MERGER ANTITRUST LAW

Unit 2: Predicting Merger Antitrust Outcomes

Class 2

Professor Dale Collins
Georgetown University Law
Center Fall 2022

Table of Contents

2010 DOJ/FTC Horizontal Merger Guidelines

Department of Justice

FOR IMMEDIATE RELEASE | AT
THURSDAY, AUGUST 19, 2010 | (202) 514-2007
WWW.JUSTICE.GOV | TDD (202) 514-1888

DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION ISSUE REVISED HORIZONTAL MERGER GUIDELINES

2010 Guidelines More Accurately Represent Agencies' Merger Review Process

WASHINGTON – The Department of Justice and the Federal Trade Commission (FTC) issued today revised Horizontal Merger Guidelines that outline how the federal antitrust agencies evaluate the likely competitive impact of mergers and whether those mergers comply with U.S. antitrust law. These changes mark the first major revision of the merger guidelines in 18 years, and will give businesses a better understanding of how the agencies evaluate proposed mergers.

A primary goal of the 2010 guidelines is to help the agencies identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that either are competitively beneficial or likely will have no competitive impact on the marketplace. To accomplish this, the guidelines detail the techniques and main types of evidence the agencies typically use to predict whether horizontal mergers may substantially lessen competition.

The revised merger guidelines derive from the agencies' collective experience in assessing thousands of transactions focusing on the types of evidence the department and the FTC use to decide whether a merger of competitors may harm competition. Many of the proposed refinements and changes reflect issues previously identified in the "Commentary on the Horizontal Merger Guidelines," which the agencies jointly issued in 2006. In crafting the revisions, the agencies considered a wide range of opinions gathered through a series of joint public workshops, as well as hundreds of public comments submitted by attorneys, academics, economists, consumer groups and businesses.

"The revised guidelines better reflect the agencies' actual practices," said Christine Varney, Assistant Attorney General in charge of the Department of Justice's Antitrust Division. "The guidelines provide more clarity and transparency, and will provide businesses with an even greater understanding of how we review transactions. This has been a successful process due to the commitment of the talented staff from both agencies and the excellent working relationship with the FTC led by Jon Leibowitz."

"Because of the hard work of all involved at both agencies, private parties and judges will be better equipped to understand how the agencies evaluate deals. That improvement in clarity and predictability will benefit everyone," said FTC Chairman Jon Leibowitz. "We thank Christine Varney and her team at DOJ for their terrific work on this initiative, demonstrating once again how effectively and collegially the two agencies work together."

The agencies jointly announced the project in September 2009, followed by a series of workshops over the course of the winter. The FTC issued proposed revisions for public comment on April 20, 2010. All of the written comments are posted on the FTC's website at www.ftc.gov/os/comments/hmgrevisedguides/index.shtm.

The 2010 guidelines are different from the 1992 guidelines in several important ways. The guidelines:

- Clarify that merger analysis does not use a single methodology, but is a fact-specific process through which the agencies use a variety of tools to analyze the evidence to determine whether a merger may substantially lessen competition.
- Introduce a new section on "Evidence of Adverse Competitive Effects." This section discusses several categories and sources of evidence that the agencies, in their experience, have found informative in predicting the likely competitive effects of mergers.
- Explain that market definition is not an end itself or a necessary starting point of merger analysis, and market concentration is a tool that is useful to the extent it illuminates the merger's likely competitive effects.
- Provide an updated explanation of the hypothetical monopolist test used to define relevant antitrust markets and how the agencies implement that test in practice.
- Update the concentration thresholds that determine whether a transaction warrants further scrutiny by the agencies.
- Provide an expanded discussion of how the agencies evaluate unilateral competitive effects, including effects on innovation.
- Provide an updated section on coordinated effects. The guidelines clarify that coordinated effects, like unilateral effects, include conduct not otherwise condemned by the antitrust laws.
- Provide a simplified discussion of how the agencies evaluate whether entry into the relevant market is so easy that a merger is not likely to enhance market power.
- Add new sections on powerful buyers, mergers between competing buyers, and partial acquisitions.

The 2010 guidelines are available on the Department of Justice's website at www.justice.gov/atr/public/guidelines/hmg-2010.html.

The Horizontal Merger Guidelines, which were first adopted in 1968, and revised in 1992, serve as an outline of the main analytical techniques, practices and enforcement policies the Department of Justice and the FTC use to evaluate mergers and acquisitions involving actual or potential competitors under federal antitrust laws.

The guidelines issued today take into account the legal and economic developments since the 1992 guidelines were issued. They are not intended to represent a change in the direction of merger review policy, but to offer more clarity on the merger review process to better assist the business community and, in particular, parties to mergers and acquisitions.

The Bank Merger Competitive Review guidelines, which the federal banking agencies and the Department of Justice developed in 1995 to facilitate the competitive review of bank mergers, remain unchanged. The Bank Merger Competitive Review guidelines can be found at www.justice.gov/atr/public/premerger.htm.

# # #

MEDIA CONTACTS:

Gina Talamona
Department of Justice
Office of Public Affairs
202-514-2007

Peter Kaplan or Mitchell J. Katz
Federal Trade Commission
Office of Public Affairs
202-326-2180

10-938

Horizontal Merger Guidelines

U.S. Department of Justice

and the

Federal Trade Commission

Issued: August 19, 2010

Table of Contents

1. Overview

These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to mergers and acquisitions involving actual or potential competitors ("horizontal mergers") under the federal antitrust laws.[1] The relevant statutory provisions include Section 7 of the Clayton Act, 15 U.S.C. § 18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Most particularly, Section 7 of the Clayton Act prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The Agencies seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral. Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.

These Guidelines describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition. They are not intended to describe how the Agencies analyze cases other than horizontal mergers. These Guidelines are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context.

These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology. Rather, it is a fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time. Where these Guidelines provide examples, they are illustrative and do not exhaust the applications of the relevant principle.[2]

---

1 These Guidelines replace the Horizontal Merger Guidelines issued in 1992, revised in 1997. They reflect the ongoing accumulation of experience at the Agencies. The Commentary on the Horizontal Merger Guidelines issued by the Agencies in 2006 remains a valuable supplement to these Guidelines. These Guidelines may be revised from time to time as necessary to reflect significant changes in enforcement policy, to clarify existing policy, or to reflect new learning. These Guidelines do not cover vertical or other types of non-horizontal acquisitions.

2 These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring. Although relevant in that context, these Guidelines neither dictate nor exhaust the range of evidence the Agencies may introduce in litigation.

The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise. For simplicity of exposition, these Guidelines generally refer to all of these effects as enhancing market power. A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives. In evaluating how a merger will likely change a firm's behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm.

A merger can enhance market power simply by eliminating competition between the merging parties. This effect can arise even if the merger causes no changes in the way other firms behave. Adverse competitive effects arising in this manner are referred to as "unilateral effects." A merger also can enhance market power by increasing the risk of coordinated, accommodating, or interdependent behavior among rivals. Adverse competitive effects arising in this manner are referred to as "coordinated effects." In any given case, either or both types of effects may be present, and the distinction between them may be blurred.

These Guidelines principally describe how the Agencies analyze mergers between rival suppliers that may enhance their market power as sellers. Enhancement of market power by sellers often elevates the prices charged to customers. For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects. Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition. Enhanced market power may also make it more likely that the merged entity can profitably and effectively engage in exclusionary conduct. Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers. The Agencies examine effects on either or both of the direct customers and the final consumers. The Agencies presume, absent convincing evidence to the contrary, that adverse effects on direct customers also cause adverse effects on final consumers.

Enhancement of market power by buyers, sometimes called "monopsony power," has adverse effects comparable to enhancement of market power by sellers. The Agencies employ an analogous framework to analyze mergers between rival purchasers that may enhance their market power as buyers. See Section 12.

2. Evidence of Adverse Competitive Effects

The Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition. This section discusses several categories and sources of evidence that the Agencies, in their experience, have found most informative in predicting the likely competitive effects of mergers. The list provided here is not exhaustive. In any given case, reliable evidence may be available in only some categories or from some sources. For each category of evidence, the Agencies consider evidence indicating that the merger may enhance competition as well as evidence indicating that it may lessen competition.

2.1 Types of Evidence

2.1.1 Actual Effects Observed in Consummated Mergers

When evaluating a consummated merger, the ultimate issue is not only whether adverse competitive effects have already resulted from the merger, but also whether such effects are likely to arise in the future. Evidence of observed post-merger price increases or other changes adverse to customers is given substantial weight. The Agencies evaluate whether such changes are anticompetitive effects resulting from the merger, in which case they can be dispositive. However, a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct. Consequently, the Agencies also consider the same types of evidence they consider when evaluating unconsummated mergers.

2.1.2 Direct Comparisons Based on Experience

The Agencies look for historical events, or "natural experiments," that are informative regarding the competitive effects of the merger. For example, the Agencies may examine the impact of recent mergers, entry, expansion, or exit in the relevant market. Effects of analogous events in similar markets may also be informative.

The Agencies also look for reliable evidence based on variations among similar markets. For example, if the merging firms compete in some locales but not others, comparisons of prices charged in regions where they do and do not compete may be informative regarding post-merger prices. In some cases, however, prices are set on such a broad geographic basis that such comparisons are not informative. The Agencies also may examine how prices in similar markets vary with the number of significant competitors in those markets.

2.1.3 Market Shares and Concentration in a Relevant Market

The Agencies give weight to the merging parties' market shares in a relevant market, the level of concentration, and the change in concentration caused by the merger. See Sections 4 and 5. Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

2.1.4 Substantial Head-to-Head Competition

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. See Section 6. This evidence can also inform market definition. See Section 4.

2.1.5 Disruptive Role of a Merging Party

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. 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.

2.2 Sources of Evidence

The Agencies consider many sources of evidence in their merger analysis. The most common sources of reasonably available and reliable evidence are the merging parties, customers, other industry participants, and industry observers.

2.2.1 Merging Parties

The Agencies typically obtain substantial information from the merging parties. This information can take the form of documents, testimony, or data, and can consist of descriptions of competitively relevant conditions or reflect actual business conduct and decisions. Documents created in the normal course are more probative than documents created as advocacy materials in merger review. Documents describing industry conditions can be informative regarding the operation of the market and how a firm identifies and assesses its rivals, particularly when business decisions are made in reliance on the accuracy of those descriptions. The business decisions taken by the merging firms also can be informative about industry conditions. For example, if a firm sets price well above incremental cost, that normally indicates either that the firm believes its customers are not highly sensitive to price (not in itself of antitrust concern, see Section 4.1.3[3]) or that the firm and its rivals are engaged in coordinated interaction (see Section 7). Incremental cost depends on the relevant increment in output as well as on the time period involved, and in the case of large increments and sustained changes in output it may include some costs that would be fixed for smaller increments of output or shorter time periods.

Explicit or implicit evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts after the merger, or explicit or implicit evidence that the ability to engage in such conduct motivated the merger, can be highly informative in evaluating the likely effects of a merger. Likewise, the Agencies look for reliable evidence that the merger is likely to result in efficiencies. The Agencies give careful consideration to the views of individuals whose responsibilities, expertise, and experience relating to the issues in question provide particular indicia of reliability. The financial terms of the transaction may also be informative regarding 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.

---

3 High margins commonly arise for products that are significantly differentiated. Products involving substantial fixed costs typically will be developed only if suppliers expect there to be enough differentiation to support margins sufficient to cover those fixed costs. High margins can be consistent with incumbent firms earning competitive returns.

2.2.2 Customers

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.

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.

The conclusions of well-informed and sophisticated customers on the likely impact of the merger itself can also help the Agencies investigate competitive effects, because customers typically feel the consequences of both competitively beneficial and competitively harmful mergers. In evaluating such evidence, the Agencies are mindful that customers may oppose, or favor, a merger for reasons unrelated to the antitrust issues raised by that merger.

When some customers express concerns about the competitive effects of a merger while others view the merger as beneficial or neutral, the Agencies take account of this divergence in using the information provided by customers and consider the likely reasons for such divergence of views. For example, if for regulatory reasons some customers cannot buy imported products, while others can, a merger between domestic suppliers may harm the former customers even if it leaves the more flexible customers unharmed. See Section 3.

When direct customers of the merging firms compete against one another in a downstream market, their interests may not be aligned with the interests of final consumers, especially if the direct customers expect to pass on any anticompetitive price increase. A customer that is protected from adverse competitive effects by a long-term contract, or otherwise relatively immune from the merger's harmful effects, may even welcome an anticompetitive merger that provides that customer with a competitive advantage over its downstream rivals.

> *Example 1:* As a result of the merger, Customer C will experience a price increase for an input used in producing its final product, raising its costs. Customer C's rivals use this input more intensively than Customer C, and the same price increase applied to them will raise their costs more than it raises Customer C's costs. On balance, Customer C may benefit from the merger even though the merger involves a substantial lessening of competition.

2.2.3 Other Industry Participants and Observers

Suppliers, indirect customers, distributors, other industry participants, and industry analysts can also provide information helpful to a merger inquiry. The interests of firms selling products complementary to those offered by the merging firms often are well aligned with those of customers, making their informed views valuable.

Information from firms that are rivals to the merging parties can help illuminate how the market operates. The interests of rival firms often diverge from the interests of customers, since customers normally lose, but rival firms gain, if the merged entity raises its prices. For that reason, the Agencies do not routinely rely on the overall views of rival firms regarding the competitive effects of the merger. However, rival firms may provide relevant facts, and even their overall views may be instructive, especially in cases where the Agencies are concerned that the merged entity may engage in exclusionary conduct.

> *Example 2:* Merging Firms A and B operate in a market in which network effects are significant, implying that any firm's product is significantly more valuable if it commands a large market share or if it is interconnected with others that in aggregate command such a share. Prior to the merger, they and their rivals voluntarily interconnect with one another. The merger would create an entity with a large enough share that a strategy of ending voluntary interconnection would have a dangerous probability of creating monopoly power in this market. The interests of rivals and of consumers would be broadly aligned in preventing such a merger.

3. Targeted Customers and Price Discrimination

When examining possible adverse competitive effects from a merger, the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products. Such differential impacts are possible when sellers can discriminate, e.g., by profitably raising price to certain targeted customers but not to others. The possibility of price discrimination influences market definition (see Section 4), the measurement of market shares (see Section 5), and the evaluation of competitive effects (see Sections 6 and 7).

When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers. A price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would substitute away. When discrimination is reasonably likely, the Agencies may evaluate competitive effects separately by type of customer. The Agencies may have access to information unavailable to customers that is relevant to evaluating whether discrimination is reasonably likely.

For price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage.

First, the suppliers engaging in price discrimination must be able to price differently to targeted customers than to other customers. This may involve identification of individual customers to which different prices are offered or offering different prices to different types of customers based on observable characteristics.

> *Example 3:* Suppliers can distinguish large buyers from small buyers. Large buyers are more likely than small buyers to self-supply in response to a significant price increase. The merger may lead to price discrimination against small buyers, harming them, even if large buyers are not harmed. Such discrimination can occur even if there is no discrete gap in size between the classes of large and small buyers.

In other cases, suppliers may be unable to distinguish among different types of customers but can offer multiple products that sort customers based on their purchase decisions.

Second, the targeted customers must not be able to defeat the price increase of concern by arbitrage, e.g., by purchasing indirectly from or through other customers. Arbitrage may be difficult if it would void warranties or make service more difficult or costly for customers. Arbitrage is inherently impossible for many services. Arbitrage between customers at different geographic locations may be impractical due to transportation costs. Arbitrage on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a discriminatory pricing strategy.

4. Market Definition

When the Agencies identify a potential competitive concern with a horizontal merger, market definition plays two roles. First, market definition helps specify the line of commerce and section of the country in which the competitive concern arises. In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Second, market definition allows the Agencies to identify market participants and measure market shares and market concentration. See Section 5. The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.

The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.

Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects. For example, evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market. Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.

Where analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects.

Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis. They are considered in these Guidelines in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.

Customers often confront a range of possible substitutes for the products of the merging firms. Some substitutes may be closer, and others more distant, either geographically or in terms of product attributes and perceptions. Additionally, customers may assess the proximity of different products differently. When products or suppliers in different geographic areas are substitutes for one another to varying degrees, defining a market to include some substitutes and exclude others is inevitably a simplification that cannot capture the full variation in the extent to which different products compete against each other. The principles of market definition outlined below seek to make this inevitable simplification as useful and informative as is practically possible. Relevant markets need not have precise metes and bounds.

Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market. Although excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance as proportional to their shares in an expanded market.

> *Example 4:* Firms A and B, sellers of two leading brands of motorcycles, propose to merge. If Brand A motorcycle prices were to rise, some buyers would substitute to Brand B, and some others would substitute to cars. However, motorcycle buyers see Brand B motorcycles as much more similar to Brand A motorcycles than are cars. Far more cars are sold than motorcycles. Evaluating shares in a market that includes cars would greatly underestimate the competitive significance of Brand B motorcycles in constraining Brand A's prices and greatly overestimate the significance of cars.

Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. As a result, properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers. However, a group of products is too narrow to constitute a relevant market if competition from products outside that group is so ample that even the complete elimination of competition within the group would not significantly harm either direct customers or downstream consumers. The hypothetical monopolist test (see Section 4.1.1) is designed to ensure that candidate markets are not overly narrow in this respect.

The Agencies implement these principles of market definition flexibly when evaluating different possible candidate markets. Relevant antitrust markets defined according to the hypothetical monopolist test are not always intuitive and may not align with how industry members use the term "market."

Section 4.1 describes the principles that apply to product market definition, and gives guidance on how the Agencies most often apply those principles. Section 4.2 describes how the same principles apply to geographic market definition. Although discussed separately for simplicity of exposition, the principles described in Sections 4.1 and 4.2 are combined to define a relevant market, which has both a product and a geographic dimension. In particular, the hypothetical monopolist test is applied to a group of products together with a geographic region to determine a relevant market.

4.1 Product Market Definition

When a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the Agencies define a relevant product market around Product A to evaluate the importance of that competition. Such a relevant product market consists of a group of substitute products including Product A. Multiple relevant product markets may thus be identified.

4.1.1 The Hypothetical Monopolist Test

The Agencies employ the hypothetical monopolist test to evaluate whether groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets. The Agencies use the hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms.

The hypothetical monopolist test requires that a product market contain enough substitute products so that it could be subject to post-merger exercise of market power significantly exceeding that existing absent the merger. Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.[4] For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. The SSNIP is employed solely as a methodological tool for performing the hypothetical monopolist test; it is not a tolerance level for price increases resulting from a merger.

Groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose. The hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase.

> *Example 5:* Products A and B are being tested as a candidate market. Each sells for $100, has an incremental cost of $60, and sells 1200 units. For every dollar increase in the price of Product A, for any given price of Product B, Product A loses twenty units of sales to products outside the candidate market and ten units of sales to Product B, and likewise for Product B. Under these conditions, economic analysis shows that a hypothetical profit-maximizing monopolist controlling Products A and B would raise both of their prices by ten percent, to $110. Therefore, Products A and B satisfy the hypothetical monopolist test using a five percent SSNIP, and indeed for any SSNIP size up to ten percent. This is true even though two-thirds of the sales lost by one product when it raises its price are diverted to products outside the relevant market.

When applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product. The third product is a closer substitute if, in response to a SSNIP on the first product, greater revenues are diverted to the third product than to the second product.

> *Example 6:* In Example 5, suppose that half of the unit sales lost by Product A when it raises its price are diverted to Product C, which also has a price of $100, while one-third are diverted to Product B. Product C is a closer substitute for Product A than is Product B. Thus Product C will normally be included in the relevant market, even though Products A and B together satisfy the hypothetical monopolist test.

The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market

---

4 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.

satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects. Because the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.

> *Example 7:* In Example 4, including cars in the market will lead to misleadingly small market shares for motorcycle producers. Unless motorcycles fail the hypothetical monopolist test, the Agencies would not include cars in the market in analyzing this motorcycle merger.

4.1.2 Benchmark Prices and SSNIP Size

The Agencies apply the SSNIP starting from prices that would likely prevail absent the merger. If prices are not likely to change absent the merger, these benchmark prices can reasonably be taken to be the prices prevailing prior to the merger.[5] If prices are likely to change absent the merger, e.g., because of innovation or entry, the Agencies may use anticipated future prices as the benchmark for the test. If prices might fall absent the merger due to the breakdown of pre-merger coordination, the Agencies may use those lower prices as the benchmark for the test. In some cases, the techniques employed by the Agencies to implement the hypothetical monopolist test focus on the difference in incentives between pre-merger firms and the hypothetical monopolist and do not require specifying the benchmark prices.

The SSNIP is intended to represent a "small but significant" increase in the prices charged by firms in the candidate market for the value they contribute to the products or services used by customers. This properly directs attention to the effects of price changes commensurate with those that might result from a significant lessening of competition caused by the merger. This methodology is used because normally it is possible to quantify "small but significant" adverse price effects on customers and analyze their likely reactions, not because price effects are more important than non-price effects.

The Agencies most often use a SSNIP of five percent of the price paid by customers for the products or services to which the merging firms contribute value. However, what constitutes a "small but significant" increase in price, commensurate with a significant loss of competition caused by the merger, depends upon the nature of the industry and the merging firms' positions in it, and the Agencies may accordingly use a price increase that is larger or smaller than five percent. Where explicit or implicit prices for the firms' specific contribution to value can be identified with reasonable clarity, the Agencies may base the SSNIP on those prices.

> *Example 8:* In a merger between two oil pipelines, the SSNIP would be based on the price charged for transporting the oil, not on the price of the oil itself. If pipelines buy the oil at one end and sell it at the other, the price charged for transporting the oil is implicit, equal to the difference between the price paid for oil at the input end and the price charged for oil at the output end. The relevant product sold by the pipelines is better described as "pipeline transportation of oil from point A to point B" than as "oil at point B."

---

[5] Market definition for the evaluation of non-merger antitrust concerns such as monopolization or facilitating practices will differ in this respect if the effects resulting from the conduct of concern are already occurring at the time of evaluation.

Example 9: In a merger between two firms that install computers purchased from third parties, the SSNIP would be based on their fees, not on the price of installed computers. If these firms purchase the computers and charge their customers one package price, the implicit installation fee is equal to the package charge to customers less the price of the computers.

Example 10: In Example 9, suppose that the prices paid by the merging firms to purchase computers are opaque, but account for at least ninety-five percent of the prices they charge for installed computers, with profits or implicit fees making up five percent of those prices at most. A five percent SSNIP on the total price paid by customers would at least double those fees or profits. Even if that would be unprofitable for a hypothetical monopolist, a significant increase in fees might well be profitable. If the SSNIP is based on the total price paid by customers, a lower percentage will be used.

4.1.3 Implementing the Hypothetical Monopolist Test

The hypothetical monopolist's incentive to raise prices depends both on the extent to which customers would likely substitute away from the products in the candidate market in response to such a price increase and on the profit margins earned on those products. The profit margin on incremental units is the difference between price and incremental cost on those units. The Agencies often estimate incremental costs, for example using merging parties' documents or data the merging parties use to make business decisions. Incremental cost is measured over the change in output that would be caused by the price increase under consideration.

In considering customers' likely responses to higher prices, the Agencies take into account any reasonably available and reliable evidence, including, but not limited to:

- how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions;
- information from buyers, including surveys, concerning how they would respond to price changes;
- the conduct of industry participants, notably:
    - sellers' business decisions or business documents indicating sellers' informed beliefs concerning how customers would substitute among products in response to relative changes in price;
    - industry participants' behavior in tracking and responding to price changes by some or all rivals;
- objective information about product characteristics and the costs and delays of switching products, especially switching from products in the candidate market to products outside the candidate market;
- the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market, with a higher recapture percentage making a price increase more profitable for the hypothetical monopolist;
- evidence from other industry participants, such as sellers of complementary products;

- legal or regulatory requirements; and
- the influence of downstream competition faced by customers in their output markets.

When the necessary data are available, the Agencies also may consider a "critical loss analysis" to assess the extent to which it corroborates inferences drawn from the evidence noted above. Critical loss analysis asks whether imposing at least a SSNIP on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits. While this "breakeven" analysis differs from the profit-maximizing analysis called for by the hypothetical monopolist test in Section 4.1.1, merging parties sometimes present this type of analysis to the Agencies. A price increase raises profits on sales made at the higher price, but this will be offset to the extent customers substitute away from products in the candidate market. Critical loss analysis compares the magnitude of these two offsetting effects resulting from the price increase. The "critical loss" is defined as the number of lost unit sales that would leave profits unchanged. The "predicted loss" is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the price increase. The price increase raises the hypothetical monopolist's profits if the predicted loss is less than the critical loss.

The Agencies consider all of the evidence of customer substitution noted above in assessing the predicted loss. The Agencies require that estimates of the predicted loss be consistent with that evidence, including the pre-merger margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction (see Section 7), high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price.[6] Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture percentage necessary for the candidate market to satisfy the hypothetical monopolist test.

Even when the evidence necessary to perform the hypothetical monopolist test quantitatively is not available, the conceptual framework of the test provides a useful methodological tool for gathering and analyzing evidence pertinent to customer substitution and to market definition. The Agencies follow the hypothetical monopolist test to the extent possible given the available evidence, bearing in mind that the ultimate goal of market definition is to help determine whether the merger may substantially lessen competition.

4.1.4 Product Market Definition with Targeted Customers

If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a SSNIP. Markets to serve targeted customers are also known as price discrimination markets. In practice, the Agencies identify price discrimination markets only where they believe there is a realistic prospect of an adverse competitive effect on a group of targeted customers.

> *Example 11:* Glass containers have many uses. In response to a price increase for glass containers, some users would substitute substantially to plastic or metal containers, but baby food manufacturers would not. If a

6 While margins are important for implementing the hypothetical monopolist test, high margins are not in themselves of antitrust concern.

> hypothetical monopolist could price separately and limit arbitrage, baby food manufacturers would be vulnerable to a targeted increase in the price of glass containers. The Agencies could define a distinct market for glass containers used to package baby food.

The Agencies also often consider markets for targeted customers when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product. If prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are as narrow as individual customers (see also Section 6.2 on bargaining and auctions). Nonetheless, the Agencies often define markets for groups of targeted customers, i.e., by type of customer, rather than by individual customer. By so doing, the Agencies are able to rely on aggregated market shares that can be more helpful in predicting the competitive effects of the merger.

4.2 Geographic Market Definition

The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Both supplier and customer locations can affect this. The Agencies apply the principles of market definition described here and in Section 4.1 to define a relevant market with a geographic dimension as well as a product dimension.

The scope of geographic markets often depends on transportation costs. Other factors such as language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability may impede long-distance or international transactions. The competitive significance of foreign firms may be assessed at various exchange rates, especially if exchange rates have fluctuated in the recent past.

In the absence of price discrimination based on customer location, the Agencies normally define geographic markets based on the locations of suppliers, as explained in subsection 4.2.1. In other cases, notably if price discrimination based on customer location is feasible as is often the case when delivered pricing is commonly used in the industry, the Agencies may define geographic markets based on the locations of customers, as explained in subsection 4.2.2.

4.2.1 Geographic Markets Based on the Locations of Suppliers

Geographic markets based on the locations of suppliers encompass the region from which sales are made. Geographic markets of this type often apply when customers receive goods or services at suppliers' locations. Competitors in the market are firms with relevant production, sales, or service facilities in that region. Some customers who buy from these firms may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future producer of the relevant product(s) located in the region would impose at least a SSNIP from at least one location, including at least one location of one of the merging firms. In this exercise the terms of sale for all products produced elsewhere are held constant. A single firm may operate in a number of different geographic markets, even for a single product.

Example 12: The merging parties both have manufacturing plants in City X. The relevant product is expensive to transport and suppliers price their products for pickup at their locations. Rival plants are some distance away in City Y. A hypothetical monopolist controlling all plants in City X could profitably impose a SSNIP at these plants. Competition from more distant plants would not defeat the price increase because supplies coming from more distant plants require expensive transportation. The relevant geographic market is defined around the plants in City X.

When the geographic market is defined based on supplier locations, sales made by suppliers located in the geographic market are counted, regardless of the location of the customer making the purchase.

In considering likely reactions of customers to price increases for the relevant product(s) imposed in a candidate geographic market, the Agencies consider any reasonably available and reliable evidence, including:

- how customers have shifted purchases in the past between different geographic locations in response to relative changes in price or other terms and conditions;
- the cost and difficulty of transporting the product (or the cost and difficulty of a customer traveling to a seller's location), in relation to its price;
- whether suppliers need a presence near customers to provide service or support;
- evidence on whether sellers base business decisions on the prospect of customers switching between geographic locations in response to relative changes in price or other competitive variables;
- the costs and delays of switching from suppliers in the candidate geographic market to suppliers outside the candidate geographic market; and
- the influence of downstream competition faced by customers in their output markets.

4.2.2 Geographic Markets Based on the Locations of Customers

When the hypothetical monopolist could discriminate based on customer location, the Agencies may define geographic markets based on the locations of targeted customers.[7] Geographic markets of this type often apply when suppliers deliver their products or services to customers' locations. Geographic markets of this type encompass the region into which sales are made. Competitors in the market are firms that sell to customers in the specified region. Some suppliers that sell into the relevant market may be located outside the boundaries of the geographic market.

The hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region would impose at least a SSNIP on some customers in that region. A region forms a relevant geographic market if this price increase would not be defeated by substitution away from the relevant product or by arbitrage,

[7] For customers operating in multiple locations, only those customer locations within the targeted zone are included in the market.

e.g., customers in the region travelling outside it to purchase the relevant product. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

> *Example 13:* Customers require local sales and support. Suppliers have sales and service operations in many geographic areas and can discriminate based on customer location. The geographic market can be defined around the locations of customers.

> *Example 14:* Each merging firm has a single manufacturing plant and delivers the relevant product to customers in City X and in City Y. The relevant product is expensive to transport. The merging firms' plants are by far the closest to City X, but no closer to City Y than are numerous rival plants. This fact pattern suggests that customers in City X may be harmed by the merger even if customers in City Y are not. For that reason, the Agencies consider a relevant geographic market defined around customers in City X. Such a market could be defined even if the region around the merging firms' plants would not be a relevant geographic market defined based on the location of sellers because a hypothetical monopolist controlling all plants in that region would find a SSNIP imposed on all of its customers unprofitable due to the loss of sales to customers in City Y.

When the geographic market is defined based on customer locations, sales made to those customers are counted, regardless of the location of the supplier making those sales.

> *Example 15:* Customers in the United States must use products approved by U.S. regulators. Foreign customers use products not approved by U.S. regulators. The relevant product market consists of products approved by U.S. regulators. The geographic market is defined around U.S. customers. Any sales made to U.S. customers by foreign suppliers are included in the market, and those foreign suppliers are participants in the U.S. market even though located outside it.

5. Market Participants, Market Shares, and Market Concentration

The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects. The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.

Market shares can directly influence firms' competitive incentives. For example, if a price reduction to gain new customers would also apply to a firm's existing customers, a firm with a large market share may be more reluctant to implement a price reduction than one with a small share. Likewise, a firm with a large market share may not feel pressure to reduce price even if a smaller rival does. Market shares also can reflect firms' capabilities. For example, a firm with a large market share may be able to expand output rapidly by a larger absolute amount than can a small firm. Similarly, a large market share tends to indicate low costs, an attractive product, or both.

5.1 Market Participants

All firms that currently earn revenues in the relevant market are considered market participants. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently earning revenues in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP, without incurring significant sunk costs, are also considered market participants. These firms are termed "rapid entrants." Sunk costs are entry or exit costs that cannot be recovered outside the relevant market. Entry that would take place more slowly in response to adverse competitive effects, or that requires firms to incur significant sunk costs, is considered in Section 9.

Firms that produce the relevant product but do not sell it in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are close to the geographic market.

> *Example 16:* Farm A grows tomatoes halfway between Cities X and Y. Currently, it ships its tomatoes to City X because prices there are two percent higher. Previously it has varied the destination of its shipments in response to small price variations. Farm A would likely be a rapid entrant participant in a market for tomatoes in City Y.

> *Example 17:* Firm B has bid multiple times to supply milk to School District S, and actually supplies milk to schools in some adjacent areas. It has never won a bid in School District S, but is well qualified to serve that district and has often nearly won. Firm B would be counted as a rapid entrant in a market for school milk in School District S.

More generally, if the relevant market is defined around targeted customers, firms that produce relevant products but do not sell them to those customers may be rapid entrants if they can easily and rapidly begin selling to the targeted customers.

Firms that clearly possess the necessary assets to supply into the relevant market rapidly may also be rapid entrants. In markets for relatively homogeneous goods where a supplier's ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available "swing" capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant.[8] However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm's possession of idle or swing capacity alone does not make that firm a rapid entrant.

5.2 Market Shares

The Agencies normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data. The Agencies also calculate market shares for other market participants if this can be done to reliably reflect their competitive significance.

Market concentration and market share data are normally based on historical evidence. However, recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. The Agencies consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agencies may conclude that that firm's historical market share

---

[8] If this type of supply side substitution is nearly universal among the firms selling one or more of a group of products, the Agencies may use an aggregate description of markets for those products as a matter of convenience.

overstates its future competitive significance. The Agencies may project historical market shares into the foreseeable future when this can be done reliably.

The Agencies measure market shares based on the best available indicator of firms' future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, annual data are used, but where individual transactions are large and infrequent so annual data may be unrepresentative, the Agencies may measure market shares over a longer period of time.

In most contexts, the Agencies measure each firm's market share based on its actual or projected revenues in the relevant market. Revenues in the relevant market tend to be the best measure of attractiveness to customers, since they reflect the real-world ability of firms to surmount all of the obstacles necessary to offer products on terms and conditions that are attractive to customers. In cases where one unit of a low-priced product can substitute for one unit of a higher-priced product, unit sales may measure competitive significance better than revenues. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively few revenues. In cases where customers sign long-term contracts, face switching costs, or tend to re-evaluate their suppliers only occasionally, revenues earned from recently acquired customers may better reflect the competitive significance of suppliers than do total revenues.

In markets for homogeneous products, a firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in the relevant market in response to a price increase or output reduction by others in that market. As a result, a firm's competitive significance may depend upon its level of readily available capacity to serve the relevant market if that capacity is efficient enough to make such expansion profitable. In such markets, capacities or reserves may better reflect the future competitive significance of suppliers than revenues, and the Agencies may calculate market shares using those measures. Market participants that are not current producers may then be assigned positive market shares, but only if a measure of their competitive significance properly comparable to that of current producers is available. When market shares are measured based on firms' readily available capacities, the Agencies do not include capacity that is committed or so profitably employed outside the relevant market, or so high-cost, that it would not likely be used to respond to a SSNIP in the relevant market.

> *Example 18:* The geographic market is defined around customers in the United States. Firm X produces the relevant product outside the United States, and most of its sales are made to customers outside the United States. In most contexts, Firm X's market share will be based on its sales to U.S. customers, not its total sales or total capacity. However, if the relevant product is homogeneous, and if Firm X would significantly expand sales to U.S. customers rapidly and without incurring significant sunk costs in response to a SSNIP, the Agencies may base Firm X's market share on its readily available capacity to serve U.S. customers.

When the Agencies define markets serving targeted customers, these same principles are used to measure market shares, as they apply to those customers. In most contexts, each firm's market share is based on its actual or projected revenues from the targeted customers. However, the Agencies may instead measure market shares based on revenues from a broader group of customers if doing so would more accurately reflect the competitive significance of different suppliers in the relevant market. Revenues earned from a broader group of customers may also be used when better data are thereby available.

5.3 Market Concentration

Market concentration is often one useful indicator of likely competitive effects of a merger. In evaluating market concentration, the Agencies consider both the post-merger level of market concentration and the change in concentration resulting from a merger. Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger. They are used in conjunction with other evidence of competitive effects. See Sections 6 and 7.

In analyzing mergers between an incumbent and a recent or potential entrant, to the extent the Agencies use the change in concentration to evaluate competitive effects, they will do so using projected market shares. A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others.

The Agencies give more weight to market concentration when market shares have been stable over time, especially in the face of historical changes in relative prices or costs. If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger. By contrast, even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings. However, if competition by one of the merging firms has significantly contributed to these fluctuations, perhaps because it has acted as a maverick, the Agencies will consider whether the merger will enhance market power by combining that firm with one of its significant rivals.

The Agencies may measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure revenues in the relevant market. The Agencies also may consider the combined market share of the merging firms as an indicator of the extent to which others in the market may not be able readily to replace competition between the merging firms that is lost through the merger.

The Agencies often calculate the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual firms' market shares,[9] and thus gives proportionately greater weight to the larger market shares. When using the HHI, the Agencies

---

[9] For example, a market consisting of four firms with market shares of thirty percent, thirty percent, twenty percent, and twenty percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about firms with small shares is not critical because such firms do not affect the HHI significantly.

consider both the post-merger level of the HHI and the increase in the HHI resulting from the merger. The increase in the HHI is equal to twice the product of the market shares of the merging firms.[10]

Based on their experience, the Agencies generally classify markets into three types:

- Unconcentrated Markets: HHI below 1500
- Moderately Concentrated Markets: HHI between 1500 and 2500
- Highly Concentrated Markets: HHI above 2500

The Agencies employ the following general standards for the relevant markets they have defined:

- *Small Change in Concentration:* Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Unconcentrated Markets:* Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.
- *Moderately Concentrated Markets:* Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
- *Highly Concentrated Markets:* Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.

The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration. The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies' potential competitive concerns and the greater is the likelihood that the Agencies will request additional information to conduct their analysis.

---

[10] For example, the merger of firms with shares of five percent and ten percent of the market would increase the HHI by 100 ($5 \times 10 \times 2 = 100$).

6. Unilateral Effects

The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition. Such unilateral effects are most apparent in a merger to monopoly in a relevant market, but are by no means limited to that case. Whether cognizable efficiencies resulting from the merger are likely to reduce or reverse adverse unilateral effects is addressed in Section 10.

Several common types of unilateral effects are discussed in this section. Section 6.1 discusses unilateral price effects in markets with differentiated products. Section 6.2 discusses unilateral effects in markets where sellers negotiate with buyers or prices are determined through auctions. Section 6.3 discusses unilateral effects relating to reductions in output or capacity in markets for relatively homogeneous products. Section 6.4 discusses unilateral effects arising from diminished innovation or reduced product variety. These effects do not exhaust the types of possible unilateral effects; for example, exclusionary unilateral effects also can arise.

A merger may result in different unilateral effects along different dimensions of competition. For example, a merger may increase prices in the short term but not raise longer-term concerns about innovation, either because rivals will provide sufficient innovation competition or because the merger will generate cognizable research and development efficiencies. See Section 10.

6.1 Pricing of Differentiated Products

In differentiated product industries, some products can be very close substitutes and compete strongly with each other, while other products are more distant substitutes and compete less strongly. For example, one high-end product may compete much more directly with another high-end product than with any low-end product.

A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.

The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next choice. The Agencies consider any reasonably available and reliable information to evaluate the extent of direct competition between the products sold by the merging firms. This includes documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys. The types of evidence relied on often overlap substantially with the types of evidence of customer substitution relevant to the hypothetical monopolist test. See Section 4.1.1.

Substantial unilateral price elevation post-merger for a product formerly sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view products formerly sold by the other merging firm as their next-best choice. However, unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority. For this purpose, incremental cost is measured over the change in output that would be caused by the price change considered. A merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner.

> *Example 19:* In Example 5, the merged entity controlling Products A and B would raise prices ten percent, given the product offerings and prices of other firms. In that example, one-third of the sales lost by Product A when its price alone is raised are diverted to Product B. Further analysis is required to account for repositioning, entry, and efficiencies.

In some cases, the Agencies may seek to quantify the extent of direct competition between a product sold by one merging firm and a second product sold by the other merging firm by estimating the diversion ratio from the first product to the second product. The diversion ratio is the fraction of unit sales lost by the first product due to an increase in its price that would be diverted to the second product. Diversion ratios between products sold by one merging firm and products sold by the other merging firm can be very informative for assessing unilateral price effects, with higher diversion ratios indicating a greater likelihood of such effects. Diversion ratios between products sold by merging firms and those sold by non-merging firms have at most secondary predictive value.

Adverse unilateral price effects can arise when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm and thereby divert sales to products previously sold by the other merging firm, boosting the profits on the latter products. Taking as given other prices and product offerings, that boost to profits is equal to the value to the merged firm of the sales diverted to those products. The value of sales diverted to a product is equal to the number of units diverted to that product multiplied by the margin between price and incremental cost on that product. In some cases, where sufficient information is available, the Agencies assess the value of diverted sales, which can serve as an indicator of the upward pricing pressure on the first product resulting from the merger. Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration. The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products. If the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.[11]

Where sufficient data are available, the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger. These models often include independent price responses by non-merging firms. They also can incorporate merger-specific efficiencies. These merger simulation methods need not rely on market definition. The Agencies do not treat merger simulation evidence as conclusive in itself, and they place more weight on whether their merger simulations consistently predict substantial price increases than on the precise prediction of any single simulation.

---

[11] For this purpose, the value of diverted sales is measured in proportion to the lost revenues attributable to the reduction in unit sales resulting from the price increase. Those lost revenues equal the reduction in the number of units sold of that product multiplied by that product's price.

A merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes for the products offered by the merging firms. In some cases, non-merging firms may be able to reposition their products to offer close substitutes for the products offered by the merging firms. Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency. See Section 9. The Agencies consider whether repositioning would be sufficient to deter or counteract what otherwise would be significant anticompetitive unilateral effects from a differentiated products merger.

6.2 Bargaining and Auctions

In many industries, especially those involving intermediate goods and services, buyers and sellers negotiate to determine prices and other terms of trade. In that process, buyers commonly negotiate with more than one seller, and may play sellers off against one another. Some highly structured forms of such competition are known as auctions. Negotiations often combine aspects of an auction with aspects of one-on-one negotiation, although pure auctions are sometimes used in government procurement and elsewhere.

A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger. The Agencies analyze unilateral effects of this type using similar approaches to those described in Section 6.1.

Anticompetitive unilateral effects in these settings are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business. These effects also are likely to be greater, the greater advantage the runner-up merging firm has over other suppliers in meeting customers' needs. These effects also tend to be greater, the more profitable were the pre-merger winning bids. All of these factors are likely to be small if there are many equally placed bidders.

The mechanisms of these anticompetitive unilateral effects, and the indicia of their likelihood, differ somewhat according to the bargaining practices used, the auction format, and the sellers' information about one another's costs and about buyers' preferences. For example, when the merging sellers are likely to know which buyers they are best and second best placed to serve, any anticompetitive unilateral effects are apt to be targeted at those buyers; when sellers are less well informed, such effects are more apt to be spread over a broader class of buyers.

6.3 Capacity and Output for Homogeneous Products

In markets involving relatively undifferentiated products, the Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price. A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another so as to raise the price in the former market. The competitive analyses of these alternative modes of output suppression may differ.

A unilateral output suppression strategy is more likely to be profitable when (1) the merged firm's market share is relatively high; (2) the share of the merged firm's output already committed for sale at prices unaffected by the output suppression is relatively low; (3) the margin on the suppressed output is relatively low; (4) the supply responses of rivals are relatively small; and (5) the market elasticity of demand is relatively low.

A merger may provide the merged firm a larger base of sales on which to benefit from the resulting price rise, or it may eliminate a competitor that otherwise could have expanded its output in response to the price rise.

> *Example 20:* Firms A and B both produce an industrial commodity and propose to merge. The demand for this commodity is insensitive to price. Firm A is the market leader. Firm B produces substantial output, but its operating margins are low because it operates high-cost plants. The other suppliers are operating very near capacity. The merged firm has an incentive to reduce output at the high-cost plants, perhaps shutting down some of that capacity, thus driving up the price it receives on the remainder of its output. The merger harms customers, notwithstanding that the merged firm shifts some output from high-cost plants to low-cost plants.

In some cases, a merger between a firm with a substantial share of the sales in the market and a firm with significant excess capacity to serve that market can make an output suppression strategy profitable.[12] This can occur even if the firm with the excess capacity has a relatively small share of sales, if that firm's ability to expand, and thus keep price from rising, has been making an output suppression strategy unprofitable for the firm with the larger market share.

6.4 Innovation and Product Variety

Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.

The first of these effects is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm. The second, longer-run effect is most likely to occur if at least one of the merging firms has capabilities that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm. The Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction.

The Agencies evaluate the extent to which successful innovation by one merging firm is likely to take sales from the other, and the extent to which post-merger incentives for future innovation will be lower than those that would prevail in the absence of the merger. The Agencies also consider whether the merger is likely to enable innovation that would not otherwise take place, by bringing together

12 Such a merger also can cause adverse coordinated effects, especially if the acquired firm with excess capacity was disrupting effective coordination.

complementary capabilities that cannot be otherwise combined or for some other merger-specific reason. See Section 10.

The Agencies also consider whether a merger is likely to give the merged firm an incentive to cease offering one of the relevant products sold by the merging parties. Reductions in variety following a merger may or may not be anticompetitive. Mergers can lead to the efficient consolidation of products when variety offers little in value to customers. In other cases, a merger may increase variety by encouraging the merged firm to reposition its products to be more differentiated from one another.

If the merged firm would withdraw a product that a significant number of customers strongly prefer to those products that would remain available, this can constitute a harm to customers over and above any effects on the price or quality of any given product. If there is evidence of such an effect, the Agencies may inquire whether the reduction in variety is largely due to a loss of competitive incentives attributable to the merger. An anticompetitive incentive to eliminate a product as a result of the merger is greater and more likely, the larger is the share of profits from that product coming at the expense of profits from products sold by the merger partner. Where a merger substantially reduces competition by bringing two close substitute products under common ownership, and one of those products is eliminated, the merger will often also lead to a price increase on the remaining product, but that is not a necessary condition for anticompetitive effect.

> *Example 21:* Firm A sells a high-end product at a premium price. Firm B sells a mid-range product at a lower price, serving customers who are more price sensitive. Several other firms have low-end products. Firms A and B together have a large share of the relevant market. Firm A proposes to acquire Firm B and discontinue Firm B's product. Firm A expects to retain most of Firm B's customers. Firm A may not find it profitable to raise the price of its high-end product after the merger, because doing so would reduce its ability to retain Firm B's more price-sensitive customers. The Agencies may conclude that the withdrawal of Firm B's product results from a loss of competition and materially harms customers.

7. Coordinated Effects

A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm's incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.

Coordinated interaction includes a range of conduct. Coordinated interaction can involve the explicit negotiation of a common understanding of how firms will compete or refrain from competing. Such conduct typically would itself violate the antitrust laws. Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction. Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms. Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.

The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals' responses to a price change or other competitive initiative. Under some circumstances, a merger can result in market concentration sufficient to strengthen such responses or enable multiple firms in the market to predict them more confidently, thereby affecting the competitive incentives of multiple firms in the market, not just the merged firm.

7.1 Impact of Merger on Coordinated Interaction

The Agencies examine whether a merger is likely to change the manner in which market participants interact, inducing substantially more coordinated interaction. The Agencies seek to identify how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct. There are, however, numerous forms of coordination, and the risk that a merger will induce adverse coordinated effects may not be susceptible to quantification or detailed proof. Therefore, the Agencies evaluate the risk of coordinated effects using measures of market concentration (see Section 5) in conjunction with an assessment of whether a market is vulnerable to coordinated conduct. See Section 7.2. The analysis in Section 7.2 applies to moderately and highly concentrated markets, as unconcentrated markets are unlikely to be vulnerable to coordinated conduct.

Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place. The Agencies are likely to challenge a merger if the following three conditions are all met: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct (see Section 7.2); and (3) the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. An acquisition eliminating a maverick firm (see Section 2.1.5) in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects.

7.2 Evidence a Market is Vulnerable to Coordinated Conduct

The Agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have since changed significantly. Previous express collusion in another geographic market will have the same weight if the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market. Failed previous attempts at collusion in the relevant market suggest that successful collusion was difficult pre-merger but not so difficult as to deter attempts, and a merger may tend to make success more likely. Previous collusion or attempted collusion in another product market may also be given substantial weight if the salient characteristics of that other market at the time of the collusion are closely comparable to those in the relevant market.

A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals. This is more likely to be the case if the terms offered to customers are relatively transparent. Price transparency can be greater for relatively homogeneous products. Even if terms of dealing are not transparent, transparency regarding the identities of the firms serving particular customers can give rise to coordination, e.g., through customer or territorial allocation. Regular monitoring by suppliers of one another's prices or customers can indicate that the terms offered to customers are relatively transparent.

A market typically is more vulnerable to coordinated conduct if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by likely responses of those rivals. This is more likely to be the case, the stronger and faster are the responses the firm anticipates from its rivals. The firm is more likely to anticipate strong responses if there are few significant competitors, if products in the relevant market are relatively homogeneous, if customers find it relatively easy to switch between suppliers, or if suppliers use meeting-competition clauses.

A firm is more likely to be deterred from making competitive initiatives by whatever responses occur if sales are small and frequent rather than via occasional large and long-term contracts or if relatively few customers will switch to it before rivals are able to respond. A firm is less likely to be deterred by whatever responses occur if the firm has little stake in the status quo. For example, a firm with a small market share that can quickly and dramatically expand, constrained neither by limits on production nor by customer reluctance to switch providers or to entrust business to a historically small provider, is unlikely to be deterred. Firms are also less likely to be deterred by whatever responses occur if competition in the relevant market is marked by leapfrogging technological innovation, so that responses by competitors leave the gains from successful innovation largely intact.

A market is more apt to be vulnerable to coordinated conduct if the firm initiating a price increase will lose relatively few customers after rivals respond to the increase. Similarly, a market is more apt to be vulnerable to coordinated conduct if a firm that first offers a lower price or improved product to customers will retain relatively few customers thus attracted away from its rivals after those rivals respond.

The Agencies regard coordinated interaction as more likely, the more the participants stand to gain from successful coordination. Coordination generally is more profitable, the lower is the market elasticity of demand.

Coordinated conduct can harm customers even if not all firms in the relevant market engage in the coordination, but significant harm normally is likely only if a substantial part of the market is subject to such conduct. The prospect of harm depends on the collective market power, in the relevant market, of firms whose incentives to compete are substantially weakened by coordinated conduct. This collective market power is greater, the lower is the market elasticity of demand. This collective market power is diminished by the presence of other market participants with small market shares and little stake in the outcome resulting from the coordinated conduct, if these firms can rapidly expand their sales in the relevant market.

Buyer characteristics and the nature of the procurement process can affect coordination. For example, sellers may have the incentive to bid aggressively for a large contract even if they expect strong responses by rivals. This is especially the case for sellers with small market shares, if they can realistically win such large contracts. In some cases, a large buyer may be able to strategically undermine coordinated conduct, at least as it pertains to that buyer's needs, by choosing to put up for bid a few large contracts rather than many smaller ones, and by making its procurement decisions opaque to suppliers.

8. Powerful Buyers

Powerful buyers are often able to negotiate favorable terms with their suppliers. Such terms may reflect the lower costs of serving these buyers, but they also can reflect price discrimination in their favor.

The Agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices. This can occur, for example, if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry, or if the conduct or presence of large buyers undermines coordinated effects. However, the Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger. Even buyers that can negotiate favorable terms may be harmed by an increase in market power. The Agencies examine the choices available to powerful buyers and how those choices likely would change due to the merger. Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer.

> *Example 22:* Customer C has been able to negotiate lower pre-merger prices than other customers by threatening to shift its large volume of purchases from one merging firm to the other. No other suppliers are as well placed to meet Customer C's needs for volume and reliability. The merger is likely to harm Customer C. In this situation, the Agencies could identify a price discrimination market consisting of Customer C and similarly placed customers. The merger threatens to end previous price discrimination in their favor.

Furthermore, even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers.

> *Example 23:* In Example 22, if Customer C instead obtained the lower pre-merger prices based on a credible threat to supply its own needs, or to sponsor new entry, Customer C might not be harmed. However, even in this case, other customers may still be harmed.

9. Entry

The analysis of competitive effects in Sections 6 and 7 focuses on current participants in the relevant market. That analysis may also include some forms of entry. Firms that would rapidly and easily enter the market in response to a SSNIP are market participants and may be assigned market shares. See Sections 5.1 and 5.2. Firms that have, prior to the merger, committed to entering the market also will normally be treated as market participants. See Section 5.1. This section concerns entry or adjustments to pre-existing entry plans that are induced by the merger.

As part of their full assessment of competitive effects, the Agencies consider entry into the relevant market. The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.

The Agencies consider the actual history of entry into the relevant market and give substantial weight to this evidence. Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult. Market values of incumbent firms greatly exceeding the replacement costs of their tangible assets may indicate that these firms have valuable intangible assets, which may be difficult or time consuming for an entrant to replicate.

A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger. Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.

The Agencies examine the timeliness, likelihood, and sufficiency of the entry efforts an entrant might practically employ. An entry effort is defined by the actions the firm must undertake to produce and sell in the market. Various elements of the entry effort will be considered. These elements can include: planning, design, and management; permitting, licensing, or other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements. Recent examples of entry, whether successful or unsuccessful, generally provide the starting point for identifying the elements of practical entry efforts. They also can be informative regarding the scale necessary for an entrant to be successful, the presence or absence of entry barriers, the factors that influence the timing of entry, the costs and risk associated with entry, and the sales opportunities realistically available to entrants.

If the assets necessary for an effective and profitable entry effort are widely available, the Agencies will not necessarily attempt to identify which firms might enter. Where an identifiable set of firms appears to have necessary assets that others lack, or to have particularly strong incentives to enter, the Agencies focus their entry analysis on those firms. Firms operating in adjacent or complementary markets, or large customers themselves, may be best placed to enter. However, the Agencies will not presume that a powerful firm in an adjacent market or a large customer will enter the relevant market unless there is reliable evidence supporting that conclusion.

In assessing whether entry will be timely, likely, and sufficient, the Agencies recognize that precise and detailed information may be difficult or impossible to obtain. The Agencies consider reasonably available and reliable evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency.

9.1 Timeliness

In order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those effects and thus leading to entry, even though those actions would be profitable until entry takes effect.

Even if the prospect of entry does not deter the competitive effects of concern, post-merger entry may counteract them. This requires that the impact of entrants in the relevant market be rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry.

The Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices.

9.2 Likelihood

Entry is likely if it would be profitable, accounting for the assets, capabilities, and capital needed and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits. Profitability depends upon (a) the output level the entrant is likely to obtain, accounting for the obstacles facing new entrants; (b) the price the entrant would likely obtain in the post-merger market, accounting for the impact of that entry itself on prices; and (c) the cost per unit the entrant would likely incur, which may depend upon the scale at which the entrant would operate.

9.3 Sufficiency

Even where timely and likely, entry may not be sufficient to deter or counteract the competitive effects of concern. For example, in a differentiated product industry, entry may be insufficient because the products offered by entrants are not close enough substitutes to the products offered by the merged firm to render a price increase by the merged firm unprofitable. Entry may also be insufficient due to constraints that limit entrants' competitive effectiveness, such as limitations on the capabilities of the firms best placed to enter or reputational barriers to rapid expansion by new entrants. Entry by a single firm that will replicate at least the scale and strength of one of the merging firms is sufficient. Entry by one or more firms operating at a smaller scale may be sufficient if such firms are not at a significant competitive disadvantage.

10. Efficiencies

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets. In a unilateral effects context, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price. Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price. In a coordinated effects context, incremental cost reductions may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm. Even when efficiencies generated through a merger enhance a firm's ability to compete, however, a merger may have other effects that may lessen competition and make the merger anticompetitive.

The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies.[13] Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination. The Agencies do not insist upon a less restrictive alternative that is merely theoretical.

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.

Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process. By contrast, efficiency claims substantiated by analogous past experience are those most likely to be credited.

Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.[14] To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market, e.g., by preventing price

---

13 The Agencies will not deem efficiencies to be merger-specific if they could be attained by practical alternatives that mitigate competitive concerns, such as divestiture or licensing. If a merger affects not whether but only when an efficiency would be achieved, only the timing advantage is a merger-specific efficiency.

14 The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small so the merger is likely to benefit customers overall.

increases in that market.[15] In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers.

In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly. Just as adverse competitive effects can arise along multiple dimensions of conduct, such as pricing and new product development, so too can efficiencies operate along multiple dimensions. Similarly, purported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value.

The Agencies have found that certain types of efficiencies are more likely to be cognizable and substantial than others. For example, efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the incremental cost of production, are more likely to be susceptible to verification and are less likely to result from anticompetitive reductions in output. Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions. Yet others, such as those relating to procurement, management, or capital cost, are less likely to be merger-specific or substantial, or may not be cognizable for other reasons.

When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation. Research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify or result from anticompetitive reductions in innovative activities.

---

[15] The Agencies normally give the most weight to the results of this analysis over the short term. The Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market. Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict. Efficiencies relating to costs that are fixed in the short term are unlikely to benefit customers in the short term, but can benefit customers in the longer run, e.g., if they make new product introduction less expensive.

11. Failure and Exiting Assets

Notwithstanding the analysis above, a merger is not likely to enhance market power if imminent failure, as defined below, of one of the merging firms would cause the assets of that firm to exit the relevant market. This is an extreme instance of the more general circumstance in which the competitive significance of one of the merging firms is declining: the projected market share and significance of the exiting firm is zero. If the relevant assets would otherwise exit the market, customers are not worse off after the merger than they would have been had the merger been enjoined.

The Agencies do not normally credit claims that the assets of the failing firm would exit the relevant market unless all of the following circumstances are met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.[16]

Similarly, a merger is unlikely to cause competitive harm if the risks to competition arise from the acquisition of a failing division. The Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless both of the following conditions are met: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill;[17] and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition.

12. Mergers of Competing Buyers

Mergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling side of the market. Buyer market power is sometimes called "monopsony power."

To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market. In defining relevant markets, the Agencies

---

16 Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Liquidation value is the highest value the assets could command for use outside the relevant market.

17 Because the parent firm can allocate costs, revenues, and intra-company transactions among itself and its subsidiaries and divisions, the Agencies require evidence on these two points that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

focus on the alternatives available to sellers in the face of a decrease in the price paid by a hypothetical monopsonist.

Market power on the buying side of the market is not a significant concern if suppliers have numerous attractive outlets for their goods or services. However, when that is not the case, the Agencies may conclude that the merger of competing buyers is likely to lessen competition in a manner harmful to sellers.

The Agencies distinguish between effects on sellers arising from a lessening of competition and effects arising in other ways. A merger that does not enhance market power on the buying side of the market can nevertheless lead to a reduction in prices paid by the merged firm, for example, by reducing transactions costs or allowing the merged firm to take advantage of volume-based discounts. Reduction in prices paid by the merging firms not arising from the enhancement of market power can be significant in the evaluation of efficiencies from a merger, as discussed in Section 10.

The Agencies do not view a short-run reduction in the quantity purchased as the only, or best, indicator of whether a merger enhances buyer market power. Nor do the Agencies evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell.

> *Example 24:* Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output.

13. Partial Acquisitions

In most horizontal mergers, two competitors come under common ownership and control, completely and permanently eliminating competition between them. This elimination of competition is a basic element of merger analysis. However, the statutory provisions referenced in Section 1 also apply to one firm's partial acquisition of a competitor. The Agencies therefore also review acquisitions of minority positions involving competing firms, even if such minority positions do not necessarily or completely eliminate competition between the parties to the transaction.

When the Agencies determine that a partial acquisition results in effective control of the target firm, or involves substantially all of the relevant assets of the target firm, they analyze the transaction much as they do a merger. Partial acquisitions that do not result in effective control may nevertheless present significant competitive concerns and may require a somewhat distinct analysis from that applied to full mergers or to acquisitions involving effective control. The details of the post-acquisition relationship between the parties, and how those details are likely to affect competition, can be important. While the Agencies will consider any way in which a partial acquisition may affect competition, they generally focus on three principal effects.

First, a partial acquisition can lessen competition by giving the acquiring firm the ability to influence the competitive conduct of the target firm. A voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, can permit such influence. Such influence can lessen competition because the acquiring firm can use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm.

Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete. Acquiring a minority position in a rival might significantly blunt the incentive of the acquiring firm to compete aggressively because it shares in the losses thereby inflicted on that rival. This reduction in the incentive of the acquiring firm to compete arises even if cannot influence the conduct of the target firm. As compared with the unilateral competitive effect of a full merger, this effect is likely attenuated by the fact that the ownership is only partial.

Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can lead to adverse unilateral or coordinated effects. For example, it can enhance the ability of the two firms to coordinate their behavior, and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the acquiring firm to the target firm.

Partial acquisitions, like mergers, vary greatly in their potential for anticompetitive effects. Accordingly, the specific facts of each case must be examined to assess the likelihood of harm to competition. While partial acquisitions usually do not enable many of the types of efficiencies associated with mergers, the Agencies consider whether a partial acquisition is likely to create cognizable efficiencies.

STATEMENT OF CHAIRMAN LEIBOWITZ ON THE RELEASE OF THE 2010 HORIZONTAL MERGER GUIDELINES
Project No. P092900
August 19, 2010

The process for modifying the Horizontal Merger Guidelines has concluded more successfully than I could have predicted at the outset. The result is a clear and systematic description of the techniques the FTC and the Antitrust Division of the Department of Justice use to review mergers, and a document that has received bi-partisan and unanimous support from the Commission. Because of the hard work of all involved at both agencies, private parties and judges will be better equipped to understand how the agencies evaluate deals. That improvement in clarity and predictability will benefit everyone.

In revising the Guidelines, the Commission jointly with the Antitrust Division solicited public comments on a number of questions, and held a series of public workshops around the country. Fifty-one parties filed comments in response to those questions, and the agencies incorporated the input they received through those responses and workshops into the draft of the Guidelines that the Commission put out for public comment in April. The Commission received 31 public comments on that draft from a wide variety of sources, including lawyers, economists, corporations, trade associations, and public interest groups. Those comments played a critical role in staff's compilation of the final Guidelines we release today.

The Guidelines have been improved through this process in ways – large and small – that are too numerous to mention. But several major advances stand out: first, the Guidelines emphasize the competitive effects of a deal over the more rigid, formulaic approach imposed by some interpretations of the 1992 Guidelines. Second, for the first time the Guidelines provide a clear description, and many examples, of the range of evidence the agencies consider when evaluating the competitive effects of a transaction. Third, the Guidelines explain in more detail the role of market-concentration measures and revise the concentration thresholds from which the agencies will draw inferences about the likely effects of a merger on market power. Finally, the new Guidelines contain revised discussions of several factors that may be important in analyzing a merger, among them innovation and product variety, coordinated effects, price discrimination, and market entry.

With these and other changes, the new Guidelines provide a clearer and more accurate explanation to merging parties, courts, and antitrust practitioners of how the agencies review transactions. We thank everyone who participated in this process.

STATEMENT OF COMMISSIONER J. THOMAS ROSCH ON
THE RELEASE OF THE 2010 HORIZONTAL MERGER GUIDELINES

Project No. P092900

August 19, 2010

It would be wrong not to acknowledge that this project makes at least one monumental contribution to the guidance that the Agencies are providing to the business community, practitioners, and the courts. The 1992 Guidelines treated evidence of competitive effects as relevant to merger analysis. However, those Guidelines considered market structure and shares first and considered the competitive effects of a merger only after that. That created the misimpression that proof of market structure and shares are "gating items," without which competitive effects cannot be considered. These Guidelines properly consider competitive effects first, and market definition second, thereby making clear that while market definition is important to assessing competitive effects and that the market must be defined at some point in the process, ultimately merger analysis must rest on the competitive effects of a transaction. Additionally, these Guidelines make a substantial contribution by listing at the outset a variety of empirical evidence that may illuminate those competitive effects.

At the same time, it would be wrong not to acknowledge that these Guidelines are still flawed both as a description of how the staff (at the Commission at least) conducts ex ante merger review and what the Agencies should tell courts about merger analysis. Things have changed substantially since the 1992 Guidelines were issued twenty years ago. *First*, the Commission is increasingly challenging mergers in preliminary injunction and administrative (Part 3) proceedings. *See* Federal Trade Commission, The FTC in 2010, at 2 (Apr. 2010) (identifying merger enforcement rates); Federal Trade Commission & U.S. Department of Justice, Hart-Scott-Rodino Annual Report Fiscal Year 2008, at Appendix A (identifying the number of reported transactions and second requests issued). Thus, the staff's ex ante merger reviews are and must be tethered to the evidence that it plans to present and defend in those litigation proceedings. *Second*, economic theories embedded in the 1992 Guidelines emphasized price effects almost exclusively. Increasingly, the Agencies and courts have considered non-price effects, like effects on quality, variety, and innovation, to be no less important. *Third*, for a variety of reasons, many, if not most, courts have relied on empirical evidence instead of economic evidence, and have considered economic evidence as corroborative of that empirical evidence, if they have considered it at all. *See, e.g.*, *FTC v. Staples, Inc*., 970 F. Supp. 1066 (D.D.C. 1997); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009). As previously discussed, that in turn has led the staff reviewing mergers ex ante to devote more attention to the empirical evidence that can be presented and defended at trial.

The process used in this project virtually ensured that the Merger Guidelines resulting from it would not fully reflect these substantial changes. I had hoped that this would be an instance in which the Commission would lead, not be led by, the staff. Lamentably, that did not happen.

More specifically, the perspectives of all stakeholders were not considered equally. First, of the six architects of the project, three were economists trained and steeped in price theory. To be sure, some of the Commission attorneys responsible for reviewing mergers ex ante and/or explaining to the Commission how they planned to present and defend their challenges in court or in Part 3 were consulted in connection with the project. But the three economists initiated and largely managed this project. Second, there was indeed a series of workshops held around the country, and a number of comments were submitted respecting these Guidelines. But the participants in the workshops were mostly members of the defense bar, academics, and other kindred souls, and the comments apparently given the most serious attention by the project's architects (and incorporated in these Guidelines) largely reflected those same perspectives. Third, long before these Guidelines were finalized, representations were made to the ABA Antitrust Section about the changes in the 1992 Guidelines that were likely to occur. Indeed at least one private meeting was held with the Section's leadership regarding their desire for changes in the April 2010 draft of the Guidelines.

This process inevitably led to overemphasis on economic formulae and models based on price theory. For example, Sections 4.1.1 and 4.1.2 retain the SSNIP test, an economic test which posits that a small but significant profitable price increase over "benchmark prices" may be used to define a relevant market's structure. Section 5.3 builds on the markets defined by the SSNIP test and provides what amount to "safe harbors" for mergers that result in certain levels of market concentration.

The architects of the project included colleagues who co-authored papers and articles proposing economic models relying largely on margins (prices minus incremental costs) to determine whether a merger was likely to result in coordinated or unilateral anticompetitive effects. As a result, many of the economic theories in the revised Guidelines are based wholly or partially on margins. For example, the April 20, 2010 draft of Section of 2.2.1 treated margins as a species of empirical evidence and asserted that "if a firm sets price well above marginal cost, that normally indicates either that the firm is coordinating with its rivals or that the firm believes its customers are not highly sensitive to price." The final version adds that in the absence of coordinated behavior, the presence of high margins is "not in itself of antitrust concern." But that should fool no one: that a sinister inference is intended to be drawn from this provision is unmistakable not only because the prior version omitted any benign explanation for high margins, but because the alternative—i.e., the existence of coordinated interaction—is unambiguously pernicious. To be sure, footnotes 3 and 6 acknowledge that "high margins are not in themselves of antitrust concern" and identify several benign factors explaining why margins may be high. However, the acknowledgement is contained only in footnotes, and the benign factors noted are nowhere mentioned in the text. If there were any doubt about the inferences to be drawn from high margins, those doubts are dispelled by Section 4.1.3, which opines that "[u]nless the firms are engaging in coordinated interaction . . ., high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price."

Section 4.1.3 goes on to discuss the role of margins in a critical loss analysis, saying that "[h]igher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture percentage necessary for the candidate market to satisfy the hypothetical monopolist test." Indeed, both Section 4.1.3, blessing for the first time the use of critical loss analysis in dealing with market definition, and Section 6.1, dealing with the likelihood of unilateral effects in differentiated product mergers, incorporate the concepts, if not the exact models, that two of the architects of the project have proposed in economic papers and articles in order to determine whether such effects were likely.

In contrast to heavy reliance on prices and margins (as described above, which are based in large measure on prices), the new Guidelines say comparatively little about non-price competitive effects, such as how a transaction affects quality, service, innovation, and product variety. To be sure, the Guidelines note in the introduction that "[e]nhanced market power can also be manifested in non-price terms and conditions" and contain a new section on innovation and product variety (Section 6.4). However, this same section asserts that "[m]any reductions in variety following a merger are not anticompetitive" and that "[m]ergers can lead to the efficient consolidation of products." (This observation, it should be emphasized, applies to factors other than reductions in variety. For example, economies of scale can be an efficiency in some contexts but a barrier to entry in others.) These additions are significant improvements over the 1992 Guidelines, but their comparative brevity (and their ambivalence respecting a merger's effect on variety) leaves the misimpression that non-price factors are far less significant than price factors to the Commission.

In addition, the Guidelines fail to offer a clear framework for analyzing non-price considerations. First, Section 4 mentions that non-price considerations can be incorporated into the SSNIP test but does not explain what a "small but significant" change in quality or service is. Second, the Guidelines do not offer any details as to how to evaluate a merger's effect on product quality or service, saying only that the agencies "employ an approach analogous to that used to evaluate price competition." (Section 1.) Third, the test for analyzing the loss of product variety raises more questions than answers. For example, how are the agencies to determine whether a reduction of variety is due to "a loss of competitive incentives attributable to the merger"? (Section 6.4.) Fourth, the Guidelines do not address some of the key issues involving innovation market analysis. For example, how should enforcers resolve cases when the predicted price effects of a merger suggest one enforcement outcome but the innovation effects suggest a different outcome? What role, if any, do entry and repositioning play in the analysis? How does one determine a diversion ratio for products that have not been invented? Are innovation concerns limited to unilateral effects, as suggested by the Guidelines, or can innovation concerns result from coordinated behavior? These deficiencies are illustrative and not exhaustive.

This process cannot be justified on the ground that the Guidelines are supposed to be transparent—i.e., to reflect the way that ex ante merger review is conducted. These Guidelines do not describe the way that the Bureau of Competition and enforcement staff at the Commission proceed today. They also do not reflect the way that the courts proceed. Time and again, appellate courts have rejected "high" prices as a basis for inferring market or monopoly power. *See, e.g.*, *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1411-12 (7th Cir. 1995) (Posner, J.); *United States v. Eastman Kodak Co.*, 63 F.3d 95, 107-09 (2d Cir. 1995); *Harrison Aire, Inc. v. Aerostar Int'l Inc.*, 423 F.3d 374, 381 (3d Cir. 2005). The district courts have likewise eschewed reliance on economic models based on margins for a variety of reasons, including their complexity (*see Staples*, 970 F. Supp. 1066; *CCC*, 605 F. Supp. 2d 26; *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004)), because margins are dependent on exogenous factors (*see Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408, 428 (D.

Del. 2006)), or because the use of such economic simulation models, in the absence of substantial, verified efficiencies, will almost always predict that a transaction will have price effects (*see CCC*, 605 F. Supp. at 68-72). To the contrary, economic theories based on prices and margins are considered to be just that—theories. Although they may be considered in order to corroborate the inferences drawn from the empirical evidence, they are not substitutes for that evidence.

The antitrust defense bar and its clients do not need safe harbors. That bar (including the many who are members of the Antitrust Section) are among the best and brightest lawyers in the world. What that bar and their clients deserve is what these Guidelines promise at the outset—namely, that they will be a complete and accurate description of what our enforcement staff considers in merger investigations and that they will be a helpful guide to courts. These Guidelines are neither. Notwithstanding these flaws, however, I concur with issuance of these Guidelines. The significant advancements described at the outset warrant and deserve the Commission's support.

August 2010

The 2010 DOJ and FTC Horizontal Merger Guidelines: Increasing Realism While Reducing Predictability

On August 19, 2010, the DOJ and FTC released a comprehensive revision of the horizontal merger guidelines that had been issued almost two decades ago.[1] An overhaul was in order, since the agencies have not followed the prior guidelines for years. The revised Guidelines better reflect current agency thinking, including a greater range of potentially actionable transactions and greater roles for analytical flexibility and agency judgment in assessing transactions. The more aggressive and flexible tone of the revised Guidelines is likely intended to help the agencies in litigation, where some courts have criticized the agencies for departing from the more structured approach of the prior guidelines. However, since the agencies have been operating internally under the new models for some time, we expect no major change going forward in merger enforcement decision making.

The context

In principle, merger guidelines describe the approach the agencies use in analyzing mergers and acquisitions for the benefit of the agency staff, who must make enforcement recommendations to senior management, as well as the business community and the bar, who must consider how the antitrust agencies are likely to react to potential transactions. Guidelines also serve to educate the courts about the analytics the agencies use in evaluating transactions, presumably with the hope that the courts will defer to the agencies' expertise and gravitate to the same approach.

Beginning in the 1960s and continuing today, courts have held that a horizontal merger is presumptively unlawful if the transaction produces a combined firm with an "undue" market share in a sufficiently concentrated market. But the early standards for defining markets—which determine both market shares and market concentration—were nebulous at best. Without a meaningful standard, courts tended to defer to the government agencies, resulting in Justice Potter Stewart's famous observation "that the sole consistency that I can find [in antitrust merger litigation] is that the government always wins."

In 1982, the DOJ issued merger guidelines that, among other things, rejected limiting market concentration as the objective of merger antitrust law in favor of preventing mergers that create or facilitate the exercise of market power to the harm of

1 The revised guidelines may be found at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

consumers. Using this consumer welfare standard, the 1982 Guidelines provided a rigorous analytical approach to defining relevant antitrust markets and raised the thresholds of market share and concentration necessary to invoke a presumption of likely anticompetitive effect. The 1982 Guidelines, which many mark as a milestone of modern antitrust law, were intentionally rigid and formulaic, precisely because they were designed to eliminate fuzziness and unpredictability in merger antitrust analysis. The 1982 Guidelines also focused almost exclusively on the price effects of transactions, because the economic theory of price effects was reasonably well-developed and accepted, while the theory on nonprice effects—product quality, product choice, and innovation—was far behind in development, acceptance, and predictive value.

The 1992 DOJ/FTC revisions, which introduced the theories of "coordinated interaction" and "unilateral effects" and required that the anticompetitive mechanism of a putatively unlawful transaction strictly fit into one of these theories, retained the basic design, price focus, and programmatic approach of the 1982 Guidelines. Horizontal merger analysis was to follow a strict sequence: market definition, calculation of market shares and market concentration, application of the thresholds of presumptive illegality, fitting of the facts into one of the two theories of anticompetitive harm, and consideration of entry and efficiencies defenses.

The impetus for change

Two developments motivated the 2010 revisions. First, the agencies came to believe that the Guidelines were too inflexible in their approach and if strictly followed would allow some anticompetitive mergers to avoid challenge. Over time, the agencies internally adopted new approaches to merger analysis to the point where many elements of the 1992 Merger Guidelines—including market definition—were largely irrelevant to prosecutorial decision-making.

Second, despite some initial reluctance, courts increasingly accepted the Guidelines approach, especially as to market definition. But some courts rejected agency challenges when they concluded that the agency had departed from the Guidelines, either because the agencies failed to prove an element required by the Guidelines or because the court applied the Guidelines algorithms—especially on market definition—to the facts to reach different conclusions than the agencies.

The changes

The 2010 revisions are designed to conform the Guidelines to the actual practices of the agencies and, although not explicitly acknowledged by the agencies, to provide the agencies with more flexibility in challenging transactions in court without the prospect that the Guidelines will be cited or otherwise used against them. To this end, the 2010 revisions make four major thematic changes and a number of other less significant modifications.

New, flexible approach to analyzing competitive effect

Although the revised Guidelines continue to view the purpose of antitrust merger enforcement as preventing the creation, enhancement, or entrenchment of market power to the harm of consumers, they stress that the agencies need not and do not approach merger analysis in the linear fashion prescribed by the guidelines for the last 28 years. Rather, in addressing the central question of whether consumers will be harmed, the revised Guidelines—consistent with current practice over the last several years—hold that the agencies may use whatever tools and approaches the agencies thinks are appropriate. In other words, the agencies, "guided by their extensive experience," may employ any reliable means of analyzing the competitive effect of a transaction on customers.

The revised Guidelines are explicit that they only illustrate and not exhaust the range of tools and approaches the agencies may use in analyzing a transaction. And even for the approaches they illustrate, they are mostly qualitative rather than quantitative in their explication. For example, the 2010 Guidelines have eliminated several quantitative thresholds that were designed to prevent aggressive enforcement applications, notably the two-year period for evaluating ease of entry and the requirement in an unilateral effects challenge that the merging firms have a combined market share of at least 35 percent. Moreover, while the revised Guidelines offer a large number of helpful illustrative examples, the examples tend to be factually specific and the guidelines give little or no guidance of how much the facts can change before the conclusions also change.

The upshot is that the 2010 Guidelines will be less useful in predicting agency enforcement behavior. A literal reading of the 2010 Guidelines will yield far more actionable transactions than we believe the agencies will choose to challenge. We believe that this is an intentional feature of the revised Guidelines, designed to permit the agencies to exercise more judgment in evaluating the potential competitive effects of a merger without the risk that a party or a court will cite the Guidelines against them when they do bring a challenge. However, because the agencies have already been applying for some time the approaches described in the revisions, experienced practitioners should be able to predict agency decision-making in particular transactions reasonably well.

New emphasis on nonprice dimensions of anticompetitive harm

With a more flexible approach to analyzing anticompetitive effect, the revised Guidelines also place much greater emphasis on harm to customers arising from reduced product quality, reduced product variety, reduced service, or diminished innovation. This is a substantial change to the prior guidelines, which made only a passing reference to nonprice anticompetitive effects.

There is little experience, and almost no jurisprudence, on the relationship between mergers and these nonprice variables, although the agencies have obtained consent decrees, almost all in the pharmaceutical sector, on the basis that the merger will reduce incentives to continue with existing product development efforts. If the agencies elect to challenge mergers based on their predicted nonprice effects, they will be operating in largely uncharted waters. The existing economic theory and legal precedent on the relationship between mergers and nonprice welfare effects remains mostly ad hoc and sensitive to the assumptions of the model. In this context, reduced product variety could be especially problematic for the parties, since in many mergers the combined firm will seek to reduce costs by consolidating two differentiated premerger product offerings into a single postmerger offering.

Our view, however, is that the agencies will not aggressively pursue transactions solely on the basis of nonprice effects. Rather, they are likely to devote attention to potential welfare-reducing nonprice effects in cases that are otherwise actionable because of their price effects. However, when the direct evidence of a consumer welfare-reducing nonprice effect is sufficiently strong, we expect the agencies to challenge the transaction even in the absence of adverse price effect.

Deemphasis of market definition in favor of more direct evidence of competitive effect

For almost 50 years, courts consistently have used market definition, and the resulting market shares and market concentration in the defined market, as the sole means to assess the legality of horizontal transactions under the antitrust laws. Under this approach, horizontal combinations are unlawful when they create a firm with an "undue" market share in a sufficiently concentrated market.

Until now, the DOJ and FTC have accepted this approach and with rare exception tried their merger cases in the courts accordingly. In both their judicial challenges and their merger guidelines, the agencies focused on creating an algorithm to make market definition analytically sound and to specify market share and market concentration thresholds that were more consistent with the economic theory of the day.

The 2010 Guidelines move in a decidedly different direction. The revised Guidelines relegate market definition to just one of a number of tools the agencies may use in assessing competitive effect. In place of market definition, the revised Guidelines place much greater emphasis on more direct evidence of competitive effects. This direct evidence approach, which the agencies have used internally for several years, is consistent with many rule of reason cases under Section 1 of the Sherman Act. To date, however, the agencies have not pressed this approach on the courts, and given the language of the Clayton Act and the multiple Supreme Court precedents that expressly require the courts to locate the threatened anticompetitive effect in a "line of commerce" (product market) and a "section of the country" (geographic market), it is questionable whether the courts will be receptive to the direct evidence approach contained in the Guidelines in the absence of a traditional analysis of market definition, market shares and market concentration.

According to the revised Guidelines, direct evidence of anticompetitive effect may include, among other things, (1) documents or testimony from the merging parties indicating an intention to raise prices or otherwise harm consumers through means enabled by the merger; (2) the financial terms of the transaction, especially when they suggest that the combined firm will have to raise prices or otherwise act anticompetitively to make the transaction profitable to the buyer's owners; (3) information from customers about the extent to which they could protect themselves from an anticompetitive price increase or other harm by the merged firm; (4) "natural experiments" resulting from the historical impact of mergers, entry, expansion, or exit in same or a similar marketplace; (5) indications of substantial head-to-head competition that would be eliminated with the merger; and (6) indications of disruptive or "maverick" conduct of a merging party, which is likely to be eliminated by the merger.

For consummated transactions, the agencies will give "substantial weight" to any actual consumer harm attributable to the transaction. Indeed, the 2010 Guidelines suggest that, in a proper case, nothing more than a price increase may be necessary to support an agency decision to challenge the transaction. By contrast, consistent with the case law, the agency may give only limited weight to the absence of an actual anticompetitive effect in a consummated transaction, especially if there is reason to believe that the combined firm was moderating its conduct in light of the prospect of a postmerger review.

The revised Guidelines recognize that market shares and market concentration also can provide important, although not essential, evidence. When this evidence is used, markets must be defined using the traditional "hypothetical monopolist" test first introduced in the 1982 Guidelines to identify relevant markets in which market power can be exercised. But unlike the prior guidelines, which were designed to arrive at a unique market definition, the 2010 Guidelines appear to recognize essentially any market definition where a hypothetical monopolist could exercise market power. This approach could lead to multiple market definitions existing simultaneously, significantly increasing the agencies' flexibility to define markets and hence bring challenges.

The 2010 Guidelines also increase the market share and market concentration thresholds that trigger a presumption that a transaction may be anticompetitive.[2] We do not consider this change to be of much practical significance. It has been commonly accepted for many years that the thresholds in the prior guidelines were much too low compared to the agencies' actual enforcement decisions. Our view is that the 2010 thresholds will prove to continue to be too low and the agencies will rarely challenge transactions unless they are significantly above the new thresholds, at least in cases that depend on the standard presumption and not direct evidence of anticompetitive effect. Nonetheless, by continuing to set the thresholds at a relatively low level, the agencies will be able to argue in court that most challenged transactions far exceed their guidelines as well as reserve the ability to challenge lower concentration combinations without the Guidelines being cited against them.

---

[2] The Guidelines' thresholds are measured in terms of the postmerger Herfindahl-Hirschman Index (HHI), which is the sum of the squares of the market shares for all of the firms in the relevant market. Under the 2010 Guidelines, mergers that result in an unconcentrated market (HHI less than 1500, which would result from a market containing a little more than six equivalently-sized firms) or mergers that produce a change in the HHI of less than 100 are regarded as unlikely to have adverse competitive effects and ordinarily will require no further analysis. Mergers in moderately concentrated markets (HHI between 1500 and 2500, or between four and six equivalently-sized firms) that produce a change in the HHI of over 100 potentially raise significant competitive concerns. Mergers in highly concentrated markets (HHI over 2500) that produce a change in the HHI of between 100 and 200 potentially raise significant competitive concerns, while those that produce a change in the HHI of over 200 are presumed to be anticompetitive.

Increased emphasis on unilateral effects and on targeted customers

Merger antitrust law has historically been grounded in oligopoly theory, which holds combinations of significant competitors in concentrated markets are anticompetitive because they increase the prospect of collusion across the market. The 1992 Guidelines termed this theory "coordinated interaction" and distinguished it from "unilateral effects," which depends only on the elimination of significant competition between the merging firms and not on any marketwide coordination. Significantly, under the unilateral effects theory, a transaction can eliminate substantial premerger competition between the merging parties and result in an actionable competitive threat even in an unconcentrated market.

Unilateral effects theory quickly became the dominant method employed by the agencies for evaluating horizontal mergers, since it was relatively easy to apply in practice—especially as the agencies gravitated away from the quantitative requirements contained in the prior guidelines and hence did not require the agencies to define markets—and adverse unilateral effects were almost always present in every actionable coordinated effects case anyway. But for the most part the agencies did not seriously press a pure unilateral effects theory on the courts in what might appear otherwise to be relatively unconcentrated markets. Rather, the agencies attempted to define relevant markets narrowly around the products of the merging firms, so that the market shares and market concentration would be sufficiently high to trigger the standard judicial presumption of anticompetitiveness.

Not surprisingly, some courts rejected the prosecuting agency's narrow market definitions as artificial, finding the markets were much broader and concluding that competition in these broader markets was sufficient to ensure that the markets remained competitive postmerger. Other courts rejected the application of the theory of unilateral effects to the facts, finding that the agency had not satisfied some of the requirements in the existing Guidelines.

The 2010 Guidelines seek to elevate the theory of unilateral effects to a level at least on par with coordinated interaction and to make the application of the theory more robust. The reduced role of market definition is a major element in this effort. The 2010 Guidelines also eliminate certain requirements of the prior guidelines—specifically that the merged firm have a combined 35 percent share in the relevant market and that the products of the merging parties be each other's next best substitutes for a large fraction of customers—in order to give the theory more flexibility and reach in application.

The 2010 Guidelines also state that competition between the merging firms may exist for only certain customers and not be marketwide. In many situations, the nature of the product or service being offered will not permit arbitrage or resale in a secondary market, so that different groups of customers may be treated differently. In the extreme, as may occur when sales are individually negotiated, each customer may be treated differently and constitute its own group. The 2010 Guidelines hold that the unilateral effects theory can reach a transaction even if the threatened anticompetitive effect extends to only a targeted group of customers and not to customers in the market as a whole.

While the new qualitative nature of the theory, especially the broadened scope permitted by customer targeting, will give the agencies more flexibility and call for the exercise of more agency judgment, the agencies have been applying this approach for some time. Although a strict reading of the 2010 Guidelines is likely to substantially overpredict enforcement challenges, experienced practitioners should be able to assess with reasonable accuracy when the agencies will actually employ the theory to challenge a transaction in the future.

Raising the bar on entry and repositioning defenses

The case law recognizes several defenses to a presumption of anticompetitive effect in a properly defined market. One of the most important is entry. The idea is that when entry is easy, even if a merger creates a firm with a large combined share in a highly concentrated market, entry will ensure that the market continues to function competitively postmerger.

The agencies, and the prior merger guidelines, always have been demanding in the evidence required to make a valid entry defense. The 2010 Guidelines increase the demands on the parties: while the prior guidelines permitted entry to be evaluated over a period of two years, the revised Guidelines adopt the more ambiguous but presumably more restrictive requirement that entry be "rapid enough" to ensure that no meaningful anticompetitive effect will result from the merger. We believe that under this requirement the agencies will demand that the parties show that sufficient entry is likely to occur in a timeframe considerably shorter than two years in most cases.

Repositioning by nonmerging firms to take advantage of and thereby compete away any attempt by the merged firm to act anticompetitively can also be an important element of a merger defense. In some recent transactions, the agencies have exhibited significant skepticism as an analytical matter to repositioning as a means of ensuring competition. The 2010 Guidelines view repositioning as a supply-side response that should be evaluated much like entry, and we expect the agencies to apply the same demanding standards to repositioning as they are towards entry.

Other areas

The 2010 Guidelines make modifications in other areas, but these are not likely to be as significant to horizontal merger enforcement as the areas just discussed. For example, the revised Guidelines ease the requirements for applying a coordinated interaction theory, but even as reformulated coordinated effects almost surely will continue to take a back seat to unilateral effects as the primary theory motivating agency challenges. Likewise, the 2010 Guidelines make a number of changes to the treatment of efficiencies, including a greater acceptance of fixed cost efficiencies, but maintain the historical agency antipathy toward efficiency defenses. If anything, the revisions are even more demanding on the reliability and quantum of proof necessary to advance an efficiencies defense than the prior guidelines.

The revised Guidelines also cover a number of areas that have been a standard part of horizontal merger review that were not addressed in the prior guidelines. These include the competitive analysis of auction markets, the countervailing influence of powerful buyers, mergers of competing buyers (monopsony), and acquisitions of minority positions involving competing firms (partial acquisitions).

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Kenneth S. Prince
New York, NY
+1.212.848.4139
kprince@shearman.com

Wayne Dale Collins
New York, NY
+1.212.848.4127
wcollins@shearman.com

Beau Buffier
New York, NY
+1.212.848.4843
bbuffier@shearman.com

Edward Schwartz
Washington, D.C.
+1.202.508.8150
edward.schwartz@shearman.com

Heather Kafele
Washington, D.C.
+1.202.508.8097
hkafele@shearman.com

Lisl Dunlop
New York, NY
+1.212.848.8010
ldunlop@shearman.com

Jessica Delbaum
New York, NY
+1.212.848.4815
jdelbaum@shearman.com

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069 | WWW.SHEARMAN.COM

2022 Merger Guidelines Review

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers

Agencies Launch Joint Public Inquiry Aimed at Modernizing Merger Guidelines to Better Detect and Prevent Anticompetitive Deals

January 18, 2022

Tags: Competition | Bureau of Competition

WASHINGTON – Today, the Federal Trade Commission (FTC) and the Justice Department's Antitrust Division launched a joint public inquiry aimed at strengthening enforcement against illegal mergers. Recent evidence indicates that many industries across the economy are becoming more concentrated and less competitive – imperiling choice and economic gains for consumers, workers, entrepreneurs, and small businesses. These problems are likely to persist or worsen due to an ongoing merger surge that has more than doubled merger filings from 2020 to 2021. To address mounting concerns, the agencies are soliciting public input on ways to modernize federal merger guidelines to better detect and prevent illegal, anticompetitive deals in today's modern markets.

"Illegal mergers can inflict a host of harms, from higher prices and lower wages to diminished opportunity, reduced innovation, and less resiliency," said FTC Chair Lina M. Khan. "This inquiry launched by the FTC and DOJ is designed to ensure that our merger guidelines accurately reflect modern market realities and equip us to forcefully enforce the law against unlawful deals. Hearing from a broad set of market participants, especially those who have experienced first-hand the effects of mergers and acquisitions, will be critical to our efforts."

"Our country depends on competition to drive progress, innovation, and prosperity," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "We need to understand why so many industries have too few competitors, and to think carefully about how to ensure our merger enforcement tools are fit for purpose in the modern economy."

Competition is critical to the success of the economy. It ensures that Americans have the freedom to choose among different suppliers and different employers. When businesses face competition, it spurs them to improve their products, develop new ones, and lower prices. Mergers can reduce choices for consumers, workers, and other businesses, leaving them increasingly dependent on larger and more powerful firms that have purchased greater power to dictate the terms of their deals. To protect competition and prevent increased consolidation, Congress passed a series of antitrust laws and authorized the FTC and the Justice Department to enforce them.

The antitrust laws charge the FTC and the Justice Department with preventing mergers that may substantially lessen competition or tend to create a monopoly. Merger guidelines are frameworks for the analysis of mergers under the antitrust laws. The Justice Department first published merger guidelines in 1968, with the goal of providing transparency into the standards it applied in reviewing mergers. Since then, the agencies have published a number of updates, generally specified by whether the transaction is considered horizontal (within the same market) or vertical (within the same supply chain). Although the guidelines identify some of the competitive harms mergers present, markets may fall outside the frameworks under the current approach.

The public inquiry launched today seeks comments on developments in the modern economy and new evidence of mergers' effects on competition to inform potential revisions to the guidelines. The agencies encourage the public, including market participants, government entities, economists, attorneys, academics, unions, employees, farmers, workers, businesses, franchisees, and consumers, to share feedback, evidence, and ideas that may inform revisions to the guidelines. Some of the specific areas of inquiry on which the agencies are seeking public input and information include:

- **Purpose and scope of merger review:** The agencies seek information on whether the guidelines explain and implement the statutory ban on transactions that "may" substantially lessen competition or tend to create a monopoly, and what harms are contemplated by those standards. The agencies further seek input on whether distinctions between horizontal and vertical transactions reflected in the guidelines should be revisited in light of trends in the modern economy.

- **Presumptions that certain transactions are anticompetitive:** The guidelines identify certain market circumstances that justify a presumption of competitive harm based on market concentration. The agencies seek information on whether concentration thresholds should be adjusted to improve the efficiency and effectiveness of enforcement, whether alternative metrics or qualitative factors should also trigger presumptions of competitive harm, and evidence regarding the accuracy of such presumptions.

- **Use of market definition in analyzing competitive effects:** The agencies seek input on potential updates to the guidelines' market definition analysis to better account for non-price competition. They also seek to input on when direct evidence of a transaction's likely competitive effects, such as evidence of head-to-head competition, may eliminate the need for a separate market definition exercise.

- **Threats to potential and nascent competition:** The agencies seek input on potential updates to the guidelines' discussion of potential and nascent competitors, which may be key sources of innovation and competition.

- **Impact of monopsony power, including in labor markets:** The agencies seek input on how to address the issue of buyer power in more detail in the guidelines. Labor markets are a key example of buyer power, and the agencies seek information regarding how the guidelines should analyze labor market effects of mergers.

- **Unique characteristics of digital markets:** The agencies seek information on how to account for key areas of the modern economy like digital markets in the guidelines, which often have characteristics like zero-price products, multi-sided markets, and data aggregation that the current guidelines do not address in detail.

The Request for Information is available at: https://www.regulations.gov/docket/FTC-2022-0003/document.

The comment period is open for 60 days. Comments can be submitted to regulations.gov and must be received no later than Monday, March 21, 2022. The information will be used by the agencies to consider updates and revisions to the guidelines. If such revisions are contemplated in light of the evidence received and the agencies' independent research, the agencies will publish proposed guidelines for public comment.

In a press event, Chair Lina M. Khan gave remarks as did Assistant Attorney General Jonathan Kanter. Commissioners Noah Joshua Phillips and Christine S. Wilson issued a statement.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

Contact Information

Media Contact

Betsy Lordan
Office of Public Affairs
202-326-3707

U.S. Department of Justice
U.S. Federal Trade Commission

January 18, 2022

Request for Information on Merger Enforcement

The Federal Trade Commission and Antitrust Division of the Department of Justice ("the agencies") seek public comment on how the agencies can modernize enforcement of the antitrust laws regarding mergers.[1] The Commission and the department have a long history of developing and publishing frameworks for the analysis of mergers under the antitrust laws.[2] The merger guidelines[3] set forth analytical techniques, practices, and enforcement policy of the agencies, and are under review to ensure that they (1) reflect current learning about competition based on modern market realities,[4] and (2) faithfully track the statutory text, legislative history, and established case law around merger enforcement. A key overriding question is how effectively the current guidance documents capture the competitive issues raised by mergers today and whether these documents adequately equip enforcers to identify and proscribe unlawful, anticompetitive transactions.[5]

---

[1] As used herein, the term "mergers" refers to mergers, acquisitions, joint ventures, and other structural realignments of firms.

[2] Mergers may violate Section 7 of the Clayton Act (as amended by the Celler-Kefauver Antimerger Act of 1950), Sections 1 and 2 of the Sherman Act, and Section 5 of the FTC Act.

[3] As used herein, the term "merger guidelines" refers both to the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. While the agencies work to jointly develop replacement guidance, market participants should be advised that the Federal Trade Commission has already withdrawn the 2020 Vertical Merger Guidelines, and the Department of Justice shares the Commission's substantive concerns with economic and legal errors in them and seeks to replace them expeditiously with a document better reflecting its current approach. *See* Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, Comm'n File No. P810034, at 8-9 (Sep. 15, 2021), https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-commissioner-rohit-chopra-commissioner-rebecca; Press Release, Dep't of Just., Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

[4] The Supreme Court has explained that "careful analysis of market realities" is necessary in antitrust enforcement because "[i]f those market realities change, so may the legal analysis." *NCAA v. Alston*, 141 S.Ct. 2141, 2158 (2021).

[5] The FTC similarly requested information to improve enforcement in pharmaceutical mergers in May 2021, as part of the Multilateral Pharmaceutical Merger Task Force. *See* Press Release, Fed. Trade Comm'n, Multilateral Pharmaceutical Merger Task Force Seeks Public Input (May 11, 2021), https://www ftc.gov/news-events/press-releases/2021/05/multilateral-pharmaceutical-merger-task-force-seeks-public-input. Comments received in response to that request will be considered as well.

In support of this review, the agencies seek new learning related to firm and market behavior and comments on how these advances should inform the guidelines. The agencies are particularly interested in aspects of competition the guidelines may underemphasize or neglect, such as labor market effects and non-price elements of competition like innovation, quality, potential competition, or any "trend toward concentration."[6] Finally, the agencies seek specific examples of mergers that have harmed competition, with descriptions of how the merger harmed competition, including how those mergers made it more difficult for customers, workers, or suppliers to work with the merged firm or competitors of the merged firm or made it more difficult for rivals to compete with the merged firm.

The agencies encourage the public, including market participants, government entities, economists, attorneys, academics, unions, workers, farmers, ranchers, businesses, franchisees, and consumers, to share feedback, evidence, and ideas that will lead to the development of merger enforcement and policy guidance. The agencies invite submissions addressing the following questions:

1. Purpose, Harms, and Scope
    a. Does the analytical framework described in the guidelines properly reflect the text and purpose of the Clayton Act, namely, to prevent mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly"? Are the guidelines sufficiently clear that mergers may be enjoined when there is sufficient risk that they will substantially lessen competition in any relevant downstream or upstream market? Are they sufficiently clear about the circumstances in which mergers may be enjoined because they tend to create a monopoly?
    b. What effects should be covered by the term "lessen competition"?
    c. Do the guidelines sufficiently reflect the Act's concern with mergers that "may" substantially lessen competition?
    d. Do the guidelines reflect any additional competitive concerns reflected in the statute's prohibition against mergers that "may … tend to create a monopoly"? Is this statutory language directed at preventing monopolies in their incipiency such as through serial acquisitions, including rollups? How should the guidelines address a merger that may tend to create a monopoly? How should the guidelines analyze whether there is a "trend toward concentration in the industry,"[7] and what impact should such a trend have on the analysis of an individual transaction?
    e. Do the guidelines sufficiently reflect the observation that assessing the likely effects of a merger "is not the kind of question which is susceptible of a ready and precise answer in most cases"?[8]
    f. Are the guidelines sufficiently "alert to the danger of subverting congressional intent by permitting a too-broad economic investigation"?[9]

[6] *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 316 (1962); *United State v. Baker Hughes*, 908 F.2d 981, 990 (D.C. Cir. 1990), (quoting *United States v. Phil Nat'l Bank*, 374 U.S. 321, 363 (1963)).
[7] *Id*. at 332.
[8] *Phil. Nat'l Bank*, 374 U.S. at 362; *see also United States v. Gen. Dynamics Corp*., 415 U.S. 486, 496-7 (1974).
[9] *Phil. Nat'l Bank*, 374 U.S. at 362.

g. Should the guidelines' traditional distinctions between horizontal and vertical mergers be revisited in light of recent economic trends in the modern economy? What aspects of modern market realities may be lost by focusing on these relationships categorically? Should the guidelines address all mergers in a common framework that covers all market relationships relevant to competition? If so, how?
h. How should the guidelines assess whether a lessening of competition is "substantial"?[10] What factors should be considered in assessing the likelihood and, separately, the magnitude of harms resulting from a merger?
i. Does the guidelines' framework suggest limiting enforcement to a subset of the mergers that are illegal under controlling case law?
j. Should the guidelines include more discussion of applicable case law? What lessons from recent enforcement experience should the agencies consider incorporating in the guidelines?

2. Types and Sources of Evidence
   a. Has the guidelines' framework been interpreted unduly narrowly as focusing primarily on the predicted price outcome of a merger? Are there nonprice effects that are not adequately analyzed by analogy to price effects, and how should the guidelines address such effects? What evidence should the guidelines consider in evaluating these effects?
   b. Has the guidelines' framework made it difficult to identify some mergers that are illegal by focusing on certain types of evidence? For example, should the guidelines make it clearer that the tests for an antitrust market can often be satisfied using direct evidence of likely effects (such as evidence of head-to-head competition between the merging parties) or qualitative evidence about substitution?[11]
   c. Does the guidelines' framework make it difficult to identify some anticompetitive mergers by overemphasizing predictive quantification techniques? What does contemporary economic learning suggest the role of predictive quantification should be in predicting a transaction's competitive effects?
   d. Does the guidelines' framework sufficiently capture the range of circumstances in which a merger will likely enhance the ability and/or incentive of the merging parties or other market participants to reduce competition, and the range of evidence that may be relevant to that consideration?
   e. How frequently have unchallenged mergers or mergers that were subject to remedies resulted in a lessening of competition, and how does that lessening of competition typically manifest? Please identify examples of such mergers. What are the characteristics of those transactions that, if recognized before the merger, would have helped anticipate the adverse outcomes?

[10] *See, e.g.*, *Brown Shoe Co.*, 370 U.S. at 321-22 (noting that while the Clayton Act provides no definition of substantial, "Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry.").
[11] *Id.* at 325 (identifying "practical indicia" of substitutability).

3. Coordinated Effects
    a. What developments have there been in research or practice with respect to identifying possible coordinated effects from a merger? What revisions, if any, to the guidelines should the agencies consider in light of those developments?
    b. Does the guidelines' approach adequately account for the likelihood of coordinated effects in oligopolistic and oligopsonistic market structures?
    c. How have changes in the modern economy affected the incentive and ability of firms to engage in harmful tacit coordination, particularly in oligopolistic and oligopsonistic markets? How should these changes affect enforcement?
    d. How should the guidelines address the incentive and ability of firms to develop moats around oligopolistic and oligopsonistic market structures by explicit or parallel exclusionary conduct?
    e. Should evidence of conscious parallelism in the relevant market be sufficient to establish that a merger will likely further diminish competition by facilitating oligopolistic post-merger coordination?

4. Unilateral Effects
    a. What developments have there been in research or practice with respect to unilateral effects from a merger? What revisions, if any, to the guidelines' approach to unilateral effects should the agencies consider?
    b. Should evidence of substantial competition between the merging parties be sufficient to establish the loss of competition due to merger?

5. Presumptions
    a. Do the guidelines adequately identify mergers that are presumptively unlawful under controlling case law?[12] Do they accurately identify those circumstances where the agencies will conclude a merger would substantially lessen competition absent rebuttal evidence?
    b. Does the structural presumption in the guidelines accurately reflect current understanding of the characteristics of mergers that prove to be anticompetitive? Should the guidelines be revised to adjust the stated thresholds, emphasize certain criteria, or include other metrics such as the number of significant competitors as a supplement or alternative to, or even as a replacement for, HHI-based metrics?
    c. What specific metrics or observable features of a transaction, firm, or market should, alone or in combination, trigger a presumption that a horizontal transaction is anticompetitive? Are there factors that could be applied in such screens, such as whether the transaction involves a leading firm, a maverick firm, the closest competitor, or a nascent competitor? What would be their accuracy and predictive power relative to the quantitative factors in the guidelines?
    d. Should the guidelines identify thresholds for customer diversion and margins that, solely or together, create a presumption of competitive harm from certain mergers?
    e. What specific metrics or observable features of a transaction, firm, or market should, alone or in combination, trigger a presumption that a non-horizontal transaction is anticompetitive?

[12] *Phil. Nat'l Bank*, 374 U.S. at 363 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

f. Would the inclusion of multiple alternative presumptions better reflect the diversity of transactions and evidence presented by the modern economy?
g. Should separate metrics be considered or specified for markets involving labor, based on the unique characteristics of such markets (e.g., search frictions typically greater than those present in product/service markets)?
h. How does the administrative cost and accuracy of the guidelines' structural presumption or any proposed alternative presumption(s), standing alone, compare to the administrative cost and accuracy of individually analyzing each transaction in depth?

6. Market Definition
   a. Is it necessary to precisely define the market in every case?[13] In what cases is it more or less important? Does the importance of market definition vary between horizontal and non-horizontal mergers? What conclusions about the existence of a relevant market can be drawn from the identification of probable harm?
   b. Are there tools used to define markets that are or should be unique to merger analysis? If so, which ones and why?
   c. Where a market is defined, do the guidelines explain sufficiently clearly that markets can be defined using qualitative evidence, and that direct evidence of probable harm, such as evidence of substantial competition between the merging parties, is one way to define a market?
   d. What conclusions about the existence of a relevant market can be drawn from direct evidence that one of the merging parties possesses market power? What factors constitute such direct evidence?
   e. Are the guidelines sufficiently clear that the same product or service may be in multiple relevant antitrust markets depending on the competitive effects being evaluated?
   f. Do the guidelines imply that precision is necessary or possible in defining relevant markets? In the various inputs used to define relevant markets?
   g. Does the focus on the SSNIP test in implementing the Hypothetical Monopolist Test specifically, and in undertaking market definition more broadly, obscure the various types of harms in addition to price effects that may arise?
   h. How should markets be defined when the potential harm to competition stems not from the risk of an immediate price increase, but instead from other longer-term or non-price factors such as a loss of innovation, changes to product quality or variety, or creation of new entry barriers?
   i. Does a formalistic market definition exercise mask the potential for dynamic competition to be lost as a result of a merger, such as through emergent and disruptive competition, competition for the market, and the development of component competition to decrease dependency on stacks of services?

[13] *Compare Brown Shoe Co.*, 370 U.S. at 324 ("determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected."), with *Phil. Nat'l Bank*, 374 U.S. at 363 ("intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects.").

j. To what extent does a focus on product market overlaps fail to identify broader concerns about other aspects of competition?

7. Potential and Nascent Competition
    a. What changes in standards or approaches would appropriately strengthen enforcement against mergers that eliminate a potential competitor?
    b. Should the guidelines focus on whether either merging firm is contemplating entry[14] into, or is well situated to enter, a market where the other firm competes? Should it be sufficient to demonstrate either firm's capability of entering a concentrated market or that the acquiring firm has market power?
    c. How can the guidelines characterize, and perhaps quantify, the importance of a potential competitor to market competition? What sources of evidence are most probative?
    d. In the case of a nascent competitor—a firm that, while small now, might evolve into a competitive force—how should the guidelines assess its potential path of evolution into a plausible competitor? What degree of probability should serve as sufficient, especially in cases where technology and products evolve rapidly or unpredictably?[15] Should the sufficient probability vary depending on the degree of market concentration?
    e. How should the guidelines account for the possibility that competition may develop from unexpected sources?
    f. How should the guidelines assess an acquisition where the acquiring firm would likely develop its own product if acquisition was not possible?

8. Remedies
    a. Parties often propose or alter divestitures or other partial remedies for an unlawful transaction after the agencies have expended significant resources investigating the competitive effects of the transaction as proposed. Should the guidelines adopt a formal process and deadlines for remedy proposals? How should any such approach be structured?

9. Monopsony Power and Labor Markets
    a. How should the guidelines' analysis of monopsony power differ from its analysis of monopoly power? How, if at all, should the thresholds for applicable market-structure presumptions differ from those used in analysis of monopoly power?
    b. How should the guidelines treat a merger that may generate monopsony power, but does not substantially lessen competition in an output market?
    c. Are there specific monopsony situations that the guidelines should address explicitly, such as monopsony power in labor markets? Are there differences between monopsony power in labor markets and other upstream markets?

[14] *See, e.g.*, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532 (1973) ("error lay in the assumption that because Falstaff, as a matter of fact, would never have entered the market *de novo*, it could in no sense be considered a potential competitor.").

[15] *See, e.g.*, *United States v. Microsoft Corp.*, 253 F. 3d 34, 79 (D.C. Cir. 2001) (finding that Java and Netscape constituted nascent competitive threats to Microsoft because they "showed potential" in the context of a Sherman Act § 2 monopolization claim).

d. Do the guidelines set forth a sufficient framework to analyze mergers that may lessen competition in labor markets and thereby harm workers?
e. In addition to employers' ability and incentive to exert downward pressure on wages via employment restrictions, what other signs of an uncompetitive labor market should the guidelines consider?
f. What characteristics of labor markets are most likely to be associated with transactions that risk substantially lessening competition? What lessons about relevant labor markets can be taken from enforcement cases against identified anticompetitive restraints on competition for workers?
g. In addition to wages, salaries, and other financial compensation, what aspects of workers' terms and conditions of employment should be considered?
h. How should a labor market be defined in terms of job characteristics, geography, and worker flows? Should the guidelines adopt presumptions around the definition of relevant labor markets based on existing government analyses such as defined commuting zones and labor market areas? How should the guidelines address switching costs and other barriers to changing jobs?
i. Should the guidelines address coordinated effects in upstream markets separately from coordinated effects in downstream markets?

10. Innovation and IP
    a. Should the guidelines use a different approach to market definition when considering innovation as compared to price effects? Should market definition play a secondary role to analysis of how the merger directly affects the incentive to innovate?
    b. To what extent does a focus on product market overlaps fail to identify broader concerns about incentives to innovate, particularly given that innovation may involve the creation of new product or service categories?
    c. What approaches can the guidelines use to determine whether technologies subject to a license or acquisition either compete with or complement the licensee's or acquirer's own technologies? How do those approaches perform in circumstances where parties own or license many patents related to the same categories of products?
    d. Where technology-by-technology analysis is impractical, what alternative methods of analysis could be used to identify anticompetitive concerns in merger cases involving intellectual property?
    e. How should the guidelines analyze innovation in markets with high failure rates?

11. Digital Markets
    a. How, if at all, should the guidelines' analysis of mergers in digital markets differ from mergers in other markets? How should markets be defined in the case of mergers in the digital sector where products and services undergo rapid change? How should the guidelines address prospective competitive harms in rapidly evolving markets?
    b. How should the guidelines analyze mergers in markets subject to tipping toward oligopoly or monopoly, such as may result from significant network effects? How should the nature and timing of enforcement strategy differ in markets subject to tipping?

c. How should the guidelines approach market definition in zero-price markets, negative-price markets, or markets without explicit prices? Can "quality" and other characteristics play the same role as price in market definition?
d. How should the guidelines evaluate mergers in two-sided simultaneous transaction platform markets? What are the competitively-relevant differences between two-sided simultaneous transaction platforms and other kinds of multi-sided platforms?
e. What are the appropriate indicia of market power in complex and multi-sided markets? Are traditional market definition approaches reliable frameworks for assessing the existence and magnitude of market power in these markets? Are other tools as effective or more effective than market definition in those contexts?
f. How should the guidelines analyze mergers involving data aggregation as an important motive and/or effect? How should economies of scale and scope be measured in these cases?
g. How should the guidelines account for multihoming or interoperability? To what degree does multihoming or interoperability offset competitive concerns in actual practice?
h. How should the guidelines analyze mergers involving competition for attention? How should relevant markets be defined? What types of harms should the guidelines consider?

12. Special Characteristics Markets
   a. Bargaining. Is the guidelines' approach to markets characterized by bargaining adequate? If not, what changes should be made? Does increased bargaining leverage give rise to competitive effects?
   b. Auctions. Is the guidelines' approach to auction markets adequate? If not, what changes should be made?
   c. Bundled products. Is the guidelines' approach to bundled products adequate? If not, what changes should be made?
   d. Cluster markets. Is the guidelines' approach to cluster markets adequate? If not, what changes should be made, and in what circumstances should such markets be analyzed?
   e. Price discrimination. In what circumstances is evidence of potential price discrimination helpful in defining a relevant market?[16] In those circumstances, how precise or targeted must price discrimination be to support a relevant market?
   f. Non-horizontal mergers. Do the current guidelines adequately identify the full range of non-horizontal mergers that may harm competition? Should the guidelines address the acquiring firm's market power in markets adjacent to the target's business? Should the guidelines address the possibility that a large firm entering a new market comprised of smaller companies by acquiring one of those market participants may eliminate potential competition or raise entry barriers and thereby substantially lessen competition?
   g. Consummated mergers. Do the current guidelines adequately explain the appropriate analysis of consummated mergers and the use of post-merger evidence?
   h. Common ownership. Is the guidelines' approach to common ownership and horizontal stockholding adequate? If not, what changes should be made?

[16] *See, e.g.*, *Fed. Trade Comm'n v. Whole Foods Mkt, Inc.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008).

i. Private equity. Is the guidelines' approach to private equity acquisitions adequate? If not, what changes should be made?

13. Barriers to Firm Entry and Growth
    a. Does the guidelines' approach to analyzing whether merger-induced entry may counteract a merger's potentially harmful effects account for modern learning?
    b. What factors impact the ability of new firms to enter a market that are not currently addressed by the guidelines?
    c. What objective indicators could be used to estimate the size and significance of entry barriers in a market, such as incumbent firm size, rates of entry and exit over time, behavior of capital markets toward new entrants, or other metrics?
    d. To what extent should the guidelines treat an increase in the size of entry barriers or new impediments to rivals' growth as a harm to competition,[17] even in the absence of any identified potential entrant? How should they do so?

14. Efficiencies
    a. Is the guidelines' approach to efficiencies consistent with the prevailing legal framework as enacted by Congress and interpreted by the courts?[18]
    b. Do the guidelines reflect the best evidence regarding how often mergers in fact achieve the cost savings and other benefits claimed by merging parties? What are some examples of cases where merger-specific efficiencies were, in fact, realized or not realized? What types of claimed efficiencies and other benefits appear more likely to be realized? How often do these appear to be passed through to consumers? What evidence is there concerning the durability of any beneficial effects?
    c. For those mergers that appear to yield cognizable efficiencies, what degree of certainty should the guidelines require that they cannot be achieved in any other way?
    d. Where a merger is expected to generate cost savings via the elimination of "excess" or "redundant" capacity or workers, should the guidelines treat these savings as cognizable "efficiencies"? How should the guidelines address the potential for capacity reductions to reduce resilience of supply or otherwise lower product or service quality?
    e. For those mergers that appear to yield lower input purchasing prices, how can cost savings due to monopsony power be distinguished from other forms of savings?
    f. If mergers generally or often fail to realize cognizable efficiencies, how should that affect the guidelines' treatment of efficiency claims?
    g. How often do mergers lead to cost or quality inefficiencies such as diseconomies of scale? Do the guidelines adequately address the possibility that a merger may lead to such inefficiency? How should the potential for such inefficiencies be addressed?

[17] *See, e.g.*, *Microsoft Corp.*, 253 F.3d at 55 (actions to prevent erosion of the "applications barrier to entry" constituted monopolization under Sherman Act § 2).

[18] *See, e.g.*, *Fed. Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."); *United States v. Anthem, Inc.*, 855 F.3d 345, 353 (D.C. Cir. 2017) ("it is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7.").

15. Failing and Flailing Firms
    a. Is the guidelines' approach to failing firms adequate? If not, what changes should be made?
    b. In what situations, if any, should a weakened competitor defense apply? What are the characteristics of a "weakened competitor"? How, if at all, is a weakened competitor defense related to the failing firm defense? Are there circumstances in which a firm may meet the criteria for a "weakened competitor," but an acquisition of that firm may still substantially lessen competition? How should the guidelines address the potential for the acquired firm to weaken its competitiveness by reducing investment after deciding to put itself up for sale?

Office of the Chair

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Remarks of Chair Lina M. Khan
Regarding the Request for Information on
Merger Enforcement
Docket No. FTC-2022-0003

January 18, 2022

Good afternoon, everyone. Welcome to today's joint DOJ-FTC announcement.

I am excited to share that the FTC and DOJ today are jointly launching a review of the merger guidelines. Ever since issuing the first merger guidelines in 1968, the antitrust agencies have sought to ensure that these documents accurately set forth current enforcement policy and identify the techniques that we use to detect and assess unlawful mergers.[1]

Keeping with past practice, the DOJ and FTC today are issuing a request for information, identifying key questions and topics on which we are particularly keen to receive public comment.[2] These public comments will be critical for informing our review of the existing guidelines and our process for considering potential revisions and updates.

While periodic review of existing guidance is good practice generally, this review of the merger guidelines is especially timely and ripe. Global deal-making in 2021 soared to $5.8 trillion, the highest level ever recorded,[3] with the FTC and DOJ receiving more than double the number of merger filings received on average in any of the past five years.[4] Major technological and economic changes, meanwhile, have led to shifts in how businesses compete and grow, creating new interconnections and dynamics across multiple dimensions. For us to accurately detect and analyze potentially illegal transactions in the modern economy, ensuring that our merger guidelines reflect these new realities is critical.

This inquiry comes against the backdrop of a broader reassessment of the effects of mergers across the U.S. economy. Evidence suggests that decades of mergers have been a key driver of consolidation across industries, with this latest merger wave threatening to concentrate

[1] U.S. DEPT OF JUST., 1968 MERGER GUIDELINES; U.S. DEPT OF JUST., 1982 MERGER GUIDELINES; U.S. DEPT OF JUST., 1984 MERGER GUIDELINES; U.S. DEPT OF JUST., 1992 MERGER GUIDELINES; U.S. DEPT OF JUST., 1997 MERGER GUIDELINES; U.S. DEPT OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010); U.S. DEPT OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (June 30, 2020) (Fed. Trade Comm'n withdrew on Sept. 15, 2021).

[2] Fed. Trade Comm'n, Request for Information on Merger Enforcement, Dkt No. FTC-2022-0003 (Jan. 18, 2022).

[3] Kaye Wiggins et al., *Dealmaking surges past $5.8tn to highest levels on record*, FIN. TIMES (Dec. 30, 2021), https://www.ft.com/content/6dfdd78a-e229-4524-a400-144396524eb6.

[4] *Premerger Notification Program*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/premerger-notification-program (last visited Jan. 18, 2022).

our markets further yet. As President Biden noted in his Executive Order on Promoting Competition, industry consolidation and weakened competition have "den[ied] Americans the benefits of an open economy," with "workers, farmers, small businesses, and consumers paying the price."[5] While the current merger boom has delivered massive fees for investment banks,[6] evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation.[7] A lack of competition also appears to have left segments of our economy more brittle, as consolidated supply and reduced investment in capacity can render us less resilient in the face of shocks.[8]

These facts invite us to assess how our merger policy tools can better equip us to discharge our statutory obligations and halt this trend.

For over a century, Congress has codified a policy in favor of competition over consolidation. In 1890, as trusts captured the sugar, steel, oil, and railroad industries, lawmakers passed the Sherman Act, prohibiting, among other practices, monopolization, attempted monopolization, and conspiracies to monopolize.[9] Once it became clear that this statute was failing to prevent monopolization through acquisition, Congress in 1914 passed the Clayton Act, prohibiting mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[10] When businesses began exploiting loopholes in the Clayton Act, Congress once again stepped in, passing the 1950 Celler-Kefauver Antimerger Act to ensure the law captured vertical and conglomerate deals as well as acquisitions of assets.[11] With each of these efforts, Congress redoubled its commitment to open markets and free and fair competition.

---

[5] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021). *See also* FACT SHEET: Executive Order on Promoting Competition in the American Economy, THE WHITE HOUSE (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ (noting that "Economists find that as competition declines, productivity growth slows, business investment and innovation decline, and income, wealth, and racial inequality widen.").

[6] Ortenca Aliaj et al., *Investment bank fees soar past $100bn on M&A boom*, FIN. TIMES (Oct. 1, 2021), https://www.ft.com/content/a67e0300-98a8-4e29-890a-0949135933ba ("Investment banks are raking in record sums, with fees surging past $100bn in the first nine months of the year thanks to a rush of dealmaking.").

[7] *See, e.g.*, José A. Azar et al., *Concentration in US Labor Markets* 13 (Nat'l Bureau of Econ. Res., Working Paper No. 24395, 2018); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421, 2422 - 45, 48 (2020); Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON 561, 644 (2020); Germán Gutiérrez & Thomas Philippon, *Investmentless Growth: An Empirical Investigation*, BROOKINGS PAPER ON ECON. ACTIVITY 89, 95–97 (2017); *See generally* JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POL'Y (2014).

[8] *See, e.g.*, David Dayen, *The Great Supply Shock We Brought Upon Ourselves*, AM. PROSPECT (Sept. 22, 2021), https://prospect.org/economy/great-supply-shock-we-brought-upon-ourselves.

[9] Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*. (1890); *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.").

[10] Clayton Act, 15 U.S.C. § 12 *et seq*. (1914). Congress in 1914 also passed the Federal Trade Commission Act, supplementing the Sherman and Clayton Acts by creating the Federal Trade Commission and assigning it with checking "unfair methods of competition." Federal Trade Commission Act, 15 U.S.C. § 41 *et seq*. (1914).

[11] *See* Act of Dec. 29, 1950, Pub. L. No. 81-899, 64 Stat. 1225 (codified as amended at 15 U.S.C. § 18 (1994)).

The durability and public legitimacy of our antitrust regime depends on the ability of enforcers and courts to adapt, remaining faithful to these legislative mandates even as markets and business practices shift and evolve. Just as we must revise our theories and models to fit new facts and evidence, we must ensure our merger guidelines accurately reflect the realities of the modern economy. Matching our analysis to contemporary business strategy requires that our tools be dynamic and holistic rather than static and atomistic.

Our request for information identifies a broad set of topics. While each one of these is worthy of extensive study and discussion, I'd like to spotlight three in particular.

First, are the guidelines adequately attentive to the range of business strategies and incentives that might drive acquisitions, be it moat-building or data-aggregation strategies by digital platforms, or roll-up plays by private equity firms? More broadly, how should the guidelines analyze whether a merger may "tend to create a monopoly," including in its incipiency, or whether there is a "trend toward concentration" in the industry?

Second, do the guidelines adequately assess whether mergers may lessen competition in labor markets, thereby harming workers? Are there factors beyond wages, salaries, and financial compensation that the guidelines should consider when determining anticompetitive effects? And when a merger is expected to generate cost savings through layoffs or reduction of capacity, should the guidelines treat this elimination of jobs or capacity as cognizable "efficiencies"?

Third, are the guidelines unduly limited in their focus on particular types of evidence? Are there certain markets where the guidelines should provide a framework to assess direct evidence of market power? What types of indicia of market power should the guidelines consider? And more generally, what types of evidence should the guidelines consider in evaluating nonprice effects?

A wealth of scholarship and empirical research over the last decade has delivered significant learning about the effects of mergers and acquisitions. Our review process will benefit immensely from this valuable work and from the insights of experts who have long studied these issues. But I want to take this opportunity to also encourage those beyond the antitrust community—including consumers, workers, entrepreneurs, start-ups, farmers, investors, and independent businesses—to share feedback and evidence. The quality of our review and any subsequent revisions to the guidelines will depend on robust public participation, and we are especially eager to hear from a broad set of market participants.

Lastly, I'd like to give deep thanks to both FTC and DOJ staff for preparing the thoughtful set of questions we are issuing today. This process has already benefited significantly from the experience and perspective of the staff that investigate mergers day after day, and who have carried a particularly heavy load during the merger surge of the last year.

I'd now like to turn it over to Assistant Attorney General Jonathan Kanter. Since taking the helm less than two months ago, AAG Kanter has hit the ground running, bringing his wealth of experience and talent to bear on some of the most urgent questions we face. Defenders of open markets and free competition have a fierce champion and vigorous enforcer in AAG Kanter, and I am grateful for our partnership and the close collaboration between our agencies.

***

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Regarding the Request for Information on Merger Enforcement
January 18, 2022

Merger enforcement should be administrable, predictable, and credible.[1] Merger guidelines advance those goals when they reflect judicial precedent, incorporate sound developments in economic analysis, and accurately describe how the antitrust agencies assess mergers. Those goals are also advanced by the Federal Trade Commission's long history of critical self-examination, including to inform merger policy.[2] We welcome the Request for Information on Merger Enforcement (RFI) issued today by the FTC and the Antitrust Division of the DOJ because it reflects this posture of continual learning. And we appreciate the diligent work of FTC staff and their counterparts at the Antitrust Division.

Sound merger enforcement ensures that the federal antitrust agencies address anticompetitive deals while allowing consumers and companies to reap the benefits of M&A markets. As the law and economic learning concerning mergers evolve, so too should our assessment of them. In addition to enforcement, the agencies expend significant resources conducting merger retrospectives, monitoring industry developments, and the like. If there are changes in legal precedent, updated and validated empirical or theoretical learning, or competitive dynamics that we are missing in merger review, consumers will benefit from reflecting them in agency guidelines. Prudence dictates, though, that any recalibration of our current approach to merger enforcement should be undertaken only if warranted by developments in legal and economic analysis, and only after a thorough evaluation of both the administrability and likely impact of that new approach. If revisions to the merger guidelines follow this path, they will stand the test of time.

The 2010 Horizontal Merger Guidelines (Guidelines) are noteworthy because, although the agencies' views are not binding on the judiciary, courts adjudicating merger challenges routinely cite them as persuasive.[3] The Guidelines derive their persuasive value from laying out a consensus view on the framework that the FTC and DOJ have developed, over decades of experience, to analyze the effects of mergers. Reflecting precedent from courts and the agencies, and based on accepted economic principles, they garnered support at adoption and in case after case, serving as

---

[1] *See* Christine S. Wilson, Thomas J. Klotz, & Jeremy A. Sandford, Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate, 26 Geo. Mason L. Rev. 1435, 1452-53 (2019).

[2] The Vertical Merger Guidelines issued by FTC and the Antitrust Division of the Department of Justice in June 2020 are but one recent example of this tradition. FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers (June 30, 2020), https://www ftc.gov/news-events/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers.

[3] *See e.g.,* FTC v. Sanford Health*,* 926 F.3d 959 (8th Cir. 2019); FTC v. Sysco Corp., 113 F.Supp.3d 1 (D.D.C. 2015); ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014).

the touchstone for merging parties, enforcers, and judges alike.[4] The Guidelines are also, of course, a useful guidepost for businesses that seek to ensure their conduct is lawful. Describing the principles and analytical framework the agencies will apply in evaluating mergers increases transparency and predictability for the business community and antitrust practitioners.

The RFI requests public input on many important legal and economic questions. It is appropriate to consider, for example, what constitutes a "digital market" and how the assessment of mergers in such markets should differ, if at all, from mergers in other markets. It is equally appropriate to ensure that the agencies are accurately evaluating mergers involving potential and nascent competitors, assessing impacts on labor markets, and capturing the impact of mergers on incentives to innovate. We encourage comments from all interested and impacted constituencies.

We also encourage comments on the assumptions that appear to underlie particular questions in the RFI. For example, the RFI seeks examples of mergers that have harmed competition, including how those mergers "made it more difficult for rivals to compete with the merged firm."[5] The question appears to assume that difficulty for rivals equates to harm to competition. But mergers that benefit consumers through lower prices, enhanced quality, and more innovation may also make it more difficult for rivals to compete with the merged firm.[6] We hope that comments provide a means to distinguish the two. The RFI also appears to assume that "mergers generally or often fail to realize cognizable efficiencies," and consequently suggests that the agencies should discount or ignore efficiencies when analyzing mergers.[7] The extent to which mergers lead to projected efficiencies is a worthy inquiry, and we hope that comments provide relevant data and an array of examples involving mergers where efficiencies were or were not achieved. These are just two of the questions that appear to be premised on debatable assumptions.[8]

Finally, we observe that much of the legal authority cited in the RFI is nearly or more than half a century old.[9] Courts have decided quite a few antitrust cases in the intervening years, merger

---

[4] *See* Carl Shapiro & Howard Shelanksi, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 Rev. Indus. Org. 51-79 (2021).

[5] Request for Information on Merger Enforcement (hereinafter "RFI"), at 1 (Jan. 18, 2022).

[6] The Supreme Court has instructed that the antitrust laws "were enacted for 'the protection of competition, not competitors'". Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984). The assumption in the RFI appears to contravene the Court's guidance.

[7] RFI, at 9.

[8] Others include, for example, questions based on apparent assumptions that the agencies assess product market overlaps in lieu of innovation and other aspects of competition, ignore monopsony power unless it has an impact on output markets, or exercise a single-minded focus on price effects to the exclusion of other competitive harms. Our experience leads us to question each of these assumptions. S*ee* Guidelines §§ 6.4 ("Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. . ."), 12 (when evaluating monopsony concerns, the Agencies do not "evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell"), 1 ("A merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."). Nonetheless, we welcome the input of stakeholders on these topics.

[9] The RFI repeatedly cites language from *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967) which then-Judge Kavanaugh described as "ahistorical drive-by dicta". United States v. Anthem, Inc., 855 F.3d 345, 379 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("For the majority opinion, we are apparently stuck in 1967. The antitrust clock has stopped. No *General Dynamics*. No *Continental T. V. v. GTE Sylvania*. No *Baker Hughes*. No *Heinz*.").

and non-merger alike, which further elucidate the Sherman, Clayton, and FTC Acts.[10] The RFI commits to "faithfully track…established case law around merger enforcement."[11] We hope it does, as proposed revisions to the Guidelines should be considered in light of antitrust jurisprudence and must reflect legal precedent.

The potential revision of both the Horizontal and Vertical Merger Guidelines is a serious undertaking that could have a dramatic impact on the economy. We encourage the leadership of the FTC and the Antitrust Division to proceed with care and caution. As the agencies have done when promulgating past guidelines, we should afford the public ample time and opportunity to provide input, including through workshops and other public fora. We encourage the public to participate, and look forward to reviewing the responses to the RFI. And we hope to work closely with our colleagues at the FTC and the Antitrust Division as this process progresses.

[10] *See e.g.,* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016); FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); FTC v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999); FTC v. Univ. Health, Inc. 938 F.2d 1206 (11th Cir. 1991). One recent case, *Kimble v. Marvel*, states that because antitrust questions address restraints of trade, Supreme Court rulings "necessarily" have turned on the Court's understanding of economics. Thus, the Supreme Court has "felt relatively free to revise our legal analysis as economic understanding evolves and … to reverse antitrust precedents that misperceived a practice's competitive consequences." Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 461 (2015). Although *Kimble* addressed the Sherman Act, we welcome comments on how this statement interacts with the Court's statement highlighted in the RFI regarding "the danger of subverting congressional intent by permitting a too-broad economic investigation[.]"

[11] RFI, at 1.

“Bad Documents”

Anne K. Bingaman
Steven C. Sunshine
Constance K. Robinson
UNITED STATES DEPARTMENT OF JUSTICE
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
(202) 514-2401

John F. Greaney
N. Scott Sacks
Michael F. Bailey
Reid B. Horwitz
Kenneth W. Gaul
Antitrust Division
UNITED STATES DEPARTMENT OF JUSTICE
555 4th Street, N.W.
Room 9901
Washington, D.C. 20001
(202) 307-6200

Michael J. Yamaguchi
United States Attorney
OFFICE OF THE UNITED STATES ATTORNEY
450 Golden Gate Avenue
Box 36055
San Francisco, CA 94102
(415) 556-1126

Attorneys for Plaintiff United States of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, a Washington corporation, and INTUIT INC., a Delaware corporation, Defendants.	)	No. ___________ (Antitrust) **COMPLAINT FOR INJUNCTIVE RELIEF AGAINST COMBINATION IN VIOLATION OF SECTION 7 OF THE CLAYTON ACT**

The United States of America, acting under the direction of the Attorney General, brings this civil action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to obtain equitable and other relief to prevent a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and alleges:

Nature of the Action

1. The United States brings this antitrust action to prevent the proposed acquisition by Microsoft Corporation, the world's largest and most powerful personal computer software company, of Intuit, Inc., the dominant producer of Personal Finance/Checkbook ("PF/Checkbook") software. Microsoft is Intuit's most significant competitor. The proposed acquisition would eliminate competition between Microsoft and Intuit, which has benefitted consumers by leading to high quality, innovative products at low prices.

2. The PF/Checkbook Software Market is highly concentrated, with Intuit's "Quicken" product commanding a 1994 unit sales share of 69% and a total installed base of more than seven million customers. Microsoft's PF/Checkbook product, "Microsoft Money," was introduced in 1991, and the resulting competition led to lower prices and increased innovation. Microsoft is now the number two competitor in the PF/Checkbook Software Market, with a 1994 unit sales market share of about 22%, and an installed user base of about one million customers. Absent the acquisition, Microsoft Money would likely continue to compete successfully because (a) Microsoft already has devoted substantial resources to the Money product, which it would increase even more substantially in the future, and (b) the PF/Checkbook Software Market, for the reasons explained below, is strategically important to Microsoft.

3. The effects of this proposed acquisition could reach well beyond today's PF/Checkbook Software Market. The acquisition threatens harm to consumers in other important areas of commerce, especially the area of personal computer based ("PC-based") home banking, which is a relatively tiny part of the PF/Checkbook Software Market today. Before the acquisition, Microsoft and Intuit had independent plans to compete in the field of electronic commerce, starting with enhancement of their PF/Checkbook software products to enter the emerging home banking

marketplace. Established PF/Checkbook software products provide an important asset to develop home banking, in part because existing customers are likely candidates for PC-based home banking. The special competitive significance to Microsoft and Intuit of dominating the present PF/Checkbook Software Market as a strategic "cornerstone" asset in that emerging business (and the likely effect of the proposed acquisition) were recognized by Intuit's Chairman, who wrote in a September 1994 memorandum to his board about the proposed acquisition of Intuit by "Godzilla" (Intuit's code name for Microsoft):

> Our future vision is both vulnerable to and would benefit from Godzilla's strengths. . . . Our combination gives FIs [Financial Institutions] one clear option, *eliminating a bloody share war* and speeding adoption. --That, in turn *enriches the terms of trade* we can negotiate with FIs.
>
> . . . .
>
> Vulnerability [of Intuit to Microsoft] is a key question.
>
> If we believe we are not overly vulnerable, then we believe we can succeed. *Elimination of competition will enhance that success, perhaps greatly.*

(Emphasis supplied).

4. Microsoft's Manager, Business Development and Investments, reached a similar conclusion in an August 1994 analysis of the proposed acquisition.

> * Slade [a Microsoft code name for Intuit] is the clear and dominant leader in PF software and the current installed base of users would likely prefer to stay with Quicken when they do electronic transactions. MS owns Windows and Marvel [a new Microsoft on-line network] and therefore is in a much better position to access many millions of users in the future with PF service options. Since neither company has both of these strengths, the banks, credit card associations and others *are in a stronger position to play us off against each other. As a combination, we would be dominant.*

(Emphasis supplied).

5. Microsoft has agreed to acquire Intuit for what, as of Monday, April 24, 1995 would exceed $2 billion in Microsoft stock, more than twice Intuit's preannouncement market capitalization of $813 million. In an attempt to avoid an obvious antitrust challenge, Microsoft devised a planned "fix," whereby it has agreed simultaneously to transfer part (but not all) of Microsoft's Money business unit to a third party, Novell, Inc. The purported fix would fail to

remedy the anticompetitive effects of the proposed Intuit transaction. Novell, with the assets it is supposed to receive from Microsoft, cannot be nearly as effective a competitor with Money as Microsoft is and would be absent the transaction.

6. If consummated, the proposed transaction, even accounting for the asset sale to Novell, likely would add to the dominance of the number one product (Quicken), would weaken greatly the number two product (Money), and would substantially increase concentration and substantially reduce competition in the PF/Checkbook Software Market. Because these products are a crucial springboard into other important, but emerging, areas of commerce, the effect on consumers would likely be higher prices and lessened innovation not only in PF/Checkbook software products but in other related products and services, such as PC-based home banking.

7. Accordingly, the proposed acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

Jurisdiction

8. Microsoft sells Microsoft Money and Intuit sells Quicken in interstate commerce. Defendants' activities in developing, producing and selling Money and Quicken also substantially affect interstate commerce in other respects. The Court has jurisdiction of this action and jurisdiction over the parties pursuant to 15 U.S.C. § 22 and 28 U.S.C. §§ 1331 and 1337.

Venue

9. Both Microsoft and Intuit transact business in this District. Venue is proper in this District under 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

The Defendants

10. Microsoft is a Washington corporation with its headquarters in Redmond, Washington. Microsoft's operating system software, particularly its Disk Operating System ("DOS") and its associated Windows product, are by far the dominant operating systems for Intel x86 architecture personal computers (sometimes also called "IBM-compatible" personal computers), which in turn is the dominant platform for personal computing. Microsoft also develops, markets and sells applications software, including applications software for use with DOS and Windows on IBM-compatible personal computers. Microsoft has announced that it will

introduce "Windows 95" in August of this year. Windows 95 will be the next upgraded release of Microsoft's Windows operating system.

11. Microsoft has a dominant position in operating systems for IBM-compatible personal computers. It also is the most powerful competitor in the world for many categories of applications software. Using its resources and operating system position, Microsoft has introduced new products to compete directly against, and has secured the leading position over, the previous leaders in the most significant business applications software categories for IBM-compatible personal computers, including spreadsheet software (Microsoft's Excel has overtaken Lotus 1-2-3), word processing software (Microsoft's Word has overtaken WordPerfect), and others. Intense competition against category leaders by the most powerful competitor in the industry has benefitted consumers by increasing the pace of innovation and accelerating the price decline of products in those categories.*

12. In the field of consumer software for IBM-compatible personal computers, Microsoft also has competed vigorously and successfully. It has the leading applications in several categories, including a combined word processing/spreadsheet/database product (Microsoft Works), a low-end desktop publishing product (Microsoft Publisher), a CD-ROM encyclopedia (Microsoft Encarta) and others. As with business applications, Microsoft has directly challenged the leader in some categories (such as desktop publishing and CD-ROM encyclopedias), and has competed successfully to a leading position. Such competition has benefitted consumers through greater innovation and lower prices.

13. Intuit is a Delaware corporation with its headquarters in Menlo Park, California. Intuit has concentrated its efforts on the development and sale of financial applications software. Intuit's Quicken is the leader in the PF/Checkbook Software Market by a substantial margin. Intuit also owns the category leader in personal tax preparation software (Turbo Tax, a recently acquired product) and the co-leader in small business accounting software (Quickbooks).

---

* The United States takes no position in this complaint as to whether all of Microsoft's practices were lawful under the antitrust laws.

Relevant Product Market

14. Some 30% of households in the United States now have a home personal computer (a "home PC"). The vast majority of home PCs now being sold are IBM-compatible personal computers. All IBM-compatible personal computers can run Microsoft's DOS or Windows operating systems, and an overwhelming majority (well in excess of 80%) now are being sold with a Microsoft operating system. Because applications are written to work with specific operating systems, applications programs for IBM-compatible personal computers must, as a practical matter, be written to run on Windows or, to a lesser, waning extent, on DOS without Windows.

15. One important application for home PCs is PF/Checkbook software. Intuit's Quicken product was the number one selling home PC software product in 1994, topping all others, including even the most popular entertainment programs. PF/Checkbook software is designed to give the home PC user electronic control over an integrated set of personal finance records and transactions. Currently, the core integrated functions of PF/Checkbook software products include an "electronic checkbook," which automates check writing and check register record keeping, household budgeting, personal asset and liability tracking and reporting, including features such as loan tracking, stock and bond portfolio tracking, home inventories, cash and retirement account tracking and personal financial statements, and "front end" software for automated bill-paying in association with a bill-paying service. The term "front end" means that only the initiating part of the function resides in home PC software. To complete the function, there must also be a communication channel or "switch" (usually a service using the telephone network) and a "back end," consisting of software and associated equipment at the other end of the line to receive and process each transaction (in this example, the other end of the line would be located at a bill-paying service, but for home banking it would be at the bank).

16. Importantly, the checkbook, automated bill paying, asset tracking and other functions in PF/Checkbook software are linked together so that transactions are automatically accounted for wherever affected assets appear in the program. That integration allows the consumer to track all transactions across account, financial and tax files.

17. The core functions of PF/Checkbook software have increased in both number and

quality over the past several years, as Microsoft and Intuit have battled to attract new customers through better and more useful products. Competition to improve old functions and to add new ones is an important part of the rivalry between Intuit and Microsoft.

18. There has been substantial innovation in the market for Personal Finance/Checkbook software. Within the past year, a potentially important new function, front end software for home banking, has been developed and incorporated into some PF/Checkbook software products. Microsoft's 1994 release of Microsoft Money (version 3.0) included a home banking feature. This year, Intuit plans to add home banking in its 1995 release of Quicken products. As with the functions discussed above, home banking is linked to the rest of the program so that home banking transactions are accounted for automatically wherever affected assets appear in the program.

19. PF/Checkbook software is targeted principally for sale to owners of home PCs. It is sold through two major distribution channels, the "OEM channel" and the "retail channel." The OEM channel consists of personal computer manufacturers who pre-install operating systems and applications programs on their personal computers. The retail channel consists both of sales through retail stores that sell software products and direct sales to consumers who order from a catalog or over telephone lines.

20. PF/Checkbook software for IBM-compatible personal computers (the PF/Checkbook Software Market) is a relevant product market under the Clayton Act. PF/Checkbook software offers a group of linked features that make it a superior product for personal financial asset tracking and for which there are no close substitutes. Purchasers and potential purchasers of IBM-compatible PF/Checkbook software would not turn to any alternate product if the price of PF/Checkbook software increased by a small but significant amount.

Relevant Geographic Market

21. The relevant geographic market is the United States. Monetary, language, financial industry, and other differences outside the United States prevent PF/Checkbook software products suitable for other foreign markets from being reasonable substitutes for a U.S. version.

Competition and Entry

22. The principal competitors in the PF/Checkbook Software Market are Intuit with Quicken and Microsoft with Money. H&R Block Financial's "Managing Your Money" and Computer Associates' "Simply Money" also are sold in the market, but have little competitive significance. Managing Your Money was a significant participant several years ago, but its importance as a competitive influence has declined. The product recently has been offered for sale by H&R Block at least partly as a result of the announcement of the proposed Intuit acquisition. Similarly, Computer Associates, a major supplier of mainframe computer software, attempted unsuccessfully to enter and establish a meaningful presence in the market by "giving away" more than a million free copies of Simply Money for only a shipping and handling charge. A low percentage of "free copy" recipients actually use the software and Computer Associates has little, if any, competitive influence in the market.

23. The PF/Checkbook Software Market is highly concentrated. Quicken's unit market share of 1994 sales was about 69%. Microsoft Money's unit share was about 22%. Unit shares for Managing Your Money and Simply Money were less than 5% each. From a 1994 revenue perspective, Quicken's lead in the market was even more substantial: Quicken, 85%; Microsoft Money, 7%; Managing Your Money, 5%; and Simply Money, 2%.

24. Entry into the PF/Checkbook Software Market is difficult. Between them, Intuit and Microsoft control more than 90% of the market, and both are daunting competitors in the market. A substantial installed user base with an established, successful product (such as Intuit's seven million customer installed base for Quicken) creates a revenue stream of profitable upgrade sales to the installed base. The upgrade revenue stream can justify low initial pricing by market leaders with a proven product, particularly in the OEM market. Such pricing, and the prospect of such pricing, discourages new entry, because a potential competitor with an unproven product would know that it would at best be faced with years of losses, with no assurance of ever generating enough upgrade revenue to recoup its losses. Writing adequate software "code" even to match today's successful products would be no easy task--as witnessed by Microsoft's own four-year effort to achieve feature parity with Quicken. Even with the code, entry into the PF/Checkbook Software Market would be difficult, expensive and slow. Microsoft's own attempt to enter the market with its Microsoft

Money product has been slow and expensive. After four years, it still has not achieved a positive return on its investment, but has incurred substantial losses.

25. Most OEMs and retail customers in the PF/Checkbook Software Market will purchase only products with an established reputation for reliability, performance and customer support. At a minimum, it takes years and a significant investment of resources to build such a reputation.

26. In sum, a new competitor would not be likely to enter successfully the PF/Checkbook Software Market within any reasonable time with a product offering the core functions necessary to compete effectively. No such entry could be expected, within any reasonable time, to deter or counteract a small but significant price increase resulting from the acquisition.

The Proposed Acquisition

27. Microsoft has agreed to acquire all the stock of Intuit from Intuit's shareholders in exchange for 1.336 shares of Microsoft stock for each share of Intuit stock, with a minimum price of $1.4 billion. If the transaction closed today, the price would be approximately $2 billion. There is no ceiling on the purchase price, which ultimately could be higher.

28. If the proposed acquisition of Intuit closes, Microsoft has agreed to transfer to Novell some of its Microsoft Money business assets--but not enough to allow it to compete anywhere near the level provided by Microsoft before the proposed Intuit acquisition. The transfer to Novell would include only the Microsoft Money computer code, associated intellectual property and documentation, the Microsoft Money customer list and some technical assistance from a few members of the Microsoft Money team during a brief transition period. The Microsoft Money team itself, including all product managers, developers, programmers and sales and marketing personnel, apparently will remain with Microsoft. In contrast, Microsoft has described the Intuit people as the most important resource it will acquire if the transaction closes. Novell had no plans to enter the PF/Checkbook Software Market as an owner/developer of such software before Microsoft offered Microsoft Money to it in connection with this proposed transaction. Instead, Novell proposed to become a Quicken customer, intending to resell Quicken as part of a package of home computer software products.

29. Although Microsoft considered the Microsoft Money business to be important enough to justify devoting significant resources--many millions of dollars--as a business in its own right and as the cornerstone of a significant emerging market, the up-front purchase price to be paid by Novell for those Microsoft Money assets that Microsoft has agreed to transfer would be zero. Novell would thereafter pay to Microsoft a ten percent royalty on its first year of net sales of Money, which would be less than a million dollars even if Novell were as successful as Microsoft expected to be in 1995. To induce Novell to enter into the proposed transaction, Microsoft has given Novell certain other guarantees that could require Microsoft to pay millions of dollars to Novell if it does not succeed with Money.

30. Before the proposed transaction was announced, part of the vigorous competition between Intuit Quicken and Microsoft Money was competition for OEM customers and for PC-based home banking strategic allies. Microsoft has an existing business relationship with two important OEMs, Packard-Bell and Gateway 2000. Both currently pre-install on their Home PCs a "bundle" of Microsoft consumer applications software that includes Microsoft Money. Shortly before the acquisition was announced, Microsoft received a signed letter of intent from MasterCard, under which Microsoft Money and derivative products of Microsoft Money would have been used as part of a "Master Banking" home banking program in a strategic alliance between Microsoft and MasterCard. Both relationships were valuable to Microsoft's Money business. The Microsoft Money relationships with Packard-Bell, Gateway and MasterCard would be of critical importance to Novell's ability to compete with Money. Microsoft did not agree to transfer those relationships to Novell, but agreed instead not to use Quicken to compete with Novell in relationships with Packard-Bell, Gateway or MasterCard through March 1996.

Harm To Competition

31. The effect of the proposed acquisition of Intuit by Microsoft may be substantially to lessen competition in the PF/Checkbook Software Market.

32. Actual and potential competition between Microsoft and Intuit, the two strongest and most significant competitors in the PF/Checkbook Software Market, will be eliminated. Competition from Novell against Quicken will be at best a weak replacement for the lost

competition from Microsoft. Microsoft, the strongest competitor in the software industry, has the resources, ability and resolve to challenge Intuit's leading market position (in both the OEM and retail channels), while Novell does not. Absent the acquisition, competition between Quicken and Microsoft Money would increase. Microsoft's reason for proposing the acquisition of Intuit was its identification of the PF/Checkbook Software Market as strategically important to Microsoft as a leading home PC application today, as a front end for home banking tomorrow, and as a front end more generally for on-line financial transactions in the more distant future.

33. But for the proposed acquisition, Microsoft would compete aggressively against Intuit for sales in the PF/Checkbook Software Market. In fact, Microsoft advised Intuit that Microsoft would substantially increase its competitive efforts against Quicken if Intuit did not agree to be acquired. Microsoft's Executive Vice President reported to Microsoft's Chairman:

> I tried to tell him [Intuit's Chairman] what else we could do since we have decided this is such an important area and we had not organized or staff[ed] adequately. I tried to tell him how much we could do with a $1 billion. I tried to be non threatening, but let him know we would do something aggressively.

34. The proposed transaction would weaken Money greatly, which would further enhance the dominance of Quicken in Microsoft's hands. As a senior Microsoft official responsible for Microsoft Money wrote in approximately June 1994:

> If we were to try to buy Intuit and had to sell our offerings in [the core PF/Checkbook functions], *who would be willing to buy us out and be a serious competitor*. If it was known that we were buying Intuit's offerings in [the core PF/Checkbook functions], then *I can't imagine anyone would be stupid enough too* [sic]--not only would they be way, way far behind competitively[,] I think they would imagine that we'd never be allowed to do it.

(Emphasis supplied).

35. Potential new competitors, if any, would find it even more daunting to compete against Quicken, the number one product in the market, if it were in Microsoft's hands. Microsoft would retain many of the advantages that made Microsoft Money a powerful number two competitor against Quicken. Instead of using those advantages to compete against Quicken, Microsoft would be able to use the combined advantages of both to dominate potential customers and strategic partners more thoroughly than Intuit could do with Quicken or Microsoft could do with Microsoft Money--especially if the two had to compete with each other.

36. As spelled out in defendants' documents (quoted in Paragraphs 3 and 4), the proposed transaction creates an appreciable risk that future PC-based home banking services will have to use a Microsoft Quicken front end at higher prices than would prevail in the absence of the acquisition.

37. Novell would be a substantially weaker competitor with Money against Microsoft Quicken than Microsoft has been (and would continue to be) against Intuit Quicken. For example, because of the market power that Microsoft will acquire if the acquisition is consummated and Novell's lack of comparable advantages, MasterCard, Gateway and Packard-Bell, which Microsoft and Novell agreed were crucial to Novell's ability to compete with Money in the marketplace, will not commit to arrangements with Money in Novell's hands that are comparable to the arrangements they had or proposed to have with Microsoft Money.

38. Novell lacks important assets, resources and commitment to the product that give Microsoft competitive strength with Money and make the PF/Checkbook category strategically important to Microsoft. Novell was not willing to pay any up-front purchase price to obtain Money. The category is not as strategically important to Novell as it is to Microsoft. Novell may ultimately conclude not to continue funding the extended losses that would be required, with little chance of success, to compete vigorously enough to provide price, quality and innovation discipline in the PF/Checkbook Software Market comparable to Microsoft's competition in the absence of the proposed acquisition.

39. Unless restrained, the proposed acquisition will violate Section 7 of the Clayton Act.

Requested Relief

The United States requests (a) adjudication that Microsoft's proposed acquisition of Intuit would violate Section 7 of the Clayton Act, (b) preliminary and permanent injunctive relief preventing consummation of the proposed acquisition, (c) an award to the United States of the costs of this action, and (d) such other relief as is just and proper.

Dated: April 27, 1995

ANNE K. BINGAMAN
Assistant Attorney General

STEVEN C. SUNSHINE
Deputy Assistant Attorney General

CONSTANCE K. ROBINSON

Director of Operations

JOHN F. GREANEY

Chief, Computers and Finance Section

N. SCOTT SACKS
Assistant Chief, Computers and Finance Section

MICHAEL F. BAILEY
REID B. HORWITZ
KENNETH W. GAUL
United States Department of Justice
555 4th Street, N.W.
Room 9901
Washington, D.C. 20001
(202) 307-6200

MICHAEL J. YAMAGUCHI
United States Attorney

By ____________________________

Assistant United States Attorney
Office of the United States Attorney
Northern District of California
450 Golden Gate Avenue
Box 36055
San Francisco, California 94102
(415) 556-1126

IN THE UNITED STATES DISTRICT COURT
THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580 Plaintiff, v. WHOLE FOODS MARKET, INC. 550 Bowie Street Austin, Texas 78703 and WILD OATS MARKETS, INC. 1821 30th Street Boulder, Colorado 80301 Defendants.	)	Civ. No. COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION PURSUANT TO SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT FILED UNDER SEAL Case: 1:07-cv-01021 Assigned To : Friedman, Paul L. Assign. Date : 06/06/2007 Description: TRO/PI

I.
INTRODUCTION

Whole Foods Market, Inc.'s ("Whole Foods") proposed acquisition of Wild Oats Markets, Inc. ("Wild Oats"), will substantially lessen competition and thereby cause significant harm to consumers. This merger, involving the two leading operators of premium natural and organic supermarkets, will increase prices and reduce quality and services in a number of geographic markets throughout the United States. Whole Foods' Chief Executive Officer John Mackey bluntly advised his Board of Directors of the purpose of this acquisition: "By buying [Wild Oats] we will . . . avoid nasty price wars in Portland (both Oregon and Maine), Boulder, Nashville, and several other cities which will harm [Whole Foods'] gross margins and profitability. By buying [Wild Oats] . . . we eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us. . . . [Wild Oats] may not be able to defeat us but they can still hurt us . . . . [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever." To prevent this consumer harm, the Federal Trade Commission ("Commission") petitions the Court to maintain the status quo and enjoin defendants from allowing Whole Foods to acquire any stock, assets, or other interests in Wild Oats, during the pendency of an administrative proceeding, which will be commenced by the Commission pursuant to Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21, and Section 5(b) of the FTC Act, 15 U.S.C. § 45(b).

II.
THE PARTIES

1. Plaintiff Commission is an administrative agency of the United States Government established, organized, and existing pursuant to the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission is vested with authority and responsibility for enforcing, among other things, Section 7 of the Clayton Act and Section 5 of the FTC Act.

2. Defendant Whole Foods is a corporation organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal place of business at 550 Bowie Street, Austin, Texas 78703. Established in 1980, Whole Foods operates approximately

190 premium natural and organic supermarkets in more than 30 states and the District of Columbia. It is the largest operator of premium natural and organic supermarkets in the United States.

3. According to Mr. Mackey, Whole Foods is "a company that is authentically committed to its mission of natural/organic/healthy foods. Its core customers recognize this authenticity and it creates a customer loyalty that will not be stolen away by conventional markets who sell the same products. Whole Foods has created a 'brand' that has real value for millions of people."

4. Defendant Wild Oats is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1821 30th Street, Boulder, Colorado 80301. Wild Oats is the second largest operator of premium natural and organic supermarkets in the United States, currently operating numerous premium natural and organic supermarkets throughout the United States.

5. Founded in 1987, Wild Oats provides a broad selection of natural, organic, and gourmet foods, environmentally friendly products, and natural vitamins, remedies, and body care products. The firm was built "on the vision of enhancing the lives of our customers and our people with products and education that support health and wellbeing." As Wild Oats' Vice President of Marketing Laura Coblentz has described: "Wild Oats is more than a retail chain—it's about a lifestyle, and that's how we market ourselves."

6. Consumers spent a combined total of $6.5 billion in fiscal 2006 at Whole Foods and Wild Oats. Approximately 70% of that total was spent on perishable products, such as produce, meat, seafood, baked goods, and prepared foods.

III.
JURISDICTION AND VENUE

7. Jurisdiction is based on Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and 28 U.S.C. §§ 1337 and 1345. Venue is proper under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b); 28 U.S.C. § 1391(b) and (c); and Section 12 of the Clayton Act, 15 U.S.C. § 22.

8. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

> (b) Whenever the Commission has reason to believe --
>
> (1) that any person, partnership or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public –
>
> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . . .

9. Whole Foods and Wild Oats are engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. § 12(a). The businesses of Whole Foods and Wild Oats have been and are now in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

10. Whole Foods transacts business within the District of Columbia.

11. Wild Oats transacts business within the District of Columbia.

IV.
The Proposed Acquisition and the Commission's Response

12. On February 21, 2007, Whole Foods and Wild Oats executed an agreement whereby Whole Foods proposes to acquire all of the voting securities of Wild Oats through WFMI Merger Co., a wholly-owned subsidiary of Whole Foods. The purchase will be effected through tender offer for all shares of Wild Oats common stock. The total cost of the acquisition is expected to be approximately $671 million in cash and assumed debt.

13. The closing of the transaction is subject to clearance under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a. The defendants have advised the Commission that, in the absence of a court order to the contrary, Defendant Whole Foods will be free to acquire all shares of Wild Oats common stock after 11:59 pm June 6, 2007.

14. Defendant Whole Foods intends to then merge Wild Oats into Whole Foods; to close numerous Wild Oats stores; to sell several Wild Oats stores; and to operate the remainder as Whole Foods stores.

15. On June 5, 2007, following a three-month investigation, the Commission determined that it has reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act because the Acquisition may substantially lessen competition and/or tend to create a monopoly in the operation of premium natural and organic supermarkets across the United States.

16. On that same day, the Commission determined that the injunctive relief requested herein would be in the public interest and authorized its staff to seek a temporary restraining order ("TRO") and preliminary injunction ("PI") in federal district court under Section 13(b) of

the FTC Act. The purpose of the TRO and PI is to prevent the Acquisition during the pendency of an administrative proceeding to be initiated by the Commission under Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), challenging the legality of the proposed Acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The legality of the proposed Acquisition, and the appropriate remedy in the event it is found illegal, will be determined by the Commission through those administrative proceedings, subject to judicial review.

V.
PREMIUM NATURAL AND ORGANIC FOODS INDUSTRY

17. "Natural foods" are foods that are minimally processed and largely or completely free of artificial ingredients, preservatives, and other non-naturally occurring substances.

18. "Organic foods" are foods that are produced using: agricultural practices that promote healthy ecosystems; no genetically engineered seeds or crops, sewage sludge, long-lasting pesticides or fungicides; healthy and humane livestock management practices including use of organically grown feed, ample access to fresh air and the outdoors, and no antibiotics or growth hormones; and food processing that protects the healthfulness of the organic product, including the avoidance of irradiation, genetically modified organisms, and synthetic preservatives.

19. Pursuant to the United States Department of Agriculture's ("USDA's") Organic Foods Production Act of 1990 (the "Organic Rule"), all products labeled "organic" must be certified by a federally accredited certifying agency as satisfying USDA standards for organic foods. The Organic Rule further requires that retailers of products labeled "organic" use

handling, storage, and other practices to protect the integrity of organically-labeled products, including: preventing commingling of organic and non-organic ("conventional") products; protecting organic products from contact with prohibited substances; and maintaining records that document adherence to the USDA requirements.

20. Premium natural and organic supermarkets offer a distinct set of products and services to a distinct group of customers in a distinctive way, all of which significantly distinguish premium natural and organic supermarkets from conventional supermarkets and other retailers of food and grocery items ("Retailers").

21. Premium natural and organic supermarkets are not simply outlets for natural and organic foods. Whole Foods' Chief Executive Officer John Mackey acknowledged that "Whole Foods isn't primarily about organic foods. It never has been. Organic food is only one part of its highly successful business model." In announcing its fourth quarter results for 2006, Whole Foods stated that "Whole Foods Market is about much more than just selling 'commodity' natural and organic products. We are a lifestyle retailer and have created a unique shopping environment built around satisfying and delighting our customers." Specifically, Mr. Mackey has said that "superior quality, superior service, superior perishable product, superior prepared foods, superior marketing, superior branding, and superior store experience working together are what makes Whole Foods so successful . . . people who think organic foods are the key don't understand the business model."

22. To begin with, premium natural and organic supermarkets focus on perishable products, offering a vast selection of very high quality fresh fruits and vegetables–including exotic and hard-to-find items–and other perishables. As Whole Foods stated in its 2006 annual

report, "We believe our heavy emphasis on perishable products differentiates us from conventional supermarkets and helps us attract a broader customer base." Whole Foods' Mr. Mackey has also emphasized the importance of high quality perishable foods to Whole Foods' business model: "This [produce, meat, seafood, bakery, prepared foods] is over 70% of Whole Foods total sales. Wal-Mart doesn't sell high quality perishables and neither does Trader Joe's while we are on the subject. That is why Whole Foods coexists so well with [Trader Joe's] and it is also why Wal-Mart isn't going to hurt Whole Foods."

23. Relative to conventional supermarkets and most other Retailers, premium natural and organic supermarkets target shoppers who are, in the words of one of the defendants, "affluent, well educated, health oriented, quality food oriented people." The core shoppers of premium natural and organic supermarkets have a preference for natural and organic products, and premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable those shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip.

24. Premium natural and organic supermarkets are differentiated from other Retailers in that premium natural and organic supermarkets offer more amenities and service venues; higher levels of service and more knowledgeable service personnel; and special features such as in-store community centers.

25. Premium natural and organic supermarkets promote a lifestyle of health and ecological sustainability, to which a significant portion of their customers are committed. Through the blending together of these elements and others, premium natural and organic supermarkets strive to create a varied and dynamic experience for shoppers, inviting them to

make the premium natural and organic supermarket a destination to which shoppers come not merely to shop, but to gather together, interact, and learn, often while enjoying shared eating and other experiences. Premium natural and organic supermarkets expend substantial resources on developing a brand identity that connotes this blend of elements, and especially the qualities of trustworthiness (*viz.*, that all products are natural and, when so-labeled, organic, that the store's suppliers practice humane animal husbandry and provide humane working environments for employees, and that the store's actions are ecologically sound) and qualitative superiority to other Retailers.

26. Relative to most other Retailers, premium natural and organic supermarkets' products often are priced at a premium reflecting not only product quality and service, but the marketing of a lifestyle to which their customers aspire.

27. As Whole Foods' Mr. Mackey has acknowledged, "Safeway and other conventional retailers will keep doing their thing – trying to be all things to all people . . . . They can't really effectively focus on Whole Foods Core Customers without abandoning 90% of their own customers . . . . Whole Foods core customers will not abandon them because Safeway has made their stores a bit nicer and is selling some organic foods. Whole Foods knows their core customers well and serves them far better than any of their potential competitors do."

28. Mr. Mackey has also said that "all those [conventional supermarkets and club stores] you named have been selling organic foods for many years now. The only thing 'new' is that they are now beginning to sell private label organic foods for the first time. However, they've been selling organic produce and organic milk for many years now. Doing so has never hurt Whole Foods."

29. Wild Oats' most recent 10K filed with the Securities and Exchange Commission noted: "Despite the increase in natural foods sales within conventional supermarkets, [Wild Oats] believe[s] that conventional supermarkets still lack the concentration on a wide variety of natural and organic products, and emphasis on service and consumer education that our stores offer."

30. Premium natural and organic supermarkets are also very different from mass-merchandisers, such as Wal-Mart and Target. According to Mr. Mackey, "Wal-Mart does a particularly poor job selling perishable foods. Whole Foods quality is better, its customer service is far superior, and the store ambience and experience it provides its customers is fun, entertaining and educational."

31. With respect to Trader Joe's, Mr. Mackey stated: "TJ's is a completely different concept than WFMI. WFMI's business is all about perishables - fresh produce, fresh seafood, fresh meat, in store delis, juice bars, and bakeries. WFMI has stated that more than 50% of their sales are in these categories of products - categories which TJ's doesn't even have. TJ's is primarily a discount private label company with a large wine selection."

32. Unlike other natural and organic product retailers, premium natural and organic supermarkets offer an extensive selection of natural and organic products to enable shoppers to purchase substantially all of their food and grocery requirements during a single shopping trip. As a result, premium natural and organic supermarkets are appreciably larger than other natural and organic retailers in square footage, number of products offered, inventory for each product offered, and annual dollar sales.

33. Premium natural and organic supermarkets' primary competitors are other

premium natural and organic supermarkets. Shoppers with preferences for premium natural and organic supermarkets are not likely to switch to other retailers in response to a small but significant non-transitory increase in premium natural and organic supermarket prices.

VI.
RELEVANT MARKETS

34. The operation of premium natural and organic supermarkets is a distinct "line of commerce" within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

35. Unlike conventional supermarkets, which tend to draw their customers from within a radius of three or four miles, premium natural and organic supermarkets tend to draw their customers from within a radius of five or six miles. As a result, areas as small as approximately five or six miles in radius from premium natural and organic supermarkets or as large as a metropolitan area are distinct "sections of the country" within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

VII.
COMPETITION BETWEEN WHOLE FOODS AND WILD OATS

36. Whole Foods and Wild Oats, respectively, are the largest and second largest operators of premium natural and organic supermarkets in the United States.

37. Whole Foods and Wild Oats are the only two nationwide operators of premium natural and organic supermarkets in the United States.

38. Whole Foods and Wild Oats are one another's closest competitor in twenty-one geographic markets. Consumers in those markets have reaped price and non-price benefits of

competition between Whole Foods and Wild Oats. The markets where the two compete head to head are: Albuquerque, NM; Medford, MA (suburban Boston); Saugus, MA (suburban Boston); Boulder, CO; Hinsdale, IL (suburban Chicago); Evanston, IL (suburban Chicago); Cleveland, OH; Denver, CO; Lakewood, CO; Ft. Collins, CO; West Hartford, CT; Henderson, NV; Indianapolis, IN; Kansas City-Overland Park, KS; Las Vegas, NV; Los Angeles-Santa Monica-Brentwood, CA; Louisville, KY; Omaha, NE; Pasadena, CA; Phoenix, AZ; Portland, ME; Portland, OR; Princeton, NJ; St. Louis, MO; and Tualatin, OR.

39. Over the last five years, Whole Foods has targeted markets for entry where, in Whole Foods' words, Wild Oats enjoyed a "monopoly." Consumers in those markets benefitted from the new competition in those markets.

40. There are other geographic markets in which only one or the other is present. In many of these markets, Wild Oats or Whole Foods plans, but for the proposed Acquisition, to enter to offer direct and unique competition to the other. Each has developed expansion plans that target each other's "monopoly" markets, as Whole Foods describes it. These markets include: Palo Alto, CA; Fairfield County, CT; Miami Beach, FL; Naples, FL; Nashville, TN; Reno, NV; and Salt Lake City, UT.

41. Whole Foods' Mr. Mackey has said that "Whole Foods has taken significant market share from OATS wherever they have opened competing stores--Boulder, Santa Fe, Denver, Boca Raton, Ft. Lauderdale, and St. Louis." Each of the parties, in anticipation of entry by the other, engages in aggressive price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry in those geographic markets of other retailers. In addition, when Whole Foods or Wild Oats expects the

other to enter one of its markets, each plans substantial improvements in quality, including renovations, expansions, and competitive pricing. As Mr. Mackey explained upon Whole Foods' entry into Nashville: "At least Wild Oats will likely improve their store there in anticipation of Whole Foods eventually opening and [customers will] benefit from that." Neither company responds in the same way to competition from conventional supermarkets or other retailers.

42. Consumers have benefitted directly from the price and quality competition between Whole Foods and Wild Oats. If the acquisition occurs, those benefits will be lost if the acquisition occurs in the markets where the two currently compete and they will not occur in those markets where each is planning to expand.

VIII.
LIKELIHOOD OF SUCCESS ON THE MERITS AND NEED FOR RELIEF

43. The Commission is likely ultimately to succeed in demonstrating, in administrative proceedings to adjudicate the legality of the proposed merger, that the proposed Acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. In particular, the Commission is likely ultimately to succeed in demonstrating, among other things, that:

a. the proposed Acquisition will eliminate one of only two or three premium natural and organic supermarkets and substantially increase concentration in the operation of premium natural and organic supermarkets in each of the geographic areas identified in paragraphs 38 and 40 hereof, each of which already is highly concentrated;

b. the proposed Acquisition will eliminate substantial and effective price and non-price competition between Defendant Whole Foods and Defendant Wild Oats in the operation of premium natural and organic supermarkets in each of the geographic areas identified in paragraphs 38 and 40 hereof, substantially reducing or eliminating competition in the operation of premium natural and organic supermarkets in each of those geographic areas;

c. the proposed Acquisition will eliminate one of only two or three premium natural and organic supermarkets in each of the geographic areas identified in paragraphs 38 and 40 hereof, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

d. the proposed Acquisition will eliminate the only existing company that can serve as a meaningful springboard for a conventional supermarket operator to enter the premium natural and organic supermarket market in each of the geographic areas identified in paragraphs 38 and 40 hereof, tending to create a monopoly in the operation of premium natural and organic supermarkets in each of those geographic areas;

e. the proposed Acquisition will eliminate defendant Whole Foods' closest competitor in geographic and product space in each of the geographic areas identified in paragraphs 38 and 40 hereof, resulting in the loss of direct and unique price and non-price competition that conveys to shoppers benefits that go well beyond the benefits resulting from the presence or threatened entry of other retailers;

f. the proposed Acquisition will result in the closing of numerous Wild Oats stores, reducing or eliminating consumer choice in premium natural and organic supermarkets; and

g. the proposed Acquisition will enable the combined Whole Foods/Wild Oats to exercise market power unilaterally.

h. the proposed acquisition will eliminate potential competition in numerous parts of the country.

44. Entry or repositioning into the operation of premium natural and organic supermarkets is time-consuming, costly, and difficult. As a result, entry or repositioning into the operation of premium natural and organic supermarkets in the geographic localities identified in paragraphs 38 and 40 hereof is unlikely to occur or to be timely or sufficient to prevent or defeat the anticompetitive effects described in paragraph 43 hereof.

45. If the proposed Acquisition were to occur, it likely would be difficult or impossible to reconstitute Wild Oats as it presently exists and to restore the competitive *status quo ante*. Further, it is likely that substantial harm to competition would occur in the interim even if it proved possible to reconstitute Wild Oats as it presently exists and to restore the competitive *status quo ante*.

46. For the reasons stated above, the granting of the injunctive relief sought is in the public interest.

WHEREFORE, the Commission requests that the Court:

1. Temporarily and preliminarily enjoin Defendant Whole Foods from taking any

further steps to acquire the stock, assets, or any other interest in Wild Oats, directly or indirectly;

2. Retain jurisdiction and maintain the status quo pending the issuance of an administrative complaint by the Commission challenging the proposed Acquisition, and until such complaint is dismissed by the Commission, set aside by a court on review, or becomes final; and

3. Award such other and further relief as the Court may determine to be proper and just, including costs.

Respectfully submitted,

Dated: June 6, 2007

WILLIAM BLUMENTHAL
General Counsel

JEFFREY SCHMIDT
Director

KENNETH L. GLAZER
Deputy Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave, N.W.
Washington, DC 20580

MICHAEL J. BLOOM
CATHARINE M. MOSCATELLI (D.C. Bar No. 418510)
JOAN L. HEIM
THOMAS H. BROCK (D.C. Bar No. 939207)
MICHAEL A. FRANCHAK
ABIGAIL SLATER
JEANNE H. LIU
Federal Trade Commission
601 New Jersey Ave., N.W.
Washington, DC 20001
(202) 326-2475 (direct dial)
(202) 326-2284 (facsimile)
mjbloom@ftc.gov

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing papers were served by hand delivering a copy to:

Alden L. Atkins, Esq.
Vinson & Elkins LLP
The Willard Office Building
1455 Pennsylvania Ave., N.W.
Suite 600
Washington, D.C. 20004-1008
(202) 639-6613
Aatkins@VELaw.com

Counsel for Defendant Whole Foods Market, Inc.

Clifford H. Aronson, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(212) 735-2614
Caronson@Skadden.com

Counsel for Defendant Wild Oats Markets, Inc.

Dated: June 6, 2007

Thomas H. Brock, Esq.

RECEIVED

JUN - 6 2007

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Synergies

Dissenting Statement of Commissioner Joshua D. Wright
In the Matter of Ardagh Group S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain

FTC File No. 131-0087

April 11, 2014

The Commission has voted to issue a Complaint and Decision & Order ("Order") against Ardagh Group ("Ardagh") to remedy the allegedly anticompetitive effects of Ardagh's proposed acquisition of Saint-Gobain Containers Inc. and Compagnie de Saint-Gobain (jointly, "St. Gobain"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Ardagh's acquisition will substantially lessen competition in glass containers manufactured and sold to beer brewers and spirits distillers in the United States, in violation of Section 7 of the Clayton Act. FTC staff and their economic expert should be commended for conducting a thorough investigation of this matter, working diligently to develop and analyze a substantial quantity of documentary and empirical evidence, and providing thoughtful analyses of the transaction's potential competitive effects. Indeed, I agree with the Commission that there is evidence sufficient to give reason to believe the proposed transaction would likely result in unilateral price increases. After reviewing the record evidence, however, I concluded there is no reason to believe the transaction violates Section 7 of the Clayton Act because any potential anticompetitive effect arising from the proposed merger is outweighed significantly by the benefits to consumers flowing from the transaction's expected cognizable efficiencies. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

I write separately today to explain my reasoning for my vote in the matter and to highlight some important issues presented by this transaction relating to the burden of proof facing merging parties seeking to establish cognizable efficiencies.

I. Potential Anticompetitive Effects Are Small At Best Relative to Cognizable Efficiencies

The Commission alleges both unilateral and coordinated price effects will arise from the proposed transaction. The economic logic of the unilateral effects theory is straightforward: If the merger combines the two glass manufacturers who are the most preferred for a set of customers, there is the potential for a price increase arising from the loss of competition between those two firms. This is because sales previously diverted to the next closest competitor in response to a price increase will now be internalized by the post-merger firm. When analyzing the potential for unilateral price effects, the 2010 Merger Guidelines indicate the Agencies will consider "any reasonably available and reliable information," including "documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys."[1] The Merger Guidelines also contemplate a number of quantitative analyses to facilitate the analysis of potential unilateral effects including calculating diversion ratios and the value of diverted sales. Where sufficient data are available, the Merger Guidelines indicate "the Agencies may construct economic models designed to quantify the unilateral price effects resulting from the merger."[2] In my view, the totality of record evidence supports an inference – though a fragile one – that the merger is likely to result in very modest unilateral price effects at best.

With respect to the potential coordinated price effects, I find successful coordination in this market highly unlikely.[3] However, even if coordination was a more plausible concern, I am not persuaded record evidence is probative of the effects that would arise as a result of *this* merger. My view and analysis of the record evidence relied upon to assess the magnitude of any potential coordinated effects is that it is suspect and cannot identify price differences attributable to changes in post-merger incentives to coordinate that would result from the proposed transaction rather than other factors. In addition, even if coordinated effects were likely, any estimated expected effect would need to be discounted by a probability of successful coordination that is less than one.

In summary, given the totality of the available evidence, I am persuaded that the proposed transaction is likely to generate, at best, small unilateral price effects.

The key question in determining whether the proposed transaction is likely to violate Section 7 of the Clayton Act is thus whether any cognizable efficiencies "likely

---

[1] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html [hereinafter MERGER GUIDELINES].

[2] *Id*.

[3] Although coordinated effects may be more likely with two rather than three key competitors, I do not find evidence sufficient to conclude coordination is likely. For example, I find that prices are individually negotiated and not particularly transparent, and the incentive to cheat without detection would likely undermine a collusive outcome. In the ordinary course of business, competitive firms collect information and monitor one another's behavior. There is no evidence that the information collected by firms in the glass container market is accurate or that coordination based upon that information has taken place to date.

would be sufficient to reverse the merger's potential to harm customers in the relevant market."[4] The 2010 Merger Guidelines and standard cost-benefit principles teach that efficiencies should matter most when competitive effects are small.[5] The Commission's view of the record evidence is apparent in the Complaint, which alleges that "nearly all" of the efficiencies proffered by the parties are non-cognizable.[6] However, my own review of the record evidence leads me to disagree with that conclusion. In fact, I find that given reasonable assumptions, cognizable efficiencies are likely to be substantial and more than sufficient to offset any anticompetitive price increase. While reasonable minds can differ with respect to the magnitude of cognizable efficiencies in this case, I do not find the allegation of zero or nearly zero efficiencies plausible. Indeed, my own analysis of the record evidence suggests expected cognizable efficiencies are up to six times greater than any likely unilateral price effects. The relative magnitude of the expected cognizable efficiencies set forth is dispositive of the matter under my own analysis.

---

[4] MERGER GUIDELINES § 10.

[5] MERGER GUIDELINES § 10 ("In the Agencies' experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great."). It is sometimes argued, pointing to language in the Merger Guidelines that "efficiencies almost never justify a merger to monopoly or near-monopoly," that the Merger Guidelines rule out or render the burden facing merger parties practically insurmountable in the case of mergers to monopoly or "three-to-two" situations. In my view, this is a misreading of the Merger Guidelines in letter and spirit. The sentence prior notes that "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great." The Merger Guidelines' reference to mergers to monopoly or near-monopoly are illustrations of cases in which likely adverse effects might be large. The Merger Guidelines themselves do not rule out an efficiencies defense when a merger with small anticompetitive effects, with any market structure, generates cognizable efficiencies that are sufficient to prevent the merger from being anticompetitive. Nor do the Merger Guidelines suggest that a merger in a market with many firms that exhibits significant unilateral price effects should face a less serious burden in order to establish an efficiencies defense. The Merger Guidelines' more general shift toward effects over market structure is also consistent with this analysis and undermines the logic of a position that the comparison of anticompetitive harms to cognizable efficiencies should be conducted differently depending upon the number of firms in the relevant market. To the extent the Commission believes the judicial decisions cited in note 5 of their statement endorse the notion that extraordinary efficiencies are required to justify a merger to monopoly or duopoly even when the anticompetitive effects from that merger are small, this is the analytical equivalent of allowing the counting of the number of firms within a market to trump analysis of competitive effects. The Commission should reject that view as inconsistent with the goal of promoting consumer welfare.

[6] *See*, *e.g.* Complaint, In the Matter of Ardagh Group S.A., F.T.C. Docket No. 9356 (June 28, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf.

II. When Is There an Efficiencies Defense at the FTC?

I would like to highlight some important issues presented by this transaction as they relate to how the Commission analyzes parties' efficiencies claims, and in particular, whether the burden of proof facing parties seeking to establish cognizable efficiencies is or should be meaningfully different than the burden facing the agency in establishing that a proposed merger is likely to substantially lessen competition.

My view is that the burden facing the agency with respect to the likelihood of anticompetitive effects should be in parity to that faced by the parties with respect to efficiencies. I recognize that this view is at least superficially in tension with the 2010 Merger Guidelines, which appear to embrace an asymmetrical approach to analyzing harms and benefits. Indeed, the 2010 Merger Guidelines declare that "the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies."[7] This tension is easily resolved in the instant case because the efficiencies substantially outweigh the potential harms, but it merits greater discussion.

To begin with, it is important to define which issues are up for discussion and which are not with some precision. The issue is not whether the burden-shifting framework embedded within Section 7 of the Clayton Act is a useful way to structure economic and legal analysis of complex antitrust issues.[8] It is. Nor is the pertinent question whether the parties properly bear the burden of proof on efficiencies. They do.[9]

The issues here are twofold. The first issue is whether the magnitude of the burden facing merging parties attempting to demonstrate cognizable efficiencies *should* differ from the burden the Commission must overcome in establishing the likelihood of anticompetitive effects arising from the transaction *in theory*. The second is whether the magnitudes of those burdens differ *in practice*. The Commission appears to answer the first question in the negative.[10] With respect to the second question, the Commission points to some evidence that the Agency does in fact consider efficiencies claims when

---

[7] MERGER GUIDELINES § 10.

[8] See, e.g., United States v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990).

[9] *See* MERGER GUIDELINES § 10.

[10] Statement of the Commission, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 (April 11, 2014) ("We also disagree with Commissioner Wright's suggestion that the Commission imposed an unduly high evidentiary standard in analyzing the parties' efficiency claims").

presented in many investigations. There is little dispute, however, that the Commission gives some form of consideration to efficiency claims; the relevant issue is over precisely *how* the Commission considers them. More specifically, must merging parties overcome a greater burden of proof on efficiencies in practice than does the FTC to satisfy its prima facie burden of establishing anticompetitive effects? This question, in my view, merits greater discussion.

Even when the same burden of proof is applied to anticompetitive effects and efficiencies, of course, reasonable minds can and often do differ when identifying and quantifying cognizable efficiencies as appears to have occurred in this case. My own analysis of cognizable efficiencies in this matter indicates they are significant. In my view, a critical issue highlighted by this case is whether, when, and to what extent the Commission will credit efficiencies generally, as well as whether the burden faced by the parties in establishing that proffered efficiencies are cognizable under the Merger Guidelines is higher than the burden of proof facing the agencies in establishing anticompetitive effects. After reviewing the record evidence on both anticompetitive effects and efficiencies in this case, my own view is that it would be impossible to come to the conclusions about each set forth in the Complaint and by the Commission – and particularly the conclusion that cognizable efficiencies are nearly zero – without applying asymmetric burdens.

Merger analysis is by its nature a predictive enterprise. Thinking rigorously about probabilistic assessment of competitive harms is an appropriate approach from an economic perspective. However, there is some reason for concern that the approach applied to efficiencies is deterministic in practice. In other words, there is a potentially dangerous asymmetry from a consumer welfare perspective of an approach that embraces probabilistic prediction, estimation, presumption, and simulation of anticompetitive effects on the one hand but requires efficiencies to be *proven* on the other.

There is ample discretion in the 2010 Merger Guidelines to allow for this outcome in practice. For example, the merger-specificity requirement could be interpreted narrowly to exclude any efficiency that can be recreated with any form of creative contracting. While the Merger Guidelines assert that Agencies "do not insist upon a less restrictive alternative that is merely theoretical," there is little systematic evidence as to how this requirement is applied in practice. Verifiability, on the other hand, could be interpreted to impose stricter burden of proof than the agency is willing to accept when it comes to predictions, estimates, presumptions, or simulations of anticompetitive effects. There is little guidance as to how these provisions of the

Merger Guidelines ought to be interpreted.[11] Neither is further guidance likely forthcoming from the courts given how infrequently mergers are litigated. None of this, of course, is to say that parties should not bear these burdens in practice. Efficiencies, like anticompetitive effects, cannot and should not be presumed into existence. However, symmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.

There are legitimate and widespread concerns that this has not been the case. Academics, agency officials, and practitioners have noted that although efficiencies are frequently a significant part of the business rationale for a transaction, receiving credit for efficiencies in a merger review is often difficult.[12] Professor Daniel Crane has analyzed the perceived asymmetries between competitive effects analysis and efficiencies discussed above and their implications for competition systems and consumer welfare.[13] Others have pointed out that recent court cases reveal that "the efficiency defense faces an impossibly high burden."[14] Moreover, testimony from senior agency officials recognize the potential costs of imposing an unnecessarily high burden of proof to demonstrate cognizable efficiencies and states that symmetrical treatment of the evidence as they related to efficiencies versus competitive effects is warranted.

> *Placing too high a burden on the parties to quantify efficiencies and to show that they are merger-specific risks prohibiting transactions that would be efficiency-enhancing. On the other hand, we are not able simply to take the parties' word that the efficiencies they have identified will actually materialize. Ultimately, we evaluate evidence related to*

---

[11] The 2006 Merger Guidelines Commentary provides some guidance on efficiencies, but offer little guidance on the interpretation of these provisions and the type of substantiation required. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (Mar. 2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.htm#44.

[12] *See, e.g.*, Michael B. Bernstein & Justin P. Hedge, *Maximizing Efficiencies: Getting Credit Where Credit Is Due*, ANTITRUST SOURCE, Dec. 2012, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec12_hedge_12_20f.authcheckdam.pdf.

[13] Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 386-87 (2011). Professor Crane argues that "as a matter of both verbal formulation in the governing legal norms and observed practice of antitrust enforcement agencies and courts, the government is accorded greater evidentiary leniency in proving anticompetitive effects than the merging parties are in proving offsetting efficiencies," *id.* at 348, and rejects a variety of justifications for asymmetrical treatment of merger costs and benefits.

[14] Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View*, 13 SUP. CT. ECON. REV. 230 (2005).

efficiencies under the same standard we apply to any other evidence of competitive effects.[15]

The lack of guidance in analyzing and crediting efficiencies has led to significant uncertainty as to what standard the Agency applies in practice to efficiency claims and led to inconsistent applications of Section 10 of the Merger Guidelines, even among agency staff.[16] In my view, standard microeconomic analysis should guide how we interpret Section 10 of the 2010 Merger Guidelines, as it does the rest of the antitrust law. To the extent the Merger Guidelines are interpreted or applied to impose asymmetric burdens upon the agencies and parties to establish anticompetitive effects and efficiencies, respectively, such interpretations do not make economic sense and are inconsistent with a merger policy designed to promote consumer welfare.[17] Application of a more symmetric standard is unlikely to allow, as the Commission alludes to, the efficiencies defense to "swallow the whole of Section 7 of the Clayton Act." A cursory read of the cases is sufficient to put to rest any concerns that the efficiencies defense is a mortal threat to agency activity under the Clayton Act. The much more pressing concern at present is whether application of asymmetric burdens of proof in merger review will swallow the efficiencies defense.

---

[15] Statement of Kenneth Heyer on Behalf of the United States Department of Justice, Antitrust Modernization Commission Hearings on the Treatment of Efficiencies in Merger Enforcement (Nov. 17, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Heyer.pdf.

[16] In a recent study examining agency analysis of efficiencies claims, an FTC economist and attorney found significant disparities. Malcolm B. Coate & Andrew J. Heimert, Merger Efficiencies at the Federal Trade Commission: 1997-2007 (2009), *available at* http://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997%E2%80%932007/0902mergerefficiencies.pdf. Coate and Heimert find that "BE staff endorsed 27 percent of the claims considered, while BC accepted significantly fewer (8.48 percent) of the claims considered during the studied period." The disparity also applies to rejection of efficiencies claims. The Bureau of Economics rejected 11.9 percent of the claims, while the Bureau of Competition rejected a significantly higher 31.9 percent of claims. *Id*. at 26.

[17] For example, Professor Crane explains that "[i]f the government and merging parties were held to the same standard of proof—preponderance of the evidence, for example—then, conceptually, harms and efficiencies would be given equal weight despite the different allocations of burdens of proof." In addition, "[i]f probabilities of harm are easier to demonstrate on an individualized basis than probabilities of efficiencies, even though in the aggregate both harms and efficiencies are similarly likely in the relevant categories of cases, then merger policy will display a bias in favor of theories of harm even if it adopts an explicit symmetry principle." Crane, *supra* note 11, at 387-88.

III. Conclusion

There are many open and important questions with respect to the treatment of efficiencies at the Agencies. While the Agencies' analytical framework applied to diagnosing potential anticompetitive effects got an important update with the 2010 Merger Guidelines, there remains significant room for improvement with respect to the aligning agency analysis of efficiencies with standard principles of economic analysis. Primary among these important questions is whether the burden of proof required to establish cognizable efficiencies should be symmetrical to the burden the Agencies must overcome to establish anticompetitive effects. In my view, issues such as out-of-market efficiencies and the treatment of fixed costs also warrant further consideration.[18]

For the reasons set forth in this statement, I conclude that the harms from the transaction are small at best and, applying a symmetric standard to assessing the expected benefits and harms of a merger, the expected cognizable efficiencies are substantially greater than the expected harms. Accordingly, I believe the merger as proposed would have benefitted consumers. As such, I cannot join my colleagues in supporting today's consent order because I do not have reason to believe the transaction violates Section 7 of the Clayton Act nor that a consent ordering divestiture is in the public interest.

[18] See, e.g., Jan M. Rybnicek & Joshua D. Wright, *Outside In or Inside Out?: Counting Merger Efficiencies Inside and Out of the Relevant Market*, *in* 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM (2014) (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411270; Judd E. Stone & Joshua D. Wright, *The Sound of One Hand Clapping: The 2010 Merger Guidelines and the Challenge of Judicial Adoption*, 39 REV. INDUS. ORG. 145 (2011).