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New Vertical Merger Guidelines Are Consistent With FSF Comments

by

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I. Introduction and Summary

The Federal Trade Commission and the Department of Justice on June 30, 2020, announced their new Vertical Merger Guidelines to explain how these federal antitrust agencies will evaluate the competitive impact of vertical mergers and whether those mergers comply with U.S. antitrust law. These new Vertical Merger Guidelines, the first major revision to guidance on vertical mergers since 1984, are consistent in significant respects with comments we submitted urging a less interventionist, more pro-consumer welfare posture and more clarity. The revision is long overdue, because the 1984 Guidelines no longer reflected current economic analysis.

The FTC and DOJ released their Draft Vertical Merger Guidelines ("Draft Guidelines") in January 2020 and invited public comment on the draft. In response, we submitted comments in which we stated that the new enforcement guidelines were generally done well, but that they could be improved with some additional clarification to avoid inviting government intervention in mergers in cases where such intervention would not benefit consumers.

In the final version of the Vertical Merger Guidelines, the FTC and DOJ addressed each of the three main points we made in our Free State Foundation comments, mostly in the directions we recommended.

> First, we argued that any vertical merger guidelines should retain case-by-case enforcement and not succumb to calls for more interventionist enforcement based on structural factors. Case-by-case enforcement was retained in the new guidelines, but a useful safe harbor provision was unfortunately dropped.
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> Second, we praised the draft for providing for the first time a definition of "related products," but argued that the definition was too vague and requested that the agencies provide additional clarification of what the agencies mean by the term. The new Vertical Merger Guidelines contain clarifying language that addressed our main concern about the agencies using a vague definition as a basis for new theories of enforcement.
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> Third, we called on the agencies to clarify their analysis of efficiency benefits arising from vertical mergers, especially in light of how critical efficiency benefits were considered in the ruling against DOJ when it unsuccessfully tried to block the AT&T/Time Warner merger. The new language regarding efficiencies, and particularly the elimination of double marginalization, is much improved. Antitrust policy that is overly skeptical of efficiency benefits can be particularly harmful if unsuccessful challenges, like the AT&T/Time Warner lawsuit, have a chilling effect on other vertical mergers where the efficiency benefits outweigh the potential for anticompetitive harm.

<u>Vertical merger enforcement should proceed on a case-by-case basis</u>. The agencies in the final Vertical Merger Guidelines wisely reject the calls for more interventionist antitrust enforcement based on certain structural characteristics found in markets where the merging companies operate. For example, a group of prominent economists asserted that a vertical merger involving a firm that is dominant on a particular platform should be presumed anticompetitive on the grounds that network effects and economies of scale would raise barriers to entry and increase market power of the dominant firm. This view was echoed in the dissent by FTC Commissioner Rohit Chopra, who criticized the majority for not adopting a rebuttable presumption against certain vertical mergers based on market structure features.

While Commissioner Chopra is correct that dominance of a firm on a particular platform is an example of a structural characteristic that may raise legitimate anticompetitive concerns, this situation can nonetheless be addressed under a case-by-case review. Even though some burden-shifting presumptions already exist for horizontal mergers, there is too little caselaw from vertical merger challenges to justify imposing new presumptions against vertical mergers. Moreover, the economics literature is at best mixed, with several leading studies finding a lack of evidence of systematic harm from vertical mergers the agencies have not challenged.

The final Vertical Merger Guidelines make one significant change regarding merger presumptions that go in the opposite direction of what our Free State Foundation comments recommended. The comments commended the Draft Guidelines for proposing a "safe harbor" market share of 20 percent. The FTC majority, however, decided to drop that safe harbor from

the final Vertical Merger Guidelines, evidently in response to criticism from Commissioner Rebecca Kelly Slaughter.

The FTC majority appears to have been concerned about the perception of being inconsistent by rejecting pro-regulatory presumptions while accepting a deregulatory presumption. However, there are good economic reasons for being skeptical about imposing interventionist presumptions against vertical mergers while allowing other presumptions in favor of vertical mergers. Vertical mergers do not involve the loss of a direct competitor, so, if anything, antitrust policy should presume that vertical mergers are less likely to harm consumers or competition than horizontal mergers.

Clarifying the definition of "related products." The Draft Guidelines for the first time contain a definition of "related products," which we said was a useful addition that would benefit from some additional clarification. The new Vertical Merger Guidelines add some further additional clarifying language. In particular, we were concerned that a vague definition of "related products" could be used to create a new theory of harm. We argued that this should not be the case.

The Vertical Merger Guidelines add some new clarifying language that appears to be consistent with sound economic analysis. By giving three examples and tying them to language in the agencies' Horizontal Merger Guidelines, the Vertical Merger Guidelines appear to be indicating that the definition of related products is intended to provide a foundational concept for these vertical theories of harm. Thus, the new language in the Vertical Merger Guidelines appears to address our concern about the concept of "related products" being used to support a separate theory of harm.

Describing vertical merger efficiencies. In our Free State Foundation comments, we were concerned with the negative way that the Draft Guidelines described how evidence of efficiencies can be used to offset anticompetitive concerns from a vertical merger. In particular, we were concerned about the section in the draft discussing the benefits from eliminating "double marginalization," or having only one company profiting from marking up prices instead of two. Elsewhere the Draft Guidelines only briefly acknowledged that other efficiencies are possible and referred to efficiency analysis in the Horizontal Merger Guidelines.

The new language regarding efficiencies, and particularly the elimination of double marginalization, is much improved. It describes how the agencies evaluate whether the elimination of double marginalization is merger specific. It also discusses 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.

Commissioner Rebecca Kelly Slaughter in her dissenting statement alleged that the final Vertical Merger Guidelines were based on a faulty foundation that assumed that vertical mergers are almost always pro-competitive. Commissioner Slaughter appears to be claiming that not enough vertical mergers are being challenged, and that the new Vertical Merger Guidelines are overly favorable toward vertical mergers. We disagree. It is true that very few vertical mergers are

being challenged under the antitrust laws, but there are good reasons for this lack of vertical merger cases.

One important reason why vertical mergers have seldom been challenged on antitrust grounds is that the harm alleged has tradeoffs for the merged entity, making the net losses much less clear. For example, under the theory alleged by the DOJ in its challenge to the AT&T/Time Warner merger, if the merged company decides to harm competitors of DirecTV by charging high rates for HBO and other Warner content, it also will have to accept a loss of viewers and revenues for Time Warner channels. It seems unlikely that AT&T would pay $85 billion for these Time Warner channels only to damage their value by using them for leverage against video distribution competitors of AT&T.

Because all of the vertical merger cases since 1972 were either unsuccessful challenges or were settled out of court, there is very little recent legal precedent to support the sort of more aggressive merger enforcement advocated by Commissioner Slaughter. Departing from past merger review practices has other costs as well, including sending a chill through a marketplace that has evolved under antitrust enforcement practices that have been followed, predictably, by administrations of both political parties.

In sum, the new Vertical Merger Guidelines are largely a positive pro-consumer development. They incorporate more modern economic analysis of vertical mergers. Their approach also provides more transparency and guidance regarding how these agencies will evaluate their enforcement decisions. In the end, the impact of the new Vertical Merger Guidelines will depend, of course, on how they are applied. But the new Guidelines nonetheless appear to show a commitment by the agencies to only proceed with enforcement actions when they have rigorous evidence of consumer harm – and this is a good thing.

II. Issuing the New Vertical Merger Guidelines

The Federal Trade Commission and the Department of Justice on June 30, 2020, jointly issued their new Vertical Merger Guidelines to explain how these federal antitrust agencies will evaluate the competitive impact of vertical mergers and whether those mergers comply with U.S. antitrust law.[1]

These new Vertical Merger Guidelines are the first major revision to guidance on vertical mergers since the 1984 Non-Horizontal Merger Guidelines.[2] As such, the 1984 Guidelines did not reflect current economic analysis, particularly regarding "unilateral effects" theories of harm, such as foreclosure and raising rivals' costs. As the statement by the majority of FTC Commissioners explained:

> These Guidelines replace the framework for analyzing non-horizontal mergers contained in the Department of Justice's 1984 Merger Guidelines. They incorporate the agencies'

[1] Federal Trade Commission and U.S. Department of Justice, "Vertical Merger Guidelines" (2020), available at: https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.
[2] U.S. Department of Justice, "Non-horizontal Merger Guidelines" (1984), available at: http://www.justice.gov/atr/public/guidelines/2614.htm.

> accumulated knowledge from over 35 years of experience investigating and challenging anticompetitive nonhorizontal 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.
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> 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?[3]

Because the Department of Justice is an executive branch agency, the head of its Antitrust Division, Assistant Attorney General Makan Delrahim, approved the Guidelines himself. For the FTC, a majority vote of the five commissioners was required. The Commission approved the new Guidelines by a 3-2 vote, with two commissioners arguing that the Guidelines provided an enforcement policy that was not sufficiently aggressive against vertical mergers.

Having vertical merger guidelines in place is important because there is much less legal precedent for vertical mergers than horizontal mergers. Antitrust concerns regarding vertical mergers in recent decades usually have been resolved with settlements with the agencies rather than litigated enforcement, with the decision regarding the A&T/Time Warner merger being the only recent court decision providing guidance through legal precedent.[4]

The FTC and DOJ released their Draft Vertical Merger Guidelines on January 10, 2020, and invited public comment on the draft document. In response, we submitted comments on February 26, 2020.[5] In those comments, we stated that incorporating more current economic analysis into these enforcement guidelines is a positive development and generally done well in the Draft Guidelines. But we said the Draft Guidelines could be improved with some additional clarification.

III. The FSF Comments Are Reflected in New Vertical Merger Guidelines

In our comments, we made three main points. First, we argued that any vertical merger guidelines should retain case-by-case enforcement and not succumb to calls for more interventionist enforcement based on structural factors. Retaining case-by-case enforcement is

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[3] Federal Trade Commission, "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," June 30, 2020, available at: https://www.ftc.gov/system/files/documents/public_statements/1577507/vmgmajoritystatement.pdf.

[4] *United States v. AT&T*, 916 F.3d 1029 (D.C. Cir. 2019).

[5] Randolph L. May and Theodore R. Bolema, "Comments of the Free State Foundation: FTC and DOJ Announce Draft Vertical Merger Guidelines for Public Comment," February 26, 2020, available at: https://freestatefoundation.org/wp-content/uploads/2020/02/FSF-Comments-on-Draft-Vertical-Merger-Guidelines-022620.pdf. These comments are also available on the FTC website at: https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/fsf_comments_on_draft_vertical_merger_guidelines_022620.pdf.

appropriate because even though the 1984 Guidelines might not reflect the current state of economic analysis of vertical merger impacts, there is little or no evidence that vertical merger enforcement has not been aggressive enough or has systematically allowed anticompetitive vertical mergers to occur.

Second, we praised the Draft Guidelines for providing for the first time a definition of "related products," but argued that the definition was too vague and requested that the agencies provide additional clarification of what the agencies mean by the term.

Our third point in our comments was that the Draft Guidelines explanation of efficiency benefits arising from vertical mergers was framed rather negatively and could also benefit from more clarification, especially in light of how critical efficiency benefits were in the ruling against DOJ when it tried unsuccessfully to block the AT&T/Time Warner merger.

In the final version of the Vertical Merger Guidelines, the FTC and DOJ addressed each of the three points we made in our Free State Foundation comments, mostly in the direction we recommended. The several ways in which the final Vertical Merger Guidelines address these concerns, and the one way in which the final guidelines went counter to our comments are discussed in the following sections.

A. Vertical Merger Enforcement Should Proceed on a Case-by-Case Basis

In the final Vertical Merger Guidelines, the agencies wisely rejected the calls for more interventionist antitrust enforcement based on certain structural characteristics found in markets where the merging companies operate. In particular, some who commented on the Draft Guidelines have argued that certain structural factors should be presumed anticompetitive. For example, a group of prominent economists asserted that a vertical merger involving a firm that is dominant on a particular platform should be presumed anticompetitive on the grounds that network effects and economies of scale would raise barriers to entry and increase market power of the dominant firm.[6] The same economists, in their comments on the Draft Guidelines, claimed:

> [T]he presumption is important because firms participating in vertically-adjacent or complementary markets are often potential entrants, so the presumption would reach nascent threats to dominance created by potential entrants that would be eliminated by the acquisition. The presumption also recognizes that a dominant platform's market power would give it the ability to substantially disadvantage firms in adjacent markets by choosing not to interoperate.[7]

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[6] Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, and Fiona Scott Morton, "Five Principles for Vertical Merger Enforcement Policy," Georgetown Law Working Paper (Apr. 5, 2019), available at https://scholarship.law.georgetown.edu/facpub/2148.

[7] Jonathan B. Baker, Nancy L. Rose, Steven C. Salop and Fiona Scott Morton, Comment Letter No. 21 on #798: Draft VMGs, Matter No. P810034 at 24 (Feb. 24, 2020), available at: https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg21_baker_rose_salop_scott_morton_comments.pdf.

Thus, these more intervention-oriented economists do not argue for *per se* illegality based on these structural characteristics. Instead they argue for a shifting of the burden of the proof to the merging parties to show that the vertical merger is not anticompetitive.

This view was echoed in the dissent by Commissioner Rohit Chopra, who criticized the majority for not adopting a rebuttable presumption against certain vertical mergers based on market structure features:

> In the data economy, vertical mergers can allow dominant firms to integrate and enhance data inventories and collection capabilities in ways that new entrants cannot replicate. The dynamism of data-based markets means that products that might initially appear unrelated could quickly become related or relevant in unanticipated ways. Many commenters suggested that the agencies adopt a presumption against vertical transactions by dominant platforms based on these market realities. Yet, the Guidelines do not even address these digital issues, let alone include any such presumption.[8]

Commissioner Chopra is correct that dominance of a firm on a particular platform is an example of a structural characteristic that may well raise legitimate anticompetitive concerns. But this situation can nonetheless be addressed under a case-by-case review. While some burden-shifting presumptions already exist for horizontal mergers, it is not appropriate at this time to impose new presumptions against vertical mergers. With very little recent caselaw on vertical mergers, we have little or no legal precedent to draw upon for making such a significant presumption in enforcement policy.

Moreover, the economics literature is at best mixed on whether vertical mergers result in economic harm. While Commissioner Chopra found studies by certain antitrust scholars finding harm from vertical mergers, other leading studies have found a general lack of evidence of systematic harm from vertical mergers the antitrust agencies did not challenge.[9]

The final Vertical Merger Guidelines made one significant change regarding merger presumptions that went in the opposite direction of what our Free State Foundation comments recommended. The comments praised the Draft Guidelines for proposing a "safe harbor" market share of 20 percent. The FTC majority, however, decided to drop that safe harbor from the final Vertical Merger Guidelines, evidently in response to criticism from Commissioner Rebecca Kelly Slaughter. As the FTC majority explained:

> 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

[8] Federal Trade Commission, "Dissenting Statement of Commissioner Rohit Chopra Regarding Joint Department of Justice and Federal Trade Commission Vertical Merger Guidelines," June 30, 2020, available at: https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf.

[9] Two such studies finding a lack of evidence of systematic harm are James C. Cooper, Luke M. Froeb, Daniel P. O'Brien and Michael Vita, "Vertical Antitrust Policy as a Problem of Inference, " 23 International Journal of Industrial Organization 639 (2005), and Francine Lafontaine and Margaret Slade, "Vertical Integration and Firm Boundaries: The Evidence," 45 Journal of Economic Literature 629 (2007).

> concern of our colleague Commissioner Slaughter, many State Attorneys General, and a broad set of commenters.[10]

The FTC majority appears to have been concerned about the perception of being inconsistent by rejecting pro-regulatory presumptions while accepting a deregulatory presumption. In our comments, however, we argued that there is no such inconsistency. The "safe harbor" defined in the Draft Guidelines identifies a situation in which the agencies make a rebuttable assumption of no antitrust harm, so it is an example of a *deregulatory* rebuttable presumption, while the presumption proposed by Commissioner Chopka and Baker, *et.al*, was more like a regulatory presumption.

Free State Foundation scholars have advocated for the employment of deregulatory presumptions in the context of assessing competitive effects in the increasingly competitive, technologically dynamic communications marketplace.[11] But shifting the burdens to the parties to a vertical merger based on a structural characteristic would be more of a regulatory presumption. In effect, deregulatory rebuttable presumptions are a matter of procedure not requiring substantive law change, while it is less clear that a presumption of harm from a vertical merger is not a substantive change. Randolph May pointed out that similar deregulatory presumptions have been created by other agencies, including:

> FERC's presumption that sellers who "pass[] two indicative . . . screens" lack horizontal market power and the FCC's presumption that foreign carriers with less than 50% market share in relevant foreign markets "lack[] sufficient market power to effect competition in the United States." In both cases, the agency expressly provided for parties who wish to contest the application of the presumption in specific circumstances to make their case to the agency. Similar provisions for contesting the rebuttable presumption could be made by the FCC in implementing Sections 10 and 11 (internal citations omitted).[12]

There are good economic reasons for being skeptical about imposing presumptions against vertical mergers while allowing other presumptions in favor of vertical mergers. Vertical mergers do not involve the loss of a direct competitor, so, if anything, antitrust policy should presume that vertical mergers are less likely to harm consumers or competition than horizontal mergers. Moreover, as discussed below, the lack of antitrust precedent for blocking vertical mergers argues for the agencies being reluctant to create any such burden-shifting presumption for vertical mergers. Current legal precedent and economic theory are not sufficient to identify the potentially anticompetitive vertical mergers *a priori* with any confidence. Thus, the case-by-

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[10] Federal Trade Commission, "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".

[11] *See, e.g.,* Randolph J. May and Seth L. Cooper, "A Proposal for Improving the FCC's Forbearance Process," Perspectives from FSF Scholars, Vol. 12, No. 4 (Jan. 17, 2017), available at https://freestatefoundation.org/wp-content/uploads/2019/10/A-Proposal-for-Improving-the-FCC%E2%80%99s-Forbearance-Process-011717.pdf.

[12] Randolph J. May, "The FCC Should Employ Rebuttable Presumptions to Reduce Unnecessary Regulation," Perspectives from FSF Scholars, Vol. 14, No. 1 (January 8, 2019), at 11, available at: https://freestatefoundation.org//wp-content/uploads/2019/05/The-FCC-Should-Employ-Rebuttable-Presumptions-in-Forbearance-and-Regulatory-Review-Proceedings-010719.pdf.

case approach continues to be the appropriate policy for identifying vertical mergers that could be anticompetitive.

B. Clarifying the Definition of "Related Products"

The Draft Guidelines for the first time contained a definition of "related products," which we said was a useful addition that would benefit from some additional clarification. The new Vertical Merger Guidelines have added some additional clarifying language. In particular, we were concerned that a vague definition of "related products" could be used to create a new theory of harm. We argued that this should not be the case, but that this language still appears to be somewhat unclear about what the agencies intend. We also proposed that the agencies add some language on how the agencies plan to determine whether access to a related product affects competition in the relevant market.

The new Guidelines have added some clarifying language that appears to be consistent with sound economic analysis. As the FTC majority explained:

> 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 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.[13]

An upstream input or downstream distribution channel could be considered related if access to an input, a means of distribution, or a set of customers would affect competition in the relevant market. For example, in the challenge to the AT&T/Time Warner merger, DOJ claimed that the combined company could deny access to key Warner programming such as HBO to video programming distributors that compete with AT&T's U-Verse and DirecTV services.

The foreclosure theory raised by DOJ in its AT&T/Time Warner challenge is a plausible economic theory that failed to persuade the court based on the harm not being supported by DOJ's evidence. The foreclosure theory and the elimination of potential competition theory raised by Commissioner Slaughter were not included in the 1984 Guidelines. By giving these examples and tying them to language in the agencies' Horizontal Merger Guidelines, the new Vertical Merger Guidelines appear to be clarifying that the definition of related products is intended to provide a foundational concept for these vertical theories of harm. Thus, the new

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[13] Federal Trade Commission, "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."

language in the Vertical Merger Guidelines appears to address our concern about the concept of "related products" being used to support a separate theory of harm.

C. Describing Vertical Merger Efficiencies

In our comments, we were concerned with the negative way that the Draft Guidelines described how evidence of efficiencies can be used to offset anticompetitive concerns from a vertical merger. In particular, we were concerned about the section in the Draft Guidelines discussing the benefits from eliminating "double marginalization," or having only one company profiting from marking up prices instead of two. The Draft Guidelines acknowledged that eliminating double marginalization often benefits both the merging companies and their customers. Elsewhere the Draft Guidelines only briefly acknowledged that other efficiencies are possible and referred to efficiency analysis in the Horizontal Merger Guidelines.

The new language regarding efficiencies, and particularly the elimination of double marginalization, is much improved. As the FTC majority explained:

> 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.[14]

AT&T's demonstration of efficiency benefits were a key part of the District Court's analysis when rejecting DOJ's challenge to AT&T's Time Warner acquisition[15] Therefore, it is useful to have more clarification that the agencies will carefully consider efficiency benefits as part of their review of vertical mergers. Antitrust policy that is overly skeptical of efficiency benefits can be particularly harmful if unsuccessful challenges, like the AT&T/Time Warner challenge, have a chilling effect on other vertical mergers where the efficiency benefits outweigh the potential for anticompetitive harm.

IV. Vertical Mergers Rarely Raise Concerns Under Modern Economics Analysis

Commissioner Rebecca Kelly Slaughter in her dissenting statement alleged that the final Vertical Merger Guidelines were based on false allegations that vertical mergers are almost always procompetitive. After praising the agencies for the progress they made in incorporating more modern economic analysis in the vertical merger guidelines, Commissioner Slaughter claimed:

> However, this progress is compromised by provisions that undermine one of the key points of the Guidelines: to disavow the false assertion that vertical mergers are almost always procompetitive. I also fear that the Guidelines signal that the Agencies will view

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[14] *Id.*.

[15] *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (DDC 2018).

> vertical mergers as likely to be procompetitive and will use the Guidelines to justify lack of enforcement against vertical mergers.[16]

Commissioner Slaughter appears to be claiming that not enough vertical mergers are being challenged and that the new Vertical Merger Guidelines are overly favorable toward vertical mergers. We disagree. It is true that very few vertical mergers are being challenged under the antitrust laws, but there are good reasons for this lack of vertical merger cases.

U.S. antitrust agencies before the 1980s were harshly criticized by economists and legal scholars for their hostility to vertical mergers based on dubious theories of economic harm. The U.S. antitrust agencies took notice of the criticism in the 1980s, and since then they have employed more rigorous economic analysis when reviewing vertical mergers.

Before DOJ filed to block the AT&T/Time Warner merger in 2017, the last vertical merger challenged in a contested court proceeding by U.S. antitrust agencies was in 1979, when the Federal Trade Commission lost its challenge to truck trailer manufacturer Fruehauf's acquisition of a brake component supplier.[17] Between 1979 and 2017, U.S. antitrust enforcers consistently allowed vertical mergers to proceed or negotiated behavioral changes rather than suing to seek major divestitures.[18]

Some recent vertical mergers have involved large and prominent media companies, like the AT&T/Time Warner merger, so they have attracted more scrutiny than other vertical mergers. For example, Comcast's 2011 acquisition of NBC and NewsCorp's 2004 acquisition of DirecTV raised similar alleged competitive issues as the AT&T/Time Warner merger, and both were settled with behavioral restrictions that allowed the mergers to proceed without structural changes.[19] In 2017, Amazon's acquisition of Whole Foods also attracted considerable media attention and objections based on alleged concentration of power over retail sales, but this merger was allowed to proceed about a month after its filing with the U.S. antitrust agencies without any court challenge or consent decree settlement.[20]

One important reason why vertical mergers have seldom been challenged on antitrust grounds is that the harm being alleged has tradeoffs for the merged entity, making the net losses much less clear. For example, under the theory alleged by the DOJ in its challenge to the AT&T/Time

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[16] Federal Trade Commission, "Dissenting Statement of Commissioner Rebecca Kelly Slaughter In re FTC-DOJ Vertical Merger Guidelines," June 30, 2020, available at: https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

[17] Fruedhauf Corp. v. FTC, 603 F.2d 345, (2d Cir. 1979), available at: https://openjurist.org/603/f2d/345/fruehauf-corporation-v-federal-trade-commission.

[18] The last vertical merger successfully challenged by the government was in 1972, when Ford Motor Company bought a supplier, Autolite, and was forced to sell off some of the assets after DOJ challenged the merger. Ford Motor Co. v. United States, 405 U.S. 562 (1972), available at: https://supreme.justia.com/cases/federal/us/405/562/case.html.

[19] Theodore R. Bolema, "Revisiting the Comcast/NBCU Merger: Antitrust Claims Have Even Less Merit Than in 2011," Perspectives from FSF Scholars, Vol. 13, No. 43 (November 29, 2018), at 14-16, available at: https://freestatefoundation.org//wp-content/uploads/2019/05/Revisiting-the-Comcast-NBCU-Merger-Antitrust-Claims-Have-Even-Less-Merit-Than-in-2011-112918.pdf.

[20] David McLaughlin and Spencer Soper, "Amazon's Whole Foods Deal Wins Swift U.S. Antitrust Approval," Bloomberg News (August 23, 2017), available at: https://www.bloomberg.com/news/articles/2017-08-23/amazon-s-whole-foods-deal-wins-fast-track-u-s-antitrust-nod.

Warner merger, if the merged company decides to harm competitors of DirecTV by charging high rates for HBO and other Warner content, it also will have to accept a loss of viewers and revenues for Time Warner channels. It seems unlikely that AT&T would pay $85 billion for these Time Warner channels only to damage their value by using them for leverage against video distribution competitors of AT&T.[21]

Because all of the vertical merger cases since 1972 were either unsuccessful challenges or were settled out of court, there is very little recent legal precedent to support the sort of more aggressive merger enforcement advocated by Commissioner Slaughter.[22] Departing from past merger review practices has other costs as well, including sending a chill through a marketplace that has evolved under antitrust enforcement practices that have been followed by administrations of both political parties.

V. Conclusion

The new Vertical Merger Guidelines are largely a positive development. They incorporate more modern economic analysis of vertical mergers. Their approach provides more transparency and guidance regarding how these agencies will make their enforcement decisions, particularly with respect to the theories of harm they will consider and how they evaluate merger efficiencies.

The most recent changes are not entirely positive. In particular, the agencies eliminated a useful "safe harbor" presumption against merger challenges when market shares are below a certain level. But this step in the wrong direction appears to be significantly outweighed by the additional guidance the agencies provide and their rejection of presumptions against vertical mergers, particularly in technology markets, in favor of case-by-case analysis. In the end, the impact of the new Vertical Merger Guidelines will depend on how they are applied. But the Guidelines nonetheless appear to show a commitment by the agencies to only proceed with enforcement actions when they have rigorous evidence of consumer harm.

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[21] Theodore R. Bolema, "The Proper Context for Assessing the AT&T/Time Warner Merger," Perspectives from FSF Scholars, Vol. 13, No. 6 (February 8, 2018), at 11-12, available at: https://freestatefoundation.org//wp-content/uploads/2019/05/The-FCC-Should-Employ-Rebuttable-Presumptions-in-Forbearance-and-Regulatory-Review-Proceedings-010719.pdf.

[22] Former FTC Commissioner J. Thomas Rosch found in his 2007 study that the federal government had only challenged 23 vertical mergers since the unsuccessful 1979 Fruehauf merger challenge. Of those, three were abandoned by the parties, and the others were all approved, most with behavioral conditions to address the alleged harms. J. Thomas Roach, "The Challenge of Non-Horizontal Merger Enforcement," (Speech, New York, NY, September 28, 2007), available at: https://www.ftc.gov/sites/default/files/documents/public_statements/challenge-non-horizontal-merger-enforcement/070927-28non-horizontalmerger_1.pdf.