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Unilateral Effects Analysis in Assessing Anti-Competitive Mergers: The Judicially Approved New Approach to Challenging Mergers

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UNILATERAL EFFECTS ANALYSIS IN ASSESSING ANTI-COMPETITIVE MERGERS: THE JUDICIALLY APPROVED NEW APPROACH TO CHALLENGING MERGERS

I. INTRODUCTION: ANTITRUST UNILATERAL EFFECTS

Domestic and global merger activity has escalated to new highs in recent years. Since 1991, the number of merger filings has tripled.[1] In the last year, the Federal Trade Commission ("FTC") and Antitrust Division of Department of Justice ("DOJ") have been inundated with pre-merger notification filings.[2] These antitrust enforcement agencies have responded by challenging more mergers for anti-competitive reasons.[3] Until recently, an agency challenge may not have been an alarming signal to an antitrust lawyer seeking to move a company merger forward. While the government enforcement agencies have been successful in stifling potential mergers through the force of its

1. *See FTC: FTC Wraps Up Record Year in Antitrust Enforcement,* M2 Presswire, Oct. 9, 1998, *available in* 1998 WL 16526888 [hereinafter *FTC Record Year*].

2. *See* Michael L. Weiner, *Surfing the Merger Wave*, 12-SUM ANTITRUST 4 (1998). In 1998, there were a record 4,643 premerger notification filings, a 25% increase over 1997. *FTC Record Year, supra* note 1, at 1. Premerger notification requirements are identified in the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, 15 U.S.C. §18a (1988). William J. Kolasky, Jr. & James W. Lowe*, The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law,* 49 ADMIN. L. REV. 889, 891 (1997). Firms have to notify the FTC and DOJ of an expected merger if the transaction is valued at $15 million or more and one firm has at least $100 million in sales or assets and at least one other firm has $10 million or more in sales or assets. *Id*.

3. *FTC Record Year, supra* note 2. Growth in DOJ merger investigations has been dramatic with 134 in Fiscal Year ("FY") 1995, 237 in FY 1996, and 277 in FY 1997. Daniel L. Rubinfeld, Antitrust Enforcement At DOJ: An Economist's Perspective, Address Before The Association of the Bar of the City of New York (Nov. 17, 1997) <http://www.usdoj.gov/atr/public/speeches/1370.htm>. Even though FTC enforcement actions have not grown at DOJ's rate (i.e., 27 in FY 1996 & 1997, and 33 in FY 1998), the number of litigated cases has surged (while averaging 1.1 litigated decisions per year from 1990 through 1996, the FTC litigated 3 cases simultaneously in the summer of 1998). *See* Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 867 (1997); *See also* Willard K. Tom, *What's Really Going On Inside The Beltway*?, Remarks Before the Insight Information Conference (Oct. 20, 1998) <http://www.ftc.gov/speeches/other/insight1.htm>. Furthermore, mergers today involve transactions that are a great deal higher in value than the typical mergers of the 1980s. Rubinfeld, *supra*.

administrative offices, the FTC and DOJ have generally chosen not to litigate to enjoin a merger.[4] The FTC and DOJ are, however, no longer allowing mergers to occur with only a few curtailing provisions in a consent decree.[5] By adding talented, experienced antitrust attorneys to their staffs[6] the agencies are foregoing the traditional market analysis approach set forth in the their 1992 Horizontal Merger Guidelines, and taking a more aggressive approach to merger enforcement.[7]

The agencies are now using new techniques in antitrust economics such as "Unilateral Effects Analysis"[8] to predict anti-competitive effects of potential horizontal mergers.[9] Prior to *FTC v. Staples*, the antitrust enforcement agencies had not convinced a court of the validity of this approach in assessing the potential harm of a merger.[10] But due to the recent judicial acceptance of

4. Sims, *supra* note 3, at 868-69.

5. *See* Tom, *supra* note 3, at 7 (noting the FTC's increased willingness to litigate in the last few years rather than bow out and accept a proposed consent decree). Willard K. Tom is Deputy Director of the Bureau of Competition at the FTC. *Id.*; *see also* Joel I. Klein, *The Importance of Antitrust Enforcement in the New Economy*, Address Before The New York State Bar Association Antitrust Law Section Program (Jan. 29, 1998), <http://www.usdoj.gov/atr/public/speeches/1338.htm> (citing the DOJ's three merger challenges in the summer of 1998 as a modern day record for the agency). Joel I. Klein is Assistant Attorney General for the DOJ Antitrust Division. *Id. See, e.g.* F.T.C. v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997); Federal Trade Comm'n v. Cardinal Health, Inc., 1998 WL 433784 (D.D.C 1998); U.S. v. Long Island Jewish Medical Center, 983 F.Supp. 121 (E.D.N.Y. 1997).

6. Weiner, *supra* note 2, at 4 (citing John R. Wilke & Bryan Gruley, *In Merger Blitz, Regulators Vie to Bust Biggest Prizes*, WALL ST. J., June 11, 1998, at B1).

7. *See* Robert H. Lande & James Langenfeld, *From The Surrogates To Stories: The Evolution of Federal Merger Policy*, 11-SPG ANTITRUST 5, 5-6 (1997).

8. The agencies state that unilateral effects surface when "merging firms [] find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output," without regard to other market competitors. Yvonne S. Quinn, *An Overview Of Merger Analysis*, 987 PLI/CORP 417, 444 (1997) (quoting 1992 Horizontal Merger Guidelines, §2.2); For a discussion of the new techniques used to evaluate unilateral effects, see *infra* Part III.B.

9. *See* Michael L. Weiner, *Explaining New Theories of Unilateral Effects*, 11-SPG ANTITRUST 4,4 (1997). Horizontal mergers involve "two [or more] firms [that] are (or could be) direct competitors, manufacturing the same product or providing the same service, and serving customers in the same general geographic market." Barbara A. Reeves, *Acquisitions and Mergers,* 1049 PLI/CORP 569, 585 (1998). Firms involved in a vertical merger are not in the same market, but "stand in a supplier-customer or manufacturer-dealer relationship." *Id*. The federal agencies focus primarily on evaluating horizontal mergers because vertical mergers are less likely to create competitive problems. *See* A.B.A. ANTITRUST SECTION, MONOGRAPH NO. 12, HORIZONTAL MERGERS: LAW AND POLICY 328 (1986) [hereinafter A.B.A. HORIZONTAL MERGERS].

10. Courts have failed to adopt unilateral effects analysis in lieu of traditional structural approach. *See, e.g.* Moore Corp., Ltd. v. Wallace Computer Services, Inc., 907 F. Supp. 1545, 1581-82 (D. Del. 1995), *discussed in* James F. Rill, *Practicing What They Preach: One Lawyer's View of Econometric Models in Differentiated Products Mergers*, 5 GEO. MASON L. REV. 393, 394, 406 (1997). Courts have also rejected agencies empirical estimations of unilateral effects

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this truncated merger analysis,[11] counsel for companies seeking to merge are well advised to determine whether the transaction is likely to be challenged on both traditional antitrust grounds and under the new unilateral effects merger analysis.

This comment explores the emergence of unilateral effects analysis in agency merger review, its recent judicial acceptance, and its impact on the antitrust practitioner. Part II of this Comment depicts the development of horizontal merger law and the government enforcement agencies' guidelines for merger analysis. After defining the basic economic principles involved in horizontal merger analysis, part II discusses the problems with the traditional market analysis approach that led the antitrust enforcement agencies to retool and embrace the unilateral effects approach. Part III describes the emergence of the unilateral effects analysis, focusing on the econometric methods developed to evaluate the competitive effects of a merger within a differentiated product industry. Part IV highlights the judicial approval of the unilateral effects analysis approach for enjoining a potentially anti-competitive merger, evaluating the holding of *Staples* and subsequent court cases, noting where the court has found an antitrust violation without a traditional definitive market definition or market concentration analysis. Having established judicial precedence for enjoining a merger based on an unilateral effects analysis, part IV identifies the problems antitrust lawyers must face to get a desired merger approved when the agencies current merger guidelines and policies do not reflect their current approach to merger review. The Comment concludes that, while the FTC and DOJ will continue to challenge mergers based on unilateral effects analysis, antitrust lawyers should be given an accurate road map and certain safeharbors from the agencies and the courts to evaluate future mergers and to avoid enjoinment.

analysis to support the identification of a narrow markets under a traditional structural approach. *See infra* note 105 and accompanying text. While the DOJ has reviewed and challenged several differentiated product mergers based on anti-competitive unilateral effects evidence obtained from recently developed simulation models, these cases were settled with consent decrees calling for significant merger modifications. *See* discussion *infra* Part III.C. Worried that a court would not give much weight to econometric estimations of unilateral effects, the FTC had not "tr[ied] out this new approach in a courtroom" until *Staples*. Joe Sims, *Making Sense of Staples and Boeing/McDonnell Douglas*, 1997-AUG ANDREWS ANTITRUST LITIG. REP. 3, 5 (1997).

11. *See* SERDAR DALKIR & FREDERICK R. WARREN-BOULTON, *Prices, Market Definition, and the Effects of Merger: Staples-Office Depot (1997)*, in THE ANTITRUST REVOLUTION 143-44 (John E. Kwoka, Jr. & Lawrence J. White, eds., 3rd ed. 1998).

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II. DEVELOPMENT OF HORIZONTAL MERGER ENFORCEMENT

A. *Traditional Market Approach Prior To 1992 Horizontal Merger Guidelines*

Enacted in 1914 and significantly amended in 1950,[12] Section 7 of the Clayton Act is the primary government enforcement mechanism for preventing anti-competitive mergers and acquisitions.[13] The Act prohibits those combinations "where in any line of commerce" or relevant product market "in any section of the country" or relevant geographic market, the effect of the combined businesses "may be substantially to lessen competition, or to tend to create a monopoly."[14]

Prior to the 1950 amendments of the Clayton Act, merger enforcement was largely ineffective because the Supreme Court refused to "read into the Clayton Act restrictions it felt did not exist."[15] Interpreting the power of the amended Clayton Act, the Supreme Court took a more aggressive approach to merger enforcement in *Brown Shoe Co. v. United States*.[16] *Brown Shoe* provided enforcement agencies with factors to evaluate the effects of a potential merger,[17] particularly in regards to defining the existence of a submarket or product market within the broader product market.[18] The factors which should be examined to determine if a submarket exists include: "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

12. *See* Brian Golden, *The Evolution of Horizontal Mergers and the 1992 Merger Guidelines,* 28 NEW ENG. L. REV. 159, 170, 173 (1993).

13. 15 U.S.C. § 18 (1994) *noted in* Reeves, *supra* note 9, at 576. Mergers can also be challenged under section 1 of the Sherman Act, 15 U.S.C. § 1, "which prohibits 'contracts, combinations, or conspiracies in restraint of trade,' or section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits 'unfair methods of competition' and 'unfair acts or practices'." Reeves, *supra* note 9, at 576. In addition, mergers can be challenged by state attorney general through each state's own antitrust laws. *Id.* at 577, 619. In 1993, the National Association of Attorneys General (NAAG) promulgated their own horizontal merger guidelines, which differ somewhat from the federal agencies' guidelines. *Id.* at 619.

14. Samuel C. Thompson, Jr., *Introduction to this Symposium and a Guide to Issues in Mergers and Acquisitions*, 51 U. MIAMI L. REV. 533, 550 (1997) (quoting 15 U.S.C § 18). *See also,* F.T.C. v. Staples, Inc., 970 F. Supp. 1066, 1072 (D.D.C. 1997); United States v. Marine Bancorporation, 418 U.S. 602, 618-23 (1974).

15. Golden, *supra* note 12, at 172-73.

16. Golden, *supra* note 12, at 174-75 (discussing Brown Shoe Co. v. United States, 370 U.S. 294 (1962)).

17. *See* Golden, *supra* note 12, at 175-76 (discussing *Brown Shoe Co*., 370 U.S. at 311-46)

18. *Brown Shoe Co.*, 370 U.S. at 325, *analyzed in* Reeves, *supra* note 9, app. at 588-89.

vendors."[19] The Court did not, however, specify how these factors should be weighed.[20]

While the concept of a submarket within a broader market has been strongly criticized,[21] *Brown Shoe's* mandate to define the relevant market and focus on the effects of the firms' market share is still followed by the courts today.[22] But "the open-ended test of *Brown Shoe"* was abandoned in *United States v. Philadelphia National Bank* "in favor of a presumptive rule governing horizontal mergers."[23] Under this test, the government must prove the relevant market, the merging firms' market share, and the market concentration in the relevant market.[24] If these surrogates for market power are proven and there is no clear showing that the merger is unlikely to have anti-competitive effects, the merger will be enjoined.[25]

For the last thirty years, courts have adhered to the principles set forth in *Philadelphia National Bank* for evaluating mergers.[26] Flaws with this traditional approach to merger analysis have surfaced, however, including failure to account for excess production capacity in evaluating a firm's relevant market share,[27] possibility of new entrants diluting merged firm's market power,[28] and influence of dominant buyers overcoming a post-merger increase in the concentration of sellers.[29] Furthermore, because the traditional structural

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19. *Staples,* 970 F. Supp. at 1075 (quoting *Brown Shoe*, 370 U.S. at 325).

20. *Brown Shoe Co.*, 370 U.S. at 325 construed in Reeves, *supra* note 9, app. at 588-89.

21. Quinn, *supra* note 8, at 428. If a submarket is properly defined, then it should be treated as a market. *Id*. However, "if a 'submarket' does not have the attributes of a 'market', then it is irrelevant to the analysis and should be disregarded." *Id*. Courts have recognized "that the existence of submarkets may be inconsistent with the [1992 Merger] Guidelines' method for designating markets, but submarkets may still exist under the law." William T. Lifland, *Monopolies And Joint Ventures*, 1049 PLI/CORP 151, 166 (1998) (discussing Olin Corp. v. FTC, 986 F.2d 1295 (9th Cir. 1993)).

22. Gregory J. Werden, *Simulating the Effects of Differentiated Products Mergers: A Practical Alternative to Structural Merger Policy*, 5 GEO. MASON L. REV. 363, 364-65 (1997) (citing Brown Shoe, 370 U.S. at 322 n.38, 325, 343). Gregory Werden is Director of Research, Economic Analysis Group, for the DOJ's Antitrust Division. *Id*. at 363 n.a.

23. A.B.A. HORIZONTAL MERGERS, *supra* note 9, at 35, (construing United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963)); *See also* Golden, *supra* note 12, at 176-77, 180.

24. *Id.* discussed in Golden, *supra* note 12, at 177. *See also* Lande, *supra* note 7, at 5.

25. *Id. See also* Lande, *supra* note 7, at 5.

26. Werden, *supra* note 22, at 365. Werden references authority for overview of relevant cases and associated policy issues. *Id*. at 386 n.13.

27. United States v. General Dynamics Corp., 415 U.S. 486 (1974), *discussed in* Lande, *supra* note 7, at 5. Traditional structural merger analysis reliance on the merging firms' current market share can be a misleading measure of future competition when competitors' uncommitted capacity is relevant indicator of production potential. Id. at 5, 8 n.5.

28. United States v. Waste Management, Inc., 743 F.2d 976 (2nd Cir. 1984), *noted in* Lande, *supra* note 7, at 5.

29. United States v. Country Lake Foods, 754 F. Supp. 669, 673-74, 677 (D. Minn. 1990), *noted in* Lande, *supra* note 7, at 5.

approach to defining a relevant market is suited to homogenous products, the treatment of differentiated products has posed a continuing dilemma for the agencies and courts.[30] The significance of the problem of market definition under the traditional structural approach is underscored by the Supreme Court's position that "market definition generally determines the result of the case."[31] The agencies have mitigated the ambiguity with these problems to some extent in the development of Merger Guidelines.[32] In order to provide direction to businesses contemplating mergers, the DOJ produced the first Merger Guidelines in 1968, revising them in 1982 and again in 1984.[33] These guidelines did not deviate significantly from the existing case law, but provided a detailed framework and defined economic concepts that reflected the government's approach for analyzing a merger.[34] In 1982 the FTC released a statement indicating their approach to evaluating horizontal mergers was similar to the DOJ's 1982 Guidelines.[35]

B. Antitrust Enforcement Agencies' 1992 Horizontal Merger Guidelines

In 1992, the Department of Justice and the Federal Trade Commission, who share antitrust enforcement jurisdiction, jointly published their Horizontal Merger Guidelines ("Guidelines").[36] The Guidelines were developed to add

30. *See* A.B.A. HORIZONTAL MERGERS, *supra* note 9, at 258 (discussing *In re Coca-Cola Bottling Co*., 93 F.T.C. 110 (1979)). In a merger of two wine producers, the FTC was criticized for finding two differentiated wines (i.e. a dry wine and a very sweet, berry-flavored wine to be in the same market. Id. at 258, 258 n.1320; Lande, *supra* note 7, at 5, 8 n.4 (citing *In re General Motors, Corp.,* 103 F.T.C. 374 (1984)). If two leading luxury car producers are lumped into an "all new automobiles" relevant market, the merger would likely go through unchallenged instead of being blocked as anti-competitive. *Id*. at 5; *See also, infra* note 105 and accompanying text identifying court rejecting government's narrow relevant market for differentiated products merger.

31. Werden, *supra* note 22, at 363,(quoting Eastman Kodak Co. v. Image Technical Servs., Inc. 504 U.S. 451, 469 n.15 (1992)).

32. *See infra* notes 33-36 and accompanying text; s*ee also* discussion *infra* Part II.A.

33. Golden, *supra* note 12, at 180-81. While the 1982 Guidelines provided a rational framework for assessing the economic effects of a merger, this version of the DOJ's Guidelines contained certain ambiguities, which necessitated a revision in 1984. Id. at 182, 188 n.157 (citing A.B.A. HORIZONTAL MERGERS, *supra* note 9, at 45).

34. Golden, *supra* note 12, at 181, 188 n.159 (discussing FTC Statement Concerning Horizontal Mergers (June 14, 1982)).

35. Golden, *supra* note 12, at 160, 188 n.159 (discussing FTC Statement Concerning Horizontal Mergers (June 14, 1982)).

36. U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION HORIZONTAL MERGER GUIDELINES (992), *reprinted in* 57 Fed. Reg. 41,552, 41,553 (1992) [hereinafter GUIDELINES]. Section 4 of the GUIDELINES dealing with efficiencies defense to a merger challenge was revised in April 1997. *See* Reeves, *supra* note 9, at 636-37. For complete GUIDELINES, *see* Reeves, *supra* note 9, app. at 651 or 4 Trade Reg. Rep. (CCH) ¶ 13,104 (*as revised* April 8, 1997). For analyzing vertical mergers, the enforcement agencies still follow section 4 of the DOJ's 1984 Merger Guidelines. GUIDELINES, *supra*, at 41,552.

predictability to the agencies' enforcement actions.[37] These guidelines set forth a five-step analytical approach for the agencies to follow in determining the probability that the proposed merger will create or increase market power or will facilitate its exercise.[38] With increased market power, merged firms can raise and sustain prices above competitive levels either unilaterally or through coordinated interaction with other remaining competitors.[39] The traditional structural analysis for assessing a merger under the Guidelines includes the following steps: (1) market definition, measurement and concentration;[40] (2) the potential adverse competitive effects of mergers;[41] (3) entry analysis;[42] (4) efficiencies;[43] and (5) failure and existing assets.[44]

1. Market Definition, Measurement, and Concentration

The Guidelines are premised on the traditional theory that a merger will not increase market power "unless it significantly increases concentration and results in a concentrated market, properly defined and measured."[45] Thus, the first step in merger analysis is to define the market and to calculate the concentration levels in the market.[46]

The relevant market analysis includes defining the applicable product and geographic markets for the merger.[47] The relevant product market definition is based "on the micro-economic concept of cross elasticity of demand,"[48] which measures consumers' willingness to switch from one product to another in response to a price increase.[49] Hence, "market definition under the Guidelines focuses on the demand side of the market."[50] The Guidelines specifically define the relevant market as:

> a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and

37. GUIDELINES, *supra* note 36, at 41,553, 41,553 n.4.
38. GUIDELINES, *supra* note 36, at 41,553 § 0.1, discussed in Thompson, *supra* note 14, at 551.
39. GUIDELINES, *supra* note 36, at 41,553 § 0.1.
40. GUIDELINES, *supra* note 36, at 41,554 § 1.
41. *Id*. at 41,558 § 2.
42. *Id*. at 41,561 § 3.
43. *Id*. at 41,562 § 4.
44. *Id*. at 41,562 § 5.
45. GUIDELINES, *supra* note 36, at 41,554 § 1.0.
46. Thompson, *supra* note 14, at 551.
47. GUIDELINES, *supra* note 36, at 41,554 § 1.0.
48. Thompson, *supra* note 14, at 551.
49. Quinn, *supra* note 8, at 425-26.
50. Thompson, *supra* note 14, at 551.

> nontransitory' increase in price, assuming the terms of sale of all other products are held constant.[51]

Once the relevant market is defined, the market share and concentration in that market are determined by analyzing "the productive capacities of both actual competitors and certain potential competitors (i.e., 'uncommitted entrants')."[52] Firms classified as "uncommitted entrants" do not currently produce in the relevant market, but could begin producing within one year "without incurring significant 'sunk' costs of entry or exit."[53] Thus, should merged firms raise prices, these potential firms could effectively re-deploy assets quickly "to add new sources of supply to the relevant product market."[54]

2. Potential Adverse Competitive Effects

The second step in merger analysis is to ascertain if the merger raises anti-competitive concerns based on concentration and other factors in the relevant market.[55] Because concentration in the market may understate or overstate the potential anti-competitive impact of a merger, the Guidelines consider other factors such as:

> changing market conditions; the degree of difference between the products and locations in the market and the next-best substitutes; the ease by which other firms can enter the market; the nature of the product; information about market conditions, transactions, competitors and buyer and seller characteristics; and potential efficiencies that will result from the merger.[56]

In determining the probability of any anti-competitive effect, consideration is given to post-merger market concentration in conjunction with the "market structure to determine whether the market is likely to be characterized by either coordinated interactions or unilateral anti-competitive effects."[57]

The Guidelines identify three classifications for analyzing market-concentration levels based on the post-merger Herfindahl-Hirschman Index ("HHI").[58] The HHI is calculated by squaring the market shares of each competitor in the relevant market, then summing those values.[59] For example, a monopolist firm, controlling 100% of a market, would have an HHI of

51. GUIDELINES, *supra* note 36, at 41,554 § 1.0.

52. Thompson, *supra* note 14, at 551. Entry of "uncommitted entrants" into the relevant market is considered a supply-side response. Quinn, *supra* note 8, at 430.

53. *Id*. "Sunk costs are the acquisition costs of [] assets that cannot be recovered through redeployment of these assets outside the relevant . . . ." GUIDELINES, *supra* note 36, at 41,556 § 1.32.

54. Quinn, *supra* note 8, at 431.

55. Thompson, *supra* note 14, at 551.

56. Quinn, *supra* note 8, at 440.

57. Thompson, *supra* note 14, at 551.

58. *Id.* at 551-52.

59. *Id.* at 552.

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10,000.[60] Alternatively, "if each of 100 firms in a market has 1% of the market, the HHI is 100, indicating a competitive market."[61]

An agency decision to challenge a merger is predicated on "the total post-merger HHI for the market and the increase in the HHI resulting from the merger."[62] Under the Guidelines first classification, a market with a post-merger HHI below 1000 (i.e. "corresponds roughly to a 4-firm concentration level of 40%") is considered unconcentrated and a safeharbor where mergers are rarely challenged.[63] Under the second classification, a relevant market with a post-merger HHI between 1000 and 1800 (i.e. "corresponds roughly to a four firm concentration level of 70%") is judged moderately concentrated.[64] In moderately concentrated markets, a merger that produces an HHI increase of more than 100 points raises potential anti-competitive concerns.[65] To rebut these concerns, an investigation of coordinated and unilateral effects, entry conditions, efficiencies and the failing firm doctrine is required.[66]

Under the final category, a relevant market with an HHI above 1800 is deemed highly concentrated.[67] A merger that produces an HHI increase of more than 50 points is likewise presumed to create or enhance market power, a presumption of illegality that requires investigation of coordinated and unilateral effects, entry conditions, efficiencies and the failing firm doctrine to be overcome.[68]

If, therefore, the post-merger aggregate market concentration and the resulting increase in concentration raise the possibility of a competitive concern, "the second step proceeds to an analysis of whether the merger is likely to lead to coordinated interactions or unilateral anti-competitive effects."[69] If anti-competitive concerns are found, the analysis proceeds to the next step to determine if entry into the market would make the anti-competitive effects unlikely to occur.[70]

3. Entry Analysis

The next step under the Guidelines examines "whether entry into the market by 'committed entrants' would be timely, likely and sufficient to

60. *Id*.
61. *Id*.
62. Thompson, *supra* note 14, at 552.
63. *Id*.
64. *Id.*
65. Quinn, *supra* note 8, at 438.
66. Thompson, *supra* note 14, at 552.
67. *Id.*
68. Quinn, *supra* note 8, at 438-39.
69. Thompson, *supra* note 14, at 552.
70. *Id*.

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deconcentrate the market."[71] Committed entrants are defined as new competitors that incur significant sunk costs upon entry and exit.[72] If entry into the market is so easy that market participants would prevent the exercise of market power, then the agencies may not challenge the merger "[e]ven if the merger appears to be anti-competitive after an analysis of concentration levels and the other oligopoly factors."[73]

4. Efficiencies

Under the Guidelines' fourth step, if entry considerations do not offset the possibility of the merging firms wielding increased market power, the agencies will examine merger efficiencies.[74] The agencies will not consider efficiencies that could have been achieved without the firms combining.[75] "Cognizable efficiencies" are efficiencies that have been verified as merger specific and that "do not arise from anti-competitive reductions in output or service."[76] A merger will not be challenged "if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anti-competitive in any relevant market."[77]

5. Failure and Exiting Assets

The Guidelines' fifth step is the last defense to an agency decision to challenge a merger.[78] Under the failing firm defense, the merger can still be approved if one of the firms involved in the merger can prove that: 1) it is on the verge of failing; 2) it cannot reorganize in bankruptcy; 3) no alternative purchasers are forthcoming; and 4) the firm's assets would exit the relevant market if it is not acquired.[79]

71. *Id.*

72. Thompson, *supra* note 14, at 552.

73. *Id.*

74. *Id.* Possible efficiencies to be gained from a merger include "economies of scale, plant specialization, integration of production facilities, decreased costs of freight, administrative or other costs . . . ." Don Lloyd Cook, *The Economic Analysis of Mergers*, 16 J. PUB. POL. & MARKETING 353 (1997) (book review).

75. GUIDELINES, *supra* note 36, at 41,562 § 4.

76. Thompson, *supra* note 14, at 553.

77. *Id.*

78. *Id.*

79. Kevin J. Arquit & Richard Wolfram, *Mergers & Acquisitions: United States Government Antitrust Analysis and Enforcement,* 1049 PLI/CORP 459, 478 (1998).

III. EMERGENCE OF UNILATERAL EFFECTS ANALYSIS TO EVALUATE THE COMPETITIVE EFFECTS OF POTENTIAL MERGER

A. *Origin And Popularity of Unilateral Effects Analysis*

While the antitrust enforcement agencies have placed increased emphasis on unilateral effects analysis in recent years,[80] the government's concern with and "treatment of differentiated products mergers can be traced back at least fifteen years" to the Baxter Antitrust Division's development of the DOJ's 1982 Guidelines.[81] While addressing the possibility of collusion, the DOJ's 1982 Guidelines state the fundamental concept behind the government's current approach to unilateral effects:

> In markets with highly differentiated products, the Department will consider the extent to which consumers perceive the products of the merging firms to be relatively better or worse substitutes for one another than for other products in the market. . . . If the products of the merging firms are particularly good substitutes for one another, the Department is more likely to challenge the merger.[82]

Within the 1992 Horizontal Merger Guidelines, the FTC and DOJ officially coined the term, "unilateral effects," in context with analyzing mergers involving differentiated products.[83] In addition, the government for the first time specifically distinguished when and how a potential merger would be judged anti-competitive based on coordinated interaction or unilateral effects.[84] Under the 1992 Guidelines, unilateral effects analysis of differentiated products "is based on an evaluation of whether the merging firms' products are relatively close or distant substitutes in the differentiated product space such that the merger of the two firms will give the firm greater pricing flexibility."[85] Using new econometric[86] tools and computerized point-of-sale scanner data certain unilateral effects of a differentiated products merger can be predicted, such as: the degree to which consumers consider

80. Tom, *supra* note 33, at 7.

81. Weiner, *supra* note 9, at 4.

82. *Id*. (quoting 1982 Merger Guidelines, § III.C.1.c.); s*ee also* Tom, *supra* note 3, at 7 (noting that 1984 Merger Guidelines, § 3.413, contained similar language identifying that the DOJ would challenge a differentiated products merger).

83. Quinn, *supra* note 8, at 470 (citing GUIDELINES, *supra* note 36, at 41, 560 § 2.21).

84. Tom, *supra* note 33, at 7.

85. Quinn, *supra* note 88, at 470-71.

86. "'Econometrics' is 'the application of mathematical form and statistical techniques to the testing and quantifying of economic theories and the solution of economic problems.'" Note, *Analyzing Differentiated-Product Mergers: The Relevance of Structural Analysis*, 111 HARV. L. REV. 2420, 2437 n.6 (1998) [hereafter Harvard Note] (quoting Webster's Third New International Dictionary 720 (1981)). For a discussion of econometric estimations and merger simulations for evaluating unilateral effects, see *infra* Part III.B. and Part III.C.

particular products close substitutes, the degree to which certain products limit the pricing of industry competitors, and the degree to which mergers cause prices to rise when these constraints are removed.[87]

Unilateral effects analysis using econometric techniques is now the most common method of merger analysis for the antitrust enforcement agencies.[88] When evaluating a merger involving differentiated products, the agencies rely on econometric techniques to analyze unilateral effects as opposed to a "traditional (homogenous) Merger Guidelines analysis" for three principle reasons.[89] First, "collusion among producers of differentiated products is often unlikely," because firms in a differentiated product market compete over dimensions other than price, making "collusive agreements difficult to reach."[90] Second, within a differentiated product market, firms usually provide a wide spectrum of products that are distinguished both in product features and price levels.[91] Hence, "drawing a definitive line between products 'inside' and 'outside' the relevant market can be problematic."[92] Third, even where a market can be carved out, "market shares may provide a misleading standard by which to evaluate the competitive significance of differentiated products and the price-constraining influence the products have on one another."[93] Without a specific relationship between market share and the effects of a merger on price, a presumption of illegality based on HHI index cannot theoretically be found in a differentiated product market.[94]

B. Federal Agencies' Econometric Methods For Measuring Unilateral Effects

Rather than struggle to define the relevant market and make structural inferences to analyze a merger involving differentiated products,[95] the antitrust

87. Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, 11-SPG ANTITRUST 21, 21 (1997).

88. *Id*.

89. Christopher A. Vellturo, *Creating An Effective Diversion: Evaluating Mergers With Differentiated Products*, 11-SPG ANTITRUST 16, 16 (1997).

90. *Id*.

91. *Id*.

92. *Id*.

93. *Id*.

94. Werden, *supra* note 22, at 367-68.

95. Thomas Overstreet et al., *Understanding Econometric Analysis of the Price Effects of Mergers Involving Differentiated Products*, 10-SUM ANTITRUST 30-1, 33 n.3 (1996). Both DOJ and FTC have used empirical methods in lieu of structural analysis to investigate mergers involving differentiated products. *Id*. Economists with the DOJ and FTC have even suggested that the agencies and courts enjoin such mergers based on "econometrically predicted (unilateral) price increases." *Id.*; s*ee also* Gregory J. Werden, *Simulating Unilateral Competitive Effects from Differentiated Products Mergers*, 11-SPG ANTITRUST 27, 27 (offering that merger simulation "can replace the marketshare-based presumptions").

enforcement agencies developed several methods to evaluate merging firms' "unilateral incentives and opportunities to raise price."[96] Each method follows the same simplified three-stage process:[97] 1) estimate demand parameters such as own-price and cross-price elasticities;[98] 2) calculate post-merger prices based on the estimated demand parameters; and 3) interpret the results in combination with other qualitative information[99] such as "the testimony of industry participants" and "business documents."[100] It is necessary to derive demand parameters because the ability of merging firms to increase prices unilaterally depends on the elasticities of demand and supply facing the merging firms.[101] Without sufficient data to create and feed a sophisticated economic simulation model, the agencies' economists created empirical models to "estimate elasticities and predict unilateral market power with a reduced data set."[102]

While these empirical models provide econometric price estimations to initially gauge the unilaterally anti-competitive effects of a merger,[103] those predictions are limited, especially when used to delineate a relevant market for the court as part of a traditional structural approach to enjoin a differentiated product merger.[104] Because the agencies' demand elasticities translations into market delineation conclusions are often disputed by the merging firms'

96. Overstreet, *supra* note 95, at 31 (presenting approaches for estimating demand elasticities and parameters to capture unilateral effects). *See also* Carl Shapiro, *Mergers with Differentiated Products*, 10-SPG Antitrust 23 (1996) (explaining basic Diversion Ratio (i.e., estimate of merging firms' own-price and cross-price elasticities) approach for deducing unilateral competitive effects); Werden, *supra* note 95, at 27 (discussing merger simulation as opposed to empirical models as a superior method for predicting a merging firms' ability to unilaterally raise price).

97. Harvard Note, *supra* note 86, at 2425.

98. Own-price elasticity measures "the extent to which a firm or brand will lose sales as its relative prices rise . . . ." Overstreet, *supra* note 95, at 33 n.10. Cross-price elasticity measures "the extent to which one brand will lose sales to [another brand] as relative prices change. . . ." *Id*.

99. Harvard Note, *supra* note 86, at 2425.

100. Shapiro, *supra* note 96, at 29 n.12.

101. Harvard Note, *supra* note 86, at 2425 (*noted in* 2A Phillip Areeda et al., Antitrust Law P 507, at 103 (rev. ed. 1995)).

102. *Id*. at 2425. The more common empirical models created by the agencies are: the "Almost Ideal" Demand System Model, the Antitrust Logit Model , and the Residual Demand Elasticity Model . *Id*. at 2437 n.34.

103. Overstreet, *supra* note 95, at 32-33 (noting DOJ's use of ALM Model and FTC's use of RDE Model to "influences first impressions, if nothing else."). As earlier as the mid-eighties, the FTC used empirical techniques to evaluate the "attempted acquisitions of Dr Pepper by Coke and of Seven Up by Pepsi," although the econometric estimations were not used in subsequent litigation. *Id*. at 33 n.21.

104. Werden, *supra* note 22, at 371-74. Werden discusses the limitations of using elasticity estimates to "glean something about likely price and welfare effects of mergers" due to the difficulty in convincing a judge as to the significance of those effects and how they were derived. *Id.* at 373-74.

economic experts, courts have not been willing to accept the agencies' narrow "relevant market" definition when based primarily on weak econometric estimations.[105] Even when adequate, reliable data is available, these empirical models can still lead to erroneous predictions.[106] These empirical models assume demand elasticity is constant,[107] which means "consumers' willingness to switch products does not change regardless of the price."[108] This underlying assumption can result in overestimating post-merger price increases when an anti-competitive merger generates a significant change in quantity of the relevant product.[109]

To overcome this problem, DOJ economists developed a merger simulation, "a procedure through which the estimated demand parameters [from the empirical models] are combined with pre-merger prices and outputs, and processed systematically through a conventional economic model of short-run profit maximization."[110] The simulation predicts post-merger prices and quantities from which unilateral anti-competitive effects can be measured.[111] By processing the demand estimates through a simulation, an analysis of the post-merger results are more precise and objective, making it easier for a court to understand.[112] While merger simulations can be performed using a reduced data set,[113] more realistic results are achieved using "detailed, high-frequency

105. *See* United States v. Gillette Co., 828 F. Supp. 78, 82, 82-84 (D.D.C. 1993) (rejecting DOJ's expert testimony that "prestige fountain pens" was the relevant market for merger analysis), discussed in Rill, *supra* note 10, at 409. Lacking sufficient price and quantity data to empirically model the demand for pens, the DOJ and Gillette disputed how to translate the "evidence of substitution" to form a pens market based on price. *See* Shapiro, *supra* note 96, at 29; New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321 (S.D.N.Y. 1995) (rejecting relevant product market of adult cereals and indicating that Post Grape-Nuts and Nabisco Shredded Wheat were part of "ready-to-eat" cereals market) discussed in Werden, supra note 22, at 372-73. Expert testimony did not identify how "cross elasticities could be translated into market power conclusions upon which market delineation should be based." *Id.* at 373.

106. Werden, *supra* note 22, at 375-76.

107. Werden, *supra* note 22, at 376.

108. Overstreet, *supra* note 95, at 32.

109. Werden, *supra* note 22, at 376.

110. Werden, *supra* note 22, at 363, 376. Werden states that the estimation of demand parameters are the "front-end" of the merger simulation or quantitative analysis he and others have used to analyze differentiated product mergers for the DOJ. Werden, *supra* note 95, at 27. While discussing the empirical models that can be used to derive demand parameters and then estimate unilateral pricing effects, Overstreet, Keyte, and Gale refer to simulation as a "full-system approach" to analyzing a merger that can only be accomplished when sufficient data is available. Overstreet, *supra* note 95, at 31.

111. Werden, *supra* note 22, at 363.

112. Werden, *supra* note 22, at 374.

113. Werden, *supra* note 95, at 30 n.4. The reduced data set can be derived from "less quantitative evidence on suitability." *Id.* *See also*, Vellturo, *infra* note 211, and accompanying text.

data."[114] Furthermore, certain assumptions are required to match the simulation model to the industry and products involved in the merger.[115] While these assumptions are reasonable, "the reliability of a particular model's predictions depends on whether the assumptions underlying that model comport with reality."[116] After a merger simulation is run, the predicted post merger prices and quantities still need to be adjusted for efficiencies, entry, or product repositioning associated with the merger.[117]

C. Merger Simulation Utilized In Recent Merger Investigations

The antitrust enforcement agencies have used merger simulation to gain first impressions in their review of potential differentiated product mergers and, where warranted, to support an administrative complaint to enjoin.[118]

114. Werden, *supra* note 22, at 383, 383 n.3. Information Resources, Inc. and Neilson ScanTrak maintain national point-of-sale databases of prices and quantities of products scanned in supermarkets and mass-market retailers. *Id.; see also* Constance K. Robinson, *Quantifying Unilateral Effects In Investigations And Cases*, 5 GEO. MASON L. REV. 387, 388, 390 (1997).

115. Werden, *supra* note 95, at 28. The three main assumptions are: (1) "Competitive interaction assumed for the industry" follows Bertrand competition (i.e., non-cooperative price-setting), (2) "Marginal cost does not vary in the relevant range," and 3) the shape of the demand curves for the products of interest is assumed with the choice of the empirical model for estimating demand parameters. *Id*.

116. Harvard Note, *supra* note 86, at 2425; s*ee also* Werden, *supra* note 22, at 376. The choice of a demand system might be disputed in court, but "basic price increase predictions are not very sensitive to the demand system assumption." *Id.*

117. Harvard Note, *supra* note 86, at 2426; s*ee also* Werden, *supra* note 95, at 29. Within the merger simulation model, marginal costs but not fixed costs can be reduced to account for merger efficiencies. *Id*. Entry or product repositioning cannot currently be simulated. *Id.*

118. Rill, *supra* note 10, at 399. Prior to *Staples* (*Staples*, 970 F. Supp. at 1066 (decided on June 30, 1997)), the DOJ used merger simulation in five investigations, of which only three were challenged. *See* Rill, *supra* note 10, at 399, 399 n.34; Robinson, *supra* note 114, at 387 n.a., 389 (In an October 1996 speech, Robinson discussed unilateral effects analysis in prior year's merger investigations by DOJ, including those that went unchallenged); s*ee* note *infra* for identification of these pre-*Staple* cases. Van de Kamp's acquisition of Mrs. Paul's, a merger of branded prepared seafood producers, was not challenged. Robinson, *supra* note 114, at 388-89. L'Oreal's acquisition of Maybelline, a merger of two branded mascara manufacturers, was not challenged. *Id.* at 389-91. Interstate Bakeries Corp.'s acquisition of Continental Baking Co., a merger of premium branded white pan bread makers, was challenged and then settled by consent decree. *Id.* at 391-92; s*ee also,* United States v. Interstate Bakeries Corp. 1996-1 Trade Cas. (CCH) ¶ 71,271 (N.D. Ill. 1996). Kimberly-Clark Corp. acquisition of Scott Paper Co., a merger of branded facial tissues and baby-wipe products, was challenged and then settled by consent decree. Rill *supra* note 10, at 399-400 (discussing United States v. Kimberly-Clark Corp. 1996-1 Trade Cas. (CCH) ¶ 71,405 (N.D. Tex. 1996)). Vail Resorts, Inc. acquisition of Ralston Resorts, Inc., a merger of prime Colorado downhill skiing areas, was challenged and settled with consent decree requiring one of five resorts be divested. *Id*. (citing Proposed Final Judgment and Competitive Impact Statement, United States v. Vail Resorts, Inc., 62 Fed. Reg. 5037, 5038, 5044 (D. Col. 1997), available in 1997 WL 357277). In *Vail Resorts, Inc.*, the DOJ actually utilized a simplified

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While these investigations did not lead to a court decision to enjoin the merger based on anti-competitive unilateral effects,[119] the cases illustrate how the enforcement agencies quantify unilateral effects in their investigations and cases.[120] The agencies realize that the courts are accustomed to "making decisions based on facts about what happened" as opposed to predicting what might happen in the future should firms merge.[121] Consequently, in a product-differentiation case, the agencies must provide concrete rather than anecdotal evidence that delineates to the court "exactly how many customers would be willing to switch" to a substitute product.[122] Likewise, the agencies must prove the competitive effect of the merger is of a magnitude sufficient to be harmful.[123]

In one merger investigation that illustrates the agencies approach to quantifying unilateral effects, the DOJ evaluated the impact of Van de Kamp acquiring Mrs. Paul's, two manufactures of frozen and prepared seafood.[124] In the possible product market of "branded prepared fish products," the three major competitors were Van de Kamp, Mrs. Paul's, and Gorton.[125] The DOJ recognized that if they could support the relevant market as frozen prepared seafood, they could challenge the merger.[126] But there might not be a case if other products such as fresh seafood (i.e. frozen, but unprepared shrimp), or frozen non-seafood items (i.e. frozen chicken nuggets) were a part of the relevant market.[127] Because the results of modeling unilateral effects of a merger differ depending on the assumptions and choices made in organizing the data used in the model, the agency seeks adequate industry facts from

simulation, the "Diversion Ratio" analysis, with a reduced data set of skier price and quantity data. *Id.*

119. *See* Robinson, *supra* note 114, at 389, 391, 392; United States v. Interstate Bakeries Corp. 1996-1 Trade Cas. (CCH) ¶ 71,271 (N.D. Ill. 1996), *available in* 1995 WL 803559, at *1; United States v. Kimberly-Clark Corp., 1996-1 Trade Cas. (CCH) ¶ 71,405 (N.D. Tex. 1996), *available in* 1996 Wl 351145, at *1; Competitive Impact Statement, United States v. Vail Resorts, Inc., 62 Fed. Reg. at 5038.

120. Robinson, *supra* note 114, at 387-88.

121. *Id.* at 387.

122. *Id.*

123. *Id*. Even though judges as a whole do not possess the expertise to evaluate the economics of a merger as presented by the agencies, commentators argue that regulation by the federal agencies should not unseat impartial adjudication of mergers. Sims, *supra* note 3, at 889. These lifetime appointed judges view potential mergers with "a more balance eye" and with " a much broader range of life experiences than the typical antitrust agency lawyer." *Id.* at 890. By "apply[ing] the case law to the facts that can be established by evidence not to the hypotheses of agency lawyers, the parties, or the economists," the courts act as a safeguard to curb the approach and attitude of the agencies towards merger review. *Id.* at 890.

124. Robinson, *supra* note 114, at 388.

125. *Id*.

126. *Id*.

127. *Id*.

documents or other sources to support their findings.[128] Depositions and documents from the three national companies showed they competed vigorously against each other with no apparent substitute for their branded frozen prepared fish.[129] But "interviews with brokers and grocers" indicated that "consumers would shift to other products, including other types of frozen convenience foods, if prices increased."[130]

To evaluate this merger, the DOJ got a nationwide detailed sampling for 108 weeks of scanned price and quantity data for "all 'prepared fish products' by brand (Mrs. Paul's, Van de Kamp's, Gorton's, and [other minor brands])."[131] The agency also acquired the same data for "prepackaged raw frozen seafood."[132] The data was used to model demand elasticities of the market and the individual firm.[133] Using the Guidelines' market definition criteria, the agency tested for all the possible product groupings.[134] Again, where a "small but significant and nontransitory price increase in price" does not result in a reduction in sales for the merged firm, then the product grouping under test is considered the relevant market.[135]

Based on their findings, the DOJ decided not to challenge this merger.[136] This process is indicative, however, of how the agencies use econometric techniques to identify the relevant market or narrow the broader market.[137]

IV. RECENT JUDICIAL ANTITRUST DECISIONS DENYING MERGERS BASED ON UNILATERAL EFFECTS

While the courts have followed the antitrust enforcement agencies' Guidelines to evaluate whether a merger should be enjoined, the courts are not bound by the Guidelines.[138] As a result the court can deny a merger based on evidence other than traditional relevant market definition, concentration, and evaluation of the increase in market power harming competition.[139]

128. *Id*. at 389.

129. Robinson, *supra* note 114, at 388.

130. *Id*.

131. *Id*.

132. *Id*.

133. *Id*. at 389.

134. Robinson, *supra* note 114, at 389.

135. *See* discussion of Guidelines' Market Definition, *supra* Part II.B.

136. Robinson, *supra* note 114, at 389.

137. Id. at 387-88.

138. Kevin J. Arquit & Richard Wolfram, *Mergers & Acquisitions: United States Government Antitrust Analysis and Enforcement,* 1049 PLI/CORP 459, 464 (1998).

139. *See Prices, Market Definition, and the Effects of Merger: Staples-Office Depot (1997)*, in THE ANTITRUST REVOLUTION 143-44 (John E. Kwoka, Jr. & Lawrence J. White, eds., 3rd ed. 1998).

A. *FTC v. Staples: Court Adopts Unilateral Effects Analysis To Define Relevant Product Market And Anti-Competitive Effects*

In April of 1997, the FTC sought a preliminary injunction to prevent two office superstores, Staples, Inc. and Office Depot, Inc., from merging.[140] To succeed, the FTC did not have to prove with absolute certainty that the merger would have an anti-competitive effect.[141] To obtain a preliminary injunction, the antitrust enforcement agency only had to prove that there was a reasonable probability that the proposed merger would substantially impair competition.[142] With this lower standard of proof, the court considered the FTC's assessment of the geographic market, relevant product market, and probable effect on competition based on market concentration statistics as dictated by the Guidelines.[143]

The court found that the parties did not dispute the forty-two geographic areas identified as the markets where Staples or Office Depot ["Staples-Office Depot"] faced competition or where "consumers can practically turn for alternative sources of the product."[144] The FTC and the defendants disagreed, however, on the "appropriate definition of the relevant product market or line of commerce."[145]

The FTC argued that the relevant product market was "the sale of consumable office supplies through office superstores."[146] Alternatively, the FTC broadened their definition to be "the sale of consumable office supplies through retail stores" such as Wal-Mart, Viking, Quill, or CompUSA.[147] The FTC validated their market definition through a "large-scale econometric model that predicted the effect of the merger on prices" for office supplies.[148]

The defendants argued that the relevant product market was "the overall sale of office products, of which a combined Staples-Office Depot accounted for 5.5% of total sales in [the agreed geographic areas]."[149] Undaunted by the FTC's ability to derive the unilateral effects of this proposed merger, Staples-Office Depot argued that, however the product market is defined, their combined company would not "substantially lessen competition."[150]

While acknowledging that many different retailers sell consumable office products and those products are undeniably the same, the court still adopted the

140. *Staples*, 970 F. Supp. at 1070, *discussed in* DALKIR, *supra* note 1391, at 143.
141. *Staples,* 970 F. Supp. at 1072.
142. *Id.*
143. *Id.* at 1073-83.
144. *Id.* at 1073.
145. *Id*.
146. *Staples,* 970 F. Supp. at 1073.
147. *Id.* at 1073-74, 1074 n.7.
148. DALKIR, *supra* note 11, at 144, 149.
149. *Staples,* 970 F. Supp. at 1073.
150. *Id.* at 1074.

FTC's narrow definition of the relevant market to be "the sale of consumable office supplies through office supply superstores."[151] The court noted the Supreme Court precedents for recognizing within a broad market well-defined submarkets that "constitute product markets for antitrust purposes."[152] In addition, the court agreed with the FTC that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it."[153] Following the FTC's unilateral effects analysis argument for restricting the relevant product market to office supply superstores,[154] the court stated that the FTC's analysis corresponds to *Brown Shoe's* "sensitivity to price changes" factor.[155] Based on the FTC's calculations, the court found that a "small but significant [price] increase" of 5% in Staples' or Office Depot's prices would "not cause a significant number of consumers to turn to non-superstore alternatives for purchasing their consumable office supplies."[156]

The court recognized that using the FTC's calculations for "the reasonable interchangeability of use or cross-elasticity of demand" of the office superstores' products is not sufficient by itself to assess whether the combined firm can raise prices unilaterally or without regard as to the competition.[157]

The court looked at internal price comparisons provided by Staples and Office Depot that indicated price differentials between the respective companies and the other two office supply superstores.[158] While this internal data showed price differentials significantly smaller than those calculated by the FTC, the court noted how the data confirmed that Staples and Office Depot's prices were lowest when they competed with Office Max and highest where there were no other office supply superstore.[159] Ultimately, the court found that the "evidence indicates a low cross-elasticity of demand between consumable office products sold by Staples or Office Depot and those same

151. *Id.* at 1074-75, 1080.

152. *Staples*, 970 F. Supp. at 1075 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

153. *Id.* at 1074 (citing *Brown Shoe Co*., 370 U.S. at 325).

154. Although the Court in *Staples* does not explicitly refer to unilateral effects analysis, commentators have indicated that the reference to the a merged firm being able to make a "slight but significant price increase" without regard to the competition is indicative of unilateral analysis. *See e.g.,* Arquit & Wolfram, *supra* note 79*,* at 482-483; DALKIR, *supra* note 1391, at 143-44; John Deq. Briggs & Howard T. Rosenblatt, *FTC Looks Beyond the Market Shares*, LEGAL TIMES, May 4, 1998, at S36. Jonathan Baker, FTC's chief economist, states that "Judge Hogan employed [unilateral effects] logic in explaining why he found an office superstore submarket and why the merger would have harmed competition." *Id*.

155. *Staples*, 970 F. Supp. at 1075.

156. *Id.* at 1075-76 n.8, 1078.

157. *Id.* at 1076 n.8.

158. *Id.* at 1076-77.

159. *Staples*, 970 F. Supp. at 1076-77.

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products sold by other sellers of office supplies," thereby confirming office supply superstores to be the relevant product market within the larger market.[160]

Having defined the relevant product and geographic markets, the court next assessed the probable effect of the merger on competition.[161] After reviewing the HHI calculations and market concentration evidence for the office supply superstores, the court noted that the pre-merger markets fell within the Guidelines' "highly concentrated" range.[162]

The court proceeded to address the unilateral effects of the proposed Staples-Office Depot merger.[163] In addition to finding that the post-merger concentration of the two office superstores would harm competition, the court adopted the FTC unilateral effects analysis, concluding that the combination of the stores would have an anti-competitive effect.[164]

The court rejected Staples and Office Depot's arguments that efficiencies or new entrants of office superstores were likely, finding that high sunk costs would have to be incurred and economies of scales could not be achieved due to the already saturated office superstore markets.[165] While the law is not well settled as to whether efficiencies can rebut a presumption of anti-competitive concerns, the court assumed that the defense was viable as defined by the revised efficiencies section of the Merger Guidelines.[166] But the court determined that the defendants' "estimates of the efficiencies were unreliable, unverified, and unrealistic."[167] The court also found that the defendants did not show that their claimed efficiencies were merger-specific or that the benefits would be passed on to consumers.[168]

B. Post Staples *Court Decisions and Agency Challenges Based on Unilateral Effects Analysis*

Following the FTC's favorable decision in *Staples*, the court in *United States v. Long Island Jewish Medical Center* addressed the DOJ's unilateral effects argument for blocking a hospital merger.[169] In *Long Island Jewish Medical Center*, the DOJ was not able to convince the court to enjoin the merger of Long Island Jewish Medical Center and North Shore Health

160. *Id.* at 1080.
161. *Id.* at 1081.
162. *Id.* at 1082.
163. *Id.*
164. *Staples*, 970 F. Supp. at 1082-83.
165. *Staples*, 970 F. Supp. at 1086-88, *discussed in* DALKIR, *supra* note 11, at 162-63.
166. *Id*. at 1088-89.
167. DALKIR, *supra* note 1391, at 163.
168. *Id*. at 163.
169. United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 142-43 (E.D.N.Y. 1997).

Systems, Inc., a merger of the two largest hospitals in Long Island, New York.[170] The court followed the traditional analytical approach set forth in the Merger Guidelines to evaluate the potential anti-competitive effects of the merger.[171] Despite concluding that the government could not support its case for limiting the relevant product market,[172] the court looked at the potential merged hospital's ability to raise prices unilaterally, regardless of the relevant market boundaries.[173] Specifically, the court looked at "whether there is a reasonable probability that the merged entity will increase prices above the competitive level for a prolonged period."[174] Citing both *Staples* and *Vail Resorts, Inc.*, the court recognized that "direct evidence" could be provided to prove that merging firms have the combined market power to raise prices unilaterally regardless of any potential response by competitors.[175]

The DOJ argued that the market should be defined as "the bundle of acute inpatient services provided by anchor hospitals to managed care plans" and that the merger would result in a monopoly in the relevant geographic market.[176] The court rejected the DOJ's view of the relevant market, because the DOJ did not produce adequate evidence to support a sufficient cross-elasticity of demand (i.e. customers would be willing to switch) between "anchor hospitals" and other area hospitals.[177] The court reasoned that there was no evidence that the services provided by numerous other hospitals in the area could not reasonably be substituted for the parties' services.[178] The court found that, with respect to primary and secondary care services, the merging hospitals competed with numerous surrounding community hospitals.[179] In addition, the court determined that the merging hospitals competed with Manhattan and other Long Island hospitals to provide more sophisticated

170. *Id.* at 149.

171. *Id.* at 136-37.

172. *Id.* at 139-40. Even though the DOJ did not establish the relevant market to be "anchor hospitals", the Court proceeded to review the possible anti-competitive effects of the merger. *Id.* at 142.

173. *Long Island Jewish Med. Ctr*., 983 F. Supp. at 142-43.

174. *Id*. at 142.

175. *Id*. at 143. "[D]irect evidence shows that by eliminating Staples' most significant . . . rival, the merger would allow Staples to increase prices." *Id*. (citing *Staples*, 970 F. Supp. at 1082). Referencing the proposed final judgment and competitive impact statement for Vail Resorts, Inc. acquisition of Ralston Resorts, Inc., the court in *Long Island Jewish Medical Center* explicitly stated that a "merged entity could unilaterally raise prices without risk of losing [customers] to a competitor." *Id.* (citing *Vail Resorts, Inc*., 62 Fed. Reg. 5037 (D. Colo. 1997), *available in* 1997 WL 36727).

176. *Long Island Jewish Med. Ctr*., 983 F. Supp. at 137.

177. C. Benjamin Crisman, Jr. & Matthew S. Barnett, *Mergers & Acquisitions: Recent Trends in Antitrust Enforcement*, 1049 PLI/CORP 379, 426 (1998) (discussing *Long Island Jewish Med. Ctr*., 983 F. Supp. at 138-39).

178. *Long Island Jewish Med. Ctr*., 983 F. Supp. at 139.

179. *Id.*

tertiary services.[180] Finally, the court observed that the Department's proposed anchor hospital market was "unnecessarily restrictive in that it fails to take into consideration the dynamics of the marketplace."[181]

The government "was unable to satisfy the court with the type of substantive economic data provided by the FTC in Staples[sic]."[182] The expert and empirical data presented by the DOJ to substantiate the merged entity's ability to raise prices were dismissed by the court as "totally speculative."[183] Because there was precedent for defining the relevant product market as "general acute inpatient services," the DOJ could not support its narrow market definition.[184] Without "an undue share of the relevant market" to support a presumption of anti-competitive effects, the court indicated that the government must prove that the merger would produce an anti-competitive effect.[185] Because the DOJ could not produce sufficient evidence to show that the merging firms would raise prices or reduce services beyond the competitive level, the court concluded that there would not be an unwarranted reduction in competition from the merger and allowed it to proceed.[186] While no other fully litigated case since *Long Island Jewish Medical Center* has supported unilateral effects analysis to enjoin a merger, the agencies have challenged subsequent cases on unilateral effects grounds.[187]

C. Evaluation of Staples & Long Island Jewish Medical Center *on Use of Unilateral Effects Analysis to Enjoin a Merger*

Both the *Staples* and *Long Island Jewish Medical Center* courts relied in part on unilateral effects analysis to arrive at their respective holdings.[188] The court in *Staples* relied implicitly on unilateral effects analysis to support the relevant market of office superstores and the merged entity's potential for

180. *Id.* at 139-40.

181. *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 140.

182. Crisman, *supra* note 177, at 426.

183. *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 143.

184. Crisman, *supra* note 177, at 426.

185. *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 145.

186. *Id*. at 145.

187. *Annual Review of 1997 Antitrust Law Developments*, ANN. REV. 1997 ANTITRUST L. DEV. CH. III.B, at 90-91 (1998). *See* United States v. Chancellor Media Co., No. CV-97-6497 (E.D.N.Y. filed Nov. 6, 1997) which alleges that merger of two radio stations in New York would have combined power to unilaterally raise prices to advertisers; Proposed Final Judgment and Competitive Impact Statement; United States v. Signature Flight Support Corp., 62 Fed. Reg. 7,041, 7,048 (1997) (proposed Feb. 14, 1997) (challenging merger of two of the three airport base operators (i.e., airplane fuel sellers) because of economic model showing potential of merged entity to raise fuel prices by 4% without divesture).

188. *See* discussion *supra* Part IV.A. and Part IV.B.

unilaterally raising prices.[189] The court in *Long Island Jewish Medical Center* explicitly referenced unilateral effects analysis as a potential method to enjoin a merger.[190] Both courts, however, were constrained by judicial precedence to rely on the traditional approach of defining a relevant market and the concentration thereof.[191]

The court in *Staples* did not bar the Staples-Office Depot merger solely on the FTC's unilateral effects analysis of the proposed Staples-Office Depot merger.[192] Following the traditional framework of the Guidelines, the Court found the increased concentration in the identified geographic markets sufficient to determine that the merger would harm competition and should be barred.[193] The Court implied, however, that where evidence overwhelmingly indicates that the combined firm can unilaterally raise prices beyond 5%, the Court would overlook any data limitations of such an analysis and enjoin the merger.[194] Even though the Court in *Staples* identified a market to "satisfy the language of older cases and the Clayton Act's reference to a 'line of commerce' affected by the merger," commentators argue that the FTC first presented evidence that the merger threatened competition before defining the market.[195] Hence, some view *Staples* as reversing the Guidelines' traditional approach of delineating the relevant market boundaries, and then evaluating the merger's anti-competitive effect.[196] But because the FTC's non-econometric evidence or "hot documents" strongly supported its simulation predictions, *Staples* gives the agencies confirmation of their ability to convince courts that they can model and accurately measure unilateral effects of a differentiated products merger.[197]

The court's recognition of unilateral effects analysis in *Long Island Jewish Medical Center* is somewhat at odds with the court in *Staples*. In *Long Island Jewish Medical Center*, the court was open to the opportunity to evaluate

189. *See supra* note 154 and accompanying text that shows commentators concurring that *Staples* references and adopting unilateral effects analysis of FTC.

190. *See supra* note 175 and accompanying text.

191. *See Staples,* 970 F. Supp. at 1072; *Long Island Jewish Med. Ctr.,* 983 F. Supp. at 137.

192. *Staples,* 970 F. Supp. at 1082-83; *See also*, DALKIR, *supra* note 11, at 162.

193. *Id*. at 1082.

194. Id. at 1075-76, 1076 n.8, 1078.

195. Briggs & Rosenblatt, *supra* note 154.

196. *Id*. After producing "evidence that [proved] competition was threatened by a merger of the two superstores," the finding that certain retailers like Wal-Mart were "inadequate alternatives to consumers" was proven true, making "the need for arguments about market definition questionable at best." *Id*.

197. *See* DALKIR, *supra* note 1391, at 147 (observing that Staples and Home-Depot had internal documents that showed each was concerned primarily with the other); Sims, *supra* note 10 (noting that Bob Pitofsky, Chairman of the FTC, thought it was "a good time to roll the dice and see whether this new approach could succeed" given that they had "hot documents" to fall back on).

econometric evidence in support of an unilateral effects argument to block the hospitals' merger,[198] but the government did not offer any such credible evidence.[199] Instead, the DOJ offered weak and unsubstantiated expert testimony that the merging hospitals would be able to raise prices unilaterally by 20 percent.[200] Had the scanner-like data been available for the DOJ to do a merger simulation similar to *Staples* or had there been enough data to do an empirical model, the court may have been persuaded that the relevant market was "anchor hospitals" and not the broad relevant market of "general acute inpatient services" that the non-econometric evidence supported.[201] Thus, while *Staples* and *Long Island Jewish Medical Center* courts consistently applied the traditional Guidelines approach of defining a relevant market and determining market concentration, the courts also looked at econometric evidence of unilateral effects in order to sharpen the market definition and provide indications (i.e., via predicted price increases) of anti-competitive effects in the absence of clear market boundaries.

D. *Impact of* Staples *and* Long Island Jewish Medical Center *on Antitrust Lawyers Seeking to Evaluate Prospective Differentiated Products Mergers*

1. Guidelines Must Be Updated to Reflect Agencies' Developments in Merger-Review Approach

Both the FTC and DOJ have attested to their increased use of econometric estimation and simulation tools in unilateral effects analysis to evaluate the competitive effects of a merger.[202] One primary reason the agencies increasingly substituted unilateral effects for the Guidelines' traditional structural analysis is that the agencies were unsuccessful in litigation to enjoin a merger.[203] The courts were either unwilling to accept the agency's market definition[204] or could not be persuaded that increased concentration with fewer

198. *Long Island Jewish Med. Ctr*, 983 F. Supp. at 142-43 (discussing court's willingness to review anti-competitive effects even though government couldn't support its market definition).

199. *Id*. at 143.

200. *Id*. at 143-44.

201. *Id*. at 143-44 (discussing lack of information to support price increase as a result of the merger).

202. *See* Tom, *supra* note 3, at 7-8; Rubinfeld, *supra* note 3, at 11. Daniel L. Rubinfeld is Deputy Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice. *Id*. at 1.

203. *Is Antitrust Policy A Growing Threat to M&A?,* MERGERS & ACQUISITIONS, Sept.-Oct., 1997, at 11, *available in* 1997 WL 10614295 (roundtable discussion among antitrust lawyers) [hereinafter *Roundtable*].

204. *See supra* text accompanying note 105.

players in the defined market automatically means less competition.[205] Despite disagreement over whether these econometric techniques have replaced the Guidelines' traditional market analysis,[206] commentators, the agencies, and the courts (i.e., *Staples* and *Long Island Jewish Medical Center*) agree that the econometric techniques supplement or refine the Guidelines' structural analysis discussion of the unilateral effects of a merger.[207] Because "merger rules are increasingly set by the agencies rather than by court decisions,"[208] it is essential that the Guidelines clearly reflect the way the agencies actually analyze mergers. In other words, while the agencies have embraced the traditional threshold steps to determine the market power for the merging firms, they have also used econometric estimations and merger simulation models to analyze unilateral effects that are not explicitly detailed in the Guidelines.[209]

While the courts have not specifically blessed the agencies' methods for establishing the relevant differentiated product market or the modeling techniques for judging the unilateral effects of the merging firms, they have implicitly given credence to the agencies' underlying methods in their holdings.[210] Even the practitioners who have used modeling techniques to evaluate mergers involving differentiated products, have raised concerns for "guidance on a 'safe harbor' range for unilateral effects merger analysis, pointing out that "economic models of imperfect competition" usually generate "at least some price increase resulting from a merger in which the products of the two companies compete to any degree."[211] Unless the agencies perform a

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205. *Roundtable*, *supra* note 205, at 11.

206. *See* William J. Baer, *New Myths and Old Realities: Perspectives on Recent Developments in Antitrust Enforcement*, Remarks before the Bar Association of the City of New York (Nov. 17, 1997), *available in* 1997 WL 728608 at *2-*4; *See generally,* Rill *supra* note 10, at 393-94; Harvard Note, *supra* note 86, at 2420.

207. For commentators concurrence, see Rill, *supra* note 10, at 399. For agreement of agencies, see Baer, supra note 206, at 3-4; Robinson, *supra* note 114, at 387-88. For support of the courts, see Dalkir, *supra* note 11, at 143-44, 160-62 (noting that Judge Hogan's Decision in *Staples* was based in part on FTC's post-merger econometric price estimations); Briggs & Rosenblatt, *supra* note 195, at S36 (indicating that "econometric evidence" was key to the Staples-Office Depot decision).

208. Sims, *supra* note 3, at 882.

209. Sims, *supra* note 3, at 882 n.65. (noting 1992 Guidelines address unilateral effects, but do not give sufficient guidance on the agencies' implementation of the unilateral effects concept in their current merger investigations).

210. S*ee* DALKIR, *supra* note 207 and accompanying text; s*ee also* discussion *supra* Part IV.C.

211. Vellturo, *supra* note 89, at 20. Without extensive scanner data available for use in demand model merger simulations, Vellturo discusses the Diversion Ratio model, a "second line of analysis" for mergers which makes use of intermediate data like "Switching Studies" that track customer purchase patterns over time, firms' "Win/Loss (and Related) Reports" that provide data on purchaser bid decisions, "End User Surveys" of purchaser preferences, and firms' "Market

full-blown simulation with ample supporting data, their predictions that the merging firms will be able to raise prices unilaterally is premised on the chosen demand system used in their underlying empirical analysis.[212] Additionally, each agency favors a different demand system model, which neither the Guidelines nor any agency policy statements identify.[213]

The enforcement agencies have recognized that the Guidelines need to be reevaluated in the area of unilateral effects analysis.[214] With the increased use of "econometric estimation and simulation techniques to predict the likely effects of mergers," the agencies are sharpening their understanding of the methodological issues involved.[215] Consequently, the Guidelines need to be refined to reflect that understanding. The Guidelines also do not clearly address the relationship between the potential market share of merged firms and the degree of unilateral effects from the merger.[216] Under unilateral effects analysis, it is possible for merging firms to have smaller market shares after merging but substantial ability to raise prices unilaterally.[217] Likewise, the combined firms could have a dominant share of the market, but insignificant unilateral power to raise prices.[218] Furthermore, when the agencies rely substantially on unilateral effects rather than coordinated effects analysis to evaluate a merger, the Guidelines need to clarify the function of market definition.[219] Unlike coordinated effects analysis, the exact boundary of the product market is not important in unilateral effects analysis.[220] The market definition merely provides guidance on the products to be included in the pricing analysis.[221]

The enforcement agencies have previously clarified concerns with their Guidelines by providing safeharbors for merging firms within a specific

Share and Sales Volume Patterns". *Id.* at 16, 18-19. Vellturo expresses the concern, however, that the Diversion Ratio approach does not have a defined "threshold level" or "implied predicted price [level] increase" below which no significant anti-competitive effects are generated. *Id.* at 20.

212. Werden, *supra* note 22, at 370-71, 377.

213. *Roundtable*, *supra* note 205, at 12. Antitrust lawyers must deal with the fact that each agency "has a different approach and neither has sufficiently articulated exactly what its approach is." *Id*.

214. Rubinfeld, *supra* note 202, at 11-12.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. Rubinfeld, *supra* note 202, at 11-12.

220. *Id.* at 12.

221. *Id.*

industry such as health care.[222] The agencies have created an "Antitrust Safety Zone" where the mergers of hospitals will not be challenged by the agencies.[223] If the mergers fall outside the safety zone, the agencies will continue to follow the Guidelines to determine if the merger is potentially anti-competitive.[224] Due to the uncertainty in the agencies new approach and the fact that the courts in *Staples* and *Long Island Jewish Medical Center* have sanctioned the use of this approach, an update to the Guidelines or a new policy statement should be forthcoming from the agencies to add renewed predictability to merger investigations.

2. Clarify acceptable increase in combined market share, and acceptable de minimis increase in future industry prices

The Guidelines specify that the ability of merging firms' to unilaterally raise price will be presumed by the agencies, if the post-merger market concentration does not fall within the Guidelines' HHI safeharbor regions and the merged firms' combined market share exceeds the threshold of thirty-five percent.[225] Some commentators believe that this serves as a "screen to eliminate from serious consideration mergers among firms with small market shares, which are unlikely to result in anti-competitive effects even when the products of the merging companies are close substitutes."[226]

Because market share measures for differentiated product mergers do not adequately reflect when unilateral effects rise to a level of anti-competitive concern, the agencies would not likely adhere to the 35 percent market share threshold before implementing agency review of such a merger.[227] The agencies' own economists have produced evidence that shows that this safe harbor does not make sense,[228] which means that the safe harbor may not really be "safe" for firms seeking to merge. Once again, the agencies need to clarify their position in relation to the Guidelines.

222. Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, *reprinted in* William T. Lifland, *Monopolies and Joint Ventures*, 1049 PLI/CORP 151 app. b at 289-90 (1998).

223. *Id.* at 290.

224. *Id.*

225. *See* GUIDELINES, *supra* note 36, at 41,560 § 2.211

226. Rill, *supra* note 10, at 397.

227. Interview by Michael Weiner with Robert D. Willig, Princeton Prof. of Econ. and Public Affairs, Former Deputy Asst. Gen. Attorney for Econ. Analysis, DOJ Antitrust Division, 11-SPG ANTITRUST 11, 11-12 (1997) [Hereinafter Willig Interview].

228. Werden, *supra* note 22, at 369. Werden, a leading DOJ economist, states that results of a simulation study on differentiated product mergers indicates that the Guidelines' thirty-five percent rule (i.e., market share safe-harbor from agency review of unilateral effects) "is inappropriate because the combined share of the merging firms is a poor predictor of effects on price or consumer welfare." *Id*.

To test if merged firms can unilaterally raise prices despite the competition, the Guidelines suggest and courts have used a threshold price increase of 5% as being the anti-competitive minimum.[229] The enforcement agencies do not, however, maintain that 5% is a threshold.[230] "If there is evidence the merger will lead to a 2% price rise, or something else less than 5%, they will step in and stop the deal if they can."[231] Rather than concede to a de minimis threshold, the agencies are advocating that their unilateral analytic procedures account for moderately sized anticipated efficiencies "to counter-balance relatively small feared price increases."[232] As discussed above, however, these procedures or econometric techniques have not yet been explained within the context of any policy statement or update to the Guidelines.[233]

3. Advocate Process by which Agencies and Parties Can Openly Exchange Data at Early Stage of Investigation.

One of the lessons to be drawn from Staples is that an antitrust lawyer must be familiar with the "high-tech world of unilateral effects and demand elasticity models" in order to ensure the agencies' econometric assumptions and methods for challenging a merger are valid.[234] A number of commentators have advocated that the agencies establish a process whereby the agencies and merging firms share data early in the process.[235] If the agencies do not share their assumptions for developing their econometric merger simulation models, erroneous predictions could result.[236] Consequently, with the threat of undue delay and unlimited pre-complaint discovery, the one-sided HSR[237] premerger notification process can force firms to accept unwarranted consent decrees to divest even though the firms believe that the agency would not prevail in court.[238]

229. *See* Guidelines, *supra* note 36, at 41,555 § 1.11; *Staples*, 970 F. Supp. at 1076, n.8.

230. Willig Interview, *supra* note 227, at 12.

231. *Id.*

232. *Id.*

233. *See* discussion *supra* Part IV.D.1.

234. Briggs, *supra* note 195, at 5-6.

235. See, Weiner, 11-SPG Antitrust at 4; Willig Interview, *supra* note 227, at 13.

236. Willig Interview, *supra* note 227, at 13. As a DOJ consultant, Willig recounts a merger investigation where he found the wrong demand model was being used which could have lead to erroneous results and unfortunate consequences. *Id*.

237. For a brief description of the HSR premerger notification process, see Kolasky, *supra* note 2 and accompanying text.

238. Sims, *supra* note 3, at 868-69, 887. The enforcement agencies have used the "Second Request" requirement under the HSR premerger notification process "to create a whole new discovery mechanism, unconstrained by the Federal Rules (or any other rules, for that matter) and free of any practical oversight by any neutral arbiter." *Id.* at 881. Hence, the agencies "can

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Now is a good time to approach the FTC and DOJ with arguments for improving the process and modifying their guidelines.[239] Those heading up and working for these federal agencies "are more open to at least listening to the arguments" than their past predecessors were apt to do.[240]

V. CONCLUSIONS

During this period of intense merger activity, the enforcement agencies have challenged mergers based on an unilateral effects analysis, deviating from the traditional, structural market definition approach outlined in their Merger Guidelines. But the courts have refused to rely exclusively on the enforcement agencies' unilateral effects analysis to bar a merger. For mergers involving firms with differentiated products, the agencies must still lay a foundation for a relevant product market. Where the boundaries of the relevant product market cannot be drawn definitively, courts look at econometric evidence both to supplement the product market definition and to determine if the proposed combination has the power to raise product prices unilaterally. While the agencies' econometric techniques for evaluating unilateral effects a merger have not supplanted traditional analysis of market definitions and concentrations, *Staples* and *Long Island Jewish Medical Center* indicate that proof of a unilateral anti-competitive threat may precede the market definition or alter the initial agency definition. Due to judicial acceptance of non-traditional or non-structural factors as a basis for assessing anti-competitive effects of a proposed merger, antitrust lawyers should anticipate narrow product market classifications and continued use of unilateral effects analysis for assessing proposed mergers. Because enforcement agencies rely on econometric techniques to review a merger and support a subsequent challenge, antitrust lawyers should push for clarification in the Guidelines, safeharbors where warranted, and a policy for early data exchange. The federal agencies promulgated the 1992 Guidelines to eliminate uncertainty and add predictability to their enforcement actions. Because their approach to a merger has again changed, the agencies should issue new Guidelines so that businesses can anticipate and efficiently evaluate the prospects of a desired merger.

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effectively delay" the investigation of a merger through an "essentially unlimited precomplaint discovery" process. *Id.* at 868-69.

239. *Id*. at 903.

240. *Id*.

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