MERCATUS CENTER
George Mason University

PUBLIC INTEREST COMMENT

NEW MERGER GUIDELINES SHOULD BE CONCISE, BE ADMINISTRABLE, AND AVOID ANTIMERGER BIAS

ALDEN F. ABBOTT
Senior Research Fellow and Director, Competition Project, Mercatus Center at George Mason University

Request for Information on Merger Enforcement
Agencies: Federal Trade Commission and US Department of Justice
Comment Period Opens: January 18, 2022
Comment Period Closes: March 21, 2022
Comment Submitted: March 4, 2022
Docket No. FTC-2022-0003-0001

I am pleased to respond to the request for information (RFI) to help inform the work of the Federal Trade Commission (FTC) and US Department of Justice (DOJ) (the Agencies) as they consider whether to issue new merger guidelines aimed at strengthening enforcement against illegal mergers.[1] I trust that the views I express may prove helpful to the Agencies as they undertake this important initiative.[2]

The Competition Project at the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. Conducting careful and independent analysis that employs contemporary economic scholarship is part of the Competition Project's mission. This comment does not represent the views of any particular interest group.

INTRODUCTION

The RFI, jointly issued by the Agencies, sets forth 91 sets of questions (under 15 headings) that provide ample opportunity for public comment on a large range of topics. Rather than focusing on specific analytic complexities inherent in individual questions, in this submission I reflect on the big-picture policy concerns raised by the RFI (but not alluded to in the questions). Viewed from a broad policy perspective, the initiative described in the RFI risks undermining the general respect

1. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, REQUEST FOR INFORMATION ON MERGER ENFORCEMENT (2022), https://www.regulations.gov/document/FTC-2022-0003-0001; Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers.
2. My comments draw in large part on Alden F. Abbott, *FTC-DOJ RFI on Merger Guidelines: The Agencies Should Proceed with Caution*, TRUTH ON THE MARKET (Feb. 4, 2022), https://truthonthemarket.com/2022/02/04/ftc-doj-rfi-on-merger-guidelines-the-agencies-should-proceed-with-caution/.

that courts have accorded merger guidelines over the years and reducing incentives for economically beneficial business consolidations. Policy concerns that flow from various features of the RFI, which could undermine effective merger enforcement, are highlighted in the following sections. These concerns counsel against producing overly detailed guidelines that adopt a merger-skeptical orientation.

THE RFI REFLECTS THE FALSE PREMISE THAT COMPETITION IS DECLINING IN THE UNITED STATES

The FTC press release introducing the RFI makes clear that a supposed weakening of competition under the current merger guidelines is a key driver of the Agencies' interest in new guidelines: "Today, the Federal Trade Commission (FTC) and the Justice Department's Antitrust Division launched a joint public inquiry aimed at strengthening enforcement against illegal mergers. Recent evidence indicates that many industries across the economy are becoming more concentrated and less competitive—imperiling choice and economic gains for consumers, workers, entrepreneurs, and small businesses."[3]

This premise is not supported by the facts. On the basis of a detailed literature review, chapter 6 of the 2020 *Economic Report of the President* concludes that "the argument that the U.S. economy is suffering from insufficient competition is built on a weak empirical foundation and questionable assumptions."[4] More specifically, the report explains, "Research purporting to document a pattern of increasing concentration and increasing markups uses data on segments of the economy that are far too broad to offer any insights about competition, either in specific markets or in the economy at large. Where data do accurately identify issues of concentration or supercompetitive profits, additional analysis is needed to distinguish between alternative explanations, rather than equating these market indicators with harmful market power."[5]

Recent quantitative research by Robert Kulick (of NERA Economic Consulting and the American Enterprise Institute) is consistent with and supplements the report's findings. In presenting his research (which will be published this spring) at the January 26 Mercatus Center Antitrust Conference,[6] Kulick stressed that "there is no general trend towards increasing industrial concentration in the U.S. economy from 2002 to 2017."[7] In particular, industrial concentration has been declining since 2007, the Herfindahl–Hirschman Index has declined significantly in manufacturing since 2002, and the economy-wide concentration ratio for the largest five firms in 2017 was approximately the same as in 2002. Even in industries where concentration may have risen, "the evidence does not support claims that concentration is persistent or harmful."[8] In that regard, Kulick's research finds that higher-concentration industries tend to become less concentrated, whereas lower-concentration industries tend to become more concentrated.

---

3. *See* Press Release, Fed. Trade Comm'n, *supra* note 1.
4. EXEC. OFFICE OF THE PRESIDENT, ECONOMIC REPORT OF THE PRESIDENT ch. 6, at 217 (2020).
5. *Id.* at 226.
6. Robert Kulick, Assoc. Dir., NERA Econ. Consulting, Presentation at the Mercatus Center Antitrust Conference: Industrial Concentration in the United States: 2002–2017 (2022); *see* Mercatus Antitrust Forum: One Year of Biden Antitrust, MERCATUS CENTER AT GEORGE MASON UNIVERSITY (Jan. 26, 2022), https://www.mercatus.org/events/mercatus-antitrust-forum-one-year-biden-antitrust.
7. Kulick, *supra* note 6, at 11.
8. *Id.*

Increases in industrial concentration are associated with economic growth and job creation, particularly for high-growth industries, and rising industrial concentration may be driven by increasing market competition.

In short, the strongest justification for issuing new merger guidelines is based on a false premise: an alleged decline in competition within the Unites States. Given this reality, the adoption of revised guidelines designed to ratchet up merger enforcement appear highly questionable.

THE RFI STRIKES A MERGER-SKEPTICAL TONE THAT IS OUT OF TOUCH WITH MODERN MAINSTREAM ANTITRUST SCHOLARSHIP

The overall tone of the RFI reflects a skeptical view of the potential benefits of mergers. It ignores overarching beneficial aspects of mergers,[9] which include the reallocation of scarce resources to higher-valued uses (through the market for corporate control) and the realization of various standard efficiencies (including cost-based efficiencies and incentive effects, such as the elimination of double marginalization through vertical integration).[10] Mergers also generate benefits by bringing together complementary assets and by generating various synergies, including the promotion of innovation and the scaling up of the fruits of R&D.[11] Furthermore, as the Organisation for Economic Co-operation and Development has explained, "evidence suggests that vertical mergers are generally pro-competitive, as they are driven by efficiency-enhancing motives such as improving vertical co-ordination and realising economies of scope."[12]

Given the manifold benefits of mergers in general, the negative, merger-skeptical tone of the RFI is regrettable. This tone not only ignores sound economics, but also is at odds with recent pronouncements by the Agencies. Notably, the 2010 *Horizontal Merger Guidelines* (which were issued by Democratic Obama administration enforcers) strike a neutral tone, recognizing the duty to challenge anticompetitive mergers while noting the public interest in avoiding unnecessary interference with mergers that do not harm competition: "the Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral."[13] The same neutral approach is found in the 2020 *Vertical Merger Guidelines*: "the Agencies use a consistent set of facts and assumptions to evaluate both the potential competitive harm from a vertical merger and the potential benefits to competition."[14] The RFI, however, expresses no concern about unnecessary government interference and strongly emphasizes the potential shortcomings of existing guidelines in

9. For a good catalogue of the many efficiency benefits associated with vertical mergers, *see* Roger D. Blair et al., *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically about Efficiencies*, 27 GEO. MASON. L. REV. 761 (2020).

10. Jonathan R. Macey, *Market for Corporate Control*, ECONLIB, https://www.econlib.org/library/Enc/MarketforCorporateControl.html (last visited Feb. 17, 2022). *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 29–32 (2010); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES 11–12 (2020).

11. For an example of how mergers may enable greater innovation, *see* Alden F. Abbott & Andrew Mercado, Pharmaceutical Merger Enforcement Should Be Supported by Evidence and Sound Economic Theory (June 24, 2021), https://www.mercatus.org/publications/antitrust-and-competition/pharmaceutical-merger-enforcement-should-be-supported.

12. Pedro Gonzaga & Gabriella Erdei, Org. for Econ. Coop. and Dev. [OECD], *Vertical Mergers in the Technology, Media, and Telecom Sector* 2 (June 7, 2019), https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf.

13. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, *supra* note 10, at 1.

14. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES, *supra* note 10, at 2.

questioning whether the guidelines "adequately equip enforcers to identify and proscribe unlawful, anticompetitive transactions."[15]

Merger skepticism is also reflected throughout the RFI's 15 questions. A close reading reveals that they are generally phrased in a way that implicitly assumes competitive problems or rejects potential merger justifications.

For example, question 14, which addresses efficiencies, casts efficiencies in a generally negative light. Question 14a asks whether "the [existing] guidelines' approach to efficiencies [is] consistent with the prevailing legal framework as enacted by Congress and interpreted by the courts," citing the statement in *FTC v. Procter & Gamble* that "possible economies cannot be used as a defense to illegality."[16] The view that antitrust disfavors mergers that enhance efficiencies (the "efficiencies offense") has been roundly rejected by mainstream antitrust scholarship.[17] One may assume that today's Supreme Court (which has deemed consumer welfare to be the lodestone of antitrust enforcement since *Reiter v. Sonotone Corp.*) would give short shrift to an "efficiencies offense" justification for a merger challenge.[18]

Question 14d, which is also related to efficiencies, may in application fly in the face of sound, market-oriented economics: "Where a merger is expected to generate cost savings via the elimination of 'excess' or 'redundant' capacity or workers, should the guidelines treat these savings as cognizable 'efficiencies'?"[19] One could conceive of a merger that generates synergies and thereby expands the number of goods, raises the quality of goods and services, or both, with reduced capacity and fewer workers. Such a merger would enable human and physical resources to be allocated to higher-valued uses elsewhere in the economy, yielding greater economic surplus for consumers and producers. There is the risk that such a merger could be viewed unfavorably under new merger guidelines that were revised in light of question 14d. (Although part of question 14d involves capacity reductions that have the potential to reduce supply resilience or product or service quality, this part of the question does not limit the rest.)

Th RFI's discussion of guidelines topics other than efficiencies similarly sends the message that existing guidelines are too promerger. For example, question 5 (which deals with presumptions), asks rhetorically, "do the [existing] guidelines adequately identify mergers that are presumptively unlawful under controlling case law?"[20] This question answers itself, by citing to the statement from *United States v. Philadelphia National Bank* that "without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."[21] This statement antedates all merger guidelines and is out of step with the modern economic analysis of mergers, which the existing guidelines embody. The statement would, if taken seriously, threaten a huge number of proposed mergers that, until now,

---

15. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 1, at 1.
16. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 1, at 9; FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967).
17. *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Keynote Address at GCR Live Merger Control: There's Nothing New Under the Sun: Reviewing Our History to Foresee the Future (Oct. 7, 2021); WILLIAM J. KOLASKY & ANDREW R. DICK, U.S. DEP'T OF JUST., THE MERGER GUIDELINES AND THE INTEGRATION OF EFFICIENCIES INTO ANTITRUST REVIEW OF HORIZONTAL MERGERS (2003); Carl Shaprio & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sept. 23, 2021), https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/.
18. Reiter v. Sonotone Corp., 442 U.S. 330 (1979).
19. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 1, at 9.
20. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 1, at 4.
21. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 (1963).

have not been subject to second request review by the Agencies. As Judge Douglas Ginsburg and professor Joshua Wright have explained,

> The practical effect of the [*Philadelphia National Bank*] presumption is to shift the burden of proof from the plaintiff, where it rightfully resides, to the defendant, without requiring evidence—other than market shares—that the proposed merger is likely to harm competition. . . . The presumption ought to go the way of the agencies' policy decision to drop reliance upon the discredited antitrust theories approved by the courts in such cases as *Brown Shoe*, *Von's Grocery*, and *Utah Pie*. Otherwise, the agencies will ultimately have to deal with the tension between taking advantage of a favorable presumption in litigation and exerting a reformative influence on the direction of merger law.[22]

By inviting support for the style of thinking in *Philadelphia National Bank*, question 5a effectively rejects economic effects–based analysis, which has been central to agency merger analysis for decades. Guideline revisions that downplay effects in favor of mere concentration would likely be viewed askance by reviewing courts (and almost certainly would be rejected by the Supreme Court as currently constituted if the occasion arose).

These particularly striking examples are illustrative of a questioning tone regarding existing merger analysis that permeates the RFI.

NEW MERGER GUIDELINES, IF ISSUED, SHOULD NOT INCORPORATE THE MULTIPLE PROBLEMS EMBODIED IN THE RFI

The 15 questions in the RFI in large part read like a compendium of theoretical harms to the working of markets that might be associated with mergers. Although these questions may be of general academic interest and may shed some light on particular merger investigations, most of them should not be incorporated into guidelines.

As Justice Stephen Breyer has pointed out,[23] antitrust is a legal regime that must account for administrative practicalities. Justice (then Judge) Breyer described the nature of the problem in his opinion in the 1983 case *Barry Wright Corp. v. ITT Grinnell Crop.* (affirming the dismissal of a Sherman Act section 2 complaint based on "unreasonably low" prices):

> While technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.[24]

It follows that any effort to include every theoretical merger-related concern in new merger guidelines would undercut their (presumed) overarching purpose, which is the provision of useful

---

22. Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 377 (2015).
23. Leon B. Greenfield & Daniel J. Matheson, *Rules versus Standards and the Antitrust Jurisprudence of Justice Breyer*, 23 ANTITRUST 87 (2009).
24. Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983).

guidance to the private sector. All-inclusive guidelines in reality provide no guidance at all. Faced with a laundry list of possible problems that might prompt the Agencies to oppose a merger, private parties would face enormous uncertainty, which could deter them from proposing a large number of procompetitive, welfare-enhancing or welfare-neutral consolidations. This would undercut the very economic ends of promoting competition that are served by section 7 enforcement.

Furthermore, all-inclusive merger guidelines also could be seen by judges as undermining the rule of law.[25] If the Agencies were able to pick and choose at will from an enormously wide array of considerations to justify opposing a proposed merger, they could be seen as engaged in arbitrary enforcement, rather than in a careful weighing of evidence aimed at condemning only anticompetitive transactions. Such an engagement would be at odds with the promise of fair and dispassionate enforcement found in the 2010 *Horizontal Merger Guidelines*—namely, to "seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral."[26]

Up to now, federal courts have virtually always implicitly deferred to (and not questioned) the application of merger guidelines' principles by the Agencies. The Agencies have won or lost cases on the basis of courts' weighing of particular factual and economic evidence, not on whether guidelines' principles should have been applied by the enforcers.

One would expect courts to react very differently, however, to cases brought in light of ridiculously detailed guidelines that do not provide true guidance (particularly if the guidelines were heavy on competitive harm possibilities and were to discount efficiencies). The Agencies' selective reliance on particular anticompetitive theories could be seen as exercises in arbitrary or prejudicial condemnations, not dispassionate enforcement. As such, the courts would tend to be far more inclined to reject (or accord far less deference to) the new guidelines in evaluating merger challenges from the Agencies. Even transactions that would have been particularly compelling candidates for condemnation under prior guidelines could be harder to challenge successfully, owing to the taint of the new guidelines.

In short, the adoption of highly detailed guidelines that emphasize numerous theories of harm would likely undermine the effectiveness of the Agencies' merger enforcement, the precise opposite of what the Agencies would have intended.

NEW MERGER GUIDELINES, IF ISSUED, SHOULD AVOID RELYING ON OUTDATED CASE LAW AND NOVEL SECTION 7 THEORIES

The Agencies could, of course, acknowledge the problem of administrability and issue a more straightforward guidelines revision, one of length and detail comparable to prior guidelines. If they do so, they would be well advised to eschew relying on dated precedents and novel section 7 theories. They should also give due credit to efficiencies. Seemingly biased guidelines would undermine merger enforcement, not strengthen it.

As discussed earlier, the respect accorded by the RFI to *Philadelphia National Bank* and *Procter & Gamble* is at odds with contemporary economics-based antitrust thinking, which has been accepted by the federal courts. As such, the granting of favorable treatment to those

---

25. *See* Andrew C. Finch, Acting Assistant Att'y Gen., U.S. Dep't of Just., Remarks at the 11th annual Global Antitrust Enforcement Symposium: Antitrust Enforcement and the Rule of Law (Sept. 12, 2017).
26. U.S. Dep't of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines, *supra* note 10, at 1.

antediluvian holdings, and to *Brown Shoe Co. v. United States* (another very dated case cited multiple times in the RFI),[27] would do much to discredit new guidelines. In particular, new guidelines should not adopt language echoing the suggestion in the introduction of the RFI that existing merger guidelines may not "faithfully track the statutory text, legislative history, and established case law around merger enforcement."[28] Similarly, new guidelines should avoid referring to the *Brown Shoe* and *Philadelphia National Bank* concerns with a "trend toward concentration" and "the danger of subverting congressional intent by permitting a too-broad economic investigation."[29]

New guidelines that focus on (or even give lip service to) a trend toward concentration and eschew overly detailed economic analyses (while emphasizing instead concentration-based rules of thumb) would predictably come in for judicial scorn as economically unfounded. Such references would do as much (if not more) to ensure judicial rejection of the Agencies' guidelines as endless lists of theoretically possible sources of competitive harm, discussed previously. In particular, those references implicitly reject the need to consider efficiencies, which play a key role in modern enlightened merger evaluations. It is not credible that a majority of the current Supreme Court would have a merger analysis epiphany and decide that the RFI's preferred interventionist reading of section 7 statutory language and legislative history trumps decades of economically centered consumer welfare scholarship and agency guidelines.

NEW MERGER GUIDELINES, IF ISSUED, SHOULD GIVE DUE CREDIT TO EFFICIENCIES

Question 14 of the RFI, which deals with efficiencies, is in line with the document's implicitly negative portrayal of mergers. Question 14a inauspiciously cites *Procter & Gamble*, suggesting that the current guidelines' approach to efficiencies is "[in]consistent with the prevailing legal framework as enacted by Congress and interpreted by the courts."[30]

Such an anti-efficiencies reference would be viewed askance by most if not all reviewing judges. As the leading American antitrust treatise author Herbert Hovenkamp, who has been cited countless times by the Supreme Court, recently explained (in an article coauthored with Carl Shapiro), "when the FTC investigates vertical and horizontal mergers will it now take the position that efficiencies are irrelevant, even if they are proven? If so, the FTC will face embarrassing losses in court."[31]

Reviewing courts would no doubt take heed of this statement in assessing any future merger guidelines that rely on dated and discredited cases and minimized efficiencies.

Other parts of question 14 also view efficiencies as problematic. They suggest that efficiency claims should be treated negatively because efficiency claims are not always realized after the fact. But merger activity is a private-sector search process, and the inability to predict ex post effects with perfect accuracy is an inevitable part of market activity. Using such a natural aspect of markets as an excuse to ignore efficiencies would prevent many economically desirable consolidations from being achieved.

---

27. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).
28. U.S. Dep't of Just. & Fed. Trade Comm'n, *supra* note 1, at 1.
29. *Id.* at 2.
30. *Id.* at 9.
31. Shapiro & Hovenkamp, *supra* note 17.

Furthermore, the suggestion under question 14 that parties should have to show with certainty that cognizable efficiencies could not have been achieved through alternative means asks the impossible. Theoreticians may be able to dream up alternative means by which efficiencies might have been achieved (through, say, convoluted contracts), but such constructs may not be practical in real-world settings.[32] Requiring businesses to follow dubious theoretical approaches to achieve legitimate business ends, rather than allowing them to enter into arrangements they favor that appear efficient, would manifest inappropriate government interference in markets. (It would also be just another example of the "pretense of knowledge" by government officials that F. A. Hayek brilliantly describes in his 1974 Nobel Prize lecture.[33])

Other parts of question 14 raise concerns about the lack of discussion of possible inefficiencies in current guidelines and speculate about possible losses of product or service quality owing to otherwise-efficient reductions in physical capacity and employment. Such theoretical musings offer little guidance to the private sector and further cast in a negative light potential real resource savings.

Rather than incorporating the theoretical and problematic efficiencies critiques under question 14, the Agencies should consider a more helpful approach to evaluating efficiencies in new guidelines. Such an approach could be based on FTC Commissioner Christine Wilson's helpful discussion of merger efficiencies in recent writings.[34] Wilson has appropriately called for the symmetric treatment of the potential harms and benefits arising from mergers, explaining that "the agencies readily credit harms but consistently approach potential benefits with extreme skepticism."[35] She and Joshua Wright (who is a former FTC commissioner) have also explained that overly narrow product market definitions may sometimes preclude the consideration of substantial "out-of-market" efficiencies arising from certain mergers.[36] The consideration of offsetting "out-of-market" efficiencies that greatly outweigh competitive harms might warrant inclusion in new guidelines.

CONCLUSION

The Agencies could soon face a merger enforcement catastrophe if they adopt new guidelines incorporating the merger-skeptical tone and excruciating level of detail found in the RFI. Such guidelines would yield a long, uninformative list of potential competitive problems that would allow the Agencies to selectively cite well-tailored competitive harm stories when opposing mergers, in tension with the rule of law. Far from strengthening merger enforcement, such new

---

32. Insisting that an ideal solution should be preferred over a workable one is a manifestation of the nirvana fallacy described by professor Demsetz. *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).
33. F. A. Hayek, Lecture to the Memory of Alfred Nobel: The Pretence of Knowledge (Dec. 11, 1974).
34. Christine S. Wilson, Comm'r, Fed. Trade Comm'n, remarks at the Bates White Antitrust Webinar: The Other Side of the Coin: Proper Evaluation of Efficiencies in Merger Analysis: Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies (June 24, 2020); Wilson, *supra* note 17.
35. Wilson, *supra* note, 17, at 11.
36. Christine S. Wilson, Comm'r, Fed. Trade Comm'n, remarks at the 2019 Antitrust Enforcement Symposium: The Unintended Consequences of Narrower Product Markets and the Overly Leveraged Nature of *Philadelphia National Bank* (June 30, 2019); Joshua D. Wright, *Do the New HMGs Move from Cheap Talk to Commitment on Out-Of-Market Efficiencies?*, TRUTH ON THE MARKET (Aug. 20, 2010), https://truthonthemarket.com/2010/08/20/do-the-new-hmgs-move-from-cheap-talk-to-commitment-on-out-of-market-efficiencies/; Joshua D. Wright, *Judge Sullivan and the UPP: Much Ado about Nothing or Articulating the Real Problem with the New HMGs?*, TRUTH ON THE MARKET (May 14, 2010), https://truthonthemarket.com/2010/05/14/judge-sullivan-and-the-upp-much-ado-about-nothing-or-articulating-the-real-problem-with-the-new-hmgs/.

guidelines would lead to economically harmful business uncertainty and severely undermine judicial respect for the federal merger enforcement process. Certain welfare-enhancing transactions would never be entered into, and judges would be less likely to accept sound arguments by the Agencies' prosecutors. The result would be most unfortunate for businesses, enforcers, and the American economy.

If the Agencies enact new guidelines, those guidelines should be short and straightforward, designed to give private parties the clearest possible picture of general enforcement intentions. In particular, the new guidelines should (a) eschew references to dated and discredited case law; (b) adopt a neutral tone that acknowledges the benefits of mergers; (c) recognize the duty to challenge anticompetitive mergers while noting the public interest in avoiding unnecessary interference with competitively beneficial or neutral mergers (consistent with the Agencies' 2010 *Horizontal Merger Guidelines*); and (d) acknowledge the importance of efficiencies, treating them symmetrically with competitive harms and according appropriate weight to countervailing out-of-market efficiencies (which would be a distinct improvement over existing enforcement policy).

Merger enforcement should continue to be grounded on fact-based case-specific evaluations informed by sound economics. Populist nostrums that treat mergers with suspicion and that ignore their benefits should be rejected. Such ideas are at odds with current scholarly thinking and judicial analysis, and they are best relegated to the graveyard of unsound public policy proposals.