Public Comments of the Colorado and Nebraska Attorneys General in Response to the Request for Information on Merger Enforcement

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We, the undersigned Attorneys General of the State of Colorado and the State of Nebraska, and co-chairs of the National Association of Attorneys General Antitrust Committee, submit these Comments in response to the request by the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission (together, "the Agencies") for public comments on the way in which the Agencies can modernize enforcement of the antitrust laws regarding mergers. As co-enforcers of the nation's antitrust laws, the state Attorneys General have unique perspectives, experiences, and interests in the consistent application of updated principles to the analysis of merger transactions.

I. INTRODUCTION

The horizontal merger guidelines (hereinafter, the "Guidelines") are a successful model of administrative guidance. They represent the Agencies' "most explicit and important communication to the business community about the mergers they are likely to challenge . . . ."[1] For over sixty years, the Guidelines have continued to serve many purposes to different stakeholders, including industry and courts, along with state and federal enforcers. This legal framework shapes merging parties' behavior and informs the analysis of transactions that affect millions of consumers every year. While not binding, courts regard the Guidelines as a "benchmark of legality."[2] The value of these Guidelines lies in the collective effort they reflect—they draw on the compounded expertise not only of the experts that investigate, litigate, and study competition issues, but also of the parties that are the subject of their scrutiny.

Since the inception of the Guidelines, enforcers have debated the principles that animate competition laws and the economic understandings that support these principles.[3] We now find ourselves at another juncture in the evolution of that debate as modern market forces, particularly in the global digital economy, continue to push antitrust law into new territory.[4] The Agencies and their state counterparts are charged with the obligation of modernizing the enforcement of the antitrust laws to ensure they reflect our current understandings of competition based on market realities. Those understandings have evolved since the latest iteration of the Guidelines in 2010.[5]

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[1] Bill Baer et al., *Restoring Competition in the United States: A Vision for Antitrust Enforcement for the Next Administration and Congress*, WASH. CTR. FOR EQUITABLE GROWTH at 27 (Nov. 2020), *available at* https://faculty.haas.berkeley.edu/shapiro/restoringcompetition.pdf.
[2] United States v. Kinder, 64 F.3d 757, 771 (2d Cir. 1995).
[3] *See generally* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49 (2010).
[4] *See* JONATHAN B. BAKER, MARKET POWER IN THE U.S. ECONOMY TODAY 1-6 (2017), https://equitablegrowth.org/market-power-in-the-u-s-economy-today/.
[5] *See generally* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, Horizontal Merger Guidelines (2010) [hereinafter 2010 Guidelines]; *see also* Steven C. Salop & Fiona Scott Morton, *The 2010 HMGs Ten Years Later: Where Do We Go From Here?*, 58 REV. INDUS. ORG. 81 (2021).

State enforcers are committed to a tradition of robust partnership with our federal counterparts, particularly related to merger oversight and enforcement. We appreciate the opportunity to respond to the Request for Information on Merger Enforcement, issued on January 18, 2022, and offer suggestions and experience-based insights so that the principles in the Guidelines not only reflect today's competitive realities, but also equip businesses, courts, and enforcers with the tools they need to evaluate mergers and their competitive effects.

The comments herein address various topics noted in the Agencies' request. First, we posit that competitive dynamics in the U.S. economy have reached a critical turning point, and that the current Guidelines do not capture key aspects of modern competition. Next, we address the role of market definition in antitrust analyses and argue that the Guidelines should make clear that market definition may not be necessary in every case and that effective merger review must also consider other forms of probative evidence. Third, we offer suggestions to revitalize merger analyses by focusing on the purpose of merger review and reexamine the "may be to substantially lessen competition" and "tend to create a monopoly" standards. Fourth, we discuss the effect that digital markets have on how enforcers analyze anticompetitive effects and their implications for market definition. Finally, we spotlight a growing and problematic trend: the elimination of nascent competition. We examine why nascent competition should receive more robust discussion in the Guidelines and identify potential solutions. We appreciate the opportunity to offer these suggestions for your consideration.

II. THE GUIDELINES DO NOT CAPTURE KEY ASPECTS OF MODERN COMPETITION

This section proceeds in four parts. First, we offer reflections on the evolution of the Guidelines and their historical application. Second, we discuss key observations about the current structure of the U.S. economy, which differ from the backdrop against which prior Guidelines were written. Here, we seek to highlight how enforcers do not have the tools or resources they need to oversee an increasingly concentrated economy. Third, we discuss the consequences associated with the current competitive landscape. Those harms are not only reflected in higher consumer prices, but also decreasing wages, stymied innovation, and a broad-scale languishing of economic dynamism. Last, we highlight ways that the Guidelines might mitigate some of these harms by capturing anticompetitive mergers.

a. Evolution of the Guidelines and Historical Application

Merger analyses have come a long way since the first iteration of the Guidelines in 1968, which, for example, made no mention of collusion or coordinated effects.[6] Following a perceived era of overenforcement, we saw a marked shift away from the "structure-conduct-

[6] *See* U.S. DEP'T OF JUSTICE, Merger Guidelines (1968).

performance" paradigm in favor of a Chicago School approach.[7] Sentiments such as Justice Stewart's quip, "the government always wins,"[8] influenced the 1982 revisions, which were heralded as elevating the role of disciplined economics in merger analyses. While the 1982 Guidelines were revolutionary in many respects,[9] the legal landscape created in their wake has tilted too far toward non-interventionalist and thereby enabled large-scale consolidation and increasing industry concentration.[10]

For decades under the Chicago School, antitrust policy has miscalculated the error cost equation and given undue weight to the costs of false negatives in merger enforcement. The result has been less enforcement and fewer challenges, erring on the side of nonintervention.[11] According to some estimates, the FTC conducted in-depth investigations in about 5% of filed mergers in the early 1990s, but by the early 2000s the rate dropped to about 1%, where it remained through 2016.[12] During this period, the number and value of mergers has continued to climb. There was a corresponding sharp decline in the rate of merger challenges in the mid-1990s. The FTC challenged 2.7% of filed mergers between 1989 and 1996, and 1.2% of mergers between 1997 and 2016.[13]

Resource constraints also have hampered enforcement efforts. Over the past decade, antitrust appropriations have been nearly flat, despite nearly 40% growth in U.S. Gross Domestic Product.[14] The Antitrust Division had 25% fewer full-time employees in 2019 than it did a decade earlier. And the FTC had roughly the same number of full-time employees in 2020 as it did in 2009.[15] Against a backdrop of precedent embodying a Chicago-school

[7] The 1982 Guidelines opened with a proclamation of purpose, stating "mergers generally play an important role in a free enterprise economy. . . . While challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral." U.S. DEP'T OF JUSTICE, Merger Guidelines § I (1982).
[8] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966).
[9] In many ways, the 1982 Guidelines established the modern framework for merger analyses. Innovations from this iteration included: the "unifying theme" for enforcement, "that mergers should not be permitted to create or enhance 'market power' or to facilitate its exercise"; the introduction of the hypothetical monopolist test for market definition; and the incorporation of the Herfindahl-Hirschman Index (HHI) into merger analyses. *See* Shapiro, *supra* note 3, at 52-53.
[10] *See generally* Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement, in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 235 (Robert Pitofsky ed., 2008), *available at* http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf.; William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSPS. 43 (Winter 2000), *available at* https://faculty.haas.berkeley.edu/shapiro/century.pdf.
[11] *See* Philip J. Weiser, *Meeting this Antitrust Moment* at 2-4 (Feb. 2021), *available at* https://coag.gov/app/uploads/2021/02/Meeting-this-Antitrust-Moment.pdf; *see also* Baker & Shapiro, *supra* note 10, at 6 (noting "the pendulum has now swung too far").
[12] Malcom B. Coate, *The Merger Review Process at the Federal Trade Commission from 1989 to 2016* at 32-34 (Feb. 28, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2955987.
[13] *Id.*
[14] *See* Baer et al., *supra* note 1, at 14.
[15] *Id.*

preference for non-intervention, enforcers have faced difficult decisions about where to put limited resources. This lack of agency intervention has caught the public's attention. In January 2007, the Wall Street Journal reported "[t]he federal government has nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish."[16]

In this environment, the door has opened for private plaintiffs and state Attorneys General to step in and supplement merger oversight. Indeed, the success of these efforts underscores the critical nature of a multimodal approach to merger regulation. In 2018, for example, door manufacturer Steves & Sons litigated and prevailed in an unprecedented merger challenge over a transaction that enforcers approved four years prior. The landmark victory resulted in a divesture remedy, the first of its kind for a private plaintiff.[17]

State Attorneys General likewise increased their efforts. Colorado, for example, protected competition in the Colorado Springs area against a combination proposed between DaVita and UnitedHealth Group that would have impacted Medicare-eligible residents. The settlement took special care to ensure the transaction would not reduce competition, increase health care costs, or otherwise undermine health benefits and choices for local seniors.[18]

With history as the guide, enforcers must confront the virtues and failings of past enforcement priorities and approaches. Understanding the nature of the current competitive landscape offers important insights to reshape policy. Given stakeholders' broad reliance on the Agencies' guidance to investigate and challenge mergers, it is more important than ever to have clear Guidelines reflecting economic realities and the law.

b. Changes in the Competitive Landscape and the Current Structure of the U.S. Economy

The current competitive landscape is markedly different from the backdrop against which previous iterations of the Guidelines were written.[19] Economic realities—including record

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[16] Dennis Berman, *The Game: Handicapping Deal Hype and Hubris*, WALL ST. J. (Jan. 16, 2007) at C1.
[17] Steves & Sons v. Jeld-Wen, Inc., 988 F.3d 690, (4th Cir. Feb. 18, 2021).
[18] *Press Release: Antitrust Challenge and Settlement to the UnitedHealth Group and DaVita Merger Will Safeguard Competition, Cost, and Quality of Healthcare for Seniors in the Colorado Springs Area*, COLORADO ATTORNEY GEN. (June 19, 2019), https://coag.gov/press-releases/06-19-19/; *see also People of the State of California Ex. Rel. Xavier Becerra v. Sutter Health*, No. CGC 18-565398 (Cal. Sup. Ct. filed Mar. 29, 2018).
[19] Attempts to modernize the Guidelines have been made. Although the 2010 iteration of the Guidelines began to recognize, for example, non-price harms to competition by formalizing the role of innovation in merger review, they did not go far enough. Jennifer Cascone Fauver et al., *The*

industry concentration and increasing market power held by dominant firms—provide enforcers an opportunity to adapt antitrust policy in a way that protects American consumers, maximizes the nation's competitive potential, and promotes equality.[20] Indeed, by some estimates, more than 75% of U.S. industries have experienced an increase in concentration levels over the last two decades.[21]

Increasing consolidation is far from an intangible reality—it affects industries steeped in daily American life. Sectors such as financial services, health care, manufacturing, telecommunications, transportation, and agriculture are increasingly dominated by fewer players.[22] While broadly aggregated data on industry concentration levels cannot tell the complete story with respect to market power, industry-specific data indicates a rise in market power in multiple sectors such as hospitals, wireless providers, and railroads.[23] The durability of market power held by dominant firms, in combination with the observation that an increasing number of firms are controlled by a smaller number of financial investors,[24] signals that competition law may be approaching a tipping point and is at risk of giving way to regulatory forces.[25]

While mergers to monopoly or duopoly have occupied central stage in enforcement priorities, three or four competitor markets have become increasingly common—and the

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Increasing Cross-Border Importance of Innovation in Merger Review, 32 ANTITRUST MAGAZINE 70, 70 (2018).

[20] *See* Baker and Shapiro, *supra* note 10, at 4 ("[T]he emphasis in merger enforcement has shifted over three decades from proving market concentration to telling a convincing story of how the merger will actually lead to a reduction in competition. Put simply, market definition and market shares have become far less important relative to proof of competitive effects").

[21] Gustavo Grullon et al., *Are US Industries Becoming More Concentrated?*, 23 REV. OF FIN. 697, 697 (July 2019).

[22] *See, e.g.*, Council of Economic Advisers Issue Brief, *Benefits of Competition and Indicators of Market Power* at 4 (Table 1) (Apr. 2016); *see also* David M. Cutler & Fiona Scott Morton, *Hospitals, Market Share, and Consolidation*, 18 J. AM. MED. ASS'N 1964 (2013) (healthcare); Dean Corbae & Pablo D'Erasmo, *Quantitative Model of Banking Industry Dynamics* (Oct. 7, 2011), *available at* https://www.bostonfed.org/-/media/Documents/conference/PDF/corbae-derasmo.pdf (banking and finance); Dennis A. Shields, *Consolidation and Concentration in the U.S. Dairy Industry*, CRS (Apr. 27, 2010) (agriculture).

[23] *See, e.g.*, Council of Economic Advisers Issue Brief, *supra* note 22, at 4-5.

[24] Marshall E. Blume & Donald B. Keim, *The Changing Nature of Institutional Stock Investing* at 5 (Nov. 12, 2014) (unpublished manuscript), *available at* https://faculty.wharton.upenn.edu/wp-content/uploads/2015/06/ChangingInstitutionPreferences_12Nov2014_CFR.pdf; *The 2010 Institutional Investment Report* at 22 tbl.10, THE CONFERENCE BOARD (2010), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707512 (describing how institutional ownership of U.S. equities rose from 28.4% in 1980 to 50.6% in 2009); *id.* at 27 tbl.13 (noting that institutions owned 73% of the equity in the top 1,000 corporations in 2009).

[25] JONATHAN B. BAKER, THE ANTITRUST PARADIGM 3 (2019) (arguing that without reform, public support may grow for draconian responses, such as treating more businesses as public utilities).

effects of these dynamics is troubling.[26] The airline industry is a perfect example of a market now dominated by a small number of competitive firms.[27] Between 2005 and 2014, the Antitrust Division reviewed seven airline mergers.[28] In five of those cases, there were no challenges, and the antitrust division settled the other two. Now, four airlines control almost 65% of domestic air travel in the United States. This trend continues with the recent announcement of a proposed combination of Spirit and Frontier or JetBlue.[29] And the harm from such mergers is not hypothetical—just consider that when fuel prices fell dramatically in 2016, consumers did not see any benefits passed on to them, other than free peanuts, and the industry recorded massive profits.[30]

Concentration in healthcare and related sectors also has resulted in harmful consequences. In 2015, the pharmaceutical industry reported 1,353 mergers and acquisitions, worth a total of $574.5 billion, a new record for the industry.[31] Research has reported price increases of 2.4–3.5% for drugs belonging to consolidated markets than within matched control drugs.[32] And, as recently highlighted by Colorado's *Prescription Insulin Drug Pricing Report*, with the national market for insulin left in the hands of just three players, prices rose by an inflation-adjusted 262% between 2007 and 2018.[33]

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[26] *See e.g.,* COLORADO DEP'T OF LAW, PRESCRIPTION INSULIN DRUG PRICING REPORT 22-23 (Nov. 2020) [hereinafter Insulin Report] (noting a three-competitor stronghold over the national insulin market); *see also* Edward C. Baig & Zlati Meyer, *T-Mobile, Sprint Agree To Merge As America's National Wireless Carriers Shrink From 4 To 3*, USA TODAY (April 29, 2018).
[27] *See* Jonathan B. Baker & Joseph Farrell, *Oligopoly Coordination, Economic Analysis and the Prophylactic Role of Horizontal Merger Enforcement*, Washington College of Law Research Paper No. 2020-23 (May 19, 2020) (citing DOJ's allegations on coordinated conduct through "cross market initiatives" by major U.S. airlines).
[28] *See* Baer et al., *supra* note 1, at 28.
[29] Statistica, *Leading Airlines In The U.S. By Domestic Market Share 2020* (July 21, 2021), https://www.statista.com/statistics/250577/domestic-market-share-of-leading-us-airlines/; Michael Goldstein, *Spirit And Frontier Airlines Get The Urge To Merge*, FORBES (Feb. 7, 2022), https://www.forbes.com/sites/michaelgoldstein/2022/02/ 07/will-the-merger-between-frontier-and-spirit-airlines-fly/?sh=41e3db313c78; *see also* Michael Laris, *JetBlue Makes $3.6 Billion Bid for Spirit Airlines*, WASH. POST (Apr. 5, 2022), https://www.washingtonpost.com/transportation/2022/04/05/jetblue-spirit-frontier-airlines/.
[30] Jad Mouawad, *Airlines Reap Record Profits, and Passengers Get Peanuts*, N.Y. TIMES (Feb. 6, 2016), https://www.nytimes.com/2016/02/07/business/energy-environment/airlines-reap-record-profits-and-passengers-get-peanuts.html ("A decade of consolidation has reduced the number of airlines competing in many markets, making it easier for dominant carriers to charge more for flights.").
[31] Joanne Finnegan, *2015 Was a Record Breaker for M&A in Pharma, Medical and Biotech with Deals Worth $575 Billion*, BIOSPACE (Jan. 14, 2016), http://www.biospace.com/News/2015-was-a-record-breaker-for-ma-in-pharma-medical/405749.
[32] Alice Bonaimé & Ye (Emma) Wang, *Mergers, Product Prices, and Innovation: Evidence from the Pharmaceutical Industry* at Abstract (June 2020), *available at* https://ssrn.com/abstract=3445753.
[33] *See* Insulin Report, *supra* note 26, at 2.

On the buyer side, growing monopsony power in U.S. labor markets exacerbates systemic inequities.[34] Recent research reports the average market has an HHI of 4,378, or the equivalent of 2.3 recruiting employers.[35] According to that same study, 60% of labor markets are considered highly concentrated. Real wage growth has stagnated behind productivity growth over the last four decades, and, as a result, the labor income share has steadily declined while profit share has increased.[36] While more active competition in labor markets creates employee mobility, employers with a dominant position have cabined employee bargaining power and opened the door for oppressive employment conditions, including reduced benefits and wages.[37] In light of the predominantly local nature of labor markets, state Attorneys General have been particularly active in policing anticompetitive labor practices.[38]

FTC data about the disposition of horizontal merger investigations subject to "second requests" between 1996 and 2011 shows that the likelihood of an agency challenge rises as the number of significant rivals falls.[39] Yet, as noted above, the consequences of three or four-player markets indicates that this narrow scope of concern is failing to capture competitive conditions that are causing significant consumer harm.

Acknowledgment of this trend has garnered significant political attention over the past decade, including a sweeping executive order bolstering executive branch support for enhanced "enforce[ment] [of] the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.

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[34] *See generally* Marshall Steinbaum, *Evidence and Analysis of Monopsony Power, Including but Not Limited to, in Labor Markets* (Aug. 2018), *available at* https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0054-d-0006-151013.pdf.

[35] José Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data* 2 (NBER, Working Paper No. 24395, 2018).

[36] *See* Isabel Cairó & Jae Sim, *Market Power, Inequality, and Financial Instability*, Finance and Economics Discussion Series 2020-057 at 1-6 (2020) (using economic modeling to argue that the rise of market power in both product and about markets over the last four decades could be affecting observed trends in declining labor share, rising profit share, rising income and wealth inequalities, and associated financial instability).

[37] Council of Economic Advisors Issue Brief, *Labor Market Monopsony: Trends, Consequences, and Policy Responses* at 4 (Oct. 2016).

[38] *See, e.g.*, LABOR AND ANTITRUST, WASHINGTON STATE ATTORNEY GEN., https://www.atg.wa.gov/labor-and-antitrust (discussing an initiative to eliminate no-poach clauses in franchise agreements nationwide) (last accessed Apr. 13, 2022).

[39] FED. TRADE COMM'N, *Horizontal Merger Investigation Data*, *Fiscal Years 1996–2011* at tbl. 4.1 (Jan. 2013).

. . ."[40] Appetite for reform is growing and reflects bipartisan efforts to adapt antitrust principles to a global, digital economy.[41]

c. Consequences Associated with the Current Competitive Landscape

The effects of increasing concentration and market power across multiple sectors has significant consequences for consumers, the business community, and the U.S. economy at large. For example, consumer markups for goods are at an all-time high. According to a recent, landmark study looking at sixty years of data from publicly traded U.S. companies, average markups hovered around 1.2–1.3 from 1955 to 1980 and rose to 1.67 by 2014.[42] In another study involving consummated mergers that were not subject to challenge, researchers found four out of five led to higher consumer prices.[43]

But price effects are not the only consequence. Innovation suffers in the absence of robust competition, which is particularly important given the U.S.' reliance on digital and computing industries.[44] When compared with traditional sectors, the U.S.' digital economy accounted for 9.6% ($2,051.6 billion) of current-dollar GDP in 2019, fourth behind only real estate, government, and manufacturing.[45] Of course, GDP measures only underestimate the magnitude the digital economy plays in consumers' daily lives, as more of society's daily activities rely upon digital technologies. Also in 2019, the total market capitalization of the top four tech firms—Apple, Amazon, Alphabet, and Facebook (now known as Meta)—

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[40] Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/. President Biden also highlighted his concern with the state of competition in his recent State of the Union Address. *See* President Joseph R. Biden, Remarks by President Biden in State of the Union Address (Mar. 1, 2022) ("I'm a capitalist, but capitalism without competition is not capitalism. Capitalism without competition is exploitation.").

[41] This includes a package of five bills proposed by a bipartisan group of lawmakers in June of 2021 to tackle the issues related to dominant tech platforms. *See* Lauren Feiner, *Lawmakers Unveil Major Bipartisan Antitrust Reforms That Could Reshape Amazon, Apple, Facebook And Google*, CNBC (June 11, 2021), https://www.cnbc.com/2021/06/11/amazon-apple-facebook-and-google-targeted-in-bipartisan-antitrust-reform-bills.html.

[42] *See generally* Jan De Loecker & Jan Eeckhout, *Market Power and the Macroeconomic Implications* (NBER, Working Paper No. 23687, 2017).

[43] Orley Ashenfelter & Daniel Hosken, *The Effect of Mergers on Consumer Prices: Evidence from Five Selected Case Studies* 4 (NBER, Working Paper No. 13859, 2010).

[44] Fauver et al., *supra* note 19, at 70 (discussing the economic mechanisms underlying how mergers might affect merging parties' incentives to innovate); Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 12 (2007) (outlining the importance of considering both an "innovation impact" effect and "innovation incentive" effect in merger analyses).

[45] BUREAU OF ECON. ANALYSIS, *Updated Digital Economy Estimates – June 2021* at 2 (June 2021).

exceeded $5 trillion.[46] When adding Microsoft and Netflix to this group, the top six tech companies comprised roughly 18% of the S&P 500's total market capitalization.[47]

Economic research confirms that firms with greater market power innovate less,[48] and elimination of competition through mergers can undermine incentives to invest in costly research and development or improve product quality.[49] Though difficult to quantify, innovation from nascent and potentially disruptive firms likewise suffers without more robust merger enforcement. Conservative estimates indicate that 5.3%–7.4% of a studied pharmaceutical sample involved acquisitions of innovative targets solely to discontinue the target's projects and preempt future competition.[50] The power to exclude works an immediate harm when it results in the loss of an innovative market rival.

Increasing market power also contributes to an overall languishing of U.S. economic dynamism.[51] Data on one measure of dynamism—new firm entry—shows that U.S. start-up culture is declining, with new firm entry decreasing for nearly four decades.[52] And incumbent firms are increasingly responsible for growth and productivity improvements relative to entering firms.[53] Experts correlate widening market power with a growing gap between the most and least profitable firms and reduced business investment.[54]

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[46] Kyle Daly, *Big Tech's Power, in 4 Numbers*, AXIOS (July 27, 2020), https://www.axios.com/big-techs-power-in-4-numbers-de8a5bc3-65b6-4064-a7cb-3466c68b2ea0.html.
[47] Carmen Reinicke, *Mega-Cap Tech Stocks Have Dominated Earnings Season. Here's How Each Juggernaut Did, From Apple to Netflix*, BUS. INSIDER (Oct. 31, 2019), https://markets.businessinsider.com/news/stocks/facebook-apple-amazon-netflix-google-microsoft-earnings-season-recap-2019-10-1028649369.
[48] *See generally* Federico J. Díez, *Global Market Power and its Macroeconomic Implications* (IMF, Working Paper WP/18/137, 2018).
[49] *See, e.g.*, Thomas G. Wollman, *How to Get Away with Merger: Stealth Consolidation and its Real Effects on US Healthcare* 17-20 (NBER, Working Paper No. 27274, 2020); Paul J. Eliason et al., *How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry*, MICROECONOMIC INSIGHTS (Dec. 9, 2020), https://microeconomicinsights.org/how-acquisitions-affect-firm-behavior-and-performance-evidence-from-the-dialysis-industry/.
[50] Colleen Cunningham et al., *Killer Acquisitions*, 129 J. POL. ECON. 649, at Abstract (2021).
[51] *See* Baker, *supra* note 4.
[52] Ian Hathaway & Robert E. Litan, *Declining Business Dynamism in the United States: A Look at States and Metros* at 1, fig. 1, BROOKINGS (May 2014), *available at* https://www.brookings.edu/search/?s=Hathaway+Litan (finding a decline in the firm entry rate between 1978 and 2011).
[53] *See generally* Daniel Garcia-Macia et al., *How Destructive is Innovation*? (NBER, Working Paper No. 22953, 2016).
[54] Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise of Inequality* at 10 (Oct. 16, 2015), *available at* https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf; *see also* Germán Gutiérrez & Thomas Philippon, *Investment-Less Growth: An Empirical Investigation* 2 (NBER, Working Paper No. 22897, 2016) (finding that private fixed investment is weak relative to measures of profitability and valuation).

d. Guidelines Reform

As currently drafted, the Guidelines do not give sufficient attention and weight to the consideration of concentrated markets and do not capture the dynamic harms that include, but reach beyond, price effects. Based on the reflections above, we submit that there are numerous modifications to the Guidelines required to reflect modern competitive realities more accurately. In this section, we highlight three, specific suggestions: (1) the Guidelines should reinvigorate the role that market structures, and particularly the structural presumption, play in merger review; (2) the Guidelines should provide more exacting standards against which efficiency arguments must be analyzed in the merger review process; and (3) the Guidelines should incorporate a more diverse set of non-price harms theories when evaluating competitive effects.

1. Market Structure and Strengthening the Structural Presumption

Currently, Section 5.3 of the Guidelines suggests that enforcement agencies will typically only challenge mergers implicating a high degree of market concentration. This approach reflects efforts from the 2010 revisions to tighten merger control over only those anticipated to cause the most consumer harm.[55] Against this backdrop, commentators have noted that so long as a transaction does not cross the "highly concentrated threshold," parties presume a merger's legality.[56]

As discussed further below, the Guidelines should clarify that even mergers in moderately concentrated markets are not presumptively legal. The Agencies may also consider introducing other presumptions that reinforce the role of market concentration. One option is a presumption based solely on the increase in concentration caused by a merger.[57] This might embody a presumption against mergers that increase the HHI by 200 or more in cases where the theory of harm is based on unilateral effects.[58] Another is a presumption against mergers that create significant upward pricing pressure.[59] Similarly, the Agencies should consider a more explicit sliding scale of proof that requires stronger evidence to rebut the structural presumption for mergers resulting in higher HHI levels.[60]

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[55] *See* Volker Nocke & Michael D. Whinston, *Concentration Screens for Horizontal Mergers* 3-4 (NBER, Working Paper No. 27533, 2020) (outlining the historical evolution of concentration screens).
[56] *See* Nancy L. Rose & Carl Shapiro, *What Next for the Horizontal Merger Guidelines?*, ANTITRUST MAGAZINE at 7 (Forthcoming Spring 2022).
[57] *See* Nocke and Whinston, *supra* note 55,at 13-20 (modeling data that suggested consumer harm from a merger may be more strongly related to the change in HHI than to its post-merger level).
[58] *See* Rose & Shapiro, *supra* note 56, at 7-9.
[59] *See* Salop & Scott Morton, *supra* note 5, at 86.
[60] *See* Rose & Shapiro, *supra* note 56, at 7-9.

2. Scrutinizing Efficiencies

The 2010 Guidelines acknowledge that "efficiencies are difficult to verify and quantify."[61] In practice, though, merger review has tended toward giving more and more credit to prospective efficiencies.[62] "[P]arties have incentives to fight very hard to justify their deal," and claiming merger-specific efficiencies is an increasingly common avenue for justifying a merger.[63] Allowing efficiencies to play a leading role in many merger cases is problematic given that "there is no robust body of empirical evidence showing that most mergers realize cognizable efficiencies."[64] We do not suggest that efficiencies should not be considered. However, the Guidelines should require higher standards of evidence to demonstrate efficiencies and should encourage enforcers to credit only those efficiencies that are concrete, verifiable, and merger-specific.

3. Non-price Harms

The 1992 Guidelines recognized that a merger could affect both price and non-price competition, as well as product quality or innovation, but provided little guidance with respect to these principles. Building on this foundation, the 2010 Guidelines included a new section (Section 6.4) that describes how the Agencies evaluate whether a merger is likely to diminish innovation or product variety. Overall, however, the Guidelines continue to place significant focus on predicted price outcomes of a merger while underemphasizing—or failing to recognize—other effects. The Guidelines should be more robust in recognizing these other effects and emphasize their importance to a merger analysis.

i. Innovation

While initially innovation factored into more traditional price effects analyses, there is growing consensus that a merger's impact on dynamic competition, particularly innovation, must become a more prominent, stand-alone feature of competitive effects.[65] Currently, the Guidelines acknowledge that mergers can diminish a firm's incentive to invest in costly

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[61] 2010 Guidelines, *supra* note 5, at § 10.
[62] *See, e.g,* F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001); Nancy Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers*, 168 U. PA. L. REV. 1941, 1946-53 (2020).
[63] Salop & Scott Morton, *supra* note 5, at 84.
[64] Rose & Shapiro, *supra* note 56, at 16.
[65] *See, e.g.*, Salop & Scott Morton, *supra* note 5, at 93 (noting the "short shrift" given to innovation effects in coordinated effects analyses).

research and development by eliminating a competitor.[66] This, for example, was a central issue in the FTC's challenge of the merger of DraftKings and FanDuel Limited.[67]

The Guidelines should, however, also recognize that a merger can have an immediate effect on innovation if the transaction eliminates a nascent competitor.[68] Eliminating a nascent competitor can impede innovation from both the incumbent and innovation from the rival looking to garner future sales. As discussed further below in Section VI, the Guidelines should expand the role that innovation analyses play in transactions involving tech-driven markets and fledgling, rival competitors.[69]

ii. Privacy

Privacy is another non-price factor that is not currently, but should, be considered in the Guidelines, particularly given data concerns and digital markets.[70][71] As the FTC rightly recognized in the *Google/DoubleClick* investigation, privacy can and should continue to play a role in a holistic merger analysis.[72] Incorporation of privacy harms into the Guidelines must acknowledge that consumers increasingly recognize the value of privacy, often in the form of personal information and data online.[73] Consumers' recognition of this value indicates that privacy has become, at least in some industries, an indicator of product

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[66] 2010 Guidelines, *supra* note 5, at § 6.4 ("That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.").

[67] Complaint at 9, DraftKings, Inc. & FanDuel Limited, Docket No. 9375 (June 19, 2017).

[68] This immediate harm is especially concerning in the case of so-called "killer acquisition," which stave off competitive innovative efforts at their infancy. *See generally* Cunningham, *supra* note 50.

[69] *See* Rose & Shapiro, *supra* note 56, at 12-15.

[70] Complaint, New York v. Facebook, Inc., No. 20-cv-3589-JEB (D.D.C. Dec. 9, 2020), ECF No. 4 ¶ 32 ("Personal Social Networking providers compete for users based on a variety of factors, including quality of the user experience, functionality, and privacy protections, among other factors."); *Statement of Federal Trade Commission Concerning Google/DoubleClick* at 1, FED. TRADE COMM'N, *available at* https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

[71] *See, e.g.*, Darren S. Tucker, *The Proper Role of Privacy in Merger Review*, CPI ANTITRUST CHRONICLE (May 2015) (noting, "in industries where firms differentiate themselves through their approaches to privacy, a merger could reduce the incentive of a merged entity to compete on this basis. A substantial lessening of this competition could be a basis on which to block a proposed transaction. Still, the number of transactions that will raise serious concerns about loss of privacy competition is likely to be very limited even in digital markets").

[72] In the *Google/DoubleClick* investigation, the FTC considered whether the "transaction could adversely affect non-price attributes of competition, such as consumer privacy." *Statement of Federal Trade Commission Concerning Google/DoubleClick, supra* note 70, at 2-3.

[73] *See* Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 70 (2019).

quality.[74] Nonetheless, a lack of competition in certain markets leads to both a lack of transparency about privacy issues and substantially decreased competition surrounding protecting consumer privacy.

iii. Complementary Services

The Guidelines also should address competition related to the provision of complementary services.[75] Complementary services are services offered by a firm that supplement or relate to the primary market.[76] For example, in consumer-facing industries such as airlines, the provision of customer service is complementary to transportation services. Reduced competition leaves firms less incentive to invest in costly service departments.[77]

iv. Resilience and Sustainability

Resilience and sustainability of competition should also weigh in the balance of a merger analysis.[78] Assessing short-term, static price effects can fail to capture a merger's long-term impact on the efficiency, competitiveness, and stability of the overall network.[79] Consideration of how a merger might affect long-term security of a particular market is critical to ensuring U.S. competition policy remains conducive to sustained productivity gains.[80] Overly permissive merger policy risks creating fragile networks susceptible to failure in the face of significant market disturbances, such as financial crises, public health emergencies or even a network outage or data breach.[81] Consideration of resilience and sustainability issues should be encouraged on a case by case basis given, among other things, the nature of the industry and merger parties at issue.

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[74] *See generally* OECD Secretariat, *Considering Non-Price Effects in Merger Control* (May 4, 2018), *available at* www.oecd.org/daf/competition/non-price-effects-of-mergers.htm.
[75] *See generally* Matthew Jones et al., *Economics at the FTC: Non-Price Merger Effects and Deceptive Automobile Ads*, 53 REV. OF INDUS. ORG. 593 (Dec. 2018).
[76] *Id.*
[77] *Cf.* David Schaper, *Complaints Soar as Customers Fight Airlines For Refunds From Pandemic Cancellations*, NPR (May 15, 2021), https://www.npr.org/2021/05/15/996857812/complaints-soar-as-customers-fight-airlines-for-refunds-from-pandemic-cancellati.
[78] *Cf.* Frédéric Jenny, *Economic Resilience, Globalisation and Market Governance: Facing the Covid-19 Test* (Mar. 28, 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3563076.
[79] Sally J. Goerner et al., *Quantifying Economic Sustainability: Implications for Free-Enterprise Theory, Policy and Practice*, 69 ECOLOGICAL ECON. 76, 77 (2009).
[80] Howard A. Shelanski, *Enforcing Competition During an Economic Crisis*, 77 ANTITRUST L.J. 229, 239-45 (2010).
[81] For a discussion of the importance of resilience more broadly, *see* Phil Weiser, *Resilience as a Policy Guide for Water Management* (Oct. 27, 2021), *available at* https://coag.gov/app/uploads/2021/10/Towards-Resilience-as-a-Core-Policy-Value.pdf.

v. Ability to Exclude Competitors

The Guidelines should give greater attention to a firm's ability to profitably engage in exclusionary conduct as evidence of market power. "[E]vidence that a defendant was able to exclude a rival or suppress its sales even while keeping its own price high is certainly probative,"[82] and courts recognize that "market power . . . may be proven directly by evidence of the control of prices or the exclusion of competition."[83] The 2010 Guidelines acknowledge this form of evidence, noting that "market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct."[84] However, profitable exclusionary conduct is yet another potential indicator of market power that deserves greater attention in the Guidelines, as a means of supplementing price-based signals of market power.

At bottom, "[w]hether an antitrust violation exists necessarily depends on a careful analysis of market realities. If those market realities change, so may the legal analysis."[85] Given the Guidelines' importance to both federal and state enforcers, private parties, and courts, the Guidelines must reflect marketplace realities, and the Agencies should reexamine the alignment of the Guidelines with broader U.S. competition policy and the goals of antitrust law.

III. MARKET POWER AND MARKET DEFINITION

Protecting competition in the twenty-first century often requires enforcers to move beyond a strict adherence to market definition as the first step in antitrust analysis. To protect competition in the modern economy, we recommend that the Guidelines make clear that market definition may not be necessary in every case. Further, when market definition is used, it should be a product and not a determinant of the competitive effects analysis. Next, we suggest that direct evidence of market power and adverse effects can be just as illuminating as structural analysis, and in many cases more useful for accurately determining the effects of a merger. We also discuss the importance of direct evidence in three specific contexts: evaluating merges in non-monetary price markets, analyzing mergers involving multi-sided platforms, and protecting nascent competitors. Finally, we offer a special note on labor markets.

While structural analysis of markets is an important tool, it cannot by itself accurately portray the potential consequences of every merger. The Guidelines should reflect a more holistic view of evidence of market power and adverse impacts on competition. Such a

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[82] PHILLIP E. AREEDA & HERBERT HOVENKAMP, 2020 SUPP. TO ANTITRUST LAW – AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 520 at 135 (2020).
[83] Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97-98 (2d Cir. 1998).
[84] 2010 Guidelines, *supra* note 5, at § 1.
[85] NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021) (citations omitted).

holistic approach is necessary to protect all forms of competition (including nascent competition) in today's economy.

a. Decreased Reliance on Formal Market Definition

To adopt this holistic approach, the Guidelines should first clarify that market definition, while a useful tool, may not be necessary to demonstrate market power or harms to competition in every case. This principle is well-established in antitrust doctrine.[86] For instance, in their discussion of unilateral effects cases, Herbert Hovenkamp and Carl Shapiro note that "[t]he requirement [of defining a market] can become an unnecessary and counterproductive encumbrance."[87] This is because "drawing an artificial boundary between products that are close enough substitutes to be 'in the market' and those that are not is simply not a part of the economic analysis of likely competitive effects," and thus does not always make sense as a universal legal requirement.[88] Rigid adherence to market definition as an analytical construct can produce false negatives by overlooking the untidy realities of consumer behavior in the economy.[89]

b. Competitive Effects as the Key Determinant of Market Definition

The Guidelines should make clear that where market definition is employed as an analytical tool, it should be guided by an analysis of competitive effects. In many cases, the Hypothetical Monopolist Test can be satisfied by multiple product markets.[90] However, market definition "does not take place in a vacuum: . . . demand substitution must be evaluated with reference to the specific allegations of anticompetitive effect in the matter under review."[91] An approach to market definition that does not permit analysis of any and all markets where anticompetitive effects may occur "give[s] concentration statistics more prominence than they deserve and . . . lead[s] competitive effects analysis to turn more on market definition than is necessary or appropriate."[92] Instead, where multiple market definitions may lead to multiple sets of market shares, enforcers "should ask which set of market shares more accurately reflects the likely competitive effects of the proposed merger

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[86] *See, e.g.,* FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-61 (1986) (citing 7 PHILLIP AREEDA, ANTITRUST LAW ¶ 1511 at 429 (1986)); *see also, e.g.,* AREEDA & HOVENKAMP, *supra* note 82, ¶ 520 at 136-37; Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, & Burdens of Proof*, 127 YALE L.J. 1996, 2015-16 (2018).
[87] Hovenkamp & Shapiro, *supra* note 86.
[88] *Id.*
[89] Diane Coyle, *Practical Competition Policy Implications of Digital Platforms*, 82 ANTITRUST L. J. 835, 855 (2019).
[90] AREEDA & HOVENKAMP, *supra* note 82, ¶ 4.1 at 402-03; *see also, e.g.,* Jonathan Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 148 (2007).
[91] Baker, *supra* note 90, at 173.
[92] *Id.* at 148.

for the overlap products."[93] In short, we suggest that the Guidelines make clear that market definition must flow from the competitive effects analysis, rather than the other way around.

c. Importance of Direct Evidence in Demonstrating Market Power

In addition to clarifying that market definition may not be required in every case, the Guidelines should do more to highlight the utility of direct evidence. The 2010 Guidelines acknowledge that direct evidence can be "highly informative,"[94] but they should more explicitly recognize that direct evidence can be sufficient to demonstrate market power. This recognition is supported by Supreme Court precedent. The Court has acknowledged that, "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition," direct evidence "can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'"[95]

We recommend that the Guidelines clarify not only that direct evidence can suffice on its own, but that it also often provides *more* useful insight than merely totaling shares in a relevant market.[96] Areeda and Hovenkamp point out that "[d]irect measurement of power is frequently superior . . . [as it] permits the fact finder to quantify and offset harms and benefits, while market definition permits only 'yes' or 'no' conclusions." [97] Thus, even where market definition is easily applicable and provides a useful function, enforcers should not overlook direct evidence.

As discussed above, the Guidelines should also place greater emphasis on non-price effects, and that extends to their treatment of non-price effects as direct evidence of market power. While the Guidelines recognize that "[e]nhanced market power can also be manifested in non-price terms and conditions that adversely affect customers," they nonetheless "generally discuss the analysis in terms of such price effects."[98] The Guidelines should

[93] Hovenkamp & Shapiro, *supra* note 86, at 1998.
[94] 2010 Guidelines, *supra* note 5, § 2.2.1; *see also* § 1 ("Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation.").
[95] FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-61 (1986) (citations omitted).
[96] *See, e.g.,* Hovenkamp & Shapiro, *supra* note 86, at 2016 ("[I]n most cases, unilateral effects can be estimated without the need to define a relevant antitrust market, and the legal requirement that it be done does not assist in this analysis.").
[97] "Direct measurement of power is frequently superior to market-share estimates even on two-sided platform markets and in cases where harms on one side will be offset by benefits on the other. Direct measure permits the fact finder to quantify and offset harms and benefits, while market definition permits only 'yes' or 'no' conclusions." AREEDA & HOVENKAMP, *supra* note 82, ¶ 520 at 136.
[98] 2010 Guidelines, *supra* note 5, § 1.

clearly reflect the ways in which non-price features, including the ability to profitably engage in exclusionary conduct, can provide direct evidence in merger analysis.

Direct evidence of market power can be especially critical in non-monetary price markets. Many of the markets that consumers interact with most frequently today do not involve a monetary price for services, but rather charge consumers a fee for attention, personal data, or another form of value.[99] Given that the traditional tools of market definition rely on a monetary price as a metric, they fail in non-monetary price markets.[100] In non-monetary price markets, erosion of quality (including privacy protections), reductions in innovation, exclusion of rivals, and increases in non-monetary costs can provide direct evidence of market power or adverse effects, particularly when these changes arise after shifts in the competitive landscape.[101]

Direct evidence also plays an important role in multi-sided markets. Traditional approaches to market definition are unwieldy to apply in multi-sided markets and thus may present problems in assessing market power.[102] Economists have argued "in a two-sided market," where the analysis is complicated by network effects and can be highly susceptible to error, "the [SSNIP] test cannot be applied in its traditional form."[103] As in non-monetary price markets, modifications have been proposed to remedy this shortfall,[104] but the Guidelines should also look to direct evidence as a substitute.

In short, the Guidelines can adopt a more holistic view of evidence that better conforms to realities of the modern economy by reducing their emphasis on market definition and placing greater focus on direct evidence.

These concepts of market definition and market power apply elsewhere in our comments, including:

- Part IV calls for a broadening of the Guidelines' presumptions about market concentration, which typically rely on traditional tools of market definition.

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[99] *See, e.g.,* Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 787-88 (2019); John Newman, *Antitrust in Zero-Price Markets: Applications* 94 WASH. U. L. REV. 49, 65 (2016).
[100] Wu, *supra* note 99; Newman, *supra* note 99.
[101] "Among the criteria identified by courts are: . . . (3) the exclusion of competition; . . . and (7) abrupt changes in practices following the elimination of competitors." Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 45 (2014); *see also* Michael Katz & Jonathan Sallet, *Multisided Platforms & Antitrust Enforcement*, 127 YALE L.J. 2142, 2159 fn. 56 (2018) ("[O]ther products are sufficiently close substitutes if they would constrain the hypothetical monopolist to offer consumers a combination of product features, service quality, and price"); Newman, *supra* note 99, at 58.
[102] *See, e.g.,* Katz & Sallet, *supra* note 101, at 2152-53, 2161; Lapo Filistrucchi et al, *Market Definition in Two-Sided Markets: Theory & Practice*, 10 J. OF COMP. L & ECON. 293, 295 (2014).
[103] Filistrucchi et al, *supra* note 102.
[104] *See generally, e.g., id.*

- Part V suggests possible updates to the tools of market definition while noting that direct evidence also provides a powerful substitute.
- Finally, Part VI emphasizes that heavy reliance on market shares, concentration and market definition often fails to consider nascent competitors.[105] In today's economy, dominant players can face key challengers both from outside the bounds of a strictly defined market and from firms whose competitive potential is not captured by market share.[106] As such, the Guidelines should make clear that protecting nascent competitors may require going beyond a strict focus on market definition.

d. Special Note on Labor

In Section II.b. we noted that reduced competition and accumulation of market power can have harmful effects for workers, for consumers, and on output markets generally.[107] Anticompetitive effects from mergers that would harm input markets deserve additional scrutiny, and potential harm to a labor market should constitute sufficient grounds on its own to challenge a merger. To avoid monopsony power that manifests competitive harms through downward pressure on input prices, we recommend that the Agencies discuss tools for market definition that can be used to address concentration in labor markets.

IV. THE PURPOSE OF SECTION 7 AND THE "MAY BE SUBSTANTIALLY TO LESSEN COMPETITION" AND "TEND TO CREATE A MONOPOLY" STANDARDS

Growing concentration in many U.S. industries provides a clear signal that the current approach to merger review may be falling short of the objectives of the Clayton Act.

The first part of this section briefly reviews the purpose of Section 7 of the Clayton Act, the inherently predictive nature of merger review, and the Guidelines' role in the doctrinal drift towards requiring higher levels of certainty in merger cases. We then discuss the "may be substantially to lessen competition" standard and the more rigorous presumptions regarding concentration that are required to protect competition in today's economy. Finally, we address the "tend to create a monopoly" standard, which the Guidelines can better reflect by acknowledging the ways in which mergers can threaten competition beyond their direct impact on concentration.

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[105] *See* C. Scott Hemphill and T. Wu, *Nascent Competitors*, 168 UNIV. PENN. L. REV. 1879, 1890-91 (2020).

[106] *See generally, e.g.,* Hemphill & Wu, *supra* note 105. *See also* Part VI, "Addressing Nascent Competitors."

[107] *See* Section II.b. "Changes in the Competitive Landscape & the Current Structure of the U.S. Economy," *supra*. *See also, e.g.*, C. Scott Hemphill & Nancy Rose, *Mergers that Harm Sellers*, 127 Yale L.J. 2078, 2083 (May 2018); Steinbaum, *supra* note 34.

a. The Purpose of Section 7

In this section, we discuss how the Guidelines have been interpreted and relied on to set a higher standard of certainty and a narrower view of competitive harm than is called for under the Clayton Act. Although the 2010 Guidelines clearly express that given the "inherent need for prediction . . . certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal,"[108] the Guidelines have often been interpreted and implemented in a way that stands in contrast to this clear acceptance of uncertainty. As the foundational tool of merger analysis, new Guidelines can more emphatically reflect the inherent uncertainty in Section 7 and thereby help to arrest the trend toward more exacting standards than are appropriate under the Clayton Act.

Lower standards of predictive certainty are not only justified but required for merger review to serve its intended statutory purpose; namely, confronting anticompetitive effects before they can arise. The drafters of the 1950 Celler-Kefauver amendments described the purpose of merger review as being "to cope with monopolistic tendencies in their incipiency."[109] This forward-looking approach seeks to avoid situations that may be much more challenging to remedy once they have arisen.[110] It can be especially difficult to craft *ex post facto* remedies "that do not involve ongoing regulation of the firm in question."[111] Merger review cannot wait until anticompetitive effects have manifested, but rather must intervene when mergers merely "create an appreciable danger of such consequences in the future."[112] By embracing what Herbert Hovenkamp refers to as the "prophylactic rationale" for merger policy, the Guidelines can reduce the need for administratively complicated remedies in the future.[113]

This prophylactic approach is consistent with the fact that the Clayton Act's merger review provisions were intended to shore up weaknesses in the Sherman Act.[114] The drafters of both the 1914 Act and the 1950 amendments made clear that this law was written to "make unlawful certain trade practices, which . . . are not covered by the [Sherman Act] or other

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[108] 2010 Guidelines, *supra* note 5, at § 1.
[109] S. Rep. 81-1775, *reprinted in* 1950 U.S.C.C.A.N. 4293 at *4296, 1950 WL 1913; *see also, e.g.,* FTC v. Procter & Gamble, 386 U.S. 568, 577 (1967).
[110] *See, e.g.,* S. Rep. 81-1775, 1950 U.S.C.C.A.N. 4293 at *4296-97; Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 Hastings L.J. 45, 57 (2018).
[111] Hovenkamp, *supra* note 110.
[112] Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986) ("All that is necessary is that the merger create an appreciable danger of such consequences in the future").
[113] Hovenkamp, *supra* note 110.
[114] S. Rep. 81-1775, *reprinted in* 1950 U.S.C.C.A.N. 4293 at *4296-97, 1950 WL 1913; *see also* H. Rep. 1191, at 4 (1949); *see also* U.S. v. Penn-Olin Chemical Co., 378 U.S. 158, 170-71 (1964) ("The grand design of the original s 7 . . . was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach"); Hovenkamp, *supra* note 110, at 48; Herbert Hovenkamp & Fiona Scott Morton, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. 2026, 2047 (2018).

existing antitrust acts."[115] Merger review standards must reflect the fact that the Clayton Act "reaches far beyond" the Sherman Act's prohibitions, to address potential competition problems that the Sherman Act had failed to solve.[116]

While the incipiency doctrine is reflected in both the existing Guidelines and case law,[117] the Guidelines have nonetheless operated in a framework that imposes a higher bar of certainty than is appropriate under the Clayton Act.[118] Thus, while alive in theory, in practice the incipiency principle "has been applied with less certainty in merger cases, with requirements that the harm to competition must be 'likely' and 'imminent' appearing in more and more cases."[119] A stronger emphasis in the Guidelines on the necessary uncertainty inherent in robust merger review can help to arrest this drift in standards, and ensure that merger review is providing the safeguards it was designed to provide.

b. The "May Be Substantially to Lessen Competition" Standard

In this section, we recommend ways that the Guidelines can better reflect the "may be substantially to lessen competition" standard. Our recommendations generally fall into two areas: diversifying the means by which the Guidelines' structural presumption can be triggered and taking a broader view of evidence of adverse effects and market power.

1. Diversifying Presumptions

Based on market realities discussed in Part II, the current approach to the structural presumption must be examined.[120] The past several decades have seen a gradual trend toward less rigorous application of this critical aspect of merger review.[121] This trend has been reflected across previous iterations of the Guidelines as well as in actual enforcement.[122] To counteract this gradual drift in application, the Guidelines should lay out an analytical framework that emphasizes the uncertainty in the "*may* be substantially

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[115] H. Rep. 1191, at 4 (1949); *see also* S. Rep. 81-1775, *reprinted in* 1950 U.S.C.C.A.N. 4293 at *4296-97, 1950 WL 1913.
[116] S. Rep. 81-1775, *reprinted in* 1950 U.S.C.C.A.N. 4293 at *4297, 1950 WL 1913.
[117] 2010 Guidelines, *supra* note 5, at § 1; *see also, e.g.,* United States v. AT & T Inc., 310 F. Supp. 3d 161, 189 fn. 16 (D.C. Cir. 2018).
[118] *See, e.g.,* Richard Steuer, *Incipiency*, 31. LOY. L. REV. 155, 169 (2019); Peter Cartensen & Robert Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competition*, 2018 WIS. L. REV. 781, 795-97 (2018).
[119] Steuer, *supra* note 118.
[120] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, REQUEST FOR INFORMATION ON MERGER ENFORCEMENT 4 (Jan. 18, 2022).
[121] *See* Hovenkamp & Shapiro, *supra* note 86, at 2002-06; John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 841-42 (2017); Peter Cartensen, *The* Philadelphia National Bank *Presumption: Merger Analysis in an Unpredictable World*, 80 ANTITRUST L.J. 219, 236-40 (2015).
[122] Hovenkamp & Shapiro, *supra* note 86, at 2002-04; Kwoka, *supra* note 121.

to *lessen* competition" standard and as part of that framework should build on the presumptions that are used to enforce the standard.[123]

Increasing market concentration can, at least to some extent, be countered by more vigorously enforcing existing presumptions. Many observers have called for more vigorous merger enforcement using the structural presumption.[124] Consistent enforcement of the presumptions already present in the 2010 Guidelines is warranted in today's economy.[125]

The Guidelines can adapt the standard to the modern economy by creating an additional presumption for unilateral effects cases based solely off of *the increase* in concentration resulting from the merger. As discussed further below, the tools used to evaluate mergers may require greater flexibility in merger review to address the myriad ways in which anticompetitive effects may result.

Thus, while we also favor stronger enforcement of the existing presumption, additional tools in the toolkit may be required to properly administer the "may be substantially to lessen competition" standard. For example, Carl Shapiro notes that "[t]he Clayton Act standard—whether the merger may substantially lessen competition—is explicitly focused on the *change* resulting from the merger."[126] Thus, an additional presumption that focuses specifically on the change in the HHI resulting from the merger, rather than also relying on the overall HHI of the market, has a sound theoretical and empirical basis.[127] We recommend the Agencies consider the effect of allowing the presumption to be triggered by mergers that generate a delta of 200 or more in HHI, regardless of the post-merger level.

Another approach would be to focus on the merger's effect on upward pricing pressure. The 2010 Guidelines "popularized the use of upward pricing pressure," and the Agencies could build on this progress by creating an additional presumption based on a change in such pressure to address situations in which an HHI-based presumption might lead to false negatives.[128] This tool should thus supplement, rather than replace, a strengthened HHI-based approach to implementing the structural presumption.

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[123] 15 U.S.C. § 18 (emphasis added); *see also, e.g.,* Nocke & Whinston, *supra* note 55, at 2; Cartensen, *supra* note 121, at 219; Cartensen & Lande, *supra* note 118, at 795-97, 805-812.
[124] *See* Rose & Shapiro, *supra* note 56, at 8; Weiser, *supra* note 11, at 7; *see generally* Cartensen & Lande, *supra* note 118.
[125] *See, e.g.,* Rose & Shapiro, *supra* note 56, at 8.
[126] *Supra* note 3, at 90.
[127] Nocke & Whinston, *supra* note 55, at 2, 9, 25; Shapiro, *supra* note 3, at 69.
[128] Salop & Scott Morton, *supra* note 5, at 86-87, (citing 2010 Guidelines, *supra* note 5, § 6.1); *see also* Filistrucchi et al, *supra* note 102, at 294; Joseph Farrell and Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. OF THEORETICAL ECON. Art. 9 at 11 (2010).

2. Taking a Broader View of Evidence

In addition to strengthening presumptions, the Guidelines can better capture the inherent uncertainty of the "may be substantially to lessen competition" standard by embracing a broader, less rigid approach of evidence of potential anticompetitive effects in merger cases.[129]

First, the Guidelines should increase their focus on the potential non-price effects of a merger.[130] While the 2010 Guidelines "took a big step forward in embracing and elaborating on non-price considerations and effects," new Guidelines could "go further in recognizing non-price competition and effects in U.S. merger analysis." [131] In Part II, we discussed a merger's impact on incentives to innovate, to protect consumer privacy, and to provide complementary services.[132] By expanding their focus on these and other non-price effects, the Guidelines can take a broader view of relevant evidence that better reflects the nuanced intent of the "may be substantially to lessen competition" standard.

In Part III, we noted the importance of direct evidence as an alternative, and at times a superior alternative, to market definition.[133] Part V will discuss how such evidence may be particularly important in digital markets, where consumers may not be charged a monetary price, but also will note there is a strong case for giving such evidence greater weight in non-digital markets. By giving greater attention to direct evidence—including non-price direct evidence— the Guidelines can better capture the numerous ways in which the effect of a merger "may be substantially to lessen competition."

Finally, the Guidelines might also consider the parties' pattern of prior acquisitions when evaluating the adverse effects of a merger. The last decade has provided numerous examples of repeated acquisitions that collectively have a significant impact on competition.[134] To address this growing concern, the Guidelines should consider the past acquisitions of merging parties as viable evidence of the potential effects of a merger, particularly where those acquisitions present a pattern that threatens to erode competition over time.

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[129] *For additional discussion, see* Part III, "Market Power & Market Definition," and Part V, "Digital Markets."
[130] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 120, at 3.
[131] Greg Gundlach, *Non-Price Effects of Mergers: A Primer*, AM. ANTITRUST INST. (June 15, 2016); *see also, e.g.,* BAKER, *supra* note 4, at 6.
[132] *See* Subsection II.d.3, "Non-Price Harms," *supra*.
[133] *See* Section III.c, "Importance of Direct Evidence," *supra*.
[134] *See generally, e.g.,* Cunningham, *supra* note 50; *see also* Hemphill & Wu*, supra* note 105, at 1884-86; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 768-71 (2017); AM. BOOKSELLERS ASS'N ADVOCACY DIV., AMERICAN MONOPOLY: AMAZON'S ANTI-COMPETITIVE BEHAVIOR IS IN VIOLATION OF ANTITRUST LAWS 5 (2020).

c. The "Tend to Create a Monopoly" Standard

While the "may be substantially to lessen competition" standard calls for strengthening structural presumptions, the "tend to create a monopoly" standard should be implemented to evaluate mergers with a tendency toward monopoly that is disproportionate to their immediate effect on the present level of concentration.

The legislative history of Section 7 makes clear that the second prong, the "tend to create a monopoly" standard, was not intended merely as a restatement of the first prong but rather was intended to address a separate and independent harm condemned by the statute.[135] However, recent court decisions interpreting Section 7 have arisen primarily under the first prong, barring mergers where "the effect of such acquisition may be substantially to lessen competition."[136] We suggest that this may have resulted in a lack of emphasis on the "tend to create a monopoly" standard.

The second prong of Section 7 should be applied to scrutinize more closely those mergers that—taken individually—do not have a substantial immediate impact on market concentration but where other factors indicate a heightened risk of monopolization associated with the merger.[137]

For example, this would include a series of small acquisitions. The legislative history of Section 7 identifies concern about the cumulative effect of a series of small mergers: "[i]mminent monopoly may appear when one large concern acquires another, but . . . [a]s a large concern grown through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act test against them."[138] As suggested above, the Guidelines should consider evidence of a pattern of acquisitions as evidence of potential anticompetitive harm. Under the "tend to create a monopoly standard," such evidence could be appropriately applied to scrutinize relatively small acquisitions, no single one of which constitutes a substantial decrease in market competition.[139]

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[135] "It is intended that acquisitions which substantially lessen competition, *as well as* those which tend to create a monopoly, will be unlawful . . ." S. Rep. 81-1775, *reprinted in* 1950 U.S.C.C.A.N. 4293 at *4297, 1950 WL 1913 (emphasis added); "Under [the Celler-Kefauver amendments] a merger or acquisition will be unlawful if it may have the effect of *either* (a) substantially lessening competition *or* (b) tending to create a monopoly." H. Rep. 1191, at 8 (1949) (emphasis added).
[136] *See, e.g.,* United States v. AT & T, 310 F. Supp. 3d 161, 189-90 (D.C. Cir. 2018); United States v. Anthem, 236 F. Supp. 3d 171, 192 (D.D.C. 2017); FTC v. Tronox Limited, 332 F. Supp. 3d 187, 197 (D.D.C. 2018).
[137] *See, e.g.,* Rose & Shapiro, *supra* note 56, at 12.
[138] S. Rep. 81-1775, *reprinted in* 1950 U.S.C.C.A.N. 4293 at *4297, 1950 WL 1913.
[139] S. Rep. 81-1775, *reprinted in* 1950 U.S.C.C.A.N. 4293 at *4296-97, 1950 WL 1913; *see also* Hovenkamp & Scott Morton, *supra* note 114.

The "tend to create a monopoly" standard should also be applied to acquisitions that may forestall potential competition that may not be a significant current presence in the market in question. This might include the acquisition of firms in adjacent markets (particularly in industries with significant network effects) that could present a serious risk to the incumbent via potential entry, even where the acquisition would not significantly impact the HHI in the acquiring firm's market at the time of acquisition.[140] The "tend to create a monopoly" standard can also account for acquisitions of potential entrants by an incumbent, acquisitions that forestall competition from a disruptive new product, or mergers that raise or maintain barriers to entry.[141] Such mergers may not immediately impact competition among direct competitors, but can nonetheless be used to build or maintain durable market power. The Guidelines should emphasize the importance of nascent competitors and potential entrants—a topic we discuss in greater detail in Part VI—as a key application of the "tend to create a monopoly" standard.

In summary, we recommend that the Guidelines apply the lessons learned from recent decades of increasing concentration by (1) diversifying the presumptions and evidence used to enforce the "may be substantially to lessen competition standard," and (2) applying the "tend to create a monopoly" standard to mergers that threaten to have an outsized impact on future competition relative to their immediate structural impact.

V. DIGITAL MARKETS

Digital markets have not only transformed large sectors of the American economy but they also carry distinctive characteristics that require greater flexibility and consideration of evidence than many aspects of conventional merger review. This section first addresses the need to adapt merger review to non-monetary price markets, including potential adaptations of the price-based tools of market definition and the need to rely on other forms of evidence in the absence of price. In the second part, we note that non-monetary factors, in addition to providing possible metrics for market definition, must be front-and-center in assessing the potential anticompetitive effects of a merger.

a. Market Definition in Digital Markets

The traditional tools laid out by previous iterations of the Guidelines to define product markets have proven insufficient to protect competition in the digital economy. This is in

[140] Coyle, *supra* note 89 ("Acquisitions of innovative businesses in apparently unrelated fields should be scrutinized with skepticism as different areas of technology may converge more rapidly than non-expert economists and lawyers may realize."); *see also* Part V, "Digital Markets"; Part VI, "Addressing Nascent Competitors."
[141] *See, e.g.,* Rose & Shapiro, *supra* note 56, at 12; Farrell & Shapiro, *supra* note 128, at 26; *see also* Part VI, "Addressing Nascent Competitors."

large part because the Guidelines' approach to market definition has traditionally looked to the ability of the merged entity to impose durable increases in price.[142]

A common characteristic of many digital markets is that consumers on one side of the platform pay no monetary price for content or services.[143] Instead, these markets often operate on an advertising model that provides content or services in exchange for consumers' time, attention, or personal data.[144] As a result, the Guidelines' focus on price as the primary indicia of anticompetitive effects "loses its coherence in zero-price markets, where the basic unit of value extracted from customers is not expressed as a [monetary] price."[145]

In addition to lacking monetary prices for consumers, many digital markets present challenges for the traditional tools of market definition because they are structured as multi-sided markets in which the value extracted from one side of the market may be an input into another market.[146] In multi-sided markets, the user groups on different sides of a platform and the terms that those groups operate under can differ significantly but are nevertheless often connected.[147] A seller or provider in a multi-sided market can control not only the price level, but also the price structure, or the relative prices charged to users on different sides of the platform.[148] "This makes traditional SSNIP tests non-operational," scholars argue, "as the prices set by the platform on each of its 'sides' cannot be considered in isolation, so that looking at the high price side alone as a potential indicator of market power could give a misleading result."[149] A lack of competition, in other words, may result in harm to one side of the platform while having no impact, or even a positive impact, on

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[142] "[T]he test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ('hypothetical monopolist') likely would impose at least a small but significant and non-transitory increase in price ('SSNIP') on at least one product in the market, including at least one product sold by one of the merging firms." 2010 Guidelines, *supra* note 5, at § 4.1.1; *see also* Katz & Sallet, *supra* note 101.
[143] *See, e.g.,* Newman, *supra* note 99; Wu, *supra* note 99.
[144] Wu, *supra* note 99.
[145] Newman, *supra* note 99; *see also* STIGLER CTR. FOR THE STUDY OF THE ECON. & THE STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS FINAL REPORT 87-88 (2019) [hereinafter Stigler Report]; Sarah Oxenham Allen et al., *Market Definition in the Digital Economy: Considerations for How to Properly Identify Relevant Markets* 6, AM. ANTITRUST INST. (June 17, 2020); Coyle, *supra* note 89.
[146] *See, e.g.,* ANIA THIEMANN & PEDRO GONZAGA, OECD DIRECTORATE FOR FIN. & ENTER. AFFAIRS COMPETITION COMM., BIG DATA: BRINGING COMPETITION POLICY TO THE DIGITAL ERA 16-17 (2016); Steven Salop, *Dominant Digital Platforms: Is Antitrust Up to the task?*, 130 YALE L.J. FORUM 563, 575-76 (2021).
[147] Katz & Sallet, *supra* note 101, at 2153-54, 2161; Salop, *supra* note 146; Julie Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 189 (2017).
[148] Filistrucchi et al, *supra* note 102, at 299-300.
[149] Coyle, *supra* note 89, at 839.

users on the other side of the platform. As a result, traditional market definition may not always accurately reflect market power.

If traditional tools of market definition are frequently inoperable in digital markets, the Guidelines should explore new analytical tools.

1. Reworking the Tools of Market Definition

To address the shortcomings of traditional market definition, we recommend that the Guidelines provide tools to define a relevant market based on a potential increase in the price paid by consumers when that price is nonmonetary.

In digital markets, consumers do pay a price for goods and services (albeit a non-monetary price), and reduced competition can, just as in monetary markets, result in a price increase. As discussed above, the price in these markets is merely levied in terms of data, time, and attention.[150] Like monetary price markets, a lack of competition can manifest in increased attentional cost in the form of more advertising, an increase in the amount of consumer data that is collected, a decrease in quality of services provided, fewer privacy protections, or a combination of these factors.[151] It is also important to note that "[w]here monetary prices are fixed at zero while quality changes over time—in response to changes to the nature of the services, privacy protections, content offerings and the like—the quality-adjusted prices change."[152] To effectively define the relevant market, the Guidelines need more tools that account for these harms.

i. Increase in Non-monetary Price

To address this concern, numerous proposals have called for a test that operates as a traditional SSNIP test, but measures changes in non-monetary price or changes in quality while holding the non-monetary price constant.[153] One option would be a SSNIP-like test that looks to a durable increase in the time, data, or attention that consumers must exchange for a service.[154] For example, an attentional SSNIP test "would posit a hypothetical monopolist who adds a 5-second advertisement before the mobile map and leaves it there for a year" and determine whether a loss of market share is likely to result.[155] This could also be examined in terms of quality in which the 5-second

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[150] *See, e.g.,* Oxenham Allen et al, *supra* note 145, at 9; Inge Graef, *Market Definition & Market Power in Data: The Case of Online Platforms*, 38 WORLD COMP. 473, 474-75 (2015).
[151] Stigler Report, *supra* note 145.
[152] Stigler Report, *supra* note 145.
[153] Makan Delrahim, Deputy Att'y Gen., U.S. Dep't of Justice, "I'm Free": Platforms & Antitrust Enforcement in the Zero-Price Economy, Address at Silicon Flatirons Annual Tech. Pol'y Conf. (Feb. 11, 2019), *in* JUSTICE NEWS, U.S. DEP'T OF JUSTICE, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-silicon-flatirons.
[154] *See, e.g.,* Newman, *supra* note 99, at 65-66; Wu, *supra* note 99, at 796-97.
[155] Wu, *supra* note 99, at 797.

advertisement could be evaluated as durable decrease in quality. This reflects the principle that, in non-monetary price markets, "a group of products satisfies the HMT if a hypothetical monopolist controlling that group of products would significantly lower *quality*."[156] Similarly, a SSNIP test expressed in terms of data might look to a small but significant reduction in user privacy.[157]

Few, if any, of these approaches would be as simple to implement as a SSNIP test in a monetary price market, because attention, quality, and data, for example, may not be as easily or uniformly quantifiable as monetary price.[158] Nonetheless, the Guidelines should consider how modifications to the SSNIP test concerning increases in time, data, or attentional costs might operate to improve market definition in digital markets.

ii. Reduced Incentive to Innovate

In addition to accounting for the various ways in which consumers pay aside from money, the Guidelines may need to use a different approach to market definition when considering innovation—and how mergers may impact incentives to innovate— in digital markets. Innovation is particularly critical in digital markets, where low capital costs and high network effects, both direct and indirect, can lead to rapid product dissemination and shifts in consumer behavior resulting from innovation.[159]

In non-monetary price markets, anticompetitive effects can manifest in reduced incentives to innovate.[160] While other sections of this comment call for reconsideration of rigid market definition in order to protect innovative competition from outside of a narrowly defined horizontal market,[161] the Guidelines should also consider new tools of market definition that better account for the role of innovation in digital markets, such as by measuring diversion ratios pre- and post-merger.[162] Consideration should also be given to how innovation might be hampered in adjacent or apparently unrelated markets.

Each of these measures presents its own challenges, but to the extent that merger review continues to rely, at least in some instances, on market definition and structural analysis, a more diverse toolkit should be developed. We suggest that the Guidelines consider ways to move the tools of market definition forward or, as noted, eschew the need to focus on market definition.

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[156] *See* Rose & Shapiro, *supra* note 56.
[157] Newman, *supra* note 99, at 69.
[158] *Id.* at 66-69.
[159] *See, e.g.,* Imanol Ramirez, *Merger Thresholds in the Digital Economy*, 45 DEL. J. CORP. L. 433, 440-43 (2021).
[160] Newman, *supra* note 99, at 58 ("Anticompetitive conduct in zero-price markets may yield . . . less competitive efforts directed toward innovation.").
[161] *See* Part III, "Market Power & Market Definition"; Part VI, "Addressing Nascent Competitors."
[162] *See, e.g.,* Farrell & Shapiro, *supra* note 128, at 33-34.

2. Direct Evidence of Likely Effects

As discussed in Part III, it is important for antitrust analysis to look to direct evidence of the likely effects of a merger in addition to relying on market definition. Given the weaknesses of existing structural tools, direct evidence is particularly important in digital markets, where price-based tools of market definition are frequently lacking and where multi-sided markets are common. While the previous section discussed potential avenues to improve the tools of market definition in non-monetary price markets, direct evidence also circumvents many of the weaknesses of structural analysis in multi-sided markets. [163]

In digital markets, consumers can be harmed by a lack of competition without the monetary price of the product exceeding zero.[164] Therefore, "looking only at price effects can be misleading" when weighing efficiencies and anticompetitive effects of a merger.[165]

The same features discussed above—erosion of quality, reductions in innovation, and increases in non-monetary costs like attention and user data—can provide direct evidence of market power. [166] This is particularly indicative when these changes arise after shifts in the competitive landscape—for instance, a change in privacy protections or advertising load that immediately follows the acquisition or elimination of a competitor.[167] While these non-monetary features may inform new approaches to the Hypothetical Monopolist Test, where real-world evidence exists, enforcers should not hesitate to rely on it.

3. Qualitative Evidence of Substitutability

Under the holistic approach to evidence that we recommend, we suggest that the Guidelines explicitly legitimize qualitative evidence of substitutability, particularly as a substitute for quantitative market definition in digital markets. The goal of the Hypothetical Monopolist Test is "to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms."[168] For instance, the main focus of quantitative tests like the SSNIP Test is "to assess demand or supply side substitutability."[169] As such, qualitative evidence indicating that consumers consider two products interchangeable can obviate the need for market definition.

As the Agencies' questions on this topic note, the *Brown Shoe* decision provides a number of examples of "practical indicia" of substitutability that enforcers can look to as valid

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[163] *See, e.g.,* Katz & Sallet, *supra* note 101, at 2152-53.
[164] *See, e.g.,* Srinivasan, *supra* note 73, at 69-76.
[165] Maria Wasastjerna, *European Union Competition Policy for the Twenty-First Century Digital Economy,* 24 COLUM. J. EUR. L. 527, 532 (2017).
[166] Crane, *supra* note 101; *see also* Katz & Sallet, *supra* note 101; Newman, *supra* note 99, at 58.
[167] *See* Srinivasan, *supra* note 73, at 81-82.
[168] 2010 Guidelines, *supra* note 5, at § 4.1.1.
[169] Caio Pereira Neto & Filippo Lancieri, *Towards a Layered Approach to Relevant Markets in Multi-sided Transaction Platforms*, 83 Antitrust L.J. 429, 440 (2020).

evidence.[170] More recent case law has affirmed that "[c]ourts routinely rely on qualitative economic evidence to define relevant markets."[171]

Focusing the inquiry on the underlying goal of market definition rather than the form of evidence is particularly important in multi-sided digital markets. In multi-sided markets, two platforms may be substitutes for users on one side of the platform but not another.[172] This means that a SSNIP test looking at prices on only one side of a platform, or one that looks at only the net price change, can both fail to account for the differences in substitutability for different user groups.[173]

Antitrust inquiries can avoid these challenges by acknowledging that market definition is simply a means to an end and considering traditional tools of market definition "in conjunction with all of the relevant evidence."[174] In the context of digital platforms, user surveys, internal documents suggesting whether the parties consider each other's products to be substitutes, and other such qualitative evidence can and should be used to complement quantitative tests.

The Guidelines also should emphasize forms of evidence that might be more readily available in digital markets. For instance, advocates have pointed out the utility of natural experiments based on real-world data.[175] The lack of physical infrastructure, the low resource cost of developing and iterating products, and the ability to easily target specific populations with updates all give digital platforms an unprecedented insight into consumer behavior. Internal information and documents that reflect the results of these experiments can prove highly probative. Similarly, consumer responses to a service outage on a given platform could be a key indication of substitutability in a digital market.[176] Enforcers may also look to the ways in which firms themselves behave differently in different jurisdictions. In short, digital markets can provide novel sources of evidence about firm and consumer responses to changing market conditions, sources that are rarely available in traditional markets.

However, while noting that enforcers may consider "any reasonably available and reliable evidence," including "all . . . evidence of customer substitution," the 2010 Guidelines

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[170] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 120, at 3 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).
[171] McWane, Inc. v. FTC, 783 F.3d 814, 829 (11th Cir. 2015) (citations omitted).
[172] *See, e.g.,* Katz & Sallet, *supra* note 101, at 2154-55.
[173] *See, e.g.,* Katz & Sallet, *supra* note 101, at 2153, 2160-61; *see generally* Filistrucchi et al, *supra* note 102.
[174] Katz & Sallet, *supra* note 101, at 2153.
[175] *See generally, e.g.,* Malcolm B. Coate, *The Use of Natural Experiments in Merger Analysis*, 1 J. ANTITRUST ENFORCEMENT 437 (2013).
[176] *See, e.g.*, Jack Neary, *How the Longest Facebook Outage Since 2008 Affected the Way Readers Found and Consumed News Content*, CHARTBEAT BLOG (Nov. 3, 2021), https://blog.chartbeat.com/2021/11/03/ facebook- outage-20210-reader-data/.

dedicate their discussion of market definition primarily to the SSNIP test.[177] By including a more fulsome discussion of qualitative evidence, the Guidelines can encourage a more nuanced and accurate approach to determining substitutability.

4. A Focus on Distribution Channels

Substitutability is traditionally dictated by the current feature set of the products or services in question. But in digital markets, a merger's impact on channels of product distribution can be just as important.

In digital markets, powerful network effects, the ubiquitous value of data, and the relatively low cost of deploying a new product via existing channels, mean that scale and increases in distribution may be more important to the competitive analysis than the current feature set of a given product or service. Even when a firm's existing product is not a substitute to the product in question, "the use of large-scale data and insights from machine learning" and the ability to "leverage their existing and trusting user base to start with strong network externalities" may render a firm a potential competitor.[178] In other words, a firm that has achieved ubiquitous distribution in one market may more easily enter another market. This type of competition is often referred to as competition *for* the market rather than competition *within* the market.[179]

As noted in Part IV, above, we recommend that the Guidelines discuss these novel avenues of competition as factors under the "tend to create a monopoly" standard. In their treatment of digital markets, the Guidelines should emphasize that a merger's impact on channels of distribution may be as significant, or even more significant, than its impact on the number of products currently competing within a given market. This is yet another reason why strict adherence to traditional market definition may be problematic in digital markets, and why the Guidelines should instead focus on holistic evaluation of the competitive effects of a merger.

VI. ADDRESSING NASCENT COMPETITORS[180]

Competitive disruptors play a crucial role in the twenty-first century economy. In this section, we discuss the important role that nascent firms play in modern markets, particularly in innovation-based fields like digital or computing industries. Second, we

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[177] 2010 Guidelines, *supra* note 5, at § 4.1.3; *but see generally* § 4; *see also, e.g.,* Oxenham Allen et al, *supra* note 145, at 6.
[178] Ramirez, *supra* note 159, at 442.
[179] *See, e.g.,* Steven Berry, Martin Gaynor, & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSPECTIVES 44, 56 (2019).
[180] The primary focus of this section is on nascent competitors, as opposed to potential competitors. While nascent competitors may already operate in the market, it is their innovative potential, often with unproven products, that threatens incumbents and defines their role in the competitive analysis. Hemphill & Wu*, supra* note 105, at 1883-89.

highlight an emerging trend over the past decade: the elimination of nascent competition. Third, we address how nascent competition has been undervalued and underemphasized because of fear of overenforcement and chilled investment. Fourth, we spotlight how acquisitions involving nascent rivals generally have not been a focus for enforcers. Finally, we discuss why nascent competition should receive more robust discussion in the Guidelines and highlight potential solutions.[181]

a. The Importance of Nascent Competition

Innovation is a primary driver of national economic prosperity, and protecting innovation is a central goal of competition policy.[182] Particular focus in antitrust policy discussions is growing with respect to a specific type of market rival: nascent competitors. Nascent competitors hold a unique value not only in their present contributions, but also, and even more importantly, their prospective innovations.[183]

Nascent competitors hold the promise of market disruption. Those prospects can threaten incumbents and provide upward pressure to innovate and compete.[184] Indeed, they can offer "fresh competition *for* the market, not just *in* the market."[185] This, of course, includes markets still in their incipiency. When evaluating the nature of their economic contribution, the importance of these firms lies not necessarily in what they are doing, but what they can do. It is the path of "creative destruction" that can transform markets and open gateways of follow-on improvement.[186] Moreover, the ultimate success of a nascent rival is irrelevant, as even transitory competitors can spur innovation by incumbents who merely perceive a threat. Indeed, creative destruction "acts not only when in being but also when it is merely an ever-present threat. It disciplines before it attacks."[187] Despite their

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[181] A bi-partisan coalition of twenty-eight (28) state Attorneys General, including Colorado and Nebraska, noted the importance of evaluating nascent or potential competition in developing the theories of harm presented by vertical mergers. *U.S. Department of Justice and the Federal Trade Commission Public Comments of 28 State Attorneys General on Draft Vertical Merger Guidelines* (Feb. 26, 2020), *available at* https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/state_ags_final_vmg_comments.pdf. The entry issues discussed in those comments overlap substantially with issues raised herein with respect to horizontal mergers.
[182] *See generally* Giulio Federico et al., *Antitrust and Innovation: Welcoming and Protecting Disruption*, *in* INNOVATION POLICY AND THE ECONOMY 125 (2020).
[183] A. Douglas Melamed, *Mergers Involving Nascent Competition* at 1 (Jan. 14, 2022) (forthcoming), *available at* https://www.competitionpolicyinternational.com/mergers-involving-nascent-competition/.
[184] *See, e.g.*, Austan Goolsbee & Chad Syverson, *How Do Incumbents Respond to the Threat of Entry? Evidence from the Major Airlines* 1-3 (NBER, Working Paper No. 11072, 2005) (noting that incumbent airlines dropped average fares when Southwest threatened a route, but before Southwest actually started flying the route).
[185] Hemphill & Wu, *supra* note 105, at 1887 (emphasis in original).
[186] *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 82 (1942).
[187] *Id.* at 85.

relative size and sometimes unproven history, the entry of small innovators can result in paradigmatic market shifts.

Nascent competition is particularly important in sectors defined by rapid innovation and technological change. Competition in such markets is largely for the future and is sometimes called "competition for the market" or "leapfrog" competition.[188] Fields reliant on information technology—such as software, financial services, healthcare, telecommunication, e-commerce, computing, and social network services—are especially impacted by the competitive dynamics of disruptive firms. Some of the more prominent examples of U.S. companies who began as modest disruptors include Apple, Genentech, and Bell Telephone Company.[189]

b. The Elimination of Nascent Competition

Entrenched incumbent firms in innovation-based industries have made serial acquisitions of nascent competitors a core strategic play to maintain dominance.[190] Though this strategy began receiving high profile scrutiny in earlier litigations, such as in *Microsoft*,[191] the approach has scaled up, particularly in technology and pharmaceuticals.

According to congressional findings, tech firms such as Facebook have adopted the "acquire, copy, or kill"[192] strategy with much success. Reports indicate that 46 of Facebook's 92 acquisitions since 2007 were with a potential or actual competitor, and of Google's 270 acquisitions since 2010, 171 were of potential or actual competitors.[193] By 2011, Facebook boasted that it comprised "95% of all social media" in the U.S. and recent estimates indicate that more than half of the U.S. population over age thirteen use a Facebook service every day.[194] Others point to Amazon.[195] Prior to acquiring Quidsi, Amazon allegedly began selling diapers at a loss and forced Quidsi's owners to sell the business.[196] Soon after buying Quidsi, Amazon reportedly raised prices.[197]

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[188] Stigler Report, *supra* note 145.
[189] *See* Hemphill & Wu, *supra* note 105, at 1886-87.
[190] *See* Cunningham, *supra* note 50, at 649.
[191] *See generally* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc).
[192] *See* SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMIN. LAW OF THE COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 14 (2020).
[193] Tim Wu & Stuart A. Thompson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html.
[194] Brief for Appellant at 6, New York v. Facebook, Inc., No. 21-7078 (D.C. Cir. Jan. 14, 2022).
[195] *See* Khan, *supra* note at 134, at 768-71.
[196] *See* Heather Struck, *Amazon Absorbs Diaper Competitor Quidsi*, FORBES (Nov. 8, 2010), https://www.forbes.com/2010/11/08/amazon-quidsi-acquisition-markets-equities-online-retail.html?sh=257079bd1dbd.
[197] *See* AM. BOOKSELLERS ASS'N, *supra* note at 134, at 5.

Recent scholarship has highlighted this so-called "killer acquisition" strategy, in which the acquiring firm in effect shuts down the threatening nascent competitor after acquiring it.[198] Such a strategy has been used, for example, in the pharmaceutical industry where researchers have estimated that approximately 6% of merger activity has involved killer acquisitions.[199] One such example involved Questcor's attempt in 2013 to maintain its monopoly over a specialty drug used as a treatment for infantile spasms. As highlighted in an FTC complaint, in the U.S., Questcor's drug maintained 100% share over the market for adrenocorticotropic hormone drugs. In a post-acquisition challenge, the FTC charged that, as opposed to other bidders who sought to develop the target synthetic alternative known as Synacthen, "Questcor had only inchoate plans for Synacthen and conducted limited due diligence when it submitted its initial offer."[200] Mallinckrodt later settled with the FTC.[201]

Failing to develop a principled approach to merger analyses affecting nascent rivals creates enormous risk to the U.S. economy, which relies on innovators and disruptors to drive growth, productivity, and ensure long-term global competitiveness.

c. The Undervaluing and Underemphasizing of Nascent Competition

Historically, nascent competition has been undervalued and underemphasized because of fear of overenforcement and chilled investment.[202] The common refrain in response to calls to reform nascent rival analyses is the fear of an outsized response to an uncertain threat.[203]

Exit through acquisition is often the goal of emerging firms. The share of U.S. startups that sell to incumbents rather than compete has markedly increased over the past two

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[198] Cunningham, *supra* note 50, at 649.
[199] Cunningham, *supra* note 50, at 649.
[200] Compliant at ¶ 12, FTC v. Mallinckrodt ARD Inc., No. 1:17-cv-00120 (D.D.C. Jan. 25, 2017), ECF No. 10.
[201] *See* Dan Mangan, *Mallinckrodt to Pay $100 Million to Settle FTC, State Charges on Antitrust Violations Linked to Martin Shkreli-Backed Lawsuit*, CNBC (Jan. 18, 2017), https://www.cnbc.com/2017/01/18/mallinckrodt-reaches-settlement-with-ftc-on-probe-linked-to-martin-shkreli-backed-lawsuit.html.
[202] The analysis of potential competitors has gained a particular judicial gloss through the doctrines of actual and perceived potential competition. *See generally* Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 4 WIS. L. REV. 1035 (2004). As highlighted by recent scholarship, however, potential competition doctrines do not capture the unique nature of nascent competitors. *See* Hemphill & Wu, *supra* note 105, at 1894-95 (explaining that "APC" case law is "distinguishable" because: (1) it has focused on the incumbent acquirer as the potential entrant, as opposed to the nascent competitor target; and (2) it has ignored the notion that the target entrant would be contributing innovative technology, as opposed to an existing product).
[203] *Cf.* Douglas H. Ginsburg & Jacob Philipoom, *A Certain Harm Overlooked: The Case of Nascent Competitors Revisited* (April 1, 2021), *available at* https://leconcurrentialiste.com/ginsburg-philipoom-nascent-competitors.

decades.[204] According to recent findings, the number of venture capital-backed firms acquired has jumped from 190 per year in the 1990s to 450 per year in 2013. And, over the last ten years, more than 50% of the deal value of each year's top ten acquisitions has been generated by dominant firms acquiring horizontal competitors.[205] Putting aside concerns about whether this trend in startup lifecycle generally enhances or hurts consumer welfare, critics argue that an increased threat of merger enforcement could stifle an already diminished competitive environment for upstart firms.[206]

Contrary to the views held by skeptics, early research indicates that these types of nascent acquisitions themselves might be chilling business investment. According to one study, after Google and Facebook made a large acquisition, venture capitalists invested less in both the target firm's market and in related markets.[207]

d. Lack of Historical Focus

Generally, acquisitions involving nascent rivals have not been a focus for merger enforcement.[208] In the realm of reportable transactions, merger review has failed to protect consumers and competition despite the Guidelines addressing "maverick" firms in, for example, the evidence section.[209] According to some estimates, since 2017, the five largest digital technology firms have made approximately 130 acquisitions, but the Agencies have not challenged any reportable under HSR. These transactions comprised almost 20% of total transactions consummated by the companies over the last three decades.[210]

Moreover, many transactions involving nascent firms simply do not meet current HSR thresholds. This is especially a problem in the technology industry, where dominant firms operate in winner-take-all or winner-take-most markets.[211] In a landmark study of non-HSR acquisitions from 2010-2019 for the "top five in tech" (Alphabet, Amazon, Apple, Facebook, and Microsoft), the FTC estimated between 39.3% to 47.9% of transactions were

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[204] Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1, 14 (2021).
[205] *Id*. at 18 Fig. 1.
[206]*Cf*. John M. Taladay & Jeffrey S. Oliver, *Analyzing Nascent Competitor Acquisitions Rationally*, CPI COLUMNS (Feb. 22, 2021), https://www.competitionpolicyinternational.com/analyzing-nascent-competitor-acquisitions-rationally/ (cautioning against "frenzied reactionism" on developing policy with respect to this information area of merger reform).
[207] *See generally* Sai Krishna Kamepalli et al., *Kill Zone* (NBER, Working Paper No. 27146, 2020).
[208] AM. ANTITRUST INSTITUTE, THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S. 6 (2020).
[209] 2010 Guidelines, *supra* note 5, at § 2.1.5.
[210] *See* THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S. *supra* note 208, 10; *see also* Chris Alcantara et al., *How Big Tech Got So Big: Hundreds of Acquisitions*, WASH. POST (Apr. 21, 2021), https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/.
[211] Stigler Report, *supra* note 145, at 32.

for target entities that were less than five years old at the time of their acquisition.[212] The strategy of acquiring nascent rivals is becoming an industry norm, at least in the tech sector, and merits additional scrutiny.

e. The Guidelines Should Protect Nascent Competition

As enforcers, we recommend a more robust and tailored doctrinal approach to evaluating mergers involving nascent competitors.[213] The antitrust analysis of nascent competitors is often muddled[214] and lacking a particular focus on the unique effect that small, disruptive firms can have on markets with entrenched incumbents and the strategic use of so-called, "killer acquisitions."[215] As the Supreme Court has long recognized, it may take a long time before an acquisition can "ripen into a prohibited effect."[216] Yet "it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will . . . ."[217] The magnitude of the harm associated with eliminating competition from market disruptors warrants a special approach.[218]

Potential solutions to reflect the importance of nascent rivals may take many forms. As a threshold matter, recalibrating HSR thresholds might be a viable solution to capture further oversight of this type of merger activity.[219] Readjustment may not need to sweep across industry sectors—for example, limiting a threshold readjustment to digital or technology-driven markets may be meaningful.

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[212] FED. TRADE COMM'N, NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010-2019: AN FTC STUDY 23-24 (Sep. 15, 2021) [hereinafter FTC Study].
[213] *Compare* Hemphill & Wu, *supra* note 105, at 1890 ("We favor an enforcement policy that prohibits anticompetitive conduct that is reasonably capable of contributing significantly to the maintenance of the incumbent's market power") *with* Doni Bloomfield, *Getting to "May Be": Probability, Potential Competition, and the Clayton Act* (Jan. 26, 2021), *available at* https://ssrn.com/abstract=3589820 ("Courts should presume a merger between an incumbent and an alleged potential competitor to be illegal when (1) one of the merging parties has a dominant market share in an already-concentrated market; (2) the market is difficult to enter; and (3) there are non-speculative reasons to believe that the alleged potential competitor may enter the market in a reasonable period of time.").
[214] *Cf*. Andrew Elzinga et al., *Economic Issues in Assessing Potential and Nascent Competition*, CPI ANTITRUST CHRONICLE 3 (Feb. 2022) (distinguishing "potential competition" from "nascent competition").
[215] Cunningham, *supra* note 50, at 649.
[216] United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957).
[217] United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc).
[218] Hemphill & Wu, *supra* note 105, at 1890; *see also* Michael R. Moiseyev, *Potential and Nascent Competition in FTC Merger Enforcement in Health Care Markets*, CPI ANTITRUST CHRON. 6 (May 2020) ("The 'competitive significance' of the entrant is the product of both its probability of successful entry and its impact if, and when, it occurs."). *But see* Jonathan Jacobson & Christopher Mufarrige, *Acquisitions of "Nascent" Competitors*, ANTITRUST SOURCE (Aug. 2020).
[219] *See* FTC Study, *supra* note 212, at 13 (reporting that of the 616 non-HSR reportable transactions above $1 million that were studied, 65% were between $1 million and $25 million).

Others have suggested more broad reforms to capture small size merger activity. At least one prominent group of academic and industry professionals proposed the creation of a specialist regulator, the Digital Authority, with "merger review authority over even the smallest transactions involving digital businesses with bottleneck power because nascent competition against these entities is very valuable for consumers." [220] Others have considered a "Quick File" program for low threshold mergers.[221]

Commensurate with the importance these firms play in our economy, we also suggest additional consideration of nascent rivals be included in the market definition, entry, and evidence sections of the Guidelines.

1. Market Definition

It is critical that merger analyses look beyond current market share data in markets characterized by innovation and mergers involving a potentially nascent competitor.[222] As unearthed in the Visa-Plaid merger, direct evidence of an incumbent's view of a rival firm's competitive potential should be a relevant factor in determining whether that rival constrains competition.[223] In that case, internal documents revealed one Visa executive analogizing Plaid to an island "volcano," whose current capabilities were just "the tip showing above the water" and warned that "[w]hat lies beneath though, is a massive opportunity—one that threatens Visa."[224]

Figure 1: Plaid's "Volcanic" Competitive Potential[225]

[220] *See* Stigler Report, *supra* note 145, at 32.
[221] *See* Baer et al., *supra* note 1, at 48-49 ("Congress also should create a quick file system, without a fee, that would give the two antitrust agencies' notice of deals more than $4 million but less than current reporting thresholds. Standard HSR reporting thresholds should be lowered to $50 million.").
[222] *Cf*. 2010 Guidelines, *supra* note 5, § 5.1 ("All firms that currently earn revenues in the relevant market are considered market participants…. Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.").
[223] *See generally* Complaint, United States v. Visa Inc., No. 20-cv-07810 (N.D. Cal. Nov. 5, 2020), ECF No. 1.
[224] *Id*. at ¶ 9.
[225] *Id*.

The ability and incentive of the merged firms to invest and compete may be the more appropriate inquiry when evaluating nascent competitors.[226] Indeed, this is the general approach reflected in the recently published CMA Merger Assessment Guidelines.[227] At the very least, the Guidelines should make clear that when evaluating a merger involving a nascent competitor, the market definition exercise requires evidentiary flexibility with respect to identifying areas of competitive overlap.

The government's loss in the *Sabre* case is another example of how market definition plays a critical role in capturing anticompetitive effects from acquisitions of nascent firms. In that case, citing the U.S. Supreme Court's *American Express*[228] decision, the court concluded as a matter of law that "Sabre, a two-sided transaction platform, only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre's platform."[229]

Setting aside the competitive issues involved in platform conduct more generally, a ruling that ignores competition in a relevant market on one side of a two-sided platform is unsupported by both economics and antitrust principles.[230] Given the increasing importance of the number of nascent competitors that have emerged in this space, the market definition section of the Guidelines should be updated to acknowledge a multiple markets approach.[231] Indeed, emphasis on the Guidelines' current point that "[t]he Agencies may evaluate a merger in any relevant market satisfying the test" would be beneficial.[232]

Finally, merger analyses must also adapt to account for the competitive significance of firms in concentrated markets that purchase start-up companies in adjacent or proximate markets. Firms in adjacent markets may hold unique competitive significance—and promising innovative potential—relative to an incumbent. An incumbent may also compete in markets adjacent to the incumbent's primary market, which could be lost or severely impacted by merger. These issues warrant additional scrutiny.

2. Entry

With respect to entry, nascent competitors demand a nuanced approach.[233] When evaluating acquisitions of nascent competitors, the Guidelines should make clear that it is

[226] *See* Rose & Shapiro, *supra* note 56, at 10-11.
[227] *See* COMPETITION AND MARKETS AUTH., MERGER ASSESSMENT GUIDELINES, March 2021 (UK) § 5.
[228] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).
[229] United States v. Sabre Corp., 452 F. Supp. 3d 97, 136-38 (D. Del. 2020) *vacated as moot*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020) (vacating the district court's decision after the parties abandoned the transaction).
[230] *Cf*. Randy M. Stutz, *We've Seen Enough: It Is Time to Abandon Amex and Start Over on Two-Sided Markets*, AM. ANTITRUST INST. (2020).
[231] Katz & Sallet, *supra* note 101, at 2154.
[232] *See* Rose & Shapiro, *supra* note 56, at 5.
[233] For the application within the potential competition doctrine body of case law, see Ginsburg v. InBev NV/SA, 649 F. Supp. 2d 943, 951 (E.D. Mo. 2009), aff'd, 623 F.3d 1229 (8th Cir. 2010) ("the

not required to show that successful competitive entry in the "but-for" world by the excluded innovator would necessarily or probably have occurred. Rather, given the magnitude of potential harm of a nascent rival's elimination, requiring a "reasonable possibility" that the nascent rival "will, but-for the acquisition, develop into a substantial competitor of the acquired firm or provide a uniquely valuable complement to such a competitor,"[234] would more appropriately safeguard innovation markets. This approach accounts for the fact that the potential competitive effect of a nascent rival needs to be gauged by not only that upstart's potential to impact one market as a stand-alone entity, but also the potential role that the nascent competitor could play when linked to another firm operating in a different market at the time of the potential acquisition.

3. Evidence

The Guidelines should also highlight the role of a robust evidentiary record in evaluating mergers affecting nascent competitors. First, evidence of anticompetitive plan on behalf of the incumbent is illustrative.[235] Internal memos or documents may explicitly espouse an intent or pattern of competitive elimination.[236] A pattern of nascent, competitive acquisition behavior, sometimes only available post-consummation, may also emerge.[237] Evidence of self-sacrifice is probative of an incumbent's view of the threat—*i.e.*, a company may pay higher than valuation prices to neutralize a threat it finds significant.[238] Post-acquisition evidence may also indicate price increases or quality deterioration.[239]

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relevant issue is would [the potential rival], absent the acquisition, probably have entered" the market) (quotation marks omitted); Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982) (entry must overwise have been "likely"); Yamaha Motor Co. v. FTC, 657 F.2d 971, 977 (8th Cir. 1981) (question is whether potential rival would "probably" have entered); United States v. Siemens Corp., 621 F.2d 499, 506-07 (2d Cir. 1980) ("there must . . . be at least a reasonable probability that the acquiring firm would enter the market, and preferably clear proof that entry would occur") (quotation marks and citations omitted).

[234] *See* Melamed, *supra* note 183, at 2.

[235] *See* Hemphill & Wu, *supra* note 105, at 1890, 1903.

[236] *See, e.g.*, Email from David Ebersman to Mark Zuckerberg (Feb. 28, 2012), https://perma.cc/4B6V-S42E (suggesting, as motivations for an acquisition, "(1) neutralize a potential competitor? . . . (3) integrate their products with ours in order to improve our service?"); Email from Mark Zuckerberg to David Ebersman (Feb. 28, 2012), https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf ("It's a combination of (1) and (3)."); Memorandum from Bill Gates, Chairman and CEO of Microsoft Corp., to Exec. Staff and Direct Reports, Microsoft Corp. (May 26, 1995), https://perma.cc/K8CX-ZDFQ.

[237] Complaint, New York v. Facebook, Inc., No. 20-cv-3589-JEB (D.D.C. Dec. 9, 2020), ECF No. 4 ¶¶ 98-231 (outlining the acquisition strategy portion of Facebook's "buy or bury" strategy).

[238] *See generally* FTC v. Actavis, Inc., 570 U.S. 136 (2013).

[239] Complaint, New York v. Facebook, Inc., No. 20-cv-3589-JEB (D.D.C. Dec. 9, 2020), ECF No. 4 ¶ 234 (supporting allegations of "Facebook's ability to profitably degrade quality and exclude competition is further evidence of its monopoly power").

At a high level, enforcers either need tools to be able to address such transactions at the front end or more grace to address them after-the-fact. The current situation—a lack of front-end oversight and unwarranted skepticism about such actions after the fact—is untenable.[240]

VII. CONCLUSION

Current marketplace realities call for an antitrust course correction, including in the analysis and enforcement of mergers. While these Comments address only a subset of the important topics enumerated in the Agencies' request, we think the recalibration of the Guidelines to more accurately reflect the modern economy and the challenges facing enforcers, consumers, businesses, and courts is necessary.

This type of reflection and advancement has been achieved before. In the wake of a series of failed merger challenges, the FTC declined to simply "give up on hospital mergers."[241] It thereafter engaged in a meaningful series of retrospective studies that ultimately led to the successful post-consummation *Evanston Northwestern* hospital challenge[242] and a more robust framework to analyze hospital markets.

These Comments offer perspectives on specific areas where the Guidelines may be updated to reflect current competitive dynamics in the U.S. economy and new economic learning. As the Agencies work to achieve these goals, we stand ready to collaborate with and support such leadership.

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[240] *Cf.* Opinion, New York v. Facebook, Inc., No. 20-cv-3589-JEB (D.D.C. June 28, 2021), ECF No. 137 (dismissal).

[241] *Assessing Part III Administrative Litigation: Interview with Timothy J. Muris*, 20 ANTITRUST 6, 10 (2006). Chairman Muris responded to that criticism as follows:

> In 2001 many said, give up on hospital mergers, but I disagreed because health care is such an important part of the economy and because there was evidence of problematic mergers. We began a retrospective study, which sounded simple, but turned out to be hard and complex. We picked several mergers, in part to bring a case or two if we found them, but also to study and report to help the government use the HSR process at some future date.

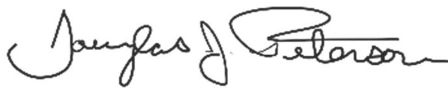
Id.

[242] Complaint, Evanston Northwestern Healthcare Corp., FED. TRADE COMM'N, No. 9315 (Feb. 10, 2004), https://perma.cc/8PWT-VWLC.

Sincerely,

Philip J. Weiser

Colorado Attorney General



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