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Via Website: https://www.regulations.gov/commenton/FTC-2023-0043-0001

SUBJECT: Antitrust Law Section Comments on the Federal Trade Commission and Department of Justice's Draft Update of the Merger Guidelines

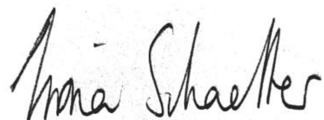
Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law Section, we respectfully submit these comments in response to the Federal Trade Commission and Department of Justices' Draft Update of the Merger Guideline.

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,



COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION ON THE FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE'S DRAFT UPDATE OF THE MERGER GUIDELINES

September 13, 2023

The views stated herein are presented on behalf of the Antitrust Law Section. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the American Bar Association.

I. Introduction

The American Bar Association's Antitrust Law Section ("Section") appreciates this opportunity to provide these comments to the Federal Trade Commission ("FTC" or the "Commission") and the Antitrust Division of the Department of Justice ("DOJ"; together with FTC, the "Agencies") on their Draft Update of the Merger Guidelines. The Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 10,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. The Section hopes these comments will be useful to the Agencies as they finalize the new Merger Guidelines.

The Section understands that the Draft Merger Guidelines (the "Guidelines") represent an effort by the DOJ and FTC to explain the framework, the analytical tools, and the sources of evidence the Agencies use when reviewing mergers. We commend the Agencies' effort to provide greater transparency and improve accessibility of the methods they use. This benefits the public, business community, practitioners, and courts. We also appreciate the significant amount of time and energy from FTC and DOJ staff that went into preparing the Guidelines.

To better achieve the stated goal of helping the business community, practitioners, and courts understand the Agencies' approach to merger review, below we provide views on where the Guidelines could be improved. Our suggestions largely focus on identifying where additional clarification and explanation would be helpful. We have divided this comment into three sections. Section A provides overarching comments that apply to the Guidelines in their entirety. Section B identifies specific Guidelines about which the Section has chosen to provide comments. Section C provides comments related to the Guidelines' perspective on efficiencies in Section IV, which addresses rebuttal evidence that parties may provide.

We appreciate your consideration of the views of the Section and look forward to the final version of the Guidelines.

A. Overarching Points

We start with two overarching points that do not apply to any specific guideline but apply to the Guidelines generally. First, we believe it is critical for the Guidelines to clarify when they are describing a legal presumption connected to a statute or case law, a presumption by the Agencies

based on their prosecutorial discretion, and/or when they are describing a scenario that suggests the need for closer inquiry because the Agencies view the circumstances as indicating a substantial risk that the result of the merger may be to substantially lessen competition or tend to create a monopoly.

Second, we believe the Agencies could greatly improve the Guidelines by clarifying how Section IV, which explains how the Agencies approach several common types of rebuttal evidence, interact with the rest of the Guidelines. For example, if the type of rebuttal evidence described in Section IV is available to rebut all the presumptions referred to in the various individual Guidelines, it would be helpful for the Agencies to clarify that is the case.

B. Comments on Specific Guidelines

1. Guideline 1: Mergers Should Not Significantly Increase Concentration in Highly Concentrated Markets

We agree that, in already highly concentrated markets, significant increases in concentration can harm competition. We believe, however, that Guideline 1 would benefit from the Agencies elaborating on certain statements and views set forth therein.

First, we suggest that the Agencies provide a more robust and comprehensive explanation of the empirical, qualitative, and/or legal basis for changing the concentration thresholds back to pre-2010 Merger Guidelines levels. We recognize that these were the thresholds in prior iterations of the Guidelines and that the changes may have been made to adjust them to the Agencies' view of the appropriate level of merger enforcement. However, the Section notes that practitioners have become accustomed to the thresholds in the 2010 Guidelines, so providing an explanation for the changes would help the antitrust bar and business community to better understand and adapt to the new thresholds.[1]

Additionally, we observe that this Guideline could be read to posit that, in a highly concentrated market, the Agencies would view a significant increase in concentration, alone, without any other evidence of a risk of a substantial lessening of competition or a tendency to create a monopoly, as problematic under antitrust law. It would be helpful for the Agencies to clarify in the final version of the Guidelines whether this is what they intend to convey, and if so, what their support is for taking this approach. If the above characterization is correct, an understanding of what underlies the Agencies' position would be helpful.

These suggestions, and other similar requests for explanatory and contextual information highlighted throughout the Section's comments, could be incorporated by the Guidelines themselves or in other, more appropriate avenues to convey such information, such as in Commentary to the Guidelines.[2]

2. Guideline 2: Mergers Should Not Eliminate Substantial Competition between Firms

The Section seeks clarification on what the Agencies mean by the term "substantial competition" in Guideline 2. The Agencies cite to *United States v. First Nat'l Bank & Trust Co. of*

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[1] The Section notes that Shapiro and Rose have commented that, "empirical literature is [not] clear on what those [new HHIs] should be" to replace what was in the 2010 Horizontal Merger Guidelines. Nancy L. Rose & Carl Shapiro, "What Next for the Horizontal Merger Guidelines," Antitrust, Vol. 36, No. 2, Spring 2022.

[2] *See, e.g.*, FTC/DOJ Commentary on the Horizontal Merger Guidelines, March 2006, at https://www.justice.gov/d9/383663.pdf.

Lexington and *ProMedica Health System, Inc. v. FTC* for this general principle. However, neither of these citations nor the text of Guideline 2 explain what constitutes "substantial competition" and we believe the Guidelines could benefit from a more complete explanation of this term.

The Section appreciates that Appendix 2 of the Guidelines describes how the Agencies evaluate competition between firms in general terms, and the Appendix refers to the description of Guideline 2. We note, however, that neither this Guideline nor Appendix 2 contains a limiting factor in the definition of "substantial competition." The Section proposes the addition of a limiting factor in the text of the Guideline itself. The Section believes this addition could provide helpful incremental guidance to merging parties in a number of circumstances. For example, a merger may be especially problematic where the parties are particularly close competitors in a large field of competitors or where the parties are two competitors in a relatively narrow field of competitors. In other words, the Section understands the Guidelines to indicate that, all other things equal, a larger change in HHI in an already highly concentrated industry is more problematic than a small change in HHI in a less concentrated industry. The Guidelines should expressly state this.

However, when transactions fall outside of these circumstances, parties and their counsel would benefit from understanding in which situations the Agencies may find that, prior to the merger, the merging parties do compete, but that competition does not rise to the level of "substantial competition." For example, in the case of a merger where, post-transaction, there would remain many significant competitors in a relevant market, without substantial product differentiation, it would be helpful to understand if the Agencies would agree that such a merger is less likely to raise competitive concerns.

Further, it would be helpful to practitioners for the Agencies to clarify any intended differences in this Guideline from the unilateral effects analysis contained in the 2010 Guidelines, specifically § 2.1.4 ("Substantial Head-to-Head Competition"). To the extent the language is intended to do something different or extend beyond what was in the 2010 Guidelines, it would be helpful to state that this is the case and why.

3. <u>Guideline 3: Mergers Should Not Increase the Risk of Coordination</u>

Guideline 3 addresses the risk of coordinated effects that could result from a merger. A focus on coordinated effects is uncontroversial as an enforcement aim. We believe, however, that this Guideline would benefit from the Agencies providing clarification as to how it will be applied. For example, for transactions that result in concentration levels above 1800, the Section queries whether the Agencies will generally assume an increase in the risk of coordinated effects or whether there are market-specific characteristics or factors specific to a given market that would make some mergers more likely to result in harm than others or create coordination concerns below the 1800 threshold. To this end, this Guideline would benefit from descriptive examples of what would constitute a harmful merger (and what would not).

Further, there is ambiguity as to whether the description of coordinated effects in the new Guidelines differs from how coordinated effects were treated in the 2010 Guidelines, and if so, how. To the extent that the Agencies intend to take a different approach from the 2010 Guidelines, it would be beneficial to explicitly state that and provide an explanation for the Agencies' rationale for doing so.

4. <u>Guideline 4: Mergers Should Not Eliminate a Potential Entrant in a Concentrated Market.</u>

This Guideline takes a broad approach to which firms may be considered actual or perceived potential entrants, with a focus on a variety of objective evidence used to evaluate potential entry. The Section proposes the Agencies add clarity to help practitioners, businesses, and

the public identify more precisely those transactions involving potential competition that could be problematic. To this end, we suggest a few ways in which the Agencies could modify this Guideline.

First, in assessing whether a firm constitutes an *actual* potential entrant, the fact that a company is technically *able* to enter (i.e., has the means to overcome any meaningful entry barriers), or had merely *considered* entering, are useful indicators, but should not be the end of the inquiry. The current draft states that "[s]ubjective evidence that the company considered organic entry as an alternative to merging generally suggests that, absent the merger, entry would be reasonably probable."[3] However, absent evidence as to the economic feasibility and operational capability of entering a new market, a firm's mere *consideration* of entry alone should not be dispositive of the actual likelihood of the firm entering and being able to have an impact on competition.[4]

The Section suggests this Guideline explicitly recognize other relevant factors in addition to the ability to enter. Such factors may include: (1) whether a company has the characteristics, capabilities, and economic incentive to enter successfully (i.e., whether a company is well-suited to enter and be competitive within a reasonable period of time)[5]; (2) whether its entry is plausible (i.e., even if a firm could enter, do its internal communications or plans suggest entry is *realistic* absent the merger); and (3) the extent to which the firm's premerger presence on the fringe of the target market has at all tempered oligopolistic behavior on the part of existing participants in that market.[6]

Second, the Section recommends the Agencies distinguish between situations where this Guideline is likely to play a greater role from those where this Guideline is likely to play a lesser role, based on objective evidence or market structure. For example, a circumstance where there are few potential entrants, and a transaction eliminates one of those most likely to enter and be successful, may indicate greater concern. On the other hand, a circumstance where there are multiple potential entrants, each technically capable of entering and with significant incentives to enter, may be less concerning.

Finally, the Section emphasizes that the tests articulated above must be flexible enough to account for the availability of evidence (or lack thereof).

5. Guideline 5: Mergers Should Not Substantially Lessen Competition by Creating a Firm That Controls Products or Services That Its Rivals May Use to Compete

The Section appreciates the Agencies' proper analytical focus on a merged firm's ability and incentive to engage in foreclosure. However, the Section seeks additional clarity on (i) how certain or hypothetical uses of products, services, or customers to compete will be considered in the Agencies' foreclosure analysis; (ii) whether the incentive to exclude or weaken a rival need be profitable to create a competitive concern; and (iii) the role of the elimination of double marginalization in merger analysis.

[3] Draft Guidelines, at 12.
[4] The Section notes that a federal court in a recent potential competition case stated that "financial and engineering capabilities alone are insufficient" to determine whether competitive entry is reasonably probable. FTC v. Meta Platforms Inc., 2023 WL 2346238, at *23 (N.D. Cal., 2023).
[5] *FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015); *see also* John M. Yun, Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust, 104 Marq. L. Rev. 613 (2021).
[6] *See also* Gregory Werden and Kristen Limarzi, Forward-Looking Merger Analysis and the Superfluous Potential Competition Doctrine, Antitrust Law Journal, Vol. 77, No. 1 (2010).

First, the Guideline would benefit from elaboration of the meaning of “may” in the context of foreclosure of “related products rivals may use, now or in the future, as inputs,”[7] and additional clarity on the Agencies’ assessment of a rival’s potential or future use of an input. For this Guideline, it would be particularly instructive for the Agencies to provide a time horizon for evaluating whether a firm “may” use a product or service to compete.

The current draft Guideline also suggests that even if an input or other related product is not used at all by rivals, “it might be competitively significant because, for example, its availability enables rivals to obtain better terms from other providers in negotiations.”[8] The Section recommends the Agencies provide an example to better illustrate when the *availability* of a product, but not use, is a significant factor for foreclosure analysis.

Second, as to whether the merged firm would have the incentive to weaken or exclude rivals, the Section recommends the Agencies clarify what evidence may give rise such a concern. Notably, the current draft states that if a firm “has the ability and incentive to make it harder for its rivals to compete,” the firm may nonetheless offer rebuttal evidence, which may include “evidence that there are no plausible ways in which they could profitably worsen the terms for the related product and thereby make it harder for rivals to compete.”[9] The Section seeks clarity as to the role that evidence on profitability plays in the evaluation of incentive to weaken or exclude rivals (acknowledging that clear evidence on this is not always available).

One important factor (but not the sole factor) in determining the likelihood of post-merger conduct that could weaken or exclude rivals is the anticipated profits associated with it. Also relevant for this determination is the timeframe on which that profitability (or reduction in profits) would be achieved. To the extent the Agencies intend to assess incentives beyond financial incentives, those incentives should be further detailed.

Finally, the Section urges the Agencies to explicitly address the role (or lack thereof) of the elimination of double marginalization (EDM) in merger analysis, if not in Guideline 5 then in the discussion of rebuttal evidence in Section IV. EDM was a significant feature of the Agencies’ 2020 Vertical Merger Guidelines (VMGs) and their discussion of foreclosure and raising rivals’ costs.[10]

Though the VMGs were withdrawn by the FTC with extensive critique of the consideration of EDM as a pro-competitive benefit, a similar action was not taken by the DOJ, although even before the 2020 VMGs were promulgated, DOJ leadership made clear that “double marginalization is present only in some vertical relationships, and therefore eliminated by only some vertical mergers.”[11] Given its extensive treatment by the Agencies in prior Guidelines, despite its controversy, the Section suggests it may be helpful to include a discussion of the Agencies’ current position on EDM and what role it plays (or does not play) in merger analysis.

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[7] Draft Guidelines, at 14.
[8] Id.
[9] Draft Guidelines, at 16.
[10] VMG p. 5 (“To the extent practicable and appropriate, the Agencies will use the same set of facts and assumptions to evaluate both the potential harm from a vertical merger and the potential benefits of the elimination of double marginalization, and will focus on evaluating conduct that would be most profitable for the merged firm as a whole.”)
[11] Makan Delrahim, “Harder Better Faster Stronger”: Evaluating EDM as a Defense in Vertical Mergers, Geo. Mason L. Rev. 22d Annual Antitrust Symposium, at 6 (Feb. 15, 2019), https://www.justice.gov/opa/speech/file/1132831/download.

6. Guideline 6: Vertical Mergers Should Not Create Market Structures That Foreclose Competition

The Section recognizes that vertical mergers can create incentives for the merged firm to increase its prices above the pre-merger prices or reduce quality, because the merged firm internalizes the fact that a higher price in its upstream division increases the costs of rival downstream firms, which benefits its downstream division.[12] The Section also recognizes that vertical mergers can create incentives for the merged firm to decrease its prices below the pre-merger prices, because the merged firm internalizes the fact that a lower price in its upstream division reduces the costs of its downstream division.[13]

The Section does not opine on the frequency with which this price-decreasing effect is present and/or satisfies the conditions for procompetitive efficiencies discussed in Section IV. Nor does the Section opine on the relative magnitudes of these two effects (when both are present) and their interactions as a general matter. But the Section does suggest acknowledging the possible existence of both effects, as well as additional articulation of the conditions under which one effect is likely to be deemed to outweigh the other in a particular case.

As noted in footnote 52 of the draft Guidelines, the likely effects of a vertical merger can be evaluated by means of the "ability and incentive" analysis discussed in Guideline 5. If Guideline 6 is going to introduce a 50% market share presumption alongside that analysis, the Section suggests making it clear that this presumption can be rebutted if the Guideline 5 analysis strongly indicates an absence of ability and/or incentive.

7. Guideline 7: Mergers Should Not Entrench or Extend a Dominant Position

The Guidelines state that the Agencies should evaluate whether a merger involving an "already dominant" firm can substantially decrease competition, and/or extend that firm's dominant position into other markets. The Section acknowledges that a merger may harm competition by entrenching or extending a dominant position of the acquiring entity and/or the merging party(ies) where there is actual evidence that the transaction is likely to lead to harm (i.e., that the possibility of anticompetitive bundling or tying, for example, are realistic consequences of the combination).

The Section emphasizes that dominance by the acquiring firm alone should not, without more, be enough to establish that a merger may result in a substantial lessening of competition or otherwise tend to lead to a monopoly. As with the analysis of all mergers that come before the Agencies, the Agencies must engage in the full merger analysis contemplated by the Guidelines, including assessing whether the transaction could create the ability and economic incentive for harm to competition through increased prices, reduced quality, or lower innovation.

Finally, the Section acknowledges that the entrenchment or extension of a dominant position held premerger by the party to be acquired may also harm competition,[14] but additional explanation or illustration of contexts where it is likely to create competitive concern may help public understanding. Mere conjectures or speculative scenarios are not sufficient to determine that a

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[12] Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: A Post-Chicago Approach, 63 Antitrust L.J. 513, 519 (1995).

[13] *Id.*

[14] *See, e.g.*, Cedars-Huntington Conditional Approval, at https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/nonprofithosp/ag-decision-huntington-121020.pdf?; *see also* Decision and Order, In *re Negotiated Data Solutions LLC*, No. C-4234 (F.T.C. Sept. 22, 2008). *See generally* Keith Brand & Ted Rosenbaum, A Review of the Economic Literature on Cross-Market Mergers, 82 ANTITRUST L.J. 533 (2019).

merger will result in a substantial lessening of competition in violation of Section 7 of the Clayton Act, or otherwise to define that a merger must be challenged.

8. Guideline 8: Mergers Should Not Further a Trend Toward Concentration

Guideline 8 states that "the effect of a merger may be substantially to lessen competition or to tend to create a monopoly if it contributes to a trend toward concentration"[15]. While the Section acknowledges that there are instances in which a merger leading to increased concentration, alongside other factors, may hinder competition, the Section urges the Agencies to provide more clarity regarding the application of this Guideline in practical terms.

As such, the Section suggests that the Agencies review how a specific merger will affect competition, considering the context in which it occurs. For example, the Agencies should regularly look to recent past mergers in an industry to assess likely competitive effects of the transaction under review. The type of industry or acquirer may also be relevant.

Furthermore, the current wording of this Guideline could be read to eliminate the particularity requirement, which assesses the specific competitive impact of each merger, and condemn a transaction only because it is the last one in a series of transactions previously made by other firms in a particular industry as opposed to whether, for example, given an acquirer's dominant position, the transaction at issue may substantially lessen competition even if the to-be-acquired company is a start-up or otherwise has a small market share. The Section believes it would be useful for the Agencies to clarify that this interpretation is accurate, and if not, to clarify what is intended by Guideline 8.

Finally, the Section remarks that, as noted in the comments to Guidelines 1 and 7, while there is literature that supports the view that a significant concentration increase in a highly concentrated market alone may indicate a likelihood of reduced competition[16], high levels of pre-merger concentration alone should not be enough to establish that a merger will result in a substantial lessening of competition or otherwise be challenged.

9. Guideline 9: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series

According to Guideline 9, "if an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy", citing the Clayton Act's intention of permitting "intervention in a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize".[17]

The Section acknowledges that Section 7 of the Clayton Act contemplates that a series of acquisitions may constitute an antitrust violation. However, Guideline 9 would benefit from clarity as to whether the Agencies' intention is to (i) challenge an earlier merger in a series of mergers, none of which would independently give rise to a Section 7 claim; or (ii) challenge the latest merger as a tipping point or the aggregation of all of the previous mergers.

[15] *See Guidelines,* at page 21.
[16] *See Guidelines,* at page 22.
[17] H.R. Rep. No. 1191, 81st Cong., 2d Sess. 12-13 (1950).

10. Guideline 10: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform

Guideline 10 covers multi-sided platforms, and the Section agrees with the Agencies that platform mergers may warrant special considerations. There are aspects of platforms that make each transaction unique, and thus crafting a Guideline to address it must be done carefully.

On the one hand, the Section acknowledges that, where appropriate, the Agencies may review a merger focusing on only one side of a platform. The Agencies are within their rights under Section 7 to challenge a transaction based on harm on one side as long as the economics and the facts support doing so.[18] The Section would agree that single-side focus may make sense, for example, where one platform charges consumers an effectively negative price—as is often the case with nominally "free" products—and with the merger, that platform operator seeks to acquire another platform that charges consumers a low but positive price. If the prices the platform charges merchants on another side would likely increase because of reduced merchant-side competition between platforms post-transaction, the Agencies could properly give minimal attention to the consumer side and focus on the merchant side of the transaction. That is true whether or not consumers would also be at risk of harm from merchants passing through price increases to them in part or in whole.

On the other hand, it can also be appropriate, when the Agencies are considering harm on one side of the platform, to consider effects on the other side. This does not mean that significant harms on one side of the platform can or should be offset by benefits on another.[19] But where there may be a reduction of competition on one side of a platform (e.g., the consumer-facing side), but also expansion on another side (e.g., the ability of the acquired company to begin serving the merchant side of the platform), the Agencies could consider both the harms to consumers and the benefits to merchants.

Finally, while the Guideline appropriately considers issues particular to platform competition, the Section—and, we think, the public—would welcome additional clarification on what the Agencies perceive to constitute competition "on the platform" such that it could give rise to an action under Section 7. For example, does this concern apply when the platform operator is not a competitor "on" the platform?

11. Guideline 11: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers

The Section agrees that buyer power, including an impact on labor, is a valid consideration in merger review. While the 2010 Guidelines addressed merger review of competing buyers briefly and largely by reference to its similarities to review of mergers of competing sellers, the draft Guidelines provide significant detail on the nuances and rationale associated the Agencies' review of these matters.

The draft Guidelines highlight the view that labor markets are often relatively narrow. However, without further clarification, the narrowness of such markets may undercut the ability of firms to evaluate transactions for firms with large numbers of employees filling a highly diverse set of

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[18] *See, e.g.*, Herbert Hovenkamp, Antitrust and Platform Monopoly, 130 *Yale L.J.* 1952, 1957 (2021) ("Antitrust law needs to treat digital-platform markets for what they are: markets that have some unique characteristics, but markets nonetheless susceptible to fact-specific antitrust analysis").

[19] Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 972 (5th ed. 2020); *see also* Hovenkamp, Antitrust and Platform Monopoly, 130 *Yale L.J.* at 2047.

roles to evaluate their transaction risks. In analyzing labor markets as part of assessing the impact of a transaction on competition, it may be appropriate to consider the competitiveness of each affected relevant labor market, subject to appropriate clustering (see App. § 3.B.4) and other tools the Agencies may use.

In discussing mergers of competing buyers, the 2010 Guidelines provided particularly informative guidance concerning the role that efficiencies play in such matters, or explaining to a non-antitrust audience the difference between changes in prices paid post-merger that arise from reduced competition versus increased efficiency. The draft Guidelines are noticeably silent on this topic. In the context of labor markets that drive the discussion of Guideline 11, this difference between merger efficiencies and competitive effects may be particularly confusing to non-antitrust readers. As an underlying rationale for mergers is often to efficiently cut costs, it may be unclear to firms evaluating transactions that, e.g., rationalizing redundant roles likely is not an issue for concern when the power to carry out such cuts does not derive from the newly combined market power of the merged entity. The Section encourages the Agencies to weigh verified, cognizable, merger-specific efficiencies in their evaluation of buyer power concerns as they do for mergers that implicate seller power concerns. It would be helpful to note in the Guideline, or at least the section on Procompetitive Efficiencies, the extent to which such efficiencies may be used to rebut a concern based on this Guideline.

12. Guideline 12: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition

Guideline 12 posits, and the Section agrees, that partial acquisitions and acquisitions of minority interests can reduce competition, even if they do not, as the 2010 Guidelines put it, "necessarily or completely eliminate competition between the parties."[20] The notions that a partial acquisition could reduce competition by (a) giving the acquirer the ability to influence the target firm's competitive conduct, (b) reducing the acquirer's incentive to compete, and/or (c) giving the acquirer access to non-public, competitively sensitive information are also not new.[21] Moreover, they may also implicate coordinated-effects concerns.[22]

However generally uncontroversial these concepts are, Guideline 12 as written could be read to imply a zero or close-to-zero tolerance policy for such ownership changes, which could chill competitively harmless movement of capital, because the language used (e.g., "minority position," "voting interest") includes no modifiers requiring a minimum magnitude to trigger competitive concerns. The Section therefore proposes that the Agencies indicate the circumstances in which they are unlikely to exercise their prosecutorial discretion to challenge minority ownership.

C. Section IV: Rebuttal Evidence Showing that No Substantial Lessening of Competition is Threatened by the Merger

1. Procompetitive Efficiencies

The Section notes that the draft Guidelines adopt the requirements from the 2010 Guidelines—e.g., efficiencies must be cognizable, procompetitive, and of a "magnitude" and "likelihood" sufficient to overcome any "lessening of competition." The draft Guidelines' requirements relating to merger specificity of efficiencies omits the 2010 Guidelines' statement that "[t]he Agencies

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[20] 2010 Horizontal Merger Guidelines § 13.

[21] *See, e.g.*, Martin C. Schmalz, Recent Studies on Common Ownership, Firm Behavior, and Market Outcomes, 66 *Antitrust Bulletin* No. 1, 12 (2021); Steven C. Salop & Daniel P. O'Brien, Competitive Effects of Partial Ownership: Financial Interest and Corporate Control, 67 *Antitrust L.J.* 559, 575-76 (incentives of acquiring firm), 579-84 (partial control effect on acquired firm) (2000).

[22] Einer Elhauge, Horizontal Shareholding, 109 *Harvard L. Rev.* 1267, 1274 (2016).

do not insist upon a less restrictive alternative that is merely theoretical" when assessing whether a claimed efficiency is merger specific. This raises the question of whether what the 2010 Guidelines called "merely theoretical" alternatives to the proposed merger—such as organic growth, contracts between the merging parties, mergers with other entities, or "a partial merger involving only those assets that give rise to the procompetitive efficiencies"—would suffice to make a given efficiency non-merger-specific in the Agencies' view. The Section supports rigorous examination of the merger specificity of claimed efficiencies, but also seeks clarity on the Agencies' objective with the proposed changes to the language in the Guidelines on efficiencies.