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AGENCY CHARACTER AND THE CHARACTER OF AGENCY GUIDELINES: AN HISTORICAL AND INSTITUTIONAL PERSPECTIVE

HILLARY GREENE*

I. INTRODUCTION

Though antitrust guidelines have become commonplace, their approach was novel when first introduced. In a 1964 front-page article entitled, *Industries Will Get Merger Guidelines*, *The New York Times* observed, "An entirely new approach to the enforcement of the antitrust laws is about to be attempted by the Federal Trade Commission."¹ Similarly, the American Bar Association's 1968 *Antitrust Developments* treatise described these first antitrust agency guidelines as "a new method to advise businessmen" about how the FTC would gauge the competitiveness of mergers.²

In the nearly forty years since the introduction of the first merger guidelines, the federal antitrust agencies have issued numerous additional guidelines. Nearly all of those promulgated or revised over the last decade and a half have been joint efforts between the FTC and the U.S. Department of Justice. However, the agencies' respective entrances into this policymaking realm were not only separate but also distinctive.

This essay explores the FTC's evolving approach to antitrust guidelines, beginning with an overview of the general context in which the FTC

* Visiting Researcher, Harvard Law School. I am grateful to James Hurwitz, Tara Isa Koslov, and Marc Winerman for valuable comments and input.

¹ Eileen Shanahan, *Industries Will Get Merger Guidelines*, N.Y. TIMES, May 16, 1964, at 1.

² ABA SECTION OF ANTITRUST LAW, ANTITRUST DEVELOPMENTS 1955-1968 at 242 (1968). Technically, the FTC promulgated its first antitrust guidelines when it extended its practice of issuing consumer protection guides, which addressed deceptive advertising to encompass advertising allowances. These guides "spelled out in layman's language the general prohibitions of sections 2(d) and 2(e) of the R[obinson]-P[atman] Act." FEDERAL TRADE COMM'N, 1960 ANNUAL REPORT 2. These guides, now commonly known as the Fred Meyer Guides, 16 C.F.R. 240.1, have been revised and remain in effect. See generally Donald S. Clark, *The Robinson-Patman Act: Annual Update*, Remarks Before the ABA Section of Antitrust Law 17-20 (Apr. 2, 1998). This essay will address only those guidelines pertaining to the Sherman Act §§ 1-2 and Clayton Act § 7, to which most of the agency effort regarding guidelines has been devoted.

first introduced guidelines as an antitrust policy tool. The FTC's merger guidelines can be roughly divided into three successive waves: industry-specific; general; and jointly promulgated with the DOJ. What emerges is a picture of guidelines as a dynamic institution along many dimensions, including content, form, and manner of promulgation. This essay explores some of the FTC's unique institutional features that likely contributed to the particular contours of the agency's various guidelines.

II. GUIDELINES AS A POLICY TOOL

The FTC's incorporation of antitrust guidelines into its enforcement repertoire constituted a new approach to an old problem: the high degree of uncertainty that was perceived to characterize antitrust law. This criticism had been dramatically leveled by Professor Derek Bok in 1960, when he described the relevant considerations in antitrust analysis as "a dizzying array of factors."³ A related criticism was issued by U.S. Supreme Court Justice Potter Stewart in his famous *Von's Grocery* dissent, where he noted that the only consistency he could discern in antitrust was that "the government always wins."⁴ Certainty would not be forthcoming in the form of legislation, as the antitrust laws had proven to be largely resistant to clarifying amendments.⁵ Rather, guidelines would partially fulfill that role.

A. GUIDELINES DEFINED

Neither the Congress nor the antitrust agencies have formally defined "guidelines" per se. As a practical matter, agency guidelines are nonbinding public statements of enforcement policy. Guidelines articulate how and why the FTC navigates the legal discretion available to it and, in so doing, provide both a degree of direction to agency staff and a degree of predictability to the public. This function is particularly important given the "open texture" of antitrust law.⁶ In light of the generality of the antitrust statutes, antitrust law relies heavily upon common law development as well as the prosecutorial discretion of the enforcement agencies.⁷

³ Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 256 (1960).

⁴ *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

⁵ See, e.g., Thomas E. Kauper, *The Report of the Attorney General's National Committee to Study the Antitrust Laws: A Retrospective*, 100 MICH. L. REV. 1867, 1888 (2002) (noting Congressional reluctance to amend the Sherman Antitrust Act, which had "achieved a virtual icon status.").

⁶ William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 470 (2003).

⁷ *Id.*

Antitrust guidelines were first promulgated during the tenure of FTC Chairman Paul Rand Dixon (1961–1969). Dixon's interest in this policy tool reflected his "deep concern with expanding [the FTC's] function to guide businessmen away from illegal methods of competition, rather than simply to exert the menace of the law against transgressors."⁸ "Such a guidance role for the Commission," Dixon correctly believed, "was envisioned by President Woodrow Wilson and the Congress in creating the Commission in 1914."⁹

B. GUIDELINES AND LITIGATION

Antitrust guidelines supplement litigation. The perceived need for guidelines arose, to some degree, from a recognition of the limitations of litigation as a policy articulation device, and a sense that further elaboration was needed. According to Commissioner Philip Elman, an important driving force behind the FTC's early guideline efforts, individual adjudicative proceedings were an inadequate tool for developing the "solid foundation of fact finding concerning particular markets and industries" necessary to articulate specific legal standards.¹⁰ Elman noted that the shortcomings of litigation pertained not only to efficiency but also to equity concerns. "The crucial inferences required in a merger proceeding—which are really in the nature of prophecies as to future competitive conditions and effects—are unlike those which a judge is ordinarily required to draw; neither he nor the counsel in a single litigation should be asked to assume so large a burden of inquiry and judgment."¹¹

Guidelines were expected to enable the agencies to transcend the case law on substance as well as speed of review. As Elman observed, "Where controlling legal principles have not yet crystallized . . . [guidelines] may often provide a useful alternative or supplement to the traditional case-by-case adjudicative approach as a method of formulating legal doctrines and standards."¹² Similarly, Willard Mueller, then the Director of the FTC's Bureau of Economics, opined that spelling out the law "more clearly than is presently the case . . . could be done either legislatively or by issuing an enforcement policy statement. . . . I fear the case-by-case approach, one that begins by bringing a few cases for the purpose

⁸ FEDERAL TRADE COMM'N, 1962 ANNUAL REPORT 1–2.

⁹ *Id.* at 2.

¹⁰ Philip Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385, 386 (1964).

¹¹ *Id.* at 389.

¹² *Id.* at 390–91.

of creating precedents, will never do the job.”¹³ Guidelines arguably would have the virtue of providing more understandable, more comprehensive, and more timely direction compared to litigation alone—which, by its nature, would always be inherently bound to the facts of individual cases, and also would take longer to resolve. By setting forth a clearer and faster articulation of policy, guidelines would serve as a valuable tool to enhance business decision making.

Such reliance on guidelines was not, however, without critics. Within six months of the 1965 arrival of Donald Turner, a proponent of merger guidelines, as Assistant Attorney General of the DOJ Antitrust Division, two top DOJ antitrust aides quit their jobs. They were “said to believe that the only effective way to establish antitrust policy is to file and litigate cases.”¹⁴ Time has proven such concerns regarding guideline efficacy to have been largely misplaced; however, reasonable minds still may differ regarding the desirability of all the effects of guidelines.

III. INDUSTRY GUIDELINES

The FTC’s first merger guidelines were industry-specific. As described below, the model followed by the FTC likely was attributable to several unique features of the agency, including its institutional mandate. In contrast, the DOJ’s first merger guidelines, which were largely contemporaneous with the FTC’s, followed an alternative model.

A. FTC: INDUSTRY-SPECIFIC GUIDANCE

Professor Edwin Zimmerman, writing in 1964, noted that, “Over the years the Commission has experimented with industry-wide trade practice conferences, industry guides, [and] trade regulation rules. . . .”¹⁵ The provision of such “industry-wide regulation guidance” was unique to the Commission.¹⁶ Consistent with that approach, the FTC’s guidelines applicable to mergers focused initially on the cement (1967) and food

¹³ Willard F. Mueller, *Antitrust Policy and the Market Economy: An Interview*, 3(2) ANTITRUST L. & ECON. REV. 37, 69 (1969–70). See also Philip Elman, *The Need for Certainty and Predictability in the Application of the Merger Law*, 40 N.Y.U. L. REV. 613, 621 (1965) (“The common law method of inclusion and exclusion—the painstaking extraction of a legal principle from a long series of individual decisions—may simply be too slow and cumbersome to produce specific and clear standards . . .”).

¹⁴ Fred P. Graham, *2 Top Aides Quit Antitrust Posts*, N.Y. TIMES, Dec. 9, 1965, at 1, 63. During interviews conducted the day Turner was sworn in, he stated that guidelines were “a continuing process to clarify the law and bring a more orderly development.” *U.S. Seeks to Map Antitrust Guides*, N.Y. TIMES, July 17, 1965, at 21.

¹⁵ Edwin M. Zimmerman, *The Federal Trade Commission and Mergers*, 64 COLUM. L. REV. 500, 508 (1964).

¹⁶ *Id.*

distribution (1967) industries. Guidelines for grocery products manufacturing (1968), textile mill products (1968), and the dairy industry (1977), followed. While these industries were disparate, each industry had experienced considerable consolidation, to which the merger guidelines were a response. The guidelines clarified the FTC's enforcement policy, with an express goal of reducing mergers within select industries.

Commissioner Elman succinctly presented the rationale underlying industry-specific guidelines when he advocated their use in a 1964 adjudicative opinion regarding a cement merger: "Where a problem involves an entire industry made up of a large number of firms, it may be uneconomical, inefficient, and inequitable to proceed exclusively on the basis of individual adjudicative proceedings. Industry-wide problems require, so far as is practicable, industry-wide solutions."¹⁷ Elsewhere, Elman further elaborated that the FTC approach emphasized "the development of concrete factual standards" rather than more general "articulation of general rules and controlling legal principles. . . ."¹⁸

Though variations existed, each of these early sets of guidelines contained highly fact-specific criteria regarding key legal issues, including concentration levels and trends, market definition, and entry. For example, the cement industry guidelines stated that "concrete is normally not transported more than five to ten miles from the production site . . ." and concluded that "[a]ny given metropolitan area would therefore appear to be a definitive market for concrete production."¹⁹

Another feature shared by several industry guidelines was a premerger notification requirement. Pursuant to its Section 6(b) authority under the FTC Act,²⁰ the Commission required firms above certain size thresholds to notify the Commission at least sixty days prior to any acquisition. Each year the FTC notified firms affected by this requirement that they would need to "file special reports" (a novel use of special report authority preceding adoption of the Hart-Scott-Rodino premerger notification regime).²¹ Several years after promulgating these industry guides, the FTC ultimately required premerger notification across all industries for

¹⁷ *Permanente Cement Co.*, 65 F.T.C. 410, 494 (1964).

¹⁸ Elman, *Rulemaking Procedures*, *supra* note 10, at 388.

¹⁹ Federal Trade Comm'n, *Enforcement Policy with Respect to Vertical Mergers in the Cement Industry*, *reprinted in* 289 *Antitrust & Trade Reg. Rep.* (BNA) X-1 (Jan. 24, 1967).

²⁰ Section 6(b) empowers the FTC to require corporations to file written reports in response to specific questions.

²¹ *See, e.g.*, Federal Trade Comm'n, *Enforcement Policy with Respect to Mergers in the Food Distribution Industries*, *reprinted in* 289 *Antitrust & Trade Reg. Rep.* (BNA) X-2 (Jan. 24, 1967), at X-3 [hereinafter *Food Distribution Guidelines*]. For years prior to these industry guidelines the FTC had argued, unsuccessfully, that § 7 of the Clayton Act should

corporations and transactions exceeding specified sizes. The FTC stated, however, that this notification requirement did not impose a requirement of Commission approval prior to consummating a merger.²²

B. DOJ: GENERAL GUIDANCE

Shortly after the FTC issued its first merger guidelines, DOJ issued its own set of merger guidelines.²³ Those guidelines were generally applicable, not industry-specific, and were not meant to combat particular merger waves. The legal standards set forth in the DOJ guidelines were somewhat more permissive towards mergers than the Supreme Court rulings of the time. Regardless of one's position on *Von's Grocery*, *Pabst Brewing*, or even *Brown Shoe*, "it was clear that the [1968 Merger Guidelines] did not reflect these [decisions]" in the thresholds it established for merger challenges.²⁴ The DOJ guidelines have, over time, been revised rather than replaced; their format provided the foundation for the current joint DOJ/FTC merger guidelines.

Some criticized the DOJ's approach, which was more general and relied more overtly on economic theory compared to the FTC approach, which was grounded in industry facts. For example, Commissioner Elman stated: "To be most useful and meaningful, merger enforcement guidelines must be specific, concrete, and related to particular markets and industries. If they merely indicate in a general way areas of concern to the prosecuting agency, individual businessmen will still be in the dark as to whether they may lawfully undertake particular mergers."²⁵ Similarly, economist Lucille Shepard Keyes opined:

In addition to its inferiority with respect to the treatment of economic benefits, a more general approach to the formulation of merger guidelines probably could not achieve the admirable clarity with which the Commission has defined the precise applicability of its guidelines: there may well be no very general way of specifying mergers with significant

have been amended to require premerger notification. See, e.g., FEDERAL TRADE COMM'N, 1963 ANNUAL REPORT 25.

²² Federal Trade Comm'n, Special Reports Relating to Large Corporate Mergers: Requirements Concerning Notification and Submission, 37 Fed. Reg. 7951-52 (1972).

²³ U.S. Dep't of Justice, Merger Guidelines (1968), reprinted in 2 Trade Reg. Rep. (CCH) ¶ 4510 [hereinafter 1968 Merger Guidelines].

²⁴ Thomas E. Kauper, *The 1982 Horizontal Merger Guidelines: Of Collusion, Efficiency, and Failure*, 71 CAL. L. REV. 497, 507 n.23 (1983) (noting that the thresholds under which a violation likely would not be found were higher in the guidelines than in the prevailing Supreme Court rulings of the time).

²⁵ Elman, *The Need for Certainty*, *supra* note 13, at 620.

anticompetitive tendencies which would leave no major question as to just who was forbidden to engage in just what transactions.²⁶

What such criticism underestimated, however, was the value the DOJ guidelines offered through the more overt use of economics, as well as the benefits to guidelines users of having a clear and broadly applicable enforcement policy. Over time, reliance on the FTC guidelines declined. Eventually, all of them were rescinded.²⁷ Meanwhile, the DOJ guidelines slowly gained strength.²⁸

C. INSTITUTIONAL FEATURES OF THE FTC

Various features of the FTC as an institution are reflected in the contours of the agency's earliest guidelines, especially in comparison to the DOJ and its own guidelines.

1. *Expert and Study Function*

Congress created the FTC as an expert body on competition policy. Towards that end, the FTC's enabling legislation included powers, such as the ability to undertake studies and draft reports.²⁹ As one court has noted, "Information gathered by the Commission under its broad investigatory powers can be used for a variety of purposes, including promulgation of new rules, reporting to Congress, disseminating economic knowledge to the public, or . . . to enable the Commission to better administer the statutes over which it has jurisdiction."³⁰

Perhaps the most persistent theme sounded among the Commissioners when these industry-specific guidelines were first introduced was to link the FTC's role as an expert body to the agency's ability to provide nonlitigation guidance. Elman implicitly criticized the DOJ's approach to guidelines when he rejected the idea that an agency could merely draft guidelines without having engaged in an "extended factual inquiry."³¹ Though he wished "not to slight" the DOJ's ability to contribute within this context, he noted that the DOJ "labors under the inherent handicap

²⁶ Lucile Sheppard Keyes, *The Merger Guidelines of the Department of Justice*, 2 (1) ANTITRUST L. & ECON. REV. 77, 103 (1968).

²⁷ The importance of the industry-specific guidelines was diminished by the growth in influence of the DOJ guidelines, the passage of HSR (which somewhat mooted the pre-merger notification elements of the industry guidelines by imposing a premerger notification requirement upon all mergers of a particular size, regardless of industry), and a reduction in the number of mergers in the guideline-covered industries.

²⁸ Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse* (2004) (unpublished manuscript, on file with author).

²⁹ Federal Trade Commission Act §§ 6(b), (f), as amended 15 U.S.C. §§ 46(b), (f).

³⁰ *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1375 (9th Cir. 1978).

³¹ Elman, *The Need for Certainty*, *supra* note 13, at 624.

of being primarily a prosecuting agency" and that any guidelines the DOJ generated likely would be unable to provide "the whole answer to the need for certainty."³²

The FTC's first guidelines emerged from the agency's extensive experience handling cement merger cases, followed by a study conducted by FTC economists; the study resulted in a report³³ that became the focus of public hearings.³⁴ The FTC then promulgated guidelines to reflect the information it had gathered in all of these settings. The fact-specific manner in which the FTC undertook promulgation of the cement industry guidelines exemplified the agency's institutional mandate. However, the FTC's guideline promulgation process drifted, at times significantly, from that benchmark.

The second set of guidelines promulgated, pertaining to the food distribution industries, were based not only upon the FTC's own knowledge gleaned from its litigation experience and its survey of leading food distributors, but also on "authoritative studies of others."³⁵ Similarly, the FTC relied upon a combination of external and internal information sources for the related set of guidelines pertaining to grocery products manufacturing.³⁶

The FTC's next set of guidelines, which applied to the textile mill products industry, were not preceded by any hearings or formal study.³⁷ Commissioner Mary Gardiner Jones dissented from the textile guidelines on this basis and wrote, "[M]erger guidelines should not be issued unless a marshalling and evaluation of available industry facts and expert opin-

³² *Id.* at 619.

³³ FEDERAL TRADE COMM'N, STAFF REPORT, ECONOMIC REPORT ON MERGERS AND VERTICAL INTEGRATION IN THE CEMENT INDUSTRY (1966).

³⁴ Federal Trade Comm'n, Vertical Integration in Cement Industry: Notice of Public Hearing, 31 Fed. Reg. 7772 (1966) [hereinafter Cement Hearing Notice].

³⁵ Food Distribution Guidelines, *supra* note 21, at X-2.

³⁶ Federal Trade Comm'n, Enforcement Policy with Respect to Product Extension Mergers in Grocery Products Manufacturing, *reprinted in* 358 Antitrust & Trade Reg. Rep. (BNA) X-1 (May 21, 1968). *See, e.g.*, NAT'L COMM'N ON FOOD MARKETING, THE STRUCTURE OF FOOD MANUFACTURING, TECHNICAL STUDY No. 8 (June 1966) (a study prepared by FTC staff for the National Commission on Food Marketing.).

³⁷ Federal Trade Comm'n, Enforcement Policy with Respect to Mergers in the Textile Mill Products Industry, *reprinted in* 385 Antitrust & Trade Reg. Rep. (BNA) X-1 (Nov. 26, 1968) [hereinafter Textile Guidelines]. The guidelines did, however, have a factual basis. Sources cited by the guidelines included: FEDERAL TRADE COMM'N, MERGER MOVEMENT, A SUMMARY REPORT (1948); basic statistics regarding textile mill products acquisition compiled by the FTC's Bureau of Economics; and FEDERAL TRADE COMM'N & SECURITIES EXCHANGE COMM'N, QUARTERLY FINANCIAL REPORT FOR MANUFACTURING CORP., FOURTH QUARTER (1967). Textile Guidelines, *supra*.

ion has taken place either through a record in an adjudicatory proceeding or in a public hearing.”³⁸

The agency’s final industry-specific merger enforcement guidelines issued during this time pertained to the dairy industry. The factual specificity of these guidelines was limited to the identification of acquisitions that might warrant investigation. The guidelines contained no references to any studies (conducted by the FTC or others) or to public input (from hearings or comments).³⁹ Nonetheless, the FTC had considerable insight into the industry, based on many previous investigations. In fact, the agency viewed the expiration of several FTC orders restraining the largest national dairies as the source of the renewed threat of mergers “ruinous to the dairy industry.” Smaller, but still potentially suspect, acquisitions were to be evaluated under the DOJ’s 1968 merger guidelines.⁴⁰

Although they were the least factually specific of all the industry-based guidelines, even the dairy guidelines illustrated that when a policy statement’s value derives from its fact-specificity, the statement must remain current. The dairy guidelines were issued in July 1973. However, inflationary pressures in subsequent years led the agency to issue revised guidelines in 1978 that more accurately reflected the agency’s enforcement intentions. The new guidelines incorporated a volume figure for class I milk, rather than a sales figure, to act as both a reporting threshold and a substantive trigger for agency investigation.⁴¹ The implications of this change were twofold. First, the change demonstrated that industries in a state of flux are least likely to benefit from fact-specific guidance. Second, if—or when—an industry subject to guidelines does change, the guidelines must be revised or abandoned as necessary. Collectively, these factors suggest that only particular types of industries would be amenable to fact-specific guidelines.

2. *Dual Role as Prosecutor and Adjudicator*

Another defining feature of the FTC, relative to the DOJ, is its role as an adjudicatory body as well as an enforcement agency. This dual

³⁸ Textile Guidelines, *supra* note 37, at X-16. In addition to their insufficient substantive basis, Commissioner Jones also based her dissent upon the fact that it was “manifestly unfair” for the Commission to adopt guidelines while simultaneously accepting a consent order against Burlington Industries that effectively legalized the same acquisitions that are “clearly contrary to the guidelines.” *Id.*

³⁹ Federal Trade Comm’n, Enforcement Policy with Respect to Mergers in the Dairy Industry, 43 Fed. Reg. 1992 (1978).

⁴⁰ *Id.*

⁴¹ *Id.*

role has been the source of various logistical complexities and resulting criticisms, in several different contexts.⁴² The guidelines context is no exception.

No clear consensus existed among the Commissioners as to the treatment of industry-specific guidelines during subsequent FTC adjudicatory proceedings.⁴³ Chairman Dixon, for example, said that "official notice" would be taken of the record amassed during the rulemaking proceeding,⁴⁴ while Commissioner Everette MacIntyre stated that "the adjudicative proceeding initiated to enforce the rule would be greatly simplified since the only factual issue to be adjudicated would be whether the rule had been violated."⁴⁵ On a practical level, if the Commission had adopted certain industry facts in a set of guidelines, reasonable litigants probably would treat those facts as likely to be "found" in subsequent trials before the administrative law judges and the Commission itself. Thus, fact-based guidance conceivably would be more effective when issued by the FTC, as opposed to the DOJ, which had only an enforcement role.

The FTC guidelines' strength—their specificity—also exposed the Commission to charges of prejudice. A combination of the terminology "trade regulation rule proceeding" to describe guideline promulgation,⁴⁶ coupled with the ostensibly outcome-specific nature of the guidelines, led to numerous and repeated due process challenges by those subject to prosecution under the newly formulated enforcement policies. Their constitutional arguments were: first, that the FTC had no authority to promulgate antitrust trade regulation rules; and second, that such impermissible rulemaking violated the due process right to a fair trial.⁴⁷

These arguments were unsuccessful. The courts and the FTC alike rejected those challenges, ruling that the FTC was not engaged in rulemaking when it promulgated its guidelines, and that the agency's "broad investigatory powers" encompassed the ability to conduct hearings and draft policy statements.⁴⁸ In a unanimous ruling, the Commission justified its conduct as follows:

⁴² See, e.g., Philip Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652 (1964–65).

⁴³ Bernie R. Burrus & Harry Teter, *Antitrust: Rulemaking v. Adjudication in the FTC*, 54 GEO. L.J. 1106, 1110–18 (1966).

⁴⁴ *Id.* at 1111.

⁴⁵ *Id.* at 1112.

⁴⁶ See *infra* text accompanying notes 50–53.

⁴⁷ *Ash Grove Cement Co.*, FTC Docket No. 8785, Respondent's Answer at 7–8 (Aug. 29, 1969).

⁴⁸ *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1375 (9th Cir. 1978).

If the Commission's expertise has been enlarged as a result of the general inquiry conducted by it in connection with formulating the Statement of Enforcement Policy, that fact neither prejudices the respondents' rights nor constitutes any reason for dismissing these proceedings. Respondents are entitled to have their cases adjudicated by Commissioners with open minds, not empty ones.⁴⁹

3. *Historical and Political Context*

The FTC amended its Rules of Practice to permit promulgation of trade regulation rules in 1962. When the FTC first undertook the development of its industry guidelines, the agency described its activities as trade regulation *rule* proceedings.⁵⁰ Both the ability and wisdom of the FTC to engage in rulemaking, particularly in the antitrust arena, was extremely controversial.⁵¹ The FTC's proceedings culminated in the release of guidelines styled as "Statements of Enforcement Policy." Commissioner Elman explained the relationship between rules and guidelines as follows: while rules often denote "an absolute and inflexible prescription of conduct," they also can be "more in the nature of standards, guidelines, pointers. . . ."⁵² The FTC's "statements of enforcement policy" were in the latter category.⁵³

In 1967, then-Chairman Dixon gave a speech entitled, "Program Planning at the Federal Trade Commission." In it, he acknowledged the longstanding criticism of the FTC for failing to more rationally plan its enforcement programs.⁵⁴ Dixon then highlighted the merger guidelines as a primary example of agency efforts to address the critics.⁵⁵ He also discussed how Commission action in establishing merger guidelines was not a "capricious, overnight policy change," but rather it was based upon years of agency litigation and study.⁵⁶ In so doing, Dixon concurrently

⁴⁹ Lehigh Portland Cement Co., 71 F.T.C. 1618, 1620-21 (1967).

⁵⁰ See, e.g., Cement Hearing Notice, *supra* note 34.

⁵¹ Glen E. Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B.J. 548, 569-72 (1964).

⁵² Elman, *Rulemaking Procedures*, *supra* note 10, at 385.

⁵³ *Id.*

⁵⁴ Paul Rand Dixon, Program Planning at the Federal Trade Commission, Remarks Before Washington Conference on Business—Government Relations 1 (Apr. 18, 1967). See also James T. Halverson, Whatever Happened to the Little Old Lady of Pennsylvania Avenue, Speech Before the Association of General Counsel, *reprinted in* 634 Antitrust & Trade Reg. Rep. (BNA) D-1 (Oct. 16, 1973) (FTC Bureau of Competition Director noting that, "In report after report on the operations of the Federal Trade Commission since its birth in 1914 . . . the Commission has been criticized for its proclivity to expend resources . . . on 'trivial' cases.").

⁵⁵ Dixon, *supra* note 54, at 7.

⁵⁶ *Id.* at 8-9.

demonstrated a coherent policy to deal with future problems as well as justified prior agency actions.

The severity and significance of criticism directed towards the FTC during this time cannot be overstated. One report, issued by the American Bar Association in 1969, stated in no uncertain terms, "Further temporizing is indefensible. Notwithstanding the great potential for the FTC in the field of antitrust and consumer protection, if change does not occur there will be no substantial purpose to be served by its continued existence. . . ."⁵⁷ It is worth noting, however, that a number of the reports evaluating the FTC written during the 1960s frequently identified the "new" policy of tool of guidelines as "very promising."⁵⁸ Even Nader's highly critical report of the FTC stated, "We think guidelines and rule-making represent the Agency's most effective institutional approach" because they are "so uniquely suited to the FTC's theoretical expertise."⁵⁹

IV. GENERAL GUIDELINES

In 1982 the FTC introduced a new set of guidelines entitled, "Merger Statement Regarding Horizontal Mergers."⁶⁰ These generally applicable guidelines, which were reminiscent in format to the DOJ's 1968 guidelines, were less detailed than the new merger guidelines issued contemporaneously by the DOJ.⁶¹

A. FTC'S MERGER STATEMENT VERSUS DOJ'S MERGER GUIDELINES

While the two sets of guidelines reflected a similar economic perspective, several differences were apparent. The primary difference was that the FTC Statement was worded more broadly and was less obviously based on particular economic theories. Tom Campbell, then the Director of the FTC's Bureau of Competition, offered the following explanation: "The clarity and statement of economic principles which we find in the

⁵⁷ AMERICAN BAR ASSOCIATION, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969); EDWARD F. COX ET. AL., THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969) [hereinafter NADER REPORT].

⁵⁸ Carl Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 455 (1964) (advocated amending the FTC and Clayton Acts to give the Commission "express authority to issue substantive rules and regulations to carry out the provisions of these acts").

⁵⁹ NADER REPORT, *supra* note 57, at 380.

⁶⁰ Federal Trade Comm'n, FTC Statement Concerning Horizontal Mergers (1982), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,200 [hereinafter 1982 Merger Statement].

⁶¹ U.S. Dep't of Justice, Merger Guidelines (1982), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,102 [hereinafter 1982 Merger Guidelines].

[DOJ] Merger Guidelines are capable of misuse as well as of profitable employment. . . . [There are] economic talismans, [and] the FTC's approach is to avoid [their use]."⁶² Among the most symbolic examples of the DOJ's reliance on economics was the complete omission of any reference to the political or social goals of antitrust. By contrast, in its 1982 Merger Statement the FTC recognized that Section 7 of the Clayton Act, "while primarily focusing on competitive considerations, also reflected Congress' concern about the overall social and political ramifications of economic concentration attributable to merger activity."⁶³

The guidelines' differing approaches to concentration measures exemplified their more fundamental differences. Prior to 1982, market concentration had been measured almost exclusively in terms of concentration ratios (the percentage of the market occupied by the two, four, or eight largest firms). While this could be a useful measure, dissatisfaction with its adequacy had been growing steadily. In its 1982 Guidelines, the DOJ adopted the Herfindahl-Hirshman Index (HHI) for measuring concentration and prescribed very specific thresholds for likely enforcement action—thresholds that, technically, persist today.⁶⁴ By contrast, the FTC's 1982 Statement merely acknowledged the need for further refinement of concentration assessments. While the FTC mentioned HHI as one possible concentration measure, the FTC Statement did not endorse HHIs, nor did it propose any specific concentration thresholds.⁶⁵

B. INSTITUTIONAL FEATURES OF THE FTC

The FTC switched to general merger guidelines, but the FTC's guidelines were less specific than those of the DOJ. Here, as in the earlier examples regarding industry-specific guidelines, several institutional features of the FTC likely contributed to the nature of its guidelines.

1. *Dual Role as Adjudicator and Prosecutor*

Although the FTC eventually prevailed in its earlier battles over potential prejudgment and the industry guidelines,⁶⁶ the prejudgment issue

⁶² Thomas J. Campbell, *New Merger Guidelines: A Federal Trade Commission Perspective*, 51 ANTITRUST L.J. 295, 297 (1982).

⁶³ 1982 Merger Statement, *supra* note 60, at Introduction.

⁶⁴ 1982 Merger Guidelines, *supra* note 61, at Part III(A)(1).

⁶⁵ 1982 Merger Statement, *supra* note 60, at Part II. The FTC also stated, however, that the DOJ's 1982 Guidelines "[would] be given considerable weight by the Commission and its staff." *Id.* at Part I.

⁶⁶ See *supra* notes 43–49 and accompanying text.

may have contributed to the FTC Statement's level of generality. FTC Bureau Director Campbell remarked at the time:

Judges are not inclined to state in advance what aspects they will consider important; one must learn that through our process case by case. This, I believe explains the reluctance of specificity in the FTC Statement. . . . I am not sure I would have wanted a more specific statement. . . . I do not believe it is a disservice to American industry or to the bar to allow for case-by-case determinations.⁶⁷

While Commissioners may constrain themselves when writing guidelines, those Commissioners, when sitting as judges, can elaborate upon or clarify the guidelines in their opinions. Throughout the 1980s the Commissioners used their rulings to provide further guidance, an option clearly unavailable to their DOJ counterparts.⁶⁸

The Commission's dual role informed not only the guidelines' general tenor, but also specific provisions. For example, the Statement provided that the Commission's reliance upon evidence regarding efficiencies or the failing firm defense would be limited to the Commission's exercise of its *prosecutorial* discretion.⁶⁹ Stated alternatively, the Commission would not treat either factor as a legally cognizable defense. The Commission rejected the efficiency defense because of the extensive "analytical ambiguities" involved and the failing firm defense because of "difficulties of proof."⁷⁰ In so doing, the Commission accounted for the challenges it faced as an adjudicator.

2. Agency Structure

Another defining feature of the FTC is its organizational structure. The Commission's design itself enhances the likelihood of diverse views on aspects of antitrust law that are not clear-cut. The FTC is run by a five-member Commission, where no more than three of the five Commissioners may be from the same political party. Each Commissioner is nominated by the President and confirmed by the Senate for staggered seven-year terms. Therefore, at any given time, the Commission also is likely to be composed of appointees from more than one Presidential administration.

Even assuming general agreement among Commissioners about the value of merger guidelines, one would expect a level of compromise in

⁶⁷ Campbell, *supra* note 62, at 296-97.

⁶⁸ See, e.g., Jeffrey I. Zuckerman, *The FTC's Approach to Merger Analysis: Is Anyone Out There Paying Attention?*, 57 ANTITRUST L.J. 115, 116 (1988).

⁶⁹ 1982 Merger Statement, *supra* note 60, Parts IV-V.

⁷⁰ *Id.*

an FTC document that would be unnecessary in its DOJ counterpart. Such compromises would most likely manifest themselves in a more flexible document that encompassed a wider range of possibilities. The FTC Statement essentially begins with explicit recognition of such a compromise: "While the Commission supports the Department of Justice's decision to revise the 1968 Guidelines, individual Commissioners, however, may not endorse each specific revision that has been proposed."⁷¹ For example, Chairman James Miller's support for the failing division defense is relegated to a footnote in the guidelines.⁷²

Certain agency differences pertaining to merger remedies also have been attributed to their respective institutional structures.⁷³ Fix-it-first remedies are structural remedies implemented before merger consummation. The DOJ embraces such remedies whereas the FTC eschews them. Their preferences arguably reflect the relative ease with which each agency can pursue each type of remedy.⁷⁴ In terms of FTC's reluctance to use fix-it-first, some have argued that "[t]he decentralized and independent nature of the FTC's decision-making apparatus is not particularly conducive to back-and-forth negotiation. The discussion and negotiation required to implement a fix-it-first remedy may be more difficult to achieve in this environment than at DOJ, which has a single decision maker."⁷⁵

C. JOINT GUIDELINES

Given the yearning for predictability underlying the antitrust guidelines, it is not surprising that the agencies ultimately came together to issue joint guidance. The fact that an agency's institutional character influences the guidelines it promulgates is no less true when the guidelines result from joint agency efforts, although now the agencies' imprints

⁷¹ *Id.* at Part I n.1.

⁷² Miller advocated recognition of a failing division defense (which the FTC Statement did not recognize). *Id.* at Part V n.26.

⁷³ Agency differences regarding remedies persist despite their issuance of joint merger guidelines. *See supra* Part IV.C.

⁷⁴ Logan M. Breed & David J. Michnal, *Merger Remedies: The DOJ's New Guide to Old Differences with the FTC*, ANTITRUST, Spring 2005, at 37.

⁷⁵ *Id.* at 38–39. As a further logistical matter, despite similar public notice and comment requirements, the FTC in its judicial capacity has the ability to grant final approval of a consent agreement. By contrast, per the Tunney Act, a DOJ consent order is not final until it is determined to be "in the public interest" by a district court judge. *Id.* at 38. *But see* Deborah Platt Majoras, Looking Forward: Merger and Other Policy Initiatives at the FTC, Remarks Before the ABA Section of Antitrust Law 7–9 (Nov. 18, 2004) (Chairman Majoras argued that differences in approaches to remedies between the FTC and DOJ are "overblown"), available at <http://www.ftc.gov/speeches/majoras/041118/abafallforum.pdf>.

are collective. It is reasonable to conclude that the differences between the two agencies lead to the FTC being a moderating influence, on average. This moderation results, in part, from the fact that the FTC's internal organization and incentives already will have caused the FTC's position itself to be a product of compromise.⁷⁶

Although general guidelines have dominated the merger landscape for decades, their format has not evolved inexorably towards less industry-specificity. The joint FTC/DOJ Statements of Enforcement Policy in Health Care, first issued in 1993 and later revised, marked a limited return to industry-specific guidelines.⁷⁷ For example, they established "safety zones" for certain mergers⁷⁸ and for various types of joint ventures⁷⁹ based on specific characteristics of the participants and transactions in question. However, the Health Care Guidelines also relied heavily upon the agencies' jointly issued guidelines regarding horizontal mergers.

During their promulgation, the Health Care Guidelines did not appear to benefit from the FTC's study function per se. However, these guidelines were written at a time when health care reform (especially the idea of national health care plans) was a topic of national debate, and the antitrust agencies likely incorporated information developed in the course of that debate. Still, industry-specific guidelines have their drawbacks: they often invoke calls for additional guidance; and they are more likely to become outdated than general guidelines. In fact, two revisions followed within three years after the 1993 guidelines were released.⁸⁰

⁷⁶ One possible exception to this relationship could result if the same conduct might have criminal, as well as civil, consequences, in which case the DOJ's concerns regarding its criminal jurisdiction (which the FTC does not share) could prompt the DOJ to act as a more moderating influence. See *Panel 1: Strategic Planning for Financial Institutions in a New Legal and Economic Environment*, 6 *FORDHAM J. CORP. & FIN. L.* 23, 55-56 (2001) (William T. Lifland noted that competitor collaborations that do not constitute mergers could, in the extreme, result in either clearance or criminal prosecution).

⁷⁷ U.S. Dep't of Justice & Federal Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (rev. 1996), *reprinted in* 41 *Trade Reg. Rep. (CCH)* ¶ 13,153 [hereinafter *Health Care Guidelines*].

⁷⁸ The Health Care Guidelines indicate that the agencies "will not challenge, absent extraordinary circumstances, any merger between two general acute-care hospitals where one of the hospitals (1) has an average of fewer than 100 licensed beds . . . and (2) has an average daily inpatient census of fewer than 40 patients over the three most recent years. . . ." *Id.* at Statement 1 (A).

⁷⁹ The Health Care Guidelines indicate that the agencies "will not challenge, absent extraordinary circumstances, an exclusive physician network joint venture whose physician participants share substantial financial risk and constitute 20 percent or less of physicians in each physician specialty." *Id.* at Statement 8(A)(1).

⁸⁰ See generally *id.* at Introduction (discussing the 1994 and 1996 revisions in which the agencies expanded and clarified their enforcement policies).

Later, in 2002, then-FTC Chairman Timothy Muris launched a two-day public workshop, "Health Care and Competition Law and Policy," to examine a multitude of issues, including whether the Health Care Guidelines needed further updating.⁸¹ In 2003 the FTC, in conjunction with the DOJ, conducted a lengthy set of public hearings to further the dialogue and learning begun in the earlier workshop. Both the hearings and the July 2004 report in which they culminated included a limited review of the Health Care Guidelines. The report discussed several issues covered in the guidelines—primarily geographic market definition and the safety zone for joint purchasing arrangements—and concluded that that the guidelines did not warrant revision.⁸²

Finally, it is important to recognize that the FTC's study function continues to inform guidelines development. Under then-Chairman Robert Pitofsky, the FTC held public hearings (beginning in October 1995) and subsequently published a report (in May 1996) examining the impact of increasing globalization and rapid innovation on competition policy. Based on testimony from many witnesses, the staff report argued that "the evidentiary issues posed by efficiencies are difficult, but manageable."⁸³ The report both offered substantive recommendations regarding efficiencies and recommended creation of a joint FTC/DOJ task force to determine whether or how the 1992 Merger Guidelines should be changed.⁸⁴ Pitofsky credited the report with having departed from "conventional wisdom" of the time in a number of ways and with having "accelerated and focused debate on the treatment of efficiencies in merger enforcement. . . ."⁸⁵ In 1997 the DOJ/FTC merger guidelines were revised to include a section outlining treatment of efficiencies.⁸⁶

The globalization and competition hearings had a second guidelines consequence. According to an "oft-told tale," at the end of those hearings the FTC asked the participants what area of antitrust was most uncertain and was leading to over-deterrence of otherwise procompetitive conduct.

⁸¹ Federal Trade Comm'n, Notice of Public Workshop and Opportunity for Comment, 67 Fed. Reg. 47,365-66 (2002).

⁸² U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, IMPROVING HEALTH CARE: A DOSE OF COMPETITION 26-27 (2004).

⁸³ FEDERAL TRADE COMM'N, STAFF REPORT, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE ch. 2 at 17 (1996).

⁸⁴ *Id.* ch. 2 at 20-43.

⁸⁵ Robert Pitofsky, FTC Staff Report on Competition Policy: Six Months After, Remarks Before ABA Section of Antitrust Law 3 (Nov. 7, 1996).

⁸⁶ U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, rev. 1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104, available at www.ftc.gov/bc/docs/horizmer.htm.

The law regarding joint ventures, and horizontal collaborations generally, was the primary response. To follow up, the FTC then conducted further public hearings and roundtables on this issue.⁸⁷ The FTC, joined by the DOJ, subsequently drafted guidelines addressing this specific area of law.⁸⁸ Pitofsky stated that among the most “challenging” issues these guidelines posed was the presentation of “a single analytical framework that cuts across many types of agreements . . . and cuts across industries.”⁸⁹ In so doing, the malleability of this policy tool was demonstrated yet again.

V. CONCLUSION

Over the years, the FTC’s guideline choices have reflected a number of its special institutional features, ranging from the agency’s study function, to its dual role, to its multi-member structure. These features of agency character caused the FTC to issue separate guidelines that embodied different choices from those issued by DOJ. While the FTC’s early industry-specific guidelines have since been rescinded, those guidelines left us with some valuable lessons (some of which were quite relevant to the relatively recent foray into health care guidelines), as well as a legacy of premerger notification requirements that (in their HSR manifestation) are now a critical foundation of U.S. merger policy. In the current environment of predominantly joint FTC/DOJ guidelines, the influence of the FTC’s institutional features is now reflected more subtly in the behind-the-scenes negotiation process. Agency guidelines have become a staple of antitrust discourse. This policy tool will, no doubt, continue to evolve. Ideally, the FTC and DOJ will find ways to coordinate while still making unique contributions to the evolution of antitrust guidelines.

⁸⁷ Robert Pitofsky, Joint Venture Guidelines: Views from One of the Drafters, Remarks Before ABA Section of Antitrust Law 1 (Nov. 11, 1999).

⁸⁸ U.S. Dep’t of Justice & Federal Trade Comm’n, Guidelines for Collaborations Among Competitors (2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161, *available at* www.ftc.gov/os/2000/04/ftcdojguidelines.pdf. *See also* U.S. Dep’t of Justice, Antitrust Guide Concerning Research Joint Ventures (1980), *reprinted in* 992 Antitrust & Trade Reg. Rep. (BNA) Spec. Supp. (Dec. 4, 1980).

⁸⁹ Pitofsky, *supra* note 87, at 3.