THREE KEY PRINCIPLES FOR

REVISING THE

HORIZONTAL MERGER GUIDELINES

HMG REVIEW PROJECT – COMMENT

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The Horizontal Merger Guidelines[1] ("Guidelines") successfully have served as "the blueprint for the architecture of merger analysis"[2] for more than twenty-five years. They set forth "as simply and clearly as possible .... [a] clear statement" of the U.S. government's merger enforcement policy to the business community, the antitrust agencies, the courts, and competition agencies around the world.[3]

Numerous Assistant Attorney Generals and Federal Trade Commission Chairmen of both political parties have adopted and supported the analytical framework introduced by Bill Baxter in 1982. The Guidelines greatly influence federal court development of Section 7 law,[4] and competition agencies[5] in many jurisdictions follow the Guidelines approach. As one former Assistant Attorney General explained, the Guidelines provide:

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[1] 1992 DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION HORIZONTAL MERGER GUIDELINES (APRIL 8, 1997) (hereinafter "GUIDELINES"), *available at* http://www.ftc.gov/bc/docs/hmg080617.pdf.

[2] *See* REPORT AND RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMMISSION (2007) (hereinafter "AMC REPORT") at 54-55:

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

[3] *See* Federal Trade Commission Chairman Robert Pitofsky, Federal Trade Commission Press Release, *FTC/DOJ Announce Revised Guidelines on Efficiencies in Mergers* (April 8, 1997).

[4] *See, e.g., FTC v. Whole Foods Mkt*, 548 F.3d 1028 (D.C. Cir. 2008); *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410 (5th Cir. 2008); *FTC v. Heinz*, 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *United States v. Englehard Corp.*, 126 F.3d 1302 (11th Cir. 1997); *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶75,725 (D.N.M. 2007); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Ca. 2004); *FTC v. Arch Coal*, 329 F. Supp. 2d 109 (D.D.C. 2004); *United States v. UPM-Kymmene Oyj*, 2003-2 Trade Cas.

> [C]ontext and reference points that will benefit many: The business community will benefit by improved guidance in understanding the analysis applied in merger review, and, therefore, in conforming merger behavior to the antitrust laws. The Agencies will benefit by improved guidance in developing merger investigations, and importantly, in litigating cases once they have determined that a merger violates the antitrust laws. Finally, one can expect that courts also will benefit by having the guidelines available to assist in the evaluation of parties' assertions. Rather than having to engage in an ad hoc inquiry into the issues of big buyers and entry, for instance, the courts will have a framework for relating these issues to the statutory objective of preventing mergers, the effect of which may be substantially to lessen competition.[6]

We offer three observations. First, the Merger Guidelines have succeeded in significant part because they do not try to do too much. Rather than complex, lengthy regulations, the Guidelines provide a flexible and durable framework that reflects the antitrust community's consensus on how to evaluate the competitive effects of horizontal mergers. Any potential changes to the Guidelines should be evaluated in this light. Second, as economic experience and learning evolve, so too does agency practice. The

(CCH) ¶74,101 (N.D. Ill. 2003); *FTC v. Libbey*, 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.D.N.Y. 1997); *FTC v. Staples*, 970 F. Supp. 1066 (D.D.C. 1997).

[5] A review of the merger guidelines of other jurisdictions illustrates the influence the Guidelines have had in shaping merger policy worldwide. *See, e.g.*, GUIDELINES ON THE ASSESSMENT OF HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS (Feb. 2004), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF; Canada Competition Bureau, MERGER ENFORCEMENT GUIDELINES (Sept. 2004), *available at* http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/$file/2004%20MEGs.Final.pdf; The United Kingdom's COMPETITION COMMISSION AND OFFICE OF FAIR TRADING, MERGER ASSESSMENT GUIDELINES (Consultation Document, April 2009), *available at* http://www.oft.gov.uk/shared_oft/consultations/OFT1078con.pdf; The Australian COMPETITION & CONSUMER COMMISSION MERGER GUIDELINES (November 2008), *available at* http://www.accc.gov.au/content/index.phtml/itemId/809866.

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

Guidelines similarly should evolve to reflect actual agency practice. We identify a few areas in which agency practice and the Guidelines currently diverge. Third, evaluation of individual mergers is heavily fact specific; any changes to the Guidelines should highlight those facts that are particularly probative in making enforcement decisions. We provide several examples of such facts.[7]

I. THE GUIDELINES SHOULD CONTINUE TO PROVIDE A FLEXIBLE FRAMEWORK THAT REFLECTS A CONSENSUS VIEW

The Guidelines are widely accepted and widely used. They provide a flexible, comprehensive, and administrable approach. The Guidelines focus on the key questions, concentrating on a merger's likely competitive effects. They do not, indeed cannot, explain the precise analysis to be undertaken in each investigation. Antitrust analysis is highly fact dependent, and the flexibility (and generality) of the Guidelines reflects this crucial point. To be durable, law enforcement guidelines should reflect the existing consensus views of academics and professionals.[8]

The lack of such consensus doomed the recent attempt to provide a "one-size fits all" test for analyzing unilateral conduct under Section 2 of the Sherman Act.[9] As discussed in more detail below, the long-held consensus regarding the relative

[7] The examples we provide under our second and third points are not meant to be exhaustive.

[8] *See also* Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, *Enforcement Priorities in the New Administration* at 14 (November 17, 2009), *available at* http://www.ftc.gov/speeches/rosch/091117enforceprioritiesremarks.pdf. ("The 1992 Guidelines have been successful in large measure due to their acceptance by both agencies and every administration since their adoption. The next version of the Guidelines will need to attain a similar level of consensus to be successful.")

[9] The Federal Trade Commission refused to join with the Department of Justice in issuing the Section 2 Report because of concerns it "seriously overstate[d] the level of legal, economic, and academic consensus regarding Section 2." *Statement of Commissioners Harbour, Leibowitz And Rosch On The Issuance Of The Section 2 Report By The Department Of Justice* at 1 (September 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf.

insignificance of simple concentration tests in evaluating horizontal mergers justifies reflection of that view in any revisions to the current Guidelines. Major changes that lack such consensus, however, risk the fate of the Department of Justice's 2008 Section 2 Report.[10]

Successful Guidelines also walk a fine line between remaining broadly applicable and providing certainty to businesses and practitioners. On the one hand, to remain broadly applicable across widely varying markets and industry settings, the Guidelines must incorporate sufficient flexibility. On the other hand, to provide significant certainty, the Guidelines must be both administrable and sufficiently constraining.[11] The Guidelines have largely accomplished this difficult balancing act. Absent serious deficiencies in the current Guidelines, revisions should not disrupt established practice.[12]

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[10] The search for consensus does not mean that different decision-makers will or should reach identical decisions in individual cases. There will always be close cases on which no set of guidelines can provide only one answer to a merger's legality. Moreover, decision-makers differ about how they value Type I / Type II error, about the quantum of evidence necessary to settle an investigation short of litigation, and about the level of risk they should bear when challenging a merger in federal court.

[11] *See* AMC Report, *supra*, note 2, at 29:

> [S]ubstantive standards of antitrust law ... should meet several criteria. The rules of antitrust must be economically sound and flexible enough to accommodate new economic learning and changes in the nature of competition. The rules should also be clear, predictable, and administrable, so that businesses can comply with them and courts can administer them. ... As antitrust law has more fully incorporated economic learning into the substantive rules of antitrust, the courts and the antitrust agencies have sought to develop revised rules that combine economically sound principles and flexible analysis with clarity, predictability, and administrability.

[12] *See, e.g.*, the comment of FTC Chairman Robert Pitofsky on the likely limited effect of the 1997 revisions to the Guidelines: "At the end of the day ... we do not believe that they will dramatically alter the outcome of our current merger enforcement policy. At most, they will make a difference in a few close cases." (As quoted in Federal Trade Commission Press Release, *FTC/DOJ Announce Revised Guidelines on Efficiencies in Mergers* (April 8, 1997).); *see also Remarks of FTC Chairman Janet Steiger Before the American Bar Association Section of Antitrust Law* (April 3, 1992) just after release of the Guidelines:

> I should stress that ... the new Guidelines reaffirm the basic approach to merger analysis in the 1982 and 1984 Merger Guidelines and the Commission's 1982 Statement Concerning Horizontal Mergers. For the most part, the changes that have been made clarify the analysis, correct some misunderstandings under the

II. THE GUIDELINES SHOULD REFLECT AGENCY PRACTICE

As the joint FTC and DOJ 2006 Commentary on the Merger Guidelines ("Commentary")[13] made clear, current agency practice reflects both the additional experience gained from hundreds of investigations since 1992 and the further development of economic knowledge. Similar developments motivated the Guidelines' revisions in 1982 (incorporating a substantial body of new economic learning[14]), in 1992 (incorporating directly the concept of unilateral effects and revising the analysis of entry[15]), and in 1997 (advancing the treatment of efficiency claims[16]). Incorporating the best of the agencies' recent learning and experience into the Guidelines will help them remain relevant into the next decade.[17]

> prior Guidelines, and refine the Guidelines in light of advancements in thinking about mergers during the past decade. But on the whole, I do not expect the Commission's analysis of mergers to change substantially under the new Guidelines.

[13] FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006) (hereinafter "COMMENTARY").

[14] William Baxter, *Responding to the Reaction: The Draftman's View*, 71 CALIF. L. REV. 618 ("When the Antitrust Division of the United States Department of Justice undertook to update the 1968 Merger Guidelines, two goals were set: first, to bring the Guidelines into line with subsequent developments in antitrust law and economics; and second, to reduce the uncertainty surrounding the evaluation of mergers and acquisitions by the Department.").

[15] *See Remarks of James Rill, Assistant Attorney General For Antitrust* (April 9, 1992) *reprinted at* 62 ANTITRUST & TRADE REG. REP. (BNA) 485, introducing the 1992 Horizontal Merger Guidelines ("These new Guidelines represent the next logical step in the continued refinement of the Department's analysis of mergers ... Our purpose in undertaking the Guidelines revision project was to incorporate into the 1984 Merger Guidelines the legal, economic, and practical learning that has taken place since their release almost eight years ago.").

[16] *See* comment of Federal Trade Commission Chairman Robert Pitofsky ("These revisions to our Guidelines are designed to bring the analysis of efficiencies in mergers up-to-date with the analysis of efficiencies in other areas of antitrust and up-to-date with our contemporary competitive environment.") as quoted in Federal Trade Commission Press Release, *FTC/DOJ Announce Revised Guidelines on Efficiencies in Mergers* (April 8, 1997).

[17] *See, e.g.*, ABA SECTION OF ANTITRUST LAW, 2008 TRANSITION REPORT 32-38 (2008) ("[T]here are concerns that some parts of the Guidelines no longer reflect current economic thinking and the approach taken by the agencies or do not adequately address certain issues that arise in merger cases. ... The agencies should consider revisions to the Merger Guidelines, and ensure that they remain up-to-date on an ongoing basis."); *See also* AMC REPORT, *supra*, note 2, at 48 (("Most agree that current law,

A. The Agencies Should Adjust The HHI Thresholds And No Longer Characterize Certain Mergers As "Presumptively Anticompetitive"

The Guidelines identify three concentration levels as "useful indicator[s] of the likely potential competitive effect of a merger." Markets with an HHI below 1000 are regarded as unconcentrated; markets with an HHI between 1000 and 1800 are regarded as moderately concentrated; and markets with an HHI above 1800 are regarded as highly concentrated.[18] The Guidelines state that mergers in unconcentrated markets are unlikely to have adverse competitive effects; mergers in, or resulting in, moderately concentrated markets may raise competitive concerns; and, mergers in, or resulting in, highly concentrated markets raise competitive concerns, that, depending on the size of the combined firm, are presumed to be anticompetitive.

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including as interpreted and applied under the agencies' merger guidelines, is sufficiently grounded in economic learning and has sufficient flexibility to analyze properly the competitive issues that can arise in industries in which innovation, intellectual property, and technological change are central features. Nonetheless, room for improvement exists."), and at 49 (Recommendations 6-9, discussing treatment of efficiencies and entry)).

[18] GUIDELINES, at §1.51.

Neither the economic literature[19] nor actual agency practice[20] supports these tiers as indicators of likely competitive effects. The FTC's investigative and enforcement data from 1996 to 2007 – covering administrations of both political parties – show that the antitrust agencies do not find the current thresholds to predict accurately which mergers are likely to be anticompetitive. From 1996 through 2007, setting aside certain mergers among petroleum firms,[21] the FTC did not challenge *any* mergers, or seek relief in *any* markets, when, post-merger, the market concentration level was below 2000. The FTC examined 53 non-petroleum markets with post-merger concentration levels below 1999; in 13 of those markets, the post-merger concentration level fell between 1800 and 1999. Although deltas in these unchallenged markets were as high as 800, the FTC did not allege anticompetitive effects in any of them.[22]

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[19] *See* Paul Pautler, *Evidence on Mergers and Acquisitions*, 48 ANTITRUST BULLETIN 119, and studies cited therein; Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in Richard Schmalensee and Robert D. Willig, II HANDBOOK OF INDUSTRIAL ORGANIZATION (1989, Elsevier Science Publishers, B.V.), and studies cited therein. *See also* John Sutton, TECHNOLOGY AND MARKET STRUCTURE (1998, MIT Press) at 486 ("Competition policy commonly pursues the aim of reducing or limiting the level of concentration to achieve some gain in welfare. ... [T]he overriding conclusion for policy analysis is that the answers to most of the questions we ask may turn upon the details of the particular market involved."); and Dennis Carlton, *Transcript of Department of Justice and Federal Trade Commission Merger Workshop*, February 19, 2004, at 133, *available at* http://www.ftc.gov/bc/mergerenforce/040219ftctrans.pdf. ("[T]here are some industries in which competition is naturally vigorous, all else equal. They're just naturally more competitive for whatever reason. In game theory terms, they're playing a more competitive game. In those industries, there is an inverse relationship between, or can be, between concentration and price. It completely reverses our usual notions of price and concentration. The more concentrated the industry, the lower the price.").

[20] FEDERAL TRADE COMMISSION, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2007 (hereinafter "HORIZONTAL MERGER DATA, 1996-2007"), (Dec. 1, 2008), *available at* http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf; FEDERAL TRADE COMMISSION, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2003 (hereinafter "HORIZONTAL MERGER DATA, 1996-2003") (Aug. 31, 2004), *available at* http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf; FEDERAL TRADE COMMISSION AND DEPARTMENT OF JUSTICE, MERGER CHALLENGES DATA, FISCAL YEARS 1999-2003 (Dec. 18, 2003) (hereinafter "MERGER CHALLENGES DATA, 1999-2003"), *available at* http://www.ftc.gov/os/2003/12/mdp.pdf. We encourage the Commission to continue to release updated data every few years; the Department of Justice should follow suit.

[21] We remove the FTC's enforcements in petroleum markets for the reason discussed in note 31.

[22] *See* Tables 3.1 to 3.6 in HORIZONTAL MERGER DATA, 1996-2007 and Tables 3.1 to 3.6 in HORIZONTAL MERGER DATA, 1996-2003, *supra*, note 20. Data on "deltas" were presented in ranges. In nine instances, a

The FTC data also show that the agency did not, on a consistent or preponderant basis, allege that anticompetitive effects were likely to occur in a variety of markets with post-merger concentration levels as high as 2399 (except for mergers involving petroleum firms). For the ten-year period 1998 through 2007, of the 43 non-petroleum product markets where the post-merger concentration level was between 2000 and 2399, the FTC sought relief in only 16 (37 percent). (In 14 of these challenges, the change in the HHI was at least 300.[23]) These data are consistent with (and in part overlaps with) the FTC's actions over the eight years from 1996 through 2003: of the 38 non-petroleum product markets where the post-merger concentration level fell between 2000 and 2399, the FTC sought relief in only 19 (50 percent). (In 16 of these challenges, the change in the HHI was at least 300.[24])

The DOJ has not released data as extensive as that released by the FTC. Nevertheless, the data provided indicate that from 1999 through 2003, the DOJ sought relief in no more than eight markets with post-merger HHIs below 2000, and in no more than 29 markets where the post-merger HHIs fell below 2400.[25] (Twenty-four of those twenty-nine markets were in the banking industry.[26]) A review of complaints filed by the

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delta of 500 or more (combined with a post-merger HHI as high as 1999) was not deemed sufficient to challenge a transaction.

[23] Tables 3.1 to 3.6, HORIZONTAL MERGER DATA, 1996-2007, *supra*, note 20.

[24] Tables 3.1 to 3.6, HORIZONTAL MERGER DATA, 1996-2003, *supra*, note 20.

[25] MERGER CHALLENGES DATA, 1999-2003, *supra*, note 20. DOJ sought relief in only two markets (banking) where the post-merger concentration level was below 1800. Compare Tables 1, 5, and 7 in the MERGER CHALLENGES DATA, 1999-2003.

[26] *Id.* The data is not clear regarding the number of markets in which DOJ sought relief; the data allow for the identification of at least 572 markets where the DOJ sought relief. An additional 334 markets are identified as either FTC or DOJ; in those 334 markets, the agencies sought relief in only one market with a post-merger HHI below 2000, and in only two markets where the post-merger HHI fell between 2000 and 2399. For our calculation we have assumed these are DOJ actions. Even under these restrictive assumptions, it is clear that the DOJ, like the FTC, is not likely to challenge a merger where the post-

DOJ between 2004 and 2009 (fiscal years) identifies no significant enforcement activity in markets with concentration levels below 2000. Given these enforcement statistics – the fruit of over a decade of detailed merger investigations in a wide variety of industries – the agencies cannot credibly "presume" that a merger with a post-merger HHI not exceeding 2400 is likely anticompetitive.

Even when the post-merger HHI is high, the numbers are "only the starting point for analyzing the competitive impact of a merger."[27] Additional analysis will trump market share and concentration statistics. In practice, the agencies apply "the Guidelines as an integrated whole to case-specific facts" without "undue emphasis on market share and concentrations statistics."[28] The FTC's merger investigation data clearly show the limited utility of share- and concentration-based analysis. The FTC has not required relief in markets with post-merger concentration levels as high as 4999. Of 411 markets where the post-merger HHI was between 2400 and 4999 (as identified in the most recent data release), the FTC did not require relief in 105 (25.5 percent). In 77 of those 105 markets (73 percent), the merger-induced change in concentration (delta) was 500 or greater; in another 11 markets (10.5 percent), the delta ranged from 300 to 499. In 208 markets where the post-merger HHI was 5000 to 6999, the FTC did not seek relief in 27 (13 percent); in 24 of those 27 markets (89 percent), the delta was 800 or greater.[29]

merger concentration level is below 2000. (The data release notes that the DOJ did not compute concentration statistics for "a handful" of markets; it appears that these markets were not included in the data release.)

[27] GUIDELINES, §2.0.

[28] COMMENTARY, *supra*, note 13, at 15.

[29] *See* Table 3.1, HORIZONTAL MERGER DATA 1996-2007, *supra*, note 20. This table also shows that the FTC sought relief in 227 of 230 markets (98.7 percent) where the post-merger HHI was 7000 or greater. This fact suggests, as the antitrust community recognizes, that mergers to duopoly or monopoly face significant hurdles in receiving antitrust clearance.

In accord with the agencies' de-emphasis on structural factors, any Guidelines changes should: (i) eliminate the presumption of anticompetitive effects associated with mergers in, or resulting in, highly concentrated markets; (ii) revise the HHI thresholds to levels that are more consistent with the agencies actual enforcement practices; and, (iii) use the revised HHI thresholds solely as a screen to identify mergers that require a competitive effects analysis. We would adjust the Guidelines' three-tier concentration levels[30] to reflect enforcement practice and the prevailing emphasis on a more direct analysis of likely competitive effects. The proposed adjustments would still provide substantial guidance as highly useful screens:

> (i) Mergers resulting in markets with a post-merger HHI below 1800 are unlikely to raise competitive concerns[31];

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[30] We would abandon characterization of markets as unconcentrated, moderately concentrated, or highly concentrated, as reliance on the characterization may substitute for analysis.

[31] This number – a substantial jump from the existing "safe harbor" of 1000 – is appropriate even though the agencies have, in the 17 years since the release of the 1992 Guidelines, occasionally sought relief in markets with a post- merger concentration level below 1800. The data released by the FTC and the DOJ, (*see* note 20 *supra*), as well as a review of FTC and DOJ complaints for the FYs 1992-2009 (representing the tail end of the Bush I Administration, the first year of the Obama Administration, and the complete terms of the Clinton and Bush II Administrations) show very clearly that the agencies rarely challenge transactions in "moderately concentrated" markets. Agency challenges to mergers in moderately concentrated markets have largely been limited to transactions combining the wholesale and retail gasoline marketing assets (and related terminal assets) of large petroleum firms. These challenges derive from the FTC's practice in large petroleum firm mergers (*e.g.*, British Petroleum Company p.l.c. and Amoco Corporation, Exxon Corporation and Mobil Corporation) to seek relief at lower concentration levels (as low as 1400) as an alternative to a comprehensive, but substantially longer, investigation. *See* Federal Trade Commission, Bureau of Economics, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT, at 27-29 (Aug. 2004) (hereinafter "PETROLEUM INDUSTRY REPORT"). This practice is an accommodation to the realities of a modern merger investigation – in particular the time and expense – and the merging parties' interest in consummating their transaction in a reasonable time. *Id.* at 27-28. When the parties desire to consummate their acquisition prior to, or without, a detailed investigation, it is proper that they bear the risk of over-enforcement. *Id.*

There is little basis for distinguishing wholesale and retail gasoline markets from the many other markets where price is transparent and products are homogenous. *See Statement of Timothy J. Muris Concerning FTC Merger Enforcement in the Oil Industry* (June 2, 2004), *available at* http://www.ftc.gov/speeches/muris/040602response.shtm. Unsurprisingly, for petroleum mergers raising issues in fewer markets, in which an investigation was more manageable, the Commission did not seek relief in markets with a post-merger HHI below 2000. PETROLEUM INDUSTRY REPORT, at 28, note 33. The FTC's data also reveal non-enforcement in many petroleum markets with HHIs above 2000. *See* Table 3.3, HORIZONTAL MERGER DATA, 1996-2007, *supra*, note 20 (showing no action taken in 16 petroleum markets

> (ii) Mergers resulting in markets with a post-merger HHI of 1800 to 2399 are unlikely to have adverse competitive effects when the merger increases the HHI by less than 300. Mergers in this tier that increase the HHI by 300 or more are likely to require detailed investigation into their likely competitive effects; and,
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> (iii) Mergers resulting in markets with a post-merger HHI of 2400 or greater are unlikely to have adverse competitive effects when the merger increases the HHI by less than 150. Mergers in this tier that increase the HHI by 150 or more are likely to require detailed investigation into their likely competitive effects.

We note that our suggestions are based on the lowest level of the ranges for which enforcement data has been released and that they generally represent a lower bound on the HHI levels the agencies have found to trigger a concern.[32] Of course, "cases falling just above and just below a threshold present comparable competitive issues"[33] and should not be precluded from (or subject to) a more detailed investigation simply because they are slightly lower (or higher) than the recommended tiers.

B. The Guidelines Should Recognize Fixed-Cost Efficiencies As Cognizable

The Commentary makes it clear that the agencies accept fixed-cost savings under certain circumstances.[34] Indeed, the Commentary notes that "under certain market or

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where the post-merger HHI ranged from 2000 to 3999, for the period FY 1998 through 2007); Table 3.3 of HORIZONTAL MERGER DATA, 1996-2003, *supra*, note 20 (showing no action taken in 17 petroleum markets where the post-merger HHI ranged from 2000 to 3999, for the period FY 1996 through 2003).

[32] The choice of a 150 delta for mergers in the highest tier represents a midpoint. Moreover, the data as published are in ranges and thus do not allow for precise delineation of the appropriate lower and upper bounds. The agencies should use the more precise, non-public, data to properly adjust the thresholds.

[33] GUIDELINES, §1.50.

[34] COMMENTARY, *supra*, note 13, at 58 (the agencies "consider merger-specific, cognizable reductions in fixed costs, even if they cannot be expected to result in direct, short-term, procompetitive price effects because consumers may benefit from them over the longer term even if not immediately").

sales circumstances, fixed-cost savings may result in lower prices in the short term."[35] A recent study of 186 FTC merger investigations found "staff was as likely to accept fixed-cost savings as they were to accept claims of variable-cost savings."[36] Additionally, the economic literature and experience suggests that many companies price based on total cost or some other cost measure that includes at least some fixed costs; thus, as fixed costs change for these companies, so will prices.[37]

To reflect the actual practice of the agencies and the economic literature, the Guidelines should be revised (1) to acknowledge that fixed-cost savings may result in lower prices in the short term; and, (2) to state that the agencies will consider as cognizable those fixed-cost savings that are likely to provide some benefit to consumers.

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[35] *Id.* The Commentary includes two examples of fixed-cost savings passed on to consumers: (i) where contracts are "cost based," and (ii) where contracts require fixed-cost savings to be passed through to the customer.

[36] Malcolm B. Coate and Andrew J. Heimert, MERGER EFFICIENCIES AT THE FEDERAL TRADE COMMISSION 1997-2007 at (vi), *available at* http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf. Efficiency claims were raised and evaluated in 147 of the 186 matters. *Id.* at 6-7.

[37] *See, e.g.*, comment of David T. Scheffman, Director, Bureau of Economics, Federal Trade Commission, at the Bureau of Economics Roundtable on Understanding Mergers: Strategy & Planning, Implementation and Outcomes, at page 228 of the conference transcript, *available at* http://www.ftc.gov/be/rt/xscriptpanel4.pdf. ("[E]conomists have known ... forever ... that actual business decisions are often made in part based on average costs rather than incremental costs."); remarks of David Painter, Chief Accountant, Federal Trade Commission, *Id.*, at pages 232-252; comment of Gabe Dagen, Assistant Director, Accounting and Financial Analysis, Federal Trade Commission, *Id.*, at page 263 ("Having come from industry, I know that fixed costs are involved in pricing decisions."); and various studies, including Eric. W. Noreen and David Burgstahler, *Full-Cost Pricing and the Illusion of Satisficing*, J. OF MANAGEMENT ACCOUNTING RESEARCH 239, 252 (1997) ("[I]t is common to hear some variation of the assertion that 'of course, full costing is necessary for long term pricing decisions.'"); Eunsup Shim and Ephraim F. Sudit, *How Manufacturers Price Products*, MANAGEMENT ACCOUNTING 37 (Feb. 1995) (finding that 70 percent of large manufacturing companies set prices by marking up some version of full costs; V. Govindarajan and R.N. Anthony, *How Firms Use Cost Data in Price Decisions*, MANAGEMENT ACCOUNTING 30 (July 1983) (finding that 41 percent of companies responding to the author's survey based their prices on total costs (production and non-production) and another 41 percent based prices on total production costs (which contain certain elements of fixed cost)).

C. The Guidelines Should Confirm That The Evidentiary Burden on The Parties To Demonstrate Efficiencies Is No Greater Than The Agencies Burden To Show Anticompetitive Effects

The Guidelines should make clear that the merging parties are not, in supporting their efficiency claims, held to a higher standard of proof than the one to which agency staff is held in showing anticompetitive effects. In our experience, agency leaders do not apply different levels of proof, although some of the investigating attorneys appear more skeptical of efficiency claims.[38] We believe that the Guidelines should reject different burdens of proof for procompetitive and anticompetitive effects. If agency practice is to apply different burdens, any revisions should justify such an extraordinary position.

III. THE GUIDELINES SHOULD REFLECT THE IMPORTANCE OF "ACTUAL EVIDENCE" AND MERGER-SPECIFIC HIGHLY PROBATIVE FACTS

Although it is clear that agency practice is to rely heavily on case-specific facts, not all facts are created equal. Here we discuss five facts whose presence provides especially reliable information for guiding agency decisions. We also discuss one issue – innovation markets – in which the lack of reliable data about how to analyze mergers is a fact calling for caution in agency action.

A. The Guidelines Should Recognize That Firm And Industry Experience Are Highly Reliable For Determining The Merged Firm's Ability To Capture Cost Savings or Other Efficiencies

In determining whether merging parties are likely to obtain efficiencies, such as successfully implementing cost savings or production enhancing processes, the agencies should give substantial weight to the past experiences and successes (or failures) of the firm, or similarly situated firms in the same or similar markets. Just as the agencies

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[38] In litigation, however, the agencies remain unduly hostile toward efficiency claims.

rightly dismiss unsubstantiated efficiency claims, they should accept as presumptively valid those claims based on the best evidence possible: the resulting efficiencies, or lack thereof, in recent mergers involving one of the merging companies or others in the relevant industry.[39] Moreover, such evidence may include improvements in product quality, not just reductions in cost.

B. The Guidelines Should Not Assume The Form of Competition Among Firms That Offer Differentiated Products

Firms compete in different ways, including by bargaining (in auctions), by using promotions and advertising, by setting capacity, and by managing revenue or "yield." [40] The Guidelines framework searches for ways in which market power may be exercised successfully; this analysis depends highly on the particular industry at issue. Changing the Guidelines to assume a specific form of competition – e.g., that firms compete by simply setting price – would make it more difficult for the Guidelines both to characterize existing competition accurately and to predict any post-merger loss of competition. Specifying the form that competition takes, independent of the industry particulars, risks serious error.

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[39] Benefits that arise in non-merger settings may also produce meaningful evidence of successful efficiencies. For example, experience may reveal lower costs from improved production techniques that one of the merging firms uses or increased product quality associated with increases in output.

[40] *See, e.g.*, the discussion of auction and bargaining models in the COMMENTARY, *supra*, note 13, at 31-36; *Statement of the Federal Trade Commission Concerning Google/DoubleClick*, FTC File No. 071-0170 (Dec. 19, 2007) (advertising), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf; *United States v. Exelon*, Case. No.: 1:06CV01138 (D.D.C. 2006) (Complaint) (bidding of capacity into same-day and day-ahead markets), *available at* http://www.justice.gov/atr/cases/f216700/216785.pdf; *Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc* and *Carnival Corporation/P&O Princess Cruises plc*, FTC File No. 021 0041 (Oct. 4, 2002) (yield management), *available at* http://www.ftc.gov/os/2002/10/cruisestatement.htm.

More than 15 years of using various models to estimate the price effects of mergers "has lead to a greater appreciation of the complexity and variety of competitive processes, and clearer understanding that differing modeling assumptions can amplify or attenuate merger price increases."[41] While a model can "usefully complement a fact-intensive analysis of consumers, competitors, and the institutional setting of an industry, it cannot substitute for such an analysis."[42] As the Guidelines move away from reliance on structural presumptions, it is unnecessary and inconsistent to incorporate models that do not reflect real-world competition.[43]

C. The Guidelines Should Recognize That Merging Firms Have An Incentive To Pass on Marginal Cost-Savings, Regardless of The Number of Remaining Competitors

The Guidelines should correct the mistaken view that a firm's incentive to pass-on merger-specific efficiencies is positively correlated with the number of post-merger competitors.[44] The economic literature establishes, with little or no disagreement, that

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[41] Gregory J. Werden, Luke M. Froeb, David T. Scheffman, *A Daubert Discipline for Merger Simulation*, 18:3 ANTITRUST 89, 91.

[42] *Id.* at 91.

[43] Importantly, simulation models are highly sensitive to assumptions about costs, efficiencies, and demand variables. Gregory J. Werden, et. al., *A Daubert Discipline for Merger Simulation*, *supra* note 41.

[44] *Compare* HORIZONTAL MERGER GUIDELINES OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL (1993) § 2, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,406 ("to the extent that a merger increases market power, there is less likelihood that any productive efficiencies would be passed on to consumers"), *available at* http://www.naag.org/assets/files/pdf/at-hmerger_guidelines.pdf, *and* GUIDELINES ON THE ASSESSMENT OF HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS, *supra*, note 5, at ¶ 84 ("the incentive on the part of the merged entity to pass efficiency gains on to consumers is often related to the existence of competitive pressure from the remaining firms in the market") *with* Michael Vita & Paul Yde's, *Merger Efficiencies and Pass-Through Analysis* (comment to the Antitrust Modernization Commission), *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/merger_pdf/060316_Vita_Yde.pdf ("enforcement agency standards and legal commentary reflect[ ] the mistaken view that static competition is what causes a company to "pass on" efficiencies achieved through merger. ... [T]he extent to which a firm passes on firm-specific marginal cost reductions is determined by the shape of the demand curve it faces, and ... the pass through rate for such merger efficiencies is directly related to the merged firm's market power. By contrast, the greater the amount of competition faced by the merged firm, the less likely

merger-specific marginal cost savings will, at least in part, be passed on to consumers whenever the merged entity will face a downward sloping demand curve, as do almost all real world firms.[45] A recent study of FTC staff treatment of efficiency claims, however, suggests that investigating lawyers frequently express concerns that merger-generated cost reductions may not be passed on to consumers.[46] To avoid error, and to correct the mistaken view that firms only pass-on cost savings because of competitive pressures, the Guidelines should be revised to recognize that marginal-cost savings will lower prices.

D. The Guidelines Should Reflect The Importance of Customer Views In Agency Determinations of Likelihood of Anticompetitive Effects

An important variable in the agencies' decision to challenge a merger is the volume and strength of customer complaints. The merger data that the FTC released in 2004, subsequently updated twice, demonstrate that strong, consistent complaints from customers almost always lead to a government challenge.[47] Although the data do not permit testing the point, our experience is that strong support from sophisticated

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it is to pass on any firm-specific marginal cost reductions. This analysis is well-known and the conclusions are uncontroversial among economists.").

[45] *See, e.g.*, Luke Froeb, et. al., *Pass-Through Rates and the Price Effects of Mergers*, 23 INT'L J. INDUS. ORG. 703 (2005); Paul L. Yde & Michael G. Vita, *Merger Efficiencies: Reconsidering the "Passing-On" Requirement*, 64 ANTITRUST L J. 735, 736 (1996) ("A reduction in marginal cost invariably increases the firm's incentive to expand output. And if the firm faces a downward sloping, firm-specific demand curve ... then the firm also will reduce its price.")

[46] Malcolm B. Coate and Andrew J. Heimert, MERGER EFFICIENCIES AT THE FEDERAL TRADE COMMISSION 1997-2007 at 27 ("pass-through issues were much more likely to be a concern to [the Bureau of Competition] than [the Bureau of Economics]").

[47] Tables 7.1 and 8.1, HORIZONTAL MERGER DATA, 1996-2007, *supra*, note 20, and Tables 7.1 and 8.1, HORIZONTAL MERGER DATA, 1996-2003, *supra*, note 20. To be reliable, the evidence must reflect a substantial volume of customer experience and, for similarly situated customers, be consistent.

customers generally does, and should, lead to a merger's approval. Unfortunately, in *Heinz, Arch Coal,* and *Oracle,* courts were dismissive of customer opinions.[48]

The agencies rely substantially on the opinions of customers to implement the Guidelines: customer opinions provide important, perhaps unparalleled, evidence for defining the relevant product and geographic markets by identifying: (a) the firms that participate in those relevant markets and their competitive strengths, and (b) the firms that may be credible entrants. Nevertheless, some judges appear to want customers to do empirical or econometric analysis to understand fully how a merger may affect them. Such judicial criticism can easily be extended to suggest that failure to perform a critical loss analysis of the ability of a hypothetical monopolist test to raise price profitably, or do an analysis of the economic requirements of entry, would render suspect customer testimony on market definition and entry.

We believe that the agencies correctly recognize the importance of opinions from experienced customers; courts should grant similar deference to those opinions, both positive and negative. In assessing customer testimony, the courts (and the agencies) should acknowledge the policy judgment that underlies the Business Judgment Rule that figures so prominently in corporate law.

The Business Judgment Rule creates a rebuttable presumption that "in making a business decision the directors of a corporation act on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[49]

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[48] *FTC v. Heinz*, 116 F. Supp. 2d 190 (D.D.C. 2000), *rev'd on other grounds*, 246 F.3d 708 (D.C. Cir. 2001) (district court rejected strong customer testimony in support of merger); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

[49] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

Moreover, it explicitly recognizes the difficulties judges face in distinguishing business judgments that are or are not in the corporation's or shareholders' best interests, and the many factors that weigh in business decisions that may be unknown or unclear to the court. The Rule essentially requires judicial abstention from second-guessing corporate decisions based in part on the relative expertise of businesses versus judges and courts. Substantive due care requires directors exercise "care and prudence."[50] Procedural due care is concerned with process: decisions that are "unintelligent or unadvised" are not entitled to the Rule's presumption.[51]

The rationale for the Business Judgment Rule applies with equal force to customer testimony on mergers. Once the agencies or courts have screened customers to ensure their testimony is reasonably informed, offered in good faith, and not prompted by conflicting or anticompetitive incentives, the decision-makers should give great weight to customers' views on a merger's likely effects. Customers will most directly experience the effects of a merger. Customers' self-interest, combined with their experience in the industry ensures that their views will provide crucial evidence. We believe most antitrust lawyers – on both sides of the table – agree that "customers remain the most objective marketplace participants .... the decisions they make in the

[50] *Litwin v. Allen*, 25 N.Y.S.2d 667 (N.Y. Sup. 1940); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (A decision by a "loyal and informed board will not be overturned by the courts unless it cannot be attributed to any rational business purpose.").

[51] *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del 1985). The Rule's presumption disappears, and liability inures, only if a court finds a corporation's directors or officers acted without good faith, loyalty (e.g., acts based on fraud or self-dealing), and due care. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993); *see also Panter v. Marshall Field & Co.*, 646 F.2d 271, 293 (7th Cir. 1981) ("in the absence of fraud, bad faith, gross overreaching or an abuse of discretion, courts will not interfere with the exercise of business judgment by corporate director").

ordinary course of business frequently provide a better window onto how the market actually functions than an economist's model or the court's intuition."[52]

To encourage greater court (and agency) deference to customer testimony, while increasing transparency and consistency, any Guidelines revisions should include a discussion of how the agencies ensure that customer testimony is informed, in good faith, representative, and not prompted by conflicting or anticompetitive incentives. The Guidelines also should recognize that customer testimony is not credited on only one side of the ledger – customer support for a merger, if well-founded, is as relevant, and entitled to as much weight, as customer concern. Indeed, customers may be able to provide more specificity about the merged firm's ability to increase competition than about the potential decreased competition from mergers that customers oppose.[53]

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[52] Remarks by Thomas O. Barnett, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Antitrust Enforcement Priorities: A Year in Review* at 14 (Nov. 19, 2004), *available at* http://www.justice.gov/atr/public/speeches/206455.pdf.

[53] We note that our reliance on the expressed view of customers reflects a different, albeit related, policy judgment than the so-called "power buyer" doctrine. Some courts recognize the ability of large purchasers to discipline markets. *See, e.g., Chicago Bridge and Iron v. FTC.*, 534 F.3d 410, 440 (5th Cir. 2008) ("courts have found that the existence of power buyers can be considered in their evaluation of an anti-trust case"); *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990) (the existence of power buyers, and ease of entry, rebutted the government's prima facia case); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 908 (7th Cir. 1989) ("concentrated and knowledgeable buy[ers] make[] collusion by sellers more difficult"); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶75,725 (D. N.M. May 29, 2007) (some customers have substantial buying power and can discipline any unilateral attempt to reduce output); *United States v. Archer-Daniels-Midland*, 781 F. Supp. 1400 (S.D. Iowa 1991) (recognizing "the negotiating power of the power buyers and large buyers" in preventing the merged entity from raising price). The Guidelines, at §2.2, recognize that the ability of large purchasers to swing large volumes of purchases to different sellers can undermine the ability of firms to coordinate their output decisions. Similarly, a number of competition agencies recognize a power-buyer defense. *See, e.g.*, the merger guidelines of other jurisdictions cited, *supra*, note 5.

If the Guidelines are revised, they should recognize explicitly that competitive pressures on a seller can come not only from its competitors but from customers who can credibly threaten to switch to alternative sources of supply by: (i) vertically integrating to the upstream market; (ii) sponsoring entry (including through increased imports), or expansion by committing to do sufficiently large business with a potential entrant; and (iii) refusing to buy other products produced by the merged supplier.

E. The Guidelines Should Reflect The Importance of Post-Merger Evidence in Consummated Merger Transactions

With consummated mergers, the agencies may be able to use fundamentally different facts than are available in the normal HSR process: evidence of the merger's actual competitive impact. When reliable evidence of that impact is available, it should trump the normal predictive analysis used in the standard HSR process. The relevant analogy is to judicial decisions regarding the superiority of direct evidence of competitive impact in Sherman Act cases.[54]

Of course, post-merger evidence must be reliable. The agencies need to be confident that the measurements are accurate and merger specific. Obviously, lawyers and economists may disagree regarding the evidence and its correct interpretation, and, as is often the case, decision-makers will need to adjudicate the conflicting positions. Moreover, in at least two instances, reliable measurement of the merger's impact will likely be impossible. The first involves transactions for which too little time has passed post-merger to measure the effects. The FTC's challenge to Chicago Bridge's acquisition of certain assets of Pitt-Des Moines provides a good example: lumpy sales and little elapsed time post-merger rendered post-merger evidence of limited probative value.

The second instance when measurement of the merger's impact likely will be unreliable occurs when the merging parties have manipulated the post-acquisition evidence. Here, we would reject the Fifth Circuit's dictum in *Chicago Bridge* to ignore

[54] *See FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 460-61 (1986) ("[G]enuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (internal quotation marks omitted).

post-merger evidence that "could arguably" be manipulated.[55] Because the agencies have access to the merging parties internal records and deliberations, making a judgment about whether the merging parties likely have manipulated the post-acquisition evidence is no more difficult than the myriad other judgments the agencies and the courts must make.[56]

F. Any Discussion of How A Merger Affects Innovation Should Recognize The Lack of Evidence Supporting Structural Presumptions

Innovation is crucial for an economy's long-term economic growth. The Antitrust Modernization Commission noted the "'broad agreement . . . that research and development is a major source of economic growth.'"[57] The agencies recognize that "research and development by individual firms, especially basic research, has contributed significantly to increases in their productivity, and at the macro level, technical progress has been estimated to have accounted for as much as three-quarters of the economic growth in major industrialized countries."[58]

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[55] *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 435 (5th Cir. 2008).

[56] The view expressed in *Chicago Bridge* also obscures the requirement that, at least in coordinated effects cases, it is not only the merging parties who are refraining from anticompetitive conduct – it is some or all firms operating in the relevant market.

Although detailed analysis of the circumstances in which agencies should even investigate consummated mergers are beyond the scope of this comment, we note that such investigations should hardly be the norm for mergers otherwise subject to the HSR process. For investigating consummated mergers, the agencies need compelling factual or policy reasons to deviate from the certainty that the process provides. For mergers that the agencies allowed to proceed only pursuant to a legally enforceable agreement with the parties, violation of that agreement should be the sole basis upon which additional government action against the merger should occur.

[57] AMC REPORT, *supra*, note 2, at 59 (citations omitted).

[58] *See Note By the United States Submitted in Connection with the OECD Roundtable on Dynamic Efficiencies* (May 22, 2007), *available at* http://www.oecd.org/dataoecd/53/22/40623561.pdf.

In practice, innovation concerns play a central role in antitrust enforcement. Former FTC Chairman Majoras observed that:

> Competition's role in spurring innovation ... has secured a central position in antitrust analysis . . . . [Not] so long ago, antitrust largely focused only on static efficiencies. The learning of recent decades, however, has made it clear that a broader lens, reaching issues of innovation and progress over time, is essential. Today, we care enormously about innovation and the competitive forces that drive it.[59]

Given this importance, some argue the Guidelines should be revised to include a discussion of how the agencies evaluate the competitive effects of a merger on innovation. Although we think the agencies should provide additional guidance regarding this issue, we question whether the current state of knowledge and experience with innovation markets supports their inclusion in the Guidelines. In practice, the agencies' experience with innovation markets is quite limited and largely derived from investigations of mergers in the pharmaceutical industry, which has regulatory features that make identifying market participants, and determining likelihood of competitive effects, relatively tractable.

A firm facing aggressive competition in existing product-markets has an incentive to develop new products to defend its position. As mergers remove product rivals, this incentive may be dulled, and a concern about cannibalizing sales of existing products may grow. Yet, firms with many rivals may be unable to recoup sufficient returns to make investments worthwhile. Similarly, a business competing with one or more firms

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[59] Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, *Welcoming Remarks for the Patent Reform Conference* (June 9, 2005), at 3, *available at* http://www.ftc.gov/speeches/majoras/050609comppolicy.pdf. *See also* Robert Kramer, Chief, Litigation II Section, Antitrust Division, *Antitrust Considerations in International Defense Mergers* at 3 (May 4, 1999) ("[a]s important as price competition is to us, a second major and possibly even greater concern is maintaining competition for innovation").

to be the first to patent a new technology or drug has an incentive to move quickly lest it lose the race. An acquisition of a rival "runner" may slow or increase its pace. The increased certainty that a merged firm will obtain a monopoly patent may cause the firm to devote more resources to obtaining a patent or technological breakthrough, thereby increasing incrementally the probability of achieving a break-through. Moreover, a merger of two previously competing firms may combine complementary assets (including intellectual property), increasing the chances of success and decreasing the time required to achieve that success. But the dynamics of the integration and the loss of a competitor also may slow the pace of innovations. These determinations remain intensely fact specific.

Thus, if the Guidelines include a section on innovation, they should recognize that the competition-innovation link is neither settled nor supportive of a causal relationship between the number of firms and amount of (successful) innovation.[60] Any guidance should make clear that the examination of a merger's affect on innovation is "presumption" free. Theoretical and empirical work in economics has not found a conclusive relationship between concentration levels and the pace or amount of innovation.[61] In accord with agency practice and the economic literature, any revised

[60] Thus, we have included innovation markets in the section of our comment about agency reliance on "actual" evidence. Here the evidence is the *lack* of reliable data on how to address the underlying issues.

[61] *See, e.g.*, Michael Katz and Howard Shelanski, *Mergers and Innovation*, 74 ANTITRUST L. J. 1, 12-31; Richard Gilbert, *Looking for Mr. Schumpeter: Where are We in the Competition-Innovation Debate?* in 6 INNOVATION POLICY AND THE ECONOMY 159 (Adam B. Jaffe, 2006); *Statement of Federal Trade Commission Chairman Timothy J. Muris In The Matter Genzyme Corporation / Novazyme Pharmaceuticals, Inc.* (Jan. 13, 2004) at 2-3, *available at* http://www2.ftc.gov/os/2004/01/murisgenzymestmt.pdf (hereinafter "Muris Genzyme Statement") discussing the economic learning in the FTC's 1996 Report, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace* (*available at* http://www.ftc.gov/opp/global/report/gc_v1.pdf). The Muris Genzyme Statement observes that "the Commission properly has been cautious in using innovation market analysis" and that the 1996 Report

Guidelines should make clear that innovation inquiries must be even more factually intensive than product market investigations, and subject to case-by-case analysis.[62]

IV. CONCLUSION

The 1982 Horizontal Merger Guidelines represent one of the most useful and important steps in antitrust's long history. Because previous changes to the Guidelines

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"acknowledged that 'economic theory and empirical investigations have not established a general causal relationship between innovation and competition.'" Muris Genzyme Statement at 2-3. Consequently, the 1996 Report suggested that a "careful, intense factual investigation is necessary" to "distinguish between procompetitive and anticompetitive combinations of innovation efforts." *Id.* at 3-5. (In Genzyme / Novazyme, the FTC's investigation focused on whether the combination of the only two firms known to be pursuing a treatment for Pompe disease would slow the introduction of a first or second generation treatment, or increase the likelihood (and speed) of bringing a treatment to market. We note that Genzyme has successfully brought a product to market; on April 28, 2006, the Food and Drug Administration approved the use of Myozyme in the treatment of Pompe disease. Myozyme was also granted Orphan Drug status; the Orphan Drug Act provides a seven-year period of exclusive marketing to the first sponsor who obtains marketing approval for a designated orphan drug. *See* Food and Drug Administration Press Release, *FDA Approves First Treatment for Pompe Disease* (April 28, 2006), *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108645.htm.). FTC Commissioner Tom Rosch has also recognized that "there is not yet a universally accepted consensus as to the kind of market structure that best facilitates innovation." J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, *Antitrust Regulation of Innovation Markets*, Remarks before the ABA Antitrust Intellectual Property Conference, Berkeley, CA (Feb. 5, 2009), at 10, *available at* http://www2.ftc.gov/speeches/rosch/090205innovationspeech.pdf.

[62] In their important article, *Mergers and Innovation, supra*, note 61, Katz & Shelanski recognize the weakness of structural presumptions, retaining a presumption only in "mergers to monopoly." We disagree that a presumption is appropriate even in this context. In product markets, mergers to monopoly are almost never justified. In innovation markets, the evidence does not support such an overwhelming conclusion. *See* references cited in note 61, *supra*. The FTC's 1996 Report noted that while "there are a number of theoretical models that suggest when a monopolist may have a disincentive to invest in research and development[,] [a]ntitrust enforcers can examine whether the facts of a specific matter are generally consistent with a particular theoretical description." FTC Staff Report, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, Vol. I, ch. 7, at 19 (May 1996). *See also* Council of Economic Advisers, ECONOMIC REPORT OF THE PRESIDENT (1999) at 176:

> To the extent there is consensus, it is that neither the presence of many competitors nor pure monopoly correlates systematically with optimal levels of innovation. But even in such polar cases, predictions about R&D activity are hard to make. The determination requires looking at the facts in each case, because market factors other than concentration, as well as a firm's regulatory status and the nature of its products and technologies, also affect innovation.

Katz and Shelanski appear to recognize these concerns, and suggest that the effect of their presumption in mergers-to-monopoly should be relatively insignificant, by approving of the intensive factual investigation the Commission undertook in the Genzyme/Novazyme matter – characterized as a merger to monopoly – and by disapproving of the strong presumption favored by Commissioner Thompson and Commissioner Harbour. Katz & Shelanski, *Mergers and Innovation, supra*, note 61, at 85.

adhered to the three principles for revision we have discussed, the Guidelines continue to be pivotal in merger analysis for both the agencies and the courts. Attention to these three key principles for revision will help ensure the Guidelines continued utility.

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