Public Comments of Attorneys General of 19 States and Territories in Response to the July 29, 2023 Request for Comments on the Draft Merger Guidelines

September 18, 2023

OVERVIEW

The Attorneys General of New York, California, Illinois, Oregon, Arizona, Connecticut, Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Pennsylvania, Rhode Island, the United States Virgin Islands, Washington, and Wisconsin (the "States") submit the following Comments in response to the July 19, 2023 Request for Comment on the Draft Merger Guidelines ("Draft Guidelines") from the United States Department of Justice and the Federal Trade Commission (the "Agencies").

We appreciate the opportunity to comment on the Draft Guidelines. Through these Comments, we hope to suggest ways to clarify the Draft Guidelines based on our collective experience. As co-enforcers of the nation's antitrust laws, the States have unique perspectives, experiences, and interests in protecting their residents from anticompetitive harms, including those arising from mergers. The States are often the first stop for small businesses and residents seeking to call attention to such harms. We thus have a strong track record of merger enforcement, whether by joining forces with our federal counterparts, acting individually, or acting as a group.[1]

These Comments on the Draft Guidelines follow several statements by Attorneys General across the nation urging robust merger enforcement to protect competition.[2] As stated then and reiterated now, the States are concerned that years of overly permissive merger enforcement may have contributed to significant consolidation in many sectors; hindered economic dynamism, entrepreneurialism, and innovation; and harmed consumers and competition generally.[3]

The ways in which businesses compete have shifted, with continuously increasing interconnections and impacts across varying dimensions, as opposed to only price or output effects. Moreover, concerns about increasing concentration in a wide variety of markets have rightfully become more acute.[4] Thus, there was a critical need for an overhaul of the Guidelines

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[1] *See, e.g.*, Allocation of Antitrust Enforcement Between the States and the Federal Government: Hearing Before the Antitrust Modernization Comm'n, at 21 (Oct. 26, 2005), https://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-First.pdf (statement of Harry First, Professor of Law, N.Y. Univ. Sch. of Law) ("[M]ergers have been involved in a significant percentage of the cases filed by the states.").

[2] *See, e.g.*, Comments from Att'ys Gen. in Response to Request for Information on Merger Enforcement (Apr. 21, 2022), https://www.naag.org/wp-content/uploads/2022/08/Public-Comments-of-23-State-Attorneys-General-.pdf (hereinafter "23 State AG Comments").

[3] *Id*.

[4] COUNCIL OF ECON. ADVISERS ISSUE BRIEF, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER at 4 (Apr. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf (noting change in revenue share earned by 50 largest firms in each sector); David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645 (2020) (finding that top four firms in top sectors of economy became steadily and significantly more concentrated); Thomas Philippon, *Causes,*

to reflect current economic realities and how enforcers will assess these realities. Matching antitrust analysis to contemporary market realities requires a dynamic and adaptable approach to guiding principles. This is not new. The Agencies have a long history of updating their guidance to reflect new developments and actual practices.

In the Draft Guidelines, the Agencies seek to "better reflect how the agencies determine a merger's effect on competition in the modern economy and evaluate proposed mergers under the law."[5] The Draft Guidelines take a functional approach to assessing competition and helpfully underscore that no single method or tool has primacy. We applaud the Agencies for updating the Guidelines to reflect economic realities, using as a framework the intent of Congress to favor competition over consolidation, bolstered by prevailing legal precedent.

We further commend the Agencies for making the Draft Guidelines more accessible to the public, thereby increasing transparency in the merger review process and improving visibility for market participants and the courts concerning the Agencies' core enforcement principles.

The Merger Guidelines have long served as important tools for state antitrust enforcement. Because courts respect the Agencies' expertise, the Merger Guidelines have helped shape the evolution of both state and federal antitrust law. The Draft Guidelines will better equip the States to discharge our obligations as enforcers of the antitrust laws and halt anticompetitive mergers in their incipiency, while at the same time providing clear insights to market participants regarding our guiding principles.

STRUCTURE OF STATE COMMENTS

The State Comments follow the form outlined by the Draft Guidelines:

Guideline 1 (Presumptions): The States strongly support the strengthening of the structural presumption. We suggest clarifying that there is no safe harbor for transactions that do not trigger the presumption, that market shares are not necessary for gauging concentration, and that the Agencies are open to using tools other than HHIs to evaluate transactions, such as those involving nascent competitors.

Guideline 2 (Substantial Competition Between Firms): For several proposed factors for substantial competition, the States comment that certain proposed examples would benefit from additional description.

Guideline 3 (Coordinated Effects): The States comment that this Guideline would benefit from additional discussion of maverick firms and other specific risks associated with coordinated effects.

Consequences, and Policy Responses to Market Concentration, *in* MAINTAINING THE STRENGTH OF AMERICAN CAPITALISM (Aspen Institute Press, 2021) (reviewing literature on concentration in U.S. economy).

[5] Press Release, U.S. Dep't of Justice, Justice Department and FTC Seek Comment on Draft Merger Guidelines (Jul. 19, 2023), https://www.justice.gov/opa/pr/justice-department-and-ftc-seek-comment-draft-merger-guidelines (hereinafter "Draft Guidelines Press Release").

Guideline 4 (Potential Competition): The States encourage the Agencies to consider expanding this Guideline regarding (a) the protection of rivalrous innovation, by underscoring welcome discussions related to innovation from other sections in the Guidelines, including Appendix 2.E; and (b) the types of objective evidence that may prove relevant in the analysis of perceived potential competition.

Guideline 5: The States support the Agencies' recognition of the anticompetitive harms that may result from vertical and other non-horizontal mergers. The States also support Draft Guideline 5's recognition that a merger may provide the merging firm access to rivals' competitively sensitive information.

Guideline 6: The States support the rebuttable presumption described in Draft Guideline 6, whereby a foreclosure share in a "related market" for a "related product" above 50 percent establishes a rebuttable presumption that the effect of the merger may be to substantially lessen competition. The States also support the recognition that a vertical merger may require entering both an input and output market and the omission of a safe harbor for vertical mergers falling below a certain market share threshold.

Guideline 7 (Entrenchment): The States suggest that the Agencies consider addressing (a) ways in which the variety, velocity, value, and volume of data can provide artificial competition advantages and entrench market power; and (b) how acquisitions of innovative firms can allow the merged firm to throttle and channel future industry innovation along its preferred path, further entrenching an incumbent.

Guideline 8 (Trends Toward Concentration): The States emphasize that ignoring trends toward concentration disregard Congress's mandate and Supreme Court precedent.

Guideline 9 (Serial Acquisitions): The States propose some factors that the Agencies may consider relevant to detecting the merging parties' intent, strategy, or design in a pattern of serial acquisitions. Doing so may assist in distinguishing a benign series of acquisitions from an anticompetitive one.

Guideline 10 (Multi-Sided Platforms): The States commend Draft Guideline 10's holistic approach and suggest minor revisions to how the Guideline addresses the interplay of relevant markets, platform sides, and platform owners' conflicts of interest. Further, the States respond to some common, and unsupported, criticisms of this Guideline.

Guideline 13: The States support the effort to identify mergers that may lessen competition and yet may fall outside the traditional merger framework. With respect to non-horizontal mergers, the States propose several presumptions, tools, and limited principles to help identify potentially anticompetitive non-horizontal mergers, and the States encourage the Agencies to consider evidence of increased costs of services or quality harms.

Section III (Market Definition): The Draft Guidelines correctly emphasize that market definition is not a "one-size-fits-all" exercise but rather depends on multiple sources of evidence, including direct evidence of competitive behavior and market characteristics. The States comment on (a) the continuity of the Agencies' approach; (b) the improved readability and accessibility afforded by the organization of the Draft Guidelines concerning market definition;

(c) the appropriate recognition of potential monopsony or buy-side dominance in merger analysis; and (d) the importance of the further refinements offered to the "small but significant non-transitory increase in price or worsening of other terms" (SSNIPT) hypothetical monopolist test, which is discussed further in the States' comments on Appendix 3.

Section IV (Rebuttal Evidence): The Agencies' approach to analyzing claims of procompetitive efficiencies, as set forth in Part Three of this section, reaffirms governing precedent while simultaneously tightening the scrutiny of claims that are often supported by partial, selective, and speculative evidence and analysis. The States strongly support this approach, while suggesting that the Agencies (a) provide further guidance and detail with regard to the standards that they will apply when scrutinizing efficiency claims, specifically concerning verifiability and pass-through; and (b) clarify the statement that efficiencies are not cognizable if they will accelerate trends toward concentration or vertical integration.

Appendix 1: The States comment on the sources of evidence relied on by the Agencies and encourage the Agencies to consider any evidence of a merger increasing costs or quality harms.

Appendix 3: The States comment on the process for defining relevant markets and expand on their comments to Section III (Market Definition), which are summarized above.

GUIDELINE 1

The States support Draft Guideline 1 and its strengthening of the structural presumption. Clearly understandable and consistently applied presumptions provide predictability to the market. They let judges know what the federal enforcers will consider policy; they let corporate boards know the risks associated with their potentially anticompetitive deals before they spend millions on bankers, consultants, and lawyers; and they shift the law towards more administrable antitrust policy. Thus, Guideline 1 enhances merger enforcement overall.

We strongly support the focus of Guideline 1 on blocking market share increases in highly concentrated markets. This is especially important, for example, in an industry like healthcare, which faces high and increasing concentration in hospital, physician, and insurance markets.[6] A wealth of research has shown that concentrated healthcare markets result in higher prices for patients.[7]

The States offer a few suggestions for further refining this Guideline.

First, we emphasize that the existence of a structural presumption should not be taken to mean that transactions falling below the presumption thresholds are presumptively

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[6] Martin Gaynor et al., *The Industrial Organization of Health-Care Markets*, 53 J. ECON. LIT. 235 (2015).

[7] Karyn Schwartz et al., *What We Know About Provider Consolidation*, KAISER FAMILY FOUND. (Sept. 2, 2020) https://www.kff.org/health-costs/issue-brief/what-we-know-ab; *see also* DAVID DRANOVE & LAWTON R. BURNS, BIG MED: MEGAPROVIDERS AND THE HIGH COST OF HEALTH CARE IN AMERICA (2021); Nicholas C. Petris Center at the School of Public Health, University of California, Berkeley, *Consolidation in California's Health Care Market 2010-2016: Impact on Prices and ACA Premiums* (2018); Gaynor et al., *supra* note 6; Cory Capps & David Dranove, *Hospital Consolidation and Negotiated PPO Prices*, 23 HEALTH AFFAIRS 175 (2004).

procompetitive or unproblematic. In other words, a presumption should not create a "safe harbor."[8] As such, we recommend that the Draft Guidelines explicitly reject any implied safe harbor for mergers that do not trigger the presumptions.

Second, we recommend that the title of Guideline 1 be revised to read, "Mergers Should Not Increase Concentration in Highly Concentrated Markets." Excluding the word "significantly" would avoid the false impression that small increases in concentration are not likely to lessen competition. This impression is explicitly rejected in this section's second sentence, which reads "even a relatively small increase in concentration in a relevant market can provide a basis to presume that a merger is likely to substantially lessen competition."

Third, while we agree market shares are *often* an important way to gauge concentration, the second paragraph risks giving the incorrect impression that market shares are *necessary* for gauging concentration. Documents, testimony, and other forms of evidence can establish that a market is concentrated. These alternatives should be acknowledged to avoid giving the mistaken impression that antitrust enforcement, unlike other areas of law enforcement, is cabined to relying on only certain forms of evidence (i.e., metrics). In some cases, especially where nascent and potential competitors are being acquired, calculating market shares might reveal little about the likely effects of a transaction.

Fourth, the Draft Guidelines should recognize that while HHIs may be an important tool, the Agencies should be open to using other tools to assess the likelihood that a particular merger may reduce competition. HHIs, for example, may not be the best tool for evaluating acquisitions of small or nascent competitors.

GUIDELINE 2

The States support Draft Guideline 2's extended discussion of head-to-head competition. The States strongly agree that head-to-head competition must be preserved and promoted. Mergers that substantially eliminate this competition raise significant competitive concerns.

The States do note that certain proposed examples of "substantial competition" in Draft Guideline 2 would benefit from elaboration, including "strategic decisions" and "customer substitution." The Guideline would benefit from distinguishing examples of decisions and substitutions which may substantially lessen competition. While Appendix 2 provides some limited additional discussion, the Draft Guidelines do not provide comprehensive guidance on analyzing how "substantial" these factors may be in a particular case. Based on our collective experience, the States agree that strategic decisions and customer substitution are recurring potential issues for the evaluation of proposed mergers. For that reason, additional guidance on identifying the circumstances that raise material and substantial competitive concerns would be beneficial. As with other draft Guidelines, this additional guidance could take various forms. Past

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[8] Steven C. Salop, Potential Competition and Antitrust Analysis, Org. for Econ. Coop'n & Dev., Directorate for Fin. & Enter. Affairs, Competition Comm., Roundtable on the Concept of Potential Competition, at ¶ 21 (2021), https://one.oecd.org/document/DAF/COMP/WD(2021)37/en/pdf ("Indeed, my own view is that such safe harbors also are inappropriate for evaluating acquisitions of established firms in vertically adjacent or complementary product mergers, except perhaps when both firms compete in unconcentrated markets. A safe harbor certainly should not be applied if only one of the markets is unconcentrated.").

merger examples, or hypothetical descriptions of comparable circumstances, would assist in distinguishing more from less consequential strategic decisions and customer substitution patterns. Further discussion of relevant economic analyses exploring these factors would be helpful. The States' recommendation is that additional discussion and description of these specific subcategories would be valuable.

GUIDELINE 3

The States agree with the Agencies that mergers may increase the risk of coordination among the remaining firms in a market, and we support Draft Guideline 3 and its helpful discussion of coordinated effects. We have three specific comments on this Draft Guideline.

First, the examples of primary factors for the analysis of coordinated effects properly include elimination of a "maverick." Though Guideline 3 cites to *United States v. Alcoa*,[9] this Guideline might benefit from additional illustration of the "maverick" term. Either hypothetical scenarios, or relatively recent transactions like Southwest/Frontier (2009), AT&T/T-Mobile (2011), or Visa/Plaid (2021) might provide additional clarity on the significant characteristics of a maverick. In our collective experience, a major characteristic of a relevant maverick would be a different business model, like an alternative pricing structure or product bundle. This type of detail would provide more helpful analytical guidance to the business community.

Second, a secondary factor for analysis of coordinated effects is "if a firm's behavior can be promptly and easily observed by its rivals," but Draft Guideline 3 does not further discuss how to assess this factor. Guideline 3 would benefit from examples of transactions for which ease of observation of rival behavior was a key issue. Another way to provide more guidance would be to discuss industries, or types of businesses, where this factor is most salient for competitive analysis. With additional illustration and description, the risk of coordinated effects could be assessed more systematically.

Third, the secondary factors also note that "[r]emoving a firm that has different incentives from most others in a market can increase the risk of coordination." The Guideline could clarify what the Agencies mean by "different incentives" by adding additional examples of relevant incentives.

GUIDELINE 4

The States applaud the expanded discussion of potential competition in the Draft Guidelines[10] and encourage the Agencies to consider further expansion of Guideline 4 to include the protection of rivalrous innovation in the context of potential competition. Specifically, we suggest that the Agencies incorporate into Guideline 4 the phenomenon of killer and reverse acquisitions (already addressed in Appendix 2.E), the channeling of innovative efforts, and the relevant evidence in assessing a firm's incentives and capabilities to innovate under this

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[9] 377 U.S. 271, 280–81 (1964).

[10] U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Merger Guidelines, Guideline 4, at 11 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

Guideline. Further, we encourage the Agencies to further address the types of objective evidence that may prove relevant in the analysis of perceived potential competition.

A. Recommended Expansion of Guideline 4 Regarding Rivalrous Innovation

The antitrust laws protect rivalrous innovation, even when products have not yet launched or become available in the marketplace.[11] The Clayton Act's prohibition of mergers that reduce competition in *any* line of commerce includes acquisitions in nascent markets or markets that do not yet consist of commercially available products, including those marked by significant research and development and the potential for rapid technological advances.[12] Innovation resulting from vigorous research and development is often the precursor to entry into the relevant market by potential entrants.[13] In other words, a merger of two potential entrants who are currently engaged in rivalrous innovation may substantially lessen competition or tend to create a monopoly.

As the FTC has recognized, it is particularly important to protect competition in "infant industr[ies] which appear[] destined for far greater expansion and growth. Strong and vigorous competition is the catalyst of rapid economic progress."[14] Similarly, researchers have highlighted the importance of innovation, beyond any economic efficiency, in fostering growth.[15] Rivalry has a direct role in stimulating innovation.[16] Innovation drives dynamic competition, which introduces new products, processes, and services.[17] Antitrust law promotes dynamic competition for the benefit of entrepreneurs and consumers, providing potential competitors with the oxygen innovation needs to thrive.[18]

The Agencies have previously challenged mergers to protect both rivalrous innovation and potential competition. For example, the FTC's 2002 challenge to Amgen's acquisition of Immunex alleged reductions to rivalrous innovation and potential competition as to certain

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[11] *See e.g.*, *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 652 (2d Cir. 2015); *Woods Expl. & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1303 (5th Cir. 1971); *PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 839 (9th Cir. 2022), *cert. denied*, 143 S.Ct. 567 (2023); *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (citing *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876-77 (Fed. Cir. 1985)); *DAT Sols., LLC v. Convoy, Inc.*, No. 22-cv-00088, 2023 WL 3058057, at *11 (D. Or. Apr. 24, 2023); *Catch Curve, Inc. v. Venali, Inc.*, 519 F. Supp. 2d 1028, 1036 (C.D. Cal. 2007); *United States v. Bos. Sci. Corp.*, 253 F. Supp. 2d 85, 89 (D. Mass. 2003).

[12] 15 U.S.C. § 7; *see also United States v. Phila. Nat'l Bank*, 374 U.S. 321, 356 (1963).

[13] Richard J. Gilbert & Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 63 ANTITRUST L.J. 569, 570 (1995).

[14] *See, e.g.*, *In the Matter of Union Carbide Corp.*, 59 F.T.C. 614, 656 (1961); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc).

[15] Michael A. Carrier, *Two Puzzles Resolved: Of the Schumpeter-Arrow Stalemate and Pharmaceutical Innovation Markets*, 93 IOWA L. REV. 393, 399 & n.8 (2008).

[16] MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 143 (1990).

[17] Nicolas Petit & David J. Teece*, Innovating Big Tech Firms and Competition Policy: Favoring Dynamic Over Static Competition, Industrial and Corporate Change*, 30 INDUS. & CORP. CHANGE 1168, 1170 (2021).

[18] *See, e.g.*, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945); Christine A. Varney, Comm'r, Fed. Trade Comm'n, Competition Policy in Vertical Mergers and Innovation Markets: Remarks at the Conference of the National Health Lawyers Association, at 12 (Apr. 1995), https://www.ftc.gov/system/files/documents/public_statements/694391/1995_varney_competition_policy_in_vertical_mergers_and_innovation_markets.pdf (hereinafter "Remarks of Commissioner Varney").

products under development as a result of the merger.[19] Similarly, the FTC's 1996 challenge to Ciba-Geigy's merger with Sandoz alleged a reduction in innovation competition and redirection of research and development tracks of certain products under development, resulting in the elimination of both actual potential and perceived potential competition.[20]

Terms like "killer acquisition" and "reverse killer acquisition," coined by economists, describe an acquisition that allows the discontinuation of the target's product or innovation (or in reverse, the acquiring firm's product or innovation) and address the anticompetitive phenomenon where some mergers reduce the development of potentially competing products.[21] Either way, innovative efforts are extinguished, and the opportunities for resulting procompetitive effects are reduced.[22] These types of acquisitions may also allow the merged firm to throttle and channel future industry innovation along its preferred path.[23]

We support the Draft Guidelines' discussion of killer and reverse killer acquisitions in Appendix 2.E in the context of innovation and product variety.[24] However, we suggest that the Agencies consider further addressing killer and reverse killer acquisitions and the channeling of innovative efforts with respect to Guideline 4, to clarify that these may be important considerations in the context of potential competition.[25]

Further, we suggest that the Agencies consider addressing the types of evidence that may be helpful in assessing a firm's incentives and capabilities to compete on innovation and product variety. As the D.C. Circuit recognized in *Anthem*, a "threat to innovation is anticompetitive in its own right."[26] Thus, the Agencies could outline in the Draft Guidelines how they will assess this threat in the context of potential competition. After all, while innovation is broadly relevant in

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[19] *In the Matter of Amgen Inc., et al*., 134 F.T.C. 333, 340 (2002).
[20] *In the Matter of Ciba-Geigy Ltd., et al.*, No. 961-0055, 1996 WL 743359, at 9 (F.T.C. Dec. 5, 1996).
[21] Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 650, 654 (2021); Cristina Caffarra et al., *"How Tech Rolls":Potential Competition and "Reverse" Killer Acquisitions*, COMPETITION POL'Y INT'L (May 26, 2020), https://www.competitionpolicyinternational.com/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions/.
[22] *See* Caffarra, *supra* note 21; *United States v. Am. Tobacco Co*., 221 U.S. 106, 182–83 (1911); *United States v. Am. Can Co*., 230 F. 859, 875 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921).
[23] Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and The Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 783, 812-13 ("The loss is not just the acquired or acquiring company's new products or its innovation, but equally important, loss of the "stimulus for innovation" that would otherwise result from "preserving a wide range of private efforts to innovate. . . . [I]t is vital to continue to have many options being explored and developed at the same time. . . .").
[24] Draft Guidelines, *supra* note 10, Appendix 2.E, at 7 (addressing incentives to "ceas[e] to offer one of the merged firm's products"). Though the Guidelines do not use the terms "killer acquisition" or "reverse killer acquisition," they nonetheless address the same anticompetitive phenomenon.
[25] Killer and reverse killer acquisitions are not new to antitrust law. The concepts of killer acquisition and reverse killer acquisition are broadly applicable to merger analysis and not limited to potential competition and innovation. We discuss this further *infra* in our comments on Guideline 9.
[26] *See, e.g.*, *United States v. Anthem, Inc*., 855 F.3d 345, 361 (D.C. Cir. 2017); *see also Otto Bock HealthCare N. Am., Inc.*, 168 F.T.C. 324, 352 (2019) (holding that acquiring firm poised to launch product that would "intensify" competition was "likely harm to competition").

multiple areas of antitrust law and policy,[27] potential competitors are most likely to be today's rivalrous innovators.

Analyses focused on price, output effects, diversion ratios, and HHIs are often unhelpful in assessing potential competition, because the firms will have no in-market sales and no sales data at all.[28] Thus, other types of evidence may be key to the analysis and should be featured in the Draft Guidelines. To be sure, the same evidence that Guideline 4 already addresses in the context of potential competition is highly probative concerning rivalrous innovation. However, discussion of relevant evidence could be expanded regarding, for example, rivalrous research and development innovation. Such evidence would also be complementary to the types of evidence obtained through the Agencies' proposed amendments to the premerger notification rules, including descriptions of current or known planned products or services from the merging parties.[29]

Markets with regulatory checkpoints for pipeline innovations may provide accessible and reliable evidence of the likelihood of market entry by a potential competitor.[30] In the pharmaceutical industry, for example, applications by firms to the U.S. Food & Drug Administration are relevant to evaluating whether research and development efforts are rivalrous and whether entry is imminent.

For all markets, the Agencies can look to the parties' internal innovation programs and weigh them against a firm's capabilities and incentives. Doing so would allow the Agencies to assess mergers that threaten to reduce rivalrous innovation. Capabilities and incentives may be informed by, for example, firms' specialized assets, including intellectual property. Patents may also disclose research and development efforts by rivalrous innovators.[31] Yearly investment in research and development by different innovators or the number of employees working on a particular project may also be informative. In the technology industry, for example, the type and number of engineers allocated to a specific development effort by each innovator may be relevant.

Another relevant factor is a history of innovation capabilities, managerial experience, or competitive strength in research and development. As the Supreme Court has stated, "The existence of an aggressive, well equipped and well financed corporation engaged in the same or

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[27] For example, a market may be defined as an "innovation market" or "research and development market" where innovation may create an entirely new product. Innovation may also be a form of non-price competition between current competitors in current markets.

[28] C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879, 1905–06 (2020) ("[F]orms of evidence typically used to build a *prima facie* case, such as evidence of higher prices, will not typically be available, given that a nascent competitor, by its nature, has not begun to fully compete at the time of acquisition.").

[29] Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42,178, 42,196 (proposed June 29, 2023) (to be codified at 16 C.F.R. pts. 801, 803) (hereinafter "Proposed Premerger Notification Amendments").

[30] Org. for Econ. Coop'n & Dev., Directorate for Fin. & Enter. Affairs, Competition Comm., *The Concept of Potential Competition: OECD Competition Committee Discussion Paper*, at 27–28 (2021), https://www.oecd.org/daf/competition/the-concept-of-potential-competition-2021.pdf.

[31] Remarks of Commissioner Varney, *supra* note 18, at 16.

related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."[32]

Evidence of past behavior may also be probative of the likelihood of substantial lessening of competition. If a firm has a history of acquiring innovative competitors with ongoing research projects and engaging in killer or reverse killer acquisitions, the firm may be more likely to engage in this pattern again.[33] This evidence would be complementary to the categories of evidence called for by the Agencies' proposed amendments to the premerger notification rules regarding previous acquisitions,[34] and a potential assessment of serial acquisitions under Guideline 9,[35] discussed *infra*. Similarly, if an incumbent firm has a history of coordination involving the types of research developed in the relevant industry, or a history of eliminating alternative tracks that may disrupt its products or services through exclusionary conduct, this too may make it more likely that the firm will repeat this behavior and throttle and channel future industry innovation along its preferred path again.[36]

Incentives to innovate may also be probative. While pre-acquisition firms may have planned to or engaged in an innovation race, post-acquisition firms' incentives change, and these may be reduced if continuing or initiating development of new products or services may 'cannibalize' products or services offered by the same firm.[37] The incentive to chill innovation may thus be heightened when one of the merged firms already has existing products in the relevant market or complementary product markets.[38]

The above examples are non-exhaustive, like the Draft Guidelines as a whole. However, we believe it would be worthwhile to expand the discussion of rivalrous innovation under Guideline 4.

B. Objective Evidence and Perceived Potential Competition

In analyzing perceived potential competition, courts focus not on the potential entrant's subjective intent to enter the market, but instead on objective evidence, such as the firm's presence on the fringe of the market and whether it would be reasonable for in-market participants to perceive the firm as a potential entrant.[39] In other words, only conditions of which

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[32] *United States v. Falstaff Brewing*, 410 U.S. 526, 532.
[33] Remarks of Commissioner Varney, *supra* note 18, at 18.
[34] Proposed Premerger Notification Amendments, *supra* note 29, 88 Fed. Reg. at 42,202-04.
[35] Draft Guidelines, *supra* note 10, Guideline 9, at 22.
[36] See generally Michael A. Carrier & Gwendolyn J. Lindsay Cooley, *Prior Bad Acts and Merger Review*, 111 GEO. L.J. ONLINE 106 (2023).
[37] *Fed. Trade Comm'n v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at *24 (D.N.J. Aug. 4, 2021) (merger would "remove an incentive for both entities to continue to improve quality metrics and offer innovative medical technology"), *aff'd*, 30 F.4th 160, 178 (3d Cir. 2022) ("If the merger occurs, consumers would likely be disadvantaged because Englewood would no longer have an incentive to outperform HUMC and HUMC would have no reason to strive for improvement in those areas.").
[38] See generally Michael A. Carrier & Gwendolyn J. Lindsay Cooley, *Why the Antitrust Agencies Should Consider Prior Bad Acts in Merger Review*, PROMARKET (Mar. 7, 2023), https://www.promarket.org/2023/03/07/why-the-antitrust-agencies-should-consider-prior-bad-acts-in-merger-review/; *see also* Carrier & Cooley, *supra* note 36, at 19.
[39] 410 U.S. 526, 533–36 (1973).

competitors could be aware are relevant to perceived potential competition.[40] Plaintiffs need to show that the potential entrant "has the characteristics, capabilities, and economic incentive to render it a perceived de novo or toehold entrant."[41] Given this precedent, we agree with the Agencies that subjective evidence of perceived potential entry is not required to establish a violation of the Clayton Act.

In *United States v. Falstaff Brewing Corp.*, the Supreme Court identified the specific question related to perceived potential competition as "whether, given [the potential entrant's] financial capabilities and conditions in the [] market, it would be reasonable to consider it a potential entrant into that market."[42] The Court emphasized that "Circumstantial evidence is the lifeblood of antitrust law . . . [p]otential competition cannot be put to a subjective test."[43] Fringe effects can thus be inferred when a target market is highly concentrated, based on objective circumstantial evidence, as a fringe presence would temper oligopolistic behavior by existing participants in the market.[44] As such, and considering the weight ascribed to objective evidence, we encourage the Agencies to provide examples of objective evidence that may establish that a potential entrant is waiting in the wings of the market. The Supreme Court has considered size, financial capabilities,[45] prior history of acquisitions or de novo expansion, technological capabilities, management and marketing expertise,[46] and whether entry was an attractive alternative as evidence of capability and incentive to enter the market, which a reasonable in-market participant would perceive.[47]

Market proximity is also relevant, if two markets are similar in terms of production, marketing, technology, and transactional relationships.[48] For example, this would include geographic extension or product extension mergers involving complementary products.[49] Given the nexus between the company and the target market, in-market competitors would likely be aware of the threat the company would pose.

Public announcements that signal a company's interest in the target market are also relevant.[50] A company's general desire to expand, the pattern of its previous expansion, and the

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[40] *See United States v. Phillips Petroleum Co*., 367 F. Supp. 1226, 1238 (C.D. Cal. 1973), *aff'd mem*., 418 U.S. 906 (1974). Some mergers may present threats to both "actual" potential competition and perceived potential competition. In these cases, the same objective facts utilized to show a potential competitor's capability of entering the market ("actual" potential competition), are also highly probative and bolster the showing of a procompetitive on-the-fringe influence (perceived potential competition); *See, e.g.*, *Falstaff Brewing*, 410 U.S. at 534 n.13; *see also United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 770 (D. Md. 1976); Brief for the States as Amici Curiae, *Fed. Trade Comm'n v. Meta Platforms, Inc.*, No. 22-cv-4325, ECF No. 190-1 (N.D. Cal. Nov. 7, 2022) (hereinafter "States Meta/Within Amicus Brief").
[41] *United States v. Marine Bancorp*., 418 U.S. 602, 624–25 (1974).
[42] 410 U.S. at 533.
[43] *Id.* at 534 n.13.
[44] *Marine Bancorp*., 418 U.S. at 624–25.
[45] *Falstaff Brewing*, 410 U.S. at 529, 533–36.
[46] *Fed. Trade Comm'n* v. *Procter & Gamble Co.*, 386 U.S. 568, 580–81 (1967).
[47] *See also Yamaha Motor Co., Ltd. v. Fed. Trade Comm'n*, 657 F.2d 971, 978.
[48] Joseph Brodley, *Potential Competition under the Merger Guidelines*, 71 CAL. L. REV. 376, 391–92 (1983).
[49] *Procter & Gamble*, 386 U.S. at 580–58; *see also Falstaff Brewing*, 410 U.S. 526, *on remand*, 383 F. Supp. 1020 (D.R.I. 1974); *Phillips Petroleum Co*., 367 F. Supp. 1226 (C.D. Cal. 1973), *aff'd mem*., 418 U.S. 906 (1974).
[50] *Falstaff Brewing*, 410 U.S. at 529 n.8.

way it has already expanded should be considered in evaluating whether a company is a reasonably perceived potential entrant.[51] By contrast, however, where a company is known to lack the necessary economic, technical, or marketing capabilities, firms within the target market may be unaffected by the acquiring firm.

Ultimately, the reasonable perception of the likelihood of entry is a fact-intensive inquiry. However, outlining the broad categories of objective evidence that may be considered in a perceived potential competition analysis may clarify what evidence of a reasonable "perception" by in-market firms may be considered.

GUIDELINE 5

The States support Draft Guideline 5 for recognizing the potential harms from vertical and other non-horizontal mergers. Most of all, the States agree that a non-horizontal merger may allow a firm to foreclose competition by giving that firm control over access to a product, service, or customers that its rivals use to compete. As noted in previous comments by certain States, the post-merger ability to foreclose competition is an important concern for antitrust enforcers.

The States also support Draft Guideline 5 for noting that a merger may provide the merging firm access to rivals' competitively sensitive information which could be used to undermine competition or facilitate coordination. While this type of harm could play out in various industries, it is a very real concern in healthcare. For example, where a hospital and insurer merge, and the insurer gains access to information about rates negotiated between the hospital and its rival insurers, the merging insurer may use that to its own competitive advantage or to possibly collude with rival insurers.

GUIDELINE 6

The States support the rebuttable presumption set forth in Draft Guideline 6, whereby a foreclosure share in a "related market" for a "related product" above 50 percent suffices to establish that the effect of the merger may be to substantially lessen competition (subject to rebuttal evidence). Where an acquiring firm gains a market share so significant in a concentrated market, anticompetitive effects may follow in the vertically connected market, whether upstream or downstream. For example, in a merger between a hospital and an insurer, the merged entity may either exclude the merged hospital from participating in an insurer's network or raise the reimbursement rates that rival insurers must pay to include the merged provider in their networks. A high market share makes this scenario (and the attendant harm to competition) more likely to occur.

Where the foreclosure share in a vertical merger falls below 50 percent, the States support the plus factors set forth in Draft Guideline 6. In particular, as noted above, when the relevant market is already concentrated, the risk to competition is greater.

Draft Guideline 6 also properly recognizes that a vertical merger may require entering both an input and output market. For example, during the review of a California non-profit

[51] *Id. Cf. United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill. 1968).

hospital transaction between a large hospital and a vertically integrated health system that was the dominant insurer in the region, economists found that such a merger was likely to require any new entrant to compete at both levels (insurer and health provider) to effectively compete in the insurer market.[52]

Finally, we also support the Agencies' decision to omit a safe harbor for vertical mergers falling below a certain market share threshold.

GUIDELINE 7

The States strongly support the expanded discussion of entrenchment in the Draft Guidelines.[53] We suggest that the Agencies consider addressing (a) how data might entrench market power and (b) how acquisitions of innovative firms can allow the merged firm to channel innovation along its preferred path, further entrenching an incumbent.

Entrenchment is an independent basis to challenge an acquisition. In *Federal Trade Commission v. Procter & Gamble Co.*,[54] the Supreme Court recognized the dangers of entrenchment in holding that the acquisition would entrench Clorox, the leading household bleach manufacturer, because Procter and Gamble, as the leading household products supplier, could give the brand competitive advantages.[55] In short, the Supreme Court in *Procter & Gamble* recognized the dangers of entrenchment, including the deterrence of new entry, where "few firms would have the temerity to challenge a []solidly entrenched [firm]."[56]

Entrenchment concerns include the leveraging of economic power in one market in a way that confers an actual or potential competitive advantage over rivals in another market.[57] This may include the merged firm's ability to leverage its position through tying, bundling, conditioning, or otherwise linking its sales or excluding rivals. For example, recent research has demonstrated that cross-market mergers in healthcare may harm competition and raise prices in

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[52] *See* Lisa Maiuro, *An Evaluation of the Proposed Change in Control of St. Mary Medical Center*, MAIURO HEALTH CARE CONSULTING, 121 (Nov. 11, 2021), https://oag.ca.gov/system/files/media/smmc-impact-report-2021-redacted.pdf.

[53] Draft Guidelines, *supra* note 10, Guideline 7, at 18.

[54] 386 U.S. at 570–71.

[55] *Id*. at 581 (P&G's position would bestow upon Clorox significant competitive advantages, including access to volume discounts on advertising, promotion, and display preferences at retail level, and financial strength of large, diversified parent company; these advantages would alter structural characteristics of liquid bleach industry and intimidate competitors and potential entrants, in turn substantially reducing competition throughout liquid bleach industry.)

[56] *Id*.; *see also General Foods Corp. v. Fed. Trade Comm'n*, 386 F.2d 936, 945–46 (3d Cir. 1967) (leading firm's acquisition of non-competitor would raise entry barriers); *Wilson Sporting Goods Co*., 288 F. Supp. at 559 (leading sporting goods company enjoined from acquiring leading gymnastics equipment company where acquisition would entrench both parties).

[57] *Cf*. Sean P. Sullivan, *Anticompetitive Entrenchment*, 68 KAN. L. REV. 1133, 1144–45 (2020); *Procter & Gamble*, 386 U.S. at 581; *Berkey Photo, Inc. v. Eastman Kodak Co*., 603 F.2d 263, 275 (2d Cir. 1979) ("It is clear that a firm may not employ its market position as a lever to create or attempt to create a monopoly in another market . . . That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable.").

certain contexts.[58] Thus, we welcome the acknowledgment that merger assessments should consider evidence of trends toward vertical integration between firms.[59] We also strongly agree that this assessment should be applied to all mergers, regardless of whether they are horizontal, vertical, or conglomerate.[60]

The States are concerned that past mergers may have led to over-concentration in many sectors, and that incumbent firms have often entrenched their market (and, at times, industry-wide) dominance in large part through acquisitions. Thus, we particularly welcome the discussion of nascent competitive threats in this Guideline.[61] The States have filed challenges to unwind consummated mergers or to otherwise address anticompetitive conduct enabled by a merger that entrenched an incumbent and eliminated potential competition.[62] Ideally, however, merger enforcement should "nip monopoly in the bud."[63]

Moreover, while we strongly support the examples included in Guideline 7 and understand that these are not exhaustive, we encourage the Agencies to consider addressing (a) the way the variety, velocity, value, and volume of data can provide artificial competitive advantages and entrench market power,[64] and (b) how acquisitions of innovative firms can allow the merged firm to throttle and channel future industry innovation along its preferred path, further entrenching an incumbent, as discussed in our comments on Guideline 4, *supra*.

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[58] Jamie S. King & Erin V. Fuse Brown, *The Anti-Competitive Potential of Cross-Market Mergers in Health Care*, 11 ST. LOUIS U. J. HEALTH L. & POL'Y 43, 45 (2018).

[59] Draft Guidelines, *supra* note 10, Guideline 6 at 18; *see also U.S. Steel Corp. v. Fed. Trade Comm'n*, 426 F.2d 592, 602–03 (6th Cir. 1970) ("[A]n acquisition which may be viewed as part of an industry-wide trend toward vertical integration may be considered particularly obnoxious to Section 7.").

[60] Draft Guidelines, *supra* note 10, Guideline 6 at 19.

[61] *See, e.g.*, 23 State AG Comments, *supra* note 2, at 16.

[62] *See, e.g.*, Compl., *New York v. Facebook, Inc.*, No. 1:20-cv-03589, ECF No. 4 (D.D.C. Dec. 9, 2020); Compl., *United States v. Google LLC*, No. 1:23-cv-00108, ECF No. 1 (E.D. Va. Jan. 24, 2023).

[63] S. REP. No. 81-1775, at 4-5 (1950) ("The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."); 96 CONG. REC. 16433, 16453 (1950) (Sen. Kefauver stating that "[t]he Sherman Act test has been a measurement of accomplished monopoly. The purpose of the Clayton Act is to reach in their incipiency certain practices which if permitted to persist might eventually ripen into violations of the Sherman Act."); *United States v. du Pont*, 353 U.S. 586, 592–93 ("For it is the purpose of the Clayton Act to nip monopoly in the bud."); *Brown Shoe Co. v. United States*, 370 U.S. 294, 328–29 (1962) ("[T]he legislative history of [Section] 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act.")

[64] See MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY, 121, 200 (2016); Fed. Trade Comm'n, Dissenting Statement of Commissioner Pamela Jones Harbour, at 7-8, *In the Matter of Google/DoubleClick*, FTC File No. 071-0170 (Dec. 20, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf (hereinafter "Harbour Dissenting Statement") ("The combined Google/DoubleClick will be able to exploit network effects. . . [M]arrying the two datasets raises long-term competition questions that beg further inquiry."); *see also United States v. United Health Grp. Inc.*, 630 F. Supp. 3d, 118, 140–50 (D.D.C. 2022); Compl. ¶ 11, *United States v. United Health Grp. Inc.*, No. 22-cv-00481 (D.D.C. Feb. 24, 2022) ("United would gain unprecedented access to a vast trove of its health insurance rivals' competitively sensitive claims data," and competitors would thus be harmed). Note that after trial, the Court rejected DOJ's "data misuse" theory based on the facts.

GUIDELINE 8

The States welcome the inclusion of Guideline 8 in the Draft Guidelines. When analyzing a merger, the Agencies should assess trends toward concentration and the relevant market structures. Assessing general industry trends is a basic step and a well-recognized starting point for merger analysis.[65] Ignoring trends toward concentration would be equivalent to disregarding Congress's mandate and Supreme Court precedent.

In amending Section 7 in 1950, Congress sought to prevent trends toward concentration,[66] as discussed *infra* in the comments to Guideline 9. Supreme Court precedent underscores the importance of stopping these trends in their incipiency and before consumer choice is curtailed.[67] In this context, we welcome the acknowledgment that trends toward concentration are not limited to horizontal analyses, or HHIs, but also can include trends toward vertical integration and other factors such as exit from the market by significant players.[68] As the Supreme Court has stated, "[A] trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be."[69]

GUIDELINE 9

The States support the Agencies' recognition of serial acquisitions in Guideline 9. We suggest that the Agencies consider adopting examples of relevant factors or characteristics that illuminate the merging parties' intent, strategy, and/or design in a pattern of serial acquisitions, which may assist in distinguishing a benign series of acquisitions from an anticompetitive one.

The legislative history of the 1950 amendments to the Clayton Act shows that, with Section 7, Congress intended to cover serial acquisitions. For example, the House Report noted that "control of the market . . . may be achieved not in a single acquisition but as the result of a series of acquisitions."[70] The States thus champion the Agencies' inclusion of Guideline 9 in

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[65] *Phila. Nat'l Bank*, 374 U.S. 321. This analysis is complementary to other analyses, including assessments of the risks of coordination flowing from a merger. *See, e.g.*, Draft Guidelines, *supra* note 10, Guideline 3, at 9.

[66] *Brown Shoe*, 370 U.S. at 315–18, 345; *see also Marine Bancorp.*, 417 U.S. at 622 (*quoting Brown Shoe*, 370 U.S. at 317 (Clayton Act designed to arrest mergers "at a time when the trend to a lessening of competition in a line of commerce is still in its incipiency").

[67] *See, e.g.*, *United States v. Pennzoil*, 252 F. Supp. 962 (W.D. Pa. 1965) (Pennzoil's acquisitions contributed in substantial part to industry concentration in Penn Grade oil); *Crown Zellerbach Corp. v. Fed. Trade Comm'n*, 296 F.2d 800 (9th Cir. 1961), *cert denied*, 370 U.S. 937 (1962) (increasing concentration in pulp and paper industry); *Phila. Nat'l Bank*, 374 U.S. at 367; *United States v. Cont'l Can Co.*, 378 U.S. 441, 461–62 (1964) (quoting *Phila. Nat'l Bank*, 374 U.S. at 365 n.42) ("[I]f concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great."); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 604 (S.D.N.Y. 1958) (highlighting **"**the deep concern of the Congress with the continued trend towards concentration of economic power through mergers and acquisitions . . . increased concentration . . . from the merger cannot be considered in a vacuum; it cannot be divorced from the history of mergers and acquisitions, which in large measure accounts for the existing high degree of concentration in the industry").

[68] Draft Guidelines, *supra* note 10, Guideline 8, at 22.

[69] *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552–53 (1966).

[70] H.R. REP. No. 81-1191, at 8 (1949); *see also* S. REP. No. 81-1775, at 4-5 (1950) ("Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large

keeping with Congress's mandate.[71] However, below we identify a number of factors relevant to detecting the merging parties' intent, strategy, and/or design in a pattern of serial acquisitions (also known as systematic, roll-up, or creeping acquisitions) that the Agencies may consider adopting.[72] In other words, as not every merger is evidently anticompetitive, it may be possible to determine whether there is a common anticompetitive thread behind a series of acquisitions by examining each acquisition in the series against certain factors or characteristics.

These factors include mutually reinforcing strategies. Although they do not need to be present in the same way at every single acquisition, they may be relevant to understanding a company's intentions and goals in a pattern of acquisitions. While the characteristics identified below are neither exhaustive nor presented in any particular order, they involve relevant historical evidence that may come to light as part of a merger assessment.

If multiple acquisitions possess these characteristics, the series may be anticompetitive.

1. Defensive Acquisitions

An acquisition is "defensive" where the acquiring firm seeks to preserve its dominance by buying a potential threat.[73] This may include acquiring the target to prevent it from ending up in a rival's hands, preventing it from receiving independent funding, or preventing it from being acquired by a non-rival that would provide it with the resources to develop into a stronger competitive constraint against the acquiring firm.[74] Promising targets, including those that exhibit the potential to threaten incumbents, often receive multiple overtures from different potential acquirers and funding offers from independent investors. Where a firm fears or is aware of a competing overture or independent funding offer to a target, this may motivate the firm to buy the threat.

2. Acquisition Premium or Economic Sacrifice

Evidence of anticompetitive intent may include an acquirer paying an anticompetitive premium, i.e., more than what the standard valuation tools would indicate is the target

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concerns produce the entire supply."); FED. TRADE COMM'N, THE MERGER MOVEMENT: A SUMMARY REPORT (1948), at 6-7, 19 ("In appraising the over-all effect of mergers on economic concentration, it must be constantly borne in mind that they tend to become cumulative over a period of time. In other words, each year's mergers are superimposed upon a structure of economic concentration which has been built up over many past years.")

[71] Draft Guidelines, *supra* note 10, Guideline 9, at 22.

[72] *See generally* Jay L. Himes, *Nibblers Beware: Antitrust On Site*, CPI ANTITRUST CHRON., at 19-38 (Aug. 2022), https://www.pymnts.com/cpi_category/summer-2023-august-volume-2/.

[73] *See e.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1, 74 (1911) (Consolidation of control in Standard Oil "operated to destroy the potentiality of competition which otherwise would have existed."); *United States v. Continental Can Co*., 378 U.S. 441, 465 (1964) (The acquisition by Continental, a metal container manufacturer, "cannot help but diminish the likelihood of Hazel-Atlas [the acquired company, a manufacturer of glass containers] realizing its potential as a significant competitor," who could innovate to offer its glass containers for soft drinks and baby food, products that Continental sought to shift to metal containers.).

[74] *See generally* Hemphill & Wu, *supra* note 28; *see also Reid Bros. Logging Co. v. Ketchikan Pulp Co*., 699 F.2d 1292, 1297–98 (9th Cir. 1983) ("[T]he defendant blocked the establishment of competing [lumber] mill facilities by using covertly controlled corporations ('fronts') to bid preclusively on [United States Forest Service] lumber sales.").

company's market value.[75] The Draft Guidelines already recognize this as broadly relevant evidence in Appendix 1,[76] but we encourage the Agencies to explicitly reference these transaction terms in Guideline 9.

A purchase price far higher than a target's revenues or market value may also signal the elimination of a potential competitor or a defensive acquisition.[77] Paying a premium is another indication of economic sacrifice by the acquirer. A track record of multiple defensive acquisitions where an acquirer repeatedly overpays to preserve its dominance—as opposed to organically developing its own business or competing on the merits—may thus suggest an anticompetitive purpose.[78] In *United States v. American Can Co.*, for example, plants were purchased "at prices which in most cases far exceeded the cost of fitting up, with brand new and up-to-date machinery, factories capable of turning out several if not many times as many cans in the same time . . . from 1 1/2 to 25 times the sum which would have sufficed to have replaced the property sold with brand new articles of the same kind."[79] As the court stated, there was "no other conceivable reason, than the desire to suppress competition, for buying plants which it obviously would not pay to run . . . ."[80]

3. Killer Acquisitions

A killer acquisition is one where the acquiring firm shuts down the acquired company's products, services, or innovation with likely anticompetitive effects.[81] *American Can*, discussed *supra* in connection with acquisition premiums, also provides an example of a killer acquisition. As described by the court, "[t]he defendant began to shut up plants so soon as it got possession of them . . . the plants were bought, not for use, but to get them out of the market."[82] Similarly, in *United States v. American Tobacco Co.*, the Supreme Court emphasized the company's "persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade."[83] In *United States v. Grinnell Corp.*, the court noted that Grinnell's post-acquisition shutdowns "characteristically revealed a monopolistic temper and explained a monopolistic growth."[84] In *City of Rockford v. Mallinckrodt Ard, Inc.*, Mallinckrodt's purchase and immediate

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[75] Norbert Maier & Kalle Kantanen, *Economics of Potential Competition*, CPI ANTITRUST CHRON., at 12 (Feb. 2022), https://www.competitionpolicyinternational.com/wp-content/uploads/2022/02/ANTITRUST-CHRONICLE-Economics-of-Potential-Competition-February-2022.pdf.
[76] Draft Guidelines, *supra* note 10, Appendix 1, at 2.
[77] *Id.*
[78] Hemphill & Wu, *supra* note 28, at 1904.
[79] 230 F. 859, 870, 877 (D. Md. 1916).
[80] *Id*. at 877.
[81] *See generally* Amy C. Madl, *Killing Innovation?: Antitrust Implications of Killer Acquisitions*, 38 YALE J. REG. BULL. 28 (2020); Cunningham, *supra* note 21.
[82] *American Can*, 230 F. at 875, 877.
[83] 221 U.S. 106, 183 (1911); *See also United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 334-35 (D. Mass. 1953) (United bought second-hand shoe machinery, but "did not use them as machines or re-sell them. It is a fair inference that United's purpose in acquiring them was to curtain competition from second-hand shoe machinery.").
[84] *United States v. Grinnell Corp.*, 236 F. Supp. 244, 254, 255 (D.R.I. 1964), *aff'd*, 384 U.S. 563 (1966).

"shelving" of Synacthen, a potentially competing pharmaceutical, was found to have "no legitimate business justification."[85]

An acquisition of intellectual property can also amount to a killer acquisition. For example, in *Bloch v. SmithKline Beckman Corp*., the defendant purchased an exclusive license to suppress a product that, if developed, would compete with one of the defendant's existing products, and would expose misrepresentations related to the defendant's existing product.[86] As the court stated, "purposely obstructing the development of a potentially competitive product makes sense only because it eliminates competition."[87] A serial acquisition inquiry should also consider whether the acquiring firm's transactions include the accumulation of patents or other intellectual property at a level that could have anticompetitive effects.

When a series of acquisition targets are shut down after being acquired, anticompetitive intent and effects are likely, as it is improbable that multiple companies would have turned out to be duds otherwise. As stated by Professors Scott Hemphill and Tim Wu, "[a] track record of multiple acquisitions of nascent competitors that turned out in retrospect to be duds is a further indication of [profit] sacrifice."[88]

4. Reverse Killer Acquisitions

A reverse killer acquisition is one where the acquiring company shuts down or halts its own products, services, or innovation. In other words, the acquirer refrains from continuing organic expansion to avoid competing with the acquired company's products, services, or innovation. In *United States v. Grinnell*, for example, the Supreme Court noted that Grinnell had been preparing to go into the central station service business, but by acquiring ADT, Grinnell extinguished the possibility of its internal expansion.[89] A pattern of abandoning internal development in favor of a series of acquisitions requires scrutiny.[90] As underscored by Justice Brennan in *United States v. Philadelphia National Bank*, "surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth

[85] 360 F. Supp. 3d 730, 757 (N.D. Ill., 2019), *reconsideration denied*, 2019 WL 2763181 (N.D. Ill. May 3, 2019).
[86] 1988 WL 117927, at *2 (E.D. Pa. Nov. 1, 1988).
[87] *Id*. at *6 (cleaned up).
[88] Hemphill & Wu, *supra* note 28, at 1904.
[89] 384 U.S. at 576. *See also Ekco Prods. Co. v. Fed. Trade Comm'n*, 347 F.2d 745, 753 (7th Cir. 1965) (Absent acquisition, "there was a reasonable probability Ekco would have entered the commercial meat-handling industry by internal expansion"); Caffarra, *supra* note 21; States Meta/Within Amicus Brief, *supra* note 40, at 7 ("Meta's acquisitions also have suppressed innovation. For example, after Meta acquired Instagram, it terminated work on its own innovative alternative: Facebook Camera. In other cases, Meta has shut down the services of innovative acquired firms altogether, having accomplished its goal of eliminating a nascent or potential competitor or denying the firm to an existing rival. In fact, Meta has reportedly shut down nearly half of its acquisitions."); Harbour Dissenting Statement, *supra* note 64, at 1-2 ("Prior to the announcement of the deal, Google was developing and beta-testing its own third party ad serving solution, Google for Publishers and Google for Advertisers, which would have competed against DoubleClick's DART for Publishers and DART for Advertisers. Development efforts ceased once the proposed acquisition of DoubleClick was announced . . . It is difficult to believe that Google – with a market capitalization of nearly $207 billion, a top-notch engineering team, and a wealth of connections among publishers and advertisers – would have been unable to refine its beta product and release a highly competitive third-party ad serving solution of its own.").
[90] *See generally* Hemphill & Wu, *supra* note 28.

by acquisition."[91] Thus, when a company routinely opts to buy as opposed to build and in turn regularly shuts down its own products, services, and/or innovation, these patterns indicate a high potential for anticompetitive effects.

5. Channeling Innovation

Since a "threat to innovation is anticompetitive in its own right,"[92] preserving innovative rivalry is an important consideration in a serial acquisition inquiry.[93] Importantly, a pattern of serial acquisitions may also affect competition among innovative firms and throughout industries by channeling innovation into the hands of incumbents able to control the pace or direction of innovation in their preferred path. Post-acquisition exclusivity in connection with innovative assets, which may be key inputs to other innovations, as discussed *infra* in comments to Guideline 9, is a related consideration.

6. Stealth Acquisitions

The deliberate concealment of control in previous acquisitions, to preserve an appearance of competition, is also instructive. For example, in *American Tobacco*, the company held the companies it controlled as "seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade."[94]

Structuring transactions to avoid Hart-Scott-Rodino ("HSR") reporting and scrutiny may show anticompetitive intent.[95] Many States have highlighted a recent trend of private equity firms engaging in "stealth consolidation" by acquiring multiple smaller companies that either compete against each other or are vertical in nature and then combining the acquired companies in a direct or indirect consolidation or "roll up" for resale, generally attracting a higher valuation due to the combination.[96] For example, a private equity firm named JAB pursued a serial acquisition strategy that would have resulted in the consolidation of 100 pet health services clinics

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[91] 374 U.S. at 370; *see also Brown Shoe*, 370 U.S. at 346 n.72 ("Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs, or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions. Section 7 was enacted to prevent even small mergers that added to concentration in an industry.").

[92] *Anthem*, 855 F.3d at 361.

[93] *See, e.g.*, JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 111 (2019) ("Innovation competition and future product-market competition are appropriate concerns under the antitrust laws.").

[94] *American Tobacco*, 221 U.S. at 163-64, 183; *American Can*, 230 F. at 891 (The parent deliberately concealed ownership of a subsidiary, using the subsidiary's price cuts "to fight its general line competitors . . . , while still maintaining [the parent's] own [higher] prices.").

[95] Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified at 15 and 28 U.S.C. (2000)).

[96] 23 State AG Comments, *supra* note 2, at 47.

throughout the country.[97] The FTC challenged the latest acquisition by JAB in this market,[98] resulting in a settlement. As this was not the first time that JAB pursued a roll-up strategy, the FTC not only secured divestitures of clinics in certain local markets, but also required advance written notice before any future acquisition by JAB within 25 miles of a clinic currently owned by the company.[99]

Such roll-up strategies are also used in other industries.[100] For example, the States' recent experience in healthcare—where private equity transactions have contributed to greater market concentration and harm to patients—demonstrates the need for greater oversight and transparency. The rise in private equity investments in healthcare has been associated with higher prices and diminished quality of care, with the most harmful effects occurring where a private equity firm controls a competitively significant share of the local market.[101] Examples of these types of market power abuses abound.[102]

Stealth acquisitions are certainly not limited to private equity firms. Concerns have been raised across multiple industries that the nation might be facing a new era of stealth acquisitions.[103]

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[97] Fed. Trade Comm'n, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, In the Matter of JAB Consumer Fund/SAGE Veterinary Partners, at 1 (June 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022.06.13%20-%20Statement%20of%20Chair%20Lina%20M.%20Khan%20Regarding%20NVA-Sage%20-%20new.pdf; Fed. Trade Comm'n, Press Release, *FTC Acts to Protect Pet Owners from Private Equity Firm's Anticompetitive Acquisition of Veterinary Services Clinics* (June 13, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-protect-pet-owners-private-equity-firms-anticompetitive-acquisition-veterinary-services.

[98] Complaint, *JAB Consumer Partners SCA SICAR*, Docket No. C-4766 (F.T.C. June 3, 2022).

[99] *Id*.

[100] *See generally* Richard M. Scheffler et al., *Monetizing Medicine: Private Equity and Competition in Physician Markets* (July 10, 2023), https://www.antitrustinstitute.org/wp-content/uploads/2023/07/AAI-UCB-EG_Private-Equity-I-Physician-Practice-Report_FINAL.pdf (discussing concentration of physician services in local markets following private equity acquisitions below HSR reporting thresholds).

[101] *Id.*; *see also* Laura M. Alexander et al., *Private Equity's Entry into Healthcare Reveals Gaps in Competition Policy*, CPI ANTITRUST CHRONICLE (2022), https://petris.org/wp-content/uploads/2022/11/CPI-Private-Equity-10-27-22.pdf.

[102] *See, e.g.*, Peter Whoriskey, *Financiers bought up anesthesia practices, then raised prices*, WASH. POST (July 5, 2023), https://www.washingtonpost.com/business/2023/06/29/private-equity-medical-practices-raise-prices/?itid=ap_peterwhoriskey; Fred Schulte, *Sick Profit: Investigating Private Equity's Stealthy Takeover of Health Care Across Cities and Specialties*, KAISER HEALTH NEWS (Nov. 14, 2022), https://kffhealthnews.org/news/article/private-equity-takeover-health-care-cities-specialties/; Lovisa Gustafsson et al., *The Role of Private Equity in Driving Up Health Care Prices*, HARVARD BUS. REV. (Oct. 29, 2019), https://hbr.org/2019/10/the-role-of-private-equity-in-driving-up-health-care-prices; Ashvin Ghandi, YoungJun Song & Prabhava Upadrashta, Private Equity, *Consumers, and Competition: Evidence from the Nursing Home Industry* (Mar. 22, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3626558; Atul Gupta et al., *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes* (Nat'l Bureau of Econ., Working Paper No. 28474, 2021), https://www.nber.org/papers/w28474.

[103] *See e.g.*, JOHN M. BARRIOS & THOMAS WOLLMANN, BECKER FRIEDMAN INST. FOR ECON., UNIV. OF CHI., A NEW ERA OF MIDNIGHT MERGERS: ANTITRUST RISK AND INVESTOR DISCLOSURES (May 11, 2022), https://bfi.uchicago.edu/insight/research-summary/a-new-era-of-midnight-mergers-antitrust-risk-and-investor-disclosures; FED. TRADE COMM'N, NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS 10-11 (2021).

7. Systematic Targeting

A series of acquisitions or attempted acquisitions may indicate an anticompetitive pattern, including systematic targeting or conduct not discernible from any individual acquisition. For instance, a firm's practice of targeting nascent or potential competitors who are gaining "traction" sheds light on its intent in making each acquisition.[104] Similarly, the existence of an internal firm program to identify promising competitors is informative if that program has motivated the firm's completed and attempted acquisitions.[105] Finally, exclusionary actions against previous acquisition hold-outs, or threats along these lines, may also show anticompetitive intent.[106]

8. Post-acquisition Exclusivity

Acquisitions confer the ability to require exclusivity and foreclose or worsen access to rivals. Thus, if a target dealt with competitors and industry players more generally before its acquisition but no longer does so after its acquisition, the acquisition should be viewed as suspect. The anticompetitive effects of a foreclosure strategy may be extensive, especially in cases where a target was previously working with multiple industry participants and fueling multiple types of innovation.[107]

Moreover, where pre-acquisition, the firms had a pre-established relationship, such as a licensing agreement, assessing whether the merger led to cognizable merger-specific efficiencies may be relevant. If the efficiencies supposedly generated by the acquisition were readily attainable through the partnership that existed before the acquisition, those efficiencies are not merger-specific and therefore not cognizable. A relationship such as this may also indicate that the true purpose of the acquisition was to foreclose or worsen rivals' access to the target—particularly if the pre-acquisition partnership was non-exclusive or exclusive for only a short term, or if the acquirer has a history of opting to buy rather than build, and forcing targets into exclusive agreements.

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[104] Hemphill & Wu, *supra* note 28, at 1904.

[105] *Id. See also* Thomas Hoppner, *From Creative Destruction to Destruction of the Creatives: Innovation in Walled-Off Ecosystems*, 1 J. LAW, MARKET & INNOVATION 10, 25 (2022) (Through surveillance tools, digital platforms can "spot which new products or services are getting traction and pose a competitive threat," thereby adopting strategies "to defend their dominance in a highly targeted manner, either by acquiring any promising innovation or by anti-competitively preventing its success."); Sam Schechner & Parmy Olson, *Facebook Feared WhatsApp Threat Ahead of 2014 Purchase, Documents Show*, WALL ST. J. (Nov. 6, 2019, 6:37 PM), https://www.wsj.com/articles/facebook-feared-whatsapp-threat-ahead-of-2014-purchase-documents-show-11573075742.

[106] Jonathan Kanter, Ass't Atty. Gen., Antitrust Div., U.S. Dep't of Justice, Solving the Global Problem of Platform Monopolization: Keynote Address at the Fordham Competition Law Institute's 49th Annual Conference on International Antitrust Law and Policy (Sept. 16, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham.

[107] *See, e.g.*, Carstensen & Lande, *supra* note 23, at 813 ("[S]timulus for innovation comes from preserving a wide range of private efforts to innovate.")

Analyses should take account of the cumulative effect of post-acquisition exclusivity, heeding the general principle that "Section 7 of the Act does not require that each acquisition be examined separately; they may be evaluated for their combined effect."[108]

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The above factors are not exhaustive. Their inclusion may help shed light on what types of intent, strategy, and design may be relevant in distinguishing an anticompetitive pattern of serial acquisitions from a benign one, beyond the examples highlighted in other Guidelines. We encourage the Agencies to assess whether adopting examples such as these may provide further clarity concerning what makes a series of acquisitions anticompetitive.[109]

Serial acquisitions may involve a firm that acquires multiple interrelated or complementary businesses or actual or potential competitors. These creeping acquisitions may not always creep in the same direction.[110] A series of acquisitions in separate but adjacent markets that amass a combination of products, services, or innovation can raise barriers to entry and impede competition. Thus, in looking at serial acquisitions, mergers that relate to adjacent markets should be vetted for flywheel effects, even though those effects may not be strictly horizontal or vertical.[111] For example, as discussed *supra* in the States' comments on Guideline 7, an acquisition or a series of acquisitions that further solidifies a firm's dominant position and discourages rivals from attempting to enter a market can have a "moat building" effect.[112]

GUIDELINE 10

The States commend the Agencies' view of platform mergers through multiple dimensions of competition. In our experience, platforms interact with each other, their users, and their potential dis-intermediators in complex ways. This complexity warrants a holistic and nuanced approach to merger review. Having litigated cases in which platforms acquired or maintained monopolies through exclusionary acts levied in each relevant dimension of competition, the States support a holistic merger review to identify such problems in their incipiency. We applaud the Agencies for reflecting this approach in Draft Guideline 10.

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[108] *United States v. Healthco, Inc.*, 387 F. Supp. 258, 271 (S.D.N.Y 1975); *see also United States v. Reading Co.*, 253 U.S. 26, 55, 63-64 (1920) (invalidating exclusive supply agreements arising from unlawful acquisitions); *Microsoft,* 253 F.3d at 71 (Microsoft's exclusivity contracts with several internet access providers "helped keep usage of [rival browser Netscape] Navigator below the critical level necessary . . . to pose a real threat to Microsoft's monopoly."); *IT&T Corp. v. GTE Corp*., 449 F. Supp. 1158, 1174 (D. Haw. 1978) ("In-house" exclusive dealing after acquiring phone equipment manufacturers and operating companies foreclosed rivals' access); *United States v. Jerrold Electronics*, 187 F. Supp. 545, 572 (E.D. Pa. 1960) ("The effect of each of the acquisitions by the defendant Jerrold of community television antenna systems and the cumulative effect of the entire series of said acquisitions is to foreclose competitors of the defendants from a share of the market in community television antenna system equipment.").

[109] *See e.g., Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (en banc); *United States v. American Tel. & Tel. Co*., 524 F. Supp. 1336, 1344 (D.D.C. 1981).

[110] 23 State AG Comments, *supra* note 2, at 15-16.

[111] Kanter, *supra* note 106 ("If we isolate individual practices without considering the flywheel of anticompetitive effects then we overlook the dimension of meaningful competition.").

[112] *Procter & Gamble*, 386 U.S. at 576, 581.

Some commenters contend that this Guideline ignores the procompetitive efficiencies of joint platform-participant ownership; however, it does not. In Part IV.3, the Agencies provide a detailed framework for evaluating procompetitive efficiencies in transactions. We read the Draft Guidelines as permitting merging firms to present evidence of the procompetitive efficiencies of the integration or combined ownership of a platform owner and participant—as long as they satisfy the criteria indicative of "cognizable efficiencies." Further, a firm's "right" to control the terms of access to its facility is not—and has never been—without limit. For example, a monopolist cannot impose terms of access to its facility or product that forbid its customers from transacting with its rivals.[113] Indeed, as the Supreme Court opined in *Lorain Journal Co. v. United States*:

> The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisement from whomever it pleases. We do not dispute that general right. But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise a[s] [*sic*] a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.[114]

Here too, while a platform may have a qualified right to control its terms of access, that right is not absolute. Thus, mergers that facilitate platforms anticompetitively overstepping that right warrant exacting scrutiny.

The States offer two suggestions to further strengthen and clarify this Guideline:

First, on page 23, Section D, we suggest changing "one side of the market or segment of participants" to "the participants on one side of the platform." The nature of the indirect network effect may impact whether the platform is a market or is comprised of multiple markets. We interpret the remainder of Section D as addressing sides of platforms, not markets or market definitions. Accordingly, we believe that this revision will clarify the meaning of the guideline.

Second, we agree with the substance of Section E on page 24 but have observed conflicts of interest on certain platforms that extend further than the Guideline contemplates. Where competition exists both on and off a platform, the platform/participant's interest in winning competition off-platform may create a conflict of interest with its operation of the platform. A monopolist of a product that also owns a platform for the distribution of that product (and of its competitors' products) may abuse its monopoly power and control of the platform to exclude its rivals. And it may do so not to win competition on its platform, but to entrench its dominance off-platform. To address this scenario, the States recommend revising Section E to state: "A conflict of interest may arise when a platform operator is also a platform participant. The conflict of interest stems from the operator's interest in operating the platform as a forum for competition and its interest in winning competition **both on and off the platform**."

[113] *Lorain J. Co. v. United States*, 342 U.S. 143, 155 (1951).
[114] *Id.* (internal citations and quotation marks omitted).

GUIDELINE 13

The Agencies confirm that the Guidelines "are not mutually exclusive"[115] and that a "given merger may implicate multiple guidelines."[116] Guideline 13 highlights that the Guidelines are "not exhaustive" and that certain mergers may lessen competition without implicating any specific guideline.[117] For instance, Guideline 13 lists three examples where the Agencies identified past mergers that lessened competition through mechanisms not covered by traditional merger review. Citation to the cases or settlements giving rise to these examples would enhance the authority of these examples.

We applaud the Agencies' effort to identify mergers that may fall outside the scope of the traditional merger framework and yet may still lessen competition. We have also specifically encouraged the Agencies to identify the full range of non-horizontal mergers that may harm competition and to pay particular attention to mergers that may fall outside the traditional focus for merger review.[118] For example, in the 23 State AG Comments, the States asked the Agencies to include vertical mergers, partial mergers, and cross-market mergers within the Guidelines.[119]

It appears that Guidelines 6 and 7 seek to provide guidance on these non-horizontal mergers. In the same Comments, the States also proposed several presumptions, tools, and limited principles to help identify the full range of potentially anticompetitive non-horizontal mergers.[120] We encourage the Agencies to employ these proposed presumptions, tools, and limited principles within the framework outlined by Guidelines 6, 7, and 13.

We support the Agencies' increasing scrutiny of mergers involving private equity.[121] We are concerned that the structure and distinguishing features of private equity investments encourage private equity firms to focus unduly on short-term revenue generation, rather than long-term investment in innovation, research, and development.[122] In addition, the lack of transparency into private equity complicates evaluating both the magnitude and the effects of private equity acquisitions.

The States suggest that under Guideline 13, the Agencies should explain that they will consider the likelihood of harms to competition specific to private equity transactions, such as impairing an acquired firm's ability to compete—or even potentially driving that firm to bankruptcy—through such measures as saddling the company with high debt burdens, selling

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[115] Draft Guidelines, *supra* note 10, at 2.
[116] Draft Guidelines Press Release, *supra* note 5.
[117] Draft Guidelines, *supra* note 10, at 4, 28.
[118] 23 State AG Comments, *supra* note 2, at 2, 43.
[119] *Id*. at 43.
[120] *Id*. at 43-53 (suggesting employing rebuttable presumptions of anticompetitive harm for certain vertical mergers, application of horizontal standard to efficiency claims, and discarding assumption of double marginalization among other proposals).
[121] *See id*. at 79-90.
[122] 23 State AG Comments, *supra* note 2, at 81-83; Bryce Covert, *The Demise of Toys "R" Us is a Warning*, THE ATLANTIC (July/August 2018), https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/ (quoting analyst at Forrestor that while Toys "R" Us was not in great shape at time of buyout, transaction "probably hastened their death").

key assets for short-term revenue, and cutting back on investments to cut costs and increase short-term profits.[123]

Moreover, Guideline 13 should encourage the Agencies and courts to consider any evidence of a merger resulting in increased costs or decreased quality. As the States suggested in the 23 State AG Comments, the Agencies should consider other potentially helpful approaches. For instance, so-called "natural experiments"—e.g., relevant historical evidence of increases or decreases in attention or information costs, decreases in quality, and competitive entry or exit—should guide merger review.[124] Similarly analogous mergers resulting in increased attention costs or decreased quality imply that the proposed merger would do the same. The Agencies should "give significant weight to a merging company's internal documents regarding the effect of the merger."[125]

PART III. MARKET DEFINITION

The Draft Guidelines correctly note the importance of the market definition exercise—*i.e.*, the process of identifying the "area of effective competition" in which competition may be lessened through "reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')."[126] Undertaking this analysis both allows a focused review of the relevant antitrust markets and provides a mechanism for identifying market participants, measuring market shares, and assessing market concentration. We fully support the robust analysis called for by the Draft Guidelines.

We also emphasize that market definition is not a one-size-fits-all assessment. As the Draft Guidelines correctly note, there are multiple ways that market definition should be determined, including through any direct evidence of competition between the merging parties,[127] direct evidence of a participant's market power, evidence of market characteristics (sometimes referred to as "practical indicia" of a market), and a "hypothetical monopolist test," which gauges the likely effect of and response to potentially monopolistic conduct. In our state enforcement work, we use these same analyses because each represents the "commercial realities" that get to the core of identifying an area of effective competition.

Our perspective concerning the importance of market definition is informed by significant experience in evaluating mergers and market activity. Perhaps more so than any other individual section, Section III carries forward the prior iterations of the Guidelines to the present draft. Building upon the economic and practical experience from the prior Guidelines is appropriate, as is the draft's upfront treatment of the first three categories of evidence (evidence of competition between the merging parties, evidence of a participant's market power, and practical indicia) that often inform the decision making of competitors. Understanding how market participants and potential participants view competitive opportunities is essential to the

[123] *See* 23 State AG Comments, *supra* note 2, at 89 n.492 (focus on less traditional competition harms is consistent with Guideline 13 and changes in federal enforcers' views on other issues, e.g., privacy and competition in labor markets).
[124] *Id*. at 42-43.
[125] *Id*.
[126] Draft Guidelines, *supra* note 10, at 29.
[127] *See* the discussion of Guideline 2, *supra*, which treats this analysis in detail.

ultimate analysis of the market and the proposed merger. While the focus may sometimes shift quickly to a hypothetical monopolist test, these forms of evidence should never be overlooked or given short shrift. The Draft Guidelines underscore the importance of this evidence and, as noted above, clarity as in the analytical process benefits the merging parties, the Agencies, state enforcers, and the public.

Appendix 3 to the Draft Guidelines addresses the hypothetical monopolist test in detail. Variations of the hypothetical monopolist test have evolved to some degree, as reflected in refinements in prior versions of the Guidelines, and that evolution appropriately continues in the Draft Guidelines. Specific comments concerning the hypothetical monopolist test and Appendix 3 follow. In addition to those specific comments, we note three broad concepts that bear emphasis:

First, the Draft Guidelines appropriately note that a similar undertaking should be applied in instances where a merger creates a risk of potential monopsony. We fully support the application of Section III and the related provisions in buy-side or monopsony scenarios. This is reinforced by recent, successful merger litigation.[128]

Second, the Draft Guidelines appropriately recognize that there is no "one-size-fits-all" approach for market definition. In some cases, a complete picture of a market requires assessment from multiple categories of evidence. The Draft Guidelines emphasize that sometimes multiple forms of evidence should be assessed, depending upon the specific circumstances of a proposed merger.

Third, the Draft Guidelines make explicit that the most common hypothetical monopolist test—the small but significant and non-transitory increase in price ("SSNIP") test[129]—should be applied to both price and key non-price terms that a dominant firm may manipulate to its benefit. Although this has been recognized in certain past merger analyses,[130] we applaud the Agencies for recognizing this up-front and revising the naming convention from SSNIP to SSNIP**T**. The potential for a post-merger worsening of other key non-price terms (quality, related services, product features, etc.) is critical to product valuation, the consumer experience, and the competitive environment.

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[128] *See United States v. Bertelsmann SE & Co. KGaA*, Civ. A. No. 21-2886-FYP, 2022 WL 16949715, at *14 (D.D.C. Nov. 15, 2022).

[129] SSNIP refers to a "small but **s**ignificant **n**on-transitory **i**ncrease in **p**rice" and the Draft Guidelines, *supra* note 10, correctly build on that to include "T," "or other worsening of **t**erms," which is further described as "such as quality, service, capacity investment, choice of product variety or features, or innovative effort."

[130] *See*, *e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, § 4.1.3 (Aug. 19, 2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf (hereinafter "2010 Horizontal Guidelines") (recognizing "response to relative changes in price or other terms and conditions.").

PART IV. REBUTTAL EVIDENCE
Section 3. Procompetitive Efficiencies

A. General Approach

To this day, the vast majority of courts hearing merger challenges have rejected the parties' efficiencies claims and cast doubt on the viability of efficiencies as a defense.[131] Yet the 2010 Horizontal Merger Guidelines opened the discussion of efficiencies with a lengthy discussion of their potential benefits,[132] even as those Guidelines limited the types of cognizable efficiencies and required substantial evidence to support them. The treatment of efficiencies in the Draft Guidelines addresses this discrepancy by adopting a framework firmly rooted in governing precedent. This framework characterizes efficiencies claims as a rebuttal argument rather than a defense, and adopts the requirement from *General Dynamics* and *Baker Hughes* that such claims show that "no substantial lessening of competition is in fact threatened by the merger."[133] In other words, evidence of efficiencies must be sufficient to show that the *incipient*, *potential* threat to competition posed by the transaction, and proscribed by the plain language of Section 7, does not exist.

This is a high bar, and the Draft Guidelines subject efficiencies claims to an appropriately high level of scrutiny, tighter in several respects than in the 2010 Horizontal Guidelines. For instance, the Draft Guidelines expressly state that the Agencies will not credit efficiencies claims "outside the relevant market," following the bar on cross-market balancing in *Philadelphia National Bank.*[134] Regarding the requirement that any efficiencies be specific to the merger and not achievable through alternative means, the 2010 Horizontal Guidelines said that the Agencies would only consider "alternatives that are practical" and would not "insist upon a less restrictive alternative that is merely theoretical."[135] In contrast, the Draft Guidelines close these loopholes, stating simply that efficiencies are cognizable only if they "could not be achieved without the merger under review," and putting the burden on the parties to identify "barriers to achieving [those efficiencies] by contract."[136]

At the same time, most of the analysis in this section is consistent with the framework of the 2010 Horizontal Guidelines. Both the Draft Guidelines and the 2010 Guidelines state that the

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[131] *See, e.g.*, *Procter & Gamble*, 386 U.S. at 580 ("Possible economies cannot be used as a defense to illegality."). The Draft Guidelines attribute this quote to *Phila. Nat'l Bank.* Draft Guidelines, *supra* note 10, at 33 & n.102. *See also Anthem*, 855 F.3d at 353-55 ("it is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7"); *Hackensack Meridian*, 30 F.4th at 176 (court "skeptical such a defense exists" but does "not rule out that the efficiencies defense may be viable"); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 790 (9th Cir. 2015) ("We remain skeptical about the efficiencies defense in general and about its scope in particular.").

[132] 2010 Horizontal Guidelines, *supra* note 130, §10, at 29-30.

[133] Draft Guidelines, *supra* note 10, Part IV.3, at 33; *cf. United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974) ("no substantial lessening of competition occurred or was threatened by the acquisition"); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 990 (D.C. Cir. 1990) (quoting *General Dynamics*).

[134] Draft Guidelines, *supra* note 10, Part IV.3, at 33; *cf. Phila. Nat'l Bank*, 374 U.S. at 370; *compare* 2010 Horizontal Guidelines, *supra* note 130, § 10, at 30 n.14.

[135] 2010 Horizontal Guidelines, *supra* note 130, § 10, at 30.

[136] Draft Guidelines, *supra* note 10, Part IV.3, at 33 & n.105.

Agencies will not consider vague or speculative claims of efficiencies.[137] And both sets of Guidelines affirm that competition usually spurs firms to achieve efficiencies internally.[138] To the extent the efficiencies analysis in the Draft Guidelines differs from that in the 2010 Horizontal Guidelines, these differences are largely of degree, not of kind.[139]

The States strongly support the Agencies' approach. It squarely addresses a trend that the States frequently encounter in merger investigations and litigation: efficiencies claims that are based on selective evidence and opinion testimony concocted solely as a response to enforcement and that offer speculative analyses that amount to little more than mere promises by the parties. By basing their approach on governing precedent, and by tightening scrutiny without completely reinventing the wheel, the Agencies have updated their guidance on efficiencies in ways that not only reflect the realities of present-day merger enforcement, but also reaffirm the fundamental doctrines of merger law.

The States have two suggestions for further refinement of the efficiencies discussion. *First*, the logic discussed above has to be teased out from the terse statement of the approach in this section; the implications of the specific language may not be immediately apparent, and could benefit from further explanation. *Second*, given the Agencies' emphasis on heightening the standards for efficiency claims, more specific discussions of these heightened standards would be useful additions to the current text of the Draft Guidelines, either in this Part IV, an additional Appendix, or accompanying commentary.[140] For instance, the Agencies eliminated various detailed discussions of efficiencies from the 2010 Horizontal Guidelines, which are still consistent with the framework in the newer version. Returning these discussions to the Guidelines could provide additional guidance without altering or weakening the overall approach. These discussions are addressed in further detail below.

B. Verifiability

The analysis of verifiability in the Draft Guidelines adopts much of the corresponding language from the 2010 Horizontal Guidelines; the newer Guidelines repeat the earlier findings

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[137] *Cf. id.* at 33 ("the Agencies will not credit vague or speculative claims"); 2010 Horizontal Guidelines, *supra* note131, § 10, at 30 ("Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means.").

[138] *Cf.* Draft Guidelines, *supra* note 10, Part IV.3, at 33 ("Competition usually spurs firms to achieve efficiencies internally . . . ."); 2010 Horizontal Guidelines, *supra* note 130, § 10, at 29 ("Competition usually spurs firms to achieve efficiencies internally.").

[139] Some critics of the Draft Guidelines maintain that the Agencies wish to essentially kill the efficiencies defense. These criticisms exaggerate the degree to which the Draft Guidelines depart from the prior treatment of efficiencies by the Agencies and the courts (as discussed above). *See, e.g.*, Dennis Carlton, *Have the Draft Guidelines Demoted Economics?*, PROMARKET (Aug. 4, 2023), https://www.promarket.org/2023/08/04/have-the-draft-guidelines-demoted-economics/ ("[T]he draft Guidelines give inadequate recognition to the fact that mergers generate efficiencies that cannot be duplicated by contract."); Alden Abbott, *The New Merger Guideline Commandments: Thirteen is an Unlucky Number*, TRUTH ON THE MARKET (July 19, 2023), https://truthonthemarket.com/2023/07/19/the-new-merger-guideline-commandments-thirteen-is-an-unlucky-number/ ("The very brief discussion of efficiencies near the end of the DMG (see Part IV, Rebuttal Evidence) makes it clear that efficiency defenses are in reality a dead letter.").

[140] *Cf.* U.S. Dep't of Justice and Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (March 2006), https://www.justice.gov/d9/383663.pdf.

that efficiencies are "difficult to verify and quantify," and efficiencies "projected by the merging firms often are not realized."[141] Both versions express healthy skepticism toward projections of efficiencies drawn up by the parties expressly for the purposes of merger advocacy[142] and place the burden solely on the merging parties to produce the necessary evidence to substantiate their efficiency claims.[143]

The States recommend the addition of some basic guidance on what constitutes a verifiable efficiency claim. For instance, the Agencies could state that any efficiency analysis should be based on facts that are independently verifiable by a third party, not on management judgments or estimates made by the parties' internal business teams.[144] Analyses relying on the parties' characterizations of their own managerial expertise, incentives, or internal verification efforts are not sufficient to substantiate efficiency claims.[145] Efficiency claims are also not verifiable when they are contradicted by ordinary-course business documents or testimony as to whether cost savings will be realized.[146] While some of these principles are aligned with the broader discussions of relevant evidence in Appendix 1 of the Draft Guidelines, we suggest that articulating them specifically with respect to efficiency claims would help merging parties, enforcers, and the courts understand precisely how the Agencies will bring greater scrutiny to such claims.

We also suggest that specific statements regarding verifiability in the 2010 Horizontal Guidelines remain valid and could be reincorporated into the Draft Guidelines. First, the 2010 Guidelines stated that "efficiency claims substantiated by analogous past experience are those most likely to be credited."[147] We believe that this approach continues to offer a useful corrective to many merging parties' overreliance on speculative future projections concocted solely to justify a proposed merger—so long as claims regarding such past experience are supported by factual evidence sufficient to enable independent verification. Second, the 2010 Guidelines distinguished between three categories of efficiencies, in decreasing order of verifiability: (a) efficiencies resulting from "shifting production among facilities formerly owned separately," (b) "those relating to research and development," and (c) "those relating to procurement, management, or capital cost . . . ."[148] The States regard this categorization as helpful guidance,

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[141] Draft Guidelines, *supra* note 10, Part IV.3.B, at 34; *cf.* 2010 Horizontal Guidelines, *supra* note 130, § 10, at 30 ("Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized.").
[142] *See* Draft Guidelines, *supra* note 10, Part IV.3.B, at 34 (requiring verification through "methodology and evidence not dependent on the subjective predictions of the merging parties or their agents"); 2010 Horizontal Guidelines, *supra* note 130, § 10, at 30 ("Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process.").
[143] *See* Draft Guidelines, *supra* note 10, Part IV.3.B, at 34 ("If reliable methodology for verifying efficiencies does not exist or is otherwise not presented by the merging parties, the Agencies are unable to credit those efficiencies."); 2010 Horizontal Guidelines, *supra* note 130, § 10, at 30 ("it is incumbent upon the merging firms to substantiate efficiency claims").
[144] *See, e.g.*, *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 91 (D.D.C. 2011); *Fed. Trade Comm'n v. Tronox Ltd.*, 332 F. Supp. 3d 187, 216 (D.D.C. 2018).
[145] *See, e.g.*, *Fed. Trade Comm'n v. Wilhelm Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 73 (D.D.C. 2018).
[146] *See, e.g.*, *Tronox*, 332 F. Supp. 3d at 216.
[147] 2010 Horizontal Guidelines, *supra* note 130, § 10, at 30.
[148] *Id.* at 31.

and an expression of reasonable suspicion toward efficiency claims that are less tangible, and therefore harder to substantiate.

One difference between the Draft Guidelines and the 2010 Horizontal Guidelines is that in the former, the Agencies place special emphasis on "*reliable* methodology and evidence" for verifying efficiencies, stating that if such methodology is not presented, "the Agencies are unable to credit those efficiencies."[149] But the Draft Guidelines do not define "reliable" in this context. One possible reading is that evidence meeting the reliability standards in *Daubert* and Federal Rule of Evidence 702 will be deemed sufficient.[150] Certainly, these standards can be helpful in barring expert testimony on efficiencies, as in the recent Penguin Random House/Simon & Schuster merger litigation.[151] However, we caution that in our experience, courts can vary widely in the degree of scrutiny they apply under *Daubert* and Rule 702.[152]

C. Pass-Through

The States support the Draft Guidelines' more rigorous approach to analyzing the pass-through of claimed efficiencies to benefit consumers and improve competition. While the 2010 Guidelines briefly mentioned pass-through,[153] the Draft Guidelines explicitly require, as a separate element, that parties demonstrate the pass-through of efficiencies to improve competition or prevent the threat that it may be lessened in order for those efficiencies to be cognizable.[154] Furthermore, the new language specifies that the pass-through and the consequent benefits to competition must be realized "within a short period of time,"[155] heightening a standard that was briefly mentioned in the 2010 Guidelines.[156] Finally, the States commend the Agencies for rephrasing the pass-through requirement in more general terms than in the 2010 Guidelines, so that the pass-through inquiry is no longer limited to, or focused upon, price effects.[157]

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[149] Draft Guidelines, *supra* note 10, Part IV.3.B, at 34 (emphasis added).

[150] *Daubert v. Merrell Dow Pharms Inc.*, 509 U.S. 579, 589 (1993) ("[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.").

[151] *Bertelsmann*, Civ. A. No. 21-cv-2886-FYP, Trial Tr. 2772:12-13 (D.D.C. Aug. 17, 2022) (oral ruling excluding opinion of defendants' expert on efficiencies).

[152] To some extent, this flexibility is built into the standards themselves; the definition of "evidentiary reliability" in *Daubert* relates only to admissibility and merely demands that the testimony "pertain to scientific knowledge. . . ." 509 U.S. at 590 (quotation marks omitted) & n.9.

[153] 2010 Horizontal Guidelines, *supra* note 130, § 10, at 30-31 ("the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market . . . the greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers").

[154] Draft Guidelines, *supra* note 10, Part IV.3.C, at 34.

[155] *Id*.

[156] 2010 Horizontal Guidelines, *supra* note 130, § 10, at 31 n.15 ("The Agencies normally give the most weight to the results of this analysis over the short term. . . . Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict.").

[157] *Compare* 2010 Horizontal Guidelines, *supra* note 130, § 10, at 30-31 ("To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market."); Draft Guidelines, *supra* note 10, Part IV.3, at 34 ("To the extent efficiencies merely benefit the merging firms, they are not cognizable. The

The States recommend that the Agencies provide further guidance about the types of evidence that could be considered when analyzing the likelihood that efficiencies will pass through to benefit consumers and improve competition. For instance, the Agencies could reaffirm the principle from the 2010 Guidelines quoted above—that claims based on "analogous past experience" may be more probative than the parties' current projections.[158] The Agencies could also state that documentary evidence from the merging parties, prepared in the ordinary course of business and not tailored for merger advocacy, is likely to be more probative than expert evidence when it comes to pass-through probability.[159] Finally, the Agencies could point to industry-wide analyses of prevailing pass-through rates as potentially more probative than future projections or promises from the merging parties.[160]

D. Procompetitive

Perhaps the greatest change in the Draft Guidelines' treatment of efficiencies comes in Part IV.3.D, which states that "efficiencies are not cognizable if they will accelerate a trend toward concentration (see Guideline 8) or vertical integration (see Guideline 6)." The States understand that efficiencies can have anticompetitive effects that are separate from, and subsequent to, the transaction that allegedly generates those efficiencies. For instance, they can enhance the market power of the merged firm in a market that already has a high degree of concentration, tipping that market toward a monopoly. We support the Agencies' approach of deeming such efficiency claims as non-cognizable, but encourage the Agencies to explain this passage in further detail, perhaps by providing an example like the one mentioned above.

APPENDIX 1

A. Sources of Evidence

Appendix 1 identifies the most common sources of evidence the Agencies rely on in a merger investigation and further confirms that the Agencies will weigh the evidence based on its probative value. Providing prospective merging parties with a clear sense of the types of evidence Agencies consider will allow the merging parties and the public to more easily assess the viability of the proposed combination. We welcome this helpful clarity.

In addition to the evidence discussed in Appendix 1 and suggested with respect to Guideline 13, we encourage the Agencies and courts to consider any evidence of a merger resulting in increased costs or quality harms. As the States discussed in the 23 State AG Comments, the Agencies should consider other potentially helpful approaches. For instance, so-

merging parties must show that, within a short period of time, the benefits will improve competition in the relevant market or prevent the threat that it may be lessened.").

[158] *Id.* at 30; *See also Fed. Trade Comm'n v. Staples, Inc.*, 970 F. Supp. 1066, 1090 (D.D.C. 1997) (parties' projected pass-through rate of 2/3 belied by defendant's historical pass-through rate of only 15-17%; court rejected efficiencies claims).

[159] *See, e.g.*, *Anthem*, 855 F.3d at 362, 365 (parties' claimed efficiency pass-through rate of 98% contradicted in part by internal documents "that discussed ways to keep those savings for itself"; court rejected efficiencies claims).

[160] *See, e.g.*, *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 95, 98 (D.D.C. 2017) (while parties claimed over $2 billion in efficiencies, defense expert conceded that in this industry only 50% of reductions in marginal costs would pass through to consumers; court rejected efficiencies claims).

called "natural experiments"—e.g., relevant historical evidence of increases or decreases in attention or information costs, decreases in quality, and competitive entry or exit—should guide merger review.[161] Similarly analogous mergers resulting in increased attention costs or decreased quality imply that the proposed merger would do the same. The Agencies should "give significant weight to a merging company's internal documents regarding the effect of the merger."[162]

B. On the role of economics

The Draft Guidelines contain repeated reminders that the Agencies may rely on forms of evidence other than empirical economics. The States welcome this approach. Economics, and economists, *can* play an important role in antitrust cases, but econometric analysis is certainly not the only way to establish that a merger is unlawful. The Draft Guidelines importantly, and correctly, remind the reader that other forms of evidence can be, and should be, relied on. Economics is but one tool for assessing whether a merger violates the antitrust laws.

While the use of empirical economic analysis can provide rigor, overreliance on this analysis comes at a real cost. Antitrust cases are inherently complicated, but their complexity can be unnecessarily inflated if too many fact questions (or even the whole case) come down to a question of proof through empirical economics (and the costly services required to produce these results). Law is not economics, and as such it adopts different procedures and balances different goals. The law appropriately considers things like justice, fairness, administrability, and judicial economy. The explicit inclusion of analysis and sources of evidence other than economic testimony follows court precedent and agency practice and is a positive addition to the Draft Guidelines.

APPENDIX 3

Appendix 3 to the Draft Guidelines provides important detail and context concerning both the hypothetical monopolist (and, when appropriate, monopsonist) test (Appendix 3.A) and addresses issues that may arise when defining antitrust markets in a number of specific circumstances (Appendix 3.B). This component of the Draft Guidelines promotes a deeper *ex ante* understanding for the proposed merging parties, agency staff, state enforcers, and the public. We provide three specific comments:

First, the organizational interplay between Section III of the Draft Guidelines and Appendix 3 advances the goals of making the Draft Guidelines more readable and approachable for a wide audience. The economic analyses are not relegated—they are reinforced—and more logically organized to aid the reader in assessing how the Agencies approach this aspect of their analysis. The guidance provided in Appendix 3 builds upon the enforcement community's collective economic and heuristic learning in a manner which reflects a positive, sophisticated evolution of the Guidelines.

Second, the States applaud the refined SSNIP**T** test which (a) more prominently recognizes the potential for degradation of key "terms" in addition to price increases, (b)

[161] 23 State AG Comments, *supra* note 2, at 42-43.
[162] *Id*.

underscores that the benchmarks and magnitudes applied should be calibrated to market specifics, and (c) elucidates how recapture rates and critical loss analyses are utilized. These refinements will lead to more realistic analyses of the responses to dominant firm behavior, and the updated presentation of the Agencies' approach fosters better understanding.

Third, the States welcome Part 3.B's detailed discussion of eight circumstances commonly presented by mergers. They track the current understanding of market dynamics, and their inclusion will provide clarity for prospective merging parties and the public. In this subsection, we encourage the Agencies to use examples and hypotheticals wherever helpful to further illustrate their approach.

CONCLUSION

In sum, the States applaud the Agencies for taking on the important task of updating the Merger Guidelines to reflect the economic and legal realities of the present day and hope that these Comments will help the Agencies further clarify the Guidelines so that they will be accessible to wide audience—firms, enforcers, and the broader public alike.

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LETITIA JAMES
Attorney General
STATE OF NEW YORK

ROB BONTA
Attorney General
STATE OF CALIFORNIA

KWAME RAOUL
Attorney General
STATE OF ILLINOIS

ELLEN F. ROSENBLUM
Attorney General
STATE OF OREGON

KRIS MAYES
Attorney General
STATE OF ARIZONA

WILLIAM TONG
Attorney General
STATE OF CONNECTICUT

KATHY JENNINGS
Attorney General
STATE OF DELAWARE

BRIAN L. SCHWALB
Attorney General
DISTRICT OF COLUMBIA

ANNE E. LOPEZ
Attorney General
STATE OF HAWAII

AARON M. FREY
Attorney General
STATE OF MAINE

ANTHONY G. BROWN
Attorney General
STATE OF MARYLAND

ANDREA JOY CAMPBELL
Attorney General
COMMONWEALTH OF MASSACHUSETTS

KEITH ELLISON
Attorney General
STATE OF MINNESOTA

MATTHEW J. PLATKIN
Attorney General
STATE OF NEW JERSEY

MICHELLE A. HENRY
Attorney General
COMMONWEALTH OF PENNSYLVANIA

PETER F. NERONHA
Attorney General
STATE OF RHODE ISLAND

ARIEL M. SMITH
Attorney General
U.S. VIRGIN ISLANDS

BOB FERGUSON
Attorney General
STATE OF WASHINGTON

JOSHUA KAUL
Attorney General
STATE OF WISCONSIN