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

Office of Commissioner
Rohit Chopra

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Regarding the Request for Comment on Vertical Merger Guidelines
Commission File No. P810034
January 10, 2020

Summary

- The 1984 Non-Horizontal Merger Guidelines should be rescinded, as they represent an antiquated, narrow, and overly permissive mode of thinking that is not reflective of today's economy or the current approach to enforcement.
- The U.S. economy is far different than it was forty years ago. Increasing concentration, declining new firm formation, and other market trends necessitate a modernization of vertical merger review.
- The draft guidelines released for public comment miss the mark. They are not supported by an analysis of past enforcement decisions, perpetuate an overdependence on theoretical models, and do not reflect all of the ways that competition can be harmed.
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_fordham_speech_on_hearings_output_9-13-19.pdf.
[3] Because my position is split along the lines outlined in this statement, I have registered my vote as an abstention.

markets, data has become a currency, a price that must be paid to participate in economic or social activity.[4] Big data and artificial intelligence are driving network effects and creating new first-mover advantages.[5]

Today's economy is also more financialized, leading managers of both small and large enterprises to be more responsive to incentives driven by Wall Street and the capital markets. This has significant implications, since large firms are increasingly optimizing for return on invested capital, rather than overall profits. Indeed, companies often shut down profitable business segments for this reason.

Economic activity and wealth are more closely concentrated in a smaller set of firms across and within sectors and geographic areas.[6] Corporate profits as a percent of our nation's economic output have risen, since new entry has not competed these profits away. Despite our perception of the U.S. as an entrepreneurial nation, new business starts have been on the decline for decades, with firm deaths actually eclipsing new businesses a decade ago.[7] Outsourcing and reduction of employee bargaining power has reshaped the competitive landscape of our labor markets.

Current Guidelines Should Be Rescinded

The 1984 Guidelines developed and published

tested with real-world business intelligence and their predictions checked against the actual outcomes.

Third, the draft guidelines do not account for all of the ways that existing dominance can be used to choke off market entry or distort competition. In today's economy, it is not enough to solely look at overlapping product markets or markets that appear relevant to a specific supply chain. The nature of competition for capital, the new norms created by technological advancement, and the business incentives associated with data require a broader assessment of market power. Capital markets don't just reward the creators of great ideas; they also reward managers who can build moats around these discoveries. The digital environment has opened up new ways for dominant firms to introduce new products and services that can quickly go to market and increase a firm's reach. Technology has also provided new tools to assess and execute business decisions. Sophisticated algorithmic machine learning allows firms in any sector to mine their proprietary data for market trends and insights that might not be obvious or intuitive to enforcers or even the business leaders of the past.

New Guidelines Should Reflect Economic Realities

Merger review must evolve to reflect these present-day economic realities. New guidelines should not simply reaffirm the existing methodology in practice. It is critical that they establish a comprehensive framework for assessing the modern threats to competition posed by prospective vertical mergers. One of the biggest threats to a competitive economy is increasing barriers to entry and reducing new firm formation. Throughout history, nascent firms have been a key source of innovation and dynamism in the economy. Transaction reviews should encompass all the ways that the merger will allow the combined firm to deter entry into any market in which it participates.

First, enforcers need to be more thorough about assessing each firm's existing dominance. A rigorous investigation must rely on a full inventory of the means by which each company has achieved, maintains, or exercises market power in all its respective lines of business. This means
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broadening and deepening the review of each firm's operations to identify all of the elements that would allow the combined entity to increase profitability by unfairly exploiting any advantages from a merger to lessen or eliminate competition.

Corporate executives and board directors conduct these kinds of state property, infrastructure, and even data, may provide dominance, especially if they offer unique advantages or key leverage over competitors and new entrants. The acquirer's *track record*, including how it has operated acquired assets, its business strategy, and its past history of any anticompetitive or problematic behavior may indicate a root source or exercise of market power.

Second, enforcers need to be realistic about predicting the likely ways that the merger will incentivize or allow firms to distort competition by extending or enhancing their existing dominance. Understanding the deal rationale is key here, as it is likely to be linked to new ways to leverage market power. This requires a careful inquiry into all the incentives and opportunities that can lead to harm. Will the vertically integrated firm create a fundamental conflict of interest that allows the new entity to exploit other market participants? Will the merged firm have an incentive to gain an upper hand using government-granted benefits such as intellectual property rights or legal immunity? Will the merger give the combined firm the ability to access to competitors' sensitive business information? Will the new firm be able to package products or link technologies in ways that deter entrants from launching or gaining scale? Does the new firm's structure allow it to evade regulatory requirements that their competitors must follow? If any of these or other market distortions are possible, then the deal warrants significant scrutiny.

Finally, enforcers must be mindful of the expansive universe of harms that can result from a vertical merger that lessens competition. These harms go beyond the few currently considered by enforcers such as higher prices, reduced innovation, or a decrease in outputs or quality. The loss of competition can fundamentally alter business models and incentives to the extent that the private sector is no longer willing or able to deliver on market demands. And absent robust entry by new market participants, the public will lose the power to reap the benefits that competitive markets once produced.

Conclusion

The consequences of losing the benefits of competition can be severe for both consumers and the country. We may [illegible] unclear whether there is any empirical basis for the market-share cutoff that the draft guidelines suggest would indicate that a vertical merger is benign.[21]

Public comment on these and other deficiencies will help inform any next steps the FTC might take.[22] In theory, both the FTC and DOJ will be able to align on a new set of guidelines that are robust and transparent. However, the FTC must be mindful of its role as an independent agency. Any guidelines published by the FTC must clearly reflect today's economic realities and a sober-eyed assessment of the harms from a permissive approach.

[21] I agree that oligopoly markets in particular merit special scrutiny when it comes to vertical merger enforcement. *See* Salop *supra*, note 14 at 13.
[22] Given the breadth of issues raised by the draft, the current duration of the comment period is likely too short.