MERGER GUIDELINES

1. Purpose. The purpose of these guidelines is to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under Section 7 of the Clayton Act. (Although mergers or acquisitions may also be challenged under the Sherman Act, commonly the challenge will be made under Section 7 of the Clayton Act and, accordingly, it is to this provision of law that the guidelines are directed.) The responsibilities of the Department of Justice under Section 7 are those of an enforcement agency, and these guidelines are announced solely as a statement of current Department policy, subject to change at any time without prior notice, for whatever assistance such statement may be in enabling interested persons to anticipate in a general way Department enforcement action under Section 7. Because the statements of enforcement policy contained in these guidelines must necessarily be framed in rather general terms, and because the critical factors in any particular guideline formulation may be evaluated differently by

the Department than by the parties, the guidelines should not be treated as a substitute for the Department's business review procedures, which make available statements of the Department's present enforcement intentions with regard to particular proposed mergers or acquisitions.

2. General Enforcement Policy. Within the over-all scheme of the Department's antitrust enforcement activity, the primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition. Market structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market, *i.e.*, by those market conditions which are fairly permanent or subject only to slow change (such as, principally, the number of substantial firms selling in the market, the relative sizes of their respective market shares, and the substantiality of barriers to the entry of new firms into the market). Thus, for example, a concentrated market structure, where a few firms account for a large share of the sales, tends to discourage vigorous price competition by the firms in the market and to encourage other kinds of conduct, such as use of inefficient methods of production or excessive promotional expenditures, of an economically undesirable nature. Moreover, not only does emphasis on market structure generally produce economic predictions that are fully adequate for the purposes of a statute that requires only a

showing that the effect of a merger "may be substantially to lessen competition, or to tend to create a monopoly," but an enforcement policy emphasizing a limited number of structural factors also facilitates both enforcement decision-making and business planning which involves anticipation of the Department's enforcement intent. Accordingly, the Department's enforcement activity under Section 7 is directed primarily toward the identification and prevention of those mergers which alter market structure in ways likely now or eventually to encourage or permit non-competitive conduct.

In certain exceptional circumstances, however, the structural factors used in these guidelines will not alone be conclusive, and the Department's enforcement activity will necessarily be based on a more complex and inclusive evaluation. This is sometimes the case, for example, where basic technological changes are creating new industries, or are significantly transforming older industries, in such fashion as to make current market boundaries and market structure of uncertain significance. In such unusual transitional situations application of the normal guideline standards may be inappropriate; and on assessing probable future developments, the Department may not sue despite nominal application of a particular guideline, or it may sue even though the guidelines, as normally applied, do not require the Department to challenge the merger. Similarly, in the area of conglomerate merger activity, the present incomplete state of knowledge concerning structure-conduct relationships may preclude sole reliance on the structural criteria used in these guidelines, as explained in paragraphs 17 and 20 below.

3. Market Definition. A rational appraisal of the probable competitive effects of a merger normally requires definition of one or more relevant markets. A market is any grouping of sales (or other commercial transactions) in which each of the firms whose sales are included enjoys some advantage in competing with those firms whose sales are not included. The advantage need not be great, for so long as it is significant it defines an area of effective competition among the included sellers in which the competition of the excluded sellers is, *ex hypothesi*, less effective. The process of market definition may result in identification of several appropriate markets in which to test the probable competitive effects of a particular merger.

A market is defined both in terms of its product dimension ("line of commerce") and its geographic dimension ("section of the country").

(i) Line of commerce. The sales of any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily constitute a relevant product market, even though, from the standpoint of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of price, quality, and use. On the other hand, the sales of two distinct products to a particular group of purchasers can also appropriately be grouped into a single market where the two products are reasonably interchangeable for that group in terms of price, quality, and use. In this latter case, however, it may be necessary also to include in that market the sales of one or more other products which are equally interchangeable with the two products in terms of price, quality, and use from the standpoint of that group of purchasers for whom the two products are interchangeable.

The reasons for employing the foregoing definitions may be stated as follows. In enforcing Section 7 the Department seeks primarily to prevent mergers which change market structure in a direction likely to create a power to behave non-competitively in the production and sale of any particular product, even though that power will ultimately be limited, though not nullified, by the presence of other similar products that, while reasonably interchangeable, are less than perfect substitutes. It is in no way inconsistent with this effort also to pursue a policy designed to prohibit mergers between firms selling distinct products where the result of the merger may be to create or enhance the companies' market power due to the fact that the products, though not perfectly substitutable by purchasers, are significant enough alternatives to constitute substantial competitive influences on the production, development or sale of each.

(ii) Section of the Country. The total sales of a product or service in any commercially significant section of the country (even as small as a single community), or aggregate of such sections, will ordinarily constitute a geographic market if firms engaged in selling the product make significant sales of the product to purchasers in the section or sections. The market need not be enlarged beyond any section meeting the foregoing test unless it clearly appears that there is no economic barrier (*e.g.*, significant transportation costs, lack of distribution facilities, customer inconvenience, or established consumer preference for existing products) that hinders the sale from outside the section to purchasers within the section; nor need the market be contracted to exclude some portion of the product sales made inside any section meeting the foregoing test unless it clearly appears that the portion of sales in question is made to a group of purchasers separated by a substantial economic barrier from the purchasers to whom the rest of the sales are made.

Because data limitations or other intrinsic difficulties will often make precise delineation of geographic markets impossible, there may often be two or more groupings of sales which may reasonably be treated as constituting a relevant geographic market. In such circumstances, the Department believes it to be ordinarily most consistent with the purposes of Section 7 to challenge any merger which appears to be illegal in any reasonable geographic market, even though in another reasonable market it would not appear to be illegal.

The market is ordinarily measured primarily by the dollar value of the sales or other transactions (e.g., shipments, leases) for the most recent twelve month period for which the necessary figures for the merging firms and their competitors are generally available. Where such figures are clearly unrepresentative, a different period will be used. In some markets, such as commercial banking, it is more appropriate to measure the market by other indicia, such as total deposits.

I. HORIZONTAL MERGERS

4. Enforcement Policy. With respect to mergers between direct competitors (i.e., horizontal mergers), the Department's enforcement activity under Section 7 of the Clayton Act has the following interrelated purposes: (1) preventing elimination as

an independent business entity of any company likely to have been a substantial competitive influence in a market; (ii) preventing any company or small group of companies from obtaining a position of dominance in a market; (iii) preventing significant increases in concentration in a market; and (iv) preserving significant possibilities for eventual deconcentration in a concentrated market.

In enforcing Section 7 against horizontal mergers, the Department accords primary significance to the size of the market share held by both the acquiring and the acquired firms. ("Acquiring firm" and "acquired firm" are used herein, in the case of horizontal mergers, simply as convenient designations of the firm with the larger market share and the firm with the smaller share, respectively, and do not refer to the legal form of the merger transaction.) The larger the market share held by the acquired firm, the more likely it is that the firm has been a substantial competitive influence in the market or that concentration in the market will be significantly increased. The larger the market share held by the acquiring firm, the more likely it is that an acquisition will move it toward, or further entrench it in, a position of dominance or of shared market power. Accordingly, the standards most often applied by the Department in determining whether to challenge horizontal mergers can be stated in terms of the sizes of the merging firms' market shares.

5. Market Highly Concentrated. In a market in which the shares of the four largest firms amount to approximately 75% or more, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

Acquiring Firm	Acquired Firm
4%	4% or more
10%	2% or more
15% or more	1% or more

(Percentages not shown in the above table should be interpolated proportionately to the percentages that are shown.)

6. Market Less Highly Concentrated. In a market in which the shares of the four largest firms amount to less than approximately 75%, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

Acquiring Firm	Acquired Firm
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25% or more	1% or more

(Percentages not shown in the above table should be interpolated proportionately to the percentages that are shown.)

7. Market With Trend Toward Concentration. The Department applies an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly

unconcentrated, in which there is a significant trend toward increased concentration. Such a trend is considered to be present when the aggregate market share of any grouping of the largest firms in the market from the two largest to the eight largest has increased by approximately 7% or more of the market over a period of time extending from any base year 5-10 years prior to the merger (excluding any year in which some abnormal fluctuation in market shares occurred) up to the time of the merger. The Department will ordinarily challenge any acquisition, by any firm in a grouping of such largest firms showing the requisite increase in market share, of any firm whose market share amounts to approximately 2% or more.

8. Non-Market Share Standards. Although in enforcing Section 7 against horizontal mergers the Department attaches primary importance to the market shares of the merging firms, achievement of the purposes of Section 7 occasionally requires the Department to challenge mergers which would not be challenged under the market share standards of Paragraphs 5, 6, and 7. The following are the two most common instances of this kind in which a challenge by the Department can ordinarily be anticipated:

(a) acquisition of a competitor which is a particularly "disturbing," "disruptive," or otherwise unusually competitive factor in the market; and

(b) a merger involving a substantial firm and a firm which, despite an insubstantial market share, possesses an unusual competitive potential or has an asset that confers an unusual competitive advantage (for example, the acquisition by a leading firm of a newcomer having a patent on a significantly improved product or production process).

There may also be certain horizontal mergers between makers of distinct products regarded as in the same line of commerce for reasons expressed in Paragraph 3(i) where some modification in the minimum market shares subject to challenge may be appropriate to reflect the imperfect substitutability of the two products.

9. <u>Failing Company</u>. A merger which the Department would otherwise challenge will ordinarily not be challenged if (i) the resources of one of the merging firms are so depleted and its prospects for rehabilitation so remote that the firm faces the clear probability of a business failure, and (ii) good faith efforts by the failing firm have failed to elicit a reasonable offer of acquisition more consistent with the purposes of Section 7 by a firm which intends to keep the failing firm in the market. The Department regards as failing only those firms with no reasonable prospect of remaining viable; it does not regard a firm as failing merely because the firm has been unprofitable for a period of time, has lost market position or failed to maintain its competitive position in some other respect, has

poor management, or has not fully explored the possibility of overcoming its difficulties through self-help.

In determining the applicability of the above standard to the acquisition of a failing division of a multi-market company, such factors as the difficulty in assessing the viability of a portion of a company, the possibility of arbitrary accounting practices, and the likelihood that an otherwise healthy company can rehabilitate one of its parts, will lead the Department to apply this standard only in the clearest of circumstances.

10. Economies. Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (*i.e.*, improvements in efficiency) because, among other reasons, (i) the Department's adherence to the standards will usually result in no challenge being made to mergers of the kind most likely to involve companies operating significantly below the size necessary to achieve significant economies of scale; (ii) where substantial economies are potentially available to a firm, they can normally be realized through internal expansion; and (iii) there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed for a merger.

II. VERTICAL MERGERS

11. Enforcement Policy. With respect to vertical mergers (i.e., acquisitions "backward" into a supplying market or "forward" into a purchasing market), the Department's enforcement activity under Section 7 of the Clayton Act, as in the merger field generally, is intended to prevent changes in market structure that are likely to lead over the course of time to significant anticompetitive consequences. In general, the Department believes that such consequences can be expected to occur whenever a particular vertical acquisition, or series of acquisitions, by one or more of the firms in a supplying or purchasing market, tends significantly to raise barriers to entry in either market or to disadvantage existing non-integrated or partly integrated firms in either market in ways unrelated to economic efficiency. (Barriers to entry are relatively stable market conditions which tend to increase the difficulty of potential competitors' entering the market as new sellers and which thus tend to limit the effectiveness of the potential competitors both as a restraint upon the behavior of firms in the market and as a source of additional actual competition.)

Barriers to entry resting on such factors as economies of scale in production and distribution are not questionable as such. But vertical mergers tend to raise barriers to entry in undesirable ways, particularly the following: (i) by foreclosing equal access to potential customers, thus reducing the ability of non-integrated firms to capture competitively the market share needed to achieve an efficient level of production, or imposing the burden of entry on an integrated basis (_i.e._, at both the supplying and purchasing levels) even though entry at a single level would permit efficient operation; (ii) by foreclosing equal access to potential suppliers, thus either increasing the risk of a price or supply squeeze on the new entrant or imposing the additional burden of entry as an integrated firm; or (iii) by facilitating promotional product differentiation, when the merger involves a manufacturing firm's acquisition of firms at the retail level. Besides impeding the entry of new sellers, the foregoing consequences of vertical mergers, if present, also artificially inhibit the expansion of presently competing sellers by conferring on the merged firm competitive advantages, unrelated to real economies of production or distribution, over non-integrated or partly integrated firms. While it is true that in some instances vertical integration may raise barriers to entry or disadvantage existing competitors only as the result of the achievement of significant economies of production or distribution (as, for example, where the increase in barriers is due to achievement of economies of integrated production through an alteration of the structure of the plant as well as of the firm), integration accomplished by a large vertical merger will usually raise entry barriers or disadvantage competitors to an extent not accounted for by, and wholly disproportionate to, such economies as may result from the merger.

It is, of course, difficult to identify with precision all circumstances in which vertical mergers are likely to have adverse effects on market structure of the kinds indicated in the previous paragraph. The Department believes, however, that the most important aims of its enforcement policy on vertical mergers can be satisfactorily stated by guidelines framed primarily in terms of the market shares of the merging firms and the conditions of entry which already exist in the relevant markets. These factors will ordinarily serve to identify most of the situations in which any of the various possible adverse effects of vertical mergers may occur and be of substantial competitive significance. With all vertical mergers it is necessary to consider the probable competitive consequences of the merger in both the market in which the supplying firm sells and the market in which the purchasing firm sells, although a significant adverse effect in either market will ordinarily result in a challenge by the Department. ("Supplying firm" and "purchasing firm," as used herein, refer to the two parties to the vertical merger transaction, the former of which sells a product in a market in which the latter buys that product.)

12. Supplying Firm's Market. In determining whether to challenge a vertical merger on the ground that it may significantly lessen existing or potential competition in the supplying firm's market, the Department attaches primary significance to (i) the market share of the supplying firm, (ii) the market share of the purchasing firm or firms, and (iii) the conditions of entry in the purchasing firm's market. Accordingly, the Department will ordinarily challenge a merger or series of mergers between a supplying firm, accounting for approximately 10% or more of the sales in its market, and one or more purchasing firms, accounting *in toto* for approximately 6% or more of the total purchases in that market, unless it clearly appears that there are no significant barriers to entry into the business of the purchasing firm or firms.

13. Purchasing Firm's Market. Although the standard of paragraph 12 is designed to identify vertical mergers having likely anticompetitive effects in the supplying firm's market, adherence by the Department to that standard will also normally result in challenges being made to most of the vertical mergers which may have adverse effects in the purchasing firm's market (*i.e.*, that market comprised of the purchasing firm and its competitors engaged in resale of the supplying firm's product or in the sale of a product whose manufacture requires the supplying firm's product) since adverse effects in the

purchasing firm's market will normally occur only as the result of significant vertical mergers involving supplying firms with market shares in excess of 10%. There remain, however, some important situations in which vertical mergers which are not subject to challenge under paragraph 12 (ordinarily because the purchasing firm accounts for less than 6% of the purchases in the supplying firm's market) will nonetheless be challenged by the Department on the ground that they raise entry barriers in the purchasing firm's market, or disadvantage the purchasing firm's competitors, by conferring upon the purchasing firm a significant supply advantage over unintegrated or partly integrated existing competitors or over potential competitors. The following paragraph sets forth the enforcement standard governing the most common of these situations.

If the product sold by the supplying firm and its competitors is either a complex one in which innovating changes by the various suppliers have been taking place, or is a scarce raw material or other product whose supply cannot be readily expanded to meet increased demand, the merged firm may have the power to use any temporary superiority, or any shortage, in the product of the supplying firm to put competitors of the purchasing firm at a disadvantage by refusing to sell the product to them (supply squeeze) or by narrowing the margin between the price at which it sells the product to the purchasing firm's competitors and the price at which the end-product is sold by the purchasing firm (price squeeze). Even where the merged firm has sufficient market power to impose a squeeze, it may well not always be economically rational for it actually to do so; but the Department believes that the increase in barriers to entry in the purchasing firm's market arising simply from the increased risk of a possible squeeze is sufficient to warrant prohibition of any merger between a supplier possessing significant market power and a substantial purchaser of any product meeting the above description. Accordingly, where such a product is a significant feature or ingredient of the end-product manufactured by the purchasing firm and its competitors, the Department will ordinarily challenge a merger or series of mergers between a supplying firm, accounting for approximately 20% or more of the sales in its market, and a purchasing firm or firms, accounting *in toto* for approximately 10% or more of the sales in the market in which it sells the product whose manufacture requires the supplying firm's product.

14. Non-Market Share Standards.

(a) Although in enforcing Section 7 against vertical mergers the Department attaches primary importance to the market shares of the merging firms and the conditions of entry in the relevant markets, achievement of the purposes of Section 7 occasionally requires the Department to challenge mergers which would not be challenged under the market share standards of paragraphs 12 and 13. Clearly the most common instances in which challenge by the Department can ordinarily be anticipated are acquisitions of suppliers or customers by major firms in an industry in which (i) there has been, or is developing, a significant trend toward vertical integration by merger such that the trend, if unchallenged, would probably raise barriers to entry or impose a competitive disadvantage on unintegrated or partly integrated firms, and (ii) it does not clearly appear that the particular acquisition will result in significant economies of production or distribution unrelated to advertising or other promotional economies.

(b) A less common special situation in which a challenge by the Department can ordinarily be anticipated is the acquisition by a firm of a customer or supplier for the purpose of increasing the difficulty of potential competitors in entering the market of either the acquiring or acquired firm, or for the purpose of putting competitors of either the acquiring or acquired firm at an unwarranted disadvantage.

15. Failing Company. The standards set forth in paragraph 9 are applied by the Department in determining whether to challenge a vertical merger.

16. Economies. Unless there are exceptional circumstances, and except as noted in paragraph 14(a), the Department will not

accept as a justification for an acquisition normally subject to challenge under its vertical merger standards the claim that the merger will produce economies, because, among other reasons, (i) where substantial economies of vertical integration are potentially available to a firm, they can normally be realized through internal expansion into the supplying or purchasing market, and (ii) where barriers prevent entry into the supplying or purchasing market by internal expansion, the Department's adherence to the vertical merger standards will in any event usually result in no challenge being made to the acquisition of a firm or firms of sufficient size to overcome or adequately minimize the barriers to entry.

III. CONGLOMERATE MERGERS

17. Enforcement Policy. Conglomerate mergers are mergers that are neither horizontal nor vertical as those terms are used in sections I and II, respectively, of these guidelines. (It should be noted that a market extension merger, i.e., one involving two firms selling the same product, but in different geographic markets, is classified as a conglomerate merger.) As with other kinds of mergers, the purpose of the Department's enforcement activity regarding conglomerate mergers is to prevent changes in market structure that appear likely over the course of time to cause a substantial lessening of the competition that would otherwise exist or to create a tendency toward monopoly.

At the present time, the Department regards two categories of conglomerate mergers as having sufficiently identifiable anticompetitive effects as to be the subject of relatively specific structural guidelines: mergers involving potential entrants (Paragraph 18) and mergers creating a danger of reciprocal buying (Paragraph 19).

Another important category of conglomerate mergers that will frequently be the subject of enforcement action--mergers which for one or more of several reasons threaten to entrench or enhance the market power of the acquired firm--is described generally in Paragraph 20.

As Paragraph 20 makes clear, enforcement action will also be taken against still other types of conglomerate mergers that on specific analysis appear anticompetitive. The fact that, as yet, the Department does not believe it useful to describe such other types of mergers in terms of a few major elements of market structure should in no sense be regarded as indicating that enforcement action will not be taken. Nor is it to be assumed that mergers of the type described in Paragraphs 18 and 19, but not covered by the specific rules thereof, may not be the subject of enforcement action if specific analysis indicates that they appear anticompetitive.

18. Mergers Involving Potential Entrants.

(a) Since potential competition (*i.e.*, the threat of entry, either through internal expansion or through acquisition and expansion of a small firm, by firms not already or only marginally in the market) may often be the most significant competitive limitation on the exercise of market power by leading firms, as well as the most likely source of additional actual competition, the Department will ordinarily challenge any merger between one of the most likely entrants into the market and:

(i) any firm with approximately 25% or more of the market;

(ii) one of the two largest firms in a market in which the shares of the two largest firms amount to approximately 50% or more;

(iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more; or

(iv) one of the eight largest firms in a market in which the shares of these firms amount to approximately 75% or more, provided either (A) the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market, or (B) the merging firm is a rapidly growing firm.

In determining whether a firm is one of the most likely potential entrants into a market, the Department accords primary significance to the firm's capability of entering on a competitively significant scale relative to the capability of other firms (i.e., the technological and financial resources available to it) and to the firm's economic incentive to enter (evidenced by, for example, the general attractiveness of the market in terms of risk and profit; or any special relationship of the firm to the market; or the firm's manifested interest in entry; or the natural expansion pattern of the firm; or the like).

(b) The Department will also ordinarily challenge a merger between an existing competitor in a market and a likely entrant, undertaken for the purpose of preventing the competitive "disturbance" or "disruption" that such entry might create.

(c) Unless there are exceptional circumstances, the Department will not accept as a justification for a merger inconsistent with the standards of this paragraph 18 the claim that the merger will produce economies, because, among other reasons, the Department believes that equivalent economies can be normally achieved either through internal expansion or through a small firm acquisition or other acquisition not inconsistent with the standards herein.

19. Mergers Creating Danger of Reciprocal Buying.

(a) Since reciprocal buying (i.e., favoring one's customer when making purchases of a product which is sold by the customer) is an economically unjustified business practice which confers a competitive advantage on the favored firm unrelated to the merits of its product, the Department will ordinarily challenge any merger which creates a significant danger of reciprocal buying. Unless it clearly appears that some special market factor makes remote the possibility that reciprocal buying behavior will actually occur, the Department considers that a significant danger of reciprocal buying is present whenever approximately 15% or more of the total purchases in a market in which one of the merging firms ("the selling firm") sells are accounted for by firms which also make substantial sales in markets where the other merging firm ("the buying firm") is both a substantial buyer and a more substantial buyer than all or most of the competitors of the selling firm.

(b) The Department will also ordinarily challenge (i) any merger undertaken for the purpose of facilitating the creation of reciprocal buying arrangements, and (ii) any merger creating the possibility of any substantial reciprocal buying where one (or both) of the merging firms has within the recent past, or the merged firm has after consummation of the merger, actually engaged in reciprocal buying, or attempted directly or indirectly to induce firms with which it deals to engage in reciprocal buying, in the product markets in which the possibility of reciprocal buying has been created.

(c) Unless there are exceptional circumstances, the Department will not accept as a justification for a merger creating a significant danger of reciprocal buying the claim that the merger will produce economies, because, among other reasons, the Department believes that in general equivalent economies can be achieved by the firms involved through other mergers not inconsistent with the standards of this paragraph 19.

20. Mergers Which Entrench Market Power and Other Conglomerate Mergers.

The Department will ordinarily investigate the possibility of anticompetitive consequences, and may in particular circumstances bring suit, where an acquisition of a leading firm in a relatively concentrated or rapidly concentrating market may serve to entrench or increase the market power of that firm or raise barriers to entry in that market. Examples of this type of merger include: (i) a merger which produces a very large disparity in absolute size between the merged firm and the largest remaining firms in the relevant markets, (ii) a merger of firms producing related products which may induce purchasers, concerned about the merged firm's possible use of leverage, to buy products of the merged firm rather than those of competitors, and (iii) a merger which may enhance the ability of the merged firm to increase product differentiation in the relevant markets.

Generally speaking, the conglomerate merger area involves novel problems that have not yet been subjected to as extensive or sustained analysis as those presented by horizontal and vertical mergers. It is for this reason that the Department's enforcement policy regarding the foregoing category of conglomerate mergers cannot be set forth with greater specificity. Moreover, the conglomerate merger field as a whole is one in which the Department considers it necessary, to a greater extent than with horizontal and vertical mergers, to carry on a continuous analysis and study of the ways in which mergers may have significant anticompetitive consequences in circumstances beyond those covered by these guidelines. For example, the Department has used Section 7 to prevent mergers which may diminish long-run possibilities of enhanced competition resulting from technological developments that may increase interproduct competition between industries whose products are presently relatively imperfect substitutes. Other areas where enforcement action will be deemed appropriate may also be identified on a case-by-case basis; and as the result of continuous analysis and study the Department may identify other categories of mergers that can be the subject of specific guidelines.

21. Failing Company. The standards set forth in paragraph 9 are normally applied by the Department in determining whether to challenge a conglomerate merger, except that in marginal cases

involving the application of Paragraph 18(a)(iii) and (iv) the Department may deem it inappropriate to sue under Section 7 even though the acquired firm is not "failing" in the strict sense.