Comments of Economists and Lawyers on the Draft Merger Guidelines

September 15, 2023

We appreciate the opportunity to comment on the draft Merger Guidelines (dMGs).[1]

We are economists and lawyers with substantial experience in antitrust policy. Most of us have government antitrust enforcement experience and substantial experience in evaluating the competitive effects of proposed mergers for government enforcers and merging firms. Several of us have substantial experience in drafting merger guidelines. Our names, affiliations, and disclosure statements appear at the end of these comments.[2]

We welcome the dMGs as a statement of intention to strengthen merger enforcement because we believe that enforcers need to do more to deter anticompetitive mergers than in past decades.[3] We also welcome their explicit consideration of several issues in merger enforcement that deserve greater attention, including platforms, potential and nascent competition, exclusionary effects (raising rivals' costs), and harms to suppliers including workers.

We are concerned, however, about aspects of the draft guidelines that could be read to interfere with their ability to implement our shared objective effectively, by making it more difficult for enforcers to rely on economic analysis to discriminate between mergers that risk harming competition and those that do not. Such an approach to merger enforcement would limit the influence of the dMGs and potentially undermine their capacity to benefit buyers and suppliers in the affected markets, foster economic growth, and lessen inequality. The comments below explain these concerns more fully.

We are writing primarily to share a broad policy concern involving the way the dMGs depict the role of market structure in merger analysis and to provide recommendations for addressing it. In brief, our common concern is that the dMGs could be read to treat aspects of market structure as inherently harmful or as conclusively identifying competitive harm, rather than as indicators of the risk that the merger will enhance the exercise of market power. We also have included comments on some selected additional topics. Although many of us will submit separately our

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[1] U.S. Department of Justice & Federal Trade Commission, Merger Guidelines, Draft for Public Comment (2023) (hereinafter "dMGs").

[2] By signing these comments, a signatory does not necessarily endorse every specific statement in them.

[3] *E.g.,* JONATHAN B. BAKER, THE ANTITRUST PARADIGM 77-80, 125-28, 152-67 (2019); Jonathan B. Baker, Nancy L. Rose, Steven C. Salop & Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 12 (2019); A. Douglas Melamed, *Mergers Involving Nascent Competition,* in JUDGING BIG TECH: INSIGHTS ON APPLYING U.S. ANTITRUST LAW TO DIGITAL MARKETS 38 (Washington Center for Equitable Growth, December 2022); Steven C. Salop & Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go From Here?*, 58 REV. INDUS. ORG. 81 (2021).

individual views on other aspects of the dMGs, we uniformly regard the recommendations in these comments as a better way to achieve stronger merger enforcement than the approach taken in the dMGs.

Role of Market Structure

We understand merger analysis to be concerned with the risk that a merger will enhance the exercise of market power, thereby harming trading partners (*i.e.,* buyers, including consumers, and suppliers, including workers).[4] Market structure matters in merger policy when it is an indicator of the risk that firms will have the ability and incentive to lessen competition by exercising market power post-merger (or an enhanced ability and incentive to do so), to the detriment of trading partners (buyers or sellers) in the relevant market.[5]

Our concern is that the dMGs can be read instead to treat aspects of market structure—high market concentration (Guideline 1), high market shares (dominant position) (Guideline 7), extensive vertical integration (Guideline 6), a trend toward concentration (Guideline 8), and a trend toward vertical integration (referenced in Guideline 6)—as intrinsically harmful or, to similar effect, as conclusive indicators of harm.[6] We would treat these aspects of market structure only as indicators of the risk to

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[4] As the D.C. Circuit has recognized, "Merger enforcement, like other areas of antitrust, is directed at market power." *Federal Trade Commission v. H.J. Heinz Co.,* 246 F.3d 708, 713 (D.C. Cir. 2001) (quoting Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust* § 9.1, at 511 (2000)). More precisely, merger analysis is concerned with a possible change in the incentive and ability of market participants to exercise market power flowing from the merger, measured relative to their incentive and ability in a but-for world in which the merger did not take place (which is often reasonably proxied by the pre-merger world). In general, it is easier to evaluate the change in the ability and incentive of firms to exercise market power resulting from a merger than to determine the extent to which firms exercise market power.

[5] On the relationship between concentration and market power see, *e.g.,* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981) (discussing determinants of single firm market power); George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964) (discussing factors influencing the likelihood of successful interfirm coordination).

[6] This interpretation of the dMGs is suggested by several provisions. *E.g.,* the reference to "likelihood of deconcentration" as a procompetitive effect (in a subheading in Guideline 4 § A); the dMGs' concern with trends toward concentration (Guideline 8) and vertical integration (referenced in Guideline 6) regardless of the source of those trends; the statement that efficiencies that accelerate a trend toward concentration or vertical integration are not cognizable (§ IV.3.D); the framing of the concern with mergers entrenching or extending a dominant position (Guideline 7) as an effort "to preserve the possibility of eventual deconcentration;" the omission of language indicating that the analysis of the extension of a dominant position into a related market is concerned with mechanisms "that lessen the competitive threat the merged firm faces" when that language is included in discussing the entrenchment of a dominant position; and the absence of discussion in the guidelines involving increased concentration (Guideline 1) and vertical mergers that affect market structure (Guideline 6) explaining why those structural changes would be expected to increase the risk of obtaining or enhancing market power, or protect market power from erosion. This interpretation is also consistent with the omission of the language found in the overview section of the 2010 Horizontal Merger Guidelines stating their "unifying theme" in terms of market power, and with the absence of an explicit recognition that presumptions of competitive harm arising from any of various guidelines (including those based exclusively or importantly on aspects of market structure) can be rebutted by showing that the merger will not raise the risk of lessening the

competition arising from an increased ability and incentive of market participants to exercise market power post-merger.

The possible reading of the dMGs that treats aspects of market structure as inherently harmful or as conclusively identifying competitive harm raises more than one difficulty.[7] One problem is that merger enforcement would not succeed in stemming a trend toward concentration when that trend is the product of economic factors like growing scale economies, increasingly powerful network effects, or endogenous sunk costs[8]—or if it did succeed, it may well do so at the cost of substantial harm to counterparties, including consumers and workers.[9]

Another problem is that market structure is not always a good indicator of market power. Market structure can play a valuable role in merger enforcement, as with the structural presumption in horizontal merger analysis. However, other aspects of market structure relied upon in the dMGs—trends toward concentration or vertical integration, and extensive vertical integration— are related to the exercise of market power from merger only under some circumstances or in conjunction with other factors. They are not related to market power with sufficient consistency to justify relying on them the way the dMGs could be read to do: either as near-conclusive indicators of market power on their own or as intrinsically harmful features of market structure.

Those guidelines in the dMGs that specifically appear to treat aspects of market structure as intrinsically harmful, taken as a whole, would seem to permit a presumption of competitive harm from virtually all mergers in industries with fewer than, say, a dozen market participants, without regard to the magnitude of the risk that the transaction will enhance the exercise of market power. Rebuttal under the dMGs is,

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incentive or ability of firms to compete. We do not view the "lessening competition" language employed in the dMGs as having a clear interpretation: it could refer either to enhancing market power or to adverse changes in market structure such as increasing concentration.

[7] Regardless of what is intended, moreover, the lack of clarity in the dMGs about the significance of market structure lessens the extent to which the dMGs can be expected to provide guidance to the business and legal communities, including courts that choose to consult the dMGs.

[8] *E.g.,* ALFRED D. CHANDLER, SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM (1994) (discussing scale and scope economies); CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY (1998) (discussing network effects); JOHN SUTTON, SUNK COSTS AND MARKET STRUCTURE: PRICE COMPETITION, ADVERTISING, AND THE EVOLUTION OF CONCENTRATION (2007) (discussing the tendency of markets to become more concentrated as they grow in size when that growth makes more profitable substantial firm expenditures on advertising or research and development, referred to as endogenous sunk costs).

[9] For example, one study finds that the U.S. grocery industry transitioned from a fragmented industry to an oligopoly market structure in most distribution areas (roughly state-sized regions) as a result of the economies of scale and scope arising from mid-20th century introduction of the supermarket format and the adoption of technology-intensive distribution systems in the 1980s and 1990s. Paul B. Ellickson, *Does Sutton Apply to Supermarkets?* 38 RAND J. ECON. 43 (2007). In general, the study concludes, these dynamics made it possible for supermarkets to stock the wide variety of products we take for granted today and sell them at lower prices than small groceries charged. That conclusion, if correct, means that consumers would have been deprived of substantial benefits had the trend toward industry concentration been prevented by *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), which sought to halt it.

in general, difficult. Thus, the practical effect of the way market structure appears to be treated in the draft could be to justify challenging most or nearly all mergers outside of fragmented markets without need to explain how the transaction enhances the ability or incentive of firms to exercise market power. That could deter firms from undertaking many if not most such mergers, particularly those involving firms unwilling to litigate.[10]

The empirical evidence does not warrant such a near per se ban on mergers and acquisitions among oligopolists.[11] If such a policy were applied in a systematic and thoroughgoing way, without regard to whether the ability of firms to exercise market power is enhanced in individual cases, it would interdict or deter some mergers that would be expected to generate lower quality-adjusted prices for buyers, higher quality-adjusted prices for suppliers, and enhanced incentives to innovate. It would also be expected to have economy-wide effects in inhibiting economic growth and exacerbating inequality.[12]

While our primary concern is with policy and economics, we also note that an intrinsic concern with concentration may not be compelled by judicial precedent. The courts, including the Supreme Court, have often accounted for developments in economics when interpreting antitrust statutes and when formulating and applying antitrust rules. To the extent that Supreme Court merger precedents from 1950 through 1975 control in the interpretation of Clayton Act § 7 today, as to which there is debate,[13]

[10] The extent to which mergers are deterred will be affected by the anticipated reception of the dMGs in the courts, however. Moreover, if the dMGs increase the likelihood of agency challenge across-the-board, without regard to the risk that the merger will enhance market power, they may end up discouraging smaller firms from undertaking mergers more than they discourage larger firms, and thus have the unintended consequence of increasing concentration in many markets.

[11] Some of us interpret the research literature in economics as providing little or no evidence that, on average, efficiencies from merger in oligopoly markets benefit competition. That conclusion is not inconsistent with recognizing that efficiencies from merger benefit competition in some cases. Competition and consumers would benefit by permitting those mergers that benefit competition through the efficiencies they generate to proceed. (The observation that efficiency arguments are generally unpersuasive among litigated mergers or mergers blocked by the enforcement agencies does not suggest otherwise. As a result of agency exercise of prosecutorial discretion, efficiencies from merger would tend to be less beneficial in those samples of mergers than among mergers as a whole.)

[12] We recognize that the economy grew more rapidly and experienced less inequality during the 1960s, when the concentration standards employed in merger enforcement were substantially stricter than those used today. We also recognize that too lax antitrust enforcement since that time likely contributed to a slowed rate of economic growth and greater inequality since then (though it was not the only cause). Those observations do not support a policy of interdicting most mergers among oligopolists, however, because there is a better way. A policy that makes presumptions based on market structure irrebuttable (which would be tantamount to treating certain market structures as intrinsically harmful rather than indicators of market power) would tend to reduce growth and exacerbate inequality relative to what could be achieved by making them rebuttable. (The connection between market power and inequality may not be obvious: it is that in practice, the rents from the exercise of market power accrue disproportionately to the wealthy.)

[13] ANDREW I. GAVIL ET. AL, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 707-10 (4th ed. 2022) (Sidebar 5-1: The Sound of Silence: The Supreme Court and Merger Policy Since 1975). *See id.* at 705-06 (discussing alternative interpretations of *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974)). The Supreme Court has counselled lower courts to follow a Court

the dicta set forth in those opinions do not bind the enforcement agencies and courts and the rationales they adopt are not entirely consistent.[14] Much of the discussion in those opinions is based on mid-twentieth century economic thinking. It does not reflect developments in economics since that time and the best economic thinking today. If the agencies, in asserted reliance on Supreme Court merger precedents from 1960 to 1975, frame cases in terms of intrinsic harms from concentration, courts that understand how economics has developed over succeeding decades could be led to question cases that they would see as harmful if understood instead in terms of the exercise of market power.[15]

Recommendations on the Role of Market Structure

We encourage the agencies to clarify from the outset of the dMGs that the risk to competition from merger is tied to the increased ability or incentive of market participants to exercise market power post-merger.[16] To this end, **we recommend** that

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precedent with direct application in a case, even when the precedent appears to be in tension with another line of Supreme Court decisions, *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. --, 143 S.Ct. 2028, 2038 (2023). But the particular facts matter in determining whether a previous case controls and, if so, how to apply it to a later case. Not surprisingly, the dMGs themselves indicate that the agencies would not necessarily analyze the facts in prior court decisions the same way today.

[14] For example, we do not understand *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) and the legislative history of the Celler-Kefauver Act that it references as compelling an intrinsic concern with concentration. One reason is that *Brown Shoe* sets forth inconsistent themes, only one of which is consistent with that interpretation. On the one hand, the decision recognizes that Congress feared a trend toward concentration and understood that maintaining fragmented market structures might generate higher costs and prices. On the other hand, it recognizes that a merger of two small firms can benefit competition by allowing those sellers to compete more effectively with larger incumbents, and that Congress was concerned to protect competition not competitors. GAVIL ET. AL, *supra* note 13, at 694. In addition, interpreting Court precedent as compelling an intrinsic concern with concentration would be inconsistent with the influential D.C. Circuit decisions in *United States v. Baker Hughes*, 908 F.2d 981 (D.C. Cir. 1990) and *Federal Trade Commission v. Heinz*, 246 F.3d 708 (D.C. Cir. 2001). Those decisions can be understood as working out a way to rationalize the Supreme Court's holding in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), and earlier Court decisions with developments in economics since that time.

[15] Moreover, if the dMGs are written to imply that nearly all mergers among oligopolists should be challenged but the enforcement agencies nevertheless allow the vast majority of reported mergers to proceed without challenge (consistent with past agency practice and limited agency resources), including a substantial fraction of mergers in oligopoly markets, their credibility will be severely undermined. That disjunction would call into question whether the guidelines truly reflect agency views and thus whether courts should follow them.

[16] Doing so could be viewed as expanding on language already in the dMGs. In discussing Guideline 2, the dMGs recognize that "Competition often involves firms trying to win business by offering lower prices, new or better products and services, more attractive features, higher wages, improved benefits, or better terms relating to various additional dimensions of competition." Our recommendation is tantamount to suggesting that the dMGs make this point near the start of the document to frame all the guidelines, not just Guideline 2, and to extend the point by defining competitive harm from merger in terms of enhancing market power.

the dMGs adopt in the overview section language indicating that the Guidelines explicitly focus on whether the merger enhances market power, such as:[17]

> The unifying theme of these Guidelines is that mergers should not be permitted when they pose a significant risk that they would substantially lessen competition or tend to create a monopoly by creating, enhancing, or entrenching market power or facilitating 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 the (quality-adjusted) price of outputs, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. A merger also enhances market power if it is likely to encourage one or more firms to reduce the (quality-adjusted) price of inputs, reduce input purchases, diminish innovation, or otherwise harm suppliers (including workers) as a result of diminished competitive constraints or incentives.

To reinforce the point, **we recommend** that the dMGs explicitly describe the aspects of market structure pointed to as triggering concern as "indicators" of market power (as distinct from intrinsic harms) and that the dMGs identify the mechanisms of concern. For example, the research literature in economics relates increases in concentration in highly concentrated markets (Guideline 1) to several mechanisms by which market power could be enhanced.[18] There is less empirical evidence or economic theory relating other types of changes in market structure identified in the dMGs to an increased risk of exercising market power—particularly a trend toward concentration (Guideline 8), and a trend toward vertical integration (referenced in Guideline 6). However, there may be conditions under which those trends would be reasonable indicators of concern about various mechanisms by which the merger would increase the ability or incentive of firms to exercise market power, most likely in conjunction with other factors.[19] The Guidelines should identify the mechanisms that concern the

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[17] This recommendation is based on a paragraph in the 2010 Horizontal Merger Guidelines that was edited, primarily to reflect the increased attention in the dMGs to the statutory text and to harms to suppliers. We also deleted a sentence in that paragraph about a different subject not relevant to this discussion.

[18] These include an increased risk of the elimination of substantial competition between firms (Guideline 2); an increased risk of coordination (Guideline 3); an increased risk of harm from firms controlling products that their rivals use to compete when combined with foreclosure) (Guideline 5); and an increased risk that a dominant firm would enhance or entrench its market power by acquiring a firm that constrains its exercise of market power or has the potential to introduce a next-generation product that could challenge its market power (which is related to the mechanisms set forth in Guidelines 2 and 10, and reflected in Guideline 7 to the extent that guideline is not interpreted as suggesting intrinsic harm from acquisitions by dominant firms).

[19] Under some circumstances, for example, it is possible that a trend toward concentration could generate a heightened concern about the possibility that a merger would tip the incentives of market participants to undertake practices that would lessen competition.

agencies or, if the drafters conclude that the relevant research literature in economics has not yet matured sufficiently to do so at this time, delete those two sections.

To further reinforce that the concern is with market power, and that aspects of market structure are relevant to the extent they are good indicators of market power, **we recommend** that the dMGs create a new rebuttal section (presumably located within Section IV). The new rebuttal section would clarify that the merging firms can rebut any of the guidelines, including those guidelines based exclusively or importantly on aspects of market structure, on the ground that the merger will not raise the risk of lessening the incentive or ability of firms to compete.[20]

To help explain what would count as a satisfactory rebuttal on this ground, that section could provide a non-exclusive list of such rebuttal possibilities, even if those possibilities are also alluded to in some of the specific guidelines or related to other rebuttal sections.[21] For example:

- When the concern is with the risk of coordination—whether through application of Guideline 3 or through the application of another Guideline based on changes in market structure where that change in structure is viewed as an indicator of a risk of coordination—the merging firms should be permitted to show in rebuttal that their transaction would not affect a maverick's incentives to constrain coordination or would enhance them, or that it would benefit competition by creating a new maverick.
- Regardless of the competitive concern, the merging firms should be permitted to show in rebuttal that the industry would not behave less competitively following the merger. That could be the product of the incentives of the remaining firms to maintain prices (as in some oligopoly models) or to continue to target customers of the merged firms in auction settings. It could also be the result of entry or repositioning,[22] which are discussed in a separate rebuttal section that could be cross-referenced.
- The merging firms should also be permitted to show in rebuttal that one of the merging firms would likely have little or no influence on competition in the future because of its weakness as a competitor in the present and a lack of capabilities suggesting that it could become a more significant competitor in

[20] The dMGs do not systematically and explicitly recognize that the merging firms can rebut the presumptions embodied in the various guidelines by showing that the merger will not raise a risk of enhancing market power (*i.e.,* that it will not raise a risk of lessening the incentives or ability of firms to compete). Some of the discussion of specific guidelines could be interpreted as permitting rebuttal on this ground, but the draft does not consistently identify and discuss this approach to rebuttal.

[21] The agencies may also wish to explain, analogously to how they discuss efficiencies, that they would decline to credit claims that are not based on reasonably available and reliable evidence.

[22] Repositioning is mentioned only in passing in the dMGs. It would be helpful to explain, as the 2010 Guidelines do, that it is a supply-side response evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency.

the future (or, if it is at a different level of the supply chain, suggesting that it could help a rival compete more effectively in the future).

- When the concern is with the risk of harm through foreclosure of rival access to a product or service in a related market that rivals use to compete (Guideline 5), and that concern is identified through an analysis of the share of the related market controlled by the merging firm (Guideline 6),[23] the merged firm should be permitted to rebut by showing that foreclosure of the related product would not materially affect the incentives of rivals to compete (*e.g.,* because it accounts for a small share of rival costs).

Relatedly, **we recommend** that the dMGs recognize explicitly a "sliding scale" approach to rebuttal: that the merging firms be required to provide more convincing evidence in rebuttal the more persuasive the inference of competitive harm (risk of enhancing market power) that arises from meeting the conditions of the thirteen guidelines.[24] (The dMGs suggest this possibility in Guideline 4, but not generally.) The general approach of employing presumptions while allowing rebuttal on a sliding scale can reasonably be expected to strengthen merger enforcement while preserving a focus on market power.[25]

Other Suggestions for Improvement

A. Market Definition (Section III)

The market definition discussion in the dMGs does not connect market definition to a concern with market power other than in discussing the hypothetical monopolist test. The market definition discussion also deviates from prior Guidelines, Supreme Court precedent, and sound practice by not emphasizing that market definition accounts for just one economic force: buyer substitution, when the concern is with market power exercised with respect to buyers, and, analogously, supplier substitution when the concern is with market power exercised with respect to sellers.[26] (The dMGs do state that "market definition focuses solely on demand substitution factors," but that statement is buried. It appears in the discussion of the role of "supplier responses" in market definition in a subsection of an appendix.[27])

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[23] This discussion assumes that the structural analysis described in Guideline 6 is employed to indicate the likelihood of the competitive concern set forth in Guideline 5.

[24] The D.C. Circuit has adopted a sliding scale approach to evaluating rebuttal evidence. *United States v. Baker Hughes,* 908 F.2d 981, 991 (D.C. Cir. 1990); *Federal Trade Commission v. H.J. Heinz. Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001).

[25] Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L. J. 1996 (2018); BAKER, *supra* note 3, at 74-80.

[26] Other economic forces relevant for competitive effects analysis, such as supply substitution and entry or the extent of rivalry, are not and should not be ignored when evaluating mergers. They are properly considered in other stages of merger analysis and other sections of the dMGs.

[27] dMGs App. 3 § B.3.

The relationship between market definition and market power and attention to the economic force of buyer substitution matter when applying the various "tools" identified in Section III as providing reliable bases to "demonstrate the validity of a candidate relevant market."[28] In some cases, those methods can support an appropriate market definition. Direct evidence of market power (method B) can also be understood as providing direct evidence that buyer substitution would not make it unprofitable for a hypothetical monopolist to raise the price of a relevant product within a geographic region; when the direct evidence can be understood in both ways, it could provide a basis for defining a market.[29] When direct evidence shows that the loss of competition between the merging firms (method A) would be expected to lead to at least a small but significant and non-transitory increase in price (or worsening of terms on other dimensions), it could provide a basis for defining a market in which the merging firms are market participants.[30] Those *Brown Shoe* practical indica (method C) that are indicators of buyer substitution, directly or through inference, can also provide a basis for defining a market.[31] In other cases, however, these three methods would not be useful for defining markets.[32] Without a connection to buyer substitution, the use of these tools for market definition may lead the agency to define markets unconnected with the exercise of market power.[33]

For these reasons, **we recommend** (a) that the dMGs explicitly relate market definition to market power (as by indicating that combining the products and locations in an antitrust market would allow a hypothetical monopolist to worsen the terms to trading partners, accounting for the economic force of buyer substitution, or more generally, trading-partner substitution); (b) that the dMGs' discussion of market power be framed by indicating that market definition focuses solely on trading partner

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[28] Perhaps the point of setting forth four methods for demonstrating the validity of a candidate market, or at least the point of highlighting the practical indicia, is to clarify that market definition can be undertaken with qualitative evidence and does not necessarily require quantification. If so, that (correct) point should be made explicitly. The dMGs might, for example, state that none of the four methods, including the hypothetical monopolist test, necessitates quantification, and that the probative value of quantitative and qualitative evidence can vary from case to case.

[29] *Federal Trade Commission v. Staples, Inc.*, 970 F.Supp. 1066 (D.D.C. 1997). The multiple interpretations of the pricing evidence in that case are discussed in GAVIL ET. AL, *supra* note 13, at 564-65.

[30] This could be the case, for example, with some horizontal mergers between sellers of differentiated products that are close substitutes. But in other cases, evidence of some competition between the merging firms would not be sufficient to determine that the competition is "substantial" without information about other sources of competition for the firms.

[31] Many of the practical indicia can be interpreted as indicators of buyer substitution but some cannot. Jonathan B. Baker, *Stepping Out in an Old* Brown Shoe*: In Qualified Praise of Submarkets*, 68 ANTITRUST L.J. 203 (2000).

[32] The discussion of the hypothetical monopolist test (method D) avoids this problem, though it would be helpful if the role of buyer substitution were emphasized more.

[33] Direct evidence of market power (method B) may support a reasonable conclusion as to the competitive effects of the merger even if it does not support a reasonable market definition. In such a case, the definition of the market may still matter for identifying an appropriate remedy.

substitution factors (demand (buyer) substitution factors when the harm is to buyers, and the analogue when the harm is to sellers); and (c) that the discussion of market definition methods A, B and C indicate that those tools can support defining a market to the extent they provide evidence about buyer substitution.

B. Mavericks and the Risk of Coordination (Guideline 3)

Although the definition of maverick in the dMGs, as "a firm with a disruptive presence in the market," is similar to the definition in the 2010 Guidelines, recent legal developments and economic research make clear that this definition is imprecise and misleading. The legal problem is that the court in *H&R Block* found this definition unhelpful because the government did not "set out a clear standard, based on functional or economic considerations, to distinguish a maverick from any other aggressive competitor."[34] In the recent research literature in economics, that problem is solved by defining a maverick as a firm with the incentive and ability to prevent coordination or prevent coordination from becoming more effective, regardless of whether the firm is observably disruptive.[35] The district court judge in *H&R Block* gestured in the direction of that definition when she explained that, while she did not find the "maverick" concept helpful, she found "particularly germane" the question of whether the acquire firm "consistently play[s] a role within the competitive structure of the market that constrains prices."[36] Accordingly, **we recommend** that the dMGs define a maverick as a firm with the incentive and ability to prevent coordination or prevent coordination from becoming more effective, regardless of whether the firm is observably disruptive.

C. Potential Competition (Guideline 4)

The dMG's discussion of potential competition in Guideline 4 does not take advantage of a valuable opportunity to clarify the analysis of potential competition. It does not distinguish between potential entrants that would compete in existing products and two other types of potential entrants: ones that would compete in future products, and ones that are competing in R&D. Making that distinction is important because the relevant case law, which addresses the loss through merger of anticipated rivalry in current products, requires that the potential entrant have plans to enter the market in which the acquiring firm competes within a reasonable time.[37]

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[34] *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 79 (D.D.C. 2011).

[35] More technically, a maverick is a firm that is most apt to be the binding constraint on coordination, for example by being nearly indifferent between going along with a high coordinated price and cheating on that price. *See* Joseph Farrell & Jonathan B. Baker, *Natural Oligopoly Responses, Repeated Games, and Coordinated Effects in Merger Analysis: A Perspective and Research Agenda*, 58 REV. INDUS. ORG. 103, 111-122 (2021) (explaining how the effect of a merger involving a maverick on coordination can be evaluated in the context of a formal model that potentially permits quantification).

[36] *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 80 (D.D.C. 2011).

[37] *Federal Trade Commission v. Steris Corp.*, 133 F. Supp.3d 962 (N.D. Ohio 2015); *see Federal Trade Commission v. Meta Platforms Inc.*, 2023 WL 2346238 (N.D. Cal. 2023).

As written, the dMGs appear to assume that any such requirement would also apply to a potential entrant that might compete in future products or R&D.[38] But, as the dMGs recognize in footnote 36, the economic analysis of acquisitions of future rivals or innovation rivals properly extends to raise concerns about the acquisition of firms with capabilities for entry or firms that have made investments that might facilitate entry, as well as the acquisition of firms with concrete plans to enter.

We recommend that the dMGs clarify that Guideline 4 does not address the acquisition of potential entrants in markets for future products or R&D markets (technology markets), and that the dMGs indicate that such cases should be analyzed instead along lines suggested by footnote 36.

D. Market Definition Holding in *Amex*

The dMGs concede too much in footnote 76, when describing the market definition holding in the Supreme Court's *Amex* decision.[39] Doing so will inappropriately encourage courts to extend the holding in that case to settings beyond what the decision requires, weakening both merger enforcement and non-merger enforcement. In particular, the footnote assumes without justification that the holding in *Amex* defining a relevant market encompassing both sides of a transaction platform applies under the Clayton Act as well as under section 1 of the Sherman Act, the statute at issue in the decision.

In addition, the footnote should clarify that if the *Amex* approach applies to market definition under the Clayton Act, it does not apply unless two conditions are met, not just the first: (i) the platform must be a transaction platform (a platform that matches users on both sides in a single, simultaneous transaction) and (ii) network effects must be so strong as to make it impossible for firms other than other transaction platforms to compete on either side of the platform.[40]

We recommend that footnote 76 be revised to indicate that the approach to market definition in *Amex* applies to Sherman Act § 1 cases only, and that if it applies to Clayton Act cases, it requires both a transaction platform and a showing that network effects are so strong as to make it impossible for firms other than other transaction platforms to compete on either platform side.

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[38] dMG footnote 36 suggests a reasonable analysis of the acquisition of potential future rivals focusing on the number of firms with capabilities and incentives to enter, and App. 2 § E discusses an analytical approach to evaluating mergers that would affect future competition and R&D competition generally. But footnote 36 does not disclaim application to potential entrants in future markets or R&D markets of the requirement in the potential competition case law that the potential entrant have plans to enter in a reasonable time, which frames the discussion in the text of Guideline 4.

[39] *Ohio v. American Express Co.,* 585 U.S. —, 138 S. Ct. 2274 (2018) (*Amex*).

[40] *Amex*, 138 S. Ct. at 2287. *See* Jonathan B. Baker, *What about the Supreme Court? The lurking threat to US antitrust reform,* 11 J. ANTITRUST ENFORCEMENT 154, 157 (2023); Nancy L. Rose & Jonathan Sallet, *Ohio v. American Express: The Exception Should Not Become a Rule*, 36 ANTITRUST 76, 78 (2022).

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Respectfully submitted,[41]

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Disclosure: During the past two years, I have consulted on two merger matters: a telecommunications industry merger with the Antitrust Division and another matter with a private sector entity that I am not authorized to disclose. I am not currently consulting for any client or entity with respect to the Merger Guidelines or any pending or contemplated merger. I served on the enforcement agency working groups charged with drafting the 1992 and 1997 Horizontal Merger Guidelines.

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[41] We are each joining these comments in our individual capacities and have identified our institutional affiliations for identification purposes only.

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Disclosure: I do not represent any entity with respect to these draft Merger Guidelines but frequently represent merging parties before the FTC and DOJ. I was a member of the FTC/DOJ joint working group charged with drafting the 2010 Horizontal Merger Guidelines.