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To: FTC; Horizontal Merger Guidelines Review Project

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Re: Comment regarding Proposed Update of the Horizontal Merger Guidelines (released April 20, 2010)

Public Disclosure:

Robert C. Marshall is a partner in the economics consulting firm Bates White, LLC.

Leslie M. Marx is a partner in the economics consulting firm Bates White, LLC.

The proposed update to the Guidelines continues to place emphasis on “maverick” firms (see Sections 2.1.5, 5.3, 10). Contrary to the implied definition in the guidelines (e.g. “a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition,” Section 2.1.5), “maverick” is almost surely not an exogenous characteristic of a firm but rather is a strategic choice of a firm. “Maverick” may be the choice of a firm pre-merger, but not post-merger, and vice versa. The guidelines should not emphasize this choice by a firm as a critical determinant of merger approval but, instead, the Guidelines should emphasize the payoffs (incentives) that firms confront “to cooperate on price setting or other terms of competition,” and how these payoffs (incentives) can change as a consequence of a merger.