Looking Ahead: Nascent Competitor Acquisition Challenges in the “TechLash” Era

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Antitrust regulators have long focused on the competitive harm that may result from combinations that implicate potential or future competition. While this focus remains, regulatory approvals of several high profile “Big Tech” acquisitions have prompted many to criticize the enforcement agencies for being too lax in their reviews, particularly in their treatment of acquisitions of nascent competitors. Acquisitions of nascent competitors—or companies with products and technologies that could one day emerge as significant head-to-head competitors—are certainly not new. Recently, however, high-profile acquisitions of small but successful companies by the likes of Facebook (Instagram and WhatsApp) and Google (Waze), and concerns that these acquisitions have served to enhance the dominance of Big Tech, have cast the topic into the enforcement spotlight.

Officials at the Federal Trade Commission and Department of Justice (the Agencies) have made clear that nascent competitor acquisitions are potentially harmful to competition and, as a result, are an enforcement priority. In recent years, the Agencies have devoted significant time and energy to understanding better the competitive implications of nascent competition. For example, the FTC devoted three panels and two presentations during its 2018–2019 Hearings on Competition and Consumer Protection in the 21st Century to the issue of nascent competition “to illustrate the importance that Chairman [Joseph Simons] specifically and the [FTC] collectively is putting on this issue.” A key topic of discussion was whether current antitrust law is sufficiently equipped to evaluate the competitive impact of nascent competitor acquisitions in light of the dramatic growth in the digital sector. Furthermore, the Agencies have dedicated substantial resources to issues relating to Big Tech: in February 2019, the FTC launched a Technology Task Force (now called the “Technology Enforcement Division”) with the stated goal of “investigating


2 Joseph Simons, Chairman, Fed. Trade Comm’n, Remarks at Georgetown Law Global Antitrust Enforcement Symposium 5 (Sept. 25, 2018), https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf (stating in his first key speech as FTC Chairman that “one of our interests in this area will be mergers of high-tech platforms and nascent competitors”). See also Makan Delrahim, Ass’t Att’y Gen. Antitrust Div., U.S. Dept of Justice, “… And Justice for All:” Antitrust Enforcement and Digital Gatekeepers, Remarks as Prepared for Delivery at Antitrust New Frontiers Conference: The Digital Economy and Economic Concentration 11 (June 11, 2019), https://www.justice.gov/opa/speech/file/1171341/download (“It is not possible to describe here each way that a[n] acquisition of a nascent competitor] may harm competition in a digital market, but I will note the potential for mischief if the purpose and effect of an acquisition is to block potential competitors, protect a monopoly, or otherwise harm competition by reducing consumer choice, increasing prices, diminishing or slowing innovation, or reducing quality.”).

anticompetitive conduct and consummated mergers in the digital economy.” The DOJ similarly confirmed last summer that it is “reviewing the practices of market-leading online platforms.”

The Agencies’ concerns have not manifested themselves in words alone; they have also recently challenged a series of nascent competitor acquisitions—a signal that they are shifting towards a more aggressive approach to their review of such transactions than they have previously.

While there are a number of challenges associated with assessing the likely competitive impact of a nascent competitor acquisition, it seems unlikely that the Agencies will back down any time soon. Whether in the form of pre-consummation challenges, post-consummation reviews, post-consumption conduct investigations, or possibly even the unwinding of consummated transactions in the most extreme circumstances, all indications are that the Agencies will closely examine and challenge potentially anticompetitive nascent competitor acquisitions, particularly those in the digital sector, in the years ahead. This is especially true given the centrality of digital platforms to daily life. Now more than ever, as Americans navigate the COVID-19 pandemic, tech companies and their product offerings have increased relevance, and the Agencies will closely assess how potential acquisitions by these firms will impact consumers.

As the Agencies adapt to the complexities of the digital age, we anticipate that their analytic toolkit for assessing acquisitions of nascent competitors will necessarily adopt a more flexible form, though—as we discuss below—most likely staying within the confines of the existing enforcement framework (i.e., we do not anticipate a wholesale overhaul of the Agencies’ approach to merger review). By coupling creative refinement of the existing enforcement framework with more aggressive enforcement, the Agencies will enhance their ability to mount credible nascent competitor acquisition challenges, influence merging parties’ conduct, and even deter certain mergers altogether.

The Current State of Play: An Uphill Battle for the Agencies


A nascent competitor, as distinct from a potential competitor, is a current competitor whose competitive presence is not fully actualized but could develop into a significant head-on competitor of the acquirer. Agency concerns about the potential anticompetitive impact of nascent competitor acquisitions have primarily arisen in three different scenarios. An example of the first scenario is Facebook’s acquisition of Instagram, in which the acquisition of an incipient product or technology with the intent of fostering or growing it may result in one large entity owning two major competing products and/or technologies down the road. A second related scenario occurs where a company purchases a product or technology that currently operates predominantly in an adjacent market, but which could evolve into a full-fledged competitor in the acquirer’s market. The third scenario is the so-called killer acquisition of a nascent competitor. These are described as acquisitions in which one firm acquires another firm to “eliminate a potentially promising, yet like-

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ly competing, innovation” by stifling rather than growing a potentially competing product or technology.\(^7\) This differs from the first scenario because in the case of a killer acquisition, the acquiring firm acquires the target without any intent to invest capital or resources to further grow and develop it, effectively stamping it out by virtue of the acquisition.

**The Current Enforcement Regime.** The current enforcement regime for potentially anticompetitive mergers includes premerger notifications of certain transaction under the Hart-Scott-Rodino Act (HSR Act) and enforcement under the Clayton and Sherman Acts. These statutes are agnostic as to the industry involved, and the Agencies have not developed distinct standards for addressing acquisitions or conduct in the digital sector. Rather, the Agencies are uniformly driven by the goal of maximizing consumer welfare in the form of lower prices or greater or higher quality output.\(^8\)

Section 7 of the Clayton Act’s prohibition on mergers and acquisitions where the effect “may be substantially to lessen competition or to tend to create a monopoly” has been the Agencies’ primary vehicle for challenging nascent competitor acquisitions. To determine whether mergers and acquisitions by competitors may harm competition, the Agencies use the analytical framework set forth in the Horizontal Merger Guidelines, in which they look at market shares and concentration deltas pre- and post-merger and use quantitative and qualitative evidence of price and non-price effects (such as product quality, product variety, and innovation), efficiencies, and the potential for new entry.\(^9\) To prevail on a Section 7 claim, the government must show a “reasonable probability that the merger will substantially lessen competition.”\(^10\)

As then-FTC Director of the Bureau of Competition Bruce Hoffman noted, “Mergers are not necessarily completely compartmentalized from anticompetitive conduct analysis.”\(^11\) As such, in certain situations the Agencies may also turn to Section 2 of the Sherman Act to evaluate whether the acquirer undertook the nascent competitor acquisition to acquire or maintain a monopoly. A Section 2 claim 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 historical accident.”\(^12\) The crux of the Section 2 nascent competition issue is “whether, as a general matter, the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s continued market power.”\(^13\)

**Difficulties Policing Nascent Competition Acquisitions Under the Current Regime.** Even with these tools, the challenge for the Agencies in addressing nascent competitor acquisitions is two-fold. First, it is difficult to determine whether a nascent competitor acquisition is likely to have anticompetitive effects by asking the same questions typically asked when analyzing an acquisi-

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7 Id. at 2.


11 Hoffman, supra note 4, at 7.


tion of a full-fledged current competitor—e.g., to what extent is there head-to-head competition between the parties today or to what extent is one party a competitive constraint on the other. When a nascent competitor is involved, the answers to these questions may not provide meaningful insight into a transaction’s likely impact on competition and whether a nascent competitor will become competitively significant. This injects considerable uncertainty into the Agencies’ evaluation, which will necessarily plague any assessment of a nascent competitor’s future viability and competitive significance.

Second, even if the Agencies determine that a nascent competitor acquisition is likely to harm competition, they then face significant evidentiary hurdles in attempting to prove in court that the transaction is indeed anticompetitive. This means demonstrating that, absent the transaction, competition in the relevant market would intensify as a result of the growing significance of the nascent competitor, even where that firm’s current market share is small and the data do not show that the firm presently acts as a significant competitive constraint on other market participants.

While the case involved the acquisition of a potential, rather than a nascent, competitor, the FTC’s 2015 failed challenge to Steris Corporation’s $1.9 billion acquisition of Synergy Health illustrates these evidentiary challenges. The FTC alleged that the acquisition “would violate the antitrust laws by significantly reducing competition in regional markets for sterilization of products using radiation, particularly gamma or x-ray radiation.” The FTC argued that until the merger, UK-based Synergy planned to enter the U.S. market and provide x-ray sterilization services as a competitive alternative to the gamma radiation sterilization services provided by Steris in the United States. Despite the evidence presented by the FTC, an Ohio district court determined that the FTC had not proved that Synergy would have introduced competing sterilization technology in the United States absent the merger. The case exemplifies the challenges the Agencies face in persuading courts that a transaction is anticompetitive when they lack evidence of robust present day competition and their arguments instead largely hinge on the future state of competition—even where compelling documentary evidence as to anticompetitive motive exists.

In the aftermath of this case, many wondered whether the Agencies would step back from bringing these difficult challenges. Looking back, Hoffman noted that the Steris case serves as “a reminder that future competition cases pose challenges in weighing and assessing evidence, since predictions about entry can often be called into question.” Despite the inherent difficulties of bringing these challenges, the FTC was confident that it had gotten Steris/Synergy Health right; just last year Hoffman stated:

Our view is that case [Steris] came out the wrong way . . . At the FTC, we are persistent. The mere fact that we lose a case is not itself a deterrent to us. The nascent-competitor issue is a complex issue because we are not prescient . . . Our job is to look at a merger and make a fact-based, evidence-

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14 Yun, in his Statement before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, aptly explained: “The term ‘potential competitor’ has a longer history and is typically defined as a firm that is predicted to have a product that will compete at some point in the future, but not currently. ‘Nascent competitor,’ however, is a term that is relatively new in antitrust jurisprudence . . . [I]t is a term that typically refers to a current product or technology, whether inside or outside some relevant product market, that could, at some point, be considered a significant competitor.” Yun, supra note 6, at 2.


18 Id. at 18.
based, economic-based prediction about what will happen . . . We are not afraid of these cases. We will bring them.\textsuperscript{18}

In line with these statements, the FTC has pressed forward and continued to mount challenges against nascent competitor acquisitions and will likely continue doing so in the years ahead. Similarly, as discussed in more detail below, the Delaware District Court’s recent holding rejecting the DOJ’s challenge to Sabre Corporation’s proposed acquisition of a nascent competitor serves as another example of the high evidentiary hurdles the Agencies must clear in pursuing such challenges.\textsuperscript{19} However, there is no indication that the DOJ will be deterred by the setback.\textsuperscript{20}

**Finding a Middle Ground: The Future of Nascent Competitor Challenges**

To assess future competition more accurately when reviewing these acquisitions, the Agencies must look beyond the typical factors used to assess competitive impact (such as price) to less tangible predictive factors, including the likelihood of innovation after the merger and also in a but-for world. As we have noted, it can be difficult for the Agencies to foresee which acquisitions are aimed at stifling a potentially threatening competing product or technology and which are aimed at bolstering a promising idea in need of additional resources to reach its full potential. As Chairman Simons stated, “These types of transactions are particularly difficult for antitrust enforcers to deal with because the acquired firm is by definition not a full-fledged competitor, and the likely level of future competition with the acquiring firm is often not apparent.”\textsuperscript{21}

This is not to say, however, that the Agencies’ approach to nascent competitor acquisitions will remain stagnant. Although we do not expect the Agencies to seek a complete overhaul of the existing approach to enforcement under the Merger Guidelines, as has been suggested by some,\textsuperscript{22} there are a number of different approaches the Agencies can take to supplement their existing enforcement toolkit and more effectively mount these challenges. It is our view that they will make incremental changes in their approach to nascent competitor acquisitions, without a wholesale departure from the traditional anticompetitive indicia that guide the Agencies’ approach to merger reviews, such as the current presumptions, burdens of proof, and industry-neutral


\textsuperscript{20} Makan Delrahim, U.S. Dep’t of Justice, Statement from Assistant Attorney General Makan Delrahim on Sabre and Farelogix Decision to Abandon Merger (May 1, 2020), https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-sabre-and-farelogix-decision-abandon (remarking that the decision by the United Kingdom’s Competition and Markets Authority to block the deal “confirms our view that the merger was anticompetitive”).

\textsuperscript{21} Simons, supra note 2, at 5.

Guidelines, to enable them to more squarely address the unique competitive concerns these acquisitions raise.

For example, the Agencies may depart from their practice of limiting challenges implicating future competition issues to those transactions where they have powerful internal documentary evidence that is probative of anticompetitive impact. The Agencies surely will continue to bring challenges where there is strong internal documentary support for their position, as the parties are arguably the best suited to anticipate how their markets will evolve and their internal documents are viewed as uniquely persuasive to a court in evaluating the nascent competitor’s future competitive significance to determine if the transaction is likely to have anticompetitive effects. However, in the face of mounting pressure to preserve competition, particularly in the technology industry, we expect to see the Agencies press ahead when they conclude competition will be harmed even if there is a significant litigation risk enhanced by limited documentary evidence from the parties. Doing so would enable the Agencies credibly to threaten litigation and thereby influence the conduct and incentives of major companies considering acquiring a nascent or potential competitor, signaling a warning that parties should proceed with caution if they are unable to articulate a strong procompetitive rationale for the proposed transaction.

Alternatively (or additionally), the Agencies may seek to push the boundaries of the current enforcement approach by straying from the Guidelines’ “focus on narrowly defined markets and ‘one acquisition at a time.’” Instead, they might begin to evaluate acquisitions of nascent competitors from an “expanded…lens” that focuses less so on single acquisitions and instead on serial transactions and their longer-term effects on market concentration and entry barriers. The Agencies may deem this approach most useful in the technology sector where acquisitions are often rapid and numerous and where many transactions are not reportable under the HSR Act. The general idea is that this expanded lens gives the Agencies a long view of an acquirer’s business strategy and insights into how the acquirer expects that the market will evolve, thereby providing the Agencies with an additional tool for establishing whether a particular acquisition of a nascent competitor is being undertaken for anticompetitive reasons or is likely to have an anticompetitive outcome. In furtherance of this approach, we may begin to see a focus on merger retrospectives and an emphasis upon agency transparency into their actions in the tech sphere.

Indeed, the FTC recently exercised its authority under Section 6(b) of the FTC Act and issued orders to five large technology companies (Alphabet Inc. (including Google), Amazon.com, Inc.,

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23 The FTC’s March 2018 challenge to specialized software vendor CDK Global Inc.’s acquisition of a smaller innovative competitor, Auto/Mate, Inc. illustrates the Agencies’ willingness to mount a challenge where they deem the documents to be compelling evidence of the anticompetitive impact of a particular transaction or the parties’ anticompetitive intent. Alleging that the acquisition would not only harm current competition but could also amount to a “killer acquisition” of a growing rival, the FTC Complaint cited numerous internal party documents demonstrating direct competition between the parties and cited one internal document stating: “We [CDK] are so serious about acquiring new customers that we bought DMS [Auto/Mate] that has been kicking our butts.” Complaint at 11, CDK Global & Auto/Mate, FTC Dkt. No. 9382 (Mar. 19, 2019), https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf. Similarly, the DOJ viewed the parties’ documents in its challenge of the Sabre/Farelogix deal as demonstrating the merger’s anticompetitive impact. The DOJ stated in its pre-trial brief that “Defendants’ business documents confirm that Sabre views the growth of Farelogix and the technology it has developed as a threat to the traditional GDS business model, and reinforce that the acquisition would eliminate this competition.” Plaintiff’s Pretrial Brief at 4, United States v. Sabre Corp., No. 1:19-cv-01548 (D. Del. Jan. 15, 2020); see also Complaint at 17, United States v. Sabre Corp., No. 1:19-cv-01548 (D. Del. Aug. 20, 2019) (citing Farelogix’s CFO’s statement that if Sabre acquired Farelogix, it would be “taking out a strong competitor vs. continued competition and price pressure in the market”).

24 Moss Testimony, supra note 22, at 6.

25 Id. at 4, 6.

26 Moss, Weak U.S. Merger Enforcement in Big Tech, supra note 1, at 10.
Apple Inc., Facebook, Inc., and Microsoft Corp.) requiring that they provide information and documents about prior acquisitions that were not required to be reported to the Agencies under the HSR Act.\(^27\) The orders seek information about the companies’ corporate acquisition strategies, voting and board appointment agreements, agreements to hire key personnel from other companies, post-employment covenants not to compete, and post-acquisition product development and pricing. The materials produced to the Agencies in response to the orders will enable the Agencies to have a full retrospective of these companies’ acquisition histories and to determine whether these companies are habitually acquiring nascent or potential competitors and, if so, the reasons for doing so. Armed with the information gleaned from this effort, the Agencies may feel emboldened to challenge acquisitions of nascent competitors, particularly if they believe technology companies and others are embarking on a long-term strategy to thwart rivals’ growth or entry.

One possible result may be an uptick in the number of monopolization cases the Agencies choose to bring. For example, where an acquirer has made a number of non-reportable acquisitions which, examined individually, do not raise competitive concerns under Section 7, the Agencies may choose to challenge the strategy as violating Section 2, which prohibits attempted monopolization and attempts to unlawfully maintain a monopoly, where a buyer may be implementing a strategy to eliminate competition through acquisitions of smaller or emerging rivals. Indeed, during a recent webinar, Ian Conner, Director of the FTC’s Bureau of Competition, confirmed the FTC’s view that Section 2 reaches exactly this type of conduct and stated that the FTC would not hesitate to bring a monopolization case to challenge serial acquisitions of potential competitors.\(^28\)

It may also become increasingly common for the Agencies to take an alternative or even broader approach to market definition, such as in the FTC’s challenge to Illumina’s proposed acquisition of Pacific Bioscience, where it broadened its product market definition to include adjacent markets where the nascent competitor predominantly operated.\(^29\) Market definition also took center stage in the DOJ’s Sabre/Farelogix challenge, where the DOJ framed the combination of dominant Global Distribution System (GDS) operator Sabre with Farelogix, an entity that developed a service enabling airlines to circumvent GDS and sell directly to travel agencies, as the horizontal acquisition of a competing booking service rather than a vertical acquisition of a complementary technology.\(^30\) The Delaware District Court invoked the Supreme Court’s 2018 Amex decision that “[o]nly other two-sided platforms can compete with a two-sided platform for transactions” in rejecting the DOJ’s contention that the two parties compete in the same relevant market, finding that


\(^{28}\) Brian Baker, US FTC Won’t Hesitate to Bring Monopolization Cases over Serial Acquisitions, Top Official Says, MLEX MARKET INSIGHT (May 19, 2020).

\(^{29}\) See Complaint at 5, Illumina Inc. and Pacific Biosciences of California Inc., FTC Docket No. 9387 (Dec. 17, 2019) (viewing the market for “long-read” and “short-read” technology as one).

\(^{30}\) Plaintiff’s Pretrial Brief at 7–11, Sabre Corp., No. 1:19-cv-01548-LPS, at *1–2 (D. Del. Apr. 8, 2020); see also Defendants’ Pre-Trial Brief at 15–16, United States v. Sabre Corp., No. 1:19-cv-01548 (D. Del. Jan. 15, 2020) (arguing that “DOJ ignores how the industry actually works in order to concoct a ‘market’ consisting of one isolated service of Sabre’s GDS . . . . that allegedly overlaps with a technical function of FLX OC”).

Sabre is a two-sided platform while Farelogix is not. This district court determination, if not vacated on appeal given that the parties terminated their merger agreement on May 1, could give the Agencies pause in bringing challenges against acquisitions of a non-two-sided platform by an arguably two-sided, even where documentary evidence exists that the parties view themselves as competitors. In spite of this setback, we expect to see the Agencies continue to push the bounds of traditional market definitions as they seek to address the complexities of digital marketplaces.

In addition to adopting alternative or broader market definitions, the Agencies may give greater weight to innovation—or the potential that the combined entity will have muted incentives to invest in innovation than has traditionally been the norm—in their assessments of nascent competitor acquisitions. The DOJ recently put this tactic to the test in Sabre/Farelogix, where it alleged that the combination would harm competition by eliminating Farelogix as an independent “disruptive competitor” that had previously spurred Sabre to innovate. The district court ultimately rejected the DOJ’s argument that Sabre’s purchase of Farelogix will “reduce competition to innovate.” According to the court, the “DOJ offers nothing more in support of its contention than vague theories,” explaining that “no party offered evidence that Farelogix has more recently created or introduced innovative products or services” and that the evidence does not suggest that Sabre seeks to eliminate Farelogix’s technology. Notwithstanding this decision, we expect that the Agencies will continue to raise this theory of competitive harm, especially where evidence of incentive and intent to stifle innovation is robust and compelling.

It is unlikely, however, that the Agencies will adopt dramatic changes to the existing framework when evaluating nascent competitor acquisitions like those that have been endorsed by some in the antitrust community. These include instituting presumptions that apply to transactions by certain technology companies, imposing affirmative burdens on certain firms to justify their acquisitions, finding “proxies for innovation” that would instead be measured and used to evaluate a potential acquisition, or breaking up the large technology giants altogether. Although we expect the agencies to eschew these aggressive proposals, we believe the issuance of the FTC’s Section 6(b) orders, coupled with the Agencies’ focus on responding to public concern about acquisitions of smaller competitors by much larger ones, ensures that the Agencies will prioritize acquisitions by large players of emerging ones in the years ahead, especially where the acquirer has been particularly acquisitive.

31 Plaintiff’s Pre-trial Brief at 15, Sabre Corp., supra note 19; see also Complaint at 18–19, Sabre Corp., supra note 23.
32 Sabre Corp., 2020 WL 1855433, at *42.
33 See Raut, supra note 22.
34 Id. at 1–2 (Recognizing the challenges with quantifying harm in nascent competition analyses, Raut encouraged enforcers to “move beyond price and output analysis to find proxies for innovation,” including “the rate at which market shares change, or the frequency with which the market lead shifts,” the frequency of new developments or technical features, or even the number of patents filed (an approach tested in the European Union’s investigation of Dow-DuPont)).
35 Particularly noteworthy were Senator Elizabeth Warren’s public calls to break up the tech giants altogether. See Elizabeth Warren, Here’s How We Can Break Up Big Tech, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9a9d9e0da324c.
36 We may soon learn more about how the Agencies evaluate competitive concerns related to digital platforms and large technology players. Press reports in May stated that the DOJ and some state attorneys general might bring suit against Google as soon as this summer. Although the suit likely would not be a challenge to a nascent competitor acquisition (the states have largely focused on Google’s conduct in the online advertising business, while the DOJ has focused on Google’s conduct in the search business), it might offer insights into how the Agencies view efforts by Google and similarly situated firms to further grow and develop their offerings. See Brent Kendall & John D. McKinnon, Justice Department, State Attorneys General Likely to Bring Antitrust Lawsuits Against Google, WALL ST. J. (May 15, 2020).
Conclusion

Dominant firms’ acquisitions of nascent competitors have increasingly drawn scrutiny, and all indications are that the Agencies will continue to examine these acquisitions closely despite the considerable challenges involved. Indeed, as the Agencies are facing rising public pressure to thwart potentially anticompetitive nascent competitor acquisitions, especially in the digital sector where large firms enjoy significant incumbent advantages, we expect to see them apply subtle shifts in approach to better address these inherent challenges. As such, it is unlikely the Agencies will depart significantly from the existing enforcement framework. Instead of drastic measures or bright line rules, we expect that the agencies will implement incremental changes within the existing enforcement framework—such as adopting alternative market definitions, closely considering the parties’ incentives or potential to innovate after the merger and in a but-for world, and investing substantial resources in consummated merger retrospectives.

For those advocating a major overhaul of the antitrust laws, this may seem like too little. But the Agencies can have a significant impact even with modest shifts in approach. The Agencies can use subtle changes not only to seek to stop anticompetitive transactions but also to send a forceful message to the business community. The Agencies’ impact will thus extend beyond merging parties or particular transactions to industry as a whole, leading companies to consider even more carefully the likelihood of agency scrutiny (and associated costs) when seeking to acquire a nascent competitor, the importance of fostering innovation and development of acquired products and technologies long after the preliminary acquisition review hurdles have been cleared, and the risks involved with serial acquisitions.