



**U.S. Department of Justice and Federal Trade Commission
Request for Information on Merger Enforcement,
Docket ID No. FTC-2022-0003**

Comments of the American Antitrust Institute

April 21, 2022

I. INTRODUCTION

The American Antitrust Institute (AAI) appreciates the opportunity to submit comments in response to the Request for Information on Merger Enforcement (RFI) issued by the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) on January 18, 2022.¹ AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy.²

AAI's comments address both overarching aspects of merger policy and specific aspects of the 2010 Horizontal Merger Guidelines (hereinafter "2010 Guidelines"). Sections II-III examine overarching issues that have troubled merger law for decades and should be constructively addressed during the Agencies' review process. Sections IV-X address specific areas where AAI believes drafting changes are necessary in the next iteration of the 2010 Guidelines (hereinafter the "Revised Guidelines").

II. THE PURPOSE AND FUNCTION OF THE MERGER GUIDELINES

A. Principles for an Effective Review and Drafting Process

The horizontal merger guidelines have been designed to serve "the dual purposes of leading to appropriate enforcement decisions on proposed horizontal mergers, and providing the antitrust bar and the business community with reasonably clear guidance to assess the antitrust enforcement risks of proposed transactions."³ As they did when they last revised the guidelines in 2010,⁴ the Agencies

¹ U.S. Dep't. of Just. & Fed. Trade Comm'n, Request for Information on Merger Enforcement (Jan. 18, 2022), <https://www.justice.gov/opa/press-release/file/1463566/download>.

² For more information, see www.antitrustinstitute.org.

³ U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006) ["2006 Guidelines Commentary"], available at <http://www.justice.gov/atr/public/guidelines/215247.htm>.

⁴ To ensure an appropriate review process, Assistant Attorney General Varney announced a series of joint agency workshops designed "to explore whether and how the Agencies should update the Guidelines in light of changes during those seventeen years in economic learning, the development of the case law, and agency practice." Christine A. Varney, Asst. Att'y Gen, Antitrust Div., U.S. Dept. of Just., Merger Guidelines Workshops: Remarks Prepared for the Third Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 22, 2009) ["2009 Varney Remarks"],

today should seek to maintain the core function and purpose of the current guidelines while also adapting to recent changes in agency practice, new empirical, economic and strategic learning, new case law, and major changes in the U.S. economy since 2010. Based on this perspective, AAI recommends several principles that should guide the review process and the drafting of the Revised Guidelines:

1. ***The Revised Guidelines should be descriptive and delineate settled principles and agency policy; they should not be prescriptive or delineate aspirational principles.*** It is a remarkable credit to the Agencies and the 2010 Guidelines that courts have treated the guidelines as a source of authority rather than advocacy in merger cases.⁵ That has been possible because the 2010 Guidelines were crafted to “set forth clearly and comprehensibly the state-of-the-art techniques that should be used by the Agencies to predict the competitive effects of a merger, promoting [the Agencies’] goal of greater accuracy and efficiency in the merger review process.”⁶ Guidelines that are not well grounded in theoretical or empirical learning or that advance contested propositions are unlikely to enjoy the same status as persuasive authority in the federal courts, which would substantially undermine effective merger control.
2. ***The Revised Guidelines should be limited to broad principles that have widespread application across sectors and industries.*** As the Agencies have noted previously, the core contribution of the merger guidelines is to provide “an analytical framework.”⁷ The challenge is that the framework must be “both robust and sufficiently flexible to allow the Agencies to account properly for the particular facts presented in each merger investigation.”⁸ Mergers involving products, sectors, or relevant markets that feature special factual complexities or unique policy considerations may warrant independent treatment, but that treatment does not belong in the merger guidelines.⁹ When categories of mergers do present special complexities or unique policy considerations, however, the Agencies should not hesitate (and have not hesitated historically) to provide context-specific analysis in a different document.¹⁰

<https://www.justice.gov/atr/speech/merger-guidelines-workshops>. The stated goal of the review process was to determine whether the Guidelines “accurately and clearly describe current agency practice, promoting our goal of greater transparency in the merger-review process,” and “to assess whether the Guidelines should be revised to capture advances in research or evolution in best practices that have taken place over the seventeen years since the Guidelines were last updated in a wholesale fashion.” *Id.*

⁵ See, e.g., *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (2017) (applying guidelines in DOJ case and noting that, although the Guidelines are not owed deference, “this court considers them a helpful tool, in view of the many years of thoughtful analysis they represent”); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.2 (3d Cir. 2016) (applying Guidelines in FTC case and observing, “Although the Merger Guidelines are not binding on the courts, they are often used as persuasive authority.”) (citations and internal quotation omitted).

⁶ 2009 Varney Remarks, *supra* note 4.

⁷ 2006 Guidelines Commentary, *supra* note 3, at v.

⁸ *Id.*

⁹ U.S. Dept. of Just. & Fed. Trade Comm’n, Horizontal Merger Guidelines § 1, at 1 (2010) [“2010 Guidelines”] (“These Guidelines outline the principal analytical techniques, practices, and the enforcement policy” of the Agencies); see also U.S. Dept. of Just. & Fed. Trade Comm’n, Vertical Merger Guidelines § 1, at 1 (2020) [“2020 Vertical Guidelines”] (“outline the principal analytical techniques, practices, and enforcement policies”).

¹⁰ See, e.g., U.S. Dept. of Just., Antitrust Div. & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property 34 (2017) (separately addressing mergers involving the sale of intellectual property); U.S. Dept. of Just., Antitrust Div. & Fed. Trade Comm’n, Statement of Antitrust Enforcement Policy in Health Care 8 (1996) (separately addressing hospital mergers); see also 2020 Vertical Guidelines, *supra* note 9.

3. ***The Revised Guidelines should prioritize the use of clear and intelligible language and accessibility to non-experts.*** As the foregoing should make clear, the heavy reliance on the merger guidelines by generalist federal judges, the lay business community, and the consumer and worker advocacy community demands that the Agencies place a premium on using comprehensible language and clear illustrative examples. To the extent economic and other complex jargon cannot be avoided, the Agencies should consider relegating it to an appendix or commentary.
4. ***The Agencies should consider revising the Commentary to the Merger Guidelines.*** The 2006 Commentary to the Horizontal Merger Guidelines has not been updated in 16 years, notwithstanding that it was crafted pursuant to the 1992 Guidelines and not the 2010 Guidelines that superseded them.¹¹ The Agencies should consider whether the 2006 Commentary should be revised in tandem with the Revised Guidelines. Given the evolution of digital commerce since 2006, new topics and applications of new case law may warrant coverage in a revised Commentary.

B. Separate Horizontal and Non-Horizontal Guidance

A key question for consideration during the review process is whether the Agencies should combine revised horizontal guidance with revised vertical guidance. The question does not admit of an easy answer, and there are principled arguments on both sides. One argument for maintaining separate guidance, for example, is that the vertical or horizontal orientation of the merging parties is often a useful starting point for distinguishing various mergers' likely competitive effects. Yet, at the same time, an argument for issuing combined guidance is that courts and litigants too often fail to recognize that the distinction between horizontal and vertical merger effects "flows not so much from the relationship between the parties..., but from *the mechanism for producing anticompetitive effects*."¹² Of particular concern to AAI, confusion over why horizontal and vertical mergers generally tend to threaten different kinds of anticompetitive effects, and a failure to recognize that vertical mergers sometimes can threaten the same kind of harm as horizontal mergers, has often led courts to reflexively and improperly dismiss the harm threatened by vertical mergers.¹³

Given the judiciary's longstanding reliance on independent horizontal guidelines, the persuasive value that the 2010 Guidelines have earned in court, and the analytic challenges judges have struggled to overcome in vertical cases, where implicit deference is often wrongly afforded to theoretical efficiencies claims, AAI recommends that the Agencies continue the current practice of maintaining distinct guidelines for horizontal and non-horizontal mergers. However, both sets of guidelines should go further than they currently do in clarifying that horizontal and vertical mergers "do not always threaten competition in different ways, or call for different analysis,"¹⁴ and that "the

¹¹ But see 2010 Guidelines, *supra* note 9, § 1, at 1 n.1 (stating that "The Commentary on the Horizontal Merger Guidelines issued by the Agencies in 2006 remains a valuable supplement to these Guidelines.").

¹² ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 45 (2d ed. 2008) (emphasis in original); see *id.* at 517, 860-61.

¹³ See, e.g., Am. Antitrust Inst., AAI Applauds Move to Block AT&T-Time Warner Merger, Sets Record Straight on Vertical Merger Enforcement (Dec. 6, 2017), <https://www.antitrustinstitute.org/work-product/aai-applauds-move-to-block-att-time-warner-merger-sets-record-straight-on-vertical-merger-enforcement/> (noting proposed vertical merger threatens coordinated effects among vertically integrated content-distributors); Steven C. Salop, *The AT&T/Time Warner Merger: How Judge Leon Garbled Professor Nash*, 6 J. ANTITRUST ENF. 459, 463 (2018) (noting that the same bargaining-leverage analysis that would apply to a horizontal merger should have applied to the AT&T/Time Warner merger).

¹⁴ Redacted Final Form Brief of the United States, 50, *United States v. American Express Co.*, No. 15-1672 (2d. Cir. filed Oct. 21, 2015) (quoting 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1503, at 392 (3d ed. 2010)).

‘horizontal-vertical distinction’ is ‘relevant only insofar as it helps identify competitive effects.’”¹⁵

Conclusions: Instead of recognizing implicitly that horizontal mergers can generate “exclusionary” anticompetitive effects that are commonly associated with vertical mergers, and that vertical mergers can generate “collusive” anticompetitive effects that are commonly associated with horizontal mergers, as the 2010 Guidelines and 2020 Vertical Guidelines each do, the Revised Guidelines should both state explicitly that the vertical or horizontal orientation of the merging parties neither dictates nor limits the scope or the severity of anticompetitive effects that may be threatened by any given merger.¹⁶

III. RECOGNIZING RELEVANT HISTORICAL INFORMATION IN MERGER REVIEWS

A. Accounting for Trends Toward Concentration

There are a number of factors that may contribute to rising concentration in sectors, industries, and markets. These include advances in technology, organic firm growth, scale and scope economies, and lax merger control.¹⁷ The Revised Guidelines should recognize the role of any “trend toward concentration” in evaluating a current merger proposal.¹⁸ This is a departure from the status quo, under which each merger is viewed largely in isolation, without considering past or concurrent consolidation by the merging parties or other rivals in the same or related markets.

Accounting for trends toward concentration is important because current merger proposals may reflect the next step in an anticompetitive strategy to reinforce dominance by eliminating close competitors or neutralizing smaller rivals through serial acquisitions. Likewise, previous consolidation in a market may signal a strategy by incumbent firms to “soften” competition by further reducing competition to a small group of friendly rivals. Failed merger remedies can also create a trend toward concentration because they do not fully maintain or restore competition lost in past mergers.

A leading example of serial mergers or acquisitions creating a trend toward concentration is found in the agricultural biotechnology sector. Prior to 2017, there were six major agricultural biotechnology rivals operating in adjacent markets for genetic traits, traited crop seed, and agrochemicals. With the merger of Dow-DuPont in 2017, concentration increased as a result of the elimination of a major rival.¹⁹ With the merger of Bayer-Monsanto a year later (2018), yet

¹⁵ GAVIL, KOVACIC & BAKER, *supra* note 12, at 45.

¹⁶ The 2010 Guidelines recognize that the enhanced market power from a horizontal merger “may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct,” but they do not acknowledge that this concern is more commonly associated with vertical mergers. 2010 Guidelines, *supra* note 9, § 1, at 2; *see also id.* § 2.2.3, at 6 (example 2); *id.* § 6, at 20. The 2020 Vertical Guidelines contain a section on coordinated effects, and the section states that “Section 7 of the Horizontal Merger Guidelines describes how the Agencies evaluate coordinated effects,” but the section does not recognize that the coordinated effects from a vertical merger can be just as harmful (or more so) than the coordinated effects from a horizontal merger. *See* 2020 Vertical Guidelines, *supra* note 9, § 5, at 10-11. Indeed, the section wrongly downplays them. *Id.* at 11 (“Some effects of a vertical merger may make the market less vulnerable to coordination. For example, a vertical merger’s elimination of double marginalization (see Section 6) may increase the merged firm’s incentive to cheat on a tacit agreement, thereby reducing the risk of coordinated effects.”).

¹⁷ *See, e.g.,* Carl Shapiro, *Antitrust in a time of populism*, 61 INT’L J. OF INDUSTRIAL ORG. 714 (2018).

¹⁸ RFI, *supra* note 1, at 2.

¹⁹ *DowDuPont Merger Successfully Completed*, CORPORATE.DOW.COM (Sept. 1, 2017), <https://corporate.dow.com/en-us/news/press-releases/dowdupont-merger-successfully-completed.html>.

another rival was eliminated, increasing concentration again.²⁰ The two mergers of Dow-DuPont and Bayer-Monsanto reduced the number of agricultural biotechnology firms from six to four in a two-year period.

Another example is the digital sector. Leading digital ecosystems have serially purchased hundreds of smaller rivals over the last 25 years.²¹ This pattern has fortified the major digital platforms, increased their cloud infrastructure holdings, and expanded their ecosystems of connected services. But of all reportable merger transactions in the digital sector between 2001 and 2019 cleared to the DOJ and FTC, only one deal—Google-ITA—was challenged.²² The rate of merger challenges in the digital sector is far below the average across all sectors. This has contributed to the emergence of dominant firms, some of which are currently the subject of public and private monopolization claims.²³

Another example is the use of “buy-and-build” and “rollup” models by private equity funds in healthcare and other markets. A common private equity strategy is to consolidate fragmented markets by acquiring a target company and then using that target company to acquire competing and complementary companies through a series of relatively small acquisitions.²⁴ Using this process, private equity funds have been able to amass significant stakes in certain industries and markets while flying largely under the radar of antitrust enforcers.

Examples of failed merger remedies producing a trend toward concentration also abound. For example, the FTC’s 2017 study on the pharmaceutical industry explains that between 2006-2012, only 75% of buyers of divestiture assets involving 60 on-market generic drugs studied actually sold the drug post-divestiture.²⁵ In the merger of retail grocers Safeway and Albertsons, the purchaser of divested stores in the Pacific Northwest, Haggen, failed to maintain the assets.²⁶ This led to the shuttering of stores, some of which were then re-purchased by Albertsons.²⁷ The failed remedy in the vertical merger of Live Nation and Ticketmaster has facilitated the maintenance of

²⁰ *Bayer Closes Monsanto Acquisition*, BUSINESSWIRE.COM (Jun. 7, 2018), <https://www.businesswire.com/news/home/20180607005617/en/Bayer-Closes-Monsanto-Acquisition>.

²¹ Diana L. Moss & David Hummel, *Anticipating the Next Generation of Powerful Digital Players: Implications for Competition Policy*, AM. ANTITRUST INST. 4-6 (Jan. 18, 2022), <https://www.antitrustinstitute.org/wp-content/uploads/2022/01/NextGenDigitalAAIReport.1.18.22-1.pdf>.

²² Diana L. Moss, *The Record of Weak U.S. Merger Enforcement in Big Tech*, AM. ANTITRUST INST. 5-6 (Jul. 8, 2019), https://www.antitrustinstitute.org/wp-content/uploads/2019/07/Merger-Enforcement_Big-Tech_7.8.19.pdf.

²³ See, e.g., *FTC v. Facebook*, No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020); *New York v. Facebook*, No. 1:2020-CV-03589 (D.D.C. filed Dec. 9, 2020); *United States v. Google LLC*, No. 1:20-cv-03010 (D.D.C. filed Oct. 20, 2020).

²⁴ Richard M. Scheffler, Laura M. Alexander & James R. Godwin, *Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk*, AM. ANTITRUST INST. & PETRIS CENTER AT THE SCHOOL OF PUBLIC HEALTH, UNIVERSITY OF CALIFORNIA, BERKELEY (May 18, 2021).

²⁵ Fed. Trade Comm’n., *The FTC’s Merger Remedies 2006-2012* 30-31 (Jan. 2017), www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf.

²⁶ Fed. Trade Comm’n., *FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger* (Jan. 27, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger>.

²⁷ Anna Marcum, *Failed divestiture: Albertsons is bidding on 36 Haggen stores, including some it used to own*, OREGONLIVE.COM (Jan. 9, 2019), https://www.oregonlive.com/window-shop/2015/11/albertsons_bids_on_36_haggen_s.html.

Ticketmaster’s monopoly position in ticketing.²⁸

Evidence that demonstrates a trend toward concentration is highly relevant to the incipency standard embodied in Section 7 of the Clayton Act.²⁹ Acquirers, and not consumers or workers, can and should bear the risk of the uncertain consequences of a merger or acquisition that may substantially lessen competition by incrementally advancing a strategy or process that facilitates anticompetitive market outcomes. Any other approach would only encourage acquirers to make more and earlier anticompetitive acquisitions.

Conclusions: AAI urges the Agencies to recognize the importance of a trend toward concentration in evaluating current merger proposals, to set forth the types of evidence they will consider in doing so, and to explain how such evidence will be used in conjunction with other evidence of likely anticompetitive effects.

B. Scrutiny of Mergers Involving Past Antitrust Violators

In addition to previous M&A activity in a given sector, the Revised Guidelines should expressly factor previous anticompetitive behavior, including serial collusion and monopolistic conduct, into merger analysis. The public record reveals that serial colluders—*i.e.* firms that participate in criminally illegal horizontal cartels repeatedly—are rampant.³⁰ Disturbingly, many of these firms have been caught colluding not just frequently but routinely.³¹ Economist John Connor examined cartel convictions from 1990 to 2009 and found that 52 firms were members of seven or more cartels; 26 were in ten or more cartels; and six were in 20 or more cartels.³² These figures strongly suggest that “collusion is simply a way of doing business for many firms.”³³ This way of doing business should be recognized as highly probative evidence when, for example, the Agencies evaluate whether such firms’ acquisitions may threaten coordinated effects.

Past monopolistic conduct, in addition to collusive conduct, also can be relevant in merger analysis. The FTC, for example, has alleged that Facebook engaged in exclusionary acquisitions as part of a multiprong “campaign” of conduct pursuant to a unified, integrated scheme to thwart nascent competitors from emerging and challenging its social networking products.³⁴ After the DOJ settled its merger case against Ticketmaster and Live Nation with behavioral remedies, evidence came to light that the merged firm repeatedly exercised market power against ticket

²⁸ Letter to Assistant Attorney General Makan Delrahim re: Amended Final Judgment: *U.S. v. Ticketmaster Entertainment, Inc., and Live Nation Entertainment, Inc.*, AM. ANTITRUST INSTITUTE (Feb. 4, 2020) [“AAI Ticketmaster-Live Nation Letter”], https://www.antitrustinstitute.org/wp-content/uploads/2020/02/AAI_Ltr-to-DOJ_LN-TM_F.pdf.

²⁹ See, e.g., Robert Lande, *Resurrecting Incipency: From Von’s Grocery to Consumer Choice*, 68 ANTITRUST LAW J. 875 (2001).

³⁰ Kovacic, Marshall & Meurer find that, in the chemical industry, at least 12 firms have been caught cartelizing four different products since 1955 (Akzo Nobel, BASF, Solvay, Bayer, Degussa, Hoechst, Arkema/Atofina, Shell, Rhone Poulenc/Aventis, ICI, Elf Aquitaine, and Atochem). In the electronics industry, there are at least five such firms since 1980 (Hitachi, Samsung, Mitsubishi, Toshiba, and Panasonic). In auto parts, at least 11 firms have been caught cartelizing three different products since 2000 (Hitachi, DENSO, Autoliv, TRW, NGK Spark Plug, Mitsubishi, Mitsuba, Robert Bosch, Toyota, Panasonic, Valeo, and Yazaki). In the financial industry, there are at least three such firms since 2000 (JP Morgan, Royal Bank of Scotland (RBS), and Union Bank of Switzerland (UBS)), and in the graphites industry there is at least one such firm since 2000 (SGL). William E. Kovacic, Robert C. Marshall & Michael D. Meurer, *Serial Collusion by Multi-Product Firms*, 6 J. ANTITRUST ENF’T 296, 297-98 (2018).

³¹ Hitachi, for example, has colluded in the sale of 16 products; Akzo Nobel nine. *Id.* at 298.

³² John M. Connor, *Recidivism Revealed: Private International Cartels 1990-2009*, 6 COMP. POL’Y INT’L 101, 110 (2010).

³³ Kovacic, Marshall & Meurer, *supra* note 30, at 299.

³⁴ First Amended Complaint, *FTC v. Facebook*, No. 1:20-cv-03590 (D.D.C. filed Aug. 19, 2021).

resellers, in violation of the consent decree.³⁵ Findings that a powerful firm has previously used M&A activity as part of a scheme to maintain or exercise monopoly power should be considered not only as part of the competitive effects analysis in future merger cases involving the firm, but also in evaluating potential remedies.

To be sure, evidence of past bad behavior by merging firms should not be dispositive. Indeed, judges sometimes exclude pattern-of-behavior evidence in non-antitrust proceedings on the theory that its prejudicial impact outweighs its probative value. But the probative value of pattern-of-behavior evidence has heightened significance in agency merger proceedings under Section 7 of the Clayton Act. It is entirely appropriate for the Agencies to consider such evidence when applying a statute that requires *ex ante* predictions about future behavior under an incipency standard.³⁶ Yet the 2010 Guidelines take an ostrich-like approach to this evidence, burying their proverbial head in predictive economic models and largely ignoring probative evidence of persistent anticompetitive business strategies.

Conclusions: The Revised Guidelines should explicitly state that the Agencies accord significant weight to a history of collusion, monopolization and other anticompetitive conduct in evaluating mergers, and that the Agencies apply the incipency standard to treat a firm’s prior history of anticompetitive behavior in the industry as a strong indicator that a merger’s effect may be to substantially lessen competition by facilitating future anticompetitive conduct.

IV. THE ROLE OF EVIDENCE IN MERGER REVIEWS

A. Establishing a Clearer “Lexicon” of Evidence

The 2010 Guidelines were the first to include a section on types of evidence the Agencies would look to in determining whether to challenge a merger.³⁷ Types of evidence include natural experiments; observations about changes in market structures or firm behavior in the same or similar relevant markets; market shares and concentration; elimination of head-to-head competition; elimination of a disruptive or “maverick” firm; and evidence of adverse post-merger effects in addressing challenges of consummated mergers. A major theme in the 2010 Guidelines therefore is that economic evidence—and the types of evidence that are available—is a central component of merger analysis.

The Agencies have used the types of evidence described in the 2010 Guidelines in challenging a number of mergers. These include mergers that eliminated a disruptive firm, such as H&R Block-Tax Act³⁸ and mergers that eliminated head-to-head competition, such as General Electric-Electrolux.³⁹ Evidence used in the FTC’s successful challenge of the Staples-Office Depot merger (1997) was in large part based on natural experiments, or adverse price effects based on data on the number of, and entry by, office superstore rivals in different geographic markets.⁴⁰

³⁵ See AAI Ticketmaster-Live Nation Letter, *supra* note 28.

³⁶ AAI has noted that in the generic pharmaceutical industry, where numerous mergers were approved subject to targeted divestitures, many of the merging parties are now defendants in price-fixing cases. See Diana L. Moss, *From Competition to Conspiracy: Assessing the Federal Trade Commission’s Merger Policy in the Pharmaceutical Sector*, AM. ANTITRUST INST. (Sept. 3, 2020).

³⁷ 2010 Guidelines, *supra* note 9, § 2.

³⁸ Complaint 2-3, *U.S. v. H&R Block, Inc., et al.*, Case No. 1:11-cv-00948 (D.D.C., filed May 23, 2011).

³⁹ Complaint 12-13, *U.S. v. AB Electrolux, et al.*, Case No. 1:15-cv-01039 (D.D.C., filed Jul. 1, 2015).

⁴⁰ *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

The 2010 Guidelines’ breakthrough in outlining the importance of evidence in the Agencies’ merger review and enforcement process has been enormously beneficial. However, the 2010 Guidelines contain various undefined and unclear descriptions of evidence. They use terms such as “more direct,” “indirect,” “explicit,” “implicit,” “reliable,” “historical,” and “persuasive.” In the Revised Guidelines, the Agencies should organize and clarify the growing lexicon of evidence, providing examples of when and how the Agencies will consider multiple forms of evidence and how such evidence would be balanced as part of agency decision-making. This would aid transparency and predictability.

B. Evidence of Actual Effects from Consummated Mergers

As more mergers have led to dominant firms and oligopolies, demonstrable evidence of harmful post-merger conduct and adverse effects is accumulating. For example, the domestic cartel of beef packers that has emerged from successive past consolidation is currently the subject of a private antitrust case.⁴¹ Evidence in that case reveals that the packer cartel has anticompetitively lowered prices paid to ranchers for their fed cattle. Similarly, as discussed above, DOJ’s investigation of persistent violations of the consent decree in the Live Nation-Ticketmaster merger revealed threats and retaliation against rival concert venues if they did not take Ticketmaster’s services.⁴² This exclusionary conduct reinforced the company’s dominant position in ticketing.

The Agencies should give great weight to such concrete evidence of harm from consummated mergers. Just as such evidence is important in cases seeking to prevent prospective harm from pending mergers, as discussed above, it is important in cases seeking to undo existing harm from consummated transactions. For example, competitive concerns arising from serial consolidation in beef packing should inform the DOJ’s analysis of whether to bring consummated merger challenges against any of the previous beef packer mergers that have resulted in high concentration and a tight oligopoly.⁴³ Likewise, evidence of post-merger exclusionary conduct, as was revealed in the DOJ’s investigation of Live Nation-Ticketmaster, should have carried more weight when the DOJ decided to amend the ineffectual consent decree rather than attempt to unwind the merger.⁴⁴

Conclusions: AAI urges the Agencies to devote a new section in the Revised Guidelines to challenges of consummated mergers. There remains a good deal of uncertainty around how the Agencies initiate and investigate consummated merger challenges where there is evidence of post-merger anticompetitive conduct and harm. This new section should discuss the role of different forms of observable evidence, including around prices, quality and innovation, in both input markets (including labor) and output markets.

C. Evidence on Structural Market Conditions

Evidence of structural market conditions, such as market concentration, should play an important role in merger review. The 2010 Guidelines note that high market shares and concentration are an

⁴¹ Memorandum Opinion & Order Granting in Part and Denying in Part Motion to Dismiss, *In re Cattle & Beef Antitrust Litig.*, Case No. 20-1319 (D. Minn. Sept. 14, 2021).

⁴² *U.S. v. Ticketmaster Entertainment, Inc. and Live Nation entertainment, Inc.*, Motion to Modify Final Judgment and Enter Amended Final Judgment 6-10, Case No 1:10-cv-00139-RMC (D.D.C., filed Jan. 8, 2020).

⁴³ See, e.g., Wyatt Bechtel, *Purchase of Iowa Premium by National Beef Completed*, DROVERS.COM (June 12, 2019), <https://www.drovers.com/markets/purchase-iowa-premium-national-beef-completed>.

⁴⁴ AAI Ticketmaster-Live Nation Letter, *supra* note 28.

important source of evidence in agency decision-making, reflecting the well-known premise that highly concentrated markets are less conducive to competitive outcomes.⁴⁵ But enforcement actions reveal that market share and concentration “thresholds” (post-merger HHI, and merger-induced change in HHI) are too often interpreted as “soft” guidance. Many highly concentrative mergers go unchallenged or are settled with remedies, increasing the risk of anticompetitive effects.

Empirical economic research buttresses the concern that highly concentrative mergers have resulted in post-merger price increases, which provides strong support for the position that highly concentrative mergers should be presumed unlawful.⁴⁶ Some Agency decision-making clearly reflects the 2010 Guidelines’ admonitions regarding high market concentration. For example, the effect of higher post-merger concentration on increasing incentives to coordinate was a leading reason why the Obama DOJ forced the abandonment of the proposed 4-3 merger of AT&T and T-Mobile in 2011.⁴⁷ The failure of the Trump DOJ to marshal this same evidence when it approved the 4-3 merger of Sprint-T-Mobile in 2016 was an enormous setback for enforcement of highly concentrative mergers.

Conclusions: In the Revised Guidelines, AAI urges the Agencies to give more emphasis to evidence of structural market conditions in deciding whether to challenge a merger. AAI encourages the Agencies to consider making the existing concentration thresholds “hard” guidance, signaling an intention to challenge all mergers that violate the structural presumption, thus forcing the abandonment or restructuring of more deals. If the Agencies choose to integrate vertical analysis into the Revised Guidelines, or in separate vertical guidance if they pursue that path, AAI also urges the Agencies to consider adopting additional presumptions based on structural market features in vertical mergers, including vertical mergers where upstream and/or downstream markets are highly concentrated and acquisitions of nascent competitors where the acquiring firm has a dominant market share.⁴⁸

D. Evidence of Ownership by Institutional and Non-Traditional Investors

Modern ownership structures are often complex, and effective merger enforcement must account for this complexity. An increasingly large share of publicly traded stock is held by institutional investors. Such investors may hold stakes in multiple competitors in a single sector, which recent scholarship has demonstrated can have a meaningful impact on competition.⁴⁹ The 2010

⁴⁵ 2010 Guidelines, *supra* note 9, § 2.1.3.

⁴⁶ John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 860-61 (2017).

⁴⁷ Complaint 11-12, *United States v. AT&T Inc., et al.*, Case No. 1:11-cv-01569 (D.D.C., filed Aug. 31, 2011).

⁴⁸ AAI’s comments in the 2020 Draft Vertical Merger Guidelines strongly urged the Agencies to adopt a “vertical presumption” of high concentration in an upstream and/or downstream market, as conducive to vertical foreclosure and anticompetitive coordination. See Comments of the American Antitrust Institute, Draft Vertical Merger Guidelines 5-6 (Feb. 25, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/02/AAI-Comments_Draft-VM-Guidelines2.25.2020.pdf.

⁴⁹ J. Azar, *A New Look at Oligopoly: Implicit Collusion Through Portfolio Diversification, Market Power, and the Theory of the Firm*, Princeton, <http://www.princeton.edu/~smorris/pdfs/PhD/Azar.pdf> (May 2012); J. Azar, *Portfolio Diversification, Market Power, and the Theory of the Firm* [unpublished manuscript]. <https://www.tse-fr.eu/sites/default/files/TSE/documents/sem2017/finance/azar.pdf> (September 22, 2017); J. Azar, M. C. Schmalz, & I. Tecu, *Anticompetitive Effects of Common Ownership*, 73(4) J. OF FIN. 1513-65. <https://doi.org/10.1111/jofi.12698> (May 10, 2018); J. B. Baker, *Overlapping Financial Investor Ownership, Market Power, and Antitrust Enforcement: My Qualified Agreement with Professor Elhauge*, 129 HARV. L. REV. 212, 212-32, https://harvardlawreview.org/wp-content/uploads/2016/03/vol129_Baker-2.pdf (2016).

Guidelines do not include any discussion of this issue.

Among privately held companies, investment by private equity funds and other strategic investors has grown rapidly.⁵⁰ Private equity firms will often invest heavily in a particular industry, acquiring interests in multiple competing or complementary companies in the same sector.⁵¹ Because firms operate multiple investment funds, and each company held by each fund remains a separate legal entity, the common investment by the private equity firm is not always apparent. It is particularly critical that a firm's complete holdings are taken into account when any of its funds' investments are analyzed, as the Agencies may not have any means to successfully challenge a subsequent combination of companies in which one of the firm's funds is a common majority investor.⁵²

For example, in 2015, the Agencies declined to challenge a merger between Ainsworth Lumber Co. Ltd. and Norbord Inc., two oriented strand board companies majority-owned by Brookfield Asset Management (BAM). The companies argued that BAM's common legal control implied that all three companies were entitled to single-entity status, immunizing the merger from Section 7. This was despite the fact that Ainsworth and Norbord were two of only three such suppliers in the market and the fact that less than a year earlier a merger between Ainsworth and Louisiana-Pacific Corp., the third manufacturer in the market, was abandoned after DOJ threatened to block it on Section 7 grounds.

Private equity funds are not always passive investors; part of their value proposition is their ability to install managers in target companies and actively direct the businesses in which they invest. A private equity firm's influence on the management of a company may continue after it sells its stake, as the managers and directors that it has installed may stay with the company. Increasingly, private equity investments are being undertaken by consortiums of private equity funds, increasing the layers of overlapping interests in these transactions. Likewise, when a private equity fund sells its interest in a company, it often sells to another private equity fund. These transactions create overlapping webs of interest that extend beyond particular transactions and create complex incentives for the companies involved.

Conclusions: The Revised Guidelines should note that even passive investments far short of majority control can be competitively significant when covering multiple horizontal competitors. In addition, the Agencies should address in the Revised Guidelines how they will gather and assess evidence of overlapping and influential ownership structures that may impact competition. In particular, the Revised Guidelines should address the need to evaluate acquisitions in light of all of the other companies legally controlled by either merging party or either of the merging parties' majority investors.

E. Indirect Evidence from Predictive Economic Methods

⁵⁰ See, e.g., GLOBAL PRIVATE EQUITY REPORT 2022, BAIN & CO. (2022) (PE investments have surged to \$1.12 trillion in 2021).

⁵¹ Scheffler, Alexander, & Godwin, *Soaring Private Equity*, *supra* note 24.

⁵² See James A. Keyte & Kenneth B. Schwartz, *Private Equity and Antitrust: A New Landscape*, ANTITRUST (Fall 2016); see also *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984) (holding that companies subject to common control cannot legally conspire); *Novatel Comm'ns, Inc. v. Cellular Telephone Supply, Inc.*, (a company and its 51%-owned subsidiary are a single entity for antitrust purposes); *Bell Atlantic Business System Services v. Hitachi Data Systems Corp.*, (legal control sufficient for single-entity status); see also Brief of the United States as Amicus Curiae Supporting Petitioners, *Copperweld*, 467 U.S. 752 (No. 82-1260), 1983 U.S. S. Ct. Briefs LEXIS 398, at *20 n.29 (arguing that rule applies even where companies hold themselves out as competitors in the marketplace).

Despite the mounting quantity and range of evidence that is referenced in the 2010 Guidelines, it is clear from the case law that many litigated merger challenges turn largely on predictive economic analysis. Antitrust has benefitted greatly from the contributions of economists in pioneering tools that illuminate key questions in merger analysis. These include, for example, diversion analysis and unilateral anticompetitive effects, critical loss analysis and market definition, and bargaining theory and vertical foreclosure. Much like in other contexts, however, “too much of a good thing” may not serve the broader purpose of stronger and consistent merger enforcement.

Judges routinely struggle with complex economic analysis in implementing standards of proof and burden-shifting in litigated merger cases. This has produced decisions that heavily reference such analysis, often without the benefit of complementary forms of evidence that can and should bear on decision-making. For example, the FTC’s record of losing all six attempts to block harmful hospital mergers in the 1990s was arguably almost solely the result of the economic model used to define geographic hospital markets. Defendants in those cases used the Elzinga-Hogarty (“E-H”) test, which produced broad regional geographic markets, thus minimizing the effect of a merger. The E-H test has faded away in the wake of evidence that hospital mergers in the 1990s systematically led to higher prices,⁵³ and its application to hospital mergers has been largely disclaimed by one of its namesakes.⁵⁴ But the damage was already done, namely, a swath of mergers that have contributed to high concentration and powerful hospital systems with significant market power and the incentives to exercise it.

Previous FTC Commissioners have noted the importance of using a mix of evidence in antitrust analysis. For example, Chairman Edward Howrey explained in 1954, “Competition is a complex and constantly changing phenomena. It has never been sharply defined. Injury to competition...is seldom capable of direct proof and must therefore be inferred from *all* of the surrounding circumstances.”⁵⁵ And Commissioner Thomas Rosch noted in 2009, “the more fundamental problem with many economic analyses is that they are too complex and therefore are incomprehensible...[.] direct evidence of the effects of a transaction or practice in the form of a party’s own statements or documents is superior to those formulae in terms of their probative value...”⁵⁶

Conclusions: AAI urges the Agencies to stress in the Revised Guidelines that while they will consider evidence based on predictive economic techniques for the purposes of evaluating various questions, such evidence is rarely conclusive and is ideally considered together with complementary factual evidence, such as bidding data, evidence from natural experiments based on past mergers in the same or similar markets, documentary evidence of intent, and qualitative

⁵³ Cory S. Capps, David Dranove & Zenon Zabinski, *The Long, Slow Decline of Elzinga-Hogarty*, CPI ANTITRUST CHRONICLE (Jul. 2017). The E-H test was ultimately replaced with the two-stage model of hospital competition, under which the FTC began to win hospital merger challenges.

⁵⁴ Kenneth G. Elzinga & Anthony W. Swisher, *Limits of the Elzinga-Hogarty Test in Hospital Mergers: the Evanston Case*, 18 INT’L J. OF BUS. ECON. 133 (2011).

⁵⁵ *Economic Evidence in Antitrust Cases*, Address by the Honorable Edward F. Howrey, Chairman, Fed. Trade Comm’n, Before the American Marketing Association (Jun. 14, 1954), at 7, https://www.ftc.gov/system/files/documents/public_statements/687161/19540614_howrey_economic_evidence_in_antitrust_cases.pdf (emphasis added).

⁵⁶ J. Thomas Rosch, Commissioner, Fed. Trade Comm’n, *Observations on Evidentiary Issues in Antitrust Cases, Remarks Before the EU Competition Law and Policy Workshop* (Jun. 19, 2009), at 10, https://www.ftc.gov/sites/default/files/documents/public_statements/observations-evidentiary-issues-antitrust-cases/090619antitrustcases.pdf.

evidence. And where evidence of actual effects is available, it is superior to theoretical evidence, including evidence from economic modeling.

F. Evidence of Non-Price Effects

The time is ripe for the Revised Guidelines to address how the Agencies will evaluate concerns over the potential adverse non-price effects of mergers. While the debate over the meaning and future of the prevailing consumer welfare standard continues, it remains clear based on theory and evidence that the standard is sufficiently flexible to accommodate an increasing variety of competitive concerns. These include at least: (1) the price and non-price effects of mergers, (2) anticompetitive output reductions in any market (i.e., input or output), and (3) the acquisition, enhancement, or maintenance of market power on the buy side and the sell side of any market. An increasing number of merger cases raise the foregoing concerns and are clearly reachable under the prevailing consumer welfare standard.

For example, the adverse effects from the potential post-merger exercise of market power in some digital markets may not be revealed in higher prices, but instead in lower quality, less variety, and slower or socially suboptimal rates and types of innovation. In zero-price markets, the “currency” of exchange is not dollars but rather user attention and information.⁵⁷ The post-merger exercise of market power could therefore manifest in a degraded quality of consumer engagement, as reflected in greater misuse of data and violations of user privacy. The same is true of mergers where a loss of innovation is a potential non-price effect, for example, through the elimination of parallel-path R&D programs in mergers of agricultural biotechnology and branded pharmaceutical rivals.⁵⁸

Conclusions: AAI urges the Agencies to spell out more carefully the possible types of evidence that would support merger challenges in cases where a transaction reduces incentives to compete on non-price dimensions. This includes evidence of reductions in parallel-path innovation pipelines, and quality and variety reductions. The Revised Guidelines could also usefully describe predictive economic tools that the Agencies will consider using to evaluate the non-price effects of mergers, such as the “small but significant and non-transitory decrease in quality (SSNDQ)” concept (that mirrors price effects through the SSNIP).

G. The Vital Role of “Intent” Evidence

The Revised Guidelines can be strengthened by discussing how and what evidence of intent is relevant to merger analysis. Although intent is not an element of a Section 7 violation, such evidence of the parties’ subjective perceptions about the markets in which they participate, the competitors and competition they face, and the motivation for and expected result of the merger are highly probative on the likely effects of a merger. Intent evidence, whether from the firm itself or from active market participants with intimate knowledge of current and future market realities, is particularly probative with respect to acquisitions of nascent competitors, where economic data about future competition may be lacking.

The 2010 Guidelines do not list intent evidence among the types of evidence the Agencies consider in evaluating a merger. However, they list the merging parties as one of the “most

⁵⁷ See, e.g., John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 174 (2015).

⁵⁸ William S. Comanor & F.M. Scherer, *Mergers and Innovation in the Pharmaceutical Industry*, 32 J. OF HEALTH ECON. 106, 108 (2013).

common sources of reasonably available and reliable evidence”⁵⁹ and explain the relevance and importance of intent evidence gathered from the parties:

Explicit or implicit evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts after the merger, or explicit or implicit evidence that the ability to engage in such conduct motivated the merger, can be highly informative in evaluating the likely effects of a merger.⁶⁰

By discussing this type of evidence only in the context of “Sources of Evidence” and not as a “Type of Evidence,” the 2010 Guidelines give the mistaken impression that this evidence is secondary to other types. On the contrary, as the 2010 Guidelines acknowledge, this type of evidence can be among the most telling of a merger’s likely effects.

Conclusions: AAI urges the Agencies to clarify the role of intent evidence in merger analysis. In particular, the guidelines would benefit from adding intent evidence to Section 2.2 as a powerful type of evidence the Agencies will consider in evaluating a merger.

V. ACCOUNTING FOR BUYER POWER AND LABOR-MARKET EFFECTS

Section 9 of the RFI raises specific questions about analytical distinctions among upstream and downstream markets, the buy-side and sell-side of any given market, and mergers that generate competitive effects in multiple, interconnected markets. The Revised Guidelines should address each of these issues explicitly as part of an expansion of the 2010 Guidelines’ analysis of mergers that threaten to enhance buyer power. A more fulsome treatment of buyer power, including but not limited to buyer power in labor markets, is needed both for analytical clarity and to ensure the guidelines more accurately reflect the balance of competition concerns in the modern economy.

A. Buyer Power vs. Monopsony Power

Section 9 of the RFI identifies a basic distinction between “monopoly power” and “monopsony power.” However, the Revised Guidelines should be careful not to use these terms when referring to the level of power required to establish liability under the Clayton Act, as they overstate the burden on the Agencies under the Clayton Act. The Revised Guidelines should use the term “market power” in lieu of these terms, as the Current Guidelines do.⁶¹ Although leading scholars argue persuasively that “market power and monopoly [or monopsony] power are qualitatively identical concepts,” courts sometimes distinguish between market power and monopoly or monopsony power as a matter of degree.⁶² Monopoly or monopsony power, which is required under the Sherman Act but not the Clayton Act’s incipency standard,⁶³ is sometimes defined as “substantial”

⁵⁹ 2010 Guidelines, *supra* note 9 § 2.2.1, at 4.

⁶⁰ *Id.*

⁶¹ See *id.* § 1, at 2 (“Enhancement of market power by buyers, *sometimes called* ‘monopsony power,’ has adverse effects comparable to enhancement of market power by sellers.”) (emphasis added).

⁶² Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 246 (1987); John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 B.U. L. Rev. 1169, 1173 n.14 (2018).

⁶³ Importantly, the Sherman Act was already in effect when the Clayton Act was enacted in 1914 and amended in 1950. Prior to the enactment and amendments, the Sherman Act already prohibited mergers that would constitute actual or attempted monopolization (or monopsonization) of a market or an unreasonable restraint of trade. Accordingly, the Clayton Act’s prohibition against mergers whose effect “*may* be to substantially to lessen competition, or to *tend to* create

market power.⁶⁴

Conclusions: The Revised Guidelines should spell out this qualitative difference explicitly and clarify that only the threat of enhanced “market power”—not the “substantial market power” that case law sometimes defines as monopoly or monopsony power—is needed to establish liability under the Clayton Act.

B. Symmetries and Asymmetries with Seller Power; Multi-Market Balancing

Analytically, the Revised Guidelines’ framework for evaluating mergers that enhance buyer market power should not differ from its framework for evaluating mergers that enhance seller market power. The Agencies should maintain the “unifying theme” of the Current Guidelines, which is that “mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise,” regardless of whether the power is on the sell-side or the buy-side of any given upstream or downstream market.⁶⁵ And the same basic tools that guide merger analysis on the seller side should be used on the buyer side.

Equal legal treatment of upstream and downstream markets and buy-side and sell-side effects follows from the axiom that the antitrust laws “were enacted for the protection of *competition*.”⁶⁶ The Supreme Court has determined that a “line of commerce” under the Clayton Act or a “relevant market” under the Sherman Act is an “area of effective competition.”⁶⁷ It has also determined that a “line of commerce” or “relevant market” in which competition occurs can be found either upstream or downstream.⁶⁸ And it has determined that, under the Separation of Powers, the judiciary does not have authority or competency to preference one area of effective competition over another area of

a monopoly,” was meant to lead to stricter merger enforcement than what occurred under the Sherman Act.

⁶⁴ See e.g., *United States v. Microsoft Corp.*, 346 U.S. App. D.C. 330, 253 F.3d 34, 51 (2001) (A firm has monopoly power if it can “raise prices substantially above the competitive level”); *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 967 (10th Cir. 1990) (“Market and monopoly power only differ in degree—monopoly power is commonly thought of as “substantial” market power.”); see also *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 481 (1992) (“Monopoly power under § 2 requires...something greater than market power under § 1.”).

⁶⁵ 2010 Guidelines, *supra* note 9, § 1, at 2; see *id.* § 12, at 32 (“To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market.”).

⁶⁶ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotation omitted; emphasis in original). See also *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 n.27 (1984) (“the policy unequivocally laid down by the [Sherman] Act is competition.”); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992) (Competition is “[a] national policy of such a pervasive and fundamental character” as to be “an essential part of the economic and legal system.”).

⁶⁷ See, e.g., *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 283 (1964) (“A line of commerce is an ‘area of effective competition.’”); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (“[T]he relevant market is defined as ‘the area of effective competition.’”).

⁶⁸ *Am. Express Co.*, 138 S. Ct. at 2285. (“Typically this is the ‘arena within which significant substitution in consumption or production occurs.’”) (emphasis added); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (“The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers,” but rather “is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”); see also *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321, n.12 (2007) (recognizing that predatory bidding, like predatory pricing, violates Section 2 of the Sherman Act if it satisfies the same *Brooke Group* test, even if the predatory firm lacks monopoly power in the output market and cannot recoup its losses there); see also C. Scott Hemphill & Nancy L. Rose., *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2087-92 (2018) (citing and discussing “numerous cases [that] are premised on input market effects alone, particularly when output market harms may be comparatively difficult to measure or demonstrate,” but also where “immediate harm to the output market may be attenuated or absent”).

effective competition; only Congress can do so.⁶⁹

However, the Revised Guidelines should be careful to avoid creating the misimpression that the actual case-by-case analysis of buy-side merger effects will always or usually mirror that of sell-side merger effects. Scholars have noted, for example, that this “mirror-image” metaphor breaks down on the buy side of input markets when buyers deal directly with suppliers in the absence of a public commodity market, or when a producer regularly sells to multiple buyers at once. Likewise, the metaphor can break down on the buy side of markets for branded consumer goods. In these instances, economic evidence suggests the appropriate concentration thresholds on the buy side should be substantially lower than the levels conventionally associated with market power on the sell side.⁷⁰

The Revised Guidelines also should clarify the Agencies’ analytical approach to mergers that have competitive effects on *both* the buy-side and sell-side of a given market, particularly where the effects diverge, such as, for example, where a merger is believed to cause anticompetitive harm on the buy-side but procompetitive benefits on the sell-side. Likewise, the Revised Guidelines should explain how the Agencies address mergers that have divergent competitive effects in altogether different markets.

The 2010 Guidelines state that “the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s),” and that “[i]nextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.”⁷¹

This exercise of discretion is perfectly appropriate as far as it goes. However, the 2010 Guidelines’ statement is flawed. First, it addresses only mergers that have divergent effects on different customer groups, not mergers that have divergent effects on customers and upstream groups, such as suppliers or workers. Second, the statement does not explain why the Agencies construe themselves to have this discretion. The Statement fails to acknowledge that the Agencies have no authorization from Congress, nor any principled analytical basis, to determine “how much competition is in the public interest” in any given line of commerce, “and how much is not.”⁷² It is only appropriate for the Agencies to exercise discretion not to challenge a merger that has divergent effects in different markets based on the judgment that their limited resources are better spent on comparatively more-harmful mergers or conduct.

Conclusions: The 2010 Guidelines provide that “[t]he Agencies may evaluate a merger in any

⁶⁹ E.g., *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963) (weighing competition in one market against competition in another is “a value choice... beyond the ordinary limits of judicial competence, and, in any event, [the choice] has been made for us already, by Congress,” which prohibited mergers that are anticompetitive any line of commerce); see also *United States v. Topco Assocs.*, 405 U.S. 596, 611 (1972) (“If a decision is to be made to sacrifice competition in one portion of the economy,” then “this . . . is a decision that must be made by Congress and not by private forces or the courts.”).

⁷⁰ PETER CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER 52-66 (2017).

⁷¹ 2010 Guidelines, *supra* note 9, § 10, at 30 n.14.

⁷² *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898); see also *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632, (1992) (Competition is “[a] national policy of such a pervasive and fundamental character” as to be “an essential part of the economic and legal system” that cannot be “displaced” in “discrete parts of the economy” except by sovereign federal or state actors).

relevant market,” because they are “guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects.”⁷³ The Revised Guidelines should state explicitly that this principle means the Agencies will evaluate a merger on the buy-side or sell-side of any given upstream or downstream market.

The Revised Guidelines also should clarify their statement regarding “small” competitive harms in a line of commerce and “large,” inextricably linked out-of-market efficiencies. They should specify that they may exercise discretion not to challenge such a merger based exclusively on the judgment that their limited resources are better spent on comparatively more-harmful mergers or conduct. They should further consider revising their statement in footnote 14 of the 2010 Guidelines along the following lines:

“The Agencies ~~normally~~ **are required to** assess competition in each relevant market affected by a merger independently **under the Clayton Act** and normally will challenge the merger if it is likely to be anticompetitive in any relevant market.... The Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that ~~a partial divestiture or other remedy could not feasibly eliminate~~ the anticompetitive effect in the relevant market **cannot be remedied** without sacrificing the efficiencies in other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small ~~so the merger is likely to benefit customers overall~~, **such that agency resources would be better spent challenging a merger that causes comparable harm but generates no efficiencies or small efficiencies. Importantly, however, the Agencies have neither statutory authority nor any principled methodology to adjudge whether harm to competition in one market should be tolerated for the sake of efficiencies in a different market; only sovereign actors may choose to displace the national policy favoring competition in discrete parts of the economy. In choosing how to allocate limited resources, the Agencies do not purport to exercise discretion to make that political judgment.**”

C. Labor-Market Considerations

The Revised Guidelines should leave no doubt that the same basic analytical framework applied to input (and output) markets applies to labor markets, which are a type of input market in which mergers can have buy-side and/or sell-side competitive effects like any other.⁷⁴ Among the principles for an effective review and revision process we identified in Part II.A. above, however, we noted that the Revised Guidelines should not single out any specific seller power scenarios for highly detailed substantive treatment. The same is true of buyer power scenarios, including labor-market scenarios. AAI nonetheless recommends that the Revised Guidelines should directly acknowledge mergers that have anticompetitive labor-market effects by using such a merger in an illustrative example of a general principle.

⁷³ 2010 Guidelines, *supra* note 9, § 4.1.1, at 10.

⁷⁴ Courts routinely recognize that anticompetitive labor-market effects can be the basis of antitrust claims. *See, e.g., Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995) (“Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.”) (quoting II PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 377c (rev. ed. 1995)); *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (reduction in NCAA basketball coaches’ salaries is a cognizable anticompetitive effect); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 140–41 (3d Cir. 2001) (“[E]mployees may challenge antitrust violations that are premised on restraining the employment market.”).

As AAI has noted in previous work, U.S. labor markets were long assumed to be highly competitive. The major, pathbreaking economic evidence confirming the error of this assumption has come to light relatively recently.⁷⁵ To date, apparently no court has ever condemned a merger based on its anticompetitive labor-market effects.⁷⁶ And the former Chairman of the FTC, Joseph Simons, publicly acknowledged that he instructed agency staff to “look for potential effects on the labor market with every merger they review” only as recently as 2018.⁷⁷ In the interests of transparency, then, the Revised Guidelines should specify that a merger is illegal if it threatens anticompetitive labor-market effects.

Conclusions: Although the Revised Guidelines should not address context-specific buyer power scenarios, the Agencies should consider using a labor-market merger in an illustrative example demonstrating a broadly applicable principle of input-market analysis.⁷⁸ The Agencies should also consider issuing a distinct, context-specific guidance document on analyzing the labor-market effects of mergers to address issues raised in Sections 9.7 and 9.8 of the RFI, among other things. The administration has called on the Agencies to consider revising their primary guidance document on competition in labor markets; the Agencies should consider adding a discussion of labor-market mergers to that document.⁷⁹

D. Countervailing Power Defenses

Calls to include or expand consideration of powerful buyers or countervailing power in the Revised Guidelines should be rejected. The 2010 Guidelines note that the presence of powerful buyers may “constrain the ability of the merging parties to raise prices.”⁸⁰ But they also make clear that a merger of sellers in the face of a powerful buyer may still harm that buyer or other buyers in the market.⁸¹ This approach properly situates consideration of the presence of powerful trading partners in the analysis of merger effects. By noting that a reduction in a buyer’s negotiating leverage harms the buyer, this approach recognizes that the antitrust laws protect against wealth transfers from reductions in competition.

Some commenters have suggested that the Agencies should go further and endorse a permissive stance toward mergers and collaborations that allow horizontal competitors to accumulate bargaining leverage to countervail powerful counterparties, and particularly powerful buyers. Instead, the Guidelines should continue to embrace an enforcement approach rooted in preserving competition. That a merger or collaboration allows the parties to countervail bargaining

⁷⁵ See Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST. (July 31, 2018) (reviewing recent scholarship).

⁷⁶ Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 INDIANA L.J. 1031, 1032 (2019).

⁷⁷ See Questions for Joseph Simons, Chairman, Fed. Trade Comm’n, Senate Committee on the Judiciary, Hearing on Oversight on the Enforcement of the Antitrust Laws 20 (Oct. 3, 2018), *available at* <https://www.judiciary.senate.gov/imo/media/doc/Simons%20Responses%20to%20QFRs1.pdf>.

⁷⁸ See 2010 Guidelines, *supra* note 9, § 1, at 1 (Guidelines provide examples that “are illustrative” but that “do not exhaust the applications of the relevant principle”).

⁷⁹ EXECUTIVE OFFICE OF THE WHITE HOUSE, EO 14036, PROMOTING COMPETITION IN THE AMERICAN ECONOMY (July 9, 2021); see Fed. Trade Comm’n & U.S. Dep’t of Just., Antitrust Div., Antitrust Guidance for Human Resource Professionals (Oct. 2016).

⁸⁰ 2010 Guidelines, *supra* note 9, § 8 at 27.

⁸¹ *Id.* (“[T]he Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger.... Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer’s negotiating leverage will harm that buyer.... Furthermore, even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers.”).

leverage held by powerful buyers does not justify the elimination of horizontal competition. Rather, such mergers risk further entrenching market power, tend to foster collusion and consolidation, and may raise barriers to entry and harm small buyers and sellers.⁸²

For example, in *FTC v. Sanford Health*, two healthcare providers in North Dakota argued they should be allowed to merge to near-monopoly in several relevant markets because the presence of a dominant insurance company in those markets, Blue Cross, would mitigate any anticompetitive effects.⁸³ The court rejected this argument, reasoning that despite Blue Cross's dominance, the merger would eliminate its ability to switch to other providers in the face of a price increase. The court found this harm was sufficient, without any consideration of whether Blue Cross itself possessed market power or whether pre-merger prices were below a competitive level. The court was correct.

Conclusions: The Revised Guidelines should retain the current limited role for consideration of powerful buyers in analyzing effects of mergers between sellers. To the extent consideration of powerful counterparties is expanded in the Revised Guidelines, it should be only to note a symmetrically limited role for consideration of powerful sellers in mergers between buyers.

VI. ACCOUNTING FOR DIGITAL BUSINESS ECOSYSTEMS

The rise of the digital economy has transformed business models and incentives for consolidation. The rapid expansion of digital business ecosystems (DBEs) over the last 25 years poses a number of pressing issues for merger enforcement. DBEs feature unique economic, technological, and business characteristics, which play a major role in fostering strategic competitive incentives relating to the value proposition of monetizing user data.⁸⁴ These include a range of market failures such as network effects, information asymmetries around user data and privacy, data externalities, and the use of algorithms to shape user preferences. Cloud computing technology exhibits significant economies of scale and adds further complexity, including data analytics, supported by artificial intelligence and machine learning. DBEs are also markedly different than traditional, non-digital business models in that they have historically grown primarily through acquisition, as opposed to organically.⁸⁵

Despite their unique market characteristics, mergers involving digital markets can raise many of the same competition concerns that the 2010 Guidelines currently address. This is particularly true of acquisitions of potential competitors—especially “nascent” rivals that pose an innovative threat—by dominant digital players. The relevant markets defined in a merger investigation involving a DBE should be treated as any other input or output market. Such relevant markets could include markets for “data” and data enrichment based on any or all components of cloud computing, and ecosystem applications such as fintech, digital healthcare, and mobile video gaming.

⁸² Laura M. Alexander, *Countervailing Power: A Comprehensive Assessment of a Persistent but Troubling Idea*, AM. ANTITRUST INST. (Oct. 15, 2020) (reviewing caselaw and recent scholarship).

⁸³ *FTC v. Sanford Health*, 926 F.3d 959, 964 (8th Cir. 2019).

⁸⁴ Diana L. Moss, Gregory T. Gundlach, and Riley T. Krotz, *Market Power and Digital Business Ecosystems: Assessing the Impact of Economic and Business Complexity on Competition Analysis and Remedies*, AM. ANTITRUST INST. (Jun. 1, 2021), <https://www.antitrustinstitute.org/work-product/aai-issues-report-market-power-and-digital-business-ecosystems-assessing-the-impact-of-economic-and-business-complexity-on-competition-analysis-and-remedies/>.

⁸⁵ Moss & Hummel, *supra* note 21.

For example, in 2020, Google acquired cloud computing startup Looker, an acquisition that increased concentration in cloud computing in an already highly concentrated market. The transaction went unchallenged, despite the fact that three players (Amazon Web Service, Microsoft Azure, and Google Cloud) accounted for more than 60% of a market featuring high barriers to market entry, such as data externalities and economies of scale.⁸⁶ Similarly, Google’s acquisition of fitness wearables maker Fitbit was unchallenged by U.S. enforcers. However, the European Commission sought conditions, based on the concern that Google’s enhanced market power in the market for health and fitness data could be extended to the broader ad-tech market.⁸⁷ The weak record of merger enforcement in the digital sector, coupled with a lack of agency transparency around why they closed earlier stage investigations (e.g., press releases or closing statements) has created significant uncertainty over how the Agencies will define relevant markets.

Conclusions: AAI urges the Agencies to include, in an illustrative example or perhaps as part of a revision to the 2006 Commentary, a discussion of how they anticipate identifying and defining relevant markets in digital mergers. Ideally, the Agencies should also explain, in an appropriate guidance document, how the various unique characteristics of digital markets will affect market definition. These include network and lock-in effects that limit switching, as well as the use of algorithms that can shape the preferences of users and that contribute to lock-in. But new guidance should also include discussion of how anomalies around consumer behavior—such as providing personal information in ways that may be inconsistent with preferences for privacy—also affect market definition.

VII. ACCOUNTING FOR TWO-SIDED SIMULTANEOUS TRANSACTION PLATFORMS

Section 11.d of the RFI raises the important question of how the Revised Guidelines should evaluate mergers in two-sided simultaneous transaction platform markets. The Revised Guidelines should address this issue to help resolve confusion and uncertainty following the Supreme Court’s holding in *Ohio v. American Express*, 138 S. Ct. 2274 (2018) (“*Amex*”). When a platform sells transaction services to both sides of a two-sided market, *Amex* recognizes a “single market” for “transactions” comprised of both sides of the platform. This is an obvious departure from fundamental market definition principles, which focus on demand-side cross-elasticities and practical indicia of substitution. Although the Supreme Court sanctioned this departure in a vertical restraints case under the Sherman Act, at least one federal court has extended *Amex* to a Clayton Act challenge to a merger.⁸⁸

The Supreme Court’s holding in *Amex* was that “courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.”⁸⁹ But the Court also held that “it is not always necessary to consider both sides of a two-sided platform.”⁹⁰ It held that both sides of a two-sided transaction market should be treated as a “single market” only when the transactions are jointly consumed on both sides, transaction services are simultaneously sold to both sides, and the platform generates “pronounced” indirect network effects and interconnected

⁸⁶ *Id.* at 5.

⁸⁷ *Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions*, Press Release, EUROPEAN COMM’N. (Dec. 17, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484.

⁸⁸ *United States v. Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del. 2020); see Randy M. Stutz, *We’ve Seen Enough: It Is Time to Abandon Amex and Start Over on Two-Sided Markets*, AM. ANTITRUST INST. (Apr. 2020).

⁸⁹ *Amex*, 138 S. Ct. at 2286.

⁹⁰ *Id.*

pricing and demand.⁹¹

Despite its short lifespan, *Amex* is already the most heavily criticized Supreme Court opinion of the modern antitrust era. Leaders of the antitrust bar have called the decision “wrong,”⁹² “alarming,”⁹³ “deeply flawed,”⁹⁴ “tortured,”⁹⁵ “a mistake,”⁹⁶ “nonsense,”⁹⁷ “inappropriate,”⁹⁸ “regressive,”⁹⁹ a “house of cards,”¹⁰⁰ and worse. By “grouping both the buyer and seller into the same relevant market,” it “make[s] any coherent economic analysis of the relevant market impossible.”¹⁰¹ Further common-law development of *Amex*, including to properly limit its scope, is necessary and seems likely to be forthcoming, which renders its current doctrinal implications somewhat uncertain.¹⁰²

Nevertheless, the Revised Guidelines can assist courts by applying sound, well-accepted economic and analytic principles to fact patterns that may implicate *Amex*. The Revised Guidelines should recognize, for example, that the *Amex* single-market approach necessarily fails to provide useful analysis in two-sided transaction markets when the “competitive conditions may differ on the two sides of a platform.”¹⁰³ Likewise, the Revised Guidelines should recognize that when network effects are not sufficiently “pronounced” to preclude competition except from other transaction platforms, firms that are *not* platforms and that do *not* sell transaction services may compete in a line of commerce exclusively on one side of the platform or exclusively on the other side.¹⁰⁴ The Revised Guidelines should state that the Agencies will evaluate the competitive effects of mergers in markets featuring two-sided simultaneous transaction platforms by examining the competitive effects on one side of the platform if the hypothetical monopolist test is satisfied on that side.¹⁰⁵

⁹¹ *Id.* at 2280–81, 2286.

⁹² Dennis W. Carlton, *The Anticompetitive Effects of Vertical Most-Favored-Nation Restraints and the Error of Amex*, 2019 COLUMBIA BUS. L. REV. 93, 93 (2019).

⁹³ Herbert Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUMBIA BUS. L. REV. 35, 52 (2019).

⁹⁴ Jack Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 CARDOZO L. REV. 1805, 1815 (2020).

⁹⁵ Steven C. Salop et al., *Rebuilding Platform Antitrust: Moving on from Ohio v. American Express* (forthcoming), transcript available at <https://bit.ly/3o2a2Tk>.

⁹⁶ Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2151 (2018).

⁹⁷ Hovenkamp, *supra* note 93, at 57, 81.

⁹⁸ Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust*, 168 U. PENN. L. REV. 2061, 2101 (2000).

⁹⁹ Hovenkamp, *supra* note 93, at 46, 51.

¹⁰⁰ Jeffrey Harrison, *Ohio v. American Express: Misunderstanding Two-Sided Platforms; the Charge Card “Market;” and the Need for Procompetitive Justifications*, 70 MERCER L. REV. 437, 455 (2019).

¹⁰¹ Hovenkamp, *supra* note 93, at 53.

¹⁰² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“from the beginning the Court has treated the Sherman Act as a common-law statute.”); see Carlton, *supra* note 92, at 105 (“The beauty of the common law is that a bad decision can be either overturned or so confined to its unique facts that the effect of bad decisions can be mitigated. I hope that is what happens here.”).

¹⁰³ Katz & Sallet, *supra* note 96, at 2155.

¹⁰⁴ AAI believes that this competition warrants the same protection as any other competition under antitrust law. Compare, e.g., *United States v. Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del. 2020) (making but ignoring fact findings that one-sided firm imposes competitive pressure on one side of two-sided platform); with Salop et al., *supra* note 95, at 24–25 (explaining why Sabre’s fact-findings rendered its application of *Amex* “demonstrably wrong”).

¹⁰⁵ This approach “does not prevent a platform defendant from relying on feedback effects to attack a plaintiff’s case by showing it lacks incentive to harm competition on the side where injury is alleged.” JONATHAN BAKER, *THE ANTITRUST PARADIGM* 189 (2019).

Conclusions: The Revised Guidelines should recognize that many two-sided markets, including two-sided markets that facilitate transactions, do not warrant single-market treatment. They should state that the presence of a two-sided simultaneous transaction platform market should not prevent inquiry into the potential competitive effects of a merger in a line of commerce on one side of a two-sided platform. Finally, they should reiterate that the hypothetical monopolist test “does not lead to a single relevant market,” and that, “[a]lmost invariably, a competitive effects allegation can be analyzed in multiple markets, including overlapping or nested markets, each satisfying the hypothetical-monopolist test.”¹⁰⁶ It is important that the Revised Guidelines state explicitly that these longstanding principles apply to two-sided transaction markets and any separate markets that may be identified on each side.

VIII. UPDATE THEORIES OF ANTICOMPETITIVE EFFECTS

The 2010 Guidelines’ focus on unilateral and coordinated effects remains an appropriate approach to characterizing how the Agencies think about potential anticompetitive effects of mergers. The current focus on the elimination of head-to-head rivalry and acquisitions of potential rivals is particularly relevant to changes over the past decade. The 2010 Guidelines’ focus on mergers that increase the ability and incentives to coordinate on price or output, or to divide up markets or customers also remains highly relevant. However, there are several areas where AAI believes the Revised Guidelines would usefully benefit from expansion and clarification.

A. Acquisitions of Nascent Competitors

The 2010 Guidelines reference the effects of mergers on actual and potential competition. However, unlike elimination of head-to-head rivals, the guidelines do not set forth how the Agencies intend to evaluate acquisitions of potential rivals. Mergers involving an important type of potential rival, the “nascent” competitor, have increased significantly.¹⁰⁷ This is in large part due to the rise of the digital business ecosystem model, which is particularly conducive to growth through acquisition and provides an exit strategy for smaller startups. But it is also clear that acquisitions of nascent rivals is a strategy employed by dominant firms that has burgeoned as a result of decades of lax merger enforcement.

As acquisitions of nascent rivals have increased, there has been no corresponding guidance on how the Agencies will evaluate them and what sources of evidence they will consider, such as evidence of “intent.” Perhaps the most important feature of a theory of harm around acquisitions of nascent rivals is that, but for the acquisition, these firms could grow and expand as standalone rivals, eventually coming to challenge the market dominance of an incumbent firm. In retrospect, it is clear that many of these deals were expressly designed to eliminate an innovative threat. Moreover, a theory of harm around the acquisition of nascent rivals should be informed by what is likely to be a history of serial acquisitions by a dominant acquiring firm.

Conclusions: AAI urges the Agencies to provide more discussion in the Revised Guidelines of how they will evaluate acquisitions of nascent competitors, including the types of evidence the Agencies will consider as well as the role of serial acquisitions in trends toward concentration. In particular, the Revised Guidelines should reject any supposition that plaintiffs should have to

¹⁰⁶ 2010 Guidelines, *supra* note 9, § 4.1.1, at 9; BAKER, *supra* note 105, at 184; *see also* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 79 ANTITRUST L.J. 129, 148 (2007).

¹⁰⁷ C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020).

demonstrate that a potential rival would have entered a market but for the acquisition. Instead, AAI encourages the Agencies to include a discussion of the role of evidence of “intent” to eliminate a competitive threat.

B. Information Exchanges

Technological developments since 2010 have only increased the significance of information exchanges to competition. The 2010 Guidelines list access to information as a way in which a partial acquisition can lessen competition:

Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can lead to adverse unilateral or coordinated effects. For example, it can enhance the ability of the two firms to coordinate their behavior, and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the acquiring firm to the target firm.¹⁰⁸

But information exchanges are a concern for all types of mergers, not only partial acquisitions. Information exchanges can be an effective means for coordinating among competitors, even in relatively unconcentrated markets.¹⁰⁹ Not all information exchanges are anticompetitive, but those that are can dampen competition by changing competitive incentives, even absent any coordination between the parties beyond the exchange itself.¹¹⁰ Mergers among parties to an existing information exchange can increase the risk that the information exchange becomes anticompetitive or is converted to an outright cartel.¹¹¹ The 2010 Guidelines do not address this risk.

For example, a critical allegation in the *Broilers* litigation was that the parties to an information exchange were able to de-anonymize data and specifically identify which numbers related to which competitor.¹¹² Where a merger reduces the number of parties to an information exchange, it could facilitate such identification. Moreover, the presence of a robust information exchange may indicate a tendency toward coordination which may be at increased risk of cartelization by a merger reducing the number of competitors. The defendants in *Broilers* argued that “a conspiracy of 17 [competitors] is implausible because it would be too unwieldy.”¹¹³ But as the *Broilers* case illustrates, information exchanges can be a particularly effective mechanism of coordination when a large number of competitors might undermine a traditional cartel.

Conclusions: The Revised Guidelines should add to this discussion to clarify that such lessening of

¹⁰⁸ 2010 Guidelines, *supra* note 9, § 13, at 34.

¹⁰⁹ Peter C. Carstensen, *Information Exchange – An Underappreciated Anticompetitive Strategy*, COMP. POLICY INT’L, at 4 (Jan. 2020) (discussing information exchanges in rivalrous markets).

¹¹⁰ *Id.*

¹¹¹ Antitrust Guidelines for Collaborations Among Competitors, U.S. Dept. of Justice & Federal Trade Comm’n, at 10 (April 2000) (“[I]n some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables.”).

¹¹² *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 783-84 (N.D. Ill. 2017); *see also* Antitrust Guidance for Human Resource Professionals, United States Dept. of Justice & Federal Trade Comm’n, at 5 (Oct. 2016) (noting reduced risk to competition where information is aggregated to prevent such identification).

¹¹³ *Id.* at 796.

competition from access to competitively sensitive information in a partial merger can occur, even where neither firm separately or combined has market power and in relatively unconcentrated markets. In addition, the Revised Guidelines should also include discussion of information exchanges in horizontal mergers that completely and permanently eliminate rivalry between competitors.

IX. INCREASED SKEPTICISM OF EFFICIENCIES CLAIMS BASED ON PAST EXPERIENCE

The role of efficiencies in merger analysis has a troubled history, and evidence from prior mergers suggests that claimed efficiencies have often failed to materialize. The analysis of merger-specific, cognizable efficiencies envisioned in the 2010 Guidelines enters the enforcement calculus largely in litigated merger challenges. There, once the government has made its case for anticompetitive effects, the burden shifts to the defendants to show that pro-competitive effects will ameliorate the anticompetitive effects. In some cases, judges have insisted on proof that such cost savings will be passed onto consumers in the form of lower prices.¹¹⁴

However, the judiciary has struggled with burden-shifting. This is especially true in instances where the government makes a case for anticompetitive effects and defendants respond with claims of both short-term cost savings and longer-term dynamic efficiencies, such as increased innovation. The government often faces a lopsided battle on two fronts: one, the too-high standard for showing that a merger that has not yet occurred is likely to substantially lessen competition; and, two, the burden of defeating an expansive, and often unsubstantiated, long-term efficiencies defense. This “asymmetry” in competitive effects and efficiencies analysis has demonstrably weakened merger enforcement. It has led to bad caselaw and mergers that have been shown, in retrospect, to harm competition and consumers. Indeed, evidence shows that many efficiencies claims have not materialized, and that such uncertain, longer-term efficiencies face a real “cognizability” risk.

For example, AT&T’s decision to spin off Warner Media less than three years after its merger evidences that AT&T-Time Warner failed to realize longer-term dynamic efficiencies around coordinating content and distribution.¹¹⁵ Yet, those efficiencies played a central role in the district court’s opinion finding for the defendants. Likewise, a decade after United Airlines and Continental consummated their 2010 merger, the airlines were still trying, ineffectively, to integrate their information technology (IT) systems.¹¹⁶ This failure to deliver on the simplest of merger benefits created inconvenience and costs for customers (i.e., merger-related “inefficiencies”). To take a third example, many of the claimed benefits of increased connectivity from new and increased service made by Southwest-AirTran never materialized. Indeed, Southwest exited numerous routes shortly after merger consummation.¹¹⁷ In retrospect, it is clear the efficiencies relied upon in clearing these mergers were overstated, unsubstantiated, and subject to considerable risk that they would not be realized as, indeed, they were not.

¹¹⁴ See, e.g., *Staples-Office Depot* (1997), *supra* note 40, at 1090.

¹¹⁵ American Antitrust Institute & Public Knowledge, Letter to Acting Assistant Attorney General Richard Powers, Strategic Consolidation, Market Power, and Efficiencies in the Media/Entertainment and Distribution Markets: Implications for Antitrust Reviews of Proposed Mergers (Sept. 2, 2021), https://www.antitrustinstitute.org/wp-content/uploads/2021/09/AAI_PK-Ltr-on-Warner-Media-Disc_9.2.21.pdf.

¹¹⁶ Diana L. Moss, *Delivering the Benefits? Efficiencies and Airline Mergers*, AMERICAN ANTITRUST INST. 6-10 (Nov. 21, 2013), https://www.antitrustinstitute.org/wp-content/uploads/2013/12/AAI_USAir-AA_Efficiencies-1.pdf.

¹¹⁷ *Id.* at 12-14.

Conclusions: AAI urges the Agencies to provide more clarity on how they intend to evaluate merger-related efficiencies in Revised Guidelines. In doing so, the Revised Guidelines should stress the importance of presumptions of anticompetitive effects, since these raise the bar on efficiencies defenses. The Revised Guidelines should reflect increased skepticism about efficiencies claims, especially longer-term dynamic efficiencies around innovation and quality. Separately, AAI encourages the Agencies to develop a system for post-merger monitoring of efficiencies and whether benefits have been passed through to consumers. Such a proposal could be incorporated in broader agency efforts to engage in more systematic merger retrospectives.

X. REMEDIES

Guidance on how the Agencies approach merger remedies does not reside in the merger guidelines. Rather, DOJ maintains a Merger Remedies Manual whose content is periodically revised (most recently in 2020) and the FTC maintains a “statement” of principles in negotiating merger remedies.¹¹⁸ Section 10 of the 2010 Guidelines makes a singular reference to merger remedies, in the limited context where a merger produces claimed, out-of-market efficiencies.¹¹⁹ The Agencies’ operating principle is that an effective remedy will maintain or restore competition lost by a merger. Accumulating evidence on failures of past remedies highlights the importance of adhering to this principle, which emphasizes that often the most effective remedy for an anticompetitive merger is a full-stop injunction.

For example, highly concentrative horizontal mergers that violate the structural presumption will put a commensurately larger burden on a remedy to fully maintain or restore competition. Conduct remedies, in particular, are not up to the task of sustaining this burden and should be disfavored by the Agencies.¹²⁰ Also, complex remedies designed to address multiple competitive concerns in complex business organizations carry a higher “execution” risk and may therefore fail to maintain or restore competition.¹²¹ Accordingly, the Revised Guidelines should establish a clear linkage between the analysis that supports an Agency merger challenge and—should they decide to settle it with a specific remedy(ies)—the risks associated with realizing the remedy(ies). In articulating these important risks, the Agencies will make clear that the availability of effective remedies bears materially on a determination of whether to settle or move to block a challenged merger. It will also send a stronger signal to merging parties and to the courts that the Agencies are less willing to “litigate the fix” in proceedings involving presumptively illegal mergers.

Conclusions: AAI urges the Agencies to reference other Agency guidance and statements on remedies, while at the same time explaining the important connection between a decision to challenge a merger and the availability of effective merger remedies. The Revised Guidelines should acknowledge that some past remedies have failed and that, moving forward, the Agencies will look skeptically upon remedies in mergers that violate the structural presumption and other presumptions that the Agencies may include in the Revised Guidelines or that otherwise risk anticompetitive effects.

¹¹⁸ U.S. Dep’t. of Justice, *Merger Remedies Manual* (Sept. 2020); Fed. Trade Comm’n., *Statement of the Federal Trade Commission’s Bureau of Competition on Negotiating Merger Remedies* (Jan. 2012).

¹¹⁹ 2010 Guidelines, *supra* note 9, § 10, at 30 n.14..

¹²⁰ John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57 ANTITRUST BULL. 979 (2012).

¹²¹ See, e.g., Letter from Daniel P. Ducore to AAI President, Diana Moss *re* U.S. Department of Justice Antitrust Division’s Settlement in Bayer/Monsanto (Aug. 2, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/Ducore-Letter-to-AAI_BAY-MON_8.2.18.pdf.