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Some Comments for Improving the 2023 Draft Merger Guidelines

Steven C. Salop*

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*Professor of Economics and Law Emeritus, Georgetown University Law Center; and Senior Consultant, Charles River Associates These comments reflect my views and may not be shared by my colleagues at CRA or GULC, or any consulting clients or potential clients. No client or potential client has had any input into these comments.

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Some Comments For Improving the 2023 Draft Merger Guidelines

Steven C. Salop*

I. Introduction

1. There are aspects of the Draft Merger Guidelines (DMGs) that I like and other aspects that I do not like. I would say the same about the previous Guidelines. While I will explain these likes and dislikes of the DMGs, I want to stress that my goal for these comments is to improve the Guidelines, not to bury or praise them. For the most part, this means that my comments mainly are focused on improving the DMGs on their own terms. However, I will express my concerns about certain issues. Moreover I have suggested deleting one Guideline (Guideline 8) and substantially revising two others (Guidelines 6 and 7).

2. In what follows, some of my comments involve the structure and general approach of the DMGs, while others apply to analysis in the specific guidelines. Some are expository suggestions intended to make the points clearer to readers. Others are suggestions to add analysis that has been omitted. Some others involve proposals for significant revisions. Some of the proposed revisions suggest a more interventionist approach while others suggest less.

3. I believe that there are numerous useful advances in the DMGs. For example, I share the concern that competitive harms suffered by workers and other input suppliers have been given short shrift in merger enforcement. Acquisitions of potential entrants and nascent competitors also raise serious concerns. The 2020 Vertical Merger Guidelines needed to be revised and the approach of making it clear that foreclosure concerns can also arise in horizontal, complementary product and conglomerate merger transactions is a helpful addition. Given the importance of multi-sided platforms, and the complexities and confusion they engender, it is useful to include them explicitly. I also support the inclusion of regulatory evasion and the concerns raised by Commissioner Rosch in his *Ovation* concurrence. Explaining why certain evidentiary burdens should be shifted to the parties and explaining that skepticism towards certain rebuttal claims is also a good idea.

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4. I share the concern that merger enforcement has been under-deterrent and needs to be strengthened. I am also specifically concerned that the courts sometimes have imposed what appear to be excessive burdens of proof on the agencies, perhaps by ignoring insights from modern industrial organization economics and empirical evidence. Some judges also may have been too skeptical or dismissive of economic analysis presented at trial, while over-relying on testimony by self-interested executives, including promises that are inconsistent with the profit-maximizing incentives of the firms. In this regard, I hope that these Guidelines can raise awareness and influence judges to recognize these concerns.The DMGs are structured around merger law and litigation, not simply economic analysis. Unlike previous Guidelines, the DMGs quote judicial language and contain many legal citations. The various specific guidelines in Section II were characterized by Deputy AAG Susan Athey (in her opening remarks at the September 5 workshop[1]) as presenting the various types of theories and evidence that might comprise the Agencies' *prima facie* case in litigation.

5. There have been numerous comments about the DMGs.[2] Some commenters that I highly respect have raised serious concerns about this structure and fear that this approach will end up harming the credibility and staying power of these Guidelines.[3] That would be an unfortunate and unintended side effect. However, I also understand that simply providing the courts with modern and rigorous economic analysis in the 2010 HMGs has not corrected the under-deterrence problem. There are, of course, other reasons for this problem, including Agency budget constraints and Agency enforcement philosophy and priorities. Another reason is the excessive burden of proof that courts have appeared to demand from the Agencies. Influencing courts to moderate this burden is a likely goal of the drafters, a goal that I share, and a rationale for the structure of the DMGs. Thus, I recognize both the benefits of this approach and the risks raised by the commenters. But I do not claim to know the best answer at this time. I intend to read the critical comments in detail and may offer subsequent comments later on. But for the purpose of these comments, I will take the structure as given and attempt to improve the DMGs in that context.

6. A goal of all the previous Guidelines has been to influence courts. And they have. For example, the 1982 Guidelines had a dramatic influence. However, these DMGs are different in that they are more explicit about that goal. They seem geared particularly towards informing generalist judges with less experience or even familiarity with the antitrust analysis of mergers. I expect that was one of the reasons for the inclusion of the quotations and citations to merger cases.

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[1] https://www.ftc.gov/media/draft-merger-guidelines-workshop-september-5-2023

[2] I refer in various places to comments and views of "other commenters." These involve comments I have heard in conversations or read or heard in workshops and podcasts, blog posts and articles.

[3] For example, *see* Daniel Francis, *Comments on the 2023 Draft Merger Guidelines* (Sept. 12, 2023); Herbert Hovenkamp, *The 2023 Draft Merger Guidelines: A Review* (September 2023).

7. Many of these involve older Supreme Court cases that the DMGs characterize as "binding legal precedents." But I fear that merely quoting the language from these cases is incomplete. There could be benefits from also citing and including language from more recent case law that supports the approach in the DMGs. After all, the Agencies have won most litigated cases since 2001.[4] There also would be a benefit to acknowledging the context, whether the language is dicta, and where the doctrine arguably has not been followed by the agencies or courts. Perhaps this is too much to expect of the Guidelines. But in that case, the solution is to have an accompanying legal Commentary.

8. Moreover, in that the goal is to inform and then influence these judges, it similarly would be useful to provide them with more of the economic analysis earlier in the DMGs and to place more emphasis in the Overview on the anticompetitive economic consequences of illegal mergers. This can be very useful for inexperienced judges who might be reluctant to deviate from certain permissive recent legal decisions or might be reluctant to demand a less excessive burden of proof on the agencies.

9. This also would be a way to make the connections between modern economics and merger law. After all, economic analysis is at the core of merger law. I provide some concrete suggestions below, including an insert into the Overview, placing the economic analysis into the main body rather than an Appendix, and pointing to the relevant economic analysis to be applied in specific guidelines. I also suggest that the Agencies draft a Supplementary report that provides a partial list of specific examples of weak or failed enforcement, including remedies, as discussed in more detail below. This also can increase awareness and affect the attitudes of busy judges.

II. Lessening of Competition, Market Power, and Economic Effects

10. As mentioned above, the DMGs are structured around the issue of whether a merger violates Section 7. The DMGs explain (in footnote 21) that they "pertain only to consideration of whether a merger or acquisition is illegal."

11. Some might take this to mean that economic effects should be irrelevant or have much lower priority. This view of merger law would make no sense. Merger law is filled with economic concepts. Perhaps most notably for the DMGs, the D.C. Circuit panel in the *Heinz* (that included then-judge Garland) recognized that "Merger enforcement, like other areas of antitrust, is directed at market power."[5]

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[4] Logan Billman and Steven C. Salop, *Merger Enforcement Statistics 2001-2020*, 85 ANTITRUST L. J. *1 (2023).*

[5] *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)).

12. My close reading of the DMGs also suggests that any such interpretation that economic effects are irrelevant was not intended. The reference (on page 5) to "binding legal precedent" is followed immediately by the statement that the citations "do not necessarily suggest that the Agencies would analyze the facts in those cases identically today." The paragraph goes on to explain that the Agencies "adapt their analytic tools to new learning," and apply "core principles … in a matter consistent with modern analytic tools and market realities." This is a reference to economic analysis even if the term was not being. The previous paragraph stressed the fact that merger review is "ultimately a fact-specific exercise," and that the "Agencies assess any relevant evidence to evaluate whether the effect of the merger may be substantially to lessen competition or tend to create a monopoly." Moreover, these DMGs are filled with economic concepts.

13. Even accepting arguments that economic welfare effects were not the primary Congressional goals,[6] I disagree with the associated claim that merger enforcement should be driven solely by law, not economics -- for a simple practical reason. Because of resource constraints, the Agencies cannot challenge every merger that may violate Section 7. Therefore, it makes sense to challenge the likely illegal transactions that would do the most economic damage to consumers, workers and suppliers. This means that the economic effects must retain a very high priority even though the mission of the agency is law enforcement.

14. A related issue is that the current structure of the DMGs might be interpreted by some readers as suggesting that the only relevant concern is the increase in concentration or the change in market structure, not market power or direct economic consequences. (I am thinking both of Guidelines 6 and 8, but also some language elsewhere.) For example, the summary "titles" and focus of the specific Guidelines are framed in terms of concentration and market structure rather than in terms of market power (or monopoly) power. Because the detailed economic analysis is not integrated in detail into the discussion of the specific Guidelines, some readers might infer that these Guidelines are intended to support challenging a merger solely on the grounds that it would increase concentration.

15. This inference seems incorrect. Lessening of competition is defined in terms of economic effects in several places. For example, as explained in Guideline 2, "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." Appendix 2 has a similar detailed discussion, including the fact that the lessening of competition can be gauged in terms of higher prices,

[6] That is, I understand that Congress has the power and the right to pass laws that have adverse economic effects.

lower wages, reduced quality, reduced innovation and so on, not simply an increase in concentration.[7]

16. However, to clarify the focus of the DMGs and correct any possible misimpression of this fundamental issue, it would be very useful to add more detail in the Overview. This discussion can make it perfectly clear that the DMGs are focused on the *economic consequences* of the lessening of competition from mergers, rather than simply *intrinsic adverse effects* of mergers increasing market concentration. As every antitrust teacher notes at the outset, every horizontal merger eliminates competition between the merging parties and increases concentration, even a merger between pygmies in a market with giants. In fact, this is one reason why merger enforcement has focused on the economic consequences.

17. For these reasons, I think it is very important for the Guidelines to place more emphasis on the economic concern that mergers can cause economic harms from the effects of increasing or entrenching market or monopoly, and the general relationship of these economic impacts and increases in concentration. In economic terms, competition is lessened when a merger achieves, enhances, or entrenches market power or monopoly power. It is these effects that directly harm customers, workers, and other suppliers.[8] To repeat the language quoted in *Heinz,* "Merger enforcement, like other areas of antitrust, is directed at market power."[9]

18. In this regard, it is not necessary for the Agencies to calculate and compare the post-merger market power to a perfectly competitive market. All that is necessary is to evaluate the competitive effects of the merger which are the likely effects of the change in market power. This is not an abstract exercise. Instead, it involves evaluating whether the merger raise unacceptable risks of leading to higher prices (or lower wages in case of labor market effects),

[7] Section B of Appendix 2 explains how competition "can lead firms to set lower prices or offer more attractive terms when they act independently than they would in a setting where that competition was eliminated by a merger." Section C of Appendix 2 explains that "Competition among sellers can significantly enhance the ability of a buyer to obtain a result more favorable to it, and less favorable to the sellers, compared to a situation where the elimination of competition through a merger prevents buyers from playing those sellers off against each other in negotiations." Section D explains that "The loss of competition through a merger of two firms may lead the merged firm to leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, lay off or stop hiring workers, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another market so as to raise the price in the former market." Section E explains that "competition between firms may lead them to make greater efforts to offer a variety of products and features than would be the case if the firms were jointly owned."

[8] Indeed, in *Philadelphia National Bank*, while the presumption was based on concentration the decision was not based on concentration alone. Instead, it was based on anticompetitive consequences of increased concentration on small customers.

[9] *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)).

lower output, less innovation, etc. This is a much easier analysis than defining and estimating the degree of market power explicitly.

19. The Overview can clarify that the level and increase in concentration are useful evidence in merger enforcement for predicting the economic competitive effects of horizontal mergers.[10] This connection between market power effects and concentration is valid even though not every horizontal merger that increases concentration is anticompetitive (which is why Guideline 1 is a *rebuttable* presumption). Similarly, competition can be lessened, and market power can be increased by a horizontal merger, even if the increase in concentration is small, for example when a maverick firm is acquired. A high market share or level of concentration also can be is predictive of the ability and incentive to foreclose in non-horizontal mergers.[11] And there similarly can be anticompetitive effects in purely non-horizontal mergers even though the level of concentration does not rise.[12] Thus, increases in concentration also should not be treated as a straitjacket that limits enforcement of vertical mergers and other mergers that raise foreclosure concerns. The Agencies can use a variety of means to show that the merger will lead to adverse economic effects from a lessening of competition.

20. I specifically recommend adding a new paragraph along the following lines.[13]

> The unifying economic theme of these Guidelines is that mergers should not be permitted if they pose a serious risk[14] of substantially lessening competition or tending to create a monopoly in any relevant market by creating, enhancing, or entrenching market power or facilitating its exercise. These are the economic concerns associated with increases in market concentration. A merger can achieve or enhance market power and lessen competition in an output market if

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[10] I do not mean to ignore the broader concerns expressed that higher concentration might harm democracy in a systemic away by its effects on political power or campaign finance. However, those systemic effects cannot so easily be adjudicated on a case-by-case basis. Thus, they are more relevant to setting the overarching legal standard. Greater concerns with effects on democracy would call for a lower burden on the agencies to show anticompetitive effects in all mergers and a higher rebuttal burden on the parties. Moreover, as noted above, agency resource constraints also suggest placing a higher priority on mergers that cause the largest economic harms.

[11] In a recent article, Serge Moresi and I constructed a model in which input foreclosure can be seen as leading the same type of increase in concentration as generated by partial ownership. Serge Moresi and Steven C. Salop, *When Vertical is Horizontal: How Vertical Mergers Lead to Increases in 'Effective Concentration,* 59 REV. IND. ORG. 177 (2021). However, I am not suggesting that the Guidelines should base a numerical presumption or inference on this model. It would be premature to do so.

[12] These facts might also explain why the DMGs lack structural safe harbors.

[13] This updates text from the 2010 HMGs. Similar, but somewhat different language is proposed in Jonathan B. Baker et. al. *Comments of Economists and Lawyers* (September 13, 2023).

[14] An alternative would be to refer to “significant risk.”

> it encourages one or more firms to raise the price of outputs, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. A merger similarly can lessen competition in an input market if it encourages one or more firms to reduce the price of inputs, reduce input purchases, diminish innovation, or otherwise harm suppliers (including workers) as a result of diminished competitive constraints or incentives. A merger also can entrench market power and prevent market deconcentration, thereby reducing the likelihood of lower output prices (or higher wages and other input prices) and other benefits of increased competition that likely would have occurred but-for the merger.

21. At the same time, it should be made clear that this does not mean that the Agencies are required to satisfy a high burden of proof. In particular, the "sliding scale" standard applied in *Heinz*[15] raises the rebuttal burden on the merging parties when concentration (and change in concentration) are high, thereby reducing the ultimate burden on the Agencies. For this reason, it is important to give this sliding-scale standard significant visibility in the Overview.

22. The Guidelines also should stress the legal point that a merger violates Section 7 if it lessens competition "in *any* relevant market." This key point is made in the Market Definition section of the DMGs. But it is sufficiently important – and can lead to erroneous decisions if it ignored -- that it should be made prominent in the Overview as well.[16] This emphasis is needed because market definitions are not unique (as the DMGs point out). There might be a relevant market for "beer," plus also a relevant market for "craft beer," plus also a relevant market for "all malt beverages," and plus also a relevant a market for "all alcoholic beverages." The existence of these other relevant markets would not mean that anticompetitive effects in the "beer" market or even the "craft beer" market are irrelevant.

23. As mentioned above, greater emphasis on economic consequences can be useful for newer or inexperienced judges who might be reluctant to deviate from certain permissive recent legal decisions or might be reluctant to demand a less excessive burden of proof on the agencies. While the DMGs have numerous citations to case law (and I have suggested more), the DMGs do not cite the modern economics literature that provides support for the analysis in the DMGs. However, rather than add such citations to the Guidelines, I suggest that it would be more productive for the Agencies to prepare a supplementary economics Commentary that reviews the supportive economic literature. The Commentary most pointedly could also identify and

[15] As stated in *Heinz* at 725, "[a]s we said in Baker Hughes, "[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." 908 F.2d at 991."

[16] In the DMGs, the reference is made on page 1 to "any line of commerce," but it is not connected to the concept of a relevant market.

discuss various specific mergers (or groups of mergers) that were cleared but turned out to be anticompetitive on balance. This discussion also might include discussion of specific mergers with insufficient or otherwise failed remedies. The numerous published econometric retrospectives would be useful both for identifying specific false negatives and providing evidence, as well as drawing systematic conclusions.[17] A Commentary with these examples could be a useful and possibly significant input into the awareness and attitudes of judges.

24. The Guidelines have placed together the economic analysis that applies to all 13 Guidelines, rather than including the relevant economic analysis repetitively in each Guideline. It appears that some readers have erroneously interpreted this placement of the economics section in an Appendix as signaling that economic analysis has been relegated to a lower priority or will be ignored by the agencies, and that the DMGs are signaling to judges that they should ignore. This impression is easy to fix. First, this rationale for collecting the economic analysis in one place can be clearly stated. Second, the discussion of the specific guidelines can point to the relevant economic analysis in the economic section. Third, the economic analysis can be placed in the main body rather than an Appendix. This could be a new Section V. But the drafters instead might consider the partial integration of placing Appendices 1 and 2 after Section II and Appendices 3 and 4 after Section III.

III. Guidelines Structure

25. As noted earlier, Susan Athey made the point that the DMGs are structured explicitly around the multi-step process of *prima facie* case, rebuttal, and ultimate conclusion. That is, in step 1, the Agency seeks to satisfy the burden of establishing its *prima facie* case, and possibly strengthen its *prima facie* case, which then would shift the burden to the merging parties to rebut. This burden might be shifted either with a legal presumption or sufficient evidence to infer a sufficient likelihood of anticompetitive harm, or a combination of the two. As emphasized by *Baker Hughes* and *Heinz*, a stronger *prima facie* case raises the rebuttal burden on the merging parties, thereby strengthening the Agencies' overall position.

26. Note: To clarify my terminology, I refer to the concept of a "sufficient evidence to infer" as an "anticompetitive inference." This inference amounts to what might be called an "economic" or "evidentiary" presumption, as distinct from a "legal presumption" derived from a statute or binding legal precedent. Of course, even a legal presumption is based on evidence that forms the basis for the inference. For this reason, the choice of the term "inference" over

[17] This should include a substantial number of mergers and should provide summary descriptions, not just citations. By doing so, readers' understanding would be enhanced. Some possible candidate mergers that have been flagged include Miller/Coors, LiveNation/Ticketmaster, Jeld-Wen/CMI Google/DoubleClick, Google/AdMob, Albertsons/Safeway, Hertz/Whirlpool/Maytag. Hospital mergers and airline consolidation also are broader examples. For some other sources of specific mergers, *see e.g.,* Orley Ashenfelter and Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Mergers on the Enforcement Margin*, 53 J. LAW ECON 417 (2020); Marissa Beck and Fiona Scott Morton, *Evaluating the Evidence on Vertical Mergers*, 59 REV. IND. ORG. *273 (2020)*

"presumption" mainly serves to distinguish the evidence of "structural presumption" introduced in *Philadelphia National Bank* from other evidence that is sufficient to shift the burden.[18]

27. I interpret the specific guidelines in Section II as taking a general approach of identifying the various ways in which the Agencies might satisfy their *prima facie* burden and possibly strengthen their case. Section IV then analyzes the types of rebuttal claims and sufficient evidence that the parties might provide to raise material questions of fact and shift the burden back to the Agencies.

28. The fact that the specific Guidelines are intended to specify the sufficient evidence (or legal presumptions) sufficient to satisfy the Agencies' *prima facie* burden (and possibly strengthen the case) and shift the burden to the merging parties is not made sufficiently clear.[19] While this structure is generally indicated by the discussion on page 2 (where *Philadelphia National Bank*, but not *Baker Hughes* or *Heinz* are cited), it is not said directly. (This also may have been a source of misinterpretation of the DMGs by some commentors.) This is an important intended feature of the Guidelines, as discussed above. Given this intention, readers would benefit from making it more explicit.

29. In addition to making the structure explicit, it would be clearer if these Guidelines were "Titled" and then explained in terms suggesting satisfaction of the Agencies' *prima facie* burden. I have drafted suggested new titles for the eight primary guidelines. They have the following form: "The Agencies infer a serious likelihood of significant competitive harm from evidence that …"[20] While these titles are focused on the *prima facie* burden, I have chosen to employ the phrase "serious likelihood of significant competitive harm" rather than the arguably more precise legal formulation such as "sufficient likelihood of competitive harm to satisfy the *prima facie* burden." Because titles are focused on the Agencies' *prima facie* burden, they do not identify cognizable rebuttal claims.

30. An important feature -- and caveat – of my suggested titles is that they reflect my proposed revisions to some of the specific guidelines that are discussed and developed below.

[18] U.S. v Philadelphia National Bank 374 U.S. 321 (1963) The "structural presumption" can be seen as is a legal presumption that was based on a combination of the statute and its legislative history along with decision theory considerations and economic analysis. As stated in the opinion, "Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration. Furthermore, the test is fully consonant with economic theory." *Id.* at 364.

[19] The DMGs current state (on page 2) that Guidelines 1-8 identify several "frameworks" while Guidelines 9-12 "explain issues that often arise" when applying those frameworks. This does not mention the *prima facie* burden.

[20] One possible alternative would be "serious likelihood of *substantial* competitive harm." Another would be *significant* likelihood of *substantial* competitive harm)

31. With those explanations and caveats, here are my suggested re-titles for revised versions of the eight specific guidelines.

> <u>Guideline 1</u>: The Agencies infer a serious likelihood of significant competitive harm from evidence that a horizontal merger in a highly concentrated market or by a firm with a substantial market share that substantially increases concentration share.
>
> <u>Guideline 2</u>: The Agencies infer a serious likelihood of significant competitive harm from evidence that a horizontal merger eliminates substantial head-to-head competition.
>
> <u>Guideline 3</u>: The Agencies infer a serious likelihood of significant competitive harm from evidence that a horizontal merger substantially increases the risk of coordination.
>
> <u>Guideline 4</u>: The Agencies infer a serious likelihood of significant competitive harm from evidence that a dominant (or substantial) competitor merges with one of a small number of important likely potential entrants.
>
> <u>Guideline 5</u>: The Agencies infer a serious likelihood of significant competitive harm from evidence that the merged firm has a substantial ability and incentive to foreclose rivals' access to one or more products or services that it sells or buys.
>
> <u>Guideline 6</u>: The Agencies infer a serious likelihood of significant competitive harm from foreclosure when evidence indicates that the merged firm controls a large share of one or more products or services that are critical for the downstream rivals of the merged firm. *[Note that I have proposed a substantial revision to this guideline.]*
>
> <u>Guideline 7</u>: The Agencies infer a serious likelihood of significant competitive harm from evidence that one of the merging firms is dominant and has the ability and incentive use the merger to entrench or extend its dominance. *[Note that I have proposed to revise the dominance threshold from 30% to 50%, along with some other changes.]*
>
> <u>Guideline 8</u>: *[Note that I have proposed to delete this guideline.]*

32. I think that these specific guidelines would be clearer if they were revised along these lines and re-titled accordingly. Any title must be a summary and my proposed titles may not be the best formulations. Some of the Guidelines go beyond these summary titles. The discussion of the specific guidelines can go into more detail to better indicate why the evidence is sufficient to satisfy the Agencies' *prima facie* burden and strengthen the inference.

33. If the agency satisfies its *prima facie* burden, the burden then shifts to the merging parties to provide sufficient evidence to rebut the *prima facie* case under the sliding scale standard.

Baker Hughes frames this as a "burden of production." However, this does not mean that a mere scintilla of evidence would satisfy the burden of production. The parties instead must provide "sufficient" rebuttal evidence to satisfy their burden of production. This is made clear by the "sliding scale," which demands more evidence in response to a stronger legal presumption or inference from evidence supporting the *prima facie* case. This "sufficiency" requirement amounts to a type of "burden of proof" (i.e., "burden of persuasion"), in fact, if not in terminology.[21] This need for sufficient rebuttal evidence is contained in previous Merger Guidelines and well accepted in merger law. For example, efficiency claims must be "verified" and shown to be merger-specific, not simply asserted. A claim of easy entry must be supported by sufficient evidence that entry would be timely, likely, and sufficient.

34. It also would be useful for the Agencies to provide support for the idea that the Section 7 legal standard is and should be less demanding on the Agencies than "more likely than not." This issue has arisen in recent cases. Since one audience for the Guidelines is judges, as suggested by inclusion of the legal citations, more attention should be given to this burden of proof issue. This could benefit from having discussion in addition to the citations now included.

35. The following points might be useful to raise awareness and affect attitudes.[22]

    a. First, the language of the Clayton Act and Section 7 case law reject an excessive burden of proof on the Agencies. It is clear from the legislative history of the Clayton Act that the Section 7 standard is intended to set a lower burden of proof on the plaintiff than does Section 1.[23] Judge Bork made the same point in *Rothery*.[24] Applying the often-quoted language of "incipiency," the commonly stated Section 7 standard is "appreciable danger" or "reasonable probability" of anticompetitive effects.[25] These terms and the statute itself signal requiring something less than a showing that the

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[21] This is why the distinction between burden of production and burden of persuasion is "elusive," as noted in *Baker Hughes*.

[22] *See e.g.,* Steven C. Salop, *A 'Probability of a Probability': Understanding the Section 7 Reasonable Probability Standard*, __ U. BALT. L.R. __ (2024).

[23] The legislative history of the Clayton Act in 1914 indicates that the House and Senate conferees explicitly adopted a compromise language that changed the language from "is" to "may be." This was explained by conferee Senator Chilton as follows: "That compromise was the adoption of the words 'may be' instead of the word 'is,' so that instead of reading 'where the effect is' the bill now reads, 'where the effect may be'; that is, where it is possible for the effect to be…" Earl W. Kintner, 4 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAW AND RELATED STATUTES 2629 (1978). I am grateful to Daniel Francis for flagging this legislative history.

[24] Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 220 (D.C. Cir. 1986))

[25] Unlike Section 2, for example, when a merger raises substantial risks, Section 7 requires the defendant to establish disproportionate benefits, not the plaintiff to show disproportionate harm.

anticompetitive effects are "more likely than not." Judge Posner summarized this well in *Elders Grain*, stating that "doubts are to be resolved against the transaction."[26]

b. Second, the application of economic decision theory ("error cost") analysis also suggests that the burden on the agencies should be lower than "more likely than not."[27] False positives tend to be less costly to society than false negatives. Anticompetitive mergers that create entry barriers or eliminate significant competitors can prevent markets from self-correcting, thereby turning false negatives into long-lasting opportunities for profit at the expense of workers, consumers, or other counterparties. By contrast, the fact that firms can achieve efficiencies through internal growth or less concerning mergers holds down the cost of false positives.[28] In addition, as explained by Judge Posner in an article, deterrence is reduced by false positives as well as false negatives.[29] The fact that merger remedies often have been insufficient also suggests greater concerns with false negative.[30] Agency budget constraints inevitably lead to under-detection, fewer challenges and weaker consent decrees, all of which then lead in turn to less deterrence of anticompetitive merger proposals.[31]

[26] FTC v. Elders Grain, Inc., 868 F.2d 901, 906 (7th Cir. 1989).

[27] Decision theory considerations were used in *Philadelphia National Bank*, albeit not by name, As explained there, "And so, … without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." *Philadelphia National Bank* at 362.

[28] For general analysis of these points, see, e.g., Jonathan B. Baker, *Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015); Andrew I. Gavil and Steven C. Salop, Probability, *Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 UNIV. PENNA. L.R. 2107 (2020).

[29] Both false positives and false negatives reduce the incremental benefits of compliance over non-compliance. False negatives decrease the likelihood that non-compliant behavior will lead to liability. False positives increase the likelihood that compliant behavior will lead to liability. The incentive to comply depends on the difference in the likelihood of penalties for non-compliance relative to compliance, and both types of errors reduce this difference. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. R. 1477, 1484 (1999). For a simple technical example, see Henrik Lando, Does *Wrongful Conviction Lower Deterrence?*, 35 J. LEGAL STUD. 327, 329–30 (2006). See also Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647, 2668- 69, 2669 n.60 (2013)

[30] The FTC's 2017 remedy self-study found systematic evidence of insufficient consent decrees. See Fed. Trade Comm'n, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics*, at 7 (Jan. 2017).

[31] Steven C. Salop and Jennifer E. Sturiale, *Fixing "Litigating the Fix,"* __ ANTITRUST L.J. __ (2023)(forthcoming).

36. Before turning to the specific guidelines, I have some comments on rebuttals and merger remedies. I am placing these in advance because some of my comments on specific guidelines apply to these sections.

IV. Rebuttal Claims

37. Section IV of the DMGs sets out several possible rebuttal arguments: (1) Failing Firms; (2) Entry and Repositioning; (3) Procompetitive Efficiencies; and (4) Structural Barriers to Coordination.

38. This list fails to discuss two common rebuttal claims that I recommend be added. This discussion of these two claims can include discussion of evidence relevant to evaluating their validity and sufficiency, as well as any relevant limitations on those rebuttal claims.

    a. Sufficient Ongoing Market Competition: A common rebuttal claim is that market competition among established firms is sufficiently strong that the merger will not lead to anticompetitive effects. Repositioning is mentioned in Section IV.B, but repositioning is not the only mechanism. Non-merging established competitors might take this opportunity to expand their competitive efforts to fill the competitive gap created by the merger in ways other than strictly repositioning. Anticompetitive unilateral or coordinated effects also might be deterred or undone by powerful buyers with countervailing bargaining power (or by powerful sellers in the case of buyer-side harms).[32] Coordination might be deterred by maverick competitors or various other complicating factors.

    b. Weak (or Flailing) Acquired Competitor: Merging parties sometime claim that the acquired firm is "weak" or "flailing," such that the loss of its competition would have no anticompetitive effect. Section IV explains that the agencies will evaluate such claims under the narrow conditions required for the "failing firm defense." However, a rebuttal based on the claim that the acquired firm's market share overestimates its competitive impact might be distinguished from the failing firm *defense.* The merging parties instead might be basing their rebuttal claim on the view in *General Dynamics* that market shares may not provide an accurate portrayal of competitive conditions. If the agencies are skeptical of such claims, it might be worthwhile to explain why such claims tend to be overstated or why the testimony and economic evidence typically offered tends to be unreliable or lacking in credibility.

39. These two rebuttal factors are anticipated in the analysis in the economics appendix. However, there is no reason for readers or courts to hunt for them, and including these would explicitly

[32] As noted in the 2010 HMGs, powerful buyers may only protect themselves, while other customers are harmed. And powerful buyers might even use their power to induce sellers to discriminate against or raise the costs of rivals. The same points apply to powerful sellers in the comparable buy-side mergers.

enhance the credibility of the Guidelines by reflecting better what the courts do today. Moreover, their absence might create confusion.

40. As will be discussed in Guideline 5, there are common rebuttal claims that apply to foreclosure allegations that also could be added.

41. The DMGs explain in Guideline 5 that the Agencies will give "little weight" to claims of reputational harms unless they are supported by objective evidence. While stated here with respect to foreclosure concerns. I assume it is meant to apply across-the-board. Thus, to make the guidance clearer to readers, including judges, it should be included in Section IV as well.

42. I have several comments with respect to the exposition of the Efficiency Rebuttal Section IV.3.

    a. First, this Section begins by making the doctrinal point that efficiencies may not be used as a "defense" to anticompetitive mergers. It then goes on to explain that efficiencies can be used as a "rebuttal factor" to show that the merger likely will not be anticompetitive. This paragraph may have confused some readers who are wondering if efficiency claims are cognizable or not. (I know from experience that this distinction between a defense and a rebuttal factor is confusing to law students.) An explanatory sentence (and perhaps a footnote with a cite to a relevant case) would be useful for inexperienced readers. The sentence contained in the last paragraph in the section ("To overcome evidence that a merger may substantially lessen competition, cognizable efficiencies must be of sufficient magnitude and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market.") also might be moved up to this first paragraph.

    b. Second, the section does not contain any reference to the sliding scale standard set out in *Heinz*. As noted above, this is an important point that deserves greater emphasis with respect to efficiency claims. The sliding scale would treat mergers to monopoly as the limiting case, which can place into context the Agencies' view that efficiencies cannot justify merger to monopoly; this point is now expressed in the final sentence of the section ("Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly."). This sentence also might be moved up.

    c. Third, a citation to *Philadelphia National Bank* also should be included in footnote 103 regarding out-of-market efficiency claims.

43. Section IV.3.D treats cost-savings efficiencies as non-cognizable if they will accelerate a trend toward concentration (as analyzed in Guideline 8) or vertical integration (as analyzed in Guideline 6). As I discuss in detail below with respect to those specific guidelines, this non-cognizability could be counterproductive to competition by forcing small firms to either invest and grow internally – or else shrink relative to larger competitors. This the latter can lead to a market with higher concentration, more market power, and less competition.

44. Finally, unlike earlier versions of the Guidelines, the DMGs do not explicitly flag conditions under which there are unlikely to be anticompetitive effects.[33] Moreover, even where the DMGs mention metrics that normally are used to signal lack of concerns, the DMGs leave open the possibility of other factors might warrant a challenge.[34] Because the DMGs cover vertical as well as horizontal mergers, I understand why there is not a safe harbor based on changes in market concentration. But the failure to point out situations where concerns are less likely, or that many mergers are beneficial or competitively neutral, has led some commenters to fear that the scope of possible liability under the DMGs is unbounded. It would be important to correct this impression.

V. Merger Remedies

45. Previous versions of the Merger Guidelines have not focused on remedial issues. Footnote 21 explains that this is also the approach of the DMGs. However, because almost all the recent challenges have been "litigate the fix" cases, it might be useful to make an exception to flag that issue and make a comment or two.[35]

46. Moreover, the DMGs do make at least one comment about remedies. Guideline 5 explains that" the Agencies are unlikely to credit claims or commitments to protect or otherwise avoid harming their rivals that do not align with the firm's incentives." The Guidelines also might explain this skepticism, perhaps citing the various Agency remedies reports.

47. This skepticism makes economic sense. As illustrated by the history of sectoral regulation, the firms have better information than the agencies and courts, so the firms may be able to design various ways to foreclose that have not been contemplated. This same point also applies to commitments to continue to compete with rivals or commitments to maintain intra-firm competition, such as those made in *Penguin.*

48. In this regard, it would be very useful to have courts include provisions in their remedial orders that would mandate modifications if the ordered remedy failed to preserve competition.[36]

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[33] For example, The 1992 HMGs state that HHI increases of less than 100 points in moderately concentrated markets are "unlikely to have adverse competitive consequences and normally require no further analysis." (Para 1.51(b).) An analogous statement is made in the 2010 HMGs with respect to unconcentrated markets. (Para 5.3).

[34] For example, in Guideline 8, after discussing the threshold based on a 200 point HHI increase, the DMGs state that in the alternative, "it may be established by other facts showing the merger would increase the pace of concentration."

[35] Steven C. Salop and Jennifer E. Sturiale, *Fixing "Litigating the Fix,"* __ ANTITRUST L.J. __ (2023)(forthcoming).

[36] This was a feature of the DOJ's *Assa Abloy* settlement. I have previously suggested the benefits of such modification provisions and various ways to structure them. Steven C. Salop, *Modifying Merger Consent Decrees: An Economist Plot to Improve Merger Enforcement Policy*, 31 ANTITRUST 15, 17 (2016).

VI. Discussion Of Specific Guidelines

49. I will next discuss the specific guidelines. These specific guidelines are best framed in terms of evidence sufficient to satisfy (and possibly strengthen) the agency's *prima facie* burden and shift the burden to the merging parties to rebut. In my view, the most controversial guidelines are G6-G8, as discussed below.

50. The DMGs make the point on page 2 that a particular transaction may raise concerns that involve more than one of the 13 Guidelines. It is similarly clear that a particular anticompetitive mechanism can implicate multiple Guidelines. For example, the economic analysis and harms from foreclosure are the focus of Guideline 5. But foreclosure concerns are also raised in Guidelines 6, 7, and 10. Guideline 7's concern with entrenchment caused by the acquisition of a nascent competitor by a dominant firm also would be covered by Guideline 4. And so on. This might be confusing to readers or to courts that want to apply only one Guideline to each allegation in the complaint. Thus, it is important to make sure that these inter-relationships are clear, a point that might be clarified in the revision.

51. One useful feature of the 2010 HMGs was the inclusion of hypothetical examples to illustrate certain concepts in a concrete way. Such examples can help readers to better understand and apply tricky or subtle concepts. I suggest that the agencies consider adding such examples. If there is a concern that they will interrupt the flow of the document, they can be placed in an Appendix and referenced when the issues arises in the main text.

A. Guideline 1:

52. *Suggested Title: The Agencies infer a serious likelihood of significant competitive harm from evidence that a horizontal merger in a highly concentrated market or by a firm with a substantial market share that substantially increases concentration share.*

53. Guideline 1 sets out the anticompetitive structural presumption from *Philadelphia National Bank* and applied by *Baker Hughes*, *Heinz,* and other cases. The DMGs revert the HHI trigger back to the 1800 level from the 1982-97 Merger Guidelines, but with a 100 threshold for the increase in the HHI. The DMGs make the key point is that the 2500 HHI level in the 2010 HMGs was intended to reflect current practice, not the law or desired policy. And the current practice arguably was limited by budget constraints, agency risk aversion and the enforcement preferences of previous administrations.[37]

54. Concerns about underenforcement in the context of the Section 7 incipiency standard's greater emphasis on false negatives than false positives supports this lower threshold for applying an

[37] I also have supported this reversion to an 1800 HHI level. Steven C. Salop and Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go From Here?* 58 REV. IND. ORG. 81 (2021); Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269 (2015). I did not consider the possible reduction change.

anticompetitive threshold, as discussed above. The recent economics article by Nocke & Whinston provides economic support for the low threshold increase in the HHI.[38]

55. Some commenters might seem to suggest that this lower HHI threshold signals that the Agencies will now bring challenges for mergers with HHIs below 2500. Other commenters suggest that setting the lower level is irrelevant because the budget-constrained agencies will still only challenge mergers with HHIs above 2500. But I think there is another point that is being ignored by both these comments. The key effect of lowering the HHI threshold will strengthen the presumption that is obtained from a specific HHI level. For example, under the 2010 HMGs, an HHI of 2600-2800 would be considered as barely satisfying the presumption. This was an unintended but anti-enforcement message sent by the 2010 HMGs. But when the HHI threshold is 1800, then an HHI of 2600-2800 instead will be seen as clearly satisfying the presumption. And, as a result, the *Baker Hughes* and *Heinz* "sliding scale" will demand more rebuttal evidence from the merging parties to satisfy their Step 2 burden of production.

56. Guideline 1 has a separate anticompetitive presumption when one merging has a share of at least 30% and the other firm has a share high enough that the increase in the HHI would exceed 100 points (e.g., 30% plus 2%).[39] This 30% share is formally drawn from language in *Philadelphia National Bank,*[40] and it has been cited in the more recent cases that have continued to flag the presumption (i.e., *Bertelsmann, T-Mobile Energy Solutions)*. However, without economic justification it likely will be seen as a very weak presumption.[41] If the agencies intend it instead to be treated as a strong presumption, it should explain the economic justification for that presumption as well as the legal one.[42]

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[38] Volker Nocke and Michael D. Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 AM. ECON. REV. 1915 2022)

[39] This is also close to that market share in the "leading firm proviso" in the 1982 Merger Guidelines that applied when where one merging must have a share of at least 35% and other a share of at least 1%.

[40] Some commenters have noted that the combined share in the Philadelphia National Bank case was approximately 35%. While not calculated at the time, the post-merger HHI likely exceeded 2000. Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269 (2015).

[41] A 30% share was used in Guideline 7 as is sufficient to characterize the firm as "dominant." However, as discussed below, my view is that 30% is more likely a proxy for market power than dominance.

[42] Carl Shapiro has suggested a methodology to show the relevance of the combined market shares of the merging firms and the increase in the HHI, based on the GUPPI and the assumption proportional diversion. If the 2 merging firms have shares of S1 and S2, there is proportional diversion among the firms in the market, and the aggregate elasticity is zero, then the diversion ratio from firm 2 to firm 1 is DR21 = S1/(1-S2). If S2 is relatively small, then one can approximate 1-S2 = 1/(1+S2), and the diversion ratio DR21 = S1 + S1S2. Assuming further that the prices (P) and the margins (M) of the two firms are equal, then the Firm-i GUPPIi (i= 1,2) is given by

57. Unlike previous iterations of the Merger Guidelines since 1982, there is no statement in Guideline 1 that certain low levels of concentration and changes in concentration statistics suggest that adverse competitive consequences are unlikely and that transactions in those circumstances normally require no further analysis. This absence of any safe harbors has led some to wonder whether the agencies intend to pursue matters where the merging firms' market shares are at the levels of *Vons* or *Brown Shoe*. As noted above, the Guidelines explain that the Agencies intend to analyze the facts in light of new learning.[43] This issue is worth further clarification.

B. Guideline 2

58. *Suggested Title: The Agencies infer a serious likelihood of significant competitive harm from evidence that a horizontal merger eliminates substantial head-to-head competition.*

59. Guideline 2 contains and basically tracks the basic unilateral effects analysis set out in the 2010 HMGs, which itself extended the analysis first introduced in the 1992 HMGs. This is an important guideline because most modern enforcement has focused on unilateral effects, and it is well accepted by the courts.

60. Guideline 2 lists a variety of evidence that might satisfy (and strengthen) the Agencies; *prima facie* burden. Appendix 2 might flag the fact that an estimated value of the Gross Upward Pricing Pressure Index (GUPPI)[44] metric of at least 10% is an obvious candidate for sufficient evidence to clearly satisfy the *prima facie* burden. In fact, a GUPPI of 10% (or something less), can support the conclusion that the two merging firms *by themselves* would satisfy the Hypothetical Monopolist Test (HMT) for a targeted relevant market definition, which then would satisfy the structural presumption.[45] This obviously is relevant for the market definition section. But even if the market definition does not rely on the HMT or does not define the market limited only to the merging firms, the GUPPI inference could be applied. At the same

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GUPPIi = [Si+S1S2] x M.

Summing the two GUPPIs leads to the expression:

GUPPI1+GUPPI2 = {(S1+S2) + 2S1S1S2}M

This expression contains both the change in the HHI and the combined market share (S1+S2). It also includes the margin is commonly viewed as gauging market power. *See* Carl Shapiro, *The 2010 Merger Guidelines: From* Hedgehog to Fox *in Forty Years*, 77 ANTITRUST L. J. 701, 714-15, 721. (Shapiro merely sums up the DRs and does not calculate the GUPPIs, so the margin term is left out.)

[43] I also note that *Vons* is not cited.

[44] The 2010 HMGs refer to the "value of diverted sales" and (in footnote 11) defines the value of diverted sales as "measured in proportion to the lost revenues attributable to the reduction in unit sales resulting from the price increase; this metric is the GUPPI.

[45] That is, if the GUPPI of a product exceeds 10% and the demand curve is linear or convex, then a hypothetical monopolist would have the incentive to raise the price of the product by at least 5%.

time, I recognize that this inference would require estimating the diversion ratio, which can involve a contentious debate between the economic experts, so any inference might be treated as weak in cases that did not define the narrower market.

C. Guideline 3

61. *Suggested Title: The Agencies infer a serious likelihood of significant competitive harm from evidence that a horizontal merger substantially increases the risk of coordination*.

62. Guideline 3 contains and extends the basic coordinated effects analysis from the 2010 HMGs. Most coordinated effects cases will involve merger transactions where the Guideline 1 structural presumption also applies.

63. The 2010 HMGs had an anticompetitive inference when there was a history of collusion. The DMGs go further and apply the inference when there is a history of *attempted* collusion. This does raise the question of how substantial the attempt must be and whether there was any likelihood of success, two issues that now would be part of the merging parties' rebuttal case.

64. Unlike the 2010 HMGs, the DMGs also adopt the approach in *Heinz* of allocating to the merging parties the burden of showing that the market is not vulnerable to coordination, rather than requiring the Agencies to show that the market is vulnerable.

65. The DMGs also suggest an anticompetitive inference for mergers that involve acquisition of a maverick. This inference was hinted at but not adopted in the 2010 HMGs.[46] The definition of a mavericks might be clarified in light of *H&R Block.*[47] The Baker et al Comments[48] suggests a possible definition of 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."

D. Guideline 4

66. *Suggested Title: The Agencies infer a serious likelihood of significant competitive harm from evidence that a dominant (or substantial) competitor merges with one of a small number of important likely potential entrants.*

67. Guideline 4 concerns potential competitive harms where one or both firms is a potential entrant. Guideline 4 separately analyzes acquisitions that involve "actual" or "perceived" potential entrant, while noting that a particular potential entrant may be both.

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[46] For further discussion, see Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269 (2015).

[47] This issue may have been cryptically addressed in the DMGs section on Aligned Incentives, but it would benefit from further clarification.

[48] Baker et. al, *supra*, note 13

Guideline 4A: Actual Potential Entrant Mergers

68. Guideline 4 states that acquisitions of potential entrants that have a "reasonable probability" of entering are "presumed" to have a substantial anticompetitive effect, "unless there is substantial direct evidence" that the competitive effect would be de minimis."

69. The legal standard for determining "reasonable probability" of entry absent the merger is a key issue. In this regard, courts have applied what my analysis suggests is an excessively high standard. For example, in the recent *Meta/Within* merger, the court applied a standard that it characterized as "noticeably greater than 50%," based on the 1980 Fifth Circuit decision in Mercantile Texas Corp. v. Bd. of Governors, 638 F.2d 1255, 1268–69 (5th Cir. 1981).

70. In a previous article, I provided an extreme example to illustrate just how excessive false negatives would result from placing such a high burden on the agencies to show that the potential entrant was more likely than not to enter absent the merger. Suppose there are three *(and only three)* potential entrants into a monopoly market, each of which has a 20% independent probability of entering. A monopolist would be permitted (simultaneously or serially) to acquire *all three entrants* under a "more-likely-than-not" (i.e., 50.1%) standard, even if there are no likely efficiency benefits. This is because the likelihood of entry by at least one of these three is only 49%. Yet, these three acquisitions obviously would raise unacceptable competitive risks. I hope that the Agencies can use the Guidelines to help to influence courts to correct this excessive burden.

71. Various authors (including myself) have supported more interventionist merger enforcement of potential entry acquisitions. In fact, I have recommended that an anticompetitive inference be applied to acquisitions involving actual potential entrants, if one of the merging firms is dominant.[49] There are several reasons for this recommendation. Where there are only a few uniquely situated likely potential entrants, a dominant firm has the incentive to acquire potential entrants to entrench (i.e., preserve or even enhance) its market power. A dominant firm also has the ability and incentive to outbid other potential acquirers by the prospect of maintaining its supra-competitive profits.[50] In addition, if a dominant firm is permitted to acquire potential entrants, the likelihood of a market self-correcting a non-competitive structure is reduced. Thus, a permissible policy raises a high risk of false negatives.

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[49] Jonathan B. Baker, THE ANTITRUST PARADIGM (2019) at 208 Steven C. Salop and Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go From Here?* 58 REV. IND. ORG. 81 (2021). Steven C. Salop, *Potential Competition and Antitrust Analysis – Note by Steven C. Salop*, OECD Roundtable on the Concept of Potential Competition (10 June 2021). (However, I do not suggest assuming that a firm with a 30% market share is dominant. I suggest applying a substantially higher share, perhaps 50%, as discussed in more detail below. This would also make it consistent with the foreclosure share,)

[50] Moreover, their winning the bidding competition does not imply an efficiency benefit, only the prospect of preserving monopoly profits.

72. This anticompetitive inference based on an acquisition by a dominant firm is consistent with Guideline 1. For example, suppose that the established acquiring firm has a market share of 50%. The increase in the HHI would exceed 100 points if the potential entrant is projected to achieve a market share of only 1% and its entry were to succeed for certain. If the entrant is only "reasonably likely" to enter, then a higher projected market share would be necessary to make the expected value of the increase in the HHI greater than 100 points. Specifically, if the "reasonable probability" of successful entry is 40%, then the expected value of the HHI increase exceeds 100 points if the successful entrant's projected market share is at least 2.5% (i.e., 100 = 0.4 x 2 x 50 x 2.5.). This is still a fairly low projected share. Moreover, this should consider that the entrant's market share may grow. In markets with strong network effects, for example, a potential entrant is unlikely to be static at 1 or 2% share but quickly rise to a higher level.

73. Even when an incumbent firm acquires a likely potential entrant, there may be no anticompetitive effects. I suggest that these be treated as rebuttal factors when the one merging firm is dominant, rather than being part of Agencies' *prima facie* burden.

74. One possible rebuttal claim is that there are multiple other equally likely potential entrants, such that the acquisition of one entrant would not significantly reduce the overall likelihood of entry. However, this rebuttal might be viewed skeptically for two reasons. First, the acquired firm may have some special quality that makes it the most likely or otherwise most threatening potential competitor. Second, unless there are many equally well-situated potential entrants, the overall likelihood of entry could decline significantly.[51] Indeed, the 1982 Merger Guidelines on Potential Entrant acquisitions asked whether there were at least three additional equally well-situated likely entrants and suggested it could challenge an acquisition even if there were more than three others.

75. Another possible rebuttal claim is that the competition from other established firms is sufficient to maintain competition and that the potential entrant lacked competitive significance. For example, suppose that the market is growing, and the new capacity that would be supplied by the potential entrant would be replaced by increases in capacity by the other established firms if the entrant were acquired.

76. Identification and discussion of these rebuttal factors also might be included in this guideline and/or added to Section IV.

<u>Guideline 4B: Perceived Potential Entrant Mergers</u>

77. Guideline 4 also discusses acquisitions of "perceived" potential entrants. If the acquired firm is a likely actual potential entrant as well as a perceived potential entrant, then the analysis

[51] For example, suppose there were 3 potential entrants, each with a 20% likelihood of entering. In this case, the probability that at least one of the three enters is 49%. If one of the three is acquired, the probability that at least one of the remaining two enters is now only 36%.

above would apply. The Guideline 4B analysis is most relevant when the acquired firm is perceived to be a reasonably likely potential entrant, but it is not a likely actual entrant in fact.

78. This scenario raises an interesting practical issue. One might expect that the discussions between the potential merging parties would reveal whether the perceived entrant was also a likely actual entrant. And if it was not an actual potential entrant, then the other firm would have the incentive to break off its pursuit of the entrant if its sole goal was to eliminate the need to respond to its previous perceptions.[52] This issue is not discussed in the DMGs.

79. The issues discussed above of multiple potential entrants and the competitive significance of potential entrants over and above the constraints imposed by other established firms also would be relevant to acquisitions of perceived potential entrants.

E. Guideline 5

80. *Suggested Title: The Agencies infer a serious likelihood of significant competitive harm from evidence that the merged firm has a substantial ability and incentive to foreclose rivals' access to one or more products or services that it sells or buys.*

81. Guideline 5 applies to mergers that have potential anticompetitive effects from foreclosure strategies. Guideline 5 sets out and applies the "ability and incentive" analysis to foreclosure, as used in modern economic literature and recent cases. This guideline makes clear that these anticompetitive foreclosure concerns may also apply to complementary product mergers.

82. I suggest that the discussion note that these foreclosure concerns and the ability & incentive method of analysis also applies to foreclosure concerns that can arise in horizontal and conglomerate mergers that are the topics of other Guidelines. For example, Guideline 7 involves foreclosure implemented through tying, bundling and conditioning strategies in complementary product or conglomerate mergers. Guideline 10 includes foreclosure concerns involving platforms. Guideline 6 covers foreclosure strategies that raise entry barriers, the so-called two-stage entry issue. Relatedly, Guideline 4 would appear to cover acquisitions of a potential entrants into adjacent, related markets where those transactions would create or enhance barriers to entry by denying rivals low cost access to the products that the entrant would sell.[53]

83. Jennifer Sturiale and I previously suggested in a *ProMarket* post that Guideline 6 could be deleted, with the foreclosure share trigger and other plus factors included in Guideline 5.[54]

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[52] Indeed, this also raises the question of whether a firm would remain perceived potential entrant for very long if it were not an actual potential entrant.

[53] This would be worth including in Guideline 4. The *Sabre/Farelogix* merger could have been analyzed in this way.

[54] Steven C. Salop and Jennifer Sturiale, *Vertical Merger Enforcement in the Draft Merger Guidelines*, PROMARKET (July 28, 2023), https://www.promarket.org/2023/07/28/steven-salop-and-jennifer-sturiale-vertical-merger-enforcement-in-the-draft-merger-guidelines/

However, on reflection, I now do see a useful rationale for keeping it separate but revising Guideline 6 substantially. I discuss the definition and role of the foreclosure share in Guideline 6.

84. Guideline 5 includes reference to competitive harms from "self-foreclosure" (*e.g.*, rivals abandoning purchasing from now vertically merged supplier, whom they rationally might fear will misuse their competitively sensitive information).[55] This is a useful addition because it was omitted from the 2020 VMGs.

85. The discussion of Guideline 5 in Section II or the Economics Appendix (or section) also would be benefited from including certain other issues.[56]

    a. The Economics Appendix is focused on horizontal merger analysis. It might benefit from a more detailed analysis of foreclosure concerns. It might explain the differential economic mechanics of customer foreclosure and input foreclosure. It also might trace through the logic of the vGUPPI incentives analysis, not for the purpose of requiring quantitative analysis (and perhaps not even using the term vGUPPI), but rather to facilitate greater understanding of the mechanics and the close connections between the economic analysis of horizontal and vertical concerns. In fact, vGUPPI analysis is exactly analogous to horizontal merger GUPPI analysis, an analogy that would be useful to explain in words.[57]

    b. Input foreclosure only raises substantial competitive concerns for inputs that are "critical" to the downstream rivals in the sense that foreclosure tactics[58] (e.g., loss of access, price increases or other worsened terms) would significantly disadvantage the rivals in competing for customers.[59] This analysis involves both the rivals' rational

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[55] See also Steven C. Salop, *Analyzing Vertical Mergers to Avoid False Negatives: Three Recent Case Studies* 33 ANTITRUST 27 (2019).

[56] Some of these issues are presented in detail in Steven C. Salop, *A Suggested Revision of the Vertical Merger Guidelines*, ANTITRUST BULLETIN (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839768

[57] As an example, it is now well understood that elimination of head-to-head competition in a horizontal can lead to upward pricing pressure that depends on the diversion ratios between the two firms and the variable margin. However, it is less well understood that there is a close analogy for vertical mergers, that is, the upward pricing pressure on the input price charged by the merged firm to downstream rivals depends on a similar diversion ratio – the fraction of these upstream input sales that flow to the downstream merger partner as a result of diversion from the downstream rivals to the downstream merger partner. For the details, *see* Serge Moresi & Steven C. Salop, *vGUPPI: Scoring Unilateral Pricing Incentives in Vertical Mergers*, 79 ANTITRUST L.J. 185 (2013).

[58] I have referred to these flavors of input foreclosure as the "4 D's," that is, *denial, discrimination degradation, and delay*.

[59] Illumina's product was such a critical input, as were the inputs in the *Lockheed Martin/Aerojet Rocketdyne* and *Nvidia/ARM* mergers.

willingness to substitute to other brands of the input and other substitute inputs, as well as the impact of the potential foreclosure on their costs and product quality. To illustrate with an extreme example, if the merged firm were the sole supplier of paper clips, or it had the power to raise the price of its paper clips by more than 100% before users would substitute away, foreclosure of paper clips to its downstream competitors (say, rival law firms) would not likely lead to significant competitive disadvantages.[60]

c. Competition from other upstream competitors can eliminate the ability to foreclose. This would be case, for example, if the upstream merging firm would lose all or substantial input sales made to downstream rivals if it raised their input price by a SSNIP.

d. By contrast, the other upstream competitors might accommodate the input price increase. In fact, the foreclosure tactics (*e.g.*, withholding or raising the price of an input) may incentivize competing suppliers to accommodate the foreclosure by raising their own input prices, which would *exacerbate* the foreclosed rivals' disadvantage.

e. Guideline 5 explains that the incentive of the merged firm to worsen terms to downstream rivals depends on the degree to which it competes with the rivals. However, this discussion does not make it clear that the incentives are reduced to the degree that the merged firm and the rivals also compete with numerous other substantial competitors that are not subject to the foreclosure strategy.[61] They may not be subject to the foreclosure because they use different inputs, or are vertically integrated themselves, or have severe countervailing power. This competition from non-foreclosed downstream rivals can be an important limitation on foreclosure incentives, so it is worth clarifying and including in the Rebuttal section.

f. Guideline 5 omits an explanation of how foreclosure may facilitate downstream tacit coordination, rather than simply leading to unilateral harms. This can be important when the downstream market is or would become vulnerable to coordination.

g. Guideline 5 does not mention evasion of regulation, but it is apparently captured in Guideline 13A ("Avoid a Regulatory Constraint"), though the connection to foreclosure is not made explicit.

[60] However, one must be careful with this analysis. Suppose there is intense pre-merger competition by duopoly input suppliers that leads to a perfectly competitive input price. A vertical merger by one of the duopolists can lead the merged firm to raise its input price substantially to partially foreclose and can lead the other duopolist to "accommodate" by raising its own input price. As a result, the post-merger input price and the competitive disadvantages faced by the downstream rivals could be substantial. For one formal model, see Janusz Ordover et. al., *Equilibrium Vertical Foreclosure*, 80 AM. ECON. REV. 127 (1990).

[61] That is, suppose that most of the rivals' customers that would be lost when their costs rise, and they raise their prices would be diverted to non-foreclosed rivals rather than to the downstream merging firm.

h. A vertical or complementary product merger can eliminate potential entry by one or both of the merging firms into the other firm's market. It similarly can raise barriers to entry to other potential and thereby forcing two-stage entry. This issue is implicit in Guideline 5 and is covered explicitly in Guideline 6. I suggest that it be made explicit in Guideline 5.

i. Guideline 5 does not make the point that partial foreclosure (i.e., worsening terms) is generally more profitable than total foreclosure. Thus, a showing by the parties that total foreclosure would be unprofitable does not imply that partial foreclosure also would be unprofitable such that there would be no incentive to engage in partial foreclosure.[62]

j. Some might argue that an incentive to foreclose is exceptional, even absent efficiency benefits. However, this is not correct. As a general economic matter, and putting aside EDM effects, input price increases to rivals (i.e., partial foreclosure) typically are typically profitable for the merged firm when is selling a differentiated input and there also is differentiated product competition downstream.[63] This is also the case when the upstream marker is highly concentrated but also highly competitive in the pre-merger world, but foreclosure would lead to accommodation by upstream rivals.[64]

k. It is not the case that EDM effects inevitably or usually dominate foreclosure effects. That is a fact issue. Some economic models even show that EDM never dominates.[65] However, EDM claims should be mentioned in Guideline 5 and discussed in detail in the Rebuttal section (and the Economics section), including the shortcomings of EDM claims and relevant evidence.

l. This is necessary because of the visibility EDM has been given in the economic literature and flaws in the common analysis of EDM as an efficiency. The issue of merger-specificity is flagged in the DMGs. However, what is less well understood and appreciated is that EDM can only be a *cognizable* efficiency benefit for merger analysis if it is passed through to downstream customers in the form of lower prices (or higher quality, etc.). (Otherwise, it is just a different accounting entry.) This is important

[62] Serge Moresi & Steven C. Salop, *vGUPPI: Scoring Unilateral Pricing Incentives in Vertical Mergers*, 79 ANTITRUST L.J. 185 (2013). This issue apparently has become relevant in the *Microsoft/Activision* merger.

[63] Serge Moresi & Steven C. Salop, *vGUPPI: Scoring Unilateral Pricing Incentives in Vertical Mergers*, 79 ANTITRUST L.J. 185 (2013); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513,566 (1995).

[64] Janusz Ordover et. al., *Equilibrium Vertical Foreclosure*, 80 AM. ECON. REV. 127 (1990).

[65] For example, see Serge Moresi et. al., *Vertical Mergers in a Model of Upstream Monopoly and Incomplete Information*, 59 REV. IND. ORG. 363 (2021); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

because there can be significant impediments to passing-though EDM as lower downstream prices. These impediments include both "opportunity costs" and anticipated competitor price reductions. Both mitigate or eliminate the incentive to pass through EDM.[66] (The technical analysis of opportunity costs could be placed in the Economics section.)

m. Moreover, this discussion should also include discussion of the flaws in the oft-made claim that substantial foreclosure incentives mean that EDM pass-through necessarily also will be high. In particular, the incentive to pass-through EDM is impeded by the "opportunity cost," that is, the fact that some or all of the incremental sales will entail lost input sales profits by the upstream merging firm. By contrast, when the downstream firm raises its price, and loses some sales as a result, that diversion to rivals can lead to the upstream merging firm gaining more profitable input sales. increase of reducing the price the of the downstream merging firm anticipation of responsive price reductions by downstream competitors (including non-foreclosed competitors) in response to EDM pass-through is a potential impediment to passing through EDM. By contrast, the anticipation of responsive price increases by downstream competitors in response to foreclosure induced downstream price by the merged firm increases the foreclosure incentives. Thus, the door does not swing both ways in an identical fashion.

86. Economics has developed several quantitative methodologies that can be applied to foreclosure concerns.[67] These can provide valuable information to the agencies in deciding whether to challenge a merger. However, for cases that go to court, it should not be necessary for the agency to present a full-blown quantitative analysis to satisfy its *prima facie* burden. I instead suggest that quantitative modeling be made part of the merging parties' rebuttal, such that they have the burden to show that the quantitative analysis is reliable, robust, and relevant to the alleged foreclosure claims.

a. As a legal matter, the D.C. Circuit in *AT&T/Time Warner* remarked that quantitative analysis is not required when it focused on innovation effects. But the same concerns about the impediments to reliable quantification also can apply to price and quality effects. In addition, since Clayton Act Section 7 is focused more on fear of false

[66] For example, in *Illumina/Grail*, the ALJ accepted EDM claims even though Illumina's expert only carried out an illustrative calculation of the gross margin that did not properly estimate the opportunity cost of passing through the EDM as a lower downstream price, as pointed out in the Commission decision.

[67] These methodologies include the vertical arithmetic methodology for determining whether total foreclosure (denial of access) is profitable; the vertical GUPPI analysis for determining post-merger pricing incentives; Nash bargaining equilibrium analysis for negotiation markets; economic equilibrium simulation models that estimate structural parameters use them to predict post-merger prices; econometric estimates of the impact of previous analogous transactions.

negatives than concerns about false positives, placing the burden of this quantitative analysis burden on the agencies inevitably will lead to under-enforcement.[68]

b. As an economic matter, not every specific quantitative methodology formally applies to every foreclosure concern. For example, the commonly used vertical arithmetic analysis formally applies only to total foreclosure, not partial foreclosure.[69] Vertical GUPPIs formally apply only to price effects. Nash Bargaining models formally apply only to negotiation markets. Nor do these methodologies typically account for potential responses of rival suppliers or coordination effects. There also may not be sufficient reliable data to carry out the analysis in a reliable way. Most importantly, every specific economic model or econometric study can be criticized, and evaluating competing models will challenge the typical generalist judge, even assuming that the court has the time and interest to story to understand the models.

87. Guideline 5 seems to set a rebuttal standard for foreclosure concerns that requires the parties to show that there are "no plausible ways in which they could profitably worsen the terms for the related product and thereby make it harder for rivals to compete, or that the merged firm will be more competitive as a result of the merger." This appears to be a very high standard – perhaps close to impossible to meet -- and higher than simply rebutting the Agency's evidence of ability and incentive to foreclose. Thus, it requires further explanation and justification if the Agencies intend to retain it in the final Guidelines.

88. Guideline 5 states skepticism towards "speculative" rebuttal claims relating to reputational harms. Discussion of these claims belongs in Section IV because reputational constraints can also apply to horizontal mergers. The Guidelines should detail the reasons for their skepticism, or these reasons might be spelled out in more detail in a separate commentary.[70]

89. There are several economic reasons for skepticism. While fear of financial harm flowing from violating its reputation may provide a constraint, it is also the case that a firm's interest in maintaining its reputation may change when market conditions change. This was illustrated by *Kodak*. Similarly, a vertical merger that would increase the incremental profits earned by conduct contrary to the firm's reputation may be sufficient to tip its behavior to some degree. In this regard, reputation may not be "all or nothing." Reputational constraints also can be

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[68] Steven C. Salop, *A 'Probability of a Probability': Understanding the Section 7 Reasonable Probability Standard*, UNIV. BALTIMORE L.R. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4367573; Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269 (2015).

[69] As noted above, some degree of partial foreclosure can be profitable even if total foreclosure is not. Thus, vertical arithmetic evidence of a lack of incentive for total foreclosure does not rule out an incentive for partial foreclosure by worsening terms.

[70] Guideline 5's skepticism towards merging parties' voluntary commitments is discussed in the Remedies section of these comments below.

significant when the potentially harmed counterparties can detect violations and also have good alternatives. It also would be necessary that the firm cannot repair the harm to its reputation simply by apologizing and promising not to sin again, or simply by firing the CEO or the offending managers.

F. Guideline 6

90. *Suggested Title: The Agencies infer a serious likelihood of significant competitive harm from foreclosure when evidence indicates that the merged firm controls a large share of one or more products or services that are critical for the downstream rivals of the merged firm.*

91. Guideline 6 currently evaluates foreclosure concerns in vertical and other mergers based on the merging parties' ability and incentives to foreclose. By contrast, Guideline 6 applies only to vertical mergers, It details evidence that leads to the inference of likely foreclosure if the foreclosure share is at least 50%. It then treats other structural indicia (i.e., market share; level and trend of concentration) as plus factors. Its analysis of ability and incentive appears limited to an inquiry into the nature and purpose of the merger and any effects on barriers to entry, which also implies a much lower evidentiary burden than in Guideline 5.

92. As noted above, I previously suggested in Jennifer Sturiale and my *ProMarket* post that Guideline 6 could be deleted, with this foreclosure share trigger and other plus factors ported into Guideline 5. However, on reflection, I now do see a rationale for keeping Guideline 6 separate but revising it substantially.

93. Under my proposed revision, Guideline 6 would specify certain evidence that provides a way to satisfy the Agencies' *prima facie* burden.[71] Thus, in a merger that raises foreclosure concerns, the Agencies might satisfy their *prima facie* burden with either Guideline 6's "structural" evidence or Guideline 5's "ability and incentives" evidence. This would be analogous to the connection between Guideline 1 and Guidelines 2 and 3.

94. The current form of Guideline 6 is applied only to strictly vertical mergers. By contrast, my proposed revision would apply it to all foreclosure concerns -- vertical and complementary product mergers (as in Guideline 5), horizontal mergers that raise foreclosure concerns (as in Guideline 10), and conglomerate mergers that raises foreclosure concerns (as in Guideline 7B).

95. The Agencies' required structural evidence for satisfying their *prima facie* burden is that the "foreclosure share" is at least 50%. The foreclosure share as the "share of the related market controlled by the merging firm such that it could foreclose rivals' access of the related product on competitive terms." The DMGs do not provide further explanation or an example. For input foreclosure concerns, I assume that this is intended to be the upstream merging firm's

[71] Jonathan Baker, Nancy Rose, Fiona Scott Morton and I proposed several economic presumptions to apply to foreclosure concerns. Jonathan B. Baker et al, *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 12 (2019)

share of the relevant input market. What is unclear is how the DMGs intend to define the relevant input market. One definition might comprise all purchasers of the upstream firm's input and other close substitutes. However, since the merged firm only has an incentive to foreclose rivals of the downstream merging firm, then if the upstream firm can discriminate, the relevant market might better be defined as the "targeted customer" market comprised only of the rivals of the downstream merging firm.

96. In my view, the anticompetitive inference from a high foreclosure share should only apply to foreclosure of "critical" inputs. As noted in the discussion of Guideline 5, input foreclosure only raises substantial competitive concerns for inputs that are "critical" to the downstream rivals in the sense that foreclosure tactics (e.g., loss of access, price increases or other worsened terms) would significantly disadvantage them in competing for customers.

97. Thus, I would suggest revising the Agencies' required structural evidence for satisfying their *prima facie* burden in the case of input foreclosure concerns under Guideline 6 to include two prongs: (i) the merging firm controls a 50% (or more) foreclosure share for the input; and (ii) the input supplied by the merging firm is "critical" to downstream rivals in the sense that elimination of access or worsened terms would place them at a material competitive disadvantage.

98. The current version of Guideline 6 does not explain the rationale for the 50% trigger. As a legal matter, *Microsoft* explained that a foreclosure share of 40-50% is commonly required in Section 1 exclusive dealing cases. Other courts have suggested 30-40%.[72] DOJ's Section 2 report reported that 50% has been viewed as the minimum share for presuming monopoly power. And for Section 2, it is common (but not inevitable) to limit a finding monopoly power to firms with market shares of 50% or more. [73] Of course, a share of more than 64% or more was famously applied in *Alcoa*. [74] These sources suggest that a 50% foreclosure share should be sufficient to shift the burden here since Section 7 is more interventionist than Sections 1 or 2.

[72] RJ Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362 (M.D.N.C. 2002); Minnesota Mining and Mfg. v. Appleton Papers, 35 F. Supp. 2d 1138 (D. Minn. 1999)

[73] See, e.g. Federal Trade Commission, *Monopolization Defined*, https://www.ftc.gov/advice-guidance/competition,guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined; Department of Justice, *Chapter 2 Monopoly Power*, https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2

[74] For one discussion of the possible providence of the market share standards for monopoly power in *Alcoa*, see Andew I. Gavil, et al. 4 Antitrust LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 480-84 (2022).

99. The revised Guideline 6 is not a per se rule. As an economic policy matter, I do not think that a per se rule would be warranted.[75] Thus, the revised Guideline 6 would permit the merging firms to rebut the Agencies' prima facie case satisfied by the structural evidence, When the burden shifts to the defendants, they could rebut in several ways.

a. First, they could rebut with evidence that the foreclosed rivals could easily substitute to other input suppliers without bearing a substantial cost or quality disadvantage. Even if they could not substitute in response to a SSNIP or if competing suppliers charge higher prices, for example, the rivals would not necessarily suffer a substantial market disadvantage, as in my example of paper clip foreclosure.

b. Second, the defendants also could rebut by providing evidence to show that the merging firm would not gain an incentive to foreclose because the foreclosure of these rivals would not significantly increase the profits of the downstream merging firm. This could involve evidence showing that there were sufficient non-foreclosed rivals that would attract substantial sales diverted from the foreclosed rivals to reduce or eliminate diversion to the downstream firm and deter downstream price increases.

c. As part of its rebuttal evidence, the defendants might carry out the "vertical arithmetic" or vertical GUPPI analysis.

d. The defendants also might rebut by showing that defendant firm would lack incentives to engage in this input foreclosure or raise downstream prices[76] for other reasons, including EDM or cost-savings.

e. Cost-savings are not treated as cognizable in the current Guideline 6, but would be in the revised version if they satisfy the usual requirements. While there might be a justification for non-cognizability in the case of a merger to monopoly. But that non-cognizability can have significant adverse competitive effects under broader circumstances. In my view, a better approach would be to apply the "sliding scale" approach of *Baker Hughes* and *Heinz*.

100. Thus, Guidelines 6 and 5 work together. The difference between Guideline 6 and Guideline 5 is that when the foreclosure share is sufficiently high for such a critical input, the burden of showing that there is no ability and incentive to foreclose is allocated to the defendant, whereas

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[75] I understand that *Brown Shoe* was a Supreme Court decision that has never been reversed. However, as the Guidelines point out in the Overview, the Agencies are not tied to the factual analysis in previous cases. And as I noted earlier, resource-constrained Agencies should challenge mergers that raise the greatest economic harms, rather than challenging mergers raise economic welfare. The same point applies to deterrence.

[76] In the case of foreclosure by a firm with monopoly power downstream, the foreclosure could have the anticompetitive effect of maintaining that monopoly power and supra-competitive prices and other conduct, that is, entrenching the monopoly power and deterring competition that otherwise would have led to lower prices or other competitive benefits.

the burden of showing ability and incentive to foreclose is allocated to the Agencies under Guideline 5.

G. Guideline 7

101. *Suggested Title: The Agencies infer a serious likelihood of significant competitive harm from evidence that one of the merging firms is dominant and has the ability and incentive use the merger to entrench or extend its dominance.*

102. The economic analysis driving Guideline 7 is focused on competitive effects that also are covered in Guidelines 2, 3, 4 and 5. The role of Guideline 7 is to examine these concerns when one of the merging firms is dominant.

103. My concern with Guideline 7 involves the use of the term "dominant" and the reach of the Guideline as result. Footnote 62 treats a firm with "market power" (but not necessarily also "monopoly power") as "dominant."[77] This terminology is very confusing because the terms are treated as distinct in antitrust.[78] Moreover, characterizing a firm with a 30% market share as "dominant" seems overly expansive.[79] Dominance has more commonly been equated with monopoly power, that is, a very high level of market power. As discussed above, a market share of 50% would be more appropriate. In Europe dominance is given a broader meaning, but even there, the minimum market share seems to be 40% or 50%, but not 30%.[80] Characterization a firm with a market share of 30% (or lower) as dominant in Guideline 7 is also inconsistent with the Guideline 6 inference for a firm with a foreclosure share of at least 50%.

104. Thus, I suggest applying the inference of dominance only if the firm has a market share of at least 50%. Indeed, it might work even better to use the term monopoly power – or "substantial likelihood" or "dangerous probability" of monopoly power" -- instead of dominance.

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[77] Footnote 62 states that "concern with entrenching or extending a powerful position, however, does not depend on the precise term, and arises whether the firm has market power or monopoly power. These Guidelines therefore use the term "dominant position" to refer to the position of those firms for which antitrust law is concerned about extending or entrenching power through a merger."

[78] Monopoly power and market power are synonyms in formal economic models. But in *Kodak*, the Court used the term "monopoly power" to denote a high level of market power.

[79] Even more concerning, a 30% share is treated only as a sufficient condition for dominance, not a necessary condition. Guideline 7 states that a firm with an even lower market share could be considered dominant if "there is direct evidence that one or both merging firms has the power to raise price, reduce quality, or otherwise impose or obtain terms that they could not obtain but for that dominance." As drafted, this condition amounts also to a tautology by defining dominance as conduct that could not be profitably implemented absent dominance.

[80] See, e.g., Case T-210/02 - – General Electric Company v. Commission of the European Communities (2005) at ¶115 ("50%"); CASE M.7962 – ChemChina/ Syngenta (2004) at 142 (Table 39) ("40-50%"), https://ec.europa.eu/competition/mergers/cases/decisions/m7962_4097_3.pdf.

105. Alternatively, the Guidelines need to provide a convincing economic justification for applying its anticompetitive inference to firms with only 30% shares. After all, competitive conditions obviously are quite different if the other firms in the market all have shares of 1-2%; versus their having shares of 25-30%; versus the 30% firm facing competition from a rival with 60%.

106. In motivating the competitive concerns covered by Guideline 7, the DMGs quote *Emhart v. USM* that "Th[is] entrenchment doctrine properly blocks *artificial* competitive advantages … but *not simple improvements in efficiency*" (italics added). This is an important limitation that should be developed. The term "artificial" is not defined but might apply to conduct that raises rivals' costs, raises barriers to entry, etc. that is not motivated by direct efficiency benefits to the firm. That is, it may correspond to the so-called "no economic sense" test.

107. The scope of this limitation (that the doctrine only blocks "artificial" competitive advantages) is not clear in the bullets that list the mechanisms by which dominance may be entrenched. Some of that conduct might turn out to raise product quality or reduce costs. The same point applies to the conduct flagged in the section analyzing extension of dominance. It would be helpful to clarify the Agencies' view intended definition of "artificial" to ensure that beneficial conduct will not be treated as anticompetitive.

108. I now will discuss some further issues raised by the two separate parts of this Guideline.

<u>Guideline 7A: Entrenchment of Dominant Position</u>

109. The competitive concern that a merger might allow a dominant firm to entrench its market power in its current market is not controversial. While courts may frame the concern as preserving the possibility of "deconcentration," it also can be well framed in terms of preventing a reduction in monopoly power.

110. That is, the economic competitive concern is not that the proposed merger will lead to *price increases*. Instead, the competitive concern is that the merger will reduce the likelihood that competition (absent the merger) will lead to *price decreases* or to quality increases. (That is, the but-for world absent the merger likely would have lower prices, or other competitive benefits that the merger likely will eliminate.) This concern is most obvious when the transaction is a merger to monopoly, even if the acquired firm is small or even nascent. Microsoft's failed attempt to acquire Netscape is an illustrative example. However, the concern can extend further. For example, the analysis in Guideline 4 (Potential Entry) also applies to entrenchment when one of the merger partners is dominant.

111. Guideline 7 lists various other ways in which the merger can entrench a dominant position. This theory also could apply to technology intensive products where the dominant firm obtains technology from the acquired firm that allows it to entrench its dominance into the next generation of its product market, while foreclosing rivals' access to that technology.

112. While Guideline 7 is focused on a single dominant firm, the same analysis in some cases could also apply to a highly concentrated market (e.g., a duopoly) where the firms are highly successful in coordinating prices, as discussed in Guideline 3. A merger can entrench that coordination. That is, the competitive concern is not that the merger will cause prices to increase. Instead, the competitive concern is that the merger will "perfect" the coordination and reduce or eliminate the likelihood that the coordination will break down and cause prices to fall. One example could be the acquisition of a small firm or nascent competitor that has a reasonable likelihood of being a maverick in the near future.

113. If it is not carefully analyzed, the fact that the merger will not cause prices to rise could lead to a false negative involving market definition. If the court frames the market definition concern in the context of the impact of a price *increase* or quality *decrease* by the dominant firm, it could conclude that the market is so broad that the alleged dominant firm has a low market share. In fact, this was precisely the infamous *Cellophane Fallacy* in the *DuPont* Section 2 case. This is also why the earlier versions of the HMGs have treated the starting point for the HMT's SSNIP test to be the "competitive price," not the current price. However, this could be confusing in that it requires the competitive price to be defined. As a result, it might be clearer to treat the initial price level for the SSNIP simply as the significantly lower prices for all the competitors that might be achieved in the but-for world.

114. If the market is properly defined with the knowledge that the concern involves preventing lower prices, the result could amount to a "single brand" market. There has been resistance to this concept.[81] But this is because the most cases involve restraints that will lead to higher prices in the future. By contrast, the concern here is different -- that the merger will prevent lower prices in the future. The fundamental issue to be explained is that markets should be defined in the contexts of the relevant restraint at issue, not in a vacuum or by blindly using the SSNIP test.

Guideline 7B: Extension of Dominant Position to a New Market

115. The DMGs devote only a single paragraph to this variation. The extension concern focuses on post-merger foreclosure from tying, bundling, or conditioning that leads to "excluding rival firms" and thereby lessening competition.[82] Thus, it involves the same foreclosure concerns as Guidelines 5 and 6.

116. I assume that the intent of Guideline 7B is that a finding of a dominant firm would be sufficient to shift the burden to the merging parties to produce evidence either that the restraints

[81] When the merger partner is a potential or nascent competitor, a court might be more comfortable treating that firm as a market participant.

[82] While DMGs' Footnote 66 cites to the *Ford/Autolite* vertical merger, the guideline also seems to apply to the leverage harms alleged in the FTC's Amgen/Horizon merger challenge.

would not be used or that they would create beneficial competitive effects for consumers or suppliers.

117. The Guidelines do not explain how the likelihood of tying, bundling or other conditioning would be gauged in a case, or the relevant time frame for concern, or the relative likelihood of beneficial vs harmful competitive effects. Filling these omissions would add needed clarification to this Guideline.

118. The DMGs do not provide a hypothetical example for this Guideline. One possibility would be a concern that a pharmaceutical company that is dominant in the drug market for a particular indication (say, as the result of patent) uses tying or other multi-product pricing in an attempt to achieve market power or dominance for another drug it acquires in a merger.

119. The FTC's recent *Amgen/Horizon* merger challenge fits under Guideline 7 but with a twist. The concern was that the merger would entrench Horizon's current dominance by having Amgen engage in tying or portfolio pricing with drugs it already owned. Thus, if Guideline 7B were to be applied to shift the burden through a showing of dominance, Amgen's so-called "blockbuster" drugs also would have to be shown to be dominant. The market share threshold for dominance would be very important in the litigation. If Amgen's products were found to be dominant, the FTC's prima facie case might be satisfied solely by that showing, and the burden then would shift to Amgen to provide evidence that the portfolio pricing would not occur or would not lead to competitive harm. But if Amgen was found to have non-dominant shares, the evidentiary burden to these facts would be allocated to the FTC.

120. It is noteworthy that Guideline 7B applies only to mergers that lead to leveraging dominance by tying, bundling, or conditioning, not to mergers that might extend dominance solely by reducing the cost or increasing the quality of the acquiring firm. This limitation might be made clear.

H. Guideline 8

121. I suggest that the agencies consider deleting this Guideline and folding the "concentration trend" into Guidelines 2, 3, 5 and 7 as a plus factor.

122. Guideline 8 states a concern with acquisitions that would further a trend toward concentration sufficiently such that it may substantially lessen competition or tend to monopoly. Under Guideline 8, the Agencies' *prima facie* burden is satisfied and the burden shifts if (i) there has been an increasing concentration trend, (ii) the HHI is between 1000 and 1800, and (iiii) the merger increases the HHI by more than 200 points. This formulation partially reflects the 1982 HMGs, which stated that the DOJ may challenge mergers in this range if they increased the HHI by more than 100 points. The DMGs go further than the 1982 Guidelines in that the burden might be satisfied even if the post-merger HHI is less than 1000 points or there has been exit of significant players or other unidentified factors. In addition, the DOJ did not treat

the increase in concentration by itself as sufficient to warrant action and did not focus on the concentration trend.

123. Some readers may have interpreted this Guideline as condemning such mergers with no rebuttal possible. The language from *Heinz* that I quoted earlier, seems directly to reject the interpretation. However, Section IV.3.D treats cost-savings as non-cognizable for Guideline 8 and no other rebuttal factors are listed. For example, it is not made explicit that the parties can rebut by showing that trend is caused by economies of scale or superior products. The Guideline also does not make clear that a showing of economic benefits (or lack of direct economic harm suffered) by consumers, workers or suppliers would be a valid rebuttal.

124. The economic rationale for treating this market structure evidence as sufficient to satisfy the *prima facie* burden also is not explained. The rationale may be focused on what is sometimes called the "frog in the pot" scenario. This can occur when none of a series of small acquisitions appears problematic at the time. But then it turns out that the cumulative effect of all the acquisitions and other market responses lessens competition.

125. the "frog in the pot" problem is usually associated with the after-the-fact analysis of the cumulative effect of a series of acquisitions by a single firm (as analyzed in Guideline 9). Guideline 8, however, is different. It focuses on situations where there has been a trend toward concentration *but there is not yet any anticompetitive effect*. It also encompasses situations where that trend may be resulting from internal growth instead of, or in addition to, previous acquisitions. It also might involve previous mergers by multiple firms rather than a single firm. It also appears to encompass concentration trends caused by economic forces like scale economies, cost savings or product improvements which provide benefits to downstream customers.

126. Consider this illustrative example.

   a. Suppose the hypothetical market initially comprised 12 equal-sized firms, each with a market share of 8.3% and an HHI of 833. Suppose that over a 3-4 year period, four of those firms each increases their market share to 15% from cost-reducing internal growth, 2 firms exit and the other 4 achieve market shares of 10% each, leading to an HHI of 1500.

   b. Suppose that 2 of 10% firms now propose to merge, leading to an HHI increase of 200. These facts thus would satisfy the agency's *prima facie* case. Suppose further that the merging firms supply credible evidence that the merger will allow them to reduce their costs and increase their output. Thus, the merger would appear to be procompetitive. However, as explained in the Rebuttal Section IV.3.D, this cost savings evidence would be rejected as non-cognizable for Guideline 8.

   c. This non-cognizability also means that, unless each of these 10% smaller firm can achieve the cost-savings unilaterally, they will continue to be disadvantaged, and the largest four firms likely will continue to increase their market shares. It follows that a merger policy of forcing the smaller firms either to grow internally or to shrink may raise a greater risk of higher prices and lower output than if they were permitted to merge. If the end point is four firms with 25% shares, market concentration will also be higher.

d. Moreover, Guideline 8 goes even further than this hypothetical example because it could be applied even when the pre-merger HHI is less than 1000 or the merger leads to an increase in the HHI of less than 200.

127. In my view, this type of "prospective" application of "frog in the pot" scenario, which involves predicting *future* high concentration and market power, is not prudent as an economic policy matter. Agencies instead can engage in "watchful waiting" and attack a future merger if and when it more likely tips the market.[83] Importantly, permitting one merger in a market does not mean that subsequent similar mergers must also be permitted.

128. This suggests that Guideline 8 might be deleted, and the concentration trend evidence instead be treated as a relevant "plus factor" for other Guidelines (e.g., 2, 3, 4, 7, 10). The fact that concentration has been rising could be evidence to predict that concentration likely will be rising irrespective of the merger, so that the pre-merger HHI level underestimates the likely level in a few years, an interpretation consistent with the approach in *General Dynamics*.

I. Guideline 9

129. Guideline 9 appears to focus on a more standard retrospective "frog in the pot" scenario. In contrast to Guideline 8, Guideline 9 concerns transactions by a single firm that engages in serial acquisitions in the same market. That is, a firm might make a series of very small acquisitions, where none of them raises serious competitive concerns on its own, but where the cumulative effect of the series of acquisitions turns out to raise significant concern. These competitive concerns might be identified first in the context of analyzing a newly proposed acquisition. Or it might be revealed from standalone, retrospective analysis of the previous set of acquisitions.

130. The cumulative harmful effects of the serious can be illustrated with an example. Consider a hypothetical firm with an initial market share of (say) 30% that competes with 70 rivals, each with a 1% share. Under the 2010 HMGs, where the presumption is only triggered if the increase in the HHI is at least 200, that firm could acquire 69 of the rivals, one at a time, without triggering the HHI structural presumption. Even the last acquisition, where the firm increases its market share from 99% to 100%, would only have an HHI increase of 198.

[83] Footnote: As I noted in my ProMarket article, scientific evidence suggests it is only brainless frogs that get boiled. Frogs with brains work to jump out of the pot.

131. Under the DMGs Guideline 1 with its delta HHI trigger of 100, the Agencies' *prima facie* burden would be satisfied when the firm increases its share from 50% to 51%. However, the anticompetitive inference for this single merger would be very weak because the impact of a single 1% acquisition likely would be very small. After all, there would still be many other 1% competitors in the market. However, when evaluated cumulatively, if the firm made all those 21 acquisitions simultaneously, increasing its share from 30% up to 51%, the increase in the HHI would be 1302 (i.e., 1302 = 2 x 31 x 21).

132. This Guideline raises several important analytical and policy questions that might be discussed in more detail. First, there is the threshold analytic issue of whether the anticompetitive effect arises only from the last small merger or the last few small mergers versus the entire series. For example, it could be that the market has remained competitive despite the earlier acquisitions, but the move from 50% (or 49%) to 51% would be the competitive inflection point where anticompetitive effects occur. Or perhaps it was the previous 5 acquisitions (where the firm's share increased from 45% to 50%) that turned out to generate anticompetitive effects that were not apparent earlier.

133. Second, while the DMGs do not focus on remedies, this scenario raises important issues of the proper (and feasible) remedy. If the inflection point is only hit when the firm's share rises from 50% to 51%, then only that acquisition should be prohibited. But such empirical precision is unlikely to exist. If the harm is detected after the previous five acquisitions taken together, then should the firm be forced to divest some of all of them to re-achieve competition, as well as give up on the last acquisition?[84] Finally, if the eggs have already been so scrambled from the previous five acquisitions such that divestitures would be very inefficient, it would be necessary to order some type of regulatory remedy.

J. Guideline 10

134. Guideline 10 analyzes mergers that involve platforms, including platforms with network effects. This is an important addition to the DMGs. The competitive analysis is complicated because of the multiple production and consumption levels involved. That is, there are the platform operators, participants on the multiple sides of the market, suppliers of inputs to the platform or the participants, and consumers who purchase from participants. Because of possible economies of scale, network effects, and switching costs, mergers can raise substantial risks of irreversible anticompetitive effects.

135. Because the discussion of Guideline 10 is new and substantial, and because the issues are complicated, it may be perceived by readers as difficult and incomplete. The concerns raised in this Guideline also arise in other Guidelines, so it would be helpful to draw the connections.

[84] Some might argue that no divestiture should be ordered if the previous five were cleared rather than challenged. However, in the recent *Steves v Jeld-Wen* case, the court did order a divestiture even though the DOJ permitted the merger.

Examples also would be useful, perhaps as an additional economic section or in the supplemental Commentary. Again, this can serve to help elucidate these issues for judges as well as staff attorneys and the business community.

136. In reading this section, I thought that the narrative would have been somewhat clearer if the distinction between direct elimination of (head-to-head) competition and anticompetitive effects of the various foreclosure effects was made clearer. For example, the former could involve a merger between two platforms or two platform participants. The latter could involve the merger of a platform and participants on one side or the other.

137. Footnote 76 addresses the issues raised by the *American Express* non-merger case. This is an important issue, particularly considering the *Sabre/Farelogix* merger case. Further discussion (not necessarily in a footnote) could address the fact that the Supreme Court did not suggest that its analysis would apply to mergers. I hope the discussion also makes clear that it is not intended to suggest that *American Express* was correctly decided.[85]

138. In addition, the discussion can make it clear that both a single firm and a merged firm comprised of participants on both sides of a two-sided market can compete with a platform, if only to a limited extent. For example, an online book store might provide some competition to Amazon, and a taxi company can compete with Uber and Lyft. A real estate broker that has seller and/or buyer clients can provide some competition with a multiple listing service.

K. Guideline 11

139. Guideline 11 analyzes mergers that may create anticompetitive effects on the buyer-side, both labor markets and other input markets. This Guideline is a straightforward extension of other Guidelines but aimed at these buyer-side markets.

140. Guideline 11 also makes the important point that competitive conditions in labor markets may differ from typical seller-side markets. This is because workers may face high switching costs, particularly geographically, and may have needs and preferences that limit the number of close substitutes. These differences might be discussed in more detail.

141. "Classical monopsony" that reduces input purchases may lead to reduced downstream output and associated higher downstream prices. However, the scope of concerns goes beyond classical monopsony. A buyer-side merger alternatively may endow the merged firm with greater "bargaining power" over suppliers. This increased bargaining power is market power that causes anticompetitive harm to the suppliers in the form of lower prices received by the input suppliers, worsened terms, etc. Moreover, any alleged downstream output market price reductions attributable to that buyer-side lessening of competition caused by the merger are "out of market" and should not be considered cognizable efficiency benefits, as was made clear

[85] For one criticism (among numerous other) of the opinion, *see* Steven C. Salop et al, *Rebuilding Platform Antitrust: Moving on from* Ohio v. American. Express, 84 ANTITRUST. L.J. 883 (2022).

in *Philadelphia National Bank*. For this reason, I also suggest that footnote 79 cite that case as well as *Brown Shoe*.

142. By contrast, a merger may lead to reduced demand for an input as a result of adoption of more efficient technology. In this scenario, resulting harm to the suppliers does not arise from either classical monopsony power or increased bargaining power. Thus, these cost savings should be considered cognizable, and the harms to the suppliers should not be considered competitive harms.

143. As a separate matter, Guideline 11 might add the point that a buyer-side merger might also cause anticompetitive effects in the downstream markets even if it does not cause harm in the upstream market. As noted in the 2010 HMGs, the merged firm may exercise its buyer-side market power over suppliers by forcing them to refuse to sell or otherwise discriminate against its downstream rivals to achieve or enhance its downstream market power. This same caveat also applies to rebuttal claims that large buyers might prevent anticompetitive effects from seller-side mergers.

L. Guideline 12

144. Guideline 12 applies to the acquisition of partial ownership interests. It follows the 2010 HMGs and the literature by analyzing the separate effects of the financial interest and control (or influence) acquired in the transaction, as well as the potential for the acquisition of competitively sensitive information that can reduce competition.

145. Guideline 12 refers specifically to "partial" or "common" ownership, which refers to a firm having a minority interest in multiple competitors. This can apply to private equity firms. The term has also been applied to financial funds like Vanguard and Blackstone that form and sell mutual funds as well as investing on their own behalf. Concerns about this latter type of common control are fairly new so it might be useful to flag the most serious problems and indicate that concerns might become greater as knowledge and facts accumulate.

146. It is well accepted that partial ownership interests can lead to competitive harms. This can be the case even if the financial interests are passive, that is, carrying no control or influence over the acquired firm. While this incentive effect is recognized in the 2010 HMGs, the idea that there can be concerns even if the acquiring firm lacks control is made explicit in the DMGs. Where there is control or influence, the competitive risks are increased. In the case of partial ownership interests by multiple owners, concerns are exacerbated if they have similar interests and communicate with one another. [86]

[86] It has been suggested that a firm might (or should) choose to take actions that benefit its large investors that hold interests in rivals even if that harms the returns to its investors that lack such interests. If they do, then even a passive financial interest could lead to *implicit influence* to take actions that benefit the interests of these rivals. This is a new issue that is not flagged in the DMGs.

147. Acquisition of partial ownership interests also may have a lower likelihood of leading to procompetitive efficiencies than do mergers. This is because the acquiring firm would have less economic incentive to share its proprietary technology with the acquired firm. And the acquired firm would have no unilateral incentive to share its proprietary technology with the acquiring firm. Acting in the private interest of large shareholder that owns a large share of the acquiring firm at the expense of smaller shareholders violates the firm's fiduciary duty to those smaller shareholders.

148. Guideline 12 omits mention of the acquisitions of partial ownership interests in suppliers or customers or firm that sell complementary products. Those partial ownership acquisitions can lead to foreclosure harms (as discussed in Guideline 5) and/or procompetitive benefits (e.g., if it leads the acquiring firm to reduce its prices).

M. <u>Guideline 13</u>

149. Guideline 13 states that there may be other competitive concerns not captured by the 12 specific guidelines. All three of these would benefit from more explanation. In fact, they each could be treated as separate numbered Guidelines.

150. Guideline 13.A applies to situations where a merger can allow a firm to escape regulatory constraints. This can apply most directly to vertical and complementary product mergers, where one of the products is regulated. By selling the two products on a bundled basis, the constraint might be avoided. Or, in a vertical merger, if the downstream firm is regulated but the regulated price is permitted to pass on cost increases, the merged firm can avoid that regulatory constraint by raising the input price charged by the upstream firm to the downstream firm.

151. Guideline 13.B would benefit from more explanation. On first reading it appears to describe the conventional situation of a merger of two close competitors in a bidding market, as analyzed in Appendix 2.C.[87]

152. Guideline 13.C concerns "a merger that would dampen the acquired firm's incentive or ability to compete due to the structure of the acquisition or the acquirer." In my view, this is a useful generalization of the concerns in Commissioner Rosch's *Ovation* (Lundbeck) Concurrence.[88] In that matter, Commissioner Rosch suggested that Merck faced regulatory or reputational constraints that deterred it from raising prices. Applied here, an acquisition of a product can lessen price competition if the acquiring firm has an incentive to raise prices because it lacks the reputational *(or other)* constraints that deterred higher prices by the seller firm. That is,

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[87] This Guideline might be focused on the usual circumstances of the *Booz Allen* case. But I was unsure.

[88] *Concurring Statement of Commissioner J. Thomas Rosch Federal Trade Commission v. Ovation Pharmaceuticals, Inc.* (2008), https://www.ftc.gov/system/files/documents/public_statements/418091/081216ovationroschstmt.pdf

the seller firm may have objective components of self-interest that the buyer lacks, rather than simply different subjective preferences.[89] While this lessening of competition does not flow from elimination of direct competition *between the two firms*, it is merger-specific and covered by Section 7 because the reduction in competition does flow directly *from the acquisition*.

153. This analysis might be applied to an acquisition by a private equity firm with a track record of a high price "milking" business strategy, in contrast to the low price, growth strategy of the seller. I also wonder if the concerns about a risky LBO in footnote 25 might flow from this Guideline.

154. As another example, suppose that the firm has market power over a product, but the market price of this product is constrained by countervailing bargaining power by some customers that also buy some of the firm's other products. If the firms sell that product business to a firm that sells only that single product, then the acquiring firm will have the ability and incentive to raise the price, thereby harming the customers.[90] This also might apply to private equity acquirers.

VII. Market Definition

155. As noted earlier, it is important to give prominence to the fact that a merger is illegal if it lessens competition or tends to create a monopoly in *any* relevant market. This point is made but it could be made more prominent by directly connecting it to the discussion that there is not a unique relevant market definition. The fact that there can be multiple relevant market definitions that satisfy the various methods (especially the HMT) does not weaken or alter the fact that the merger violates Section 7 if it lessens competition in any one of the possible market definitions. As noted earlier, this point also might be included in the Overview considering the key role that market definition plays in merger litigation.

156. Unlike the 2010 HMGs, the DMGs treat the hypothetical monopolist test (HMT) as only one of four market definition methodologies. I believe that the other three methods were essentially included in the 2010 HMGs as evidence relevant to applying the HMT. So the change is not as significant as some readers might assume.

157. Separating the methods rather than embedding all of them within the HMT might be somewhat less confusing for courts, which have been comfortable applying the *Brown Shoe*

[89] The criticism that that this was just a change in business strategy that Merck could have implemented on its own, and thus not merger specific, is not correct in my view. it ignores the fact that Merck lacked an incentive to implement the higher price policy because of the market constraints it faced.

[90] In this scenario, customers with the countervailing bargaining power might then be able to mitigate the harm by negotiating lower prices for the selling firm's other products. However, because their points of negotiation are reduced by the divestiture, these customers likely would be harmed to some extent. These harms also are merger-specific because the acquired firm's product was constrained by normal market forces in this negotiation market.

factors and other methodologies as distinct from the HMT but viewing the HMT solely as the technical quantitative analysis (e.g., critical loss analysis).

158. The DMGs (either in Section III or the Economics section) might provide further discussion or examples of the various methods.

a. An example of "Direct Evidence of Substantial Competition" might involve the situation where the historical facts indicate a set of firms responding to the competitive moves of one another but not to other firms (or far more intensely to one another than to other firms).

b. An example of "Direct Evidence of Market Power" might involve the conditions in the Staples- I case, where the superstores charged lower price when the other superstores were present than when they were not.

c. One longstanding concern with the *Brown Shoe* factors is that market definition is normally focused solely on demand substitution (i.e., "reasonable interchangeability"), but a few of the *Brown Shoe* factors do not have this focus.[91] Thus, it might be useful to flag that issue and explain that the focus should be placed on the factors that relate to demand substitution because those are ones that relate to "reasonable interchangeability." Supply substitution has been used in modern analysis in identifying market participants, not in defining the relevant market. This is the way market participants are identified in Appendix 4, but the point also belongs in the market definition section and Appendix 3.

d. In the economics section, the discussion of the HMT (also called the SSNIPT) might emphasize the conditions under which the two merging firms by themselves would have the incentive to raise one or both of their prices by a SSNIP (i.e., even if others did not change their prices.) This is the GUPPI analysis mentioned earlier. When the GUPPI is sufficiently high, the two merging firms by themselves would comprise a market by themselves. [92] This also could be connected in words to Method A.

159. The DMGs cite the language from *Brown Shoe* that refers to the "area of effective competition." I am concerned that this mushy term might be used by merging parties to define a broad market that is not restricted to demand substitutes. It therefore would be useful to explain in a footnote why that is not the operable definition of a relevant market.

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[91] In *Ohio v American Express*, the Court deviated from this focus on demand substitution for the case of 2-sided simultaneous transaction platforms, which has led to substantial critical commentary, include my own article. Steven C. Salop et al, *Rebuilding Platform Antitrust: Moving on from* Ohio v. American. Express, 84 ANTITRUST. L.J. 883 (2022).

[92] This two-firm is contained in the 2010 HMGS but could be given more visibility in the new Guidelines. It also might benefit from an example.

160. Neither Section III nor Appendix 3 focuses on market definition analysis when a firm is vertically integrated.[93] For example, in considering whether to raise its (input) price in coordination with other (upstream) firms, a vertically integrated firm would consider the increased sales flowing to its downstream division from the fact that its unintegrated rivals would have higher costs. The HMT analysis should take this added incentive into account.[94] It should not pretend that the firm was unintegrated.

VIII. Conclusions

161. I hope the comments are helpful. I am looking forward to reading the other comments, engaging in further discussions, and reading the final Guidelines when they are released.

[93] DMGs Footnote 3 flags this issue in referring to the "hypothetical cartel." But the footnote is too terse. It also can lead to the same confusion as did that footnote in the 2010 HMGs in that it begins with a focus on a firm that also sells *substitutes* and only mentions *complements* at the end.

[94] The vertically integrated firm analogously would have a lesser incentive to raise its downstream price in coordination with rivals if it would lead to lower upstream input sales to those rivals.