TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines

Examples from FTC Enforcement 1993–2022

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The Department of Justice and Federal Trade Commission are considering changes to the Horizontal and Vertical Merger Guidelines and have asked whether the current guidelines "underemphasize or neglect … potential competition." Whether potential competition is underemphasized in the merger guidelines is a subjective question, but the FTC's merger enforcement record of the past three decades illustrates the scope of the merger guidelines application to transactions that may eliminate an actual potential entrant or will create or strengthen a merged entity's ability or incentive to exclude an actual potential entrant from a relevant market. After a short history of the development of the potential competition doctrine, in law and in the merger guidelines, this paper collects examples of the FTC's potential competition merger enforcement record to inform discussion on whether, and if so, how, the merger guidelines might be revised. This review of the FTC's enforcement record should also inform Congress's future consideration of whether legislation to revise or supplement the Sherman Act, Clayton Act or FTC Act is necessary for the antitrust agencies to successfully challenge mergers that eliminate or affect potential or nascent competitors.

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INTRODUCTION

> Potential competition—"the threat of entry, either through internal expansion or through acquisition and expansion of a small firm, by firms not already or only marginally in the market"—"may often be the most significant competitive limitation on the exercise of market power by leading firms, as well as the most likely source of additional actual competition."[1]

The Federal Trade Commission ("FTC" or "Commission") and Department of Justice leadership appear interested in reviving and expanding reliance on the potential competition doctrine. The two federal competition agencies recently requested comment on ten questions focused on the appropriate analysis of mergers that may eliminate potential or nascent competition.[2] They "are particularly interested in aspects of competition the [merger] guidelines may underemphasize or neglect," including, among others, "potential competition."[3]

This interest is understandable. Incumbent firms can face meaningful competitive pressure not only from firms that currently operate in a relevant market, but also from prospective and nascent market entrants. Antitrust law[4] and economic theory[5] recognize that mergers[6] may eliminate current and future competition from firms not presently operating in the relevant market (so-called "potential," "future," or "non-incumbent" firms or competitors[7])

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[1] U.S. DEPT. OF JUST., 1968 MERGER GUIDELINES at 14.

[2] U.S. Department of Justice and Federal Trade Commission, Request for Information on Merger Enforcement (Jan. 18, 2022), at 6-8, https://www.justice.gov/opa/press-release/file/1463566/download.

[3] Id. at 1.

[4] The relevant statutory provisions include Section 7 of the Clayton Act, 15 U.S.C. §18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1-2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.

[5] See, e.g., John Kwoka, *Eliminating Potential Competition*, in 2 ISSUES IN COMPETITION LAW AND POLICY 1437 (ABA Section of Antitrust Law 2008).

[6] As used herein, the term "merger" refers to the acquisition of assets, stock, or non-corporate interests of another firm, the formation of a new entity where one or more persons or firms contribute assets to the new entity, and the combination of two or more firms, including the absorption of one firm into another; it does not differentiate between corporate and non-corporate entities.

[7] Supreme Court case law generally refers to such firms as "potential competitors" or "potential entrants," sometimes further modified to identify such firms as "perceived" or "actual" potential entrants. Federal Trade Commission complaints sometimes refer to future entrants or future competitors. This paper occasionally also uses the term "non-incumbent" to identify firms without present sales in a market.

John Yun describes potential competition as competition from "a product that does not yet compete within a specific relevant market but is predicted to compete or could compete very quickly." He describes "nascent competition" as "rivalry or potential rivalry with a product or technology – particularly one associated with a great deal of innovation – that exists but has not yet matured into a significant competitor whether within or outside the same relevant market." See John M. Yun, Potential Competition, Nascent Competitors, and Killer

or whose future competitive impact is not reflected in their current position in the relevant market ("emerging" or "nascent" competitors).

But, to some, the potential competition doctrine has proven toothless. In the Report on the Investigation of Competition in Digital Markets, the majority staff of the Antitrust Subcommittee of the House Judiciary Committee found that "dominant firm[s] evidently acquired nascent or potential competitors to neutralize a competitive threat or to maintain and expand the firm's dominance"[8] and "recommend[ed] strengthening the Clayton Act to prohibit acquisitions of potential rivals and nascent competitors" because of the "patchwork of cases that are unfavorable to potential and nascent competition-based theories of harm."[9] Four members of the Subcommittee, writing in a separate report, similarly concluded that "it [is] nearly impossible to bring an enforcement case on potential competition grounds in digital markets" because of "the judiciary's onerous evidentiary requirements on innovation and potential competition," the "insurmountably high standard of proof for demonstrating that the startup would likely enter the market" and the requirement that the startup be "uniquely situated to enter" and significantly reduce the dominant firm's market power."[10] Others have also called for changes to the doctrine to allow for a more expansive use of the doctrine, to make it easier to block such mergers.[11] Still others are critical of the doctrine,

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Acquisitions 652, 654-55, in Joshua D. Wright & Douglas H. Ginsburg, The Global Antitrust Institute Report on the Digital Economy (2020), https://gaidigitalreport.com/wp-content/uploads/2020/11/The-Global-Antitrust-Institute-Report-on-the-Digital-Economy_Final.pdf.

[8] MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COMMERCIAL, & ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., REP. ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 11 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [hereinafter REPORT].

[9] *Id.* at 394, referencing only United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974). This paper discusses some of the appellate court decisions after Marine Banc that, to some, suggest a higher standard for challenging a merger on the theory of actual potential entry. The Commission ultimately prevailed in two of the four matters discussed, including those that arguably imposed a high standard on the Commission.

[10] REP. KEN BUCK, SUBCOMM. ON ANTITRUST, COMMERCIAL, AND ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., THE THIRD WAY REP. 9-10 (2020), https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf [hereinafter THIRD WAY REPORT]. According to the drafters, "Congress should look to reinvigorate the antitrust enforcement agencies' ability to conduct proper oversight and bring enforcement cases based on potential competition doctrine. This may require legislation restoring the potential competition doctrine to its original Congressional intent while freeing it from its current overly restrictive standards."

[11] See, e.g., Request for Information on Merger Enforcement, Public Comments of 23 State Attorneys General (Apr. 21, 2022) at 9 ("potential competitor acquisitions are nearly impossible to challenge"); Public Comments of the Colorado and Nebraska Attorneys General in Response to the Request for Information on Merger Enforcement (Apr. 21, 2022) at 23-24, 35-39 (apply "tend to create a monopoly standard to acquisitions that may forestall potential competition"; "guidelines should protect nascent competition").

and the agencies, for not adopting a more dynamic approach to the analysis of such mergers.[12]

While the proper level of antitrust enforcement is subjective, the Federal Trade Commission's enforcement record with respect to mergers that eliminate or otherwise affect potential or nascent competitors is instructive to this public discussion. In December 2020, the Commission alleged that Facebook (now Meta) "willfully maintained its monopoly power [in the market for personal social networking] through anticompetitive acquisitions" by, in part, acquiring Instagram and WhatsApp, two firms with allegedly significant potential to challenge Facebook's alleged dominate position in the relevant market.[13] In July 2022, the Commission sought to enjoin META's acquisition of Within Unlimited, alleging that the acquisition would eliminate Meta as a potential entrant into the market for "virtual reality fitness apps"[14] and initiated an administrative review of the proposed merger. [15]

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[12] See, e.g., Alden F. Abbott, New Merger Guidelines Should Be Concise, Be Administrable, and Avoid AntiMerger Bias (Mar. 4, 2022), https://www.mercatus.org/research/public-interest-comments/new-merger-guidelines-should-be-concise-be-administrable-and; Global Antitrust Institute, Potential and Nascent Competition in Merger Review (Apr. 2022); Jay Ezrielev and Joseph J. Simons, Updating the Merger Guidelines: A Dynamic Reboot (Apr. 123, 2022); Jay Ezrielev, An Economic Framework for Assessment of Innovation Effects of Nascent Competitor Acquisitions (Mar. 22, 2021) (working paper) (available at SSRN.com); David Teece, Towards a Dynamic Competition Approach to Big Tech Merger Enforcement: The Facebook-Giphy Example (Dec. 2021) at 10, 16 ("the long and short of it is that the potential competition doctrine is hollow" and "we must … renovate the potential competition doctrine by creating frameworks that require and enable us to understand and assess organizational capabilities"); https://www.competitionpolicyinternational.com/towards-a-dynamic-competition-approach-to-big-tech-merger-enforcement-the-facebook-giphy-example/; Information Technology and Innovation Foundation, In the Matter of Request for Information on Merger Enforcement (Mar. 21, 2022), https://www2.itif.org/2022-doj-ftc-merger-enforcement-rfi.pdf; International Center for Law and Economics, Request for Information on Merger Enforcement (Apr. 21, 2022).

[13] The district court dismissed the FTC's complaint, but gave the agency leave to amend it complaint. Federal Trade Commission v. Facebook, 560 F. Supp. 3d. 1 (D.D.C. 2021). The Commission filed an amended complaint in August 2021. Amended Complaint, Federal Trade Commission v. Facebook, Inc., Case No. 1:20-cv-03590-JEB (D.D.C, Aug. 19, 2021) (alleging monopoly maintenance through anticompetitive acquisitions, monopoly maintenance through an unlawful course of conduct, both "unlawful monopolization in violation of Section 2 of the Sherman Act" and "thus unfair methods of competition"), https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf. Facebook moved to dismiss, but the district court found the Commission's complaint sufficient to withstand a motion to dismiss. Federal Trade Commission v. Facebook, 581 F. Supp. 3d 34 (D.D.C. 2022).

[14] Complaint for Temporary Restraining Order and Preliminary Injunction, Federal Trade Commission v. Meta Platforms, Case No. 04325 (July 27, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/221%200040%20Meta%20Within%20TRO%20Complaint.pdf. The Commission amended its complaint in October 2022 to narrow its claims.

[15] Administrative Complaint, Meta Platforms, Mark Zuckerberg, and Within Unlimited, FTC Docket No. 9411 (Aug. 11, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09411MetaWithinComplaintPublic.pdf. The Commission filed an amended administrative complaint in October 2022, narrowing its claims. Amended Administrative Complaint, Meta Platforms, Mark Zuckerberg, and Within Unlimited, FTC Docket No. 9411

These two matters are not outliers. The Commission routinely identifies harm from the acquisition of (or combination with) a potential competitor.[16] The Commission has, over the last thirty-years, challenged transactions that threatened to eliminate future competition from potential or future competitors in markets for existing energy products,[17] healthcare

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(Oct. 13, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09411%20-%20AMENDED%20COMPLAINT%20FILED%20BY%20COUNSEL%20SUPPORTING%20THE%20COMPLAINT%20-%20PUBLIC%20%281%29_0.pdf.

[16] For a discussion of recent actions by the Department of Justice (and additional matters of the FTC), see SUBMISSION OF THE UNITED STATES TO THE OECD, *The Concept of Potential Competition* (Jun. 10, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)20/en/pdf; SUBMISSION OF THE UNITED STATES TO THE OECD, *Start-ups, Killer Acquisitions and Merger Control* (Jun. 11, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf; SUBMISSION OF THE UNITED STATES TO THE OECD, *Conglomerate Effects of Mergers* (Jun. 4, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf; SUBMISSION OF THE UNITED STATES TO THE OECD, *Merger Control in Dynamic Markets* (Dec. 6, 2019), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-merger_control_in_dynamic_markets_us.pdf; SUBMISSION OF THE UNITED STATES TO THE OECD, *Non-Price Effects of Mergers* (Jun. 6, 2018), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/non-price_effects_united_states.pdf. The author was a participant in the drafting of these comments during his time at the FTC. In some instances, the case descriptions in this paper are adopted from the agency's write-up in the OECD papers. *See also* Darren S. Tucker, *Potential Competition Analysis Under the 2010 Merger Guidelines*, 12 SEDONA CONF. J. 273 (2011), and Gregory J. Werden and Kristen C. Limarzi, *Forward-Looking Merger Analysis and the Superfluous Potential Competition Doctrine*, 77 ANTITRUST LAW J. 109 (2010). See also John E. Kwoka, *Non-Incumbent Competition: Mergers Involving Constraining and Prospective Competitors*, 52 CASE W. RES. L. REV. 173 (2001).

[17] *See, e.g.,* DTE Energy Co., No. C-4691, 2019 WL 6893028, at *16 (F.T.C. Nov. 21, 2019) (complaint) (proposed acquisition eliminates actual and potential competition in the market for natural gas pipeline transportation in certain counties in Ohio); Conoco Inc., 135 F.T.C. 105, 124 (2003) (merger would eliminate potential competition in the market for "natural gas gathering" in the Permian Basin); El Paso Energy Corp., 131 F.T.C. 704, 714, 719, 721, 722-23 (2001) (firms are potential competitors in the market for natural gas in the Evansville, Illinois area; loss of potential competition in the market for firm natural gas transportation in Central Florida and the Central Gulf of Mexico; loss of potential competition in the market for transportation of natural gas in West Central Gulf of Mexico; loss of potential competition in the market for the provision of tailored services in the Milwaukee-Waukesha area); El Paso Energy Corp., No. C-3915, 2000 WL 195666, at *2-3, *4, *5 (F.T.C. Jan. 6, 2000) (complaint) (elimination of potential competition in the markets for the transportation of natural gas out of gas producing fields in certain areas of the Gulf of Mexico off the coast of the State of Louisiana, and in the transportation of natural gas into gas consuming areas in eastern Tennessee and northern Georgia); BP Amoco PL.C., No. C-3938, 2000 WL 1224962, at *6 (F.T.C. Aug. 25, 2000) (complaint) (elimination of actual and potential competition in the transportation of Alaska North Slope crude oil); FTC v. Questar Corp., No. 2:95-CV-1137 S, 1995 WL 1053848 (D. Utah 1995) (transaction abandoned) (transaction would eliminate potential competition between Questar and the Kern River pipeline in the market for transportation of natural gas for industrial customers in the Salt Lake City area); Arkla Inc., 112 F.T.C. 509 (1989) (alleging the lessening of potential competition, including the perceived threat of future competition, in the markets for transportation of gas out of the gas producing area of the Arkoma Basin, and into the gas consuming area of the Conway-Morrilton-Russellville corridor). The Commission challenged each of these acquisitions, obtaining an order in each matter (except for Questar, which abandoned its proposed acquisition after the Commission filed its request for a preliminary injunction), that it believed sufficient to resolve its concerns.

products,[18] human and animal pharmaceutical products,[19] retail operations,[20] manufactured products,[21] chemical products,[22] software products,[23] broadband markets,[24] and markets

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[18] *See, e.g.,* Administrative Complaint, Illumina/Grail, No. 9401 (Mar. 30, 2021) (merger would give the combined firm the incentive and ability to exclude existing and future rivals from the market for research, development, and commercialization of multi-cancer early detection tests), https://www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf; Össur Hf., No. C-4712, 2020 WL 1875546, at *2 (F.T.C. 2020) (elimination of substantial future competition between Össur, a potential new entrant, and College Park in the U.S. market for the development, manufacturing, marketing, distribution and sale of myoelectric elbows); Steris Corp., No. 9365, 2015 WL 3489676, at *13 (2015) (merger would eliminate Synergy as an actual potential entrant and future competitor in the U.S. market for contract radiation sterilization services); Medtronic, Inc., 159 F.T.C. 200, 202 (2015) (acquisition would eliminate the likely entry of one of the two firms, and future competition between the two firms, in the U.S. market for drug-coated balloon catheters for the fem-pop artery); Thoratec Corp., No. 9339, 2009 WL 2402681, at *1, *3 (F.T.C. July 28, 2009) (elimination of future competition from potential entrant Heartware into the U.S. market for left ventricular assist devices, and related devices); Boston Sci. Corp., No. C-4164, 2006 WL 2330115, at *3 (F.T.C. July 21, 2006) (transaction would eliminate potential competition between BSC and Guidant, in the markets for the manufacture and sale of implantable cardioverter defibrillators and coronary drug eluting stent with a Rapid Exchange delivery system); Johnson & Johnson, 140 F.T.C. 1062, 1066, 1067 (2005) (proposed transaction would eliminate potential competition between two of only three firms in the U.S. market for drug eluting stents with access to a Rapid Exchange delivery system); Boston Sci. Corp., 119 F.T.C. 549, 552 (1995) (proposed acquisition of SCIMED would eliminate potential competition from the most likely potential entrant, with a substantial entry advantage over other potential entrants, into the highly concentrated U.S. market for the research, development, manufacture, and sale of intravascular ultrasound catheters); Wright Med. Tech., Inc., 119 F.T.C. 344, 346 (1995) (proposed acquisition would eliminate Orthomet as a potential competitor in the market for orthopedic implants used or intended for use in the human hand approved by the FDA). The Commission challenged each of these acquisitions, obtaining an order in each matter that it believed sufficient to resolve its concerns, except with respect to Steris/Synergy and, to date, Illumina. In Steris/Synergy, the FTC's request for a preliminary injunction was denied, with the court finding that it was not probable that Synergy would have entered the relevant market, as the FTC alleged. FTC v Steris Corp., 133 F.Supp.3d 962 (N.D. Ohio, 2015). In Illumina, the Administrative Law Judge dismissed the FTC's complaint, finding that complaint counsel failed to show that a likelihood of harm to the merged entities rivals was probable or imminent, in part because Illumina had committed to an "open offer" of its products for a 12-year term, post-merger. Initial Decision, Illumina, No. 9401 (Sept. 9, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.

[19] *See, e.g.,* Complaint, Hikma Pharmaceuticals, No. C-4771(Jul. 30, 2022) (elimination of future competition in the market for generic injectable triamcinolone acetonide, where Hikma had a product in its development pipeline, and the target company recently received FDA approval to market its product), https://www.ftc.gov/system/files/ftc_gov/pdf/221%200002%20C4771%20Hikma%20Custopharm%20Final%20Complaint.pdf; Complaint, ANI Pharmaceuticals, No. C-4754 (Nov. 9, 2021) (elimination of future competition in the market for generic sulfamethoxazole-trimethoprim oral suspension, where ANI was in the market and the target company, Novitium, was one of a limited number of suppliers capable of entering the market, and elimination of future competition in the market for generic dexamethasone tablets, where both ANI and Novitium were two of a limited number of companies capable of entering the market in the near future), https://www.ftc.gov/system/files/documents/cases/2110101c4754aninovitiumcomplaint.pdf; Complaint, Pfizer, Inc., No. C-4727 (Oct. 30, 2020) (elimination of future competition between Pfizer and Mylan in the market for generic levothyroxine sodium tablets, generic sucralfate tablets and generic varenicline tartrate tablets), https://www.ftc.gov/system/files/documents/cases/c47271910182pfizermylancomplaint.pdf; Abbvie Inc., No. C-4713, 2020 WL 2473466, at *2 (F.T.C. May 5, 2020) (complaint) (elimination of future competition between the parties' Interleukin-23 inhibitor drugs for moderate to severe Chron's disease, and for moderate

to severe ulcerative colitis; both products were in development, with Allergan's products expected to come to market in 5 to6 years); Bristol-Myers Squibb Co., 2019 WL 6168274, at *2 (F.T.C. Nov. 15, 2019) (complaint) (eliminating future competition from BMS, a potential entrant, in the development and sale of oral products to treat moderate to severe psoriasis); Complaint, Baxter International Inc., No. C-4620 (F.T.C., Jul. 20, 2017) (merger would eliminate one of only a limited number of suppliers capable of entering the market for milrinone in dextrose intravenous bags), https://www.ftc.gov/system/files/documents/cases/171_0052_c4620_baxter_claris_complaint.pdf; Teva Pharm. Indus. Ltd., No. C-4589, 2016 WL 4128219, at *17 (F.T.C. July 26, 2016) (elimination of future competition in existing generic drug markets where one or both of Teva and Allergan were potential entrants); Novartis AG, 159 F.T.C. 1252, 1254-55 (2015) (elimination of substantial future competition from the potential entry of Novartis into the markets for the development and sale of BRAF-inhibitors and MEK-inhibitors); Schering-Plough Corp., No. C-4268, 2009 WL 3683186, at *2-3 (F.T.C. Oct. 29, 2009) (elimination of future competition between Merck's on-market neurokinin 1 receptor antagonist and Schering-Plough's product Rolapitant, an NK-1 receptor antagonist under development); Teva Pharm. Indus. Ltd., No. C-4242, 2008 WL 5652610, at *5 (F.T.C. Dec. 18, 2008) (transaction would eliminate potential competition from Teva in ten markets in which Barr supplied certain generic pharmaceutical products, and future competition in an additional market, where both Teva and Barr were developing a product); Complaint, Cephalon, Inc., No. C-4121 (F.T.C., Sep. 20, 2004) (merger would eliminate potential competition between Cephalon, the dominant supplier of prescription drugs for the treatment of breakthrough cancer pain, and Cima, the firm best positioned to next enter the relevant market), https://www.ftc.gov/sites/default/files/documents/cases/2004/09/040924comp0410025.pdf; American Home Products & American Cyanamid, 119 F.T.C. 217, 220 (1995) (acquisition would eliminate potential competition from American Home Products to American Cyanamid's existing product in the market for the research, development, production, and marketing of cytokines for white blood cell and platelet restoration). The Commission challenged each of these acquisitions, obtaining an order in each matter that it believed sufficient to resolve its concerns.

For a list and description of additional pharmaceutical mergers where the Commission challenged the elimination of potential competition and competition in innovation or research and development markets, *see* HEALTH CARE DIV., BUREAU OF COMPETITION, FED. TRADE COMM'N, OVERVIEW OF FTC ACTIONS IN PHARM. PRODUCTS & DISTRIBUTION 65-75, 75-77 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2022.10.28OverviewPharma.pdf (challenges to 44 mergers raising potential competition concerns in the period 1995 to 2022, and challenges to another five mergers that raised concerns in markets for innovation).

[20] *See, e.g.,* Complaint at 15, FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008) (No. 07-5276), 2007 WL 1849944 (proposed acquisition would eliminate potential competition in the operation of premium natural and organic supermarkets in "numerous parts of the country"); Albertsons, Inc., No. C-3986, 2000 WL 1809690, at *4-5 (F.T.C. Dec. 6, 2000) (proposed acquisition would eliminate potential competition in the retail sale of food and grocery products in supermarkets in four markets in California); Kroger Co., No. C-3917, 2000 WL 195668, at *3 (F.T.C. Jan. 10, 2000) (proposed acquisition would eliminate potential competition in the retail sale of food and grocery products in supermarkets in and near Cheyenne, Wyoming); Koninklijke Ahold NV, 127 F.T.C. 404, 408 (1999) (proposed acquisition would eliminate potential competition in the market for the retail sale of food and grocery products in supermarkets in Hilltown, Pennsylvania); Complaint at 6, FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) (No. 1:97CV00701), 1997 WL 34710489 (proposed acquisition would eliminate potential competition in the market for the retail sale of office supplies through office supply superstores in geographic markets including areas in New Jersey, New York, North Carolina, and Virginia). The Commission challenged each of these acquisitions, obtaining an order in each matter that it believed sufficient to resolve its concerns.

[21] *See, e.g.,* Polypore Int'l, Inc., 149 F.T.C. 486, 492 (2010) (acquisition would eliminate Microporous as uniquely positioned potential entrant in the market for separators for automotive lead-acid batteries); Gencorp Inc., 136 F.T.C. 1264, 1268-69 (2003) (transaction would eliminate potential competition in the market for the research, development, manufacture, and sale of bipropellant attitude control thrusters); ABB

for defense products.[25] Many of these challenges are summarized in this paper, to illustrate the application of the analytic framework of the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines[26] (and their predecessor documents) as applied to mergers involving potential, nascent, or emerging future competitors.[27]

AB, 127 F.T.C. 494, 497 (1999) (proposed acquisition would eliminate potential competition from Elsag Bailey in the market for the manufacture and sale of process mass spectrometers). The Commission challenged each of these acquisitions, obtaining an order in each matter that it believed sufficient to resolve its concerns.

[22] *See, e.g.,* Lubrizol Corp., No. C-4254, 2009 WL 1022867, at *2 (F.T.C. Apr. 7, 2009) (consummated acquisition eliminated potential competition in the market for oxidate for use as a rust preventative additive); Bayer AG, 134 F.T.C. 184, 196 (2002) (proposed acquisition would eliminate potential competition in the markets for new generation chemical insecticide products and the markets for specific crop applications); Hoechst AG, No C-3919, 2000 WL 254668, at *3-4 (F.T.C. 2002) (proposed acquisition would eliminate potential competition in the U.S. market for cellulose acetate); Atl. Richfield Co., 113 F.T.C. 1050, 1053-54 (1990) (elimination of potential competition in the manufacture and sale of propylene oxide). The Commission challenged each of these acquisitions, obtaining an order in each matter that it believed sufficient to resolve its concerns.

[23] *See, e.g.,* Autodesk, Inc., 123 F.T.C. 1694, 1698 (1997) (proposed acquisition would eliminate potential competition between Autodesk and Softdesk in the market for computer-aided design software platforms). The Commission challenged this acquisition and entered into an order that it believed sufficient to resolve its concerns.

[24] *See, e.g.,* Am. Online, Inc., 131 F.T.C. 829, 836 (2001) (proposed merger would eliminate existing and potential competition in the market for broadband internet access services).

[25] *See, e.g.,* Administrative Complaint, Lockheed Martin Corp., No. 9405 (Jan. 25, 2022) (merger of Lockheed and AeroJet would provide Lockheed the ability and incentive to foreclose existing competitors and future potential competitors by denying or limiting access to Critical Propulsion Technologies used in various missile programs), https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf; Complaint, Boeing Company, No. C-4188 (May 1, 2007) (joint venture would give the combined entity access to non-public information whereby competition between the joint venture and potential Medium-to-Heavy Launch Service suppliers, and, as a supplier of Space Vehicles, give the combined entity the ability to disadvantage or raise the costs of entry to potential Medium-to-Heavy Launch Services suppliers by withholding support and information necessary to make a Space Vehicle compatible with a Launch Vehicle), https://www.ftc.gov/sites/default/files/documents/cases/2007/05/0510165complaint.pdf. Lockheed abandoned its merger with Aerojet, and the Commission obtained relief in the Boeing/Lockheed matter.

[26] The 2010 HORIZONTAL MERGER GUIDELINES and the 2020 VERTICAL MERGER GUIDELINES note that the relevant statutory provisions governing the review of mergers are Section 7 of the Clayton Act, Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. (The 1982 Merger Guidelines and the 1984 Merger Guidelines, which were issued by the Department of Justice only, did not identify them as applicable to mergers that might be challenged under Section 2 of the Sherman Act; nor did the 1992/1997 Horizontal Merger Guidelines, which were issued by both the Department of Justice and Federal Trade Commission; they did however apply to mergers subject to Section 5.) The 1968 Merger Guidelines recognized that mergers could be challenged under the Sherman Act, the guidelines were directed to challenges that would be made under Section 7 of the Clayton Act.)

[27] Table One of the Horizontal Merger Investigation Data, Fiscal Years 1996-2011, indicates that 6.6% of the second requests issued by the FTC during that period were predicated on a theory of potential competition.I exclude from this calculation the characterization of second requests issued to parties who abandoned the

The enforcement actions identify the following concerns:

- Mergers (including acquisitions of a minority interest) may eliminate future competition between firms which do not presently compete, but which, absent the proposed transaction, may compete in the future because of entry or repositioning by one or both merging parties;
- Mergers may eliminate future competition from firms that operate in the market but where their current market position is believed to understate their long-term competitive significance;
- Mergers may eliminate future competition by creating or strengthening the incentive of the merged firm not to enter a relevant market, or innovate towards new or improved products post-merger because such entry or innovation will cannibalize its existing market position; and,
- Mergers may eliminate future competition by creating or strengthening the incentive and/or ability of the merged firm to hinder or otherwise restrict entry or expansion into a market by firms that are not parties to the merger by foreclosing access, in whole or in part, to assets necessary to enter or operate in a relevant market.

Most potential competition enforcement matters focused on the loss of a so-called "actual potential entrant" – the loss of future competition from a firm not presently in the market and did not have an effect on the market at the time of the merger, but was an expected or likely entrant in the future. The theories of harm are consistent with the theories of harm articulated in the current and earlier iterations of the merger guidelines but for two theories included in the 1968 Merger Guidelines – entrenchment and reciprocity – that have been abandoned.[28]

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acquisition after receipt of a second request and those instances where a second request was closed after "a quick look." These are excluded because the Commission does not characterize those second requests as predicated on a specific theory of harm. See Federal Trade Commission, 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.

[28] For a discussion of the move away from the entrenchment and reciprocity theories, see, SUBMISSION OF THE UNITED STATES TO THE OECD, *Conglomerate Effects of Mergers* (Jun. 4, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf; See also Department of Justice, Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers (Oct. 12, 2001), https://www.justice.gov/sites/default/files/atr/legacy/2015/01/26/9550.pdf.

I. OVERVIEW OF MERGER CASE LAW WITH RESPECT TO MERGERS INVOLVING POTENTIAL AND EMERGING COMPETITORS

The analysis of the possible competitive effects of mergers or other combinations is forward-looking and, as the Supreme Court has recognized, probabilistic: "Congress used the words 'may be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties."[29] In practice, antitrust law recognizes that mergers may eliminate current and future competition from firms not presently operating in the relevant market.

A. Perceived Potential Competition

The *perceived potential competition* doctrine recognizes that firms not presently operating in a market can affect current competition by their mere threat of entry. An acquisition may be unlawful where "the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market."[30] The Supreme Court has accepted the perceived potential competition doctrine; as

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[29] Brown Shoe v. United States, 370 U.S. 294, 321-22 (1962).

[30] See generally, United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623-24 (1974) ("the Court has interpreted § 7 as encompassing what is commonly known as the 'wings effect' – the probability that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in that market as likely to enter de novo."); United States v. Falstaff Brewing Corp., 410 U.S. 526, 532-33 (1973) (in reviewing a district court decision finding that Falstaff's acquisition of Narragansett Brewing company did not violate § 7, the Court chastised the district court for "failing to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market" and recognizing that "potential competition may stimulate a present competitive influence"). Other perceived potential competition cases are Ford Motor Co. v. United States, 405 U.S. 562, 574 (1972) (Ford's acquisition of Autolite "remove[d] the significant procompetitive effects in the concentrated spark plug market that resulted from Ford's position on the edge of the market as a potential entrant"); FTC v. Procter & Gamble, 386 U.S. 568, 581 (1967) (in evaluating the competitive effects of Procter and Gamble's acquisition of the assets of Clorox Chemical Co., the Supreme Court noted that notwithstanding that P&G did not operate in the market for liquid bleach, "it is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market" for liquid bleach); and United States v. Penn-Olin Chemical Co., 378 U.S. 158, 173 (1964) (lower court should have considered whether the joint venture "eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter" rather than focus solely on the "probability that both companies would have entered the [relevant] market" but for the joint venture). United States v. El Paso Natural Gas Co. was considered the Supreme Court's first case evaluating the competitive importance of a potential competitor. 376 U.S. 651 (1964). The Supreme Court later described *El Paso* as "an actual-competition rather than potential-competition case" because of "the degree of entry that [Pacific Northwest] had achieved into the market of [El Paso]." United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623-24 n.24 (1974). See also Commission Opinion, In Re Brunswick Co., 94 F.T.C. 1174, 1205 (FTC 1979) ("*El Paso* involves the elimination of actual competition from the market.") Alternatively, the transaction could be characterized as one involving a nascent or emerging competitor.

discussed herein, the underlying premise of the doctrine has been adopted into the merger guidelines in the identification and analysis of so-called "uncommitted" or "rapid" entrants.

B. Actual Potential Competition

The *actual potential competition* doctrine recognizes the future competitive effect of a firm that, but for the merger, may enter the relevant market directly or through the acquisition of an existing market participant with limited market presence. The Supreme Court has reserved its views on whether and under what conditions the acquisition of an actual potential entrant could violate Section 7 but has indicated that "ease of entry on the part of the [non-incumbent] firm is a central premise of the potential competition doctrine" and "that an actual potential entrant will significantly deconcentrate the relevant market is a necessary requirement too." In evaluating potential competition cases, the courts should consider "the economic feasibility and likelihood of de novo entry, the capabilities and expansion history of the acquiring firm, and the performance as well as the structure of the target market." It is "the loss of competition which is sufficiently probable and imminent [that] is the concern of [Section] 7;" "remote possibilities are not sufficient to satisfy the test set forth in [Section] 7."[31]

C. Evidentiary Standard for Showing Actual Potential Entrant

Appellate courts have accepted the doctrine of actual potential competition. There is mixed appellate case law on the level of certainty of future entry necessary to support a challenge to an acquisition of (or by) an actual potential entrant into the relevant market at issue. FTC litigated cases after *Marine Banc* are illustrative. In *FTC v. Atl. Richfield Co.,* the court found that "the proof … fails to show a *significant commitment* at the decisional level that Arco was *seriously considering* original entry … or entry by toehold acquisition."[32] The court also suggested "*clear proof*" of entry by a potential competitor was necessary to show a violation of Section 7, but this may have been limited to situations where a firm has recently withdrawn from the relevant market.[33] In *BOC*, the court accepted a standard of "*reasonable*

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[31] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623, 628, 633, 642 (1974).

[32] FTC v. Atl. Richfield Co., 549 F.2d. 289 (4th Cir. 1977), at 296-297.

[33] Id. at 300. In *B.A.T. Industries*, the Commission required the plaintiff to show *clear proof* that an acquiring firm would have entered the market but-for the merger." B.A.T. Industries, Ltd., 104 F.T.C. 852, 917-18 (1984) ("[I]n … the absence of clear proof that B.A.T. would have entered the United States CCP market independently had it not been able to acquire Appleton, the Commission has determined that the allegations of a violation of the actual potential competition doctrine have not been sustained"). The Commission moved away from the "clear proof" requirement in its non-litigated challenge to the 1990 merger of Roche and Genentech. In *Roche/Genentech*, the Commission required relief in markets where, according to the dissenting Commissioner: "there [was] substantial doubt that the prospective entrant [was] willing to enter; there [was] only speculation that the prospective entrant [would be able] to enter; and … it [was] certain that entry [was] not imminent." Roche Holding Ltd., 113 F.T.C. 1086, 1087-88 (1990). In *Polypore*, the Commission explained

probability" of entry but did not identify what evidence might be necessary to meet that burden.[34] In *Yamaha Motor Co. v. FTC*, the appellate court defined the relevant burden differently—"would Yamaha, absent the joint venture, *probably have entered* the U.S. outboard-motor market independently."[35] In *Tenneco, Inc. v. FTC*, the appellate court indicated that "to establish a violation … based upon the elimination of actual potential competition, … the Commission must show [among other things] that absent its acquisition of Monroe … Tenneco *would likely have entered* the market in the near future either de novo or through toehold acquisition."[36] Notwithstanding these allegedly high evidentiary requirements, the Commission ultimately prevailed in two of these four matters.

1. Atlantic Richfield

The Commission alleged that Atlantic Richfield's ("ARCO") acquisition of The Anaconda Company would eliminate likely potential competition from ARCO in the markets for copper mine production and the production and sale of refined copper. According to the Commission's complaint, ARCO had demonstrated interest in entering both markets, and it was already involved in the business of exploring for copper. ARCO was a diversified energy company and mining company.[37] ARCO was also a nascent or emerging competitor in the market for the production and sale of uranium oxide.[38] The FTC sought but was not granted a preliminary injunction.[39]

On appeal, the FTC contended that, but for the merger, there was a "reasonable probability" that Arco would enter the copper markets by original entry, by joint venture, by acquisition of an ore body, or by toehold acquisition." The appellate court indicated that the FTC

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that "[a]ctual potential competition rests on the theory that the merger eliminated a firm that was on the *verge of entering* the market *de novo* or through a toehold acquisition." Commission Opinion, Polypore International, 150 F.T.C. 586 (2010), at *23, note 41 (emphasis added).

[34] BOC International v. FTC, 557 F.2d 24 (1977) (emphasis added).

[35] Yamaha Motor Co. v. FTC, 657 F.2d 971, 977 (8th Cir. 1981) (emphasis added).

[36] Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982) (emphasis added).

[37] Administrative Complaint, Atlantic Richfield Company, 94 F.T.C. 1054, 1056-59 (1979).

[38] Id. at 1057-59. The Commission's complaint did not identify ARCO as a nascent competitor, but as an actual competitor and as "one of the few most likely potential competitors on a significant scale in the production and sale of uranium oxide." ARCO had recently entered the market for production of uranium and had a market share of roughly one-fifth of 1%.

[39] Federal Trade Commission v. Atlantic Richfield, 1976 WL 1341 (E.D. Va. 1976). The district court found that the Commission had "no proof … that Arco is an actual potential entrant into the copper industry" and "has no proof that there are feasible alternative entries into the industry." The district court also found that while entry into the production of uranium was unlikely, the evidence did not exclude "a substantial number of possible entrants of equal standing with ARCO, perhaps some with better potential than ARCO" and that the merger finds "an early increase in the production of uranium is a probable result of this merger." Finally, the district court noted that competition in the market for aluminum "will be enhanced" as a result of the merger.

"showe[ed] that Arco has strong economic incentives to seek diversification [away from oil]," "possessed the financial resources to make a de novo entry into the copper markets," "made inquiries" about potential acquisitions, "undertook studies regarding the copper industry and its future importance," that Arco's board had "formally approved diversification," and that lower-level management evaluated different forms of future entry. However, "the [FTC's] proof … fail[ed] to show a *significant commitment* at the decisional level that Arco was *seriously considering* original entry … or entry by toehold acquisition." "The proof [was] equally consistent with an attitude of gathering information and watchful waiting for a future determination of the means of entry … if diversification into copper was to be undertaken."[40] The government also acknowledged that there were at least three other oil and gas firms that were likely entrants into the copper market.[41] Conversely, the court also recognized that de novo entry was "tremendously expensive, time-consuming, and unusually difficult, so that it may be fairly concluded that entry de novo is not readily feasible even for a company possessing the economic and technological resources of ARCO."[42] With respect to the uranium market, ARCO had recently exited the market, proof of "interests and incentives to enter" the market was "lacking" and, even were ARCO a potential entrant, there were a large number of firms exploring for uranium, and seven firms had entered the market for uranium production in the previous ten years.[43] "Clear proof" that ARCO would probably reenter the market was necessary to show a violation of Section 7.[44] The appellate court affirmed the district court's denial of the preliminary injunction.

The Commission continued the administrative litigation and three years after the FTC's initial failure to obtain a preliminary injunction, ARCO agreed to divest its interest in certain copper mining assets. [45]

2. British Oxygen Company

The Commission's complaint in *BOC* alleged a violation of Section 7 by British Oxygen Company ("BOC") and related organizations through the acquisition of four million shares (35%) of Airco stock (the third largest industrial gas producer in the United States), and a violation of Section 5 by both BOC (and related organizations) and Airco for the acquisition of the four million shares. According to the complaint, the transaction eliminated potential

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[40] FTC v. Atl. Richfield Co., 549 F.2d. 289, 296-97 (4th Cir. 1977) (emphasis added).

[41] Id. at 294, note 8.

[42] Id. at 298.

[43] Id. at 299-300.

[44] Id. at 300.

[45] Decision and Order, Atlantic Richfield Co., 94 F.T.C. 1054, 1059 (1979). The divestiture order was subsequently modified. See Set Aside Order, Atlantic Richfield Co., 106 F.T.C. 611 (1985).

competition in the market for industrial gases and actual competition in other markets. (The complaint also alleged the elimination of potential competition in markets for electrical welding equipment and gas welding and cutting equipment, but those allegations were not pursued in the administrative trail.) BOC was a small competitor in the U.S. markets where the complaint alleged the elimination of actual competition.[46]

The Commission's administrative complaint did not allege a violation of Section 8, but pursuant to an agreement with Airco, BOC obtained and filled four seats on Airco's board of directors. The Commission also sought a temporary restraining order to limit BOC's role in the operation of Airco's business and maintain Airco as a separate company; the court granted the temporary restraining order but did not enjoin BOC from voting its Airco shares and did not enjoin BOC personnel from serving on Airco's board of directors.[47]

The administrative law judge determined that "strong objective evidence … indicated that BOC would have eventually entered the U.S. industrial gases market" and concluded that the transaction eliminated BOC as a significant perceived potential entrant and as an actual potential entrant, finding a violation of Section 7. The ALJ rejected the argument that BOC's acquisition of Airco was a "toehold acquisition" and presumably legal.[48]

In its review of the initial opinion, the Commission adopted the ALJ's finding of "eventual entry" by BOC. The Commission found that "there was a reasonable probability that BOC would have eventually entered the U.S. industrial gases market by internal expansion, or its equivalent, but for the acquisition of Airco."[49] The Commission's conclusion was

> based on the fact that BOC had the clear incentive to enter the U.S. market; that it had the technological, and managerial expertise necessary to effectuate such entry as well as having large capital resources; that it earlier entered the Canadian market; that it in fact considered possible acquisitions of small American firms; and that the demand for industrial gases in the U.S. was

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[46] Complaint, British Oxygen Company, 86 F.T.C. 1241, 1246-47 (Feb. 26, 1974).

[47] FTC v. British Oxygen Co., 1974 WL 863 (D. Del. 1974), vacated in part and remanded, 529 F.2d 196 (3rd Cir. 1976); Commission Opinion, 86 F.T.C. 1241, 1341-42.

[48] Initial Opinion, British Oxygen Company, 86 F.T.C. 1241, 1247, 1319-1327, 1336-38. The ALJ further found that the acquisition was a violation of Section 5, consistent with its finding of a violation of Section 7. ("An acquisition that violates Section 7 … also violates Section 5." Id. at 1334.). Airco, as the acquired firm, was a party to the violation of Section 5 (but not Section 7). BOC acquired the stock through a tender offer, but "Airco was instrumental in BOC's acquisition of Airco's stock." (The Commission had previously ruled that "Section 5 is the proper statute under which to charge an acquired corporation where the acquisition substantially lessens competition." Id. at 1334-35.)

[49] Commission Opinion, British Oxygen Company, 86 F.T.C. 1241, at 1360.

> outstripping capacity in 1973-1974 with indications that this is a long-term trend.[50]

The appellate court set aside the Commission's order of divestiture. According to the appellate court, the FTC "all but conceded that [its] eventually standard contained no temporal estimate … but rather involved long range considerations that might take decades to come to fruition." "Such uncabined speculation cannot be the basis of a finding that Section 7 has been violated."[51] The appellate court believed the Commission was correct in requiring only a "reasonable probability" of entry, but "eventual entry" was too "ephemeral" to sustain a challenge to the merger.[52] The Commission's order was set aside and remanded for reconsideration.

Three years later (1980), the Commission, having been presented with a proposed settlement, dismissed the administrative complaint.[53]

3. Yamaha

The FTC alleged, in part, that Yamaha, but for its participation in a joint venture, was "one of the most likely potential entrants into the United States market for outboard motors" and that the joint venture eliminated "substantial potential competition" between Yamaha and the other parties to the venture. FTC complaint counsel alleged that joint venture "may tend to increase barriers to entry of new and effective competition in the relevant market," may "increase previously existing high levels of concentration" and may "precipitate additional acquisitions or mergers" in the relevant market, whose "effect may be to eliminate actual and potential competition. The FTC's administrative complaint alleged that the joint venture agreement, by eliminating Yamaha as "one of a few likely entrants" constituted a violation of both Section 7 and Section 5.[54]

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[50] Commission Opinion, British Oxygen Company, 86 F.T.C. 1241, at 1359.

[51] BOC International v. FTC, 557 F.2d 24 (2nd Cir. 1977). See also U.S. v. Siemens Corp., 621 F.2d 499 (2nd Cir. 1980) (challenge to a merger alleging elimination of actual potential and perceived potential competition failed because "[w]ith respect to the key issues there is simply a lack of sufficient evidence, as distinguished from speculation or suggested presumptions, to support preliminary relief.")

[52] BOC International v. FTC, 557 F.2d 24, 28-9 (2nd Cir. 1977). See also Mercantile Tex. Corp. v. Board of Governors of the Fed. Reserve Sys., 638 F.2d 1255, 1266 (5th Cir. 1981) (appellate court could not evaluate the merits of application of the potential competition doctrine to a bank merger because the Board "made only minimal findings" that did not distinguish between "probabilities" and "ephemeral possibilities").

[53] Dismissal Order, BOC International Limited, 95 F.T.C. 805 (1980).

[54] Complaint, In the Matter of Brunswick Corp., 94 F.T.C. 1174, 1176, 1178-79 (Apr. 15, 1975) (later amended). The joint venture was effectuated through Brunswick's acquisition of a 38% interest in Sanshin Kogyo, a subsidiary of Yamaha, with Yamaha's interest being diluted down to 38%. Sanshin would manufacture outboard motors in Japan for distribution in the United States, under the trademark Mariner, with Yamaha agreeing not to sell outboard motors in any place reserved for sales/distribution by Sanshin.

The Administrative Law Judge found Yamaha to be both a likely potential unilateral entrant, and that prior to the joint venture, it exerted "a substantial procompetitive effect on the behavior of those in the market from its position on the edge of the market.[55] (The ALJ defined the relevant market as each of high-power and low-power outboard motors.) However, it found that "actual procompetitive effects" of the joint venture – increased production, enhanced probability of early unilateral entry by Yamaha – outweighed the loss of the effects of the "temporary removal of Yamaha from the edge of the market." Thus, it dismissed the complaint with respect to the Section 7 claim.[56]

The Commission reversed. It found the record "unusually clear in … showing that Yamaha would have entered the U.S. outboard motor market and also its two submarket components if the joint venture had been unavailable to it." The U.S. market "was the only developed market in the world where Yamaha was not selling;" Yamaha had attempted to enter the U.S. market twice before; it had "concrete plans" to enter the market that were abandoned only when the joint venture alternative arose. The record was "unusually clear that Yamaha had what it would take to sell outboard motors in the United States." There were no technological or other reasons why it could not have "successfully carried out its entry plans." It was engaged in a vigorous product development plan for the high horsepower motors for which the U.S. was the prime market, prior to the time it entered the joint venture. Yamaha's management was experienced in producing and marketing outboard motors, including in "remote areas". It was producing a broad enough range of motors to enter the U.S. market. It "is clear that Yamaha was a likely entrant," an "actual potential entrant" and "the most likely potential entrant. The Commission concluded that all of the required conditions of *Marine Banc* were met (including the absence of other potential entrants poised at the edge of the market, and that Yamaha's entry would have had a significant procompetitive effect). The elimination of Yamaha's "present procompetitive effect" (similar to the effect in the *El Paso* case) was also anticompetitive.[57] The Commission rejected, as "unpersuasive and unsupported" the ALJ's determination that the joint venture "would

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The agreement also provided that Yamaha would not produce any marine engines the same as those manufactured by Brunswick (and its Mercury division), and Mercury would not manufacture any product competitive with products manufactured by Yamaha, except snowmobiles.

Yamaha might properly be defined as a nascent competitor. It had made sales of low power outboard motors in the United States representing less than 1% of the market in the years prior to entry into the joint venture. The FTC's administrative complaint alleged the elimination of "substantial potential competition," suggesting a focus on Yamaha's ability to expand rapidly, but for the joint venture.

[55] Initial Opinion, Brunswick Corp., 94 F.T.C. at 1242.

[56] Id. at 1249. The ALJ also dismissed the complaint with respect to the Section 5 claim, finding that the restrictions on the joint venture were reasonable and ancillary to the lawful purpose of the joint venture. Id. at 1253.

[57] Commission Opinion, 94 F.T.C. 1174, at 1267-74.

enhance the probability of early unilateral entry by Yamaha" after the ten-year term of the joint venture.[58] The Commission also evaluated the "collateral restrictive agreements" of the joint venture under Section 5 and found them "unreasonable."[59] The Commission reversed and remanded for consideration of a proper remedy.[60]

On appeal, the Eighth Circuit found that the formation of the joint venture eliminated Yamaha as an actual potential entrant and violated Section 7 and "it follow[ed] that the joint venture agreement also violated Section 5 of the FTC Act." Objective evidence of Yamaha's capacity to enter the relevant market was "substantial" and that evidence of its subjective intent to enter the market was "considerable." The appellate court "easily found" that "independent entry by Yamaha would certainly have had a significant procompetitive impact."[61] The appellate court also upheld the Commission's determination that certain collateral agreements violated Section 5.[62]

4. Tenneco

In *Tenneco*, the Commission challenged the acquisition of Monroe Auto Equipment, alleging that Tenneco's proposed acquisition of Monroe, if consummated, violated Section 7 and Section 5, by, among other things, eliminating potential competition from Tenneco in the market for shock absorbers and from Monroe in the market for exhaust system parts for sale in the replacement and independent aftermarkets.[63] Complaint counsel alleged that Tenneco was a potential market participant through de novo entry, or through toehold acquisition;

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[58] Id. at 1274.

[59] Id. at 1275-78.

[60] The Commission issued a final order, requiring, in part, that the parties dissolve their joint venture agreement, that Brunswick sell its interest in the joint venture entity back to Yamaha, and requiring, for a three year period, prior approval for acquisitions of any company manufacturing outboard motors for sale in the United States. See Final Order, Brunswick Corp., 96 F.T.C. 151 (1980). The order was modified after the appellate court opinion. See discussion below.

[61] Yamaha Motor Co. v. FTC, 657 F.2d 971, 977-79, 981 (8th Cir. 1981). Neither the Commission (acting in its appellate role) nor the appellate court appear to have distinguished the analysis and application of the actual potential competition doctrine under Section 5 from the analysis and application of the doctrine under Section 7. However, the agency was directed to modify the final order to find Yamaha liable under only Section 5 and not Section 7 (without determining whether Yamaha, as an entity that did not acquire any shares, could be held liable under Section 7) (the Commission had "disclaimed" any interest in this issue), and to allow for the parties to engage in certain vertical agreements with respect to the sale of outboard motors in the United States for resale. See Modified Final Order, Brunswick Corp., 99 F.T.C. 411 (1982).

[62] Yamaha Motor Co. v. FTC, 657 F.2d 971, 981 (8th Cir. 1981).

[63] Complaint, Tenneco, 98 F.T.C. 464, 473 (Mar. 15, 1977). The Commission also alleged that both Tenneco and Monroe had violated Section 5 through the steps they took to effectuate the acquisition. The Commission's request for a preliminary injunction prior to the administrative trial was denied, and the merger was consummated prior to the administrative trial. F.T.C. v Tenneco, 433 F. Supp. 105 (D.D. C. 1977). The district court had found that Tenneco had no alternative means of entry. Id. at 112, 114.

similarly, Monroe was alleged to be a potential market participant through acquisition of a small market participant and expansion of its sales. [64]

The Administrative Law Judge dismissed the complaint, finding that while Tenneco had the capability, interest and incentive to enter the relevant market, there was no reliable evidence that Tenneco was "actually planning" to enter de novo. The ALJ also found that Tenneco did not have other feasible alternative methods – no viable toehold acquisitions – to enter the market for shock absorbers (so was not an actual potential entrant) other than through the acquisition of Monroe, and that there was insufficient evidence to find Tenneco, prior to entry, had a competitive impact on the market as a perceived potential entrant. [65] The ALJ also dismissed the complaint with respect to complaint counsel's allegation that Monroe was a potential entrant into the market for exhaust system parts. [66]

The Commission reversed with respect to the acquisition's effect in the replacement and independent aftermarkets for the sale of shock absorbers, finding that Tenneco's "presence … poised on the market's edge" had a current competitive impact[67] and that Tenneco was an actual potential entrant. [68] The Commission had "little doubt that, given its existing capabilities … Tenneco could have entered de novo" and "while Tenneco did not demonstrate interest in attempting entry on … a completely de novo basis, it did express interest in entry aided by technology licensed from a foreign firm."[69] According to the Commission, "Tenneco, had it wished to pursue the license route rather than the Monroe acquisition, very likely could have obtained whatever technology it desired."[70] The Commission had "little doubt that Tenneco could scale most of the [barriers to entry]," such as "the need for substantial capital, a nationwide distribution network, marketing ability, brand-name acceptance, technology to produce at a competitive price, and volume sufficient to support [a minimum efficient scale] plant."[71] The Commission concluded that "there existed the strong probability that Tenneco would have entered by alternative means within the near term had Tenneco

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[64] Complaint, Tenneco, 98 F.T.C. at 470-72. Complaint counsel also alleged that it was probable that Tenneco had a current (pre-acquisition) effect on the market as a perceived potential entrant. Id. at 471. The complaint is unclear to what degree complaint counsel thought Monroe was a potential de novo entrant.

[65] Initial Opinion, Tenneco, 98 F.T.C. at 573-75.

[66] Id., at 98 F.T.C. at 575-76, discussing the unlikelihood that the merger will entrench Monroe in the market for exhaust system parts.

[67] Commission Opinion, 98 F.T.C. at 611-16.

[68] Id. at 616-23.

[69] Id. at 616-17.

[70] Id. at 617.

[71] Id. at 617.

not acquired Monroe."[72] The Commission also concluded that entry via a toehold acquisition was both feasible and available.[73] The Commission dismissed Tenneco's argument that there were other firms well-placed to enter – including the major auto companies, and manufacturers of original equipment shock absorbers and other motor vehicle parts.[74] None of the firms "shared Tenneco's special combination of characteristics which established it as an especially potent and like likely potential entrant."[75] The Commission entered a final order requiring, among other things, Tenneco to divest all assets and properties of Monroe Auto, and, for ten years, to obtain prior approval for acquiring any entity engaged in the manufacture or sale of shock absorbers.[76]

The appellate court reversed. While there was "abundant evidence that Tenneco had both the interest and incentive to enter the market for replacement shock absorbers," that "Tenneco would have entered … with the aid of a license absent its acquisition of Monroe … is based on the kind of unsupported speculation that the Supreme Court condemned when it warned that we should remember that [Section] 7 deals in probabilities not ephemeral possibilities." The "Commission's conclusion" that "Tenneco would likely have entered … through toehold acquisition" was "speculation." "The Commission cannot negate the evidence that [two potential toehold acquisitions] were not reasonably available with a bald prediction that the situation might change in the future." Nor did the court accept the Commission's "remarkabl[e] conclu[sion]" that a third potential toehold acquisition of Blackstone, a "weak and deteriorating firm with a poorly accepted product and run-down equipment in which [no company] had shown significant interest [in acquiring]," was sufficient to "satisfy[y]the requirement that a finding of Section 7 violation be based on probabilities."[77] Holding that "the Commission's findings and conclusions with respect to Tenneco as an actual potential competitor … are unsupported by substantial record evidence" and that "the record contains inadequate evidence to support the Commission's conclusion that [the acquisition] eliminat[ed] Tenneco as a perceived potential competitor" that "tempered the conduct of oligopolists in the market", the court set aside the Commission's order.[78]

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[72] Id. at 618.

[73] Id. at 618-22. The Commission was not impressed by the failure of negotiations between Tenneco and potential acquisition targets, finding it not unusual, and not an indication that additional efforts would not lead to an agreement.

[74] Id. at 604-07.

[75] Id. at 604.

[76] Final Order, Tenneco, 98 F.T.C. 464, at 636 (Sep. 23, 1981).

[77] Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982).

[78] Id. at 355, 358.

D. Current Commission Position: "Reasonable Probability" of Entry

In the *Competitor Collaboration Guidelines* (2000), the Commission (and the Department of Justice) articulated a standard of "reasonable probability" of entry to identify potential competitors: "A firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable … or that competitively significant decisions by actual competitors are constrained by concerns that anticompetitive conduct likely would induce the firm to enter."[79] The *Antitrust Guidelines for the Licensing of Intellectual Property* have a similar standard: "A firm will be treated as a potential competitor if the Agency finds that it is reasonably probable that the firm would have become a competitor in the absence of the licensing arrangement."[80] The type and extent of evidence needed to determine whether a firm is a potential competitor "will vary with the circumstances."[81]

The "reasonable probability" standard is not defined with specificity in the agency guideline documents, but it is notable that the Commission has acted to challenge mergers where the likelihood of entry of one or both parties to the merger appears to have been less than 50 percent.[82]

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[79] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 2 (at note 6) (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [hereinafter "COLLABORATION GUIDELINES"]. See also Amended Administrative Complaint, Meta Platforms, Mark Zuckerberg, and Within Unlimited, FTC Docket No. 9411 (Oct. 13, 2022) at ¶83 ("absent this anticompetitive Proposed Acquisition, there is a reasonable probability that Meta would have exercised one of its other available options to enter the VR Dedicated Fitness App market"), https://www.ftc.gov/system/files/ftc_gov/pdf/D09411%20-%20AMENDED%20COMPLAINT%20FILED%20BY%20COUNSEL%20SUPPORTING%20THE%20COMPLAINT%20-%20PUBLIC%20%281%29_0.pdf.

[80] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 8 (at note 27) (2017), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf [hereinafter IP GUIDELINES].

[81] IP GUIDELINES, at 8.

[82] See, e.g., the discussion of Pfizer/Pharmacia, Amgen/Immunex, and Roche/Genentech at pp 70-71.

II. ANTITRUST MERGER POLICY TOWARDS POTENTIAL AND NASCENT (OR EMERGING) COMPETITORS

The Merger Guidelines[83] articulate the "principal analytical techniques, practices, and enforcement policies" of the Department of Justice and the Federal Trade Commission with respect to "mergers and acquisitions involving actual and potential competitors (horizontal mergers)"[84] and "transactions often described as vertical mergers and acquisitions (non-horizontal transactions)."[85] The Horizontal Merger Guidelines have significantly influenced the analytical structure of the federal courts' review of horizontal mergers[86] but the Vertical

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[83] The agencies have issued merger guidelines for both horizontal and vertical transactions. This paper refers to them collectively as "Merger Guidelines."

[84] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010) at 1 (hereinafter "2010 Horizontal Merger Guidelines"); *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.") (hereinafter "1997 Horizontal Merger Guidelines"); U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) at 1 (same) (hereinafter "1992 Horizontal Merger Guidelines"); 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.") (hereinafter "1984 Merger Guidelines"); U.S. DEPT. OF JUST., 1982 MERGER GUIDELINES at 1(same) (hereinafter "1982 Merger Guidelines"); 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.") (hereinafter "1968 Merger Guidelines").

[85] 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) (hereinafter "2020 Vertical Merger Guidelines").

[86] For cases applying some or all of the framework or analytic insight of the 2010 Horizontal Merger Guidelines, see F.T.C. v. Hackensack Meridian Health, 30 F.4th 160 (3d. Cir. 2022); 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); U.S. v. Bertelsmann SE & Co., 2022 WL 16748157 (D.D.C. Nov. 7, 2022); 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,

Merger Guidelines have not, perhaps because there have been very few litigated vertical merger matters in the last four decades.[87] As we describe below, the guidelines have incorporated the case law on mergers involving or affecting potential or non-incumbent competitors.

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 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.[88]

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 109 (D.D.C. 2004); United States v. UPM-Kymmene Oyj, 2003-2 Trade Cas. (CCH) ¶¶ 74, 101 (N.D. Ill. 2003); FTC v. Liibbey, 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. For cases applying some or all of the framework of the 1982/1984 Merger Guidelines, see, among others, 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).

[87] But see United States v. AT&T, 310 F. Supp. 3d 161 (D.D.C.2018).

[88] United States v. Baker Hughes, 908 F.3d 981, 982-983 (D.C. Cir. 1990) (internal citations omitted). The burden-shifting approach articulated in *Baker Hughes* derived from Supreme Court case law, including, most prominently, Brown Shoe v. United States, 370 U.S. 294 (1962), United States v. Philadelphia National Bank, 374 U.S. 321 (1963), United States v. General Dynamics, 415 U.S. 450 (1974). The Supreme Court's last potential competition case also adopted a burden shifting approach. See United States v. Marine Bancorporation, Inc., 418 U.S. 602, 631 (1974) (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."

The *Baker Hughes* burden-shifting approach has been broadly endorsed by the appellate[89] and district[90] courts and has, over time, been incorporated into the Merger Guidelines.[91] *Marine Banc*, the Supreme Court's most recent potential competition case adopted a burden shifting approach.[92]

A. 1968 Merger Guidelines

1. Elimination of a Potential or Nascent Competitor

The 1968 Merger Guidelines[93] identified four situations where an acquisition might harm future competition but not existing competition: (i) a horizontal merger between a

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[89] See. e.g., F.T.C. v. Hackensack Meridian Health, 30 F.4th 160 (3d. Cir. 2022); 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).

[90] See, e.g., U.S. v. Bertelsmann SE & Co., 2022 WL 16748157 (D.D.C. Nov. 7, 2022); U.S. v. United States Sugar Corporation, 2022 WL 4544025 (D. Del. Sept. 23, 2022); U.S. v. UnitedHealth Group, 2022 WL 4365867 (D.D.C. Sept. 19. 2022); 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).

[91] *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."). A presumption may be difficult to establish in mergers involving a potential competitor. See, e.g., *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.")

[92] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 631 (1974) (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." The concentration ratios referred to were calculated with respect to the current participants in the relevant market because "[t]he potential-competition doctrine has meaning only as applied to concentrated markets." Id.

[93] U.S. DEPT. OF JUST., 1968 MERGER GUIDELINES (Jun. 1968) (hereinafter "1968 MERGER GUIDELINES"). Earlier and contemporaneous FTC policy statements with respect to mergers in certain industries sometimes identified specific criteria for challenging mergers involving potential or nascent competitors. Such policy

"substantial firm and a firm which, despite an insubstantial market share, possesses an unusual competitive potential or has an asset that confers an unusual competitive advantage (for example, the acquisition by a leading firm of a newcomer having a patent on a significantly improved product or production process)";[94] (ii) a vertical merger that raised barriers to entry[95] or otherwise impeded entry of new sellers into a supplying (upstream) or purchasing (downstream) market;[96] including "acquisition … of a customer or supplier for

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statements generally focused on mergers involving firms where one firm, or the combined firm, met certain sales thresholds, and sometimes contained pre-merger notification requirements. *See* Federal Trade Comm'n, Enforcement Policy with Respect to Vertical Mergers in the Cement Industry, reprinted in 289 Antitrust & Trade Reg. Rep. (BNA) X-4 (Jan. 24, 1967) (expressing concern about acquisitions of potential suppliers and requiring all Portland cement companies to notify the Commission at least 60 days prior to consummation of any merger or acquisition involving any ready-mixed concrete producer, and file special reports); Federal Trade Comm'n, Enforcement Policy with Respect to Mergers in the Food Distribution Industries, reprinted in 289 Antitrust & Trade Reg. Rep. (BNA) at X-1 (Jan. 24, 1967) (requiring food retailers and wholesalers with annual sales in excess of $100 million to notify the Commission at least 60 days prior to consummation of any merger, acquisition, or consolidation involving any food retailer or wholesaler, and file special reports); Federal Trade Comm'n, Enforcement Policy with Respect to Product Extension Mergers in Grocery Products Manufacturing, reprinted in 58 Antitrust & Trade Reg. Rep. (BNA) at X-1, X-4, 5 (May 21, 1968) (highlighting "product extension" mergers—those that combine firms with a strong market position in some products (being one of the top four producers of a product in which the four firm concentration ratio is forty percent or more)—as raising significant questions of law or policy because "[t]he potential entrant, by providing the threat of entry, may restrain oligopolists in the market from securing monopoly profits …. Or by actually entering the market, the potential entrant would add capacity to the industry, become an active competitor and erode the non-competitive profits of the oligopolists. Merging in, rather than building in, would remove both of these constraints on the potential entrants and might simultaneously raise the barriers to additional entrants."); Federal Trade Comm'n, Enforcement Policy with Respect to Mergers in the Textile Mill Products Industry, reprinted in 385 Antitrust & Trade Reg. Rep. (BNA) at X-1 (Nov. 26, 1968) (expressing, among other concerns, the potential for product or market extension mergers to raise entry barriers and eliminate the constraints potential entrants place upon firms in the market, and identifying certain product extension mergers between firms meeting a certain size and having a substantial market position—one of the top four sellers in a market with four firm concentration ration of forty percent or more—as raising "significant questions of law or policy"). *See also* Enforcement Policy with Respect to Mergers in Dairy Industry: Criteria for Assessing Future Mergers, 38 Fed. Reg. 17770 (Jul. 3, 1973) (applying criteria of policy statement towards "product extension" mergers in the grocery product industry to mergers involving acquisitions of manufacturers other than fluid milk, and requiring premerger notification and special reports for companies that processed more than 300 million pounds of milk annually, or when combined with an acquired company processed that amount, at least 60 days prior to making acquisitions of dairy companies located within a 500-mile radius that had annual milk sales in excess of $2.5 million or which processed 26 million pounds or more of milk), amended, 43 Fed. Reg. 1992 (Jan. 13, 1978).)

[94] 1968 MERGER GUIDELINES at 7. Arguably, this is more properly characterized as the elimination of a nascent, rather than potential, competitor, and is consistent with the "leading firm proviso" of the 1982 Merger Guidelines.

[95] The guidelines define barriers to entry as "relatively stable market conditions which tend to increase the difficulty of potential competitors' entering the market as new sellers and which thus tend to limit the effectiveness of the potential competitors both as a restraint upon the behavior of firms in the market and as a source of additional actual competition." 1968 MERGER GUIDELINES at 9. Here, the guidelines appear to accept that a non-incumbent firm can act as a constraint on incumbent firms, merely through the threat of future entry (when entry is not impeded by entry barriers), and not only through actual entry.

1968 MERGER GUIDELINES at 9.

the purpose of increasing the difficulty of potential competitors in entering the market of either the acquiring or acquired firm;[97] (iii) a "conglomerate merger"[98] between a firm operating in a market and "one of the most likely entrants"[99] into the market, where certain single firm or multiple firm market share or concentration ratio thresholds were met;[100] and, (iv) where an acquisition of a likely entrant was undertaken to prevent the "disturbance" or "disruption" of the market that entry might create.[101] The guidelines also identified a concern with mergers which "entrench market power," stating that the "acquisition of a leading firm in a relatively concentrated or rapidly concentrating market may serve to entrench or increase the market power of that firm or raise barriers to entry in that market."[102]

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[97] 1968 MERGER GUIDELINES at 12.

[98] Mergers involving a potential competitor were evaluated as one version of a "conglomerate merger"—neither horizontal nor vertical. 1968 MERGER GUIDELINES at 13. (Two firms selling the same product, but in different geographic markets, were classified as a conglomerate merger.) Id.

[99] 1968 MERGER GUIDELINES at 14. "In determining whether a firm is one of the most likely potential entrants into a market, the Department [would] accord[] primary significance to the firm's capability of entering on a competitively significant scale relative to the capability of other firms (i.e. the technological and financial resources available to it) and to the firm's economic incentive to enter (evidenced by, for example, the general attractiveness of the market in terms of risk and profit; or any special relationship of the firm to the market; or the firm's manifested interest in entry, or the natural expansion pattern of the firm, or the like." Id. at 14-15. The guidelines did not discuss in any detail the possibility that a "likely entrant" might, pre-entry, constrain the behavior of firms operating in the relevant market, but the guidelines' lack of specificity would not foreclose such an argument.

[100] Potential competition mergers were a category of "conglomerate mergers." The market share and concentration ratios were different than those used to evaluate horizontal mergers. According to the guidelines, the Department would "ordinarily challenge any merger between one of the most likely entrants into the market and (i) any firm with approximately 25% of the market; (ii) one of the two largest firms in a market in which the shares of the two largest firms amount to approximately 50% of the market; (iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more; or (iv) one of the eight largest firms in a market is which the shares of these firms amount to approximately 75% or more, provided either (A) the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market, or (B) the merging firm is a rapidly growing firm. U.S. DEPT. OF JUST., 1968 MERGER GUIDELINES at 14. The guidelines did not identify the characteristics of a rapidly growing firm, nor what constituted a "not insubstantial" market share. However, it must have been low, given the concentration and market share thresholds used in "evaluating" horizontal mergers. 1968 MERGER GUIDELINES at 6-7 (in markets with a four firm concentration ratio of 75%, challenges to acquisitions of an acquired firm with a 4% share were likely, even where the combined firm market share would be no greater than 8%, and, in evaluating a trend toward concentration, the Department was likely to challenge a merger of any firm whose market share was 2% or more).

[101] 1968 MERGER GUIDELINES at 15. The guidelines contained similar considerations for the evaluation of horizontal mergers. Id. at 7 (in a horizontal merger, the Department would ordinarily challenge an "acquisition of a competitor which is particularly disturbing, disruptive or otherwise unusually competitive factor in the market").

[102] 1968 MERGER GUIDELINES at 16.

2. Treatment of Economies (Efficiencies)

The guidelines expressed a concern that mergers in concentrated markets would lead to the "use of inefficient methods of production" or "excessive promotional expenditures"[103]—but did not discount efficiencies or "economies" as a rationale for merger, or even as a defense to a merger that would otherwise be challenged. However, "unless there [were] exceptional circumstances," the guidelines dismissed economies as a justification for mergers of horizontal competitors or involving likely entrants (potential competitors) that were otherwise likely to be challenged. With respect to mergers involving a likely entrant, the Department "believe[d] that equivalent economies can be normally achieved either through internal expansion or through a small firm acquisition or other acquisition not inconsistent" with the guidelines' theories of harm.[104]

Skepticism towards certain vertical mergers was predicated, in significant part, on their ability to raise barriers or impediments to entry for new competitors.[105] However, "barriers to entry resting on such factors as economies of scale in production and distribution [were] not questionable as such."[106] A sliding scale—measuring the economies against possible harm—was incorporated. "While it is true that in some instances vertical integration may raise barriers to entry or disadvantage existing competitors only as a result of the achievement of significant economies of production of distribution … integration accomplished by a large vertical merger will usually raise entry barriers or disadvantage competitors to an extent not accounted for by, and wholly disproportionate to, such economies as may result from the merger."[107] But, consistent with the treatment of efficiency (or economies) claims in horizontal or conglomerate mergers, the guidelines did not foreclose claims of economies as a justification for allowing a vertical merger that would otherwise be subject to challenge. The guidelines did, however, limit this justification to

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[103] 1968 MERGER GUIDELINES at 1-2.

[104] 1968 MERGER GUIDELINES at 15. The guidelines referred to unspecified "other reasons" as well. The guidelines similarly rejected economies as a justification for horizontal mergers likely to be challenged "unless there [were] exceptional circumstances" because, "among other reason, (i) the Department's adherence to the standards [of the guidelines] will usually result in no challenge being made to mergers of the kind most likely to involve companies operating significantly below the size necessary to achieve significant economies of scale; (ii) where substantial economies are potentially available to a firm, they can normally be realized through internal expansion; and (iii) there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed for a merger." Id. at 8. The guidelines largely but not entirely dismiss economies in the context of mergers that raised concerns about "reciprocal buying"; absent "exceptional circumstances", the Department believes "equivalent economies can be achieved by the firms involved through other mergers" not likely to be challenged. Id. at 16.

[105] 1968 MERGER GUIDELINES at 9.

[106] 1968 MERGER GUIDELINES at 9.

[107] 1968 MERGER GUIDELINES at 9.

"exceptional circumstances" where the merging parties met certain market share thresholds: "Unless there were exceptional circumstances, the Department [would] not accept [economies] as a justification for a [vertical merger] normally subject to challenge … because, among other reasons, (i) where substantial economies of vertical integration are potentially available to a firm, they can normally be realized through internal expansion into the supplying or purchasing market; and (ii) where barriers prevent entry … by internal expansion" the guidelines standards "will … usually result in no challenge being made to the acquisition of a firm or firms of sufficient size to overcome or adequately minimize the barriers to entry."[108]

But, in other situations, the guidelines were more open to claims of economies (or efficiencies). In "the most common instance" of a challenge to a vertical merger—where there was, or was developing, a "trend toward vertical integration by merger, such that the trend, if unchallenged, would probably raise barriers to entry or impose a competitive disadvantage on unintegrated or partly integrated firms"—the Department suggested it would act only where "*it does not clearly appear that the particular acquisition will result in significant economies of production or distribution"* (unrelated to advertising or promotional economies).[109]

3. Treatment of Entry

The 1968 guidelines indicated that:

> In determining whether a firm is one of the most likely potential entrants into a market, the Department [would] accord[] primary significance to the firm's capability of entering on a competitively significant scale relative to the capability of other firms (i.e. the technological and financial resources available to it) and to the firm's economic incentive to enter (evidenced by, for example, the general attractiveness of the market in terms of risk and profit; or any special relationship of the firm to the market; or the firm's manifested interest in entry, or the natural expansion pattern of the firm, or the like.)[110]

Concerns about vertical mergers were predicated, in large part, on the potential for the acquisition of a selling (upstream) or purchasing (downstream) entity to create or strengthen entry barriers.[111] The analysis of potential harm from a vertical merger turned

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[108] 1968 MERGER GUIDELINES at 13.

[109] 1968 MERGER GUIDELINES at 12 (emphasis added).

[110] 1968 MERGER GUIDELINES at 14-15. There was no discussion of the timing of possible entry as a relevant factor.

[111] 1968 MERGER GUIDELINES at 9.

on current entry conditions in the selling and purchasing market and access to alternative sources of production or distribution.[112] However, the guidelines did not discuss how entry conditions would be evaluated, nor what would constitute the "no significant barriers to entry" condition necessary for not challenging a vertical merger.[113] There was no discussion of ease of entry as a factor in evaluating the competitive effects of horizontal or conglomerate mergers, including mergers involving a potential competitor.[114]

B. 1982/1984 Merger Guidelines

1. Elimination of a Potential or Nascent Competitor

The 1982 Merger Guidelines[115] addressed mergers involving potential or non-incumbent competitors—future competitors—somewhat differently than the 1968 Merger Guidelines. First, the guidelines included non-incumbent firms in the relevant market where a firm ha[d] "existing production and distributive facilities that could easily and economically be used to produce and sell the relevant product within six months in response to a small but significant and non-transitory increase in price.[116] Second, recognizing that a merger may "adversely affect competition … if the merger effectively removes the [potential entrant] from the edge of the market," the guidelines identified two theories of harm with respect to "specific potential entrants:" (i) harm to "perceived potential competition" and (ii) harm to actual potential competition."[117]

The guidelines evaluated mergers that raised perceived and actual potential competition concerns under a single analysis focused on four factors: (i) concentration in the relevant market, (ii) entry conditions, (iii) number of potential entrants, and (iv) the potential for

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[112] 1968 MERGER GUIDELINES at 9-12.

[113] 1968 MERGER GUIDELINES at 10-11.

[114] The guidelines noted that, with respect to horizontal mergers, one factor in the Department's enforcement policy was to "preserv[e] significant policies for eventual deconcentration in a concentrated market, and that the guidelines focus on market structure included the substantiality of barriers to entry." 1968 MERGER GUIDELINES at 5, 1.

[115] U.S. DEPT. OF JUST., 1982 MERGER GUIDELINES (Jun. 14, 1982) (hereinafter "1982 MERGER GUIDELINES"). In conjunction with the Department of Justice release of the guidelines, the Commission released its Statement on Horizontal Mergers. The policy statement did not discuss potential competition. FTC Statement on Horizontal Mergers (Jun. 1982), reprinted in 1069 Antitrust & Trade Reg. Rep. (BNA) at S-12 (Jun. 17, 1982). In 1984, the Department issued revised guidelines. U.S. DEPT. OF JUST., 1984 MERGER GUIDELINES (Jun. 14, 1984) (hereinafter "1984 MERGER GUIDELINES"). Relevant differences are identified in the footnotes and the text.

[116] 1982 MERGER GUIDELINES at 7. The 1984 Merger Guidelines revised the six-month period to one year. 1984 MERGER GUIDELINES at 7.

[117] 1982 MERGER GUIDELINES at 21.

procompetitive effects from entry through toehold acquisition.[118] This analysis was "analogous to that applied to horizontal mergers."[119] A challenge to a merger raising concerns about the elimination of a potential competitor was unlikely unless concentration of the relevant market was above 1800 (although a lower concentration level was sufficient if factors in the relevant market were consistent with a collusive market outcome);[120] a challenge was unlikely where new entry into the relevant market could be accomplished by firms without any specific entry advantage;[121] and a merger that was an alternative to de novo entry by the acquiring firm (the potential entrant) was unlikely to have any adverse effect if more than three other firms had the same or similar entry advantages into the relevant market.[122] However, where "evidence of likely actual entry by the acquiring firm [the potential entrant] is particularly strong … the Department may challenge a potential competition merger, notwithstanding the presence of three or more firms that are objectively similarly situated."[123] Under that condition "[t]he Department will … evaluate the merger much as it would a horizontal merger between a firm the size of the likely scale of entry [of the potential entrant] and the [incumbent] firm."[124]

The guidelines adopted a "leading firm proviso," indicating that the Department was likely to challenge the merger of any firm with a market share as low as 1% with the leading firm in the market, provided that the firm had a market share of at least 35% and was twice as large as that of the second largest firm.[125] Although not described as a provision to prevent

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[118] 1982 MERGER GUIDELINES at 22-24. The guidelines use the term "acquired firm" to refer to the firm operating in the market and "acquiring firm" to refer to the potential entrant to that market. The text above follows that convention when referring to acquiring and acquired firm. For a stylized example of the analysis in the guidelines, see U.S. DEP'T. OF JUSTICE, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1988), Case 3 (Acquisition of a Foreign Potential Competitor) (analyzing a merger of Beta, a U.S. firm selling product X in the U.S. market, and Alpha, a Japanese firm that sells product X in Japan, but that could enter the U.S. market and begin selling product X in as little as 18 months).

[119] 1982 MERGER GUIDELINES at 22.

[120] 1982 MERGER GUIDELINES at 22.

[121] 1982 MERGER GUIDELINES at 22-23.

[122] 1982 MERGER GUIDELINES at 23.

[123] 1982 MERGER GUIDELINES at 23. Evidence that might indicate entry was "particularly strong" included the making of investments demonstrating an actual decision to enter. Id.

[124] 1982 MERGER GUIDELINES at 23.

[125] 1982 MERGER GUIDELINES at 15. The 1984 guidelines removed the requirement that the leading firm have a market share twice as large as that of the second largest firm. 1984 MERGER GUIDELINES at 15. The 1968 Merger Guidelines had a similar concern, although perhaps best described as a "substantial firm proviso" – highlighting the potential for harm from a merger of a "substantial firm and a firm which, despite an insubstantial market share possesses an unusual competitive potential or has an asset that confers an unusual competitive advantage." 1968 MERGER GUIDELINES at 7. The market share thresholds of the 1968 Merger Guidelines were consistent with a leading firm proviso, although at much lower standards, in its

so-called dominant firms from eliminating nascent competition, it is consistent with this concern. [126] The guidelines also recognized that vertical integration could raise "objectionable" barriers to entry, making entry or expansion more difficult for future or existing competitors of the combined firm.[127] This too could have an impact on so-called nascent competitors.

2. Treatment of Efficiencies

In the 1982 Merger Guidelines, the Department indicated that except in extraordinary cases, it would not consider a claim of specific efficiencies as a mitigating factor for a merger that would otherwise be challenged.[128] The guidelines recognized that the acquisition of a small firm operating in the relevant market by a potential entrant that otherwise might enter de novo could be procompetitive, because the acquisition might create a significant competitive firm from what was otherwise a "fringe" firm.[129] Consistent with this view, the Department indicated it was unlikely to challenge such an acquisition where the incumbent firm had a market share of 5% or less. There was a limit to the Department's comfort with this argument; the guidelines indicated that the Department was likely to challenge such an acquisition where the incumbent firm had a market share of 20% or more.[130]

The 1984 Merger Guidelines were significantly more hospitable to efficiency claims and affirmatively committed to consider them in potential competition matters:[131]

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articulation of an intent to challenge the acquisition of a very small firm, one with a market share of 1%, where the acquiring firm had a share of 15% or more (where the CR4 was approximately 75%), or 25% or more (where the CR4 was less than approximately 75%). 1968 MERGER GUIDELINES at 6.

[126] Commentators express support for reviving the leading firm provision in the next iteration of the guidelines, in part to address concerns about the acquisition of so-called nascent competitors. *See, e.g.,* Comment of Nancy L. Rose and Carl Shapiro, What Next for the Horizontal Merger Guidelines (Feb. 21, 2022) at 8 (proposing a 50% threshold in place of the 35% threshold); Comments of Florian Ederer and Zaakir Tameez, April 11, 2022 at 5; Submission of Gregory J. Werden in Response to Request for Information on Merger Enforcement at17; Steve Salop and Fiona Scott Morton, The 2010 HMGs Ten Years Later: Where Do We Go From Here? at 18.

[127] 1982 MERGER GUIDELINES at 24-26.

[128] 1982 MERGER GUIDELINES at 29. "At a minimum, the Department will require clear and convincing evidence that [a] merger [would] produce substantial cost savings resulting from the realization of scale economies, integration of production facilities, or multi-plant operations which [were] already enjoyed by one or more firms in the industry and that equivalent results could not be achieved within a comparable period of time through internal expansion or through a merger that threatened less competitive harm. In any event, the Department [would] consider such efficiencies only in resolving otherwise close cases. Id.

[129] 1982 MERGER GUIDELINES at 23-24.

[130] 1982 MERGER GUIDELINES at 24.

[131] 1984 MERGER GUIDELINES at 27.

> Some mergers that the Department otherwise might challenge may be reasonably necessary to achieve significant net efficiencies. If the parties to the merger establish by clear and convincing evidence that a merger will achieve such efficiencies, the Department will consider those efficiencies in deciding whether to challenge the merger."[132]

The 1984 guidelines' treatment of efficiencies introduced a significant change; unlike the treatment of efficiency or economies claims in the 1982 and 1968 guidelines, efficiencies were no longer treated as a "defense" to or a "justification" for an otherwise anticompetitive merger but were treated as integral to the competitive effects analysis.[133] But the guidelines did not explain how efficiencies from a merger might affect the competitive effects analysis. The 1984 guidelines also broadened the scope of the efficiencies the Department would consider, to include general selling, administrative, and overhead expenses, and others not related to specific manufacturing, servicing, or distribution operations of the merging firms, but they recognized that such claims might be hard to demonstrate.[134]

3. Treatment of Entry

The guidelines indicated that the Department was unlikely to challenge a horizontal merger "if entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time."[135] The Department would consider the likelihood and magnitude of entry, and ask how much new entry "would be likely to occur within two years" as it considered whether entry conditions were such that a challenge to a merger was not warranted.[136]

Consistent with the treatment of horizontal mergers, in evaluating the likelihood of anticompetitive effects from a merger involving a potential competitor, the Department

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[132] 1984 MERGER GUIDELINES at 23.

[133] Compare the 1982 Merger Guidelines, describing efficiencies as a "defense" and "mitigating factor" for a merger that would otherwise be challenged, and the 1968 Merger Guidelines, describing economies as a possible but unlikely "justification" for an acquisition "normally subject to challenge", with the 1984 Merger Guidelines, which have no similar qualifications.

This approach makes more economic sense. All else equal, mergers create the incentive to reduce output. Where that restriction in output can be replaced by other firms, a merger is unlikely to be anticompetitive. Economies, or efficiencies, create incentives to increase output. Where efficiencies are related to a merger, the output enhancing effect may swamp the output reducing effect of a merger and post-merger output is likely to increase. Where output increases, it is unlikely that a merger is anticompetitive.

[134] 1984 MERGER GUIDELINES at 23.

[135] 1982 MERGER GUIDELINES at 15; 1984 MERGER GUIDELINES at 18. Firms that engaged in product substitution or extension without incurring significant sunk costs were treated as market participants.

[136] 1982 MERGER GUIDELINES at 16; 1984 MERGER GUIDELINES at 18 ("a two year period would generally be used").

"[was] unlikely to challenge a potential competition merger when new entry into the [relevant market] can be accomplished by firms without any specific entry advantages."[137] The Department believed "if entry to the market is generally easy, the fact that entry is marginally easier for one or more firms is unlikely to affect the behavior of firms in the market."[138] However, the Department was "increasingly likely to challenge a merger as the difficulty of entry increases."[139]

While the Department recognized that the likelihood of future entry of non-merging parties was a strong factor in determining whether a merger raised concerns of competitive harm,[140] it also indicated it was likely to challenge a merger of an incumbent and non-incumbent firm where the evidence of likely actual entry by the non-incumbent firm is "particularly strong" even where there were "three or more [non-incumbent] firms" similarly situated.[141]

C. 1992/1997 Horizontal Merger Guidelines

1. Elimination of a Potential or Nascent Competitor

The 1992 Horizontal Merger Guidelines did not update the analysis of potential competition mergers.[142] At their release, the agencies noted that "[n]either agency has changed its policy with respect to non-horizontal mergers" and that the discussion of non-horizontal mergers in the 1984 Merger Guidelines should be "read in context of today's revisions to the treatment of horizontal mergers."[143] However, the 1982/1984 Merger Guidelines evaluated so-called potential competition mergers in a manner "analogous to horizontal mergers" and potential competition cases subsequent to the 1992 Horizontal Merger Guidelines largely appear to follow the analytic framework of the 1992 guidelines.

The 1992 Horizontal Merger Guidelines updated the 1982/1984 Merger Guidelines discussion of market participants to better explain the conditions under which firms not presently participating in the relevant market would be considered as market participants. Firms not currently producing or selling the relevant product, but who, in response to a small but significant non-transitory price increase could begin producing or selling the relevant

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[137] 1982 MERGER GUIDELINES at 23; 1984 MERGER GUIDELINES at 26.

[138] 1982 MERGER GUIDELINES at 22; 1984 MERGER GUIDELINES at 26.

[139] 1982 MERGER GUIDELINES at 23; 1984 MERGER GUIDELINES at 26.

[140] 1982 MERGER GUIDELINES at 15; 1984 MERGER GUIDELINES at 18.

[141] 1982 MERGER GUIDELINES at 23; 1984 MERGER GUIDELINES at 27.

[142] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) hereinafter "1992 HORIZONTAL MERGER GUIDELINES").

[143] See Justice Department, FTC Issue Unified Federal Guidelines on Horizontal Mergers, 1559 Antitrust & Trade Reg. Rep. (BNA) at 404:1 (Apr. 2, 1992).

product within one year without incurring significant sunk costs of entry and exit would be considered market participants. The guidelines designated such firms "uncommitted entrants."[144] The guidelines were silent on whether such firms had a pre-entry effect on price and competition in the relevant market—whether their pre-entry status was the same as a perceived potential competitor, but the swiftness of their potential response seems consistent with that of the competitive "threat" of a perceived potential competitor.

Relevant to the potential entrant's "uncommitted" entry status was (and is) both the capability and the incentive to enter. The guidelines noted that a firm that has the technological capability to engage in an uncommitted supply response but likely would not—perhaps because it would not be profitable, or because of difficulties in achieving product acceptance—was not considered a market participant.[145] The uncommitted entrant must have both the ability and the incentive to engage in production substitution or production extension. [146] The guidelines expanded on the identification of market participants, indicating that generally, "firms which have committed to entering the market prior to the merger … will be included in the measurement of the market."[147] However, the guidelines were silent on whether committed entrants (whether evaluated with respect to pre-merger conduct or with reference to post-merger incentive and ability to enter) were the equivalent of actual potential competitors.

The 1992 Horizontal Merger Guidelines dropped the leading firm proviso of the 1982 and 1984 Merger Guidelines, introducing a broader conceptual analytical framework for evaluating mergers that enhanced or created unilateral market power than had previously been developed in the guidelines and a focus on closeness of competition between the merging firms.[148]

2. Treatment of Efficiencies

The 1992 Horizontal Merger Guidelines made one significant change to the 1984 Merger Guidelines discussion of efficiencies; it removed the evidentiary standard—clear and convincing evidence—that would be applied to efficiency claims.[149]

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[144] 1992 HORIZONTAL MERGER GUIDELINES at 10-11.

[145] 1992 HORIZONTAL MERGER GUIDELINES at 11.

[146] 1992 HORIZONTAL MERGER GUIDELINES at 11.

[147] 1992 HORIZONTAL MERGER GUIDELINES at 26.

[148] 1992 HORIZONTAL MERGER GUIDELINES at 21-24.

[149] Compare 1992 HORIZONTAL MERGER GUIDELINES at 28 with 1984 MERGER GUIDELINES at 23.

The 1997 revisions to the guidelines' efficiencies section were substantial. The revisions made clear that efficiencies were integral to the analysis of the competitive effects of a merger: "Efficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[150] The revisions recognized that efficiencies may enhance competition by creating a stronger competitor, by decreasing the merged firm's incentive to raise price, or by making coordination less likely or effective, and may result in non-price benefits, like the introduction of new products.[151] The revisions incorporated a new evidentiary requirement: efficiencies were to be substantiated so that the agencies could "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."[152]

3. Treatment of Entry

The 1992 Horizontal Merger Guidelines significantly updated the framework for evaluating whether entry was "so easy that market participants after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels."[153] Entry was "that easy" if it would be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[154] The guidelines assessed the impact of "committed entry" ("new competition that requires expenditure of significant sunk costs of entry and exit") asking whether: (i) a new entrant (or combination of entrants) could achieve significant market impact within a timely period; (ii) entry would be profitable at premerger prices; and (iii) timely and likely entry would be sufficient to drive price to premerger levels.[155] In its assessment, the agencies would examine the means of entry—"entry alternatives"—a potential entrant might practically employ (without attempting to

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[150] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997) (hereinafter "1997 HORIZONTAL MERGER GUIDELINES") at 30.

[151] 1997 HORIZONTAL MERGER GUIDELINES at 30.

[152] 1997 HORIZONTAL MERGER GUIDELINES at 31.

[153] 1992 HORIZONTAL MERGER GUIDELINES at 25.

[154] 1992 HORIZONTAL MERGER GUIDELINES at 25. 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 and misunderstood the standard articulated in the 1982 and 1984 Merger Guidelines' discussion of entry, and the Department's application of that standard in its enforcement matters. *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 *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.

[155] 1992 HORIZONTAL MERGER GUIDELINES at 26-27.

identify a potential entrant).[156] There is no indication that this framework would be applied to the evaluation of mergers involving a perceived or actual potential entrant. However, these factors, or a version of them, are a possible analytic construct to evaluate the likelihood of entry by an actual or perceived potential entrant.

The guidelines' entry analysis distinguished between pre-merger and post-merger decisions to enter: "firms who have committed to entering the market prior to the merger generally will be included in the measurement of the market. Only committed entry or adjustments to pre-existing plans that are induced by the merger will be considered as possibly deterring or counteracting the competitive effects of concern."[157] Firms that would enter in response to post-merger opportunities are not, by reason of that, necessarily either perceived potential entrants or actual potential entrants.

D. 2010 Horizontal Merger Guidelines

1. Elimination of a Potential or Nascent Competitor

The joint Federal Trade Commission and Department of Justice 2010 Horizontal Merger Guidelines updated the analysis of potential competition mergers, rejecting the need for the separate framework for potential competition mergers identified in the 1982/1984 Merger Guidelines.[158] The 2010 guidelines made explicit that the framework and policy positions articulated therein applied to mergers and acquisitions involving both actual and potential competitors.[159] In evaluating the competitive effects of a merger "the agencies consider whether the merging parties, have been, or likely will become absent the merger, substantial head-to-head competitors."[160] The 2010 guidelines recognize that the acquisition of a maverick firm—"a firm that plays a disruptive role in the market to the benefit of

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[156] 1992 HORIZONTAL MERGER GUIDELINES at 25.

[157] 1992 HORIZONTAL MERGER GUIDELINES at 26, at footnote 27.

[158] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) (hereinafter "2010 HORIZONTAL MERGER GUIDELINES").

[159] 2010 HORIZONTAL MERGER GUIDELINES at 1. There was criticism of the 1992 Horizontal Merger Guidelines failure to address, or clarify the treatment of, potential competition mergers. See John E. Kwoka, Comments Submitted to the Horizontal Merger Guidelines Review Project of the Federal Trade Commission and Department of Justice (Jan. 2010) at 5, https://www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-545095-00060/545095-00060.pdf (The 1992 Horizontal Merger Guidelines "err[ed] in their silence concerning mergers that eliminate potential competitors affecting market equilibrium" and urge[d] that the Guidelines be modified to make such mergers an explicit concern of enforcement policy, and to offer guidance … as to how such mergers are to be evaluated.").

[160] 2010 HORIZONTAL MERGER GUIDELINES at 4.

customers"—may eliminate actual or potential competition.[161] Although not stated explicitly, a nascent competitor can be a maverick firm.

There are similarities between the 1992 Horizontal Merger Guidelines and 2010 Horizontal Merger Guidelines discussions of "market participants" but one notable difference. In the 1992 Horizontal Merger Guidelines, market participants included those firms "not currently producing or selling the relevant product in the relevant area" if their "supply response" into the relevant market was "*likely* to occur within one year."[162] (These firms are identified as "uncommitted entrants.") The 2010 Horizontal Merger Guidelines appear to adopt a higher threshold: "firms that are not current providers in a relevant market, but that would *very likely* provide rapid supply responses with direct competitive impact in the event of a [small but significant non-transitory increase in price], without incurring significant sunk costs, are also considered market participants.[163] (These firms are identified as "rapid entrants.")

In other ways, the 2010 Horizontal Merger Guidelines' discussion of market participants expands on but does not appear to fundamentally change the identification of market participants as articulated in the 1992 and 1982/84 guidelines. Conceptually, firms that presently produce the relevant product, but do not supply into a geographic market or to certain customers in a geographic market, are potential competitors for customers in those geographic markets. The guidelines recognize that such firms may be rapid entrants.[164]

The hypothetical monopolist test includes the concept of potential or future competition—a hypothetical monopolist is a firm that is the only present and future seller of a product—but this could be made more clear by referencing both existing and future products.[165] Although not stated explicitly, the hypothetical monopolist test does not preclude the inclusion of a future product in the determination of relevant product market, or as the relevant market.[166] As the later discussion of market participants makes clear, firms not presently selling into a market may be considered market participants if they are "rapid entrants" or have already

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[161] 2010 HORIZONTAL MERGER GUIDELINES at 4.

[162] 1992 HORIZONTAL MERGER GUIDELINES at 11 (emphasis added).

[163] 2010 HORIZONTAL MERGER GUIDELINES at 21 (emphasis added). The change in "likelihood" is not explained; however, it may have been intended to make it harder to advance speculative claims of rapid or otherwise uncommitted entry or market participation by non-merging firms. It may, however, have the effect of increasing the burden on the antitrust agencies to show that one or both of the merging parties not presently in the market is, through a supply response, a market participant.

[164] 2010 HORIZONTAL MERGER GUIDELINES at 22.

[165] 2010 HORIZONTAL MERGER GUIDELINES at 12 ("hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products").

[166] 2010 HORIZONTAL MERGER GUIDELINES at 11-12, describing implementation of the hypothetical monopolist test. This was true, too, of the 1992 Horizontal Merger Guidelines and the 1982/1984 Merger Guidelines.

committed to enter. The identification of geographic markets, based on locations of sellers, does not preclude a non-incumbent firm—a rapid entrant—from affecting the definition of geographic market, but the guidelines do not state this explicitly.[167] The guidelines are silent on whether or how a future supplier can affect the definition of geographic markets located around suppliers. They are silent on how a geographic market definition exercise focused on the identification of suppliers may be affected by a potential entrant. In defining markets around targeted customers, the guidelines do not discuss the inclusion of a future product in the relevant market (or as the relevant market) but the framework does not preclude it. [168] Enforcement actions are clear, however, that a future product can be in the relevant market or be the relevant market.

The 2010 Horizontal Merger Guidelines incorporate a short discussion on "powerful buyers" who can discipline current sellers by, among other things, sponsoring entry.[169] Left unsaid, or perhaps simply thought implicit elsewhere in the guidelines, is that a firm that is an attractive candidate to be "sponsored" may in another context be considered a potential competitor whose acquisition could eliminate future competition. To use the terminology of the case law and earlier iterations of guidelines, a to-be sponsored firm (or an attractive candidate to be sponsored) may be considered a perceived potential entrant, an actual potential entrant, or, consistent with the "entry" framework, a "committed" entrant. In short, a firm may be an attractive candidate for sponsored entry because they have entry advantages not available to other firms. Previous iterations of the Merger Guidelines indicated that the Department of Justice was more likely to challenge the acquisition of a potential entrant where that potential entrant had certain entry advantages.[170] Acquisition of such a firm may also be considered the acquisition of a potentially disruptive firm.[171]

2. Treatment of Efficiencies

The efficiencies section of the 2010 Horizontal Merger Guidelines largely but not entirely tracks the efficiencies section of the predecessor guidelines.[172] In some areas, the 2010 guidelines expand on the potential beneficial effects of efficiencies and how they might

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[167] 2010 HORIZONTAL MERGER GUIDELINES at 18-19, describing identification of the relevant geographic market based on supplier location.

[168] 2010 HORIZONTAL MERGER GUIDELINES at 17 (describing product market definition with targeted customers).

[169] 2010 HORIZONTAL MERGER GUIDELINES at 37.

[170] 1984 MERGER GUIDELINES at 26-27; U.S. DEPT. OF JUST., 1982 MERGER GUIDELINES at 23.

[171] 1968 MERGER GUIDELINES at 5, 37 ("A firm that may discipline prices based on its ability and incentive to expand production rapidly using available capacity also can be a maverick" and can be a source of "sponsor[ed] entry.")

[172] 2010 HORIZONTAL MERGER GUIDELINES at 40-43.

impact the competitive effect of a merger; in other areas they expand on the high hurdles necessary to substantiate an efficiency claim.

The guidelines recognize that a merger may diminish innovation competition. That diminished competition may reduce the speed or certainty with which improved or future products come to market. Recognizing this, the 2010 guidelines indicate the agencies "consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products."[173] Consistent with the guidelines' stronger emphasis on innovation, the efficiencies section incorporates, for the first time, the potential effects of merger-related efficiencies on innovation.[174] The agencies "consider the ability of the merged firm to conduct research and development more effectively" because "efficiencies may spur innovation" even though they "may not affect short term pricing."[175] The merger may also allow the merged firm "to appropriate a greater fraction of the benefits resulting from its innovation;"[176] this may increase the incentive to increase or maintain the premerger scope and pace of innovation.

3. Treatment of Entry

The 2010 guidelines' treatment of entry is consistent with that of the 1992 guidelines. Importantly, the guidelines are clearer that the entry discussion "concerns entry or adjustments to pre-existing entry plans that are induced by the merger."

In evaluating the conditions for entry, the agencies "consider the actual history of entry into the relevant market," giving it "substantial weight."[177] "Lack of successful and effective entry … suggest[s] that successful entry is slow or difficult."[178] This may be relevant to consideration of likelihood of actual and successful entry by a so-called actual potential entrant. Earlier iterations of the guidelines suggested that general entry conditions were relevant with respect to the analysis of a merger with a potential competitor.[179] Similarly,

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[173] 2010 HORIZONTAL MERGER GUIDELINES at 32-33.

[174] 2010 HORIZONTAL MERGER GUIDELINES at 43.

[175] 2010 HORIZONTAL MERGER GUIDELINES at 43.

[176] 2010 HORIZONTAL MERGER GUIDELINES at 43.

[177] 2010 HORIZONTAL MERGER GUIDELINES at 38.

[178] 2010 HORIZONTAL MERGER GUIDELINES at 38.

[179] 1984 MERGER GUIDELINES at 26 (conditions of entry generally and the acquiring firm's entry advantage); 1982 MERGER GUIDELINES at 22-23 (same).

where "market values of incumbent firms greatly exceed[] the replacement cost of their tangible assets … [it] indicates that these firms have valuable intangible assets," and it may be "difficult or time consuming for an entrant to replicate" such assets.[180] This may also be relevant to whether a firm with substantial financial assets, but perhaps not market-specific assets, has capabilities consistent with likely or reasonable potential entry.

The guidelines identify a non-inclusive list of actions a firm may undertake as part of an entry effort: planning, design, and management considerations; permitting, licensing, or other approvals; construction, debugging, and the operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements.[181] These factors may also be relevant to determining whether a firm is an actual potential entrant (pre-merger), the certainty of and speed with which the firm might enter, and the reasonableness of the perception of future entry, if this is evaluated from the perspective of the current market participant.

While the guidelines acknowledge that "firms operating in adjacent or complementary markets … may be best placed to enter," they "will not presume that a powerful firm in an adjacent market … will enter the relevant market unless there is reliable evidence supporting that conclusion.[182] This principle should be applicable to the identification of actual potential entrants.

The 2010 guidelines' timeliness, likelihood, and sufficiency analysis is generally consistent with the 1992 guidelines' discussion, but it drops specific timing requirements for entry and focuses on whether entry will reverse or constrain the actions of the merged entity. This framing of the entry determination—the competitive effects of post-merger entry—should be relevant, with some adjustments, to the evaluation of the competitive effects of an acquisition of a potential entrant. For example, in evaluating the competitive effect of the acquisition of an actual potential entrant, the timing of that future entry seems relevant both for evidentiary purposes and for competitive effects analysis. This seems especially true where there are efficiencies associated with the acquisition that can be captured as soon as the acquisition is consummated, but any entry, absent the merger, would have occurred in the more distant future. The agencies ask, in considering likelihood of entry, if entry "would be profitable, accounting for the assets, capabilities, and capital needed and the risks

[180] 2010 HORIZONTAL MERGER GUIDELINES at 38.

[181] 2010 HORIZONTAL MERGER GUIDELINES at 38-39.

[182] 2010 HORIZONTAL MERGER GUIDELINES at 39.

involved."[183] Implicit in this likelihood inquiry is whether entry would be profitable as compared to alternatives available to the firm.

This same question should apply to the entry decisions of the so-called actual potential entrant. Future entry by an actual potential entrant should also meet a sufficiency requirement (or expectation) of market impact before an acquisition raises concerns about anticompetitive harm. This is consistent with the standard articulated in *Marine Bancorp*, although possibly a lower standard than the requirement that such entry have a significant deconcentrating effect on the market.

E. 2020 Vertical Merger Guidelines

The 2020 Vertical Merger Guidelines update and replace the discussion of non-horizontal mergers in the 1982/1984 Merger Guidelines and explain how the Department of Justice analyzes "a range of non-horizontal transactions."[184] The guidelines apply to "strictly vertical mergers … diagonal mergers … and vertical issues that can arise in mergers of complements."[185] If a vertical transaction removes from the market a party that could, pre-merger, facilitate entry, the Department considers whether the merger removes competition from a potential entrant using the framework in the 2010 Horizontal Merger Guidelines.[186]

The guidelines recognize that "a vertical merger may diminish competition by allowing the merged firm to profitably use its control of the related product to weaken or remove the competitive constraint from one or more of its … potential rivals in the relevant market."[187] The merger may allow the merged firm to raise a future rival's costs (to give it power over price), or, by refusing to supply its future rival, foreclose it from the market, absent entry into both markets by the rival.[188] This theory of harm is consistent with earlier guidelines' recognition that vertical mergers can create barriers to entry, disadvantaging prospective or potential competitors.

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[183] 2010 HORIZONTAL MERGER GUIDELINES at 40.

[184] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES at 1 (June 30, 2020) [hereinafter 2020 VERTICAL MERGER GUIDELINES]. Fed. Trade Comm'n withdrew from the 2020 Vertical Merger Guidelines on Sept. 15, 2021. See also Press Release, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021) (noting that the Department was conducting a close review of the guidelines, and that review "has already identified several aspects of the guidelines that deserve close scrutiny").

[185] 2020 VERTICAL MERGER GUIDELINES at 1.

[186] 2020 VERTICAL MERGER GUIDELINES at 1.

[187] 2020 VERTICAL MERGER GUIDELINES at 4. "A related product is a product or service that is supplied or controlled by the merged firm and is positioned vertically or is complementary to the products and services in the relevant market." Id. at 3.

[188] 2020 VERTICAL MERGER GUIDELINES at 7, example 4.

III. Market Definition in Potential Competition Enforcement Actions

"Determination of the relevant product and geographic markets is a necessary predicate to deciding whether a merger contravenes the Clayton Act."[189] "Market definition helps specify the line of commerce and section of the country in which the competitive concern arises."[190] "The definition of the relevant market" must "correspond to the commercial realities of the industry."[191] "The failure to properly define either a product or geographic market is fatal to a plaintiff's case."[192] "The Agencies … examine all plausible markets to determine whether an adverse competitive effect is likely to occur in any of them."[193]

The Commission has alleged harm to competition from mergers that eliminate a potential entrant in three market categories: (i) a market for an existing product (or service); (ii) a market for a future product; and (iii) a market for technology. The Commission has also alleged harm to actual competition in (iv) a market for research and development, accompanied by harm from the elimination of a potential competitor in a market for an

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[189] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618 (1974). F.T.C. v. Hackensack Meridian Health, 30 F.4th 160, 166 (3d. Cir. 2022.

The Commission has litigated to completion three potential competition matters in the past fourteen years. In Ovation, the Commission sued *Ovation Pharmaceuticals*, alleging it acquired a future competitor to protect its monopoly in the market for "the sale of drugs approved by the [Food and Drug Administration] to treat patent ductus arteriosus," a congenital heart defect that primarily affect premature babies. Indocin was the only pharmaceutical treatment for PDA when Ovation acquired it in 2005 from Merck. In 2006, Ovation acquired the U.S. rights to Neoprofen from Abbott Laboratories; at that time, Neoprofen was awaiting marketing approval by the FDA. According to the Commission, "Ovation expected Neoprofen would take a substantial portion of sales from Indocin" and acquired Neoprofen "to eliminate this competitive threat." Neoprofen received FDA approval shortly after it was acquired by Ovation. Complaint, F.T.C. v. Ovation Pharmaceuticals, Civ. No. 08-6379 (D. Minn. Dec. 16, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/12/081216ovationcmpt.pdf.

The district court dismissed the Commission's complaint. It held that the FTC failed to show that Neoprofen and Indocin were in the same relevant market and did not take on the question of whether the Commission appropriately identified the acquired firm as a potential market entrant. FTC v. Lundbeck, 2010 WL 3810015 (D. Minn., Aug. 31, 2010). The Court of Appeals affirmed. FTC v. Lundbeck, 650 F.3d. 1236 (8th Cir. 2011). In neither opinion was there a discussion of Neoprofen's status as an actual or potential competitor. For a discussion of the FTC's complaint, and the district court and appellate court decisions, see Richard Parker, Michael Antalics, and Bilal Sayyed, *Shrinking from the Third Rail: Avoiding Direct Effects Analysis in Lundbeck*, 25 ANTITRUST 14 (Spring 2011). The other two litigated cases—*Polypore* and *Steris*—are discussed at pp. 54-56 and 71-73.

[190] 2010 HORIZONTAL MERGER GUIDELINES at 7.

[191] See, e.g., U.S. v. United States Sugar Corporation, 2022 WL 4544025, at *19 (D. Del. Sept. 23, 2022), citing Ohio v. American Express Co., 138 S. Ct. 2274, 2285 (2018); see also Brown Shoe v. U.S., 370 U.S. 294, 336-37 (1962).

[192] U.S. v. United States Sugar Corporation, 2022 WL 4544025, at *19 (D. Del. Sept. 23, 2022), citing, inter alia, FTC v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999).

[193] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006) at 5, https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf

existing or future product. The Commission only infrequently identifies markets for technology in its merger enforcement efforts and appears to have rejected innovation markets (or research and development markets) as possible relevant markets in merger matters, in favor of identifying harm to a market for a future product or identifying concerns that a merger slows the pace or lessens the likelihood of innovation for an existing or future product.

A. Potential Competition in a Market for an Existing Product (or Service)

A merger may eliminate future competition in an *existing product market* from a potential or future market participant. For example, in *Össur/College Park*, the Commission alleged that Össur's proposed acquisition of College Park would eliminate substantial future competition in the market for the development, manufacturing, marketing, distribution, and sale of myoelectric elbows, where Össur, a large prosthetic manufacturer, was developing a myoelectric elbow that would allow it to enter the U.S. market.[194] In *Novartis/GlaxoSmithKline*, the Commission alleged that Novartis's proposed acquisition of certain GlaxoSmithKline (GSK) oncology assets raised competitive concerns in the markets for BRAF and MEK inhibitors to treat cancer, where, absent the acquisition, Novartis was a potential future competitor to GSK's existing, on-market BRAF and MEK inhibitors.[195] *Roche/Genentech*[196] and *Institut Mérieux/Connaught BioSciences*[197] are earlier examples of matters where the Commission alleged harm to competition in an existing market from an acquisition that would eliminate a potential future competitor.

An acquisition may eliminate future competition in a *geographic market* where one or both parties to a transaction may be a potential or future entrant. In *Whole Foods/Wild Oats*, the Commission alleged that Whole Foods's proposed acquisition of Wild Oats would eliminate competition in the market for the operation of premium natural and organic supermarkets in various local geographic areas, including in seven geographic markets where one or the other of the merging parties did not, at the time of the proposed transaction, have retail

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[194] Complaint, Össur Hf./College Park Industries, No. C-4712 (F.T.C. 2020), https://www.ftc.gov/system/files/documents/cases/191_0177_ossur_college_park_complaint.pdf.

[195] Complaint, Novartis AG/GlaxoSmithKline, PLC., No. C-4510 (FTC 2015), https://www.ftc.gov/system/files/documents/cases/complaint_0.pdf.

[196] Roche Holding Ltd., 113 F.T.C. 1086 (1990) (elimination of potential competition in the market for vitamin C, where Roche was the market leader and Genetech was a potential entrant, and in the market for therapeutics for treatment of human growth hormone deficiency, where Genetech was a near-monopolist and Roche was a potential entrant).

[197] Institut Mérieux S.A., 113 F.T.C. 742 (1990) (elimination of potential competition in the market for rabies vaccine, where Mérieux was the only firm selling the rabies vaccine nationwide, and Connaught was one of two potential entrants, and in the market for inactivated polio vaccine, where Connaught was a monopolist and Mérieux was one of two potential entrants).

locations.[198] In *Staples/Office Depot*, the Commission alleged that the proposed acquisition of Office Depot by Staples would eliminate "actual potential competition between Staples and Office Depot in other metropolitan areas where they would compete in the future."[199]

B. Potential Competition in a Market for a Future Product (or Service)

Acquisitions may eliminate competition in a future market—a market for a product (or service) not yet in existence or commercially available. In *Nielsen/Arbitron*, the Commission alleged that Nielsen's proposed acquisition of Arbitron would result in the loss of future competition between the combining firms, where both parties planned to enter a market for cross-platform audience measurement—a new service, with no existing suppliers—designed to capture audiences on non-traditional platforms like mobile phones.[200] In *BP Amoco/Atlantic Richfield* (ARCO), the Commission alleged that BP Amoco's proposed merger with ARCO would "eliminate substantial potential competition" in the market for the development and commercial sale of ANS natural gas, and would reduce the potential for future competition in the sale of North Slope natural gas from three firms to two firms while also "substantially increas[ing] the probability that commercial development of natural gas on the North Slope [would] be delayed, and that the sale of natural gas, when and if the fields [were] commercially developed, [would] be at non-competitive prices."[201]

The Commission regularly challenges mergers among pharmaceutical firms where the merger may eliminate competition to develop new products. In *Teva/Allergan,* the Commission alleged that Teva's proposed acquisition of Allergan's generic pharmaceutical business would cause competitive harm in the market for each of 24 generic pharmaceutical products by eliminating future competition between the two firms; in some instances, no generic product was on the market, and both firms were potential entrants, and in other markets, one firm was an actual supplier and the other was a potential entrant.[202] In *Watson Pharmaceuticals/Actavis*, the Commission alleged that Watson's proposed acquisition of Actavis would "eliminat[e] future competition" in the markets for six generic drug products that were not yet available in the United States but were in development by both

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[198] Administrative Complaint, Whole Foods Market/Wild Oats Markets, No. 9324 (June 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/06/070628admincmplt.pdf.

[199] Complaint for Temp. Restraining Order & Preliminary Injunction Pursuant to Section 13(b) of the Fed. Trade Comm'n Act, FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) (No. 1:97CV00701), https://www.ftc.gov/sites/default/files/documents/cases/1997/04/staples2.pdf.

[200] Nielsen Holdings N.V., No. C-4439, 2014 WL 869523, at *3 (F.T.C. Feb. 24, 2014).

[201] BP Amoco P.L.C., No. C-3938, 2000 WL 422209 at *3-4, *6 (F.T.C. Apr. 13, 2000).

[202] Teva Pharm. Indus. Ltd., No. C-4589, 2016 WL 4128219, at *3, *16 (F.T.C. July 26, 2016).

companies.[203] In *Upjohn/Pharmacia*, both Upjohn and Pharmacia were in advanced stages of developing topoisomerase I inhibitors for the treatment of colorectal cancer. The Commission alleged that their merger would eliminate actual competition in research and development in the market for such topoisomerase I inhibitors as well as the "potential for actual, direct, and substantial price competition" for topoisomerase I inhibitors for the treatment of colorectal cancer.[204] In *Roche/Genentech*, the Commission alleged that Roche's proposed acquisition of Genentech eliminated actual and potential competition in the U.S. markets for research, development, production, and marketing of, among other products, CD4-based therapeutics for the treatment of AIDS and HIV infection. Neither Genentech nor Roche (nor any other firm) had a CD4-based therapeutic for AIDS/HIV infection on the market. Genentech was the most advanced of a limited number of companies developing such a therapeutic; Roche had engaged in research and development of CD4-based therapeutics and had patent applications pending on its products. Among other concerns, the Commission alleged that the merger eliminated Roche as a potential entrant into the (future) relevant product market for CD4-based therapeutics.[205]

C. Potential Competition in a Market for Technology

Intellectual property can constitute a relevant antitrust market—a "technology market."

> Technology markets consist of the intellectual property that is licensed (the "licensed technology") and its close substitutes—that is, the technologies or goods that are close enough substitutes to constrain significantly the exercise of market power with respect to the intellectual property that is licensed. When rights to intellectual property are marketed separately from the products in which they are used, the Agencies may analyze the competitive effects of a licensing arrangement in a technology market.[206]

The Commission has alleged harm in markets for technology in non-merger cases. In *Motorola*, the Commission identified the relevant market as the technology covered by any Google-owned standards-essential patent (SEP) and all substitutes for that technology.[207] In *Union Oil*, the Commission identified a relevant market as "the technology claimed in patent application No. 07/628 488 … and Unocal's issued RFG patents, and any alternative

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[203] Complaint, Watson Pharmaceuticals/Actavis, No. C-4373 (FTC 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/12/121015watsonactaviscmpt.pdf.

[204] The Upjohn Co., 121 F.T.C. 44, 45 (1996).

[205] Roche Holding Ltd., 113 F.T.C. 1086, 1088-89 (1990).

[206] IP GUIDELINES, at 9.

[207] Motorola Mobility LLC, 156 F.T.C. 147, 152 (2013).

technologies that enable firms to refine, produce, and supply CARB-compliant 'summer-time' RFG for sale in California at comparable or lower cost, and comparable or higher effectiveness, without practicing the Unocal technology."[208] In *Rambus*, the Commission identified relevant markets for "latency technology," "burst length technology," "clock synchronization technology," and "data acceleration technology."[209] In *Summit Technology*, the Commission's challenge to a patent pooling arrangement identified a relevant market for the licensing of technology related to photorefractive keratectomy (PRK), and the sale and lease of PRK equipment, including the licensing of patents for use in performing PRK. The Commission alleged that, but for the pooling arrangement, Summit and VISX would have engaged in competition with each other in the licensing of technology related to PRK.[210] In *Intel*, the Commission alleged Intel engaged in exclusionary conduct to maintain monopoly power (and attempted to monopolize) the market for "general-purpose microprocessors, including current-generation microprocessors … future-generation microprocessors and technologies for current-generation and future-generation microprocessors."[211]

The Commission has also alleged harm to technology markets from a merger or joint venture. In each matter, the respondents licensed the relevant technology separately from the sale of a commercialized product.[212] In *Montedison*, the Commission alleged that the combination of Shell Petroleum N.V.'s (Shell) and Montedison's worldwide polyolefins businesses would eliminate competition in three technology markets: (i) the licensing of polypropylene technology; (ii) polypropylene technology, whether licensed to others or used by the joint venture; and (iii) the "licensing, production and sale of high-yield/high-specificity polypropylene catalysts and catalyst technology." The Commission identified one likely effect of the proposed joint venture as a reduction in Montedison's and Shell's incentive to license polypropylene technology to polypropylene resin manufacturers that would compete with the joint venture.[213]

The Commission has challenged mergers where one effect of the transaction was the elimination of potential competition in a market for technology where that technology was, or could be, separately licensed. Competitive harm in a technology market can also affect future competition in a market for an existing or future product. Firms may use

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[208] Union Oil Co. of Cal., 140 F.T.C. 123, 144 (2005).

[209] Rambus Inc., No. 9302, 2002 WL 1436415, at *24-25 (F.T.C. June 18, 2002).

[210] Summit Tech. Inc., 127 F.T.C. 208, 209, 213 (1999).

[211] Intel Corp., No. 9288, 1998 WL 297178 (F.T.C. June 8, 1998).

[212] Where intellectual property is licensed, sold, or transferred as an integral part of a marketed good, the antitrust agencies take the position that "there is no need for a separate analysis of technology markets to capture relevant competitive effects." IP GUIDELINES at 9.

[213] Montedison S.P.A., 119 F.T.C. 676, 678, 679, 684 (1995).

developments in technology markets to introduce new commercial products or differentiate existing commercial products to compete with current market participants.

In *Dow Chemical/Union Carbide*, the Commission alleged that Dow Chemical's proposed merger with Union Carbide would substantially reduce competition in three related polyethylene markets, including two technology markets: (i) linear low-density polyethylene (LLDPE); (ii) metallocene catalyst technology for use in LLDPE production; and (iii) LLDPE reactor process technology. Exxon and Dow had patents on the technology used to make and use metallocene catalysts in the manufacturing of LLDPE and were the only firms in the world that had succeeded in developing commercially viable metallocene catalyst technology for LLDPE. Dow produced metallocene catalysts in a solution process. Union Carbide, through a 50/50 joint venture with Exxon—Univation Technologies—was working to develop and commercialize metallocene catalysts in a gas-phase polyethylene process. Dow, through a joint development agreement with BP Amoco, was also working to develop a commercially viable implementation of metallocene catalyst technology in gas phase polyethylene processes.[214]

Prior to announcing the merger, Dow terminated its participation in the joint development agreement. According to the Commission, "Dow's decision to enter into the merger agreement with Carbide, and its decisions (1) to allow the Dow/BP joint development agreement to expire by its terms and (2) not to license its metallocene technology to BP, [were] sufficiently related to consider together in examining the effects of the merger." The Commission's investigation found that the combining firms competed by "among other things, innovating and developing technology (including patents, trade secrets and know-how) for their own use and, in some cases, for license to other LLDPE producers." The Commission recognized that "the reduction or elimination of competition in metallocene catalyst technology, resulting from the merger, in turn reduces competition in LLDPE itself and in LLDPE reactor process technology. The reduction in competition in LLDPE process technology in turn further reduces competition in LLDPE."[215]

The Commission alleged that the proposed merger affected potential competition in the market for metallocene catalyst technology in two ways. First, pursuant to the merger, Dow would become a participant with Exxon in the Univation joint venture, and two firms—the combined Dow/Union Carbide, and the Univation joint venture—would control all commercialized metallocene technology for LLDPE. Dow, while it had incentives to continue to support Univation's development of metallocene catalyst technology, might develop the

[214] Dow Chemical Co., 131 F.T.C. 600, 603-08 (2001).

[215] *Id.* at 603-605, 693-94, 698 n.2.

Union Carbide/Exxon technology in ways less likely to threaten Dow's existing competing proprietary technology. Dow's post-merger interest in Univation would also allow it to impair Univation's ability to compete in the licensing of metallocene catalyst technology. The Commission alleged that the transaction would eliminate potential competition between Dow and Union Carbide in the market for metallocene catalyst technology used in the manufacture of LLDPE. [216]

Second, the transaction would also remove potential competition between Dow and Univation through Dow's joint development program with BP Amoco. Prior to the proposed merger, Dow and BP Amoco were working to develop a version of Dow's metallocene catalyst to use in a BP Amoco manufacturing process. If successfully commercialized, this technology would have competed directly with Univation. After the merger, Dow had less incentive to continue to partner with BP Amoco (as reflected by its termination of the joint development agreement). The Commission alleged that the merger would eliminate BP Amoco as an actual and potential competitor in the development and licensing of metallocene catalyst technology for LLDPE manufacture, by "permit[ting] Dow to further impair the ability of BP to compete in gas phase licensing and develop new technology and products based on its work with Dow under the [joint development agreement]." The Commission further alleged that the transaction would "reduce innovation competition among developers of the relevant products, including the delay of, or redirection of, research and development projects in metallocene catalyst technology, LLDPE reactor process technology, LLDPE and LLDPE applications."[217]

In *Bayer/Aventis*, Bayer's proposed acquisition of Aventis Crop Science (ACS) raised competitive concerns in four markets, including a market for the "research, development, manufacture, and sale of [New Generation Chemical Insecticide Active Ingredients] and related technologies for specific end use applications." New Generation Chemical Insecticide Active Ingredients technologies included "patented techniques for the commercial synthesis of New Generation Chemical Insecticide Active Ingredients molecules, patented and proprietary process technology used to manufacture such molecules, and patented formulations for chemical insecticide products based on these technologies." At the time of the proposed merger, Syngenta was "the only other firm with significant development and production of New Generation Chemical Insecticide Active Ingredients."[218]

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[216] *Id.* at 604, 606-08.

[217] *Id.* at 604-05, 608.

[218] Bayer AG, 134 F.T.C. 184, 186-189 (2002).

According to the Commission, "Bayer and ACS developed New Generation Chemical Insecticide Active Ingredients and related technologies after years of analytical work and study of molecules suitable for use in pesticide applications. That work led to the identification of important molecules, techniques for commercial synthesis of those molecules, and the development of insecticide product formulations." The Commission recognized that "Bayer and ACS competed by … innovating and developing technology (including patents, trade secrets, and know-how) for use in the production of New Generation Chemical Insecticide Products, [a separate product market]." Bayer and Aventis also "own[ed] significant intellectual property estates relat[ed] to these products." While other firms had discovered new molecules, Bayer and ACS were, according to the Commission, "distinguished by their ability to … take new molecules from the discovery phase to the development of production processes for commercial scale synthesis;" consequently, both firms had been "licensed by competitors to develop New Generation Chemical Insecticide Active Ingredients based on molecules discovered by other firms." The Commission alleged that the proposed acquisition would "eliminate potential competition between Bayer and ACS in the markets for New Generation Chemical Insecticide Active Ingredients and the technology used in their manufacture."[219]

The Commission also alleged that the proposed merger would eliminate potential competition between Bayer and ACS in the markets for New Generation Chemical Insecticide Products (and markets for specific crop applications). According to the Commission, the proposed acquisition would reduce innovation competition in both the relevant technology and product markets, and increase barriers to entry, including enhancing patent barriers, in the relevant markets.[220]

In *Ciba-Geigy/Sandoz*, the Commission alleged that the proposed merger of Ciba-Geigy with Sandoz (to create Novartis) would, among other effects, eliminate actual potential and perceived potential competition in a market for "gene therapy technology" and "research and development of gene therapies" related to the development of gene therapies for the treatment of cancer, hemophilia, graft versus host disease, and chemoresistance gene therapy. At the time of the proposed merger, Ciba-Geigy held, not solely for investment, a 46.5% interest in Chiron. Chiron was "engaged in the discovery, development, manufacture and sale of proprietary and generic pharmaceutical products, including gene therapy products." Ciba-Geigy "fund[ed] research at Chiron and guarantee[d] its debt, and ha[d] the right to appoint members of its board of directors and to veto specified actions of [Chiron]." While "no gene therapy [had] been approved by the FDA, gene therapy treatments [then] in

[219] *Id.* at 189-191, 289.

[220] *Id.* at 192, 196.

clinical trials offer[ed] patients the prospect of significant medical improvements or cures for diseases." Ciba-Geigy, through Chiron, and Sandoz, were either in clinical development or near clinical development for the treatment of certain human diseases using gene therapies.[221]

Ciba-Geigy (with Chiron) and Sandoz "controlled the substantial proprietary rights necessary to commercialize gene therapy products and possess[ed] the technological, manufacturing, clinical, regulatory expertise and manufacturing capability to commercially develop gene therapy products." They were "the two leading commercial developers of gene therapy technologies and control[led] critical gene therapy proprietary portfolios, including patents, patent applications, and know-how." The competitive development of "potentially life-saving therapies … could be hindered by the merged firm's control of substantially all of the proprietary rights necessary to commercialize gene therapy products." Pre-merger, Ciba/Chiron and Sandoz "had the incentive and did act as rival centers from which [developers of potential gene therapies] could obtain needed intellectual property rights." In fact, "Ciba/Chiron and Sandoz would grant limited intellectual property rights to other developers and researchers" in return for compensation. The Commission was concerned that, "[w]hereas before the merger third parties might have had the option of licensing one party's patents or challenging the validity of the other's … the merger created a 'killer' patent portfolio so broad as to eliminate that option."[222]

D. Potential Competition and Markets for Research and Development (Innovation Markets)

Research and development efforts support the improvement and differentiation of existing products and the introduction of future products.[223] The Antitrust Guidelines for the

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[221] Ciba-Geigy Ltd., 123 F.T.C. 842, 843-47 (1997). "Gene therapy technology" and "research and development of gene therapies" were two separate components of the relevant market. *Id.* at 894 (Statement of Chairman Robert Pitofsky & Comm'rs Janet D. Steiger, Roscoe B Starek, III & Christine A. Varney). The Commission also identified "[s]pecific gene therapy product markets … includ[ing] the research, development, manufacture and sale" of gene therapies for the treatment of cancer, hemophilia, graft versus host disease, and chemoresistance. *Id.* at 844-45.

[222] *Id.* at 846, 895, 897, 897 n.10.

[223] *See, e.g.*, Bayer AG, 134 F.T.C. 184, 188 (2002) ("Competition in research and development of New Generation Chemical Insecticide Active Ingredients has led to innovations including reductions in the cost of insecticides, reduced amounts of chemical insecticides used, development of chemicals with reduced risk of harmful environmental and health impacts due to insecticide exposure, and improved product properties and performance."); Dow Chemical Co., 131 F.T.C. 600, 606 (2001) ("Innovation through competition in research and development in LLDPE reactor process technology leads to reductions in cost, improved product properties, performance, and expansion of uses for polyethylene resin."); ABB AB, 127 F.T.C. 494, 495 496-97 (1999) (Elsag Bailey was engaged in the research and development of Process Mass Spectrometers and planned to begin manufacturing and selling Process Mass Spectrometers within the next year; Elsag Bailey was a potential competitor to ABB).

Licensing of Intellectual Property define the characteristics of research and development markets:

> A research and development market consists of the assets comprising research and development *related to the identification of a commercializable product, or directed to particular new or improved goods or processes*, and the close substitutes for that research and development. When research and development is directed to particular new or improved goods or processes, the close substitutes may include research and development efforts, technologies, and goods that significantly constrain the exercise of market power with respect to the relevant research and development, for example by limiting the ability and incentive of a hypothetical monopolist to reduce the pace of research and development. The Agencies will delineate a research and development market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.[224]

The Commission has identified stand-alone "research and development" for an existing or future commercial product as a relevant antitrust market. In *Ciba-Geigy/Sandoz*, the Commission alleged that the merger would combine two firms in the "highly concentrated" markets for "research and development" in four gene therapy markets: (i) HSV-tk gene therapy for the treatment of cancer; (ii) HSV-tk gene therapy for the treatment of graft versus host disease; (iii) gene therapy for the treatment of hemophilia; and (iv) chemoresistance gene therapy.[225] In *American Home Products/American Cyanamid*, the Commission identified competitive concerns in the market for "the research and development of a vaccine against Rotavirus infection in humans." [226] In *Sensormatic Electronics/Knogo*, the Commission alleged that the transaction would harm competition in the "highly concentrated" markets for research and development of disposable labels developed or used for source labeling, and for processes to manufacture disposable labels.[227] In *Wright Medical*, the Commission alleged that Wright's proposed acquisition of Orthonet would eliminate actual competition between Wright and Orthonet in the market for the research and development of orthopedic implants used or intended for use in the human hand. The Commission also alleged that the proposed acquisition would eliminate Orthonet as a potential competitor of Wright in the

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[224] IP GUIDELINES, at 11 (emphasis added). The 1995 IP Guidelines use the term "innovation markets" to describe such markets. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 10 (Apr. 6, 1995).

[225] Ciba-Geigy Limited, 123 F.T.C. 842, 844-45 (1997).

[226] Am. Home Products Corp., 119 F.T.C. 217, 219 (1995).

[227] Sensormatic Elecs. Corp., 119 F.T.C 520, 522 (1995).

market for FDA-approved orthopedic implants used or intended for use in the human hand.[228] In *Glaxo/Wellcome*, the Commission alleged that the merger would eliminate competition in the market for the research and development of non-injectable 5HT1D agonists, a specific class of drugs known to act on the receptors in the human body that cause migraine attacks; the merger would decrease the number of R&D tracks, and post-merger, Glaxo would have the ability to unilaterally reduce research and development of non-injectable 5HT1D agonists.[229] In *Upjohn/Pharmacia*, both Upjohn and Pharmacia were in advanced stages of developing topoisomerase I inhibitors for the treatment of colorectal cancer. The Commission alleged that their merger would eliminate actual competition in research and development in the market for such topoisomerase I inhibitors as well as the "potential for actual, direct, and substantial price competition" for topoisomerase I inhibitors for the treatment of colorectal cancer.[230] In *Baxter/Immuno*, the Commission identified a relevant market for "research, development, manufacture and sale of Fibrin Sealant to be approved by the FDA for sale in the United States" and explained that the merger would eliminate "the significant on-going competition between Baxter and Immuno in the research and development … of fibrin sealant in the United States" and "future competition in the manufacture and sale of fibrin sealant in the United States."[231]

The Commission appears to have stopped alleging innovation markets/research and development markets as stand-alone markets.[232] *Boston Scientific/Guidant* is the last instance where the Commission did so. There, the Commission identified harm in the market for research and development of Implantable Cardioverter Defibrillators (ICDs). Guidant, Medtronic, and St. Jude Medical were the only companies with significant sales of Implantable Cardioverter Defibrillators (ICDs) in the United States. A fourth firm, Cameron Health Inc., was involved in the research and development of ICDs and was poised to receive

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[228] Wright Medical Technology, Inc., 119 F.T.C. 344, 346 (1995).

[229] Glaxo PLC, 119 FTC 815 (1995).

[230] The Upjohn Co., 121 F.T.C. 44, 45 (1996).

[231] Complaint, Baxter International, No. C-3726 (Mar. 24, 1997, FTC), https://www.ftc.gov/sites/default/files/documents/cases/1997/03/c3726cmp.pdf; Analysis of Proposed Consent Order to Aid Public Comment at 2 (Dec. 1996), https://www.ftc.gov/sites/default/files/documents/cases/1996/12/baxterim.pdf.

[232] See Richard J. Gilbert and Michael J. Katz, Comments on Proposed Revisions to the Horizontal Merger Guidelines, Docket FTC-2022-0003, Comment ID FTC-2002-0003-0715 (April 21, 2022) (recommending that revised guidelines indicate the agencies may define research and development as a relevant market). The Commission investigated the impact on the "market for basic research and innovation in any human health market[]" in its analysis of the Pfizer/Wyeth merger. See Statement of the Federal Trade Commission Concerning Pfizer/Wyeth, FTC File No. 091-0053 (Oct. 14, 2009) at 3-4 ("staff evaluated whether the transaction would decrease basic research … in pharmaceutical markets by eliminating a leader in pharmaceutical research and development …"), https://www.ftc.gov/sites/default/files/documents/cases/2009/10/091014pwyethstmt.pdf.

FDA approval to sell its ICD in the United States within two to three years. Cameron was a potential future competitor in the highly concentrated ICD market, so its entry into the ICD market would likely be competitively significant. The acquisition of Guidant by Boston Scientific (BSC) potentially threatened Cameron's future entry into this market because BSC had a 10 to 15 percent equity stake in Cameron and had an option to acquire Cameron. Pursuant to that option and related agreements, Cameron was obligated to provide BSC with non-public, competitively sensitive information. The agreements also provided BSC a means to exert certain aspects of control over the conduct and business of Cameron. The Commission alleged that the proposed acquisition would eliminate "actual, direct, and substantial competition between Cameron and Guidant in the market for research and development of ICDs through BSC's exercise of its contractual control and receipt of information rights over Cameron, thereby reducing innovation in this market." The Commission also alleged that the effect of the proposed acquisition would "eliminat[e] potential competition between BSC/Cameron and Guidant in the market for the manufacture and sale of ICDs."[233]

The Commission also alleges relevant markets that include research and development as a component of a market that also includes the manufacture and/or distribution of an existing or future commercialized product. An early enforcement matter is *Roche/Genentech*.[234] In *Roche/Genentech*, the Commission alleged that Roche's proposed acquisition of Genentech eliminated actual and potential competition in, among others, the U.S. markets for research, development, production, and marketing of (i) vitamin C and (ii) therapeutics for treatment of human growth hormone (HGH) and HGH releasing factor. Roche was the market leader in the market for vitamin C. Genentech did not participate in that market but had developed a patented process for producing vitamin C using recombinant technology. Genentech had a near-monopoly share of the market for therapeutics for treatment of HGH deficiency and

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[233] Boston Sci. Corp., No. C-4164, 2006 WL 2330115, *3 (F.T.C. July 21, 2006).

[234] Roche/Genentech (1990) preceded the articulation of research and development markets in the 1995 IP Guidelines. The concept of research and development markets preceded the 1995 IP Guidelines. *See* U.S. DEP'T OF JUSTICE, ANTITRUST ENF'T GUIDELINES FOR INT'L OPERATIONS, Trade Reg. Rep. ¶13, 109.10 (November 10, 1988) (superseded) (case 5, research and development joint venture, discussing research and development markets); Pub. L. No. 98-462, 15 U.S.C. §§4301-4306 (1984) (National Cooperative Research Act of 1984) (certain joint research and development ventures to be evaluated on the effect on competition in "properly defined research and development markets"). The Act was later amended to include production joint ventures. For an early case, see U.S. v. Automobile Mfrs. Ass'n, 307 F. Supp 617 (C.D. Cal. 1969) (judicial proceeding to accept consent decree settling charges of conspiracy to eliminate competition in the research, development, manufacture, and installation of motor vehicle air pollution control equipment). For background on the Automobile Mfrs. case, see Bennett H. Goldstein and Howell H. Howard, Antitrust Law and the Control of Auto Pollution: Rethinking the Alliance Between Competition and Technical Progress, 10 ENVIRONMENTAL LAW 517 (1980). The Department of Justice issued guidelines for research joint ventures in 1980, but did not include the concept of research and development markets. U.S. DEP'T. OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (1980).

HGH releasing factor. Genentech's product was designated an orphan drug and, for a period, was protected from competition from any product, unless a new entrant could establish its product was superior to Genentech's. Roche had conducted advanced clinical trials for a product that would compete with HGH (HGH releasing factor) and had developed and patented human growth hormone releasing factor analogs. [235]

Bristol-Myers Squibb/Celgene and *Illumina/Grail* are recent examples of the current practice to allege research and development as part of markets that include manufacturing and sale of the relevant product. (Other matters are discussed throughout this paper.) In *Bristol-Myers Squibb/Celgene,* the Commission alleged that BMS's proposed acquisition of Celgene raised concerns in the relevant product market for "research, development, manufacture and sale of oral products to treat moderate-to-severe psoriasis." Celgene's product, Otezla, was the most significant oral product approved in the United States to treat moderate to severe psoriasis. BMS was developing a competing treatment; its potential (future) commercial product was the most advanced oral treatment in development. The Commission's complaint alleged that the effect of the transaction would eliminate future competition between BMS and Celgene in the development (and sale) of oral products to treat moderate to severe psoriasis. [236] In *Illumina/Grail*, a vertical transaction, the Commission alleged that the acquisition "would substantially lessen competition in the market for the research, development, and commercialization of [multi-cancer early detection ("MCED")] tests in the United States. According to the Commission's complaint, Illumina, the dominant provider of DNA sequencing platforms, would have the incentive, post-acquisition, to foreclose or disadvantage Grail's rivals. Illumina's next-generation sequencing platform is an essential input for the development and commercialization of MCED tests; Grail was "racing against several other firms to develop and commercialize" an MCED test. Post-merger, Illumina would have the incentive, and ability, to discriminate against its post-merger rivals, and would "control the fate of every potential rival to Grail." According to the Commission's complaint, Illumina could "impede the rival's research and development efforts by denying important technical assistance and other proprietary information." [237]

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[235] Roche Holding Ltd., 113 F.T.C. 1086, 1087-88 (1990).

[236] Bristol-Myers Squibb Co., No. C-4690, 2019 WL 6168274 (F.T.C. Nov. 15, 2019).

[237] Complaint, Illumina, Inc., No. C-9401 (F.T.C. Mar. 30, 2021), https://www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf. The complaint in this matter is discussed in Submission of the United States to the OECD, The Concept of Potential Competition (Jun. 10, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)20/en/pdf. An FTC Administrative Law Judge recently dismissed the Commission's complaint, finding, among other things, that the FTC failed to prove that rivals to Grail "are poised to imminently launch their products commercially in direct competition with Grail." Initial Decision, Illumina, Inc., No. C-9401 (F.T.C. Sep. 1, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.

The Commission often identifies a slowing or elimination of innovation competition in the market for an existing or future product as a possible anticompetitive effect arising from a transaction.[238]

IV. IDENTIFICATION OF MARKET PARTICIPANTS AND IDENTIFICATION OF FUTURE OR POTENTIAL ENTRANTS

Although *Baker Hughes* (and related cases) have moved merger analysis away from simple structural considerations, the agencies identify current and prospective market participants as an initial step in their investigation of a merger. Firms that currently earn revenues in a relevant market are market participants.[239] A firm that has no sales in the relevant market but has some current or expected future influence on the decisions of one or more firms operating in the relevant market is considered a market participant if it is either a rapid entrant or committed entrant.[240]

A. Rapid Entrants

A firm that has no current sales but would likely rapidly enter the market in response to a "small but significant non-transitory increase in price" (SSNIP) without incurring significant sunk costs is analytically equivalent to a firm making current sales and is a market participant.[241] A simple example of such a "rapid entrant" would be a firm with excess capacity that cannot profitably ship goods into the relevant geographic market at current price levels, but would profitably serve that market almost immediately in the event of a SSNIP.[242] Such firms are recognized as market participants under the 2010 Horizontal Merger Guidelines because they can influence and discipline the behavior of the other market participants in exactly the same way as a firm currently making sales in the relevant market. Other examples of rapid entrants include, but are not limited to, firms that produce the relevant product but do not sell in the relevant geographic market, firms that "clearly possess the necessary assets to supply into the relevant market," and firms with efficient idle capacity for relatively homogenous goods.[243]

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[238] See discussion at pp. 74-77.

[239] 2010 HORIZONTAL MERGER GUIDELINES at 15.

[240] 2010 HORIZONTAL MERGER GUIDELINES at 15-16.

[241] 2010 HORIZONTAL MERGER GUIDELINES at 9.

[242] Such firms were identified as "uncommitted entrants" in § 1.32 of the 1992 HORIZONTAL MERGER GUIDELINES. *See also* 1984 MERGER GUIDELINES § 2.21 (1984) (discussing firms that can engage in production substitution).

[243] 2010 HORIZONTAL MERGER GUIDELINES at 16.

A firm with no current sales in the relevant market can have a similar disciplining effect on existing rivals as a firm that is actively making sales in that market.[244] To show harm from an acquisition of a rapid entrant, no showing of the likelihood of actual entry by the firm is required. A rapid entrant is a firm whose *threat* of entry imposes some discipline on existing market participants. A rapid entrant appears to be functionally identical to a *perceived potential competitor/entrant*.

In *Polypore*, the Commission alleged that Polypore's consummated acquisition of Microporous Products eliminated competition in four markets: deep-cycle battery separators; motive battery separators; automotive starter, lighter, and ignition battery separators; and uninterruptible power supply stationary ("UPS") battery separators.[245] The Commission alleged that Polypore and Microporous were direct competitors in the deep-cycle and motive battery markets, that Microporous was "preparing to compete actively"[246] in the market for SLI battery separators, and that Microporous had developed a new product to compete directly with Polypore in the market for UPS battery separators.[247] The Commission's Administrative Law Judge ("ALJ") found "that there is a reasonable probability that [the] acquisition … will substantially lessen competition in the deep-cycle, motive, UPS, and SLI battery separator markets in North America."[248]

Polypore appealed to the Commission, and, as part of its review, the Commission undertook an evaluation of the ALJ's identification of market participants.[249] With respect to competition in the markets for deep-cycle and motive battery separators, Polypore argued that a third firm, Entek, was an "uncommitted entrant … because it had previously sold separators for deep-cycle and industrial applications."[250] Polypore argued that Entek "could quickly shift supply to these applications in response to a price increase" and that it had excess capacity and was discussing sales of these products with significant battery

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[244] *See* United States v. Falstaff Brewing Corp, 410 U.S. 526, 532-33 (1973) (the lower court "failed to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in [the relevant market]").

[245] Polypore Int'l, Inc., 149 F.T.C. 486, 488 (2010).

[246] *Id.* at 491.

[247] *Id.* at 491-92. The Commission also alleged the transaction would eliminate emerging or potential competition in a market for polyethylene ("PE") battery separators. *Id.*

[248] *Id.* at 508.

[249] Polypore Int'l, Inc., 150 F.T.C. 586, 613-22 (2010), aff'd. Polypore International v. F.T.C., 686 F.3d 1208, 1214-15 (11th Cir. 2012).

[250] *Id.* at 619.

suppliers.[251] The Commission, however, found that the evidence did not show that Entek was in a position to "provide a rapid and effective supply response."[252]

The Commission similarly evaluated and rejected Polypore's argument that Microporous was not a participant in the SLI market.[253] The Commission recognized that Microporous had not made any sales of SLI batteries.[254] However, Microporous was actively competing for contracts, and had made "meaningful progress" towards agreements to supply two large North American automotive battery manufacturers with SLI batteries.[255] The Commission found that Polypore perceived Microporous as a competitor and reduced prices in response to this competitive threat. [256] The Commission rejected Polypore's argument that Microporous's failure to obtain those supply agreements was evidence inconsistent with a conclusion that Microporous was a market participant.[257] In the alternative, "liability in the SLI market could be premised … on the elimination of actual or perceived potential competition" said the Commission:

> The facts here support liability under both theories. Microporous was the only firm in a position to enter the concentrated North American SLI market and was already bidding for business. [Polypore] perceived Microporous as a competitive threat and reacted by offering more competitive terms to those customers it believed it could lose to Microporous. Accordingly, even if Microporous was not an actual competitor in the SLI market at the time of the acquisition, the acquisition was nevertheless unlawful.[258]

With respect to the UPS separator market, the Commission rejected the ALJ's conclusion that Microporous was a potential competitor "poised" to enter the North American UPS separator market and determined that Microporous was not a market participant in the market for UPS

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[251] *Id.*

[252] *Id.* at 622. While there was evidence that Entek had responded to a request to supply motive and UPS battery separators, its proposal required the potential customer to pay for tooling, and Entek was not able to guarantee a "competitive price." *Id.* at 619. Another customer had received an incomplete or insufficient response to a proposal and determined not to purchase from Entek, *id.*, and even had Entek and this customer decided to proceed, any decision to supply would have required approximately three years of additional preliminary testing and production testing, *id.* at 621. Similarly, the Commission concluded that Entek's testing of a product with two potential purchasers was insufficient evidence to show Entek was a market participant. *Id.* at 622.

[253] *Id.* at 614.

[254] *Id.* at 615.

[255] *Id.* at 614.

[256] *Id.* at 617.

[257] *Id.*

[258] *Id.* at 611, at footnote 41.

battery separators.[259] The Commission found that, unlike its capabilities in the SLI market, Microporous had not developed a commercially viable separator or "come close to qualifying a Microporous UPS separator."[260] That "Microporous was testing a UPS product it expected would generate substantial revenues"[261] was an insufficient basis to conclude Microporous was a potential competitor or a participant in the UPS separator market. The Commission concluded that Polypore's acquisition was "reasonably likely to substantially lessen competition in [the markets for] deep-cycle; motive; and [SLI] battery separators" but that complaint counsel had not shown harm to competition in the UPS separator market.[262]

Polypore appealed to the Eleventh Circuit and argued, with respect to the SLI market, that the Commission wrongly treated Microporous as an actual, rather than potential, competitor, and, in doing so, failed to apply the analytic framework of the potential competition doctrine. The Appeals Court disagreed:

> Microporous was already making similar separators. It would need only to retool a production line, and it had already purchased a new one that could produce the SLI separators. It had begun discussions with several companies and had produced a sample product satisfactorily for at least one large customer. It had even submitted quotes and entered into memoranda of understanding with another large customer. … Polypore ... certainly considered [Microporous] to be [a] competitive threat[]s]. [Polypore] lowered [its] prices and gave other concessions in respond to [its] customers' dealing with [Microporous]. Polypore began to discuss the possibility of acquiring Microporous to eliminate competition and developed the MP Plan to remove Microporous as a competitive threat … in the SLI market. … Polypore clearly viewed Microporous as a serious threat and sought to acquire it to eliminate that threat. … [T]he pre-acquisition market activity by [Microporous]—although resulting in no actual sale—had a substantial, actual pro-competitive effect on the market. … [t]he perception by [Polypore] of the competitive threat posed by [Microporous] provided additional evidence of [its] competitive presence.[263]

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[259] *Id.* at 618.

[260] *Id.*

[261] *Id.*

[262] *Id.* at 588.

[263] Polypore International v. F.T.C., 686 F.3d 1208, 1214-15 (11th Cir. 2012).

B. Committed Entrants & Post Merger Entrants

When a firm has already committed to enter a market and has incurred sunk costs required for entry in the near future, the Horizontal Merger Guidelines treat that firm as a market participant, since the entity's anticipated, future effect on the market is essentially identical to a firm that is already making sales.[264] A committed entrant appears to be a subset of firms that might be considered an *actual potential entrant.*

Firms that have not committed to enter or are not rapid entrants are not treated as market participants. However, applying the entry standards of the 2010 Horizontal Merger Guidelines, the agencies will also evaluate whether a firm would enter the relevant market in response to a post-merger change in market conditions and whether that entry will be competitively relevant.[265] Evidence that established firms in a related market have the resources to enter is not sufficient to conclude that entry is likely, especially if there is no evidence that they have taken any of the steps toward entering.[266]

C. Relevance of Minority Interests, Financial Interests, and Contractual or Governance Rights

The Horizontal Merger Guidelines recognize that "a partial [ownership interest] can lessen competition by giving the [holder] the ability to influence the competitive conduct of [the firm]."[267] In reviewing the competitive effects of a merger, the Commission may "review [holdings] of minority positions involving competing firms."[268] A firm that does not itself

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[264] 2010 HORIZONTAL MERGER GUIDELINES at 15-16.

[265] 2010 HORIZONTAL MERGER GUIDELINES at 38.

[266] *See* FTC v. Staples, Inc., 190 F. Supp. 3d 100 (D.D.C 2016) (the merging parties had not established that Amazon or other local and regional office supply companies would restore the competition lost by Staples's acquisition of Office Depot within two to three years; despite Amazon's size and reputation, it still faced a number of institutional and structural challenges to attaining the competitive significance of Office Depot for large business-to-business customers); United States v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 WL 203966, at *49 (N.D. Cal. Jan. 8, 2014) (the court rejected defendant's argument that a number of large, highly capitalized firms had the resources and market position from which to launch a product to compete with Bazaarvoice, dismissing the likelihood of each of these companies' entry into the market, mainly because they had not taken any steps toward entry. According to the court: "The companies … have the size and strength to enter virtually any technology market and become strong competitors. But there is no credible evidence that any of them are considering entry into the [relevant market]"); FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009) (the court rejected the merging parties' argument of future entry, finding that the only potentially competitive entrant was a repositioned current competitor, and that by the most favorable predictions it would take that competitor five years to make "even a splash" compared to the newly merged firm); Chicago Bridge & Iron Company, 138 F.T.C. 1024 (2004) (the Commission rejected "the mere fact that new entrants and fringe firms have an intent to compete" as being sufficient to show that "firms are significant competitors capable of replacing lost competition." The Commission found it insufficient that "firms have the capacity to submit a bid," saying that "[b]ids from … new entrants must also be taken seriously by the customers").

[267] 2010 HORIZONTAL MERGER GUIDELINES at 33.

[268] *Id.* at 33.

participate in the relevant market, but which has a minority interest in another firm may be considered a market participant, through that ownership interest. In *Medtronic/Physio-Control*, the Commission alleged that Medtronic's acquisition of Physio-Control International would eliminate competition in the market for research, development, manufacture and sale of Automated External Defibrillators ("AEDs"). Physio-Control was one of only three significant suppliers of AEDs in the United States. Another significant supplier was SurVivaLink. Medtronic did not participate in the market for AEDs, but it held a small (less than 10% interest) in SurVivaLink, had the right to appoint one member to SurVivaLink's board of Directors, and had the right to vote on all matters requiring a shareholder vote. The Commission considered Medtronic, through its ownership interest in SurVivaLink, and Physio-Control, to be actual competitors in the relevant market

A firm with marketing rights may be considered a potential entrant. In *Hikma Pharmaceuticals/Roxane*, the Commission alleged that the combination would eliminate Hikma as a future competitor in the market for generic flecainide tablets; had Hikma entered, it would have been the fifth competitor in the relevant market. Four firms marketed generic flecainide; Hikma was deemed a potential future participant in the relevant market because it held the U.S. marketing rights to a generic flecainide in development at Unimark Remedies. (HIkma also held a 23% equity interest in Unimark.)[269]

A firm that does not itself operate in the relevant market but holds a minority interest or other governance rights in a firm may affect the likelihood that that firm continues as a potential or future competitor, when the holding firm itself enters the market, through merger (or expansion).[270] In *Pfizer/Wyeth*, the Commission considered whether the merger would eliminate "potential future competition" in any relevant market. The Commission considered not only those products Pfizer or Wyeth were "directly developing" "but also products that other companies are developing in which Pfizer or Wyeth have a financial interest." [271]

In *Abbott/St. Jude Medical,* the right to acquire a firm, under certain conditions, was sufficient to create a concern that a merger would affect the entry by a third-party potential competitor. Abbott, a significant supplier of vascular products, proposed to acquire St. Jude

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[269] Complaint, Hikma Pharmaceuticals PLC, No. C-4568 (F.T.C., Feb. 26, 2016), https://www.ftc.gov/system/files/documents/cases/160226hikmacmpt.pdf.

[270] In addition to the enforcement actions discussed below, see *Ciba-Geigy/Sandoz*, discussed at pp. 47-48.

[271] Statement of the Federal Trade Commission Concerning Pfizer/Wyeth (2009), https://www.ftc.gov/sites/default/files/documents/cases/2009/10/091014pwyethstmt.pdf. The Commission did not identify any markets where potential future competition would be harmed; in general, in the areas where Pfizer and Wyeth were both developing potential future products, there were many other firms also developing potential competing products.

Medical, also a leading provider of vascular products. St. Jude Medical and Biosense Webster Inc. were the only suppliers of lesion-assessing ablation catheters in the U.S. market. Advanced Cardiac Therapeutics, Inc. ("ACT") was developing lesion-assessing ablation catheter products that would compete directly with the lesion-assessing ablation catheters offered by St. Jude Medical and Biosense Webster in the United States. Abbott and ACT had previously entered into a strategic partnership to develop lesion-assessing ablation catheters; Abbott no longer had an interest in ACT but, under certain conditions, had the right to acquire the assets of ACT. The Commission alleged that an acquisition of ACT by Abbott would eliminate potential competition between Abbott/ACT and St. Jude Medical in the U.S. market for lesion-assessing ablation catheters, thereby reducing additional competition that would have resulted from an additional U.S. supplier of lesion-assessing ablation catheters.[272]

In *Boston Scientific/Guidant*, the Commission identified harm in the market for research and development of Implantable Cardioverter Defibrillators (ICDs).[273] Guidant, Medtronic, and St. Jude Medical were the only companies with significant sales of Implantable Cardioverter Defibrillators (ICDs) in the United States. A fourth firm, Cameron Health Inc., was involved in the research and development of ICDs and was poised to receive FDA approval to sell its ICD in the United States within two to three years. Cameron was a potential future competitor in the highly concentrated ICD market, so its entry into the ICD market would likely be competitively significant. The acquisition of Guidant by Boston Scientific (BSC) potentially threatened Cameron's future entry into this market because BSC had a 10 to 15 percent equity stake in Cameron and had an option to acquire Cameron. Pursuant to that option and related agreements, Cameron was obligated to provide BSC with non-public, competitively sensitive information. The agreements also provided BSC a means to exert certain aspects of control over the conduct and business of Cameron. The Commission alleged that the proposed acquisition would eliminate "actual, direct, and substantial competition between Cameron and Guidant in the market for research and development of ICDs through BSC's exercise of its contractual control and receipt of information rights over Cameron, thereby reducing innovation in this market."[274] The Commission also alleged that the effect of the proposed acquisition would "eliminat[e] potential competition between BSC/Cameron and Guidant in the market for the manufacture and sale of ICDs."[275]

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[272] Abbott Laboratories, No. C-4600, 2016 WL 7634653 (F.T.C. Dec. 27, 2016).

[273] Boston Sci. Corp., No. C-4164, 2006 WL 2330115 (F.T.C. July 21, 2006).

[274] *Id.* at *3.

[275] *Id.* at *3.

The Commission alleged that the formation of new company *Aventis* through the merger of *Hoechst AG/Rhone-Poulenc* eliminated actual potential and perceived potential competition in the market for cellulose acetate. Eastman Chemical Company, Celanese AG and the Primester joint venture accounted for 100% of U.S. production capacity of cellulose acetate. Primester was a 50-50 joint venture between Eastman and Rhodia. Rhodia was controlled by but not wholly owned by Rhone-Poulenc; it was entitled to 50% of the production of the Primester joint venture. Rhodia did not sell cellulose acetate in or into the United States. Rhone-Poulenc, because of its control of Rhodia and Rhodia's interest in Primester, was a potential supplier of cellulose acetate to the U.S. Through the merger, Aventis would succeed to Rhodia's interest in the Primester joint venture. Hoechst was not a participant in the U.S. market for cellulose acetate.

The Kuwait Petroleum Company ("KPC") held a 25 percent interest in Celanese, and, upon consummation of the merger of Hoechst and Rhone-Poulenc into Aventis, would hold a 12.5%-15% interest in Aventis. The Commission alleged that KPC controlled Celanese and would also have significant control of Rhodia, through its ownership interest in Aventis. The Commission recognized that, because of KPC's partial ownership interest of both Celanese and Aventis, the merger could allow KPC to coordinate the actions of Celanese and Rhodia (through Aventis) and the Primester joint venture; one potential effect would be to eliminate potential competition in the market for sales of cellulose acetate in the United States.[276]

In *Zeneca/Astra*, the Commission alleged that the merger would eliminate "actual potential competition" between Zeneca and Astra, and "reduce innovation" in the market for the manufacture and sale of long-acting local anesthetics. Astra was the leading supplier in the United States; Abbott Laboratories was the only other supplier. Zeneca did not, at the time of the merger, sell long-acting local anesthetics. However, it had entered into an agreement with Chiroscience to market and assist in the development of levobupivacaine, a long-acting local anesthetic under development by Chiroscience. Levobupivacaine was expected to be on the market in the near future. Through this agreement, "Zeneca [was] an actual potential competitor in the U.S. market for long-acting local anesthetics." (Zeneca also had a 3% interest in Chiroscience.)[277]

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[276] Hoechst AG, No. C-3919, 2000 WL 254668 (F.T.C. Jan. 18, 2000); Hoechst AG, No. C-3919, Analysis of Proposed Consent Order to Aid Public Comment (Dec. 7, 1999), https://www.ftc.gov/sites/default/files/documents/cases/1999/12/hoechstrana.htm.

[277] Zeneca Grp., 127 F.T.C. 874 (1999)

D. Exogenous Factors That May Impact Entry

1. Regulatory Hurdles

In *Medtronic/Covidien*, the Commission alleged that Medtronic's proposed acquisition of Covidien would eliminate future competition between the parties in the U.S. market for drug-coated balloon catheters used to treat peripheral arterial disease in the femoropopliteal ("fem-pop") artery. Neither Medtronic nor Covidien supplied the relevant product. However, they were the only two firms that had advanced to the clinical-trial stage of the FDA approval process, and, according to the Commission, were likely to be the second and third firms to enter the relevant market—the development, licensing, manufacturing, marketing, distribution, and sale of drug-coated balloon catheters indicated for the fem-pop artery. While there were other firms with drug-coated balloon catheters in development for sale in the U.S. market, the Commission rejected their potential effect on near-term competition because these prospective entrants had not advanced to the clinical-trial stage of the FDA approval process.[278]

In *Gencorp/Sequa*, Gencorp's intention to acquire substantially all of the assets of Sequa Corporation's subsidiary Atlantic Research Corporation (ARC) raised competitive concerns in multiple markets, including the market for bipropellant attitude control thrusters (BACTs). At the time of the proposed acquisition, ARC was the leading supplier of BACTs in the United States, and, for many customers, ARC essentially had a monopoly position in this market. Aerojet, a subsidiary of Gencorp, did not produce BACTs, but had substantial expertise in producing them and had produced them in the recent past. The Commission's investigation concluded that Aerojet was a likely potential entrant into this market and that the proposed acquisition would eliminate the most likely and effective potential entrant into the market for BACTs. The Commission also considered whether post-merger entry by foreign firms would prevent the combined firm from raising the price of, or reducing quality or innovation of, BACTs, but concluded that the firms seemingly well placed to enter were unlikely to do so. Foreign producers of in-space propulsion thrusters were subject to significant regulatory hurdles in supplying U.S. military and government projects and were thus unlikely to constrain the merged firm. In addition, on many U.S. Department of Defense as well as other U.S. governmental spacecraft programs, foreign-supplied thrusters were not an option due to national security issues. [279]

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[278] Medtronic, Inc., 159 F.T.C. 200 (2015).

[279] Gencorp Inc., 136 F.T.C. 1264 (2003).

2. Insufficient Market Demand

In *El Paso Energy/Coastal*, future market demand was thought insufficient to support entry of a third firm. The Commission alleged that the merger of El Paso Energy and Coastal would eliminate competition in the market for natural gas transportation in Central Florida.[280] El Paso owned a 50% interest in the Florida Gas Transmission Pipeline, the only interstate natural gas pipeline transporting natural gas to Central Florida. Coastal, which did not transport natural gas into Central Florida, had proposed building the Gulfstream Natural Gas System to allow it to do so. At the time of the merger, it had long-term future transportation agreements with ten Florida utilities and power-generation facilities, representing commitments for the majority of its daily transportation capacity. The Commission identified Coastal as an "ongoing competitor[], actual potential competitor[], and perceived potential competitor[],"and concluded that the merger would eliminate that competition and have the effect of maintaining price and reducing output of natural gas transportation in Central Florida. However, the Commission did not find future entry by another firm likely. At the time of the proposed merger, Duke Energy and the Williams Companies were developing the Buccaneer Pipeline, another pipeline that, in the future, would, if operating, transport natural gas in Central Florida.[281] The Commission did not find the Buccaneer Pipeline to be a likely participant in the market because insufficient demand for a third pipeline made it unlikely that it would come into service.[282]

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[280] El Paso Energy Corp., 131 F.T.C. 704, 719 (2001).

[281] *See Duke Energy, Williams to buy Gulfstream pipeline, suspend Buccaneer plans*, OIL & GAS J. (Nov. 17, 2000), https://www.ogj.com/pipelines-transportation/article/17252160/duke-energy-williams-to-buy-gulfstream-pipeline-suspend-buccaneer-plans; *Economic Impacts of the proposed Buccaneer Natural Gas Pipeline*, S. FLA. REG'L PLANNING COUNCIL (March 2000), http://www.sfrpc.com/ftp/pub/sfefp/TBRPCBuccaneerNGasPipeline.pdf.

[282] *El Paso Energy Corp.*, 131 F.T.C. at 708-09. *See also* LCG Consulting, *Duke, Williams to Buy Rival Pipeline Project*, ENERGY ONLINE (Nov. 20, 2000), http://www.energyonline.com/Industry/News.aspx?NewsID=4138&Duke%2c_Williams_to_Buy_Rival_Pipeline_Project; NGI Staff Reports, *Joint Buccaneer, Gulfstream Line Proposed*, NAT. GAS INTELLIGENCE (Sept. 4, 2000), https://www.naturalgasintel.com/joint-buccaneer-gulfstream-line-proposed/; Stacie Kress Booker, *Around the State- Southwest/Tampa Bay: The Florida Pipeline,* FLA. TREND (Feb. 1, 2000), https://www.floridatrend.com/article/13255/around-the-state-southwest-tampa-bay-feb-2000.

Consistent with a conclusion that the Buccaneer pipeline was not a potential alternative to the merging entity, the Commission approved Duke Energy and the Williams Company as the divestiture buyer of Coastal's in-development Gulfstream pipeline. *El Paso Energy Corp.*, 131 F.T.C. at 738; *FTC Clears Merger of El Paso Energy and Coastal Corp.*, FED. TRADE COMM'N (Jan. 29, 2001), https://www.ftc.gov/news-events/press-releases/2001/01/ftc-clears-merger-el-paso-energy-and-coastal-corp.

V. THEORIES OF HARM IN POTENTIAL COMPETITION MATTERS

A. Elimination of a Significant Potential Entrant

An acquisition of a potential or future competitor (or combination of two potential or future competitors) is likely to raise significant competitive concerns when it is the only firm or one of only a few firms attempting to enter the relevant market.[283]

Examples of Commission challenges to mergers where one or both of the parties was identified as a potential entrant and the only firm, or two of only a few firms, capable of entering the relevant market for an *existing product* (or service) include (but are not limited to) *Bristol-Myers Squibb/Celgene,*[284] *Össur/College Park,*[285] *Novartis/GlaxoSmithKline,*[286] *Medtronic/Covidien*,[287] *Inverness/ACON*,[288] *Polypore*,[289] *Thoratec/Heartware*,[290] *Whole*

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[283] 2010 HORIZONTAL MERGER GUIDELINES at §5.3 ("In analyzing mergers between an incumbent and a recent or potential entrant, to the extent the Agencies use the change in concentration to evaluate competitive effects, they will do so using projected market shares. A merger between an incumbent and a potential entrant can raise significant competitive concerns. The lessening of competition resulting from such a merger is more likely to be substantial, the larger is the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater is the competitive threat posed by this potential entrant relative to others."); 1984 MERGER GUIDELINES at 26 ("[t]he Department is increasingly likely to challenge a merger as the number of other similarly situated firms decreases below three and as the extent of the entry advantage over non-advantaged firms increases. If the evidence of likely actual entry by the acquiring firm is particularly strong, however, the Department may challenge a potential competition merger, notwithstanding the presence of three of more firms that are objectively similarly situated.")

[284] Bristol-Myers Squibb Co., No. C-4690, 2019 WL 6168274 (F.T.C. Nov. 15, 2019).

[285] Complaint, Össur Hf./College Park Industries, No. C-4712 (F.T.C. 2020), https://www.ftc.gov/system/files/documents/cases/191_0177_ossur_college_park_complaint.pdf.

[286] Complaint, Novartis AG/GlaxoSmithKline, PLC., No. C-4510 (FTC 2015), https://www.ftc.gov/system/files/documents/cases/complaint_0.pdf.

[287] Medtronic, Inc., 159 F.T.C. 200 (2015) (Medtronic and Covidien were the likely second and third firms to enter the market for drug-coated balloon catheters used to treat peripheral arterial disease in the femoropopliteal artery; no other firm, other than the market incumbent, had advanced to the clinical trial stage of the FDA process.) This matter is discussed at p. 61.

[288] Complaint, Inverness Medical Innovations, No. C-4244 (FTC, Jan. 23, 2009), https://www.ftc.gov/sites/default/files/documents/cases/2009/01/090127invernesscmpt.pdf; Analysis to Aid Public Comment, Inverness Medical Innovations, No. C-4244 (FTC, Dec. 2009), https://www.ftc.gov/sites/default/files/documents/cases/2008/12/081223invernessanal.pdf. This matter is discussed at pp. 95-96.

[289] Polypore Int'l, Inc., 150 F.T.C. 586, 613-22 (2010), aff'd. Polypore International v. F.T.C., 686 F.3d 1208, 1214-15 (11th Cir. 2012). This matter is discussed at pp. 54-56.

[290] Thoratec Corp., No. 091-0064, 2009 WL 2402681 (F.T.C. 2009). This matter is discussed at p. 96.

Foods/Wild Oats[291] (entry into geographic market), *Gencorp/Sequa,*[292] *Amgen/Immunex*,[293] *El Paso Energy/Coastal,* [294] *Staples/Office Depot,* [295] *Hoechst/Rhone-Poulenc,* [296] *Roche/Genentech,* [297] and *Institut Mérieux/Connaught BioSciences.* [298] Other matters, discussed below, include *Boston Scientific/Guidant* and *Johnson & Johnson/Guidant, Glaxo Wellcome/SmithKline Beecham, ABB AB/Elsag Bailey Process Automation* and *Boston Scientific/SCIMED Life Systems.* Non-horizontal mergers may raise the same concern when, absent the merger, one party to the merger might expand its current product or service offerings and compete with its merger partner. *Cytec/Digene* [299] and *Barnes & Noble/Ingram*[300] are examples; in *Staples/Essendant*, the Commission considered whether

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[291] Administrative Complaint, Whole Foods Market/Wild Oats Markets, No. 9324 (June 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/06/070628admincmplt.pdf. This matter is discussed at pp. 41-42, 87.

[292] Gencorp Inc., 136 F.T.C. 1264 (2003) (Sequa, through its subsidiary Atlantic Research Corporation, was the leading supplier of bipropellant attitude control thrusters; Gencorp.'s subsidiary Aeroject was the most likely entrant.) This matter is discussed at p. 61.

[293] Amgen Inc., 134 F.T.C. 333 (2002) ("proposed merger… would cause significant anticompetiive effects in the U.S. IL-1 inhibitor market by eliminating Amgen's most significant (and likely only) potential competitor, Immunex"). This matter is discussed at 70-71.

[294] El Paso Energy Corp., 131 F.T.C. 704 (2001) (El Paso was a 50% owner of the only interstate natural gas pipeline transporting natural gas to Central Florida and Coastal had proposed building a natural gas system to transport natural gas to Central Florida; no other pipeline was expected to come into service in the near future.) This matter is discussed at pp. 80-81.

[295] Complaint for Temp. Restraining Order & Preliminary Injunction Pursuant to Section 13(b) of the Fed. Trade Comm'n Act, FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) (No. 1:97CV00701), https://www.ftc.gov/sites/default/files/documents/cases/1997/04/staples2.pdf. This matter is discussed at p. 41.

[296] Hoechst AG, No. C-3919, 2000 WL 254668 (F.T.C. Jan. 18, 2000). This matter is discussed at p. 60.

[297] Roche Holding Ltd., 113 F.T.C. 1086 (1990) (elimination of potential competition in the market for Vitamin C, where Roche was the market leader and Genetech was a potential entrant, and in the market for therapeutics for treatment of human growth hormone deficiency, where Genetech was a near-monopolist and Roche was a potential entrant). This matter is discussed at pp. 41, 43, 51-52.

[298] Institut Mérieux S.A., 113 F.T.C. 742 (1990) (elimination of potential competition in the market for rabies vaccine, where Mérieux was the only firm selling the rabies vaccine nationwide, and Connaught was one of two potential entrants, and in the market for inactivated polio vaccine, where Connaught was a monopolist and Mérieux was one of two potential entrants). This matter is discussed at pp. 41-42.

[299] Cytec/Digene is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 7-8.

[300] Barnes & Noble/Ingram is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 6.

either of the parties would move into the space occupied by the other, but there was insufficient evidence to support a potential competition case.[301]

In *Boston Scientific/Guidant* and *Johnson & Johnson/Guidant*, the Commission evaluated competing bids to acquire Guidant. Boston Scientific (BSC) and Johnson and Johnson (J&J) were the only two firms selling coronary drug eluting stents (DESs) in the United States. Guidant was one of three firms engaged in the research and development of coronary DESs. Each of the three firms expected to receive FDA approval to sell coronary DESs in the United States within two to three years from the time of the proposed merger. However, BSC, J&J, and Guidant were the only three firms with access to the intellectual property covering rapid exchange versions of coronary DESs. Rapid exchange coronary DESs comprised over 70% of coronary DESs sold in the United States, and the Commission believed that percentage was likely to increase rapidly. The Commission alleged that BSC's proposed acquisition of Guidant and J&J's proposed acquisition of Guidant would "eliminat[e] potential competition between two of only three suppliers of Coronary Drug Eluting Stents with access to a Rapid Exchange delivery system." The Commission also alleged that either transaction, if consummated, would reduce research and development in the relevant market.[302]

In *ABB AB/Elsag Bailey Process Automation,* the Commission alleged that the acquisition of Elsag Bailey by ABB would eliminate actual potential competition in the market for process mass spectrometers. ABB manufactured and sold process mass spectrometers. Elsag Bailey was engaged in the research and development of process mass spectrometers and planned to begin manufacturing and selling process mass spectrometers within the next year. The Commission characterized Elsag Bailey as an actual potential competitor in the relevant market for the manufacture and sale of process mass spectrometers, and charged that the transaction would eliminate future, imminent competition between ABB and Elsag Bailey increased the likelihood that customers of process mass spectrometers would pay higher prices and reduce innovation in the market for the manufacture and sale of process mass spectrometers.[303]

In *Boston Scientific/SCIMED Life Systems*, the Commission alleged that Boston Scientific's (BSC) acquisition of SCIMED would eliminate a potential competitor in the highly

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[301] See 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 (Jan. 2019), https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf.

[302] Boston Sci. Corp., No. C-4164, 2006 WL 2330115, at *3 (F.T.C. July 21, 2006); *Johnson & Johnson*, 140 F.T.C. 1062, 1067.

[303] ABB AB, 127 F.T.C. 494 (1999).

concentrated market for intravascular ultrasound (IVUS) catheters (including imaging catheters, imaging cores, and imaging guidewires. BSC and Cardiovascular Imaging Systems (CVIS) were the two leading competitors in the market for IVUS catheters. (BSC had, at the time of the merger, also entered into an agreement to acquire CVIS.) SCIMED had conducted substantial research and development with respect to IVUS catheters, and after several years of work, had developed a prototype imaging guidewire. The Commission alleged that, but for its acquisition by Boston Scientific, SCIMED, which had the capacity, incentives, and economic interest for entry, was likely to enter the U.S. IVUS catheter market within two to three years. The Commission's investigation had identified no firm with an entry advantage similar to SCIMED's and concluded that the acquisition would eliminate the most likely potential entrant to the relevant markets. Its acquisition by BSC would eliminate competition in research and development of IVUS catheters, likely result in diminished product innovation and higher prices, and, by combining the patent portfolios of the merging parties, make entry into the IVUS catheter market more difficult. [304]

Teva/Allergan, [305] *Nielsen/Arbitron*, [306] *Watson Pharmaceuticals/Actavis*, [307] *BP Amoco/Atlantic Richfield*, [308] *Upjohn/Pharmacia*[309] and *Roche/Genentech*[310] are examples of matters where the Commission alleged competitive harm from the combination of a very small number of potential or future competitors in a market for a future product. *Bayer/Aventis*, [311] *Dow Chemical/Union Carbide*, [312] and *Ciba-Geigy/Sandoz*[313] are examples of matters where the Commission alleged a substantial lessening of competition from the acquisition of one of only one or one of only a few potential entrants in a market for technology.

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[304] Boston Scientific Corp., 119 F.T.C. 549 (1995).

[305] Teva Pharm. Indus. Ltd., No. C-4589, 2016 WL 4128219 (F.T.C. July 26, 2016). This matter is discussed at pp. 42, 74, and 80.

[306] Nielsen Holdings N.V., No. C-4439, 2014 WL 869523 (F.T.C. Feb. 24, 2014). This matter is discussed at p. 42.

[307] Complaint, Watson Pharmaceuticals/Actavis, No. C-4373 (FTC 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/12/121015watsonactaviscmpt.pdf. This matter is discussed at pp. 42-43.

[308] BP Amoco P.L.C., No. C-3938, 2000 WL 422209 (F.T.C. Apr. 13, 2000). This matter is discussed at p. 42.

[309] The Upjohn Co., 121 F.T.C. 44, 45 (1996). This matter is discussed at pp. 43, 50.

[310] Roche Holding Ltd., 113 F.T.C. 1086 (1990). This matter is discussed at pp. 41, 43, 51-52.

[311] Bayer AG, 134 F.T.C. 184 (2002). This matter is discussed at pp. 46-47, 48.

[312] Dow Chemical Co., 131 F.T.C. 600 (2001). This matter is discussed at 45-46.

[313] Ciba-Geigy Limited, 123 F.T.C. 842 (1997). This matter is discussed at 47-48.

Conversely, where the merging firms do not presently compete but absent the merger might compete in the future, the Commission may not identify a competitive concern where the firms are not likely to be uniquely close competitors. Examples include *Google/DoubleClick*, *Roche/Spark Therapeutics*, and *Pfizer/Wyeth*.

In *Google/DoubleClick*, the Commission "assessed whether the evidence supported a challenge on the theory that the transaction would eliminate potential competition" between the firms. Google's primary business was the sale of advertising through its search engine and its ad intermediation product. DoubleClick sold two third-party ad serving products. Google had been developing a third-party ad serving solution prior to its agreement to purchase DoubleClick, and therefore "[was at the time of the merger] a potential future competitor of DoubleClick." However, "for the elimination of this potential competition to be a competitive concern, Google must be uniquely positioned to have a substantial competition-enhancing effect on the third party ad serving markets." According to the Commission:

> A pivotal consideration in any potential competition case is the current market dynamic. In this case, Google's entry is unlikely to have a significant procompetitive effect because the evidence shows that the third party ad serving markets are competitive despite relatively high levels of concentration in both markets. Although DoubleClick enjoys a significant share of today's third party ad serving markets, it does not appear that DoubleClick has market power in these markets. More specifically, prices and margins in the third party ad serving markets have eroded substantially over the past few years. The evidence shows that this decline in prices and margins is largely attributable to aggressive competition. Further, the evidence indicates that ad serving has become a commodity good, as competition from small third party ad serving competitors has forced larger competitors to slash prices. The recent acquisitions of existing third party ad servers by firms with significant financial resources are likely to increase further the competitiveness of this market.
>
> In addition, there is no evidence that Google's developmental product is unique relative to existing third party ad servers, nor is the evidence clear that Google is certain to be successful in winning customers for these products. For these reasons, we have concluded that it is unlikely that the elimination of

> Google as a potential competitor in the third party ad serving markets would have a significant impact on competition.[314]

The Commission also assessed the likelihood of competitive harm from the elimination of potential competition in the market for ad intermediation, because DoubleClick was developing an ad exchange product that would compete with Google's ad intermediation product. The Commission concluded that the ad intermediation market was highly fragmented and competitive, and there was no evidence suggesting that DoubleClick was uniquely positioned to "significantly enhance competition" in the market. The Commission concluded that "the elimination of DoubleClick as a potential competitor [was] not likely to have a meaningful impact on competition."[315]

In *Roche/Spark Therapeutics*, the Commission reviewed Roche's proposed acquisition of Spark Therapeutics to determine whether it would eliminate or limit competition in a market for treatments of hemophilia A. Roche's treatment for hemophilia A, Hemlibra, was a relatively new but potentially leading treatment. Other existing treatments include Factor VIII replacement therapy and bypassing agents. Gene therapies are recognized as having the potential to significantly improve the treatment of (and possibly cure) hemophilia A, eliminating the need for additional treatment. However, there was no approved gene therapy for treatment of hemophilia A. Additionally, the likelihood and degree of competition between gene therapies and other therapies is unknown and uncertain.

Spark was one of several companies developing a gene therapy treatment for hemophilia A. Two firms (in addition to Spark) were conducting clinical trials. Other firms had not reached the clinical stage. The Commission considered whether the acquisition of Spark would slow the development of Spark's gene therapy: if Spark's gene therapy would be first-to-market or best in class, Roche could have the incentive to delay its development to avoid competition between it and Hemlibra. After a ten-month investigation, the Commission concluded that, "as the other companies endeavor to bring their gene therapies to market, Roche would have the incentive to accelerate, rather than decelerate the development of Spark's gene therapy

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[314] Statement of Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 2007), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

[315] Id. One Commissioner dissented from the closing of the investigation. See Dissenting Statement of Commissioner Pamela Jones Harbour, in the Matter of Google/DoubleClick, FTC File No. 071-0170 (Dec. 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf.

in order to compete for gene therapy patients" and closed the investigation.[316]

Pfizer/Wyeth (2010) is another example. The Commission alleged that Pfizer's proposed acquisition of Wyeth eliminated competition in 21 markets for animal vaccines. Additionally, the Commission investigated whether the transaction "threatened to eliminate potential future competition in any relevant market." The Commission recognized that "there [were] a small number of diseases or conditions for which Pfizer or Wyeth markets a product where the other company [was] developing a potentially competitive product." The Commission "extensively investigated Alzheimer's disease treatments." Pfizer marketed the leading drug to treat Alzheimer's disease; Wyeth had no products on the market but had several products in development. The Commission noted that "a significant number of other companies, including both large and small pharmaceutical companies and biotechnology companies, have products in development for the treatment of the disease" and, at the time of the merger, "there [were] approximately 50 companies with at least 66 products in various phases of development." Further, Pfizer and Wyeth overlapped in only a small number of the several different therapeutic approaches being pursued for Alzheimer's disease, and, in those therapeutic areas where they did overlap, "there [were] several other companies also developing products. The Commission concluded that "Pfizer and Wyeth's products [were] unlikely to be sufficiently close competitors that the elimination of competition between them would affect the competitiveness of any relevant human health market" and "the most likely outcome is that they each will compete more closely with products from other companies."[317]

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[316] Statement of the Federal Trade Commission in re Roche Holdings/Spark Therapeutics, Commission Matter No. 1910086 (Dec. 16, 2019), https://www.ftc.gov/system/files/documents/public_statements/1558049/1910086_roche-spark_commission_statement_12-16-19.pdf.

[317] Complaint, Pfizer Inc., No. C-4267 (F.T.C. Oct. 14, 2009), https://www.ftc.gov/sites/default/files/documents/cases/2010/01/091014pwyethcmpt.pdf; Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comment, Pfizer Inc., No. C-4267 (F.T.C. Oct. 2009), https://www.ftc.gov/sites/default/files/documents/cases/2009/10/091014pwyethanal.pdf; Statement of the Federal Trade Commission Concerning Pfizer/Wyeth (2009), https://www.ftc.gov/sites/default/files/documents/cases/2009/10/091014pwyethstmt.pdf.

The Commission also determined that "the combination of the intellectual property of Pfizer with that of Wyeth would not pose any greater barrier to entry to third-party companies than the intellectual property held by the companies individually." The Commission further found that the evidence did not support a concern that the transaction "would decrease basic research or the pace of innovation in pharmaceutical markets by eliminating a leader in pharmaceutical research and development."

1. Factors That May Impact Significance of Potential Entrant

a. Certainty of Entry

Neither the Horizonal Merger Guidelines nor the Vertical Merger Guidelines discuss what level of certainty is necessary for a non-incumbent firm to be considered a potential or future entrant. As discussed earlier, the appellate courts have articulated different standards. The Commission too has articulated varying standards. In the *Competitor Collaboration Guidelines* the Commission (and the Department of Justice) articulated a standard of "reasonable probability" of entry to identify potential competitors: "A firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable … or that competitively significant decisions by actual competitors are constrained by concerns that anticompetitive conduct likely would induce the firm to enter."[318] The "reasonable probability" standard is not defined with specificity, but it is notable that the Commission has acted to challenge mergers where the likelihood of entry of one or both parties to the merger appears to have been significantly less than 50 percent.

In *Pfizer/Pharmacia*, the Commission alleged that Pfizer's acquisition of Pharmacia would, among other effects, "eliminat[e] actual, direct, and substantial competition between Pfizer and Pharmacia in the market for the research and development of prescription drugs for the treatment of [erectile dysfunction]" … and "eliminat[e] potential competition between Pfizer and Pharmacia in the market for the manufacture and sale of prescription drugs for the treatment of ED." By eliminating potential competition from Pharmacia, the merger "increase[ed] … the likelihood that the combined entity would delay or forego the launch of Pharmacia's intranasal apomorphine (IN APO) and D2 dopamine receptor agonist (PNU-142, 774) products" and "increase[ed] the likelihood that the combined entity would delay or eliminate the additional price competition that would have resulted from Pharmacia's entry into the market for ED products." Pharmacia's products were in "early clinical development."[319] Although the Commission did not quantify or otherwise describe the likelihood of entry, "early clinical development" seems consistent with a relatively low probability or certainty of entry.

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[318] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 2 (at note 6) (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [hereinafter Collaboration Guidelines].

[319] Pfizer Inc., 135 F.T.C. 608 (2003). With the exception of Pharmacia's two products in development, entry into the market for drugs to treat ED was unlikely. Pfizer owned an extensive patent portfolio that protected Viagra. Patent litigation initiated by Pfizer with the most significant potential entrants was likely to prevent entry in the two years following the merger.

In *Amgen/Immunex*, the Commission alleged that Amgen's proposed acquisition of Immunex would reduce innovation competition in the research, development, and commercialization of IL-1 Inhibitor products, and eliminate potential competition in the market for IL-1 Inhibitor products. Amgen, Immunex, and Regeneron were the only companies developing second-generation Interleukin-1 (IL-1) Inhibitors, and Regeneron was unlikely to succeed in commercializing its IL-1 Inhibitor product because its product likely infringed on Immunex's patent rights. IL-1 Inhibitors treated Rheumatoid arthritis and other autoimmune diseases. Amgen had a first-generation product, Kineret, on the market. It also had R&D efforts directed at a second-generation product. Immunex was in Phase I trials of its product. The Commission alleged the loss of potential competition even though Immunex's IL-1 Inhibitor was only in Phase I clinical trials.[320]

In *Roche/Genentech* the Commission alleged harm to future competition in three markets, where one or both of the parties were no further along than the early-stage research or development of a product. In the market for vitamin C, Roche was the market leader; Genentech did not participate in the market but had developed a patented process for producing vitamin C. In the market for therapeutics for treatment of human growth hormone ("HGH") deficiency and HGH releasing factor, Genentech had a near-monopoly and Roche had conducted advanced clinical trials for a product that would compete with HGH (HGH releasing factor). In the market for CD4-based therapeutics for the treatment of AIDS and HIV infection, neither Genentech nor Roche (nor any other firm) had a product on the market. Genentech was the most advanced of a limited number of companies developing such a therapeutic; Roche had engaged in research and development of CD4-based therapeutics and had patent applications pending on its products. The Commission alleged that the merger eliminated potential competition in all three markets.[321]

In *Steris/Synergy*, the Commission alleged that Steris's proposed acquisition of Synergy Health would eliminate future competition from Synergy in the market for contract radiation sterilization services. Steris and Sterigenics International were the only two firms that provided gamma ray sterilization services in the United States. According to the Commission,

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[320] Amgen Inc., 134 F.T.C. 333 (2002). The Commission also acted to prevent harm to competition in a market for tumor necrosis factor ("TNF") inhibitors that treated Rheumatoid arthritis and other autoimmune diseases. At the time of the acquisition, Immunex had a soluble TNF inhibitor on the market, and Amgen had a soluble TNF inhibitor in late Phase II clinical trials. No other firm was developing or marketing soluble TNF inhibitors. Only one other company had a TNF inhibitor on the market, and two other firms had products in clinical trials. Notwithstanding the uncertainty of Amgen's TNF inhibitor moving to market, the Commission alleged that Amgen's proposed acquisition of Immunex would reduce innovation competition in the research, development, and commercialization of TNF inhibitors and eliminate potential competition in the market for a TNF inhibitor product.

[321] Roche Holding Ltd., 113 F.T.C. 1086, 1088-89 (1990).

X-Ray radiation sterilization is a close substitute for gamma ray sterilization. Synergy provided other types of sterilization services in the United States and was a leading provider of gamma ray sterilization services outside the United States. The Commission alleged that:

> Synergy ha[d] entry advantages in x-ray that no other firm can match, including its global scale, a reputation as a quality service provider, a head-start of several years, and, as of the date of the transaction, a ten-year exclusive agreement with the world's only supplier of commercially viable x-ray sterilization machines. No other firm is attempting to enter the United States with x-ray sterilization services capable of competing effectively with gamma sterilization. … Synergy's entry into the United States with contract x-ray sterilization services would compete directly with Steris and Sterigenics' contract gamma businesses and would produce substantial consumer benefits that no other market participant or potential entrant could replicate.[322]

The Commission alleged that Steris's proposed acquisition of Synergy "eliminat[ed] … the likely future competition from Synergy's deployment of x-ray sterilization in the United States."[323] According to the Commission:

> Steris and Sterigenics [were] two of the three significant contract radiation sterilization providers and the only two contract gamma providers in the United States in each of the geographic markets at issue. Synergy, as the only major worldwide sterilization company without a gamma offering in the United States, was on the verge of entering with what it considered to be a disruptive sterilization technology, x-ray, that would allow it to compete directly for Steris and Sterigenics' customers.[324]

During the Commission's investigation of the proposed merger, Synergy abandoned its plans to enter the U.S. market. The Commission sought a preliminary injunction to halt the transaction pending an administrative trial at the Commission, arguing that the merger with Steris caused Synergy to abandon its plans to enter. The court focused its inquiry on "whether, absent the acquisition, the evidence shows that Synergy probably would have entered the U.S. contract sterilization market by building one or more x-ray facilities within

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[322] Steris Corp., 160 F.T.C. 987, 988, 993, 1005, 1009-10 (2015) (Complaint).

[323] *Id.* at 1009.

[324] *Id.* at 1009-10.

a reasonable period of time."[325] Despite Synergy's significant entry advantages and what the Commission believed were advanced plans to enter, the court found sufficient evidence that Synergy had abandoned its plans for entry because it could not obtain sufficient customer commitment to use x-ray sterilization and could not obtain the capital required to build x-ray facilities in the U.S. The court found that the FTC had failed to show "by a preponderance of the evidence" that it was likely to succeed on the merits in an administrative trial and denied the agency's request for a preliminary injunction.[326]

b. Multiple Future Entrants

Where the Commission has evidence that more than one firm may be a future entrant in a relevant market and the merger will eliminate only one such future entrant, the Commission may still allege harm from the merger. For example, in *Hikma/Boehinger*, the Commission alleged that Hikma's proposed acquisition of certain assets of Boehringer would eliminate competition in the markets for five generic injectable pharmaceutical products. The proposed transaction would have reduced the number of likely future suppliers of generic injectable acyclovir sodium from five to four, and the number of likely future suppliers of generic injectable diltiazem hydrochloride, generic injectable hydrochloride, generic injectable prochlorperazine edisylate and generic injectable valproate sodium from four to three.[327]

In *Schering-Plough*, the Commission challenged Schering-Plough's proposed acquisition of Merck. Merck was the only supplier of neurokinin 1 ("NK1") receptor antagonists for chemotherapy-induced nausea and vomiting ("CINV") and post-operative nausea and vomiting ("PONV") in humans. According to the Commission, only two firms had NK1 receptor antagonists for CINV and PONV in development. Schering-Plough, with its in-development product Rolapitant, was one of those firms. (Schering-Plough was in the process of out-licensing its product to another firm.) The other potential entrant had nearly completed clinical trials and was on track to gain FDA approval ahead of Schering-Plough. However, as Schering-Plough was one of only two potential future entrants into the market, the Commission alleged that the transaction raised significant future competition concerns; the proposed transaction would diminish the combined firm's incentive to license Schering's

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[325] In this, the court accepted the Commission's standard. According to the Commission, "the acquisition of an actual potential competitor violates Section 7 if (1) the relevant market is highly concentrated, (2) the competitor probably would have entered the market, (3) its entry would have had procompetitive effects, and (4) there are few other firms that can enter effectively." FTC v. Steris Corp., 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015).

[326] FTC v. Steris Corp., 133 F. Supp. 3d 962, 978 (N.D. Ohio 2015).

[327] Complaint, Hikma Pharmaceuticals PLC, No. C-4572 (F.T.C., Mar. 28, 2016), https://www.ftc.gov/system/files/documents/cases/160331hikmaboehringercmpt.pdf.

product, as its future launch could have a significant impact on the revenues of Merck's first-to-market product.[328]

For examples of situations where the Commission did not allege harm to competition when there were multiple potential entrants, see *Google/DoubleClick* [329] , *Roche/Spark Therapeutics*,[330] and *Pfizer/Wyeth*.[331]

c. Timing & Order of Future Entry

The Commission considers the timing of future entry by firms other than the merging parties in evaluating the competitive effects of a transaction. Where a merger between an incumbent supplier and the firm closest to entry would delay future competition until additional firms enter, the Commission has sought to ensure that future competition occurs earlier rather than later. In *Teva/Allergan*, the Commission challenged Teva's proposed acquisition of Allergan's generic pharmaceutical business. Both Teva and Allergan were significant suppliers of generic pharmaceutical products. The Commission identified 24 markets where the combination would eliminate future competition between the two firms. (In some markets, both firms were potential entrants, and in other markets, one firm was an actual supplier and the other was a potential entrant.) Firms other than the combining parties had also submitted Abbreviated New Drug Applications ("ANDAs") for many of the relevant products. The Commission recognized those firms as likely entrants into the relevant market. However, the FDA approval process might delay the entry of these firms beyond the entry of Teva or Allergan. The Commission concluded that the acquisition would result in harm, notwithstanding the likely entry of additional competitors.[332]

B. Loss of Innovation Competition in an Existing or Future Product Market

The Agencies "may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products."[333]

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[328] Schering-Plough Corp., No. C-4268, 2009 WL 3683186, at *2 (F.T.C. Oct. 29, 2009).

[329] This matter is discussed at pp. 67-68.

[330] This matter is discussed at pp. 68-69.

[331] This matter is discussed at p. 69.

[332] Teva Pharm. Indus. Ltd., No. C-4589, 2016 WL 4128219 (F.T.C. July 26, 2016).

[333] 2010 HORIZONTAL MERGER GUIDELINES at 23. A vertical merger may also diminish the incentive for the combined firm to engage in innovation or to support innovation efforts by competitors. *See, e.g.*, Administrative

"The first of these effects is most likely to occur if at least one of the merging firms is *engaging in efforts* to introduce new products that would capture substantial revenues from the other merging firm."[334] *Thoratec/Heartware*,[335] *Boston Scientific/Guidant*,[336] *Amgen/Immunex*,[337] *Pfizer/Pharmacia*,[338] and *Pfizer/Warner-Lambert*,[339] are examples of challenges to mergers involving potential competitors that would, according to the Commission, reduce innovation competition. In each, the Commission raised concerns about the continued incentive of the combined firm to continue to develop, or develop as quickly, differentiated products of the potential entrant that might cannibalize sales of the acquiring firm's existing products.

Glaxo Wellcome/SmithKline Beecham is another such matter. In *Glaxo Wellcome/SmithKline Beecham*, the Commission alleged that the merger would eliminate competition in three

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Complaint, Lockheed Martin, No. 9405 (F.T.C., Jan. 25, 2022) (merger of Lockheed Martin, prime contractor for missile development, and Aerojet Rocketdyne Holdings, supplier of critical propulsion technologies, may result in diminished innovation, as post-merger the combined firm would have the incentive and ability to disadvantage rival missile developers by, among other things, failing to provide pre-acquisition levels of research investment, in order to shift future prime missile contracts to Lockheed), https://www.ftc.gov/system/files/documents/cases/d09405lockheedaerojetp3complaintpublic.pdf; Administrative Complaint, Nvidia Corp., No. 9404 (F.T.C., Dec. 2, 2021) (rivals to combined firm would be less likely to share information necessary to innovate because combined firm could misuse this information and combined firm would have less incentive to pursue innovation that would benefit competitors), https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf.

[334] 2010 HORIZONTAL MERGER GUIDELINES at 23. (emphasis added).

[335] Thoratec Corp., No. 091-0064, 2009 WL 2402681 (F.T.C. 2009) ("of Thoratec's competitors, only Heartware poses a potential significant threat … [to] rapidly erose Thoratec's monopoly … [and] will quickly take market share from Thoratec. Competition from Heartware has already forced Thoratec to innovate even though [Heartware's product] is still in clinical trials. … Proposed acquisition will … elimina[e] innovation competition."). This matter is discussed at p. 96.

[336] Boston Sci. Corp., No. C-4164, 2006 WL 2330115 (F.T.C. July 21, 2006) (transaction will reduce potential competition and research and development in the market for Coronary Drug Eluting Stents). This matter is discussed at p. 65.

[337] Amgen Inc., 134 F.T.C. 333, 340 (2002) ("effects of the merger, if consummated" include "reducing innovation competition in the research, development and commercialization of (a) neutrophil regeneration, (b) TNF Inhibitor, and (c) IL-1 Inhibitor products"). This matter is discussed at pp. 70-71.

[338] Pfizer Inc., 135 F.T.C. 608 (2003) (merger would eliminate potential competition in the market for prescription drugs to treat erectile dysfunction and actual competition in the market for the research and development of prescription drugs for the treatment of erectile dysfunction). This matter is discussed at pp. 70.

[339] Pfizer Inc., No. C-3957, 2000 WL 1088335 (F.T.C. July 27, 2000). The Commission alleged that Pfizer's acquisition of Warner Lambert increased the likelihood that the combined firm would unilaterally delay, deter or eliminate competing programs to research and develop Epidermal Growth Factor receptor tyrosine kinase (EGFr-tk) inhibitors for the treatment of cancer, potentially reducing the number of drugs reaching the market and thus resulting in higher prices for consumers. The FDA had not approved any EGFr-tk inhibitors for the treatment of cancer. The market for the research, development, manufacture and sale of EGFr-tk inhibitors for the treatment of cancer was highly concentrated; only four companies, including Pfizer (with its development partner OSI Pharmaceuticals) and Warner Lambert, were in human clinical testing.

markets where one or both firms was a potential entrant. First, the merger would eliminate competition between the two firms likely to be the first two competitors to reach the market with prophylactic herpes vaccines. At the time of the proposed merger, SmithKline had the most advanced development effort towards a herpes vaccine. Glaxo, in conjunction with a partner, had been developing a vaccine for Herpes Simplex Virus infection. Other firms that had undertaken efforts to develop a vaccine had failed in their efforts or were far behind the merging parties and had vaccines only in pre-clinical stages of testing. The Commission alleged that the merger was likely to "chill certain innovations in a very complex area as a combined Glaxo SmithKline would potentially forego the development efforts of one of the firms." The Commission further alleged that if both products were developed, the merger would eliminate future price competition between the two prophylactic vaccines. [340]

The Commission also alleged that the merger would eliminate competition in two other markets where one firm was on the market and the other was a potential entrant: (i) the market for research, development, manufacture, and sale of topoisomerase I inhibitors; and (ii) the market for topical prescription herpes antivirals. With respect to topoisomerase I inhibitors, SmithKline's drug Hycamptin was a leading second-line therapy for ovarian and non–small cell lung cancer. There was only one other topoisomerase I inhibitor on the market; it was indicated for treatment of colorectal cancer. Glaxo maintained rights in a topoisomerase I inhibitor formulation for ovarian, non–small cell lung cancer, and other solid tumor indications. The Commission's investigation did not identify any other topoisomerase I inhibitor in development. According to the Commission, as a result of the merger, the combined entity could unilaterally delay, terminate, or otherwise fail to develop the Glaxo topoisomerase I inhibitor, resulting in less product innovation, fewer choices, and higher prices for consumers.[341]

The merger also combined SmithKline, a monopolist in the market for research, development, manufacture, and sale of topical prescription herpes antivirals with Glaxo, the only potential entrant. Prior to the merger, Glaxo was in the final stages of seeking FDA approval for a cream formulation of its product, Zovirex, for the treatment of oral herpes. (Zovirex was the "dominant prescription cold sore product in … Europe.") After announcement of the merger, Glaxo withdrew the application for FDA approval of Zovirex, without prejudice to its refiling its NDA with the FDA; but for the withdrawal, Glaxo's product could have been on the market in less than one year. The Commission's investigation did not identify any other companies working on a prescription topical treatment for oral herpes.[342]

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[340] Glaxo Wellcome PLC, 131 F.T.C. 56, 62, 64, 147 (2001).

[341] Id. at 62-65.

[342] Id. at 61-63, 65, 143-44.

The Commission believed it was "highly unlikely that the merged firm would bring the Zovirex cream to market to compete against [SmithKline's existing product]."

Dow Chemical/Union Carbide is an example of a potential competition merger that raised concerns about the continued incentives of the combined firm to develop *technology*, alone or in combination with third parties, which might cannibalize future sales of products that relied on the relevant technology or revenue from licensing the relevant technology.[343]

"The second, longer-run effect is most likely to occur if at least one of the merging firms *has capabilities* that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm."[344] *Nielsen/Arbitron*,[345] *Bayer/Aventis*,[346] and *Ciba-Geigy/Sandoz*[347] are examples of transactions where the merging parties were believed to be the two, or two of only a few, firms that had the capabilities to develop new or future products that if brought to market in the absence of the merger would likely have captured substantial revenues from each other.

C. Improved Conditions for Post-Merger Coordination and Interdependence

An acquisition of or merger with a potential entrant may diminish competition by enabling or strengthening the conditions for post-merger coordinated interaction.

In *Hoechst/Marion Merrell Dow*, the Commission alleged that Hoechst's consummated acquisition of Marion Merrell Dow (MMD) eliminated potential competition in the market for research, development, manufacture, and sale of the once-a-day diltiazem. MMD's Cardizem CD had a "dominant" share of the U.S. market for once-a-day diltiazem. Hoechst and Biovail were jointly developing a competing product, Tiazac. The pendency of the

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[343] Dow Chem. Co., 131 F.T.C. 600 (2001) (merger would eliminate potential competition in the market for metallocene catalyst technology and reduce innovation competition in metallocene catalyst technology). This matter is discussed at pp. 45-46.

[344] 2010 HORIZONTAL MERGER GUIDELINES at 23. (emphasis added)

[345] Nielsen Holdings N.V., No. C-4439, 2014 WL 869523 (F.T.C. Feb. 24, 2014) (merging parties "are the best-positioned firms to develop (or partner with others to develop) a national syndicated cross-platform audience measurement service because only [the merging parties] maintain large, representative panels capable of measuring television with the required individual-level demographics, the date source preferred by advertisers and media companies."). This matter is discussed at p. 42.

[346] Bayer AG, 134 F.T.C. 184 (2002) (merger would eliminate potential competition in the market for New Generation Chemical Insecticide Active Ingredients and the technology used in their manufacture; Bayer, Aventis, and Syngenta were the only firms with significant development and production of New Generation Chemical Insecticide Active Ingredients, and Bayer and Aventis were distinguished by their ability to take new molecules from the discovery phase to the development and then marketing of such products). This matter is discussed at pp. 46-47, 48.

[347] Ciba-Geigy Ltd., 123 F.T.C. 842 (1997). This matter is discussed at pp. 47-48.

transaction affected Hoechst's incentive to continue with the development of Tiazac. Prior to acquisition, Hoechst returned all of its rights in Tiazac to Biovail. The Commission alleged that this "fix-it-first" remedy was insufficient to remedy the anticompetitive effects of the merger because it left Biovail as a less effective competitor than it would have been absent the merger, in part because the transaction gave the combined entity access to competitively sensitive non-public information relating to Tiazac, enhancing the likelihood of collusion or coordination between or among the firms in the relevant market.[348]

The Commission alleged that the formation of the new company *Aventis* through the merger of *Hoechst AG/Rhone-Poulenc* eliminated actual potential and perceived potential competition in the market for cellulose acetate. Eastman Chemical Company, Celanese AG and the Primestar joint venture accounted for 100% of U.S. production capacity of cellulose acetate. Primestar was a 50-50 joint venture between Eastman and Rhodia. Rhodia was controlled by but not wholly owned by Rhone Poulenc; it was entitled to 50% of the production of the Primestar joint venture. Rhodia did not sell cellulose acetate in or into the United States. Rhone-Poulenc, because of its control of Rhodia and Rhodia's interest in Prime Star, was a potential supplier of cellulose acetate to the U.S. Through the merger, Aventis would succeed to Rhodia's interest in the Primestar joint venture. Hoechst was not a participant in the U.S. market for cellulose acetate.

The Kuwait Petroleum Company ("KPC") held a 25 percent interest in Celanese, and, upon consummation of the merger of Hoechst and Rhone-Poulenc into Aventis, would hold a 12.5%-15% interest in Aventis. The Commission alleged that KPC controlled Celanese and would also have significant control of Rhodia, through its ownership interest in Aventis. The Commission recognized that, because of KPC's partial ownership interest of both Celanese and Aventis, the merger could allow KPC to coordinate the actions of Celanese and Rhodia (through Aventis) and the Primestar joint venture; one potential effect would be to eliminate potential competition in the market for sales of cellulose acetate in the United States. [349]

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[348] 120 F.T.C. 1010 (1995). The Commission also alleged that the consummated acquisition eliminated actual potential competition in three markets: (i) Rifampin (used to treat tuberculosis), (ii) oral dosage forms of mesalamine (used to treat ulcerative colitis and Crohn's Disease); and (iii) drugs approved by the FDA for the treatment of intermittent claudication (severe cramping in the legs caused by inadequate blood flow due to arteriosclerosis).

[349] Hoechst AG, No. C-3919, 2000 WL 254668 (F.T.C. Jan. 18, 2000); Hoechst AG, No. C-3919, Analysis of Proposed Consent Order to Aid Public Comment (Dec. 7, 1999), https://www.ftc.gov/sites/default/files/documents/cases/1999/12/hoechstrana.htm.

D. Exclusion of Future Competitors

1. Through Foreclosure or Raising Rivals Costs

A vertical merger or a horizontal transaction with vertical components may create or strengthen the ability or the incentive for the combined firm to disadvantage or discriminate against future competitors to the combined firm and give the combined firm power over price.[350] Foreclosure of, or raising the cost to rivals of, access to an asset or input may hinder or prevent entry or expansion by an existing or future market entrant.

Non-horizontal mergers (or horizontal mergers with a vertical component) that the Commission alleged would have significantly hindered entry by new competitors include *AOL/Time Warner*,[351] *Biovail/DOV Pharmaceuticals*,[352] *Cadence Design/Cooper&Chyan*,[353]

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[350] Vertical Merger Guidelines at 4. *See also* FED. TRADE COMM'N, COMMENTARY ON VERTICAL MERGER ENF'T 9-11 (Dec. 2020) [hereinafter COMMENTARY ON VERTICAL MERGER ENF'T], https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf, discussing the framework for the evaluation of changes in a firm's ability or incentive to foreclose or otherwise disadvantage rivals. (The author participated in the drafting of the Commentary.) See also Alison Oldale, Bilal Sayyed, and Andrew Sweeting, *A Review of Cases Involving the Loss of Potential and Nascent Competition, With Particular Reference to Vertical Mergers*, http://econweb.umd.edu/~sweeting/SWEETING_nascent.pdf.

[351] Am. Online, Inc., 131 F.T.C. 829 (2001) (merged firm would have the ability to deny distribution services to rival interactive television competitors to prevent or deter entry by next generation interactive television suppliers). This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 21.

[352] Biovail Corp., No. C-4060, 2002 WL 727033, at *1 (F.T.C. Apr. 23, 2002) (acquisition of exclusive license to intellectual property necessary to manufacture pharmaceutical product provided the ability to exclude competition by blocking the entry of any bioequivalent generic drug capable of competing with Biovail's product). This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 20.

[353] Cadence Design Sys., Inc., 124 F.T.C. 131 (1997) (combined firm had incentive to refuse access to its microchips by competitors in the routing tool market, thus requiring simultaneous entry into a second market s by prospective entrants into market for "constraint-driven, shape based integrated circuit routing tools"). This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 3.

Ceridian/Trendar,[354] *Corpus Christi Polymers*, [355] C*ytyc/Digene*,[356] *Eli Lilly/PCS Health Systems*,[357] *Energy Transfer/Williams Co.*,[358] *Silicon Graphics*,[359] and *Teva/Allergan Pharmaceutical.* [360] Other matters include *Illumina/Grail* [361], *El Paso Energy/Coastal, Dominion Resources/CNG, Time Warner/Turner Broadcasting, Hologic/Fischer, Boston Scientific/SCIMED, Ciba-Geigy/Sandoz, Provident/UNUM,* and *Graco.*

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[354] Ceridian Corp., No. C-3933, 2000 WL 362196, at *1 (F.T.C. Apr. 5, 2000) (combined firm could refuse to accept rival "fleet" cards at its truck stops, raising barriers to entry by prospective entrants in the market for fleet cards; potential entrants into the truck stop fuel desk automation system market must be able to process Ceridian's fleet cards). This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 22.

[355] Complaint, Corpus Christi Polymers, LLC, No. C-4672 (F.T.C. Feb. 20, 2019) (future competitors in the market for polyethylene terephthalate resin would now also need to enter the market for purified terephthalic acid), https://www.ftc.gov/system/files/documents/cases/181_0030_c-4672_dak_indorama_decision_and_order_2-25-19.pdf; Analysis of Agreement Containing Consent Order to Aid Public Comment, Corpus Christi Polymers, LLC, No. C-4672 (F.T.C. Dec. 2018), https://www.ftc.gov/system/files/documents/cases/181_0030_pet_analysis_12-21-18.pdf. This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 31.

[356] Press Release, Federal Trade Commission, FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp., 2002 WL 1361365 (Jun. 24, 2002) (combined firm could refuse to allow future competitors to pair their liquid pap tests with combined firm's HPV test; cellular samples collected during the liquid pap test were used to test for HPV). This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 7-8, 19-20.

[357] Eli Lilly and Co., Inc., 120 F.T.C. 243 (1995) (transaction might make two-level/two-market entry necessary). This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 12, 28.

[358] Energy Transfer Equity, L.P., No. C-4377, 2016 WL 3345407, at *1 (F.T.C. Jun. 8, 2016) (transaction created incentive to limit capacity of pipeline for the transport of natural gas to potential entrants in the downstream market for the sale of natural gas in competition with the combined firm)to markets where a potential entrant might compete with the combined firm in the sale of nature gas). This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 15-16.

[359] Silicon Graphics, Inc., 120 F.T.C. 928 (F.T.C. 1995) (transaction created incentive to foreclose access to combined firm's workstations to rival software developers, thus requiring two-stage or two-level entry by future competitors). This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 4.

[360] Teva Pharm. Indus. Ltd., No. C-4589, 2016 WL 4128219, at *1 (F.T.C. July 26, 2016) (transaction created incentive and ability to foreclose current and future rival pharmaceutical firms from active ingredients necessary to manufacture certain pharmaceuticals). This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 16.

[361] Complaint, Illumina, Inc., No. C-9401 (F.T.C. Mar. 30, 2021), https://www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf. The complaint in this matter is discussed in Submission of the United States to the OECD, The Concept of Potential Competition (Jun. 10, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)20/en/pdf. An FTC Administrative Law Judge recently dismissed the Commission's complaint, finding, among other things, that the FTC failed to prove that rivals to Grail "are poised to imminently launch their products commercially in direct competition with Grail." Initial Decision, Illumina, Inc., No. C-9401 (F.T.C. Sep. 1, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.

In *El Paso Energy/Coastal Corporation,* the Commission alleged that the merger of El Paso Energy and Coastal would eliminate competition in the market for the provision of tailored services in the transportation of natural gas in the Milwaukee-Waukesha area. Coastal's ANR Pipeline was the only supplier of natural gas transportation to the Milwaukee-Waukesha PMSA, the only pipeline that allowed Wisconsin users of natural gas to access storage fields in Michigan, and the only supplier of tailored services to the Milwaukee–Waukesha area. Guardian Pipeline LLC was a potential entrant. Guardian had proposed building a pipeline to compete with Coastal's ANR Pipeline in the Milwaukee–Waukesha area in the provision of natural gas pipeline transportation and tailored services. Guardian's proposed pipeline was a potential competitor to Coastal's ANR Pipeline. Prior to the proposed merger, El Paso's Midwestern Gas Transmission (MGT) Pipeline would likely offer tailored services to customers within the Milwaukee–Waukesha area by acting as an upstream supplier to Guardian once the Guardian pipeline came into service. MGT was the only supplier of tailored services capable of providing Guardian access to low-cost natural gas storage fields in Michigan. The merged firm would control both MGT and ANR, preventing Guardian from competing effectively by denying the rival Guardian Pipeline timely and reliable access to tailored services or competitive prices for tailored services. The Commission alleged the merger would threaten potential competition in a market for the provision of tailored services in the Milwaukee–Waukesha service area.[362]

In *Dominion Resources, Inc.*, Dominion's proposed acquisition of Consolidated Natural Gas (CNG) combined the largest provider of electric power in the Commonwealth of Virginia with the primary distributor of natural gas in southeastern Virginia.[363] Dominion provided 70% of the electric power generation in Virginia. CNG, through its subsidiary Virginia Natural Gas (VNG), was the primary distributor of natural gas in southeastern Virginia. Dominion's proposed acquisition of CNG would give Dominion control of the primary source of "firm natural gas transportation capacity in the [CNG/]VNG service territory, thereby enhancing its control over the generation of electrical power in that area." The Commission alleged that "Dominion's control over [CNG/]VNG would likely *deter or disadvantage entry* by independent electrical power generation companies because Dominion may have the ability to raise the costs of entry and/or production to *new entrants*." "Entry into the electrical power generation market … [through] construction of plants that use fuels other than natural gas was unlikely to occur due to environmental restrictions."

Time Warner's proposed acquisition of Turner Broadcasting System raised competitive concerns in the market for sales of cable television programming services (e.g., cable

[362] El Paso Energy Corp., 131 F.T.C. 704, 719 (2001).

[363] Dominion Res., Inc., 128 F.T.C. 636, 638 (1999).

channels) to households in various local areas in which Time Warner served as a "multichannel video programming distributor" (MVPD) (e.g., the cable television provider or the satellite television provider). Time Warner and Turner were competitors in the market for the sale of cable television programming services to MVPDs. Time Warner's HBO, and Turner's CNN, TNT, and WTBS were a large percentage of the limited number of "marquee" cable television programming services that attracted subscribers to MVPDs. Time Warner faced actual and potential competition from other MVPD and potential MVPD entrants in the sale of cable television programming services to households. Pre-merger, Turner, as a programmer but not a distributor, had no incentive to, and generally did not charge, significantly higher prices to new MVPD entrants, as compared to the prices it offered established MVPDs. Time Warner had an incentive to discriminate against MVPDs because of its interest in protecting itself from MVPDs in or entering its downstream distribution areas. The Commission alleged that the merger would allow Time Warner to "den[y] rival MVPDs and any potential rival MVPDs … competitive prices for cable television programming services, or charging rivals discriminately high prices …"[364]

Mergers that combine differentiated technology or intellectual property rights or other forms of intangible property, including data,[365] may also raise barriers to entry for future competitors.

In Hologic/Fischer, Hologic acquired substantially all of the intellectual property and certain other assets of Fischer Imaging Corporation's mammography and breast biopsy businesses, including the patents, trademarks, customer lists, and vendor lists relating to Fischer's prone

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[364] Time Warner Inc., 123 F.T.C. 171 (1997).

[365] The Commission has challenged transactions where the relevant product was data or information. *See, e.g.*, Complaint, CoStar Group, No. 9398 (Nov. 30, 2020) (relevant market was "internet listing services advertising for large apartment complexes), https://www.ftc.gov/system/files/documents/cases/d09398complaintpublic.pdf; Fidelity Nat'l Fin., Inc., No. 9385, 2019 WL 4461620, at *7 (F.T.C. Sept. 5, 2019) (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) (relevant market was "national assessor and recorder bulk data"); Nielsen Holdings N.V., No. C-4439, 2014 WL 869523 (F.T.C. Feb. 24, 2014) (national syndicated cross-platform audience measurement services); Dun & Bradstreet Corp., 150 F.T.C. 144, 146 (2010) (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) (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) (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) (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) (relevant market of, among others, "salvage yard inventory data for estimates").

stereotactic breast biopsy system (prone SBBS) business. Post-transaction, Fischer exited the mammography and breast biopsy businesses. Hologic and Fischer were head-to-head competitors in the market for prone SBBS, with each firm having a market share of approximately 50%. Hologic's MultiCare prone SBBS was the only product to compete successfully against Fischer's MammoTest prone SBBS product, in part because, some years prior to the acquisition, it obtained a license to relevant Fischer patents. The Commission alleged that "[p]otential entrants must overcome significant intellectual property barriers to develop a prone SBBS product" and recognized "there is little prospect for entry into the U.S. prone SBBS market" because "the strength and scope of Hologic's patent portfolio, including the patents that it acquired from Fischer, insulate the U.S. prone SBBS market from entry."[366]

In its challenge to *Boston Scientific/SCIMED*, the Commission alleged that the combination of the patent portfolios of the merging firms, one of whom was a potential entrant into the relevant market, would make entry into the IVUS catheter market more difficult. [367]

In *Ciba-Geigy/Sandoz,* the Commission recognized that Ciba-Geigy (with Chiron) and Sandoz "controlled the substantial proprietary rights necessary to commercialize gene therapy products and possess[ed] the technological, manufacturing, clinical, regulatory expertise and manufacturing capability to commercially develop gene therapy products." They were "the two leading commercial developers of gene therapy technologies and control[led] critical gene therapy proprietary portfolios, including patents, patent applications, and know-how." The competitive development of "potentially life-saving therapies … could be hindered by the merged firm's control of substantially all of the proprietary rights necessary to commercialize gene therapy products." Pre-merger, Ciba/Chiron and Sandoz "had the incentive and did act as rival centers from which [developers of potential gene therapies] could obtain needed intellectual property rights." In fact, "Ciba/Chiron and Sandoz would grant limited intellectual property rights to other developers and researchers" in return for compensation. The Commission was concerned that, "[w]hereas before the merger third parties might have had the option of licensing one party's patents or challenging the validity of the other's … the merger created a 'killer' patent portfolio so broad as to eliminate that option."[368]

In *Provident/UNUM*, the Commission alleged that the merger of two providers of disability insurance sold to individuals might raise barriers to entry or expansion by competitors through a refusal to share claims data with a public database. According to the Commission's

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[366] Hologic, Inc., No. 51-0263, 2006 WL 2522714, at *2 (F.T.C. Aug. 9, 2006).

[367] Boston Scientific Corp., 119 F.T.C. 549 (1995). This matter is discussed at pp. 65-66.

[368] Ciba-Geigy Limited, 123 F.T.C. 842, 846, 895, 897, 897 n.10. This matter is discussed at pp. 47-48.

complaint, access to credible data on disability claims was required to design and price disability insurance policies for individuals. The Commission recognized that the combined entity's participation in public, industry-wide databases was essential to ensure that actuarial predictions by the industry. Post-merger, the combined firm would have a substantial percentage of claims data and might have an economic incentive not to share that data with a publicly available database. Thus, existing providers of individual disability insurance without access to a credible source of claims data might not be able to expand and successfully compete in the relevant market. [369]

A merger may give the combined firm the ability to exclude its current or future competitors to distribution outlets necessary to be an effective competitor. In *Graco*, the Commission alleged that Graco had acquired its only significant competitors in the North American market for fast-set equipment used by contractors. "Prior to the acquisitions, the three companies were the only domestic full-line manufacturers of fast-set equipment," according to the Commission. The Commission alleged that the acquisitions gave Graco the ability to raise barriers to entry and hinder entry and expansion by potential competitors. Historically, fast-set equipment distributors carried multiple manufacturers' brands. After acquiring the only other full-line manufacturers of fast-set equipment, Graco initiated several strategies that reduced prospective entrants' access to distribution resources required for success in the market. "These strategies included raising distributors' discount and inventory thresholds, thereby reducing distributors' ability to carry the products of new entrants, and threatening distributors with termination or other retaliation should they agree to carry the products of competing manufacturers." These actions heightened barriers to entry in the relevant market. Most prospective entrants did not offer full lines of fast-set equipment, but only individual components of a complete fast-set equipment system. "Without access to the specialized distribution channels, these prospective entrants [were] not likely to expand beyond being fringe competitors."[370]

2. Through Control of or Access to Information

A merger may give the combined firm access to and control of sensitive business information about its upstream or downstream rivals that was unavailable to it before the merger. In some circumstances, the combined firm can use access to a rival's competitively sensitive information to make entry unprofitable for rivals. Rivals may refrain from doing business

[369] Provident Cos., 128 F.T.C. 291 (1999).

[370] Graco Inc., 155 F.T.C. 665, 666, 671 (2013).

with the merged firm rather than risk that the merged firm would use their sensitive business information to make entry or expansion decisions unprofitable.[371]

In *Pacificorp*, the Commission alleged that Pacificorp's acquisition of Energy Group, the owner, through Peabody, of coal mines, would lessen competition in the market for wholesale electricity sales in, among other areas, the geographic market of the Western Systems Coordinating Council ("WSCC"). Wholesale electricity was (or would soon be) sold into centralized auction markets and through bilateral contracts between power generators and distributors of power (or final end-use customers). Power generators sold wholesale electricity directly and through power-marketing affiliates created to participate in deregulated wholesale markets. The cost of coal represented 90% of the cost of generating electricity in a coal-fired plant, and Peabody supplied 27% of the demand for coal to coal-fired generating plants in the WSCC.

Many of Peabody's contracts did not contain a bar on the sharing of pricing information. Through the merger, Pacificorp would have access to real-time information on the operating conditions and production plans of approximately 150 power plants supplied by Peabody. Access to this information would allow Pacificorp to predict supply shifts and price movements, thus giving it an advantage over its competitors. The Commission alleged that this advantage would affect the development of competitive power markets. According to the Commission, expected profits for both incumbents and *prospective entrants* would be lower if PacifiCorp possessed inside information regarding competitors' costs, supply conditions, and future operating plans. Because of PacifiCorp's perceived information advantage regarding electricity supply and costs, competitive entry in power marketing would be discouraged, and existing power marketing companies might defer greater investments in such enterprises and perhaps even exit, making the market for wholesale electricity operate less efficiently.[372]

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[371] Vertical Merger Guidelines at 10. *See also* COMMENTARY ON VERTICAL MERGER ENF'T, at 25-27. The Commission raised this concern in Nvidia/Arm, alleging an effect on future innovation. See Administrative Complaint, Nvidia Corp., No. 9404 (F.T.C., Dec. 2, 2021) (rivals to combined firm would be less likely to share information necessary to innovate because combined firm could misuse this information and combined firm would have less incentive to pursue innovation that would benefit competitors), https://www.ftc.gov/system/files/documents/cases/d09404_part_3_complaint_public_version.pdf.

[372] Complaint, Pacificorp., FTC File No. 971-0091 (Feb. 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/02/9710091.cmp_.htm; Analysis of Proposed Consent Order to Aid Public Comment, Pacificorp., FTC File No. 971-0091 (Feb. 1998), https://www.ftc.gov/sites/default/files/documents/cases/1998/02/9710091.ana_.htm. The complaint was withdrawn after the transaction with abandoned.

3. Through Agreements Not to Compete

Noncompete agreements may illegally preclude post-merger entry into a relevant market by a party to the acquisition. In *Arko/GPM/Corrigan* the Commission alleged that Arko's acquisition of sixty gasoline stations from Corrigan included a noncompete agreement that "restricted Corrigan's ability to compete in the sale, marketing and supply of gasoline and diesel fuel" at "more than 190 GPM locations … few [of which] … were anywhere near an acquired Corrigan retail fuel station." According to the Commission, "the non-compete agreement eliminated potential competition in a substantial number of territories where Corrigan, but for the noncompete agreement, could have otherwise competed with retail fuel stations owned, leased or operated by Respondents and other companies." The noncompete agreement "[was] not reasonably limited in scope to protect a legitimate business interest." The noncompete agreement was unreasonable because the geographic scope was too broad, the term was too long, and it applied to retail locations not included in the acquisition. [373]

DTE Energy Company is another example. North Coast Gas Transmission (NCGT) was a minority owner of Generation Pipeline LLC ("Generation"), and separately the operator of the North Coast Pipeline, a 280-mile pipeline that served thirteen counties in Ohio, including Lucas, Ottawa, and Wood counties. Nexus, a 50/50 joint venture of DTE and Enbridge, proposed to acquire Generation Pipeline, which served the Toledo, Ohio area. The sale agreement prevented NCGT from "competing to provide natural gas transportation within a restricted area encompassing parts of Lucas, Ottawa, and Wood counties in Ohio for a period of three years post-closing." The Commission alleged that the noncompete eliminated actual and potential competition between NGCT and any other pipeline competitor in the relevant market and was "not reasonably limited in scope to protect a legitimate business interest."[374]

In *Lubrizol/Lockhart,* the Commission alleged that Lubrizol's consummated acquisition of assets related to Lockhart's oxidates business eliminated "actual, actual potential, and perceived potential competition" between the two firms—he only two significant U.S. suppliers of oxidate for use as a rust preventive additive. The asset purchase agreement included a five-year non-competition agreement prohibiting Lockhart from directly or

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[373] Complaint, ARKO Corp., No. C-4773 (Aug. 5, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110087C4773ArkoExpressComplaint.pdf; Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M Bedoya, In the Matter of ARKO Corp./Express Stop (Jun. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110187GPMExpressKhanStatement.pdf. The Commission Order resolving its concerns limited the scope of the noncompete agreement to the sixty acquired stations, limited it to three years, and to a three-mile distance from any acquired location. Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of ARKO Corp. (Jun. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2110087GPMAAPC.pdf.

[374] DTE Energy Co., No. C-4691, 2019 WL 6893028 (F.T.C. Nov. 21, 2019).

indirectly engaging in any business competitive with the assets it sold to Lubrizol. Lubrizol subsequently indicated that this provision barred Lockhart from leasing its Flint, Michigan plant to another oxidate manufacturer. Lubrizol's plant in Painesville, Ohio, and Lockhart's plant in Flint, Michigan, were the only two plants in the United States that had the equipment capable of oxidizing products to produce quality products. The Commission alleged that the noncompete agreement "thwart[ed] entry by restricting the use of Lockhart's plant or equipment."[375]

4. Elimination of a "Springboard" for a Potential Entrant

Parties to a merger may be direct competitors in a relevant market, and their combination may eliminate the ability of another firm, operating outside the relevant market, to enter the relevant market by acquisition and to operate the acquired entity in a manner that expands future competition. The actual potential entrant doctrine postulates that a non-incumbent firm's entry into a market by acquisition of a small competitor—a toehold or foothold acquisition—is preferred to entry by acquisition of a significant competitor.[376] The Commission has acted to preserve the independence of a small incumbent firm to allow it to serve as a "springboard" for a product extension merger by a non-incumbent.

In *Whole Foods/Wild Oats*, the Commission alleged that Whole Foods's acquisition of Wild Oats would eliminate competition in the markets for premium natural and organic supermarkets in various local geographic areas where the firms were actual or potential competitors. Whole Foods operated approximately 190 stores in more than 30 states and was the largest operator of premium natural and organic supermarkets in the United States. Wild Oats operated 74 stores in 24 states and was the second largest operator of premium natural and organic supermarkets in the United States. The Commission alleged that the proposed acquisition would eliminate the only existing company—Wild Oats—that could serve as a "meaningful springboard for a conventional supermarket operator to enter the market for premium natural and organic supermarkets in each of the relevant geographic markets." Whole Foods recognized this:

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[375] Complaint, Lubrizol/Lockhart, No. C-4254. April 7, 2009, https://www.ftc.gov/sites/default/files/documents/cases/2009/04/090410lubrizolcmpt.pdf.

[376] See, e.g., United States v. Marine Bancorporation, Inc., 418 U.S. 602, 625 (1974). ("The Court has not … resolved whether the potential-competition doctrine proscribes a market extension merger solely on the ground that such a merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a de novo undertaking or through the acquisition of a small existing entrant.") See also U.S. DEPT. OF JUST., 1984 MERGER GUIDELINES at 27 ("Entry through acquisition of a relatively small firm in the market may have a competitive effect comparable to new entry. Small firms frequently play peripheral roles in collusive interactions, and the particular advantages of the acquiring firm may convert a fringe firm into a significant factor in the market."); U.S. DEPT. OF JUST., 1982 MERGER GUIDELINES at 23-24 (same).

> By buying [Wild Oats] … we eliminate forever the possibility of Kroger, Super Value, or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us… [Wild Oats] may not be able to defeat us but they can still hurt us … [Wild Oats] is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space. Eliminating them means eliminating this threat forever, or almost forever. [377]

In *MSC.Software Corporation*, the Commission challenged MSC's consummated acquisitions of Universal Analytics (UAI) and Computerized Structural Analysis & Research (CSAR). Prior to the acquisitions, MSC, UAI, and CSAR were the only three firms competing in the licensing or sale of advanced versions of Nastran. MSC was a near monopolist, with a 90% share; UAI and CSAR each had 5% of the market. The products had similar features and capabilities, and users could switch between them without substantial loss of functionality and without significant switching costs and time. The Commission alleged that one competitive harm from the acquisitions, together or individually, was that they "prevent[ed] other suppliers of engineering software from acquiring UAI and CSAR and increasing competition."[378]

VI. LEADING FIRMS & COMBINATIONS WITH NASCENT/EMERGING RIVALS

A merger between an incumbent firm and a new entrant or emerging competitor can raise significant competitive concerns:

> [I]f one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can involve the loss of actual or potential competition.[379]

In evaluating the future competitive dynamics between the merging parties and other participants in the market, the antitrust agencies consider and seek to protect this

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[377] Administrative Complaint, Whole Foods Market/Wild Oats Markets, No. 9324 (June 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/06/070628admincmplt.pdf.

[378] MSC. Software Corp., 134 F.T.C. 580 (2002).

[379] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010) at 4.

"disruption."[380] *Illumina/PacBio*[381] (2019) and *Mallinckrodt (Questcor)/Novartis*[382] (2017) are examples of recent matters where the Commission challenged an acquisition of an emerging or nascent competitor by a leading incumbent as a violation of Section 2's prohibition on illegal monopoly maintenance. (*Illumina/PacBio* was also challenged as a violation of Section 7's prohibition on mergers whose effect may be to substantially lessen competition.)

In *Edgewell Personal Care Company/Harry's*, the Commission alleged that Edgewell's proposed acquisition of Harry's, Inc. would eliminate emerging competition from Harry's in the market for the manufacture and sale of wet shave system razors and disposable razors sold in the United States, and the narrower markets of (i) men's wet shave razors; (ii) women's wet shave razors; (iii) system razors (including both men's and women's) (iv) men's system razors; and (v) women's system razors. (Narrower product markets were also recognized for products sold through brick-and-mortar retailers.) Both companies were participants in the brick-and-mortar, wet shave market. According to the Commission, P&G's Gillete brand and Edgewell's Schick brand had dominated the wet shave market for many years. Harry's was a successful Internet-only, direct-to-consumer wet shave brand, and, approximately two-and-one-half years prior to the proposed acquisition, succeeded in entering the brick-and-mortar channel in an exclusive deal with the large discount retailer Target. One year prior to the merger, Harry's began selling at Walmart. In both instances, Harry's took "shelf space" from Edgewell and Gillette. In the months just prior to the announcement of the proposed acquisition, Harry's expanded into three more significant regional or national brick-and-mortar chains. The Commission's complaint argued that Harry's recent success in expanding into the brick-and-mortar channel was a better indicator of its future competitive significance than its current market share.[383]

Harry's success was largely (but not exclusively) with respect to sales to men. The Commission made similar allegations in an almost contemporaneous challenge to Procter & Gamble's proposed acquisition of Billie, but with a focus on sales to women. In *P&G/Billie*,

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[380] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) at 4; U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) at 20; U.S. DEPT. OF JUST., 1984 MERGER GUIDELINES at 15; U.S. DEPT. OF JUST., 1982 MERGER GUIDELINES (same) at 15; U.S. DEPT. OF JUST., 1968 MERGER GUIDELINES at 7, 15.

[381] Illumina, Inc., No. 9387, 2019 WL 7168931 (F.T.C. Dec. 17, 2019). This matter is discussed in Submission of the United States to the OECD, The Concept of Potential Competition (Jun. 10, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)20/en/pdf, and SUBMISSION OF THE UNITED STATES TO THE OECD, *Start-ups, Killer Acquisitions and Merger Control* (Jun. 11, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf.

[382] This matter is discussed at pp.97-98.

[383] Edgewell Pers. Care Co., No. 9390, 2020 WL 564174 (F.T.C. Feb. 2, 2020).

Billie was a successful on-line entrant into the market for the production and sale of wet shave system razors and disposable razors, and the narrower markets for the production and sale of women's wet shave razors, and of wet shave system razors. Billie had entered the relevant market(s) through on-line sales of "mid-tier women's system razors" in the fall of 2017. Billie "targeted P&G" with a "vision to dethrone Gillette's Venus [razor] to become the number one women's razor brand in the U.S." and "shake up the women's shaving category." One year after Billie's entry, P&G "set up a women's system razor [direct-to-consumer] business … as a competitive response to Billie." The proposed acquisition – announced just two years after Billie's initial online sales and as Billie was "poised to expand into brick-and-mortar" retail – would "arrest[] Billie's progress as it was on the cusp of expanding into brick-and-mortar retail stores, which would have greatly heightened the already fierce competition between P&G and Billie."[384]

In *Danaher Corp/General Electric.*, the Commission alleged that Danaher's proposed acquisition of the "biopharma" business of General Electric ("GE") eliminated competition in, among other markets, the market for the "research, development, manufacture, marketing, distribution, and sale of … single-use tangential flow filtration ("TFF") systems." GE had only recently entered the very small market for TFF systems and had limited sales, but the Commission's investigation identified GE as Danaher's closest competitor and as one of only three significant competitors (including Danaher) in this relevant market. [385]

In *Otto Bock/Freedom Innovation* the Commission challenged Otto Bock's consummated acquisition of Freedom Innovation. Otto Bock was the largest supplier of microprocessor controlled prosthetic knees (MPKs) at the time it acquired Freedom Innovations. Freedom had been developing a next-generation MPK that it had designed to compete directly with Otto Bock's market-leading product. The Commission determined that, at the time Otto Bock acquired Freedom, Freedom was "preparing to introduce a new MPK that it expected would take significant share away from Otto Bock." In fact, "Otto Bock itself described [this new MPK] as a 'serious threat.'"[386]

In *CDK Global, Inc.*, the Commission challenged CDK's proposed acquisition of Auto/Mate, a small but growing competitive threat to CDK's market leading position in the market for dealer management systems for franchise new car dealerships. DMS is "mission-critical"

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[384] Administrative Complaint, Procter & Gamble Company, No. 9400 (Dec. 8, 2020), https://www.ftc.gov/system/files/documents/cases/d09400_administrative_part_3_complaintpublic600214.pdf.

[385] Complaint, Danaher Corp., No. C-4710, 2 (F.T.C. Mar. 19, 2020), https://www.ftc.gov/enforcement/cases-proceedings/191-0082/danaher-corporation-matter.

[386] Otto Bock HealthCare N. Am., Inc., No. 9378, 2017 WL 6764968 (F.T.C. Dec. 20, 2017).

software used by dealerships to manage their business; it includes, among other things, accounting, payroll, parts and inventory, financing, and service repair scheduling functions. CDK and Reynolds & Reynolds, the second largest firm, had a combined market share of approximately 70%. Auto/Mate, at the time of its proposed acquisition by CDK, was the fifth largest competitor in the relevant market, significantly smaller than CDK and Reynolds & Reynolds. However, in the few years prior to the proposed acquisition, Auto/Mate had grown as a competitive threat, and was specifically targeting CDK customers for future growth. Auto/Mate had an innovative business model that was winning business from larger firms by offering lower prices, flexible contract terms, free software upgrades and training, and high-quality customer service. Prior to its proposal to acquire Auto/Mate, CDK had identified Auto/Mate as a current and emerging threat, and had responded aggressively, by offering discounted pricing and more flexible and improved terms to customers. Auto/Mate's recent history of success indicated that its pre-acquisition market share underrepresented its future market significance. The Commission concluded that the acquisition, if consummated, would have eliminated competition from a key emerging rival.[387]

In *Abbott Laboratories/St. Jude Medical*, the Commission alleged that Abbott's proposed acquisition of St. Jude raised competitive concerns in the market for the development, licensing, manufacturing, marketing, distribution and sale of steerable sheaths. St. Jude Medical was the largest supplier of steerable sheaths at the time of the merger, with a market share approaching a monopoly position. There were other suppliers into the market, but all had very small market shares. Shortly before the acquisition was announced, Abbott had entered the market through its acquisition of Kalila Medical, Inc. ("Kalila") and coincident with (but not related to) the announcement of the merger, began offering its steerable sheath in the United States.[388] Although a new entrant, and despite not having significant sales, the Commission's investigation identified Abbott's steerable sheath as the most significant competitive threat to St. Jude Medical's near-monopoly position in the relevant market.[389]

In *Verisk Analytics, Inc.*, the Commission challenged the proposed combination of Eagleview and Verisk Analytics, alleging that it would result in a virtual monopoly in the U.S. market for rooftop aerial measurement products used by insurers to estimate repair costs for property damage claims. Elimination of the firms' ever-closer competition would likely lead to higher

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[387] CDK Global, Inc., No. 9382, 2018 WL 1522516 (F.T.C. Mar. 19, 2018) (order dismissing complaint).

[388] Kalila had obtained FDA approval to begin marketing its sheath approximately 18 months prior to being acquired by Abbott, but Abbott had only recently entered the U.S. market. *Id. See also Kalila Medical Announces 501(k) Clearance For The Vado Steerable Sheath Used During Atrial Fibrillation Procedures*, BIOSPACE (May 5, 2014), https://www.biospace.com/article/releases/kalila-medical-announces-510-k-clearance-for-the-vado-steerable-sheath-used-during-atrial-fibrillation-procedures-/.

[389] Abbott Laboratories, No. C-4600, 2016 WL 7634653 (F.T.C. Dec. 27, 2016).

prices and reduced incentives to innovate. EagleView was a near monopoly provider, with a 90% share of Rooftop Aerial Measurement Products for insurance purposes. Other firms operated at the fringe of the market, were only distant competitors, and had small market shares. Verisk was the dominant provider of Claims Estimation Software, with an 85% share of such software used by insurers to process roof damage claims. Prior to the proposed acquisition, EagleView, by agreement, had integrated its products into Verisk's claims estimation software. Approximately two-years prior to the proposed acquisition, Verisk had entered the market for Rooftop Aerial Measurement Products for insurance purposes, bringing it into direct competition with EagleView. Approximately five months prior to the proposed acquisition, Verisk launched a second Rooftop Aerial Measurement Product. Verisk's newly introduced products were successful in replacing EagleView as a supplier to significant insurance carriers. Despite Verisk being a relatively recent entrant into the relevant market, the Commission's investigation concluded that the combination of Verisk and Eagleview would eliminate competition between the two closest rivals in the relevant market [390]

In *Kyphon, Inc.*, the Commission alleged that Kyphon's proposed acquisition of certain assets of Disc-O-Tech threatened to eliminate competition in the market for the research, development, manufacture, and sale of minimally invasive vertebral compression faction treatment products. Kyphon was "engaged in the design, manufacture, marketing and sale of single-use and implantable medical device products used in minimally invasive therapies for the treatment and restoration of spinal anatomy, including through its KyphX Kyphoplasty products." Kyphon had a market share of over 90 percent in the relevant market. Disc-O-Tech was engaged in the research, development, marketing, and sale of medical device products used in minimally invasive therapies for the treatment and restoration of spinal anatomy, including its newly launched Confidence Vertebroplasty system." Disc-O-Tech's recently launched Confidence Vertebroplasty system was the only product on the market that was "likely to provide significant and unique competition to Kyphon," and was "poised to take a significant share of Kyphon's sales." "Kyphon's product, which use[d] balloons, and Disc-O-Tech's product, which use[d] a highly viscous cement, ha[d] substantially lower risks of leakage from the vertebral body following injection than … the "traditional" vertebroplasty products offered by" many other firms. The Commission had evidence that suggested Kyphon intended to acquire Disc-O-Tech to "preclude[e] other major spine companies from acquiring Confidence and marketing it against [Kyphon's] kyphoplasty" products.[391]

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[390] Verisk Analytics, Inc., No. 9363, 2014 WL 7330492, at *6, *7 (F.T.C. Dec. 16, 2014).

[391] Kyphon, Inc., No. C-4201, 2007 WL 3045196, at *2 (F.T.C. Oct. 5, 2007).

In *Bayer AG/Aventis*, Bayer's proposed acquisition of Aventis Crop Science ("ACS"), the crop science business of Aventis S.A, raised competitive concerns in the market for "the research, development, manufacture, and sale of post-emergent grass herbicides for spring wheat (Spring Wheat Herbicides)." The market for spring wheat herbicides was highly concentrated, with ACS's herbicides accounting for almost 70% of total sales of spring wheat herbicides. The market, however, was relatively small: total U.S. sales of spring wheat herbicides totaled approximately $73 million in the year prior to the proposed acquisition. Bayer had introduced Everest, a competing herbicide, one year before the proposed acquisition; in its first year of sales, Everest accounted for approximately 7% of total sales of spring wheat herbicides. Although another firm had substantially more sales in the relevant market than Bayer's new product, the Commission's investigation concluded that Bayer's small share of the relevant market was not representative of its potential to be a significant competitor and a uniquely close competitor to ACS. The Commission alleged that the acquisition would "eliminate the potential for increased actual, direct, and substantial price competition and cause consumers to pay higher prices for Spring Wheat Herbicides" by allowing the combined firm to exercise unilateral market power and by increasing the "likelihood and degree of coordinated interaction." [392]

AOL/Time Warner raised competitive concerns in the market for broadband internet access.[393] At the time of the merger, "the vast majority of residential users … access[ed] the internet via dial-up modems: their computers use[d] standard telephone lines to connect to an [internet service provider], which in turn connects the user to the internet. This service is referred to as 'narrowband' access." However, residential users were beginning to access the internet through "broadband" networks and transmission facilities. The principal types of transmission facilities that provided broadband access to residential users were cable television systems and local telephone company networks through digital subscriber lines ("DSL").

Time Warner operated cable systems and provided broadband internet access services to customers through its partially-owned Road Runner subsidiary. AOL was the leading provider of narrowband internet access. It also provided broadband internet access service through DSL. Broadband subscribers on DSL were lost revenue opportunities for cable broadband transport services. The Commission recognized that AOL's narrowband customer base positioned it to become a significant broadband ISP competitor and alleged that the merger would eliminate actual and potential competition between AOL and Time Warner nationally and in Time-Warner cable service areas, and that AOL would have less incentive

[392] Bayer AG, 134 F.T.C. 184, 186 (2002).

[393] Am. Online, Inc., 131 F.T.C. 829 (2001).

to promote DSL as a transport medium in Time-Warner cable areas after the merger.[394]

VII. MONOPOLIZATION THROUGH ACQUISITION

The prohibitions of the Sherman Act apply to mergers.[395] A claim of monopolization under Section 2 requires "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[396]

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[394] Am. Online, Inc., 131 F.T.C. 829 (2001).

[395] 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. See also, e.g., Standard Oil v. United States, 221 U.S. 1 (1911); United States v. United Shoe Machinery Corp., 110 F. Supp. 295(D. Mass. 1953), aff'd per curiam, 347 U.S. 521; United States v. Aluminum Company of America, 145 F. 2d 416 (2d Cir. 1945).

The 2010 Horizontal Merger Guidelines and 2020 Vertical Merger Guidelines note that the relevant statutory provisions applicable to mergers include Section 2 of the Sherman Act. 2010 HORIZONTAL MERGER GUIDELINES at 1; VERTICAL MERGER GUIDELINES at 1. The Commission has included monopolization counts in enforcement challenges to acquisitions by a firm of one or more of its competitors. *See* Complaint at 13, FTC v. Mallinckrodt Ard Inc., 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 13-14, 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 (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 *3, *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 form the complete salvage yard information systems network, consisting of an interchange integrated with yard management systems and electronic communications systems."). The Commission's recent challenge to Facebook's consummated acquisitions of Instagram and WhatsApp is the most recent example. Amended Complaint, Federal Trade Commission v. Facebook, Inc., Case No. 1:20-cv-03590-JEB (D.D.C, Aug. 19, 2021) (alleging monopoly maintenance through anticompetitive acquisitions, monopoly maintenance through an unlawful course of conduct, both "unlawful monopolization in violation of Section 2 of the Sherman Act" and "thus unfair methods of competition"), https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf.

[396] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Section 2 can apply where a monopolist engages in exclusionary conduct[397] (such as an acquisition) to eliminate the potential or nascent competitive threat posed by a technology, product, or service, even if it "is not presently a viable substitute" for the acquirer's own technologies, products, or services.[398] The Commission has acted to challenge or reverse the acquisition of a potential or nascent competitive threat as "reasonably capable" of "making a significant contribution to creating or maintaining monopoly power."[399]

Inverness (2009) and *Thoratec/Heartware* (2009) as examples of matters where the Commission challenged an acquisition of a potential or future competitor as a violation of Section 2's prohibition on illegal monopoly maintenance.

In *Inverness* (2009), the Commission charged that Inverness Medical Innovations' ("Inverness") acquisition of assets of ACON Laboratories ("ACON") enabled Inverness to maintain its monopoly power by jeopardizing the development and supply of future consumer pregnancy test products that could pose a competitive threat to Inverness in the future. Inverness was the dominant firm in the market for consumer pregnancy tests, with a 70% market share. Inverness's acquisition and conditions related to the acquisition made a significant contribution to maintaining its power in two segments of this market: (i) digital consumer pregnancy tests and (ii) water soluble dye consumer pregnancy tests. Inverness was only one of three firms manufacturing or marketing digital consumer pregnancy test at the time of the acquisition; shortly after the acquisition, the other two firms left the market. Prior to the acquisition, ACON was one of only a few firms (and maybe the only firm) involved in the development of consumer pregnancy tests that used water-soluble dye technology.

Through its acquisition of the ACON assets, Inverness imposed a covenant not to compete on ACON that limited the scope and duration of its pre-acquisition joint venture with Church & Dwight to develop and market digital consumer pregnancy tests. (The collaboration with Church & Dwight envisioned that ACON would manufacture and supply the resulting digital consumer pregnancy test products on Church & Dwight's behalf.) Inverness also required ACON

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397 "Exclusionary conduct is conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power." Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983); *see also* S. Pac. v. Am. Tel. & Tel. Co., 740 F.2d 980, 999 n.19 (D.C. Cir. 1984) ("'Exclusionary' conduct may be defined as 'conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power.' The issue is whether the defendant's conduct is reasonable in light of its business needs, or whether it unreasonably excludes competition.") (internal citation omitted).

398 United States v. Microsoft Corp., 253 F.3d 34, 54 (D.C. Cir. 2001) ("Nothing in § 2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes.").

399 3 Phillip Areeda & Donald F. Turner, ANTITRUST LAW ¶ 626 at 83 (1978).

to remit to Inverness any profits from that joint venture and acquired rights to intellectual property developed by ACON and its joint venture partner. The Commission alleged that through these actions, Inverness interfered with ACON's ability and incentive to develop and manufacture digital consumer pregnancy tests and hampered the Church & Dwight's ability and incentive to develop and market competing digital consumer pregnancy tests.

The Commission also alleged that Inverness eliminated future competition from water-soluble dye lateral flow consumer pregnancy tests by purchasing ACON's water-soluble dye consumer pregnancy test assets and ceasing development and marketing efforts for test products associated with the assets. Inverness "made no use of the test." Its acquisition of the ACON assets "protected [its] monopoly power in consumer pregnancy tests by weakening potential competition from competing water-soluble dye consumer pregnancy tests." Inverness's actions "reasonably appeared capable of making a significant contribution to its monopoly power by restricting competition from new consumer pregnancy tests." [400]

In *Thoratec/Heartware*, the Commission alleged that Thoratec's acquisition of Heartware would eliminate the "one company poised to seriously challenge Thoratec's monopoly" in the U.S. market for left ventricular assist devices (LVADs). The acquisition of Heartware "[was] conduct [ ] reasonably capable of contributing significantly to Thoratec's maintenance of monopoly power." Thoratec had the only FDA-approved LVAD; HeartWare, with its "HVAD," was one of only a few companies developing LVADs. Although HeartWare's HVAD was still in clinical trials, the Commission alleged that HeartWare's in-development product had forced Thoratec to innovate, and that the intensity of their rivalry would increase once HeartWare obtained FDA approval. The Commission's investigation identified several other companies developing LVADs but "only HeartWare pose[d] a potential significant threat" and "[would] rapidly erode Thoratec's monopoly following the HVAD's projected FDA approval." Thus, the Commission did not view these other firms as likely to challenge Thoratec's monopoly position. The Commission alleged that Thoratec's acquisition of HeartWare would, among other things, eliminate future competition and innovation competition between the merging parties, maintain Thoratec's existing monopoly position, allow Thoratec to exercise market power unilaterally, and enhance the likelihood of collusion or coordinated interaction between Thoratec and other LVAD manufacturers. [401]

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[400] Complaint, Inverness Medical Innovations, No. C-4244 (FTC, Jan. 23, 2009), https://www.ftc.gov/sites/default/files/documents/cases/2009/01/090127invernesscmpt.pdf; Analysis to Aid Public Comment, Inverness Medical Innovations, No. C-4244 (FTC, Dec. 2009), https://www.ftc.gov/sites/default/files/documents/cases/2008/12/081223invernessanal.pdf.

[401] Thoratec Corp., No. 091-0064, 2009 WL 2402681, at *1 (F.T.C. 2009). LVADs are a life-sustaining technology for treating end-stage heart failure patients who have failed other courses of treatment.

Illumina/PacBio[402] (2019) and *Mallinckrodt (Questcor)/Novartis* (2017) are examples of matters where the Commission challenged an acquisition of an emerging or nascent competitor as a violation of Section 2's prohibition on illegal monopoly maintenance.

In *Mallinckrodt (Questcor)/Novartis,* the Commission alleged that Questcor, through its sales of Acthar, was a monopoly supplier of therapeutic adrenocorticotropic hormone (ACTH) drugs sold in the United States. No other ACTH drug had FDA approval for therapeutic use, and barriers to entry into the market are high.[403] Novartis sold Synacthen, a synthetic ACTH product, in Europe and other parts of the world. It could not be sold in the United States without FDA approval, and neither Novartis nor any other firm had commenced clinical studies towards obtaining FDA approval. There was uncertainty as to whether a firm could gain U.S. approval of Synacthen because, among other things, it would be difficult to design and recruit patients for a trial that drew on the very small and vulnerable IS population.

Questor understood that other companies were interested in acquiring the U.S. rights to Synacthen, and, if acquired, would price it well below Acthar. The Commission's investigation had identified substantial evidence that Quester considered Synacthen to constitute a nascent competitive threat to its monopoly, notwithstanding the significant uncertainty that Synacthen would be approved by the FDA (were someone to seek approval). When Questcor learned that Novartis planned to sell the U.S. rights to Synacthen to another firm, Questcor moved to, and did, acquire Synacthen. By acquiring Synacthen, Questcor eliminated the possibility that another firm would develop it and compete against Acthar. The Commission alleged that, but for Questcor's acquisition of Synacthen, one of the alternative bidders would have acquired Synacthen and pursued its plan to develop Synacthen for IS and/or IMN to compete directly with Acthar at a lower price. Questor's "disrupting the bidding process for Synacthen and executing a license to the U.S. rights to Synacthen from Novartis eliminated the nascent competitive threat posed by an independently owned Synacthen." Such conduct was "conduct reasonably capable of contributing significantly to Questcor's maintenance of monopoly power." The

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[402] Illumina, Inc., No. 9387, 2019 WL 7168931 (F.T.C. Dec. 17, 2019). This matter is discussed in Submission of the United States to the OECD, The Concept of Potential Competition (Jun. 10, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)20/en/pdf, and SUBMISSION OF THE UNITED STATES TO THE OECD, *Start-ups, Killer Acquisitions and Merger Control* (Jun. 11, 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf.

[403] ACTH drugs are used to treat infantile spasms ("IS"), a rare but extremely serious disorder, and idiopathic membranous nephropathy ("IMN") (a cause of kidney disorders), as well as other disorders.

Commission challenged these acts and practices as monopolization in violation of Section 5.[404]

VIII. APPLICATION OF SECTION 5 ON A STAND-ALONE BASIS TO ACQUISITIONS

When the FTC challenges a merger as a violation of the monopolization standards of the Sherman Act, it does so by alleging a violation of Section 5.[405] Mergers that violate Section 7 also violate Section 5; when the FTC alleges a violation of Section 7, it always, or nearly always, also alleges the merger violates Section 5; in the period FY 2017-2020, nearly every merger challenge initiated by the FTC alleged that the merger (or proposed merger, if consummated) violated both Section 7 and Section 5, and every merger alleged to violate Section 7 was also alleged to violate Section 5. In some instances, the Commission will allege only a violation of the monopolization standards of Section 2 (under Section 5).

The Commission will also challenge as a violation of Section 5 (and only Section 5) the parties' agreement to merge.[406] Older matters provide some guidance on the scope of

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[404] FTC v. Mallinckrodt, Civil Action No. 1:17-cv-00120 (D.D.C. 2017) (complaint filed Jan. 25, https://www.ftc.gov/system/files/documents/cases/170118mallinckrodt_complaint_public.pdf; *see* FTC Press Release, *Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants* (Jan. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it.

[405] See, e.g., Amended Complaint, Federal Trade Commission v. Facebook, Inc., Case No. 1:20-cv-03590-JEB (D.D.C, Aug. 19, 2021) (alleging monopoly maintenance through anticompetitive acquisitions, monopoly maintenance through an unlawful course of conduct, both "unlawful monopolization in violation of Section 2 of the Sherman Act" and "thus unfair methods of competition"), https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf; FTC v. Mallinckrodt Ard Inc., 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 13-14, 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 (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 *3, *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 form the complete salvage yard information systems network, consisting of an interchange integrated with yard management systems and electronic communications systems.").

[406] See, e.g., Administrative Complaint, Post Holdings, Inc., and TreeHouse Foods, FTC Docket No. 9388 (Sept. 19, 2019) ("Respondents … have executed an asset purchase agreement in violation of Section 5 of the FTC Act … which if consummated would violate Section 7 of the Clayton Act … and Section 5 of the FTC Act.") https://www.ftc.gov/system/files/documents/cases/d09388posttreehousecomplaint.pdf; Complaint, Mars Incorporated and VCA Inc., FTC Docket No. C-4633 (Nov. 30, 2017) ("Respondent Mars … has agreed to acquire Respondent VCA … in violation of Section 5 of the FTC Act … [and] that such acquisition, if

Section 5 as applied to contracts to merge or to acquire shares. The Commission's challenge to Vons' proposed acquisition of Safeway alleged that the agreement of Vons to acquire Safeway violated Section 5.[407] The Commission's challenge to American Stores' proposed acquisition of Lucky Stores alleged that American Stores' tender offer to acquire Lucky Stores violated Section 5.[408] Similarly, in Dean Foods, the Commission alleged that Dean's acquisition of all or substantially all of the assets, tangible and intangible, of Bowman Dairy Company would violate Section 7, by, among other things, eliminating actual and potential competition in the sale and distribution of packaged milk in Chicago (and surrounding area), and that the "contract and combination by which Dean and Bowman undertook to eliminate the independent competition of Bowman is [an] unreasonable restraint of trade and commerce, and may hinder or have a dangerous tendency to hinder competition" and thus violated Section 5.[409] Bowman argued that there was no basis for alleging a violation by the company whose assets were being acquired, under either Section 5 or Section 7. The administrative law judge agreed, dismissing Bowman from the complaint. The full Commission agreed that Bowman was not a proper party to the Section 7 charge but disagreed with respect to Section 5, noting that in *Beatrice*, the Commission held that "a violation of Section 5 could be properly charged against a company engaged in a merger prohibited under Section 7 where that company was not subject to Section 7 under the terms of the statute."[410]

The use of Section 5 to challenge an agreement to merge (or to acquire shares) appears consistent with the prohibition of agreements that unreasonably restrain trade under

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consummated, would violate Section 7 of the Clayton Act … and Section 5 of the FTC Act.), https://www.ftc.gov/system/files/documents/cases/171_0057_c4633_mars-vca_complaint.pdf.

[407] See The Vons Companies, 111 FTC 64 (1988) (acquisition agreement, and the actions of the respondents to implement that agreement, constitute violations of Section 5).

[408] See American Stores, 111 FTC 80 (1988) (tender offer of American Stores and its wholly owned subsidiary Alpha Beta Acquisition Corp. to acquire the shares of Lucky Stores, and the actions to implement that offer, constitute violations of Section 5 of the FTC Act). (Note that the Vons and American Store complaints alleged both unilateral effects and a facilitation of collusion (if the merger was consummated); this is a few years before the merger guidelines incorporated "unilateral effects" as a theory of competitive harm and is further evidence of the proposition that the merger guidelines do not introduce new concepts but articulates theories the agencies have experience applying.)

[409] Complaint, Dean Foods, 70 F.T.C. 1146, 1151-52 (1966).

[410] Dean Foods, 70 F.T.C. 1148, 1291 (1966). (The Commission sought a temporary restraining order and preliminary injunction to prevent the parties from consummating the merger. The Seventh Circuit originally granted that relief, then reversed, finding that the Commission did not have authority to seek such relief prior to the entry of a cease-and-desist order. The Supreme Court reversed and remanded to the Seventh Circuit for consideration of whether to enter an injunction, but the parties had already consummated the transaction. Federal Trade Commission v. Dean Foods Company, 384 U.S. 597 (1966).)

Section 1 of the Sherman Act but is likely limited to situations where the merger violates Section 7 or the substantive provisions of the Sherman Act (or, if distinct, Section 5). The use of Section 5 to challenge a tender offer (whether consummated or not) where there was no agreement between two separate entities goes beyond the prohibitions of the Sherman Act (which requires an agreement) unless the shareholder's tender of the shares in response is considered part of an agreement (which might be a proper understanding of a contract offered and accepted). It is possible, but seems unhelpful, to consider this a use of Section 5 that may properly ignore the agreement requirement of a Section 1 claim. However, in either case, it seems that the underlying proposed (or consummated) merger or acquisition would need to be illegal for the tender offer to constitute a violation of Section 5.

The Commission's recently released updated statement on the application of its statutory authority to prohibit unfair methods of competition suggests that mergers may violate Section 5 even where they do not violate Section 7 or, possibly, the monopolization standards of Section 2.[411] The UMC Policy Statement identifies two "stand-alone" uses of Section 5. First, the Commission asserts that Section 5 can be used to challenge mergers where the technical requirements of Section 7 are not met. [412] The Commission alleged in both Beatrice Foods and in Foremost Dairies that their acquisitions of dairy producers not structured as corporations was, under the relevant facts, a violation of Section 5.[413] In Beatrice, the Commission noted that it was "well established that Section 5 reaches transactions which violate the standards of the Clayton Act though for technical reasons are not subject to that Act, unless such application of Section 5 would be an attempt to supply what Congress has studiously omitted. … Applying Section 5 to noncorporate acquisitions effectuates, rather than circumvents or conflicts with, Congress' policy with respect to the prevention of anticompetitive transactions."[414]

The new UMC Policy Statement also suggests that *Foremost* and *Beatrice* stand for the proposition that Section 5 can be used to challenge a series of mergers because of their cumulative effect, regardless of whether any individual merger or acquisition violates

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[411] FEDERAL TRADE COMMISSION, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (Nov. 10, 2022) (hereinafter UMC Policy Statement) at 14, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[412] Citing Dean Foods, 70 F.T.C. 1146 (1966), Beatrice Foods, 67 F.T.C. 473 (1965), supplemented, 68 F.T.C. 1003 (1965), modified, 71 F.T.C. 797 (1967), and Foremost Dairies, 60 F.T.C. 944 (1962).

[413] See Complaint, Foremost Dairies, 60 F.T.C. 944, 948 (1962) (nine of the acquired firms were not corporations, but alleging their acquisition was a violation of Section 5); Complaint, Beatrice Foods, 67 F.T.C. 473, 477, 480 (1965) (amended complaint challenged 175 acquisitions, including 98 which were not corporations, as violations of Section 5). (The citation to Dean Foods may relate to the acquired firm not being subject to liability under Section 7.)

[414] Beatrice, 67 F.T.C. 473, 726 (1965).

Section 7.[415] In Beatrice, the Commission stated that it might be "appropriate to scrutinize a series of acquisitions over a long period of time from the standpoint not only of whether particular acquisitions violate Section 7 or Section 5, but also of whether the respondent's course of conduct viewed as a whole constitutes an attempt to monopolize or an unfair method of competition. Looked at this way, the series of acquisitions may justify relief beyond what might be appropriate in a Section 7 or Section 5 case challenging a particular one or number of the acquisitions in the series, and irrespective of whether every individual acquisition, viewed separately, is unlawful."[416] There, the Commission "did not find it necessary to determine … whether respondent's series of acquisitions, viewed as a pattern, violated Section 5."[417] In *Foremost* (decided a few years prior to *Beatrice*), the Commission "had no doubt that where, as here, a respondent with a proclivity for growth by acquisitions is charged with a violation of Section 5, the cumulative effect of all of its acquisitions is of importance."[418] The Commission did not reach this question however, except to deny complaint counsel's request for a cease-and-desist order with respect to future acquisitions.[419] The Commission noted, without citation, that it had "previously rejected the argument under Section 7 that certain acquisitions in a series of acquisitions, none of which could be shown to have the adverse effect on competition required by Section 7, become illegal … for the reason that the cumulative effect on competition of these prior mergers may be such as to make any further acquisition illegal."[420]

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[415] See Foremost Dairies, 60 F.T.C. 944, 948 (1962) (complaint alleging "constant and systematic elimination of actual and potential competitors by means of acquisition … constitute unfair methods of competition"); Beatrice Foods, 67 F.T.C. 473, 477, 480 (1965) (complaint alleging "constant and systematic elimination of actual and potential competitors … by means of the acquisitions … constitute unfair methods of competition").

[416] Id. at 726-27.

[417] Id. at 731.

[418] Foremost Dairies, 60 F.T.C. 944, 1091 (1962).

[419] Id. at 1092.

[420] Id. at 1091. The Commission obtained relief from three other dairies that had engaged in a series of acquisitions. See Dean Foods, 70 F.T.C. 1146 (1966) (alleging the elimination of actual and potential competition from the acquisition of a major competitor; Commission ordered, after an administrative trial, divestiture, and prior approval provision for future acquisitions); Complaint and Order, Borden Company, 65 F.T.C. 296 (1964) (allegation that company that acquired over 500 entities and engaged in "constant and systematic elimination of actual and potential competitors;" such activity "constitute[s] a violation of Section 5"; ordered to divest eight regional dairy businesses" and obtain prior approval for future acquisitions); Complaint and Order, National Dairy Products Corp., 62 F.T.C.120 (1963) ("the constant and systematic elimination of actual and potential competitors … constitute[s] a violation of Section 5"; ordered to divest two dairy companies and obtain prior approval for future acquisitions).

In 1973, in response to the expiration of orders limiting future acquisitions by Beatrice, Dean Foods, Foremost Dairies, National Dairy Products, and Borden, the Commission adopted an "Enforcement Policy with Respect to Mergers in Dairy Industry" that required prior notice to the Commission of any acquisition of a dairy company that met certain production metrics for fluid milk. See Enforcement Policy with Respect to Mergers in Dairy Industry: Criteria for Assessing Future Mergers, 38 Fed. Reg. 17770 (Jul. 3, 1973).

The Commission identified and challenged other instances of multiple acquisitions as violations of Section 5.[421] The Commission's complaint against Facebook alleging illegal monopoly maintenance through a course of conduct that includes "acquiring companies that could emerge as or aid competitive threats" to "maintain its dominant position" in the market for personal social networking may be viewed as alleging a cumulative anticompetitive effect from Facebook's history of acquisitions. However, the complaint does not allege clearly allege this effect, limiting its concerns to "anticompetitive" acquisitions, without clearly identifying any but for WhatsApp and Instagram.[422] The Commission has also charged multiple acquisition cases as a violation only of Section 7.[423]

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[421] Complaint and Commission Opinion, SKF Industries, 94 F.T.C. 6, 82, 88 (1979) (alleging that multiple acquisitions by SKF and the by-sell agreement between SKF and Federal Mogul, "individually or taken as a whole, constitute an unfair method of competition in violation of Section 5"; Commission holding that "SKF has acquired a large number of … manufacturers that were located outside the United States and that exported little to the United States. Complaint Counsel allege that these acquisitions, even if not distinct violations of Section 5 … are part of a pattern of conduct that has had an adverse impact on the domestic bearings market. …. While the cumulative impact of many acquisitions could injure domestic competition to such an extent as to violate Section 5, inadequate proof was offered."); Complaint and Decision and Order, Damon Corp., 91 F.T.C. 301 (1978) (alleging that Damon's entered into a program of acquiring independent laboratories for the purpose of establishing a national chain, and, in nine years, made more then 50 acquisitions; this series of acquisitions, separately and cumulatively, alleged to violate both Section 7 and Section 5, and eliminated actual and potential competition); Complaint and Decision and Order, Georgia Pacific, 81 F.T.C. 984 (alleging that the cumulative effect of the acquisition of 45 companies violated Section 5 and Section 7 by, in part, eliminating actual and potential competition between the acquired companies and between the acquired companies and Georgia Pacific); National Tea, 69 F.T.C. 226, 227-29, 265, (1966) (alleging that series of acquisitions was a violation of Section 5, as an unfair method of competition, and a violation of Section 7; Commission found liability under Section 7 for acquisitions of over 400 stores acquired in 26 separate transactions; complaint counsel did not present testimony on Section 5 claim, so administrative law judge presumed such claim to be abandoned and Commission did not revive it; notably, the Commission did not order any divestitures, but merely prohibited further acquisitions unless approved by the Commission, as the "various dynamic features of the industry itself – particularly the relative ease of entry … will dissipate" the effects of the acquisitions.); Complaint and Order, Martin-Marietta Corp., 62 F.T.C. 834 (1963) (alleging that acquisition of nearly 100 entities, a "constant and systematic elimination[] of actual and potential competitors by … acquisition … constitute unfair methods of competition and unfair acts and practices").

[422] Amended Complaint, Federal Trade Commission v. Facebook, Inc., Case No. 1:20-cv-03590-JEB (D.D.C, Aug. 19, 2021) (alleging monopoly maintenance through anticompetitive acquisitions, monopoly maintenance through an unlawful course of conduct, both "unlawful monopolization in violation of Section 2 of the Sherman Act" and "thus unfair methods of competition"), https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf.

[423] See, e.g., Frito-Lay, 74 F.T.C. 688 (1968) (challenging eight acquisitions of potato chip, corn chip and pretzel manufacturers as a violation of Section 7; negotiated order to divest ten manufacturing plants, obtain Commission approval for future acquisitions, and not to advertise snacks in combination with parent's carbonated soft-drinks); Consolidated Foods Corporation, 68 F.T.C. 1137 (1965) (Section 7 challenge to the acquisition of three grocery store chains, for a total of over eighty stores; divestiture and prior approval for future acquisitions required); St. Regis Paper Company, 68 F.T.C. 57 (1965) (alleging acquisition of 15

The UMC Policy Statement notes that mergers involving potential or nascent competitors may violate Section 5.[424] The Commission also challenges such mergers under Section 7 of the Clayton Act and as a Section 5 monopolization claim. Many of the earlier challenges alleging a violation from the cumulative impact of many acquisitions included claims of harm arising from an elimination of potential competition.

IX. EFFICIENCIES

The Horizontal Merger Guidelines and the Vertical Merger Guidelines recognize that a merger may generate efficiencies, and that "merger-generated efficiencies may enhance competition"[425] and "have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers."[426] Efficiencies available through merger may increase the certainty of bringing new products to market or increase the speed with which new products are brought to market.[427]

Certain Supreme Court merger cases are viewed as skeptical towards efficiency claims and whether (and how) they should be recognized in evaluating the legality of a merger.[428] Yet the continuing relevance of the Supreme Court cases casting doubt on efficiencies is suspect after the Court's recognition of efficiency claims in later 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."[429] 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.[430] In *BMI*, the Court recognized the procompetitive rationale of a "blanket" music license as a reason to forego

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companies, individually or cumulatively, violated Section 7; agreed to divestiture of some assets and to a prior approval requirement for future acquisitions).

[424] UMC Policy Statement) at 14.

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

[426] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES at 11 (June 30, 2020). The Commission's revised policy statement on application of its authority to prohibit unfair methods of competition argues that it is not required to consider efficiency claims in evaluating whether a practice is unfair. UMC Policy Statement, at 10-12. Since a merger may be found to violate Section 5, this suggests the Commission may not consider efficiency claims in mergers challenged under Section 5. The Commission's position seems unlikely to be sustained in future merger matters. Most of the litigated Section 5 cases that the statement references were litigated well prior to the courts' recognition that efficiency claims are relevant in Sherman Act and Clayton Act cases, including merger cases.

[427] U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES at 40-41.

[428] FTC v. Procter & Gamble, 386 U.S. 568 (1967); United States v. Philadelphia National Bank 370 US 291,370 (1963); Brown Shoe v. United States, 370 U.S. 294, 344 (1962).)

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

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

per se treatment of a horizontal agreement among the members of two music societies on license terms.[431] 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.[432] 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.[433] (others?)

In *Baker Hughes*, the D.C. Circuit articulated a burden-shifting approach to evaluating the government's challenge to a merger. One way merging parties may "provide … evidence that the [government's] prima facia case inaccurately predicts the relevant transaction's probable effect on future competition" is "to offer evidence that post-merger efficiencies will outweigh the merger's anticompetitive effects."[434] As part of the burden-shifting approach, 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. There, the hospital argued 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 defense in any form." 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." 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."[435]

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."[436] In *Sandford Health*, the Eighth Circuit again

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

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

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

[434] United States v. AT&T, 310 F. Supp. 3d 161, 191 (D.D.C.2018).

[435] FTC v. University Health, Inc., 938 F.2d 1206, 1222 (11th Cir. 1991).

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

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."[437]

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."[438] 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." "Consequently" according to the *Anthem* court, "the circuit precedent that binds us allowed that evidence of efficiencies could rebut a prima facia showing." [439]

Other appellate courts have considered efficiency claims without ruling on the larger question of whether an efficiency defense exists. In *Penn State Hershey*, 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. 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.[440] 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."[441] District

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

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

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

[440] FTC v. Penn State Hershey Medical Center, 838 F.3d 327, 347-51 (3d. Cir. 2016); see also F.T.C. v. Hackensack Meridian Health, 30 F.4th 160, 175-178 (3d. Cir. 2022) ("efficiencies defense, as adopted by other Circuits, is clearly not met here" but "to the extent that the District Court required a showing of extraordinary procompetitive effect, it would have been incorrect").

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

courts routinely consider efficiencies in analyzing the competitive effects of a proposed merger.[442]

A combination with a potential entrant (or the combination of two potential entrants) may result in efficiencies or other procompetitive effects. The Commission will consider whether such a combination has the potential to generate significant efficiencies that may result in lower prices, improved quality, enhanced service, or new products. Cognizable efficiencies must be merger-specific, verifiable, and not result from an anticompetitive aspect of the merger. Merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, *e.g.*, by combining

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[442] 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. 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).

complementary assets.[443] Cognizable efficiencies "are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service."[444]

The Commission's review in *Genzyme/Novazyme* is instructive. Genzyme was a "large biotech company with substantial experience in developing therapies for lysosomal storage disorders," a group of disorders including Pompe disease, a life-threatening medical condition affecting infants and young children. Novazyme, a small research company, was founded in 1999, two years prior to its acquisition in 2001 by Genzyme. No treatment for Pompe disease existed prior to Genzyme's acquisition of Novazyme.[445]

At the time of its acquisition, Novazyme's Pompe disease program was at an early pre-clinical stage. Genzyme did not have a product on the market, but had previously entered into joint ventures with two other firms, Pharming and Synpac, to develop treatments. By the time of its acquisition of Novazyme, Pharming had abandoned efforts to commercialize its product. The Synpac treatment enzyme was in clinical trials, "but manufacturing problems were preventing production on a scale sufficient for commercialization."[446]

Prior to its acquisition of Novazyme, Genzyme had begun to ramp up its own internal research program. At the time of the merger (and continuing through the time of the Commission's investigation), neither company had a product on the market or approved for marketing by the Food and Drug Administration. Genzyme's treatment was further along than Novazyme's, but Novazyme's treatment was potentially superior.[447]

The Commission's investigation focused on how the transaction affected, and would continue to affect, the "pace and scope of research" into development of enzyme replacement therapies for Pompe disease.[448] The Commission ultimately closed the investigation.[449]

Chairman Timothy J. Muris, writing for himself, issued a statement indicating that the evidence was sufficient for him to conclude that the transaction had not and was not likely to

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[443] Horizontal Merger Guidelines at 29.

[444] *Id.* at 30.

[445] Statement of Chairman Timothy J. Muris, Genzyme Corporation/Novazyme Pharmaceuticals, Inc., at 6, 8 (2004), https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf.

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

[447] *Id.* at 8-10.

[448] *Id.* at 1.

[449] *FTC Closes its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc.*, FED. TRADE COMM'N. (Jan. 13, 2004), https://www.ftc.gov/news-events/press-releases/2004/01/ftc-closes-its-investigation-genzyme-corporations-2001.

slow the development of the internal Genzyme product and had resulted in benefits that accelerated the development of the Novazyme product. According to the Chairman, the merger "made possible comparative experiments"—"'comprehensive, blinded pre-clinical analysis comparing all four Pompe enzymes,' and the results of that analysis"—that "provided information that enabled the Novazyme program to avoid drilling dry holes" and created other possible synergies.[450]

The Commission also identified significant efficiencies in the *United Launch Alliance* joint venture of Boeing Corp. and Lockheed Martin. There, the Commission alleged harm to competition in the markets for the research, development and sale of Medium-to-Heavy launch services, and the research, development, and sale of Space Vehicles. The Commission alleged that the joint venture participants had the means and incentive to raise the costs of entry to potential Medium-to-Heavy launch service suppliers, by withholding support and information relevant to making a Space Vehicle compatible with a Launch Vehicle.[451] The Commission accepted the potential for efficiencies in the formation of the United Launch Alliance, stating that "[t]he compelling justification for permitting the ULA transaction to proceed, subject to conditions, is its capacity to improve quality in the performance of design, production, and launch preparation tasks in a discipline in which operational reliability is a paramount objective."[452]

In evaluating efficiency claims associated with mergers when challenged under a monopolization theory, the Commission has applied the efficiencies framework in the 2010 Horizontal Merger Guidelines, including the requirement that efficiencies be merger specific, that they be substantiated, and that they be verifiable.[453] When parties come forward with

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[450] *Id.* at 15, 17.

[451] Complaint, Boeing/Lockheed Martin, Docket No. C-4188 (F.T.C., May 1, 2007), https://www.ftc.gov/sites/default/files/documents/cases/2007/05/0510165complaint.pdf. This matter is discussed and summarized in the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENF'T (2020) at 25-26.

[452] *See Statement of Commissioner William E. Kovacic, with whom Chairman Deborah Platt Majoras and Commissioner J. Thomas Rosch Join, In the Matter of Lockheed Martin Corporation, The Boeing Company and United Launch Alliance, L.L.C.*, (May 1, 2007) at 2, https://www.ftc.gov/sites/default/files/documents/cases/2007/05/0510165kovacicmajorasrosch.pdf. See also William E. Kovacic, Competition Policy Retrospective: The Formation of the United Launch Alliance and the Ascent of Space, 27 Geo. Mason. L. Rev. 863 (2020), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2757&context=faculty_publications.

[453] See Prepared Remarks of Chairman Joseph J. Simons, ABA Section of Antitrust Law Fall Forum 2020 (Nov. 12, 2020) at 8-9, https://www.ftc.gov/system/files/documents/public_statements/1583022/simons_-_remarks_at_antitrust_law_fall_forum_2020.pdf; see also SUBMISSION OF THE UNITED STATES TO THE OECD, *Start-ups, Killer Acquisitions and Merger Control* 4-5 (Jun. 11, 2020),

sufficient evidence to substantiate the claimed procompetitive benefits of an acquisition, the Commission may consider whether that acquisition would result in, among other things, new or improved products, or increased speed to market of any acquired products.[454] The Commission may also consider any benefits in the form of improved innovation, including the ability of the merged firm to conduct research and development more effectively, to the extent those have likely effects on the relevant market.[455] Where a transaction is likely to produce harm and the merging parties are able to identify a non-pretextual justification for the transaction, the Commission will balance the potential harms and potential benefits, and consider whether the merging parties can accomplish by less restrictive means any procompetitive effects or efficiencies associated with the transaction.[456] The 2010 Horizontal Merger Guidelines, in evaluating the effect of potential efficiencies associated with a transaction, reject the position of some courts that a mere showing of a non-pretextual justification for an acquisition is sufficient for a defendant to overcome a challenge under Section 2.[457]

https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf.

[454] 2010 Horizontal Merger Guidelines, at 29.

[455] *Id.* at 30.

[456] *Id*.

[457] *Compare* United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (requiring balancing), *with* Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp., 592 F.3d 991 (9th Cir. 2010) (rejecting the need to balance after a showing of product improvements and benefits of certain conduct).