Comments of

TechFreedom

Bilal Sayyed[1]

In the Matter of

Request for Information on Merger Enforcement

Docket (FTC-2022-0003)

April 21, 2022

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I. Introduction

TechFreedom welcomes the agencies' Request for Information on Merger Enforcement,[2] for "as the law and economic learning concerning mergers evolve, so too should [the agencies'] assessment of them."[3]

The Horizontal Merger Guidelines serve as the "blueprint for the architecture of merger analysis."[4] They have significantly influenced the analytical structure of the federal courts' review of horizontal mergers;[5] in fact, as the footnote suggests, it is difficult to identify a

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[2] Press Release, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers* (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers; U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, REQUEST FOR INFORMATION ON MERGER ENFORCEMENT (Jan. 18, 2022), https://www.justice.gov/opa/press-release/file/1463566/download.

[3] *Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Request for Information on Merger Enforcement* at 1 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf.

[4] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS at 54–55 (2007) (citations omitted), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf:

> There is general consensus that the Merger Guidelines have acted as the "blueprint for the architecture" of merger analysis and, overall, provide a guide that "functions well." The Guidelines have had a significant influence on judicial development of merger law, which is reflected in their widespread acceptance by the courts as the relevant framework for analyzing merger cases. ... The Guidelines have also provided useful guidance and transparency to the business community and antitrust bar. Finally, the Guidelines have helped to influence the development of merger policy by jurisdictions outside the United States.

[5] For cases applying some or all of the framework or analytic insight of the 2010 Horizontal Merger Guidelines, *see FTC v. Sanford Health*, 926 F.3d 959 (8th Cir. 2019); *United States v. Anthem*, 855 F.3d. 345 (D.C. Cir. 2017); *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); *FTC v. Penn State Hershey Med. Ctr*., 838 F.3d 327 (3d Cir. 2016); *Saint Alphonsus Medical Center-NAMPA v. St. Luke's*, 778 F.3d 775 (9th Cir. 2015); *Promedica Health Systems v. FTC*, 749 F.3d 559 (6th Cir. 2014); *FTC v. Thomas Jefferson Univ.,* 505 F. Supp. 3d. 522 (E.D. Pa. 2020); *FTC v. Peabody Energy*, 492 F. Supp. 3d 865 (E.D. Mo. 2020); *FTC v. Rag-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020); *United States v. Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del. 2020), *vacated*, 2020-1 Trade Cas. (CCH) ¶¶ 81, 294; *New York v. Deutsche Telecom AG*, 439 F. Supp. 3d 179 (S.D.N.Y 2020); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d. 27 (D.D.C. 2018); *FTC v. Tronox Ltd*., 332 F. Supp. 3d. 187 (D.D.C. 2018); *United States v. Energy Sols, Inc.*, 265 F. Supp. 3d 415 (D. Del. 2017); *United States v. Aetna*, 240 F. Supp. 3d. 1 (D.D.C. 2017); *FTC v. Staples*, 190 F. Supp. 3d 100 (D.D.C. 2016); *FTC v. Sysco*, 113 F. Supp. 3d 1 (D.D.C. 2015); *United States v. Bazaarvoice, Inc.*, 2014-1 Trade Cas. (CCH) ¶¶ 78, 641 (N.D. Cal. Jan. 8, 2014); *FTC v. OSF Healthcare Sys*., 852 F. Supp. 2d 1069 (N.D. Ill. 2012); *FTC v. LabCorp*., 2011 WL 3100372 (C.D. Cal. Feb. 22, 2011); *United States v. H&R Block*, 833 F. Supp. 2d 36 (D.D.C. 2011). In most of these litigated matters, but not all, the court found for the government.

For cases applying some or all of the framework or analytic insight of the 1992 Horizontal Merger Guidelines, *see*, among others, *FTC v. Whole Foods Mkt*., 548 F.3d 1028 (D.C. Cir. 2008); *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410 (5th Cir. 2008); *FTC v. Heinz*, 246 F.3d 708 (D.C. Cir. 2001; *FTC v. Tenet Health Care Corp*., 186 F.3d 1045 (8th Cir. 1999); *United States v. Englehard Corp.*, 126 F.3d 1302 (11th Cir. 1997); *FTC v. CCC Holdings, Inc*. 605 F. Supp. 2d 26 (D.D.C. 2009); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75, 725 (D.N.M. 2007); *United States v. Oracle Corp*., 331 F. Supp. 2d 1098 (N.D. Ca. 2004); *FTC v. Arch Coal*, 329 F. Supp. 2d

litigated horizontal merger matter of the past 25 years that has not relied, at least in part, on the analytical framework of the Horizontal Merger Guidelines. Challenges to horizontal mergers initiated by state enforcement authorities,[6] the review of mergers by sector-specific federal regulatory agencies,[7] and the merger guidelines of foreign competition agencies[8] have all been strongly influenced by the 2010 Horizontal Merger Guidelines and their 1992 predecessor.[9] Acknowledging their importance, Federal Trade Commission Chair Lina Khan is correct when she emphasizes that the merger guidelines must "accurately set forth current enforcement policy and identify techniques that [the agency] use[s] to detect and assess unlawful mergers."[10] Assistant Attorney General Jonathan Kanter is correct to recognize that

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109 (D.D.C. 2004); *United States v. UPM-Kymnmene Oyj*, 2003-2 Trade Cas. (CCH) ¶¶ 74, 101 (N.D. Ill. 2003); *FTC v. Líbbey*, 211 F. Supp. 2d 34 (D.D.C. 2002); *United States v. Sungard Data Sys.*, 172 F. Supp. 2d 172 (D.D.C. 2001); *FTC v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d. 151 (D.D.C. 2000); *FTC v. Cardinal Health*, 12 F. Supp. 2d 34 (D.D.C. 1998); *United States v. Long Island Jewish Med. Ctr*., 983 F. Supp. 121 (E.DN.Y. 1997); *FTC v. Staples*, 970 F. Supp. 1066 (D.D.C. 1997). In most of these litigated matters, but not all, the court found for the government.

[6] *See, e.g.*, Plaintiff States' Pretrial Memorandum, Case No. 1:19-cv-5434-VM-RWL, *State of New York v. Deutsche Telekom Ag* (S.D.N.Y. 11/26/2019); State of Washington's Trial Brief, Case No. 3:17-cv-05690, *State of Washington v. Franciscan Health System* (W.D. Wash. Feb. 28, 2019).

[7] The analytical framework of the Horizontal Merger Guidelines heavily influences the Federal Communications Commission's (FCC) and the Federal Energy Regulatory Commission's (FERC) review of mergers. For the FCC, *see, e.g.*, In re Applications of Level 3 Commc'n., Inc. & CenturyLink, Inc., 32 FCC Rcd 9581 (F.C.C. October 30, 2017); In re AT&T Inc., 26 FCC Rcd 16184 (F.C.C. November 29, 2011); XM Satellite Radio Holdings and Sirius Satellite Radio, Inc., Memorandum Opinion and Order, MB Docket No. 07-57, FCC 08-178 (July 25, 2008); News Corp. and Liberty Media Corporation, Memorandum Opinion and Order, MB Docket No. 07-18, FCC 08-66 (Feb. 25, 2008). For FERC, *see*, Analysis of Horizontal Mkt. Power, 138 F.E.R.C. P61, 109 ¶¶ 2, 4 (F.E.R.C. February 16, 2012) (affirming the Commission's usage and adoption of the thresholds created within the Merger Policy Statement, and noting that the "Commission adopted the five-step framework set out in the Antitrust Agencies' 1992 Horizontal Merger Guidelines as the basic framework for evaluating the competitive effects of proposed mergers."); Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 30, 1996), FERC Stats. and Regs., ¶¶ 31, 44 (1996) (1996 Merger Policy Statement), reconsideration denied, Order No. 592-A, 62 Fed. Reg. 33,341 (June 19, 1997), 79 FERC ¶¶ 61, 321 (1997).

[8] *See, e.g.,* Rachel Brandenburger and Joseph Matelis, *The 2010 U.S. Horizontal Merger Guidelines: A Historical and International Perspective*, 25 (3) ANTITRUST (Summer, 2011). A comparison of merger guidelines issued by the European Union (2004), the Canadian Competition Bureau (2004 and 2011), the Australian Competition & Consumer Commission (2008, updated in 2017) and the 2010 merger guidelines of the U.K.'s Office of Fair Trading and Competition Commission, and the 2021 merger guidelines of the U.K's Competition and Market Authority (the successor to the Office of Fair Trading and Competition Commission, with respect to competition matters) shows the heavy influence of the 1992 Horizontal Merger Guidelines.

[9] The Vertical Merger Guidelines have not had a similar impact on litigated matters both because there have been very few litigated vertical merger matters in the last four decades and because they were released in 2020.

[10] *Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement* at 1-2 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf.

the agencies must "ensure [that the] approach to analyzing mergers … captures the rich complexity of the modern economy."[11]

At the time of the most recent revision to the Horizontal Merger Guidelines, former FTC Chairman Robert Pitofsky stated that "the guideline process, in many ways, has had the most important influence on American antitrust policy in the last fifty years."[12] That influence is remarkable, considering that the merger guidelines are not binding on the courts; indeed, the courts do not have any obligation or requirement to consult them. Their influence is a function of their persuasiveness.[13] Thus, we strongly agree with Commissioners Phillips and Wilson that "any recalibration of [the] 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."[14] In that spirit, TechFreedom is pleased to submit these comments in response to the agencies' request for information on the merger guidelines.

Founded in 2010, TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

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[11] *Remarks of Assistant Attorney General Jonathan Kanter, Modern Competition Challenges Require Modern Merger Guidelines* at 2 (Jan. 18, 2022), https://www.justice.gov/opa/speech/file/1463546/download.

[12] Comments of Robert Pitofsky, Transcript of the Horizontal Merger Guidelines Review Project at 15 (Dec. 3, 2009), https://www.ftc.gov/sites/default/files/documents/public_events/horizontal-merger-guidelines-review-project/091203transcript.pdf.

[13] *See, e.g.*, *FTC v. Penn State Hershey Med. Center*, 838 F.3d 327, 338, n.2 (3rd Cir. 2016) ("Although the Merger Guidelines are not binding on the courts, they are often used as persuasive authority."); *Saint Alphonsus Medical Center-NAMPA v. St. Luke's*, 778 F.3d 775, 784, n. 9 (9th Cir. 2015) (same); *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 431, n. 11 (5th Cir. 2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates antitrust law."); *New York v. Deutsche Telecom AG*, 439 F. Supp. 3d 179, 232 (S.D.N.Y 2020) ("The Court recognizes that the Merger Guidelines are undoubtedly helpful in analyzing the competitive impact of mergers, and therefore has endeavored to give them due consideration throughout this analysis."); *FTC v. Rag-Stiftung*, 436 F. Supp. 3d 278, 293, n. 2 (D.D.C. 2020) ("The Merger Guidelines, while not binding on courts, offer persuasive guidance in examining competitive effects.") *United States v. Bazaarvoice, Inc.*, 2014-1 Trade Cas. (CCH) ¶¶ 78, 641 n. 18 (N.D. Cal. Jan. 8, 2014) ("The Merger Guidelines are not binding on the courts, but they 'are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws.'").

[14] *Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Request for Information on Merger Enforcement* at 1 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599775/phillips_wilson_rfi_statement_final_1-18-22.pdf.

TechFreedom has weighed in on significant issues over which the FTC has jurisdiction over the past decade:

- We analyzed the pros and cons of the FTC and DOJ's 2020 Vertical Merger Guidelines.[15]
- We challenged the FTC's authority to issue binding rules on non-compete and exclusive contract terms.[16]
- We analyzed the law and impact of non-compete agreements in the tech sector and warned that insufficient study has been done to merit a rulemaking proceeding.[17]
- We responded to, and critiqued, a petition for rulemaking calling to ban exclusive agreements.[18]
- We recommended that the FTC retain the "without unduly burdening legitimate business activity" clause in the agency's mission statement when drafting the FTC's Strategic Plan for 2022-2026.[19]
- We have analyzed, in Congressional testimony, pending legislative proposals to reform the FTC's operations[20] as part of a larger ongoing study of the Commission's processes.[21]
- We championed a reasoned discussion of COPPA enforcement that does not destroy the creative community or tech industry.[22]

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[15] *TechFreedom Praises, Critiques New Vertical Merger Guidelines*, TECHFREEDOM (June 30, 2020), https://techfreedom.org/techfreedom-praises-critiques-new-vertical-merger-guidelines/.

[16] TechFreedom, Comments on Petition for Rulemaking to Prohibit Worker Non-Compete Clauses; Petition for Rulemaking to Prohibit Exclusionary Contracts, Docket ID: FTC-2021-0036 (Sept. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/10/FTC-UMC-Rulemaking-Authority-FTC-Comment-9.30.2021-FINAL.pdf.

[17] TechFreedom, Comments on Request for Public Comment Regarding Contract Terms That May Harm Fair Competition, Docket ID: FTC-2021-0036 (Sept. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/10/Comments-FTC-Non-Compete-UMC-Rulemaking-10.2021.pdf.

[18] TechFreedom, Comments on Request for Public Comment Regarding Contract Terms That May Harm Fair Competition, Docket ID: FTC-2021-0036 (Sept. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/10/Comments-FTC-Exclusivity-UMC-Rulemaking-10.2021.pdf.

[19] TechFreedom, Comments on Draft FTC Strategic Plan for FY2022-2026, Docket ID: FTC-2021-0061 (Nov. 30, 2021), https://techfreedom.org/wp-content/uploads/2021/11/FTC-2021-0061-0010_attachment_1.pdf.

[20] Berin Szóka & Geoffrey A. Manne, *The Federal Trade Commission: Restoring Congressional Oversight of The Second National Legislature* at 57-60 (2016), https://techfreedom.org/wp-content/uploads/2021/09/ftc-restoring-congressional-oversight.pdf.

[21] Consumer Protection & Competition Regulation in a High-Tech World: Discussing the Future of the Federal Trade Commission, Report 1.0 of the FTC: Technology & Reform Project, 3 (Dec. 2013), http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf.

[22] We hosted an event in the U.S. Capitol on January 13, 2020, bringing together the YouTube creator community with staffers to discuss the impact of the FCC's settlement with YouTube. *See Will Kids' Privacy Crackdown Break the Internet? Watch the 1/13 event*, TECHFREEDOM (Jan. 13, 2020),

- We urged caution in rescinding prior FTC Policy Statements without thorough examination and something to fill the void.[23]
- We challenged the notion that the FTC Act requires plaintiffs to utilize the FTC's in-house adjudicatory process for constitutional claims against the agency.[24]
- We encouraged the Supreme Court to limit the FTC's remedy powers to those that are explicitly granted by the FTC Act.[25]

II. Significant Changes to the Merger Guidelines are Unwarranted

The Horizontal Merger Guidelines have achieved exactly what then-Assistant Attorney General James F. Rill foresaw when commenting on the release of the updated guidelines in 1992:

> The business community will benefit by improved guidance in understanding the analysis applied in merger review, and, therefore, in conforming merger behavior to the antitrust laws. The Agencies will benefit by improved guidance in developing merger investigations, and importantly, in litigating cases once they have determined that a merger violates the antitrust laws. Finally, one can expect that courts also will benefit by having the guidelines available to assist in the evaluation of parties' assertions. Rather than having to engage in an ad hoc inquiry into the issues of big buyers and entry, for instance, the courts will have a framework for relating these issues to the statutory objective of preventing mergers, the effect of which may be substantially to lessen competition.[26]

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https://techfreedom.org/save-the-date-will-kids-privacy-crackdown-break-the-internet/. We also hosted a Capitol Hill panel discussion on COPPA in 2011, *see* TECHFREEDOM, https://techfreedom.org/reminder-techfreedomfosi-coppa-event-in-dc/ (last visited April 21, 2022), and appeared at the FTC's workshop on COPPA. *See* Press Release, Federal Trade Commission, The Future of the COPPA Rule: An FTC Workshop (Oct. 07, 2019) (General Counsel James E. Dunstan appeared on Panel 2: Scope of the COPPA Rule), https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop. *See also* TechFreedom, Comments on COPPA Rule Review, Project No. P195404, Docket ID: FTC-2019-0054 (Dec. 11, 2019), https://techfreedom.org/wp-content/uploads/2019/12/TechFreedom-Comments-COPPA-12-11-19.pdf.

[23] *See* Letter from TechFreedom to Chair Lina Kahn regarding Comments for July 1 Open Commission Meeting in re Unfair Methods of Competition Policy Statement (June 30, 2021), https://techfreedom.org/wp-content/uploads/2021/07/TechFreedom-FTC-Open-Meeting-Comments-6.30.21-Investigations.pdf.

[24] *Axon: Can Defendants Raise Constitutional Defenses in Court Before the FTC Forces them to Settle?*, TECHFREEDOM (May 12, 2020), https://techfreedom.org/axon-can-defendants-raise-constitutional-defenses-in-court-before-the-ftc-forces-them-to-settle/.

[25] *SCOTUS Should Apply Congressional Limits Placed On FTC's Remedy Power*, TECHFREEDOM (Oct. 2, 2020), https://techfreedom.org/scotus-should-apply-congressional-limits-placed-on-ftcs-remedy-power/.

[26] Remarks of James Rill, Assistant Attorney General for Antitrust, introducing the 1992 Horizontal Merger Guidelines, *reprinted at* 62 ANTITRUST & TRADE REG. REP. (BNA) 485 (Apr. 9, 1992).

Substantial revisions to the Merger Guidelines are neither necessary nor appropriate. With one exception, discussed below, there have been no significant changes in the analytical framework used by the antitrust agencies in the dozen years since the release of the 2010 Horizontal Merger Guidelines, and, at least at this writing, no apparent change in the substantive analysis used to evaluate the competitive effects of horizontal mergers. There is no significant or material divergence between the case law and the analytical framework in the Horizontal Merger Guidelines. Similarly, there have been no changes in the law governing vertical mergers, nor in the actual analysis of vertical mergers by the antitrust agencies, since the 2020 release of the Vertical Merger Guidelines.[27] Although the current leadership of the antitrust agencies has suggested the Biden Administration intends to challenge more mergers, no current agency official (or recent past agency official, whether nominated by President Obama or President Trump) has articulated an analytical framework significantly different from that in either set of guidelines.

The one exception is the agencies' use of a monopolization theory to challenge the acquisition or acquisitions of potential or nascent competitors.[28] Under ordinary circumstances,

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[27] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES (June 30, 2020).

[28] *See generally* Prepared Remarks of Chairman Joseph J. Simons, ABA Section of Antitrust Law Fall Forum 2020 (Nov. 12, 2020) (discussing application of Microsoft and Actavis to acquisitions of nascent and potential competitors, and cases cited therein), https://www.ftc.gov/system/files/documents/public_statements/1583022/simons_-_remarks_at_antitrust_law_fall_forum_2020.pdf; Remarks of Acting Deputy Assistant Attorney General Jeffrey M. Wilder at the Hal White Antitrust Conference (June 10, 2019) (discussing application of Section 2 of the Sherman Act to acquisitions of potential and nascent competitors), https://www.justice.gov/opa/speech/file/1176236/download. Section 2 of the Sherman Act prohibits monopolization and related offenses. 15 U.S.C. §2. The prohibitions of the Sherman Act apply to mergers. *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (holding that the defendant's "monopoly was achieved in large part by unlawful and exclusionary practices . . . [including, among other things] [t]he acquisitions by Grinnell of ADT, AFA, and Holmes."). The conduct challenged by the Government as unlawful monopolization in *Grinnell* included several acquisitions by the defendant. *Id.* at 576. The Commission has included monopolization counts in enforcement challenges to acquisitions by a firm of one or more of its competitors. *See* cases cited within *Remarks of Joseph Simons*, and, Complaint at 9, FTC v. Mallinckrodt, No. 1:17-cv-00120 (D.D.C. Jan. 25, 2017), https://www.ftc.gov/system/files/documents/cases/170118mallinckrodt_complaint_public.pdf (acquisition of competitor Synacthen Depot was monopolization in violation of FTC Act); Inverness Med. Innovations, Inc., No. C-4244, 2009 WL 285499, at *3 (F.T.C. Jan. 23, 2009) (acquisition of assets of ACON protected Inverness's monopoly power); Polypore Int'l, Inc., 149 F.T.C. 486, 494 (2010) (acquisition of competitor was monopolization); Complaint at 12-13, FTC v. Hearst Trust, No. 1:01CV00734, 2001 WL 36080059 (D.D.C. Apr. 5, 2001) (acquisition of Medi-Span is a course of conduct that constitutions monopolization and attempted monopolization in the market for integratable electronic drug database products); MSC Software Corp., 134 F.T.C. 580, 588,589 (2002) (MSC's acquisitions of Universal Analytics Inc., and Computerized Structural Analysis & Research Corp., was unlawful monopolization, and an unlawful attempt to monopolize, the market for the licensing or sale of advanced versions of Nastran); Automatic Data Processing, Inc., No. 9282, 1996 WL 768219, at *7 (F.T.C. Nov. 13, 1996) (ADP's acquisitions of Autoinfo and Hollander was an attempt to monopolize, and monopolized, the market for "integrated group of information products and services that

we think the agencies should incorporate and articulate the general analytic framework they will use to evaluate the appropriateness of such challenges. However, this theory is the basis of the FTC's challenge to Facebook's acquisition of Instagram and WhatsApp;[29] given this, we think it appropriate to defer inclusion of this issue in any revised guidelines until this matter (and any other pending similar matters) are resolved.[30]

The agencies may wish to clarify some aspects of the Merger Guidelines; clarification would be appropriate based on their experience with data,[31] with alleged effects upon innovation,[32]

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form the complete salvage yard information systems network, consisting of an interchange integrated with yard management systems and electronic communications systems.").

[29] Complaint, FTC v. Facebook, Inc., Case No. 1:20-cv-03590-JEB (D.D.C., Sep. 8, 2021), https://www.ftc.gov/system/files/documents/cases/2021-09-08_redacted_substitute_amended_complaint_ecf_no._82.pdf.

[30] The agencies may wish to clarify whether there is case support and analytical merit to the "leading firm" proviso of the 1982/1984 Merger Guidelines, or whether the analytical framework of unilateral effects analysis subsumes this proviso, and, in general terms, whether it overlaps or is an alternative to a Section 2 case of the type described in the Facebook complaint.

[31] For example, it apparently remains unclear to some interested parties whether "data" can be defined as a relevant market, or whether the merger guidelines analytic framework supports a finding of anticompetitive effects in labor markets. The agencies have brought cases reflecting both, and adoption of language or examples in revised merger guidelines that make clear both propositions are within the guidelines seems appropriate and potentially useful. For data markets, *see, e.g.,* Fidelity Nat'l Fin., Inc., No. 9385, 2019 WL 4461620, at *7 (F.T.C. Sept. 5, 2019) (the relevant market was "title information services"—the provision of access to title plant information); Corelogic, Inc., No. C-4458, 2014 WL 2331024, at *1 (F.T.C. May 20, 2014) (the relevant market was "national assessor and recorder bulk data"); Dun & Bradstreet Corp., 150 F.T.C. 144, 146 (2010) (the relevant market was "kindergarten through twelfth grade educational marketing data"); Reed Elsevier NV, No. C-4257, 2009 WL 1639519, at *2 (F.T.C. June 1, 2009) (the relevant market was "electronic public records services for law enforcement customers"); Complaint at 12, FTC v. Hearst Trust, No. 1:01CV00734, 2001 WL 36080059 (D.D.C. Apr. 5, 2001) (the relevant market was "integratable drug data files, and/or one or more subsets"); Complaint at 2, Fidelity Nat'l Fin., Inc., No. C-3929 (F.T.C. Feb. 25, 2000) (the relevant market was "the provision of title information services" – the provision of selected information contained in a title plant (a collection of records and indices regarding the ownership of and interests in real property)), https://www.ftc.gov/sites/default/files/documents/cases/2000/02/fidelitycmp.pdf; Automatic Data Processing, Inc., No. 9282, 1996 WL 768219, at *5 (F.T.C. Nov. 13, 1996) (the relevant market of, among others, "salvage yard inventory data for estimates"). For mergers alleging harm to labor or employment markets, *see, e.g.*, Complaint, United States v. Penguin Random House, LLC, No. 1:21-cv-02886 (D.D.C., filed Nov. 2, 2021), https://www.justice.gov/opa/press-release/file/1445916/download; *see also*, Complaint, United States v. Pacific Amphitheatre Partnership, Civ. No. 90-3797 (C.D. Cal., filed Jul. 19, 1990) (effects of the combination of two performance theaters may result in "artists … receiv[ing] lower financial consideration for performing at Orange County concert amphitheatres), https://www.justice.gov/atr/case-document/file/1027101/download.

[32] The agencies could also clarify whether concepts included in other guidelines are or remain relevant for merger analysis. For example, revised merger guidelines could indicate under what conditions the agencies will identify a market for and competitive effects in a "research and development" market, or a technology market. Both markets are identified as potential candidate markets in the Intellectual Property Guidelines (at §3.2), but we did not identify instances of harm to R&D markets and technology markets in merger matters subsequent to the publication of the 2010 Horizontal Merger Guidelines, although the agencies routinely allege harm to innovation (in an existing or future product market) in merger matters. *See* Richard Gilbert &

with recent developments in the law,[33] and in economics.[34] But we do not believe there is a reasonable and reasoned basis to make significant changes to the analytical framework indicated in each of the horizontal and vertical merger guidelines.[35]

Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 863 GEO. WASH. L. REV. 1920 (2015). The agencies should consider expanding the discussion on factors that may impact the rate of innovation. Jay Ezrielev, *An Economic Framework for Assessment of Innovation Effects of Nascent Competitor Acquisitions*, COMPETITION POLICY INTERNATIONAL (Mar. 29, 2021), https://www.competitionpolicyinternational.com/an-economic-framework-for-assessment-of-innovation-effects-of-nascent-competitor-acquisitions/.

Similarly, the agencies could explain to what extent the Competitor Collaboration Guidelines' identification of a "potential competitor" is applicable to merger matters. According to footnote six of the CCGs, "a firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the relevant agreement, or that competitively significant decisions by actual competitors are constrained by concerns that anticompetitive conduct likely would induce the firm to enter." Is this definition relevant to merger matters, and to what degree does it overlap with, or differ from, the concept of rapid and/or committed entrants in the 2010 Horizontal Merger Guidelines? And, if the agencies do identify a potential competitor based on a reasonable probability of entry, does (and should) that probability standard align with the "timely, likely, and sufficient" requirements of entry identified in Section Ten of the 2010 Horizontal Merger Guidelines, and the Supreme Court case law on certainty of entry in potential competition cases?

[33] For example, the agencies may wish to clarify their approach to market definition and competitive effects analysis in markets involving multi-sided platforms or two-sided markets, in response to the Supreme Court's opinion in *Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018); in support of such an effort, the agencies may also wish to identify the relevant characteristics of a multi-sided platform. *See, e.g.,* Daniel Francis and Jay Ezrielev, *Disaggregating Market Definition: AmEx and a Plural View of Market Definition*, 98 NEB. L. REV. 460 (2019).

[34] Agency leadership (and others) believes there is substantial support, in new empirical literature, of claims of increased harmful concentration across many industries, and of insufficiently vigorous merger enforcement. We believe it would be useful for the agencies to hold one or more public economic conferences to explore the strength of the economic literature, and its relevance to merger analysis. The FTC did just this when it was alleged that econometric research showed the agency was insufficiently aggressive in challenging oil mergers. *See* Press Release, FTC To Host Conference on Oil Industry Merger Effects (Jan. 12, 2005), https://www.ftc.gov/news-events/news/press-releases/2005/01/ftc-host-conference-oil-industry-merger-effects; FTC Staff Technical Report, Robustness of the Results in GAO's 2004 Report Concerning Price Effects of Mergers and Concentration Changes in the Petroleum Industry (Dec. 21, 2004), https://www.ftc.gov/system/files/documents/reports/ftc-staff-technical-report-robustness-results-gaos-2004-report-concerning-price-effects-mergers/ftcstafftechnicalreport122104.pdf. *See also*, Transcript, Estimating the Price Effects of Mergers and Concentration in the Petroleum Industry: An Evaluation of Recent Learning (Jan. 14, 2005), https://www.ftc.gov/sites/default/files/documents/public_events/oil-industry-merger-effects/50114foilmergertrans.pdf. It would be especially useful to again review, and have the agencies' economists comment on, the strength and relevance, of the "common-ownership" literature for merger analysis and for the analytic framework of revised merger guidelines.

[35] Better merger enforcement does not depend solely, if at all, on revisions to the Merger Guidelines. The Guidelines do not prevent the prosecution of meritorious cases. As the agencies consider revisions to the Guidelines, they might also consider revisions to the merger notification rules and merger notification form. The FTC initiated a process to revise and rethink the rules implementing the Hart-Scott-Rodino Act at the end of the Trump administration. That process should be continued. Additionally, if the agencies will be less likely to accept negotiated settlements to address problematic mergers, they ought to move more quickly to seek a preliminary (and permanent) injunction, and, in the case of the FTC, significantly advance the timeline in which it handles the administrative litigation of a merger. If the Department of Justice can successfully

III. Key Principles of Revised Merger Guidelines

The Merger Guidelines have been useful to merging parties and persuasive to courts in significant part because they do not try to do too much. Rather than complex, lengthy regulations, the Merger Guidelines provide a flexible and durable framework that reflects the antitrust community's consensus on how to evaluate the competitive significance of mergers. Any potential changes to the Merger Guidelines should be evaluated in this light. The following "key principles" highlight considerations we think the agencies should adhere to, to maintain the persuasiveness and influence of any revised guidelines.[36]

A. Revised Merger Guidelines Should Continue to Outline the *Principal* Analytical Techniques, Practices, and Enforcement Policies of the Antitrust Agencies

Antitrust enforcement guidelines "state the antitrust enforcement policy of the U.S. Department of Justice and the Federal Trade Commission"[37] and provide "guidance … to businesses … on questions that concern the Agencies' … enforcement policy."[38] Guidelines provide "transparency of the analytical process underlying the Agencies' enforcement decisions"[39] and are intended to "enable businesses to evaluate proposed transactions with greater understanding of possible antitrust implications."[40] However, not every theory of harm, factor, or consideration potentially relevant to analyzing the competitive effect of a given merger should be encapsulated in the Merger Guidelines. Guidelines state general

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combine the preliminary and permanent injunction stages of a merger trial, there is no reason that FTC administrative litigation on the merits of a merger should take any longer than litigation at the district court. DOJ merger litigation moves on an expedited basis, and there is no reason that FTC administrative litigation must move as slowly as it does. Reforms in this area should be considered too.

[36] One important principle we do not discuss is the need for a transparent public process to review and comment on any proposed guidelines revisions. We discussed this principle in our submission of March 24, 2022, a copy of which is attached to this submission.

[37] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY at 1 (Jan. 12, 2017); U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 1 (Apr. 20, 2000).

[38] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION at 1 (Jan. 13, 2017).

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

[40] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 1 (Apr. 20, 2000).

policy,[41] and because "no set of guidelines could possibly indicate how the Agencies will assess the particular facts of every case"[42] the agencies do not, and should not, catalogue all potential harms or analytical concepts and tools that could be applied to a transaction. The Merger Guidelines "outline the *principal* analytical techniques, practices, and enforcement policies of the Department of Justice and the Federal Trade Commission" with respect to horizontal[43] and vertical mergers.[44] Consistent with their focus on an analytical framework for merger review, the Merger Guidelines (and antitrust guidelines in general) have not included a discussion of the characteristics of specific relevant markets and factors within such markets that might support different treatment under the merger guidelines' analytical framework. (Such facts are, of course, relevant for the analysis of a specific transaction.)

Revisions to the guidelines should be consistent with past practice and not attempt to catalogue all potential theories of harm, or all exceptions to the guidelines and analytical framework; they should balance any desire for completeness and comprehensiveness with their potential loss of clarity and consensus.

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[41] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 2 (Apr. 20, 2000); U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY at 1 (Jan. 12, 2017).

[42] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION at 3 (Jan. 13, 2017); U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY at 1 n.2 (Jan. 12, 2017); *see also* U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS at 1-2 (Apr. 20, 2000) ("No set of guidelines can provide specific answers to every antitrust question that might arise …").

[43] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010) at 1 (emphasis added); *see also* U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997) at 1 ("These Guidelines outline the present enforcement policy of the Department of Justice and the Federal Trade Commission … concerning horizontal acquisitions and mergers …. They describe the analytical framework and specific standards *normally used* by the Agency in analyzing mergers."); U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) (same); U.S. DEPT. OF JUST., 1984 MERGER GUIDELINES at 1 ("These Guidelines state in outline form the present enforcement policy of the U.S. Department of Justice … concerning acquisitions and mergers …. They describe the general principles and specific standards normally used by the Department in analyzing mergers."); U.S. DEPT. OF JUST., 1982 MERGER GUIDELINES (same); U.S. DEPT. OF JUST., 1968 MERGER GUIDELINES at 1 ("The purpose of these guidelines is to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under Section 7 of the Clayton Act.").

[44] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES at 1 (June 30, 2020) (Fed. Trade Comm'n withdrew on Sept. 15, 2021).

As in the past, explanations of the application of, or extensions of, the analytical framework in the guidelines can and should be provided. Speeches,[45] testimony,[46] public statements,[47] commentaries,[48] and agency workshops[49] and conferences allow for additional explanation

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[45] *See, e.g.,* Bruce Hoffman, Director, Bureau of Competition, Federal Trade Commission, *Antitrust in the Digital Economy: A Snapshot of FTC Issues* (May 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf; Jeffrey M. Wilder, Acting Deputy Assistant Attorney General, *Potential Competition in Platform Markets* (June 10, 2019), https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-jeffrey-m-wilder-delivers-remarks-hal-white; Jonathan Sallet, Deputy Assistant Attorney General, *The Interesting Case of the Vertical Merger* (Nov. 17, 2016), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-jon-sallet-antitrust-division-delivers-remarks-american; Jonathan Baker, Director, Bureau of Economics, *Unilateral Competitive Effects Theories in Merger Analysis* (Aug. 6, 1996), https://www.ftc.gov/news-events/news/speeches/unilateral-competitive-effects-theories-merger-analysis.

[46] *See, e.g.*, Prepared Statement of the Federal Trade Commission, Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms, Before the Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, United States Senate (Sept. 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf.

[47] *See, e.g.*, Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson, Concerning the Proposed Acquisition of Essendant, Inc., by Staples, Inc., (FTC File No. 181-0180), https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf; Department of Justice Antitrust Division Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag (March 29, 2006), https://www.justice.gov/archive/atr/public/press_releases/2006/215326.pdf; Statement of Chairman Timothy J. Muris in the Matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc., https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf; Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises., Ltd/P&O Princess Cruises plc, and Carnival Corporation/P&O Princess Cruises plc. (FTC File No. 021-0041), https://www.ftc.gov/sites/default/files/documents/cases/2002/10/cruisestatement.htm.

[48] *See* U.S. DEPT. OF JUST. & FED. TRADE COMM'N, COMMENTARY ON HORIZONTAL MERGERS (2006), https://www.justice.gov/atr/file/801216/download; FED. TRADE COMM'N, COMMENTARY ON VERTICAL MERGER ENFORCEMENT (2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

[49] *See* Department of Justice, *Public Workshop on Draft Vertical Merger Guidelines* (2020), https://www.justice.gov/atr/public-workshops-draft-vertical-merger-guidelines; Press Release, *FTC Announces Agenda for Fifth Session of its Hearings on Competition and Consumer Protection in the 21st Century* (October 12, 2018), https://www.ftc.gov/news-events/events/2018/11/ftc-hearing-5-vertical-merger-analysis-role-consumer-welfare-standard-us-antitrust-law (previewing and seeking comment on questions with respect to Vertical Merger Guidelines and enforcement that would be discussed at the hearing session and including transcripts of the public discussion sessions held on November 1, 2018); Press Release, *Department of Justice and Federal Trade Commission to Hold Workshops Concerning Horizontal Merger Guidelines* (September 22, 2009), https://www.justice.gov/opa/pr/department-justice-and-federal-trade-commission-hold-workshops-concerning-horizontal-merger ("The goal of the workshops will be to determine whether the Horizontal Merger Guidelines accurately reflect the current practice of merger review at the Department and the FTC as well as to take into account legal and economic developments that have occurred since the last significant Guidelines revision in 1992."); Events, *Unilateral Effects Analysis and*

of the Merger Guidelines, new theories of harm, and application of the guidelines framework to specific matters. The effectiveness (and thus the long-term viability) of the analytical framework can be analyzed in case studies, with the case studies published as staff or agency merger retrospectives.[50]

The regular and consistent publication of key statistics (on an aggregate basis) of agency merger investigations helps the public identify evidence or facts that may be relevant to merger investigation outcomes. Past data releases have provided data on the relative frequency of challenges to mergers depending on post-merger concentration levels, the change in concentration, the number of significant competitors in a relevant market, ease of entry, and types of evidence, including customer complaints and documents predicting post-merger price effects that may have a disproportionate impact on agency decisions.[51] To the

Litigation Workshop (Feb. 12, 2008), agenda, transcript and event materials, https://www.ftc.gov/news-events/events/2008/02/unilateral-effects-analysis-litigation-workshop; Press Release, *Department of Justice and FTC Issue Merger Challenges Data, Announce Upcoming Merger Enforcement Workshop* (Dec. 18, 2003), https://www.justice.gov/archive/atr/public/press_releases/2003/201899.htm; Department of Justice, *Announcement of a Workshop on Merger Enforcement* (Dec. 18, 2003), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/17/201896.pdf ("The workshop will allow the Commission and the Department to receive input on topics that arise in horizontal merger investigations.").

[50] For a detailed discussion of the value of merger retrospectives, *see* Transcript, Federal Trade Commission, Competition and Consumer Protection in the 21st Century: Merger Retrospectives (Apr. 12, 2019), https://www.ftc.gov/system/files/documents/public_events/1466002/ftc_hearings_session_13_transcript_4-12-19_1.pdf. The FTC's Bureau of Economics maintains a list of merger retrospectives conducted by the staff of the Bureau of Economics; *see* Federal Trade Commission, *Retrospective Studies by the Bureau of Economics*, https://www.ftc.gov/policy/studies/merger-retrospective-program/retrospective-studies-bureau-economics; more generally, *see* Federal Trade Commission, *Merger Retrospective Program,* https://www.ftc.gov/policy/studies/merger-retrospective-program, discussing the Bureau's active and long-standing merger retrospective program. In 2002, then-FTC Chairman Muris and then-Bureau Director Joseph Simons initiated a half-dozen investigations of consummated hospital mergers; papers summarizing the Bureau of Economics' analysis of the competitive effects of those mergers are included in volume 18 of the INTERNATIONAL JOURNAL OF THE ECONOMICS OF BUSINESS (2011). According to then-FTC Chairman Simons, "these retrospective studies were critical in subsequent hospital merger challenges." *See* Prepared Opening Remarks of Chairman Joseph J. Simons, Hearings on Competition and Consumer Protection in the 21st Century, Merger Retrospectives (Apr. 12, 2019), https://www.ftc.gov/system/files/documents/public_statements/1513555/merger_retrospectives_hearing_opening_remarks_chairman.pdf. In January 2021, the FTC initiated another study of consolidation in the health care field. *See* Press Release, *FTC to Study the Impact of Physician Group and Healthcare Facility Mergers* (Jan. 14, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/01/ftc-study-impact-physician-group-healthcare-facility-mergers. In October 2019, the Commission initiated a study of consummated hospital mergers. *See* Press Release, *FTC to Study the Impact of COPAs* (Oct. 21, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/10/ftc-study-impact-copas.

[51] FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2011(JAN. 2013), https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf; FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2007 (DEC. 2008), https://www.ftc.gov/reports/horizontal-merger-investigation-data-fiscal-years-1996-2007; FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-

extent the agencies wish to deter certain mergers from "getting out of the boardroom," publication of updated challenge statistics may be helpful.

These discussions and releases inform the public of incremental (and sometimes significant) developments in the agencies' analytical framework for evaluating mergers. The Merger Guidelines are only one tool of many to inform the public, staff, and the judiciary of a proper analytical framework to evaluate the competitive effects of mergers; they need not identify all possibilities of competitive harm or competitive effects analysis.

B. Revised Guidelines Should Continue to Align with the Burden Shifting Approach of Brown Shoe, Philadelphia National Bank, and General Dynamics, as Recognized by the Appellate Courts

"It is a foundation of section 7 doctrine … that evidence on a variety of factors can rebut a prima facia case."[52] Notwithstanding this well-settled proposition, agency leadership has suggested new merger guidelines may make greater use of "presumptions," presumably presumptions of illegality.[53] Revising the Merger Guidelines to identify concentration levels or other facts that are likely to elicit a challenge may be appropriate, but the incorporation of more or more stringent *presumptions* into the merger guidelines merely undercuts the persuasiveness of the guidelines, because an increased reliance on presumptions as a basis for finding a merger illegal is inconsistent with the case law.

In *Baker Hughes*, the D.C. Circuit articulated a burden-shifting approach to evaluating the government's challenge to a merger:

> The basic outline of a Section 7 horizontal acquisition case is familiar. By showing that a transaction will lead to undue concentration in the market for a particular

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2005 (JAN. 2007), https://www.ftc.gov/reports/horizontal-merger-investigation-data-fiscal-years-1996-2005; FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2003 (FEB., 2004, revised, AUG. 2004), https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2003/040831horizmergersdata96-03.pdf; U.S. DEPT. OF JUST. & FED. TRADE COMM'N, MERGER CHALLENGES DATA, FISCAL YEARS 1999-2003 (DEC. 2003), https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/201898.pdf.

[52] *United States v. Baker Hughes*, 908 F.3d 981, 984 (D.C. Cir. 1990).

[53] *See, e.g.*, Logan Breed, *FTC and DOJ Officials Speak About Merger Enforcement Priorities*; *see also Prepared Statement of Federal Trade Commission Acting Chairwoman Rebecca Kelly Slaughter,* Before the Subcommittee on Antitrust, Commercial and Administrative Law of the Judiciary Committee, United States House of Representatives, Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power (Mar. 18, 2021) (Commission challenging "mergers that are clearly illegal and should never have gotten out of the boardroom"), https://www.ftc.gov/system/files/documents/public_statements/1588320/p180101_prepared_statement_of_ftc_acting_chairwoman_slaughter.pdf.

> product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. The burden of producing evidence to rebut this presumption then shifts to the defendant. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.[54]

The burden-shifting approach articulated in *Baker Hughes* derived from Supreme Court case law, including, most prominently, *Brown Shoe,*[55] *Philadelphia National Bank*,[56] and *General Dynamics*[57]:

- In *Brown Shoe*, the court recognized that while "statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are … the primary index of market power … only a further examination of the particular market, its structure, its history and probable future can provide the appropriate setting for judging the probably anticompetitive effect of the merger."[58]
- In *Philadelphia National Bank*, the court recognized any presumption based on market share or concentration to be rebuttable. It indicated that while "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition," it must be enjoined only "in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[59]
- In *General Dynamics*, a challenge to the acquisition of a strip-mining coal corporation, the Court found that the district court was justified in viewing the market share and market concentration statistics relied on by the government as insufficient to sustain its allegation of an anticompetitive merger. The district court had correctly considered additional "pertinent factors affecting the coal industry and the business of the [merged firms]" in concluding that no substantial lessening of competition had occurred or was threatened to occur.[60]

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[54] *United States v. Baker Hughes*, 908 F.3d 981, 982-983 (D.C. Cir. 1990) (internal citations omitted).

[55] *Brown Shoe v. United States*, 370 U.S. 294 (1962).

[56] *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

[57] *United States v. General Dynamics*, 415 U.S. 450 (1974).

[58] 370 U.S. 294, 322, n. 38 (1962).

[59] 374 U.S. 321, 363 (1963).

[60] 415 U.S. 450, 498 (1974).

- In *Marine Bancorp*, the Court found that the government had made out a prima facia case based on concentration ratios; on this finding, "the burden was then upon [the bank] to show that the concentration ratios … did not accurately depict the economic characteristics of the [relevant geographic] market."[61]
- In *Citizens and Southern National Bank*, the Court agreed that the government had "plainly made out a prima facia case of a violation of section 7," and that "it was thus incumbent upon C&S to show that the market share statistics gave an inaccurate account of the acquisitions' probable effects on competition."[62]

The *Baker Hughes* burden-shifting approach has been broadly endorsed by the appellate[63] and district[64] courts and has been incorporated into the Merger Guidelines.[65] Whether or not *General Dynamics* overruled *Brown Shoe's* and *Philadelphia National Bank's* reliance on "undue concentration" to establish illegality, it is not in dispute that *General Dynamics* "has, at the very least, lightened the evidentiary burden on a section 7 defendant."[66] For the Commission and Department to place greater reliance on presumptions, and thereby minimize other factors—to, in effect, disregard or substantially weaken the ability of

[61] *United States v. Marine Bancorporation*, 418 U.S. 602, 631 (1974).

[62] *United States v. Citizens and Southern National Bank*, 422 U.S. 86, 120-21 (1975).

[63] *See. e.g.*, *F.T.C. v. Sanford Health*, 926 F3d. 959 (8th Cir. 2019); *United States v. AT&T*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (vertical merger); *United States v. Anthem*, 855 F.3d. 345,349-50 (D.C. Cir. 2017); *FTC v. Penn State Hershey Med. Ctr*., 838 F.3d 327, (3d Cir. 2016); *Saint Alphonsus Medical Center-NAMPA v. St. Luke's*, 778 F.3d 775, 783 (9th Cir. 2015); *Promedica Health Systems v. F.T.C.*, 749 F.3d 559, 570-571 (6th Cir. 2014) ("The Commission was correct to presume the merger substantially anticompetitive. The remaining question is whether Promedica has rebutted that presumption."); *Chi. Bridge & Iron, v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *FTC v. University Health*, 938 F.2d 1206 (11th Cir. 1991).

[64] *See, e.g.*, *New York v. Deutsche Telecom AG*, 439 F. Supp. 3d 179, 198-199 (S.D.N.Y 2020); *United States v. Energy Sols, Inc.*, 265 F. Supp. 3d 415, 436 (D. Del. 2017); *United States v. Bazaarvoice, Inc.*, 2014-1 Trade Cas. (CCH) ¶¶ 78, 641 (N.D. Cal. Jan. 8, 2014); *FTC v. OSF Healthcare Sys*., 852 F. Supp. 2d 1069, 1075 (N.D. Ill. 2012).

[65] *See* U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES at 19 (Aug. 19, 2010) ("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."); U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES at 15-16 (1992) ("Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that factors set forth in Sections 2–5 of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares.").

[66] *United States v. Baker Hughes*, 908 F.3d 981, 984 (D.C. Cir. 1990).

merging parties to advance evidence that would rebut a presumption based on market share or concentration—would be inconsistent with the well-settled case law.[67]

C. The Analysis of Efficiency Claims Must Remain an Integral Part of a Competitive Effects Analysis

"Low prices … benefit consumers regardless of how those prices are set, and, so long as they are above predatory levels, they do not threaten competition."[68] The Horizontal Merger Guidelines and the Vertical Merger Guidelines recognize that a merger may generate efficiencies, and that "merger-generated efficiencies may enhance competition"[69] and "have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers."[70] Notwithstanding their potentially procompetitive effects, the guidelines create significant hurdles for merging parties to have their efficiency claims recognized by agency staff. Agency leadership suggests an interest in placing even larger hurdles in the path of efficiency claims; this would be unjustified.

As Robert Pitofsky stated many years ago:

> [H]ostility to efficiency claims in merger analysis is odd since there is nothing in the legislative history of the Sherman or Clayton Acts to justify exclusion or even special skepticism toward efficiency claims, and because antitrust is supposed to encourage efficiency in order to serve consumer welfare. The American position has become odder still as American firms find themselves increasingly locked in commercial combat with companies around the world, often located in countries where barriers to mergers are extremely low or non existent, or where efficiency claims are generously viewed.[71]

There is a perception that the Supreme Court foreswears efficiencies in merger cases. This perception arose largely from statements by the Court in *FTC v. Procter and Gamble,*[72] *United States v. Philadelphia National Bank, and Brown Shoe v. United States.* In *P&G*, the Court stated

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[67] *See also United States v. AT&T*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) ("unlike horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share. Instead, the government must make a "fact-specific" showing that the proposed merger is "likely to be anticompetitive.") (citations omitted).

[68] *Atlantic Richfield Company v. USA Petroleum*, 495 U.S. 328, 339 (1990).

[69] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES at 29 (Aug. 19, 2010).

[70] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES at 11 (June 30, 2020).

[71] Remarks of Robert Pitofsky, *FTC Staff Report on Competition Policy: Six Months After* (Nov. 7, 1996), https://www.ftc.gov/news-events/news/speeches/ftc-staff-report-competition-policy-six-months-after.

[72] *FTC v. Procter & Gamble*, 386 U.S. 568 (1967).

that possible economies cannot be used as a defense to illegality. It was concerned that the company's acquisition of Clorox might have the effect of raising barriers to entry for new competitors because P&G had a much larger advertising budget and could divert a portion of that budget to support Clorox; other firms, with smaller budgets, would not be able to devote similar resources to support a new entrant in the bleach market. In *Philadelphia National Bank*, the Court rejected the view that anticompetitive effects in one market could be offset by procompetitive consequences in another.[73] In *Brown Shoe*, the Court recognized that "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets."[74]

The continuing relevance of these cases is suspect after the Court's recognition of efficiency claims in other antitrust decisions. In *Brunswick Corp*., the Court found that antitrust injury was absent where a plaintiff alleged that an illegal acquisition threatened to bring a "deep pocket" parent into a market of "pygmies."[75] In *GTE Sylvania,* the Court recognized the efficiency rationale of territorial and location-based restraints on intrabrand competition in support of competition at the Interbrand level, and overturned the *per se* ban on certain vertical non-price restraints.[76] In *BMI*, the Court recognized the procompetitive rationale of a "blanket" music license as a reason to forego *per se* treatment of a horizontal agreement among the members of two music societies on license terms.[77] In *Khan*, the Court accepted the efficiency rationale of a vertical maximum price-setting arrangement, and overturned the *per se* ban on vertical, maximum price setting agreements.[78] In *Leegin*, the Supreme Court overturned the *per se* ban on vertical minimum price setting agreements because of the potential efficiencies associated with such agreements.[79]

Appellate courts have been considering efficiency claims in their analysis of mergers since at least the FTC's challenge to University Health's proposed 1991 acquisition of the assets of a competing hospital.[80] There, the hospital argued, among other things, that its proposed acquisition would generate significant efficiencies and therefore would not lessen competition; in response, the FTC argued that Section 7 "recognizes no such efficiency

[73] *United States v. Philadelphia National Bank* 370 US 291,370 (1963).

[74] *Brown Shoe v. United States*, 370 U.S. 294, 344 (1962).

[75] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*. 429 U.S. 477, 487 (1977).

[76] *Continental T.V. Inc. v. GTE Sylvania, Inc*., 433 U.S. 36 (1977).

[77] *Broadcast Music v. CBS*, 441 U.S. 1 (1979).

[78] *State Oil v. Khan*, 522 U.S. 3 (1997).

[79] *Leegin Creative Leather Products v. PSKS, Inc.,* 551 U.S. 2705 (2007).

[80] *FTC v. University Health, Inc*., 938 F.2d 1206 (11th Cir. 1991).

defense in any form."[81] The Eleventh Circuit Court of Appeals, after considering the varying viewpoints on the scope, if any, of an efficiencies defense, held that, "in certain circumstances, a defendant may rebut the government's prima facia case with evidence showing that the intended merger would create significant efficiencies in the relevant market."[82] To the court, it was "clear that whether an acquisition would yield significant efficiencies in the relevant market is an important consideration in predicting whether the acquisition would substantially lessen competition. … [E]vidence that a proposed acquisition would create significant efficiencies benefiting consumers is useful in evaluating the ultimate issue—the acquisition's overall effect on competition."[83]

In *Tenet*, the Eighth Circuit reversed a district court decision to enjoin the merger of Lucy Lee Hospital and Doctors' Regional Medical Center for failing to consider evidence of enhanced efficiency of the combined firm. "[T]he evidence shows that a hospital that is larger and more efficient than Lucy Lee or Doctors' Regional will provide better medical care than either of those hospitals could separately."[84] In *Sandford Health*, the Eighth Circuit again accepted efficiency claims as relevant to the competitive effects analysis but also held that for "efficiencies to counteract anticompetitive effects, they must be independently verifiable and derived specifically from the merger."[85]

In *Heinz*, in its review of the district court's denial of a preliminary injunction in the proposed merger of two baby food manufacturers, the D.C. Circuit Court of Appeals recognized that the "trend among lower courts is to recognize the [efficiency] defense," although it found that the district court's analysis of the merging parties' claims "falls short of the findings necessary for a successful efficiencies defense in the circumstances of [the] case."[86] In its more recent *Anthem* decision, the D.C. Circuit held that "this court was satisfied in *Heinz*, in view of the trend among lower courts and secondary authority, that the Supreme Court can be understood only to have rejected 'possible' efficiencies, while efficiencies that are verifiable can be credited."[87] "Consequently" according to the *Anthem* court, "the circuit

[81] *Id.* at 1222.

[82] *Id*.

[83] *Id*.

[84] *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054-55 (8th Cir. 1999).

[85] *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019).

[86] *FTC v. Heinz*, 246 F.3d 708, 720 (D.C. Cir. 2001).

[87] *United States v. Anthem*, 855 F.3d 345, 355 (D.C. Cir. 2017).

precedent that binds us allowed that evidence of efficiencies could rebut a prima facia showing."[88]

Other appellate courts have considered efficiency claims without ruling on the larger question of whether an efficiency defense exists. The Third Circuit, in reviewing the district court's denial of a grant of an injunction against the merger of the two largest hospitals in a market, evaluated the parties' efficiencies claims against the standards articulated in the 2010 Horizontal Merger Guidelines.[89] Because the court found the merging parties did not "clearly show" that their claimed efficiencies offset the anticompetitive effects of the merger, the court did not need to decide whether to adopt or reject the efficiencies defense.[90] In *St. Alphonsus*, the appellate court assumed that "because Section 7 of the Clayton Act only prohibits those mergers whose effect 'may be substantially to lessen competition,' a defendant can rebut a prima facie case with evidence that a proposed merger will create a more efficient combined entity and thus increase competition."[91] District courts routinely consider efficiencies in analyzing the competitive effects of a proposed merger.[92]

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[88] *Id*.

[89] *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327, 347-51 (2016).

[90] *Id.* at 351.

[91] *Saint Alphonsus Medical Center-NAMPA v. St. Luke's*, 778 F.3d 775, 790 (9th Cir. 2015).

[92] *See, e.g.*, *FTC v. Thomas Jefferson Univ.,* 505 F. Supp. 3d. 522, 538 (E.D. Pa. 2020) (Defendants can rebut presumption by showing "that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger."); *FTC v. Peabody Energy*, 492 F. Supp. 3d 865, 913 (E.D. Mo. 2020) ("even if evidence of efficiencies alone is insufficient to rebut the government's prima facie case, such evidence may nevertheless be relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition.") (internal quotation marks eliminated); *New York v. Deutsche Telecom AG*, 439 F. Supp. 3d 179, 207-08 (S.D.N.Y 2020) ("lower courts have … considered whether possible economies might serve not as justification for an illegal merger but as evidence that a merger would not actually be illegal"; this Court will consider evidence of efficiencies, given courts' and federal regulators' increasingly consistent practice of doing so, and because Section 7 requires evaluation of a merger's competitive effects under the totality of the circumstances." (internal citations omitted); *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d. 27, 71-72 (D.D.C. 2018) ("efficiencies produced by a merger can form part of a defendant's rebuttal of the FTC's prima facie case … but the court must undertake a rigorous analysis of the kinds of efficiencies … in order to ensure that those efficiencies represent more than mere speculation and promises about post-merger behavior") (internal citations omitted); *FTC v. Tronox Ltd*., 332 F. Supp. 3d. 187 (D.D.C. 2018) ("When a court "finds high market concentration levels, defendants must present proof of extraordinary efficiencies to rebut the government's prima facie case. … To be able to offset a merger's likely anticompetitive effects, purported synergies and efficiencies must represent more than mere speculation and promises about post-merger behavior.") (internal citations omitted); *United States v. Aetna*, 240 F. Supp. 3d. 1, 94, 95 (D.D.C. 2017) ("Court will … consider Aetna's and Humana's efficiencies defense" and "is unpersuaded that the efficiencies generated by the merger will be sufficient to mitigate the transaction's anticompetitive effects."); *FTC v. Sysco*, 113 F. Supp. 3d 1, 81 (D.D.C. 2015) ("efficiencies resulting from the merger may be considered in rebutting the governments prima facie case"); *United States v. Bazaarvoice, Inc.*, 2014-1 Trade Cas. (CCH) ¶¶ 78, 641 (N.D.

D. Revisions to the Merger Guidelines Should Be Incremental, Reflecting the Agencies' Recent Experience and Developments in the Case Law

Revisions to the Merger Guidelines have historically "reflect[ed] the ongoing accumulation of experience at the Agencies"[93] and were consistent with the agencies then-recent practices. The agencies' analysis of mergers should reflect the experience gained from hundreds of investigations since 2010, combined with the further development of economic knowledge and any significant developments in the case law. Similar developments and experience motivated revisions to the merger guidelines in 1982 (incorporating a substantial body of new economic learning), in 1992 (incorporating directly the concept of unilateral effects and revising the analysis of entry), in 1997 (advancing the treatment of efficiency claims), and in 2010 (in updating the Horizontal Merger Guidelines to reflect increased sophistication of economic analysis and almost two decades of experience with the 1992 Horizontal Merger Guidelines). Each is summarized below.

1. 1968 Merger Guidelines

The 1968 Merger Guidelines were largely focused on market share and market structure. Horizontal mergers were to be judged based almost entirely on the market share of the merging parties and the four-firm concentration ratio, although, regardless of market share, the acquisition of a disruptive or unusually competitive firm, or one that possessed an unusual competitive potential, was likely to be challenged.[94] The Guidelines recognized a failing firm defense, but, barring exceptional circumstances, would not recognize a claim of

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Cal. Jan. 8, 2014) (evaluating efficiencies but court not persuaded that the merger will result in efficiencies sufficient to overcome the merger's anticompetitive harms); *FTC v. OSF Healthcare Sys*., 852 F. Supp. 2d 1069, 1089 (N.D. Ill. 2012) ("The court has thoroughly reviewed the claimed efficiencies in this case and the expert testimony from both sides and is compelled to conclude that, at least for the purpose of these proceedings, defendants have failed to present sufficient proof of the type of "extraordinary efficiencies" that would be necessary to rebut the FTC's strong prima facie case."); *FTC v. LabCorp*., 2011 WL 3100372, at paragraph 164 (C.D. Cal. Feb. 22, 2011) ("In evaluating the legality of a merger or acquisition under section 7, courts consider the procompetitive benefit of efficiencies related to the transaction."); *United States v. H&R Block*, 833 F. Supp. 2d 36, 89-92 (D.D.C.2011) (evaluating the parties efficiencies claims, pursuant to the guidance of FTC v. Heinz, 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶¶ 75, 725, 245 (D.N.M. 2007) ("The Defendants have, however, rebutted this presumption with proof of ease of entry, cognizable efficiencies, or other recognized defenses."); *United States v. Oracle Corp*., 331 F. Supp. 2d 1098, 1173-75 (N.D. Ca. 2004) (evaluating efficiency claims); *United States v. Long Island Jewish Med. Ctr*., 983 F. Supp. 121, 149 (E.DN.Y. 1997) (hospitals established, to reasonable certainty, that efficiencies gained in merger would result in benefits to consumers).

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

[94] U.S. DEPT. OF JUST., 1968 MERGER GUIDELINES at 5-7.

efficiencies as a justification for merger.[95] Vertical mergers were to be challenged whenever they "tended significantly to raise barriers to entry … unrelated to economic efficiency";[96] barriers to entry could, according to the Guidelines, be created by a combination of firms with relatively low market shares. The Guidelines also identified conglomerate mergers likely to be challenged: a merger that removed a potential entrant,[97] a merger that created conditions for "reciprocal buying;"[98] and mergers that would entrench or increase the market power of a party to the merger, or that raised barriers to entry in a market. The discussion of horizontal and vertical mergers was "a description of current policies"[99] and, according to a Justice Department official at the time of their release, "if the guidelines had existed three years ago, I know of no case we did not bring that we would have brought had we had the guidelines."[100]

2. 1982 Merger Guidelines

Revisions to the 1968 Merger Guidelines were appropriate because they had been rendered "obsolete" "by new economic thinking and new judicial attitudes and decisions."[101] Consistent with the Supreme Court's admonition in *General Dynamics* that market structure was not to be the last word of merger review,[102] the 1982 revisions to the 1968 Merger Guidelines shifted the focus from market structure to the prohibition of mergers that either create or enhance market power or facilitate its exercise.[103]

Key changes incorporated into the 1982 Merger Guidelines included: (i) introducing the Herfindahl-Hirschman Index as an alternative to the "concentration ratio" statistics of the 1968 Merger Guidelines and the introduction of a "leading firm" provision to address

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[95] *Id.* at 7-8.

[96] *Id.* at 8-9.

[97] *Id.* at 13.

[98] *Id.* at 15.

[99] U.S. DEPT. OF JUST., 1968 MERGER GUIDELINES at 1.

[100] *Justice Department Issues Merger Guidelines*, BNA ANTITRUST AND TRADE REGULATION REPORTER (Jun. 4, 1968) at A-10.

[101] Statement of Attorney General William French Smith, *reprinted in* BNA ANTITRUST AND TRADE REGULATION REPORTER (June 17, 1982) S-11, 12.

[102] *United States v. General Dynamics*, 415 U.S. 486, 1192-1197 (1974) (finding that the district court was justified in viewing the market share and market concentration statistics relied on by the government were insufficient to sustain its allegation of an anticompetitive merger).

[103] *Compare* U.S. DEPT. OF JUST., 1968 MERGER GUIDELINES at 1 ("the primary role of Section 7 enforcement is to preserve and promote market structures conductive to competition") to U.S. DEPT. OF JUST., 1982 MERGER GUIDELINES at 2 ("The unifying theme of the Guidelines is that merger should not be permitted to create or enhance 'market power' or facilitate its exercise.").

acquisitions combining a significant firm with a small firm that might not otherwise fall within the prescribed concentration levels; (ii) increasing the post-merger concentration levels that were consistent with competitive markets; (iii) incorporating the hypothetical monopolist test into the market definition exercise; (iv) focusing on post-merger collusion as a consequence of increased market concentration; (v) eliminating discussion of conglomerate mergers that could not be characterized as acquisitions involving a potential competitor; and, (vi) greater discussion of anticompetitive effects from vertical mergers. The changes, "constitute[d] an evolutionary change—not a revolutionary change," were "a formal embodiment of the existing policy," and conformed to the "actual practice of the Department over recent years."[104]

3. 1984 Merger Guidelines

The 1984 revisions to the 1982 Merger Guidelines incorporated "some important refinements and clarifications" but "reflect[ed] the Department's experience in applying the 1982 Guidelines during the past two years" and suggestions by "knowledgeable observers [from] inside and outside the government."[105] According to the Department, "the revisions [were] intended to correct any misperception that the Guidelines are a set of rigid mathematical formulas that ignore market realities and rely solely on a static view of the marketplace."[106]

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[104] Statement of Attorney General William French Smith, *reprinted in* BNA ANTITRUST AND TRADE REGULATION REPORTER (June 17, 1982) S-11,12. The 1982 Merger Guidelines, while credited with introducing sophisticated economic analysis to agency merger analysis, drew on concepts the Department had previously used in analyzing mergers and non-merger conduct. The 1982 Merger Guidelines adopted HHI concentration thresholds as a (rough) screen for identifying potentially anticompetitive mergers, with the thresholds "based on practical experience." Comments of Bill Baxter, Assistant Attorney General for Antitrust, *Justice Department Unveils Long-Awaited Revisions to Merger Guidelines,* BNA ANTITRUST AND TRADE REGULATION REPORTER 1251, 1253 (June 17, 1982). The guidelines also adopted the Hypothetical Monopolist Test to define markets; however, the "basic idea behind the hypothetical monopolist paradigm predate[d] the 1982 Merger Guidelines by more than two decades." Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm* at 2 (June 4, 2002), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11256.pdf; *see also* 2 Phillip Areeda & Donald Turner, ANTITRUST LAW ¶ 518 at 347 and ¶ 525a at 370 (1978); Lawrence A. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST 41 (1977); Richard A. Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 133 (1976).

[105] U.S. DEPT. OF JUST., Statement to Accompany Release of 1984 Merger Guidelines (June 14, 1984), *reprinted in* Special Supplement, BNA ANTITRUST AND TRADE REGULATION REPORTER (June 14, 1984) S-13. The revisions principally addressed five areas: (1) market definition and measurement; (2) factors that may affect the significance of concentration and market share data in evaluating horizontal mergers; (3) the treatment of foreign competition; (4) the treatment of efficiencies; and (5) the treatment of failing divisions of healthy firms.

[106] U.S. DEPT. OF JUST., Statement to Accompany Release of 1984 Merger Guidelines (June 14, 1984), *reprinted in* Special Supplement, BNA ANTITRUST AND TRADE REGULATION REPORTER (June 14, 1984) S-13.

4. 1992 Horizontal Merger Guidelines

The 1992 Horizontal Merger Guidelines[107]—the first joint agency guidelines—"reflect[ed] … a decade of development in merger analysis" and were "the next logical step in the development of merger analysis."[108] Many of the revisions were "largely technical or stylistic."[109] FTC Chair Janet Steiger stressed that "the new Guidelines reaffirm the basic approach to merger analysis in the 1982 and 1984 Merger Guidelines and … for the most part, the changes that have been made clarify the analysis, correct some misunderstandings under the prior Guidelines, and refine the Guidelines in light of advancements in thinking about mergers during the past decade."[110] She "[did] not expect the Commission's analysis of mergers to change substantially under the new Guidelines."[111]

Then-Assistant Attorney General James Rill explained that the agencies aimed "to incorporate into the 1984 Merger Guidelines the legal, economic, and practical learning that ha[d] taken place since their release."[112] Significant changes to the discussion of horizontal mergers included the introduction of a section on single-firm (or unilateral) effects that could arise from a merger,[113] and a revision to the treatment of entry.

The new Unilateral Effects section built on the "leading firm" proviso of the 1984 Merger Guidelines to "take into account that the nature of the unilateral effect, and other market factors relevant to a particular effect, depend on the primary characteristics that distinguish firms and shape the nature of their competition."[114] This advance was made possible by advancements in both the theoretical and the empirical economic literature on the effects of

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[107] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992).

[108] *Justice Department, FTC Issue Unified Federal Guidelines on Horizontal Mergers*, BNA ANTITRUST AND TRADE REGULATION REPORTER at 404:1 (Apr. 2, 1992).

[109] *Id*.

[110] *Remarks of Federal Trade Commission Chairman Janet Steiger* at 4 (Apr. 3, 1992), https://www.ftc.gov/system/files/documents/public_statements/694121/19920403_steiger_remarks_before_the_american_bar_association_section_of_antitrust_law.pdf.

[111] *Id.*

[112] *60 Minutes with the Honorable James F. Rill* at 4 (Apr. 3, 1992), https://www.justice.gov/atr/speech/file/1239441/download.

[113] The 1982 Merger Guidelines included a discussion of the closeness of competition between two merging firms as a relevant factor in the decision to challenge a merger on the basis of likely collusive or coordinated effects, post-merger. *See* U.S. DEPT. OF JUST., 1982 MERGER GUIDELINES at 18 ("Where products in a relevant market are differentiated or sellers are spatially dispersed, individual sellers usually compete more directly with some rivals than with others. In markets with highly differentiated products, the Department will consider the extent to which consumers perceive the products of the merging firms to be relatively better or worse substitutes for one another than for other products in the market.").

[114] *60 Minutes with the Honorable James F. Rill* at 19 (Apr. 3, 1992), https://www.justice.gov/atr/speech/file/1239441/download.

horizontal mergers.[115] At the time "the Division was basing many merger challenges on unilateral effects theories not articulated in [the 1984 Merger Guidelines]."[116] The Antitrust Division's chief economist had previewed unilateral effects analysis in an influential article;[117] the Assistant Attorney General had discussed the analysis two years prior to the revised guidelines release, in discussions at the ABA Spring Meeting in 1990.[118] The revised entry analysis—a requirement that entry be timely, likely, and sufficient—was a response to the Department's belief that the courts had misinterpreted the standard articulated in the 1982 and 1984 Merger Guidelines' discussion of entry.[119] The revision to the entry analysis was previewed, not only in the filings before the courts, but in speeches and articles by Division officials, well before incorporation into the merger guidelines.[120]

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[115] Jon Baker, *Unilateral Competitive Effects Theories in Merger Analysis* (Aug. 6, 1996) (describing developments in the theoretical and empirical economic literature that "brought unilateral theories to the fore"), https://www.ftc.gov/news-events/news/speeches/unilateral-competitive-effects-theories-merger-analysis#N_12_; Janusz A. Ordover and Robert D. Willig, *Economics and the 1992 Merger Guidelines: A Brief Survey*, 8 REV. OF INDUS. ORG. 139 (1993).

[116] Gregory Werden, *Should the Agencies Issue New Merger Guidelines?: Learning From Experience*, 16 GEO. MASON L. REV. 839, 842 (2009); for cases that appear to include a unilateral effects concern, *see, e.g.*, Complaint, *United States v. The Procter & Gamble Company and Rhone-Poulenc Rorer*, No. 90-5144 (E.D. Pa., Aug. 7, 1990), https://www.justice.gov/atr/case-document/file/912386/download; Complaint, *United States v. The Rank Organisation PLC*, No. 90-3795TJH(TX) (CD. Cal. filed July. 19, 1990), https://www.justice.gov/atr/case-document/file/1022361/download; Complaint, *United States v. Pacific Amphitheatre Partnership*, No. 90-3797KM(SX) (CD. Cal. filed July 19, 1990), https://www.justice.gov/atr/case-document/file/1027101/download; Complaint, *United States v. Baker Hughes Inc.*, No. 90-0825 (D.D.C. filed April 10, 1990), https://www.justice.gov/atr/case-document/file/935376/download; Complaint, United States v. United Tote Inc., No. CA-90-130 (D. Del. filed Mar. 14, 1990), https://www.justice.gov/atr/case-document/file/1025931/download; Complaint, *United States v. The Gillette Company*, No. 90-0053 (D.D.C. filed Jan. 10, 1990), https://www.justice.gov/atr/case-document/file/931241/download; Complaint, *United States v. American Safety Razor Co.*, No. 90-0188 (E.D. Pa. filed Jan. 10, 1990), https://www.justice.gov/atr/case-document/file/940621/download; Complaint, *United States v. Westinghouse Electric Co.*, No. 89-CIV-1032 (S.D.N.Y. filed Feb. 14, 1989), https://www.justice.gov/atr/case-document/file/970941/download.

[117] Robert Willig, *Merger Analysis, Industrial Organization Theory, and Merger Guidelines*, BROOKINGS PAPERS: MICROECONOMICS 281 (1991).

[118] *See 60 Minutes with the Honorable James F. Rill,* 59 (1) ANTITRUST LAW JOURNAL 45*,* 51-53 (1990).

[119] *See United States v. Baker Hughes*, 908 F.2d 981 (D.C. Cir. 1990); *United States v. Syufy*, 903 F.2d 659 (9th Cir. 1990); and *United States v. Waste Management*, 743 F.2d 976 (2d Cir. 1984). *See also 60 Minutes with the Honorable James F. Rill* at 22-26 (Apr. 3, 1992), https://www.justice.gov/atr/speech/file/1239441/download.

[120] *See 60 Minutes with the Honorable James F. Rill,* 59 (1) ANTITRUST LAW JOURNAL 45*,* 47-48 (1990); Judy Whalley, *After the Herfindahls are Counted: Assessment of Entry and Efficiencies in Merger Enforcement by the Department of Justice* (1989) 13(3) WORLD COMPETITION 53.

5. 1997 Revisions to the Efficiency Section of the 1992 Horizontal Merger Guidelines

The 1997 revisions to the 1992 Horizontal Merger Guidelines discussion of efficiencies "explain[ed] more thoroughly how [the Department already] take[s] efficiencies into account and what information [it] need[ed] from the merger parties to evaluate their claims" and "better reflect[ed] existing practices at the agencies."[121] The Commission's 1995 Global Competition Hearings had solicited information on the role of efficiencies in merger analysis,[122] and according to then-Chairman Pitofsky, immediately after the hearings concluded, the Commission, in conjunction with the Department, had set to work on revisions to the efficiency section of the Guidelines because the FTC staff report had "focused debate on the treatment of efficiencies in merger enforcement."[123]

6. 2010 Horizontal Merger Guidelines

Similarly, the 2010 Horizontal Merger Guidelines focused on making the Guidelines consistent with agency practice and learning since the 1992 revisions. They "better reflect[ed] the agencies' actual practices" and "derive[ed] 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."[124] Notably, "[m]any of the proposed refinements and changes reflect[ed] issues previously identified in the "Commentary on the Horizontal Merger Guidelines," which the agencies jointly issued in 2006."[125] Prior to revising the Guidelines, 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."[126] The revised Guidelines "take into account the legal and

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[121] Press Release, *Justice Department and Federal Trade Commission Announce Revisions to Merger Guidelines* (Apr. 8, 1997), https://www.justice.gov/archive/atr/public/press_releases/1997/1088.pdf.

[122] *See, e.g.*, Federal Trade Commission, Hearings on FTC Policy in Relation to the Changing Nature of Competition, 60 FR 139, at 37449-50 (Jul 20, 1995).

[123] Remarks of Robert Pitofsky, *FTC Staff Report on Competition Policy: Six Months After* (Nov. 7, 1996), https://www.ftc.gov/news-events/news/speeches/ftc-staff-report-competition-policy-six-months-after.

[124] Press Release, *Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines: 2010 Guidelines More Accurately Represent Agencies Merger Review Process* (Aug. 19, 2010), https://www.ftc.gov/news-events/news/press-releases/2010/08/federal-trade-commission-us-department-justice-issue-revised-horizontal-merger-guidelines.

[125] *Id*. In 2006, the agencies released a commentary on horizontal mergers, to update the public on how the 1992 Horizontal Merger Guidelines were being implemented. The U.S. DEPT. OF JUST. & FED. TRADE COMM'N, COMMENTARY ON HORIZONTAL MERGERS (2006), https://www.justice.gov/atr/file/801216/download.

[126] Press Release, *Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines: 2010 Guidelines More Accurately Represent Agencies Merger Review Process* (Aug. 19, 2010),

economic developments since the 1992 guidelines were issued" and "[were] 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."[127]

7. 2017 Revisions to the International Operations Guidelines and Intellectual Property Guidelines

The 2017 revisions to the International Guidelines and Intellectual Property Guidelines were similarly based on agency practice and developments in the period after the publication of the then-existing guidelines.[128]

E. Revised Merger Guidelines Should Reflect a Consensus View of the Law and Agency Practice

Guidelines that do not reflect a consensus view of the law or existing agency practice are unlikely to withstand a change in administration. Guidelines that are revised because of a change in agency leadership, or to conform with idiosyncratic views of agency leadership, are unlikely to be persuasive to courts.

The 1985 Vertical Restraints Guidelines did not command broad support. Although they purported to "reduce the uncertainty associated with enforcement of the antitrust laws in this area,"[129] they did not achieve their goal. In 1993, then-Assistant Attorney General Anne Bingaman rescinded them and explained:

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https://www.ftc.gov/news-events/news/press-releases/2010/08/federal-trade-commission-us-department-justice-issue-revised-horizontal-merger-guidelines.

[127] *Id*.

[128] Press Release, *Federal Trade Commission and Department of Justice Announce Updated International Antitrust Guidelines* (Jan. 13, 2017) ("the changes we have made to the international guidelines, last issued in 1995, reflect developments in the department's practices and in the law over the last 22 years", quoting Acting Assistant Attorney General for Antitrust Renata Hesse), https://www.ftc.gov/news-events/news/press-releases/2017/01/federal-trade-commission-department-justice-announce-updated-international-antitrust-guidelines; Press Release, *FTC and DOJ Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property* (Jan. 13, 2017) (revisions "reflect intervening changes in statutory and case law, as well as relevant enforcement and policy work"), https://www.ftc.gov/news-events/news/press-releases/2017/01/ftc-doj-issue-updated-antitrust-guidelines-licensing-intellectual-property; Statement of Commissioner Maureen K. Ohlhausen, U.S. DEPT. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY at 1 (Jan. 13, 2017) ("modest[] updates" to the Guidelines), https://www.ftc.gov/system/files/documents/public_statements/1055153/mkohlhausen_statement_ip_guidelines.pdf.

[129] U.S. DEPT. OF JUST., VERTICAL RESTRAINTS GUIDELINES at 1 (1985).

> They were controversial from the outset, even beyond the norm for antitrust. Within the year, Congress expressed its "sense" that the Vertical Restraints Guidelines: (1) were not an accurate expression of federal antitrust law or of Congressional intent; (2) should not be accorded any force of law or be treated by the courts as binding or persuasive, and (3) should be recalled by the Attorney General. [P.L.99-180, 99 Stat.1170.] That same year, the National Association of Attorneys General expressed their dissatisfaction with the Vertical Restraints Guidelines by adopting alternative Guidelines. In the ensuing years, neither Congress nor the State Attorneys General have retreated from their position. … We, the Department, have a constitutional and statutory obligation to enforce the laws of the land as interpreted by the courts … The core of my decision is based on the belief that the Guidelines unduly elevate theory at the expense of factual analysis and reflect a continued resistance to case law that, at this point in our history, is inappropriate. … If we are to continue as one of the foremost economic nations, we must observe the Supreme Court's admonition that our focus be on promoting competition, not just the prerogatives of competitors.[130]

The agencies' experience with the Section 2 Report[131] is another example of the futility of pushing ahead without consensus. Issued in 2008 by the Department of Justice, without Federal Trade Commission concurrence,[132] it was withdrawn almost immediately by the next administration.[133] Regardless of the merits of either decision, the unilateral issuance and subsequent withdrawal of the report, after nearly three years of joint FTC and DOJ efforts, called into serious question the consistency and non-partisan nature of federal antitrust enforcement. According to a majority of the Commission,

> the final Report's descriptions and conclusions respecting how Section 2 is and should be enforced cannot be said to represent the consensus, or even the prevailing, view of the myriad of stakeholders interested in Section 2 enforcement.

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[130] Anne K. Bingaman, *Antitrust Enforcement, Some Initial Thoughts and Actions* (August 10, 1993), https://www.justice.gov/atr/speech/antitrust-enforcement-some-initial-thoughts-and-actions.

[131] U.S. DEP'T. OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008).

[132] *See* Statement of Federal Trade Commission Chairman William Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act, https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmtkovacic.pdf.

[133] Press Release, Department of Justice, *Justice Department Withdraws Report on Antitrust Monopoly Law* (May 11, 2009), https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law.

> The Report also goes beyond the holdings of the Supreme Court cases upon which it relies.[134]

The agencies should be attentive to such concerns if they wish any revised Merger Guidelines to support, rather than undercut, long-term efforts to enforce the prohibition against anticompetitive mergers.

The experience with the 2020 Vertical Merger Guidelines is also useful to consider. The 2020 Vertical Merger Guidelines "explain [the Department's] investigative practices as [it] appl[ies] them today and [has] applied them in recent years"[135] and "reflect[ed] [the FTC's] current enforcement approach."[136] In support of the drafting of vertical merger guidelines, the Commission staff undertook a review of twenty-five years of FTC vertical merger enforcement matters. The 2020 Commentary on Vertical Merger Enforcement made clear that the analytical framework in the vertical merger guidelines was consistent with the agencies past investigatory focus and enforcement decisions.[137] There was unanimous support for revoking the vertical merger discussion of the 1984 Merger Guidelines,[138] and unanimous agreement that the 2020 Vertical Merger Guidelines were an improvement over the predecessor discussion in the 1984 Merger Guidelines.[139] Yet the inability to obtain a

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[134] Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice at 1, https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf.

[135] Press Release, *FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers* (June 30, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers.

[136] *Id*.

[137] FED. TRADE COMM'N, COMMENTARY ON VERTICAL MERGER ENFORCEMENT (2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

[138] *See* Dissenting Statement of Commissioner Rebecca Kelly Slaughter, in re FTC-DOJ Vertical Merger Guidelines at 1 ("I continue to appreciate the need to withdraw and update the old Guidelines."), https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf; Dissenting Statement of Commissioner Rohit Chopra Regarding the Publication of Vertical Merger Guidelines at 9 ("I appreciate that the Federal Trade Commission and the U.S. Department of Justice rescinded the old, outdated 1984 Guidelines."), https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf.

[139] Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines at 2 (Sept. 15, 2021) ("The 2020 VMGs represent a substantial improvement over the 1984 guidelines that they replaced and address important principles such as raising rivals' costs, foreclosure, and misuse of competitively sensitive information. Going forward, the FTC intends to work with the Department of Justice to issue updated merger guidance. This update will provide an opportunity to build on the positive steps that were taken in the 2020 VMGs."), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf; Statement of Chairman

consensus view over the treatment of efficiencies, certain theories of harm[140], and certain presumptions that were or were not included in the text, encouraged the "new" Commission to withdraw from the Guidelines. (The DOJ initiated a process to improve or clarify the vertical merger guidelines, consistent with the approach it took in 1984 to revise the 1982 Merger Guidelines.)[141] Although the agencies have, together, now embarked on a process to revise the Merger Guidelines, the split in the agencies' position is unhelpful and suggests that there are clear and significant differences in how the two federal antitrust agencies approach the evaluation of vertical mergers.

We recall Commissioner Thomas B. Leary's reaction in supporting the issuance of the 2000 Competitor Collaboration Guidelines:

> I support publication of these Guidelines, which make a significant contribution toward the articulation and synthesis of relevant antitrust principles in an

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Joseph Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson, Regarding Joint Department of Justice and Federal Trade Commission Vertical Merger Guidelines (Jun 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577507/vmgmajoritystatement.pdf; *See also* Prepared Remarks of Commissioner Rebecca Kelly Slaughter Regarding the Proposed Rescission of the FTC's Approval of the 2020 Vertical Merger Guidelines (Sept. 15, 2021) ("I will confess anxiety about rescinding the 2020 Guidelines without a replacement proposed jointly by the Commission and DOJ. I do not want to give the impression that we intend to return to or be governed by the dead-letter of the 1984 Guidelines. … And I want to be very clear to the markets that I believe the catalogue of harms in the 2020 Guidelines continues to be valid, though non- exhaustive, and that this understanding of harms continues to be critical to our analysis of vertical mergers. Our enforcement efforts and any future guidelines must build on that."), https://www.ftc.gov/system/files/documents/public_statements/1596408/rks_remarks_on_rescinding_ftc_approval_of_vmgs_9152021.pdf. The inability to obtain consensus on a document that everyone agreed was an improvement over existing guidance and which included those theories of harm the agency routinely considered in vertical mergers suggests that an effort to issue "combined" guidelines creates unnecessary hurdles to obtaining revised guidance on horizontal mergers.

[140] Most notable appears to be a dispute over whether the guidelines should have included the harm of "regulatory evasion" as was included in the 1984 Merger Guidelines. Without taking a position on the merits of this question, the Supreme Court's opinions in *Verizon Communications v. Trinko*, 540 U.S. 398 (2004) and *Credit Suisse v. Billing*, 551 U.S. 264 (2007) raise a question of whether such harm is an antitrust harm, justiciable under the antitrust laws. Notably, the agencies may raise concerns of post-merger regulatory evasion with the relevant state or federal regulatory agency, if certain practices or mergers are subject to meaningful regulatory oversight. In our research we were only able to identify three instances between 1986 and 2022 in which "regulatory evasion" was the basis for an FTC challenge to a vertical merger. *See* Complaint, In the Matter of Fresenius/Daiichi Sankyo, Docket No. C-4236 (Oct. 20, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/10/081021freseniuscmpt.pdf; Complaint, In the Matter of Entergy/Entergy-Koch, Docket No. C-3998 (Jan. 31, 2001), https://www.ftc.gov/sites/default/files/documents/cases/2001/01/entergycmp.pdf; and, Occidental Petroleum Corporation, et. al., 109 F.T.C. 167 (1987).

[141] Press Release, Department of Justice, 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.

> important area of antitrust law. The Guidelines are the product of lengthy discussions between the two agencies that have issued them, and also reflect comments from private parties. *Inevitably, there were accommodations and compromises. Although I do not necessarily agree with every statement in the Guidelines, I believe that my individual differences are less important than the consensus view that they reflect.* These Guidelines give private counselors, who are on the front line of antitrust compliance efforts, valuable insights into the enforcement philosophy of the antitrust agencies.[142]

Former Commissioner Leary's approach is commendable; firms and their counsel deserve guidelines that reflect interagency consensus, and not the idiosyncratic views of an agency or its personnel.

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We applaud the effort to review and clarify the Merger Guidelines. The current Merger Guidelines, and their earlier iterations, are a jewel among many millions of government documents. They are clear evidence that the antitrust agencies take seriously their role to provide objective analysis of the law in matters that could otherwise devolve into public interest lobbying in support of one decision or another based less on merits and more on status. We hope our present comments are helpful to the agencies' efforts to review and clarify the Merger Guidelines.

Respectfully submitted,

_____/s/_____
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[142] Statement of Commissioner Thomas B. Leary, Antitrust Guidelines for Collaborations Among Competitors (emphasis added), https://www.ftc.gov/system/files/documents/public_statements/300501/000407antitrustguideleary.pdf.