[2] There is nothing in that definition that limits it to capitated contracts.

Second, the inclusion of a capitated-only market cannot be reconciled with footnote 4 of the Horizontal Merger Guidelines. Footnote 4 explains that if the sale of one product affects the prices of another product sold by the same company, the two products should be placed in the same candidate market.

[3] That is precisely what is occurring here.

The physician groups in this case control two products that Labcorp, Westcliff, and every other lab in the capitated business are interested in – (1) the sale of capitated contracts to labs,

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[1] Complaint ¶ 13, *In re Labcorp of Am. Holdings*, FTC File No. 101-0152 (Nov. 30, 2010) ("the sale of clinical laboratory testing services under capitated contracts to physician groups constitutes a relevant antitrust market"). Alternatively, the complaint permits the product market to be defined as "the sale of clinical laboratory testing services to physician groups." *Id.* at ¶ 12. That market is distinct from a market that includes all clinical laboratory testing services provided under fee-for-service contracts to physician groups, as opposed to just those services *paid for* by those physician groups.

[2] Complaint ¶ 8, *In re Quest Diagnostics Inc./Unilab Corp.*, FTC Docket No. C-4074 (Feb. 21, 2003), *available at* http://www.ftc.gov/os/2003/02/questcmp.htm.

[3] Footnote 4 states in its entirety:

> If the pricing incentives of the firms supplying the products in the candidate market differ substantially from those of the hypothetical monopolist, for reasons other than the latter's control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment.

U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.1.1 n.4 (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf.

and (2) the ability to steer lucrative pull-through fee-for-service business to the labs that purchase a physician group's capitated business. The sale of these two products (regardless of whether the IPA or a fee-for-service insurer pays for the product) is inextricably linked: without the promise of the pull-through fee-for-service business, it would be against the labs' economic self-interest to enter into the capitated contracts.

The complaint's central premise – that a capitated-only market follows the Merger Guidelines' approach to market definition – is misleading. The hypothetical monopolist test in the Guidelines operates under the assumption that price effects across multiple products sold by the merging firms are de minimis. We have reason to believe that this is not the case here. Application of the standard hypothetical monopolist test to a subsidized product (like capitated labs) will result in a candidate market that is misleadingly narrow. Footnote 4 provides a partial explanation of how to apply the hypothetical market case under these circumstances.

Third, any doubt about the proper apcaprketn Act,f-ivepremcourold reashey