Concurring Statement of Christine S. Wilson

Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment

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Today the Commission – with the Department of Justice – issues draft Vertical Merger Guidelines for public comment. I concur in this action, which allows the Agencies to gather and consider input from the public before the Guidelines are finalized.

As a more general matter, I also concur with the decision to update and replace the outdated 1984 Non-Horizontal Merger Guidelines. Indeed, during the Commission's recently-concluded Hearings on Competition and Consumer Protection in the 21st Century, and particularly during the November 1, 2018 session on vertical mergers,[1] commentators almost unanimously called upon the Commission to issue modern guidance that explains how we assess vertical mergers today. Now, just over a year after that Hearing, the Agencies are responding with a timely and comprehensive draft.

I am pleased that the Agencies are working to create Guidelines that explain and formalize existing agency practices. In so doing, the Agencies will promote transparent and predictable enforcement.[2] That said, I believe the Guidelines will benefit from public input. I encourage comments from all interested and impacted constituencies, particularly on the following topics:

- **Elimination of Double Marginalization (EDM):** Should we align our treatment of EDM[3] more closely with the economic literature, which recognizes both its significant benefits and the many reasons that these benefits may not be achieved by contract?[4]

- **Symmetry:** Relatedly, given their close correlation,[5] should we assess both procompetitive merger effects (EDM) and anticompetitive merger effects (raising rivals costs, or RRC) symmetrically,[6] including the extent to which they are merger-specific?

- **Safe Harbor:** Given that vertical mergers are often procompetitive,[7] should we limit the area of antitrust concern to oligopoly markets,[8] and therefore should the Guidelines establish a definitive safe harbor when a merger involves only relatively unconcentrated markets?[9] And, if a safe harbor is appropriate, at what threshold should it apply?[10]

- **Market Definition:** When defining markets, should we continue to define two relevant product markets (one upstream, one downstream),[11] or should we adopt the looser requirement to define one relevant product market and identify a "related product?"[12]

- ***De Minimis* Effects:** What magnitude of anticompetitive effects should we view as *de minimis*, in light of EDM and likely vertical efficiencies?[13]

Given the unprecedented level of public involvement in our Hearings,[14] I expect we will receive a great deal of input, and I look forward to reviewing it all. And, with the benefit of those comments, I look forward to completing the process by issuing final Guidelines that reflect the governing law, existing agency practice, and economic literature.

[1] Fed. Trade Comm'n, Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law, Nov. 1, 2018, Georgetown Univ. Law Center, *materials available at* https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.

[2] *See* Christine S. Wilson, Vertical Merger Policy: What Do We Know and Where Do We Go?, Keynote Address at GCR Live, at 6-7, Feb. 1, 2019, *available at* https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf ("In each case, the ultimate goal is to promote transparent and predictable agency enforcement. Each of the goals I just listed – and in particular clarifying unsettled law and codifying existing agency practice – help the public understand how the agencies are likely to evaluate a given proposed transaction. We therefore ensure that parties contemplating an anticompetitive transaction know we are likely to challenge it. On the other side of the coin, we also ensure we do not chill procompetitive transactions that we are unlikely to challenge. Guidelines similarly inform Congress, the press, and other constituencies.").

[3] *See* Draft Vertical Merger Guidelines § 6 ("The effects of the elimination of double marginalization may be lower if, prior to the merger, the merging parties already engaged in contracting that aligned their incentives, for example by using a two-part tariff with a fixed fee and low unit prices that incorporate no, or a small, margin.").

[4] *See, e.g.*, Paul L. Joskow, *Vertical Integration*, *in* HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 321 (C. Menard & M. Shirley eds., 2008) (summarizing the literature on various forms of vertical integration, from contracting to merger, and explaining that "[c]ontractual incompleteness, and its interaction with the attributes of different types of transactional attributes including asset specificity, complexity, and uncertainty, plays a central role in the evaluation of the relative costs of governance through market-based bilateral contracts versus governance through internal organization"); Oliver E. Williamson, *The Theory of the Firm as Governance Structure: From Choice to Contract*, 16 J. ECON. PERSP. 171, 179-192 (2002) (describing the "make-versus-buy" decision, graphing the relative attractiveness of various options, and addressing its application to vertical integration); Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297 (1978) (identifying "the possibility of post-contractual opportunistic behavior" as one reason a firm may choose "an intrafirm rather than an interfirm transaction"); *see also* R.H. Coase, *The Nature of the Firm*, 4 ECONOMETRICA 386 (1937).

[5] *See, e.g.*, Gopal Das Varma & Martino De Stefano, Equilibrium Analysis of Vertical Mergers (2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3307150 ("In this paper, we show that RRC and EDM are not two separate effects. Instead, they are inseparably linked because the extent of EDM affects the strength of the RRC incentive, making EDM to be [sic] not just a stand-alone competitive benefit to be weighed against RRC.").

[6] *See, e.g.*, Christine S. Wilson, There's Nothing New Under the Sun: Why Professor Roger Blair of the University of Florida Is *Still* Right About Vertical Integration; Remarks at the University of Florida Competition Policy Enforcement Conference, at 14-15, Nov. 1, 2019, *available at* https://www.ftc.gov/system/files/documents/public_statements/1552631/wilson_remarks_-_florida_competition_policy_enforcement_conference_11-1-19.pdf (summarizing the underlying economics).

[7] *See, e.g.*, Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with other commentators that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases"); James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Merger Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 641 (2005) ("The theory shows that vertical practices potentially can harm competition. This finding is fragile, however, as anticompetitive equilibria emerge only under specific – and difficult to verify – assumptions about (among other things) costs, demand, the nature of input contracts, conditions of entry, the slope of reaction functions, and the information available to firms."); Michael A. Salinger, Is It Live or Is It Memorex? Models of Vertical Mergers and Antitrust Enforcement, Address at the Association of Competition Economics Seminar on Non-Horizontal Mergers, at 1, Sept. 7-8, 2005, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/it-live-or-it-memorex-models-vertical-mergers-and-antitrust-enforcement/050927isitlive.pdf (summarizing two economic papers "suggest[ing] that antitrust challenges to vertical mergers should be rare" because "there should be a presumption

that vertical mergers are pro-competitive" and there is "a relatively narrow set of circumstances under which these models predict an anticompetitive effect").

[8] *See, e.g.*, Steven C. Salop, Revising the Vertical Merger Guidelines: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century, at 8 (Nov. 1, 2018), *available at* https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf ("Enforcement should be focused on oligopoly markets," "[a] stronger overarching procompetitive presumption for vertical mergers does not make sense in oligopoly markets," and "[r]evised Vertical Merger Guidelines should reflect these points); Transcript at 19, 25, 116, 141, FTC Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5 (consumer welfare and vertical merger policy), *available at* https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf (statements of Prof. Salop and Mssrs. Hoffman and Yde agreeing that, in Mr. Yde's words, "we are only going to look at vertical transactions where we are confident that we are looking at an oligopoly at both stages").

[9] *See* Draft Vertical Merger Guidelines § 3 (explaining that "[t]he Agencies are unlikely to challenge a vertical merger where the parties to the merger have a share in the relevant market of less than 20 percent, and the related product is used in less than 20 percent of the relevant market," but then identifying "circumstances" in which "mergers with shares below the thresholds can give rise to competitive concerns" and rejecting the notion of "a rigid screen to separate competitively benign mergers from anticompetitive ones").

[10] For example, is the proposed 20 percent threshold consistent with our past cases, the Agencies' practices, and the somewhat higher thresholds (30 percent, with some exceptions) used in the European Union? *See* Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, 2008 O.J. (C 265) 9 ¶ 25 ("The Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30 % and the post-merger HHI is below 2,000.").

[11] *See, e.g.*, United States v. AT&T Inc., 310 F. Supp. 3d 161, 196 (D.D.C. 2018) (explaining that, "as will become clear in the ensuing discussion, examining the importance of Turner's content to distributors in the upstream programming market is a necessary (but not sufficient) step in evaluating the Government's increased-leverage theory" of harm in the proposed downstream product market for the "distribution of live-TV content to consumers").

[12] *See* Draft Vertical Merger Guidelines § 2 ("In any merger enforcement action involving a vertical merger, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. . . . When the Agencies identify a potential competitive concern in a relevant market, they will also specify one or more related products.").

[13] *See id.* § 5(a)(4) ("In identifying whether a vertical merger is likely to result in unilateral harm to competition through foreclosure or raising rivals' costs, the Agencies may consider whether: . . . [t]he magnitude of likely foreclosure or raising rivals' costs is not *de minimis*, such that it would substantially lessen competition.").

[14] We received hundreds of written comments, including fifteen specifically addressed to vertical merger policy. *See* Public Comments, FTC Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law, https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century.