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

STATEMENT OF
COMMISSIONER REBECCA KELLY SLAUGHTER

FTC-DOJ Draft Vertical Merger Guidelines
Commission File No. P810034
January 10, 2020

Introduction

I write separately to explain why I cannot join my colleagues in voting to release these proposed Vertical Merger Guidelines ("Guidelines") for public comment and instead abstain. I come to this decision with some reluctance because I believe the 1984 Non-Horizontal Guidelines should be rescinded and rewritten and because I recognize the utility of public comments. I do not object to the public having an opportunity to comment on these proposed Guidelines, however my substantive concerns about the proposal in its current form rise to a level where I am unable to provide an endorsement of it.

General Concerns About Vertical Mergers

Vertical tie-ups are occurring across the economy, and they present an enforcement challenge that we must meet. In 2018, companies announced mergers at record rates,[1] and three of the five largest mergers announced between 2016 and the fall of 2018 had vertical components.[2] Moreover, some observers believe that the approval of recent high-profile vertical mergers by the courts and FTC and DOJ ("the Agencies") will spark further vertical merger activity.[3] Given the enormous impact that vertical mergers have and will have on the economy, I wrote extensively

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[1] *See* THOMSON REUTERS, MERGERS & ACQUISITIONS REVIEW, FIRST NINE MONTHS OF 2018 1–2, 5 (2018).
[2] *See id.*; THOMSON REUTERS, MERGERS & ACQUISITIONS REVIEW, FULL YEAR 2017 3, 6 (2017); THOMSON REUTERS, MERGERS & ACQUISITIONS REVIEW, FULL YEAR 2016 2, 6 (2016);); Press Release, U.S. Dep't of Justice, Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger (Oct. 10, 2018); Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on the Closing of Its Investigation of the Cigna-Express Scripts Merger (Sept. 17, 2018); Press Release, U.S. Dep't of Justice, Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner (Nov. 20, 2017); *see also* Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on UnitedHealth Group's Proposed Acquisition of DaVita Medical Group (June 19, 2019); Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on Staples' Acquisition of Office Supply Wholesaler Essendant Inc. (Jan. 28, 2019); Press Release, Eur. Comm'n, Commission Approves Acquisition of Rockwell Collins by UTC, Subject to Conditions (May 4, 2018); Press Release, U.S. Dep't of Justice, Lam Research Corp. and KLA-Tencor Corp. Abandon Merger Plans (Oct. 5, 2016).
[3] Tony Romm & Brian Fung, *AT&T-Time Warner Merger Approved, Setting the Stage for More Consolidation Across Corporate America*, WASH. POST, (June 12, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/06/12/att-time-warner-decision; Cecelia Kang, Brooks Barnes, & Michael J. de la Merced, *AT&T-Time Warner Ruling has Deal Makers Bracing*, N.Y. TIMES, (June 10, 2018), https://www.nytimes.com/2018/06/10/technology/att-time-warner-ruling.html.

about my views on them in relation to the Commission's 2019 decision regarding Sycamore Partners/Staples' acquisition of Essendant, the country's largest, and one of only two, nationwide office product wholesale distributors.[4] In that statement, I emphasized the following points:

- The importance of thoroughly investigating all potential theories of harm in vertical mergers in a forward looking manner to prevent anticompetitive mergers in their incipiency and without having to wait until the merger's anticompetitive effects come to fruition.
- Concern about an approach to vertical mergers that can be too credulous of claimed procompetitive benefits, while being more skeptical about the likelihood of anticompetitive harm.
- The requirement for parties, as they do in horizontal mergers, to demonstrate that claimed efficiencies are verifiable, merger-specific, do not arise from anticompetitive reductions in output or service, are not mitigated by any costs necessary to achieve the efficiencies, and fully offset the anticompetitive harm.
- The need to do more retrospective reviews of vertical mergers, especially on close cases—a vertical merger that raises meaningful competitive concerns, but where we have not identified sufficient evidence to justify a court challenge, or where we obtained a limited consent decree—which would help inform subsequent enforcement decisions, including a decision to challenge a consummated merger if necessary.
- Concern that there has been a history of under-enforcement of vertical mergers and that the Commission needs to be more willing to challenge and block vertical mergers.

Support for Updated Guidelines and Positive Aspects of the Current Proposal

Against that general backdrop, I consider the proposed Guidelines. Before outlining my concerns, I want to emphasize the positive attributes of these new Guidelines. First, it is critical that we replace the outdated 1984 Non-Horizontal Merger Guidelines. There is little dispute that those Guidelines do not accurately reflect the Agencies vertical merger investigative experience, enforcement actions, or the significant developments in research and learning over the past thirty-five years.[5]

I also want to acknowledge the importance of the proposed Guidelines rejecting the notion that vertical mergers are rarely anticompetitive and nearly always procompetitive.[6] Notably, these Guidelines do not create a presumption, rebuttable or otherwise, that vertical mergers are lawful. This draft rightly identifies several of the serious competitive risks that may be presented by vertical mergers, including foreclosure, raising rivals' costs, and access to competitively sensitive information about rivals. The Guidelines also import, via reference to Section 10 of the

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[4] Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Dissenting Statement In the Matter of Sycamore Partners II L.P, Staples, Inc., and Essendant, Inc., File No. 181-0180 (January 28, 2019).

[5] Comm'r Christine S. Wilson, Fed. Trade Comm'n, Concurring Statement on Publication of FTC-DOJ Draft Vertical Merger Guidelines for Public Comment, File No. P810034 (January 10, 2020); Comm'r Rohit Chopra, Fed. Trade Comm'n, Statement Concurring in Part and Dissenting in Part Regarding the Request for Comment on Vertical Merger Guidelines, File No. P810034 (January 10, 2020); Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L. J. 1962, 1983, n.85 (2018); Bryan Koenig, *DOJ Vertical Merger Guidelines Called "Badly Out Of Date,"* LAW360 (Nov. 1, 2018), https://www.law360.com/articles/1098243.

[6] *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF, 225–45 (1978).

Horizontal Merger Guidelines, the rigorous standard that the Agencies require for parties to substantiate and prove merger-specificity of efficiencies.[7]

Substantive Concerns with Proposed Guidelines

Despite these benefits, I have a number of concerns with the proposed Guidelines. My two primary objections are: (1) the effective safe harbor for firms with less than 20 percent market share, and (2) the departure from Section 7 of the Clayton Act's mandate to stop anticompetitive mergers in their incipiency. I am also concerned that certain issues lack sufficient emphasis.

My biggest concern with the Guidelines is that they include what amounts to a safe harbor indicating that the 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." My apprehensions about this language are three-fold: setting a safe harbor generally, the choice of 20 percent market share for the safe harbor, and the lack of a corresponding presumption of harm, or at a minimum close scrutiny, for mergers involving highly concentrated markets.

I agree that market shares and concentration in the upstream and downstream markets are relevant to vertical merger analysis and that vertical mergers among firms in unconcentrated and highly competitive markets are unlikely to pose competitive problems. However, I worry that creating a market-share based threshold for enforcement may be an imperfect proxy for assessing whether a vertical merger poses competitive concerns.[8] Furthermore, the justification for using 20 percent as the threshold is not clear to me. While I am uncomfortable with any safe harbor, I am particularly uncomfortable with one that sets a threshold without evidentiary support.

I also find it difficult to consider a safe harbor that is not coupled with stronger language about when a merger is likely to warrant scrutiny or enforcement. If there is a threshold below which the Agencies are not likely to enforce, should not there be a presumption of harm when the market share is high or very high and there are barriers to entry?[9] While the draft guidelines provide examples of vertical-merger fact patterns that "potentially raise significant competition concerns," the concluding guidance to the examples note that these mergers "*may* warrant scrutiny" (emphasis added). I believe that such competition concerns *do* warrant scrutiny, and *may* warrant enforcement, and the Guidelines should say as much.

Next, I am concerned that the Guidelines do not sufficiently capture the incipiency standard of Section 7 of the Clayton Act. The Guidelines suggest a high degree of certainty is required for enforcement, even though, as the Supreme Court has said, the Clayton Act "can deal only with

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[7] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010).
[8] Salop, *supra* note 5, at 1990 (describing how even firms with small market shares in the upstream and downstream markets may be enforcing market discipline in the premerger world).
[9] *Id.* at 1983; Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, & Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement*, ANTITRUST, Summer 2019, at 12, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3166&context=facpub; Sandeep Vanheesen, Open Mkts. Inst., Public Comment by Open Markets Institute on the FTC's Fifth Session of Its Hearings on Competition and Consumer Protection in the 21st Century (Dec. 31, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/12/ftc-2018-0091-d-0017-163568.pdf.

probabilities, not certainties."[10] For example, the descriptions of issues the Agencies will consider when investigating whether a vertical merger is likely to result in unilateral harm to competition set too high a bar for certainty. The proposed Guidelines say the Agencies may consider whether the "merged firm's foreclosure or raising costs of one or more rivals would cause those rivals to lose sales." It seems to me that in order to accurately implement the incipiency standard, less definitive terminology, such as "likely to," is more appropriate.

Finally, while I would have preferred a greater emphasis on the fact that the Agencies will investigate the full range of potential competitive harms, I am particularly concerned that the Guidelines do not sufficiently emphasize at least three key points. First, vertically related firms are often particularly well-positioned to be successful potential entrants into each other's markets, so elimination of that potential competition is particularly concerning.[11] Second, the Guidelines fail to mention regulatory evasion as a theory of harm.[12] And finally, the Guidelines would benefit from making more explicit that they do not prohibit the Agencies from adapting enforcement strategies and theories according to research, learning, and retrospective analysis, especially given the strong interest in vertical mergers and the ongoing work being done to better understand them.[13]

I hope commenters will address all of these subjects and I invite comments on my views as well as the Guidelines themselves. In addition, I am interested to hear from commenters about several other topics that raise important questions:

- In addition to the market share and concentration presumptions referenced above, are there any other presumptions that should guide the Agencies' enforcement?
- The elimination of double marginalization is a significant topic of debate among antitrust scholars, practitioners, and advocates. Do these guidelines sufficiently represent the analysis that the Agencies should conduct?
- How should the Guidelines account for differentiated products and non-linear pricing as well as bargaining leverage that may be unique to individualized negotiations between upstream and downstream firms?

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[10] FTC v. Procter & Gamble Co., 386 U.S. 294, 321 (1962).

[11] *See* Steven C. Salop & Daniel P. Culley, Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners, at 11 (Dec. 8, 2014) (available through Scholarship @ Georgetown Law) ("Established firms competing in adjacent markets may be well-situated to enter because they may have expertise relevant to that market or easier access. The fear of entry by a customer or supplier may serve as a constraint on the pre-merger prices of a firm. The merger would reduce or eliminate this constraint.").

[12] U.S. DEPT. OF JUSTICE, 1984 MERGER GUIDELINES § 4.23 (1984). In 2008, the FTC brought a vertical merger action based on this theory—that a firm can evade rate regulations by acquiring an upstream input and raising the cost of that input, which can lead to a regulator to authorize a higher downstream regulated rate based on that higher input cost. Press Release, Fed. Trade Comm'n, FTC Challenges Vertical Agreement Between Fresenius and Daiichi Sankyo (Sept. 15, 2008).

[13] *See, e.g.*, OECD, *Workshop on Vertical Mergers*, OECD.ORG, https://www.oecd.org/daf/competition/workshop-on-vertical-mergers-and-vertical-restraints.htm (last visited Jan. 10, 2020) (advertising an upcoming vertical merger event); Kellogg School of Management, *Navigating the Uncertain Climate of Vertical Merger Enforcement*, KELLOG.NORTHWESTERN.EDU, https://www.kellogg.northwestern.edu/news-events/conference/vertical-merger-enforcement.aspx (last visited Jan. 10, 2020) (describing a conference on vertical merger enforcement).

Conclusion

Repealing and replacing the Non-Horizontal Merger Guidelines with updated Vertical Merger Guidelines is a worthy effort. However, it is critical that the Guidelines fully reflect the experience of the agencies and provide sufficient room for the Agencies to enforce the Clayton Act to the fullest extent possible against anticompetitive vertical mergers. The comments we receive will play an important part of this process, and I hope that they will inform additional changes and modifications. Given the importance of the comment process, the Commission should consider whether it will be necessary to extend the comment period to ensure that all interested stakeholders have sufficient time to respond. It is my hope to be able to support bipartisan Guidelines at the end of this process.