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The Consumer Healthcare Data Market: Redefining Healthcare Mergers Through The Linked Consumer Retail Data and Health Insurance Markets

Thaddeus Sheehy Jr.

COMMENT

THE CONSUMER HEALTHCARE DATA MARKET: REDEFINING HEALTHCARE MERGERS THROUGH THE LINKED CONSUMER RETAIL DATA AND HEALTH INSURANCE MARKETS

By: Thaddeus Sheehy, Jr.*

INTRODUCTION

Antitrust laws, as discussed hereunder, are used to prevent competitors from merging when the newly-merged company would have a large enough market share to enable it to charge monopoly pricing and exert their monopoly power to control a competitive market.[1] As an example, Amazon and Google are not competitors and thus would not be heavily scrutinized under the antitrust laws. However, the two corporations would never be allowed to merge. But why? The answer is a simple one: data. Amazon and Google are both in entirely different industries; however, they are also competitors in the Consumer Data Market. The Consumer Data Market is the process of companies acquiring personal data on consumers in order to tailor and market products and services to consumers.[2]

However, within the broad Consumer Data Market, there can be well-defined submarkets.[3] This paper will focus on the well-defined Consumer Healthcare Data submarket, through an analysis of the Linked Health Insurance and the Consumer Retail Data Markets. Specifically, this analysis will address the well-defined submarket in *U.S. v. Aetna*, where the Medicare Advantage Plan Market was recognized as a well-defined Health Insurance

* Thaddeus C. Sheehy, Jr.: J.D. Candidate, 2019, University of Baltimore School of Law. I would like to first thank my family, friends, and especially my fiancé, Emily, for their love and support throughout law school. I would also like to thank my faculty advisor, Robert H. Lande, for his knowledge and guidance during my drafting process. Last, but certainly not least, I would like to thank the entire *University of Baltimore Law Forum* staff for all their hard work editing this comment.

[1] Sherman Anti-Trust Act 15 U.S.C. § 1 *et. seq.* (2004) [hereinafter "Sherman Act"]; Clayton Act 15 U.S.C. § 12 *et. seq.* (2002) [hereinafter "Clayton Act"].

[2] Meta S. Brown, *When and Where to Buy Consumer Data (And 12 Companies Who Sell It)*, FORBES (Sept. 30, 2015, 09:49 AM), https://www.forbes.com/sites/metabrown/2015/09/30/when-and-where-to-buy-consumer-data-and-12-companies-who-sell-it/#2d7ce0683285.

[3] Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (holding that within a broad market, "well-defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes"); *see also* FTC v. Staples, 970 F. Supp. 1066 (D.D.C. 1997).

Market.[4] In *Dino Rikos*, the Retail Sales Data Market was recognized as a relevant market when denying certiorari for a class action certification.[5] Finally, in *WELLPOINT,* the United States District Court for the Central District of California recognized that a Data Market could be directly and inextricably linked to a market to provide medical services (the "Consumer Healthcare Data Market").[6]

Generally, there are three types of mergers that occur in the healthcare industry: vertical,[7] horizontal,[8] and conglomerate.[9] A Linked Market exists when, at the time of the merger, the companies are using the data from the Consumer Retail Data Market to set the insurance rates in the Health Insurance Market.[10] Linked markets are generally hard to define and account for, which does not fit the model of the antitrust laws that were written before a digital market place.[11]

Since the passage of the Patient Protection and Affordable Care Act ("ACA"),[12] there has been an increasing trend of retail companies engaging mergers with healthcare companies. Examples of this include Amazon's acquisition of the online pharmacy, PillPack, or CVS Pharmacy's acquisition of the health insurance company, Aetna.[13] However, the government did not

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[4] *United States v. Aetna, Inc.,* 240 F. Supp. 3d 1 (2017) (holding that Aetna and Humana would not be allowed to merge due to the anti-competitive effects).

[5] *Rikos v. Procter & Gamble Co.*, No. 1:11-cv-226, 2014 WL 11370455 (S.D. Ohio June 19, 2014).

[6] *In re* WELLPOINT, Inc. Out-of-Network "UCR" Rates Litig., 865 F.Supp.2d 1002 (2011) ("The relevant product market is the market for data used to calculate UCRs (Usual, Customary, and Reasonable rates) for reimbursements of claims by health insurance beneficiaries for out-of-network, non-negotiated medical services (the 'Data Market'). The Data Market is directly and inextricably linked to the market for ONS (the 'Linked ONS Market') in that the Data Market constitutes the primary input to the Linked ONS Market, and the Insurer Conspirators use the Data Market to control and depress amounts reimbursed in the Linked ONS Market.").

[7] Roger Wohlner, *Mergers and Acquisitions: Definition*, INVESTOPEDIA, https://www.forbes.com/sites/metabrown/2015/09/30/when-and-where-to-buy-consumer-data-and-12-companies-who-sell-it/#2d7ce0683285 (last visited Feb. 13, 2019) (A vertical merger is a merger between "a customer and company or a supplier and company. This of a cone supplier merging with an ice cream maker.").

[8] *Id.* (A horizontal merger is a merger between "two companies that are in direct competition and share the same product lines and markets.").

[9] *Id.* (A Conglomerate merger is a merger between "two companies that have no common business areas.").

[10] *In Re WELLPOINT*, 865 F.Supp.2d 1002.

[11] *Id.*

[12] Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010).

[13] *See* Luke Lango, *Amazon's acquisition of PillPack is the Start of Something Big*, INVESTORPLACE (June 29, 2018, 10:03 AM), https://investorplace.com/2018/06/amazons-acquisition-pillpack-start-something-big/; Kenneth Yood, *WHAT SAY YOU, NEW YORK? Now that Federal Antitrust Regulators Have*

challenge these mergers, which leads to a strong presumption that these mergers were evaluated as conglomerate mergers. There are many pro-competitive reasons for firms to engage in conglomerate mergers, such as efficiency. However, with the advent of "Patient-Generated Health Data" ("PGHD"),[14] or data that is gathered by consumers from manual entries or the use of health-related information from smartphones and other wearables, access to a consumer's data has become more valuable. According to a recent complaint filed by the Federal Trade Commission ("FTC"), PGHD is considered health records data and demonstrates an attempt by the FTC to regulate healthcare data.[15]

Included with PGHD is information about a consumer's lifestyle choice.[16] For instance, large retail consumer data market companies such as Amazon can collect such information from the online purchases or grocery store choices of their customers from their subsidiary, Whole Foods.[17] The purchase of Whole Foods enables Amazon to get more precise and focused data than they are currently receiving from the use of their e-commerce platform, as grocery store purchases are "habitual and frequent."[18] The depth and breadth of access to data that Amazon, Walmart, and others in the Retail Consumer Data Market have about consumers raises serious antitrust issues that require careful analysis in order to protect consumers from monopolistic effects.[19] Due to these concerns, this paper will redefine the process for evaluating mergers between companies in the healthcare and retail industries

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Approved CVS's Proposed Acquisition of Aetna, Attention Turns to New York State, NAT'L L. REV. (Oct. 23, 2018), https://www.natlawreview.com/article/what-say-you-new-york-now-federal-antitrust-regulators-have-approved-cvs-s-proposed; Carl O'Donnell and Greg Roumeliotis, *Walmart talking with Humana on closer ties; acquisition possible: sources*, YAHOO FINANCE (Mar. 30, 2018), https://finance.yahoo.com/news/walmart-talking-humana-closer-ties-000530657.html.

[14] *What are patient-generated health data?*, HEALTH IT SECURITY (Jan. 19, 2018), https://www.healthit.gov/topic/otherhot-topics/what-are-patient-generated-health-data.

[15] Jessica Davis, *Facebook Accused of Exposing User Health Data in Complaint to FTC*, HEALTH IT SECURITY (Feb. 20, 2019), https://healthitsecurity.com/news/facebook-accused-of-exposing-user-health-data-in-ftc-complaint.

[16] *Id.*

[17] Greg Petro, *Amazon's Acquisition Of Whole Foods Is About Two Things: Data and Product*, FORBES (Aug. 2, 2017, 12:13 PM), https://www.forbes.com/sites/gregpetro/2017/08/02/amazons-acquisition-of-whole-foods-is-about-two-things-data-and-product/#277640eaa808.

[18] *Id.*

[19] Terrell McSweeny & Brian O'Dea, *Data, Innovation, and Potential Competition in Digital Markets – Looking Beyond Short-Term Price Effects in Merger Analysis*, FTC (Feb. 2018), https://www.ftc.gov/system/files/documents/public_statements/1321373/cpi-mcsweeny-odea.pdf.

by including an analysis of the direct and inextricable link in the Consumer Healthcare Data Market. Specifically, this paper will demonstrate the "link" between the Retail Sales Data and Insurance Markets through the anti-competitive effects of the potential merger between Walmart and Humana.

To understand how mergers are evaluated, Section I will discuss the background of antitrust law concerning mergers through the Twelve-Step Rule of Reason merger analysis. Section II will conduct a full Twelve-Step Rule of Reason merger analysis on the potential merger between Walmart and Humana and the threat this potential merger poses to consumers. Section III will propose stricter enforcement of the antitrust laws for mergers that affect Maryland and increased regulations on how companies are allowed to use the personal data of consumers.

I. BACKGROUND

When Congress passed the Sherman Anti-Trust Act in 1890 ("Sherman Act"),[20] the intent was a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[21] The Sherman Act and Clayton Act ensure that competition[22] is protected by precluding contracts or combinations that "unreasonably" restrain competition.[23] Together, these acts represent an effort by Congress to provide a reasonable curb to the confessed industrial and commercial abuses of the time as greed for profit ran wild.[24] With time the court developed a better understanding of the economic effects of corporations and evaluated whether a merger would unreasonably restrain trade by conducting an economic analysis of the relevant market.[25] The FTC's 2010 Horizontal Merger Guidelines ("2010 Guidelines")[26] that regulate acquisitions and

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[20] Sherman Anti-Trust Act 15 U.S.C. §1 *et seq.*; Clayton Act 15 U.S.C. §12 *et. seq.*
[21] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).
[22] Chelsea Levinson, *Types of Competition in Economics,* BIZFLUENT (June 08, 2018), https://bizfluent.com/info-7904519-types-competition-economics.html (competition is present in a market when there are a number of companies providing a product or service in the same market. When there is not sufficient competition in a market, a monopoly is present and leads to increased costs for consumers).
[23] *Standard Oil Co. v. United States*, 221 U.S. 1, 90 (1911); *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238-39 (1918).
[24] Charles Nagel, *The Origin and Purpose of the Sherman Act*, 15 ST. LOUIS L. REV. 313, 318-19 (1930), https://openscholarship.wustl.edu/law_lawreview/vol15/iss4/1.
[25] *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957).
[26] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, FTC (2010), *available at* http://ftc.gov/os/2010/08/100819hmg.pdf. [hereinafter, 2010 Guidelines].

mergers ("mergers") are subject to section 1 of the Sherman Act[27] and section 7 of the Clayton Act.[28] In order to demonstrate antitrust violations that would occur as the result of a proposed merger, the court requires the presence of several different factors.[29]

First, courts must determine the relevant product market (the "line of commerce").[30] Second, the courts must determine the relevant geographic market.[31] After defining both relevant markets, courts will be able to establish whether a merger is considered vertical, horizontal, or conglomerate.[32] A vertical merger is a merger between a customer and a company or a supplier and a company,[33] whereas a horizontal merger is a merger between two companies that are in direct competition and share the same product lines and markets,[34] and a conglomerate merger is a merger between two companies that have no common business areas.[35] If the Consumer Healthcare Data Market were considered a horizontal market that can be used to affect the healthcare and pricing decisions for Marylanders, courts apply the "Rule of Reason" analysis.[36]

The "Rule of Reason" analysis compares the pro-competitive and anti-competitive effects on the relevant product and geographic market at issue.[37] There are a number of ways that a court can analyze a potential merger, but where the anti-competitive effects are not intuitively obvious, the Twelve-Step Rule of Reason analysis needs to be conducted.[38] The method that this analysis will focus on is the more detailed twelve-step merger analysis because the Consumer Healthcare Data Market is a new way to look at

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[27] Sherman Anti-Trust Act § 1 *et. seq.*, (mergers subject to § 1 are prohibited if they constitute a "contract, combination . . . or conspiracy in restraint of trade . . . "); *see also* 2010 Guidelines, *supra* note 26, § 5.3, at 18-19.
[28] Clayton Act § 12 *et. seq.*, (mergers subject to § 7 are prohibited if their effect "may be substantially to lessen completion, or to tend to create a monopoly."); *see also* 2010 Guidelines, *supra* note 26, § 5.3, at 18-19.
[29] 2010 Guidelines, *supra* note 26, § 1, at 1.
[30] *du Pont*, 353 U.S. at 589.
[31] United States v. Phila. Nat'l Bank, 374 U.S. 321, 371-72 (1963) (holding that merging companies with greater than thirty percent market share cannot merge and that merging companies cannot counterbalance pro-competitive effects in one market with anti-competitive effects in another market).
[32] 2010 Guidelines, *supra* note 26, § 4, at 7.
[33] Mitchell Grant & Will Kenton, Horizontal Merger: INVESTOPEDIA, https://www.investopedia.com/terms/h/horizontalmerger.asp (last visited Sept. 24, 2019).
[34] *Id.*
[35] *Id.*
[36] *Standard Oil*, *supra* note 23.
[37] *Id.*
[38] FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.D.C. 2001); see also *California Dental Ass'n v. FTC*, 119 S.Ct. 1604, 1606 (1999).

mergers between the Consumer Retail Data and Health Insurance Markets. The Twelve-Step Rule of Reason merger analysis is:

> (1) product market definition; (2) geographic market definition; (3) number of market participants and relative market share; (4) market concentration; (5) unilateral effects with a corporation's ability to raise prices, decrease quality or variety of offerings, or raise a rival's costs; (6) potential for coordinated effects – such as collusion; (7) powerful buyers in the market; (8) ease of entry into the relevant market; (9) efficiencies in allowing the merger; (10) is there a failing company or division; (11) is this a merger of competing buyers; (12) or would this be considered a partial acquisition.[39]

The Twelve-Step Rule of Reason merger analysis contains several tests and methods in each step to determine the impact(s) a merger may have on consumers and competition.[40]

However, the Twelve-Step Rule of Reason analysis relies on a traditional price-based model for merger analysis that may not be effective in showing the anti-competitive effects.[41] This approach may not be effective because it is common for there to be two-sided markets where consumers provide information on themselves for "free" in one market, and where the information is used in a second market to charge for products or services.[42] Data is a competitive asset for a corporation, and some argue that data aggregation is not an issue because it does not prevent competitors from simultaneously using that data.[43] However, data with a competitive significance may be hard to obtain, and companies possessing that data will have little incentive to share.[44] Additionally, innovation in a merger may include a non-price dimension of current competition, such as the ability for companies to gather, store, and process PGHD.[45] Although the Rule of Reason analysis may not be effective in fully demonstrating the anti-

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[39] 2010 Guidelines, *supra* note 26; *see also* The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers, Department of Justice, available at: https://www.justice.gov/archives/atr/merger-guidelines-and-integration-efficiencies-antitrust-review-horizontal-mergers (last visited November 25, 2019)(explaining the integration of the Rule of Reason analysis into the Horizontal Merger Guidelines over time).

[40] *Id.*

[41] McSweeny & O'Dea, *supra* note 19, at 2.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*; *see also* 2010 Guidelines, supra note 26, at 2.

competitive effects, until the FTC changes its guidelines, it is the best and only tool provided for antitrust analysis.[46]

Since the issue of the anti-competitive effects from data has been plaguing our country, the FTC has created a new Technology Task Force ("Task Force").[47] The mandate of the Task Force includes reviewing mergers that have already been approved and challenging new mergers that could have anti-competitive effects.[48] However, the Task Force does not currently have a plan to change the 2010 Guidelines related to the technology sector.[49] Since the anti-competitive effects of the potential merger between Walmart and Humana are not intuitively obvious because the market is new and difficult to understand, the Twelve-Step Rule of Reason analysis is required to evaluate this potential merger.[50]

II. ISSUE

A. How the Consumer Healthcare Data Market can and has been used to set Health Insurers to Insurance Prices

The broad Consumer Data Market is essentially an abstract portrait of who an individual is, and more importantly whom an individual is when compared to other people.[51] Consumer data can be used to compromise individuals because companies are building models or avatars of individuals in the cloud and showing hundreds of thousands of videos to this avatar to see what advertising messaging is effective.[52] The purpose of companies doing this practice is to create a persuasion and prediction tool for consumers, and the Consumer Data Market is just in its infancy.[53] In years past, advertisers paid companies a cost per thousand views ("CPM") for a marketing campaign, but today companies in the Consumer Data Market are paid on a cost per action ("CPA").[54] The data a company acquires about consumers consists of

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[46] 2010 Guidelines, supra note 26, § 6.2, at 22.

[47] John McKinnon, *FTC's New Task Force Could Be Trouble for Big Tech*, WALL STREET J. (Feb. 28, 2019, 7:30 AM), https://www.wsj.com/articles/ftcs-new-task-force-could-be-trouble-for-big-tech-11551357000; *see also* Frank Bajak, *Top antitrust enforcer warns Big Tech over data collection*, Newstimes (Nov. 8, 2019) ("Antitrust enforcers cannot turn a blind eye to the serious competition questions that digital markets have raised").

[48] *Id.*

[49] *Id.*

[50] *California Dental Ass'n*, 119 S.Ct. at 1606.

[51] Jacob Ward, *Why data, not privacy, is the real danger*, NBC NEWS (Feb. 4, 2019, 2:49 PM), https://www.nbcnews.com/business/business-news/why-data-not-privacy-real-danger-n966621.

[52] *Id.*

[53] *Id.*

[54] *Id.*

intimate personal details (e.g. race or sexual orientation_ derived from their behavioral history and not the result of consumer disclosure to the company.[55] While it would be difficult to show the effect of data in our personal lives, the value of an individual's data, when combined with everyone else's data, is priceless, even without companies having access to healthcare data.[56]

For an example of how valuable and impactful it would be for a company to have access to data in healthcare, think of the data that Amazon and Walmart have on their consumers. These companies know what consumers purchased, what products they did not purchase, the location of the consumers, and which advertisements were effective on those consumers. Now, imagine that one of these companies has a consumer that regularly purchases soft drinks and junk food and is a customer for that company's healthcare business. Currently, health insurers are gathering lifestyle data on consumers to link patients' medical outcomes and costs to the details of their personal lives, like their level of education, net worth, retail purchases, family structure, and race.[57] The implication of this is a future where everything an individual does, purchases, eats, and time they spend watching television is used to determine how much that individual pays for health insurance.[58] That future, according to a research scientist from an unnamed insurance company, is today.[59]

In *WELLPOINT*, the data used to set consumers' rates for both out-of-network healthcare services and the Insurance Market were considered "Linked Markets."[60] A "Linked Market" can also be demonstrated in the Consumer Retail Data Market and the Medicare Advantage Plan Market, collectively, the Consumer Healthcare Data Market. Humana is one of the four largest companies to provide Medicare Advantage Plans to customers in Maryland.[61] Additionally, an estimated 95% of all consumers shopped at Walmart in 2016.[62] While this is not an exact figure for Walmart's market

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[55] *Id.*
[56] *Id.*
[57] Marshall Allen, *Health Insurers Are Vacuuming Up Details About You – And It Could Raise Your Rates*, PROPUBLICA (July 17, 2018, 5:00 AM), https://www.propublica.org/article/health-insurers-are-vacuuming-up-details-about-you-and-it-could-raise-your-rates.
[58] *Id.*
[59] *Id.* (When asked if customer data is used to set prices, "a research scientist from one company told (Allen): 'I can't say it hasn't happened.'").
[60] *In Re WELLPOINT*, 865 F. Supp. 2d at 1029-31.
[61] *Continued Enrollment Growth in Employer-Group Medicare Advantage*, MARK FARRAH ASSOCIATES (Oct. 31, 2018), https://www.markfarrah.com/mfa-briefs/continued-enrollment-growth-in-employer-group-medicare-advantage/.
[62] Krystina Gustafson, *Nearly every American spent money at Wal-Mart last year*, CNBC NEWS (Apr. 12, 2017, 9:58 AM),

share, it is the type of data that is difficult and costly to obtain that may operate as a barrier to entry for potential new entrants, or new competitive companies, in the Consumer Healthcare Data Market that raises anti-competitive concerns.[63]

In Maryland, there are approximately 107,000 Medicare Advantage Plan patients.[64] These patients represent approximately 36% of Maryland's total Medicare Beneficiaries in 2019, which is an 11.5% increase in the total Medicare Beneficiaries from 2018.[65] Humana has approximately 14% of the total Medicare Advantage customers in Maryland.[66] Additionally, Humana's Medicare Advantage Plan is available to 91% of beneficiaries nationally.[67] Further, Humana added more seniors to its individual Medicare Advantage plans than any of its rivals between 2013 and 2016.[68]

Because of Humana's prominence, the potential merger between Walmart and Humana would create a significant risk of anti-competitive effects that exist in Linked Markets.[69] The risk for anti-competitive effects is heighted by the current practice of insurance companies using consumer retail data to set rates for insurers.[70] Finally, since insurance companies are seeking to use the consumer data to set insurance premiums, Marylanders are at risk of Walmart and Humana gaining a sole monopoly position in the Consumer Healthcare Data Market.[71] Walmart would be able to accomplish this through the use of its sixty retail stores in Maryland.[72] This next section will apply the Twelve-Step Rule of Reason merger analysis to the potential merger between Walmart and Humana.

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https://www.cnbc.com/2017/04/12/nearly-every-american-spent-money-at-wal-mart-last-year.html.

[63] McSweeny, *supra* note 19, at 7.

[64] *Medicare Advantage in Maryland*, MEDICARE ADVANTAGE.COM, https://www.medicareadvantage.com/plans-by-state/maryland (last visited June 30, 2019).

[65] *Medicare Advantage premiums continue to decline while plan choices and benefits increase in 2019*, CENTERS FOR MEDICARE & MEDICAID SERVICES (Sept. 28, 2018), https://www.cms.gov/newsroom/press-releases/medicare-advantage-premiums-continue-decline-while-plan-choices-and-benefits-increase-2019 (This is an estimated figure based on the total national numbers).

[66] *Continued Enrollment Growth in Employer-Group Medicare Advantage*, *supra* note 61.

[67] *Aetna*, 240 F. Supp. 3d at 10.

[68] *Id.*

[69] *In Re WELLPOINT*, 865 F. Supp. 2d at 1002.

[70] Allen, *supra* note 57, at 3.

[71] Dana Mattioli, et al., *Walmart in Early-Stage Acquisition Talks With Humana*, WALL STREET J. (Mar. 29, 2018, 8:02 PM), https://www.wsj.com/articles/walmart-in-early-stage-acquisition-talks-with-humana-1522365618.

[72] *Walmart Location Facts, Maryland,* WALMART (last updated Feb. 1, 2019), https://corporate.walmart.com/our-story/locations/united-states/maryland#/united-states/maryland.

B. Application of the Twelve-Step Rule of Reason Analysis for the Potential Walmart-Humana Merger

1. (1) Defining the Relevant Product and (2) Geographic Markets

The most important and debated part of this analysis is the relevant product and the relevant geographic market definitions.[73] If the merger is not in the same market, or well-defined submarket,[74] it would either not have enough concentration or would not otherwise be subject to the strict horizontal merger analysis.[75] The geographic market's scope generally depends on transportation costs, but may also include language, regulations, tariff and non-tariff trade barriers, custom and familiarity, reputation, and service availability which may impede long-distance or international transactions.[76] For the purpose of the analysis of the immediate issue, the relevant geographic market will be Maryland.[77]

Defining the relevant product and geographic markets is the most important and divisive step of the merger analysis process.[78] The FTC's 2010 Guidelines provide two critical tools used to define the effects of a merger in the relevant product markets: the "hypothetical monopolist test" and the "Small but Significant but Non-Transitory Increase in Price" ("SSNIP") benchmark.[79] Together, both tests are used to define both the relevant product and geographic markets, which form the basis for any antitrust analysis.

The "hypothetical monopolist test" is used to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms.[80] This test requires that a product market "contain enough substitute products so that it could be subject to post-merger exercise of market power

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[73] Arthur N. Lerner, *Mergers: Antitrust Issues for Hospitals and Health Plans*, AM. HEALTH LAW.'S ASS'N, at 6, 16 (June 30 – July 2, 2008), https://www.crowell.com/documents/Mergers_Antitrust-Issues-for-Hospitals-and-Health-Plans_Lerner.pdf.
[74] F.T.C. v. Staples, Inc., 970 F. Supp. 1066, 1075 (D.D.C. 1997); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 325–26, 82 S. Ct. 1502, 1524, 8 L. Ed. 2d 510 (1962).
[75] 2010 Guidelines, *supra* note 26, § 1, at 1.
[76] *Id*.; *see also* United States v. Phila. Nat'l Bank, 374 U.S. 321, 363, 83 S. Ct. 1715, 1741, 10 L. Ed. 2d 915 (1963).
[77] 2010 Guidelines, *supra* note 26 ("The arena of competition affected by the merger may be geographically bounded if geography limits some customers' willingness or ability to substitute some products, or some suppliers' willingness or ability to serve some customers. Both supplier and customer locations can affect this.").
[78] Lerner, supra note 73.
[79] 2010 Guidelines, *supra* note 26, § 4.1.1, at 9.
[80] *Id.* §4.1, at 9.

significantly exceeding that existing absent the merger."[81] The specific requirement is that a "hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least… [SSNIP] on at least one product in the market, including at least one product sold by one of the merging firms."[82] The application of the SSNIP test involves interviewing consumers regarding buying decisions and determining whether a hypothetical monopolist could profit from a price increase of five percent for at least one year.[83]

When conducting a SSNIP test, all terms of sale of products outside of Maryland are held constant.[84] The SSNIP test is only a tool for the hypothetical monopolist test; it is not designed as a tolerance level for price increases resulting from the merger.[85] The SSNIP test in effect is defining the cross-elasticity of demand – a measurement to the responsiveness in the quantity demanded of one good when the price for another changes.[86] The hypothetical monopolist test may also include products that are not in the relevant market, so long as a customer would substitute with those products in response to a price increase.[87]

In *Aetna*, a SSNIP test concluded that individual Medicare Advantage plans constituted a relevant product market.[88] The SSNIP test imposed a SNNIP of 5% and 10%, and the Medicare Advantage Plan Market passed the hypothetical monopolist test for the majority of the 364 counties in the complaint.[89] While this is not an exact figure, because of the challenge involved in surveying thousands of Maryland Medicare Advantage Plan customers, it provides a useful guide of Humana's hypothetical monopolist position.[90]

However, for companies like Walmart, the SSNIP test will need to be conducted for a number of different product markets because the data could be used in various well-defined submarkets.[91] The product variances between Walmart and one of its competitors provides a practical application

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[81] *Id.*
[82] *Id.*
[83] *Id. a*t 10.
[84] *Id.*
[85] 2010 Guidelines, *supra* note 26, §4.1, at 9.
[86] Will Kenton, *Cross Elasticity of Demand*, INVESTOPEDIA, (last updated July 22, 2018), https://www.investopedia.com/terms/c/cross-elasticity-demand.asp.
[87] 2010 Guidelines, *supra* note 26, § 4.1, at 9.
[88] *Aetna*, 240 F. Supp. 3d at 35.
[89] *Id.* at 36.
[90] *Id*.
[91] *See generally Brown Shoe*, 370 U.S. 294.

of the SSNIP test.[92] As an example, Walmart's flu shot is "Product A," and its competitor's flu shot is "Product B." Each flu shot sells for $100, has an incremental cost of $60, and each company sells 1,200 units.[93] For every dollar increase in Product A with any given price for Product B, Product A loses twenty units of sales to products outside of this candidate market.[94] Ten units would also be lost to Product B.[95] Likewise, if the same price increase occurred with Product B, then ten units would be lost to Product A.[96] Economic analysis of this result demonstrates that Walmart and its competitor would raise their prices to $110 and satisfy a SSNIP test of up to 10%.[97] This is true despite the fact that two-thirds of the sales lost by one product are diverted to products outside of the relevant market with a price increase.[98] A SSNIP test of up to 10% means that Walmart would be able to charge monopoly pricing for its flu shots and competition would not likely be timely, sufficient, or likely to prohibit the anti-competitive effects.[99]

Additionally, when reviewing a merger, part of the review of the effects is to ensure that a merging company is not going to use its monopoly power in one market to gain monopoly power in another market.[100] For example, Walmart cannot use its monopoly power in retail sales market to gain monopoly power in the pharmaceutical market by providing a discount to Humana's Medicare Advantage Plan customers.

2. Determining the (3) Market Participants,[101] Market Shares,[102] and (4) Concentration in the Relevant Product and Geographic Markets

There are two primary ways that courts determine the relative product market concentration. In the FTC's 1968 Horizontal Merger Guidelines

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[92] *Flu Shots & Immunizations*, WALMART, https://www.walmart.com/cp/Immunizations-Flu-Shots/1228302 (last visited Mar. 11, 2019).
[93] 2010 Guidelines, *supra* note 26, § 4.1, at 9.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] 2010 Guidelines, *supra* note 26, § 4.1, at 9.
[100] *Phila. Nat'l Bank*, 374 U.S. 321.
[101] 2010 Guidelines, *supra* note 26, § 5.1 (explaining that market participants includes all firms currently earning revenue in the relevant market and firms that are not currently producing in the relevant market but would very likely provide rapid supply responses with a direct competitive impact in the event of a SSNIP, without incurring significant sunk costs).
[102] *Id.* § 5.2, at 16 (explaining that market shares are normally calculated with shares of all firms that currently produce products in the relevant market, provided that this data is available).

("1968 Guidelines"), the FTC used the Four-Firm Concentration Ratio ("CR4").[103] The CR4 is the sum of the largest four firms in the market shares, and if the merging firms are greater than thirty percent, the merger will not be permitted.[104]

In the FTC's 1982 Horizontal Merger Guidelines ("1982 Guidelines"), the FTC still used the CR4, but included a new measure of geographic market share[105]: the Herfindahl-Hirschman Index ("HHI").[106] However, in the FTC's 2010 Guidelines, the FTC abandoned the CR4 approach for the HHI approach to determine the target company's geographic market share.[107] While the 2010 Guidelines abandoned the use of the CR4 approach, it is still a useful tool used by the courts to determine the target company's product market share because the HHI is not always the best indicator.[108]

The HHI consists of the sums of the squares of all market participants' shares in the market before and after the merger based on the relative size of all firms.[109] The advantage of the HHI approach is that it takes into account every firm that participates in the market, rather than just the largest four firms in a market place.[110] "The HHI is calculated by taking the market share

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[103] Antitrust Div. Horizontal Merger Guidelines § 2, 16, U.S. DEP'T OF JUSTICE (1968) [hereinafter "1968 Guidelines"], http://www.justice.gov/atr/hmerger/11247.pdf.

[104] *Phila. Nat'l Bank*, 374 U.S. at 636-67 (holding that a merger with greater than thirty percent may substantially lessen competition because the newly merged company would have an undue percentage share of the relevant market. However, the merging companies may be able to rebut the notion that thirty percent market share may substantially lessen competition with a clear showing that the merger will not have this anti-competitive effect).

[105] See sources cited infra note 105 (as an example, in Maryland, CVS may have 50% of the prescription pharmacy revenue for consumers at home, while Walgreens has 20%, Grocery Stores have 20%, and locally-owned pharmacies have the rest).

[106] Antitrust Div. Horizontal Merger Guidelines § III.A at 12, U.S. DEP'T OF JUSTICE (1982) [hereinafter, "1982 Guidelines"], http://www.justice.gov/atr/hmerger/11248.pdf; *see also* U.S. Antitrust Div.'s Horizontal Merger Guidelines § 3.10 at 8-9, 12-13, U.S. DEP'T OF JUSTICE (1984) [hereinafter "1984 Guidelines"], http://www.justice.gov/atr/hmerger/11249.pdf.

[107] 2010 Guidelines, *supra* note 26 (The CR4 approach was abandoned because the HHI approach was seen as being able to include more of the marketplace by counting all companies in the relevant market, rather than just the largest four).

[108] *United States v. General Dynamics Corp.*, 415 U.S. 486, 501-04 (1974) (holding that past production and an HHI increase does not always predict future competitive effects. Despite the proposed merger and increase in HHI, all of the coal in the merger in issue had already been contracted and accounted for, so the increase in market concentration would not enhance General Dynamic's market power).

[109] Adam Hayes, *Herfindahl-Hirschman Index – HHI*, INVESTOPEDIA (Apr. 29, 2018) https://www.investopedia.com/terms/h/hhi.asp.

[110] *See id.* (Absent one of the largest four firms merging with a fifth firm that is not one of those largest four firms).

of each firm in the industry, squaring them, and summing the result" and can range up to an HHI of 10,000.[111] The HHI calculation results in a proportionately greater weight given to larger firms, since they have a larger market share than the smaller firms.[112] When conducting an HHI calculation, agencies such as the FTC, consider both the pre-merger level[113] of the HHI and the increase of HHI resulting from the merger.[114] The increase in the HHI level is equal to the squared sum of the merging firms and all other firms in the market.[115]

The 2010 Guidelines do not provide strict rules[116] to determine whether the increase in the defined relevant markets will raise significant anti-competitive concerns; however, it has set forth general standards.[117] The four general standards for measuring an increase in market share are Small Change in Concentration,[118] Unconcentrated Markets,[119] Moderately Concentrated Markets,[120] and Highly Concentrated Markets.[121] However, the presumption that the merger would lead to anti-competitive effects "may be rebutted with persuasive evidence that the merger is unlikely to enhance market power."[122] Additionally, the HHI calculation is more subject to error

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[111] *See Hayes*, *supra* note 108.
[112] 2010 Guidelines, *supra* note 26, § 5.3, at 18.
[113] 2010 Guidelines, *supra* note 26, § 5.3, at 18. (Noting that the pre-merger level of the market is the current concentration of the market based on the HHI levels of all competitors in the market prior to the merger commencing).
[114] 2010 Guidelines, *supra* note 26, § 5.3, at 18.
[115] 2010 Guidelines, *supra* note 26, § 5.3, at 18.
[116] 2010 Guidelines, *supra* note 26, § 1 (Explaining that the FTC stated that the purpose of the guidelines is to provide the business community and antitrust practitioners with the analytical process of the FTC, as well as assisting courts in developing an appropriate framework for interpreting and applying antitrust laws).
[117] *Id.* § 5.3, at 19.
[118] 2010 Guidelines, *supra* note 26, § 5.3, at 19 ("Mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis.").
[119] 2010 Guidelines, *supra* note 26, § 5.3, at 19 ("Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.").
[120] 2010 Guidelines, *supra* note 26 § 5.3, at 19 ("Mergers resulting in moderately concentrated markets that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.").
[121] 2010 Guidelines, *supra* note 26 § 5.3, at 19 ("Mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points potentially raise significant competitive concerns and often warrant scrutiny. Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.").
[122] 2010 Guidelines, *supra* note 26, § 5.3, at 19; *see also United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

than the CR4 approach because if a firm's percentage was 30%, but incorrectly measured at 35%, then the CR4 would only be off by 5%. However, application of the HHI calculation results in a 325 point increase.[123] For this reason, both the CR4 and HHI are critical when evaluating the market concentration in the relevant product and geographic markets.

In order to show the current market concentrations for the Consumer Retail Data and Medicare Advantage Plan Markets, this analysis will used an estimated CR4 and HHI approach.[124] For Humana, the following data is based on the 2017 national enrollment for Medicare Advantage Plans by the company.[125] The market shares are as follows: Company 1 is 24%, Humana is 17%, Company 3 is 13%, Company 4 is 8%, Company 5 is 7%, Company 6 is 3%, Company 7 is 2%, Company 8 is 2%, and the remaining companies are estimated at 1% each for the remaining 24% market share.[126] Under the CR4 approach, the merger would be presumed as anti-competitive if Humana was able to increase its market share to 30% as a result of the merger.[127] The pre-merger HHI level is 1,188, or an unconcentrated market.[128] Additionally, under either approach, since Walmart does not currently sell health insurance,[129] the market shares show that there would not be an increase in market share above a competitive level.

However, Walmart, in comparison, has a 95% market share in the Consumer Retail Data Market.[130] The 95% figure represents the estimated percentage of consumers in the United States that shopped at Walmart in 2016.[131] Walmart has the largest percentage of total United States retail customers of any company in the United States.[132] In *the Matter of Reed Elsevier*, FTC's consent decree stated that even though other firms could possess this relevant data, other companies may not be able to compete

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[123] Calculated as 35% market concentration as 35^2 = 1,225 and 30% market concentration as 30^2 = 900, and then subtracting the difference: 1,225 – 900 = 325.

[124] 2010 Guidelines, *supra* note 26, § 5.3, at 18 (explaining that this figure will be estimated because without the financial resources to be able to discover this information, it will be difficult to provide exact figures).

[125] Gretchen Jacobson, et al., *Medicare Advantage 2017 Spotlight: Enrollment Market Update*, KFF (June 6, 2017), https://www.kff.org/medicare/issue-brief/medicare-advantage-2017-spotlight-enrollment-market-update/.

[126] Jacobson, *supra* note 124.

[127] *Phila. Nat'l Bank*, 374 U.S. at 364.

[128] 2010 Guidelines, *supra* note 26, § 5.3, at 18 (HHI calculated as: 24^2 + 17^2 + 13^2 + 8^2 + 7^2+3^2 + 2^2 + 2^2 + 1^2*24 (representing the remaining 24% market share) =1,188).

[129] Walmart Inc., YAHOO! FINANCE, https://finance.yahoo.com/quote/WMT/profile (last updated Oct. 4, 2019, 4:00PM).

[130] Gustafson, *supra* note 62.

[131] Gustafson, *supra* note 62.

[132] Gustafson, *supra* note 62.

effectively because of the combination of data and analytics capabilities.[133] As a result of its data and analytics abilities,[134] Walmart continues growing in the online retail market with a projected sales increase of 35% in 2019.[135] This is exactly the type of monopoly power that Walmart has in the Consumer Retail Data Market that would lead to anti-competitive effects in the Consumer Healthcare Data Market.[136]

Presently, however, there are no competitors in the Consumer Healthcare Data Market.[137] So through the CR4 approach, the resulting merger would leave Walmart and Humana with essentially 100% market share. Under *Phila. Nat'l Bank*, this would be far greater than the 30% benchmark for courts to determine that the resulting merger would likely be anti-competitive.[138] Similarly, with the HHI approach, the resulting merger would lead to a concentration of 10,000 or a highly concentrated market.[139] The HHI is calculated by summing the squares of the pre-merger market share of "0" and the post-merger market share of "100."[140] With companies using information in the Consumer Retail Data Market in order to set health insurance rates, the Consumer Healthcare Data Market represents a Linked Market.[141] Through either the CR4 or HHI approach, the decision in *Alcoa* shows that the merger between Walmart and Humana would have a monopoly and monopoly power that is illegal *per se* in the Consumer Healthcare Data Market.[142]

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133 McSweeny, *supra* note 19 (citing Analysis of Agreement Containing Consent Order to Aid Public Comment, *In the Matter of Reed Elsevier and ChoicePoint,* File No. 081-0133 (Sept. 16, 2008) at 2-3), https://www.ftc.gov/sites/default/fles/documents/cases/2008/09/080916reedelseviercpanal.pdf.

134 Nandita Bose, *Walmart seeks ad business boost in fight with Amazon*, REUTERS (Feb. 26, 2019, 12:11 PM), https://www.reuters.com/article/us-walmart-suppliers-advertising-idUSKCN1QF25M. (Discussing the ad growth Walmart anticipates by consolidating advertising sales for its stores and websites).

135 Haris Anwar, *Walmart, Target Have Cracked The Online Sales Code, With Impressive Growth*, INVESTING.COM (Mar. 7, 2019, 1:30 AM), https://www.investing.com/analysis/one-big-reason-to-buy-shares-of-walmart-and-target-200395056.

136 *See* McSweeny, *supra* note 19, at 4.

137 Mattioli, *supra* note 72.

138 *Phila. Nat'l Bank*, 374 U.S. at 364.

139 2010 Guidelines, *supra* note 26, § 5.3, at 18.

140 2010 Guidelines, *supra* note 26, § 5, at 15.

141 Allen, *supra* note 57.

142 Gustafson, supra note 62. *See* 2010 Horizontal Merger Guidelines, *supra* note 26, § 5; *see also United States v. Aluminum Co. of America et al.*, 148 F.2d 416 (2d Cir. 1945).

3. (5) Unilateral Effects with a Corporation's Ability to Raise Prices, Decrease Quality or Variety of Product Offerings, or to Raise a Rival's Cost

When competition is eliminated between two firms competing in a relevant market by way of a merger, the resulting unilateral effects may alone substantially lessen competition.[143] Mergers are evaluated by agencies and courts to look at the effect that a merger will have on consumers in the relevant market place.[144] The Sherman Act represented an effort to provide a reasonable curb to the confessed industrial and commercial abuses of the time as greed for profit ran wild.[145] A merging corporation's ability to raise prices, decrease quality or variety of product offerings, or raising a rival's costs are at the heart of antitrust enforcement.[146]

Companies that engage in consolidation in a relevant product and geographic market are able to abuse their market power and raise prices above the competitive level.[147] According to a study by the Center for American Progress, one of the ways that this is happening in the healthcare industry is through healthcare provider consolidation.[148] The ability to raise prices through market power occurs in concentrated markets where a small number of competitors control most of the sales and generally have higher prices due to the lack of competition.[149] The SSNIP test is used to demonstrate incremental price increases.[150] The SSNIP test provides a tool to determine if a merging company can raise prices above the competitive level in the relevant market based on all available substitutes.[151] By measuring this cross-elasticity of demand with the SSNIP test, agencies and courts can determine if the merger will lead to increased pricing because of a product with a low cross-elasticity of demand.[152] However, as was seen in

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[143] 2010 Guidelines, *supra* note 26**,** § 6, at 20.
[144] Sherman Act, *supra* note 1 "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.".
[145] Nagel, *supra* note 24.
[146] 2010 Guidelines, *supra* note 26, § 6, at 20.
[147] 2010 Guidelines, *supra* note 26, § 6, at 20.
[148] Emily Gee & Ethan Gurwitz, *Provider Consolidation Drives Up Health Care Costs*, AMERICAN PROGRESS, Dec. 5, 2018, 8:00 AM, https://www.americanprogress.org/issues/healthcare/reports/2018/12/05/461780/provider-consolidation-drives-health-care-costs/.
[149] *Id.*
[150] 2010 Guidelines, *supra* note 26, § 4.1, at 9; *see also infra* Part II.B.i.
[151] du Pont, 353 U.S. 586; *see also* Satellite Television & Associated Resources, Inc. v. Cont'l Cablevision of Va., Inc., 714 F.2d 351, 356 (5th Cir. 1983), cert. denied.
[152] Will Kenton, *Cross Elasticity of Demand*, *supra* note 85; *see also* Staples, 970 F. Supp. at 1078-79 (*holding* that there was a low cross-elasticity of demand between the potential merging companies, Staples and Office Depot in comparison to other companies that sold office goods, such as Walmart. The court reasoned that many of the consumers that went to

du Pont, a SSNIP test could be an ineffective measurement because du Pont was already a monopoly charging monopoly prices.[153]

When a merging company has the incentive to reduce product quality after the merger is complete and independent of competitive responses from other firms, the reduction in quality is considered an anti-competitive effect that may substantially lessen competition.[154] The effects of reducing the quality or variety of product offerings may have a direct impact on consumers' ability to choose between products in a competitive market. As can be seen in *Brown Shoe*,[155] the unilateral effect of pricing occurs when raising rivals' costs, just as it would in raising the price of a merging company's own goods because of the detrimental effects to the consumer. In *Brown Shoe*, the effect of the horizontal and vertical merging of the manufacturing and retail facilities would have raised their rivals' costs by forcing their competitors to create more facilities to meet consumer demand.[156] The result, if not stopped prior to a merger occurring, is best seen in *Aspen Skiing*.[157] In *Aspen*, three of the four major ski resort areas in Aspen, Colorado, offered interchangeable lift tickets and refused to let the fourth resort engage in this interchangeable ticket when they had previously done so.[158] By doing so, the monopolist effectively decreased the variety of skiing options to consumers and raised their rival's costs because the fourth company was not able to benefit from the interchangeable tickets.[159]

The unilateral effects are readily apparent in the Consumer Healthcare Data Market, a differentiated market where some products are very close substitutes and compete strongly with one another, while other products are

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Staples or Office Depot for office supplies would not look to go to Walmart as an available substitute).

[153] du Pont, 353 U.S. 586; *see also* Aron & Burnstein, *Regulatory Policy and the Reverse Cellophane Fallacy* (Dec. 4, 2010), J. OF COMPETITION LAW AND ECON., Vol. 6, Issue 4, pp. 973-994, 2010. Available at SSRN: https://ssrn.com/abstract=1171292 (*discussing* that because du Pont already had a monopoly and was charging monopoly pricing, the SSNIP test was not an adequate measure of raising pricing at a competitive level in the marketplace).

[154] *FTC v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d 151, 173 (2000) (*holding* that the merger should be enjoined because the FTC demonstrated a "reasonable probability" that the merger may substantially lessen competition by reducing the quality and variety of the offerings).

[155] *Brown Shoe*, 370 U.S. at 324 (In Brown Shoe, the proposed merger was an integration of both vertical and horizontal mergers for shoe manufacturing and retail).

[156] *Brown Shoe*, 370 U.S. at 337-39.

[157] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 589-91 (1985).

[158] *Id.*

[159] *Id.* at 609-610 (*holding* that there was no valid reason for discontinuing the participation of the fourth ski resort in the interchangeable ticketing).

substitutes that are more distant and are not as strong of competitors.[160] As an example, BMW and Lexus sedans compete with each other for consumers more readily than either company does with a Dodge sedan. A merger between companies selling differentiated products may unilaterally raise one or both of the products above the pre-merger price and capture sales lost to the other differentiated product. In *Heinz*, both potentially merging companies were found to be selling in a differentiated "second-shelf" market for Gerber baby foods.[161] The post-merger ability to increase pricing was shown to likely substantially lessen competition because they were the only two companies selling in this "second-shelf" market by raising prices on those products against Gerber, who did not effectively compete with either company.[162] An example of Walmart and Humana's ability to unilaterally affect the market would be that the merger would result in forcing rivals in the Health Insurance Market to gain access to more consumer data in order to compete with the newly-merged company.

4. (6) Potential for Coordinated Effects

Mergers may enable or encourage post-merger coordinated effects, or collusion between firms in the relevant market that diminishes competition and ultimately harms consumers.[163] The reason this is analyzed and prohibited is that "collusion typically leads to monopoly-like outcomes, including monopoly profits that are shared by the colluding parties."[164] Firms involved in collusion are generally referred to as "cartels" when looking to harm consumers in the relevant market.[165] The simple way of thinking about this from a merger perspective is that when fewer firms are competing in a relevant market, collusion becomes easier. There are three types of collusion that can occur after a merger: Type I involves collective action to raise price

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[160] 2010 Guidelines, *supra* note 26, § 6.1, at 20-1.

[161] Heinz, 246 F.3d at 718 (A "second-shelf" market occurs when there is one dominate company in the relevant market, while other companies are competing for the "second spot on the shelf." As an example, in Maryland, Old Bay is known to have a monopoly on crab seasoning, while other companies compete for the "second-shelf" market).

[162] *Id.*

[163] 2010 Guidelines, *supra* note 26, § 7, at 24. ("Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others.").

[164] Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941 (2000).

[165] *Id.; see also* 2010 Guidelines, *supra* note 26, § 7, at 24. Collusion ("involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others.").

directly;[166] Type II involves disadvantaging rivals in a manner that causes the rivals output to diminish or causes their behavior to become chastened;[167] and Type III involves firms fixing the rules of competition in the relevant market.[168]

However, the ability of rival firms to engage in any type of collusion can depend on the market concentration and strength as well as the predictability of the rival firms in the market to respond to price or other competitive initiatives.[169] Additionally, when firms merge, it can increase market concentration to enable firms to strengthen their positions and to create more incentives for other firms in the market to act in a coordinated or collusive manner.[170] When looking at a merger, agencies are likely to challenge a merger if: "(1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) the market shows signs of vulnerability to coordinated conduct;[171] and (3) the agencies have a credible basis on which to conclude that the merger may enhance that vulnerability."[172]

As an example, if Walmart and Humana were allowed to merge, the merger would result in a monopoly in the Consumer Healthcare Data Market.[173] If another company entered the Consumer Healthcare Data Market, Walmart might have an incentive to collude, either explicitly or implicitly, with other firms. The incentive occurs when it allows Walmart and Humana to maintain its monopoly position and charge monopoly

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[166] Lande, *supra* note 163 "The monopoly outcome arises as the cartel members agree either to restrict output (such as OPEC), to raise prices, or to divide markets"; *See also du Pont*, *supra* note 25 where the FTC was unsuccessful in challenging this type of practice.

[167] *Id.* (*explaining* that there is type of collusion "consists of agreements to take action jointly to harm rivals that are not party to the collusion"); *see also* N.W. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co., 472 U.S. 284 (1985) (holding that a purchasing co-operative's joint effort to coerce suppliers and customers to deny a relationship that competitors needed was an illegal way to disadvantage a rival).

[168] *Id.* Type III collusion "includes instances of collusion that are often subtle and complex. Most examples of collusion to manipulate the rules of competition have arisen in industries with heterogeneous products, or in industries where it would be extremely difficult for a classic cartel to monitor prices or to detect firms that deviate from agreed-upon prices."; *see also* Calif. Dental Ass'n v. Fed. Trade Comm'n., 224 F.3d 942, 943 (9th Cir. 2000) (*holding* that the association's refusal to release X-rays from patients to insurers was a rule-making collusion that was per se illegal and similar to a refusal to compete on price that harmed consumers with higher insurance premiums.)

[169] 2010 Guidelines, *supra* note 26, § 7, at 24.

[170] 2010 Guidelines, *supra* note 26, § 7, at 25.

[171] 2010 Guidelines, *supra* note 26, § 7, at 25. (The market would show signs to vulnerability if there had been a history of collusion in the relevant market or failed attempts for collusive conduct in another geographic or product market).

[172] 2010 Guidelines, *supra* note 26, § 7.1, at 25.

[173] Allen, *supra* note 57.

pricing.[174] Additionally, as collusion relates to data, companies can easily share data, which is a practice that major companies have been under increased scrutiny for, such as Facebook.[175] Therefore, if Walmart and Humana were permitted to merge, there would be a strong potential for coordinated effects in the market.

5. (7) Powerful Buyers

Powerful buyers generally can negotiate favorable terms and lower costs based on the volume of business conducted, but the favorable terms can also reflect price discrimination in their favor.[176] When agencies review mergers, they consider whether the presence of powerful buyers obviates the potential for collusive activity.[177] If the merger consists of a powerful buyer in the marketplace, that buyer could also use their ability to negatively impact prices based on their volume of purchases.[178] As an example, Walmart is currently contracting with six healthcare organizations nationwide to provide its health plan-covered employees with no out-of-pocket costs for certain surgeries.[179] Another example of this practice is Amazon selling online ads to a chain of physical therapy centers with the intent of targeting customers who live near these centers and had recently bought knee braces through Amazon.[180] Walmart, after partnering with Google and Google Home, has the same capability as Amazon's Alexa to target consumers.[181] If powerful buyers like Walmart can enter the Consumer Healthcare Data Market with the amount

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[174] *See generally* Lande, *supra* note 163.

[175] Matt Weinberger, *Facebook is reportedly under criminal investigation over deals that gave Apple, Amazon, and other companies access to user data*, BUSINESS INSIDER, Mar. 13, 2019, https://www.businessinsider.com/facebook-criminal-investigation-data-sharing-2019-3.

[176] 2010 Guidelines, *supra* note 26, § 8, at 27.

[177] 2010 Guidelines, *supra* note 26, § 8, at 27. ("This can occur, for example, if powerful buyers have the ability and incentive to vertically integrate upstream or sponsor entry, or if the conduct or presence of large buyers undermines coordinated effects.").

[178] 2010 Guidelines, *supra* note 26, § 8, at 27. ("Agencies do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from a merger.").

[179] Chris Anderson, *Wal-Mart Emphasizes Outcomes, Value in Centers of Excellence Program*, HEALTHCARE FINANCE NEWS, Oct. 12, 2012, https://www.healthcarefinancenews.com/news/walmart-emphasizes-outcomes-value-centers-excellence-program.

[180] Karen Weise, *Amazon Knows What You Buy. And It's Building a Big Ad Business From It*, N.Y TIMES, Jan. 20, 2019, https://www.nytimes.com/2019/01/20/technology/amazon-ads-advertising.html.

[181] Daisuke Wakanayashi & Michael Corkery, *Google and Walmart Partner With Eye on Amazon*, N.Y. TIMES, Aug. 23, 2017, https://www.nytimes.com/2017/08/23/technology/google-walmart-e-commerce-partnership.html.

and sophistication of the data that they have on their consumers, they become a threat to the competitive market.

6. (8) Entry into the Relevant Market

When analyzing entry into the market, a reviewing agency will look at pre-existing plans that are induced by the merger.[182] The agency will consider the entry sufficient to alleviate any anti-competitive concern if entry into the relevant market is deemed "easy." [183] Entry into a relevant market is considered easy when such entry is "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[184] When evaluating timeliness, the entrance must be rapid enough to deter a potential monopolist from charging monopoly pricing, making it unprofitable because the new entrant to the market would, in theory, lower prices in order to take away market share from their rivals in the industry.[185] An entrant is likely to the relevant market if it is profitable for a firm to sell goods into that market.[186]

In *Heinz*, a new entrant to the market was not likely because of the barriers to entry, including economies of scale, high fees for getting the product into stores, lack of brand recognition, and lack of trust of the firms in the market.[187] However, even if an entry were to be both timely and likely, it may not be sufficient to counteract the anti-competitive effects.[188] For example, a new entrant into the healthcare market will likely not be a monopolist if that entrant is not able to provide targeted ads for potential new consumers based on their location services, a technique that Amazon employs.[189] The issue with the Consumer Healthcare Data Market is exactly the type of "valuable intangible asset, which may be difficult or time

[182] 2010 Guidelines, *supra* note 26, § 9, at 27-8. ("The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers.").
[183] 2010 Guidelines, *supra* note 26, § 9, at 27-8.
[184] 2010 Guidelines, *supra* note 26, § 9, at 27-8.
[185] 2010 Guidelines, *supra* note 26, § 9.1, at 29 ("The Agencies will not presume that an entrant can have a significant impact on prices before that entrant is ready to provide the relevant product to customers unless there is reliable evidence that anticipated future entry would have such an effect on prices.").
[186] 2010 Guidelines, *supra* note 26, § 9.2, at 29 ("[A]ccounting of assets, capabilities, and capital needed, and the risks involved, including the need for the entrant to incur costs that would not be recovered if the entrant later exits" the relevant market.").
[187] *Heinz*, 246 F.3d at 717 ("The district court found that there had been no significant entries in the baby food market in decades and that new entry was 'difficult and improbable.'").
[188] 2010 Guidelines, *supra* note 26, § 9, at 27-8.
[189] Weise, *supra* note 179.

consuming for an entrant to replicate," which would make an entry into the market unlikely to counteract the anti-competitive effects of a merger.[190] Companies would now have to acquire data on 95% of American consumers in order to remain competitive.[191]

7. (9) Efficiencies of the Merger; (10) Failing Companies or Divisions; (11) Mergers of Competing Buyers; and (12) Partial Acquisitions

When a company is charged with a merger that is perceived as anti-competitive, it may be able to combat that perception through an efficiency or failing company or division defense.[192] However, any efficiencies gained during a merger must be merger-specific.[193] An efficiency is considered to be merger-specific when the merging companies can demonstrate to a court that the efficiency would not be possible unless the companies were allowed to merge.[194] Walmart and Humana would likely be able to claim a number of efficiencies that would result from the merger, such as using Walmart to provide Humana with the largest information technology infrastructure of any company in the world.[195] Walmart would also be able to create a true one-stop-shop for customers through its stores and the healthcare clinics that Walmart is constructing.[196] Another efficiency the companies would be able to claim is that Humana customers would have the advantage with Walmart to negotiate rates for healthcare services, as they are doing now.[197]

However, as the decision in *Brown Shoe* demonstrates, claiming an efficiency defense can be difficult to prove.[198] In *Brown Shoe*, a case involving a horizontal and vertical merger, the efficiencies came from being able to integrate manufacturing and retail facilities.[199] However, the government met its burden of proof in showing that these integrated facilities had a tendency toward concentration in the market that would result in anti-competitive effects.[200] Similarly, in *Heinz*, the merger would have resulted in efficiencies such as economies of scale with manufacturing, better

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[190] 2010 Guidelines, *supra* note 26, § 9, at 27-8; *see also* McSweeny, *supra* note 19.
[191] *See WELLPOINT*, 865 F.Supp.2d at 1029-31.
[192] 2010 Guidelines, *supra* note 26, §§ 10, 11, at 29-31.
[193] *Heinz*, 246 F.3d at 721-22 n.20.
[194] *Id.*
[195] Kirk Heath, *Efficiency in healthcare: Lessons to learn from Amazon and Walmart*, BECKER'S HOSP. REV. (Mar. 13, 2019), https://www.beckershospitalreview.com/hospital-management-administration/efficiency-in-healthcare-lessons-to-learn-from-amazon-and-walmart.html.
[196] *Id.*
[197] Anderson, *supra* note 178.
[198] Brown Shoe, 370 U.S. at 326.
[199] *Id.* at 325-28.
[200] *Id.* at 332-33.

manufacturing processes, and better product formulas.[201] In *Heinz*, the merger was stopped because the efficiencies were not merger-specific, or in other words, could have been achieved by means other than through the merger.[202]

As in *Heinz*, the Walmart-Humana merger could likely achieve many of the potential efficiencies by other means, such as increased research and development for a better technology infrastructure.[203] Therefore, the merger should not be permitted on an efficiency basis because the efficiencies gained in the Walmart-Humana merger are not merger-specific.

A company needs to demonstrate to a court that absent a merger, the company or division would fail in order to assert the failing company or division defense.[204] Specifically, to demonstrate the failing company or division defense, a company shows that there is a grave probability that the business or division will fail,[205] and a failing company or division must show that it attempted to search for a less anti-competitive purchaser.[206] However, neither company is likely to raise this defense as both Walmart and Humana have strong earnings.[207]

Mergers of competing buyers, just like mergers of competing sellers, can enhance market power and lead to anti-competitive effects.[208] The market power of powerful buyers is sometimes referred to as "monopsony power" leading to "monoposonization" violations.[209] In evaluating monopsony concerns, the essential elements of monoposonization violations are the mirror image of the elements of monopolization.[210] Thus, the merger of competing buyers is likely to lessen competition in a manner that is harmful to sellers and, ultimately, consumers in a relevant market.[211]

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201 *see Heinz*, 246 F.3d at 722**.**
202 *Heinz*, 246 F.3d at 723-24.
203 *Heinz*, 246 F.3d at 722; *see also* Heath, *supra* note 194.
204 *See Citizen Publ'g Co. v. United States*, 394 U.S. 131, 138 (1969).
205 *Id.* at 138-40 (Explaining that although the fact that some companies may go out of business does not justify a cartel or joint venture.)
206 *Id.*
207 Bret Kenwell, *Trading Walmart Stock After Earnings Jump*, THESTREET (Feb. 19, 2019, 4:59 PM), https://www.thestreet.com/investing/earnings/trading-walmart-stock-after-earnings-14871045; Edmund Ingham, *Positive Earnings Report, Growth In Its Flagship Product And Focus On Personalised Health: Humana A Strong Growth Proposition For Short To Medium Term*, SEEKING ALPHA (Feb. 26, 2019, 10:37 AM), https://seekingalpha.com/article/4244218-positive-earnings-report-growth-flagship-product-focus-personalised-health-humana-strong.
208 2010 Guidelines, *supra* note 26, § 12, at 32-33.
209 2010 Guidelines, *supra* note 26, § 12, at 32.
210 *Allen v. Dairy Farmers of America, Inc.*, 2014-1 Trade Cas. (CCH) ¶ 78807, 2014 WL 2610613 (D. Vt. 2014).
211 2010 Guidelines, *supra* note 26, § 12, at 33.

Finally, the agencies also review acquisitions of minority positions involving competing firms, even if those minority positions do not necessarily eliminate competition between the parties to the transaction.[212] If an agency determines that the partial acquisition will result in effective control of or involve substantially all of the assets of the target firm, the partial acquisition will be analyzed just like a merger.[213] As an example, if Walmart partially acquired a substantial portion of shares in Walgreens, it may be able to influence the competitive conduct of Walgreens. Walmart could influence the competitive conduct of Walgreens through a voting interest that may give Walmart the power to appoint members to the board of directors. This acquisition of a minority position could directly impact Walgreens' competitive conduct, reduce the incentive of Walmart to compete with Walgreens,[214] or give Walmart access to competitively sensitive information from Walgreens.[215] In conclusion, the Twelve-Part Rule of Reason analysis applied to Walmart and Humana means that the hypothetical resulting merger would be anti-competitive and in violation of the Sherman and Clayton Acts.

III. SOLUTION

A. *The Need for Stricter State and Federal Enforcement*

Maryland's Attorney General has concurrent authority with the Department of Justice ("DOJ") and FTC under the Sherman and Clayton Acts to prevent mergers between companies in the Consumer Retail Data and Health Insurance Markets that unreasonably restrain trade.[216] As such, Maryland's Attorney General, the DOJ, and the FTC should take a new approach in analyzing mergers to prevent companies like Amazon and Walmart from gaining a foothold in the healthcare industry. The issue with new companies entering the Consumer Data Market is that "companies are not successful because they have a lot of data, they have a lot of data because

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[212] 2010 Guidelines, *supra* note 26, § 13, at 33.

[213] 2010 Guidelines, *supra* note 26, § 13, at 33.

[214] This would occur because Walmart would not have as much incentive to aggressively compete with Walgreens because it would share it the losses inflicted on Walgreens; *see* 2010 Guidelines, supra note 26, § 13 at 34.

[215] 2010 Guidelines, *supra* note 26, § 13, at 34 ("Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can lead to adverse conduct of the target firm, access to competitively sensitive information can lead to adverse unilateral or coordinated effects. For example, it can enhance the ability of the two firms to coordinate their behavior and make other accommodating responses faster and more targeted.").

[216] Sherman Act and Clayton Act, *supra* note 1.

they're successful."[217] Data is essentially the source of a company's intellectual capital, and to punish companies for it would be tantamount to discouraging success.[218]

Discouraging competition is against the basic principles of antitrust law in the United States,[219] but companies still cannot use their monopoly power in one market to gain monopoly power in another.[220] Even if the Consumer Healthcare Data Market was considered a "new market" for antitrust enforcement, the principles of preserving free and unfettered competition remain the same.[221] In *U.S. v. Microsoft*, the technology company was accused of abusing its monopoly power by integrating and bundling its operating services with its web browser software.[222] This would result in Microsoft having a monopoly in the web browser market in addition to its monopoly in the operating services market. However, the case was ultimately settled after the DOJ decided not to seek the break up of Microsoft, but rather to allow personal computer manufacturers to adopt non-Microsoft software.[223] The *Microsoft* case is a prime example of an enforcement action against a company in a new market that was using its intellectual property, similar to the way data is used in the Consumer Data Market, to exercise its monopoly power.[224]

To ensure success while bringing suit under the Sherman Act or FTC Act against potential monopolists in the Consumer Healthcare Data Market is through a detailed product definition.[225] By narrowly defining the product market, the market shares of the merging parties is often a prima facie showing of a violation of the antitrust laws.[226] For example, in *Staples*, the FTC was able to convince a U.S. District Court for the District of Columbia, that office supply stores were a completely separate market from other companies selling identical office supplies.[227] This case shows that through a narrow definition of the product market, it is not relevant that other

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[217] Nitasha Tiku, *Digital Privacy Is Making Antitrust Exciting Again*, WIRED, June 4, 2017, 08:15 PM, https://www.wired.com/2017/06/ntitrust-watchdogs-eye-big-techs-monopoly-data/.
[218] *Id.*
[219] Nagel, *supra* note 24.
[220] *Phila. Nat'l Bank*, 374 U.S. at 370.
[221] *See infra* Part I.
[222] *United States v. Microsoft Corp.*, 253 F.3d 34, 52-55 (D.C. Cir. 2001).
[223] *Id.*
[224] *Id.*
[225] *See infra* Part II.A.
[226] Caroline Varner and Heather Cooper, *Product Markets in Merger Cases: The Whole Foods Decision*, ABA (Oct. 2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct07_Varner.pdf.
[227] Varner, *supra* note 225; *see also* Staples, 970 F. Supp. 1066.

companies are providing similar products or services to consumers. On the other hand, when the relevant market is too broadly defined, it is unlikely that the merger will be found unlawful because the market shares of the merging entities are much smaller.[228] By focusing on a narrow product definition of the Consumer Healthcare Data Market, rather than the broad Consumer Data Market, and a narrow geographic market of Maryland, there will be a much better chance for enforcement success.[229]

Additionally, without narrowly defining the product market, any potential enforcement may run into similar issues that arose in *du Pont* with the Cellophane Fallacy.[230] In *du Pont*, the product market at issue was Cellophane, the water-proof plastic wrap that is used on cigarette boxes.[231] When defining the product market, du Pont was successful in convincing the court that it did not have a monopoly because Cellophane was also used on products other than cigarettes, such as meat.[232] Since Cellophane was a product that did not meet the hypothetical monopolist test based on its uses for products other than cigarettes, in addition to already charging monopoly pricing, the Cellophane Fallacy came into existence.[233] Had the government been able to narrow the market definition, to only apply to cigarette packaging, du Pont would have failed the hypothetical monopolist test because more consumers responded to a price increase for cigarette packaging.[234]

For Maryland's Attorney General to be successful in litigating the potential Walmart-Humana merger, they will need to follow the Twelve-Step Rule of Reason analysis to ensure that all of the pro-competitive and anti-competitive effects are fully understood. However, as demonstrated above,[235] the Achilles heel of antitrust enforcement actions has been a failure to narrowly define the relevant market. In the instant analysis, the Twelve-Step Rule of Reason analysis will lead to a demonstration that the merger between Walmart and Humana is anti-competitive. The Attorney General will be able to narrowly define Consumer Healthcare Data Market through the linked Consumer Retail Data and Health Insurance Markets. Additionally, by narrowly defining the Consumer Healthcare Data Market, the Attorney General will be able to show that a new market, driven by data, has been rapidly growing and has very real anti-competitive effects for Marylanders.

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228 Varner, *supra* note 225; *see also* Staples, 970 F. Supp. 1066.
229 Varner, *supra* note 225; *see also* Staples, 970 F. Supp. 1066.
230 du Pont, 353 U.S. 586.
231 *Id.*
232 *Id.*
233 *Id.*; *see also* Aaron, *supra* note 152.
234 *Id.*; *see also* Aaron, *supra* note 152.
235 *See infra* Part III.A.

Finally, the Attorney General needs to ensure that the demonstrated anti-competitive effects outweigh any pro-competitive effects.

B. *Increased Need for State and Federal Regulation*

As Microsoft lost the ability to have a PC monopoly with the browser market, in order to counter Walmart's monopoly power, users should be the primary owners of their data. While outside of the field of antitrust, state and federal regulators could accomplish this by permitting consumers the right to control their data, prevent companies from using it, or to withdraw their data in a usable format.[236] There are two recent examples of government regulators allowing consumers to have more control over their data. First, the European Union recently implemented the General Data Protection Requirements ("GDPR") that imposes strict penalties on companies that do not comply with its rules of data capture, storage, usage, and sharing.[237] Second, California recently passed a similar law to GDPR, the California Consumer Privacy Act ("CCPA") that makes California the developer of guidelines on consumer data, rather than a company's internal decision-makers.[238] While these legislative efforts focus on data privacy, rather than a curb on the antitrust violations in the Consumer Healthcare Data Market, the legislation represents a model for Maryland and the U.S. Government to follow.[239] The GDPR represented a cosmic shift in the use of enforcement actions to start to reign in the power of companies and protect consumers from the technology sector. However, that cosmic shift in enforcement actions still has many gaps that could be addressed with future legislation. Some of those gaps include how data should be addressed in antitrust enforcement and provide greater protection to consumers.

California's CCPA represents what is sure to be the first of many attempts by several states to address the use of consumer data by companies.[240] However, to promote consistent laws in commerce and to have a more effective enforcement mechanism that all states can follow, it would be more effective for Congress to address the issue. If Congress does not act to solve the issues with data in antitrust enforcement, Maryland should take steps to lead with antitrust regulations that protect Marylanders from anti-competitive

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236 McSweeny, *supra* note 19.
237 Adam Uzialko *How Businesses Are Collecting Data (And What They're Doing With It)*, BUS. NEWS DAILY, Aug. 3, 2018, 07:25 AM, https://www.businessnewsdaily.com/10625-businesses-collecting-data.html.
238 *Id.*
239 *Id.*
240 *Id.*

effects, as California has with consumer data in the CCPA. The federal government could seek to address this issue in two ways.

First, the DOJ or FTC could engage in rulemaking as prescribed by the Administrative Procedure Act's notice and comment process.[241] However, this process can be lengthy, and it would not have an immediate impact on the fast-growing Consumer Healthcare Data Market. This delay would leave consumers with higher prices until the notice and comment period ends. Second, Congress could enact legislation that specifically targets the Consumer Healthcare Data Market to prevent antitrust violations in the industry.

If regulators did increase consumers' rights to and control over their data, it might foster competition in the market to improve quality of services to retain customer data or lower barriers to entry for less data-rich innovators.[242] Additionally, by regulating the way that companies can use consumers' data and how consumers can monitor and control a company's use of their data, regulators can work to ensure a competitive market without the massive cost of antitrust litigation.[243]

IV. CONCLUSION

The Consumer Data Market, which is something that affects every citizen in the United States, has never been more important to focus on than now. Healthcare costs in the United States have continued to rise and present a massive issue for consumers who are seeking to address the exorbitant costs while maintaining a competitive healthcare market.[244] The federal government needs to take action by enforcing the current antitrust laws and creating new laws that will strengthen antitrust enforcement capabilities by accounting for changes in today's economy. These enforcement actions and new laws will continue to encourage businesses to be innovative while curbing rampant abuse by companies that are using their monopoly power to charge higher prices to consumers for healthcare services. Through data regulations, Maryland can protect its citizens from the potential abuse of their data in the healthcare industry and ensure that the healthcare market remains competitive.

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[241] Joshua Wright, *Expanding FTC's Rulemaking and Enforcement Authority*, FED. SOC'Y, May 26, 2010, https://fedsoc.org/commentary/publications/expanding-ftc-s-rulemaking-and-enforcement-authority.
[242] McSweeny, *supra* note 19.
[243] McSweeny, *supra* note 19.
[244] *See* Gurwitz, *supra* note 147.