

**Remarks of Charles A. James**  
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**on the occasion of the**  
**Twentieth Anniversary of the 1982 Merger Guidelines**  
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**GIANT STEPS**

On May 4, 1959, a 34-year-old John Coltrane entered the Manhattan studios of Atlantic Records to record his composition *Giant Steps*. A simple melody dissected and re-assembled into a series of varied but mathematically precise progressions, *Giant Steps* seemed to synthesize all that had come before it into an entirely new form. It was the next logical step, converging the strains from Charlie Parker's free improvisation, Miles Davis' melodic abstraction, Charles Mingus' rhythmic power and Thelonious Monk's trained orchestration. One of the famous but unverifiable stories of the time is that *Giant Steps* was such a major leap forward that Sonny Rollins, the then-reigning "Big Horn" of the day, saw Coltrane perform *Giant Steps* and refused for years to play in public, spending his evenings playing alone on the Brooklyn Bridge in a failed attempt to devise a worthy alternative.

*Giant Steps* changed forever the face of modern jazz music and is regarded by many enthusiasts as one of the most important and revolutionary saxophone performances of all time. For more than 40 years, it has stood as a defining moment of pure genius. Although there certainly have been wonderful jazz compositions and brilliant performances over the intervening years, nothing thus far has come close to *Giant Steps* as a quantum advance in the art form. Even John Coltrane, who spent the remainder of his short life exploring new musical styles and producing critically acclaimed recordings, found it impossible to innovate beyond *Giant Steps*. If he were alive to do it, John Coltrane could perform *Giant Steps* today in front of a sophisticated jazz audience and still be at the very cutting edge.

Antitrust seldom resembles art, but Bill Baxter's 1982 Merger Guidelines were every bit as significant in the field of antitrust as the recording of *Giant Steps* was in the field of modern jazz. The 1982 Guidelines were a revolutionary leap forward when they were first promulgated, and they have defined antitrust analysis of mergers, joint ventures and other structural issues for the past twenty years. No policy document issued by the antitrust agencies has been more enduring or far-reaching. It is only fitting that we celebrate both the 20<sup>th</sup> anniversary of the Baxter Guidelines and the legacy of the visionary Assistant Attorney General responsible for their creation.

Looking back over the 20 years since the Baxter Guidelines were announced in June of 1982, it is difficult to fathom the world of merger policy before them. Did we really define markets based almost entirely on circumstantial indications, such as company documents or whether producers of a particular product were all in the same trade association? Did we actually make enforcement decisions based upon little more than four- and eight-firm concentration ratios, without regard to actual shares held by individual firms? Did the courts actually sustain challenges to mergers producing a combined firm with less than five percent of the relevant market? Could it possibly have been the case that merger enforcement policy was blind to the potential competitive significance of entry conditions? Was there really a time in which merger-related efficiencies were viewed with such great skepticism as to be, at best, neutral, and, at worst, potentially harmful, in government merger review? Amazingly, the answer to each of the foregoing questions is a resounding yes.

In retrospect, it is even more amazing that the decision to move beyond the purely structural approach reflected in those policies was highly controversial at the time. Initially, the Baxter Guidelines were regarded as heresy by the activists who had dominated antitrust in the Sixties and Seventies. Having been promulgated by a Reagan-appointed Assistant Attorney General, the 1982 Guidelines were portrayed as an act of unilateral disarmament by the Reagan Justice Department, a blank check for corporate consolidation. Indeed, the State Attorneys General were so incensed by the Baxter Guidelines that they quickly published a set of counter guidelines that attempted to move merger policy in the exact opposite direction. Even some in the antitrust bar were critical of the Guidelines for their reliance on economic concepts, such as the "hypothetical monopolist" test for market definition. How, they asked, were these high-minded theoretical questions going to be answered in the context of real life merger investigations?

The critics notwithstanding, the Baxter Guidelines reflected an emerging consensus among those seeking to move beyond pure structure. One of their great strengths was the manner in which the 1982 Guidelines integrated the new economic learning without getting too far ahead of the emerging case law. Bill Baxter did not invent “entry” as an antitrust concept; he merely showed it to be a necessary component in the assessment of a merger’s competitive effects. Because the Baxter Guidelines could not be dismissed as a radical departure from existing law, the courts quickly became comfortable with using them as an analytical tool. In a very real sense, the Baxter Guidelines stepped in to fill the policy void created when the Supreme Court stopped granting certiorari in merger cases after its decision in *General Dynamics*.

The Baxter Guidelines were “Giant Steps” because they claimed so much policy ground in a single event. They transformed federal merger policy from a purely structural exercise riddled with circumstantial proxies and short-cuts into an honest attempt to assess the competitive consequences of proposed mergers employing the best available economic techniques and evidence. Over the past 20 years, the Guidelines have been revised on four occasions. Each revision, however, retains the basic Baxter formulation, making clarifying changes, not radical departures. Even the Jim Rill revisions in 1992, which reflect the most extensive re-write, merely elaborated upon the market definition, entry and competitive effects concepts the Baxter Guidelines had established ten years earlier -- “human steps,” if you will.

The papers we are publishing in this volume chronicle the ways in which the 1982 Guidelines changed the manner in which we analyze mergers and, indeed, competitive issues in general. They bring us up to the current state of merger analysis, showing how Bill Baxter set us upon a course of constant improvement and refinement. The legal and economic scholarship since the 1982 Guidelines were promulgated have allowed the agencies to move to a higher plane of competitive analysis. We have better tools, improved techniques, more probative evidence. It is significant, however, that much of the scholarship serves to confirm the vision, foresight and intrinsic soundness of the 1982 Guidelines. Assistant Attorney General Baxter and his Guidelines team are to be commended for this monumental contribution to the field of antitrust, and we, as their successors in the Antitrust Division, are truly honored to do so through this 20<sup>th</sup> anniversary celebration.