

JOINT SUBMISSION

of

THE BIOTECHNOLOGY INDUSTRY ORGANIZATION,
THE FINANCIAL SERVICES ROUNDTABLE, MICROSOFT CORPORATION,
THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND
VERIZON COMMUNICATIONS INC.

to the

U.S. DEPARTMENT OF JUSTICE AND
FEDERAL TRADE COMMISSION

for the

HORIZONTAL MERGER GUIDELINES REVIEW PROJECT

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HMG REVIEW PROJECT – COMMENT, PROJECT NO. P092900

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The Biotechnology Industry Organization, the Financial Services Roundtable, Microsoft Corporation, the National Association of Manufacturers, and Verizon Communications Inc. welcome the U.S. Department of Justice's and Federal Trade Commission's initiative to review the Horizontal Merger Guidelines ("Guidelines" or "HMG"). We applaud the goals of increased transparency and predictability for the business community, which will assist companies in assessing whether to undertake transactions and in presenting to the agencies the materials that will assist them in making informed enforcement decisions. We also appreciate the agencies' transparent processes. The agencies' decision to hold public workshops and solicit public comment allows for transparency into the government's decision making process and allows affected parties to offer input on how mergers should be evaluated.¹

The agencies have reason to be proud of their heritage of being at the forefront of merger analysis in their practices, and they have been extremely effective in advocating sound antitrust enforcement policies in their dealings the OECD and the International Competition Network ("ICN"). The ICN's recently adopted Recommended Practices for Merger Analysis, developed with substantial input from the United States, provides an outstanding example of such leadership.

Domestically, however, it has been over seventeen years since the Horizontal Merger Guidelines were issued. The agencies' Horizontal Merger Guidelines Review Project offers an opportunity to ensure that the Guidelines accurately reflect current enforcement policy, practice, and case law, and to refine the Guidelines for the benefit of the business community, other jurisdictions, and the courts. However, any revisions should preserve the ability of businesses to make practical and informed decisions based on reasonably predictable results when assessing potential transactions.

What the agencies say in their Guidelines matters. Since 1980, over fifty percent of U.S. merger decisions have cited and relied on the analytical framework of the Guidelines.² It is thus critical that the Guidelines reflect current law and consensus views. We therefore believe that the agencies are well-advised to adopt (and in their enforcement decisions to follow) guidelines that conform with well-established and proven benchmarks, case law, and international consensus on best merger review practices.

¹ It would be greatly appreciated if the agencies continued this plan of transparency by publishing a draft version of any revisions to the Guidelines before they are made final, and offer an opportunity for public comment.

² See Ilene Knable Gotts and Étienne Renaudeau, *Through the Looking Glass: Ruminations on Improving the Current U.S. Merger Enforcement Guidelines*, ANTITRUST SOURCE 1 (April 2009).

In particular, we believe that agency review is at its best when it takes account of key post-merger changes, especially in dynamic industries. In addition to examining entry, it is critical that the agencies consider the competitive responses of other market actors, including not just current and potential suppliers, but also buyers. For example, suppliers may be able to readily respond to a merger through repositioning. Likewise, buyers may be able to spread their purchases strategically, swing sales volume among suppliers to induce favorable terms, postpone purchases until better terms are offered, qualify alternate sources, sponsor entry, vertically integrate, or implement a host of other strategies – or even just threaten to do so – to effectively countervail any potential exercise of market power a merger might otherwise theoretically be able to produce. The full range of potential benefits of the transaction, including fixed-cost efficiencies savings and innovation, should also be fully considered. We discuss each of these points in turn below.

I. Importance of Dynamic Market Responses To Mergers

As recognized by the ICN’s Recommended Practices, “[t]he purpose of competition law merger analysis is to identify and prevent or remedy only those mergers that are likely to harm competition significantly.”³ Moreover, “[m]erger review laws and policies should provide competition agencies with the ability to differentiate mergers that are unlikely to have significant anticompetitive effects from those that require more analysis.”⁴

The use of historical market shares and market concentration may be of limited use to predict the direction of – and the competitive effectiveness of mergers in – dynamic markets, that is, markets that are nascent, evolving or converging, or that are marked by landscape-changing technology. We thus welcome the agencies’ question about whether the Guidelines should be revised “to explain more fully than in the current §1.521 how market shares and market concentration are measured and interpreted in dynamic markets, including markets experiencing significant technological change.”⁵

The agencies should rely on market definition and market share only as the starting point for analysis in assessing the likely effects of a merger, especially in dynamic markets, and deal with the facts presented in the particular industry to determine how the marketplace is likely to operate and the role that the transaction parties, current and potential competitors, suppliers, and customers are likely to play should the transaction occur.⁶ Indeed, a proper analysis requires the reviewers to take a holistic

³ Int’l Competition Network, Recommended Practices for Merger Analysis, Section I(A), http://www.internationalcompetitionnetwork.org/media/library/Cartels/Merger_WG_1.pdf [hereinafter ICN RP].

⁴ ICN RP, *supra* note 3, at Working Group Comments to Section I(A) at Comment 3 (April 2008).

⁵ Fed. Trade Comm’n & U.S. Dep’t of Justice, Horizontal Merger Guidelines: Questions for Public Comment No. 8 (Sept. 22, 2009) [hereinafter HMG Questions].

⁶ As a general proposition, we question the role that static market shares and concentration play. Market shares and measures of concentration are not determinative of possible competition concerns; indeed, “[a]gencies should not make enforcement decisions to prevent or remedy a merger solely on the basis of

approach and assess on a forward-looking basis the anticipated state of competition with and without the merger.

For example, in some dynamic markets (*e.g.*, where technologies or customer usage are converging), delineating a market using the SSNIP test will frequently result in a narrow market that does not reflect competitive reality. Such an inquiry might fail to consider whether customers are likely to switch to firms employing *new, different* means of competition. For example, in telecommunications, “[t]raditionally, wireline long-distance, wireline local, wireless telephony, cable, and satellite services each were separate and distinguishable services, with different firms supplying each offering.”⁷ Today, however, that is hardly the case. Indeed, voice telephony can be provided by a wide variety of different technologies and companies.⁸ Similarly, online services today compete with traditional “brick and mortar” suppliers, for instance, in the banking industry. The markets that many high-technology companies inhabit today did not even exist a few short years ago. Rapid cycles of innovation exist in the software, biotechnology and pharmaceutical sectors, as well, at times bedeviling any easy predictions about the direction of future competition in those markets. The relevant innovations need not be purely technological in nature, of course. In the financial industry and others, new and better ways of doing things can have as profound an effect in the marketplace – and on consumer welfare – as new material devices can.

In short, the governing principle in law enforcement (as in medicine), should be to “first, do no harm.” Given the difficulty that often occurs in accurately predicting the course of dynamic markets, the agencies should hesitate to challenge mergers absent a high level of confidence as to how the market will evolve. Otherwise, the agencies may actually harm competition and consumer welfare by denying or delaying innovation or Schumpeterian competition.

II. UPP and the Guidelines

The attached companion paper by Professor Dennis Carlton notes that the Guidelines may not be the ideal forum for testing new or untried theories or approaches. Rather, the Guidelines should provide guidance regarding the core aspects of the analytic paradigm to be applied in merger review, consistent with well-established legal principles. Speeches, policy statements, and other avenues will still be available for voicing suggestions for more fundamental change, without cementing them – untried and untested – into a document that courts rely on and that other jurisdictions follow as a model. For example, as Professor Carlton’s paper notes, there has been very little empirical analysis performed to date to validate the predictive value of the “upward

market share and concentration.” ICN RP, *supra* note 3, at Section II(A); *id.* at Section II(C), Comment 3. As currently drafted, the Guidelines risk putting more weight on market shares and concentration than they can bear.

⁷ Ilene K. Gotts & Damian G. Didden, *The Goldilocks Standard: Getting the Antitrust Review Standard “Just Right” for the Telecommunications Industry*, ANTITRUST REPORT 10 (Summer 2004).

⁸ *Id.*

pricing pressure” (“UPP”) test, making it perhaps premature to enshrine it in the agencies’ guidelines now.

Indeed, his paper illustrates some of the dangers that could arise, both for the agencies and for companies seeking prospective mergers, from shifting from the Guidelines’ current focus on market definition and market concentration as an analytical starting point to an alternative starting point based on a competitive effects framework such as the UPP test. The UPP test has not been widely used in merger analysis to date. Like standard merger simulation analysis, it has limitations which can produce misleading results about the competitive effects of mergers. As the companion paper notes, the UPP test is a static analysis that assumes that sellers do not or cannot meaningfully change the way they respond to other rivals’ actions, and that does not account for entry, repositioning, buyer recourse, and the like (except as part of a rebuttal case to be made after the presumption of anticompetitiveness has been reached). As further noted in the Carlton paper, the UPP test also appears to be considerably more complicated than traditional market-definition and market-concentration analysis (which is hardly simple to begin with). Indeed, it may call for data that is sometimes simply unavailable. Such a test would make it even more difficult to counsel clients about their mergers and to predict the agencies’ actions on mergers. While the UPP test and similar analyses may have a role in merger analysis in some cases, it would be a mistake to institutionalize their use now, displacing other techniques to analyze competitive effects in the Guidelines.

III. Entry, Repositioning, and Buyer Response are Important Considerations Worthy of Greater Recognition and Discussion

As competitors in our respective marketplaces, we cannot overstate the importance that actual and potential entry, repositioning, and buyer response can have on ensuring that a market remains competitive and that the benefits of the transaction are shared by consumers. Merger review policy should take into account whether entrants (committed or otherwise) could readily enter and whether rivals could reposition to compete with the merged entity.⁹ As Professor Hovenkamp has observed, data about customers’ immediate responses to price variations

say nothing about whether [in response to a merger between “premium” baby-food makers Beech-Nut and Gerber,] Heinz would be in a position to modify its product so as to compete in the premium market niche itself. Nor do they say anything about grocers’ ability to respond to a price increase in premium baby

⁹ See, e.g., *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1118 (N.D. Cal. 2004) (“repositioning by the non-merging firms must be unlikely. ... [A] plaintiff must demonstrate that the non-merging firms are unlikely to introduce products sufficiently similar to the products controlled by the merging firms to eliminate any significant market power created by the merger”); *id.* at 1109 (“plaintiffs have not proved that SAP, Microsoft and Lawson would not be able to reposition themselves in the market so as to constrain an anticompetitive price increase or reduction in output by a post-merger Oracle.”); see also Herbert J. Hovenkamp, *Analyzing Horizontal Merger: Unilateral Effects in Product-Differentiated Markets* 17 n. 39 (U. Iowa Legal Studies Research Paper No. 09-12, 2009), available at <http://ssrn.com/abstract=1359288> (discussing repositioning in light of Whole Foods merger).

food by reallocating more shelf space to lower-priced brands. Excessive reliance on short-run consumer behavior undoubtedly provides an exaggerated picture to the extent that consumer choice is only one of many avenues along which substitution among products occurs. Before consumer data tell us reliably that a merger between two makers of similar products is anticompetitive, we also need to have fairly reliable information about how other firms in the market are likely to respond to the market shifts caused by the merger.¹⁰

It is important that the agencies recognize that existing competitors can reposition, either on their own initiative or with the sponsorship of customers, in order to become even more vibrant substitutes for the merged firm. Static models based on current product and service offerings, market shares, and diversion ratios do not capture this potential for repositioning. The agencies should look at the totality of the circumstances, including information on past conduct, documents, and industry experts, to determine under what conditions and to what extent such repositioning might occur as a result of the transaction, particularly if the merged firm were to attempt to exercise market power to raise price, reduce output, or otherwise diminish competition.

Likewise, buyers' response to mergers can help mitigate any anticompetitive effects, and the agencies are properly seeking public comment on that issue.¹¹ The agencies' 2006 Commentary on the Guidelines treats buyer response with some skepticism,¹² and a former Acting Deputy Assistant Attorney General for the Antitrust Division has flatly stated that the Guidelines "do not include a big buyer defense."¹³

Yet the response of buyers – whether large or small – can make a significant competitive difference. It therefore makes sense for the agencies to recognize the potential buyers' response that exists in many marketplaces, and the Guidelines would benefit from explicitly embracing it. Buyers may indeed be able to take responsive actions after a merger to protect themselves from adverse price or non-price effects of the deal, and seller knowledge of these potential countervailing strategies can be an effective disciplining mechanism. Indeed, in a book written for business managers and "government officials seeking to understand competition in order to formulate policy," Harvard Business School Professor Michael Porter notes that in many cases, buyer

¹⁰ Hovenkamp, *supra* note 9, at 22-23.

¹¹ See HMG Questions, *supra* note 5, at No. 12 ("The Guidelines do not explicitly address the implications of large buyers. Merging firms commonly argue that the merged entity would not be able profitably to raise price because it will be selling to large, powerful buyers. Should the Guidelines be revised to discuss the implications of large buyers for merger analysis? For example, even if large buyers are able to negotiate more favorable terms than smaller buyers, what further evidence is required to establish that they are immune from harm due to the loss of competition resulting from the merger? Are large buyers less susceptible to non-price effects than small buyers? Even if large buyers are protected, under what circumstances should antitrust analysis attend to the interests of smaller buyers?").

¹² See Fed. Trade Comm'n & Dep't of Justice, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 17-18 (March 2006).

¹³ Paul T. Denis, *Market Power in Antitrust Merger Analysis: Refining the Collusion Hypothesis*, 60 ANTITRUST L.J. 829, III (1991/1992).

strategy can mitigate suppliers' power.¹⁴ Buyers can spread their purchases, resist the temptation to become too dependent on a particular supplier, help to qualify alternate sources, promote standardization, create a threat of upstream integration, and use partial upstream integration, Prof. Porter notes, to counter supplier power.¹⁵ These techniques can "improve the bargaining position of the firm and hence its long-run input costs."¹⁶

The European Commission's guidelines for horizontal mergers state expressly that "[t]he Commission considers, when relevant, to what extent customers will be in a position to counter the increase in market power that a merger would otherwise be likely to create."¹⁷ For example, buyers can "threaten to resort, within a reasonable timeframe, to alternative sources of supply should the supplier decide to increase prices [or erode quality], ... threaten to vertically integrate into the upstream market or to sponsor upstream expansion or entry, for instance by persuading a potential entrant to enter by committing to placing large orders with this company ... [or] by refusing to buy other products produced by the supplier or, particularly in the case of durable goods, delaying purchases."¹⁸ Similarly, the International Competition Network's Recommended Practices for Merger Analysis notes that

[i]n some circumstances, customers may have the incentive and ability to defeat the exercise of market power through their bargaining strength against the seller because of their size, commercial significance to the seller, or ability to switch to alternative sources of supply. Customers also may have the ability to encourage or sponsor competitive entry or expansion, or to produce the relevant product themselves. In such cases, even firms with very high market share may not be in a position to exercise market power post-merger.¹⁹

The D.C. Circuit's decision in *Baker Hughes* – decided by a panel including Judges (now Justices) Ginsberg and Thomas – expressly recognized that the response of large, sophisticated buyers is indeed relevant and should be considered in evaluating the competitive effect of a merger.²⁰ The court accepted the district court's findings that the

¹⁴ Michael E. Porter, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* xv-xvi, 123-25 (1980).

¹⁵ *Id.* at 123-25.

¹⁶ *Id.* at 125.

¹⁷ *Commission Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings*, 2004 O. J. (C 31), ¶ 65, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205(02):EN:NOT) [hereinafter EC Horizontal MEGs].

¹⁸ EC Horizontal MEGs, *supra* note 17, at ¶ 65. See also Case No. COMP/M.4214 - *Alcatel/Lucent Technologies*, 24 July 2006 ¶ 39 (noting that customers use "sophisticated procurement procedures (e-auctions in some cases) in which they can maximise their bargaining power vis-a-vis suppliers" and that as a result, "the possible high combined market shares are not necessarily (in themselves) to be considered indicative of future market power of the merged entity.").

¹⁹ ICN RP, *supra* note 3, at Section V(C), comment 2 (adding that "[t]o prevent significant anticompetitive effects, however, buyer power must constrain the exercise of market power in the market and not merely protect certain individual customers.").

²⁰ *United States v. Baker Hughes Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990) (Thomas, J.) (noting that consideration of buyer power, along with another, unrelated factor, "was not only appropriate, but imperative, because in this case these factors significantly affected the probability that the acquisition

buyers in that case “closely examine available options and typically insist on receiving multiple, confidential bids for each order,” and that such “sophistication ... was likely to promote competition even in a highly concentrated market.”²¹

As another court has noted, “power buyers and other large buyers use numerous tactics to obtain low prices ..., including:

- (a) Refusal to reveal the prices quoted by other suppliers and the price which a supplier must meet to obtain or retain business, creating uncertainty among suppliers.
- (b) Swinging large volume back and forth among suppliers to show each supplier that it better quote a lower price to obtain and keep large volume sales.
- (c) Delaying agreement to a contract and refusing to purchase product until a supplier accedes to acceptable terms.
- (d) Holding out the threat of inducing a new entrant into ... production and assuring the new entrant adequate volume and returns.”²²

Nor is the impact of such countervailing buyer strategies limited to large, sophisticated customers. The spill-over effects of their responsive actions can benefit even smaller buyers. This is true even in industries where, theoretically, the seller could price discriminate. Such price discrimination is more difficult (and unlikely) in practice than in theory. Arbitrage, via large buyers reselling goods bought at a discount to small buyers, can frustrate price discrimination. Smaller buyers can pool their orders and seek the same discounts large buyers receive.²³ Finally, the transaction costs of charging different buyers different prices can overwhelm any gain from price discrimination, making sellers unlikely to attempt it in the first place. Accordingly, we urge the agencies to include a robust discussion of each of these mitigating factors.

would have anticompetitive effects.”); *id.* at 987 (noting that “these factors are relevant, and can even be dispositive, in a section 7 rebuttal analysis.”). Large and sophisticated buyers can also make collusion among the post-merger sellers more difficult. As Judge Posner has explained, “[c]olluders are tempted to cheat on their fellows when they can augment their profits by a single large sale (at a shade below the cartel price) that is unlikely to be detected. Knowing this, sophisticated buyers may be able to chivvy particular sellers for secret discounts, and the cumulative effect may be the collapse of the cartel.” *Fed. Trade Comm’n v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989); *see also* Denis, *supra* note 13, at Section III (stating that “[t]he ability to capture large chunks of business in a single contract may raise the gains from deviation to the point that, for some firms, deviating from the consensus becomes more profitable than continued coordinated interaction.”).

²¹ *Baker Hughes, Inc.*, 908 F.2d at 986. Other courts have likewise credited buyer response as a relevant factor and found for the defendants. *See, e.g., United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669 (D. Minn. 1990). Not every case examining whether buyers can effectively respond to a price increase finds that they can, of course. *See, e.g., Chicago Bridge & Iron Co. v. Fed. Trade Comm’n*, 534 F.3d 410 (5th Cir. 2008).

²² *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1417-18 (S.D. Iowa 1991).

²³ Darren S. Tucker & Bilal Sayyed, *The Merger Guidelines Commentary: Practical Guidance and Missed Opportunities*, ANTITRUST SOURCE 5 n. 21 (May 2006).

IV. Efficiencies: Fixed Cost Savings and Innovation

The agencies have also asked whether the Guidelines should be “updated to state that any cognizable cost reductions are relevant to the extent that they are likely to generate benefits for customers in the foreseeable future” and whether they should “be updated to address more explicitly the non-price effects of mergers, especially the effects of mergers on innovation.”²⁴ We believe that they should, on both scores.

As noted in the companion Carlton paper, it is important for the agencies to take fixed cost efficiencies into account, especially in dynamic, high-tech industries. The Guidelines’ discussion of efficiencies today distinguishes between fixed and marginal costs, and in practice, the agencies tend to credit savings in marginal costs as more likely to influence price.²⁵ The short term analysis “will determine the Agency’s enforcement decision in most cases,” according to the current Guidelines.²⁶

Yet, as the Federal Trade Commission noted over a decade ago, “an arbitrary exclusion of fixed costs from cognizable efficiencies is unwarranted because savings in fixed costs may affect competition and have an ultimate downward effect on price.”²⁷ The Antitrust Modernization Commission has since confirmed that view, noting that “[t]he agencies should account for the value of fixed-cost efficiencies in assessing the likely competitive effects of a merger,” and that “[f]ailure to take account of and give proper weight to such fixed costs in evaluating a merger could deprive consumers and the U.S. economy of significant benefits from a procompetitive merger.”²⁸ Reductions in costs – including fixed costs – can generate real savings in the long run. This is because “[o]ver the longer run, costs that are at one time fixed (or sunk) become variable.”²⁹

This point is illustrated by the one species of fixed cost – research and development – that the Antitrust Modernization Commission singled out as deserving more weight in the agencies’ consideration.³⁰ Although the Guidelines today acknowledge that efficiencies “relating to research and development, are potentially substantial,” they state that such innovation efficiencies “are generally less susceptible to verification and may be the result of anticompetitive output reductions.”³¹ They add that cognizable efficiencies that lack a “short-term, direct effect on prices in the relevant

²⁴ HMG Questions, *supra* note 5, at Nos. 14, 15.

²⁵ DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, Section 4 (1992) [hereinafter HMG].

²⁶ HMG, *supra* note 25, at Section 4, n. 37.

²⁷ FED. TRADE COMM’N STAFF REPORT, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH GLOBAL MARKETPLACE, ch. 2, at 34, available at http://www.ftc.gov/opp/global/report/gc_v1.pdf (1996).

²⁸ ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 58 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm [hereinafter AMC Report].

²⁹ AMC Report, *supra* note 28, at 75 n. 67; see also Michael J. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 Antitrust L.J. 1, 55 (2007) (noting that “over a long enough time horizon, everything is variable”).

³⁰ AMC Report, *supra* note 28, at 58; see also *id.* at 60 (“the agencies should endeavor to weigh more heavily the potential for welfare-enhancing innovation that a merger will create”).

³¹ HMG, *supra* note 25, at Section 4.

market” will be considered, but such “[d]elayed benefits ... will be given less weight because they are less proximate and more difficult to predict.”³²

Yet this may reflect an unnecessarily static view of markets, one that may be out of step with the dynamic innovation that marks so many industries today. Innovation is “a critical component of a sustained, healthy economy,”³³ yet innovation often depends on the high fixed costs of research and development. Mergers can significantly reduce those costs by allowing firms to combine complementary assets and know-how, share R&D risks, and maximize the chances of successful commercialization.³⁴ None of that is guaranteed to immediately lower consumer prices in all cases, but it has the power to “bring significant benefits to consumers through new, improved, or lower priced products in the longer run.”³⁵ Focusing on the reduction of marginal costs – almost to the exclusion of the reduction of the fixed costs of research and development – gives short shrift to the point that “a change in the fixed costs of innovation may trigger a change in the resulting level of innovation (i.e., whether a project is undertaken or not), which then has consequences for consumer welfare. Consequently, it is important that fixed costs not be summarily excluded from the efficiencies analysis when innovation is at issue.”³⁶

A merger policy that unduly elevates the reduction of marginal costs over the potential for fostering innovation risks missing the forest for the trees. Although the Guidelines reflect some skepticism about the agencies’ ability to quantify such efficiencies, “discount[ing] those benefits too greatly ... run[s] the risk of preventing mergers that may have short-term anticompetitive effects but long-run procompetitive benefits to consumer welfare.”³⁷

Conclusion. In sum, we welcome the opportunity to participate in the agencies’ review of the Guidelines and the transparency under which the review is occurring. We believe it is imperative that the business community be provided a clear picture of how transactions will be analyzed, both for internal assessment purposes and to guide transaction parties on what information will be of use to the agencies. In the last few decades, commerce has become increasingly global, such that it is not unusual for a transaction to require clearance from competition authorities in multiple jurisdictions. It is important that the U.S. Horizontal Merger Guidelines not only remain the gold standard for the analytic paradigm provided, but also be consistent with what has developed as a consensus view through the activities of ICN, OECD, and bilateral agreements. Finally, we urge the agencies to focus on the dynamic aspects of competition that govern many of our industries, which mitigate the potential for anticompetitive effects and help ensure that the transactions indeed promote consumer welfare.

³² HMG, *supra* note 25, at Section 4, n. 37.

³³ Katz & Shelanski, *supra* note 29, at 1.

³⁴ AMC Report, *supra* note 28, at 59.

³⁵ AMC Report, *supra* note 28, at 59.

³⁶ Katz & Shelanski, *supra* note 29, at 55.

³⁷ AMC Report, *supra* note 28, at 59; *see also id.* at 58 (“Mergers generally benefit consumers by making innovation more likely or less costly in such industries, rather than by reducing (the generally very low) marginal costs”).