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Chair, Federal Trade Commission
600 Pennsylvania Ave. NW
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Honorable Jonathan Kanter
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U.S. Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

Re: *Merger Enforcement Guidelines*

Chair Khan, Assistant Attorney General Kanter, and Commissioners of the Federal Trade Commission:

As you may have heard before, famed economist Ronald Coase, when asked why he "tired of antitrust," dryly responded, "because when the prices went up the judges said it was monopoly, when the prices went down, they said it was predatory pricing, and when they stayed the same, they said it was tacit collusion."[2]

Coase was right to be frustrated. In his time, the "sole consistency" of antitrust law was "that in litigation under § 7 of the Clayton Act, the Government always wins."[3]

But times change. These days, antitrust doctrine is coherent and credible: antitrust protects competition, not competitors, does so for the

[1] NetChoice is a trade association of tech businesses committed to advancing the principles of free speech and free enterprise online. A list of NetChoice's members is available at www.netchoice.org.
[2] Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago*, 26 J. L. & ECON. 163, 193 (Apr. 1983).
[3] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

benefit of consumers, and relies on economic theory and evidence to sort anticompetitive mergers from procompetitive or benign ones.

The restoration of antitrust's core purpose—to protect competition for the benefit of consumers—and the introduction of consistent analytical rigor have been a legal and economic success story. And like all success stories, the consumer-welfare-oriented approach currently embodied in the agencies Horizontal and Vertical Mergers Guidelines (and in binding court precedent) has its critics. Indeed, both agencies are now headed by enforcers who have rejected the approach and called for its overhaul.

That is regrettable. Not only have the agencies played a starring role in insisting on standards, economic analysis, and analytical rigor, but the Department of Justice also took the lead. The Department issued the first set of merger guidelines in 1968—at a time when the Court's deference to the agencies was at its highest. In other words, even the agencies recognized they had to appropriately channel and limit their discretion.

Even worse, the RFI strikes a skeptical tone about the benefits of mergers. If that's a sign of things to come, then the agencies will be acting contrary to overwhelmingly evidence showing "not only are most mergers welfare-enhancing, but barriers to merger activity have been shown to significantly, and negatively, affect early company investment."[4]

The calls to return to Coase's day are remarkably shortsighted. Indeed, the agencies should not seize for themselves the power to reshape or regulate the economy beyond the narrow circumstances allowed by statute.

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So while NetChoice appreciates the opportunity to comment on the Request for Information on Merger Enforcement, we hope this is only the start of the agencies' efforts to engage the public *before* issuing draft guidelines.

As a trade association of tech businesses, NetChoice's comments naturally skew toward examples from digital markets. But because NetChoice believes traditional *tried-and-trusted* analytical tools apply to digital markets just as they do "traditional" ones, we addressed the RFI's questions in their entirety (and gave truncated responses where appropriate).

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[4] Geoffrey A. Manne, Samuel Bowman, & Dirk Auer, *Technology Mergers and the Market for Corporate Control*, 86 MO. L. REV. 1047, 1053 (2021) (collecting extensive list of studies).

At bottom, NetChoice's comments should be understood as supporting the 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines, and as offering more points as food for thought, not an invitation to reissue the Guidelines.

To be clear, NetChoice supports the agencies updating their Guidelines when proper. Not only is that rooted in historical practice, but it also supports the rule of law by noticing the agencies' actual thinking on enforcement decisions. But that only underscores the FTC's curious decision to unilaterally revoke its adherence to the HMGs before engaging the public or even meaningfully consulting with all Commissioners. And it casts doubt on how much weight the agencies will give public stakeholders.

Given all that, NetChoice encourages the agencies to proceed cautiously. Rather than rush to the finish line by racking up anecdotal evidence without fully evaluating market realities or countervailing evidence as a pretext to overhauling the Guidelines, the agencies should organize many opportunities for all interested parties to engage. And, of course, the agencies should be sensitive to the fact that Congress is currently debating antirust reform. The agencies shouldn't introduce shifts in the law when Congress might legislate based on assumptions or practices that no longer apply.

Thank you in advance for considering NetChoice's comment, and please contact us if you have any questions or concerns.

§ 1. PURPOSE, HARMS, AND SCOPE

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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?

Yes, yes, and yes. *First*, Congress enacted the Clayton Act "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[5] To achieve that end, § 7 of the Clayton Act prohibits mergers "with a probable anticompetitive effect."[6] Reflecting this, the Guidelines have the "unifying theme" "that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[7]

Second, the Guidelines are clear that the agencies may seek an injunction against anticompetitive mergers—those likely to create, enhance, or entrench market power or to facilitate its exercise—in any relevant market. That includes mergers that "tend to create a monopoly."[8]

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

The Clayton Act prohibits mergers "with a probable anticompetitive effect."[9] As a starting point, then, the term covers anticompetitive effects. Neither the law nor the Supreme Court has ever spelled out all anticompetitive effects[10], but text, history, and precedent give useful guideposts for identifying them in specific cases[11]:

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[5] S. REP. NO. 698, 63d CONG., 2d Sess. 1 (1914).
[6] Brown Shoe, Inc. v. United States, 370 U.S. 294, 323 (1962).
[7] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGERS GUIDELINES § 1 (2010).
[8] For further explanation of this point, see NetChoice's answer to question 1(d).
[9] Brown Shoe, Inc. v. United States, 370 U.S. 294, 323 (1962).
[10] Consistent with economic learning, however, the Supreme Court has identified evidence of higher prices or reduced output as the most common culprits, followed by degraded product quality and stifled innovation. *See* 11 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1901d (4th ed. 2018).
2018)
[11] As the Supreme Court recognized in *Brown Shoe*, "the relevance and importance of economic data that places any given merger under consideration within an industry framework [is] almost inevitably unique in every case." 370 U.S. at n.38.

- *First*, under *Brown Shoe* and *General Dynamics*, courts must fully examine the relevant market's "structure, history and probable future" to determine whether that *specific* merger is reasonably likely to be anticompetitive;[12]

- *Second*, under *Philadelphia National Bank*, courts may infer anticompetitive harm from evidence showing that a merger is likely to result in "undue" market power, and a "significant increase in the concentration of firms" in the relevant market;[13] but

- *Third*, under *Philadelphia Nat'l Bank* and *General Dynamics*, firms may rebut that inference, including with countervailing evidence of market power or of cognizable efficiencies—meaning, evidence of competitive effects must also be included in the analysis.[14]

Put simply, "[t]he Supreme Court has adopted a totality-of-the-circumstances approach to the [Clayton Act], weighing a variety of factors to determine the effects of particular transactions on competition."[15] Simpler still: all "combinations are judged under a rule of reason."[16] Given that, the term must also include *anticompetitive effects* and *competitive effects and efficiencies*.[17]

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[12] United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974) (emphasizing that the Court's key precedent—*Brown Shoe*—long ago held that "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger") (internal quotation and citation omitted).

[13] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).

[14] Philadelphia Nat'l Bank, 374 U.S. at 363 ("Specifically, we think 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*.") (emphasis added); General Dynamics Corp., 415 U.S. 486.

[15] United States v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990).

[16] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984).

[17] For more discussion on this point, see NetChoice's responses to § 14 of the RFI.

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

Yes. Congress enacted (and amended) Section 7 of the Clayton Act "to arrest incipient threats to competition which the Sherman Act did not ordinarily reach" before consummation.[18] It thus requires "a prediction of [a merger's] impact upon competitive conditions in the future."[19] And while the agencies need not prove that prediction with certainty[20] (in which case it would no longer be a *prediction*), they must show it is reasonably likely to happen.[21]

The Guidelines reflect this: "Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal."[22]

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?

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[18] United States v. Penn-Olin Chemical Co., 378 U.S. 158, 170-71 (1964).
[19] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963).
[20] *See* Brown Shoe, Inc. 370 U.S. at 323.
[21] *Id.*
[22] HMGs § 1 (2010).

Congress intended the Clayton Act "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[23] Reflecting this, the HMGs note that their "unifying theme" "is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise."[24] Mergers that "tend to create a monopoly" are by definition mergers that would *create*, *enhance*, or *entrench* market power.[25] The Guidelines also cover unilateral effects in great detail,[26] and even give examples of how mergers might lead to unlawful monopoly power.[27]

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"?

Yes. Echoing *Philadelphia National Bank*, the Guidelines warn that "[m]ergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance economic power."[28]

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[23] *See* S. REP. NO. 698, 63d CONG., 2d Sess. 1 (1914).
[24] HMGs § 1 (2010).
[25] *See, e.g.*, HMGs § 2 (2010).
[26] *See, e.g.*, HMGs § 6 (2010).
[27] *Id.* at § 2 (example 2).
[28] HMGs § 2.1.3 (2010); *see also* VMGs § 3 (2020) ("Existing levels of concentration may nonetheless be relevant. For example, high concentration in the relevant market may provide evidence about the likelihood, durability, or scope of anticompetitive effects in that relevant market.").

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

Yes. The Guidelines reflect the Clayton Act's text, history, and precedent. The HMGs, for example, adopt *Philadelphia National Bank*'s rebuttable presumption,[29] and reflect analytical processes required by the Supreme Court's instruction that "combinations are judged under a rule of reason."[30] Use of the rule of reason—"an inquiry into market power and market structure [is] designed to assess the combination's *actual* effect"—is necessary to distinguish anticompetitive combinations from "mergers, joint ventures, and other vertical agreements" that "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively."[31] For that reason, the agencies "consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition."[32] (Even if the agencies disagree with reading *Copperweld* as requiring a rule-of-reason framework for mergers challenged under the Clayton Act, the Court still requires a totality-of-the-circumstances approach.[33])

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[29] *See, e.g.*, HMGs § 5.3 (2010) ("Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.").
[30] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984).
[31] *Id.*
[32] HMGs § 2 (2010).
[33] United States v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990).

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?

No, none, and no. *First*, neither the HMGs nor the VMGs claim to be encyclopedias of *every* combination's effect—or *possible* effect—on competition. Instead, they distill decades of legal doctrine,[34] economic thinking, and enforcement practices into coherent summaries on the two most common *types* of competitive effects (coordinated and unilateral), the two most common *means* of producing those effects (horizontal and vertical arrangements), and the most trusted and supported *theories* connecting means and ends.

The Guidelines are exactly that—guidelines. They inform the public, merging parties, and courts. But to work as intended, they must actually guide, which the current Guidelines do. And since nearly every conceivable merger can be analyzed under these frameworks, it makes little sense to dispense with the familiar in favor of the untested.

Second, because a totality-of-the-circumstances test applies to *all* mergers, and because the agencies must evaluate *all* evidence relevant to competition, no "aspects of modern market realities" should be lost. To the contrary, the current Guidelines help the agencies discover and consider all potential effects—as best they can be predicted.

[34] Contrary to the RFI's seeming suggestion that the Supreme Court's interpretation of the antitrust statutes froze in the 1960s, the Court later decisions not only clarify antitrust doctrine but bear directly upon merger cases. The lower courts have also built up an extensive body of case law.

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?

Rather than use arbitrary thresholds for deciding whether a merger's effect is "substantial," the agencies should follow common sense: § 7 applies to mergers with probable anticompetitive effects unrebutted by cognizable efficiencies.[35]

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

No.

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?

No. Consider the RFI—its extensive use of case law from the 1960s, and utter exclusion of later developments, an expanded discussion of case law in the Guidelines could have the unintentional effect of misleading the public about the status of the law. *Second*, recent enforcement lessons (most notably, *Amex*) suggest the agencies needn't change the Guidelines, but instead to drill down into market realities by analyzing *all* relevant evidence.

§ 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

[35] For further explanation, see NetChoice's responses to section 1 of the RFI.

guidelines address such effects? What evidence should the guidelines consider in evaluating these effects?

The Guidelines reflect that "[e]ver since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, 'protecting consumers from monopoly prices' has been 'the central concern of antitrust.'"[36] But far from interpreting "monopoly prices" or competitive harm unduly narrowly, the Guidelines underscore that "nonprice" factors—effects on quality and innovation, for example—are also relevant.[37]

A recent Agency submission to the OECD on non-price effects in mergers details the vigorous U.S. enforcement, and court decisions, in this area across a variety of industries.[38] The agencies' enforcement record likewise underscores that the current Guidelines' framework is not an obstacle to investigate or to challenge mergers based on non-price effects. Notably, the FTC recently voted unanimously to close an investigation where the principal concern was whether the acquirer would have an incentive to delay or drop the development of a pipeline pharmaceutical treatment—*i.e.*, a reduction in innovation, a nonprice competitive effect. In this matter, the Guidelines framework was sufficient for the FTC staff to conduct "an exhaustive, 10-month investigation" into "various theories of potential competitive harm," including nonprice effects.[39] That said, the Supreme

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[36] Apple, Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019).

[37] *See, e.g.*, HMGs § 1 (2020) (underscoring that adverse competitive effects include "non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation").

[38] OECD, Directorate for Financial and Enterprise Affairs Competition Committee, Non-price Effects of Mergers–Note by the United States, DAF/COMP/WD(2018)45 (May 30, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)45/en/pdf https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/non-price_effects_united_states.pdf ; see also MERGER CONTROL IN DYNAMIC MARKETS – Contribution from the United States (ftc.gov)

[39] Statement of the Federal Trade Commission in re Roche Holding/Spark Therapeutics, FTC Matter No. 1910086, at 1 (Dec. 16, 2019)

Court long ago warned that § 7 litigation requires evidence of "probable and imminent" effects on competition.[40]

At bottom, the Guidelines should include only tried-and-trusted analytical approaches, and even then, those approaches should rely on evidence of probable near-term effects, lest the agencies rely on "little more than speculation" in merger enforcement.[41]

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 Guidelines accurately reflect that the agencies review mountains of potentially relevant information, including direct evidence of harm, consideration of head-to-head competitors, and qualitative evidence—about substitution and otherwise.[42] They thus signal that the agencies will consider all probative evidence of the likely competitive impact of a merger in a relevant antitrust market. Even so, the agencies cannot forgo defining a relevant antitrust market. Courts have consistently held that "[d]etermination of a relevant product market and geographic market is 'a 'necessary predicate'"[43] to establishing a Section 7 claim because of the

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https://www.ftc.gov/system/files/documents/public_statements/1558049/1910086_roche-spark_commission_statement_12-16-19.pdf.

[40] United States v. Cont'l Can Co., 378 U.S. 441, 458 (1964).

[41] United States v. Marine Bancorp., Inc., 418 U.S. 602, 641 (1974).

[42] HMGs §§ 2.1-2.2 (identifying potential evidence as including everything from "the merging parties' market shares in a relevant market," to "whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors," to "[i]nformation from firms that are rivals to the merging parties").

[43] United States v. Marine Bancorp., Inc., 418 U.S. 602, 618 (1974) (quoting United States v. E.I duPont de Nemours, 353 U.S. 586, 593 (1957); Brown Shoe Co. v. U.S., 370 U.S. 294, 235

statute's requirement that a substantial lessening of competition be shown "in any line of commerce. . . in any section of the country."[44]

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?

Because mergers that lead to procompetitive effects—even at rivals' expense—are lawful under § 7,[45] the Guidelines should include only techniques that have proved dependable in assessing or approximating market power and competitive effects. Indeed, because § 7's language prohibits only mergers that will have a "substantial" effect on competition, the agencies must ensure any techniques—whether heavy or light on predictive quantification—are (1) defensible under economic theory and observable in practice, (2) clear enough that stakeholders generally understand the technique's use, and (3) capable of predictable application such that "substantial" keeps a consistent meaning across industries and federal courts.

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?

(1962)). Courts continue to apply this approach. See, e.g., FTC v. Lundbeck, Inc., No. 08-6379, 2010 U.S. Dist. LEXIS 95365, at *60 (D. Minn. Aug. 31, 2010) ("The determination of the relevant market is a 'necessary predicate' to a finding of a Clayton Act violation") (internal citations omitted); FTC v. Rag-Stiftung, 436 F. Supp. 3d 278 (D.D.C. 2020) (holding that the FTC must "first meet its prima facie burden by . . . defining a relevant product market").

[44] 15 U.S.C. § 18. See, e,g, FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1036 (D.C. Cir. 2008) (rejecting the FTC's contention that "market definition is not necessary in a § 7 case.").

[45] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117 (1986).

Yes. Consider the recently published VMGs, which expressly warn that "[a] vertical merger may diminish competition between one merging firm and rivals that trade with, or could trade with, the other merging firm."[46] In fact, the VMGs have an entire section—"Unilateral Effects"—that outlines theories of harm,[47] and even provides detailed examples of potential harm.[48]

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?

The FTC has periodically examined the competitive effects of consummated mergers, including a hospital merger retrospective project that demonstrated the competitive harm that occurred from particular unremedied mergers and played a crucial role in reinvigorating the agency's hospital merger enforcement efforts.[49] FTC economists have also completed a number of retrospective analyses of horizontal and vertical transactions in health care, oil-related markets, consumer products markets, and retailing.[50]

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[46] VMGs § 4 (2020).

[47] *See, e.g.*, *id.* at § 4(a) ("Foreclosure and Raising Rivals' Costs") ("A vertical merger may diminish competition by allowing the merged firm to profitably use its control of the related product to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market. For example, a merger may increase the vertically integrated firm's incentive or ability to raise its rivals' costs by increasing the price or lowering the quality of the related product. The merged firm could also refuse to supply rivals with the related products altogether ("foreclosure").").

[48] *Id.* at 5-10.

[49] *See* Farrell, Joseph, Paul A. Pautler, and Michael G. Vita, *Economics at the FTC: retrospective merger analysis with a focus on hospitals*, 35 REV. OF INDUS. ORG. 369 (2009).

[50] *See, e.g.*, Thomas Koch, Brett Wendling, & Nathan Wilson, *The Effects of Physician and Hospital Integration on Medicare Beneficiaries' Health Outcomes* (Bureau of Economics, Working Paper No. 337, July 2018); F. David Osinski & Jeremy Sandford, *Merger Remedies: A Retrospective Analysis of Pinnacle/Ameristar* (Bureau of Economics, Working Paper, May 2018); Thomas Koch & Shawn W. Ulrick, *Price Effects of a Merger: Evidence from a*

In 2017, the FTC released a large retrospective study of remedies associated with mergers completed from 2006 through 2012, which found that, of the 50 orders examined, more than 80% of the Commission's orders maintained or restored competition.[51]

§ 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?

There have been no new developments since the agencies issued the HMGs in 2010 and the VMGs in 2020—underscoring the Guidelines' continued usefulness.

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

Yes.

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?

Physicians' Market (Bureau of Economics, Working Paper No. 333, Aug. 2017); Daniel J. Greenfield, Nicholas M. Kreisle, & Mark D. Williams, *Simulating a Homogeneous Product Merger: A Case Study on Model Fit and Performance* (Bureau of Economics, Working Paper No. 327, Oct. 2015); Daniel Hosken, Luke Olson, & Loren Smith, *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (Bureau of Economics, Working Paper No. 313, Dec. 2012) – Published in the Journal of Economics and Management Strategy (Spring 2018). Research conducted by staff of the Bureau of Economics is available at https://www.ftc.gov/policy/reports/policyreports/economics-research.

[51] See FED. TRADE COMM'N, THE FTC'S MERGER REMEDIES 2006-2012, A REPORT OF THE BUREAUS OF COMPETITION AND ECONOMICS, January 2017.

No.[52] Indeed, as the HMGs recognize, a merger "may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms consumers."[53] That insight was true in 2010 and is true today. So long as the agencies keep the consumer welfare standard, they need not worry that market changes will render the Guidelines outmoded.

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 Guidelines should not address "moats" at this time. *First*, while moats may be relevant in specific merger cases, neither economic literature nor antitrust practice supports including a specific approach to analyzing moats in the Guidelines. *Second*, the agencies should convene working groups to study the issue further; the mere hosting of a conference will spur research in the field and should better inform the agencies moving forward. *Third*, in any event, it is difficult to imagine entire market structures protected by moats.

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?

No. "Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism," the Supreme Court explains, "describes the process, *not in itself unlawful*, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and

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[52] For further discussion of this point, see NetChoice's response to question 11(a).

[53] HMGs § 7 (2010).

their interdependence with respect to price and output decisions."[54] Because conscious parallelism is not per se unlawful, the agencies should not hinge merger enforcement only on its presence (or suspected presence). Instead, the agencies should couple evidence of conscious parallelism with evidence of anticompetitive conduct—harm to consumers.[55] After all, "[e]ven in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism or supracompetitive pricing."[56]

§ 4. UNILATERAL EFFECTS

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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?

Because the Guidelines are rightly focused on preventing the exercise of market power to the detriment of consumers,[57] they are flexible enough to incorporate any tried-and-trusted theories, tools, or techniques that reveal market realities and evaluate potential effects on consumers.

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[54] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) (emphasis added).

[55] *Id.* at 237 ("Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand. Under these conditions, a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.") (citation omitted).

[56] *Id.*

[57] *See, e.g.*, HMGs § 1 ("The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.").

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

No. To conclude otherwise would violate the Clayton Act. *First*, as discussed more fully in response to question 5(a), the Clayton Act requires the agencies to evaluate effects on competition in the *relevant market*, not solely between the merging parties. By transforming a *factor* into a per se rule, the agencies effectively rewrite the statute to ignore Congress's direction that the antitrust statutes protect competition in specific "section[s] of the country" for specific "line[s] of commerce."[58] *Second*, because the statute bans only mergers that will "substantially" lessen competition in identified markets, the agencies must still show that the *specific merger under review* qualifies.

§ 5. PRESUMPTIONS

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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?

Yes, and yes. *First*, because the law recognizes "the stimulation to competition that might flow from particular mergers," including mergers allowing small firms "to compete more effectively with larger corporations dominating the relevant market,"[59] the Clayton Act prohibits only "[m]ergers with a probable anticompetitive effect."[60]

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[58] 15 U.S.C. § 18.
[59] Brown Shoe, Inc. v. United States, 370 U.S. 294, 319-20 (1962).
[60] *Id.* at 323.

For that reason, a horizontal merger is presumed to substantially lessen competition under § 7 only when it (1) "produces a firm controlling an undue percentage share of the relevant market," (2) "results in a significant increase in the concentration of firms in that market," *and* (3) lacks "evidence clearly showing that the merger is not likely to have anticompetitive effects."[61]

While the Supreme Court has yet to define "undue percentage" or "significant increase," neither is an empty vessel for the agencies or courts to pour their instincts about the economy into. To the contrary, presumptions should be "*fully consonant with economic theory*," because then—and only then—"is [it] possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality."[62] Without a sound economic basis, the agencies risk undermining the rule of law and due process. That is why the agencies (until recently, at least) and courts follow the economics-based HMGs.[63] Under § 5 of the current HMGs, for example, the agencies clarify that mergers that increase the merged firm's HHI by more than 200 points, resulting in an HHI of more than 2500, "often warrant scrutiny" as they are presumed "to be likely to enhance market power" absent "persuasive" evidence to the contrary.[64]

To be sure, the agencies may be tempted to "strengthen" the rule of law by all but proscribing mergers over a certain size. But that severe interpretation of the Supreme Court's acknowledgment that "a too-broad economic investigation" is sometimes unnecessary[65] would rewrite § 7 to

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[61] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).
[62] *Id.* at 362-63 (emphasis added).
[63] *See, e.g.*, Stevens & Sons, Inc. v. Jeld-Wen, Inc., 988 F.3d 690, 704 (4th Cir. 2021).
[64] HMGs § 5.3 (2010).
[65] Philadelphia Nat'l Bank, 374 U.S. at 362.

ignore Congress's balancing approach and flout the Court's explicit instruction that the presumption is indeed rebuttable: "statistics concerning market share and concentration, while of great significance, [are] not conclusive indicators of anticompetitive effects."[66]

Second, when it comes to vertical mergers, "the government must make a 'fact-specific' showing that the proposed merger is 'likely to be anticompetitive.'"[67] In other words, "the government cannot use a short cut to establish a presumption of anticompetitive effect."[68] The 2020 VMGs recognize this fact-specific requirement: "In evaluating effects, the Agencies focus on the likely changes in competitive outcomes caused by a merger," which includes "focus[ing] on competitive outcomes caused by conduct that would be compatible with firms' abilities and incentives following a vertical merger, but would not be in the absence of the merger."[69]

Whether the agencies keep the substance of the existing Guidelines or not, they must heed the Supreme Court's warning that the Clayton Act is for the "protection of *competition*, not *competitors*."[70] And they should reflect only tried-and-trusted approaches to determining whether the merging firms' market shares accurately reflect their ability to compete and the likelihood of anticompetitive effects from combining their market shares.

Last, to the extent the agencies perceive a gap between the Supreme Court's precedents in the 1960s and current practice, then-Judge Clarence Thomas's unanimous opinion in *Baker Hughes* persuasively harmonizes the

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[66] United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974).
[67] United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019).
[68] *Id.*
[69] VMGs § 1 (2020).
[70] Brown Shoe, 370 U.S. at 320.

Court's precedents: "*General Dynamics*," he notes, "began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s" by:

- "[C]arefully analyz[ing] defendants' rebuttal evidence," "[i]nstead of accepting a firm's market share as virtually conclusive proof of its market power"; and

- "Discard[ing] *Philadelphia Bank*'s insistence that a defendant 'clearly' disprove anticompetitive effect, and instead described the rebuttal burden simply in terms of a 'showing.'"[71]

At bottom, the agencies should follow the Court's clear direction and not rely on market share presumptions without a careful evaluation of likely actual competitive effects.

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 agencies should abolish the structural presumption. While supporters claim it serves a useful screening function, it is based on arbitrary assumptions about market power. It is also a relic from antitrust's mid-century past that is out of step with current jurisprudence, which focuses on likely actual impacts. Instead, the agencies should accelerate the adoption of a totality-of-the-circumstances test for a merger's likely effects on consumers.

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[71] United States v. Baker Hughes, Inc., 908 F.2d 981, 990-91 (D.C. Cir. 1990).

In other words, while structuralist approaches to antitrust were a hallmark of the Warren Court, each subsequent Court has placed a greater emphasis on observing how a relevant market *operates* in the real world. Indeed, given that the Warren Court itself thought its presumptions were economically based,[72] this underscores that the agencies should reconsider structural presumptions entirely.

In any case, the agencies should measure concentration and market power with HHI, not by the number of significant competitors in a relevant market. To be sure, under the totality-of-the-circumstances approach NetChoice supports (and the Guidelines endorse), the number of significant competitors *may* be relevant. But under existing theory and practice, NetChoice doubts it is of much use to the agencies' objective consideration of a merger's likely effects on competition. Plus, it would serve simply to draw out the litigation process—along with arguing about market definition, parties will also challenge each other's definition of "significant."

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?

As discussed more fully in NetChoice's response to questions 5(a)-(b) and 11(a), the agencies should keep the current approach, as outlined in the 2010 HMGs and 2020 VMGs. Because the agencies must enforce all antitrust laws with an eye toward "market realities,"[73] "screens" are appropriate only

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[72] *See, e.g.*, Philadelphia Nat'l Bank, 370 U.S. at 363.

[73] For further explanation, see NetChoice's responses to section 11, especially question 11(a).

when justified by (1) economic learning *and* (2) experience. For that reason, use of factors like "whether a transaction involves a leading firm, a maverick firm, the closest competitor," etc., will fail as screening devices.

First, screening devices are useful because they save time and resources by accurately identifying mergers that are likely to reduce competition in a relevant market. Rather than evaluate every single proposed merger, agencies may screen mergers to flag, prioritize, and review only those most likely to violate the law. To work as intended, then, screening devices must use factors that accurately identify likely anticompetitive mergers. Use of factors like those cited in the question above would violate this cardinal rule. Consider a "maverick"—"a firm that plays a disruptive role in the market to the benefit of consumers."[74] Identifying a maverick firm and assessing its competitive significance requires careful analysis and cannot be done by merely affixing a label to a smaller player in a market.[75]

Second, use of such factors is not based on sound economic learning. Take so-called "nascent competitors." A House Judiciary Majority Staff Report on competition in digital markets from 2020 asserts—without evidence—that "*any* transaction" that "eliminates a nascent competitor" inherently strengthens market power,[76] and thus recommends—without analysis—"strengthening the Clayton Act to prohibit acquisitions of potential

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[74] HMGs § 2.1.5 (2010).

[75] *See, e.g.*, Eric Fruits, *Merger Lore: Dispelling the Myth of the Maverick*, TRUTH ON THE MARKET (July 24, 2019) (highlighting recent examples of disagreement over a firm's so-called maverick status), https://truthonthemarket.com/2019/07/24/merger-lore-dispelling-the-myth-of-the-maverick/.

[76] STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION OF DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 387 (Comm. Print. 2020) ("Majority Staff Report").

rivals and nascent competitors."[77] The Majority Staff Report thus recommends that, among other things, Congress (1) overrule case law "unfavorable to potential and nascent competition-based theories of harm," and (2) unburden the government of its entire burden of proof by "clarifying that proving harm on potential competition or nascent competition grounds does *not* require proving that the potential or nascent competitor would have been a successful entrant in a but-for world."[78]

While NetChoice rejects the Majority Staff Report's recommendations, it applauds the report's warning that it would take an *act of Congress* to prohibit mergers only because they "eliminate[] a nascent competitor," and an *act of Congress* to change the antitrust laws so that they "look unfavorably upon incumbents purchasing innovative startups."[79] While Congress has *not* yet changed our antitrust laws, it is actively considering antitrust reform—indeed, the House Judiciary Committee passed a package of antitrust reform bills in the fall of 2021, and the Senate Judiciary approved a major overhaul of the antitrust law in the spring of 2022. As the democratic process plays out, the agencies ought to keep at least the core theories and approaches in the 2010 HMGs and 2020 VMGs. Doing so will adhere to the law, give parties much-needed clarity and predictability, and ensure the agencies do not unlawfully preempt Congress.

Should the agencies disagree, NetChoice then recommends the agencies follow the suggestions outlined in TechFreedom's comment in response to this RFI—including (1) holding public workshops on the guidelines *before* issuing new ones, and (2) holding another round of

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[77] *Id.* at 394.
[78] *Id.* (emphasis added).
[79] *Id.*

workshops after releasing draft guidelines to "allow for a dynamic discussion."[80] At all workshops, the agencies should invite feedback from *all* stakeholders and from *all viewpoints*, including those who disagree with the Majority Staff Report's "factual findings" and recommendations,[81] and those who argue that digital markets are competitive and nascent competitors aren't at risk under existing laws.[82]

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

No. As the D.C. Circuit Court held in *AT&T*, the government must make a "fact-specific" showing that a merger would cause anticompetitive

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80 Comment of TechFreedom, in response to RFI, at 3-5.

81 *See, e.g.*, Tracy C. Miller & Trace Mitchell, *Dynamic Competition in Digital Markets: A Critical Analysis of the House Judiciary Committee's Antitrust Report*, MERCATUS CENTER POLICY BRIEFS (Jan. 27, 2021), https://www.mercatus.org/publications/antitrust-and-competition-policy/dynamic-competition-digital-markets-critical-analysis; ROBERT D. ATKINSON, SEVENTEEN FLAWS IN THE CICILLINE ANTITRUST REPORT ON COMPETITION IN DIGITAL MARKETS, INFO. TECH. & INNOV. FOUND. 1 (Oct. 23, 2020) (" A recent majority staff report summarizing the findings of a yearlong House Antitrust
Subcommittee investigation into competition in digital markets is filled with analytical errors that
highlight larger problems with the report's basic framing and policy conclusions."); Lawrence J. Spiwak, *The House Staff Antitrust Report Will Negatively Affect More Than the Tech Industry*, FED. SOC. BLOG (Nov. 6, 2020) ("At the heart of the staff's analysis is the age-old but discredited belief that a high market share equates to market power."), https://fedsoc.org/commentary/fedsoc-blog/the-house-staff-antitrust-report-will-negatively-affect-more-than-the-tech-industry.

82 *See, e.g.*, JOHN M. YUN, POTENTIAL COMPETITION, NASCENT COMPETITORS, AND KILLER ACQUISITIONS, IN REPORT ON THE DIGITAL ECONOMY, GLOBAL ANTITRUST INST. 662 (2020) ("Clearly, the acquisition of a potential or nascent competitor can result in an outcome that is harmful to consumers and innovation, yet it can also result in an outcome that unlocks a great deal of consumer value. Beyond the standard efficiencies, a merger that occurs early in the life of a product could significantly increase the probability that a product or technology develops and/or increases the speed at which the product or technology will arrive to the market. *Presumptively declaring that all, or most, acquisitions from large technology firms are harmful to consumers, without sufficient evidence to support the claim, can result in significantly lower levels of innovation and consumer welfare*.") (emphasis added).

harm; it may not "short cut" that process by creating a presumption.[83] While that case involved a vertical merger, its "fact-specific" requirement closely mirrors the Supreme Court's repeated emphasis that antitrust law often requires a "fact-intensive" inquiry into "market realities."[84] And because diversion ratios do not reveal similar insights across industries, thresholds would ignore the market realities not just in specific cases but of whole industries.

The 2010 HMGs take a nuanced approach, noting that the business decisions taken by the merging firms can be informative of actual market conditions: "For example, if a firm sets price well above incremental cost, that normally indicates either that the firm believes its customers are not highly sensitive to price (not in itself of antitrust concern, . . .) or that the firm and its rivals are engaged in coordinated interaction."[85] This explicit acknowledgment that margins above incremental cost is not necessarily indicative of competitive concerns shows why a presumption would be inappropriate.

Such a presumption is at odds with market realities in, for example, high-tech markets: nearly all software firms license their products well above their marginal costs because of successful differentiation. Because such presumptions would serve only to mask market realities, the agencies should not include them.

e. What specific metrics or observable features of a transaction, firm, or market should, alone or in combination, trigger a

[83] AT&T, Inc., 916 F.3d at 1032.
[84] *See, e.g.*, NCAA v. Alston, 594 U.S. __, __ (2020) (slip op., at 9) (quoting Ohio v. American Express Co., 585 U.S. at 8-9).
[85] HMGs § 2.2.1 (201).

presumption that a non-horizontal transaction is anticompetitive?

Neither experience nor economic learning justifies creating a presumption against non-horizontal mergers under any but the most extreme set of facts. But even if the agencies disagree, "the government cannot use a short cut to establish a presumption of anticompetitive effect" for non-horizontal mergers.[86] To the contrary, "the government must make a fact-specific showing that the proposed merger is likely to be anticompetitive."[87]

Should the agencies ignore this legal command, they should still resist the political temptation to peg certain "observable features" to specific firms, products, or markets. As a general legal matter, it undermines the rule of law when the agencies unilaterally short-circuit the "fact-specific showing" requirement for *some* defendants. And in the antitrust context specifically, such an approach is ripe for judicial admonishment.

Just last year, the Court *unanimously* reaffirmed that the rule of reason "generally requires a court to 'conduct a fact-specific assessment of market power and market structure' to assess a challenged restraint's 'actual effect on competition.'"[88] While the Court reaffirmed that rule in § 1 Sherman Act cases, it underscores "the sensitivity of antitrust analysis to market realities."[89] And "[w]hether an antitrust violation exists necessarily depends on a careful analysis of market realities."[90] And when "those market realities

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[86] *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (internal quotation marks and citations omitted).
[87] *Id.*
[88] *NCAA v. Alston*, 594 U.S. __, __ (2020) (slip op., at 9) (quoting *Ohio v. American Express Co.*, 585 U.S. at 8-9).
[89] *Id.* at 21.
[90] *Id.* at 21 (citing *Amex*, 585 U.S. at 10-12).

change, so may the legal analysis."[91] Given the Court's tying of antitrust enforcement to *current* market facts, the Guidelines must avoid presumptions that rely, in whole or in part, on "metrics" or "features" that in turn rely on generalizations about a specific "transaction, firm, or market."

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

Presumptions are appropriate only when they reflect market realities. So the inclusion or exclusion of presumptions depends on their substance and ability to capture complex market dynamics. Because anticompetitive harm is often a case-by-case determination, presumptions capable of accurately capturing complex market dynamics in complex markets aren't just unlikely to work—they currently don't exist.

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)?

No. Evidence does not suggest labor markets are so different from product or service markets that they require "special treatment." The agencies should apply the same metrics to *all* markets until economic theory and observed market realities prove another tool would better capture competitive effects in the relevant market.

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?

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[91] *Id.*

The administrative cost of merger enforcement is heavily influenced by the agencies' own choices—a decision to scrutinize even benign mergers will tax the agencies' resources. But to the extent the question imagines trading greater *accuracy*, as gained from "individually analyzing each transaction in depth," for administrative ease, NetChoice adamantly opposes any "short cuts." Fiscal prudence is no doubt sound governance; fiscal prudence bought at the expense of due process ends up costing society far more—in principles, innovation, economic growth, and international competitiveness. False positives should not be casually downplayed.

§ 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?

Both § 7's text and Supreme Court precedent require the agencies to accurately define the relevant market in every merger case.[92] While a market definition's adequacy will depend on the specifics of each case, the Guidelines should reflect the Supreme Court's repeated warning that market definition reflect actual market realities.[93]

[92] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974) ("Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.") (citing United States v. Du Pont & Co., 353 U.S. 586, 593 (1957); Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962)). It's also worth noting that when the Federal Trade Commission tested its theory that market definition is not required, the D.C. Circuit Court of Appeals not only rejected the argument in the context of the specific case, but also reiterated that the Clayton Act's text requires market definition in all cases. *See* FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1036 (D.C. Cir. 2008).
[93] *See, e.g.*, Ohio v. American Express Co., 138 S. Ct. 2274, 2285 (2018).

Market definition is *always* important because it is *always* required by law. For that reason, the agencies would do well to keep the current framework and further refine it. By contrast, adding new arbitrary distinctions ("when 'x' is present, market definition is *very* important"; when 'y' is missing, it's *merely* important") to the analysis will not aid the agencies, the public, or the courts. To the contrary, it would "rest on formalistic distinctions rather than actual market realities," and thus serve only to blur the agency's view of the merger's competitive effects.[94]

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

No.

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?

First, yes, the 2010 HMGs spill considerable ink outlining the agencies' *extensive* use of qualitative evidence.[95] In fact, the HMGs expressly hinge market definition on quantitative *or* qualitative considerations about "customers' likely responses" to anticompetitive behavior.[96] (The Guidelines also explain that—in the agencies' opinion—market definition isn't always

[94] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466-67 (1992).
[95] *See, e.g.*, HMGs § 4.1.3 (2010).
[96] *Id.*

necessary.[97] But the Supreme Court disagrees, affirming time and again that market definition is necessary.[98] So too the lower courts.[99])

Second, yes, the Guidelines explain that market definition and competitive effects are like a double helix: just as "competitive effects can inform market definition," "market definition can be informative about competitive effects."[100] For that reason, the agencies note, "analysis need not start with market definition."[101] And when evidence "directly predict[s] the competitive effects of a merger," the "role of inferences from market definition and market shares" is reduced.[102]

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?

Conclusions? None. Because the Clayton Act requires market definition for every merger challenge, and because market definition is unique to each case, the agencies should consider it along with all other

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[97] *See, e.g.*, HMGs § 4 (2010) ("Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.").

[98] *See, e.g.*, United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974) ("Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."); Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962); United States v. Du Pont & Co., 353 U.S. 586, 593 (1957).

[99] *See, e.g.*, FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1036 (D.C. Cir. 2008) (rejecting the FTC's argument that "market definition is not necessary in a § 7 case" as "in contravention of the statute itself"); United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (rejecting the government's merger challenge for not accurately defining the relevant market).

[100] HMGs § 4 (2010).

[101] *Id.*

[102] HMGs § 4 (2010). The HMGs also say: "Where analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects." *Id.*

"reasonably available and reliable evidence."[103] And unless the Supreme Court takes an unexpected u-turn, the agencies' use of so-called direct evidence for market definition will run headlong into the Court's teaching that "[t]o assess [direct] evidence, we must *first* define the relevant market."[104] Direct evidence of market power includes effects like "reduced output, increased prices, or decreased quality in the relevant market."[105]

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?

Yes.[106]

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, the Guidelines imply neither. To the contrary, the 2010 HMGs broke new ground in rethinking market definition's role in merger enforcement. Unlike earlier versions, the 2010 HMGs note that "analysis need not start with market definition," that not all analytical tools rely on market definition, that competitive effects can inform market definition and vice versa.[107] That said, the Guidelines are wrong about one thing: declaring that market definition isn't always required when—according to the Supreme Court—it is.

g. Does the focus on the SSNIP test in implementing the Hypothetical Monopolist Test specifically, and in undertaking

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[103] HMGs § 2 (2010).
[104] Ohio v. American Express, 138 S. Ct. 2274, 2284-85 (2018) (emphasis added).
[105] *Id.* at 2284 (citations omitted).
[106] *See, e.g.*, HMGs § 4 (2010) ("In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition.").
[107] *See, e.g.*, HMGs § 4 (2010).

market definition more broadly, obscure the various types of harms in addition to price effects that may arise?

No. *First*, the SSNIP test is but one reliable tool the agencies use to define markets. *Second*, even if relevant evidence isn't relied on in the market-definition exercise, it will come up during the competitive-effects analysis (and vice versa).

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?

Because market definition and competitive-effects analysis are like a double helix, the two inform each other. In other words, evidence of anticompetitive harm in any of its recognized forms—reduced output, higher prices, degraded quality, stifled innovation, and so forth—may help in accurately defining the relevant market, and the relevant market may help in discovering and assessing potential competitive effects. So, as the current Guidelines make clear, the agencies may (and often do) consider non-price effects.

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?

While certain principles guide market definition, both case law and the current Guidelines underscore that it is a tool for assessing competitive effects specific to each merger. For that reason, the "double helix"[108] of market definition and competitive-effects analysis ensure relevant evidence isn't

[108] *See* NetChoice's answer to question 6(c) for further explanation.

overlooked (even in dynamic markets marked by disruptive technology). Indeed, the government successfully defined a precise high-tech product market in *Microsoft*—back when the internet was new and PCs were still new to most homes—through a totality-of-the-circumstances approach.

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

A focus on product market overlaps is consistent with—and effective in enforcing—the Clayton Act. Under § 7, for example, the law expressly requires the agencies to distinguish anticompetitive mergers from others (procompetitive or benign), in specific product markets, in specific geographic areas. This specific command may not address all concerns about competition—but that's because the law has never served, or been intended to serve, that function.

§ 7. Potential & Nascent Competition

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

None. The Guidelines recognize that all mergers—including those with a "potential competitor"—pose competitive risks and rewards.[109] So like all mergers, the agencies should evaluate those with potential competitors by looking at all relevant evidence—exactly what the current Guidelines recommend.[110]

[109] *See* HMGs § 5.3 (2010) ("A merger between an incumbent and a potential entrant can raise significant competitive concerns."); VMGs § 4(a) (2020) ("A vertical merger may diminish competition by allowing the merged firm to profitably use its control of the related product to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market.")

[110] *See, e.g.*, HMGs § 9 (2010) ("As part of their full assessment of competitive effects, the Agencies consider entry into the relevant market. The prospect of entry into the relevant

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?

The Guidelines should—as they currently do—focus on market power. In assessing market power, the agencies consider all relevant, reliable, and reasonably available evidence. And when that evidence reveals "firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future," the Guidelines count them as participants.[111] This approach strikes an appropriate balance: By including relevant non-incumbents, it may help paint a more accurate picture of market realities; and by excluding those who haven't shown a commitment to entering the market in the near future, it tightens the fit between economic theory and market realities.

No, a merging firm's capability of market entry or market power should not—and indeed probably cannot—be sufficient. *First*, the Supreme Court has underscored that the agencies must assess *all* competitive effects, including cognizable efficiencies. And in *Marine Bancorporation*, the Court implied that the agencies needed "[u]nequivocal proof that an acquiring firm actually would have entered *de novo* but for a merger."[112]

Second, because the Clayton Act prohibits only mergers that may *substantially* lessen competition, the agencies cannot rely on speculation

market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.").

[111] HMGs § 5.1 (2010).

[112] United States v. Marine Bancorporation, 418 U.S. 602, 624 (1974).

alone—piling inference upon inference to draw conclusions about future behavior. Instead, the agencies must take each merger on its own terms.

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 Guidelines should stick with the current characterization[113]: "market participants" include (1) firms currently earning revenues in the relevant market ("incumbents"), (2) firms not currently earning revenues in the relevant market but have committed to entering the market in the near term ("potential competitors"), and (3) firms not currently selling in the relevant product in the relevant geographic market but would be induced to enter the relevant market quickly after prices rise ("potential competitors").[114]The Guidelines align with case law too. For example, in *El Paso Natural Gas*, the Supreme Court recognized that firms *outside* the relevant market may exert competitive pressure on incumbents *inside* the market and thus may sometimes be treated as competitors.[115]

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?

The Clayton Act prohibits mergers with a reasonable probability of causing anticompetitive harm. The statute doesn't exempt mergers with nascent competitors from that requirement. And neither the statute nor case

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[113] For further explanation, see NetChoice's answer to question 14(b).
[114] HMGs § 5.1 (2010).
[115] United States v. El Paso Nat'l Gas Co., 376 U.S. 651, 659-61 (1964).

law suggest a customized analytical approach applies to "nascent competitors." That makes sense: an incumbent's acquisition of a nascent competitor is *already covered* by the HMGs (and potentially the VMGs too).

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

The Guidelines should follow the case law, which instructs that while the agencies need not prove a merger will *certainly* cause anticompetitive harm, they must still show such an outcome is reasonably probable to happen. While this standard is relaxed, it is still a standard: the agencies must proffer actual evidence of likely harm; they cannot carry the day on speculation alone.

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

The Guidelines should not consider whether a firm would develop its own product. To be sure, under a totality-of-the-circumstances approach, evidence the firm was (or is) on the cusp of entering the relevant market may be relevant. But since the Clayton Act prohibits only anticompetitive mergers, the agencies must still prove harm.

§ 8. REMEDIES

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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?

No. Requiring merging parties to propose remedies *before* the agencies have completed their review would be like putting the cart far before the horse.[116] As a practical matter, it is difficult to see how the parties might propose effective remedies—or even know what needs remediating—before the agencies have completed their review. In fact, the above question's reference to the government's expenditure of "significant resources investigating the competitive effects" underscores the unreasonableness of requiring parties to predict both the government's verdict on competitive effects[117] *and* the government's preferences on remedies when it is *precisely* the agencies' expertise and deep dives into a merger's effects that enables parties to tailor remedies to specific concerns and thus boost the merger's overall competitive effects even more.

§ 9. MONOPSONY POWER & LABOR MARKETS

This section's questions assume that (1) monopsony power requires its own customized analysis, (2) current analytical approaches are ineffective in mergers involving buyers or labor markets, and (3) labor markets are so different from product or service markets that they too require special treatment. None is true. Rather than belabor that point question by question, NetChoice offers these general principles and points:

[116] Another example: the FTC's split, unprecedented decision to revoke the 2010 Horizontal Merger Guidelines *before* soliciting public feedback on those Guidelines—and forcing stakeholders to operate in the dark about the agency's practices. Point being, a rush to end results may seem efficient but in reality it comes at the hefty price of accuracy, fairness, and meaningful deliberation.

[117] After all, the government often considers evidence that falls outside the merging firms' control—imagine the awkwardness of asking competitors for their thoughts on the merger's effects.

- Exercises of monopsony power in buyer markets "are the mirror images of the monopoly power exercises in selling markets."[118] The current Guidelines recognize this.[119]

- Just as the law condemns anticompetitive effects from use of monopoly power, it condemns anticompetitive effects from use of monopsony power.[120]

- And just as the law protects competition in distinct product or service markets, it protects competition in distinct labor markets.[121]

§ 10. INNOVATION AND IP

Like the last section, this section's questions rest on faulty assumptions. This time implying that (1) innovation-focused mergers require special rules of the road, (2) current analytical approaches are deficient, and (3) the agencies' skill set includes soothsaying. NetChoice again offers some general principles and points to keep in mind:

- Although courts will consider a merger's effects on innovation, and although effects on innovation may inform market definition (at least within the agencies), the agencies may not use innovation (alone) to define the relevant market, or to reduce their burden in

[118] Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L. J. 1031 (2019).
[119] *See, e.g.*, HMGs § 1 ("Enhancement of market power by buyers, sometimes called "monopsony power," has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers."); *id.* at 12.
[120] *Id.*
[121] *See, e.g.*, California v. eBay, Inc., No. 12-05874, 2014 WL 4273888 (N.D. Cal. Aug. 29, 2014).

defining as best possible the real relevant market.[122] The Supreme Court has recently held that market definition is a required tool in assessing market realities, and in accurately assessing competitive effects.

- As discussed throughout, the Clayton Act requires the agencies to define a product's relevant market.

§ 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?

The Guidelines should describe the tried-and-trusted tools, processes, and theories of harm the agencies will use when evaluating "market realities."[123] To begin, market realities do not support broadly defined "digital markets." Many businesses provide digital products or operate online platforms but that does not mean that they all compete with each other in a relevant antitrust market or do not also compete with companies that provide services offline. For that reason, among others, the Guidelines should not presume the realities of digital markets, however defined, are stable and distinct enough to deserve special treatment. Instead, the agencies should stick with precedent and organize the Guidelines around analytical tools and

[122] For further explanation, see NetChoice's responses to §§ 1-2, 5-6.
[123] For example, the Horizontal Merger Guidelines (2010) emphasize "that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise." § 1. Evaluating market power requires evaluating market realities.

concepts designed to evaluate effects on market choices for consumers from a particular transaction, not static market definitions.

While markets are dynamic, especially given rapid technological improvements, they can be defined with objectivity, as shown in the Department of Justice's landmark *Microsoft* case. So as the agencies flesh out market definition in actual cases—for example, in the governments' cases against Facebook and Google—they should avoid enshrining arbitrary rules for so-called "digital markets" in the Guidelines. Indeed, the comments solicited for this RFI will likely reveal that there is no consensus for defining digital markets through different means, underscoring the need for further study.

The Guidelines should also avoid "tidying up" case law or market realities the agencies do not like. While clear rules may be helpful and support due process, they must always be consistent with *actual* laws, as interpreted by the courts. And as the Supreme Court has made clear time and again, antitrust enforcement must focus on actual market realities. In today's markets, these realities are often messy—should Walmart's relevant market include both its e-commerce platform *and* its brick-and-mortar stores? If TikTok competes against YouTube, Facebook, Instagram, and Snapchat for advertisers, is its relevant market one for attention, social media, personalized social media networks, or something else altogether? Rather than bring arbitrary order to these complicated facts, the agencies should provide a clear roadmap for how *tried-and-trusted* analytical tools will apply to markets that defy easy categorization. This will be even more important as more markets move online and as markets take on a "hybrid" nature, blurring market boundaries and creating entirely new ones in the process.

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?

When a service grows more valuable to one consumer the more others use the same service, the service has direct network effects. While the RFI suggests this economic insight is unique to digital markets, it's (at least) as old as the telegram. And while it looks different today, network effects are the same. In fact, consider the telegram's successor, the telephone: It'd be useless if no one else had one.[124] Similarly, Facebook, Instagram, and other digital platforms would be less valuable to users if no one else they knew were users.

Even so, critics maintain that network effects in digital markets pose significant risks. But economists David S. Evans, who the Supreme Court cites regularly, and Richard Schmalensee debunked the argument that network effects in digital markets pose heightened risks.[125] Evans and Schmalensee begin by noting that those worried about network effects believe that "if a firm moved fast and got some customers, those customers would attract more customers, which would attract even more," and eventually "result in a single firm owning the market forever."[126] As history has shown, however, that outcome "is far from inevitable."[127] Despite the government recently suing Facebook for monopolizing the personal social media network market, upstart TikTok has surpassed Facebook in popularity and is now

[124] Then again, consumer welfare would rise considerably if cheats, charlatans, and criminals could no longer use phones to harass others.
[125] David S. Evans & Richard Schmalensee, *Debunking the "Network Effects" Bogeyman*, 40 REG. 36, 39 (2017).
[126] *Id.* at 36.
[127] *Id.*

dominating among Facebook's most valuable consumers: teens and young adults. Facebook also faces severe competitive pressure from Apple, which recently cut steeply into Facebook's advertising revenue.

If network effects couldn't save Facebook from upstart TikTok or Apple—a competitor without a standard social media network—from competitive pressure, it is unlikely that network effects pose a significant risk at this point. Until empirical studies show otherwise, the Guidelines should not take a categorical approach and should instead focus on evaluating market realities on a case-by-base basis.

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?

The Guidelines should focus on advancing consumer welfare. So long as the agencies retain the consumer welfare standard, there is no need for the Guidelines to differentiate between markets based on prices and those where competition occurs across a different dimension. Instead, the Guidelines should, as the question above hints at, consider all relevant competitive effects, including quality, innovation, and non-monetary prices (when appropriate).

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?

The Guidelines should rely on existing doctrines with an eye toward the Supreme Court's holding that market definition is a mandatory tool for evaluating vertical restraints in two-sided, simultaneous-transaction

markets under the Sherman Act.[128] Given the Court's reasoning there, it will likely demand a similar approach to market definition in vertical mergers.

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?

Market power is a firm's ability to profitably raise prices above marginal costs. The greater the margin between price and marginal cost, the greater the firm's exercise of market power. This is true in all markets, including "complex" or "multi-sided markets," because markets must by definition consist of buyers and sellers exchanging goods for a price.

Even when direct evidence of market power is unavailable, traditional market definition tools are at the agencies' disposal. And since § 7 limits enforcement power to mergers harmful only to "a line of commerce" in a "section of the country," the agencies must by law incorporate some form of market definition. Whether theirs hews closer to the *Brown Shoe* or 2010 Guidelines approach is a difference that makes little difference: Both approaches emphasize demand-side elasticity. So while there's play in the joints in measuring elasticity, the need to define a market is required by statute and by the *Brown Shoe* precedent itself.

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?

The Guidelines should not address data aggregation and leveraging apart from whether it is likely to reduce competition in a relevant antitrust

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[128] Ohio v. American Express Company, 138 S.Ct. 2274, 2285 (2018).

market. Like all mergers, those involving data can have procompetitive or anticompetitive effects, depending on the particulars of the affected market. And so like all mergers these should be analyzed the same way.

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

The Guidelines shouldn't address multihoming or interoperability. While multihoming is relevant to consideration of network effects—the former blunts the latter—it is too specialized for inclusion in the Guidelines. In other words, rather than get out ahead of the economic literature, the agencies should continue engaging practitioners, academics, economists, OECD, and firms (including nonprofits) on the proper method for assessing multihoming's effect. For example, to some, multihoming is evidence of robust competition[129]; to others, it suggests monopolized markets[130]. Either way, evidence suggests consumer preferences drive multihoming—for example, Generation Z embraces video-based communications more enthusiastically than older generations.[131] For this reason—it's highly subjective—multihoming isn't likely to provide meaningful insights into a merger's effect on competition.

Interoperability is also too specialized for inclusion in the Guidelines. To be sure, interoperability may affect product substitution and thus may appear relevant to merger analysis, but its usefulness is limited to individual

[129] *See, e.g.*, Christopher Marchese, *Debunking the "Big is Bad" Bogeyman: How Facebook Benefits Consumers*, 28 GEO. MASON L. REV. 1, 24-27 (2020).
[130] *See, e.g.*, Fiona M. Scott Morton & David C. Dinielli, *Roadmap for an Antitrust Case Against Facebook*, OMIDYAR NETWORK 11 (June 2020).
[131] Marchese, *supra* note 7, at 25-27.

cases. In other words, it is too early to say whether interoperability will always be largely irrelevant, but it's also too early to draw any reliable inferences from the anecdotal interoperability-related evidence we do have.

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?

First, the Guidelines should not treat attention markets as a standalone concept worthy of special attention. As noted in our answer to 11(a), digital markets are innovative but not so innovative that the agencies' traditional tools are insufficient.

Should the agencies decide otherwise, then the Guidelines must take care to rely only on *traditional* tools. This is to rebut any mistaken impression that by singling out attention markets for special analysis, the Guidelines are signaling that traditional tools aren't effective. So, for example, the Guidelines might emphasize the need to *follow the money*, as Gregory Warden emphasizes in his response to this RFI.[132] In digital markets, this will often mean looking at advertisers—the consumers of digital ads—and users—those whose "attention" the advertisers try to attract. From this bird's-eye view, the Guidelines could then emphasize the need to analyze market realities that include a firm's business model and competitive threats to that business model.[133] Understood this way, tech firms Google and Facebook are direct

[132] In response to question 11(c), Werden explained that, in zero-price markets like radio, "antitrust should 'follow the money,'" to discern the relevant market's boundaries. Submission of Gregory J. Werden in Response to Request for Information on Merger Enforcement, 37 (Mar. 2022).

[133] *See* Marchese, *supra* note 7, at 15-21 (emphasizing the need to examine a zero-price firm's business model in defining its relevant market).

competitors[134], despite the agencies' recently arguing otherwise in court. If the guidelines do discuss attention markets, they should also consider that such a definition would also likely sweep many participants into the relevant market.

But whatever the market, the Guidelines must insist on objective analysis toward an objective end. In specific terms, the Guidelines should keep the long-espoused goal of advancing consumer welfare through objective antitrust enforcement: mergers that are reasonably certain to cause substantial harm to consumers—higher prices, degraded product or service quality, or stifled innovation. To point a finer point on it: The agencies should not use attention markets as a backdoor tool for blocking mergers that would not be found anticompetitive under other market definitions. Consider Facebook's acquisition of Instagram in 2012. At the time, the U.K. Office of Fair Trading approved the merger partly because "Facebook did not have an important photo app, meaning that Facebook was not a serious competitor to Instagram in consumer markets."[135] But even if Facebook and Instagram were found to be competitors in attention markets, the merger posed no risk of harm to the competitive nature of the relevant attention market or to consumers (advertisers and viewers).

Indeed, Facebook's acquisition of Instagram was precisely the sort of procompetitive merger the Sherman and Clayton Acts seek to promote: Instagram's output soared, its business model became reliable and profitable

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[134] Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L. J. 771, 771 (2019) ("Firms like Facebook and Google, which have emerged as two of the most important firms in the global economy, depend nearly exclusively on attention markets as a business model.").

[135] Wu, *supra* note 12, at 774 (citing OFFICE OF FAIR TRADING, ME/5525/12, *Anticipated Acquisition by Facebook Inc of Instagram Inc*, at 4-5 (Aug. 14, 2012)).

with the introduction of advertising, and its quality improved dramatically, transforming from a platform limited to photo editing and sharing into a full-fledged social media platform, and transforming from a platform riddled with major security problems and bugs into a secure and trusted service.[136]

Second, the Guidelines should consider only objective harms. Just like in challenging mergers between "non"-digital firms—AT&T and Time Warner, for example—the agencies should challenge mergers in digital markets, attention markets, and the like *only* when evidence of likely consumer harm is clearly shown. In other words, the Guidelines should emphasize evaluation of objective harms that lend themselves to objective measurement. Because attention markets often include zero-price products or services on at least one side of the market, enforcers will likely need to consider a merger's quality effects. To do this objectively, the Guidelines should reflect a hostility toward subjective indicia of quality like privacy[137], which "operates on a sliding scale—some users want total privacy [while] others are content with sharing some or all data in return for free services."[138]

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[136] *See* Marchese, *supra* note 7, at 38-39.

[137] For example, while Tim Wu and NetChoice agree that enforcement agencies "take into consideration whether the decrease in attention markets yielded quality effects," NetChoice parts ways with his suggestion for consideration of the subjective example of "the diminishment of privacy protections offered by WhatsApp in the years following the Facebook acquisition." *See* Wu, *supra* note 12, at 778. For starters, Facebook's acquisition of WhatsApp has had an overwhelmingly procompetitive effect—it became entirely free for users (originally charging use and subscription fees), and its output grew significantly. *See* Marchese, *supra* note 7, at 39-40. Second, privacy isn't an appropriate consideration for antitrust law because privacy can't be objectively measured and is often in conflict with antitrust's aims. *See, e.g.*, LAURA ALEXANDER, PRIVACY AND ANTITRUST AT THE CROSSROADS OF BIG TECH, AMERICAN ANTITRUST INSTITUTE 4 (Dec. 16, 2021) ("While often mutually reinforcing, the doctrines of privacy law and antitrust law are also regularly in tension and sometimes outright conflict.").

[138] *Id.* at 30.

§ 12. SPECIAL CHARACTERISTICS MARKETS

Most questions in this section ask whether the existing Guidelines sufficiently address specific markets. They do. As for the remaining questions, it's worth remembering:

- The Guidelines should reflect tried-and-trusted analytical approaches to merger enforcement. Special characteristics markets are, well, special. When market realities and experience justify context-dependent considerations, the Guidelines ought to include those. Until then, the agencies should not try to conjure up rules or insights.
- The Guidelines adequately explain the appropriate analysis of consummated mergers and the use of post-merger evidence. Recent merger reviews by the agencies underscore this point.

§ 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?

Yes.

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

The Guidelines do not offer, nor claim to offer, an exhaustive list of every relevant factor. Nor should they.

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?

Under the Clayton Act, courts use a totality-of-the-circumstances (or a rule-of-reason) approach to assessing each merger on its own terms. So, the agencies may develop "objective indicators" to the extent they are accurate measures of market realities. Because market realities are nearly always case-specific, it is unlikely such "objective indicators" will serve much use—and indeed, under *General Dynamics*, courts would force the agencies to defend their statistics in the context of the specific merger under review regardless.

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?

Economic learning does not justify inclusion of specific rules or considerations for entry barriers in the absence of a potential entrant. That said, the Clayton Act prohibits mergers with anticompetitive effects. So, assuming the agencies can identify competitive harms, and trace those harms to the merger's potential strengthening of entry barriers, then such factors may indeed be of significance. Absent that, the Guidelines should consider them as potentially relevant factors in the agencies' complete review of the merger and market realities.

§ 14. EFFICIENCIES

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

Yes. *First*, mergers often benefit consumers by allowing firms to cut costs and prices, improve products and services, and invest in innovation—

all which spur competition.[139] Indeed, because "[c]ooperation is the basis of productivity," "[i]t is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production."[140] And because Congress recognized "the stimulation to competition that might flow from particular mergers," including mergers allowing small firms "to compete more effectively with larger corporations dominating the relevant market,"[141] the Clayton Act prohibits only "[m]ergers with a probable anticompetitive effect."[142] The guidelines reflect this. For example, the HMGs' section on efficiencies opens by noting that while "[c]ompetition usually spurs firms to achieve efficiencies internally," "merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor."[143]

Second, the guidelines give efficiencies weight consistent with case law. In *FTC v. Procter & Gamble Co.*, the Supreme Court said that "*[p]ossible* economies cannot be used as a defense to illegality," because "Congress was aware that some mergers which lessen competition *may* also result in economies but it struck that favor of protecting competition."[144] In other words, anticompetitive mergers—those that hurt consumers—aren't saved by speculative evidence of internal efficiencies gained. And while the majority in *Procter & Gamble* did not "determine whether certain economies are inherent in the idea of competition," Justice Harlan emphasized in his concurrence that Congress favored competition because, among other reasons, it leads to

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[139] *See, e.g.*, HMGs § 10 (2010) ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.").
[140] Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188 (7th Cir. 1985).
[141] Brown Shoe, Inc. v. United States, 370 U.S. 294, 319-20 (1962).
[142] *Id.* at 323.
[143] HMGS § 10 (2010).
[144] 386 U.S. 568, 580 (1967) (emphasis added).

"more efficient operation."[145] For that reason, when "a firm's ability to achieve economies enhances its competitive position," courts must distinguish "adverse on competitors" from those "on competition."[146] So, Justice Harlan concluded, "merging companies may attempt to prove that there are countervailing economies reasonably probable which should be weighed against the adverse effects."[147]

The 2010 HMGs reflect this, noting that "[e]ven when efficiencies generated through a merger enhance a firm's ability to compete, however, a merger may have other effects that may lessen competition and make the merger anticompetitive."[148] And thus "it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."[149]

Whether Justice Harlan broke new ground or merely synthesized existing case law, the Court later adopted much of his approach expressly. First, in *United States v. General Dynamics*, the Court explicitly held that the structural presumption is rebuttable, noting that "statistics concerning market share and concentration, while of great significance, [are] not conclusive indicators of anticompetitive effects."[150] Second, in *Cont'l TV, Inc. v. GTE Sylvania, Inc.*, the Court emphasized that antitrust law "must be based upon demonstrable economic effect rather than . . . upon formalistic

[145] *Id.* at 597 (Harlan, J., concurring).
[146] *Id.* at 598 (Harlan, J., concurring) (citing *Brown Shoe Co.*, 370 U.S. at 320).
[147] *Id.* at 599 (Harlan, J., concurring).
[148] HMGs § 10 (2010).
[149] HMGs § 10 (2010).
[150] United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974).

line drawing."[151] And while *GTE Sylvania* was a § 1 case, it established that to show "demonstrable economic effect," courts must evaluate efficiencies—or "redeeming virtues," as the Court called them.[152] Given these precedents, the lower courts have correctly held that "a defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition," which must include analysis of potential efficiencies.[153]

The Guidelines reflect the case law. Take the 2010 HMGs:

- "The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market."

- "To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market."

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[151] 433 U.S. 36, 58-59 (1977).
[152] *Id.* at 55 (internal quotation marks and citation omitted).
[153] United States v. Baker Hughes, Inc., 908 F.2d 981, 991 (D.C. Cir. 1990). For more examples, *see, e.g.*, FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016) (holding that efficiencies may render a merger procompetitive on balance); St. Alphonsus Med. Ctr.–Nampa v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015) (evidence must show the "merger enhances rather than hinders competition because of the increased efficiencies"); FTC v. HJ Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) ("[T]he court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054, 1054 (8th Cir. 1999), reh'g and reh'g en banc denied (Oct. 6, 1999) (holding that while the district court may reject a defendant's "efficiencies defense," it must still consider "evidence of enhanced efficiency in the context of the competitive effects of the merger"); FTC v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991) (holding that efficiencies are one factor that may rebut a case based on market concentration).

- "Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means."[154]

Likewise, the 2020 VMGs declare:

- "Vertical mergers combine complementary economic functions and eliminate contracting frictions, and therefore have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers."

- "The Agencies evaluate efficiency claims by the parties using the approach set forth in Section 10 of the Horizontal Merger Guidelines, as elaborated here. Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service."

- "The Agencies do not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is unlikely to be anticompetitive in any relevant market."[155]

Because the Guidelines accurately reflect Supreme Court and lower court precedent, and align with economic theory and experience, the agencies should keep the current approach to considering efficiencies.

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

[154] HMGs § 10 (2010).
[155] VMGs § 6 (2020).

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?

First, yes. *Second*, while the agencies may (and should) conduct periodic studies of consummated mergers to glean insights, they must remember that the Supreme Court requires individualized review in each merger case, and allows firms to rebut or overcome the government's use of statistics. *Third*, the agencies must be very careful to act within the bounds of their statutory authority. Every process can be abused, and where, as here, the government exercises immense discretion—the FTC has even recently taken it upon itself to extend its statutory deadline under the HSR Act—it is essential the government not let personal biases about efficiencies (and whether they're "worth it") interfere with faithful application of court precedent.

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?

Because antitrust laws protect competition and not competitors, the agencies should keep the current approach: "Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical."[156] Put differently, the agencies do not—and should not—try to spare inefficient firms competitive pressure by insisting their rivals compete less vigorously. To the contrary, the agencies should heed the Supreme Court's century-old caution to courts:

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[156] HMGs § 10 (2010).

unless the challenged conduct leads to or maintains monopoly power, the courts should avoid intervening in private business decisions.[157]

The agencies must also shun picking winners and losers and avoid government interference in private markets. Although the Department of Justice falls under the President's control, the Federal Trade Commission is *supposed* to be an independent body of experts—designed to be "non-partisan" and to "act with entire impartiality."[158] And because the FTC "is charged with the enforcement of *no* policy except the policy of the law,"[159] it should not use the Guidelines to advance any policy other than blocking anticompetitive mergers *by faithfully following the law's text and the Supreme Court's interpretation of it*.

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?

The Guidelines should keep the current approach, which recognizes efficiencies so long as they "do not arise from anticompetitive reductions in output or service."[160] This objective standard promotes the rule of law, due process, and fairness. So long as a merger's efficiencies promote competition—for example, by combining two inefficient firms into an efficient one—the agencies should not endeavor to micromanage the 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?

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[157] *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919).
[158] Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935).
[159] *Id.*
[160] HMGs § 10 (2010).

Under the Guidelines' current totality-of-the-circumstances approach to merger enforcement, the agencies look for evidence of anticompetitive harms like price increases or output restrictions. So even if a merger poses no risk of price hikes, it might still be unlawful for, say, reducing output without offsetting benefits to justify it.[161]

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

The question above reflects an anti-merger bias not supported by law, by precedent, or by empirical study. *First*, the Clayton Act requires case-by-case analysis, so while the agencies may of course learn from history, they must not fail to give each case a fair hearing. But because the law already requires efficiencies be cognizable, and because the law imposes a probability standard on the government, it is difficult to imagine the agencies could lawfully reject evidence of procompetitive effects solely because those effects weren't fully realized in previous mergers.

Second, it is also difficult to imagine the agencies could justify ignoring or downplaying cognizable efficiencies when economic research overwhelmingly shows that "not only are most mergers welfare-enhancing, but barriers to merger activity have been shown to significantly, and negatively, affect early company investment."[162]

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[161] Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L. J. 1031, 1033 (2019) ("The goal of antitrust policy toward mergers is to protect consumers from noncompetitive price increases or reductions in output, which can be measured by quantity, but also by reductions in quality or innovation.").

[162] Geoffrey A. Manne, Samuel Bowman, & Dirk Auer, *Technology Mergers and the Market for Corporate Control*, 86 MO. L. REV. 1047, 1053 (2021) (collecting extensive list of studies).

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?

The same principles and points made in NetChoice's answer to questions 14(c)-(f) apply here.

§ 15. FAILING AND FLAILING FIRMS

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

Yes. As the FTC explains, the "failing firm" defense recognizes that when one merging party is failing, "it is preferable to have [its] assets in the hands of the acquirer than see the assets exit the market completely."[163] Because the failing firm defense is just that—a defense—the agencies have clarified that it applies only when the failing firm (1) can't meet near-term financial obligations, (2) can't reorganize successfully under bankruptcy law, and (3) made unsuccessful good-faith efforts to "elicit reasonable alternatives" to achieve the same ends as the proposed merger.[164] This is consistent with the Supreme Court's totality-of-the-circumstances (rule-of-reason) approach to Clayton Act cases.

The agencies must remember that—failing firm defense or not—they must consider *all* relevant evidence when determining market power. So even if a firm fails the failing firms test, its proposed merger may still be lawful.[165]

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[163] Ian Conner, *On "Failing" Firms—And Miraculous Recoveries*, FED. TRADE COMM'N, COMPETITION MATTERS BLOG (May 27, 2020), https://www.ftc.gov/enforcement/competition-matters/2020/05/failing-firms-miraculous-recoveries.
[164] HMGs § 11 (2010).
[165] For fuller discussion of this point, see NetChoice's response to question 15(b).

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?

The "weakened competitor" consideration flows from the Supreme Court's decisions in *International Shoe Co.*, *Brown Shoe*, and *General Dynamics*. In *General Dynamics*, the Court held that mergers that flunk the "failing firm" test may still be lawful when evidence shows the firm's weakened financial condition is likely to decrease its future market share.[166] While the question above frames this holding as the "weakened competitor *defense*," the Court held its a relevant consideration on the front end—the government should have considered the firm's past and current finances when predicting its future market realities.[167] So, the agencies should consider a competitor's financial weaknesses whenever they calculate market shares, and when they assess a merger's competitive effects.

[166] General Dynamics, 415 U.S. at 507-510.
[167] *Id.* at 508.