# Revising the Merger Guidelines: Second Request Screens and the Agencies' Empirical Approach to Competitive Effects

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## I. Introduction

The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, "the Agencies") have stated that an update to the Horizontal Merger Guidelines (the "Merger Guidelines") potentially could serve two primary goals. Specifically, the Merger Guidelines could be updated so that they "more accurately and clearly describe current Agency practice" and so that they "reflect and incorporate learning and experience gained since 1992."[1] We applaud both of these goals and offer our comments in that spirit.

In general, the Merger Guidelines describe an analytical framework that is useful in giving the business community, the antitrust bar, and consulting economists guidance on how the Agencies will evaluate the likely competitive effects of a proposed transaction. However, there are two aspects of the Merger Guidelines that could benefit from a revision.

First, the Merger Guidelines do not provide guidance on how the Agencies determine whether or not they will issue a Request for Additional Information and Documentary Material (i.e., a "Second Request."). Yet, for many merging parties, guidance on how the Agencies make this initial decision is critical because the receipt of a Second Request implies substantial costs, a lengthier investigation, and delays that could jeopardize the financing of the transaction itself. Thus, a revision that gives greater clarity on the types of evidence and screens that are used in this stage of the investigation will help merging parties and their counsel make more informed decisions as they contemplate the antitrust risk associated with a particular transaction.

Second, the Merger Guidelines offer little guidance regarding the types of empirical evidence and analyses that the Agencies rely upon to determine the likely competitive effects of a proposed transaction. Yet Second Requests typically ask for substantial amounts of data, and, in our experience, the Agencies routinely seek to use these data to implement analyses designed

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* The authors are economists and Senior Vice Presidents at NERA Economic Consulting. This comment was prepared in response to the FTC and DOJ's Notice of Public Workshop(s) and Request for Comments in connection with the FTC and DOJ's Horizontal Merger Guidelines Review Project. The views expressed are their own and do not necessarily reflect the views of others at NERA.

[1] "Horizontal Merger Guidelines: Questions for Public Comment," FTC, September 22, 2009, p. 1 (available at http://www.ftc.gov/bc/workshops/hmg/hmg-questions.pdf).

to shed light on the competitive effects of the proposed transaction. Thus, a revision to the Merger Guidelines that provides guidance on the types of empirical analyses that may be undertaken by the Agencies will help the merging parties and the antitrust bar appreciate (a) why the Agencies ask for substantial amounts of data in the Second Request and (b) the variety of empirical questions that the Agencies may ask when evaluating the competitive impact of a proposed transaction.

The nature of the revisions that we are proposing derives from our view that the Merger Guidelines would be more informative and useful if they reflected the actual practices of the Agencies. Revisions of this nature will enhance the transparency of the merger review process, which may help merging parties and their counsel more accurately evaluate the antitrust risks of a particular transaction. Moreover, the addition of an explicit empirical framework to the Merger Guidelines will give merging parties and their counsel a better understanding of the kinds of data they will need to collect and the types of empirical analyses they may want to consider presenting to the Agencies. The guidance will allow merging parties and their counsel to focus their efforts on analyses that are likely to be of greater use and interest to the Agencies and to provide this information in a more efficient and timely manner.

## II. Suggestion 1: Revise the Merger Guidelines to Explicitly Identify the Evidence and Indicia that are Relied Upon by the Agencies to Determine Whether a Second Request Will be Issued

The timing and procedures mandated by the Hart-Scott-Rodino (HSR) Act have created what amounts to a two-stage process for merger review by the Agencies. In the first stage, during the first 30 days after the HSR filing, the Agencies apply an initial screen to decide whether the competitive implications of a proposed transaction should be subjected to a deeper investigation. If additional investigation is needed, the Agencies issue a Second Request and, in the second stage, proceed with a deeper investigation to determine whether there is a likelihood of significant anticompetitive effect that warrants challenging the merger.

As we understand it, the Agencies have not codified formal procedures that describe or govern how they conduct the screening process in the first stage to determine whether they should issue a Second Request. Instead, it seems that a case-by-case approach is used, with reference to the general principles contained in the Merger Guidelines. While any screening process will necessarily incorporate case-specific information, it would be useful to have an explicit statement of the approach to screening that the Agencies have been using as a matter of practice, as well as the general criteria that will be relied upon to determine whether a Second Request is likely to be issued.

In our experience, the Agencies focus their efforts in the first stage on gathering the information and data needed to reach preliminary judgments on market definition and the effect of the transaction on the structure and concentration of the likely relevant market. In addition, the Agencies begin the process of articulating the mechanism by which the proposed transaction could harm consumers and competition. To do this, the initial investigation in this stage of the investigation typically involves the following: (a) an assessment of the structure of the market and computation of indicia such as market shares, the Herfindahl-Hirschman Index (HHI), and the number and competitive significance of the major market participants, (b) an evaluation of the merging parties' 4(c) documents, and (c) interviews with market participants and customers. These are logical first steps in an antitrust analysis, but there is considerable variation across and within the two Agencies in how this initial investigation is executed and how the results are interpreted and weighed.

In articulating the screen that the Agencies have been or will be using to determine which transactions require a Second Request, it would be useful if the Agencies would address the following concepts and principles:

## A. The Purpose of Articulating a Screen

Only a limited number of proposed transactions are subject to a Second Request, which implies that the Agencies already apply a screen, and, indeed, this is consistent with our experience. Given the limited resources of the Agencies, it is appropriate that the Agencies focus their efforts on an evaluation of the impact of transactions that are more likely to raise competitive concerns. At the same time, a well-articulated screen would provide clarity and guidance to merging parties and the antitrust bar generally. Such clarity would allow the merging parties the opportunity to evaluate the antitrust risks of proposed transactions prior to a merger agreement and to plan for the expenses and time for the merger review that is likely to occur. For merging parties, reducing risk and uncertainty is valuable.

## B. The Need for a Screen that Minimizes the Expected Costs Associated with False Positives and False Negatives

The use of a screen is part of a sound antitrust enforcement policy, and one that is consistent with the principles of decision theory. Consider the following, admittedly stylized, description of the Agencies' problem. At any given moment in time, the Agencies are presented with a multitude of potential transactions. While the competitive effects of some potential transactions may be clear, there generally is a substantial gray area, which presents the Agencies with the following dilemma: which transactions should they investigate further and which ones should they grant early termination?

If the Agencies had perfect foresight and the ability to predict perfectly which transactions are likely to harm consumers and competition, then there would be no need for a screen. Of course, this is not the case. In making a decision, the Agencies face two types of potential errors: false positives (i.e., determining that a transaction is anticompetitive when it is not) and false negatives (i.e., determining that a transaction is not anticompetitive when it is likely to harm consumers and competition). Both types of errors reduce social welfare relative to making the *correct* decision. In the case of a false positive (also known as a Type I error), there are costs to the Agencies in the form of allocating resources to evaluating transactions that are not likely to raise competitive concerns, as well as costs to the merging parties in the form of expenses and delays and to consumers in terms of delays in receiving the benefits of procompetitive mergers. In the case of a false negative (also known as a Type II error), there are costs to consumers in the form of a transaction that is allowed to proceed, with the result being harm to competition and higher prices or lower quality.

In seeking to maximize social welfare when there is imperfect information or uncertainty, one approach is to use Bayesian optimal decision rules to make a decision (e.g., whether to issue a Second Request or not). In this case, that would involve minimizing the sum of the expected social welfare costs of false positives and false negatives. Using a Bayesian approach, the Agencies would consider the expected costs using the probability distribution that it has on the *true* competitive effect of a proposed merger. Where does this probability distribution come from? It would come mainly from experience that the Agencies have from previous mergers they have evaluated (the *prior* distribution), which is updated for the specific merger in question (to obtain the *posterior* distribution) after the Agencies evaluate information that they obtain in the first stage (i.e., the *signal*).[2] Decision theory suggests that the weight afforded to the signal (as opposed to the prior distribution) by the decision maker should depend on the signal's precision. The precision of the signal—that is, the information that is available to the Agencies in the first stage of its merger review—is likely to vary from transaction to transaction; as a result, the weight that is placed on the signal is likely to vary from merger to merger.

An appropriate screening process drawing on the stylized Bayesian approach described above can improve the Agencies' decision-making process by reducing the probability of error.[3] In this way, the development and use of a clearly defined merger screen can be valuable in helping the Agencies target their Second Requests more accurately, which means that Second Requests are issued on transactions that are most likely to be anticompetitive, but not issued on transactions that are less likely to be anticompetitive. The Agencies may well want to be conservative in their enforcement efforts by accepting a higher level of Type I error, but, we hope that, over time, the Agencies can perform the research needed to update their decision rules in a way that will improve the merger review process for all. If the Agencies adopt this approach, we hope they will revise the Merger Guidelines to provide insight as to what signals they use and what weight they place upon them in the screening process.[4]

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[2] In practice, the Agencies might adjust the updating process over time to reflect, for example, advances in economic theory, learning on the types of information that are most valuable in the screening process, and the availability of newer and better data through advances in information systems and technologies.

[3] This benefit needs to be weighed against the cost of obtaining the signal in cases where obtaining the signal is costly.

[4] While it may be difficult to quantify exactly the weights that would be ascribed to information that is available in the screening process, the approach that is currently in the Merger Guidelines may provide a useful model for explaining in a qualitative sense how information is weighed. For example, in discussing cognizable efficiencies, the Merger Guidelines state that "[t]he greater the potential adverse competitive effect of a merger—as indicated by the increase in the HHI and post-merger HHI from Section 1, the analysis of potential adverse competitive effects from Section 2, and the timeliness, likelihood, and sufficiency of entry from Section 3—the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market." (Merger Guidelines, Section 4.0). A discussion of this kind may be one way to describe the relative importance of the various types of information that may be available in the first stage of the merger review process.

## C. The Role of Market Definition, Market Shares, and the HHI in the Screening Stage

Market definition is one of the questions that, in our experience, the Agencies typically address in the first 30 days of their analysis, yet it is also an issue that often requires substantial empirical inquiry. Indeed, defining relevant markets—particularly when there are potential scores of local and regional markets—can be time-consuming and costly for both the Agencies and the merging parties. Thus, it would be useful for the Agencies to state how they evaluate and assess evidence on market definition in the first 30 days, particularly when there is substantial debate or uncertainty about the extent of the relevant market.

Returning to decision theory, the weight given to a signal by a decision maker should depend upon the precision of the information provided by the signal. The same type of signal may be precise in one situation and imprecise in another situation. For example, for transactions where market definition is uncertain and the conclusions to be drawn from the market definition vary significantly depending on the chosen market definition, the precision of the signal provided by market definition is relatively low. Decision theory would suggest that little weight be afforded to the market definition in the case of such transactions. Again, we presume that the Agencies take these considerations into account. It would be useful for the Agencies to articulate the conditions under which market definition, market shares, and the HHI are given substantial weight in the first stage and when they are not.[5]

## D. The Use of Information Contained in the Merging Parties' 4(c) Documents

The Agencies recognize that the documents that are often included in the merging parties' 4(c) documents were created for business purposes and not for the purpose of antitrust market definition. Indeed, the Agencies have made clear that they do not assume that the use of the term "market" in a 4(c) document is a relevant market for the purposes of merger review.[6] Insights from the Agencies' experience in reviewing 4(c) documents would be particularly valuable.

## E. The Use of Customer Interviews

The Agencies have stated that they will rely on evidence from and about customers.[7] For example, the Agencies will interview and obtain data and documents from customers regarding their views of the market, the merging parties, and the competitors of the merging parties. It would be useful for the Agencies to discuss how they evaluate such evidence. If the views regarding a proposed transaction are uniform—either in support of a transaction or against it, then, for the purpose of determining whether a Second Request is warranted, the Agencies may

[5] It would also be useful for the market concentration and HHI thresholds in the Merger Guidelines to be revised to reflect actual Agency practice. In our experience, the existing thresholds have little relationship to actual practice.

[6] DOJ and FTC, "Commentary on the Horizontal Merger Guidelines," March 2006, p. 11.

[7] DOJ and FTC, "Commentary on the Horizontal Merger Guidelines," March 2006, p. 9.

want to discuss how they consider and weigh that evidence against potentially contradictory evidence from other sources (e.g., the 4(c) documents). However, the views of customers are often mixed or uncertain. Again, this is a situation where the signal is relatively imprecise. In these situations, it would be especially important for the Agencies to clarify how they interpret and weigh such information in the screening process.

## F. The Use of Other Market Data

It may be possible to develop other types of evidence that could be used in the screening process. For example, it may be possible to compute reliable estimates of diversion ratios based on historical consumer data or to determine the competitive significance of key competitors based on win-loss data. In many cases, these types of studies can be performed using aggregate data or data that are informative yet easily obtained. While the kind of information that is part of a typical Second Request would allow for more sophisticated analyses, it would be valuable if the Agencies would consider discussing the types of studies that they have found useful historically in determining whether a Second Request is warranted or not.

## G. Consideration of Efficiencies and the Overall Rationale for the Transaction

The types of evidence that the Agencies consider in determining whether to issue a Second Request should include information provided by the merging parties regarding the rationale for the transaction and the potential efficiencies. The Agencies already recognize that efficiencies are important in answering the ultimate question of whether a transaction is likely to harm consumers or competition, but it is unclear how and whether efficiencies are considered in the first 30 days. This is particularly important because it may not be possible to complete a full analysis of the potential efficiencies and synergies before the Agencies have to issue a Second Request. The Agencies may have experience that they may be able to articulate regarding the types of documentation that they have found useful, and such guidance would be valuable. For example, it would be useful to know how the Agencies weigh third party consulting reports on efficiencies that have been commissioned by the parties.

In summary, we recognize that the Agencies have considerable experience in evaluating and screening proposed transactions, particularly for the purpose of determining which transactions should be subjected to a Second Request. At present, the Merger Guidelines do not describe how this important initial phase of the analysis is conducted. Because this kind of guidance would be of enormous value to the merging parties and the antitrust bar, it would be useful for the Agencies to develop a systematic screening process and to consider a revision of the Merger Guidelines that discusses the general parameters of this screening process. Such a discussion might include the types of information that would be considered and how much weight would be assigned to them, the types of analyses that are likely to be performed, and the criteria that are likely to be employed to determine whether a Second Request will be issued.

## III. Suggestion 2: Describe the Empirical Approaches the Agencies Use to Evaluate the Potential Competitive Impact of a Proposed Transaction

We believe that it would be extremely useful for the Agencies to revise the Merger Guidelines so as to more explicitly reflect the empirical focus of the Agencies' actual practice. A typical Second Request seeks substantial amounts of data and information concerning competition in the marketplace and, in our experience, the Agencies undertake empirical analyses of these data and information in the second stage of the investigation. Moreover, with increasing access to better and more useful data, the Agencies, in many cases, have been focusing their efforts in the second stage of the merger review process on determining competitive effects using information other than market shares and market concentration.

However, a reading of the Merger Guidelines, as currently written, gives the false impression that the Agencies place substantial weight on market share and concentration statistics rather than empirical analysis when evaluating the competitive impact of a proposed transaction. Given that this impression is, in fact, inconsistent with the practice of the Agencies, a revision that emphasizes empirical evidence and outlines the types of empirical analyses that the Agencies use in second stage investigations would be valuable.

### A. Guidelines that Reflect the Shift Away from Market Shares and Concentration Towards Direct Evidence of Competitive Effects

The practice of the Agencies to focus on market shares and concentration in the first stage of the merger review process is consistent with the Agencies' own statements that market shares and concentration are only a "starting point for analyzing the competitive impact of a merger" and that the Agencies "do not make enforcement decisions solely on the basis of market shares and concentration....".[8] Indeed, the Agencies have cleared transactions that might, on the surface, appear to be mergers to monopoly (e.g., the DOJ's clearance of a merger of two satellite radio providers, HM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc., in 2008).[9] Also, as noted by the FTC, "[w]here direct evidence of anticompetitive effects is presented, courts have recognized that traditional market definition may be altogether unnecessary to the adjudication of antitrust claims."[10]

A revision that deemphasizes market share and concentration statistics as evidence of competitive effects would be valuable because it would eliminate what we view to be a distortion that is induced by the current emphasis in the Merger Guidelines on market definition shares and concentration: an inefficient allocation of resources to the task of defining markets. By revising

[8] DOJ and FTC, "Commentary on the Horizontal Merger Guidelines," March 2006, p. 15.

[9] In the case of XM and Sirius, one concern was whether the transaction would create a monopoly in a market limited to satellite radio. See "Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc." (available at http://www.justice.gov/opa/pr/2008/March/08_at_226.html).

[10] See Proof Brief for Appellant Federal Trade Commission, *FTC v. Whole Foods Market, Inc. and Wild Oats Markets, Inc.*, p. 38, footnote 26 (available at http://www.ftc.gov/os/caselist/0710114/0710114.shtm).

the Merger Guidelines in the ways we suggest below, with a greater emphasis placed on empirical evidence that gets at the heart of the competitive effects question, the efforts of merging parties and the Agencies would be more efficiently directed.

## B. The Agencies' Empirical Focus to Competitive Effects Analysis Suggests an Approach that Integrates Analyses of Competitive Effects, Entry, and Efficiencies

The Agencies' empirical focus also raises a question about whether it continues to make sense to distinguish competitive effects analysis as separate and distinct from inquiries about entry and efficiencies. In the end, the ultimate question is whether or not a proposed transaction is likely to lead to higher prices, lower quality, or reduced innovation. Indeed, as stated in the DOJ and FTC Commentary on the Horizontal Merger Guidelines:

> The Guidelines' integrated process is "a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or facilitate its exercise." Guidelines § 0.2. At the center of the Agencies' application of the Guidelines, therefore, is competitive effects analysis. That inquiry directly addresses the key question that the Agencies must answer: Is the merger under review likely substantially to lessen competition? To this end, the Agencies examine whether the merger of two particular rivals matters, that is, whether the merger is likely to affect adversely the competitive process, resulting in higher prices, lower quality, or reduced innovation.[11]

This is the right approach, and one that appropriately focuses the inquiry on the overall competitive impact of the proposed transaction. But entry and efficiencies are important determinants of what this overall competitive impact will be. The questions typically addressed include the following: Will new entry or expansion by existing incumbents be effective in preventing prices from rising post-merger? Will the efficiencies and cost savings provide the merged firm the incentive to lower its prices? Does excess capacity give the merged entity an incentive to lower prices? There is no reason to draw lines between what are currently termed "competitive effects" questions, "entry" questions, and "efficiencies" questions.

The questions above are the right questions to ask, and a revision to the Merger Guidelines that emphasizes these lines of inquiry as part of an integrated analysis will be consistent with not only the way economists tend to approach these questions, but also the Agencies' focus on the ultimate competitive impact of a proposed transaction.

[11] DOJ and FTC, "Commentary on the Horizontal Merger Guidelines," March 2006, p. 2.

## C. Merger Guidelines that Provide Guidance on the Types of Empirical Evidence that the Agencies Find Informative and Useful

Assuming a revision that refocuses the Merger Guidelines on analyzing empirical evidence in merger investigations, the following are four types of analyses that would benefit from further explicit discussion in the Merger Guidelines:

*Natural experiments*: It has become common for analysts to identify events referred to as "natural experiments" that have the potential to provide evidence useful for assessing the likely competitive effects. For example, it may be possible to analyze the effects of previous entry or expansion by rivals, repositioning, or capacity additions or subtractions by the merging parties (or their rivals). These events may allow one to test assumptions regarding the way in which competition works.[12] However, while such events can provide useful information, one must check that the conditions required to draw valid conclusions in fact hold. Not all events provide a valid "natural experiment." Randomized experimental design leads to valid conclusions because application of the "treatment" is necessarily uncorrelated with characteristics of the study subjects. In a parallel sense, an event is a true "natural experiment" only if the incidence of the event is uncorrelated with the effect of the event. However, because the event is *natural* and not *controlled*, there is no guarantee that this zero correlation property holds. One must carefully evaluate whether that is the case in a given situation. For example, the occurrence of entry into a geographic area may be (negatively) correlated with the likely impact of the entry in that area. In that case, entry may not be a valid "natural experiment," at least in the way entry is commonly used in merger analysis. Another problem with supposed "natural experiments" is that they may fail to provide information that is relevant to the competitive effects question at hand. We suggest that the Merger Guidelines be revised to discuss how and when "natural experiments" will be used by the Agencies.

*Merger simulation*. Merger simulation can be a valuable tool in merger analysis.[13] However, as with all tools (including "natural experiments," as described above), merger simulation will produce reliable results only when used in appropriate circumstances using appropriate modeling assumptions. For example, use of short cuts—for example, the use of information on market shares to compute cross elasticities of demand (or diversion ratios)—will often fail to accurately reflect the true competitive situation, resulting in unreliable merger simulation results. For this reason, cross elasticities should be based on empirical analyses of customer switching behavior rather than market shares. Similarly, making an invalid assumption about the form of competition can lead to poor predictions of a merger's effects. Thus, assumptions regarding the form of competition should be subjected to tests of validity where possible. In addition, while efficiencies can be modeled and accounted for in a merger simulation, other types of competitive factors (e.g., repositioning) may be more difficult to incorporate. In situations where such factors are important, the results of a merger simulation

[12] We have written on how to analyze such events. See Gregory K. Leonard and Lawrence Wu, "Assessing the Competitive Effects of a Merger: Empirical Analysis of Price Differences Across Markets and Natural Experiments," *Antitrust* (2007).

[13] See Gregory K. Leonard and J. Douglas Zona, "Simulation in Competitive Analysis," *Issues in Competition Law and Policy* (2008).

analysis may need to be adjusted or weighed appropriately to account for the impact of these other factors. We suggest that the Merger Guidelines be revised to discuss when and how merger simulation will be used by the Agencies.

*Buyer power*. It is sometimes asserted that a merger will not have an anticompetitive effect on a given buyer because the buyer is large and, thus, has *countervailing* buyer power that would prevent the merged firm from raising price to that buyer.[14] We note that—by itself—this proposition is no more valid than the proposition that a seller with a large market share necessarily has market power. We suggest that the Merger Guidelines be revised to discuss the conditions under which a "buyer power" argument could make economic sense. For example, in a situation where a fixed cost investment would be required to develop a substitute product or supplier, it is possible that a large buyer may find it profitable to make such an investment following a price increase (given the large volume over which the fixed investment cost would be spread) whereas a small buyer may not, which may prevent the merged firm from increasing price to the large buyer. Because the conditions for such buyer power to be effective in disciplining pricing post-merger are likely to vary from market to market and buyer to buyer, it would be valuable for the Agencies to discuss their empirical approach to this important issue.

*Efficiencies*. As discussed above, efficiencies often have competitive effects and, thus, should be included as an integral part of the competitive effects analysis, rather than treated as an afterthought. The Agencies have substantial experience in analyzing the competitive effects of marginal cost reductions, and the Agencies' learning and insights could be included in a revised Merger Guidelines. However, the analysis of efficiencies that primarily increase output (e.g., transactions that help to bring a new technology to market) is less straightforward, yet such efficiencies are important, particularly in new and emerging markets. Given the substantial and increasing importance of innovation in the U.S. economy, output-enhancing efficiencies should not be ignored, particularly because they are likely to gain in economic significance. In the case of output-enhancing efficiencies, the benefits must be assessed in terms of consumer surplus or total market output rather than prices or reductions in cost. The "output test" may be useful in this context. If a merger's output-enhancing efficiencies have a procompetitive effect that exceeds the price effects resulting from the lessening of competition, consumer surplus will increase post-merger. A consumer surplus increase likely coincides with an increase in total market output. Thus, demonstrating that the merger will lead to an increase in output suggests that the merger will be overall procompetitive.[15] We suggest that the Merger Guidelines be revised to address these issues.

In summary, the Merger Guidelines offer little guidance on the empirical evidence and analyses that the Agencies rely on to determine whether a proposed transaction is likely to lead to anticompetitive effects. Yet it is clear that the focus of the Agencies—particularly in the post-

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[14] For example, the Merger Guidelines already note the potential importance of buyer size in its discussion of coordinated interaction. (See Merger Guidelines, Section 2.12.)

[15] Although an increase in output is not necessary and sufficient for a consumer surplus increase, the output test nevertheless is a useful test for competitive effects because it is often easier to apply than a consumer surplus test and often provides the same answer as the consumer surplus test. See Frank H. Easterbrook, "The Limits of Antitrust," *Texas Law Review* (1984).

Second Request phase—is on empirical analyses that use quantitative methods and, in some cases, merger simulation. A revision that provides guidance on the types of empirical data that are likely to be informative to the Agencies and the kinds of analyses that may be undertaken by the Agencies would be valuable in helping merging parties and the antitrust bar appreciate that the Agencies evaluate the competitive impact of a proposed transaction on a case-by-case basis using empirical data and analyses rather than market shares and concentration.

## IV. Conclusions

As stated in Section 0.1 of the Merger Guidelines, the Merger Guidelines outline the merger enforcement policy of the DOJ and FTC. The Merger Guidelines were also written to articulate the Agencies' analytical framework and to "set forth a methodology for analyzing issues once the necessary facts are available."[16] We submit our suggestions for how the Merger Guidelines could be revised based on the idea that the Merger Guidelines would provide more information and guidance if they reflect the actual practice and analytical process that the Agencies employ in evaluating the potential competitive impact of a proposed merger.

Thank you for the opportunity to submit this comment. We appreciate the Agencies' commitment to enforcing the antitrust laws, interest in providing guidance and transparency, and dedication to developing a merger review process that is based on sound legal and economic principles.

[16] Merger Guidelines, Section 0.1.