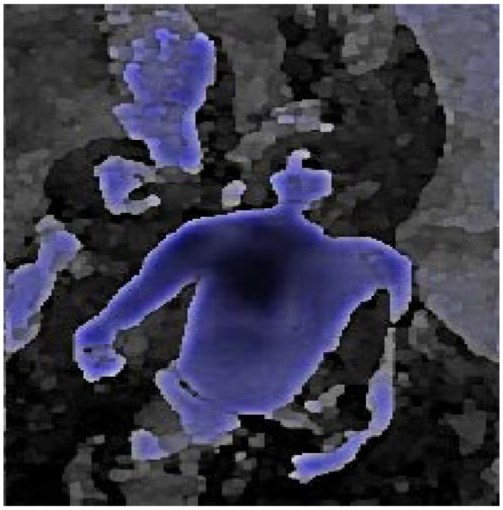

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Contents

The Proposed Revisions to the Horizontal Merger Guidelines: Implications for High-Tech

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On April 20, 2010, the Department of Justice and the Federal Trade Commission (the "Agencies") released for public comment their draft revised Horizontal Merger Guidelines (the "Revised Guidelines"), which outline the Agencies' analytical techniques and enforcement policy with respect to mergers and acquisitions involving actual or potential competitors.[1] The Revised Guidelines are intended to "keep pace with the advancement of economic thinking" and address "gaps between the [1992[2]] Guidelines and actual agency practice—gaps in the sense of both omissions of important factors that help predict the competitive effects of mergers and statements that are either misleading or inaccurate."[3]

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1 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines for Public Comment (Apr. 20, 2010), http://www.ftc.gov/os/2010/04/100420hmg.pdf [hereinafter Revised Guidelines].

2 This article adopts the common shorthand of referring to the established version of the Horizontal Merger Guidelines as the "1992 Guidelines." While this most recent version of the 1992 Guidelines includes revisions relating to efficiencies that were implemented by the Agencies on April 8, 1997, the remaining portions of the 1992 Guidelines were unchanged in 1997, and appear as they were issued on April 2, 1992. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) (with Apr. 8, 1997 revisions to § 4 on efficiencies) [hereinafter 1992 GUIDELINES], *available at* http://www.ftc.gov/bc/docs/hmg080617.pdf.

3 Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, An Update on the Review of the Horizontal Merger Guidelines, Prepared Remarks for the Horizontal Merger Guidelines Review Project's Final Workshop (Jan. 26, 2010), http://www.justice.gov/atr/public/speeches/254577.pdf, at 1, 3. As recently as 2006, in issuing commentary on the 1992 Guidelines (the "Guidelines Commentary"), the Agencies evaluated the Guidelines' framework and ultimately concluded at that time that a revamping was "neither needed nor widely desired." Nevertheless, several of the concepts and revisions that have now been incorporated into the current Revised Guidelines were foreshadowed in the Guidelines Commentary. For instance, the 1992 Guidelines describe a five-step analytical process that proceeds in almost lockstep fashion. *See* 1992 GUIDELINES, *supra* note 2, § 0.2 ("First, the Agency assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and

The Agencies believe that the Revised Guidelines will provide more meaningful guidance to businesses engaged in the merger review process and, perhaps more importantly, be more useful to courts that rely on them as "persuasive authority."[4] The Agencies evidently believe that modernizing the Guidelines may influence courts' analyses of litigated merger challenges. Thus, while many of the revisions merely reflect current practice at the Agencies, others have the potential to alter the face of merger analysis and litigation over time.

This article highlights some of the more significant proposed revisions to the Guidelines, in particular those revisions that are most likely to relate to the investigation and analysis of mergers in high-technology markets. While technology-related transactions are generally analyzed under the same framework as any other deal, they frequently present unique characteristics and factors that must be considered, including the pace at which innovation and change have the potential to transform a given industry, the fact that many of these markets exhibit low marginal cost structures and high profit margins, and issues associated with network effects.[5] As a result, some of the revisions to the Guidelines have the potential to influence merger analysis in high-technology markets in a unique way.

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measured. . . . Finally the Agency assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market."). In the Guidelines Commentary, however, the process is described as "an integrated approach to merger review" that "the Agencies do not apply as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies or failing assets." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 2 (2006) [hereinafter GUIDELINES COMMENTARY], *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf. And, finally, in the Revised Guidelines, the latest Agency approach "deemphasiz[es] the sequential nature of the Guidelines inquiry" and recognizes that "defining markets and measuring market shares may not always be the most effective starting point for many types of merger reviews." Varney, *supra*, at 6.

4 Varney, *supra* note 3, at 4-5 ("Courts also rely on the Guidelines, in the words of the Fifth Circuit Court of Appeals, as providing 'persuasive authority when deciding if a particular acquisition violates anti-trust laws.' When the Guidelines either inaccurately reflect enforcement or omit crucial considerations, we do a disservice to business and law.") (internal citations omitted).

5 *See, e.g.*, Robert Pitofsky, Chairman, Fed. Trade Comm'n, Antitrust Analysis in High-Tech Industries: A 19th Century Discipline Addresses 21st Century Problems, Prepared Remarks for the American Bar Association Section of Antitrust Law's Antitrust Issues in High-Tech Industries Workshop (Feb. 25-26, 1999), http://www.ftc.gov/speeches/pitofsky/hitch.shtm ("[I]t is essential to acknowledge that high-tech industries are different and enforcement must take those differences into account. . . . New generations of products, undermining existing market power, appear more frequently in high-tech than in mature industries. . . .

The Reduced Importance of the Market Definition Exercise

In the Revised Guidelines, the analysis of competitive effects, and, in particular, unilateral effects, has been revamped and now largely eclipses market definition in terms of focus and significance. Indeed, while the 1992 Guidelines (and, importantly, the courts[6]) require that a proper antitrust market be defined,[7] the Revised Guidelines reduce market definition to the status of a "tool" that is only useful "to the extent it illuminates the merger's likely competitive effects."[8] Thus, the Agencies, pursuant to their own Guidelines at least, will often no longer require that they be held to the burden of properly defining an antitrust market.

This reduced burden, while generally beneficial to the Agencies in any given context, might be even more significant in high-tech merger investigations and challenges. The changing face of technology and the frequent presence of highly differentiated product markets can increase the difficulty of delineating relevant markets.[9] Indeed, the Agencies' success rate in

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Finally, and most perplexing, there is the question of how to deal with network efficiencies."); M. Howard Morse, *Antitrust Issues in High-Tech Industries: Recent Developments*, THE ANTITRUST REVIEW OF THE AMERICAS, 2002, at 25, *available at* http://www.drinkerbiddle.com/files/Publication/90d2d070-a79b-478b-9262-4bd95cea8e0d/Presentation/PublicationAttachment/fe2fc25b-777e-46e4-9f4a-bde7cb1846a2/High-tech.pdf ("What makes high-tech industries different? . . . [T]hese are extremely dynamic industries, changing rapidly, with short product cycles. The pace of change often makes the future difficult to predict and tends to undermine or erode existing market power. . . . [H]igh-tech industries are often characterized by a 'positive feedback loop' or 'network effects', generating increasing returns to scale. . . . [M]any high-tech industries, heavily dependent on intellectual property, incur large upfront fixed costs, and have relatively small marginal costs of production.").

6 *See, e.g.*, United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) ("In determining whether a transaction will create or enhance market power, courts historically have first defined the relevant product and geographic markets within which the competitive effects of the transaction are to be assessed. This is a 'necessary predicate' to finding anticompetitive effects.") (internal citations omitted).

7 1992 GUIDELINES, *supra* note 2, § 0.2 ("First, the Agency assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured.").

8 Revised Guidelines, *supra* note 1, § 4.

9 Pitofsky, *supra* note 5 ("[D]efining relevant markets . . . is difficult enough under any circumstances. But it can become far more difficult in high-tech industries such as biotechnology, where products that might curtail the market power of a dominant incumbent firm are not in existence yet, and will not reach the market for several years.").

high-tech merger challenges has suffered substantially at the hands of the market definition requirement. In *Sungard*, for example, the DOJ sought to enjoin the merger of two computer disaster recovery service providers, but was stopped in its tracks by a court unwilling to accept the DOJ's proposed market definition, which did not account for the "rapidly evolving" and "changing nature" of the technologies at issue.[10] Not long thereafter, the DOJ faced a similar problem when it sought to enjoin Oracle's proposed acquisition of PeopleSoft.[11]

To the extent the courts embrace the notion that market definition is not absolutely necessary but is rather merely one construct within which to assess competitive effects, the Agencies could find their chances of winning in court to be greatly improved, especially in technology transaction challenges. Moving the courts in the direction suggested by the Revised Guidelines, however, may prove to be a significant challenge. There is a long line of precedent—including from the Supreme Court—that squarely holds that market definition is a necessary first step in the process of evaluating the potential anticompetitive effects of a merger.[12] Nevertheless, the Agencies historically have had some measure of success in dancing

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[10] United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172, 188,193 (D.C. 2001) ("In light of the decreasing costs of equipment and telecommunications and the rapidly evolving computer technology, the Court cannot accept the government's overly narrow and static definition of the product market.").

[11] Oracle, 331 F. Supp. 2d at 1158 ("Based upon a review of the law and the evidence, the court concludes that the plaintiffs have not met their burden of establishing that the relevant product market is limited to so-called high function FMS and HRM sold by Oracle, PeopleSoft and SAP.").

[12] *See, e.g.*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 356 (1963) ("We have no difficulty in determining the 'line of commerce' (relevant product or services market) and 'section of the country' (relevant geographical market) in which to appraise the probable competitive effects of appellees' proposed merger."); Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962) ("[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act . . . ") (internal citations omitted); FTC v. Whole Foods Mkt., Inc., 502 F.Supp.2d 1, 7 (D.D.C. 2007) ("[D]efinition of the relevant product market in this case is crucial"); Oracle, 331 F. Supp. 2d at 1110 ("[C]ourts historically have first defined the relevant product and geographic markets within which the competitive effects of the transaction are to be assessed.") (internal citations omitted); *In re* Evanston Nw. Healthcare Corp., 2007 WL 2286195, at 35 (F.T.C. Aug. 6, 2007) ("The courts analyze whether a merger will produce or increase market power through the use of the now-familiar sequential approach. The plaintiff first establishes the relevant market, which itself consists of the relevant product and geographic markets.") (internal citations omitted).

among precedent, economics, and policy in order to steer the courts through evolution of the content of the Guidelines and education of the judiciary.[13]

Regardless of how the reduction in status of market definition fares in the courts, the change is nevertheless likely to influence the merger review process. Market definition arguments have often contributed to the early resolution of merger investigations on terms favorable to the merging parties. To the extent that this path to quick resolution will be less available under the Revised Guidelines, it is likely that merger investigations will tend to become longer and more burdensome.

A Stricter Approach to Unilateral Effects Analysis

Equally important is the Revised Guidelines' treatment of unilateral competitive effects, especially in the differentiated products context. While the focus of unilateral effects remains

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[13] *See, e.g.*, California v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001) ("Although the Merger Guidelines are not binding, courts have often adopted the standards set forth in the Merger Guidelines in analyzing antitrust issues.") (internal citations omitted). *See also* Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 ANTITRUST L.J. 189, 190-91, 201 (2003) (internal citations omitted):

> Although the drafters of the 1992 Merger Guidelines were not closely parsing Supreme Court opinions, they were well aware of developments in the case law in the lower courts. Nowhere in that drafting project were the problems of steering between the demands of precedent and economic logic more difficult than in writing the section on entry. The Justice Department had just been on the losing side of two appellate decisions refusing to enjoin mergers on grounds of ease of entry, *Baker Hughes* and *Syufy*. Both appellate courts had sharply criticized the Justice Department's entry arguments and the Department's seeming lack of fidelity to the 1984 Merger Guidelines, which were then in force. The drafters of the 1992 Merger Guidelines understood the need to respond to these decisions by setting forth a method of analysis that would harmonize the Division's internal analytic approach to entry with the judiciary's concerns.
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> . . . .
>
> How has the framework for entry analysis set forth in the 1992 Merger Guidelines fared over the following decade? Its greatest success has probably been in clarifying the relevant issues conceptually. . . .
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> . . . .
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> The enforcement agencies no longer habitually lose merger challenges on grounds of ease of entry . . . .

largely the same as in the 1992 Guidelines—the elimination of competition between two firms that alone could constitute a substantial lessening of competition—the Revised Guidelines' treatment may broaden significantly the range of mergers that may raise unilateral effects concerns.

As the Revised Guidelines explain, the general approach for assessing unilateral effects in differentiated product markets is as follows:

> In differentiated product industries, some products can be very close substitutes and compete strongly with each other, while other products are more distant substitutes and compete less strongly. . . .
>
> A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost due to the price rise will merely be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable prior to the merger.[14]

However, while the 1992 Guidelines highlighted concerns where the merging parties were each other's closest competitors,[15] the Revised Guidelines articulate a theory of unilateral anticompetitive effects that explicitly calls into question mergers of firms whose products are not the closest substitutes in demand for the majority of consumers:

> Substantial unilateral price elevation post-merger for a product formerly sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view products formerly sold by the other merging firm as their next choice. However, unless pre-merger margins between price and incremental cost are low, that significant fraction need not approach a majority. *A merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner*.[16]

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[14] Revised Guidelines, *supra* note 1, § 6.1.

[15] 1992 GUIDELINES, *supra* note 2, § 2.21 ("Substantial unilateral price elevation in a market for differentiated products requires that there be a significant share of sales in the market accounted for by consumers who regard the products of the merging firms as their first and second choices . . . .").

[16] Revised Guidelines, *supra* note 1, § 6.1 (emphasis added).

In short, if pre-merger margins are sufficiently high and a significant fraction of one of the merging party's customers (which could be less than a majority) view the other merging party's products as their next choice, the Agencies may develop concerns even where there are a relatively large number of other competitors to whom sales are or could be diverted (indeed, those other competitors could be enjoying a majority of those sales).

This can have significant consequences for proposed technology mergers. Because technology firms' competing products typically are differentiated (that is, products that are imperfect substitutes for each other, exhibiting a range of product features and characteristics that appeal differently to different customers), the Agencies frequently will apply its differentiated-products unilateral effects analysis to technology mergers.[17] In such cases, different customers will have different preferences or requirements, such that a price increase for any one of the differentiated products can lead significant numbers of customers to switch to each of a number of alternative products. Moreover, gross (or variable) margins for technology products such as software or integrated circuits are typically high. This is because short-run marginal costs tend to be quite low for such products. Taken together, this suggests that the Agencies often will determine, all else held constant, that a merger of technology firms whose products are not the closest substitutes for the largest number of customers could nevertheless lead to higher prices for one or both of the parties' products.

It is also worth noting that, while the Revised Guidelines' treatment of unilateral effects involves the analysis of pre-merger margins and consumer substitution patterns, the new Guidelines also indicate that "if a firm sets price well above marginal cost, that normally indicates either that the firm is coordinating with its rivals or that the firm believes its customers are not highly sensitive to price."[18] This signals that the Agencies may consider high pre-merger margins for merging firms to be sufficient to provoke competitive concerns. As noted earlier, high variable margins are the norm in many technology markets. With the revisions to the Guidelines, transactions involving differentiated technology products could therefore meet with increased antitrust scrutiny.

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[17] FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 68 (D.D.C. 2009) ("The differentiated products theory applies to markets where the products sold by different suppliers are not perfect substitutes for one another."); Oracle, 331 F. Supp. 2d at 1115 ("Differentiated products are imperfect substitutes representing as they do different features or characteristics that appeal variously to different customers.").

[18] Revised Guidelines, *supra* note 1, § 2.2.1.

Innovation Competition and Network Effects

While the 1992 Guidelines give little attention to innovation competition,[19] the Revised Guidelines provide more detail on the instances in which the Agencies may have concerns about whether a merger is likely to diminish innovation. Specifically, the Revised Guidelines outline two categories of adverse innovation-related effects:

- Reduced incentives to continue existing product-development efforts. "[This] is most likely to occur if at least one of the merging firms is engaging in efforts to introduce new products that would capture substantial revenues from the other merging firm."[20]

- Reduced incentives to begin development of new products. "[This] second, longer-run effect is most likely to occur if at least one of the merging firms has capabilities that are likely to lead it to develop new products in the future that would capture substantial revenues from the other merging firm."[21]

Thus, the Revised Guidelines now explicitly suggest that the Agencies may determine that a risk of anticompetitive effects exists even where neither party actually has a product on the market. That said, while these new provisions in the Revised Guidelines may seem to push the envelope in terms of deals that are likely to substantially lessen competition, the Agencies have already investigated, and in some instances challenged, deals that potentially eliminate competition from products that might not enter the market for some time (if at all). It therefore appears that this aspect of the new Guidelines simply reflects existing Agency practice. Two recent cases illustrate this point.

- In October 2006 the FTC challenged Watson Pharmaceuticals, Inc.'s ("Watson") proposed acquisition of Andrx Corporation ("Andrx").[22] In that case, the FTC found that both Watson and Andrx were developing generic Mircette tablets and generic Ovcon-35 tablets, and that the two companies were among a limited number of

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[19] Indeed, the only mention of "innovation" in the 1992 Guidelines is in a footnote offering that "[s]ellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation." 1992 GUIDELINES, *supra* note 2, n.6.

[20] Revised Guidelines, *supra* note 1, § 6.4.

[21] *Id.* In describing this effect, the Revised Guidelines go on to explain that "[t]he Agencies therefore also consider whether a merger will diminish innovation competition by combining two of a very small number of firms with the strongest capabilities to successfully innovate in a specific direction." *Id.*

[22] Complaint, *In re* Watson Pharm., Inc. and Andrx Corp., No. C-1472, (Oct. 31, 2006), http://www.ftc.gov/os/caselist/0610139/0610139complaint.pdf.

suppliers capable of entering these future generic markets.[23] The FTC ultimately obtained a consent order in the matter, noting that the acquisition threatened to eliminate future competition between Watson and Andrx, thus increasing the likelihood that the combined entity would forego or delay the launch of Watson's or Andrx's products in these markets, and also increasing the likelihood that the combined entity would delay or eliminate the substantial additional price competition that would have resulted from Watson's and Andrx's independent entry into the markets.[24]

- The FTC investigated the 2001 acquisition of Novazyme Pharmaceuticals, Inc. by Genzyme Corp.[25] At the time of the acquisition, both parties were engaged in conducting early pre-clinical studies and testing relating to enzyme-replacement treatment for Pompe disease. This investigation, which was ultimately closed without action, focused on the deal's potential impact on the pace and scope of the parties' R&D.[26]

The Revised Guidelines also mention issues associated with network effects. Network effects have been observed in a number of high-technology industries, including telecommunications, computer software, computer hardware, and online services. The Revised Guidelines offer an example of how network effects might contribute to the likelihood that a merger could provide the combined entity with the incentive to foreclose rivals:

> Merging Firms A and B operate in a market in which network effects are significant . . . . Prior to the merger, they and their rivals voluntarily interconnect with one another. The merger would create an entity with a large enough share that a strategy of ending voluntary interconnection would have a dangerous probability of creating monopoly power in this market.[27]

While the potential for such adverse competitive consequences due to network effects issues were not addressed in the 1992 Guidelines, these potential concerns raised in the foregoing example again seems consistent with past Agency experience and practice. For example, in March 2010 the DOJ articulated such network effect concerns with respect to

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23 *Id.*

24 *Id.*

25 *See* Press Release, Fed. Trade Comm'n, FTC Closes its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc. (Jan. 13, 2004), http://www.ftc.gov/opa/2004/01/genzyme.shtm.

26 *Id.*

27 Revised Guidelines, *supra* note 1, § 2.2.3

Cisco's acquisition of Tandberg.[28] The DOJ focused on the effect of combining Cisco's and Tandberg's respective videoconferencing products, particularly in telepresence.[29] Similar in many respects to telephones – the classic networked industry – the DOJ defined telepresence as a form of high-definition videoconferencing capable of providing users with an immersive experience.[30] The DOJ found that Cisco was the largest provider of telepresence equipment worldwide, while Tandberg was the largest provider of videoconferencing equipment worldwide, and relied heavily on interoperability commitments made by the parties to the European Commission (EC) before allowing the transaction to proceed.[31] Specifically, the EC required a number of commitments from the parties to facilitate interoperability between their telepresence products and those of competing providers.[32] Thus, the revisions relating to innovation and network effects concerns likely will not change things from an enforcement perspective.

A More Skeptical View of Entry and Certain Efficiency Defenses

In developing the Revised Guidelines, the Agencies appear to have approached the subject of entry with a fair degree of skepticism. According to Assistant Attorney General Christine Varney, "[t]heoretical assumptions that market forces naturally and inevitably correct for market failures clearly need to be reconsidered. In the context of the Horizontal Merger

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[28] Press Release, U.S. Dep't of Justice, Justice Department Will Not Challenge Cisco's Acquisition of Tandberg (Mar. 29, 2010), http://www.justice.gov/atr/public/press_releases/2010/257173.pdf.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* *See also* Case COMP/M.5669—Cisco/Tandberg, March 29, 2010, ¶ 81, *available at* http://ec.europa.eu/competition/mergers/cases/decisions/M5669_20100329_20212_253140_EN.pdf. ("[T]he [EC's] market investigation clearly confirmed that there is a strong case for interoperability, in particular as interoperability is key for consumers and network effects are important in this industry. . . . In particular, it can not be excluded that even though the merged entity may still have an incentive to develop interoperability with its main competitors, it could have an increased incentive to strategically restrict interoperability with new entrants or less important competitors, a strategy considered in some older internal technical documents from Cisco, which could be implemented in the absence of an adopted industry standard (or appropriate remedies).").

Guidelines, the most relevant aspect of this reassessment involves explicit or implicit assumptions that entry will erode market power otherwise enhanced by a merger."[33]

Under the Revised Guidelines' discussion of entry, the prospect of entry may alleviate competitive concerns raised by a merger only when such entry would be sufficient to deter or counteract those anticompetitive effects.[34] Like the 1992 Guidelines, this indicates that a merger is not likely to enhance the combined company's market power if entry is "so easy" (that is, would be timely, likely, and sufficient) that the merged firm and its remaining rivals could not profitably raise price or otherwise reduce competition.[35] In addition, the new Guidelines leave open the possibility that mergers presenting potential anticompetitive effects that would *not* be deterred by the prospect of entry could nevertheless be allowed. But the bar is high. According to the Revised Guidelines, "[t]his requires that the impact of entrants in the relevant market be rapid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to entry."[36]

This change represents a noteworthy departure from the 1992 Guidelines. In the 1992 Guidelines, entry was considered to be "timely" if it would occur within two years.[37] In contrast, the timeframe for "timely" entry under the Revised Guidelines is flexible, depending on (a) whether entry would be fast enough to deter anticompetitive effects, or (b) whether the pre-entry interval is short enough to prevent "significant" consumer harm when deterrence fails.

There are other reasons to believe that the bar for proving entry has been raised. While the 1992 Guidelines required that prospective entry "involve a product so close to the products of the merging firms that the merged firm will be unable to internalize enough of the sales loss due to the price rise, rendering the price increase unprofitable,"[38] under the Revised Guidelines, the Agencies appear to be looking for more, *i.e.,* "reliable evidence that entry will be sufficient to replicate at least the scale and strength of one of the merging firms."[39]

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[33] Varney, *supra* note 3, at 2.

[34] Revised Guidelines, *supra* note 1, § 9.

[35] *Id.*

[36] *Id.* § 9.1.

[37] 1992 GUIDELINES, *supra* note 2, §3.2.

[38] *Id.* § 3.4.

[39] Revised Guidelines, *supra* note 1, § 9.3.

The Agencies also note that they will give substantial weight to the existence of an "actual history of entry." However, any history of entry (or lack thereof) might have little relevance in technology spaces, where forecasts contingent on a lack of past entry would fail to predict the competitive discipline that may be imposed by future entrants with new or "disruptive" technologies. Conversely, a history of leapfrogging technologies might not always be a meaningful predictor of continued revolution. More generally, hindsight is often a poor predictor of future competitive developments in dynamic technology markets.

The Revised Guidelines' focus on historical evidence may imply that such considerations will receive insufficient credit. Consider, for example, the DOJ's investigation of the merger of XM and Sirius, where the DOJ closed its investigation without action in part due to a number of technology platforms that were under development and that were likely to offer new or improved alternatives to satellite radio.[40] Under the Revised Guidelines, it is unclear how much weight such predictions would receive given the Agencies call for an "actual history" of entry.

With respect to efficiencies, the Revised Guidelines still recognize that mergers can be a means to generate procompetitive outcomes: "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[41] However, some of the revisions disallow some of the typical types of efficiencies that are often envisioned in technology transactions.

The Agencies will view "with skepticism" projections of efficiencies that are created outside of the "usual business planning process."[42] In the typical situation where there is no "analogous past experience" of having realized similar efficiencies in past deals, the Agencies appear to be demanding that a rigorous and verifiable substantiation of potential efficiencies be undertaken as part of a firm's business planning process as it considers potential acquisitions.[43] Thus, while as a practical matter firms often do not undertake this sort of costly, rigorous

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[40] Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), http://www.justice.gov/atr/public/press_releases/2008/231467.pdf.

[41] Revised Guidelines, *supra* note 1, § 10.

[42] *Id.*

[43] Like the 1992 Guidelines, the Revised Guidelines require that the merging parties "substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency . . . ." In this connection, the Revised Guidelines note that "efficiency claims substantiated by analogous past experience are those most likely to be credited." *Id.* § 10.

analysis (for instance, because the firm is opting instead to rely on its own experience and business judgment in predicting its abilities to realize a certain magnitude of efficiencies, or is under particular time constraints that preclude the firm from undertaking such an extensive analysis), such pre-deal efficiencies analyses may be necessary in cases where there may be concerns over anticompetitive effects and the potential to generate significant efficiencies is real.

The revisions also describe the types of efficiencies that are more likely to be cognizable and substantial. For example, from the Agencies' perspective, efficiencies resulting from shifting production among formerly separately-owned facilities and that reduce the marginal cost of production are more likely to be verifiable. On the other hand, merger-related reductions in R&D costs may be less likely to be accepted by the Agencies. Many technology mergers are undertaken with an eye toward consolidating R&D efforts in order to attain the same (or higher) degree of innovation at lower cost. Nevertheless, such efficiencies can be difficult to verify and, indeed, might be viewed by the Agencies as reflecting anticompetitive effects of the deal (*i.e.,* what the parties might see as the elimination of "duplicative R&D" may be viewed by the Agencies as the destruction of innovation competition). Moreover, technology deals often are undertaken without the goal or expectation of reduced marginal costs of production (*e.g.,* in software or other markets where marginal costs are already very low). While the Revised Guidelines recognize the possibility that mergers may give rise to efficiencies, the narrow band of efficiencies that the Agencies deem likely to be cognizable appears to make it very difficult for parties to technology transactions to claim the benefits of increased innovation and other procompetitive efficiencies.[44]

Conclusion

The proposed Revised Guidelines have a number of potential implications for high-tech transactions. Many of the Agencies' revisions simply bring the Guidelines up to speed with current practice at the Agencies (*e.g.,* the section on innovation). Others potentially expand the scope of Agency concern (such as the revamped section on unilateral effects) or limit the utility of certain entry and efficiencies stories. Finally, the Revised Guidelines' treatment of market definition signals a potentially fundamental change in enforcement approach and policy. As of the time of this writing, it is unclear whether all of the proposed revisions will be included in the Agencies' finalized Guidelines. We should know the answer to that question quite soon.

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[44] *Id.* ("When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. . . . Research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify . . . .").