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RECOMMENDATIONS TO UPDATE THE FTC & DOJ'S GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS



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Sabin Center for Climate Change Law
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Table of Contents

EXECUTIVE SUMMARY	4
GUIDING PRINCIPLES	5
NAMING AREAS OF TENSION	7
INTRODUCTION: ANTITRUST UNDER THE BIDEN ADMINISTRATION	9
1. WHY ADDRESS COLLABORATION GIVEN RENEWED FOCUS ON COMPETITION?	12
1.1 MODERNIZED COLLABORATION GUIDELINES SUPPORT THE AGENCIES' AGENDA	13
1.2 GLOBAL STANDARDS HAVE EVOLVED	14
1.3 WHAT DO INTERNATIONAL GUIDELINES HAVE IN COMMON?	17
1.4 GROWING SUSTAINABILITY CONCERNS	18
2. CONSIDERATIONS FOR UPDATING THE COMPETITOR COLLABORATION GUIDELINES	19
3. RECOMMENDATIONS FOR UPDATED GUIDELINES	22
3.1 EFFICIENCIES DEFENSES	22
3.2 INFORMATION SHARING	25
3.3 FORECLOSURE CONCERNS	31
3.4 MONOPSONY CONSIDERATIONS	32
3.5 PRESUMPTIVE THRESHOLDS	33
3.6 RESEARCH COLLABORATIONS	35
3.7 CONSOLIDATION CHARACTERISTICS	36
4. PROCEDURAL RECOMMENDATIONS	37
4.1 ADVISORY OPINIONS	37
4.2 EXAMPLES	38
4.3 TERMINOLOGY	39

EXECUTIVE SUMMARY

The Biden Administration has reinvigorated antitrust enforcement at a scale and pace not seen in decades. Enforcers at the Department of Justice (“DOJ”) Antitrust Division and the Federal Trade Commission (“FTC”) have recently made sweeping changes and updates to guidance documents, more heavily scrutinized mergers and acquisitions, and the FTC issued its first rulemaking in 50 years with its April 2024 noncompete ban.¹

One area which has received less attention from the agencies is the area of competitor collaborations. The existing joint agency guidance, “Antitrust Guidelines for Collaborations Among Competitors” was written in 2000 and is currently out of step with the agencies’ focus on market power considerations and protecting the competitive process. This white paper seeks to provide both a rationale and some suggestions for revising the collaboration guidelines to better align them with the agencies’ current enforcement approaches. The existing guidelines, for example, rely heavily on efficiency defenses for anti-competitive collaborations, which are now disfavored by the agencies and other international jurisdictions, like Canada, which recently removed efficiencies defenses from its competition legislation.²

Many international jurisdictions, including the EU, UK, Japan, and The Netherlands, have updated their competitor collaboration guidelines over the last few years, particularly in response to calls from the private sector to more clearly articulate what forms of sustainability-related collaborations are permissible under the law. In the US, politicized antitrust accusations against financial firms engaged in climate-related standard setting have further muddied the waters and created confusion for many players, including nonprofit groups engaged in facilitating collaborative private sector activities. As detailed in our July 2023 report, “Antitrust and Sustainability: A Landscape Analysis,” it is our position that much of the activity in question falls within well-established antitrust norms and does not pose significant antitrust risk.³ Updated guidance could help to clarify this further.⁴

¹ Fed. Trade Comm’n, 16 C.F.R. Part 910, Non-Compete Clause Rule (Apr. 23, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf.

² News Release, Prime Minister of Canada Justin Trudeau, Fighting for the middle class (Sept. 14, 2023), <https://www.pm.gc.ca/en/news/news-releases/2023/09/14/fighting-for-the-middle-class>.

³ See Denise Hearn, Cynthia Hanawalt and Lisa Sachs, “Antitrust and Sustainability: A Landscape Analysis,” Columbia Center on Sustainable Investment and Sabin Center for Climate Change Law (July 2023), <https://ccsi.columbia.edu/content/antitrust-and-sustainability-landscape-analysis>; see also Denise Hearn and Cynthia Hanawalt, *The antitrust theories are weak, but the effects can be chilling on corporate collaboration for climate action*, IMPACT ALPHA, Dec. 2, 2023, <https://impactalpha.com/the-antitrust-theories-are-weak-but-the-effects-can-be-chilling-on-corporate-collaboration-for-climate-action/>.

⁴ Phil Weiser, Colo. Att’y Gen., Prepared remarks: The Rule of Law and Antitrust at the New York University Law School (Apr. 20, 2024), <https://coag.gov/blog-post/rule-of-law-antitrust-4-20-24/>.

This white paper first lays out a series of ‘guiding principles’ statements to situate the subsequent recommendations. We look to examples in other jurisdictions, with an eye to their treatment of sustainability-related collaborations, as many were updated with these considerations in mind. Importantly, we do not recommend that updated guidelines follow international examples in creating explicit sustainability-related carve outs, safe harbors, or exemptions. Due to the complex and expansive definition of sustainability-related private sector activity, exemptions could lead to obfuscation or abuse. However, we think that updated guidance would benefit from including sustainability-related examples of permissible collaborations to better align with modern market realities and the increasing pressure that firms face from consumers, workers, and some investors to address societal challenges.

Updated guidelines should follow the structure of the new Merger Guidelines⁵, using a principles-based approach and creating bright-line rules for firms to follow, while making accommodation for more complex cases by reviving the advisory opinion or business review process. Other complex cases will necessarily be resolved by the courts. However, by signaling that the agencies are willing to engage in good faith discussion with groups who have genuine questions about how to structure their collaborations, the agencies can ameliorate the narrative that antitrust is somehow an impediment to sustainability progress.

Below, we provide recommendations on how to approach various kinds of collaborations, including: information sharing, joint research and development initiatives, joint procurement, and standard setting. We also discuss how updated guidance should move away from efficiencies-based justifications for anti-competitive behavior, as well as consider monopsony dynamics of collaborations, presumptive thresholds, and consolidation concerns.

GUIDING PRINCIPLES

This section sets forth the “guiding principles” that inform our approach. We hope these foundational propositions clarify our perspective on addressing the complex intersection of competition and sustainability and contextualize our recommendations.

1. **We believe that strong regulatory and legislative regimes are the most effective form of market governance**, and that the efficacy of private-sector-led voluntary initiatives has proven mixed. However, as carbon pricing or other important regulatory mechanisms remain elusive and difficult to

⁵ Fed. Trade Comm’n and U.S. Dep’t of Justice, MERGER GUIDELINES (2023), <https://www.justice.gov/atr/2023-merger-guidelines>.

attain across multiple jurisdictions, the private sector maintains an important role in standard-setting and in meeting the terms of international goals and treaties, like the Paris Agreement.

2. **“Sustainability” is too broad and imprecise a concept to warrant special exemptions or safe harbors in antitrust law at this time.** Sustainable development must incorporate socially inclusive, and environmentally sustainable, economic development. This means protecting the planet’s natural resources (water, air, land, biodiversity), as well as sustainably provisioning critical social needs and services, like decent jobs, living wages, food security, affordable housing, peace and security, education, gender and racial equity, healthcare, and so on. Given the enormous range of markets and goals, and the breadth of firm activities which fall under these wide definitions, we believe that special accommodation for “sustainability-related” firm activity has the potential for abuse or obfuscation.
3. **However, firm collaboration regularly occurs and should be able to proceed when it does not harm the main parameters of competition.** Firms frequently collaborate with industry partners or other competitors in ways that can advance prosocial benefits to stakeholders. As long as these activities do not harm the main parameters of competition, and remain within the boundaries of the law, companies should not fear antitrust liability or use it as a pretext to step back from collaborative efforts to advance sustainable outcomes. Updated guidance can provide this clarity and reassurance to firms without needing to provide special accommodation for sustainability-related collaborations.
4. **Updated guidance should remain focused on the *behavior* of firm collaborations, not the *intent* for such collaborations.** Indeed, as the new Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act⁶ mentions, proving intent for monopolistic practices is not expressly required by the statutes. Relatedly, seemingly benevolent intent does not shield firms from liability in the presence of breaches of the law.
5. **An emphasis on private-firm collaboration should not preclude or supersede other economic stakeholders from their right to collaborate, particularly workers or smaller suppliers.** As antitrust scholar Sanjukta Paul has emphasized, antitrust is fundamentally an allocator of economic coordination rights. As she states, “because antitrust has effectively established a state monopoly on the allocation of coordination rights, we ought to view coordination rights as a public resource, to be allocated and regulated in the public interest rather than for the pursuit of only private ends.”⁷

⁶ Fed. Trade Comm’n, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (Nov. 10, 2022), <https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission>.

⁷ Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV., 4 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337861.

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6. **“Competitors” are not defined by industry.** Today, firms often occupy many product verticals and have ecosystems of financial, tangible, and intangible assets that combine to reinforce a company’s strategic market position. For this reason, firms are not necessarily exempt from the guidance laid out in this document by claiming that they do not compete with a firm with which they collaborate. Any project that involves and impacts parameters of competition is subject to this guidance and to antitrust scrutiny.

Naming Areas of Tension

While crafting this document, certain challenging areas or points of tension emerged. By naming these tensions here, we hope that the agencies, and other scholars, lawyers, and practitioners, will further engage with these important questions and help craft the most appropriate path forward.

1. **What replaces efficiency?** Beginning in the 1970s and early 1980s, the normative goal of antitrust law intentionally moved away from monitoring the concentrated power of firms, towards focusing on maximizing efficiency gains, typically measured by lower prices for consumers. Some evidence suggests that this “consumer welfare standard” failed its own metrics with rising markups across a number of industries. More fundamentally, non-price harms, such as harms to democracy, privacy, and worker and supplier bargaining power, among others, were not captured in this frame. Under the current administration in the US, and indeed around the world, efficiency is diminishing as the ultimate measure of competition policy. However, there is no broad consensus on what replaces it. The existing collaboration guidelines were written under an efficiencies-defense framework, and therefore are misaligned with the current agencies’ enforcement approach. While alternative proposals, such as the “competitive process standard” or “effective competition standard” have been advanced, there is little scholarship as to how these theories relate to elements of competitor collaborations.
2. **Overuse of economic analysis in adjudicating antitrust law.** The benefits and harms of competitor collaborations can be difficult to quantify and measure. Some international agencies have revised their guidance to account for the pro-social benefits of sustainability or climate-related collaborations and accrue those benefits to out-of-market product consumers (e.g. to all citizens within the UK). While quantifying the benefits of a reduction in greenhouse gasses to an entire national citizenry may make sense scientifically, it adds layers of complexity to an already complex process of quantification in antitrust enforcement and may tilt the balance of benefits in favor of large or incumbent firms. In practice, the quantification of such harms and benefits has historically made it difficult for agencies to win cases and has elevated the role of economists in adjudicating antitrust law. However, structural presumptions or plainer-text readings of the statutes do not necessarily provide sufficient support in

the area of competitor collaborations, and therefore make it more difficult to determine how to proceed.

- 3. How much should sustainability framings guide this document?** It is our position that antitrust law should be enforceable regardless of the particular motivation of firm action. However, the majority of international agencies have specifically addressed sustainability in updated guidance, and much of the discussion of competitor collaborations in the legal community has been driven by sustainability concerns. In this document, we refer to and detail the sustainability-related updates to international guidelines, but we do not herein recommend an approach that creates safe harbors or special exemptions for such agreements. We believe that providing examples of sustainability-related competitor collaborations within updated guidance could go a long way toward providing clarity. It is also our position that much of the current sustainability collaboration activity that has been accused of violating antitrust laws (industry associations, standard setting, benchmarking, shareholder engagement, etc.) falls safely within long-standing antitrust precedent and presents minimal antitrust risk. Clarifying this would be helpful in discouraging the politicized weaponization of core antitrust principles.⁸
- 4. Traditional notions of price reduction and output maximization may be in tension with sustainability.** What is truly novel or necessary about sustainability-related projects that require new approaches by the agencies? Some contend that antitrust’s focus on reducing prices or maximizing output are fundamentally in tension with sustainability goals, and therefore requires internalizing long-externalized costs and reducing production. Reconciling this may require moving away from a focus on output and refocusing on market power as the ability to control competition or the competitive process.⁹ However, this shift is not universally accepted, and there is no clear articulation in Neo-Brandeisian scholarship about the intersection of competition, market power, and protection of the environment (or what role, if any, competition law should play in this arena). This is an area ripe for additional scholarship.

Where there are complex and competing normative goals in applying antitrust law (for example, maximizing output in net-harm industries), these nuances can be resolved in courts under a rule of reason analysis. We believe that other policy areas and comprehensive legislative agendas should set

⁸ Phil Weiser, Colo. Att’y Gen., Prepared remarks: The Rule of Law and Antitrust at the New York University Law School (Apr. 20, 2024), <https://coag.gov/blog-post/rule-of-law-antitrust-4-20-24/>.

⁹ John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563 (2022), <https://ilr.law.uiowa.edu/print/volume-107-issue-2/the-output-welfare-fallacy-a-modern-antitrust-paradox>.

market guardrails for sustainability, and competition regulators can ensure competitive markets meet those mandates by focusing on their existing statutory remit.

Reader’s Note: The “Antitrust Guidelines for Collaborations Among Competitors”, issued by the Federal Trade Commission and Department of Justice in April 2000, are hereinafter referred to as the “Existing Guidelines”.

INTRODUCTION: ANTITRUST UNDER THE BIDEN ADMINISTRATION

President Biden has made a reinvigorated approach to antitrust enforcement a cornerstone of his Administration’s agenda. In July 2021, he signed Executive Order Number 14036: “Promoting Competition in the American Economy,”¹⁰ affirming his Administration’s commitment to enforcing the Sherman Antitrust Act and Clayton Antitrust Act, backed by a clear mandate and high-profile leadership for the two leading federal antitrust agencies: the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”), (hereinafter referred to collectively as the “Agencies”).

These actions, among others, are intended to counteract the dramatic decline in antitrust enforcement and the subsequent harms to consumers that have resulted over the last several decades. Since the 1970’s, neoclassical economic theories promoted by the Chicago School gave rise to an emphasis on efficiency and the consumer welfare standard, where business conduct is evaluated with respect to its impact on consumers, largely through the lens of price.

During this period of inactivity, corporations across tech, healthcare, airlines, and many other industries consolidated and grew into behemoths, largely eliminating their competitors along the way, and leading to unfair market practices and fewer, lower quality, choices for consumers. Since the year 2000, market concentration in the United States has increased in over 75% of industries¹¹; simultaneously, the stock markets have shrunk, with the number of publicly traded firms decreasing by nearly 50%.¹² This concentration has had the same effect as it had nearly a century ago, when similar conditions drove rising economic inequality and a disempowered workforce with stagnant wages, ultimately leading to populist uprisings attempting to improve the status quo.

¹⁰ Exec. Order No. 14036, 3 C.F.R. 609 (2022).

¹¹ Gustavo Grullon, Yelena Larkin, and Roni Michaely, *Are US Industries Becoming More Concentrated?*, 23 REVIEW OF FINANCE, 697, 698 (2019), <https://doi.org/10.1093/rof/rfz007>.

¹² Nicole Goodkind, *America has lost half of its publicly traded companies since the 1990s. Here’s why*, CNN, June 9, 2023, <https://www.cnn.com/2023/06/09/investing/premarket-stocks-trading/index.html>.

The consumer welfare theory allowed for this increased concentration, as it did not emphasize the fundamental conditions of healthy competition. But recently there has been a reevaluation of antitrust theory, with a particular emphasis on the importance of competition for the economy and workers alike. President Biden has made increased competition a priority, taking a whole-of-government approach and embracing the neo-Brandeisian view that emphasizes the benefits of competition over gains in efficiency. These anti-monopoly and pro-competitive aims galvanize proactive regulation to prevent exploitative practices and also emphasize more stringent remedies like structural separations (break ups). The approach focuses on the structures and procedures that drive competition, not just outcomes like price, which was often the ultimate measure under the previous consumer welfare standard.

Under the Biden Administration’s new approach, the Agencies have been working diligently to increase enforcement actions aligned with these priorities. The DOJ has focused on enforcing Section 2 of the Sherman Act, which not only includes civil penalties for those “who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize” but also deems the person or persons guilty of a felony. Notably, between January 2022 and September 2023, in criminal antitrust enforcement the Agencies achieved 11 corporate guilty pleas, 22 individual guilty pleas, and seven convictions of individuals at trial.¹³ This includes winning the first criminal monopolization case brought in fifty years against a construction firm that agreed to divide a market with a competitor. The Agencies also reported that, in fiscal year 2022, together they brought fifty merger enforcement actions, the highest number seen since the US began requiring pre-merger antitrust review in the 1970’s.

The Agencies have also worked to update outdated antitrust guidance. In 2023, the Agencies jointly released revised Merger Guidelines, reflecting the Administration’s modernized view of how competition works in markets, and a renewed adherence to statutory text in guiding enforcement. Additionally, in 2022, the FTC released a policy statement regarding Unfair Methods of Competition¹⁴ that supersedes all previous guidance, making clear that the FTC’s authority reaches beyond the Sherman and Clayton Acts to other types of unfair conduct that negatively impact competitive market conditions. The Agencies have been active in other rulemaking proceedings as well, including banning noncompete clauses in employment contracts as an unfair method of competition in April 2024. This policy is part of a larger rulemaking agenda which also includes a

¹³ Jonathan Kanter, Assistant Att’y Gen., U.S. Dep’t of Justice, Remarks at the Fordham Competition Law Institute International Antitrust Law and Policy Conference (Sept. 22, 2024), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law>.

¹⁴ Fed. Trade Comm’n, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (Nov. 10, 2022), <https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission>.

review of commercial surveillance, data security practices, and online consumer protection measures such as ‘Click to Cancel’ rules for subscriptions which acknowledge modern market realities.

The Agencies have also repealed guidance that is unresponsive to modern market realities, such as two previous policy statements regarding enforcement in healthcare markets.¹⁵ The FTC noted in withdrawing those statements that they are “outdated” and “may be overly permissive on certain subjects, such as information sharing,” as they may have allowed for sharing sensitive wage and benefit information between employers to the detriment of employees, among other anticompetitive practices. The FTC has indicated that it will instead rely on general statements and principles of antitrust enforcement and policy for all markets, rather than healthcare-specific statements. Again, this action reflects a focus on emerging market realities in a data and internet-based economy that were unimaginable when, for example, these healthcare statements were released 15-30 years ago.

Those guidelines were overly permissive on certain subjects like information sharing, and silent in important developing areas. Unfortunately, the Agencies have not issued new guidelines in replacement, an approach that has left an information vacuum, which is harmful for transparency and confusing for practitioners. Given the lack of clarity around emerging areas like information sharing, the repeal of what limited guidance existed has thrown into question not only the standard for the healthcare industry but also for other sectors as well. While the specific healthcare guidance may not have been intended to apply beyond the borders of the industry, in practice it was used extensively by corporate antitrust practitioners to advise clients. There is an open question now about what standards for competitor information sharing will apply, and whether they will be stringent across all industries. This uncertainty highlights the need for clarity and consistency in updated guidance documents that apply to competitors generally across all sectors.

One topic the Agencies have not yet addressed is under what circumstances collaboration among competitors may be permissible. That is the subject of this paper.

¹⁵ Press Release, U.S. Dep’t of Justice, Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), <https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements>.

1. WHY ADDRESS COLLABORATION GIVEN RENEWED FOCUS ON COMPETITION?

As detailed above, the Agencies have undertaken an increasingly comprehensive and stringent review of antitrust violations throughout the American economy. Given this commitment to the pursuit of fair and increased competition across sectors, why should the Agencies focus on collaborations?

There are calls for increased collaboration opportunities in the modern, global, and interconnected market, and other jurisdictions around the world are responding – the Agencies have yet to do so. In some areas where competitor collaboration is indispensable to achieving ends that both increase efficiencies and are pro-competitive, such as climate and sustainability collaborations, the threat of antitrust enforcement has been weaponized by opponents and is stifling progress in these spaces.

Antitrust has, over the last number of decades, focused on maximizing output and reducing price – which can be in tension with environmental goals. It raises complex questions about whether firms should be able to collaborate on sustainability and other pro-social goals when higher costs may initially be incurred, or some restrictive practices may be necessary to realize constructive change. These scenarios are not abstract: it is a common concern that firms may need to pay more for greener inputs, and thus raise prices, or to act in anti-competitive ways in order to collectively boycott a supplier with poor labor or environmental practices. Agencies should take this opportunity to clarify permissible practices for firms that have sought leeway to restrain competition in limited, time-bounded ways to achieve improved levels of sustainability. More clarity is required for entities to set and pursue sustainability goals, with some assurance that they will not face antitrust scrutiny so long as their collaborations are limited in scope and within the bounds of reasonableness to achieve and important public policy goals. If increasing sustainability were considered a way to alleviate a market failure justifiable by limited restraints on trade, this could be possible under a rule of reason analysis.

This need has particular resonance in the United States, where efforts by coalitions to reduce greenhouse gas emissions have been undermined by the specter of antitrust liability. For example, one of the world’s largest asset manager firms, BlackRock, recently stated that joining with a climate action industrial group to push companies to reduce emissions across their assets “would raise legal considerations, particularly in the US,”¹⁶ and, accordingly, the firm has limited its participation in Climate Action 100+, an international coalition of asset managers focused on encouraging companies to address the climate crisis. Attacks on pro-environmental coalitions – including antitrust investigations against climate coalitions like Climate Action 100+ and various Net Zero alliances – have stemmed from some State Attorneys General and members of Congress.

¹⁶ David Gelles, *What’s behind Wall Street’s flip-flop on climate?*, N.Y. TIMES, Feb. 20, 2024, <https://www.nytimes.com/2024/02/20/climate/wall-street-environmental-pledge-retreat.html?>

These attacks are having a chilling effect on pro-social behavior, and, in this context, more clarity is needed for corporations to pursue their sustainability goals.

There are challenging questions related to pro-social collaboration in markets for consumer or citizen benefit. At its core, as Professor Sanjukta Paul points out, antitrust is as allocator of collaboration rights, and this body of law aims to answer complex and profound questions about beneficial forms of both competition and collaboration in markets. Which economic actors should have collaboration rights, and for what purposes?

The Existing Guidelines, which date to April 2000, are ripe for review and modernization and are out of step with the Agencies' current enforcement approach. Revising them would meet this market demand and help align collaboration with current anti-monopoly priorities at the Agencies. Competitor collaboration guidance is important as industry and practitioners alike are wary of transgressing beyond the Agencies' new enforcement thresholds. Further, having a clearer, modernized guidance document would aid all stakeholders in terms of notice and increasing compliance.

1.1 Modernized Collaboration Guidelines Support the Agencies' Agenda

The Agencies' current pro-competitive antitrust agenda is not well served by the Existing Guidelines, both due to fundamentally new market considerations and that the guidelines are out of ideological step with the current enforcement approach. As the Existing Guidelines note, "competitor collaborations and the market circumstances in which they operate vary widely." The dramatic technological, economic, social, and environmental changes over the last quarter century have reshaped market circumstances considerably.

An update to the Existing Guidelines would also align well with the Agencies' current robust enforcement approach. While the reinvigoration of antitrust enforcement has substantial benefits, increased enforcement may create a chilling effect on potentially beneficial collaborations between competitors that could also advance competition or pro-stakeholder (workers, consumers) outcomes. Issuing new guidelines could ameliorate potential areas of confusion and reduce this phenomenon. New guidelines would bolster agency goals and foster greater industry understanding and compliance in ways that are unique to modern markets. They would protect competition on all sides of a market while enabling the benefits that can be gained through collaboration, and throughout a complex production and distribution chain that has become increasingly global (including a focus on labor and input suppliers). They would reflect substantive consideration, in a market analysis, of potential or nascent competitors. This offers additional benefits, as updated collaboration guidelines could contextualize a proposed merger amid broader market trends (such as a series of such mergers by a given firm, or within a given industry), and would allow for heightened scrutiny of the type of data sharing that has plagued modern markets, and heightened scrutiny of platform dynamics.

Finally, they should de-emphasize horizontal as opposed to vertical effects with platforms and instead focus on ecosystem theories of harm which need not delineate between horizontal and vertical effects.

1.2 Global Standards Have Evolved

In response to changing norms and realities around competitor collaboration, Europe, the UK, Japan, Canada, and The Netherlands – among others – have all released substantive updates to their competitor collaboration guidelines in recent years. Other jurisdictions are following suit.

In the European Union (“EU”), revised Horizontal Block Exemption Regulations on Research and Development and Specialization agreements (“HBERs”) were adopted in June 2023 (the “European Guidance”).¹⁷ These guidelines are meant to offer updated clarity and guidance in assessing whether horizontal cooperation agreements are in compliance with EU competition laws. The previous guidelines had been in force since 2011, already a full decade more recent than the United States’ comparable guidelines, and yet still in need of an update. The HBERs exempt Research and Development and specialization agreements from the general prohibition that exists under Article 101(1) on the Treaty of the Functioning of the European Union. That provision bans agreements that aim to restrict, prevent, or distort competition within the EU, and that impact trade between EU member states. The accompanying Guidelines released with the HBERs explicitly include a new chapter covering Sustainability Agreements, clarifying that antitrust rules do not stand in the way of agreements between competitors that pursue a sustainability objective.

The Guidelines draw from the U.N.’s Sustainable Development Goals and provide a soft safe harbor for sustainability standardization agreements that meet specified conditions. Importantly, to be exempted, they must not have greater costs than benefits for consumers. The EU explained that part of the goal of these guidelines is to recognize that there are negative externalities to the environment caused by individual production and consumption that are not reflected in the price paid for goods, nor captured by taxes or regulation. As such, sustainability cooperation can be effective, and perhaps even necessary, in these areas to mitigate negative environmental and social impacts. In naming these sustainability goals, the EU does not only include environmentally focused agreements, but also gives deferential treatment to agreements that further labor and human rights. Informal guidance from DG Competition is also available for companies wishing to enter into sustainability agreements to ensure that they comply with EU competition rules.

¹⁷ Commission Regulation 2023/1066 of June 1, 2023, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, 2023 O.J. (L 143) 9-19; Commission Regulation 2023/1067 of June 1, 2023, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, 2023 O.J. (L 143) 20-26.

While we do not think the US needs to follow this approach, there may be an opportunity to provide clarity on competitor agreements that aim to meet international commitments such as the Paris Agreement or evolving climate disclosure regimes, which could support better compliance for firms and clarify permissible collaborative action in these areas. We think the inclusion of examples in updated guidance that demonstrate relevant types of permissible collaborations would be helpful.

The UK released its competitor collaboration guidance on horizontal agreements in August 2023.¹⁸ The UK’s “Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements” is targeted at businesses with horizontal agreements that may restrict competition but can be beneficial to consumers. There is a complete prohibition in the Competition Act on agreements that have as their object an appreciable “prevention, restriction or distortion of competition within the UK.” However, some agreements that might appear to fall within this blanket prohibition are exempted by Horizontal Block Exemption Orders that define specified conditions for exemption, including, for example, research and development, and specialization agreements. Other potentially beneficial agreements that fall outside these block exemptions are addressed in the remainder of the guidelines. These guidelines are designed to be generally applicable to all corporate collaboration.

The UK’s Competition and Markets Authority’s draft guidance on sustainability was also released in 2023.¹⁹ That guidance has a similar focus to the EU’s HBERs, noting that “ensuring environmental sustainability is a major public concern” and that it is important “competition law does not impede legitimate collaboration” required for environmental sustainability. The core focus is Environmental Sustainability Agreements (“ESAs”), which are designed to mitigate or reduce the adverse impact of industry on environmental sustainability. These types of agreements are a new phenomenon in the world of corporate collaboration and competition law, and, given their profound importance to society, the UK chose to develop a separate guidance document focused exclusively on the permissibility of competitor collaboration with an environmental goal. Within this category is a special subsection for Climate Change Agreements, which are allowed further latitude due to the “sheer magnitude of the risk that climate change represents, the degree of public concern about it, and the binding national and international commitments that successive UK governments have entered into.”²⁰ The guidance divides collaborative agreements into three categories: those unlikely to raise antitrust concerns, those that have restricting competition as their “object” and are *per se* banned, and those where the antitrust

¹⁸ UK Competition & Markets Authority, Guidance on the application of Chapter I prohibition in the Competition Act 1998 to horizontal agreements, UK Competition & Markets Authority, 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178791/Horizontal_Guidance_FINAL.pdf.

¹⁹ UK Competition & Markets Authority, Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements, UK Competition & Markets Authority, 2023, https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf.

²⁰ *Id.* at 7.

harm is outweighed by the overall benefit, which is measured by a multipronged inquiry. Note that this document does not replace or supersede the UK’s general guidance on horizontal agreements but works in tandem with it.

Within the category of ESA’s “unlikely to infringe,” the UK included shareholder voting agreements to promote corporate environmental sustainability, because they either do not relate to how businesses compete or because they are unlikely to have an appreciable adverse competitive effect.²¹ This provision is the first of its kind. The guidance indicates that shareholder agreements within a single business to vote for environmentally friendly practices are unlikely to infringe upon competition law. Similarly, agreements among shareholders of competitor businesses are deemed unlikely to violate competition law where the agreement encourages or requires the adoption of environmental agreements that the guidance already contemplates as being unlikely to violate antitrust law. Recognizing that these environmentally focused shareholder agreements are unlikely to be anticompetitive enables shareholders to work together to encourage corporations to become more sustainable, a practice that has gained momentum globally but only has achieved this sort of special legal recognition within the UK and may further encourage shareholders to pursue these societally beneficial arrangements.

Along the same lines as the UK’s sustainability guidance, Japan released Green Guidelines in 2023 and recently revised them in April 2024, aimed at encouraging businesses to reduce their environmental impact by improving clarity of choice and predictability in the application and enforcement of antitrust law while preventing anti-competitive activities. The guidelines are broad and include not only competitor collaborations but also mergers and acquisitions. However, their primary focus is horizontal cooperation, and they offer insights into the jurisdiction’s priorities in the broader realm of competitor collaboration beyond just sustainability-focused agreements. The guidelines recognize that, in many cases, collaborations aimed at achieving greater sustainability do not generally harm free and fair competition. Instead, they foster technological innovation and produce positive outcomes for consumers, like reducing greenhouse gas emissions. Reducing greenhouse gasses is explicitly considered to be an improvement in quality, even if there is no direct change in the value in use for consumers, and therefore promotes competition.²² If collaborations only have anti-competitive effects and do not exhibit these same positive outcomes (e.g. if they are “hard-

²¹ UK Competition & Markets Authority, Green Agreements Guidance: Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements, UK Competition & Markets Authority, 2023, 20, https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf.

²² Japan Fair Trade Comm’n, Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act: <Summary>, Japan Fair Trade Comm’n, Revised 2024, 9, <https://www.iftc.go.jp/en/pressreleases/yearly-2024/April/240424.html>.

core” restrictions, as identified in the guidelines)²³, then they would be found in violation of Japanese antitrust principles, even if they have a greening effect. The guidelines lay out several key points, including a presumption that cooperation is not anti-competitive if it does not restrain key competition factors, restrain entry, or exclude existing entrants. The guidelines also provide a balancing test to weigh the impact on competition of any agreement that does not reach the level of *per se* anti-competitive violations. The Japanese guidelines are also interesting because they include considerations relating to abuses of a dominant bargaining position.

Notably, Japan’s Green Guidelines have the added benefit of concrete examples, including sustainability features that are relevant to the modern era. Japan has released other guidance reflective of changing market realities as well, including competitor collaboration guidelines for working with start-ups that reflect the inherently unequal bargaining power between market incumbents and newcomers that characterizes the modern, digital economy. Japan has also periodically released new guidance around its anti-monopoly laws and acceptable business practices, noting that “practices are rapidly changing because of the increasing globalization of economic activities, technological innovations, and other factors.”²⁴ The Green Guidelines take a broad approach to all aspects of antitrust that might be implicated by the modern market emphasis on sustainability. However, collaborations must still produce tangible benefits to the consumer, or they may be found in violation of antitrust law, even if they have a greening effect.

1.3 What do International Guidelines Have in Common?

Across these jurisdictions, the revised guidelines do not seek to reinvent core antitrust principles. Instead, they reflect the passage of time and the concomitant shifting market dynamics that have resulted in new industries and market practices that were not envisaged by previous antitrust guidance documents. Many core principles remain clear across these new guidelines. Indeed, classic antitrust violations, including *per se* violative behaviors like price fixing, market allocation, bid rigging, and boycotts, are not saved by sustainability-related aims. Inversely, most of these guidelines stipulate that if collaborations do not affect key aspects of competition (e.g. price, restraint of new entrants, market division, boycotts) they should not fall afoul of competition rules. In most cases, the reasonableness, or “rule of reason,” test will apply, though here, different authorities take slightly different approaches. As agencies or courts determine whether a restriction of competition is “reasonable” or not, there is variation in the guidance regarding how to quantify harms and benefits. And with respect to sustainability gains, there are some proposals for quantification using measures

²³ Japan Fair Trade Comm’n, Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act, Japan Fair Trade Comm’n, Revised 2024, 10, <https://www.jftc.go.jp/en/pressreleases/yearly-2024/April/240424.html>.

²⁴ Sec. Gen., Japan Fair Trade Comm’n, Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act, Japan Fair Trade Comm’n, Revised 2017, https://www.jftc.go.jp/file/230331EN_GreenGuidelines.pdf.

like the social cost of carbon, or other metrics like the consumer willingness to pay for more sustainable products, which the EU takes into account. Notably, in the UK, the guidance allows companies to accrue benefits to the entire UK consumer base (as opposed to only product-market consumers) if they are climate-related or reduce greenhouse gas emissions.

To improve competition and accrue benefits to consumers, the need to overhaul the competitor collaboration guidelines is not cabined just to environmental considerations. However, it is clear across the jurisdictions acting on these topics that special attention is given to environmentally focused competitor collaboration agreements. **This paper does not recommend the approach seen in some jurisdictions to grant “exceptions” to climate-related or environmentally minded collaborations, but rather seeks a comprehensive revision to the Existing Guidelines aligned with sustainability goals and the Agencies’ pro-competitive agenda.** That said, some discussion of the special circumstances arising from sustainability concerns is warranted.

1.4 Growing Sustainability Concerns

The special treatment of environmental collaborations across the jurisdictions discussed above reflects a growing perspective in the antitrust community that sustainability-related agreements are necessary and beneficial to consumers and society, and, as such, warrant differentiated treatment from other forms of competitor collaboration. Shifting market conditions, including threats posed by climate and environmental externalities, raise new and complex challenges about private sector sustainability-related collaborations.

This is in part because sustainability can be a costly endeavor for firms. Firms have argued that a ‘first mover disadvantage’ follows companies which prioritize sustainability, as they may incur higher costs than less innovative or less environmentally conscious competitors. Without cooperation, they argue, firms have little incentive to shoulder the higher cost of sustainability projects when competitors who do not internalize environmental externalities can outcompete them on price. The outsized success of Chinese-Singaporean fast-fashion house, Shein – the world’s largest fashion retailer as of 2022 – is one example. Despite longstanding and well-known environmental issues in fast-fashion such as high water usage, fossil fuel use in textile production, and high levels of generated landfill waste, competitors are threatened by the continued output-maximizing nature of Shein and similar companies. While our position is that robust environmental regulations are the most efficacious way to deal with these concerns, it is also true that for large firms operating in multiple jurisdictions, the regulatory landscape is fragmented and inconsistent and lends itself to a lowest-common-denominator approach. While the effectiveness of industry self-regulation is contestable and controversial, sometimes industry standards can provide meaningful progress in setting safety, sustainability, and product quality guardrails for industry players.

While the revisions proposed herein are universally applicable to competitor collaboration agreements, sustainability is thus an area of particular consideration. Companies have claimed they lacked clarity on what was permissible or found competition law to be a barrier to collaborating on climate or sustainability-related projects.²⁵ As already noted, many jurisdictions have responded to these concerns with revised, generally applicable competition guidelines or guidelines specifically tailored to sustainability or green-focused agreements. This acknowledges the importance of green agreements and progress to safeguard the climate and the environment for future generations. For example, Japan states in their Green Guidelines that “climate change is a pressing issue for all ... this issue urgently requires the international community to strengthen its concerned efforts ... it is necessary to create a society that combines the reduction of environmental burdens and the accomplishment of economic growth.” They go on to state that if antitrust guidance is not clear, “it may possibly cause concerns for enterprises and trade associations that their various efforts toward the realization of a green society might pose problems under the Antimonopoly Act.”²⁶ This echoes similar statements from competition regulators across the globe. The UK’s Green Amendments Guidance focuses on “ensuring that competition supports a resilient economy that can grow sustainably.” Any updated guidance from the Agencies should endeavor to do the same.

2. CONSIDERATIONS FOR UPDATING THE COMPETITOR COLLABORATION GUIDELINES

The Antitrust Guidelines for Collaborations Among Competitors were released by the FTC and DOJ in April 2000 through the FTC’s website and the Consumer Response Center. The Guidelines were issued in response to “forces of globalization and technology” which were “driving firms toward complex collaborations to achieve goals.” They were envisaged as “encouraging procompetitive collaborations and deterring collaborations likely to harm competition and consumers.” The guidelines were the logical outgrowth of a series of hearings in 1997 designed to tackle questions relating to joint ventures, which were flagged at the time as the portion of antitrust law and enforcement that “seemed least clear and arguably most out of date.” Issued in draft form in October 1999, parties were requested to submit their views on competitor collaboration by February 2000. The final guidelines were issued two months later. At the time, it was

²⁵ Int’l Chamber of Com., *Taking the chill out of climate action: A progress report on aligning competition policy with global sustainability goals* (2023), <https://iccwbo.org/news-publications/policies-reports/how-competition-policy-acts-as-a-barrier-to-climate-action/#single-hero-document>.

²⁶ Japan Fair Trade Comm’n, “Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act”, Japan Fair Trade Comm’n, Mar. 31, 2023, Revised Apr. 24, 2024, <https://www.jftc.go.jp/en/pressreleases/yearly-2024/April/240424EN2.pdf>

expected that they would provide practitioners “valuable insights into the enforcement philosophy of the antitrust agencies.”

The recommendations provided herein are our suggestions for updating these Existing Guidelines, which have now been in place for nearly a quarter century, to create new “Updated Guidelines.” Like the recently released 2023 Merger Guidelines, a new edition of the competitor collaboration guidelines would consolidate, revise, and replace the previous version of the guidelines previously issued by the Agencies. New guidelines would build on the learning and experience of the past quarter century and reflect the experience of the Agencies over many years of collaboration review in a changing economy. They would also benefit from refinement through an extensive public consultation process. The goal of this document is to serve as a launching point for discussion of this important work with the Agencies and the practitioner public. Feedback to refine and strengthen the recommendations herein is warmly welcomed.

RECOMMENDATIONS

3. RECOMMENDATIONS FOR UPDATED GUIDELINES

The section that follows includes recommendations for modernizing and revising the April 2000 Existing Guidelines to bring them up to date with the dramatic changes of the past twenty-five years. The recommendations that follow span seven key issues by topic area, including Efficiencies Defenses, Information Sharing, Foreclosure Concerns, Monopsony Considerations, Presumptive Thresholds, Research Collaborations, and Consolidation Characteristics. The recommendations below are not meant to be exclusive, nor comprehensive, but rather examine several thematic areas that should be addressed in the Updated Guidelines and offer a perspective on how the Agencies might address them. We take a principles-based approach, though throughout the recommendations we refer to sections of the Existing Guidelines and attempt to offer clear suggestions as to how the Agencies could modernize the Existing Guidelines to better suit the needs of the twenty-first century marketplace.

3.1 Efficiencies Defenses

Efficiency-enhancement is frequently cited in the Existing Guidelines as a valid justification for allowing competitor collaboration despite antitrust concerns. For example, in the Existing Guidelines, Section 2.1, Agencies cite a variety of beneficial outcomes for consumers deemed to be linked to efficiency-enhancing integration of economic activity through agreements between competitors. Similar advantages are posited in many other provisions, including Section 3.36, which supposes that increased efficiencies make goods “cheaper, more valuable to consumers, or brought to market faster than would otherwise be possible.”

The new European Guidance takes the same approach in Section 3.5.1.248, listing a sample of possible efficiency gains that may justify collaboration, including combining complementary skills and know-how to improve product quality and producing at a lower cost to achieve economies of scale. Japan even defines “pro-competitive effects” as “the improvement of efficiency” in some cases.²⁷

However, firm promises that these benefits will be passed directly to the consumer in the form of greater choices or lower prices have often proven illusory.²⁸ As applied in past decades, this has led in practice to

²⁷ Sec. Gen., Japan Fair Trade Comm’n, Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act, 2 n. 4, Japan Fair Trade Commission, Revised 2017, https://www.iftc.go.jp/file/230331EN_GreenGuidelines.pdf.

²⁸ John Kwoka, a competition policy expert, analyzed over 3000 US mergers and found that when mergers led to six or fewer significant competitors, prices rose in nearly 95% of cases. And on average, post-merger prices increased 4.3%. Firms often argue that mergers will increase efficiencies. See John Kwoka, “U.S. antitrust and competition policy amid the new merger wave,” Washington

aggregation of market power by large firms across many sectors that have been left unaddressed, in addition to other market outcomes like privacy loss, harms to workers, and the erosion of democracy.²⁹ As Tim Wu notes, big businesses and concentrated or monopolized industries that have been allowed to turn into behemoths for the sake of efficiency – like insurance, pharmaceuticals, and airlines – abuse their clients and engender widespread disaffection and anger from consumers.³⁰ The benefits that have supposedly accrued to the “consumer” have rarely materialized as promised.

Acknowledging these failures, the European Guidance is careful to note that efficiency gains that only benefit the parties and are not passed on to consumers are insufficient to justify any leniency from antitrust scrutiny. And Japan includes a framework for analyzing whether promises of efficiency are sufficient to justify competitor collaboration that might impose a horizontal restraint on trade:

- Improvement in efficiency should be specific to the business combination.
 - Improvement in efficiency has to be a result specifically derived from a business combination. Therefore, with respect to such factors related to the efficiency expected from a business combination as economies of scale, integration of production facilities, specialization of factories, reduction in transportation costs, and efficiency in R&D for next-generation technology, environmentally friendly capabilities, etc., it is necessary for those factors not to be achievable by other less anti-competitive means.
- Improvement in efficiency should be feasible.
 - Improvement in efficiency has to be feasible. In this regard, for example, such documents as the following are considered: documents on the internal procedures leading to the decision on the relevant business combination; explanatory materials for shareholders and financial markets regarding the expected efficiency; and materials, etc. prepared by external specialists concerning improvement in efficiency, etc.
- Improvement in efficiency should enhance the interests of users.
 - The outcome of improvement in efficiency through a business combination has to be returned to users, for example, through the reduced prices of products and services, improved quality, the supply of new products, or streamlined R&D for next-generation technology, environmentally friendly capabilities, etc. In this regard, in addition to the materials listed in (ii)

Center for Equitable Growth (July 27, 2017), <https://equitablegrowth.org/wp-content/uploads/2017/07/072717-kwoka-antitrust-report.pdf>.

²⁹ Denise Hearn, Cynthia Hanawalt, and Lisa Sachs, “Antitrust and Sustainability: A Landscape Analysis,” Columbia Center on Sustainable Investment and Sabin Center for Climate Change Law, 14 (July 2023), <https://ccsi.columbia.edu/content/antitrust-and-sustainability-landscape-analysis>.

³⁰ Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, Columbia Global Reports (2018), <https://search-ebscohost-com.ezproxy.cul.columbia.edu/login.aspx?direct=true&AuthType=ip&db=nlebk&AN=1906644&site=ehost-live&scope=site>.

above, the matters to be scrutinized include information related to improved capabilities that may bring effects such as price reduction and the history of actual price reductions, quality improvements, supply of new products, etc. implemented under competitive pressure from both the demand and supply sides.³¹

Given the modern understanding of how infrequently efficiencies actually benefit the consumer, the Updated Guidelines should avoid providing any safe harbor for vague, unquantified promises of greater efficiency, and should instead emphasize concrete, beneficial outcomes that can be quantified in terms of their benefit to consumers or society.

In the context of mergers, the Supreme Court has held that “possible economies” from the merger “cannot be used as a defense to illegality.”³² While in theory this is also true for competitor collaboration agreements already, and efficiency-enhancing outcomes are considered in a rule of reason analysis, the promises have frequently differed from the reality, and this same logic should be enforced for competitor collaboration agreements.

Where efficiency considerations were a substantial defense under prior rule of reason analyses, a revised approach should be taken in Updated Guidelines to prioritize demonstrable, concrete goals, as opposed to promised synergies. This is in keeping with the new 2023 Merger Guidelines, which promise that in reviewing for efficiency defenses, the Agencies will not “credit vague or speculative claims, nor will they credit benefits outside the relevant market that would not prevent a lessening of competition in the relevant market. Rather, the Agencies examine whether the evidence presented by the merging parties” shows the following characteristics: specificity, verifiability, preventing a reduction in competition, and not anticompetitive.³³ This same framework can be applied to competitor collaboration agreements.

Similarly, a promise of increased sustainability or a reduced carbon footprint should be required to be quantified before any pro-social benefit is considered to justify restraints on competition. These types of promises must also be shown to be more than illusory before any sustainability considerations should be given weight as a possible defense in a rule of reason analysis. We caution that vague sustainability defenses should not replace or substitute vague efficiencies defenses in applying the law.

³¹ Sec. Gen., Japan Fair Trade Comm’n, Guidelines Concerning Distribution Systems and Business Practices Under the Antimonopoly Act, 55 n. 110, Japan Fair Trade Commission, Revised 2017, https://www.jftc.go.jp/file/230331EN_GreenGuidelines.pdf.

³² *U.S. v. Phila. Nat’l Bank*, 374 U.S. 321, 371 (1963).

³³ Fed. Trade Comm’n and U.S. Dep’t of Justice, MERGER GUIDELINES, 32-33 (2023), <https://www.justice.gov/atr/2023-merger-guidelines>.

Hypothetical Scenarios

In the Existing Guidelines, Example 6 illustrates a situation where efficiency-enhancing integration is present and thus would survive an Agency rule of reason analysis. This scenario could be updated to better illustrate how concrete these commitments should be to justify collaboration. For example, the bolded language could be inserted into Example 6, as shown below:

Compu-Max and Compu-Pro are two major producers of a variety of computer software. Each has a large, world-wide sales department. Each firm has developed and sold its own word-processing software. However, despite all efforts to develop a strong market presence in word processing, each firm has achieved only slightly more than a 10% market share, and neither is a major competitor to the two firms that dominate the word-processing software market. Compu-Max and Compu-Pro determine that in light of their complementary areas of design expertise they could develop a markedly better word-processing program together than either can produce on its own. **Compu-Max and Compu-Pro form a joint venture, WORD-FIRM, to jointly develop and market a new word-processing program, with expenses and profits to be split equally. Compu-Max and Compu-Pro agree that their joint venture WORD-FIRM will not be priced in excess of competitor software, nor will it be bundled with other products from Compu-Max or Compu-Pro when it is sold. Compu-Max and Compu-Pro additionally promise they will not share any other competitively sensitive information – either directly or through third-party data aggregators that both firms have access to – during this joint venture and their other product streams remain independent from one another.** Compu-Max and Compu-Pro both contribute to WORD-FIRM software developers experienced with word processing. Analysis Compu-Max and Compu-Pro have combined their word-processing design efforts, reflecting complementary areas of design expertise, in a common endeavor to develop new word-processing software that they could not have developed separately. Each participant has contributed significant assets – the time and know-how of its word-processing software developers – to the joint effort. Consequently, the evaluating Agency likely would conclude that the joint word processing software development project is an efficiency-enhancing integration of economic activity that promotes procompetitive benefits **with adequate safeguards guaranteeing these benefits will accrue to consumers as well as to the entities.**

3.2 Information Sharing

Information sharing is an increasingly challenging area for antitrust, given the speed, volume, and ecosystems of data that firms have access to or collect. To reiterate a core principle, firms should avoid sharing confidential or proprietary information with their competitors (including prices, marketing and product plans, profit, and cost details), even if done so through algorithms or third-party brokers. Algorithms can also act as data brokers between parties in ways which make it difficult for Agencies to detect, but the Agencies have been responding

to instances of algorithmic price collusion.³⁴ However, there are some instances when non-competitively sensitive information sharing is likely to be necessary, and socially beneficial, and in those circumstances may justify competitor collaboration. Providing clarity on what kinds or methods of information sharing are permissible vs. impermissible would be helpful for firms engaged in shared initiatives.

Industry Standards

The Existing Guidelines do not account for the effects of standard setting in the context of competitor collaborations. However, as the market has developed, standards have become increasingly important within industries. As technology has developed, heightened manufacturing and sustainability standards have become increasingly popular as a way for businesses to signal their responsiveness to consumer pressure and societal concerns. Understanding what types of standards are permissible, and how standards may be enforced or developed, is critical to ensuring that competition thrives, and markets deliver high-quality, safe, and reliable goods and services. Standards set a floor whereby firms can compete and better the market. Standard setting should be voluntary, non-exclusionary and accessible to all market participants. For mandatory standards, rule of reason analysis should apply to assess whether the standard offers significant benefits to society or consumers in a way that justifies some restriction on trade, and if there are ways that the standard can be pro-competitive.

Voluntary, non-exclusionary standard setting initiatives are generally compatible with traditional antitrust scrutiny, as are trade associations. If firms are free to meet an agreed-upon, voluntary standard, and that standard is not designed to exclude others from the market, then there is typically no anticompetitive effect that would draw antitrust enforcement proceedings.

However, voluntary standards have no enforcement mechanism and often fail to advance their purported goals as a result. Pro-competitive benefits may at times justify the imposition of mandatory standards by trade associations or other competitor groups, to achieve a certain label or threshold. In particular, sustainability-focused industry standards may involve coordination through information sharing, foreclosure of other standards, or exclusion of competitors who fail to meet the standards. These standards may also offer pro-competitive or social benefits that serve as justification in a rule of reason analysis. For example, they may encourage development of new products or markets, or improve supply conditions. Standards thus generally increase competition and lower costs, maintain, and enhance quality, security, access to information and can

³⁴ Press Release, Fed. Trade Comm'n and U.S. Dep't of Justice, FTC and DOJ File Statement of Interest in Hotel Room Algorithmic Price-Fixing Case (Mar. 28, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-doj-file-statement-interest-hotel-room-algorithmic-price-fixing-case>.

even increase interoperability and compatibility.³⁵ For example, major chip manufacturers TSMC, Intel, Samsung, AMD, and Google, have formed a consortium to do standard setting to allow more interface interoperability between various chips and circuit boards.³⁶

A particularly modern example of standard setting agreements are environmental sustainability standards, which have proliferated in the last few decades. **They are unlikely to negatively affect competition as long as: the standard setting process is open and inclusive of market participants; no business is forced to adopt the standard; any business may adopt the standard; the standard operates as a floor not a ceiling; and it is unlikely to result in decreased product choice for consumers.** In order to set these standards, market participants may sometimes need to coordinate to share proprietary information so that the standard can be developed with sufficient information and specificity to ensure it is accurate and beneficial. This can be achieved without harming competition through the use of a third-party aggregator or trustee which does not act as a hub for illegal information sharing,³⁷ and careful constraints on the information shared, especially with attention to protecting sensitive proprietary or customer information.

Mandatory standards go beyond what voluntary standards may achieve and may accrue greater positive results for sustainability and the environment. Because of this feature, the European Guidance provide a soft safe harbor for sustainability standardization agreements that meet six conditions:

- The procedure for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process leading to the selection of the standard.
- The standard must not impose on undertakings that do not wish to participate in the standard any direct or indirect obligation to comply.
- While binding requirements can be imposed on participants in order to ensure compliance with the standard, participants must remain free to apply higher sustainability standards.
- The parties should not exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption, or modification of the standard.

³⁵ UK Competition & Markets Authority, Guidance on the application of Chapter I prohibition in the Competition Act 1998 to horizontal agreements, UK Competition and Markets Authority, 2023, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178791/Horizontal_Guidance_FINAL.pdf.

³⁶ Qianer Liu, *Inside the miracle of modern chip manufacturing*, THE FINANCIAL TIMES, 2024, <https://ig.ft.com/microchips/?emailId=a0a9a51a-c95d-43e0-a6d4-03f047feece0&segmentId=22011ee7-896a-8c4c-22a0-7603348b7f22>.

³⁷ See, e.g., Press Release, U.S. Dep't of Justice, Justice Department Sues Agri Stats for Operating Extensive Information Exchanges Among Meat Processors (Sept. 28, 2023), <https://www.justice.gov/opa/pr/justice-department-sues-agri-stats-operating-extensive-information-exchanges-among-meat> (recognizing the agencies have recently pursued action against third-party data brokers, such as Agri Stats which acted as a hub to price fix).

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- Effective and non-discriminatory access to the outcome of the standard-setting process must be ensured.
 - The sustainability standard must satisfy at least one of the following conditions: (a) The standard must not lead to a significant increase in price or a significant reduction in the quality of the products concerned; and/or (b) The combined market share of the participating undertakings must not exceed 20% of any relevant market affected by the sustainability standard.³⁸

Unique to this safe harbor for sustainability agreements is the idea that regulators will allow for a slight increase in cost to the consumer without finding that a firm has violated the safe harbor. This reflects the reality that some additional cost to the consumer may further sustainability goals and accrue enough additional benefits for society as to outweigh a minimal individual cost increase. We do not recommend this approach for the Updated Guidelines, however, and contend that a thorough rule of reason analysis would serve the same purpose as the safe harbor and would also prevent the risk of abuse and ineffectiveness of regulating through exceptions. By embracing the factors that underlie the European safe harbor – including transparency & inclusivity, no obligation, setting a floor as opposed to a ceiling, protecting competitively-sensitive information, and open access to the final standard – while making sure that the standard either does not lead to a significant increase in price or reduction in quality, or the share of participants does not exceed a market threshold (discussed in Section 3.5) that risks anticompetitive effects, in guidance for any rule of reason analysis, the Agencies could achieve the same outcome without creating an inflexible safe harbor.

Standard setting within an industry can also enhance competition as firms vie to meet the standard, as those standards are often developed in response to consumer demand, particularly with respect to sustainability. If the standards are voluntary, open, and accessible, as described above, firms can compete against one another to be recognized as superior to their peers, or on par with their peers, in a world that is increasingly demanding that industries become greener. Setting Scope 3 emissions disclosure standards for an industry, for example, may further competition. As participants seek to bolster their environmental credentials, they will work to align their emissions with the industry standard. In addition, investment funds that compete to be recognized as climate-friendly, or as abiding by climate norms, will then be able to invest with greater accuracy and allocate capital appropriately. This will provide investors with greater choice and provides a new metric for competitiveness that consumers seek.

³⁸European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 152-53 (2023) (E.C.), https://competition-policy.ec.europa.eu/document/fd641c1e-7415-4e60-ac21-7ab3e72045d2_en.

Pro-Social Collaborations

Pro-social considerations should be an explicit factor included in any rule of reason analysis when weighing competitor collaboration agreements for their antitrust merit. Greater transparency in this regard would be beneficial to consumers and aligned with statements made by DOJ’s Assistant Attorney General Jonathan Kanter. Mr. Kanter stated that one of his goals was to make antitrust in the United States “accessible to all citizens, consumers, workers and small businesses—not just large corporations that can afford expensive counsel,” when revising its language.³⁹ Accessible and comprehensible language would enable operators of smaller firms and laymen consumers to understand what kind of positive externalities that accrue to society through collaboration agreements would be given consideration by the Agencies in an antitrust challenge. If the Agencies remove efficiency and efficiencies defenses as the guiding definition of pro-competitive or pro-social outcomes, it would be helpful to have an articulation of its replacement or clarity around a bright-line, principles-based approach to competitor collaborations which could avoid complex econometric analysis of harms vs. benefits. Importantly, the burden of proof for any purported benefits must be shouldered by the firm/s.

Data Pooling

Data pooling is a uniquely modern phenomenon that necessitates strict agency oversight and guidance to protect consumers and competitors alike from abuses. Automatic and algorithmic information and data sharing need to be addressed in new guidelines as they did not exist in their modern form when the Existing Guidelines were drafted. But the guidelines also need to grapple with benign forms of data pooling. For example, pooling objective, evidence-based information about suppliers such as their environmental sustainability track record has no bearing on whether those suppliers will be patronized by consumers. Rather, it provides valuable data for informed decision-making. It is also pro-competitive as it gives insight into relevant metrics that may shape business decisions and can enable competition as market participants strive to improve their standings relative to industry peers. Data such as these can also be used to craft better industry standards, as discussed.

Data pooling can incorporate appropriate measures and safety valves to limit how data is used by competitors. For example, competitors should only be able to access their own raw data; conversely, competitors should only be able to access the final, aggregated information of any collaborators in a form that complies with antitrust considerations. One option is for the management of a data pool to be assigned to a trustee or other third party subject to strict confidentiality standards. Only the information necessary for implementing a legitimate, legal purpose of the data pool should be collected and disseminated. Any contact regarding the

³⁹ Jonathan Kanter, Assistant Att’y Gen., U.S. Dep’t of Justice, Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>.

information in the data pool between entities must adhere to the same guidelines and only the necessary information that has been shared should be discussed so as to avoid risks to competition.

Under the Existing Guidelines, Section 3.34(e), the Agencies currently evaluate the extent to which competitively sensitive information concerning markets affected by the collaboration likely would be disclosed. This likelihood depends on, among other things, the nature of the collaboration, its organization and governance, and safeguards implemented to prevent or minimize such disclosure. For example, participants might refrain from assigning marketing personnel to an R&D collaboration, or, in a marketing collaboration, participants might limit access to competitively sensitive information regarding their respective operations to only certain individuals or to an independent third party. Similarly, a buying collaboration might use an independent third party to handle negotiations in which its participants' input requirements or other competitively sensitive information could be revealed. In general, it is less likely that the collaboration will facilitate collusion on competitively sensitive variables if appropriate safeguards governing information sharing are in place.

The Existing Guidelines are too vague given current technological advancements and the ease and frequency with which data is shared. Standards for safeguards should be enhanced and made more specific, and what types of data may be shared should be enumerated in more detail so that entities may better extrapolate to understand if their own data sharing or pooling run afoul of antitrust law. Categorizing what types of data may be pooled and shared legally would be beneficial to competitors. The ultimate goal of the data pool should also be addressed to understand what aims are legitimate and which are beyond the bounds of antitrust law. One option Agencies could consider is to provide that compliance with international law and treaty goals should be a permissible use, such as to reduce the carbon footprint of a product by aggregating greenhouse gas emissions from each supply chain to investigate more sustainable practices. Providing, of course, that data collection must always comply with other international laws, including privacy and interoperability laws.

Repeal of Health Care Guidelines

The Existing Guidelines include multiple outdated references to the previous health care guidelines released by the Agencies (the *DOJ and FTC Antitrust Enforcement Policy Statements in the Health Care Area* (Sept. 15, 1993), and *Statements of Antitrust Enforcement Policy in Health Care* (Aug. 1, 1996), and *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (Oct. 20, 2011)). As noted above, in light of the repeal of those guidelines, many industries are calling for clarity as to whether broad legal standards (applicable across many sectors) now exist for information sharing; whether any such standards would be narrowly specified to a given industry's market conditions; and how an industry can obtain an actionable understanding from the Agencies. The Updated Guidelines should address the specific implications of that repeal for information sharing.

Hypothetical Scenarios

As noted above, many jurisdictions offer hypothetical scenarios in their guidance on competitor collaborations, to help illuminate the type of behaviors that may be permissible under those guidelines. Similarly, the Existing Guidelines offer certain examples as well, and Agencies should consider expanding its treatment of hypothetical behaviors with related commentary throughout the Updated Guidelines. A permissible information-sharing example may be particularly valuable to the market, given the importance of data sharing in the context of developing safety, quality, and/or sustainability norms.

For consideration, here is one such possible example: three entities, A, B, and C are competing within an industry and seek to report their Scope 3 emissions in line with international norms. As competitors, they share certain common supply chain elements. The competitors could come together to create a common set of questions for all of their suppliers and aggregate the information into a data pool. The data pool could be administered by a trustee who could manipulate the raw data to hide any competitively sensitive data, and then could share the emissions data with all three entities so they can more accurately report their own Scope 3 emissions. This would also reduce the reporting burden for the suppliers, allowing those firms to use a single set of interrogatories from the entities, rather than three different sets of questions that would inevitably seek slightly varied information.

3.3 Foreclosure Concerns

In the Existing Guidelines, the Agencies refer repeatedly to the horizontal merger guidelines, which were replaced with uniform Merger Guidelines in 2023. The 2023 Merger Guidelines do not distinguish between vertical or horizontal mergers because it is difficult to categorize mergers cleanly between the two in the modern era where conglomerates or ecosystems of firm assets are prevalent. Instead, analysis focuses on how competition presents itself in the market that the two or more entities occupy, to see if the merger will have anticompetitive effects. Agencies should consider how, if at all, this unification of the horizontal and vertical merger guidance should impact any Updated Guidelines issued on competitor collaboration agreements.

One area where the type of collaboration could be significant, whether horizontal or vertical, is in foreclosure. As previously noted, the Existing Guidelines do not directly address the possible effects of standard setting in the context of competitor collaborations, nor the possibility of foreclosing or limiting competition by rivals that are not participating in a collaboration. This is only lightly acknowledged in Footnote 5 of the Existing Guidelines. Foreclosure, or when a dominant entity leverages monopoly power in one segment of the market to another potentially competitive segment of the market, should be addressed in revised guidelines. Foreclosure concerns could be especially problematic if, for example, standards proliferate that identify upstream suppliers as having substandard environmental credentials. A competitor collaboration resulting in a

production or standardization agreement may give rise to anticompetitive foreclosure. As the European Guidance notes, “the agreement may prevent or restrict the parties’ competitors from competing effectively, for example by denying them access to an important input or by blocking an important route to the market.”⁴⁰ The Updated Guidelines will have to consider how foreclosure concerns can be squared with potential pro-social benefits of collective action by competitors within a market.

3.4 Monopsony Considerations

While all competitor collaboration agreements are reviewed for possible anticompetitive effects, often the anti-competitive concerns focus on only one side of the market. Any analysis of the efficiencies promised by a competitor collaboration should take care to focus on the multisided effects of the agreement, even if the collaboration is timebound such that it does not raise any significant red flags. In certain types of collaborations—like joint purchasing/procurement and offtake agreements⁴¹—the effects are even more likely to be imbalanced and can tend to increase monopsony (buyer market power) pressures in a market. This is achieved, as the 2023 Merger Guidelines note, through traditional competitors in a purchasing market collaborating and increasing their ability or incentive to drive the price of a purchased product below market value, thus depressing output of that product. Information sharing agreements, or other agreements that tend to similarly facilitate collusion, should be similarly scrutinized to assess whether the efficiencies for one side of the market are not outweighed by anti-competitive effects on the other. Standard setting agreements, for example, are less likely to raise these sorts of monopsony considerations.

Updated guidelines from other jurisdictions offer little in the way of comparable guidelines to draw from in considering how to address monopsony power. The Canadian competitor collaboration guidance addresses monopsony thresholds but no explicit advice for how to view these pressures in terms of net-harm or societal benefits. Moreover, given the Agencies’ rightful wariness of sustainability carve outs, a safe harbor parallel to CMA 5.10 is not attractive here, nor especially workable.

In the Existing Guidelines, Section 3.31(a) explains how buying collaborations can create monopsony power. This advice remains relevant and should be retained in any Updated Guidelines: “such agreements can create or increase market power (which, in the case of buyers, is called “monopsony power”) or facilitate its exercise

⁴⁰ European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 152-53 (2023) (E.C.), 11, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01)).

⁴¹ See, e.g. FIRST MOVER’S COALITION, <https://initiatives.weforum.org/first-movers-coalition/home> (last visited Apr. 30, 2024) (an offtake agreement is an agreement between a buyer and a producer to purchase future goods from the producer at a specified price. It is typically a way for businesses to secure project financing from banks to invest in building factories, scaling up an emerging technology, or purchasing necessary equipment. These types of agreements are increasingly popular, particularly in efforts to spur the adoption of more sustainable materials, such as greener steel, aluminum, or alternative aviation fuels, among others).

by increasing the ability or incentive to drive the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement. Buying collaborations also may facilitate collusion by standardizing participants' costs or by enhancing the ability to project or monitor a participant's output level through knowledge of its input purchases."

Depressing output through monopsony power could be especially problematic for suppliers of inputs for renewables or other products that are critical to the green transition. Taking these public interest considerations into account when applying a rule of reason analysis and looking at all aspects of the market is critical. Nonetheless, depressing output may have significant pro-social benefits in the case of net-harm industries where increased output would have net negative effects for society.⁴² Given the complexity of this dynamic, this area is ripe for case-by-case analysis. It may also be an area for deploying a threshold test using other factors – such as the social cost of greenhouse gases – to analyze an industry's impact and see if some type of output depressing competitive arrangement offers enough quantifiable benefits to be justified. The same analysis could be used to measure the potential negative impact that depressing output might have for sustainability considerations.

3.5 Presumptive Thresholds

In the Existing Guidelines, Section 3.33 relating to market share concerns in competitor collaborations refers to the 1992 Horizontal Merger Guidelines to determine how to calculate a variety of factors that affect the analysis of whether a collaboration's market share is at risk of being anticompetitive. These references should be updated not necessarily because they are outmoded in all cases but because they should be made to reflect the pro-competitive perspective fundamental to the Agencies' current approach. In addition, for practitioners, it would be beneficial to make the references consistent with the current administration's controlling 2023 Merger Guidelines document.

Furthermore, to obtain pro-social benefits through competitor collaborations, there may need to be a new standard to measure acceptable levels of market share that do not immediately raise antitrust red flags, provided there are quantifiable benefits to offset the increase in market share or market concentration, and more so if those benefits are connected to greater market share. The 2023 Merger Guidelines deploy a market share threshold of 30% to create a rebuttable presumption of illegality because high market concentration tends to reduce competition or even tends to create a monopoly. Eliminating substantial competition or increasing coordination are also areas of antitrust concern for mergers and competitor collaboration agreements alike. However, in some instances, this sort of coordination at a level that exceeds 30% market

⁴² John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563 (2022), <https://ilr.law.uiowa.edu/print/volume-107-issue-2/the-output-welfare-fallacy-a-modern-antitrust-paradox>.

share has societal benefits. Rather than creating a specific safe harbor threshold for competitor collaboration agreements that tend to reach 30% or more of a marketplace, other metrics could be deployed in the rule of reason analysis of the collaboration's effects to reflect modern considerations and societal concerns.

For example, in the United Kingdom, one justification for allowing collaborations to temporarily enjoy increased market power is if there are benefits to production, distribution or technical or economic progress associated with the collaboration. For instance, allowing for competitor collaborations in the renewable energy space is crucial to the development of certain technologies and the concomitant benefits associated with reduced reliance on greenhouse gasses. Competitor collaborations are likely to shorten the timeframe for infrastructure development and consumer access, improve distribution, and spur greater innovation. These are all factors that are currently considered when reviewing this sort of arrangement in the United Kingdom, and these could be deployed in the Agencies' updated competitor collaboration guidelines as part of the rule of reason analysis. The United Kingdom also makes certain that the benefits are accruing sufficiently domestically, within a reasonable future time frame, and are certain enough to be quantifiable. In some instances, sweeping technological developments will spur uptake across entire markets and may result in dramatic shifts in market power, but these can be part of societal progress and socially beneficial and should withstand a rule of reason examination.

Another possible avenue for approaching analyses of collaborations that raise antitrust concerns but also have quantifiable pro-social benefits is through net-harm analyses.⁴³ Net-harm markets are those markets that have demonstrable negative externalities, such as flavored electronic cigarettes, and either (1) consuming that good at any level of output produces greater total costs than benefits, or (2) at the output level set by the market, consumption produces greater total costs than benefits. Flavored e-cigarettes fit this description because, while proponents argue that they reduce the consumption of tar by traditional smokers who substitute flavored e-cigarettes and increase the utility of those who consume them, they have been shown to increase the usage of nicotine by young people who were not previously habitual smokers and are thus linked with developing a possibly harmful habit in a wide swath of society. Regulators have acted to limit the sales of these kinds of products dramatically. There are methods to quantify what constitutes as a net-harm market, which the Agencies could deploy to attempt to identify such markets. In these markets, increasing output and lowering prices can be harmful. If a product or market is identified as net-harm, it is possible the traditional view of depressing market share to increase competition may be more societally harmful than beneficial. This would be a normative and conceptual shift away from traditional views of antitrust, but may be more reflective of modern realities and understandings.

⁴³ Daniel Crane, *Harmful Output in the Antitrust Domain: Lessons from the Tobacco Industry*, 39 Ga. L. Rev. 321 (2005), <https://ssrn.com/abstract=711882>.

3.6 Research Collaborations

Research and Development Collaborations are frequently procompetitive. Section 3.31(a) of the Existing Guidelines describes a Research and Development Collaboration as an agreement that might harm competition by eliminating independent decision making, or combining control or financial interests, but Section 4.3 carves out a safety zone for innovation-market collaboration if at least three research and development initiatives remain working on a “close substitute.” This is in recognition of the fact that R&D has many pro-competitive benefits when engaged in by multiple, complementary parties, including the possibility to develop technologies more efficiently, and to create new or improved goods, services, or production processes. However, R&D agreements can also reduce innovation or consumer choice if the firms engaged have too much market power and are not incentivized to innovate.

Innovation markets are critical to societal progress, but such narrow language threatens to stymie innovation in emerging fields which might benefit from competitor collaboration. The existing safety zone recognizes that concentrated innovation efforts might be anti-innovative or anti-competitive if they tend to create a monopoly, and thus requires that there are three other independently controlled research efforts that are a close substitute for the agreement to benefit from the safety zone. This works well in the case of the pharmaceutical market where there are many established, similarly situated competitors vying for similar R&D opportunities. However, it is unlikely to work for other, more nascent industries and overburdens the Agencies in identifying appropriate substitutes.

Hypothetical Scenarios

Updated Guidelines would benefit from an example that addresses R&D collaboration. Here is a possible scenario for consideration:

Competitors A, B and C are engaged in developing distributed energy resources. They agree in principle to a R&D collaboration where they will share their technological advances pertaining to harnessing the produced energy, but will take all necessary steps to protect anti-competitive information from being shared, like customer details and pricing. The hoped-for result would be synergies that enable the competitors to rapidly develop cleaner technologies and possibly move away from toxic battery storage systems for their distributed energy resources. There is not a close substitute for this research group as the competitors have emerged with a significant market share, which means they are more financially prepared to engage in significant R&D than their direct competitors. However, there are functional substitutes engaging in similar R&D, including groups with even more assets, working on more efficient battery technology. And there are others engaged in renewable development such that the technologies proffered by competitors A, B and C will be obsolete and no need for the batteries will exist as distributed energy resources are no longer desirable. If A, B and C

present a compelling and quantified-benefit proposal to the Agencies recognizing that functional substitutes exist for their collaboration, then the Agencies could, at their discretion, allow the firms to pursue the collaboration through a business review letter or advisory opinion.

3.7 Consolidation Characteristics

Collaborations that trend toward consolidation have potential competition harm and should be policed so that they do not allow for evasion of Merger & Acquisition scrutiny. For example, a social media company could collaborate with a cluster of fitness-app firms, which could essentially constitute a supply chain, even if the social media company never merges with any of these firms. This type of collaborative approach should receive stricter scrutiny.

One model for this assessment is the new Merger Guideline 8, which flags that a series of acquisitions by a given firm can be viewed as a whole rather than evaluating each individual acquisition in isolation. The pattern of acquisitions can be reviewed to determine whether they increase concentration in a highly concentrated market, eliminate competition, increase risk of coordination, eliminate a potential entrant, limit access to supply chain needs for rivals, and/or extent a dominant position. The updated competitor collaboration guidelines could analyze a given collaboration within its broader context when evaluating its possible anti-competitive effects. This is not unprecedented – the legality of collaborations for R&D is already measured by reviewing close substitutes in Existing Guidelines 4.3 to see if there is sufficient competition to allow for any given R&D collaboration to persist. Taking a broader view of the dynamics of the sector or direct competitor firms when assessing whether a series of collaborations is potentially anti-competitive would better reflect the realities of today’s market, rather than approaching each collaboration as if it were transpiring in a vacuum.

In the 2023 Merger Guidelines, “the Agencies may examine a pattern or strategy of growth through acquisition by examining both the firm’s history and current or future strategic incentives. Historical evidence focuses on the strategic approach taken by the firm to acquisitions (consummated or not), both in the markets at issue and in other markets, to reveal any overall strategic approach to serial acquisitions. Evidence of the firm’s current incentives includes documents and testimony reflecting its plans and strategic incentives both for the individual acquisition and for its position in the industry more broadly. Where one or both of the merging parties has engaged in a pattern or strategy of pursuing consolidation through acquisition, the Agencies will examine the impact of the cumulative strategy under any of the other Guidelines to determine if that strategy may substantially lessen competition or tend to create a monopoly.” While the Merger Guidelines refer to acquisitions, these same principles should hold true in the case of competitor collaborations that on their own might not raise any antitrust red flags, but when considered as part of a larger pattern or a trend within a sector, may substantially lessen competition or create a monopoly.

Hypothetical Scenarios

Here, too, Updated Guidelines would benefit from illustration. The social media example is a possible scenario for consideration:

Social media platform A enters into a collaboration with fitness-app provider X. Over the next two years, platform A engages with X's competitors, Y and Z, to also enter similar collaborations. Upstart entrant social media platform B would have benefitted from a collaboration with either X, Y or Z, the three dominant market players, but cannot do so as their competitor A has already engaged in these agreements over the past few years and effectively controlled the supply chain. Platform A's series of collaborations should be viewed wholistically and assessed for broader anti-competitive effect.

4. PROCEDURAL RECOMMENDATIONS

This section proceeds with further recommendations on several technical points pertaining to competitor collaborations and making them more accessible, procedurally transparent, and incorporating modern sensibilities. While some of the substantive, uniquely twenty-first century issues facing competitor collaborations have been addressed above, what follows are procedural recommendations that the Agencies could put in place, and examples and points of terminology the Agencies could adopt that would further serve the needs of the modern market when it comes to competitor collaborations. Many of these are drawn from comparable guidance issued by foreign jurisdictions to meet the demands of the moment.

4.1 Advisory Opinions

Given the antitrust complexities around competitor collaborations and the benefits of governmental transparency, one area where the Agencies could help market participants is by offering a clear framework for seeking Agency guidance on a proposed collaboration. The Agencies could emulate the approach taken by the United Kingdom's Competition and Markets Authority in offering an explicit open-door policy. Under the UK's new guidelines, collaborators considering entering into an environmental sustainability agreement can approach the CMA for informal guidance on their proposed agreement if there is uncertainty about its legality under the relevant competitor collaboration guidelines. The CMA will offer fact specific feedback to the collaborators in a "light touch review" that is "proportionate to the size, complexity and likely impact of the agreement" and will be based on "publicly available information and the information shared with [them] by the businesses." The CMA promises that it will provide options, concerns, risk, and possible solutions and may provide informal guidance as to whether antitrust concerns are applicable and how collaboration guidance

may otherwise apply. The CMA also offers a safe harbor from financial penalties for those who seek and follow this informal guidance should the agreement later be found to impermissibly infringe on competition.⁴⁴

The Agencies should revive their business review and advisory opinion practices for all competitor collaboration agreements (not just those with a sustainability focus, as the UK has done). The Agencies could prioritize reviewing agreements that purport to have considerable pro-social benefits. The Agencies could also offer a fast-track review process for those agreements that are especially time sensitive in nature to expedite this advisory opinion process. Functionally, this also serves to dispel the narrative that antitrust is standing in the way of climate or sustainability progress and puts the onus back onto firms to come forward if they truly have concerns or are lacking clarity.

4.2 Examples

In the Appendix of the Existing Guidelines, the Agencies provide a series of 10 interrelated examples of how the Existing Guidelines would likely be implemented in practice. These examples focus on industries that remain relevant, including banking, software, and fossil fuels, but do not explore many dynamics at play in contemporary markets that raise antitrust concerns. New market considerations including AI, financialization dynamics, and sustainability considerations, have become increasingly present in competitor collaborations and should be addressed in the examples used in the Appendix of any Updated Guidelines.

The action of a single market participant is insufficient to address many of the pressing concerns of the twenty-first century, including sustainability and other climate-related considerations. Industry has signaled their willingness to collaborate with competitors as part of the green energy transition, with 73% of business leaders indicating they would like to pursue these types of agreements.⁴⁵ These agreements could mitigate the competitive disadvantage facing first movers, and help scale up the impact of implemented changes, in response to clear societal demand. With such significant public interest in adoption, there is a pressing need to include these types of examples.

For example, the European Guidance includes several examples that include sustainability-related collaborations. In Section 9 of the Guidelines on horizontal co-operation agreements, there are five examples of sustainability agreements that would survive antitrust scrutiny. These include NGOs that license a label for

⁴⁴ UK Competition & Markets Authority, Guidance on the application of Chapter I prohibition in the Competition Act 1998 to horizontal agreements, UK Competition & Markets Authority, 2023, 43, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178791/Horizontal_Guidance_FINAL.pdf.

⁴⁵ Baker McKenzie, *The Race to Net Zero*, 2022, <https://insight.bakermckenzie.com/race-to-net-zero/p/1>.

clothes indicating they are produced using fair wages, a fair-trade label for fruit producers, an agreement to reduce packaging size, and an agreement to phase out production of an outmoded type of machinery which has comparable, more efficient substitutes in the market for prices that are only slightly higher. Other countries have embraced the same types of examples, including the UK and Japan in their recently released guidance. Shareholders who regularly collaborate on shareholder engagement initiatives to streamline proxy voting requests are another example of collaborations which should easily pass antitrust scrutiny in most cases and could be elaborated on in Updated Guidelines.

4.3 Terminology

As noted previously, Assistant Attorney General Kanter outlined one of the Agencies' priorities: making antitrust "more accessible to all citizens" by improving the "language of antitrust" which will make "enforcement more accessible and responsive."⁴⁶ Improving the language within the Existing Guidelines to increase clarity and transparency would be valuable given the wide variety of businesses (in terms of scale and sector) that are interested in pursuing competitor collaborations. This could be done through public consultation with stakeholders in the competitor collaboration space, including businesses and independent business owners, workers, consumers, citizens, as well as policy advocates, lawyers, and economists just as the Agencies did in drafting the 2023 Merger Guidelines.⁴⁷ In areas where other jurisdictions have already created frameworks that would translate well to the United States' antitrust regime, interpretive guidance and representative scenarios already exist as points of reference. In the existing language, the Agencies could provide more clarity and give concrete, modern examples as illustrations.

Below are two examples, drawn from the Existing Guidelines, that would benefit from greater clarity and the addition of modern examples to provide notice and greater transparency.

- Existing Guidelines 3.2, "Agreements Challenged as *Per Se* Illegal": offers carveouts (by rule-of-reason analysis) for efficiency-enhancing integration through collaboration on one or more business functions, potentially benefitting consumers by expanding output, or enhancing quality, service, or innovation. This is a technically complex description, and would benefit from explicit examples which would be quality-enhancing. Innovation considerations are now routine in quality assessments, and environmental or social impact could also be a factor of any quality consideration. Making these types of considerations explicit in defining quality as a consumer benefit, for example, will provide improved guidance to practitioners and business owners alike.

⁴⁶ Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Justice, "Opening Remarks at 2022 Spring Enforcers Summit" (April 4, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers>.

⁴⁷*Id.*

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- Existing Guidelines 3.31, “Nature of the Relevant Agreement: Business Purpose, Operation in the Marketplace and Possible Competitive Concerns”: the critical terms “business purpose” and “nature of the agreement” are not expressly defined in this section. In light of the growing emphasis on pro-social benefits and business purposes, more clarity around these definitions would be beneficial. Including a list of examples of business purposes that the Agencies come across frequently could be useful for distinguishing that purpose’s likely pro-competitive or anti-competitive effects. These should include modern pro-social business purposes which are becoming more prevalent.

The above examples illustrate where the language employed in the Existing Guidelines requires legal interpretation and can be opaque for market participants, especially those who have less access to human capital and resources. Throughout the Existing Guidelines, there are similar opportunities to improve clarity and the addition of modern examples to provide the market with notice and greater transparency. Other new considerations have arisen in the realm of competitor collaborations that have already been addressed in these Recommendations, which could also benefit from clear definitions. While these Recommendations have provided some suggestions, Agencies will ultimately have to determine how they will consider these and other modern terms that apply to competitor collaborations and their pro-competitive purposes when undergoing a rule of reason analysis. Still, it is clear that all stakeholders would benefit from greater clarity and new examples that align with the Administration’s overall agenda and whole-of-government approach to tackling society’s most pressing issues.