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## Antitrust Policy and Legal Standards for Build-or-Buy Decisions

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# Antitrust Policy and Legal Standards for Build-or-Buy Decisions

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## I. Introduction

The newly finalized U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) Merger Guidelines have excluded one of the most controversial statements of the draft Merger Guidelines.<sup>2</sup> That statement is: “The antitrust laws reflect a preference for internal growth over acquisition.”<sup>3</sup> The Merger Guidelines replaced this statement with: “In general, expansion into a concentrated market via internal growth rather than via acquisition benefits competition.”<sup>4</sup>

Both statements refer to firms’ build-or-buy decisions, which many firms face as they look to expand.<sup>5</sup> A firm looking to expand into a new market (or within a market in which it already participates) may do so by developing the necessary capability internally (building) or by acquiring a firm that is already present in that market (buying). Acquiring a firm to enter a market may obviate the acquirer’s organic entry into that market. The new Merger Guidelines discuss a theory under which the FTC and DOJ (the “Agencies”) may challenge acquisitions for which *de novo* entry is a feasible alternative.<sup>6</sup> Under this theory, the acquisition violates antitrust law because it eliminates potential competition that would come from the acquirer’s

*de novo* entry. Some commentators refer to such cases as reverse killer acquisitions.<sup>7</sup>

Build-or-buy merger cases are nothing new. Many of the past landmark merger cases involved build-or-buy decisions. In *FTC v. Proctor & Gamble*, the FTC argued that Proctor & Gamble’s acquisition of Clorox violated antitrust law because, among other reasons, it eliminated Proctor & Gamble as a potential *de novo* entrant in the bleach market where Clorox had a significant share.<sup>8</sup> The U.S. Supreme Court ultimately upheld the FTC’s order that forced Proctor & Gamble to divest Clorox. Other important merger cases involving build-or-buy decisions include *United States v. Marine Bancorporation*,<sup>9</sup> *United States v. Falstaff Brewing*,<sup>10</sup> and *Yamaha Motor v. FTC*.<sup>11</sup>

During the past several years, the Agencies have taken a more aggressive enforcement posture toward build-or-buy mergers. The FTC’s challenge of the Meta/Within transaction focused on Meta’s build-or-buy decision.<sup>12</sup> The FTC pursued this case despite extremely weak evidence of competitive harm, leading the

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<sup>2</sup> MERGER GUIDELINES (2023) [hereinafter 2023 MG], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2023\\_merger\\_guidelines\\_final\\_12.18.2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf); U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, DRAFT MERGER GUIDELINES (2023) [hereinafter DMG], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p859910draftmergerguidelines2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf).

<sup>3</sup> DMG §II.4.A (footnote omitted).

<sup>4</sup> 2023 MG §2.4.A (footnote omitted).

<sup>5</sup> See George S. Yip, *Diversification Entry: Internal Development Versus Acquisition*, 3 STRATEGIC MGMT. J. 331 (1982), <https://www.jstor.org/stable/2486300>; Richard Gilbert & David M. Newbery, *Alternative Entry Paths: The Build or Buy Decision*, 1 J. ECON. MGMT. STRATEGY 129 (1992), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1430-9134.1992.00129.x>.

<sup>6</sup> 2023 MG §2.4

<sup>7</sup> See Oliver Latham, Isabel Tecu & Nitika Nagaria, *Beyond Killer Acquisitions: Are There More Common Potential Competition Issues in Tech Deals and How Can These be Assessed?*, CPI ANTITRUST CHRON. (May 2020), [https://www.pymnts.com/cpi\\_posts/beyond-killer-acquisitions-are-there-more-common-potential-competition-issues-in-tech-deals-and-how-can-these-be-assessed/](https://www.pymnts.com/cpi_posts/beyond-killer-acquisitions-are-there-more-common-potential-competition-issues-in-tech-deals-and-how-can-these-be-assessed/).

<sup>8</sup> *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

<sup>9</sup> *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

<sup>10</sup> *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

<sup>11</sup> *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981).

<sup>12</sup> Press Release, Fed. Trade Comm’n, FTC Seeks to Block Virtual Reality Giant Meta’s Acquisition of Popular App Creator Within (July 27, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within>.

district court to reject the FTC's challenge.<sup>13</sup> A build-or-buy decision was also at the core of the FTC's Altria/Juul challenge.<sup>14</sup> Although the finalized Merger Guidelines included a toned-down version of the "preference for internal growth" statement compared to their earlier draft, the new statement nonetheless states this preference.<sup>15</sup> Moreover, the finalized Merger Guidelines have adopted the substance of the draft Merger Guidelines' policy on build-or-buy mergers. The preference for internal growth language also appears in the Agencies' advocacy.<sup>16</sup>

Is favoring build over buy the right policy? If the acquirer cannot buy the target, the acquirer may have stronger incentives to build. Using this logic, several commentators argue that build-or-buy acquisitions may harm innovation.<sup>17</sup> There is, however, no basis for concluding that build-or-buy acquisitions harm innovation. Despite providing "build" incentives, restrictions on buying may lead to less building and less innovation. Building induced by a restriction on buying is likely to be relatively inefficient. Forcing inefficient builders to build would raise costs and discourage more efficient builders from undertaking building projects as these projects would have fewer potential buyers. Buying rather than building frees up resources that the acquirer may use for other innovations. Buying also allows firms to expand into new markets faster and with more certainty. In some cases, buying may be less costly than building and is likely to be more rational for firms. Overall, forcing entrants to build would lead to

inefficient use of resources, reduce investment in innovation, and impede entry into adjacent markets, thus deterring firms from realizing economies of scope.<sup>18</sup>

Antitrust case law does not recognize build-or-buy mergers as a distinct category. However, there are important differences between build-or-buy and other potential competition mergers, with the former being competitively more benign. Courts and merger guidelines should recognize these differences.

## II. How Do Build-or-Buy Decisions Differ from Other Potential Competition Merger Cases?

Build-or-buy mergers represent just one type of potential competition merger case. The Agencies have frequently brought potential competition merger challenges under an alternative theory where innovation pursued by one of the merging parties is a potential competitive threat to the other merging party. Under this theory, the merger weakens innovation incentives because one merging party's innovation cannibalizes or replaces a line of business owned by the other merging party. The reduction in innovation incentives under this theory is the replacement effect that Kenneth Arrow described in his famous innovation model.<sup>19</sup> I refer to this theory as the replacement effect theory.

Agency enforcement actions under the replacement effect theory include the FTC's

<sup>13</sup> See Jay Ezrielev, *Why Does the FTC Continue To Pursue Losing Cases?*, PROMARKET (Aug. 11, 2023), <https://www.promarket.org/2023/08/11/the-ftc-takes-another-l-why-is-the-agency-continuing-to-pursue-bad-cases/>.

<sup>14</sup> Press Release, Fed. Trade Comm'n, *FTC Sues to Unwind Altria's \$12.8 Billion Investment in Competitor Juul* (April 1, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul>.

<sup>15</sup> See *supra* note 4 and accompanying text.

<sup>16</sup> Press Release, Fed. Trade Comm'n, U.S. Department of Justice & Federal Trade Commission Joint Comment To Canada Competition Authority (Mar. 31, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/USFTC-USDOJ-joint-comment-to-Canada-Consultation-Paper.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/USFTC-USDOJ-joint-comment-to-Canada-Consultation-Paper.pdf).

<sup>17</sup> See Cristina Caffarra, Gregory S. Crawford & Tommaso Valletti, "How Tech Rolls": *Potential Competition and "Reverse" Killer Acquisitions*, CPI ANTITRUST CHRON. (May 2020), <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/05/CPI-Caffarra-Crawford-Valletti.pdf>.

<sup>18</sup> See John C. Panzar and Robert D. Willig, *Economies of Scope*, 71 AM. ECON. REV. 268 (1981), <http://www.jstor.org/stable/1815729>.

<sup>19</sup> See Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 361–404 (Josh Lerner and Scott Stern, eds., 2012); Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609–626 (Universities-National Bureau Committee for Economic Research, Committee on Economic Growth of the Social Science Research Council eds., 1962); Richard Gilbert, *Five Not So Easy Pieces to Make Antitrust Work for Innovation*, CPI ANTITRUST CHRON. (Oct. 2018); Jay Ezrielev, *An Economic Framework for Assessment of Innovation Effects of Nascent Competitor Acquisitions* (March 22, 2021), <https://ssrn.com/abstract=3810486>.

challenges of Illumina/Pacific Biosciences,<sup>20</sup> Questcor/Novartis,<sup>21</sup> Bristol-Myers Squibb/Celgene,<sup>22</sup> Pfizer/Mylan,<sup>23</sup> AbbVie/Allergan,<sup>24</sup> Otto Bock/Freedom Innovations,<sup>25</sup> Facebook/Instagram/WhatsApp,<sup>26</sup> and Steris/Synergy<sup>27</sup> and the DOJ's challenge of Visa/Plaid.<sup>28</sup> Both the 2010 Horizontal Merger Guidelines and the new Merger Guidelines discuss the replacement effect theory.<sup>29</sup> The replacement effect is just one of several mechanisms that determine how mergers affect innovation.<sup>30</sup> Other merger effects, such as innovation synergies, may encourage innovation and reverse the replacement effect.<sup>31</sup> Commentators have recently called for stricter merger enforcement under the replacement effect theory. For example, Scott Hemphill and Tim Wu argue that, "[g]iven the incentive and ability of incumbents to destroy or coopt innovative threats, avoiding that outcome is an important target for enforcement."<sup>32</sup> Bolstering these concerns, Colleen Cunningham, Florian Ederer, and Song Ma find that a significant percentage of pharmaceutical mergers are killer

acquisitions where the incumbent acquires a target for the sole purpose of eliminating it as a future competitive threat.<sup>33</sup>

Build-or-buy cases are very different from replacement effect cases. The acquirers in build-or-buy cases do not have an existing business that is threatened by the target's innovation. The main purpose of build-or-buy acquisitions is to expand into a new market (or to expand a firm's capacity in a market it already serves) in the most cost-effective way. These acquisitions do not weaken incentives to continue ongoing innovations. On the contrary, many acquirers may be looking to accelerate the development of the target's innovation. These acquirers may be attracted to the target's technology precisely because it is promising. Acquirers may be uniquely qualified to recognize the true potential of the target's innovation because of their related expertise.

Another important difference between build-or-buy and other potential competition merger cases is that in build-or-buy cases, the nexus between the buy transaction and lessening of competition (weaker build incentives) is

<sup>20</sup> Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of Pacbio (December 17, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio>.

<sup>21</sup> Press Release, Fed. Trade Comm'n, Mallinckrodt Will Pay \$100 Million to Settle FTC, State Charges It Illegally Maintained Its Monopoly Of Specialty Drug Used To Treat Infants (January 18, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it-illegally-maintained-its-monopoly>.

<sup>22</sup> Press Release, Fed. Trade Comm'n, FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition (November 15, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation-divest-psoriasis-drug-otezla-condition>.

<sup>23</sup> Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on Combination of Pfizer Inc.'s Upjohn and Mylan N.V. (October 30, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/10/ftc-imposes-conditions-combination-pfizer-incs-upjohn-mylan-nv>.

<sup>24</sup> Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on Abbvie Inc.'s Acquisition of Allergan Plc (May 5, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/05/ftc-imposes-conditions-abbvie-incs-acquisition-allergan-plc>.

<sup>25</sup> Press Release, Fed. Trade Comm'n, FTC Challenges Consummated Merger of Companies That Make Microprocessor Prosthetic Knees (December 20, 2017), <https://www.ftc.gov/news-events/news/press-releases/2017/12/ftc-challenges-consummated-merger-companies-make-microprocessor-prosthetic-knees>.

<sup>26</sup> Press Release, Fed. Trade Comm'n, FTC Sues Facebook for Illegal Monopolization (December 9, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

<sup>27</sup> Press Release, Fed. Trade Comm'n, FTC Challenges Merger of Companies That Provide Sterilization Services to Manufacturers (May 29, 2015), <https://www.ftc.gov/news-events/news/press-releases/2015/05/ftc-challenges-merger-companies-provide-sterilization-services-manufacturers>.

<sup>28</sup> Press Release, U.S. Dep't of Just., Justice Department Sues To Block Visa's Proposed Acquisition Of Plaid (November 5, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid>.

<sup>29</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.4 (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>; 2023 MG §4.2.E.

<sup>30</sup> Ezrielev, *supra* note 19.

<sup>31</sup> Shapiro, *supra* note 19.

<sup>32</sup> C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9715&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9715&context=penn_law_review).

<sup>33</sup> Colleen Cunningham, Florian Ederer, & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 649 (2021), <https://www.journals.uchicago.edu/doi/epdf/10.1086/712506>.



relatively attenuated. Instead of weakening build incentives, a buy transaction may enhance the incentive and ability to develop the target's innovation. This may happen because of investment synergies, which occur when a merger combines complementary assets such as the acquirer's financial strength and access to customers and the target's technical know-how.<sup>34</sup> In many cases, the buy transaction may have no effect on the buyer's no-build decision because the buyer views building as uneconomic with or without the buy transaction.

In some cases, there will be a causal link between a firm's buy decision and the firm's decision not to enter a market by building. However, the same causal link exists for many other actions that are not normally condemned under the antitrust laws for the reason that a firm could have built but didn't. For example, a firm may decide to license intellectual property rather than developing its own innovation. A manufacturer may enter into a supply agreement to source an input rather than building a plant to produce the input itself. A firm may forgo an acquisition that provides the capability to pursue a future building project. The firm may likewise decide not to hire personnel with the expertise required for a building project. All these actions have the same causal relationship with a no-build decision as buying. If courts are unlikely to condemn supply and licensing agreements as illegal under the antitrust laws for their role in deterring *de novo* entry, why should the courts treat buy transactions differently?

### III. Buy Advantages

*De novo* entry is not always efficiency enhancing. Economics literature shows that *de novo* entry (entry by building) may be inefficient.<sup>35</sup>

Moreover, from the perspective of potential entrants, buying has important advantages over building. Entry through buying is much quicker

and more certain. *De novo* entry typically has a high probability of failure. Consider a consumer products company that is looking to expand into the personal health care area. A project to develop a new personal health care brand would require billions of dollars in investment and still face a high risk of failure. In the unlikely event that the project succeeds, it could be over a decade before the new brand ever establishes a meaningful market presence.

In many industries, building a viable entrant requires the accumulation of both physical and intangible assets. Intangible assets include technological know-how, customer goodwill, reputation, intellectual property, management expertise, supply contracts, licenses, and permits. Successful entry also requires achieving minimum viable scale. In many markets, entrants face significant obstacles to acquiring the necessary physical and intangible assets and to achieving minimum viable scale. Buy decisions in such markets may be a reasonable strategy for avoiding the risks and delays of entry by building. Indeed, economic research shows that entry by acquisition is more likely in markets with higher entry barriers.<sup>36</sup>

Building may also be more costly than buying. This can occur for several reasons. A target may face poor financial prospects because of unfavorable market conditions. There may be more competitors in the market than the market can support. The capital markets may simply undervalue the target. The target may have pursued the wrong business model. The target may also lack certain critical assets that an acquirer could supply, such as skilled management, access to capital, customer relationships, or access to a production input. In all these cases, the market value of the target's assets may be well below the cost of replicating the assets. The acquisition of the target may shift the assets to higher value use and save costs compared to building. The asset's higher value use may lead to higher output levels.

<sup>34</sup> Ezrielev, *supra* note 19; Shapiro, *supra* note 19.

<sup>35</sup> N. Gregory Mankiw & Michael D. Whinston, *Free Entry and Social Inefficiency*, 17 RAND J. ECON. 48 (1986), <https://www.jstor.org/stable/2555627>.

<sup>36</sup> John R. Baldwin & Paul K. Gorecki, *Plant Creation Versus Plant Acquisition: The Entry Process in Canadian Manufacturing*, 5 INT. J. IND. ORG. 27 (1987), <https://www.sciencedirect.com/science/article/abs/pii/016771878790004X>.

Furthermore, the firm looking to enter a new market may be relatively inefficient at building the assets needed for entry. Other firms may be specialized at building the assets. The firm may instead be relatively efficient at exploiting these assets. The difference between exploiters and builders is analogous to the difference between families who live in homes (exploit home assets) and commercial builders who are efficient at building. Prohibiting families from buying homes to induce them to build is unlikely to result in more building and would likely make home ownership more expensive.

The pharmaceutical industry provides a good illustration of how some firms specialize in building certain assets and others specialize in exploiting them. This dichotomy exists between large pharmaceutical companies that focus on clinical testing, regulatory approvals, manufacturing, marketing, and distribution of approved drugs and biotech and smaller pharmaceutical companies that focus on new drug discovery. Although large pharmaceutical companies still engage in new drug discovery, they are increasingly dependent on biotech and smaller pharmaceutical companies for the pipeline of new drugs. Of all the drugs in late stages of development in 2018, 72% were discovered by emerging biopharma companies (less than \$500 million in annual revenue).<sup>37</sup> Large pharmaceutical companies obtain access to externally discovered new drugs through acquisitions, licensing deals, partnerships, and joint ventures.

Analysts suggest that biotech and smaller pharmaceutical companies are more efficient at new drug discovery and large companies are more efficient at later stages of development, regulatory approvals, manufacturing, and marketing.<sup>38</sup> Forcing large pharmaceutical companies to engage in more drug discovery by

restricting their ability to acquire new drugs is unlikely to result in more drug discovery. Restricting acquisitions of new drugs would also discourage biotech and smaller pharmaceutical companies from investing in new drug discovery as they would have fewer prospects for commercializing their discoveries.<sup>39</sup>

Buying rather than building also frees up resources that firms can use in other projects. Firms can use these resources to pursue innovations in new areas or to develop and integrate the target's innovation.

#### IV Build Advantages

Acquisition is not always the best entry strategy. There are advantages to entry by building. Building allows entrants to offer new products and services and to use innovative marketing strategies and low prices to expand the market and take sales away from incumbents. Building also lets entrants deploy newer technologies, giving them a cost advantage over incumbents. Building in a differentiated products market may enable the entrant to capture a market segment that is inadequately served by incumbents. Building may also be advantageous in a market with capacity shortages. Building allows entrants to deploy their underutilized assets or production capacity to serve a new market at a relatively low cost.<sup>40</sup> In addition, building could be an optimal entry strategy when entrants have related or complementary assets that facilitate entry into a new market.<sup>41</sup> These are just some examples where building may be advantageous relative to buying. In these cases, the entrant would build even without any buy restrictions.

In addition, entry by building may lead to significant new competition for market incumbents. Gilbert and Newbery argue that

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<sup>37</sup> IQVIA INSTIT., THE CHANGING LANDSCAPE OF RESEARCH AND DEVELOPMENT (April 23, 2019), <https://www.iqvia.com/insights/the-iqvia-institute/reports-and-publications/reports/the-changing-landscape-of-research-and-development>.

<sup>38</sup> Joanna Shepherd, *Consolidation and Innovation in the Pharmaceutical Industry: The Role of Mergers and Acquisitions in the Current Innovation Ecosystem*, 21 J. HEALTH CARE L. & POL'Y (2018), <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1356&context=jhclp>.

<sup>39</sup> Ezrielev, *supra* note 19.

<sup>40</sup> See Sayan Chatterjee, *Excess Resources, Utilization Costs, and Mode of Entry*, 33 ACAD. MGMT. J. 780 (1990), <https://www.jstor.org/stable/256290>.

<sup>41</sup> Yip, *supra* note 5; Gwendolyn K. Lee & Marvin B. Lieberman, *Acquisition vs. Internal Development as Modes of Market Entry*, 31 STRAT. MGMT. J. 140 (2010), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/smj.804>.

entrants can use the threat of *de novo* entry to negotiate lower acquisition prices, thus inducing some entrants to buy rather than build.<sup>42</sup> However, there is no evidence to suggest that such effects are significant. Acquisition targets are unlikely to view *de novo* entry threats as credible. Moreover, *de novo* entry typically has a low probability of success and requires a long time to develop. This is especially the case in markets with significant entry barriers where acquisitions may raise antitrust concerns for the Agencies.

## V. Conclusion

The Agencies have signaled increased scrutiny of build-or-buy acquisitions with the new Merger Guidelines, public statements, and recent enforcement actions. It is unclear whether additional scrutiny is warranted. I am not aware of any evidence that build-or-buy acquisitions are causing significant harm to consumers or the U.S. economy. As the Agencies contemplate future enforcement actions against build-or-buy acquisitions, they should carefully consider both the costs and benefits of challenging such deals. While build-or-buy acquisitions may lead to a loss of future competition between the merging parties, these transactions may also produce significant benefits through innovation synergies, more efficient allocation of resources, and enhanced innovation incentives. Furthermore, many build-or-buy acquisitions lead to faster, more certain, and potentially less costly entry into adjacent

markets, inducing more entry and leading to greater realization of economies of scope. The competition benefits of *de novo* entry may be moderated by high failure rates, lengthy build times, low probability of achieving significant market shares, and the fact that other firms may enter the relevant market.

There is also bound to be significant uncertainty about whether any given buy transaction replaces *de novo* entry. In fact, in *Meta/Within*, the district court found that it is not “reasonably probable” that Meta would have entered the relevant market in the absence of the *Within* acquisition.<sup>43</sup> It is also worth noting that Proctor & Gamble never entered the bleach market after the FTC forced Proctor & Gamble to divest Clorox. Blocking a buy transaction may not yield a competition benefit of *de novo* entry but may instead forgo the benefits of entry by buying.

Why was the draft Merger Guidelines’ “preference for internal growth” statement controversial? It suggests skepticism of all mergers and was yet another expression of the Agencies’ overall hostility to mergers.<sup>44</sup> Randy Picker discredits the draft Merger Guidelines’ legal case for the “preference for internal growth over acquisition” as do others.<sup>45</sup> Entering a market through internal growth instead of acquisition increases the number of competitors in the market by one. However, antitrust laws do not necessarily seek to maximize the number of competitors in a market and instead recognize that mergers have benefits. The Clayton Act expresses no preference for internal growth over acquisition.

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<sup>42</sup> Gilbert & Newbery, *supra* note 5.

<sup>43</sup> *FTC v. Meta Platforms Inc.*, et al., 5:22-cv-04325-EJD, 2023 WL 8629125, at \*59 (N.D. Cal. Jan. 31, 2023).

<sup>44</sup> Jay Ezrielev, *The FTC’s (and DOJ’s) Merger Aversion*, TRUTH ON THE MARKET (Oct. 2, 2023), <https://truthonthemarket.com/2023/10/02/the-ftcs-and-dojs-merger-aversion/>.

<sup>45</sup> Randy Picker, *Understanding Firm Entry and the Internal Growth Presumption in the Draft Merger Guidelines*, PROMARKET (Aug. 1, 2023), <https://www.promarket.org/2023/08/01/randy-picker-understanding-firm-entry-and-the-internal-growth-presumption-in-the-draft-merger-guidelines/>; Letter from Melinda Hatton, General Counsel, American Hospital Association, to Jonathan Kanter, Assistant Att’y Gen, U.S. Dep’t of Just., and Lina Khan, Chair, Fed. Trade Comm’n (September 13, 2023), <https://www.aha.org/system/files/media/file/2023/09/AHA-Letter-to-the-Attorney-General-and-FTC-on-Draft-Merger-Guidelines.pdf>.