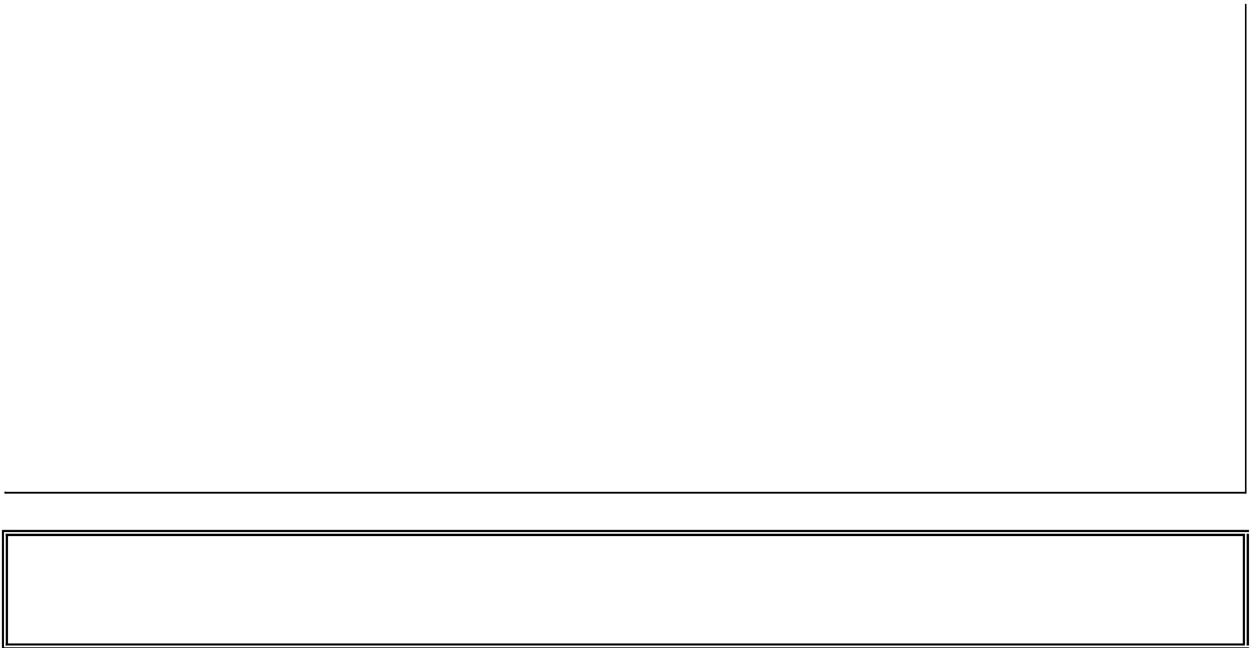

1. This paper responds to the Chair’s letter of December 9, 2010, calling for submissions for the

inform DOJ's conclusion that the 2002 transaction, by eliminating competition between the parties, would likely result in a significant increase in school milk prices for certain districts.[7]

12. Another such event that helped inform the FTC's evaluation of Nestle Holdings, Inc.'s proposed acquisition of Dreyer's Grand Ice Cream, Inc. in 2003 was the recent entry of Dreyer's into the superpremium ice cream segment. The impact of that entry on sales products in various segments of the market complemented econometric analysis of retail scanner data in both the analysis of market definition and competitive effects.[8]

13.

data econometric model was employed to estimate the effect of the nearby Whole Foods and Wild Oats stores on the prices and profit margins of the other, controlling for other nearby potential competitors. These included conventional and gourmet food retailers as well as mass merchandisers and club stores. The results indicated that the presence of Whole Foods stores had a significant effect on the prices at Wild Oats stores and that the presence of most other retailers had little or no effect. A federal judge declined to issue a preliminary injunction and the transaction was consummated. However, this ruling was overturned on appeal, and, ultimately, the FTC and Whole Foods reached a consent agreement requiring the divestiture of some of the former Wild Oats stores.[11].

18. The 2008 combination of meat packers JBS, National and Smithfield raised concerns both that the merger might enable the merged firm unilaterally to reduce price for fed cattle in the affected region and that market conditions might facilitate coordinated pricing for fed cattle among the region's few

22. In another matter, very high and increasing concentration in commercial health insurance in the Lansing, Michigan area helped to inform DOJ's decision to challenge Blue Cross Blue Shield of Michigan's (Blue Cross-Michigan) 2010 attempt to purchase Physicians Health Plan of Mid-Michigan (PHP). Blue Cross-Michigan and PHP are the two largest providers of commercial health insurance in the Lansing area. Blue Cross-Michigan has almost a 70 percent market share in Lansing, and PHP is its largest competitor with approximately a 20 percent market share. The parties' high shares suggest that they are each other's closest competitors. The results from empirical work on win-loss data by DOJ economists were consistent with this hypothesis. The parties abandoned the merger shortly after being informed of DOJ's decision to challenge it.[15]

23. High and increasing concentration in tin mill products likewise underlay DOJ's concern that the 2006 merger of Mittal Steel with rival producer Arcelor, eliminating Arcelor as an independent competitive force, would significantly increase the risk of anticompetitive conduct between the market's two largest remaining firms. EAG performed an analysis to determine whether these two largest remaining firms could profitably coordinate on a price increase post-merger, taking into account, among other things, the margins of price over marginal cost that the firms would lose on sales captured by non-coordinating fringe players as a result of the price increase, as well as the extent to which these fringe players could expand by filling unused capacity. The potential for fringe expansion was not sufficient to rebut the finding of likely harm from anticompetitive coordination between the two largest remaining firms post-merger.[16]

24. High and increasing concentration also played a role in the FTC's decision to challenge the proposed 2007 acquisition of Prince William Hospital by the Inova Health System in northern Virginia. In this case, the acquiring system had a very large share (65%-70%, depending on the metric used) while the

26. The FTC's investigation of the 2010 acquisition of AdMob by Google offers another example of when current shares, or recent trajectories of shares, may be poor predictors of future competitive significance. AdMob was a leading mobile advertising network, and Google was a significant and fast-growing rival. Mobile advertising networks place advertisements in applications on mobile devices such as Apple's iPhone, Android and Blackberry smart-phones, and tablet devices. Initially, there was concern that the merger would reduce competition in the terms that mobile advertising networks offer advertisers and application developers, and that Google would reduce its R&D in mobile advertising once it had AdMob's technology. However, staff learned that Apple itself was about to launch its own mobile advertising network and announced its intention to manage its iPhone platform in a way that would provide advantages to its mobile advertising network that would not be available to competitors. This development made the current shares of AdMob and Google, and Google's recent growth, in this market poor indicators of the likely harm to competition. The FTC closed its investigation and allowed Google to acquire AdMob. *See* http://www.ftc.gov/opa/2010/05/ggladmob.shtm.

### *1.4 Substantial head-to-head competition*

27. The Agencies consider whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors. Such evidence can be especially relevant for evaluating adverse unilateral effects, which result directly from the loss of that competition. This evidence can also inform market definition.

28.

The two largest suppliers of ultrasonic non-destructive testing equipment in the United States were subsidiaries of these companies. The combined firm would have had a market share in excess of 70% in each of several relevant markets. The closeness of competition went beyond high concentration ratios, with documentary and testimonial evidence that the parties' products were often the first and second choices of their customers. The Commission obtained a consent order requiring divestiture of GE's NDT business.[21]

### *1.5 Disruptive role of a merging party*

32. The Agencies consider whether a merger may lessen competition by eliminating a "maverick" firm, i.e., a firm that plays a disruptive role in the market to the benefit of customers. For example, if one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition.

33. Likewise, one of the merging firms may have the incentive to take the lead in price cutting or other competitive conduct or to resist increases in industry prices. A firm that may discipline prices based on its ability and incentive to expand production rapidly using available capacity also can be a maverick, as can a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition.

34. Dean Foods' acquisition of rival Foremost's milk processing plants, challenged by DOJ in 2010, illustrates how revealing a party's internal documents can be about the nature of competitive interactions. Dean's internal memoranda referred to Foremost in terms suggesting that Foremost was a maverick whose quest for greater plant utilization threatened existing margins in fluid milk. Those same memoranda characterized Dean's other rivals as "good competitors" whose plants were close to full capacity and who therefore lacked Foremost's aggressive pricing incentives.[22]

## 2. Sources of evidence

35. The Agencies consider many sources of evidence in their merger analysis. The most common

have withdrawn individually absent the merger in the face of declining demand. DOJ resolved this

49. The financial terms of a transaction may also be informative regarding its competitive effects. For example, a purchase price in excess of the acquired firm's stand-alone market value may indicate that the acquiring firm is paying a premium because it expects to be able to reduce competition or to achieve efficiencies.

### *2.2 Customers*

50. Customers can provide a variety of information to the Agencies, ranging from information about their own purchasing behavior and choices to their views about the effects of the merger itself.

51. Information from customers about how they would likely respond to a price increase, and the relative attractiveness of different products or suppliers, may be highly relevant, especially when corroborated by other evidence such as historical purchasing patterns and practices. Customers also can provide valuable information about the impact of historical events such as entry by a new supplier.

52. The conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate 1.152.7 ( uTyi(l)7.9 (i)-3 (k)12.7 (ely)12.73(Cug23]6tCug23]6.4 (e

monopoly maintenance, and competition advocacy–which typically involves commenting formally or informally on legislative proposals or regulatory proceedings at other federal agencies. EAG also provides support during litigation and assists in criminal investigations and trials. In addition, it has a very active research program and its economists frequently make presentations at conferences and publish in scholarly journals.

65. There are a total of six EAG managers: a chief and assistant chief for each of three sections. They are supervised by two economists in the Division's Front Office. The first is a career Division economist who serves as Economics Director. The second, and the Division's highest ranking economist, is the Deputy Assistant Attorney General for Economics. The latter is a political appointee with a professional background in industrial organization and antitrust chosen from academia for a term of, typically, two years.

66. Despite its organization into three sections, EAG operates essentially as one integrated section with six managers. The staff operates as a common pool, working for any or all of the managers. We have found this arrangement to be more efficient than assigning individual staff to specific managers, specific industries, or specific legal sections. The approach allows management to take advantage of the staff's availability and expertise when making assignments, and permits each economist to work with multiple legal sections and multiple EAG managers, allowing maximum flexibility either to specialize or to diversify the work he or she handles. In essence, we view the benefits of added flexibility–including the personal and professional satisfaction to economists who value diversity--to exceed those of rigid specialization.

67. The six EAG managers specialize somewhat by industry, with each sharing primary responsibility for a portion of the matters within two (of the Division's six) legal sections. This partial specialization allows the managers to develop industry-specific human capital while at the same time allowing for variety in management assignments and flexibility in dividing up EAG's overall workload across managers.

68. The management structure in EAG is relatively flat, with the managers dividing the work amongst themselves rather than, as is the case in many of the Division's legal sections, having the Chief and Assistant Chief work together on the same investigations. The managers supervise the economists assigned to work on their investigations, and they report regularly to the Economics Director and/or the Deputy for Economics. The Director and Deputy tend to divide primary responsibility amongst themselves for particular investigations, although they frequently work together and interact regularly with the Division's Legal Deputies and with the Assistant Attorney General for Antitrust. They maintain an involvement throughout the progress of all significant investigations, receiving weekly reports and having weekly meetings with management to discuss resource allocation, staffing, and the status and economic analysis of active matters.

### *3.2 The structure of the FTC's Bureau of Economics*

69. The Federal Trade Commission is organized into three functional bureaus. The Bureau of Consumer Protection and the Bureau of Competition are comprised of attorneys responsible for the FTC's

are doing antitrust work, including analysis of mergers and horizontal restraints as well as conducting
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78. In the Antitrust Division, economists formally focus investigations early on not merely through discussion, but by preparing a relatively short, albeit formal, “Issues In” memo. These memos, which incorporate input from the attorneys working with EAG on the matter, provide an overview of the basic facts (names of parties, products they produce, where they produce and sell them), a statement of the candidate theory (or theories) of harm, a discussion of the types of evidence that would tend to support or

The agencies seldom, though occasionally, retain outside experts purely as "consultants." In circumstances where an outside economist has particular expertise not available in-house and the investigation requires those particular skills, the agencies may depart from their usual custom; in the vast majority of situations, however, the agaa-o2tt 2progfr essognoal-91.1 (ta ag)13fr