Three Key Principles for Revising the Horizontal Merger Guidelines

Timothy J. Muris and Bilal Sayyed

The analytical framework of the Horizontal Merger Guidelines,[1] first introduced by Bill Baxter in 1982, has been adopted by numerous Assistant Attorney Generals and Federal Trade Commission Chairmen of both political parties. For example, former Assistant Attorney General Charles James called the 1982 Merger Guidelines "Giant Steps" in the development of antitrust analysis, with no other policy document "more enduring or far-reaching"[2] and past FTC Chairman Robert Pitofsky, stated that "the guideline process, in many ways, has had the most important influence on American antitrust policy in the last fifty years."[3] We agree with these distinguished observers that the Guidelines' influence is (rightly) considerable; this influence extends to the federal courts,[4] foreign competition agencies,[5] and state enforcement[6] and regulatory agencies[7] in the United States.

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1 U.S Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, rev. 1997) [hereinafter Guidelines or Merger Guidelines], *available at* http://www.ftc.gov/bc/docs/hmg080617.pdf.

2 Charles A. James, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks on the Occasion of the Twentieth Anniversary of the 1982 Merger Guidelines 2 (June 10, 2002), *available at* http://www.justice.gov/atr/hmerger/11253.pdf.

3 Transcript of the Horizontal Merger Guidelines Review Project at 15 (Dec. 3, 2009), *available at* http://www.ftc.gov/bc/workshops/hmg/transcripts/091203transcript.pdf.

4 *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006); Christine Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Merger Guidelines Workshops at 4–5 (Sept. 22, 2009), *available at* http://www.justice.gov/atr/public/speeches/250238.pdf (discussing lower and appellate court reliance on the Guidelines); *see also* Timothy J. Muris & Bilal Sayyed, Three Key Principles for Revising the Horizontal Merger Guidelines, Submitted to the Federal Trade Commission and Department of Justice Horizontal Merger Guidelines Review Project No. PO92900, at 1 n.4 (Dec. 7, 2009) [hereinafter Comment], *available at* http://www.ftc.gov/os/comments/horizontalmergerguides/545095-00052.pdf (identifying recent lower and appellate court merger decisions relying heavily on the Guidelines' analytical framework).

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. Other competition agency guidelines that follow the U.S. Guidelines are identified at Comment, *supra* note 4, at 2 n.5.

6 The National Association of Attorneys General (NAAG) also has adopted merger guidelines influenced by, but at parts in tension with, the Guidelines. Nat'l Ass'n of Att'ys Gen., Horizontal Merger Guidelines § 2 (1993), *available at* http://www.naag.org/assets/files/pdf/at-hmerger_guidelines.pdf. In practice, state attorneys general have largely adopted the approach of the Guidelines, perhaps because of their cooperation with the FTC and DOJ in general and in specific matters and because they do not have resources sufficient to pursue alternative relief or investigative paths. We encourage the NAAG formally to revoke their existing Merger Guidelines and formally adopt, as their policy, any revised Guidelines.

7 The analytical framework of the Guidelines heavily influences the Federal Communications Commission's (FCC) and the Federal Energy Regulatory Commission's (FERC) review of mergers. For the FCC, see, for example, XM Satellite Radio Holdings and Sirius Satellite Radio, Inc., Memorandum Opinion and Order, MB Docket No. 07-57, FCC 08-178 (July 25, 2008); News Corp. and Liberty Media Corporation, Memorandum Opinion and Order, MB Docket No. 07-18, FCC 08-66 (Feb. 25, 2008). For FERC, see Inquiry Concerning the Commission's

We believe the Guidelines successfully have served as "the blueprint for the architecture of merger analysis"[8] for more than twenty-five years because 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.[9] But, with "the bulk of the Guidelines . . . well over seventeen years old," we agree with Chairman Leibowitz's statement that "the time has come . . . to provide more accurate guidance than practitioners and the courts have been getting from the Guidelines."[10] Assistant Attorney General Varney has correctly noted the importance of "explor[ing] whether and how the Agencies should update the Guidelines in light of changes in "economic learning, the development of [Section 7] case law and agency practice" and whether the Guidelines "accurately and clearly describe current agency practice."[11] Thus, we support the Agencies' recently announced effort to consider revisions to the Guidelines.[12]

Besides the potential substantive benefits to merger enforcement, the revision effort confirms that institutional efforts towards increased transparency and self-evaluation will likely continue. The revision project follows former FTC Chairman, and now Commissioner, Kovacic's recognition that "periodic reassessment of existing statements of . . . enforcement intentions" and the "sys-

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Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 30, 1996), FERC Stats. and Regs., ¶ 31,044 (1996) (1996 Merger Policy Statement), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (June 19, 1997), 79 FERC ¶ 61,321 (1997). *See also* Greene, *supra* note 4, at 844–47.

We recognize that neither the FCC nor FERC follow the Guidelines slavishly. In fact, in our experience, there are significant transaction costs associated with dual agency merger review, even accounting for the different standard—a public interest standard—that the FCC and FERC must follow. (For a discussion of the limitations of application of a Section 7 standard to the public interest standard of the FCC, see Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest*, 94 Cal. L. Rev. 371 (2006).) While it may be too aspirational given the regulatory structure of the FCC and FERC, we believe the DOJ, FCC, FERC, and FTC should engage in greater institutional efforts to more fully harmonize their competitive effects analysis of mergers, with an eye towards the adoption of Federal Merger Guidelines. Of course, any such guidelines should not implement a "lowest common denominator" approach. We understand that this may, and likely will, require significant procedural and perhaps statutory adjustments. The Domestic Competition Network proposed by FTC Commissioner William Kovacic presents a model for this type of discussion, substantive convergence, and procedural cooperation. *See* William E. Kovacic, *Toward a Domestic Competition Network*, *in* Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy 316 (2004).

[8] *See* Antitrust Modernization Commission, Report and Recommendations 54–55 (2007) [hereinafter AMC Report] (citations omitted), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf:

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

[9] *See* Press Release, Fed. Trade Comm'n, FTC/DOJ Announce Revised Guidelines on Efficiencies in Mergers (Apr. 8, 1997), *available at* http://www.ftc.gov/opa/1997/04/effpress.shtm.

[10] Jon Leibowitz, Chairman, Fed. Trade Comm'n, Introduction of Philip Lowe and Announcement of Joint FTC/DOJ Project to Modernize the Horizontal Merger Guidelines 2–3 (Sept. 22, 2009), *available at* http://www.ftc.gov/speeches/leibowitz/090922mergerguideleibowitzremarks.pdf.

[11] Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Merger Guidelines Workshops 4 (Sept. 22, 2009), *available at* http://www.justice.gov/atr/public/speeches/250238.pdf.

[12] On September 22, 2009, Federal Trade Commisson Chairman Jon Leibowitz and Assistant Attorney General Christine Varney announced that the antitrust agencies would hold public workshops to consider revisions to the Guidelines. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice to Hold Workshops Concerning Horizontal Merger Guidelines (Sept. 22, 2009), *available at* http://www.ftc.gov/opa/2009/09/mgr.shtm.

tematic reevaluation of guidelines"[13] is especially important for the FTC and Antitrust Division because of the "inherently evolutionary" nature of the United States' competition policy framework.[14] It is, in fact, a necessary predicate of building and maintaining strong competition policy institutions.[15] Similarly, the effort is consistent with Kovacic's recommendation that "the Commission . . . engage in regular, periodic consultations with external constituencies—including legislators, other public agencies, consumer groups, business organizations, academic institutions, and legal societies" to determine the proper scope of its enforcement efforts.[16]

"[S]ystematic reevaluation of guidelines" . . . . is, in fact, a necessary predicate of building and maintaining strong competition policy institutions.

The Guidelines revision project builds on significant recent efforts to increase the transparency of merger review and enforcement decisions. During the last decade both the FTC and Department of Justice began the regular practice of issuing public statements describing their rationale for closing certain merger investigations,[17] released data on a decade's worth of merger enforcement efforts,[18] and held a three-day Merger Enforcement Workshop[19] that helped inform the 2006 Commentary on the Horizontal Merger Guidelines.[20] These continued efforts to make merger enforcement policy and practice more transparent are of significant importance to practioners and the business community.[21]

For revising the Guidelines, we offer three key principles. 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 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.[22]

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13 *See* Ernest Gellhorn & William E. Kovacic, Analytical Approaches and Institutional Processes for Implementing Competition Policy Reforms by the Federal Trade Commission (Dec. 1995), *available at* http://www.ftc.gov/opp/global/gmu_1.shtm.

14 William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance*, 16 Geo. Mason L. Rev. 903, 907 (2009).

15 *See* William E. Kovacic, Gen. Counsel, Fed. Trade Comm'n, Achieving Better Practices in the Design of Competition Policy Institutions (Apr. 20, 2004), *available at* http://www.ftc.gov/speeches/other/040420comppolicyinst.pdf.

16 The Federal Trade Commission at 100: Into Our 2nd Century; The Continuing Pursuit of Better Practices, A Report by Federal Trade Commission Chairman William E. Kovacic 178 (2009), *available at* http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf.

17 *See* Ilene Knable Gotts & James F. Rill, *Reflections on Bush Administration M&A Antitrust Enforcement and Beyond*, Competition Pol'y Int'l, Spring 2009.

18 *See, e.g.*, Fed. Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996–2003 (Feb. 2004), *available at* http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf and the data releases cited *infra* notes 31 and 34.

19 *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Announcement of a Workshop on Merger Enforcement (Dec. 18, 2003), *available at* http://www.ftc.gov/opa/2003/12/mwa.pdf.

20 Fed. Trade Comm'n and U.S. Dep't of Justice, Commentary on the Horizontal Merger Guidelines (2006) [hereinafter Commentary], *available at* http://www.justice.gov/atr/public/guidelines/215247.htm.

21 *See, e.g.*, Biotechnology Industry Organization et al., Joint Submission to the U.S. Department of Justice and Federal Trade Commission for the Horizontal Merger Guidelines Review Project (Nov. 2009), *available at* http://www.ftc.gov/os/comments/horizontalmergerguides/545095-00038.pdf ("We applaud the goals of increased transparency and predictability for the business community, which will assist companies in assessing whether to undertake transactions and in presenting to the agencies the materials that will assist them in making informed decisions.").

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

Principle 1: The Guidelines Should Continue to Provide a Flexible Framework That Reflects a Consensus View

The Guidelines are widely accepted and widely used because they provide a flexible, comprehensive, and administrable approach, focusing on only the issues necessary to determine a merger's likely competitive effects. They do not, indeed could not, 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.[23]

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.[24] The Guidelines have largely accomplished this difficult balancing act. Absent serious deficiencies in the current Guidelines, revisions should not disrupt established practice.

Principle 2: The Guidelines Should Reflect Agency Practice

As the joint FTC and DOJ 2006 Commentary 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[25]), in 1992 (incorporating directly the concept of unilateral effects and revising the analysis of entry[26]), and in 1997 (advancing the treatment of efficiency claims[27]). Incorporating the best of the Agencies' recent learning and experience into the Guidelines will help them remain relevant into the next decade.

A. The Agencies Should Adjust The HHI Thresholds and No Longer Characterize Certain Mergers as "Presumptively Anticompetitive." Section 1.51 of the Guidelines identifies 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

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[23] *See also* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Enforcement Priorities in the New Administration 14 (Nov. 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."). 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.

[24] *See* AMC Report, *supra* note 8, 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 also should 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.

[25] William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 Cal. L. Rev. 618 (1983).

[26] Remarks of James Rill, Assistant Att'y Gen'l for Antitrust, Introducing the 1992 Horizontal Merger Guidelines, *reprinted in* 62 Antitrust & Trade Reg. Rep. (BNA) 485 (Apr. 9, 1992).

[27] *See* Press Release, Fed. Trade Comm'n, FTC/DOJ Announce Revised Guidelines on Efficiencies in Mergers (Apr. 8, 1997), *available at* http://www.ftc.gov/opa/1997/04/effpress.shtm.

as "highly concentrated."[28] 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.

We would adjust the Guidelines' three-tier concentration levels to reflect enforcement practice and the prevailing emphasis on a more direct analysis of likely competitive effects, and we would abandon characterization of markets as unconcentrated, moderately concentrated, or highly concentrated

There is little support in the economic literature, however, for these tiers as indicators of likely competitive effects,[29] and they are no longer (although they once were[30]) consistent with the agencies' enforcement efforts.[31] In opening the last day of the Guidelines workshops, Assistant Attorney General Varney indicated that "[r]evising the HHI thresholds to express accurately how the Agencies use HHIs seems not just appropriate but also necessary to correct what has become an affirmative misstatement."[32]

We would adjust the Guidelines' three-tier concentration levels to reflect enforcement practice and the prevailing emphasis on a more direct analysis of likely competitive effects, and we would abandon characterization of markets as unconcentrated, moderately concentrated, or highly concentrated, as reliance on the characterization can substitute for analysis. The proposed adjustments would still provide substantial guidance as highly useful screens. Based on our review of the FTC and DOJ merger challenge data, and a review of all merger complaints issued since the 1992 Guidelines,[33] we would adjust the tiers as follows:

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[28] Guidelines, *supra* note 1, § 1.51.

[29] *See* Paul Pautler, *Evidence on Mergers and Acquisitions*, 48 ANTITRUST BULL. 119 (2003) (citing relevant studies); Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, *in* 2 RICHARD SCHMALENSEE & ROBERT D. WILLIG, HANDBOOK OF INDUSTRIAL ORGANIZATION (1989) (citing relevant studies); *see also* JOHN SUTTON, TECHNOLOGY AND MARKET STRUCTURE 486 (1998) ("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."); Transcript of Department of Justice and Federal Trade Commission Merger Workshop 133 (Feb. 19, 2004), *available at* http://www.ftc.gov/bc/mergerenforce/040219ftctrans.pdf (Dennis Carlton: "[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.")

[30] *See* Timothy J. Muris, Chairman, Fed. Trade Comm'n, How History Informs Practice—Understanding the Development of Modern U.S. Competition Policy 18–19 (Nov. 19, 2003) (recounting the history of merger enforcement in the Reagan Administration), *available at* http://www.ftc.gov/speeches/muris/murisfallaba.pdf; David Scheffman et al., 20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective 16–17 (June 2002), *available at* http://www.ftc.gov/be/hilites/ftc20thanniversarypaper.pdf.

[31] 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, the FTC did not challenge *any* mergers, or seek relief in *any* markets, when, post-merger, the market concentration level was below 2000. (We remove the FTC's enforcements in petroleum markets for the reason discussed in note 34.) 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). *See* FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996–2007 at 10–15 tbls. 3.1 to 3.6 (Dec. 1, 2008) [hereinafter HORIZONTAL MERGER DATA 1996–2007], *available at* http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf. We encourage the Commission to continue to release updated data every few years; the Department of Justice should follow suit. For a more detailed discussion of the FTC data release, and a discussion of the DOJ's data release, *see* Comment, *supra* note 4, at 7–9.

[32] Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice, An Update on the Review of the Horizontal Merger Guidelines 8 (Jan. 26, 2010), *available at* http://www.justice.gov/atr/public/speeches/254577.pdf.

[33] *See* Comment, *supra* note 4, at 7–9.

(i) Mergers resulting in markets with a post-merger HHI below 1800 are unlikely to raise competitive concerns;[34]

(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,

(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.[35] Of course, "cases falling just above and just below a threshold present comparable competitive issues"[36] 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.[37] Indeed, the Commentary notes that "under certain market or sales circumstances, fixed-cost savings

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[34] This number—a substantial jump from the existing "safe harbor" of 1000—is appropriate even though the Agencies have, in the seventeen 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 (*see supra* note 31), and the DOJ (*see* FED. TRADE COMM'N & DEP'T OF JUSTICE, MERGER CHALLENGES DATA, FY 1999–2003 (Dec. 18, 2003), *available at* http://www.ftc.gov/os/2003/12/mdp.pdf), as well as a review of FTC and DOJ complaints for the fiscal years 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* FED. TRADE COMM'N, BUREAU OF ECONOMICS, THE PETROLEUM INDUSTRY: MERGERS, STRUCTURAL CHANGE, AND ANTITRUST ENFORCEMENT 27–29 (Aug. 2004) [hereinafter PETROLEUM INDUSTRY REPORT], *available at* http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf. 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* Timothy J. Muris, Chairman, Fed. Trade Comm'n, Statement 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, *supra*, at 28 n.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 31 (showing no action taken in 16 petroleum markets where the post-merger HHI ranged from 2000 to 3999, for the period FY 1998 through 2007).

[35] The choice of a 150 delta for mergers in the highest tier represents a midpoint of the published data. 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.

[36] GUIDELINES, *supra* note 1, § 1.50.

[37] COMMENTARY, *supra* note 20, 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").

may result in lower prices in the short term."[38] 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."[39] 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.[40]

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.

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, but some (not all) investigating attorneys appear more skeptical of efficiency claims than they do of potential anticompetitive effect claims.[41] We believe that the Guidelines should explicitly reject different burdens of proof for procompetitive and anticompetitive effects; this would support consistent treatment within (and across) each agency. If agency practice is to apply different burdens, any revisions should justify such an extraordinary position.

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Principle 3: 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

38 *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.

39 Malcom B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission 1997–2007* at vi (Feb. 2009), *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.

40 *See, e.g.*, Comment of David T. Scheffman, Director, Bureau of Economics, Fed. Trade Comm'n, Transcript of Roundtable Sponsored by the Bureau of Economics, Understanding Mergers: Strategy & Planning, Implementation and Outcomes at 228 (Dec. 10, 2002), *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 232–52; Comment of Gabe Dagen, Assistant Dir., Accounting and Fin. Analysis, Fed. Trade Comm'n, *id.* at 263 ("Having come from industry, I know that fixed costs are involved in pricing decisions."); and various studies, including Eric. W. Noreen & David Burgstahler, *Full-Cost Pricing and the Illusion of Satisficing*, J. MGMT. ACCT. RES. 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 & Ephraim F. Sudit, *How Manufacturers Price Products*, MGMT. ACCT., Feb. 1995, at 37 (finding that 70 percent of large manufacturing companies set prices by marking up some version of full costs); V. Govindarajan & R.N. Anthony, *How Firms Use Cost Data in Price Decisions*, MGMT. ACCT., July 1983, at 30 (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)).

41 In litigation, however, the Agencies remain unduly hostile toward efficiency claims.

the past experiences and successes (or failures) of the firm, or similarly situated firms in the same or similar markets. Just as the Agencies 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.[42] Moreover, such evidence may include improvements in product quality, not just reductions in cost.

B. The Guidelines Should Not Assume a Form of Competition Among Firms, but Conduct a Fact Specific Inquiry of Industry Competitive Dynamics. Firms compete in different ways, including by bargaining (in auctions), by using promotions and advertising, by setting capacity, and by managing revenue or "yield."[43] 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. More than fifteen years of using various models to estimate the price effects of mergers "has led 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."[44] 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."[45] 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. Specifying the form that competition takes, independent of the industry particulars, risks serious error: simulation models are highly sensitive to assumptions about costs, efficiencies, and demand variables.[46]

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 cor-

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[42] 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.

[43] *See, e.g.*, COMMENTARY, *supra* note 20, at 31–36 (discussing auction and bargaining models); Fed. Trade Comm'n, Statement 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, 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; Fed. Trade Comm'n, Statement Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corp./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.

[44] Gregory J. Werden, Luke M. Froeb & David T. Scheffman, *A* Daubert *Discipline for Merger Simulation*, ANTITRUST, Summer 2004, at 89, 91.

[45] *Id.*; *see also* Remarks of Dan Rubenfeld, former Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Transcript of Horizontal Merger Guidelines Review Project 182 (Jan. 14, 2010), *available at* http://www.ftc.gov/bc/workshops/hmg/transcripts/100114transcriptstanford.pdf ("[W]e don't have very much evidence as to how accurately these models predict. I like to use them not so much as predictors but as sort of ways to evaluate robustness of results.").

[46] *See* Werden, *supra* note 44; Remarks of Jeremy Bulow, former Director, Bureau of Economics, Fed. Trade Comm'n, Transcript of Horizontal Merger Guidelines Review Project 73 (Jan. 14, 2010), *available at* http://www.ftc.gov/bc/workshops/hmg/transcripts/100114transcriptstanford.pdf ("When you are trying to model a particular industry or analyze a particular industry, sometimes one kind of model is appropriate or relatively easy to use. Sometimes it's not.").

related with the number of post-merger competitors.[47] The economic literature establishes, with little or no disagreement, that 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.[48] 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.[49] 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.[50] Although the data do not permit testing the point, our experience is that strong support from sophisticated customers generally does, and should, lead to a merger's approval. Unfortunately, in *Heinz*, *Arch Coal*, and *Oracle*, courts were dismissive of customer opinions.[51]

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.[52] 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.

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[47] *Compare* Nat'l Ass'n Of Att'ys Gen., *supra* note 6, at 4 ("[T]o the extent that a merger increases market power, there is less likelihood that any productive efficiencies would be passed on to consumers."), *and* Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, *supra* note 5, ¶ 84 ("[T]he 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, Merger Efficiencies and Pass-Through Analysis: Comment on Testimony of George Cary to the Antitrust Modernization Commission 1 (Mar. 16, 2005), *available at* http://govinfo.library.unt.edu/amc/public_studies_fr28902/merger_pdf/060316_Vita_Yde.pdf ("[E]nforcement 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.").

[48] *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.").

[49] Coate & Heimert, *supra* note 39, at 27 ("Pass-through issues were much more likely to be a concern to [the Bureau of Competition] than [the Bureau of Economics]").

[50] Horizontal Merger Data 1996–2007, *supra* note 31, at 26, 28 (tbls. 7.1 and 8.1). To be reliable, the evidence must reflect a substantial volume of customer experience and, for similarly situated customers, be largely consistent.

[51] FTC v. H.J. Heinz Co., 116 F. Supp. 2d 190 (D.D.C. 2000) (rejecting strong customer testimony in support of merger), *rev'd on other grounds*, 246 F.3d 708 (D.C. Cir. 2001); 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).

[52] *Oracle*, 331 F. Supp. 2d at 1131.

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."[53] 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."[54] Procedural due care is concerned with process: decisions that are "unintelligent or unadvised" are not entitled to the Rule's presumption.[55]

[T]he Agencies correctly recognize the importance of opinions from experienced customers; courts should grant similar deference to those opinions, both positive and negative.

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 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."[56]

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.[57]

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53 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

54 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.").

55 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.*, 634 A.2d at 360; *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 directors.").

56 Thomas O. Barnett, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice, Antitrust Enforcement Priorities: A Year in Review 14 (Nov. 19, 2004), *available at* http://www.justice.gov/atr/public/speeches/206455.pdf.

57 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. A number of courts recognize the ability of large purchasers to discipline markets. *See, e.g.*, Chicago Bridge & Iron Co. 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. . . ."). The Guidelines, *supra* note 1, § 2.2, do 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. But, if the Guidelines are revised to include

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.[58]

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 post-merger evidence, that "could arguably" be manipulated.[59] 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.[60]

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.'"[61] 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

a power buyer defense, 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.

[58] *See* FTC v. Indiana Fed'n 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).

[59] *Chicago Bridge*, 534 F.3d at 435.

[60] 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 article, 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.

[61] AMC Report, *supra* note 8, at 59 (citations omitted).

estimated to have accounted for as much as three-quarters of the economic growth in major industrialized countries."[62]

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

> 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.[63]

[W]e do not think the current state of knowledge and experience with innovation markets supports their inclusion in the Guidelines.

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 do not think 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 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 breakthrough. 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.[64] Any guidance should make clear that the examination of a merger's effect on innovation is "presumption" free. Theoretical and empirical work in economics has not found a conclusive relationship between concentration levels and the pace or

[62] Organization for Economic Cooperation and Development, Dynamic Efficiencies in Merger Analysis 248 (2007), *available at* http://www.oecd.org/dataoecd/53/22/40623561.pdf.

[63] Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Competition Policy, Patent Law, and Innovation: Welcoming Remarks for the Patent Reform Conference 3 (June 9, 2005), *available at* http://www.ftc.gov/speeches/majoras/050609comppolicy.pdf. *See also* Robert Kramer, Chief, Litigation II Section, Antitrust Div., U.S. Dep't of Justice, Antitrust Considerations in International Defense Mergers 3 (May 4, 1999) ("As important as price competition is to us, a second major and possibly even greater concern is maintaining competition for innovation.").

[64] 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.

amount of innovation.[65] In accord with agency practice and the economic literature, any revised Guidelines should make clear that innovation inquiries must be even more factually intensive than product market investigations, and subject to case-by-case analysis.[66]

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 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. We also encourage the Agencies to continue their recent history of transparency and consultation by releasing the Guidelines in draft form, for public comment. ●

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[65] *See, e.g.*, Michael Katz & Howard Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 12–31 (2007); 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 ed., 2006); Timothy J. Muris, Chairman, Fed. Trade Comm'n, Statement In the Matter of Genzyme Corporation/Novazyme Pharmaceuticals, Inc. 2–3 (Jan. 13, 2004), *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). The Muris Genzyme Statement observes that "the Commission properly has been cautious in using innovation market analysis" and that the 1996 Report "acknowledged that 'economic theory and empirical investigations have not established a general causal relationship between innovation and competition.'" Muris Genzyme Statement, *supra*, 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* Press Release, Food and Drug Administration, FDA Approves First Treatment for Pompe Disease (Apr. 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 10 (Feb. 5, 2009), *available at* http://www.ftc.gov/speeches/rosch/090205innovationspeech.pdf. *See also* Remarks of Professor David Teece, Transcript of the Horizontal Merger Guidelines Review Project 234–35 (Jan. 14, 2010), *available at* http://www.ftc.gov/bc/workshops/hmg/transcripts/100114transcriptstanford.pdf ("The evidence . . . that links concentration to innovation, notwithstanding the frequent reference to it, is weak. . . . Market concentration is only one of many, many factors that affects the rate and direction of innovation at the enterprise level.").

[66] In their important article, *Mergers and Innovation*, *supra* note 65, Katz and 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 *supra* note 65. 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." 1 FED. TRADE COMMN, STAFF REPORT, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH GLOBAL MARKETPLACE ch. 7, at 19 (1996), *available at* http://www.ftc.gov/opp/global/report/gc_v1.pdf. *See also* COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 176 (1999):

> 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 Commissioners Thompson and Harbour. Katz & Shelanski, *Mergers and Innovation*, *supra* note 65, at 85.