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# INTO THE AMAZON: CLARITY AND TRANSPARENCY IN FTC SECTION 5 MERGER DOCTRINE

CHRISTINA C. MA<sup>†</sup>

## INTRODUCTION

Antitrust law seeks to preserve competition and check unconstrained power in the market place. Although this basic precept of antitrust law has not changed, shifts in how competition is defined and conceptualized—whether people should get their fair share or whether companies should be provided with the requisite resources to compete—have changed antitrust doctrine. Does it mean that companies be provided the requisite resources to compete—have changed antitrust doctrine. Take, for example, the Sherman Act. The Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal” and actions taken by parties to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony.”<sup>1</sup> For many years, the Sherman Act was enforced to the letter and without exception. In 1911, however, the Supreme Court, in the landmark *Standard Oil Co. v. United States*<sup>2</sup> case, held that only *unreasonable* restraints of trade would be illegal,<sup>3</sup> expressing a shift in doctrine and the Court’s views on competition.

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<sup>1</sup> Sherman Act, 15 U.S.C. §§ 1–2 (2012).

<sup>2</sup> 221 U.S. 1 (1911).

<sup>3</sup> *See id.* at 76–77.

Today, while concerns of smoke-filled dealings among industry leaders are still real and present,<sup>4</sup> the name of the game is no longer “if you can’t beat them, join them,” but rather “if you can’t beat them, buy them.”<sup>5</sup> Antitrust doctrine has similarly evolved consistent with changing business norms, with increasing attention paid to merger enforcement by the Antitrust Department of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC” or the “Commission”), and with relatively less judicial intervention or regulation of anticompetitive conduct. This has been particularly true in the quickly changing international and e-markets.<sup>6</sup>

In evaluating and accepting or rejecting merger requests, the DOJ and FTC both operate under the power of section 7 of the Clayton Act, which provides: “No person engaged in commerce . . . shall acquire . . . the whole or any part of the stock or . . . the assets of another person engaged also in commerce . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly,”<sup>7</sup> and section 1 of the Sherman Act, text provided above.<sup>8</sup>

The FTC also operates under section 5 of the FTC Act, which gives it the exclusive power to prohibit “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”<sup>9</sup>

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<sup>4</sup> See, e.g., Michael Arrington, *So a Blogger Walks into a Bar . . .*, TECHCRUNCH (Sept. 21, 2010), <http://techcrunch.com/2010/09/21/so-a-blogger-walks-into-a-bar/>.

<sup>5</sup> See *Mergers and Acquisitions—Joining Forces To Compete with Industry Giants, Seeking Refuge with a Larger Partner*, FREE ENCYCLOPEDIA OF ECOMMERCE, <http://ecommerce.hostip.info/pages/725/Mergers-Acquisitions.html> (last visited Mar. 6, 2014); Ronald W. Davis, *Innovation Markets and Merger Enforcement: Current Practice in Perspective*, 71 ANTITRUST L.J. 677 (2003–2004).

<sup>6</sup> Cf. Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 2 (2007) (“Merger policy faces a perplexing problem in industries marked by ongoing technological innovation: a problem related, in part, to the uncertain fit between the market conditions that produce innovation and the market conditions to which antitrust policy generally aspires, and, in part, to uncertainty about how innovation might affect market structure and performance.”). The new Merger Guidelines also evidence a growing concern with stifling innovation and the importance of a variety of products. See Herbert Hovenkamp, *Merger Policy and the 2010 Merger Guidelines* (Oct. 16, 2010) (unpublished legal studies research paper), available at <http://ssrn.com/abstract=1693246>.

<sup>7</sup> Clayton Act § 7, 15 U.S.C. § 18 (2012).

<sup>8</sup> 15 U.S.C. § 4 (2012). Formally, the Antitrust Division of the DOJ under the guidance of the U.S. Attorney General enforced the Sherman Act. However, both the FTC and states enforce the Sherman Act.

<sup>9</sup> Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (2012).

Under these broad legislative mandates, the DOJ and the FTC have significant flexibility to guide and change antitrust doctrine to be responsive to changing economic times and to the particularities of a given transaction.<sup>10</sup> At the same time, because most large transactions are subject to pre-merger agency notification,<sup>11</sup> these shifts in merger doctrine occur behind an administrative curtain, are relatively non-public,<sup>12</sup> and have little precedential value despite directly impacting corporations and other entities that compete in today's marketplace.

And, while the courts have offered some guidance as to the scope of section 7 merger enforcement, they have been comparatively silent as to the scope of section 5 enforcement power.<sup>13</sup> The FTC, therefore, has substantially more power to mold and give shape to antitrust law than the DOJ because it operates under both section 7 and section 5, a power which is coupled with the benefits of an internal adjudicative procedure. This difference in power is problematized by the agencies' de facto

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<sup>10</sup> See *infra* Part II.A.2 (discussing the degree to which transactions are approved or settled through consent decrees). Although length only serves as one proxy for the level of detail and direction Congress has given, a simple comparison of the Clayton Act at eleven pages, Clayton Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (codified as amended in scattered sections of 15 U.S.C.), and the FTC Act at eight pages, Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. 41-58 (2012)), to the Dodd-Frank Act, which stands at 848 pages, Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010), suggests that compared to modern day statutes, these older antitrust laws gave substantially more discretion to the agencies than might have otherwise been given in today's legislative context.

<sup>11</sup> See *infra* Part I.A (describing Hart-Scott-Rodino notification process).

<sup>12</sup> The FTC and the DOJ are still required to submit a public report anytime an actual challenge is brought; however, the opinions are cursory and the notice and comment publications are often written with reference to general terms of the transaction. See 15 U.S.C. § 45(b). Thus, for both public and industry members, prior transactions may provide little guidance as to the relevant standards and analysis of the agencies.

<sup>13</sup> See S. REP. NO. 63-597, at 13 (1914); H.R. REP. NO. 63-1142, at 18-19 (1914) (Conf. Rep.); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 276-87 (1979-1980) (describing legislative and case law history evincing expansive view of what constitutes "unfair methods of competition"); Peter C. Carstensen & Nina H. Questal, *The Use of Section 5 of the Federal Trade Commission Act To Attack Large Conglomerate Mergers*, 63 CORNELL L. REV. 841, 850-51 (1978) ("Congress used sweeping language to avoid limiting the applicability of the Act to a particular practice or category of practices."); see also *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) ("It is clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act to stop in their incipency acts and practices which, when full blown, would violate those Acts . . .").

division of enforcement by industry. For example, any merger or acquisition in the beer industry will likely be reviewed by the DOJ, whereas a merger or acquisition in the wine or liquor industry will be reviewed by the FTC.<sup>14</sup> As a result, different industries may face substantially different legal standards as a result of section 5 or may be placed under different settlement pressures because of the different administrative procedures available to the FTC.

This Article seeks to track the problems that arise with both the procedural and substantive differences in antitrust enforcement between the DOJ and FTC, with particular emphasis on understanding how section 5<sup>15</sup> has been and can be used to extend merger enforcement law beyond the traditional confines of section 7 of the Clayton Act.<sup>16</sup> Ultimately, this Article concludes by suggesting that the FTC draft section 5-specific Merger Guidelines<sup>17</sup> describing the scope of section 5 and how the FTC

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<sup>14</sup> FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, MEMORANDUM OF AGREEMENT BETWEEN THE FEDERAL TRADE COMMISSION AND THE ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE CONCERNING CLEARANCE PROCEDURES FOR INVESTIGATIONS 3, 8–11 (2002), available at <http://www.justice.gov/atr/public/10170.pdf>; Nathan Chubb, Comment, *Agency Draw: How Serious Questions in Merger Review Could Lead to Enhanced Merger Enforcement*, 18 GEO. MASON L. REV. 533, 559 (2011); Aruna Viswanatha, *Justice or FTC. Which Agency Will Review Comcast-NBC Deal?*, MAIN JUST. (Dec. 9, 2009, 3:34 PM), <http://www.mainjustice.com/2009/12/09/justice-or-ftc-which-agency-will-review-comcast-deal/>.

<sup>15</sup> 15 U.S.C. §§ 45(a)(1), 45(b).

<sup>16</sup> Clayton Act § 7, 15 U.S.C. §18 (2012). While there is a rich academic literature describing how section 5 may give shape as a supplement to the Sherman Act, much less has been written on how section 5 may give shape to the Clayton Act and its merger provision. See, e.g., Susan A. Creighton et al., *Some Thoughts About the Scope of Section 5: Workshop on Section 5 of the FTC Act*, FED. TRADE COMM. 1 (Oct. 17, 2008), [http://www.ftc.gov/sites/default/files/documents/public\\_events/section-5-ftc-act-competition-statute/screighton.pdf](http://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/screighton.pdf) (discussing how section 5 can be used in context of the Sherman Act in light of historical limitations); GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 36–38 (1968) (describing advantages of section 5 over section 2 of the Sherman Act); Andy J. Miller, Note, *A Procedural Approach to "Unfair Methods of Competition"*, 93 IOWA L. REV. 1485, 1489–90 (2008) (arguing to interpret section 5 as reaching conduct in its incipiency); Lauren E. Schrero, *A New Era in Section 5 Enforcement: The FTC Steps (Back) Up to the Plate* (on file with author) (reviewing how recent cases parallel earlier attempts to expand Section 5 within context of the Sherman Act).

<sup>17</sup> Merger Guidelines are provisions drafted by the DOJ and the FTC, explicating their approach to analyzing a given merger, giving parties a sense of when a particular transaction will be challenged. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *HORIZONTAL MERGER GUIDELINES 1* (2010) [hereinafter *HORIZONTAL MERGER GUIDELINES*], available at <http://ftc.gov/os/2010/08/100819hmg.pdf> ("These Guidelines describe the principal analytical techniques and the main types of evidence on

intends to enforce section 5. This will appease courts' concerns of agency abuse and will provide greater predictability to merging parties.

Part I of this Article provides a description of the enforcement procedures available to the DOJ and the FTC and of the existing standards guiding enforcement. Part II discusses how agency settlements and greater court deference to the agencies has changed the landscape of merger enforcement, raising transparency and accountability concerns.<sup>18</sup> These concerns are magnified within the FTC because of its administrative proceeding and section 5 powers, ultimately providing the FTC with greater opportunity to shape merger law.<sup>19</sup> Despite the expansive discretion available to the FTC, section 5 case law is sparse. Part III tracks early attempts to broaden the scope of section 5 through the courts.<sup>20</sup> It concludes by examining recent judicial limitations on section 7 and, subsequently, section 5, providing justification for an independent section 5 doctrine.<sup>21</sup> Part IV will suggest that while section 5 may in theory be more expansive than section 7, the FTC must provide clearer guidance before courts accept independent section 5 liability and must apply section 5 doctrines to all industries to ensure fairness in the review process. Part IV proposes that the FTC establish its own merger guidelines, delineating between mergers targeted by section 5 and those targeted by section 7.<sup>22</sup>

## I. MERGER ENFORCEMENT

As a general rule, mergers over \$68.2 million must be reported to the antitrust agencies for pre-merger review.<sup>23</sup> This filing is funneled to the appropriate antitrust agency—either the FTC or DOJ depending on the industries involved<sup>24</sup>—which then

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which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition.”).

<sup>18</sup> See *infra* Part II.

<sup>19</sup> See *infra* Part II.B.1.

<sup>20</sup> See *infra* Part III.A–B.

<sup>21</sup> See *infra* Part III.C.

<sup>22</sup> See *infra* Part IV.

<sup>23</sup> Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 77 Fed. Reg. 4323 (Jan. 27, 2012).

<sup>24</sup> See ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 132 (2007) [hereinafter ANTITRUST MODERNIZATION COMM’N], available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

reviews the transaction and evaluates whether the merger will have an anticompetitive effect. Until agency clearance is obtained, the transaction is at a standstill. While the FTC and DOJ operate under the same Merger Guidelines<sup>25</sup> in reviewing the transaction and largely operate under the same procedures in challenging transactions, there are important differences which provide the FTC with additional procedural powers. This Part seeks to provide a very brief background on the procedural mechanisms of antitrust merger enforcement, which is important in contextualizing the Article's analysis. Part I.A examines the basic pre-merger procedures parties must comply with under the Hart-Scott-Rodino Act. Part I.B describes procedural differences between the FTC and DOJ both in the agencies' initial review and on appeal to a federal district court. Finally, Part. I.C provides some history on the joint-agency Merger Guidelines that were designed to standardize the substantive standards between the FTC and the DOJ and to mitigate differentiated outcomes between the agencies.

#### A. *The Hart-Scott-Rodino Act and Initial Filings*

When parties decide to consummate a particular merger or acquisition, they must typically obtain clearance from the antitrust agencies.<sup>26</sup> These initial filing and review procedures are governed by the Hart-Scott-Rodino Act ("HSR" or the "HSR Act").<sup>27</sup> The HSR Act requires that counterparties to the transaction file a "Notification and Report Form," setting forth the terms of the proposed transaction.<sup>28</sup> Parties must wait thirty

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<sup>25</sup> *Id.* at 200.

<sup>26</sup> Pre-merger notification is only required where the transaction proposed is for \$68.2 million or more. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 77 Fed. Reg. at 4,323-02. Where parties suspect that a transaction will nonetheless result in antitrust scrutiny, parties may request a letter of opinion from the relevant agency to avoid the risk of post-termination break-up.

<sup>27</sup> Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a (2012)).

<sup>28</sup> Although the HSR Act only requires filing for transactions of a certain size or where parties have met a threshold in terms of annual sales or assets, for the purposes of this discussion, this Article assumes that the mergers of interest for this Article will typically require an HSR filing. Additionally, absent an HSR filing, the agencies are still free to request information and otherwise investigate the merger or acquisition and so the discussion following is still relevant for smaller parties and transactions. 16 C.F.R. § 803.1 (2013); *see* 16 C.F.R. § 803 app'x (2013).

days,<sup>29</sup> providing a window of time for the agency responsible for the case<sup>30</sup> to determine whether they will issue a “Request for Additional Information and Documentary Material,” otherwise known as a “Second Request.”<sup>31</sup> As the DOJ Merger Review Policy states, during this waiting period, “[t]he staff is encouraged to be as aggressive as possible” and the parties and counsel “are encouraged to be equally active in framing issues for inquiry, substantiating claimed defenses and responding in a timely manner to staff requests.”<sup>32</sup> It is in the parties’ interest to be as cooperative as possible to avoid a Second Request because of the additional time and cost that such a request places on often time-sensitive transactions.<sup>33</sup> If a Second Request is made, the relevant agency receives a much more substantial record of the relevant transaction and must thereafter make a final decision to approve or challenge the transaction in an adjudicative forum.<sup>34</sup>

### B. *The Procedures Diverge*

Although the initial filing and review processes are the same under both the FTC and the DOJ, agency procedures diverge after a decision to challenge the transaction has been made. In other words, once an agency concludes that the transaction will substantially lessen competition, how each agency thereafter challenges the problematic transaction varies.

If the DOJ decides that it wants to challenge a proposed transaction, the DOJ *must* seek to enjoin the parties from merging by requesting and obtaining a preliminary *and* permanent injunction from a federal district court.<sup>35</sup> The DOJ’s complaint will generally include a description of the challenged

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<sup>29</sup> 16 C.F.R. § 803.10 (2013). There are exceptions to the thirty-day waiting period. Namely, if the transaction is an all-cash tender offer, then the waiting period is narrowed to fifteen days. *Id.*

<sup>30</sup> *See supra* note 14 and accompanying text (discussing the industry division between the FTC and DOJ).

<sup>31</sup> 16 C.F.R. § 803.20 (2013).

<sup>32</sup> ANTITRUST DIVISION, U.S. DEPT OF JUSTICE, MERGER REVIEW PROCESS INITIATIVE 2 (Dec. 14, 2006), available at <http://www.justice.gov/atr/public/220237.pdf>.

<sup>33</sup> A Second Request, unlike the initial filing, will involve an extensive inquiry into the parties’ industry, requiring large document requests and on occasion, interviews with consumers, competitors, and other interested parties. *See id.* at 2–3.

<sup>34</sup> ANTITRUST MODERNIZATION COMM’N, *supra* note 24, at 151.

<sup>35</sup> *See id.* at 138–39.



action, the relevant markets of interest, the competitive effects of the merger or acquisition, the violation alleged, and the requested relief.<sup>36</sup> If the court finds in favor of the DOJ, the transaction is enjoined.<sup>37</sup> If the court finds for the parties, the parties are free to close the deal.<sup>38</sup> Both the DOJ and the parties may also appeal the case to the appellate level and eventually, the Supreme Court.<sup>39</sup>

If, on the other hand, the FTC decides that it wants to challenge a proposed transaction, the FTC *may* request a preliminary injunction from a federal district court to enjoin the transaction.<sup>40</sup> It is not, however, required to do so and even in such instances where a request for a preliminary injunction is made, the FTC will rarely request a permanent injunction.<sup>41</sup>

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<sup>36</sup> *Id.* at 64.

<sup>37</sup> *See id.* at 130.

<sup>38</sup> *See id.*

<sup>39</sup> *Guide to the Antitrust Laws: The Enforcers*, FED. TRADE COMMISSION, <http://www.ftc.gov/bc/antitrust/enforcers.shtm> (last visited Mar. 8, 2014).

<sup>40</sup> 15 U.S.C. § 53(b) (2012) ("Whenever the Commission has reason to believe . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission . . . the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice . . . [A] preliminary injunction may be granted . . .").

<sup>41</sup> Recent cases have suggested that the standard for granting a preliminary injunction to the FTC is in fact lower than the standard faced by the DOJ. In *FTC v. H.J. Heinz Co.*, the court noted that Congress recognized that the traditional four-part equity standard that is typically applied when determining whether to issue a preliminary injunction is not "appropriate for the implementation of a Federal statute by an independent regulatory agency." 246 F.3d 708, 714 (D.C. Cir. 2001). The court, in *FTC v. Whole Foods Market*, affirmed this standard, finding that a district court should grant a preliminary injunction anytime the FTC raises questions "so serious, substantial, difficult[,] and doubtful" with regard to the merits of the proposed transaction that a full administrative hearing is warranted. 548 F.3d 1028, 1035 (D.C. Cir. 2008) (alteration in original). This standard was affirmed in *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (citing *FTC v. Staples*, 970 F. Supp. 1066, 1072 (D.D.C. 1997)). As practitioners have noted, *Whole Foods* and *CCC Holdings* will likely mean that the "FTC is likely to be energized to bring more cases of this nature and to pursue them longer into the process than previously." *FTC v. Whole Foods: The Standard May Be More Important than the Substance*, ARNOLD & PORTER LLP CLIENT ADVISORY 5 (Aug. 2008), [http://www.arnoldporter.com/resources/documents/CA\\_FTCvWhole%20Foods-The%20Standard\\_080108.pdf](http://www.arnoldporter.com/resources/documents/CA_FTCvWhole%20Foods-The%20Standard_080108.pdf). The FTC is also likely to "rely [more heavily] on its own administrative proceedings to resolve whether a transaction violates the antitrust laws." Peter J. Love & J. Bruce McDonald, *Antitrust Alert: U.S. FTC and Whole Foods Settle Long-Running Merger Challenge*, JONES DAY PUBLICATIONS (Mar. 2009), <http://www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=5991>. Furthermore, the FTC will be emboldened by the decisions to pursue an aggressive merger enforcement policy. *FTC Obtains Preliminary*

Alternatively, the agency may also choose to forego a district court proceeding entirely and instead challenge the transaction within an internal administrative proceeding before an FTC selected Administrative Law Judge (“ALJ”).<sup>42</sup> The Commission will file its complaint with the ALJ,<sup>43</sup> who will then act as the presiding judge over the proceeding and evaluate whether or not the transaction does raise anticompetitive concerns. Note that the FTC may raise allegations both under the Clayton and Sherman Acts as well as under section 5 of the FTC Act. section 5 allegations may be strategically important in sensitive cases because unlike the Sherman and Clayton Acts, section 5 liability is not subject to treble damages.<sup>44</sup>

If the FTC or the parties are unsatisfied with the ALJ’s holding, either party may appeal, but the first appeal is made to the Commission, the same Commission that filed the initial complaint.<sup>45</sup> If the FTC upholds the ALJ’s decision, the parties may *then* appeal to a federal district court where the Commission’s determination will be subject to *Chevron* deference.<sup>46</sup>

### C. Merger Guidelines and Standardizing Substance

In 1968, the DOJ and the FTC promulgated the first joint-agency Merger Guidelines which codified some of the agencies’ basic enforcement policies. Those Guidelines have since been amended several times to reflect changing doctrine and approaches to enforcement.<sup>47</sup> The Guidelines “describe the

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*Injunction To Block CCC/Mitchell Merger; Parties Abandon Transaction*, WEIL BRIEFING: ANTITRUST/COMPETITION 5 (Mar. 20, 2009), [http://www.weil.com/files/upload/Weil\\_Briefing\\_Antitrust\\_March\\_20.pdf](http://www.weil.com/files/upload/Weil_Briefing_Antitrust_March_20.pdf).

<sup>42</sup> See ANTITRUST MODERNIZATION COMM’N, *supra* note 24, at 129.

<sup>43</sup> See *id.* Unlike the DOJ, which is constrained by the procedures of the FRCP, the FTC procedures are governed by administrative rules, 16 C.F.R. § 3–4, which in many ways mirror the FRCP. See Charles E. Spicknall, *Chilcutt v. United States: The Fifth Circuit Creates a Test for Sanctioning Government Attorneys Personally Under Rule 37*, 69 TUL. L. REV. 260, 266 n.41 (1994).

<sup>44</sup> See 15 U.S.C. § 45 (2012); Stephen Calkins, *Symposium: Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1083–84 (1986).

<sup>45</sup> Although the process seems a bit counterintuitive, it’s not unheard of for the Commission as appellate judge to overturn a holding that favors the Commission as prosecutor.

<sup>46</sup> See *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

<sup>47</sup> See, e.g., Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 781 (2006). Note that

principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition” and “are intended to assist the business community . . . by increasing the transparency of the analytical process . . . [and] may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws.”<sup>48</sup>

Although these Guidelines provide some insight into how the agencies will review a particular transaction, and might successfully mitigate some of the agencies’ procedural differences,<sup>49</sup> the Guidelines are limited. They do not provide clear standards or rules; thus, merging parties cannot necessarily ascertain when a transaction will be challenged in the same way that litigating parties can rely on past precedent to predict the outcome of a case. Rather, the Guidelines present the available set of tools the agencies have in evaluating the transaction and the range of potential relevant factors that the agencies will or may consider.<sup>50</sup> Moreover, the Guidelines are not binding on the agencies.<sup>51</sup> As will be discussed, the Guidelines have given courts reason to defer to agency decisions or reasoning and have been influential in this manner, but insofar as agency determinations have appeared inconsistent with prior doctrine, courts are free to reject the agencies’ Guideline applications.<sup>52</sup>

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the agencies also adopted joint non-horizontal merger guidelines (i.e. vertical merger guidelines), last amended in 1984. U.S. DEPT OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES 23 (2010), *available at* <http://www.justice.gov/atr/public/guidelines/2614.pdf>. Similarly to the horizontal merger guidelines, these provide standards by which agencies evaluate particular transactions, with the aim of providing guidance to parties and of creating more uniform outcomes in merger review. *See id.* While the non-horizontal merger guidelines play an important role in antitrust enforcement, challenges to vertical merges are rare. *Cf.* Joseph P. Bauer, *Government Enforcement Policy of Section 7 of the Clayton Act: Carte Blanche for Conglomerate Mergers?*, 71 CALIF. L. REV. 348, 349–50 (1983) (“In 1982 . . . the Department of Justice promulgated new Merger Guidelines, indicating that it will not challenge non-horizontal mergers, unless the transactions are likely to have an adverse impact on actual or potential competition.”). Therefore, the focus of this Article is on the Horizontal Merger Guidelines.

<sup>48</sup> HORIZONTAL MERGER GUIDELINES, *supra* note 17, at 1.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1 n.2.

<sup>52</sup> *See infra* notes 83–94 and accompanying text (discussing the role of Merger Guidelines in court decisions).

The role of the Merger Guidelines is important to understanding how section 5 doctrine takes form and develops. Although the current Merger Guidelines cover merger enforcement under the Sherman Act, the Clayton Act, and the FTC Act,<sup>53</sup> this Article will argue that a more defined distinction between section 5 and section 7 liability is important to the agencies' legitimacy and parties' expectations and further argue that such distinctions likely already exist despite the ostensible equivalence under the Guidelines. In light of the legislative intent of section 5 discussed in Part II, and the likely growing substantive divergence between the FTC and the DOJ discussed in Part III, this Article will argue for separate Guidelines governing section 5 doctrine.

## II. THE CHANGING LANDSCAPE OF COMPETITION LAW

The Hart-Scott-Rodino Act drastically changed the landscape of merger enforcement and provided the agencies, particularly the FTC, with an opportunity to expand or at the very least enforce competition law more aggressively.<sup>54</sup>

Today, as this Part argues, the FTC finds itself in a very different regulatory world, one that is more favorable to an expansive use of section 5 within the merger context. This Part will proceed in three sections. In Part II.A, this Article will examine the manifold structural changes that have enabled the antitrust agencies to control, direct, and change merger enforcement law. Part II.B will consider how the FTC has used, and can use, section 5 within these new structures to leverage merging parties and direct merger enforcement law in even more "extreme" directions. Finally Part II.C provides some reasons why we might be concerned with the current use of section 5.

### A. *Structural Changes Permitting Agency-Made Law*

The arc of antitrust law can be characterized as an evolution from common to statutory law and, over the course of the last fifty years, an evolution from statutory interpretation and enforcement by the courts to one of regulatory interpretation and enforcement

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<sup>53</sup> HORIZONTAL MERGER GUIDELINES, *supra* note 17.

<sup>54</sup> See Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a (2012)); *infra* notes 55-72 and accompanying text (explaining the role of HSR in changing merger enforcement).

by the agencies.<sup>55</sup> This relatively recent shift is a consequence of statutory and subsequent structural changes made within antitrust law and its agencies. As this Section will describe, the passage of the HSR Act,<sup>56</sup> coupled with the advent of the consent decree<sup>57</sup> and a lessening of court oversight, as well as greater deference to agencies on particular antitrust theories,<sup>58</sup> provide the antitrust agencies with substantial discretion to inform and enforce competition law.

### 1. HSR and Premerger Filings

In 1976, Congress passed the HSR Act,<sup>59</sup> requiring merging parties to submit *premerger* filings for the review and approval of the antitrust agencies.<sup>60</sup> Agencies were thus able to intervene *prior* to the consummation of a transaction.<sup>61</sup> Although initially

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<sup>55</sup> See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (acknowledging the Sherman Act as a common law statute); Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 175–76 & n.61 (“The merger control system in the United States, like the rest of antitrust law, began under a ‘law enforcement’ model, in which a prosecutorial entity would attempt to prove to a judicial body violations of a clearly stated legal rule on an *ex post* basis.”).

<sup>56</sup> See *infra* notes 60–66 and accompanying text (explaining how HSR Act changed shape of merger enforcement).

<sup>57</sup> See *infra* notes 71–82 and accompanying text (documenting the rise in consent decrees and consequences). *But cf.* Richard G. Parker, Senior Deputy Dir., Bureau of Competition, Fed. Trade Comm’n, Address before the Annual Briefing for Corporate Counsel, Washington, D.C.: Trends in Merger Enforcement and Litigation (Sept. 16, 1998) (transcript available in 5 HEALTH CARE & ANTITRUST L. app. E86 (2012)) (arguing “agencies increasingly are recognizing that not all cases can be settled, and that a settlement which does not effectively restore competition is not worth adopting”).

<sup>58</sup> See *infra* notes 83–94 and accompanying text (describing how lack of court precedent and greater influence of agencies in cases heard has led to greater agency control over merger enforcement law).

<sup>59</sup> See 90 Stat. 1383.

<sup>60</sup> See *id.* § 201; see also Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1275 (1998–1999) (noting HSR “fundamentally altered existing practice regarding the application of antitrust law to corporate mergers,” but made “no changes to the *substantive* antitrust rules regarding mergers”). For a more detailed description of how parties make their HSR filings and the subsequent processes, see generally Frankel, *supra* note 55, at 160–61; *Merger Review*, FED. TRADE COMM’N, <http://www.ftc.gov/enforcement/merger-review> (last visited Apr. 16, 2014).

<sup>61</sup> See William J. Kolasky, Jr. & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 897 (“The stated purpose of the [HSR] Act was to give the agencies ‘an effective mechanism to enjoin illegal mergers *before* they occur.’”) (quoting S. REP. NO. 94-803, at 72 (1976)). Note that this was a distinct change from past practices. See Bhagwat, *supra* note 60, at 1275 (noting HSR drastically shifted agency power in merger enforcement);

envisioned merely as a pre-notification statute, the HSR Act has provided the antitrust agencies with substantial leverage and power over mergers and acquisitions.<sup>62</sup> This power stems from the agencies' ability to delay merger transactions that are, by their very nature, time sensitive.<sup>63</sup> Because parties seeking approval are first and foremost concerned with avoiding delay and a "Second Request,"<sup>64</sup> merging parties and their lawyers are increasingly concerned with whether a particular transaction will "please or displease the current antitrust officials,"<sup>65</sup> rather than asking the seemingly obvious question: does this merger violate antitrust law?<sup>66</sup> As Ashutosh Bhagwat has noted:

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Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 181 (2005) ("The enactment of the HSR legislation . . . revolutionized merger practice.").

<sup>62</sup> See Bhagwat, *supra* note 60, at 1292 ("In practice, however, the HSR prediscovery requirements, combined with other interim coercive powers created by the Act, operate as a preclearance regime."); Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFF. L. REV. 937, 945–47 (2003) ("For Section 7 of the Clayton Act, what was judicially made law [pre-HSR] has now become much more administrative law—law that is determined by the enforcement decisions of the two federal agencies.").

<sup>63</sup> See Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 868 (1996–1997) (finding "pre-closing leverage strongly favors the government"); Joe Sims & Michael McFalls, *Negotiated Merger Remedies: How Well Do They Solve Competition Problems?*, 69 GEO. WASH. L. REV. 932, 942 (2001) (arguing that HSR results in significant negotiating advantages for the government and thus disadvantages for merging parties). One particular leverage point is time. Agencies will often prolong the approval process as a means to leverage a favorable outcome. See Bhagwat, *supra* note 60, at 1295–96 ("The great power conferred upon an agency by *ex ante* regulation is the power of delay. [A] regulatory hold-up, if sufficiently long, can derail almost any significant merger.").

<sup>64</sup> A "Second Request" is a request by the agencies for additional information from the merging parties after the initial filing per the HSR. See Bhagwat, *supra* note 60, at 1292. The agencies will typically make a second request when there is a high likelihood that the transaction will have anticompetitive effects. See Thomas J. Horton, *Fixing Merger Litigation "Fixes": Reforming the Litigation of Proposed Merger Remedies Under Section 7 of the Clayton Act*, 55 S.D. L. REV. 165, 195 (2010). While the second request does not automatically mean that the transaction will be challenged by the agencies, it signals to the parties that the agencies are concerned and also typically involves substantial time and investment on the part of the merging parties to provide the requisite documentation for the agencies. See *id.*

<sup>65</sup> A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 14 (1995); see James T. Halverson & Ronald C. Wheeler, *Negotiating Merger Consent Decrees*, 2 ANTITRUST 23, 23–27 (1988) (discussing ways to negotiate with antitrust agencies); Kolasky, Jr. & Lowe, *supra* note 61, at 901–02 (describing fix-it-first policy).

<sup>66</sup> Melamed, *supra* note 65.

The critical differences between *ex ante* enforcement mechanisms and the traditional, *ex post* mechanism described . . . lie in the timing of judicial review, and in the placement of the burden of inertia and inaction. . . . In an *ex ante* regime . . . [f]ailure to seek or gain agency approval, or inaction by the agency, preclude the firm from pursuing desired conduct, and therefore the burden of delay and inaction fall entirely on the firm.<sup>67</sup>

The *ex ante* nature of review provides space for agencies to both direct parties and shape substantive antitrust law.<sup>68</sup> Parties seeking to avoid the costs and delay of litigation are effectively tied to the agency's interpretation of the antitrust laws. Few will raise substantive issues relating to antitrust doctrine before a court, and, as a result, the antitrust agencies often have the last word on whether a particular transaction is anticompetitive.<sup>69</sup> Additionally, parties who maintain a positive relationship with the agencies might fear challenging an agency's finding for fear of future retaliation.<sup>70</sup> While HSR's initial ambitions were more modest, the statute has given agencies leverage, vested by the power of delay, to direct and control party behavior and has provided a space through which agencies can interpret the antitrust statutes more liberally or strictly than might otherwise be permitted by the judicial system.

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<sup>67</sup> Bhagwat, *supra* note 60, at 1283.

<sup>68</sup> *See id.* at 1279 ("The power of *ex ante* review provides an agency with an enormous amount of substantive discretion to shape the policies it implements, as well as a great deal of power to coerce or otherwise hold-up private, regulated entities.").

<sup>69</sup> *See* Kolasky, Jr. & Lowe, *supra* note 61, at 898 (describing parties' reluctance to challenge the FTC). Companies will also be reluctant to challenge a particular finding because courts typically remand the case back down to the agency for findings consistent with the judgment, adding additional delay and uncertainty. *See* Bhagwat, *supra* note 60, at 1297.

<sup>70</sup> *See* Bhagwat, *supra* note 60, at 1297 ("[A] firm is often deterred from seeking review because of the fear of agency retaliation in *future* proceedings. As a result, both firms and agencies know that the threat of appeal is a hollow one."); Kolasky, Jr. & Lowe, *supra* note 61, at 902 (describing informality between agencies and parties as crucial to efficient and favorable outcome for all involved).

## 2. The Rise of the Consent Decree and a Dearth of Court Precedent

The HSR Act also created spaces in which agencies and transacting parties could negotiate and often settle any anticompetitive concerns.<sup>71</sup> Today, most parties facing agency review will settle.<sup>72</sup> These settlements, memorialized in consent decrees, are another vehicle through which the antitrust agencies can shape merger enforcement law.<sup>73</sup> In *Silicon Graphics*,<sup>74</sup> for

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<sup>71</sup> Where a complaint has already been filed, the challenging agency must obtain approval for the settlement from either the presiding court or, in the case of an administrative proceeding under the FTC Act, the ALJ. See Commission Statement to Accompany Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,742, 39,742 n.2 (Aug. 3, 1995) [hereinafter Commission Statement, Administrative Litigation] (noting between FY 1990–1994, the Commission resolved complaints through administrative consent orders in 67% of merger actions). Where the settlement is negotiated prior to the filing of a complaint, the agencies are free to give form to the terms without oversight or review. Note that even after a complaint is filed and the settlement is subject to review, most courts and ALJs will approve the terms of the settlement. Cf. Grimes, *supra* note 62, at 961–62 (arguing that court review of settlements “does precious little . . . to alter pre-existing judicial powers”). See generally Lloyd C. Anderson, *United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 ANTITRUST L.J. 1, 10–36 (1996–1997) (reviewing history of Tunney Act litigation).

<sup>72</sup> In 2009, for example, the FTC took twelve merger enforcement actions. See FED. TRADE COMM’N & DEP’T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT 7 (2009), available at [http://www.ftc.gov/sites/default/files/documents/reports\\_annual/32st-report-fy-2009/101001hrsreport\\_0.pdf](http://www.ftc.gov/sites/default/files/documents/reports_annual/32st-report-fy-2009/101001hrsreport_0.pdf). Of these, six were resolved through consent decrees, three transactions were withdrawn, three involved second request investigations without further action, and in five, the FTC filed a preliminary injunction complaint. See *id.*; ANTI-TRUST DIV., DEP’T OF JUSTICE, BACKGROUND INFORMATION ON THE 2006 AMENDMENTS TO THE MERGER REVIEW PROCESS INITIATIVE 6 (2006), <http://www.justice.gov/atr/public/220241.pdf> (“In fiscal years 1999–2005 the Division issued second requests in 248 merger investigations, but only 55 of those investigations resulted in the filing of a complaint, and only four of those complaints led to a trial.”); see also Cavanagh, *supra* note 61, at 181–84 (“[D]isputes have been resolved administratively through consent decrees in those cases where anticompetitive potential existed.”); Frankel, *supra* note 55, at 182–84 (noting how agency incentives favor settlement); Melamed, *supra* note 65, at 13 (pointing to increasing use of consent decrees at DOJ and FTC in early 1990s). Settlement comes in the form of either a consent decree or agreement. See 16 C.F.R. § 2.34(c) (2013) (stating the FTC will publish consent decrees and solicit comments). Similarly, the DOJ will also publish its consent decrees on the Internet and invite comments. See 15 U.S.C. § 16(b) (2012) (requiring DOJ decisions to be published in the Federal Register).

<sup>73</sup> See Sims & Herman, *supra* note 63, at 868 (finding “pre-closing leverage strongly favors the government”); Sims & McFalls, *supra* note 63, at 942 (arguing that HSR results in significant negotiating advantages for the government and thus disadvantages for merging parties).



example, the FTC procured a consent agreement after alleging that the acquisition presented vertical foreclosure concerns, and therefore violated section 5 and section 7.<sup>75</sup> Commissioner Roscoe B. Starek, III argues in his dissenting statement that “[v]ertical foreclosure theories generally provide a weak basis for Section 7,” and instead advocates that the FTC address the more horizontal issues raised by the transaction.<sup>76</sup> Because a court never reviewed *Silicon Graphics*, a theory of liability based on a theory of vertical foreclosure continues to be a viable option for the FTC,<sup>77</sup> even though many economists and courts have critiqued vertical foreclosure as a legitimate basis for antitrust liability.<sup>78</sup>

Moreover, because consent decrees are by their very nature contractual, they typically only concern the government agency and merging parties. Even if the merger may have a ripple effect on closely related parties or might prove damaging to those same parties at a later date because of established consent decree practices within the agencies, the settlement does not consider third party concerns and may also ignore these future consequences.<sup>79</sup> As discussed, parties care less about the effect a consent decree will have on the substance of antitrust law and more about closing a deal.<sup>80</sup> While there are some safeguards in

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<sup>74</sup> Silicon Graphics, Inc., Proposed Consent Agreement with Analysis to Aid Public Comment, 60 Fed. Reg. 35,032, 35,032 (July 5, 1995).

<sup>75</sup> See *id.* at 35,035.

<sup>76</sup> See Dissenting Statement of Commissioner Roscoe B. Starek, III in the Matter of Silicon Graphics, Inc., 60 Fed. Reg. 35,036, 35,036 (July 5, 1995).

<sup>77</sup> Although vertical foreclosure has some case support, see A.G. Spalding & Bros., Inc., 56 F.T.C. 1125, 1168 (1960), the issue has never been adequately addressed by a federal court. Rather, the doctrine is confined to FTC consent decrees and administrative proceedings. See Scott A. Stempel, *Moving Beyond the '84 Guidelines: Government Shows Increasing Concern with Vertical Mergers*, 9 ANTITRUST 17, 17-18, 21-22 (1994) (describing antitrust enforcement agencies' rising concerns over vertical mergers and subsequent use of consent decrees to combat them).

<sup>78</sup> For a discussion of vertical foreclosures and its critiques, see ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 232-34 (1993); David Reiffen & Michael Vita, Comment, *Is There New Thinking on Vertical Mergers?*, 63 ANTITRUST L.J. 917, 917-23 (1995).

<sup>79</sup> See Kolasky, Jr. & Lowe, *supra* note 61, at 893 (“In calculating the costs and benefits of a consent decree, the parties to a transaction are likely to take into account only the effects on their own transaction, and not the effects on third parties. This may cause them to agree to relief that the agency would not be able to obtain in litigation in order to close the transaction expeditiously.”).

<sup>80</sup> See *supra* notes 64-66, 68-70 and accompanying text (describing the pressures placed on parties facing agency review).

The reality is that very few transactions can afford the delay inherent in litigating, even through a preliminary injunction, and even fewer parties

place, none are controlling—in other words, agencies can easily bypass them.<sup>81</sup> As a result, consent decrees provide a unique avenue through which the agencies can shape merger enforcement law while offering favorable deals to transacting parties.<sup>82</sup>

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have the stomach for the additional legal fees entailed in such litigation. Moreover, taking the antitrust agencies to court, in effect, inverts the pyramid that provides the fundamental rationale for appeal mechanisms generally. . . . Most businesses prefer the certainty of dealing with two federal enforcement agencies to the risks associated in having any one of several hundred federal judges deciding their cases.

Kolasky, Jr. & Lowe, *supra* note 61, at 910–11.

<sup>81</sup> See *supra* note 71 (noting that obtaining court approval for settlements is not burdensome). Where a complaint has been filed, a third party may seek to intervene in the dispute where its interests are adversely affected. See, e.g., Intervenor Hollingsworth & Vose Co.'s Brief on Remedies Affecting Its Contractual Rights at \*4, Polypore International, Inc., No. 9327, 2009 WL 3328240 (Fed. Trade Comm'n Oct. 1, 2009) ("Remedies imposed by the Commission must bear a 'reasonable relation to the unlawful practices found to exist,'" and in this instance, went beyond the scope thereby causing harm to petitioner (quoting *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957))); Ky. Household Goods Carrier Ass'n, 139 F.T.C. 404, 406 (2004) (Chappell, A.L.J.). Additionally, both the FTC and the DOJ submit consent decrees for public comment before they come into force, but agencies are not required to take public comment into consideration or change their consent decree based on the dissenting voices. See Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DEPAUL L. REV. 515, 524 (2010).

<sup>82</sup> See Sims & Herman, *supra* note 63, at 887–88, 896–99 (tracking use of consent decrees to pressure parties to cede to agency wishes); Kolasky, Jr. & Lowe, *supra* note 61, at 910–11; cf. E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L. Q. 997, 1051–52 (1986) (acknowledging the benefit of a consent decree). Consent decrees have not only given substance to merger enforcement law, but have also changed the shape of merger remedies not otherwise found through court orders. See Kolasky, Jr. & Lowe, *supra* note 61, at 892–93 (arguing reliance on consent decrees results in greater "use of regulatory provisions, such as mandatory licensing, non-discriminatory access, and firewalls to prevent the flow of competitively-sensitive information"); see also Mary Lou Steptoe & David Balto, *Finding the Right Prescription: The FTC's Use of Innovative Merger Remedies*, 10 ANTITRUST 16, 16–20 (1995) (describing new forms of remedies negotiated between agencies and merging parties). For example, under an enforcement regime that relies on consent decrees, remedies are elusive; some legal scholars have even suggested that consent decrees should consider including post-merger pricing guidelines. See Farrell Malone & J. Gregory Sidak, *Should Antitrust Consent Decrees Regulate Post-Merger Pricing?*, 3 J. COMPETITION L. & ECON. 471, 471, 486–88 (2007) (stating that "[i]t is surprising, however, that there are no well-defined principles for what merger remedies—divestiture or other alternatives—should enter a consent decree," and continuing to argue possibilities of post-merger pricing within consent decrees).

### 3. A Dearth of Court Precedent and Greater Deference to Agency Procedures

The development of “new” merger enforcement law as proscribed by the antitrust agencies occurs at two levels. First, agencies can use consent decrees as a means of developing new forms of liability,<sup>83</sup> as well as new remedies not necessarily available through court orders.<sup>84</sup> Second, agencies can expand or contract the scope of liability by changing the relevant factors of analysis on a case-by-case basis.<sup>85</sup> Both of these methods operate, to some extent, through the agencies’ Merger Guidelines.

The degree to which the agencies have been successful in formulating the scope of liability publicly—since consent decrees also permit reformulation behind closed doors—is a consequence of the agencies’ Merger Guidelines.<sup>86</sup> As Hillary Greene argues, the Merger Guidelines “have acted as a stealth force on the development of antitrust merger law” and have had an “undue influence upon common law development.”<sup>87</sup>

The influence Merger Guidelines have had on actual court interpretations of merger enforcement law is not entirely clear. In *Skidmore v. Swift & Co.*,<sup>88</sup> the Supreme Court held that “rulings, interpretations and opinions” of a federal agency, “while not controlling . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>89</sup> Although the Merger Guidelines are not controlling,<sup>90</sup>

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<sup>83</sup> See *Silicon Graphics, Inc., Proposed Consent Agreement with Analysis to Aid Public Comment*, 60 Fed. Reg. 35,032, 35,032 (July 5, 1995) (illustrating a consent decree that went beyond the scope of court liability); *supra* notes 74–78 and accompanying text (explaining consent decree in *Silicon Graphics* as one that went beyond the scope of court liability).

<sup>84</sup> See *supra* note 82 and accompanying text (enumerating ways consent decrees give agencies greater flexibility in choice of remedies).

<sup>85</sup> See *infra* notes 90–94 and accompanying text (describing the development of Merger Guidelines and the evolution of merger enforcement law).

<sup>86</sup> HORIZONTAL MERGER GUIDELINES, *supra* note 17, at 1; see also Greene, *supra* note 47, at 779–80 (explaining how merger guidelines clearly convey enforcement policies to the public).

<sup>87</sup> See Greene, *supra* note 47, at 772; see also Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 114 (2002) (observing common themes in the historical versions of Merger Guidelines).

<sup>88</sup> 323 U.S. 134 (1944).

<sup>89</sup> *Id.* at 140; see Greene, *supra* note 47, at 817–21 (describing how *Skidmore* set the groundwork for extensive reliance on Merger Guidelines by courts in evaluating antitrust cases).

courts have relied more heavily on the agencies' Merger Guidelines in recent years<sup>91</sup> because of the lack of recent case law, a consequence of the HSR Act.<sup>92</sup>

Although important to an understanding of how agencies can shape law, Merger Guidelines are not frequently reviewed or used by courts because of the rarity of merger litigation. Additionally, insofar as the Merger Guidelines diverge from court practice, courts will be less willing to adopt the Merger Guidelines as influential. Central to the changing form of merger enforcement is not the mere ability of agencies to use Merger Guidelines to affect merger enforcement, but the lack of judicial review.<sup>93</sup> While the possibility of litigation always lingers in the backdrop and deters

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<sup>90</sup> See, e.g., *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45 (2006) (describing Guidelines as helpful but not controlling on the court).

<sup>91</sup> For general discussion of use of Merger Guidelines by courts, see Kolasky, Jr. & Lowe, *supra* note 61, at 899 nn.51 & 53, 900–01 (“They provide antitrust practitioners and the business community with a detailed description of the methodology the agencies use to evaluate proposed acquisitions, the relevant factors they consider, and the standards they apply. By revising the guidelines as the agencies’ approach has changed, the agencies have kept the public fully apprised of those changes.”). For cases illustrating reliance, see, for example, *Ill. Tool Works, Inc.*, 547 U.S. at 45 (using enforcement guidelines as persuasive although “not binding on the Court” in its assessment of market power); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505–07 (1974) (adopting similar structural approach to merger as promulgated in 1968 Merger Guidelines); *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 390–91 (1963) (adopting clear merger rules as a precursor to Merger Guidelines); *Crane Co. v. Harsco Corp.*, 509 F. Supp. 115, 124–26 (D. Del. 1981) (relying on Guidelines for both market concentration analysis and standard). See generally Greene, *supra* note 47, at 784–87, 802–09 (describing case law supporting and rejecting use of Guidelines as persuasive in court and the general influence of the Merger Guidelines).

<sup>92</sup> The infrequency of suit means that case law is significantly underdeveloped or at least not directly responsive or relevant to today’s economy. See Cavanagh, *supra* note 61, at 183–84 (noting that “[t]he vast majority of judicial precedent in the merger area, which developed in the 1950s and 1960s, is largely irrelevant to merger practice today” and that “[t]he Supreme Court decided the last substantive merger case under section 7 of the Clayton Act . . . over thirty years ago” (citing *Gen. Dynamics Corp.*, 415 U.S. at 486)).

<sup>93</sup> See Bhagwat, *supra* note 60, at 1298 (“Many commentators have noted that the passage of the HSR, and the coercive Second Requests it authorized, has eviscerated judicial review of merger policy. Other examples are more difficult to document since they are primarily evidenced by the *absence* of judicial decisions, but common sense and casual empiricism suggest that in the face of *ex ante* regulation, judicial review is often utterly impractical from the point of view of regulated firms.”).

agencies from diverging wildly from accepted practices, reasonable interpretations of the statutes will likely receive some degree of judicial deference.<sup>94</sup>

### B. *A Place for Section 5 and the FTC*

Changes in merger enforcement have given greater credence to the possibility of an independent section 5 theory of liability. Although both the DOJ and the FTC are privy to the changes in merger enforcement law,<sup>95</sup> the FTC has two things the DOJ does not: (1) the option of bringing a complaint before an administrative law judge, appeals of which are received by none other than the Commissioners who brought the complaint in the first place,<sup>96</sup> and (2) the statutory hook of section 5.<sup>97</sup>

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<sup>94</sup> See generally *id.* at 1307 ("Not only have the antitrust agencies been effectively 'making law' pursuant to their pre-review powers under HSR, but since the passage of HSR in 1976 the various Guidelines and other agency internal policies have become essentially the *only* law governing such mergers because of the absence of any judicial (or congressional) activity in this area."). Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 702 (2007) ("Chevron's framework encourages judge-made ossification of regulatory statutes . . . Because of their lasting impact through *stare decisis*, and because they can be broad and abstract, judicial holdings that find fixed meaning in regulatory statutes can deprive agencies of needed flexibility to change course in the future."); Malcolm R. Pfunder, *Some Reflections on, and Modest Proposals for Reform of, the Hart-Scott-Rodino Premerger Notification Program*, 65 ANTITRUST L.J. 905, 907-08 (1996-1997); David S. Rubenstein, "Relative Checks": *Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2183 (2010) ("The power to interpret statutes in the administrative state . . . carries with it the power to make policy choices that Congress itself has not." (internal quotation marks omitted)). While there is literature describing both the benefits and harms resulting from the HSR Act, the advent of the consent decrees, and the general lack of court oversight, this Article is not concerned with whether a stronger administrative regulatory state is good or bad. Rather, it not only seeks to consider how these new structural and procedural facts create space for the agencies to develop new merger enforcement law but also allows the FTC to go even further through the use of section 5. See, e.g., Bhagwat, *supra* note 60, at 1275-79 (considering the positives, negatives, and dangers associated with *ex ante* and *ex post* administrative states); Frankel, *supra* note 55, at 159-60 (critiquing asymmetric access to judicial review in antitrust law); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009) (arguing for greater administrative review).

<sup>95</sup> See *supra* notes 55-94 and accompanying text (providing a narrative of structural changes within antitrust law relating to mergers).

<sup>96</sup> See Federal Trade Commission Act, 15 U.S.C. § 45 (2012); see also *infra* notes 98-110 and accompanying text (describing FTC procedural differences).

<sup>97</sup> 15 U.S.C. § 45.

## 1. Expanding Use of the Administrative Adjudication Process

In recent years, the FTC has exercised its right to bring a complaint before an administrative law judge with greater frequency.<sup>98</sup> Historically, both agencies would file for a preliminary injunction, and the DOJ would also file for a permanent injunction.<sup>99</sup> If the injunction was denied, the transaction would, pending other non-antitrust issues, close. Although the DOJ is legally bound by the courts' preliminary and permanent injunction rulings, the FTC is not so bound.<sup>100</sup>

When the DOJ challenges a merger, it alleges that the transaction violates section 7.<sup>101</sup> Parties know that a preliminary and permanent injunction will only be granted if a district court determines that the DOJ has demonstrated by a preponderance of the evidence that the challenged transaction will "substantially lessen competition."<sup>102</sup> Consequently, the DOJ is more confined to current antitrust law doctrine if only because parties may have

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<sup>98</sup> See Darren S. Tucker & Amanda P. Reeves, *Effective Advocacy Before the Commission*, ANTITRUST, Summer 2010, at 52, 52 ("The Commission's active docket, combined with the likely upturn in merger activity, suggests that there will be more matters in which parties will be appearing before the Commission in the future."); cf. D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319, 328 (2003-2004) ("The Commission's current extensive use of administrative litigation may certainly be viewed as consistent with the idea that complex issues are particularly appropriate for [FTC] adjudication.")

<sup>99</sup> Unlike the FTC, the DOJ must request a preliminary and permanent injunction concurrently. The DOJ must therefore meet a heightened preponderance of the evidence standard before obtaining a preliminary injunction. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004); ANTITRUST MODERNIZATION COMM'N, *supra* note 24, at 138-42.

<sup>100</sup> The procedural differences between the FTC and the DOJ have been subject to scrutiny. See ANTITRUST MODERNIZATION COMM'N, *supra* note 24, at 127-42 (describing and recommending changes to current procedural differences merging parties face). However, given the perceived lack of real substantive difference, no effort has been made to change the differing procedures. See Matt Andrejczak, *Federal Trustbusters Abandon Pact: Justice, FTC Succumb to Budget Threats*, MARKET WATCH (May 21, 2002, 10:49 AM), <http://www.marketwatch.com/story/federal-trustbusters-abandon-merger-review-pact> (describing failed Merger Clearance Agreement).

<sup>101</sup> See, e.g., Cengage Learning Holding I, L.P., Proposed Final Judgment and Competitive Impact Statement, 73 Fed. Reg. 34,948, 34,950 (Fed. Trade Comm'n June 19, 2008) (portraying challenged acquisition as one that would "substantially lessen competition in interstate trade and commerce in violation of section 7 of the Clayton Act").

<sup>102</sup> See 15 U.S.C. § 18 (2012); *supra* note 101-103 and accompanying text (describing the evidentiary standard of the DOJ).

stronger incentives to not settle before a preliminary injunction motion is filed: If the DOJ's request is denied, the transaction can go forward as planned.<sup>103</sup>

The FTC, on the other hand, has the added advantage of an administrative procedure and the section 5 statutory hook.<sup>104</sup> The existence of an administrative proceeding means that the FTC is less constrained by the courts and, in recent years, the FTC has preferred the administrative adjudication route.<sup>105</sup> Even if a court were to reject a request for a preliminary injunction, the FTC administrative proceeding can proceed concurrently with a preliminary injunction hearing or even after the preliminary injunction has been denied.<sup>106</sup> Moreover, recent cases have lowered the standard of review under which courts will examine the findings of the FTC in its request for a preliminary injunction and the standard of review of its findings after an appeal from an ALJ's decision.<sup>107</sup>

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<sup>103</sup> Jeffrey W. Brennan & Sean P. Pugh, *Inova and the FTC's Revamped Merger Litigation Model*, ANTI-TRUST, Fall 2008, at 28, 31 (noting that a "preliminary injunction 'almost always kills the deal'" (citation omitted)).

<sup>104</sup> See 15 U.S.C. § 45 (2012).

<sup>105</sup> See Janet L. McDavid & Richard G. Parker, *Recent Federal Agency Antitrust Merger Enforcement*, in MERGERS & ACQUISITIONS: WHAT YOU NEED TO KNOW NOW 123, 152–54 (2009) (pointing to the FTC's efforts to encourage adjudication through administrative proceeding); *FTC Seeks Comments on Proposed Amendments to Its Rules of Practice Regarding Adjudicative Proceedings*, FED. TRADE COMMISSION (Sept. 25, 2008), <http://www.ftc.gov/opa/2008/09/nprmt3.shtm> (expediting adjudicative process with an aim to shift litigating challenged mergers toward adjudicative proceedings).

<sup>106</sup> In its Statement of Policy, the Commission notes that "a preliminary injunction proceeding, regardless of its outcome, may not in and of itself provide a sufficient basis for the resolution of complex merger litigation," and that "it would not be in the public interest to forego an administrative trial solely because a preliminary injunction has been denied." Commission Statement, *Administrative Litigation*, *supra* note 71, at 39742–43. In recent years, changes to the FTC's administrative procedural rules have addressed previous criticisms that the FTC review took significantly longer than the DOJ procedure. See *Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding Government Enforcement Institutions: Differential Merger Enforcement Standards*, AM. BAR ASS'N 9 (Oct. 28, 2005), [http://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/comments\\_mergerenfrcstandards10-05-comm.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_mergerenfrcstandards10-05-comm.authcheckdam.pdf) (administrative litigation following preliminary injunction "forced [parties] into a long and costly process"); Proposed Rules: Federal Trade Commission, 73 Fed. Reg. 58,832, 58,837 (Oct. 7, 2008).

<sup>107</sup> In other words, the FTC has even greater leverage in the negotiating process because parties are assured that if a preliminary injunction is filed, there is a high likelihood that it will be issued, further prolonging the merger or acquisition and potentially killing the transaction entirely. See *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (adopting a serious questions test for the FTC review);

The administrative proceeding gives the FTC more leverage than the DOJ to successfully challenge mergers or to otherwise enter a favorable consent decree with the parties even when the transaction may not be problematic from a court's perspective.<sup>108</sup> In other words, merger enforcement law, as understood by the courts, is less of a constraining force on the FTC than it is on the DOJ.<sup>109</sup> Even if a preliminary injunction is denied and the parties are free to enter into the proposed merger, the FTC might still choose to bring a challenge before an ALJ, thus creating a sufficient deterrent for parties to consummate the deal.<sup>110</sup>

## 2. A Statutory Hook

The added buttress afforded by an administrative proceeding is not particularly alarming standing alone. An ALJ, much like a district court judge, can quickly assess the allegations, determine whether the agency's case is a viable one under current antitrust doctrine, and make a determination accordingly. But, because the complaint alleges both FTC Act section 5 and Clayton Act section 7 violations, an ALJ has greater flexibility.<sup>111</sup>

Existing case law and literature speaking to the differences and relationship between section 7 and section 5 is stark.<sup>112</sup> Earlier cases suggest that section 5 can and should be read more

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FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (interpreting Whole Foods and affirming lower standard); Nathan Chubb, *supra* note 14, at 554–59 (describing effect of lowered standard on agency review). For more discussion, see generally, Jessica Fricke, Note, *FTC v. Whole Foods Market: A New FTC Preliminary Injunction Standard?*, 8 DEPAUL BUS. & COM. L.J. 173 (2010); David Pettit, Comment, *Submarkets and Supermarkets: FTC v. Whole Foods Market and the Resurrection of Brown Shoe*, 16 GEO. MASON L. REV. 971 (2009).

<sup>108</sup> See Tucker & Reeves, *supra* note 98, at 52–54 (describing Commission review process).

<sup>109</sup> ANTITRUST MODERNIZATION COMM'N, *supra* note 24, at 138.

<sup>110</sup> See, e.g., Hoffman & Royall, *supra* note 98, at 328 (“The merger bar, in particular, may view *MSC Software* and *Chicago Bridge* as both unusual and important in that they involve efforts to unwind consummated mergers that were discovered to be anticompetitive after the fact.”).

<sup>111</sup> See, e.g., Proctor & Gamble Co., 140 F.T.C. 944, 951 (2005) (charging that the acquisition “constitutes a violation of Section 5 of the FTC Act” and “if consummated, would constitute a violation of Section 7 of the Clayton Act”); see also Stephanie W. Kanwit, Federal Trade Commission Enforcement of Section 7 of the Clayton Act—Mergers and Pre-merger Notification Rules, 1 F.T.C. § 17:1 (2012) (“Section 5 counts . . . are routinely included, along with § 7 counts, in FTC challenges to mergers or acquisitions.”).

<sup>112</sup> See *infra* notes 184–200 and accompanying text (examining limiting case law for merger enforcement).



liberally than section 7, but these cases also do not provide any limits or guidance as to the outer boundaries of the section 5 power in the context of mergers.<sup>113</sup> ALJs, therefore, may choose to constrain section 5 to section 7 doctrine or may choose to adopt a more liberalized view of section 5 in cases where the transaction may not be subject to section 7 or where a decision might fall outside current section 7 precedent.<sup>114</sup> Further, because ALJs are appointed by the Commissioners, we may have greater concerns that ALJs may do the latter. Perhaps evidencing this point, the Commission has, in some instances, appointed one of its own members as an ALJ.<sup>115</sup>

Section 5 therefore provides the FTC and its appointed ALJs a safe harbor if and when they choose to expand current merger antitrust doctrine. While section 5 allegations are added to complaints as a matter of course, the growing number of cases that are settled or resolved by the FTC administrative process under the auspices of section 5 means that, insofar as consent

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<sup>113</sup> See *infra* notes 147–54 and accompanying text (discussing case law that suggests FTC section 5 is and can be construed more broadly than section 7 of the Clayton Act); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (“The standard of ‘unfairness’ . . . is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.” (internal citations omitted)).

<sup>114</sup> See Kanwit, *supra* note 111 (finding that the Commission noted that section 5 “reaches all mergers which violate the standards set forth in § 7 of the Clayton Act, even if for technical reasons the acquisition would not be subject to the Clayton Act.”).

<sup>115</sup> See Order Designating Administrative Law Judge, *Inova Health Sys. Found.*, FTC Docket No. 9326 (May 8, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080509order.pdf> (appointing Commissioner Rosch as ALJ for *Inova* hearing); Respondent's Motion to Disqualify the Commission as Administrative Law Judge and To Appoint a Presiding Official Other than a Commissioner, *Whole Foods Market, Inc.*, FTC Docket No. 9324 (Aug. 22, 2008), available at <http://ftc.gov/os/adjpro/d9324/080822respmoedisqualifycomm.pdf> (arguing that benefits of having Commissioner serve as ALJ in *Inova* are not present here); see also Brennen & Pugh, *supra* note 103, at 28–29 (noting that practice of appointing Commissioner as ALJ is departure from past practice). In *Inova*, the parties ultimately pulled out of the transaction. See Press Release, *Inova Health Sys.*, Statement from Inova Health Sys. and Prince William Health Sys. About the Proposed Merger (June 6, 2008), available at <http://www.inovanewsroom.org/statement-from-inova-health-system-and-prince-william-health-system-about-the-proposed-merger/> (“A challenge and unusual process changes by the Federal Trade Commission threatened to prolong completion of the merger by as much as two years, which both health systems believe is not in the best interest of the communities they serve.”).

decrees give form and establish precedent or otherwise expand merger enforcement, section 5 can provide a statutory justification for expansion.<sup>116</sup>

While it is not exactly clear how or in what direction the Commission hopes to use section 5 to expand merger enforcement,<sup>117</sup> the Commission has a clear mission of expansion in mind.<sup>118</sup> Over the course of the last decade, the FTC has

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<sup>116</sup> Most FTC complaints allege both FTC section 5 and Clayton Act section 7 violations, but the discussion of anticompetitive effects and barriers to entry that give the allegation substance reference neither section. For example, in the recent *Novartis* case, the FTC alleged that “[e]ntry into the relevant markets . . . would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition” and that the transaction would “substantially lessen competition . . . in violation of Section 7 of the Clayton Act . . . and Section 5 of the FTC Act . . . by eliminating actual, direct, and substantial competition between Novartis and Alcon.” Complaint at 9–10, *Novartis AG*, FTC Docket No. C-4296 (Aug. 16, 2010), available at <http://ftc.gov/os/caselist/1010068/100816novartismcpt.pdf>.

<sup>117</sup> See *infra* note 200 and accompanying text.

<sup>118</sup> Under Leibowitz’s leadership, the FTC has pursued a rigorous merger enforcement policy. See McDavid & Parker, *supra* note 105, at 149–50 (“The FTC will likely expand its involvement in proposed mergers under Leibowitz’s Chairmanship.”). In his concurring opinion in the Matter of Rambus, Leibowitz stated:

[T]he framers of the FTC Act gave the Agency a mandate—one unique to the Commission—to use Section 5 to supplement and bolster the antitrust laws by providing, in essence, a jurisdictional ‘penumbra’ around them . . . . [W]e need to . . . further develop this aspect of our enforcement responsibility—and to use all the arrows in our jurisdictional quiver to ensure that competition is robust, innovative, and beneficial to consumers.

Concurring Opinion of Commissioner Jon Leibowitz at 21, *Rambus, Inc.*, FTC Docket No. 9302 (Aug. 2, 2006), available at <http://www.ftc.gov/sites/default/files/documents/cases/2006/08/060802rambusconcurringopinionofcommissionerleibowitz.pdf>. Commissioner Rosch has been particularly active in efforts to expand the reach of section 5 in the area of mergers and the Clayton Act. See Jonathan Gleklen, *The Emerging Antitrust Philosophy of FTC Commissioner Rosch*, ANTITRUST, Spring 2009, at 46, 46. In his concurring opinion in *Ovation*, Rosch pointed to previous conglomerate cases as justification for an expanded section 5 power. *Id.* Commissioner Rosch has advocated for an “unprecedented expansion of Section 5” and that this approach was “coupled with a push to broaden the reach of Section 7 substantively beyond existing precedent.” *Id.*; see Mark D. Whitener, *Interview with J. Thomas Rosch, Commissioner, Federal Trade Commission*, ANTITRUST, Spring 2009, at 32, 39 (appealing to old conglomerate cases, dissenting in *Ovation* decision); Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Ovation Pharms., Inc.*, No. 0:2008cv06379 (D. Minn., Dec. 16, 2008), available at <http://www.ftc.gov/sites/default/files/documents/cases/2008/12/081216ovationcmpt.pdf>.

From Kovacic’s view, section 5 has been constrained beyond its original purpose, but, unlike Rosch and Leibowitz, Kovacic believes that these court constraints have been a product of the Commission’s own failures and seeks to remedy the Commission’s past errors in adopting a new path for section 5 jurisprudence. William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 940–50 (2009–2010) (advocating that the

successfully isolated itself procedurally whereby, either through consent decree or administrative proceeding, it has paved a path for an independent line of section 5 cases.<sup>119</sup>

### C. *Some Initial Concerns*

The growing use of consent decrees under HSR procedures creates a growing divide between merger enforcement in practice and merger enforcement as understood by the courts.<sup>120</sup> At the same time, the availability of the administrative proceeding and the statutory hook of section 5 has the potential to create, and has arguably created, a divide between the FTC and the DOJ in the enforcement of their Merger Guidelines and antitrust laws.<sup>121</sup> These shifts raise a number of concerns.

First, a division between antitrust doctrine in practice and antitrust doctrine as understood by judicial precedent raises general concerns of accountability and transparency of the decision-making processes.<sup>122</sup> As William J. Kolasky, Jr. and

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Commission learn from historical experience and expand section 5 in a principled, standardized manner). For Kovacic, expansive FTC power is possible through legitimizing the administrative litigation proceeding and otherwise justifying decisions based on principled standards and rules. Kovacic noted that “[t]he Inova/Prince William Health System transaction is a good example of how the agency has learned and applied very useful lessons though a process of critical self assessment concerning experience [with prior case law],” and praised the Whole Foods and Chicago Bridge cases as providing “useful foundations for future FTC merger enforcement.” Elizabeth M. Bailey, *Interview with William E. Kovacic, Chairman, Federal Trade Commission*, THE ANTITRUST SOURCE 4–5 (Aug. 2008), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Aug08\\_FullSource8\\_6f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Aug08_FullSource8_6f.authcheckdam.pdf).

The remaining two commissioners, Commissioner Julie Brill and Chairwoman Edith Ramirez, were sworn in on April 2010 and it is unclear where they will stand on the debate. See *Julie Brill, Commissioner*, FED. TRADE COMMISSION, <http://ftc.gov/commissioners/brill/index.shtml> (last visited Mar. 9, 2014); *Edith Ramirez, Chairwoman*, FED. TRADE COMMISSION, <http://ftc.gov/commissioners/ramirez/index.shtml> (last visited Mar. 9, 2014).

<sup>119</sup> See *supra* notes 71–82 and accompanying text (discussing advent of consent decree in context of administrative proceedings); see also *Evanston Nw. Healthcare Corp.*, No. 9315, 2007 WL 2286195, at \*62 (Fed. Trade Comm’n Aug. 6, 2007) (noting that, in a consummated merger, “our analysis is a retrospective inquiry based on empirical evidence” of competitive effects); Hoffman & Royall, *supra* note 98, at 331 (describing expanding procedural devices, including bringing claims post-merger, and noting that “[i]t seems likely that the Commission’s extensive use of administrative litigation to resolve important and difficult antitrust issues will continue for the foreseeable future”).

<sup>120</sup> See *supra* Part II.A.

<sup>121</sup> See *infra* Part III.B.

<sup>122</sup> See, e.g., Grimes, *supra* note 62, at 939 (“Although both agencies disclose a great deal of information...their record in publishing information about enforcement

James W. Lowe argue, “The lack of meaningful opportunity for judicial review in the overwhelming majority of cases imposes a special obligation on the [antitrust] agencies to behave fairly and responsibly.”<sup>123</sup> Because this Article is less concerned with theories of agency and administrative law, the issue of transparency is less relevant, particularly where the “clients” of the agencies are often well-represented and sophisticated corporations.<sup>124</sup> However, differences between the DOJ and the FTC as to the transparency of decisions are problematic insofar as the agencies apply different standards and rules. Although both agencies “follow” the Merger Guidelines, these guidelines merely provide a framework without describing dispositive factors.<sup>125</sup> While both agencies have improved their reasons for challenging a merger and their ability to articulate claims through complaints, the DOJ still provides a more “detailed and useful” statement of impact than the FTC.<sup>126</sup> As noted before, an ALJ’s decision or FTC’s complaint will reference both section 7 of the Clayton Act and section 5 of the FTC Act,<sup>127</sup> but the analysis and conclusion will most likely reference neither.<sup>128</sup> Consequently, there is not only less transparency in the basis of an FTC challenge, but also little to no transparency as to whether a particular decision is based on how the FTC distinguishes section 5 or section 7.

Second, and on a related note, we might worry that parties are facing both different procedural *and* substantive standards when their transactions are reviewed. As discussed, whether a

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decisions is problematic.”); Watts, *supra* note 94 (arguing that agencies must be more transparent about political motivations and pressures).

<sup>123</sup> Kolasky, Jr. & Lowe, *supra* note 61, at 911.

<sup>124</sup> HSR only requires pre-merger filings for transactions that meet the following: (1) the transaction affects commerce; (2) either (a) one of the parties has sales each year or assets of \$100 million or more [as of 2008, raised to \$126.3 million] and the other party has sales or assets of \$12.6 million or more; or (b) the amount of stock the acquirer has is valued at \$252.3 million or more at any time; and (3) the value of the transaction is \$63.1 million or more. See 15 U.S.C. § 18a (2012).

<sup>125</sup> See Kolasky, Jr. & Lowe, *supra* note 61, at 903 (noting changes in merger guideless toward “a more nuanced analysis of the likely competitive effects of a merger, driven by the economists, leaves businesses and their advisors at sea in predicting whether the agency will challenge a particular transaction”).

<sup>126</sup> *Id.* at 894 (“[T]he FTC, while doing a better job of explaining the bases for its decisions, still lags behind its sister agency, the DOJ, in that area. The DOJ’s Competitive Impact Statements are far more detailed and useful than the FTC’s Analyses in Aid of Public Comment.”).

<sup>127</sup> See *supra* note 111 and accompanying text.

<sup>128</sup> See *infra* notes 184–200 and accompanying text.

merger is reviewed by the DOJ or the FTC is largely a matter of industry.<sup>129</sup> Because of the procedural changes in merger enforcement, a party facing FTC review might unknowingly be subject to an independent section 5 claim couched within a traditional Clayton Act complaint or challenge—a challenge that would pose no concerns for a party facing review by the DOJ. Although courts have typically afforded the FTC flexibility in its enforcement of section 5,<sup>130</sup> flexibility can also result in business confusion and the view that decisions are made arbitrarily if parties are not subject to the same standards of review.

The lack of transparency as to how section 5 affects the FTC's review of a merger is a challenge which all parties subject to FTC review must deal with. Over the course of the past few years, the FTC has pursued a rigorous merger enforcement docket,<sup>131</sup> but the lack of transparency in FTC review means that practitioners and academics alike must infer from single cases how the FTC intends to analyze a particular transaction.<sup>132</sup> It is an added factor, not relevant to the DOJ, and one that is particularly subject to critique as arbitrary or unfair.<sup>133</sup>

### III. THE FTC: GROWING UP AND TESTING THE BOUNDARIES

Over the course of the past century, both the antitrust agencies and courts have struggled to shape the contours of section 5.<sup>134</sup> As discussed, through the HSR pre-merger

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<sup>129</sup> See *supra* Part II.B.1 (highlighting the FTC and the DOJ's historical experience and advantages of each).

<sup>130</sup> See Jeff Govern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 443–44 & n.41 (1991) (outlining the history of judicial deference afforded to the FTC).

<sup>131</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2011, at 5 (2011) (“[T]he number of merger investigations in which second requests were issued in fiscal year 2011 increased 26% from the number of merger investigations in which second requests were issued in fiscal year 2010.”).

<sup>132</sup> See Ilene Knable Gotts, *M&A Antitrust Enforcement in FY 2010: Are the Obama Officials Promoting a New or a Souped Up Model of Enforcement?*, ANTITRUST REP., 2010, at 4 (examining recent FTC actions at the boundaries of antitrust doctrine).

<sup>133</sup> See Bhagwat, *supra* note 60, at 1304 (“In addition to the problems of generalized arbitrariness and lack of supervision, the existence of *ex ante* enforcement authority also raises substantial issues regarding an agency's *substantive* powers to make and interpret law. Here may lie the greatest danger resulting from the increased discretionary power generated by preclearance authority.”).

<sup>134</sup> Although the arguments for independent section 5 merger liability are not novel, they take different forms in changing contexts, evolving as the U.S. has faced new

notification requirements and the FTC's administrative and statutory advantages, section 5 has likely taken its own shape within the merger context.<sup>135</sup> However, Article III courts have yet to acknowledge an expansive section 5.<sup>136</sup> In this Part, the Article will track the history of section 5 and its changing relationship to section 7. Part III.A provides the historical backgrounds of section 5 and section 7. Part III.B considers the proposed use of section 5 to target conglomerate mergers of the 1960s and 70s.<sup>137</sup> Finally, Part III.C examines recent cases that have interpreted section 7 and section 5 narrowly.<sup>138</sup>

## A. *The FTC and Clayton Acts*

### 1. FTC Section 5

Although section 5 was initially touted and passed as an all-encompassing antitrust statute,<sup>139</sup> the FTC's efforts to expand liability have been unsuccessful.<sup>140</sup> Despite some earlier successes,<sup>141</sup> courts have largely interpreted section 5 as mere

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economic challenges. *See infra* Part II.A (describing the new context in which these arguments are made). Despite the arguments for and against expanded section 5 liability, most recognize that section 5 does have some role outside of the Clayton and Sherman Acts. Averitt, *supra* note 13, at 228 (noting that "language of Section 5 was deliberately left broad and general" and courts have had to determine its scope "through a process of case-by-case construction"); Creighton et al., *supra* note 16, at 2 (arguing that section 5 enforcement should consist of " 'frontier' cases, 'gap-filling' cases and 'yes, but' cases"); Layne E. Kruse, *Deconcentration and Section 5 of the Federal Trade Commission Act*, 46 GEO. WASH. L. REV. 200, 202–10 (1978) (examining whether section 5 should cover shared monopolies); *see also infra* notes 164–83 and accompanying text (examining the argument that section 5 should cover conglomerate mergers).

<sup>135</sup> *See supra* notes 55–72 (explaining the role of the HSR in changing merger enforcement).

<sup>136</sup> *See infra* Part III.C (describing how courts have limited the scope of the Clayton Act, and with it, section 5).

<sup>137</sup> *See infra* notes 163–83 and accompanying text (discussing conglomerate cases and early legislative efforts to address the perceived conglomerate epidemic).

<sup>138</sup> *See infra* notes 184–200 and accompanying text (describing recent case law narrowly construing section 7 and giving agencies less deference).

<sup>139</sup> *See infra* Part III.A.1.a–b (discussing legislative history of section 5 and examining case law that suggested section 5 should be interpreted broadly).

<sup>140</sup> *See infra* Part III.C (describing how courts have limited the scope of the Clayton Act, and with it, section 5).

<sup>141</sup> *See, e.g.,* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 249–50 (1972); FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966).

surplusage in section 7 cases. This Section of the Article will examine the congressional history of section 5 and describe the courts' early reception of expansive section 5 liability.

*a. Congressional Purpose of Section 5*

The FTC Act was passed in 1914, establishing the Federal Trade Commission as an independent agency for the purposes of hearing and adjudicating antitrust cases under the Sherman and Clayton Acts.<sup>142</sup> It also provided the FTC, under section 5, with the power to challenge “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”<sup>143</sup>

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<sup>142</sup> 15 U.S.C. § 45(b)–(n) (2012) (describing the procedure and remedies of the FTC administrative proceedings). Unlike the Antitrust Division at the DOJ, the FTC was set up as a bipartisan administrative agency, and thus, less subject to the demands of the Executive Branch. *Id.* §§ 41–58 (describing selection of Commissioners and their term).

<sup>143</sup> *Id.* § 45(a)(1). The terms “unfair or deceptive acts or practices in or affecting commerce” were not originally in the FTC Act. It was not until 1938, with the Wheller-Lea amendment, that those terms were included. *See* Cartensen & Questal, *supra* note 13, at 853. According to the text of the statute, the FTC must evidence harm to consumers and may consider established public policies in determining whether any given practice is “unfair.” 15 U.S.C. § 45(n) (detailing the Commission’s standard of proof). In order to find any given practice unfair, the Commission must evidence that it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” *Id.* By way of background, the FTC Act was largely a Congressional and Executive response to the Supreme Court’s *Standard Oil Co. v. United States* (“*Standard Oil*”) decision. *See generally* 221 U.S. 1 (1911). Shortly after the decision was issued, Senator Newlands of Nevada proposed remedial legislation, fearful that courts would be acting as regulators under the *Standard Oil* standard. *See* Averitt, *supra* note 13, at 231 (narrating Newland’s objections to *Standard Oil*). President Wilson was supportive of legislation, hoping to aid courts in determining what constituted an unreasonable practice. *See* 51 CONG. REC. 1978–79 (1914); Kruse, *supra* note 134, at 211. Legislation was also supported within the business communities who wanted greater clarity and to know with greater certainty what would be considered an unreasonable restraint on trade. *See* ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 179–80 (1972). *See generally* HENDERSON, *supra* note 16. Under the *Standard Oil* standard, courts would conduct a case-by-case inquiry. *Standard Oil Co.*, 221 U.S. at 60. *Standard Oil* has also been described as the first case to recognize the true limitations of the Sherman Act and to address its legal deficiencies. “The context clearly showed that a broader meaning was intended, and it was fair inference that the law was aimed at agreements, combinations, or conspiracies which had the effect of eliminating or limiting competition between the participants,” not that it was aimed at every such contract. *See* HENDERSON, *supra* note 16, at 5–6.

In selecting the terms “unfair methods of competition,” Congress sought to give the FTC broad power in defining the scope of unfair competition.<sup>144</sup> Congress also hoped that section 5 would serve as a gap-filler for other conduct missed by the express terms in the Clayton Act, targeting acquisitions that may have the effect “substantially [to] lessen competition or tend to create a monopoly.”<sup>145</sup> By framing the FTC’s power broadly, Congress granted the FTC great discretion, hoping to move antitrust policy into the hands of skilled economists, rather than judges and politicians with varying and competing notions of how antitrust law could and should be used.<sup>146</sup>

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<sup>144</sup> The Act went through various versions. The initial FTC Act did not contain a substantive provision—it merely provided for the Commission’s procedural evaluation. The first draft of what is now section 5, used the term “unfair competition,” which was meant to encompass both those acts enumerated in the Clayton Act, while also leaving room for courts and the Commission to give additional substance to the language. See HENDERSON, *supra* note 16, at 34–35; see also S. REP. NO. 63-597, at 13 (1914) (noting that in deciding whether to enumerate illegal conduct or leave the language general, Congress chose the latter in recognition that there were “too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others”). The context in which the statute was passed suggests that Congress was primarily concerned with conduct *tending* toward monopoly. See Kruse, *supra* note 134, at 214–16 (arguing that section 5 was intended to address conduct tending toward monopolization); see also *FTC v. Gratz*, 253 U.S. 421, 428–29 (1920) (rejecting the FTC’s claim because it failed to demonstrate that the conduct tends toward monopoly).

<sup>145</sup> HENDERSON, *supra* note 16, at 44–48 (arguing that the FTC was the stronger of the two Acts and that “in so far as the proponents of supplemental anti-trust legislation had hoped to clarify the law of restraints and monopolies by substituting specific rules of conduct for general principles, they had largely failed”). Similarly, Congress intended section 5 to supplement section 2 of the Sherman Act. *Id.* at 36–38 (describing advantages of section 5 over section 2 of the Sherman Act).

<sup>146</sup> *Cf.* Discount Pricing Consumer Protection Act, S. 2261, 110th Cong. (2007) (seeking to overturn the court’s decision in *Leegin* and thereby restoring the per se rule of liability in resale price maintenance cases).



b. *Sperry & Hutchinson and Others Shine a Light*

Early case law supported Congress's broad vision of section 5.<sup>147</sup> Although the vague language of section 5 has been an area of heated contestation, proponents of an expanded section 5 often point to these early cases—most predominantly, *FTC v. Sperry & Hutchinson Co.*<sup>148</sup> In *Sperry & Hutchinson*, the Supreme Court looked to the text and legislative history of section 5, holding that section 5 empowered the Commission to “define and proscribe an unfair competitive practice, even though the practice [did] not infringe either the letter or the spirit of the antitrust laws.”<sup>149</sup> Moreover, the Court indicated that section 5 permitted the Commission to “proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition.”<sup>150</sup> During the

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<sup>147</sup> See *infra* notes 148–54 and accompanying text (describing *Sperry & Hutchinson*); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986) (noting § 5 is more expansive in scope than § 1 of the Sherman Act); *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 313–14 (1934) (finding in favor of the FTC where evidence of harm to the consumer and public policy interests are shown). “Commission has broad power to apply s 5 to reach transactions which violate the standards of the Clayton Act, although technically not subject to the Act's prohibitions,” *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 279 n.7 (1975), and “[w]hile alternative constructions may be gleaned from congressional legislative history, it seems that, on balance, the Commission has authority under section 5 to proceed against *equivalent types* of practices not within the jurisdictional bounds of the coverage specified in the Clayton Act.” S. Chesterfield Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 MICH. L. REV. 821, 835 (1961); see *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394–95 (1953) (holding that the FTC Act “was designed to supplement and bolster the Sherman Act and the Clayton Act”).

<sup>148</sup> 405 U.S. 233 (1972). A precursor to *Sperry & Hutchinson* can be found in *FTC v. Brown Shoe Co.*, in which the Supreme Court held that the FTC could “arrest trade restraints in their incipency without proof that they amount to an outright violation of s 3 of the Clayton Act,” and that “[i]t is clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act to stop in their incipency acts and practices which, when full blown, would violate those Acts.” 384 U.S. 316, 322 (1966) (quoting *Motion Picture Adver. Serv.*, 344 U.S. at 394–95).

<sup>149</sup> *Sperry & Hutchinson*, 405 U.S. at 239–41, 243–44 (explicating on text and Congressional intent of section 5 as justifying broad interpretation).

<sup>150</sup> *Id.* at 239. The Court cited and approved three factors used by the FTC: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, competitors, or other businessmen. *Id.* at 244 n.5 (citation omitted). Despite this finding, the Court remanded the case to the Court of Appeals with instructions to remand it back to the Commission upon finding that the Commission's initial opinion

1970s, the scope of section 5 continued to expand. Courts acknowledged section 5 as a “potentially . . . dynamic analytical tool capable of progressive, evolving application which can keep pace with a rapidly changing economy”<sup>151</sup> and used section 5 where the statutory language of the Clayton Act was limiting.<sup>152</sup>

The legislative history of section 5 and the Court’s early interpretation of section 5 contemplate a role for the FTC outside the purview of the Clayton and Sherman Acts.<sup>153</sup> While *Sperry & Hutchinson* created an avenue for an expansive section 5 power, the FTC’s subsequent attempts to push the boundaries of traditional antitrust legal doctrine have been rebuffed by the courts.<sup>154</sup>

## 2. Clayton Act, Section 7

The Clayton Act was ratified in conjunction with the FTC Act. Unlike the FTC Act, the Clayton Act provides a more specific enumeration of what Congress hoped to target with its new

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“failed to ‘articulate any rational connection between the facts found and the choice made.’” *Id.* at 249–50 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Court also stated that despite the broad scope of section 5, the Commission’s “opinion is barren of any attempt to rest the order on its assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects on competition. Nor were any standards for doing so referred to or developed.” *Id.* at 248.

<sup>151</sup> *Pfizer, Inc.*, 81 F.T.C. 23, 1972 WL 127465, at \*28 (July 11, 1972).

<sup>152</sup> For example, the FTC used section 5 to challenge a merger where entities were not corporations and therefore, at the time, not subject to section 7 of the Clayton Act. *Beatrice Foods Co.*, 67 F.T.C. 473, 1965 WL 92798, at \*7, \*121 (Apr. 26, 1965). The FTC also used section 5 to challenge a merger that did not involve “interstate commerce,” which at the time prevented a section 7 claim. *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1962 WL 75760, at \*64, \*112–13 (Apr. 30, 1962). See generally CORPORATE COUNSEL’S GUIDE TO RELATIONS WITH COMPETITORS (2010) (arguing section 5 use as an interstitial provision).

<sup>153</sup> For a critique of this view, see generally James A. Rahl, *Does Section 5 of the Federal Trade Commission Act Extend the Clayton Act*, 5 ANTITRUST BULL. 533, 539–41 (1960) (“I do not believe, however, that it was ever seriously considered that the FTC Act could or should operate to supplement the very specific Clayton Act provisions, until the unexpected dictum of the Supreme Court in *FTC v. Motion Picture Advertising Service Co.* . . .”).

<sup>154</sup> See *supra* notes 184–200 and accompanying text (examining ways in which section 5 has been limited by the courts). A similar path of proposed expansion and limitation by the courts is evidenced in the line of Sherman Act cases. See *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128, 135–39 (2d Cir. 1984); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581–82 (9th Cir. 1980); *Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920, 923, 927–28 (2d Cir. 1980). For a discussion of these cases and the limits it imposed on the FTC with respect to the Sherman Act, see, for example, Miller, *supra* note 16, at 1500–03.

antitrust program.<sup>155</sup> In its relevant part, section 7 bars acquisitions of “whole or any part of the stock . . . or any part of the assets of another person engaged also in commerce or in any activity affecting commerce . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”<sup>156</sup>

The Clayton Act and the FTC Act were clearly envisioned as part of a coordinated effort to address perceived problems in U.S. competition law.<sup>157</sup> How exactly the two statutes work with one another, however, is less clear. Should they be viewed as a single program such that conduct covered by section 7 is distinct from conduct covered by section 5?<sup>158</sup> Should section 5 be able to target the same or even additional conduct provided for in section 7?<sup>159</sup> In other words, the statutory text does not resolve the question of whether the FTC can have an independent section 5 action against merging parties without alleging a section 7 violation.<sup>160</sup>

When section 7 is construed broadly, these questions are moot because the FTC is free to bring section 7 challenges regardless of the status of section 5.<sup>161</sup> When section 7 is construed more narrowly, however, the question becomes more relevant as proponents of expansion seek to use section 5 as statutory grounds for expanding liability beyond section 7.<sup>162</sup>

<sup>155</sup> See Averitt, *supra* note 13, at 261 (noting that the Clayton Act was driven by a school seeking to provide “clear standards of legal and illegal conduct”). Section 2 of the Clayton Act, for example, makes illegal price discrimination and section 3 targets unlawful tying of goods in commerce. The Clayton Act, 15 U.S.C §§ 13–14 (2012).

<sup>156</sup> 15 U.S.C. § 18 (2012).

<sup>157</sup> Averitt, *supra* note 13, at 260.

<sup>158</sup> See Rahl, *supra* note 153, at 539.

<sup>159</sup> See Miller, *supra* note 16, at 1488–89 (pointing to three interpretations of section 5: (1) FTC may use section 5 for conduct that only also violates antitrust law; (2) FTC may enjoin conduct that antitrust laws do not reach; or (3) FTC can enjoin conduct on pure section 5 grounds).

<sup>160</sup> *Id.*

<sup>161</sup> In *In re Negotiated Data Solutions LLC*, Commissioner Deborah Majoras dissented, arguing that there is “scholarly consensus” that the Clayton and Sherman Acts, as currently interpreted, are broad enough to reach “nearly all matters that properly warrant competition policy enforcement.” Dissenting Statement of Chairman Majoras at 1, 3, *Negotiated Data Solutions LLC*, No. 0510094 (Jan. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf>.

<sup>162</sup> See *infra* notes 163–83 and accompanying text (describing a historical instance in which section 7 was viewed as a constraint on antitrust law and section 5 was appealed to in an effort to expand current merger doctrine); Cartensen & Questal, *supra* note 13, at 860–61 (arguing that in passing the Clayton Act, Congress “addressed only those types of mergers that then posed a threat to the economy” and recognized a need to use both

### B. Conglomerates as an Early Test Case

In the 1960s and 1970s, some hoped that antitrust law, either through an expansive section 7 reading or independent section 5 liability, would target the growing conglomerates of America.<sup>163</sup> During this time, a number of companies engaged in successive mergers giving rise to the modern day conglomerate.<sup>164</sup> While these mergers did not facially violate the Clayton Act because they lacked the traditional horizontal and vertical characteristics of mergers with which merger law was initially concerned, some viewed the bigness of conglomerates as foreboding the end of the locally owned, small business and were thus a force with which to be reckoned.<sup>165</sup> As Peter C. Carstensen and Nina H. Questal explain, “conglomerate mergers between large firms involve a quantum leap in terms of corporate growth, and . . . such instantaneous augmentation of size and power is particularly undesirable.”<sup>166</sup>

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specific and general provisions, like section 5, in antitrust enforcement). There is also substantial literature on just how far section 5 should go if it should be broader than the Clayton Act. As Oppenheim argues:

Most important of all, this attempted accommodation of the several statutes in this antitrust pattern should not be viewed as an invitation to invoke section 5 whenever the Commission believes that the conduct “runs counter” to or is contrary to “the spirit” of any one of these statutes. Such vague grasping for jurisdiction would be a misconceived and uncontrolled administrative discretion of the Commission neither intended by Congress nor supportable on judicial review.

Oppenheim, *supra* note 147, at 837–38.

<sup>163</sup> See *infra* notes 164–83 and accompanying text (providing narrative of conglomerate busting and shared monopolies).

<sup>164</sup> See Carstensen & Questal, *supra* note 13, at 841.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 842. The sorts of mergers that Carstensen and Questal were concerned with include the General Electric merger with Utah International. Section 7 was not implicated because the merger did not appear to substantially lessen competition or tend toward monopoly because General Electric and Utah International were in entirely different lines of business. See *id.* at 843–44.

While early attempts to go after conglomerates using the Clayton Act were unsuccessful,<sup>167</sup> the FTC was able to gain some ground in the courts.<sup>168</sup> In *FTC v. Proctor & Gamble Co.*,<sup>169</sup> for example, the FTC challenged what it coined a "product-extension merger," in which the merging entities were in complementary markets.<sup>170</sup> The merging parties were not direct competitors, but through the merger, the companies were able to gain efficiencies through shared facilities and joint-marketing.<sup>171</sup> Although the Court noted "[a]ll mergers are within the reach of s 7, and all must be tested by the same standard,"<sup>172</sup> it agreed with the Commission that such an acquisition had the potential to "reduce the competitive structure of the industry by raising entry barriers" and by "eliminat[ing] the potential competition of the acquiring firm."<sup>173</sup> Unlike the cases brought by the DOJ, the FTC framed

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<sup>167</sup> See, e.g., *United States v. Int'l Tel. & Tel. Corp.*, 324 F. Supp. 19, 22 (D. Conn. 1970) (rejecting the government's case for failing to demonstrate substantial lessening of competition); *United States v. Nw. Indus., Inc.*, 301 F. Supp. 1066, 1095-98 (N.D. Ill. 1969) (denying a preliminary injunction because economic concentration does not warrant a section 7 violation). Joseph F. Brodley commented that "[d]uring what has become one of the great merger waves of American history, narrow judicial constructions of the Clayton Act have allowed conglomerate mergers to proceed virtually unchecked." Joseph F. Brodley, *Limiting Conglomerate Mergers: The Need for Legislation*, 40 OHIO ST. L.J. 867, 867 (1979) (tracking events leading up to proposed legislation amending antitrust law in the 1970s).

<sup>168</sup> While the FTC had some earlier success, its efforts to expand under a theory of shared monopoly, as opposed to a theory of product-extension merger were less successful, even though the ultimate concern was similar—overly concentrated markets saturated by a few large companies. See Kruse, *supra* note 134, at 200-01 (examining the FTC's efforts to break up the "ready-to-eat cereal companies" and petroleum industries). Aspirations to expand antitrust law were not limited only to mergers but also extended to Sherman Act violations. See *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128, 130 (2d Cir. 1984) (finding that the FTC did not meet the evidentiary burden for a section 5 violation in an instance of non-collusive business practices with anticompetitive effects); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 573 (9th Cir. 1980) (denying the FTC's claim of a section 5 violation for the adoption and maintenance of delivered price scheme permitting price fixing); *Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980) (denying the FTC's section 5 allegation that Petitioner arbitrarily failed to publish connecting flight schedules of commuter air carriers and noting that "enforcement of the FTC's order . . . would give the FTC too much power to substitute its own business judgment for that of the monopolist"). For a discussion of these cases and the limits it imposed on the FTC with respect to the Sherman Act, see, for example, Miller, *supra* note 16, at 1500-03.

<sup>169</sup> 386 U.S. 568 (1967).

<sup>170</sup> *Id.* at 577-78.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 577.

<sup>173</sup> *Id.* at 578.

the merger as one of closely related entities that had the potential to change broader markets generally, rather than individual product markets.<sup>174</sup>

Similarly, in *Ecko Products Co. v. FTC*,<sup>175</sup> the court upheld the FTC's order of divestiture, finding that the acquisition of a small meat-handling equipment company with a large market share in a line of products by a diversified manufacturing company, had a tendency to substantially lessen competition in violation of section 7.<sup>176</sup> Appealing to *United States v. Continental Can Co.*,<sup>177</sup> the court found that section 7 could be violated where the merging entities might become competitors in the future.<sup>178</sup>

Even though the FTC never challenged a merger on section 5 grounds alone, its successes compared to the DOJ's failures, suggest either greater deference to the FTC or an understood role for section 5.<sup>179</sup> During this time, the FTC viewed its power as supplementary to the Clayton Act, but chose not to invoke section 5 as an independent claim of liability in either *Proctor* or *Ecko*.<sup>180</sup> For some, however, these cases did not adequately consider the potential social and economic harms of large conglomerates, and

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<sup>174</sup> *Id.* at 586–94 (stating that the Court takes the Commission's word that this is not a pure conglomerate merger, without explanation, and that the Court should consider whether new standards should be adopted in addressing new forms of mergers, and that in this case, the analysis focused on probable changes in market structure as a proxy for market power).

<sup>175</sup> 347 F.2d 745 (7th Cir. 1965).

<sup>176</sup> *Id.* at 753.

<sup>177</sup> 378 U.S. 441 (1964).

<sup>178</sup> See *Ecko Prods. Co.*, 347 F.2d at 752; see also *Cont'l Can. Co.*, 378 U.S. at 458; *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370 (1963) (holding that internal expansion is socially preferable to growth by acquisition).

<sup>179</sup> Courts' acceptance of the FTC's arguments stand in stark contrast to the courts' general sentiment at the time, which involved reading section 7 narrowly. See, e.g., *FTC v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 275–76 (1975) (holding that it is not enough for the acquisition to merely affect commerce, it must actually be “in commerce” and, “[u]nder the explicit reach of s 7 . . . not only must the acquiring corporation be ‘engaged in commerce,’ but the corporation or corporations whose stock or assets are acquired must be ‘engaged also in commerce’”).

<sup>180</sup> See *Grand Union Co. v. FTC*, 300 F.2d 92, 102–04 (2d Cir. 1962); James A Rahl, *supra* note 153, at 533 (“In the recent *Grand Union* case . . . the Federal Trade Commission asserted not only a power, but a duty to ‘supplement and bolster’ Section 2 of the amended Clayton Act . . .”).

instead suggested that the courts and the FTC consider using section 5 as an independent justification for dismantling conglomerates.<sup>181</sup>

While “[t]here is no principled reason why Section 5 should be confined to [the letter] of the Clayton Act,” courts have typically maintained that the scope of section 5 is informed and constrained by the scope of section 7.<sup>182</sup> Therefore, when courts view section 7 in a limited fashion, section 5 is similarly constrained. It is important to note that while the FTC historically challenged mergers as violating section 7 only—in part, because it was so expansive—it now challenges mergers under both section 7 and section 5—perhaps in recognition of courts’ recent reluctance to find a section 7 violation.<sup>183</sup>

### C. Reading Section 7 and Section 5 Narrowly

In the 1960s and 70s, the agencies limited their merger claims to section 7. In recent years, however, the agencies’ section 7 analyses have moved away from the rigid market analysis still employed by the courts. This divergence prompted the FTC to challenge mergers on section 7 *and* section 5 grounds and has caused significant tension between the courts and the agencies. *FTC v. Arch Coal, Inc.*<sup>184</sup> and *United States v. Oracle Corp.*<sup>185</sup> evidence this divergence. In both cases the court rejected the FTC and the DOJ’s requests for a preliminary injunction, believing the agencies to be deficient in their market definitions and market power analyses.

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<sup>181</sup> See Cartensen & Questal, *supra* note 13, at 846 (noting that where courts held that merger violated antitrust laws, courts “focused on specific problems raised by the particular combination in issue, rather than on broader social and economic effects”); see also Bauer, *supra* note 47, at 369 (writing that the 1982 Merger Guidelines was too much of a concession on the part of agencies in reacting to negative response to conglomerate merger enforcement).

<sup>182</sup> See Averitt, *supra* note 13, at 241.

<sup>183</sup> See, e.g., Cengage Learning Holding I, L.P., Proposed Final Judgment and Competitive Impact Statement, 73 Fed. Reg. 34,948-01, 34,950 (Dep’t of Justice June 19, 2008) (portraying the challenged acquisition as one that would “substantially lessen competition in interstate trade and commerce in violation of Section 7 of the Clayton Act”); Proctor & Gamble Co., 140 F.T.C. 944, 951 (2005) (charging that the acquisition “constitutes a violation of Section 5 of the FTC Act” and “if consummated, would constitute a violation of Section 7 of the Clayton Act”).

<sup>184</sup> 329 F. Supp. 2d 109 (D.D.C. 2004).

<sup>185</sup> 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

In *Arch Coal*, the FTC challenged the merger between Arch Coal and New Vulcan, both owners of coal mines in the Southern Powder River Basin.<sup>186</sup> The FTC argued that the merger would allow the parties to engage in tacit coordination that would limit output and cause prices to rise.<sup>187</sup> But rather than relying on a direct impact on output, the FTC argued that the merger would result in a lower coal output than would have existed absent the merger.<sup>188</sup> The court, characterizing the FTC's theory as novel, noted that the FTC's burden was therefore raised.<sup>189</sup> Conducting a full-fledged market analysis, the court concluded that the FTC did not meet its burden of "showing a 'reasonable probability' that the challenged transactions may substantially lessen competition" raising "'serious, substantial, difficult and doubtful' questions going to the merits that further investigation and deliberation by the FTC . . . are warranted."<sup>190</sup> The court therefore rejected the FTC's request for a preliminary injunction.

In *Oracle*, the court rejected the DOJ's claim that the acquisition of PeopleSoft, Inc. by Oracle Corporation would violate section 7 by substantially lessening competition.<sup>191</sup> Again, the court conducted a full market analysis, examining the likely anticompetitive effects of the merger with close scrutiny.<sup>192</sup> In its assessment of the DOJ's unilateral effects claim,<sup>193</sup> the court considered the economic viability of the theory.<sup>194</sup> The court also heard testimony from customers,<sup>195</sup> experts in the field,<sup>196</sup> and others,<sup>197</sup> before determining that the Government had not met its burden of demonstrating a substantial lessening of competition by a preponderance of the evidence.<sup>198</sup>

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<sup>186</sup> *Arch Coal*, 329 F. Supp. 2d at 114.

<sup>187</sup> *Id.* at 131.

<sup>188</sup> *Id.* at 132.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 157.

<sup>191</sup> *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1175–76 (N.D. Cal. 2004).

<sup>192</sup> *Id.* at 1109.

<sup>193</sup> See HORIZONTAL MERGER GUIDELINES, *supra* note 17, at 20 (defining unilateral effects as those resulting from the "elimination of competition between two firms").

<sup>194</sup> See *Oracle*, 331 F. Supp. 2d at 1113–18.

<sup>195</sup> See *id.* at 1125–33.

<sup>196</sup> See *id.* at 1133–34, 1145–48.

<sup>197</sup> See *id.* at 1134–45, 1148–54.

<sup>198</sup> *Id.* at 1175–76.



Taken together, *Arch Coal* and *Oracle* were viewed as a significant defeat for the antitrust agencies, evidencing the courts' willingness to scrutinize agencies' findings and question the market analysis employed in a non-deferential manner typically associated with agency review.<sup>199</sup> As Deborah Feinsein notes, "[a] commonly suggested explanation for the significant decline in litigation activity in 2005 is that the agencies lost their nerve after being handed high-profile defeats the previous year in *Oracle* and *Arch Coal*."<sup>200</sup>

However, as Part II of this Article argues, rather than stifling merger enforcement, *Arch Coal* and *Oracle* might have simply redirected merger enforcement from the purview of litigation to agency enforcement through the use of consent decrees and, in the case of the FTC, an administrative adjudication. Recognizing that the courts would be reluctant to endorse new theories of merger liability, the agencies have instead sought alternative means to push the law forward through the use of its Merger Guidelines

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<sup>199</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."). For a general discussion of the *Chevron* doctrine and agency deference, see generally Note, *Chevron and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594 (2010); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

<sup>200</sup> Deborah L. Feinsein, *Recent Trends in U.S. Merger Enforcement: Down But Not Out*, ANTITRUST, Summer 2007, at 74, 76. In response to the courts' pushback on the agencies' attempts to expand liability, some have suggested that while section 5 can be viewed as expansive, it is particularly important that in its expansion, the FTC is principled. Case law further supports the proposition that the FTC must evidence tangible anticompetitive effects as understood by the courts, like evidence of market power in a well-defined market. See Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 875-76 (2010) (arguing for a more expansive section 5 couched in anticompetitive justifications); Kovacic & Winerman, *supra* note 118, at 944-45 (noting that "unfair methods of competition . . . should be a competition-based concept, in the modern sense of fostering improvements in economic performance rather than equating the health of the competitive process with the well-being of individual competitors"); Amanda Reeves, *Conduct-Specific Tests? How the Federal Trade Commission Can Reframe the Section 5 Debate*, CPI ANTITRUST J., Feb. 2010, at 3 (arguing that FTC section 5 limiting principle should be centered on evidence of anticompetitive effects); cf. Robert H. Lande, *FTC v. Intel: Applying the "Consumer Choice" Framework to "Pure" Section 5 Allegations*, CPI ANTITRUST J., Feb. 2010, at 5-6 (arguing section 5 expansion should be shaped by consumer choice framework); Michael A. Salinger, *A Symposium on Antitrust & Behavioral Economics: Behavioral Economics, Consumer Protection, and Antitrust*, 6 COMPETITION POL'Y INT'L 65, 81-82 (2010) (discussing the implications of behavioral economics for antitrust).

and consent decrees. It is in this sphere of enforcement that the FTC can use its administrative proceeding and section 5 powers to extend merger law beyond current court doctrine.

#### IV. PAVING A CLEARER PATH FOR SECTION 5 JURISPRUDENCE

More so than ever, corporations are expanding via mergers and acquisitions, opting for stair-like growth rather than the more traditional slow and steady growth of a unified, singular entity.<sup>201</sup> The HSR Act sought to address the administrative burdens and concerns associated with the growth in transactions and in so doing, created a new regime of merger enforcement.<sup>202</sup> This new regime primarily operates through the use of consent decrees agreed to by the enforcing agency and the merging parties,<sup>203</sup> and in the case of the FTC, through an administrative proceeding under the supervision of an ALJ.<sup>204</sup> As this Article argues, current merger enforcement processes give agencies greater discretion and space to inform and direct antitrust law<sup>205</sup> and, more specifically, the interpretation of Clayton Act section 7 through consent decrees<sup>206</sup> and its Merger Guidelines.<sup>207</sup>

Unlike Sherman Act violations, Clayton Act section 7 violations are more often settled covertly within the antitrust agencies as opposed to adjudicated and resolved before a district court.<sup>208</sup> Subsequently, changes in the agencies' philosophy or approach to merger enforcement are less apparent than changes to

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<sup>201</sup> See, e.g., *Mergers and Corporate Consolidation: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. (1998) (statement of Joel I. Klein, Assistant Att'y Gen., Antitrust Div., Dep't of Justice), available at <http://www.justice.gov/atr/public/testimony/1795.pdf> (describing existence of merger wave during the 20th century); Susan Gribbin, *Washington Group International vs. Raytheon Company* (Apr. 25, 2001), <http://ebookbrowse.com/susan-gribbin-washington-group-international-doc-d24838952> (noting nearly every industry engages in mergers and acquisitions as normal form of growth); Jon Swartz, *Number and Value of Tech Mergers Is on the Upswing*, USA TODAY (May 18, 2010), [http://www.usatoday.com/money/industries/technology/2010-05-18-techacquisitions18\\_CV\\_N.htm](http://www.usatoday.com/money/industries/technology/2010-05-18-techacquisitions18_CV_N.htm).

<sup>202</sup> Bhagwat, *supra* note 60, at 1292.

<sup>203</sup> See *supra* notes 71–82 and accompanying text (describing growth of consent decrees in merger enforcement).

<sup>204</sup> See *supra* notes 71–92 and accompanying text (explicating FTC's administrative process).

<sup>205</sup> See *supra* notes 120–33 and accompanying text (describing concerns associated with current structure of merger enforcement).

<sup>206</sup> See *supra* Part III.A.2.

<sup>207</sup> See *supra* Part III.A.3.

<sup>208</sup> See *supra* Part II.A.2–3.

conduct cases, because disputes are less likely to find themselves before a district court judge.<sup>209</sup> It is difficult to pinpoint exactly how merger enforcement has changed—as has been discussed, changes to merger enforcement guidelines provide one resource evidencing change. But there are structural characteristics within the FTC in particular which suggest that if merger enforcement has not yet already changed, it is capable of changing without detection both because the FTC has added the statutory hook of section 5 and because it has an administrative proceeding to which courts defer, now more than ever.<sup>210</sup> As this Article argues, while the FTC has greater flexibility in interpreting section 7 because it has the option to bring a case before an ALJ,<sup>211</sup> the real strength in pushing merger enforcement law lies within the statutory hook of section 5, which allows the FTC to push for consent decrees consistent with its view of how section 5 should be used<sup>212</sup> and gives ALJs license to go beyond understood Merger Guidelines or traditional section 7 interpretation.<sup>213</sup> As a result, parties facing merger review may increasingly find themselves at a disadvantage where the FTC is involved.<sup>214</sup>

This raises a number of concerns including a general lack of transparency and thus predictability in the merger enforcement system and the appearance of differing standards applicable to different industries.<sup>215</sup> To remedy the perceived shortfalls of

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<sup>209</sup> As discussed, many cases have challenged attempts by the agencies to expand conduct liability particularly with respect to section 5. Consequently, much has been authored to understand the relationship between the Sherman Act and the FTC Act—much less has been authored to understand the relationship between the Clayton Act and the FTC Act.

<sup>210</sup> See *supra* notes 98–119 and accompanying text (explaining structural characteristics of the FTC that permit changes to merger enforcement law).

<sup>211</sup> See *supra* notes 163–78 and accompanying text.

<sup>212</sup> See *supra* note 118 (describing views of Commissioners).

<sup>213</sup> See *supra* Part III.B (providing reasoning for how administrative process and section 5 give the FTC greater space to inform merger enforcement law); see also Hoffman & Royall, *supra* note 98, at 331 (“[I]n recent Commission actions, the FTC’s adjudicative process has been employed to litigate consummated mergers; to test claims of efficiency justifications for restraints agreed to among joint venturers; to address a variety of provocative issues surrounding pharmaceuticals; and to challenge the alleged subversion of standards-setting activities to achieve anticompetitive ends. Each of these cases would seem to lie at the heart of the role originally envisioned, and frequently reaffirmed, for administrative litigation before the FTC.”).

<sup>214</sup> See *supra* Part III.C (explaining initial concerns of division between agency standards).

<sup>215</sup> See *supra* notes 120–33 and accompanying text (describing some initial concerns with structural characteristics of merger enforcement system).

current merger enforcement, this Article argues that the FTC should establish its own section 5 Merger Guidelines (“FTC Guidelines”) to provide merging entities and courts with guidance as to how section 5 will play out in the merger context and, moreover, provide courts with reason to affirm specific expansions of the FTC power rather than equating and limiting section 5 doctrine to section 7 doctrine. Part IV.A will consider the mechanics of this scheme while providing an initial suggestion as to its substantive content. Part IV.B will examine why the FTC Guidelines are a good alternative compared to other options. Finally, Part IV.C will briefly describe the feasibility of such a scheme.

#### A. *The FTC Guidelines*

To avoid the appearance of divergent standards applicable to parties based on historical experience and expertise,<sup>216</sup> the FTC should adopt, similarly to the joint-agency Merger Guidelines, a set of the FTC Guidelines. The FTC Guidelines should describe the types of mergers section 5 will target as well as the factors the FTC will consider in evaluating a proposed transaction similarly to the existing Merger Guidelines. Although there will understandably be some overlap with traditional section 7 mergers, the FTC Guidelines should fundamentally be concerned with mergers that are not currently targeted by section 7 and the joint-agency Merger Guidelines. To avoid unequal treatment between industries, the FTC Guidelines will be applicable to *all* industries. Mechanically, they will operate similarly to the current Merger Guidelines. Where a merger falls within the purview of the FTC Guidelines rather than the Merger Guidelines, the DOJ may simply hand the case over to the FTC.<sup>217</sup> By distinguishing a set of section 5 mergers and section 7 mergers, the FTC will be able to go after mergers in all industries that meet its standards and thus equalize the playing field,<sup>218</sup> give courts reason to support an independent section 5 jurisprudence by

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<sup>216</sup> See *supra* notes 60–70 and accompanying text (explaining the merger clearance process).

<sup>217</sup> A similar scheme currently operates within conduct cases. Where the FTC is investigating a case that is more appropriately a criminal case, it will hand the case over to the DOJ for further investigation and prosecution.

<sup>218</sup> See Part IV.A (elaborating on potential structure of new section 5 reform).

legitimizing and clarifying the process,<sup>219</sup> and better fulfill its congressional mandate.<sup>220</sup> Similarly to the current joint-agency Merger Guidelines, the FTC Guidelines will give courts reason to extend section 5 in a direction consistent with the agency's view, potentially establishing a precedent upon which the FTC Guidelines can be further informed.<sup>221</sup>

Substantively, the FTC could target its new guidelines to a variety of mergers and acquisitions.<sup>222</sup> One potential area of concern that the FTC Guidelines could address is with the modern-day conglomerate.<sup>223</sup> Appealing to the conglomerate

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<sup>219</sup> See *supra* note 118 (describing courts' reluctance to permit expansion of antitrust law where the agencies have provided weak guidelines and concrete means of review); see also Rubenstein, *supra* note 94, at 2231-32 ("*Chevron* recognized the potential dangers of giving administrators carte blanche discretion in policymaking. By deferring only to 'reasonable' interpretations, *Chevron* obliges agencies to operate within the permissible bounds of statutory text. In this way, courts continue to promote Congress's primacy in lawmaking as well as the core judicial function of promoting administrative fidelity to Congress's loosely expressed commands.")

<sup>220</sup> See *supra* notes 142-46 and accompanying text (providing a narrative of section 5 congressional history); see also Kolasky, Jr. & Lowe, *supra* note 61, at 896 ("Congress intended that the Commission would be: first, a politically independent enforcer that would be more active, creative, and far-reaching than the DOJ had been; second, a sophisticated antitrust tribunal that would develop recognized expertise and provide business clear guidance as to the scope and meaning of the antitrust laws; and third, a source of research and guidance for the business community."); Miller, *supra* note 16, at 1496 ("The legislative history of the FTC Act, because vast, is a bit slippery. Nevertheless, it does provide ample evidence that the purpose of the Act was to create an administrative agency with antitrust expertise, an enforcement mandate more expansive than that of the antitrust laws, and the structure and flexibility to identify, analyze, and challenge new forms of unfair methods of competition as they developed." (internal quotation marks omitted)).

<sup>221</sup> See generally Greene, *supra* note 47, at 810-15 (explaining institutionalization of Guidelines as driving force for court deference of agency interpretation of antitrust law).

<sup>222</sup> See, e.g., Parker, *supra* note 57 (tracking shifts in mergers relating to the health industry and need for reform); Ronald W. Davis, *Innovation Markets and Merger Enforcement: Current Practice in Perspective*, 71 ANTITRUST L.J. 677, 677-84 (2003-2004) (suggesting new merger approaches in "innovation markets"); cf. Feinstein, *supra* note 200, at 74-76, 79 (noting that agency doctrine has shifted from 1984 Vertical Merger Guidelines, but unclear whether process of drafting is worthwhile in light of the low frequency of actual litigation); David T. Scheffman & Richard S. Higgins, *Vertical Mergers: Theory and Policy*, 12 GEO. MASON L. REV. 967, 967-69, 971, 977 (2004) (arguing that there is no need for new Vertical Merger Guidelines in light of the FTC's continued persistence to enforce vertical mergers).

<sup>223</sup> See Gotts, *supra* note 132, at 9-12 (noting conglomerate theories are being investigated more extensively under "changed incentive" theory of harm and that this view is supported by recent attacks on consummated mergers). For a review of competitive concerns raised with conglomerates, see Harlan M. Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555, 571-79 (1973); Simon N. Whitney, *Mergers, Conglomerates, and Oligopolies: A Widening of Antitrust Targets*,

language of the 1970s, the FTC could use section 5 to get at mergers, which section 7 has been unable to reach, focusing more on the anticompetitive effects associated with “bigness.”<sup>224</sup> As Judge Wyzanski stated in 1953:

Concentrations of power, no matter how beneficently they appear to have acted, not what advantages they seem to possess, are inherently dangerous. Their good behavior in the past may not be continued; and if their strength were hereafter grasped by presumptuous hands, there would be no automatic check and balance from equal forces in the industrial market. And in the absence of this protective mechanism, the demand for public regulation, public ownership, or other drastic measures would become irresistible in time of crisis. Dispersal of private economic power is thus one of the ways to preserve the system of private enterprise.<sup>225</sup>

There are a number of reasons why we might be more concerned with bigness today than we were in the 1970s. First, “bigness” today operates on an entirely different level than it did in the 1970s. The merger that most concerned critics was the General Electric and Utah International merger priced at \$2.17 billion in 1976.<sup>226</sup> That is the equivalent of \$8.88 billion in 2014.<sup>227</sup>

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21 RUTGERS L. REV. 187, 231–37 (1967). For an economic reasoning and analysis evidencing these concerns, see Jeffrey Church, *Conglomerate Mergers*, in 2 ISSUES IN COMPETITION LAW AND POLICY 1503, 1506–07, 1519–45 (ABA Section of Antitrust Law 2008).

<sup>224</sup> See generally ROBERT PITOFSKY ET AL., TRADE REGULATION: CASES AND MATERIALS 967–71 (6th ed. 2010) (examining the reasoning for the adoption of potentially stricter merger laws). For a review of potential standards or tests for regulating conglomerates, see, for example, Church, *supra* note 223, at 1548 (arguing for a structured rule of reason assessing “(1) a market power screen, (2) a theory of the case and factual screen, and (3) an assessment of offsetting nonprice efficiencies realized by the merger”). Blake, *supra* note 223, at 590–92 (reviewing three legislative proposals to regulate conglomerates and supporting presumption of anticompetitive effect based on size); Henry A. Einhorn, *Antitrust and the Conglomerate Movement: An Alternative from the Regulated Sector*, 44 ST. JOHN’S L. REV. 451, 457–59 (1970) (proposing the use of “net benefits” analysis to determine whether conglomerate mergers warrant antitrust scrutiny); Irwin M. Stelzer, *Antitrust Policy and the Conglomerate*, 44 ST. JOHN’S L. REV. 196, 200–04 (1970) (describing potential public policy factors that may be relevant in evaluating conglomerates).

<sup>225</sup> *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 347 (D. Mass. 1953).

<sup>226</sup> See Special Report, *Anatomy of the General Electric-Utah International Merger*, 4 EXECUTIVE INTELLIGENCE REV. 29, 29 (1977).

<sup>227</sup> Calculated at CPI INFLATION CALCULATOR, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Mar. 9, 2014).

In 2000 alone, GE sought to purchase Honeywell for a whopping \$45 billion.<sup>228</sup> In 2004, it acquired Amersham PLC for \$9.5 billion and Vivendi Universal Entertainment for \$14 billion, in what were viewed as small, uncontested acquisitions.<sup>229</sup>

Additionally, more industries now rely on large economies of scale to successfully compete in a global economy than was the case in the 1970s. Being big is a prerequisite to success in many industries, creating larger barriers to entry than had previously existed.<sup>230</sup> To enter some of the more competitive and global markets, parties must be willing to enter a variety of markets relevant to production and to enter with significant capital. The Internet has also changed the geographic market in which corporations operate. Historically limited to a local consumer base, companies now compete with foreign companies for global customers that purchase items online rather than in stores. In 2008, the Nielsen Survey found that 85% of the world's population and 92% of the population in North America had made purchases online.<sup>231</sup> Revenues generated from e-commerce sales have also been on the rise.<sup>232</sup>

Furthermore, as noted above, corporations now rely largely on mergers for growth, meaning that a company may engage in a number of transactions amounting to massive increases in capital,

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<sup>228</sup> See Luisa Beltran & Martha Slud, *GE Sets Honeywell Deal*, CNNMONEY (Oct. 23, 2000), [http://money.cnn.com/2000/10/23/deals/honeywell\\_ge/index.htm](http://money.cnn.com/2000/10/23/deals/honeywell_ge/index.htm).

<sup>229</sup> See, e.g., *GE Completes Amersham Acquisition*, IN-PHARMA TECHNOLOGIST.COM (Apr. 13, 2004), <http://www.in-pharmatechnologist.com/Regulatory-Safety/GE-completes-Amersham-acquisition>; Richard Verrier & Meg James, *GE, Vivendi Finalize NBC Universal Deal*, L.A. TIMES (Oct. 9, 2003), <http://articles.latimes.com/2003/oct/09/business/fi-nbc9>.

<sup>230</sup> The importance of size is evident, for example, in *Staples*, the FTC noted the difficulty of entering the market of specialty stores and described prior failed attempts. *FTC v. Staples*, 970 F. Supp. 1066, 1087 (D.D.C. 1997).

<sup>231</sup> NIELSEN, TRENDS IN ONLINE SHOPPING: A GLOBAL NIELSEN CONSUMER REPORT 1 (2008), available at <http://at.nielsen.com/site/documents/GlobalOnlineShoppingReportFeb08.pdf>.

<sup>232</sup> In 2008, e-commerce sales accounted for approximately 3.4% of total retail sales. *Quarterly Retail E-Commerce Sales: 3rd Quarter 2008*, U.S. CENSUS BUREAU (Nov. 19, 2008, 10:00 AM), <http://www.census.gov/mrts/www/data/html/08Q3.html>. By the end of 2013, that number had increased to 7%. U.S. CENSUS BUREAU: ESTIMATED QUARTERLY U.S. RETAIL SALES (NOT ADJUSTED): TOTAL AND E-COMMERCE, available at <https://www.census.gov/retail/mrts/www/data/excel/tsnotadjustedsales.xls> (last revised Feb. 18, 2014). Sales in the top five hundred online retailers grew 8.7% in 2009. See Jochen Krisch, *Internet Retailer: Top 500 in the USA (2009)*, OPTAROS BLOG (Jun. 22, 2010), <http://www.optaros.com/blogs/internet-retailer-top-500-in-the-usa-2009>.

even if individually each transaction is relatively small. Firms, therefore, can grow more quickly even absent the larger mergers that might raise agency attention.

Finally, greater credence has been given to the view that a company with cross-market power might be more susceptible to illegal tying or predation.<sup>233</sup> The traditional focus on market power and market definition may therefore miss potential anticompetitive effects that occur cross market. As the new 2010 Merger Guidelines note, “[t]he Agencies’ analysis need not start with market definition. . . . Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.”<sup>234</sup>

The greater scale and level at which “bigness” operates, and the growing recognition that market power may not adequately capture the degree to which economies of scale permit anticompetitive conduct, offers a space outside traditional section 7 analysis for section 5 to operate. Take, for example, Amazon.com: It is a \$170.87 billion operation,<sup>235</sup> and by far the largest U.S. online retailer, followed by Staples with less than half of Amazon’s sales.<sup>236</sup> Over the last five years, Amazon has engaged in a number of acquisitions, purchasing both those companies within its traditional “book market” as well as those outside of its traditional market in hopes of expanding and breaking into new markets. In 2009, for example, Amazon.com consummated a deal with Zappos.com, an online shoe retailer, for \$1.2 billion.<sup>237</sup> In 2010, Amazon acquired Woot.com, a small online

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<sup>233</sup> Cf. *United States v. AMR Corp.*, 335 F.3d 1109, 1115 (10th Cir. 2003) (“Post-Chicago economists have theorized that price predation is not only plausible, but profitable, especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets.”).

<sup>234</sup> HORIZONTAL MERGER GUIDELINES, *supra* note 17, at 7.

<sup>235</sup> *Amazon.com Inc. (AMZN)*, YAHOO FINANCE, <http://finance.yahoo.com/q?s=AMZN> (last accessed Mar. 9, 2014).

<sup>236</sup> In 2009, Amazon accounted for 19.4% of online sales generated by the top 500 online retailers in North America. See Mark Brohan, *The Top 500 Guide 2010*, INTERNET RETAILER (May 27, 2010, 1:20 PM), <http://www.internetretailer.com/2010/05/27/top-500-guide>.

<sup>237</sup> See Thomas Kaplan, *Deal Gives Amazon a Diaper Strategy*, N.Y. TIMES, Nov. 9, 2010, at B10; Allison Abell Schwartz, *Amazon.com To Acquire Zappos.com in Biggest Purchase (Update3)*, BLOOMBERG (July 22, 2009, 19:21 EDT), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFwAulHL7K8k>. In 2009, Amazon also acquired SnapTell, a small image recognition startup, and Lexcycle, the producer of a popular e-book application. See Leena Rao, *Image Recognition Startup SnapTell Acquired by Amazon Subsidiary A9.com*, TECHCRUNCH (June 16, 2009),



discount retailer,<sup>238</sup> and, for \$545 million, acquired Quidsi, the owner of Diapers.com.<sup>239</sup> Although Amazon has largely been a product of organic growth, acquisitions of this sort allow Amazon to break into markets in which it had otherwise struggled to make headway.<sup>240</sup> This was the case in its acquisition of Diapers.com and seems to be a continuing trend. In 2011, Amazon announced its purchase of LoveFilm, an international competitor of Netflix,<sup>241</sup> and Pushbutton,<sup>242</sup> allowing Amazon to make accessible to its members over 5,000 free movies and television shows.<sup>243</sup> From this view, Amazon might provide a good target for section 5.

Unlike traditional markets,<sup>244</sup> Amazon operates across various product markets. Consumers can purchase a large variety of books, Halloween costumes, non-perishable foods, and high-definition televisions from the same site: It is like a conglomerate, but serves the entire public through the Internet. The geographic scope is, therefore, more expansive than traditional conglomerates. Although Amazon does not have significant market power in the sale of online shoes or groceries, it has a degree of market power for online retail sales generally and, unlike the Staples or the Wal-

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<http://techcrunch.com/2009/06/16/image-recognition-startup-snaptell-acquired-by-amazon-subsiary-a9com>; Brad Stone, *Amazon Acquires Stanza, an E-Book Application for the iPhone*, N.Y. TIMES BITS BLOG (Apr. 27, 2009, 4:03 PM), <http://bits.blogs.nytimes.com/2009/04/27/amazon-acquires-stanza-an-e-book-application-for-the-iphone>.

<sup>238</sup> See Josh Lowensohn, *Amazon Acquiring Eccentric Retailer Woot.com*, CNET (June 30, 2010, 1:51 PM), [http://news.cnet.com/8301-27076\\_3-20009333-248.html](http://news.cnet.com/8301-27076_3-20009333-248.html).

<sup>239</sup> See, e.g., Jay Yarow, *Amazon Announces \$545 Million Acquisition of Diapers.com*, BUS. INSIDER (Nov. 8, 2010, 9:11 AM), <http://www.businessinsider.com/amazon-announces-500-million-acquisition-of-diaperscom-2010-11>.

<sup>240</sup> See Kaplan, *supra* note 237 (noting Amazon's use of acquisitions to get into shoe and diaper business).

<sup>241</sup> See, e.g., Ben Rooney, *Digital Media: Amazon Buys Remainder of LoveFilm*, WALL ST. J., Jan. 21, 2011, at B6; Parmy Olson, *Amazon Thwarts Netflix with Lovefilm Buy*, FORBES (Jan. 21, 2011, 7:17 AM), <http://www.forbes.com/sites/parmyolson/2011/01/21/amazon-thwarts-netflix-with-lovefilm-buy>.

<sup>242</sup> See Paul Sawers, *Amazon Acquires London-Based TV App Company Pushbutton*, TNW (July 28, 2011 1:23 PM), <http://thenextweb.com/uk/2011/07/28/amazon-acquires-london-based-tv-app-company-pushbutton>.

<sup>243</sup> See Greg Sandoval, *Amazon Streams Free Movies to Prime Members*, CNET (Feb. 22, 2011, 6:13 AM), [http://news.cnet.com/8301-31001\\_3-20034714-261.html](http://news.cnet.com/8301-31001_3-20034714-261.html).

<sup>244</sup> See Parker, *supra* note 57 (“[U]nlike the transactions of a decade ago which were primarily motivated by financial considerations, today's transactions are increasingly strategic in nature. Many firms perceive a need to be the market leader, and use acquisitions as the path to leadership. Other acquisitions come about where firms seek to acquire critical inputs in the market. Other acquisitions may be motivated by a desire to relieve competitive pressures in the market.”).

Marts of the world, does not have a physical store.<sup>245</sup> Amazon, therefore, has greater ability to adjust and leverage prices because it is not tied to a particular “in-store” price, and it also may offset losses in one market for gains in another. In the case of Diapers.com, for example, Amazon had previously competed by “selling its diapers at rock-bottom prices—something that analysts said might now change.”<sup>246</sup>

Because of Amazon’s novel presence in the market, recognized both as a market leader but, at the same time, an insignificant player in any given product market with perhaps the exception of e-readers and e-books, it provides a good test case for potential areas of interest for the new FTC Guidelines. In particular, Amazon illuminates issues that existing Merger Guidelines do not capture and thus provides fertile ground for independent section 5 Guidelines. First, the FTC may want to consider market share across various markets rather than limiting itself to a single product market as the current Merger Guidelines suggest.<sup>247</sup> Although that percentage might be below ten percent for each separate market, the FTC might use section 5 to better understand and target cross-market power and effects and understand how small market shares in the aggregate can, in certain markets, present high risks for anticompetitive conduct.

Second, the FTC Guidelines may want to consider how prices change post-merger or might be expected to change post-merger even if market shares are low.<sup>248</sup> This suggestion is consistent with language in the newly revised 2010 Merger Guidelines, which express concern with over-reliance on market definitions.<sup>249</sup> In the case of Amazon, the FTC would want to look to the changes in

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<sup>245</sup> See *supra* notes 235–36 and accompanying text (describing Amazon’s sales compared to other online retailers).

<sup>246</sup> Kaplan, *supra* note 240.

<sup>247</sup> Cf. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–23 (1993) (holding that predatory pricing liability is premised on more than simply showing pricing below costs); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 905–06 (9th Cir. 2008) (rejecting price measurements based on Plaintiff’s costs in bundling cases); *United States v. AMR Corp.*, 335 F.3d 1109, 1117–20 (10th Cir. 2003) (rejecting alternative measures of price as appropriate for determining antitrust liability).

<sup>248</sup> In *FTC v. Lundbeck, Inc.*, the FTC sought to target a consummated merger that resulted in higher prices, but the court rejected that the two products were in the same “market” and, therefore, could not cause the sort of anticompetitive effects antitrust law targeted. See *FTC v. Lundbeck, Inc.*, Nos. 08-6379 (JNE/JJG), 08-6381 (JNE/JJG), 2010 WL 3810015, at \*1, \*21–22 (D. Minn. Aug. 31, 2010), *aff’d*, 650 F.3d 1236 (8th Cir. 2011).

<sup>249</sup> For a description of how the 2010 merger guidelines changed the focus of merger enforcement and its likely effects, see generally Hovenkamp, *supra* note 6.

diaper prices after its merger with Quidsi. Even though Quidsi might have a small share of the online diaper market, the agencies might be concerned that Amazon would be able to leverage its broad consumer base to raise Quidsi's prices while pushing other competitors out of the market. In other words, consumers might opt out of going to Huggies.com to purchase cheaper diapers when they can do so at Amazon at a premium while also purchasing the rest of their holiday presents and groceries. This result, however, would not necessarily reward the more efficient producer. Although this fact alone should not necessarily give rise to antitrust liability,<sup>250</sup> it should, at the very least, raise agency concern.

Finally, Amazon's case suggests that the FTC should concern itself with how conglomerates may stifle innovation. Because online retailers operate over the Internet, mergers and acquisitions are relatively inexpensive and easy transactions, and the pressures imposed on Internet service providers often mean that new, successful websites are quickly absorbed into larger institutions. Once a website becomes "viral," it is immediately the target of an acquisition, at a pace not present with the classical mergers, which require massive asset and capital shifts and time consuming consolidations. The dot-com industry, subsequently, has grown through more frequent, smaller mergers than the agencies have seen in the past.<sup>251</sup>

Section 5 might add value in industries that, although part of large, influential markets, do not fall within the traditional mold of a products market, but might, nonetheless, result in

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<sup>250</sup> Cf. *Brooke Grp. Ltd.*, 509 U.S. at 230–32 (noting that the competitive pricing scheme, which included rebates to wholesalers, was not enough to give rise to liability because there was no evidence that defendant had a reasonable chance to recoup its losses).

<sup>251</sup> Cf. *Mergers and Acquisitions – Joining Forces To Compete with Industry Giants, Seeking Refuge with a Larger Partner*, FREE ENCYCLOPEDIA OF ECOMMERCE, <http://ecommerce.hostip.info/pages/725/Mergers-Acquisitions.html> (last visited Mar. 9, 2014) (describing examples of recent mergers and acquisitions of dot-com businesses). Innovation markets are defined as those that might facilitate innovation but from a traditional antitrust perspective would be anticompetitive. See Davis, *supra* note 222, at 677; see also Katz & Shelanski, *supra* note 6 (“Merger policy faces a perplexing problem in industries marked by ongoing technological innovation: a problem related, in part, to the uncertain fit between the market conditions that produce innovation and the market conditions to which antitrust policy generally aspires, and, in part, to uncertainty about how innovation might affect market structure and performance.”). The new merger guidelines also evidence a growing concern with stifling innovation and the importance of variety of products. See Hovenkamp, *supra* note 6, at 3–4.

anticompetitive effects.<sup>252</sup> The Amazons of the world present one area in which section 5 might find its home—in new industries that rely on economies of scale across many markets, and in which there is greater risk for anticompetitive effects despite small market shares.

### B. Choosing FTC Guidelines over Other Alternatives

There are various options that some may consider preferable to the development of independent FTC Guidelines. Namely, critics might suggest that agency power has gone too far and that the FTC should be kept in check, avoiding any unwanted expansion of section 5. At the same time, FTC Guidelines might prove unwieldy absent any clear doctrinal guidance. As noted, courts have typically deferred from establishing the limits or scope of section 5 as applied to mergers. In *FTC v. Lundbeck, Inc.*,<sup>253</sup> for example, the FTC challenged a merger both on section 5 and section 7 grounds.<sup>254</sup> While the court noted that “[f]or present purposes, the parties agree that Section 5 of the FTC Act prohibits the same conduct as Section 2 of the Sherman Act,” the court made no mention of section 5 in its discussion of the Clayton Act violations.<sup>255</sup> Rather, the court starts, “[t]he FTC claims that Lundbeck acquired the rights to NeoProfen in violation of Section 7 of the Clayton Act,”<sup>256</sup> discarding the section 5 allegation altogether. Absent a clear interpretation of section 5 by the courts, the FTC Guidelines might prove to be too big a step in merger enforcement development.

Alternatively, we could envision a regime that simply expands the scope of section 7. However, expanding section 7 jurisprudence ignores the ability of the FTC to use section 5 as a way to expand doctrine even further. Arguably, the adoption of the 2010 Merger Guidelines demonstrated an effort by the agencies to change the focus of traditional section 7 analysis focusing more on effects rather than market definition and power. The Merger Guidelines have historically been a means for the

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<sup>252</sup> For a discussion of the difficulties associated with drafting guidelines to inform antitrust enforcement against conglomerates, see Church, *supra* note 223, at 1545–46.

<sup>253</sup> *Lundbeck*, 2010 WL 3810015.

<sup>254</sup> *See id.* at \*1.

<sup>255</sup> *See id.* at \*21.

<sup>256</sup> *Id.* at \*1.

agencies to communicate both to merging parties and to courts shifts in doctrine and economic analysis.<sup>257</sup> It has also signaled to the courts that the process is not without standards, making the courts more comfortable with agency deference.<sup>258</sup> Unfortunately, section 5 jurisprudence is still clouded in ambiguity without clear guidance from either courts or agencies;<sup>259</sup> absent guidance from the agencies, courts will continue to treat section 5 consistent with section 7 for fear of subjecting parties to unknown metrics and boundaries.<sup>260</sup> In so doing, courts have evaded the fact that most merger enforcement happens behind closed doors, without the protection of the courts. This fact makes it more important that clear guidelines be established for section 5, specifically to give parties greater predictability and perhaps leverage in the negotiating process. Because many of the conglomerate mergers discussed above would not be subject to HSR pre-merger review,<sup>261</sup> directing section 5 specifically to mergers not conducive to the general consent decree procedure would bring section 5 doctrine to the forefront, requiring judicial resolution.

As to reining in the FTC, the sheer administrative burden makes this option implausible. Courts hear and determine such a small percentage of merger cases.<sup>262</sup> Court action is limited to cases that either the agencies or parties choose to bring. The FTC may very well opt for an administrative proceeding rather than a preliminary injunction where the deterrent effect is the same, namely, preventing the consummation of the deal for fear of future breakup. Moreover, parties have incentives to cut a deal with the agencies, preserving good rapport with the agencies because

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<sup>257</sup> See *supra* notes 86–94 and accompanying text (tracking courts' reliance of Merger Guidelines); see also Greene, *supra* note 47, at 778–81 (describing Merger Guidelines as having an express role of helping parties navigate agency negotiations and an implicit role of giving commentary on law).

<sup>258</sup> See Greene, *supra* note 47, at 801–02 (noting the passage of the 1982 Merger Guidelines was a response to court losses and that previously rejected arguments were subsequently adopted by courts).

<sup>259</sup> See *supra* notes 147–54 and accompanying text (describing early section 5 cases and broad, sweeping language of courts that provide little guidance as to scope or limits of section 5).

<sup>260</sup> See *supra* note 118 (describing Kovacic's belief that courts' lack of deference stems from agencies' failure to be clear about applicable standards).

<sup>261</sup> Cf. Einhorn, *supra* note 224, at 453 (“Many conglomerate cases are not amenable to an analysis of ‘anti-competitive’ situations; the most controversial cases frequently involve companies related only in a very peripheral fashion.”).

<sup>262</sup> See *supra* notes 55–72 and accompanying text (explaining the shift in merger enforcement).

corporations are repeat players and ultimately hope to avoid a lengthy court proceeding.<sup>263</sup> Even if the courts had the capacity and willingness to contain FTC discretion, their means are limited by the structure of the current merger regime.

Additionally, as this Article argues, both Congressional history<sup>264</sup> and precedent<sup>265</sup> suggest that FTC's section 5 was envisioned as and should be used to capture more than the Sherman and Clayton Acts. As the Court held in *Sperry & Hutchinson*, the FTC has license to "proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition."<sup>266</sup> There is reason, therefore, to think that the courts should not limit FTC discretion.

Furthermore, although some court guidance is obviously useful, courts are weary of establishing clear standards and rules. First, courts are reluctant because of the amorphous nature of section 5 and the view that it should change with the times.<sup>267</sup> Second, as Professor Stewart explains, "Even where seemingly precise standards are provided, the translation of such standards into operational realities may involve such large measures of discretion that their practical effect in restraining agency choice may be extremely limited."<sup>268</sup> From this view, court guidance

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<sup>263</sup> See *supra* notes 55–82 and accompanying text (describing the leverage agencies have over merging parties).

<sup>264</sup> See *supra* notes 142–46 and accompanying text (describing Congressional intent of section 5 as an expansive provision meant to go beyond confines of section 7); see also Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1054 (1979) (stating that Congress, in its antitrust enactments, and most clearly when it amended section 7 of the Clayton Act in 1950, "exhibited a clear concern that an economic order dominated by a few corporate giants could, during a time of domestic stress or disorder, facilitate the overthrow of democratic institutions and the installation of a totalitarian regime. That concern about economic power and the desire that it be dispersed complements the general American governmental preference for a system of checks and balances and distribution of authority to prevent abusive actions by the state").

<sup>265</sup> See *supra* notes 147–54 and accompanying text (summarizing early interpretations of section 5).

<sup>266</sup> *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). For a discussion of some potential areas of expansion, see generally Lande, *supra* note 200, at 2 (arguing section 5 expansion should be shaped by consumer choice framework); Salinger, *supra* note 200, at 65.

<sup>267</sup> See *supra* notes 142–46 and accompanying text (explaining the view of section 5 as a catch all phrase for changing times).

<sup>268</sup> Rubenstein, *supra* note 94, at 2183 (quoting Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1697 n.132 (1975)).

within the confines of a particular set of facts is difficult and might not actually provide useful or meaningful limitations on the scope of section 5. In fact, as this Article argues, despite courts' adherence to older merger frameworks, the FTC and DOJ are able to shape merger enforcement through consent decrees and otherwise, indicating an ultimately limited ability of courts to set merger rules.<sup>269</sup>

At the same time, we ultimately want court interpretations to align with the work of the agencies. This will dispel appearances of discord amongst the courts and agencies and make the merger process more predictable. The courts' historic use of Merger Guidelines in its opinions is one example of coordination between the courts and agencies.<sup>270</sup> However, this coordination is limited to the few, but still persuasive, section 7 cases on the books that limit a court's review. When a court, on a rare occasion, hears a merger case, it can pull from the Merger Guidelines, but is ultimately bound by prior case precedent. In the case of section 7 jurisprudence, this means a strong focus on market definition and market share rather than the emphasis proclaimed by the 2010 Merger Guidelines.<sup>271</sup> *Oracle* and *Arch Coal* exemplify the degree to which courts are tied to a particular framework of review of mergers.<sup>272</sup> Rather than examining new evidence and theories, courts stick to an analysis which places primary and arguably dispositive emphasis on market definition. Again in *Lundbeck*, where there was a substantial amount of evidence pointing to anticompetitive effects, the court relied on the Eighth Circuit's 1995 decision in *FTC v. Freeman Hospital*,<sup>273</sup> affirming that "[t]he determination of the relevant market is a 'necessary predicate' to a finding of a Clayton Act [Section 7] violation."<sup>274</sup>

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<sup>269</sup> See *supra* notes 55–82 and accompanying text (providing background on courts' limitations resulting from merger enforcement structure).

<sup>270</sup> See *supra* notes 86–94 and accompanying text (outlining ways courts have used Merger Guidelines as informing merger framework).

<sup>271</sup> For a description of 2010 Merger Guidelines and its likely effects on merger enforcement, see generally Stijepko Tokic, *The New Horizontal Merger Guidelines*, 22 J. CORP. ACCT. & FIN. 31 (2011).

<sup>272</sup> See *supra* notes 184–200 and accompanying text (describing the courts' approach in *Oracle* and *Arch Coal*).

<sup>273</sup> 69 F.3d 260, 268 (8th Cir. 1995).

<sup>274</sup> *F.T.C. v. Lundbeck*, Nos. 08-6379 (JNE/JJG), 08-6381 (JNE/JJG), 2010 WL 3810015, at \*22 (D. Minn. Aug. 31, 2010) (quoting *Freeman Hosp.*, 69 F.3d at 268), *aff'd*, 650 F.3d 1236 (8th Cir. 2011).

Section 7 jurisprudence exemplifies the need to create a new set of FTC Guidelines rather than rely on expanding current section 7 jurisprudence. Unlike section 7 liability, section 5 claims may only be brought by the FTC and therefore, courts will be less worried about private suits. Additionally, unlike section 7 cases, section 5 does not impose treble damages and so the chilling effect, which has concerned courts of late,<sup>275</sup> will be less prevalent. Additionally, the courts will have at their disposal a “clean slate” without the precedential limitations that exist with section 7 cases.

With FTC Guidelines in place, courts would be able to assess a given merger anew and hopefully, in agreement with the established FTC practices. Courts will obviously be free to impose limitations on the Guidelines where they see fit, declaring sections or parts of them less or more important. But in so doing, courts will necessarily be sensitive to the importance of flexibility in the administration of merger regulation and thus sensitive to reading too narrowly any set of Guidelines that, at the very least, places parties on notice.<sup>276</sup>

### C. A Plausible Solution?

This Article proposes that the FTC establish its own Guidelines, which will describe the factors the FTC will consider in enforcing section 5. In so doing, the FTC Guidelines will hopefully align current merger enforcement via consent decrees and elusive ALJ decisions with a public document, giving courts a framework to better interpret and enforce section 5 and greater predictability for merging parties. Rather than relying on the

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<sup>275</sup> See, e.g., *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (unwilling to adopt a lower measure of costs for fear of chilling effect); *U.S. v. AMR Corp.*, 335 F.3d 1109, 1115–18 (10th Cir. 2003) (rejecting theory of capacity predation and price below marginal cost as appropriate test for fear of chilling effect).

<sup>276</sup> Rubenstein, *supra* note 94, at 2169, 2184–85 (2010) (“These potential virtues in application often are pitched in *relativistic* and *general* terms. Thus conceived, agencies generally have more expertise with regulatory issues than do Congress, the President, or the courts. Moreover, agencies generally have better information to draw from in making policy than do the political or judicial branches. Further, agencies generally can be more flexible in responding to changing conditions than Congress, which is hampered by the ‘finely wrought’ bicameralism and presentment requirements, and can be more flexible than the judiciary, which is constrained by principles of *stare decisis*.”).



vague language in *Sperry & Hutchinson*, courts will be able to proceed with greater faith than in *Oracle*, *Arch Coal*, and *Lundbeck*, that section 5 enforcement is not "standardless."

That said, this Article does not suggest that the proposal will not be contentious. First, it gives the FTC jurisdiction over all industries, which ultimately means more regulation for nearly half of the industries.<sup>277</sup> However, it also means that for half of the industries already subject to FTC review, the process will be more transparent and more "fair," albeit in a direction that means more rather than less regulation. Additionally, industry participants might find expansion via section 5 rather than section 7 more attractive for the same reasons that the courts might be more willing to accept section 5 liability: no treble damages and no private suits. In other words, if section 7 is going to be expanded in a direction that moves away from market definition as the Merger Guidelines suggest anyway, industries might prefer that it come in the form of separate section 5 liability.

The proposal that the FTC guidelines expand to all industries might also result in growing tensions between the two agencies. The agencies already enter prolonged merger clearance processes where a merger involves a "new" market or where the deal is particularly newsworthy.<sup>278</sup> At the same time, the agencies do coordinate with one another in enforcing merger claims—where criminal charges are brought, the case is given to the DOJ.<sup>279</sup> Additionally, the degree to which the FTC Guidelines will step on the DOJ's toes is hard to predict. It might very well be the case that, given limited resources, the FTC will divert attention to more section 5 cases, leaving the brunt of the classic section 7 cases to the DOJ. While the DOJ might disagree with the provision of additional enforcement power to the FTC, this expansive power was envisioned by Congress and might spawn the sort of competition between agencies originally intended.<sup>280</sup>

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<sup>277</sup> For a breakdown of industries across the FTC and the DOJ, see FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, *supra* note 14, 3-5, 8-11.

<sup>278</sup> ANTITRUST MODERNIZATION COMM'N, *supra* note 24, at 132-37.

<sup>279</sup> FED. TRADE COMM'N, AN FTC GUIDE TO THE ENFORCERS: THE FEDERAL GOVERNMENT, STATES, AND PRIVATE PARTIES 1.

<sup>280</sup> See *supra* notes 142-54 and accompanying text (explaining the congressional view that section 5 should be more expansive and that the FTC was designed to bring competition into merger enforcement agencies).

Although the FTC Guidelines represent a fairly radical departure from current practice, the FTC may be well positioned to make such changes in the aftermath of the financial crisis.<sup>281</sup> Shortly after the 2008 economic meltdown, many pointed to an overly liberal merger policy as one potential instigating or contributory force.<sup>282</sup> The critique was that antitrust law had become too soft, allowing banks and other institutions to get “too big to fail.”<sup>283</sup> While the “fix” has come in the form of the Dodd Frank Act that requires the Federal Reserve to enforce capital and leverage requirements,<sup>284</sup> thus making leveraging size less attractive, the crisis did bring into question current economic theories upon which antitrust law is based.<sup>285</sup> Albert Foer, President of the American Antitrust Institute, recommends statutory changes to the Clayton Act, thus giving the FTC and

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<sup>281</sup> See Gotts, *supra* note 132, at 13 (arguing that certain merger defenses have been holding less water post financial crisis).

<sup>282</sup> See *Too Big To Fail?: The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 2 (2009) (Statement of Rep. Henry C. “Hank” Johnson, Jr., Chairman, Subcomm. on Courts & Competition Policy) (stating that if there are banks and financial institutions which are so big that we cannot allow them to fail, then “should antitrust have prevented them from becoming so embedded in the economy?”). While many have attributed antitrust law to the financial crisis, most recognize that banks, unlike other industries, are regulated by multiple agencies including the Federal Reserve, which was also blamed for allowing banks to get too big to fail. See Robert P. Zora, Note, *Bank Failure Crisis: Challenges in Enforcing Antitrust Regulation*, 55 WAYNE L. REV. 1175, 1176 (2009) (“[T]he Federal Reserve and the Department of Justice began readily approving these ‘weekend bank mergers’ and disregarding antitrust regulations. The effect has been a patch-job on an old, leaking tire.”).

<sup>283</sup> See Ann Graham, *Bringing To Heel the Elephants in the Economy: The Case for Ending “Too Big To Fail”*, 8 PIERCE L. REV. 117, 118–29 (2009) (identifying key regulatory gaps leading to “too big to fail” entities); Zora, *supra* note 282, at 1188–91 (arguing that the public policy in preventing “too big to fail” trumps antitrust law’s sole concern of anticompetitive effects).

<sup>284</sup> See generally S. COMM. ON BANKING, BRIEF SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, available at [http://www.banking.senate.gov/public/\\_files/070110\\_Dodd\\_Frank\\_Wall\\_Street\\_Reform\\_comprehensive\\_summary\\_Final.pdf](http://www.banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf) (last visited Mar. 12, 2014).

<sup>285</sup> See Alan Devlin, *Antitrust in an Era of Market Failure*, 33 HARV. J.L. & PUB. POL’Y 557, 581–85 (2010) (discussing the degree to which the financial crisis challenged current antitrust economic theories); J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Remarks to the New York Bar Association Annual Dinner: Implications of the Financial Meltdown for the FTC 2 (Jan. 29, 2009), available at [www.ftc.gov/speeches/rosch/090129financialcrisisnybarspeech.pdf](http://www.ftc.gov/speeches/rosch/090129financialcrisisnybarspeech.pdf) (“One thing is clear to me: the orthodox and unvarnished Chicago School of economic theory is on life support, if it is not dead.”).

other regulators greater power to oversee bank mergers.<sup>286</sup> Alternatively, current antitrust law could be interpreted more broadly, giving the antitrust agencies greater flexibility in addressing various mergers and their effects on the economy.<sup>287</sup> From this view, the economic crisis has provided the FTC with an opportunity to justify an expansion of section 5 in light of the dissatisfactory outcomes in which the narrow reading of the Clayton Act resulted.<sup>288</sup>

One way to fill this perceived gap in antitrust enforcement is through the creation of FTC Guidelines. The economic crisis has provided circumstances where courts and legislators may be receptive to an expansion of antitrust liability under transparent standards. FTC Guidelines, properly drafted, could achieve this objective, and expansion through section 5 seems appropriate because it has no historical baggage tying it down to a particular understanding of economic modeling or view of merger enforcement.<sup>289</sup>

Finally, the FTC would be smart to develop such section 5 Guidelines in light of the more recent defeats before the courts. Although the FTC does benefit from the current system in that it does have significant ability to shift doctrine in particular cases, it is still constrained by the courts. As the FTC tries to push

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<sup>286</sup> Albert A. Foer, *Preserving Competition After the Banking Meltdown*, GCP: THE ONLINE MAG. FOR GLOBAL COMPETITION POL'Y, Dec. 2008, at 3, 12, [http://www.antitrustinstitute.org/files/bank%20meltdown%20article%2012-16-08\\_121520082145.pdf](http://www.antitrustinstitute.org/files/bank%20meltdown%20article%2012-16-08_121520082145.pdf) ("Congress could modify the Clayton Act in such a way that the antitrust agencies . . . could participate when a potential merger is characterized as involving a keystone firm."); see also Kanwit, *supra* note 111 (noting that the FTC has lobbied for expanded section 5 and amended section 7).

<sup>287</sup> Foer, *supra* note 286, at 12 (noting that allowing agencies to consider whether merger will weaken a company financially might be one positive step but that "[t]his is not the current interpretation of the law").

<sup>288</sup> See Thomas B. Leary, *A Suggestion for the Revival of Section 5*, THE ANTITRUST SOURCE, at 4–5 (Feb. 2009), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Feb09\\_Leary2\\_26f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Leary2_26f.authcheckdam.pdf) ("Recent events in the financial sector suggest another possible use of Section 5," and that it might consider incorporating whether "an over-leveraged buyout could impair the competitive potency of an aggressive company in the same way that acquisition by a more staid rival could" into its analysis); *supra* notes 184–200 and accompanying text (discussing the current interpretation of the Clayton Act).

<sup>289</sup> See Maurice E. Stucke, *Lessons from the Financial Crisis*, 77 ANTITRUST L.J. 313, 341 (2010) ("The regulatory, intellectual, and moral failures of the past decade have already prompted competition lawyers and economists in the United States . . . to reconsider the assumptions underlying current competition policies and whether such policies are indeed achieving their desired goals.").

doctrine further and if it continues to face defeats in the courtroom, parties may be less willing to settle and more willing to establish binding precedent through the court system. Although the courts have yet to speak on the specific scope of section 5, the FTC would be wise to at least establish its interpretation and understanding of the scope of section 5 enforcement power which may influence a subsequent court interpretation rather than have a court establish section 5 precedent without FTC input. Additionally, it gives the FTC an opportunity to further distinguish itself from the DOJ as an independent enforcement agency that has particular hold over a certain type of merger which serves the FTC well in its ongoing turf wars with the DOJ.

#### CONCLUSION

Merger enforcement is constantly changing at the behest of the FTC and the DOJ. The approaches have not likely changed drastically over the course of the past twenty years, although, recent amendments to the Merger Guidelines suggest that there might be greater divergence between the agencies and courts than previously known. The FTC is particularly well-positioned to expand merger enforcement through the use of administrative proceedings and the added charge of section 5. To address the growing gap between courts and agencies and to make the merger process more transparent, the FTC should develop FTC Guidelines targeting mergers of particular interest under section 5 as separate from section 7 in a fashion not too dissimilar from the development of the agencies' Merger Guidelines in the 1980s.

As this Article argues, one potential area of expansion is in modern day conglomerates such as Amazon. FTC Guidelines are preferable to a narrow court interpretation because of the structural limitations imposed on courts and are preferable to an expanded section 7 scope because they do not carry the risk of treble damages and private suits. Additionally, FTC Guidelines would give courts, in the same way they would give ALJs, some leeway in the interpretation of antitrust law. The courts have been reluctant to give substance to section 5, but by producing FTC Guidelines, the FTC will be able to give the courts some substance with which to work, thus invigorating enforcement of section 5 to the level previously envisioned by its drafters.

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