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Almost But Not Quite Perfect: The Past, Present, and Potential Future of Horizontal Merger Enforcement

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ALMOST BUT NOT QUITE PERFECT: THE PAST, PRESENT, AND POTENTIAL FUTURE OF HORIZONTAL MERGER ENFORCEMENT

*Marleina Paz**

Since the beginning of his administration, President Obama and his colleagues at the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have espoused a renewed vigor for horizontal merger enforcement. While this more aggressive stance is appropriate given that the U.S. economy is currently recovering from a recession, the disparity between the government agencies' and the federal courts' approaches to examining proposed horizontal mergers poses an obstacle to successful legal analysis in this area. This Article presents four solutions that would close the gap in horizontal merger enforcement between the courts and the agencies—as well as between the agencies themselves—and achieve the government's antitrust goals of fostering competition and promoting consumer welfare. These solutions regarding the adoption of the new Horizontal Merger Guidelines, consistency between the FTC and the DOJ, the serious consideration of efficiency and efficiency-related arguments, and the utilization of behavioral economics would improve the analysis of potential business combinations. This is especially important in rapidly developing industries that, because of their inherent characteristics, pose unique challenges to determining when a horizontal merger will harm the economy.

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I. INTRODUCTION

"The law protects competition, not competitors."[1] This seemed to be the theme driving the U.S. Department of Justice (DOJ) and its lawsuit against AT&T and T-Mobile, two wireless telecommunications companies that announced a $39 billion merger on March 20, 2011.[2] Because the DOJ believed that competition would be harmed by losing T-Mobile as an independent competitor in the market—which would result in higher prices, reduced quality of service, and fewer choices for consumers—it argued that the merger should be permanently enjoined.[3] While the merger may have produced some benefits, the lawsuit demonstrated that the DOJ was less concerned with the potential benefits of the transaction and more focused on how consumers would be affected by the lack of competition in the wireless telecommunications market.

In cases such as this, Section 7 of the Clayton Act—("Section 7")—which requires a merger's challenger to show that it will create a reasonable probability of a monopoly or a substantial lessening of competition—governs.[4] Because of Section 7, the government can preemptively attack mergers that would be likely to harm competition before consumers actually feel any anticompetitive effects in the market.[5] Thus, Section 7 provides the DOJ with a

1. Eleanor M. Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped—A Story of the Politics of Convergence*, *in* ANTITRUST STORIES 331, 335 (Eleanor M. Fox & Daniel A. Crane eds., 2007) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

2. Complaint at 2–5, United States v. AT&T Inc., No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011) [hereinafter Complaint, *United States v. AT&T*]. In mid-December 2011, however, AT&T abandoned its plans to merge with T-Mobile because of the government's concerns with the transaction. *AT&T T-Mobile Deal Dropped after Fierce Government Backlash*, HUFFINGTON POST (Dec. 19, 2011, 4:40 PM), http://www.huffingtonpost.com/2011/12/19/att-tmobile-bid-dropped_n_1158851.html.

3. Complaint, *United States v. AT&T*, *supra* note 2, at 20–21.

4. 15 U.S.C. § 18 (2006). Since Section 7 applies "in any line of commerce or in any activity affecting commerce . . . , the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," the statute and especially its Celler-Kefauver amendments make clear that this law covers transactions such as horizontal mergers, vertical mergers, conglomerate mergers, and market extensions. *Id.* However, this Article focuses exclusively on horizontal mergers and the ways in which the federal government and the courts have addressed this topic.

5. Scott A. Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 48 (2004).

statutory basis to preemptively halt deals like the AT&T and T-Mobile merger if a federal court agrees that the transaction is substantially anticompetitive in nature.

The case involving AT&T and T-Mobile is but one of the many examples of the Obama Administration's renewed vigor when it comes to merger enforcement. Historically, enforcement of the antitrust laws that regulate horizontal mergers has been inconsistent due to the differing opinions of political leaders and judges.[6] The most recent example of this is the Obama Administration's more aggressive stance on mergers as compared to the Bush Administration's position on the subject.[7] Unlike the Bush Administration, which adopted a laissez-faire approach, the Obama Administration has repeatedly made it clear that it will aggressively monitor these transactions and "take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not."[8] Given the distressed state of the economy, the Obama Administration has argued that increased enforcement will foster competition among companies, thereby stimulating the economy and benefitting consumers.[9]

Despite these good intentions, various commentators have questioned whether the Obama Administration is properly handling the issue of horizontal merger enforcement.[10] While the argument that increased oversight in this economy is necessary to ensure competition and promote consumer welfare is valid, some critics have argued that the Obama Administration's approach to merger enforcement is effectively preventing beneficial business transactions

6. William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMPETITION POL'Y INT'L 129, 134–36 (2009), *available at* http://www.ftc.gov/speeches/kovacic/2009horizontalmerger.pdf.

7. *See infra* Part III.

8. Senator Barack Obama, Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

9. Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era: Remarks as Prepared for the Center for American Progress, 5–16 (May 11, 2009) (transcript available at http://www.justice.gov/atr/public/speeches/245711.pdf).

10. *See* Michael Mandel, *Obama Should Restrain the Regulators*, CNN (Aug. 17, 2011, 5:22 PM), http://globalpublicsquare.blogs.cnn.com/2011/08/17/obama-should-restrain-the-regulators/?iref=allsearch; Peter Schiff, *Obama Looking Like Job Killer in Chief*, FORBES (Sept. 2, 2011, 6:32 PM), http://www.forbes.com/sites/greatspeculations/2011/09/02/obama-looking-like-job-killer-in-chief/.

from taking place.[11] Furthermore, they assert that the government's decisions are actually hurting consumer welfare by destroying jobs.[12] For these reasons, it is important to determine whether this more restrictive approach is as beneficial as the Obama Administration suggests that it is.

There is another pressing issue in horizontal merger enforcement: whether the agencies[13] in charge of merger review and the courts are treating these transactions appropriately. While the Federal Trade Commission (FTC) and the DOJ have engaged in federal litigation to challenge questionable horizontal mergers,[14] many of these issues are addressed outside of court at the agency level.[15] For this reason, the FTC and the DOJ have created Horizontal Merger Guidelines to help businesses understand what the agencies can consider when investigating these transactions.[16] However, these guidelines, which the FTC and the DOJ updated in October 2010, are not binding legal authority.[17] Therefore, while courts have adopted some suggestions from previous versions of the guidelines,[18] it is unclear whether they will readily accept the proposals from the new 2010 Horizontal Merger Guidelines.[19] This will likely put companies in a difficult position as they plan and propose mergers, especially if they anticipate resistance and potential litigation.

This problem of uncertainty is compounded for companies in rapidly changing industries, such as telecommunications and technology.[20] Regarding market definition—a factor that courts have

11. Mandel, *supra* note 10; Schiff, *supra* note 10.

12. Mandel, *supra* note 10; Schiff, *supra* note 10.

13. This Article refers to the Federal Trade Commission (FTC) and the DOJ collectively as the "federal agencies" or the "agencies."

14. *See infra* Part II.B.

15. *See generally* 15 U.S.C. §§ 18a, 18a(b)(1)(A) (2006) (requiring parties to a merger to obtain agency approval before consummating the transaction).

16. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter 2010 GUIDELINES], *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

17. Leah Brannon & Kathleen Bradish, *The Revised Horizontal Merger Guidelines: Can the Courts Be Persuaded?*, ANTITRUST SOURCE, Oct. 2010, at 1.

18. *See infra* Part II.B.3.b.

19. Brannon & Bradish, *supra* note 17.

20. *See infra* Part V.

emphasized as a starting point for establishing a Section 7 claim[21]—the new merger guidelines state that the FTC and the DOJ will usually, but not always, start by defining a relevant market[22] when challenging a proposed merger.[23] Given this inconsistency between the courts and the 2010 Horizontal Merger Guidelines with respect to market definition, companies in technology-based industries may not know what to follow as they structure their transactions.[24] Additionally, efficiency and innovation issues[25] that inhere in the telecommunications and technology industries, if given enough time for research and development, may easily outweigh identifiable market concerns.[26] Unfortunately, courts do not always focus on efficiency and innovation arguments,[27] which puts certain companies at a disadvantage when attempting to successfully complete a merger.

Given the current state of merger enforcement, this Article argues that while the Obama Administration's aggressive stance on horizontal merger enforcement is necessary to foster competition and prevent harm to consumers in today's economic climate, the real obstacle that companies and consumers face is the disconnect between the courts' and the agencies' approaches to proposed mergers. If courts do not attempt to adopt some of the new Horizontal Merger Guidelines, companies may not have the guidance they need to structure successful mergers that will benefit

21. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957) (describing the "[d]etermination of the relevant market" as "a necessary predicate to a finding of a violation" of Section 7); *see also* Brown Shoe, Co. v. United States, 370 U.S. 294, 324 (1962) (indicating that Section 7 requires the determination of market definition).

22. Defining a relevant market requires the parties proposing or challenging a horizontal merger to specify the industry and geographic location that the merger will affect. 2010 GUIDELINES, *supra* note 16, at 7–15.

23. *Id.*

24. *See infra* Part III.B.1.

25. *See infra* Part IV.

26. *See* Sunny Woan, Note, *Antitrust in Wonderland: Regulating Markets of Innovation*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 53, 56 (2008). The term "innovation" refers to "scientific breakthroughs, important commercial inventions, product modifications and new production techniques." Anne K. Bingaman, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust, Innovation, and Intellectual Property: Address Before the Stanford Law School Program on Antitrust and Intellectual Property (Oct. 7, 1994), http://www.usdoj.gov/atr/public/speeches/0116.pdf. Mergers in rapidly developing industries may give companies the ability to innovate and create new and more technologically advanced goods or services at a lower cost for consumers. *See infra* Part IV.

27. Woan, *supra* note 26, at 55.

competition and consumers. This is especially true in rapidly changing industries like telecommunications and technology, which may have stronger innovation and efficiency arguments supporting their merger plans.[28] In addition, if the FTC and the DOJ do not approach mergers in the same manner and give enough weight to factors such as innovation, efficiencies, and other economic concerns like job creation, courts will have less to consider when applying precedent to investigations that reach litigation. Finally, because firms and consumers are not always rational actors[29] when it comes to the technology-based products that they use, the courts and the agencies should incorporate behavioral economics[30] into their merger-enforcement analysis so they can better ascertain which mergers are truly harmful to the economy. If the courts and agencies fail to change the way they approach merger enforcement, they may unnecessarily block beneficial horizontal mergers that do not pose a great risk of creating a single firm with a dominant market share or a concentrated market conducive to collusive activity.

In analyzing horizontal merger enforcement, it is important to understand how this area of law has evolved and how sensitive it can be to various economic considerations. Thus, Part II provides a backdrop for this Article by tracing the development and enforcement of antitrust law as it pertains to mergers. Part III then analyzes how horizontal merger enforcement is being handled generally and includes a discussion of how the Obama Administration's aggressive stance on merger enforcement is appropriate given the harsh economic climate and why the agencies and the courts still pose an obstacle to successful merger analysis. Part IV focuses on what can be done to eliminate the disparity between the agencies' and the courts' approaches to horizontal mergers. Finally, Part V discusses the impact of horizontal merger enforcement on rapidly changing markets, with a focus on what the DOJ's former case against AT&T and T-Mobile means for future mergers in industries such as telecommunications and technology. This part posits that, unlike transactions in traditional industries, these kinds of mergers require greater attention to factors such as

28. *See infra* Part IV.C.
29. *See infra* Part IV.D.
30. *Id.*

efficiency, innovation, and consumer benefits (including job creation) that undoubtedly improve consumer welfare in the long run; only then can the agencies and the courts make the proper determination about whether a merger will be harmful to competition and the market in general.

II. BACKGROUND

An understanding of what horizontal mergers are and how corresponding policies have evolved is necessary to evaluate the current state of horizontal merger enforcement in the United States. The following section provides an overview of the mechanics of horizontal mergers, the statutes governing their implementation, the government's role in overseeing these mergers, and the current administration's actions regarding these proposed business deals.

A. The Basics

According to neoclassical economic theory, people are rational actors seeking to maximize their profits in efficient and self-correcting markets.[31] Thus, if an individual or a firm makes a bad business decision while trying to increase profits, the market will correct this lapse in judgment and eventually cause the actor to leave the industry.[32] One such way that an economic actor may decide to maximize its profits is by agreeing to a horizontal merger with a competitor.[33] Government intervention in these kinds of deals is usually unnecessary because the market can adjust to offset the effects of faulty mergers,[34] but there are certain circumstances where federal agencies and courts may have to step in and regulate companies engaged in horizontal mergers in order to protect competition and consumers.

31. Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1548 n.136 (2011) (citing Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928, 933–34 (1979)).

32. Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 266 (2010).

33. *See* Donald C. Langevoort, *The Behavioral Economics of Mergers and Acquisitions*, 12 TRANSACTIONS: TENN. J. BUS. L. 65, 70 (2011).

34. Reeves & Stucke, *supra* note 31, at 1548.

1. How a Horizontal Merger Works

A transaction between two firms qualifies as a horizontal merger "when one firm acquires another firm that manufacturers the same product or a close substitute, *and* both firms operate in the same geographic market."[35] In other words, the parties involved in a horizontal merger are competitors in a single industry and region that have decided to become one company.[36]

Horizontal mergers between competing firms can have many important economic implications. First, a merger can result in fewer firms in the market, thus increasing market concentration[37] and giving each firm involved in the transaction a greater market share.[38] Horizontal mergers may also lead to harmful monopolistic activity or collusion in the form of oligopolistic behavior[39] on the part of the companies involved in the transaction, which can lead to price increases that may harm consumers.[40] On the positive side, however, horizontal mergers may increase a firm's efficiency and allow it to produce more goods at a cheaper price or invest more in research and development.[41] Because mergers can cause these effects—and many more—Congress has enacted several pieces of antitrust legislation that allow the FTC and the DOJ to determine whether they should approve or challenge a proposed merger between competing firms.

35. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 542 (4th ed. 2011).

36. *Id.*

37. Market concentration refers to how many firms are in the market and how much of the market each firm controls. *See* 2010 GUIDELINES, *supra* note 16, at 18. This factor can help the agencies determine whether a horizontal merger will have anticompetitive effects. *Id.*

38. *See* HOVENKAMP, *supra* note 35, at 544. Market share refers to how much of the market a firm controls. *Market Share Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/market+share (last visited Oct. 6, 2012).

39. A firm engages in monopolistic behavior when it controls the market in terms of price, and it participates in oligopolistic behavior when it colludes with other firms to collectively control the market price. *Economic Basics: Monopolies, Oligopolies and Perfect Competition*, INVESTOPEDIA, http://www.investopedia.com/university/economics/economics6.asp#axzz1obtfCQ8O (last visited Mar. 19, 2012).

40. HOVENKAMP, *supra* note 35, at 544–45.

41. *Id.* at 545.

2. Statutes Governing Horizontal Mergers

The first piece of legislation[42] that attempted to regulate horizontal mergers between competing companies was the Sherman Act.[43] Passed in 1890, the Sherman Act gave Congress the opportunity to delineate violations of federal antitrust law.[44] Specifically, Section 1 of the Sherman Act states that "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal."[45] Therefore, courts may find that horizontal mergers that seem to restrain trade by suppressing competition violate this section.[46]

Complementing Section 1 of the Sherman Act is Section 7 of the Clayton Act, which governs the area of horizontal mergers.[47] Congress passed Section 7 in 1914 to supplement the Sherman Act and allow the government to preemptively attack mergers that were likely to harm competition.[48] Section 7 does not make mergers automatically illegal; instead, it looks to whether the merger has a reasonable probability of creating either a monopoly or a substantial lessening of competition.[49] Because this section only focuses on probabilities, a court may enjoin a merger without first requiring proof that a transaction has already created anticompetitive effects in

42. This Article focuses on federal enforcement of antitrust law as it pertains to mergers; however, states and private parties can also sue to enjoin a merger that they believe is an illegal restraint on competition. *Id.* at 648–52.

43. Sher, *supra* note 5, at 44–45.

44. *Id.* at 45.

45. 15 U.S.C. § 1 (2006).

46. The issue of whether a merger promotes or suppresses competition falls within the scope of the "rule of reason." *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). The U.S. Supreme Court has said the following on the subject:

> Although the Sherman Act, by its terms, prohibits every agreement "in restraint of trade," this Court has long recognized that Congress intended to outlaw only unreasonable restraints. As a consequence, most antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors . . . .

Id. (citation omitted).

47. 15 U.S.C. § 18 (2006).

48. Sher, *supra* note 5, at 47–48.

49. *Id.* at 60–61 (citing United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957)).

the market.[50] Specifically, the current version of Section 7 states the following:

> No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person . . . shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where . . . the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly.[51]

In 1950, Congress enacted the Celler-Kefauver amendments to allow the government to be more aggressive with its investigation of mergers and acquisitions.[52] This is reflected in the quoted language above since the amendments make Section 7 applicable to both stock and asset acquisitions, whereas the original statute only applied to stock acquisitions.[53] Furthermore, while Section 7 originally allowed the government to consider a merger's anticompetitive effects only on the parties involved with a transaction, the Celler-Kefauver amendments permit the government to consider a merger's anticompetitive effects on third parties in the same market as the two merging parties.[54]

In addition to Section 7, Section 5 of the Federal Trade Commission Act specifically allows the FTC to investigate mergers.[55] This statute gives the FTC the power to regulate "unfair

50. Allen P. Grunes & Maurice E. Stucke, *Antitrust Review of the AT&T/T-Mobile Transaction*, 64 FED. COMM. L.J. 47, 48 (2011) (quoting FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967)).

51. 15 U.S.C. § 18 (2006).

52. Sher, *supra* note 5, at 50–51.

53. ROBERT PITOFSKY ET AL., TRADE REGULATION 967–68 (6th ed. 2010). This change in Section 7 was important because it closed a large loophole in the original statute. *Id.* To prevent the government from stopping a merger under the original Section 7, a company would acquire another company's assets instead of its stock in completing the merger. *Id.* Therefore, the Celler-Kefauver amendments allowed the government to regulate the multiple ways in which companies could accomplish a horizontal merger. *See id.*

54. *Id.*

55. 15 U.S.C. § 45 (2011). It is also important to note that the FTC has specific authority to enforce the Clayton Act. *Appendix 1—Laws Enforced by the FTC*, FEDERAL TRADE COMMISSION, http://www.ftc.gov/opp/gpra/append1.shtm (last visited Mar. 9, 2012). However, it technically does not have the power to enforce the Sherman Act. *An FTC Guide to the Antitrust Laws*, FEDERAL TRADE COMMISSION, http://ftc.gov/bc/antitrust/factsheets/antitrustlawsguide.pdf (last visited Mar. 9, 2012).

methods of competition in or affecting commerce," thus enabling the agency to halt mergers that would be harmful to consumers.[56]

A final statute that regulates horizontal mergers is the Hart-Scott-Rodino Act ("HSR Act"), which requires parties to obtain merger approval from the FTC and the DOJ.[57] The HSR Act's purpose is "to amend . . . Section 7 . . . by establishing premerger notification and waiting requirements for corporations planning to consummate very large mergers and acquisitions," and its goal is "to strengthen the enforcement of Section 7" by allowing the government to investigate questionable mergers before they are completed.[58] This statute illustrates the importance of the FTC and the DOJ in horizontal merger enforcement and allows the agencies to begin a process that may ultimately lead them to challenge a transaction in court.

B. Federal Enforcement: The Interaction of Federal Agencies and Courts in Analyzing Horizontal Mergers

Given the statutory process that Congress has laid out for horizontal merger enforcement, the federal agencies and the courts each play a large role in this area. In other words, because of the premerger clearance procedures that the HSR Act requires, Section 7 enforcement has become more of an administrative task than a judicial one.[59] The FTC or the DOJ must first initiate merger investigations under the HSR Act before they can challenge those transactions in court.[60] As a result, both the agencies and the courts are influential in determining which horizontal mergers will be consummated.

56. 15 U.S.C. § 45.
57. 15 U.S.C. §§ 18a, 18a(b)(1)(A).
58. H.R. REP. NO. 94-1373, pt. 1 (1976).
59. *See* Raymond Z. Ling, Note, *Unscrambling the Organic Eggs: The Growing Divergence Between the DOJ and the FTC in Merger Review After* Whole Foods, 75 BROOK. L. REV. 935, 939–50 (2010).
60. *Id.*

1. Agency Enforcement: The FTC and the DOJ

The Antitrust Division of the DOJ and the FTC are both charged with the task of investigating mergers and deciding whether they would cause substantial harm to competition and consumers.[61] As a result of this dual enforcement system,[62] the HSR Act requires parties to file a notice of their proposed merger with both agencies.[63] This starts a thirty-day waiting period, during which the FTC and the DOJ confer and decide between themselves which agency will review the merger.[64] Then, one of two things can happen: the investigating agency can clear the merger, or it can issue a second request to further examine the transaction during another thirty-day waiting period.[65] After the second waiting period ends, the investigating agency can allow the parties to complete the merger or it can challenge the merger in court.[66]

2. The Development and Use of the Horizontal Merger Guidelines in the Agencies' Work

In investigating mergers and deciding which cases to litigate, the FTC and the DOJ have come up with Horizontal Merger Guidelines to focus their analysis of potentially anticompetitive mergers.[67] The DOJ first issued these guidelines in 1968, and since then the agencies have created three major versions of the guidelines with slight

61. ANTITRUST MODERNIZATION COMMISSION, ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATIONS 129 (2007). The FTC and the DOJ receive their power to enforce the antitrust laws from various sources. The Sherman Act and the Clayton Act allow the DOJ to pursue civil actions against companies proposing harmful mergers, while the Sherman Act also gives the DOJ the authority to pursue criminal cases for egregious violations—for example, explicit cases of price fixing and other clear restrains on trade—of the antitrust laws. *See id.* Aside from Section 7 of the Clayton Act, the FTC gets its antitrust enforcement authority from Section 5 of the FTC Act, which allows it to pursue both actions in federal court as well as administrative hearings against parties to a merger. *Id.*

62. *Id.*

63. *Mergers: Premerger Notification and the Merger Review Process*, FED. TRADE COMM'N, http://www.ftc.gov/bc/antitrust/premerger_notification.shtm (last visited Sept. 29, 2011).

64. *Id.*

65. *Id.*

66. HOVENKAMP, *supra* note 35, at 642; FED. TRADE COMM'N, *supra* note 63.

67. *See* 2010 GUIDELINES, *supra* note 16, § 1.

modifications in between.[68] While their content has changed throughout the years, the guidelines' unifying goal has been "to prevent the enhancement of market power that might result from mergers."[69] To understand how the agencies have determined whether a merger harms competition, it is helpful to look at how the guidelines have evolved.

a. Horizontal merger guidelines of the past: 1968 to 2006

In 1968, the DOJ issued the first set of merger guidelines.[70] These guidelines were based on the idea that "horizontal mergers that increase market concentration inherently are likely to lessen competition."[71] Therefore, the 1968 Guidelines specified the thresholds at which the DOJ would challenge mergers based on a certain market concentration.[72] Prior to the release of these guidelines, courts used a four-firm ("CR4") concentration measure, which accounted for the market shares of the four largest firms in the industry, to determine when a merger would be illegal.[73] The downside to the CR4 approach was that the "legal standard for market concentration and increases in market concentration evolved in such a way that small acquisitions in relatively unconcentrated industries became illegal."[74] Thus, the 1968 Guidelines created standards that prevented the unnecessary injunction of certain mergers.

The next major update to the DOJ's Horizontal Merger Guidelines occurred in 1982.[75] These guidelines specified a new focus for merger enforcement: "[M]ergers should not be permitted to create or enhance 'market power' or to facilitate its exercise."[76] Additionally, the 1982 Guidelines introduced two new tools for

68. Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 50 (2010).

69. HOVENKAMP, *supra* note 35, at 543.

70. *Id.* at 702.

71. Shapiro, *supra* note 68, at 50–51.

72. Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 782–83 (2006).

73. *Id.* at 782.

74. *Id.*

75. Shapiro, *supra* note 68, at 52.

76. U.S. DEP'T OF JUSTICE, MERGER GUIDELINES, § I (1982), *available at* http://www.justice.gov/atr/hmerger/11248.pdf.

analyzing mergers: the hypothetical monopolist test (HMT) for defining the relevant product market and the Herfindahl-Hirschman Index (HHI) for determining at what post-merger HHI level the agencies would move to block a merger.[77] As compared to the 1968 Merger Guidelines, the 1982 Merger Guidelines focused more on competitive effects and less on market concentration.[78] Two years later, the DOJ made minor changes to the guidelines that addressed issues such as efficiencies and market concentration, thus resulting in the 1984 Merger Guidelines.[79]

In 1992, the DOJ and the FTC jointly released a major revision of the Horizontal Merger Guidelines.[80] This revision was especially notable because it was the first time the FTC joined the DOJ in formulating guidelines for merger analysis.[81] The changes included the introduction of the concept of "unilateral effects,"[82] a greater emphasis on market entry,[83] and a shift in merger enforcement from traditional industries that provided consumers with homogenous products to industries that produced more differentiated products in connection with the "information age."[84] These changes indicated that the agencies were basing their decisions regarding which mergers to challenge less on the grounds of "structural presumptions based on market shares and concentration ratios" and more on issues

77. Shapiro, *supra* note 68, at 52. The HMT allows the agencies to determine if "groups of products in candidate markets are sufficiently broad to constitute relevant antitrust markets." 2010 GUIDELINES, *supra* note 16, § 4.1.1. The HHI measures market concentration by taking the sum of the squares of each firm's market share; this helps the agencies determine whether a merger will have anticompetitive effects. *Id.* § 5.3. There are three types of markets: unconcentrated markets (HHI below 1500), moderately concentrated markets (HHI between 1500 and 2500), and highly concentrated markets (HHI above 2500). *Id.* Markets with higher concentrations are more likely to experience anticompetitive effects due to a merger. *Id.*

78. Shapiro, *supra* note 68, at 53.

79. Greene, *supra* note 72, at 786 & n.43.

80. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992, rev. 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf [hereinafter 1992 GUIDELINES].

81. *Id.*

82. Shapiro, *supra* note 68, at 54. Unilateral effects are a type of anticompetitive effect created when a merger negatively impacts competition even if the other firms do not change their behavior. 2010 GUIDELINES, *supra* note 16, § 6.

83. Shapiro, *supra* note 68, at 54. "Market entry" refers to the ease with which a firm can enter the market. *See* 2010 GUIDELINES, *supra* note 16, § 9. The FTC and the DOJ currently look at the timeliness, likelihood, and sufficiency of entry into the market to determine whether a merger will be harmful to competition. *Id.*; *see infra* note 201.

84. Shapiro, *supra* note 68, at 49. Shapiro uses "information age" to distinguish the modern economy from the "industrial age" of the past. *Id.*

involving "qualitative competitive effects analysis."[85] In 1997, the agencies slightly revised the 1992 Guidelines with respect to their approach concerning merger efficiencies.[86] This demonstrated the agencies' belief that "mergers [could] promote competition by enabling efficiencies, and that such efficiencies [could] be great enough to reduce or reverse adverse competitive effects that [could] arise in their absence."[87]

Finally, in 2006, the FTC and the DOJ released a commentary on the 1992 Horizontal Merger Guidelines.[88] The purpose of this 2006 commentary was to "provide greater transparency" and expand upon points made in the 1992 Merger Guidelines.[89] The commentary focused on market definition and concentration, adverse competitive effects, market entry, and efficiencies to help those interested understand what the agencies examined during a merger investigation.[90] It is also important to note that the FTC and the DOJ made clear that this commentary, while made prior to the 2010 Horizontal Merger Guidelines, is still useful today in interpreting the agencies' approach to horizontal mergers.[91]

b. The current state of the agencies' merger analysis: The 2010 horizontal merger guidelines

On August 19, 2010, eighteen years after the last major overhaul of the guidelines, the FTC and the DOJ issued the latest version of the Horizontal Merger Guidelines.[92] The 2010 Guidelines build upon the previous guidelines and commentary by incorporating factors

85. William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 224 (2003). "Qualitative competitive effects analysis" refers to the manner in which the agencies evaluate the market characteristics of a particular industry to determine whether a merger will have a negative impact on competition. Charles A. James, *Overview of the 1992 Horizontal Merger Guidelines*, 61 ANTITRUST L.J. 447, 452–53 (1993). Thus, instead of treating every merger in every market in a similar fashion, the FTC and the DOJ engage in a fact-specific inquiry for each transaction they investigate. *See id.*

86. 1992 GUIDELINES, *supra* note 80.

87. Shapiro, *supra* note 68, at 55.

88. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES (2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.pdf.

89. *Id.* at v.

90. *Id.*

91. 2010 GUIDELINES, *supra* note 16, at 1 n.1.

92. 2010 GUIDELINES, *supra* note 16.

such as the HMT, entry barriers, and efficiencies.[93] Additionally, the 2010 Guidelines improve the agencies' treatment of market definition and unilateral effects in order to bring the guidelines into agreement with current enforcement practices.[94] For example, the new guidelines clarify that defining the relevant market does not have to be the starting point of merger analysis.[95] If there is sufficient evidence that adverse competitive effects will result from a merger, sometimes this will be more informative than the market definition about the nature of such a transaction; consequently, market definition does not have to be defined first.[96] This change thus ties into a prior addition to the Horizontal Merger Guidelines regarding evidence of anticompetitive effects.[97] This section suggests that even without proof of market definition or market power—tools central to traditional market analysis—the agencies will be more aggressive in challenging mergers with potentially significant anticompetitive effects.[98] Because of these changes, the 2010 Guidelines reflect the FTC and the DOJ's goals of recognizing frequently used economic tools and increasing transparency with regard to the agencies' merger analysis.[99]

The timing of these revisions demonstrates that the merger guidelines do not necessarily change with each administration, but rather that those in office certainly have the power to influence them. For example, one of President Obama's goals was to increase antitrust enforcement,[100] and the FTC and the DOJ acted accordingly. Consistent with President Obama's objective, the agencies revised the Horizontal Merger Guidelines in 2010 to incorporate developments in antitrust and economics that took place

93. Christine A. Varney, *The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution*, 77 ANTITRUST L.J. 651, 651–652 (2011).

94. *Id.* at 652.

95. 2010 GUIDELINES, *supra* note 16, § 4.

96. *Id.* For example, evidence about potential price and output changes might be more useful than market concentration in determining whether a merger will result in harmful unilateral effects. Peter T. Barbur et al., *Market Definition in Complex Internet Markets*, 12 SEDONA CONF. J. 285, 287 (2011).

97. Press Release, Fed. Trade Comm'n, Federal Trade Commission and U.S. Department of Justice Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010), *available at* http://www.ftc.gov/opa/2010/08/hmg.shtm.

98. *See* 2010 GUIDELINES, *supra* note 16, § 2.

99. Varney, *supra* note 93, at 659.

100. Obama, *supra* note 8.

since the release of the 1992 Guidelines.[101] This clearly illustrates that changes to the merger guidelines can reflect specific antitrust policies that certain government actors want both the courts and the firms planning mergers to consider.

3. The Courts' Role in Horizontal Merger Enforcement

Since the FTC and the DOJ have the authority to challenge mergers in court, federal courts have played a considerable role in horizontal merger enforcement. The U.S. Supreme Court has heard some of these cases and created important precedent; however, the Court has not addressed the merits of a Section 7 case in almost forty years.[102] For this reason, most of the current analysis of horizontal mergers occurs in lower federal courts.[103] It is important to look at both older Supreme Court cases and more recent lower federal court cases to understand the current state of horizontal merger enforcement.

a. Older cases

The Supreme Court has heard several cases regarding mergers and acquisitions over the years, but the most notable cases come from the 1960s and 1970s. In the 1960s, the aggressive Warren Court almost always blocked the merger in question.[104] One important case from the Warren Court era is *Brown Shoe Co. v. United States*,[105] a case in which the Court analyzed the merger of two shoe companies. The Court found that the merger violated Section 7 because the probable effects of the transaction would increase the new firm's market share in various areas and result in a substantial lessening of competition.[106] A year after *Brown Shoe*, the Court blocked the merger of two banks in *United States v. Philadelphia National*

101. Varney, *supra* note 93, at 651.
102. Daniel R. Shulman, *A New U.S. Administration and U.S. Antitrust Enforcement*, 10 SEDONA CONF. J. 1, 7 (2009).
103. *Id.*
104. PITOFSKY ET AL., *supra* note 53, at 987.
105. 370 U.S. 294 (1962).
106. *Id.* at 346.

Bank[107] and established the prima facie test for determining merger liability:

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[108]

Finally, in *United States v. Von's Grocery Co.*,[109] the Court blocked the merger of two major retail grocery companies, focusing on the importance of market definition in determining the harmful effects of a merger on competition.[110]

However, the Supreme Court's tendency to block mergers changed in the 1970s with *United States v. General Dynamics Corporation*.[111] This case was a turning point because the Court allowed the merger of two coal-mining corporations, finding that even though the merger would increase the concentration of firms in the market, it nevertheless would not threaten competition because coal was a resource that could not be recreated.[112] Thus, while this case had unique facts that influenced its outcome, *General Dynamics* indicated that merger enforcement policy would be less aggressive than it had been in the past.

b. More recent cases

Since *General Dynamics*, subsequent merger enforcement decisions have unfolded in the lower federal courts. While there have been numerous merger cases since the 1970s, the following cases give a brief overview of how modern horizontal merger enforcement case law has developed.

Starting in the late 1990s, several federal cases have shown how modern courts have addressed the issue of merger enforcement. For

107. 374 U.S. 321 (1963).
108. *Id.* at 363.
109. 384 U.S. 270 (1966).
110. *Id.* at 272–74, 277–78.
111. 415 U.S. 486 (1974).
112. *Id.* at 494–502.

example, in *FTC v. Staples, Inc.*,[113] the court granted a preliminary injunction blocking the merger of Staples and Office Depot, two major office-supply superstores, not only because each company would have had a greater market share, but also because the merger would have allowed the new firm to raise prices to an anticompetitive level.[114] However, in *United States v. Oracle Corp.*,[115] the court denied the request of the DOJ and ten state attorneys general for a preliminary injunction blocking the Oracle-PeopleSoft merger because they failed to define a proper product and geographic market.[116] Finally, in *FTC v. Whole Foods Market, Inc.*,[117] the appellate court ruled that the district court should have granted a preliminary injunction blocking the merger of Whole Foods and Wild Oats, two organic-supermarket chains, because the product market that the FTC had identified—premium and organic supermarkets and not general supermarkets—was valid. These cases reflect various federal courts' approaches to merger enforcement, which involve integrating certain portions of the FTC and the DOJ's Horizontal Merger Guidelines (e.g., the increased emphasis on competitive effects) while still adhering to older precedent that first requires the definition of the product and geographic markets.

The cases since 2009 continue this trend. For example, in cases such as *FTC v. ProMedica Health System, Inc.*[118] and *FTC v. CCC Holdings Inc.*,[119] the courts granted preliminary injunctions blocking the mergers of hospitals in *ProMedica* and loss estimation and valuation software companies in *CCC Holdings Inc.* because the mergers would have resulted in greater market concentration of

113. 970 F. Supp. 1066 (D.D.C. 1997).

114. *Id.* at 1081–82.

115. 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

116. *Id.* at 1134, 1158. The DOJ and ten states lost this case on the ground of market definition because the witness testimony they offered to define the market was largely based on consumers' personal preferences as to high-end automated business-data processing systems instead of whether the products were "'reasonabl[y] interchangeab[le]' based upon 'price, use, and qualities.'" *Id.* at 1131. However, given the 2010 Guidelines' assertion that market definition does not have to be the starting point of the court's analysis—rather, evidence of a merger's anticompetitive effects may be enough—it is possible that this case may have turned out differently today because of the merger's probable effects.

117. 548 F.3d 1028 (D.C. Cir. 2008).

118. No. 3:11 CV 47, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011).

119. 605 F. Supp. 2d 26 (D.D.C. 2009).

firms, increased prices, and other anticompetitive effects.[120] Furthermore, in *FTC v. Laboratory Corp. of America*[121] and *Malaney v. UAL Corp.*,[122] the courts denied motions for preliminary injunctions because the plaintiffs failed to define the relevant geographic markets for the mergers in these industries—clinical laboratories and airlines—and failed to demonstrate that these transactions would not substantially lessen competition.[123] Finally, in *United States v. Verizon Communications, Inc.*[124] and *United States v. InBEV N.V./S.A.*,[125] courts permitted the mergers of wireless telecommunications companies and of brewing companies, respectively, as long as the merging companies divested some of their assets to compensate for their transactions' possible lessening of competition.[126] Thus, a careful reading of these cases shows that federal courts have employed the use of the FTC and the DOJ's Horizontal Merger Guidelines—especially when defining anticompetitive effects—but at the same time have, consistent with precedent, required parties challenging a merger to first successfully define a relevant product and geographic market. This has been true regardless of the industry in question: healthcare, airlines, telecommunications, and various consumer products.

C. The Obama Administration's Approach to Horizontal Merger Enforcement

Closely linked to how the FTC, the DOJ, and federal courts engage in horizontal merger enforcement is the overall characterization of how presidential administrations implement their respective antitrust policies. This section illustrates how the Obama Administration has been more aggressive than the Bush Administration in policing horizontal mergers, which reflects the current administration's efforts to find a middle ground between lax and excessive enforcement of the antitrust statutes. President Obama

120. *ProMedica Health Sys.*, 2011 WL 1219281, at *53; *CCC Holdings, Inc.*, 605 F. Supp. 2d at 74.
121. No. SACV 10-1873 AG (MLGX), 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011).
122. No. 3:10-CV-02858-RS, 2010 WL 3790296 (N.D. Cal. Sept. 27, 2010).
123. *Id.* at *7; *Lab. Corp. of Am.*, 2011 WL 3100372 at *7–9, *23.
124. 607 F. Supp. 2d 1 (D.D.C. 2009).
125. No. 08-CV-1965 (JR), 2009 WL 2778025 (D.D.C. Aug. 11, 2009).
126. *Id.* at *1; *Verizon Commc'ns, Inc.*, 607 F. Supp. 2d 1, at 1–2.

first revealed this approach as he was running for office. Specifically, President Obama said that because the Bush Administration had the "weakest record of antitrust enforcement of any administration in the last half century," he wanted to "reinvigorate antitrust enforcement" by increasing merger-review activity in an effort to protect consumers.[127] Since contemporary enforcement strategies are (at least in part) a reaction to prior policies, it is helpful to place the Obama Administration's antitrust activities in historical context.

1. The Pendulum Narrative of Horizontal Merger Enforcement

According to several scholars, horizontal merger enforcement can be described by likening the government's interventionist merger approach to a swinging pendulum.[128] On one end of the pendulum's swing, the government has been too aggressive in challenging and preventing mergers, while on the other end the government has been too lax.[129] These scholars note that there have been four distinct periods of pendular swings, each with differing intensities of intervention.[130]

The first three periods of the pendulum narrative capture efforts dating from the Warren Court era in the 1960s to the Clinton Administration in the 1990s.[131] The first period, the 1960s to the 1970s, is characterized as being "too aggressive" in terms of horizontal merger enforcement, especially since the Supreme Court blocked most mergers.[132] The period of the 1980s is portrayed as being "too lenient," with the Reagan Administration challenging relatively fewer mergers.[133] Finally, the period of the 1990s—especially during the Clinton Administration—is seen as being "just right" in regard to horizontal merger enforcement.[134] For example,

127. Obama, *supra* note 8.

128. Kovacic, *supra* note 6, at 134; *see also* Jamie Henikoff Moffitt, *Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis*, 63 VAND. L. REV. 1697, 1724 (2010) (describing the Obama Administration's "stricter scrutiny of deals" as a pendulum "swing[ing] back towards more aggressive antitrust enforcement").

129. Kovacic, *supra* note 6, at 134–35.

130. *Id.* at 135.

131. *Id.*

132. *Id.*; *see supra* Part II.B.3.a.

133. Kovacic, *supra* note 6, at 135.

134. *Id.* at 135–36.

the "zealous"[135] agencies under the Clinton Administration challenged forty-six to fifty-one mergers a year between 1998 and 2000, which equates to a little over a 2 percent challenge rate each year.[136] Thus, these three periods describe the pendulum of merger enforcements as swinging from one extreme to the other, finally settling in the middle with the Clinton Administration's horizontal merger policy.

However, the pendulum narrative's fourth period, which spans from 2000 to 2008, shows that the pendulum again swung to the lenient end of the spectrum with the Bush Administration's antitrust policies.[137] In this "cooling down" period of merger enforcement,[138] HSR premerger notification filings, second requests from the FTC and the DOJ, and actual challenges leading to consent orders or litigated cases declined.[139] In contrast with the Clinton Administration, the Bush Administration opposed fewer mergers, bringing a low of four challenges in 2005 and a high of sixteen challenges in 2006.[140] Even though companies filed fewer mergers during this time period because Congress increased the HSR minimum for the value of reportable mergers from $15 million to $50 million—which may account for the lower number of challenges overall—the average of the merger challenges brought between 2002 and 2006 was still only 1 percent of the total amount of HSR filings.[141] Furthermore, the trend of fewer governmental challenges to horizontal mergers was seen more clearly at the DOJ than at the FTC.[142] Several of the more recent cases where the court ultimately allowed the merger to proceed, including *Oracle*[143] and *Whole Foods*,[144] were also filed during this era.

135. Ilene Knable Gotts & Phillip A. Proger, *M&A Antitrust 2000 Annual Update: Clinton Administration's Last Year Continued Zealous Enforcement Trend*, M & A LAW., Feb. 2001, at 17.

136. James Langenfeld & Daniel R. Shulman, *The Future of U.S. Fed. Antitrust Enforcement: Learning from Past and Current Influences*, 8 SEDONA CONF. J. 1, 3–4 (2007).

137. Kovacic, *supra* note 6, at 136.

138. Shulman, *supra* note 102, at 5.

139. PITOFSKY ET AL., *supra* note 53, at 1075; Shulman, *supra* note 102, at 5.

140. Langenfeld & Shulman, *supra* note 136, at 3.

141. *Id.* at 4.

142. PITOFSKY ET AL., *supra* note 53, at 1075.

143. United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

144. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008).

2. The Obama Administration's Place in the Pendulum Narrative

Given that the pendulum swung toward the lenient end of the spectrum during the Bush Administration, the Obama Administration's statements about bolstering antitrust enforcement make sense. In 2009, the FTC stated that its antitrust focus would be on industries that directly impact consumers, such as healthcare, energy, technology, chemicals, and consumer goods.[145] Furthermore, the FTC and the DOJ released new Horizontal Merger Guidelines in 2010 to give guidance to companies planning mergers.[146] The FTC and the DOJ also continued to adhere to their policy of heightened merger enforcement by "applying increased scrutiny to mergers, both those subject to the . . . [HSR reporting requirements] . . . as well as non-reportable, consummated transactions."[147] Finally, in 2011, the Obama Administration remained consistent in its aggressive approach to antitrust enforcement by challenging more mergers than the Bush Administration, including the $39 billion proposed—and now defunct—merger of AT&T and T-Mobile mentioned at the beginning of this Article.

The FTC and the DOJ merger statistics for the fiscal years during the Obama Administration support the assertion that the pendulum of horizontal merger enforcement is swinging toward the middle again. In fiscal year 2009, companies pursuing mergers made 713 HSR premerger notification filings, while in fiscal year 2010 that number increased to 1,200[148] and consequently affected the number of proposed transactions that the FTC and the DOJ reviewed. Also in 2010, the agencies issued second requests in a little less than 2 percent of the merger filings.[149] Several proposed mergers

145. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Enforcement Priorities in the New Administration: Remarks at the Global Competition Review's 2009 Competition Law Review 3–4 (Nov. 17, 2009) (transcript available at http://www.ftc.gov/speeches/rosch/091117enforcepriorities remarks.pdf).

146. 2010 GUIDELINES, *supra* note 16.

147. Bernard Nigro Jr. et al., *U.S. Antitrust Outlook*, MONDAQ BLOG (Feb. 2, 2011), *available at* 2011 WLNR 2072182.

148. Christine A. Varney, Assistant Attorney Gen., Antitrust Div., Overview of 2010 Antitrust Enforcement: Remarks as Prepared for the 7th Annual Institute on Corp. Sec. and Related Aspects of Mergers and Acquisitions (Oct. 7, 2010) (transcript available at http://www.justice.gov/atr/public/speeches/264301.htm).

149. *Id.*

involving high profile companies were investigated, including transactions between United and Continental Airlines, Blue Cross and Physicians Health, Oracle and Sun Microsystems, and Microsoft and Yahoo.[150] In fiscal year 2011, the number of HSR filings increased to 1,450, and the agencies issued second requests in 2 percent of these filings.[151] This included challenges to the mergers of AT&T and T-Mobile; H&R Block and TaxACT; George's Incorporated and Tyson Foods; and Sara Lee, Grupo Bimbo, and BBU.[152] The upward trend in these statistics demonstrates that as compared to the Bush Administration, the Obama Administration has challenged more mergers—many of which were high profile deals—per fiscal year. This data thus reflects the agencies' current aggressiveness when it comes to horizontal mergers.

Aside from these statistics, perhaps the most notable sign that the Obama Administration is taking horizontal mergers seriously is the agencies' update to the Horizontal Merger Guidelines. In the overview to the guidelines, the agencies have made clear that "merger analysis does not consist of uniform application of a single methodology" but is rather a "fact-specific process through which the [a]gencies . . . apply a range of analytical tools . . . to evaluate competitive concerns."[153] Therefore, the agencies have made their approach to merger enforcement more transparent by laying out the following areas that they can examine in investigating a transaction: competitive effects, targeted customers and price discrimination (which includes the HMT test), product and geographic market definition, market participants, market shares, market concentration

150. *Id.*

151. Sharis A. Pozen, Assistant Attorney Gen., Antitrust Div., Developments at the Antitrust Division & the 2010 Horizontal Merger Guidelines—One Year Later: Remarks as Prepared for the ABA Section of Antitrust Law, 2011 Antitrust Fall Forum (Nov. 17, 2011) (transcript available at http://www.justice.gov/atr/public/speeches/277488.pdf).

152. *Id.* Most recently, in November 2011, the United States District Court for the District of Columbia ruled in favor of the DOJ in its case against H&R Block and TaxACT. United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 92 (D.D.C. 2011). The merging parties could not rebut the presumption that their deal would substantially lessen competition, and consequently the court enjoined the merger. *Id.*

153. 2010 GUIDELINES, *supra* note 16, § 1. The agencies will examine facts particular to an individual industry, such as the power each firm has in the market, the effect of recent mergers on the market, the ease of entry or exit, changes in price, and customer reaction to the merger. *Id.* § 2. Sources of this evidence include "the merging parties, customers, other industry participants, and industry observers." *Id.* § 2.2.

(which includes the HHI index), unilateral effects, coordinated effects, powerful buyers, entry, efficiencies, failure and exiting assets, mergers of competing buyers, and partial acquisitions.[154] While the guidelines state that these areas of analysis are not exhaustive when it comes to what the agencies can present in litigation,[155] the new Horizontal Merger Guidelines demonstrate that the agencies are willing to be flexible and creative in determining whether a merger will harm competition or be detrimental to consumers.

The Obama Administration's increased antitrust activity, especially regarding horizontal mergers, has set the pendulum swinging back towards a middle ground. While this reflects the administration's efforts to find a balance between blocking harmful mergers and allowing beneficial ones, the question remains as to whether this approach is appropriate, especially given that the economy is still recovering from a recession. Even though this issue is complex, it can be analyzed by examining the FTC and the DOJ's activity in combination with the manner in which federal courts have ruled on merger cases.

III. ANALYSIS OF HORIZONTAL MERGER ENFORCEMENT IN GENERAL

Given the current economic climate and the Obama Administration's horizontal merger enforcement policies, it appears that the government is handling the subject well. However, there are still flaws with the courts' and agencies' approaches to horizontal merger enforcement. More specifically, the agencies are actively using the updated 2010 Horizontal Merger Guidelines, while the courts are more likely to make their decisions in accordance with precedent that follows older versions of the guidelines.[156] Because of this disparity, the agencies and the courts must both find a way to reform their policies if they are to be effective in policing horizontal merger transactions.

154. *Id.*
155. *Id.* at n.2.
156. *See infra* Part III.B.1.

A. The Appropriateness of the Obama Administration's Approach to Horizontal Merger Enforcement

Over the past three years, the Obama Administration has increased merger enforcement, as evidenced by the policies of the FTC and the DOJ. However, the following question remains: is this approach beneficial for the U.S. economy given its current state? This section will argue that given the economy's struggles, the Obama Administration's more aggressive approach to horizontal merger enforcement is appropriate because governmental oversight is needed to ensure that consumers are protected and that competition continues to stimulate economic activity.

1. Current State of the U.S. Economy

Since 2007, the U.S. economy can be described as anything but strong.[157] According to the National Bureau of Economic Research, the "Great Recession" started in December 2007 and lasted until June 2009.[158] During this eighteen-month period, Americans lost 7.3 million jobs,[159] the popping of the housing bubble affected homeowners and depleted many of their assets, and consumer spending decreased.[160] Some commentators aptly described this period as "an era of economic frustration, characterized by slower growth and contentious competition for scarce resources."[161]

Even though the National Bureau of Economic Research declared that the recession ended in 2009, its effects have lingered.[162] The economy has seen some hopeful signs: compared to 2009, the

157. Douglas A. McIntyre, *10 Signs the Double-Dip Recession Has Begun*, MSNBC (Jul. 14, 2011, 1:53 PM), http://www.msnbc.msn.com/id/43946055/ns/business-us_business/t/signs-double-dip-recession-has-begun/#.TqysQlY0L7s.

158. The Associated Press, *Great Recession Ended in June 2009, Panel Says*, CBS NEWS (Sept. 21, 2010, 8:26 AM), http://www.cbsnews.com/stories/2010/09/20/business/main6884342.shtml.

159. *Id.*

160. Christina D. Romer, Council of Economic Advisers, Treatment and Prevention: Ending the Great Recession and Ensuring That It Doesn't Happen Again: Remarks for the Council of Economic Advisors (May 3, 2010) (transcript available at http://www.whitehouse.gov/sites/default/files/rss_viewer/treatment_prevention_recession.pdf).

161. Robert J. Samuelson, *The Great Recession's Aftermath*, THE DAILY BEAST (Jan. 3, 2010, 7:00 PM), http://www.thedailybeast.com/newsweek/2010/01/03/the-great-recession-s-aftermath.html.

162. *See id.*

2011 unemployment rate has decreased slightly,[163] and the nation's gross domestic product has grown in 2011 more than predicted.[164] Despite these points, unfortunately, inflation has continued to rise, the housing market has not yet recovered,[165] and the federal budget deficit has exceeded $1.1 trillion for the third year in a row.[166] Making matters worse are both the continuing lack of jobs for experienced workers and recent college graduates[167] and the so-called ever-increasing gap between the richest 1 percent of the population and the remaining 99 percent.[168] For these reasons, some have reported that the "double-dip," or a second recession, has started.[169] Because of this perceived renewal of the economic crisis, many consumers and companies, including merging parties, may face even more obstacles as they try to continue or to enhance their businesses.

2. Criticisms of the Obama Administration's Approach to Antitrust Enforcement

The FTC and the DOJ's investigations have become increasingly protracted and demanding, thus forcing merging parties

163. *The Employment Situation—September 2011*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR (Oct. 7, 2011, 8:30 AM), http://www.bls.gov/news.release/archives/empsit_10072011.pdf.

164. Chris Isidore, *GDP Forecast: Growing Faster, But Not for Long*, CNN MONEY (Oct. 24, 2011), http://money.cnn.com/2011/10/24/news/economy/gdp_forecast/index.htm. Gross domestic product (GDP) is seen by economists to be "the broadest measure of a country's economic activity." *Id*.

165. McIntyre, *supra* note 157.

166. Martin Crutsinger, *Federal Budget Deficit Tops $1 Trillion for Third Straight Year*, HUFFINGTON POST (Aug. 10, 2011 4:19 PM), http://www.huffingtonpost.com/2011/08/10/federal-budget-deficit_n_923528.html.

167. Chris Isidore, *The Great Recession's Lost Generation*, CNN MONEY (May 17, 2011, 5:30 PM), http://money.cnn.com/2011/05/17/news/economy/recession_lost_generation/index.htm; Francine Knowles, *Lack of Jobs Leaves More Suburban, Middle Class Sliding into Poverty*, CHICAGO-SUN TIMES (Jan. 23, 2012, 3:08 AM), http://www.suntimes.com/8305452-417/lack-of-jobs-leaves-more-suburban-middle-class-sliding-into-poverty.html; .

168. Alan Bjerga, *Protests Show Wall Street Will Be a Campaign Issue, Axlerod Says*, BLOOMBERG (Oct. 16, 2011, 9:00 PM), http://www.bloomberg.com/news/2011-10-16/occupy-wall-street-shows-u-s-wants-a-fair-shake-axelrod-says.html. This is a reference to the Occupy Wall Street movement, which started in New York City and has become a worldwide protest against the concentration of wealth in the top 1 percent of the population and the inability of the government to provide relief to the middle and lower classes. *See* Jeffrey Sachs, *Jeffrey Sachs Speaks to Occupy Wall Street*, CNN WORLD (Oct. 30, 2011, 8:00 AM), http://globalpublicsquare.blogs.cnn.com/2011/10/30/jeffrey-sachs-speaks-to-occupy-wall-street/?iref=allsearch.

169. McIntyre, *supra* note 157.

to provide more evidence that proves their transaction will not be harmful to competition.[170] Given the state of the economy, this practice could greatly discourage companies from planning mergers if they believe that it is more difficult to successfully complete this kind of transaction. For example, instead of wasting time and money researching ways to complete a merger and defend against potential lawsuits by the FTC and the DOJ, companies may use their resources to work on other internal business projects. As a result, the FTC and the DOJ's policies may stymie many beneficial mergers that could further innovation or foster industry growth.[171]

Another argument against the Obama Administration's aggressive horizontal merger enforcement strategy is that it may be hurting the economy even more by halting job creation. For example, Obama has been called a "job killer in chief" because his antitrust policies are seen as detrimental to American businesses' survival chances in a competitive market.[172] Many labor unions supported the proposed AT&T/T-Mobile merger because AT&T was at the time the only unionized company in the wireless telecommunications industry,[173] but the Obama Administration's "legal activism" in challenging the deal may have eliminated not only these unionized jobs[174] but also potential jobs that could have resulted from other transactions.[175]

170. Nigro Jr. et al., *supra* note 147.

171. Mandel, *supra* note 10.

172. Schiff, *supra* note 10.

173. Mike Hall, *AT&T/T-Mobile Merger Would Be Major Gain for Workers' Rights*, AFL-CIO NOW BLOG (June 24, 2011), http://blog.aflcio.org/2011/06/24/attt-mobile-merger-would-be-major-gain-for-workers-rights/; *see also* Nathan Newman, *Pro-Labor Progressives Should Support the AT&T-T-Mobile Merger*, HUFFINGTON POST (June 23, 2011, 6:40 PM), http://www.huffingtonpost.com/nathan-newman/prolabor-progressives-sho_b_883321.html (describing the benefits the merger will have on unionized jobs and noting that the Communication Workers of America is one of the unions that supports the transaction); Sasha Segan, *Why Do So Many Groups Support the AT&T/T-Mobile Merger?*, PCMAG (June 1, 2011, 4:35 PM), http://www.pcmag.com/article2/0,2817,2386277,00.asp#fbid=0udcVgtWoFR (noting that many unions both in the United States and worldwide are advocating for the merger).

174. Maria Elena Durazo, *Defending Merger Between AT&T and T-Mobile*, DAILY NEWS L.A. (Oct. 14, 2011), http://www.dailynews.com/opinions/ci_19108319.

175. Schiff, *supra* note 10.

3. Why This Aggressive Approach Is the Right Strategy

Despite these valid points, the very fact that the U.S. economy is struggling requires an aggressive antitrust approach from the government concerning horizontal mergers. Admittedly, successful mergers can help companies innovate, become more efficient, expand, and create jobs for American workers.[176] During the current economic hardship, all these goals can help promote consumer welfare. Businesses may also have more reason to use the "failing firm" defense against FTC and DOJ challenges in order to argue that their mergers should be allowed to proceed; otherwise their companies would have to exit the market, causing more harm than good for competition.[177] However, despite the beneficial reasons to allow mergers, aggressive horizontal merger oversight is still needed to ensure that competition is not hindered by harmful transactions.[178] If the agencies protect competition, companies will be more productive and more apt to stimulate the economy.

History indicates that government oversight has helped floundering economies. Before the Antitrust Division increased its policing of antitrust activities in the 1930s after the start of the Great Depression, competition remained unregulated and produced harmful effects such as a lower level of firm output, higher commodity prices, and less consumer purchasing power.[179] Toward the end of the Great Depression, the U.S. government revived its antitrust enforcement policies.[180] From 1937 to 1943, the DOJ's Antitrust Division began a "strengthened competition policy," which included increasing the number of its antitrust case filings.[181] This protection of competition played a part in the country's financial recovery in the 1940s.[182] Drawing from this example, former Assistant Attorney General Christine Varney argued that "vigorous antitrust

176. *See* 2010 GUIDELINES, *supra* note 16, § 10; *infra* Part IV.C.

177. Phillip A. Proger et al., *An Early Look into Merger Review in the Obama Administration*, M & A LAW., Nov./Dec. 2009, at 16, 18.

178. *Id.*

179. Varney, *supra* note 9, at 3.

180. *Id.*

181. *Id.* at 4.

182. Proger et al., *supra* note 177, at 18.

enforcement" is necessary and can turn the economy around.[183] Specifically, Varney said that there are two lessons to be learned from the Great Depression: "First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the [g]overnment's response to economic crises to ensure that markets remain competitive."[184] Because many commentators have likened the most recent recession to the Great Depression,[185] this aggressive approach to horizontal merger enforcement seems very appropriate.

During the Bush Administration, merger enforcement was lax, and the lack of competition regulation did not effectively help the economy grow. Consumer welfare decreased rather than increased, in part due to failing firms that harmed consumers as they floundered.[186] Companies did not police themselves, and the current recession began.[187] Based on these observations, the FTC and the DOJ's revamped competition policy on horizontal mergers seems to be a good step forward. Because a laissez-faire approach did not work, perhaps a more aggressive one will be better. In other words, we need government oversight to prevent companies from making the same mistakes that resulted in the recession. Increased antitrust enforcement, at least in part, accomplishes that goal. Only time will tell whether this renewed horizontal merger enforcement policy—in combination with other government solutions to stimulate the economy—will ultimately bring the United States out of a potential double-dip recession, but as of now it seems to be the most appropriate antitrust remedy.

B. Existing Issues with Horizontal Merger Enforcement

While an aggressive horizontal merger policy appears to be the best way to police potentially harmful mergers of competitors, there

183. Varney, *supra* note 9, at 4.

184. *Id.*

185. Bob Willis, *U.S. Recession Worst Since Great Depression, Revised Data Show*, BLOOMBERG (Aug. 1, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aNivTjr852TI.

186. *See* Varney, *supra* note 9, at 4.

187. *Id.* at 4–5.

is still a problem with the current state of horizontal merger enforcement. Despite the commendable efforts of the Obama Administration in shaping antitrust policy to help the economy recover, there is a disparity in the ways that the agencies and the federal courts address the topic of mergers. This inconsistency in horizontal merger enforcement poses a challenge to companies considering such transactions because the parties do not know how to properly structure their horizontal mergers so as to avoid liability under Section 7. The government, therefore, must resolve the inconsistency between the agencies and the courts in order to achieve its goal of handling merger challenges with greater transparency.[188]

1. The Agencies' and Courts' Differing Approaches to Horizontal Merger Enforcement

A discrepancy exists between the agencies and the federal courts when it comes to the subject of horizontal merger enforcement. On one hand, the agencies have been actively employing the 2010 Horizontal Merger Guidelines.[189] On the other, the courts seem to be strictly following precedent when making their rulings.[190] This creates two issues: (1) the agencies' work in preventing harmful mergers may be undercut by the courts' refusal to accept the agencies' approach to horizontal merger analysis; and (2) companies planning mergers may be at a disadvantage because they may not know what to expect if their transaction is ultimately challenged.

In challenging questionable mergers, the FTC and the DOJ have consistently employed the Horizontal Merger Guidelines. Recent filings by the agencies prove this point. For example, the FTC's

188. Varney, *supra* note 9, at 5.

189. *See, e.g.*, Complaint at 14–16, United States v. H&R Block, Inc., 2011 WL 5438955 (D.D.C. May 23, 2011) (No. 1:11-cv-00984) [hereinafter Complaint, *United States v. H&R Block*]; Complaint at 3–11, Lab. Corp. of Am., No. 9345 (F.T.C. Dec. 1, 2010) [hereinafter Complaint, *Lab. Corp. of Am.*]; Complaint at 10–17, Phoebe Putney Health Sys., No. 9348 (F.T.C. Apr. 20, 2011) [hereinafter Complaint, *Phoebe Putney Health*]; Complaint at 4–10, ProMedica Health Sys., Inc., No. 9346 (F.T.C. Jan. 6, 2011) [hereinafter Complaint, *ProMedica Health Sys.*]; Complaint, *United States v. AT&T*, *supra* note 2, at 17.

190. *See, e.g.*, City of New York v. Grp. Health Inc., 649 F.3d 151, 156 (2d Cir. 2011); Malaney v. UAL Corp., No. 3:10-CV-02858-RS, 2010 WL 3790296 (N.D. Cal. Sept. 27, 2010); FTC v. Lundbeck, Inc., Civil Nos. 08-6379 (JNE/JJG), 08-6381 (JNE/JJG), 2010 WL 3810015 (D. Minn. Aug. 31, 2010), aff'd, 650 F.3d 1236 (8th Cir. 2011); Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc., No. C-09-3854 MMC, 2010 WL 1541257 (N.D. Cal. Apr. 16, 2010).

filings to stop the mergers of clinical laboratories[191] and hospitals[192] make it clear that the agency implements factors from the new guidelines and not from an older version. Additionally, the DOJ's recent filings against companies such as H&R Block,[193] AT&T, and T-Mobile[194] show that the DOJ actively uses factors from the 2010 Horizontal Merger Guidelines to support its arguments.

Despite this, the courts seem to be utilizing precedent when making their rulings but do not seem to give much consideration to the new Horizontal Merger Guidelines. While the guidelines state that defining a relevant market is not necessarily the starting point of the agencies' analyses,[195] federal courts have required parties challenging mergers to first define a relevant product and geographic market as part of their claim.[196] Without this market definition, courts have dismissed lawsuits against merging parties for failing to state a legally cognizable claim.[197] This suggests that the courts are unwilling to fully accept the 2010 Horizontal Merger Guidelines' approach to determining what constitutes a harmful merger.

The disconnect between the agencies and the courts creates an issue for both the agencies and the companies considering horizontal mergers. For example, the FTC and the DOJ may challenge mergers that are truly anticompetitive, but if they fail to state their case in a way that comports with precedent, then federal courts will apparently dismiss the matter without reaching the merits. As for parties actually planning mergers, the agencies' and courts' varying analyses are problematic because they provide little guidance to companies deciding whether to participate in such deals. Specifically, it is unclear whether companies should heed the new guidelines or follow past court decisions that take a slightly different approach to merger

191. *See, e.g.*, Complaint, *Lab. Corp. of Am.*, *supra* note 189, at 3–11.

192. *See, e.g.*, Complaint, *Phoebe Putney Health*, *supra* note 189, at 10–17; Complaint, *ProMedica Health Sys.*, *supra* note 189, at 4–10.

193. Complaint, *United States v. H&R Block*, *supra* note 189, at 14–16.

194. Complaint, *United States v. AT&T*, *supra* note 2, at 17.

195. 2010 GUIDELINES, *supra* note 16, § 4.

196. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957).

197. *See, e.g.*, City of New York v. Grp. Health Inc., 649 F.3d 151, 156 (2d Cir. 2011); Malaney v. UAL Corp., No. 3:10-CV-02858-RS, 2010 WL 3790296, at *7 (N.D. Cal. Sept. 27, 2010); FTC v. Lundbeck, Inc., Civil Nos. 08-6379 (JNE/JJG), 08-6381 (JNE/JJG), 2010 WL 3810015, at *21 (D. Minn. Aug. 31, 2010), *aff'd*, 650 F.3d 1236 (8th Cir. 2011); Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc., No. C-09-3854 MMC, 2010 WL 1541257, at *5 (N.D. Cal. Apr. 16, 2010).

analysis. Responding to an agency challenge in court is a real possibility, especially for large companies planning merger transactions.[198] It is important for these parties to know what they might face so they can plan accordingly and assess whether pursuing a merger is in their best interest. Therefore, something must be done to reconcile the agencies' emphasis on the 2010 Horizontal Merger Guidelines and the federal courts' insistence on using precedent when analyzing horizontal merger cases.

2. A Possible Solution to This Enforcement Problem

Even though it is possible for future administrations to change the Horizontal Merger Guidelines, which would require further adjustment to the way agencies and courts approach such transactions, a consistent approach is needed now given the obvious disparity between the agencies' and the courts' current modes of analysis. Approaches to horizontal merger analysis will constantly change due to developments in economics and the economy, but the goal of determining whether there is a reasonable probability of a substantial lessening of competition remains the same.[199] Therefore, the agencies and the courts must consider and adopt the best analytical solutions possible that benefit both consumers as well as companies planning mergers. Ultimately, the agencies and the courts must agree on a single, flexible approach to merger enforcement if they are to achieve their goals of fostering competition, protecting consumers, and achieving transparency for companies planning mergers.

IV. PROPOSALS THE AGENCIES SHOULD CONSIDER TO REVAMP THEIR APPROACH TO ANTITRUST ENFORCEMENT

In order to make the process of horizontal merger enforcement more transparent for companies planning mergers, several solutions should be implemented. This Article proposes four different ways to

198. *See* Revised Jurisdictional Thresholds for Section 7a of The Clayton Act, 76 Fed. Reg. 4, 349 (Jan. 25, 2011). The most recent HSR filing thresholds are in the millions, indicating that mergers between large competitors are more likely than mergers between smaller competitors to be investigated and challenged. *See id.*

199. *See* 15 U.S.C. § 18 (2006).

improve the current state of horizontal merger enforcement: (1) the federal courts should be more amenable to using the 2010 Horizontal Merger Guidelines; (2) the FTC and the DOJ must approach horizontal merger challenges in the same manner; (3) the FTC and the DOJ should be more open to considering merging companies' efficiency arguments; and (4) the agencies should incorporate behavioral economics into their horizontal merger analyses to more accurately understand why companies enter into mergers and how their behavior may impact competition and consumers. As long as the agencies and the courts come to an agreement regarding horizontal merger enforcement, companies will have a better understanding of what transactions will be acceptable. This, of course, will help the government protect competition and promote consumer welfare because companies will more likely pursue only beneficial mergers.

A. Federal Courts Should Be More Open to Using the Horizontal Merger Guidelines as They Decide Section 7 Cases

Even though the Horizontal Merger Guidelines are not law, courts should be more open to using the 2010 version as they decide Section 7 cases. Since the Horizontal Merger Guidelines accurately summarize the economic analytical tools that the agencies use in determining whether a merger would be harmful to competition and consumers,[200] courts would be wise to adopt the guidelines to bring their own decisions in line with modern antitrust analysis. This would then allow the courts to create new precedent that both the agencies and companies could rely on in ensuring the success of beneficial mergers.

The main hurdle that courts face in incorporating the 2010 Horizontal Merger Guidelines is the guidelines' approach to market definition. Case law has established market definition as a necessary element of a Section 7 claim,[201] but the 2010 Horizontal Merger Guidelines do not require the FTC and the DOJ to always initially to

200. Varney, *supra* note 93, at 651.

201. Brannon & Bradish, *supra* note 17, at 3; *see, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962); United States v. E. I. du Pont de Nemours & Co., 353 U.S. at 593.

define a relevant market.[202] The FTC has made clear that "market definition is an important part of the analysis, but not necessarily the starting point and certainly not the end."[203] Rather, evidence of a merger's anticompetitive effects on a market may be enough to allow the agencies to gain an injunction.[204] This puts the current Horizontal Merger Guidelines at odds with the manner in which courts have decided merger cases in the past.

This tension is new, as federal courts have used older versions of the guidelines in a "precedent-like manner" in other points of horizontal merger analysis.[205] For example, in *United States v. Baker Hughes Inc.*,[206] the court rejected the DOJ's argument that the defendant had the burden of proving that market entry for hydraulic underground drilling rigs would be "quick and effective" after a merger.[207] After this decision, however, the FTC and the DOJ adopted the 1992 Horizontal Merger Guidelines that described entry as "a defense to the extent it is shown to be 'timely, likely, and sufficient.'"[208] Subsequently in *FTC v. Cardinal Health, Inc.*,[209] the court used the "timely, likely, and sufficient" criteria[210] of the 1992

202. 2010 GUIDELINES, *supra* note 16, § 4.

203. Jon Leibowitz, Chairman, Fed. Trade Comm'n, Making the Grade? A Year at the FTC: Remarks as Prepared for Delivery at Fourth Annual Global Antitrust Enforcement Symposium, Georgetown Law Center, 4 (Sept. 21, 2010) (transcript available at http://www.ftc.gov/speeches/leibowitz/100921makingthegradespeech.pdf).

204. *See* 2010 GUIDELINES, *supra* note 16, § 4, at 7.

205. Greene, *supra* note 72, at 775.

206. 908 F.2d 981 (D.C. Cir. 1990).

207. *Id.* at 987.

208. Brannon & Bradish, *supra* note 17, at 2 (quoting 1992 GUIDELINES, *supra* note 80, § 3). "Timely" in the 1992 Guidelines refers to "only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact." 1992 GUIDELINES, *supra* note 80, § 3.2, at 27. However, the new 2010 Guidelines do not have this two-year requirement; instead, the FTC and the DOJ simply state that "[i]n order to deter the competitive effects of concern, entry must be rapid enough to make unprofitable overall the actions causing those [anticompetitive] effects and thus leading to entry." 2010 GUIDELINES, *supra* note 16, § 9.1, at 29. This suggests that the Guidelines are more concerned with whether new firms can join the relevant market in time to effectively counteract the potential negative effects of a horizontal merger and less concerned with a specific time period that differentiates between very quick entry and longer-term entry.

209. 12 F. Supp. 2d 34 (D.D.C. 1998).

210. The FTC and the DOJ have carried these criteria over into the 2010 iteration of the Horizontal Merger Guidelines. 2010 GUIDELINES, *supra* note 16, § 9, at 28. The agencies have said the following on the analysis of entry barriers when determining a merger's potential effect on competition:

> A merger is not likely to enhance market power if entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or

Merger Guidelines in determining that the defendant distributors' argument that entry into the wholesale prescription drug market would not be harmed by the merger and did not outweigh the anticompetitive effects of the transaction.[211] This shows that, despite the precedent in *Baker Hughes*, the court in *Cardinal Health* followed the agencies' merger guidelines to direct its analysis.

Few decided cases refer to the 2010 Horizontal Merger Guidelines,[212] so the case law that companies may be relying on to defend their proposed mergers most likely predates the FTC and the DOJ's most recent update. However, since courts have previously been open to the FTC and the DOJ's analysis in the guidelines,[213] parties may look to this precedent and believe that the 2010 Horizontal Merger Guidelines can be successfully cited as persuasive authority that supports their reasons for why their merger should be allowed to proceed. Unlike with previous versions of the guidelines, courts may be less willing to adopt the 2010 Guidelines because of the significant conflict between precedent and the agencies' current view on market definition.[214] This is most likely because the new Horizontal Merger Guidelines are only persuasive authority, and the precedent is grounded in the older language of Section 7.[215]

Regardless, federal courts should consider adopting the 2010 Horizontal Merger Guidelines' approach to horizontal merger analysis. The goal of the Horizontal Merger Guidelines is to "promote transparency" regarding what the FTC and the DOJ consider when evaluating proposed mergers,[216] and it is the agencies that provide the courts with the information that ultimately

> collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger. Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.

Id.

211. FTC v. Cardinal Health, Inc., 12 F. Supp. 2d at 34, 55–58.

212. *See, e.g.*, Malaney v. UAL Corp., No. 3:10-CV-02858-RS, 2010 WL 3790296 (N.D. Cal. Sept. 27, 2010).

213. *See, e.g.*, *Cardinal Health*, 12 F. Supp. 2d at 55–63.

214. Brannon & Bradish, *supra* note 17, at 3.

215. *Id.*

216. Carl Shapiro, Deputy Assistant Attorney Gen. for Econs., Antitrust Div., U.S. Dep't of Justice, Update from the Antitrust Division: Remarks as Prepared for the American Bar Association Section of Antitrust Law Fall Forum (Nov. 18, 2010) (transcript available at http://www.justice.gov/atr/public/speeches/264295.pdf).

determines whether a merger will be blocked by an injunction. Instead of being mired in precedent that utilizes older methods of horizontal merger analysis, the courts should use the 2010 Horizontal Merger Guidelines even though they "ask more of the courts than previous versions have."[217]

It is true that the guidelines can be changed at any time by any administration, thus potentially causing much uncertainty and confusion for courts and merging companies. Theoretically, the FTC and the DOJ could change the Horizontal Merger Guidelines multiple times during every presidential term, and the courts would have to review them in order to keep abreast of the agencies' modes of merger analysis. However, frequent updates such as these are unlikely to occur. Over the past forty years, the agencies have only released four major versions of the guidelines—the original Horizontal Merger Guidelines in 1968 and the significantly changed updates in 1982, 1992, and 2010—with only two slight modifications and a commentary for clarification in between.[218] The fourteen-, ten-, and eighteen-year gaps between each major update have given both the courts and merging companies plenty of time to adjust to the new merger guidelines and act accordingly. Furthermore, all of the changes that the agencies have made have at heart the goals of protecting competition and preventing any one firm from unfairly dominating the market.[219] These unifying themes have not been thwarted by the introduction of new economic tools; rather, the new methods of analysis utilized by the FTC and the DOJ are designed to bring the agencies closer to achieving their goals with regard to horizontal merger policies.[220] By adopting the Horizontal Merger Guidelines in their updated form either now or in the future, courts will be able to prevent confusion and give better guidance to businesses, especially since the new guidelines incorporate updated economic analysis that is likely to be more accurate about whether a merger is anticompetitive.

217. Brannon & Bradish, *supra* note 17, at 4.
218. *See supra* Part II.B.2.
219. *See id.*
220. *See* Varney, *supra* note 93.

B. Consistency Between the FTC and the DOJ Is Necessary for the Success of Mergers That Are Beneficial to Competition and Consumers

More than judicial reform is needed, however—the FTC and the DOJ need to make procedural changes to the way they challenge horizontal mergers and must come to a consensus regarding how they initiate lawsuits against merging parties. Even though the agencies use the same Horizontal Merger Guidelines to guide their analysis, they have different processes by which they challenge horizontal mergers, which can affect the outcome of their case. Therefore, the success of a merger may depend largely on which agency decides to conduct the investigation.[221]

Under Section 1 of the Sherman Act and Section 7 of the Clayton Act, the DOJ can bring civil actions against merging parties.[222] For "clear, intentional" violations of the law, the DOJ can also file a criminal action against a party involved in an especially egregious merger.[223] When dealing with a merger that is potentially harmful to competition, the DOJ seeks both a preliminary and permanent injunction against the companies.[224] The issue of determining whether the horizontal merger should be blocked is resolved in a single proceeding, thus giving finality to the merging parties and allowing them to complete the merger absent a DOJ appeal.[225]

On the other hand, Section 5 of the FTC Act gives the FTC the authority to pursue actions against merging parties that threaten competition both in federal court and in internal administrative proceedings.[226] When pursuing an action in federal court, the FTC seeks only preliminary injunctions.[227] If it loses in federal court, the FTC can seek administrative relief and file a Part III proceeding

221. *See* DEBORAH A. GARZA ET AL., ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATIONS 130–31 (2007).

222. *Id.* at 129; HOVENKAMP, *supra* note 35, at 643.

223. HOVENKAMP, *supra* note 35, at 643.

224. GARZA ET AL., *supra* note 221, at 130.

225. *Id.*

226. *Id.* at 129.

227. *Id.* at 130, 139.

internally.[228] As a result, this fails to give the merging parties a sense of finality. Companies may move ahead with their proposed merger after winning in federal court only to face an expensive and lengthy FTC administrative challenge afterward.[229]

This procedural difference between the FTC and the DOJ was made especially clear in the recent *Whole Foods* case. In this case, the court "explicitly articulated a standard that significantly reduce[d] the FTC's burden of proof in its request for preliminary injunctions."[230] This lower burden of proof was due to the fact that the FTC seeks only preliminary injunctions, while the DOJ simultaneously seeks preliminary and permanent injunctions in court when challenging a merger.[231] As a result, the DOJ has to establish its case by a preponderance of the evidence, while the FTC uses a lower standard for obtaining a preliminary injunction.[232] Specifically, the FTC has to meet a "public interest standard" mandated by Section 13(b) of the FTC Act, which allows a federal court to grant a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[233]

Review by either the FTC or the DOJ creates uncertainty and causes additional harm to companies because it is unclear whether merging parties will have to face more obstacles to their proposed merger after winning the initial lawsuit.[234] To reduce this uncertainty, the FTC should follow the DOJ's approach and file for both a preliminary and a permanent injunction at the outset of litigation.[235] Knowing what they have to defend against will both allow parties to better prepare for challenges to their merger and instill a sense of finality after litigation in federal court is complete.[236] Furthermore, adopting this approach will make certain

228. *Id.* at 130. Specifically, a Part III proceeding is the administrative means by which the FTC can seek a permanent injunction against a merger after failing to get a preliminary injunction in court. *Id.*

229. *Id.* at 139.

230. Ling, *supra* note 59, at 936.

231. GARZA ET AL., *supra* note 221, at 138.

232. *Id.* at 139.

233. 15 U.S.C. § 53(b).

234. GARZA ET AL., *supra* note 221, at 139.

235. *Id.*

236. *Id.*

that the DOJ and the FTC are on the same page when it comes to analyzing and challenging mergers.

By requiring both agencies to simultaneously file preliminary and permanent injunctions in federal court, Congress will also ensure that the FTC and the DOJ are subject to the same standard when they seek to halt transactions.[237] Since the FTC currently has a lower burden of proof than the DOJ, the FTC does not have to offer as much evidence to prove its case against an anticompetitive merger. Especially after *Whole Foods*, arguably the issue is "no longer how much the FTC must show in order to obtain a preliminary injunction, but rather how little the FTC can show in order to obtain such an injunction."[238] Thus, merging parties have more difficulty defending their transaction against the FTC than they do against the DOJ.[239] If the agencies must file the same injunctions and are held to the same standard in federal court, then it will be clearer what companies have to prove and defend against to keep their proposed transaction viable. Applying the same standard to both the FTC and the DOJ will therefore allow the agencies to achieve their goal of transparency in explaining the agencies' horizontal merger enforcement activity.

Finally, the FTC should eliminate its internal administrative proceeding process.[240] To achieve this, Congress must amend Section 13(b) of the FTC Act to prevent the agency from pursuing administrative action after attempting to obtain an injunction in federal court.[241] By allowing the FTC to only file cases in court, Congress would save companies from uncertainty and the risk of protracted litigation against their proposed mergers. While the FTC may argue that administrative proceedings are needed as a backup in case courts allow anticompetitive mergers, the costs of both time and money for a second challenge can be draining on all parties involved.[242] This statutory change provides another option that allows for finality and agency transparency, which will make horizontal merger enforcement a more unified and efficient system.

237. *Id.*
238. Ling, *supra* note 59, at 961.
239. *See id.* at 958.
240. GARZA ET AL., *supra* note 221, at 140.
241. Ling, *supra* note 59, at 970.
242. GARZA ET AL., *supra* note 221, at 141.

C. The FTC and the DOJ Need to Be More Open to Efficiency and Efficiency-Related Arguments

In addition to establishing a unified approach toward merger enforcement, the FTC and the DOJ should also be more open to looking at factors such as efficiencies, innovation, and the potential impact on the job market when deciding to allow or challenge mergers.[243] The agencies state that efficiency factors are important to their analyses of horizontal mergers, but in practice they often give little weight to these arguments.[244] Admittedly, the FTC and the DOJ have had little time to clearly establish how they will use the 2010 Horizontal Merger Guidelines with regard to efficiency and efficiency-related arguments in practice, but because the number of litigated horizontal merger cases is so few already, "it is critical to understand how the agencies internally analyze efficiencies"[245] and to determine whether the current approach is best for competition and consumers.

In the 2010 Horizontal Merger Guidelines, the agencies state that mergers may be beneficial because they can "generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[246] These efficiencies can result from companies investing in research and development (R&D) to innovate their products and services, especially in technology-driven industries.[247] However, for an efficiency argument to succeed, the merging parties must prove that

243. Specifically, the term "efficiencies" refers to the cost savings that result from the consolidation of competing companies. Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 49 (2007). Since these internal cost savings can free resources and allow companies to spend more time on areas such as product development and workforce expansion, innovation and job creation can be seen as important efficiency-related factors that also promote consumer welfare. Efficiencies must be "merger-specific," meaning that they must be unattainable via another option that does not pose the same kind of anticompetitive concerns as the proposed merger. 2010 GUIDELINES, *supra* note 16, § 10, at 30.

244. Woan, *supra* note 26, at 55; *see* Moffitt, *supra* note 128, at 1698.

245. D. Daniel Sokol & James A. Fishkin, *Antitrust Merger Efficiencies in the Shadow of the Law*, 64 VAND. L. REV. EN BANC 45, 50 (2011).

246. 2010 GUIDELINES, *supra* note 16, § 10, at 29.

247. *See* Katz, *supra* note 243, at 12.

the effect can only be achieved through the merger.[248] The FTC and the DOJ will apply a "sliding scale approach" to evaluate efficiencies and determine whether they are enough to outweigh the potential harm of the proposed transaction:

> In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.[249]

This statement indicates that efficiencies can be important counterarguments to objections to the proposed merger, thus giving merging parties a fair chance to defend their transaction.[250]

Unfortunately, the agencies have not given as much consideration to efficiency arguments—especially those touting innovation as an important outcome of a proposed merger—as they have to other factors.[251] For example, a study focusing on the forty-seven merger cases involving innovation arguments decided between 1995 and 1999 under the 1992 version of the Horizontal Merger Guidelines demonstrates that innovation was not necessary to most of the courts' decisions to either grant or deny an injunction.[252] In fact, factors such as increased prices and entry barriers appear to

248. 2010 GUIDELINES, *supra* note 16, § 10, at 30. The 2010 Horizontal Merger Guidelines specifically state that "[t]he Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies." *Id.* Furthermore, the proposed efficiencies must be verifiable and quantifiable. *Id.*

249. 2010 GUIDELINES, *supra* note 16, § 10, at 31.

250. *See* Moffitt, *supra* note 128, at 1709; Woan, *supra* note 26, at 55.

251. Woan, *supra* note 26, at 66.

252. RICHARD J. GILBERT & WILLARD K. TOM, IS INNOVATION KING AT THE ANTITRUST AGENCIES?: THE INTELLECTUAL PROPERTY GUIDELINES FIVE YEARS LATER 2, 7–10 (2001), *available at* http://escholarship.org/uc/item/4mf5t2bm#.

have been more important in thirty-nine of these challenges.[253] Instead of looking at innovation, it seems the FTC and the DOJ have put more emphasis on "(1) price effects, (2) quality, [and] (3) . . . availability of the goods and services" that the proposed merger can provide.[254] If the FTC and the DOJ focus on these factors instead of on other efficiency arguments, then there will be nothing to consider in the agencies' sliding-scale analysis that would counteract the supposed anticompetitive nature of the proposed merger.

Increased employment for American workers should also be seen as an efficiency-related outcome and, consequently, should be given more weight in the FTC and the DOJ's initial determination of whether to challenge a proposed horizontal merger. Job creation is especially important since employment is a pressing concern in this economy. Given that the unemployment rate is still around 8 percent,[255] job creation is a legitimate efficiency argument that directly impacts consumer welfare: having more workers would allow companies to innovate more quickly and create products for public consumption more cost efficiently. This increased workforce and creation of improved products would then spur competition because other companies in the same industry would have to adapt in order to remain successful. If the FTC and the DOJ fail to appropriately consider these employment consequences, they may ignore an important benefit that could be great enough to outweigh the proposed merger's anticompetitive effects.

Efficiency arguments, especially those involving innovation and job creation, are important to consider in this economic climate. If companies have legitimate arguments showing that their merger will result in more choices and better products for consumers, as well as more jobs for the public, then these factors should be appropriately incorporated into the FTC and the DOJ's sliding-scale analysis of efficiencies versus anticompetitive effects. If the agencies fail to do so, then mergers that may be beneficial to consumer welfare may be unnecessarily blocked, which would cause more harm than good to the economy overall.

253. *Id.* at 7–10.

254. Woan, *supra* note 26, at 66.

255. Motoko Rich, *Job Gains Reflect Hope a Recovery Is Blooming*, N.Y. TIMES, Feb. 3, 2012, at B1.

D. The Agencies Should Incorporate Behavioral Economics into Their Analyses of Horizontal Mergers

Behavioral economics—an interdisciplinary economic theory that incorporates elements from fields such as neuroscience, psychology, and sociology in order to determine human behavior in the market[256]—is not a tool currently incorporated in the Horizontal Merger Guideline analysis, but it is something that the agencies should seriously consider when determining whether a merger is harmful enough to be blocked.[257] While FTC Commissioner J. Thomas Rosch has stated that the FTC would consider "how to incorporate behavioral economics principles into [its] enforcement decisions,"[258] this has yet to be seen in the government's antitrust practices. If the government is to promote competition and protect consumers, it must utilize all available economic means of examining how firms act and how their choices may impact others in the marketplace.

Behavioral economics is different from the traditional Chicago School view of economic theory that underlies the agencies' Horizontal Merger Guidelines.[259] The Chicago School assumes that firms in the market are perfectly "rational profit maximizers," which enables economists and policy makers to predict how these firms will act in any given situation.[260] This theory is the basis for the agencies' assumption that firms are rational actors seeking to maximize their profits when planning mergers.[261] However, behavioral economics runs counter to the Chicago School's view of economic actors because it assumes that firms do not always act rationally or predictably.[262] Instead, it assumes that actors behave according to their "bounded rationality, bounded willpower, and bounded self-

256. Reeves & Stucke, *supra* note 31, at 1532.

257. *See id.* at 1531.

258. Rosch, *supra* note 145, at 23.

259. Reeves & Stucke, *supra* note 31, at 1552.

260. *Id.* at 1548 (quoting Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928, 933–34 (1979)).

261. *Id.* at 1532; *see also* 2010 GUIDELINES, *supra* note 16, § 1, at 2 ("In evaluating how a merger will likely change a firm's behavior, the Agencies focus primarily on how the merger affects conduct that would be most profitable for the firm.").

262. Reeves & Stucke, *supra* note 31, at 1532.

interest."[263] Specifically, behavioral economics suggests that economic actors (1) act rationally but are biased toward their goals and beliefs (bounded rationality); (2) sometimes behave in a manner that is harmful to their long-term interests because of the short-term benefits (bounded willpower); and (3) may be motivated by the desire to benefit others rather than to maximize wealth (bounded self-interest).[264]

Given the weakened state of the economy, behavioral economics offers several benefits. Firms do not always act as perfectly rational actors, and behavioral economics can be used to account for that fact in horizontal merger analysis. People often make decisions and plan mergers in a way that runs contrary to the assumptions of traditional economics; for example, chief executive officers in particular have been "both overly confident in their abilities and more risk-seeking than a rational choice model would predict."[265] This explains why companies may act in an economically irrational manner when they overestimate the efficiencies of their planned mergers.[266] For example, the AOL/Time-Warner and Sony/Columbia Pictures mergers did not result in the efficiencies that the merging parties believed would occur.[267] These deals were allowed under a traditional antitrust analysis, but the use of behavioral economics may have helped the agencies better analyze the merging companies' biases and evaluate whether the deals would actually result in efficiencies that would benefit consumers.[268] Furthermore, the Chicago School posits that the rationality of firms allows markets to self-correct and operate efficiently, but the recent recession that the United States has experienced proves that firms can act irrationally and actually make the market and consumers worse off than before.[269] Therefore, the Chicago School assumptions that drive traditional merger analysis are not always valid.[270] The effect that economically irrational firms have on consumers needs to be taken

263. *Id.*
264. *Id.* at 1533–38.
265. Langevoort, *supra* note 33, at 71.
266. Reeves & Stucke, *supra* note 31, at 1561–62.
267. *Id.*
268. *See id.*
269. *Id.* at 1531, 1539–41.
270. *Id.* at 1532.

into consideration when determining how a merger will impact competition and consumer welfare.[271]

Since behavioral economics has developed as a way to deal with irrational actors, this theory can supplement the agencies' current approach to analyzing the behavior of merging parties.[272] By looking at mergers in terms of bounded rationality, bounded willpower, and bounded self-interest, the FTC and the DOJ can more accurately grasp why companies plan mergers. This allows the agencies to account for any bias that merging parties may have, especially in regard to two factors that the FTC and the DOJ have included in their Horizontal Merger Guidelines: entry barriers and efficiencies.[273] For example, bias can influence what companies believe a merger can accomplish in terms of efficiencies and whether firms enter into the market after a proposed merger.[274] The agencies and the merging parties will undoubtedly include arguments regarding entry barriers and efficiencies in any filing or argument that they present in court. For instance, the agencies could use behavioral economics to argue, both in their pleadings and with expert witnesses at trial, that a merger that would pass traditional analysis—such as the AOL/Time-Warner or Sony/Columbia Pictures mergers—would harm competition because the merging parties are biased in believing that their deal will generate cost savings for consumers when it would actually make it more difficult for other companies to enter the market and provide the same or similar service or good. Based on this information, courts can make more informed decisions when ruling on whether a merger should be enjoined. Even though behavioral economics is unlikely to inform a definitive rule that the courts can employ when deciding horizontal merger cases, it can still

271. *See id.* at 1532–33.

272. *See id.* at 1553–54.

273. *Id*. at 1557–63.

274. *Id*. The three kinds of bias that can have an effect on entry barriers are "optimistic bias," "desirability bias" (also known as "wishful thinking"), and the bias that results when firms ignore the current state of competition and focus on themselves instead. *Id*. at 1557–58. Because firms may not fully understand how a merger may affect the market, behavioral economics would be helpful in explaining the actions of companies evaluating whether to enter the market after such a proposed transaction. *See id.* Regarding efficiencies, merging companies may demonstrate signs of "self-attribution bias" and overestimate the beneficial aspects of their proposed transaction based on their companies' previous successes. *Id*. at 1562–63. Looking at this self-attribution bias can help the agencies and the courts determine whether a merging party's efficiency argument is valid. *Id*.

be beneficial to the FTC and the DOJ in making their prelitigation determinations of whether a transaction will harm competition and consumers more comprehensive.

Although the agencies should not completely displace the economics they currently use in analyzing horizontal mergers, they should integrate elements of behavioral economics so that their analyses accurately reflect what can happen in the market. This economic theory does upset the traditional Chicago School approach by complicating the view of the market and market participants, and it does not allow for an exacting test for whether a horizontal merger will be beneficial, but it also expands the agencies' and courts' views on what could hinder or help competition and consumers.[275] Some scholars have said that "the insights from behavioral economics can . . . provid[e] agencies, courts, and legislatures with an additional lens through which to understand the facts before them,"[276] which is what is needed to make horizontal merger analysis more accurate. Behavioral economics takes into account what the Chicago School does not, and these insights can make a difference in helping the government and companies understand what kinds of mergers are acceptable.

V. THE IMPORTANCE OF HORIZONTAL MERGER ENFORCEMENT REFORM IN RAPIDLY CHANGING INDUSTRIES

The changes discussed in Part IV of this Article are especially crucial for the successful handling of mergers in rapidly changing industries such as telecommunications and technology. Since these industries are dynamic, the agencies and the courts must pay particular attention to how they approach Section 7 challenges in these sectors. Even though the agencies say they apply the merger guidelines in a fact-specific manner, they must also account for other factors, such as arguments for efficiencies and innovation, job creation, and failing firms.[277] If they do not, mergers that benefit

275. *See id.* at 1577.

276. *Id.* at 1544.

277. For some larger companies, the agencies and the courts have an additional factor to consider: the effect that foreign activity has on domestic competition. Some technology companies such as Microsoft, Google, and Intel are multinational corporations with competitors across the globe. *See generally World's Best Multinational Workplaces*, GREAT PLACE TO WORK,

consumers and help the economy in the long run may unnecessarily be blocked.

A. Rapidly Changing Industries Such As Telecommunications and Technology Are Unique

Because of the particular characteristics of technology-based industries, mergers of competitors in these industries require special consideration. Technology-based industries are dynamic because they constantly benefit from technological advances, which makes it more difficult to predict the effects a merger will have on competition.[278] As a result, the application of traditional horizontal merger analysis may not achieve antitrust policy's goals of fostering competition and ensuring consumer welfare.

According to one scholar, one of the three typical features of these industries that complicates horizontal merger analysis is the prevalence of R&D.[279] Because of the R&D that goes into product development and production, these industries "undergo rapid rates of technological change, much more so than traditional markets," which complicates the forecasting of industry growth.[280] "The king-size[d] firms of today [may] become the technological guppies of

http://www.greatplacetowork.com/best-companies/worlds-best-multinationals/list-of-the-25-best-from-2011 (last visited Apr. 10, 2012) (listing data for the top twenty-five multinational workplaces in 2011). These companies' overseas operations may serve as a check on their domestic market power because they must use some of their resources to be successful abroad. *See, e.g.*, Douglas MacMillan, *Google Undergoes Global Growing Pains*, BLOOMBERG BUSINESSWEEK (Feb. 25, 2010, 12:01 AM), http://www.businessweek.com/technology/content/feb2010/tc20100224_084405.htm (describing Google's overseas business expansion as crucial for the company since domestic growth in search advertising has slowed down). This lessened power may cut in favor of allowing a horizontal merger because even if technology companies have a large market share in the United States, they might not have the capacity to exert a strong controlling force on the market. Along the same lines is the effect that foreign firms have on the U.S. economy. Foreign firms may be able to check the market power of domestic firms by providing alternatives to consumers, *see, e.g.*, Ian Shapira, *Begun, the Tablet Wars Have—and There's No End in Sight*, WASH. POST, Apr. 23, 2011, at A09 (explaining the tablet and mobile phone competition between Apple and Samsung, Apple's South Korean competitor), which may also mitigate the probable anticompetitive effects of domestic mergers. Both of these factors—the activity of domestic corporations abroad and the impact of foreign companies on domestic markets—can greatly impact how the courts and the agencies define the relevant geographic market and evaluate a firm's market power in some Section 7 cases.

278. Katz, *supra* note 243, at 2.

279. GILBERT & TOM, *supra* note 252, at 4.

280. Woan, *supra* note 26, at 60–61.

tomorrow" because of innovation,[281] thus upsetting the traditional notion that a firm's ability to curb competition naturally results from its high market concentration.[282] This results in product markets that are challenging to delineate in the terms of the Horizontal Merger Guidelines, especially if the markets are volatile and of short duration.[283]

Another trait of technology-based industries is that there are initial high fixed costs and subsequent low variable costs related to creating new products for consumers.[284] High fixed costs refer to the large sums of money companies have to invest before engaging in any R&D.[285] After these high fixed costs are incurred, companies experience low variable costs because reproducing the good or service is much cheaper than the initial investment.[286] This differs from what traditional markets experience because the development and production of those products require low fixed costs and high variable costs.[287] Consequently, technology-based industries need market power to set the price of their goods or services above what it takes to produce one more unit of the good or service in order to make the firm viable.[288]

Finally, technology-based industries involve "knowledge spillovers"[289] that "benefit[] . . . society at large, including the firms' competitors."[290] This characteristic encourages firms to collaborate and even merge in order to gain access to information that can help them produce new and better products and services.[291] These mergers can be seen as antithetical to horizontal merger policy because they have the potential to reduce the total number of firms in the industry and thus reduce the overall level of competition.[292] However, these

281. *Id.* at 61.
282. *See* CHARLES T.C. COMPTON, IP ISSUES IN THE ANTITRUST TREATMENT OF MERGERS 3 (2005), *available at* http://www.wsgr.com/PDFSearch/Berkeley_Conf_PaperJune_05.pdf.
283. Woan, *supra* note 26, at 61–62.
284. GILBERT & TOM, *supra* note 252, at 4.
285. Woan, *supra* note 26, at 62.
286. *Id.*
287. *Id.*
288. *Id.* at 63.
289. GILBERT & TOM, *supra* note 252, at 4.
290. Woan, *supra* note 26, at 63; *see also* GILBERT & TOM, *supra* note 252, at 4 (explaining that firms' R&D efforts can produce knowledge that competitors may use).
291. Woan, *supra* note 26, at 63.
292. GILBERT & TOM, *supra* note 252, at 4.

horizontal mergers can improve consumer welfare by allowing companies to make products at a lower price and enabling them to pass on these savings to the public.[293]

Even though R&D, fixed and variable costs, and knowledge spillovers in technology-based industries make horizontal merger analysis more complicated, they do not make such an analysis impossible.[294] In fact, these characteristics require the FTC, the DOJ, and the courts to be sensitive to the special challenges that technology companies face when making the decision to merge with a competitor.[295] Therefore, R&D, costs, and knowledge spillovers should be additional considerations that influence whether courts perceive a horizontal merger as either anticompetitive or beneficial to competition and consumers.

B. Case Study: The AT&T and T-Mobile Merger

With these characteristics in mind, it is clear that both the agencies and the federal courts should pay close attention to the facts regarding horizontal mergers in rapidly changing industries. These industries are markedly different from traditional ones and should thus elicit a more nuanced antitrust analysis. While the DOJ's lawsuit against AT&T and T-Mobile is now moot because the parties abandoned the merger, the transaction remains a prime example of why special care should be taken with mergers in technology-driven industries.

1. Description of Case

On March 20, 2011, AT&T and T-Mobile agreed to enter into a $39 billion merger in which AT&T would acquire T-Mobile from its parent company, Deutsche Telekom AG ("Deutsche Telekom").[296] Both AT&T and T-Mobile comprise two of the four major U.S. wireless service providers, with the other two companies being Verizon Wireless ("Verizon") and Sprint Nextel Corp. ("Sprint").[297]

293. *Id.*
294. Woan, *supra* note 26, at 63.
295. *Id.*
296. Complaint, *United States v. AT&T*, *supra* note 2, at 2–5.
297. *Id.* at 2.

Together, these companies comprise the "Big Four" and account for 90 percent of the mobile wireless service market.[298]

Because the AT&T/T-Mobile deal would collapse the Big Four into a "Big Three," the DOJ filed suit in federal court in August 2011 to enjoin the merger.[299] Specifically, the DOJ argued in its complaint that the AT&T/T-Mobile merger would violate Section 7 by harming competition, thus resulting in "higher prices, less product variety and innovation, and poorer quality services due to reduced incentives to invest than would exist absent the merger."[300] In response to these allegations, AT&T argued that the merger would allow the merged company to "provide wireless broadband access to more people . . . and . . . provide more competition in an already competitive industry."[301] AT&T also utilized the failing firm defense[302] mentioned in the Horizontal Merger Guidelines, stating that if the court did not approve the merger, T-Mobile would suffer from the lack of investment from its parent company.[303] Finally, AT&T and its supporters argued that the merger would bring back five thousand call-center jobs to the United States[304] and create an additional hundred thousand jobs,[305] which would add more jobs to the "only unionized wireless telecommunications company in the country."[306]

298. *Id.*

299. *Id.*

300. *Id.*

301. Roger Cheng, *AT&T Responds to Justice Department Lawsuit*, CNET (Sept. 9, 2011), http://news.cnet.com/8301-1035_3-20104072-94/at-t-responds-to-justice-department-lawsuit/.

302. *See* 2010 GUIDELINES, *supra* note 16, § 11. The failing firm defense says that "a merger is not likely to enhance market power if imminent failure . . . of one of the merging firms would cause the assets of that firm to exit the relevant market." *Id.* In order to successfully utilize the failing firm defense, AT&T and T-Mobile must prove that

> (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.

Id.

303. Cheng, *supra* note 301.

304. *AT&T to Bring 5,000 Call Center Jobs Back to U.S. Following T-Mobile Merger Closing*, AT&T (Aug. 31, 2011), http://www.att.com/gen/press-room?pid=20909&cdvn=news&newsarticleid=32663.

305. Roger Cheng, *U.S. Attorney General: DOJ "Ready and Eager" for AT&T Trial*, CNET (Nov. 8, 2011), http://news.cnet.com/8301-1035_3-57320696-94/u.s-attorney-general-doj-ready-and-eager-for-at-t-trial/.

306. Nathan Newman, *Pro-Labor Progressives Should Support the AT&T-T-Mobile Merger*, HUFFINGTON POST (Jun. 23, 2011), http://www.huffingtonpost.com/nathan-newman/prolabor-

Shortly after the DOJ filed for this injunction, seven state attorneys general filed suit to halt the merger as well.[307] Even though the trial was scheduled to begin on February 13, 2012,[308] AT&T stated it was still "interested in a solution that addresse[d] the DOJ's issues with the T-Mobile merger."[309] Despite these efforts to make the deal a reality, AT&T and T-Mobile ended their merger plans on December 19, 2011, after acknowledging they "could not overcome stiff opposition by the Obama Administration."[310]

2. What Would Have Happened with the Merger Given the Current State of Horizontal Merger Enforcement

If AT&T and T-Mobile had gone through with their merger plans and if the agencies and the courts had analyzed the deal in accordance with precedent, the merger would most likely have been blocked. Since the definition of a relevant product or geographic market would not have been an issue, the court likely would have resolved the failing firm defense and the factors of market share and concentration, unilateral effects, entry barriers, and efficiencies in the DOJ's favor without much debate in court.

In arguing against the merger, the DOJ would have asserted that the transaction between AT&T and T-Mobile would have increased the new firm's market share and reduced the number of major firms in the wireless telecommunications market, thus posing a threat to competition. This increased market share would most likely have

progressives-sho_b_883321.html; *see also* Maria Elena Durazo, *Defending Merger Between AT&T and T-Mobile*, L.A. DAILY NEWS (Oct. 14, 2011), http://www.dailynews.com/opinions/ci_19108319 (highlighting an AFL-CIO member's argument that unionizing T-Mobile workers as a result of the merger with AT&T will give them "the right and opportunity to bargain for better [working] conditions"); Sacha Segan, *Why Do So Many Groups Support the AT&T/T-Mobile Merger?*, PCMAG (Jun. 1, 2011), http://www.pcmag.com/article2/0,2817,2386277,00.asp#fbid=hVu_JTdJkWu (describing how the merger would be beneficial to T-Mobile's non-unionized workers).

307. Cecilia Kang, *AT&T, T-Mobile Merger Faces New Obstacle as Seven States Join DOJ Lawsuit*, WASH. POST (Sept. 16, 2011, 4:44 PM), http://www.washingtonpost.com/blogs/post-tech/atandt-t-mobile-merger-faces-new-obstacle-as-seven-states-join-doj-lawsuit/2011/09/16/gIQAC3a2XK_blog.html.

308. Cheng, *supra* note 305.

309. Cheng, *supra* note 301.

310. Michael J. De La Merced, *AT&T Ends $39 Billion Bid for T-Mobile*, N.Y. TIMES (Dec. 19, 2011, 4:44 PM), http://dealbook.nytimes.com/2011/12/19/att-withdraws-39-bid-for-t-mobile/.

been evidence of the proposed firm's enhanced market power in a highly concentrated market. As a result, the merger would have been blocked if the court accepted the DOJ's argument that the transaction would decrease competition since there would be three major cell phone service providers instead of four, with the AT&T/T-Mobile firm as the company controlling the market.

Because of this enhanced market power, the DOJ would have also argued that the merger would have resulted in the unilateral effects of higher prices and reduced variety of products.[311] This argument might or might not have been valid, especially since the wireless telecommunications industry is technology-based and involves a high level of innovation and R&D.[312] Therefore, even if there would have been a merger, the new AT&T/T-Mobile firm might have been forced to lower prices and provide more products to keep up with the technological advances of Verizon and Sprint. Without more facts, however, this would be difficult to prove.

The DOJ might have also argued that the AT&T and T-Mobile merger would have made it more difficult for new firms to enter the market. Because of the size and market power of the merged company, smaller companies might have decided to opt out of entering the wireless telecommunications industry because it would have been an unprofitable venture. High entry barriers resulting from the merger would have prevented new companies from entering the national wireless telecommunications market and might possibly have prevented them from entering the regional wireless telecommunications market as well, even though AT&T and T-Mobile do not provide coverage in certain areas.

AT&T and T-Mobile's strongest arguments against the DOJ's traditional horizontal merger analysis would have come in the form of efficiencies and the failing firm defense. AT&T could have argued that the merger would have resulted in more product innovation and would have provided more jobs in an ailing economy.[313] Another defense that AT&T could have raised is that blocking the merger would have put AT&T, T-Mobile, and their respective customers in a

311. Complaint, *United States v. AT&T*, *supra* note 2, at 21.
312. *See supra* Part IV.A.
313. *Id.*

worse position.[314] Specifically, AT&T was required to pay Deutsche Telekom "$3 billion in cash and an additional $3 billion-worth of wireless spectrum" if the proposed merger was not completed.[315] AT&T could have also argued that this would not prevent Deutsche Telekom from stopping its investment in T-Mobile,[316] which could be "potentially disastrous" for the smaller company.[317] However, given the courts' sliding scale approach when it comes to efficiency arguments,[318] these innovation and job creation factors may not have been enough to overcome the merger's anticompetitive nature. Additionally, it is unclear whether AT&T and T-Mobile would have been able to satisfy the three factors necessary to successfully use the failing firm defense.[319]

3. What This Failed Deal Means for Future Technology Mergers and What Could Happen if This Article's Suggestions Are Adopted

If AT&T and T-Mobile had gone through with their merger plans, the transaction would have most likely been prevented under a traditional horizontal merger analysis. This Article's proposed changes would probably not have altered that result. This, however, does not mean that it would be futile for the agencies and the courts to adopt these proposals; rather, it shows that the AT&T and T-Mobile merger was doomed from the start. With any merger of two large players in an industry with only four main competitors, companies planning to unify their operations must be wary of government resistance due to the threat that the transaction poses to both competition and consumers. In this case, the AT&T/T-Mobile merger would have given the new company 80 percent of the wireless telecommunications market,[320] and this extreme market

314. *Id.*; David Goldman, *Without AT&T, T-Mobile Is a Wireless White Elephant*, CNN MONEY (Sept. 7, 2011, 10:13 AM), http://money.cnn.com/2011/09/06/technology/tmobile_options/index.htm.

315. Goldman, *supra* note 314. This in fact is the penalty that AT&T faces now that the merger is no longer a viable option.

316. *Supra* Part IV.A.

317. Goldman, *supra* note 314.

318. *See* 2010 GUIDELINES, *supra* note 16, § 10.

319. *See* 2010 GUIDELINES, *supra* note 16, § 11, at 32.

320. Steven M. Davidoff, *AT&T's Battle for T-Mobile Is Political as Well as Legal*, N.Y. TIMES (Sept. 6, 2011, 6:58 PM), http://dealbook.nytimes.com/2011/09/06/atts-battle-for-t-mobile-is-political-as-well-as-legal/.

share would have put Verizon and Sprint at a large competitive disadvantage.

While AT&T and T-Mobile would have lost under either the traditional approach to horizontal merger enforcement or a more nuanced approach, there is a benefit to adopting this Article's proposals: companies' arguments for efficiencies, innovation, and job creation would at least be given more weight. Given the current recession, the impact that these factors have on competition and consumers is important to consider. Cost savings could benefit merging companies, which could then pass the savings onto consumers via new and improved products created by potentially larger and more efficient work forces. At any rate, adopting and implementing these proposals could create precedent that companies can rely on when planning and defending their transactions, especially in dynamic industries such as technology and telecommunications.

Mergers in technology industries would especially benefit from this Article's proposals in the area of efficiencies. Assuming that AT&T and T-Mobile had continued defending their merger, the DOJ could have seriously considered the companies' efficiency arguments regarding innovation and job creation in such a dynamic market as wireless telecommunications. AT&T claimed that the merger would have increased wireless broadband access to more people,[321] which could have been the result of R&D efforts to improve networks and acquire better mobile phones for consumers. While the DOJ could have said that these effects are not quantifiable enough to merit a legitimate efficiency argument, AT&T and T-Mobile could have asserted that they should have had a chance to prove that they could have achieved these efficiencies because of the rapidly evolving nature of technology-based industries.[322] Together, AT&T and T-Mobile could have afforded the high fixed costs associated with R&D and then passed the benefits of lower variable costs on to consumers.[323] AT&T and T-Mobile's strongest argument would have been that the merger could potentially create 105,000 unionized jobs, which would help alleviate the pressure of the high unemployment

321. Cheng, *supra* note 301.
322. *See supra* Part V.A.
323. *See supra* Part IV.C.

rate on the U.S. economy.[324] The companies also could have stated that because AT&T was the single unionized wireless telecommunications company in the market,[325] this merger would have been the only way to create more jobs that would give workers the ability to bargain for and achieve higher wages, better working conditions, and more benefits.[326] Because it seems that public support for unions is weak despite these advantages to workers,[327] AT&T and T-Mobile's push for the creation of unionized jobs in the wireless telecommunications market would have been even more appealing. Therefore, these efficiency arguments would have been essential to AT&T and T-Mobile's case and could have been given great weight when compared to the merger's potential anticompetitive effects.

Finally, application of behavioral economics may also help the courts and the agencies predict how mergers like the one between AT&T and T-Mobile may affect other companies and consumers. By taking into account bounded rationality, bounded willpower, and bounded self-interest,[328] the courts and agencies would be able to determine what biases are motivating the reactions of the merging companies' competitors and customers. In the AT&T/T-Mobile example, Verizon and Sprint—the other half of the wireless telecommunications Big Four—could have opposed the AT&T/T-Mobile merger for fear of harm to competition: prices would have gone up as a result of the merger, which would benefit the companies, but consumers may have remained with AT&T and T-Mobile anyway because of brand loyalty. Verizon and Sprint may have also opposed the merger because they wanted to buy T-Mobile themselves. It also would have been interesting to consider biases of the consumers who would have been affected by the deal. For example, these customers may have supported the merger because they did not want to lose out on increased service in the form of

324. *Supra* Part IV.C.

325. Newman, *supra* note 306.

326. *See* Harry Bradford, *Labor Unions, Advantages Understood, Still Near Record-Low Approval*, HUFFINGTON POST (Aug. 31, 2011), http://www.huffingtonpost.com/2011/08/31/labor-unions-becoming-inc_n_944094.html; Art Pulaski, *Viewpoints: The Whole Nation Benefits When Labor Unions Are Thriving*, SACRAMENTO BEE (Nov. 14, 2011), http://www.sacbee.com/2011/09/05/3885139/the-whole-nation-benefits-when.html.

327. Bradford, *supra* note 326.

328. *See supra* Part IV.D.

better cell phone reception and more choices in phones. Additionally, there may have been an issue of brand loyalty because some phones are only offered by certain carriers; regardless of potential changes with AT&T and T-Mobile, customers may have stayed with Verizon or Sprint. Finally, customers may have remained with Verizon or Sprint because they were accustomed to those companies and their current wireless plans. Therefore, these examples of consumer irrationality could have impacted whether the AT&T/T-Mobile merger would actually have affected competition in the wireless telecommunications industry and could have been considered using behavioral economics. While these specific arguments pertain to telecommunications, companies planning mergers in other rapidly evolving industries could use similar arguments. Because these points focus on the behavior of customers and firms, behavioral economics could give courts more to consider and provide a more complete picture of both the positive and negative effects certain mergers may have on the market.

If the agencies and the federal courts adopt this Article's proposals—especially those regarding efficiencies and behavioral economics—and clearly lay out what they will consider in regard to these economic tools, cases similar to the now-expired AT&T/T-Mobile merger effort would likely become helpful precedent for other technology-based companies that plan horizontal mergers. Even though this more nuanced approach to horizontal merger enforcement would have been detrimental to AT&T and T-Mobile—innovation, job creation, and behavioral economics arguments would probably not have been enough to outweigh harm to competition in the agencies' sliding-scale analysis[329]—it may prove to be more useful for other companies in rapidly developing industries in the future.

VI. CONCLUSION

While the Obama Administration's more aggressive approach to horizontal merger enforcement seems to be appropriate given the weakened state of the U.S. economy, the system is far from perfect. The FTC, the DOJ, and the federal courts have varied when it comes

329. *See* 2010 GUIDELINES, *supra* note 16, § 10.

to their analytical approaches to the subject, and this is an issue that must be resolved if the government is to achieve its goals of protecting competition, promoting consumer welfare, and being transparent in its horizontal merger enforcement policies. This Article has suggested that (1) the courts should be more open to using the 2010 Horizontal Merger Guidelines; (2) the FTC and the DOJ should streamline how they litigate merger cases and should each be subject to the same burden of proof when trying to obtain an injunction against potentially anticompetitive mergers; (3) the agencies should be more open to efficiency arguments dealing with innovation and job creation; and (4) both the agencies and the courts should utilize principles from behavioral economics to more accurately forecast how a horizontal merger will affect a given market. These considerations are especially important for companies in rapidly changing industries dependent on technology, such as AT&T and T-Mobile, because market developments in those industries are more difficult to predict. The adoption of such considerations will lead to a more nuanced approach to horizontal merger enforcement, which, although it may not have helped AT&T and T-Mobile, may greatly assist both future merging parties and consumers by ensuring that competition and consumer welfare are protected.