Office of Commissioner
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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

PREPARED REMARKS OF COMMISSIONER ROHIT CHOPRA

Regarding the Motion to Rescind the 2020 FTC-DOJ Vertical Merger Guidelines

September 15, 2021

One of the ways that the FTC can regain credibility is to be more analytically rigorous and draw upon a richer set of quantitative and qualitative data to better inform our decisions, rather than relying on discredited theoretical models about the economy. Last year, FTC Commissioners voted 3-2 to implement new Vertical Merger Guidelines. Although we received public comments highlighting the competitive dangers of vertical mergers and advances in our understanding of their effects, the Guidelines we issued relied on a series of unproven or disproven assumptions, giving a blueprint to companies seeking to engage in an illegal vertical merger. Issuing these guidelines was actually worse than doing nothing at all.

From agriculture to automobiles, COVID-19 has provided us with real-world examples of how excessive concentration and bottlenecks can be detrimental to families, businesses, and our national resilience.

One of the effects we are seeing of the growing concentration in our economy is supply shortages. Since the pandemic began, we have seen shortages of critical goods and manufacturing inputs, affecting vast segments of the economy. These shortages are not merely inconvenient—they are slowing the economic recovery from the pandemic. The Federal Reserve Board reports that economic growth has been frustrated by supply chain disruptions. Automobile sales are down, for example, because car makers can't buy microchips.[1] And businesses report "widespread concern about ongoing supply disruptions and resource shortages."[2] Small businesses are particularly harmed by these shortages, since dominant firms have the power to demand that their suppliers fill their orders first.

Unfortunately, merger analysis has increasingly come to focus on efficiencies. Efficiencies sound good—nobody wants to be inefficient—and companies seeking to avoid prosecution for illegal mergers constantly stress them. But what do we mean by the term? In some instances, it means cost cutting that reduces productive capacity and resilience.

For example, cost cuts sometimes come through the "rationalization" of so-called "excess" capacity. In plain language, sometimes a firm shuts down a production line. But what makes that capacity "excess"? The competitiveness of the market is a key factor. For a firm in a competitive

[1] Fed. Rsrv. Bd., The Beige Book (Sept. 8, 2021), https://www.federalreserve.gov/monetarypolicy/files/BeigeBook_20210908.pdf.
[2] *Id.*

market, “excess” capacity is an actually opportunity and an incentive to compete for business from new customers. For a dominant firm, however, there are few new customers to win, and no short-term incentive to maintain that extra capacity—so it gets cut. But markets change. Demand may quickly increase, or one competitor may be suddenly taken offline—perhaps its raw materials are wedged in the Suez Canal. The competitive market is resilient. All those competitors who had incentives to maintain the capacity to win more business can step up to meet the demand shock. But the dominant firm, having spent years “rationalizing” production, cannot.

Today, we are voting to withdraw the vertical merger guidelines. Vertical integration, as we all recognize, can lead to foreclosure of rivals and increased barriers to entry. When old rivals are pushed out and new rivals are kept out, you get rising concentration—potentially in two markets. In any type of merger that we might challenge, the result is less competition, less diversity of options, and less resilience.

Going forward, we need to take a hard look at our approach to efficiencies in merger review. We cannot ignore situations where firms in many sectors are becoming too big to fail, and their short-term cost-cutting measures create a risk of widespread shortages and outages. And we certainly shouldn’t trade off the many benefits of a competitive market—including supply chain resilience—for a theoretical short-term price cut.

I look forward to a broad examination of our failed policies of the past, and instead move toward a more rigorous analysis of business realities to chart a new path forward. Thank you, Madam Chair.