

RICHARD BLUMENTHAL
CONNECTICUT

COMMITTEES:

AGING

ARMED SERVICES

COMMERCE, SCIENCE, AND TRANSPORTATION

JUDICIARY

VETERANS' AFFAIRS

United States Senate

WASHINGTON, DC 20510

706 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510

(202) 224-2823
FAX: (202) 224-9673

90 STATE HOUSE SQUARE, TENTH FLOOR
HARTFORD, CT 06103

(860) 258-6940
FAX: (860) 258-6958

915 LAFAYETTE BOULEVARD, SUITE 304
BRIDGEPORT, CT 06604

(203) 330-0598
FAX: (203) 330-0608

<http://blumenthal.senate.gov>

August 20, 2018

The Honorable Joseph Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Dear Chairman Simons:

I write pursuant to the Federal Trade Commission's (FTC) request for comments in preparation for the Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201), which are expected to begin next month and continue through January 2019. This comment – one of several I am submitting, pursuant to the Commission's request for a separate comment for each topic – responds to "Topic 6" of the announcement: "Evaluating the competitive effects of corporate acquisitions and mergers."

Antitrust authorities have generally taken a permissive approach to vertical mergers, often presuming that vertical mergers are typically pro-competitive. In light of such lax enforcement, firms have been able to pursue mergers and acquisitions with little fear of federal enforcement action.

Vertical merger enforcement remains stubbornly stuck in the past. The Non-Horizontal Merger Guidelines have not been revised since 1984. There have been numerous calls to update the Non-Horizontal Merger Guidelines; for instance, both the Antitrust Modernization Commission and the Antitrust Section of the American Bar Association have urged antitrust authorities to revise the guidelines.^{1 2} I would like to echo these calls for reform and believe that the upcoming set of hearings would be an opportune time to consider reforms to the current vertical merger enforcement regime and an opportunity to consider what sort of revisions ought to be codified in a revised edition of the Non-Horizontal Merger Guidelines. With this in mind, I urge you to seriously consider the following in any future appraisal of vertical merger enforcement:

¹ Antitrust Modernization Commission, "Reports and Recommendations," (Apr. 2007): 68, available at: https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

² American Bar Association Section of Antitrust Law, "Presidential Transition Report: The State of Antitrust Enforcement" (Jan. 2017), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.authcheckdam.pdf.

First, the FTC should take a balanced approach when considering the competitive impact of vertical mergers. The FTC and DOJ rarely investigate vertical mergers, typically opting to challenge, on average, only one vertical merger per year.³ While it is true that certain vertical combinations can be efficiency-enhancing, this is often not the case. From entry barriers to exclusionary conduct, the potential competitive harms associated with vertical mergers are well-documented.⁴ By presuming that vertical combinations are pro-competitive at the outset of merger review, antitrust authorities are encouraging false negatives and underdeterrence.⁵ The FTC's current approach encourages consolidation in a manner that harms both consumers and competition. The FTC should increase the number of vertical merger challenges. Efficiency is not an inevitability. FTC policy must reflect this reality.

Second, when analyzing proposed vertical mergers, as a best practice, the FTC should opt for structural remedies over behavioral ones wherever possible. Over the past few decades, a substantial portion of vertical enforcement actions have come in the form of behavioral remedies.⁶ Though some circumstances call for behavioral remedies, behavioral remedies often fail to adequately prevent misconduct. In horizontal mergers, the FTC has a clear preference for structural remedies; in the future, the FTC should more stringently apply structural remedies in vertical mergers as well.

Third, the FTC should investigate whether it would be wise to apply greater scrutiny to mergers initiated by dominant firms. FTC policy requires agency review in cases in which mergers exceed a particular monetary threshold. But in light of changes in the digital economy, such an approach may be insufficient. Should the FTC review acquisitions in which dominant firms make strategic acquisitions of firms valued under the threshold set under the Hart-Scott-Rodino Antitrust Improvements Act? Should the FTC apply greater scrutiny in mergers in which dominant firms procure large quantities of data, regardless of the financial value of the merger? The upcoming set of hearings provides a great opportunity to determine whether or not the FTC's current approach is sufficient to address the power of dominant incumbent firms.

I welcome this opportunity to help evaluate whether our antitrust and consumer protection laws are able to meaningfully address recent developments. In light of evidence demonstrating industrial consolidation across the economy, I take merger review very seriously. I hope that this formal self-reflection will lead to stronger and more robust enforcement of our laws, as well as new laws where warranted.

Sincerely,

³ Federal Trade Commission, Bureau of Competition, *Vertical Merger Enforcement at the FTC*, remarks by Acting Director D. Bruce Hoffman (Jan. 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf (noting that between 2000 and 2018, the FTC and DOJ have challenged 22 vertical mergers).

⁴ Steven C. Salop and Daniel P. Culley, "Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners" (2014), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2404&context=facpub>.

⁵ Steven C. Salop, "Invigorating Vertical Merger Enforcement," *Yale Law Journal* 127 no. 7 (2018): 1989.

⁶ Steven C. Salop and Daniel P. Culley, "Vertical Merger Enforcement Actions: 1994-2016" (2017), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2541&context=facpub>.

Richard Blumenthal
United States Senate