

A Summary of Comments on the 2023 Draft Merger Guidelines

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On July 19, 2023, the Federal Trade Commission and the Department of Justice (jointly, the Agencies) released a draft update to the merger guidelines (DMGs).¹ The proposed draft document would replace the 2010 Horizontal Merger Guidelines (2010 HMGs) and the 2020 Vertical Merger Guidelines (2020 VMGs), the latter of which were withdrawn by the FTC 15 months after being issued. The Agencies invited comments on the draft and, over a 60-day period, received 1,600 comments from antitrust practitioners, industry participants, and the general public.²

Many commenters simply provided statements of support or disapproval for the DMGs, while a smaller group of 211 comments provided more articulated feedback by attaching essays that develop arguments for the authors' positions. This article summarizes our review of these 211 comments, which come from a wide spectrum of stakeholders. We note that, as economists, we focus our summary on commentary that speaks more directly to the economic analysis that arises in merger review.

Our reading of the views expressed is that the Agencies' bold approach and tougher stance on merger enforcement, in particular for mergers involving large firms, struck a chord with many. However, there were also those who worried that the many innovations introduced by the DMGs relative to prior guidelines—such as the organization of the material into 13 standalone Guidelines with different approaches and degrees of detail, the inclusion of a broader set of competitive concerns, and the addition of legal citations—diminish the clarity and credibility of the guidelines.

Taken together, the comments indicate that there is room for the Agencies to accommodate the feedback received and clarify their guidance while keeping their priorities firm. For example, the Agencies could revise the DMGs to better explain how they interpret a lessening of competition; what role structural evidence will play going forward; how the different Guidelines relate to one another and can be rebutted; and what role efficiencies play in the analysis of mergers. Some of these revisions may also help bring back the clarity of the economics—and the teaching value—of previous merger guidelines.

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¹ U.S. Dep't of Justice and Federal Trade Comm'n, Draft Merger Guidelines (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

² While 3,313 comments were received, only 1,600 were posted for public viewing. Draft Merger Guidelines for Public Comment, FTC Docket ID FTC-2023-0043-0001 (07/18/2023), <https://www.regulations.gov/document/FTC-2023-0043-0001>. All posted comments are available at <https://www.regulations.gov/document/FTC-2023-0043-0001/comment>.

The Agencies' Tougher Stance on Enforcement Finds a Good Amount of Support, but There Are Concerns About the Reorganization of the Material and the Inclusion of Legal Citations

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When the Agencies released the DMGs, they explained that the updated draft guidelines aimed to better reflect how the Agencies determine a merger's effect on competition in the modern economy. FTC Chair Lina Kahn noted, at the time of the release, “[with] these draft Merger Guidelines, we are updating our enforcement manual to reflect the realities of how firms do business in the modern economy...these guidelines contain critical updates while ensuring fidelity to the mandate Congress has given us and the legal precedent on the books.”³ Similarly, Assistant Attorney General Jonathan Kanter stated that the DMGs “are faithful to the law, which prevents mergers that threaten competition or tend to create monopolies. As markets and commercial realities change, it is vital that we adapt our law enforcement tools to keep pace so that we can protect competition in a manner that reflects the intricacies of our modern economy.”⁴

Many commenters applauded the Agencies' effort to update the guidelines, observing that mergers that harm competition have been allowed in recent decades and that increasing enforcement is in order.⁵ Others expressed skepticism about the need to increase enforcement, observed that over-enforcement could preempt or deter mergers that would benefit the economy, or criticized the update to the guidelines as an attempt to remake the law to fit policy priorities of the Agencies' leadership.⁶

The substantial revisions in the presentation of materials relative to prior guidelines also proved controversial, even among commenters who support stronger enforcement.⁷

³ Press Release, Fed. Trade Comm'n, FTC and DOJ Seek Comment on Draft Merger Guidelines (July 19, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-doj-seek-comment-draft-merger-guidelines>.

⁴ *Id.*

⁵ Steven C. Salop, *Some Comments for Improving the 2023 Draft Merger Guidelines* 3 (Sept. 13, 2023); Johnathan B. Baker, Andrew I. Gavil, Richard J. Gilbert, Herbert Hovenkamp, Michael L. Katz, A. Douglas Melamed, Fiona Scott Morton, Daniel L. Rubinfeld, Carl Shapiro, and Howard Shelanski, *Comments of Economists and Lawyers on the Draft Merger Guidelines* 1 (Sept. 15, 2023); Darren Bush, Mark Glick, Pavitra Govindan, and Gabriel A. Lozada, *Although the New Merger Guidelines Should Be Applauded, There Is Still Room for Improvement* 1 (Sept. 15, 2023); Eleanor Fox, *The 2023 Draft Merger Guidelines: A Comment* 1 (Sept. 18, 2023); Daniel Francis, *Comments on the 2023 Draft Merger Guidelines* 4 (Sept. 12, 2023); Fiona Scott Morton, *Comments on the 2023 draft merger guidelines* 1 (Sept. 18, 2023); Thomas J. Greaney, Richard M. Scheffler, Katherine L. Gudiksen, Jaime S. King, Amy Y. Gu, Brent D. Fulton, Paul B. Ginsburg, and Daniel R. Arnold, *Comments of Professors of Law and Economics, Economists, and Health Policy Researchers on the Draft Merger Guidelines* 1–2 (Sept. 19, 2023); Mark Lemley, *Free the Market—How We Can Save Capitalism from Itself* 46 (Sept. 5, 2023); Russell Hollander and Matthew Loeb, *Directors Guild of America and International Alliance of Theatrical Stage Employees* 1–2 (Sept. 15, 2023); Jeff Chester, Center for Digital Democracy, *Comment on the 2023 Merger Guidelines* 1–2 (Sept. 18, 2023); Jonathan S. Jones, American Academy of Emergency Medicine, *Draft Update of Merger Guidelines* 1–2 (Sept. 13, 2023).

⁶ Mark Israel, Dan O'Brien, Jonathan Orszag, Jeremy Sandford, Loren Smith, and Nathan Wilson, *Compass Lexecon, Guidelines Lacking Guidance: Improving the FTC/DOJ Draft Merger Guidelines* 4 (Sept. 19, 2023); Sean Heather, U.S. Chamber of Commerce, *RE: Response to Request for Public Comment on Draft Merger Guidelines* 1–2 (Sept. 18, 2023); John L. Thornton, Hal S. Scott, and R. Glenn Hubbard, Committee on Capital Markets Regulation, *Re: FTC-2023-0043—Draft Merger Guidelines for Public Comment* 1–2 (Aug. 15, 2023); Melinda Hatton, American Hospital Association, *Re: FTC-2023-0043: Draft Merger Guidelines* 1–2 (Sept. 13, 2023); Thomas Lenard, Scott Wallsten, and Sarah Oh, Technology Policy Institute, *Comments Filed with the Federal Trade Commission on the Matter of “Draft Merger Guidelines”* 1–2 (Sept. 18, 2023); John R. Dearie, Center for American Entrepreneurship, *Re: FTC and Department of Justice Draft Merger Guidelines* 2 (Sept. 15, 2023).

⁷ Baker et al., *supra* note 5, at 1; Scott Morton, *supra* note 5, at 1; Carl Shapiro, *Recommended Revisions to the Draft Merger Guidelines* 1 (Sept. 14, 2023); Herbert Hovenkamp, *The 2023 Draft Merger Guidelines: A Review* 4–5, 10 (Sept. 8, 2023); Francis, *supra* note 5, at 1.

One of the innovations in the DMGs that sparked the most controversy is the inclusion of extensive citations to case law. Some commenters praised the approach of anchoring the analytical approach in the law that the Agencies are called to enforce.⁸ However, many disagreed with this approach—some of them vehemently—stating that it turned the guidelines into a legal brief, and imperiled their achievements to date: to support courts and practitioners by providing a summary of the conceptual and methodological tools in economics used by the Agencies to evaluate mergers.⁹

Several commenters pointed out that the DMGs mostly cite case law from more than 50 years ago, and neglect more recent Supreme Court decisions in antitrust matters more widely, as well as the record in lower courts on merger matters, thus raising the concern that the selection of legal citations is inadequate or potentially partisan.¹⁰ Some also observed that using the guidelines to convey how the Agencies currently interpret merger law could lead to substantial revisions of the guidelines or to their retraction when administrations change. This stands in contrast to prior merger guidelines, which focused on summarizing consensus economics and, therefore, evolved only gradually as economic research advanced.¹¹

Another feature of the DMGs that some commenters found to be misaligned with standard economic approaches is the organization of the analysis into 13 standalone Guidelines. Commenters pointed out that these Guidelines often overlap in terms of addressing the same economic mechanism (for example, Guidelines 5 and 6 or Guidelines 1, 2, and 4), and in some cases are not tied to any specific economic mechanism (Guidelines 7 and 8).¹² This is again a departure from prior merger guidelines which provided overarching frameworks for analyzing theories of competitive harm and for organizing the supporting evidence.

Some commenters concluded that an important downside of mixing legal and economic analysis and breaking up the overall economic frameworks into component pieces is that the teaching value of the merger guidelines is greatly diminished: readers are left to disentangle law from

⁸ Open Markets Institute, Athena Coalition, Campaign for Family Farms and the Environment, Economic Security Project, Fight for the Future, Food & Water Watch, Future of Music Coalition, Governing for Impact, HEAL Food Alliance, Jobs with Justice, Main Street Alliance, NextGen Competition, Public Citizen, Rural Advancement Foundation International-USA (RAFI-USA), Revolving Door Project, Service Employees International Union, Cristina Caffarra, Hal Singer, Mark Glick, and Tommaso Valletti, *Re: Draft Merger Guidelines (Docket FTC-2023-0043)*, at 3 (Sept. 19, 2023); Fox, *supra* note 5, at 2; Salop, *supra* note 5, at 3–4.

⁹ Scott Morton, *supra* note 5, at 1; Shapiro, *supra* note 7, at 5; Stephen Calkins, *Comments on the Draft Merger Guidelines 1* (Sept. 19, 2023); Gregory J. Werden, *Comments on Draft Merger Guidelines 1–3* (Aug. 4, 2023); Salop, *supra* note 5, at 3–4; Israel et al., *supra* note 6, at 1–3; U.S. Chamber of Commerce, *supra* note 6, at 2.

¹⁰ Hovenkamp, *supra* note 7, at 7; Committee On Capital Markets Regulation, *supra* note 6, at 2; U.S. Chamber of Commerce, *supra* note 6, at 1; Alden Abbott, Mercatus Center, *Draft Merger Guidelines Jointly Proposed By the U.S. Department of Justice and the Federal Trade Commission are Seriously Flawed in Their Discussion of Merger Case Law 1, 4* (Sept. 13, 2023); Werden, *supra* note 9, at 5; Salop, *supra* note 5, at 3–4; Jennifer Huddleston, Cato Institute, *Re: Draft Merger Guidelines for Public Comment, FTC-2023-0043*, at 1 (Sept. 18, 2023); Scott Morton, *supra* note 5, at 2; Shapiro, *supra* note 5, at 5; American Hospital Association, *supra* note 6, at 4; Calkins, *supra* note 9, at 4–5; Geoffrey A. Manne, Dirk Auer, Brian Albrecht, Eric Fruits, Daniel J. Gilman, and Lazar Radi, International Center for Law & Economics, *Comments of the International Center for Law & Economics on the FTC & DOJ Draft Merger Guidelines 67* (Sept. 19, 2023).

¹¹ Ana McDowall, Lorenzo Michelozzi, and Andrew Sfekas, Cornerstone Research, *Comments on the 2023 Draft Merger Guidelines 7* (Sept. 14, 2023); Chris Mitchell, Iowa Hospital Association, *Re: FTC-2023-0043: Draft Merger Guidelines 2* (Sept. 18, 2023); Werden, *supra* note 9, at 2; Hovenkamp, *supra* note 7, at 10; Francis, *supra* note 5, at 2–3; Mary Sullivan, *Public Interest Comment on FTC-DOJ 2–3* (Sept. 19, 2023); Calkins, *supra* note 9, at 1; Jonathan Skrmetti, Tennessee Attorney General, *Comments on 2023 Proposed Merger Guidelines 7–8* (Sept. 19, 2023).

¹² Scott Morton, *supra* note 5, at 5; Shapiro, *supra* note 7, at 8–9, 19; Salop, *supra* note 5, at 30; International Center for Law & Economics, *supra* note 10, at 2, 39, 47–48; McDowall et al., *supra* note 11, at 9–11; Werden, *supra* note 9, at 17.

economics, the connections between the different Guidelines, and how the different types of evidence are used to build a picture of the effects of a merger.¹³ Further, diluting the economics in a document that also covers legal analysis may lead to the inference that the economic principles follow from case law, and might complicate the use of the guidelines as an authoritative text about economics upon which economic experts may rely.¹⁴

To address these concerns, commenters proposed a wide range of revisions: simple additions to the text such as the re-introduction of a unifying theme of market power;¹⁵ the use of examples (as in the 2010 HMGs) to clarify the economics underlying individual Guidelines;¹⁶ the inclusion of a more comprehensive and balanced review of case law;¹⁷ or a thorough reorganization of the document splitting out the legal analysis into a separate document or legal appendix.¹⁸

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The Emphasis on Structural Evidence and Presumptions

In a reversal to the direction taken in previous merger guidelines, the DMGs appear to re-assign an augmented role to structural evidence. This sparked a substantial debate. Several commenters argued that the DMGs could be interpreted as supporting the proposition that increases in concentration are, in and of themselves, a lessening of competition, or are conclusive evidence of it.¹⁹ Some also pointed out that this approach is especially precarious given the removal of language from the 2010 HMGs that established the “unifying theme of the guidelines”—“that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.”²⁰ If the omission of language on market power was accidental, commenters proposed for the unifying theme to be reinstated at the start of the document, and for the Guidelines to clarify that structural evidence matters only inasmuch as it speaks to how the merger may enhance market power. Alternatively, if the implied goal of deconcentration is intended, then it may be helpful to be explicit about it and explain that this goal is grounded in the law (since it does not follow from the economics).²¹

When it comes to the specific Guidelines that are based on structural evidence—i.e., levels and changes in concentration and market shares—we see a range of positions and varying reactions and recommendations depending on the specific Guideline.

¹³ Scott Morton, *supra* note 5, at 1–2; American Bar Association Section of Antitrust Law, *Comments of the American Bar Association's Antitrust Law Section on the Federal Trade Commission and Department of Justice's Draft Update of the Merger Guidelines 2* (Sept. 19, 2023); McDowall et al., *supra* note 11, at 5–6; Francis, *supra* note 5, at 2.

¹⁴ Scott Morton, *supra* note 5, at 2; Israel et al., *supra* note 6, at 3; Shapiro, *supra* note 7, at 8; McDowall et al., *supra* note 11, at 8.

¹⁵ Baker et al., *supra* note 5, at 6; McDowall et al., *supra* note 11, at 3; Salop, *supra* note 5, at 7–8; Shapiro, *supra* note 7, at 2–3; Hovenkamp, *supra* note 7, at 2; George P. Slover, Center for Democracy & Technology, *Comments of the Center for Democracy & Technology on the Justice Department - Federal Trade Commission Draft Merger Guidelines 8* (Sept. 19, 2023).

¹⁶ Salop, *supra* note 5, at 17; Shapiro, *supra* note 7, at 6; Jeremy Nighohossian, Susan Manning, Andrea Chung, and Sabiha Quddus, FTI, *Draft Merger Guidelines (FTC-2023-0043)*, at 2 (Sept. 18, 2023); Sumit Sharma, Consumer Reports, *Consumer Reports Comments on Proposed New FTC-DOJ Draft Merger Guidelines 6* (Sept. 19, 2023); Progressive Policy Institute, *RE: Comments of the Progressive Policy Institute on the Draft Merger Guidelines for Public Comment (Docket FTC-2023-0043)*, at 2 (Sept. 18, 2023).

¹⁷ Abbott, *supra* note 10, at 4; Salop, *supra* note 5, at 4.

¹⁸ McDowall et al., *supra* note 11, at 8; Salop, *supra* note 5, at 4; Scott Morton, *supra* note 5, at 1, 8.

¹⁹ Baker et al., *supra* note 5, at 2; Scott Morton, *supra* note 5, at 3; Hovenkamp, *supra* note 7, at 3, 12; Salop, *supra* note 5, at 5; Abbott, *supra* note 10, at 3; Israel et al., *supra* note 6, at 4–5.

²⁰ Shapiro, *supra* note 7, at 2; Baker et al., *supra* note 5, at 5; Scott Morton, *supra* note 5, at 2; Joseph Farrell, *Comments of Joseph Farrell on the Draft Merger Guidelines (dMGs) 1–2* (Sept. 19, 2023).

²¹ Baker et al., *supra* note 5, at 5–6; Scott Morton, *supra* note 5, at 4; McDowall et al., *supra* note 11, at 6; Salop, *supra* note 5, at 7–8; Farrell, *supra* note 20, at 2.

- Several commenters welcomed an augmented role for structural presumptions in merger enforcement. These commenters viewed structural presumptions as a more transparent framework for evaluating competitive harm and a critical tool for enforcers to bring more cases and shift the burden of evidence to the merging parties.²² Some supporters of stronger reliance on structural presumptions called for more explicit language defining these presumptions of illegality and/or further lowering the concentration thresholds for Guideline 1.²³
- Even those commenters who were critical of the excessive focus on structural evidence did not object to structural presumptions altogether. The 2010 HMGs already included rebuttable presumptions for horizontal mergers, and there was little resistance to continuing that approach, although some commenters considered the lower thresholds in Guideline 1 relative to the 2010 HMGs to be unwarranted.²⁴ Further, other Guidelines that appear to introduce new structural presumptions were met with concern by some. Guideline 8 in particular, which raises a concern for mergers that “further a trend towards concentration,” received considerable pushback, with those opposed to the Guideline opining that such a trend could just as likely signal a procompetitive tendency towards consolidation as an anticompetitive one.²⁵
- Further, some commenters pointed out that increased reliance on market structure will reinforce the prominence of market definition—a pre-requisite for calculating meaningful shares—in contrast with the Agencies’ apparent effort to de-emphasize it elsewhere in the DMGs.²⁶

Given the extent and variety of reactions generated by the DMGs’ renewed emphasis on structural evidence, it is reasonable to expect that the Agencies will seek to better clarify the role and purpose that such evidence will play in merger review going forward. Clarifying, as an overall theme, that merger review is focused on evaluating whether a merger is likely to enhance market power, and that structural evidence provides useful indicators of likely competitive effects of a merger and *rebuttable* presumptions for harm, could assuage some stakeholders’ concerns about the emphasis on structural presumptions in the DMGs.

²² Open Markets Institute et al., *supra* note 8, at 3; Peter C. Carstensen, *Comments on the Draft Merger Guidelines* 1–2 (Sept. 19, 2023); Bush et al., *supra* note 5, at 1; Greaney et al., *supra* note 5, at 2; Robert H. Lande, American Economic Liberties Project, *Written Comments from the American Economic Liberties Project Request for Comments on Draft Merger Guidelines* 7–9 (Sept. 19, 2023).

²³ Carstensen, *supra* note 22, at 1; Fox, *supra* note 5, at 3; Meredith Stiehm and Tino Gagliardi, Writers Guild of America West and American Federation of Musicians, *Comment on Draft FTC-DOJ Merger Guidelines* 3 (Sept. 18, 2023); Open Markets Institute et al., *supra* note 8, at 5, 8–9; National Resources Defense Council, *RE: NRDC Comments on Draft Merger Guidelines*, Docket No. FTC-2023-0043, at 5 (Sept. 19, 2023); Americans for Financial Reform Education Fund, *RE: Draft Merger Review Docket ID No. FTC-2023-0043*, at 2 (Sept. 19, 2023); Tyler Lobdell and Rebecca Wolf, Food & Water Watch, Buffalo River Watershed Alliance, Farm and Ranch Freedom Alliance, Friends of the Earth, Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America, and Western Organization of Resource Councils, *Re: Draft Merger Guidelines for Public Comment*, Docket No. FTC-2023-0043, at 3 (Sept. 19, 2023); The Campaign for Family Farms and the Environment, *Re: Draft Merger Guidelines for Public Comment*, Docket No. FTC-2023-0043, at 10 (Sept. 19, 2023).

²⁴ Israel et al., *supra* note 6, at 4; Global Antitrust Institute, *Comment on the 2023 Draft Merger Guidelines’ Emphasis on Structural Antitrust* 4 (Sept. 15, 2023); Joseph V. Coniglio, Information Technology and Innovation Foundation, *Comments of ITIF Before the Federal Trade Commission and Department of Justice* 10 (Sept. 18, 2023); Rebekah Jurata, American Investment Council, *Re: Draft Merger Guidelines* 4–5 (Sept. 19, 2023); Federation of American Hospitals, *Re: Draft Merger Guidelines*, Docket No. FTC-2023-0043 (July 19, 2023), at 2–4 (Sept. 19, 2023); Business Roundtable, *Re: Request for Comment on Draft Merger Guidelines*, Docket No. FTC-2023-0043, at 9–10 (Sept. 19, 2023); Daniel P. Mehan, Missouri Chamber of Commerce and Industry, *Re: FTC-2023-0043-0001, Draft Merger Guidelines* 1 (Sept. 15, 2023).

²⁵ Werden, *supra* note 9, at 17; Hovenkamp, *supra* note 7, at 30–31; Salop, *supra* note 5, at 35–36; Shapiro, *supra* note 7, at 8; Baker et al., *supra* note 5, at 3; Scott Morton, *supra* note 5, at 6.

²⁶ Hovenkamp, *supra* note 7, at 40; McDowall et al., *supra* note 11, at 18; Farrell, *supra* note 20, at 3.

Guidance on Non-Horizontal Theories of Harm

Guidelines 5, 6, and 7 of the DMGs all address theories of harm that arise from combining firms operating in vertically related or adjacent markets. While Guideline 5 was well received, Guidelines 6 and 7 proved controversial.

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Guideline 5, which brings back the ability and incentive framework for foreclosure concerns set out in the 2020 VMGs, met with few objections and was praised for its flexibility in dealing with mergers of complements generally, not just those from combining firms at different stages of the supply chain (i.e., vertical mergers).²⁷ Some commenters proposed to expand Guideline 5 (or the technical appendix) with economic tools that provide further guidance on how to analyze the competitive effects for mergers of complements, such as vertical arithmetic and upward price pressure indices.²⁸

Some commenters called for the elimination of Guideline 6 or for it to be, at least, *clearly* presented as a rebuttable presumption within Guideline 5, primarily based on a concern that the 50% threshold for the presumption lacks a sound economic basis.²⁹ Some commenters, however, considered a simple share-based presumption a valuable assessment of vertical mergers, including, for example, by bringing vertical merger enforcement in line with laws on vertical restraints, which also have share-based presumptions of illegality.³⁰

Another feature of Guideline 6 that met with opposition was the inclusion of “a trend towards vertical integration” as one of the plus factors for vertical mergers, as well as the statement that efficiencies are not cognizable if they will accelerate such a trend.³¹ Commenters pointed out that shifts in technology and other industry trends can lead to vertical integration that corresponds with greater efficiency and does not involve anticompetitive behavior.³²

Several commenters also lamented the absence in Guideline 6 (and Guideline 5) of a recognition that non-horizontal mergers have higher potential for procompetitive effects than horizontal mergers.³³ In particular, some commenters found the lack of a discussion of the elimination of double marginalization (EDM) a notable omission. They argued EDM involves a change in incentives

²⁷ Hovenkamp, *supra* note 7, at 25; Salop, *supra* note 5, at 23; McDowall et al., *supra* note 11, at 9.

²⁸ Salop, *supra* note 5, at 24; Alessandro S. Kadner-Graziano and Serge Moresi, *Vertical Mergers: The Guidelines Should Discuss an Additional Theory of Harm and the Use of Quantitative Tests on Ability to Foreclose versus Incentive to Foreclose* 7 (Sept. 18, 2023); Steven C. Salop, *Supplemental Comments for Improving Guideline 6 of the 2023 Draft Merger Guidelines 2–3* (Sept. 19, 2023).

²⁹ Werden, *supra* note 9, at 15; Shapiro, *supra* note 7, at 9; Francis, *supra* note 5, at 27–28; McDowall et al., *supra* note 11, at 10; International Center for Law & Economics, *supra* note 10, at 44–45; U.S. Chamber of Commerce, *supra* note 6, at 10.

³⁰ Hovenkamp, *supra* note 7, at 26; Salop, *supra* note 5, at 29–31; William E. Kramer, The Purchaser Business Group on Health, 2 (Sept. 19, 2023); Charlotte Slaiman and Elise Phillips, Public Knowledge, *Re: Draft FTC-DOJ Merger Guidelines for Public Comment, FTC-2022-0003-0001*, at 2 (Sept. 19, 2023); Institute for Agriculture and Trade Policy, *Re: FTC-2023-0043-0001—Draft Merger Guidelines for Public Comment 3* (Sept. 8, 2023).

³¹ Draft Merger Guidelines (2023), *supra* note 1, at 34.

³² Scott Morton, *supra* note 5, at 6; Shapiro, *supra* note 7, at 10; Werden, *supra* note 9, at 31; Hovenkamp, *supra* note 7, at 26.

³³ Shapiro, *supra* note 7, at 6; International Center for Law & Economics, *supra* note 10, at 27–28; American Consumer Institute, *In the Matter of the FTC-DOJ Draft Merger Guidelines 6* (Sept. 15, 2023); Werden, *supra* note 9, at 15.

that can arise for a merger of complements without any change to the firm's productive capabilities and needs to be part of the assessment of competitive effects.³⁴

Guideline 7 addresses situations in which a “dominant” firm may seek to entrench its dominant position, or leverage it into another market, through a merger. Some commenters did see value in expanding the merger guidelines beyond the more standard set of theories/concerns (unilateral effects, coordinated effects, and vertical foreclosure).³⁵ However, there seemed to be some confusion about what economic theories of harm Guideline 7 is bringing forward that are not already covered in other Guidelines.³⁶

Some of the theories identified by commenters as potentially distinct from the theories already covered in other Guidelines included: cross-market mergers in healthcare; concerns about data at one level of the supply chain being used anticompetitively at other levels; and the acquisition by a firm of a service that supports multi-homing by its consumers.³⁷

While Guideline 7 does include some pointers for the defining features of these novel theories of harm, commenters expressed concern that no analytical framework for their assessment is provided. For example, there is no guidance on how the Agencies will distinguish between entrenchment resulting from procompetitive conduct (such as a reduction in costs) and entrenchment due to anticompetitive conduct. There is also no mention of metrics that can provide insight into the risks of competitive harm.³⁸ The only metric proposed by the Agencies, a 30 percent share for defining a dominant firm, was noted to have little economic or legal basis as a screen for anticompetitive conduct.³⁹ More clarity on the truly novel mechanisms of competitive harm and more robust guidance on implementation would thus be welcome as substantial improvements to Guideline 7.

Guidance on Rebuttal Evidence

Section IV of the DMGs discusses four types of rebuttal evidence that—subject to legal tests established by the courts—may overturn the conclusions from the application of one or more Guidelines: the failing firm defense, the possibility of entry and repositioning by rivals, procompetitive efficiencies, and structural barriers to coordination unique to the industry.

Several commenters considered that the guidance on rebuttal in the DMGs requires some unpacking. Some commenters noted that the DMGs' organization around 13 standalone Guidelines requires a clearer statement of what rebuttal evidence is permissible in order to overturn the finding of anticompetitive effects for *each* Guideline.⁴⁰ Others emphasized that different Guidelines

³⁴ Shapiro, *supra* note 7, at 10; American Bar Association Section of Antitrust Law, *supra* note 13, at 6; Israel et al., *supra* note 6, at 10; John Asker, Julia Gonzalez, Craig Malam, and Russell Molter, Cornerstone Research, *Comments on the July 2023 Draft Merger Guidelines: Implications for the Economic Analysis of Horizontal Merger Efficiencies 2* (Sept. 19, 2023); Hovenkamp, *supra* note 7, at 26–27; McDowall et al., *supra* note 11, at 14–15; Werden, *supra* note 9, at 14; Salop, *supra* note 5, at 24.

³⁵ Hovenkamp, *supra* note 7, at 28; Scott Morton, *supra* note 5, at 5; Carmine Ormaghi and Jian Tong, *Comment on the Draft Merger Guidelines 3* (Sept. 18, 2023); Israel et al., *supra* note 6, at 13; McDowall et al., *supra* note 11, at 12.

³⁶ Salop, *supra* note 5, at 32; Shapiro, *supra* note 7, at 9; Scott Morton, *supra* note 5, at 5; McDowall et al., *supra* note 11, at 12.

³⁷ Greaney et al., *supra* note 5, at 5; John Davisson and Suzanne Bernstein, Electronic Privacy Information Center, *Comments of the Electronic Privacy Information Center 3* (Sept. 18, 2023); Scott Morton, *supra* note 5, at 5.

³⁸ Hovenkamp, *supra* note 7, at 30; Israel et al., *supra* note 6, at 13–15; Nighohossian et al., *supra* note 16, at 4, 6–7; American Bar Association Section of Antitrust Law, *supra* note 13, at 7; McDowall et al., *supra* note 11, at 14; Marc Jarsulic and Adam Conner, The Center for American Progress, *Re: Draft Merger Guidelines for Public Comment FTC-2023-0043*, at 2 (Sept. 19, 2023).

³⁹ Salop, *supra* note 5, at 3, 23; U.S. Chamber of Commerce, *supra* note 6, at 10; Israel et al., *supra* note 6, at 14.

⁴⁰ Shapiro, *supra* note 7, at 3; American Bar Association Section of Antitrust Law, *supra* note 13, at 2; Asker et al., *supra* note 34, at 2; Nighohossian et al., *supra* note 16, at 2.

Of all the rebuttal possibilities discussed in the DMGs, the efficiency defense attracted the most attention in comments.

face different legal tests for rebuttal—for example, structural presumptions may potentially allow for a more limited set of rebuttal evidence.⁴¹ As a possible solution, some commenters suggested bringing back the language of market power (and the reference to higher prices, and reduced quality and innovation) to better clarify what the rebuttal evidence would need to demonstrate.⁴²

Some also suggested expanding the types of rebuttal evidence included or, alternatively, clarifying why the Agencies consider that a particular type of evidence tends to be unreliable or lack credibility. Additions proposed in the comments include evidence of sufficient ongoing competition, a weak (flailing) acquired competitor, reputational harms, a showing that a merger would not affect a maverick's incentive to disrupt coordination (as a specific rebuttal to Guideline 3), or a showing that a merger would not create the incentive to engage in anticompetitive foreclosure (as a specific rebuttal to Guideline 6).⁴³ There is also a proposal to apply a sliding scale approach to rebuttal—with more rebuttal evidence being required to the extent concerns arising from applying the 13 Guidelines are relatively more serious.⁴⁴

Of all the rebuttal possibilities discussed in the DMGs, the efficiency defense attracted the most attention in comments. Several commenters interpreted the guidance on efficiencies to be tightening the standard of proof for an efficiency to be cognizable and provided contrasting responses.

Some commenters praised the Agencies for taking a tougher stance on efficiencies, noting that courts have been excessively lenient in crediting efficiencies in recent years.⁴⁵ Some commenters urged the Agencies to go even further, suggesting that efficiencies cannot be used as a defense when a merger satisfies a presumption for illegality, and encouraged the Agencies to completely excise the discussion of procompetitive efficiencies from the DMGs.⁴⁶ Other commenters suggested corrections in the opposite direction and asked the Agencies to acknowledge in clear terms—as the 2010 HMGs did—that mergers can give rise to efficiencies that can serve as rebuttal because they can lead to improved outcomes (price, quality and innovation) for consumers.⁴⁷ This position was particularly prominent among hospital groups.⁴⁸

Regardless of the authors' own skepticism about merger efficiencies, several comments indicated that the current guidance on efficiencies is confusing. Some authors noted that the DMGs begin the discussion of procompetitive efficiencies with a citation to Supreme Court precedent that appears to rule out an efficiency defense, only to almost immediately delve into criteria for

⁴¹ Carstensen, *supra* note 22, at 2; Open Markets Institute et al., *supra* note 8, at 4.

⁴² Shapiro, *supra* note 7, at 5; Hovenkamp, *supra* note 7, at 45.

⁴³ Baker et al., *supra* note 5, at 7–8; Salop, *supra* note 5, at 14–15, 24; Werden, *supra* note 9, at 25–26.

⁴⁴ Baker et al., *supra* note 5, at 8; Salop, *supra* note 5, at 8–9.

⁴⁵ Hovenkamp, *supra* note 7, at 43; Lemley, *supra* note 5, at 8.

⁴⁶ Open Markets Institute et al., *supra* note 8, at 13; Bush et al., *supra* note 5, at 2–4; Food & Water Watch et al., *supra* note 23, at 7; The Campaign for Family Farms and the Environment, *supra* note 23, at 10; Farm Action, *RE: Comment on Draft Merger Guidelines | Docket ID: FTC-2023-0043*, at 51–52 (Sept. 19, 2023); Stacy Mitchell and Ron Knox, The Institute for Local Self-Reliance, *Strengthening Enforcement Against Illegal Mergers: Comment Letter on Proposed Merger Guidelines* 5 (Sept. 19, 2023).

⁴⁷ U.S. Dep't of Justice and Federal Trade Comm'n, Horizontal Merger Guidelines (2010), <http://ftc.gov/os/2010/08/100819hmg.pdf> 29; Werden, *supra* note 9, at 5; U.S. Chamber of Commerce, *supra* note 6, at 7; Asker et al., *supra* note 34, at 5–6; Benjamin Zycher, American Enterprise Institute, *Comment to the Department of Justice and the Federal Trade Commission: Draft Merger Guidelines* 2 (Sept. 14, 2023); American Bar Association Section of Antitrust Law, *supra* note 13, at 10; Sullivan, *supra* note 11, at 3; Israel et al., *supra* note 6, at 16–18; International Center for Law & Economics, *supra* note 10, at 59–60.

⁴⁸ Stephen G. Wohleb, Texas Hospital Association, *Comment Letter* 2 (Sept. 18, 2023); American Hospital Association, *supra* note 6, at 20; Iowa Hospital Association, *supra* note 11, at 2.

cognizability.⁴⁹ At the very least, the Agencies' position on whether and under what conditions an efficiency defense can be used in merger enforcement should be made clearer.⁵⁰

Other commenters suggested revisions to more specific aspects of the discussion to improve its clarity and align it with established economic principles. Some commenters indicated that it would be beneficial to remove language about efficiencies not being cognizable if they “accelerate a trend toward concentration (see Guideline 8) or vertical integration (see Guideline 6),” as this is not economically coherent—for example, technological changes could enable greater economies of scale which would lead to a trend towards consolidation associated with efficiency improvements.⁵¹

Platforms and Labor Markets

Another innovation relative to prior Guidelines is the inclusion of an extended discussion of the competitive effects of mergers in platforms (Guideline 10) and labor markets (Guideline 11). Both of these Guidelines attracted substantive commentary from supporters and detractors. A common theme, however, was a request for additional clarity and guidance on how the Agencies would address platform and labor issues going forward.

Many applauded the introduction of Guideline 10, exclusively dedicated to mergers involving multisided platforms, given the prominent role that platforms play in the digital economy.⁵² Others called for a more careful consideration of the guidance provided,⁵³ as well as for a more explicit acknowledgement of the role that certain features of platform markets, such as network effects or multi-homing strategies, can play in preserving or increasing competition following a merger.⁵⁴

Several commenters also took issue with Guideline 10's discussion of a “conflict of interest” as a source of harm from the acquisition of a platform participant by the platform operator.⁵⁵ Some of these commenters related this “conflict of interest” to the practice of a retailer self-preferencing its own products (for example a big box retailer giving more prominent in-store placement to its own soft drinks over those of third parties). They noted that self-preferencing is a common practice, often not considered an antitrust violation, which, in some cases, fosters competition within or between platforms. They suggested that the Agencies include an acknowledgement that

⁴⁹ American Bar Association Section of Antitrust Law, *supra* note 13, at 11; Scott Morton, *supra* note 5, at 6; Werden, *supra* note 9, at 28; Open Markets Institute et al., *supra* note 8, at 11.

⁵⁰ American Bar Association Section of Antitrust Law, *supra* note 13, at 11; Scott Morton, *supra* note 5, at 6.

⁵¹ Asker et al., *supra* note 34, at 5; Scott Morton, *supra* note 5, at 6; Shapiro, *supra* note 7, at 8.

⁵² Salop, *supra* note 5, at 38; Center for Digital Democracy, *supra* note 5, at 1–2; Letitia James, Kris Mayes, Rob Bonta, William Tong, Brian Schwalb, Kwame Raoul, Aaron M. Frey, Anthony G. Brown, Andrea J. Campbell, Matthew J. Platkin, Ellen F. Rosenblum, Michelle A. Henry, Ariel M. Smith, Bob Ferguson, and Joshua Kaul, *Comments of 15 Attorneys General of the States and Territories on Labor Market Issues in Response to the July 19, 2023 Request for Comments on the Draft Merger Guidelines 3* (Sept. 19, 2023).

⁵³ Hovenkamp, *supra* note 7, at 35–36; Lenard et al., *supra* note 6, at 3–5; American Bar Association Section of Antitrust Law, *supra* note 13, at 9; Avigail Kifer and Jeffrey T. Prince, Cornerstone Research, *Conflicts of Interest and Platforms 12* (Sept. 18, 2023); Teddy Wataler, Raj Bhargava, and Samuel Turner, Thurman Arnold Project, *A New Approach to Digital Market Mergers: Platform Competition Analysis 3* (Sept. 4, 2023); Werden, *supra* note 9, at 19.

⁵⁴ Hovenkamp, *supra* note 7, at 36; Lenard et al., *supra* note 6, at 4; Information Technology and Innovation Foundation, *supra* note 24, at 10; Kifer and Prince, *supra* note 53, at 5; Daniel Minh McCarthy and Kenneth C. Wilbur, *Did Recent Platform Mergers Reduce Competition? Descriptive Analyses of 6 Platform Mergers 2* (Sept. 19, 2023).

⁵⁵ Werden, *supra* note 9, at 20; Center for American Entrepreneurship, *supra* note 6, at 8; Hovenkamp, *supra* note 7, at 34; Kifer and Prince, *supra* note 53, at 1–2; Lenard et al., *supra* note 6, at 5.

A common theme . . . , was a request for additional clarity and guidance on how the Agencies would address platform and labor issues going forward.

self-preferencing need not be anticompetitive and explain what evidence would be informative about the risk of anticompetitive self-preferencing post-merger.⁵⁶

Several comments lauded Guideline 11, observing that the monopsony provision and its application to the potential competitive effects of mergers in labor markets is an area previously given “short shrift” by the Agencies.⁵⁷ The commenters considered this a helpful innovation, noting, for example, that antitrust protections are intended to extend to workers, not just to consumers, or that monopsony power is pervasive in U.S. labor markets and as harmful as monopoly power.⁵⁸ Furthermore, several groups approved the inclusion of consultations with labor organizations and workers as a source of evidence in merger review.⁵⁹

Several other commenters, however, were critical about Guideline 11. For example, some commenters characterized the Guideline as an inappropriate attempt to pursue social policy goals through antitrust enforcement, noting that labor issues are outside of the legal scope of merger enforcement, or expressing skepticism towards the prevalence of monopsony concerns for labor markets.⁶⁰ Perhaps not surprisingly, the sentiment towards Guideline 11 often related to whether a comment was voicing the concerns of worker or employer groups.⁶¹

⁵⁶ Hovenkamp, *supra* note 7, at 34–35; Kifer and Prince, *supra* note 53, at 1–2, 12; Lenard et al., *supra* note 6, at 5.

⁵⁷ Salop, *supra* note 5, at 2; David W. Berger, Thomas Hasenzagl, Kyle F. Herkenhoff, Simon Mongey, and Eric A. Posner, *Comments on the 2023 Draft Merger Guidelines: A Labor Market Perspective* 1 (Aug. 18, 2023); Anthony M. Perrone, The United Food and Commercial Workers International Union, *Re: Comments on Draft Merger Guidelines* 1 (Sept. 15, 2023); Ornaghi and Tong, *supra* note 35, at 1; Candace C. Archer, American Federation of Labor and Congress of Industrial Organizations, *Re: Comments on Draft Merger Guidelines*, Docket ID: FTC-2023-0043, at 2 (Sept. 19, 2023); James et al., *supra* note 52, at 1; International Center for Law & Economics, *supra* note 10, at 46; Elizabeth Warren, Becca Balint, Barbara Lee, Andre Carson, Katie Porter, Joe Neguse, Greg Casar, Summer Lee, Rashida Tlaib, Jamaal Bowman, Chris Deluzio, Jill Tokuda, Bonnie Watson Coleman, Mary Gay Scanlon, Delia C. Ramirez, Pramila Jayapal, Cori Bush, Mazie Hirono, Peter Welch, Ayanna Pressley, Bernard Sanders, and James P. McGovern, Congress of the United States, 8–9 (Sept. 19, 2023); American Economic Liberties Project, *supra* note 22, at 2–3; Duncan Crabtree-Ireland, Screen Actors Guild—American Federation of Television and Radio Artists, 3 (Sept. 15, 2023); Directors Guild of America, *supra* note 5, at 1; Washington Center for Equitable Growth, *Re: Comments of the Washington Center for Equitable Growth on the Draft Merger Guidelines for Public Comment* (Docket FTC-2023-0043), at 2 (Sept. 19, 2023).

⁵⁸ Warren et al., *supra* note 57, at 8; Berger et al., *supra* note 57, at 1, 3. Berger et al. also encouraged the Agencies to adopt lower concentration thresholds than those of Guideline 1 to establish a structural presumption for mergers that increase concentration in a relevant labor market.

⁵⁹ The Communications Workers of America, *Re: Request for Information on Merger Guidelines Federal Trade Commission and Department of Justice Docket No. FTC-2023-0043*, at 3–4 (Sept. 18, 2023); Ahmer Qadeer, Service Employees International Union, *RE: FTC-2023-0043; Draft Merger Guidelines for Public Comment* 5 (Sept. 19, 2023); The International Brotherhood of Teamsters, *Comments of International Brotherhood of Teamsters In response to Draft Merger Guidelines for Public Comment FTC-2023-0043-0001*, at 2 (Sept. 19, 2023); Strategic Organizing Center, *Comments of the Strategic Organizing Center In response to Draft Merger Guidelines for Public Comment*, Docket No. FTC-2023-0043, at 10 (Sept. 19, 2023).

⁶⁰ Skrmetti, *supra* note 11, at 16–17; Huddleston, *supra* note 10, at 2; U.S. Chamber of Commerce, *supra* note 6, at 9–10.

⁶¹ For example, the American Hospital Association expressed concern over the application of antitrust enforcement in labor markets that are already tight, while the American Medical Association and the American Academy of Emergency Medicine welcomed the ability to challenge the perceived “buyer” power amongst health insurers. The Directors Guild of America and the Screen Actors Guild—American Federation of Television and Radio Artists applauded Guideline 11, as did the American Federation of Labor and Congress of Industrial Organizations and United Food and Commercial Workers International Union. The U.S. Chamber of Commerce, instead, questioned the need for merging parties to bear the upfront cost of addressing labor issues that almost never arise in practice. American Hospital Association, *supra* note 6, at 19; James L. Madara, American Medical Association, *Re: AMA Comments on Draft Merger Guidelines* 3 (Sept. 18, 2023); American Academy of Emergency Medicine, *supra* note 5, at 2; Screen Actors Guild—American Federation of Television and Radio Artists, *supra* note 57, at 1; Directors Guild of America, *supra* note 5, at 1; American Federation of Labor and Congress of Industrial Organizations, *supra* note 57, at 2–3; The United Food and Commercial Workers International Union, *supra* note 57, at 5–6; John Frahm, Kathy Finn, Kim Cordova, Nicolai Cocergine, Andrea Zinder, Faye Guenther, and Mark Federici, The United Food and Commercial Workers Local Unions, *Comments on the Draft Merger Guidelines on Behalf of the United Food and Commercial Workers* 1 (Sept. 19, 2023); U.S. Chamber of Commerce, *supra* note 6, at 9–10.

Commenters also weighed in on the specifics of Guideline 11. For example, several commenters highlighted some of the complexities inherent to defining markets and calculating shares when market boundaries may be hard to define (e.g., labor markets may or may not have clear geographic or industry limits), or when the available prices (i.e., wages) may not adequately reflect the non-monetary aspects of compensation over which many firms compete for workers.⁶² Several commenters also pointed out that Guideline 11 should more clearly acknowledge that not every reduction in labor demand is anticompetitive. Economically, there is a difference between eliminating jobs and hurting competition or gaining monopsony power—a firm may have fewer employees post-merger but not have wage-setting power in a market.⁶³ Additional guidance and clarity from the Agencies on these issues would be welcome.

Conclusion

The Agencies took a bold approach in revising the merger guidelines. This attracted support from many who consider it imperative to have a marked shift in how the Agencies enforce laws prohibiting anticompetitive mergers. However, there were also many commenters who expressed concern about the risks of this approach. They pointed out that if the guidelines lose the focus on and the clarity of the economics, subsequent administrations may retract or substantially revise them. Courts and practitioners may also become reluctant to rely on them. Some of these risks may be mitigated with targeted revisions that would clarify areas of confusion and better align the document with economic principles. ●

⁶² Hovenkamp, *supra* note 7, at 36–38; The United Food and Commercial Workers Local Unions, *supra* note 61, at 3; Ornaghi and Tong, *supra* note 35, at 2; American Bar Association Section of Antitrust Law, *supra* note 13, at 10; Arshia Hashemi and Rainer Schwabe, Cornerstone Research, *Re: Submission to DOJ-FTC Draft Merger Guidelines Request for Comment 1* (Sept. 5, 2023); Kavan Kucko, Justin McCrary, Bryan Ricchetti, and Rainer Schwabe, Cornerstone Research, *A Comment on Labor Market Definition 2–6* (Sept. 15, 2023); Berger et al., *supra* note 57, at 5; Nighohossian et al., *supra* note 16, at 8.

⁶³ Hovenkamp, *supra* note 7, at 37; Salop, *supra* note 5, at 40; Sullivan, *supra* note 11, at 3; American Bar Association Section of Antitrust Law, *supra* note 13, at 10; International Center for Law & Economics, *supra* note 10, at 50.