U.S. Department of Justice and Federal Trade Commission
Request for Public Comment Regarding Guidance on Business Collaborations,
Docket No. ATR-2026-0001

Comments of the American Antitrust Institute
May 21, 2026

I. INTRODUCTION

The American Antitrust Institute ("AAI") is pleased to submit comments in response to the joint public inquiry of the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") (collectively, "the Agencies") regarding competitor-collaboration guidelines.[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. *See* http://www.antitrustinstitute.org.

If the Agencies choose to issue revised guidelines, AAI urges them to preserve key themes of the April 2000 *Antitrust Guidelines for Collaborations Among Competitors* ("2000 Guidelines")[2] while accounting for recent changes in agency practice, empirical, economic and strategic learning, case law and scholarship, and the U.S. economy. Section II of these comments recommends general drafting principles for revised guidelines. Section III recommends clarifications to the Agencies' general legal framework for analyzing competitor collaborations, focusing on the rule of reason and the ancillary restraints doctrine. Section IV recommends clarifications concerning specific issues unique to the competitor-collaboration context. For ease of reference, we use bold text throughout this document to highlight items recommended for incorporation into revised guidelines.

II. GENERAL PRINCIPLES IN DRAFTING REVISED GUIDELINES

When the Agencies withdrew the 2000 Guidelines, they committed to enforcement "on a case-by-case basis" and directed businesses contemplating competitor collaborations to "review the relevant statutes and caselaw."[3] Issuing revised guidelines would be worthwhile if the Agencies set forth legally and economically sound interpretations that clarify the statutes and caselaw. To that end, we encourage the Agencies to adhere to several drafting principles in crafting new guidance.

First, ***the Agencies should make the revised guidelines accessible not only to businesses and their counsel but the courts, private enforcers, and the public***. The 2000 Guidelines set out "[t]o

[1] U.S. Dep't. of Justice & Fed. Trade Comm'n, *Justice Department and Federal Trade Commission Seek Public Comment for Guidance on Business Collaborations* (Feb. 23, 2026), https://www.regulations.gov/document/ATR-2026-0001-0001.
[2] U.S. DEP'T. OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (April 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf (withdrawn Dec. 11, 2024) [hereinafter "2000 Guidelines"].
[3] U.S. Dep't. of Justice & Fed. Trade Comm'n, *Justice Department and Federal Trade Commission Withdraw Guidelines for Collaboration Among Competitors* (Dec. 11, 2024), https://www.ftc.gov/legal-library/browse/withdrawal-guidelines-collaboration-among-competitors.

provide guidance to business people,"[4] and many defense practitioners found this tailoring valuable in client counseling and influential in boardrooms. Except in a handful of instances, however, the 2000 Guidelines failed to gain significant traction with the courts. They have not been cited in judicial opinions with nearly the same frequency as the merger guidelines, notwithstanding that competitor collaborations garner merits decisions—including in private cases—more commonly than mergers do.

The Agencies can expand the utility of the revised guidelines by addressing them to everyone with an important stake in proper guidance, including not only businesses and their counsel but judges, private enforcers, and the public. To make them more accessible to non-experts in particular, the Agencies should use plain language, integrate the governing statutes and caselaw with the guidance, and directly tie the language of the guidance to the language of the statutes and caselaw, much as the 2023 Merger Guidelines do.[5]

Second, ***the Agencies should eliminate the suggestion that antitrust enforcement may deter procompetitive collaborations***. The Preamble to the 2000 Guidelines observed that "the federal antitrust agencies have brought relatively few civil cases against competitor collaborations," yet it also speculated, without support, that antitrust enforcement "may deter the development of procompetitive collaborations."[6] This unsubstantiated assertion does not square with the pervasiveness of procompetitive collaborations throughout the United States and the relative paucity of enforcement actions.

Economic incentives and practical realities prevent antitrust enforcement from deterring procompetitive collaborations. Neither government entities nor private trading partners stand to benefit from thwarting a procompetitive collaboration because they benefit from the reduced costs or increased quality or innovation it generates. To be sure, rivals that lose market share to efficient collaborations might prefer to see them dissolved, and some suppliers may suffer losses if a collaboration's efficiencies lead to reduced demand for their inputs. But both groups lack prudential standing to file antitrust suits because they do not suffer cognizable antitrust injury, meaning they cannot survive preliminary motions practice and thus cannot inflict litigation costs on the collaboration beyond the complaint stage. The vast majority of firms injured by competition itself thus have little to gain from wasting resources on frivolous litigation.

Ill-intentioned executives also have little incentive to attempt an anticompetitive collaboration unless they can confidently mask it with pretextual justifications. Unlike cartel agreements, which can often be achieved using signaling, information sharing, or tacit communication, competitor collaborations are usually arms-length transactions that must be reduced to writing in formal contracts, courting obvious antitrust risk if they are anticompetitive. No sensible, well counseled wrongdoer opts for public-facing agreements memorialized in writing when a hidden cartel agreement formed with a handshake or a wink will do.

Because anticompetitive collaborations are foolish to pursue and procompetitive collaborations are foolish to challenge, the risk of Type 1 enforcement errors (i.e., "false positives") has proven to be low. At the same time, the risk of Type 2 errors (i.e., "false negatives"), while limited to a subset of pretextual competitor collaborations, is comparatively high. Some competitor collaborations pose a significant threat to competition because they mask naked price fixing yet may be mistakenly reviewed, as explained *infra* in Part III., under an overly forgiving liability standard.

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[4] 2000 Guidelines, *supra* note 2, at 1 (Preamble).

[5] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf [hereinafter "2023 Merger Guidelines"].

[6] 2000 Guidelines, *supra* note 2, at 1 (claiming "a perception" that this is so without explanation or attribution).

Others warrant comprehensive rule of reason review, but that standard has proven prone to errors of underenforcement.[7] The revised guidelines should eliminate speculation that antitrust enforcement may deter procompetitive collaborations and focus attention on the proven dangers of subjecting anticompetitive collaborations to diminished scrutiny.

Third, ***the Agencies should give equal attention to sell-side and buy-side conduct, horizontal and vertical restraints, and exclusionary and collusive effects***. Although the 2000 Guidelines referenced buying collaborations in their discussion of independent decision making, facilitating practices, and information sharing,[8] they focused disproportionately on competition among sellers rather than buyers. They also gave short shrift to vertical restraints and exclusionary effects relative to horizontal restraints and collusive effects. The revised guidelines should recognize that buy-side antitrust violations "eliminate competition in the same irredeemable way" as sell-side antitrust violations,[9] and they should treat distinctions between horizontal and vertical restraints and collusive and exclusionary effects commensurately with their treatment in the 2023 Merger Guidelines.

Fourth, ***the Agencies should forgo safe harbors and eliminate "safety zones*."** Safe harbors and safety zones violate the fundamental principle that "the essential inquiry" in antitrust analysis is "whether or not the challenged restraint enhances competition."[10] They also cross the line between agency transparency and distorting markets. History teaches that powerful firms will invariably organize their affairs in a manner that best enables them to exercise market power while avoiding scrutiny.[11] Safe harbors and safety zones tend to be counterproductive policy tools because they induce powerful firms to invest resources in creating methods of exploiting market power in zones deemed safe.

In particular, the 2000 Guidelines' "general safety zone" for collaborations that account for no more than twenty percent share of a relevant market should be eliminated. The use of market share screens as a proxy for the absence of market power or anticompetitive effects may have enjoyed some support when the 2000 Guidelines were issued, but it is now well established that a low market share does not reliably distinguish a competitively benign agreement from an anticompetitive one.[12] Moreover, the 2000 Guidelines' 20% rule is contrary to current agency practice. The Agencies now investigate and sometimes challenge, for example, agreements involving nascent competitors or that create a trend toward consolidation.[13]

III. GENERAL FRAMEWORK: THE RULE OF REASON AND THE ANCILLARY

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[7] *See* Michael A. Carrier & Mark A. Lemley, *Rule or Reason? The Role of Balancing in Antitrust Law*, 100 N.D. L. REV. 139, 145–46 (2025).

[8] 2000 Guidelines, *supra* note 2, §§ 3.31(a), 3.31(b), 3.34(e).

[9] U.S. DEP'T. OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS at 4 (Oct. 2016), https://www.justice.gov/atr/file/903511/dl.

[10] *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 (1984).

[11] *See* Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST. (white paper, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0-1.pdf (discussing historical absence of labor-market enforcement and summarizing the economics literature documenting a rise in anticompetitive labor-market restraints).

[12] 2023 Merger Guidelines, supra note 5, § 4.4 ("[T]he extent to which structural measures calculated in [a] market are probative in any given context depends on a number of considerations."); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010); Mark R. Patterson, *Justice Stevens and Market Relationships in Antitrust*, 74 FORDHAM L. REV. 1809, 1827–30 (2006) (discussing problems that arise from "[t]he use of market power as a screen"); Steven C. Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium*, 68 ANTITRUST L.J. 187, 189–201 (2000) (same).

[13] 2023 Merger Guidelines, *supra* note 5, §§ 2.6.A, 2.7 (2023); *see*, *e.g.*, *FTC v. Meta Platforms, Inc.*, 811 F. Supp. 3d 67 (2025) (challenging nascent competitor acquisitions as a conduct violation under Section 5 of the FTC Act).

RESTRAINTS DOCTRINE

The rule of reason and the ancillary restraints doctrine can affect all aspects of analyzing competitor collaborations. The 2000 Guidelines articulated the fundamental precepts of each but did not go far enough in elucidating either. Both have been a source of confusion and error among litigants and courts. The Agencies should provide sound clarifying interpretations that help ensure a proper analysis.

A. The Rule of Reason

The 2000 Guidelines correctly recognized that "[t]he central question" in rule of reason analysis "is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."[14] They also correctly recognized that "[r]ule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstance."[15] Both principles should be retained in revised guidelines.

However, the 2000 Guidelines' discussion of the rule of reason omits many difficult aspects of its application. While a comprehensive discussion of the rule of reason is beyond the scope of revised guidelines, we believe the Agencies should clarify at least seven aspects of its application that are essential in evaluating competitor collaborations correctly.

First, ***the Agencies should clarify that the rule of reason has four steps, not three***. The first three steps of the rule of reason are well established: at Step 1, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect"; at Step 2, "the burden then shifts to the defendant to show a procompetitive rationale for the restraint."; and at Step 3, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[16] However, the circuits are split as to whether there is a fourth step, under which "the harms and benefits must be compared to reach a net judgment whether the challenged behavior is, on balance, reasonable."[17] Adding to the confusion, the Supreme Court in dicta in its last two rule of reason cases diffidently omitted the fourth balancing step yet cited to caselaw that explicitly includes balancing in the analysis.[18]

Both the weight of precedent and sound policy are on the side of those courts that include a fourth balancing step in the rule of reason. The leading antitrust treatise describes balancing as the "standard methodology under the rule of reason" and "firmly grounded in the history of application of the antitrust laws."[19] It is the central component of the canonical articulation of the rule of reason under Section 1 in *Chicago Board of Trade*, and the seminal *Microsoft* decision described it as having emerged "[f]rom a century of case law on monopolization under Section 2."[20] Moreover, because the plaintiff's showing at Step 3 often entails proving a less-restrictive alternative, a fourth balancing step remains necessary to ensure the rule of reason is not rendered indeterminate: without it, the

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[14] 2000 Guidelines, *supra* note 2, § 1.2.
[15] *Id.*
[16] *NCAA v. Alston*, 594 U.S. 69, 96–97 (2021) (quotations omitted).
[17] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1502 (5th ed. Cum. Supp. 2022).
[18] *Alston*, 594 U.S. at 96 (noting that the rule of reason is "sometimes described" as having three steps); *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018) (noting that "the parties" framed it this way).
[19] AREEDA & HOVENKAMP, *supra* note 17, at ¶ 1502.
[20] *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1917) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."); *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (2001) (cleaned up).

analysis will prove inconclusive because the reasonableness of the less restrictive alternative will never be compared to the competitive baseline. While only a tiny fraction of rule of reason cases ever reach the fourth step—3% according to a 32-year empirical study from 1977–2009[21]—it remains an important part of the analysis.

Balancing is especially important in competitor-collaboration cases. As we observed in Part II, the only competitor collaborations that are rationally challenged as antitrust violations are those that thwart the competitive process and threaten anticompetitive harm to the collaborators' direct or indirect trading partners. Meanwhile, the proponents of even anticompetitive collaborations usually will claim procompetitive justifications particular to the collaboration, even if they are pretextual. As Carrier & Lemley have put it, "[c]ases in which there are both unique procompetitive and anticompetitive effects to assess are precisely the ones in which it is important to apply an appropriate rule of reason, balancing the harms and the benefits to decide whether the conduct is legal."[22] Consistent with the 2000 Guidelines' statement that "[i]n most cases, the Agencies' enforcement decisions depend on their analysis of the overall effect,"[23] the revised guidelines should acknowledge the fourth balancing step and recognize that competitor collaborations analyzed under the rule of reason may be more likely to require it.

Second, ***the Agencies should clarify that the plaintiff's burden at Step 1 of the rule of reason is satisfied by a direct or indirect showing of anticompetitive effects***. Although plaintiffs typically carry their Step 1 burden under the rule of reason by establishing an inference of anticompetitive effects from circumstantial evidence of market power in a defined market, the revised guidelines should clarify that they can also do so by proving anticompetitive effects directly, obviating the need for an inquiry into market definition and market power.[24]

Moreover, the Agencies should clarify that either showing, alone, shifts the burden to defendants.[25] Although the point is otherwise well established, enterprising defense counsel sometimes have induced courts to merge the rule of reason's Step 1 and Step 2 showings into a single threshold inquiry by arguing, implicitly or explicitly, that a plaintiff must "prebut" efficiencies claims at Step 1. Instead of treating efficiencies as a rebuttal argument after the evidentiary burden has shifted at Step 2, defendants have pressed courts to inject efficiencies into the plaintiff's prima facie case, effectively raising the bar for establishing an anticompetitive effect.[26] If the plaintiff cannot rule out an efficiency explanation for the challenged conduct at Step 1, the argument goes, then the analysis cannot proceed to Step 2 because any resulting accumulation of market power could simply be the just reward for competing successfully.

The revised guidelines should explicitly reject this erroneous approach and specify the correct one, consistent with the 2023 Merger Guidelines.[27] Requiring enforcers to preemptively

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[21] Carrier & Lemley, *supra* note 7, at 140 n.7 (citations omitted).
[22] *Id.* at 160.
[23] 2000 Guidelines, *supra* note 2, at 25 n.51.
[24] *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986); *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 477 (1992) ("It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition … since respondents offer direct evidence that Kodak did so.").
[25] Kodak, 504 U.S. at 469 (Kodak, then, … must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable.").
[26] *Cf., e.g., Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (imposing burden on plaintiff to show that monopolist's conduct was "irrational but for its anticompetitive effect"); *see also* Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right*, 168 U. PENN. L. REV. 1941, 1946–49 (2020) (showing that, over time, as the treatment of efficiencies became more generous, the level of market concentration that signals presumptive harm in merger cases has increased).
[27] *See* 2023 Merger Guidelines, *supra* note 5, § 3.3 (noting that the argument "that the merger would not substantially lessen

refute efficiencies claims at Step 1 contravenes the rule of reason's burden-shifting framework and places a thumb on the scale against enforcement. The rule of reason tasks defendants with adducing evidence of procompetitive justifications at Step 2 precisely because "[t]he evidence of efficiencies is almost always likely to be in the control of the defendants" and "[t]hey are thus in the best position to come forward with that evidence."[28] The revised guidelines should clarify that the collaborators have the burden to establish efficiencies and that the plaintiff's prima facie case need not anticipate them.

Third, ***the Agencies should clarify that the defendant's burden at step 2 is a burden of proof***. This point is also well established, but some defendants have seized upon recent Supreme Court dicta to argue, implicitly or explicitly, that their burden "to show a procompetitive rationale for the restraint"[29] is satisfied by merely identifying one. The Agencies should specify that a defendant must *prove* its claimed justifications are procompetitive.[30] This interpretation follows from the long-standing recognition of the rule of reason as a "burden"-shifting framework[31] and that "[w]hether valid business reasons motivated a [defendant's] conduct is a question of fact."[32]

Fourth, ***the Agencies should clarify that the defendant has the burden at Step 2 to show procompetitive justifications that are nonpretextual.*** Although the law is clear that the defendant at Step 2 "bears the burden of presenting a 'nonpretextual claim,'"[33] some courts have mistakenly allocated the evidentiary burden for establishing pretext to the plaintiff at Step 3.[34] Pretext can be relevant at Step 3 when it is the subject of material factual disputes raised at Steps 1 and 2, but if the defendant has not proffered evidence sufficient to show that a procompetitive justification is nonpretextual at Step 2, then it has not carried its burden in the first place.[35] The case should not proceed to Step 3 at all; it should end.

The structure of this analysis is particularly important in competitor-collaboration cases because, as discussed in Part III., competitor collaborations premised on pretextual procompetitive justifications often should be condemned under a per se or quick-look standard, without additional expenditure of limited resources by enforcers and courts. Misallocating the burden needlessly prolongs litigation and may even skew litigation outcomes on the central question of liability.

Fifth, ***the Agencies should specify that cognizable efficiencies must be "in the relevant market."*** The 2000 Guidelines' described "cognizable efficiencies" as "efficiencies that have been verified by the Agencies, that do not arise from anticompetitive reductions in output or service, and

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competition in any relevant market in the first place" because "evidence of procompetitive efficiencies shows that no substantial lessening of competition is in fact threatened by the merger" is a "rebuttal argument.")

[28] Andrew I. Gavil, *Burden of Proof in U.S. Antitrust Law*, *in* 1 ISSUES IN COMPETITION L. AND POL'Y 125, 156 (ABA Section of Antitrust Law 2008).

[29] *NCAA v. Alston*, 594 U.S. 69, 96 (2021).

[30] *See id.* at 100 ("deficiencies in the [defendant's] proof of procompetitive benefits at the second step" cause it to "flunk[] the rule of reason").

[31] *Id.*

[32] *High Tech. Careers v. San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993) (citing *Eastman Kodak*, 504 U.S. at 483); *see Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 776 (1999) (The defendant must "adduce hard evidence of the procompetitive nature of its policy.").

[33] *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 488 (7th Cir. 2020) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc)); *see also, e.g., FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020); *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 438 (3d Cir. 2016).

[34] *See, e.g., Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1038 (N.D. Cal. 2021) (stating that "[a] procompetitive rationale is a 'nonpretextual claim that defendant's conduct is indeed a form of competition on the merits" but mistakenly holding that the "plaintiff's proffer" failed to persuasively rebut "Apple's security rationale" because the plaintiff "d[id] not persuasively … show[] it to be pretextual.").

[35] *See, e.g., New York v. Actavis PLC*, 787 F.3d 638, 658 (2d Cir. 2015).

that cannot be achieved through practical, significantly less restrictive means."[36] Elsewhere, they explained further that "the Agencies assess the likelihood and magnitude of cognizable efficiencies and anticompetitive harms to determine the agreement's overall actual or likely effect on competition in the relevant market" and "consider whether cognizable efficiencies likely would be sufficient to offset the potential of the agreement to harm consumers in the relevant market."[37] The revised guidelines should update the Agencies' definition of cognizability, which now includes an additional criterion,[38] and reaffirm the Agencies' statements that they only credit efficiencies "in the relevant market," as the 2023 Merger Guidelines do.[39]

The 2000 Guidelines caused confusion by stating that multiple agreements "are assessed together if their procompetitive benefits or anticompetitive harms are so intertwined that they cannot meaningfully be isolated and attributed to any individual agreement."[40] Read in isolation, this statement failed to adequately convey that only the agreements, and not the *markets*, can be "assessed together." As important as it is to balance anticompetitive harm to injured trading partners against procompetitive benefits *within* markets, the Supreme Court has made clear that anticompetitive injury in one market cannot be excused by procompetitive benefits to a different group of trading partners in a different market.[41]

Efficiencies in one market that depend inextricably on anticompetitive harm to trading partners in a different market fail the cognizability test—they "arise from" the anticompetitive harm precisely because of their inextricability. Moreover, limits on balancing efficiencies and harms across markets are necessary for both normative and practical reasons. Normatively, the decision to force one group of trading partners in one market to tolerate competitive injury for the sake of another group of trading partners in another market is fundamentally a policy judgment. As Robert Bork has explained, "such value trade-offs" are "the very essence of politics" and therefore are reserved "for legislative determination."[42]

Practically, judges have no way to make such value trade-offs. "Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments."[43] In addition, once a partial equilibrium analysis of the market where harm has been plausibly alleged is abandoned, there is no principled stopping point in the analysis short of undertaking a general equilibrium analysis of effects on everyone in the economy.[44] Netting out ripple effects across multiple markets would require cascading market-definition and effects analyses that would generate exceedingly high costs and unpredictability in litigation.

While factfinders must avoid multi-market balancing for all of these reasons, Agencies can engage in a limited form of it as a matter of prosecutorial discretion. For example, a competitor

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[36] 2000 Guidelines, *supra* note 2, § 3.36.
[37] *Id.* § 3.37 (emphases added).
[38] *See* 2023 Merger Guidelines, *supra* note 5, § 3.3 (adding that, in addition to being specific, verifiable, and not anticompetitive, efficiencies must not "merely benefit the … firms").
[39] *Id.* ("[T]he Agencies will not … credit benefits outside the relevant market that would not prevent a lessening of competition in the relevant market.").
[40] 2000 Guidelines*, supra* note 2, § 2.3.
[41] *United States v. Topco Assocs.*, 405 U.S. 596, 611 (1972); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 34-35 (1979).
[42] ROBERT BORK, THE ANTITRUST PARADOX 80 (1978); *id.* at 79 ("[T]here is no economics, no social science, no systematized knowledge of any sort that can provide the criteria for making such a trade-off decision.").
[43] *Baker v. Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting); *see also id.* ("To charge courts with the task of accommodating the incommensurable factors of policy" is to wrongly attribute "omnicompetence to judges.").
[44] JONATHAN B. BAKER, THE ANTITRUST PARADIGM 191 (2019).

collaboration could cause small harm to a small group of wealthy consumers in a luxury goods market and create large benefits for a large group of impoverished workers in nationwide labor markets. Almost no one would favor prohibiting such a collaboration as a matter of economic policy, but if it were challenged as an antitrust violation and a merits decision were required, then a court would be powerless to excuse the restraint by weighing the harms and benefits across (although it could weigh them within) the affected markets.

Where condemning a competitor collaboration would create transparently harmful economic policy, the Agencies should forbear, exercising their discretion to deploy their limited resources to combat more harmful conduct. But while revised guidelines should commit the Agencies to doing so, they should also clarify the sharp distinction between multi-market balancing inside and outside of adjudicatory settings, expressly rejecting the former and explaining why factfinders cannot be tasked with making political value trade-offs and policy judgments.

Sixth, ***the Agencies should emphasize the heightened importance of relying on the per se rule when a competitor collaboration's horizontal restraints lack cognizable procompetitive justifications***. Competitor collaborations often entail agreements not to compete or to fix prices among horizontal rivals—the kind of restraints that, when naked, are "so 'plainly anticompetitive' … that they are conclusively presumed illegal without further examination."[45] The rule of reason is invoked in these circumstances only because the restraints may be reasonably necessary to an efficiency enhancing integration of business activity.

If it is clear upon a quick look—or becomes clear at Step 2 of the rule of reason—that the collaborators' claimed procompetitive justifications are not credible, there is no valid reason as a matter of law or policy to inquire any further into market power or anticompetitive effects.[46] Absent cognizable procompetitive justifications, there is nothing left to distinguish the challenged agreement from a per se offense. The "collaboration" (or the challenged aspect of it) has been revealed to be a cartel.

The revised guidelines should clarify that, once a competitor collaboration involving a traditional per se offense is found to lack cognizable procompetitive justifications, the agreement should be immediately condemned as naked and illegal "on its face"[47] without further inquiry or expenditure of resources.

Seventh, ***the Agencies should recognize that vertical restraints that have collusive effects and no cognizable efficiencies can be condemned under the quick-look standard***. As the DOJ has recognized in federal circuit court briefing, "horizontal and vertical restraints do not always threaten competition in different ways, or call for different analysis."[48] Rather, "the 'horizontal-vertical distinction' is 'relevant only insofar as it helps identify competitive effects.'"[49]

Some vertical restraints are indistinguishable from per se offenses in their competitive effects. The disturbing discovery of pervasive vertical no-poach agreements targeting low-skill, low-wage workers in the franchise sector are a prime example in the competitor-collaboration context.[50]

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[45] *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (citations omitted).
[46] *See* Peter C. Carstensen, *The Incoherent Justification for Naked Restraints of Competition: What the Dental Self-Regulation Cases Tell Us About the Cavities in Antitrust Law*, 51 LOY. U. CHI. L. REV. 679, 736 (2020).
[47] *Bd. of Regents*, 468 U.S. at 113.
[48] *See* Redacted Final Form Brief of Plaintiffs-Appellees 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)).
[49] *Id.* (quoting same).
[50] *See* Letter from the American Antitrust Institute to the Hon. Makan Delrahim and Dep'y Assist. Att'y Gen. Michael Murray 6–12 (May 2, 2019) [hereinafter "AAI No-Poach Letter"], *available at* https://www.antitrustinstitute.org/wp-

While vertical franchise no-poach agreements appropriately limited in duration and scope may plausibly give rise to material factual disputes, those targeting low-skill, low-wage fast food workers in the franchise sector had no conceivable efficiencies and made no economic sense but for their collusive anticompetitive effects, which eliminated competition among horizontal rivals for labor.[51]

The revised guidelines should clarify that the Agencies do not elevate form over function by automatically deploying a comprehensive rule of reason simply because the orientation of a restraint happens to be vertical. Rather, a quick-look or other more truncated standard may apply to vertical restraints that have a "close family resemblance" to practices "that already stand[] convicted in the court of consumer welfare."[52]

B. The Ancillary Restraints Doctrine

The ancillary restraints doctrine provides for a determination of the appropriate liability standard when an agreement that is "unlawful in and of itself"[53] is functionally intertwined with an efficiency-enhancing aspect of integrative business activity. The doctrine was created to strike a balance between preserving the substantive and administrative benefits of the per se rule and protecting against unwarranted condemnations of beneficial competitor collaborations. Because the "per se concept" recognizes "[t]he anticompetitive potential inherent in all" horizontal price-fixing, bid-rigging and market allocation agreements, the doctrine is only invoked by defendants seeking to avoid the "conclusive presumption" of illegality that ordinarily attaches to such agreements.[54]

Without referencing the ancillary restraints doctrine by name, the 2000 Guidelines endorsed the doctrine's two elements, stating that the rule of reason rather than the per se rule should govern horizontal restraints that are (1) "reasonably related to" and (2)"reasonably necessary to achieve procompetitive benefits from," an efficiency-enhancing integration of economic activity.[55] While these two elements remain essential to a proper analysis, the Agencies should ensure they are not misapplied, opening the door to a mistaken review of restraints warranting the per se rule under a comprehensive (and too forgiving and expensive) rule of reason standard.[60] The Agencies should clarify at least five issues to ensure a proper application.

First, ***the Agencies should specify that the ancillary restraints doctrine is an affirmative defense.*** Notwithstanding that "the classification of a restraint as ancillary is a defense, and complaints need not anticipate and plead around defenses,"[61] numerous courts have wrongly decided the ancillarity question on a motion to dismiss, without holding the defendant to a burden of proof. As a result, they have mistakenly ordered comprehensive rule of reason treatment without ever making a proper finding that the restraint is in fact ancillary.[62] The revised guidelines should specify that an ancillarity determination cannot be made on the pleadings without hard evidence, and the "hallmarks of anticompetitive behavior" inherent in otherwise per se illegal agreements "place upon [the defendant] a heavy burden of establishing an affirmative defense which

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content/uploads/2019/05/AAI-No-Poach-Letter-w-Abstract.pdf.

[51] *Id.*

[52] *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (2005) (Ginsburg, J.).

[53] *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

[54] *Ariz. v. Maricopa County Medical Soc.*, 457 U.S. 332, 351 (1982).

[55] 2000 Guidelines, *supra* note 3, § 1.2.

[60] *See Deslandes v. McDonald's USA*, 2022 U.S. Dist. LEXIS 113524 (N.D. Ill. June 28, 2022), *rev'd* 81 F.4th 699 (7th Cir., 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

[61] *Deslandes v. McDonald's USA*, 81 F.4th 699, 705 (7th Cir. 2023) (Easterbrook, J.), *cert. denied*, 144 S. Ct. 1057 (2024).

[62] *See, e.g., Deslandes v. McDonald's USA*, 2022 U.S. Dist. LEXIS 113524 (N.D. Ill. June 28, 2022); *Giordano v. Saks Inc.*, 654 F. Supp. 3d 174, 201 (E.D.N.Y. Jan. 31, 2023); *Ogden v. Little Caesar Enters.*, 393 F. Supp. 3d 622, 633–34 (E.D. Mich. July 18, 2019).

competitively justifies this apparent deviation from the operations of a free market."[63]

Second, ***the Agencies should specify that a putatively ancillary restraint is not removed from the per se category simply because it is part of an otherwise efficiency-enhancing integration***. A restraint should never be treated as ancillary simply because it is "appended to" a collaborative, efficiency enhancing integration.[64] As the leading antitrust treatise explains, "it would be foolish to describe agreements…as ancillary *merely*" on this basis alone.[65] "Such a rule could protect cartels from the heightened scrutiny attending naked restraints through the simple device of attaching the cartel agreement to some other, independently lawful transaction."[66]

The revised guidelines should clarify that, before the Agencies or the courts consider whether an agreement is "reasonably necessary" to achieve an efficiency enhancing integration, they must first consider whether it is "reasonably related to" it.[67] Price-fixing, bid-rigging and market allocation should not be tested for reasonable necessity or reviewed under the rule of reason if "the organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint a merely ancillary one is missing."[68] Indeed, the per se rule "would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category."[69] When a horizontal agreement is not functionally and inextricably intertwined with procompetitive integrative activity, the per se rule should be applied from the outset—without analysis of market power or competitive effects—just as it would to any other naked horizontal restraint.

Third, ***the Agencies should specify that ancillary restraints can be reviewed under the quick-look rule of reason, not just the comprehensive version***. The 2000 Guidelines correctly recognized that the level of intricacy needed to conduct a rule-of-reason analysis exists on a spectrum.[70] Notwithstanding that the per se rule may not be warranted, "it does not follow that every case attacking a less obviously anticompetitive restraint … is a candidate for plenary market examination."[71] Rather, "our categories of analysis … are less fixed,"[72] and we no longer "locate the appropriate analysis, and the concomitant burden of proof, by reference to the vestigial line" between the per se rule and the comprehensive rule of reason.[73]

The Supreme Court has held that a quick-look or other more truncated version of the rule of reason can be used to inculpate some agreements and has suggested in dicta that it can be used to exculpate others.[74] The revised guidelines should clarify that the analysis should never be moved all the way across the spectrum—from the per se rule at one end to the comprehensive rule of reason at the other—without stopping to consider whether the "enquiry meet for the case" is a quick-look standard.[75]

The dangers of reflexively resorting to a comprehensive rule of reason rather than a quick

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[63] *Bd. of Regents*, 468 U.S. at 109–10.
[64] AREEDA & HOVENKAMP, *supra* note 17, ¶ 1908b.
[65] *Id.* (emphasis in original).
[66] *Id.*
[67] 2000 Guidelines*, supra* note 2, § 1.2.
[68] *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Assoc.*, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.).
[69] *Id.*
[70] *See* 2000 Guidelines, *supra* note 2, § 1.2.
[71] *Cal. Dental Ass'n*, 526 U.S. at 781.
[72] *Id.*
[73] *Polygram*, 416 F.3d at 36.
[74] *Bd. of Regents*, 468 U.S. at 113; *Alston*, 154 U.S. at 88.
[75] *Cal. Dental*, 526 U.S. at 781.

look are particularly acute when the Agencies or the courts confront putatively ancillary restraints that otherwise satisfy the elements of a traditional per se offense. Ancillary restraints that would otherwise be per se illegal should always be reviewed under a truncated rule of reason and never under the comprehensive version. The application of the rule of reason in these circumstances is not based on a lack of "considerable experience with the type of restraint at issue" or because the court cannot "predict with confidence that it would be invalidated" if it is not reasonably related and reasonably necessary to the procompetitive integration.[76] Notwithstanding that it may be ancillary, a bid-rigging, market allocation, or price fixing agreement prima facie harms competition "on its face",[77] meaning the plaintiff should not have to prove market power or anticompetitive effects to make out a prima facie case at Step 1. The revised guidelines should recognize that, when such intrinsically harmful restraints have been properly pleaded and are defended as ancillary,[78] the burden shifts immediately to the defendant to prove procompetitive justifications at Step 2.[79]

Fourth, ***the Agencies should reiterate that two or more restraints are "assessed together" only if they are intertwined "inextricably."***[81] The 2000 Guidelines rightly cautioned that the Agencies will not consider the combined effect of multiple agreements unless the agreements are "so intertwined that they cannot meaningfully be isolated."[82] The revised guidelines should retain this clarification of inextricability because it is particularly important when enforcers challenge horizontal restraints that are ordinarily subject to the per se rule.

Knowing that such restraints are far more likely to receive forgiving rule of reason treatment if they are considered in tandem with procompetitive aspects of an integration, defendants often argue that such restraints are inextricably intertwined with another agreement when in fact they can be easily isolated and condemned under the per se rule. The horizontal no-poach agreements at issue in *Deslandes v. McDonald's* provide a stark example.[83] The defendants argued that no-poach agreements should be assessed together with the expansive procompetitive benefits of the broader McDonald's franchise agreement, but at the time of the litigation McDonald's had already excised and repealed the no-poach provisions, confirming beyond doubt that they were extricable.[84]

Fifth, ***the Agencies should clarify that the ancillary restraints doctrine does not countenance multi-market balancing for the same reason the rule of reason does not***. The revised guidelines should state explicitly that the out-of-market benefits principle is not relaxed simply because a challenged restraint is ancillary to a procompetitive integration. Factfinders are no more permitted and no more equipped to make political value tradeoffs and policy judgments by weighing the effects of an ancillary restraint across markets than they are by weighing the effects of a naked restraint across markets.[85] If integrative business activity causes anticompetitive injury to trading partners in

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[76] *Alston*, 154 U.S. at 89 (internal quotation omitted); *see Bd. of Regents*, 468 U.S. at 100–01

[77] *Bd. of Regents*, 468 U.S. at 113; *see Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992) ("[A]ny agreement to reduce output…requires some justification—some explanation connecting the practice to [procompetitive effects].")

[78] Although the Supreme Court has stated that an agreement on price is "not usually unlawful" when the collaboration is a "single entity" and the agreement is "core" rather than "ancillary," meaning it is "necessary to market the product at all," *Dagher*, 547 U.S. at 7–8, only a small fraction of the competitor collaborations that harm trading partners can be characterized as core. Most collaborators' horizontal restraints that are plausibly (and rationally) challenged as antitrust violations are defended as ancillary, not core.

[79] *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007 (7th Cir. 2012) (Posner, J.) ("[E]ven if a challenged practice doesn't quite rise to the level of per se illegality, it may be close enough to shift to the defendant the burden of showing that appearances are deceptive[.]") (citing *Bd. of Regents*, 468 U.S. at 109–10).

[81] 2000 Guidelines, *supra* note 2, § 2.3.

[82] *Id.*

[83] 81 F.4th 699, 702 (7th Cir. 2023).

[84] *See id.*; AAI No-Poach Letter, *supra* note 50, at 3–5, 12–13.

[85] *See supra* Part III.A.

a relevant market, the defendants' justifications must establish procompetitive benefits that compensate for *that* injury in *that* market. To be sure, interdependent demand across markets can support a rebuttal argument at Step 2 of the rule of reason if it shows that competitive harm in that market is implausible, but the revised guidelines should recognize that out-of-market benefits do not excuse uncompensated anticompetitive harm caused by an ancillary restraint.

IV. SPECIFIC ISSUES: COMPETITOR COLLABORATIONS IN CONTEXT

This Section highlights several specific issues involving competitor collaborations that we believe warrant treatment in the revised guidelines: the concerted action requirement under Section 1, collaborations involving a mix of vertical and horizontal restraints, platforms, group purchasing organizations, and tacit and express agreements in the algorithmic pricing context.

A. Concerted Action

The Agencies should clarify that every single competitor collaboration—including those that form single entities—constitutes concerted action subject to Section 1 scrutiny. When analyzing agreements among competitors under Section 1, the Supreme Court has consistently "eschewed … formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."[86] Under that approach, competitor collaborations are invariably concerted action subject to Section 1, which applies to "any contract, combination …, or conspiracy."[87] Concerted action exists because "two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture … [that] joins together independent centers of decisionmaking."[88] Every competitor collaboration does so, including joint ventures where the venturers create a single entity to effectuate their collaboration.

B. Collaborations with Both Horizontal and Vertical Elements

The Agencies should specify that collaborations with both horizontal and vertical elements may be reviewed under the per se rule and may be evaluated for both collusive and exclusionary effects. Competitor agreements with both horizontal and vertical elements are ubiquitous in today's economy. When evaluating them, the Agencies should first consider whether the agreement's horizontal elements have collusive anticompetitive effects and should be approached as a potential per se violation regardless of whether a vertical element is also present. Such an approach is consistent with the Agencies' historical practice and also reflects the majority rule applied in the courts of appeals.[89] When the collaboration has collusive effects but is not subject to per se condemnation because its horizontal elements are deemed reasonably ancillary, the Agencies should apply a quick-look standard, under which the burden should shift immediately to the defendants to establish procompetitive justifications,[90] including as they may relate to the collaborators' vertical relationship if such justifications are cognizable.

Consistent with their approach in the 2023 Merger Guidelines, the Agencies should also consider whether the collaboration may create vertical integration and foreclosure that limits access to products, services, or routes to market that rivals need to compete. Here, as there, the Agencies should consider historical trends toward concentration and vertical integration, including where the

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[86] *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 191 (2010) (cleaned up); *see also Ohio v. Am. Express Co.*, 585 U.S. 529, 543–44 (2018); *NCAA v. Alston*, 594 U.S. 69, 93 (2021).
[87] 15 U.S.C. § 1.
[88] *Am. Needle*, 560 U.S. at 196 (cleaned up).
[89] *See United States v. Koppers Co.*, 652 F.2d 290, 297 (2d Cir. 1981); *United States v. Apple, Inc.*, 791 F.3d 290, 297 (2d Cir. 2016); *Deslandes*, 81 F.4th at 703; *but see United States v. Brewbaker*, 87 F.4th 563, 578–79 (4th Cir. 2023).
[90] *See supra* Part III.B.

latter may make entry more difficult.

C. Platforms

The Agencies should address competitor collaborations in markets involving platforms. Since the 2000 Guidelines, the economy has experienced exponential growth in platforms that "provide different products or services to two or more different groups or 'sides' who may benefit from each other's participation."[91] Competitor collaborations are common in platform markets. To cite just a couple of examples, in telecommunications, media, and entertainment markets, competitors are collaborating to offer new networks or distribution channels. Technology companies are also collaborating in the development of artificial intelligence tools.

While a detailed discussion of the competitive implications of platform business models is beyond the scope of these comments, we note that the Agencies do not have to start from scratch. The 2023 Merger Guidelines specifically address mergers involving platforms. And both Agencies have gained substantial experience with them through ongoing litigation. The revised guidelines should build upon and be consistent with these resources.

D. Group Purchasing Organizations ("GPOs")

The Agencies should treat GPOs as a distinct structural category of competitor collaboration and provide the dedicated analytical framework their scale and competitive risks warrant. GPOs are among the most economically significant types of competitor collaborations. They are used across a range of industries, including agriculture, retail, manufacturing, education, and—perhaps most pervasively—health care, with nearly all U.S. hospitals enrolled in at least one.[92] Yet GPOs did not receive dedicated guidance in the 2000 Guidelines. Since the 2023 withdrawal of Statement 7 of the Agencies' *Statements of Antitrust Enforcement Policy in Health Care*,[93] no guidance exists for analyzing their potential anticompetitive effects. Revised guidelines should fill that gap.

The starting premise of any GPO analysis should not be a blanket presumption of efficiency. While properly delimited GPOs can indeed produce efficiencies, the potential benefits are easily overstated, as a 2002 GAO pilot study found when it determined that large hospital GPOs often did not deliver on their promised savings.[94] At the same time, GPOs create specific, well-documented competitive concerns that are analytically distinct from seller-side collaborations and that require their own treatment in revised guidelines.

Economic analysis identifies four such concerns: (1) GPO purchasing power can harm input suppliers through monopsony effects, even when GPO participants' product-market prices fall[95]; (2) information sharing in the GPO context can lead to anticompetitive tacit collusion even more easily than in the seller context; (3) GPO contracting methods, such as bundling, exclusivity, and sole-source

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[91] 2023 Merger Guidelines, *supra* note 5, § 2.9.

[92] GOV'T ACCOUNTABILITY OFFICE, GROUP PURCHASING ORGANIZATIONS: SERVICES PROVIDED TO CUSTOMERS AND INITIATIVES REGARDING THEIR BUSINESS PRACTICES, No. GAO-10-738 (2010) (reporting that nearly all U.S. hospitals held at least one GPO membership).

[93] U.S. Dep't of Justice & Fed. Trade Comm'n, *Statement 7: Joint Purchasing Arrangements Among Health Care Providers*, *in* STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE at 53–60 (Aug. 1996), *withdrawn*, DOJ (Feb. 3, 2023), FTC (July 14, 2023), available at https://www.justice.gov/atr/media/1378581/dl [hereinafter "Statement 7"].

[94] GOV'T ACCOUNTABILITY OFFICE, GROUP PURCHASING ORGANIZATIONS: PILOT STUDY SUGGESTS LARGE BUYING GROUPS DO NOT ALWAYS OFFER HOSPITALS LOWER PRICES, GAO-02-690T (Apr. 30, 2002).

[95] Roger D. Blair & Christine P. Durrance, *Group Purchasing Organizations, Monopsony, and Antitrust Policy*, 35 MANAGERIAL DECISION ECON. 433, 436 (2013) (noting "potential serious, adverse effects in the long run" because of, among other things, loss of suppliers' incentives to invest in R&D).

arrangements, can foreclose equally efficient competitors from supply relationships[96]; and (4) the administrative-fee-funding structure common to GPOs, under which the GPO is paid by suppliers rather than members as a percentage of contract value, creates an incentive incompatibility: GPO managers may not seek the lowest prices for members when higher list prices generate larger fees for themselves.[97] Each of these concerns requires a distinct analysis; none is adequately addressed by generic collaboration guidance. Revised guidelines should independently address each accordingly.

First, ***the Agencies should explicitly build on the buyer-side market power framework developed in the 2023 Merger Guidelines, according GPOs' buy-side effects coequal analytical treatment alongside their sell-side effects***.[98] The guiding insight from economic analysis of buyer cartels and buying groups is that buyer-side market power arises at substantially smaller market shares than seller-side market power.[99] Empirical findings confirm that buyers with combined shares as low as 10–20% of a relevant input market have distorted competition among their suppliers.[100]

Buyer-side coordination is also more durable and harder to detect than its sell-side counterpart, for two structural reasons: (a) defection from a buyer cartel is less attractive because a defector must bid up input prices and absorb larger volume at lower margins; and (b) tacit collusion is easier to sustain because buyers who implicitly respect each other's supplier relationships each gain greater leverage over their own suppliers as a result.[101] These structural features mean that market share thresholds used in the past for seller-side safe harbor analysis are systematically too permissive on the buyer side.[102] Further, the incentive incompatibility of the administrative-fee-funding structure is analytically equivalent to the foreclosure concern addressed in the 2023 Merger Guidelines' discussion of vertical integration, in that an intermediary's financial incentives diverge from the interests of the parties it nominally serves.[103]

Accordingly, the revised guidelines should reject any safe harbor for GPO arrangements. A GPO with de minimis combined purchasing significance, no exclusivity or sole-source requirements,

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[96] *See, e.g.*, Diana L. Moss, *Healthcare Intermediaries: Competition and Healthcare Policy at Loggerheads?*, Am. Antitrust Inst., 8–11 (white paper, 2012), available at https://www.antitrustinstitute.org/wp-content/uploads/2012/05/AAI-White-Paper-Healthcare-Intermediaries.pdf; Einer Elhauge, *Antitrust Analysis of GPO Exclusionary Agreements*, Statement for DOJ/FTC Hearing on Health Care and Competition Law and Policy, 31–34 (2003), available at https://faculty.law.harvard.edu/einer-elhauge/wp-content/uploads/sites/20/2023/11/elhauge_statement_for_ftc-_doj_hearing_w_page_numbers.pdf.

[97] Moss, *supra* note 96, at 15-16.

[98] 2023 Merger Guidelines, *supra* note 5, §§ 2.6, 6 (2023). The 2000 Guidelines, in contrast, gave buying collaborations only a footnote, and the mismatch between the two should be corrected.

[99] Peter Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WM. & MARY BUS. L. REV. 1, 8–10 (2010).

[100] *Id.* (documenting EU findings that a buyer taking as little as 20% of a grocery input has the capacity to distort competition, and UK findings of buyer power at as little as 10% of branded goods). *See also Toys R Us, Inc. v. FTC*, 221 F.3d 928, 936–38 (7th Cir. 2000) (finding that a buyer with approximately 20% of the toy retail market could coerce suppliers into refusing to deal with rivals).

[101] Carstensen, *supra* note 99, at 10–12 (explaining that defection from buyer-side coordination is structurally less attractive than from seller-side coordination because a defector must bid up input prices and process larger volume at lower margins, and that tacit collusion is easier to sustain when buyers implicitly respect each other's supplier relationships).

[102] The Statement 7 safe harbor thresholds—35% of product sales and 20% of member revenues—were calibrated for enforcement avoidance in a seller-side framework and are systematically too permissive for buyer-side analysis. *See* Statement 7, *supra* note 93, at 53–54.

[103] Einer Elhauge, *The Exclusion of Competition for Hospital Sales through Group Purchasing Organizations*, Report to U.S. Senate, 42–43 (June 2002), available at https://faculty.law.harvard.edu/einer-elhauge/wp-content/uploads/sites/20/2023/11/gpo_report_june_02.pdf (identifying the administrative fee funding structure as a source of "side payments" that create incentive misalignment: GPO managers may not seek the lowest prices for members when higher list prices generate larger administrative fees for themselves).

and no mechanism for information sharing beyond the purchasing function may be less likely to present serious antitrust risk; a GPO with significant purchasing power in concentrated input markets, extensive exclusivity arrangements, or an administrative-fee-funding structure that creates perverse incentives warrants close scrutiny.

Second, ***the Agencies should specifically address the information sharing risks associated with GPO membership***. Because certain information sharing is necessary to a GPO's joint purchasing activities, there is a structural risk that sharing will extend further than the purchasing function requires. Exchanges of competitively sensitive information—particularly where inputs are a significant determinant of downstream pricing—can not only compromise competition in the input market but also increase collusion risk in the downstream markets where GPO members compete against each other. That risk is amplified by the same structural features that make buyer-side coordination durable generally: once established, GPO-facilitated anticompetitive information sharing is particularly difficult to detect and remedy.

The Agencies' treatment of the information-sharing issue in Statement 7 of the Healthcare Guidelines does not fit today's economy.[104] The Statement's safety zone for GPOs whose purchases account for less than 20% of members' revenues has been systematically too permissive and should not be retained. It has been routinely criticized for missing the mark on the collusion concern in particular,[105] and the mitigating factors for collaborations outside the safety zone are outdated.

The revised guidelines should clarify that information sharing extending beyond the GPO's purchasing function is not protected by the GPO label. The analysis should focus on the modern GPO data infrastructure and whether the information exchange, given the GPO's platforms and member interaction patterns, has the capacity to facilitate coordination on competitive variables beyond the purchasing context. Finally, because platforms and other third-party agents in the modern economy may facilitate anticompetitive coordination as readily as they prevent it, the revised guidelines should emphasize that the Statement 7 safeguard for appointing a third-party agent to handle member information does not eliminate the collusion risk.

Third, ***the Agencies should address the particularly significant role of exclusionary contracting in GPOs***. In a significant oversight, Statement 7 did not address contracting at all, creating confusion as to whether the safety zone analysis immunized such conduct.[106] Economic analysis shows that exclusivity and bundling terms in GPO contracts can squeeze out smaller or newer suppliers and can effectively operate as market division agreements in the supplier market.[107] This theory—the use of collective buyer power to foreclose supply competition rather than merely to reduce input prices—is analytically distinct from the monopsony concern and requires its own treatment in revised guidelines.

Fourth, ***the Agencies should recognize that fee structures can create anticompetitive effects***. This risk is illustrated by the FTC's 2024 administrative complaint against the three largest pharmacy benefit managers and their affiliated GPOs, which alleged that these entities used their purchasing intermediary position to distort pharmaceutical pricing dynamics and shift costs to vulnerable

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[104] Statement 7, *supra* note 88, at 56–57.

[105] *See, e.g.,* Elhauge, *Antitrust Analysis of GPO Exclusionary Agreements*, *supra* note 91, at 46.

[106] *See, e.g.,* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, IMPROVING HEALTH CARE: A DOSE OF COMPETITION, ch. 4, at 45 (July 2004), *available at* https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf (discussing critiques of Statement 7 and clarifying that it does not immunize contracting practices, while declining to amend).

[107] Elhauge, *The Exclusion of Competition for Hospital Sales through Group Purchasing Organizations*, *supra* note 98, at 46–47.

patients.[108] The revised guidelines should make clear that fee structures will be subject to scrutiny if they are used by the purchasing entity to extract rents and foreclose competition in adjacent markets. Particular scrutiny is warranted when a GPO has significant purchasing power in concentrated input markets, relies on exclusive or sole-source contracting, or operates under an administrative fee structure that misaligns the GPO's incentives with its members' interests.

E. Algorithmic Pricing Agreements

The Agencies should emphasize that an anticompetitive agreement among competitors need not be express and may be inferred from conduct enabled by modern technologies. The Supreme Court has long recognized that cartels are often hatched with a wink and nod rather than an express agreement.[109] That is especially true of cartels enabled by modern technologies and may be a heightened risk in the competitor-collaboration context.

Notwithstanding that Section 1 prohibits tacit anticompetitive agreements as much as express ones, some courts have treated tacit agreements as inherently less likely and have imposed increasingly high evidentiary burdens on enforcers seeking to plead and prove their existence, including in oligopoly markets.[110] At the same time, technological advancements such as machine learning and algorithmic pricing software enable firms to make stable tacit agreements with more ease than ever before.[111] These developments warrant a reminder in revised guidelines that tacit anticompetitive agreements are just as illegal as express ones. The point has special relevance for competitor collaborations because even otherwise procompetitive integrations can become a breeding ground for tacit cartel agreements as rivals gain familiarity through collaboration.

The Agencies also should make clear that there is no exhaustive list of plus factors and that the absence of any particular plus factor is not fatal to the inference of concerted action. When pleading a tacit agreement, enforcers are permitted to demonstrate concerted action by pleading and proving that the defendants engaged in parallel conduct along with one or more plus factors suggesting the existence of an agreement.[112] The list of plus factors is not exhaustive and no one plus factor is required,[113] but some courts have declined to infer an agreement if one or more plus factors is absent—particularly evidence of direct communications and evidence that the communications were close together in time.[114]

To account for recent advancements in computer science allowing disparate parties to form stable tacit agreements without ever communicating directly, through conduct that is spread out over time, the Agencies should clarify that plus-factor analysis must be informed by technological

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[108] *See generally* Compl., *In the Matter of Caremark RX, LLC*, No. 9437 (F.T.C. Sept. 20, 2024).

[109] *Interstate Cir., Inc. v. United States*, 306 U.S. 208, 221 (1939); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)).

[110] *See* Christopher R. Leslie, *The Factor/Element Distinction in Antitrust Litigation*, 64 WM. & MARY L. REV. 585, 589 (2023).

[111] David O. Fisher, *Cleaning and Sharpening Our Antitrust Tools for the Age of AI* at 3, AM. ANTITRUST INST., https://www.antitrustinstitute.org/wp-content/uploads/2025/03/AAI-Commentary-Algorithmic-Pricing.pdf.

[112] *See, e.g.*, *White v. R.M. Packer Co.*, 635 F.3d 571, 577 (1st Cir. 2011); *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 104 (2d Cir. 2018); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 424–25 (4th Cir. 2015); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654–55 (7th Cir. 2002); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003).

[113] *See, e.g.*, *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d. Cir. 2004) ("The question then becomes, what are 'plus factors' that suffice to defeat summary judgment? There is no finite set of such criteria; no exhaustive list exists.").

[114] *See, e.g.*, *Cornish-Adebiyi v. Caesars Ent. Inc.*, No. 1:23-cv-02536-KMW-EAP, 2024 U.S. Dist. LEXIS 178504, at *12–22, (D.N.J. Sept 30, 2024), appeal docketed, No. 24-3006 (3rd Cir. Oct. 29, 2024) (treating the lack of simultaneous conduct and direct information sharing as dispositive).

realities.[115] In particular, the revised guidelines should reflect the fact that common new technologies allow for non-simultaneous decision-making in the absence of direct communication, such that, in cases involving the use of algorithmic decision making, the timing of competitors' agreements and the lack of evidence of direct communication does not make the existence of a tacit agreement less plausible.

The Agencies also should clarify that competitors' use of the same pricing algorithm may amount to concerted action. When two or more competitors contract with the same provider of algorithmic pricing software, they may be able to combine pricing decisions in violation of Section 1.[116] But some courts have mistakenly failed to scrutinize such agreements, including on grounds that agreements with algorithmic software providers are vertical rather than horizontal.[117] Troublingly, one court has even found that competitors' agreements with such software providers are not subject to Section 1 at all.[118] The revised guidelines should recognize that the horizontal/vertical distinction, by itself, does not determine any contract, combination or conspiracy's reasonableness; what matters is the agreement's overall effect on the competitive process. They should also expressly recognize that competitors' vertical agreements with pricing software providers may be scrutinized for anticompetitive effects under Section 1.

The revised guidelines should also explain that information sharing in this context is more likely to lead to anticompetitive effects when the information shared is about a firm's pricing and output decisions, when it is granular, and when it is forward-looking.[119] When multiple competitors use a common pricing algorithm in a way that allows them to combine pricing and output decisions, the algorithm effectively serves as a cartel manager, collecting each competitor's information and implementing shared pricing rules based on that information.[120] Empirical research establishes that, even when competitors do not agree to be bound by the algorithm's pricing or output recommendations, competitors' use of the same algorithm is consistent with joint profit maximization strategies and leads to higher prices and lower output over time.[121] To account for this empirical reality, the Agencies should clarify that competitors' use of the same algorithmic pricing provider may limit independent decision making and facilitate collusion notwithstanding that information is not shared directly but rather indirectly or through an intermediary.

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115 Fisher, *Antitrust Tools, supra* note 105, at 3.

116 *See, e.g.*, *In re RealPage, Inc.*, 709 F.Supp.3d 478 (M.D. Tenn. 2023); *Duffy v. Yardi Systems, Inc.*, 758 F.Supp.3d 1283 (W.D. Wash. 2024); *In re Multiplan Health Ins. Provider Litig.*, No. 24-cv-6795, 2025 U.S. Dist. LEXIS 104989 (N.D. Ill. June 3, 2025); *see* David O. Fisher, *Tacit Agreements to Collude: Enforcing Section 1 of the Sherman Act in the Age of Algorithms,* 40 A.B.A. ANTITRUST MAGAZINE 30, 30–31 (Fall 2025) (discussing the role of algorithmic cartel managers).

117 *See, e.g.*, *Cornish-Adebiyi*, *supra* note 108, at *12–22.

118 *Gibson v. Cendyn Grp., LLC*, 148 F.4th 1069, 1082 (9th Cir. 2025) (holding that competitors' separate agreements with algorithmic pricing software provider are not subject to Section 1 scrutiny because software provider does not compete in the relevant market).

119 Statement of Interest of the United States*, In re Pork Antitrust Litigation*, No. 0:18-cv-01776-JRT-JFD, Dkt. No. 2616 (D. Minn. Filed Oct. 1, 2024).

120 Fisher, *Tacit Agreements, supra* note 110 at 30–31.

121 *Id.* at 31; Calder-Wang, Sophie and Kim, Gi Heung, *Algorithmic Pricing in Multifamily Rentals: Efficiency Gains or Price Coordination?* (February 18, 2026), available at https://www.ftc.gov/system/files/ftc_gov/pdf/calder-wangkim.pdf; Leon Musolff, *Algorithmic Pricing, Price Wars and Tacit Collusion: Evidence from E-Commerce* (Dec. 26, 2026), available at https://lmusolff.com/papers/Algorithmic_Pricing.pdf.

Thank you for considering AAI's views. Please contact the undersigned if you wish to discuss any of the issues raised in these comments.

Sincerely,

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