Evaluating Mergers Between Potential Competitors Under the New Horizontal Merger Guidelines

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IN AUGUST 2010, THE U.S. DEPARTMENT of Justice Antitrust Division and the Federal Trade Commission issued new Horizontal Merger Guidelines, representing the first comprehensive revisions to the Guidelines in eighteen years.[1] The issuance of the new Guidelines is a welcome development that gives firms and practitioners much-needed clarity regarding the Agencies' current approach to the merger review process and methods of analysis.

A number of key revisions formalize what has become established Agency practice in recent years. Many changes reflect the Agencies' ongoing efforts to embrace a more flexible approach to merger analysis by highlighting the central role played by direct evidence of competitive effects. The new Guidelines elevate the importance of various measurements of competitive effects, while recognizing that "rigid" and "formulaic" presumptions based on market definition and market concentration statistics are in many cases not decisive.[2]

In another, more subtle change from prior versions of the Guidelines, the opening sentence of the new Guidelines defines "horizontal mergers" to include "mergers and acquisitions involving actual or *potential* competitors."[3] Under the 1984 Merger Guidelines, mergers between an incumbent competitor and a potential new entrant were characterized as "non-horizontal" mergers and reviewed under a separate analytical framework than "horizontal mergers."[4] The 1992 Horizontal Merger Guidelines did not mention whether or how the Guidelines analysis may apply to mergers between potential competitors, creating ambiguity. The Agencies' 2006 Commentary on the Horizontal Merger Guidelines added to the confusion by defining "'horizontal' mergers" as "[m]ergers between *competing* firms,"[5] raising questions as to whether the analytical methods described in the Commentary apply to mergers involving firms that were not incumbents at the time of the merger. The new Guidelines, however, expressly state that mergers involving potential new or emerging competitors, no less than mergers between incumbent firms, will be regarded as "horizontal" for purposes of the Agencies' analysis, removing any uncertainty that may have existed before.

Nonetheless, important questions remain unanswered. To pick one example, the new Guidelines introduce analytical methods for evaluating competitive effects that appear to rely heavily on evidence of historic competition between the merging firms. Yet they do not explain which of these methods would apply in a potential competition scenario, if at all, given that a potential competitor will have little or no track record in the incumbent's market.

Thus, while the Agencies are explicit in placing potential competition mergers within the scope of the new Guidelines, the Guidelines themselves offer relatively little guidance regarding the approach parties can expect to be taken by the government in evaluating such transactions. Whatever one thinks about Section 7 analysis of mergers involving potential competition, there is good reason to be concerned about the potential for what courts at times have labeled "uncabined speculation."[6] While mergers raising potential competition issues may be appropriate subjects for government scrutiny, any effort by the government to prove a likelihood of anticompetitive effects necessarily must be grounded in fact, not conjecture. Because this is a theme that runs throughout the relevant case law, the new Guidelines should squarely address it and communicate the methods that the Agencies will employ to avoid such concerns, which are predictable in virtually any merger investigation focused on a hypothesized loss of potential future competition.

Provisions Addressing Potential Competition Under the 2010 Horizontal Merger Guidelines

The Supreme Court has long held that Section 7 was passed by Congress "to arrest incipient threats to competition" and, as a result, its application is inherently forward-looking.[7] Even in conventional horizontal mergers involving actual competitors, the key issue is whether the effect of the merger "may be substantially to lessen competition" in the future.[8]

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For this reason, both the 1992 and 2010 Horizontal Merger Guidelines account for dynamic, ongoing changes in the marketplace in assessing the future competitive significance of market participants.[9] As noted above, however, the new Guidelines go a step further, calling out the potential for challenges to mergers raising *only* or *largely* concerns about future competition.

The new Guidelines address issues relevant to mergers involving potential competitors in a number of different provisions. In addition to expressly stating that the 2010 Horizontal Merger Guidelines apply to mergers between potential competitors, Section 1 of the new Guidelines places greater emphasis than prior Guidelines on the forward-looking nature of merger analysis. Consistent with Section 7's purpose, the Agencies state that merger analysis is "necessarily predictive" and that "merger enforcement should interdict competitive problems in their incipiency."[10] The Agencies also assert that "certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal."[11] Section 2 of the new Guidelines discusses how the Agencies weigh various factors in determining whether a horizontal merger poses competitive concerns. In evaluating evidence of direct competition, the Agencies "consider whether the merging firms have been, *or likely will become absent the merger*, substantial head-to-head competitors."[12] Another factor is the potentially "disruptive" role played by a merging firm that has exhibited "maverick" behavior. A merger may involve "a loss of actual or potential competition" where one merging party "has a strong incumbency position" and the other party "threatens to disrupt market conditions with a new technology or business model."[13]

Although it adds new nomenclature, Section 5.1 of the new Guidelines generally preserves the prior framework for identifying market participants and their market shares, provisions that are also relevant to potential competition cases. In addition to current market participants—i.e., firms that sell in the relevant market at the time of the merger—Section 5.1 includes two categories of potentially competing firms as participants in the relevant market: committed entrants (firms "not currently earning revenues in the relevant market, but that have committed to entering the market in the near future") and "rapid entrants" (firms that are "very likely [to] provide rapid supply responses" in the event market prices increase).

These provisions in the new Guidelines suggest that the Agencies are seeking to encompass a broad range of potential competition concerns. On one end of the spectrum is a case involving a merging party that has made no effort to enter and compete with the incumbent merging party at the time of the merger. A potential competition concern may nevertheless arise if there is evidence that, absent the merger, the non-competing party would constrain market prices and could potentially enter and compete in the relevant market. On the other end of the spectrum is a case involving a merging party that, at the time of the merger, has only recently entered and begun to compete with its merger partner. Section 2.1.5 of the new Guidelines clarifies that this scenario could raise potential competition concerns if there is evidence that the recent entrant is a "maverick" or, absent the merger, would expand and become a larger and more significant competitor in the future.

Other potential competition cases may fall somewhere between these two scenarios. For example, evidence may show that the potential competitor is committed to entering the market in the near future absent the merger (a "committed entrant") or would be very likely to enter in the event incumbent competitors increased prices (a "rapid entrant"). Under Section 5.1 of the new Guidelines, a merging party that is a "committed" or "rapid" entrant would be counted as a competitor in the relevant market.

This general framework provides some guidance on whether a merging party is likely to be viewed as a participant in the same relevant market as the other merging firm (either as an actual current participant, a "committed entrant," or a "rapid entrant") or as a potential entrant under the entry analysis discussed in Section 9. Such distinctions are meaningful, but the more important question is how to predict the magnitude of the future competitive impact of a potential competitor. The new Guidelines address this, in part, by noting that the Agencies will use projected revenues to compute the market share of a potential new entrant.[14] According to Section 5.3 of the new Guidelines, the larger the market share of the incumbent and the greater the competitive significance of the merging potential entrant (as measured by projected revenues) relative to other firms, the greater the competitive concern raised by a proposed merger.

Competitive Effects in Potential Competition Cases

Although the new Guidelines provide some guidance regarding whether a potential competitor should be categorized as a market participant or possible entrant, they stop short of addressing a number of more difficult issues that often arise in potential competition cases. One issue is that the use of projected revenues to estimate a potential competitor's market share involves making assumptions about the future market success of the potential competitor, which in many cases can inject a great deal of uncertainty into the analysis. A potential entrant by definition is a firm that lacks a significant track record of either supplying the relevant product at all or supplying it within the same relevant geographic market as the incumbent. When the potential competitor's entry or expansion has yet to occur, it is often unclear whether and to what extent the new business or expansion effort will survive, let alone have material impact on competition.

Supreme Court decisions have recognized this issue and crafted special evidentiary standards to relieve concerns about inherent speculation. In *United States v. Falstaff Brewing Corp.*[15] and *United States v. Marine Bancorporation*,[16] the Court affirmed the concept that potential competition is, in some cases, worthy of protection under Section 7. At the same time, the Court in both cases recognized the difficulty of challenging a merger that, while perhaps eliminating potential future competition, in the more immediate term "leave[s] competition in the marketplace exactly as it was, neither hurt nor helped."[17]

According to the Court's *Marine Bancorporation* decision, at least two conditions must be met before a merger between potential competitors may be found to violate Section 7: (1) the potential competitor must have an "available feasible means" for entering the market; and (2) those means must "offer a substantial likelihood of ultimately producing deconcentration . . . or other significant procompetitive effects."[18] These evidentiary requirements had a significant impact on the Agencies' ability to win subsequent potential competition cases in court. In the eight years following the *Marine Bancorporation* decision, between 1974 and 1982, the DOJ and FTC were unsuccessful in a large percentage of the potential competition cases they brought, winning only one of a total of five suits that reached a federal appeals court.[19]

Perhaps because of the Agencies' low success rate and higher burdens of proof, over the course of the ensuing three decades there have been very few litigated merger cases involving potential competition claims. The Agencies have continued to investigate and take enforcement action in cases based in whole or in part on potential competition theories, but they have done so almost exclusively through the consent decree process or early settlement.[20] There has not been a federal court of appeals merger decision applying the potential competition framework since the 1980s.

Despite longstanding requirements emanating from the case law, the new Guidelines appear to equate actual and projected revenues for purposes of determining market shares. In projecting market shares based on expected revenues going forward, the Agencies make two implicit assumptions—first, that the potential competitor had "available feasible means" for successful entry, and second, that the new venture will be successful and have a procompetitive impact on the relevant market. The new Guidelines are silent, however, regarding how the Agencies plan to evaluate either assumption.

The new Guidelines also do not address how the Agencies will evaluate competitive effects in potential competition cases. In a unilateral effects case involving potential competitors, the allegation is not only that the potential competitor be a market participant in the future absent the deal, but that it would provide a new and uniquely effective source of competition for the other merging party, an established incumbent. The DOJ's enforcement action against the merger between Ticketmaster and Live Nation illustrates a "potential competition unilateral effects" fact pattern. The DOJ's complaint was based on a theory that, absent the merger, "Live Nation would become Ticketmaster's direct competitor" in the relevant market for primary ticketing services provided to "major concert venues."[21] The complaint described a unique brand of competition Live Nation was allegedly poised to bring to the marketplace absent the merger: "Live Nation

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presented a new and different source of competition in primary ticketing" and, through its promotions business, "could offer venues access to concert tours as an inducement to use Live Nation's ticketing service."[22]

While Live Nation had actually entered by the time the merger was announced, the DOJ envisioned that the primary impact of Live Nation's entry would occur in the future. According to the DOJ's complaint, before the merger, Live Nation had planned to compete with Ticketmaster for third-party ticketing contracts "in late 2009 and early 2010," roughly a year after the merger announcement.[23] And although Live Nation had attempted to secure a number of third-party ticketing contracts prior to the merger, the DOJ's complaint alleged Live Nation would become a much more significant competitor in the future than it was at the time the merger was made public. In the DOJ's words, "[t]he proposed merger came at a time when Live Nation was just starting to make a competitive impact."[24] The DOJ's core competitive concern was the loss of nascent competition between an incumbent and a recent entrant that allegedly would have blossomed into a more substantial and unique competitive rivalry.

In reviewing the potential for unilateral effects, the Agencies state that they will evaluate whether a substantial percentage of one merging party's customers "consider products sold by the other merging firm to be their next choice."[25] The Agencies indicate that the value of the diverted sales—based in part on the profit margins for the relevant products sold by the merging parties—is relevant to the evaluation of unilateral effects. In industries where buyers and sellers engage in bargaining on price and other terms, the Agencies will review historic evidence of bidding competition, including the profitability of winning bids and the frequency of close, direct-bidding contests between the merging paties.[26]

These methodologies presuppose the existence of data showing pre-merger profit margins for the merging firms' competing products and evidence regarding which products customers view as close substitutes, enabling the Agencies to estimate the value of diverted sales based on past market experience. This evidence, according to the new Guidelines, includes "win/loss reports," "evidence from discount approval processes," and "customer switching patterns."[27] But cases involving mergers between potential competitors (and cases involving a merger between an incumbent and a recent entrant) by definition involve at least one firm with little or no history of competing in the relevant market. Having not participated in the market (or having participated for at most a short period), the potential competitor would lack an established track record of profitability, and there would be little or no available evidence—such as win/loss reports or customer switching patterns—from which to infer diversion between the merging firms.

Given the limited or non-existent history of competition between the parties in potential competition cases, it is not clear how the Agencies will test whether a significant proportion of future customers would view the merging parties' products or services as next-best substitutes. As discussed above, in potential competition merger cases, the Supreme Court has required proof that future entry by the non-competing firm will produce substantial procompetitive benefits.

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As applied in a unilateral effects case involving potential competitors, established law thus requires proof that the potential or emerging entrant would not only enter but become a particularly close competitor to the other merging party. In addition, according to the new Guidelines, there must be some evidence that non-merging firms are unable to reposition their product lines to offer "very close substitutes for the products offered by the merging firms."[28] If other firms are likely to expand or reposition their offerings to replace the future competition lost through the merger, the merger does not eliminate the unique competitive threat posited by a unilateral effects theory.[29]

As a general matter, the new Guidelines state that competitive effects may be measured based on "analogous events in similar markets."[30] This could include a study comparing prices charged by the merging parties in geographic areas where they compete with prices charged in areas where they do not yet compete. The Agencies have used such studies in the past to show unique competition between actual competitors—most famously in *FTC v. Staples*.[31] These comparative studies may also be useful in cases where the merging parties are actual competitors in some geographic markets and potential competitors in others. For example, if there are instances where one party entered a geographic area in competition with the other, such evidence may inform whether future potential competition in areas where the merging parties do not compete is likely to have procompetitive benefits. However, these methods are limited because they presuppose that the parties compete in at least one geographic market. The new Guidelines shed little light on how the Agencies plan to address potential competition involving new entry or expansion by one party into a new product or service that it does not offer in any geographic area.

Considerations in Analyzing Potential Competition Mergers Under the New Guidelines

Going forward, there are a number of issues that practitioners and the Agencies will be required to address in the context of merger investigations rooted in concerns about potential competition. It is critical to ask the right questions and, as a significant body of potential competition case law teaches, to recognize that the analysis of potential competition may differ in material respects from the analysis of actual competition. Questions one can expect to arise in such cases include the following:

Is entry likely absent the merger? What is the risk that the potential competitor will not actually enter absent a merger? Potential competitors vary widely in terms of their ability to enter the relevant market. Some potential entrants, such as generic pharmaceutical companies with new products nearing final FDA approval, may find themselves on a well-defined path to successful entry, although even in this context successful entry cannot be predicted with certainty. Others, particularly those in industries where there is a history of failed entry or declining profitability, face greater uncertainty.[32] At the outset, it is important to identify all the risks facing the potential competitor to determine whether those risks make predictions about the success and impact of future entry. Some potential competitors may lack all the necessary attributes for successful entry. For example, a potential entrant that has the financial resources and incentive to enter may not have the talent, skill, or wherewithal to develop an entirely new product, service, or technology.[33]

When would the potential competitor enter absent the merger? As the new Guidelines explain, entry must be "timely" in order to have a competitive impact on incumbent firms.[34] The courts have not imposed a specific time period for new entry in potential competition cases, but one court has required that a "finding of probable entry at least contain some reasonable temporal estimate related to the near future."[35] The key factors are "entry barriers" and the "lead time" the potential competitor needs to enter. If the industry is changing rapidly and the evidence suggests the potential competitor's entry is years away, then it may be unduly speculative to assume that entry will occur.

Absent the merger, what would the competitive impact of the potential competitor be? As noted earlier, the new Guidelines elevate the importance of direct evidence of competitive effects. In a potential competition case, this adds another layer of complexity to the analysis. If the theory is that a merger between an incumbent and a potential competitor will lead to unilateral effects, there must be additional evidence to show not only that successful entry would occur absent the merger but also that close, unique competition would ensue between the parties. In a case where the theory of harm is based on coordinated effects, the evidence should show that the new entry would undermine the ability of incumbent firms to engage in coordinated behavior, resulting in lower prices and other benefits for consumers. Likewise, if the allegation is that a proposed merger will remove a rival in a race to introduce a new product, the evidence should show that the lost rivalry would harm innovation.[36]

Is the potential competitor uniquely positioned among other potential entrants or incumbents? A merger that eliminates potential competition from one source has no overall market impact if other firms are equally (or better) positioned to enter or expand. For example, the FTC recently concluded that the Google/DoubleClick transaction did not raise potential competition concerns even though, at the time of the merger, Google had been developing its own third-party ad serving solution to compete with DoubleClick's. According to the FTC, DoubleClick faced substantial competition from other potential entrants and existing rivals. There was therefore no evidence that Google was "uniquely positioned to have a substantial competition-enhancing effect" on the relevant market.[37] Thus, a key issue is whether and to what extent non-parties to the merger are poised to enter, or would be motivated to enter if the would-be entrant/potential competitor is eliminated by the merger. A related issue is whether incumbent firms currently competing in the market are capable of repositioning or expansion sufficient to thwart the purported anticompetitive effects of the transaction.

What is the rationale for the transaction and how does it relate to potential future competition? In many merger cases, the business rationale for the transaction may be deemed relevant to an assessmernt of the merger's competitive effects. Potential competition cases are no exception. If, for example, the evidence shows that the potential entrant believes that merging with an incumbent is a superior or more feasible means of entering the relevant market, such evidence may call into question whether the firm would have risked de novo entry, or would have succeeded in the event it did enter. Evidence of this nature may suggest that the merger will increase competition by combining complementary resources that enable the merged firm to more successfully expand or introduce new and improved products.

It is difficult to fault the Agencies for not addressing every conceivable issue that may arise in a potential competition case. The new Guidelines are intended to be flexible and cannot account for all possible fact patterns. Still, the emphasis placed on potential competition in the new Guidelines calls out for more guidance from the Agencies, so that parties contemplating transactions raising such issues will have a better ability to assess likely government responses and the methods by which their proposed mergers will be analyzed.

It remains to be seen what standards will be employed by the Agencies in potential competition cases. As in the past, the Agencies and the courts will need to balance competitive concerns against the risks associated with antitrust enforcement predicated on assumptions about uncertain future events. While merger analysis may always be inherently forward-looking, it is equally true that such cases "must be resolved on the basis of the record evidence relating to the market and its probable future."[38] Where it is potential future competition that the Agencies seek to protect, they bear a high burden in validating the reliability of their predictions. ■

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[1] *See* U.S. Dep't of Justice & the Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) [hereinafter 2010 Merger Guidelines], *available at* http://ftc.gov/os/2010/08/100819hmg.pdf.

[2] See Statement of Chairman Leibowitz on the Release of the 2010 Horizontal Merger Guidelines (Aug. 19, 2010), *available at* http://ftc.gov/os/2010/08/100819hmgleibowitz.pdf; Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines (Aug. 19, 2010), *available at* http://63.241.106.251/speeches/rosch/100819horizontalmergerstatement.pdf ("[The 2010] Guidelines properly consider competitive effects first, and market definition second, thereby making clear that while market definition is important . . . ultimately merger analysis must rest on the competitive effects of a transaction.").

[3] 2010 Horizontal Merger Guidelines, *supra* note 1, § 1 (emphasis added).

[4] U.S. Dep't of Justice, Merger Guidelines §§ 3.0, 4.0–4.1 (1984), *available at* http://www.justice.gov/atr/hmerger/11249.pdf (distinguishing "horizontal mergers," which involves firms that "are in the same product and geographic market," from "non-horizontal mergers," which "involve firms that do not operate in the same market.").

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

[6] BOC Int'l, Ltd. v. FTC, 557 F.2d 24, 26–29 (2d Cir. 1977).

[7] *See* United States v. Penn-Olin Chem. Co., 378 U.S. 158, 171 (1964), *aff'd*, 389 U.S. 308 (1967). More generally, Section 7 seeks to address a merger's impact on future competition and therefore a merger may be unlawful even in cases where its predicted anticompetitive effect is probable but not certain. *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 367 (1963) (one purpose of Section 7 is "to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer's alternatives disappeared through merger.") (emphasis added); Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) ("Congress used the words 'may be substantially to lessen competition,' to indicate that its concern was with probabilities, not certainties").

[8] 15 U.S.C. § 18.

[9] See, e.g., 2010 Horizontal Merger Guidelines, supra note 1, § 5.2 ("The Agencies consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data.").

[10] *Id.* § 1 ("Most merger analysis is necessarily predictive . . . . Given this inherent need for prediction, these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency . . . .").

[11] *Id.*

[12] *Id.* § 2.1.4 (emphasis added).

[13] *Id.* § 2.1.5.

[14] *Id.* § 5.2.

[15] 410 U.S. 526 (1973).

[16] 418 U.S. 602 (1974).

[17] *Falstaff*, 410 U.S. at 537. The Court distinguished between two separate potential competition theories: "Perceived potential" competition, where a merger eliminates a potential competitor on the fringes of the market that, absent the merger, would serve to constrain prices of current competitors even if the potential competitor never actually enters the market; and "actual potential" competition, where a merger's elimination of a potential entrant removes the competitive benefits that may come to fruition *in the future* when, absent the merger, the potential competitor would have entered.

[18] 418 U.S. at 633.

[19] *See* Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982) (finding in favor of defendants); Yamaha Motor Co. v. FTC, 657 F.2d 971, 977 (8th Cir. 1981) (affirming FTC's finding that proposed transaction violated Section 7); United States v. Siemens Corp., 621 F.2d 499, 504 (2d Cir. 1980) (finding in favor of defendants on government's potential competition claim); BOC Int'l, Ltd. v. FTC, 557 F.2d 24, 26–28 (2d Cir. 1977) (same); FTC v. Atl. Richfield Co., 549 F.2d 289, 293 (4th Cir. 1977) (same). In addition to the cases brought by the FTC and DOJ, the Fifth Circuit—applying Clayton Act Section 7 legal standards—vacated a Federal Reserve Board order denying the merging parties' proposed merger on potential competition grounds. *See* Mercantile Tex. Corp. v. Bd. of Governors of the Fed. Reserve Sys., 638 F.2d 1255, 1259–66 (5th Cir. 1981) (vacating and remanding Federal Reserve Board ruling because the Board failed to provide sufficient evidence in support of the probability of entry).

[20] *See, e.g.*, Verified Complaint, United States v. Microsemi Corp., No. 1:08cv1311 (E.D. Va. Dec. 18, 2008), *available at* http://www.justice.gov/atr/cases/f240500/240537.htm; Complaint, United States v. Pearson PLC, No. 1:08-cv-00143, (D.D.C. Jan. 24, 2008), *available at* http://www.justice.gov/atr/cases/f229500/229561.htm; Analysis of Agreement Containing Consent Orders to Aid Public Comment, Allergan, Inc. and Inamed Corporation, FTC File No. 061 0031 (Mar. 14, 2006), *available at* http://www.ftc.gov/os/caselist/0610031/0610031AlleganInamedAnalysis.pdf; Cephalon, Inc., 138 F.T.C. 583, 635-36 (2004); Roche Holding Ltd., 113 F.T.C. 1086 (1990), *modified*, 1996 FTC LEXIS 45 (1996).

[21] Amended Complaint ¶ 3, United States v. Ticketmaster Entm't, Inc., No. 1:10-cv-00139 (D.D.C. Jan. 28, 2010), *available at* http://www.justice.gov/atr/cases/f256300/256322.htm. The authors worked on behalf of Ticketmaster in connection with the DOJ's review of the Live Nation merger.

[22] *Id.* ¶ 4.

[23] *Id.* ¶ 29.

[24] *Id.* ¶ 40 (emphasis added). The DOJ's complaint also alleged that the proposed merger would eliminate "actual *and potential*" competition between the parties. *Id.* ¶ 48 (emphasis added).

[25] 2010 Horizontal Merger Guidelines, *supra* note 1, § 6.1.

[26] *Id.* § 6.2.

[27] *Id.* § 6.1.

[28] *Id.*

[29] *See, e.g.*, United States v. Siemens Corp., 621 F.2d 499, 509 (2d Cir. 1980) ("In view of the large number of potential entrants, the elimination of Siemens does not appear to pose a significant threat to competition").

[30] 2010 Horizontal Merger Guidelines, *supra* note 1, § 2.1.2.

[31] 970 F. Supp. 1066 (D.D.C. 1997).

[32] In *Tenneco*, for example, the Second Circuit found the FTC's evidence of potential future entry by the potentially competing merging party unpersuasive. *See Tenneco*, 689 F.2d at 354. At the time of the merger, industry profits were declining and the potential entrant had decided not to enter even during periods of high industry profitability.

[33] *See, e.g.*, *Siemens*, 621 F.2d at 507 ("Because we are not here confronted with the claim that Siemens may extend geographically its market for one of its existing products . . . but rather with the claim that it could develop an entirely new product, we must carefully scrutinize the technological feasibility of that expansion, particularly where, as here, the market is characterized by technological innovation.").

[34] 2010 Horizontal Merger Guidelines, *supra* note 1, § 9.

[35] BOC Int'l, Ltd. v. FTC, 557 F.2d 24, 29 (2d Cir. 1977).

[36] *See* Statement of Chairman Timothy J. Muris in the Matter of Genzyme Corporation/Novazyme Pharmaceuticals, Inc., at 6 (Jan. 13, 2004), *available at* http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf (in evaluating the impact of a merger on the pace of innovation, "one must examine whether the merged firm was likely to have a reduced incentive to invest in R&D").

[37] Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220statement.pdf.

[38] FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 116–17 (D.D.C. 2004).