U.S. Department of Justice and the Federal Trade Commission

Public Comments of 26 State Attorneys General on Draft Vertical Merger Guidelines

February 26, 2020

We, the undersigned Attorneys General, submit these Comments in response to the request by the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC," together "the Agencies") for public comments in connection with its issuance of Draft Vertical Merger Guidelines ("DVMG"). As co-enforcers of the nation's antitrust laws, the State Attorneys General have a unique perspective, experience, and interest in the consistent application of updated principles to the analysis of vertical transactions.

I. Introduction

The states thank the Agencies for taking an important step toward replacing the outdated 1984 Non-Horizontal Guidelines ("1984 Guidelines") with guidance on how vertical mergers should be assessed. In the DVMG, the Agencies have identified the critical theories of harm that can arise from a vertical combination, including foreclosure, raising rivals' costs, preventing the entry of an effective rival, and misuse of sensitive information. The Agencies also correctly premise their analysis on the view, established by Section 7 of the Clayton Act, that vertical mergers must be judged under the same legal standards as horizontal mergers; no greater showing of prospective harm need be made in a case involving a vertical merger than in litigation challenging a horizontal one.[1]

The establishment of effective guidelines is important to the State Attorneys General, whose offices have been active in guarding against harms from vertical transactions, both in cases in which they joined forces with their federal counterparts and when they have acted independently. As these comments reflect, the states have brought important enforcement actions addressing vertical conduct in recent years.[2] Assessments of the competitive effects of vertical mergers on local markets, and expertise in critical sectors of the economy, such as healthcare, have provided a crucial element to antitrust enforcement efforts, including those led by the Agencies. Many states have their own merger statutes, often patterned after federal antitrust laws. Moreover, State Attorneys General working together can bolster antitrust enforcement across the nation by effectively deploying expertise and resources. Antitrust enforcement at the federal and state level is improved when antitrust enforcers cooperate, share information, and coordinate investigations. That cooperation rightly extends to the issuance and finalization of the DVMG.

Thus, state enforcers have a key stake in guidelines that will be used in investigations and enforcement actions. Like the 2010 Horizontal Merger Guidelines ("HMG"), the final Vertical Merger Guidelines ("VMG") may be used by courts to aid analysis of mergers, including in

---

[1] *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019).

[2] *See, e.g.*, Complaint, Colorado v. UnitedHealth Group Inc. and DaVita Inc., No. 2019-cv-031424 (El Paso County Dist. Ct. June 19, 2019) (addressing potential foreclosure in healthcare); Petition, *Pennsylvania v. UPMC*, No. 334 M.D. 2014 (Pa. Commw. Ct. Feb. 7, 2019); Commonwealth v. UPMC, 208 A.3d 898 (Pa. 2019) (vertical conduct in healthcare); *California v. Valero Energy Co.*, No. C 17-03786 WHA, 2017 WL 3705059, at *1–3 (N.D. Cal. Aug. 28, 2017) (oil refinery and independent terminal).

cases where the states are plaintiffs. It is critical that the VMG are robust because the guidelines will direct how federal and state enforcers assess vertical mergers and may influence courts. In these comments, we suggest how the DVMG can be improved. Our recommendations relate to the DVMG's treatment of market definitions; theories of harm; how harm is demonstrated; the use of the proposed safe harbor and presumptions of harm; the treatment of alleged procompetitive outcomes, including elimination of double marginalization and efficiencies; and appropriate remedies. We appreciate the opportunity to offer these suggestions for improvement.[3]

II. Related Products

The State Attorneys General appreciate that Section 2 of the DVMG addresses market definition, which was not discussed in the 1984 Guidelines. This is important for cases in which market definition is needed to bolster the assessment of the anticompetitive effects of a proposed vertical merger (e.g., where direct effects or predictive direct effects analysis cannot be conducted or is insufficient standing on its own). In the DVMG, the Agencies explain that many of the general purposes and limitations of market definition described in HMG Section 4 are also relevant and an important starting point to defining markets for vertical mergers, and that they will use the methodology set forth in Sections 4.1 and 4.2 of the HMG to define relevant markets for such transactions.

The Agencies offer an important addition by identifying a uniquely vertical category of analysis involving "related products." The States agree with this approach. The DVMG describe a "related product" as "a product or service that is supplied by the merged firm, is vertically related to the products and services in the relevant market, and to which access by the merged firm's rivals affects competition in the relevant market." The term "related product" connects the DVMG to a long line of United States Supreme Court precedent reflecting similar concepts.[4]

---

[3] The endorsement by the State Attorneys General of the replacement of the outdated 1984 Non-Horizontal Merger Guidelines, and these comments, do not necessarily imply that antitrust investigations and lawsuits should be the only means to address the impact of vertical mergers. Some of the undersigned states believe that, to adequately address the real harms of vertical mergers—especially in industries where efficiencies arising out of those mergers have not generally been observed—sector-specific state antitrust laws could serve as a useful complement to federal antitrust laws, general state antitrust laws, the VMG, and state and federal enforcement efforts. *See* Emilio Varanini, *Competition as Policy Reform: The Use of Vigorous Antitrust Enforcement, Market-Governance Rules, and Incentives in Health Care*, 11 ST. L. UNIV. J. OF HEALTH LAW & POLICY 69 (2017).

[4] The term "related products" encapsulates a series of decisions from the Supreme Court involving complementary products, products at different points in the chain of distribution, and product extension mergers in which the same supply chain was used to distribute the closely similar products of the merging companies. *See, e.g.*, *Ford Motor Co. v. United States*, 405 U.S. 562, 565–66, 569–70 (1972) (holding that acquisition by Ford, the second-leading auto manufacturer, of an aftermarket spark plug supplier with 33% market share could be barred because of potential for tying); *Fed. Trade Comm'n v. Proctor & Gamble Co.*, 386 U.S. 568, 574–76, 580–81 (1967) (holding that acquisition of leading liquid bleach manufacturer by diversified household products company that made packaged detergent used in a complementary fashion with liquid bleach could be barred, given evidence sufficient to show acquiror was potential competitor in the liquid bleach market); *Fed. Trade Comm'n v. Consolidated Foods Corp.*, 380 U.S. 592, 594–97, 599–601 (1965) (finding Clayton Act violation where food retailer acquired manufacturer of dehydrated

In that spirit, we believe that the use of the terms "relevant markets" and "related product" or "related service" in analyzing vertical acquisitions is an important step forward. First, the State Attorneys General understand the term "related products" to capture either the upstream or downstream market that interacts with the market(s) in which there are competitive concerns.[5] Second, the State Attorneys General also understand the term "related products" to apply more broadly than upstream or downstream products. "Related products" may include complementary products in vertically adjacent markets.[6] For example, in industries like healthcare and high-tech/internet, vertical acquisitions do not necessarily involve the traditional scenario of an upstream buyer of a downstream firm that incorporates the upstream firm's inputs into the downstream product. Rather, the products or services are related within a vertical framework as vertically adjacent products or complements. The term "related product" may properly capture the nature of vertical transactions while furthering the purpose of defining and proving the ultimate competitive harm.

Although we support the inclusion of the term "related product," the DVMG could better explain the dynamics of vertical mergers and note that requiring strict market definition of these related markets may be overly rigid in identifying competitive harm. We recognize that market definition can be an important tool to help assess the ultimate competitive harm in appropriate cases. Market definition is not an end in itself; it is *a* means to the end of identifying competitive harm, but it is not the *only* means. For example, a firm's acquisition of a potential competitor in an industry involving a related product in an adjacent market in the same vertical framework may be anticompetitive if it prevents the entry of a potentially formidable rival. In such a case, it is important to recognize what markets may be affected by the transaction but not to require market definition be used as an overly rigid tool. Instead, the analysis should focus on harm, the nature of the related product(s), how those related products are used, and how producers and sellers compete. To be clear, we do not object to the "related product" market language as such, as we believe it appropriate. Rather, our goal is for this concept to be clarified.

---

onion and garlic used in packaged foods, and retailer increased market share for manufacturer's inferior products by requiring that independent food processors use them in exchange for access to retailer's stores). The "related product" analysis thus captures a wider range of potentially problematic vertical acquisitions than would be found anticompetitive if only using the traditional terminology of upstream and downstream markets, such as inputs and outputs.

[5] To the extent there may be doubt as to whether "related products" captures the upstream or downstream products or services, the Agencies may wish to clarify. The upstream and downstream terminology has a long history in the case law and fits well with conventional commodity markets like agriculture or petroleum as opposed to markets like health care or high tech/internet. *See, e.g.*, *Valero*, 2017 WL 3705059 at *1-3; *see also, e.g.*, *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312, 321 n. 2, 3, 5 (2007); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988–89 (9th Cir. 2000). But this terminology also fits some transactions in healthcare or high tech.

[6] To the extent footnote two in the DVMG could be interpreted as limited to only upstream or downstream products, the State Attorneys General request that the footnote be clarified to indicate that the term also includes complements.

III. Theories of Harm

The State Attorneys General commend the Agencies for proposing guidelines in Sections 5 and 7 of the DVMG that more fully reflect the potential competitive harms caused by vertical mergers. In particular, we support the recognition of other theories of harm beyond input and customer foreclosure, raising rivals' costs, the importance of avoiding the removal of mavericks from a market, and the potential for vertical mergers to foster information sharing to the detriment of competition. That comports with the experience of the State Attorneys General. For example, the State of California successfully blocked a proposed merger of a vertically integrated petroleum company, which also owned refineries, pipelines, and terminals, with the last independent terminal for importing petroleum products into the state. This acquisition, if consummated, would have raised the costs of independents seeking to import petroleum into the state or resulted in the terminal closing, eliminating those imports altogether.[7]

In markets for digital services, the accumulation of data has raised the stakes as to the potential harms of vertical mergers, both in those markets and in the broader economy. According to the Organisation for Economic Co-operation and Development, "big data related" mergers and acquisitions rose from 55 in 2008 to 134 in 2012.[8] This desire for analytic capabilities and new data, particularly when used to feed and train artificial intelligence, can impact the competitive landscape in ways that limit new entry. This phenomenon is not limited to internet platforms or consumer-facing businesses.[9] The increasing importance of data across many industries underscores that the DVMG should fully capture our best understanding of the latest theories of harm, avoid overreliance on market definition, and eliminate the presumptive safe harbor. The Agencies also should thoroughly explore presumptions of harm and industry-specific guidelines in the upcoming workshops.[10]

The States suggest adding widely recognized theories of harm that, based on our real-world experience and on economic analyses, can threaten competition. These should include the squashing of nascent or potential competition (a particular problem where dominant platforms may be concerned), the necessity of two-tier entry, regulatory evasion, and treatment of bargaining leverage.

[7] *See Valero*, 2017 WL 3705059 at *1-3.
[8] European Data Protection Supervisor, *Report of Workshop on Privacy, Consumers, Competition and Big Data* at 1 (June 2014).
[9] *See id*.
[10] The states believe the VMG should be broad enough to encompass different industries with unique characteristics and vertical issues. But, if the VMG result in overly narrow guidance—such that the VMG would not apply to or capture certain vertical characteristics of particular industries—the Agencies should consider developing and issuing industry-specific guidelines.

a. Nascent or Potential Competition

Because "[a] vertical merger…can eliminate the most likely potential entrant,"[11] the VMG should address potential and nascent competition both in the context of upstream and downstream markets and in the context of vertically adjacent markets involving complementary products or services.[12] In markets with entrenched participants or dominant platforms, vertical acquisitions can remove potential or nascent competitors[13] in adjacent related markets that likely would enter the market in question.

Two types of potential entry can be frustrated by a vertical merger between sellers of complementary products or services. First, the merger might involve a firm in an adjacent market that is well-situated to enter the primary one because of its knowledge, expertise, and relationships.[14] The merger of Live Nation, a performance venue manager, with Ticketmaster, the dominant ticketing platform, is a good example. In that case, Live Nation had actually started to enter into the ticketing business. Even had it not yet done so, Live Nation would have been a natural and formidable potential entrant, which the merger eliminated.

Second, vertically related firms can, even if they do not enter an adjacent market themselves, facilitate new entry by cooperating with or sponsoring new entrants.[15] One could imagine a scenario where Live Nation did not itself enter the ticketing business, but instead decided to sponsor and support a rival to Ticketmaster. As such, the acquisition of a vertically related firm that has the incentive and opportunity to enter a concentrated market directly, or support entry by another, can create significant competitive harms.

Ticketmaster/Live Nation is one of many such cases. For example, DOJ's consent decree in *Comcast/NBCU* anticipated new online content distribution models and entrants, envisioning that current content companies might enter distribution, or vice versa. The consent decree's terms

---

[11] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1974–76 (2018); *see also* Steven C. Salop & Daniel P. Culley, *Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners*, Dec. 8, 2014, at 11 (available through Scholarship @ Georgetown Law) ("Established firms competing in adjacent markets may be well-situated to enter because they may have expertise relevant to that market or easier access. The fear of entry by a customer or supplier may serve as a constraint on the pre-merger prices of a firm. The merger would reduce or eliminate this constraint."); Jonathan Baker, Nancy Rose, Steven Salop & Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 12, 13-14 (Summer 2019).

[12] The one analysis proffered by the DVMG is the foreclosure test. This foreclosure test does not adequately consider potential entrants and is limited in its focus on rivals. *See* U.S. Dep't of Justice and the Fed. Trade Comm'n, Draft Vertical Merger Guidelines § 5.a, Condition 1 ("The merged firm's foreclosure of, or raising costs of, one or more rivals would cause those rivals to lose sales.").

[13] A nascent competitor is a threatening new entrant that might become a full-fledged rival in time. C. Scott Hemphill, *Disruptive Incumbents: Platform Competition in an Age of Machine Learning*, 119 COLUMBIA L.J. 1973, 1974 (2019). Instagram's threat to Facebook after it launched in 2010 is a commonly cited example. *Id.* at 1974, 1983. Nascent competition suggests that competition is presently felt but not yet fully realized. Paul T. Denis, "Nascent and Potential Competition: The Current Analytical Framework," Hearings on Competition and Consumer Protection in the 21st Century, Oct. 17, 2018, https://www.ftc.gov/system/files/documents/public_events/1413712/cpc-hearings-gmu_1017.pdf.

[14] Salop & Culley, *Potential Competitive Effects of Vertical Mergers*, *supra* note 11, at 11.

[15] *Id.* at 12.

sought to protect nascent competition, recognizing that "nascent competitors may be relatively easy to quash."[16] In short, entry considerations are not limited to the horizontal merger context, and they deserve their own discussion in the VMG.[17]

The DVMG mention potential competition as a concern in passing, but do not expound on its role in a vertical merger enforcement action.[18] We urge the Agencies to develop this concept further in the VMG through the upcoming workshops because either party to a vertical merger may be a logical—and perhaps even the most logical—new entrant into the other market. To be sure, a vertical merger—and the impact it has on potential competition—could be analyzed as a horizontal merger under the HMG. Nevertheless, the VMG should explicitly acknowledge that vertical mergers can harm competition when the merging parties are positioned to enter each other's markets, or otherwise position the merged firm to harm potential and/or nascent competition.

b. Two-tier Entry

Vertical acquisitions can require would-be entrants to enter multiple tiers of vertically adjacent markets, or multiple upstream and downstream markets, at the same time, to compete effectively.[19] In healthcare markets, for example, entry or expansion may be more difficult because of the need to enter multiple markets or tiers at the same time (e.g., insurer mergers with providers, or hospital acquisitions of physician groups). Similarly, the acquisition of content creators by firms that distribute that content via broadband or Pay TV packages may limit the ability of other content providers to sell to customers, unless they have a consumer-facing distribution mechanism of their own. And even in commodity markets like petroleum, acquisition of a key downstream asset, such as the last independent terminal for importing petroleum into the state, can mean that any potential new supplier of petroleum will face heightened barriers to entry because it might need to build its own terminal to compete effectively.[20]

c. Regulatory Evasion

Vertical acquisitions may facilitate regulatory evasion, which can harm consumers by distorting prices.[21] If the merged entities sell complementary products in a bundle, but one product's price

---

[16] Competitive Impact Statement at 21, United States v. Comcast Corp., No 1:11-cv-00106 (D.D.C. 2011).
[17] In general, harms are not strictly separated between "vertical" and "horizontal" mergers and, indeed, some mergers involve both aspects; some arrangements are not easily placed into one set or another (thus, the earlier label of "non-horizontal" mergers used in the 1984 Guidelines). The Agencies should emphasize that the distinctions are aids to analysis, not limitations on inquiries into potential harm. Indeed, in *Ticketmaster*, DOJ focused on horizontal aspects of what otherwise might be viewed as a vertical merger, because the relevant entry had already taken place. *See* Salop, *Invigorating Vertical Merger Enforcement*, *supra* note 11, at 1976-77 (2018); Competitive Impact Statement, United States v. Ticketmaster Entm't, Inc., No. 1:10-cv-00139 (Jan. 25, 2010).
[18] Draft Vertical Merger Guidelines § 5.a.
[19] *See, e.g.*, Baker et al., *supra* note 11, at 13.
[20] *See Valero*, 2017 WL 3705059 at *1-3.
[21] *See, e.g.*, Baker et al., *supra* note 11, at 13, 17.

is regulated, the merged firm can increase the non-regulated product's price, increasing the effective price of the bundled product as a means of escaping regulatory scrutiny. For example, many states require that the billed charges for inpatient hospital stays be published to aid transparency and promote the ability of patients to price-shop for non-emergency services. As a practical matter, such transparency measures also restrain hospitals' ability to charge the full price their market power would allow because of the possibility of a public outcry. However, the hospitals often do not publish outpatient rates and physician rates; accordingly, hospitals instead can acquire outpatient clinics and physician groups and raise their prices to the detriment of patients. Similarly, AT&T was formerly vertically integrated and faced regulation on its telephone services, but it was often able to charge what it wanted for the rental of telephone equipment that it required its customers to have.[22]

d. Bargaining Leverage, including Forcing Pricing below Competitive Levels

Because the typical foreclosure case involves negotiations between companies for inputs or access to customers, the DVMG should do more to spell out the bargaining theory of foreclosure threats and provide guidance on the types of evidence of bargaining leverage[23] the Agencies find relevant for proving competitive harm. In markets where prices are set by negotiation, the merged firm's bargaining leverage might increase to the point that it can harm competition. Walking away from the negotiations will be more attractive for the merged firm because it can recoup some of the lost sales from its business customer (potential rival) by winning business from its rival's customers.[24]

Importantly, a vertically merged firm could use such bargaining leverage to force prices below their competitive levels.[25] For example, a dominant downstream grocery wholesaler can purchase upmarket agricultural producers and then favor its newly owned producers by forcing competing farmers to sell their products at prices lower than those in a competitive market. As output falls, those competing agricultural producers cannot cover their costs and must decide whether to sell or close their farms. In turn, remaining downstream wholesalers are also squeezed out as they either must lose their upstream suppliers (i.e., the competing agricultural producers)

---

[22] Salop & Culley, *Potential Competitive Effects of Vertical Mergers*, *supra* note 11, at 29; *see United States v. AT&T*, 524 F. Supp. 1336, 1370–75 (D.D.C. 1981). Similarly, in *Knevelbaard*, 232 F.3d 979, milk producers claimed the minimum price floor set for milk by regulators was affected by a cartel of cheese makers who rigged the prices they paid for bulk cheese to lower the cost of that cheese and of the milk that they used.
[23] "By bargaining leverage, we mean the exercise of market power through price negotiations that may use the *threat* of reduced purchases to lower input prices without necessarily reducing the actual quantity purchased." C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2080–81 n. 6 (2018). Professors Hemphill and Rose explain that bargaining power determines the fraction of the surplus from agreement that each party captures while bargaining leverage affects the magnitude of the surplus and derives from each party's walk-away value. The competitive impact of a merger is exercised through increased leverage. *Id.* at 2093 n. 58.
[24] *See AT&T*, 916 F.3d at 1035–36.
[25] *United States v. Anthem, Inc.*, 236 F.Supp.3d 171, 187, 249–53 (D.D.C. 2017); Pls.' Supplemental Memorandum on the Buy-Side Case at 2, United States v. Anthem, Inc., No. 1:16-cv-01493 (ABJ) (D.D.C. Dec. 19, 2016); C. Scott Hemphill et al., *Mergers that Harm Sellers*, *supra* note 23, at 2080–81 n.6.

or raise their own prices in an effort to sustain those suppliers, even as the dominant downstream wholesaler can keep its prices low.[26]

Bargaining power and leverage were key issues to both the district and appellate court in the AT&T/Time Warner merger. DOJ posited that the combination of Time Warner's programming and DirecTV's distribution platform would give the merged company increased bargaining leverage in negotiations with rival distributors for Time Warner content, resulting in higher prices for consumers.[27] The district court rejected the government's assertions after reviewing evidence of prior instances of vertical integration and the government's expert analysis.[28] In the wake of that litigation, the Agencies should provide additional guidance on how they will assess bargaining leverage when reviewing vertical mergers.

IV. Demonstrating Harm

In addition to discussing possible harms from vertical mergers, Sections 4, 5, and 7 of the DVMG also offer examples of evidence the Agencies consider relevant in proving such harm. But unlike the HMG, the DVMG offer little guidance on how the Agencies will assess and demonstrate harm. It would be useful to add detail and clarity on the types of evidence the Agencies may rely on in proving adverse competitive effects, the Agencies' burden of proof, what constitutes a prima facie case as to unilateral effects, and the DVMG's four-part foreclosure test.

The VMG should expressly identify nonprice harms, namely reduced output, the stagnation or diminution of quality, loss of access to services, and reduced innovation. As discussed below, the economic literature explains the importance of nonprice harms.[29] The State Attorneys General have seen from experience how vertical mergers can lead to harmful price effects, lower quality,

---

[26] *See, e.g.*, Brief of Amicus Curiae States of California, Oregon. Arizona, Iowa, Louisiana, Montana, West Virginia, and Wisconsin in support of Respondent, Weyerhaeuser v, Ross-Simmons Hardware Lumber Co, Inc., No. 05-381, 2006 WL 2966603, at * 8–10, 20–21 n.7 (U.S. Oct. 12, 2006) (describing these effects and noting that the former effect has been described in testimony before the U.S. Senate while the latter effect specifically referenced in European Union guidelines on vertical mergers).
[27] *AT&T*, 916 F.3d at 1035.
[28] *Id.* at 1037.
[29] *See, e.g.*, Baker et al., *supra* note 11, at 13.

loss of access to services,[30] the potential for exclusionary conduct,[31] and how promised innovation and quality benefits have failed to materialize.[32]

a. Unilateral Effects & The Burden of Demonstrating Potential Anticompetitive Harm

Although the DVMG largely follow the HMG, they do not explicitly discuss the burden of proof that the Agencies bear in a vertical merger challenge. The Agencies should consider clarifying that antitrust enforcers have no greater burden of proof in a vertical merger challenge than in the horizontal context. [33]

Section 7 of the Clayton Act applies equally to both vertical and horizontal mergers in its broad prohibition of mergers where "the effect of such acquisition may be substantially to lessen competition. . ."[34] Despite arguments to the contrary, "[t]here is no presumption in the law that vertical mergers are presumed procompetitive" such that a heightened burden of proof would apply in the vertical merger context.[35] The DMVG should state this clearly.[36]

---

[30] *United States v. Anthem, Inc.*, 855 F.3d 345, 366–67 (D.C. Cir. 2017); *id.* at 369–70 (Millet, C.J., concurring).

[31] For example, vertical acquisitions can enable a healthcare system to leverage even further its market power for existing providers through anticompetitive conduct, such as all-or-nothing, anti-steering, anti-tiering, and anti-transparency of pricing and quality information. *See, e.g.*, Martin Gaynor, Farzhad Mostashari & Paul B. Ginsburg, *Making Health Care Markets Work: Competition Policy for Health Care*, Apr. 2017, at 7-8, 29, https://www.brookings.edu/wp-content/uploads/2017/04/gaynor-et-al-final-report-v11.pdf. The potential for this anticompetitive conduct enhances the effects of an anticompetitive vertical merger because it prevents insurers from providing incentives or information to patients to encourage them to use lower-cost or higher-quality providers. *Id.* at 27-29.

[32] In healthcare services, many states have failed to see specific quality benefits materialize in related markets as a general matter from the wave of vertical mergers of hospitals and physician groups. *See* Leemore Dafny et al., *The Price Effects of Cross-Market Hospital Mergers*, National Bureau of Economic Research, Working Paper 22106, March 2016, revised Oct. 2018, at 1. For technology markets, the stark contrast in overall innovation between the *Microsoft* pre-settlement and post-settlement environments shows how a dominant firm can hinder innovation in related markets.

[33] *AT&T*, 916 F.3d at 1032.

[34] 15 U.S.C. § 18; *see Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962) (explaining Congress intended "to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country."); Proposed Conclusions of Law ¶ 21, United States v. AT&T Inc., No. 1:17-cv-02511-RJL (D.D.C. May 8, 2018), ECF No. 127 [hereinafter AT&T/Time Warner Proposed Conclusions of Law] ("Defendants incorrectly maintain that a different set of standards applies because this case involves a vertical merger and not a horizontal merger . . . The same statutory language applies, regardless of the categorization of the merger.").

[35] AT&T/Time Warner Proposed Conclusions of Law, *supra* note 34, at ¶ 23; *Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967) ("All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other.").

[36] As part of clarifying the burdens of proof, the Agencies should not only state that the burden is not heightened in the vertical context but also should specify the extent of each party's burden throughout the full merger analysis. For example, if the Agencies adopt any presumptions of anticompetitive harm, the Agencies should clarify that the Defendants must show that their claimed efficiencies are sufficient to overcome the presumption. *See Fed. Trade Comm'n v. Sysco Corp.*, 113 F. Supp. 3d 1, 86 (D.D.C. 2015); *see also Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 350 (3d Cir. 2016). Or, if the potential adverse anticompetitive effects are likely to be

b. The Proposed Four-Part Test

In Section 5.a, the DVMG articulate a four-part foreclosure test for when vertical mergers "potentially raise significant competitive concerns and often warrant scrutiny."[37] To the extent the DVMG require the use of this four-part test to analyze a vertical merger, this test may be overly restrictive. In some situations, a vertical merger may only meet three of the four conditions but still foreclose competition. For example, a medical device manufacturer and a distributor contemplate an exclusive supply contract. The agreement would foreclose other medical device manufacturers, or would-be entrants, from entering the market if they do not have access to a key distributor. The parties decide not to enter the contract but instead merge. Under either scenario, raising rivals' costs or foreclosure conduct would be profitable. But, this merger would not "warrant scrutiny" under the four-part test because the conduct absent the merger also would have been profitable. As a result, the foreclosure test and conditions in the DVMG may have the unintended consequence of increasing the Agencies' burden of proof for foreclosure.

In lieu of a strict four-part test, the DVMG could give examples of potentially relevant types of evidence and inquiries and how the Agencies may make a prima facie case of foreclosure. For input foreclosure, that may include:

- Downstream competitors likely targeted by a foreclosure strategy;
- The ability and incentive of other input suppliers and downstream competitors to compete even if foreclosed;
- The existence and effects of other vertical contracts by the parties or others in the market;
- The ability of downstream competitors to substitute input suppliers and those suppliers' capacity and willingness to supply;
- Whether other input suppliers would also raise prices, either unilaterally or in coordination;
- Whether other products that do not rely on the same inputs serve as a competitive constraint; and
- Natural experiments relevant to estimating diversion ratios from foreclosure.[38]

For customer foreclosure, this may include:

- Whether the impact of lost sales on upstream firms might lead to exit or higher costs;

---

substantial, "extraordinarily great cognizable efficiencies would be necessary." U.S. Dep't of Justice and the Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010); *Saint Alphonsus Med. Ctr. Nampa Inc. v. St. Luke's Health Sys., Ltd.,* 778 F.3d 775, 790 (9th Cir. 2015).

[37] Draft Vertical Merger Guidelines § 5.a.

[38] Salop & Culley, *Potential Competitive Effects of Vertical Mergers*, *supra* note 11, at 16–17; *see also* Complaint ¶¶ 4, 43, 51, 54, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), https://www.justice.gov/atr/case-document/complaint68.

- Whether a downstream buyer would have the power to get upstream firms to raise input prices charged to competitors;
- Whether upstream firms would have the ability and willingness to sell to other downstream firms that might not want to deal with the merged upstream firm; and
- The ability of upstream firms to demand or bargain for higher prices.[39]

Such examples reflect the complexity and multiple considerations that may factor into a prima facie showing of foreclosure.

We now turn to specific aspects of the proposed four-part test.

i. Quantification of harm and the proposed "*de minimis*" standard

The foreclosure test's use of a "*de minimis*" standard overemphasizes quantifying results for vertical mergers. This standard is problematic for several reasons.

First, the DVMG do not define "*de minimis*," nor do the proffered examples in Section 5.a. clarify or provide any context for how this standard would apply. In addition, the *de minimis* standard could operate as a substantive limitation on the reach of Section 7. For example, a vertical merger may raise downstream rivals' costs but not drive those rivals into inefficient production because they, in turn, increase their downstream prices. The foreclosure effect may not be immediately or apparently substantial because the rivals remain viable and are able to achieve minimum efficient scale of production. But, over time, prices may increase, the targeted rivals may lose competitiveness, or the merger may lead to increased entry barriers.[40] The current foreclosure test would not capture these harms.

Second, requiring quantification of competitive harms unnecessarily raises the Agencies' burden.[41] Not only could this requirement impair the Agencies' success in challenging vertical mergers, but it also may result in fewer challenges being brought. Agencies may shy away from challenging mergers that have limited data or do not neatly lend themselves to traditional methodologies of quantifying harm.

A quantification requirement would undermine the purpose of Section 7 because the Clayton Act is a predictive statute and is concerned with probabilities, not certainties.[42] As the Supreme Court emphasized in *Brown Shoe* when quoting the legislative history:

> The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of

[39] Salop & Culley, *Potential Competitive Effects of Vertical Mergers*, *supra* note 11, at 21–22.
[40] *Id.* at 14.
[41] *See* Baker et al., *supra* note 11, at 12.
[42] *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362–64 (1963) (a Section 7 inquiry "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future.").

> certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.[43]

Section 7 neither dictates nor suggests a quantitative or qualitative test to assess a merger's impact on competition.[44]

Imposing a *de minimis* requirement to show harm of foreclosure is also inconsistent with DOJ's position in *AT&T/Time Warner*. In its Proposed Conclusions of Law, DOJ rejected an argument that harm must be quantified, and it emphasized the ability of "courts [to] find liability under Section 7 without finding the specific magnitude of the potential harm."[45] DOJ contended that some kinds of harm are not susceptible to quantification and that "[a] Section 7 plaintiff does not need to quantify the potential harm."[46]

By using a test that over-emphasizes the quantification of harm, the DVMG also fail to account for other types of harm, such as harm to quality or innovation, which are not as easily quantifiable.[47] It would be useful for the DVMG to emphasize that some merger-related harms may not be susceptible to quantification, to remind observers, including courts, that requiring quantification would give these harms short shrift.[48] In addition, harm may not always result in short-term effects, which is why DOJ considers longer-term effects, even when quantifying them is a challenge, but the potential for harm is sufficiently grave to warrant an enforcement action.[49]

Indeed, use of a *de minimis* standard may invite parties to advance quantifications that obscure common-sense evidence.[50] Recent enforcement actions by the State Attorneys General demonstrate the importance of evidentiary analysis. In its challenge to UnitedHealth's wholly owned subsidiary Optum Inc.'s purchase of DaVita Medical Holdings, Colorado alleged the merger would lessen competition by preventing Humana and other insurers from competing in the Colorado Springs area for Medicare Advantage plans.[51] UnitedHealth's share of the

[43] *Brown Shoe*, 370 U.S. at 323 n.39 (quoting S.Rep.No. 1775, 81st Cong., 2d Sess. 6, U.S. Code Cong. and Adm.News 1950, p. 4298).
[44] *Id.* at 321 (Section 7 provides "no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to determine whether it may 'substantially' lessen competition or tend toward monopoly.").
[45] AT&T/Time Warner Proposed Conclusions of Law, *supra* note 34, at ¶ 16.
[46] *Id.* ¶ 14.
[47] *Id.* ¶ 16. ("In fact, some types of harm—e.g., a loss in 'product variety, quality, [or] innovation'—are not susceptible to quantification.").
[48] Competitive Impact Statement, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011 ("The application and enforcement of antitrust law is appropriate in such situations because promoting innovation is one of its important goals. The crucial role of innovation has led at least one noted commentator to argue that restraints on innovation 'very likely produce a far greater amount of economic harm than classical restraints on competition,' and thus deserve special attention.").
[49] Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, Remarks at the George Mason Law Review 22nd Annual Antitrust Symposium, "Harder Better Faster Stronger:" Evaluating EDM as a Defense in Vertical Mergers 10 (Feb. 15, 2019).
[50] *See United States v. AT&T, Inc.*, 916 F.3d 1029, 1035–38 (D.C. Cir. 2019). *Cf.* AT&T/Time Warner Proposed Conclusions of Law, *supra* note 34, ¶ 71.
[51] *See generally* Complaint, Colorado v. UnitedHealth Group Inc. and DaVita Inc., *supra* note 2.

Medicare Advantage market had been almost 80 percent and had decreased to about 50 percent after facing increased competition from Humana. In the transaction, UnitedHealth sought to purchase a key wholesale input—medical providers. Because the acquisition would likely incentivize the combined entity to raise the cost of services for Medicare Advantage insurers other than UnitedHealth, those rival insurers likely would lose their ability to effectively compete with UnitedHealth.[52] Injury to the competitive process does not require quantification,[53] and practical, real-world evidence of such injury served as a solid basis to challenge the vertical merger.

ii. Profitability test

The DVMG suggest a "profit" test as one of the requirements of the foreclosure test. Whether the merger makes exclusionary conduct profitable does not address the incentive or ability of the merging firms to harm competition. For example, suppose that a standalone firm could have profitably raised its rivals' costs before a merger with an upstream supplier, perhaps through an exclusive contract, but finds such foreclosure even more profitable and easier to execute after acquiring that input supplier. The DVMG give no reason why such a case should be walled off from examination.[54]

c. Potential/Nascent Competition

In addressing potential/nascent competition, the Agencies should expand on how they will examine and assess ease of entry and the impact of entry as a source of constraint on pricing as discussed in Section III.a.[55] Although the HMG address entry in Section 9, the DVMG's discussion of harm and evidence does not expressly incorporate Section 9 and should do so.

d. Access to Competitively Sensitive Information

Section 5.b. of the DVMG describes how a combined firm's access to and control of sensitive business information may harm competition.[56] But it does not explain how the Agencies will use that evidence and what significance it may play in analyzing a merger. For example, in the Staples/Essendant merger, the FTC found that Sycamore and Staples would have access to Essendant's reseller customers' commercially sensitive business information.[57] By gaining such access, Staples could charge higher prices than it otherwise would when bidding against those resellers for an end customer's business.[58] The FTC alleged that the merger therefore would substantially lessen competition in the market for the sale and distribution of office products to

---

[52] Complaint, Colorado v. UnitedHealth Group Inc. and DaVita Inc., *supra* note 2, ¶ 34.
[53] *See United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001).
[54] *See generally* Draft Vertical Merger Guidelines.
[55] *See* Salop & Culley, *supra* note 14, at 13.
[56] Draft Vertical Merger Guidelines § 5.b.
[57] Complaint ¶ 11, In re Sycamore Partners II, L.P., No. C-4667 (F.T.C. Jan. 25, 2019).
[58] *Id.*

midmarket business-to-business consumers, resulting in higher prices to end customers.[59] Ultimately, it approved the merger, but the FTC considered the access to competitively sensitive information to be highly relevant and instead imposed a conduct remedy to allow the merger to proceed.[60]

Access to competitively sensitive information may be key evidence in a prima facie case. To make this clear, the Agencies should consider offering examples of how firms can misuse such information to the detriment of competition or describe conditions that may foster such misuse. Important considerations include whether the pre-merger upstream firm already has access to sensitive competitive information about downstream firms and vice versa; how the merged firm could use the information against competitors; and if the use of this information could lead downstream firms to avoid dealing with the merged firm.[61]

V. Safe Harbor/Presumptions

a. Eliminating the Proposed Safe Harbor

The Agencies propose a presumptive safe harbor when companies have 20% or less market share in both the market where there are competitive concerns, such as the downstream or output market in a merger where the presumed harm is raising rivals' costs, and the related product, such as the upstream market's inputs used in the downstream or output market. The Agencies should reconsider whether there should be a presumptive safe harbor at all, let alone whether it would be appropriate to set that presumptive safe harbor at a market share of 20% or below.

First, the 20% applies to single companies, but not to market concentration generally. Thus, the safe harbor does not reflect the fact that a 20% or less market share or rate of product usage in a market may still present competitive concerns if one of the affected markets is sufficiently concentrated.[62] For example, in healthcare markets, the PBM industry is considered to be concentrated—the largest three PBMs share approximately 66% of the market, even though one of the Big Three has a reported market share of approximately 13%, which falls below the 20% safe harbor threshold.[63] Merging parties may rely on the DVMG to suggest that PBM

---

[59] *Id.*

[60] Agreement Containing Consent Order, In re Sycamore Partners II, L.P., No. 181-0180 (F.T.C. Jan. 2019); *see also In re Broadcom Ltd.,* No. C-4622 (F.T.C. July 3, 2017); *In re PepsiCo, Inc.*, No. C-4301 (F.T.C. Feb. 26, 2010); *In re The Coca-Cola Co.*, No. C-4305 (F.T.C. Sept. 27, 2010).

[61] Salop & Culley, *supra* note 14, at 23.

[62] *See, e.g.*, Baker et al., *supra note* 11, at 16.

[63] Neeraj Sood, Tiffany Shih, Karen Van Nuys & Daniel Goldman, *The Flow of Money Through the Pharmaceutical Distribution System*, USC Schaeffer, June 2017, at 3, https://healthpolicy.usc.edu/wp-content/uploads/2017/06/USC_Flow-of-MoneyWhitePaper_Final_Spreads.pdf. The reported market shares of the top three firms in the PBM industry vary quite a bit; the trade association for the biotechnology industry, for example, reported higher market share figures for the top three. *See, e.g.*, "Prescription Medicines: Costs in Context," PhRMA presentation, Aug. 2016, at 16, http://phrma-docs.phrma.org/sites/default/files/pdf/prescription-medicines-costs-in-context-extended.pdf. But this illustrates the difficulties that ensue when the presumptive safe harbor is tied to market shares (or usage of the relevant product) or how the relevant market is defined without

acquisitions of insurers or of pharmacy chains—or even of others in the vertical chain (wholesalers, pharmacy services administrative organizations, or pharmaceutical manufacturers)—are of lesser concern despite real competitive concerns about such vertical acquisitions by PBM companies.[64] Or a dominant platform may purchase an emerging company in a related market to prevent it from acquiring market share and ultimately supplanting the dominant platform.[65]

Second, the safe harbor fails to recognize the cumulative effects of incremental vertical acquisitions over time that may warrant action even though each acquisition falls below 20%. This is especially true where barriers to entry may be present. In healthcare, for example, the States have found that the incremental acquisition of physician groups and outpatient clinics by hospitals and healthcare systems can, over time, lock out competing hospitals and healthcare systems and a corresponding increase in prices.[66] The same is true when a dominant digital platform acquires nascent competitors in related markets,[67] especially where the end result is a single firm that dominates at key chokepoints along an entire vertical chain.[68] The VMG should be consistent with the case law that permits the Agencies to consider cumulative effects.[69]

Indeed, well-respected economists have emphasized that presumptive safe harbors should not be employed as a default and that, if they are used at all, then only when *all affected markets* are unconcentrated, meaning the HHI for all affected markets is less than 1500.[70] A downstream firm with significant market share in an otherwise unconcentrated market can, through a vertical

---

factoring in the consideration of direct effects as well as other facts and evidence, such as a firm's maverick role or the existence of barriers to entry.

[64] *Cf., e.g.*, The Council of Economic Advisers, *Reforming Biopharmaceutical Pricing at Home and Abroad*, Feb. 2018, § 2.3 at 10, https://www.whitehouse.gov/wp-content/uploads/2017/11/CEA-Rx-White-Paper-Final2.pdf ("Policies to decrease concentration in the PBM market and other segments of the supply chain (i.e., wholesalers and pharmacies) can increase competition and further reduce the price of drugs paid by consumers (Sood et al. 2017).").

[65] *See, e.g.*, Fiona Scott Morton, Professor of Economics at the Yale School of Management, Comments at Fed. Trade Comm'n Hearing, Competition and Consumer Protection in the 21st Century 303–05 (Sept. 13, 2018), https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf.

[66] *See, e.g.*, Nicolas Petris Center Institute on Health Care Markets and Consumer Welfare, School of Public Health, University of California, Berkeley, *Consolidation in California Healthcare Market 2010-16: Impact on Prices and ACA Premiums*, Mar. 26, 2018, at 9, 16–26 [hereinafter "Petris Consolidation Report"].

[67] *See, e.g.*, Steven Davidoff Solomon, *Tech Giants Gobble Up Start-Ups in an Antitrust Blindspot,* N.Y. TIMES, Aug. 16, 2016, https://www.nytimes.com/2016/08/17/business/dealbook/expect-little-antitrust-challenge-to-walmarts-bid-for-jet-com.html?login=email&auth=login-email.

[68] *See, e.g.*, Damien Geradin & Dimitrios Katsifis, *An EU Competition Law Analysis of Online Display Advertising in the Programmatic Age*, 15 EUR. COMPETITION J. 55 (2019).

[69] *See, e.g.*, *United States v. Bethlehem Steel Corp*., 168 F. Supp. 578, 607 n.55 (S.D.N.Y. 1958); *United States v. Von's Grocery Co.*, 384 U.S. 270, 283 (1966) (Stewart, J., dissenting, joined by Harlan, J.) ("The principal danger against which the 1950 amendment was addressed was the erosion of competition through the cumulative centripetal effect of acquisitions by large corporations, none of which by itself might be sufficient to constitute a violation of the Sherman Act.").

[70] *See, e.g.*, Baker et al., *supra* note 11, at 16.

merger, profit from input foreclosure due to the diversion of inputs away from rivals, ultimately raising prices for consumers.[71]

Finally, the proposed safe harbor is more expansive than that in the 1984 Non-Horizontal Guidelines. Those guidelines, which predate our increased understanding about how and in what ways vertical mergers can harm competition, set the safe harbor at 5% for the acquired firm, with a challenge likely if the acquired firm had a market share of 20% or more and where the market of the acquiring firm had an HHI of at least 1800.[72]

Ultimately, setting a relatively high 20% presumptive safe harbor risks undermining the laudable effort to update the 1984 Guidelines. Would-be merging companies will simply pitch their transactions as falling, or even restructure their transactions to fall, below the 20% line. By doing so, merging firms may avoid scrutiny as to overall trends towards market concentration, the cumulative effect of those transactions, the results of any direct effects analysis, or even what evidence in the investigation, such as internal corporate documents, may reveal.

b. Considering the Appropriate Use of Presumptions and Similar Indications of Harm

The DVMG do not set out circumstances under which harm can be presumed nor do they note circumstances in which particularized scrutiny would be appropriate. For example, the HMG both describe circumstances in which a proposed merger is presumed to harm competition, and those that potentially raise significant competitive concerns.[73] Similar guidance would be helpful here.

The DVMG wisely reject the view that vertical mergers carry with them any presumption of being pro-competitive,[74] but the Agencies also should explore and potentially propose circumstances in which a proposed vertical merger raises a particular threat of harm. Indeed, scholarship and real-world experience have shown several different circumstances under which vertical mergers can cause substantial anticompetitive harm,[75] a marked change from the state of affairs at the time of the original 1984 Guidelines.[76] Moreover, as discussed, some vertical mergers have led to price increases, particularly in non-commodity markets such as healthcare.[77]

---

[71] *Id.*
[72] U.S. Dep't of Justice, Non-Horizontal Merger Guidelines §§ 4.134, 4.213 (June 14, 1984).
[73] Horizontal Merger Guidelines, *supra* note 36, § 5.3.
[74] *See, e.g.,* Pl.'s Pretrial Br. 2, 18, United States et al. v. Sabre & Farelogix, No. 1:19-cv-01548-LPS (D. Del. Jan. 15, 2020).
[75] *See, e.g.,* Baker et al., *supra* note 11, at 13–15.
[76] *See, e.g.,* Baker et al., *supra* note 11, at 13–14; Jon Sallet, Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Remarks at the A.B.A. Fall Forum: The Interesting Case of the Vertical Merger (Nov. 17, 2016), https://www.justice.gov/opa/speech/file/938236/download.
[77] *See, e.g.,* Petris Consolidation Report, *supra* note 66; Cory Capps, David Dranove & Chris Ody, *The Effect of Hospital Acquisitions of Physician Practices on Prices and Spending*, 59 J. OF HEALTH ECON., May 2018, at 139–152; Laurence Baker, M. Kate Bundorf & Daniel Kessler, *Vertical Integration: Hospital Ownership of Physician Practices Is Associated with Higher Prices and Spending*, 33 HEALTH AFFAIRS, 2014, at 756–63; Laurence Baker et al., *The Effect of Hospital/Physician Integration on Hospital Choice*, 50 J. OF HEALTH ECON., Dec. 2016, at 1–8;

Further, in healthcare markets, procompetitive efficiencies from such mergers generally have yet to materialize.[78]

A useful starting point for inquiry would be the presumptions offered by Professors Baker, Rose, Salop and Scott Morton.[79] For example, they suggest the following input foreclosure presumption: "If the upstream merging firm in a concentrated market is a substantial supplier of a critical input to the competitors of the other merging firm and a hypothetical decision to stop dealing with those downstream competitors would lead to substantial diversion of business to the downstream market firm."[80] The Agencies can aid future law enforcement by, for example, identifying whether such circumstances could give rise to a formal presumption or require more intense examination. Either would aid Agency and state investigations and would provide a useful roadmap to courts.

Finally, the Agencies should explore in the upcoming workshops whether presumptions or other indications of harm based on a combination of the level of concentration as measured by HHIs, market shares, or other measurements of affected sales in related product markets could be developed.

The states encourage the Agencies to consider whether any such presumptions are warranted based on economic theory or real-world experience[81] and, at a minimum, develop criteria for closer investigation to ensure that the real and substantial economic harms associated with vertical mergers are not overlooked. The rebuttable presumption in the context of horizontal mergers has been invaluable to antitrust enforcement.[82]

VI. Alleged Pro-Competitive Outcomes

In DVMG Sections 6 and 8, the Agencies address claims made by merging parties that, if true, might offset potential anticompetitive effects. We suggest combining those two sections so that all such claims are assessed under the standard established by Section 10 of the HMG for

---

Thomas Koch et al., *How Vertical Integration Affects the Quantity and Cost of Care for Medicare Beneficiaries*, 52 J. OF HEALTH ECON., Mar. 2017, at 19–32.

[78] *See, e.g.,* Nancy D. Beaulieu et al., *Changes in Quality of Care after Healthcare Mergers and Acquisitions*, 51THE NEW ENGLAND J. OF MED., Jan 2, 2020 (hospital acquisitions by other hospitals or hospital systems lead to modestly worse patient experiences and no significant changes in readmission rates or mortality); Brady Post, Tom Buchmueller & Andrew M. Ryan, *Vertical Integration of Physicians: Economic Theory and Empirical Evidence on Spending and Quality,* 75 MED. CARE RES. & REVIEW 399, 417–18 (2018) (showing how studies of vertical mergers do not show any systematic improvement in quality as a generalized matter). As also set out above, if the VMG result in overly narrow guidance that would not apply to or capture certain vertical characteristics of the healthcare industry, the Agencies may need to consider special guidelines for vertical mergers in the healthcare industry.

[79] *See generally* Baker et al., *supra* note 11.

[80] *Id.* at 16 ("These presumptions *set* out conditions where concerns are greatest. They identify narrow factual settings where competitive harm is particularly likely, and thus, where it is appropriate to presume anticompetitive harm.") (emphasis added).

[81] Granted, the 1984 Guidelines also seem to suggest that the acquiring firm's market must also be sufficiently concentrated, with an HHI of 1800 or more absent additional factors suggesting collusion was likely, before the agencies were likely to challenge the merger. Non-Horizontal Merger Guidelines, *supra* note 72, §§ 4.131.

[82] *E.g.*, *Anthem*, 236 F. Supp. 3d at 192, 214; *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 47 (D.D.C. 2017).

considering claims of efficiencies. The Agencies also should take this opportunity to reiterate the duty of merging parties to demonstrate that claimed pro-competitive benefits that would allegedly offset potential harm must benefit an identifiable class of market participants in a relevant market (or markets).

a. Considering Claims of Offsetting, Pro-Competitive Effects

As discussed above, Section 7 of the Clayton Act "necessarily requires a prediction of the merger's impact on competition, present and future."[83] Such prediction effectuates Congress's intent "to arrest anticompetitive tendencies in their 'incipiency.'"[84] Accordingly, antitrust enforcers need show only "reasonable probability" of anticompetitive harm.[85] Because the purpose of Section 7 is to forestall harm to competition before it occurs, in close cases antitrust enforcers should receive the benefit of the doubt.[86]

The United States Supreme Court has never approved an efficiencies defense and lower courts have either noted that Section 7 of the Clayton Act may afford no efficiency defense or heavily disfavored such a defense.[87] Nonetheless, the Agencies have long chosen to recognize the possibility that merging parties might be able to demonstrate that procompetitive outcomes would offset, or nullify, the potential for anticompetitive harms.[88] As in Section 10 of the HMG, the showing typically requires demonstration of merger "efficiencies" of a sufficient certainty and magnitude.[89]

---

[83] *Procter & Gamble*, 386 U.S. at 577.
[84] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963) (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 322 (1962)).
[85] *Ford Motor*, 405 U.S. at 567 n.4.
[86] AT&T/Time Warner Proposed Conclusions of Law, *supra* note 34, ¶ 104.
[87] *See, e.g., Anthem*, 855 F.3d at 353; *Penn State Hershey Med. Ctr.*, 838 F.3d at 348 ("[W]e are skeptical that such an efficiencies defense even exists."); *Saint Alphonsus,* 778 F.3d at 790 ("We remain skeptical about the efficiencies defense in general and about its scope in particular."). The states are not taking a position one way or the other on whether an efficiencies defense does or should exist under Section 7.
[88] In 1997, revised Horizontal Merger Guidelines set out the now-familiar requirements that efficiencies be (i) merger-specific, (ii) substantiated, (iii) cognizable (which is to say that they meet the previous conditions and also do not "arise from anticompetitive reductions in output or service"), and (iv) prevent harm to consumers through, for example, preventing price increases. U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines (revised 1997), https://www.justice.gov/atr/horizontal-merger-guidelines-0.
[89] Whether or not a claim of the elimination of double marginalization fits the technical definition of an efficiency, it is proffered for the same purpose—to show that any anticompetitive effects would be nullified and, as we explain below, should be subject to the same legal requirements. *See Anthem*, 855 F.3d at 370 (Millet, J. concurring) (transferring income from supplier to purchaser without any resource savings because of increased bargaining power is not a procompetitive efficiency). All such claims should be analyzed using the same standards established by Section 10 of the HMG for efficiencies.

The examination of claimed efficiencies is rigorous.[90] Any purported procompetitive benefit must be directly related to the potential harm that a merger would create[91] and the merging parties bear the burden of demonstrating that their claimed efficiencies would offset potential anticompetitive harm.[92] That is as true for vertical as for horizontal cases. As DOJ has explained, "there is no basis for 'any blanket assumption that all vertical mergers generate substantial efficiencies.'"[93] Indeed, "'both prior to and when defending a merger[,] firms tend to exaggerate the magnitude of efficiencies that can be realized from a merger.'"[94]

Despite early claims that efficiencies sufficient to forestall competitive harm would inevitably result from vertical combinations,[95] antitrust enforcement actions (including those ending in consent decrees) and modern economic analysis suggests that vertical transactions may not produce efficiencies of that kind and/or magnitude. The healthcare sector provides a particularly important example. In 2010, 24% of primary care physicians in California were in practices owned by hospital/health systems, but that percentage had grown to 42% by 2018.[96] For specialists, the percentage of physicians in practices owned by hospital/health systems more than doubled during the same period.[97] And this increasing vertical concentration led to price increases.[98]

Antitrust enforcement tells the same tale. For example, in the UnitedHealth/DaVita transaction, a health insurer sought in a vertical transaction to acquire managed care provider organizations in Las Vegas and physician practices in Colorado. The Federal Trade Commission imposed a remedy on the Las Vegas acquisition because it would "ultimately increase prices or reduce

---

[90] AT&T/Time Warner Proposed Conclusions of Law, *supra* note 34, at ¶ 93. Under the case law, Defendants bear the burden of showing that: (1) the claimed efficiencies are "verifiable, not merely speculative," *Saint Alphonsus,* 778 F.3d at 791; (2) the efficiencies are "merger-specific. . . which is to say that the efficiencies cannot readily be achieved without the concomitant loss of a competitor," *id.* at 790–91; *see also Fed. Trade Comm'n v. H.J. Heinz Co*., 246 F.3d 708, 721–22 (D.C. Cir. 2001); and (3) the claimed efficiencies will benefit consumers, *Fed. Trade Comm'n v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991).

[91] *Cf.* Br. of Mississippi et al. as *Amicus Curiae* in Support of the Respondent 5, Impax Laboratories, Inc., v. Federal Trade Commission (5th Cir. Mar. 28, 2019).

[92] AT&T/Time Warner Proposed Conclusions of Law, *supra* note 34, ¶ 94.

[93] *Id.* ¶ 98 (quoting Lawrence Sullivan & Warren Grimes, THE LAW OF ANTITRUST 549 (3d ed. 2016)).

[94] *Id.* ¶ 100 (quoting AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 970a).

[95] *Id.* ¶ 98 (citing to LAWRENCE SULLIVAN & WARREN GRIMES, THE LAW OF ANTITRUST 549 (3d ed. 2016)).

[96] Richard M. Scheffler et al., *The Sky's the Limit: Health Care Prices and Market Consolidation in California*, California Health Care Foundation, Oct. 3, 2019, at 20.

[97] *Id.*

[98] *Id.*; *see also* Martin Gaynor, E.J. Barone University Professor of Economics and Public Policy, Carnegie Mellon University, *Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets*, Statement before the Committee on the Judiciary, Subcommittee on Antitrust, commercial, and Administrative Law, U.S. House of Representatives, March 7, 2019, at 11, https://www.congress.gov/116/meeting/house/109024/witnesses/HHRG-116-JU05-Bio-GaynorM-20190307.pdf. A study by the Nicholas C. Petris Center on Health Care Markets and Consumer Welfare at the University of California, Berkeley in 2018 found that higher prices accompanied the steady acquisition of physician practices by hospitals/health systems. Petris Consolidation Report, *supra* note 66.

quality" for Medicare Advantage plans.[99] The Colorado Attorney General objected to the proposed vertical combination of the health insurer with a key physician's group in the Colorado Springs area because the acquisition would allow the health insurer to raise the costs of physician services to competing insurers to the disadvantage of Medicare Advantage participants.[100] The Colorado Attorney General specifically rejected an efficiencies defense, explaining that claimed "cost savings are unsubstantiated and reflect speculative assumptions."[101]

Indeed, past experience with efficiency claims in the healthcare sector underscores that they must be vetted carefully. Dr. David Dranove specifically reviewed potential vertical efficiencies when he appeared as the economic expert for the Federal Trade Commission and the State of Idaho in connection with the proposed acquisition by St. Luke's Health Systems of a primary care physician group in Nampa, Idaho. Dr. Dranove testified that past studies of vertical integration had yielded "mixed results" and that there was "[n]o evidence of systematic reductions in healthcare costs following St. Luke's past acquisitions of PCP groups. Indeed, results suggest that St. Luke's past PCP acquisitions may have resulted in increased healthcare spending."[102]

Section 8 of the DVMG explains that the "Agencies will evaluate efficiency claims by the parties using the approach set forth in Section 10 of the Horizontal Merger Guidelines." That is undoubtedly the correct approach.

The DVMG serve as an opportunity to provide additional guidance on three specific issues, consistent with the expressed views of DOJ in recent litigation and the HMG. First, the DVMG should clarify the burden that merging parties must bear, a burden that grows with an increasing potential for harm,[103] and one that applies as much to vertical as to horizontal mergers.[104] That

---

[99] UnitedHealth Group and DaVita; Analysis of Agreement Containing Consent Orders to Aid Public Comment, 84 Fed. Reg. 30114 (June 26, 2019). Quality is, of course, an important outcome of healthcare and is often claimed as a benefit of healthcare transactions. There is no reason to believe that quality claims are generally or systematically valid, *see, e.g.*, Bealieu, *supra* note 78 (examining horizontal hospital mergers), and claims of quality must be carefully examined for merger-specificity and cognizability more generally. *See generally Aetna, Inc.*, 240 F. Supp. 3d 1.

[100] *See generally* Complaint, Colorado v. UnitedHealth Group Inc. and DaVita Inc., *supra* note 2.

[101] *Id.* at ¶ 54. The Colorado complaint also asserted that claimed efficiencies were neither merger specific nor large enough to overcome the potential harm to competition. *Id.* Two FTC Commissioners would not have undertaken the litigation risk of attempting to block the Colorado portion of the acquisition, noting the "mixed results" of proffered pro-competitive benefits. *See* Statement of Commissioners Phillips & Wilson, In re UnitedHealth Group and DaVita (June 19, 2019). Two other commissioners supported the action of the Colorado Attorney General, *see* Statement of Commissioners Slaughter and Chopra, In re UnitedHealth Group and DaVita (June 19, 2019).

[102] Demonstratives for the testimony of Professor David Dranove at 50, FTC & State of Idaho v. St. Luke's Health System & Saltzer Medical Group, No. 1:13-cv-00116 (Oct. 2, 2013), https://www.ftc.gov/system/files/documents/cases/131002stlukedemodranove.pdf. The acquisition was blocked on the basis of its horizontal characteristics. *Saint Alphonsus,* 778 F.3d at 788.

[103] *See H.J. Heinz Co*., 246 F.3d at 720; *see* Horizontal Merger Guidelines, *supra* note 36, § 10 ("When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.").

[104] AT&T/Time Warner Proposed Conclusions of Law, *supra* note 34, ¶¶ 95-98.

burden includes the well-recognized requirements that the efficiency must be reasonably verifiable, merger-specific, and sufficient to offset potential anticompetitive harms of the merger.[105] Second, DOJ has emphasized that "any claimed efficiencies must occur *in the challenged markets*," and the DVMG should make this explicit.[106] And third, the DVMG should directly state that the claimed efficiencies "must also '*pass[] through to consumers*, rather than simply bolstering [the defendant's] profit margin.'"[107] Inclusion of these statements, modified to apply to the multiple vertical merger theories recognized by the DVMG, would aid the administration of justice.[108]

b. Ensuring Rigorous Analysis of Elimination of Double Marginalization ("EDM")

Section 6 of the DVMG presents EDM as a topic separate from efficiencies and includes it in the discussion of how the Agencies can demonstrate anticompetitive harms. This leaves the impression that the Agencies regard EDM as more similar to a showing they must make in their case-in-chief, rather than a defense to be presented by the merging parties. The discussion of EDM explains that the Agencies "generally rely on the parties to identify and demonstrate whether and how the merger eliminates double marginalization" but does not specifically identify the burden the merging parties must bear. Despite this notion that EDM should be considered as part of the government's burden in demonstrating competitive harm—perhaps on the ground that the incentive to reduce double-marginalization parallels the incentive to raise rivals' costs—in fact, the circumstances surrounding EDM depend on multiple considerations that must be carefully examined.[109] Similarly, the DVMG provide explanation as to why EDM may be lower because of pre-merger contracting, but they do not expressly require that EDM be merger-specific.

DOJ set out a better approach, both in a speech by the Assistant Attorney General[110] and in DOJ's Proposed Conclusions of Law in the AT&T/Time Warner litigation.[111] As the Assistant Attorney General explained, DOJ views EDM as an affirmative defense,[112] not a topic that it must address in its case-in-chief with "evidence rebutting or anticipating the defendants' affirmative claim that EDM will cause a price decrease."[113] In considering EDM claims, DOJ examines whether the merging parties have demonstrated the existence of pre-merger margins (a condition for their elimination), whether alternative means of achieving the same benefits are present, and whether savings will be passed along to consumers (in a vertical transaction that is

[105] *Id.* ¶ 47.
[106] *Id.* ¶ 101.
[107] *Id.* ¶ 102 (quoting *Anthem*, 855 F.3d at 362).
[108] *See* discussion of customer and input foreclosure Section IV.b., *supra*.
[109] *See* Baker, et al., *supra* note 11, at 12, 15; Salop, *Invigorating Vertical Merger Enforcement*, *supra* note 11, at 1970–71.
[110] Delrahim, *supra* note 49, at 10.
[111] AT&T/Time Warner Proposed Conclusions of Law at 44–53.
[112] Delrahim, *supra* note 49, at 10.
[113] *Id.*

examining the potential for harm to a downstream consumer market).[114] As the Assistant Attorney General explained, if merging parties "want credit for EDM, then they have to do the work, and have the evidence, necessary to support it."[115] Similarly, in its proposed conclusions of law in the AT&T/TWE litigation, DOJ emphasized that claimed efficiencies, which in that case included EDM, must withstand "rigorous analysis."[116]

Indeed, the Agencies' approach to EDMs demonstrate that they should be treated as efficiencies. As the HMG explain, "[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms."[117] Moreover, the ability to achieve efficiencies depends on execution by the new firm, and "efficiencies projected reasonably and in good faith by the merging firms may not be realized."[118] Thus, substantiation of efficiencies rests upon the shoulders of the merging parties.[119] Professor Hovenkamp's explanation of the Agencies' treatment of efficiencies is just as persuasive when claims of EDM are considered:

> [E]vidence of efficiencies typically relates to a firm's own internal production and processes…. firms almost always know more about their own internal processes and the costs of changing them than any outside, including the merger enforcement Agencies.[120]

So too with EDM, where the firms themselves have superior knowledge of what margins have existed in the past; what actions, if any, have been considered in order to align the interest of upstream and downstream firms (in the markets where the vertical integration is proposed); what incentives to margin elimination would exist post-merger; and why the transaction would remove past impediments to the alignment of profits between the merging parties. Unlike the analysis of competitive harms, which relates to "market and predictions of consumer behavior,"[121] merging parties claiming EDM have a considerable informational advantage. And, as antitrust enforcers know, claims of pro-competitive benefits may shift during an investigation. The Agencies should not have to guess at the evolving plans and analysis of merging parties. As DOJ has emphasized, if antitrust enforcers "bore the burden on efficiencies, 'the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to

---

[114] *See id.*
[115] *Id.*
[116] AT&T/Time Warner Proposed Conclusions of Law, *supra* note 34, ¶ 92.
[117] Horizontal Merger Guidelines, *supra* note 36, § 10.
[118] *Id.*
[119] *Id.* ("[I]t is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.").
[120] Hebert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 726 (2017).
[121] *Id.* at 725.

present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise.'"[122]

VII. Remedies

Although the HMG do not separately discuss remedies, it would be helpful for the VMG to do so. In a series of consent decrees, the Agencies have imposed remedies on proposed vertical mergers, as have the states.[123] The Agencies should give careful consideration to placing importance on blocking vertical mergers or requiring divestitures given that, as we now know, vertical mergers cannot be presumed to be pro-competitive. Behavioral, or conduct, remedies can, however, play an important, procompetitive role in permitting the benefits of a vertical combination to be realized, while lessening the threat of anticompetitive harms.[124]

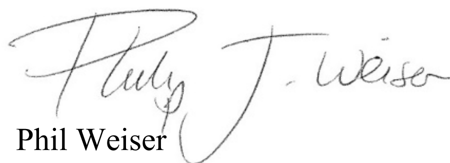
Thus, as DOJ has recognized, the core question will always be whether conduct relief is adequate to eliminate the risk of anticompetitive harms. If employed to eliminate harm, conduct remedies must be adequate to address identified risks, subject to practicable monitoring by the Agencies, and capable of being effectively enforced in a timely manner.[125]

VIII. Conclusion

The State Attorneys General appreciate the opportunity to provide input on the DVMG and look forward to continued engagement in this valuable effort. We hope that many of these issues will be explored in the upcoming workshops being conducted by the Agencies on March 11 and 18, 2020. We request that a representative from the states be selected to participate in one of the workshops.

Sincerely,

Xavier Becerra
California Attorney General

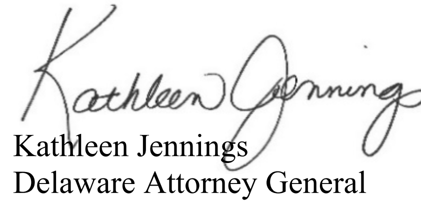


Phil Weiser
Colorado Attorney General

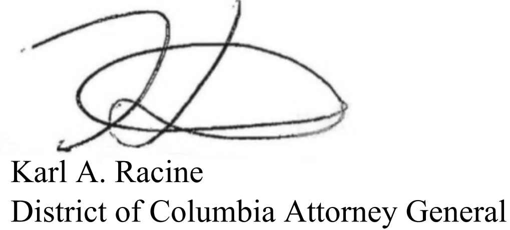
---

[122] AT&T/Time Warner Proposed Conclusions of Law, *supra* note 34, ¶ 96 (quoting *United States v. H&R Block Inc*., 833 F.2d 36, 91 (D.D.C. 2011)).
[123] *See, e.g.*, Consent Judgment, Colorado v. UnitedHealth Group Inc. and DaVita Inc., No. 2019-cv-031424 (El Paso County Dist. Ct., June 19, 2019).
[124] Agreement Containing Consent Order, In re Sycamore Partners II, L.P., No. 181-0180 (F.T.C. Jan. 2019); *see also In re Broadcom Ltd.,* No. C-4622 (F.T.C. July 3, 2017); *In re PepsiCo, Inc.*, No. C-4301 (F.T.C. Feb. 26, 2010); *In re The Coca-Cola Co.*, No. C-4305 (F.T.C. Sept. 27, 2010) (imposing firewall to prevent the misuse of sensitive commercial information)..
[125] Sallet, *supra* note 76; *see also* D. Bruce Hoffman, Acting Director, Bureau of Competition, Federal Trade Commission, Remarks at Credit Suisse 2018 Washington Perspectives Conference, Vertical Merger Enforcement at the FTC (Jan. 10, 2018),
https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf
.

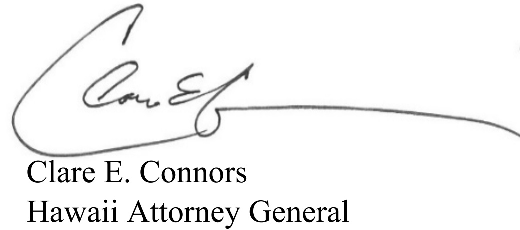
William Tong
Connecticut Attorney General



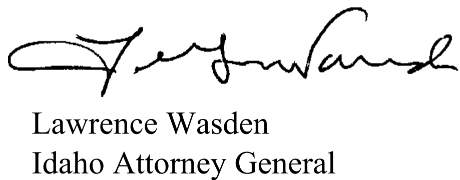
Kathleen Jennings
Delaware Attorney General



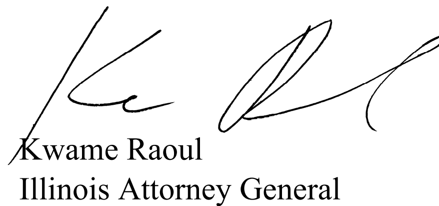
Karl A. Racine
District of Columbia Attorney General



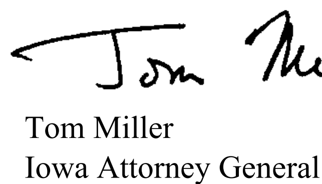
Clare E. Connors
Hawaii Attorney General



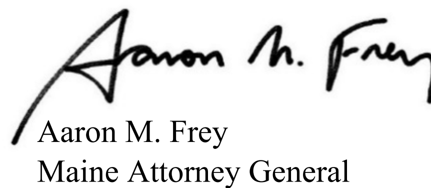
Lawrence Wasden
Idaho Attorney General



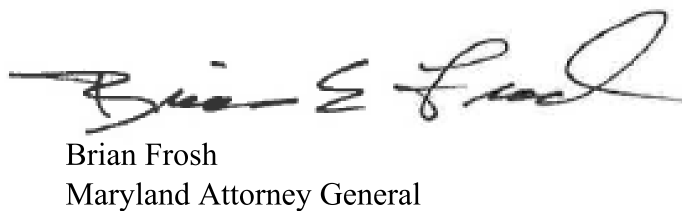
Kwame Raoul
Illinois Attorney General



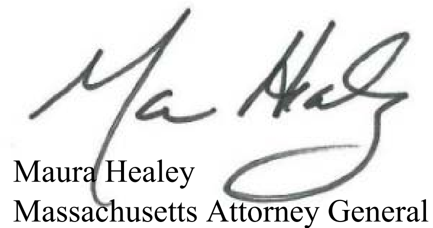
Tom Miller
Iowa Attorney General



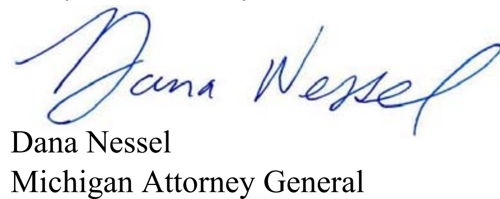
Aaron M. Frey
Maine Attorney General



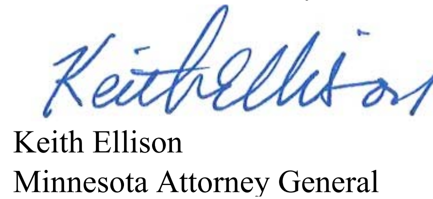
Brian Frosh
Maryland Attorney General



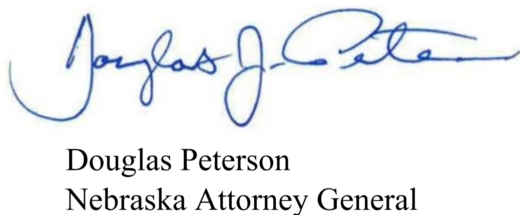
Maura Healey
Massachusetts Attorney General



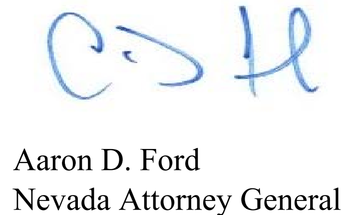
Dana Nessel
Michigan Attorney General



Keith Ellison
Minnesota Attorney General



Douglas Peterson
Nebraska Attorney General

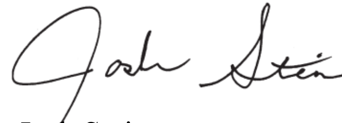


Aaron D. Ford
Nevada Attorney General

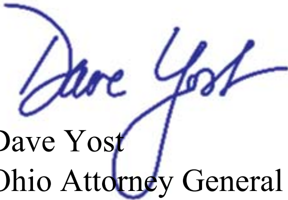
Gurbir S. Grewal
New Jersey Attorney General

Hector Balderas
New Mexico Attorney General

Letitia James
New York Attorney General



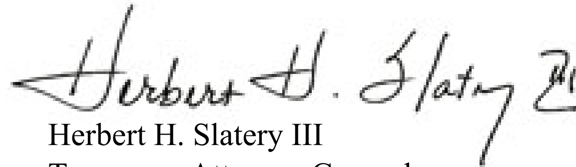
Josh Stein
North Carolina Attorney General



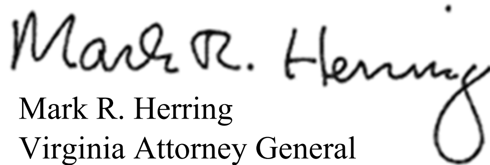
Dave Yost
Ohio Attorney General

Ellen F. Rosenblum
Oregon Attorney General

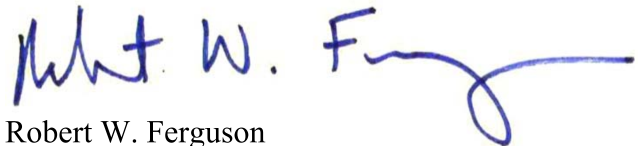
Josh Shapiro
Pennsylvania Attorney General



Herbert H. Slatery III
Tennessee Attorney General



Mark R. Herring
Virginia Attorney General



Robert W. Ferguson
Washington Attorney General