Submission of Gregory J. Werden in Response to Request for Information on Merger Enforcement

1. Purpose, Harms, and Scope

a. Does the analytical framework described in the guidelines properly reflect the text and purpose of the Clayton Act, namely, to prevent mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly"? Are the guidelines sufficiently clear that mergers may be enjoined when there is sufficient risk that they will substantially lessen competition in any relevant downstream or upstream market? Are they sufficiently clear about the circumstances in which mergers may be enjoined because they tend to create a monopoly?

The analytical framework of the Horizontal Merger Guidelines (HMGs) reflects the text and purpose of Section 7 of the Clayton Act. "Merger enforcement, like other areas of antitrust, is directed at market power." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (quoting LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST 511 (2000)). And the HMGs' analytical framework is constructed around the "unifying theme" (§ 1, ¶ 5) "that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise." The Vertical Merger Guidelines (VMGs), unfortunately, do not share this theme.

The nearly identical opening paragraphs of the HMGs and VMGs state that Section 7 prohibits mergers that substantially lessen competition in any relevant market. Both the HMGs and VMGs indicate that the competition that is lessened can be among buyers or sellers. In addition, section 12 of the HMGs is devoted to mergers that harm competition on the buying-side of the market. That section states that likely downstream effects are not necessary for the agencies to challenge a merger that lessens competition on the buying side of a relevant market.

The phrase "tend to create a monopoly" in Section 7 was part of the original Clayton Act and also appeared in several of its other prohibitions. The best explanation of its import after the 1950 amendment is from the Senate Judiciary Committee's report (S. Rep. No. 81-1775, at 4–5): "The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."

The Supreme Court explained that "what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency'" is that a merger can be condemned on the basis of "a prediction of its impact upon competitive conditions in the future." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963). The existing guidelines reflect this interpretation of the incipiency concept. *See also* response to 1.d.

b. What effects should be covered by the term "lessen competition"?

"The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951). Antitrust "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

Section 7 protects the process of competition—not the products of competition. There is no reason to ponder which concrete effects from a merger should be counted against it, or in its favor, because Section 7 does not call for a "reckoning of social or economic debits and credits." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963). Section 7 "proscribed anticompetitive mergers, the benign and the malignant alike." *Id.*

The prediction of concrete effects from a merger can be evidence of a likely substantial lessening of competition. In this regard, price (or output) effects are by far the best evidence because economic theory directly and unambiguously relates only price (or output) to the intensity of competition. No concrete effects—not even price effects—can substitute for harm to competition. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

c. Do the guidelines sufficiently reflect the Act's concern with mergers that "may" substantially lessen competition?

"Congress used the words '*may be* substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962) (footnote omitted). The existing guidelines properly reflect the concern with probabilities.

Justice Thurgood Marshall further explained that

> Congress was concerned with the *potential* effects of mergers even though, at the time they occur, they may cause no present anticompetitive consequences. To be sure, remote possibilities are not sufficient to satisfy the test set forth in § 7. Despite substantial concern with halting a trend toward concentration in its incipiency. Congress did not intend to prohibit all expansion and growth through acquisition and merger. The predictive judgment often required under § 7 involves a decision based upon a careful scrutiny and a reasonable assessment of the future consequences of a merger without unjustifiable, speculative interference with traditional market freedoms.

United States v. Falstaff Brewing Corp., 410 U.S. 526, 555–56 (1973) (concurring opinion) (citation omitted).

d. Do the guidelines reflect any additional competitive concerns reflected in the statute's prohibition against mergers that "may . . . tend to create a monopoly"? Is this statutory language directed at preventing monopolies in their incipiency such as through serial acquisitions, including rollups? How should the guidelines address a merger that may tend to create a monopoly? How should the guidelines analyze whether there is a "trend toward concentration in the industry," and what impact should such a trend have on the analysis of an individual transaction?

In the original Section 7, "tend to create a monopoly" brought acquisitions within Section 7's prohibition when they harmed competition other than the head-to-head competition between the acquired and acquiring firms. *See Aluminum Co. of Am. v. FTC*, 284 F. 401, 407–08 (3d Cir. 1922). The "tend to create a monopoly" clause did not serve that purpose after the prohibition was reframed by the 1950 amendments, but Congress must have thought that it served some useful purpose.

"Monopoly" in antitrust law is a position of dominance. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945). A merger can "tend to create a monopoly," yet not substantially lessen competition, when a dominant, or near-dominant, firm acquires a tiny rival. The 1982/84 merger guidelines addressed such acquisitions with a leading-firm proviso. 1982 Guidelines § III.A.1.A.2; 1984 Guidelines § 3.12. The agencies should restore the proviso, as detailed in the response to 5.c.

A "trend toward concentration" can be a relevant fact in a merger assessment, but the agencies should not revert to the trend analysis of *United States v. Von's Grocery Co.*, 384 U.S. 270, 277–78 (1966). The market was far from concentrated, with a post-merger HHI of only about 250. *United States v. Von's Grocery Co.*, 233 F. Supp. 976, 980 (S.D. Cal. 1964). The district court observed that small stores were disappearing due to "the development of the supermarket, the shopping centers, and the decrease of the small neighborhood grocery store." *Id.* at 981. The trend was normal market evolution, which the Court could not halt.

Section 7 can be applied to a series of acquisitions when the cumulative effect is substantially to lessen competition. This scenario is somewhat comparable to the gradual accumulation of a company's stock leading to control, and the Supreme Court has treated that as a single acquisition for purposes of Section 7. *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974).

When the government's theory of harm to competition from a merger is "little more than speculation" about the future, the reasonable probability test of Section 7 is not met. *See United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 641 (1974). A theory of harm to competition is speculative if it posits a causal chain containing links that involve actions by third parties and those actions cannot be predicted on the basis of economic incentives and foreseeable circumstances. A proposed merger cannot be found in violation of Section 7 on the basis that it might become a link in a causal chain that leads to a lessening of competition.

e. Do the guidelines sufficiently reflect the observation that assessing the likely effects of a merger "is not the kind of question which is susceptible of a ready and precise answer in most cases"?

The existing guidelines do not suggest that the assessment of likely competitive effects is susceptible to "a ready and precise answer." But the guidelines are sensitive to the fact that the district courts refuse to condemn mergers without a sound basis in fact and in economics.

The observation is from *Philadelphia National Bank*'s justification for a structural presumption. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963). The 2010 HMGs acknowledge that legal presumption (§ 2.1.3) and assert a parallel presumption for agency decision making (§ 5.3, ¶ 6).

f. Are the guidelines sufficiently "alert to the danger of subverting congressional intent by permitting a too-broad economic investigation"?

What Justice William Brennan (and clerk Richard Posner) meant in *Philadelphia National Bank* by "a too-broad economic investigation" is indicated by the citation to a case rejecting a rule-of-reason-type assessment in the application of Section 3 of the Clayton Act. *Standard Oil of Cal. v. United States*, 337 U.S. 293, 312–14 (1949). Application of the rule of reason had been said to entail a "complicated and prolonged economic investigation." *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). But the Court later observed that mergers "are judged under a rule of reason." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

The reference to "a too-broad economic investigation" appears a few lines after the Court's observation that Section 7 demands "a firm understanding of the structure of the relevant market." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963). Gaining that understanding requires a broad and deep examination of the facts through the lens of economics, and courts demand no less. In the same paragraph, the Court observed that "the relevant economic data are both complex and elusive," *id.*, but current analytical tools can cope with complex data.

g. Should the guidelines' traditional distinctions between horizontal and vertical mergers be revisited in light of recent economic trends in the modern economy? What aspects of modern market realities may be lost by focusing on these relationships categorically? Should the guidelines address all mergers in a common framework that covers all market relationships relevant to competition? If so, how?

The existing guidelines distinguish between horizontal and vertical theories of harm to competition rather than between horizontal and vertical mergers. This is clear in the explicit allocation of potential competition theories to the HMGs even when they arise from vertical mergers. *See* VMGs § 1, ¶ 3. Separately analyzing horizontal and vertical theories was a standard practice when the Supreme Court did it in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and it should remain so.

If Section 7 theories were categorized by the nature of the harm, all would be horizontal, since Section 7 prohibits only mergers that harm competition in a relevant market. Section 7 theories, however, are categorized by the mechanism of harm, and the horizontal and vertical mechanisms differ.

Horizontal theories involve the interaction of substitutes: Usually, the merging firms are close rivals in the relevant market. Vertical theories involve the interaction of complements: Usually, one merging firm (actually or potentially, directly or indirectly) supplies the other (with goods, services, or technology), and either firm's market can be the relevant market. Conglomerate theories involve the interaction of independent goods or services connected only by conduct.

With complex firms, mergers can present long lists of competitive relationships to be investigated. As merger assessments progress, some items on the list crystalize into theories of harm to competition. A single case can have multiple theories, but every theory is premised on a well-defined competitive relationship. Recent economic trends might make the initial list longer and give rise to new variations on familiar themes, but all cognizable theories fit the old categories.

The frameworks for analyzing horizontal and vertical competitive effects theories have common elements, but combining substitutes and combining complements have fundamentally different direct effects. The direct effect of combining substitutes is to eliminate competition, while the direct effect of combining complements is to enhance coordination. The litigation of horizontal theories also differs materially from the litigation of non-horizontal theories because a structural presumption is applied only with horizontal theories.

All theories could be described in comprehensive merger guidelines, as was the case before 1992, but doing so offers no particular advantage for the agencies, the bar, or the business community. Indeed, there is little advantage in having guidelines for non-horizontal mergers.

For 99% of time that the FTC enforced Section 7 of the Clayton Act, it did so without guidelines on non-horizontal mergers. The Non-Horizontal Merger Guidelines were in force at the Antitrust Division from June 14, 1982 until January 10, 2020, and yet it is difficult to identify a single merger complaint advancing a theory sketched in the guidelines.

Having a separate policy statement on horizontal theories allows the agencies to update that statement while avoiding the difficult and unrewarding task of writing non-horizontal merger guidelines. This must have been what the agencies were thinking in 1992 when they issued the first HMGs. The Antitrust Division should follow the lead of the FTC by withdrawing the VMGs. The agencies have much to do just now and should assign a low priority to guidelines on non-horizontal mergers.

h. How should the guidelines assess whether a lessening of competition is "substantial"? What factors should be considered in assessing the likelihood and, separately, the magnitude of harms resulting from a merger?

The existing guidelines are entirely directed to identifying mergers with the requisite likelihood and magnitude of harm to competition. The existing guidelines, however, do not directly address the requisite likelihood or magnitude, and no merger guidelines should.

Seven decades of jurisprudence on Section 7 of the Clayton Act, as amended in 1950, produced remarkably little guidance on what constitutes a "substantial" lessening of competition. The Supreme Court indicated that substantiality is gauged relative to the relevant market. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 321–22, 324 (1962). "Market shares are the primary indicia" because the large "size" of a merger, relative to the market, makes the merger "suspect." *United States v. Cont'l Can Co.*, 378 U.S. 441, 458 (1964).

Citing legislative history, the Supreme Court held that the word "may" in Section 7's prohibition implies that the agencies must demonstrate a "reasonable probability" of harm to competition. *Brown Shoe*, 370 U.S. at 323 n.39. Courts only rarely have commented on what that means. *E.g. Mercantile Texas Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 638 F.2d 1255, 1268 (5th Cir. 1981) (wrongly asserting that a "reasonable probability" implies significantly more than a 50% probability). Since the agencies cannot usefully quantify the likelihood of harm to competition, the vagueness of the reasonably probability standard is a blessing.

The phrase "may be substantially to lessen competition" is best understood as a unitary substantiality test rather than as separate likelihood and magnitude tests. This permits the application of a sliding scale in which lower likelihoods of harm to competition suffice when associated with greater harms to competition. The Supreme Court hinted at this sliding scale when it observed: "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 365 n.42 (1963).

i. Does the guidelines' framework suggest limiting enforcement to a subset of the mergers that are illegal under controlling case law?

Two distinct issues are raised by this question: One is whether the case law supports theories of harm to competition that the guidelines do not support. The other is whether the case law relating to particular theories suggests a broader range of mergers are unlawful than the guidelines suggest will be challenged.

On vertical theories, neither the guidelines nor the case law provides much basis for comparison. The D.C. Circuit observed a "dearth of modern judicial precedent" and declined "to opine on the proper legal standards for evaluating vertical mergers." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1037 (D.C. Cir. 2019). The agencies then issued VMGs lacking either general or specific standards.

On horizontal theories, the courts of appeals cite the thresholds in the 2010 HMGs. *See Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 988 F.3d 690, 704 (4th Cir. 2021); *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 346–47 (3d Cir. 2016); *St. Alphonsus Med. Ctr.–Nampa v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 786 (9th Cir. 2015); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014).

1960s Supreme Court decisions are not controlling on which mergers are unlawful. The last four merger cases decided by the Supreme Court on direct appeal (in 1974–75) produced no judgments of illegality. The majority opinions were written by Justices Potter Stewart and Lewis Powell, and they signaled an inflection point in Section 7 law. The Supreme Court has not since addressed the merits of a merger case, but the Court has repeatedly reversed its antitrust precedents, "recognizing and adapting to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

The 1982 Merger Guidelines were in the mainstream of the case law on the thresholds at which horizontal mergers become unlawful. *See* Donald I. Baker & William Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CAL. L. REV. 311, 332 (1983). The 1992 HMGs went where no case had gone before in articulating unilateral effects theories of harm to competition from horizontal mergers. The 1992 HMGs also boldly articulated the timely, likely, and sufficient approach to entry even after it got a cool reception when it was previewed in *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

j. Should the guidelines include more discussion of applicable case law? What lessons from recent enforcement experience should the agencies consider incorporating in the guidelines?

The rule of law "excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government." A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 198 (8th ed., 1915). But mid-1960s Supreme Court merger decisions afforded boundless discretion. Attorney General Nicholas Katzenbach acknowledged a problem on May 8, 1965 and promised "guidelines." The first merger guidelines were released on May 30, 1968, and they remain a shining example of an agency promoting the rule of law by tying its own hands. *See* Gregory J. Werden, *The 1968 Merger Guidelines: In Praise of Committing to Restraint*, 53 REV. INDUS. ORG. 445 (2018).

Merger guidelines have always been, and should always be, a statement about how the executive exercises the discretion afforded by the legislature and the judiciary. Merger guidelines should articulate enforcement intentions with clarity and accuracy, and they should do nothing else. Merger guidelines would lose their gravitas if they justified enforcement policies as well as explained them. Merger guidelines would lose their influence with the courts if they became legal argument.

The agencies could issue a statement, not titled "guidelines," that parses the case law and stakes out litigation positions on important issues, particularly issues not addressed by case law. Such a statement would prevent divergence between the two agencies and prevent agency litigators from arguing whatever is convenient. Such a statement, however, would become a lightning rod if several courts rejected positions taken by the agencies. In that event, separation from merger guidelines would be of paramount important.

2. Types and Sources of Evidence

a. Has the guidelines' framework been interpreted unduly narrowly as focusing primarily on the predicted price outcome of a merger? Are there nonprice effects that are not adequately analyzed by analogy to price effects, and how should the guidelines address such effects? What evidence should the guidelines consider in evaluating these effects?

The predicted price effects of unconsummated mergers can be of great evidentiary significance: Section 7 prohibits mergers likely to lessen competition, and price generally is a powerful lens through which to view the merger's short-term effect on competition. Any way in which customers get less value for money is viewed as a price increase, so modeled price effects from horizontal mergers fully reflect the short-term exercise of market power attributable to the mergers.

The contention that antitrust should focus on choice has no basis in economics. Price competition yields a socially optimal allocation of resources. *See* Kenneth J. Arrow & Gérard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265 (1954). Choice competition does not. *See* Avinash K. Dixit & Joseph E. Stiglitz, *Monopolistic Competition and Optimum Product Diversity*, 67 AM. ECON. REV. 297 (1977); N. Gregory Mankiw & Michael D. Whinston, *Free Entry and Social Inefficiency*, 17 RAND J. ECON. 48 (1986); Michael Spence, *Product Selection, Fixed Costs, and Monopolistic Competition*, 43 REV. ECON. STUD. 217 (1976).

The contention that antitrust should focus on choice has no basis in law. The Supreme Court held that antitrust law protects price competition rather than choice. The Court found clear Section 1 and Section 7 violations from a joint operating agreement between two newspapers that preserved their separate editorial voices but eliminated all other competition. *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969).

Psychology and behavioral economics teach that too much choice is a bad thing. *See* BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS (2004); Alexander Chernev, Ulf Böckenholt & Joseph Goodman, *Choice Overload: A Conceptual Review and Meta-Analysis*, 25 J. CONSUMER PSYCHOL. 333 (2015); Sheena S. Iyengar & Mark R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCHOL. 995 (2000).

If merger enforcement goes wrong, it is by unduly focusing on the short term. More than a century ago, an antitrust policy book by leading economists explained that:

> *It is not a large present social income that is the chief desideratum but a constantly enlarging income*. Progress is in itself the *summum bonum* in economics, and that society is essentially the best which improves the fastest. No state can be good if it is stationary, or fundamentally bad if it is now advancing at a satisfactory rate. It is the direction and the rate of social progress which afford the supreme test of the quality of an economic system.

JOHN BATES CLARK & JOHN MAURICE CLARK, THE CONTROL OF TRUSTS 134–35 (1912).

Robert Solow found that technical change accounted for seven-eighths of U.S. economic growth from 1909 to 1949. Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957). During the post–World War II period, it was about half. *E.g.* Charles I. Jones, *Sources of U.S. Economic Growth in a World of Ideas*, 92 AM. ECON. REV. 220 (2002).

Solow's Nobel lecture observed: "Adding a couple of tenths of a percentage point to the growth rate is an achievement that eventually dwarfs in welfare significance any of the standard goals of economic policy." Robert M. Solow, Growth Theory and After, Lecture for the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1987 (Aug. 2001 addendum), https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1987/solow-lecture.html.

The relationship between competition and innovation, however, is complicated. If merger enforcement focused on long-term innovation effects, the agencies typically would be able to offer the courts "little more than speculation," *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 641 (1974). Moreover, the agencies would have to confront the Supreme Court's sensible observation that Section 7 focuses on competition that is "probable and imminent." *United States v. Cont'l Can Co.*, 378 U.S. 441, 458 (1964).

b. Has the guidelines' framework made it difficult to identify some mergers that are illegal by focusing on certain types of evidence? For example, should the guidelines make it clearer that the tests for an antitrust market can often be satisfied using direct evidence of likely effects (such as evidence of head-to-head competition between the merging parties) or qualitative evidence about substitution?

The existing guidelines cast an appropriately wide net and, thus, do not focus on "certain types of evidence." Moreover, no single piece of evidence is ever sufficient to answer the question posed by Section 7, and a great deal of evidence typically must be assessed to determine which evidence is most telling.

The HMGs mention evidence of head-to-head competition (§ 2.1.4), and both the HMGs and VMGs indicate that the agencies rely on quantitative indications of diversion. In assessing a horizontal merger involving differentiated consumer products, multiplying diversion ratios by the corresponding margins yields a good predictor of likely harm to competition. *See* response to 5.d. The 2010 revision of

the HMGs downplayed market delineation and market shares, but the agencies did not go as far as some would have preferred. One reason is that market shares sometimes are the best available basis for approximating diversion ratios.

Diversion ratios and similar indicators do not provide a basis for defining the relevant market. And every so-called "test" for an antitrust market that can be satisfied with simple evidence is both faulty and inconsistent with the hypothetical monopolist test (HMT). *See also* responses to 6.c & 6.d.

The RFI references the "practical indicia" for market definition listed in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). These "practical indicia" still are cited by courts, but they did more harm than good back when they were applied without analytic principles. *See* Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 173–79 (1992). When the HMT supplied needed analytic principles, the courts embraced them. *See* Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253, 263–66 (2003).

> *c. Does the guidelines' framework make it difficult to identify some anticompetitive mergers by overemphasizing predictive quantification techniques? What does contemporary economic learning suggest the role of predictive quantification should be in predicting a transaction's competitive effects?*

The existing guidelines do not overemphasize predictive quantification techniques. Such techniques are widely used to assess unilateral effects, and the guidelines refer to them in that context. Predictive quantification techniques have not made "it difficult to identify some anticompetitive mergers" by crowding out all other methods.

Merger simulation "can usefully complement a fact-intensive analysis of consumers, competitors, and the institutional setting of an industry, but it cannot substitute for such an analysis." Gregory J. Werden, Luke M. Froeb & David T. Scheffman, *A* Daubert *Discipline for Merger Simulation*, ANTITRUST, Summer 2004, at 89, 91. "Structural modeling can be particularly useful for identifying what really matters, why it matters, and how much it matters." *Id.*

Section 7 has a substantiality test and imposes a burden of proof. Predictive quantitative techniques were developed largely as means by which the agencies could carry their burden. Analyzing a formal economic model of imperfect competition calibrated to real-world data can provide persuasive evidence of substantial harm to competition. *See* Gregory J. Werden & Luke M. Froeb, *Calibrated Economic Models Add Focus, Accuracy, and Persuasiveness to Merger Analysis*, *in* THE PROS AND CONS OF MERGER CONTROL 63 (Swedish Competition Authority 2002). Before this practice came into use, defense experts could blithely opine that the quantitative evidence pointed to insubstantial competitive effects. *E.g. New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 356 (S.D.N.Y. 1995).

d. Does the guidelines' framework sufficiently capture the range of circumstances in which a merger will likely enhance the ability and/or incentive of the merging parties or other market participants to reduce competition, and the range of evidence that may be relevant to that consideration?

In asking about circumstances in which "the merging parties or other market participants [act] to reduce competition," rather than circumstance in which mergers reduce competition, the agencies evidently are asking about merger-induced exclusionary conduct. That is the main subject of the VMGs, and they capture the range of circumstances in which combining complements predictably enhances the ability or incentive to harm competition by harming rivals.

The HMGs should not address the remote possibility that combining substitutes would induce exclusionary conduct. It is difficult to conceive of circumstances in which exclusionary conduct would be a predictable result of combining substitutes, and ephemeral possibilities will not do. The Supreme Court specifically held that a merger does not violate Section 7 when it predictably leads to aggressively procompetitive conduct that harms rivals. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 114–17 (1986).

e. How frequently have unchallenged mergers or mergers that were subject to remedies resulted in a lessening of competition, and how does that lessening of competition typically manifest? Please identify examples of such mergers. What are the characteristics of those transactions that, if recognized before the merger, would have helped anticipate the adverse outcomes?

Merger retrospectives have identified some mergers that appear to have had anticompetitive effects. But it is impossible to estimate reliably the frequency with which mergers subject to remedies (or unchallenged mergers) actually lessened competition because merger retrospectives do not present a random sample of the mergers subject to remedies (or unchallenged mergers).

Because agency decision-making is never transparent, merger retrospectives conducted by outsiders cannot distinguish among possible sources of error or identify systematic errors of assessment. Mistakes of judgment are unavoidable in any human endeavor, and infallible judgment would not eliminate anticompetitive mergers: The agencies cannot foresee what is unforeseeable in merger assessment, and they cannot prove what is unprovable in Section 7 litigation.

It also should be appreciated that merger retrospectives do not reveal truth; rather, they only provide estimates, subject to errors and biases, of merger effects. Economists at the FTC have disputed studies finding anticompetitive effects from petroleum mergers, and other retrospectives present inconsistent findings that defy explanation. *See* Gregory J. Werden, *Inconvenient Truths on Merger Retrospective Studies*, 3 J. ANTITRUST ENFORCEMENT 287 (2015).

3. Coordinated Effects

a. What developments have there been in research or practice with respect to identifying possible coordinated effects from a merger? What revisions, if any, to the guidelines should the agencies consider in light of those developments?

The assessment of coordinated effects has not made notable progress since 2010. Attempts to develop something like merger simulation for coordinated effects met will little success. No new analytical tools have come into use, and no developments in economic theory or empirical research suggest particular revisions in the HMGs.

b. Does the guidelines' approach adequately account for the likelihood of coordinated effects in oligopolistic and oligopsonistic market structures?

The likelihood of coordinated effects is unknown and could be insignificant. Most economists once thought that coordination was demonstrated by the correlation between concentration and profits or price, but that interpretation is no longer credited. Nearly all supracompetitive pricing in the U.S. economy plausibly is the product of single-firm dominance and non-cooperative oligopoly. Secret cartels exist, but criminal antitrust enforcement limits their significance. Only a few modern academic studies claim to document pricing coordination in specific markets, so there is no indication that the phenomenon is widespread.

c. How have changes in the modern economy affected the incentive and ability of firms to engage in harmful tacit coordination, particularly in oligopolistic and oligopsonistic markets? How should these changes affect enforcement?

The term "tacit coordination" does not have a consistent meaning. Antitrust law uses "tacit" to denote a type of agreement and to connote the absence of an agreement. Repeated-game models of "tacit coordination" in economics can be interpreted as models of coordination without agreement or as models of explicit cartels. *See* Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L.J. 719, 725–36 & nn.69–70, 729–33, 739 n.84 (2004).

The question calls for speculation about whether coordination of some kind has become more prevalent due to changes in the economy. There is no evident basis for speculating that any major economic shift—as from goods to services—made anticompetitive coordination more likely. Service industries are less apt than goods industries to exhibit characteristics thought to facilitate coordination. One might speculate that new communications technologies have facilitated secret cartels, and a few criminal trials have featured electronic communications.

Recent research pointing to increasing margins does not suggest increased coordination because all of the margin increase came from largest, highest-margin firms. *See* Gregory J. Werden, *Concentration and Rising Market Power: Fears and Facts*, *in* RESEARCH HANDBOOK ON ABUSE OF DOMINANCE AND MONOPOLIZATION (Pinar Akman, Konstantinos Stylianou & Or Brook eds., forthcoming 2022).

Algorithms and artificial intelligence have not yet had much impact because machines run little of the economy. Moreover, machines can exploit their spectacular speed only in markets with perfect pricing transparency and no human intervention.

d. How should the guidelines address the incentive and ability of firms to develop moats around oligopolistic and oligopsonistic market structures by explicit or parallel exclusionary conduct?

The term "moat" was popularized by Warren Buffet, who uses it on occasion to describe what makes a firm a good investment. Per financier Charles T. Akre: "Moats are fairly rare but come from a variety of things, such as intellectual property, scale economies, a regulatory advantage, high customer switching costs, or some sort of network effect." Quoted in JOHN HEINS & WHITNEY TILSON, THE ART OF INVESTING: HOW THE WORLD'S BEST INVESTORS BEAT THE MARKET (2013).

Section 7 opens the door to any cogent theory that a merger substantially lessens competition, possibly including a theory involving a moat. *Cf. Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121–22 (1986) (declining to deny competitor standing under Section 7). And the agencies are free to advance a theory never endorsed by case law, merger guidelines, or economic literature. But the agencies should not include a theory in merger guidelines unless they genuinely expect to deploy it at least every few years. Attempting to catalogue all possible theories undermines the rule-of-law purpose of guidelines. *See* response to 1.j.

Section 7 does not condemn companies for making themselves stronger in ways that do not directly make any rival weaker. Thus, the unilateral foreclosure and raising rivals' cost scenarios dealt with in the VMGs appear to comprise all of the means through which a merger might violate Section 7 by creating or maintaining a durable source of competitive advantage.

It is difficult to imagine circumstances in which an entire market would be protected by a durable source of comparative advantage arising in any significant part from a merger. An entire industry might be surrounded by a moat created by legislation or by something like a patent pool, but not by a merger.

e. Should evidence of conscious parallelism in the relevant market be sufficient to establish that a merger will likely further diminish competition by facilitating oligopolistic post-merger coordination?

The consciously parallel conduct in the leading case was exhibiting films in neighborhood theaters only after doing so in downtown theaters. *See Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954). There was no suggestion of interdependence, and parallelism without interdependence generally is a sign of strong competition and market efficiency.

In a later case, the Supreme Court equated conscious parallelism with "[t]acit collusion" and defined it as supracompetitive pricing achieved by recognition of "interdependence with respect to price and output decisions." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). Assuming the question uses "conscious parallelism" in this latter sense, the answer is "no."

The agencies are unlikely to possess convincing evidence of *Brooke Group*–type conscious parallelism, even if a few econometric studies claimed to provide it. But if convincing evidence of *Brooke Group*–type conscious parallelism did exist, it could suggest that further diminishing competition is impossible. On the other hand, a merger could undermine coordination by creating asymmetry among the firms that must coordinate. Unconvincing evidence of *Brooke Group*–type conscious parallelism often is part of a coordinated effects case. But unconvincing evidence of coordination cannot be sufficient to establish a Section 7 violation.

4. Unilateral Effects

a. What developments have there been in research or practice with respect to unilateral effects from a merger? What revisions, if any, to the guidelines' approach to unilateral effects should the agencies consider?

Incremental improvements are constantly being made in the analytic tools for assessing unilateral effects, as well as in understanding the pitfalls and limitations. Revisions should be made in the merger guidelines' treatment of auctions and bargaining, as discussed in the response to 12.a–b.

b. Should evidence of substantial competition between the merging parties be sufficient to establish the loss of competition due to merger?

If the question is whether the loss of competition between the merging parties equates to the lessening of competition that violates Section 7, the answer is "no." To answer "yes" ignores the text of Section 7 and its legislative history. Whether a merger violates Section 7 "can be determined only in terms of the market affected." *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

The original Section 7 "prohibited the acquisition by one corporation of the stock of another corporation when such acquisition would result in a substantial lessening of competition *between the acquiring and the acquired* companies." *Brown Shoe Co. v. United States*, 370 U.S. 294, 312 (1962). This prohibition was "directed primarily at the development of holding companies." *Id.* at 314.

At the FTC's repeated urging, the Celler-Kefauver Act made Section 7 into a true anti-merger statute. In doing so, Congress redirected Section 7's focus from 'competition between the parties' to 'competition in the relevant market.' With this refocusing, Senator Estes Kefauver reassured his fellow Senators in floor debate that a merger "would not be illegal merely because of the elimination of the competition which had previously existed between the acquiring and acquired firms." 96 CONG. REC. 16,456.

5. Presumptions

a. Do the guidelines adequately identify mergers that are presumptively unlawful under controlling case law? Do they accurately identify those circumstances where the agencies will conclude a merger would substantially lessen competition absent rebuttal evidence?

In Section 7 litigation predicated on non-horizontal theories, controlling case law holds that "the government cannot use a short cut to establish a presumption of anticompetitive effect . . . . Instead, the government must make a fact-specific showing that the proposed merger is likely to be anticompetitive." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (internal quotation marks and citation to Non-Horizontal Merger Guidelines omitted)).

In Section 7 litigation predicated on horizontal theories, controlling case law holds that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963).

As to what constitutes "an undue percentage share of the market" and a "significant increase in concentration," courts look to the 2010 HMGs. *See Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 988 F.3d 690, 704 (4th Cir. 2021); *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 346–47 (3d Cir. 2016); *St. Alphonsus Med. Ctr.–Nampa v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 786 (9th Cir. 2015); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014).

Under the HMGs, a merger is presumed "likely to enhance market power" absent "persuasive" contrary evidence if the post-merger HHI exceeds 2500 and the increase in the HHI exceeds 200 (§ 5.3, ¶ 6). The thresholds were set in the expectation that many mergers presumed "likely to enhance market power" would not be challenged, and that expectation has been fulfilled. In preparing the 2010 HMGs, the Antitrust Division initially contemplated thresholds that would be brighter lines and complied the HHI data for merger challenges during FY 2004–09 to determine what actual practice had been.

During the first Reagan Administration, but not before or since, merger guidelines accurately indicated which mergers were challenged. The 1982 Merger Guidelines (§ III.A.1.c) declared that a challenge was "likely" when the post-merger HHI exceeded 1800 and the increase in the HHI exceeded 100. Such mergers were challenged. The 1984 Merger Guidelines (§ 3.11.c) indicated such mergers would be challenged except in "extraordinary cases." And they were in 1984. The 1992/97 HMGs (§ 1.51.c) stated that such mergers were presumed "likely to create or enhance market power," but the presumption could be overcome, and it often was.

b. Does the structural presumption in the guidelines accurately reflect current understanding of the characteristics of mergers that prove to be anticompetitive? Should the guidelines be revised to adjust the stated thresholds, emphasize certain criteria, or include other metrics such as the number of significant competitors as a supplement or alternative to, or even as a replacement for, HHI-based metrics?

The HMGs reflect mainstream views in economics on unilateral and coordinated effects, but there is no consensus among economist on the characteristics of mergers that prove anticompetitive. Economists' understandings are based more on theory than on experience because the data are statistically "censored." Section 7 enforcement prevents the consummation of many proposed mergers that would prove anticompetitive, and obviously anticompetitive mergers are rarely proposed.

Philadelphia National Bank's presumption is triggered by a significant increase in concentration, regardless of the level of concentration, so the case law allows the agencies to simplify the HMGs' thresholds by relying on just the increase in the HHI. With unilateral effects, the change in the HHI is a far better predictor than the HHI. *See* Volker Nocke & Michael D. Whinston, Concentration Screens for Horizontal Mergers (Apr. 29, 2020), http://economics.mit.edu/files/19692.

The number of significant competitors (NSC) is inferior to HHI-based metrics. NSC is employed when incumbent competitors are viewed as roughly equal and competition is modeled as an auction with symmetric bidders. The HHI is then the reciprocal of NSC times 10,000. In all other circumstances, the competitive significance of individual competitors is non-binary.

NSC approximates the "numbers equivalent" of the HHI, which is its reciprocal times 10,000. Nothing is gained by using an approximation, and NSC can be a very bad approximation. Posit a relevant market with shares of 35, 35, 10, 10, and 10. The HHI is 2750, yielding a numbers equivalent of 3.6 firms. Depending on whether the three smallest firms are deemed significant, NSC is either 2 or 5, and neither is a good approximation to 3.6. Furthermore, the market is likely to perform much better than a two-firm market but not as well as a five-firm market.

Using NSC to approximate the increase in the HHI is an extraordinarily bad idea. Suppose the shares in a relevant market are just as before. If all five firms were deemed significant, all possible mergers would reduce MSC from 5 to 4, but the increase in the HHI could be 200, 700, or 2450, depending on which two firms merged. The different possible mergers should be viewed differently.

Reliance on NSC also would spawn wasteful disputes over whether particular firms are significant, and such disputes could become major issues in litigation because they would determine whether mergers are presumed unlawful. Suppose the shares were as before and the two largest firms proposed to merge. The agencies might argue that the merger was 2-to-1, while the merging parties would argue that it was 5-to-4. Both would be wrong.

c. What specific metrics or observable features of a transaction, firm, or market should, alone or in combination, trigger a presumption that a horizontal transaction is anticompetitive? Are there factors that could be applied in such screens, such as whether the transaction involves a leading firm, a maverick firm, the closest competitor, or a nascent competitor? What would be their accuracy and predictive power relative to the quantitative factors in the guidelines?

The agencies can adopt and publicize rules under which they challenge a merger that satisfies certain criteria absent persuasive evidence that the merger would not substantially lessen competition. Such rules are best termed "presumptions of challenge" because they refer to agency actions rather than matters of fact or law. The HMGs have a presumption of challenge which attaches if the post-merger HHI exceeds 2500 and the increase in the HHI exceeds 200 (§ 5.3, ¶ 6). This presumption was designed for coordinated effects cases, and the HMGs suggest that is not used with differentiated consumer products (§ 6.1, ¶ 6). An alternative for such cases is presented in the response to 5.d.

Acquisitions of tiny competitors are likely to pass through the 2500/200 screen. For example, if the acquiring firm has a share of 50%, the increase in the HHI exceeds 200 only if the acquired firm's share exceeds 2%. The guidelines should assert an additional presumption of challenge similar to the old leading-firm proviso. 1982 Merger Guidelines § III.A.1.A.2; 1984 Merger Guidelines § 3.12. When a firm controlling more than 50% of the relevant market proposes to inquire an incumbent, a presumption of challenge should attach no matter how small the acquired firm. The 50% threshold assures that the presumption cannot attach when the acquiring firm competes with an incumbent of equal or greater size.

Many firm and market characteristics are relevant in merger assessment, but few are useful as screens. For example, the agencies have long focused on maverick status. *See* 1968 Merger Guidelines § I.8(a); 1982 Merger Guidelines § III.C.3.c.; 1984 Merger Guidelines § 3.44(c).; 1992/97 HMGs § 2.12; 2010 HMGs §§ 2.1.5, 5.3, 7.1, 10. But neither economics nor law provides a method to identify a maverick without a thorough investigation of market conduct and sources of divergent incentives. Maverick status can be a central issue, but it cannot be a screen.

Whether either merging firm is the other's closest competitor is a problematic screen. The issue was badly handled in the only litigated case in which it was a central issue. *United States v. Oracle Corp.*, 331 F. Supp. 1098 (N.D. Cal. 2004). Six distinct closeness metrics could be used. *See* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 405 (1998). The relative diversion ratio is the wise choice. It is the diversion ratio divided by what the diversion ratio would be if diversion were proportionate to market share. The agencies, however, twice chose unwisely. *See* 1992/97 HMGs § 1.11 n.9; 2010 HMGs § 4.1.1, ¶ 4.

The recurring problem relates to markets with a clear leader that is not one of the merging firms. By some metrics, the leading firm usually is the closest competitor of all of its relevant market rivals, and the merging firms then argue that the merger does not significantly lessen competition because they are not each other's closest competitors. Relative to market share, however, diversion between the merging firms often has been greater than that to any other firm. Suppose that the shares are 50, 25, and 25, and that there is no outside diversion. If the diversion ratios between the smaller firms are between a third and a half, they are each other's closest competitors per the relative diversion ratio, but not per the other metrics.

d. Should the guidelines identify thresholds for customer diversion and margins that, solely or together, create a presumption of competitive harm from certain mergers?

The HMGs (§ 6.1, ¶ 6) say the agencies "rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products." The agencies should clearly state whether they rely on the increase in the HHI and whether they employ the 200-point threshold. The agencies also could be more precise about computing the "value of diverted sales."

With differentiated consumer products, a good screen is either diversion ratio between the merging firms multiplied by its corresponding margin. *See* Gregory J. Werden & Luke M. Froeb, *Choosing among Tools for Assessing Unilateral Merger Effects*, 7 EUR. COMPETITION J. 155, 159–60, 168–69 (2011). If the merging products are labeled 1 and 2, the diversion ratio from 1 to 2 is multiplied by 2's margin, and the diversion ratio from 2 to 1 is multiplied by 1's margin.

The agencies should adopt a presumption of challenge that attaches when the merging firms sell competing differentiated consumer products and either "diversion product" exceeds 10%. For example, if both merging firms had margins of 50%, their merger presumptively would be challenged if either of the diversion ratios between them exceeded 20%. The "value of diverted sales" might be the same or quite similar to the diversion product. If so, that misleading term should be changed.

e. What specific metrics or observable features of a transaction, firm, or market should, alone or in combination, trigger a presumption that a non-horizontal transaction is anticompetitive?

The economic literature finds that, "under most circumstances, profit-maximizing vertical-integration decisions are efficient, not just from the firms' but also from the consumers' points of view." Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007). Experience does not justify a presumption of challenge under any non-horizontal theory under any particular circumstances. *See* Francine Lafontaine & Margaret E. Slade, *Presumptions in Vertical Mergers: The Role of Evidence*, 59 REV. INDUS. ORG. 255 (2021).

Some non-horizontal mergers do harm competition, and idiosyncratic facts can make harm to competition reasonably probable. But such cases do not lend themselves to generalization based on readily observable features of the merging firms, their competitive relationship, or the markets involved. Professor Salop advocates merger challenges based on foreclosure and raising rivals' costs theories, but he does propose a presumption under any particular circumstances. Steven C. Salop, A Suggested Revision of the 2020 Vertical Merger Guidelines (Dec. 31, 2021), https://ssrn.com/abstract=3839768. Identifying the right mergers to challenge is not simple.

The presumptions for non-horizontal mergers suggested by Professor Salop are unhelpful. He suggests a presumption of challenge "if a platform that is dominant in its market acquires an actual or potential competitor into this market, or into a vertically related or complementary product market." As a practical matter, Professor Salop would presumptively challenge all acquisitions by dominant platforms. Congress might adopt such a policy, but it has not done so yet, nor does the Celler-Kefauver Act empower the agencies to do so.

Professor Salop's other suggested presumptions are not based on readily "observable features" of firms or markets and would not accomplish the goal of shortcutting merger assessment. One presumption attaches when "either or both merging firms have a substantial probability of entering the other firm's concentrated market absent the merger." Two of the presumptions attach when either merging firm acts as a maverick to prevent or substantially constrain coordination. The final presumption involves the regulatory evasion scenario discussed in the response to 12.f.

It is possible to develop a foreclosure metric, but foreclosure does not equate with a lessening of competition in antitrust law. *See, e.g.*, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270–72 (3d Cir. 2012); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162–63 (9th Cir. 1997); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236–37 (1st Cir. 1983) (Breyer, J.).

It might be is possible to develop a competitor-harm metric, but the Supreme Court has repeatedly observed that antitrust is for "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *see Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990).

Specific metrics for non-horizontal mergers make sense as quasi–safe harbors. All seem to agree that the merger of two small firms cannot produce a substantial lessening of competition, whatever the competitive relationship between the firms. The difficult question for the agencies is whether they should commit to delineating not only relevant markets, but also all of the markets in which merging firm are small. The VMGs took pains to avoid the much simpler task of delineating both the relevant market and the related market.

f. Would the inclusion of multiple alternative presumptions better reflect the diversity of transactions and evidence presented by the modern economy?

Yes. It also would better reflect the diversity presented by the old economy.

g. Should separate metrics be considered or specified for markets involving labor, based on the unique characteristics of such markets (e.g., search frictions typically greater than those present in product/service markets)?

Differences between labor markets and goods markets could influence the competitive effects of particular mergers. At present, however, there is no basis in theory or experience for different metrics. A recent working paper suggests that wage effects relate to changes in concentration much like price effects relate to changes in concentration. David Arnold, Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes (Oct. 29, 2021), https://darnold199.github.io/madraft.pdf. More evidence is needed.

h. How does the administrative cost and accuracy of the guidelines' structural presumption or any proposed alternative presumption(s), standing alone, compare to the administrative cost and accuracy of individually analyzing each transaction in depth?

The HMGs apply a presumption of challenge when the post-merger HHI exceeds 2500 and the increase in the HHI exceeds 200, which "may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power" (§ 5.3, ¶ 6). A transaction is analyzed in some depth before the presumption attaches, and rebuttal evidence is then considered. Many transactions subject to the presumption are not challenged. If the agencies are asking about ceasing to consider rebuttal evidence, the result would be false positives and substantially increased litigation costs. Raising the thresholds would mitigate both problems.

6. Market Definition

a. Is it necessary to precisely define the market in every case? In what cases is it more or less important? Does the importance of market definition vary between horizontal and non-horizontal mergers? What conclusions about the existence of a relevant market can be drawn from the identification of probable harm?

Merger assessment needs the relevant market and needs more than any other area of antitrust. The first antitrust decision to use "the relevant market" terminology was not in one of the classic monopoly cases, but in a post–World War II merger decision—*United States v. Columbia Steel Co.*, 334 U.S. 495, 508, 519, 520, 527 (1948). *See* Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 125–30 (1992). That decision was rendered under Section 1 of the Sherman Act, and the Supreme Court's ruling against the government spurred passage of the Celler-Kefauver Act.

Before the Supreme Court ever interpreted Section 7 as amended in 1950, a panel of leading antitrust experts parsed the text and declared that it requires "some judgment that the challenged acquisition may adversely affect the competitive character of some *relevant market*." THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 118 (Stanley N. Barnes & S. Chesterfield Oppenheim co-chairs, 1955).

In the last case applying the original Section 7, the Supreme Court declared that: "Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act . . . ." *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957).

In one of the first cases interpreting Section 7 as amended, the district court explained that its task was to determine "whether there is a reasonable probability that the merger may substantially lessen competition or tend to create a monopoly within the relevant market." *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 583 (S.D.N.Y. 1958).

Fast-forward a half-century. When the FTC contended that "market definition is not necessary in a § 7 case," the D.C. Circuit held that the contention was "in contravention of the statute itself." *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008).

Precisely defining the market is necessary if that means clearly identifying the locus of competition alleged to be harmed. "The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')." *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). But merger assessment tends to be insensitive to whether certain existing products or areas are in or out of the market, and there is rarely a need to state whether any future products would be in or out of the market.

The RFI references the Supreme Court's willingness to dispense with "elaborate proof of market structure" in *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963). But the Court did not focus on anything other than market structure in subsequent bank merger cases. *See United States v. Conn. Nat'l Bank*, 418 U.S. 656 (1974); *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970). Focus on market structure made the relevant market the central issue.

A year after *Philadelphia National Bank*, the Court observed: "Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of § 7's design to prevent undue concentration." *United States v. Cont'l Can Co.*, 378 U.S. 441, 458 (1964). This observation could not have been an invitation to dispense with the relevant market because it came just after the Court's assertion that: "Market shares are the primary indicia of market power . . . ." *Id.* The "size" of a merger referred to the market shares of the merging firms, which presupposes the relevant market.

Reliance on economic models to predict merger effects does not dispense with market definition. The relevant market concept in antitrust is analogous to the partial-equilibrium construct in economics. To model competition, an economist specifies its nature and scope. Inside the model, competitors interact strategically. Prices of outside goods are held constant and their suppliers cannot respond to what goes on inside the model. *See* Gregory J. Werden, *The Relevant Market Concept in Antitrust Law*, *in* GLOBAL ANTITRUST ECONOMICS: CURRENT ISSUES IN ANTITRUST LAW & ECONOMICS 117, 118–20 (Douglas H. Ginsburg & Joshua D. Wright eds., 2016).

A well-constructed model of real-world competition specifies what is inside much as a properly defined relevant market: The relevant market is the "area of effective competition." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962); *Tampa Elect. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327–29 (1961). "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn . . . ." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n.31 (1953).

In some senses, the relevant market is less important for non-horizontal mergers than for horizontal mergers. Although it is always important to clearly identify the locus of competition alleged to be lessened, disputes over market boundaries are less likely to matter when a structural presumption is not possible. Formal modeling also is apt to be less important with non-horizontal mergers than with horizontal mergers.

If "identification of probable harm" refers to formulation of a concern to be investigated, it provides only the focal point around which a relevant market is delineated. If "identification of probable harm" refers to a conclusion on likely competitive effects at the end of an investigation, that conclusion should clearly state the scope of the competition lessened. The relevant market is a useful part of a standard statement of investigative conclusions.

b. Are there tools used to define markets that are or should be unique to merger analysis? If so, which ones and why?

No. The HMT is ideally suited to the analysis of unconsummated mergers leading to an incremental exercise of market power, and it is problematic in the analysis of already exercised market power. Nevertheless, the HMT is used in monopoly cases. *See* Gregory J. Werden, *Market Delineation under the Merger Guidelines: Monopoly Cases and Alternative Approaches*, 16 REV. IND. ORG. 211 (2000). The HMT was not, as often asserted, developed as part of the 1982 Merger Guidelines. It was developed four years earlier to explain why the Elzinga-Hogarty test (and other shipments tests) did not work in the coal industry. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, COMPETITION IN THE COAL INDUSTRY 26–27 (May 1978).

c. Where a market is defined, do the guidelines explain sufficiently clearly that markets can be defined using qualitative evidence, and that direct evidence of probable harm, such as evidence of substantial competition between the merging parties, is one way to define a market?

The HMGs (especially § 4.1.3, ¶ 5) are clear that the relevant market can be delineated without quantitative evidence. The HMGs are not as clear that the application of the HMT is a conclusion of an investigation, and that the agencies reach conclusions about relevant markets and competitive effects in tandem.

Direct evidence of actual harm from a merger might obviate market definition, but direct evidence of actual harm cannot define the relevant market. The FTC erred in *Evanston Northwestern Healthcare Corp.*, 144 F.T.C. 1, 465–76 (2007), by holding that actual harm proved that the relevant market consisted of just the merging hospitals.

If a merged firm raised price significantly after a merger, that does not mean that the merging firms were alone in the relevant market. Nor does it mean that the merging firms were each other's closest competitors in the sense relevant to market definition (e.g. relative diversion ratio, see response to 5.c). With typical margins, all that is required for a significant unilateral effect from a differentiated products merger is that the merging firms are the closest competitors from the point of view of a relatively small fraction of their customers (e.g. 20%).

Nothing that might be called "direct evidence" can shortcut the investigative process for an unconsummated merger. The fact of substantial competition between the merging parties can be easy to establish, but that has no immediate implication for the relevant market or for the likely effect of a merger on competition. The fact that each merging firm presents the only significant competition for the other can be established only through careful investigation, so the possibility of establishing that fact cannot provide much of a shortcut.

d. What conclusions about the existence of a relevant market can be drawn from direct evidence that one of the merging parties possesses market power? What factors constitute such direct evidence?

None. The proper definition of the relevant market always depends on many things. The fact that one merging firm possesses significant market power is never sufficient. Take the simplest possible case in which both merging firms produce the same homogeneous product in the same place, and in which the theory of the case is that the merger increases the market power of merging firm that already possesses market power. The merging firms must be at the core of the relevant market, but the dimensions of the relevant market in both product and geographic space are unknowable without more information.

Courts have not addressed direct proof of market power in merger cases, and what conduct cases say on the subject does not translate to merger cases. In cases involving ongoing (or past) conduct, courts hold that proof of detrimental effects

from the conduct suffices to prove the market power element of the offense. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986). The Supreme Court cited "reduction of output" as the quintessential detrimental effect. *Id.* at 460. And some courts have insisted on evidence of output restriction. *E.g. Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1275–76 (9th Cir. 1997). The Supreme Court came close in *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284, 2288 (2018). The Court also has held that restriction of anything but the output of the core good or service will not suffice. *Cal. Dental Assn. v. FTC*, 526 U.S. 756, 776 (1999).

As a matter of economics, a firm possesses market power if it faces a downward-sloping demand curve. The elasticity of demand faced by a firm, therefore, is direct evidence of its market power. But undisputed evidence of demand elasticity, implying significant market power, was deemed insufficient to prove market power in what appears to be the only appellate decision squarely addressing the question. *United States v. Eastman Kodak Co.*, 63 F.3d 95, 108–09 (2d Cir. 1995) (also not a merger case).

e. Are the guidelines sufficiently clear that the same product or service may be in multiple relevant antitrust markets depending on the competitive effects being evaluated?

The HMGs are reasonably clear that the delineation of relevant markets does not occur in a vacuum, but rather in the context of a specific competitive concern under investigation. Moreover, HMGs are reasonably clear that each product of either merging firm is a potential starting point in delineating a relevant market in which they compete. Prior guidelines were clearer, however. The 1992/97 HMGs stated that the agencies delineated a relevant market "for each product or service . . . of each merging firm" (§ 1.0) and that they "beg[a]n with each product (narrowly defined) produced or sold by each merging firm" (§ 1.11). Roughly the same language appeared in the 1984 Merger Guidelines (§§ 2.0, 2.11).

To the extent that the question is whether the HMGs make clear that the agencies have complete discretion over the size and shape of the relevant market, the answer is that they do not and should not. Guidelines since 1982 have explicitly constrained market delineation through the circle principle and the smallest market principle, both of which are stated in the 2010 HMGs (§ 4.1.1, ¶¶ 4–5). The agencies should not abandon either principle.

f. Do the guidelines imply that precision is necessary or possible in defining relevant markets? In the various inputs used to define relevant markets?

No.

g. Does the focus on the SSNIP test in implementing the Hypothetical Monopolist Test specifically, and in undertaking market definition more broadly, obscure the various types of harms in addition to price effects that may arise?

No. The HMT formally grounded market delineation in the underlying market power concern that animates Section 7 enforcement. *See* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 384–96 (1998). Harm to competition from a merger might manifest in many ways, but no harm is possible unless a hypothetical monopolist (not subject to regulatory or contractual constraints) would raise price significantly. (The application of the HMT with no-revenue products is discussed in the response to question 11.c.)

"Merger enforcement, like other areas of antitrust, is directed at market power." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (quoting LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST 511 (2000)). "Market power is the ability to raise prices above those that would be charged in a competitive market." *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984). A firm possessing significant market power maximizes short-run profits by raising price significantly above marginal cost. In this regard, price encompasses all aspects of the value for money. The focus must be on price in identifying potential for the exercise of market power by delineating a relevant market.

Recent appellate decisions under Section 7 notably endorse the HMT. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338–41 (3d Cir. 2016); *St. Alphonsus Med. Ctr.–Nampa v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784–85 (9th Cir. 2015); *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016).

h. How should markets be defined when the potential harm to competition stems not from the risk of an immediate price increase, but instead from other longer-term or non-price factors such as a loss of innovation, changes to product quality or variety, or creation of new entry barriers?

The differing manifestations of harm to competition rarely affect the delineation of the relevant market. When innovation is the driving force of competition, merger enforcement is directed to preventing the creation and exercise of market power associated with the goods and services that are the fruits of the innovation. The delineation of the relevant market focuses on the potential for exercising market power over present or future goods or services.

One recurring innovation scenario involves the merger of two firms with ongoing projects directed at developing much the same product. The proper analysis is a fact-based unilateral-effects assessment focused on the specific product to which the projects relate. Product innovation competition is incentivized by the prospect of developing a new product that confers significant market power, so the relevant market should be defined as if price effects for those products were of concern.

Another recurring scenario involves the merger of firms in a bidding competition to supply next-generation products. The proper analysis is a fact-based unilateral-effects assessment modeled as an auction with bids that have multiple dimensions. The definition of the relevant market, as usual, is driven by customer demand because the competition potentially lessened is that to supply whatever customers specify in procurement. An illustrative case is *PPG Industries, Inc. v. FTC*, 798 F.2d 1500 (D.C. Cir. 1986), where the relevant market was defined as high-technology aircraft transparencies.

Quality and variety often can be changed in the near term, although normally not as quickly as price. To the extent that changes to quality or variety are predictable exercises of market power, the standard analysis of market power and the standard approach to market definition should be applied in merger assessment. And if changes to quality or variety are not predictable exercises of market power, they should not be considered in merger assessment.

i. Does a formalistic market definition exercise mask the potential for dynamic competition to be lost as a result of a merger, such as through emergent and disruptive competition, competition for the market, and the development of component competition to decrease dependency on stacks of services?

Merger assessment can go badly wrong if market definition is divorced from the assessment of competitive effects. When the two are married together, however, neither the fact of market definition nor any particular method for delineating the relevant market can mask any aspect of competition, any impact of a merger on competition, or any concrete effect of harm to competition. The relevant market is simply the arena in which the competition at issue occurs.

The *Microsoft* case featured emergent and disruptive competition, competition for the market, and the development of component competition to decrease dependency on stacks of services. Delineation of the PC operating systems market was not complicated by fact that the case focused on disruptive competition from outside the market. *See United States v. Microsoft Corp.*, 253 F.3d 34, 51–54 (D.C. Cir. 2001) (en banc) (per curiam). Nor did the market definition exercise mask anything important to the competitive analysis.

The unpredictability of disruptive competition can present a major challenge to antitrust analysis, but the concern that a merger effectively eliminates a disrupter presents only a minor challenge for market delineation. Disruption could cause the relevant market to morph into something very different or even disappear, but Section 7 is concerned only with reasonable probabilities, and its enforcement is grounded in the reality of the present and foreseeable future.

j. To what extent does a focus on product market overlaps fail to identify broader concerns about other aspects of competition?

In the initial screening of Hart-Scott-Rodino filings, the agencies are bound to miss things, but focusing mainly on product market overlaps is the best policy. With

serious resource constraints, the agencies must focus merger investigations on competitive relationships between the merging firms. "The proper question to be asked" in most merger cases "is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 357 (1963). Other competitive relationships can be significant, and the agencies do not completely ignore them.

7. Potential and Nascent Competition

a. What changes in standards or approaches would appropriately strengthen enforcement against mergers that eliminate a potential competitor?

Merger guidelines should indicate that the agencies challenge incumbents' acquisitions of nascent and imminent rivals but not acquisitions of mere potential competitors. A merger eliminating a mere potential for competition does not violate Section 7. The perceived potential competition doctrine, discussed in the response to 7.b, was predicated on supposed actual, ongoing competition.

A merger violates Section 7 only if harm to competition is "reasonably probable." This standard can be met when an incumbent acquires a nascent or imminent competitor. A nascent competitor actively vies for sales but has not yet made any, while an imminent competitor is at the cusp of actively vying for sales. In the forward-looking analysis mandated by Section 7, incumbents' acquisitions of nascent and imminent rivals present conventional horizontal theories. *See* Gregory J. Werden & Kristen C. Limarzi, *Forward-Looking Merger Analysis and the Superfluous Potential Competition Doctrine*, 77 ANTITRUST L.J. 109 (2010).

When challenging acquisitions by incumbents of nascent and imminent rivals, the agencies have prevailed in court. *E.g. Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012); Y*amaha Motor Co., Ltd. v. FTC*, 657 F.2d 971 (8th Cir. 1981). The agencies were rebuffed when the evidence failed to establish nascent or imminent competition. *E.g. FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015); *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982); *United States v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980).

b. Should the guidelines focus on whether either merging firm is contemplating entry into, or is well situated to enter, a market where the other firm competes? Should it be sufficient to demonstrate either firm's capability of entering a concentrated market or that the acquiring firm has market power?

In characterizing a non-incumbent's status, what matters is whether it is reasonably probable that the firm will be an incumbent in relatively near future. That a firm is "well situated to enter" or "contemplating entry" is important only if that equates to being on the verge of incumbency. Firms that cannot begin vying for sales without incurring significant sunk costs can be on the verge of incumbency if they have committed to incur those sunk costs.

An acquiring firm's possession of market power is not a sufficient basis for challenging its acquisition of a nascent or imminent competitor. Such acquisitions should be assessed using the tools usually applied to horizontal mergers, and the possession of market power is too low a bar. An acquiring firm might be found to possess market power even though it is, for example, the fourth-largest firm in the relevant market. The acquiring firm's possession of a dominant market position, however, is a sufficient basis for a presumption of challenge for its acquisition of a nascent or imminent competitor. *See* response to 5.c.

The RFI references the Supreme Court's reliance in *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532–33 (1973), on the supposed salutary effect of a mere threat to enter. Although the Supreme Court endorsed the perceived potential competition theory, it never invoked the theory to declare a merger unlawful, nor did any appellate court. In contrast, the *Falstaff* decision was relied upon by appellate courts to reject merger challenges. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 987–89 (D.C. Cir. 1990); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 981–84 (2d Cir. 1984).

The idea underlying the perceived potential competition doctrine goes back to Franklin H. Giddings, *The Persistence of Competition*, 2 POL. SCI. Q. 62 (1887). For a time, the idea was championed by the leading U.S. economist—John Bates Clark. In 1890 he cited it in arguing against the adoption of the antitrust legislation. John Bates Clark, *The "Trust": A New Agent for Doing an Old Work: Or Freedom Doing the Work of Monopoly*, 52 NEW ENGLANDER & YALE REV. 223 (1890).

The idea was later formalized into the theory of contestable markets. *See* William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 AM. ECON. REV. (PAPERS & PROC.) 1 (1982). The theory breaks down if entry entails *any* unrecoverable sunk costs. *See* Marius Schwartz & Robert J. Reynolds, *Contestable Markets: An Uprising in the Theory of Industry Structure: Comment*, 73 AM. ECON. REV. 488 (1983). Nevertheless, for about a decade, the theory made it difficult for the government to win a Section 7 case.

If agencies managed to rouse *Falstaff* from its repose, judges now sitting on the federal bench could be expected to use it against the agencies. Ease of entry could become a magic bullet shooting down agency merger challenges.

> *c. How can the guidelines characterize, and perhaps quantify, the importance of a potential competitor to market competition? What sources of evidence are most probative?*

The case law has applied the misleading label "potential competitor" to firms that are actively vying to make sales. *E.g. United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 653, 659 (1964). Firms actively vying for sales are incumbents under the HMGs (§ 5.1, ¶ 2). *Cf. Polypore Int'l, Inc.*, 150 F.T.C. 586 (2010), *aff'd*, 686 F.3d 1208 (11th Cir. 2012). Such firms sometimes are assigned market shares on the basis of their capacity.

Firms at the cusp of incumbency should be treated essentially as incumbents in the forward-looking analysis called for by Section 7. Whether a merging firm is near the end of the entry path should be clear from the routine documentary evidence. Identifying non-merging firms in such a position can present a challenge, but they are likely to announce themselves at about the point that they become relevant.

A firm that would have to incur significant sunk costs before it could vie for sales is highly unlikely to be important to competition. The only such firms that could be useful to identify are those that have proceeded down well-mapped entry paths and incurred much of the sunk cost of entry. Documentary evidence should reveal how committed such firms are to entry and when they can begin vying for sales.

d. In the case of a nascent competitor—a firm that, while small now, might evolve into a competitive force—how should the guidelines assess its potential path of evolution into a plausible competitor? What degree of probability should serve as sufficient, especially in cases where technology and products evolve rapidly or unpredictably? Should the sufficient probability vary depending on the degree of market concentration?

In vying for sales, a nascent competitor typically must demonstrate product performance. Successful tests by potential customers are sufficient proof that the firm is relevant to competition in a forward-looking analysis. Nascent competitors also might prove themselves in other ways. The agencies have no special tools for projecting the arc of a nascent competitor's evolution once it has proved itself. Nor can the agencies assign probabilities to various alternative arcs.

An imminent competitor is on the cusp of actively vying for sales. Typically, it does not yet have a product, so it could not have begun demonstrating its performance. The agencies might be able to identify major development milestones that have been reached. Characteristics of acquiring firms, e.g. dominance, could make the acquisition of imminent competitors reasonably likely to harm to competition.

e. How should the guidelines account for the possibility that competition may develop from unexpected sources?

The agencies cannot account for the possibility that competition may develop from unexpected sources. And unforeseeable events can cause the best possible predictions of mergers effects to prove faulty. But it is unhelpful to acknowledge the possibility unforeseeable events in merger guidelines.

f. How should the guidelines assess an acquisition where the acquiring firm would likely develop its own product if acquisition was not possible?

An acquiring firm can be deemed likely develop a particular product, but for an acquisition, only when the firm has the product in development and the development has achieved significant milestones. The agencies appear to imagine a different scenario, however, in which the acquiring firm has only a strong interest in developing the product. Merger guidelines should not address that scenario.

It is not inherently anticompetitive for a start-up company with a potentially important product in development to be acquired by a large company that could have developed the product independently. The acquisition can be the best way to bring the product to market. Indeed, neither company might have what it takes to succeed on its own. The start-up might need cash, complementary technology, and marketing muscle. The large acquiring firm might need the core technology and scarce human capital. The merger, therefore, might be procompetitive.

8. Remedies

a. Parties often propose or alter divestitures or other partial remedies for an unlawful transaction after the agencies have expended significant resources investigating the competitive effects of the transaction as proposed. Should the guidelines adopt a formal process and deadlines for remedy proposals? How should any such approach be structured?

In scenarios termed "litigating the fix," the merging parties ask a court to assess the legality of a transaction different from that in the Hart-Scott-Rodino filing. Courts do as the parties ask when the fix is an accomplished fact. *E.g. FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 114, 132 (D.D.C. 2004); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 45–46 (D.D.C. 2002). A divestiture contingent on merger consummation is treated as a possible rebuttal to the government's prima facie case. *E.g. United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 59–75 (D.D.C. 2017).

In *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 857 (2005), the Sixth Circuit ruled that the Section 7 issue presented by the transaction originally challenged was not moot, even though the parties had significantly altered the terms of the transaction. Nevertheless, the government has no entitlement to relief if the parties have irrevocably implemented a sufficient remedy. The "court's power to grant injunctive relief survives discontinuance of the illegal conduct," but "the moving party must satisfy the court that relief is needed." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

It is altogether fitting and proper that the merging parties should propose remedies after the agencies have expended significant resources. The merging parties cannot be expected to address the agencies' concerns until the agencies reveal them, and the agencies cannot be expected to formulate their concerns without expending significant resources investigating the merger.

Procedural rules affecting the timing of remedy proposals could prove problematic because different merger reviews proceed at different paces. Furthermore, the Antitrust Division should not act like an administrative agency, and the FTC should not make consequential which agency reviews a particular transaction.

If the agencies were to adopt a policy on remedies that affects which mergers are challenged, merger guidelines should state the policy and its implications. Otherwise, remedy policies should be dealt with in a separate document. Procedural rules for remedy proposals are unlikely to impact merger litigation.

9. Monopsony Power and Labor Markets

a. How should the guidelines' analysis of monopsony power differ from its analysis of monopoly power? How, if at all, should the thresholds for applicable market-structure presumptions differ from those used in analysis of monopoly power?

As the HMGs (§ 12, ¶ 3) note, buying-side analysis focuses on alternative available to input supplier, just as selling-side analysis focuses on alternatives available to customers. For the present, the agencies should apply the same presumption(s) of challenge on the selling-side and buying-side of the relevant market.

The textbook exercise of monopsony power reduces an input's price by reducing the quantity purchased, which tends to inflict downstream harm. The exercise of bargaining power, in contrast, does not reduce the quantity purchased. In *Anthem* Judge Brett Kavanaugh took the view of some commentators that antitrust law cheers the exercise of bargaining power by buyers but decries the exercise of monopoly power. *United States v. Anthem, Inc.*, 855 F.3d 345, 377–78 (D.C. Cir. 2017).

The *Anthem* case concerned the merger two large health insurers. They defended the merger, in part, on the basis that it would enable them to save billions of dollars in payments to health care providers. The government countered that the reductions in provider payments would signify harm to competition and thus be an independent basis for condemning the merger. The trial court rejected the parties' defense on the facts and ruled for the government without considering harm to buying-side competition. *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 251–54 (D.D.C. 2017).

On appeal Judge Kavanaugh opined that the merger was lawful if the reduction in provider payments was the exercise of bargaining power, so the case should be remanded for the district court to resolve a factual dispute. The appeals court majority affirmed without addressing the issue raised by Judge Kavanaugh.

If the agencies update the HMGs' treatment of buying-side harm to competition, they should reject Judge Kavanaugh's view. It is wrong to think that antitrust law cares only about final consumers and therefore treats the buying side of the market different than the selling side. *See* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707 (2007). Those intent on distinguishing monopsony power from bargaining power also wrongly presume that Section 7 implicates a welfare standard.

Among the commentators who reject Judge Kavanaugh's view are C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2017), who argue that harm to sellers is a sufficient basis for condemning a merger under Section 7. But Section 7 protects the competitive process without regard to who is helped or hurt by competition.

b. How should the guidelines treat a merger that may generate monopsony power, but does not substantially lessen competition in an output market?

Merger guidelines should state that: "The agencies' evaluation of the impact of a merger on a relevant input market does not depend on whether or how harm to competition in the relevant market affects anyone downstream."

A likely substantial lessening of competition in any relevant market renders a proposed merger unlawful under Section 7. The agencies should challenge mergers even if the only harm to competition occurs on the buying-side of a market. The Supreme Court recently found a Sherman Act violation involving only harm to competition in a labor market. *See NCAA v. Alston*, 141 S. Ct. 2141, 2154 (2021).

The agencies also should challenge mergers even if the harm to competition on the buying-side of a market has no impact on final consumers. That is possible even when buying-side harm involves the exercise of monopsony power and input quantity is reduced. An example is provided by the facts of *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), in which the Supreme Court condemned collusive purchasing by California sugar refiners. Final consumers were unlikely to be affected even if the refiners significantly restricted their purchases. Sugar was shipped long distances, and California accounted for less than 10% of U.S. sugar production.

c. Are there specific monopsony situations that the guidelines should address explicitly, such as monopsony power in labor markets? Are there differences between monopsony power in labor markets and other upstream markets?

"It is a capital mistake to theorise before one has data." A. Conan Doyle, *Adventures of Sherlock Holmes. Adventure I. A Scandal in Bohemia*, 2 STRAND MAG. 61, 63 (1891). And little is known about whether and how the effects of mergers differ between labor markets and other input markets.

Merger assessment should be tailored to the particularities of the markets affected, but merger guidelines should be written at the high level of generality to afford the flexibility to cope with endless variations and complications. Merger guidelines should not commit to particular frameworks for particular markets, including labor markets. Nor should merger guidelines identify sectors of the economy in which mergers are more or less apt to harm competition.

For sake of clarity, merger guidelines should mention labor markets. Guidelines should observe something like: "The agencies, as appropriate, define and analyze relevant markets in which the merging firms compete as buyers, including markets in which they hire employees." Guidelines might add that: "The relevant labor markets in which to assess a merger can be local when the associated output markets, and markets for other inputs, are not." Merger guidelines should not go further and suggest any particular scope for local labor markets.

d. Do the guidelines set forth a sufficient framework to analyze mergers that may lessen competition in labor markets and thereby harm workers?

Even if it were appropriate for merger guidelines to detail the assessment of mergers in labor markets, the agencies should not do so at this time. Merger guidelines should synthesize the experience gained in actual merger assessments. "The life of the law has not been logic. It has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

AAG Donald Turner worked on the 1968 Merger Guidelines throughout his three years in the Antitrust Division, while supervising hundreds of merger cases. The Guidelines then began with: "The purpose of these guidelines is to acquaint the business community, the legal profession, and other interested groups and individuals with the standards *currently being applied* by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under Section 7 of the Clayton Act." (emphasis added) The word "present" appeared in the first sentence of subsequent merger guidelines until 2010, when the press release observed that: "The revised merger guidelines derive from the agencies' collective experience in assessing thousands of transactions . . . ."

e. In addition to employers' ability and incentive to exert downward pressure on wages via employment restrictions, what other signs of an uncompetitive labor market should the guidelines consider?

Merger guidelines should not discuss signs that competition is lacking in labor markets, just as they do not discuss signs that competition is lacking in goods and services markets. Even if the agencies could accurately identify signs that competition is lacking in labor markets, those signs need have much utility in identifying mergers that harm competition. Those signs might point to markets with monopsony employers, while their absence might point to markets in which intense competition between merging firms would be eliminated by their merger.

f. What characteristics of labor markets are most likely to be associated with transactions that risk substantially lessening competition? What lessons about relevant labor markets can be taken from enforcement cases against identified anticompetitive restraints on competition for workers?

If input and output markets were mirror images, it would suffice to assess merger effects in output markets. But merging firms could sell in national or international markets, while competing for workers in regional or local markets. In communities with specialized economies, merging firms could be the only competition for each other in hiring workers, even though they are mere atoms in the relevant output markets. Enforcement cases against anticompetitive restraints on competition for workers appears to have provided little information on the extent to which relevant labor markets are far narrower in geographic scope than relevant product markets.

g. In addition to wages, salaries, and other financial compensation, what aspects of workers' terms and conditions of employment should be considered?

The agencies should assess the likely impact of merger on competition generally. With respect to labor markets, all aspects of competition for workers are relevant, and the agencies should not focus on particular conditions of employment. Section 7 does not make concrete harms necessary or sufficient to establish a violation.

h. How should a labor market be defined in terms of job characteristics, geography, and worker flows? Should the guidelines adopt presumptions around the definition of relevant labor markets based on existing government analyses such as defined commuting zones and labor market areas? How should the guidelines address switching costs and other barriers to changing jobs?

Lacking substantial experience assessing competitive effects in labor markets, the agencies would be unwise to adopt market delineation practices that might prove infeasible, inflexible, or just wrong. Even with substantial experience, merger guidelines should neither get into the weeds nor over generalize. An approach that seems ideal in one case often can be improved upon in a subsequent case.

i. Should the guidelines address coordinated effects in upstream markets separately from coordinated effects in downstream markets?

Yes, although a single additional sentence should suffice.

10. Innovation and IP

a. Should the guidelines use a different approach to market definition when considering innovation as compared to price effects? Should market definition play a secondary role to analysis of how the merger directly affects the incentive to innovate?

No. Innovation undertaken by commercial enterprises is directed at improving existing goods and services or creating new ones. The relevant markets for assessing innovation competition are ordinary goods or services markets delineated in the usual way. If a particular case led one of the agencies to develop an innovative analysis of innovation competition, the agency would not need to be concerned that the analysis had not already been anticipated in merger guidelines.

The concept of a "innovation market" was introduced in a 1993 merger challenge to deal with a situation in which the merging firms did not currently compete head-to-head in any goods or services market. No court endorsed the concept, and the agencies never explained how they applied it. *See* Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.3 (1995). In 2017 the agencies renamed the concept a "research and development market." Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.3 (2017). But it is not a market in any normal sense because there will never be any transactions within it.

b. To what extent does a focus on product market overlaps fail to identify broader concerns about incentives to innovate, particularly given that innovation may involve the creation of new product or service categories?

As explained in the response to 6.j, focusing mainly on product market overlaps is the best policy. This focus identifies most innovation concerns. Nevertheless, some innovation concerns must be identified by looking at overlaps more broadly or at research and development programs, as the agencies do. Vague innovation concerns that do not arise from identifiable competitive relationships between the merging firms are an insufficient basis for challenging a merger.

c. What approaches can the guidelines use to determine whether technologies subject to a license or acquisition either compete with or complement the licensee's or acquirer's own technologies? How do those approaches perform in circumstances where parties own or license many patents related to the same categories of products?

In most instances, the technology portfolios of merging firms are not vast. The agencies should have no difficulty in identifying competitive and complementary technologies through standard investigative methods. In particularly technology-intensive industries, however, the agencies might be unable to identify all relevant competitive and complementary technologies from documents. The cost of having experts carefully parse two huge patent portfolios would be prohibitive.

d. Where technology-by-technology analysis is impractical, what alternative methods of analysis could be used to identify anticompetitive concerns in merger cases involving intellectual property?

Merging parties typically cooperate with the agencies in identifying relevant technologies and technological relationships between them. If the merging parties are uncooperative, interrogatories can be structured to identify such relationships.

e. How should the guidelines analyze innovation in markets with high failure rates?

Merger assessment does not vary with failure rates for innovation in part because all markets have high failure rates. Attempts to invent usually produce nothing useful; inventions usually are not implemented; and innovative new products usually fail to find favor with customers.

The fact of high failure rates can affect the merger assessment. Consider the merger of two firms with similar ongoing research projects, and suppose that no comparable research projects are underway elsewhere. If success was highly likely, the elimination of competition between the firms would mean that both projects would not go forward. The merged firm would reduce costs by merging the projects or shutting one down. A high probability of failure substantially alters the merged firm's optimization problem. To maximize the probability of success, the merged firm likely would keep both projects on their separate tracks.

11. Digital Markets

a. How, if at all, should the guidelines' analysis of mergers in digital markets differ from mergers in other markets? How should markets be defined in the case of mergers in the digital sector where products and services undergo rapid change? How should the guidelines address prospective competitive harms in rapidly evolving markets?

Merger guidelines should not explicitly mention digital markets. The guidelines should be organized around analytical concepts, such as market delineation and competitive effects theories. Articulating a distinct analysis for digital markets could make sense only if multiple analytical concepts were unique to digital markets, but digital markets are not fundamentally different from other markets.

Every feature said to be common with digital markets was observed and studied in the old economy, and no feature said to be common with digital markets is always present. The agencies should engage in a deeply factual analysis that accounts for all material features of competition and the environment in which it occurs. The agencies should not prejudge the evidence on the basis that a market is digital.

If the agencies attribute significance to the "digital markets" category, they could make categorization the central issue, and that could make decisive otherwise minor aspects market definition: The relevant market in which Amazon Marketplace operates cannot be categorized as "digital" if fulfillment is part of it.

Rapid change occurs in many high technology markets that are not considered digital. Rapid change does not profoundly affect market definition, but can complicate matters by requiring the agencies to map market boundaries through a space of possible future goods and services. The exercise is not purely academic because it has implications for the assessment of entry.

Niels Bohr is reputed to have said: "It is very difficult to predict—especially the future." Alan G. Mencher, *On the Social Deployment of Science*, 27 BULL. ATOMIC SCIENTISTS 34, 37 (1971). Rapid change makes prediction more difficult. If it becomes too difficult, the reasonable probability standard cannot be met. But Section 7 deals only with "existing competition" and "that which is sufficiently probable and imminent." *United States v. Cont'l Can Co.*, 378 U.S. 441, 458 (1964).

b. How should the guidelines analyze mergers in markets subject to tipping toward oligopoly or monopoly, such as may result from significant network effects? How should the nature and timing of enforcement strategy differ in markets subject to tipping?

Significant network effects can act as a barrier to entry and protect incumbents from entry. *See* Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons from the* Microsoft *Case*, 69 ANTITRUST L.J. 87 (2001). The prospect of tipping could make mergers involving market leaders especially concerning, but the agencies have limited ability to predict tipping, and they should not actively strive to prevent tipping.

The propensity of network effects to tip markets and the resulting harm are both exaggerated. Networks effects are just one of the many forces shaping market evolution. Dominance can be unstable and short-lived with digital platforms, and several other forces can counter the positive reinforcement of network effects. *See* Catherine Tucker, *What Have We Learned in the Last Decade? Network Effects and Market Power*, ANTITRUST, Summer 2018, at 77.

The strategy and timing of merger enforcement should not depend on the possibility of tipping. Unlike other areas of antitrust, merger enforcement is almost entirely reactive. Mergers of consequence are likely to be subject to the Hart-Scott-Rodino Act, giving the agencies an opportunity to assess likely competitive effects and seek injunctions against consummation.

> *c. How should the guidelines approach market definition in zero-price markets, negative-price markets, or markets without explicit prices? Can "quality" and other characteristics play the same role as price in market definition?*

Zero-price markets, negative-price markets, and markets without explicit prices are all too specialized for explicit treatment in merger guidelines. Nor should the agencies to give up the flexibility to undertake "an enquiry meet for the case," *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

Zero-price markets are the free sides of platforms with fees on just one side. Radio in the United States is a century-old example. Charging listeners subscription or usage fees was infeasible, and with no government subsidies, advertising proved necessary to make broadcasting into a self-supporting business. The Antitrust Division dealt with numerous radio mergers in the late 1990s. In delineating the relevant market, the Division properly focused on paying customers—advertisers. *See* Joel I. Klein, DOJ Analysis of Radio Mergers (Feb. 19, 1997 address), https://www.justice.gov/atr/file/517681/download.

With zero-price markets like radio, antitrust should "follow the money," as Deep Throat advised Carl Bernstein and Bob Woodward in the film version of *All the President's Men*. A no-revenue product must be supported by an ancillary revenue source, and the relevant market in which a no-revenue product operates must be defined to include the source of revenue that supports the platform.

I have sketched the proper application of the HMT to no-revenue platforms by focusing on ancillary revenue sources and accounting for how price increases in those sources feedback across the platform. *See* GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES 355–59 (2020). Commentators who do not follow the money suggest applying something a bit like the HMT based just on the feedback. But their suggestions do not account for the manner in which the hypothetical monopolist would exercise market power.

Negative prices can persist on one side of a platform, as with credit card rewards. The Supreme Court decreed a platform-wide relevant market for such transaction platforms in *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2285–87 (2018). *See* response to 11.d.

Markets without explicit prices presumably are those in which users of nominally free services must give up something in the bargain. What is given up can be viewed as a price even it is not an expenditure of income. If the platform monetizes what is given up, and if it is a major source of platform revenue, the HMT can be applied by focusing on the platform revenue generated. *See* response to 11.h.

> *d. How should the guidelines evaluate mergers in two-sided simultaneous transaction platform markets? What are the competitively-relevant differences between two-sided simultaneous transaction platforms and other kinds of multi-sided platforms?*

Simultaneity is the hallmark of transaction platforms; usage on one side of the platform is the mirror image of usage on the other side. When all platform fees are tied to transactions, simultaneous platforms have a "two-sided price," and the HMT can be applied using this constructed price. *See* Eric Emch & T. Scott Thompson, *Market Definition and Market Power in Payment Card Networks*, 5 REV. NETWORK ECON. 45 (2006).

Non-simultaneous platforms do not have two-sided prices, and simultaneous platforms do not have meaningful two-sided prices if fees are not mainly tied to transactions. When a platform lacks a two-sided price, there is no sensible way to apply the HMT to both sides at the same time. The HMT can be applied to the two sides separately while accounting for the cross-platform feedback. This can be done with or without simultaneity, and it was done in the *American Express* case.

The two-sided analysis mandated by *American Express* is apt to be problematic. Antitrust analysis should focus on how market power is exercised and where, which likely is just one side of a platform. In theory, competition on one side can prevent the exercise of market power on either side, but that does not always work in practice. Users on one side of the platform can be bribed with a share of the profits earned on the other side. In the analysis mandated by the Supreme Court, bribes paid to users on one side of a platform are taken as evidence of platform-wide competition. *See US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 50–51, 61–63 (2d Cir. 2019) (travel agents single home to get large payments).

> *e. What are the appropriate indicia of market power in complex and multi-sided markets? Are traditional market definition approaches reliable frameworks for assessing the existence and magnitude of market power in these markets? Are other tools as effective or more effective than market definition in those contexts?*

With perfect competition, the absence of market power makes each firm a price taker and the force of competition pushes price down to short-run marginal cost.

Any margin between price and marginal cost, therefore, signifies the exercise of market power, and the extent to which market power is exercised is signified by the price-cost margin (aka Lerner Index)—price minus marginal cost, all divided by price. When a firm has many products and prices, price-cost margins are computed as averages over product groupings that correspond to plausible relevant markets.

Complex and multi-sided markets are not so special, except that ancillary revenue streams must be accounted for. Complex and multi-sided markets are the same as other markets is the critical respect that high margins demonstrate only short-run power over price. High margins are normal and not concerning in industries with substantial fixed or sunk costs. *See* Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, J. ECON. PERSP., Summer 2019, at 44.

In all markets, shares have major limitations as indicators of the existence and extent of market power. Reliably assessing market power requires a well-constructed economic model calibrated with real-world data, especially the elasticity of market demand. As discussed in the response to 6.a, economic models of competition do not dispense with the relevant market. There is always an inside and an outside to a model, and the relevant market demarcates the two.

The relevant market also serves an essential narrative purpose under Section 7 by clearly stating what competition a merger is alleged to lessen. No other tool can serve the narrative purpose of the relevant market. *See* Gregory J. Werden, *Why (Ever) Define Market? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729, 740–43 (2013). Moreover, Section 7 specifies that a lessening of competition be tied to a line of commerce and section of the country. *See* response to 6.a.

> *f. How should the guidelines analyze mergers involving data aggregation as an important motive and/or effect? How should economies of scale and scope be measured in these cases?*

Data aggregation need not be concerning. For example, biomedical research finds that a massive increase in the amount of data has little impact on the accuracy of machine learning. *See* Alexandre Bailly et al., *Effects of Dataset Size and Interactions on the Prediction Performance of Logistic Regression and Deep Learning Models*, 213 COMPUTER METHODS & PROGRAMS IN BIOMEDICINE art. 106504 (2022).

Data is most apt to be an important in mergers when it is leveraged rather than when it is aggregated. Companies with ideas for making use of data look to partner with companies with systems in place to collect data. Such mergers can lead to new products offering substantial value. The fact that merging firms with foresight manage to steal the march on rivals does not make their merger unlawful under Section 7.

g. How should the guidelines account for multihoming or interoperability? To what degree does multihoming or interoperability offset competitive concerns in actual practice?

Multihoming or interoperability can mitigate network effects and prevent tipping, but this is much too specialized an issue for inclusion in merger guidelines, and no general rule applies. Although multihoming and interoperability can facilitate substitution, they do not imply significant substitution at the margin. Customer behavior is what matters, and simple descriptive information on multihoming and interoperability supports no reliable inferences about consumer behavior.

h. How should the guidelines analyze mergers involving competition for attention? How should relevant markets be defined? What types of harms should the guidelines consider?

The HMGs should not specifically address competition for attention because it is nothing special. Competition for attention characterizes familiar markets, such as television and radio. The business model is drawing consumers in by providing something of value with little or no charge and exposing the audience to paid advertising. The inconvenience of viewing advertising can be considered a price, and something vaguely like the HMT might be applied accordingly.

The correct approach is to analyze a profit-maximizing hypothetical monopolist that draws an audience with entertainment and makes money from advertising. The agencies need not undertake a formal or quantitative analysis, but they must focus on what is sold—the advertising. The agencies also must keep in mind that restricting the output of advertising is not an exercise of market power, but rather a legitimate way to compete for attention by improving quality.

Competition for attention has been cited as a rationale for extraordinarily broad relevant markets—potentially as broad as all media. The argument is almost entirely wrong. An advertiser seeking a certain number of exposures usually has a lot of choice, but advertisers generally want very particular exposures in terms of the target audience and the timing and method of exposure. This drastically reduces advertisers' choice. Putting together the optimal media portfolio is complicated, but adding unique exposures of the right sort can be simple because there is little choice. For example, a television advertiser guarantees no duplication of audience only by running its ad simultaneously on multiple channels.

12. Special Characteristics Markets

a. Bargaining. Is the guidelines' approach to markets characterized by bargaining adequate? If not, what changes should be made? Does increased bargaining leverage give rise to competitive effects?

Bargaining theories became important in agency merger work after release of the 2010 HMGs. *See* Aviv Nevo, Mergers that Increase Bargaining Leverage (Jan. 22, 2014 speech), https://www.justice.gov/atr/file/517781/download. And bargaining

models now have been used in several merger trials. The treatment of bargaining could be updated based on what the agencies have learned.

The HMGs observe that real-world markets can have features of both auctions and bargaining and might be read to suggest that bargaining and auction are not distinct analyses. But the analyses are distinct, and the distinction can affect the predicted effects of mergers. An auction is apt to be the better analysis when the market is called upon to decide who trades with who, while bargaining is apt to be the better analysis when the market is deciding only the terms of trade.

Quantitative bargaining analysis in agency merger matters has employed the Nash-in-Nash equilibrium concept, which is well accepted by economists, but Nash-in-Shapley is an alternative. The concepts specify different alternatives to reaching agreement. In Nash-in-Nash equilibrium, other existing agreements are assumed to be immutable, whereas in Nash-in-Shapley equilibrium, all existing agreements are assumed to be re-contractable. Plausibly, pre-merger equilibrium is Nash-in-Shapley, while near-term, post-merger equilibrium is Nash-in-Nash.

b. Auctions. Is the guidelines' approach to auction markets adequate? If not, what changes should be made?

The treatment of auctions in the HMGs makes it seem like auction models are much like models of differentiated consumer products, and the second-score auction model is similar. *See* Nathan Miller, *Modeling the Effects of Mergers in Procurement*, 37 INT'L J. INDUS. ORG. 201 (2014). But differences tend to matter.

In the standard analysis of differentiated consumer products, each product has the same price in all transaction. Raising price causes marginal customers to substitute, and the diversion to particular substitute products largely determines the unilateral competitive effects of differentiated consumer products mergers.

In the standard analysis of auctions, each product is priced separately in each auction. Consequently, a merger does not affect which bidders win which auctions, and there is no diversion of customers from one merging firm to the other. The HMGs raise possibility that bidders are poorly informed about the competitive situation so they bid the same in each auction. In most cases, however, the evidence is apt to indicate that bidders are well informed about what matters.

A model useful in assessing the likely effects of mergers in some procurements is the common values English auction in which competitors are distinguished by their costs. *See* Gregory J. Werden & Luke M. Froeb, *Unilateral Competitive Effects of Horizontal Mergers II: Auctions and Bargaining*, *in* 2 ISSUES IN COMPETITION LAW AND POLICY 1343 (Wayne Dale Collins, ed. 2008). This model supports the insights in the HMGs (§ 6.4, ¶ 3). Other insights from this model are that competition is intense with just a few bidders if they have equal costs, and that cost savings are not passed through in the auctions won by a merged firm, but rather in the auctions in which it sets the price as the second-best choice.

c. Bundled products. Is the guidelines' approach to bundled products adequate? If not, what changes should be made?

The existing guidelines have no approach to bundled products, as such, and that is best. A bundling issue has arisen, for example, in hospital merger cases where insurers contract for large bundles of services. The agencies have alleged various ranges of hospital services in Section 7 complaints, and the apparent rationale always has been aggregation as a matter of convenience. This practice is noted in the 2010 HMGs (§ 5.1 n.8) and was noted in all prior merger guidelines back to 1982. Aggregation as a matter of convenience is how the HMT accounts for "nearly universal" supply-side substitution. Products sold in bundles are a subset of the products aggregated as a matter of convenience.

d. Cluster markets. Is the guidelines' approach to cluster markets adequate? If not, what changes should be made, and in what circumstances should such markets be analyzed?

The approach of the existing guidelines is to make no use of cluster markets, and that is best. The Antitrust Division explicitly decided not to incorporate the cluster market concept in the 1982 Merger Guidelines, and the concept has not appeared in any subsequent guidelines.

The "cluster market" locution derives from the Supreme Court's 1963 description of "commercial banking" as a "cluster of products . . . and services." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 356 (1963). But the rationale for defining the relevant market as commercial banking was supplied by the trial court. The court could "perceive no useful purpose" in defining many distinct relevant markets, by which the court seems to have meant that defining many markets would complicate the analysis with no assurance of changing the conclusion. *See United States v. Phila. Nat'l Bank*, 201 F. Supp. 348, 363 (E.D. Pa. 1962).

The court should have required assurance that defining many markets would *not* affect the result. That assurance is provided only when competition is the same in all of the markets that might be defined, and that is precisely when aggregation as a matter of convenience is employed under the HMT. Because competition is not the same for all of the products and services provided by commercial banks. The Antitrust Division has not employed the commercial banking cluster market in its assessment of bank mergers or in its court challenges to bank mergers. *E.g. United States v. Cent. State Bank*, 621 F. Supp. 1276, 1291 (W.D. Mich. 1985), *aff'd*, 817 F.2d 22 (6th Cir. 1987) (per curiam).

e. Price discrimination. In what circumstances is evidence of potential price discrimination helpful in defining a relevant market? In those circumstances, how precise or targeted must price discrimination be to support a relevant market?

Price discrimination markets can be usefully defined when price discrimination is both feasible and profitable. The concept of a price discrimination market was

articulated in the 1982 Merger Guidelines and the exposition was substantially expanded in the 2010 HMGs. Further expansion is unnecessary.

The essential premise of the Elzinga-Hogarty test was that the relevant market must encompass the locations of both production and consumption. The HMT was developed to explain why the Elzinga-Hogarty test was wrong. *See* response to 6.b; Gregory J. Werden, *On the Use and Misuse of Shipments Data in Defining Geographic Markets*, 26 ANTITRUST BULL. 719 (1981).

The original idea behind the HMT was that the market should be defined around locations of production, while consumption could be anywhere. The additional concept of a price-discrimination market was then necessary to deal with targeted price competition, which must be assessed in a market defined around targeted customers. Either way, the relevant market typically does not encompass the locations of both production and consumption.

Since 1982 the guidelines have articulated two distinct relevant market concepts. The market can be defined around a product and a point of production, or it can be defined around a product and a point of consumption. Either market can be the relevant market in a particular case. The agencies have not always been clear as to which sort of market they were alleging. To allege that the geographic scope of the relevant market is the United States is ambiguous as to whether the United States is the location of production or of consumption.

The RFI references *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1037–39 (D.C. Cir. 2008), in which the court observed that the relevant market was limited to "premium, natural, and organic supermarkets" (PNOS) under the HMT only if such stores have dedicated core customers. The court referred to "price discrimination" but did not define a price discrimination market: The PNOS market definition references neither core customers nor customer locations. Moreover, the court did not advert to any way of discriminating against the core customers.

The *Whole Foods* court rightly rejected the defense expert's critical loss analysis, which considered only the profitability of a 1% or 5% price increase. *See* Paul Friedman & Gorav Jindal, Federal Trade Commission v. Whole Foods Market, Inc.—*A View from the Dugout*, 3 THRESHOLD, Fall 2007, at 3, 7–8. In contrast, the HMT asks whether the most profitable price increase for a hypothetical monopolist would be at least 5%.

With a core of dedicated customers, profit maximization without price discrimination almost certainly dictates a price increase far greater than 5%, and the profit-maximizing price increase could result in the loss of all non-core customers. *See* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 394–96 (1998); Gregory J. Werden, *Market Delineation and the Justice Department's Merger Guidelines*, 1983 DUKE L.J. 514, 543–44 & n.94.

f. Non-horizontal mergers. Do the current guidelines adequately identify the full range of non-horizontal mergers that may harm competition? Should the guidelines address the acquiring firm's market power in markets adjacent to the target's business? Should the guidelines address the possibility that a large firm entering a new market comprised of smaller companies by acquiring one of those market participants may eliminate potential competition or raise entry barriers and thereby substantially lessen competition?

Merger guidelines should not include every theory the agencies can dream up for challenging mergers. Rather, merger guidelines should include every theory that the agencies anticipate relying on a fairly regular basis. By that standard, the existing guidelines do not suffer from omissions. Moreover, the existing guidelines keep the door open to innovation by not claiming to exhaust all possible theories.

The 1982/84 Merger Guidelines indicated that the Antitrust Division would challenge a vertical merger on the basis that it made entry into the relevant market more difficult by requiring simultaneous entry into a related market. The non-horizontal portion of the 1982/84 Merger Guidelines remained in force until 2020, yet one struggles to find any use of the two-level entry theory in merger enforcement.

The agencies made the right decision when they decided not to include the two-level entry theory in the VMGs. If there is a concrete basis for such a concern, it comes within the foreclosure theories endorsed by the VMGs. Without a concrete basis, the two-level entry theory is a potential entry theory without its sine qua non—"the likelihood of entry" but for the merger, *BOC International, Ltd. v. FTC*, 557 F.2d 24, 27 (2d Cir. 1977).

The 1982/84 Merger Guidelines indicated that the Antitrust Division would challenge a vertical merger (in regulatory proceedings) on the basis that it could lead to regulatory evasion. Opportunities for regulatory evasion have diminished with the decline of traditional cost-based regulation. For that reason alone, the agencies were right to omit the regulatory evasion theory from the VMGs.

Furthermore, a regulatory evasion theory does not state a Section 7 claim because it does not complain about the lessening of competition. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), is insightful. The defendant had used its vertical integration to evade traditional cost-based regulation, but that conduct did not violate the Sherman Act because it did not harm on the competitive process.

Commentators have argued that the VMGs should endorse the elimination of potential competition as a theory of harm, but that is a horizontal theory and, therefore, was allocated to the HMGs, as the VMGs observe (§ 1, ¶ 3). If the agencies do address the elimination of potential competition from vertical mergers, they should disavow the only Supreme Court decision to condemn a vertical merger for eliminating potential competition—*Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

Ford's acquisition of Autolite assets, including the Fostoria spark plug plant, did not harm competition by eliminating Ford as potential entrant. The plant was built to supply Chrysler. When Chrysler later decided to make its own spark plugs, as General Motors did, the Fostoria plant could remain open only if it supplied Ford. It made little difference from a competition standpoint whether Ford or an independent Autolite owned and operated the plant. And much the same is true whenever a large customer acquires a large supplier. If the customer instead built a new factory, its supplier almost certainly would be forced to exit.

If adjacency implies complementarity, merger guidelines should address the case of a firm with significant market power acquiring a firm in an adjacent market. Mergers combining complements can have competitive consequences if one of the merging firms possesses significant market power. Significant power in both the relevant and the related market is necessary for certain consequences, in particular raising rivals' costs (RRC) and the elimination of double marginalization (EDM).

The VMGs correctly state that EDM is not an efficiency (§ 6, ¶ 3), but EDM can make the merged firm a stronger and more aggressive competitor, in which case EDM is relevant to the question posed by Section 7. The statement released by Chair Khan and the other Democrat commissioners upon withdrawal of the VMGs was wrong to assert that EDM arises only in "very specific factual scenarios." EDM is a robust prediction of economic theory not contradicted by experience. The effects of EDM on downstream prices, however, are sensitive to circumstances and assumptions, as is the feasibility of achieving EDM without vertical integration.

The final question posed relates to a theory reminiscent of *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967). That case involved a firm controlling half of the market for household bleach, which had been acquired by a firm with exceptional marketing prowess. Citing both potential competition and entrenchment theories, the Supreme Court agreed with the FTC that the acquisition violated Section 7. Had the acquired firm been one of many similarly situated companies, as posited by the question, the Court surely would have found the acquisition lawful, and current Section 7 law is not more interventionist than it was in 1967.

> *g. Consummated mergers. Do the current guidelines adequately explain the appropriate analysis of consummated mergers and the use of post-merger evidence?*

The HMGs devote a paragraph to evidence of actual effects from consummated mergers. Greater detail would not be useful, and merger guidelines should not declare that the agencies rely on observations of the post-merger world whenever it is possible to do so. On occasion, the agencies can prove harm to competition by comparing market performance after a merger to that prior to the merger, but clear evidence of actual harm to competition is unusual even for consummated mergers.

The analysis of most consummated mergers is indistinguishable from that of unconsummated mergers because challenges to consummated mergers typically

occur before it is possible to observe the post-merger world. When changes in market performance are observed following a merger, they are not necessarily attributable to the merger. Mergers are not controlled experiments, and sorting out the demand and supply factors affecting market performance is complicated. Merger guidelines should not specify best practices in econometrics.

Finally, the failure to observe changes in market performance following a merger is not dispositive. "If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 504–05 (1974).

h. Common ownership. Is the guidelines' approach to common ownership and horizontal stockholding adequate? If not, what changes should be made?

Section 13 of the HMGs on partial acquisitions adequately deals with stock acquisitions giving rise to, or increasing, common ownership. The economics of unilateral effects from common ownership is straightforward, but the law is undeveloped. A single circuit has declared that a Section 7 violation can arise from stock ownership without control or influence. *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 860 (6th Cir. 2005).

The existing guidelines do not address common ownership as background fact, and that is best. Debate on the effects of common ownership has come to no conclusions of significance for the application of Section 7. *See* Merritt B. Fox & Menesh S. Patel, *Common Ownership: Do Managers Really Compete Less?*, 39 YALE J. REG. 136 (2022); Isabel Tecu, *"Anticompetitive Effects of Common Ownership" at Seven Years*, ANTITRUST, Fall 2021, at 56.

The agencies should look backwards to the grand experiment performed by the 1911 breakups of Standard Oil and American Tobacco. Despite 100% common ownership of the successor companies in both industries, competition broke out. *See, e.g.*, GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES 95–96, 107–08 (2020). The degree of common ownership observed today is comparatively tiny, and most is due to index funds.

i. Private equity. Is the guidelines' approach to private equity acquisitions adequate? If not, what changes should be made?

Private equity acquisitions can raise standard horizontal and vertical concerns, which are addressed in the existing guidelines, but the agencies have rarely found that private equity acquisitions raise significant competition concerns. Most often, private equity acquisitions promote efficiency by reorganizing under-performing companies and replacing failing management. Private equity acquisitions occasionally provide remedies in merger cases.

13. Barriers to Firm Entry and Growth

a. Does the guidelines' approach to analyzing whether merger-induced entry may counteract a merger's potentially harmful effects account for modern learning?

The 1992 HMGs were written when contestability theory led some judges to believe that that entry would prevent mergers from harming competition. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 987–89 (D.C. Cir. 1990) (Thomas, J.); *United States v. Syufy Enters.*, 903 F.2d 659, 664–69 (9th Cir. 1990) (Kozinski, J). But the key insight from contestability theory actually was that sunk costs can deter entry even if incumbents have no long-run cost advantage. Sunk costs also create a critical asymmetry between incumbents and potential entrants, preventing the latter from influencing price or other aspects of market performance. The 2010 HMGs incorporate this insight, but the 1992 HMGs were clearer than the about the central role of sunk costs.

The important learning on entry after the contestability bubble was that mergers are unlikely to induce entry that counteracts harm to competition. *See* Gregory J. Werden & Luke M. Froeb, *The Entry-Inducing Effects of Horizontal Mergers: An Exploratory Analysis*, 46 J. INDUS. ECON. 525 (1998); Patrice Bougette, Kai Hüschelrath & Kathrin Müller, *Do Horizontal Mergers Induce Entry? Evidence from the U.S. Airline Industry*, 21 APPLIED ECON. LETTERS 31 (2014). Nor are mergers apt to lead non-merging firms to reposition products in ways that mitigate harm to competition from the mergers. *See* Amit Gandhi, Luke Froeb, Steven Tschantz & Gregory J. Werden, *Post-Merger Product Repositioning*, 56 J. INDUS. ECON. 49 (2008).

b. What factors impact the ability of new firms to enter a market that are not currently addressed by the guidelines?

Merger guidelines should not catalogue the numerous factors that can impact the ability to enter. The HMGs properly emphasize timeliness: Even if entry would reverse the harm to competition from a merger, the merger violates Section 7 unless that reversal would occur quickly. And the HMGs recognize that the entry induced by a merger does not necessarily reverse the merger's harm to competition because entrants tend to avoid competition. The HMGs also should observe that a merger generally does not create a meaningful entry opportunity.

c. What objective indicators could be used to estimate the size and significance of entry barriers in a market, such as incumbent firm size, rates of entry and exit over time, behavior of capital markets toward new entrants, or other metrics?

Attempts to quantify barriers to entry can be found in the industrial organization literature of the 1950s through the 1970s. Those efforts were not considered particularly successful at the time, and they are not considered relevant now. The agencies should focus on sunk costs, but quantification of sunk costs is unlikely to

prove useful. Even small sunk costs can prove decisive because anticompetitive mergers normally make entry only slightly more attractive than it had been.

d. To what extent should the guidelines treat an increase in the size of entry barriers or new impediments to rivals' growth as a harm to competition, even in the absence of any identified potential entrant? How should they do so?

Section 7 invites every legitimate theory of harm to competition, and increasing entry impediments could be the core of a legitimate theory, but more is needed. There must be a concrete reason to believe that competition would intensify but for increasing entry impediments. A mere possibility of harm to competition is never sufficient for a Section 7 violation.

Merger decisions from the 1960s and 1970s expressed concerns that mergers would raise entry barriers. *See Ford Motor Co. v. United States*, 405 U.S. 562, 571 (1972); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 579 (1967). Those decisions, however, did not purport to condemn mergers on the basis that they raised entry barriers. As observed in the response to 12.f, under controlling case law, a potential entry theory requires a likely entrant.

14. Efficiencies

a. Is the guidelines' approach to efficiencies consistent with the prevailing legal framework as enacted by Congress and interpreted by the courts?

The existing guidelines are largely consistent with the case law. Both acknowledge that merger-generated efficiencies can make a firm a stronger and more aggressive competitor, which is relevant to the impact of a merger on competition. Neither applies a welfare standard.

In the 1997 revision of the efficiencies section of the HMGs, the agencies inserted these sentences (among others), which were retained by the 2010 HMGs:

> The Agency will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agency considers whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market.

The second sentence attributes evidentiary significance to likely price effects. Predictions of price effects are particularly helpful as to whether projected cost reductions would make the merged firm a more aggressive competitor. But the first sentence, which the VMGs borrow, makes the decisive test whether the merger is "anticompetitive."

The 2010 HMGs (but not the 1997 HMGs) refer to the extent to which efficiencies are passed through (§ 10, ¶ 6). That reference should be deleted because the appellate courts have consistently held that a consumer welfare standard does not govern Section 7.

In the first insightful judicial treatment of efficiencies, the Eleventh Circuit declared: "It is 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." The court stressed that efficiencies are relevant to "the ultimate issue—the acquisition's overall effect on competition." *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991).

The Eleventh Circuit held that "a defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition." *Id.* at 1223. The court rejected a welfare standard by observing that "once it is determined that a merger *would* substantially lessen competition, expected economies, however great, will not insulate the merger from a Section 7 challenge." *Id.* at 1222 n.29.

Concurring with the Eleventh Circuit are three recent appellate decisions addressing efficiencies as a rebuttal to a prima facie case of illegality. The Ninth Circuit holds that a prima facie case can be rebutted with "evidence that the proposed merger will create a more efficient combined entity and thus increase competition." The court stresses that "the language of the Clayton Act must be the linchpin of any efficiencies defense," so the requisite showing is that the "merger enhances rather than hinders competition because of the increased efficiencies." *St. Alphonsus Med. Ctr.–Nampa v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015).

Although "skeptical" that "an efficiencies defense even exists," the Third Circuit agrees with the Ninth Circuit "that the 'language of the Clayton Act must be the linchpin of any efficiencies defense,'" and holds that "'a successful efficiencies defense requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive.'" *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 348 (3d Cir. 2016).

While doubting that efficiencies offer "a viable legal defense to illegality under Section 7," the D.C. Circuit proceeds on the assumption of "the availability of an efficiencies defense." The court reads circuit precedent to hold that "efficiencies could rebut a prima facie showing, which is not invariably the same as an ultimate defense to Section 7 illegality." The court agrees with the Eleventh Circuit that "once it is determined that a merger would substantially lessen competition, expected economies, however great, will not insulate the merger from a [S]ection 7 challenge." *United States v. Anthem, Inc.*, 855 F.3d 345, 353, 355 (D.C. Cir. 2017).

The HMGs credit not only merger-specific efficiencies in the relevant market but also those that are "inextricably linked" to the relevant market. This position is not contrary to the case law. *See* Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should it Be*, 43 J. CORP. L. 119 (2017).

b. Do the guidelines reflect the best evidence regarding how often mergers in fact achieve the cost savings and other benefits claimed by merging parties? What are some examples of cases where merger-specific efficiencies were, in fact, realized or not realized? What types of claimed efficiencies and other benefits appear more likely to be realized? How often do these appear to be passed through to consumers? What evidence is there concerning the durability of any beneficial effects?

From scattered anecdotes, one might surmise that merging parties commonly claim much more than they deliver, but efficiencies claims are not all the same, and each must be evaluated on its own merit. The agencies should not concern themselves with whether merger-generated efficiencies have been passed on, or with the rate of pass on, because Section 7 does not implicate a welfare standard.

The agencies should focus on efficiencies claims that they have credited in merger assessments. The list is short, and it is very short if limited to cases in which crediting efficiencies altered the agency's enforcement decision. The 2006 *Commentary on the Horizontal Merger Guidelines* revealed a couple of cases in which efficiencies affected the Antitrust Division's decision making but none in which efficiencies affected the FTC's decision making. Because the agencies always have been very skeptical about efficiencies, it is doubtful that an anticompetitive merger ever has gone unchallenged because of an efficiencies claim.

To better reflect their longstanding skepticism, the agencies could amend the sentence in the HMGs (§ 10, ¶ 3) stating: "Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized." The agencies should not delete the sentence (§ 10, ¶ 1) stating that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete." Even if many mergers fail to deliver projected benefits, many surely succeed.

c. For those mergers that appear to yield cognizable efficiencies, what degree of certainty should the guidelines require that they cannot be achieved in any other way?

The HMGs assert the proper test (§ 10, ¶ 2 (emphasis added)): "The Agencies credit only those efficiencies *likely* to be accomplished with the proposed merger and *unlikely* to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects." Demanding greater certainty would be inconsistent with the reasonable probability standard.

Efficiencies can be merger specific even if coordination between the merging firms, short of merger, might achieve the efficiencies. In most instances, the fact that the merging firms have not achieved the efficiencies already should be sufficient proof that the efficiencies are unlikely to be achieved without the merger. The important exceptions are situations in which projected efficiencies result from past actions or from future actions that do not involve coordination between the merging firms.

As the VMGs state, EDM is not an efficiency, but it is treated much like an efficiency. The agencies should not maintain that EDM is possible and profitable without merger, so EDM is never merger-specific. If the merging parties have done business for a substantial period of time without achieving EDM, that is sufficient proof that they are unlikely to achieve EDM without the merger. Moreover, achieving EDM through contract to is not a well-documented phenomenon; indeed, it is not always possible as a theoretical matter.

If the agencies elect, in a particular case, to maintain that EDM has been achieved premerger, they then have to explain how it was achieved and demonstrate that any theory of harm to competition is consistent. That demonstration could prove impossible.

> *d. Where a merger is expected to generate cost savings via the elimination of "excess" or "redundant" capacity or workers, should the guidelines treat these savings as cognizable "efficiencies"? How should the guidelines address the potential for capacity reductions to reduce resilience of supply or otherwise lower product or service quality?*

Efficiencies are relevant to the extent that they make the merged firm a stronger competitor, and therefore enhance, rather than lessen, competition. The merged firm can become a stronger competitor as a result of a reduction in its marginal cost of production or as a result of enhancement of its capabilities in product development or distribution.

Efficiencies permitting the elimination of excess capacity or workers can make a merged firm a stronger competitor. Like any other efficiencies, they are cognizable if they are merger specific and "do not arise from anticompetitive reductions in output or service" (§ 10, ¶¶ 2, 5). If the merging firms propose to reduce costs by reducing output, they are not projecting that the merged firm becomes a stronger competitor. The same is apt to be true when they propose to reduce quality.

If the merging firms are projecting efficiencies that would make the merged firm a stronger competitor, the agencies are not entitled to reject the efficiencies claim on the grounds that it would reduce resilience of supply or displace workers. Section 7 does not entertain a "reckoning of social or economic debits and credits." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963).

If the agencies could open the door to social welfare considerations, the result would be what AAG Donald Turner vividly described just as he was just beginning to write the first merger guidelines:

> In the brief time that I have been head of the Antitrust Division I have had proponents defend a contemplated merger on the grounds that it would promote the national defense, assist in solving the balance of payments problem, reduce unemployment and contribute to the Administration's anti-poverty program. I fully expect to hear before long that a merger should be allowed because it will contribute to the President's program for making America beautiful.

Donald F. Turner, *Antitrust Enforcement Policy*, 29 SEC. ANTITRUST L. 187, 191 (1965). The agencies should react to this prospect just as AAG Turner (*id.*) did:

> I doubt that it would overstate the matter if I said that those claims almost invariably either rest on sheer speculation or present factual questions incapable of satisfactory resolution. But even assuming that the factual issues could be readily resolved, I question to what extent, if at all, such claims should be given recognition by a Government agency charged with the responsibility of enforcing the antitrust laws, which fundamentally reflect a legislative judgment that . . . the country is best served by promoting and preserving a competitive economy.

e. For those mergers that appear to yield lower input purchasing prices, how can cost savings due to monopsony power be distinguished from other forms of savings?

If "cost savings due to monopsony power" refers only to the exercise of monopsony power through the restriction of output (*see* responses to 9.a & 14.d), the agencies should examine the efficiencies claim to determine whether it contemplates reducing input prices by decreasing the quantity purchased.

If "cost savings due to monopsony power" also includes cost savings achieved through the exercise of bargaining power, the agencies also should examine the efficiencies claim to determine whether it contemplates reducing input prices by reducing the resources required. On occasion, a merger can allow an input supplier to operate more efficiently, e.g. by standardizing components across the merging firms and lengthening production runs. Absent any efficiency, abductive reasoning points to bargaining power as the source of reduced input prices.

f. If mergers generally or often fail to realize cognizable efficiencies, how should that affect the guidelines' treatment of efficiency claims?

An important real-world phenomenon with little recognition in economic theory is the inability to marry divergent corporate cultures. Mergers often fail outright, fail to achieve much, or fail to deliver in projected time frames. Judge Richard Leon should not have been "confident" about the efficiencies of the AT&T–Time Warner merger. *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 191 n.17 (D.D.C. 2018). As indicated in response to 14.b, the guidelines should take a more skeptical tone.

g. How often do mergers lead to cost or quality inefficiencies such as diseconomies of scale? Do the guidelines adequately address the possibility that a merger may lead to such inefficiency? How should the potential for such inefficiencies be addressed?

In economics, "scale" is a property of a production process rather than of a firm. A merger cannot alter the scale of any existing facility, and thus cannot allow the merged firm to realize economies or diseconomies of scale in the near term. On rare occasions, mergers can lead to the construction of new and larger-scale facilities within the foreseeable future. On those occasions, the new facilities would never be inefficiently outsized.

Mergers might give rise to managerial diseconomies. Although commonly referred to as "diseconomies of scale," they are more properly termed "diseconomies of scope." They arise from limits to effective coordination across large organizations. Diseconomies of scope from a merger are unlikely to be reasonably probable, and "it is to be remembered that § 7 deals in 'probabilities,' not 'ephemeral possibilities.'" *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 622–23 (1974) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)).

Post-merger profit-maximization across the two merging firms is a basic "principle of antitrust law." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1043 (D.C. Cir. 2019). Without this principle, the agencies would take on a weighty additional burden in trying to prove unilateral effects because such effects usually arise from effective coordination across different business units. That is especially true for vertical theories. The principle cuts both ways and also lightens the burden on the merging parties in sustaining efficiencies claims.

15. Failing and Flailing Firms

a. Is the guidelines' approach to failing firms adequate? If not, what changes should be made?

"[T]he very wording of § 7 requires a prognosis of the probable *future* effect of the merger." *Brown Shoe Co. v. United States*, 370 U.S. 294, 332 (1962). And an acquired firm has no future in the relevant market if its assets are about to exit the market. The loss of the acquired firm's independence, therefore, does not harm competition in the relevant market. This is the proper rationale for a failing-firm defense. The HMGs reflect this rationale but stress the case law's stringent requirements, *see United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971). More stress on the rationale of the defense would be an improvement.

b. In what situations, if any, should a weakened competitor defense apply? What are the characteristics of a "weakened competitor"? How, if at all, is a weakened competitor defense related to the failing firm defense? Are there circumstances in which a firm may meet the criteria for a "weakened competitor," but an acquisition of that firm may still substantially lessen competition? How should the guidelines address the potential for the acquired firm to weaken its competitiveness by reducing investment after deciding to put itself up for sale?

In substance, a "weakened-competitor" defense can be a failing-firm argument. If the acquired firm suffers from a competitive weakness that is apt to prove fatal, the firm's assets are apt to exit the relevant market. If the proposed merger is the only reasonable way to keep the acquired firm's assets in the market, the rationale of the failing-firm defense applies. The financial conditions imposed by the case law and the HMGs should not apply.

In substance, a "weakened-competitor" defense can be an efficiency argument. Cognizable, merger-specific efficiencies are generated when an acquirer has something important to competition that the acquired firm needs, provided that other mergers that could address the problem are infeasible or competitively objectionable. Such an efficiency is relevant to the effect of a merger on competition, but the merger, nevertheless, could still harm competition.

In substance, a "weakened-competitor" defense can be the contention that current sales overstates the competitive significance of a merging firm. The argument should be headed off by the use of an appropriately forward-looking basis for assigning market shares. *See* Gregory J. Werden, *Assigning Market Shares*, 70 ANTITRUST L.J. 67 (2002). The HMGs (§ 5.2, ¶ 3) state that the agencies "measure market shares based on the best available indicator of firms' future competitive significance in the relevant market."

The 1992/97 HMGs (§ 1.52) observed that "in some situations, market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger." The sentence was dropped from the 2010 HMGs, although no policy change seems intended. The agencies could restore the sentence.

The HMGs should not specifically address ways in which the merging firms can manipulate evidence, and this particular way of doing so is not concerning. A temporary reduction in investment almost never would create a serious and lasting competitive weakness. Moreover, when shopping the company, management does not have an incentive to create a serious and lasting competitive weakness because that greatly reduces the value of the company to a potential acquirer.