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Comments of

TechFreedom

Bilal Sayyed[i]

In the Matter of

Draft Merger Guidelines

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[i] Bilal Sayyed is Senior Competition Counsel of TechFreedom, a nonprofit, nonpartisan technology policy think tank. He was previously Director of the Office of Policy Planning at the Federal Trade Commission; in that role, he participated in the drafting of the Department of Justice and Federal Trade Commission's 2020 Vertical Merger Guidelines and the FTC's Commentary on Vertical Merger Enforcement. He can be reached at bsayyed@techfreedom.org.

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I. Introduction

The Horizontal Merger Guidelines serve as the "blueprint for the architecture of merger analysis."[1] They have significantly influenced the analytical structure of the federal courts' review of horizontal mergers, and it is difficult to identify a litigated horizontal merger matter of the past 25 years that has not relied, at least in part, on the analytical framework of the Horizontal Merger Guidelines.[2] Challenges to horizontal mergers initiated by state

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[1] Antitrust Modernization Commission, Report and Recommendations at 54–55 (2007) (citations omitted), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf:

> There is general consensus that the Merger Guidelines have acted as the "blueprint for the architecture" of merger analysis and, overall, provide a guide that "functions well." The Guidelines have had a significant influence on judicial development of merger law, which is reflected in their widespread acceptance by the courts as the relevant framework for analyzing merger cases. . . . The Guidelines have also provided useful guidance and transparency to the business community and antitrust bar. Finally, the Guidelines have helped to influence the development of merger policy by jurisdictions outside the United States.

[2] For cases applying some or all of the framework or analytic insight of the 2010 Horizontal Merger Guidelines, *see* Fed. Trade Comm'n v. Sanford Health, 926 F.3d 959 (8th Cir. 2019); United States v. Anthem, 855 F.3d. 345 (D.C. Cir. 2017); Fed. Trade Comm'n v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016); FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016); Saint Alphonsus Medical Center-Nampa v. St. Luke's, 778 F.3d 775 (9th Cir. 2015); ProMedica Health System v. Fed. Trade Comm'n, 749 F.3d 559 (6th Cir. 2014); Fed. Trade Comm'n v. Thomas Jefferson Univ., 505 F. Supp. 3d. 522 (E.D. Pa. 2020); Fed. Trade Comm'n v. Peabody Energy, 492 F. Supp. 3d 865 (E.D. Mo. 2020); Fed. Trade Comm'n v. Rag-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020); United States v. Sabre Corp., 452 F. Supp. 3d 97 (D. Del. 2020), vacated, 2020-1 Trade Cas. (CCH) ¶¶ 81, 294; New York v. Deutsche Telecom AG, 439 F. Supp. 3d 179 (S.D.N.Y 2020); Fed. Trade Comm'n v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d. 27 (D.D.C. 2018); Fed. Trade Comm'n v. Tronox Ltd., 332 F. Supp. 3d. 187 (D.D.C. 2018); United States v. Energy Sols, Inc., 265 F. Supp. 3d 415 (D. Del. 2017); United States v. Aetna, 240 F. Supp. 3d. 1 (D.D.C. 2017); Fed. Trade Comm'n v. Staples, 190 F. Supp. 3d 100 (D.D.C. 2016); FTC v. Sysco, 113 F. Supp. 3d 1 (D.D.C. 2015); United States v. Bazaarvoice, Inc., 2014-1 Trade Cas. (CCH) ¶¶ 78, 641 (N.D. Cal. Jan. 8, 2014); Fed. Trade Comm'n v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012); Fed. Trade Comm'n v. LabCorp., 2011 WL 3100372 (C.D. Cal. Feb. 22, 2011); United States v. H&R Block, 833 F. Supp. 2d 36 (D.D.C. 2011). In most of these litigated matters, but not all, the court found for the government.

For cases applying some or all of the framework or analytic insight of the 1992 Horizontal Merger Guidelines, see, among others, Fed. Trade Comm'n v. Whole Foods Mkt., 548 F.3d 1028 (D.C. Cir. 2008); Chi. Bridge & Iron Co. N.V. v. Fed. Trade Comm'n, 534 F.3d 410 (5th Cir. 2008); Fed. Trade Comm'n v. Heinz, 246 F.3d 708 (D.C. Cir. 2001); Fed. Trade Comm'n v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999); United States v. Engelhard Corp., 126 F.3d 1302 (11th Cir. 1997); Fed. Trade Comm'n v. CCC Holdings, Inc. 605 F. Supp. 2d 26 (D.D.C. 2009); Fed. Trade Comm'n v. Foster, 2007-1 Trade Cas. (CCH) ¶¶ 75, 725 (D.N.M. 2007); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Ca. 2004); Fed. Trade Comm'n v. Arch Coal, 329 F. Supp. 2d 109 (D.D.C. 2004); United States v. UPM-Kymmene Oyj, 2003-2 Trade Cas. (CCH) ¶¶ 74, 101 (N.D. Ill. 2003); Fed. Trade Comm'n v. Libbey, 211 F. Supp. 2d 34 (D.D.C. 2002); United States v. Sungard Data Sys., 172 F. Supp. 2d 172 (D.D.C. 2001); Fed. Trade Comm'n v. Swedish Match N. Am., Inc., 131 F. Supp. 2d. 151 (D.D.C. 2000); Fed. Trade Comm'n v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998); United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997); Fed. Trade Comm'n v. Staples, 970 F. Supp. 1066 (D.D.C. 1997). In most of these litigated matters, but not all, the court found for the government.

enforcement authorities,[3] the review of mergers by sector-specific federal regulatory agencies,[4] and the merger guidelines of foreign competition agencies[5] have all been strongly influenced by the 2010 Horizontal Merger Guidelines[6] and their 1992 predecessor.[7] Acknowledging their importance, Federal Trade Commission Chair Lina Khan is correct when she emphasizes that the merger guidelines must "accurately set forth current enforcement policy and identify techniques that [the agency] use[s] to detect and assess unlawful mergers."[8] Assistant Attorney General Jonathan Kanter is also correct to recognize that the agencies must "ensure [that the] approach to analyzing mergers . . . captures the rich complexity of the modern economy."[9]

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[3] *See, e.g.*, Plaintiff States' Pretrial Memorandum, Case No. 1:19-cv-5434-VM-RWL, State of New York v. Deutsche Telekom Ag (S.D.N.Y. Nov. 26, 2019); State of Washington's Trial Brief, Case No. 3:17-cv-05690, State of Washington v. Franciscan Health System (W.D. Wash. Feb. 28, 2019).

[4] The analytical framework of the Horizontal Merger Guidelines heavily influences the Federal Communications Commission's (FCC) and the Federal Energy Regulatory Commission's (FERC) review of mergers. For the FCC, *see, e.g.*, In re Applications of Level 3 Commc'n., Inc. & CenturyLink, Inc., 32 FCC Rcd 9581 (F.C.C. October 30, 2017); In re AT&T Inc., 26 FCC Rcd 16184 (F.C.C. November 29, 2011); XM Satellite Radio Holdings and Sirius Satellite Radio, Inc., Memorandum Opinion and Order, MB Docket No. 07-57, FCC 08-178 (July 25, 2008); News Corp. and Liberty Media Corporation, Memorandum Opinion and Order, MB Docket No. 07-18, FCC 08-66 (Feb. 25, 2008). For FERC, see, Analysis of Horizontal Mkt. Power, 138 F.E.R.C. P61, 109 ¶¶ 2, 4 (F.E.R.C. February 16, 2012) (affirming the Commission's usage and adoption of the thresholds created within the Merger Policy Statement, and noting that the "Commission adopted the five-step framework set out in the Antitrust Agencies' 1992 Horizontal Merger Guidelines as the basic framework for evaluating the competitive effects of proposed mergers."); Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 30, 1996), FERC Stats. and Regs., ¶¶ 31, 44 (1996) (1996 Merger Policy Statement), reconsideration denied, Order No. 592-A, 62 Fed. Reg. 33,341 (June 19, 1997), 79 FERC ¶¶ 61, 321 (1997).

[5] *See, e.g.*, Rachel Brandenburger and Joseph Matelis, *The 2010 U.S. Horizontal Merger Guidelines: A Historical and International Perspective*, 25 ANTITRUST MAG. (2011). A comparison of merger guidelines issued by the European Union (2004), the Canadian Competition Bureau (2004 and 2011), the Australian Competition & Consumer Commission (2008, updated in 2017), the 2010 merger guidelines of the U.K.'s Office of Fair Trading and Competition Commission, and the 2021 merger guidelines of the U.K's Competition and Market Authority (the successor to the Office of Fair Trading and Competition Commission, with respect to competition matters) shows the heavy influence of the 1992 Horizontal Merger Guidelines.

[6] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) [hereinafter 2010 Guidelines], http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[7] The Vertical Merger Guidelines have not had a similar impact on litigated matters both because there have been very few litigated vertical merger matters in the last four decades and because they were released in 2020. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines (2020) [hereinafter 2020 Vertical Merger Guidelines], https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

[8] Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement at 1-2 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf.

[9] Remarks of Assistant Attorney General Jonathan Kanter, Modern Competition Challenges Require Modern Merger Guidelines at 2 (Jan. 18, 2022), https://www.justice.gov/opa/speech/file/1463546/download.

At the time of the most recent revision to the Horizontal Merger Guidelines, former FTC Chairman Robert Pitofsky stated that "the guideline process, in many ways, has had the most important influence on American antitrust policy in the last fifty years."[10] That influence is truly remarkable, considering that the merger guidelines are not binding on the courts; indeed, the courts have no obligation to consult them. Their influence is a function of their persuasiveness.[11] Thus, we strongly agree with former FTC Commissioners Noah Phillips and Christine Wilson: "recalibration of [the] 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."[12]

In that spirit, TechFreedom welcomes the Federal Trade Commission's and Department of Justice's ("the Agencies") request for comment on the 2023 Draft Merger Guidelines. Founded in 2010, TechFreedom is a nonprofit, nonpartisan think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

TechFreedom has weighed in on significant issues over which the FTC has jurisdiction over the past decade—for example:

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[10] Comments of Robert Pitofsky, Transcript of the Horizontal Merger Guidelines Review Project at 15 (Dec. 3, 2009), https://www.ftc.gov/sites/default/files/documents/public_events/horizontal-merger-guidelines-review-project/091203transcript.pdf.

[11] *See, e.g.*, Fed. Trade Comm'n v. Penn. State Hershey Med. Center, 838 F.3d 327, 338, n.2 (3rd Cir. 2016) ("Although the Merger Guidelines are not binding on the courts, they are often used as persuasive authority."); Saint Alphonsus Medical Center-Nampa v. St. Luke's, 778 F.3d 775, 784, n. 9 (9th Cir. 2015) (same); Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 431, n. 11 (5th Cir. 2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates antitrust law."); New York v. Deutsche Telecom AG, 439 F. Supp. 3d 179, 232 (S.D.N.Y 2020) ("The Court recognizes that the Merger Guidelines are undoubtedly helpful in analyzing the competitive impact of mergers, and therefore has endeavored to give them due consideration throughout this analysis."); Fed. Trade Comm'n v. Rag-Stiftung, 436 F. Supp. 3d 278, 293, n. 2 (D.D.C. 2020) ("The Merger Guidelines, while not binding on courts, offer persuasive guidance in examining competitive effects.") United States v. Bazaarvoice, Inc., 2014-1 Trade Cas. (CCH) ¶¶ 78, 641 n. 18 (N.D. Cal. Jan. 8, 2014) ("The Merger Guidelines are not binding on the courts, but they 'are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws.'").

[12] Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Request for Information on Merger Enforcement at 1 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf.

- We provided comments on the Agencies' Request for Information on Merger Enforcement.[13]
- We analyzed the pros and cons of the FTC and DOJ's 2020 Vertical Merger Guidelines.[14]
- We challenged the FTC's authority to issue binding rules on non-compete and exclusive contract terms.[15]
- We analyzed the law and impact of non-compete agreements in the tech sector and warned that insufficient study has been done to merit a rulemaking proceeding.[16]
- We responded to, and critiqued, a petition for rulemaking calling to ban exclusive agreements.[17]
- We recommended that the FTC retain the "without unduly burdening legitimate business activity" clause in the agency's mission statement when drafting the FTC's Strategic Plan for 2022-2026.[18]
- We have analyzed, in Congressional testimony, pending legislative proposals to reform the FTC's operations[19] as part of a larger ongoing study of the Commission's processes.[20]

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[13] Comments of TechFreedom, In the Matter of Request for Information on Merger Enforcement (Apr. 21, 2022), https://techfreedom.org/wp-content/uploads/2022/04/TechFreedom-Comments-Merger-Guidelines-April-21-2022.docx.pdf.

[14] *TechFreedom Praises, Critiques New Vertical Merger Guidelines*, TECHFREEDOM (June 30, 2020), https://techfreedom.org/techfreedom-praises-critiques-new-vertical-merger-guidelines/.

[15] Comments of TechFreedom, Petition for Rulemaking to Prohibit Worker Non-Compete Clauses; Petition for Rulemaking to Prohibit Exclusionary Contracts, Docket ID: FTC-2021-0036 (Sept. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/10/FTC-UMC-Rulemaking-Authority-FTC-Comment-9.30.2021-FINAL.pdf.

[16] Comments of TechFreedom, Request for Public Comment Regarding Contract Terms That May Harm Fair Competition, Docket ID: FTC-2021-0036 (Sept. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/10/Comments-FTC-Non-Compete-UMC-Rulemaking-10.2021.pdf.

[17] *Id.*

[18] TechFreedom, Comments on Draft FTC Strategic Plan for FY2022-2026, Docket ID: FTC-2021-0061 (Nov. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/11/FTC-2021-0061-0010_attachment_1.pdf.

[19] Berin Szóka & Geoffrey A. Manne, *The Federal Trade Commission: Restoring Congressional Oversight of The Second National Legislature*, at 57-60 (May 2016), https://techfreedom.org/wp-content/uploads/2021/09/ftc-restoring-congressional-oversight.pdf.

[20] Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission, Report 1.0 of the FTC: Technology & Reform Project, at 3 (Dec. 2013), http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf.

II. Market Power Is a Necessary Predicate for the Finding of Harm from a Merger.

The 1982 Merger Guidelines,[21] the 1984 Merger Guidelines,[22] the 1992 Horizontal Merger Guidelines,[23] and the 2010 Horizontal Merger Guidelines[24] all contained a common unifying principle, which the current Guidelines express as follows:

> [M]ergers 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.[25]

The Draft Merger Guidelines abandon this unifying principle and adopt a principle of protecting market structure. This is most clear in Guideline 1 (mergers in highly concentrated markets), Guideline 4 (elimination of a potential entrant), Guideline 7 (high market shares and entrenchment of a dominant position), Guideline 8 (trend toward concentration and/or trend toward vertical integration), but it appears to underlay the concerns expressed in each of the first eight Guidelines, and, through that, the principle carries over to Guideline 9 (overall strategic approach, strategy of growth by acquisition) and Guideline 10 (concern about conflicts of interest arising from vertical integration in platform markets).

A. Recommendation: The Merger Guidelines Should Recognize That Market Power, Not Market Structure, Is the Necessary Predicate to Alleging a Merger Is Illegal.

Market structure is not necessarily a strong proxy for market power or the intensity of competition. Thus, revised Merger Guidelines should incorporate a market power principle to distinguish mergers that are not harmful and those that are competitively benign from those that may be anticompetitive. For example, and drawing on the language in the 2010 Horizontal Merger Guidelines:

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[21] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1982) [hereinafter 1982 Guidelines], https://www.justice.gov/atr/hmerger/11248.pdf.

[22] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1984) [hereinafter 1984 Guidelines], https://www.justice.gov/atr/hmerger/11249.pdf.

[23] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992) [hereinafter 1992 Guidelines], https://www.justice.gov/atr/hmerger/11250.pdf.

[24] 2010 Guidelines.

[25] *Id.*

> [M]ergers 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 (or slow a decrease in) price (adjusted for quality), reduce output, diminish or slow innovation, or otherwise harm customers (at any level of distribution) as a result of diminished competitive constraints or incentives. The enhancement of market power by buyers, sometimes called monopsony power, has adverse effects comparable to the enhancement of market power by sellers, including a reduction by one or more firms in the price paid for an input and a reduction in the quantity of inputs purchased; for the avoidance of doubt, labor is an input. A merger may enhance market power if it allows or enhances the ability of the merged firm to exclude, in part or in full, actual or potential rivals or trading partners from one or more relevant markets; however, under certain conditions, acting on an incentive to exclude one or more rivals is consistent with procompetitive effects, and the welfare effect may be positive.

III. The Intersection of Commission Policy Statement on Unfair Methods of Competition and the Merger Guidelines Should Be Explained.

The Commission should explain whether the principles or framework articulated in its Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act[26] ("UMC Statement") is consistent with the principles and framework articulated in final Merger Guidelines. The Commission's authority to challenge mergers under Section 5, and its intention to advance the use of Section 5 to prohibit unfair methods of competition, suggest the Merger Guidelines do not bind the Commission much with respect to merger policy.

The UMC statement "describes the key principles of general applicability concerning whether conduct [including mergers] is an unfair method of competition."[27] According to the Commission's UMC Statement, Section 5 of the Federal Trade Commission Act "extends beyond the Sherman and Clayton Acts" and thus reaches conduct not violative of Section 7 of the Clayton Act, nor subject to the requirements of a Section 7 case.[28] In short, more

[26] Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) [hereinafter UMC Statement], https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[27] Id. at 1.

[28] Id. at 2.

mergers (defined to include acquisitions of stock or assets, including partial acquisitions) can be challenged under Section 5.

Recently, the Commission confirmed it would allege that acquisitions violated the law under theories broader than those reachable under Section 7.[29] In *EQT Corporation*, the Commission, proceeding under Section 8 of the Clayton Act and Section 5 of the FTC Act (but not Section 7), declared that the complaint in this matter "should remind market participants that transactions that might not strictly violate Section 7 can still pose a risk to competition that the FTC has a statutory obligation to address."[30] Whatever the binding constraints of the proposed Merger Guidelines (and there are very few), they are largely irrelevant to the ultimate determination of whether the Commission finds a proposed or consummated merger illegal.

The Commission should explain to what degree, if any, the principles and guidelines of any final Merger Guidelines will bind the Commission in its use of Section 5 to challenge mergers on a stand-alone basis. In short, in counseling clients, do lawyers need to refer to both the Merger Guidelines and the Commission's Policy Statement on Unfair Methods of Competition?

IV. Draft Guideline One: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets.

The Draft Merger Guidelines propose to redefine "highly concentrated markets" as markets where the post-merger Herfindahl–Hirschman Index (HHI) is greater than 1800 (down from the current guidelines' HHI of 2400), and to create a structural presumption against any merger in a highly concentrated market that increases the HHI by greater than 100 points; in addition, the draft announces a large-firm proviso by which almost any acquisition by a firm with a market share of 30% or greater would be presumptively unlawful. The Draft Merger Guidelines draw on the 1982/1984 Merger Guidelines to reintroduce ideas abandoned or modified in subsequent guidelines. Experience with the 1982/1984 Merger Guidelines' significant focus on structural arguments suggests that the government should not incorporate into the merger guidelines a heavy reliance on a structural presumption in horizontal merger matters. Neither of the proposed revisions in the draft are supported by

[29] *See* EQT Corporation, FTC File No. 221-0212 (Aug. 21, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210212-qep-partnerseqt-corporation-matter (Decision and Order).

[30] Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya In the Matter of EQT Corporation, FTC File No. 221-0212, at 7 (Aug. 16, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210212eqtqepkhanstatement.pdf.

the Agencies' experience, and they should be tabled in favor of the recommendations in the following section.

A. Recommendation: The Merger Guidelines' HHI Thresholds Should Be Revised Upwards from the Proposal in the Draft.

The HHI thresholds should be revised to clarify that (a) no presumption of harm is created by a merger with a post-merger HHI of less than 2400 and a merger-induced change in the HHI of 300 or fewer points; (b) any such presumption is rebuttable by factors including but not limited to post-merger entry or repositioning, factors that make coordination unlikely or unlikely to be sustained, merger-specific efficiencies and other procompetitive effects, countervailing buyer power, or the reasonable likelihood of the exit of one of the party's assets from the relevant market absent the merger; (c) consistent with the above, mergers raising HHI by 200 to 299 points raise possible competitive concerns that will likely warrant investigation and (d) these numbers are not a rigid screen but take account of a modest margin of imprecision.

The 1982 Merger Guidelines introduced the pre- and post-merger HHI concentration level as a relevant metric for merger analysis. There, the Department indicated it was "likely to challenge" mergers where the post-merger HHI exceeded 1800 and the merger-induced change in concentration was 100 points or more. The Department also indicated that it was "more likely than not to challenge mergers" where the post-merger HHI was between 1000 and 1800, and the merger-induced change in concentration was more than 100 points, subject to consideration of other factors.[31]

The 1984 Merger Guidelines adopted a more aggressive position, with the Department indicating that, when the post-merger HHI was in excess of 1800, and (i) when the merger-induced change in the HHI exceeded 50 points, it was likely to challenge the merger, subject to consideration of other factors and (ii) when the merger-induced change in the HHI exceeded 100, it was likely to challenge the merger. Only in extraordinary cases would other factors establish that the merger was not likely to substantially lessen competition. The 1984 Merger Guidelines also indicated that the Department was likely to challenge mergers where the post-merger HHI fell between 1000 and 1800 and the merger-induced change in the HHI exceeded 100, subject to other factors.[32] A post-merger HHI of 1800 represents approximately, but slightly less than, 6 equal-sized firms.

[31] 1982 Guidelines at 14-15.

[32] 1984 Guidelines at 14-15.

The 1992 Horizontal Merger Guidelines adopted similar HHI concentration levels to the 1982/1984 Merger Guidelines but made clear that any presumption associated with those numerical thresholds was rebuttable. This significantly improved the ability of the Agencies to tell, and courts to understand, a competitive effects story. For markets where the post-merger HHI was in excess of 1800, "[m]ergers producing an increase in the HHI of more than 50 points in highly concentrated markets post-merger potentially raise significant competitive concerns, depending on the factors set forth [elsewhere in the] Guidelines" and the Agencies "will [] presume[] that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." However, "the presumption may be overcome by a showing that factors [elsewhere in] the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise."[33]

The rationale for weakening the importance of a presumption based on concentration (or market share) and strengthening the framework for articulating a competitive effects story in the 1992 Horizontal Merger Guidelines seems clear. In five cases between 1984 and 1992, the Department, relying heavily on the structural presumption in seeking a preliminary or permanent injunction failed to obtain an injunction.[34] In other cases, while courts did enjoin mergers at lower concentration levels, they considered other factors that would, if correct, undercut the prima facie case based on concentration or market share.[35]

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[33] 1992 Guidelines at 16.

[34] *See* United States v. Baker Hughes, 908 F2d 981 (D.C. Cir. 1990) (government's prima facie case based on high post-merger HHI and significant merger-induced HHI change insufficient to preliminarily enjoin transaction where entry was easy, customers were sophisticated, and sales were small in number and infrequent, suggesting market share statistics were not reliable); United States v. Syufy, 903 F. 2d 659 (9th Cir. 1989) (a prima facie case established in a merger to monopoly/monopsony case was rebutted by ease of entry); United States v. Waste Management, 743 F.2d 976 (2d Cir. 1984) (prima facie case established by post-merger market share of 48.8% rebutted by ease of entry); United States v. Country Lake Foods, 754 F. Supp. 669 (D. Minn. 1990) (even accepting that DOJ properly defined the relevant geographic market, a post-merger market share of 36%, and two-firm concentration ratio of 72%, was insufficient to enjoin transaction where entry was easy, the merger would result in efficiencies, and purchasers had power); United States v. Calmar, 612 F. Supp 1298 (D. N.J. 1985) (dramatic increase in the HHI in each of the product markets, from 4400 to 7100 in one market and from 4000 to 6400 in another market was insufficient to preliminarily enjoin the transaction, because entry was easy).

[35] In Fed. Trade Comm'n v Bass Brothers, 1984 WL 355 (N.D. Ohio, Eastern Division, June 6, 1984), the court preliminarily enjoined two transactions after finding the FTC had made out its prima facie case where the pre-merger HHI was approximately 1700, a merger-induced change of 200-300 points, where entry was unlikely, and, absent the injunction, splitting the firms later would be difficult. Similarly, the district court properly enjoined the merger of PPG and Swedlow, where the pre-merger HHI in a market closest to the relevant "high technology" market was approximately 1950, and, post-merger, would be approximately 3300, and create a market leading firm with a share of approximately 55%. Fed. Trade Comm'n v PPG Industries, 798 F. 2d 1500 (D.C. Cir. 1986). The district court also found that entry barriers were high, and that any efficiencies did not appear to be merger-specific, both findings the appellate court agreed with.

In short, as early as the early 1980s, courts were strongly moving away from market share and concentration presumptions as reasons sufficient to enjoin a merger. In the last 25 years, the courts have largely found market share and concentration data to be an insufficient basis to enjoin a merger. That shift is complete. The articulation in *Baker Hughes* of a burden-shifting framework that required the courts to evaluate the strength and merits of the government's prima facie case against a merger's possible procompetitive effects and the defendants' rebuttal arguments has been broadly endorsed by the appellate and district courts[36] including at the preliminary injunction stage.[37]

The 2010 Horizontal Merger Guidelines significantly increased the numerical thresholds consistent with a presumption or likelihood of anticompetitive effects. A highly concentrated market was redefined as one with an HHI above 2500, and only those mergers that induced a change in the HHI of greater than 200 were presumed likely to enhance market power. Mergers that resulted in a change in the HHI of less than 100 were identified as unlikely to have adverse competitive effects. Mergers in moderately and highly concentrated markets that raised HHI by more than 100 points potentially raised significant competitive concerns and "often warranted scrutiny." These changes were based on experience. The Agencies now dispute this, arguing that resource constraints were the rationale for allowing mergers with post-merger HHIs much greater than 1800, and with merger-induced changes in the HHI much greater than 100. But the data does not support this view and does not support the proposed HHI or merger-induced change in HHI that the Agencies propose.

[36] *See. e.g.*, Fed. Trade Comm'n v. Sanford Health, 926 F3d. 959 (8th Cir. 2019); United States v. AT&T, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (vertical merger); United States v. Anthem, 855 F.3d. 345,349-50 (D.C. Cir. 2017); Fed. Trade Comm'n v. Penn State Hershey Med. Ctr., 838 F.3d 327, (3d Cir. 2016); Saint Alphonsus Medical Center-Nampa v. St. Luke's, 778 F.3d 775, 783 (9th Cir. 2015); ProMedica Health Systems v. Fed. Trade Comm'n, 749 F.3d 559, 570-571 (6th Cir. 2014) ("The Commission was correct to presume the merger substantially anticompetitive. The remaining question is whether ProMedica has rebutted that presumption."); Chi. Bridge & Iron, v. Fed. Trade Comm'n, 534 F.3d 410, 423 (5th Cir. 2008); Fed. Trade Comm'n v. University Health, 938 F.2d 1206 (11th Cir. 1991); New York v. Deutsche Telecom AG, 439 F. Supp. 3d 179, 198-199 (S.D.N.Y 2020); United States v. Energy Sols, Inc., 265 F. Supp. 3d 415, 436 (D. Del. 2017); United States v. Bazaarvoice, Inc., 2014-1 Trade Cas. (CCH) ¶¶ 78, 641 (N.D. Cal. Jan. 8, 2014); Fed. Trade Comm'n v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1075 (N.D. Ill. 2012).

[37] District courts routinely apply the Baker Hughes framework when the Commission seeks a preliminary injunction in merger matters. *See* Fed. Trade Comm'n v. Thomas Jefferson Univ., 505 F. Supp. 3d 522, 538 (E.D. Pa. 2020); Fed. Trade Comm'n v. Peabody Energy, 492 F. Supp. 3d 865, 883, 907-18 (E.D. Mo. 2020); Fed. Trade Comm'n v. Rag-Stiftung, 436 F. Supp. 3d 278, 290-91 (D.D.C. 2020); Fed. Trade Comm'n v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d 27, 44-45 (D.D.C. 2018); Fed. Trade Comm'n v. Tronox Ltd., 332 F. Supp. 3d 187, 197 (D.D.C. 2018); Fed. Trade Comm'n v. Staples, 190 F. Supp. 3d 100, 115-116 (D.D.C. 2016); Fed. Trade Comm'n v. Sysco, 113 F. Supp. 3d 1, 23-4 (D.D.C. 2015); Fed. Trade Comm'n v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1074-75 (N.D. Ill. 2012); Fed. Trade Comm'n v. LabCorp., 2011 WL 3100372, at *21 (C.D. Cal. Feb. 22, 2011); Fed. Trade Comm'n v. CCC Holdings, 605 F. Supp. 2d 26, 36 (D.D.C. 2009); Fed. Trade Comm'n v. Foster, 2007-1 Trade Cas. (CCH) ¶¶ 75,725, 2007 WL 1793441, *52-53 (D.N.M. 2007).

Starting in 2003 and continuing through early 2013, the FTC regularly released concentration data for markets reviewed for possible anticompetitive effects in merger matters.[38] That data, released most recently in 2013, eventually covered 264 horizontal merger investigations and 1,372 relevant antitrust markets. The Commission published HHI data in aggregate form for 1,359 markets; in 1,055, the Commission sought relief, and in 304 it did not. In only 42 markets did it seek relief where the change in the HHI was below 200; that 42 represented 37% of the markets (114) in which the merger-induced change was below 200. The FTC sought relief in only 54% of those markets where the change in the HHI was between 200 and 299 points (52/96), in only 67% of the markets where the change in the HHI was between 300 and 499 points (95/142), and in 73% of mergers where the merger-induced change in the HHI was between 500 and 799 (148/204). DOJ/FTC data for the period 1999–2003, limited to merger enforcement actions, suggests something similar: of 1,263 markets in which a merger was challenged, in only 85 instances (6.7%) was the merger-induced HHI change less than 300.

Where a presumption (even a rebuttable one) should attach is going to be subjective, but it seems unwarranted to attach a presumption of competitive harm to market concentration statistics that are rebutted by additional evidence 33% of the time.

The data on FTC challenges and investigations suggests that no presumption of competitive harm should attach to mergers where the post-merger HHI is less than 2400. For the period 1996–2011, for mergers where the post-merger HHI was below 2400, challenges occurred only 50% of the time. For mergers where the post-merger HHI was below 2000, challenges occurred only 46% of the time, and this figure is heavily influenced by mergers in the oil industry. The combined DOJ/FTC data for the 1999–2003 period is similar; only 14% of mergers challenged were in markets where the post-merger HHI was less than 2,400.

The Agencies argue that their record of enforcement is an unreliable guide to establishing a prima facie case because of recent resource constraints at the Agencies. With limited resources, they say, the Agencies performed a kind of triage and investigated and challenged

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[38] Federal Trade Commission, Horizontal Merger Investigation Data, Fiscal Years 1996-2011 (Jan. 2013), https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf; Federal Trade Commission, Horizontal Merger Investigation Data, Fiscal Years 1996-2007 (Dec. 2008), https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2007/081201hsrmergerdata.pdf; Federal Trade Commission, Horizontal Merger Investigation Data, Fiscal Years 1996-2005 (Jan. 2007) https://www.ftc.gov/sites/default/files/documents/reports_annual/horizontal-merger-investigation-data-fiscal-years-1996-2005/p035603horizmergerinvestigationdata1996-2005_0.pdf; Federal Trade Commission, Horizontal Merger Investigation Data, Fiscal Years 1996–2003 (Feb. 2004, Rev. Aug. 2004). The figures and tables calculated in the text draw from the data in Table 3.1 of the 2008 and 2013 reports.

those mergers with the most likely anticompetitive effects. The data does not support this claim. The FTC data set released periodically 2003–2013 is instructive. During periods of lower merger activity, as measured by the number of transactions for which a Hart-Scott-Rodino Act (HSR) filing was made, the FTC—the only agency for which data is available—never reached lower down the concentration scale for additional merger enforcement, as one would expect if the agency's previous level of enforcement had been dictated by limited resources rather than assessing the merits of each matter.

The annual HSR Report to Congress identifies the number of HSR filings received by the Agencies. That number is not static.[39] There is a significant drop in the number of HSR filings in the period FY 2008–2011, as compared to both FY 2007 and the previous four-year period, FY 2004–2007. The FTC merger enforcement data allows for a comparison of the post-merger HHI/change in the HHI data for the two four-year periods. Tables 2 and 3 present the data. Notwithstanding a significant drop in the number of HSR filings over the second four-year period, I can discern no shift of resources towards challenging transactions at a lower post-merger HHI level or a lower level of merger-induced change in the HHI.

The Agencies have advanced no credible basis for adopting presumptions against horizontal mergers in markets with a post-merger HHI below 2400 and a merger-induced change in the HHI below 300.[40] While the Agencies may wish to signal a more aggressive merger policy, experience suggests they will not be able to sustain a presumption against a merger below those concentration levels. Thus, any language in final merger guidelines should be qualified to make clear that any structural presumption is rebuttable. Rather than set presumptions (even rebuttable presumptions) at low levels of market share or market concentration, or change in concentration, the Guidelines should adopt an alternative: mergers where the post-merger concentration is greater than 1800 and the change in concentration is greater than 200 raise substantial concerns and are likely to receive significant scrutiny, and only those whose post-merger HHI is 2400 or higher where the merger-induced change is 300 or more, will be presumed to be anticompetitive, subject to rebuttal.

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[39] Table 1 was created using the data at Appendix A (Summary of Transaction by Year) of Federal Trade Commission, Hart-Scott-Rodino Annual Report, Fiscal Year 2011), . https://www.ftc.gov/sites/default/files/documents/reports_annual/34th-report-fy2011/2011hsrreport_0.pdf; and Federal Trade Commission, Hart-Scott-Rodino Annual Report to Congress, Fiscal Year 2005), https://www.ftc.gov/sites/default/files/documents/reports_annual/28th-report-fy-2005/p989316twentyeighthannualhsrreport_0.pdf.

[40] The Agencies also suggest the courts have accepted the proposed thresholds as consistent with a structural presumption. There are very few instances of a court preliminarily or permanently enjoining a merger with the proposed thresholds (or near the proposed thresholds), and none in at least the past 25 years.

Table 1: Number of Transactions Reported to FTC/DOJ

Fiscal Year	# of Transactions Reported	Change in Number of Filings from Previous Year
1996	3087	NA
1997	3702	615
1998	4728	1026
1999	4642	-86
2000	4926	284
2001	2376	-2550
2002	1187	-1189
2003	1014	-173
2004	1428	414
2005	1675	247
2006	1768	93
2007	2201	433
2008	1726	-475
2009	716	-1010
2010	1166	450
2011	1450	284

Table 2: Challenge/Close Data, FTC, FY 2004–2007

		Merger-Induced Change in HHI								
		0-99	100-199	200-299	300-499	500-799	800-1199	1200-2499	2500+	TOTAL
Post-Merger HHI	0-1799	0/0	0/10	1/12	0/7	0/4	0/0	0/0	0/0	1/33
	1800-1999	0/0	0/0	0/2	0/3	0/2	0/0	0/0	0/0	0/7
	2000-2399	0/1	0/0	0/3	3/5	0/2	0/1	0/0	0/0	3/12
	2400-2999	0/0	0/0	2/2	5/1	3/2	1/6	0/0	0/0	11/12
	3000-3999	0/0	0/0	1/1	0/4	4/6	17/7	3/7	0/0	25/25
	4000-4999	0/0	1/0	0/0	0/1	0/3	6/4	12/1	0/0	19/9
	5000-6999	0/0	2/0	1/0	1/0	6/0	4/1	47/6	16/2	77/9
	7000-10000	0/0	0/0	1/0	0/0	0/0	3/0	6/0	117/0	127/0
	TOTAL	0/2	3/10	6/20	9/21	13/19	31/19	68/14	133/2	263/107

Table 3: Challenge/Close Data, FTC, FY 2008–2011

		Merger-Induced Change in HHI								
		0-99	100-199	200-299	300-499	500-799	800-1199	1200-2499	2500+	TOTAL
Post-Merger HHI	0-1799	0/0	0/1	0/0	0/0	0/1	0/0	0/0	0/0	0/2
	1800-1999	0/0	0/0	0/1	0/0	0/1	0/0	0/0	0/0	0/2
	2000-2399	0/0	0/1	0/1	0/3	1/2	1/0	0/0	0/0	2/7
	2400-2999	0/0	0/1	0/0	0/1	0/1	0/1	0/0	0/0	0/4
	3000-3999	1/1	1/0	1/0	3/0	6/2	5/3	8/0	0/0	25/6
	4000-4999	0/0	1/0	0/0	2/0	2/0	6/0	14/0	0/0	25/0
	5000-6999	1/0	2/0	4/0	4/0	7/0	10/0	35/2	11/1	74/3
	7000-10000	0/0	0/0	0/0	0/0	1/0	1/0	9/0	48/0	59/0
	TOTAL	2/1	4/3	5/2	9/4	17/7	23/4	66/2	59/1	185/24

B. Recommendation: The Merger Guidelines Should Not Include a "30% Firm" Proviso but Should Include a "Leading Firm" Proviso

Merger Guidelines should indicate that an acquisition (a) by the leading firm (b) with a market share in the relevant market of 40% or greater of (c) any firm operating in the same or an adjacent market (d) with a market share of, or more than, 2% is likely to warrant significant scrutiny.

The 1982 Merger Guidelines also introduced the "leading firm" proviso: "the Department is likely to challenge the merger of any firm with a market share of at least 1 percent with the leading firm in the market, provided that the leading firm has a market share that is at least 35 percent and is approximately twice as large as that of the second largest firm in the market."[41] The 1984 Merger Guidelines removed the requirement that the leading firm be approximately twice as large as the second largest firm but also made clear that entry, efficiencies, and factors affecting the significance of market shares and concentration were relevant to determining whether such an acquisition was anticompetitive.[42] The 1992 Horizontal Merger Guidelines dropped the leading firm proviso in favor of adopting a more

[41] 1982 Guidelines at 15.

[42] 1984 Guidelines at 15.

complex articulation of "unilateral effects" (maintenance or creation of single-firm market power) through merger. The Guidelines adopted a presumption that at a 35% combined market share, the merging parties accounted for a significant share of first- and second-choice sales to consumers.[43]

The Draft Merger Guidelines revive an over-inclusive version of the leading firm proviso, proposing a structural presumption against any acquisition that creates a firm with a market share more than 30% where the merger-induced change in the HHI is greater than 100. The case law does not support this position. To the extent that the case law supports a presumption of competitive harm with a post-merger market share of 30% (or lower), that case law requires the combined firm to be the leading firm in the relevant market.[44] A firm with a post-merger market share of 30% or slightly greater may be the third-largest firm in a market; preventing such a firm from growth through acquisition may affect its competitive significance. The Draft Merger Guidelines should abandon this 30% firm proviso as inconsistent with the case law, experience, and economic evidence, and because it may limit too broadly the way in which a non-leading firm may enhance its share.

The Agencies should consider adopting, in its place, a true leading firm proviso, subjecting to strict scrutiny acquisitions by a firm with a pre-market share of 40% or higher, where the target firm has a 2% or greater share of the same or adjacent market.

V. Draft Guideline Four: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market

The Draft Merger Guidelines propose reviving the potential competition doctrine's two core theories of harm—the elimination of a perceived potential entrant and the elimination of an actual potential entrant. There appears to be no clear benefit from doing so. The inclusion of rapid/uncommitted entrants and committed entrants as market participants, and the recognition that a vertical merger may allow for exclusion of a future entrant, appears to capture any sensible application of the two doctrines.

A. Recommendation: The Merger Guidelines Should Not Include the Concept of Perceived and Actual Potential Competition but Should Rely on Market Participant Analysis to Identify Non-Incumbent Firms Likely to Enter or Constrain Post-Merger Market Power in the Relevant Market

The loose standard for identifying perceived potential competitors, and somewhat loose standard for identifying actual potential competitors, will be used by parties and ultimately

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[43] 1992 Guidelines at 22.

[44] United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

by courts to justify the inclusion of many firms in the relevant market or as likely entry candidates. This will undercut the Agencies' challenge to horizontal and non-horizontal mergers. The existing framework for identifying and evaluating the competitive impact of non-incumbent firms is sufficient to address concerns about the elimination or extinguishing of future competition.

The *perceived potential competition* doctrine recognizes that firms not presently operating in a market can affect current competition by their mere threat of entry. An acquisition may be unlawful where "the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market."[45] The Supreme Court has accepted the perceived potential competition doctrine. (The draft merger guidelines' statement that "the impact of perceived potential entrants is secondary to the competition provided by current market participants" (at 13) is inconsistent with the recognition of the effect of a perceived (or actual) potential entrant doctrine. If the constraining effect of the perceived (or actual) potential entrant is not equivalent or superior to the constraints imposed by other firms in the market, then it is not

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[45] *See generally* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623-24 (1974) ("the Court has interpreted § 7 as encompassing what is commonly known as the 'wings effect'—the probability that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in that market as likely to enter de novo."); United States v. Falstaff Brewing Corp., 410 U.S. 526, 532-33 (1973) (in reviewing a district court decision finding that Falstaff's acquisition of Narragansett Brewing company did not violate § 7, the Court chastised the district court for "failing to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market" and recognizing that "potential competition may stimulate a present competitive influence"). Other perceived potential competition cases are Ford Motor Co. v. United States, 405 U.S. 562, 574 (1972) (Ford's acquisition of Autolite "remove[d] the significant procompetitive effects in the concentrated spark plug market that resulted from Ford's position on the edge of the market as a potential entrant"); Fed. Trade Comm'n v. Procter & Gamble, 386 U.S. 568, 581 (1967) (in evaluating the competitive effects of Procter and Gamble's acquisition of the assets of Clorox Chemical Co., the Supreme Court noted that notwithstanding that P&G did not operate in the market for liquid bleach, "it is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market" for liquid bleach); and United States v. Penn-Olin Chemical Co., 378 U.S. 158, 173 (1964) (lower court should have considered whether the joint venture "eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter" rather than focus solely on the "probability that both companies would have entered the [relevant] market" but for the joint venture). United States v. El Paso Natural Gas Co. was considered the Supreme Court's first case evaluating the competitive importance of a potential competitor. 376 U.S. 651 (1964). The Supreme Court later described El Paso as "an actual-competition rather than potential-competition case" because of "the degree of entry that [Pacific Northwest] had achieved into the market of [El Paso]." United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623-24 n.24 (1974). See also Commission Opinion, Brunswick Co., 94 F.T.C. 1174, 1205 (FTC 1979) ("El Paso involves the elimination of actual competition from the market.") Alternatively, the transaction could be characterized as one involving a nascent or emerging competitor.

constraining and seems to deserve no protection.) As discussed herein, the underlying premise of the doctrine has been adopted into the 1992 and 2010 Horizontal Merger Guidelines in the identification and analysis of so-called "uncommitted" or "rapid" entrants, and no change is necessary for new merger guidelines.

The *actual potential competition* doctrine recognizes the future competitive effect of a firm that, but for the merger, may enter the relevant market directly or through the acquisition of an existing market participant with limited market presence. The Supreme Court has reserved its views on whether and under what conditions the acquisition of an actual potential entrant could violate Section 7, but the Court has indicated that "ease of entry on the part of the [non-incumbent] firm is a central premise of the potential competition doctrine" and "that an actual potential entrant will significantly deconcentrate the relevant market is a necessary requirement too." This concern is not unbounded. In evaluating potential competition cases, it is "the loss of competition which is sufficiently probable and imminent [that] is the concern of [Section] 7"; "remote possibilities are not sufficient to satisfy the test set forth in [Section] 7."[46]

The 1968, 1982, and 1984 Merger Guidelines included a discussion of the court-developed doctrine of potential competition. Neither the 1992 nor 2010 Horizontal Merger Guidelines included reference to these two doctrines, but both identified non-incumbent firms as market participants when they met the criteria of rapid/uncommitted or committed entrants.

The 1992 Horizontal Merger Guidelines updated the 1982/1984 Merger Guidelines' discussion of market participants to better explain the conditions under which firms not presently participating in the relevant market would be considered market participants: firms not currently producing or selling the relevant product, but who, in response to a small but significant non-transitory increase in price (SSNIP) could begin producing or selling the relevant product within one year without incurring significant sunk costs of entry and exit. The Guidelines designated such firms "uncommitted entrants."[47] The Guidelines were silent on whether such firms had a pre-entry effect on price and competition in the relevant market—whether their pre-entry status was the same as a perceived potential competitor, but the swiftness of their potential response seems consistent with that of the competitive "threat" of a perceived potential competitor.

Relevant to the potential entrant's "uncommitted" entry status was (and is) both the capability and the incentive to enter. The Guidelines noted that a firm that has the

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[46] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623, 628, 633, 642 (1974).

[47] 1992 Guidelines at 10-11.

technological capability to engage in an uncommitted supply response but likely would not—perhaps because it would not be profitable, or because of difficulties in achieving product acceptance—was not considered a market participant.[48] (The Agencies suggest, in their discussion of evidence in support of identifying potential entrants, that reliance on the incentive to enter will be less relevant.) The uncommitted entrant must have both the ability and the incentive to engage in production substitution or production extension.[49] The Guidelines expanded on the identification of market participants, indicating that generally, "firms which have committed to entering the market prior to the merger . . . will be included in the measurement of the market."[50] However, the Guidelines were silent on whether committed entrants, whether evaluated with respect to pre-merger conduct or with reference to post-merger incentive and ability to enter, were the equivalent of actual potential competitors.

The 2010 Horizontal Merger Guidelines updated the analysis of potential competition mergers, rejecting the need for the separate framework for potential competition mergers identified in the 1982/1984 Merger Guidelines.[51] The 2010 guidelines made explicit that the framework and policy positions articulated therein applied to mergers and acquisitions involving both actual and potential competitors.[52] In evaluating the competitive effects of a merger "the agencies consider whether the merging parties, have been, *or likely will become absent the merger*, substantial head-to-head competitors."[53] The 2010 Guidelines recognize that the acquisition of a maverick firm—"a firm that plays a disruptive role in the market to the benefit of customers"—may eliminate actual or potential competition.[54]

The 1992 Horizontal Merger Guidelines' and 2010 Horizontal Merger Guidelines' discussions of "market participants" are similar, but with one notable difference. In the 1992 Horizontal Merger Guidelines, market participants included those firms "not currently producing or selling the relevant product in the relevant area" if their "supply response" into the relevant market was "*likely* to occur within one year."[55] These firms are identified as "uncommitted entrants." The 2010 Horizontal Merger Guidelines appear to adopt a higher threshold: "firms that are not current providers in a relevant market, but that would *very*

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[48] *Id.* at 11.

[49] *Id.*

[50] 1992 Guidelines at 26.

[51] *See* 2010 Guidelines.

[52] *Id.* at 1.

[53] *Id.* at 4.

[54] *Id.*

[55] 1992 Guidelines at 11 (emphasis added).

likely provide rapid supply responses with direct competitive impact in the event of a [small but significant non-transitory increase in price], without incurring significant sunk costs, are also considered market participants.[56] These firms are identified as "rapid entrants." This change seems to be a reaction to, or perhaps an anticipation of, claims that many firms are rapid entrants, thus minimizing rebuttal arguments based on future rapid entry by firms not party to the merger.

B. Recommendations: The Merger Guidelines Should Apply the "Entry" Requirements of the Existing Horizontal Merger Guidelines to the Identification of Non-Incumbent Firms That Are Likely Future Market Participants. They Should Not Differentiate the Standard for Showing Likelihood of Future Entry (or Expansion) by a Party to a Merger from the Likelihood of Future Entry (or Expansion) by a Non-Party. Any Burden to Show Likelihood of Entry Should Be Symmetrical.

The 2020 Vertical Merger Guidelines recognize that "a vertical merger may diminish competition by allowing the merged firm to profitably use its control of the related product to weaken or remove the competitive constraint from one or more of its . . . potential rivals in the relevant market."[57] The merger may allow the merged firm to raise a future rival's costs (to give it power over price), or, by refusing to supply its future rival, foreclose it from the market, absent entry into both markets by the rival.[58] This theory of harm is consistent with earlier guidelines' recognition that vertical mergers can create impediments to entry, disadvantaging prospective or potential competitors.

The 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines contain the framework for identifying harm from transactions that combine market participants (whether presently operating in the relevant market or merely threatening or taking active steps to enter) or that threaten to exclude future competitors. However, revised guidelines should better articulate the application of the guidelines' definitions of types of entry to identify both rapid and committed entrants. They should apply these definitions symmetrically to the evaluation of the likelihood, timing, and sufficiency of entry or

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[56] 2010 Guidelines at 21 (emphasis added). The change in "likelihood" is not explained; however, it may have been intended to make it harder to advance speculative claims of rapid or otherwise uncommitted entry or market participation by non-merging firms. It may, however, have the effect of increasing the burden on the antitrust agencies to show that one or both of the merging parties not presently in the market is, through a supply response, a market participant.

[57] 2020 Vertical Merger Guidelines at 4. "A related product is a product or service that is supplied or controlled by the merged firm and is positioned vertically or is complementary to the products and services in the relevant market." *Id.* at 3.

[58] *Id.* at 7, example 4.

expansion by parties to the merger and those not party to the merger; the entry arguments should be evaluated under symmetrical and equal requirements.

The 2010 Horizontal Merger Guidelines identify a non-inclusive list of actions a firm may undertake as part of an entry effort: planning, design, and management considerations; permitting, licensing, or other approvals; construction, debugging, and the operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements.[59] These factors are relevant to determining whether a firm is a committed entrant or, if the Guidelines maintain the term, an actual potential entrant (pre-merger); they bear on the certainty of and speed with which the firm might enter and the reasonableness of the perception of future entry, evaluated from the perspective of the current market participants, if the Guidelines maintain the perceived potential entrant perspective. While the 2010 Horizontal Merger Guidelines acknowledge that "firms operating in adjacent or complementary markets . . . may be best placed to enter," they "will not presume that a powerful firm in an adjacent market . . . will enter the relevant market unless there is reliable evidence supporting that conclusion;[60] this principle should be applicable to the identification of rapid and committed entrants (and, if the Guidelines maintain the terms, perceived potential and actual potential entrants).

The 2010 Horizontal Merger Guidelines' timeliness, likelihood, and sufficiency analysis focuses on whether entry will reverse or constrain the actions of the merged entity. This framing of the entry determination—the competitive effects of post-merger entry—is relevant, with some adjustments, to the evaluation of the competitive effects of an acquisition of a non-incumbent firm that is considered a market participant. For example, in evaluating the competitive effect of the acquisition of a committed entrant (or an actual potential entrant), the timing of that future entry seems relevant both for evidentiary purposes and for competitive effects analysis. This seems especially true where there are efficiencies or other procompetitive effects associated with the acquisition that can be captured early, but any entry, absent the merger, would have occurred in the more distant future. The Agencies ask, in considering likelihood of entry, if entry "would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved."[61] Implicit in this likelihood inquiry is whether entry would be profitable as compared to alternatives available to the firm. This same question should apply to the entry decisions of non-incumbent firms, whether described as committed entrants or actual potential entrants.

[59] 2010 Guidelines at 38-39.

[60] *Id.* at 39.

[61] *Id.* at 40.

Future entry by a committed or actual potential entrant should also meet a sufficiency requirement (or expectation) of market impact before an acquisition raises concerns about anticompetitive harm. This is consistent with the standard articulated in *Marine Bancorp*, although possibly a lower standard than the requirement that such entry have a significant deconcentrating effect on the market.[62]

C. Recommendation: The Merger Guidelines Should Not State That "The Antitrust Laws Reflect a Preference for Internal Growth over Acquisition."

The Merger Guidelines should not state that "the antitrust laws reflect a preference for internal growth over acquisition." There is no credible basis for this position, but for a comment in a concurring opinion that applies no economics or evaluation to this idiosyncratic belief of Justice Thurgood Marshall, cited in the draft.

VI. Draft Guidelines 5, 6, and 7: Vertical Mergers That May Foreclose or Raise Costs to Competitors Sufficient to Give Power over Price.

Draft guidelines 5, 6 and 7 purport to identify three separate paths by which a non-horizontal merger may foreclose competitors (or raise their costs sufficient to give the combined firm power over price) and harm competition. Draft Guideline 5 adopts, in large part, the "incentive and ability" framework of the 2020 Vertical Merger Guidelines, which was consistent with the Commission's and DOJ's evaluation of vertical and other non-horizontal mergers over at least the 25 year period summarized in the Commission's Commentary on Vertical Merger Enforcement.[63] It fails, however, to recognize and credit the procompetitive benefit of the elimination of double marginalization, which is inherent in the same incentives that give the vertically integrated firm an incentive to foreclose a competitor. At times, as the drafters likely recognize, but the draft does not, those benefits will exceed the harm (if any) from such foreclosure, whether partial or full.

Draft Guideline 6 creates a structural presumption for vertical mergers. Draft Guideline 7 adopts the language of entrenchment, but in its most sensible form is merely a concern about customer foreclosure and in its weakest form is a concern that participation in multiple markets may allow the merged firm to offer multiproduct packages (either through bundles

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[62] For additional, relevant commentary on the lack of symmetry for mergers involving potential or future competitors, and entry by third parties, see Bilal Sayyed, *The Draft Merger Guidelines Abandon the Persuasiveness of Their Predecessors*, PROMARKET BLOG (Aug. 30, 2023), https://www.promarket.org/2023/08/30/bilal-sayyed-the-draft-merger-guidelines-abandon-the-persuasiveness-of-their-predecessors/. A copy of this article is included with this submission.

[63] Federal Trade Commission, Commentary on Vertical Merger Enforcement (Dec. 2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

or tying) that a competitor cannot offer and that can be net-efficient. Guideline 7, like the 2020 Vertical Merger Guidelines, also recognizes that vertical integration may limit the ability of nascent firms to access competitive opportunities to develop into a more competitive firm. In most instances that vertical integration will come with benefits, including in the short term, that must be weighed against long-term, potentially speculative harm to future competition and future competitors.

A. Recommendation: Revise the Three Draft Guidelines into a Single Guideline, Consistent With The Framework of the 2020 Vertical Merger Guidelines. The Draft Merger Guidelines' Concern with Mergers That Merely Further a Trend Towards Concentration Should Be Abandoned.

The drafters should revise draft Guideline 5 to include the customer foreclosure theories, and the discussion of the potential for foreclosure to limit future competition from existing and nascent competitors (as explained in the 2020 Vertical Merger Guidelines) of draft Guideline 7. Revised Guideline 5 should also recognize the elimination of double marginalization as a procompetitive benefit of a vertical merger. Revised Guideline 5 should accept that certain procompetitive effects of a transaction are inextricably linked to the incentive to foreclose or exclude rivals, and at times, the benefit of those procompetitive effects may outweigh the harm (if any) from foreclosure or exclusion of rivals.

The content and substance of draft Guideline 6 should not be included in any future Merger Guidelines, as it is unsupported by case law, modern economics, and the practice of the agencies (which follows the modern economics of vertical integration). Similarly, after incorporation of portions of draft Guideline 7 into a revised Guideline 5, discard from the Merger Guidelines the remaining content of Guideline 7 which focuses unnecessarily on barriers to entry because of efficiency improvements of the combined firm.

VII. Draft Guideline Eight: Mergers Should Not Further a Trend toward Concentration

The Draft Merger Guidelines indicate that the Agencies will consider whether a merger that merely furthers a trend toward concentration is illegal, applying two conditions. The first is whether the merger will occur in a market or industry sector (undefined) where there is a significant tendency towards concentration, where that trend may be either towards horizontal concentration or towards vertical integration. The trend may be established by market structure, for example, "a steadily increasing HHI exceeds 1000 and rises toward 1800" or by "other market characteristics, such as the exit of significant players or other factors driving concentration." The second is whether a merger would increase the level of concentration or the pace of that trend, for example, by causing an HHI increase of more than 200 points.

A. Recommendation: The Draft Merger Guidelines' Concern with Mergers That Merely Further a Trend Towards Concentration Should Be Abandoned.

The Draft Merger Guidelines' concern with trend analysis does not distinguish an anticompetitive trend towards concentration from a trend towards concentration driven by exogenous factors. Such factors include the need for greater scale and scope, which may be efficient or otherwise procompetitive, and which is related to the acquisition, and more importantly, to the creation, enhancement, entrenchment, or facilitation of the exercise of market power. To the extent that merger activity in an industry is a concern, Guideline Nine's focus on serial acquisitions captures this concern.

VIII. Draft Guideline Nine: Serial & Cumulative Acquisitions

Proposed Guideline Nine adopts the view that certain acquisitions may be too small to have anticompetitive effects, but a series of such acquisitions may have a cumulative effect. Fearful that neither Section 7 nor Section 2 will reach such acquisitions, the Draft Merger Guidelines informs merging parties and courts that this cumulative effect can be challenged under an aggregation principle: some number of some acquisitions of horizontal competitors (actual or potential, current or future) and/or non-horizontally situated firms (vertical, diagonal, upstream, downstream, complementary) will be grouped together to identify an anticompetitive effect, an anticompetitive strategy (with or without an effect), or a trend towards concentration or vertical integration.

This cumulative theory of harm has been advanced before, by the Commission in the 1960s, initially solely under Section 5, and later under Section 7. In *Beatrice*[64], the Commission stated that it might be "appropriate to scrutinize a series of acquisitions over a long period of time from the standpoint not only of whether any acquisition violated Section 7 or Section 5, but also whether the respondent's course of conduct viewed as a whole constituted an attempt to monopolize or an unfair method of competition. Looked at this way, the series of acquisitions may justify relief beyond what might be appropriate in a Section 7 or Section 5 case challenging a particular one or number of the acquisitions in the series, and irrespective of whether every individual acquisition, viewed separately, is unlawful."[65] There, the Commission "did not find it necessary to determine . . . whether respondent's series of acquisitions, viewed as a pattern, violated Section 5."[66] In *Foremost Dairies* (decided a few years prior to *Beatrice*), the Commission "had no doubt that where, as here, a respondent

[64] Beatrice Foods, 67 F.T.C. 473 (1965), supplemented, 68 F.T.C. 1003 (1965), modified, 71 F.T.C. 797 (1967).

[65] *Id.* at 726-27.

[66] *Id.* at 731.

with a proclivity for growth by acquisitions is charged with a violation of Section 5, the cumulative effect of all of its acquisitions is of importance."[67] The Commission did not reach this question however, except to deny complaint counsel's request for a cease-and-desist order with respect to future acquisitions.[68] The Commission noted, without citation, that it had "previously rejected the argument under Section 7 that certain acquisitions in a series of acquisitions, none of which could be shown to have the adverse effect on competition required by Section 7, become illegal . . . for the reason that the cumulative effect on competition of these prior mergers may be such as to make any further acquisition illegal."[69] The Commission identified and challenged other instances of multiple acquisitions as

[67] Foremost Dairies, 60 F.T.C. 944, 1091 (1962).

[68] *Id.* at 1092.

[69] *Id.* at 1091. The Commission obtained relief from three other dairies that had engaged in a series of acquisitions. See Dean Foods, 70 F.T.C. 1146 (1966) (alleging the elimination of actual and potential competition from the acquisition of a major competitor; Commission ordered, after an administrative trial, divestiture, and prior approval provision for future acquisitions); Complaint and Order, Borden Company, 65 F.T.C. 296 (1964) (allegation that company that acquired over 500 entities and engaged in "constant and systematic elimination of actual and potential competitors;" such activity "constitute[s] a violation of Section 5"; ordered to divest eight regional dairy businesses" and obtain prior approval for future acquisitions); Complaint and Order, National Dairy Products Corp., 62 F.T.C.120 (1963) ("the constant and systematic elimination of actual and potential competitors . . . constitute[s] a violation of Section 5"; ordered to divest two dairy companies and obtain prior approval for future acquisitions)

violations of Section 5.[70] The Commission has also charged multiple acquisition cases as a violation only of Section 7.[71]

A. Recommendation: Merger Guidelines Should Not Require Cognizable Efficiencies or Other Procompetitive Effects of Serial Mergers to Be Merger-Specific

As discussed in the 1992 Horizontal Merger Guidelines, the 2010 Horizontal Merger Guidelines, and the 2020 Vertical Merger Guidelines, acquisitions may generate procompetitive benefits or generate efficiencies that might not otherwise be obtained. Where the "historical evidence" "reveals [an] overall strategic approach to serial acquisitions" that includes the capture of efficiencies or other procompetitive effects over a series of acquisitions, we recommend that the Guidelines explicitly recognize that those efficiencies or effects must be treated as cognizable, even if not merger-specific. If the Agencies consider the cumulative impact of a series of acquisitions, even where no single

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[70] Complaint and Commission Opinion, SKF Industries, 94 F.T.C. 6, 82, 88 (1979) (alleging that multiple acquisitions by SKF and the buy-sell agreement between SKF and Federal Mogul, "individually or taken as a whole, constitute an unfair method of competition in violation of Section 5"; Commission holding that "SKF has acquired a large number of . . . manufacturers that were located outside the United States and that exported little to the United States. Complaint Counsel allege that these acquisitions, even if not distinct violations of Section 5 . . . are part of a pattern of conduct that has had an adverse impact on the domestic bearings market. . . . While the cumulative impact of many acquisitions could injure domestic competition to such an extent as to violate Section 5, inadequate proof was offered."); Complaint and Decision and Order, Damon Corp., 91 F.T.C. 301 (1978) (alleging that Damon's entered into a program of acquiring independent laboratories for the purpose of establishing a national chain, and, in nine years, made more than 50 acquisitions; this series of acquisitions, separately and cumulatively, alleged to violate both Section 7 and Section 5, and eliminated actual and potential competition); Complaint and Decision and Order, Georgia Pacific, 81 F.T.C. 984 (alleging that the cumulative effect of the acquisition of 45 companies violated Section 5 and Section 7 by, in part, eliminating actual and potential competition between the acquired companies and between the acquired companies and Georgia Pacific); National Tea, 69 F.T.C. 226, 227-29, 265, (1966) (alleging that series of acquisitions was a violation of Section 5, as an unfair method of competition, and a violation of Section 7; Commission found liability under Section 7 for acquisitions of over 400 stores acquired in 26 separate transactions; complaint counsel did not present testimony on Section 5 claim, so administrative law judge presumed such claim to be abandoned and Commission did not revive it; notably, the Commission did not order any divestitures, but merely prohibited further acquisitions unless approved by the Commission, as the "various dynamic features of the industry itself—particularly the relative ease of entry . . . will dissipate" the effects of the acquisitions.); Complaint and Order, Martin-Marietta Corp., 62 F.T.C. 834 (1963) (alleging that acquisition of nearly 100 entities, a "constant and systematic elimination[] of actual and potential competitors by . . . acquisition . . . constitute unfair methods of competition and unfair acts and practices").

[71] *See, e.g.*, Frito-Lay, 74 F.T.C. 688 (1968) (challenging eight acquisitions of potato chip, corn chip, and pretzel manufacturers as a violation of Section 7; negotiated order to divest ten manufacturing plants, obtain Commission approval for future acquisitions, and not to advertise snacks in combination with parent's carbonated soft drinks); Consolidated Foods Corporation, 68 F.T.C. 1137 (1965) (Section 7 challenge to the acquisition of three grocery store chains, for a total of over eighty stores; divestiture and prior approval for future acquisitions required); St. Regis Paper Company, 68 F.T.C. 57 (1965) (alleging acquisition of 15 companies, individually or cumulatively, violated Section 7; agreed to divestiture of some assets and to a prior approval requirement for future acquisitions).

acquisition on its own would violate Section 7 (or Section 5), the same treatment should be granted to efficiency and procompetitive effect claims. Capturing those efficiencies or procompetitive effects may only be achievable through a series of acquisitions, and not by any one acquisition alone, especially when the efficiencies or other procompetitive effects arise from the combination of complementary or overlapping assets or the combination of multiple assets not internally owned or generated. In short, if merger harms are not going to be merger-specific, efficiency claims should not be required to be merger-specific. This is symmetrical treatment to the draft's view that only a cumulative review of a series of acquisitions may show *anti*competitive effects.

IX. Draft Guideline Ten: Mergers That Involve Platforms

The Draft Merger Guidelines recognize that platform markets may exhibit "network effects" and that platform operators may have the incentive to deny rivals sufficient scale to benefit from such network economies, either through acquiring such firms or by taking steps to exclude smaller platforms from a relevant market or from a related product. The Draft Merger Guidelines suggest that firms that operate platforms may, if they are vertically integrated (either through acquisition or internal growth), have a conflict of interest in serving firms that sell on the platform (but are themselves not operators of a platform), because they can "self-preference" their own products over third-party products.

In general, the draft says more than necessary about platforms but remains unclear on what harms are threatened, how those harms affect competition and not merely competitors or trading partners, and under what conditions conduct that may be competitively neutral or beneficial becomes harmful. The discussion could be cut back substantially to avoid giving the appearance that there are significant, novel competitive problems associated with platforms that cannot be handled within the existing analytic framework for mergers. However, if the draft is not significantly shortened, Merger Guidelines should recognize the potential efficiencies and other procompetitive benefits associated with vertical integration by platform operators and by combination of two platform operators.

A. Recommendation: The Merger Guidelines Should Recognize That Acquisitions in Platform Markets Are Associated with Significant Efficiencies Because of Network Effects.

The Draft Merger Guidelines argue that a platform may take actions, including a merger, to prevent or limit its rivals' ability to capture the benefits of direct or indirect network effects. If this is a harm to competition, revised Merger Guidelines should evaluate and weigh that harm against any direct or indirect network efficiencies gained by the merging parties through the merger or through post-merger conduct. The benefits (efficiencies) should be considered inextricably linked to the merger or post-merger conduct, and they must be

evaluated together in analyzing the competitive effects of the merger or conduct. Similarly, mergers, or post-merger conduct, that deprives rivals of platform participants on one side of the market but increases the merging parties' number (or quality) of platform participants on the other side of the market, must be evaluated together with respect to benefits and harms.

The draft notes that network effects may encourage a trend towards concentration; this sounds very much like an efficiency offense, and it should be abandoned.

B. Recommendation: Merger Guidelines Should Recognize That "Self-Preferencing" Can Be Efficient or Otherwise Pro-Competitive

The ability to self-preference is a function of being vertically integrated. Vertical integration can be, and is often, efficient. The Merger Guidelines should be clear that self-preferencing in the absence of market power is not likely to harm competition, and that self-preferencing, even when accompanied by market power is not necessarily anticompetitive. Self-preferencing may support entry into new markets; the Merger Guidelines should not discourage entry.

X. The Merger Guidelines Should State That an Analysis of Efficiency Claims Is a Standard Component of a Competitive Effects Analysis.

Sixty years ago, the Supreme Court wrote, with respect to non-germane and out of market economic benefits allegedly associated with a merger of two major commercial banks, that "possible economies [from a merger] cannot be used as a defense to illegality." The Supreme Court has moved on from its arguable hostility (or indifference) to efficiencies and economies in antitrust matters. The Commission and the Department should also move on.

In the decades following the above statement, the Supreme Court has evaluated the efficiency justification for conduct that may restrain trade, absent the efficiency justification, but improves competition when the efficiency justification is understood. In *Brunswick Corp*., the Court found that antitrust injury was absent where a plaintiff alleged that an illegal acquisition threatened to bring a "deep pocket" parent into a market of "pygmies."[72] In *GTE Sylvania,* the Court recognized the efficiency rationale of territorial and location-based restraints on intrabrand competition in support of competition at the interbrand level, and overturned the per se ban on certain vertical non-price restraints.[73] In *BMI*, the Court recognized the procompetitive rationale of a "blanket" music license as a reason to forego per se treatment of a horizontal agreement among the members of two music societies on

[72] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 487 (1977).

[73] Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

license terms.[74] In *Khan*, the Court accepted the efficiency rationale of a vertical maximum price-setting arrangement, and overturned the per se ban on vertical, maximum price-setting agreements.[75] In *Leegin*, the Supreme Court overturned the per se ban on vertical minimum price-setting agreements because of the potential efficiencies associated with such agreements.[76]

The Supreme Court has moved on from its arguable hostility (or indifference) to efficiencies and economies in antitrust matters. The Agencies should also move on, and, like the appellate courts and district courts, accept that an analysis of efficiency claims is a necessary component of merger matters.

Merger Guidelines should not include quotes suggesting the Supreme Court disfavors efficiency claims in merger cases. Any such implication would undoubtedly be wrong. Appellate courts and district courts understand that an analysis of efficiency claims is a necessary part of a competitive effects analysis, and they are in the business of implementing Supreme Court doctrine, not as it existed decades ago, but in its present-day form. Appellate courts have therefore been considering efficiency claims in their analysis of mergers since at least the FTC's challenge to University Health's proposed 1991 acquisition of the assets of a competing hospital.[77] There, the hospital argued, among other things, that its proposed acquisition would generate significant efficiencies and therefore would not lessen competition; in response, the FTC argued that Section 7 "recognizes no such efficiency defense in any form."[78] The Eleventh Circuit Court of Appeals, after considering the varying viewpoints on the scope, if any, of an efficiencies defense, held that, "in certain circumstances, a defendant may rebut the government's prima facia case with evidence showing that the intended merger would create significant efficiencies in the relevant market."[79] To the court, it was "clear that whether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition. . . . [E]vidence that a proposed acquisition would create significant efficiencies benefiting consumers is useful in evaluating the ultimate issue—the acquisition's overall effect on competition."[80]

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[74] Broadcast Music v. CBS, 441 U.S. 1 (1979).

[75] State Oil v. Khan, 522 U.S. 3 (1997).

[76] Leegin Creative Leather Products v. PSKS, Inc*.*, 551 U.S. 2705 (2007).

[77] Fed. Trade Comm'n v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991).

[78] *Id.* at 1222.

[79] *Id.*

[80] *Id*.

In *Tenet*, the Eighth Circuit reversed a district court decision to enjoin the merger of Lucy Lee Hospital and Doctors' Regional Medical Center for failing to consider evidence of enhanced efficiency of the combined firm: "the evidence shows that a hospital that is larger and more efficient than Lucy Lee or Doctors' Regional will provide better medical care than either of those hospitals could separately."[81] In *Sandford Health*, the Eighth Circuit again accepted efficiency claims as relevant to the competitive effects analysis but also held that, for "efficiencies to counteract anticompetitive effects, they must be independently verifiable and derived specifically from the merger."[82]

In *Heinz*, in its review of the district court's denial of a preliminary injunction in the proposed merger of two baby food manufacturers, the D.C. Circuit Court of Appeals recognized that the "trend among lower courts is to recognize the [efficiency] defense," although it found that the district court's analysis of the merging parties' claims "falls short of the findings necessary for a successful efficiencies defense in the circumstances of [the] case."[83] In its more recent *Anthem* decision, the D.C. Circuit held that "this court was satisfied in *Heinz*, in view of the trend among lower courts and secondary authority, that the Supreme Court can be understood only to have rejected 'possible' efficiencies, while efficiencies that are verifiable can be credited."[84] "Consequently" according to the *Anthem* court, "the circuit precedent that binds us allowed that evidence of efficiencies could rebut a prima facia showing."[85]

Other appellate courts have considered efficiency claims without ruling on the larger question of whether an efficiency defense exists. The Third Circuit, in reviewing the district court's denial of a grant of an injunction against the merger of the two largest hospitals in a market, evaluated the parties' efficiencies claims against the standards articulated in the 2010 Horizontal Merger Guidelines.[86] Because the court found the merging parties did not "clearly show" that their claimed efficiencies offset the anticompetitive effects of the merger, the court did not need to decide whether to adopt or reject the efficiencies defense.[87] In *St. Alphonsus*, the appellate court assumed that "because Section 7 of the Clayton Act only prohibits those mergers whose effect 'may be substantially to lessen competition,' a

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[81] Fed. Trade Comm'n v. Tenet Health Care Corp., 186 F.3d 1045, 1054-55 (8th Cir. 1999).

[82] Fed. Trade Comm'n v. Sanford Health, 926 F.3d 959, 965 (8th Cir. 2019).

[83] Fed. Trade Comm'n v. Heinz, 246 F.3d 708, 720 (D.C. Cir. 2001).

[84] United States v. Anthem, 855 F.3d 345, 355 (D.C. Cir. 2017).

[85] *Id*.

[86] Fed. Trade Comm'n v. Penn. State Hershey Medical Center, 838 F.3d 327, 347-51 (2016).

[87] *Id.* at 351.

defendant can rebut a prima facie case with evidence that a proposed merger will create a more efficient combined entity and thus increase competition."[88] District courts routinely consider efficiencies in analyzing the competitive effects of a proposed merger, in both preliminary and permanent injunction proceedings.[89]

Properly understood, efficiency claims and other claims of procompetitive benefits are part of the ultimate competitive effects analysis of a transaction. The Merger Guidelines should say so explicitly—rather than declaring that efficiencies and other economies are not a

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[88] Saint Alphonsus Medical Center-Nampa v. St. Luke's, 778 F.3d 775, 790 (9th Cir. 2015).

[89] *See, e.g.*, Fed. Trade Comm'n v. Thomas Jefferson Univ*.,* 505 F. Supp. 3d. 522, 538 (E.D. Pa. 2020) (Defendants can rebut presumption by showing "that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger."); Fed. Trade Comm'n v. Peabody Energy, 492 F. Supp. 3d 865, 913 (E.D. Mo. 2020) ("even if evidence of efficiencies alone is insufficient to rebut the government's prima facie case, such evidence may nevertheless be relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition.") (internal quotation marks eliminated); New York v. Deutsche Telecom AG, 439 F. Supp. 3d 179, 207-08 (S.D.N.Y 2020) ("lower courts have . . . considered whether possible economies might serve not as justification for an illegal merger but as evidence that a merger would not actually be illegal"; this Court will consider evidence of efficiencies, given courts' and federal regulators' increasingly consistent practice of doing so, and because Section 7 requires evaluation of a merger's competitive effects under the totality of the circumstances." (internal citations omitted); Fed. Trade Comm'n v. Wilh. Wilhelmsen Holding ASA, 341 F. Supp. 3d. 27, 71-72 (D.D.C. 2018) ("efficiencies produced by a merger can form part of a defendant's rebuttal of the FTC's prima facie case . . . but the court must undertake a rigorous analysis of the kinds of efficiencies . . . in order to ensure that those efficiencies represent more than mere speculation and promises about post-merger behavior") (internal citations omitted); Fed. Trade Comm'n v. Tronox Ltd., 332 F. Supp. 3d. 187 (D.D.C. 2018) ("When a court finds high market concentration levels, defendants must present proof of extraordinary efficiencies to rebut the government's prima facie case. . . . To be able to offset a merger's likely anticompetitive effects, purported synergies and efficiencies must represent more than mere speculation and promises about post-merger behavior.") (internal citations omitted); United States v. Aetna, 240 F. Supp. 3d. 1, 94, 95 (D.D.C. 2017) ("Court will . . . consider Aetna's and Humana's efficiencies defense" and "is unpersuaded that the efficiencies generated by the merger will be sufficient to mitigate the transaction's anticompetitive effects."); Fed. Trade Comm'n v. Sysco, 113 F. Supp. 3d 1, 81 (D.D.C. 2015) ("efficiencies resulting from the merger may be considered in rebutting the governments prima facie case"); United States v. Bazaarvoice, Inc., 2014-1 Trade Cas. (CCH) ¶¶ 78, 641 (N.D. Cal. Jan. 8, 2014) (evaluating efficiencies but court not persuaded that the merger will result in efficiencies sufficient to overcome the merger's anticompetitive harms); Fed. Trade Comm'n v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1089 (N.D. Ill. 2012) ("The court has thoroughly reviewed the claimed efficiencies in this case and the expert testimony from both sides and is compelled to conclude that, at least for the purpose of these proceedings, defendants have failed to present sufficient proof of the type of 'extraordinary efficiencies' that would be necessary to rebut the FTC's strong prima facie case."); Fed. Trade Comm'n v. LabCorp., 2011 WL 3100372, at paragraph 164 (C.D. Cal. Feb. 22, 2011) ("In evaluating the legality of a merger or acquisition under section 7, courts consider the procompetitive benefit of efficiencies related to the transaction."); United States v. H&R Block, 833 F. Supp. 2d 36, 89-92 (D.D.C.2011) (evaluating the parties efficiencies claims, pursuant to the guidance of Fed. Trade Comm'n v. Heinz, 246 F.3d 708 (D.C. Cir. 2001); Fed. Trade Comm'n v. Foster, 2007-1 Trade Cas. (CCH) ¶¶ 75, 725, 245 (D.N.M. 2007) ("The Defendants have, however, rebutted this presumption with proof of ease of entry, cognizable efficiencies, or other recognized defenses."); United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1173-75 (N.D. Ca. 2004) (evaluating efficiency claims); United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 149 (E.D.N.Y. 1997) (hospitals established, to reasonable certainty, that efficiencies gained in merger would result in benefits to consumers).

defense to an otherwise illegal merger. Efficiency claims and claims of other procompetitive benefits are a component of the competitive effects analysis, and, as described above, may occasionally be inextricably linked to the conduct that excludes or forecloses competitors.

XI. The Merger Guidelines Should Identify Additional Types of Relevant Markets in Which Competitive Harm May Arise

We applaud the drafters for including a description of certain non-routine markets in the Draft Merger Guidelines, e.g., cluster markets, bundled product markets, and one-stop shops. The section on market definition when there is harm to innovation is unclear; we are unclear on whether the Agencies are suggesting they will allege markets for innovation (or research and development) in addition to a market for a future good. Merger Guidelines should clarify whether the Agencies may, when appropriate, allege harm to competition in an innovation market. Merger Guidelines should also identify and explain technology markets. Technology markets and innovation markets may be particularly relevant for mergers alleging a loss of future competition.

XII. Recommendation with Respect to Rebuttal Arguments

The Draft Merger Guidelines limit rebuttal arguments to three: (i) failing firm, (ii) entry, and (iii) efficiencies. It is unclear if the Agencies are suggesting these are defenses to an otherwise anticompetitive merger or are part of the standard practice of considering such factors in the competitive effects analysis of a transaction.

The Agencies should recognize additional rebuttal arguments as part of the competitive effects analysis of a merger, including:

- A showing that the relevant market, post-merger, will operate as competitively as it did pre-merger because of the incentives or capabilities of existing or future firms to constrain the behavior of the merged firm and other firms operating in the relevant market by, among other things, increasing output, repositioning, or because of reliance on bidding and auction style negotiations for sales;
- A showing that one of the parties to the merger, although not failing, would, absent the merger, in the future act only as a weak constraint on the other party to the merger or other firms in the relevant market;
- A showing that "power buyers" can protect themselves against the anticompetitive effects of a merger, and can, through their actions, protect less powerful buyers from an anticompetitive effect too;

- A showing that foreclosure, whether full or partial, of access to a product, service or asset is immaterial to the decision or ability of a foreclosed firm to remain competitive in the relevant market;
- A showing that the merged firm, or one or more firms operating in the relevant market do not, post-merger, have a strong incentive or ability to coordinate, or enforce the "terms" of a coordinated outcome, regardless of the structural characteristics of the relevant market;
- A showing that the long-run effects of a merger will be beneficial and exceed any short-run harm; and
- A showing that the benefits of a merger in one or more markets (in the aggregate) are disproportionally greater than any harm (in the aggregate) in each and all other relevant markets.

XIII. Draft Guideline 13.

Draft Guideline 13 acts as a catchall provision to challenge mergers that do not fall within the prohibitions of draft Guidelines 1-8, and the examples of special cases in Guidelines 9-12. In a document replete with citations to old, somewhat obscure cases, the Agencies avoid identifying any enforcement actions that meet their three examples. The Agencies should identify the enforcement actions they allude to, so interested parties can comment more thoughtfully on whether those enforcement actions allege a credible theory of harm from a lessening of competition.

CONCLUSION

Unlike previous iterations of Merger Guidelines, the Draft Merger Guidelines exhibit a hostility towards a balanced competitive effects analysis of a merger. They adopt dubious case law as controlling precedent, and accept, as credible, economic theories of harm based on market structure characteristics abandoned by economists decades ago. While this submission recommends that the Draft Guidelines be revised in accordance with the proposed revisions suggested here, significant consideration should be given to retaining the 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines with only modest revisions.

Respectfully submitted,

___________/s/___________
Bilal Sayyed
Senior Competition Counsel

TechFreedom
bsayyed@techfreedom.org
1500 K Street NW
Floor 2
Washington, DC 20005

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