

Recommended Revisions to the Draft Merger Guidelines

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14 September 2023

This submission contains my recommendations for revisions to the draft Merger Guidelines released by the Department of Justice and the Federal Trade Commission on 19 July 2023.

I urge the Agencies to make major revisions to the draft Merger Guidelines before finalizing them. Major revisions are needed (1) to clarify that the goal of merger enforcement is to prevent harms to customers and suppliers from enhanced market power, (2) to strengthen rather than weaken horizontal merger enforcement, and (3) to avoid interfering with beneficial non-horizontal mergers. Without major revisions, these Merger Guidelines would make merger enforcement less effective and harm the U.S. economy.

My recommendations are presented in three groups: (a) overall recommendations, which apply to the general structure and approach taken in the draft Merger Guidelines; (b) recommendations relating to horizontal mergers; and (c) recommendations relating to non-horizontal mergers.

My Experience with Merger Enforcement

I am an economist who has been studying competition policy for roughly 40 years. I served as the Deputy Assistant Attorney General for Economics in the Antitrust Division of the Department of Justice during 2009-2011 and during 1995-1996. I led the working group at the Antitrust Division that, together with the Federal Trade Commission, revised the Horizontal Merger Guidelines in 2010. I also served as a Senate-confirmed Member of the President's Council of Economic Advisers under President Obama during 2011 and 2012. My writings and my disclosure statement are available at <https://faculty.haas.berkeley.edu/shapiro/>.

I have been [calling for stronger enforcement of horizontal mergers for many years](#). I have previously explained how the 2010 revision to the Horizontal Merger Guidelines [were designed to strengthen merger enforcement](#) and had that [effect](#). I also have [testified](#) on behalf of the government and a private plaintiff in a number of merger challenges over the past decade.

I recently published two comments on the draft Merger Guidelines at the ProMarket forum: [Why Dropping Market Power from the Merger Guidelines Matters](#), and [How Would These Draft Guidelines Work in Practice?](#) Those two comments are appended to this document as part of my submission. Previously, Professor Nancy Rose and I [made specific suggestions](#) for updating the Horizontal Merger Guidelines.

Overall Recommendations

1. Clarify that the goal of merger enforcement is to prevent harms to counterparties – usually customers but sometimes suppliers – resulting from enhanced market power.

The draft Merger Guidelines (MGs) fail to articulate the goal(s) of merger enforcement.

Such lack of clarity is not a virtue in a document intended to give guidance to the public about how the law will be enforced. Some commentators read the draft MGs as saying that the Agencies' goal when enforcing Section 7 of the Clayton Act will be to prevent increases in market concentration and to preserve possibilities for market deconcentration. If so, that would represent a major change in enforcement policy, which for decades has sought to prevent mergers that harm counterparties resulting from enhanced market power. Others read the draft MGs as following modern case law and continuing the Agencies' longstanding policy of enforcing Section 7 of the Clayton Act to protect customers (and sometimes suppliers) from harms resulting from enhanced market power. I hope that is true, but if so, then why were statements to that effect in previous guidelines systematically removed?

If the Agencies believe that Congress has instructed them to challenge some class of mergers that does not harm counterparties as a result of enhanced market power, they should state that explicitly. I am skeptical of that claim, based on the statutory language and decades of antitrust case law.

The draft MGs repeatedly invoke the text found in Section 7 of the Clayton Act by stating that a merger will be prohibited if it may substantially lessen competition or tend to create a monopoly. The phrase "lessen competition" and its cognates appear more than one hundred times. There is, of course, nothing wrong with Guidelines referring to the statutory language they are meant to effectuate. But incessant repetition of this broad language that notoriously has a number of conflicting meanings provides no guidance or clarity. Indeed, more than fifty years of Guidelines are testament to the value of explaining how the Agencies will enforce Section 7, consistent with economic learning and the case law that has evolved to interpret the statute in a manner that will advance the welfare of customers and other counterparties.

The Agencies cannot coherently communicate their enforcement intentions, and courts cannot readily apply the MGs, if the goal of the entire merger enforcement exercise remains murky. I therefore strongly recommend that the following language be included in the MGs.

"The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. A merger enhances seller market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. A merger enhances buyer market power if it causes analogous harms to suppliers, including workers."

This language is taken from the 2010 Horizontal Merger Guidelines (HMGs) but modified to explicitly refer to both seller and buyer market power in this "unifying theme" paragraph.

Retaining the unifying theme will make the MGs more effective at deterring harmful mergers by making the MGs more coherent and specific, by helping to clarify the evidence needed to

rebut the presumptions asserted in the draft, and by weakening arguments from merging firms and others that the new MGs are inconsistent with modern case law.

At a minimum, the Agencies should explain how they operationalize the core concept of a “lessening of competition.” Guideline 2 states: “Competition often involves firms trying to win business by offering lower prices, new or better products and services, more attractive features, higher wages, improved benefits, or better terms relating to various additional dimensions of competition.” The final MGs should employ this language more broadly and state explicitly that the hallmark of a lessening of competition is that counterparties are denied some of these benefits.

Perhaps the Agencies removed the unifying theme from previous guidelines to avoid taking on an excessive evidentiary burden when they challenge mergers. I share that concern, but it is best addressed directly, not by making the central goal of merger enforcement murky. Accordingly, I recommend that the following language be added immediately following the “unifying theme” paragraph above.

“Effective merger enforcement faces obstacles because assessing harms to customers or suppliers based on enhanced market power is a predictive exercise. Direct proof that such harms will arise is often not possible, even if those harms are likely. From the beginning, Congress, the courts, and the Agencies have recognized this challenge and sought to improve the means by which prospects of harm can best be determined.

The Agencies rely on various types of evidence to determine that a merger may harm customers or suppliers as a result of enhanced market power. In some cases (see Guideline 1), an inference of harm can be made based on the level and increase in market concentration. In other cases (see Guideline 2), an inference of harm can be made based on evidence that the merging firms have exerted significant competitive constraint on each other in the recent past. In yet other cases (see Guideline 4), an inference of harm can be made based on the underlying ability and incentive of the merging firms to compete in the future if they do not merge.

Regardless of the type of evidence the Agencies rely upon to infer harms, they do not require that those harms will occur with certainty or that they be quantified. Such evidentiary requirements would be inconsistent with effective merger enforcement.”

Regardless of whether the Agencies adopt this recommended language, they should clarify that the goals of merger enforcement are logically distinct from the evidentiary requirements that are applied in service of those goals.

2. Explain what harm the Agencies will presume under each individual guideline and how each presumption can appropriately be rebutted.

The draft MGs have an unworkable mismatch between Guidelines 1 through 8, any one of which the Agencies consider sufficient to create a presumption that a merger is illegal, and their discussion of rebuttal evidence. The mismatch arises because the rebuttal topics in Section IV are not matched with or connected to the individual Guidelines found in Sections I and II. As a result, it is entirely unclear what evidence, if any, would be sufficient to rebut each of those eight Guidelines. That is unacceptable in a statement of enforcement policy.

To illustrate the problem, consider Guideline 1, which provides thresholds for the structural presumption to apply. I consider Guideline 1 to be the single most important guideline. Yet it

is well settled that the structural presumption is, well, a *presumption*. To give it meaning, the MGs must explain just what is being presumed. The draft is silent on this crucial question, other than to repeat the statutory language, which does not clarify how rebuttal evidence will be evaluated.

In previous guidelines, and in the case law, a merger that produces a firm with a sufficiently large share of sales in the relevant market and significantly increases market concentration in that market is presumed to harm customers in that market as a result of diminished rivalry. Logically, that presumption can be rebutted by showing that such harm is unlikely. See my first recommendation to restore the unifying theme from previous guidelines.

The failure of the draft MGs to make clear that the goal of merger enforcement is to prevent harm to counterparties from enhanced market power wreaks havoc with any and all rebuttal arguments. Perhaps this is why some commentators have questioned whether rebuttal is even possible under the draft MGs. The presence of Section IV on rebuttal evidence indicates that rebuttal of at least some individual guidelines must be possible, but which ones and how?

What rebuttal evidence would be sufficient to convince the Agencies *not* to challenge a merger that exceeds the structural thresholds in Guideline 1? Section IV lists three categories of rebuttal evidence: failing firm, entry, and pro-competitive efficiencies. The general legal test put forward by the draft MGs for rebuttal evidence is whether that evidence mandates a conclusion that no substantial lessening of competition is threatened by the acquisition.

Consider the very common case in which the anticompetitive effects of concern are higher prices charged to customers in the relevant market. Under the 2010 HMGs, effective rebuttal evidence would have to show that the merger will not in fact cause prices to rise.

The 2010 HMGs explain in simple terms how this approach to the efficiency defense works. They state that “the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm customers in the relevant market, e.g., by preventing price increases in that market.”

The draft MGs, having dropped the unifying theme that merger enforcement seeks to prevent harm to customers due to enhanced market power, substitute no comparable explanation of how to evaluate efficiencies evidence. For example, if a merger will improve quality and reduce prices, will the Agencies still challenge that merger? Instead of answering such questions, the draft MGs fall back on the statutory language by asking whether “evidence of procompetitive efficiencies shows that no lessening of competition is in fact threatened by the merger.” This repetition of the statutory language clarifies nothing, given the conflicting meanings of a “lessening of competition” that the draft MGs do not illuminate.

The lessening of competition identified in Guideline 1 is an increase in market concentration. The draft MGs thus appear to rule out the possibility of an efficiencies defense to Guideline 1. After all, the HHI thresholds identified in Guideline 1 are based on pre-merger market shares, which are entirely unaffected by any cognizable efficiencies. The Guidelines thus do not explain how the Agencies will apply the longstanding structural presumption regarding the effects of certain mergers but instead seem to embody a *per se* prohibition against them.

Similar problems arise for the entry defense as applied to Guideline 1. The 2010 HMGs explain how the entry defense works: “A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market,

either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger.”

The draft MGs, having dropped the unifying theme that merger enforcement seeks to prevent harm to customers due to enhanced market power, do not advance a comparable explanation of how to evaluate entry evidence. Yes, they require that entry induced by the merger must “deter or counteract the competitive effects of concern.” But Guideline 1 gives no indication of what the “competitive effects of concern” are, apart from market concentration itself.

Taking Guideline 1 at face value, entry would have to prevent the level or increase in market concentration that triggered the structural presumption. But the requirement that “entry must be rapid enough to replace lost competition before any effect from the loss of competition due to the merger may occur” then eliminates the well-established entry defense. The increase in concentration will happen immediately once the merger is consummated, so only instantaneous entry would qualify. But rapid entrants are already accounted for in measuring market shares and market concentration, as explained in Appendix 4 of the draft MGs.

What is missing from Guideline 1 is an explanation of just what the Agencies are presuming when they invoke Guideline 1. What, if anything, are the “competitive effects of concern” apart from the increase in market concentration, which is not a “competitive effect” under normal usage? Without knowing that, one cannot understand how rebuttal evidence will be used and when it would be sufficient. This is just one of the many places where dropping the unifying theme from the 2010 HMGs leaves the draft MGs in a muddle.

Similar problems arise when attempting to match Guidelines 2 through 8 with Section IV on rebuttal evidence. Hence my recommendation that the MGs explain what harm the Agencies will presume under each individual Guideline and how each such presumption of harm could be rebutted, preferably with examples. Restoring the unifying theme of protecting counterparties from enhanced market power would greatly alleviate the need to explain one-by-one how each individual guideline can be rebutted.

3. Do not turn the Merger Guidelines into a legal brief.

The draft MGs depart from all previous Merger Guidelines by rooting their authority in the Agencies’ interpretation of the case law rather than in economic principles that are consistent with the statute and the evolving case law. If the Agencies shift the emphasis from economic principles consistent with the case law to a recitation of mostly outdated and often superseded case citations, they will cede the high ground, the “principal analytical techniques” explained in prior Merger Guidelines, where the Agencies’ experience and deep expertise is likely to command the most respect from the courts.

Demoting the MGs from a set of widely-accepted economic principles consistent with the case law into just another legal brief would effectively be discarding one of Agencies’ strongest tools in court. That would undermine effective merger enforcement. I am sure that is not the Agencies’ intention. I urge the Agencies to abandon the counterproductive legal-brief style used in the draft MGs and return to the prior approach, which has proven to work.

If the Agencies believe it is important for them to articulate their interpretation of the case law associated with Section 7 of the Clayton Act outside the context of any specific merger case, they should issue a separate document for that purpose. Plus, of course, in every case

the Agencies litigate, they will in any event submit detailed legal briefs explaining to the court how they believe Section 7 case law applies to that case in particular.

4. Keep the Horizontal Merger Guidelines separate from any Non-Horizontal Merger Guidelines.

The heart of merger enforcement involves preventing mergers between competitors. The dangers to competition inherent in horizontal mergers are direct and obvious. Moreover, the Horizontal Merger Guidelines (HMGs) are securely established and have played a central role over the past dozen years in [making horizontal merger enforcement more effective](#). The economic analysis of horizontal mergers is well understood, and an extensive body of case law has evolved to reflect new economic learning, in part due to the influence of the HMGs as persuasive authority. New HMGs can and should build on this sturdy foundation while seeking to move the case law in the direction of stronger enforcement.

Preserving that special role for the HMGs is critical to maintaining and strengthening horizontal merger enforcement. But that role will be imperiled if the Agencies issue Merger Guidelines that cover both horizontal and non-horizontal mergers, because the economic analysis of vertical mergers is far murkier and more controversial than for horizontal ones.

This inherent difficulty is reflected in and compounded by the dubious and controversial manner in which the draft MGs treat non-horizontal mergers. Guidelines 6 and 7 are deeply flawed and risk undermining the credibility of the entire document, including Guidelines 1 through 4, which have a solid economic basis and are important for horizontal merger enforcement. Exposing Guidelines 1 through 4 to contagion from Guidelines 6 and 7 would be risky and unwise. Some danger will remain even if Guidelines 6 and 7 are dropped.

I find it worrisome and peculiar that the draft MGs do not acknowledge the fundamental difference between horizontal mergers, which combine products that are *substitutes*, and non-horizontal mergers that combine products that are *complements*. Basic economics teaches us that combining substitutes under common ownership gives the merged entity an inherent incentive to raise prices. Guideline 2 and Appendix 2 elaborate this point. Exactly the same economic logic teaches us that combining complements under common ownership gives the merged entity an inherent incentive to *lower* prices. The MGs cannot repeal this basic law of economics. Merging parties will be quick to point out this fundamental inconsistency.

I see all downside and no upside from combining the Horizontal Merger Guidelines with Non-Horizontal Merger Guidelines, especially because the draft MGs do not explain how to analyze mergers that have both a horizontal and a non-horizontal component. If necessary, some material could be included in both sets of Guidelines, a minor cost of decoupling.

5. Include examples to illustrate how the Merger Guidelines work in practice.

The 2010 HMGs provide 24 concrete examples designed to show the manner in which horizontal mergers may be harmful and how to identify those effects. These examples have proven valuable and instructive. The draft MGs contain no such examples, making it much harder for readers to understand how they would work in practice. The lack of examples also exacerbates the ambiguity about the goals of merger enforcement noted above.

Related, the 2010 HMGs state that the [2006 Commentary on the Horizontal Merger Guidelines](#) “remains a valuable supplement to these guidelines.” If that is still true, the Merger Guidelines should so indicate. The draft MGs state: “These Guidelines reflect the

collected experience of the Agencies over many years of merger review in a changing economy.” The 2006 Commentary documents a great deal of that experience.

I further recommend that the Agencies update the 2006 Commentary, adding new material and removing old material as needed, to further explain how the MGs “reflect the experience of the Agencies over many years of merger review.” A helpful way to convince readers that the MGs embody the Agencies’ experience is to present that experience in such a document.

Horizontal Mergers

6. Retain the Hypothetical Monopolist Test as the sole method for defining relevant markets.

The Hypothetical Monopolist Test (HMT) has been an invaluable analytical tool supporting effective horizontal merger enforcement by providing a reliable method to define relevant markets so that the resulting market shares are informative about likely competitive effects. The HMT is well-established in the case law and often is critical to the government when it seeks to establish the structural presumption. Most often, the government alleges a properly defined and relatively narrow market based on the HMT, and the merging parties argue for a broader market in which their shares are smaller, but misleadingly so. I therefore find it puzzling and very worrisome that the draft MGs demote the HMT.

The 2010 HMGs state plainly: “The Agencies employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets. The Agencies use the hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms.”

By way of contrast, Section III of the draft MGs lists four methods by which the Agencies define relevant markets. The first two, which are based on direct evidence, assert that a relevant market must exist but give no guidance about what that market might be. The third uses the “practical indicia” associated with the *Brown Shoe* case. The fourth is the HMT.

Demoting the HMT in this manner would be a grave error that would undermine effective merger enforcement. I gather that the Agencies believe they are giving themselves more flexibility in how they define markets. But when they go to court, that very flexibility, one might say vagueness, will work in favor of the merging parties, not the government, raising the risk that courts will accept overly broad relevant markets and approve harmful mergers.

Regarding the third method, if the Agencies choose to refer to the *Brown Shoe* “practical indicia,” they should explain that those market characteristics are relevant and informative in an individual case to the extent that they help implement the HMT. They are not a substitute for the HMT. The HMT is the sole method used to identify “reasonable substitutes” for the products sold by the merging firms.

7. Restore the important guiding principle from the 2010 Horizontal Merger Guidelines that “when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.”

Dropping the “smallest market principle” and related ideas from the 2010 HMGs that point toward narrow markets for the purpose of measuring market shares and concentration would weaken horizontal merger enforcement by making it harder for the Agencies to prevail in

court when they should. The typical path to victory for the Agencies is by establishing the structural presumption, which of course relies on market definition. The merging parties often argue that the relevant market defined by the government is too narrow. The 2010 HMGs added a number of passages to clarify how the HMT works and to explain why the HMT often points, correctly, to narrow markets. Virtually all of that material has been removed. This is a major error that should be fixed.

See my ProMarket submission [How Would These Draft Guidelines Work in Practice?](#) for further details on additional passages from the 2010 HMGs relating to market definition and market shares that should be retained.

Restoring this guiding principle would not preclude the Agencies from defining broader relevant markets in cases where they are not relying on market shares and market concentration to infer effects, such as when applying Guidelines 2 or 4. To make that clear, this passage from the 2010 HMGs could be retained: “The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market satisfying the test.”

8. Drop Guideline 8, which states that mergers should not further a trend toward concentration.

Guideline 8 lacks an economic foundation and would impede the process by which industries make beneficial adjustments to changing conditions. Guideline 8 is especially problematic given that the Agencies will flatly ignore proven merger synergies when applying it.

Guideline 8 is fundamentally flawed because it does not inquire into *why* there is a trend toward concentration or whether that trend has helped or hurt customers. Guideline 8 considers only market concentration, not economic effects. The draft MGs also do not explain what evidence would rebut the presumption associated with Guideline 8. Merger synergies are explicitly ruled out and would could well count *against* a merger.

Example #1: The market for bicycle manufacturing is experiencing consolidation driven by technological change. Just five years ago, there were 20 manufacturers, each with a 5% share of the market. At that time, three manufacturers developed new methods that allow them to make bicycles at much lower cost using existing facilities. These innovative manufacturers have been acquiring facilities from the other manufacturers and converting them to deploy their new, proprietary methods. The result has been declining bicycle prices. There are now only 7 manufacturers left, and the HHI has risen from 500 to 1600: three innovative firms with 20% each and four others with 10% each. One of the four 10% firms has just itself become innovative and now seeks to acquire one of the other 10% firms. This acquisition will hasten the use of the improved methods and further lower bicycle prices. Yet under Guideline 8 the Agencies would presume that this acquisition will lessen competition because it would occur in a market where there has been a trend toward concentration and it would cause the HHI to rise by 200. Furthermore, the merging parties could not rebut this presumption based on merger synergies, because under the draft MGs “efficiencies are not cognizable if they will accelerate a trend toward concentration.”

Based on my experience, I do not believe that Guideline 8 reflects “the collected experience of the Agencies over many years of merger review in a changing economy.”

Guideline 8 should be dropped entirely. Industry trends would remain relevant, not for their own sake but rather to the extent that they illuminate a merger's likely effects.

Non-Horizontal Mergers

9. Eliminate Guideline 7, which states that mergers should not entrench or extend a dominant position.

Guideline 7 is fundamentally flawed because it would limit successful firms from growing through acquisition even when doing so would benefit customers.

Guideline 7 is not needed to challenge acquisitions of actual or potential competitors that may entrench a dominant position. Those acquisitions are covered by Guidelines 1 through 4.

For non-horizontal mergers that entrench a dominant position, it is critical to distinguish between mergers that make the acquiring firm a more effective competitor and those that deprive rivals of the ability to compete effectively. Guideline 7 fails to make this distinction. Guideline 5 can and should address this latter category of harmful mergers.

Regarding the extension of a dominant position, Guideline 7 would stifle competition by deterring acquisitions that successful firms use to inject competition into new markets. If many such mergers were deterred, the damage to the American economy would be severe.

Example #2: Big Iron is the leading firm in the sale of mainframe computers to Fortune 500 companies, with a 40% share of that market. Big Iron is highly efficient at manufacturing mainframe computers. Big Iron seeks to enter a distinct market for the provision of cloud computing services to small companies. Big Iron's plan is to provide these services using its mainframe computers. But Big Iron has no experience providing cloud computing services and no relationships with these smaller companies. Big Iron thus seeks to buy Stratus, a firm with 10% of the cloud computing market. The leaders in cloud computing, Cirrus and Cumulus, each have 35% of that market. There is a good chance that its acquisition of Stratus will enable Big Iron to gain a market share of at least 30% in the cloud computing market. This acquisition will benefit cloud computing customers and erode the market power of Cirrus and Cumulus. But under the draft MGs, the Agencies would presume that this acquisition may lessen competition by extending Big Iron's dominant position from mainframe computers into cloud computing.

One way to see that Guideline 7 is fundamentally flawed is to ask what evidence would successfully rebut the presumption of harm described in Guideline 7. Cognizable efficiencies that make the merged firm a stronger competitor would *exacerbate* concerns about entrenching or extending the firm's dominant position, even if they benefit customers.

See my ProMarket submission [How Would These Draft Guidelines Work in Practice?](#) for further explanation of why Guideline 7 is ill-conceived and dangerous.

10. Eliminate Guideline 6, which states a structural presumption against vertical mergers.

Under Guideline 6, there would be a presumption against a firm with more than 50 percent market share at one level from vertically integrating via acquisition.

Guideline 6 lacks a sound economic basis, either theoretically or empirically, if the goal is to protect customers from the exercise of market power. Vertical mergers between firms that are earning significant price/cost margins at both levels have the greatest prospect of enabling

beneficial price reductions for downstream customers by combining complements under common ownership. Vertical mergers also can promote innovation by enabling better coordination. Vertical mergers can harm downstream customers due to enhanced market power, but there is no economic basis for a structural presumption that they will do so.

Example #3: Marconi AR has developed an innovative wearable device that gives consumers a new and improved way of experiencing augmented reality (AR). Based on its technological leadership, Marconi has a market share of 65% in the emerging market for wearable AR devices. Marconi believes the next breakthrough will require incorporating improved 3D sensors into its device. To achieve that goal, Marconi seeks to acquire one of a handful of companies at the leading edge of 3D sensors to better coordinate and accelerate product development. This acquisition will benefit customers by enabling Marconi to improve its devices more rapidly. However, under the draft MGs, the Agencies would presume that this acquisition lessens competition, because Marconi's 65% share of AR devices "alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition, subject to any rebuttal evidence." Furthermore, it is unclear what evidence would be sufficient to rebut this presumption, given the structural approach described in Guideline 6.

Making Guideline 6 even more problematic, it views a trend toward vertical integration as inherently suspect, even if that trend has been driven by efficiencies that benefit downstream customers. In Example #3, if Marconi AR's rivals had each recently acquired one of their own 3D sensor suppliers for the same reason – to accelerate product development – that would count *against* the Marconi AR merger. That is structuralism at its worst.

11. Revise Guideline 5 to better reflect economic learning about mergers of complements.

Guideline 5 should be revised to reflect the basic economics associated with mergers involving complements. As noted above, combining complements under common ownership creates an economic incentive to lower prices or otherwise better serve customers, just as combining substitutes under common ownership creates an economic incentive to raise prices or otherwise offer less attractive terms to customers.

Any analysis that does not incorporate this basic economic incentive regarding mergers involving complements is badly incomplete and inconsistent with the treatment of unilateral price effects from horizontal mergers, which correctly infers that some upward pricing pressure will result from combining substitutes under common ownership. Economics teaches us that the effect of a merger involving complements on customers depends on how this beneficial incentive to lower prices compares with harmful incentives, including the incentive to raise rivals' costs. Guideline 5 is silent about this basic and critical comparison. Guideline 5 also does not address other important and well-recognized benefits from combining complements, such as the coordination of innovation in Example #3.

More fundamentally, Guideline 5 should clarify and emphasize that the typical inquiry is directed at whether the merger will harm downstream customers, not whether it will harm rivals. After all, a central reason that such mergers may harm rivals is because they enable the merged firm to improve its offerings to downstream customers. Yet again, the draft MGs suffer badly from having dropped the unifying theme from previous guidelines.

Why Dropping Market Power from the Merger Guidelines Matters

Carl Shapiro

[ProMarket Draft Merger Guidelines Symposium](#)

7 August 2023

The draft Merger Guidelines recently released by the Department of Justice and the Federal Trade Commission (the Agencies) seek to reinvigorate merger enforcement. As someone who has been [calling for stronger enforcement of horizontal mergers for many years](#), who has [helped draft previous guidelines to achieve that end](#), and who has [testified on behalf of the government and a private plaintiff in a number of merger challenges over the past decade](#), I share that goal. However, I question whether these draft Guidelines will advance that goal rather than set it back. I suggest revisions that would make the Guidelines more effective and more durable.

The draft announces a dramatic shift in merger policy: it abandons the focus on market power that has been fundamental to all merger guidelines for several decades. As a result, the framework it offers for reviewing mergers is disconnected from the central harm that merger control seeks to prevent, namely harm to consumers caused by a lessening of competition.

The 2010 Horizontal Merger Guidelines makes this unequivocal statement:

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.

The “unifying theme” of preventing mergers that harm customers due to enhanced market power has been in the merger guidelines for forty years.

The 2010 Horizontal Merger Guidelines further explains that enhanced market power exercised against buyers is treated in analogous fashion:

Enhancement of market power by buyers, sometimes called ‘monopsony power,’ has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers.

Purely for clarity and simplicity, in this piece I discuss harm to direct customers and final consumers. Everything I write here about protecting them also applies to protecting workers and other suppliers from mergers that lead to enhanced buyer power.

The draft Guidelines abandon enhanced market power, and thus harm to customers, as its unifying theme. Moreover, none of the draft's 13 specific guidelines even refers to market power. Indeed, the draft rarely uses the term "market power" and does not define it.

Critically, the draft says nothing to indicate that the Agencies will evaluate mergers based on whether they are likely to harm customers due to enhanced market power. Unless revised, protecting consumers will no longer be the Biden Administration's stated goal of merger enforcement. That would represent a fundamental and reckless change from forty years of merger guidelines spanning many administrations. In my view, that change is neither wise nor necessitated by the Biden Administration's desire to strengthen merger enforcement.

No one should be surprised that the draft Guidelines abandon the protection of customers from harm due to enhanced market power as their unifying theme, given the prior positions taken by the Agency leaders. FTC Chair Lina Khan [has written](#) that it is an error to evaluate mergers based on their economic effects because doing so "imports into structural analysis a focus on outcomes, misreading its purpose and orientation and potentially exposing it to weaker enforcement." Favoring an approach based on preserving deconcentrated market structures, [she believes](#) that focusing on harm to consumers "has warped America's antimonopoly regime, by leading both enforcers and courts to focus mainly on promoting 'efficiency' on the theory that this will result in low prices for consumers." Assistant Attorney General Jonathan Kanter has not gone so far, but [he has stated](#) the consumer welfare standard "does not reflect the law as passed by Congress and interpreted by the courts." Despite these statements, I hold out hope that the draft Guidelines will be revised to place consumer harm front and center.

New Theme: Preserving Deconcentrated Market Structures

The draft Guidelines do not offer a single, new unifying theme. What are its major themes?

One major theme that comes across loud and clear is that a merger will be prohibited if it "may substantially lessen competition or tend to create a monopoly," as per the text from Section 7 of the Clayton Act. The phrase "lessen competition" and its cognates appear more than one hundred times in the draft Guidelines. There is, of course, nothing wrong with Guidelines referring to the statutory language they are meant to effectuate. But incessant references to the broad statutory language found in Section 7 of the Clayton Act provide no guidance to the business community or the courts. Indeed, more than fifty years of Guidelines are testament to the value of going beyond that statutory language to clarify how the Agencies will enforce Section 7 consistent with the case law that has evolved to interpret the statute.

The draft should be revised to explain how the Agencies operationalize the core concept of a "lessening of competition." The Guidelines do state: "Competition often involves firms trying to win business by offering lower prices, new or better products and services, more attractive features..." The draft should be revised to build on this helpful language. The Guidelines should clarify that the goal of the Agencies is to protect customers by stopping mergers that harm them through higher prices, lower quality, reduced innovation, etc. due to reduced competition. That change will make the Guidelines more effective at deterring mergers that "may substantially lessen competition," by making them more coherent and specific, by clarifying what evidence is

needed to rebut the presumptions asserted in the draft, and by weakening the inevitable arguments from merging firms that the new guidelines are inconsistent with recent case law.

A second major theme found in the draft Guidelines is broad skepticism if not hostility to mergers. Such hostility is a sharp change from the 2010 Guidelines. Those Guidelines strengthened merger enforcement by making it easier for the government to define narrow markets, including markets for targeted customers, and to win based on a theory of unilateral anticompetitive effects. They [achieved widespread acceptance and credibility](#) by presenting a balanced yet pro-enforcement view and by applying widely-accepted economic principles. For example, they acknowledged that many mergers are competitively neutral or beneficial. The draft Guidelines seem instead to be an ideological or political statement, making them less persuasive in court and less durable. Taken at face value, they seem designed to enable the government to win in court without regard to whether a proposed merger is actually harmful rather than beneficial to customers. Notably, Guidelines 1-8 of the draft Guidelines assert that the government can win in court by clearing any one of eight rather low bars. That claim echoes Justice Potter Stewart's famous quip in his dissent in the [Von's Grocery case in 1966](#): "The sole consistency that I can find is that in litigation under §7, the Government always wins."

The third major theme I detect in the draft Guidelines is that deconcentrated market structures should be preserved, along with the corollary that successful firms should not be allowed to grow further through acquisition. This view can be found in [Chair Khan's writings](#): "Congress originally passed antitrust laws to safeguard against excessive concentrations of private power and to protect market structures that distributed individual opportunity and prosperity."

Many passages in the draft Guidelines fit with this theme. Perhaps most important, a "lessening of competition" seems to be equated with "greater market concentration" without reference to the benefits that competition produces for customers, such as low prices and higher quality products and services. Here are a few such passages. Guideline 1 refers to market structure without any discussion of the merger's effects on people. In Guideline 4, "market deconcentration" itself is listed as a "procompetitive effect" of new entry into a market, rather than something that *leads* to procompetitive effects. Guideline 6 asserts a structural presumption against vertical mergers without any discussion of whether the merger will benefit or harm customers. Guideline 7, which seeks to prevent a firm with at least a 30 percent share of one market from expanding into neighboring markets by acquisition, does not inquire into whether that expansion would benefit or harm customers. Guideline 8 would stop a merger that furthers a trend toward concentration, regardless of whether that trend was serving to benefit or harm customers, and regardless of whether the merger itself would benefit or harm customers.

All of these passages need to be revised to explain that the concern ultimately is about harm to customers caused by diminished competition. Done properly, such revisions would promote *stronger* merger enforcement than does the current draft by clarifying what it means to "lessen competition" while not placing an undue evidentiary burden on the government.

Implications of the Structural Approach Taken in the Draft Guidelines

What difference will it make if the Agencies put these draft Guidelines into effect?

My concerns with the draft Guidelines are greatest for mergers that are likely to benefit customers while increasing concentration in at least one market or enabling a successful firm to further grow. In other words, my concerns arise in situations where the fundamental change

announced in the draft Guidelines—from stopping mergers that enhance market power to stopping mergers that increase market concentration or allow a successful firm to grow further—really matters. Which mergers are those?

For many horizontal mergers, the goal of preserving a deconcentrated market structure overlaps with the goal of protecting customers from harm due to enhanced market power. After all, in the 1963 [Philadelphia National Bank case](#), which established the structural presumption for horizontal mergers, the Supreme Court explicitly linked increased market concentration to harm. The Court stated that a reduction in “the number of banks in the locality” would likely diminish “the vigor of competition for filling the marginal small business borrower’s needs,” harming those borrowers due to their “concomitantly greater difficulty in obtaining credit.” But even for these horizontal mergers, the draft would make merger enforcement less clear and less coherent.

Furthermore, some horizontal mergers would be treated very differently under the draft guidelines than under the 2010 Horizontal Merger Guidelines. Notably, under Guideline 8 the Agencies would block virtually any merger taking place in an industry experiencing a trend toward concentration. Guideline 8 considers only structural factors, not economic effects. The fundamental problem is that Guideline 8 does not inquire into *why* there is a trend toward concentration or whether that trend has helped or hurt customers. Consider, for example, an industry in which technological change is increasing the minimum efficient scale, which in turn is causing smaller firms to combine and exit. Under the draft guidelines, those responses would count *against* a proposed merger. The Agencies might well block a merger involving two firms, each with a market share of 10 percent, even if that merger would allow the merged entity to gain scale to compete more effectively against larger firms to the benefit of customers. Indeed, Section IV.3.D tells us that the Agencies would not credit any efficiencies for such a merger, even proven ones. It makes no economic sense to say that such a merger “lessens competition.”

My concerns are greatest for non-horizontal mergers. Most worrisome, Guideline 7 states that a firm cannot use an acquisition to “extend a dominant position” into a “related market.” As stated, this prohibition applies regardless of whether the acquisition is harmful or beneficial to customers. Guideline 7 would ensnare many firms, because a firm is said to have a “dominant position” if its market share is at least 30 percent. Various tactics that multi-product firms often use to compete, such as offering multi-product discounts “or otherwise linking sales of the two products” are viewed with suspicion, regardless of whether they are antitrust violations. The draft states that the Agencies “instead will assess whether such conduct, if it were to occur, may tend to extend the firm’s dominant position.” The draft Guidelines seem to ignore the substantial pro-competitive effects that commonly arise when successful firms expand and inject more competition into adjacent markets by acquisition. Guideline 7 can be fixed by clarifying that such extensions will only be blocked if they are likely to harm customers in that related market.

Guideline 6, which seeks to create a structural presumption against certain vertical mergers, also suffers because it is not rooted in harm to customers. The draft states: “If the foreclosure share is above 50 percent, that factor alone is a sufficient basis to conclude that the effect of the merger may be to substantially lessen competition, subject to any rebuttal evidence.” This Guideline lacks a sound economic basis, either theoretically or empirically, if the goal is to protect customers from the exercise of market power. Furthermore, it is not clear what would qualify as an effective rebuttal. Suppose the merging parties show that the merger will enable it to achieve cognizable efficiencies that are large enough that customers will benefit from the merger. Will the Agencies stand down? If merger enforcement is about preventing mergers that harm

customers by leading to enhanced market power, they will. Under these draft Guidelines, it would seem not. (For similar reasons, the entire draft lacks clarity about what constitutes an acceptable rebuttal.) Guideline 6 should be dropped or somehow folded into Guideline 5.

Lastly, Guideline 5, which applies to mergers involving products or services that rivals may use to compete, lacks clarity and coherence because it is untethered from customer harm. The basic ability-and-incentive framework described in Guideline 5 has good economic pedigree, but the draft does not employ that framework to determine whether customers will be harmed by the merger rather than benefit from it. Instead, the draft suggests that harm to *rivals* is enough to trigger a challenge by the Agencies. Guideline 5 can be fixed by explaining that the ultimate concern is harm to customers and by addressing how the Agencies account for the benefits as well as the harms to customers from combining complementary activities within a single firm.

In summary, concerns about mergers that “may substantially lessen competition or tend to create a monopoly” are really about the risk of losing what competition delivers to real people, such as lower prices, better products, and greater innovation. We cannot effectively and consistently police merger activity to prevent a lessening of competition unless we use tools that identify when competitive activity is or is not delivering these outcomes.

Author Disclosure: I am currently consulting for parties that have a financial interest in the Merger Guidelines. Please see my full disclosure statement [here](#).

How Would These Draft Guidelines Work in Practice?

Carl Shapiro

ProMarket Draft Merger Guidelines Symposium

1 September 2023

The [Round One](#) authors most supportive of the draft Merger Guidelines appear to agree that the draft announces a dramatic shift in merger policy. Unlike me, however, they see that shift as a long-overdue return to what Congress intended in 1914, when the operative language in Section 7 of the Clayton Act first became law, or in 1950, when Congress expanded the statute to include asset purchases and non-horizontal mergers and acquisitions.

If the Agencies believe that Congress has instructed them to challenge some class of mergers that does not harm counterparties based on enhanced market power, they should state that explicitly. I am skeptical of that claim, based on the statutory language and decades of antitrust case law.

For example, suppose a firm acquires an asset (a physical facility, some intellectual property, or an ongoing business operation) that allows it to enter into a new market more rapidly and more efficiently than would otherwise be possible. Suppose the acquisition will benefit customers in that new market and there is no prospect that it will tend to create a monopoly. Both common sense and economics tell us that this acquisition is a normal, healthy part of the competitive process that injects more competition into that new market. Yet the draft regards many such acquisitions as illegal extensions of a “dominant position” that “lessen competition.” That conclusion makes no sense. For centuries, “competition” has been understood to embrace just this type of dynamism, which has been central to past economic growth and is the fuel for future prosperity.

My focus in this piece is on how changes proposed in the draft guidelines would actually work in practice under current law. My assessment here builds on my [Round One submission](#), which expressed concern about the Agencies abandoning the central goal of protecting customers from mergers that harm them due to enhanced market power.

Horizontal Mergers

I applaud the Agencies for moving in the direction of stricter enforcement for horizontal mergers. My comments here are directed at the question of whether the draft is likely to be effective and durable in stopping truly harmful mergers while allowing beneficial ones.

Being in favor of stricter enforcement, I am concerned by the *absence* of several important concepts that have strengthened the Agencies’ hand in court. Here are a few examples.

- Where is the language warning courts not to accept overly broad markets in which the merging firms’ market shares are small, if there is direct evidence that the merger is likely to harm customers? The 2010 Guidelines, which I helped draft as Deputy Assistant

Attorney General for Economics at the Antitrust Division, states: “Where analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects.”

- Why does the draft downplay the role of the hypothetical monopoly test (HMT) as a method for defining relevant markets by identifying “reasonable” substitutes? The HMT is well-established in the case law and is often used in court by the Agencies to establish narrower markets than the merging firms propose based on the “practical indicia” from the *Brown Shoe* case. Recognizing this, the 2010 Guidelines added language to explain how and why the HMT often leads, correctly, to narrow markets, including markets for targeted customers. The past 13 years has proven the effectiveness of that strategy.
- Where is the language explaining that market shares calculated in broad markets can falsely suggest that a merger will not harm customers? The 2010 Guidelines states: “Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market.” This critical idea is then illustrated using an example involving a motorcycle merger. The 2010 Guidelines further explains: “The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger’s likely competitive effects.” These statements have strengthened the Agencies’ hand in court over the past 13 years.
- Why are there no examples illustrating how the Guidelines operate in various settings? The 2010 Guidelines provides 24 concrete examples designed to show the manner in which mergers may be harmful and how to identify those effects. These examples have proven valuable and instructive. Related, does the [2006 Commentary on the Horizontal Merger Guidelines](#) remain a valuable supplement to these guidelines, or not?

The important ideas highlighted above [helped the Agencies prevail](#) in challenges to mergers relating to tax preparation software, food distribution, health insurance, office supplies, hospitals, and book publishing, among others. Their absence from the draft is worrisome and perplexing.

I see no tension between retaining these important pro-enforcement ideas and updating the Guidelines to reflect new learning and the accumulation of Agency experience. The most valuable new material in the draft—such as the parts that discuss acquisitions of potential competitors, multi-sided platforms, and serial acquisitions—[could easily be included](#) in updated guidelines without changing their unifying theme or removing the ideas just identified.

So far as I can tell, these important ideas were removed as part of the overall shift away from evaluating mergers based on whether they harm customers due to enhanced market power. Whatever the reason, their removal would weaken merger enforcement. Hence my concern.

The Structural Presumption: Guideline 1

Herb Hovenkamp and I have [called for strengthening the structural presumption](#) that has applied to horizontal mergers for 60 years under the Supreme Court’s *Philadelphia National Bank* decision. The structural presumption is critical in practice because the Agencies typically prevail in merger litigation by using it to establish their *prima facie* case. I welcome efforts by the

Agencies to utilize the structural presumption more effectively. Nancy Rose and I have [provided specific suggestions](#) on how to do this. Downplaying the HMT is not one of them.

Guideline 1 adds a structural presumption if the market share of the merged firm exceeds 30% and the increase in the HHI is at least 100, citing *Philadelphia National Bank*. The 30% figure comes straight from that case, but I do not understand the basis for the 100 point increase in the HHI. The market shares of the merging firms in *Philadelphia National Bank* were roughly 20% and 15%, so the increase in the HHI was about 600, not 100. This is not a small discrepancy.

Guideline 1 also lowers the HHI thresholds that trigger the structural presumption back to the levels found in the 1982 and 1992 Merger Guidelines. I can support that change, but only if the Agencies are going to consistently enforce near these levels, which are [far lower than the HHI levels found in litigated cases over the past 20 years](#). If not, then lowering the thresholds will merely provide misleading guidance and undermine the credibility of the Merger Guidelines. After all, the HHI thresholds were raised in 2010 based on the good-government principle that official guidelines should accurately reflect Agency practice, as Assistant Attorney General Christine Varney [explained in 2010](#).

So far as I can tell, all of the horizontal merger cases litigated by the Biden Administration have involved HHI levels well above the 2010 thresholds. The HHI increases all exceed 800.

| Merging Parties | Relevant Market | Post-Merger HHI | Increase in HHI |
|--|--|-----------------|--------------------|
| United States Sugar/Imperial Sugar | Production and sale of refined sugar in the Southeast | over 2800 | over 800 |
| United States Sugar/Imperial Sugar | Production and sale of refined sugar in Georgia and its neighboring states | over 3100 | over 1100 |
| Pengiuin Random House/Simon & Schuster | U.S. publishing rights to anticipated top-selling books | 3111 | 891 |
| UnitedHealth Group/Change Healthcare | Sale of first-pass claims editing solutions in the United States | at least 5625 | at least 2500 |
| Booz Allen/EverWatch | Sale of signals intelligence modeling and simulation services to NSA through the OPTIMAL DECISION contract | 10,000 | merger to monopoly |
| ASSA ABLOY/Spectrum Brands | Premium mechanical door hardware in the United States | at least 4000 | at least 1600 |
| ASSA ABLOY/Spectrum Brands | Smart locks in the United States | at least 3000 | at least 1200 |

Given this track record, and limited resources, I wonder whether the Biden Department of Justice and Federal Trade Commission have been constrained by the HHI thresholds in the 2010 Guidelines, and if so in what way.

Of course, HHI thresholds only apply after a relevant market has been defined. In 2010, my colleagues at the Antitrust Division and I recognized that the most important step to establishing the structural presumption was to put forward a relevant market that would hold up in court. See above. We did not relish trying to convince a federal judge that a merger involving low market shares warranted a strong structural presumption, especially given the sliding scale established in the widely-cited [Baker Hughes](#) case: “The more compelling the prima facie case, the more

evidence the defendant must present to rebut it successfully.” The path to victory for the Agencies typically involves establishing narrow markets, not relying on low market concentration thresholds.

Loss of Head-to-Head Competition: Guideline 2

I like the idea behind Guideline 2. Economists have long recognized that the loss of competition between the merging firms alone can cause substantial harm to customers. The concept of unilateral effects was introduced into the Guidelines in 1992 and further developed in 2010.

Economists have also recognized for many years that unilateral effects are best diagnosed based on [diversion ratios and margins](#) and related methods, not based on HHI levels. The 2010 Guidelines introduced [Upward Pricing Pressure](#) into the Guidelines to reflect advances in economic learning. The strategy in 2010 was pragmatic: to put unilateral effects on a more solid footing in the case law. That goal has been achieved.

The Agencies should explain how Guideline 2 will operate independently of Guideline 1. Suppose the court settles on a relevant market in which the merging firms have market shares of 8% and 4% (say), and the merging firms argue that their merger cannot violate Section 7 given these low market shares, citing *Philadelphia National Bank* and the thresholds found in Guideline 1. What will the Agency say in response? My guess is that the Agencies will assert that the merger is nonetheless illegal based on direct evidence that it will lead to higher prices. Is that the idea?

Trend Toward Concentration: Guideline 8

Guideline 8 lacks an economic foundation and would make it harder for industries to make beneficial adjustments to changing conditions, especially given that the Agencies will flatly ignore proven merger synergies when applying Guideline 8. In my [Round One submission](#) I stated: “Guideline 8 considers only structural factors, not economic effects. The fundamental problem is that Guideline 8 does not inquire into *why* there is a trend toward concentration or whether that trend has helped or hurt customers.”

Guideline 8 should be dropped entirely. Industry trends would remain relevant, not for their own sake but rather to the extent that they illuminate a merger’s likely effects.

If the Agencies retain Guideline 8, they should explain how it reflects “the collected experience of the Agencies over many years of merger review in a changing economy.” I think not.

Entrenching or Extending a “Dominant Position”

Guideline 7 is fundamentally flawed and dangerous, especially because it is so broad, applying even to “mergers that are neither strictly horizontal nor vertical, so the Agencies may seek to identify any connection suggesting the merger may entrench or extend the dominant position.”

Entrenching a “Dominant Position”

Under Guideline 7, the Agencies could challenge many non-horizontal acquisitions that make the acquiring firm a stronger, more effective competitor in a market where it already has a market share of at least 30%. Under Guideline 7, if a firm with a market share of at least 30% purchases an asset that allows it to grow its share by offering customers lower prices or better products, that would “reduce the competitive structure of the industry” and “entrench” its “dominant position.”

Critically, the Agencies indicate that they will *not* evaluate such acquisitions based on their effects on customers. Rather, the stated goal is to “preserve the possibility of eventual deconcentration.” Acquisitions that increase entry barriers or deprive rivals of scale economies or network effects are explicitly identified as involving entrenchment, without any inquiry into whether these acquisitions benefit or harm customers. This approach would protect rivals from stronger competition enabled by acquisitions. Count me out.

I have to wonder what other countries will think if this becomes the official policy of the United States, after we spent decades teaching the rest of the world that efficiencies are not a dirty word.

Extending a “Dominant Position”

Overwhelming evidence teaches us that competition is normally enhanced when a capable firm expands into a new market by acquiring a participant in that market. The canonical business model is for the acquiring firm to leverage its core strengths to gain a competitive advantage in the new market and grow its market share there. Acquisitions often accelerate this process.

Yet Guideline 7 announces that the Agencies will challenge such acquisitions if the acquiring firm has at least a 30% market share in an existing market and if the acquisition “may tend to extend” that position into the new market, even if there is no prospect that the acquisition will tend to create a monopoly. Critically, the Agencies will not base their evaluation of the acquisition on whether it benefits or harms customers in the new market. They simply ask whether the acquiring firm may gain a 30% share in the new market. Guideline 7 does not explain what evidence (if any) would convince the Agencies *not* to challenge such an acquisition. Evidence that the acquiring firm has capabilities that will enable it to grow its share in the new market would seem to count *against* the acquisition. That is stunning to me.

If Guideline 7 were put into practice, a great many beneficial acquisitions that enable successful firms to enter and grow in adjacent markets, injecting more competition into those markets, would be at risk of challenge. If a large number of such acquisitions were deterred, the damage to the American economy would be severe.

Amazon provides a salient example of what is at stake. The [report released by the House Judiciary Committee](#) in October 2020 contains a section on Amazon’s acquisitions (pp. 219-224). A major concern expressed there is that these acquisitions have “effectively protected and expanded Amazon’s market power in e-commerce and helped Amazon extend that power to other markets.” The largest recent acquisitions viewed with suspicion are Whole Foods (2017), Ring (2018), and PillPack (2018). I have not studied these acquisitions in detail, but it strikes me as pro-competitive for Amazon to enter new markets (here, brick-and-mortar supermarkets, home security, and online pharmacies) by leveraging its strength in distribution, logistics and procurement, its trove of data about consumer purchasing patterns, and its extensive customer relationships. Yet these appear to be the types of acquisitions that Guideline 7 intends to challenge, without regard to whether they benefit or harm customers and without regard to whether they promote or suppress “competition” as that term is conventionally understood.

Challenging acquisitions that enable successful firms to inject more competition into related markets to the benefit of customers would be a grave error: doing that would protect incumbent firms in those markets from competition, harming consumers in the process. The best I can say about such challenges is that they would almost certainly fail in court.

If the Biden Administration believes these types of acquisitions need to be prevented, it should go to Congress to seek new legislation. In a democracy, that would be the proper way to make such a dramatic policy change, not by inserting that policy change into agency guidance that purports to enforce existing law.

More generally, if the Agencies persist in announcing radical changes in their new Guidelines, the broader danger is that the courts will not accept those Guidelines as persuasive authority. Moreover, by shifting the emphasis from economic principles consistent with the case law to a recitation of mostly outdated case citations, the draft cedes the high ground, the “principal analytical techniques” explained in prior merger guidelines, where the Agencies’ experience and deep expertise is likely to command the most respect from the courts.

Author Disclosure: I am not currently consulting on any mergers. I am currently consulting for parties that have a financial interest in the Merger Guidelines. See [here](#) for my full disclosure statement.