Exhibit 16 to Plaintiff's
Memorandum of Points and Authorities
in Support of Its Motion for Temporary
Restraining Order and Preliminary
Injunction
(PX01341)
Part 2 of 5

iteratively adding the next-best substitutes. Thus, for geographic market definition, the Agencies begin with the area(s) in which the merging firms compete respecting each relevant product, and extend the boundaries of those areas until an area is determined within which a hypothetical monopolist would raise prices by at least a small but significant and non-transitory amount.

DaVita–Gambro **(FTC 2005)** DaVita Inc., proposed to acquire Gambro Healthcare, Inc. The firms competed across the United States in the provision of outpatient dialysis services for persons with end stage renal disease ("ESRD"). Commission staff found that the relevant geographic markets within which to analyze the transaction's likely competitive effects were local. Most ESRD patients receive treatments about 3 times per week, in sessions lasting 3–5 hours, and in general either are unwilling or unable to travel more than 30 miles or 30 minutes to receive kidney dialysis treatment. In the process of defining the geographic market, staff identified the Metropolitan Statistical Areas ("MSAs") within which both firms had outpatient dialysis clinics, then examined each area to determine if geographic factors such as mountains, rivers, and bays, and travel conditions, were such that the scope of the relevant market differed from the MSA's boundaries.

Within each such MSA, staff isolated the area immediately surrounding each dialysis clinic of both merging parties, and assessed whether a hypothetical monopolist within that area would impose a significant price increase. Staff expanded the boundaries of each area until the evidence showed that such a hypothetical monopolist would impose a significant price increase. From interviews with industry participants and analysis of documents, staff found that, in general, dialysis patients tend to travel greater distances in rural and suburban areas than in dense urban areas, where travel distances as small as 5–10 miles may take significantly more than 30 minutes, due to congestion, road conditions, reliance on public transportation, and other factors. Maps indicating the locations from which each clinic drew its patients were particularly useful. Thus, some MSAs included within their respective boundaries many distinct areas over which a hypothetical monopolist would exercise market power. The Commission entered into a consent agreement with the parties to resolve the concern that the transaction would likely lead to anticompetitive effects in 35 local markets. In an order issued with the consent agreement, the Commission required, among other things, the divestiture of dialysis clinics in the 35 markets at issue.

The Breadth of Relevant Markets

Defining markets under the Guidelines' method does not necessarily result in markets that include the full range of functional substitutes from which customers choose. That is because, as the Guidelines provide, a "relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy [the hypothetical monopolist] test." Guidelines § 1.0. This is one of several points at which the Guidelines articulate what is referred to in section 1.21 as the "'smallest market' principle" for determining the relevant market. The Agencies frequently conclude that a relatively narrow range of products or geographic space within a larger group describes the competitive arena within which significant anticompetitive effects are possible.

Nestle–Dreyer's **(FTC 2003)** Nestle Holdings, Inc., proposed to merge with Dreyer's Grand Ice Cream, Inc. The firms were rivals in the sale of superpremium ice cream. Ice cream is differentiated on the basis of the quality of ingredients. Compared to premium and non-premium ice cream, superpremium ice cream contains more butterfat, less air, and more costly ingredients. Superpremium ice cream sells at a substantially higher price than premium ice cream. Using scanner data, Commission staff estimated demand elasticities for the superpremium, premium, and economy ice cream segments. Staff's analysis showed that a hypothetical monopolist of superpremium ice cream would increase prices significantly. This, together with other documentary and testimonial evidence, indicated that the relevant market in which to analyze the transaction was superpremium ice cream. The Commission entered into a consent agreement with the merging firms, requiring divestiture of two brands and of key distribution assets.

UPM–MACtac **(DOJ 2003)** UPM-Kymmene Oyj sought to acquire (from Bemis Co.) Morgan Adhesives Co. ("MACtac"). They were two of the three largest producers of paper pressure-sensitive labelstock, from which "converters" make pressure-sensitive labels. End users peel pressure-sensitive labels off a silicon-coated base material and directly apply them to items being labeled. The Department challenged the acquisition on the basis of likely anticompetitive effects in two relevant product markets. One was paper labelstock used to make pressure sensitive labels for "variable information printing" ("VIP"). Some or all of the printing on VIP labels is done by end users as the label is applied. A familiar example is the price labeling of fresh meat sold in supermarkets. Although paper labelstock for VIP labels competes with plastic film labelstock, the Department found that film labels are of sufficiently higher cost that a hypothetical monopolist of paper labelstock for VIP labels would raise price significantly. The other relevant product market was paper labelstock used for "prime" labels. Prime labels are used for product identification and are printed in advance of application. Paper labelstock for prime labels, competes not just with film labelstock, but also with pre-printed packaging and other means of product identification. Nevertheless, the Department found that a hypothetical monopolist of paper labelstock for prime labels would raise price significantly because users of pressure-sensitive paper labels find them the least-cost alternative for their particular applications and because they would have to incur significant switching costs if they adopted an alternative means of product identification. After trial, the court enjoined the consummation of the acquisition.

Tenet–Slidell **(FTC 2003)** Tenet Health Care Systems owned a hospital in Slidell, Louisiana (near New Orleans), and proposed to acquire Slidell's only other full-service hospital. There were many other full-service hospitals in the New Orleans area but all were outside of Slidell. Commission staff found that a significant number of Slidell residents and their employers required access to either of the two Slidell hospitals in their private health insurance plans. The Slidell hospitals competed against each other for inclusion in health plan networks. After merging, the combined hospital would have had no rival with "must have" network status among Slidell residents and employers. A hypothetical monopolist of the Slidell hospitals likely would have imposed a small but significant and non-transitory price increase on health plans selling coverage in Slidell, because neighboring hospitals outside of Slidell were not effective substitutes for network inclusion. The relevant geographic market, therefore, was limited to hospitals located in Slidell. Under Louisiana law, proposed acquisitions of not-for-profit hospitals must be approved by the Louisiana Attorney General. By invitation of the state Attorney General, Commission staff, in a public letter authorized by the Commission, advised the Attorney General of the staff's view that, based on the facts gathered in its then-ongoing investigation, the proposed acquisition raised serious competitive concerns. In a vote authorized by local law, parish residents subsequently rejected the proposed transaction, which never was consummated.

In sections 1.12 and 1.22, the Guidelines explain that the Agencies may define relevant markets on the basis of price discrimination if a hypothetical monopolist likely would exercise market power only, or especially, in sales to particular customers or in particular geographic areas. The Agencies address the same basic issues for any form of discrimination: Would price discrimination, if feasible, permit a significantly greater exercise of market power? Could competitors successfully identify the transactions to be discriminated against? Would customers or third parties be able to undermine substantially the discrimination through some form of arbitrage in which a product sold at lower prices to some customer groups is resold to customer groups intended by the firms to pay higher prices? In cases in which a hypothetical monopolist is likely to target only a subset of customers for anticompetitive price increases, the Agencies are likely to identify relevant markets based on the ability of sellers to price discriminate.

Quest–Unilab **(FTC 2003)** Quest Diagnostics, Inc. and Unilab Corp., the two leading providers of clinical laboratory testing services to physician groups in Northern California, proposed to merge. Their combined market share would have exceeded 70%; the next largest rival had a market share of 4%. Clinical laboratory testing services are marketed and sold to various groups of customers, including physicians, health insurers, and hospitals. Commission staff determined that purchasers of these services cannot economically resell them to other customers, and that suppliers of the services can potentially identify the competitive alternatives available to physician group customers according to the group's base of physicians and geographic coverage. This information indicated that a hypothetical monopolist could discriminate on price among customer types. Suppliers' ability to price discriminate, combined with the fact that some types of customers had few competitive alternatives to contracting with suppliers that had a network of locations, led staff to define markets based on customer categories. The Commission issued a complaint alleging that the transaction would lessen competition substantially in one of the customer categories: the provision of clinical laboratory testing services to physician groups in Northern California. An accompanying consent order required divestiture of assets used to provide clinical laboratory testing services to physician groups in Northern California.

Ingersoll-Dresser–Flowserve (DOJ 2000) Flowserve Corp. agreed to acquire Ingersoll-Dresser Pump Co. Both firms produced a broad array of pumps used in industrial processes. The Department challenged the proposed acquisition on the basis of likely anticompetitive effects in "API 610" pumps, which are used by oil refineries, and pumps used in electric power plants. Both sorts of pumps are customized according to the specifications of the particular buyer and are sold through bidding mechanisms. Customization of the pumps made arbitrage infeasible. The Department concluded that the competition in each procurement was entirely distinct and therefore that each procurement took place in a separate and distinct relevant market. The Department's challenge to the merger was resolved by consent decree.

Interstate Bakeries–Continental **(DOJ 1995)** The Department challenged Interstate Bakeries Corp.'s purchase of Continental Baking Co. from Ralston Purina Co. The challenge focused on white pan bread, and the Department found that the purchase likely would have produced significant price increases in five metropolitan areas—Chicago, Milwaukee, Central Illinois, Los Angeles, and San Diego. Among the reasons the Department concluded that competition was localized to these metropolitan areas were that bakers charged different prices for the same brands produced in the same bakeries, depending on where the bread was sold, and that arbitrage was infeasible. Arbitrage was exceptionally costly because the bakers themselves placed their bread on the supermarket shelves, so arbitrage required removing bread from the shelves, reshipping it, and reshelving it. This process also would consume a significant portion of the brief period during which the bread is fresh. The Department settled its challenge to the proposed merger by a consent decree requiring divestiture of brands and related assets in the five metropolitan areas.

The Guidelines indicate that the relevant market is the smallest collection of products and geographic areas within which a hypothetical monopolist would raise price significantly. At times, the Agencies may act conservatively and focus on a market definition that might not be the smallest possible relevant market. For example, the Agencies may focus initially on a bright line identifying a group of products or areas within which it is clear that a hypothetical monopolist would raise price significantly and seek to determine whether anticompetitive effects are—or are not—likely to result from the transaction in such a candidate market. If the answer for the broader market is likely to be the same as for any plausible smaller relevant market, there is no need to pinpoint the smallest market as the precise line drawn does not affect the determination of whether a merger is anticompetitive. Also, when the analysis is identical across products or geographic areas that could each be defined as separate relevant markets using the smallest market principle, the Agencies may elect to employ a broader market definition that encompasses many products or geographic areas to avoid redundancy in presentation. The Guidelines describe this practice of aggregation "as a matter of convenience." Guidelines § 1.321 n.14.

Evidentiary Sources for Market Definition

The Importance of Evidence from and about Customers

Customers typically are the best source, and in some cases they may be the only source, of critical information on the factors that govern their ability and willingness to substitute in the event of a price increase. The Agencies routinely solicit information from customers regarding their product and supplier selections. In selecting their suppliers, customers typically evaluate the alternatives available to them and can often provide the Agencies with information on their functional needs as well as on the cost and availability of substitutes. Customers also provide relevant information that they uniquely possess on how they choose products and suppliers. In some investigations, customers provide useful information on how they have responded to previous significant changes in circumstances. In some investigations, the Agencies are able to explore consumer preferences with the aid of price and quantity data that allow econometric estimation of the relevant elasticities of demand.

> ***Dairy Farmers–SODIAAL*** **(DOJ 2000)** The Department challenged the proposed acquisition by Dairy Farmers of America, Inc. of SODIAAL North America Corp. on the basis of likely anticompetitive effects in the sale of "branded stick and whipped butter in the Philadelphia and New York metropolitan areas." DFA sold the Breakstone brand, and SODIAAL sold the Keller's and Hotel Bar brands. The Department concluded that consumers of branded butter in these metropolitan areas so preferred it over private-label butter, as well as margarine and other substitutes, that a hypothetical monopolist over just branded butter in each of those areas would raise price significantly. This conclusion was supported by econometric evidence, derived from data collected from supermarkets, on the elasticity of demand for branded butter in Philadelphia and New York. The Department's complaint was resolved by a consent decree transferring the SODIAAL assets to a new company not wholly owned by DFA and containing additional injunctive provisions.

In the vast majority of cases, the Agencies largely rely on non-econometric evidence, obtained primarily from customers and from business documents.

> ***Cemex–RMC*** **(FTC 2005)** The proposed acquisition of RMC Group PLC by Cemex, S.A. de C.V. would have combined two of the three independent ready-mix concrete suppliers in Tucson, Arizona. Ready-mix concrete is a precise mixture of cement, aggregates, and water. It is produced at local plants and delivered as a slurry in trucks with revolving drums to construction sites, where it is poured and formed into its final shape. Commission staff determined from information received from customers that a hypothetical monopolist over ready-mix concrete would raise price significantly in the relevant area. Asphalt and other building materials were found not to be good substitutes for ready-mix concrete, due in significant part to concrete's pliability when freshly mixed and strength and permanence when hardened. Concerned that the transaction likely would result in coordinated interaction in the Tucson area, the Commission, pursuant to a consent agreement, ordered Cemex, among other things, to divest RMC's Tucson-area ready-mix concrete assets.

> ***Swedish Match–National*** **(FTC 2000)** Swedish Match North America, Inc. proposed to acquire National Tobacco Company, L.P. The acquisition would have combined the first- and third-largest producers of loose leaf chewing tobacco in the United States. Commission staff evaluated whether, as the merging firms contended, moist snuff should be included in the relevant market for loose leaf chewing tobacco. Swedish Match's own market research revealed that consumers would substitute less expensive loose leaf, but not more expensive snuff, if loose leaf prices increased slightly. Additional evidence from

the firms' own business documents, and customer testimony from distributors that purchase and resell the products to retailers, demonstrated that loose leaf chewing tobacco constitutes a distinct product market that does not include moist snuff. The acquisition would therefore have resulted in a merged firm with a high share of the relevant market for loose leaf chewing tobacco. The Commission successfully challenged the merger in federal district court.

In determining whether to challenge a transaction, the Agencies do not simply tally the number of customers that oppose a transaction and the number of customers that support it. The Agencies take into account that all customers in a relevant market are not necessarily situated similarly in terms of their incentives. For example, intermediate resellers' views about a proposed merger between two suppliers may be influenced by the resellers' ability profitably to pass along a price increase. If resellers can profitably pass along a price increase, they may have no objection to the merger. End-users, by contrast, generally lack such an incentive because they must absorb higher prices. In all cases, the Agencies credit customer testimony only to the extent the Agencies conclude that there is a sound foundation for the testimony.

Evidence of Effects May Be the Analytical Starting Point

In some investigations, before having determined the relevant market boundaries, the Agencies may have evidence that more directly answers the "ultimate inquiry in merger analysis," i.e., "whether the merger is likely to create or enhance market power or facilitate its exercise." Guidelines § 0.2. Evidence pointing directly toward competitive effects may arise from statistical analysis of price and quantity data related to, among other things, incumbent responses to prior events (sometimes called "natural experiments") such as entry or exit by rivals. For example, it may be that one of the merging parties recently entered and that econometric tools applied to pricing data show that the other merging party responded to that entry by reducing price by a significant amount and on a nontransitory basis while the prices of some other sellers that might be in the relevant market did not.

To be probative, of course, such data analyses must be based on accepted economic principles, valid statistical techniques, and reliable data. Moreover, the Agencies accord weight to such analyses only within the context of the full investigatory record, including information and testimony received from customers and other industry participants and from business documents.

Evidence pertaining more directly to a merger's actual or likely competitive effects also may be useful in determining the relevant market in which effects are likely. Such evidence may identify potential relevant markets and significantly reinforce or undermine other evidence relating to market definition.

***Staples–Office Depot* (FTC 1997)** Staples, Inc. proposed to acquire Office Depot, Inc., a merger that would have combined two of the three national retail chains of office supply superstores. The Commission found that in metropolitan areas where Staples faced no office superstore rival, it charged significantly higher prices than in metropolitan areas where it faced competition from Office Depot or the other office supply superstore chain, OfficeMax. Office Depot data showed a similar pattern: its prices were lowest where Staples and OfficeMax also operated, and highest where they did not. These patterns held regardless of how many non-superstore sellers of office supplies operated in the metropolitan area under review.

The Commission also found that evidence relating to entry showed that local rivalry from office supply superstores acted as the principal competitive constraint on Staples and Office Depot. Each firm regularly dropped prices in areas where they confronted entry by another office supply superstore, but did not do so in response to entry by other sellers of office supplies, such as Wal-Mart. Newspaper advertising and other promotional materials likewise reflected greater price competition in those areas in which Staples and Office Depot faced local rivalry from one another or from OfficeMax. Such evidence provided direct support for the conclusion that the acquisition would cause anticompetitive effects in the relevant product market defined as the sale of consumable office supplies through office supply superstores, in those metropolitan areas where Staples and Office Depot competed prior to the merger. The Commission successfully challenged the merger in federal district court.

In some cases, competitive effects analysis may eliminate the need to identify with specificity the appropriate relevant market definition, because, for example, the analysis shows that anticompetitive effects are unlikely in any plausibly defined market.

Federated–May **(FTC 2005)** Federated Department Stores, Inc. proposed to acquire The May Department Stores Co., thereby combining the two largest chains in the United States of so-called "traditional" or "conventional" department stores. Conventional department stores typically anchor enclosed shopping malls, feature products in the mid-range of price and quality, and sell a wide range of products. The transaction would create high levels of concentration among conventional department stores in many metropolitan areas of the United States, and the merged firm would become the only conventional department store at certain of the 1,200 malls in the United States.

If the relevant product market included only conventional department stores, then before the merger Federated had a market share greater than 90% in the New York–New Jersey metropolitan area. If the relevant product market also included, for example, specialty stores, then Federated's share in that geographic area was much smaller. The evidence that Commission staff obtained indicated that the relevant product market was broader than conventional department stores. For example, in the New York–New Jersey metropolitan area, Federated charged consumers the same prices that it charged throughout much of the eastern region of the United States, including where Federated faced larger numbers of traditional department store rivals. May and other department store chains, like Federated, also set prices to consumers that were uniform over very broad geographic areas and did not appear to vary local prices based on the number or identity of conventional department stores in malls or metropolitan areas.

This evidence provided support for the conclusion that the acquisition likely would not create anticompetitive effects. Staff also found no evidence that competitive constraints, e.g., rivalry from retailers other than department stores, in New York–New Jersey were not representative of other markets in which Federated and May competed. Further, evidence pertaining both to which firms the parties monitored for pricing and to consumer purchasing behavior also supported the conclusion that the relevant market was sufficiently broad that the merger was not likely to cause anticompetitive effects. The Commission closed the investigation.

Industry Usage of the Word "Market" Is Not Controlling

Relevant market definition is, in the antitrust context, a technical exercise involving analysis of customer substitution in response to price increases; the "markets" resulting from this definition process are specifically designed to analyze market power issues. References to a "market" in business documents may provide important insights into the identity of firms, products, or regions that key industry participants consider to be sources of rivalry, which in turn may be highly probative evidence upon which to define the "relevant market" for antitrust purposes. The Agencies are careful, however, not to assume that a "market" identified for business purposes is the same as a relevant market defined in the context of a merger analysis. When businesses and their customers use the word "market," they generally are not referring to a product or geographic market in the precise sense used in the Guidelines, although what they term a "market" may be congruent with a Guidelines' market.

Staples–Office Depot **(FTC 1997)** In the blocked Staples–Office Depot transaction described above in this Chapter, the Commission alleged, and the district court found, that the relevant product market was "the sale of consumable office supplies through office supply superstores," with "consumable" meaning products that consumers buy recurrently, like pens, paper, and file folders. Industry members in the ordinary course of business did not describe the "market" using this phrase. The facts showed that a hypothetical monopolist office supply superstore would raise price significantly on consumable office supplies. Many retail firms that are not office supply superstores—such as discount and general merchandise stores—sold consumable office supplies in areas near the merging firms. Despite the existence of such other sellers, evidence, including the facts identified above, justified definition of the relevant product market as one limited to the sale of consumable office products solely through office supply superstores.

It is unremarkable that "markets" in common business usage do not always coincide with "markets" in an antitrust context, inasmuch as the terms are used for different purposes. The description of an "antitrust market" sometimes requires several qualifying words and as such does not reflect common business usage of the word "market." Antitrust markets are entirely appropriate to the extent that they realistically describe the range of products and geographic areas within which a hypothetical monopolist would raise price significantly and in which a merger's likely competitive effects would be felt.

***Waste Management–Allied* (DOJ 2003)** Waste Management, Inc. agreed to acquire assets from Allied Waste Industries, Inc. that were used in its municipal solid waste collection operations in Broward County, Florida. The Department challenged the proposed acquisition on the basis of anticompetitive effects in "small container commercial hauling." Commercial haulers serve customers such as office buildings, apartment buildings, and retail establishments. Small containers have capacities of 1–10 cubic yards, and waste from them is collected using specialized, front-end loading vehicles. The Department found that this market was separate and distinct from markets for other municipal solid waste collection services. The Department concluded that a hypothetical monopolist in just small container commercial hauling would have raised prices significantly because it was uneconomical for homeowners to use the much larger containers used by commercial customers and uneconomical for commercial customers using large "roll-off" containers to switch to small commercial containers. The Department's challenge to the merger was resolved by a consent decree requiring divestiture of specified collection routes and the assets used on them.

***Pacific Enterprises–Enova* (DOJ 1998)** Pacific Enterprises (which owned Southern California Gas Co.) and Enova Corp. (which owned San Diego Gas & Electric Co.) agreed to combine the companies under a common holding company. The Department challenged the combination on the basis of likely anticompetitive effects arising from the ability of the combined companies to raise electricity prices by restricting the supply of natural gas. The Department concluded that the relevant market was the sale of electricity in California during periods of high demand. In high-demand periods, limitations on transmission capacity cause prices in California to be determined by power plants in California. Inter-temporal arbitrage was infeasible because there is only a very limited opportunity to store electric power. Thus, the Department concluded that a hypothetical electricity monopolist during just periods of high demand would raise prices significantly. The Department's complaint was resolved by a consent decree requiring divestiture of generating facilities and associated assets.

Market Definition and Integrated Analysis

Market Definition Is Linked to Competitive Effects Analysis

The process of defining the relevant market is directly linked to competitive effects analysis. In analyzing mergers, the Agencies identify specific risks of potential anticompetitive harm, and delineate the appropriate markets within which to evaluate the likelihood of such potential harm. This process could lead to different conclusions about the relevant markets likely to experience competitive harm for two similar mergers within the same industry.

Thrifty–PayLess **(FTC 1994)** A proposed merger of Thrifty Drug Stores and PayLess Drug Stores would have combined retail drug store chains with store locations near one another in towns in California, Oregon, and Washington. Commission staff identified two potential anticompetitive effects from the merger: (1) that "cash" customers, i.e., individual consumers who pay out of pocket for prescription drugs, likely would pay higher prices; and (2) that third-party payers, such as health plans and pharmacy benefit managers ("PBMs"), likely would pay higher dispensing fees to chain pharmacy firms to obtain their participation in provider networks.

Cash customers tend to shop close to home or place of employment, suggesting small geographic markets for those customers. Third-party payers need network participation from chains having wide territorial coverage. The staff assessed different relevant markets for the two risks of competitive harm. In its complaint accompanying a consent agreement, the Commission alleged that the sale of prescription drugs in retail stores (i.e., sales to cash customers) was a relevant product market and that anticompetitive effects from the merger were likely in this market. The Commission did not allege a diminution in competition regarding the process by which pharmacies negotiate for inclusion in health plan provider networks and sought no relief in that market. The Commission ordered Thrifty, among other things, to divest retail pharmacies in the geographic markets of concern.

Rite Aid–Revco **(FTC 1996)** The nation's two largest retail drug store chains, Rite Aid Corp. and Revco D.S., Inc., proposed to merge. They competed in many local markets, including in 15 metropolitan areas in which the merged firm would have had more than 35% of the retail pharmacies. As in the foregoing *Thrifty–PayLess* matter, Commission staff defined two markets in which harm potentially may have resulted: retail sales made to cash customers, and sales through PBMs, which contract with multiple pharmacy firms to form networks offering pharmacy benefits as part of health insurance coverage. Pharmacy networks often include a high percentage of local pharmacies because access to many participating pharmacies is often important to plan enrollees.

Rite Aid and Revco constrained one another's pricing leverage with PBMs in bargaining for inclusion in PBM networks. Each merging firm offered rival broad local coverage of pharmacy locations, such that PBMs could assemble marketable networks with just one of the firms included. A high proportion of PBM plan enrollees would have considered the merged entity to be their preferred pharmacy chain, leaving PBMs with less attractive options for assembling networks that did not include the merged firm. This would have empowered the merged firm successfully to charge higher dispensing fees as a condition of participating in a network.

Commission staff determined that the merger was likely substantially to lessen competition in the relevant market of sales to PBMs and similar customers who needed a network of pharmacies. The Commission voted to challenge the merger, stating that "the proposed Rite Aid-Revco merger is the first drug store merger where the focus has been on anticompetitive price increases to the growing numbers of employees covered by these pharmacy benefit plans, rather than exclusively focusing on the cash paying customer." The parties subsequently abandoned the deal.

Many mergers, in a wide variety of industries, potentially have effects in more than one relevant geographic market or product market and require independent competitive assessments for each market.

Suiza–Broughton **(DOJ 1998)** The Department challenged the proposed acquisition of Broughton Foods Co. by Suiza Foods Corp. Suiza was a nationwide operator of milk processing plants with four dairies in Kentucky and Tennessee. Broughton operated two dairies, including the Southern Belle Dairy in Pulaski County, Kentucky. The two companies competed in the sale of milk and other dairy products to grocery stores, convenience stores, schools, and institutions. The Department's investigation focused on schools, many of which require daily, or every-other-day, delivery. School districts procured the milk through annual contracts, each of which the

Department found to be an entirely separate competition. Thus, the Department defined 55 relevant markets, each consisting of a school district in south central Kentucky in which the proposed merger threatened competition. The Department's complaint was resolved by a consent decree requiring divestiture of the Southern Belle Dairy.

NAT, L.C.–D.R. Partners **(DOJ 1995)** The Department and private plaintiffs challenged the consummated acquisition of the *Northwest Arkansas Times* by interests owning the competing *Morning News of Northwest Arkansas*. The Department concluded that the acquisition likely would harm subscribers of these newspapers as well as local advertisers, and defined separate relevant markets for readers and local advertisers. The Department found that both markets included only daily newspapers because of unique characteristics valued by readers and local advertisers, and concluded that the acquisition likely would harm both groups of customers. The courts required rescission of the acquisition.

Market Definition and Competitive Effects Analyses May Involve the Same Facts

Often the same information is relevant to multiple aspects of the analysis. For example, regarding mergers that raise the concern that the merged firm would be able to exercise unilateral market power, the Agencies often use the same data and information both to define the relevant market and to ascertain whether the merger is likely to have a significant unilateral anticompetitive effect.

General Mills–Pillsbury **(FTC 2001)** General Mills, Inc. proposed to acquire The Pillsbury Co. General Mills owned the Betty Crocker brand of pancake mix and the Bisquick brand of all-purpose baking mix, a product that can be used to make pancakes as well as other products. Pillsbury owned the Hungry Jack pancake mix brand. An issue was whether the relevant product market for pancake mixes included Bisquick. General Mills' Betty Crocker pancake mix had a relatively small share of a candidate pancake mix market that excluded Bisquick, suggesting that the merger likely would not raise significant antitrust concerns in the candidate pancake mix market should the relevant market exclude Bisquick.

In addition to obtaining information from industry documents and interviews with industry participants on the correct contours of the relevant product market, FTC staff analyzed scanner data to address whether Bisquick competed with pancake mixes. Demand estimation revealed significant cross-price elasticities of demand between Bisquick and most of the individual pancake mix brands, suggesting that Bisquick competed in the same relevant market as pancake mixes. Merger simulation based on the elasticities calculated from the scanner data showed that if General Mills acquired Pillsbury it likely would unilaterally raise prices. All of the evidence taken together further confirmed that Pillsbury's Hungry Jack and Bisquick were significant substitutes, and the staff concluded that the relevant market included both pancake mixes and Bisquick. The parties resolved the competitive concerns in this market by selling Pillsbury's baking product line. No Commission action was taken.

Interstate Bakeries–Continental **(DOJ 1995)** The Department challenged Interstate Bakeries Corp.'s purchase of Continental Baking Co. from Ralston Purina Co. on the basis of likely unilateral effects in the sale of white pan bread. Econometric analysis determined that there were substantial cross-elasticities of demand between the Continental and Interstate brands of white pan bread. The Department used the estimated cross-elasticities in a merger simulation, which predicted that the merger was likely to result in price increases for those brands of 5–10%. The data used to estimate these elasticities also were used to estimate the elasticity of demand for white pan bread in the aggregate and for just "premium" brands of white pan bread. The latter estimation indicated that the relevant market was no broader than all white pan bread, despite some limited competition from other bread products and other sources of carbohydrates. The Department's challenge to the proposed merger was settled by a consent decree requiring divestiture of brands and related assets in the five metropolitan areas.

Integrated Analysis Takes into Account that Defined Market Boundaries Are Not Necessarily Precise or Rigid

For mergers involving relatively homogeneous products and distinct, identifiable geographic areas, with no substitute products or locations just outside the market boundaries, market definition is likely to be relatively easy and uncontroversial. The boundaries of a market are less clear-cut in merger cases that involve products or geographic areas for which substitutes exist along a continuum. The simple dichotomy of "in the market" or "out of the market" may not adequately capture the competitive interaction either of particularly close substitutes or of relatively distant substitutes.

Even when no readily apparent gap exists in the chain of substitutes, drawing a market boundary within the chain may be entirely appropriate when a hypothetical monopolist over just a segment of the chain of substitutes would raise prices significantly. Whenever the Agencies draw such a boundary, they recognize and account for the fact that an increase in prices within just that segment could cause significant sales to be lost to products or geographic areas outside the segment. Although these lost sales may be insufficient to deter a hypothetical monopolist from raising price significantly, combined with other factors, they may be sufficient to make anticompetitive effects an unlikely result of the merger.

Significance of Concentration and Market Share Statistics

Section 2 of the Guidelines explains that "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger." Indeed, the Agencies do not make enforcement decisions solely on the basis of market shares and concentration, but both measures nevertheless play an important role in the analysis. A merger in an industry in which all participants have low shares—especially low shares in all plausible relevant markets—usually requires no significant investigation, because experience shows that such mergers normally pose no real threat to lessen competition substantially. For example, if the merging parties are small producers of a homogeneous product, operating in a geographic area where many other producers of the same homogeneous product also are located, the Agencies may conclude that the merger likely raises no competition concerns without ever determining the precise contours of the market. By contrast, mergers occurring in industries characterized by high shares in at least one plausible relevant market usually require additional analysis and consideration of factors in addition to market share.

Section 1.51 of the Guidelines sets out the general standards, based on market shares and concentration, that the Agencies use to determine whether a proposed merger ordinarily requires further analysis. The Agencies use the Herfindahl-Hirschman Index ("HHI"), which is the sum of the squares of the market shares of all market participants, as the measure of market concentration. In particular, the Agencies rely on the "change in the HHI," which is twice the product of the market shares of the merging firms, and the "post-merger HHI," which is the HHI before the merger plus the change in the HHI. Section 1.51 sets out zones defined by the HHI and the change in the HHI within which mergers ordinarily will not require additional analysis. Proposed mergers ordinarily require no further analysis if (a) the post-merger HHI is under 1000; (b) the post-merger HHI falls between 1000 and 1800, and the change in the HHI is less than 100; or (c) the post-merger HHI is above 1800, and the change in the HHI is less than 50.

The Agencies' joint publication of Merger Challenges Data, Fiscal Years 1999–2003 (issued December 18, 2003), and the Commission's publication of Horizontal Merger Investigation Data, Fiscal Years 1996–2003 (issued February 2, 2004 and revised August 31, 2004), document that the Agencies have often not challenged mergers involving market shares and concentration that fall outside the zones set forth in Guidelines section 1.51. This does not mean that the zones are not meaningful, but rather that market shares and concentration are but a "starting point" for the analysis, and that many mergers falling outside these three zones nevertheless, upon full consideration of the factual and economic evidence, are found unlikely substantially to lessen competition. Application of the Guidelines as an integrated whole to case-specific facts—not