VII. Assessment of Potential Efficiencies
DRAFT

A. The assessment of potential efficiencies should be part of a competition agency's overall analytical framework for merger review. In specific cases where the merging parties assert that a merger is unlikely to harm competition significantly because of expected efficiencies, agencies should carefully assess appropriate efficiency claims.

WORKING GROUP COMMENTS
Original Comments (May 2017)

Comment 1: Mergers can produce significant efficiencies for the merged firm and such efficiencies can be important business motivation for a merger. Merger efficiencies can include cost savings in production or distribution, economies of scale or scope, increased innovation leading to new or improved products, increased network size or product quality, among others. Some of these efficiencies (innovation, combination of complementary assets, etc.) may bring synergies on a potentially continuous basis, thus enhancing the potential performance of the merged entity and the potential benefit to competition and consumers.

Comment 2: Mergers can produce efficiencies that may counteract the potential for anti-competitive effects. The benefits of some merger efficiencies can be passed on to consumers, for example, in lower prices or gains in innovation that lead to new or improved products. To counteract likely anticompetitive harm, efficiencies need to increase rivalry by enhancing the ability and economic incentive of the merged firm to compete. Efficiencies can have such impact if they lower costs or increase output, innovation, or quality and there is sufficient competitive pressure remaining such that the merger is unlikely to harm consumers in the relevant market(s).

Comment 3: In order to determine the impact of a merger that potentially harms competition, agencies should take into account substantiated, likely, and merger-specific efficiencies put forward by the parties. Efficiency claims should be assessed in light of all other evidence. Agencies should not challenge a proposed merger if it is likely that the demonstrated efficiencies would be passed through to consumers and would counteract the anticompetitive effects in the relevant market(s). Efficiencies are most likely to impact merger analysis when the likely adverse competitive effects, absent the efficiencies, are not large. The evaluation of efficiencies commonly is part of an agency's competitive assessment, focusing on whether the claimed efficiencies counteract the harm in the market in which the lessening of competition occurs. In a few jurisdictions, efficiencies also are considered after a merger is determined to be anticompetitive, as a separate assessment of the offsetting relevant consumer benefits of a merger.

Comment 4: The assessment of efficiencies is not necessary in those cases in which a merger does not raise competition concerns because there are sufficient competitive constraints in the market to prevent significant harm regardless of whether the merger will enable efficiencies.

Comment 5: Efficiencies can be important to merger remedy design. When feasible, merger remedies should eliminate the likely anti-competitive effects of a merger in the relevant market without unnecessarily sacrificing substantiated efficiencies in the same or other markets or aspects of the transaction.

Comment 6: Agencies should provide transparency with respect to their approach to evaluating potential efficiencies in merger control, including the weight the agency is likely to place on efficiency claims, the types of efficiencies that are likely to be taken into account, and any evidentiary requirements for substantiating efficiencies, including identifying the party that bears the burden of demonstrating efficiencies. Such guidance may be provided, for example, through public merger guidelines and other statements explaining merger analysis, as well as through decisions in specific cases in which parties have raised efficiency claims.

B. In assessing claims that a merger will not harm competition significantly because it will produce efficiencies, agencies should carefully review information provided by the merging parties on whether the claimed efficiencies are (a) merger specific, (b) sufficient enough to counteract the potential harm of the proposed merger, and (c) properly substantiated.

WORKING GROUP COMMENTS
Original Comments (May 2017)

Merger Specificity

Comment 1: Agencies should credit only those efficiencies that are merger specific. Merger-specific efficiencies are those that are of direct consequence of the merger and unlikely to be accomplished either in the absence of the merger or by alternatives with similar or less anticompetitive effects. In many cases, efficiencies can be achieved without the proposed merger. Efficiencies that are achievable, for instance, via internal growth, modernizing equipment, or adoption of industry best practices are not merger specific. In assessing whether efficiencies can be achieved by alternatives other than the merger, only realistic and practical business alternatives should be considered. Timing and cost can be important factors to consider in the evaluation of alternatives.

Sufficiency

Comment 2: Agencies should evaluate whether the claimed efficiencies are sufficient to counteract the merger's potential anticompetitive harm in the relevant market(s), e.g., by likely enhancing the merged firm's ability and incentive to lower prices, increase quality, or otherwise compete in a way that is beneficial to consumers.

Comment 3: In many jurisdictions, this sufficiency requirement includes a showing that a significant share of the benefits expected to be realised from the efficiencies is likely to be passed on to consumers (or customers), usually in the form of lower prices or increased output, innovation, or quality. Efficiencies that reduce variable or marginal costs are more likely to be passed on to consumers in the form of lower prices and thus more likely to be relevant to the assessment than those that reduce fixed costs. Cost savings due to anticompetitive decisions to reduce input prices, innovation, output, or service should not be considered. For dynamic efficiencies, it can be important not only to consider benefits from lower prices or increased output, but also from innovation and quality improvements such as new products stemming from higher R&D investment or new combinations of know-how, experience, or technologies.

Comment 4: When reasonably possible, efficiencies and resulting benefits should be quantified. Efficiency claims should be assessed net of the costs to achieve the expected efficiencies. While the quantification of claimed efficiencies is often complex and speculative, quantification can better inform the scope of possible benefits to consumers and facilitate a comparison of the efficiencies with the likely harm to competition.

Substantiation

Comment 5: Merger-specific efficiency gains are difficult to assess and verify both for merging parties and for competition agencies. Agencies should advise merging parties to submit efficiency claims very early in the process because verification by reasonable means typically requires significant time and resources. Crucial information about the claimed efficiencies is normally solely in the merging parties' possession. Therefore, the merging parties should be required to present evidence regarding the type, likelihood, size, and timing of any claimed efficiencies, including how they would be achieved, how they would enhance the firm's ability and incentive to compete, and why they are merger specific. Merging parties often claim efficiency gains but frequently fail to substantiate them with adequate evidence.

Comment 6: To verify efficiency claims, agencies typically review internal data and documents from the merging firms to determine how realistic the claims are. Evidence that agencies consider in evaluating efficiency claims typically includes internal documents that management used to decide on the merger, company statements about the expected efficiencies, business plans on how the company plans to achieve the efficiencies, examples of past efficiencies, and any studies on the type and size of expected efficiency gains. Proof that similar efficiencies were achieved in the past from similar actions can be among the most convincing evidence in evaluating efficiency claims. In evaluating the information submitted to substantiate efficiency claims and any conclusions, agencies should assess the accuracy of the parties' data and information, as well as the analytical methods and assumptions used.

Comment 7: The greater the likely adverse effects on competition, the greater the need to demonstrate clear, significant, and verifiable efficiencies and their likely impact on competition and consumers. When the potential adverse competitive effects of a merger are likely to be substantial, significant verifiable efficiencies likely to benefit consumers are necessary to prevent the merger from being anticompetitive. Likewise, the more uncertain and modest the likely harm to competition, the greater potential role for claimed efficiencies to outweigh the harm.

Comment 8: The stronger the evidence to substantiate the efficiency claims, the more confidence an agency is likely to have in relying on efficiencies as part of its analysis. Efficiency claims that are vague, speculative, and cannot be verified by reasonable means should not be credited.

Comment 9: The time horizon for claimed efficiencies can be an important consideration in evaluating efficiencies in light of potential anti-competitive harm. Efficiencies should have a timely impact on the merged firm's ability and incentives to compete. The more time projected for the efficiencies to be realised, the more uncertainty and difficulty predicting their effects.