AMERICAN ECONOMIC LIBERTIES PROJECT

Before the Department of Justice and the Federal Trade Commission
Response to Draft Merger Guidelines
Docket ID FTC-2023-0043

Written Comments from the American Economic Liberties Project
Request for Comments on Draft Merger Guidelines

September 18, 2023

The American Economic Liberties Project ("Economic Liberties") is a nonprofit research and advocacy organization dedicated to understanding and addressing the problem of concentrated economic power in the United States. We submit this comment with Professor Robert H. Lande, the Venable Professor of Law Emeritus at the University of Baltimore School of Law,[1] in response to the Draft Merger Guidelines proposed by the Department of Justice Antitrust Division and the Federal

[1] Professor Lande is the Venable Professor of Law, Emeritus, at the University of Baltimore School of Law and a Director of the American Antitrust Institute. He previously worked at Jones Day and at the Federal Trade Commission (the "FTC"), where he worked on mergers and other types of antitrust cases. He has authored or co-authored more than 80 antitrust publications, 12 of which are about merger enforcement. Eleven have been reprinted in whole or in part, and he was the co-winner of the Cohen Foundation Award for best annual Antitrust & Trade Regulation scholarship (twice) and the FTC's annual award for best trade regulation scholarship by an employee. He has testified before subcommittees of the U.S. House of Representatives and the U.S, Senate, the Antitrust Modernization Commission, and the U.S. antitrust enforcement agencies. Professor Lande has also given competition advice to enforcement officials from several nations and has given antitrust talks in Italy, Spain, Japan, England, Belgium, Venezuela, and Peru.

Trade Commission (together, "the Agencies"). Economic Liberties and Professor Lande write together in support of the Agencies' efforts to improve the Merger Guidelines, last updated in 2010, to match the market realities of the highly concentrated and monopolized markets of today, to defend the legal and policy foundations of the Draft Merger Guidelines as proposed by the Agencies, and to suggest key revisions to strengthen them.

Updating the Merger Guidelines now is more important than ever, as the scale of anticompetitive behavior, concentration, and monopoly in the American economy is at unprecedented levels. A majority of industries in the United States have become more concentrated since the 1990s,[2] markups of consumer prices over the costs of production have increased dramatically since the 1980s,[3] and American markets are now less competitive than other comparable markets abroad.[4] We and many others have already recounted the many harms caused by this situation – higher prices, less investment, slower growth, less opportunity, weaker democratic institutions, and so on – and how lax enforcement of this country's antitrust laws has contributed to these problems.[5] Central to this decline in competition are changes in merger enforcement

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[2] Grullon, G., Larkin, Y., & Michaely, R. (2019). Are US industries becoming more concentrated?. *Review of Finance*, *23*(4), 697-743.

[3] De Loecker, J., Eeckhout, J., & Unger, G. (2020). The rise of market power and the macroeconomic implications. *The Quarterly Journal of Economics*, *135*(2), 561-644.

[4] Philippon, T. (2019). *The great reversal: How America gave up on free markets*. Harvard University Press.

[5] Written Comments from the American Economic Liberties Project, Response to Request for Information on Merger Enforcement, April 2022, *available at*:

since the early 1980s. The Reagan Administration's antitrust enforcers at the Department of Justice (the "DOJ") revised the Merger Guidelines in 1982 with the specific aim of scaling back enforcement of the Clayton Act's merger provisions.[6] This coincided with a sharp decline in merger challenges by the Agencies, who at the time had an explicit understanding that the policies they were implementing ran contrary to original intent and meaning of Section 7.[7] The Draft Merger Guidelines released last month will finally correct course and address the market realities of today.

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http://www.economicliberties.us/wp-content/uploads/2022/08/MergerGuidelines_QuickTake_R2-3.pdf; Brown et al., "The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New Structuralist Approach," American Economic Liberties Project, January 2021, *available at*: https://www.economicliberties.us/our-work/courage-to-learn/; Kwoka, J., "Mergers, merger control, and remedies: A retrospective analysis of US policy", MIT Press, 2014. Kwoka's review of the evidence led him to conclude that "the agencies … fail[ed] to challenge a considerable fraction of those [mergers] that result[ed] in price increases." *Id*. at 126. *See also* Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. S67, S73–76 (2014); Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of 'Redundant' Competitors*, 2018 Wisconsin L. Rev. 783, 801-07 (2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3134480.

[6] Eisner, M. A., *Antitrust and the triumph of economics: Institutions, expertise, and policy change*, UNC Press Books, 1991; Nicholas Short, "Antitrust Deregulation and the Politics of the American Knowledge Economy", Working Paper, September 3, 2021, *available a*t: https://scholar.harvard.edu/nickshort/publications/antitrust-deregulation-and-politics-american-knowledge-economy.

[7] 15 U.S.C. § 18; Erik Peinert, "Mergers and Smoking Guns," Promarket, May 13, 2022, *available at*: https://www.promarket.org/2022/05/13/mergers-and-smoking-guns/.

This comment focuses on features of the Draft Merger Guidelines that have been subjected to the most criticism.[8] Section I outlines the policy functions and purposes of having merger guidelines promulgated by the Agencies as well as the aims of merger enforcement. We argue that an emphasis on clear, bright-line rules and presumptions provides necessary and generalizable guidance for underfunded antitrust enforcers tasked with evaluating thousands of mergers every year within the budgetary and time constraints, as well as for executives and attorneys considering the risks and benefits of going forward with a new transaction. Section II discusses the importance and legal foundations of structural presumptions and the incipiency standard in merger enforcement. Section III discusses vertical mergers, particularly supporting the agencies' choice of a clear, bright-line presumption for a market share of 50% for vertical leveraging. Section IV discusses new issues with merger enforcement in the contemporary economy, particularly the issues of common ownership by institutional investors like Vanguard and BlackRock, and the anticompetitive business strategy of "serial acquisitions" often pursued by private equity firms.

The Draft Merger Guidelines illustrate how our existing antitrust laws can and will address the competition problems that exist in today's economy. As demonstrated below, the Draft Merger Guidelines are supported by an ordinary

[8] Economic Liberties is submitting a separate comment focusing on the question of merger enforcement and labor markets, so this comment will not be addressing the issues of monopsony power and labor markets addressed in Guideline 11.

reading of Section 7 of the Clayton Act, a robust body of judicial decisions, and sound economic principles. We look forward to their implementation in the near future.

I. Purpose of Guidelines

Section 7 condemns as illegal any merger where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[9] That language is broad, so the Merger Guidelines, first published by DOJ in 1968, serve as public guidance from the Agencies to convey what information and metrics they will consider when evaluating a merger's legality under Section 7. They also provide guidance to government lawyers tasked with making enforcement decisions and, though not binding on the courts, are a "benchmark of legality" viewed as "persuasive authority."[10]

A. Harms Stem from Market Power

The Draft Merger Guidelines rightly focus on a substantial lessening of competition, but they fail to succinctly and in one place provide an explanation why this is harmful. This absence has led some critics to incorrectly say that the Draft Merger Guidelines are not concerned that mergers might lead to market power and its harmful effects. Some future judges could come to this same conclusion.

To prevent this interpretation, the Guidelines should make it clear that a lessening of competition can lead to market power, and that this is harmful for a

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[9] 15 U.S. Code § 18.

[10] *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014 WL 203966, at *70 (N.D. Cal. Jan. 8, 2014); *see also United States v. Kinder*, 64 F.3d 757, 771 (2d Cir. 1995) (Leval, J. dissenting) (collecting cases).

range of reasons, not just because it creates inefficiency or harm to consumers. A powerful way the Guidelines could express the goals of the antimerger laws would be to say that these laws are concerned with preventing all of market power's potential harms. **To do this, in Section II, second par., after the first sentence, the Guidelines should insert:**

> **A substantial lessening of competition or a tendency to create a monopoly can lead to market power and therefore to many types of cognizable harms. It can lead to supracompetitive prices to purchasers, which causes both a harmful transfer of wealth from these purchasers to the firms with market power, and to allocative inefficiency. It can lead to subcompetitive prices being paid when the firms purchase labor and other inputs, and this causes a harmful transfer of wealth from workers and other suppliers to the firms with market power, as well as allocative inefficiency. It can lead to a suboptimal level of innovation, privacy, and consumer choice. It also can enable and incentivize firms to be less productively efficient.**

This language will make it clear that the central concern of merger analysis is preventing the acquisition and maintenance of market power, which in turn is concerned with much more than economic efficiency. Courts, for their part, will likely be more receptive than they are now to arguments that a merger "may" lead to any of the possible harms from market power, including increased consumer prices, less

consumer choice, stymied innovation, reduced privacy, reduced wages for workers, and less competitive prices for suppliers' inputs.

B. Bright-Line Rules and Public Notice

As outlined in the Draft Merger Guidelines and court decisions, giving force to the standards laid out in Section 7 requires a factually specific evaluation of how a given transaction might impact the economy. However, given that those determinations are specific to individual mergers, they are not always communicable in a generalizable way that effectively gives public notice regarding the sorts of mergers and acquisitions that are condemned by the law. By their very nature, the specific facts of a case do not convey general principles.

On the other hand, bright-line presumptions already adopted by the courts, and accepted by economists, are highly useful for public notice and policy. The 1963 Supreme Court decision in *Philadelphia National Bank* created a presumption that a merger creating a firm with a 30% market share is presumptively illegal.[11] This was, in fact, the original motivation behind the *Philadelphia National Bank* decision, as explained by Judge Richard Posner, who drafted the decision as a Supreme Court clerk at the time and later ratified readings of the opinion as creating a presumption.[12] Posner recollected that he based the 30% presumption on an article by Derek Bok, who emphasized simple, bright-line presumptions to determine

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[11] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

[12] Richard Posner & C. Scott Hemphill, *Philadelphia National Bank at 50: An Interview with Judge Richard Posner*, 80 Antitrust L.J. 205, 206-7 (2015),

legality.[13] Posner extended this as the basis for the *Philadelphia National Bank* decision:

> [W]hen I was assigned the Philadelphia Bank opinion, I reread [Bok's] article. What particularly struck me was his emphasis on the need to have simple rules for determining the legality of a challenged merger, or at least a simple standard of presumptive illegality, and that made a lot of sense to me.[14]

Posner continued by noting that, "The innovation of the Philadelphia Bank opinion was to have a simple standard, one of presumptive illegality plus a short list of possible rebuttal points that the defendant would be allowed to make … that's the genesis of the opinion."[15] Not only did Posner emphasize the importance of bright-line rules generally, but also that these bright-line rules should be based on structural presumptions of market concentration, with the logic that concentration facilitates collusion and pricing power:

> The fewer large firms there are in a market, the easier it is for them to collude, either explicitly or tacitly. I don't know why that isn't still worth serious consideration. And we do have to have some relatively simple presumption. Otherwise what are the courts to do? The judges are not well equipped to deal with complex economic and statistical issues … I

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[13] Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

[14] Posner & Hemphill, *supra* note 12, at 206.

[15] *Id.*

think we'll have to continue to rely, to a considerable extent, on structural factors.[16]

Following this policy logic, by then grounded in Supreme Court precedent, the original 1968 Merger Guidelines also set clear thresholds for what size mergers the DOJ would likely challenge, based on clear categories of how concentrated the market was and whether the market was already showing a trend towards concentration.[17] Even the 1982 Guidelines maintained clear structural presumptions for anticompetitive mergers.[18] Much of the purpose of this public guidance is to draw clear and easily comprehensible lines in the sand, so businesses and the public will understand which mergers are likely to face legal challenges by the Agencies and which will not. Without the presumptions, administering Section 7's future-looking standards becomes significantly more difficult for the Agencies, the courts, and attorneys advising potential merging parties.

II. Structural Presumptions and Incipiency

It is clear from both the text of Section 7 and its legislative history that Congress enacted merger control laws that embody a vigorous incipiency doctrine and a strong desire to block anticompetitive mergers well before they substantially lessen competition. The Agencies made a wise decision to center the Draft Merger

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[16] *Id*. at 207.

[17] 1968 Merger Guidelines, U.S. Dep't of Justice, *available at*: https://www.justice.gov/archives/atr/1968-merger-guidelines.

[18] 1982 Merger Guidelines, U.S. Dep't of Justice, *available at*: https://www.justice.gov/archives/atr/1982-merger-guidelines.

Guidelines around the controlling law in this area, which of course includes the incipiency doctrine and the *Philadelphia National Bank*[19] presumption.

By contrast, the outgoing 2010 Merger Guidelines only briefly mention the incipiency doctrine and do not cite *Philadelphia National Bank*. This omission sent an inadvertent signal to the courts that enforcers may not believe these precedents are good law, that they are extremely important, or that they should still govern merger enforcement. Why should the courts implement them if they are not mentioned prominently in the Guidelines? This could explain why, in recent years, many lower court judges have not given these doctrines the deference they deserve.

We believe that courts would have been and will be much more likely to use these precedents and presumptions if the Agencies adopt Merger Guidelines that do more than merely recite that *Philadelphia National Bank* is good law, and to instead expound upon the policy motivations that necessitate the incipiency doctrine, which is called for by both the text and the legislative history of Section 7.

The Guidelines should very briefly explain the most important policy rationale that supports these doctrines: competitive markets' need for apparent redundancy, meaning the need to ensure the survival of more firms and competitors than are strictly necessary to maintain competitive markets.[20] The Merger Guidelines should explain how, without these "extra" but actually quite necessary firms, competitive

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[19] 374 U.S. 321.

[20] For a full explanation of the reasons underlying the incipiency doctrine, one that shows why markets need apparent redundancy to remain resilient, see Peter C. Carstensen and Robert Lande, *supra* note 5.

markets will very often become highly uncompetitive. The incipiency doctrine and the *Philadelphia National Bank* presumption, by preserving the resiliency enabled by this apparent redundancy, helps ensure that the benefits of competition will continue to arise in the short, medium, and even in the long term.[21]

There are many reasons why markets should have these redundancies. First, the relationship between concentration and competition, and between concentration and innovation, is uncertain. Thus, overly permissive merger enforcement, by underestimating the minimum number of firms necessary to maintain competition and innovation, is likely to result in uncompetitive markets. Second, as a result of normal competition or from an unexpected shock to the market, one or more of the firms in a market frequently withers or implodes, and this often happens surprisingly quickly. Even if enforcers accurately estimated the bare minimum number of firms needed to maintain competition, by then losing a single firm, this leaves an insufficient level of competition. Finally, when enforcers challenge a merger that would have resulted in the minimum number of competitors necessary for competition, the enforcers often allow the merger to proceed subject to complex remedies. But if the remedy fails, as they often do, and one of the firms in the market

[21] The human body similarly relies on redundant systems, having evolved to possess two lungs, two kidneys, and many similarly apparently redundant biological systems. These duplications are, of course, by no means inefficient or unnecessary. Rather, they constitute an insurance policy against semi-expected and unexpected calamities. This resilient redundancy idea applies equally well to competitive markets. A revitalized incipiency doctrine would thus preserve and ensure competition while, like our biological redundancy, actually improving the overall efficiency of the overall system.

withers or goes bankrupt, the market will have too few competitors by the enforcers' own estimate.

Taken together, these scenarios often leave markets with too few serious competitors and too little competition, and the attenuation of the incipiency doctrine has allowed many mergers that have resulted in higher prices and lower levels of choice and innovation. This has been shown by recent empirical work evaluating the consequences of major mergers.[22] Moreover, other empirical work shows that large mergers do not produce significant efficiency gains overall, and often result in losses in innovation.[23]

We suggest that the Draft Merger Guidelines can revitalize the incipiency doctrine by including a brief explanation of the most important policy reason for the incipiency doctrine, which acknowledges that predicting the precise impact any acquisition might have on competition is extraordinarily difficult, if not impossible.[24] **This addition could be added to the Introduction, in footnote 4 or footnote 6, or in the text of Guideline 1 after the first paragraph:**

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[22] *Id*. at 801-14. Kwoka, supra note 5.

[23] *Id*. at 814-26. Recent analyses of the literature have demonstrated that normally, and on the whole, mergers large enough to be of concern to the Agencies do not result in significant efficiencies. Chris Sagers, *Why Do Corporations Merge and Why Should Law Care*, 56 U. MICH. L. REV. 291 (2021), a*vailable at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802581; Mark Glick, Gabriel A. Lozada, Pavitra Govindan & Darren Bush, "The Horizontal Merger Efficiency Fallacy", Working Paper No. 212, August 24, 2023, *available at* https://www.ineteconomics.org/uploads/papers/WP_212-Glick-et-al-Efficiency-final.pdf.

[24] Carstensen & Lande, *supra* note 5, at 805–06, 824.

> **As a practical matter, this means that the federal antitrust enforcers should attempt to preserve at least one more firm than they believe to be necessary to preserve competition in each relevant market. Far from being redundant, this level of competition is necessary to help ensure the market will remain competitive even if future events reduce the level of competition or number of competitors. This can happen for a large number of reasons, and often will leave markets with too few vigorous competitors. The incipiency doctrine, by preserving apparently redundant but actually necessary competition, helps ensure that markets will remain competitive and resilient into the future.**

If the enforcers include this explanation of the most important reason why the Guidelines embody Congress's incipiency mandate and the Court's *Philadelphia National Bank* presumption, federal judges will be much more likely to give these related approaches, and the relevant judgements of the federal antitrust enforcers in their case selection, the deference they deserve. This will help restore the incipiency doctrine and the *Philadelphia National Bank* presumption to their rightful places as the guardians of competition that Congress desired.

Moreover, to further bolster emphasis on the incipiency standard, the statutory phrase "may… tend to create a monopoly" should be clarified by

adding, in a footnote to the discussed sentence, wording identical to the Supreme Court's interpretation of this phrase:

> **"Under the law, agreements are forbidden which 'tend to create a monopoly,' and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement."[25]**

III. Efficiencies

Section IV of the Draft Merger Guidelines explicitly allows for an efficiency defense,[26] and we believe that it is far too permissive in its acceptance of alleged efficiency arguments. True efficiencies from mergers are rare, and we agree with Judge Richard Posner, who said in 2015: "I wish someone would give me some examples of mergers that have improved efficiency. There must be some."[27] This is one of the reasons Judge Posner concluded, even in 1976, "I would not allow a generalized defense of efficiency."[28]

Nonetheless, since the Draft Merger Guidelines do allow for an efficiencies defense, they also should include the caution originally contained in the Reagan administration's 1982 Merger Guidelines, which only allowed for an efficiencies

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[25] *Int'l Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

[26] Draft Merger Guidelines at 33–34.

[27] Posner & Hemphill, *supra* note 12, at 216.

[28] Richard Posner, *Antitrust Law: An Economic Perspective*, 112 (1976).

defense in "extraordinary cases."[29] The 1982 Guidelines wisely explained their reluctance to accept efficiency arguments as follows:

> **In the overwhelming majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Department. Except in extraordinary cases, the Department will not consider a claim of specific efficiencies as a mitigating factor for a merger that would otherwise be challenged. Plausible efficiencies are far easier to allege than to prove. Moreover, even if the existence of efficiencies were clear, their magnitudes would be extremely difficult to determine.**

This logic should be inserted into the Draft Merger Guidelines at Section IV(3) paragraph 2, after the first sentence. Moreover, Subsection 3.C of Section IV should only permit considerations of efficiencies if they "will improve competition in the relevant market or prevent the threat that it may be lessened." This idea would be easier to understand if the Guidelines also required that the efficiencies "will be passed to purchasers".

Finally, the last sentence in Subsection 3 says: "Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly."[30] This sentence is surely designed to honor the original intent of Congress when it decreed that Section 7 should prevent mergers the effect of which "may … tend to create a monopoly."[31] Period. The way the proposed sentence is worded, however, is confusing.

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[29] 1982 Merger Guidelines at 29, *available at*: https://www.justice.gov/archives/atr/1982-merger-guidelines.

[30] Draft Merger Guidelines at 34.

[31] 15 U.S.C. § 18.

This sentence could be interpreted to mean that defendants in a merger from, for example, a 30% to 50% market share would be allowed to introduce an efficiencies defense since this merger would not actually produce a monopoly, only a tendency towards monopoly. But since a 30% to 50% merger would "tend to create a monopoly" it should be prevented, without examining the alleged efficiencies. Because the statute clearly prevents every merger that "may … tend to create a monopoly," the Draft Merger Guidelines' sentence should be changed to, "Efficiencies cannot, however, be used to justify a merger that may tend to create a monopoly."

IV. Vertical Merger Enforcement

That the Clayton Act applies to vertical mergers with equal force is non-controversial.[32] As the Supreme Court stated in 1962 and as Guideline 6 reminds us, "The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the which 'deprives rivals of a fair opportunity to compete.'"[33] And so, the Agencies have, since the Merger Guidelines were first published in 1968, offered guidelines to the public regarding how vertical mergers will be evaluated under Section 7.[34] Unfortunately, the 1984 Merger Guidelines treated these transactions as pro-

[32] *See United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 590-92 (1957) (firmly stating that Section 7 applies "to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal") (citations and quotations omitted); *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962) (same).

[33] *Brown Shoe*, 370 U.S. at 323–24 (citations omitted) (cleaned up).

[34] 1968 Merger Guidelines at 8-13, *available at*: https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf.

competitive, which was the prevailing school of wisdom at the time as promulgated by Robert Bork.[35] This was, at best, a misguided view of how vertical mergers impact the economy. In truth, as shown below, we have ample real-world evidence today of how vertical mergers actually harm competition.[36]

Vertical mergers have rarely been challenged in decades, only in recent years becoming a target for government merger enforcement again. Much of the reason for this decline or dearth of enforcement is a series of assumptions originating in the Chicago school that see vertical mergers as intrinsically harmless and presumptively efficient and beneficial. Chicago school antitrust theory often presumed that vertical mergers could not foreclose competition, but would instead simply reorient vertical relationships in an industry.[37] Chicago school thinking likewise presumed that the elimination of double marginalization (EDM) – in which, post-merger, an upstream firm will transfer inputs at marginal cost rather than with an additional profit margin – will necessarily be passed on to consumers such that vertical mergers are presumed to be efficient and beneficial to consumers.[38]

Neither of these assumptions bear out in practice: the question of whether the cost benefits of EDM are passed on to consumers is highly factually specific to a given

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[35] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1963 (2018).

[36] *See generally* Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, & Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, ANTITRUST (Summer 2019).

[37] Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, 232 (1978).

[38] *Id*. at 219.

merger and market.[39] Centrally, however, leverage concerns in vertical mergers are common, and a generation of permissive policy shows this. Through the anticompetitive concerns around leverage and foreclosure, vertical mergers allow firms to created walled gardens around their core businesses, raising costs for potential or actual rivals, creating self-contained product systems where competitors are not able to create or effectively enter complementary product markets, unfairly extracting income from business partners that have become entirely dependent on the dominant firm, or entirely excluding other firms from a given market. Three recent examples highlight these problems.

The 2010 Live Nation/Ticketmaster merger combined the dominant ticketing company and the largest live events booking and venue company, giving Live Nation leverage over business partners and ample opportunity to foreclose competition from rival ticketing companies. This combined leverage over event venues allows it to effectively require the use of Ticketmaster as the ticketing service, under threat of Live Nation taking its events business to alternative venues.[40] Not only does this allow the company to extract concessions from venues, but it also forecloses competition from other ticketing companies, who find themselves shut out of the

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[39] Salop, *supra* note 35 at 1963.

[40] Christine Jurzenski, "Live Nation Stock Can More Than Double in 3 Years, Analyst Says", Barrons, April 8, 2020, *available at*: https://www.barrons.com/articles/live-nation-stock-can-more-than-double-in-three-years-analyst-51586380765.

market. Following this merger, investors refer to the company as having "an impenetrable moat that has a monopoly-like structure."[41]

AT&T's 2018 acquisition of Time Warner combined AT&T's position in media distribution with Time Warner's media content business. Even before the deal went through, executive emails showed leverage motivations, calling Time Warner's content "a weapon" for AT&T "because AT&T's competitors need Time Warner programming."[42] Following through on those motivations, AT&T used the deal to limit consumer choice and cut its cheapest product offerings.[43] The merged company also aimed to remove Time Warner products from competing services in order to create its own streaming service[44] and shut down three smaller streaming services.[45]

Northrop Grumman's 2018 acquisition of Orbital ATK shows how severe leverage concerns can be. The acquisition gave Northrop Grumman control over the solid-fuel rocket motor market upon which several of its rival defense contractors

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[41] *Id.*

[42] Cecilia Kang, "AT&T Would Use Time Warner as a 'Weapon,' Justice Dept. Says", New York Times, March 22, 2018, *available at*: https://www.nytimes.com/2018/03/22/technology/att-time-warner-antitrust.html.

[43] Jared Newman, "AT&T is killing its cheap TV bundle for cord cutters", Fast Company, June 25, 2020, *available at*: https://www.fastcompany.com/90521422/att-is-killing-its-cheap-tv-bundle-for-cord-cutters.

[44] Melissa Repko, "AT&T CEO: We'll pull TV shows, movies from rivals as we launch new Netflix-like service", Dallas Morning News, May 14, 2019, *available at*: https://www.dallasnews.com/business/local-companies/2019/05/14/att-ceo-we-ll-pull-tv-shows-movies-from-rivals-as-we-launch-new-netflix-like-service/.

[45] Adam Levy, "WarnerMedia Is Shutting Down Its Streaming Services", The Motley Fool, October 31, 2018, *available at*: https://www.fool.com/investing/2018/10/31/warnermedia-is-shutting-down-its-streaming-service.aspx.

relied to compete with Northrop Grumman for contracts. Even with an FTC consent decree requiring Northrop Grumman to fairly supply rocket motors to its competitors,[46] by July 2022 the FTC determined that Northrop had slow-walked its supply of rocket motors to Boeing.[47] When the Defense Department put out an approximately $100 billion contract to develop next-generation intercontinental ballistic missiles, Northrop won the contract by default with no competing bids. Boeing refused to bid for it,[48] stating that Northrop's control of the rocket motor market "did not provide a level playing field on which both offerors can fairly compete."[49] Northrop Grumman today controls the production of all three legs of America's nuclear weapon delivery methods encompassing land, sea, and air strike capabilities.

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[46] Decision and Order, Northrop Grumman Corporation and Orbital ATK, Inc., Docket No. C-4652, (Dec. 4, 2018) (FTC Consent Order), *available at*: https://www.ftc.gov/system/files/documents/cases/181_0005_c-4652_northrop_grumman_orbital_atk_modified_decision_and_order_12-4-18.pdf.

[47] Josh Sisco and Lee Hudson, "FTC turns up the heat on Trump-era defense merger", Politico, Jul 22, 2022, *available at*: https://www.politico.com/news/2022/07/22/ftc-turns-up-the-heat-on-trump-era-defense-merger-00047452.

[48] Anthony Capaccio, "U.S. ICBM to Replace 1970s Minuteman May Cost $111 Billion", Bloomberg, Oct 1, 2020, *available at*: https://www.bloomberg.com/news/articles/2020-10-01/pentagon-s-next-generation-icbm-program-may-cost-111-billion.

[49] Dan Leone, "Analysis: Force Boeing and Northrop Grumman to Play Nice on GBSD?", Defense Daily, Aug 7, 2019, *available at*: https://www.defensedaily.com/analysis-force-boeing-northrop-grumman-play-nice-gbsd/analysis/.

To address these common harms from vertical mergers, Guidelines 5 and 6 return to robust vertical merger enforcement and effectively restate the standard laid out by the *Brown Shoe* court, casting doubt on mergers that foreclose "access to a product, service, or customers that its rivals use to compete" and tasking the Agencies with "undertak[ing] a structural analysis of [] supply chain[s]."[50] These methods of evaluating potential harm to competition are well accepted approaches to Section 7 enforcement.[51]

Of course, our discussion of how vertical mergers harm competition is backward looking. Section 7, on the other hand, is famously forward looking and requires a prediction of future conduct and outcomes. We need look no further than *United States v. AT&T* to understand the difficulty and inaccuracy of those predictions, which are only exacerbated by an overly permissive approach to evaluating mergers and a deferential attitude towards the promises of the merging parties. AT&T's acquisition of Time Warner was allowed to go forward based in part on (1) self-serving testimony from executives that using leverage to impose blackouts

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[50] Draft Merger Guidelines at 14, 17.

[51] In two more recent vertical mergers cases, the courts recognized there "[t]here is a dearth of modern judicial precedent on vertical mergers," primarily because, prior to *United States v. AT&T* in 2018, the Antitrust Division did not pursue any for four decades. *Fed. Trade Comm'n v. Microsoft Corp.*, No. 23-cv-02880-JSC, ___ F. Supp. 3d ___, 2023 WL 4443412, at *8 (N.D. Cal. July 10, 2023) (citation omitted); *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 193–94 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019). But those courts relied on the same jurisprudence laid out in Guidelines 5 and 6, even if they did allow the mergers to go forward based on misguided trust in voluntary and unenforceable "remedies" offered up by the defendants.

on rivals "too costly to risk and that any change in that cost would not affect negotiations as the government's theory predicted" and (2) promises to honor arbitration agreements with no-blackout commitments.[52] Within five months of the district court's ruling in favor of AT&T, the merged company pulled HBO and Cinemax from Dish's satellite television service, the first blackout in HBO's 40-year history.[53]

The Live Nation-Ticketmaster merger provides an even starker picture of the dangers of more permissive vertical merger guidelines. When Live Nation and Ticketmaster announced their merger in 2008, Ticketmaster controlled 80% of the primary ticketing market.[54] The DOJ approved the transaction pursuant to a consent decree that chiefly required (1) Ticketmaster's divestment of ticketing subsidiary Paciolan to Comcast-Spectator; (2) Ticketmaster's licensing of its ticketing software to Live Nation rival Anschutz Entertainment Group ("AEG"); and (3) an agreement to refrain from certain retaliatory behavior against venue owners.[55]

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[52] *AT&T*, 916 F.3d at 1041.

[53] Jon Brodkin, "AT&T—owner of HBO and DirecTV—lets HBO go dark on Dish in money fight", Ars Technica, November 1, 2018, *available at*: https://arstechnica.com/tech-policy/2018/11/att-owner-of-hbo-and-directv-lets-hbo-go-dark-on-dish-in-money-fight/#:~:text=AT%26T-owned%20HBO%20and%20Cinemax%20have%20been%20pulled%20from,first-ever%20blackout%20for%20HBO%20in%20its%2046-year%20history.

[54] *United States v. Ticketmaster Entertainment Inc.*, No. 1:10-cv-00139-RMC, Competitive Impact Statement (Dkt. 2), at 4 (D.D.C. Jan. 25, 2010).

[55] *Ticketmaster*, Final J'ment (Dkt. 15) (D.D.C. July 30, 2010).

Fast forward ten years, and each of these conditions failed. Paciolan's success was limited to the market for college athletics ticketing; the ticketing marketplace remained highly concentrated, with Live Nation controlling 60% and AEG controlling 30%; and the live event behemoth was systematically retaliating against venues and artists that chose to do business with its competitors. In 2018, multiple venues managed by AEG in cities across the country were told they would lose concerts if they did not use Ticketmaster.[56] Live Nation was so powerful that the 2019 court filings outlining its abuses—blatant violations of the 2010 judgment—anonymized its victims to prevent further retaliation.[57] The parties agreed to a revised consent decree in 2020, but it was no more effective than the first,[58] as illustrated by the public outrage that erupted following the Taylor Swift ticketing debacle. Live Nation's acquisition of Ticketmaster foreclosed competition in over 50% of the primary ticketing market and should never have been permitted by the Agencies.

This is why the presumption set forth in Guideline 6, drawing a line where the foreclosure share exceeds 50 percent, is so important. Not only does it eliminate the need for a qualitative analysis of market conditions that, for all intents and purposes,

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[56] Ben Sisario and Graham Bowley, "Live Nation Rules Music Ticketing, Some Say With Threats", New York Times, April 1, 2018, *available at*: https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html.

[57] *Ticketmaster*, Mtn. to Modify Final J'ment and Enter Amended Final J'ment (Dkt. 22), at 7-10 (D.D.C. Jan. 8, 2020).

[58] Krista Brown and Zach Freed, "How Antitrust Enforcers Helped Create a Live Events Monster," American Economic Liberties Project, October 2022, *available at*: http://www.economicliberties.us/wp-content/uploads/2022/10/LiveNation_QuickTake_R3-3.pdf.

guesses at future market conditions. It recognizes that vertical mergers are, at certain thresholds, inherently anti-competitive, drawing support from Supreme Court cases that reached the same conclusion.[59] And it rejects the notion, that has been thoroughly disproven by antitrust scholarship and real world conditions, that they are more often procompetitive. **We applaud the Agencies' application of this presumption to vertical mergers generally in Guideline 6 and would encourage them to incorporate the same standard into Guideline 5**. Together, these two guidelines will guide the Agencies, the courts, and merging parties toward more appropriate evaluations of vertical mergers, and they will more effectively promote competition.

V. New Ownership Structures

Updating the Merger Guidelines also means considering new business practices, new ownership structures, and new threats to competition, on top of enforcement of the law as it was originally imagined. The Draft Merger Guidelines emphasize two new areas of enforcement – common ownership of competing companies and serial acquisitions. As the final House Report on Section 7 recognized,

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[59] *Brown Shoe*, 370 U.S. at 328 ("If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated …"); *Fruehauf Corp. v. Fed. Trade Comm'n*, 603 F.2d 345, 352, n.9 (2d Cir. 1979) (recognizing that the 50% foreclosure share in *DuPont* "left no doubt that the vertical tie conferred market power."). Some commentators have criticized the age of the court decisions cited in the Draft Merger Guidelines, but as other antitrust scholars have pointed out, "[a] major consequence of the Chicago School commentators' flawed economic theories with respect to vertical merger enforcement is that this body of law has remained undeveloped for the past forty years." Salop, *supra* note 35, at 1964.

"[a]cquisitions of stock or assets have a cumulative effect, and control of the market … may be achieved not in a single acquisition but as the result of a series of acquisitions."[60] Common ownership and serial acquisitions are no different. But they have skyrocketed in popularity with little legal scrutiny, and their threats to competition are unique. We laud the Draft Merger Guidelines' adoption of standards for evaluating them, but we also recommend a few minor revisions.

A. Common Ownership

With the rise of mutual funds, and now of diversified, low-cost managed investment funds, offered by companies like Fidelity, BlackRock, and Vanguard, a new category of anticompetitive harm has evolved: by having common portfolio investors, competing firms lose the managerial pressures to compete on price or for market share, leading to increased prices and less investment.

The weight of the economic evidence on the effects of common ownership has come down definitively to show that it harms competition. Common ownership structurally changes the incentives of company managers, rather than through more traditional coordination or collusion facilitated by common institutional owners.[61] Originally finding that common ownership had clear effects of softening competition

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[60] H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8.

[61] For some general reviews of this literature, see Schmalz, M. C. (2018), *Common-ownership concentration and corporate conduct*. ANNUAL REVIEW OF FINANCIAL ECONOMICS, *10*, 413-448; Schmalz, M. C. (2021) *and Recent studies on common ownership, firm behavior, and market outcomes*, THE ANTITRUST BULLETIN, 66(1), 12-38.

in the airline[62] and banking industries,[63] the economic research on common ownership has withstood a range of critiques and criticisms,[64] and has paved the way for a broad research agenda on the anticompetitive harms of common ownership. Emphatically, however, most of this research, up to and including the most recent, high-quality evidence, continues to show that common ownership softens competition to increase prices, reduce output, and increase markups, and that these effects are driven primarily through managerial incentives, not through anticompetitive coordination.[65]

By contrast, Guideline 12 emphasizes several concerns with minority ownership: the ability for the acquiring firm to influence the competitive conduct of the target firm, the reduced incentive for the acquiring firm to compete, and the acquiring firm gaining access to competitively sensitive information that its competitors do not have. While these are all valid and important concerns, they exclude one of the most central problems with common portfolio ownership as it exists today: the structurally reduced incentive to compete. The institutional investor, such

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[62] Azar, J., Schmalz, M. C., & Tecu, I. (2018), *Anticompetitive effects of common ownership*. THE JOURNAL OF FINANCE, *73*(4), 1513-1565.

[63] Azar, J., & Schmalz, M. C. (2017). *Common ownership of competitors raises antitrust concerns*. JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE, *8*(5), 329-332.

[64] Azar, J., Schmalz, M. C., & Tecu, I. (2021). *Research on the Competitive Consequences of Common Ownership: A Methodological Critique*. THE ANTITRUST BULLETIN, 66(1), 113-122.

[65] Antón, M., Ederer, F., Giné, M., & Schmalz, M. (2023). *Common ownership, competition, and top management incentives*. JOURNAL OF POLITICAL ECONOMY, 131(5), 1294-1355.

as Vanguard, does not need to pursue an intentionally anticompetitive tactic, and the target firm does not need to intentionally act in an otherwise anticompetitive manner that would be proscribed by the Sherman Act.[66]

Rather, recent economic research has repeatedly shown that the structural incentives to compete are reduced such that the effects of common ownership of stock – and the effects of the acquisitions of that stock– "may be substantially to lessen competition."[67] In addition to increased incentives to collude – as demonstrated by a recent district court decision against Delta and United[68] –common owners are also more willing to tolerate managerial slack, as vigorous competition would harm the profits of competitors also owned by the common owner.[69] Company managers themselves, knowing the performance preferences of their common shareholders, might likewise choose less competitive business and pricing strategies so as to meet shareholder expectations of broad industry earnings. And compensation packages often promoted by common owners, where executives are compensated on the performance of their entire industry rather just their own firm over which they have

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[66] *See E. I. du Pont*, 353 U.S. at 589 ("[Section 7] is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred *or are intended*.") (emphasis added).

[67] 15 U.S. Code § 18. *See also* Einer Elhauge, *Horizontal Shareholding*, 129 HARVARD L. REV. 1267 (2016) (more thoroughly discussing the illegality of common ownership under Section 7, based on these structural incentives).

[68] *In re Domestic Airline Travel Antitrust Litigation*, ___F. Supp. 3d.___, 2023 WL 5930973 (D.D.C. September 12, 2023).

[69] Antón, M., Ederer, F., Giné, M., & Schmalz, M. (2023). *Common ownership, competition, and top management incentives*. JOURNAL OF POLITICAL ECONOMY, 131(5), 1294-1355.

influence, reduces incentives for managers to compete in a way that would harm competitors' earnings.[70]

We urge the Agencies to revise Guideline 12 to reflect this reality and specify that the Agencies will consider the competition softening effects of common ownership, and of acquisitions of stock resulting in partial ownership, irrespective of whether those effects are based in anticompetitive intent or actions, which are not elements of a Section 7 claim. Guideline 12 should make clear that acquisitions will be challenged where the transaction reduces the structural incentives for companies or their management to compete, even if there is no anticompetitive intent.

B. Serial Acquisitions

A second form of harmful business practice common in the contemporary economy is that of "serial acquisitions," in which a company acquires many smaller companies in a chain of transactions. Each acquisition might have a negligible effect on competition, but in the aggregate, they eliminate competitors and may even create a monopoly. Often viewed in the context of technology giants buying up many tech start-ups over the past decade or two,[71] the strategy has been aggressively pursued by private equity firms in particular to roll up every form of business—such as dental practices, veterinary clinics, street sweepers, outpatient clinics, funeral homes, and

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[70] Elhauge, *supra* note 67.

[71] Fed. Trade Comm'n, *Non-HSR Reported Acquisitions by Select Technology Platforms* (2021), *available at*: https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study.

even housing—into a single investment firm's portfolio.[72] These acquisition strategies are frequently pursued with the exact anticompetitive motivations that Section 7 and our antitrust laws were intended to block: the acquisition of a regional monopoly over a particular service, the acquisition of purchasing power over suppliers, the elimination of competing firms to reduce competitive pressure so as to facilitate cost cutting and disinvestment. For a few examples:

- Service Corporation International (SCI) has acquired nearly all of the more than 1,700 funeral services locations they now operate in a chain of many individual transactions.[73] SCI continues this strategy, making 121 further acquisitions in 2021.[74] Bloomberg Businessweek journalists found that prices at SCI facilities were 42% higher than independently owned competitors.[75]

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[72] Denise Hearn, Krista Brown, Taylor Sekhon, and Erik Peinert, "The Roll-Up Economy: The Business of Consolidating Industries with Serial Acquisitions", American Economic Liberties Project, December 15, 2022, *available at*: https://www.economicliberties.us/our-work/the-roll-up-economy/.

[73] Nicholas V Ille, "Who is Service Corporation International (SCI)?," May 10, 2020, *available at*: https://www.us-funerals.com/who-is-service-corporation-international-sci/.

[74] *Service Corporation International: Investor Presentation*, Service Corporation International, March 2022, *available at*: https://filecache.investorroom.com/mr5ir_scicorp/233/download/SCI%20Investor%20Presentation%20March%202022.pdf.

[75] *Id*.

- Installed Building Products, an insulation contractor, has made 180 acquisitions since 1999[76] and highlights its ability to "apply increased buying power" as key to its acquisition strategy.[77]

Given the grave costs that serial acquisitions, by private equity or others, have imposed on American society, it is critically important that Guideline 9 provide robust citations to decisions supporting the Agencies' authority to use Section 7 to consider acquisitions in the aggregate and halt this harmful business tactic by unwinding anticompetitive serial acquisitions. Guideline 9 primarily relies on *Brown Shoe*, the House Judiciary Report from the legislative history of the Celler-Kefauver Act, and the FTC's Section 5 Policy Statement from last year.[78] Section 7's legislative history

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[76] Installed Building Products, 2021 Form 10-K, Securities and Exchange Commission, *available at*: https://www.sec.gov/ix?doc=/Archives/edgar/data/1580905/000158090522000004/ibp-20211231.htm

[77] *Installed Business Products: Fiscal 2021*, Installed Business Products, February 24, 2022, *available at*: https://investors.installedbuildingproducts.com/static-files/e92bc202-c256-4e3f-b333-c60df4cf6ee5.

[78] Draft Merger Guidelines, page 22.

also provides explicit support for enforcement against serial acquisitions,[79] but several other key Supreme Court and lower court decision provide authority as well.[80]

United States v. Jerrold Electronics specifically addressed serial acquisitions. It held that "[t]he effect of each of the acquisitions by the defendant Jerrold of community television antenna systems and the cumulative effect of the entire series of said acquisitions is to foreclose competitors of the defendants"[81] and enjoined the company from any further acquisitions. *United States v. Healthco* unwound four separate acquisitions of dental offices, holding that "four separate acquisitions … may be viewed in the aggregate since they are close in time, in area, and in product market

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[79] *See* H.R. Rep. No. 1191, 81st Cong., 1st Sess., at 8 (1949) ("Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition"); Sen. R. No. 1775, 81st Cong., 1st Sess., at 5 (1950) ("Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows 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.")

[80] *See Philadelphia Nat'l Bank*, 374 U.S. at 367 ("A fundamental purpose of amending § 7 was to arrest the trend toward concentration, the tendency of monopoly, before the consumer's alternatives disappeared through merger, and that purpose would be ill-served if the law stayed its hand until 10, or 20, or 30"). It is worth noting that the District Court decision in *Brown Shoe*, upheld by the Supreme Court, also explicitly consider serial acquisitions through metaphor: "A nibbler can soon consume the whole with a bite here and a bite there. So, whether we nibble delicately, or gobble ravenously, the end result is, or can be, the same." 179 F. Supp. 721, 740 (E.D. Mo. 1959), *aff'd*, 370 U.S. 294 (1962).

[81] *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 572 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

… [and] may be evaluated for their combined effect."[82] *United States v. Pennzoil* likewise enjoined an acquisition, finding that, "[w]hen large enterprises extend their power by successive small acquisitions, the cumulative effect may lead to monopoly, or lessen competition and it is important to prevent even slight increases which will be likely 'substantially to lessen competition.'"[83]

A wide range of commentators and experts agree that serial acquisitions should be addressed in the guidelines and that enforcement against them should be enhanced.[84] Crucially, however, while many of these commentators correctly view serial acquisitions as falling under the purview of Section 7 based on this case history, many of them incorrectly turn around and suggest that the agencies' reliance on these same cases is misguided in the context of the more general principles of the incipiency standard, structural presumptions, and heightened scrutiny on trends towards

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[82] 387 F. Supp. 258 (S.D.N.Y. 1975), *aff'd without op.*, 535 F.2d 1243 (2d Cir. 1975).

[83] 252 F. Supp. 962 (W.D. Pa. 1965), citing *Brown Shoe*.

[84] Cory S. Capps and Leemore Dafny, "A Conversation on the Draft Merger Guidelines," PROMARKET, August 10, 2023, *available at*: https://www.promarket.org/2023/08/10/cory-s-capps-and-leemore-dafny-a-conversation-on-the-draft-merger-guidelines/; Cristina Caffarra, "What Signal are the Draft Merger Guidelines Sending to Enforcers Elsewhere?" Promarket, August 17, 2023, *available at*: https://www.promarket.org/2023/08/17/what-signal-are-the-draft-merger-guidelines-sending-to-enforcers-elsewhere/; Carl Shapiro, "How Would These Draft Guidelines Work in Practice?" Promarket, September 1, 2023, *available at*: https://www.promarket.org/2023/09/01/carl-shapiro-how-would-these-draft-guidelines-work-in-practice/; Zephyr Teachout, "The Proposed Merger Guidelines Represent a Reassertion of Law over Ideology," Promarket, August 16, 2023, *available at*: https://www.promarket.org/2023/08/16/zephyr-teachout-the-proposed-merger-guidelines-represent-a-reassertion-of-law-over-ideology/.

concentration.[85] Specifically, most of this criticism emphasizes that merger should be assessed on their clear harms to consumers, even though serial acquisitions, by their nature, do not individually or immediately harm consumers, and require the incipiency standard to block them well before such harms could be clearly assessed. To be clear, caselaw and legal authority relied upon for, on one hand, the incipiency standard and to halt a "trend towards concentration", and, on the other, to block or unwind serial acquisitions, are one and the same.

Lastly, we urge the agencies to add specific language to Guideline 9 to reflect that they may also rely on the other prong of Section 7 – "or tend to create a monopoly" – when pursuing enforcement actions against serial acquisitions. Most of the caselaw on which the agencies rely in the current draft emphasizes the first prong – "may be substantially to lessen competition" – whereas the second more likely captures the harms and realities associated with serial acquisitions and private equity roll-ups, which are often a cumulative trend of tiny acquisitions that tend to result in a local or niche monopoly.

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[85] See, for example, criticism of the "trend towards concentration": Carl Shapiro, "Why Dropping Market Power from the Merger Guidelines Matters", Promarket, August 7, 2023, *available at*: https://www.promarket.org/2023/08/07/carl-shapiro-why-dropping-market-power-from-the-merger-guidelines-matters/; Dennis Carlton, "*Have the Draft Guidelines Demoted Economics?*" Promarket, August 4, 2023, *available at*: https://www.promarket.org/2023/08/04/have-the-draft-guidelines-demoted-economics/; Herbert Hovenkamp, "*Distinguishing Harms from Benefits in the 2023 Merger Guidelines*," Promarket, August 31, 2023, *available at*: https://www.promarket.org/2023/08/31/herbert-hovenkamp-distinguishing-harms-from-benefits-in-the-2023-merger-guidelines/.

VI. Conclusion

The Agencies' Draft Merger Guidelines represent essential updates and improvements to American merger policy. We applaud the Agencies' updates and urge several revisions to further expound upon the legal authorities and policy reasoning behind these changes, in order to demonstrate their foundations to courts. Criticisms of the Draft Guidelines – suggesting that they are either out of step with existing judicial precedent or that they do not rest on a sound policy rationale – are baseless. In today's overly concentrated and uncompetitive markets, clear and aggressive merger control policies are necessary to scale back the crisis of monopoly that has been creeping through the American economy for decades.