PROPOSED HORIZONTAL MERGER GUIDELINES:

REQUEST FOR PUBLIC COMMENT
FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE
HMG REVIEW PROJECT – PROJECT NO. P092900

VIEWS OF THE
AMERICAN ANTITRUST INSTITUTE
JUNE 4, 2010

The American Antitrust Institute ("AAI")[1] appreciates the opportunity to provide its views on the proposed revisions of the Horizontal Merger Guidelines (the "Guidelines"), which were issued April 20, 2010, by the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) (collectively, the "Agencies").

AAI applauds the Agencies for issuing these proposed Guidelines revisions. The document constitutes a tremendous advance in merger analysis, one that should result in significant benefits for our economy as a whole and for consumers in particular. This is true for two broad categories of reasons. First, this document more accurately and more clearly reflects what the government enforcers actually do. Second, it better embodies the current, state-of-the-art, economic analysis of mergers.

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[1] AAI is an independent Washington-based non-profit education, research, and advocacy organization devoted to advancing the role of competition in the American and world economy, assuring that competition works in the interests of consumers, and challenging abuses of concentrated economic power. For more information on AAI please visit www.antitrustinstitute.org. For more information on this submission please contact Robert H. Lande, an AAI Director and principal author of these Comments, at rlande@antitrustinstitute.org.

AAI has given significant attention to merger policy for many years. We have published analyses of many specific mergers, sector-specific merger reviews, and documents concerning merger policy. Much of our analysis of merger policy and the Guidelines, in particular, is set forth in: (1) "Statement on Horizontal Mergers and the Role of Concentration in the Merger Guidelines" (February 2004); (2) "Comments of the AAI Working Group on Merger Enforcement" in response to the Antitrust Modernization Commission's request for public comments (July 2005); (3) the chapter titled "Tightening Up on Mergers," from AAI's report, THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES (October 2008); and (4) "Comments of the American Antitrust Institute" (November 9, 2009), in response to the FTC and DOJ Questions For Public Comment on the HMP Review Project, Project No. P092900. These documents and further information and details can be found on the AAI website at www.antitrustinstitute.org.

Some might believe this document increases the uncertainty of the merger review process, increasing the enforcers' flexibility at the expense of predictability for the business community. Since the new document merely embodies what the enforcers already have been doing, we believe these concerns to be unwarranted. On the contrary, since it more accurately reflects what the enforcers actually will do, it should actually increase the predictability of government actions.

Nevertheless, we are proposing that the legal framework underpinning this document be made more explicit in certain respects, and in this way reassure the business community that the merger review process is as certain and legally constrained as possible, consistent with the statutory mandate and the nature of the merger environment. To this end, we are recommending some focused, modest changes in the draft. These include a greater analysis of the Clayton Act's incipiency mandate; material that will better convey to the courts that the Agencies are entitled to more deference for their enforcement decisions; material that better explains how protecting consumer choice is a central objective of merger enforcement; language that announces an increasing presumption of a challenge as the HHIs increase; some specific changes concerning power buyers; and a number of smaller but still extremely important issues. First, however, we will explain why this draft represents a substantial advancement, one that will redound to the benefit of everyone affected by merger policy.

Benefits From The Revisions

This document tells the business and legal communities, as clearly as possible, what the enforcers actually are most likely to conduct their analysis when they decide whether to challenge a merger. This increased transparency reflects well-established principles of good government. Moreover, we do not believe this document represents a change in what the enforcement agencies have been doing. The previous Guidelines were issued in 1992 and amended in 1997, and gradually have become obsolete in many respects. These divergences between theory and reality have of course been well known to Washington insiders. But now everyone knows how the enforcers are likely to perform their analysis of mergers. If this transparency had been the Guidelines' only accomplishment, it would have been noteworthy and amply justified this revision.

Another benefit is that this document is simpler to read, and can more readily be understood by businesspeople, the press, lawyers who are not merger specialists, and judges. Its basic plan is fairly easy to follow, and it appears to be less technical than the current document, even though in reality it embodies a more sophisticated approach to merger analysis.

As noted, moreover, the new Guidelines better embody state-of-the-art economic analysis of mergers, and they do this in numerous ways. The placement of this material in the Guidelines should help convince judges that these approaches to enforcement represent the antitrust mainstream and should be used whenever the courts review the enforcers' decisions. For example, the document emphasizes that there is no single uniform approach to analyzing mergers, and that the optimal approach depends upon the available evidence. Yet, the Guidelines also make it clear that the Agencies are in no way implementing an ad hoc approach to merger analysis. The Agencies' decision to make "Evidence" the draft's first substantive section and to discuss a range of approaches towards different types of evidence makes this point vigorously. This section's discussion of the types of evidence and their likely effects on the analysis is especially new and noteworthy.

Several entire sections are new or substantially new, such as Section 8, Powerful Buyers; Section 12, Mergers of Competing Buyers; Section 13, Partial Acquisitions; Section 6.3, Innovation and Product Variety; and Section 6.2, Bargaining and Auctions. Each of these sections represents a major advance in merger analysis.

The draft rightly downplays the centrality of market definition to the enforcement process. Indeed, this could be the Guidelines' most significant change. The draft notes that market definition need not always be a threshold issue. Rather, market definition is best thought of as a tool or guide that can help determine whether a merger is likely to lead to market power. If a merger is predicted to result in significantly higher prices, however, the Guidelines make it clear that the merger will be challenged, and the market only will be defined when the Agencies get into court. While market definition remains important, its de-emphasis should help to focus attention where it counts: in predicting whether consumers will be adversely affected by a merger.

So too does the draft embody state-of-the-art economics when in Section 2.2.2 it says that the enforcers will give increased attention to pricing substantially above marginal cost because of the possibility this indicates industry coordination, the existence of highly differentiated products, and/or that the firm believes its customers are not highly sensitive to price. Because all three possibilities certainly exist, this is a valuable test which belongs in the new Guidelines. The price/cost margin indicium is analytically sound and improves the Guidelines' analysis substantially. The Guidelines wisely never say that high price/cost ratios by themselves will lead to an enforcement action. Rather the Guidelines merely and correctly state that high margins should lead to further study.

Section 4.1.3's emphasis on critical loss analysis represents another significant clarifying improvement. The Guidelines describe the correct way to perform this test, and this should be valuable both for merging firms and reviewing courts because merging parties have on occasion used critical loss analysis incorrectly.

Another noteworthy improvement concerns Section 2.2.2, the discussion of the role of customer complaints. Section 5.3's discussion concerning how mergers can eliminate potential competition and thereby harm consumer welfare also is a significant improvement. The draft's discussion of the important role played by "maverick" firms in Section 2.1.5 and Section 5.3 is another noteworthy advancement.

The Guidelines' clear explanation of why these issues are important for merger enforcement should help convince judges they should be receptive to these arguments when they are presented in court.

Nevertheless, we respectfully submit that this excellent document can be improved. Although the Guidelines are excellent insofar as they clarify existing analysis, the status quo represents a weak version of the law, and a stronger enforcement policy, more consistent with the intent of the law, should be announced through the Guidelines. The remainder of our comments will discuss five enhancements that are crucial but could be made quite easily, and a number of smaller but still important changes that also could be made quite easily.

Include A Fuller Explanation of the Incipiency Doctrine

The Guidelines' reference to incipiency is inadequate in light of the centrality of this concept to Congress's plan for the Clayton Act. The Guidelines should spell out in detail the governing legal framework in this area - i.e., what Congress intended when it enacted this doctrine. The Guidelines should explain to judges and the business community what this means for merger policy as a practical matter.

The Guidelines currently contain only two sentences on the incipiency doctrine. The very end of the second paragraph in Section 1, Overview, notes quite accurately that "these Guidelines reflect the Congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." Section 7.1 also accurately notes: "Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how this will happen."

Although this is a material improvement over the 1992 Guidelines' treatment of the issue, we fear that these conclusory references will be insufficient to affect judicial decisionmaking significantly. We strongly urge the Agencies to include enough material to clearly and forcefully explain where the incipiency mandate originated, what it means, and how it should be implemented by the enforcers and the courts.

This of course does not in any way mean a return to the discredited *Von's Grocery* merger analysis. Rather, this section should emphasize that merger policy must be guided by Congressional intent. The Guidelines should explain that the Sherman Act, with its prohibition against mergers that would constitute the monopolization or attempted monopolization of a market, or an unreasonable restraint of trade, was in effect when the Clayton Act was enacted in 1914. This will make clear that Congress intended for the Clayton Act's prohibition against mergers the effect of which "may be substantially to lessen competition, or to tend to crease a monopoly," to lead to stricter enforcement against mergers under the Clayton Act than had occurred or could occur under the Sherman Act. The incipiency mandate's increased stringency should lead to significantly different outcomes for merger enforcement, and the Guidelines should spell this out with clarity.

We believe the incipiency doctrine, as a practical matter, means a number of things, all of which should be explicit in the Guidelines. First, the Guidelines should recognize that a lower probability of harm should suffice for a violation of the Clayton Act than is required for a violation of the Sherman Act. Second, since uncertainty and errors of both over-enforcement and under-enforcement are inevitable, the Guidelines should state that when evaluating mergers the enforcers and the courts should respect Congress's desires and err on the side of strict enforcement. Third, enforcement under the Clayton Act should look further into the future for possible harms from mergers. An immediate danger of monopolization is not needed for a merger to be unlawful. Finally, mergers should be more likely to be blocked if they are likely to cause or exacerbate an industry trend towards concentration, or if they are likely to spark a merger wave in the industry.

The Guidelines should make it clear that the incipiency mandate applies to all merger analysis, including the possibilities of both coordinated and unilateral effects. We believe that an important reason for the decline of the incipiency doctrine in the courts has been the failure of the Guidelines to pay this idea more than lip service. We urge the enforcers to help effectuate Congressional intent in this area by more clearly and in much more detail explaining and endorsing this doctrine.[2]

<u>Insert Additional Information Likely To Encourage Reviewing Courts To Give the Enforcers More Deference</u>

The Agencies are the world's foremost experts in merger enforcement. Nevertheless, reviewing generalist courts have not always given their enforcement decisions the deference they are due. Even though the overriding purpose of the new Guidelines is to explain the Agencies' enforcement decisions, there is no doubt the document will be read carefully by reviewing courts.

Accordingly, another important task for the Guidelines should be to attempt to convince courts to give a substantial amount of deference to the enforcers concerning their determinations as to crucial mixed questions of law and fact, such as market definition, ease of entry, and the likelihood the merger will produce significant market power. In certain respects the Guidelines should be thought of as an all-purpose brief to the courts, with one of its most important tasks being to re-enforce the message that the enforcers are the experts in merger analysis. Deference by the courts to this expertise is entirely warranted because of the relative experience in merger analysis of the enforcers compared to that of generalist judges.

The Guidelines might appear to be over-reaching if they explicitly asked for this deference. Nevertheless, the Overview should be used to strengthen the Agencies' position with the courts by carrying the discussion of prediction a step further and explaining that better prediction is associated with experience and expertise. Then the Guidelines should describe in quantitative terms the experience the agencies have with the analysis of mergers,

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[2] For an analysis of these issues see Robert H. Lande, *Resurrecting Incipiency: From Von's Grocery to Consumer Choice*, 68 Antitrust L. J. 875 (2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134815.

such as the number of Hart-Scott-Rodino notifications they study in a decade, the number for which they issue Second Requests for additional information, the extent to which these are investigated, the number of challenges, etc. The Guidelines could refer to the numbers of lawyers and economists at the agencies that are merger specialists, their years of service, their academic work in the field, and their on-going evaluation of the results of mergers. Without actually asking for deference, this would be a way to demonstrate to judges the comparative expertise of the Agencies.

<u>Clarify That Protecting Consumer Choice is a Central Objective of Merger Enforcement</u>

As noted earlier, some might believe these Guidelines are unduly standardless and give insufficient notice as to when the enforcers will challenge mergers. One way to help reassure the business community is to emphasize the constraints provided by the overall legal framework that governs merger enforcement. These limitations can be illustrated in "consumer choice" terms.[3]

The new draft Guidelines certainly give much more emphasis to non-price competition than the 1992 version.[4] We applaud this significant advancement.

In addition, the Guidelines should state explicitly that no merger will be challenged unless it may substantially lessen the choices that competition would be likely to bring to the marketplace. This would focus attention on the factors important for a market to function competitively, including variety and quality, as well as price. When antimerger law is construed and applied within the consumer choice framework, the analysis and outcomes

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[3] *See* Neil W. Averitt & Robert H. Lande, *Using The "Consumer Choice" Approach to Antitrust Law,* 74 ANTITRUST L. J. 175, 182 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121459.

[4] The previous version of the Guidelines only mentioned non-price aspects of competition in a footnote, noting that "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation." 1992 Guidelines Section 0.1 n.6. By contrast, the new draft states in its Overview, Section 1: "A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints on incentives." Two paragraphs later the new Guidelines state: "Enhanced market power can also be manifested in non-price terms and conditions that adversely affect consumers, including reduced product quality, reduced product variety, reduced service, or diminished innovation." Moreover, the entirety of Section 6.4 is devoted to Innovation and Product Variety (a welcome new section of the Guidelines).

This represents a tremendous increase in emphasis, which AAI readily endorses. Nevertheless, we believe that safety and privacy also should be added to this list of important non-price concerns.

could change at times because this approach gives greater emphasis to such short term issues as quality and variety competition, and to such long term issues as competition in terms of innovation, ideas, and perspectives.[5] Since these are crucial to consumers, focusing on them explicitly would be likely to improve consumer welfare. The Guidelines explicitly should reassure the business community that the enforcers will not challenge a merger merely because it reduces the number of available options; enforcement will only occur if the merger may *substantially* lessen the price or non-price options available in the market that otherwise would have been provided by competition.

The Guidelines would be improved by small changes that made it clear that the enforcers are using consumer choice as a limiting principle, rather than as an additional reason to challenge mergers. For example, the Guidelines could add 2 sentences to this effect in Section 1, Overview, after: "A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints on incentives." This addition could state: "Such a merger will be challenged only if it may substantially impair the price or non-price choices that free competition otherwise would be likely to bring to the marketplace. Unless a merger may be substantially likely to unduly restrict the options available in the marketplace, it will not be challenged."[6]

An explicit consumer choice legal framework would have the advantage of explaining accurately, simply and intuitively, in a way that is easy for businesses and reviewing courts to understand, why an antimerger policy will enhance consumer welfare. It would do so in a constrained, predictable, and principled manner.[7] It also would provide a relatively clear way for businesses and courts to distinguish anticompetitive mergers from procompetitive or benign mergers.

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[5] This long term focus on consumer welfare could at times be crucial. Thus, a merger that significantly enhances innovation by the merged firm should be approved even if the merged firm's new products drive out rival products and leave consumers with fewer (albeit better) choices.

[6] This addition also could explain that sometimes the consumer choice focus will be short term (such as when a merger is likely to lead to significantly fewer options in the marketplace) while other time the focus will be long term (such as when a merger is likely to lead to less innovation).

[7] As the Commission explained in <u>In Re International Harvester Co.</u>, 104 F.T.C. 949, 1061 n. 47 (1984): "Some commentators have interpreted our policy statement as involving essentially a general balancing of interests, with all the imprecision of that course, rather than a definable economic rule. In fact, however, the principle focus of our unfairness policy is on the maintenance of consumer choice or consumer sovereignty, an economic concept that permits relatively specific identification of conduct harmful to that objective."

Include an Increasing Presumption of A Challenge as the HHI's Increase

The Agencies' decision to raise the HHI thresholds does indeed increase the Guidelines' transparency. The antitrust community has known for some time that the old HHIs were not being used. In light of these higher HHI numbers, the Guidelines should contain an explicit statement that the presumption of an increase in market power and increased likelihood of competitive harm will grow stronger as concentration increases beyond the levels mentioned in the Guidelines, and as the change in concentration increases beyond these levels. The Guidelines explicitly should state that as these thresholds increase, so too does the likelihood of an increase in market power and the probability of a challenge. The Guidelines only hint in this direction, in Section 5.3 by stating: "The higher the post-merger HHI and the increase in the HHI, the greater is the likelihood that the Agencies will request additional information to conduct their analysis."

While the preceding sentence represents an important improvement over the existing Guidelines, the document should go much further. This could be accomplished by changing the just-quoted sentence to: "The higher the post-merger HHI and the increase in the HHI, the greater is the likelihood that the merger will lead to market power that will harm consumer welfare, and the greater will be the probability of a challenge."

A related issue is that the Guidelines note in Section 5.3 that the Agencies "often" calculate the HHI. We believe "often" should be changed to "usually" and that the Guidelines explicitly should give some of the circumstances under which it is not necessary to calculate HHIs.

Include Distinct Considerations Involved in Analyzing Mergers of Buyers

The proposed Guidelines are a marked improvement over the current version in their analysis of mergers of buyers. The new guidelines devote much more space to the issue – an entire section instead of a single paragraph. They reject the notion that a merger of buyers should be evaluated solely or primarily on the basis of its effects in downstream markets.[8] And they state that a short-run reduction in output is not the only or even the best test of whether a merger enhances monopsony power. We endorse and applaud each of these changes.

In one significant respect, however, the proposed Guidelines are incomplete. Like the current version, they indicate the Agencies will use essentially the same framework for evaluating mergers of buyers that they use in evaluating mergers of sellers. This symmetric approach, however, is not entirely correct. Although buy-side and sell-side mergers are

[8] In Example 22, the Agencies point out that a merger of buyers can enhance monopsony power and depress the price received by farmers, "even if it would not lead to any increase in the price charged by the merged firm for its output." To make Example 22 even clearer, the Agencies should state explicitly that they would likely challenge such a merger.

similar in many respects, they also differ in significant ways. These differences arise not only in analyzing mergers that may enhance monopsony power, the focus of the proposed guidelines, but also in evaluating mergers that may enhance countervailing power, a type of power the Guidelines recognize in Section 8 but do not address in Section 12.[9]

Mergers that Enhance Monopsony Power

The Agencies should note the most important ways in which the analysis of a merger that may enhance monopsony power is likely to differ from the analysis of a merger that may enhance seller market power. We mention two.[10]

First, geographic markets are more likely to be narrow. As Example 22 recognizes, monopsony concerns are most likely to arise in agricultural or labor markets, and in those markets, the relevant geographic area tends to be localized because the sellers are small and it is expensive for them to transport their products or move themselves substantial distances. Agricultural goods, for instance, frequently require special handling, refrigeration, or prompt processing to avoid deterioration.

Second, anticompetitive coordination may occur at lower concentration levels or be more stable at moderate concentration levels. Buyers engaged in coordinated monopsony pricing may be less inclined to cheat on the consensus price than sellers engaged in coordinated pricing, since cheating on a monopsony price requires the cheater to pay more for an input. Firms may be reluctant to pay more for an input, even if it would enable them to increase their short-run profits, because it would raise their costs and place them at a competitive disadvantage relative to buyers that do not cheat. As a result, coordinated monopsony pricing may occur at a lower concentration levels, or be easier to sustain at moderate concentrated levels, than coordinated pricing by sellers.

Mergers that Enhance Countervailing Power

The proposed Guidelines do not contain any discussion of mergers that may enhance countervailing power, even though a merger of buyers is more likely to create or enhance countervailing power than it is to produce monopsony power.[11] The new Guidelines allude

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[9] For definitions of monopsony power and countervailing power, and a comparison of the two, see *Buyer Power: The New Kid on the Block*, *in* THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 99-112 (Albert A Foer ed. 2008) (hereafter "*Buyer Power*").

[10] For other differences in the analysis of buy-side and sell-side mergers, see Peter C. Carstensen, *Buyer Power and Merger Analysis – The Need for Different Metrics*, Statement Prepared for the Department of Justice and Federal Trade Commission Workshop on Merger Enforcement, Feb. 17, 2004.

[11] As many commentators have pointed out, monopsony power is rare in the economy because it tends to occur only in markets in which a dominant buyer (or group of

to countervailing power in Section 8, where they state that powerful buyers "may constrain the ability of [a firm] to raise prices," but they do not explain how the Agencies would analyze a merger that creates countervailing power rather than monopsony power. We recommend that the Guidelines note that, while most mergers that create or enhance countervailing power are likely to be procompetitive, in some cases such mergers may reduce competition.[12]

Mergers that enhance countervailing power are typically procompetitive because they enable the merged firm to induce price reductions or other benefits from its suppliers, and in most cases, at least some of those benefits are passed on to consumers. To be sure, price cuts to a powerful buyer, if discriminatory, can cause anticompetitive effects. But in many instances, the net effect of the lower prices is beneficial, increasing the overall welfare of consumers.

In certain circumstances, however, mergers that enhance countervailing power can diminish competition and result in the exploitation of consumers or powerless suppliers. For example, the merged firm may induce a discriminatory price cut that is so large and sustained that the merged firm drives out its rivals and gains market power as a seller, allowing it to raise prices to consumers. Alternatively, the merged firm may use its power to force suppliers to *increase* their prices to the merged firm's rivals, causing both the rivals and the merged firm to raise prices to customers. A merger that enhances countervailing power may even create monopsony power upstream: the merged firm might induce a price cut by shifting all its business to a particular supplier, and this exclusivity may allow the supplier to exercise monopsony power over small sellers further up the vertical chain, forcing them to accept all-or-nothing contracts. While these anticompetitive effects may not be the typical result of a merger of buyers, the Guidelines should recognize that, in appropriate circumstances, the threat of harm may be large enough to warrant an enforcement action.

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coordinating buyers) obtains inputs from small, competitive sellers. While those conditions may be present in agricultural or labor markets, they do not often appear elsewhere in the economy. In most other markets, sellers have some market power, and large buyers ordinarily exercise countervailing power rather then monopsony power. Moreover, they do not need a dominant market share, or to coordinate with other buyers, in order to do so. To the contrary, both theory and evidence suggest that an individual buyer may be able to exert some countervailing power with a market share as low as 10 or 20%. *See Buyer Power*, *supra* note 9, at 104 n. 23.

[12] For more extensive discussions of countervailing power, see *Buyer Power*, *supra* note 9; Peter C. Carstensen, *Buyer Power, Competition Policy, and Antitrust: the Competitive Effects of Discrimination Among Suppliers*, 53 ANTITRUST BULL. 271 (2008); John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?* 72 ANTITRUST L.J. 625 (2005); Carstensen, *supra* note 10.

Other Important Issues

- Section 2.2.2, customer evidence, should add that customers might not always be candid with the enforcers, or be able to testify candidly, because of their fear of retaliation by the postmerger firm.

- Section 2.2.2 should add that a merger can raise competitors' costs in a way that harms competition and consumer welfare.

-Section 3, Price Discrimination, should include a presumption that higher prices to any significant class of customers violates Section 7 of the Clayton Act. Although it is possible that price discrimination will have offsetting benefits to other customers, the burden should be on the merging firms to demonstrate the net benefits or benign overall effect of price discrimination.

-Section 4.1, insert the word "candidate" in the second sentence between "Such a" and "relevant market," to clarify that a relevant market is not properly defined unless it satisfies the SSNIP test.

- Section 4.1.2 states that the enforcers will employ a SSNIP test that "in most contexts, will use a price increase of ten percent lasting for the foreseeable future." The corresponding section of the 1992 Guidelines, Section 1.1, stated that the enforcers usually will use a five percent SSNIP test. AAI recommends the retention of the old five percent SSNIP test in most instances.

- The Section 4.1.2 SSNIP test and many other price oriented features of the Guidelines will not work well when prices are regulated, when costs are borne by third party payers, or when a joint venture occupies an entire industry. The Guidelines should state that in circumstances where price standards will not work well the enforcers instead will rely upon non-price variables.

-Section 4.1.3, Implementing the Hypothetical Monopolist Test, should note that the enforcers will not assume that potential entrants will immediately or always ascertain that increased prices were caused by market power, as opposed to higher costs. This factor should be noted in Section 9, Entry, as well: increased prices due to an increase in market power might not quickly attract new entry if, for example, potential entrants erroneously believe that costs had increased.

- Section 5.1 provides that "rapid entrants" should be counted as market participants. We believe they should be treated as just another type of entry. The Guidelines should state that the burden is on merging parties to show that entry is sufficiently easy to counteract any competitive effects of concern.

- Section 9.1, Entry, eliminates the statement that entry must take place within 2 years to be considered "timely" enough to prevent the anticompetitive effects of market power from being significant. AAI fears that reviewing judges might deem entry within 3, 5 or even more years to be sufficient to prevent the emergence of significant anticompetitive effects.

We respectfully urge the Agencies to reinstate the 2 year requirement, at least as a presumption.

-Section 10, Efficiencies, appears to reject the total welfare standard in favor of the consumer welfare standard. We applaud the Agencies for this approach, at least when the concern is seller power. Nevertheless, there is one respect in which the Guidelines' articulation arguably is ambiguous. Paragraph 6 states that "the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price increases in that market." (Footnote omitted.) We would suggest that this sentence begin: "the Agencies only will consider whether...." to make it clear they always will use a consumer welfare approach. Similarly, the second to last sentence of that paragraph should change "being anticompetitive" to "raising prices" to make this clear.

- In Sec. 10, a relevant factor in evaluating the effects of a merger on innovation is "the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations." We are concerned that this factor could create an open-ended efficiency argument for virtually any merger in a concentrated market, since the parties will almost always be able to make the Schumpeterian argument that increased post-innovation profits increases their incentive to innovate. But antitrust law generally starts from the premise that competition, not monopoly, is the greater spur to innovation. Indeed, even within the domain of intellectual property law, scholars recognize that greater appropriability does not necessarily translate into more innovation (or research and development), and that the proper goal should be to limit the degree of appropriability to the minimum necessary to induce innovation. In any event, we do not believe that antitrust should be in the business of sanctioning the accumulation of market power to foster innovations otherwise not well protected by the IP laws.