from supplying an input or a complementary product; if it learns about promotion plans and anticipated product improvements or innovations from its role as a distributor; or if it learns about entry plans from discussions with potential rivals about compatibility with a complementary product it controls. A merger that gives the merged firm access to competitively sensitive information could undermine rivals' ability or incentive to compete aggressively or could facilitate coordination.

Undermining Competition. The merged firm might use access to a rival's competitively sensitive information to undermine competition from the rival. For example, the merged firm's ability to preempt, appropriate, or otherwise undermine the rival's procompetitive actions can discourage the rival from fully pursuing competitive opportunities. As a result, rivals might see less value in taking procompetitive actions when a competitor has access to its competitively

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[48] *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001).
[49] *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 770–72 (1984); *United States v. AT&T, Inc.*, 916 F.3d 1029, 1043 (D.C. Cir. 2019).
[50] *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957); *see also Miss. River Corp. v. FTC*, 454 F.2d 1083, 1089 (8th Cir. 1972) ("Honest intentions, business purposes and economic benefits are not a defense to violations of an antimerger law.").

sensitive information. Relatedly, rivals might refrain from doing business with the merged firm rather than risk that the merged firm would use their competitively sensitive business information to undercut them. Those rivals might become less-effective competitors if they must rely on less preferred trading partners or accept less favorable trading terms because their outside options have worsened or are more limited.

Facilitating Coordination. A merger that provides access to rivals' competitively sensitive information might facilitate coordinated interaction among firms in the relevant market by allowing the merged firm to observe its rivals' competitive strategies faster and more confidently. (See Guideline 3.)

6. Vertical Mergers Should Not Create Market Structures That Foreclose Competition.

A merger is "vertical" when the merging firms operate different levels of the same supply or distribution chain. Vertical integration occurs when the product or service supplied by the "upstream" firm (e.g., an input supplier) will be used by the "downstream" firm (e.g., a manufacturer of a finished product). "The primary vice of a vertical merger…is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition, which deprives rivals of a fair opportunity to compete."[51] The Agencies therefore sometimes undertake a structural analysis of a supply chain as a means of assessing whether a vertical merger may substantially lessen competition.[52]

A. Market Share Analysis

The risk of harm to competition is greater when unintegrated rivals have fewer substitutes for the related product. The Agencies may define a "related market" around the related product (see Guideline 5), using methodologies described in Section III. The "foreclosure share" is the share of the related market that is controlled by the merged firm, such that it could foreclose rival's access to the related product on competitive terms. If the foreclosure share is above 50 percent, that factor alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition, subject to any rebuttal evidence (see Section IV).[53]

B. Plus Factors Analysis

Below a foreclosure share of 50 percent, the Agencies consider a range of plus factors, in addition to the foreclosure share, to determine whether a vertical merger is reasonably likely to

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[51] *Brown Shoe*, 380 U.S. at 323-24 (cleaned up). *See Fruehauf Corp. v. FTC*, 603 F.2d 345, 352 (2d Cir. 1979); *U.S. Steel Corp. v. FTC*, 426 F.2d 592, 599 (6th Cir. 1970); *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 567 (2d Cir. 1983).

[52] In addition to this structural analysis, many vertical mergers can also be analyzed under the ability and incentive analysis in Guideline 5. Either can be a sufficient basis to warrant concern.

[53] *Brown Shoe*, 370 U.S. at 328 ("If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated . . ."); *Fruehauf Corp.*, 603 F.2d 345, 352, n.9 (2d Cir. 1979) ("[N]o such Per se rule has been adopted, except where the share of the market foreclosed reaches monopoly proportions," and the roughly 50% foreclosure share in *United States v. EI du Pont de Nemours & Co.*, 353 U.S. 586 (1957) "left no doubt that the vertical tie conferred market power.").

restrict options along the supply chain, depriving rivals of a fair opportunity to compete. The following is not an exhaustive list of all sources of potentially relevant evidence.

Trend Toward Vertical Integration. The Agencies will generally consider evidence about the degree of integration between firms in the relevant and related markets and whether there is a trend toward further vertical integration. The acceleration of a trend toward vertical integration may be shown through, for example: a pattern of vertical integration following mergers by one or both of the merging companies; or evidence that a merger was motivated by a desire to secure supply or distribution in response to similar transactions among other companies.[54]

Nature and Purpose of the Merger. When the nature and purpose of the merger is to foreclose rivals, including by raising their costs, that suggests the merged firm is likely to foreclose rivals.[55]

The Relevant Market is Already Concentrated. The risk to competition from restricted supply chains is greater when the relevant market is already concentrated or when the merged firm already has a dominant position in that market (see Guideline 7).

The Merger Increases Barriers to Entry. A vertical merger can raise barriers to entry by limiting independent sources of supply so that a new entrant would need to invest not only in entering the relevant market, but also in the related market, sometimes referred to as two-stage entry.[56]

7. Mergers Should Not Entrench or Extend a Dominant Position.

In a market that is already concentrated, merger enforcement should seek to preserve the possibility of eventual deconcentration.[57] Accordingly, the Agencies evaluate whether a merger involving an "already dominant[] firm may substantially reduce the competitive structure of the industry."[58] The Agencies also evaluate whether the merger may extend that dominant position into new markets, thereby substantially lessening competition in those markets.[59] The effect of entrenching or extending an already dominant position "may be substantially to lessen competition" or it "may be…to tend to create a monopoly" in violation of Section 7 of the

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[54] *United States Steel Corp. v. FTC*, 426 F.2d 592 (6th Cir. 1970).
[55] *See Ford Motor Co.*, 405 U.S. at 571.
[56] *Marquette Cement Manufacturing, Co.*, 75 FTC 32, 44 (1969) ("The increased capital costs and the greater risks that entry at both levels would entail substantially increased barriers to entry in this market . . .").
[57] *Phila. Nat'l Bank*, 374 U.S. at 365 n.42 (1963) ("[I]f concentration is already great, the importance of … preserving the possibility of eventual deconcentration is correspondingly great.").
[58] *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-578 (1967); *see, e.g., Allis-Chalmers Mfg. Co. v. White Consol. Indus*., *Inc.*, 414 F.2d 506, 518 (3d Cir. 1969) ("The potential entrenchment of … market power… may be anticompetitive and violative of § 7."); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353 (2d Cir. 1979) (the "entrenchment of a large supplier or purchaser" can be an "essential" showing of a Section 7 violation); *United States v. FCC*, 652 F.2d 72, 102 (D.C. Cir. 1980) (under "entrenchment theory" a merger may violate Section 7 when it would allow the firm to "dominate the relevant market and to drive out actual or potential competitors"); *Stanley Works v. FTC*, 469 F.2d 498, 505 (2d Cir. 1972) (affirming order blocking a merger under Section 7 that would "entrench" an "already dominant position").
[59] *Ford Motor Co. v. United States*, 405 U.S. 562, 571 (1972) (condemning acquisition by dominant firm to obtain a foothold in another market when coupled with incentive to create and maintain barriers to entry into that market).

Clayton Act.[60] "Th[is] entrenchment doctrine properly blocks artificial competitive advantages … but not simple improvements in efficiency."[61]

These concerns can arise in mergers that are neither strictly horizontal nor vertical, so the Agencies seek to identify any connection suggesting the merger may entrench or extend the dominant position.

To evaluate this concern, the Agencies consider whether (a) one of the merged firms already has a dominant position, and (b) the merger may entrench or extend that position. The Agencies assess the magnitude of the lessening of competition that may arise from entrenching a dominant position based on the degree of dominance already held and the extent to which it would be entrenched by a merger. The greater the dominance already held, the lower the degree of entrenchment that gives rise to a substantial lessening of competition. When one merging firm has or is approaching monopoly power, any acquisition that may tend to preserve its dominant position may tend to create a monopoly in violation of Section 7.

To identify whether one of the merging firms already has a dominant position,[62] the agencies look to whether (i) there is direct evidence that one or both merging firms has the power to raise price, reduce quality, or otherwise impose or obtain terms that they could not obtain but-for that dominance, or (ii) one of the merging firms possesses at least 30 percent market share.

If this inquiry reveals that at least one of the merging firms already has a dominant position, the Agencies then examine whether the merger would either entrench that position or extend it into additional markets.

Entrenching a Dominant Position. The Agencies examine whether the merger may entrench the dominant position through any mechanism consistent with market realities that lessens the competitive threats the merged firm faces. For example:

A. *Increasing Entry Barriers Generally.* Entry barriers protect an incumbent firm from competition by making it more difficult for firms to enter the market or for existing firms to expand. Entry barriers can include, for example, the time, money, and expertise needed to develop a competing product; the risk that such entry would fail to recover the required investment; the costs to customers of switching providers;

[60] A merger that entrenches or extends a firm's dominant position may also violate Section 1 or Section 2 of the Sherman Act. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (acquisitions among the types of conduct that may violate the Sherman Act). The various provisions of the Sherman, Clayton, and FTC acts each have separate standards, and one may be violated when the others are not.

[61] *See Emhart Corp. v. USM Corp*., 527 F.2d 177, 182 (1st Cir. 1975).

[62] Cases use various terms to describe a firm with an already powerful position in a market. *See, e.g.*, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 575 (1967) ("dominant position"); *id.* at 571 ("leading manufacturer"); *United States v. Aluminum Co. of Am*., 377 U.S. 271, 278 (1964) ("leading producer"); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 524 (3d Cir. 1969) ("leading firm"); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353 (2d Cir. 1979) ("large supplier"); *United States v. FCC*, 652 F.2d 72, 103 (D.C. Cir. 1980) ("dominant firms"); *id.* ("leading . . . firm"); *Stanley Works v. FTC*, 469 F.2d 498, 505 (2d Cir. 1972) ("dominant position"); *Mo. Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 866 (2d Cir. 1974) ("dominant firm"). Concern with entrenching or extending a powerful position, however, does not depend on the precise term, and arises whether the firm has market power or monopoly power. These Guidelines therefore use the term "dominant position" to refer to the position of those firms for which antitrust law is concerned about extending or entrenching power through a merger.

existing regulatory barriers; the control over necessary inputs by a current market participant; scale economies; network effects; entrenched preferences for established brands; or control of patents. A merger that increases barriers to entry, including by requiring rivals to incur additional entry costs, can entrench a dominant position.[63] Several specific entry barriers are discussed below in B-D.

B. *Increasing Switching Costs.* The costs associated with changing suppliers (often referred to as switching costs) are an important barrier to entry that can entrench a dominant position. A merger may increase switching costs if it makes it more difficult for customers to switch away from the dominant firm's product or service, such as by enabling the bundling of multiple products or services together. A merger may also increase switching costs if it gives the dominant firm control of something customers use to switch providers, such as a data transfer service.

C. *Interfering With Use of Competitive Alternatives.* A dominant position may be threatened by a service that customers use to work with multiple providers of similar or overlapping bundles of products and services. If an already dominant firm acquires a firm that provides a service that supports the use of multiple providers, it may have an incentive to degrade the utility or availability of that service, or to modify the service to steer customers to its own products, entrenching its dominant position.

D. *Depriving Rivals of Scale Economies or Network Effects.* Scale economies and network effects can serve as a barrier to entry. Depriving rivals of access to scale economies and network effects can therefore entrench a dominant position. If an already dominant firm acquires by merger additional scale or customers such that they are not available to would-be rivals, the merger can limit the ability of rivals to improve their own products and compete more effectively.

E. *Eliminating a nascent competitive threat.* A nascent threat to a dominant firm is a firm that could grow into a significant rival, facilitate other rivals' growth, or otherwise lead to a reduction in dominance. In assessing a merger that eliminates a nascent threat, the Agencies examine the merger's tendency to create a monopoly under Section 7 of the Clayton Act.

In addition to these examples, the Agencies will assess whether the merger entrenches a dominant position in any other way based on the market realities specific to the merger.

At times, high entry barriers can become temporarily less effective in protecting a firm's dominance. For example, technological transitions can render existing entry barriers less relevant, and a dominant firm might seek to acquire firms to help it reinforce or recreate those entry barriers so that its dominance endures past the technological transition. Further, technological transitions can create temporary opportunities for entrants to differentiate based on their alignment with new technologies. A dominant firm might seek to acquire firms that might

[63] *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578 (1967) (a merger "may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing").

otherwise gain sufficient customers to overcome entry barriers. The Agencies take particular care to preserve opportunities for deconcentration during technological shifts.

Separate from and in addition to its Section 7 analysis, the Agencies will consider whether the merger violates Section 2 of the Sherman Act. For example, under Section 2 of the Sherman Act, a firm that may challenge a monopolist may be characterized as a "nascent threat" even if the impending threat is uncertain and may take several years to materialize.[64] The Agencies assess whether the merger is reasonably capable of contributing significantly to the preservation of monopoly power in violation of Section 2, which turns on whether the acquired firm is a nascent competitive threat.[65]

Extending a Dominant Position into a Related Market. The Agencies also examine the risk that a merger could enable the merged firm to extend a dominant position from one market into a related market, thereby substantially lessening competition in the related market. For example, the merger might lead the merged firm to leverage its position by tying, bundling, conditioning, or otherwise linking sales of two products, excluding rival firms and ultimately substantially lessening competition in the related market.[66] The Agencies will not attempt to assess whether such tying, bundling, conditioning, or other linkage of the two products would itself violate any law, but instead will assess whether such conduct, if it were to occur, may tend to extend the firm's dominant position.

8. Mergers Should Not Further a Trend Toward Concentration.

The effect of a merger may be substantially to lessen competition or to tend to create a monopoly if it contributes to a trend toward concentration. The Clayton Act "was designed to arrest mergers 'at a time when the trend to a lessening of competition in a line of commerce is still in its incipiency.'"[67] The Supreme Court has therefore "adopt[ed] an approach to a determination of a 'substantial' lessening of competition [that] allow[s] the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing."[68] Guideline 1 explains how the Agencies consider mergers in, or resulting in, highly concentrated markets. If concentration "has been recently increasing," the Agencies examine whether the merger would further that trend toward concentration.

The Agencies look for two factors that together indicate a merger would further a trend toward concentration sufficiently that it may substantially lessen competition.

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[64] *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) ("[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will[.]")

[65] *See id.* at 79.

[66] *Ford Motor Co. v. United States*, 405 U.S. 562, 571 (1972) (condemning an acquisition by a dominant firm with the incentive to create and maintain barriers to entry into target's market).

[67] *United States v. Marine Bancorp.*, 417 U.S. 602, 622 (1974) (*quoting Brown Shoe*, 370 U.S. at 317).

[68] *Gen. Dynamics*, 415 U.S. at 497-98 nn. 7-8 (1974) (*citing United States v. Continental Can Co.*, 378 U.S. 441, 458 (1974); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-552 (1966) and explaining that evidence of trend toward concentration "would…have sufficed to support a finding of undue concentration in the absence of other considerations.").

First, the Agencies consider whether the merger would occur in a market or industry sector where there is a significant tendency toward concentration. That trend may be toward horizontal concentration, or it may be a "trend toward vertical integration" that would ultimately result in the "foreclosure of independent manufacturers from markets otherwise open to them."[69] (See Guideline 6). That trend can be established by market structure, for example as a steadily increasing HHI exceeds 1,000 and rises toward 1,800. Or it can be reflected in other market characteristics, such as the exit of significant players or other factors driving concentration.[70]

Second, the Agencies examine whether the merger would increase the existing level of concentration or the pace of that trend. That may be established by a significant increase in concentration, such as a change in HHI greater than 200, or it may be established by other facts showing the merger would increase the pace of concentration.

9. When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.

A firm that engages in an anticompetitive pattern or strategy of multiple small acquisitions in the same or related business lines may violate Section 7, even if no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly.[71] In these situations, the Agencies may evaluate the series of acquisitions as part of an industry trend (Guideline 8) or evaluate the overall pattern or strategy of serial acquisitions by the acquiring firm under Guidelines 1-7.

In expanding antitrust law beyond the Sherman Act through passage of the Clayton Act, Congress intended "to permit intervention in a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize."[72] As the Supreme Court has recognized, a cumulative series of mergers can "convert an industry from one of intense competition among many enterprises to one in which three or four large [companies] produce the entire supply."[73] Accordingly, the Agencies will consider individual acquisitions in light of the cumulative effect of related patterns or business strategies.

The Agencies may examine a pattern or strategy of growth through acquisition by examining both the firm's history and current or future strategic incentives. Historical evidence focuses on the actual acquisition practices (consummated or not) of the firm, both in the markets at issue and in other markets, to reveal any overall strategic approach to serial acquisitions. Evidence of the firm's current incentives includes documents and testimony reflecting its plans

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[69] *Brown Shoe*, 370 U.S. at 332.
[70] *See United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-552 (1966).
[71] Such strategies may also violate Section 2 of the Sherman Act and Section 5 of the FTC Act. Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* at 12-14 nn.73, 82 (Nov. 10, 2022) (noting that "a series of acquisitions that tend to bring about the harm that the antitrust laws were designed to prevent . . . " have been subject to liability under Section 5).
[72] H.R. Rep. No. 1191, 81st Cong., 2d Sess. 12-13 (1950).
[73] *See Brown Shoe*, 370 U.S. at 334 (1962) (citing S.Rep. No. 1775, 81st Cong., 2d Sess. 5, U.S. Code Cong. and Adm. News 1950, p. 4297.61; H.R.Rep. No. 1191, 81st Cong., 1st Sess. 8).

and strategic incentives both for the individual acquisition and for its position in the industry more broadly. Where one or both of the merging parties has engaged in a pattern or strategy of pursuing consolidation through acquisition, the Agencies will examine the impact of the cumulative strategy under any of the other Guidelines to determine if that strategy may substantially lessen competition or tend to create a monopoly.

10. When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.

Platforms provide different products or services to two or more different groups or "sides" who may benefit from each other's participation. Mergers involving platforms can give rise to competitive problems, even when a firm merging with the platform has a relationship to the platform that is not strictly horizontal or vertical. When evaluating a merger involving a platform, the Agencies apply Guidelines 1-8 while accounting for market realities associated with platform competition. Specifically, the Agencies consider competition *between* platforms, competition *on* a platform, and competition to *displace* the platform.

Multi-sided platforms generally have several attributes in common, though they can also vary in important ways. Some of these attributes include:

A. Platforms have multiple sides. On each side of a platform, platform participants provide or use distinct products and services.[74] Participants can provide or use different types of products or services on each side.

B. A platform operator provides the core services that enable the platform to connect participant groups across multiple sides. The platform operator controls other participants' access to the platform and can influence how interactions among platform participants play out.

C. Platform participants comprise each side of a platform. Their participation might be as simple as using the platform to find other participants, or as involved as building platform services that enable participants to connect in new ways and allow new participants to join the platform.

D. Network effects occur when platform participants contribute to the value of the platform for other participants and the operator. The value for groups of participants on one side may depend on the number of participants either on the same side (direct network effects) or on the other side(s) (indirect network effects).[75] Network effects can create a tendency toward concentration in platform industries. Indirect network effects can be asymmetric and heterogeneous; for example, one side of the market or segment of participants may place relatively greater value on the other side(s).

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[74] For example, on 1990s operating-system platforms for personal computer (PC) software, software developers were on one side, PC manufacturers on another, and software purchasers on another.

[75] For example, 1990s PC manufacturers, software developers, and consumers all contributed to the value of the operating system platform for one another.

E. A conflict of interest may arise when a platform operator is also a platform participant. The conflict of interest stems from the operator's interest in operating the platform as a forum for competition and its interest in winning competition on it.

Consistent with the Clayton Act's protection of competition "in any line of commerce," the Agencies will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants—i.e., around one side of the platform (see Section III, Market Definition).[76]

The Agencies protect competition *between* platforms by preventing the acquisition or exclusion of other platform operators that may substantially lessen competition or tend to create a monopoly. This scenario can arise from various types of mergers:

A. Mergers involving two platform operators eliminate the competition between them. In a market with a dominant platform, entry or growth by smaller competing platforms can be particularly challenging because of network effects. A common strategy for smaller platforms is to specialize, providing distinctive features. Thus, dominant platforms can lessen competition and entrench their position by systematically acquiring platforms while they are in their infancy. The Agencies seek to stop these trends in their incipiency.

B. A platform operator may acquire a platform participant, which can entrench the operator's position by depriving rivals of participants and, in turn, depriving them of network effects. For example, acquiring a major seller on a platform may make it harder for rival platforms to recruit buyers. The long-run benefits to a platform operator of denying network effects to rival platforms create a powerful incentive to withhold or degrade those rivals' access to platform participants that the operator acquires. The more powerful the platform operator, the greater the threat to competition presented by mergers that may weaken rival operators or increase barriers to entry and expansion.

C. Acquisitions of firms that provide services that facilitate participation on multiple platforms can deprive rivals of platform participants. Many services can facilitate such participation, such as tools that help shoppers compare prices across platforms, applications that help sellers manage listings on multiple platforms, or software that helps users switch among platforms.

D. Mergers that involve firms that provide other important inputs to platform services can enable the platform operator to deny rivals the benefits of those inputs. For example,

[76] In the limited scenario of a "special type of two-sided platform known as a 'transaction' platform," under the Sherman Act, *Ohio v. Am. Express*, 138 S. Ct. 2274, 2280 (2018), a relevant market encompassing both sides of a two-sided platform may be warranted. *Id.* Simultaneous transaction platforms have the "key feature…that they cannot make a sale to one side of the platform without simultaneously making a sale to the other." *Id.* Because "they cannot sell transaction services to [either user group] individually…transaction platforms are better understood as supplying only one product—transactions." *Id.* at 2286. This characteristic is not present for many types of two-sided or multi-sided platforms; in addition, many platforms offer simultaneous transactions as well as other products and services, and further they may bundle these products with access to transact on the platform or offer quantity discounts. Even for simultaneous transaction platforms, non-price evidence such as a change in market structure (see Guideline 1) or a loss of competition between the merging firms (see Guideline 2) can still indicate that a merger may substantially lessen competition in a line of commerce for purposes of the Clayton Act.

acquiring data that helps facilitate matching, sorting, or prediction services may enable the platform to weaken rival platforms by denying them that data.

The Agencies protect competition *on* a platform in any markets that interact with the platform. When a merger involves a platform operator and platform participants, the Agencies carefully examine whether the merger would create conflicts of interest that would harm competition. A platform operator that is also a platform participant has a conflict of interest from the incentive to give its own products and services an advantage against other competitors participating on the platform, harming competition in the product market for that product or service. This problem is exacerbated when discrimination in favor of a product or service would reduce access to distribution for rivals in the participants' market and deprive rivals of network effects in the platform market, both extending and entrenching a dominant position.

The Agencies protect competition to *displace* the platform or any of its services. For example, new technologies or services may create an important opportunity for firms to replace one or more services the incumbent platform operator provides, shifting some participants to partially or fully meet their needs in different ways or through different channels. Similarly, a non-platform service can lessen dependence on the platform by providing an alternative to one or more functions provided by the platform operators. When platform owners are dominant, the Agencies seek to prevent even relatively small accretions of power from inhibiting the prospects for displacing the platform or for decreasing dependency on the platform.

11. When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers.

A merger between competing buyers may harm sellers just as a merger between competing sellers may harm buyers.[77] The same—or analogous—tools used to assess the effects of a merger of sellers can be used to analyze the effects of a merger of buyers, including employers as buyers of labor. A merger of competing buyers can substantially lessen competition by eliminating the competition between the merging buyers or by increasing coordination among the remaining buyers. It can likewise lead to undue concentration among buyers, accelerate a trend towards undue concentration, or entrench or extend the position of a dominant buyer. Competition among buyers can have a variety of beneficial effects analogous to competition among sellers. For example, buyers may compete by expanding supply networks, through transparent and predictable contracting, procurement, and payment practices, or by investing in technology that reduces frictions for suppliers. In contrast, a reduction in competition among buyers can lead to artificially suppressed input prices or purchase volume, which in turn reduces incentives for suppliers to invest in capacity or innovation. The level of concentration at which competition concerns arise may be lower in buyer markets than in seller markets, given the unique features of certain buyer markets.

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[77] *See, e.g.*, *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) (in the Sherman Act context noting that "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.… The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").

Labor markets are important buyer markets. The same general concerns as in other markets apply to labor markets where employers are the buyers of labor and workers are the sellers. The Agencies will consider whether workers face a risk that the merger may substantially lessen competition for their labor.[78] Where a merger between employers may substantially lessen competition for workers, that reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality. When assessing the degree to which the merging firms compete for labor, any one or more of these effects may demonstrate that substantial competition exists between the merging firms.

Labor markets frequently have characteristics that can exacerbate the competitive effects of a merger between competing employers. For example, labor markets often exhibit high switching costs and search frictions due to the process of finding, applying, interviewing for, and acclimating to, a new job. Switching costs can also arise from investments specific to a type of job or a particular geographic location. Moreover, the individual needs of workers may limit the geographical and work scope of the jobs that are competitive substitutes.

In addition, finding a job requires the worker and the employer to agree to the match. Even within a given salary and skill range, employers often have specific demands for the experience, skills, availability, and other attributes they desire in their employees. At the same time, workers may seek not only a paycheck but also work that they value in a workplace that matches their own preferences, as different workers may value the same aspects of a job differently. This matching process often narrows the range of rivals competing for any given employee.

In light of their characteristics, labor markets are often relatively narrow.

The features of labor markets may in some cases put firms in dominant positions. To assess this dominance in labor markets (see Guideline 7), the Agencies often examine the merging firms' power to cut or freeze wages, exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit.

If the merger may substantially lessen competition or tend to create a monopoly in upstream markets, that loss of competition is not offset by purported benefits in a separate downstream product market. Because the Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly in *any* line of commerce and in *any* section of the country, a merger's harm to competition among buyers is not saved by benefits to competition among sellers.[79] That is, a merger can substantially lessen competition in one or

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[78] *See, e.g., NCAA v. Alston*, 141 S. Ct. 2141 (2021) (applying the Sherman Act to protect workers from an employer-side agreement to limit compensation).

[79] *Brown Shoe*, 370 U.S. at 325 ("Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), 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. If such a probability is found to exist, the merger is proscribed.").

more buyer markets, seller markets, or both, and the Clayton Act protects competition in any one of them.

Just as they do when analyzing competition in the markets for products and services, the Agencies will analyze labor market competition on a case-by-case basis.

12. When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

In many acquisitions, two companies come under common control. In some situations, however, the acquisition of less-than-full control may still influence decision-making at the target firm or another firm in ways that may substantially lessen competition. Acquisitions of partial ownership or other minority interests may give the investor rights in the target firm, such as rights to appoint board members, observe board meetings, veto the firm's ability to raise capital, or impact operational decisions, or access to competitively sensitive information. The Agencies have concerns with both cross-ownership, which refers to holding a non-controlling interest in a competitor, as well as common ownership, which occurs when individual investors hold non-controlling interests in firms that have a competitive relationship that could be affected by those joint holdings.

Partial acquisitions that do not result in control may nevertheless present significant competitive concerns. The acquisition of a minority position may permit influence of the target firm, implicate strategic decisions of the acquirer with respect to its investment in other firms, or change incentives so as to otherwise dampen competition. The post-acquisition relationship between the parties and the independent incentives of the parties outside the acquisition may be important in determining whether the partial acquisition may substantially lessen competition. Such partial acquisitions are subject to the same legal standard as any other acquisition.[80]

While the Agencies will consider any way in which a partial acquisition may affect competition, they generally focus on three principal effects:

First, a partial acquisition can lessen competition by giving the partial owner the ability to influence the competitive conduct of the target firm.[81] For example, a voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, influence capital budgets, determine investment return thresholds, or select particular managers, can create such influence. Additionally, a nonvoting interest may, in some instances, provide opportunities to prevent, delay, or discourage important competitive initiatives, or otherwise impact competitive decision making. Such influence can lessen competition because the partial owner could use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm.

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[80] *See United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) ("[A]ny acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of [Section 7 of the Clayton Act] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.").

[81] *See United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 860–61 (6th Cir. 2005).

Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete.[82] Acquiring a minority position in a rival might blunt the incentive of the partial owner to compete aggressively because it may profit through dividend or other revenue share even when it loses business to the rival. For example, the partial owner may decide not to develop a new product feature to win market share from the firm in which it has acquired an interest, because doing so will reduce the value of its investment in its rival. This reduction in the incentive of the acquiring firm to compete arises even when it cannot directly influence the conduct or decision making of the target firm.

Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can substantially lessen competition through other mechanisms. For example, it can enhance the ability of the target and the partial owner to coordinate their behavior and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the investor to the target firm. Even if coordination does not occur, the partial owner may use that information to preempt or appropriate a rival's competitive business strategies for its own benefit. If rivals know their efforts to win trading partners can be immediately appropriated, they may see less value in taking competitive actions in the first place, resulting in a lessening of competition.

13. Mergers Should Not Otherwise Substantially Lessen Competition or Tend to Create a Monopoly.

The analyses above address common scenarios that the Agencies use to assess the risk that a merger may substantially lessen competition or tend to create a monopoly. However, they are not exhaustive. The Agencies have in the past encountered mergers that lessen competition through mechanisms not covered above. For example:

A. A merger that would enable firms to avoid a regulatory constraint because that constraint was applicable to only one of the merging firms;

B. A merger that would enable firms to exploit a unique procurement process that favors the bids of a particular competitor who would be acquired in the merger; or

C. In a concentrated market, a merger that would dampen the acquired firm's incentive or ability to compete due to the structure of the acquisition or the acquirer.

As these scenarios and these Guidelines indicate, a wide range of evidence can show that a merger may lessen competition or tend to create a monopoly. Whatever the sources of evidence, the Agencies look to the facts and the law in each case.

[82] *See Denver & Rio Grande v. United States*, 387 U.S. 485, 504 (1967) (identifying Section 7 concerns with 20% investment).

III. Market Definition

The Clayton Act protects competition "in any line of commerce in any section of the country."[83] The Agencies identify the "area of effective competition" in which competition may be lessened "with reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country.')."[84] The Agencies refer to the process of identifying market(s) protected by the Clayton Act as a "market definition" exercise and the markets so defined as "relevant antitrust markets." Market definition can also allow the Agencies to identify market participants and measure market shares and market concentration.

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. The outer boundaries of a relevant product market are determined by the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[85] Within a broad relevant market, however, effective competition often occurs in numerous narrower relevant markets.[86] Market definition ensures that antitrust markets are sufficiently broad, but it does not lead to a single relevant market. Section 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in any line of commerce" and in "any section of the country" and the Agencies protect competition by challenging a merger that may lessen competition in any one or more relevant markets.

Market participants often encounter a range of possible substitutes for the products of the merging firms. However, a relevant market "cannot meaningfully encompass that infinite range" of substitutes.[87] There may be effective competition among a narrow group of products, and the loss of that competition may be harmful, making the narrow group a relevant market, even if competitive constraints from significant substitutes are outside the group. The loss of both the competition between the narrow group of products and the significant substitutes outside that group may be even more harmful, but that does not prevent the narrow group from being a market in its own right.

Relevant markets need not have "precise 'metes and bounds.'"[88] Some substitutes may be closer, and others more distant, and defining a market necessarily requires including some substitutes and excluding others. Defining a relevant market sometimes requires a line drawing exercise around product features, such as size, quality, distances, customer segment, or prices. There can be many places to draw that line and properly define a relevant market. The Agencies recognize that such scenarios are common, and indeed "fuzziness would seem inherent in any

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[83] 15 U.S.C. § 18.
[84] *Brown Shoe*, 370 U.S. at 324.
[85] *Brown Shoe*, 370 U.S. at 325.
[86] *Id*. ("[W]ithin [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes"). Multiple overlapping markets can be appropriately defined relevant markets. For example, a merger to monopoly for food worldwide would lessen competition in well-defined relevant markets for, among others, food, baked goods, cookies, low-fat cookies, and premium low-fat chocolate chip cookies. Illegality in any of these in any city or town comprising a relevant geographic market would suffice to prohibit the merger.
[87] *United States v. Cont'l Can Co.*, 378 U.S. 441, 449 (1964).
[88] *United States v. Gen. Dynamics Corp.* 415 U.S. 486, 521 (1974).

attempt to delineate the relevant…market."[89] Market participants may use the term "market" colloquially to refer to a broader or different set of products than those that would be needed to constitute a valid antitrust market.

The Agencies rely on several tools to demonstrate that a market is a relevant antitrust market. For example, the Agencies may rely on any one or more of the following to demonstrate the validity of a candidate relevant antitrust market.

A. Direct evidence of substantial competition between the merging parties can demonstrate that a relevant market exists in which the merger may substantially lessen competition and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the precise metes and bounds of the market are not specified. (See Guideline 2).

B. Direct evidence of the exercise of market power can demonstrate a relevant market in which that power exists. This evidence can be valuable when assessing the risk that a dominant position may be entrenched, maintained, or extended, since the same evidence identifies market power and the rough contours of the relevant market.

C. A relevant market can be identified from evidence on observed market characteristics ("practical indicia"), such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[90] Various practical indicia may identify a relevant market in different settings.

D. Another "common method employed by courts and the [Agencies]…is the hypothetical monopolist test."[91] This test examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price. An analogous hypothetical monopsonist test applies when considering the impact of a merger on competition among buyers. Appendix 3 describes this test in more detail.

The Agencies use these tools to define relevant markets because they each leverage commercial realities to identify an area of effective competition.

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[89] *Phila. Nat'l Bank*, 374 U.S. at 360 n.37.

[90] *Brown Shoe*, 370 U.S. at 325, *quoted in United States v. U.S. Sugar Corp.*, No. 22-2806, slip op. at 11, 13-14 (3d Cir. July 13, 2023) (affirming district court's application of *Brown Shoe* practical indicia to evaluate relevant product market that included, based on the unique facts of the industry, those distributors who "could counteract monopolistic restrictions by releasing their own supplies.").

[91] *FTC v. Penn State Hershey Med. Center*, 838 F.3d 327 (3d Cir. 2016). While these guidelines focus on applying the hypothetical monopolist test in analyzing mergers, the test can be adapted for similar purposes in cases involving alleged monopolization or other conduct. *See, e.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 829-30 (11th Cir. 2015).

IV. Rebuttal Evidence Showing that No Substantial Lessening of Competition is Threatened by the Merger.

The Agencies may assess whether a merger may substantially lessen competition or tend to create a monopoly based on a fact-specific analysis under any one or more of the Guidelines discussed above.[92] Supreme Court precedent also examines whether "other pertinent factors" presented by the merging parties nonetheless "mandate[] a conclusion that no substantial lessening of competition [is] threatened by the acquisition."[93]

Several types of rebuttal and defense evidence are subject to legal tests established by the courts. The Agencies apply those tests consistent with prevailing law, as described below.

1. Failing Firms

When merging parties suggest the weak or weakening financial position of one of the merging parties will prevent a lessening of competition, the Agencies examine that evidence under the "failing firm" defense established by the Supreme Court. This defense applies when the assets to be acquired would imminently cease playing a competitive role in the market even absent the merger.

As set forth by the Supreme Court, the failing firm defense has three requirements:

A. "[T]he evidence show[s] that the [failing firm] face[s] the grave probability of a business failure."[94] The Agencies typically look for evidence in support of this element that the allegedly failing firm would be unable to meet its financial obligations in the near future. Declining sales and/or net losses, standing alone, are insufficient to show this requirement.

B. "The prospects of reorganization of [the failing firm are] dim or nonexistent."[95] The Agencies typically look for evidence suggesting that the failing firm would be unable to reorganize successfully under Chapter 11 of the Bankruptcy Act, taking into account that "companies reorganized through receivership, or through [the Bankruptcy Act] often emerge[] as strong competitive companies."[96] Evidence of the firm's actual attempts to resolve its debt with creditors is important.

C. "[T]he company that acquires the failing [firm] or brings it under dominion is the only available purchaser."[97] The Agencies typically look for evidence that a company

[92] *See United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (either "short cut" market-concentration presumption or "fact-specific showing" sufficient to establish prima facie case of Section 7 violation).
[93] *See Gen. Dynamics*, 415 U.S. 486, 498 (1974); *United States v. Baker Hughes*, 908 F.2d 981, 990 (D.C. Cir. 1990) (quoting *General Dynamics* and describing its holding as permitting rebuttal based on a "finding that 'no substantial lessening of competition occurred or was threatened by the acquisition'").
[94] *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 138 (1969).
[95] *Citizen Publ'g*, 394 U.S. at 138.
[96] *Id*.
[97] *Id.* at 136-39 (1969) (quoting *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930)).

has made unsuccessful good-faith efforts to elicit reasonable alternative offers that pose a less severe danger to competition than does the proposed merger.[98]

Although merging parties sometimes argue that a poor or weakening position should serve as a defense even when it does not meet these elements, the Supreme Court has "confine[d] the failing company doctrine to its present narrow scope."[99] The Agencies evaluate evidence of a failing firm consistent with this prevailing law.[100]

2. Entry and Repositioning

Merging parties sometimes raise a rebuttal claiming that a reduction in competition resulting from the merger would induce entry into the relevant market, preventing the merger from substantially lessening competition in the first place. This claim posits that a merger may, by substantially lessening competition, make the market more profitable for the merged firm and any remaining competitors, and that this increased profitability may induce new entry. To evaluate this rebuttal evidence, the Agencies assess whether entry induced by the merger would be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[101]

A. ***Timeliness.*** To show that no substantial lessening of competition is threatened by a merger, entry must be rapid enough to replace lost competition before any effect from the loss of competition due to the merger may occur. Entry in most industries takes a significant amount of time and is therefore insufficient to counteract any substantial lessening of competition that is threatened by a merger. Moreover, the entry must be durable: an entrant that does not plan to sustain its investment or that may exit the market would not ensure long-term preservation of competition.

B. ***Likelihood.*** Entry induced by lost competition must be so likely that no substantial lessening of competition is threatened by the merger. Firms make entry decisions based on the market conditions they expect once they participate in the market. If the new entry is sufficient to counteract the merger's effect on competition, the Agencies analyze why the merger would induce entry that was not planned in pre-merger competitive conditions.

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[98] Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Parties must solicit reasonable alternative offers before claiming that the business is failing. Liquidation value is the highest value the assets could command outside the market. If a reasonable alternative offer was rejected, the parties cannot claim that the business is failing.

[99] *Citizen Publ'g Co. v. United States*, 394 U.S. at 139.

[100] The Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill; and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition. Because firms can allocate costs, revenues, and intra-company transactions among their subsidiaries and divisions, the Agencies require evidence that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

[101] *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019).

The Agencies also assess whether the merger may increase entry barriers. For example, the merging firms may have a greater ability to discourage or block new entry when combined than they would have as separate firms. Mergers may enable or incentivize unilateral or coordinated exclusionary strategies that make entry more difficult. Entry can be particularly challenging when a firm must enter at multiple levels of the market at sufficient scale to compete effectively.

C. ***Sufficiency.*** Even where timely and likely, the prospect of entry may not effectively prevent a merger from threatening a substantial lessening of competition. Entry may be insufficient due to a wide variety of constraints that limit an entrant's effectiveness as a competitor. Entry must at least replicate the scale, strength, and durability of one of the merging parties to be considered sufficient. The Agencies typically do not credit entry that depends on lessening competition in other markets.

As part of their analysis, the Agencies will consider the economic realities at play. For example, lack of successful entry in the past will likely suggest that entry may be slow or difficult. Recent examples of entry, whether successful or unsuccessful, provide the starting point for identifying the elements of practical entry barriers and the features of the industry that facilitate or interfere with entry.

3. Procompetitive Efficiencies

The Supreme Court has held that "possible economies [from a merger] cannot be used as a defense to illegality."[102] Competition usually spurs firms to achieve efficiencies internally, and Congress and the courts have indicated their preference for internal efficiencies and organic growth. Firms also often work together using contracts short of a merger to combine complementary assets without the full anticompetitive consequences of a merger.

Merging parties sometimes raise a rebuttal argument that, notwithstanding other evidence that competition may be lessened, evidence of procompetitive efficiencies shows that no substantial lessening of competition is in fact threatened by the merger. When assessing this argument, the Agencies will not credit vague or speculative claims, nor will they credit benefits outside the relevant market.[103] Rather, the Agencies examine whether the evidence[104] presented by the merging parties shows each of the following:

A. ***Merger Specificity***. The merger will produce substantial competitive benefits that could not be achieved without the merger under review.[105] Alternative ways of achieving the claimed benefits are considered in making this determination.

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[102] *Phila. Nat'l Bank*, 374 U.S. at 371; *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").

[103] *Miss. River Corp. v. FTC*, 454 F.2d 1083, 1089 (8th Cir. 1972) ("[T]he anticompetitive effects of an acquisition in one market cannot be justified by procompetitive effects in another market. Honest intentions, business purposes and economic benefits are not a defense to violations of an antimerger law.").

[104] In general, evidence related to efficiencies developed prior to the merger challenge is much more probative than evidence developed during the Agencies' investigation or litigation.

[105] If inter-firm collaborations are achievable by contract, they are not merger specific. The Agencies will credit the merger specificity of efficiencies only in the presence of identified barriers to achieving them by contract.

Alternative arrangements could include organic growth of one of the merging firms, contracts between them, mergers with others, or a partial merger involving only those assets that give rise to the procompetitive efficiencies.

B. ***Verifiability.*** These benefits are verifiable, and have been verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging parties or their agents. Procompetitive efficiencies are often speculative and difficult to verify and quantify, and efficiencies projected by the merging firms often are not realized. If reliable methodology for verifying efficiencies does not exist or is otherwise not presented by the merging parties, the Agencies are unable to credit those efficiencies.

C. ***Pass Through to Prevent a Reduction in Competition.*** To the extent efficiencies merely benefit the merging firms, they are not cognizable. The merging parties must show that, within a short period of time, the benefits will improve competition in the relevant market or prevent the threat that it may be lessened.

D. ***Procompetitive.*** Any benefits claimed by the merging parties are cognizable only if they do not result from the anticompetitive worsening of terms for the merged firm's trading partners.[106] Similarly, efficiencies are not cognizable if they will accelerate a trend toward concentration (see Guideline 8) or vertical integration (see Guideline 6).

Procompetitive efficiencies that satisfy each of these criteria are called cognizable efficiencies. To overcome evidence that a merger may substantially lessen competition, cognizable efficiencies must be of sufficient magnitude and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market. Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly.

4. Structural Barriers to Coordination Unique to the Industry

When market structure evidence suggests that a merger may substantially lessen competition through coordination (Guidelines 1 and 3), the merging parties sometimes argue that anticompetitive coordination is nonetheless impossible due to structural market barriers to coordinating. The Agencies consider whether structural market barriers to coordination are "so much greater in the [relevant] industry than in other industries that they rebut the normal presumption" of coordinated effects.[107] In the Agencies' experience, structural conditions that prevent coordination are exceedingly rare in the modern economy. The greater the level of concentration in the relevant market, the greater must be the structural barriers to coordination in order to show that no substantial lessening of competition is threatened.

[106] The Agencies will not credit efficiencies if they reflect or require a decrease in competition in a separate market. For example, if input costs are expected to decrease, the cost savings will not be treated as an efficiency if they reflect an increase in monopsony power.

[107] *See FTC v. H.J. Heinz, Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001).

Appendix 1: Sources of Evidence

This appendix describes the most common sources of evidence the Agencies draw on in a merger investigation. The evidence the Agencies will rely upon to evaluate whether a merger *may* substantially lessen competition or tend to create a monopoly is weighed based on its probative value. In assessing the available evidence, the Agencies consider documents, testimony, available data, and analysis of those data, including credible econometric analysis and economic modeling.

Merging Parties. The Agencies often obtain substantial information from the merging parties, including documents, testimony, and data. Across all of these categories, evidence created in the normal course of business is more probative than evidence created after the company began anticipating a merger review. Similarly, the Agencies give less weight to predictions by the parties or their employees, whether in the ordinary course of business or in anticipation of litigation, offered to allay competition concerns. Where the testimony of outcome-interested merging party employees contradicts ordinary course business records, the Agencies typically give greater weight to the business records.

Evidence that the merging parties intend or expect the merger to lessen competition, such as plans to coordinate with other firms, raise prices, reduce output or capacity, reduce product quality or variety, lower wages, cut benefits, exit a market, cancel plans to enter a market without a merger, withdraw products or delay their introduction, or curtail research and development efforts after the merger, can be highly informative in evaluating the effects of a merger on competition. The Agencies give little weight, however, to the lack of such evidence or the expressed contrary intent of the merging parties.

Customers, Workers, Industry Participants, and Observers. Customers can provide a variety of information to the Agencies, ranging from information about their own purchasing behavior and choices to their views about the effects of the merger itself. The Agencies consider the relationship between customers and the merging parties in weighing customer evidence. The ongoing business relationship between a customer and a merging party may discourage the customer from providing evidence inconsistent with the interests of the merging parties.

Workers and representatives from labor organizations can provide information regarding, among other things, wages, non-wage compensation, working conditions, the individualized needs of workers in the market in question, the frictions involved in changing jobs, and the industry in which they work.

Similarly, other suppliers, indirect customers, distributors, consultants, and industry analysts can also provide information helpful to a merger inquiry. As with other interested parties, the Agencies give less weight to evidence created in anticipation of a merger investigation and more weight to evidence developed in the ordinary course of business.

Market Effects in Consummated Mergers. Evidence of observed post-merger price increases or worsened terms is given substantial weight. A consummated merger, however, may substantially lessen competition even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and is therefore moderating its conduct. Consequently, in evaluating consummated mergers, the Agencies also consider the same types of evidence when evaluating proposed mergers.

Econometric Analysis and Economic Modeling. Econometric analysis of data and other types of economic modeling can be informative in evaluating the potential effects of a merger on competition. The Agencies typically give more weight to analysis using high quality data and adhering to rigorous standards. But the Agencies also take into account that in some cases, the availability or quality of data or reliable modeling techniques might limit the availability and relevance of econometric modeling. When data is available, the Agencies recognize that the goal of economic modeling is not to create a perfect representation of reality, but rather to inform an assessment of the likely change in firm incentives resulting from a merger.

Transaction Terms. The financial terms of the transaction may also be informative regarding a merger's impact on competition. For example, a purchase price that exceeds the acquired firm's stand-alone market value can sometimes indicate that the acquiring firm is paying a premium because it expects to be able to benefit from reduced competition.

Appendix 2. Evaluating Competition Between Firms

This appendix discusses evidence and tools the Agencies look to when assessing competition between firms. The evidence and tools in this section can be relevant to a variety of settings, for example: to assess competition between rival firms (Guideline 2); the incentive to reduce or withhold access to a product rivals use to compete (Guideline 5); or for market definition (Section III of these Guidelines), for example when carrying out the Hypothetical Monopolist Test (Appendix 3.A).

For clarity, the discussion in this appendix often focuses on competition between two suppliers of substitute products that set prices. Analogous analytic tools may also be relevant in more general settings, for example when considering: competition between more than two suppliers; competition among buyers or employers to procure inputs and labor; competition that derives from customer willingness to buy in different locations; and competition that takes place in dimensions other than price or when terms are determined through, for example, negotiations or auctions.

Guideline 2 describes how different types of evidence can be used in assessing the potential harm to competition from a merger; some portions of Guideline 2 that are relevant in other settings are repeated below.

A. Generally Applicable Considerations

The Agencies may consider one or more of the following types of evidence, tools, and metrics when assessing the degree of competition among firms:

Strategic Deliberations or Decisions. The Agencies may analyze the extent of competition between the merging firms by examining evidence of their strategic deliberations or decisions in the regular course of business, as well as information considered during the process of deciding whether to merge. For example, in some markets, the firms may monitor each other's pricing, marketing campaigns, facility locations, improvements, products, capacity, output, input costs, and/or innovation plans. This can provide evidence of competition between the merging firms, especially when they react by taking steps to preserve or enhance the competitiveness or profitability of their own products or services.

Prior Merger, Entry, and Exit Events. The Agencies may look to historical events to assess the presence and substantiality of direct competition between the merging firms. For example, the Agencies may examine the impact of recent relevant mergers, entry, expansion, or exit events.

Customer Substitution. Customers' willingness to switch between different firms' products is an important part of the competitive process. Firms are closer competitors the more that customers are willing to switch between their products.

Evidence commonly analyzed to show the extent of substitution among firms' products includes: how customers have shifted purchases in the past in response to relative changes in

price or other terms and conditions; documentary and testimonial evidence such as win/loss reports, evidence from discount approval processes, switching data, customer surveys, as well as information from suppliers of complementary products and distributors; objective information about product characteristics; and market realities affecting the ability of customers to switch.

Impact of Competitive Actions on Rivals. Competitive actions, such as lowering prices or increasing output, by one firm can increase its sales at the expense of its rivals. The Agencies may gauge the extent of competition among firms by considering the impact that competitive actions by one firm have on the others. The impact of a firm's competitive actions on a rival generally depends on how many sales a rival would lose as a result of the competitive actions, as well as the profitability of those lost sales. The Agencies may use margins to measure the profitability of the sale a rival would have made.[1]

Impact of Eliminating Competition Between the Firms. In some instances, evidence may be available to assess the impact of competition from one or more firms on the other firms' actions, such as firm choices about price, quality, wages, or another dimension of competition. This can be gauged by comparing the two firms' actions when they compete and make strategic choices independently, against the actions the firms might choose if they acted jointly. Actual or predicted changes in these results of competition, when available, can indicate the degree of competition between the firms.

To make this type of comparison, the Agencies sometimes rely on economic models. Often, such models consider the firms' incentives to change their actions in one or more selected dimensions, such as price, in a hypothetical, simplified scenario. For example, a model might focus on the firms' short-run incentives to change price, while abstracting from a variety of additional competitive forces and dimensions of competition, such as the potential for firms to reposition their products or for the merging firms to coordinate with other firms. Such a model may incorporate data and evidence in order to produce quantitative estimates of the impact of a loss of competition on firm incentives and corresponding choices. For example, the model may yield a range of estimates of the effect of a merger on short-run prices or output. This type of exercise is sometimes referred to by economists as "merger simulation" despite the fact that the hypothetical setting considers only selected aspects of the loss of competition from a merger. The Agencies use such models to give an indication of the scale and importance of competition, not to precisely predict outcomes.

B. Considerations When Terms Are Set by Firms

The Agencies may use various types of evidence and metrics to assess the strength of competition between firms that offer the same terms to many different customers. Firms might offer different terms to different groups of customers.

[1]The margin on incremental units is the difference between incremental revenue (often equal to price) and incremental cost on those units. The Agencies may use accounting data to measure incremental costs, but do not necessarily rely on accounting margins recorded by firms in the ordinary course of business because such margins often do not align with the concept of incremental cost that is relevant in economic analysis of a merger.

Competition in this setting can lead firms to set lower prices or offer more attractive terms when they act independently than they would in a setting where that competition was eliminated by a merger. When considering the impact of competition on the incentives to set price, to the extent price increases on one firm's products would lead customers to switch to products from the other firm, their merger will enable the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost because of the price increase will be diverted to the products of the other firm, and capturing the value of these diverted sales can make the price increase profitable even though it would not have been profitable prior to the merger.

A measure of customer substitution between firms in this setting is the diversion ratio. The diversion ratio from one product to another is a metric of how customers likely would substitute between them. The diversion ratio is the fraction of unit sales lost by the first product due to a change in terms, such as an increase in its price that would be diverted to the second product. The higher the diversion ratio between two products made by different firms, the stronger the competition between them.

A high diversion ratio between the products owned by the merging firms can indicate strong competition between them even if the diversion ratio to a non-merging firm is higher. The diversion ratio from one of the products of one firm to a group of products made by other firms, defined analogously, is sometimes referred to as the aggregate diversion ratio or the recapture rate.

A measure of the impact on rivals of competitive actions is the value of diverted sales from a price increase. The value of sales diverted from one firm to a second firm, when the first firm raises its price on one of its products, is equal to the number of units that would be diverted from the first firm to the second, multiplied by the difference between the second firm's price and the incremental cost of the diverted sales. To interpret the magnitude of the value of diverted sales, the Agencies may use as a basis of comparison either the incremental cost to the second firm of making the diverted sales, or the revenues lost by the first firm as a result of the price increase. The ratio of the value of diverted sales to the revenues lost by the first firm can be an indicator of the upward pricing pressure that would result from the loss of competition between the two firms. Analogous concepts can be applied to analyze the impact on rivals of worsening terms other than price.

C. Considerations When Terms Are Set Through Bargaining or Auctions

In some industries, buyers and sellers negotiate prices and other terms of trade. In bargaining, buyers commonly negotiate with more than one seller, and may play competing sellers off against one another. In other industries, sellers might sell their products, or buyers might procure inputs, using an auction. Negotiations may involve aspects of an auction as well as aspects of one-on-one negotiation. Competition among sellers can significantly enhance the ability of a buyer to obtain a result more favorable to it, and less favorable to the sellers, compared to a situation where the elimination of competition through a merger prevents buyers from playing those sellers off against each other in negotiations.

Sellers may compete even when a customer does not directly play their offers against each other. The attractiveness of alternative options influences the importance of reaching an agreement to the negotiating parties and thus the terms of the agreement. A party that has many attractive alternative trading partners places less importance on reaching agreement with any one particular trading partner than a party with few attractive alternatives. As alternatives for one party are eliminated (such as through a merger), the counterparty gains additional bargaining leverage reflecting that loss of competition. A merger between sellers may lessen competition even if the merged firm handles negotiations for the merging firms' products separately.

Thus, qualitative or quantitative evidence about the leverage provided to buyers by competing suppliers may be used to assess the extent of competition among firms in this setting. Analogous evidence may be used when analyzing a setting where terms are set using auctions, for example, procurement auctions where suppliers bid to serve a buyer. If, for some categories of procurements, suppliers are often among the most attractive to the buyer, competition among them is likely to be strong.

Firms sometimes keep records of the progress and outcome of individual sales efforts, and the Agencies may use this data to generate measures of the extent to which customers would likely substitute between the two firms. Examples of such measures might include a diversion ratio based on the rate at which customers would buy from one firm if the other one was not available, or the frequency with which the two firms bid on contracts with the same customer.

D. Considerations When Firms Determine Capacity and Output

In some markets, the choice of how much to produce (output decisions) or how much productive capacity to maintain (capacity decisions) are key strategic variables. When a firm decreases output, it may lose sales to rivals, but also drive up prices. Because a merged firm will account for the impact of higher prices across all of the merged firms' sales, it may have an incentive to decrease output as a result of the merger. The loss of competition through a merger of two firms may lead the merged firm to leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, lay off or stop hiring workers, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another market so as to raise the price in the former market. The analysis of the extent to which firms compete may differ depending on how a merger between them might create incentives to suppress output.

Competition between merging firms is greater when (1) the merging firms' market shares are relatively high; (2) the merging firms' products are relatively undifferentiated from each other; (3) the market elasticity of demand is relatively low; (4) the margin on the suppressed output is relatively low; and (5) the supply responses of non-merging rivals are relatively small. Qualitative or quantitative evidence may be used to evaluate and weigh each of these factors.

In some cases, competition between firms—including one firm with a substantial share of the sales in the market and another with significant excess capacity to serve that market—can prevent an output suppression strategy from being profitable. This can occur even if the firm with the excess capacity has a relatively small share of sales, as long as that firm's ability to expand, and thus keep prices from rising, makes an output suppression strategy unprofitable for the firm with the larger market share.

Output or capacity reductions also may affect the market's resilience in the face of future shocks to supply or demand, and the Agencies will consider this loss of resilience in assessing whether the merger may substantially lessen competition or tend to create a monopoly.

E. Considerations for Innovation and Product Variety Competition

Firms can compete for customers by offering varied and innovative products and features, which could range from minor improvements to the introduction of a new product category. Features can include new or different product attributes, services offered along with a product, or higher-quality services standing alone. Customers value the variety of products or services that competition generates, including having a variety of locations at which they can shop.

Offering the best mix of products and features is a critically important dimension of competition that may be harmed as a result of the elimination of competition between the merging parties.

When a firm introduces a new product or improves a product's features, some of the sales it gains may be at the expense of its rivals, including rivals that are competing to develop similar products and features. As a result, competition between firms may lead them to make greater efforts to offer a variety of products and features than would be the case if the firms were jointly owned, for example, if they merged. The merged firm may have a reduced incentive to continue or initiate development of new products that would have competed with the other merging party, but post-merger would "cannibalize" what would be its own sales.[2] A service provider may have a reduced incentive to continue valuable upgrades offered by the acquired firm. The merged firm may have a reduced incentive to engage in disruptive innovation that would threaten the business of one of the merging firms. Or it may have the incentive to change its product mix, such as by ceasing to offer one of the merging firms' products.

The incentives to compete aggressively on innovation and product variety depend on the capabilities of the firms and on customer reactions to the new offerings. Development of new features depends on having the appropriate expertise and resources. Where firms are two of a small number of companies with specialized employees, development facilities, intellectual property, or research projects in a particular area, competition between them will have a greater impact on their incentives to innovate.

Innovation may be directed at outcomes beyond product features; for example, innovation may be directed at reducing costs or adopting new technology for the distribution of products.

[2] Sales "cannibalization" refers to a situation where customers of a firm substitute away from one of the firm's products and to another product offered by the same firm.

Appendix 3: Details of Market Definition

Section III of these Guidelines describes several approaches that can be used to define markets. In this appendix, we further discuss several details of market definition. Appendix 3.A describes one of the approaches, the Hypothetical Monopolist Test, in greater detail. Appendix 3.B addresses issues that may arise when defining antitrust markets in a number of specific scenarios.

A. The Hypothetical Monopolist Test

This Section describes the Hypothetical Monopolist Test, which is a method by which the Agencies often define antitrust markets. As outlined in Section III of these Guidelines, a relevant antitrust market is an area of effective competition. The Hypothetical Monopolist/Monopsonist Test ("HMT") evaluates whether a group of products is sufficiently broad to constitute a relevant antitrust market. To do so, the HMT asks whether eliminating the competition among the group of products by combining them under the control of a hypothetical monopolist likely would lead to a worsening of terms for customers. The Agencies generally focus their assessment on the constraints from competition, rather than on constraints from regulation, entry, or other market changes. The Agencies are concerned with the impact on economic incentives and assume the hypothetical monopolist would seek to maximize profits.

When evaluating a merger of sellers, the HMT asks whether a hypothetical profit-maximizing firm, not prevented by regulation from worsening terms, that was the only present and future seller of a group of products ("hypothetical monopolist") likely would undertake at least a small but significant and non-transitory increase in price ("SSNIP") or other worsening of terms ("SSNIPT") for at least one product in the group.[3] For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. Analogously, when considering a merger of buyers, the Agencies ask the equivalent question for a hypothetical monopsonist. This Appendix often focuses on merging sellers to simplify exposition.

1. Implementing the Hypothetical Monopolist Test

The SSNIPT. A SSNIPT may entail worsening terms along any dimension of competition, including price (SSNIP), but also other terms (broadly defined) such as quality, service, capacity investment, choice of product variety or features, or innovative effort.

Input and Labor Markets. When the competition at issue involves firms buying inputs or employing labor, the HMT considers whether the hypothetical monopsonist would undertake at

[3] If the pricing incentives of the firms supplying the products in the group differ substantially from those of the hypothetical monopolist, for reasons other than the latter's control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment. Analogous considerations apply when considering a SSNIPT for terms other than price.

least a SSNIPT, such as a decrease in the offered price or a worsening of the terms of trade offered to suppliers, or a decrease in the wage offered to workers or a worsening of their working conditions or benefits.

The Geographic Dimension of the Market. The hypothetical monopolist test is generally applied to a group of products together with a geographic region to determine a relevant market, though for ease of exposition the two dimensions are discussed separately, with geographic market definition discussed in Appendix 3.B.2.

Negotiations or Auctions. For clarity, the HMT is stated in terms of a hypothetical monopolist *undertaking* a SSNIPT. This includes the hypothetical monopolist imposing a price increase, but it also applies to cases where terms are the result of a negotiation or an auction.

Benchmark for the SSNIPT. The HMT asks whether the hypothetical monopolist likely would worsen terms relative to those that likely would prevail absent the proposed merger. In some cases, the Agencies will use as a benchmark different outcomes than those prevailing prior to the merger. For example, if outcomes are likely to change absent the merger, e.g., because of innovation, entry, exit, or exogenous trends, the Agencies may use anticipated future outcomes as the benchmark. Or if suppliers in the market are coordinating prior to the merger, the Agencies may use a benchmark that reflects conditions that would arise if coordination were to break down. When evaluating whether a merging firm is dominant (Guideline 7), the Agencies may use terms that likely would prevail in a more competitive market as a benchmark.[4]

Magnitude of the SSNIPT. What constitutes a "small but significant" worsening of terms depends upon the nature of the industry and the merging firms' positions in it, the ways that firms compete, and the dimension of competition at issue. When considering price, the Agencies will often use a SSNIP of five percent of the price charged by firms for the products or services to which the merging firms contribute value. The Agencies, however, may consider a different term or a price increase that is larger or smaller than five percent.[5]

The Agencies may base a SSNIP on explicit or implicit prices for the firms' specific contribution to the value of the product sold, or an upper bound on the firms' specific contribution, where these can be identified with reasonable clarity. For example, the Agencies may derive an implicit price for the service of transporting oil over a pipeline as the difference between the price the pipeline firm paid for oil at one end and the price it sold the oil for at the other and base the SSNIP on this implicit price.

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[4] In the entrenchment context, if the inquiry is being conducted after market or monopoly power has already been exercised, using prevailing prices can lead to defining markets too broadly and thus inferring that dominance does not exist when, in fact, it does. The problem with using prevailing prices to define the market when a firm is already dominant is known as the "Cellophane Fallacy."

[5] The five percent price increase is not a threshold of competitive harm from the merger. Because the five percent SSNIP is a minimum expected effect of a hypothetical monopolist of an *entire* market, the actual predicted effect of a merger within that market may be significantly lower than five percent. A merger within a well-defined market that causes undue concentration can be illegal even if the predicted price increase is well below the SSNIP of five percent.

2. Evidence and Tools for Carrying Out the Hypothetical Monopolist Test

Appendix 2 describes some of the qualitative and quantitative evidence and tools the Agencies can use to assess the extent of competition between two firms. The Agencies can use similar evidence and analogous tools to apply the HMT, in particular to assess whether competition among a set of firms likely leads to better terms than a hypothetical monopolist would undertake.

The Agencies sometimes interpret the qualitative and quantitative evidence using an economic model of the profitability to the hypothetical monopolist of undertaking at least a SSNIP on one or more products in the candidate market; the Agencies may adapt these tools to apply to other forms of SSNIPTs.

One approach utilizes the concept of a "recapture rate" (the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market). A price increase is profitable when the recapture rate is high enough that the incremental profits from the increased price plus the incremental profits from the recaptured sales going to other products in the candidate market exceed the profits lost when sales are diverted outside the candidate market. It is possible that a price increase is profitable even if a majority of sales are diverted outside the candidate market, for example if the profits on the lost sales are relatively low or the profits on the recaptured sales are relatively high.

Sometimes evidence is presented in the form of "critical loss analysis," which can be used to assess whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits. Critical loss analysis compares the magnitude of the two offsetting effects resulting from the price increase. The "critical loss" is defined as the number of lost unit sales that would leave profits unchanged. The "predicted loss" is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase. The price increase raises the hypothetical monopolist's profits if the predicted loss is less than the critical loss. Smaller or larger price increases may be even more profitable or more likely to be implemented by the hypothetical monopolist.

The Agencies require that estimates of the predicted loss be consistent with other evidence, including the pre-merger margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction, high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price. Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture rate[6] necessary for the candidate market to satisfy the hypothetical monopolist test. Similar considerations inform other analyses of the profitability of a price increase.

B. Market Definition in Certain Specific Settings

This Appendix provides details on market definition in several specific common settings. In much of this section, concepts are presented for the scenario where the merger involves

[6] The recapture rate is sometimes referred to as the aggregate diversion ratio, defined in Appendix 2.B.

sellers. In some cases, clarifications are provided as to how the concepts apply to merging buyers; in general, the concepts apply in an analogous way.

1. Targeted Trading Partners

If the merged firm could profitably target a subset of customers for changes in prices or other terms, the Agencies may identify relevant markets defined around those targeted customers. The Agencies may do so even if firms are not currently targeting specific customer groups but could do so after the merger.

For targeting to be feasible, two conditions typically must be met. First, the suppliers engaging in targeting must be able to set different terms for targeted customers than other customers. This may involve identification of individual customers to which different terms are offered or offering different terms to different types of customers based on observable characteristics.[7] Markets for targeted customers need not have precise metes and bounds. In particular, defining a relevant market for targeted customers sometimes requires a line-drawing exercise on observable characteristics. There can be many places to draw that line and properly define a relevant market. Second, the targeted customers must not be likely to defeat a targeted worsening of terms by arbitrage (e.g., by purchasing indirectly from or through other customers). Arbitrage may be difficult if it would void warranties or make service more difficult or costly for customers, and it is inherently impossible for many services. Arbitrage on a modest scale may be possible but sufficiently costly or limited, for example due to transaction costs or search costs, that it would not deter or defeat a discriminatory pricing strategy.

If prices are negotiated or otherwise set individually, for example through a procurement auction, there may be relevant markets that are as narrow as an individual customer. Nonetheless, for analytic convenience, the Agencies may define cluster markets for groups of targeted customers for whom the conditions of competition are reasonably similar. (See Appendix 3.B.4 for further discussion of cluster markets.)

Analogous considerations arise for a merger involving one or more buyers or employers. In this case, the analysis considers whether buyers target suppliers, for example by paying targeted suppliers or workers less, or by degrading the terms of supply contracts for targeted suppliers. Arbitrage would involve a targeted supplier selling to the buyer indirectly, through a different supplier who could obtain more favorable terms from the buyer.

If the HMT is applied in a setting where targeting of customers is feasible, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the targeted group would undertake at least a SSNIPT on some, though not necessarily all, customers in that group. The products sold to those customers form a relevant market if the hypothetical monopolist likely would undertake at least a SSNIPT despite the potential for customers to substitute away from the product or to take advantage of arbitrage.

[7] In some cases, firms offer one or more versions of products or services defined by their characteristics (where brand might be a characteristic). When customers can select among these products and terms do not vary by customer, the Agencies will typically define markets based on products rather than the targeted customers. In such cases, relevant antitrust markets may include only some of the differentiated products, for example products with only "basic" features, or products with "premium features." The tools described in Appendix 2 can be used to assess competition among differentiated products.

In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

2. Geographic Markets

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. A market's geography depends on the limits that distance puts on some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Factors that may limit the geographic scope of the market include transportation costs (relative to the price of the good), language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and local service availability.

a) Geographic Markets Based on the Locations of Suppliers

The Agencies sometimes define geographic markets as regions encompassing a group of supplier locations. When they do, the geographic market's scope is determined by customers' willingness to switch between suppliers. Geographic markets of this type often apply when customers receive goods or services at suppliers' facilities, for example when customers buy in-person from retail stores. A single firm may offer the same product in a number of locations, both within a single geographic market or across geographic markets; customers' willingness to substitute between products may depend on the location of the supplier. When calculating market shares, sales made from supplier locations in the geographic market are included, regardless of whether the customer making the purchase travelled from outside the boundaries of the geographic market (see Appendix 4 for more detail about calculating market shares).

If the HMT is used to evaluate the geographic scope of the market, it requires that a hypothetical profit-maximizing firm that was the only present or future supplier of the relevant product(s) at supplier locations in the region likely would undertake at least a SSNIPT in at least one location. In this exercise, the terms of sale for products sold to all customers at facilities outside the region are typically held constant.[8]

b) Geographic Markets Based on Targeting of Customers by Location

When targeting based on customer location is feasible (see Appendix 3.B.1), the Agencies may define geographic markets as a region encompassing a group of customers.[9] For example, geographic markets may sometimes be defined this way when suppliers deliver their products or services to customers' locations, or tailor terms of trade based on customers' locations. Competitors in the market are firms that sell to customers that are located in the specified region. Some suppliers may be located outside the boundaries of the geographic market, but their sales to customers located within the market are included when calculating market shares (see Appendix 4 for more detail about calculating market shares).

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[8] In some circumstances, as when the merging parties operate in multiple geographies, if applying the HMT, the Agencies may apply a "Hypothetical Cartel" framework for market definition, following the approach outlined in Appendix 3A n.3.

[9] For customers operating in multiple locations, only those customer locations within the targeted region are included in the market.

If prices are negotiated individually with customers that may be targeted, geographic markets may be as narrow as individual customers. Nonetheless, the Agencies often define a market for a cluster of customers located within a region if the conditions of competition are reasonably similar for these customers. (See Appendix 3.B.4 for further discussion of cluster markets.)

A firm's attempt to target customers in a particular area with worsened terms can sometimes be undermined if some customers in the region substitute by travelling outside it to purchase the product. Arbitrage by customers on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a targeting strategy.[10]

If the HMT is used to evaluate market definition when customers may be targeted by location, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region likely would undertake at least a SSNIPT on some, though not necessarily all, customers in that region. The products sold in that region form a relevant market if the hypothetical monopolist would undertake at least a SSNIPT despite the potential for customers to substitute away from the product or to locations outside the region. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.[11]

3. Supplier Responses

Market definition focuses solely on demand substitution factors, that is, on customers' ability and willingness to substitute away from one product or location to another in response to a price increase or other worsening of terms. Supplier responses may be considered in the analysis of competition between firms (Guideline 2 and Appendix 2), entry and repositioning (Section IV), and in calculating market shares and concentration (Appendix 4).

4. Cluster Markets

A relevant antitrust market is generally a group of products that are substitutes for each other. However, when the competitive conditions for multiple antitrust markets are reasonably similar, it may be appropriate to aggregate the products in these markets into a "cluster market" for analytic convenience, even though not all products in the cluster are substitutes for each other. For example, competing hospitals may each provide a wide range of acute health care services. Acute care for one health issue is not a substitute for acute care for a different health issue. Nevertheless, the Agencies may aggregate them into a cluster market for acute care services if the conditions of competition are reasonably similar across the services in the cluster.

[10] Arbitrage by suppliers is a type of supplier response and is thus not considered in market definition; see Appendix 3.B.3.

[11] In some circumstances, as when the merging parties operate in multiple geographies, the Agencies may apply a "Hypothetical Cartel" framework for market definition, as described in Appendix Footnote 2.

The Agencies need not separately analyze market definition for each product included in the cluster market, and market shares will typically be calculated for the cluster market as a whole.

Analogously, the Agencies sometimes define a market as a cluster of targeted customers (see Appendix 3.B.1) or a cluster of customers located in a region (see Appendix 3.B.2(b)).

5. Bundled Product Markets

Firms may sell a combination of products as a bundle or a "package deal," rather than offering products "*a la carte*," that is, separately as standalone products. Different bundles offered by the same or different firms might package together different combinations of component products and therefore be differentiated according to the composition of the bundle. If the components of a bundled product are also available separately, the bundle may be offered at a price that represents a discount relative to the sum of the *a la carte* product prices.

The Agencies take a flexible approach based on the specific circumstances to determine whether a candidate market that includes one or more bundled products, standalone products, or both is a relevant antitrust market. In some cases, a relevant market may consist of only bundled products. A market composed of only bundled products might be a relevant antitrust market even if there is significant competition from the unbundled products. In other cases, a relevant market may include both bundled products and some unbundled component products.

Even in cases where firms commonly sell combinations of products or services as a bundle or a "package deal," relevant antitrust markets do not necessarily include product bundles. In some cases, a relevant market may be analyzed as a cluster market, as discussed in Appendix 3.B.4.

6. One-Stop Shops in Markets

In some settings, the Agencies may consider a candidate market that includes one or more "one-stop shops," where customers can select a combination of products to purchase from a single seller, either in a single purchase instance or in a sequence of purchases. Products are commonly sold at a one-stop shop when customers value the convenience, which might arise because of transaction costs or search costs, savings of time, transportation costs, or familiarity with the store or web site.

A multi-product retailer such as a grocery store or online retailer is an example of a one-stop shop. Customers can select a particular basket of groceries from a range of available goods and different customers may select different baskets. Some customers may make multiple stops at specialty shops (e.g., butcher, baker, green grocer), or they may do the bulk of their shopping at a one-stop shop (the grocery store), but also shop at specialty shops for particular product categories.

There are several ways in which markets may be defined in one-stop shop settings, depending on market realities, and the Agencies may further define more than one antitrust market for a particular merger. For example, a relevant market may consist of only one-stop shops, even if there is significant competition from specialty shops; or it may include both one-stop shops and specialty shops. When a product category is sold by both one-stop shops and

specialty suppliers (such as a type of produce sold in grocery stores and produce stands), the Agencies may define antitrust markets for the product category sold by a particular type of supplier, or it may include multiple types of suppliers.

7. Market Definition When There is Harm to Innovation

When considering harm to competition in innovation, market definition may follow the same approaches that are used to analyze other dimensions of competition. In the case where a merger may substantially lessen competition by decreasing incentives for innovation, the Agencies may define relevant antitrust markets around the products that would result from that innovation, even if they do not yet exist. In some cases, the Agencies may analyze different relevant markets when considering innovation than when considering other dimensions of competition.

8. Market Definition for Input Markets and Labor Markets

The same market definition tools and principles discussed above can be used for input markets and labor markets, where labor is a particular type of input. In input markets, firms compete with each other to attract suppliers, including workers. Therefore, input suppliers are analogous to customers in the discussions above about market definition. In defining relevant markets, the Agencies focus on the alternatives available to input suppliers. An antitrust input market consists of a group of products (goods or services) and a geographic area defined by the location of the purchasers or input suppliers. Just as buyers of a product may consider products to be differentiated according to the brand or the identity of the seller, suppliers of a product or service may consider different buyers to be differentiated. For example, if the suppliers are contractors, they may have distinct preferences about who they provide services to, due to different working conditions, location, reliability of buyers in terms of paying invoices on time, or the propensity of the buyer to make unexpected changes to specifications.

The HMT considers whether a hypothetical monopsonist likely would undertake a SSNIPT, such as a reduction in price paid for inputs, or imposing less favorable terms on suppliers. See Appendix 2.C for more discussion about competition in settings where terms are set through auctions and negotiations, as is common for input markets.

When defining a market for labor the Agencies will consider the alternative job opportunities available to workers who supply a relevant type of labor service, where worker choice among jobs or between geographic areas is the analog of consumer choices among products and regions when defining a product market. The Agencies may consider workers' willingness to switch in response to changes to wages or other aspects of working conditions, such as changes to benefits or other non-wage compensation, or adoption of less flexible scheduling. Depending on the occupation, alternative job opportunities might include the same occupation with alternative employers, or alternative occupations. Geographic market definition may involve considering workers' willingness or ability to commute, including the availability of public transportation. The product and geographic market definition may involve assessing whether workers may be targeted for less favorable wages or other terms of employment according to factors such as education, experience, certifications, or work locations. The Agencies may define cluster markets for different jobs when firms employ workers in a variety of jobs characterized by similar competitive conditions (see Appendix 3.B.4).

Appendix 4: Calculating Market Shares and Concentration

This appendix further describes how the agencies calculate market shares and concentration metrics.

A. Market Participants

All firms that currently supply products (or consume products, when buyers merge) in a relevant market are considered participants in that market. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently supplying products 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 currently active in a relevant market, but that very likely would rapidly enter with direct competitive impact in the event of a small but significant change in competitive conditions, without incurring significant sunk costs, are also considered market participants. These firms are termed "rapid entrants." Sunk costs are entry or exit costs that cannot be recovered outside a relevant market. Entry that would take place more slowly in response to a change in competitive conditions, or that requires firms to incur significant sunk costs, is considered in Section IV.2 of the Guidelines.

Firms that are active in the relevant product market but not in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are already active in geographies that are close to the geographic market. Factors such as transportation costs are important; or for services or digital goods, other factors may be important, such as language or regulation.

In markets for relatively homogeneous goods where a supplier's ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available "swing" capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant. However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm's possession of idle or swing capacity alone does not make that firm a rapid entrant.

B. Market Shares

The Agencies normally calculate product market shares for all firms that currently supply products (or consume products, when buyers merge) in a relevant market, subject to the availability of data. The Agencies measure each firm's market share using the metrics that are informative about the commercial realities of competition in the particular market and firms' future competitive significance. When interpreting shares based on historical data, the Agencies may consider whether significant recent or reasonably foreseeable changes to market conditions suggest that a firm's shares overstate or understate its future competitive significance.

How market shares are calculated may further depend on the characteristics of a particular market, and on the availability of data. Moreover, multiple metrics may be informative in any particular case. For example:

- Revenues in a relevant market often provide a readily available basis on which to compute shares and are often a good measure of attractiveness to customers.
- Unit sales may provide a useful measure of competitive significance in cases where one unit of a low-priced product can serve as a close substitute for one unit of a higher-priced product. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively low revenues.
- Revenues earned from recently acquired customers (or paid to recently acquired buyers, in the case of merging buyers) may provide a useful measure of competitive significance of firms in cases where trading partners sign long-term contracts, face switching costs, or tend to re-evaluate their relationships only occasionally.
- Measures based on capacities or reserves may be used to calculate market shares in markets for homogeneous products where a firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in a relevant market in response to a price increase or output reduction by others in that market (or to rapidly expand its purchasing in the case of merging buyers).
- Non-price indicators, such as number of users or frequency of use, may be useful indicators in markets where price forms a relatively small or no part of the exchange of value.

OPINION | COMMENTARY Follow

Why I’m Resigning as an FTC Commissioner

Lina Khan’s disregard for the rule of law and due process make it impossible for me to continue serving.

By Christine Wilson

Feb. 14, 2023 12:08 pm ET

FTC Chairman Lina Khan speaks on Capitol Hill, April 21, 2021. PHOTO: GRAEME JENNINGS/ASSOCIATED PRESS

Much ink has been spilled about Lina Khan’s attempts to remake federal antitrust law as chairman of the Federal Trade Commission. Less has been said about her disregard for the rule of law and due process and the way senior FTC officials enable her. I have failed repeatedly to persuade Ms. Khan and her enablers to do the right thing, and I refuse to give their endeavor any further hint of legitimacy by remaining. Accordingly, I will soon resign as an FTC commissioner.

Since Ms. Khan’s confirmation in 2021, my staff and I have spent countless hours seeking to uncover her abuses of government power. That task has become increasingly difficult as she has consolidated power within the Office of the Chairman, breaking decades of bipartisan precedent and undermining the commission structure that Congress wrote into law. I have sought to provide transparency and facilitate accountability through speeches and statements, but I face constraints on the information I can disclose—many legitimate, but some manufactured by Ms. Khan and the Democratic majority to avoid embarrassment.

Consider the FTC’s challenge to Meta’s acquisition of Within, a virtual-reality gaming company. Before joining the FTC, Ms. Khan argued that Meta should be blocked from making any future acquisitions and wrote a report on the same issues as a congressional staffer. She would now sit as a purportedly impartial judge and decide whether Meta can acquire Within. Spurning due-process

considerations and federal ethics obligations, my Democratic colleagues on the commission affirmed Ms. Khan's decision not to recuse herself.

I dissented on due-process grounds, which require those sitting in a judicial capacity to avoid even the appearance of unfairness. The law is clear. In one case, a federal appeals court ruled that an FTC chairman who investigated the same company, conduct, lines of business and facts as a committee staffer on Capitol Hill couldn't then sit as a judge at the FTC and rule on those issues. In two other decisions, appellate courts held that an FTC chairman couldn't adjudicate a case after making statements suggesting he prejudged its outcome. The statements at issue were far milder than Ms. Khan's definitive pronouncement that all Meta acquisitions should be blocked. These cases, with their uncannily similar facts, confirm that Ms. Khan's participation would deny the merging parties their due-process rights.

I also disagreed with my colleagues on federal ethics grounds. To facilitate transparency and accountability, I detailed my concerns in my dissent—but Ms. Khan's allies ensured the public wouldn't learn of them. Despite previous disclosures of analogous information, Commissioners Rebecca Slaughter and Alvaro Bedoya imposed heavy redactions on my dissent. Commission opinions commonly use redactions to prevent disclosure of confidential business information, but my opinion contained no such information. The redactions served no purpose but to protect Ms. Khan from embarrassment.

I am not alone in harboring concerns about the honesty and integrity of Ms. Khan and her senior FTC leadership. Hundreds of FTC employees respond annually to the Federal Employee Viewpoint Survey. In 2020, the last year under Trump appointees, 87% of surveyed FTC employees agreed that senior agency officials maintain high standards of honesty and integrity. Today that share stands at 49%.

Many FTC staffers agree with Ms. Khan on antitrust policy, so these survey results don't necessarily reflect disagreement with her ends. Instead, the data convey the staffers' discomfort with her means, which involve dishonesty and subterfuge to pursue her agenda. I disagree with Ms. Khan's policy goals but understand that elections have consequences. My fundamental concern with her leadership of the commission pertains to her willful disregard of congressionally imposed limits on agency jurisdiction, her defiance of legal precedent, and her abuse of power to achieve desired outcomes.

Three additional examples are illustrative. In November 2022, the commission issued an antitrust enforcement policy statement asserting that the FTC could ignore decades of court rulings and condemn essentially any business conduct that three unelected commissioners find distasteful. If conduct can be labeled with a nefarious adjective—"coercive," "exploitative," "abusive," "restrictive"—it may violate the FTC Act of 1914. But the new policy contains no descriptions or

definitions of these terms, many of which also lack context in the law. The commission also candidly explained that its analysis under the new policy may depart from prior antitrust precedent, and identified previously lawful conduct as now suspect. In other words, the new policy adopts an "I know it when I see it" approach. But due process demands that the lines between lawful and unlawful conduct be clearly drawn, to guide businesses before they face a lawsuit.

In January 2023, the commission launched a rulemaking that would ban nearly all noncompete clauses in employee contracts, affecting roughly one-fifth of employment contracts in the U.S. This proposed rule defies the Supreme Court's decision in *West Virginia v. EPA* (2022), which held that an agency can't claim "to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority."

Under President Biden, FTC leadership has abused the merger review process to impose a tax on all mergers, not only those that hinder competition. Progressives tried but failed to enact a legislative moratorium on mergers in early 2020 and to pass other restrictions since. Ms. Khan now does so by fiat. Abuse of regulatory authority now substitutes for unfulfilled legislative desires.

We all know the simple rule: If you see something, say something. As an antitrust lawyer, I counseled clients to avoid trouble by knowing when to object and how to exit. When my clients attended trade association gatherings, I advised them to leave quickly if discussions with competitors took a wrong turn and raised alarm bells about price fixing or other illegal activity. Make a noisy exit—say, spill a pitcher of water—so that attendees remember that you objected and that you left. Although serving as an FTC commissioner has been the highest honor of my professional career, I must follow my own advice and resign in the face of continuing lawlessness. Consider this my noisy exit.

Mrs. Wilson is a Republican-appointed commissioner at the Federal Trade Commission.

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