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Antitrust Merger Efficiencies in the Shadow of the Law

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RESPONSE

Antitrust Merger Efficiencies in the Shadow of the Law

D. Daniel Sokol[*] *and James A. Fishkin*[**]

I. THE NEED FOR A BROAD UNIVERSE IN EXAMINING MERGER EFFICIENCIES 47
II. THERE IS MORE NUANCE TO THE MERGER GUIDELINES 51
III. A MORE SUBSTANTIAL DISCUSSION OF THE 1997 REVISIONS AND 2010 MERGER GUIDELINES FACILITATES A BETTER UNDERSTANDING OF EFFICIENCIES IN MERGER ANALYSIS AT THE ENFORCEMENT AGENCIES 53
IV. SLIDING SCALE VERSUS THE BALANCING APPROACH FOR ANALYZING EFFICIENCIES CLAIMS IN LITIGATED MERGER CASES 64
V. UTILIZING THE COMMENTARY AND AGENCY STATEMENTS TO BETTER UNDERSTAND EFFICIENCIES 66
VI. ECONOMIC IMPLICATIONS: THE NEED FOR EMPIRICAL SUPPORT 68
A. Banks' "Too Big to Fail" Issue as an Antitrust Problem 68
B. Alleged Antitrust Under-Enforcement Under Bush 70
VII. RISK SHIFTING PLAYS A ROLE IN FIRMS' EVALUATION OF THE SIGNIFICANCE OF EFFICIENCIES CLAIMS IF THE OUTCOME IS UNCERTAIN 70
CONCLUSION 72

This Response provides an overview of U.S. antitrust merger practice in addressing efficiencies to overcome misperceptions and

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mistaken inferences about the use of merger efficiencies made in Jamie Henikoff Moffitt's *Vanderbilt Law Review* article *Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis*.[1] Specifically, this Response provides context to her article by discussing the actual practice of merger efficiencies and the underlying scholarly work in the area.

Moffitt's article is interesting and novel. Indeed, it is the first antitrust article to apply the insights of negotiation theory to the merger process. However, Moffitt's analysis could have benefited from a more thorough discussion of the Department of Justice and Federal Trade Commission's (collectively, the "agencies") analysis of efficiencies during investigations and the broader process of negotiations involving mergers. For instance, the article does not discuss the empirical work addressing when the agencies use efficiencies, the role antitrust practitioners play during the merger process in shaping whether or not the agencies will litigate a case, or the types of issues that end in litigation. Moreover, the article does not sufficiently analyze merger enforcement decisions at the agencies based on the efficiencies section of the 1997 Revisions to the Horizontal Merger Guidelines ("1997 Revisions") and the new 2010 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("2010 Merger Guidelines").[2] Moffitt also overlooks the importance of the 2006 Commentary on the Horizontal Merger Guidelines ("Commentary") and fails to address the chapter within the Commentary that specifically addresses how the agencies consider efficiencies.[3] Lastly, Moffitt's claims stressing the importance of her work in a broader context of business issues (such as the financial crisis) and policy debates regarding shifts in antitrust merger enforcement are without empirical support.[4] This Response addresses each of these issues in turn.

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1. 63 VAND. L. REV. 1697 (2010).

2. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf [hereinafter 2010 Merger Guidelines]; U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf [hereinafter 1997 Revisions]; *see also* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (1992) [hereinafter 1992 Merger Guidelines]. The only change between the 1997 Revisions and the 1992 Merger Guidelines was Section 4 on efficiencies.

3. Fed. Trade Comm'n & U.S. Dep't of Justice, Commentary on the Horizontal Merger Guidelines, ch. 4, 49–59 (2006), *available at* http://www.usdoj.gov/atr/public/guidelines/215247.pdf [hereinafter Commentary]. The specific chapter that Moffitt omits is titled "Efficiencies."

4. Moffitt, *supra* note 1, at 1724–27.

I. THE NEED FOR A BROAD UNIVERSE IN EXAMINING MERGER EFFICIENCIES

The title of Moffitt's work suggests that Moffitt has examined the universe of behavior beyond decided cases to also include those cases decided in the "shadow of the law."[5] Instead, Moffitt excludes all but preliminary injunction cases.[6] This approach is unfortunate because the preliminary injunction cases are not necessarily representative of how the agencies evaluate efficiencies on a case-by-case basis. By failing to include an analysis of all cases truly decided in the shadow of the law, Moffitt's work leads to a combination of mistaken and overly broad inferences.

Because Moffitt's article only examines preliminary injunction cases, it is not clear what inferences apply to the larger body of merger cases. The Priest-Klein theory suggests that in looking at a narrow subset, as Moffitt does by focusing solely on litigated disputes, her analysis is neither representative nor random.[7] Indeed, most "action" in mergers generally and in merger efficiencies specifically occurs in dynamics between the agencies and outside counsel (including economists employed by outside counsel) in various stages of the merger notification process.[8] Yet the author did not analyze or evaluate the important discussions between the potential merging parties and agency staff that occur during the initial waiting period (thirty days in most cases). She also did not analyze or evaluate the dynamics in the subsequent second request period that occur before the Assistant Attorney General or the FTC decides to either seek some type of enforcement action or close an investigation. By ignoring how merger efficiencies affect these discussions, Moffitt misses an opportunity to provide more accurate insight. Thus, the litigated cases are not representative of the broader universe of matters involving merger efficiencies.

When firms contemplating mergers consider litigated cases as part of the decisionmaking process, they must consider them in context. The agencies provide a yearly breakdown of statistics showing

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5. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Mnookin and Kornhauser coined this now famous term to describe how legal rules influence parties to a dispute during the settlement process, which accounts for most case outcomes.

6. Moffitt, *supra* note 1, at 1747–54.

7. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

8. D. Daniel Sokol, *Antitrust, Institutions and Merger Control*, 17 GEO. MASON L. REV. 1055, 1100–02 (2010).

the number of merger cases they investigate each fiscal year.[9] Given the change in merger activity due to the Great Recession, Table 1 below provides the total number of mergers filed over the past six-year period to illustrate how Moffitt's focus excludes a large part of the dynamics of the merger process. We include statistics only for those cases notified under the Hart-Scott-Rodino Act ("HSR").[10]

Table 1. FTC and DOJ Merger Enforcement, FY 2005 to FY 2010

HSR Filings, Investigations	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
HSR Premerger Notifications Received	1,675	1,768	2,201	1,726	716	1,166
HSR Investigations: Second Requests	50	45	63	41	31	46

From 2005 to 2010, the agencies received a combined 1,675, 1,768, 2,201, 1,726, 716, and 1,166 HSR notifications, respectively. A smaller subset of these investigations involved a second request (an investigation beyond the thirty-day (in some cases fifteen-day) initial waiting period). Second requests totaled 50, 45, 63, 41, 31, and 46 respectively between 2005 and 2010. Based on their investigations, the agencies decided to challenge a subset of these proposed mergers. Of this very small set of cases, Moffitt examines only the subset of fully litigated preliminary injunction cases. As a result, her data do not account for consent decrees (where efficiencies may mitigate the extent of the remedies), nor do they account for situations where a second request was issued but no enforcement was obtained, where the parties abandoned deals after the second request (where it is clear that efficiencies did not prevail), or where the case is decided after a full trial on the merits.

The data above suggest that the shadow of the law regarding merger efficiencies is not the handful of litigated preliminary injunction merger cases. Rather, it is the day-to-day practice of antitrust law that does not necessarily involve litigated preliminary injunctions. Discussions regarding efficiencies happen at a number of levels. First, there are discussions between the outside counsel who

9. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, WORKLOAD STATISTICS, FY 2000-2009 (2009), *available at* http://www.justice.gov/atr/public/workload-statistics.html#N_5.

10. 15 U.S.C. § 18a (2011).

file the HSR premerger notification form and the agency staff, and if second requests are issued, there are responses to specific second request specifications regarding efficiencies claims. During this time period in a government merger investigation, counsel attempt to convince the agency staff not to oppose the merger for a variety of case-specific reasons, including efficiencies claims made by the acquiring party. Should issues develop, the discussions that occur between the outside lawyers and the agency staff and management take on greater importance, as do staff discussions with the buyer's businesspeople and discussions between economists and lawyers. These different negotiations make up the bulk of the practice of efficiency discussions and better represent the reality of efficiencies practice at the agencies.[11]

Few academic works analyze the overall merger control process and the various negotiations that occur.[12] However, one work by Malcolm B. Coate and Andrew J. Heimert (which Moffitt does not cite) specifically covers merger efficiencies and provides a nuanced view of the FTC decisionmaking process.[13] This important work reviewed the confidential files of the FTC staff to determine how the FTC staff treated claims of efficiencies in the ten years after the 1997 inclusion of efficiencies in the Merger Guidelines. During that ten-year period, the FTC staff conducted 186 second request investigations into proposed mergers. Coate and Heimert found that while staff considered efficiency arguments, they "did not take a conclusive position on the majority of efficiencies claims discussed in the studied memoranda."[14] The Coate and Heimert study also revealed that in a significant minority of merger cases (39 of 186), neither the lawyers (Bureau of Competition) nor the economists (Bureau of Economics) at the FTC addressed any efficiencies claims. However, in the majority of the mergers investigated (147 of 186), the staff did consider efficiency claims. Coate and Heimert's study details the amount of pages spent on efficiencies claims in staff recommendation memoranda from the agency lawyers and economists, the particular types of efficiency claims made, the number of claims brought up in each matter, and the

11. To be sure, it is difficult to obtain data from non-public investigations regarding non-challenged mergers.

12. One such work incorporating both quantitative and qualitative practitioner survey data is D. Daniel Sokol, *Antitrust, Institutions and Merger Control*, 17 GEO. MASON L. REV. 1055 (2010).

13. MALCOLM B. COATE & ANDREW J. HEIMERT, MERGER EFFICIENCIES AT THE FEDERAL TRADE COMMISSION 1997–2007, (2009), *available at* http://www.ftc.gov/os/2009/02/0902 mergerefficiencies.pdf.

14. *Id.* at 1.

number of claims that staff rejected. In doing so, their study provides a broader glimpse of the reality of the use of efficiencies in antitrust practice than does Moffitt's small sample of decided preliminary injunction merger cases. Because agency review shapes the nature of filed cases that might emerge in the pipeline, any analysis of efficiencies that omits a discussion of the earlier stage of negotiation will lead to mistaken inferences.

Within her small pool of preliminary injunction merger cases, efficiencies are rarely, if ever, the key issue on which courts decide a case.[15] Instead, preliminary injunction cases typically focus on primary issues such as defining the relevant product market even if the opinions analyze efficiencies claims.[16]

Moffitt, however, limited her research and conclusions to preliminary injunction matters that analyzed efficiencies during the 1986 to 2009 time period.[17] In doing so, she ignored the other litigated merger cases and, most importantly, all other merger enforcement actions during the same time period. In addition, ten of the twenty-three preliminary injunction cases listed on page 1711 of Moffitt's article were decided prior to the 1997 Revisions and the 2010 Merger Guidelines and thus are not representative of the agencies' current enforcement practices regarding efficiencies analysis.[18]

An analysis of efficiencies that is limited to litigated preliminary injunction cases provides a skewed analysis of the importance of the issue to the enforcement agencies analyzing potential competitive effects in a specific merger matter. Because so few merger cases are litigated, it is critical to understand how the agencies internally analyze efficiencies. Former FTC Commissioner Thomas Leary highlighted this point in a 2002 American Bar Association speech, where he stated: "Since very few merger cases are actually litigated and since (with the exception of hospital mergers) the prosecutors tend to prevail in court, the internal treatment of

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15. The efficiencies defense is not always raised by the merging parties in preliminary injunction matters or analyzed by courts. *See generally, e.g.*, United States v. UPM-Kymmene Oyj, No. 03-C-2528, 2003 WL 21781902 (N.D. Ill. July 25, 2003) (failing to discuss efficiencies in the decision issuing a preliminary injunction); United States v. Sungard Data Sys., 172 F. Supp. 2d 172 (D.D.C. 2001) (failing to discuss efficiencies in the decision denying a preliminary injunction).

16. *See, e.g.*, FTC v. Whole Foods Market, Inc., 533 F.3d 869 (D.C. Cir. 2008); FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

17. Moffitt, *supra* note 1, at 1747–54.

18. *Id*. at 1711. Section III, *infra*, discusses how the efficiencies section in the 2010 Merger Guidelines did not substantially change the efficiencies section in the 1997 Revisions.

merger efficiencies by the agencies is of critical importance."[19] The then-FTC Chairman Robert Pitofsky also noted in a 1998 speech that although the 1997 Revisions to the efficiencies analysis may not impact litigated merger decisions, they "will make a difference . . . in connection with the exercise of prosecutorial discretion."[20] In fact, the efficiencies section of the 2010 Merger Guidelines, which is discussed *infra*, describes how the agencies evaluate efficiencies.[21] The agencies' Commentary, which is also discussed *infra*, provides the most comprehensive summary of how the agencies apply efficiencies analysis to actual merger cases.[22]

II. THERE IS MORE NUANCE TO THE MERGER GUIDELINES

We note that there is an important institutional issue at play for efficiencies, and the Merger Guidelines more explicitly, because the Supreme Court has not heard a merger case for many years.[23] Thus, it is unclear whether the Court would apply the existing set of Merger Guidelines at any given time in a Clayton Act Section 7 case. Professor Hillary Greene provides some guidance in her explanation that courts have gradually shifted their thinking to follow more closely the language in the Merger Guidelines (at least for the 1992 Merger Guidelines).[24] But this process has been gradual, as the 1992 Merger Guidelines did not reflect the case law of the time.[25] The 1992 Merger Guidelines were aspirational (in the sense that the Merger Guidelines described how the agencies would analyze mergers) rather than a restatement of merger law.[26]

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19. Thomas B. Leary, Comm'r, Fed. Trade Comm'n, *Efficiencies and Antitrust: A Story of Ongoing Evolution*, Remarks at the ABA Section of Antitrust Law, 2002 Fall Forum (Nov. 8, 2002), *available at* http://www.ftc.gov/speeches/leary/efficienciesandantitrust.shtm.

20. Robert Pitofsky, *Efficiencies in Defense of Mergers: Two Years After*, 7 GEO. MASON L. REV. 485, 485 (1999) (reprinting his entire speech).

21. *See* 2010 Merger Guidelines, *supra* note 2, § 10.

22. *See* Commentary, *supra* note 3, ch. 4.

23. United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974) (discussing competitive effects analysis in a merger).

24. Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 774 (2006). For more information on how this process also has occurred in the area of efficiencies, see William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 232 (2003) ("The courts have largely adopted the analytical framework for evaluating efficiency claims that is set out in the Guidelines.").

25. Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 774 (2006).

26. *Id.*

As a result of a gradual process, courts harmonized their decisions with the 1992 Merger Guidelines.[27] Yet, another problem appeared as courts moved closer to the language of the Merger Guidelines. During this same period of a shift in the decided cases, the agencies themselves began to shift their own internal application of the 1992 Merger Guidelines, which eventually led to the adoption of the 2010 Merger Guidelines.[28] As a result of this lagged interpretation, the analyses set forth in some judicial opinions is different from the theories used by the agencies when they review merger filings via the HSR process in Section 7A of the Clayton Act. This contrast between how agencies interpreted the 1992 Merger Guidelines and the 1997 Revisions prior to the adoption of the 2010 Merger Guidelines and how the courts applied them suggests that for those cases that the agencies challenged, courts' application of the 1992 Merger Guidelines and the 1997 Revisions in some cases differed from agency determinations of mergers that the agencies did not challenge.

Specific to the area of efficiencies under the Merger Guidelines, the courts generally only saw preliminary injunction cases where the likelihood of harm, as alleged by the agencies, was quite certain (e.g., merger to monopoly and near-monopoly). As such, the courts in preliminary injunction cases did not have the opportunity to analyze efficiencies in moderately concentrated market cases (those cases for which the Herfindahl-Hirschman Index ("HHI") was between 1,000 and 1,800) and cases in the lower range of highly concentrated cases (HHI of 1,800 to approximately 2,500 or 3,000) to provide a better sense of how efficiencies could overcome alleged anticompetitive effects. So-called "close cases" where efficiency claims may have been accepted by the courts did not get litigated.

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27. *Id.*

28. In a scathing attack on the guidelines at a 2004 FTC/DOJ Merger Enforcement Workshop, practitioner William Blumenthal, who would become general counsel of the FTC within a year, stated:

> Basically, to draw from the parlance of the FTC's Bureau of Consumer Protection, the 1992 Guidelines are deceptive. They may be literally accurate, and their meaning may have been properly understood at the time they were issued, but their meaning is misinterpreted today by a material percentage of readers. I ignore them as an operational tool, and I urge associates and clients to do likewise, except perhaps as background reading. If the uninitiated try to apply the Guidelines without detailed annotations explaining terms of art, they are likely to reach an erroneous conclusion.

William Blumenthal, *Why Bother?: On Market Definition Under the Merger Guidelines*, DEP'T OF JUSTICE, http://www.justice.gov/atr/public/workshops/docs/202600.htm. The hearings took place in February 2004. By March 2005, Blumenthal started as General Counsel of the FTC. Thus, one can conclude that his comments rang true enough that it did not hurt his chances for the top lawyer job at the agency.

What the Merger Guidelines and Commentary provide is both clarification and change for efficiencies. Each set of new Merger Guidelines issued by the agencies includes both changes and clarifications to the methodology for determining whether a merger may be anticompetitive and in violation of Section 7 of the Clayton Act. For example, the introduction in the 1992 Merger Guidelines of unilateral effects and the concept that entry must be "timely, likely, and sufficient to deter or counteract the competitive effects of concern" reflect change.[29] Similarly, the concept of "upward pricing pressure" in Section 6.1 of the 2010 Merger Guidelines reflect change. At the same time, the concept in Section 2.2.2 of the 2010 Merger Guidelines that information from customers may be highly relevant reflects clarification on existing analysis. These examples illustrate the dual purpose of the Merger Guidelines. The interaction of the themes of clarification and change has shaped how antitrust practitioners respond to the agencies in making efficiency arguments.

III. A MORE SUBSTANTIAL DISCUSSION OF THE 1997 REVISIONS AND 2010 MERGER GUIDELINES FACILITATES A BETTER UNDERSTANDING OF EFFICIENCIES IN MERGER ANALYSIS AT THE ENFORCEMENT AGENCIES

On August 19, 2010, the DOJ and FTC issued the new 2010 Merger Guidelines, replacing the 1992 Merger Guidelines and their 1997 revised section on efficiencies.[30] We presume that Moffitt did not have enough time to incorporate significant discussion of the changes from the 2010 Merger Guidelines into her article. However, we think it is important to include a discussion of them at this point because the new developments allow us to update the analysis of merger efficiencies. The 2010 Merger Guidelines attempt to provide clarity to the federal antitrust agencies' analysis of mergers. The purpose of the 2010 Merger Guidelines is to "assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions."[31] Although the 2010 Merger Guidelines and its predecessors are not law, "[t]hey may also assist the courts in developing an appropriate

29. Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49, 53–54 (2010). Carl Shapiro is the Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice and one of the primary drafters of the 2010 Merger Guidelines.

30. 2010 Merger Guidelines, *supra* note 2, at 1 n.1.

31. *Id.* at 1.

framework for interpreting and applying the antitrust laws in the horizontal merger context."[32]

Section 10 of the 2010 Merger Guidelines is the new efficiencies section and is the direct replacement to Section 4 of the 1992 Merger Guidelines, as revised in 1997. Moffitt's substantive analysis of the new efficiencies section is limited to a statement in a footnote that "the Efficiencies section of the 2010 Revisions is not substantively different from the Efficiencies section of the 1997 Revisions."[33] Moffitt also states in the same footnote that "because the courts have not yet heard a case since the release of the 2010 Revisions, this Article does not analyze the latest revision."[34]

Moffitt is correct in stating that Section 10 of the efficiencies section in the 2010 Merger Guidelines "is not substantively different from" Section 4 in the 1997 Revisions.[35] The DOJ and the FTC did,

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32. *Id.*

33. Moffitt, *supra* note 1, at 1700 n.6. Moffitt also cites the 2010 Merger Guidelines in footnotes 46, 93, and 105, but she does not discuss the new guidelines in the text. In fairness, Moffitt makes clear in footnote 105 that her article was drafted prior to the release of the 2010 Merger Guidelines.

34. *Id.* At this time, only two cases from a federal district court or federal appellate court cite to the 2010 Merger Guidelines. *See* FTC v. ProMedica Health Sys., Inc., Case No. 3:11 CV 47, slip op. (N.D. Ohio March 29, 2011); FTC v. Lab. Corp. of Am., No. SACV 10-1873 AG (MLGx), 2011 U.S. Dist. LEXIS 20354, at *35 (C.D. Cal. Feb. 22, 2011). Paragraph 166 of the *LabCorp* preliminary injunction case cites to Section 10 of the 2010 Merger Guidelines. Paragraph 26 of the Conclusions of Law in the *ProMedica* preliminary injunction case cites to Section 10 of the 2010 Merger Guidelines for the statement that the defendant "failed in its burden of proving that its asserted efficiencies are: (1) verifiable; (2) not attributable to reduced output or quality; (3) merger-specific; and (4) sufficient to outweigh the transaction's anticompetitive effects." The *ProMedica* decision also states that "[e]fficiencies must be 'extraordinary' to overcome high concentration levels" and that "[n]o court in [an FTC Act] 13(b) proceeding, or otherwise, has found efficiencies sufficient to rescue an otherwise illegal merger." *Id.* ¶¶ 27–28. The FTC also cites to the 2010 Merger Guidelines in *Polypore International, Inc.*, 2010-2 Trade Cas. (CCH) ¶ 77,267 (Dec. 13, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/101213polyporeopinion.pdf. *Polypore* is the first FTC administrative decision citing to the 2010 Merger Guidelines. The FTC's *Polypore* decision only briefly discusses issues relating to efficiencies, in part because the "[r]espondent has not raised these arguments in its appeal briefs." *Id.* at 32 n.45. Efficiencies were raised by Polypore at the administrative trial and rejected by the administrative law judge. Polypore Int'l, Inc., 2010 F.T.C. LEXIS 17 1, 293–95 (Mar. 1, 2010), *available at* http://www.ftc.gov/os/adjpro/d9327/100305polyporeincdecision.pdf.

35. *See* Gary Zanfagna, *Pandora's Box Opened: The New Horizontal Merger Guidelines*, 10 ANTITRUST SOURCE, Oct. 2010, at 1, 3, *available at* http://www.abanet.org/antitrust/at-source/10/10/Oct10-Zanfagna10-21f.pdf (noting that Section 10 "is largely unchanged from the 1992 Guidelines, as amended in 1997"). The relatively small change in the efficiencies section of the 2010 Merger Guidelines is not surprising. On September 22, 2009, at the time the DOJ and FTC announced a series of public workshops to obtain input into updating the Merger Guidelines, the agencies stated that they did not "plan on altering the fundamental approach to efficiencies." FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HORIZONTAL MERGER GUIDELINES: QUESTIONS FOR PUBLIC COMMENT 1–2 (2009), *available at* http://www.ftc.gov/bc/workshops/hmg

however, enhance the section and broaden efficiencies analysis by adding new language that "recognize[s] and account[s] for the possibility that a merger may generate innovation efficiencies."[36] Moreover, although Section 10 of the 2010 Merger Guidelines may not be "substantively different" from Section 4 of the 1997 Revisions from an analytical framework, the likelihood that the agencies will accord more weight to efficiencies claims in mergers with a post-acquisition HHI between 1,801 and 2,500 appears significantly greater since these mergers are no longer "presumed to be likely to enhance market power" (assuming an increase in the HHI of more than 200 points) in a highly concentrated market and instead only "potentially raise significant competitive concerns" in a moderately concentrated market (assuming an increase in the HHI of more than 100 points).[37]

Moffitt also did not sufficiently discuss the importance of the key components in the 1997 Revisions to the efficiencies section and how the analysis of efficiencies is tied directly into the competitive effects analysis for the first time.[38] The key components of the 1997 Revisions include merger-specific efficiencies, cognizable efficiencies, verification of efficiencies claims, sufficiency of efficiencies, out of market efficiencies, and fixed cost savings. [39] These key components of the efficiencies section, which at the time were intended to provide clarity to the business community and practitioners, remain largely unchanged in the 2010 Merger Guidelines.

Both the 1997 Revisions and the 2010 Merger Guidelines include near-identical language, stating that a primary benefit of

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/hmg-questions.pdf. Nevertheless, the agencies did request comments on the existing efficiencies section. Question 14 on the DOJ/FTC questionnaire asked the following:

> The Guidelines ask (§4) whether cognizable efficiencies are sufficient to reverse the merger's potential to raise price. In making this determination, the Guidelines distinguish between fixed and marginal costs, with savings in marginal costs more likely to influence price. Should the Guidelines be updated to state that any cognizable cost reductions are relevant to the extent that they are likely to generate benefits for customers in the foreseeable future? Who should bear the burden of making this showing?

36. Shapiro, *supra* note 29, at 85. *See also* James Langenfeld, *2010 Horizontal Merger Guidelines: Changes in Policy, Transparency, & Predictability*, 10 CPI ANTITRUST CHRONICLE, Oct. 2010, Vol. 2, at 1, 13, 15 (discussing innovation and the efficiencies section of the 2010 Merger Guidelines).

37. *See* 2010 Merger Guidelines, *supra* note 2, § 5.3.

38. Pitofsky, *supra* note 20, at 486 ("The most significant aspect of the 1997 revisions is that they tied efficiencies directly into competitive effects analysis."); Paul T. Denis, *The Give and Take of the Commentary on the Horizontal Merger Guidelines*, ANTITRUST, Summer 2006, 51, 56 ("The 1997 revision to the efficiencies section of the Guidelines, for all practical purposes, collapsed efficiencies analysis into competitive effects analysis.").

39. It is important to note that efficiencies claims can be speculative and are often difficult to prove.

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" and that "merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets."[40] They also state:

> In a unilateral effects context, incremental cost reductions may reduce or reverse any increases in the merged firm's incentive to elevate price. Efficiencies also may lead to new or improved products, even if they do not immediately and directly affect price.[41]
>
> In a coordinated effects context, incremental cost reductions may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm.[42]
>
> The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.[43]
>
> 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.[44]

In addition to the key components for evaluating efficiencies, both the 1997 Revisions and the recent 2010 Merger Guidelines apply a sliding scale approach, rather than what Moffitt described as a "balancing approach," for weighing efficiencies benefits against the

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40. 2010 Merger Guidelines, *supra* note 2, § 10. Moffitt does cite to the 1997 Revisions for her statement that "recent Agency actions and guidelines explicitly recognize the potential positive, pro-competitive impact of merger-generated efficiencies." Moffitt, *supra* note 1, at 1705.

41. 2010 Merger Guidelines, *supra* note 2, § 10.

42. *Id.* at § 10.

43. *Id.*

44. *Id.* at 31. The agencies' analysis of efficiency claims will likely soon be analyzed at an earlier stage in the review process. On August 13, 2010, six days before the DOJ and FTC issued their new Merger Guidelines, the FTC proposed revisions to the HSR premerger notification rules. *See* FTC Press Release, "Commission Proposes Changes to Improve Premerger Notification Form," (Aug. 13, 2010), *available at* http://www.ftc.gov/opa/2010/08/hsrcarilion.shtm. The proposed revisions include "the addition of Item 4(d), which would require filing parties to submit certain documents useful to the Agencies' substantive review of transactions . . ." 75 Fed. Reg. 57110, 57111 (Sept. 17, 2010). The FTC's proposed Item 4(d)(iii) would require the filing parties to submit all "studies, surveys, analyses and reports evaluating or analyzing such synergies and/or efficiencies if they were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided in response to this item." *Id.* at 57116. New Item 4(d)(iii) will likely require the merging parties and the agency staff to analyze efficiencies claims at the time the proposed merger filing is submitted to the agencies rather than at a later time. At this time, the FTC's proposed changes to the HSR premerger form have not been adopted.

potential harm to consumers.[45] Section 10 of the 2010 Merger Guidelines specifically describes the sliding scale approach:

> In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to consumers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive. . . .
>
> In the Agencies' experience efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly.[46]

Likewise, Section 4 of the 1997 Revisions describes a sliding scale approach in almost identical language:

> In conducting this analysis [footnote omitted] the Agency will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies. The greater the potential adverse competitive effect of a merger—as indicated by the increase in the HHI and post-merger HHI from Section 1, the analysis of potential competitive effects from Section 2, and the timeliness, likelihood, and sufficiency of entry from Section 3—the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.
>
> In the Agency's experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly.[47]

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45. Pitofsky, *supra* note 20, at 486 ("The revisions expressly incorporated a sliding-scale approach into efficiency analysis."). *See also* David Scheffman, Efficiencies/Dynamic Analysis/Integrated Analysis Panel, FTC/DOJ Merger Enforcement Workshop 12, 21, 100 (Feb. 19, 2004), *available at* http://www.ftc.gov/bc/mergerenforce/040219ftctrans.pdf (discussing the sliding scale analysis for evaluating efficiency claims); COMMENTS OF THE AM. ANTITRUST INST. 11 (2009) (responding to FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 35) ("a sliding scale is already explicit in the treatment of efficiencies" in Section 4 of the 1997 Revisions to the Merger Guidelines), *available at* http://www.ftc.gov/os/comments/horizontalmergerguides/545095-00023.pdf; ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS 249 (3d. ed. 2008) ("the *Merger Guidelines*, as revised, expressly incorporate a sliding scale approach"). Moffitt mistakenly refers to "a balancing approach" rather than a sliding scale approach, even though she specifically cites in footnote 44 to the language in Section 4 of the 1992 Merger Guidelines, as revised in 1997, stating that efficiencies are most likely to impact merger analysis "when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to a monopoly or near-monopoly." Moffitt, *supra* note 1, at 1707 n.44, 1708.

46. 2010 Merger Guidelines, *supra* note 2, § 10.

47. 1997 Revisions, *supra* note 2, § 4. The Commentary indirectly suggest a sliding scale approach, stating:

The statement in Section 10 of the 2010 Merger Guidelines that "the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies" strongly suggests that a dollar-for-dollar balancing of the potential for harm versus the potential efficiencies is inappropriate where there is at least some likelihood of potential harm to consumers. This is particularly evident in the next two sentences in the section, stating:

> The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.[48]

The 2010 Merger Guidelines justify the sliding scale approach by stating: "In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, primacy in protecting customers."[49]

Figure 1 below attempts to illustrate the difference between a balancing approach and the sliding scale approach in the 2010 Merger Guidelines and the predecessor 1997 Revisions. The solid line shows a dollar-for-dollar balancing approach between the magnitude of harm and the magnitude of efficiencies. The dashed line, which is solely for illustrative purposes, attempts to show the sliding scale approach where the magnitude of efficiencies must increase by an even greater rate than the magnitude of harm as the potential adverse competitive effects from a merger increase.

Under the balancing approach, estimated efficiencies above the solid line (Zone 1 and Zone 2) are greater than the likely magnitude of harm and are sufficient to justify the merger. Estimated efficiencies below the solid line (Zone 3) are less than the estimated magnitude of harm and are insufficient to justify the merger. Under the sliding scale approach, estimated efficiencies above the dashed line (Zone 1) are sufficiently greater than the likely magnitude of harm to justify the merger. Estimated efficiencies below the dashed line (Zone 2 and Zone 3) are insufficient to justify the merger. The area in Zone 2

> Within the integrated analysis framework for evaluating competitive effects, "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great." Efficiencies are a significant factor in the Agencies' decisions not to challenge some mergers that otherwise are likely to have, at most, only slight anticompetitive effects.

Commentary, *supra* note 3, ch. 4 at 55.

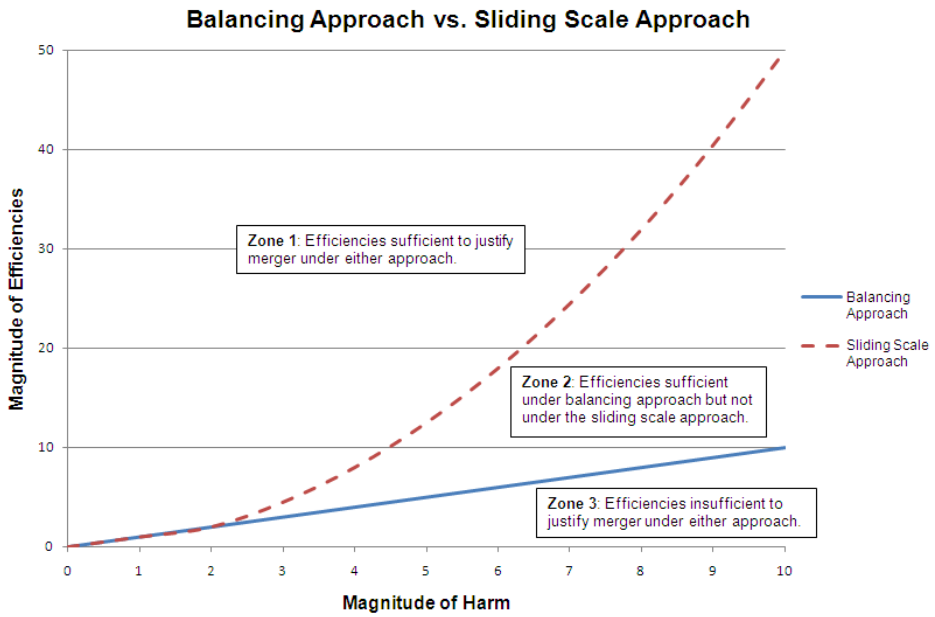
48. 2010 Merger Guidelines, *supra* note 2, § 10.

49. *Id.*

between the dashed line and the solid line shows the difference between the balancing approach and the sliding scale in evaluating whether the estimated efficiencies are sufficient to justify a merger. The exact boundary between Zone 1 and Zone 2 is not clear from the Merger Guidelines, but Figure 1 illustrates the general principle that the magnitude of efficiencies and harm are not balanced one for one under the sliding scale approach.[50] All that is clear from the Merger Guidelines is that the gap between the magnitude of efficiencies and the magnitude of harm increases as the magnitude of harm increases.

50. Herbert Hovenkamp provides a recommendation for quantifying the sliding scale approach. 4A PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 976d, at 107 (3d ed. 2009). For a "moderately threatening merger," a "showing of 'significant' efficiencies" is required. *Id.* Professor Hovenkamp defines a moderately threatening merger as "one in which the merger meets the minimum thresholds for prima facie illegality but fails to create a dominant firm, or where the post-merger HHI is not significantly above 100." *Id.* (internal citations omitted). For these types of mergers, "the proven efficiencies should be the equivalent of a 4 or 5 percent cost reduction across the *entire* output of the merging firm in the market in which the merger is challenged." *Id.* (internal citations omitted). For "a merger presenting a strong competitive threat," a "showing of 'extraordinary' efficiencies" is required. Professor Hovenkamp defines a merger presenting a strong competitive threat as one "where the merger creates a monopolist or dominant firm or the post-merger market's HHI is well above 1800 and the HHI increase is well above 100." *Id.* For these types of mergers, the "provable efficiencies must be at least 8 percent across the entire output in the market where competition is believed to be threatened; further, the defendants must show that the merger is unlikely to result in higher consumer prices." *Id.* As David Balto notes in his article, the Hovenkamp "treatise fails to provide any basis for these thresholds." David Balto, *The Efficiency Defense in Merger Review: Progress or Stagnation?*, ANTITRUST, Fall 2001, 74, at 78 (referring to an earlier edition of the same volume from the treatise).

Figure 1. Comparison of Balancing Approach to Sliding Scale Approach in Evaluating the Importance of Efficiencies



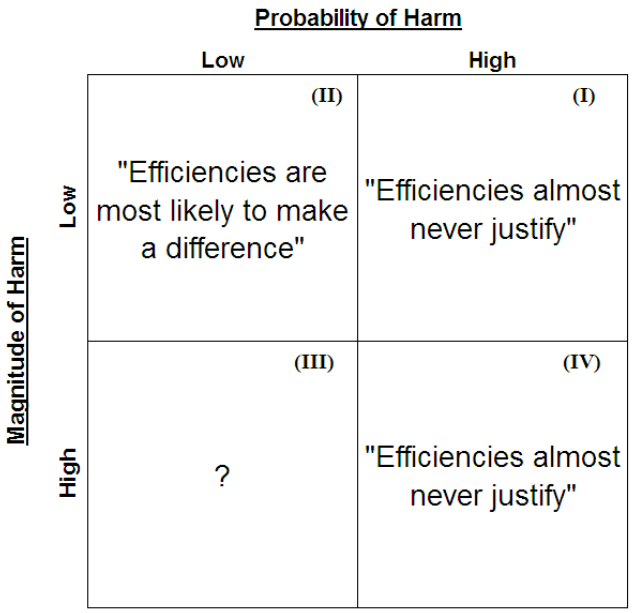
What has not been discussed at length in the literature, agency speeches and policy statements, the Commentary, the Merger Guidelines, or case law is a detailed analysis of the application of the sliding scale approach (as opposed to what Moffitt describes as a balancing approach). The statement in Section 10 of the 2010 Merger Guidelines, like the similar statement in Section 4 of the 1997 Revisions, referring to "[t]he greater the potential adverse competitive effect," only vaguely defines how to appropriately measure the potential adverse effect. For example, other than measuring the probability of harm based on a "merger to monopoly or near-monopoly," there is no further discussion whether to evaluate the probability of the harm regardless of its absolute magnitude, the absolute magnitude of the potential harm regardless of the level of probability (assuming at least a highly concentrated market), or some combination of the certainty of harm and its potential magnitude. At one level, if the probability of harm is quite high, the 2010 Merger Guidelines state that efficiencies will rarely overcome the likelihood of adverse effects (e.g., "[e]fficiencies almost never justify a merger to monopoly or near-monopoly"). At another level, if the magnitude of potential harm is substantial (e.g., "[w]hen the potential adverse

competitive effect of a merger is likely to be particularly substantial"), then the 2010 Merger Guidelines state that "extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive." Both the 2010 Merger Guidelines and the 1997 Revisions, however, are unclear in articulating how the agencies will apply a sliding scale analysis if the potential magnitude of likely harm is "particularly substantial" but the probability of harm is less than what is likely under a merger to monopoly or near-monopoly (e.g., a 5 to 4 or 4 to 3 merger where the potential magnitude of harm is "particularly substantial").

Figure 2 below attempts to apply the sliding scale language in Section 10 of the 2010 Merger Guidelines to mergers with either a high or low probability of harm and either a high or low magnitude of harm.[51] As the figure shows in Quadrants I and IV, as long as the probability of harm is high (defined as "merger to monopoly or near-monopoly"), efficiencies almost never justify a merger regardless of the magnitude of the harm. As the figure shows in Quadrant III, there is no similar discussion in Section 10 regarding how to apply the sliding scale approach if the magnitude for potential harm is high (e.g., based on the amount of commerce subject to a price increase) but the probability of harm is lower—at least lower than the probability of harm in a merger to monopoly or near-monopoly.

51. The reference to low probability of harm in Figure 2 is intended to mean low relative to the probability of harm accorded to a merger to monopoly or near-monopoly. Low probability of harm is not intended to refer to low probability of harm in an absolute sense (e.g., a merger in an unconcentrated or moderately concentrated market as defined in the 2010 Merger Guidelines).

Figure 2. Application of the Sliding Scale Approach to Efficiencies Analysis in the 2010 Merger Guidelines[52]



The following examples illustrate the dichotomy in applying a sliding scale approach to mergers where the magnitude for potential harm is high but the probability of harm is lower than the probability of harm in a merger to monopoly or near-monopoly (Quadrant III) compared to a merger where the magnitude for potential harm is low (or at least relatively low) but the probability of harm is high (Quadrant I).

Example A is illustrative of mergers that fall in Quadrant III. Assume there are five retailers of equal size and two propose merging (a 5 to 4 merger). Assume further that there is a well-defined product and geographic market with three remaining competitors and new entry is difficult and would not be timely, likely, and sufficient to deter or prevent the potential competitive effects. The total annual sales in the market are $1 billion.[53] In this example, the acquiring firm would have a forty percent post-acquisition share, the post-acquisition HHI would be 2,800 (highly concentrated market), and the increase in concentration would be 800 ("presumed likely to enhance market

52. 2010 Merger Guidelines, *supra* note 2, § 10.

53. This example is representative of five supermarket firms, each operating ten supermarkets in the same metropolitan area, with each store's weekly sales averaging approximately $385,000.

power"). A modest one percent price increase results in a potential magnitude of consumer harm of $10 million per year.[54]

Example B is illustrative of mergers that fall in Quadrant I. Assume there are three manufacturers of equal size and two propose merging (a 3 to 2 merger). Assume that there is a well-defined product and geographic market with one remaining competitor and new entry is difficult and would not be timely, likely, and sufficient to deter or prevent the potential competitive effects. The total annual sales in the market are $100 million. In this example, the acquiring firm would have a sixty-seven percent post-acquisition share, the post-acquisition HHI would be 5,556 (highly concentrated market), and the increase in concentration would be 2,222 ("presumed likely to enhance market power"). A five percent price increase results in a potential magnitude of consumer harm of $5 million per year, one-half the potential magnitude of harm in example A, although the probability of harm is greater than the probability of harm in example A.[55]

The 2010 Merger Guidelines and the 1997 Revisions are clear in stating that "[e]fficiencies almost never justify" the merger in example B since it is a merger to near-monopoly. The 2010 Merger Guidelines and the 1997 Revisions are less clear in applying the sliding scale approach to example A, where the magnitude of harm is twice the magnitude of harm in example B but the probability of harm is less. This ambiguity exists even though Section 10 states that "[w]hen the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive" because there is no corresponding assignment of the

54. To further illustrate the dichotomy in applying a sliding scale approach, if example A were changed from five firms to six firms, of which two are merging, the acquiring firm would have a thirty-three percent post-acquisition share, the post-acquisition HHI would be 2,222 (moderately concentrated market), and the increase in concentration would be 556 ("potentially raise[s] significant competitive concerns and often warrant[s] scrutiny"). The probability of potential harm in this alternative example is less than the probability of potential harm in example A, particularly since the additional competitor changes the market from highly concentrated to moderately concentrated, but the magnitude of potential harm remains the same.

55. The analysis does not materially change if we compare the expected values of the effects between example A and example B. In example A, if we assume only a fifty percent probability of a one percent market wide price increase by retailers since this is a 5 to 4 merger, the expected value of the magnitude of harm is $5 million per year. In example B, if we assume an eighty percent probability of a five percent price increase by manufacturers since this is a 3 to 2 merger, the expected value of the magnitude of harm is $4 million, which is still lower than the expected magnitude of harm in example A. The one percent price increase is typically used as a measurement of likely consumer harm in retail mergers with low margins, whereas the larger five percent price increase is a better measurement of likely consumer harm for manufactured goods with higher margins.

probability of harm. What remains unclear under the 2010 Merger Guidelines and its predecessor is exactly where the sliding scale curve bends and by how much for mergers that are not mergers to monopoly or near-monopoly but otherwise have a potentially high magnitude of harm with a relatively lower probability of the harm occurring.

IV. SLIDING SCALE VERSUS THE BALANCING APPROACH FOR ANALYZING EFFICIENCIES CLAIMS IN LITIGATED MERGER CASES

Case law also recognizes a sliding scale approach rather than a balancing approach in analyzing efficiencies where the likelihood of consumer harm is high. For example, the Court of Appeals for the District of Columbia Circuit in *FTC v. H.J. Heinz Co.* cited to Section 4 of the 1992 Merger Guidelines, as revised in 1997, in stating that "the high market concentration levels in this case require, in rebuttal, proof of *extraordinary efficiencies*, which the appellees failed to supply."[56] The *Heinz* opinion also states that "given the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."[57] Had Moffitt analyzed the litigated cases cited in her article using the Guidelines' sliding scale approach for evaluating efficiencies,[58] she may not have concluded the courts are somehow at fault for not properly applying a balancing test, particularly when a balancing test is inconsistent with the Merger Guidelines' analysis since the adoption of the 1997 Revisions.[59]

Courts' use of a sliding scale approach may explain why Moffitt found that they tend to credit efficiencies in cases with low market concentration levels and tend to discredit them in cases with high market concentration levels.[60] Put differently, when the outcome is

56. FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) (emphasis added). *See* Balto, *supra* note 50, at 78 ("Another important question raised in the *Heinz* decision is if, as the D.C. Circuit suggests, extraordinary efficiencies are necessary in a highly concentrated market, what is the level of 'extraordinary'? . . . The court is silent on what 'extraordinary' means."). The *ProMedica* decision also cites to *Heinz* as support for the proposition that "[e]fficiencies must be 'extraordinary' to overcome high concentration levels." FTC v. ProMedica Health Sys., Inc., Case No. 3:11 CV 47, slip op. at ¶ 27 of the Conclusions of Law (N.D. Ohio March 29, 2011).

57. *Id.* at 721.

58. Moffitt, *supra* note 1, at 1698–99.

59. *See id.* Moffitt similarly states that the courts apply "no true balancing analysis." *Id.* at 1700.

60. Courts generally credit efficiencies in cases where they have otherwise concluded that the relevant market is not highly concentrated and proposed merger is not anticompetitive. *See, e.g.*, United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 148–49 (E.D.N.Y. 1997) (crediting efficiencies after rejecting the government's alleged product and geographic market).

rather clear—that is, a merger to monopoly or near-monopoly as stated in the Merger Guidelines, or where both the government and courts are quite confident that the merger is anticompetitive—efficiencies rarely overcome the adverse competitive effects.[61] For the more marginal cases, by contrast, efficiencies play a much more significant role in the competitive effects analysis and therefore the outcome of the case.

Former FTC Chairman Robert Pitofsky outlined the importance of fully understanding how the agencies internally analyze efficiencies, rather than simply analyzing efficiencies claims in litigated cases, when he stated that the litigated cases are not good examples for how the agencies evaluate efficiencies claims:

> Incidentally, there was a comment that courts almost never say [a merger is] illegal, but because of the efficiencies, I'll make it—I'll call it legal. I believe the reason for that is the agency doesn't bring cases that are barely illegal but with substantial efficiencies. And therefore, the courts haven't had a shot at this, and I'm not sure they're going to get a shot very soon, because the agencies are very sensitive to claims of efficiency.[62]

Courts generally do not credit efficiencies where they find the relevant market is highly concentrated and the proposed merger is likely anticompetitive. *See, e.g.*, *H.J. Heinz Co.*, 246 F.3d at 720–21; FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 61–63 (D.D.C. 1998); FTC v. Staples, Inc., 970 F. Supp. 1066, 1088–90 (D.D.C. 1997); *see also* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 73 n.58 (2007) (citing to a Statement by George S. Cary that "the courts have done quite well in evaluating efficiency arguments in litigation"), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf.

61. Roundtable Discussion, *Advice for the New Administration*, ANTITRUST, Summer 2008, at 8, 17. Former FTC Chairman Robert Pitofsky stated: "I had a good deal to do with inserting an efficiency defense in the Merger Guidelines. But it never occurred to me that 75 percent [market share] mergers [such as the Maytag/Whirlpool merger approved by the Department of Justice in 2006] can be justified with efficiency claims. Efficiency claims seemed to me to be a tie-breaker for much smaller [market share] transactions." At the same forum, Pitofsky further stated that "I can't remember too many cases where, either formally or informally, 75 percent [market share] mergers were cleared on grounds that there were efficiencies. That just doesn't seem to me to be the idea of the efficiency defense." *Id*. at 18. *See also* Robert Pitofsky, *Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches*, 30 FORDHAM INT'L L.J. 1413, 1418 (2007) ("There is no recorded instance in the United States where an otherwise illegal merger was found by a court not to violate the antitrust laws because of the presence of efficiencies.").

62. Robert Pitofsky, Efficiencies/Dynamic Analysis/Integrated Analysis Panel, FTC/DOJ Merger Enforcement Workshop 82–83 (Feb. 19, 2004), *available at* http://www.ftc.gov/bc/mergerenforce/040219ftctrans.pdf (commenting on the efficiencies section of the Merger Guidelines); *see also* George S. Cary, Efficiencies in Merger Analysis: From Both Sides Now, Testimony to the Antitrust Modernization Commission 16 (Nov. 17, 2005) ("[T]he government will rarely litigate cases in the absence of fairly clear evidence of a likely anticompetitive effect that would be difficult to overcome with efficiencies in any event."), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Cary_final.pdf.

V. UTILIZING THE COMMENTARY AND AGENCY STATEMENTS TO BETTER UNDERSTAND EFFICIENCIES

Moffitt's article also missed the opportunity to discuss the efficiencies analysis in the Commentary, which was issued by the DOJ and the FTC in March 2006.[63] The agencies included the analysis "to provide greater transparency and foster deeper understanding regarding antitrust law enforcement."[64] The Commentary also provides detailed case summaries and analysis under the 1992 Merger Guidelines, as revised in 1997. Although the practical application of the efficiencies section of the recent 2010 Merger Guidelines will likely evolve over the next few years, the analysis and information in the Commentary continues to be applicable.

Chapter 4 of the Commentary is devoted exclusively to analyzing efficiencies in merger matters. Although the 2010 Merger Guidelines replace the 1992 Merger Guidelines, as revised in 1997, the 2010 Merger Guidelines specifically state that the 2006 Commentary "remains a valuable supplement to these Guidelines."[65] Moffitt's omission of a detailed analysis of the cases in the efficiencies analysis in the Commentary further demonstrates why drawing inferences from a limited pool of litigated preliminary injunctions does not adequately reflect agency practices and issues that parties to a merger must consider.[66]

Chapter 4 of the Commentary summarizes sixteen examples of the efficiencies analysis—seven FTC matters and nine DOJ matters—of which two cases were litigated and one was settled.[67] Table 2 below outlines the sixteen efficiencies matters in the Commentary by each component of efficiencies analysis. Of the sixteen examples in the

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63. Commentary, *supra* note 3. Footnote 123 of Moffitt's article cites to the Commentary as support for the statement that the agencies are attempting to increase transparency. Moffitt, *supra* note 1, at 1732 n.123. Moffitt, however, does not further discuss the efficiencies analysis in the Commentary in her article.

64. Commentary, *supra* note 3, at v.

65. 2010 Merger Guidelines, *supra* note 2, § 1 n.1. *See also* Jeffrey W. Brennan, *Bridge to the New Merger Guidelines: The FTC-DOJ 2006 Commentary*, ANTITRUST, Fall 2010, at 15.

66. *See* Pitofsky, *supra* note 61, at 1418–19. Professor Pitofsky cites to the Commentary for his statement that although "[t]here is no recorded instance in the United States where an otherwise illegal merger was found by a court not to violate the antitrust laws because of the presence of efficiencies . . . there is increasing evidence that efficiency claims, as spelled out in the Guidelines, have had the effect of persuading enforcement authorities not to challenge proposed mergers." *Id.*

67. The two litigated cases are *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) and *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004). Thus, of these sixteen cases, Moffitt only had two in her data set. The settled case is Genzyme-*Ilex*. *See* Genzyme Corp., 139 F.T.C. 49 (2005), *available at* http://www.ftc.gov/os/decisions/docs/Volume139.pdf.

Commentary, five "were not challenged, where efficiency claims led to that decision, or were significant factors along with other considerations."[68] Six of the other case examples were credited with at least some efficiencies.[69]

Table 2. Efficiencies Matters Analyzed in the 2006 Commentary on the Horizontal Merger Guidelines

Merger-Specific Efficiencies	*Alpha-Beta* (Disguised FTC Matter); *Nucor-Birmingham Steel* (DOJ 2002)
Cognizable Efficiencies	*Arch Coal-Triton* (FTC 2002); *Oracle-PeopleSoft* (DOJ 2004)
Verification of Efficiencies Claims	*Fine Look-Snazzy* (Disguised FTC Matter); *Genzyme-Novazyme* (FTC 2004); *A-1 Goods-Bingo* (Disguised FTC Matter)
Sufficiency of Efficiencies	*Toppan-DuPont* (DOJ 2005); *PayPal-eBay* (DOJ 2002); *DirectTV-Dish Network* (DOJ 2002); *Enerco-KleenBurn* (Disguised FTC Matter)
Out of Market Efficiencies	*Genzyme-Ilex* (FTC 2004); *Gai's-United States Bakery* (DOJ 1996)
Fixed Cost Savings	*Verizon-MCI, SBC-AT&T* (DOJ 2005); *IMC Global-Western Ag* (DOJ 1997)

The Commentary provides detailed analysis on each of these key components of the Merger Guidelines' efficiencies analysis and how they were applied to specific matters.[70] This analysis is intended to provide antitrust lawyers and the business community "with [a] useful and beneficial . . . explanation of how Agencies apply the Guidelines in particular investigations."[71]

68. *See* Pitofsky, *supra* note 61, at 1419. The five examples of cases in the Commentary that were not challenged based on efficiencies claims or where efficiencies claims were a significant factor are the following: *Nucor-Birmingham Steel* (DOJ 2002); *Genzyme-Novazyme* (FTC 2004); *Toppan-DuPont* (DOJ 2005); and *Verizon-MCI*, *SBC-AT&T* (DOJ 2005).

69. The six other examples of cases that were credited with at least some efficiencies are the following: *Fine Look-Snazzy* (Disguised FTC Matter); *A-1 Goods-Bingo* (Disguised FTC Matter); *PayPal-eBay* (DOJ 2002); *Enerco-Kleenburn* (Disguised FTC Matter); *Genzyme-Ilex* (FTC 2004); and Gai's-United States Bakery (DOJ 2005).

70. Commentary, *supra* note 3, ch. 4 at 50–59.

71. Commentary, *supra* note 3, ch. 4 at v.

In addition to the sixteen matters analyzed in the efficiencies chapter in the Commentary, then-FTC Chairman Pitofsky provided helpful information in a speech[72] to the business community and practitioners on the use of efficiencies in four litigated merger matters—*FTC v. Staples, Inc.* (Staples/Office Depot),[73] *United States v. Long Island Jewish Medical Center* (Long Island Jewish Medical/North Shore Health),[74] *FTC v. Tenant Healthcare Corp.* (Lucy Lee Hospital/Doctors Regional Medical Center),[75] and *FTC v. Cardinal Health, Inc.* (Cardinal/McKesson).[76] Other agency officials have also provided valuable information regarding efficiencies analysis in speeches and other statements.[77] To enhance transparency, the agencies and their senior officials also occasionally provide comments and analysis on matters where efficiencies played a role in the outcome.[78] This process, in turn, enables antitrust practitioners to refine and focus their efficiencies analysis in a manner that may persuade agency officials not to challenge a specific proposed merger.

VI. ECONOMIC IMPLICATIONS: THE NEED FOR EMPIRICAL SUPPORT

A. Banks' "Too Big to Fail" Issue as an Antitrust Problem

Moffitt discusses the financial crisis in her article as a way to tie her discussion on merger efficiencies to a critical policy issue of the

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72. *See* Pitofsky, *supra* note 20.

73. 970 F. Supp. 1066 (D.D.C. 1997).

74. 983 F. Supp. 121 (E.D.N.Y. 1997).

75. 17 F. Supp. 2d 937 (E.D. Mo. 1998), *rev'd*, 186 F.3d 1045 (8th Cir. 1999).

76. 12 F. Supp. 2d 34 (D.D.C. 1998).

77. *See, e.g.*, Leary, *supra* note 19; Interview with Richard A. Feinstein, Dir., FTC Bureau of Competition, theantitrustsource (Apr. 2010) 1, 6 (Feinstein discusses the FTC's evaluation of efficiencies in a proposed merger), *available at* http://www.ftc.gov/speeches/feinstein/1004-feinstein-invw.pdf; Prepared Remarks of Robert Pitofsky, "Staples and Boeing: What They Say About Merger Enforcement at the FTC," Sept. 23, 1997 (discussing the FTC's analysis of efficiencies in the Staples/Office Depot and Boeing/McDonnell Douglas mergers), *available at* http://www.ftc.gov/speeches/pitofsky/STAPLESspc.shtm.

78. *See, e.g.*, 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 at 4 (finding that "efficiencies flowing from the transaction likely would undermine any such concern [with increased prices]"), *available at* http://www.justice.gov/atr/public/press_releases/2008/231467.pdf; Department of Justice Antitrust Division Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag, Mar. 29, 2006 ("The combination of strong rival suppliers with the ability to expand sales significantly and large cost savings and other efficiencies that Whirlpool appears likely to achieve indicates that this transaction is not likely to harm consumer welfare."), *available at* http://www.justice.gov/opa/pr/2006/March/06_at_187.html.

day.[79] She suggests that a lack of antitrust enforcement might be possible because of the lower levels of concentration due in part to efficiency arguments and implies that the financial institutions undergoing mergers made strong efficiency arguments.[80] This line of thought is not well developed in the article. More importantly, sector concentration in banking seems not to have played a significant role in the recent financial crisis. The quality (or lack thereof) of financial regulation—rather than antitrust effectiveness in blocking mergers—seems to have been the primary factor for the financial crisis.[81] Indeed, if sector concentration were an important factor in the financial crisis, Moffitt needs to explain why the crisis had such a strong impact in the U.S. banking market—which was less concentrated relative to other OECD countries. For example, Canada's financial services sector is far more concentrated than the United States'. And yet, it was relatively unscathed in the financial crisis because of more conservative financial regulation.[82] Moreover, both the theoretical and empirical work on banking concentration provide mixed results. Within the theoretical and empirical literatures, one strand of literature suggests that banking competition actually creates greater instability.[83] The other strand of literature takes the opposite view—that greater competition in banking leads to increased financial stability.[84] But Moffitt does not cite to any of the theoretical or empirical finance or industrial organization literature to support why the issue of "too big to fail" matters for her discussion on merger efficiencies.

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79. Moffitt, *supra* note 1, at 1726–27.

80. *Id.*

81. *See* OECD, COMPETITION AND FINANCIAL MARKETS (2009), *available at www.oecd.org/dataoecd/9/22/43067294.pdf*; Thorsten Beck, Olivier De Jonghe, & Glenn Schepens, *Bank Competition and Stability: Reconciling Conflicting Empirical Evidence*, (2010), (Working Paper, Nov. 16, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1711165. One might add that bad decisionmaking based on misaligned incentives for the banks also played an important role. *See, e.g.*, Karl S. Okamoto, *After the Bailout: Regulating Systemic Moral Hazard*, 57 UCLA L. REV. 183 (2009).

82. Ann Graham, *Lessons from Canada: Crisis-Proofing a National Financial System*, Working Paper, Hamline University Law School (Oct. 19, 2010), *available at* http://ssrn.com/abstract=1693885 (describing more conservative financial regulation); *cf.* Anita I. Anand, *Is Systemic Risk Relevant to Securities Regulation?*, 60 U. TORONTO L.J. 941, 945–46 (2010) (discussing the causes of Canadian banks' success relative to American and European banks during the 2008 financial collapse).

83. *See, e.g.*, Alan J. Marcus, *Deregulation and Bank Financial Policy*, 8 J. BANKING & FIN. 557 (1984); Michael C. Keeley, *Deposit Insurance, Risk, and Market Power in Banking*, 80 AM. ECON. REV. 1183 (1990).

84. *See, e.g.*, Arnoud W.A. Boot & Anjan V. Thakor, *Self-Interested Bank Regulation*, 83 AM. ECON. REV. 206 (1993); FRANKLIN ALLEN & DOUGLAS GALE, UNDERSTANDING FINANCIAL CRISES, (2009).

B. Alleged Antitrust Under-Enforcement Under Bush

Moffitt reiterates the popular press's claim that antitrust enforcement was lax during George W. Bush's presidency.[85] She then suggests that antitrust enforcement during the Bush era (2001–2009), which she describes as "under-enforcement," is linked to understanding efficiencies in the court cases that she analyzed.[86] In this regard, Moffitt's analysis fails on two counts. On the narrow count, she misreads the underlying work that she cited on lax Bush enforcement. Jonathan B. Baker and Carl Shapiro's work, on which she relied, found that there was no difference in FTC antitrust enforcement between the Bush and Clinton administrations. Baker and Shapiro found a difference in merger enforcement with regard only to the DOJ, not the FTC.[87] If Baker and Shapiro are correct, then Moffitt's analysis should have detected a difference in discussions on efficiencies in court cases brought by the different agencies. However, Moffitt does not contemplate that FTC and DOJ enforcement differed. More broadly, Moffitt ignores all of the critiques of Baker and Shapiro's work. In fact, significant literature suggests that there was no effect on mergers during the Bush years relative to the Clinton years and that the attention on reduced merger enforcement is due to a few high profile mergers that the DOJ approved.[88]

VII. RISK SHIFTING PLAYS A ROLE IN FIRMS' EVALUATION OF THE SIGNIFICANCE OF EFFICIENCIES CLAIMS IF THE OUTCOME IS UNCERTAIN

Moffitt's article states that the "courts' inconsistent recognition of efficiencies adds uncertainty to the picture" and that "[t]his uncertainty increases the risk associated with proceeding forward with the merger, thus affecting individual corporations' decisions

85. Moffitt, *supra* note 1, at 1724–26.

86. *Id.* at 1724.

87. Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 246 n.86 (Robert Pitofsky ed., 2008); Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008.

88. Ilene Knable Gotts & James F. Rill, *Reflections on Bush Administration M&A Antitrust Enforcement and Beyond*, 5 COMPETITION POL'Y INT'L 91 (2009); Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, ANTITRUST, Summer 2008, at 37; D. Daniel Sokol, *Antitrust, Institutions and Merger Control*, 17 GEO. MASON L. REV. 1055, 1127–30 (2010).

regarding planned transactions."[89] Although Moffitt provides no empirical support, she further states that "[o]n an aggregate basis, corporations in concentrated markets will end up abandoning more deals than they otherwise would if courts were more consistent with their recognition of efficiency claims."[90]

To our knowledge, there is no empirical data with regard to risk shifting to either support or rebut Moffitt's statement. However, we do note that antitrust risk-shifting provisions are typically included in purchase agreements to resolve perceived antitrust risk if there is uncertainty regarding the outcome of the transaction.[91] In transactions between competing firms, each party attempts to separately analyze the antitrust risk. Sellers generally demand provisions that will ensure the completion of the deal (for example, compliance by both sides with any government second request, buyers' best efforts to resolve antitrust concerns through divestiture or licensing agreements, reverse break-up fee, termination date, etc.). At the same time, buyers attempt to negotiate provisions that do not require divestitures or other forms of relief that could materially affect the value of the transaction.

Although this Response does not analyze how parties negotiate deals,[92] buyers and sellers have an asymmetric relationship in assessing antitrust risk, in part because they do not share the same information. For example, only buyers can properly assess potential efficiencies or synergies resulting from an acquisition. If a buyer is confident that its efficiencies claims are supportable, the buyer may be more willing to accept risk-shifting provisions demanded by the seller. If the seller is less confident that the buyer will likely achieve efficiencies sufficient to counter any antitrust concerns, the seller may be more likely to demand stronger risk-shifting from the buyer. Thus, risk-shifting provisions enable firms to enter into purchase agreements even where there is some level of uncertainty concerning the outcome of any efficiencies claim.

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89. Moffitt, *supra* note 1, at 1733.

90. *Id*. at 1733.

91. *See* Robert S. Schlossberg, *Negotiating the Transaction: Issues for the Antitrust Dealmaker*, ANTITRUST, Summer 2005, at 34; John D. Harkrider, *Risk-Shifting Provisions and Antitrust Risk: An Empirical Examination*, ANTITRUST, Fall 2005, at 52; Darren S. Tucker and Kevin L. Yingling, *Keeping the Engagement Ring: Apportioning Antitrust Risk with Reverse Breakup Fees*, ANTITRUST, Summer 2008, at 70.

92. To our knowledge, this is a research gap in the antitrust merger literature.

CONCLUSION

Merger analysis is one of the most difficult areas of antitrust for businesses to understand because of the complexity of applying the underlying law. The combination of agency interactions (how the agencies interact with the merging parties, their lawyers, and third parties), guidelines that are not always clear or followed, and a significant amount of merger analysis that never appears in decided cases (since few merger cases are litigated and these cases are not representative) explains the value in looking beyond the litigated preliminary injunction cases to understand the role of efficiencies in merger analysis. Such complexities also create somewhat significant limitations to merger empirical work. Because of the nuances involved in merger work, antitrust empirical work should note the limitations of the assumptions (and indeed, have correct assumptions) and be modest in its inferences.