Statement of
Chairman Joseph Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson
Regarding Joint Department of Justice and Federal Trade Commission Vertical Merger Guidelines

Today, the Commission, with the Department of Justice, issues Vertical Merger Guidelines ("Guidelines") that describe the analytic framework the federal antitrust agencies will use to evaluate vertical and other non-horizontal mergers.

These Guidelines replace the framework for analyzing non-horizontal mergers contained in the Department of Justice's 1984 Merger Guidelines. They incorporate the agencies' accumulated knowledge from over 35 years of experience investigating and challenging anticompetitive non-horizontal mergers, as well as economic analysis on the potential harms and benefits of these types of mergers. They also benefit from well-informed public comments in response to our *Competition and Consumer Protection Hearings for the 21st Century* and to the draft Vertical Merger Guidelines put out for comment on January 10, 2020.

These Guidelines update the 1984 Merger Guidelines and more accurately reflect the agencies' current enforcement practices and policy. Central to this improvement is the more extensive treatment of the principal concern in any vertical merger review: How may a vertical merger create a firm with the ability and incentive to foreclose, in whole or in part, a rival from a relevant market and cause net harm to consumers?

These Guidelines substantially expand on unilateral theories of harm. The 1984 Guidelines focused on unilateral theories that required a rival to enter two markets, potentially simultaneously, which practically meant showing full or near full foreclosure of rivals' access to the merged entity's products or services. Although these new Guidelines continue to recognize that a vertical merger may create barriers to entry, including by creating the need for two-level entry by rival firms, they identify harm that may arise from full or partial foreclosure, through input foreclosure, customer foreclosure, and enhanced bargaining leverage that may result from a merger. They also address harm that may occur when a merged firm gains access to competitively sensitive information of rival firms that are also the merged firm's customers.

These Guidelines also present a broader treatment of the ways in which a vertical merger may make coordination more likely. They go beyond theories involving the elimination of a "disruptive buyer" and recognize that harm may result from the weakening or elimination of a maverick firm that played an important competitive role in any relevant market, whether downstream or upstream.

Like the 1984 Merger Guidelines, and the Horizontal Merger Guidelines routinely relied upon by the agencies, courts, and the private sector, these Guidelines recognize that mergers may yield cognizable efficiencies and have procompetitive effects that benefit competition and consumers. The discussion of efficiencies and procompetitive effects of vertical mergers includes an explanation of how vertical mergers can lower prices to consumers through the elimination of double marginalization, because the merged firm often pays less for an input it can supply to itself as a result of the merger. This benefit flows directly from the alignment of economic

incentives between the merging firms, which may also generate analogous efficiencies in mergers of complementary products. These cost savings are different in type than the efficiency claims often associated with horizontal mergers—*e.g.*, production, distribution, and research and development efficiencies that can be achieved by the elimination of duplicative efforts by the merging parties.

As mentioned above, we put out for comment a draft version of these Guidelines in January, and we received substantial, valuable input from the public in the form of 74 non-duplicative substantive comments. We also received useful comments from our *Hearings* and a public workshop hosted on March 11, 2020. This feedback has helped us make significant improvements to the January draft. Three changes are noteworthy.

1. The most significant change is that these Guidelines no longer suggest that certain vertical mergers—those where the merging parties' share of both a relevant market and related product are less than 20%—are unlikely to be anticompetitive. This was a major concern of our colleague Commissioner Slaughter,[1] many State Attorneys General, and a broad set of commenters.

2. These Guidelines clarify how the agencies will assess the elimination of double marginalization in three ways. They explain that the parties are expected to provide substantiation for claims that the merging firm will benefit from the elimination of double marginalization. They describe how the agencies evaluate whether the elimination of double marginalization is merger specific. And, they discuss how the agencies will use a common framework to assess the potential harm from full or partial foreclosure and the potential benefits from the elimination of double marginalization.

3. These Guidelines look beyond vertical mergers to include harms from diagonal mergers (those that combine firms or assets at different stages of competing supply chains) and mergers of complements.

The Guidelines respond to calls from our colleague Commissioner Slaughter[2] and many commenters, that the final version address the elimination of potential competition through merger. Specifically, Example 4 explains how a vertical merger can make entry by a potential competitor more difficult by requiring two-stage entry, or more generally by foreclosing access to a necessary asset. Moreover, the Guidelines acknowledge that, in some cases, one party to a vertical transaction may be a potential entrant into the vertically related market where the other party operates, and note that the agencies would evaluate these cases using the methods described in the Horizontal Merger Guidelines.[3]

---

[1] Statement of Commissioner Rebecca Kelly Slaughter, FTC-DOJ Draft Vertical Merger Guidelines at 3 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf.

[2] *Id*.

[3] The Horizontal Merger Guidelines recognize that a merger may eliminate a potential competitor, without regard to whether that potential competitor, is, at the time of the merger, in a horizontal or vertical position to the acquiring or acquired firm. If one of the parties to a vertical merger is a potential competitor to the other party to the merger (either at the upstream or downstream level), the elimination of that potential competition would be evaluated under the framework articulated in the Horizontal Merger Guidelines. The Commission routinely identifies mergers that

The Guidelines issued today mark an important development in U.S. merger enforcement and provide needed transparency into the agencies' evaluation of vertical mergers. As the agencies accumulate more experience and as the economic literature continues to evolve, these Guidelines may require further refinements. Towards that end, we encourage the academic and professional community to continue to study and assess the effects of vertical mergers so that we can continue to advance our understanding in this important area.

---

eliminate a potential competitor. *See, e.g.*, *Össur HF/College Park*, Docket No. C-4712 (2020), https://www.ftc.gov/system/files/documents/cases/1910177c4712ossurcomplaint.pdf; *BMS/Celgene*, Docket No. C-4690 (2019), https://www.ftc.gov/system/files/documents/cases/191_0061_c4690_bms_celgene_complaint_0.pdf; *Teva/Allergan*, Docket No. C-4589 (2016), https://www.ftc.gov/system/files/documents/cases/160915teva-allergan-cmpt.pdf; *Thoratec/Heartware*, Docket No. C-9339 (2009), https://www.ftc.gov/sites/default/files/documents/cases/2009/07/090730thorateadminccmpt.pdf; *Johnson & Johnson/Guidant*, Docket No. C-4154 (2005), https://www.ftc.gov/sites/default/files/documents/cases/2005/12/051227comp0510050.pdf. The Commission also may challenge a transaction that raises barriers to entry by potential competitors. *See, e.g.*, *Energy Transfer Equity/Williams*, Docket No. C-4577 (2016), https://www.ftc.gov/system/files/documents/cases/160608etecmpt.pdf; *Graco, Inc.*, Docket No. C-4399 (2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130418gracocmpt.pdf; *Hologic, Inc.*, Docket No. C-4165 (2006), https://www.ftc.gov/sites/default/files/documents/cases/2006/08/0510263hologiccomplaintfinal.pdf.