THE 2010 HORIZONTAL MERGER GUIDELINES: EVOLUTION, NOT REVOLUTION

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In 2009, the Department of Justice and the Federal Trade Commission announced a process for reviewing the Horizontal Merger Guidelines and assessing whether they should be revised to better reflect actual practice. The process included significant reflection within the Department, public workshops, and opportunities for public comment, including an opportunity to comment on a draft revision.[1]

The 2010 Guidelines are the result.[2] They accurately describe the merger-enforcement policy of the Department of Justice as it has evolved since the last major Guidelines revision in 1992.

The foundation for the 2010 Guidelines was laid in prior Guidelines. The core of the 1992 Guidelines remains: using the hypothetical monopolist test to analyze markets, assessing a merger's potential to harm consumers through coordinated or unilateral effects, and considering the prospect of entry or efficiencies to avert harm.[3] The imprint of other Guidelines is found as well. For instance, the 1982 Guidelines introduced the hypothetical monopolist test,[4] and the 1997 revisions to the Guidelines discussion of efficiencies are carried

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[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines Review Project (2009–10) [hereinafter Workshop Materials] (materials include transcripts, public comments, and draft Guidelines), *available at* http://www.ftc.gov/bc/workshops/hmg/index.shtml.

[2] 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.html.

[3] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992) [hereinafter 1992 Guidelines], *available at* http://www.justice.gov/atr/hmerger/11250.htm.

[4] U.S. Dep't of Justice, Merger Guidelines § II.A (1982) [hereinafter 1982 Guidelines], *available at* http://www.justice.gov/atr/hmerger/11248.htm.

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forward.[5] In addition, the 2010 Guidelines incorporate much of the 2006 Commentary on the Horizontal Merger Guidelines.[6]

The decision to build upon the existing framework is in keeping with the views of the Antitrust Modernization Commission, which concluded that U.S. merger policy "is fundamentally sound" and "has benefited significantly" from the Guidelines.[7] Courts, too, accept the basic Guidelines structure. For instance, the Fifth Circuit Court of Appeals recently described the Guidelines as "persuasive authority when deciding if a particular acquisition violates antitrust laws."[8] Similarly, there was consensus among workshop participants and those who submitted public comments that the basic Guidelines framework does not require significant overhaul.[9]

In contrast to the consensus among the mainstream of antitrust, the authors of "*Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines* maintain that the Guidelines are, and have been, fundamentally mistaken in two areas: defining markets and assessing unilateral effects.[10] Their views, which are in large measure retreads of worn-out attacks on the 1992 Guidelines,[11] run contrary to years of enforcement practice, rest on distortions of congressional intent and judicial precedent, and proceed from a rejection of the economic approach that has guided antitrust for decades.

This comment addresses the decision to build upon the existing Guidelines approach to market definition and unilateral effects. It briefly touches upon a few other important aspects of the 2010 Guidelines.

I. MARKET DEFINITION

The Supreme Court has articulated several principles regarding market definition. For instance, the Court has stated that a "market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered."[12] The Court also has explained that market definition must avoid "the indefensible extremes" of un-

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[5] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (1997), *available at* http://www.justice.gov/atr/hmerger/11251.htm.

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

[7] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 54 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[8] Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410, 431 n.11 (5th Cir. 2008).

[9] *See* Workshop Materials, *supra* note 1.

[10] James A. Keyte & Kenneth B. Schwartz, *"Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines*, *supra* this issue, 77 ANTITRUST L.J. [PG] (2011) [hereinafter *Tally-Ho*].

[11] *See* James A. Keyte, *Market Definition and Differentiated Products: The Need for a Workable Standard*, 63 ANTITRUST L.J. 697 (1995).

[12] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956).

duly expansive markets that "make the effect of the merger upon competition seem insignificant" and unduly narrow markets that place competing parties "in different markets."[13] Thus, attempting to seek out every substitute for a product misses the point; as the Court puts it: "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn . . . ."[14] Significantly, the Court has rejected the claim that the antitrust laws require "delineat[ing] with perfect accuracy" a market, recognizing that "fuzziness" is "inherent in any attempt."[15] That flexibility flows from the purpose of defining markets—helping to assess a merger's potential to harm consumers.

The 1982 Guidelines established that the Department would define markets under these precedents using the hypothetical monopolist test. In general, the test defines markets around the possibility of price increases were a single firm to have pricing control over a group of products.[16]

Innovative at the time of its adoption in 1982, the test is now well-established. The horizontal merger complaints filed by the Department since the 1982 Guidelines have defined markets under the test. Courts have embraced the analytical rigor it gives the relatively general pronouncements of the Supreme Court.[17] Moreover, it has been adopted in many jurisdictions outside the United States.[18]

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[13] United States v. Phila. Nat'l Bank, 374 U.S. 321, 361 n.31 (1963).

[14] Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 n.12 (1953).

[15] *Phila. Nat'l Bank*, 374 U.S at 360 & n.37; *see also du Pont*, 351 U.S. at 395 ("[N]o more definite rule can be declared . . . ."). The *Staples* court similarly made clear that the antitrust laws do not require identifying the full set of relevant markets to which every product in the economy could be uniquely assigned:

> The Court acknowledges that there is, in fact, a broad market encompassing the sale of consumable office supplies by all sellers of such supplies, and that those sellers must, at some level, compete with one another. However, the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.

FTC v. Staples, Inc., 970 F. Supp. 1066, 1075 (D.D.C. 1997).

[16] *See generally* Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129 (2007); Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253 (2003).

[17] *See, e.g.*, FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 38 n.12 (D.D.C. 2009) ("The Merger Guidelines provide an analytical tool for determining interchangeability and cross-elasticity of demand."); *Staples*, 970 F. Supp. at 1076 n.8 (relying on the "analytical framework set forth in the Merger Guidelines" to assess market definition).

[18] *See, e.g.*, Australian Competition & Consumer Division, Merger Guidelines ¶¶ 4.19–4.22 (Nov. 2008), *available at* http://www.accc.gov.au/content/item.phtml?itemId=809866&nodeId=3a4cf8c822dc673b7de0a525ac267933&fn=222_Merger%20guidelines_FA_WEB.pdfEU; European Comm'n, Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 5, ¶¶ 15–19, *available at* http://eur-lex.europa.

In contrast, the *Tally-Ho* authors criticize the hypothetical monopolist test and its "inherent flaws,"[19] describing two decisions as apparent support for their criticism.[20] Both courts, however, accepted the appropriateness of the test and only questioned its application to the particular facts at issue.[21] The *Tally-Ho* authors also assert a conflict between Court precedent and the Guidelines acknowledgment that "groups of products may satisfy the hypothetical monopolist test without including the full range of substitutes from which customers choose."[22] That observation, which was also made in the 2006 Commentary,[23] is entirely in keeping with the Court's admonition that the "circle must be drawn narrowly" to exclude products to which few customers would turn in the event of a price increase.[24]

The *Tally-Ho* authors also maintain that the test conflicts with congressional intent.[25] In 1950, Congress amended the Clayton Act and removed the reference to effects on commerce in a "community," in part because of "fear of literal prohibition of all but *de minimis* mergers through the use of the word 'community.'"[26] The amendments thus made clear that the Clayton Act concerns "the geographic area of effective competition in [a] relevant line of commerce."[27] No reasonable assessment of merger enforcement over the nearly thirty years since the hypothetical monopolist test's introduction could conclude that the test has led to the targeting of *de minimis* mergers that affect less than a "line of commerce."

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eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML; Autorité de la Concurrence, Merger Control Guidelines ¶ 303 (2009), *available at* http://www.autoritedelaconcurrence.fr/doc/ld_mergers_final.pdf; Competition Bureau, Canada, Merger Enforcement Guidelines ¶ 3.4 (Sept. 2004), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/$file/2004%20MEGs.Final.pdf; U.K. Competition Commission & Office of Fair Trading, Merger Assessment Guidelines § 5.2 (Sept. 2010), *available at* http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/pdf/100916_merger_assessment_guidelines.pdf.

[19] *Tally-Ho*, *supra* note 10, at 616.

[20] *Id.* at 615.

[21] *Id. See generally* United States v. SunGard Data Sys., Inc., 172 F. Supp. 2d 172, 182–93 (D.D.C. 2001) (describing court precedent regarding market definition and stating that the Merger Guidelines "incorporate this same approach"); FTC v. Swedish Match, 131 F. Supp. 2d 151, 160 (D.D.C. 2000) ("One way to evaluate price sensitivity is to apply the U.S. Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines' 'hypothetical monopolist' test.").

[22] 2010 Guidelines, *supra* note 2, § 4.1.1.

[23] 2006 Commentary, *supra* note 6, at 6 ("Defining markets under the Guidelines' method does not necessarily result in markets that include the full range of functional substitutes from which customers choose.").

[24] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 n.1. (1956); *see also* United States v. Phila. Nat'l Bank, 374 U.S. 321, 361 n.31 (1963).

[25] *Tally-Ho*, *supra* note 10, at 594–99.

[26] Brown Shoe Co. v. United States, 370 U.S. 294, 320 n.35 (1962).

[27] *Id.*

The 2010 Guidelines contain a number of important clarifications and refinements concerning market definition. One is substantial expansion of the discussion of market definition. That increase reflects the continued importance of market definition to the merger review process.

Another addition is the express acknowledgement that merger analysis "need not start with market definition."[28] Confusion over the sequencing of merger review has existed since the 1982 Guidelines, which some perceived to describe a rigidity that never existed. Two years later, the Department amended the Guidelines to provide that the Department "will apply the standards of the Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger."[29] That explanation carried over to the 1992 Guidelines, and the 2006 Commentary similarly acknowledged that "the Agencies do not settle on a relevant market definition before proceeding to address other issues."[30]

That flexibility is necessary to enable the efficient use of government resources. For instance, document review may reveal evidence of actual or likely market effects, and trigger significant concern, even before the contours of a relevant market are clear.[31] That evidence also would be germane to defining the relevant market. Likewise, when investigating the possibility of unilateral effects, there may be no need to settle on a market definition when evidence indicates that the diversion ratios are very low and consumers do not view the merging parties' products as particularly close substitutes; conversely, market definition may be more of a gating issue for a coordinated effects investigation.[32]

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[28] 2010 Guidelines, *supra* note 2, § 4.0.

[29] U.S. Dep't of Justice, Merger Guidelines § 1.0 (1984) [hereinafter 1984 Guidelines], *available at* http://www.justice.gov/atr/hmerger/11249.htm.

[30] 2006 Commentary, *supra* note 6, at 5.

[31] On the relevance of direct evidence of competitive effects, see generally FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 461 (1986) (relying on evidence of "actual, sustained adverse effects on competition"); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 (1984) ("This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."). In a challenge to a completed merger, relevant effects evidence could include evidence of actual price increases. In a challenge to a proposed merger, relevant evidence could include credible statements by top executives that the proposed merger will reduce competition, see, for example, *FTC v. Whole Foods Market*, 548 F.3d 1028, 1032 (D.C. Cir. 2008), or natural experiments comparing pre-merger prices in geographic markets where the merging firms do not compete to those where they do, see, for example, *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1076 (D.D.C. 1997) (finding evidence that prices were higher in geographic markets where the merging parties did not compete to be "compelling"). *See generally* 2006 Commentary, *supra* note 6, at 10–11.

[32] The Agencies made both points in 2006. See 2006 Commentary, *supra* note 6, at 16 ("[M]arket concentration may be unimportant under a unilateral effects theory of competitive harm."); *id.* at 20 (emphasizing the relevance of the number of competitors in a market when assessing coordinated effects).

The *Tally-Ho* authors incorrectly assert that the flexibility described in the 2010 Guidelines has "significantly" and "fundamental[ly]" changed the merger review process.[33] To the contrary, what has changed is an increase in transparency about a longstanding reality. At the same time, it is worth repeating that the Department will continue defining relevant markets in its merger complaints in accord with Supreme Court precedent.[34]

The 2010 Guidelines make a few other important clarifications to the discussion of market definition. The hypothetical monopolist test frequently can reveal more than one market affected by a merger. Since 1984, the Guidelines have provided that the smallest group of products that satisfies the test will "generally" be a relevant market, without further discussion.[35] The 2010 Guidelines now explain that, when relying primarily on market shares and concentration (as may be the case, for instance, under a theory of harm focused on coordinated effects), the smallest market satisfying the test is "usually" a relevant market.[36] That is not always the case, however, because the antitrust laws are designed to prevent anticompetitive effects in any relevant market. The 2010 Guidelines also describe how defining markets sometimes entails analyzing, as one of a number of factors considered in implementing the hypothetical monopolist test, "the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market."[37] As the Supreme Court has explained, market definition appropriately considers the "cross-elasticity of demand between products" as illustrated by "the responsiveness of the sales of one product to price changes of the other."[38]

II. UNILATERAL EFFECTS

The 1992 Guidelines were the first to use the phrase "unilateral effects." The antecedent concern is found in the 1982 and 1984 Guidelines, which provided that the Department was "likely to challenge" essentially any merger involving a "leading firm," which was defined as any firm with a market share

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[33] *Tally-Ho*, *supra* note 10, at 592.

[34] Carl Shapiro, Deputy Ass't Att'y Gen., Update from the Antitrust Division, Remarks as Prepared for the ABA Section of Antitrust Law Fall Forum 15 (Nov. 18, 2010) ("The Division recognizes the necessity of defining a relevant market as part of any merger challenge we bring."), *available at* http://www.justice.gov/atr/public/speeches/264295.pdf.

[35] 1992 Guidelines, *supra* note 3, § 1.11; 1984 Guidelines, *supra* note 29, § 2.11.

[36] 2010 Guidelines, *supra* note 2, § 4.1.1. To help assure that close substitutes are not omitted from a market and avoid unduly narrow markets, the 2010 Guidelines also provide that "[w]hen applying the hypothetical monopolist test to define a market around a product offered by one of the merging firms, if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product." *Id.*

[37] *Id.* § 4.1.3.

[38] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400 (1956).

greater than 35 percent.[39] As former Assistant Attorney General William Baxter explained, "It was the judgment of the Division that at about 35%, the danger of market power becomes sufficiently great to overwhelm any concern for the potential efficiencies that might be lost from prohibiting a leading firm merger."[40]

The 1992 Guidelines addressed the possibility of a merger's potential to enhance or maintain a firm's market power in a more nuanced way, introducing the concept of diversion and the possibility that, "depending on relative margins," a firm might find it profitable to raise price after a merger because some customers would "be diverted to the product of the merger partner."[41] The 1992 Guidelines also state that adverse unilateral effects are possible when "a significant share of sales in the market [is] accounted for by consumers who regard the products of the merging firms as their first and second choices."[42] Not much more detail was included, although the 1992 Guidelines did provide that, in certain circumstances, "significant" diversion would be "presume[d]" when "the merging firms have a combined market share of at least thirty-five percent."[43]

The Agencies have accumulated substantial experience in assessing unilateral effects since 1992; indeed, a majority of the Department's merger enforcement actions since 1992 have involved unilateral effects theories of harm. Reflecting the significant learning achieved during those intervening eighteen years, the 2010 Guidelines contain a greatly expanded discussion of unilateral effects broken into four sections dealing with (1) pricing, (2) bargaining and auctions, (3) capacity and output for homogeneous products, and (4) innovation and product variety.

The *Tally-Ho* authors claim that, by focusing on the loss of competition between merging firms, unilateral effects theories of harm are "inconsistent" with Section 7."[44] The claim that continued concern with unilateral effects is at odds with the Clayton Act—wherein Congress provided "authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency"[45]—departs from any sensible reading of the statute or its legislative history. Although unilateral effects arise from the internalization of the competition between the merging firms, mergers ca-

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[39] 1982 Guidelines, *supra* note 4, § III.A.2; 1984 Guidelines, *supra* note 29, § 3.12.

[40] William F. Baxter, *Responding to the Reaction: The Draftsman's View*, 71 CAL. L. REV. 618, 628 (1983).

[41] 1992 Guidelines, *supra* note 3, § 2.21.

[42] *Id.*

[43] *Id.*

[44] *Tally-Ho*, *supra* note 10, at 624.

[45] Brown Shoe Co. v. United States, 370 U.S. 294 317 (1962).

pable of creating adverse unilateral effects are obviously able to produce a general effect on competition of the sort Section 7 was intended to forestall. Indeed, in some circumstances, the products of the merging firms may themselves comprise a relevant market. A vast weight of economic learning contradicts the *Tally-Ho* authors' equally sweeping—and incorrect—argument that mergers cannot lead to adverse unilateral effects unless the merging firms "uniquely occupy a product space" that no other firm participates in.[46]

The 2010 Guidelines substantially expand the discussion of unilateral effects and make several important clarifications. One is the omission of the 1992 Guidelines presumption that, in some limited circumstances, diversion among the products of firms whose combined market share exceeds 35 percent is "significant." Although criticized by the *Tally-Ho* authors,[47] the omission of the presumption indicates no change in direction, but merely reflects actual practice, in which it is often found to be inapt. Importantly, that does not mean that unilateral effects are impossible when the merging firms' combined share is less than 35 percent. Rather, it reflects that facts drive the analysis of unilateral effects, undermining the ability to make categorical assertions.

The inability to make categorical assertions relates to the issue of the level of generality appropriate for the Guidelines. For some, the 2010 Guidelines will contain too much detail; for others, too little. The 2010 Guidelines seek to provide concrete direction yet also appropriately take into account the intensely fact-driven nature of merger analysis, which often precludes describing actual practice in absolute terms without excessive caveats that would undermine the overall clarity of the Guidelines. As prior versions have, the 2010 Guidelines note that they "may be revised from time to time as necessary to reflect significant changes in enforcement policy, to clarify existing policy, or to reflect new learning."[48] Future iterations can be counted on to provide more detail on important, recurring points as appropriate, just as the 2010 Guidelines clarify important points in the 1992 Guidelines.

One sentence in the 2010 Guidelines that has attracted attention provides that "[i]n some cases, where sufficient information is available, the Agencies assess the value of diverted sales, which can serve as an indicator of the up-

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[46] *Tally-Ho*, *supra* note 10, at 631. As former Deputy Assistant Attorney General Carl Shapiro has detailed, the economic principles of unilateral effects analysis have been widely used and developed over the past twenty years. *See generally* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 60–85 (2010).

[47] *Tally-Ho*, *supra* note 10, at 625. In their obscure criticism, the *Tally-Ho* authors appear to equate the omission of the presumption respecting diversion in the 2010 Guidelines to the elimination of a "safe harbor." *Id.* That argument turns the text of the 1992 Guidelines and the Guidelines history sketched above on their heads.

[48] 2010 Guidelines, *supra* note 2, § 1 n.1.

ward pricing pressure on the first product resulting from the merger."[49] Because market shares can be an imperfect proxy for market power and substitution patterns, the value of diverted sales can be, and has been, useful in assessing the closeness of substitution.

Those criticizing the discussion of the value of diverted sales in the 2010 Guidelines miss the mark. Recognizing a tool that economists (both those within the Agencies and those hired by merging firms to advocate on their behalf) use during merger review increases transparency. The *Tally-Ho* authors incorrectly assert that considering the value of diverted sales is inappropriate because it always suggests competitive harm,[50] but that criticism ignores the explicit recognition in the 2010 Guidelines that "if the value of diverted sales is proportionally small, significant unilateral price effects are unlikely."[51] Indeed, a similarly unfounded criticism applies to the use of market shares, HHIs, or any measure of concentration—tools that are all well-accepted by the antitrust mainstream.[52]

III. CONCLUSION

The 2010 Guidelines reflect actual practice and incorporate the accumulated experience of the eighteen years since the last significant Guidelines update. Although this comment has highlighted the continuity among Guidelines past and present, there are a number of important additions that make significant contributions to increasing the transparency of merger policy. The new section addressing evidence of adverse competitive effects describes the actual evidence-gathering work that comprises a significant part of merger review. Similarly, the increased HHI thresholds more accurately describe actual practice. The new sections on targeted customers and price discrimination, powerful buyers, mergers of competing buyers, and partial acquisitions also should provide guidance on issues that repeatedly come up but received

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[49] *Id.* § 6.1. The 2010 Guidelines use the phrase "upward pricing pressure" once, reflecting that it is one of many factors that a merger review may entail. In contrast, the *Tally-Ho* authors mention "upward pricing pressure" or "UPP" over 250 times. The *Tally-Ho* authors also incorrectly assert that the Southern District of New York has "expressly rejected the UPP analysis." *Tally-Ho*, *supra* note 10, at 609 n.99. To the contrary, the court merely denied a plaintiff's motion to amend its complaint three and a half years after filing suit, citing the plaintiff's "undue delay" and "clear prejudice to the opposing party." City of New York v. Group Health Inc., No. 06 Civ. 13122 (RJS), 2010 WL 2132246, at *6 (S.D.N.Y. May 11, 2010).

[50] *Tally-Ho*, *supra* note 10, at 625.

[51] 2010 Guidelines, *supra* note 2, § 6.1.

[52] The 2010 Guidelines do not adopt the value of diverted sales as the exclusive factor for any investigation. Just as market shares and HHIs are appropriately used as part of the merger review process despite their limits, so too is the value of diverted sales. It is worth noting that the 2010 Guidelines do not attach presumptions to high levels of diverted sales values, in contrast to the explicit anticompetitive presumption that has long applied to mergers resulting in significant HHI increases. *See, e.g.*, *id.* § 5.3; 1992 Guidelines, *supra* note 3, § 1.51(c); 1982 Guidelines, *supra* note 4, § III.A.1.c.

only brief mention in earlier Guidelines. Finally, the revisions to the coordinated-effects discussion also usefully clarify the Department's continued commitment to blocking mergers posing the threat of express or tacit collusion.[53]

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[53] *See generally* 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 901b2 (3d ed. 2009).

> The more frequent danger associated with mergers, however, is not the express cartel but tacit coordination. If the significant actors in a market are few enough, they may recognize their interdependence and succeed in coordinating their prices tacitly in the manner described elsewhere. Such "oligopoly" pricing is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. A central objective of merger policy is to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.

Id.