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The Horizontal Merger Guidelines of the Department of Justice and the National Association of Attorneys General Compared in the Context of Recent Cases and Consent Decrees

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THE HORIZONTAL MERGER GUIDELINES OF THE
DEPARTMENT OF JUSTICE AND THE NATIONAL
ASSOCIATION OF ATTORNEYS GENERAL COMPARED IN
THE CONTEXT OF RECENT CASES AND CONSENT
DECREES

JOHN CIRACE*

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I. INTRODUCTION

WHEN viewed in the context of the cyclical progressions of American politics,¹ the timing of the recently announced Horizontal Merger Guidelines of the National Association of Attorneys General (NAAG Guidelines) may portend a new, harder hitting, more active antitrust policy on the horizon.² These political cycles suggest that a more active antitrust policy may be in the offing. When the current cycle began in the 1960s, the United States Supreme Court (the Warren Court) seemed to use section 7 of the Clayton Act³ to invalidate any nontrivial acquisition of a

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1. A. SCHLEISHINGER, JR., *THE CYCLES OF AMERICAN HISTORY* (1986).

2. *NAAG Horizontal Merger Guidelines*, (CCH) Trade Reg. Rep. (CCH) No. 800 Pt. II, at 67 (March 16, 1987) [hereinafter NAAG Guidelines].

3. 15 U.S.C. § 18 (1976). Section 7 of the Clayton Act, as amended by the Celler-Kefauver Antimerger Act, provides in part that: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of

competitor.⁴ The elimination of a significant rival by itself was thought to infringe the complex of social and economic values perceived by a majority of the Court to inform the statutory words “may . . . substantially . . . lessen competition.”⁵ Apparently frustrated by this strict antimerger policy, Justice Stewart uttered his famous remark in dissent in *United States v. Von’s Grocery Co.*: “The sole consistency that I can find is that in litigation under § 7, the Government always wins.”⁶ The Department of Justice’s 1968 Merger Guidelines with its low concentration thresholds reflected this case law.⁷

The 1970s witnessed a growing disenchantment with an activist antimerger policy. The attack on the activist antitrust policy

the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” *Id.*

4. *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Aluminum Co. of Am.*, 377 U.S. 271 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

5. *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1975 (1987).

6. 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). In *Von’s Grocery*, Von’s, ranked third among retail grocery store chains in the Los Angeles area, acquired the sixth largest chain—Shopping Bag Food Stores. Their market shares were 4.3% and 3.2% respectively, or a combined market share of 7.5%. The acquisition was denied, although neither firm involved was really very big, nor was the market highly concentrated by usual standards. The concentration ratio in terms of the largest four firms, CR4, was 24.4% before the merger and 28.8% after.

7. See generally Department of Justice, 1968 Merger Guidelines, 2 TRADE REG. REP. (CCH) (1968) ¶ 4510 (Aug. 9, 1968); ANTITRUST & TRADE REG. REP. (BNA) No. 360 at X-1 to X-6 (June 4, 1968) (full text of Justice Department Merger Guidelines). In particular, paragraphs 5 through 7 are indicative of the stringent antimerger standards reflected in the guidelines. Paragraphs 5 through 7 state in full:

¶ 5. Market Highly Concentrated. In a market in which the shares of the four largest firms amount to approximately 75% or more, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

| <u>Acquiring Firm</u> | <u>Acquired Firm</u> |
|-----------------------|----------------------|
| 4% | 4% or more |
| 10% | 2% or more |
| 15% plus | 1% or more |

(percentages not shown in the above table should be interpolated proportionately to the percentages that are shown).

¶ 6. Market Less Highly Concentrated. In a market in which the shares of the four largest firms amount to less than approximately 75%, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

was led by "Chicago School"⁸ theorists, who argued that efficiency is the only legitimate goal of antitrust policy.⁹ In most extreme form, Chicago-oriented authors castigate those who advocate any other goals, even those with clear support in legislative history (e.g., the desire to maintain a decentralized economy), as populist nonsense.¹⁰ Changing economic conditions aided the Chicago School attack. The erosion of the American producers' market power by fiercely efficient foreign competitors tended to make an activist antitrust policy less necessary.¹¹ Moreover, with inflation and unemployment undermining hopes for a higher standard of living, antitrust law was blamed for preventing efficient mergers and hindering American businesses from compet-

| <u>Acquiring Firm</u> | <u>Acquired Firm</u> |
|-----------------------|----------------------|
| 5% | 5% or more |
| 10% | 4% or more |
| 15% | 3% or more |
| 20% | 2% or more |
| 25% plus | 1% or more |

(percentages not shown in the above table should be interpolated proportionately to the percentages that are shown).

¶ 7. Market With Trend Toward Concentration. The Department applies an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly unconcentrated, in which there is a significant trend toward increased concentration. Such a trend is considered to be present when the aggregate market share of any grouping of the largest firms in the market from the two largest to the eight largest has increased by approximately 7% or more of the market over a period of time extending from any base year 5-10 years prior to the merger (excluding any year in which some abnormal fluctuation in market shares occurred) up to the time of the merger. The Department will ordinarily challenge any acquisition, by any firm in a grouping of such largest firms whose market share amounts to approximately 2% or more.

Id.

Note, however, Baker and Blumenthal's comment on the 1968 Guidelines which follows: "The day has long passed since the principle consistency of merger litigation was that 'the Government always wins.' That former reality had given the 1968 Merger Guidelines a special importance." Baker & Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 CALIF. L. REV. 311, 346 (1983).

8. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

9. "The only legitimate goal of American antitrust law is the maximization of consumer welfare." R. BORK, *THE ANTITRUST PARADOX* 51 (1978); accord *GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203, 1226 (S.D. N.Y. 1981); R. POSNER, *ANTITRUST LAW* 3-4 (1976); Calvani, *Consumer Welfare is Prime Objective of Antitrust*, *Legal Times*, Dec. 1984, at 24-31; see also 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 103-113(c) (1978).

10. Sullivan, *The New Merger Guidelines: An Afterward*, 71 CALIF. L. REV. 632, 636 (1983).

11. See I. MAGAZINER & R. REICH, *MINDING AMERICA'S BUSINESS*, pt. 1 (1982).

ing more successfully in domestic and international markets.¹²

In 1980, the election of Ronald Reagan as President reflected the changed political mood of the country. Mr. Reagan promised to restore the economy to its former vigor by reducing government regulation of business.¹³ A restricted vision of antitrust fit nicely with the political philosophy and campaign commitment of his administration.¹⁴ The Department of Justice's Horizontal Merger Guidelines (DOJ Guidelines),¹⁵ announced in 1982 and hastily revised in more lenient form two years later,¹⁶ reflected that view. In actual practice, the Reagan administration's enforcement of section 7 of the Clayton Act has been still more lenient than the DOJ Guidelines.¹⁷ With the appointment of Reagan nominees to the Federal Trade Commission (FTC), it too adopted a more conservative view of merger enforcement¹⁸ to the degree that FTC Commissioner Bailey remarked in her dissent in

12. Fox, *Introduction, (Symposium): 1982 Merger Guidelines: When Economists Are Kings?*, 71 CALIF. L. REV. 281, 283 (1983).

13. Sheils, Thomas, Abraham & Lubenow, *An Economic Dream in Peril*, Newsweek, Sept. 8, 1980, at 50-51.

14. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1140-46 (1981).

15. 1982 Merger Guidelines, 47 Fed. Reg. 28, 493 (1982) [hereinafter 1982 DOJ Guidelines].

16. 1984 Merger Guidelines, 49 Fed. Reg. 26,823 (1984) [hereinafter 1984 DOJ Guidelines]. The 1984 DOJ Guidelines increased the number of defenses and added other factors which could reduce the significance of concentration levels from 10 to 14; added a failing division to the failing firm defense; and added an efficiency defense where the 1982 Guidelines indicated that the DOJ would consider efficiency claims only in "extraordinary cases." In 1984, the Guidelines changed the "five-percent market definition test to a flexible standard, defined the price for which an increase would be postulated in the market definition standard as the prevailing price (even if such price is significantly above marginal cost), changed the Post-Merger HHI below 1000 standard from "the Department is unlikely to challenge mergers in this region" to "the Department will not challenge mergers falling in this region," and changed from a cautious approach to applying its market definition standards to foreign competitors to one of applying its market definition standards equally to both foreign and domestic firms. *Statement Accompanying Release of Revised Merger Guidelines*, 1984 Merger Guidelines, 49 Fed. Reg. 26,823 (June 29, 1984). The 1984 DOJ Guidelines go substantially beyond clarification, enunciating changes in enforcement policy that are substantial in nature; these substantial changes will prolong any merger cases that are brought by widening the opportunities for defense. See generally Miller, *Notes on the 1984 Merger Guidelines: Clarification of the Policy or Repeal of the Celler-Kefauver Act?*, 29 ANTITRUST BULL. 653 (1984).

17. 49 Antitrust & Trade Reg. Rep. (BNA) No. 1245, at 1056 (Dec. 19, 1985). For further discussion of the Reagan administration's lenient approach to antitrust enforcement, see *infra* notes 144-85 and accompanying text.

18. When the FTC became "populist" in the late 1970s, Congress reigned it in through legislation and cuts in appropriations. Baker & Blumenthal, *supra* note 7, at 321.

In re Echlin Manufacturing Co. that “[w]hat is emerging in Commission merger decisions is by and large the rule that, according to the ‘new’ economic learning, a merger is almost always legal.”¹⁹ Thus, we have come full circle from Justice Stewart’s diametrically opposite remark in *Von’s Grocery* two decades ago.

Four recent developments suggest that a new phase of the cycle may be in the offing. First, there has been a wave of mergers that have been notable in producing huge wealth transfers without any discernible increase in production or efficiency.²⁰ There has also been growing public and congressional revulsion at the excesses of financial manipulation (e.g., leveraged buyouts,²¹ “greenmail,”²² “poison pills”²³), which are evidence that decision making by corporate management in large corporations and by corporate raiders may not be as effectively constrained by efficiency considerations as the apostles of a laissez-faire attitude toward mergers would have one believe. Second, the huge American trade deficit appears to be generating an irresistible momentum for protectionist legislation²⁴ which is likely to enhance the market power of domestic firms as well as their propensity to engage in explicit or implicit cartels. Moreover, the recent rapid decline in the dollar relative to other currencies will, by altering the terms of trade in favor of American producers, have the same effect as protectionist legislation: foreign producers will have more difficulty competing in American markets. Just as the slogan, “tariff is the most of trusts,” was the rallying cry of those who demanded the passage of the Sherman Act in 1890 (as the *quid pro quo* for the McKinley Tariff of that same year),²⁵ protectionist legislation and the fall of the dollar, which enhance the

19. 105 F.T.C. 410, 502-03 (1985) (Bailey, Comm’r, dissenting). Echlin involved a merger between two firms which manufactured carburetor kits. Although the merging firms are the first and third largest, having market shares of approximately 38% and 10% respectively, a majority of the FTC voted not to challenge the merger because of competition from substitute products, low entry barriers, and the prospect of new technology. *Id.* at 413-18.

20. Business Week, Nov. 24, 1986, at 86; N.Y. Times, June 29, 1987, at D1; see L. THUROW, DANGEROUS CURRENTS: THE STATE OF ECONOMICS, ch. 2 (1984).

21. See generally Note, *Leveraged Buyout, Management Buyout, and Going Private Corporate Control Transactions: Insider Trading or Efficient Market Economics?*, 14 FORDHAM URB. L.J. 685 (1986).

22. See generally Comment, *Greenmail: Can the Abuses Be Stopped*, 80 Nw. U.L. REV. 1271 (1986).

23. See generally Comment, *Corporate Law—The “Poison Pill” as a Takeover Defense Tactic—Moran v. Household Int’l, Inc.*, 21 WAKE FOREST L. REV. 1047 (1986).

24. N.Y. Times, July 9, 1987, at D1.

25. D. DEWEY, MONOPOLY IN ECONOMICS AND LAW 143 (1964); H. THORELLI,

market power of domestic firms, are likely to agitate an activist antimerger policy. Third, despite the Administration's lenient antimerger policy,²⁶ the economic position of American firms vis à vis foreign firms in terms of productivity has not improved; indeed, the secular trend in productivity has continued to decline.²⁷ Fourth, dissatisfaction with the Reagan administration's lenient merger policy caused the National Association of Attorneys General (NAAG), who are authorized, both by statute²⁸ and case law²⁹ to enforce the federal antitrust laws, to take the unprecedented step of issuing their own guidelines for the enforcement of the federal antitrust laws. The NAAG vertical restraint guidelines were announced in 1985,³⁰ and the horizontal merger guidelines announced in 1987.³¹

Because political economy is not an exact science and cannot prove conclusively whether an aggressive or a conservative anti-trust policy is more conducive to greater public benefit, political and intellectual cycles or fashions have been and will continue to be very important to understand, to analyze and, indeed, to shape the subject of political economy. For example, if we consider the phenomenon of a market in which a dominant firm survives unchallenged and earns supernormal profits for a considerable period of time, we shall see that economists who use different models to interpret this phenomenon arrive at different conclusions. There are two differences in the models used: one focuses on the concept of barriers to entry into such a market, the other focuses primarily on the presumed efficiency of large firms. Chi-

THE FEDERAL ANTITRUST POLICY 164-232 (1954); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956).

26. For a discussion of the Reagan administration's lenient enforcement attitude and practice, see *infra* text accompanying notes 149-85.

27. N.Y. Times, June 29, 1987, at D1; see also L. THURLOW, *supra* note 20, ch. 20.

28. The Clayton Act, section 4C, states in pertinent part:

(1) Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.

15 U.S.C. § 15c(a)(1) (1982).

29. The authority of the Attorney General of a State to invoke section 7 of the Clayton Act to enjoin a merger injurious to the general welfare and economy of a State is confirmed in *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945).

30. NAAG's *Vertical Restraint Guidelines*, 49 Antitrust & Trade Reg. Rep. (BNA) No. 1245, at 996 (Dec. 5, 1985).

31. See NAAG Guidelines, *supra* note 2, at pt. II-67.

chicago School authors believe that competition erodes entry barriers rather quickly (with the exception of governmentally imposed barriers); therefore, Chicago School authors conclude that if a firm has a long-term record of profitability, it must be due to efficiency.³² Chicago School opponents, on the other hand, maintain that the sustained profitability of many firms is not due to efficiency but due to durable barriers to entry, such as advertising intensity, scale economies, absolute capital requirements, natural-resource monopoly, patent protection, strategic predation³³ and the like.³⁴ In the 1980's, the laissez-faire conclusions of the Chicago School model have appeared to be more consonant with the conservative phase of the American political cycle. However, if this conservative phase has about run its course, the conclusions of models that emphasize the need for a more active antitrust policy may again become fashionable.

Part II is a summary of the article's conclusions. Part III contrasts the antitrust philosophies and policies underlying the DOJ and NAAG Guidelines. Part IV explains the three step process that both DOJ and NAAG Guidelines use to determine whether a merger may substantially lessen competition. Part V contains an analysis of the DOJ and NAAG product and geographic market definition standards in the context of recent merger cases and consent decrees. In Part VI, the stated concentration level standard of the DOJ (which was also adopted by the NAAG) is compared to the DOJ's actual performance as indicated by merger cases and consent decrees. In Part VII, other factors (e.g., ease of

32. Demsetz, *Two Systems of Belief About Monopoly*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 164 (H. Goldschmid, H.M. Mann, and J. Weston, eds. 1974); see also G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 72-80 (1968); Pautler, *A Review of the Economic Basis for Broad-Based Horizontal-Merger Policy*, 28 *ANTITRUST BULL.* 571, 633-35 (1983).

33. O. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 26-30 (1975).

34. The traditional discussions of barriers began with Bain. See J. BAIN, *BARRIERS TO NEW COMPETITION* (1956). They continued with the work of Mann. See Mann, *Seller Concentration, Barriers to Entry and Rates of Return in Thirty Industries, 1950-60*, 48 *REV. ECON. & STAT.* 296 (1966). More recently Caves, Gale and Porter and others popularized the idea of mobility barriers among firms within an industry, and other researchers have extended the theoretical discussion of entry barriers to include strategic elements, such as preemptive capacity, capacity expansion or patent accumulation, product proliferation, first-mover advantages and learning-curve effects, to mention a few. See Caves, Gale & Porter, *Interfirm Profitability Differences: Comment*, 91 *QUART. J. ECON.* 676 (1977); see also Schmalensee, *Entry Deterrence in the Ready-to-Eat Breakfast Cereal Industry*, 9 *BELL J. ECON.* 305 (1978); Spence, *The Learning Curve and Competition*, 12 *BELL J. ECON.* 49 (1981). For a more extensive bibliography, see Pautler, *supra* note 32, at 633-35.

entry), which affect the significance of concentration level standard, are discussed: the DOJ's thirteen factors are compared to the NAAG's four. The final section contains conclusions and some speculation as to the future of antimerger policy.

II. SUMMARY OF CONCLUSIONS

The DOJ and NAAG Horizontal Guidelines adopted nearly identical concentration level standards for mergers subject to section 7 of the Clayton Act.³⁵ Their main differences concern: 1) policy assumptions, 2) market definition methodologies, and 3) factors other than concentration levels which should affect the decision whether to challenge a merger. With respect to the DOJ's stated policy assumptions (as opposed to its actions), the DOJ Guidelines are eclectic and roughly in the mainstream. The NAAG Guidelines, on the other hand, contain a statement of policies that can only be read as a counter attack on the Chicago School position that allocative efficiency is the only goal of anti-trust policy. The NAAG Guidelines state that allocative efficiency is subsidiary to the central purpose of section 7 which is to prevent firms from attaining market or monopoly power to prevent a transfer of wealth from consumers to such firms.³⁶

With respect to product and geographic market definitions, the DOJ Guidelines are hypothetical and future oriented.³⁷ They tend to be biased in favor of broad markets and therefore may systematically understate market shares used to calculate market concentration, with the result that fewer mergers will be challenged. Recent merger cases and consent decrees demonstrate that the hypothetical and speculative market definitions in the DOJ Guidelines are generally unworkable in the context of litigation.³⁸ On the other hand, the NAAG market definitions, which use historical data, are similar to those which the courts have traditionally employed.³⁹ Since the NAAG market definitions rely on historical data, they may be biased toward narrower markets, and may tend to overstate market shares used to calculate market

35. See 1984 DOJ Guidelines, *supra* note 16, § 3; NAAG Guidelines, *supra* note 2, § 4.

36. See NAAG Guidelines, *supra* note 2, § 2.

37. See 1984 DOJ Guidelines, *supra* note 16, § 2.

38. For a detailed discussion of this point, see *infra* notes 67-143 and accompanying text.

39. See NAAG Guidelines, *supra* note 2, § 3.

concentration.⁴⁰

The analysis of recent merger cases and consent decrees in this article shows that the DOJ has apparently not been implementing the concentration standard in its own Guidelines.⁴¹ (The NAAG, which adopted the DOJ's concentration standard, would presumably adhere more closely to it than the DOJ has.) It will appear later in this discussion that a major reason for the inconsistency between the DOJ's stated policy and its actions may be that its Guidelines are based on the incompatible assumptions and methodologies of two rival schools of economic thought. The DOJ's actual policy guide may possibly be inferred from a footnote in its 1982 Guidelines where it stated that "[t]here is some economic evidence that, where one or two firms dominate a market, the creation of a strong third firm enhances competition."⁴² Given the reluctance of the DOJ to challenge mergers, it has been suggested that the stated threshold level of concentration at which mergers may be challenged should be raised.⁴³

With respect to what factors other than concentration levels should affect a decision whether to challenge a merger, the DOJ Guidelines take a flexible approach. When the DOJ revised its Guidelines in 1984, it increased the number of other factors and defenses from ten to fourteen.⁴⁴ The other factors and defenses were probably expanded in order to undercut the concentration level standard and to bring the Guidelines more into conformity with its lenient enforcement policy. In current form, the DOJ Guidelines include virtually any economic rationale which would allow the merged firms to demonstrate that concentration levels overstate their actual market power. On the other hand, the NAAG Guidelines, which emphasize the concentration level standard as a true guideline, limit the number of other factors and defenses that may affect the significance of market share and concentration levels to four.⁴⁵

40. For a discussion and empirical verification of this point, see *infra* text accompanying notes 67-143.

41. 49 Antitrust & Trade Reg. Rep. (BNA) No. 1245, at 1056 (Dec. 19, 1985).

42. For a discussion of the concentration standards used to establish a *prima facie* case of an antitrust violation, see *infra* text accompanying notes 144-85.

43. 49 Antitrust & Trade Reg. Rep. (BNA) No. 1245, at 1056 (Dec. 19, 1985). For a discussion of whether threshold concentration levels should be raised, see *infra* notes 144-85 and accompanying text.

44. For a discussion of the Revised DOJ Guidelines, see *infra* text accompanying notes 186-212.

45. There are three other factors plus a failing firm defense. See NAAG

III. THE DOJ AND NAAG GUIDELINES: A COMPARISON OF POLICIES

In the DOJ Guidelines, "market power" is defined as the ability of one or more firms to maintain prices above competitive levels profitably for a significant period of time.⁴⁶ Market power may be achieved either by a single seller (monopolist) or a few sellers who explicitly or implicitly (tacitly) coordinate their actions to approximate the performance of a monopolist.⁴⁷ With respect to the policies underlying the DOJ Guidelines, the DOJ states that mergers which create or enhance market power are undesirable because the "result is a transfer of wealth from buyers to sellers and a misallocation of resources."⁴⁸ DOJ Guidelines give equal weight to and do not distinguish between the goals of preventing wealth transfers and preventing resource misallocation; thus, literally they do not endorse the Chicago School position that the sole goal of antitrust policy is the efficient allocation of resources. The DOJ Guidelines also state that "[w]hile challenging competitively harmful mergers, the Department seeks to avoid unnecessary interference with that larger universe of mergers that are either competitively beneficial or neutral."⁴⁹ Lastly, the DOJ states that "the Guidelines reflect congressional intent that merger enforcement should interdict competitive problems in their *incipiency*."⁵⁰ The incipency standard echoes the Supreme Court's opinion in *Brown Shoe Co. v. United States*.⁵¹ Thus, on its face, if not in practice, the DOJ statement of purpose and underlying policy assumptions is squarely in the mainstream.

The NAAG Guidelines, on the other hand, contain a state-

Guidelines, *supra* note 2, §§ 5-6. For a discussion of these factors, see *infra* notes 186-212 and accompanying text.

46. "Market power" also encompasses the ability of a single buyer or group of buyers to depress the price paid for a product to a level that is below the competitive price. See 1984 DOJ Guidelines, *supra* note 16, § 1.

47. See, e.g., *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D. N.Y. 1958) (Congress in framing antitrust laws was clearly concerned with "concentration in an oligopoly framework" as an instance of a "trend to create monopoly.")

48. See 1984 DOJ Guidelines, *supra* note 16, § 1.

49. See *id.* "The Guidelines are designed primarily to indicate when the Department is likely to challenge mergers, not how it will conduct the litigation of cases that it decides to bring." *Id.*

50. *Id.* (emphasis added).

51. 370 U.S. 294, 317 (1962). The Supreme Court said, "It is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipency." *Id.*

ment of policies that can only be read as a counter attack on the Chicago position that the sole goal of antitrust policy is the efficient allocation of resources. Although neither the Chicago School nor any of its leading authors are explicitly mentioned, the NAAG policy statement says that:

The central purpose of [§ 7 of the Clayton Act] is to prevent firms from attaining market or monopoly power, because firms possessing such power can raise prices to consumers above competitive levels, thereby effecting a transfer of wealth from consumers to such firms. . . . Such mergers were prohibited even prior to the actual attainment or exercise of market power, that is, when the trend to harmful concentration was incipient. . . . Other goals of the law were the prevention of excessive levels of industrial concentration because of the political and social effects of concentrated economic power and the fostering of productive efficiency, organizational diversity, technological innovation and the maintenance of opportunities for small and regional businesses to compete. . . . The Congress evidenced little or no concern for allocative efficiency when it enacted section 7 and the other antitrust laws. . . . Furthermore, the Supreme Court has clearly ruled that any conflict between the goal of preventing anticompetitive mergers and that of increasing efficiency must be resolved in favor of the former explicit and predominant concern of the Congress.⁵²

The Supreme Court decisions on which the NAAG policy statement relies for support are from the 1960s: *Brown Shoe v. United States*,⁵³ *FTC v. Procter & Gamble Co.*,⁵⁴ *United States v. Philadelphia National Bank*.⁵⁵ In two subsequent cases from the 1970's, *United*

52. NAAG Guidelines, *supra* note 2, § 2; see also Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HAST. L. REV. 65 (1982); Salop & Krattenmaker, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986). For excellent summaries of arguments regarding the wisdom of a large number of possible antitrust goals, see Bork, Blake, Bowman & Jones *The Goals of Antitrust: A Dialogue in Policy*, 65 COLUM. L. REV. 363 (1965); Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1183 (1977). For a history of this debate, see Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 377-82 (1965).

53. 370 U.S. 294, 315-16 (1962).

54. 386 U.S. 568, 580 (1967).

55. 374 U.S. 321, 371 (1963).

States v. General Dynamics Corp.,⁵⁶ and *United States v. Citizens & Southern National Bank*,⁵⁷ the Supreme court refused to equate the possession of a significant market share with a significant threat to competition.⁵⁸ On the other hand, these two cases have highly unusual facts that required discounting large market shares⁵⁹ and the decisions from the 1960s have not been overruled.

The Chicago School position is further attacked in footnotes of the NAAG Guidelines, where it is explained that proper legislative function is to make basic policy choices, whether or not those choices coincide with the beliefs of a particular administration, enforcement agency, or school of economic theory;⁶⁰ that in most mergers creating market power, the effect of the wealth transfer from consumers will be many times as great quantitatively as the effect on allocative efficiency;⁶¹ that allocative efficiency is an inadequate goal since it can be achieved in an economy with massive inequalities of income distribution;⁶² and that the term of art, "consumer welfare," used by Chicago School authors,⁶³ refers to

56. 415 U.S. 486 (1974).

57. 422 U.S. 86 (1975).

58. The cases relied upon by the NAAG for its policy statement were Warren Court cases. However, both *General Dynamics* and *Citizens & Southern National Bank* are Burger Court cases. The speculation as to the different approaches taken by these two courts in the judicial implementation, if you will, of antitrust policy may illuminate why the NAAG looked to cases like *Brown Shoe*. Consider in this context the following thought on the impetus behind the Burger Court's antitrust decisions. The Burger Court dismantled the Warren Court's "simplified test of illegality" when almost always the government won, and resurrected "the rule of reason approach" where "nothing short of proof of present anticompetitive effect would be sufficient to meet the 'lessen competition' standard of section 7." Lurie, *Mergers Under the Burger Court: An Anti-Antitrust Bias and Its Implications*, 23 VILL. L. REV. 213, 214 (1978) (emphasis in original).

59. In *General Dynamics*, the market shares were of current sales (of coal) made pursuant to long-term contracts entered into a long time ago; future sales would depend on uncommitted reserves, and one of the acquired firms had no uncommitted reserves. 417 U.S. 486 (1986). In *Citizens & Southern*, the acquired banks were already under the effective control of the acquirer (they were its "de facto branches"), so that the formal merger had little competitive significance. 442 U.S. 86 (1975); see *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 107 S. Ct. 1975 (1987).

60. See NAAG Guidelines, *supra* note 2, § 1 n.7 (emphasis added).

61. Harris & Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CALIF. L. REV. 1, 12-13 (1984). Economists who have attempted to determine the welfare losses due to monopoly have come up with estimates from as little as .1% of Gross National Product to as much as 13%. Compare Harberger, *Monopoly and Resource Allocation*, 44 AMER. ECON. REV. 77 (1954) with Cowling & Mueller, *The Social Costs of Monopoly Power*, 88 ECON. J. 727 (1978). See Pautler, *supra* note 32, at 576.

62. See NAAG Guidelines, *supra* note 2, § 2 n.15.

63. "The only legitimate goal of American antitrust law is the maximization of consumer welfare." R. BORK, *supra* note 9, at 51; accord *GAF Corp. v. Eastman*

allocative efficiency and “has nothing to do with the welfare of consumers.”⁶⁴

IV. THE PROCESS OF DETERMINING WHETHER A MERGER CREATES OR ENHANCES MARKET POWER

Since the object of antitrust policy is to challenge mergers that result in market power, it would be preferable if direct evidence of market power were available. Direct evidence would be data on the spread between the merging firms' marginal cost and the prices they charge, or data on their long term profit rates. However, because the relevant data is either unavailable or severely biased when available,⁶⁵ both the DOJ and NAAG Guidelines determine whether a merger will result in market power indirectly by the following three-step process: (1) the product and geographic markets of the merging firms are defined; (2) the level of concentration in the market and its increase is compared to the standard stated in the Guidelines; and (3) if the post-merger concentration level is less than the lowest concentration threshold allowed by the standard, a merger will *not* be challenged by the DOJ⁶⁶ and is *unlikely* to be challenged according to the NAAG Guidelines.⁶⁷ If the concentration level exceeds the standard, other factors (e.g., the level of entry barriers) are weighed against the absolute concentration level and its increase in order to determine whether the merger is likely to lessen competition substantially, and therefore whether it should be challenged.⁶⁸ The major differences in the DOJ and NAAG

Kodak Co., 519 F. Supp. 1203, 1226 (S.D. N.Y. 1981); R. POSNER, *supra* note 9, at 3-4; Calvani, *supra* note 9, at 24-31; *see also* 1 P. AREEDA & D. TURNER, *supra* note 9, ¶¶ 103-113(c).

64. NAAG Guidelines, *supra* note 2, § 2 n.15.

65. M. FRIEDMAN, PRICE THEORY: A PROVISION TEXT 96, 140 (1962); G. STIGLER, *supra* note 32, ch.13; McGee, *Efficiency and Economies of Size*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 55 (H. Goldschmid, H.M. Mann, and J. Weston, eds. 1974).

66. Compare the DOJ's 1982 and 1984 Guidelines: Section III.A. 1.(a) of the DOJ 1982 Guidelines states that “[t]he Department is unlikely to challenge mergers falling in this region [post-merger HHI below 1000].” Section 3.11, 1984 DOJ Guidelines states that “[t]he Department will not challenge mergers falling in this region [post-merger HHI below 1000].” For a further discussion, see *infra* text accompanying notes 142-76.

67. Section 4, footnote 32 of the NAAG Guidelines states that “[t]he Attorneys General are unlikely to challenge any merger in an industry with a post-merger HHI of less than 1000.” See *infra* text accompanying notes 142-76.

68. Compare 1984 DOJ Guidelines *supra* note 16, §§ 3.2-3.5 with NAAG Guidelines, *supra* note 2, §§ 5.1-5.3. See *infra* text accompanying notes 142-83. This three step process which indirectly measures market power was accepted by

Guidelines concern market definitions and the number of other factors that are allowed to affect the significance of concentration levels. Both sets of guidelines will be compared in the context of recent antitrust merger cases and consent decrees.

V. PRODUCT AND GEOGRAPHIC MARKET DEFINITION

The 1982 DOJ Guidelines define markets by postulating a small but significant and nontransitory price increase for each product of each merging firm at that firm's location. Market definition is further informed by speculation on the likely responses of buyers, sellers of the same products, sellers located in other areas, sellers of substitute products, and sellers with flexible production processes which could produce the relevant product.⁶⁹ If competitive responses would cause the price increase to be unprofitable, then the area and group of products are expanded to include additional products and areas until a price increase would be profitable. At the point which it would be profitable for a hypothetical monopolist in that area to impose a small but significant and nontransitory increase in price, the monopolist's group of products and its geographic area are considered to be a market. This concept defines the so-called product and geographic markets.⁷⁰ In short, the 1982 DOJ Guidelines define a market by postulating a hypothetical cartel composed of all those firms within a geographical area that produce the product or products of the merging firms and then ask whether the cartel could sustain a hypothetical 5% increase for each product of each merging firm. If the cartel could not sustain the price increase due to competition from other firms, those other firms are included in the cartel and so on until such a price increase could be sustained. The firms in this hypothetical cartel comprise the market.

Although the DOJ stated in its 1984 Revised Guidelines that "[p]erhaps the single most important contribution of the 1982 Guidelines was the development of a clear, economically sound

the Supreme Court in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

69. See 1984 DOJ Guidelines, *supra* note 16, § 2. In *Brown Shoe Co.*, the Supreme Court said that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demands between the product itself and substitutes for it." 370 U.S. 294, 325 (1962).

70. The DOJ product and geographic market definition was published a year after and seems to have been influenced by Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981). See also F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE*, 60 (2d ed. 1980).

framework for defining markets within which to analyze mergers,"⁷¹ its market definitions are the most criticized and least successful aspect of the Guidelines.⁷² Critics immediately complained that postulating a rigid five percent increase over the prevailing price is arbitrary in three ways. First, there is no theoretical justification for choosing exactly five percent.⁷³ (Why not three, eight or ten percent?) In its Revised Guidelines, the DOJ responded to that criticism by stating that it "may at times postulate a price increase that is much larger or smaller than five percent, depending on the nature of the industry involved."⁷⁴

Second, since the DOJ market definition employs prevailing prices,⁷⁵ the higher the prices that the merging firms charge relative to marginal cost, the easier it is for distant firms to compete in the relevant market, and thus, the broader the market definition.⁷⁶ Wide markets will include more competitors and make the merger appear more competitive than it is in actuality and less likely to be challenged. Thus, DOJ market definitions are theoretically biased in favor of more lenient treatment of mergers in markets in which existing firms already have market power.

Third, the DOJ market definition is vulnerable to the same criticism that the Supreme Court's analysis in *United States v. E.I. duPont de Nemours & Co.*⁷⁷ (the Cellophane case) is subject to. In *duPont*, the Court assumed that products are substitutes just because they exhibit a high cross elasticity of demand⁷⁸ at prevailing prices.⁷⁹ In the Cellophane case, there may have been a high

71. See *Statement Accompanying Release of Revised Merger Guidelines* 1984 DOJ Guidelines, *supra* note 16, § 1.

72. The 1982 Guidelines' use of hypothetical firms is inconsistent with commercial reality. Harris & Jorde, *supra* note 61, at 465; Ordovery & Willig, *The 1982 Department of Justice Merger Guidelines: An Economic Assessment*, 71 CALIF. L. REV. 535, 540 (1983).

73. Ordovery & Willig, *supra* note 72, at 540.

74. See *Statement Accompanying Release of Revised Merger Guidelines* 1984 DOJ Guidelines, *supra* note 16, § 1.

75. Although the 1982 DOJ Guidelines did not define the "price" for which an increase would be postulated, the 1984 DOJ Guidelines specify "prevailing prices." See *Statement Accompanying Release of Revised Merger Guidelines* 1984 DOJ Guidelines, *supra* note 16, §§ 1, 2.11.

76. Harris & Jorde, *supra* note 61, at 483-84.

77. 351 U.S. 377 (1956).

78. See D. GREENWALD, *ENCYCLOPEDIA OF ECONOMICS* 331 (1982). Cross elasticity of demand "concerns the relation between the quantities bought of one commodity as a function of the price of another. The demand for commodity A is a function of the price of commodity B." *Id.*

79. For example, an increase in the price of lamb, when the price of pork remains constant, will tend to increase the quantity of pork demanded. E. MANSFIELD, *MICROECONOMICS: THEORY AND APPLICATIONS*, 127 (5th ed. 1985).

cross elasticity of demand among the several products only because the monopolist of cellophane was following profit maximizing behavior, i.e., the monopolist may have raised the price of cellophane until consumers were just willing to shift to substitute products (e.g.s, wax paper, aluminum foil), which they would have considered to be inferior to cellophane if all products were priced at their respective marginal costs. Thus, cellophane and its substitutes may have been more aptly described as related, but contained in different economic submarkets. In order to assess whether products exhibiting a high cross elasticity of demand are substitutes, one would have to know the relationship between the prevailing prices and marginal costs.⁸⁰ However, if that information were available, one would have enough information to measure market power directly and could dispense with the indirect three step process of market definition, concentration level measurement, and evaluation of other factors. Use of the DOJ's market definition is even more impractical than the measurement of cross elasticity in the Cellophane case because it requires information concerning the measure of cross elasticity where a hypothetical monopolist raised its price by a hypothetical amount.⁸¹

The hypothetical nature of the DOJ market definition results in at least two other serious problems. First, since the DOJ market definition considers all responses to a price increase likely to occur within a year, it looks to the future and therefore requires data that in most instances is not available.⁸² (For example, it would require data on the likely reaction of sellers located outside the current selling area, who could divert supplies to the area but who have not done so in the past and data on the likely reactions of sellers capable of switching production to the relevant product within one year but who have not made such a switch in the past).⁸³ Second, the hypothetical nature of the DOJ's market definition renders it extremely volatile, fluctuating according to as-

80. H. PETERSON, *BUSINESS AND GOVERNMENT* 71 (2d ed. 1985).

81. Harris & Jorde, *supra* note 61, at 481.

82. Ordovery & Willig, *supra* note 72, at 541.

83. When the DOJ revised its Guidelines in 1984, the period for determining whether production substitution by other firms is likely to occur in response to a "small but significant and nontransitory" increase in price was changed from six months to one year to conform with the time period used to identify firms that are in the relevant geographic market.

"In determining whether any of these [demand and supply] responses are probable, the department usually must rely on historical market information as the best, and sometimes the only, indicator of how the market will function in the future. It is important to note, however, that the Guidelines are fundamentally concerned with probable future demand or supply responses." This state-

sumptions of how firms outside of the provisional product and geographic markets will respond to a small but significant and nontransitory price increase.

The 1982 DOJ market definition employs Chicago School style, ideal behavioral assumptions: "that buyers and sellers immediately recognize the price increase and believe that it will be sustained for the foreseeable future."⁸⁴ Such assumptions, which ignore information imperfections, opportunistic and strategic behavior, and the risks involved in making a commitment to a selling effort based on a small price increase that may or may not be transitory, in theory nearly always overstate the bounds of both product and geographic markets in relation to the result in the actual marketplace. Critics of the DOJ market definition have often argued that the DOJ markets would be broader than the economically relevant markets and would result in a systematic understatement of market shares used in calculating market level concentration.⁸⁵

In practice, since it is not always possible to control the assumptions of those who are asked to speculate on likely response of other firms to a small price increase, the DOJ markets may as easily understate as overstate the economically relevant markets.⁸⁶ Two recent merger cases, one in which the government overstated a geographic market and the other in which it understated the product market will illustrate this point.

The DOJ's market definition was held to be too broad in *United States v. Virginia National Bankshares, Inc.*,⁸⁷ a case that involved a merger of two banking organizations located in a remote mountainous county in southwestern Virginia. The DOJ alleged that the two banks were horizontal competitors in the same geographic market despite the facts that the two areas were on opposite sides of a mountain eight miles apart and were cut off from each other in winter. The DOJ tried to prove its cases by offering surveys in which bank customers were asked to state their likely response to a five percent price rise.⁸⁸ The court rejected the

ment is tantamount to an admission that the hypothetical market definition will often be abandoned in practice. See 1984 DOJ Guidelines, *supra* note 16, § 2.

84. See 1982 DOJ Guidelines, *supra* note 15, § IIA n.10.

85. Harris & Jorde, *supra* note 61, at 465; Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of The Antitrust Laws*, 71 CALIF. L. REV. 575, 586-87 (1983).

86. Werden, *Market Delineation and the Justice Department's Merger Guidelines*, 1983 DUKE L.J. 514, 572-73.

87. 1982-2 Trade Cas. (CCH) ¶ 64,871, 72,351-53 (W.D. Va. 1982).

88. See Wertheimer, *DOJ Tries Out its 5-Percent Geographic Market Test*, Legal

DOJ's survey and concluded that the two banks were in two separate geographic markets; i.e., the DOJ market definition overstated the economically relevant market. In his oral opinion, the district judge, sitting in Big Stone Gap, Virginia, castigated the DOJ's economic expert on grounds that the survey results and his testimony were so contradicted by the facts that he must either have been ignorant or have taken the case purely for monetary reward.⁸⁹

On the other hand, the DOJ's product market definition was held to be too narrow in *United States v. Calmar, Inc.*,⁹⁰ a case which involved a merger between two firms in the dispenser/sprayer industry. On the basis of surveys, in which those interviewed speculated that they were unlikely to shift between "dispensers" (mechanical pump devices that fit on the top of containers and dispense liquid in the container by use of finger pressure on the pump) and "sprayers" (similar mechanical pump devices that emit a fine spray or droplets of liquid) in response to small but significant and nontransitory increase in price, the DOJ alleged that there were two separate product markets, sprayers and dispensers. A district court rejected the DOJ's market definitions on the ground that they were too narrow and concluded that the relevant product market was the dispenser/sprayer market.⁹¹ With respect to the survey testimony, the court said:

Of necessity, the government's testimony was anecdotal in nature—the observations of a few of the many hundreds and perhaps many thousands of users of dispensing devices.^[92] The testimony reflected in part the

Times (Washington), Aug. 30, 1982 at 17, col. 1; see also Baker & Blumenthal, *supra* note 7, at 347 n.146.

89. 1982-2 Trade Cas. (CCH) ¶ 64,871, 72,352 (W.D. Va. 1982).

90. 612 F. Supp. 1298 (D.N.J. 1985) (denying government's motion for preliminary injunction against proposed acquisition).

91. *Id.* at 1304-05; see also *United States v. Continental Can Co.*, 378 U.S. 441 (1964) (Supreme Court held illegal merger between second largest manufacturer of metal containers with third largest manufacturer of glass containers). The Supreme Court reversed a district court which had held that glass and metal containers constituted separate lines of commerce. *Id.* at 457.

92. *Cf.* *Frank Salz & Sons, Inc. v. Hart Schaffner & Marx*, 1985-2 Trade Cas. (CCH) ¶ 66,768, 63,178 (S.D.N.Y. 1985) (acquisition of financially troubled competitor by men's "better quality" tailored suit manufacturer held not to be in violation of section 7 of Clayton Act due to inadequate proof of market definition). The plaintiff was not able to demonstrate the necessary lack of demand—or supply-side substitutability between better quality and other kinds (budget, moderate, or best) of suits so as to show a distinct market. *Id.* at 63,719. The only evidence supporting lack of reasonable interchangeability was the subjective and unsupported opinions of various sales and merchandising personnel, who testified

inertia of any manufacturer to change its methods or source of supply. It did not reflect the choice which would be made by new users of dispensing devices entering the market for the first time, an event which must occur with great frequency.⁹³

In effect, the court stated that the DOJ understated the product market because its survey did not reflect the ideal market behavioral assumptions underlying the DOJ Guidelines.

Finally, consider two cases: in one the court adopted the market definitions in the DOJ Guidelines; in the other the definitions were rejected. In *Federal Trade Commission v. Occidental Petroleum Corp.*,⁹⁴ a district court expressed approval of the DOJ Guidelines.⁹⁵ The court denied the FTC's preliminary injunction to block a merger between firms which produce polyvinyl chloride (PVC).⁹⁶ In discussing the relevant geographic market the court tracked the language of the DOJ Guidelines. "A geographic market . . . will be broader than the United States whenever a small but significant and non-transitory price increase by all domestic producers would be unprofitable because of sales lost to foreign suppliers."⁹⁷ The court determined two relevant product mar-

from experience that people who bought expensive suits would not buy cheap suits. *Id.* at 63,720 (emphasis added). Since price was the sole discriminating characteristic by which to differentiate the markets, there was no way to analyze whether an increase in price would affect demand for the suits. *Id.* Moreover, there were manufacturers of lower quality suits who were capable of converting to the better quality market. *Id.* In *Carter Hawley Hale Stores, Inc. v. The Limited, Inc.*, a district court held that neither "moderate-priced women's fashion apparel" nor "special-sized women's apparel" constitute a relevant product market for section 7 purposes because there is no industry or expert agreement on the meaning of these terms. 587 F. Supp. 246 (C.D. Cal. 1984). Moreover, the court said that the proffered product market definition does not adequately address two aspects of competition which must be considered when defining any product market: demand and supply substitutability. *Id.* With respect to demand substitutability, if specialty stores in a shopping mall raised their prices, consumers could shop in a "panoply of other locations". *Id.* at 68,638. With respect to supply substitutability, garment manufacturers could easily switch production at little or no cost from size 7 to size 16 dresses. *Id.* at 68,638.

93. *United States v. Calmar Inc.*, 612 F. Supp. 1298, 1304 (D.N.J. 1985).

94. 1986-1 Trade Cas. (CCH) ¶ 67,071 (D.D.C. 1986).

95. *Id.* "The . . . remedy of divestiture remains a possibility, but on this record and the Department of Justice Guidelines the Court expresses doubt that the mere increase in concentration of domestic production will support such a result." *Id.* at 62,509.

96. *Id.* at 62,512.

97. *Id.* at 62,512-13. "Without specifically defining a global market, the Court has concluded that external production and capacity does influence the domestic price structure, and may well become a more significant factor in the immediate future." *Id.* at 62,509. The court said given that a five-year trend in

kets: suspension PVC resins and dispersion PVC resins rather than three as alleged by the FTC. The reason involves product interchangeability on the demand side and the ability of producers of similar products to switch production in the event of meaningful price increases. The court found substitution among different PVC resins ("Suspension homopolymer and copolymer resins are made with virtually the same equipment, with switch over between the two requiring not much more than the turning of a valve"), substitution between PVC resins and other plastic resins, and substitution between PVC end products and end products made from other materials.⁹⁸

The DOJ's market definition was useful in *Occidental Petroleum* because it was one of the few real-world cases in which buyers had considered the difference between a product and its next best substitutes⁹⁹ to be very small even when the products were priced at marginal cost: there is a high cross elasticity of demand even if each of product is priced close to marginal cost. In short the DOJ market definition was useful in this case because there was no cellophane problem, i.e., no issue as to whether related products were in the same market or in different economic submarkets. As an analysis of product and geographic market definitions in the DOJ's own consent decrees demonstrates, commercially relevant submarkets¹⁰⁰ (e.g., vidicon tubes,¹⁰¹ drapery hardware,¹⁰² etc.¹⁰³) are as prevalent as broad textbook markets,¹⁰⁴ (e.g., na-

increased imports and a substantial excess production capacity domestically and abroad would disrupt any attempt at collusion by domestic producers, a lessening of competition was highly unlikely. *Id.* at 62,512-13.

98. *Id.* "The boundaries of these markets, however, are not rigid due to the substitution that does occur. In addition to substitution among the different PVC resins, there is some substitution between PVC resins and other plastic products made from other materials." *Id.* at 62,512.

99. In order to avoid the Cellophane problem discussed above, a next best substitute is one in which there is a high cross elasticity of demand even when both products are charging prices equal to marginal cost.

100. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (relevant geographic market within which to assess effects of acquisition must "correspond to the commercial realities" of the industry and be economically significant").

101. *United States v. General Elec. Co.*, 1986-2 Trade Cas. (CCH) ¶ 67,382 (D.D.C. 1986).

102. *United States v. Newell Cos., Inc.* 1986-1 Trade Case. (CCH) ¶ 66,945 (D. Conn. 1985).

103. Many of the markets involved in the consent decrees are narrow; commercially relevant submarkets as opposed to homogeneous product markets where the difference between a product and next best substitute is small. Representative examples of narrow markets in the consent decrees are as follows: vidicon tubes, milling paddy rice grown in California, gabions used in river control,

tional markets for nylon¹⁰⁵ and beer¹⁰⁶). The markets in thirty consent decrees entered into by the DOJ from 1981 to 1986 are analyzed in Appendix 1.

Monfort of Colorado, Inc. v. Cargill, Inc.,¹⁰⁷ is a typical case involving a commercially relevant submarket. In *Cargill*, both the district court¹⁰⁸ and the Tenth Circuit¹⁰⁹ unequivocally rejected the DOJ Guidelines. The Tenth Circuit stated that:

[Defendant] would have preferred that the district court use the current Justice Department Merger Guidelines, . . . both to define relevant markets and to ascertain whether the acquisition will substantially lessen competition. We agree with the district court's decision not to rely on these Guidelines. . . . The Justice Department's recent revisions of the 1982 market definition standards, . . . only strengthen our conviction that these guidelines are more useful for setting prosecutorial policy than delineating judicial standards.¹¹⁰

The district court, which determined the relevant input product market to be grain fed cattle, rejected defendants' argument that non-fed cattle are functionally and reasonably interchangeable with fed cattle. The court held that the market should not include slaughter facilities for non-fed cattle: first, only grain fed

drapery hardware used to hang drapes, air turbine starters, aviation lighting, military specification computers, etc. Other consent decrees have broad product markets but narrow geographic submarkets: e.g., nursing homes in 4 local geographic markets, beer in southeast U.S., dry-mix concrete products in the Washington-Baltimore and Philadelphia-New York City markets, waste collection in 20 localities, etc. See *infra* Appendices I and II.

104. "Perfect Competition Defined . . . Homogeneity of Product. The product offered by any seller is identical to that supplied by any other seller. . . . Because the product is homogeneous, consumers do not care from which firm they buy." W. J. BAUMOL & A.S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY*, 468 (3rd ed. 1985).

105. See e.g., *United States v. E.I. duPont de Nemours & Co., Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,479 (D.D.C. 1981).

106. See e.g., *United States v. G. Heileman Brewing Co., Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,399 (D. Del. 1983).

107. 591 F. Supp. 683 (D. Col. 1983), *aff'd*, 761 F.2d 570 (10th Cir. 1985), *reversed on other grounds*, 107 S. Ct. 484 (1986) (plaintiff did not have standing).

108. See 591 F. Supp. at 695-96. "We have considered the Merger Guidelines in the process of resolving this case. However, in determining whether the planned acquisition will violate section 7 of the Clayton Act, the Court has relied primarily on the judicial standards developed in judicial precedents arising under section 7." *Id.* at 695-96.

109. 761 F.2d at 579.

110. *Id.* (citations omitted).

cattle yield beef cuts with a consistent quality of USDA "good" or better.¹¹¹ Second, customers who purchase fed cattle are generally unwilling to buy from slaughterers who deal to any great extent in non-fed cattle.¹¹² Buyers who want better cuts of beef have apparently determined that avoiding firms which have the capability of substituting inferior products is more efficient than engaging in costly inspections.¹¹³ Third, non-fed slaughtering facilities generally lack both fabrication facilities¹¹⁴ and important economies of scale because they are smaller than facilities used to slaughter fed cattle.¹¹⁵ Fourth, fed and non-fed cattle slaughtering facilities are located in different parts of the country and do not compete because of the high transportation and shrinkage costs from shipping carcasses long distances.¹¹⁶ Fifth, the overwhelming percentage of cattle slaughtered and fabricated by the parties themselves was grain fed.¹¹⁷ Sixth, defendants' internal reports indicated their belief that fed cattle constitute a separate product market.¹¹⁸ With respect to the relevant output market, the court determined that the relevant product market was vacuum-packed boxed beef. It rejected defendant's arguments for broadening the output market to include all beef whether sold as carcass,¹¹⁹ ground,¹²⁰ or boxed beef. With respect to both input and output product markets the district court said: "In order to

111. 591 F. Supp. at 697.

112. *Id.* at 698.

113. Whereas in *Occidental Petroleum*, the prospect of easy substitution in production increased the likelihood that the relevant products were in the same market, in *Cargill*, the prospect of easy substitution of an inferior product in place of a superior product dictated that the products be sold in separate markets.

114. "'Fabrication' is the process whereby the [animal] carcass is broken down into either whole cuts (referred to as 'primals,' 'subprimals' and 'portions') or ground beef." 591 F. Supp. at 690.

115. *Id.* at 696, 698.

116. *Id.* at 699-700.

117. *Id.* at 697.

118. *Id.* at 698.

119. *Id.* at 702. Although the ultimate consumer is probably unable to distinguish between carcass beef and boxed beef, they are not functionally interchangeable to the retail store owners and the hotel and restaurant industry buyers because of the reduced transportation cost, reduced labor cost and longer shelf life of boxed beef over carcass beef. Carcass beef sales currently account for only 16% of fed cattle slaughter. The market share of boxed beef has risen from zero to 80% in the past 20 years and the trend will apparently continue. *Id.*

120. *Id.* "Although ground beef and boxed beef are, in one sense, interchangeable as food stuffs, the two products are not functionally interchangeable in several important respects." *Id.* The hotel and restaurant industry only uses the better cuts of beef, i.e., boxed beef. *Id.* Boxed beef and ground beef are

justify expanding a relevant product market due to interchangeability of production facilities, it is necessary to focus on what manufacturers *actually* do as opposed to what they *could* do."¹²¹

The NAAG Guidelines, on the other hand, define markets as courts traditionally have, using hard evidence, that is, historical data.¹²² Thus, where the DOJ market definition standard is hypothetical, speculative and future oriented,¹²³ the NAAG market definition is concrete, practical and past oriented.¹²⁴

In the NAAG Guidelines, the relevant product market includes each product produced in common by the merging firms, plus comparably priced products that 75% of the customers of the merged firms consider to be suitable substitutes.¹²⁵ The rele-

products of different production facilities. *Id.* Third, there are substantial price differentials between boxed beef and ground beef. *Id.*

121. 591 F. Supp. at 697 (emphasis in original); see also *FTC v. Coca-Cola Co.*, 1986-2 Trade Cas. (CCH) ¶ 67,208 at 61,019-20 (D.D.C. 1986). The district court, in discussing the relevant product market, said:

In view of the structure and operation of [the carbonated soft drink] industry, the relevant line of commerce in evaluating the acquisition is assuredly not what Coca-Cola Company suggests—"all . . . beverages including tap water"—even though it is true that other beverages quench thirst and that "[t]he human stomach can consume only a finite amount of liquid in any given period of time." The market or submarkets delineated need not be this broad (anything potable) nor as unduly narrow (concentrate flavoring) as lawyers or economists may choose to suggest.

Id.

122. *United States v. Marine Bancorp.*, 418 U.S. 602 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1964); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

123. In practice as opposed to theory, the differences between the DOJ and NAAG Guidelines should not be overemphasized. The DOJ Guidelines state:

In determining whether any of these [supply and demand] responses are probable, the department usually must rely on historical market information as the best, and sometimes the only, indicator of how the market will function in the future. It is important to note, however, that the Guidelines are fundamentally concerned with probable future demand or supply responses. . . . In most cases, the Department's evaluation of a merger will focus primarily on firms that currently produce and sell the relevant product. In addition, the Department may include other firms in the market if their inclusion would more accurately reflect probable supply responses.

See *Market Definition and Measurement*, 1984 DOJ Guidelines, *supra* note 16, §§ 2, 2.2.

124. Economic theory demonstrates that a firm's geographic market will be discrete, its shape being a function of: (1) the firm's costs and prices, with lower costs and prices meaning a larger territory for a firm; (2) the firm's transportation rates; discriminatively low rates that do not increase with the distance shipped enlarge the territory of a firm. See NAAG Guidelines, *supra* note 2, § 3; Fetter, *The Economic Law of Market Areas*, 39 QUART. J. ECON. 520 (1924).

125. The NAAG Guidelines state that markets are defined from the per-

vant geographic market area encompasses the production locations from which the customers of the merging parties purchase 75% of their supplies of the relevant product.¹²⁶ The 75% figure is, of course, just as arbitrary as the DOJ's hypothetical 5% price increase which it used in the 1982 Guidelines. By leaving out as many as 25% of the suppliers of the merged firm's customers, the 75% figure may understate economically relevant markets and should be construed flexibly when cases warrant.¹²⁷ It is a textbook proposition that demand is more elastic in the long run than in the short run.¹²⁸ That is to say, markets tend to contain more substitutes in the future. Since the NAAG Guidelines look to the past to inform market definition, their determination is biased toward a narrower market definition than what may actually be the economically relevant market. In contrast, the DOJ market definition is biased toward markets broader than the economically relevant ones.¹²⁹ Although the general bias of the NAAG Guidelines may be to understate markets, it may in fact overstate markets in cases where the merging firms have market power. If the price charged by the merging firms is substantially above production costs, other firms may find it profitable to incur sizable transportation costs in order to ship products into this market.¹³⁰ In that case, geographic markets would be overstated, causing market share to be understated, with the result that such mergers would be less likely to be challenged.

spective of those interests § 7 of the Clayton Act was primarily enacted to protect, i.e., the classes of consumers or (suppliers) who may be adversely affected by an anticompetitive merger ("the protected interest group"). See NAAG Guidelines, *supra* note 2, § 3; Harris & Jorde, *supra* note 61, at 18-20.

126. See NAAG Guidelines, *supra* note 2, §§ 3.1-3.22. The NAAG geographic market definition is reminiscent of that proposed by Elzinga and Hogarty. See Elzinga & Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal*, 23 ANTITRUST BULL. 1 (1978); Elzinga & Hogarty, *The Problem of Geographic Market Delineation Antimerger Suits*, 18 ANTITRUST BULL. 45, 72-76 (1973) [hereinafter Elzinga & Hogarty, *Market Delineation*].

127. Elzinga & Hogarty, *Market Delineation*, *supra* note 126, at 74-75.

128. W. BAUMOL & A. BLINDER, *supra* note 104, at 386.

129. In *United States v. General Dynamics Corp.*, the DOJ charged that the acquisition of a firm by General Dynamics would violate section 7 of the Clayton Act because the latter's share of the relevant market in coal production would be 10.9% after the merger and the concentration ratios of the leading firms would also increase. 415 U.S. 486, 499-504 (1974). The Supreme Court held, however, that the district court was justified in finding this evidence to be insufficient to sustain the Government's case, because the acquired firm's coal was tied up in long term requirements contracts and the company had very limited coal reserves. *Id.* In light of the lack of reserves, the Court thought that past production and sales figures overrated the merged firm's future market power. *Id.*

130. H. PETERSON, *supra* note 80, at 73-74.

The NAAG Guidelines would also admit evidence on product and geographic submarkets.¹³¹ This provision is supported by leading merger cases, which hold that the main criteria for defining a product or submarket are distinctive end uses, independent pricing, and customer recognition. Recent cases are in accord. In *Marathon Oil Co. v. Mobil Corp.*, the Sixth Circuit held that there were many geographic markets and submarkets for gasoline in the United States.¹³² The district court for the Northern District of California in *United States v. Acorn Engineering Co.*, held that the relevant submarket included only vandal-resistant plumbing fixtures not plumbing fixtures in general.¹³³ Again, the district court for the Northern District of Illinois in *Whithaker Corp. v. Edgar*, defined the relevant market to be motor-operated aircraft valves as opposed to the broader market of remote operated aircraft valves (including motor, pneumatic, hydraulic, solenoid, and manually operated valves).¹³⁴

In order to avoid the Cellophane problem discussed above, the NAAG Guidelines consider only comparably priced prod-

131. "Evidence of the commercial reality of such a submarket includes price discrimination, inelasticity of demand and industry or public recognition of a distinct submarket." See NAAG Guidelines, *supra* note 2, § 3.11. In *Brown Shoe Co. v. United States*, the United States Supreme Court said that when defining submarkets, courts should rely on "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U.S. 294, 325 (1962).

132. 530 F. Supp. 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982). "It seems clear that there are many geographical markets and submarkets for motor gasoline in the country. The District Court did not err in analyzing concentration ratios in defining relevant markets by state rather than limiting its consideration to the nation as a whole." 669 F.2d at 380.

133. 1981-2 Trade Cas. (CCH) ¶ 64,197 (N.D. Cal. 1981). The government's position as to the existence of a relevant market encompassing only vandal-resistant plumbing fixtures prevailed because: (1) the fixtures had peculiar characteristics and uses designed for distinct customers (use of the fixtures in jails where there is a high risk of vandalism); (2) the submarket for vandal-resistant fixtures was recognized as a separate economic entity within the industry; and (3) vandal-resistant fixture pricing and price sensitivity were distinct from those of other plumbing fixtures. *Id.* at 73,712.

134. 535 F. Supp. 933 (N.D. Ill. 1982). As an example of an extremely specialized submarket in a section 7 Clayton Act case, consider *Grumman Corp. v. LTV Corp.*, 1981-2 Trade Cas. (CCH) ¶ 64,364 (2d Cir. 1981). In *Grumman Corp.*, the court stated that "[a]s both sides point out, the carrier-based aircraft market has unusual characteristics. In this country there is only one buyer, the Defense Department. It decides which companies will be invited to submit bids for new planes. Bidding competitions occur infrequently and entail enormous costs." *Id.* at 74,679.

ucts.¹³⁵ However, by so attempting to avoid this problem, and also the problem of intractable cross elasticity disputes, the NAAG market definitions run the risk of excluding genuine substitutes that are not comparably priced. For example, consumers may choose a lower-priced product because the additional benefits of the "deluxe" model are "not worth" the higher price. If, however, the price differential between the "standard" and deluxe models narrows, at least some consumers may decide that the extra features of the deluxe model are worth the higher price. Thus, in order to avoid the Cellophane problem, the NAAG market definition runs the risk of defining markets too narrowly. Nevertheless, the NAAG's rough, but practical, approach to the Cellophane problem is preferable to the DOJ's theoretical approach which necessitates speculation concerning a number of imponderables.¹³⁶

Unlike the DOJ Guidelines, which include potential competitors (firms that have not yet supplied the market) as part of the market definition, the NAAG Guidelines take a very restrictive view of such competitors in its market definition. Before including competition which is likely to occur within one year of the merger in the relevant market, the NAAG Guidelines require hard evidence of probable supply response, the most persuasive proof of which will be a prior history of supplying the market under similar circumstances. Thus, for market definition purposes, to be recognized as potential competition, the potential competitors must have provided actual competition in the past. This method, which is tantamount to ignoring potential competition when defining markets, is the one courts have traditionally used. As the Second Circuit said in *United States v. Waste Management, Inc.*, "Although potential competition resulting from easy entry can as logically be appraised as part of market definition, . . . we will utilize the traditional analysis of defining the market in terms of existing competitors."¹³⁷

135. In *FTC v. PPG Industries, Inc.*, the district court held that in addition to being functionally interchangeable, glass and acrylic transparencies frequently compete for contracts to supply airframe manufacturers and, therefore, are in the same market. 628 F. Supp. 881 (D.D.C. 1986).

136. A persistent dilemma of antitrust is that simple rules are proclaimed to be irrational, whereas rational complex rules are criticized for want of simplicity. Kauper, *The 1982 Horizontal Merger Guidelines: Of Collusion, Efficiency, and Failure*, 71 CALIF. L. REV. 497, 500 (1983).

137. 743 F.2d 976 (2d Cir. 1984) (citation omitted). For a discussion of *Waste Management*, see *infra* notes 194-201 and accompanying text. In *Tenneco, Inc. v. FTC*, an FTC conclusion that the acquisition of the second largest manufacturer of replacement shock absorbers by a diversified firm that manufactured

With respect to foreign competition, the 1982 DOJ Guidelines stated that the DOJ would be "somewhat more cautious, both in expanding market boundaries beyond the United States and in assessing the likely supply response of specific foreign firms . . . [which] may be subject to additional constraints not present in the purely domestic context."¹³⁸ However, in its 1984 Guidelines, the DOJ stated that "[t]oday's revisions clarify that, in general, the Guidelines' standards relating to the definition of markets and the calculation of market shares will apply equally to foreign and domestic firms."¹³⁹ This change, like all other revi-

automotive parts and exhaust systems eliminated actual potential competition in a highly concentrated market for replacement shock absorbers was not supported by substantial evidence that the acquiring firm had viable options to make a toehold acquisition or was likely to enter the market *de novo* in the near future and was reversed. 689 F.2d 346 (2d Cir. 1982). The point was made in a strong dissenting opinion that existing shock absorber manufacturers were aware that the acquiring firm had publicly demonstrated a strong and growing interest in entering the industry, that circumstantial evidence is the lifeblood of antitrust law, that the FTC is not required, as the majority demanded, to introduce "smoking gun" evidence, and that in determining whether the FTC's findings are supported by substantial evidence the court may not substitute its inferences for those drawn by the FTC, provided its findings are rationally based. *Id.* at 358-64 (Mansfield, J., dissenting). In *Chem-Nuclear Systems, Inc. v. Waste Management, Inc.*, a corporate takeover target was denied a preliminary injunction against a tender offer for its shares because of an inadequate showing of likelihood of success on the merits of its section 7, Clayton Act claims. 1982-2 Trade Cas. (CCH) ¶ 64,860 (W.D. Wash. 1982). Actual competition between the firm and its takeover target in an eight-state regional market for hazardous waste management services appeared improbable in view of transportation costs. In addition, the firm was not perceived by industry members as a potential entrant.

In *Republic of Texas Corp. v. Board of Governors of the Federal Reserve System*, a bank-merger application that had been denied was returned to the Board of Governors of the Federal Reserve System for more detailed findings as to whether the acquiring bank holding company and the to-be acquired commercial bank were actual potential competitors whose combination might violate the section 7 of the Clayton Act standard incorporated in section 3 of the Bank Holding Company Act. 649 F.2d 1026 (5th Cir. 1981). Although the Board had made adequate findings as to the oligopolistic character of the relevant banking market, it failed to identify explicitly other potential entrants in the market, to offer a persuasive rationale demonstrating that the acquiring bank holding company would probably have entered the market independently, or to make a reviewable finding on whether the holding company's independent entry would have resulted in a substantial likelihood of ultimately producing deconcentration or other significant procompetitive effects. *Id.* at 1044-47.

138. "For example, changes in exchange rates, tariffs, and general political conditions may limit the ability of such firms to respond to domestic price increases." 1982 DOJ Guidelines, *supra* note 15, § IIC.

139. The Guidelines also stated that "no foreign firm will be excluded from the market solely because its sales in the United States are subject to import quotas." See *Statement Accompanying Release of Revised Merger Guidelines*, 1984 DOJ Guidelines, *supra* note 16, § 3; see also *FTC v. Occidental Petroleum Corp.*, 1986-1 Trade Cas. (CCH) ¶ 62,071 (D.D.C. 1986). "Without specifically defining a

sions in the DOJ Guidelines, resulted in a more lenient attitude by the DOJ towards horizontal mergers.¹⁴⁰ Although the first half of the 1980's witnessed great foreign penetration into American markets, the rapid decline of the dollar and the growth of protectionist sentiment make it likely that the 1984 Guidelines' equal treatment of foreign and domestic competition is too lenient and may already be outdated.

In the NAAG Guidelines, foreign firms presently supplying the relevant market are assigned market shares in the same manner as domestic firms, according to their actual current sales in the relevant market. However, the NAAG Guidelines go on to say that due to tariffs, quotas, fluctuation in exchange rates, and voluntary quantitative restrictions, foreign firms are inherently a less reliable check on market power than domestic firms; therefore, when such restrictions exist, the NAAG Guidelines call for a reduction of market shares based upon historical sales data.¹⁴¹ The NAAG Guidelines approach is probably more consonant with current international political reality.

VI. CONCENTRATION STANDARDS

In *United States v. Philadelphia National Bank*,¹⁴² the Supreme Court held that large market shares and high concentration levels

global market, the Court has concluded that external production and capacity does influence the domestic price structure, and may well become a more significant factor in the immediate future." *Occidental*, 1986-1 Trade Cas. (CCH), at 62,509. The court said given that a five-year trend in increased imports and a substantial excess production capacity domestically and abroad would disrupt any attempt at collusion by domestic producers, a lessening of competition was highly unlikely. *Id.* at 62,512-13.

140. The 1984 DOJ Guidelines increased the number of defenses and other factors that may reduce the significance of concentration levels from 10 to 14; added a failing division to the failing firm defense; added an efficiency defense, whereas the 1982 Guidelines indicated that the DOJ would consider efficiency claims only in "extraordinary cases." In 1984, the Guidelines changed the "five-percent market definition test to a flexible standard," defined the price for which an increase would be postulated in the market definition standard as the prevailing price (even if such price is above marginal cost), changed the Post-Merger HHI below 1000 standard from "the Department is unlikely to challenge mergers in this region" to "the Department will not challenge mergers falling in this region," changed from a "cautious" approach to applying market definition standards to foreign competitions to one of applying market definition standards equally to both foreign and domestic firms. *Statement Accompanying Release of Revised Merger Guidelines*, 1984 DOJ Guidelines, *supra* note 16, § 3.

141. See NAAG Guidelines, *supra* note 2, § 3.41.

142. 374 U.S. 321 (1963) "[W]e think that 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

will establish a *prima facie* case of an antitrust violation. Accordingly, unless there are other factors that reduce the significance of market share and concentration levels, disturbing concentration levels will lead to the conclusion that a proposed merger is anticompetitive. The DOJ Guidelines employ the Herfindahl-Hirschman Index (HHI) as its measure of market concentration.¹⁴³ The HHI is calculated by summing the squares of the individual market shares of all firms in the market. For example, for a market consisting of five firms with shares of 30, 20, 20, 15, and 15% each, the HHI is 2150 ($30^2 + 20^2 + 20^2 + 15^2 + 15^2 = 2150$). For the same market, the traditional four-firm concentration ratio, CR4, which is the sum of the market shares of the top four firms in the market, is 85% ($30\% + 20\% + 20\% + 15\% = 85\%$). Unlike the CR4 traditionally used by the courts, the HHI takes into account both the relative size of firms in a market (giving proportionately greater weight to the market shares of larger firms) and the total number of firms in a market. It approaches zero when a market is served by a large number of firms of relatively equal size, and reaches its maximum of 10,000 when a single supplier exists in the market. The HHI increases both as the number of firms in the market decreases and as the disparity in size among those firms increases.¹⁴⁴ Although there has been considerable discussion as to whether the HHI is superior to the CR4,¹⁴⁵ the correlation between the two measures is very high; one study has arrived at a correlation coefficient of 0.936.¹⁴⁶

The DOJ arbitrarily chose critical HHI thresholds of 1000 and 1800;¹⁴⁷ these thresholds correspond roughly to CR4s of

of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.* at 363 (citation omitted).

143. For a discussion of the paternity of the HHI index, see Fox, *The New Merger Guidelines—A Blueprint for Microeconomic Analysis*, 27 ANTITRUST BULL. 519, 569 (1982).

144. The premise of the HHI is the quality of performance increases as equality of size of sellers increases. *Id.* at 571; see also Adelman, *Comment on the 'H' Concentration Measure as a Numbers Equivalent*, 51 REV. ECON. & STAT. 99 (1969).

145. E. SINGER, ANTITRUST ECONOMICS 136-55 (1968); Calkins, *The New Merger Guidelines and the Herfindahl-Hirschman Index*, 71 CALIF. L. REV. 402 (1983); Dansby & Willig, *Industry Performance Gradient Indexes*, 69 AMER. ECON. REV. 249 (1979); Ordoover, Sykes & Willig, *Herfindahl Concentration, Rivalry, and Mergers*, 95 HARV. L. REV. 1857 (1982); Schmalensee, *Using the H-Index of Concentration With Published Data*, 5 REV. ECON. & STAT. 186 (1977).

146. F. SCHERER, *supra* note 70, at 58.

147. Calkins, *supra* note 145, at 417 & n.110 (William Baxter who was Assistant Attorney General for Antitrust Division when the 1982 DOJ Guidelines were issued admits the thresholds are arbitrary).

50% and 70% respectively.¹⁴⁸ The thresholds divide the spectrum of market concentration into three regions which the DOJ characterizes as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800) and highly concentrated (HHI above 1800). the DOJ Guidelines are as follows:

post-merger HHI below 1000

the DOJ will not challenge a merger¹⁴⁹

post-merger HHI between 1000 and 1800

- a) the DOJ is unlikely to challenge a merger that increases HHI less than 100 points
- b) the DOJ is more likely than not to challenge a merger that increases HHI more than 100 points¹⁵⁰

post-merger HHI above 1800

- a) the DOJ is unlikely to challenge a merger that increases HHI less than 50 points
- b) the DOJ may challenge mergers that increases HHI between 50 and 100 points depending on other factors (discussed below),¹⁵¹

148. Those are rough average figures. The CR4 cannot be converted into any single HHI but rather includes a possible range of HHI levels. For example, consider two markets with CR4 of 100%. The first is comprised of four firms, each with a market share of 25%. This yields an HHI of 2500 ($25^2 + 25^2 + 25^2 + 25^2 = 2500$). The second market is comprised of four firms with market shares of 70%, 10%, 10% and 10%. This yields an HHI of 5200 ($70^2 + 10^2 + 10^2 + 10^2 = 5200$). One thousand corresponds to a minimum CR4 of 33.5% and a maximum CR4 of 62%; 1800 corresponds to a minimum CR4 of 44.7% and a maximum CR4 of 84.5%. Weinstock, *Some Little-Known Properties of the Herfindahl-Hirschman Index: Problems of Translation and Specification*, 29 ANTITRUST BULL. 705 (1984).

149. See 1984 DOJ Guidelines, *supra* note 16, § 3.11(a). This is a change from the 1982 Guidelines which stated that the DOJ "is unlikely to challenge mergers in this region", i.e., HHI below 1000. See 1982 DOJ Guidelines, *supra* note 15, § IIIA(1)(a).

150. The increase in concentration as measured by the HHI can be calculated independently of the overall market concentration by doubling the product of the market shares of the merging firms. For example, the merger of firms with shares of 5% and 10% of the market would increase the HHI by 100 ($5 \times 10 \times 2 = 100$). The explanation for this technique is as follows: In calculating the HHI before the merger, the market shares of the merging firms are squared individually. Thus: $(a)^2 + (b)^2$. After the merger, the sum of those shares would be squared. Thus: $(a + b)^2$, which equals $a^2 + 2ab + b^2$. The increase in the HHI therefore is represented by $2ab$. See 1982 DOJ Guidelines, *supra* note 15, § IIIA.1 n.30.

151. In the 1982 Guidelines, the DOJ said that if post-merger HHI is above 1800 and the merger produces increases in HHI between 50 and 100 points, it would base its decision on a list of other factors. In the 1984 Guidelines, the DOJ said that it would be likely to challenge such mergers, "unless" its list of

c) the DOJ will challenge a merger that increases HHI more than 100 points except in “extraordinary cases” in which other factors establish that the merger is not likely substantially to lessen competition.¹⁵²

The DOJ Guidelines also contain a “leading firm proviso” to the effect that a merger between a firm, which has a market share of at least 35% and is twice as large as the second largest firm in the market, and a firm with at least a 1% market share is likely to be challenged. However, the 1984 DOJ Guidelines state that “market share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Before determining to challenge a merger, the Department will consider all other relevant factors that pertain to its competitive impact.”¹⁵³

In practice, the DOJ has not challenged mergers that are within the HHI 1000-1800 range. As of March, 1987, not one enforcement action has been instituted against a merger within the HHI 1000-1800 range in the past seven years.¹⁵⁴ Given this permissive approach of the DOJ, former Assistant Attorney General for Antitrust, Sanford Litvak, has described his approach to counseling clients in merger cases by saying, “there is virtually nothing not worth trying.”¹⁵⁵ Another former Assistant Attorney General for Antitrust, J. Paul McGrath, has suggested that given the reluctance to challenge mergers especially where ease of entry or efficiency defenses are present, the DOJ should consider raising the threshold challenge to 1800 or 2000.¹⁵⁶

The HHI and concentration ratios of the 30 consent decrees

other factors convinced it that the merger would not be likely substantially to lessen competition. See 1984 DOJ Guidelines, *supra* note 16, § 3.11(c). The different formulations in the 1982 and 1984 Guidelines are to the same effect.

152. See *id.* § 3.11.

153. See *id.*

154. 52 Antitrust & Trade Reg. Rep. (BNA) No. 1308, at 605 (March 26, 1987). For example, the General Motors-Toyota joint venture in the subcompact automobile market would increase the HHI from 1293 to 1773, an increase of 480 points. Weinstock, *supra* note 148, at 711.

155. 49 Antitrust & Trade Reg. Rep. (BNA) No. 1245, at 1056 (Dec. 19, 1985).

156. *Id.* at 1056. In *FTC v. Coca-Cola Co.*, the largest carbonated soft drink company in the United States attempted to acquire the fourth largest, a merger that surely no one would have thought worth trying previous to 1980. 1986-2 Trade Cas. (CCH) ¶ 67,208 (D.D.C. 1985). In this case, a district court granted a preliminary injunction against the merger on a showing that the defendant would enjoy a 42% post-merger share of the market, a 4.2% addition. *Id.* In the *South and South Western United States*, its post-merger share would be over 50%. *Id.* The CR4 would be 76.6 and the HHI would increase from 2306 to 2390

that are analyzed in Appendix I bear out these statements: of the 12 consent decrees for which HHI figures are given in competitive impact statements,¹⁵⁷ all have at least one relevant market in which the HHI is substantially above 1800; of the 17 consent decrees, for which concentration ratios are given (but not HHI), all but one are correspondingly high, having CR4s exceeding 70%. In one consent decree the competitive impact statement gives neither HHI nor concentration ratios. The consent decrees also reflect the DOJ's "fix it first" or curative divestitures approach to mergers.¹⁵⁸ Under this approach, rather than limiting its alternatives to either challenging or not challenging a merger, the DOJ is willing to discuss partial divestitures that would make a merger acceptable. There are suggestions in at least two cases that the curative divestiture approach to mergers may be subject to abuse due to the possibility of sham divestitures.¹⁵⁹

An investigation of consent decrees from 1981-1986 supports the following generalizations: four consent decrees involve

(concentration figures calculated from table 1986-2 Trade Cas. at 61,020). *Id.* at 61,020.

157. "Simultaneously with the filing . . . [of any proposal for a consent judgment submitted by the United States under the antitrust laws], unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement. . . ." 15 U.S.C. § 16(b) (1982).

158. N.Y. Times, Sept., 16, 1986, § IV, at 2, col. 1.

159. National Union Elec. Corp. v. Emerson Elec. Co., 1981-2 Trade Cas. (CCH) ¶ 64,274 (N.D. Ill. 1981). The merger of two competitors in the highly concentrated chain saw market, was not challenged by the government on condition that one of the merging firms—also a manufacturer of other lines of power tools—sell, its chain saw business to a third party. *Id.* at 74,197. The merged companies' subsequent decision to begin marketing chain saws through the power tool distribution system, could be viewed as a possibly unlawful horizontal merger only if the sale of the chain saw assets had been a sham transaction. *Id.* at 74,198. A third party's charges under section 7 of the Clayton Act were not dismissed, but a preliminary injunction was denied. *Id.*

White Consolidated Industries, Inc. v. Whirlpool Corp., involved two stock purchases under which a dishwasher manufacturer would 1) acquire a competitor's dishwasher marketing (including brand names) and manufacturing subsidiaries, and 2) as a curative divestiture would (a) sell the manufacturing subsidiary to a dishwashing marketer and (b) agree to be supplied from the manufacturing subsidiary it transferred. 612 F. Supp. 1009 (E.D. Ohio), *vacated*, 619 F. Supp. 1022 (N.D. Ohio 1985), *aff'd*, 781 F.2d 1224 (6th Cir. 1986). The HHI made a *prima facie* case (HHI for dishwashers ranging from 1,599 to 2,572 and post-transaction HHIs ranging from 1,844 to 3,832). However, over plaintiff's objections that the supply contract placed the dishwashing marketer to whom the manufacturing subsidiary was transferred in the position of a subcontractor for the merged firm, a district court allowed the merger after the parties to the supply contract agreed to an amendment of the contract so as to allow the marketer-manufacturer to control its own production and to become an independent force in the market.

regional or national firms that competed in many local markets (nursing homes,¹⁶⁰ banks,¹⁶¹ waste collection services,¹⁶² and textile rental services¹⁶³). The DOJ ended its challenge to these mergers when the firms consented to a divestiture of plants in localities where the merger would result in HHIs substantially in excess of 1800. One can assume that because of inherent multiplicant economies of scale,¹⁶⁴ the DOJ did not demand total divestiture in these local market extensions. Two consent decrees involved national brewers which wanted to strengthen their position in regional markets; these mergers were allowed subject to divestiture in regions where the HHI would substantially exceed 1800.¹⁶⁵ Two consent decrees involved large diversified firms that when combined would have had a near monopoly in a single product line which each firm produced.¹⁶⁶ In each case, the merger was not challenged subject to divestiture of that product line by one of the diversified firms. The 1981-1986 consent decrees of the DOJ are analyzed in Appendix II.

The natural question to ask is, why has the DOJ enforcement policy apparently been at odds with the stated thresholds in its own Guidelines? The answer may be found in the inconsistent methodology or schizophrenic nature of the DOJ Guidelines. On the one hand, the DOJ's market definition standards show the influence of the Chicago School: the market definition is theoretically ideal, but in practice, unworkable.¹⁶⁷ On the other hand, the HHI thresholds that divide the spectrum of market concentration into three regions show the influence of the "Harvard School":¹⁶⁸ the HHI thresholds are theoretically arbitrary, but definite and

160. *United States v. Beverly Enter.*, 1984-1 Trade Cas. (CCH) ¶ 66,052 (M.D. Ga. 1984).

161. *United States v. National Bank and Trust Co. of Norwich*, 1984-1 Trade Cas. (CCH) ¶ 66,074 (N.D.N.Y. 1984).

162. *United States v. Waste Management Inc.*, 743 F.2d 976 (D.D.C. 1985).

163. *United States v. ARA Servs., Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,209 (S.D. Ohio 1982).

164. D. DEWEY, *THE THEORY OF IMPERFECT COMPETITION: A RADICAL RECONSTRUCTION* 42-59 (1969).

165. *United States v. G. Heileman Brewing Co., Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,399 (D. Del. 1983); *United States v. The Stroh Brewery Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,037 (D.D.C. 1982).

166. *United States v. General Elec. Co.*, 1986-2 Trade Cas. (CCH) ¶ 67,382 (D.D.C. 1986); *United States v. Allied Corp.*, 1985-2 Trade Cas. (CCH) ¶ 66,867 (D.D.C. 1985).

167. The DOJ product and geographic market definition was published a year after and seems to have been influenced by Landes & Posner, *supra* note 70. Landes and Judge Posner are two leading Chicago School authors.

168. Posner, *supra* note 8.

practical. The tripartite division of the DOJ Guidelines is reminiscent of the tripartite characterization of the spectrum of market concentration suggested by two Harvard School authors, Carl Kaysen and Donald Turner, albeit with significantly lower thresholds. They characterized industries as either unconcentrated (CR8 below 33%), Type II [or loose] Oligopoly (CR8 between 33 and 50%), or Type I [tight] Oligopoly (CR8 above 50%, CR20 = 75%).¹⁶⁹

In general, the characterization of the spectrum of market concentration by a tripartite division is an acceptance of the Harvard School's structure-conduct-performance paradigm,¹⁷⁰ which states that there is a "causal flow from market structure . . . to conduct and performance."¹⁷¹ That is, increasing concentration causes noncompetitive conduct and results in poor performance and/or allocative inefficiency. Chicago School authors reject this paradigm as well as the possibility of determining practical thresholds.¹⁷² For example, consider the testimony of Professor George Stigler of the University of Chicago in *Marathon Oil Co. v. Mobil Corp.*,¹⁷³ concerning the interpretation of the most important element in market structure, the concentration ratio: "what level do we worry about? And I must say that we have no precise point which is a critical point at which you must worry."¹⁷⁴ The affinity of the Reagan Administration's DOJ for the Chicago School's antitrust analysis, much of which denigrates the very paradigm on which the concentration thresholds are based, is one factor that tends to explain why the DOJ has apparently not fol-

169. C. KAYSAN & D. TURNER, ANTITRUST POLICY 27 (1959).

170. The elements of market structure are: number of sellers and buyers, product differentiation, barriers to entry, cost structures, vertical integration, and conglomerateness; the elements of conduct are: pricing behavior, product strategy and advertising, research and innovation, plant investment, and legal tactics; the elements of performance are: production and allocative efficiency, progress, full employment, and equity. J. BAIN, INDUSTRIAL ORGANIZATION 36-38, 295-301, 310-15 (1968); F. SCHERER, *supra* note 70, at 3-6; Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265 (1949).

171. F. SCHERER, *supra* note 70, at 5.

172. INDUSTRIAL CONCENTRATION: THE NEW LEARNING ch. 4 (H. Goldschmid, H. Mann & J. Weston, eds., 1974) [hereinafter INDUSTRIAL CONCENTRATION]; Brozen, *The Antitrust Task Force Deconcentration Recommendation*, 23 J. LAW & ECON. 279 (1970); Kauper, *supra* note 136, at 506 (Since Chicago School authors argue that there is no correlation between concentration and performance, it follows they would argue that the 1982 Guidelines rest on same faulty premises.); Paulter, *supra* note 32, at 605-49.

173. 530 F. Supp. 315 (N.D. Ohio), *aff'd*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

174. 669 F.2d at 381.

lowed its own concentration Guidelines. Another factor may be some recent and controversial scholarship to the effect that three large firms may be sufficient for an industry to behave competitively.¹⁷⁵ In a footnote to its 1982 Guidelines the DOJ acknowledged this scholarship but said it was not presently prepared to act on it:

There is some economic evidence that, where one or two firms dominate a market, the creation of a strong third firm enhances competition. The Department has considered this evidence but is not presently prepared to balance this possible gain against the certainty or substantially increased concentration in the market.¹⁷⁶

The DOJ's recent actions indicate that it may now be acting on this evidence.

The NAAG Guidelines closely track the DOJ Guidelines, adopting both the HHI measure of concentration and the DOJ's thresholds of 1000 and 1800. An action to challenge a merger is likely in the HHI 1000-1800 range for increases of more than 100 points, and is likely when HHI is above 1800 for increases of more than 50 points.¹⁷⁷ An innovation in the NAAG Guidelines is an attempt "to objectively factor in the dynamic conditions in an industry."¹⁷⁸ An action to challenge a merger is likely if the post-merger HHI is between 1000 and 1800 (above 1800), the merger increases the HHI by more than 50(25) points, and during the 35 months prior to the proposed merger the HHI has increased by more than 100(50) points. The NAAG Guidelines contain a leading firm proviso similar to that in the DOJ's Guidelines. There is also a provision that a merger between a firm with a market share of 20% or more and a new, innovative firm in a market with a moderate to high or very high concentration will be challenged. The NAAG Guidelines also state that notwithstanding the HHI thresholds, a merger will not be challenged if other factors concerning ease of entry, history of collusive or oligopolis-

175. Kwoka, *The Effects of Market Share Distribution on Industry Performance*, 61 REV. ECON. & STAT. 101 (1979); Kwoka & Ravenscraft, *Collusion, Rivalry, Scale Economies, and Line of Business Profitability* (Washington, D.C.: FTC, Bureau of Economics, 1982); Paulter, *supra* note 32, at 642-49.

176. See 1982 DOJ Guidelines, *supra* note 15, § IIIA.1.(c) n.33.

177. See NAAG Guidelines, *supra* note 2, §§ 4.2-4.3.

178. See *id.*, § 4.1. Support for this provision is found in the Supreme Court's opinion in *Brown Shoe Co. v. United States*, in which it said "[w]e cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency." 370 U.S. 294, 315 (1964).

tic behavior, or efficiencies “compel the conclusion that the merger is not likely substantially to lessen competition.”¹⁷⁹

Given the policy statement in the NAAG Guidelines, one can assume that the drafters of the NAAG Guidelines intend that the state attorneys general will initiate enforcement actions in the moderately concentrated region (HHI between 1000 and 1800);¹⁸⁰ as pointed out above, the DOJ has not initiated actions in this range. The Sixth Circuit’s opinion in *Marathon Oil Co. v. Mobil Corp.*,¹⁸¹ in 1981, is an example of an opinion that is closer in spirit to the NAAG than to the DOJ Guidelines. The court upheld a temporary injunction against a merger of two oil companies because it said that the merger would result in concentration ratios in relevant markets and submarkets from 10% to 20%, within the range believed to confer market power and other anticompetitive behavior.

Thus far, the few attempts by state and local governments to enforce the antitrust laws have met with mixed results. In *City of Pittsburg v. May Department Stores Co.*¹⁸² a city, county, and state brought charges under section 7 of the Clayton Act against the proposed merger of the area’s two dominant department store chains. In a settlement, the chains were permitted to merge on condition that one store divest a division within two years. On the other hand, in *State of California v. Texaco, Inc.*,¹⁸³ an FTC consent order settling charges that the merger of oil companies violated section 7 was held to preempt a challenge to the merger by the State of California under its antitrust and unfair competition statutes.

VII. FACTORS AFFECTING THE SIGNIFICANCE OF MARKET SHARE AND CONCENTRATION

In *United States v. General Dynamics Corp.*,¹⁸⁴ the Supreme Court said: “statistics concerning market share and concentration, while of great significance, [are] not conclusive indicators of anticompetitive effects.” Other factors may either reduce¹⁸⁵ or

179. See NAAG Guidelines, *supra* note 2, § 4.3.

180. *Cf. United States v. Continental Can Co.*, 378 U.S. 441, 462 (1964) (it is important to prevent “even slight increases in concentration”).

181. 530 F. Supp. 315 (N.D. Ohio), *aff’d*, 669 F.2d 378 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

182. 1986-2 Trade Cas. (CCH) ¶ 67,304 (W.D. Pa. 1986).

183. 193 Cal. App. 3d 8, 219 Cal. Rptr. 824 (1985).

184. 415 U.S. 486, 498 (1974).

185. In *Stroh Brewery Co. v. Malmgren*, a district court declined to prelimina-

strengthen¹⁸⁶ the significance of market share and concentration levels. The DOJ and NAAG Guidelines take opposite approaches with respect to other factors that affect the significance of market share and concentration levels. The DOJ Guidelines take a flexible approach and consider a potpourri of other factors in addition to the HHI and the size of its increase:¹⁸⁷ e.g., ease of entry within

rily enjoy a merger between the third and seventh largest brewers in the United States (with 7.9% and 5% of the United States market, respectively) on the grounds that although the acquired company had made a *prima facie* showing through statistical data that its acquisition by a competitor would violate section 7 of the Clayton Act by increasing market concentration, it was rebutted by other factors which showed that competition would not be lessened by the proposed merger and may in fact be increased. 1982-1 Trade Cas. (CCH) ¶ 64,670, 73,641 (W.D. Wis. 1982). Factors considered by the court included geographic sales patterns, different brands and grades of beer, excess plant capacity, economics of scale, national advertising and product differentiation, the inability to fix prices, and industry structure and history. *Id.* at 73,643. This merger was also involved in a consent decree. *See United States v. Stroh Brewery Co.*, 1982-83 Trade Cas. (CCH) ¶65,037 (D.D.C. 1982). *See infra* Appendices I & II.

186. *FTC v. Bass Bros. Enterprises, Inc.*, is an example of a merger case in which other factors strengthened rather than reduced the significance of high concentration levels and high HHI. 1984-1 Trade Cas. (CCH) ¶ 66,041 (N.D. Ohio 1984). The FTC attacked two mergers in the carbon black industry. The two mergers would have reduced the number of firms in the industry from 7 to 5; the CR4 would increase from 75% to 89%, the HHI would increase from 1802 to 2320 or 518 points. Each merger alone would have increased the HHI by 200-300 points. *Id.* at 66,610. Carbon black is used in reinforcement to give rubber strength and durability. It is a unique substance for which there are no practical substitutes. Carbon black is a homogeneous, fungible product (thus, consensus on a coordinated price structure is easy to achieve). It requires specialized technology and equipment to produce. Demand is highly price-inelastic. Imports are insignificant because carbon black cannot easily be transported over water since it is hydroscopic and absorbs water. There are no signs of imminent technological change. There is an industry-wide custom of freight equalization and strong pattern of price leadership. There have been no new entrants for decades and major integrated petroleum companies have exited or are trying to exit the industry. Finally, in 1984, there was high capacity utilization with spot shortages and large price increases.

187. *See White Consol. Indus. v. Whirlpool Corp.*, 612 F. Supp. 1009 (E.D. Ohio), *vacated*, 619 F. Supp. 1022 (N.D. Ohio), *aff'd*, 781 F.2d 1224 (6th Cir. 1986). The court said:

The statistics simply require the Court to look further in examining the proposed transaction to determine whether or not it is, in fact, anticompetitive. While the statistics may appear compelling, the Court considers them to be simply a warning system which alerts regulators that there may be competitive problems with the proposed transaction. When concentrations are high and HHIs change significantly because of a transaction, those charged with maintaining competitive markets are put on notice that there may be a problem.

To rely exclusively on statistics would be to confine the Court's inquiry beyond reason, especially in a case such as this where markets are highly concentrated to begin with. The plaintiffs' argument that statistics alone should be sufficient to block this transaction virtually necessitates the conclusion that any acquisitions by any of the major firms in this industry are anti-competitive and illegal, regardless of the

two years of the merger, homogeneity-heterogeneity of the relevant product generally, conduct of firms in the market, etc. In 1984, the revised DOJ Guidelines expanded the number of other factors and defenses from 10 to 14,¹⁸⁸ allowed an efficiency defense¹⁸⁹ where the 1982 DOJ Guidelines had not,¹⁹⁰ and for the first time, included a failing division as well as the failing firm defense.¹⁹¹ In short, the revised DOJ Guidelines consider virtually any economic rationale that would demonstrate that concentration levels overstate the merged firms' actual power.¹⁹² As a result of the 1984 revisions, the DOJ Guidelines are more lenient and provide many more opportunities for defense.¹⁹³

*United States v. Waste Management, Inc.*¹⁹⁴ is an extreme example of other factors outweighing high concentration levels. In

facts surrounding such an acquisition. The Court considers that view to be extreme and inconsistent with the letter and the spirit of the Department of Justice's merger guidelines.

612 F. Supp. at 1021.

188. Changing Market Conditions (added in 1984), Financial Condition of Firms in the Relevant Market (added in 1984), Special Factors Affecting Foreign Firms (added in 1984), Ease of Entry, Homogeneity-Heterogeneity of the Relevant Product Generally, Degree of Difference Between the Products and Locations in the Market and the Next-Best Substitutes, Similarities and Differences in the Products and Locations of the Merging Firms, Information About Specific Transactions and Buyer Market Characteristics, Ability of Small or Fringe Sellers to Increase Sales (added in 1984), Conduct of Firms in the Market, Market Performance, Efficiencies, Failing Firm Defense, Failing Division Defense (added in 1984). Compare 1982 DOJ Guidelines, *supra* note 15, § III B-C with *id.*, §§ 3.2-3.5.

189. In the 1984 Guidelines, the DOJ stated that "the Department will consider . . . efficiencies in deciding whether to challenge the merger. See 1984 DOJ Guidelines, *supra* note 16, § 3.5; see also Muris, *The Efficiency Defense Under Section 7 of the Clayton Act*, 30 CASE. W. RES. L. REV. 381 (1980); Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699 (1977); Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 68 AMER. ECON. REV. 18 (March 1968), with a correction in 69 AMER. ECON. REV. 954 (1969).

190. The 1982 Guidelines indicated that the DOJ would consider efficiency claims only in "extraordinary cases". See 1982 DOJ Guidelines, *supra* note 15, § V.A; see also *FTC v. Great Lakes Chem. Corp.* 528 F. Supp. 84 (N.D. Ill. 1981) (failing company defense applied even though acquired business was division of larger corporation that was successful in other areas).

191. See 1984 DOJ Guidelines, *supra* note 16, §§ 5.1-5.2.

192. The 1982 DOJ Guidelines are not simple rules but read like a chapter in an industrial organization text; i.e., they leave a wide range of discretion. Kauper, *supra* note 136, at 508; see Bronstein, *A Review of the Revised Merger Guidelines*, 29 ANTITRUST BULL. 613, 614 (1984). The 1984 Guidelines cause the DOJ to act like a regulatory agency. But see Clanton, *Focusing the Inquiry: Specificity in Merger Guidelines and Elsewhere*, 71 CALIF. L. REV. 430, 431 (1983) (common criticism of 1982 DOJ Guidelines, that it considers too many factors and is therefore too vague and general, is mistaken).

193. Miller, *supra* note 16.

194. 743 F.2d 976 (2d Cir. 1984).

Waste Management, the Second Circuit held that although the merged firm's market share in the Dallas trash collection and disposal market was 48.8% (CR4 increased from 68.1% to 75.2%, and HHI increased from 1493 to 2676¹⁹⁵), this market share did not accurately reflect future market power in view of the ease of entry by potential competitors into the Dallas market.¹⁹⁶ It did not accept the government's claims that economies of scale outweigh ease of entry or that consumers may prefer Waste Management's services, even at a higher price, over those of a new entrant because of its "proven track record."¹⁹⁷ Although the court acknowledged that there is no persuasive authority for allowing low entry barriers and potential competition to overcome a strong *prima facie* showing of high concentration,¹⁹⁸ it said that the United States Supreme Court has held that appraisal of the impact of a proposed merger upon competition must take into account potential competition from firms not presently active in the relevant product and geographic markets.¹⁹⁹ The Court then used the DOJ Guidelines as an estoppel against the government:

Finally, the *Merger Guidelines* issued by the government itself not only recognize the economic principle that ease of entry is relevant to appraising the impact upon competition of a merger but also state that it may override all other factors²⁰⁰. . . . If the Department of Justice routinely considers ease of entry as relevant to determining

195. 588 F. Supp. 498 (S.D. N.Y. 1983), *rev'd*, 743 F.2d 976 (2d Cir. 1984).

196. 743 F.2d 976 (2d Cir. 1984). The court found that

(1) It is so easy to enter the trash collection market that the relative competitive strength of a company cannot properly be measured solely with respect to the existing companies in the market, but must also take into account potential new entrants. (2) Over the past several years there has been a trend toward deconcentration, involving steady entry into the market by new companies. . . .

[The District Court] specifically found that individuals operating out of their homes can acquire trucks and some containers and compete successfully 'with any other company.'

Id. at 981-82, 983; *cf.* *United States v. Calmar Inc.*, 612 F. Supp. 1298 (D.N.J. 1985) (district court refused preliminary injunction against proposed acquisition in dispenser/sprayer industry on grounds that potential entry would prevent unjustified price increases by merged companies).

197. 612 F. Supp. at 1303.

198. *Id.* (quoting *United States v. Waste Management, Inc.* 588 F. Supp. 498 (S.D.N.Y. 1983), *rev'd*, 743 F.2d 976 (2d Cir. 1984)).

199. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-38 (1973); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

200. "Ease of Entry If entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time, the Depart-

the competitive impact of a merger, it may not argue to a court addressing the same issue that ease of entry is irrelevant.²⁰¹

The NAAG Guidelines place primary reliance on the HHI and the size of its increase, that is, they emphasize market structure at the expense of other factors that may affect the significance of market shares and concentration levels. Support for this general approach is found in *United States v. Philadelphia National Bank*,²⁰² in which the Supreme Court held that large market shares are a convenient proxy for appraising the danger of monopoly power resulting from a horizontal merger.²⁰³ Where the DOJ Guidelines opted for flexibility at the cost of predictability, the NAAG Guidelines stressed the policy objective of maintaining a decentralized economy by limiting the other factors that affect the significance of market share and concentration levels to four: ease of entry within *one* year of the merger²⁰⁴ (as opposed to the DOJ's *two* year period), a history of collusion or oligopolistic behavior,²⁰⁵ a failing firm defense,²⁰⁶ but not a failing division de-

ment is unlikely to challenge mergers in that market." See 1984 DOJ Guidelines, *supra* note 16, § 3.3.

201. *United States v. Waste Management, Inc.* 588 F. Supp. 498 (S.D.N.Y. 1983), *rev'd*, 743 F.2d 976, 982-83 (2d Cir. 1984).

202. 374 U.S. 321 (1963). Note the court stated the following:

We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume that some price might have to be paid.

Id. at 371.

203. Under its rationale, a merger resulting in a larger market share is presumptively illegal, rebuttable only by a demonstration that the merger will not have anticompetitive effects. *Id.* at 362-63.

204. In *Laidlaw Acquisition Corp. v. Mayflower Group, Inc.*, the nation's second largest private contractor for busing of school children was granted a preliminary injunction against its largest competitor's hostile takeover offer. 636 F. Supp. 1513 (S.D. Ind. 1986). In view of the combined market share of the companies, which would have reached 85.9% in the Pacific Northwest, the acquisition would have produced a firm controlling an undue share of the relevant markets. Significant barriers to new entry existed in the form of skyrocketing insurance costs, three-to-five-year contracts, high capitalization costs, performance bond and experience requirements, and other bid specification requirements.

205. See, e.g., *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1975 (1987). The Seventh Circuit held that substantial

fense because the drafters believed that the latter is "highly susceptible to manipulation and abuse,"²⁰⁷ and an efficiency defense that is restricted to situations with a post-merger HHI of less than 1800. Support for restricting an efficiency defense is found in *Federal Trade Commission v. Proctor & Gamble Co.*²⁰⁸ Moreover, studies have found efficiency from economies of scale do not increase once a firm has a market share above 14%,²⁰⁹ and therefore, it is likely that this restriction economizes judicial resources and inflicts no costs on merging firms.

VIII. CONCLUSIONS

The DOJ and NAAG Horizontal Guidelines adopted nearly identical concentration level standards concerning mergers subject to § 7 of the Clayton Act.²¹⁰ The main differences concern: (1) policy assumptions, (2) market definition methodologies and (3) what factors other than concentration levels should affect the decision whether to challenge a merger. With respect to policy assumptions, the stated policy of the DOJ Guidelines is eclectic, giving equal weight to several goals: first to prevent increases in market power, because firms possessing such power can raise prices to consumers above competitive levels, thereby effecting a

evidence supported an FTC finding that the acquisition of two competing hospitals and management contracts for two more competitors by the largest proprietary hospital chain in the United States constituted a violation of section 7 of the Clayton Act. The acquisitions reduced the number of competing hospitals in the Chattanooga, Tennessee, market from 11 to 7; the merger made defendant the second largest provider of hospital services in a highly concentrated market, CR4 increased from 79% to 91%; Tennessee's certificate-of-need law restricted entry. The FTC's decision was also supported by the inelastic demand for hospital services and the tradition of cooperation among competing hospitals in Chattanooga. *See also* *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 371 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982). One of the reasons the Sixth Circuit gave for upholding a preliminary injunction against a merger of two oil companies was that the existence of many joint arrangements and operations among members of the oil industry already may have provided opportunity for collusion on price and output. This merger, if allowed, would enhance such possibilities of collusion.

206. *United States v. General Dynamics Corp.*, 415 U.S. 486, 507 (1974); *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971).

207. *See* NAAG Guidelines, *supra* note 2, § 6.

208. 386 U.S. 568, 580 (1967). ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition.")

209. F. SCHERER, *supra* note 70, at 91-98; *see also* Paulter, *supra* note 32, at 611-15; INDUSTRIAL CONCENTRATION, *supra* note 172, ch.2.

210. *See* 1984 DOJ Guidelines, *supra* note 16, § 3; NAAG Guidelines, *supra* note 2, § 4.

“transfer of wealth from buyers to sellers and a misallocation of resources”; second “to avoid unnecessary interference with that larger universe of mergers that are either beneficial or neutral”; and finally, to “interdict competitive problems in their incipency.”²¹¹

The NAAG Guidelines, on the other hand, contain a statement of policies which can only be read as a counterattack on the Chicago School position that allocative efficiency is the only goal of antitrust policy. The NAAG Guidelines state that allocative efficiency is subsidiary to the central purpose of section 7 which is to prevent firms from attaining market or monopoly power in order to prevent a transfer of wealth from consumers to such firms. Such mergers are to be prohibited when the trend to harmful concentration is incipient. Another goal is the prevention of excessive levels of industrial concentration because of the detrimental political and social effects of concentrated economic power.²¹²

With respect to product and geographic market definitions, the DOJ Guidelines are hypothetical and future oriented.²¹³ They tend to be biased in favor of broad markets and therefore may systematically understate market shares used to calculate market concentration, with the result that fewer mergers are challenged. Recent merger cases and consent decrees were used to demonstrate that the hypothetical and speculative market definitions of the DOJ guidelines are generally unworkable in the context of litigation.²¹⁴ On the other hand, the NAAG market definitions, which use historical data, are similar to those the courts have traditionally employed.²¹⁵ Since the NAAG market definitions are past oriented, they may be biased toward narrow markets, and therefore may overstate market shares used to calculate market concentration.²¹⁶

An analysis of recent merger cases and consent decrees demonstrated that the DOJ has apparently not been implementing the concentration standard in its own Guidelines.²¹⁷ (The

211. See 1984 DOJ Guidelines, *supra* note 16, § 1.

212. See NAAG Guidelines, *supra* note 2, § 2.

213. See 1984 DOJ Guidelines, *supra* note 16, § 2.

214. For a discussion of the market definitions in the DOJ Guidelines, see *supra* text accompanying notes 67-143.

215. See NAAG Guidelines, *supra* note 2, § 3. For a further discussion, see *supra* text accompanying notes 67-143.

216. For a discussion of these definitions, see *supra* text accompanying notes 67-143.

217. 49 Antitrust & Trade Reg. Rep. (BNA) No. 1245 at 1056 (Dec. 19, 1985). See also *supra* text accompanying notes 144-85.

NAAG, which adopted the DOJ's concentration standard, would presumably adhere more closely to it than the DOJ has.) The major reason for the inconsistency between the DOJ's stated policy and its actions may be that its Guidelines are based on the incompatible assumptions and methodologies of two rival schools of economic thought. The DOJ's market definition standard shows the influence of the Chicago School: it is theoretically ideal, but in practice, generally unworkable. The concentration level standard shows the influence of the Harvard School: it is definite and practical, but its precise critical values are arbitrary. Chicago School adherents, who tend toward advocating a laissez-faire approach to mergers, view concentration level standards with disdain; they maintain that no demonstrable relation exists between concentration and market power.²¹⁸ In practice, as demonstrated by its consent decrees and the merger cases it has prosecuted,²¹⁹ the DOJ has leaned toward the Chicago School view of mergers and has tended not to enforce its own concentration standard. The DOJ's actual policy guide may possibly be inferred from a footnote in its 1982 Guidelines where it stated that "[t]here is some economic evidence that, where one or two firms dominate a market, the creation of a strong third firm enhances competition."²²⁰ Given the reluctance of the DOJ to challenge mergers, it has been suggested that the threshold level of concentration at which mergers will be challenged should be raised.²²¹

With respect to the question of what factors other than concentration levels should affect a governmental agency's decision whether to challenge a merger, the DOJ Guidelines take a flexible approach. When the DOJ revised its Guidelines in 1984, it increased the number of other factors and defenses from ten to fourteen.²²² The other factors and defenses were probably expanded in order to both undercut its concentration standard and bring the Guidelines more in conformity to the DOJ's lenient enforcement policy. In current form, the DOJ Guidelines include virtually any economic rationale that would allow the merged

218. *Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315 (N.D. Ohio), *aff'd*, 669 F.2d 371 (6th Cir. 1981) *rev'd on other grounds*, 107 S. Ct. 484 (1987).

219. For a discussion of the DOJ's adoption of the Chicago School view of mergers, see *supra* text accompanying notes 167-76.

220. See 1982 DOJ Guidelines, *supra* note 15, § III.A.1.(c) n.33.

221. 49 *Antitrust & Trade Reg. Rep.* (BNA) No. 1245 at 1056 (Dec. 19, 1985). For a further discussion, see *supra* text accompanying notes 144-85.

222. For a discussion of sections III.B-C of the 1982 DOJ Guidelines as compared to sections 3.2-3.5 of the 1984 DOJ Guidelines, see *supra* text accompanying notes 186-212.

firms to demonstrate that concentration levels overstate their actual market power. On the other hand, the NAAG Guidelines, which emphasize the concentration level standard as a true guideline, limit the number of other factors and defenses that may affect the significance of market shares and concentration levels to four.²²³

At the beginning of this article it was noted that antimerger law has come full cycle from Justice Stewart's dissenting remark in *Von's Grocery* that "the Government always wins," to FTC Commissioner Bailey's dissenting remark in *Echlin* that "according to the 'new' economic learning, a merger is almost always legal." It remains to be seen whether recent events such as the wave of mergers which seem to be based on considerations of financial manipulation rather than productivity, the deterioration of the American balance of international trade and protectionist sentiment in Congress (which will enhance the market power of domestic firms), and the secular decline in productivity in the United States presage the need for a new activist phase in the interpretation of Section 7 of the Clayton Act. If so, the issuance of the NAAG Guidelines may well be remembered as heralding the beginning of a new phase in the cycle.

223. There are three other factors plus a failing firm defense. See NAAG Guidelines, *supra* note 2, § 5-6. For a discussion of these factors, see *supra* text accompanying notes 187-93.

APPENDIX I
CONCENTRATION RATIOS AND HHI IN THE
DEPARTMENT OF JUSTICE'S¹ CONSENT DECREES,
1981-1986

| MERGING FIRMS ² | MARKET ³ | CONCENTRATION RATIO ⁴ | HHI From-To, Increase |
|---|--|---|--|
| ----- 1986 ⁵ ----- | | | |
| General Electric; RCA ⁶ | vidicon tubes | CR2 = 90% | 7740-9852, +2116 |
| Rice Growers Ass'n of Cal; Pacific Intern'l Rice Mills ⁷ | milling paddy rice grown in California | CR2 = 63% CR4 = 95% | 3276-4874, +1598 |
| SpA. Officine Maccaffini; Terr Aqua ⁸ | gabions used in river control | CR2 = 99% | |
| Baxter Travenol Laboratories; American Hospital Supply ⁹ | parenteral solutions, fluid administration sets, flow control devices, therapeutic hemapheresis equipment, surgeons gloves | CR3 = 95% CR3 = 90% CR3 = 91% CR3 = 85% CR6 = 90% | 3648-5330, +1682 3037-4408, +1098 1919-2319, + 402 2700-4000, +1300 1667-2375, + 708 |
| ----- 1985 ----- | | | |
| Newell Co.; Stanley Drapery Hardware Division ¹⁰ | drapery hardware used to hang drapes | CR4 = 78% CR6 = 95% | 3238-2448, +790 |
| Calmar; Realex Corp. ¹¹ | sprayer, dispensers, sprayer, dispenser and triggers | CR2 = 83% CR2 = 79% CR2 = 49% | 4400-7100, +2700 4000-6400, +2400 2300-3000, + 700 |
| Allied Corp.; Signal Corp. ¹² | airturbine starters | CR4 = 90% | 3335-5310, +1975 |
| Cooper Industries; division of Westinghouse Electric Corp. ¹³ | aviation lighting | CR4 = 72% CR8 = 87% | 3107-3863, + 756 |
| Waste Management; SCA Services ¹⁴ | solid waste collection and disposal in 20 local areas, hazardous waste offsite treatment and disposal | | >1000 > +100 >2000 |

| | | | |
|--|---|--|---|
| Alcan Aluminum Ltd; Atlantic Richfield Co. ¹⁵ | aluminum can body stock | CR4 = 88% | 2300 |
| IBM Corp. Rolm Corp. ¹⁶ | mil-spec (military specification) computers | CR2 = 80% | |
| 1984 | | | |
| Nat'l Bank and Trust Co. of Norwich; Nat'l Bank of Oxford ¹⁷ | retail and commercial banking services in northern 3/4 of Chenango County, NY | CR2 = 80% | |
| Tribune and Sentinel Star Co.; 3 weekly newspapers and 2 "shoppers" owned by Luzadder Publications ¹⁸ | local print advertising Osceola County, Fla. local advertising Osceola County, Fla. | CR2 = 100% CR2 = 60% | |
| LTV Corp.; Jones & Laughlin Steel ¹⁹ | hot rolled sheets and strip steel, cold rolled sheets and strip steel, stainless cold rolled sheets and strip steel | CR2 = 21% CR2 = 22% CR2 = 47% | 871-1047, +176 953-1146, +193 2190-2898, +708 |
| American Maize-Products Co.; Bayuk Cigars ²⁰ | cigars by unit volume cigars by dollar volume | CR4 = 77% CR8 = 88% CR4 = 67% CR8 = 80% | |
| Beverly Enterprises (780 nursing homes); Southern Medical Services ²¹ | nursing homes in 4 local geographic markets | post-merger share = 73% 29% to 48% in each market | |
| 1983 | | | |
| American Brand; Ofrex Group, Ltd. ²² | home and office staplers | post-merger share = 73% CR4 = 89% | |
| British Columbia Forest Products, Ltd.; Blandin Paper Co. ²³ | Coated groundwood paper in US (used in magazines-catalogues) | CR5 = 56% CR8 = 84% | |
| G.Heileman Brewing Co.; Pabst Brewing Co., Olympia Brewing Co. ²⁴ | beer in U.S. market | CR4 = 83% | 1764-1927, + 163 |
| 1982 | | | |
| Stroh Brewery Co.; Jos. Schlitz Brewing Co. ²⁵ | beer in southeast, U.S. | CR4 = 92% | 2345-2531, + 186 |

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| ARA Services; Means Services ²⁶ | textile rental services in Cleveland-Akron- Lorain, Ohio area, Columbus, Ohio area southwest Virginia-east Kentucky area | CR4 = 59% CR4 = 60% CR4 = 68% | |
| Baldwin-United Corp.; MGIC Investment Corp. ²⁷ | private mortgage guarantee insurance | CR4 = 73% CR8 = 96% | |
| Beatrice Foods Co.; Fiberite Corp. ²⁸ | custom compounded reinforced thermoplastic, custom compounded reinforced thermosets | CR4 = 89% | (Beatrice 50%) (Fiberlite 50%) |
| Acorn Engineering Corp.; Aluminum Plumbing Fixture Corp. ²⁹ | vandal-resistant plumbing fixtures | CR2 = 100% | |
| Hospital Affiliates International; American Health Services, Inc. ³⁰ | inpatient psychiatric care provided by psychiatric hospitals and acute care hospitals not owned by State of Louisiana; submarket of private psychiatric inpatient care in all of New Orleans | | |
| 1981 | | | |
| Columbia Broadcasting System; Fawcett Publications ³¹ | mass market paperback publishing | CR4 = 53% CR8 = 81% | |
| Harvey Hubbell; Ohio Brass ³² | underground power distribution equipment utilized in coal mining | CR4 = 70% CR8 = 89% | |
| E.I. duPont de Nemours & Co.; Conoco ³³ | nylon acrylic fibers | CR4 = 88% CR2 = 76%, CR4 = 88% | |
| The Flintkote Co.; Home-Crete Division of Corsen ³⁴ | dry-mixed concrete products Wash.- Balt. market Phila.- NY market | CR2 = 47% CR2 = 72% | |

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|--|--|----------------------------|------------|
| Wheeler-Frye; Pullman ³⁵ | industrial and power plant chimneys, electric arc furnaces | CR2 = 47% CR2 = 40% | CR4 = 100% |
|--|--|----------------------------|------------|

Federal Trade Commission Consent Decree

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| Texaco, Inc.; Getty Oil Co. ³⁶ | (1) manufacture and transportation of refined light oil products; (2) wholesale distribution of oil and gasoline in northeastern U.S.; ³⁸ (3) pipeline transportation Colorado; (4) sale, pipeline transportation, and refining of heavy crude oil in California ⁴⁰ | HHI-634 of HHI- 3011, depending on assumptions ³⁷ Providence, R.I., HHI-1936 Portland, Me., HHI- 1463 NY City, HHI-2658 HHI-1202 or HHI- 2429 depending on assumptions ³⁹ HHI- 1206 |
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¹ Because of its importance in terms of size, the consent decree between the Federal Trade Commission and Texaco is included at the end of this appendix.

² The first firm is the acquiring firm, the second firm or firms are the acquired firms.

³ Unless otherwise indicated, the geographic market is nationwide.

⁴ Concentration ratios are what the post-merger ratios would be if the merger was allowed without modification.

⁵ The year is the year the consent decree was approved by the courts. Consent decrees approved in 1981 or later are considered as part of the Reagan Administration's record even if they were begun under the Carter Administration since the current administration can always drop litigation of which it does not approve.

⁶ *United States v. General Elec. Co.*, 1986-2 Trade Cas. (CCH) ¶ 67,382 (D.D.C. 1986), 51 Fed. Reg. 25754 (1986).

⁷ *United States v. Rice Growers Ass'n of Cal.*, 1986-2 Trade Cas. (CCH) ¶ 67,288 (E.D. Cal. 1986).

⁸ *United States v. S.p.A. Officine Maccaferri*, 1986-1 Trade Cas. (CCH) ¶ 67,168 (D. Md. 1986), 51 Fed. Reg. 8039 (March 7, 1986).

⁹ *United States v. Baxter Travenol Laboratories, Inc.*, 1986-1 Trade Cas. (CCH) ¶ 67,068 (N.D. Ill. 1986), 50 Fed. Reg. 50857 (Dec. 12, 1985).

¹⁰ *United States v. Newell Co.*, 1986-1 Trade Cas. (CCH) ¶ 66,945 (D. Conn. 1985), 50 Fed. Reg. 14175 (April 10, 1985).

¹¹ *United States v. Calmar, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 64,078 (D. N.J. 1985), 50 Fed. Reg. 27068 (July 1, 1985).

¹² *United States v. Allied Corp.*, 1985-2 Trade Cas. (CCH) ¶ 66,867 (D.D.C. 1985), 50 Fed. Reg. 34019 (Aug. 24, 1985).

¹³ *United States v. Cooper Indus.*, 1985-2 Trade Cas. (CCH) ¶ 66,688 (D.D.C. 1985), 50 Fed. Reg. 11019 (Mar. 19, 1985).

¹⁴ *United States v. Waste Management, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,652 (D.D.C. 1985), 49 Fed. Reg. 40679 (Oct. 17, 1984).

¹⁵ *United States v. Alcan Aluminum, Ltd.*, 1985-1 Trade Cas. (CCH) ¶ 66,427 (W.D. Ky. 1985), 49 Fed. Reg. 40454 (Oct. 16, 1984).

¹⁶ *United States v. IBM Corp.*, 1985-1 Trade Cas. (CCH) ¶ 65,439 (D.D.C. 1985), 49 Fed. Reg. 47122 (Nov. 30, 1984).

¹⁷ *United States v. National Bank and Trust Co. of Norwich*, 1984-2 Trade Cas. (CCH) ¶ 66,074 (N.D.N.Y. 1984), 49 Fed. Reg. 9630 (March 14, 1984).

¹⁸ *United States v. Tribune Co. and Sentinel Star Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,075 (M.D. Fla. 1984), 49 Fed. Reg. 5399 (Feb. 13, 1984).

¹⁹ *United States v. LTV Corp.*, 1984-2 Trade Cas. ¶ 66,133 (D.D.C. 1984), 49 Fed. Reg. 13603 (April 5, 1984).

²⁰ *United States v. American Maize-Prods. Co.*, 1984-1 Trade Cas. (CCH) ¶ 66,033 (M.D. Fla. 1983), 47 Fed. Reg. 8423 (Feb. 26, 1982).

²¹ *United States v. Beverly Enters.*, 1984-1 Trade Cas. (CCH) ¶ 66,052 (M.D. Ga. 1984), 49 Fed. Reg. 9635 (March 14, 1984).

²² *United States v. American Brands, Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,276 (S.D.N.Y. 1983), 47 Fed. Reg. 45991 (Oct. 14, 1982).

²³ *United States v. British Columbia Forest Prods., Ltd.*, 1983-1 Trade Cas. (CCH) ¶ 65,280 (D. Minn. 1983), 47 Fed. Reg. 57364 (Dec. 23, 1982).

²⁴ *United States v. G. Heileman Brewing Co., Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,399 (D. Del. 1983), 47 Fed. Reg. 56064 (Dec. 14, 1982).

²⁵ *United States v. Stroh Brewery Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,037 (D.D.C. 1982), 47 Fed. Reg. 18,445 (April 29, 1982).

²⁶ *United States v. ARA Servs., Inc.*, 1982-83 Trade Cas. (CCH) ¶ 65,209 (S.D. Ohio 1982), 47 Fed. Reg. 27164 (June 23, 1982).

²⁷ *United States v. Baldwin-United Corp.*, 1982-2 Trade Cas. (CCH) ¶ 64,788 (S.D. Ohio 1982), 47 Fed. Reg. 9591.

²⁸ *United States v. Beatrice Foods Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,698 (D. Minn. 1982), 47 Fed. Reg. 4622 (Feb. 1, 1982).

²⁹ *United States v. Acorn Eng'g Co.*, 1982-1 Trade Cas. (CCH) ¶ 64,697 (N.D. Cal. 1982), 47 Fed. Reg. 3435 (Jan. 2, 1982).

³⁰ *United States v. Hospital Affiliates Int'l, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,696 (E.D. La. 1982), 47 Fed. Reg. 1451 (Jan. 13, 1982).

³¹ *United States v. CBS, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,478 (S.D.N.Y. 1981), 46 Fed. Reg. 39916 (Aug. 5, 1981).

³² *United States v. Harvey Hubbell, Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,516 (D. Conn. 1981), 46 Fed. Reg. 47899 (Sept. 30, 1981).

³³ *United States v. E.I. duPont de Nemours & Co., Inc.*, 1982-1 Trade Cas. (CCH) ¶ 64,479 (D.D.C. 1981), 46 Fed. Reg. 41640 (Aug. 17, 1981).

³⁴ *United States v. Flintkote Co.*, 1981-1 Trade Cas. (CCH) ¶ 64,032 (D.D.C. 1981), 46 Fed. Reg. 16163 (March 11, 1981).

³⁵ *United States v. Wheelabrator-Frye, Inc.*, 1981-1 Trade Cas. (CCH) ¶ 64,018 (D.D.C. 1981), 45 Fed. Reg. 64,757 (Sept. 30, 1980).

³⁶ 49 Fed. Reg. 8553 (March 7, 1984).

³⁷ The lower HHI figures are based on the assumption of independent action by northeastern refiners who are joint owners of Colonial Pipeline, a pipeline that runs from Texas to the northeast; the higher HHI figures are based on the assumption that the northeastern refiners attempt to maximize joint profits and block expansion of the pipeline.

³⁸ These HHI figures are for terminal capacity.

³⁹ The lower HHI figure is based on capacity and assumes owners of a joint venture pipeline are competitors; the higher figures assume that the acquisition of Getty would be treated as a merger of two of the four pipelines serving Rocky Mountain, southwestern and midwestern states.

⁴⁰ If as a result of the acquisition, Texaco diverted the Getty heavy crude oil to its own refining system, it would deprive the non-integrated refiners in the San Francisco area served by the Getty trunkline of access to heavy crude oil. The HHI is calculated on that assumption.

APPENDIX II
DISPOSITION OF CONSENT DECREES OF THE
DEPARTMENT OF JUSTICE¹—1981-1986

| MERGING FIRMS ² | MARKET ³ | DISPOSITION ⁴ |
|--|--|--|
| ----- | | |
| 1986 ⁵ | | |
| General Electric; RCA | vidicon tubes | merger allowed after General Electric divests itself of tube division |
| Rice Growers Ass'n of Cal; Pacific Intern'l Rice Mills | milling paddy rice grown in California | merger not allowed, total divestiture required |
| SpA. Officine Maccaffini; Terr Aqua | gabions used in river control | merger not allowed, total divestiture required |
| Baxter Travenol Laboratories; American Hospital Supply | parenteral solutions, fluid administration sets, flow control devices, therapeutic hemapheresis equipment, surgeons gloves | merger now challenged after divestiture in the five product market areas |
| ----- | | |
| 1985 | | |
| Newell Co.; Stanley Drapery Hardware Division | drapery hardware used to hang drapes | merger not allowed, total divestiture required |
| Calmar; Realex Corp. | sprayer, dispensers, sprayer, dispenser and triggers | the DOJ lost at the district court level. ⁶ In consent decree Calmar agreed not to acquire another firm for 8 years |
| Allied Corp.; Signal Corp. | air turbine starters | merger by two diversified firms not challenged if a turbine starter business was divested from either firm |
| Cooper Industries; division of Westinghouse Electric Corp. | aviation lighting | merger not challenged, but 10-year prohibition on future mergers |
| Waste Management; SCA Services | solid waste collection and disposal in 20 local areas, hazardous waste offsite treatment and disposal | merger not challenged, but must divest in all cities where competition exists |
| Alcan Aluminum Ltd; Atlantic Richfield Co. | aluminum can body stock | Alcan allowed to retain stock but must limit interest in the joint venture to investment |
| IBM Corp.; Rolm Corp. | mil-spec (military specification) computers | merger not challenged, but IBM must divest Rolm mil-spec computer division |

1984

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|--|---|--|
| Nat'l Bank and Trust Co. of Norwich; Nat'l Bank of Oxford | retail and commercial banking services in northern 3/4 of Chenango County, NY | merger not challenged, but Nat'l Bank must divest two offices in Norwich and end legal protection that prevents other banks from opening in Norwich |
| Tribune and Sentinel Star Co.; 3 weekly newspapers and 2 "shoppers" owned by Luzadder Publications | local print advertising Osceola County, Fla. local advertising Osceola County, Fla. | merger not allowed, total divestiture required |
| LTV Corp.; Jones & Laughlin Steel | hot rolled sheets and strip steel, cold rolled sheets and strip steel, stainless cold rolled sheets and strip steel | merger not challenged, but must divest Republic's Alabama and Ohio plants and no new acquisition for 10 years |
| American Maize-Products Co.; Bayuk Cigars | cigars by unit volume, cigars by dollar volume | American allowed to buy manufacturing facilities, but not brand names |
| Beverly Enterprises (780 nursing homes); Southern Medical Services | nursing homes in 4 local geographic markets | merger not challenged, but Beverly required to divest itself of 7 nursing homes formerly owned by Southern in 4 areas plus one home owned by Beverly |

1983

| | | |
|--|--|---|
| American Brand; Ofrex Group, Ltd. | home and office staplers | merger not challenged, but American must divest one of its stapler brands and manufacturing facilities |
| British Columbia Forest Products, Ltd.; Blandin Paper Co. | Coated groundwood paper in US (used in magazines-catalogues) | merger not challenged, but Mead Corp. which owns interest in British Columbia and competes with Blandin must hold Blandin separate from Mead |
| G.Heileman Brewing Co.; Pabst Brewing Co., Olympia Brewing Co. | beer in U.S. market | merger not challenged, but Heilman must sell 2 of Pabst's 4 breweries and 1 of Olympia's 3 breweries and cannot use Pabst, Olympia, or Hamm's brand names |

1982

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|---|-------------------------|---|
| Stroh Brewery Co.; Jos. Schlitz Brewing Co. | beer in southeast, U.S. | merger not challenged, but Stroh must divest either North Carolina or Tennessee breweries |
|---|-------------------------|---|

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|---|--|--|
| ARA Services; Means Services | textile rental services in Cleveland-Akron-Lorain, Ohio area, Columbus, Ohio area southwest Virginia-east Kentucky area | merger not challenged, but Means must sell three local businesses |
| Baldwin-United Corp.; MGIC Investment Corp. | private mortgage guarantee insurance | total divestiture required |
| Beatrice Foods Co.; Fiberite Corp. | custom compounded reinforced thermoplastic, custom compounded reinforced thermosets | merger not challenged, but Fiberite must divest thermoplastics and cannot reenter business for 10 years; Beatrice enjoined from acquiring thermoplastics firm for 10 years |
| Acorn Engineering Corp.; Aluminum Plumbing Fixture Corp. | vandal-resistant plumbing fixtures | merger not challenged, but vandal-resistant plumbing in this and previous acquisitions must be divested |
| Hospital Affiliates International; American Health Services, Inc. | inpatient psychiatric care provided by psychiatric hospitals and acute care hospitals not owned by State of Louisiana; submarket of private psychiatric inpatient care in all of New Orleans | merger not challenged, but Hospital Affiliates must divest two psychiatric hospitals in local Louisiana area and agree not to acquire hospitals in local Louisiana area for 10 years |
| 1981 | | |
| Columbia Broadcasting System; Fawcett Publications | mass market paperback publishing | merger not challenged, but CBS agrees to sell its mass market paperback subsidiary and not acquire another |
| Harvey Hubbell; Ohio Brass | underground power distribution equipment utilized in coal mining | merger not challenged, but Hubbell must divest a custom underground power distribution equipment facility and no such acquisition for 10 years |
| E.I.duPont de Nemours & Co.; Conoco | nylon acrylic fibers | merger not challenged, but duPont required to purchase interest of a competitor who had an interest in a joint venture with Conoco |
| The Flintkote Co.; Home-Crete Division of Corsen | dry-mixed concrete products Wash.-Balt. market Phila.-NY market | merger not challenged, but 2 plants in Virginia and 1 in New Jersey must be divested |

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HORIZONTAL MERGER GUIDELINES

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| Wheelabrator-Frye; Pullman | industrial and power plant chimneys, electric arc furnaces | merger not challenged, but must divest chimney division of Wheelabrator and electric furnace division of either firm |
|-------------------------------|--|--|

Federal Trade Commission Consent Decree

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|--------------------------------|--|--|
| Texaco, Inc.; Getty Oil Co. | (1) manufacture and transportation of refined light oil products; | merger not challenged, but Texaco required to divest Eagle Point refinery in N.J. and must support proposals to expand pipeline to N.J., require Texaco to divest Getty's northeast marketing properties, including terminals, storage tanks and retail stations, divest Getty's pipeline, refining, and marketing properties in Rocky Mountain, southwestern and midwestern states, require Texaco to provide Getty heavy crude oil to former Getty customers until mid-1989, offer access for 10 years to Getty customers using pipeline in Los Angeles |
| | (2) wholesale distribution of oil and gasoline in northeastern U.S.; ⁷ | |
| | (3) pipeline transportation Colorado; | |
| | (4) sale, pipeline transportation, and refining of heavy crude oil in California ⁸ | |

¹ Because of its importance in terms of size, the consent decree between the Federal Trade Commission and Texaco is included at the end of this Appendix.

² The first firm is the acquiring firm, the second firm or firms are the acquired firms.

³ Unless otherwise indicated, the geographic market is nationwide.

⁴ Citations to the cases and to the competitive impact statements are given in Appendix I, *supra*.

⁵ The year is the year the consent decree was approved by the courts. Consent decrees approved in 1981 or later are considered as part of the Reagan Administration's record even if they were begun under the Carter Administration since the current administration can always drop litigation of which it does not approve.

⁶ *United States v. Calmar, Inc.*, 1985-1 Trade Cas. (CCH) ¶ 66,588 (D. N.J. 1985).

⁷ These HHI figures are for terminal capacity.

⁸ If as a result of the acquisition, Texaco diverted the Getty heavy crude oil to its own refining system, it would deprive the non-integrated refiners in the San Francisco area served by the Getty trunkline of access to heavy crude oil. The HHI is calculated on that assumption.

