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The Role of Innovation in Enforcement Cases – Note by the United States

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1. Introduction

1. The U.S. federal antitrust agencies (the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (together, "the Agencies")), have long recognized the vital role competition plays in driving innovation, and that protecting competition and innovation is critical for promoting growth in an economy.[1] When firms compete, they strive to gain an edge in the market by creating new or better products and services, introducing more attractive features, reducing costs, or adopting new technology for distribution of products. This leads to technological advancements, increased variety of goods or services, quality improvements, and increased productivity that benefit society as a whole.

2. The U.S. antitrust laws protect all dimensions of competition and the competitive process, including innovation. When conducting investigations, the Agencies start by determining how competition presents itself in the market. Recognizing that competition often plays out in the form of rivalry to innovate, the Agencies regularly consider and assess the potential impact on innovation in their enforcement programs. A "threat to innovation is anticompetitive in its own right,"[2] and the Agencies may bring an enforcement action based on adverse innovation effects.[3]

3. This paper focuses on innovation considerations in U.S. merger analysis. It first describes some of the ways mergers may raise innovation-related concerns, as reflected in the Agencies' joint Draft Merger Guidelines ("Draft Guidelines"), which were released for public comment in July 2023. It next discusses examples of proposed mergers where the Agencies have identified adverse competitive effects related to innovation. It then describes some recent additions to the toolkit the Agencies use to identify and address threats to innovation-based competition more broadly.

2. Innovation Considerations in Merger Review

4. As U.S. courts have acknowledged, "a merger can substantially lessen competition by diminishing innovation."[4] The Agencies' focus on this dimension of competition is

[1] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) at § 6.4 Innovation and Product Variety (noting that competition "often spurs firms to innovate."); The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ *(noting that* "Economists find that as competition declines, productivity growth slows, business investment and innovation decline, and income, wealth, and racial inequality widen.").

[2] *United States v. Anthem, Inc.*, 855 F.3d 345, 361 (D.C. Cir. 2017).

[3] Horizontal Merger Guidelines, § 6.4, Innovation and Product Variety (2010) https://www.justice.gov/atr/horizontal-merger-guidelines-08192010; U.S. Dep't of Justice and Fed. Trade Comm'n, Draft Merger Guidelines (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

[4] *United States v. Anthem, Inc.*, 236 F.Supp.3d 171, 229 (D.D.C.), aff'd 855 F.3d 345 (D.C. Cir. 2017).

reflected throughout the 2023 Draft Merger Guidelines, a document designed to inform the public, practitioners, firms, and courts about what the Agencies consider when reviewing or challenging a merger.[5] These guidelines update the analysis described in the 2010 Merger Guidelines, which also recognize the importance of innovation as a dimension of competition.[6] The 2023 Draft Guidelines build on the 2010 guidance but are modernized to better reflect the most recent economic scholarship and experience with dynamic markets.

2.1. Legal Standard

5. Section 7 of the Clayton Act, the U.S. competition law that most directly addresses mergers and acquisitions, prohibits transactions whose effect "may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce . . . in any section of the country."[7] The Clayton Act is focused on stopping threats to competition "in their incipiency."[8] This forward-looking approach enables the Agencies to account for the realities of the particular market and to examine not only competition related to products and services that are currently sold, but also forward-looking competition, *e.g.*, competition to create new or improved products, services, or innovative features.

6. The anticompetitive effects of a merger need not be certain to render a merger illegal under Section 7. To show that a merger is unlawful, a plaintiff need only prove that its effect "*may be* substantially to lessen competition."[9] Accordingly, the Agencies assess the risk that the merger may lessen competition substantially or tend to create a monopoly based on the available evidence and do not seek to predict specific outcomes in the future with certainty.

2.2. Assessment of Innovation-Related Risks from a Proposed Merger

7. In making merger enforcement decisions, the Agencies assess whether the merger risks lessening competition substantially now or in the future. The Draft Guidelines describe several frameworks that the Agencies use to conduct this assessment, many of which highlight innovation-related concerns. A few examples are provided below, although innovation could be implicated under any of the frameworks.

8. As explained in the Draft Guidelines, the Agencies consider whether a merger would eliminate substantial competition between firms, including competition by firms trying to win business by offering new or better products and services or more attractive

[5] The Agencies invited the public to submit comments on the Draft Guidelines in July 2023. As of this submission, the Agencies are preparing final guidelines that will incorporate feedback from the public.

[6] Horizontal Merger Guidelines, § 6.4 Innovation and Product Variety (2010).

[7] 15 U.S.C. § 18.

[8] *Brown Shoe v. United States*, 370 U.S. 294, 323 (1962). Although this paper focuses on Section 7 analysis, mergers may also be reviewed under Section 1 of the Sherman Act, which prohibits contracts, combinations or conspiracies in restraint of trade; or Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, and conspiracy to monopolize. 15 U.S.C. §§ 1, 2.

[9] *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).

features.[10] For example, competing firms might have tried to win revenues and share from one another by introducing new or better-quality products. A merger may reduce or eliminate the incentive to initiate or continue such projects if the sales of those new or improved products would "cannibalize" one of the merging parties' existing sales.[11] The more the merging parties have influenced one another's behavior, the more significant the competition between them. Where firms have research and development capabilities, competition between them can have a greater impact on their incentives to innovate.[12]

9. The Agencies also assess whether a merger may substantially lessen competition by eliminating a potential entrant.[13] The Agencies analyze acquisitions involving products in development to determine whether the firm's development efforts have, or are likely to have in the near future, a beneficial effect on competition. For example, a merger that eliminates one of only a few firms that has a reasonable probability of actually entering and deconcentrating a concentrated relevant market raises serious concerns. In certain cases, a firm may acquire another firm merely to terminate or suspend innovative activity or the development of a product perceived to be a competitive threat to the acquiring firm. Elimination of a perceived potential entrant may also raise concerns because the perceived entrant can incentivize current market participants to make investments or increase product quality, among other procompetitive responses.

10. The Agencies also consider the risk that the merger will give a firm control over products or services that are essential for competitors to effectively compete.[14] With respect to innovative efforts, development of new features or products depends on competitors having access to necessary inputs, tools, or platforms. If the merged firm obtains undue control over these inputs, it may enable the merged firm to weaken rivals or create barriers to entry or expansion for competitors.

11. The Agencies may also challenge mergers that entrench or extend a dominant firm's position.[15] For example, a dominant firm may acquire an innovative emerging rival in an effort to stifle future innovative competition. Such transactions may also violate Section 2 of the Sherman Act, which prohibits monopolization (and attempted monopolization and conspiracy to monopolize), separate from and in addition to the Clayton Act. The Agencies assess whether the acquired firm constitutes a nascent threat that, even if unproven, shows potential to disrupt the monopoly in the future. If so, eliminating that firm is conduct "reasonably capable of contributing significantly to the preservation of monopoly power in violation of Section 2" of the Sherman Act.[16] The Draft Guidelines explain the need for heightened caution against the extension of dominance during technological transitions:

> *At times, high entry barriers can become temporarily less effective in protecting a firm's dominance. For example, technological transitions can render existing entry*

[10] Draft Merger Guidelines, Guideline 2, at 8.

[11] Draft Merger Guidelines, App. 2.E., at 7.

[12] For a more detailed explanation of how a merger may diminish incentives to innovate, see Draft Merger Guidelines, App. 2.E., https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

[13] *Id*., Guideline 4.

[14] *Id*., Guideline 5.

[15] *Id*., Guideline 7.

[16] *Id*. at 21: *United States v. Microsoft Corp.*, 253 F.3d 34, 54, 79 (D.C. Cir 2001) (en banc) (per curiam).

> *barriers less relevant, and a dominant firm might seek to acquire firms to help it reinforce or recreate those entry barriers so that its dominance endures past the technological transition. Further, technological transitions can create temporary opportunities for entrants to differentiate based on their alignment with new technologies. A dominant firm might seek to acquire firms that might otherwise gain sufficient customers to overcome entry barriers. The Agencies take particular care to preserve opportunities for deconcentration during technological shifts.*[17]

2.3. Market Definition Considerations

12. The Agencies define "relevant antitrust markets" in order to identify the "area of effective competition" in which competition may be lessened.[18] Consistent with other aspects of merger analysis, the Agencies' approach to market definition reflects the principle that competitive harm may stem from harm to innovation. The Agencies consider the full range of the firms' rivalrous activities as they identify the "area of effective competition" in which competition may be lessened. As the Draft Guidelines explain, where a merger may substantially lessen competition by decreasing incentives for innovation, "the Agencies may define relevant antitrust markets around the products that would result from that innovation, even if they do not yet exist."[19] In some cases, "the Agencies may analyze different relevant markets when considering innovation than when considering other dimensions of competition."[20] For example, if a transaction would bring rival research and development programs together under the control of a single firm, potentially lessening innovation competition, the Agencies may assess the effect of the transaction in a relevant market comprising research and development programs in a particular technological space or aimed at solving a common goal or meeting a particular need.

2.4. Rebuttal Evidence

13. Merging parties sometimes argue that their merger will result in procompetitive benefits. For example, particularly in technology markets, firms often assert that a merger will increase the incentive or ability of a firm to undertake innovation activity. In evaluating these claims, the burden rests on the parties to demonstrate that such procompetitive efficiencies show that no substantial lessening of competition is in fact threatened by the merger.[21] The Agencies do not credit efficiencies that are vague or speculative or would likely be achieved without the merger.[22] For example, firms can often work together using contracts short of a merger to collaborate on innovative efforts without undertaking a full merger with the likely anticompetitive consequences. Nor do the

[17] *Id*. at 20.

[18] *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

[19] Draft Merger Guidelines, App. III.B.7. at 15.

[20] *Id*.

[21] *Id*. at 33.

[22] U.S. Dep't of Justice and Fed. Trade Comm'n, Draft Merger Guidelines § IV.3 (2023); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) ("Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.").

Agencies credit benefits outside the relevant market. Moreover, the Agencies would not trade off innovation benefits against higher prices.[23]

3. Agency Experience with Innovation-Based Harm in Merger Cases

14. The Agencies have identified innovation concerns in numerous merger cases. A few examples follow.[24]

15. The DOJ's 2020 lawsuit to block Visa Inc.'s proposed acquisition of Plaid Inc. is an example of a case where a monopolist attempted to acquire an innovative nascent threat. The DOJ alleged that Visa was a monopolist in online debit, and its proposed acquisition would extinguish a nascent competitor that had the potential to disrupt online debit with a low-cost, innovative product and further entrench Visa's dominance in the online debit market. According to the complaint, Visa sought to buy Plaid for $5.3 billion as an "insurance policy" to neutralize a "threat to our important US debit business." The DOJ challenged the deal under both Section 7 of the Clayton Act and Section 2 of the Sherman Act, recognizing that both statutes are violated when a monopolist acquires a nascent competitor to eliminate a significant competitive threat and entrench its dominant position. On January 12, 2021, Visa and Plaid announced that the companies had terminated their merger agreement.

16. In 2016, the DOJ challenged a merger between Anthem and Cigna, the second and third largest health insurance companies in the United States.[25] The DOJ alleged that Anthem and Cigna competed vigorously against one another to sell commercial health

[23] For a more detailed discussion of efficiencies analysis, *see* the U.S. Submission for the OECD Competition Committee Roundtable on Out-of-Market Efficiencies (Dec. 2023).

[24] In addition to the cases discussed in this section, the Agencies have identified adverse innovation effects in numerous other cases, *e.g.*, *United States v. Bayer AG and Monsanto Company*, Civil Action No. 1:18-cv-01241 (D.D.C. 2018), https://www.justice.gov/atr/case-document/file/1066656/download; *United States v. Deere & Company, Precision Planting LLC, and Monsanto Company*, Civil Action No. 1:16-cv-08515 (N.D. Ill. 2016), https://www.justice.gov/media/862871/dl?inline; *Applied Materials/Tokyo Electron* (Press Release, Dep't of Justice, Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy (April 27, 2015), https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011); *Amgen/Horizon Therapeutics* (Press Release, Fed. Trade Comm'n, Biopharmaceutical Giant Amgen to Settle FTC and State Challenges to its Horizon Therapeutics Acquisition (Sept. 1, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/biopharmaceutical-giant-amgen-settle-ftc-state-challenges-its-horizon-therapeutics-acquisition); *Edgewell Personal Care/Harry's* (Press Release, Fed. Trade Comm'n, FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc. (Feb. 3, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-files-suit-block-edgewell-personal-care-companys-acquisition-harrys-inc); *Thoratec/HeartWare* (Press Release, Fed. Trade Comm'n, FTC Challenges Thoratec's Proposed Acquisition of HeartWare International (July 30, 2009), https://www.ftc.gov/news-events/news/press-releases/2009/07/ftc-challenges-thoratecs-proposed-acquisition-heartware-international).

[25] Press Release, Dep't of Justice, Justice Department and State Attorneys General Sue to Block Anthem's Acquisition of Cigna, Aetna's Acquisition of Humana (July 21, 2016), https://www.justice.gov/opa/pr/justice-department-and-state-attorneys-general-sue-block-anthem-s-acquisition-cigna-aetna-s; Complaint, *United States et al. v. Anthem, Inc.*, , No. 1:16-cv-01493 (D.D.C. July 21, 2016), *available at* https://www.justice.gov/atr/file/903111/download.

insurance to national accounts. Although Cigna could not compete with Anthem solely on price, it could compete on price and non-price terms, which included finding innovative ways to lower its customers' medical costs by offering sophisticated wellness programs, providing highly regarded customer service, and working closely with doctors and hospitals to improve the quality and lower the cost of care. The DOJ alleged that because the merger would eliminate Cigna as a competitor against Anthem, it would reduce the incentive to continue innovating with respect to—and competing on—these non-price elements of its product offerings. The district court blocked the merger, finding that it likely would slow such innovation.[26] The court explained that with respect to "[t]he question to be decided as to whether the transaction would reduce the new firm's incentive to innovate in the relevant market, and in connection with that issue, it is important to note that national accounts in particular are considered to be the 'innovation incubators' for the entire industry. They push carriers to enhance plan design, customer service, technology, and data security, and the innovations they spur are often deployed to other customers and segments."[27] The district court's decision was upheld by the appellate court.[28]

17. Also in 2016, the DOJ challenged a merger between Halliburton and Baker Hughes that would have combined two of the three largest oilfield services companies in the United States and the world, eliminating important head-to-head competition in markets for more than twenty products or services used for on- and offshore oil exploration and production in the United States.[29] Halliburton, Baker Hughes, and Schlumberger comprised the "Big Three" in the industry, and they possessed unrivaled research and innovation capabilities. The DOJ alleged that because of plans to eliminate expenditures on overlapping research projects, the merger would end competition between Halliburton and Baker Hughes to develop and bring to market "game changing" or "disruptive" new technologies. The firms abandoned their merger soon after the DOJ filed suit.[30]

18. In 2022, the FTC challenged Meta Platform's (formerly Facebook) acquisition of Within Unlimited and its popular virtual reality dedicated fitness app, Supernatural.[31] While Meta did not offer its own virtual reality dedicated fitness app, through its status as a key player in the virtual reality sector with its own best-selling fitness app, capabilities, and resources, the FTC alleged that Meta's acquisition would reduce innovation in multiple ways. First, the acquisition would eliminate the prospect of Meta's independent entry into the virtual reality dedicated fitness market, depriving consumers of additional choice and increased innovation. Second, the acquisition would eliminate existing innovation by

[26] *United States, et al., v. Anthem Inc. et al.*, 236 F. Supp. 3d 171, 231 (D.D.C. 2017).

[27] *Anthem*, 236 F. Supp. 3d at 230.

[28] *United States, et al., v. Anthem Inc., et al.*, 855 F.3d 345, 362 (D.C. Cir. 2017) ("The threat to innovation is anticompetitive in its own right.").

[29] Press Release, Dep't of Justice, Justice Department Sues to Block Halliburton's Acquisition of Baker Hughes (April 6, 2016), https://www.justice.gov/opa/pr/justice-department-sues-block-halliburton-s-acquisition-baker-hughes; Complaint, *United States v. Halliburton Co. and Baker Hughes, Inc.*, No. 1:16-cv-00233-UNA (D. Del. April 6, 2016), *available at* https://www.justice.gov/opa/file/838651/download.

[30] Press Release, Dep't of Justice, Halliburton and Baker Hughes Abandon Merger After Department of Justice Sued to Block Deal (May 1, 2016), https://www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal.

[31] Press Release, Fed. Trade Comm'n, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within.

Within that resulted from the mere possibility that Meta would enter the market. Third, the acquisition would eliminate rivalry between Meta and Within in a broader virtual reality fitness market where they each add features to attract users. Although the court ultimately denied the FTC's request for a preliminary injunction, the court's decision validated the FTC's core legal theories and provided a roadmap for challenging mergers that eliminate potential competitors and threaten innovation.

19. In 2021, the FTC sued to block Illumina's proposed acquisition of Grail.[32] Grail is engaged in an innovation race against other firms to develop Multi Cancer Early Detection ("MCED") tests, while Illumina supplies the DNA sequencing technology platforms that Grail and its rivals need to develop the tests. The complaint alleged harm in the relevant market for the "research, development, and commercialization of MCED tests." Following a multi-week administrative proceeding, the Commission reversed the Administrative Law Judge's Initial Decision and ordered Illumina to divest Grail, concluding that the acquisition would allow Illumina to favor Grail and foreclose other MCED developers' access to its critical sequencing technology, which would reduce innovation, decrease choice and quality, and increase prices.[33]

20. Also in 2021, the FTC challenged chip supplier Nvidia's proposed vertical acquisition of Arm, which creates and licenses chip designs to other chip suppliers.[34] As one of the largest chip suppliers, Nvidia is best known as the dominant supplier of graphics processing units for use in personal computers and datacenters. Nvidia also offers products for advanced networking, datacenter central processing units, and computer-assisted driving. In these areas, Nvidia competes with other firms that rely on Arm's technology to develop their own products. In addition to alleging that the acquisition would result in higher prices and lower quality, the FTC alleged that it would reduce innovation, contending the combined firm would have less incentive to develop new chip design features and innovations because they might harm Nvidia's chip supply business. Nvidia eventually abandoned the acquisition after the FTC challenged the deal.

21. It is important to recognize that considering a merger's impact on innovation is not limited to traditional high technology markets. For example, in 2020, the FTC challenged the proposed merger of Edgewell Personal Care and Harry's, two suppliers of shaving products.[35] The FTC alleged that Edgewell, Harry's, and market leader Procter & Gamble were among the few significant competitors in the U.S. market for the manufacture and

[32] Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Mar. 30, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection-test-maker-grail.

[33] *In the Matter of Illumina, Inc. and GRAIL, Inc.*, No. 201-0144, at 59-60 (F.T.C. Apr. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf; *see also* Press Release, Fed. Trade Comm'n, FTC Orders Illumina to Divest Cancer Detection Test Maker GRAIL to Protect Competition in Life-Saving Technology Market (Apr. 3, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-orders-illumina-divest-cancer-detection-test-maker-grail-protect-competition-life-saving. The matter is currently on appeal before the United States Court of Appeals for the Fifth Circuit.

[34] Press Release, Fed. Trade Comm'n, FTC Sues to Block $40 Billion Semiconductor Chip Merger (Dec. 2, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger.

[35] Press Release, Fed. Trade Comm'n, FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc. (Feb. 10, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/02/statement-daniel-francis-deputy-director-ftc-bureau-competition-regarding-announcement-edgewell.

sale of men's and women's wet shave razors. The complaint further alleged that Edgewell and Procter & Gamble operated their brands of men's and women's razors as a comfortable duopoly until Harry's disrupted the market by launching a direct-to-consumer wet shave brand and offering its products in brick-and-mortar retail stores. As a result of the new competitive threat, Procter & Gamble and Edgewell reduced prices and innovated by developing value-priced products. The FTC alleged that the proposed merger would eliminate price and innovation competition between suppliers of wet shave razors, inflicting significant harm on U.S. consumers. Shortly after the FTC sued, Edgewell terminated its merger agreement with Harry's.

4. Expanding the Toolkit for Assessing Innovation Issues

22. In the U.S., there is growing recognition of the importance of ensuring that businesses have the opportunity to compete across all dimensions in modern markets, including innovation. The Biden Administration has taken a number of steps to expand the tools available to address modern market realities and promote a forward-looking approach to competition analysis.

23. First, as discussed above, the Agencies are in the process of updating the Merger Guidelines. The Draft Guidelines have been updated to reflect modern marketplace realities and state-of-the-art economic analysis. In accordance with legal precedent and up-to-date economics, the Draft Guidelines focus on the effects on competition rather than just the effects on one type of beneficiary of competitive markets, or purely price or output effects. As has been articulated in prior Guidelines, the lessening of competition from a merger can lead to many non-price harms, such as reduced quality and less innovation.[36]

24. Second, the Agencies are expanding their expertise to ensure that they have a sophisticated understanding of how modern markets function. For example, both Agencies have hired data scientists, AI experts, and technologists to provide insights into these rapidly evolving markets and ensure that opportunities for competition and innovation flourish.[37]

25. Third, the FTC, with DOJ's concurrence, has issued a Notice of Proposed Rulemaking (NPRM) proposing changes to the premerger filings required under the Hart-

[36] Relatedly, the FTC has challenged overbroad non-compete restrictions in connection with merger enforcement actions. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics (Oct. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis ("Under the proposed order, DaVita is required to divest three Provo-area dialysis clinics . . . and prohibited from entering into or enforcing non-compete agreements and other employee restrictions."). Among other harms, non-compete agreements can decrease innovation by blocking former employees from starting new business; accordingly, the FTC has proposed a rule that would ban non-compete clauses. Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[37] *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Launches New Office of Technology to Bolster Agency's Work (Feb. 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-launches-new-office-technology-bolster-agencys-work. For a more detailed discussion of recent developments, see U.S. Submission, OECD Competition Committee Working Party 3, The Optimal Design, Organisation and Powers of Competition Authorities (Dec. 2023).

Scott-Rodino (HSR) Act.[38] Currently, filers are not required to provide information about products or services that did not derive revenue in the last fiscal year. Under the proposal, filers would be required to identify pipeline or pre-revenue products and overlaps for such products anticipated to have annual revenue totaling more than $1 million within two years. This requirement will substantially improve the Agencies' ability to identify competition relating to these forthcoming products.

26. Finally, in July 2021, President Biden signed an "Executive Order on Promoting Competition in the American Economy."[39] The Executive Order calls for a "whole-of-government" approach to promoting procompetitive policies and markets across the United States. It has enhanced opportunities for the Agencies to partner with other federal agencies and collaborate across government both to address the need for more vigorous competition in the U.S. economy and to promote fair competition. As part of this process, agencies are encouraged to consider how their regulations impact competition, including whether regulations are entrenching incumbents, making it more difficult for innovative entrants to compete.

27. For example, the Executive Order requests that the U.S. Patent and Trademark Office (PTO) and U.S. Department of Agriculture (USDA) submit a report on concerns and strategies for ensuring "that the intellectual property (IP) system, while incentivizing innovation, does not also unnecessarily reduce competition in seed and other input markets beyond that reasonably contemplated by the Patent Act."[40] In March 2023, the USDA, in consultation with the PTO and other federal agencies, including the DOJ and FTC, submitted the requested report.[41] Among other initiatives, USDA announced the creation of a new Working Group on Competition and Intellectual Property to explore joint PTO-USDA opportunities to "ensure that our IP laws continue to incentivize innovation without unduly delaying competition and new market entrants," among other goals.[42]

5. Conclusion

28. The Agencies are committed to protecting all forms of competition and the competitive process, including innovation. This commitment is reflected in the 2023 Draft Merger Guidelines, which reflects the Agencies' appreciation of systemic changes occurring across the economy. The updates explain how the Agencies apply the law to modern market realities, explicitly connecting the Agencies' analyses to effects on competition, recognizing that competition plays out in different ways. The Agencies are also making use of expanded tools to protect competition and innovation in modern markets, including expanding Agency expertise to understand evolving markets, updating the merger notification form to reflect forward-looking competition, and collaborating with

[38] Press Release, Fed. Trade Comm'n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

[39] Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

[40] Executive Order, Section 5(i)(v).

[41] U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS), *More and Better Choices for Farmers: Promoting Fair Competition and Innovation in Seeds and Other Agricultural Inputs* (March 2023), https://www.ams.usda.gov/sites/default/files/media/SeedsReport.pdf.

[42] *Id*. at 39.

other agencies to employ a "whole of government" approach to promoting competition and innovation.